THE HIGH COURT

BETWEEN

JOSEPH MURPHY, FRANK REYNOLDS AND JOSEPH MURPHY STRUCTURAL ENGINEERS LTD

PLAINTIFFS

AND

FEARGUS FLOOD (THE FORMER SOLE MEMBER OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS), ALAN MAHON, MARY FAHERTY AND GERALD KEYS (THE MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS), IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

BETWEEN

JOSEPH MURPHY, FRANK REYNOLDS AND JOSEPH MURPHY STRUCTURAL ENGINEERS LTD.

APPLICANTS

AND

JUDGE ALAN MAHON (THE CHAIRMAN OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS), IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Mr. Justice T.C. Smyth delivered judgment, as follows, on Tuesday 14th February 2006

The Tribunal and its Reports.

1. A Tribunal of Inquiry into Certain Planning Matters and Payments ('the Planning Tribunal') was established by Ministerial Order, on the 4th November 1997, to enquire urgently into the matters of urgent public importance set forth in its Terms of Reference. To the extent necessary for the determination of these proceedings, the following extracts are in point:-

> *"That Dáil Eireann resolves:*
>
> > *A. That it is expedient that a Tribunal be established under the Tribunals of Inquiry (Evidence) Act, 1921, as adapted by or under subsequent enactments and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, to enquire urgently into and report to the Clerk of the Dáil and make such findings and recommendations as it see fit, in relation to the following definite matters of urgent public importance."*

2. These are indicated and enumerated and (*inter alia*) include -

> *"4(a) The identity of all recipients of payments made to .... members of .... the Oireachtas, past or present, or officials of a Dublin local authority or other public official by Mr. Gogarty or Mr. Bailey or a connected person or company within the meaning of the Ethics in Public Office Act, 1995, from 20th June 1985 to date, and the circumstances, considerations and motives relative to any such payment."*
>
> *"B (v) to report on an interim basis not later than one month from the date of the establishment of the Tribunal or the tenth day of any oral hearing, whichever shall first occur, to the Clerk of the Dáil" on specific matters.*
>
> *"C. And that the person or persons selected to conduct the Inquiry should be informed that it is the desire of the House that -*
>
> > *(a) the Inquiry be completed in as economical a manner as possible and at the earliest date consistent with a fair examination of the matters referred to it, and, in respect of the matters referred to in paragraphs 1 to 4 above, if possible, not later than the 31st December, 1997, and*
> >
> > *(b) all costs incurred by reason of the failure of individuals to cooperate fully and expeditiously with the Inquiry should, so far as is consistent with the interests of justice, be borne by these individuals."*

3. On 26th February 1998, the Sole Member or Chairman (hereinafter generally referred to as 'the Tribunal' which expression shall be indicative by its use and context) availing of the provisions of B(v) ante sought/requested the Oireachtas to amend the original Terms of Reference. By instrument dated 15th July 1998, the Minister for the Environment and Local Government issued Amended Terms of Reference to the Tribunal. While the amended Terms of Reference are more extensive and direct enquiry into any substantial payments directly or indirectly to a named politician (Mr. Raphael Burke) and expressly provide for interim reports the desire of the House as expressed in paragraph (F) is substantially the same as that contained in paragraph (C) of the original Terms of Reference.

4. When the Tribunal came to make interim reports and in particular its Second Interim Report published 26th September 2002 (hereinafter referred to as the 2nd Report) it incorporated as Appendices A and B the original and amended Terms of Reference. I am satisfied as a matter of probability that the clear provisions of the original and amended Terms of Reference must be taken as something that would have been known to the Applicants, who gave evidence to the Tribunal and who had the benefit of legal advice and were granted representation and availed of the right to be represented before the Tribunal.

5. When the Tribunal issued the 2nd Report, to which there is a preface, which is a form of explanation of its subject, purpose, scope and method of conduct, it (*inter alia*) states as follows:-

> *"All citizens have a duty to cooperate and assist a Tribunal and to tell the truth when summoned to appear at a public hearing. It is with considerable regret that I have concluded that I must report, as one of my findings, that certain parties who appeared before me chose not to cooperate with the Tribunal in its task, and, further, having been duly sworn did not to tell the truth. The extent to which their actions may have involved them in breaches of the criminal law is a matter upon which the Director of Public Prosecutions has absolute and exclusive jurisdiction. I have decided to forward a copy of my report to him to take such steps, and to do with it, what he, in his absolute discretion, considers appropriate. I am very mindful of the significant costs which have been incurred in conducting the Inquiry to date. I have endeavoured to conduct the Inquiry in as economical a fashion as possible, having regard to the rights of those appearing before the Tribunal and my obligations to the Oireachtas."*

6. [Chapter 17 of the 2nd Report itself set out at paragraphs 17.01, 17.02 and 17.03 what I believe to be the true legal obligations under the Acts on all parties and persons required to provide information to the Tribunal].

7. The Introduction makes it clear that the Tribunal considered it necessary to do so for a number of reasons (*inter alia*) -

> *"1. The Tribunal has heard sufficient evidence in public to enable to pronounce with finality upon certain payments made to Mr. Burke."*

8. The report does not record that it is pronouncing with finality on anything else (e.g. under 4(a) of either the original or amended Terms of Reference) notwithstanding that evidence had been heard in "the Gogarty Module" regarding payments to Mr. George Redmond, in that regard Chapter 17, entitled "Co-Operation with the Tribunal" it records in detail the sentiments and approach to its task enunciated in the preface, and also its findings.

9. At paragraph 17-04, it is recorded:

> *"In its review of the evidence proffered to the Tribunal in the modules in which the Tribunal has heard evidence to date, the Tribunal has concluded that the following persons and corporate entities have hindered, obstructed or not cooperated with the Tribunal to the extent set out hereunder. The findings made against Mr. Joseph Murphy Snr. and Mr. Joseph Murphy Jnr. apply pari passu to the companies within the Murphy Group to whom legal representation was granted including Joseph Murphy Structural Engineers Ltd..... "*

10. Mr. Joseph Murphy Snr., against whom certain findings were made, died in August 2000. The relevant findings in "The Gogarty Module" are:-

> *"Mr. Joseph Murphy Jnr. 17-16. The Tribunal is satisfied that Mr. Joseph Murphy Jnr. obstructed and hindered the Tribunal by:*
>
> > *(a) Failing to give a truthful account of the circumstances in which he came to attend a meeting at the home of Mr. Burke in June 1989, at which he handed to Mr. Burke a sum of not less than £30,000.*
> >
> > *(b) Failing to give a truthful account of his dealings with Mr. Michael Bailey with regard to the participation proposal, in which it was envisaged that Mr. Michael Bailey would receive 50% of the value of the Murphys' North Dublin lands in return for procuring planning permission and building bye-law approval in respect thereof.*
> >
> > *(c) Giving a false account of the involvement of Mr. James Gogarty in the sale of the Murphy lands and the role played by him in connection with the payment of JMSE monies to Mr. Burke.*
> >
> > *(d) Giving a false account of his dealings with Mr. Michael Bailey subsequent to the publication of the Sunday Business Post articles.*
> >
> > *(e) Falsely constructing an alibi which was untrue.*

11. Mr. Frank Reynolds 17-18. The Tribunal is satisfied that Mr. Frank Reynolds obstructed and hindered the Tribunal by:-

> *(a) failing to give a truthful account of his involvement in the assembly of funds which were paid to Mr. Burke by JMSE.*
>
> *(b) Falsely ascribing to Mr. Gogarty a role in the payment of monies to Mr. Burke which he knew to be untrue.*
>
> *(c) Failing to give a truthful account of his dealings with Mr. Michael Bailey (d) Failing to give a truthful account of the steps taken by him subsequent to the publication of the Gogarty allegations in the Sunday Business Post editions of the 30th March and the 6th April 1996.*
>
> *(e) Colluding with Mr. Joseph Murphy Snr., Mr. Joseph Murphy Jnr. and Mr. Roger Copsey to present a false account to the Tribunal of the role played by Mr. James Gogarty in the payment of JMSE monies to Mr. Ray Burke."*

12. A Third Interim Report dated 30th September 2002 (hereinafter referred to as the "3rd Report") was not published until 21st January 2004 because as the Tribunal noted, the information in the public media as of September 2002 was that Mr. George Redmond was awaiting trial in the Dublin Circuit Criminal Court on charges of corruption arising from the performance of his duties as Assistant City and County Manager for Dublin. The 3rd Report completed the findings upon "the Gogarty Module" of evidence referred to in the 2nd Report.

