

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 No.324 JR]

BETWEEN**OWEN O'CALLAGHAN****APPLICANT****AND**

**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 O'Neill J. delivered the 29th day of July, 2005**

1. The respondents are the moving party in this application which was initiated by notice of motion, in which the respondents seek the following reliefs:

1. A declaration that the respondents herein are in compliance with the order of the High Court dated the 14th July, 2004, in providing to the applicant the redacted documents as exhibited in the grounding affidavit of Susan Gilvarry sworn on the 15th April, 2005.

2. Further in the alternative and orders specifying the documents or parts thereof which are to be provided to the applicant herein by the respondents in compliance with the order of this on other court date of the 14th July, 2004.

2. The notice party was served with the notice of motion but there was no appearance by him or on his behalf at the hearing of this application.

3. The part of the order of this court of the 14th July, 2004 that is relevant to this application is in the following terms:

"The court doth declare that the refusal by the respondents to permit the applicant through his legal representatives access to the documents which are relevant to the present or current module of the inquiry (and not to include notes by counsel solely for their purposes but to include information recorded or transcribed from the notice party by counsel), recording prior oral and written statements by Tom Gilmartin to the Tribunal of Inquiry into Certain Planning Matters and Payments for the purpose of cross-examining the said Tom Gilmartin amounts to a failure by the respondents to observe and protect the applicant's right to fair procedures and to natural and constitutional justice."

4. The following two passages from my judgment delivered on the 7th July, 2004, have been referred to as relevant to this application. The first of these is on p.26 of that judgment and is as follows:

"The tribunal also apprehended a threat to the management of its business by the mixing of material from one module to another. In this case we are concerned only with a very limited category of documents, and of those, only those parts relevant to the current module of the tribunal. In my view in these circumstances there is no risk of bringing the kind of chaos to the business of the Tribunal that has been mentioned."

5. The other passage occurs at p.27 and is as follows:

"Accordingly I will grant the declaration sought in the applicant's statement of grounds but will amend the declaration as sought so as to confine the documents concerned to those documents which are relevant to the present or current module of the inquiry. I should make it clear, in this regard, also, that the declaration is not to include notes made by counsel solely for their own purposes, but is to include information recorded or transcribed from the notice party by counsel..." My judgment was appealed to the Supreme Court and by its judgments delivered on the 9th March, 2005, the Supreme Court affirmed the order of this court made on the 14th July, 2004.

6. The factual background to this matter is fully set out in my judgment of the 7th July, 2004 and in the judgment of Hardiman J. of the 9th March, 2005, and does not require repetition here.

7. The following passages are from the judgment of Geoghegan J. with whom Murray C.J. and Denham and Fennelly J.J. concurred appear to bear on the issues arising in this application and they are as follows (at p.4):

"For the purposes of disposing of this appeal and bearing in mind these observations of Henchy J., I think it is sufficient to rely only on In Re. Haughey [1971] I.R.271 and to state that the tribunal in this case did not comply with the requirements of the Supreme Court laid down in that case."

8. At p.5:

"The tribunal did not claim that it was absolutely hide-bound by its own policy or by any rules or systems which it may have devised and, quite rightly so, because whereas the tribunal undoubtedly has the latitude which I have suggested and which may not be available to a court of law, it is always bound to ensure, as far as possible, compliance with constitutional rights and obligations and that, of course, includes the vindication of the person's good name. For all the reasons put forward by Hardiman J. much more eloquently than I would be able to do, it was absolutely essential that the documents and materials which were sought for the purposes of carrying out a worthwhile cross-examination in the extraordinary circumstances where wild allegations were flying around the tribunal against Mr. O'Callaghan and of which he had no prior notice, be duly produced..."

9. In his judgment Hardiman J. said the following commencing at p.46:

"I have already contrasted the situation which arose before the tribunal, where allegations of great gravity and involving (if true) great turpitude, and depending in large measure on the credibility of a single witness, were made without notice, with other situations which might arise before an inquiry of some sort. The requirements of natural justice will naturally vary depending on the gravity of what is alleged, whether or not personal responsibility is to be established, whether there is a 'paper trail' or other body of uncontradicted evidence or corroboration available, whether the inquiry

sits in public or in private and other matters. Enquiries which do not seek to fix individuals with responsibility for grave wrongdoing or which, like the Oireachtas DIRT enquiry, have a large volume of uncontradicted material before it, are in obvious contrast to what the facts of this case reveal. No doubt any Court, asked to review a procedural decision of such an enquiring body, would give full weight to those factors, and refrain from interfering lightly with their legitimate procedural discretions. But this tribunal is at another extreme, and features

