2005 IEHC 301

THE HIGH COURT

[Record No.2004/1131JR]

BETWEEN

JOHN CALDWELL

APPLICANT

AND

JUDGE ALAN MAHON, JUDGE MARY FAHERTY AND JUDGE GERALD KEYS, MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS

RESPONDENTS

Judgment of Mr.Justice Hanna delivered on the 28th day of June, 2005

1. The applicant in this case is a former practising solicitor and managing partner of Binchys, solicitors.The respondents comprise the Chairman and Members of the Tribunal of Inquiry into certain planning matters and payments ("the Tribunal"), known colloquially as the Mahon Tribunal and formerly as the Flood Tribunal.

General Background

2. The respondents' workings over the years since the Tribunal was established by resolution of Dáil Eireann in November, 1997, has kept it to the forefront of public awareness to such an extent that little time need be expended in elaborating on the background facts material to its day to day activity.Briefly, the Tribunal was established as a Sole Member Tribunal by resolution of Dáil Éireann and appointed by instrument of the Minister for the Environment and Local Government dated the 4th November, 1997.These terms of reference included, inter alia, the following provision at paragraph A(5):-

> "In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process committed on or after the 20th June, 1985, which may in its opinion amount to corruption, or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties, it is required to report on such acts and to make recommendations as to the effectiveness and improvement of existing legislation governing corruption in the light of its inquiries."

3. The terms of reference were subsequently amended on a number of occasions including extending the composition of the Tribunal to three members.The most recent amendment of the terms of reference was effected by statutory instrument signed by the Minister for the Environment, Heritage and Local Government on the 3rd December, 2004 pursuant to a resolution of the Oireachtas passed on the 17th November, 2004 and, subsequently, by act of the Oireachtas passed on the 15th December, 2004.These terms of reference provided, inter alia, at para.j(1) that:-

> "The Tribunal shall, subject to the exercise of its discretion pursuant to j(6) hereunder, proceed as it sees fit to conclude its enquiries into the matters specified below (and identified in the Forth Interim Report of this Tribunal) and to set out its findings on each of these matters in an interim report or reports or in a Final Report."

4. Sub paragraph (d) of paragraph j (1) specifically refers to the Carrickmines II Module and Related Issues.

5. Finally, para.j(6) of the terms of reference expressly confers upon the Tribunal certain discretions, inter alia, to carry out such preliminary investigations as it thinks fit, to proceed or not to proceed to public hearing on any issue and to discontinue any private investigation upon which it had embarked prior to the commencement of any public hearing.Factors to be taken into account in the exercise of the Tribunal's discretion include matters such as the age and health of potential participants, the likely duration of a private investigation or public hearings and the likely cost of any investigation/hearing.I will set out part of paragraph J in greater detail later in this judgment.

6. This application arises from the Tribunal's investigations conducted in private, public hearings and future proposed public hearings of and concerning certain lands at Carrickmines, Co.Dublin and other lands.The Tribunal has engaged in the practice of dividing its enquiries into separate modules and, within those modules, separate sections or phases.The module with which we are concerned is referred to and known as the Carrickmines II and Related Issues Module.For ease of reference save where the context otherwise requires it I will describe it as the Carrickmines II Module.The lands the subject matter of this Module are specified in the latest amendment to the terms of reference.This Module follows on from the Carrickmines I Module which inquired into allegations of corruption in the planning process relating to certain lands.Public hearings in relation to this Module commenced on the 20th November, 2002, and continued until the 16th October, 2003.The Carrickmines II Module concerns the ownership of those lands and other specified lands.In the course of its enquiries, the Tribunal has examined and wishes to continue to examine the business affairs and inter-relationship (if such there be) of Mr.John Caldwell, the applicant herein, Mr.James Kennedy, a businessman and Mr.Liam Lawlor, a former TD.

7. The applicant says that he is the owner, through a limited liability company, of 50% of those lands at Carrickmines upon which the Carrickmines 1 Module focussed, also known as Jackson Way properties.The applicant admits that his former firm acted for Mr.Kennedy and Mr.Lawlor in the past.Mr.Kennedy, he says, is the other half owner of the Carrickmines land.The applicant stoutly denies that Mr.Lawlor has any interest whatsoever in the said lands.So apparently does Mr.Lawlor.Mr.Kennedy has not cooperated with the Tribunal and has not attended to give evidence.Mr.Frank Dunlop, another person who has featured prominently before the Tribunal, has alleged that he received a substantial sum in cash from Mr.James Kennedy for the purpose of ensuring support for the rezoning of the lands at Carrickmines from agricultural to residential use and Mr.Dunlop further alleges that Mr.Kennedy told him that Mr.Lawlor had an interest in the said lands.

8. The Carrickmines II Module has been divided into eight phases.As already noted, Carrickmines II phase 1 dealt with the ownership of the Carrickmine lands.The other phases deal with lands at Coolamber House, Finnstown House, Somerton, Newcastle

Road, Lucan, Willie Nolan Road, Baldoyle, Co.Dublin, Airlie Stud, Newcastle Road, St.Helens, Newcastle Road and Crockhouse.

The Issues

9. The applicant contends that the respondents have acted *ultra vires*, in breach of the requirements of natural and constitutional justice and are in breach of the applicant's constitutional right to privacy and the right to respect for his privacy under Article 8 of the European Convention on Human Rights in that:-

- Phases 2-8 of the Carrickmines II Module are outside the terms of reference of the Tribunal.

- The holding of public hearings into phases 2-8 of the Carrickmines II Modules constitutes an unjustified, unnecessary and disproportionate invasion of the applicant's right to privacy under Article 40.3 of the Constitution and Article 8 of the European Convention on Human Rights.

- The Tribunal erred in holding that it did not have a discretion under the amended terms of reference not to proceed with the inquiry into phases 2-8 of the Carrickmines II Modules and/or in not considering whether to exercise that discretion.

- The Tribunal acted in breach of natural and constitutional justice in refusing to hear submissions from counsel for the applicant as to whether it should proceed with phases 2-8 of the Carrickmines II Modules.The respondents dispute all of the foregoing.

- They assert they were acting intra vires.

- The applicant does not enjoy a right to privacy as far as his business and professional affairs are concerned either under the Constitution or the European Convention on Human Rights.

- If he did enjoy such a right then any interference with that right by the State is both proportionate and appropriate.

- The Tribunal had the discretion to proceed to public hearing in Carrickmines II and related issues and so notified the respondents on the 3rd November, 2003.

- he applicant has no right to challenge or question the work of the Tribunal during its private investigative phase nor was the Tribunal obliged to hear submissions of counsel in relation to same.

- The respondents say that Mr.Finlay was afforded every courtesy with regard to making oral submissions but that he could not question or challenge any matter leading to and including the decision to move into public hearing phase.

- Finally, the applicant's case must fail on grounds of delay for failure to comply with the provisions of Order 84 of the Rules of the Superior Courts.

Material Facts

10. The period of time with which this case is concerned covers approximately 12 months beginning in November/December 2003.It is within that time frame that we find the essential words, deeds and documents that have crystallised into matters now disputed by the parties.It is, therefore, necessary that I identify and describe those milestones which lead me to the conclusions I have reached in this judgment.

11. The respondents decided in November, 2003 to move, as it were, from the private phase of their investigations into Carrickmines II and related issues to the public phase.Affected parties were notified of this decision and a letter dated the 4th December, 2003, was sent to the applicant's solicitors.It advised that the Tribunal would commence a section or module of its public inquiry on or about the 20th January, 2004.The Tribunal said that Mr.Caldwell would be required as a witness for this and each subsequent section of the modules.This letter was responded to by letter dated the 8th December, 2003 from Messrs Miley and Miley, the solicitors for John Caldwell.This letter expresses the view that the matters which it was intended to inquire into would take most of the following year and requested the provision of materials and notice of issues to be dealt with at the earliest possible time in order to allow them and Mr.Caldwell to prepare.A letter in reply to this dated the 11th December, 2003 was written setting out the intended time scale of the inquiry and pointing out that the Tribunal intended to take matters in sections and that there would be considerable periods during the coming year, whether by reason of the interjection of unrelated modules or otherwise, when the Tribunal would not be dealing with the particular module with which Mr.Caldwell was concerned.