13. Chapter 2 of the 3rd Report deals with the Forrest Road Lands and the Tribunal drew a conclusion from the fact that radically different accounts of events were given by the witnesses before it. It expressed its conclusion thus -

> *"2.41. The Tribunal concluded that the conflicts which are apparent from consideration of the evidence of the parties could not be explained on the basis that they were innocent failures of recollection, mistakes or misinterpretation of the true facts. The Tribunal concluded that the divergences in the accounts given by the parties could only be explained on the basis that some party, or parties, had deliberately set out to mislead the Tribunal. It was clear from the disparities in the accounts given by the various witnesses that some party, or parties, gave false evidence to the Tribunal as to the true circumstances surrounding the service charges and levies payable in respect of the Forrest Road planning permission and as to the role which Mr. George Redmond played in ensuring that the 1983 charges applied, notwithstanding the expiry of the planning permission on the 21st June 1988."*

14. Chapter 8 of this report dealt with co-operation with the Tribunal, thus-

> *"8-03. The Tribunal is satisfied that Mr. Joseph Murphy Jnr. hindered and obstructed the Tribunal by:*
>
> > *(a) Failing to give a truthful account of the circumstances in which he came to pay Mr. George Redmond a sum of not less than £12,246 for devising the strategy that resulted in the Forrest Road services charges and levies being fixed at their 1983 level in respect of any similar development taking place within two years of the 21st June 1988.*

(b) Failing to give a truthful account of the circumstances in which he came to pay Mr. George Redmond £15,000 at the Clontarf Castle Hotel in July 1989.

8-05. The Tribunal is satisfied that Mr. Frank Reynolds hindered and obstructed the Tribunal by:-

(a) Failing to acknowledge that he attended a meeting at the Clontarf Castle Hotel where a payment of £15,000 was made to Mr. George Redmond by Mr. Joseph Murphy Jnr. in his presence and in the presence of Mr. Michael Bailey and Mr. James Gogarty."

15. The foregoing regretfully extensive quotations from the reports of the Tribunal represent the essential historical basis upon which the proceedings were contested. It was common case that the Court had no appellate function, that the findings of the Tribunal, particularly as to obstruction and hindrance, were the determinations of the Tribunal, although not accepted by the Applicants.

The Courts and Legal Proceedings.
16. Notwithstanding that the 2nd Report of the Tribunal, published on 26th September 2002 contained the several findings of the obstruction and hindrance hereinbefore recited and was clearly final in its terms in "The Gogarty Module" as to the payments to Mr. Burke, the Applicants issued no legal challenge by way of judicial review or otherwise to the conduct or findings of the Tribunal.

17. When the 3rd Report of the Tribunal was published on 21st January 2004 with specifically relevant like findings as to obstruction and hindrance as in the 2nd Report, save as to amount of payment and the identity of the payee in "The Gogarty Module" proceedings (in the form of a Plenary Summons) did not issue until 20th April 2004 (i.e. one day prior to the expiry of three month time limit for certain reliefs under O.84 of the Rules of the Superior Courts for judicial review).

18. The Tribunal as Defendants in the plenary proceedings brought a motion dated 22nd December 2004; following a hearing before Kelly J. on 24th January 2005, he ordered that a preliminary issue be tried on four specific questions centred on the issue of delay.

19. The Plaintiff's response was to file in the Central Office of the High Court on 2nd February 2005 in judicial review proceedings, a statement required to ground an application for judicial review dated 2nd February 2005. Mr. Murphy Jnr swore an affidavit on 27th January 2005 and a supplemental affidavit on 25th February 2005. The Notice of Motion was returnable for 7th March 2005; upon a hearing of which motion Kelly J. made an Order on 14th March 2005, on the undertaking of the Tribunal not to hear any issue in respect of costs (i.e. "costs against", for there had been a ruling on a "costs for" application on 9th November 2004 which had proceeded over the period 9th May 2003 (i.e. after publication of the 2nd Report) to November 2004, and that there would be no order on the judicial review application but liberty to apply and the parties were given leave to amend their respective pleadings. There was no appeal from either order of 24th January 2005 or 14th March 2005 of Kelly J. The decision of the Supreme Court in *BTF -v- DPP* (unreported, delivered 3rd June 2005) governed the outcome of the application for directions and fixing of the date for the hearing of the cases. It was ordered that issue of delay (and other related issues the subject of the Order of 24th January 2005) be dealt with as part of the full hearing of the proceedings rather than as a preliminary issue.

20. The plenary proceedings sought a range of declaratory relief which may be broadly characterised as:

I. Challenges to the constitutionality of section 6(1) of the Act of 1979 as substituted by section 3(1) of the Amendment Act of 1997.

II. Seeking to have the findings of obstruction and hindrance of the Tribunal's reports (2nd and 3rd) declared null and void of no effect and ultra vires the powers of the Tribunal which purported to administer justice which was a function for the Courts.

III. That fair procedures were not observed in a variety of ways.

IV. That in awarding costs, the Tribunal ought not to have taken into account the finding of facts or conduct or alleged conduct that led to the setting up of the Tribunal, but rather confine itself to the conduct of Applicants at or before the Tribunal.

21. The judicial review proceedings began in February 2005 and they seek:

I. An Order of Certiorari to quash the decision or order of the Tribunal of 9th November 2004 refusing the applicants their costs "before" the Tribunal and an Order of Mandamus to reconsider the costs applications.

II. A declaration that the Tribunals of Inquiry (Evidence)(Amendment) Act, 2004 and in particular section 2(1) thereof insofar as it permits and/or requires the Tribunal to rely on and/or have regard to the substantive findings of the Tribunal and/or its findings of obstruction and hindrance and to use same as a basis for refusing the applications for costs before the Tribunal is invalid having regard to the provisions of the Constitution.

III. Other reliefs of wide-ranging intended effect seek to challenge the constitutionality of the entire Tribunals of Inquiry (Evidence) Acts 1921-2004.

IV. Orders of intended future effect are sought in reliefs (e) and (j).

22. In my judgment it is of importance to note that in "the grounds" advanced for relief is paragraph (c) not only had the plenary proceedings expressly referred to, but the issues upon which the Applicants seek relief are set out in extenso. The principal affidavit grounding the judicial review proceedings is that of Mr. Joseph Murphy Jnr which as part of exhibit JM3 contains the outline written submissions of the Applicants for costs which expressly at section C (9) states:

"For the avoidance of doubt, the Applicants repeat the arguments contained in the Statement of Claim in the said proceedings (i.e. the plenary proceedings) and in particular paragraph 16 to 28 thereof, and thereby request the Tribunal treat the said arguments as having been incorporated into the present outline written submission." (p51 of booklet for Judicial Review)

23. The second or supplementary affidavit in the judicial review proceedings seeks to link both sets of proceedings by means of cross reference (p113/4 of booklet for Judicial Review)

24. Reviewing the proceedings at and before the Tribunal as disclosed by the pleadings and documentary evidence disclosed therewith and the oral evidence of Mr. Joseph Murphy and the submissions at the hearing before me, I am satisfied that the following issues raised on two sets of proceedings before the Court as to

(a) Constitutionality of statute and specific statutory provisions other than the Tribunals of Inquiry (Evidence) (Amendment) Act 2004.

(b) Findings as to obstruction and hindrance of the Tribunal as to:

(i) the *vires* of the Tribunal to make such findings in the context of S(6)(1) of the Act of 1979 as amended relied upon, and the non-acceptance of the Plaintiffs in this regard.

(ii) whether such constituted the purported administration of justice and accordingly was a matter for the Courts.

(c) The fairness or otherwise of procedures as to:

(i) the alleged unequal treatment of witnesses

(ii) the failure of the Tribunal to signal in advance of a finding of obstruction or hindrance their mind to do so and offer the Plaintiffs an opportunity to make submissions in that specific regard.

25. These arose, if valid, as truly on the publication of the 2nd Report on 26th September 2002 as at the date of the publication of the 3rd Report on 21st January 2004 and all could have formed the basis of proceedings by way of judicial review, which even at "the leave stage" could by the direction of a judge, if so minded, ordered to proceed on a plenary basis particularly having regard to the constitutional issue or issues raised.

26. For convenience, therefore, and not by way of treating the issue of delay as a preliminary issue, but as an issue to be determined in the proceedings and before me, I now propose to consider the four issues raised in the Order of Kelly J. for determination.

