THE HIGH COURT

[2005 No. 1367 P]

BETWEEN

GEORGE REDMOND

PLAINTIFF

AND

MR. JUSTICE FEARGUS FLOOD (THE FORMER SOLE MEMBER OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS), HIS HONOUR JUDGE ALAN MAHON, HER HONOUR JUDGE MARY FAHERTY AND HIS HONOUR JUDGE GERALD KEYES (THE MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS), IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 28th day of March, 2012

Introduction

1. Pursuant to a motion, dated the 4th July, 2011, as brought by the first, second, third and fourth defendants (collectively, unless the context suggests otherwise, "the Tribunal Defendants"), orders are sought dismissing the plaintiffs action on a number of grounds, namely inordinate and inexcusable delay; the interests of justice or the public interest or both, and the jurisdiction under Order 27, rule 1 of the Rules of the Superior Courts 1986 (as amended) (the "R.S.C.") to dismiss an action for want of prosecution. The matter came on for hearing on the 17th and 18th January last.

2. While the fifth and sixth defendants ("the State Defendants") also brought a similar motion against the plaintiff ("Mr. Redmond") and submitted written submissions to the court, on the second day of the hearing the proceedings against the State Defendants were struck out without any order by agreement between all parties.

Factual Background

3. The Tribunal of Inquiry into Certain Planning Matters and Payments (otherwise the "Flood" and later the "Mahon Tribunal", or simply the "Tribunal" unless the context implies otherwise) was established by resolution of Dáil Éireann and appointed by instrument of the Minister for the Environment and Local Government dated the 4th of November, 1997. The terms of reference of the Mahon Tribunal have been amended on four occasions since its inception.

4. As part of the Tribunal's inquiry, the plaintiff was required to attend public hearings, to give evidence and to make discovery of certain documentation in his possession. On the 15th October, 2004, which was Day 528, at pp. 59 - 62, the Mahon Tribunal refused Mr. Redmond's application for costs (the "Costs Decision"). In the course of this decision, Judge Mahon made references to the findings of Mr. Justice Flood that Mr. Redmond had obstructed and hindered the Tribunal and also a number of findings of corruption which were made against him (the "Substantive Findings"). These are set out in The Third Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (the "third interim report") dated the 30th September, 2002. The publication of the third interim report was delayed pending the determination of criminal proceedings against Mr. Redmond until the 21st January, 2004, when it was then published.

5. Before turning to the plenary summons, it must be noted that Mr. Redmond was convicted on charges of corruption on the 19th November, 2003, sentenced on the 19th December, 2003, and imprisoned for a period of 12 months. The Court of Criminal Appeal quashed his conviction on the 28th July, 2004, did not direct a re-trial and he was accordingly released. He was subsequently tried on two separate charges of corruption and in May 2008 the jury failed to reach a verdict on the first count, while he was acquitted on the second count.

6. The original plenary summons was issued on the 14th April, 2005, and served the following day. The general endorsement of claim sought a number of reliefs. In particular the plaintiff sought substantive reliefs which were framed as declarations and can be paraphrased in the following terms:

> (i) a declaration that provisions of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 (as amended) were unconstitutional;
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> (ii) a declaration that findings of the first defendant were invalid and void for lack of jurisdiction;
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> (iii) a declaration that the finding that the plaintiff had received a corrupt payment and that he had hindered and obstructed the Tribunal and therefore that he was not entitled to the costs of his legal representation amounted to a determination of criminal guilt and the imposition of a penalty which constituted the administration of justice and was therefore unconstitutional;
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> (iv) a declaration that the provisions of the Tribunals of Inquiry (Evidence) (Amendment) Acts 1921-2004 which purport to authorise the Tribunal to compel the attendance of a person at public sittings and to make discovery of documents without providing for the reimbursement of expenses was unconstitutional;
>
> (v) a declaration that the finding made against the plaintiff in circumstances where his right to cross examine was curtailed and where he was not permitted to call witnesses or to adduce evidence was unconstitutional;
>
> (vi) a declaration that the manner in which the Tribunal conducted its investigation, the scope of that investigation and its scale were, in the absence of legal aid or a guarantee that costs would be reimbursed, an unjust attack on the plaintiff's good name;

(vii) a declaration that proceedings of the Tribunal (including *inter alia* the finding of a corrupt payment) constituted a contravention of the provisions of the European Convention of Human Rights Act 2003; and

(viii) a declaration that the plaintiff is now entitled to be indemnified by the State in respect of all costs incurred by him in his dealings with the Tribunal.

The plaintiff also sought damages under various headings, costs and "further or other relief'. In essence, therefore, the plaintiff's claim is primarily targeted at the substantive findings made against him, as well as the decision to refuse to grant him his costs.

7. An appearance was then entered by the Tribunal Defendants on the 15th April, 2005. An appearance was similarly entered for the State Defendants on the 27th May, 2005. In the letter enclosing same, The Chief State Solicitor noted that he "looked forward to receipt of [the plaintiff's] Statement of Claim by return". Mr. Redmond's then solicitor indicated that he was unable to facilitate this "request" on a number of grounds. It was claimed that as a copy of the Costs Decision was still awaited, and given the amount of documentation and the limited resources available to the plaintiff, the statement of claim would not be delivered prior to the end of July 2005.

8. The Chief State Solicitor wrote again on the 25th November, 2005, enquiring as to the statement of claim. The plaintiff's solicitor responded on the 17th January, 2006, noting that the firm had been concentrating on Mr. Redmond's criminal trials which concluded in December 2005. He then went on to note that a decision was awaited in the "JMSE Limited" action but that if no judgment was delivered soon then counsel would be briefed "any way with a view to delivering a Statement of Claim next term" (i.e. Easter 2006). The Chief State Solicitor then wrote to Mr. Redmond's solicitor on two further occasions, by letters dated the 6th September, 2006, and the 27th June, 2007, requesting a statement of claim with the latter also threatening a motion to dismiss for want of prosecution. No response, substantive or otherwise, appears to have been forthcoming from Mr. Redmond.

