

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY,

30TH JUNE 2004 AT 10.30 A.M:

CHAIRMAN: Good morning.

This is my ruling on the principles to be applied in respect of certain applications for costs.

On the 14th and 15th of June, 2004, I heard oral submissions in public from a number of parties on the principles which I should apply in the exercise of my discretion in determining applications for costs made pursuant to Section 6, subsection 1 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended by Section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997. And section 2 of the Tribunals of Inquiry (Evidence) (Amendment) Act 2004.

Invitations to make submissions were extended to a number of persons who had indicated that they would be applying to the Tribunal for their own costs to be awarded to them, notwithstanding that findings against them had been made in the second and third interim reports of the Tribunal.

The findings in the second and third interim reports included findings of corruption, and/or findings of non-cooperation with the Tribunal on the part of certain named parties.

These oral submissions were preceded by written submissions, some of the parties relied upon these written submissions and did not make further oral submissions. In considering the issues raised, I have had regard to the written submissions made by all parties, in addition to the oral submissions made by some of the parties at the public hearings on the 14th and 15th June

10:35:17 1 2004.

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In addition to extending an invitation to make submissions to me to the parties against whom adverse findings had been made in the second and third interim

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10:35:28 5

reports, I invited the submissions of the Minister for Finance as the person

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who would be primarily liable to pay any such cost and the Attorney General

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representing the public interest. I received and have considered both written

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and oral submissions made by counsel on behalf of these parties. Their written

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submissions were circulated in advance of the public hearings to those parties

10:35:49 10

against whom adverse findings had been reached in the second and third interim

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reports.

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At the public hearing in relation to costs, I ruled that I could not entertain

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submissions questioning my jurisdiction to determine costs as provided for by

10:36:05 15

statute or the merit or validity of the findings of the second and third

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interim reports of the Tribunal.

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In making these pronouncements, I was mindful of the fact there are currently

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three sets of High Court proceedings in being which seek either directly or

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indirectly to challenge my jurisdiction to determine costs and/or to challenge

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the validity of certain findings made in the second and third interim reports

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of the Tribunal.

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Such issues are properly matters for the courts and I indicated that I am

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satisfied that it is appropriate for me to carry out the tasks which I have

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been directed to perform by the Oireachtas under the current legislation. The

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findings reported upon in the second and third interim reports of the Tribunal

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are findings of my predecessor, Mr. Justice Feergus Flood. My power to

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determine the issues of costs arising from Mr. Justice Flood's findings on

10:36:56 30

these issues arises by virtue of the Tribunals of Inquiry (Evidence)

10:37:01 1 (Amendment) Act 2004, which provides section 2 as follows:

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3 "1A the person who, for the time being is the Sole Member of a Tribunal or is
4 the chairperson of a Tribunal consisting of more than one member, A may make an
10:37:18 5 order under subsection 1 in relation to any costs referred to in that
6 subsection that were incurred before his or her appointment has Sole Member or
7 chairperson. And that have not already been determined in accordance with that
8 subsection and B, shall for that purpose have regard to any report of the
9 Tribunal relating to its proceedings in the period before his or her
10:37:38 10 appointment."

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12 In the exercise of my power to determine costs, sorry, issues of costs, I must
13 act in accordance with the provisions of the enabling sections of the Tribunal
14 the Inquiry (Evidence) Acts 1921 to 2004. The enabling power is set out in
10:37:55 15 Section 6 sub-section 1 of the Tribunals of Inquiry (Evidence) (Amendment) Act
16 1979 as amended by Section 3 of the Tribunals of Inquiry (Evidence) (Amendment)
17 Act 1997.

18 As amended by section 2 of the Tribunals of Inquiry (Evidence) (Amendment) Act
19 2004. For the purpose of the present exercise, the relevant extract from the
10:38:17 20 section reads as follows:

21
22 And I quote "Where a Tribunal or if the Tribunal consist of more than one
23 member, the chairperson of the Tribunal is of opinion that having regard to the
24 findings of the Tribunal and all other relevant matters, including the terms of
10:38:31 25 the resolution passed by each House of the Oireachtas relating to the
26 establishment of the Tribunal, or failing to cooperate with or provide
27 assistance to, or knowingly giving false or misleading information to the
28 Tribunal, there are sufficient reasons rendering it equitable to do so, the
29 Tribunal or the Chairperson as the case may be, may either of the Tribunals or
10:38:55 30 the chairperson's own motion, as the case may be, or on the application of any

10:39:01 1 person appearing before the Tribunal order that the whole or parts of the costs
2 A, of any person appearing before the Tribunal by counsel or solicitor as taxed
3 by a Taxing Master of the High Court shall be paid to the person by any other
4 person named in the order.

10:39:16 5
6 1 A, the person who for the time being is the Sole Member of the Tribunal or is
7 the chairperson of a Tribunal consisting of more than one member, A may make an
8 order under section 1 in relation to any costs referred to in that subsection
9 that were incurred before his or her appointment as Sole Member or Chairperson
10:39:33 10 that have not been already been determined in accordance that with that
11 subsection.

12
13 B, shall for that purpose, have regard to the Tribunal relating to its
14 proceedings in the period before his or her appointment.

10:39:44 15
16 Paragraph B of subsection 1 A shall not be taken to limit the matters to which
17 regard is to be had under subsection 1."

18
19 Discretion to award costs: I interpret this section as meaning that where I am
10:39:57 20 of opinion that there are sufficient reasons rendering it equitable for me to
21 do so, I may award a party his or her legal costs of representation before the
22 Tribunal.

23
24 I believe it is clear from the wording of the section that I have a discretion
10:40:12 25 as to whether or not to award costs. I do not accept that there is any
26 automatic entitlement to costs conferred upon persons who are granted
27 representation before the Tribunal or that I should approach the issue on the
28 basis that all persons appearing before the Tribunal have a prima facie
29 entitlement to costs.

10:40:31 30

10:40:31 1 The initial legislation setting up the Tribunals of Inquiry, sorry setting up
2 Tribunals of Inquiry was the Tribunals of Inquiry (Evidence) (Amendment) Act
3 1921 in which no express provision for costs was made. The situation pertained
4 until 1979 when the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 was
10:40:50 5 passed.

6
7 That Act provided in Section 6, subsection 1 in its original unamended form
8 that and I quote:

9
10:40:58 10 "Where a Tribunal, or if the Tribunal consists of more than one member the
11 chairman of the Tribunal, is of opinion that having regard to the findings of
12 the Tribunal and all other relevant matters, there are sufficient reasons
13 rendering it equitable to do so, the Tribunal or the Chairman, as the case may
14 be, may by order direct that the whole or part of the costs of any person
10:41:19 15 appearing before the Tribunal by counsel or solicitor as taxed by a Taxing
16 Master of the High Court shall be paid to the person by any other person named
17 in the order."

18
19 That section in its unamended form was applied by Mr. Justice Costello as
10:41:33 20 Chairman of the Whiddy Inquiry, by Mr. Justice Keane as he then was, of the
21 Chairman of the Stardust Inquiry and by Mr. Justice Lynch as chairman of the
22 Kerry Babies Inquiry. Mr. Justice Costello stated at page 345, chapter 24 of
23 his report: "It is clear that the discretion to award costs is a wide one. In
24 exercising it, the chairman of the Tribunal must have regard to both for it's
10:41:55 25 findings and all other relevant matters and having done so, if it finds that
26 there is sufficient reasons which render it equitable, may direct to the costs
27 be made by the Minister for Finance out of public funds or any by other person
28 named in the order."

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10:42:10 30 When dealing with costs in the Kerry Babies Inquiry, Mr. Justice Lynch stated

10:42:16 1 "The right to appear at the proceedings of a Tribunal, however does not
2 necessarily mean that the costs incurred by a party in so appearing must be
3 paid by some other person. Various factors have to be considered."
4

10:42:27 5 I'm satisfied that the power to award costs is discretionary and it is in
6 relation to the principles upon which I should exercise this discretion that I
7 have sought the submissions of the interested parties. In the exercise of my
8 discretion under the section, I'm required to have regard for the findings of
9 the Tribunal, in this instance the findings of Mr. Justice Flood, and all other
10 relevant matters.

11
12 The words "Findings of the Tribunal" are not to defined in the act nor are the
13 words "All other matters" defined. The section specifically refers to four
14 matters to which I should have regard.

10:43:03 15
16 1. The terms of the resolution passed by each House of the Oireachtas relating
17 to the establishment of the Tribunal.
18 2. The failure of a party to cooperate with the Tribunal.
19 3. The failure of a party to provide assistance to the Tribunal. And
10:43:18 20 4. The provision of information to the Tribunal which is known by the person
21 providing it to be false or misleading.

22
23 Findings of the Tribunal: A number of the parties have submitted that in the
24 exercise of my discretion, I cannot or should not have regard to the findings
10:43:34 25 on the substantive or the primary issues reported upon. In the second and
26 third interim reports, the substantive or primary findings are those of
27 corruption. Some of the parties who have made submissions to me, have
28 submitted that the correct interpretation of the present section requires me to
29 ignore such findings in my consideration of applications for costs.

10:43:56 30

10:43:56 1 It is contend the that had words "Findings of the Tribunal" refer to the
2 findings as to whether or not the party in question had cooperated with or
3 assisted the Tribunal in its workings and not the findings on the substantive
4 issue.

10:44:10 5
6 This was the meaning attributed to these words by Mr. Justice Hamilton as he
7 then was while acting as chairman of the Beef Tribunal. Mr. Justice Hamilton
8 was a applying the provisions of section 6, subsection 1 of the in 1997 Act
9 prior to it's subsequent amendment in 1997. The legislation with respect to
10:44:30 10 the costs incurred in appearing before a Tribunal of Inquiry has not been
11 judicially pronounced upon since the passing of the 1997 and 2004 legislation.

12
13 The 1997 Act has however, been the subject of commentary in the consultation
14 paper of the Law Reform Commission on public inquiries, including Tribunals of
10:44:50 15 inquiry published in 2003. I believe that the correct interpretation of the
16 current Section 6 of the Tribunals of Inquiry (Evidence) Acts 1921 to 2004, is
17 that which has been enunciated in the commission's consultation paper and which
18 has been urged upon me in the submissions advanced by counsel on behalf of the
19 Minister for Finance and by counsel on behalf of the Attorney General.

10:45:15 20
21 I'm firmly of the view that the word "Findings" in the context of the present
22 inquiry, means the findings of corruption and that I'm entitled to have
23 consideration to such findings when exercising my discretion as to whether or
24 not to award costs to any party to whom representation was granted. In so
10:45:32 25 holding, I wish to emphasise that a finding of corruption does not of itself
26 mean that I must in the exercise of my discretion refuse the costs of a person
27 who has been found to have been corrupt. It is a factor to which I'm entitled
28 to have regard in determining whether in all the circumstances, it is equitable
29 to make an award of costs, whether in whole or in part.

10:45:55 30

10:45:55 1 In circumstances where for example a party is has cooperated fully with the
2 Tribunal by providing truthful information to the Tribunal and is subsequently
3 reported upon by the Tribunal as having been corrupt, such a finding will not
4 of itself prevent such a person from recovering their costs whether in whole or
10:46:13 5 in part. If I believe that in all the circumstances, it is equitable that an
6 order of costs should be made.

7
8 The Tribunal's task is to ascertain the facts. Anything that would act to
9 remove or to reduce the incentive to parties to assist the Tribunal by
10:46:27 10 cooperating fully with the Tribunal in its inquiries would in my opinion be
11 seriously detrimental to the Tribunal's capacity to do so.
12 Consequently, a blanket refusal to award costs to a party who has been found to
13 have been corrupt but who has cooperated with the Tribunal's inquiries by
14 giving a truthful account of events, would be counterproductive to the purpose
10:46:50 15 of the Tribunal and detrimental to the public good.

16
17 All other relevant matters: In addition to the four relevant matters which are
18 specifically mentioned in Section 6, subsection 1, I'm also required to have
19 regard to all other relevant matters and amongst the matters I intend to have
10:47:07 20 regard to are the following:

21
22 The extent to which the applicant for costs was responsible for incurring such
23 costs.

24
10:47:14 25 The extent to which the conduct of the applicant for costs was responsible for
26 costs being incurred by the Tribunal.

27
28 The nature and extent of any non-cooperation or failure to assist the Tribunal
29 by the applicant for costs.

10:47:27 30

10:47:27 1 The consequences which flowed from the non-cooperation or failure to assist on
2 the part of the applicant for the Tribunal or other parties appearing before
3 the Tribunal.

10:47:37 5 The conduct of the applicant for costs before the Tribunal.

6
7 Whether the applicant for costs knowingly made false allegations of wrongdoing
8 on the part of others.

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10:47:47 10 The reasons if ascertained, why such persons either failed to assist or did not
11 cooperate with the Tribunal or knowingly provided false information to the
12 Tribunal.

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14 The personal circumstances of the applicant, including the financial status and
10:48:02 15 financial liabilities arising from participation in the Tribunal. The
16 consequences for the applicant if any order refusing him his costs in whole or
17 in part.

18
19 And the nature and extent of any claim for costs.

10:48:15 20
21 This list is not intended to be exhaustive and it may be appropriate in the
22 circumstances of any individual application to have regard for further matters
23 as yet is unascertained. In exercising my discretion I shall be mindful of the
24 fact the power to award or refuse costs should not be used as a means of
10:48:35 25 inflicting a penalty on any party. In making nigh my decision, I shall have
26 regard to the activities of the Tribunal and the conduct of the parties before
27 it and as found by it.

28
29 The evidential base upon which decisions been reached: The Tribunals of
10:48:51 30 Inquiry (Evidence) (Amendment) Act 2004, section 2, provides that I shall for

10:48:54 1 the purpose of making an order in relation to costs have regard to any report
2 of the Tribunal relating to its proceedings in the period before my
3 appointment. I am not however limited to considering the content of a report
4 alone in reaching my determination. In addition to the second and third
10:49:10 5 interim reports themselves, I shall have regard to the relevant extracts from
6 the transcript of the evidence heard before the Tribunal upon which the
7 conclusions of the my predecessor, Mr. Justice Flood, were based.

8
9 Where it is appropriate for me to do so, I shall have regard to the
10:49:26 10 correspondence which passed between the applicant for cost and the Tribunal. I
11 shall, where appropriate, have regard to the role played by the applicant in
12 the matters which were the subject of the inquiry as established in the
13 reports.

14
10:49:36 15 As I have already stated by consideration of the second and third interim
16 reports and of the evidence which led to their findings, will be led to
17 addressing the merits or otherwise towards the applicant's claims for costs and
18 will not be a review directly towards establishing the correctness or otherwise
19 of those findings. A copy of this ruling will be furnished to all parties who
10:49:57 20 made submissions to me on this issue. Any of these parties who wishes to make
21 an application for their costs in the light of my ruling must indicate their
22 intention to do so within seven days of today's date. After receipt of their
23 written confirmation, their applications will then be listed for hearing before
24 me on a date or dates to be announced but not before Tuesday, 13th July 2004.