27. Before embarking on a consideration of the issues determined by Kelly J. to arise, it is necessary to consider two matters referable to the 2nd and 3rd Report:-

1) The Tribunal contends that the 3rd report is in effect a "reiteration" of the 2nd report. While undoubtedly there are findings in both reports against the Applicants of obstruction and hindrance, there are also the following differences:-

a) Amount of payment

b) The identity of the payee

c) Analysis of particular factual evidence

d) Similar but different issues

Accordingly, in my judgment, this case is clearly distinguishable from same facts evidence and the decision in *Finnerty -v- Western Health Board* (unreported, the High Court, 5th October 1998, per Carroll J.). In my judgment, the 3rd Report is not a "reiteration" of the 2nd Report. While they can be said to be interlinked (they are not inextricably linked) - it is clear from the text of the 2nd Report itself that it is final only upon certain payments to Mr. Burke. The final decision on the Burke payments therefore was made known to the Applicants on the publication of the 2nd Report.

2) The Tribunal contended that because there was no challenge to the 2nd Report where the substantive findings of 'Obstruction and Hindrance' appeared and that as the 3rd Report had in effect like confirmatory findings, the Applicants were estopped by their conduct from proceeding to challenge such findings in the 3rd Report. In my judgment, it is inappropriate to introduce private law concepts of estoppel into the public law field. Tribunal decisions are taken in a sense in the name of the public, and remedies against them must take into account the interests of the general public which the Tribunal was set up to protect or promote. Estoppel binds individuals (as Lord Scarman pointed out in *Newbury District Council -v- Secretary of State for the Environment* 1981 AC 578, 616) on the ground that it would be unconscionable for them to deny what they have represented or agreed. See also *Reprotech Ltd. -v- East Sussex CC* [2003] 1 IWLR 348 per Lord Hoffman at p.357 para 33).

28. In the instant case the Applicants made no representation or agreement on the publication of the 2nd Report, their inaction does not estop them from challenging the 3rd Report.

29. Before considering the submission of the parties on the question of delay in the bringing of proceedings, I think it appropriate that I set out my findings of fact on the oral evidence given by the First Plaintiff in conjunction with the affidavit evidence, above referred to, which was put to the witness in cross-examination. I am satisfied and find as a fact that:-

1. At all material times the Applicants had the benefit of legal advice, and that Mr. Murphy kept in touch by phone or fax with his solicitors on a regular basis.

2. That on publication of the 2nd Report Mr. Murphy was, on his own evidence -

(a) absolutely horrified about the finding of the Tribunal in relation to the payment to Mr. Burke (T.4 p.11 q.43)

(b) absolutely devastated and felt criminalised by the findings of the Tribunal of 'obstruction and hindrance'. (T.4 p.11 q.44 l.19; p.45, l.25, 27; p.12 q.50 l.20, 23)

3. Following the publication of the 2nd Report on 26th September 2002 in late 2002, he had a series of meetings and consultations his lawyers to consider the effects of the report and "so on".

4. That he received advice that he had no right of appeal from the findings of the report: but swore he received no advice on the ground that he was found to have obstructed or hindered the Tribunal. I found some difficulty accepting this latter part of the evidence.

5. In early 2003 there was detailed correspondence between the Applicants' solicitors and the Tribunal in relation to costs and that specifically in May 2003 the solicitors challenged the jurisdiction of the Tribunal to make a finding of 'obstruction and hindrance' - asserting that it was a function specifically reserved by the Constitution to the Courts. The 1st Applicant was aware of this submission at the time of its being made.

6. That the Applicants decided to do nothing about the findings in the 2nd Report (which included findings of obstruction and hindrance) (T.4 p.24 q.111) but Mr. Murphy swore that he intended to wait until the Third Interim Report, whenever that might come, then the two would be taken together (T.4 p.24 q.108). However, he had earlier sworn that he "had no idea if there was a Third Interim Report, when it was coming out". (T.4, p.19 q.81 l.1-2). When asked if the 3rd Report had not been published that no steps would have been taken about the second report, his response was "maybe not". (T.4, p.25 q.118 and a like response to q.127 p.28) I found the evidence of Mr. Murphy equivocative. I am satisfied that notwithstanding whatever rights or entitlements he might have had to challenge the 2nd Report of which I am satisfied he was aware of, certainly by May 2003, he elected not to exercise those rights. I am likewise satisfied that as a matter of probability he knew that there would be a Third Interim Report - but did not know what it would contain and did not decide to await its publication to challenge the 2nd and 3rd Reports together.

30. From the foregoing, the following questions arose for determination.

(a) whether the proceedings herein ought to have been brought by way of an application seeking Judicial Review and, therefore, whether the use by the Applicants of the plenary procedure constitutes an abuse of process of the Court.

Legal Submissions.

(I) The Tribunal:
31. Objection was taken to the form of the proceedings, it is contended that had they should have been by way of Judicial Review. O.84 of the Rules of the Superior Courts were adopted specifically to ensure certain safeguards applied to challenges to decisions of public bodies (such as the Tribunal). The purpose of the order is to ensure that challenges are initiated promptly, to ensure that those bodies are protected against delayed applications and to ensure certainty in respect of decisions of findings of those bodies.

32. Delay must be analysed from both a procedural and substantive aspect, and "the analysis commences with the obligation to bring the application "promptly". It is the key word which is the foundation of the process. As to whether the application is prompt will depend on all the circumstances of the case." (*De Roiste -v- the Minister for Defence* [2001] 1 IR 190 at 204 per Denham J.)

33. By bringing plenary proceedings to circumvent both the time limits and the obligation to bring proceedings promptly as imposed by Order 84 was, in the submission of the Tribunal, an abuse of process: This argument is strengthened by the bringing of the subsequent Judicial Review proceedings. Furthermore, that as the declaratory reliefs being sought by the Applicants are discretionary in nature, the time constraints and promptitude to be observed under O.84 ought to be applied: and, that in any event the constraints were applicable notwithstanding that the reliefs were commenced by plenary proceedings.

(II) The Applicants:
34. The procedure provided for in Order 84 is not an exclusive procedure for persons seeking declaratory relief in matters of public law. The decision of the House of Lords in *O'Reilly -v- Mackman* [1983] 2 AC 237 has not been followed by our courts and there was no reason to depart from that position in the instant case. It cannot be an abuse of process for a claimant to request a court to exercise its discretion on a matter of public law. That the application for the reliefs sought in the plenary proceedings were in relation to the 2nd and 3rd Reports (the 3rd not being a reiteration of the 2nd report) were brought timeously and certainly in relation to the 3rd Report within the time constraints of O.84.

Determination:-
35. I accept the submissions of the Plaintiff that there is no exclusive procedure and that the authority in the United Kingdom has not been followed in our Courts and it is not therefore per se an abuse of process to initiate proceedings by way of Plenary Summons. However, where a procedure of the nature of O.84 is provided for in the Rules of Court to cater for the kind of reliefs sought in these proceedings then such procedure should be followed. Furthermore, the adoption by the Applicants of the plenary proceedings does not excuse the non-application of the time constraints provided for by O.84. While it is not desirable that the form of action should determine the relief to be granted, nevertheless where claims for declaratory relief (which is discretionary) are made, as they are in the instant case), exactly the same considerations (as to time) apply in the plenary proceedings as in the case of Judicial Review, otherwise the Court would be complisant with a Plaintiff in seeking to circumvent the constraints of O.84.

(b) Whether the Applicants proceedings have been brought promptly and in any event, within the time limits prescribed by Order 84, Rule 21 of the Rules of the Superior Courts?

Legal Submissions

(I) The Tribunal:
36. In the instant case there has been considerable delay in instituting proceedings, accordingly, where the relief sought is discretionary in nature, the Court should look to the behaviour of the Applicants. Reliance was placed on the decision in *O'Donnell -v- Dun Laoghaire Corporation* [1991] ILRM 301 at 314:

"A declaratory order is a discretionary order arising from the wording of a statute which conferred jurisdiction on the Court to make such orders (see Wade, Administrative Law 5th ed, p.523) and it is well established that a Plaintiff's delay in instituting proceedings may, in the opinion of the Court, disentitle the Plaintiff to relief."

37. In that case the Plaintiff had sought declaratory relief by way of plenary proceedings, where Judicial Review might have been

more appropriate. Costello J. (as he then was) applied by analogy the rules and principles contained in Order 84 R. 21 (at p.314/5 of the report). That decision was adopted and followed in *Futac Services Ltd. -v- Dublin City Council and Others* (unreported, the High Court 24th June 2003).

