Neutral Citation [2012] IEHC 603

THE HIGH COURT

[2012 No. 544 JR]

BETWEEN

Owen O'Callaghan

Applicant

v.

Judge Alan Mahon, Judge Mary Faherty and Judge Gerald B. Keys, Members of the Tribunal of Inquiry into Certain Planning Matters and Payments.

Respondents

Judgment of Mr. Justice Hedigan delivered on the 16th of May 2012.

Application
1. The applicant seeks the following reliefs:-

(a) An order of *certiorari* by way of judicial review quashing the decision of the respondents whereby the respondents in the final report of the tribunal made the findings enumerated in the schedule to their statement of grounds;

(b) an injunction directing the respondents to delete the said findings from the final report and to submit the report so amended to the Houses of the Oireachtas;

(c) a declaration that the said findings were made in breach of natural and constitutional justice and/or fair procedures and /or that they were otherwise *ultravires* the respondents.

(d) Further and other reliefs;

(e) The costs of proceedings.

Parties
2.1 The applicant is a property developer and is a director of Barkhill Limited having its registered office at 21, Lavitt's Quay, Cork and Riga Limited having its registered office at 21, Lavitt's Quay, Cork. The respondents are members of the Tribunal of Inquiry into Certain Planning Matters and Payments. (The Tribunal)

Factual background
3.1 The Mahon tribunal was established by the Oireachtas in October 1997 to investigate corrupt payments to public officials. There were a number of modules within the inquiry and the applicant was involved in the module known as Quarryvale 2.The applicant's involvement in this module stemmed from his participation in the development of Liffey Valley (then Quarryvale) in Dublin. The development was Mr. Tom Gilmartin's initiative and the applicant became involved when Mr. Gilmartin got into financial difficulties, with the applicant later buying him out.

3.2 The Quarryvale 2 brief was circulated by the Tribunal to interested parties on the 17th December, 2004, and this brief was updated from time to time, eventually comprising approximately 30,000 pages. The Quarryva1e 2 module began on the 29th November, 2005, day 603 of the public hearing. It was then adjourned and recommenced on the 28th May, 2007, day 725 and ran to the 3rd December, 2008, day 917 of the public sittings. The applicant gave evidence from the 18th June, 2008, day 874 of the public hearings, to the 16th October, 2008, day 913.

3.3 The applicant was examined about matters arising from 1990-1998. He admitted having made political donations to Mr. Liam Lawlor and accepted he had also retained and paid Mr. Frank Dunlop as a consultant and lobbyist from early on in the Quarryvale project to assist him in securing support among councillors for Liffey Valley. Mr. Dunlop, it later transpired, made payments to certain politicians which he admitted were corrupt. The applicant said he did not know about these payments and only became aware of them during the course of the tribunal.

3.4 The tribunal's final report was published on the 22nd March, 2012, with chapters 2 and 17 making findings against the applicant. 13 of the findings were that the applicant was corrupt and further findings were made that he was guilty of corrupt payments through an intermediary.

3.5 The applicant was unhappy with these findings and argues that the tribunal did not put the matters noted in the report to him during the inquiry or before publication of the report. He denies any wrong doing and argues that he did not make improper payments to anyone or authorise anyone to do so and his donations were legitimate political donations. He is now seeking, by way of judicial review, to have certain findings from the report quashed and deleted. On the 18th June, 2012, Me Govern J. granted the applicant leave to apply for judicial review.

Applicant's Submissions
4.1 Definitions of "corruption";

During its lifetime the tribunal's terms of reference were extended a number of times. Under paragraph A5 of its terms the tribunal had the power to make a finding of corruption, which term was defined by the sole member Flood J. on the 21st October, 1998 and appears in chapter 1 of the final report. He said it covered:-

> "...destroying, hindering or perverting the integrity or fidelity of a person in the discharge of his duty, or the abuse of influence or power or duty by any person, or to bribe, or to induce another to act dishonestly or unfaithfully, or an attempt to do the same, or circumstances of control, influence or involvement with such person to the extent that it gives rise to a reasonable inference of unequal access, or favouritism, or a set of circumstances detrimental to his duties."

This definition was enunciated before the applicant had legal representation. He argues that it was not apparent from this definition that a political donation made to a county councillor, who at the time it was made was likely to vote on rezoning or on any other matter which could affect the interests of the person making the donation, could be regarded as probably being corrupt.

He argues that at some point during the course of the inquiry the term corruption came to cover something other than, and in addition to, what had first been defined. The report at paragraph 33.03 notes that corruption includes the acceptance of money by an elected councillor where:-

(i) it was known/believed/expected that the land owned by the person paying the money was due for rezoning vote (ii) the money was accepted specifically in return for exercising a vote and/or (iii) money was solicited/accepted in the knowledge/expectation or belief that land, in which the developer had an interest, was, or was likely to become the subject of a decision of the local authority of which the council was an elected member.

Further paragraph 33.03 (vi) states:-

> "The payment or promise (expressly or by implication) of the payment of money (or monies worth or other favour) by a developer/landowner (or his agent) to an elected councillor (or a person standing for election to that office), in circumstances where the developer/landowner, was or was likely to be, or to become, the subject of a decision by the County Council in which the councillor was an elected public representative (or if standing for election, might become an elected public representative) and in which capacity he/she would be entitled to exercise the right to vote, or to otherwise act, was, subject to a full consideration of all the circumstances, improper, inappropriate and/or probably corrupt".