- *very grave allegations some of which, if true, would constitute breaches of the criminal law,*
- *clear and obvious attacks on the good name of Mr. O'Callaghan which is constitutionally protected,*
- *the personal credibility of Mr. Gilmartin as a vital factor,*
- *little or nothing in the way of paper trail or corroboration.*

- immediate and extensive media coverage of un-notified allegations. These features, even without the other procedural and substantive oddities and novelties set out in the first section of this judgment, seem to me to require all of the Re Haughey rights, and a very full scope for their exercise, on the part of a person impugned...."Following upon the judgments and order of the Supreme Court the respondents conducted an extensive search to find documents which were required to be disclosed pursuant to the order of this court as affirmed by the Supreme Court. This search revealed a total of 54 documents which later became 56 documents because of the inclusion of 2 additional versions of the transcript of an interview between the notice party and his then solicitor.

10. The respondents now wish to make a very substantial number of redactions in these documents for a variety of reasons which are deposed to in the affidavit of Susan Gilvarry sworn on the 15th April, 2004. The several categories of redactions and the reasons therefore are set out in paras. 6 to 16 of that affidavit inclusive and to each redaction is attributed a letter for identification purposes, i.e. A to K inclusive.

11. These paragraphs in the affidavit of Susan Gilvarry are as follows:

"6. The redactions marked with the letter 'A' contain notes to file by counsel to the tribunal. The tribunal has made these redactions as this information was excluded by the terms of the order of the High Court.

7. The redactions marked with the letter 'B' refer to the file path identifying where the documents can be found in the tribunal records. The tribunal has made these redactions as this information was excluded by the terms of the order of the High Court.

8. The redactions marked with the letter 'C' refer to matters redacted on the premise that nothing in the redaction is recorded or transcribing anything said either verbally or in writing by Mr. Tom Gilmartin. The tribunal has made these redactions as this information does not fall within the terms of the order of the High Court.

9. The redactions marked with the letter 'D' refer to material which the tribunal has determined it will not investigate in public in the course of this module. The tribunal has therefore made these redactions as it is of opinion that this information should not be provided pursuant to the terms of the order of the High Court.

10. The tribunal has conducted a private inquiry in relation to the subject matter of the redactions marked with the letter 'E'. The tribunal determined that there was not sufficient evidence to warrant proceeding to a full public inquiry at this time. The tribunal has therefore made these redactions as it is of the opinion that this information should not be provided pursuant to the terms of the order of the High Court.

11. The redactions marked with the letter 'F' refer only to personal details of an individual. The tribunal has made these redactions as it is of the view that publication of this material might constitute an unjustified interference with the rights of third parties.

12. The redactions marked with the letter 'G' refers to the name of an individual who is not the subject of any inquiry in the current module. The tribunal has therefore made these redactions as it is of the opinion that this information should not be provided pursuant to the terms of the order of the High Court.

13. The redactions marked with the letter 'H' refer to material the publication of which in the view of the tribunal may adversely affect the rights of third parties.

14. The redactions marked with the letter 'I' refer to conversation between Mr. Gilmartin and a deceased person. This material is therefore not capable of determination by the tribunal and the tribunal has redacted the material for that reason.

15. The redaction marked the letter 'J' refers to advice given to Mr. Gilmartin by his then solicitor/counsel. The tribunal has made these redactions as it is of the opinion that this information should not be provided pursuant to the terms of the order of the High Court.

16. The redactions marked with the letter 'K' relates to Mr. Gilmartin's relationship and other dealings with his then solicitor. The tribunal has made these redactions as it is of the opinion that this information should not be provided pursuant to the terms of the order of the High Court."

12. Ms. Gilvarry goes on to say the following at paras. 17, 18 and 19 of her affidavit:

"17 I say that the tribunal is mindful of the rights and entitlements of third parties, which must be upheld by the tribunal in the carrying out of its statutory functions. Some of these third parties are unrepresented before the tribunal. Other third parties are represented but not in relation to the subject matter of the redactions in question. I say and believe that some of the redacted material and in particular materials at categories (D), (E), (F), (G), and (H) above, contain information which might be highly prejudicial to third parties if that material were to be circulated or released in public at this time.