10:50:19 25
26 Applications for costs will be heard in public, the onus of establishing that
27 an applicant is entitled to his or her costs will rest with the applicant.
28 Persons who do not provide written applications for their costs within the
29 seven day period will be deemed not to have an application, not to make an
10:50:37 30 application to me for their costs.

10:50:40 1

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All right? We will sit again at 11.00.

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THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK

10:50:52 5

6

AND RESUMED AS FOLLOWS:

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CHAIRMAN: Good morning. Mr. Gallagher?

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11:14:22 10

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MR. LAWLOR: Chairman, could I just ask for clarification please. I know -- I came back especially yesterday from Prague and was here on the basis that

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Mr. Bolton, Hayden, O'Byrne and Kaye would be called in that order, but it doesn't seem to have been that way and I didn't want to be interrupting the

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Tribunals trying to fit in witnesses but if you get a list at 17 minutes past

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five the evening before, could people not be called in that order or is there

11:14:49 15

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some particular reason? Because I didn't get the opportunity to ask Mr. Kaye

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questions and on that point, Chairman, Ms. Dillon has been very specific in the purpose of bringing Mr. Kaye and Mr. Donagh to the Tribunal.

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Now, the purpose of them being called was as a result of correspondence from

11:15:10 20

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myself, as a result of Mr. Gilmartin raising matters about meetings in bank

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centre and you yourself, Chairman, on day 470, conceded and allowed the

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questioning, even though we both agreed it mightn't have been quite appropriate

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that Mr. Gilmartin raised matters which neither of us had notice about. And

11:15:41 25

26

the first opportunity to get the record on this matter, is the attendance of

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the AIB bank executives who can either collaborate Mr. Gilmartin's claim or desist from them.

28

So, if Mr. Kaye is coming back, I don't wish to get into an argument but I have

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to be allowed at this stage to get the record put right by AIB and I won't be

11:16:01 30

restricted by a discussion on maps because the reason they are here is because

11:16:05 1 I insisted they be brought here, and you conceded to that request from me.

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3 CHAIRMAN: Mr. Kaye is --

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11:16:13 5 MS. DILLON: If Mr. Lawlor had read yesterday's transcript, he would be aware
6 that Mr. Kaye is being recalled next Thursday, that is tomorrow week, at 10.30,
7 to deal the issues that were indicated by Mr. Redmond and Mr. O' Callaghan's
8 team, Mr. Lucey, yesterday.

9

11:16:28 10 Mr. Lawlor will be aware, had he read the transcript, that a similar
11 application was in fact made yesterday to the Tribunal by both Mr. Redmond and
12 Mr. Lucey. The Tribunal ruled that yesterday's hearing and the evidence of
13 Mr. Kaye will be limited to the evidence in relation to the maps but that
14 Mr. Kaye could be recalled next Thursday morning at half ten to deal with other
11:16:48 15 issues. That's the position. Mr. Kaye is being recalled. I should also say
16 it is not correct to say that Mr. Kaye's appearance here is as a result of any
17 correspondence from Mr. Lawlor. It rather, yes, Mr. Kaye's appearance
18 yesterday arose solely as a result of private inquiries of the Tribunal into
19 the origin of two specific maps.

11:17:05 20

21 MR. LAWLOR: Chairman, is Ms. Dillon claiming that he she wasn't trying to
22 restrict Mr. Kaye's questioning of the maps, is she now trying to desist from
23 and run away from.

24

11:17:16 25 CHAIRMAN: Mr. Lawlor, if you were here yesterday, this was all dealt with in a
26 very calm fashion yesterday. Mr. Redmond and Mr. Lucey were concerned that if
27 they were restricted to dealing with maps, certain issues would not be dealt so
28 arrangements were made for Mr. Kaye -- wait now -- to return next Thursday and
29 you will have an opportunity to cross-examine him next Thursday.

11:17:40 30

11:17:40 1 MR. LAWLOR: But why are we having to make this argument at all?

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3 CHAIRMAN: Mr. Lawlor if Mr. Kaye had dealt with these issues yesterday, you
4 weren't here to deal with it.

11:17:51 5

6 MR. LAWLOR: Because somebody changed the order.

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8 CHAIRMAN: What is the point in object, you weren't here, you arrived about
9 five to one. If we had dealt with Mr. Kaye on that basis, you would have
10 missed it. So you still have your --

11:18:02 10

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12 MR. LAWLOR: Chairman, I would have requested if it was different on the list
13 of witnesses, as you were calling them. But you didn't call them as they were
14 listed.

11:18:15 15

16 CHAIRMAN: We would have still dealt with all the witnesses before lunch time.

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18 MR. LAWLOR: I leave the point here, we are having to argue the case with you,
19 Chairman, to get Mr. Kaye to answer questions that Ms. Dillon doesn't want him
20 to answer. She wants to restrict it to maps and we are having to make the case
21 to you, Mr. Redmond, Mr. Lucey, myself this morning --

11:18:31 20

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23 CHAIRMAN: Mr. Lawlor, you are making an argument now which could have been
24 made by you yesterday. Fortunately, it was made by Mr. Lucey and Mr. Redmond.
25 You weren't here yesterday.

11:18:48 25

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27 MR. LAWLOR: Why do I have to be making any argument?

28

29 CHAIRMAN: We are not asking you to make an argument, this was discussed
30 yesterday and arrangements were made for Mr. Kaye to come back.

11:18:57 30

11:19:01 1
2 MR. LAWLOR: To be questioned on what, Chairman?
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4 CHAIRMAN: To be questioned on matters other than the maps, we were
11:19:07 5 concentrating yesterday on the maps.
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7 MR. LAWLOR: Yeah. And is it not the position that counsel for the Tribunal
8 has tried to restrict Mr. Kaye's questioning to the maps and you have ruled
9 otherwise, over your counsel?
11:19:22 10
11 CHAIRMAN: The question --
12
13 MS. DILLON: If I may be permitted.
14
11:19:22 15 CHAIRMAN: The question yesterday was restricted to maps and that was made
16 clear by the Tribunal before yesterday and it was made clear yesterday morning.
17
18 MR. LAWLOR: I don't want the argument arising on the day Chairman, I am just
19 asking for your clarification now, AIB has been the basis of very substantial
11:19:42 20 cross-examination of Mr. Gilmartin and others and there's a pile of
21 documentation in the brief. Mr. Kaye is coming in here to deal with that and I
22 don't want an attempted fudge to shove it into Quarryvale 2, when we now have
23 the prime witness unavailable. Why was --
24
11:19:59 25 CHAIRMAN: Mr. Lawlor, it's been made clear by the Tribunal that there are
26 certain aspects of Mr. Kaye's evidence which will not be taken until the second
27 phase which is part of the module, certain other aspects which fall into this
28 module or which we deem appropriate to fall into this module, will be dealt
29 with by Mr. Kaye in cross-examination next Thursday.
11:20:23 30

11:20:23 1 MR. LAWLOR: It would be help if that clarification could be available as to
2 what exactly we can question him on.

3
4 CHAIRMAN: I think if you read the transcript from yesterday.

11:20:30 5
6 MR. LAWLOR: I have read it, Chairman, and I just want to seek clarification,
7 why does counsel for the Tribunal on page, day 500 of all days, page 3, make
8 this announcement regarding the unavailability of Mr. Gilmartin, so where now
9 rests his being called back to finish this module and to be questioned on the
11:20:52 10 evidence that has now contradicted his own sworn evidence, where rests all that
11 sequence of events now vis-a-vis Mr. Gilmartin?

12
13 CHAIRMAN: Mr. Lawlor, Mr. Gilmartin is ill and we were furnished with a
14 medical report. The Tribunal isn't responsible for his illness.

11:21:08 15
16 MR. LAWLOR: Well Chairman Moriarty was going to get Mayo clinic to go out and
17 inspect the last Taoiseach to see was he available.

18
19 CHAIRMAN: Mr. Lawlor, we are satisfied that at this stage based on a medical
11:21:20 20 report that he will not be available over the next two or three weeks. That's
21 all that has been said. His medical condition after July will be reviewed
22 whenever that arises and it may not have to be reviewed.

23
24 MR. LAWLOR: How does that impinge on module 2 if he is not available to finish
11:21:38 25 module 1?

26
27 CHAIRMAN: It doesn't. If he is ill, he is ill.

28
29 MR. LAWLOR: If you he is ill, module 2 needs him here first. He should be the
11:21:48 30 first witness in module 2, and if he is now trying to fudge the issue of not

11:21:52 1 being available conveniently, I don't know what his medical condition is but
2 it's rather --
3
4 CHAIRMAN: Mr. Lawlor, that is a disgraceful comment, the man is ill.

11:22:01 5
6 MR. LAWLOR: It's not a disgraceful comment.
7
8 CHAIRMAN: You are suggest he is fudging.
9

11:22:05 10 MR. LAWLOR: No, I'm suggesting another Tribunal up in that building, double
11 checked the medical evidence to confirm that, that's what I'm suggesting,
12 that's no disgraceful comment, that's just fact.
13
14 CHAIRMAN: That's a matter for the Tribunal. This has only arisen in the last
11:22:19 15 few days.
16
17 MR. LAWLOR: I presume it will be pursued in the proper way.
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19 CHAIRMAN: That's a matter for the Tribunal.

11:22:25 20
21 MS. DILLON: If I may sir I would like to refute the comment made by Mr.
22 Lawlor that there was any attempt to curtail the evidence of Mr. Kaye
23 yesterday. He will be aware from reading the transcript yesterday in opening
24 the sub-module yesterday, it was dealing solely with the provenance of two
11:22:39 25 particular maps and no other issues.
26
27 CHAIRMAN: All right. Thank you.
28
29 MR. LAWLOR: And you couldn't concede it.
11:22:49 30

11:22:49 1 MS. DILLON: It would be correct to draw to Mr. Lawlor's attention that on
2 every single witness schedule with which Mr. Lawlor in common with any other
3 witness is furnished on a daily basis by the Tribunal, it records at the bottom
4 of the witness schedule "some further witnesses may be added from time to time,
11:23:04 5 witnesses are not necessarily taken in the order in which they are listed." I
6 am sorry if that wasn't clear to Mr. Lawlor, I'm sure it is clear to him now.

7
8 MR. LAWLOR: Chairman, could the time that comes on your faxes be corrected to
9 the right, it's 4.17 on this and it actually came in at 5.17 the previous
11:23:21 10 evening.

11
12 CHAIRMAN: Mr. Lawlor the point remains, you missed all the witnesses yesterday
13 because you weren't here. So even if they had been taken in the order in which
14 they are in the list, you still would have missed Mr. Kaye. Now, can we --

11:23:35 15
16 MR. LAWLOR: I don't want to be making requests to the Tribunal.

17
18 CHAIRMAN: Mr. Lawlor, we want to get on with the day.

19
11:23:44 20 MR. LAWLOR: Go ahead.

21
22 MR. SREENAN: Chairman, can I raise another matter, I appreciate that the
23 Tribunal wants to get on with matters and this is a matter of concern to my
24 clients. In particular Mr. O' Callaghan and Mr. Dean. Mr. Dean who is due to
11:23:52 25 give evidence today and Mr. O' Callaghan within the next few days. As you have
26 referred to already, we have noted as of yesterday that Mr. Gilmartin is ill
27 and unable to give instructions on an ongoing basis to his counsel, which is --

28
29 CHAIRMAN: He didn't, he was unable it was pointed out to us yesterday by
11:24:12 30 Mr. Barniville, that because he couldn't take instructions in relation to

11:24:15 1 yesterday's evidence, that he asked us could he reserve his position in
2 relation to any issues that might rise when Mr. Gilmartin was well enough to
3 discuss it with him.
4

11:24:28 5 MR. SREENAN: I appreciate that.
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7 CHAIRMAN: I assume that that position continues today.
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9 MR. BARNIVILLE: Yes, Chairman, the position as I made it clear yesterday, was
11:24:36 10 that whilst of course I know what is in the statements of the various witnesses
11 and I know the evidence that Mr. Gilmartin has given on oath to the Tribunal,
12 there may be issues that arise in the course of the evidence given to Tribunal
13 that I'm simply not in a position to take immediate instructions on for the
14 purpose of conducting an immediate cross-examination and it was for that reason
11:24:57 15 I made it clear respect to the various witnesses yesterday that I may need to
16 reserve my position.
17

18 CHAIRMAN: That doesn't mean you wouldn't be cross-examining witnesses.
19

11:25:05 20 MR. BARNIVILLE: No.
21

22 CHAIRMAN: In relation to issues that might arise at the time.
23

24 MR. BARNIVILLE: Absolutely and that remains the position. I can get
11:25:14 25 instructions from Mr. Gilmartin, I can do that, I can't get them immediately
26 because as the Tribunal is aware, Mr. Gilmartin is medically not fit to attend
27 at the moment.
28

29 MR. SREENAN: My concern, chairman, remains the same and if I could just
11:25:30 30 explain what my concern is so the Tribunal will understand it, I won't take

11:25:35 1 undue time in doing this. Obviously from Mr. Dean's point of view and Mr. O'
2 Callaghan's point of view, the allegations that have been made against them are
3 quite serious and they are anxious to give evidence and have the matter over
4 and done with as quickly as possible. But it is my in my submission somewhat
11:25:50 5 unfair to them that they should give evidence and that the cross-examination on
6 behalf of the person who is making the allegations should not be completed but
7 should be deferred in some way.

8
9 Now, the alternative to that seems to me, to be an unsatisfactory one in that
11:26:07 10 presumably Mr. Barniville would cross-examine, for example, Mr. Dean but
11 reserve his position presumably in relation to new matters that arose out of
12 the direct examination of Mr. Dean that he was unable to take instructions on
13 at the time because they weren't dealt with in the material that's before the
14 Tribunal to date.

11:26:24 15
16 The difficulty with that proposition seems to be me to be this: obviously I
17 would have to re-examine the witness following the partially complete
18 cross-examination on behalf of Mr. Gilmartin in order to deal with issues that
19 arose on behalf of Mr. Dean and Mr. O' Callaghan. But in the meantime, the
11:26:42 20 cross-examination or the completion of the cross-examination on behalf of
21 Mr. Gilmartin would be hanging over those witnesses for a period of perhaps
22 weeks or months.

23
24 Now that's naturally a source of some stress and concern to them but inevitably
11:26:57 25 what would happen when the matter resumed is that there may well be a different
26 counsel conducting the second part of the cross-examination on behalf of
27 Mr. Gilmartin, because through no fault of Mr. Barniville's, he may not be
28 available, and secondly, the second cross-examination would not be strictly
29 confined to new matters, inevitably, there would be a new angle on something or
11:27:19 30 a new perspective on something that would be used to reopen matters again so

11:27:24 1 that Mr. Dean or Mr. O' Callaghan would be in the unique position of facing two
2 cross-examinations on behalf of the alleged.

3
4 The second point is that technically and this may be overcome by agreement but
11:27:35 5 technically, Mr. Dean and Mr. O' Callaghan would still be under
6 cross-examination and I would be professionally precluded as would my junior
7 and solicitor from speaking to those witnesses while they were under
8 cross-examination.

