

TRIBUNAL OF INQUIRY

INTO

COMPLAINTS CONCERNING SOME GARDAÍ IN THE DONEGAL DIVISION

**Appointed by Instrument made by the
Minister for Justice, Equality and Law Reform
on the 24th day of April, 2002 entitled
Tribunals of Inquiry (Evidence) Act, 1921
(Establishment of Tribunal), 2002**

RULING ON APPLICATIONS FOR COSTS

**Concerning Hearings of the Tribunal in respect of Term of
Reference (h)**

Ruling of Mr. Justice Frederick Morris on applications for costs concerning Term of Reference (h)

Introduction

This ruling concerns applications for costs arising out of the publication of the Tribunal's eighth report. That report dealt with the Tribunal's findings in respect of its inquiry under Term of Reference (h). That Term of Reference required the Tribunal to urgently inquire into and report upon the following matter:

"Allegations contained in documents received by Deputy Jim Higgins on 25th of June 2000 and in information received by Deputy Brendan Howlin on 25th of June 2000 that two senior members of An Garda Síochána may have acted with impropriety."

Following publication of the eighth report, a number of parties submitted written applications for payment of their legal costs arising out of the Anonymous Allegations module. The Tribunal has already given a number of rulings on costs following upon the publication of its previous reports. In the course of these rulings the Tribunal has set out a statement of the legal principles, which it has applied in exercising its discretion in relation to the awards of costs which have been made. In addition, in Chapter 17 of the sixth report, the Tribunal drew together a clear statement of the

principles on which costs are awarded by it. As the general principles have already been fully set out in detail in Chapter 17 of the Tribunal's sixth report, it is not proposed to restate the general legal principles on which the Tribunal has proceeded in determining the costs issues arising out of the eighth report. I will now turn to a consideration of the individual applications received by the Tribunal arising out of the publication of the eighth report.

Application on behalf of Mr. Frank Connolly

At the time of the matters under review, Mr. Connolly was a journalist with the Sunday Business Post. He became aware of the existence of the facsimile which had been sent to Deputy Higgins. He also received a facsimile which broadly contained the same information as that sent to Mr. Higgins, but was significantly different in other ways. He was in contact with Mr. McBrearty Senior and he was in a position to inform the Tribunal of his interaction with Mr. McBrearty Senior. His evidence was of importance further in that Mr. Higgins gave an interview to Mr. Connolly concerning his meeting with the Minister for Justice, Equality and Law Reform, which Mr. Connolly was in a position to quote in the newspaper on the 2nd of July 2000, which Mr. Connolly described as "the hook that allowed us to publish" (the story). Mr. Connolly's evidence was of assistance in a further respect. He and Mr. Frank McBrearty Senior drove through certain areas of County Donegal, including adjacent to a shed owned by Sergeant John White. The discussion which Mr. Connolly had with Mr. McBrearty Senior on the occasion of that journey was of assistance to the Tribunal. I am satisfied that Mr. Connolly gave a frank account of his dealings with Frank McBrearty Senior and of his knowledge in relation to the matters under review. In the circumstances, it is equitable and proper that Mr. Connolly's costs on the Anonymous Allegations module should be allowed.

Application on behalf of Mr. John Mooney

Mr. Mooney gave evidence before the Tribunal on Day 589. Essentially the core of his evidence covered two matters. Firstly, he dealt in some detail with an article which he had written and which had been published in The Sunday Times newspaper on the 25th of November 2001. That article referred to the author having seen a particular document which contained serious allegations against senior officers in An Garda Síochána. However, the author was satisfied that this was a bogus document. In the article the author stated that the file which had been prepared appeared to have been a forgery and was circulated in an attempt to collapse the Donegal corruption inquiry. Mr. Mooney gave clear and cogent evidence in relation to the background investigations which he had carried out leading to his authorship of that article. He also gave evidence of having seen a document, which he felt was a "forged" document prior to the time that the facsimile document had been produced to the Minister for Justice, Equality and Law Reform by the two Dáil Deputies. Mr. Mooney gave a description of the appearance of that document and also of its general content. He went on to give reasons as to why he reached the belief at that time that it was a forged document. I am satisfied that in giving this evidence to the Tribunal, Mr. Mooney gave an honest account of his recollection of the events which occurred at that time. In so doing, he provided assistance and co-operation to the Tribunal in its work. It is appropriate that he

should receive an order for payment of his costs in the Anonymous Allegations module.