The applicant argues it was never put to him in cross- examination that such actions amounted to corruption and it was not evident from the ruling of the Sole Member. He argues that the tribunal, when it came to write its final report, should have stayed strictly within the confines of the sole member's ruling of the interpretation of the term corruption. If an alternative definition was to be postulated it ought to have been notified to the applicant in advance of the final report so that he could make submissions on it but this was not done.

The applicant contends consequently that the findings and/or observations made against him on pages 1133 to 1134 of the tribunal's report are based on vague, uncertain and non-specific definitions of the term "corruption" and are a breach of natural and/or constitutional justice and/or fair procedures and/or are otherwise *ultra vires* the tribunal given that :- .

(i) The observations differed from the sole member's definition of "corruption" for the purposes of the terms of reference of the tribunal;

(ii) The basis for the observations was never put to the applicant by the tribunal during examination insofar as they related to the matters and payments the subject matter of the findings.

Moreover, the applicant contends that it is not clear from the report which aspect of the basis of the definition of corruption was used to find him corrupt.

4.2 The requirements of fair procedures at a tribunal and the obligation to provide draft findings;

In its report on public inquiries the Law Reform Commission notes that one of the functions of a tribunal is to establish accountability, blame and retribution and that its findings must be preceded by fair procedures at every stage.

When quoting the tribunal's terms of reference counsel for the tribunal at the opening of module 2 on day 603 indicated that the mere fact that someone was a witness did not imply impropriety on their part and no decisions would be reached until all submissions and evidence had been received. The applicant therefore argues that this, taken together with the fact that no allegations of corruption were put to him, meant that he was entitled to assume that he was not going to be the subject of a finding of corruption when the final report was published. He contends that if criticisms of him were to be made in the report the respondents should at least have forewarned him of this giving him a chance to respond and failure to do so amounts to a breach of fair procedures.

The applicant contends that this breach is evident in that the procedure adopted by the tribunal did not provide for the identification of any allegations against any party and no allegations were identified or furnished to him. He therefore challenges the manner in which the defendants made findings in the final tribunal report and relies on the *audi alteram partem* rule.

He cites In *Re Haughey* [1971] IR 217 where at p. 263, O'Dalaigh C.J. held that a person whose conduct is impugned as part of the subject matter of an inquiry must be afforded a reasonable means of defending himself. The protections to be afforded to a party in such circumstances are:-

a) That he should be furnished with a copy of the evidence that reflects on his good name;

b) he should be allowed to cross-examine by counsel his accusers;

c) he should be allowed to give rebutting evidence;

d) he should be permitted to address, again by counsel, the committee in his own defence.

The applicant accepts that he was allowed to cross examine Mr.Dunphy and Mr. Gilmartin who had made allegations against him, although he had to make a court application to be furnished with prior statements. He also accepts that he was allowed to give evidence, but not rebutting evidence because this would be to rebut an allegation, whereas the allegation was never formulated. Nor was d) of the *In Re Haughey* criteria satisfied because although he was permitted to address the tribunal it cannot have been in his own defence as he did not know what allegations he should be defending.

The applicant notes that in England and Wales the obligation to provide proper notice to someone of criticisms that will be made in a report and to give them a chance to be heard is recognised as a fundamental aspect of the fairness of the process.

> "It is essential that the Inquiry report is fair both in terms of an accurate recording of the events the Inquiry has been investigating and in terms of any criticism it proposes to make of persons involved in those events".(Jason Beer Q.C., Public Inquiries, Oxford University Press p.355.)

The Inquiries Act 2005 in the United Kingdom places on a statutory footing the requirement to give notice to a person of proposed criticisms and giving them a chance to respond .This is known as a Salmon letter or the process of Maxwellisation (from the case of *Maxwell v Department of Trade* [1974] 1 Q.B.523). The applicant argues that the same standards should apply in Ireland.

The applicant points out that on day 915 of the tribunal's public sittings he requested that a draft of the proposed report findings be given to him for his comment in circumstances where no list of allegations had been provided to him. This was refused with the respondents indicating that the tribunal would not be adopting such a procedure. Instead the applicant was invited to make written submissions. He challenged this decision by way of judicial review in *O'Callaghan & Ors. v Mahon & Ors.* 2009 IEHC 428. (O'Callaghan 3) He was concerned that in the absence of identification of allegations (such as was done in the Beef Tribunal) the tribunal report could include findings adverse to him in circumstances where the basis of those findings was not put to him in examination by the respondents. He was also concerned that he would not be given a chance in testimony or written submissions to deal with the basic allegations on which the findings were based. He was unsuccessful in his challenge in the High Court. The Supreme Court in its judgment dismissing the appeal held that the application was in the nature of a *Quia Timet* application, the applicant's fears being hypothetical in nature.

The applicant argues that although he lost this case he could rely upon Murray C.J's reasoning in his *ex-tempore* judgment of the 23rd November, 2010, that since the tribunal was "bound to proceed in accordance with law and in particular the principles of fair procedures as laid down in the case law of this court", it would have to notify him of any allegations not put to him in public hearings which could form the basis of adverse findings in order that he could fully respond. However, no allegation of corruption was ever put to him in cross examination. In fact two days before the end of the inquiry in respect of a question put to him the applicant responded by saying "it wasn't corrupt". Counsel for the tribunal said "I am not putting it to you that it was corrupt".