9
11:27:47 10 Now as I say, that could perhaps be dealt with by agreement or by the Tribunal
11 simply indicating that it would be acceptable to the Tribunal.

12
13 CHAIRMAN: There would be no difficulty about that but I mean the suggestion
14 you are making, it was to be adopted by the Tribunal would mean that,
11:28:02 15 effectively because Mr. Gilmartin makes allegations against a number of people
16 that effectively the Tribunal would have to close up shop until Mr. Gilmartin
17 became well enough to be physically sitting with his counsel. I mean as I
18 understand it, he is not so unwell that he can't be briefed on, is it on a
19 daily basis or?

11:28:29 20
21 MR. BARNIVILLE: That's correct, my solicitor can speak with him in the course
22 of the evening and if an issue arises it seems to me, chairman, if I may say,
23 Mr. Sreenan's objections are entirely hypothetical at this stage, they may
24 never arise, there may never be an issue I would need to take further
11:28:48 25 instructions and I would have thought it would be far better if the Tribunal
26 were permitted to proceed to take the evidence and if the issue arose.

27
28 MR. SREENAN: The difficulty, chairman, it's all very well for Mr. Barniville
29 to say it's entirely hypothetical but once the issue arises, it's too late then,
11:29:03 30 the witness is already giving evidence and the horse has bolted to that extent.

11:29:07 1 The Tribunal has --

2

3 CHAIRMAN: Do you agree that the effect of your suggestion if it was adopted by

4 the Tribunal would effectively mean that we would have to not call virtually

11:29:17 5 all the remaining witnesses because this issue would arise on a daily basis?

6

7 MR. SREENAN: I appreciate that and I accept what the Tribunal says but the

8 Tribunal will appreciate my concern obviously in relation to Mr. Deane and Mr.

9 O' Callaghan and the Tribunal has a different concern and I appreciate the

11:29:34 10 Tribunal's --

11

12 CHAIRMAN: I accept that it's not an ideal.

13

14 MR. SREENAN: It's not.

11:29:38 15

16 CHAIRMAN: It's not an ideal situation but at the same time, it's one that we

17 have to cope with, given that it's occurred.

18

19 MR. SREENAN: Yes. And that's why I'm making the application now to the

11:29:48 20 Tribunal so that the Tribunal could understand my concerns and reach a decision

21 having considered them.

22

23 CHAIRMAN: Well, we are going to rise for a couple of minutes just to discuss

24 the.

11:30:11 25

26 **THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND**

27 **RESUMED AS FOLLOWS:**

28

29 CHAIRMAN: Mr. Sreenan, the Tribunal is not prepared to accede to your

11:40:28 30 application. We would ask Mr. Barniville and Mr. Gilmartin's legal team

11:40:34 1 generally, to ensure that within 48 hours of the conclusion of any witnesses,
2 not just your client, but of any witness, that if some issue does arise
3 following their consultation with their client, that within 48 hours, that the
4 Tribunal and the legal team and the solicitor of the party concerned be
11:40:59 5 informed so that to that extent, any issue that might arise will be out there
6 unknown to the party concerned for any length of time.

7
8 MR. SREENAN: Could I just clarify one thing arising out of that, chairman. Do
9 I take it from that, that I would be entitled then to conduct my re-examination
11:41:19 10 on the spot and to carry out a further re-examination following any additional
11 cross-examination that would take place?

12
13 CHAIRMAN: Oh yes. It might never happen so we would prefer to proceed on the
14 basis that this is the cross-examination --

11:41:36 15
16 MR. SREENAN: The end of the matter.

17
18 CHAIRMAN: If something arisings you would have the opportunity to re-examine
19 the witness, if any further matters were put to your client or had to be put to
11:41:46 20 that you are client.

21
22 MR. SREENAN: Yes. I understand from what Mr. Barniville said to the Tribunal,
23 it might be possible for him to get instructions overnight.

24
11:41:55 25 CHAIRMAN: Absolutely, I mean our, the information we have is that
26 Mr. Gilmartin is not well enough to attend at the Tribunal.

27
28 MR. SREENAN: I don't question that in anyway, Chairman.

29
11:42:09 30 MR. LAWLOR: Might I ask chairman is it the intention to recall Mr. Gilmartin?

11:42:15 1
2 CHAIRMAN: The intention always was to recall him to deal with a number of
3 outstanding issues, as far as we are concerned, we want to make it clear, we
4 have been informed that Mr. Gilmartin is ill and is likely to be not well
11:42:29 5 enough to attend for the next few weeks and that's all, that's where the matter
6 rests at this stage.
7
8 MR. LAWLOR: That sounds like it's not until the autumn then for recall, if the
9 letter I got yesterday that you were going back to Carrickmines 2.
11:42:46 10
11 CHAIRMAN: Mr. Gilmartin would not be coming back for any length of time one
12 way or the other in relation to this phase and this is a practical problem that
13 can occur at any stage in any Tribunal or any court case and so we have to deal
14 with it as best we can.
11:43:04 15
16 MR. LAWLOR: I think it's most desirable he is called before this term ends to
17 deal with this particular --
18
19 CHAIRMAN: But Mr. Lawlor, we are saying he won't be recalled before the end of
11:43:10 20 July because of his medical condition. And that's a matter between himself and
21 his doctors at this stage. The matter will be reviewed, hopefully he will be
22 well enough to return in the autumn but there's nothing anyone can do about
23 that.
24
11:43:26 25 MR. GALLAGHER: Sir, can I just seek some clarification in relation to what you
26 said about a witness being re-examined if an issue arises. I take it that is
27 not a general or blanket --
28
29 CHAIRMAN: No, just in relation to whatever matters.
11:43:42 30

11:43:42 1 MR. GALLAGHER: Yes, but it is subject to the approval of the Tribunal and it's
2 subject to the consent of the Tribunal that such re-examination would be,
3 further re-examination would be permitted.
4

11:43:54 5 CHAIRMAN: Well it would be, I think Mr. Sreenan would be entitled to
6 re-examine him a second time, in relation to any issue that was raised on a
7 subsequent day based on the reserved position --
8

9 MR. GALLAGHER: But I take it that right to re-examine would be subject to any
11:44:11 10 direction that the Tribunal might give at any stage.
11

12 CHAIRMAN: Well as would be, that's it, but as far as we are concerned, there's
13 no difficulty about that if some issue is raised because of Mr. Gilmartin's
14 illness, if Mr. Deane or any other witness wants to come back to deal with some
11:44:30 15 matter, then Mr. Sreenan would be entitled to deal with that by way of -- based
16 on that particular issue.
17

18 MR. GALLAGHER: Yes.
19

11:44:45 20 MS. DILLON: There's one further matter, sir, before we take up with the next
21 witness. You will recollect that an issue arose in the course of the evidence
22 of Mr. Tom Troy, former Secretary General of the Department of the Environment.
23 And he in his evidence referred to the fact that in the course of a meeting, he
24 had made what he described in evidence as cryptic notes, the Tribunal was in
11:45:05 25 touch with the department and required the department to discover those notes
26 and to comply and to swear an Affidavit of Discovery in relation to those
27 notes.

28 We have now received an Affidavit of Discovery sworn by Una Buckley dated 28th
29 July 2004, they have not been able to locate those notes and rather than
11:45:26 30 calling Ms. Buckley, I would propose with your permission to have the affidavit

11:45:29 1 read into the record if that's in order.

2

3 CHAIRMAN: Yes.

4

11:45:34 5 MS. FOLEY: Affidavit of discovery of Oonagh Buckley. I, Oonagh Buckley of
6 the Department Environment, Heritage and Local Government, Custom House, Dublin
7 1, aged 18 years and upwards, make oath and say as follows:

8

9 1. I am a Principal Officer in the planning section of the Department of the
11:45:46 10 Environment, Heritage and Local Government. (the department) and I make this
11 affidavit pursuant to the order of the chairperson of the Tribunal of Inquiry
12 into Certain Planning Matters and Payments dated 18th day of June 2004 for
13 discovery of a file containing notes taken by Mr. Tom Troy in 1989 at meetings
14 with the then Minister for the Environment, Mr. Pdraig Flynn.

11:46:08 15

16 2. I make this affidavit with the authority of and on behalf of the Minister
17 for the Environment, Heritage and Local Government and from facts within my own
18 knowledge save where otherwise appears. The facts herein deposed to which are
19 within my own knowledge are true and where not within my knowledge, I believe
11:46:21 20 them to be true.

21

22 I say and believe that the Department has been unable to locate the
23 aforementioned notes. Despite two extensive serves of the archives and the
24 questioning of staff who worked in the relevant divisions of the department
11:46:33 25 from the time the Troy notes were made.

26

27 4. I say and believe that files relating to complaints or allegations about
28 planning corruption were at one stage variously held in the planning division
29 and personnel division of the Department by senior officers of the Department.

11:46:47 30

11:46:47 1 I say and believe since at least mid 1997, these files were amalgamated at the
2 request of the then departmental secretary, Brendan O' Donoghue and were held
3 thereafter solely in the personnel division. No amalgamation of papers in the
4 sense of editing or collating appears to have taken place. I say and believe
11:47:04 5 that the recollection of staff is that there was receipt of a consignment of
6 paper from the department secretary's office into divisional safekeeping in or
7 about June 1994 and that they were later transferred for filing in the
8 personnel division.

11:47:15 10 These papers duplicate papers already stored in divisional files and do not
11 contain the manilla folder referred to in the letter of Mr. Brendan O'Donoghue
12 to the Tribunal of 11th May 2004 or any notes from Mr. Troy.

14 6. I say and believe that my colleague, Declan Burke, examined all files in
11:47:35 15 the planning section that has any relevance to allegations of misconduct by
16 local authorities or An Bord Pleanala. These included copy files from
17 personnel division awaiting return to them. I say and believe he contacted
18 Tony Cronin of that division who confirmed that all relevant files had already
19 been sent to the Tribunal. He also inquired of any person of who may have had
11:47:56 20 contact with the papers to no avail. He also inquired into the Secretary
21 General's office whether there was any reference to the Troy notes in their
22 computer system or whether there was a file recorded relating to the notes. I
23 say that the search proved fruitless.

11:48:05 25 7: I say and believe that another colleague, Tony Cronin, searched the
26 personnel division and in particular, searched the room where all the files
27 relating to planning matters are held. He is confident that if such papers
28 were given to file, they would have been filed in the cabinets with the other
29 planning papers which he searched.

11:48:23 30

11:48:23 1 8: I confirm that my colleague Mary Moylan contacted the following persons;
2 Former Assistant Secretaries, John Cullen and John O'Connor, and the following
3 private secretaries to Brendan O' Donoghue, former Secretary General, Eoin
4 Ryan, Maurice Coughlan, Elizabeth Monro, Shirley Groarke and Margaret
11:48:38 5 Taheny-Malone. Her inquiries did not reveal anything further. I say and
6 believe that Troy notes are lost and cannot be located despite extensive
7 searches of the planning and personnel divisions and detailed inquiries of
8 persons who might have come in contact with the papers.
9 Sworn the 28th June 2004 by the said Oonagh Buckley. This documentation is at
11:49:00 10 4807 to page 4809 of the brief.

11

12 CHAIRMAN: Thank you very much.

13

14 MS. FOLEY: I will hand it now into the registrar, Mr. Kavanagh.

11:49:17 15

16 CHAIRMAN: Thank you.

17

18 MS. DILLON: Mr. Paul Kavanagh please.

19

11:49:23 20 MR. O'DONNELL: Barry O'Donnell, barrister, I am seeking limited representation
21 on behalf of Mr. Kavanagh instructed by Frank Ward & Co, solicitors.

22

23 CHAIRMAN: That's grand.

24

11:49:37 25 MR. O'DONNELL: May it please you.

26

27

28

29

30

11:49:45 1 **PAUL KAVANAGH, HAVING BEEN SWORN, WAS QUESTIONED AS**

2 **FOLLOWS BY MS. DILLON:**

3

4 CHAIRMAN: Good morning, Mr. Kavanagh.

11:49:58 5

6 MS. DILLON: Good morning, Mr. Kavanagh. Sorry about the late start of your

7 evidence. In 1989, you were the chief fundraiser or it has been described to

8 the Tribunal by Mr. Sean Sherwin that you were what he described as the chief

9 fundraiser of Fianna Fail, is that correct?

11:50:29 10 A It is correct, yes.

11 Q 1 I understand that and you can correct me if I am wrong, that is a voluntary
12 position?

13 A Totally voluntary.

14 Q 2 Does that mean you were not then an officer of the Fianna Fail party?

11:50:38 15 A No, I wasn't.

16 Q 3 Would you have attended at a regular basis at the offices in Mount Street?

17 A Very regularly.

18 Q 4 Mr. Sean Sherwin, who has previously given evidence to the Tribunal, was an
19 officer of the Fianna Fail party?

11:50:51 20 A He was, yes.

21 Q 5 And at that time, Mr. Sean Fleming who will give evidence later on this morning
22 was also an officer, namely the financial controller of the Fianna Fail party?

23 A That is correct.

24 Q 6 And amongst the hierarchy or the structure of Fianna Fail if I can put the
11:51:06 25 permanent structure of Fianna Fail, you did not have a part, is that correct?

26 A No, I did not.

27 Q 7 You attended in November 1989 a fund-raising lunch in London, is that correct?

28 A I did.

29 Q 8 And attending at that lunch I think amongst others, was Edward Dadley of

11:51:25 30 Arlington and if we could have page 3341 please. The names at the bottom of

11:51:32 1 that page, Mr. Kavanagh, of Mr. Padraig Flynn TD, Paul Kavanagh, Emer Mulhern,
2 Sean Fleming, Bertie Ahern TD, Denis McCarthy and Lee Flynn, were they the
3 Fianna Fail representatives?
4 A They were.

11:51:50 5 Q 9 And the balance of the list on that page and the preceding page at 3340 were
6 the invitees, is that correct?
7 A Correct, yes.

8 Q 10 Now this was a fund-raising lunch, is that right?
9 A It was partly fund-raising exploratory, we felt that we needed to concentrate
11:52:08 10 on, or to look more closely at the whole development, Irish developers
11 operating in the UK and it was more exploratory than anything else. There was
12 a very, we didn't go around looking for donations at the function.
13 Q 11 When you say that you felt that, when you say we felt we should look, I presume
14 you are talking on behalf of the Fianna Fail?
11:52:30 15 A No, I am talking really on behalf of the fund-raising committee.
16 Q 12 Your focus in inviting all these people to the lunch, you may not considering
17 asking them for money on this occasion it was with a view to fund-raising.
18 A Absolutely.
19 Q 13 So that when you describe it in your statement as a Fianna Fail fund-raising
11:52:53 20 function, that was what it was?
21 A Yes.
22 Q 14 So the purpose of the meeting and the attendance at the lunch was either to
23 request support for Fianna Fail then or at a later stage?
24 A Yes.
11:52:55 25 Q 15 And was that the purpose of the attendance of all of the people, I mean it was,
26 were all of the people there in fund-raising or potential fund-raising
27 capacity?
28 A Do you mean the people from Fianna Fail side or the guest?
29 Q 16 No the guests.
11:53:11 30 A Basically, how you create a lunch like this is you ask members of the

11:53:16 1 fund-raising committee or people who are connected with the industry, who would
2 you suggest we might invite along that might be worth pursuing in the future
3 for funds.