9. The matter then appeared to fallow somewhat. The plaintiff issued a notice of change of solicitors dated the 13th May, 2010. This was followed by two notices of intention to proceed, dated the 13th May, 2010, and the 24th May, 2011, respectively.

10. By a letter dated the 16th April, 2011, the solicitors for the plaintiff then wrote to the Tribunal Defendants and noted that the 2010 notice of intention to proceed was served following the delivery by the Supreme Court of the judgment in *Murphy v Flood* [2010] 3 I.R. 136 on the 21st April, 2010. It was further noted that the plaintiff:

> "[...] had indicated prior to delivery of that Judgment that the issues raised in that case were quite pertinent to our own client's case and that we would not be delivering a Statement of Claim until that judgement was delivered. [*sic*]"

11. In the same letter it was also noted that delivery of the plaintiff's statement of claim was being withheld pending the delivery of a judgment in the case of *Caldwell v Mahon Tribunal & ors* [2011] IESC 21 on the grounds that it was anticipated that it would clarify further issues in relation to the plaintiffs case.

12. The Tribunal Defendants responded on the 6th May, 2011, and in their letter noted that no indication, in the form described, had been received. Furthermore, the Tribunal Defendants did not accept that any decision in *Caldwell* was sufficient to prohibit the plaintiff from delivering his statement of claim.

13. The present motion was then issued and served on the 7th June, 2011. Given the nature of the application, it is useful to describe generally the positions adopted by the parties at the hearing.

Submissions of the Tribunal Defendants

14. The Tribunal Defendants' claim is relatively net. It is said that the plaintiffs claim ought to be dismissed on the grounds that he has delayed unduly in progressing his case against the Tribunal Defendants. The delay involved is contended to be inordinate and inexcusable, and has had the effect of prejudicing the Tribunal Defendants with the result that the balance of justice should favour the requested dismissal.

15. Three general periods of delay are identified by the Tribunal Defendants. The first is the period of approximately 15 months from the publication of the third interim report and the making of the Substantive Findings until the service of the plenary summons on the 15th April, 2005. Included in that period is, what might be referred to as, a sub-period of six months from the delivery of the Costs Decision on the 15th October, 2004, until the service of the plenary summons. The second is a period of *circa*. five years from the delivery of the plenary summons until the 21st April, 2010, when the decision in *Murphy v Flood* [2010] 3 I.R. 136 was handed down by the Supreme Court. The third and final period of delay complained of is that of a 13 month period from the 21st April, 2010, until the present motion was issued on the 7th June, 2011.

16. The Tribunal Defendants contend that the reliefs sought are mostly *certiorari* reliefs, with certain exceptions. It is suggested that although the proceedings were brought by way of plenary summons and seek various declaratory reliefs, they are, in substance, judicial review proceedings and therefore the time limits prescribed under O. 84, r. 21 R.S.C. should apply which provides that:

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

Reliance, in this regard, is also placed on the decision of Costello J. in *O'Donnell v Dun Laoghaire* [1991] ILRM 301, which was later approved by Fennelly J. in *Murphy v Flood*. It is to be noted that the time limits have been shortened with effect from the 1st January, 2012, however this development has no bearing on the present proceedings.

17. It follows, it was submitted, that the bringing of proceedings 15 months after the making of the Substantive Findings is clearly outside the time limits set out under O. 84 and that the challenge to the Costs Decision was within time.

18. Turning to the second period of delay, it was argued that even if the plaintiff commenced some or all of his claim within time then the failure on Mr. Redmond's part to either progress his claim in a timely manner or to properly explain his delay ought to be fatal to his proceedings. It was advanced, relying on the decision in *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 I.R. 510, at 517, that neither the notice of change of solicitor nor the notices of intention to proceed constitute "steps in the proceedings" in the formal sense. On that basis, it was contended that the plaintiff had simply "sat on his rights" and "parked the proceedings" for a further period of five years in anticipation of the decision of the Supreme Court in the *Murphy v Flood* case. The court's attention was also drawn to the decisions in *Desmond v M.G.N. Ltd*. [2009] 1 I.R. 737 and *Comcast International Holdings Inc. & Ors v Minister for*

Public Enterprise & Ors [2007] IEHC 297 where decisions to deliberately delay the prosecution of proceedings to benefit a cause of action by waiting for anticipated developments in other *fora* were sharply criticised.

19. Regarding the issue of the balance of justice, Ms. Dillon, on behalf of the Tribunal Defendants, refers particularly to the issues as raised by Mr. Redmond in his affidavit wherein he averred that he was unable to identify any prejudice whatsoever which would be suffered by the defendants and that in particular it could not be suggested that the defendants' ability to defend the action would be adversely affected by the alleged delay if the action proceeds. He went on to say that the reality of the situation is that his case could not have been determined until after the Supreme Court had given its decision in *Murphy v. Flood* and there is nothing to suggest that the defendants have acted to their detriment on the strength of a belief that the proceedings would not ultimately be prosecuted through to their conclusion.

20. Ms. Dillon submits that the issues of prejudice to the Tribunal Defendants and the Tribunal Defendants acting to their detriment are but factors in a whole series of matters which the court has to take into account in assessing the balance of justice. Mere delay of itself, particularly excessive delay, creates prejudice and there is a balancing exercise to be carried out by the court in assessing such prejudice. The first named defendant has long since retired from the Tribunal and it has to be borne in mind that if the action is allowed to proceed, there are serious reputational implications involved.