12. On 20th January, 2004, the public hearing of the Carrickmines II Module commenced.This comprised an opening statement by Mr.Desmond O'Neill S.C., counsel for the Tribunal.On 21st January, 2004, counsel for Mr.Caldwell, Mr.Ian Finlay S.C., sought clarification from counsel for the Tribunal as to the scope and intent of the Carrickmines II inquiry.Counsel for the Tribunal indicated, inter alia, that the inquiry was directed towards examination of the system used in other lands with regard to the parties involved, devices, entities, business modules or structures in other transactions with a view to inquiring if they established a relationship between Mr.Caldwell, Mr.Lawlor and Mr.Kennedy thereby assisting the Tribunal in its consideration of the Carrickmines lands.The focus of the inquiry was directed towards their possible relevance to the Carrickmines Module and the ownership of those lands or the control of those lands by the persons who had been named.At that point, counsel for Mr.Caldwell expressly reserved his position in relation to the intent of the Tribunal as expressed by its counsel.The Tribunal then proceeded to hear evidence from witnesses in the Carrickmines II Module in the phase known as the Jackson Way phase.The hearing of evidence proceeded up to the 13th February, 2004, at which point the matter was adjourned until the 23rd July, 2004, to enable the respondent to hear evidence in another unrelated module in the interim.

13. Thereafter, a considerable amount of correspondence passed between the solicitors for Mr.Caldwell and the Tribunal relating not only to the public hearings of the Carrickmines II and related issues Module but also to various aspects of the ongoing private investigations concerning the Module.By letter dated the 19th February, 2004, Máire Ann Howard, solicitor to the Tribunal, wrote to Messrs Miley and Miley informing them that on the resumption of the public hearings the witnesses material to the Jackson Way phase would be concluded and that thereafter the public hearings into the phase known as "the Coolamber lands" would commence.The letter drew attention to the fact that the Tribunals work concerning the Coolamber lands was in preliminary phase and was confidential.

14. The next relevant letter is that of the 26th April, 2004, from Messrs Miley and Miley to the solicitor for the Inquiry.This letter covers two areas.Firstly, it deals with issues of discovery.However, it also goes on to deal in a detailed way with submissions referable to the arguments upon which Mr.Finlay S.C.reserved his position of 21st January.The following is an extract from the said letter.

> "Following statement (the opening) by counsel for the Tribunal, counsel for my client, on the 21st January 2004, reserved his position in relation to a submission at a later stage of the current phase.He pointed out that the proposition advanced by counsel for the Tribunal, both as a matter of law and as a matter of evidence, raised fundamental issues of principle.He also pointed out that the reason why he did not regard it necessary to make any submission of substance on that point as of 21st January 2004 was that in the current phase, on his understanding, the Tribunal was exclusively concerned with the ownership of the lands at Carrickmines.The Chairman confirmed that Mr.Finlay's understanding was correct.In this circumstance, Mr.Finlay indicated that, in relation to the issue that he had flagged, it might be both appropriate and of assistance to the Tribunal that it be best dealt with at the end of the current phase.
>
> Since the 21st January 2004, it has remained the intention of counsel to make that submission at the appropriate time, consistent with what was said on the 21st January.But counsel has now advised that, having regard to your recent correspondence, and although the correspondence relates only to the issue of discovery, it would never the less be wrong not to bring aspects of this matter to the attention of the members of the Tribunal at this stage."

15. The letter goes on to set out comprehensive argument.Although it says that it is bringing "aspects of this matter" to the attention of the Tribunal the phraseology employed might have the effect of disguising the true scope of what follows in the letter which, in substance, appears to me to set out the applicant's stall as far as proceeding with the remaining phases of Carrickmines II was concerned.A response by way of letter dated the 14th May, 2004, from the solicitor to the Tribunal deals both with the discovery question and, on a point by point basis, with the submissions made on behalf of Mr.Caldwell by Messrs Miley and Miley.Each and every submission made on behalf of the applicant was

rejected and reasons were given.However, the letter goes on to invite further submission in writing from the applicant in the following paragraph.

> "Should your client wish to make any submission to the Tribunal in respect of the ambit of the Carrickmines II and Related Issues Module of its inquiries, such submissions should be made in the first instance in writing.Unless the Tribunal receives such submissions from your client on or before the 9th June, 2004, the Tribunal will not engage in further communication with you in respect of this issue."

16. The letter concludes by informing Mr.Caldwell's solicitors that the deadline is set with a view to preventing further delay in the preliminary investigations.

17. On the 21st May, 2004, Ms.Howard wrote to Mr.Caldwell's solicitors informing them of the possibility that the Carrickmines II Module might be resumed in the following mid July for approximately two weeks of evidence.

18. By letter dated the 25th May, 2004, Messrs Miley and Miley wrote in person to the Chairman of the Tribunal, the first named respondent.In this letter, Mr.Caldwell's solicitors repeat in brief the main heads of argument expressed in far greater detail in the letter of the 26th April, 2004, and suggests a meeting with the Tribunal.The thinking behind this suggestion of a meeting can be gleamed by reference to the following extract from the letter.

> "Against all of this background, I have had lengthy and detailed discussions with counsel on the appropriate course of action which should be advised to my client.As must be apparent from the preceding paragraph, I have absolutely no wish to engage in any public or litigious confrontation with the Tribunal unless it is absolutely necessary so to do.I am aware of the Tribunal's views in relation to the non-Carrickmines lands; the Tribunal equally is aware of our views.
>
> In these circumstances, counsel and I believe that it may be constructive and of assistance to the Tribunal if, rather than continuing to deal with these issues in correspondence, we were to meet with you (and of course the other members of the Tribunal) in order to suggest some possible approaches for your consideration that might satisfy the Tribunal's stated objectives in relation to the non-Carrickmines lands, but at the same time offer the possibility of greatly shortening the time that might otherwise be spent on the non-Carrickmines investigations, with substantial consequent savings of Tribunal time and resources, and of public funds, and of course a concomitant lessening of the substantial burden that will otherwise be placed on my client and, insofar as is relevant, on his legal advisers.
>
> As I say, it is the carefully considered view of counsel and myself that such a meeting could be beneficial and of assistance to the Tribunal.It is also our view that such a meeting will enable us to explain and clarify the suggestions to which I have referred in a manner that could not be appropriately or satisfactorily achieved at a public hearing."An important feature of the foregoing quotation is that Mr.Stephen

Miley, the author, makes it abundantly clear that he knew the views of the Tribunal concerning the non-Carrickmines lands.Furthermore, it is implicit in the letter that litigation is in the author's mind.

19. By a letter of the 26th May, 2004, Messrs Miley and Miley sought an extension of time for the making of submissions which was granted by letter of the same date from the solicitors to the Tribunal.The applicant was given an extension until the 16th June, 2004.Other correspondence of the same date expresses complaint from the applicant's solicitors about the disruption which, as they would see it, the chopping and changing of dates for hearing had visited upon the applicant and his lawyers.These criticisms were rejected by the Tribunal.

20. We move on to a letter dated the 22nd June, 2004, from the solicitor for the Tribunal written at the express direction of the Chairman, the first named respondent.The meeting requested in the letter of the 25th May, 2004, from Miley and Miley was rejected.The letter goes on to express the views of the Tribunal on matters germane to the applicant's objections to proceeding with the Carrickmines II Module and sets out in clear terms (if such were necessary) the views of the Tribunal.The letter goes on to offer a further extension of time to the filing of submissions in the following terms:-

> "In the light of your correspondence with the Chairman, the deadline for making of submissions in relation to the proposed order for discovery and production against your client (and other orders for discovery and production against clients for whom your office acts) and has been extended.The Tribunal will proceed to consider the making of such orders on 30th June, 2004.Any further submissions to be made by your client must be received by the Tribunal no later than close of business on 29th June, 2004.
>
> The Tribunal has directed me to inform you that once your client has complied with any outstanding orders for discovery and/or requests for further narrative statements, it will consider inviting your client to attend for private interview by the Tribunal legal team if it considers that such a course could have the effect of expediting the public hearing or otherwise reducing the costs incurred investigating the matters with which your client is concerned."