4 Q 17 Yes, the whole purpose of this, either even if it wasn't intended to ask these
11:53:30 5 people for money on this occasion, it was intended to ask these people for
6 money at some occasion, isn't that right?

7 A Yes, and very likely at an election time.

8 Q 18 Be that as it may, the whole purpose of the lunch was the raising of money?

9 A Yes.

11:53:43 10 Q 19 Or getting together a list of possible contributors to Fianna Fail?

11 A Yes.

12 Q 20 And that was the purpose that you attended, that's the capacity you attended,
13 you were the chief fundraiser, isn't that right?

14 A That's right.

11:53:55 15 Q 21 And Mr. Fleming when he attended, he was the chief financial controller of
16 Fianna Fail?

17 A He was.

18 Q 22 And in November 1989 and in 1989 generally, what was the general state, without
19 going into detail of the over all Fianna Fail finances?

11:54:10 20 A Well, at the election that year, we had set ourselves a budget which we
21 marginally exceeded, but we also at that same time, the expenditure at the
22 election was far greater than budgeted for so inevitably we ended up with a
23 shortfall.

24 Q 23 So it was a deficit situation.

11:54:31 25 A Yes.

26 Q 24 And one of the purposes of this type of enterprise or this type of fund-raising
27 activity was to remedy the deficit, isn't that right?

28 A Yeah, but it was also an an ongoing process, this was something we had done
29 over -- I had been personally involved for about eight or nine years at that
11:54:46 30 stage and we didn't only fund raise at election time, there was always

11:54:53 1 different sectors in the economy that we would invite to lunches and the reason
2 was that the government ministers at the time, would like to firsthand hear
3 what the concerns of that particular sector were, at the same time from our
4 point of view, it was positioning ourselves for fund-raising at an election
11:55:11 5 time.

6 Q 25 But the purpose of this lunch was to put together a database of potential
7 contributors to Fianna Fail?

8 A True.

9 Q 26 And that was its main function from those who were dealing with the deficit in
11:55:24 10 Fianna Fail?

11 A Yes, that's correct.

12 Q 27 And that deficit would have been very much to the forefront of your mind and
13 other people's minds in November of 1989?

14 A In the eight years I was involved in fund-raising we always had a deficit,
11:55:37 15 that's the nature of politics unfortunately.

16 Q 28 And was the deficit in 1989 significant?

17 A It was, yes, that was a fairly difficult period around about then.

18 Q 29 So Mr. Sherwin I think has already told the Tribunal, it was a significant
19 deficit at that time.

11:55:57 20 A Yes.

21 Q 30 Can you outline to the Tribunal the methods or the mechanisms within Fianna
22 Fail for accounting for donations that are made?

23 A Yeah.

24

11:56:12 25 CHAIRMAN: At that time.

26

27 MS. DILLON: At that time.

28 A I had a suite at the time, at election time in the Westbury Hotel and we had
29 meetings there virtually every morning and Sean Fleming would come to the
11:56:30 30 meetings and any donations or any subscriptions we would have got were passed

11:56:35 1 over to him, either at the meeting or in his office later and he in turn then
2 would lodge the money in a bank account, an official bank account, and they
3 would be receipted to the contributors. That wasn't the only way. Sometimes
4 donations would be directly to Fianna Fail and he would inform me at the same
11:57:01 5 meeting and I would then cross them off the list and basically that's, yes,
6 that's how it worked.

7 Q 31 On occasion, did the leader of the party receive funds?

8 A Oh yes, in fact he would pass them over either to me -- generally he would pass
9 them over to me, yes, and I in turn then would pass them on to Sean Fleming.

11:57:28 10 Q 32 And therefore with Mr. Fleming rested the receipts and the accounting, is that
11 correct?

12 A That's correct.

13 Q 33 So that all of the money, however it was channelled into Fianna Fail now as
14 opposed to any member of Fianna Fail was funnelled in through individuals or
11:57:44 15 directly to the party, but in all cases was given to Mr. Fleming but Mr.
16 Fleming receipted and accounted for it, is that correct?

17 A That's correct, yes.

18 Q 34 And at that time in 1989, Mr. Pdraig Flynn was the secretary, is that correct?

19 A Treasurer.

11:57:58 20 Q 35 Treasurer, I beg your pardon, of the party I think he was joint treasurer. On
21 an ongoing basis would you have meetings with Mr. Flynn about the state of the
22 finance of the party?

23 A No, very rarely.

24 Q 36 You didn't have any discussions with him?

11:58:11 25 A I can only recall one or two meetings with him.

26 Q 37 In 1989 were there any difficulties in Fianna Fail with funds allegedly meant
27 for the party being paid to individual ministers and not being passed on to the
28 party?

29 A Well, the fund-raising committee were always sort of concerned about this,
11:58:29 30 because there were certain rumours around and it was something that we never

11:58:36 1 really established at the time, that it was actual fact except on one or two
2 occasions. There was one senior minister who I was aware had received a
3 donation and I tackled him on it and he -- this has been discussed either in
4 the other Tribunal or earlier here -- and when I didn't get satisfaction from
11:58:57 5 him, I went to the then, to Mr. Haughey and told him about it.

6 Q 38 You were talk being the Fitzwilton payment, I think to Mr. Ray Burke?
7 A I am, yes.

8 Q 39 And in that particular circumstances which occurred in June of 1989, you went
9 to Mr. Haughey with your complaint, is that correct?

11:59:14 10 A I did.

11 Q 40 Would it in general, would that be the procedure in circumstances where which
12 the party discovered that money destined for the party that that had not been
13 received by the party that one would go to the Taoiseach?

14 A I wouldn't describe it as procedure because it only happened on one -- that was
11:59:31 15 the only case I can remember, where we had absolutely definite evidence that a
16 donation was made intended for the party and had been sidelined.

17 Q 41 And did you say earlier in your evidence that there were rumours?
18 A Yes, there were rumours around, people -- you see one of the problems was that
19 the members of the committee were each given a list of names and they would
11:59:51 20 follow up on each of those people on their list. And there was occasions when
21 in order to avoid giving a donation, somebody might say look, I have given it
22 to so and so or given it to the party locally or whatever and we were never
23 able to quantify exactly how much that would have accounted for.

24 Q 42 I think a matter was drawn to your attention by Mr. Sean Sherwin and you say in
12:00:18 25 your statement that this conversation with Mr. Sherwin took place late in 1989?

26 A No, it was 1990, I think there was a mistake in the --

27 Q 43 In your statement in paragraph 3 you say late 1989 would you agree with
28 Mr. Sherwin and Mr. Gilmartin in fact and also I think Mr. Fleming that it
29 happened in late 1990?

12:00:38 30 A Yes, I think it was in the autumn of 1990.

- 12:00:41 1 Q 44 Mr. Sherwin came to see you, is that correct or contacted you?
- 2 A Well I was walking through the office and he called me into his office and he
- 3 said to me that Mr. Gilmartin was requesting a receipt for a donation he had
- 4 made and of 50,000 and I immediately, I mean there weren't many 50,000s flying
- 12:01:04 5 around I immediately thought it odd but just, it was a year and a half nearly
- 6 after the election, so I decided just in case something had happened that I
- 7 wasn't aware of, I contacted Mr. Fleming and he confirmed that he had not
- 8 received any donation from Mr. Gilmartin for 50,000.
- 9
- 12:01:24 10 I went back to Sean Fleming or back to Sherwin and said look, there doesn't
- 11 seem to be anything in this but if he is looking for a receipt, if the money is
- 12 lodged into the official bank account, he will get a receipt. And that was
- 13 sort of a mechanism we used when somebody was looking for a receipt, if he they
- 14 did give a cheque to somebody and it hadn't been passed on, it was the only way
- 12:01:46 15 they got it, was if the money was lodged in the official bank account.
- 16 Q 45 Sorry, if you take me slowly through that. What you said, were you suggesting
- 17 that the donation, the 50,000 pounds should at that stage be paid to Fianna
- 18 Fail?
- 19 A No, I am not, I didn't -- in fact to be very honest, I didn't really attach a
- 12:02:07 20 huge amount of credibility to this whole 50,000, because 50,000s are few and
- 21 far between and this was a year and a half after the election and I thought it
- 22 was odd that somebody who by name never appeared on any of our fund-raising
- 23 lists was claiming to have given 50,000 to Fianna Fail and was looking for a
- 24 receipt a year and a half later. The whole thing just didn't really add up
- 12:02:34 25 with me.
- 26 Q 46 But your reaction to it was if he wanted a receipt for 50,000 pounds, there
- 27 would have to be 50,000 pounds in the Fianna Fail party fund?
- 28 A Absolutely.
- 29 Q 47 At any stage a receipt would issue?
- 12:02:41 30 A Yes.

- 12:02:42 1 Q 48 Were you suggesting on that occasion that a payment of 50,000 pounds should be
2 made by Mr. Gilmartin?
- 3 A No, what I was saying was, if I personally didn't attach a lot of credibility
4 to it but there was one way of forcing the issue, that if he really needed and
12:02:58 5 wanted a receipt, the only way he could get it was to either give in the 50,000
6 or if he gave it to somebody's to force them to lodge it.
- 7 Q 49 Now, you knew I think, because you were told by Mr. Sherwin that in fact what
8 Mr. Gilmartin had said was that he had paid 50,000 pounds to Fianna Fail
9 through Pdraig Flynn.
- 12:03:17 10 A I'm not sure what the wording was but okay, he did mention Flynn's name, yes.
- 11 Q 50 Page 4501, this is your statement, Mr. Kavanagh. At paragraph 3 of your
12 statement you say:
13
14 "I recollect Sean Sherwin, Fianna Fail national organiser making inquiry of me
12:03:34 15 sometime in late 1989, I think you now agree it was probably 1990 whether a
16 donation of 50,000 pounds had been made during the General Election campaign of
17 that year by Thomas Gilmartin to Fianna Fail. I understood Mr. Gilmartin had
18 told Sean Sherwin such donation had been made through Pdraig Flynn who was
19 then honorary treasurer of the party and he, Thomas Gilmartin had not received
12:03:52 20 any receipt. I asked Sean Fleming the party's financial controller to check
21 the party records and he found no entry of any such donation, I advised Sean
22 Sherwin accordingly."
23
24 Now, if you are correct in your statement, Mr. Kavanagh, it means that when
12:04:03 25 Mr. Sherwin told you about Mr. Gilmartin's allegation that he had paid 50,000
26 pounds to Fianna Fail, he had done so through Pdraig Flynn, isn't that
27 correct?
- 28 A That's correct.
- 29 Q 51 So now you have two pieces of information, you have an allegation that 50,000
12:04:17 30 pounds was being paid to Fianna Fail, insofar as that allegation is concerned,

12:04:21 1 you make an inquiry of the financial controller, who establishes no 50,000
2 pounds had has been paid by Mr. Gilmartin, isn't that right?

3 A Yes.

4 Q 52 Mr. Gilmartin is unknown to you, he is not on your normal list of contributors,
12:04:32 5 isn't that right?

6 A No.

7 Q 53 So the second leg of that inquiry then, I assume would mean you would have
8 inquired from Mr. Flynn whether he had received 50,000 pounds on behalf of
9 Fianna Fail?

12:04:41 10 A Well, I didn't.

11 Q 54 Why didn't you?

12 A I didn't enquire of Mr. Flynn. Because I made the judgment at the time that it
13 wasn't credible to me and also for another good reason, we had had a meeting
14 with Mr. Flynn after the election and during that meeting we discussed the
12:04:57 15 financial situation, but also he asked about one or two situations if we had
16 received donations from him and in one case where we hadn't, he offered to
17 invite this person out for golf and to see if he could follow up, so here we
18 had a senior minister, treasurer of the party, a person who wanted to help out
19 in fund-raising, I wasn't on the flimsy evidence I had got through Sherwin who
12:05:27 20 didn't, who himself wasn't very convinced about it, I wasn't going to tackle
21 Pdraig Flynn about it at that stage. I made the judgment that if there was
22 any truth in the assertion that he had made a donation of 50,000 and he wanted
23 a receipt, that in his effort to get the receipt, that would solve the problem.
24 And if he didn't pursue it to get the receipt, there probably wasn't any truth
12:05:56 25 in it anyway.

26 Q 55 Mr. Gilmartin denies that in his discussions with Mr. Sherwin, there was never
27 any discussion about a receipt or discussion about looking for a receipt but
28 leaving that aside for the moment, Mr. Kavanagh, as I understand the situation
29 that you have described to the Tribunal is that Fianna Fail's finances were in
12:06:11 30 a parlous state, if I can describe it in that way, in 1989 following the

12:06:17 1 general election?

2 A No worse than they had been after previous elections, not that I'm aware of,
3 back in the early '80s when we had three elections the situation was far worse
4 I can tell you.

12:06:28 5 Q 56 Would you agree with me between 1987 and 1989, four donations approximately of
6 50,000 pounds had been made to Fianna Fail. Would that seem about right to
7 you?

8 A It seems about right.

9 Q 57 So a donation of 50,000 pounds in 1989 to any individual members or the party
10 would have been a momentum occasion?

11 A Oh yes.

12 Q 58 It was an awful lot of?

13 A It was a lot of money.

14 Q 59 Notwithstanding that you didn't know Mr. Gilmartin and he was not one of the
12:06:55 15 normal source that Fianna Fail applied to for funds in the course of elections,
16 you receive a complaint from somebody who is looking, you are told, for a
17 receipt and you are told two things, one, 50,000 pound has been paid to Fianna
18 Fail, two, it's been paid through Pdraig Flynn.
19 The first half of that, you check out and you establish no 50,000 pounds to
12:07:16 20 Pdraig Flynn, so you are left then with I suggest two possibilities, either
21 the person who is making the allegation is lying or Mr. Flynn has the 50,000
22 and it was meant for Fianna Fail, isn't that right?

23 A Yes, you could make that -- yes.

24 Q 60 Now, what in information had you available to you in late 1990 that allowed you
12:07:35 25 to decide the only thing that you could accept as it were or believe that Tom
26 Gilmartin was telling you a lie about this?

27 A It's not a matter of -- I made a judgment at the time. And the judgment was
28 based on the facts that I have just explained to you. That we are here, here
29 we have a senior minister, treasurer of the party, a person who has volunteered
12:07:57 30 to help in raising funds on one side, we have a person on the other side coming

12:08:02 1 along claim he gave a donation to Fianna Fail, on check it go out, we found it
2 wasn't there, I would have known anyway if it had been made because his name
3 never appeared on our lists and at the time, I don't believe that Sherwin
4 himself was very convinced of the legitimacy of what Mr. Gilmartin was saying.

12:08:23 5
6 But, the one thing that I felt would bring it to a head, one way or the other,
7 was if he was insistent on looking for a receipt. The mechanism of having to
8 get receipt would have drawn this thing out, if there was any truth in it, and
9 I made the judgment let it work its way through.