The applicant states that his written submissions were made to the tribunal in circumstances where no specific allegations of corruption had been made against him. He argues that notice of allegations against him would have enabled him to make more meaningful submissions.

The applicant refers the court to *Murphy & Ors. v Flood & Ors.* [2010] 3 IR 136 where the applicants challenged the decision of the tribunal to refuse to grant them their costs of representation at the tribunal on the grounds of obstructing and hindering a tribunal of inquiry pursuant to s.1(2) of the Tribunal of Inquiry Act (1921). The Supreme Court held that the tribunal was not entitled to make findings of obstructing and hindering. Denham J. held at para. 51-

> "However, the tribunal did not have jurisdiction to make findings of obstruction and hindrance in the context of a reference to a criminal offence."

She went on to note at para. 75 that a tribunal does not administer justice.

The Supreme Court decision was based on the doctrines of *ultra vires*, unreasonableness and the principle that a decision maker must not take into account irrelevant considerations.

In the same case Hardiman J. analysed *Goodman International v. Mr. Justice Hamilton* [1992] 21.R. 542 where Hederman J. had cited the Australian decision of *The State of Victoria v. The Australian Building Construction Employees and Builders Labourers' Federation* [1982]152 CLR 25. Hardiman J. at p.187 of the judgment cited quoted Murphy J.'s dissenting judgment:-

> "The authority given to the Commissioner to exercise such an important ingredient of judicial power as finding a person guilty of ordinary crimes, is in itself an undermining of the separation of powers. It is a fine point to answer that the finding is not binding and does not of itself make the person liable to punitive consequences. It is by fine points such as this that human freedom is whittled away."

Hardiman J. said that he believed that the above must be borne in mind when dealing with tribunals. This reinforces the argument of the applicant that the legal validity of a powerful and potentially destructive tribunal and its findings, depends on the manner in which it exercises its power and discretion as well as the quality and fairness of its procedures.

Denham J. also said in this case at para. 54 :-

> "I would also state that, in all the circumstances, the decision of the Tribunal was made in breach of fair procedures. On well established principles of fair procedures the plaintiffs should have been given notice of an intended ruling on obstruction and hindrance in relation to the issue of costs and an opportunity to make submissions. No notice was given of the intention to address the issues of obstruction and hindrance, and so the plaintiffs had no opportunity to make submissions on such matters. Thus...the Tribunal...was in breach of fair procedures".

The applicant argues that the Mahon tribunal was likewise bound to notify him that it was considering making the scheduled findings and failure to do so was a breach of fair procedures.

4.3 Failure to put allegations of corruption to the applicant during the trial;

The applicant argues that the purpose of the tribunal was not clear to him and he did not know findings could be made against him.

The fact the power of the tribunal encompassed an entitlement to make findings of corruption meant, the applicant argues, that it required the highest standard of fair procedures. He contends that the tribunal fell short of this standard as at no time did he know what case the respondents were making against him. He points to the fact that no allegations were made against or furnished to him either on day 603 or 725 of the inquiry. He argues that since the respondents did not formulate allegations against him at any point then, it was incumbent on them, while he was in the witness box, to put an allegation or a proposed finding of corruption to him so that he would firstly be in a position to rebut it and secondly be in a position to make meaningful submissions in relation to it. He argues that when giving evidence he denied any wrongdoing and that if the respondents deemed him to be lying they should have

challenged him, but at no time did they put it to him that payments made by him amounted to corruption. Thus, he contends, he was given no opportunity to answer what ultimately became findings of corruption in the final report.

He argues that it was reasonable to expect the inquiry to adhere to fair procedures especially given the opening statement by counsel on day 603 of the inquiry where the tribunal's right to govern its own procedures was asserted with the qualification that it had "an overriding obligation of fairness to parties who assist it with its mandate". The applicant argues he was therefore entitled to assume that he would not be subjected to adverse findings of corruption unless those findings resulted from a procedure that was fair. He further argues that it is frequent procedure in other common law jurisdictions in similar inquiries to put allegations to the person in the witness box and notes that this was the method adopted in the Ansbacher inquiry.

He submits that it was because no allegations were articulated or put to him during the course of the inquiry that he did not realise that the inquiry could make findings of corruption against him. He refutes the respondents' suggestion that because he attended the tribunal throughout there was an implication of wrongdoing on his behalf and that he should have known that there was an implication of such wrongdoing.

He points to the fact that the tribunal could make a finding of improper and inappropriate payments as an alternative to a finding of corrupt payments and argues that this defeats the respondents' argument that everyone participating in the tribunal knew that it was investigating corruption and a finding of such was possible.

The applicant refers the court to O'Callaghan v Mahon [2006] 2 IR 32. In that case the court considered the situation where many statements were given to the tribunal, only two ofwhich (those of Mr. Gilmartin and Mr.Eamon Dunphy) contained allegations against the applicant. Mr. Gilmartin's allegations that the applicant was corrupt were made without notice to him and did not specify in what manner he was corrupt. These statements were not handed over to the applicant. He challenged the ruling of the tribunal that records of prior inconsistent statements of witnesses would not be disclosed on the basis that it breached the requirement of fair procedures. The Supreme Court held that he was entitled to copies of witness statements which made serious allegations against him and found that the tribunal was not entitled to retain as confidential, information which became essential for the purposes of cross-examination pursuant to a right enumerated in *In Re Haughey*.