21. Further, Ms. Dillon contends that there has never been an application or even a request from Mr. Redmond to reconsider or to look afresh at the Costs Decision and instead, what is happening here, in simple terms, is that there is an attack on the Tribunal Defendants which is being used to cloak the fact that none of these steps were taken by Mr. Redmond. Ms. Dillon submits that other factors have to be taken into account such as the application of the European Court of Human Rights, the obligations under the Constitution to progress your claim, the recalibration factors referred to by Clarke J. in *Stephens v Paul Flynn Limited* [2008] 4 I.R. 31 and as approved by the Supreme Court and the various factors as set out in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 450.

22. Ms. Dillon particularly refers to para. 9 of the Tribunal Defendants' affidavit which sets out that there is in fact prejudice to the defendants in allowing the claim directed at the findings of the first named defendant to be challenged at this remove. The first named defendant retired from the Tribunal of Inquiry on the 27th June, 2003. Further, had the plaintiff sought to review the findings in the correct manner by seeking to issue judicial review proceedings, which would have included a statement of grounds, the defendant would have been aware of the grounds upon which the plaintiff was seeking to bring his claim. By issuing a plenary summons 15 months after the findings were published and in not delivering a statement of claim to date (almost seven and a half years later), the Tribunal Defendants are prejudiced in that they remain unaware of the grounds relied upon and to date are unaware of the case they have to answer. Ms. Dillon clarifies that this was the position as of the date of the swearing of the affidavit and that subsequently in Mr. Walsh's affidavit sworn on the plaintiffs behalf a draft statement of claim is exhibited.

23. The *Murphy v. Flood* decision was delivered by the Supreme Court on the 21st April, 2010, and the plaintiff should have moved with immediate expedition after the delivery of this judgment. While a notice of intention to proceed was served on the 20th May, 2010, a month after the judgment was delivered, inexplicably, the plaintiff then rested on his rights for a further period of approximately a year, although he again served a further notice of intention to proceed on the 15th April, 2011, which in effect crossed with the motion now before the court.

24. Ms. Dillon explained at some length the change to procedures at the Tribunal following the *O'Callaghan v. Mahon* decision, the central aspect of which related to the exchange of documents for the purposes of cross examination. In effect, what the Tribunal was doing was implementing new procedures in the wake of that decision. Ms. Dillon criticises Mr. Redmond because it was open to him after the decision in *O'Callaghan v. Mahon* to make an application for discovery and to have prepared a statement of claim and to progress the matter but instead he elected not to do that. Ms. Dillon refers to the fact that by this time the second and third interim reports had completely concluded and Mr. Gogarty had died as of the 15th September, 2005.

25. Ms. Dillon submits that the reliefs sought are orders seeking the quashing of certain decisions of the Tribunal and therefore fall foursquare within O. 84 of the R.S.C. because these are *certiorari* reliefs that are being sought in the statement of claim and they are no longer confined, as they were confined in the plenary summons, to the declaratory reliefs which were sought. Ms. Dillon contends that this puts the issue beyond doubt that the appropriate initial test for the courts to conduct is the O. 84 test.

26. In respect of the judgments as handed down in *O'Callaghan and Murphy*, Ms. Dillon submits that effectively all that occurred was that the Tribunal had a procedure in relation to the circulation of documents which was found to be incorrect and was thereafter changed and remedied. There is no suggestion in any of the decisions dealing with the failure to circulate that there was any wrongdoing in any part of the process. It was simply that the process was not the proper process.

27. Finally, the Tribunal Defendants contend that, even if waiting for the Supreme Court to deliver a decision in *Murphy v Flood* was reasonable, Mr. Redmond has nonetheless completely failed to progress his claim since April 2010 save for the swearing of affidavit evidence in opposition to the present motion. Taken together and in the light of the relevant jurisprudence, the court was asked to dismiss Mr. Redmond's claim in its entirety.

Submissions on behalf of Mr. Redmond

28. It was contended on behalf of Mr. Redmond that his challenge to the Costs Decision was within the prescribed six month time period and therefore, in relation to the first delay and concerning only the issue of the substantial findings of the Tribunal against Mr. Redmond, the court merely had to consider whether to exercise its inherent jurisdiction to extend the time limit. It was suggested that an application to extend time need not necessarily emanate from the moving party in proceedings. Furthermore, the court's attention was drawn to the fact that the Tribunal Defendants never raised any complaint of delay when proceedings were initially served nor did they complain that the form of proceedings was in any way inappropriate.

29. The plaintiff described the proposition as unreasonable that he ought to have been expected to progress his claim in the face of an appeal to the Supreme Court in *Murphy v Flood* where similar issues to those relevant in his case were to be ventilated and ruled on. While not explaining, or indeed seeking to explain, each period of delay in detail, the plaintiff argued that in circumstances where he faced criminal prosecution and imprisonment before release and trial on two further charges (neither of which resulted in any finding of guilt), coupled with his own lack of resources, the delays which are complained of could hardly be classified as inordinate or indeed inexcusable.

30. Mr. Hartnett on behalf of Mr. Redmond places considerable emphasis on the consideration of the balance of justice. It is contended that the issues which arise in these proceedings are matters of significant public importance and that it would be contrary to the principles of constitutional justice for Mr. Redmond's claim to be dismissed and to thereby allow the Tribunal's failure, to carry out its business in a proper fashion, avoid full investigation and scrutiny by the courts. In this regard much emphasis was placed on

Hardiman J.'s criticisms of the Tribunal Defendants in *Murphy v Flood*. Mr. Hartnett on behalf of Mr. Redmond contends that there are two separate issues arising. The first deals with an attempt to quash the order for costs made by the Tribunal based on a finding of hindering and obstructing the Tribunal, while the second is an attack on the substantive findings of the Tribunal based on a failure of fair procedures and constitutional justice, a matter which was addressed in the Supreme Court in *Murphy v. Flood* but in respect of which there was no decision.

31. It is contended on the plaintiffs behalf that he could not have known that documentation which ought to have been furnished to him prior to the commencement of the Gogarty Module had not been furnished to him until after he became aware of what had been stated by the Supreme Court in *Murphy v. Flood*, which decision was delivered on the 21st April, 2010.

