



**DUBLIN
DOCKLANDS**
DEVELOPMENT AUTHORITY

27th June 2012

Mr Ted McEnery
Public Accounts Committee
Leinster House
Dublin 2



Údaras Forbartha Dugthailte
Baile Átha Cliath

Dublin Docklands
Development Authority

Re: Donatex Limited and Bernard McNamara

-And-

Dublin Docklands Development Authority

[2009/8128P (2009 No. 342 COM)] (“the Proceedings”)

/ C&AG Report / PAC Proceedings

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Dear Mr McEnery

1. At the outset, we wish to point out that we fully recognise the importance of the role of the PAC in dealing with matters within its remit.
2. You will recall that the subject matter of the above proceedings is the purchase of the IGB site and that the Plaintiffs in the proceedings are claiming approximately €100m from the Authority and ultimately the Irish taxpayer.
3. I am writing to you to outline the very serious concerns that we have on the impact the PAC proceedings are having on the conduct by the Authority of its defence of the legal action. These concerns were discussed by the new Board of the Authority recently and the Board is anxious to continue with the vigorous defence of this case.
4. You will recall that in opening remarks by the Chief Executive to the PAC on June 14th 2012, the Authority cautioned as follows:

“I want to stress that we wish to provide the Committee with as much information as possible today. However, as you are aware, the transaction to purchase the Irish



Glass Bottle site is the subject of a legal action and we are somewhat constrained in the comments we can make on that matter at this time.”

5. Notwithstanding the caution, Deputy Eoghan Murphy made the following statement:

“It is incredible that the Authority’s continued existence is dependent on it successfully defending a case which no one believes it has a chance of winning.”

6. The PAC should note that the Authority has been advised that it has a good defence to the action and continues to vigorously defend their position.
7. Subsequent to the PAC Proceedings on the 14th June, an Affidavit of Mr Tom Simpson, Solicitor for the Plaintiffs, sworn the 22nd June, which Affidavit exhibited the C&AG Report and the PAC transcript of proceedings dated 14th June, 2012, was opened before the Commercial Court on Monday, 25th June, 2012. The Plaintiffs believe that these documents strengthen their case.
8. The Authority has received cautionary advice from its legal team. Due to the complex and changing nature of the issues in the Proceedings, it is not possible to predict, with certainty, what actual implications will arise from the Report and from the PAC hearings. It is clear, however, that the Plaintiffs are carefully examining what is being said at the PAC and will be seeking to use what is said to advance their case in the Proceedings. It is unlikely to be helpful for the conduct of the defence of the Proceedings if a parallel process is ongoing in PAC, at the same time that the Proceedings are being ventilated in the Courts.
9. The Plaintiffs’ Affidavit, the submissions of Counsel on behalf of the Plaintiffs at the hearing of the motion, the subsequent application to admit the Plaintiffs’ Affidavit as further evidence, make it clear that the Plaintiffs regard these matters as being helpful to the prosecution of their case and detrimental to the Authority’s defence.



10. Counsel for the Authority argued that neither the Report nor the transcript were admissible as evidence, and that, in any event, the contents thereof are not relevant to the very narrow legal issue to be determined. The Court agreed that the Report was not admissible and was no different in law than a report of a Tribunal of Inquiry, citing Supreme Court authority in this regard, nor was it relevant to the preliminary issue. As regards the Plaintiffs' reliance on the hearing before the PAC, Mr. Justice Kelly noted that while he had "considerable reservations" as to the admissibility of the transcript of the PAC hearing on 14 June 2012, he did not consider it necessary to decide upon that aspect as the matters discussed at the PAC hearing were, similarly, not relevant to the narrow legal question to be determined on a preliminary basis.
11. The Authority is not in a position to advise the PAC as to what aspect of the IGB transaction that it can or cannot inquire into which may or may not have a detrimental impact on the conduct of the proceedings.
12. Neither is the Authority now comfortable in furnishing documents pertinent to Chapter 3 of the Special Report which documents are the subject matter of an Order for Discovery while proceedings are ongoing.
13. We believe that any continued inquiry (before the Court determines the issues) by the PAC will be detrimental to the conduct of the case in circumstances where the publication of the Report and the hearing before the PAC are already being used by the Plaintiffs in an attempt to advance their case.
14. The Authority is requesting that the PAC consider whether it would be in the best interests of the Irish taxpayer to postpone any further inquiry into Chapter 3 of the Special Report pending the determination of the issue in the proceedings by Judge Kelly in the Commercial Court.
15. The Authority is also requesting the PAC pursuant to Section 7A of Standing Order 163 of Dail Eireann to refrain




from inquiring into, in public session, or publishing, confidential information regarding the legal action.

16. Mr. Justice Kelly also noted, in his rulings on both 25 June 2012 and 26 June 2012, that he is determined that the Proceedings are going to move much more expeditiously toward trial from now on and that no further delays would be permitted.
17. With the utmost respect, the Authority asks the PAC to consider the contents of this letter with a view to postponing any further inquiry until the case has been determined by the Commercial Court.
18. In order to assist your understanding of our concerns we refer you to the following documents:
 - a. The transcript of the PAC Hearing last Thursday, 14th June, 2012
 - b. The Opening Statement of the CEO to the PAC
 - c. The Authority's briefing document to the PAC
 - d. The letter requesting documents and information from the PAC dated 21st June, 2012.

Further, we enclose the following documents:

- a. Transcript of the Hearing before the Commercial Court (Judge Kelly) of the Motion to dismiss on Monday 25th June, 2012.
- b. Transcript of the Hearing of the Application by the Plaintiff to have the C&AG Report and the transcript of the PAC Hearing admitted with the affidavit of Mr Simpson into the hearing of the motion on the 26th/27th July, 2012.
- c. Affidavit of Tom Simpson sworn the 22nd June which Affidavit exhibited the C&AG Report and the PAC transcript of proceedings dated 14th June, 2012

Yours sincerely



John Tierney

Chairman