The applicant makes reference to The Scott Inquiry. This was a non-statutory inquiry, the procedures for which did not measure up to what the Irish Supreme Court jurisprudence requires of a statutory inquiry pursuant to the 1921 act, as amended (with particular reference to the right to cross- examine).Even then, Sir Richard Scott said a fair non-statutory tribunal requires "that adverse and damaging allegations (if they are relevant but not otherwise) should be drawn to the attention of the object of the allegations, so that he or she can, if desired, respond to them. In Scott's view this requirement is even more fundamental than the right to cross-examine and the right to representation.

The applicant also relies on the case of *The Honourable Peter Thomas Mahon v. Air New Zealand Ltd. & Ors* [1984] AC 808 which was a challenge to the findings of Judge Mahon who chaired an inquiry into an air disaster. In this case Lord Diplock of the Privy Council at p.835 of his judgment found that a person against whom findings have been made should have the allegation put to them when they give evidence at an inquiry so that they may then deal with it. He found that failure to do so amounted to a breach of the rules of natural justice.

4.4 The effect of adverse findings made by a tribunal

The applicant contends that the tribunal's findings (although not imposing a criminal sanction) have caused unquantifiable damage to his reputation and have exposed him to potentially catastrophic financial liability.

The applicant refers the court to where Fennelly J. in *Murphy & Ors. v. Flood & Ors.* [2010] 3 I.R 136 at para. 241 explained the effects of a tribunal's findings when he quoted the following passage from the current edition of Wade & Forsyth on Administrative Law (1oth ed. Oxford, 2009) at p.206 para. 240 to 244:-

> "The inquiry is inquisitorial in character, and often takes place in a blaze of publicity. Very damaging allegations may be made against persons who may have little opportunity of defending themselves and against whom no legal charge is preferred".

The applicant submits that given the serious impact of adverse findings of a tribunal for the good name of a person fair procedures in an inquiry are exceptionally important.

He observes that in 0'Callaghan I Hardiman J. equated the standard of fair procedures applying to a tribunal with that applying to a court case. He noted at para. 56:-

> "... I consider that the hearing of very grave allegations before a tribunal of Inquiry which not merely sits in public but whose proceedings are in practice accorded enormous publicity, attracts for persons whose reputations are impugned procedural rights analogous to (though often varying in detail from) those of the defendant in a criminal trial."

The applicant also points to Hardiman J.'s pronouncement regarding the effect of inquiries in *Maguire v Ardagh* [2002] 1 I.R. 385 at pps 669 to 670:-

> "it is true that even the most adverse imaginable finding of fact or conclusion by the sub-committee will not amount to a conviction and will not determine any person's rights and liabilities in civil law and will not expose him to any penalty or liability. But that is not the same as saying it has "no" effect. Not merely is it conceded that it would have effects: these effects would sound, *inter alia*, in the area of the affected person's constitutional rights."

The applicant further relies on the dissenting judgment of Murphy J. in *The State of Victoria v Australian Building Construction Employees and Builders Labourers' Federation* (cited above) where he found that although the tribunal in that instance would impose no criminal fine/sentence or make a finding of civil liability it was irrelevant because the applicant would still be tarnished with a finding which the public would view as a finding of guilt of a crime or serious wrongdoing.

In this instance the tribunal found the applicant to be corrupt and he argues that although not a court of law its decision still caused him damage and its findings were particularly important given that there is no appeal from its findings.

Respondent's Submissions

5.1 Definition of the term corruption.

The respondents deny the applicant's assertion that they failed to put elements of the definition of "corruption" and "attempts to influence" to him. They submit firstly that the tribunal was under no duty to put such definitions to him and secondly that he was aware in any event of the terms "corruption" and "attempts to influence" as per the sole member Flood J.'s definition of the 21st October, 1998.

The respondents argue that the term "corruption" covers a number of types of behaviour ranging from abuse of influence or power by any person to bribery. Flood J., when defining "corruption", said it was a word which depends on its factual context and there is no single set of circumstances that constitutes corruption.

The respondents do not understand the applicant's complaint in relation to paragraph 33-03 (vi) at page 1134 of the inquiry's report. The paragraph clearly states that the observation is made "subject to a full consideration of all the circumstances" i.e. the report was not suggesting that payments of that kind were always corrupt but that it depended on the circumstances in which the payments were made. The respondents argue that this is entirely consistent with the tribunal's interpretation of the term "corrupt" and does not materially differ from the sole member's ruling. Moreover, the respondents submit that pages 1133 and 1134 of the report clearly do not include any findings but are in fact observations made, based on the evidence adduced at public hearings of the tribunal at which the applicant was present and such observations are, they submit, fully consistent with the tribunal's definition of the term "corruption".

5.2 Fair procedures and putting allegations to applicant;

The respondents recognise that they must apply fair procedures to a person such as the applicant who was not a mere witness at the inquiry but was a subject of the tribunal's inquiry. However they argue that tribunals, unlike courts, are inquisitorial rather than adversarial in nature and enjoy a broad discretion in carrying out their work. They accept that the tribunal is bound by the rules of natural justice as per art. 40.3 of the Constitution. However, the respondents deny that the applicant's entitlement to fair procedures as per the principles laid out in *In Re Haughey* has been breached.