38. It was submitted that there was substantial, unnecessary and inexcusable delay in challenging the findings of the second report. There was a delay in bringing proceedings for approximately a period in excess of 19 months. This is not within the time limits and assuredly not promptly as envisaged by O.84 r.21. The evidence of the First Applicant at paragraph 9 of his affidavit sworn on 27th January 2005 in the Judicial Review proceedings was that he was 'deeply shocked and horrified' to read of the findings of obstruction and hindrance of the Tribunal, in its 2nd and 3rd reports; and, in paragraph (11) of the same affidavit, that these findings have been 'personally devastating'. At all material times during the course of the hearing by the Tribunal and thereafter, the Plaintiff had the benefit of legal advice. Further, at paragraph 7 of his affidavit sworn on 25th February 2005 in the plenary action, Mr. Murphy avers:

> "....therefore, where the Third Interim Report appeared, containing damning findings of obstruction and hindrance arising from the flimsiest evidential base and on the basis only that the Tribunal preferred two bare allegations in the evidence of Mr. Gogarty to all of our evidence, it is quite literally the straw that broke the camel's back."

39. The evidential background against which Kelly J. refused an order for Judicial Review is that set out in the affidavit evidence and the Judge is attributed as expressing the view en passent in an impromptu opinion that had it been a "leave application" in 24th January 2005 that he would have granted an extension of time to enable the bringing of an application for Judicial Review. Even if this be so, it would not be a bar to the raising of the time issue on the hearing of the application for Judicial Review. The Applicants concede that they are outside the time to challenge the 2nd Report and effectively that the onus is on them (per Costello J. in *O'Donnell's* case [1991] ILRM 301 at 315 to satisfy the Court that there are reasons which both explain the delay and afford a justifiable excuse for the delay. The following reasons were advanced in the submissions of the Applicants:-

> (I) The split between the 2nd and 3rd Report is artificial, it was a split of one body of evidence (i.e. "the Gogarty module"). That it was objectively reasonable for the Applicants to await the outcome of the 3rd Report before challenging the 2nd Report.
>
> In my opinion the character of the legal challenge is similar but the decisions are separate and it is 'the decision' that is challenged. The Applicants cannot, in my judgment, at one and the same time argue that the decisions are distinct and seek to avail of delay in one as justified because the 3rd Report decision may have been challenged in time.
>
> (II) There would be an unreality if the Applicants were to be permitted to challenge the 3rd Report decision on 'obstructing and hindering' and precluded an entitlement to challenge the like element in the 2nd Report decision.
>
> (III) It is desirable that the Court should decide any issue which might obviate the need for the Court to pronounce upon the constitutionality of a statutory provision.
>
> (IV) That as it was an undisputed fact that the Applicants were within time in challenging the decisions on costs (which was in part influenced by the findings of 'obstruction and hindrance'), it becomes necessary to consider and decide as a matter of legal principle whether the Tribunal had power to make findings of 'obstruction and hindrance'.
>
> (V) The issues, and particularly the power of the Tribunal to make findings of 'obstruction and hindrance' are matters both of public importance and public interest.
>
> (VI) There is no prejudice to the Tribunal or third party in having the issues litigated either as at the dates of the issue of either set of proceedings or at the date of hearing.

Determination:

40. It was conceded that it was possible to issue judicial review proceedings embracing certiorari and the constitutional issues on the publication of the 2nd Report (T.7 p.7/8). In my judgment if the points made in either set of actually issued proceedings (save as to costs) are good or valid, then they were so on the publication of the second report.

41. If Mr. Murphy was devastated and shocked by the finding that he had obstructed and hindered the Tribunal in its work and advanced the case as one of error in legal principle, it was not in my judgment objectively reasonable to let such go unchallenged and that promptly and within time. He should have been particularly prompt on the issue of the 3rd Report (which he at once speculated would issue or did not know if there was going to be a 3rd Report). He did not require to be twice damned (for that is in large measure in layman's language the substance of his complaint) to spring into action. If Mr. Murphy deliberately awaited the 3rd Report, and had it not issued prior to the Court hearing in October 2005, he said he may not have challenged the 2nd Report. (T.2 p.25 Q.118 l.21-27).

42. In my opinion, it not pointless, if appropriate, to permit a challenge to findings of obstruction and hindrance on the 3rd Report and to preclude it in respect of the 2nd Report. The Applicants cannot at one and the same time argue that the decisions are separate and distinct and each to be judged independently and that one is subsumed or inextricably bound into the other so that they stand or fall together. The rational of certainty in the law lies in its ability to promote justice and to serve the needs and expectations of the community.

43. The right of the Applicants to challenge the 2nd Report promptly and within time not having been exercised, the community was entitled to expect the decision to stand and to regard the inquiry on the matter of urgent public importance as completed. In my judgment, the Applicants are not entitled to challenge the determinations in the 2nd Report but that does not preclude him from challenging the determinations in the 3rd Report. This is not a futile exercise.

44. Given the alleged sense of grievance of the Applicants concerning the 2nd Report, making findings of obstruction and hindrance, which they did not challenge for 19 months, there was in my opinion an added sense of obligation to challenge the 3rd Report promptly. This they did not do. They left it to one day within the period set as the latest under the rules to challenge the 3rd Report. Notwithstanding that in such circumstances I find that there are valid grounds for exercising my discretion against permitting a challenge to the 3rd Report, I would not wish to rest a judgement on that basis. I would prefer to take a more liberal view informed by the decisions in *De Roiste -v- the Minister for Defence*, 2001 1 IR 190 per Denham J. at 204 and Fennelly J. at 221, *O'Callaghan -v- McMahon*, Supreme Court, 9th March 2005 per Hardiman J., observing that a Judicial Review application in that case was made within

one week of the decision challenged and from which the instant case is clearly distinguishable, and O'Brien -v- Moriarty, Supreme Court, 12th May 2005 per Fennelly J.. I do not believe that the Respondents can conclusively argue that there is some special substantial factor which should defeat the Applicants challenging the 3rd Report.

45. The case sought to be made by the Applicant that the Tribunal did not grant those before it equal treatment, was expressly directed to Mr. Gogarty's evidence, such arose years before legal proceedings issued. Documents obtained by the Discovery process and proven by oral evidence as so obtained, but not (other than admitted as records of the proceedings before the Tribunal and others as having emanated from or received by the Tribunal) proof as to the truth of their contents were sought to found this case. In my judgement, if there ever was a case in this regard, and even disregarding the fact that Mr. Gogarty is dead, no meaningful or serious or any challenge was brought, even when appropriate, and I do not consider it appropriate in Judicial Review or on the oral evidence to adjudicate ex post facto on certain discovered documents related to objections before the Tribunal and an attempted retrospective application of the decision *in O'Callaghan -v- McMahon ante*, for such would be to completely ignore the time limits of Order 84 R.21.

46. If this was a valid complaint, and I make no adjudication on it as an issue, it was as valid when first raised before the Tribunal as when complained of to the Court and even permitting a challenge to the 3rd Report, I would not grant relief (1) on the state of the evidence, (2) the inexcusable delay and indeed the inexplicable delay in bringing the proceedings and (3) in permitting the work of the Tribunal to proceed and when the outcome was not to the liking of the Applicants then to issue proceedings. Furthermore, the first three personal Applicants were invited to attend the Tribunal in private, having first been notified in advance of the questions that would be asked and were invited to provide the Tribunal with a written statement in respect of these questions. Both the First and Second Applicant declined by letter dated 30th September 1998. This submission was unchallenged at the hearing in court. If they were subsequently at a disadvantage from such election, it does not point to any want of fair proceedings or fair procedures. In my judgement, the Applicants declined to engage with the Tribunal in private and issues became controversial in public which required determination.

47. They cannot reasonably make many of the complaints they did in public at the Tribunal and before the court in that context. Furthermore, equality of treatment of witnesses does not mean that identical treatment must be accorded to each witness, for such does not allow for differences of capacity, age, the role and relative importance of each witness or the variants that context provides before courts or tribunals.

The Legislative Framework.