18. *I say that the tribunal is particularly mindful of the prejudice that would arise where the material relates to allegations, which the tribunal does not intend to investigate in public. The publication of such material could therefore be highly prejudicial to a party against whom allegations are made in circumstances where that party could be left without a forum which any such allegation or prejudicial material could be addressed or rebutted.*

19. *I say that the tribunal is of the view that were it to circulate such information as is contained in those categories it would be failing in its statutory duty and be encroaching on the constitutional rights of third parties."*

13. The applicant through his counsel takes objection to all of these redactions except those in categories 'A' and 'B'.

14. Since the order of the High Court was affirmed by the order of the Supreme Court the tribunal has commenced upon the business of what has become known as the "Quarryvale II" module, by which is meant that documentation in relation to that module has now been circulated to interested parties. Because of this the respondents accept that the restriction in the order of this court made the 14th July, 2004, should be applied, so as to include the Quarryvale II module in its obligation of disclosure.

15. In addition to the contentions made in the affidavit of Susan Gilvarry by Mr. Finlay S.C. it was submitted that the extent of disclosure and therefore the scope for redactions is to be informed by the purpose for which a disclosure is made in the first place, namely, to enable the applicant to cross-examine the notice party on inconsistencies between his sworn evidence in the public inquiry and statements oral or written made by him prior to that and also, as to the failure to have disclosed to the tribunal in its private investigative stage, material given in oral evidence in the public inquiry.

16. In support of this submission reference is made to passages in the judgment of Hardiman J. dealing with the importance of the question of consistency or inconsistency to the credibility of a witness and also to passages from my judgment delivered on the 7th July, 2004.

17. It was submitted that the applicant was not entitled to reargue the issues which led to the judgments of this court and the Supreme Court and the order of this court as affirmed by the Supreme Court and hence the disclosure which they were entitled to, of written or oral statements of the notice party was confined to utterances by him which could be said to be inconsistent with his oral evidence or in respect of which he was silent prior to giving his oral evidence. Necessarily excluded therefore from disclosure as being outside the terms of the High Court order would be disclosure of information which notwithstanding its potential impact on the credibility of the evidence of the notice party, was either unrelated to factual allegations under inquiry in either the Quarryvale I or Quarryvale II modules and/or could not be used for the purposes of demonstrating inconsistency. It was submitted that matters disclosed by the notice party to the tribunal in its private investigative stage and never repeated elsewhere could not be said to be inconsistent with anything. It was submitted that the applicant had applied to the High Court for disclosure solely for the purposes of demonstrating inconsistency between the oral evidence of the notice party and prior statements or for the purpose of demonstrating silence in the private investigative stage in respect of evidence given in the public inquiry. The applicant, it was submitted, sought and was successful in obtaining disclosure for that purpose but confined to that purpose as is amply demonstrated in the High Court order itself. It is not now open to the applicant to seek a much broader range of material for the purposes of demonstrating that things that were said to the tribunal in private concerning the applicant and a considerable number of other individuals, were either outlandish or demonstrably false or in respect of which enquiries would reveal them to be false, notwithstanding that in other forensic fora this range of disclosure might be available to the applicant and indeed if it were available might significantly impact on the credibility of the evidence of the notice party.

18. The applicant submitted that a central issue if not the central issue in both modules is an assessment of the credibility of the notice party. Reliance was placed upon the above quoted passages from the judgment of Hardiman J. and Geoghegan J. as supporting the proposition that the applicant was entitled to the fullest scope of disclosure for the purposes of conducting a meaningful cross-examination of the notice party. Hence it was submitted, that, as the redacted material was capable of a bearing upon the credibility of the notice party either because it would reveal a series of outlandish or outrageous allegations against a wide variety of people or it could be easily demonstrated to be false. In order to vindicate the applicant's right to his good name he was entitled to that broad range of material for the purposes of cross-examining effectively the notice party as to his credibility. It was submitted therefore that in assessing the validity of the various categories of redaction that these categories could only be justified on the basis that the material redacted under each category was irrelevant to the credibility of the notice party. It was submitted that as no issue of privilege was raised the only basis for redaction would be irrelevance to the central issue of credibility. It was submitted that relevance in this context could not be confined to the factual matrix of the modules in question.

19. It is submitted that if the applicant was inhibited in his attack on the credibility of the notice party by having withheld from him material relevant to the credibility of the notice party in the possession of the tribunal; that would undermine the public nature of the inquiry. It was further submitted that the applicant's right to defend his good name, it having been impugned by the notice party, could not be sacrificed in order to protect the privacy of other person against whom allegations apparently, were also made by the notice party. It was further submitted that the tribunal was inconsistent in its approach to the rights of privacy of other parties as demonstrated *inter alia* in the content of their grounding affidavit for this application.