Application on behalf of Mr. Jim Higgins

Mr. Higgins was the recipient of the facsimile message sent by Mr. Frank McBrearty Senior. His role in the module was central to the Tribunal's inquiries. He gave evidence which was of considerable assistance in identifying Mr. Togher as participating in the preparation of the facsimile message. He told of the meeting which he had with the Minister for Justice, Equality and Law Reform and of his interaction with An Garda Síochána during their investigation into the matter. Without the assistance afforded to the Tribunal by Mr. Higgins, it would not have been possible for the Tribunal to report on this matter as fully as it did. In addition, Mr. Higgins also supplied to the Tribunal the second facsimile document which he had received from Mr. Frank McBrearty Senior in July of 2000. This represented a significant breakthrough for the Tribunal in its inquiry into this matter.

In the course of the submission lodged on behalf of Mr. Higgins, it was asserted that the Tribunal should not deem the fact that Mr. Higgins relied on his constitutional privilege and as a result resisted an attempt by the Tribunal to obtain his telephone records, as obstruction on his part in relation to the work of the Tribunal. I accept that as a valid assertion. The Tribunal accepts that Mr. Higgins acted in an entirely honourable way when he asserted the privilege which he and his legal advisers thought he properly had at that time. The Tribunal does not regard this as any obstruction by Mr. Higgins of the work of the Tribunal. The Tribunal notes that as soon as he was relieved of the bond of confidentiality by Mr. McBrearty Senior in June 2003, he freely made the required information available to the Tribunal.

In the circumstances, the Tribunal is satisfied that it is equitable that Mr. Higgins should be allowed his costs in relation to the Anonymous Allegations module.

Application on behalf of Mr. John White

Mr. White was one of the persons who was severely criticised in the facsimile messages which were transmitted by Frank McBrearty Senior. He was in my view entitled to defend his reputation against the allegations contained in the facsimile messages. In the course of the hearings into the Anonymous Allegations module, he co-operated with the Tribunal. He gave evidence when he was required to do so. His evidence covered a wide range in not only refuting the allegations contained in the facsimile messages but moreover in informing the Tribunal of his meetings with Mr. Flynn, Mr. Coffey, officers in Garda Headquarters and others. The Tribunal is cognisant of the fact that the evidence given by Mr. White in the private session hearings was not accepted by the Tribunal. However, having regard to the fact that this issue was not one raised by Mr. White himself, but entered into the inquiry through a somewhat roundabout route and was ultimately imparted by Mr. Giblin SC in his telephone conversation with Mr. Brendan Howlin TD, the Tribunal does not regard the evidence given by Mr. White on this issue as sufficient to disentitle him to a portion of his costs. Furthermore, the Tribunal notes that an issue arose in relation to certain documents in the course of the private session hearings. Mr. White's evidence was borne out in the course of the hearings concerning those documents.

In the circumstances, the Tribunal is satisfied that it is equitable that Mr. White should be granted an order for payment of his costs in this module.

Application on behalf of Mr. James Madigan

Mr. Madigan's role in this module centered around his association with Mr. McBrearty Senior. He formed part of a nucleus of a group who concerned themselves with allegations of Garda misconduct. This group assisted Mr. McBrearty Senior through his difficulties. There were numerous meetings held at Mr. Madigan's house where various members of An Garda Síochána would meet casually and discuss with Mr. Madigan, and on occasions with Mr. McBrearty Senior, their suspicions regarding Garda misconduct in the Donegal division. Mr. Madigan had valuable information to give to the Tribunal. The Tribunal is satisfied that Mr. Madigan gave a frank account of the meetings held in his house and thereby assisted the Tribunal in establishing the source of the facsimile messages. I am satisfied that Mr. Madigan co-operated with the Tribunal in its inquiry. He is entitled to an order for payment of his costs on this module.