The respondents refute the applicant's contention that the tribunal's findings were based on allegations of corruption which were not put to him or that its findings were put into the schedule to the report without notifying him. The tribunal's remit was to inquire into matters falling within its terms of reference and to make findings relevant to those matters. The tribunal, following its terms of reference, did not make any allegations against any witnesses. Findings in the report were based solely on the evidence heard by the tribunal during the public hearings. The applicant at all times participated in those hearings, gave evidence and had evidence put to him in the knowledge that the tribunal was conducting an inquiry for the purpose of determining if corrupt activity existed within the planning process.

The respondents contend that the applicant was accorded all of his *In Re Haughey* rights in the module in that he was given a copy of the evidence which reflected on his good name. They submit that *In Re Haughey* does not require that a witness be provided with a list of allegations against him or that in advance of making its findings an inquiry should draw together the evidence upon which the findings were made and put the evidence to the witness.

Moreover the respondents contend that the applicant has no entitlement to more extensive rights than those in *In Re Haughey*. In that case counsel for the applicant seemed to identify the rights enumerated as being the minimum protection to which a person is entitled. O'Dalaigh J. however seemed to identify them as being an exhaustive list of rights that the state is obliged to vindicate. The respondents submit that O'Dalaigh J.'s view is consistent with subsequent Supreme Court decisions such as *Maguire v Ardagh* [2002]1 IR 385 and the majority judgment in *O'Callaghan* 1 where Geoghegan J. said at para. 125:-

> "In particular having regard to the clear views of this court in *In re Haughey* [1971] I.R. 217 it would not seem to me to be necessary to consider to what extent the numerous cases and statutes relating to the law of evidence for the purposes of the courts must necessarily be applied to every cross-examination in a tribunal."

They respondents note that all witnesses including the applicant were fully informed of the matters which were the subject of each module both by virtue of the briefs circulated to them and the opening statement made by counsel at the start of each module. The applicant was also fully notified of all allegations made by other witnesses. All of the relevant evidence was put to him during the tribunal and he had a chance to deal with it then. His counsel had the opportunity to cross-examine each person giving evidence touching upon the behaviour of the applicant and in particular relating to payments by him to politicians and the purpose of such payments.

5.3 The purpose of the tribunal;

The respondents argue that the central question is if the applicant was unaware that the tribunal was enquiring into whether or not the payments which were made by him either directly or through third parties to politicians were corrupt. They note that the applicant never in the pre-hearing process or in the public hearing complained that the nature of the tribunal of inquiry was unclear to him or that there had been a failure to identify issues the tribunal intended to investigate.

In the opening statement on day 603 counsel for the tribunal identified what the tribunal would be enquiring into. Counsel specifically stated that the upcoming hearings were "rooted in the terms of paragraph A5 of the tribunal's terms of reference...". Counsel went on to quote the paragraph. This paragraph deals with corrupt payments to politicians and says "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...it shall report on such acts...". The respondents argue that the applicant heard the opening statement so must have been aware the inquiry was rooted in that paragraph and was therefore in a position to address questions made to him on that point.

Moreover, the opening statement also declared that the tribunal would "trace the history of the planning and zoning of lands in west Dublin formerly known as Quarryvale, now known as Liffey Valley and also the monies passing between those who had an interest in the lands directly and indirectly and those who, with no interest in the lands had an influence in connection with what could or would or might happen to the lands." Reference was made to various payments that were of interest to the tribunal. It was outlined that payments between Mr. Dunlop and the applicant's companies would be dealt with in the module. Consequently it must have been clear to the applicant from the outset that the Quarryvale module was investigating whether the applicant or the companies controlled by him (Riga and Barkhill Ltd.) directly/indirectly made payments to members of Dublin County Council or other public representatives in return for obtaining rezoning of the Quarryvale site.

The respondents further note that in a letter of the 17th November, 1998, the tribunal wrote to the applicant enclosing its terms of reference and indicating that it was conducting an investigation under Clause AS of its terms of reference and referring to investigations into whether "payments were made or benefits provided to members of Dublin County Council in connection with their votes on zoning motions affecting Quarryvale...whether such payments were paid directly or indirectly by Barkhill Limited or whether they were channelled through Barkhill Limited". A further letter was sent on the 17th December, 1999 to the applicant's legal advisors requesting him to furnish a statement to the tribunal in relation to any payments made by him or his companies to members of Dublin County Council. He was also written to during the inquiry to provide information /statements on a range of issues that were of interest to the tribunal from the 17th December, 1999, to the 8th April, 2008.

The respondents also note that before the opening statement counsel for the applicant applied for a grant of representation. This suggests that even at this early stage the applicant was aware that he was going to be a subject of the module Quarryvale 2. The applicant was closely involved in the inquiry and was represented by counsel during it. Thus he could not have been confused as to what the tribunal was about i.e. to examine the applicant under oath to ascertain if "corruption" regarding planning had taken place and if so who was involved.

Moreover, the respondents argue that it is evident from the applicant's submissions that he knew what the purpose of the inquiry was. In his submissions to the tribunal he made reference to whether or not payments were corrupt so he must have known the allegations he was dealing with. The respondents also note that in paragraphs 41-54 of his submissions to the tribunal the applicant argued that the tribunal should have adopted a criminal standard of proof like the Beef Tribunal-the respondent submits that this demonstrates that the applicant knew that a finding of corruption might be made against him.