21. It would, therefore, appear that the Tribunal as of the 22nd June, 2004, was of the view that the further submissions which were awaited from Messrs Miley and Miley were confined to discovery and related matters.Messrs Miley and Miley replied by letter dated the 29th June, 2004.This letter comprises submissions relating to the proposed discovery orders not only against the applicant but also against other clients of Messrs Miley and Miley.The submissions in this letter broadly reiterate those arguments or submissions already made by the applicant against proceeding with Carrickmines II at all.This letter was written at a time when the question of amending the terms of reference of the Tribunal was very much "in the air".The Fourth Interim Report of the Tribunal had been published in early June and it had sought amendments to its terms of reference setting them out in detail in the said Report.The letter repeats the applicant's contention that the

Carrickmines II Module was outside the terms of reference and reiterates the earlier general arguments.

22. Having considered the matter, the respondent rejected the applicant's submissions and made the proposed discovery orders.This occurred on the 2nd July, 2004, and was communicated to Messrs Miley and Miley in a letter of that date.Subsequent correspondence from Messrs Miley and Miley raised stern objection to the orders.

23. The next material correspondence was a letter of the 6th October, 2004, from the solicitor to the Tribunal to Mr.Caldwell's solicitors.Enclosed with that letter was a large amount of documentation (with more to come) with a view to commencing the enquiry into the Coolamber lands on the 9th November, 2004, but subject to a possible change in that date.This letter was replied to on the 7th October, 2004, by Messrs Miley and Miley complaining, inter alia, that the Tribunal appeared to be departing from its previously planned schedule with regard to the commencement of the non-Carrickmines land phase.This was responded to by letter dated the 8th October, purporting to respond to the letter from Messrs Miley and Miley.This led to a further letter dated the 26th October, 2004, when Messrs Miley and Miley returned to the more general complaint, concerning whether or not the Tribunal had power to investigate the non-Carrickmines lands.At paragraph 4 of that letter they seek the opportunity to make oral submissions to the Tribunal.On the 18th November, 2004, a letter invited written submissions from the applicant's lawyers with a view to considering whether or not further oral submissions would be permitted.Detailed written submissions signed by counsel for Mr.Caldwell were furnished on the 25th November.

24. On the 26th November, 2004 the Tribunal sat.At p.1 of the transcript, the Chairman said: "We have made a decision, the Tribunal made a decision to allow you to make … such oral submissions based on your written submissions as you wish to make, but with this condition.

25. The Tribunal is not prepared to hear any submissions as to how the Tribunal should exercise its discretionary powers provided for in the new Terms of Reference.How that discretion is exercised is solely a matter for the Tribunal because the Tribunal alone has access to the information, documentation which allows it to exercise that discretion.It's not a matter which the Tribunal intends taking submissions or hearing submissions from any parties.It's a discretion which only the Tribunal can exercise in its own wisdom, and we are quite firm that that is the position and should be the position."

26. The Chairman refused to hear submissions as to how the Tribunal should exercise its discretion.No submissions were then made by counsel on behalf of the applicant.A fresh attempt was made on the 8th December, 2004, to make the submissions but this came to nought.

The workings of the Tribunal

27. Since the Tribunal began its work in 1997 a formidable body of case law has emerged from the Supreme Court informing both the parties hereto and this court as to the

jurisprudence governing the work of this and other Tribunals.In a structural sense, we are dealing here with both the private investigative work of the Tribunal and its public hearings and moving from the former to the latter and it is upon this aspect of the jurisprudence that I briefly wish to focus.

28. In *Haughey v.Moriarty* [1999] 3 I.R.1 Hamilton C.J.at p.74-75 reviewed the nature of an inquiry of the type with which we are dealing here, in the following way:-

> "A tribunal of inquiry of this nature involves the following stages:-
>
> 1. a preliminary investigation of the evidence available;
> 2. the determination by the tribunal of what it considers to be evidence relevant to the matters into which it is obliged to inquire;
> 3. the service of such evidence on persons likely to be affected thereby;
> 4. the public hearing of witnesses in regard to such evidence, and the cross-examination of such witnesses by or on behalf of persons affected thereby;
> 5. the preparation of a report and the making of recommendations based on the facts established at such public hearing.
>
> It cannot be suggested or submitted that the public or any portion thereof are entitled to be present at this latter stage.
>
> Neither can it be submitted that the public or any portion thereof are entitled to be present at the preliminary investigation of the evidence for the purposes of ascertaining whether it is relevant or not.
>
> If these inquiries in this investigation were to be held in public it would be in breach of fair procedures because many of the matters investigated may prove to have no substance and the investigation thereof in public would unjustifiably encroach on the constitutional rights of the person or persons affected thereby.
>
> The Court is satisfied that such was not the intention of the legislature and that the 'proceedings of the Tribunal' referred to in the said section relate merely to the proceedings of the Tribunal where evidence is given on oath, the witnesses giving such evidence being subject to cross-examination and the other matters at the public hearing.
>
> The Court is satisfied that the Tribunal was entitled to conduct this preliminary investigation in private for the purpose of ascertaining what evidence was relevant and to enable the Tribunal in due course to serve copies of such evidence on the plaintiffs which it is obliged to do in order to enable them to exercise their constitutional right to be present at the hearing of the Tribunal where such witnesses will give evidence on oath and be liable to cross-examination."

29. Thus, in terms of its investigations and information gathering role in what might be termed its private phase, the Tribunal is near sacrosanct.I say near in that the constitutionally protected guarantee of fairness of procedures so powerfully enunciated In

Re Haughey [1971] I.R.217 may require notice to and involvement of persons likely to be affected by, for example, an order for discovery.Thus, in Hau*ghey v.Moriarty*, in relation to a proposed discovery order in respect of a persons bank account, Hamilton C.J.said at p.75 of his judgment:-

> "Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, the person or persons likely to be affected thereby should be given notice by the Tribunal of its intention to make such order and should have been afforded the opportunity prior to the making of such order, of making representations with regard thereto."

30. That, in my view, seems to indicate the limits on any person making submissions to a Tribunal while it is engaged in its private investigative phase as to how the Tribunal should conduct its inquiries in such phase or how and when it should exercise its decision to move to public hearing.Fundamentally, it seems to me that this is what the applicant is seeking to do.The applicant is endeavouring to address the Tribunal on whether or not it should move from its private investigations into public hearing.This he does notwithstanding the fact that he has already engaged in phase 1 of the Carrickmines II Module.But even if we were dealing with this matter at a time before the commencement of phase 1 of Carrickmines II, it seems to me the position in law would be the same.The applicant is seeking to address the Tribunal as to how it should exercise its discretion in the preliminary investigative stage.

31. Citing the above quotation from *Haughey v.Moriart*y, Hamilton C.J.says at p.95 of R*edmond v.Floo*d [1999] 3 I.R.79:-

> "An inquiry under the Tribunals of Inquiry (Evidence) Act, 1921, is a public inquiry.The Court in the passage quoted accepted that it was proper for a tribunal to hold preliminary investigations in private.This would enable the Tribunal, inter alia, to check on the substance of the allegations and in this way would protect the citizens against having groundless allegations made against them in public.But the Court was not suggesting that the tribunal should proceed to a public inquiry only if there was a prima facie case or a strong case against a particular citizen.It was suggesting that the allegation should be substantial in the sense that it warranted a public inquiry.The Tribunal is not obliged to hold a private inquiry before proceeding with its public inquiry.The allegations made against the applicant in this case could be false.At this stage we simply do not know.But they are grounded on a sworn affidavit.In these circumstances it appears to this Court that the Tribunal was entitled to decide that they were of sufficient substance to warrant investigation at a public inquiry.Indeed it would have been surprising if the Tribunal had decided otherwise."