20. It was submitted that Geoghegan J. in his judgment did not dissent from the judgment of Hardiman J. in respect of the scope of the material to be disclosed in this case.

21. It was submitted relying upon the authority of the *Taylor* case that the applicant must have access to the full record of interviews between the notice party and counsel for the tribunal in order to understand or fully appreciate the content of these interviews. Without a full disclosure of statements apparently emanating from counsel the applicant was left with the impression or apprehension that inducements or assurances were offered to the notice party which could affect the credibility of his evidence.

22. It was further submitted that the fact that the statements of the notice party were in themselves insufficient to persuade the tribunal that there would have been what was described by Hardiman J. as the bare minimum threshold of evidence necessary to move into a public inquiry, necessarily impugned or indicted the credibility of the information given by the notice party and that these statements to the tribunal by the notice party should be disclosed to the applicant to assist him cross-examine the notice party as to his credibility and also to assist counsel for the applicant to make submissions to the tribunal on the issue of the notice parties credibility.

23. It is submitted that it was important for the applicant to be able to show that there had been a large number of allegations made which could be demonstrated to be untrue by reference to objective fact. It was further submitted that some of the allegations shrouded by categories 'D' or 'E' might very well refer to the applicant himself.

24. It was submitted that insofar as there was personal detail disclosed of other parties, that these details could be demonstrated to be false, a factor which could have a bearing on the credibility of the evidence of the notice party. It was submitted that the applicants capacity to attack the credibility of the notice party could not be limited by the happenstance that the person referred to or against whom an allegation was made by the notice party was one who was caught in the arbitrary definition of the current module.

25. Insofar as deceased persons were concerned, as in category 'I', it was submitted that what was said concerning these or to these persons might easily be demonstrated to be false and furthermore that in respect of conversations with deceased persons this category was not consistently applied by the tribunal.

It was submitted that the scope to redact in a document required to be disclosed should be construed strictly.

DECISION

26. In my opinion is seeking to redact material from a document the general content of which must be disclosed, there is not greater onus of proof or different standard of construction than would be the case if the redacted material were in an entirely separate and self contained document. It is immaterial in my view that the material sought to be redacted is included in a document which must otherwise be disclosed.

27. The central issue on this application is whether or not the material to be disclosed is confined to the factual matrix or factual allegations under inquiry in either the Quarryvale I or Quarryvale II modules or whether, as is contended for by the applicant, all written or oral statements by the notice party made to the tribunal or in the possession of the tribunal which could be relevant to the credibility of the notice party should be disclosed? Depending upon which way that question is answered, one can then assess the validity of the various categories under which redactions are made.

28. At the outset it was conceded by the applicant that redactions made under categories 'A' and 'B' are permissible.

29. I have read all of the redacted material and I am satisfied that the material redacted under categories 'J' and 'K' could not realistically be of any assistance to the applicant in cross-examining the notice party as to his credit. I say that having regard to the very broad range of material which the applicant submits he is entitled to see.

30. Insofar as material is redacted, as is the case under categories 'F', 'G' and 'H', on the grounds that the material affects the privacy of third parties, I am not satisfied that these grounds of redaction are permissible.

31. It must be borne in mind, as has been alluded to, that the individuals affected do of course have a right to privacy but that is a right which not just the tribunal but also the applicant must respect and observe and in my view the applicant could only use any material disclosed solely for the purpose of defending his good name by means of cross-examination in the tribunal or where appropriate the calling of rebuttal evidence. In my view the express constitutional right of the applicant to his good name and to defend his good name must prevail over the right to privacy of other individuals in respect of whom statements are made by the notice party, but only to the extent that disclosure of material which might offend their right to privacy is absolutely necessary for the purpose of enabling the notice party to defend his right to his good name.

32. In this regard it would be appropriate for me to impose in my order restrictions on the use which may be made of material disclosed to the applicant on foot of the order of this court.

33. Insofar as category 'I' is concerned in my view the respondents have failed to demonstrate to my satisfaction that there is good reason for withholding this material from the applicant. As was argued by the applicant notwithstanding the fact that a party to a conversation may be deceased, the statements made by the notice party in this conversation may still be capable of being demonstrated to be untrue.