5.4 Failure to furnish with draft findings;

The respondents accept that they did not put the draft findings to the applicant in advance of the report being published. They contend that he was in a position to comment on the evidence on which findings were based when the tribunal counsel cross-examined him. They also note that the Supreme Court had already decided the applicant did not have a right to the tribunal's findings. In *O'Callaghan v Mahon* [2009] IEHC 428 the applicant asked the court to compel the tribunal to furnish its findings in advance of publication of the report. O'Neill J. refused saying at para. 7.2 :-

> "There is no authority the applicant could point to that supported the contention that it is a requirement of natural justice in the context of a public sworn inquiry that notice of provisional findings be given to those against whom adverse findings may be made".

The respondents are of the view that the applicant may be relying on the *ex-tempore* judgment (unreported the 24th November, 2010) of Murray C.J. also in that case, where he said that the tribunal may be required to "furnish to a person notice of any fresh allegations which could be the basis for an adverse finding in order that that person could fully respond to it". The respondents contend that when it is read in context it is clear he is not referring to allegations by the tribunal but any matters the applicant might not previously have had an opportunity to deal with during the course of the tribunal hearing or any new material which had not been made available to him in the course of the proceedings of the tribunal to that date. Murray C.J. it is submitted by the respondents merely used the term "allegations" to cover any potentially adverse material which should be put to a party and was no more than an attempt to summarise the *In Re Haughey* principles. They point to the fact he also said "it is not in issue between the parties that the conduct of the tribunal to date in relation to the issues of concern to the applicants, including specific allegations made by Mr. Gilmartin and others, has fully respected fair procedures and in particular those laid down in In re Haughey [1971] IR 217."

5. Decision
Although there was some criticism made of the findings in the Tribunal's report, it must first be noted that no challenge is made herein to the findings thereof. The case that is made by the applicant is that fair procedures were not followed and that the definition of corruption used was too vague and uncertain to allow him know what case he had to answer. Nor is there any allegation of *ultra vires*, mistake of law or disproportionality. It seems to me that the following issues arise in this case;

> (a) The allegations of corruption upon which the Tribunal based its findings were not put to the applicant during his cross examination so as to enable him exercise his so called Haughey rights. This was described by counsel as the main point in this case.
>
> (b) The definition of corruption first enunciated in 1998 by the sole member and expanded by the Tribunal in its report at para. 33 was so vague, uncertain and non specific that the applicant could not have known it could apply to a political donation made by him to a County Councillor who at the time was likely to vote or on rezoning or any other matter which could affect his interests.
>
> (c) Fair procedures required that before finalising its report, the Tribunal was obliged to furnish the applicant with a draft so as to allow him respond to any intended findings of corruption against him.

5.1 Allegations not put to the Applicant.

I note that in the Supreme Court in *O'Callaghan v. Mahon* on the 24th November, 2010, the Chief Justice at p. 2 of his judgment observed that:

> "It is common case that all the applicants were afforded, in accordance with the principals of constitutional justice, an opportunity to address and respond to any matters which were tendered to the Tribunal in the course of its hearings which might be adverse to them."

At p. 3 the Chief Justice continued:

> "It is not in issue between the parties that the conduct of the Tribunal to date in relation to the issues of concern to the applicants, including specific allegations made by Mr. Gilmartin and others, has fully respected fair procedures and in particular those laid down *In Re. Haughey* [1971] I.R. 217."

Relying on this I may conclude that the only matters under this heading that this Court need concern itself with are new, if any, allegations that had not been raised before.

5.2 The applicant argues that it was not put to him that the payments in question were corrupt, notably under a new formulation that

widens the meaning of the word corruption. He argues that had he known this he would have had many arguments to make to the effect they were nothing more than political donations to Councillors that he supported in exercise of his democratic rights. He maintains that the basis upon which the payments were found to be corrupt was not put to him. Had they been, he would have had much to say in answer.

5.3 The terms of reference of the Tribunal at A5 were to report on:

> "Any acts associated with the planning process which may in its opinion amount to corruption or which involves attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties".

In his ruling on the 21st October, 1998, the then sole member of the Tribunal interpreted the Tribunal's terms of reference. He explained that for the purposes of those terms the word "corruption" includes;

> "Destroying, hindering or perverting the integrity or fidelity of a person in the discharge of his duty, or the abuse of influence or power or duty by any person, or to bribe, or to induce another to act dishonestly or unfaithfully, or an attempt to do the same, or circumstances of control, influence or involvement with such person to the extent that it gives rise to a reasonable inference of unequal access, or favouritism, or a set of circumstances detrimental to his duties."

Clearly the investigation of corruption in the planning process was the publicly stated aim of the Tribunal.

5.4 In an explanatory memo on the rezoning module issued on the 12th December, 2003, the Tribunal set out the procedures it would adopt. Documents were gathered during preliminary investigations and furnished in the form of a brief to persons affected including the applicant here. This brief comprised over 3,000 pages long. This related to the module Quarryvale 1. Subsequently a brief in respect of Quarryvale 2 was furnished to the applicants. This brief ultimately comprised over 34,000 pages.

