



June 21, 2007

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Decisions & Rulings](#)[Decisions and Rulings](#)[Statements](#)[Search](#)[Downloads Area](#)**Discovery and Production of documents by Michael Bailey, Bovale Developments Limited, Kevin Smith, Smith Foy Solicitors and Joe O'Toole, McGrath & Company Accountants****Ruling made on submissions made by the above-named parties**

This matter came before me on the 4th August, 1999 to hear representations as to whether and to what extent, if any, orders for discovery and for the production of documents should be made against the above-named persons and/or corporate entities to whom notice of my intention to consider making such order was given by letters dated the 26th and 28th July 1999 respectively.

THE EVIDENTIAL BASE FOR THE MAKING OF ORDERS FOR PRODUCTION AND DISCOVERY

James Gogarty has given evidence to the Tribunal to the effect that he believes that Michael Bailey handed over a sum of £40,000 to Ray Burke at a meeting in Ray Burke's home in June 1989 when an equivalent sum is said to have been paid to Mr. Burke by James Gogarty on behalf of JMSE. Mr. Bailey denies that any sum was paid by him to Ray Burke. Mr. Burke also denies receipt of any monies from Mr. Bailey but admits receipt of the sum of £30,000 from Mr. Gogarty.

James Gogarty has given evidence to the effect that Michael Bailey gave him a cheque for £50,000 at a meeting held at the Skylon Hotel, Drumcondra in August/September 1990 and that such payment was made to him by Michael Bailey with the intention that he should "*forego his dispute with his former employers JMSE and enjoy life*". James Gogarty has given evidence of his belief that the payment of £50,000 by way of cheque was made by Mr. Bailey so as to ensure that the fact of the payments to Mr. Burke were not publicly aired.

Michael Bailey has given evidence of having paid James Gogarty the sum of £162,000 between November 1989 and August 1996. He states that such payments were made by him at the request of James Gogarty who had sought a finders fee of £150,000 as a condition of his negotiating the sale of the Murphy lands to Mr. Bailey. Mr. Gogarty denies any such agreement or the receipt of any monies from Mr. Bailey save the un-cashed £50,000 cheque which has been

Irish Time

Dublin base
national dail
newspaper

Independence

Dublin base
national dail
newspaper

The Irish Examiner

Cork based
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produced by him to the Tribunal.

Mr. Bailey states that the payment of the sum of £162,000 to Mr. Gogarty was made by way of stage payments for varying amounts all in cash. In his evidence he has stated that these payments were recorded in the company's books of accounts. Mr. Bailey has produced to the Tribunal a notebook which he states contains a record of a number of payments made by him to James Gogarty.

Joe O'Toole, accountant of McGrath and Company, has given evidence to the Tribunal that whilst he was the accountant to Bovale Developments Limited he was totally unaware of the existence of the notebook produced by Mr. Bailey or of its contents. None of the documents produced by Mr. O'Toole to the Tribunal record any payments made to Mr. Gogarty. His preparation of the company's accounts did not include a consideration of the contents of the notebook produced by Mr. Bailey and to that extent at least it would appear that the company's annual accounts as prepared by Mr. O'Toole may not represent a true record of the financial transactions of the company during the year in question. Upon cross-examination Mr. Bailey admitted that he had conducted the business affairs of the company in certain instances in cash and that such cash transactions were "*off the books*" by which I take it he means that the company's accountants were not informed of these transactions.

Mr. Bailey states that the sum of £50,000 in cash was paid to Mr. James Gogarty in November 1989 at the Royal Dublin Hotel. The accounts for the year ending 5th April 1990 have not been produced to the Tribunal. However, the accounts for the following year record the acquisition costs of the Murphy lands incurred to that date as £230,000 representing a deposit and a subsequent sum of £50,000 incurred in the financial year 6th April 1990 to the 5th April 1991. Mr. O'Toole gave evidence that the payment of £50,000 was queried in the accounts and an explanation given by the Directors to the auditors that this sum represented a cheque for £50,000 made payable to Smith Foy Solicitors, acting on behalf of the company in connection with the acquisition of the Murphy lands.

THE NECESSITY FOR SEEKING DISCOVERY AND PRODUCTION OF THE DOCUMENTS SET FORTH IN THE LETTERS OF THE 26TH and 28th JULY 1999

It is clear from the evidence produced before the Tribunal that:

1. A dispute exists as to whether or not the sum of £40,000 was paid by Michael Bailey to Ray Burke at a meeting in June 1989.
2. A dispute arises as to whether or not Mr. Bailey paid the sum of £162,000 to James Gogarty between 1989 and 1996.
3. A dispute arises as to whether or not the accounts of Bovale Developments Limited do or do not record the

payment of £162,000 as a finder's fee on the acquisition of the Murphy lands by Bovale Developments Limited.

4. The circumstances in which a cheque for £50,000 is said to have been paid to Smith Foy in connection with the acquisition of the lands remain unclear.