32. Again, this exemplifies the broad latitude afforded a Tribunal in deciding when it moves from private to public mode.In *Lawlor v.Flood*, (Unreported, Supreme Court, ex temp., 24th November, 2000) Keane C.J.addressing the issue as to whether evidence in relation

to documents and records referred to in a discovery order should be taken in private rather than public, stated (at p.6):-

> "It is not necessary to stress, because it has been repeatedly said in this court, that the courts in interpreting the relevant legislation, must afford a significant measure of discretion to the Tribunal as to the way in which it conducts these proceedings.It must, of course, observe the constitutional rights of all persons who appear before it or upon whom the decisions of the Tribunal or the manner in which they conduct their business may impinge, but making every allowance for that important qualification, the principle remains as I have indicated.The Tribunals must be afforded a significant measure of discretion as to the manner in which they carry out the important task which has been entrusted to them by the Oireachtas because if that principle is not borne in mind then the very important objectives which the establishment of the Tribunal of this nature was intended to achieve can only be frustrated."

33. Keane C.J.then went on to quote Mrs.Justice Denham in her judgment in *Bailey v.Flood,* (Unreported, Supreme Court, 14th April, 2000) where Denham J.stated (at p.3):-

> "The novel feature of the present case was the argument that the evidence of the applicants should be heard by the tribunal in private in the first instance, and if it was then established or emerged that the evidence so given was relevant or material, the hearing could be repeated in public.Assuming, without deciding, that such a procedure was permissible, a decision as to whether that course should be adopted was one which fell to be made by the tribunal itself.That decision must conform to the standard of reasonableness laid down by this court in *The State (Keegan) and the Stardust Victims Compensation Tribunal* [1986] I.R.642 and *O'Keefe v.An Bord Pleánala* [1993] 1 I.R.39."

34. A useful and informative commentary on the decisions of the Supreme Court in *Redmond v.Flood, Lawlor v.Floo*d and *Bailey v.Flood* is to be found at pp.215-216 of the Law Reform Commission's Consultation Paper on Public Inquiries including Tribunals of Inquiry, LRC CP 22-2003 (Dublin, 2003).It states:-

> "But the critical point here and in many other cases is the decision as to the point at which a tribunal shifts from private to public proceedings."

35. At this point the Commission cites the above cited quotations from Keane C.J.and Denham J.It goes on:-

> "Here we have three recent Supreme Court authorities – Redmond, Lawlor and Bailey – giving a unanimous view.Their ruling is that, as regards the exercise of its discretion on this point, a Tribunal of Inquiry, in the same way as administrative bodies (and one might note that the point may be regarded as even stronger in that few administrative bodies are chaired by superior court judges) is to be allowed a significant measure of tolerance, in fact up to the point at which its

'decision… is irrational or flies in the face of common sense'.There is an implicit rejection here of any contention that, because the right to privacy is established on the authority of the Constitution, it follows that there must be an especially stringent review (or in U.S.jargon, 'hard look'), where there is any disturbance of it.The net result seems to be that, on the two major constitutional points (constitutional justice and privacy), which often arise together, a wide measure of discretion is allowed to a tribunal."

The test to be applied upon review

36. In these proceedings it is not the function of this Court to stand in the shoes of the Tribunal, nor is it this Court's function to consider whether it is in agreement or disagreement with any decision which the respondents might make.What standard should the Court employ when exercising its review jurisdiction?

37. In *Bailey and Others v.Flood*, (Unreported, High Court, Morris P., 6th March, 2000) Morris P.said (at p.25):-

> "Supreme Court pronouncements, which of course bind this Court, have laid down the principle that the decision of a body subject to judicial review should be interfered with on the ground of reasonableness alone, only when it 'plainly and unambiguously flies in the face of fundamental reason and common sense'.So held Henchy J.in *The State (Keegan) v.Stardust Victims' Compensation Tribuna*l [1986] I.R.642 at page 658.In *The State (O'Keeffe) v.An Bord Pleanála* [1993] 1 I.R.39 at page 71 Finlay C.J.said:
>
> > 'The Court cannot intervene with the decision of an administrative decision making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.'"

38. At p.27 Morris P.went on to state:- "

> The Parties have proposed and I am prepared to accept this as the correct statement of the test that the Court ought to apply when reviewing a decision that impinges on constitutionally guaranteed rights.However, it must at all times be borne in mind that the jurisdiction of this Court is limited to the review of the decision.The fact that the constitutional rights of a person affected by the decision are implicated is not a licence for the Court to stand in the shoes of the decision-maker and to speculate as to whether or not it would have come to the same conclusion.The function of the High Court on an application for judicial review is limited to determining whether or not the impugned decision was legal, not whether or not it was correct.The freedom to exercise a discretion necessarily entails the freedom to get it wrong; this does not make the decision unlawful.Consideration of the alternative position can only confirm this view.The effective administration of a tribunal of inquiry would be impossible if it were compelled at every turn to justify its actions to the High Court.The legislature has entrusted a broad measure of

discretion to such tribunals, including the discretion to decide how the inquiry will proceed and what evidence will be admitted, and it is no part of the duty of this Court to whittle down that discretion, with the inevitable deleterious effects that would have on the effective discharge of the important public tasks with which tribunals of inquiry are burdened."

39. Thus, as far as an applicant is concerned, in seeking to review the Tribunal, he or she has a great mountain to climb.It is by no means unassailable but it seems that one would need to stare irrationality in the face before it could be surmounted.

The decision sought to be impugned

40. My finding on this facet of the case is critical to other issues with which we are concerned.In my view the relevant decision is that of November, 2003 when the respondents decided to proceed to public hearings in the Carrickmines II and Related Issues Module.As stated above, this decision was notified in writing to the applicant via his solicitors and the public hearings for this module commenced on the 20th January, 2004.It is undoubtedly the case that counsel for the applicant sought, on the 21st January, 2004, to reserve his position with regard to the making of a possible submission.This submission, it would appear, dealt with the Tribunal's exercise of its discretion to move to public hearing in the Carrickmines II Module and, in particular, with regard to phases 2 to 8 thereof.Having so reserved his position, the applicant's lawyers then proceeded over the ensuing months to make submissions by way of correspondence making essentially the same case upon which Mr.Finlay reserved his position.At no stage of that correspondence could Messrs Miley and Miley have been unaware of the view of the respondents with regard to proceeding to public hearing – they expressly said as much in their letter of the 26th April, 2004.In my view, anything that occurred after the decision of November, 2003, communicated on the 4th December, 2003, amounted to no more than a reiteration by the parties to the said decision or a reiteration of that decision by the respondents.As Carroll J.put it in *Finnerty v.Western Health Board* (Unreported, High Court, 5th October, 1998):-

> "A decision which is a reiteration of a previous decision is not a new decision."

Ultra vires

41. The applicant contends that the public hearings into phases 2 and 8 of the Carrickmines II Module are outside the terms of reference of the Tribunal and that the Tribunal is, therefore, acting *ultra vires* and in excess of jurisdiction in proceeding to hold the said hearing.The applicant also makes the case that the Tribunal's decision to proceed with the remainder of the public hearings in the Carrickmines II Module is irrational.The applicant identifies what he describes as the rationale of the Tribunal in conducting aspects of its enquiries by reference to a statement of the Chairman of the Tribunal at the public hearing on 28th October, 2004 (Day 535) where he states:-

> "Because of the [allegation of corruption in the Carrickmines I Module] the Tribunal has decided it is necessary to determine the ownership of the lands which are the subject of those allegations…if that evidence had not been given, if there had not

been a Carrickmines I, there would have been no reason to concern ourselves with who owns Jackson Way."

42. The applicant complains that the Carrickmines II Module is an investigation into ownership of the Carrickmines land and not an investigation into corruption.They refer to page 27 of the transcript where the Chairman says:-

> "Carrickmines II is not driven in any way by an investigation into corruption.It is driven for the purpose of … the driving force is to determine the ownership of Jackson Way."

43. The following further extract is also relied upon:-

> "The reason for the investigation of ownership is more basic than that.It is to determine simply who are the beneficial owners, if there was corruption and if it did benefit to the land, then who benefited from that."

44. Thus, argues the applicant, it is evident that without allegations of corruption with regard to the lands in Carrickmines I, there would be no Carrickmines II investigation.Further, the reason for investigating the ownership of the Carrickmines lands is that, if there was in fact corruption and if that corruption did benefit the lands, the Tribunal wished to determine who were or are the beneficial owners who benefited as a result.