48. The Tribunal was originally established under the Tribunals of Inquiry (Evidence) Act, 1921, as adapted by and under subsequent enactments and the Tribunals of Inquiry (Evidence)(Amendment) Act, 1979. On the occasion of the Amended Terms of Reference, the Tribunal was requested by the Dáil to conduct its enquiries in a particular manner to the extent that it may do so consistent with the Tribunals of Inquiry (Evidence) Acts 1921 to 1998, specifically in the Amended Terms of Reference-

> *"F. And that the Sole Member of the Tribunal should be informed that it is the desire of the House that-*
>
> *(a) The enquiry into the matters referred to in paragraph E hereof [referable to Mr. Raphael Burke] be completed in as economical a manner as possible and at the earlier "(stet)" date consistent with a fair examination of the said matters, and*
>
> *(b) All costs incurred by reason of the failure of individuals to cooperate fully and expeditiously with the Inquiry should, so far as is consistent with the interests of justice, be borne by those individuals."*

49. The Act of 1921 (the Principal Act) provides that where the instrument by which the Tribunal is appointed provides that the Act is to apply "the Tribunal shall have all such powers, rights and privileges as are vested in the High Court" in respect of a limited range of matters. Section 3 of the Act of 1979 substantially amended Section 1 of the Principal Act. It is provided that if a person-

> *"(c) willfully gives evidence to a tribunal which is material to the inquiry which the tribunal relates and which he knows to be false or does not believe to be true, or*
>
> *(d) by act or omission, obstructs or hinders the Tribunal in the performance of its functions. the person shall be guilty of an offence."*

50. Section 1(2A) deals with the offence in the context of the criminal law as separate and distinct from the context of the Tribunal.

51. I am satisfied and find as a fact and as a matter of law as determined by the several authorities referred to by Counsel that-

> i) The Tribunal was and is not an adversarial but rather an inquisitorial hearing.
>
> ii) There was and is no lis inter partes.
>
> iii) The Tribunal was not prosecutorial and the question of any charges of obstruction and hindrance is a matter for another authority, to wit, the Director of Public Prosecutions.
>
> iv) The evidence given at the Tribunal could not and cannot be used in any criminal proceedings. If the Director of Public Prosecutions is prosecuting, he must assemble evidence in the ordinary course for a prosecution.
>
> v) The Tribunal in making its findings made, as it must, its determination on "the balance of probabilities", not on a criminal standard of proof.

52. I reject the submissions of the Applicants that the Tribunal when it made its finding of "obstruction and hindrance" acted *ultra vires*, or was administering justice as a court or making any determination of a criminal offence. I accept the submission of the Defendants that the Tribunal in making its findings based on its enquiries, and reporting those findings to the Oireachtas with its recommendations, was operating within its Terms of Reference and the legislation embraced therein in governing the Tribunal.

53. The report of The Ansbacher Tribunal (otherwise referred to as "The McCracken Tribunal") also had reason to consider Section 1(2) of the Principal Act as amended by the Tribunals of Inquiry (Evidence) Amendment) Act 1979, concerning 'obstruction and hindrance' in Chapter 10. That report noted that protracted correspondence and unforthcoming information "was most unhelpful and very time consuming for the staff of the Tribunal to deal with". While the language differs from the report of the Tribunal in the

instant case - the intendment is the same: McCracken concludes-

> *"It is not for the Tribunal to determine whether Mr. Charles Haughey should be prosecuted pursuant to the section quoted above as this is a matter for the Director of Public Prosecutions. However, the Tribunal considers that the circumstances warrant the papers in the matter being sent to the Director of Public Prosecutions for his consideration as to whether or not there ought to be a prosecution, and the Tribunal intends to do so."*

54. The language in which the Tribunal records the facts ascertained by it may differ from one tribunal to another - what is clear is that it is for the Director of Public Prosecutions to make his own decision on the material referred to him and such as he may gather as to whether to prosecute or not. The view of the Tribunal is not determinative of a criminal offence. The fact that Mr. Murphy "felt" criminalised is not to say that the Tribunal determined or purported to determine that a criminal offence had been committed.

55. It is true that the Terms of Reference do not in express terms empower the Tribunal to make findings of 'obstruction or hindrance', but both the original Terms of Reference (dated 4th November 1997) and the Amended Terms of Reference (dated 15th July 1998) postdate the enactment of the Principal Act and the Act of 1979. The Amended Terms of Reference also postdate the enactment of the second of the Acts of 1997 [No. 42 of 1997] and the further amending Act of 1998 (No. 18 of 1998) enacted on 12th June 1998. In mandating the Tribunal to make inquiry "and making such findings and recommendations as it sees fit", the Dáil resolution was cast in the context of the specific statutes.

56. In my judgment the Tribunal was entitled to find as a fact if there was evidence (including conduct before the inquiry and/or in correspondence or Discovery matters) before it of any of the matters set out in Section 3(2)(a) to (f) of the Act of 1979 on the balance of probabilities. That a prosecution, on its own evidence and tested by the criminal standard of proof might arise under the same headings, is nihil ad rem. The Applicants complain that when they sought some guidance from the Tribunal at the end of the evidence but before the Tribunal formulated its findings, the Tribunal did not alert them to the possibility that any findings might be made other than in respect of substantive matters. In my opinion there was no obligation to make the response contended for - it would be speculation on my part to try and determine at what stage in the decision making process the decision was even in formulation.

57. The Applicants were left at liberty as to what submissions they wished to make in relation to the issues the subject of the Tribunal. It is an opportunity afforded to advocates in many cases, sometimes the opportunity is taken to canvass the Court on the cooperative nature of one witness in assisting the Court or to criticise the impediments placed before the Court by a witness in opposition and how a lack of candour added to the length of trial.

58. In these proceedings, the Applicants challenge (1) the findings of the Tribunal as to obstruction and hindrance, (2) the rulings of 3rd June 2004 on the principles to be applied by the Tribunal in ruling on costs and the ruling of 9th November 2004 refusing the Applicants any elements of the costs, in which the Tribunal relied on the findings of obstruction and hindrance as well as the finding of corruption contained in both the 2nd and 3rd Reports.

59. Notwithstanding my determination that the Applicants cannot now challenge the findings of the 2nd Report they are within time to challenge the specific ruling of 30th June 2004 by service of the amended Statement of Claim of 28th July 2004 in the plenary proceedings. The challenge to the ruling of 9th November 2004 was brought within the time limits of Order 84 R.21 by service of the Judicial Review proceedings on 7th February 2005.

60. Specifically in relation to costs, the Applicants challenge:-

> a) the validity of the findings of obstruction and hindrance upon which part of the rationale of the refusal of the Applicants' cost is based.
>
> b) the entitlement of the Tribunal to take into account its findings of obstruction and hindrance in the exercise of its discretion in relation to costs.
>
> c) the entitlement of the Tribunal to take into account its substantive findings of corruption in the exercise of its discretion in relation to costs.
>
> d) the constitutional validity of the legislation which, contrary to the Applicants' submissions, permit the Tribunal to make findings of obstruction and hindrance or permits the tribunal to take into account such findings and/or its substantive findings of corruption in the exercise of its discretion as to costs.

61. The specific grounds of constitutionality relied upon in this regard are that, if permitted by the legislation, to act in the manner in which it did, the Tribunal has crossed the threshold into the realms of administering justice contrary to Articles 34 and 37 of the Constitution and further that such findings would be contrary to Articles 38, 40.1 and 40.3 of the Constitution.

62. The factual background to the rulings may be briefly stated by noting that the Applicants were engaged in the workings of the Tribunal for 163 hearing days and over and appreciable length of time were in communication with and made Discovery to it. As noted subsequent to the hearing of the evidence, the Applicants, with others, were invited to make submissions as they wished to the Tribunal. This is not a mere invitation to tender an explanation of past events. It comes towards the end of a process of enquiry and is therefore clearly distinguishable from the decision in Gallagher -v- Corrigan, (unreported) the High Court, 1st February 1998 per Blayney J. The Applicants, through their solicitors, by letter dated 20th July 2000 responded to the Tribunal and enumerated what appeared to be the allegations against them and then stated:

> *"We believe it to be of the utmost importance that if the Tribunal is of the view that we have not identified correctly the allegations made against our clients, or if we have failed to identify all of the allegations that it inform us of that fact prior to the making of submissions."*

63. The response of the Tribunal of 28th July 2000 was not to be drawn into the debate sought in the solicitors letter, but to (*inter alia*) state:-

> *"2. The Sole Member does not consider that it would be appropriate at least for the present to given indications or guidance in relation to any submission that any party may wish to make. However, all parties will be aware [of the amended terms of reference]."*

4. The Sole Member notes the contents of the schedule furnished by you containing what you say are 'the allegations made against the Murphy interest'. The Sole Member will consider all the evidence before he makes any finding and if, having reviewed the evidence and having considered all submissions, if any, he is of the view that it is necessary for him to hear submissions on any particular point not already covered then he will invite submissions on any such issue."