5.5 On the 29th November, 2005, at the commencement of the Q2 module, counsel for the Tribunal made an opening statement explaining in detail the matters, the subject of this part of the inquiry so as to enable interested parties appreciate its scope and extent. Prior to this statement, Paul Sreenan S.C. on behalf of the applicant applied for and was immediately granted representation. Clearly the applicant fully appreciated he was going to be, with others, the subject of this part of the inquiry. This was no surprise, because in correspondence commencing in November 1998, and running through to 2005, the solicitors for the applicant were informed by the Tribunal that it was investigating payments to County Councillors by him or through his companies. In the November 1998, letter it stated:

> "I refer you in particular to clause A5 of the enclosed terms of reference and I confirm that the information in question is being investigated for the purposes of this clause."

Counsel for the Tribunal stated in her opening that the upcoming hearings were rooted in the terms of para. A5 of the Tribunal's terms of reference and she quoted it.

Thus the inquiry dealing with Q2 commenced with the applicant in no doubt that payments he had made to Councillors and others were being investigated as to whether they were corrupt. It was clear he was one of the subjects of inquiry in this module.

5.6 In her opening, Ms. Dillon outlined the various payments made by the applicant which were to be investigated. In the course of doing so she referred to each of the payments set out in the schedule to the applicant's grounds relied upon in this application. These are the payments that formed the basis of the findings made in the Tribunal's report. No new payments are referred to in the report and these are the so called allegations to which the applicant's refer. Ms. Dillon having summarised all the payments in question stated:

> "In total Mr. O'Callaghan directly and through his companies, paid a sum of £104,700 approximately to Dublin County Councillors as follows: Mr. Colm McGrath, Mr. Sean Gilbride, the late Mr. Liam Lawlor, Mr. G.V. Wright and Mr. John O'Halloran."

And she further stated:

> "The Tribunal will inquire into all of the circumstances surrounding these payments, their sources, utilisation and treatment in the hands ofMr. O'Callaghan or his related companies and each recipient namely Messrs Gilbride, O'Halloran, Wright, McGrath and the late Mr. Lawlor so as to establish the nature, purpose and the amount of the payments and to whether or not these payments were connected with the zoning or rezoning of the Quarryvale lands."

All of this, as she had stated at the outset, was rooted in the terms of para. A5 of the terms of reference. In short these payments would be investigated to determine if they were corrupt. There could have been no doubt of this in anyone's mind least of all those circulated with the brief and granted representation such as the applicant. That this is actually so is readily apparent from an examination of the written submissions made to the Tribunal in two separate books. Even the most cursory examination shows the applicant and his legal advisers fully aware of the possibility of a finding of corruption in relation to the relevant payments. See tab 2 of book 1 at p. 8 headlined "Understanding the Functions of the Tribunal".

> "The function of the Tribunal is to find facts and report to the Dail- whether this permits the Tribunal to make a finding of corruption."

Further at para. 35 in this section there is clear appreciation that under the terms of reference the Tribunal may inquire into acts in relation to the planning process that may in its opinion amount to corruption although the submissions question whether this means it can make a finding of corruption. Later in Book 2 after green divider 4 at tabs 4 and 5, the submissions directly address the payments referred to by Ms. Dillon. The applicant was clearly aware of what payments were being referred to, but was also defending them - they were political donations not corrupt payments. He further argues the specific allegations ofMr. Gilmartin were untrue, dramatic, uncorroborated and contradictory. The submissions state explicitly:

> "It will also be shown the payments made by Owen O'Callaghan were not corrupt."

I am satisfied that all payments referred to in its report as forming the basis of the Tribunal's finding of corruption were put to the

applicant in such a way as to alert him and his legal advisers to the possibility they might be found to be corrupt and so as to allow him fully explain and answer. There were no new allegations and there could have been no doubt that the applicant was aware that the payments were being investigated to determine whether they were corrupt.

5.7 The definition of corruption

There is some doubt as to whether this aspect of the case has been properly raised in the grounds. It is raised in para. 32 in a rather vague way that has been described, not inaccurately, by Mr. McDonnell as a rolled-up plea. Such "rolled-up plea" is not permissible. This notably so when it is accompanied by a list of more specific grounds, see *A.P. v. Director of Public Prosecutions* (Unreported, Supreme Court, 25th January, 2011). Ground 32 raises two complaints. First that the definition of corruption is vague, uncertain and non specific. Paradoxically this description may justifiably be made of this part of ground 32 itself. The second part of the complaint made is that those allegations of corruption were not put to him so he could answer.

5.8 Taking the first part of this ground- the original definition by the sole member which was published in 1998 is now well beyond challenge. It can only be to the expanded definition as set out at para. 33 of the report that I can look. Even were this not so, I see nothing wrong with the sole member's definition. Corruption is not an easy thing to define. It may be nuanced by context and thus difficult to pin down precisely. In my view the original definition was a good one. The fact it was very comprehensive simply reflects the complexity of the task with which the Tribunal was charged. Moreover, no objection was taken in their submissions to the Tribunal by the applicant's legal advisers. Neither they nor the applicant himself demonstrated any difficulty with understanding what corruption meant during the cross examination process.