Application on behalf of Mr. Brendan Howlin TD

Like Mr. Jim Higgins, Mr. Brendan Howlin TD was the central figure in this module. He told of the communication which he had had with Mr. Martin Giblin SC, which led him to bring information which he had been given by Mr. Giblin SC, to the notice of the Minister for Justice, Equality and Law Reform. He gave evidence of his association with the Gardaí during the investigation which they carried out into this matter. I am satisfied that he has given a truthful account of his dealings both with Mr. Giblin SC and in relation to the information which he received from him. His evidence was of assistance to the Tribunal in identifying the origin of the facsimile messages notwithstanding the fact that Mr. Howlin TD was never given a copy of the actual facsimile message.

In the submission filed on behalf of Mr. Howlin's application for costs, it was submitted that the fact that he asserted a claim to privilege in respect of identification of his source and resisted an order for discovery of his telephone records and the fact that he pursued this claim of privilege through the Courts, should not be seen as obstruction on his part in relation to the work of the Tribunal. I accept this submission as correct. I accept that Mr. Howlin in asserting his claim to privilege in the way that he did, was not motivated by any desire to obstruct or hinder the Tribunal in carrying out its work.

In the circumstances, I am satisfied that it is appropriate that Mr. Howlin TD should receive an order for payment of his costs on the Anonymous Allegations module.

Application on behalf of Mr. William Flynn

An application for payment of costs on behalf of Mr. William Flynn was lodged by Messrs. Traynor & Co. Solicitors. Mr. Flynn was represented by solicitor and counsel during the hearings of the Anonymous Allegations module. Mr. Flynn gave evidence in relation to the meeting that was held at his house with Mr. Frank McBrearty Senior and others on the night of the 7th of March 2000. He also furnished to the Tribunal a

"memorandum" of that meeting which had been drawn up some years later and furnished to the Carty investigation team. He also furnished a copy of the first facsimile message but with a different typeface, which he alleged he had received from Frank McBrearty Senior. The Tribunal is satisfied that on these factual matters concerning the Anonymous Allegations module, Mr. Flynn did his best to give a truthful and accurate account to the Tribunal. Unfortunately, during the hearings in this module, Mr. Flynn walked out of the witness box and refused to continue to give evidence. However, I was aware at the time that Mr. Flynn had certain medical difficulties which made it difficult for him to attend at the Tribunal. Accordingly, I am not disposed to make any deduction in respect of the award of costs which I will make in favour of Mr. Flynn as a result of his walkout from the Tribunal due to the extenuating circumstances involved. I am satisfied that it is appropriate that Mr. Flynn should obtain an order for payment of his costs in this module.

An application was also received from Mr. William Flynn personally. By letter dated the 28th of October 2008, Mr. Flynn stated as follows:

"I refer to the above and completely divorced from my solicitor and barrister I wish to apply for my personal costs, i.e. professional time in monitoring daily transcripts, liaising and meeting with my legal team and instructing them re: the above module in matters concerning me and where the Chairman would allow a professional hourly rate in respect of same and where the Chairman would also consider allowing a professional fee for the disruption of my day to day business in co-operating with the Tribunal on a daily basis in relation to the above module."

Having considered the matter carefully, in my view there was no need for Mr. Flynn to monitor daily transcripts of the Tribunal for the purpose of attending at the Tribunal and giving his evidence relating to these matters. No doubt, a formal meeting with his solicitor for the purpose of instructing him was necessary and possibly a meeting with counsel. However, in my opinion, Mr. Flynn's involvement called for no more than a normal interaction with his solicitor and counsel and does not call for any special treatment by the Tribunal. His position is no different to any other person attending at the Tribunal who is required to devote time to assist the Tribunal.