32. Mr. Hartnett criticises the Tribunal Defendants for not following the decision of the High Court in *O'Callaghan v. Mahon*, which was delivered on the 7th July, 2004, on the grounds that while at that time the Tribunal Defendants knew of the relevant documentation referred to in the Supreme Court decision in *Murphy v. Flood*, their existence was never disclosed by the Tribunal to the plaintiff.

33. Mr. Hartnett contends that for the Tribunal Defendants to submit that the plaintiff should have prosecuted these proceedings, which raise identical issues to those which were being decided in the High Court and later the Supreme Court in *Murphy v. Flood* before any final decision had issued, lacks any actual reality.

34. It is further contended that a distinction has to be drawn between proceedings in which the court has been asked to bring to an end a dispute between individuals in proceedings and one in which the court is being asked to ensure that fundamental constitutional rights are vindicated and in this regard Mr. Hartnett relies heavily on the decision of the Supreme Court in *Murphy v. Flood*, which he claims represents an identical situation with the same facts particularly in relation to the costs issue as in these proceedings. Moreover Mr. Hartnett submits that the plaintiff was entitled to take time to consider the implications of the judgment in *Murphy v. Flood* and that in the particular circumstances that pertained, Mr. Redmond had very limited legal representation. In fact, although there was a vast amount of discovery and disclosure and a vast amount of work to be done, Mr. Redmond was not in a position to fund counsel at that stage and as such counsel did not represent him during the hearings of the module in relation to which findings were made against him. Instead he was represented by a solicitor.

35. Relying on the decision in *De Roiste v Minister for Defence* [2001] 1 I.R. 190, at 201, and the comments of Denham J. in particular, the plaintiff advanced the argument that delay "of itself' should not disentitle an applicant to pursue proceedings. This case is also of note because relevance was attached by the court to the fact that a relevant consideration was that the applicant, in that case, may have been wronged by the State authorities rather than by a private individual.

36. In Mr. Redmond's written submissions, a number of factors are advanced by his counsel which, it is contended, ought to form part of the court's consideration as to where the balance of justice lies in this case. They were in the following terms:

> "(a) the lack of prejudice to the Defendant;
>
> (b) the nature of the wrong alleged by the Plaintiff;
>
> (c) the fact that the Tribunal Defendants at no time corresponded with the Plaintiff or encouraged him to pursue his action;
>
> (d) that this is not a dispute between individuals but rather a claim by the Plaintiff that his constitutional rights have not been respected by an emanation of the State;
>
> (e) the age and resources of the Plaintiff;
>
> (f) the availability of legal assistance to the Plaintiff; and
>
> (g) the Plaintiffs experiences since the Tribunal commenced its investigations in 1997."

37. Mr. Hartnett emphasises the view as expressed by Fennelly J. in *De Roiste* wherein he states in the course of his judgment, at p. 221, that:-

> "[...] It is, of course, conceivable that in exceptional circumstances even very long delay might be explained and even justified. The respondent might, for example, be responsible for concealment or for exercising control over relevant information or even the applicant's own freedom of action."

38. Mr. Hartnett submits that this is the case that is being made out here on behalf of Mr. Redmond and as such he contends that the Tribunal has been responsible for concealment of material which was described in the judgment of Hardiman J. in the Supreme Court in *Murphy v. Flood* as being on one tenable view "explosive". It appears that this material, which was suppressed, concerned allegations made by Mr. Gogarty, the main, and one could say only, witness, in relation to the relevant module against other well known persons, office holders and people in public life, against whom no allegations were being made save for Mr. Gogarty, and that a decision was taken to conceal this. Mr. Hartnett submits that what was done was wrong. He refers to the revelations made by counsel on behalf of the Tribunal in the Supreme Court in *Murphy v. Flood* that the decision had been taken to limit the access to material which would have impinged on the credibility of the Tribunal's only witness in relation to the issues. He contends that this is a most serious matter and is an issue which must be taken into account in the balance of justice, whether the matter is allowed to proceed or not to a hearing. Mr. Hartnett contends that the law is clear and that even if the court is satisfied that there was inordinate and inexcusable delay, an overall view has to be taken as to where the balance of justice lies. Reference is made to Mr. Gogarty's conviction and imprisonment and his release by the Court of Criminal Appeal ironically because of the failure of disclosure by the State during the criminal trial of a most important document and where Mr. Redmond was a very elderly man taking on a huge burden.

39. Mr. Hartnett contends that the issues in relation to costs are clear as having already been decided upon by the Supreme Court and it does seem extraordinary that a State tribunal should seek to stand over a finding which the Supreme Court has already decided in relation to another party as being manifestly *ultra vires*. In this instance Mr. Hartnett contends that there has been oppressive and unfair behaviour by a tribunal set up pursuant to statute and by order of the Oireachtas. He continued by submitting that it is in the public interest that the plaintiff should not be allowed to suffer what was an undoubted wrong, a wrong that has been conceded in the Supreme Court by the State authorities in relation to the holding back of material as being incorrect by its very nature. This act was, therefore, unfair and in breach of the constitutional obligations to which Mr. Redmond was entitled and that further, he was

deprived of an opportunity to attack the credibility of the one and only witness with what has been described as "explosive material".

40. Mr. Hartnett further submits that one cannot overlook the fact that Mr. Redmond's good name is in issue.

41. Mr. Hartnett then refers extensively to the judgment of Hardiman J. in *Murphy v. Flood* particularly as to the nature of the material which was eventually produced only long after the appellants had issued their judicial review proceedings (in the *Murphy* case). Mr. Hartnett points out that, in essence, the Tribunal Defendants are seeking to have Mr. Redmond's case dismissed when a concession has already been made by counsel appearing on behalf of the Tribunal in the Supreme Court that a wrong was done. A wrong for which the Tribunal has given reasons, namely that a decision was taken to limit collateral credibility issues, in other words, to limit the basis on which Mr. Gogarty could be cross examined in relation to his credibility because he had made, quoting a Supreme Court judge, "potentially explosive allegations against respected members of society and holders of very high office".