64. It is also clear from this letter that the Tribunal did not wish to be canvassed on the evidence given to it. It is settled law that a Tribunal is not a court, even though it may use and have available to it elements appropriate to court procedure.

65. Nevertheless, in arriving at its findings on the issues referred to it, the Tribunal was entitled, as at the same time to indicate what witnesses or evidence was of assistance or hindrance to it in its deliberations. Indeed the absence of such an incidental and necessary finding or indication or decision could justifiably give rise to a complaint that the findings on the issues referred to the Tribunal had been arrived at in the form of a dictat or summary or prefunctory manner. When the Tribunal published the 2nd Report on 29th September 2002 it referred both in its preface and in chapter 17 to the matter of non-cooperation by the Murphy interest and specifically at 17-04 stated:

"There is an obligation upon every witness called to the Tribunal to give a truthful account of the matters upon which they are questioned and failure to do so can amount to a failure to cooperate with the Tribunal which can have serious consequences as regards costs and otherwise."

66. The report is to be read as a whole and in Chapter 2, paragraph 2.06, the Tribunal acknowledges its separateness from the functions of the DPP in what may involve breaches of the criminal law.

67. Subsequent to the publication of the 2nd Report and before the publication of the 3rd Report on 21st January 2004, the Tribunal wrote to the Applicants' Solicitors as well as to others on 16th April 2003 in the following terms:-

"In the light of the findings of the Tribunal made in relation to your clients, the Chairman has directed that you be afforded the opportunity to make oral submissions to him at a public sitting of the Tribunal to take place on 6th May 2003 on the principles which should be applied by him in exercising his discretion under this section in relation to the costs claimed by the persons who fall within the category of persons against whom findings of corruption were made or who have been found to have obstructed or hindered the Tribunal or to have failed to cooperate with or to provide assistance to the Tribunal as requested."

68. The letter went on to state that subsequent to hearing all submissions of all parties on this issue, the Tribunal would then proceed to hear applications for costs from individuals who fall within the aforesaid category who were seeking an order for their own costs to be paid by the State. The Tribunal indicated that having determined the entitlement of these individuals to their costs:

"...the Chairman will then proceed to deal with any applications which are brought by the Attorney General or the Minister for Finance or any other party who is seeking an order providing that the costs of others, including the Tribunal, should be paid by parties other than the State. If such an application is made by any party requiring you to pay the whole or any part of the costs including the costs of the Tribunal, you will be notified of any such application and you will be afforded an opportunity of making submissions in relation thereto, whereupon a date for the hearing of such application will be fixed."

69. Subsequent to the initiation of the plenary proceedings challenging the Tribunal's findings of obstruction and hindrance and the enactment of the Tribunals of Inquiry (Evidence)(Amendment) Act 2004, the Tribunal again wrote to the Applicant *inter alia* as follows:-

"I write to inform you that it is the intention of the Chairman of the Tribunal to sit on Monday 14th and Tuesday 15th June 2004 to hear submissions on the principles which should be applied by him in the exercise of his discretion when dealing with applications for costs made by persons (a) against whom findings of corruption have been made; or (b) who otherwise fail to cooperate with or provide assistance to the Tribunal and whose conduct was reported on in the Second and Third Interim Reports of the Tribunal.

The Tribunal has already acknowledged receipt of your written submissions and will accept the written submission already made by you in relation to his earlier request as being applicable to the present legislative provisions. The Chairman does not believe that the issues raised by your client in the present proceedings are material to the issues intended to be addressed on 14th June 2004. Your participation in this process will not be deemed to amount to an acknowledgment by your clients of the right of the Tribunal to make findings of obstruction and hindrance against persons who have been the subject of its inquiry."

70. The Applicants made written submissions and in oral submissions sought a deferral by the Tribunal of its ruling until the determination of these proceedings. Not surprisingly, given that the 2nd Report has been in circulation for almost a year and a half, or indeed more, the Tribunal refused the Applicants' request. Specifically and central to the arguments made before the Court, the Applicants submitted to the Tribunal that it ought not to have regard to the substantive findings of corruption when settling the principles to be applied in respect of costs. That submission was based on a construction of the legislation and an interpretation of the decision of the Supreme Court in *Goodman International & Anor. -v- The Honourable Mr. Justice Liam Hamilton & Others* [1992] 2 IR 542, to which I shall return.

71. In the ruling of the Tribunal on the principles to be applied on an application for costs by persons against whom a finding of corruption has been made, the Tribunal concluded that it was entitled to have regard to such findings when exercising its discretion on costs. Notwithstanding that ruling and the proceedings as they then stood at that date, the Applicants made application for their costs and the adverse ruling of 9th November 2004 is challenged herein. It is clear from that ruling that the non-cooperation of a serious nature was a factor taken into account in the ruling of 9th November 2004. The ruling *inter alia* states:-

"In spite of the serious findings of corruption on the part of some of the Applicants, I would have considered awarding a portion of their costs had they chosen to fully and honestly cooperate with the Tribunal."

72. The foregoing rulings relate to "costs for" determinations. Although the Tribunal has not addressed the issue as to whether costs should be awarded against any party, and has not even addressed the issue in principle, the Applicants claim to stand in "real and imminent danger" that costs will be awarded against them by the Tribunal. (See the amended Statement of Claim, paragraph 26).

73. The manner in which the Applicants framed their claim in the re-amended Statement of Claim and in which they put their cases in written submissions make it clear that their primary focus is on the Tribunal and on its findings and rulings. The claim against the State Defendants (Ireland and the Attorney General) is very much an alternative claim which seeks to challenge the constitutionality of unspecified provisions of the Tribunals of Inquiry (Evidence) Acts as being in breach of Articles 38, 40.1 and 40.3 and Sections 6(1) of the 1979 Act (as amended) as being in breach of Article 34 of the Constitution.

74. Applying the doctrine of judicial self-restraint, I defer a consideration of this matter until I have dealt with the case against the Tribunal. Taking a conspectus view of the evidence, I am satisfied and find as a fact that there was evidence before the Tribunal upon which it was entitled to make the findings and rulings it did. The question that then arises is did it have the power in law to do so and act as it did? It is common case that a Tribunal under Section 6 of the 1979 Act as amended by Section 3 of the 1997 Act does envisage a Tribunal having power to make findings of *inter alia* failure to cooperate. It seems reasonable and in my opinion necessary to infer that the legislature in so providing would not emasculate such power as to inhibit a Tribunal from making findings as to degrees of culpability in this regard. To so limit the tribunal would be to fail to distinguish between formal non-cooperation, perhaps through oversight or genuine misunderstanding, and active or deliberate or sustained conduct of omission or commission such as hindered a tribunal. To so limit or circumscribe the power of the Tribunal in the context of the legislation could work a manifest injustice. In my judgement, in making such distinctions as it did in the instant case, the Tribunal went no further than was necessary and properly required to do to carry into effect the task entrusted to it and that in its making findings of obstruction and hindrance, such may be fairly regarded as incidental and consequential upon those things which the Oireachtas authorised. The fact that in a different forum and evidence tendered to it tested by a different standard of proof, conduct set out in Section 3(2) of the Act of 1979 is a criminal offence and did not make the decision of the Tribunal *ultra vires*. Further, only the Courts have the punitive power in the event of a successful prosecution.

75. Furthermore, in arriving at its determination on the issues submitted to it, a Tribunal must have regard to the evidence and credibility of witnesses. Having heard the evidence and invited the submissions of the parties, there was not, in my judgement, any further necessity for the Tribunal to invite a further hearing on whether particular evidence or the lack of it or the conduct (of omission or commission) and the demeanour of a witness or witnesses fell within any particular category or range of credibility or in the spectrum of complete co-operation or non-cooperation amounting to obstruction and hindrance.

76. The arguments of the Applicants, when reduced to its essence, was that a tribunal of inquiry entitled to pronounce on the question of co-operation was confined to degrees of comparison: un-cooperative, more un-cooperative, most un-cooperative. The function of the Courts in this context is to be satisfied that the Tribunal had the appropriate authority to exercise the power to make the findings it did and observe proper procedure and apply the entitlements of the concept of, and the precepts of, natural justice as laid down in the decisions of the Courts. It is not, to adopt an expression of Marquez, "a millimetric task of hunting down errors in the thickets of language".

77. In short, in my judgement, the Tribunal was entitled to make a finding of obstruction and hindrance at one and the same time as its primary findings. Furthermore, the Tribunal in the process of its decision making was not obligated to notify any person in advance of its final decision as to what view it had formed of the conduct of any party where such party had appeared before the Tribunal and had the opportunity of availing of and exercising its legal rights and entitlements. A consideration of the evidence cannot be divorced from the person or persons giving their evidence and their credibility and conduct cannot be realistically isolated completely from any such evidence.