Mr. Flynn was a witness before the Tribunal on the Anonymous Allegations module. As such if he incurred any particular costs or expenses by virtue of his attendance before the Tribunal, these can be considered by the Registrar not as part of a payment of legal costs but as witness expenses when same are properly vouched. Accordingly, I refuse Mr. Flynn's application in the terms set out in his letter dated the 28th of October 2008, but remind him that if there are any particular costs or expenses incurred by him in connection with his attendance at the Tribunal, these can be considered by the Registrar to the Tribunal when same are submitted in a properly vouched format.

Application on behalf of Ms. Kathleen Sweeney

Ms. Sweeney's role at the Tribunal involved her giving evidence to the Tribunal of typing and doing secretarial work, which she had done for Mr. Frank McBrearty Senior. This included a description of meetings which she had with Mr. McBrearty Senior. I am satisfied that she gave her evidence fairly and was of assistance to the

Tribunal in respect of the limited areas on which she gave evidence in this module. In my view, it is equitable that she should be allowed her costs on the Anonymous Allegations module.

Application on behalf of Mr. P.J. Togher

An application was submitted by Messrs. Lyons Kenny, Solicitors seeking costs on behalf of Mr. P.J. Togher in the Anonymous Allegations module. Having regard to the content of the Tribunal's eighth report, the solicitors acting for Mr. Togher quite properly did not seek payment of his full costs in this module. It was submitted on behalf of Mr. Togher that he provided some co-operation to the Tribunal by merely attending with the Tribunal's investigators for interview and by attending to give evidence before the Tribunal itself. Unfortunately, I formed the opinion that Mr. Togher lied consistently to the Tribunal. He was in my opinion in a position to give the Tribunal valuable evidence which would have shortened the work of the Tribunal and saved significant costs. He failed to do this. On the contrary, he caused the Tribunal difficulty and wasted time. Such credible evidence that he did give, was in relation to matters of little importance to the work of the Tribunal. I have reviewed the matters referred to in the eighth report of the Tribunal with a view to seeing whether there is any basis on which even portion of the costs could be awarded to Mr. Togher. Unfortunately, given the fact that he did not give a truthful account to the Tribunal, he cannot be said to have co-operated with it in its work. Accordingly, I refuse his application for costs herein.

Application on behalf of the Association of Garda Sergeants and Inspectors

An application was submitted by Messrs. Seán Costello & Co. Solicitors seeking costs in the Anonymous Allegations module on behalf of the Association of Garda Sergeants and Inspectors. In the course of their submission they stated as follows:

"While we did not attend the hearings of this module, we did receive transcripts of evidence given on each day, reviewed each transcript and reported to the client on such evidence. In addition, following receipt of the Tribunal report on the matters covered by Term of Reference (j) [sic], we reviewed the report and advised our clients on its contents. We submit our application for an appropriate order for costs in this matter."

Having regard to the subject matter of Term of Reference (h), I do not think that the interests of the AGSI were in any way under threat in the course of this module. While there was reference to certain members of the AGSI in the second facsimile document, concerning an allegation of misuse of BSE funds, that matter had been dealt with comprehensively in the course of the Harassment sub-module. It was not touched upon in the course of this module.

Furthermore, while the Association may have been granted a limited representation, somewhat in the nature of holding a "watching brief", I do not accept that it was reasonable for them to hold any such brief by staying away from the hearings and merely reviewing the transcripts at night. If it was necessary to undertake that exercise, there was no reason why that had to be done by a solicitor acting on behalf of the Association, rather than by some officer of the Association. In the

circumstances, I do not see it as equitable that any costs should be awarded to the Association in respect of their legal representation on this module. Accordingly, I refuse the Association's application for costs herein.

Signed:

Frederick Morris
The Hon Mr. Justice Frederick Morris
Sole Member of the Tribunal

Date:

13th November 2008