42. Mr. Hartnett on behalf of Mr. Redmond clarifies that the proceedings herein are not an attack on members of the Tribunal but are a complaint being made by Mr. Redmond that he was not afforded constitutional fairness or fair play and that this has already been accepted by counsel for the Tribunal Defendants in another court.

43. Having had the benefit of considering the documentation as released prior to the commencement of the *Murphy v. Flood* case in the High Court, Mr. Hartnett submits that the documentation, which he has had read and considered briefly, contains allegations of the most serious kind and constitutes a goldmine for cross examination because of the explosive nature of the allegations. These documents were not made available to Mr. Redmond and Mr. Hartnett submits that one has to take this factor into account along with the behaviour of the Tribunal in assessing the balance of justice.

44. Having outlined the positions of the respective parties, it is now necessary to turn to the relevant case law.

The Relevant Case Law
O'Donnell v Dun Laoghaire [1991] ILRM 301

45. As a first point of departure, it must be remembered that one of the complaints made by the Tribunal Defendants, in agitating their claim, is that the delay in this case ought to be measured against the standards required under O. 84 and the rules concerning judicial review generally. As already noted, the underlying proceedings in this case were commenced by plenary summons. In this regard, counsel for the Tribunal Defendants sought to place particular emphasis on the decision of Costello J., in *O'Donnell v Dun Laoghaire*, as authority for the proposition that an applicant cannot, by constituting proceedings other than in the form of judicial review proceedings, avoid the application of the time limits set out in O. 84 R.S.C.. In the circumstances, the decision is deserved of further consideration.

46. Of particular note are the comments of Costello J. on the nature of declaratory orders and delay, namely that:

> "A declaratory order is a discretionary order arising from the wording of statute which conferred jurisdiction on the courts to make such orders [...] and it is well established that a plaintiff's delay in instituting plenary proceedings may, in the opinion of the court, disentitle the plaintiff to relief. It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in O. 84, r. 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under O. 84 time would have been extended. The rules committee considered that there were good reasons why public authorities should be protected in the manner afforded by O. 84, r. 21 when claims for declaratory relief were made in applications for judicial review and I think exactly the same considerations apply when the same form of relief is sought in a plenary action. Furthermore, it is not desirable that the form of action should determine the relief to be granted and this might well be the result in a significant number of cases if one set of principles on the question of delay was applied in applications for judicial review and another in plenary actions claiming the same remedy. And in plenary actions the effect of delay can in many cases be determined on the trial of a preliminary issue and as speedily as if the issue fell to be determined in an application for judicial review."

He then went on to say:

> "[...] I think I should exercise my discretionary powers in relation to the plaintiffs' delay by applying by analogy the rules and principles contained in O. 84, r. 21. I should therefore refuse to grant the plaintiff relief unless I am satisfied that had the application been one for judicial review I would have concluded that there were good reasons for extending the time for allowing the application notwithstanding the expiration of three months' time limit contained in the rule.
>
> The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under *O. 84 r. 21* is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights (*State (Cussen) v Brennan* [1981] IR 181).
>
> Or again, the delay may unfairly prejudice the rights and interests of the public authority which had made the *ultra vires* decision in which event there would not be a good reason for extending the time, or a plaintiff may acquiesce in the situation arising from the *ultra vires* decision he later challenges or the delay may have amounted to a waiver of his right to challenge it and so the court could not conclude that there were good reasons for excusing the delay in instituting the proceedings."

47. Costello J. in *O'Donnell* then proceeded to examine, on the facts of the case before him, whether "good reasons" had been demonstrated such as would excuse the plaintiff's unquestionable delay in initiating proceedings. Of particular note, in that regard, was the court's citation of the *Furey* case:

> "Is the course of conduct a 'good reason' within the meaning of O. 84, r. 21 which would have justified the court in extending the time for applying for a judicial review of the orders? Assistance in answering this question is to be found in

State (Furey) v Minister for Defence [1988] ILRM 89. There the applicant had been a member of the defence forces. He was discharged on 15 August 1975. He instituted proceedings four years later for an order of *certiorari* to quash his discharge. He was successful in the High Court and the minister appealed. One of the grounds of appeal was that the application should have been refused on the grounds of delay. This was rejected by a majority decision. The evidence of the plaintiff was to the effect that he did not realise that he could pursue his complaint through the court, that he could not afford legal advice, that over a four year period he had written many letters to the department, to local members of parliament and to successive Ministers for Defence. On these facts it was concluded that the applicant had not disentitled himself by his delay to the remedy he sought."

48. The judgment of Costello J. thus appears to suggest a multifarious approach when scrutinising a case involving alleged delay where the substantive reliefs sought are judicial review remedies in substance if not in form. Distilling from that judgment, the court must first examine two elements of delay. The first involves delay, if any, in the institution of proceedings. Such delay must be examined with respect to the O.84 time limits. Where it is found that proceedings have been brought outside of that time, the court must then be satisfied that there are "good reasons" to extend the prescribed time limit. The second element is any delay which has arisen post-commencement. This latter element involves the application of the jurisprudence on what might be described as the more conventional cases on delay.

Conventional delay cases

49. The starting point for any consideration of the law in this area is the decision of Finlay P. in *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 (31st July, 1979) where he laid down a number of general principles to be applied by the court when faced with an application to dismiss proceedings for want of prosecution. Those principles were approved and expanded by Hamilton C.J. in the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 450, at pp. 475-476, where he summarised the relevant principles in the following terms:

"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:-

(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiffs action,

(iii) any delay on the part of the defendant -because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiffs delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

50. These principles have since been approved in a number of decisions, including *Stephens v Paul Flynn Limited* [2008] 4 I.R. 31 where Kearns J., in the Supreme Court, approving the decision of Clarke J. in the High Court, noted that the court should approach the issue before it having regard to two central tests, namely:

"(a) ascertain whether the delay in question is inordinate and inexcusable;

and

(b) if it is so established the court must decide where the balance of justice lies."