78. Paragraph C(b) of the Terms of Reference enjoins the Tribunal to ensure that all costs incurred by reason of the failure of individuals to cooperate fully and expeditiously with the Inquiry should be borne by those individuals. Clearly, therefore, before any 'costs stage' could be arrived at, parties must have been and were effectively on notice that the issue of full co-operation would be considered by the Tribunal and that when the 'costs stage' was arrived at, all the co-operation or non-cooperation that had preceded that stage, i.e. the 'costs stage', would be of importance. There was, in my judgement, no denial of opportunity to be heard on the question of non-cooperation at any level or to any degree before the decision was made and published by the Tribunal.

79. The invitation to make submissions was general, the limitation was simply on canvassing the evidence.

80. The unchallenged submission of the Tribunal was that in stating his interpretation of the terms of reference on 21st October 1998, the Tribunal, through the Sole Member, stated:

> *"....The Tribunal has an overriding duty to discharge its urgent public mandate from the Oireachtas to the extent possible. The Oireachtas has in the Terms of Reference anticipated the possibility that certain individuals may fail to cooperate fully and expeditiously with this Inquiry. In the event that the Tribunal were to conclude that a given individual or entity did in fact fail to cooperate fully and expeditiously the Tribunal will report that "finding" to the Oireachtas."*

81. If the Applicants wished to challenge the power of the Tribunal to make such a "finding", it should have been challenged then. *Vires* cannot be conferred by acquiescence, but if there was a *bona fide* belief in such an argument, it was and is unjust that the Tribunal should not have been then challenged rather than proceed with its business to the stage to which it did before matter was raised.

82. Objection is also taken to the distinction drawn by the Tribunal which reported that some witnesses had failed to cooperate whereas the Applicants were held to have obstructed or hindered the Tribunal.

83. As noted, there are degrees of co-operation or non-cooperation and the Tribunal was entitled to distinguish such matters of degree. The Tribunal in the exercise of its function is not a mere listening post for all tendered evidence, it is, subject to the safeguards of the law, obligated to ascertain facts - the discernment applied in that task is concerned very often in trying to reconcile various elements and on occasion, in cases of conflict, determining on the balance of probabilities what are the reliable facts and who are the reliable witnesses.

84. The task of the Tribunal was to enquire into the meaning and truth of past events, if genuine conflict arises on facts, such inquiries require to be investigated and resolved. In the expression of a finding, view or opinion based on facts, the Tribunal is not to be so circumscribed as to be neutered. A person, even if assisting the Tribunal, is entitled to challenge a fact stated to exist and prove matters to the contrary. A person is not entitled to put the Tribunal to the trouble and expense (of the public) of protractedly or even economically withholding information or only admitting the inevitable when candour could have avoided such trouble and expense. The approach of a person before a Tribunal cannot be - even if there is an accusor - "catch me if you can." The Tribunal was to serve a particular purpose, not to provide an arena such as a court for a *lis inter partes*.

85. The Tribunal did not or purport to determine legal liability - but if in the course of its inquiries it was hindered or delayed or put to unnecessary or additional or unreasonable expense or trouble, it was entitled to so report; whether that took the serious form of failure to cooperate or the more serious form of non-cooperation or 'obstructing and hindering'.

86. Unlike a *lis inter partes* where each party presents their case to the independent judge (who is, subject to appeal) the judge is the final arbiter - a tribunal has no case to put, it informs those coming before it of the issues to be investigated and invites the participant to tender such information as they have on the topic, if such is inconsistent with previously gathered information, oral evidence tested by cross-examination may become necessary and a decision as to whom is the more credible and cooperative or non-cooperative witness will almost inevitably be made, as indeed the character of assistance or non-assistance of the witness.

87. I am satisfied that Mr. Murphy knew the Terms of Reference - that the Tribunal was to act and be completed in "as economical a manner as possible" and that there were costs implications for "the failure of individuals to cooperate fully and expeditiously with the Inquiry."

88. To cooperate is to work together or to act in conjunction with another person to an end. It is the opposite to hindrance which means to put at a disadvantage or to obstruct. The ordinary dictionary meaning of obstruction is "to block with obstacles or impediments or to render difficult the progress", in this instance of the Tribunal.

89. In my judgement, if the Tribunal was of the opinion on the facts before it that its work and inquiries were impeded by want of co-operation and the blocking of its progress in its inquiries, it was entitled to so find such as a fact. It would be invidious to fail to record same in its report and then at a later stage when an application for costs came to be made that such a finding was made for the first time. An applicant for costs in such circumstances could very properly object to any suggestion or ruling of an adverse nature which had not been found as a fact on the substantive hearing and reports of the Tribunal.

90. Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 was amended by substitution in Section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 [No. 42 of 1997] provides that:-

> *"(1) Where a Tribunal or, if the Tribunal consists of more than one member, the Chairperson of the Tribunal, is of opinion that, having regard to the findings of the Tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the Tribunal or failing to cooperate with or provide assistance to, or knowingly giving false or misleading information to the Tribunal), there are sufficient reasons rendering it equitable to do so, the Tribunal or the Chairperson, as the case may be"*

91. may deal with costs applications in particular ways. In my opinion, it is both right and proper as the case arises for each Tribunal to indicate clearly in its report by a finding of fact whether there has been a failure to cooperate and if degrees of non-cooperation are discernable that this be made clear. This should be done to properly carry into effect the purposes of the Statute and can be regarded as necessarily incidental or consequential upon those powers. In my judgement, there was an obligation on the Tribunal to explain to the Oireachtas and set out in its report why, having been established by Ministerial Order on 4th November 1997, it was only making its reports (2nd and 3rd Interim) years later and how such could or could not be reconciled with acting and completing its task in as economical a manner as possible.

92. In the course of the submission of the Applicants, they referred to instances of alleged disadvantage to them at page 25, paragraph 53 and following in their written submissions, to which the Tribunal's response was set out in their submissions at page 54, paragraph 703 and following to 7.29. In the circumstances, what was referred to as the primary findings of the 2nd and 3rd Reports are unchallenged by the Applicants, such must be accepted as based on evidence of probative value. What, in effect, the Applicants have sought to do in these proceedings is to draw different conclusions from those drawn by the Tribunal which had seen, heard and experienced the evidence and the matter as well as the manner of it.

93. The Court is not a forum of appeal. In this regard the Court must be particularly astute in considering an application when documents permitted to be introduced for illustrative purposes, proven to exist were not in fact opened in public hearings to the Tribunal. To admit such indulgence cannot avoid the rigours of a plenary hearing or the restraints of Judicial Review.

94. The concern of the Applicants is clearly in relation to the consequences flowing from the finding of obstruction and hindrance, rather than any of the Tribunal's primary findings. It is evident that the Tribunal's findings that the Applicants were guilty of a corrupt payment seems of less concern to them. Against the undisputed fact that a payment to Mr. Burke was not for a legitimate purpose and that payment to Mr. Redmond was corrupt, I fail to see any validity or reality in the argument that respect for constitutional right to a good name requires as a matter of construction that the Court find that there is no power to make a finding of obstruction and/or hindrance, which in my judgement is of far less serious significance than making illegitimate or corrupt payments.

95. The claim made under the Convention of Human Rights Act 2003, which did not come into operation until 31st March 2003, and which has not retrospective effect, (see *Fennell -v- Dublin City Council* [2005] 2 ILRM 288) was towards the end of the hearing abandoned, and no issue on this requires adjudication.

96. In matter of costs, the Applicants challenged the ruling on the following grounds:-

> 1. That the Chairman[Tribunal] had regard to the findings of corruption when exercising its discretion.
>
> 2. That the Chairman[Tribunal] had regard to findings of obstruction and hindrance when exercising the discretion in relation to costs.
>
> 3. Whether the making of costs orders based on findings of obstruction and hindrance and/or corruption constitutes the administration of justice.
>
> 4. Whether costs were refused on the basis of findings which were never made by the Tribunal.

97. As earlier noted, when the Tribunal was established and the public hearing commenced, Section 6 of the Act of 1979 had been amended by Section 3 of the Act of 1997. The amended provision provides that a Tribunal in forming its opinion on a matter of costs may have regard to:-

> 1) The findings of the Tribunal.

2) All other relevant matters including [an expression conceded as not being exhaustive. (T.7, p.59, l.28-29)].

