

Tribunal of Inquiry into Certain Planning Matters and Payments Binse Fiosrúcháin um Chúrsaí Pleanála agus Íocaíochtaí Áirithe

Appointed by instrument of The Minister for the Environment and Local Government dated the 4th day of November 1997 as amended by instruments dated the 15th day of July 1998, the 24th day of October 2002, the 7th day of July 2003 and the 3rd day of December 2004



Ceaptha de réir Ionstraim an Aire Comhshaoil agus Rialtais Áitiúil dar dáta an 4ú lá de Shamhain 1997 a leasaíodh de réir Ionstraimí dar dátaí an 15ú lá de Iúil 1998, an 24ú lá de Dheireadh Fómhair 2002, an 7ú lá de Iúil 2003 agus an 3ú lá de Mhí na Nollag 2004

His Honour Judge Alan P. Mahon S.C. (Chairperson)
Her Honour Judge Mary Faherty S.C.
His Honour Judge Gerald B. Keys

Correspondence 3.3 Meeting – 14/07/2011

A Onóir an Breitheamh Alan P. Mahon S.C. (Cathaoirleach)
A hOnóir an Breitheamh Mary Faherty S.C.
A Onóir an Breitheamh Gerald B. Keys

6th July, 2011

PAC-R-32

Our Ref: PTB/292

Strictly Private & Confidential – To Be Opened by Addressee Only

Mr. Ted McEnery
The Clerk to the Committee of Public Accounts
Leinster House
Dublin 2



Re: Third Interim Report on the Procurement of Legal Services by Public bodies

Dear Mr. McEnery

I refer to previous correspondence herein, resting with your letter to me of the 14th February 2011 which was accompanied by a copy of the transcript for the sitting of the Committee on the 2nd July 2009. I apologise for the delay in responding further, which was, mainly due to the fact that the Committee ceased to exist at the time of the General Election on the --- February 2011, and, as I understand it, has only recently been reconstituted subsequent to that General Election.

In any event, the Members of the Tribunal have considered the entire matter in greater detail, and particularly in the light of the transcript of the proceedings of the Committee meeting of the 2nd July 2009.

I understand from your letter to me of the 8th February 2011, that the content of Chapter 4 of the Committee's Report on legal services was based purely on the evidence given by the Accounting Officer of the Department of the Environment, Heritage & Local Government to the Committee on the 2nd July 2009. Ms. Geraldine Tallon, Secretary General of the Department of the Environment, Heritage & Local Government was the Accounting Officer in question.

As indicated in the Tribunal's letter to you of the 2nd February 2011, the Members of the Tribunal were particularly concerned with the section of the Report entitled "*Procedural Shortcomings*". These are to be found in Chapter 2, page 19 of the Third Interim Report on the Procurement of Legal Services by Public Bodies. The Finding in question is as set out under paragraph 2.5 "*Procedural Shortcomings*", and in particular the following:

"The Committee is not satisfied that after the Oireachtas making legal provision for a new procedure, to discover that the Tribunal in question then decided that it was not practicable to use it and yet because the two extra judges have now been involved in hearing around 60,000 pages of evidence, the view of the Department is that the

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three member operation is necessary to bring the huge volume of work to completion in terms of producing a Final Report. The Committee is of the view that the two extra judges retained by the Tribunal should have been released when the proposal to have parallel sittings did not proceed”.

The Members of the Tribunal are concerned with this finding. Their reasons are as follows:

1. The Members of the Tribunal were appointed to the Tribunal on foot of legislation enacted by the Houses of the Oireachtas in 2002. They were appointed for the duration of the work of the Tribunal, and save for particular circumstances which might have arisen, but have not yet arisen, their number cannot be depleted in the absence of new legislation. The appointment of additional Members in 2002 took place at a time when there was no legislative provision for the Tribunal to sit in more than one division, so that the decision of the Oireachtas to appoint additional Members was on the basis that they would conduct their inquiry as a single unit. The legislative provision in 2004 which, from that time, enabled the Tribunal Members to divide into separate divisions (and which was included in the legislation at the request of the Tribunal) was intended to facilitate the sitting in divisions by the Members of the Tribunal in the event that an opportunity arose where divisional sittings became possible, having due regard for practical (including matters relating to cost) and legal considerations. For the reasons which have been explained to the Department (and, indeed, the former Attorney General, the late Mr. Rory Brady S.C.) the opportunity to sit in separate divisions did not arise prior to the conclusion of the Tribunal’s public hearings in December 2008.

2. At page 54 of the transcript, the Department’s Accounting Officer, Ms. Tallon, in response to Deputy Sean Fleming briefly referred to the practical and legal issues which militated against the Tribunal sitting in separate divisions in the post 2004 – 2005 period.

Deputy Fleming then asked Ms. Tallon why, in 2007, a decision was not then made to *“let the two judges return whence they came...”* Ms. Tallon advised the Committee that a view was taken that because of the huge volume of documentation involved (approximately 60,000 pages of transcripts of evidence since 2002) it was deemed necessary that the Tribunal remain as it was legally constituted at that time, that is, consisting of three Members. Deputy Fleming said that he interpreted Ms. Tallon’s explanation as, in effect, meaning that, referring to the three Members *“they had their feet in the door but it was too difficult to extract them”*.

Deputy Fleming then questioned Ms. Tallon as to why three judges were necessary to deal with the 60,000 pages of documentation, while the Chairman of the Tribunal was entitled to alone deal with costs. She was asked by Deputy Fleming *“Why is the number of judges a moveable feast?”* Ms. Tallon explained that the issue of costs was a separate and distinct issue which followed the completion of the Report. In fact the relevant legislation provides that, in the case of a three person Tribunal, determinations relating to costs are the sole preserve of the Chairman of the Tribunal.

The *“Procedural Shortcomings”* identified by the Committee at page 19, expressed in clear terms a criticism of the Tribunal’s failure to sit in separate divisions, when it stated that it *“is not satisfied that after the Oireachtas making legal provision a new procedure, to discover that the Tribunal in question then decided that it was not practicable to use it...”*

It appears to the Tribunal that Ms. Tallon's explanation for the Tribunal's decision not to sit in separate division was ignored by the Committee. There was no evidence given to the Committee which could reasonably justify this criticism of the Tribunal.


The Committee also expressed "*the view that the two extra judges retained by the Tribunal should have been released when the proposal to have parallel sittings did not proceed*". This finding by the Committee ignores the fact that the "release" of two of the three judges was not possible for both practical and legal reasons.

The Members of the Tribunal respectfully request that

- i. Copies of this letter and my letter of 2nd February 2011 be published on the Committee website and,
- ii. That copies of this letter and the letter of the 2nd February 2011 be placed as an appendix to the Report of the Committee and a reference to that appendix be inserted in paragraph 2.5 of the Committee's Report.

In effect, the Tribunal, requests that your proposals as suggested in your letter of 8th February 2011 as an interim measure, be adopted as a permanent measure, and on the basis that this letter is also included therein.

Yours sincerely



Susan Gilvarry
Solicitor to the Tribunal