51. It is perhaps useful to remark on Costello J.'s emphasis, in *O'Donnell*, on the onus on a plaintiff not only to explain a delay but also to provide some justification for the delay. It appears to follow, from the judgment, that in the absence of prejudice to the defendant, or an interested third party, the length of the delay was not a factor to be ascribed considerable weight. This may be contrasted with *Stephens* where the examination of the inordinacy of any delay is given equal weight to the question of its inexcusability.

52. In seeking to reconcile both lines of authority, I intend to assess the reasons proffered for the plaintiffs delay. I will then proceed to consider whether they are sufficient to justify the extension of the O. 84 time limits, where necessary, before moving to an

examination of whether the delay can be said to be justifiable and therefore excusable in the circumstances. This latter examination will necessarily involve an enquiry into the length of the delay and its effect (if any) on the parties to the proceedings and (where relevant) any third parties. Finally, and in light of the preceding examination, as appropriate I will assess where the balance of justice lies in this case.

53. On that latter point, and while I am addressing relevant case law, it would be remiss of the court not to take into account the Supreme Court's decision in *Murphy v Flood*. That case formed a considerable plank in Mr. Redmond's submission to the court and also requires close scrutiny.

Murphy v Flood [2010] 3 I.R. 136

54. In this case, the plaintiffs were the subject of substantive findings by the Tribunal to the effect that they had obstructed and hindranced the Tribunal and made corrupt payments. Those findings were contained in the Tribunal's second and third interim reports, published on the 26th September, 2002, and the 21st January, 2004, respectively. After participating in approximately 163 days of public hearings, the plaintiffs applied for their costs from the Tribunal. In a ruling dated the 9th November, 2004, while acknowledging that the plaintiffs had participated fully in the public hearings and that they had provided extensive discovery over a long period of time, the Tribunal refused to award costs on two grounds being that adverse findings of obstruction and hindrance as well as findings of corruption had been made against the plaintiffs.

55. The plaintiffs issued plenary proceedings on the 20th April, 2004, followed by judicial review proceedings on the 2nd February, 2005, both of which were directed at the costs decision of the Tribunal. Both sets of proceedings were consolidated and came on for hearing before the High Court (Smyth J.) where three primary issues were argued. The first was whether the Tribunal was entitled to take account of its substantive findings of corruption when exercising its jurisdiction in relation to costs. The second was whether the Tribunal was entitled to make findings of obstruction and hindering either as a matter of *vires* or in the manner in which it did. Finally, the third issue was the extent to which the plaintiffs were precluded from advancing the issues by reason of delay. In addition, an issue arose when the Tribunal discovered documents at a late stage in the proceedings which it had previously only provided to the plaintiffs in a redacted form. Smyth J. ultimately refused the reliefs sought by the plaintiffs and the matter then went on appeal to the Supreme Court. Given the weight sought to be ascribed to the Supreme Court's judgment by the plaintiff and the similarity of the factual matrix, it is useful to give the decisions of the court a detailed consideration.

56. In her judgment, Denham J. allowed the plaintiffs' appeal in relation to the issue of delay. In particular, at p. 151, she found that there was no interest of justice which would require that the third interim report be challenged but not the second. She noted that there was no prejudice suffered by the Tribunal in such circumstances as it would not interfere with its work. Moreover she noted that the matters raised were of public importance and relevant to future decisions which were to be made by the Tribunal. She went on to find that the Tribunal did not have jurisdiction to make findings of obstruction and hindrance in the context of a reference to a criminal offence and that the Chairman of the Tribunal did not have power to make an order in relation to costs in the context and in the terms in which he so did. In her judgment, Denham J. considered the nature of the "administration of justice" and found that, bar one, the Tribunal did fulfil the fundamental conditions or characteristics of the administration of justice as laid down in the case of *Goodman International v Mr. Justice Hamilton* [1992] 2 I.R. 542, at pp. 589-590. In a section entitled "new evidence, a cause for concern", Denham J. approved of comments by Hardiman J. in relation to the release of previously redacted documents by the Tribunal.

57. In his judgment, at p. 169, Hardiman J. made the following comments in relation to the nature of tribunals which are worthy of recitation:

> "Both the length and the cost of tribunals are due in part to the enormous powers which have been conferred on them. They have power to require any person or body in the State to cooperate with them, to produce enormous volumes of documentation and to make themselves available to be questioned. Confidentiality can be set aside and the privilege against self incrimination does not apply. Sometimes the cost of doing this which the individual or company must bear are themselves enormous. It will not be reimbursed for years, if ever. The tribunal may withhold any re-imbursement at all. Furthermore, in recent times tribunals have taken to conducting a good deal of their work in private. This means that the material they have obtained will normally be known only to the tribunal and may be selectively concealed from the parties. This has proved enormously controversial in the past; see the decision of this court in *O'Callaghan v. Mahon* [2005] IESC 9, [2006] 2 I.R. 32.
>
> If the powers of the tribunals are enormous, so too are the consequences of their deliberations. We have seen people forced to leave public life, put to enormous expense and even imprisoned as a result of their interactions with the Tribunal."

58. As in the judgment of Denham J., Hardiman J. also laid particular emphasis on the *Goodman International* judgment, the significance of which, he remarked, can hardly be understated. Of note was his endorsement of the following description, at p. 184:

> "the Tribunal has no jurisdiction or authority of any description to impose a penalty or punishment on any person. Its finding [...] can form no basis for either the conviction or acquittal of the party concerned on a criminal charge [...] nor can it form any basis for the punishment by any other authority of that person. It is *a simple fact-finding operation, reporting to the legislature*' (emphasis added)."