12:08:43 10 Q 61 But what we know now Mr. Kavanagh, was that Mr. Gilmartin was telling the truth
11 insofar as he did pay 50,000 pounds to Mr. Flynn, isn't that correct?

12 A Oh I agree, what I said to you earlier, I made a judgment at the time based on
13 the information I had got. Now, we have other information now 15 years later
14 but at the time, that's the judgment I made.

12:09:01 15 Q 62 I see. Because I'm just contrasting that, what you did in June of 1989 when
16 you were faced with a situation in connection with --

17 A You are not comparing apples with apples, in the case of June, I was absolutely
18 certain about where the cheque came from, we had a record of fund-raising from
19 that source, we had been in contact with him about where the cheque had gone
20 and I knew it had been given to that senior minister at the time and when I,
21 when he arrived in the Westbury for a fund-raising lunch, I confronted him
22 there and then.

23 It was different. It was proven record with, I had facts that I was confident
24 I could stand over and when I went to Mr. Haughey at the time and I don't know
12:09:45 25 whether you remember, Mr. Haughey well enough, you didn't go with half baked
26 ideas to him, if you did want to complain to him, you had to have your facts
27 right.

28 Q 63 That's exactly my point?

29 A Well no facts in relation to the Gilmartin thing.

12:09:58 30 Q 64 Is that in the earlier incident, in which a not dissimilar situation arose, you

- 12:10:04 1 rang Mr. Burke, is that correct?
- 2 A I did I rang him.
- 3 Q 65 I want to know in this case, why didn't you ring Padraig Flynn?
- 4 A For the very simple reason that I just didn't believe the whole Gilmartin
- 12:10:14 5 thing, I just didn't believe it. It was flimsy, it was a year and a half
- 6 later, somebody coming along look fog for a receipt, the incident you are
- 7 referring to all happened to within weeks of the election.
- 8 Q 66 If you had had evidence that you could rely on in 1990, in relation to what
- 9 Mr. Gilmartin was telling you, what steps would Fianna Fail have taken to
- 12:10:38 10 recover or to deal with the situation?
- 11 A If I felt the evidence was -- if I believed the evidence, I would have then
- 12 probably contacted Flynn and said, look, have you got a cheque there, that
- 13 should have been lodged to the Fianna Fail account and take it from there. But
- 14 I didn't.
- 12:10:58 15 Q 67 Right. I mean, Mr. Gallagher makes the point to me and I think I should put it
- 16 to you that if you didn't believe the allegation, Mr. Kavanagh, then
- 17 Mr. Gilmartin was making a false allegation about Mr. Flynn, isn't that right,
- 18 that he had paid 50,000 pounds to Fianna Fail through Mr. Flynn, isn't that
- 19 right?
- 12:11:29 20 A Yes.
- 21 Q 68 And even if, if you believed that to be the case, why didn't you draw that to
- 22 Mr. Flynn's attention?
- 23 A I told you earlier, I made a judgment on the information I had at the time and
- 24 what I felt at the time and that's, there's no point in speculating other than
- 12:11:48 25 that, because the facts are that I made that judgment and I didn't believe it
- 26 and I wasn't going to pursue it.
- 27 Q 69 Thank you very much, Mr. Kavanagh. If you answer any questions anybody may
- 28 have.
- 29
- 12:11:57 30 CHAIRMAN: Mr. Barniville?

12:11:59 1

2

THE WITNESS WAS QUESTIONED BY MR. BARNIVILLE AS FOLLOWS:

3

4 Q 70 MR. BARNIVILLE: Yes, Mr. Kavanagh, one or two questions for Mr. Gilmartin.

12:12:03 5

6

You now accept knowing what you know now that 50,000 pounds was paid by Mr. Gilmartin, isn't that correct?

7

A Yes.

8

Q 71 You accept that, you have seen the material?

9

A I have seen the material in the newspapers and what else.

12:12:15 10

11

Q 72 Yes. You formed the judgment that you formed at the time without speaking to either of the two persons involved?

12

A Correct.

13

Q 73 You didn't speak to Mr. Flynn or the reasons you mentioned and you didn't speak to Mr. Gilmartin?

14

12:12:27 15

16

Q 74 You formed the view Mr. Gilmartin was lying without speaking to either of the two persons involved?

17

18

A That's correct.

19

Q 75 Would you accept now in retrospect that the judgment that you exercised was an incorrect judgment?

12:12:37 20

21

A Yes, I accept that now.

22

Q 76 Thanks very much.

23

24

CHAIRMAN: Mr. Redmond, do you have any? Mr. Lawlor?

12:12:45 25

26

THE WITNESS WAS QUESTIONED BY MR. LAWLOR AS FOLLOWS:

27

28

Q 77 MR. LAWLOR: Mr. Kavanagh, you have told the Tribunal that Mr. Gilmartin didn't

29

feature and was never written to in the normal course of events to support the

12:12:59 30

party's fund-raising activities, is that correct?

- 12:13:01 1 A What I said was Mr. Gilmartin's name did not appear on any of our lists, that's
2 correct, yeah.
- 3 Q 78 Still, I put two scenarios to you, one was that Mr. Gilmartin was telling a lie
4 about the contribution or two, that the contribution was made but wasn't
12:13:20 5 credited to the Fianna Fail account, would the third scenario be that
6 Mr. Gilmartin could have been making a contribution to the then minister for
7 his constituency activities?
- 8 A Well at the time I was not in a position to make a judgment like that. In
9 hindsight and from what I have read in the newspapers and the fact that the
12:13:44 10 cheque had not been completely filled in, as to who the payments had been made
11 to, you could make that assumption.
- 12 Q 79 Mr. Gilmartin didn't do what contributions normally were made out to Fianna
13 Fail --
- 14 A Made out to Fianna Fail.
- 12:13:58 15 Q 80 Etc, which was a blank cheque that he handed to Mr. Flynn, that's the evidence
16 now before the Tribunal.
- 17 A Yes.
- 18 Q 81 Would that have been the only case that you ever came across where a cheque
19 with no payee was on it, let it be for a constituency contribution or a
12:14:15 20 national contribution?
- 21 A I don't remember any cheque that ever came in without a payee written on the
22 cheque. I mean we have got cheques in over the period of time with different
23 individuals' names on them and then they would pass them on and in turn we
24 would lodge them into the account but a blank cheque, no, I don't ever remember
12:14:37 25 receiving a blank cheque.
- 26 Q 82 Would you be familiar, Mr. Kavanagh, with the legislative planning process in
27 the United Kingdom, insofar as the secretary of state for the Department of the
28 Environment still retains the appeal decision function as against our
29 legislation here where it's now --
- 12:14:58 30 A I never had any involvement in planning or anything to do with it, I don't even

- 12:15:02 1 know what you are referring to.
- 2 Q 83 Okay. It's just that the appeal function still rests with the ministerial,
3 with the appropriate minister in the UK. We now have legislation that passes
4 it on to An Bord Pleanala, as we are both aware.
- 12:15:18 5 Are you aware that Mr. Gilmartin, if his project was to progress, needed very
6 substantial modification to a Ministerial Directive that was in the gift or not
7 of Mr. Flynn at the time, are you aware of that now?
- 8 A Were you asking me was I aware at the time or aware now.
- 9 Q 84 What's your view of this matter vis-a-vis the fact that Mr. Gilmartin made this
12:15:44 10 payment to Mr. Gilmartin (sic) are you aware that evidence at this Tribunal has
11 been that he needed the Ministerial Directive modified on the size of the
12 shopping centre. Are you aware of -- do you have any knowledge of that?
- 13 A The only knowledge I have is what I read in the papers in recent times. At the
14 time I wasn't aware of -- in fact Mr. Gilmartin didn't come up on our radar
12:16:09 15 screen at the time. Arlington, the company with whom he was advising or
16 whatever was on our list, but his name personally never came on on anything.
- 17 Q 85 Sure. And you would see this contribution direct to the Minister for
18 Environment of the day, as a very circuitous route in the normal fund-raising
19 for the activities that you had the responsibility for. Would you agree with
12:16:29 20 that?
- 21 A We didn't get involved in any planning or anything like that, our job in
22 fund-raising was to focus on the business community and to try and get support
23 from the business community to support Fianna Fail. And we never got involved
24 in any of the council work or planning or anything like that. It was nothing
12:16:49 25 to, our focus was just fund-raising from business.
- 26 Q 86 Are you aware that Mr. Gilmartin prior to his claimed attendance of the then
27 Minister's office, had a meeting with the chief valuer of Dublin County
28 Council, Mr. McLoone, at which he informed Mr. McLoone that he was going to
29 make this payment, have you seen that, you are not aware of that?
- 12:17:13 30 A I am not aware of that.

12:17:14 1 Q 87 Would you be aware that Mr. Gilmartin's going to make the contribution to
2 Mr. Flynn according to the evidence of Mr. Sheeran, a former bank manager, was
3 that he hoped it would smooth his path towards tax designation and zoning, are
4 you aware of that?

12:17:33 5 A No.

6 Q 88 That's in written evidence to this Tribunal and in evidence given. So in
7 essence, a year and a half later, Mr. Gilmartin is claiming to Mr. Sherwin that
8 he wants a receipt for the contributions, isn't that right?

9 A That's correct.

12:17:49 10 Q 89 Would you agree with me that that could be the wisdom of hindsight that he now
11 realised that the blank cheque he had handed over to the then minister could be
12 construed other than be something of a political donation?

13 A In hindsight and what we know now, I think that could be construed all right.

14 Q 90 And would you finally confirm that Mr. Gilmartin never formalised his request
15 for a receipt and that despite discovery orders and attempts to seek
16 clarification from Mr. Gilmartin, that this Tribunal has no evidence as to how
17 Mr. Gilmartin treated that matter in his accounts?

18
19 MR. BARNIVILLE: Sorry chairman, I have to object to that question.

12:18:32 20
21 CHAIRMAN: Mr. Lawlor, that's a matter for the Tribunal.

22
23 MR. LAWLOR: Maybe Mr. Barniville can help.

24
12:18:37 25 CHAIRMAN: Mr. Lawlor, you are cross-examining this witness and the question
26 you have supposed to him is a matter for the Tribunal. So you should --

27
28 MR. LAWLOR: Well I just ask chairman, can you help, can you clarify?

29
12:18:50 30 CHAIRMAN: Complete your cross-examination of the witness, it's not fair to the

12:18:55 1 witness to be discussing matters of which he has no knowledge while he is in
2 the witness-box.

3
4 MR. LAWLOR: I'm just asking for clarification, does this witness know that
12:19:08 5 Mr. Gilmartin nowhere he has produced evidence to the Tribunal.

6
7 CHAIRMAN: Whether or not he does know is irrelevant. We know what information
8 has or hasn't been produced. Its not a matter to be raised with this witness.

9
10 MR. LAWLOR: Can we establish any facts on that matter?
11

12 CHAIRMAN: We will discuss that at another time.
13

14 MR. LAWLOR: Thank you very much Mr. Kavanagh.
15

12:19:30 16 CHAIRMAN: Sorry, does his counsel wish to?
17

18 MR. O'DONNELL: No chairman.
19

12:19:36 20 **THE WITNESS WAS FURTHER QUESTIONED BY MS. DILLON AS FOLLOWS:**
21

22 Q 91 MS. DILLON: There is one matter I should have put to Mr. Kavanagh, the
23 evidence of Mr. Sherwin. Mr. Kavanagh, he told the Tribunal that he came to
24 you with two matters, one was the 50,000 pounds to Fianna Fail and the second
12:19:48 25 was Mr. Gilmartin's allegation that Mr. Finbar Hanrahan had asked him for
26 100,000 pounds in return for his support. Do you have any recollection of
27 Mr. Sherwin coming to you with both matters?

28 A No, I have no recollection of anything to with Mr. Hanrahan is, I don't know
29 who he is, I do now, but at the time I wouldn't have known who he was.

12:20:11 30 Q 92 Your recollection is Mr. Sherwin did not come to you with any allegation other

12:20:15 1 than the single allegation in relation to the 50,000 pounds had been paid to
2 Fianna Fail.

3 A That's my best recollection.

12:20:22 5 CHAIRMAN: Thank you very much.

6 A Thank you.

7

8 **THE WITNESS THEN WITHDREW.**

9

12:20:34 10 MS. DILLON: Mr. Sean Fleming please.

11

12 MR. O'DONNELL: I am also instructed to seek limited representation on behalf
13 of Mr. Fleming instructed by Frank Ward and Company, solicitors.

14

12:20:47 15 CHAIRMAN: Granted.

16

17 MR. O' DONNELL: May it please you, sir.

18

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12:20:54 20

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MR. SEAN FLEMING, HAVING BEEN SWORN, WAS QUESTIONED AS

FOLLOWS BY MS. DILLON:

- 12:20:54 1
- 2
- 3
- 4 Q 93 MS. DILLON: Good afternoon, Mr. Fleming, I understand you are an accountant by
- 12:21:21 5 profession and in 1989 and subsequently, you were the financial controller of
- 6 Fianna Fail, is that correct?
- 7 A That's correct.
- 8 Q 94 Can you outline in the first instance to the Tribunal the methods by way which
- 9 funds, the various routes by which funds can end up in the Fianna Fail party
- 10 account?
- 12:21:39 10
- 11 A The first thing you have to do is distinguish, I as the financial controller
- 12 for Fianna Fail party at national level, there are over 40 individual
- 13 constituencies who have their own accounting structure at local level upon
- 14 which I would have no role or involvement or detailed knowledge of, so
- 12:21:54 15 everything I speak about is only donations to the party head office at national
- 16 level.
- 17 Q 95 Well at that level, can you explain or outline to the Tribunal the various
- 18 routes by which funds will end up in the Fianna Fail account at national level?
- 19 A Right and again in an effort to just, I'll just distinguish between routine
- 12:22:15 20 party donations that come through party branches and members and registration
- 21 fees, I take it we are talking about the larger donations that are the matters
- 22 being inquired on by the Tribunal.
- 23
- 24 What would happen generally in an election campaign, is that Fianna Fail head
- 12:22:28 25 office in consultation with the fundraising committee would issue letters of
- 26 appeal for financial donations to all our known supporters, and obviously lists
- 27 of people whom we would hope may contribute to us, if they received a letter
- 28 from us.
- 29
- 12:22:42 30 Those letters would go out. Quite a lot of donations would come back directly

12:22:48 1 by the post to Fianna Fail Head Office, that's where the letters would, the
2 suggested to people to make the donations to. Or also to a member of the
3 fund-raising committee, Paul Kavanagh has indicated various members of the
4 fund-raising committee would be designated to the follow up individual donors.
12:23:05 5 And if the donations were sent to them, there was almost a daily meeting of the
6 fund raising committee, which I would have attended, and I would have taken
7 back to head office, any cheques that were brought into that meeting and I
8 would inform the meeting of any cheques that would come directly to head office
9 so the committee member would be aware what had been received directly in head
10 office.