5.9 As to the broader definition contained in para. 33.03; the matters dealt with in (i), (ii), (iii), (iv), (v), and (vii) refer to Councillors only. Only item (vi) refers to developers and thus to the applicant. This stated:

> "The payment or promise (expressly or by implication) of the payment of money (or monies worth or other favour) by a developer/landowner (or his agent) to an elected Councillor (or a person standing for election to that office), in circumstances where the developer/landowner was or was likely to be, or to become, the subject of a decision by the County Council in which the Councillor was an elected public representative (or if standing for election, might become a elected public representative) and in which capacity he/she would be entitled to exercise the right to vote, or to otherwise act, was, subject to a full consideration of all the circumstances improper, inappropriate and/or probably corrupt."

Does this further definition, if it can be called that, raise matters that should have been but were not notified to the applicant so he could deny corruption in its context either in his cross examination or in submissions. If so, such matters have not been identified by me during the hearing. The applicant had the opportunity to answer in respect of payments made. Details were put to him. He knew it was being investigated as to whether they were corrupt payments. He knew he was likely to be a subject of a decision by the Local Authority of which the Councillor recipient was a member in which capacity he would be entitled to vote. Notably this was to be considered subject to a full consideration of all the circumstances. There is nothing I can find in this expanded "definition" of which the applicant had not full knowledge and plenty of opportunity to explain and justify.

5.10 Was the Tribunal required to furnish a draft report to the applicant;

This question has already been comprehensively answered by O'Neill J. in *O'Callagahn v. Mahon* [2009] IEHC 428. The reliefs sought herein are orders quashing the findings made against the applicant contained in the Tribunal report, deleting the said findings and a declaration they were made in breach of natural/constitutional justice and/or fair procedures. In this case, apart from the complaints dealt with above, this relief was sought on the grounds set out atE14, 16, 19 and 20. These were that the applicant asked for and was refused a draft of the report containing any proposed adverse findings against him to allow him make submissions thereon. At para. 4.1 of his judgment in the above case, O'Neill J. stated:

> "The core issue that falls to be determined in these proceedings is whether or not the applicants are entitled to notice of the provisional or preliminary findings of the tribunal on matters affecting the applicants, to enable them to address their submissions to these findings."

Outlining the submissions made to him at para. 5.1 of his judgment, O'Neill J. describes the case being put by Mr. Sreenan S.C. for the applicants. It is precisely the same argument raised in these proceedings. In his decision at para. 8.1 O'Neill J. states:

> "Given the four sources of notification emanating from the tribunal, as described in para. 3 above, there is no question but that the applicants have had ample notice of the evidence that was of individual concern to them and there is no question but that they have had an ample opportunity to deal with it. That being so, the applicants have not satisfied me that they are in any way impeded in making submissions or in dealing with additional facts that arose in evidence concerning them. In my view, if the applicants know the evidence, they can address it and can deal with it, notwithstanding that it may be a burdensome task because of its large volume. The mere fact that this task is burdensome because of the extent of the inquiry and the evidence and written material it generated, cannot, in order to vindicate the applicants constitutional rights to fair procedures and natural justice, require that the applicant be given, as they demand in these proceedings, the provisional findings of the tribunal in so far as these affect them. There is no authority for a procedure such as this in the context of a full public inquiry. The applicants' apprehension that they would somewhat or entirely miss or misinterpret certain matters adverse to them or the significance of them, is in the context of the inquiry to date, the degree of disclosure, the nature of the matters under inquiry and the participation by them in person and through legal representation in the inquiry, somewhat unreal or unconvincing. I am quite satisfied that the applicants' rights to fair procedures have, at this point in the work of the inquiry, been fully vindicated. The point has now been reached in the inquiry when all the evidence has been heard and subject only to the consideration of the submissions of the affected parties on that evidence, nothing remains but to leave the tribunal alone to make its findings and recommendations (if any). It is in the nature of all courts and other fact finding tribunals that this ultimate stage must be reached, when the parties affected must let go and permit the tribunal to freely exercise its independent judgement in the adjudication on the evidence given in the light of the relevant submissions made."

And later at 8.3:

> "... It is clear that in the instant case the applicants know the evidence that has been given and are in a position to address their submissions to those items of evidence that are adverse them. For this reason I am satisfied that there is no want of fair procedures or natural justice in the denial to them of the relief now sought."

I gratefully adopt the reasoning of O'Neill J. which is directly applicable herein and is dispositive of the applicant's case under this heading.

6.11 To summarize; I am satisfied that there were no new allegations made in the Tribunal's report which the applicant had not the opportunity to answer. Throughout the proceedings of the Tribunal including in pre hearing correspondence and in the opening statement of counsel for the Tribunal, it was made clear to all that the applicant was being investigated in relation to payments made to councillors and others as to whether those payments were corrupt. Through his evidence, through his counsel and in his written submissions furnished after the hearing, he had every opportunity to explain, rebut or excuse these payments. As to the definition of corruption impugned herein, it is far too late to challenge the 1998 definition of corruption set out then by the sole member Mr Justice Flood. No challenge thereto was made by the applicant during the Tribunal's proceedings including during the hearing. No difficulty with this definition was expressed by either the applicant or his legal advisers. Insofar as the Tribunal in its report at paragraph 33 expanded on what it would consider as corrupt, there was nothing therein of which the applicant or his advisers had not the fullest notice and the opportunity to address. There were no new allegations. Finally, whilst the law in relation to Tribunals may be different in the United Kingdom, the law of Ireland is clear and established. In Tribunals such as is involved herein, there is no obligation on the Tribunal to furnish a draft of its report for comment to those against whom adverse findings may be made. The reliefs sought are refused.