43. The applicant contends that the Tribunal is not mandated the to enquire into the beneficial ownership of any lands other than certain lands in North County Dublin which was specifically referred to in para.A1 of the terms of reference.Alternatively, if the Tribunal was correct in its interpretation, then it should proceed to enquire into the ownership of all lands in respect of which allegations of corruption have arisen.This the Tribunal has not done.If, on the other hand, the Tribunal is correct in its interpretation then such inquiries as are envisaged in the Carrickmines II Module can and should only arise if and when a finding of corruption has been made in respect of the Carrickmines I lands.Such finding has not yet been made.Therefore, if no corruption was found in respect of the Carrickmines I lands or if there was no benefit to the lands, an investigation into the beneficial ownership of the lands would be wholly unnecessary.This in turn would lead to waste of large amounts of Tribunal time and public funds in what would turn out to be an unnecessary enterprise.There is no rational basis upon which the Carrickmines II inquiries would be, potentially, of anything more than very limited probative value if at all.A mere pattern of relationships in relation to other lands is not relevant to the issues into which the respondent is mandated to inquire.This is evidence that would be excluded as inadmissible if it was sought to be tendered in civil and criminal proceedings if an issue arose as to the ownership of lands.Further, the applicant argues, even if patterns or relationships in relation to other lands could possibly be relevant, the undisputed evidence of the applicant was that such patterns militate against the proposition that Mr.Lawlor could have any beneficial interest in the Carrickmines lands or claim such an interest in the future.Further, the applicant says, Mr.Lawlor had denied any interest in the said lands.

44. Turning to the provisions of the terms of reference and, in particular, clause 5A thereof, in my view these empower the respondents, where they are made aware of acts, which may, in their opinion amount to corruption or which involve attempts to influence or compromise the exercise of duties to inquire into such Acts and to report thereon.In *Redmond v.Flood* [1999] 3 I.R.79 the Supreme Court makes this clear.In that case, the applicants sought various reliefs by way of judicial review including orders of *certiorari*, prohibition and declarations in relation to the investigations of the Tribunal.Leave to bring judicial review proceedings were granted on limited grounds by the High Court.In that court, Kelly J.held that counsel for the applicant had not raised an arguable case regarding the interpretation of para.A5 of the terms of reference.Commenting on this, Hamilton C.J.says at p.91:-

> "It is clear … that the Tribunal has interpreted the said para.A5 as entitling it to inquire into and report on any acts associated with the planning process which may in its opinion amount to corruption or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties and in particular the allegations made by Mr Gogarty involving the applicant.

45. It is submitted on behalf of the applicant that:-

(i) such interpretation is incorrect, and

(ii) if it be correct, then the said resolution of the Houses of the Oireachtas so far as it concerns para.A5 is *ultra vires* the Tribunals of Inquiry (Evidence) Acts, 1921 to 1998, inasmuch as it does not confine the Tribunal's remit to a definite matter or matters of urgent public importance.

With regard to (i), it is hard to see what alternative interpretation can be placed on para.A5.The words of the paragraph are clear and admit only of the interpretation placed thereon by the Tribunal.

They provide that:-

> 'In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process which may in its opinion amount to corruption or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties, it shall report on such acts.'

By virtue of such paragraph, the Tribunal is obliged to report on any act associated with the planning process, of which it becomes aware in the course of its inquiries, and which in its opinion, may amount to corruption or tend to compromise the disinterested performance of public duties.

It would have been competent for the two Houses of Parliament to have established a tribunal to inquire into 'corruption in the planning process in Ireland'.This being so

it was clearly competent for them to establish a tribunal to inquire into suspected cases of corruption and such other cases as might come to its attention in the course of its inquiries.

Having regard to the clear wording of para.A5, the Court is satisfied that the applicant has not established an arguable case that the interpretation of this paragraph by the Tribunal is incorrect.Indeed no serious alternative interpretation was suggested by counsel for the applicant."

46. In my view, from the wording of paragraph A5 coupled with the force of the decision of the Supreme Court in *Redmond v.Flood* the Tribunal is entitled to conduct its enquiries into the Carrickmines II Module and the Tribunal is not acting *ultra vires* in proceeding in the manner it has.The amended terms of reference as set out in the Dáil Resolution of the 17th November, 2004, and contained in the Ministerial order made on the 3rd December, 2004, and subsequently enacted into legislation, inter alia, expressly require the Tribunal to proceed as it sees fit to conclude its inquiries into a number of specified matters including, in particular, the Carrickmines II Module and related issues.In my view, even without the amended terms of reference, the Tribunal was and is empowered to inquire as it has and to proceed in the manner in which it has determined and now wishes to carry on doing.There was a concern that every time an alleged act of corruption was unearthed a fresh line of investigation would be opened up ad infinitum.If such concern were ever justified it is now laid to rest.

47. The aim of the Carrickmines II and related lands inquiry is to find out, if such can be done, whether Mr.Liam Lawlor had an involvement in the Carrickmines land material to the transactions examined in Carrickmines I and, further, to see who benefited from the alleged corruption under Carrickmines I.Consequently, the respondents argue, in my view correctly, the second and remaining phases of Carrickmines II are legitimate subjects of inquiry within the terms of reference.All of the remaining phases of the Carrickmines II Module, in my view, form part of the single subject matter of inquiry, namely who owned the Carrickmines land and did Mr.Lawlor as a public representative have an interest in the lands and the implications, as far as corruption is concerned, of the transactions which took place of and concerning the lands.These inquiries, it is argued, investigate the modus operandi of the applicant, Mr.Kennedy and Mr.Lawlor (if such there was) in acquiring beneficial ownership in the Carrickmines lands.Such is the respondents' interpretation of the terms of reference and in my view they are correct.Even if I disagreed with them it is clear from *Redmond v.Flood* that the Tribunal has a wide latitude in the interpretation of its own terms of reference.

48. The applicant argued that it was not part of the Tribunal's brief to engage in collateral enquiries of the type proposed.It was irrational that it be allowed to proceed down what may very well be blind alleys particularly in the light of the sworn testimony already available to it.Reliance was placed upon a decision of the Supreme Court in *Browne v.Tribune Newspapers Plc*.[2001] 1 I.R.521 and to the words of Rolfe B.in *A.G.v.Hitchcock* (1847) 1 Exch.91 where he says in relation to cross-examination as to collateral matters:-

> "If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper…to raise every possible inquiry as to the truth of the statements made…in fact, mankind finds it to be impossible."

49. The case of *Browne v.Tribune Newspapers Plc*.involved a Detective Superintendent in An Garda Síochána who brought libel proceedings on foot of a newspaper article dealing with the circumstances surrounding a shooting incident.An issue which fell to be determined on appeal was whether or not the trial judge had erred in permitting counsel for the defendant to cross-examine the plaintiff during the trial in order to elicit from him the fact that he had recovered a substantial sum as a result of four previous libel actions and was not, therefore, as he attempted to characterise himself, a reluctant litigant.Holding that the trial judge had so erred, Keane C.J.said at p.531:-

> "The cross-examination as to actions for defamation brought by the plaintiff in the past in respect of other unrelated publications was clearly not relevant to the issues of justification, fair comment, the meaning to be attributed to the words complained of or the identification of the plaintiff.They could, accordingly, be relevant, if at all, solely to the issue of damages.
>
> However, permitting cross-examination of this nature gives rise to an immediate difficulty.If, for example, one or more newspapers had published in the past a truly monstrous falsehood concerning the plaintiff - that he regularly accepted bribes, for example, in return for suppressing criminal prosecutions - the fact that he recovered substantial damages from the newspapers concerned would be unlikely to create a damaging impression in the mind of the jury that the plaintiff was someone who was, so to speak, in the business of exploiting every available opportunity to him of recovering damages from newspapers.It would follow that, were such cross-examination permissible, the court would have to permit the plaintiff to give details as to the precise nature of the defamation on the previous occasion, the course the proceedings took, whether any apology was offered, and the nature of the trial.In addition, matters such as the circulation of the offending publication would all have to be explored.The defendant would, presumably, be entitled to call rebutting evidence and the court would find itself in the position of having to conduct a virtual trial within a trial on this issue and this would also apply in respect of each individual defamation action which the plaintiff admitted to having instituted.It would seem remarkable that a court would be obliged to try collateral issues of this nature simply in order to determine whether, in the event of the plea of justification failing, the plaintiff's damages should be reduced because of his readiness to bring defamation proceedings in the past.It is true that no such wide-ranging inquiries were pursued in this case, as counsel for the plaintiff preferred to adopt the posture that the questioning was in any event irrelevant and inadmissible but there cannot be any serious doubt as to the entitlement of the plaintiff to require such an inquiry to be undertaken where a defendant seeks to elicit such evidence in cross-examination.In the absence of any authority on the

matter, I would have thought that the objection by counsel for the plaintiff should have been upheld by the trial judge."