5. The conflict in the accounts of events given by James Gogarty and Michael Bailey may be clarified or resolved by a consideration of the financial transactions carried out by Mr. Bailey and/or Bailey/Bovale Developments Limited or associated companies during the period in question. The documents are therefore relevant and material.

SUBMISSIONS OF THE PARTIES

Mr. Simons on behalf of the Bailey/Bovale interests submits that discovery and production of documents as sought is unnecessary. He submits that the question of these payments to Mr. Gogarty is a matter which is '*collateral*'. He states that in order to make an order for production or discovery, I must be satisfied that there is an evidential basis which has been established which would justify the making of the order. He distinguishes the credibility issue from the issues specifically enumerated in the Terms Of Reference and suggests that the degree of investigation that should be carried out into a collateral issue should not be as searching or exhaustive as that which would be applied to a core allegation. I do not believe that it is necessary to narrow the investigation in the manner suggested. The relevance of the documentation sought is in my opinion clear. It seems to me likely that a consideration of this documentation may have some probative value in resolving the issues identified above.

Mr. Simons submits that there is no evidential basis for the production by Mr. Bailey of the certificates of incorporation of all companies with which he was associated nor is there evidence to justify the requirement to produce the accounts of those companies with which he was associated. In my opinion, it is obvious that the accounts of Bovale Developments Limited were not being maintained in an orthodox fashion. It is admitted by Mr. Bailey that substantial cash payments were made which are not so recorded in the accounts of Bovale Developments Limited. If such payments were made, they must have come from companies which were under the control of Mr. Bailey. I believe it is a legitimate inquiry to establish the identity of the potential companies from which such payments may have been withdrawn or through which such payments may have been channelled. The precise method in which Mr. Bailey managed to divert monies so that they may not appear in the books of account of the company remains unclear and I believe that a consideration of all of the accounts of companies over which he had control may establish the method through which such monies were concealed from the company's auditor. The fact that Mr. Bailey may have controlled companies outside the jurisdiction does not in my opinion render the order for production of the certificates of incorporation of such

company superfluous or unnecessary. Mr. Bailey has indicated that he had involvement in companies in the United Kingdom but was unable to provide any details in his direct testimony to the Tribunal. No reasons have been advanced to me as to why Mr. Bailey as a director of such companies cannot produce copies of the accounts of such companies to the Tribunal.

It has been urged that at the order for production and discovery should be limited to identifying specific payments made to Mr. Gogarty from the companies of which Mr. Bailey was a director. In view of the admissions by Mr. Bailey regarding the payment of sums in cash and "*off the books*", it seems to me that any order for discovery and production so limited may fail to discover the true source of any such payments. I believe that it is appropriate to make the order against Mr. Bailey, notwithstanding that certain of his companies are registered outside this jurisdiction, no impediment is apparent to me at this time which would preclude Mr. Bailey from complying with an order for the production of such accounts.

There is a lack of clarity in the evidence as to whether the alleged payments to Mr. Gogarty ceased in 1996 or 1997. Accordingly, I believe that the order should relate to the accounts for the period ending on the 5th April 1998.

In relation to the Smith Foy account, it is submitted because of the potential volume of documentation involved and the sensitive nature of a solicitor/client account, the order should be confined to the monies paid out in relation to the North County Dublin lands or in relation to payments to Mr. Gogarty. In view of the unorthodox accounting practises adopted by Mr. Bailey, I believe that to so limit the orders would effectively be to deny the Tribunal the opportunity of properly investigating the nature and source of such payments and the possibility that the same may have been recorded in some other fashion in the solicitor/client account.

The submissions in respect of the disclosure of the working papers of Mr. Joe O'Toole, accountant of McGrath & Co. were advanced by Mr. Meehan S.C. and Mr. Murray. It is submitted that the terms of the order intended to be made against Mr. O'Toole are too wide and extend beyond the Terms of Reference. It is clear that the working papers of the company's auditors are relevant, particularly since there is an admission by Mr. Bailey that the company's auditors were not informed of certain payments made in cash on behalf of the company. The manner in which the accounts of the company were reconciled by the company's auditor is likely to be of assistance in identifying the source and nature of payments made and recorded in the company's books. A consideration of these working papers may well have probative value in reaching any conclusion on the issues identified above.

DECISION

I believe that the proper test to be applied by me in

determining whether or not to make an order for discovery or production is to establish whether there is any documentary base which will either corroborate the allegations which are being made or which could have the opposite effect and exonerate the person against whom the allegation is made. The parameters of such an inquiry must be such that every document relating to matters in question in the inquiry which would not only be evidence on the specific issue but also which it is reasonable to suppose contain information which may, either directly or indirectly, enable the investigator to advance the proof of the allegation or to establish the contrary should be discoverable.

I believe that the documentation set forth in the letters of the 26th and 28th July 1999 respectively falls within the category of documentation which is discoverable and accordingly I intend to order the production of such documentation, the same to be produced to the Tribunal within fourteen days of today's date.

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