11
12 Also there would be some limited amount of donations that would come through
13 the party leader, because the letter would have been signed by the then party
14 leader of the day, whoever that would have been at the time. So invariably
12:23:39 15 some of the cheques would have made their way to the party leader, maybe his
16 office in government buildings or the house and they would have been passed on
17 to head office either directly to myself by the party leader or to Paul
18 Kavanagh and once they would be received in Fianna Fail office, they would all
19 be receipted, recorded, lodged to the bank and a receipt would be issued to the
12:24:01 20 donor, be recorded in the cash receipts book, which I presume you are familiar
21 with, I think we would have made that available to the Tribunal and sometime
22 after the general election, it was normal practice that the large donors would
23 receive an individual thank you then in the name of the party leader after an
24 election, maybe several weeks when the dust had settled.

12:24:23 25 Q 96 Now, in terms of amount, would you agree that between 1987 and 1989 there would
26 have been, I think the figure in fact is four, but nor more than five donations
27 of 50,000 pounds to Fianna Fail?

28 A Well, I take your word on that because I haven't checked the record in recent
29 years but that sounds reasonable.

12:24:42 30 Q 97 Does that sound right so a payment or do nation, 50,000 pounds to Fianna Fail

12:24:48 1 in 1989 would have been a matter of great significance to Fianna Fail?

2 A Absolutely.

3 Q 98 Do you agree with Mr. Kavanagh's evidence and I think you were here for it,
4 while in the normal course of events following elections the financial affairs
12:25:00 5 might not be the healthiest but there was a deficit in 1989 and 1990?

6 A There certainly there was.

7 Q 99 And the sum of 50,000 pounds would be an important matter for Fianna Fail?

8 A Absolutely.

9 Q 100 Now, I think in late 1989 you received a telephone call from Mr. Kavanagh, is
12:25:13 10 that correct?

11 A I think it was 1990, we are a bit confused.

12 Q 101 1990, yes?

13 A The passage of time, but my best estimate of when that happened was 1990.

14 Q 102 And do you agree with Mr. Gilmartin -- when Mr. Gilmartin says that he
12:25:26 15 approached I think Mr. Sherwin in late 1990?

16 A Well that tallies with that.

17 Q 103 And I think Mr. Kavanagh was inquiring about a donation or a payment of 50,000
18 pounds by Mr. Tom Gilmartin?

19 A Yes, I recollect Paul Kavanagh phoned me and said Sean, can you check did we
12:25:43 20 get a donation of 50,000 from, it might have been the name Arlington, I didn't
21 know the name Gilmartin at that stage, I have only heard of it in recent years
22 so I checked the records and I would have known instinctively without checking
23 record that we hadn't received it, because I would be aware as financial
24 controller of the names of all the major donors to the party, but in any event
12:26:07 25 I double checked and checked the records and was fully satisfied that we have
26 no such donation in Fianna Fail head office and I informed them accordingly.

27 Q 104 Did Mr. Kavanagh inform you of any potential involvement by Mr. Pdraig Flynn
28 in this payment?

29 A Certainly not because I had no knowledge of Pdraig Flynn's involvement until
12:26:23 30 it became public in recent years.

12:26:26 1 Q 105 So you reverted to Mr. Kavanagh and told him that the books and records show no
2 such payment had fact been paid?
3 A Yes.
4 Q 106 Is that everything that you did?
12:26:36 5 A That's the beginning and end of it.
6 Q 107 But you were being told that somebody is saying 50,000 pounds --
7 A I have to stop you there, I wasn't told that. Under no circumstances was I
8 told that. I just got a phone call to enquire have we a donation of such
9 amount. Right? That could in all probability be somebody who was building up
12:27:00 10 a list for future events inquiring is this man a donor, has he contributed in
11 the past, we may contact him in the future. There was no suggestion to me that
12 there had been an actual donation because Paul Kavanagh has already indicated
13 on some occasions, donations were made to individual constituencies.
14
15 So there's no suggestion to me that a donation had actually been made. That
16 was an inquiry, did you receive a donation and the answer was no. I hope you
17 understand the important difference.
18 Q 108 With all due respect to you Mr. Fleming, it's a very, very subtle difference?
19 A It's very important, though. I think from where you are leading if I had, if a
12:27:37 20 suggestion had come to me that somebody had paid 50,000 I would have pursued
21 it. That's very important and I do make that point and I don't consider that a
22 subtle issue, I consider it a fundamental issue.
23 Q 109 The sequence of events then is the following, Mr. Gilmartin complains to
24 Mr. Sherwin that he had paid 50,000 pounds to Fianna Fail through Mr. Padraig
12:28:03 25 Flynn. Mr. Sherwin complains to Mr. Kavanagh that 50,000 pounds Mr. Gilmartin
26 says had been paid through Padraig Flynn. Mr. Kavanagh then says to you, was
27 50,000 paid by Mr. Gilmartin to Fianna Fail, is that correct?
28 A Yes.
29 Q 110 And as the financial adviser, first of all as the accountant and second of all
12:28:23 30 as the financial controller, your response to that is to examine the books and

- 12:28:28 1 see did we get 50,000 pounds from Mr. Gilmartin?
- 2 A Yeah.
- 3 Q 111 Right. And whether he was coming in as a potential donor or whether -- sorry
- 4 in whatever way it was coming to you, you made no further inquiry of any
- 12:28:42 5 description in relation to it, you simply conducted the inquiry in that
- 6 fashion?
- 7 A Yes, because you must understand I wasn't aware at that time at all of any
- 8 discussion or allegation from Mr. Gilmartin to Sean Sherwin at all. I have no
- 9 knowledge of that issue at that stage. I'm aware of it now in recent years and
- 12:29:01 10 you know, it's, I wasn't in possession of the knowledge that Tom Gilmartin had
- 11 said to Sean Sherwin. That was a quite separate issue. When the request came
- 12 to me, can you check did we receive a cheque from Tom Gilmartin or Arlington.
- 13 It was as vague as that and I just knew instinctively that we hadn't received a
- 14 cheque of that sort, I checked the records and confirmed no, we got nothing
- 12:29:27 15 like that, full stop.
- 16 Q 112 Did you ever say to Mr. Kavanagh, what's this all about, why are you inquiring
- 17 about Tom Gilmartin of Arlington?
- 18 A Because it happens all the time, because I think we would have said the whole
- 19 purpose of our fund-raising activities would be to compile and build up and add
- 12:29:40 20 new names to lists on an ongoing basis. So it would be normal to say is he on
- 21 our list from before and if not, we'll put him on the list for the future.
- 22 That's how you build you will the up list, see how who you got and try to add
- 23 new names.
- 24 Q 113 Did you put him on the list?
- 12:29:58 25 A I think the name Arlington, the company Arlington, the request came to me that
- 26 company that's doing something down the docks. The name Gilmartin per se
- 27 didn't mean anything to me.
- 28 Q 114 Did you put Mr. Gilmartin on a list?
- 29 A I don't know.
- 12:30:11 30 Q 115 Was he ever put on a list of potential donors in Fianna Fail?

12:30:16 1 A Well you will appreciate I haven't had access to the records to see is he on
2 our lists in Fianna Fail, that can easily be verified by Fianna Fail. I can't
3 off the top of my head verify that.

4 Q 116 Do you recollect you putting yourself, at that time following on the inquiry
12:30:32 5 from Mr. Kavanagh and associating a sum of 50,000 pounds with Mr. Gilmartin,
6 when you checked your records and established that in fact no such sum had been
7 paid by Mr. Gilmartin, did you then proceed, yourself, to put Mr. Gilmartin on
8 any fund-raising list?

9 A No, I'm saying the essence of the query to me was about Arlington. Not about
12:30:48 10 Tom Gilmartin. Because Arlington are and you must understand, I have little or
11 no knowledge at that time of what developments were happening in Dublin or
12 potential development and it was the company Arlington, I understood, would
13 have been the source of the funds, maybe because it was conveyed to me, the
14 name Tom Gilmartin would have meant nothing to me so to the query to me would
12:31:13 15 have been as much about Arlington and I think I have seen the name Arlington on
16 this already in the party so it would have been on the list for future
17 reference and, the company Arlington.

18 Q 117 I just show you your statement now at 4784 when you were check in the cash
19 receipts book against whose name were you checking, Mr. Fleming?

12:31:31 20 A I was checking for any large donation that I wasn't sure of the exact source
21 and when I went checking our records, I was looking and I think I make a
22 reference to any donation from Mr. Gilmartin or any connected source, I
23 specifically put that into my statement. It was really, I was looking for
24 Arlington as much as anything.

12:31:54 25 Q 118 Did you mean to say?

26 A And Tom Gilmartin. I was looking for Arlington and Tom Gilmartin and any
27 company that I wasn't familiar with because I wasn't personally familiar with
28 either of these names as being a donor to the Fianna Fail party.

29 Q 119 Are you saying what you said have said when you were checking the cash receipts
12:32:10 30 book, you were looking primarily for Arlington and then Mr. Gilmartin and then

12:32:14 1 any connected company because you don't refer I think to Arlington?

2 A No, if you look at nigh statement I say or connected sources. And I can

3 elaborate on that in public session, that can be taken to mean Arlington.

4 Q 120 But when Mr. Kavanagh came to you according to your statement, the inquiry Mr.

12:32:29 5 Kavanagh asked you to make was not in connection with Arlington or any

6 connected company, it was in connection with the payment or a donation of

7 50,000 pounds by Mr. Gilmartin, isn't that right?

8 A Well, I'll explain it to you again how our Fianna Fail.

9 Q 121 I am not worried about the records, I am talking about your statement and the

12:32:49 10 phone call you got from Mr. Kavanagh and what you have recorded in your

11 statement, that what you are asked to enquire into was whether Fianna Fail had

12 received 50,000 pounds from Mr. Gilmartin in 1989, isn't that correct?

13 A Or any related source.

14 Q 122 Sorry, I didn't understand you to say in your direct evidence to this point in

12:33:07 15 time, when Mr. Kavanagh rang you he asked you to check whether in fact there

16 had been a payment by Mr. Tom Gilmartin or any related source?

17 A When I got the query and I am going back to 1990 now, I would have said who is

18 Tom Gilmartin, who are you talk about and the discussion would have been and

19 this is only a vague recollection at this time, you know that Arlington

12:33:26 20 development down at the docks. That would have been the discussion because I

21 wouldn't have known Mr. Gilmartin could have been from Donegal or Cork or

22 England or anywhere so.

23 Q 123 Did you have that discussion with Mr. Kavanagh?

24 A Yes.

12:33:38 25 Q 124 So when you are talking to Mr. Kavanagh about the query that he is making to

26 you he says check to see did you get 50,000 from Mr. Tom Gilmartin and you say,

27 who is Tom Gilmartin and he says that crowd down on the quays, Arlington?

28 A That was the gist, not a verbatim record of a phone call.

29 Q 125 Following on that then you check the cash receipts book and you were checking

12:33:58 30 for Gilmartin or Arlington?

12:33:59 1 A I was checking for everything.

2 Q 126 You did three checks, you checked for Tom Gilmartin and you found nothing, you
3 checked for Arlington and you found nothing and you checked for any sum of
4 50,000 pounds with a source for which you could not explain or identify, and
12:34:09 5 you found nothing?

6 A I saw one cheque, not three cheques. I did one check looking for everything,
7 all three elements.

8 Q 127 You satisfied yourself had no payment had been made?

9 A Exactly.

12:34:20 10 Q 128 You then went back to Mr. Kavanagh and he said no?

11 A That's it. Exactly.

12 Q 129 Did Mr. Kavanagh make any mention to you of a receipt that somebody was looking
13 for a receipt?

14 A No, that couldn't have arisen if I hadn't received the cheque, I wouldn't have
12:34:34 15 issued a receipt if I hadn't received the donation because the receipt means
16 you issue to document to see I have received X amount of money. So the issue
17 of receipt couldn't arise in talking to me if there was no donation.

18 Q 130 If you had become aware at that time 1990 that 50,000 pounds had been destined
19 for Fianna Fail and had not arrived, and had remained with Mr. Flynn, what
12:34:56 20 steps would you have taken?

21 A No this is a hypothetical situation. I make it clear in my statement, I had no
22 knowledge of Mr. Flynn's involvement at that time.

23 Q 131 I said if?

24 A I'm very clear in that hypothetical situation, would have absolutely gone to
12:35:07 25 Pdraig Flynn to ask him about it. As I did in the instance we referred to
26 about Ray Burke in Mr. Kavanagh's statement, on the minute when we knew there
27 was an issue of the donation intended for the party wasn't coming to party head
28 office on the spot we went to Ray Burke to challenge him on it, when we got no
29 satisfaction this, we went to the part leader who was the party trustee and
12:35:30 30 that is how I would have operated and would have done precisely the same thing

- 12:35:34 1 had I known about this, absolutely no doubt.
- 2 Q 132 You would have gone in the first instance to Mr. Flynn and thereafter to the
3 then Taoiseach, I think it was still Mr. Haughey in 1990?
- 4 A Straight up, absolutely because as financial controller and accountant, it
12:35:46 5 would be incumbent on me, if I had any knowledge or even a suggestion that
6 somebody had received money that I knew hadn't come to us, that would have been
7 intended for us absolutely it was my job, because bear in mind that we spoke
8 about the financial situation of the Fianna Fail party, I was the person trying
9 to fend off the creditors. It was incumbent on me to get in every source of
10 funds that is destined for the party had I known about it.
- 11 Q 133 And was Mr. Flynn, I think he was joint secretary?
- 12 A Honorary treasure.
- 13 Q 134 He would have been also aware of the financial situation of the party?
- 14 A He would have been. And that was the purpose of the meeting after the,
12:36:22 15 sometime after the general election was just for a general update on the party
16 finances at that time.
- 17 Q 135 In the course of your examination of the records, sorry are there circumstances
18 in which money will be given by the Taoiseach, say a sum of 15, 20 or 50,000
19 pounds to the Fianna Fail party and a receipt issued in the name of anonymous?
- 12:36:47 20 A Yes, that had been well documented and covered at the Moriarty Tribunal.
- 21 Q 136 Now, in those circumstances, when you were doing your cheques and balances, if
22 you came across a receipt where the donor is described as anonymous the source
23 of the money is described as the Taoiseach and the amount is 50,000 pounds and
24 it's within your time period for this inquiry, what would you have done?
- 12:37:13 25 A Just run that by me again, I don't get the last bit.
- 26 Q 137 I think you have agreed with me, that it's possible that a receipt, that money
27 can be given anonymously by the Taoiseach to the party?
- 28 A No, I have never said that, I said donations could be given by the Taoiseach,
29 very important to understand this issue, where when the Taoiseach was handing
12:37:31 30 in the cheque he said that cheque is specifically from person or company

12:37:35 1 whoever the case may be, there was nothing anonymous about it but the person
2 did not want maybe their name recorded on the receipt and with the full
3 knowledge and records of the Fianna Fail party would have the full identity of
4 the donor, probably would have kept a photocopy of the cheque for record
12:37:52 5 purpose and would be still there, and there wasn't anonymous donations of that
6 size but the receipt issued would have given anonymous because the person
7 wouldn't have wanted their name on it. It wasn't an anonymous donation, it was
8 clearly known within the party.

9 Q 138 When you were checking the cash receipts book the name of the person wouldn't
12:38:10 10 be on the cash receipts book you but you would you know?