He later went on to describe tribunals as "legally sterile", a description of the quality of a tribunal which prevents it from being "an unconstitutional usurpation of judicial functions and powers".

59. He went on to find in similar terms to Denham J.. However, although noting that the plaintiffs had chosen not to challenge the adverse substantive findings which the Tribunal made against them, he did place particular emphasis on the Tribunal's admitted failure to disclose certain material which he remarked "might fairly be described as explosive". He then went on to give a more detailed description of the material, at pp. 194-195, in the following terms:

> "At this point it is necessary to repeat, as has already been said several times in this judgment, that the plaintiffs' claims for relief relate wholly to the findings of obstruction and hindrance and do not extend to the substantive findings of the Tribunal on the issues into which it was set up to inquire.
>
> This issue of concealed material comes before the courts very late indeed. The plaintiffs cannot be blamed for this since they received the material only, it would appear, a matter of days before the High Court hearing. One of the

consequences of this delay is that, unfortunately, both Mr. Gogarty and at least one of the persons against whom he appears to have made allegations have died since the eventual disclosure. Mr. Gogarty's death means that the material in question can never now be deployed in cross-examination of him and he himself is, of course, unable to defend his position.

The rights of third parties make it difficult to give any satisfactory account in this judgment of the material in question. However it is possible to say that, at least on one tenable view of it, it is material of an explosive nature, given the position and significance of Mr. Gogarty to the Tribunal's findings. But in dealing with the material here it is necessary for the court to have regard to the good name of the persons against whom he is said to have made allegations, who were and are without exception prominent and reputable people. It is important to say that, having read the papers presented for the purpose of this appeal, I have absolutely no reason to believe that the allegations said to have been made against the third parties have any truth whatever to them. Indeed, having regard to their constitutional right to their good name and the obligations which that imposes on the State, including the courts, I intend to presume that the allegations made against them are false. But that, as will be seen, merely emphasises the importance of the material from the plaintiffs' point of view."

60. He then noted that the Tribunal's decision to conceal the material in question was without justification and found it "very disturbing" that the Tribunal never sought to revisit its decision to redact the material, notwithstanding the judgment in *O'Callaghan v Mahon* [2006] 2 I.R. 32. Given that the plaintiffs in *Murphy v Flood* opted not to challenge the substantive decision, Hardiman J. did not believe it proper or feasible for the court to so do, although it appears obvious that he had misgivings about the Tribunal's behaviour. Nevertheless, he did find that the concealment fed into the obstruction and hindrance findings, which was itself a major cause of the order refusing costs. Of general note is the fact that, at pp. 202-203, Hardiman J. identified a number of features of concern with this Tribunal in particular, which he said are "fraught with great risks for justice".

61. Finally, in his decision, Fennelly J., who also allowed the plaintiffs' appeal, dealt with the issue of delay at p. 219 *et seq*.. Of particular note is his endorsement of the decision in *O'Donnell* and the need for the plaintiff to demonstrate "good reason" to extend the time where plenary proceedings were commenced outside the O.84 time limits. Fennelly J. also noted that the absence of prejudice to the opposing party can never, of itself, justify an extension of time.

62. I have quoted at length from the judgment of the Supreme Court for the reason that I believe that in considering the present application I must have regard to the totality of circumstances, particularly in assessing the balance of justice. The import of the decision in *Murphy v Flood*, much like that in *Goodman International*, hardly needs to be stated. This case provides a useful reminder of the nature of tribunals under Irish law as well as an exploration of how a tribunal, despite wide terms of reference and considerable powers of compulsion, can nevertheless find itself acting *ultra vires*. I will now turn to the application of the above jurisprudence to the facts as presented to the court.

Application of the Test for Delay

63. I will apply the above general principles in respect of delay to each to the plaintiff's two challenges but will set out my decision on each in turn. The reasoning behind this approach is, in part, explained by the fact that unlike the challenge to the Costs Decision, the challenge to the Substantive Findings also involves an assertion of pre-commencement delay.

64. The challenge to the Costs Decision, although in the form of plenary proceedings, in my view meets the relevant time limits as prescribed in O. 84 of the Rules of the Superior Courts. With regard to the challenge in respect of the Substantive Findings of the Tribunal, the proceedings in respect of this aspect of the claim are fundamentally judicial review by nature. However, unlike the Costs Decision aspect these were clearly instituted outside the prescribed time limits as laid down by the Rules of the Superior Courts. It is to be noted that Mr. Redmond has not brought an application before the court in early course seeking to extend the time period but has instead chosen to seek, retrospectively, a dispensation from the Rules, notwithstanding the delays on his part. It is in my view quite clear that both in respect of the Costs Decision and the challenge to the Substantive Findings, there has been inordinate delay on the part of Mr. Redmond in prosecuting his claim as against the Tribunal Defendants.

65. The next issue is as to whether or not in all the circumstances the delay involved is excusable. Mr. Redmond never communicated with the Tribunal Defendants that he was delaying in prosecuting his claim pending the decision in *Murphy v. Flood* as it progressed through the High Court and to the Supreme Court by way of appeal. Even after the delivery of the judgment of the Supreme Court on the 21st April, 2010, there was a further significant delay on the part of Mr. Redmond in prosecuting the claim and the first time a statement of claim has appeared is by way of an exhibit in the affidavit of Mr. Redmond's solicitor in reply to the Tribunal Defendants' application. Having regard to the existing jurisprudence and in particular the judgments in *Desmond v. M.G.N. Ltd*. and in *Comcast International Holdings Inc*., I am satisfied that a decision not to prosecute a claim already in being pending a decision of the court in other proceedings, unless by agreement of all the parties, is not a legitimate excuse. Therein lies a difficulty for Mr. Redmond because while I have considerable sympathy for his plight, namely: having insufficient funds to retain counsel; of having difficulty even though he had a solicitor in dealing with the vast volume of documentation as discovered in relation to the Tribunal; that having been arrested, charged, convicted and sentenced to a term of imprisonment, with that conviction subsequently set aside by the Court of Criminal Appeal; and then being subject to trial on further charges, neither of which resulted in a finding of guilt; his age and his contention that all the surrounding events sapped him of his energy; all of which clearly portrays for him a very difficult situation. Whatever about the situation up to April 2010 when the judgment of the Supreme Court was handed down in *Murphy v. Flood*, there was then a further significant delay with no actual steps being taken. I note that service of a notice of change of solicitor and service of notices of intention to proceed are not as such steps in the proceedings. Taking the overall situation in the round against a background where there was little or no communication with the Tribunal Defendants, I come to the conclusion that the particular handling of the situation in the circumstances brings about an inevitable conclusion that the delay involved is inexcusable.