(a) The terms of the Resolution passed by the Houses of the Oireachtas. [This was not permissible under the terms of Section 6 of the Act of 1979].

(b) Whether the person applying for costs had failed to cooperate with or give assistance to the Tribunal. [This was not permissible under the terms of the Act of 1979].

(c) Whether the person applying for costs had obstructed or hindered the Tribunal. [This was not something that fell for consideration under the Terms of the Act 1979 but in the Act of 1997 it reflects the upper range of failure to cooperate and/or failure to assist].

(d) Whether the person applying for costs had knowingly given misleading or false information to the Tribunal. [This was not something that fell for consideration under the terms of the Act of 1979].

(e) Other relevant circumstances going to the equity of the costs orders that might be made. [This was not something that fell for consideration under the terms of the Act of 1979].

98. In my judgement, the non-exhaustive listing of the matters that were embraced in the expression "including" permit the Tribunal to consider 'all other relevant matters if... there are sufficient reasons rendering it equitable to do so' in its opinion and these are to be taken into account in the making of a costs order. In my judgement, it is not permissible under Judicial Review on the material placed before the court nor is there any warrant on the basis of the evidence tendered at the hearing in court to displace the opinion of the Tribunal for that of the Court. There is no evidence of failure to exercise discretion within the terms of the Acts or either Terms of Reference.

99. The Applicants in their submission rely heavily on the section in its unamended form and the interpretation of it in that form by the Supreme Court in *Goodman International -v- The Honourable Mr. Justice Hamilton & Others* [1992] 2 IR 542. Section 6(1) in its amended form permitted the Tribunal to have regard to a far greater variety of factors in making a costs order than was permissible under the section, in its unamended form, as interpreted in the *Goodman* case.

100. In my Judgement, the Tribunal correctly applied Section 6 of the Act of 1979 as amended by Section 3 of the Act of 1997 - for, in my opinion, the amendment of the Act of 1997 was far more thorough than that contended for by the Applicants. In my judgement, the amendment affected by the Act of 1997 was directed towards the difficulties imposed by perhaps a perceived narrow interpretation of the Act of 1979 in the Goodman decision.

101. Notwithstanding the careful qualification in his judgement in *Haughey -v- Moriarty* [1999] 3 IR 1 at page 14, Geoghegan J. stated:

> *"In my opinion, power to award costs under the Act of 1997 is confined to instances of non-cooperation with or obstruction of the Tribunal but that, of course, would include the adducing of deliberately false evidence and that is why the statutory provisions specifically requires regard to be had to the findings of the Tribunal as well as all other relevant matters. However, I merely express that view by way of obiter dicta because, in my opinion, the issue of costs can only properly come before a High Court by way of some kind of Judicial Review for injunctive proceedings after costs have been awarded."*

102. I am satisfied in this case, both as a matter of fact and as a matter of law, that having regard to the undisputed primary findings and the findings of non-cooperation, obstruction and hindrance, that having regard to such and all relevant matters permitted under the amended Section 6 of the Act of 1979 by Section 3 of the Act of 1997 were considered by the Tribunal. The Court ought not to supplant same because the Court might have come to a different opinion.

103. The judgement of McCarthy J. in *Goodman's* case, [1992] 2 ILRM 542 at p.605, in dealing with Section 6 of the Act of 1979 states:

> *"Section 6: The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression "the findings of the Tribunal" should be read as the findings as to the conduct of the parties at the Tribunal. In all other cases, the allowance of costs at public expense lies within the discretion of the Tribunal or, where appropriate, its Chairman."*

104. Without seeking to provide a glossary or presumptive commentary on the foregoing, I am mindful of the intendment of the Oireachtas to amend Section 6 of the Act of 1979, I see no difficulty in accepting that even under Section 3 of the Act of 1979, the liability to pay costs cannot exclusively depend on the findings of the Tribunal. Further, the eminence of the Judge whose judgement, to which I have referred, can bear the observation that the second sentence of the extract is a matter of opinion - which given the reference to "a single disaster", (e.g. the Whiddy Island Inquiry, the Stardust Tribunal) is readily understandable. The two sentences that follow referable to "those costs" are in my view referable to the single disaster inquiry, whereas the final sentence referable to "all other cases", i.e. other than single issue/disaster cases, the awarding of costs lies within the discretion of the Tribunal.

105. In the instance case, to revert to the ruling of the 9th November 2004

> *"In spite of the serious findings of corruption on the part of some of the Applicants, I would have considered awarding a portion of their costs had they chosen to fully and honestly cooperate with the Tribunal".*

106. The instant case was not a single issue disaster. There was no limitation on the expression "findings of the Tribunal" in the amending legislation and the text makes clear that despite or notwithstanding the primary findings, there was a disposition to award the portion of the costs sought and the reason such award was not made was because of the Applicants' non-cooperation, (a benign approach to the finding of obstruction and hindrance) i.e. because of the conduct by or on behalf of that party at, during or in connection with the inquiry. In my judgement, the ruling as to costs falls within the terms of Section 6 of the Act of 1979 (as amended by Section 3 of the Act of 1997) and to the extent relevant, within the terms of the judgement of McCarthy J.

107. In my judgement, the determination by the Tribunal of the application for costs, in the context in which it did, did not constitute the administration of justice. "Any monetary loss incurred by the engagement of these Applicants with the Tribunal is for them an unfortunate consequence of the legitimate right to hold such an inquiry." (per Geoghegan J. in *Haughey -v- Moriarty*). Furthermore, no evidence has been adduced before me to warrant a judgement that the determination of findings which were never made by the Tribunal, if this was intended to refer to the benign view of obstruction and hindrance of the ruling on costs, I consider to be spurious science. (The instant case is wholly distinguishable from T*he State (Irish Pharmaceutical Union) -v- Employment Appeals Tribunal* [1987] ILRM 36).

108. If it was intended to mean as set forth in the submissions that the identity of the Sole Member was the issue, the matter is dealt with in the legislation, which makes it clear, in addition to giving the Chairman of the Tribunal power to have regard to the Second and Third Reports, the Chairman was expressly not limited to considering them in their findings and was permitted to have regard to all other matters referred to in Section 6 of the Act of 1979 as amended. In the 2nd Report, paragraph 11.23, 17.15, 17.16 and 17.18 are illustrative of the material properly available to be taken into account. The case against the Tribunal in my judgement fails.

Constitutionality:
109. It is settled law that a court should not pronounce upon the constitutional validity of an Act unless it is necessary to do so. Furthermore, in the instant case, two further matters are to be noted before the invitation or application to embark on this question of constitutionality should be undertaken.

> 1. The Applicants challenge to the constitutionality of Section 6(1) of the Act of 1979 (as amended) is advanced on the possibility that an order for costs may be made by the Tribunal against them. That challenge is clearly premature and hypothetical as pleaded in respect of the defences of the Tribunal and the submissions of the State Respondents. That defence is in response to the re-amended Statement of Claim. The Tribunal has not considered, much less ruled on the issue: The Tribunal has clearly indicated that it will not make any decision on the issue as to whether costs should be awarded against the Applicants without affording the Applicants a proper opportunity to make submissions on the issue. The Court is not in a position to anticipate how the Tribunal will deal with any such application, either in principle or specifically in reference to the Applicants. The Court must presume that the Tribunal will act within the terms of the legislation and in accordance with constitutional justice.

110. It is in these circumstances that the State Defendants contend, in my judgement correctly, that the Applicants lack locus standi to challenge the constitutionality of Section 6(1) of the Act of 1979.

> 2. The fact that the Applicants were refused their costs by the ruling of 9th November 2004, it does not follow, by reason of that fact, that they have locus standi to challenge the constitutionality of Section 6(1) of the Act of 1979 as amended. The striking down of Section 6 would be of no benefit to the Applicants. Section 6 is the exclusive source of the Tribunal's power to award costs, (*Goodman -v- The Minister for Finance* [1999] 3 IR 356). Therefore, if Section 6(1) is struck down as being invalid having regard to the provisions of the constitution, there remains no statutory or other basis on which the Applicants could recover their costs.

111. It is in these circumstances that the State Defendants, correctly in my judgement, rely on the well established principles (*Todd -v- Murphy* [1999] 2 IR) that the Applicants lack standing to impugn Section 6.

112. Notwithstanding the very careful and learned submissions of Counsel, written and oral, on the constitutional issue for which I am genuinely appreciative, nonetheless in my judgment I ought not to entertain the question of constitutionality as it is not necessary for the determination of the case before the court.