11 A It would be in the records, it would be in the subsidiary records of the party
12 supporting the, the cash receipts book in the financial summary and the records
13 behind that.

14 Q 139 And if you met any of those identified 50,000s when you were doing your check,
12:38:27 15 you would have gone back to check the true source of the funds?

16 A They wouldn't unidentified, they were identified at all times in the Fianna
17 Fail records and were always capable of being identified so they were, I just
18 say the source of all donations like that were always fully known and recorded
19 in the Fianna Fail party, in the records, but it may have been listed on the
12:38:49 20 receipt on the receipt as anonymous, so the person wouldn't have their name on
21 the receipt.

22 Q 140 But in the cash receipts book, the same, the cash receipts book would be a
23 duplicate of the actual receipts. So when you are checking for a 50,000 pounds
24 that you can't explain and you come across two payments?

12:39:06 25 A Sorry, there's no --

26 Q 141 That you can't identify?

27 A There's no 50,000 pounds record ever in the Fianna Fail party that I couldn't
28 identify or couldn't explain.

29 Q 142 If you jest let me finish the question.

12:39:21 30 A Okay.

12:39:21 1 Q 143 When you started to check the cash receipts book for the relevant period, which
2 is a payment in 1989 from Mr. Tom Gilmartin, is that right?
3 A A payment in 19 -- yes.
4 Q 144 Isn't that right, according to your statement?
12:39:33 5 A Yes.
6 Q 145 So you are checking the cash receipts book in 1989 for 50,000 pounds that you
7 ask cannot explain, is that what you said earlier, an unidentified 50,000 that
8 you don't know where it comes from?
9 A No. No, I don't -- I'm trying to explain to you, there's no unidentified or
12:39:50 10 unexplained money in the Fianna Fail records.
11 Q 146 I think I'll come at it a different way. The cash receipts book records
12 anonymous payments of 50,000 pounds on its face but there is information in
13 Fianna Fail behind the cash receipts book that will enable you to determine the
14 source of the funds?
12:40:08 15 A Absolutely.
16 Q 147 Now you meet two of these when you make your inquiry in 1989, is that right?
17 A Well --
18 Q 148 There are two of them?
19 A Are there? I take your word, I haven't looked at these records in years, I
12:40:21 20 take your word for it.
21 Q 149 There are two of them, so when you look at the cash receipts book, you see two
22 anonymous payments of 50,000 pounds?
23 A Two payments listed as anonymous.
24 Q 150 One is the 15th May '89 and the other is the 3rd May 1989, 3rd July.
12:40:36 25 A Listed as anonymous.
26 Q 151 But the sum is 50,000 pounds, it's exactly the same sum you received the
27 complaint about, isn't that right?
28 A Yes.
29 Q 152 Now, the cash receipts book does not disclose on its face the source of those
12:40:50 30 monies, isn't that right?

- 12:40:51 1 A Correct.
- 2 Q 153 Alright, so now you have to take some further step?
- 3 A Yes.
- 4 Q 154 Now what's that step?
- 12:40:57 5 A I just check, there's a record of, there was a sheet in the cash receipts book
- 6 opposite the receipt number and the documentation was in the cash receipts book
- 7 indicating the source of the fund.
- 8 Q 155 So that then you are satisfied at the end of your examination that
- 9 notwithstanding that the records show a receipt of two anonymous sums of 50,000
- 12:41:18 10 pounds.
- 11 A Listed as anonymous.
- 12 Q 156 Listed as anonymous. That the information is there behind them although the
- 13 cash receipts booked records only 50,000?
- 14 A And there's a document in the cash receipts book indicating that, it wasn't
- 12:41:31 15 necessary to go further beyond the cash receipts book but in all probability, I
- 16 suspect I would have also double checked the source record but the information
- 17 was in the cash receipts book. At that time. At that time. In the 1980s,
- 18 1990s.
- 19 Q 157 But you would have satisfied yourself that neither of those sources were
- 12:41:52 20 Mr. Gilmartin or a related or connected company?
- 21 A Absolutely because I would have known the source of those two donations.
- 22 Q 158 Did you take any further step other than carrying out that inquiry in relation
- 23 to this matter, did you do anything else at all?
- 24 A Absolutely not, because nothing came to me to cause me any suspicion and I have
- 12:42:11 25 indicated if I had any suspicions, I would have taken them further, but it was
- 26 just an inquiry, check did we get a donation and I did check and said no we
- 27 didn't.
- 28 Q 159 You also attended at a fund-raiser lunch in London, isn't that correct?
- 29 A That's correct.
- 12:42:26 30 Q 160 Would you agree with Mr. Kavanagh that the purpose of that, was to establish a

12:42:31 1 database of --

2 A Yes, of potential donors.

3 Q 161 But whole purpose of that I think in his statement, Mr. Kavanagh described it

4 as a Fianna Fail fund-raising?

12:42:40 5 A It was part of our fund-raising activities, that luncheon.

6 Q 162 Do you agree Mr. Gilmartin wasn't at that meeting but Mr. Dadley of Arlington

7 was. Do you remember a Mr. Dadley?

8 A I don't. I only recollect a handful of them. Most of the people at that

9 luncheon would not have been known to me personally.

12:42:55 10 Q 163 When you met with Mr. Flynn, together with Mr. Kavanagh and Mr. Denis McCarthy

11 after the 1989 election, did Mr. Flynn indicate to you in the course of that

12 meeting, it's the last paragraph on 4784 please, that he had been in receipt of

13 a sum of 50,000 pounds from Mr. Tom Gilmartin?

14 A Under no circumstances did he.

12:43:15 15 Q 164 How long were you financial controller of Fianna Fail?

16 A I think from about 1982 to 1997.

17 Q 165 Well taking the period let's say 1985 to 19 -- the end of 1989, in terms of the

18 general amount of donation, how big a donation was 50,000 pounds?

19 A Oh it would be the very biggest.

12:43:44 20 Q 166 The very biggest?

21 A One of the very biggest. Maybe there is bigger but would have been certainly

22 one of the bigger donations.

23 Q 167 Does any bigger donation to Fianna Fail spring to mind within that period?

24 A What's the period now again.

12:43:59 25 Q 168 1985 to the end of 1989?

26 A The best answer I can give is the Fianna Fail records will verify that. I

27 haven't looked at them for years, I don't work in the place any more.

28 Q 169 Do you recollect any bigger donation than 50,000 pounds?

29 A I'm just not sure without checking, that can easily be verified but not without

12:44:23 30 checking the records.

- 12:44:24 1 Q 170 Yes.
- 2 A If you have access to the records, then you can remind me and I'm happy to
- 3 confirm it.
- 4 Q 171 Would Fianna Fail have regarded a donation of 50,000 pounds at that time as
- 12:44:36 5 being hugely significant?
- 6 A Absolutely.
- 7 Q 172 If it was hugely significant for the national party to receive 50,000 pounds
- 8 what about a single individual receiving 50,000 pounds?
- 9 A Enormous is the word I'd use there.
- 12:44:47 10 Q 173 Would at that time been one of the biggest political donations you had ever
- 11 heard of?
- 12 A It would be.
- 13 Q 174 Either to the party or to any individual?
- 14 A Absolutely.
- 12:44:56 15 Q 175 And in today's terms, what's the value?
- 16 A We have.
- 17 Q 176 You are probably better qualified than anybody else here to give us that
- 18 information?
- 19 A As a result of all the revelations that have come out of Tribunal, we have
- 12:45:07 20 enacted a lot of legislation in the Oireachtas and there's I think is it's
- 21 about 5,000 euro the maximum legal donation it's illegal for anybody to make a
- 22 -- any individual to make a donation to a party above that figure.
- 23 Q 177 I know that, I'm saying in today's terms, what would 50,000 pounds be worth in
- 24 today's terms?
- 12:45:25 25 A I would say it would be twice that.
- 26 Q 178 100,000?
- 27 A I would say so, I'm only guessing, I would have to check the inflation rate,
- 28 I'm sure it's double it at least, more than double it.
- 29 Q 179 Thank you very much, Mr. Fleming, ask you answer any questions anybody may have
- 12:45:40 30 for you.

12:45:40 1

2

CHAIRMAN: All right.

3

4

THE WITNESS WAS QUESTIONED BY MR. BARNIVILLE AS FOLLOWS:

12:45:43 5

6

Q 180 MR. BARNIVILLE: Yes, one or two questions, I appear for Mr. Gilmartin. When

7

Mr. Kavanagh approached you, I think in late 1989, and asked you to check

8

whether the party had received 50,000 pounds from either Mr. Gilmartin or

9

Arlington, did you understand that that claim was in fact being made at the

12:46:01 10

time by Mr. Gilmartin?

11

A No, I had no knowledge of that.

12

Q 181 Well in what context therefore did you understand that the query was being

13

made?

14

A Well Paul Kavanagh, in fund-raising activities, we are always tacking to

12:46:14 15

see did we receive donations from any source and put them down on a list for

16

future reference, you know, that would be a regular event to see did somebody

17

ever give a donation and if they hadn't, you know and they were a person that

18

might be inclined to so do, we would put him on a list for future reference.

19

Q 182 Wouldn't it be very unusual for the query to be made unless somebody was

12:46:39 20

claiming to have made the payment?

21

A Well, I have -- well --

22

Q 183 Wouldn't that be the natural and normal circumstance in which a query like that

23

would be made to the party, whether that somebody was claiming to have made the

24

payment and Mr. Kavanagh was checking, asking you to verify it?

12:46:56 25

A I'll answer it very specifically, if somebody was take making an allegation or

26

a suggestion that they had made a donation to somebody high up in Fianna Fail,

27

they could have directed their inquiry to me as the appropriate person, so the

28

fact that somebody chose not to go through what I would call, they went through

29

a circuitous route if they went through other people.

12:47:16 30

Q 184 Hold on a second, you were being asked by Mr. Kavanagh to check whether this

12:47:20 1 payment had been received by Fianna Fail. Isn't that right?

2 A Yes, no not this payment, I didn't know there was a payment.

3 Q 185 Sorry you were asked whether Fianna Fail had any record of having received a

4 payment of 50,000 pounds from either Mr. Gilmartin or from Arlington?

12:47:35 5 A And I checked the records and I made it clear we hadn't.

6 Q 186 And having been asked that query, did you find there was something unusual on

7 the part of Mr. Kavanagh in asking you that?

8 A No, because in fund-raising and anybody who is involved in fund-raising,

9 there's always a lot of suggestions of funds that you might receive but what

12:47:55 10 you actually eventually receive and always can be regularly considerably less

11 and I'm just saying life is full of people throwing names on you, are they on

12 the list, are they on the list, did we ever get anything there, I would have

13 got questions like that umpteen times as a regular event.

14 Q 187 I am asking Mr. Fleming is, the circumstances in which that query was raised

12:48:17 15 you must have understood was surely somebody was saying they had made that

16 payment and Mr. Kavanagh was asking you to check that?

17 A No, it didn't and, I think I made it clear in my evidence, no suggestion came

18 to me that somebody was saying they had made a donation, was a an inquiry just,

19 had somebody made a donation and insisted that if I had any grounds for

12:48:38 20 believing a donation was made, I would have followed that because I was the

21 person in charged with that responsibility.

22 Q 188 That was a matter within your area of responsibility to check that and as part

23 of that responsibility, did you not ask Mr. Kavanagh who the money was supposed

24 to have been given to?

12:48:52 25 A No, because he was asking me had we got it, not me asking him.

26 Q 189 As part of your inquiry, would you not have thought it natural or normal to say

27 who was this money supposed to have been given to, was that not part of the

28 normal inquiry?

29 A No, as I said and I'm just elaborating on the phone call when Mr. Gilmartin's

12:49:12 30 name would have been mentioned, we brought in it to include Arlington, I didn't

- 12:49:14 1 even know who Mr. Gilmartin was and the suggestion was had we in Fianna Fail
2 head office got it.
- 3 Q 190 It was Fianna Fail head office that got it and not -- you didn't ask, was that
4 a suggestion or something that you asked?
- 12:49:30 5 A That's something I was asked to check, had the Fianna Fail party at national
6 level received this.
- 7 Q 191 Had the payments been made directly to Fianna Fail headquarters.
- 8 A Or had it worked its way to us.
- 9 Q 192 In order to have worked its way to you, it would have been had to have given to
12:49:42 10 somebody else, is that right?
- 11 A No, I made it clear earlier on a lot of donations came directly by post, or
12 delivered to Fianna Fail head office. Some came through members of the
13 fund-raising committee or other party people.
- 14 Q 193 In any event, it wasn't a question that you asked Mr. Kavanagh, you weren't
12:49:55 15 asking was this money supposed to be given to anybody else?
- 16 A No.
- 17 Q 194 I take it you now accept having seen what you have seen in this Tribunal that
18 the 50,000 pounds was paid by Mr. Gilmartin to Mr. Flynn for Fianna Fail, is
19 that right?
- 12:50:06 20 A On the basis of the information here, yes.
- 21 Q 195 And in fact has been repaid now at this stage by Mr. Flynn, is that correct?
- 22 A I didn't know that. I didn't know that so I'm not, you know --
- 23 Q 196 You accept, I take it --
- 24 A Oh, I accept what you are saying.
- 12:50:23 25 Q 197 You accept this was a payment made to Mr. Flynn for Fianna Fail, is that
26 correct?
- 27 A A payment made?
- 28 Q 198 By Mr. Gilmartin to Mr. Flynn.
- 29
- 12:50:33 30 CHAIRMAN: Sorry, Mr. Barniville, there's been no finding to that effect.

12:50:37 1

2 MR. BARNIVILLE: Okay, I'll leave it at that.

3

4 CHAIRMAN: The evidence of Mr. Gilmartin says he paid it on behalf of Fianna

12:50:42 5 Fail. Mr. Flynn, as I understand it, will say that it was a personal donation.

6

7 MR. BARNIVILLE: I'm just asking whether this witness accepts the position, it

8 may well be a matter, and I accept it's a matter for the Tribunal.

9

12:50:56 10 CHAIRMAN: I don't think it's an appropriate question at this stage.

11

12 MR. BARNIVILLE: Absolutely, I accept the Tribunal's ruling.

13

14 MS. DILLON: I don't wish to interrupt Mr. Barniville, but he has put to this

12:51:05 15 witness does this witness accept the money has now been repaid to Fianna Fail.

16

17 MR. BARNIVILLE: I accept --

18

19 MS. DILLON: This is what the transcript is saying, if Mr. Barniville --

12:51:14 20 A No, repaid to Mr. Gilmartin, I understood was the question. You put to me that

21 the cheque had been paid to Pdraig Flynn and you said it was repaid. I

22 understood by that you meant repaid by Pdraig Flynn by Mr. Gilmartin. That's

23 what I understood.

24

12:51:29 25 MR. BARNIVILLE: I may have phrased the question somewhat inelegantly perhaps

26 and leave that perhaps aside, that's a matter for the Tribunal ultimately to

27 hear evidence on. It's not perhaps a matter for you.

28 A But you have put to me about the cheque being repaid, I don't know anything

29 about what you are talking about.