66. Accordingly, having come to the conclusion that the plaintiffs delay is both inordinate and inexcusable. The remaining issue is as to where the balance of justice lies.

67. The two issues that arise before the court relate to the fact that the Tribunal refused Mr. Redmond his costs on the basis, *inter alia*, of having hindered and obstructed the work of the Tribunal and on the substantive findings as made against him. I consider that in deciding where the balance of justice lies the two central issues must be separated. The most crucial difference is that these proceedings insofar as they relate to the refusal of the Tribunal to award Mr. Redmond his costs were taken within time. The issue that arises in my view is clear cut in that Mr. Redmond contends that he was refused his costs on the basis of an unlawful test being applied. The facts of the issue are quite clear and it is one, therefore, for determination by the court as a matter of law. The Supreme Court in *Murphy v. Flood* has very succinctly set out the law applicable in the same circumstances that arise herein in respect of a different party arising out of the same tribunal modules and that issue was finally decided by the Supreme Court on the 21st April, 2010. I do not accept the contention as made on behalf of the Tribunal Defendants that they could have been in some

way unclear as to the issue that arose from the refusal to pay Mr. Redmond his costs and, in essence, this is the same issue as occupied the Tribunal members since the instigation of the *Murphy* proceedings by way of a plenary summons on the 20th April, 2004. Other than presumed prejudice because of delay, the Tribunal Defendants do not satisfy me on the "costs issue" that to allow this aspect to proceed would in some way be unfair to the Tribunal Defendants.

68. In my view the balance of justice in the particular and special circumstances of this case and having taken into account the judgment of the Supreme Court in *Murphy v Flood* leads me to an inevitable conclusion that the balance of justice favours the plaintiff and leads me to the conclusion that the motion to dismiss this aspect of the plaintiff's claim fails.

69. The second aspect is the plaintiffs challenge to the substantive findings of the Tribunal as made against Mr. Redmond by the then Chairman, the Honourable Mr. Justice Feargus Flood. In my view a clear distinction can be drawn between this issue and the costs issue.

70. Most significantly the proceedings in this regard were issued approximately 15 months out of time and were followed by inordinate and inexcusable delay.

71. The aspect of prejudice is different because the plaintiff, *inter alia*, challenges the handling of the Tribunal and criticises in particular aspects of cross examination, alleged hindrance of cross examination and a refusal to allow Mr. Redmond call evidence in rebuttal of allegations made against him. The hearings in this regard actually finished on the 14th July, 2000, the second interim report was published on the 20th September, 2002, and the third interim report on the 21st January, 2004.

72. The sole Chairman of the Tribunal involved in the second and third interim reports is now long since retired and clearly the issue of the redaction of parts of Mr. Gogarty's evidence and its suppression will raise issues as to why this was done and further why the nature of the redacted material was never divulged to Mr. Redmond or, indeed, to any other party to the Tribunal or to their legal advisers, the material only eventually being divulged a short time prior to the commencement of the *Murphy v Flood* hearing in the High Court.

73. This situation portrayed is clearly one of serious concern.

74. However, the reality is that it is now almost twelve years since the conclusion of the public hearings involving Mr. Gogarty, almost ten years since the publication of the second interim report and over eight years since the publication of the third interim report.

75. The nature of the case being made will necessitate allegations, explanations and a decision on the relevant facts as established. It was at all times open to the plaintiff to advance his claim and to have sought discovery of all relevant documentation. That may in itself have been a very telling moment. Having in my view done effectively nothing over a period in excess of six years from the 14th April, 2005, and having only recently prepared a statement of claim and bearing in mind the late start, the lapse of time is simply too great.

76. No application has been made for an extension of time and I have found the delay involved, against a background where the proceedings were issued out of time to challenge the substantive finding of the Tribunal, to have been both inordinate and inexcusable. Accordingly I am satisfied that no reasonable excuse for the delay has been proffered. Following the decision in *O'Donnell*, which was approved of in *Murphy v Flood*, I am satisfied that the challenge to the substantive findings of the Tribunal must fail at this point. For the sake of completeness in considering the balance of justice in respect of this issue, I bear in mind my earlier comments and in particular that Mr. Gogarty is now deceased and the Honourable Mr. Justice Feargus Flood long since retired from the Tribunal. There is also the aspect that this issue unlike the costs issue has not been determined previously by this Court or, on appeal, the Supreme Court.

77. In my view the delay involved since the publication of the second and third interim reports by the then Chairman, the Honourable Mr. Justice Feargus Flood, gives rise to a substantial risk that it is now not possible to have a fair trial within a reasonable period of time on the challenge to the Substantive Findings.

78. The general factual position leads to a conclusion that the balance of justice favours the granting of the relief as sought by the Tribunal Defendants in the notice of motion herein as regards the plaintiff's challenge to the Tribunal's findings on the substantive issues.

79. Accordingly, the appropriate order is that the court declines to dismiss so much of the plaintiffs claim as relates to the Costs Issue and dismisses the balance of the plaintiff's claim relating to the Substantive Findings as made in the second and third interim reports.