50. The applicant also complains that there is no rational basis for investigating the non Carrickmines lands because such an inquiry cannot assist the Tribunal in identifying the beneficial ownership of the Carrickmines lands.

51. Even though the task facing the applicant in establishing a case is a very stern one the respondents have not been content to rest on their laurels and have offered substantial counter argument to the applicant.They say that the applicant's attitude overlooks both the probative value of the Tribunal successfully establishing (if such there be) the true nature of the relationship between Messrs Kennedy, Lawlor and Caldwell and the way in which they sought to develop the lands, the subject matter of the inquires in Carrickmines I and Carrickmines II.In addition, they say that the applicant's attitude disregards the probative value of testing the undocumented account of that relationship and those transactions as given by Mr.Lawlor and Mr.Caldwell.The ownership structures of the non Carrickmines lands could provide valuable evidence as to the true nature and extent of the relationship between Messrs Kennedy, Lawlor and Caldwell.The following extracts from the opening statement for Carrickmines II and Related Issues Module by Mr.Desmond O'Neill S.C., counsel for the Tribunal offers a flavour of the rationale offered by the respondents for engaging in this Module.

> "Examination of a documentation generated in connection with a number of seemingly unrelated land transactions in Co.Dublin in the 1980's may assist the Tribunal in its determination as to the relationship which exists between these parties (Mr.Kennedy, Mr.Lawlor and Mr.Caldwell) and in particular whether Mr.Lawlor has a claim or entitlement to share in the profits which will result from the sale or development of the Carrickmines lands." [Day 439, p.12
>
> "The involvement of Mr.Lawlor in certain transactions with Mr.Kennedy and Mr.Caldwell will be shown to have resulted in a claim being made for a share in the profits by Mr.Lawlor and may suggest that as a matter of probability, that if Mr.Lawlor was involved in seeking to have the Carrickmines lands rezoned, that he did so in the expectation of sharing the profits which resulted from such zoning." [Day 39, p.17]

52. The applicant must satisfy me of the irrationality of the decision to inquire into the ownership of one set of lands in order to establish the ownership or pattern of ownership of separate lands.Even though the onus rests on the applicant I feel the applicant's argument is comprehensively answered.The following matters highlight a clear rationale behind the inquiry into the remaining Carrickmines phases.

(a) In order to establish the facts in weighing up the conflicts of evidence on corruption in the Carrickmines I Module it is necessary for the Tribunal to ascertain the beneficial owners.Ascertaining what parties are involved is material to issues of motivation and credibility of evidence given in one or other of the phases.

(b) The Tribunal's view that it cannot report on or properly evaluate the sworn evidence of Mr.Frank Dunlop in the Carrickmines I phase until his evidence is tested in relation to other land modules where he is making allegations of corruption is reasonable.Mr.Dunlop's credibility is the central issue as has been stated by the Tribunal and, because of this, the Tribunal will only report on these land modules when all evidence of Mr.Dunlop has been adduced and they have had the benefit of his being cross-examined by all interested parties.For example, if it was proved that he lied in six other land modules it would have been premature for the Tribunal to report on the veracity of his evidence in the Carrickmines phase 1 Module.The logic of this position, in my opinion, is difficult to resist.

(c) The Tribunal is not like a court case.Carrickmines I and II are only one part of a general body of information that has come to the Tribunal.The purpose of the modular approach is to attempt to put some order on what can be diffuse evidence so that evidence relevant to an issue can be meaningfully grouped to that issue.A series of modules may have to be proceeded with before any one of them can be reported upon.The Tribunal say that the purpose of a Module is not to allow for it to be reported from separately but to allow evidence to be heard in a logical and orderly way.

(d) Where there is an overlap of witnesses in two phases and the two phases are inextricably linked it is impractical that the Tribunal should report on part only of the Module before proceeding to the next.

(e) Were Messrs.Caldwell, Kennedy and Lawlor acting in consort? In the event of a finding of corruption, the question may properly be asked was this a one-off act of corruption or was there evidence of concerted action.

53. With regard to the applicant's complaint that the Tribunal is about to embark upon a course of enquiry that cannot be justified either in terms of use of public time and resources or the impact in terms of time and resources as far as he is concerned he says that to date he has already had to bear an enormous burden in terms of work, time commitment, travel and interference with his personal and business life.Over the previous three or four years he has had to be available to give evidence to the Tribunal at seven days notice when it was sitting and did so on three separate occasions one of which ran for seven days and another for five.He has had to research over many hundreds of hours on issues raised by the Tribunal and providing required information to them involving many different jurisdictions including this State, the Isle of Man, The United Kingdom, Jersey, Panama, Lichtenstein and Cyprus.He has made upwards of eighty trips from his home on the Isle of Man to this jurisdiction to consult with lawyers and to research and procure documents.He has travelled on numerous occasions to Jersey and the United Kingdom.He has had to make several extremely lengthy and detailed narrative statements.He has had to deal with correspondence from the Tribunal amounting to hundreds of letters.He has made several affidavits of discovery involving hundreds of pages of schedules with one affidavit of discovery alone amounting to over six hundred

pages.He has produced what he estimates to be in excess to 30,000 documents to the Tribunal.He now says that he faces literally years of the same level of engagement with the Tribunal and offers an estimate of 56 weeks of hearing.

54. This assessment of the likely time to be taken offered by the applicant was, it was submitted, uncontested on affidavit by the respondent and, accordingly, must be accepted as the probable duration of the Tribunal.Whereas it might have been preferable if, in its replying affidavit, the respondents did set out the basis upon which they would seek to contest the applicant's time projection, nevertheless, I do not feel that the respondents are inhibited in challenging what is, at the end of the day, an estimate on the part of the applicant.Whereas it is undoubtedly the case that further involvement with the Tribunal will be burdensome and time consuming on and to Mr.Caldwell, a fact which I am quite sure the respondents fully accept, nevertheless I am not convinced that the estimate of Mr.Caldwell's future involvement with the Tribunal has been established as fact.A number of matters satisfy me of this.Firstly, I feel that the applicant's projection is somewhat simplistic and has resulted from an act of simple multiplication by reference to the Tribunal's own estimate of how long the Coolamber lands phase will last.Further, the Oireachtas has directed the Tribunal to conclude its work by March, 2007.Given such imperative, and given the other work that the Tribunal must do it would seem to me that the Tribunal itself will move matters along of its own volition.The new discretion given to the Tribunal in the amended terms of reference obliges the Tribunal to conclude its enquiries.Thus it is unlikely that the Tribunal will devote a disproportionate amount of time in its remaining life to the Carrickmines II Module.

55. It is, in any event, the duty of every citizen to cooperate with the Tribunal as an instrument of the Oireachtas within the bounds of constitutional and legal fairness and reasonableness when properly called upon to do so.Both in terms of personal commitment and time scale, the intensity of such engagement no doubt has varied and will vary enormously from person to person.The extent of such commitment and the assessment of the quality, propriety and value of such cooperation or the absence of same are matters for the Tribunal and within its jurisdiction.In the absence of the clearest irrationality it would be inappropriate for a reviewing court to trespass upon that jurisdiction.

56. In conclusion, in my view, as far as the rationality aspect of the applicant's challenge goes, he has failed to satisfy me, as he must, that the Tribunal has acted *ultra vires* in proceeding to conduct its inquiries into Carrickmines II.