34. This brings me to category 'C'. Having read the material redacted under this category I am not satisfied that the applicant is in any way disadvantaged or deprived of material relevant to the cross-examination of the notice party on the issue of his credibility, approaching the matter from the standpoint argued by the applicant, namely that all material relevant to the issue of credibility should be disclosed.

35. This then brings me next to categories 'D' and 'E' which pose the central question on this application.

36. The first thing to be noted is that the problem apprehended by the respondents when the matter was initially heard, namely bringing chaos to the business of the tribunal by the mixing of material from one module to another, does not now arise having regard to the fact that the tribunal has moved on to deal with the Quarryvale II module. However the respondents now apprehend what they perceive to be an even more serious threat to the orderly business of the tribunal from the disclosure of material redacted under categories 'D' and 'E', in that they say that if this material was disclosed it would have the affect of bringing into the business of the tribunal in the current modules i.e. Quarryvales I and II issues or subjects which insofar as category 'D' is concerned it had determined it was not going to investigate in public and insofar as category 'E' was concerned it did not at this time intend to investigate further.

37. It has to be borne in mind however that this application before me is essentially two stages back from that prospect. Firstly if this material is disclosed to the applicant it cannot be anticipated at this stage what use the applicant will make of it. Undoubtedly some of it will be used for the purposes of cross-examination and undoubtedly also the applicant might seek to call evidence to rebut things said by the notice party. Secondly, as has been said many times, the respondents are the masters of their own procedures and if these issues come up, then the tribunal will be required to make rulings on the extent to which it will allow issues to arise for determination by it, arising out of the disclosure of this material. In this regard also of course the tribunal will be confined by its own terms of reference.

38. Suffice it to say at this stage, it would be both premature and indeed inappropriate for this court to make its determination on the issues raised in this application, on the basis of the extent of the issues what might be canvassed by the applicant, arising out of the disclosure of the redacted material when that is not yet apparent, and inappropriate in the sense that it is for the tribunal to rule on these questions when they arise if they do arise in due course.

39. The more fundamental question that arises is whether or not the order of this court of the 14th July, 2004, is capable of encompassing material redacted relevant to the issue of the notice parties credibility but not directly relevant to the factual allegations in modules Quarryvale I and Quarryvale II.

40. In my view this question has to be approached from the point of view of vindicating the applicant's constitutional right to his good name and in particular his right to conduct a worthwhile or meaningful cross-examination for the purposes of the defence of his good name. In the course of his judgment quoted above Hardiman J. said that having regard to the nature of the allegations and the circumstances prevailing, that "*a very full scope*" for the exercise of his right to cross-examine would have to be afforded to the applicant. Geoghegan J. talked in terms of the applicant being put in a position to conduct a worthwhile cross-examination.

41. Could it be said that without access to this redacted material the credibility of the notice party could be fully and properly tested by counsel for the applicant in cross-examination? In my view the answer to that question is in the negative. In any other forensic contest where credibility was an issue and where material of the kind which is redacted under categories 'D' and 'E' was in the possession of an amenable party it could not be seriously argued that it should not be made available to a party damaged by allegations of the kind made against the applicant.

42. I am satisfied that in order to vindicate the applicant's constitutional right as aforesaid, it is necessary that those who have the responsibility for defending the applicant's good name, i.e. his legal advisors and in particular counsel, should have access to this redacted material for the purposes of cross-examining the notice party.

43. Whilst there is a risk of interference with what may be described as the orderly conduct of its business by the tribunal, it must be said as it has indeed on many occasions in the past in many fora, that administrative convenience or order, cannot prevail over the administration of justice.

44. I am satisfied therefore that the order of the 14th July, 2004, must of necessity, extend to material relevant to the issue of the notice parties credibility but not directly relevant to the factual allegations in modules Quarryvale I or II. I have reached that conclusion for the paramount reason of the necessity to vindicate the constitutional right of the applicant, to his good name.

45. I have come to the conclusion therefore that material redacted under categories 'D' and 'E' should be disclosed to the applicant's legal advisors.

46. It is appropriate in my view that the disclosure of this material should be subject to the kind of restriction that goes with the disclosure of material on discovery of documents in civil actions, namely, that the material can only be used for the purposes for which it is disclosed in the proceeding in question and for no other purpose. Accordingly therefore I would make an order restraining the applicant from using this material for any purpose other than the cross-examination of the notice party or for necessary enquiries related thereto.

Summary

(1) Categories of redactions permissible A, B, C, J, K.

(2) Categories of redactions not permissible D, E, F, G, H, I.