The applicant's right to privacy

57. The applicant maintains that were the Tribunal to continue with its inquiries into the Carrickmines II Module that this would amount to an unjustified and disproportionate breach of his right of privacy under Article 40.3 of the Constitution and Article 8 of the European Convention on Human Rights.The respondents contended that if the applicant was possessed of such rights under the Constitution and the Convention, any interference with same was both justified and proportionate.It is fair to say that much time was expended by the parties in debating this centrally important issue.The argument proceeded on the assumption on everyone's part (including mine) that, at all times

material to these proceedings the European Convention on Human Rights was validly part of the domestic law of this State.The said Convention was incorporated into the law of Ireland on the 31st December, 2003, by virtue of the European Convention on Human Rights Act, 2003.The hearing of this case ended on the 28th April, 2005, and judgment was then reserved.On 12th May, 2005, the Supreme Court handed down judgment in the case of *Dublin City Council v.Jeanette Fennell* (Unreported, Supreme Court, 12th May, 2005).In the comprehensive and detailed judgment of the court, Kearns J.held, inter alia, that the provisions of the European Convention on Human Rights Act, 2003 were not retrospective in the circumstances of that case.In the instant case an issue may well arise as to whether or not the European Convention on Human Rights forms part of the Irish Law governing the parties hereto.There is no doubt but that the proceedings post date the coming into force of the 2003 Act (31st December, 2003).However, in view of my finding that the material decision taken by the Tribunal was in November/December 2003, the assumption that the applicant's convention rights were in force is open to argument.Since the constitutional and convention rights of the applicant, although distinct, were debated in tandem it seems to me preferable that I should postpone giving judgment on this aspect of the case until I have heard further from counsel on the impact, if any, of the decision in *Fennell*.I will hear counsel at the conclusion of this judgment as to how the parties wish to deal with this aspect of the case.

Constraining counsel's address to the Tribunal

58. It was, in my opinion, the intent of counsel for the applicant to address the Tribunal as to the exercise of its discretion in carrying out the private investigations and deciding what goes to public hearing.I have already referred to the substantial body of jurisprudence handed down by the Supreme Court on this area.Taking account of all that had transpired since November 2003 between the parties in my view the Tribunal was correct in constraining counsel's address to it in the manner it did.As is apparent from the extract from the transcript of the 26th November, 2004, it was the Tribunal's view that this was ever the position.At p.9 of the transcript the Chairman, with reference to the amended terms of reference said:-

> "So nothing has changed.The only thing that has changed is that the Tribunal now has additional powers which it can use to curtail the number of inquiries it undertakes."

59. At p.15 of the transcript, the Chairman went on to explain the practicalities of the situation as regards allowing people to make submissions with regard to its private inquiries:-

> "There are possibly hundreds of individuals who would be equally entitled to come to the Tribunal and make submissions as to why their particular inquiry should not be pursued.So you would have a situation where we would spend weeks and weeks just listening to submissions as to why particular individuals should not have to face an inquiry."

60. The Tribunal has its own way of doing things and is entitled to order its own procedures subject, of course, to the legal and constitutional rights of persons before it in public phase.It entertains both oral and written submissions as it had done in the instant case.The Tribunal had indicated that area of debate to which it did not intend to go and it was within its rights so to do.Certainly, no discreet ground or unfairness was visited upon the applicant by the refusal on the part of the Tribunal to revisit legal argument which it, rightly in my view, considered to be over and done with.The material decision was and remained the decision of November, 2003.

61. It should not be forgotten that the applicant was not prevented from making any submissions.Indeed, counsel for the applicant was invited to make submissions provided they were not on the subject of the exercise by the Tribunal of its discretion to go to public hearing.

The Tribunal's discretion under the amended terms of reference

62. On the 3rd December, 2004 the terms of reference of the Tribunal were amended by statutory instrument signed by the Minister for the Environment, Heritage and Local Government.This was consequent upon a resolution passed by both houses of the Oireachtas on the 17th November, 2004.The amended terms of reference were also incorporated into statute passed by the Oireachtas on the 15th December, 2004.Looking back for a moment, the opening statement for the Carrickmines II and Related Issues Module was made on the 20th January, 2004.This extensively opened the matters to be inquired into and identified the lands that were to be the subject matter of the inquiry and why this inquiry was to take place.Public hearings subsequently commenced into phase 1 of the Module (the Carrickmines lands).In February, 2004, even though its private investigations were not fully complete, the Tribunal informed the applicant's solicitors of its intentions with regard to the proposed public hearing in the second phase of this Module (the Coolamber lands).There then followed an exchange of correspondence including submissions by the applicant to which I have referred elsewhere in this judgment leading to a situation where, as of July, 2004, the applicant and his lawyers could have been left in no doubt as to where the respondent stood with regard to their decision in November, 2003 to move from private investigation phase to public hearing phase with regard to the Carrickmines II Modules.

63. The amended terms of reference provided at paras.J(1) and J(6) as follows:-

> "(1) The tribunal shall, subject to the exercise of its discretion pursuant to J(6) hereunder, proceed as it sees fit to conclude its inquiries into the matters specified below, and identified in the fourth interim report of this tribunal, and to set out its findings on each of these matters in an interim report or reports or in a final report:
>
> (a) the Carrickmines I Module;
> (b) the Fox and Mahony Module; (c) the St.Gerard's Bray Module;
> (d) the Carrickmines II Module and Related Issues;
> (e) the Arlington-Quarryvale 1 Module;
> (f) the Quarryvale II Module;

(g) those modules that are interlinked with the modules set out at paragraphs (a) to (f), and that are referred to in paragraph 3.04 of the fourth interim report of the tribunal.

(6) The tribunal may in its sole discretion in respect of any matter within paragraphs J(1), J(2) and J(3) of these amended terms of reference decide:

(I) to carry out such preliminary investigations in private as it thinks fit using all the powers conferred on it under the Acts, to determine whether sufficient evidence exists in relation to the matter to warrant proceeding to a public hearing if deemed necessary, or

(II) not to initiate a preliminary investigation and/or a public hearing of evidence in relation to the matter notwithstanding that the matter falls within the tribunal's terms of reference, or

(III) having initiated a preliminary investigation in private, and whether same has been concluded, but prior to the commencement of any public hearing of evidence in the matter, to discontinue or otherwise terminate its investigation notwithstanding that the matter falls within the tribunal's terms of reference."

64. The amended terms of reference had been formally requested by the Tribunal in its Forth Interim Report.The Tribunal felt that it had insufficient discretion in carrying out its enquiries and investigations and that the task facing it was, in its view, too onerous and would take many years to complete without what one might term an expanded discretion.In addition to such matters as wishing to accommodate the fact that witnesses might be older in firm, the Tribunal offered, inter alia, the following reasons for such expanded discretion:

"6.02 The Tribunal considers that the obligations imposed upon it by its current Terms of Reference do not afford the Tribunal a discretion as to which "acts" it is required to investigate and upon which it should report and in particular, when considering whether or not to conduct an investigation into any such "acts" as are referred to at Clause A5 or into such payments or benefits as are referred to at Clause E1 and E2.

6.03 The Tribunal believes, for example, that it cannot take into account such considerations as:· the level or degree of corruption alleged in respect of which there is a complaint;

· the likely duration of any investigation into such complaint;
· the likely cost of any such investigation;
· the likely effect, in the context of available resources, such an investigation might have on its current ongoing or future inquiries; and
· the probative value of any such investigation or the likelihood of such an investigation providing sufficient evidence upon which the Tribunal might reasonably be expected to be in a position to reach conclusions.

6.08 The Tribunal believes that where, for example, an identified line of inquiry would involve an unduly lengthy period of investigation, or where it would hamper or delay other and more pressing and advanced lines of inquiry, or where it would require resources which may be disproportionate to the likely benefit from such an inquiry in terms of information learned by or furnished to the Tribunal, that it should have the capacity to forego such investigation."#

65. It seems to me that the combined effects of paras.J(1) and J(6)(iii) was to confer discretion on the Tribunal to conclude, at its sole discretion, any private, preliminary investigation which it had carried out.The discretion is quite broad and, it would seem to me, could refer to such investigative work prior to the commencement of a module or any phase of a module.In my view, however, two important factors remain.Firstly, the amended terms of reference do not in anyway affect the right of the Tribunal to decide within its own discretion to move from preliminary investigation in private to hearing in public.That was the position in 1997 and remains so.In the words of the Chairman of the Tribunal:-

> "The position, as we see it, hasn't changed since 1997." (See Transcript Day 548 p.7)

66. Secondly, once the public hearing of evidence has commenced, the expanded discretion cannot be availed of.Therefore, as far as the Coolamber lands were concerned, the decision to proceed to public hearing had already been made and matters put in train that the said hearing should proceed.The Tribunal was entitled to exercise its discretion in that regard and has done so.For reasons stated elsewhere in this judgment that is not open to challenge in the circumstances of this case.I cannot see how the amended terms of reference could have the effect of undoing the exercise of a discretion which both this court and the Supreme Court have made abundantly clear is very much a matter for the Tribunal.

67. On the 26th November, 2004, it seems to me that the Chairman in addressing the assembled parties and their lawyers and in responding to counsel for the applicant stated nothing more than what was and is the true legal position with regard to the exercise of the Tribunal's discretion.He did not appear to me to say anything that would indicate that parties were not free to make submission with regard to the actual conduct of the public hearing at which stage, of course, the broad panoply of legal and constitutional rights of participants before the public hearings of the Tribunal would engage.The Chairman did no more than defend the integrity of the private investigative work and information gathering in which the Tribunal had been engaged after proceeding to public hearing.

68. There was an apprehension on the part of the applicant that the Tribunal had set its face against exercising the expanded discretion conferred or expanded at para.J(6)(iii), with regard to the remainder of the Carrickmines II Module.In written submissions, the respondents refer to this as a "misapprehension".As far as I can ascertain, this point was not raised before the Tribunal and I am satisfied that it was and is the view of the Tribunal that it will be open to it to terminate its investigation with regard to phases 3 – 8

of the Carrickmines II Module should it think fit in exercising its discretion in that regard.I am bound to say that I do not fault the applicant for misapprehending the situation given the fact that the Statement of Opposition at para.4 is open to the interpretation contended for by the applicant and para.10 of the affidavit of Susan Gilvarry, sworn on behalf of the Tribunal, seems on its face, to exclude the provisions of para.J(6) from the respondent's inquiries into Carrickmines II and Related Issues Module; on the grounds that the Module commenced its public hearings in January, 2004 and heard evidence in public in the matter thereafter including evidence in relation to lands other than the Carrickmines lands.The accuracy of what is averred by Ms.Gilvarry has not been tested.It is inevitable, given the enormous scope of the Tribunal's inquiries, that there will be evidence given in public hearing in one phase or even module that would be material to another.This was not debated for me.However, it is clear that the respondents are of the view that the discretion conferred by para.J(6) can be exercised in respect of each individual remaining phase.

69. Two views may be taken in interpreting the combined effect of para.J(1) and J(6).On one hand, one could conclude that a module has commenced and been opened by counsel for the Tribunal necessarily evidence concerning each phase of that module is put into the public domain including the identification of parties involved and what, in the view of counsel for the Tribunal, the Tribunal may be inquiring into.In my view, the intent of para.J(6)(iii) would be to ensure that persons about whom evidence was given or whose interests might adversely be affected would be given an opportunity to appear rather than having public hearings curtailed at the discretion of the Tribunal.

70. On the other hand, one might take the view that in using the word "evidence" it was the intention of the Oireachtas that Clause J(6)(iii) was to be interpreted on a phase by phase basis.In other words, prior to the commencement of public hearings in relation to individual phases the Tribunal was at liberty to shut down its private investigative inquiry.

71. On balance, I would prefer the latter view although it would be difficult to take a hard and fast opinion on this in that one could foresee circumstances where an individual or individuals or corporate entities might be named in opening statements in connection with a discrete phase of an inquiry whose hearing would be some distance off and in respect of whom private investigations might still be ongoing.One could foresee complaint were private investigations to be curtailed with public allegations, however carefully framed, left unanswered.

72. In the given circumstances, however, I am not satisfied that the applicant has made out a case that the Tribunal proceeded under any misapprehension as to the law with the Coolamber phase.I am not satisfied that the discretion to proceed to public hearing was exercised in a manner other than was fully within the rights and entitlements of the Tribunal.Nor has the applicant convinced me that the amended terms of reference have any bearing on the discretion as exercised by the Tribunal.

Delay

73. The respondents have raised the issue of delay in the bringing of these proceedings.These proceedings were commenced on 22nd day of December, 2004, by notice of motion returnable for 10th January, 2004, pursuant to leave granted by McKechnie J.on 13th December, 2004.The reliefs sought are an order of *mandamus* and declaratory relief.No order of *certiorari* is sought.The applicant maintains that time, for the purposes of Order 84 rule 21 of the Rules of the Superior Courts, 1986, runs from November or December, 2004 when Mr.Finlay S.C.attempted and reattempted to make submissions which the applicant maintains he was entitled to make.The respondents, in turn, argue that time began to run from November 2003 when the Tribunal decided to proceed to public hearing in the Carrickmines II and related issues module or the 4th December, 2003 when the decision of the respondents of the previous month was notified by letter to the applicant.No application has been made to me to extend the time to bring the proceedings.

74. Order 84 rule 21(1) of the Rules of the Superior Courts, 1986 provides as follows:-

> "1. An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made."

75. As is clear from this judgment, in my opinion the applicant's view is ill founded and at the time as far as the rules of the Superior Courts are concerned started running no later than 4th December, 2003.Even if I were wrong in this, it seems to me that any alternative computation of time would commence in February or at the very latest by the beginning of July by which time the views and rulings of the respondents were beyond doubt as far as the applicant was concerned.Yet no application has been made to this court for an extension of time.In *Dekra Éireann Teoranta v.Minister for Environment and Local Government* [2003] 2 I.R.270, the Supreme Court held, inter alia, that there was an onus on an applicant seeking an extension of time to initiate proceedings to demonstrate on an objective basis that there was an explanation and a justifiable reason for the delay.An applicant's belief that he was justified in delaying the institution of proceedings could not, of itself, justify the grant of an extension of time.What would amount to "good reasons"? Costello J.in *O'Donnell and Anor v.Dun Laoghaire Corporatio*n [1991] I.L.R.M.301 at p.315 says:-

> > "The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely.However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings.What the plaintiff has to show (and I think the onus under O.84 r.21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay.There may be cases, for example where third parties had acquired rights

under an administrative decision which is later challenged in a delayed action.Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights (*State (Cussen) v.Brennan* [1981] I.R.181).

Or again, the delay may unfairly prejudice the rights and interests of the public authority which had made the *ultra vires* decision in which event there would not be a good reason for extending the time, or a plaintiff may acquiesce in the situation arising from the *ultra vires* decision he later challenges or the delay may have amounted to a waiver of his right to challenge it and so the court could not conclude that there were good reasons for excusing the delay in instituting the proceedings."

76. There is no suggestion that the applicant was in any sense lulled into a false sense of security or put off his guard by the respondents.Having purported through Counsel to reserve his position he then proceeded to argue his case forcefully in the manner I have outlined above and it was answered with equal force and abundant clarity.In the circumstances of this case the applicant cannot rely upon a reservation of position rendered meaningless and an empty formula by subsequent events.Such a device is not intended to serve as suspending the running of time while the applicant argues his case in any event and, having failed in his attempt to get the Tribunal to change its mind to then afford him another "bite of the cherry".

77. In the absence of any evidence explaining the delay in bringing the proceedings, nothing emerged or occurred between December, 2003, and December, 2004, to alter either party's position apart from the reiteration of, no doubt, trenchantly held views.I am satisfied that the applicant must have known the mindset of the respondents when notification of the decision to proceed with the Carrickmines II Module was notified to him.As I have already indicated, even if I am wrong in that I am satisfied that the applicant must have been so aware as of July, 2004.The applicant is, therefore, by any yardstick outside the time limit prescribed in Order 84 rule 21 of the Rules of the Superior Courts, 1986 and, accordingly, his case must fail for reasons of delay.