12:51:46 30 Q 199 And finally, can I ask whether in your experience, did you ever come across a

12:51:51 1 situation where a payment for constituency expenses in the amount of 50,000
2 pounds had ever been made?

3 A No.

4 Q 200 Thanks very much.

12:52:03 5

6 CHAIRMAN: Mr. Redmond, do you want to -- Mr. Lawlor?

7

8 **THE WITNESS WAS QUESTIONED AS FOLLOWS BY MR. LAWLOR:**

9

12:52:07 10 Q 201 MR. LAWLOR: If I could just have page 930 please. Just a couple of questions,
11 I want to finish up, coming up to lunchtime. In the first paragraph there, Mr.
12 Fleming, you will see that the chief valuer of Dublin city and county, Mr.
13 McLoone, in his statement to the Tribunal is suggesting in heading C there in
14 the first paragraph that "Mr. Gilmartin was having difficulties in achieving
12:52:30 15 the zoning for the land. The banks became concerned with the delay and
16 apparently wanted to terminate the funding arrangement and subsequently altered
17 the accommodation with Mr. Gilmartin. My recollection is that Mr. Gilmartin
18 was most unhappy about being put in that position."
19

12:52:48 20 So That's the statement from the chief valuer. If I could have page 2646
21 please. I think this is, you probably are more familiar, it's an internal
22 document probably going to the credit committee of AIB. And I just want to
23 focus on the bridging loan facility there under credit grading and you will see
24 that the bank is providing or considering providing a loan of 9 million pounds
12:53:24 25 to Mr. Gilmartin and they are going to retain half a million pounds for
26 interest rolled up so that's the situation that Mr. Gilmartin has.
27

28 Now, if I could just have page 2703 please. This is the actual formal letter
29 of offer from AIB to Mr. Gilmartin or his company. And --

12:53:46 30

12:53:46 1 CHAIRMAN: Sorry, Mr. Lawlor, can you just explain the relevance to this
2 witness of this --

3
4 MR. LAWLOR: Yes, I'll explain very clearly, your request to make the inquiry
12:53:56 5 was in late 1990, isn't that right?

6 A Yes.

7 Q 202 And the relevance of that is that Allied Irish Banks on the 19th February put
8 an offer letter out to Mr. Gilmartin to advance him 9 million pounds and the
9 purpose of this line of questioning is that when Mr. Gilmartin was making his
10 complaint, Mr. Fleming, he was passed the sell-by date for repaying the 9
11 million pounds loan. He was in default of his loan with AIB when he commenced
12 making his complaint at the end of 1990. Because the page I have asked for
13 there specifies that the repayment would be paid on a given date, 19th June
14 1990. On page 2646 please.

12:54:50 15
16 The date is specified as the 19th June, so Mr. Gilmartin is making his
17 complaints to Mr. Sherwin and then without you having the detailed knowledge,
18 you are asked to make an inquiry about Mr. Gilmartin's payment of the blank
19 cheque. Do you ever recall a contribution being made either at constituency
12:55:12 20 level now you are an elected member of the Dail or at national level where a
21 blank cheque was like was offered as a donation?

22 A Well, not in the amount of 50,000 but I have seen some cheques that people
23 mightn't know whether, who exactly to make it out to, whether it's the trustees
24 of Fianna Fail or the Fianna Fail party or, you know, in a small minority of
12:55:33 25 cases, I would have seen cases like that.

26 Q 203 And in treating that in a -- as an accountant, you would have to have some
27 record to treat it in your accounts as to what it was having issued a payment
28 of 50,000 pounds under some heading, you have no invite, Mr. Gilmartin couldn't
29 get a receipt or didn't get a receipt, so somewhere in accounts, in the returns
12:55:53 30 of that year, there's a 50,000 pounds outward payment and we haven't been able

12:55:58 1 to establish the heading under which it's held.
2
3 Could I just finally have page 3436 please. This is Mr. Sheeran, the bank
4 manager at Blanchardstown, and under heading 2 there Mr. Fleming, he is
12:56:16 5 stating, "In respect of the payment to Mr. Pdraig Flynn, I was made aware of
6 this payment to Fianna Fail. It was made known to me almost immediately the
7 cheque was issued, in whatever way" -- so he, in whatever way -- "It had been
8 made to clear to Mr. Gilmartin that a donation to Fianna Fail party funds could
9 possibly ease or smooth his path re: Tax incentives/zoning."
12:56:45 10
11 So are you now in the knowledge that there was strings attached to this cheque
12 that Mr. Gilmartin gave to Mr. Flynn?
13 A Well, I have never seen any of this documentation before. Is this, this is a
14 document from --
12:57:04 15 Q 204 The retired bank manager that Gilmartin dealt with in the Bank Of Ireland in
16 Blanchardstown and his statement was that Mr. Gilmartin was assuming if he gave
17 the 50,000 pounds under whatever guise he is claiming he gave it, that he was
18 hoping it would smooth his path. Now there are other documents, I don't want
19 to waste time and we'll finish. Mr. Gilmartin needed and you would be very
12:57:27 20 familiar with wanting to protect the town of Portlaoise and its shopping
21 environs, that there's a ministerial directive on the size of shopping centres,
22 isn't that right?
23 A Correct.
24 Q 205 And Mr. Gilmartin's project couldn't proceed unless that ministerial directive
12:57:40 25 was effectively abolished, are you familiar with that?
26 A Not the detail but I know the issue you are referring to.
27 Q 206 So that's what Mr. Gilmartin wanted in return for giving the blank cheque to
28 the then minister.
29
12:57:53 30 CHAIRMAN: Mr. Lawlor, that's a submission but --

12:57:54 1
2 MR. LAWLOR: Thanks, Mr. Fleming.
3
4 MR. SREENAN: Chairman, could I raise one matter while Mr. Fleming's counsel is
12:58:01 5 here. It was put to Mr. Fleming that the cheque given to Mr. Flynn had been
6 repaid to Fianna Fail by Mr. Gilmartin's counsel. Now I was not aware of that
7 --
8
9 CHAIRMAN: I am not aware of that.
12:58:20 10
11 MR. SREENAN: If it was the case or if there's evidence to that effect,
12 obviously it's a matter I would wish to cross-examine Mr. Flynn on.
13
14 CHAIRMAN: No, I don't think that's correct.
12:58:22 15
16 MR. BARNIVILLE: Perhaps I can clarify, what I intended to say was my
17 understanding was a demand had been made for repayment of the monies by Fianna
18 Fail and I didn't phrase it perhaps particularly well and it doesn't come out
19 well on the transcript and I think Mr. Sreenan, there's no concern about that.
12:58:38 20 A Now, seeing as you have mentioned the Fianna Fail party there, if, I would say
21 as a member of the Fianna Fail party, given what I see there that there was
22 potentially a string attached, I would advise Fianna Fail not to accept any
23 such cheque even if it is ever offered to them in light of what's here.
24
12:58:55 25 CHAIRMAN: All right. Thank you very much.
26 A Thank you.
27
28 **THE WITNESS THEN WITHDREW.**
29
12:58:57 30 CHAIRMAN: We'll adjourn until two o'clock.

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THE TRIBUNAL THEN ADJOURNED FOR LUNCH
AND RESUMED AS FOLLOWS:

12:59:19 1

THE TRIBUNAL RESUMED AS FOLLOWS AT 2.00 P.M.:

2

3

MR. GALLAGHER: Good afternoon. Mr. Deane please.

4

14:15:18 5

MR. JOHN DEANE, HAVING BEEN SWORN, WAS QUESTIONED AS FOLLOWS

6

BY MR. GALLAGHER:

7

8

CHAIRMAN: Good afternoon, Mr. Deane.

9

A Good afternoon, chairman.

14:15:56 10

11

MR. GALLAGHER: Good afternoon, Mr. Deane.

12

13

CHAIRMAN: Sorry, Mr. Sreenan, are you on record for Mr. Deane?

14

14:16:03 15

MR. SREENAN: I'm on record for Mr. Deane and I have been granted

16

representation for Mr. Deane, yes.

17

18

CHAIRMAN: All right.

19

14:16:12 20

Q 207 MR. GALLAGHER: Mr. Deane, you are a solicitor and you also have a business

21

relationship with Mr. Owen O'Callaghan.

22

A That's correct.

23

Q 208 Would you mind coming closer to the microphone, pulling them closer to you, if

24

you don't mind, so that you can be heard. Thank you. You have been circulated

14:16:34 25

with the brief by the Tribunal over the past number of months?

26

A That's correct.

27

Q 209 Did you disclose to any person or persons other than your legal advisers, any

28

of the contents of the brief which have been circulated?

29

A No, I did not.

14:16:47 30

Q 210 Did any other person to your knowledge or belief or with your consent disclose

14:16:53 1 any of the contents of the brief to any person other than your legal advisers?

2 A No.

3 Q 211 You have furnished a total of three statements that are relevant to the present
4 module to the Tribunal, the first of those was to be found on page 4584, it was
14:17:10 5 made on the 3rd of May 2000 and I propose to read that into the record so far
6 as it is relevant to what we are dealing with at the moment. The second was a
7 statement dated the 12th of March 2000, which is to be found at page 4085 and
8 that deals specifically with the meeting in Buswells Hotel, and the third more
9 recent statement is one which is to be found at page 4608, which is dated the
14:17:38 10 16th of June 2004 and deals specifically I think, or largely with your dealings
11 with Mr. Maguire and Mr. Gilmartin concerning the Neilstown site.

12 A That's correct.

13 Q 212 Now, I propose to go through those, to get them on the record and then we'll
14 ask you some questions arising from them. I don't know whether you have a copy
14:17:57 15 of the first statement before you but I'll read it as it appears.

16
17 Statement of John Dean. "I qualified as a solicitor in 1972 and commenced my
18 own practice in 1976. I have known Owen O'Callaghan personally as well as
19 acting as his solicitor for a considerable number of years. I am, and have
14:18:18 20 been, a director of Riga Limited since its incorporation. In 1998, I merged my
21 practice with the firm of Ronan Daly Jermyn and I am presently a consultant to
22 that firm. I became secretary of Barkhill Limited on the 4th July 1996, and a
23 director on the 23rd September 1998.

24
14:18:35 25 I first heard of the Quarryvale site from Owen O'Callaghan following a
26 discussion he had with an anchor tenant whom he approached in connection with
27 the Neilstown site.

28
29 As far as I can recall, I first met Tom Gilmartin in the offices of his
14:18:49 30 solicitor, Seamus Maguire and Company, at the time of the completion of an

14:18:52 1 option agreement dated 31st January 1989 between O'Callaghan Properties Limited
2 and Thomas Gilmartin.
3
4 I was involved in the drafting of this option agreement, its negotiation with
14:19:02 5 Seamus Maguire and subsequently attending at his office in Main Street,
6 Blanchardstown with Owen O'Callaghan to finalise the agreement. During the
7 course of the discussions on the agreement, Seamus Maguire advised Tom
8 Gilmartin that the agreement should include a clause making it conditional upon
9 Tom Gilmartin obtaining planning permission for the Quarryvale site.
14:19:20 10
11 Tom Gilmartin's response was that this was not part of his agreement with Owen
12 O'Callaghan and he did not expect Owen O'Callaghan to wait for his money. Tom
13 Gilmartin was prepared to take the risk. When the final engrossments were
14 prepared for signing, Seamus Maguire again told Tom Gilmartin that it would be
14:19:37 15 unwise for him to sign any agreement which was not subject to planning.
16
17 I reminded Seamus Maguire that Tom Gilmartin had earlier said that it was not a
18 term of the agreement and Tom Gilmartin agreed with this. The option agreement
19 was signed in Seamus Maguire's office. Owen O'Callaghan kept me informed of
14:19:52 20 his discussions with Tom Gilmartin regarding the payments due under the option
21 agreement.
22
23 In February/March 1990, Owen O'Callaghan became aware that Tom Gilmartin may
24 have been seeking to have the zoning transferred from Neilstown to Quarryvale
14:20:05 25 without having completed the payments under the option agreement of the 31st
26 January 1989. In order to ascertain the legal position, I was instructed to
27 seek counsel's opinion. I wrote to Sean O'Leary, BL on the 22nd March 1990,
28 seeking his advice on the matter. In that advice, Mr. O'Leary suggested that
29 if the zoning was transferred, this would leave O'Callaghan Properties in a
14:20:27 30 position to claim compensation.

14:20:28 1
2 In July 1990, correspondence passed between Seamus Maguire and me relating to
3 the transaction but as the proposals were on the basis that any further
4 payments would be subject to Tom Gilmartin obtaining planning permission for
14:20:40 5 the Quarryvale site, they were unacceptable to Owen O'Callaghan."
6

7 Now the balance of that statement deals with other matters and I don't propose
8 to open it at this stage.
9

14:20:49 10 I now pass to the third statement which really is a most recent one as I said,
11 to be found at 4608. Solely because it deals in more details with your
12 dealings with Mr. Gilmartin and Mr. Maguire.
13

14 "I received a statement of John Deane made 16th June 2004, concerning option
14:21:12 15 agreement dated 31st January 1989 and made between Owen O'Callaghan properties
16 on the one part and Thomas Gilmartin of the other part. I received
17 instructions from Owen O'Callaghan in connection with the terms of an agreement
18 which he reached with Thomas Gilmartin early in January 1989.
19

14:21:29 20 Following receipt of those instructions, I sent a fax to Seamus Maguire dated
21 the 16th January 1989 comprising 69 pages. I believe this fax contained copies
22 of the following documents.

23 A. Contract for sale between Dublin Corporation and Merrygrove Limited.
24 B. Contract for sale between Merrygrove Limited on the one part and to
14:21:49 25 O'Callaghan Properties, Owen O'Callaghan, Jack O'Callaghan, of the other part.
26 C. Option deed made between Celtic Nominees Limited and Buckfast Limited of the
27 first part and O'Callaghan Properties of the other part.
28

29 The fax may also have contained maps and the copy of the relevant folio.

14:22:02 30 Thereafter I prepared an agreement reflecting Mr. O' Callaghan's instructions

14:22:05 1 which for the purposes of the statement I shall refer to as draft A.

2

3 That I should say is to be found on page 3931 and also at 4620 of the brief.

4

14:22:15 5 "I sent this agreement under cover of a letter dated 19th of January 1989 to

6 Seamus Maguire. The letter I believe was sent by fax.

7

8 It would be noted that in letter refers to "Recent meeting" from which

9 reference I take it that I must have personally met Mr. Maguire sometime before

14:22:33 10 the 19th January 1989. I do not have a recollection of this meeting now,

11 however, I have attached a copy of draft A, together with a copy of the letter

12 of the 19th January 1989 at appendix J1."

13

14 That's at page 4620 -- I should say that the copies of the various versions of

14:22:55 15 the agreement which are attached as appendices hereto, contain handwritten

16 annotations describing the documents as draft A, draft B etc. Which were not

17 present on the original versions of these documents which are in the possession

18 of the Tribunal. These annotations which are on post-it notes on the original

19 versions held by the Tribunal were made in recent weeks to assist in

14:23:16 20 identifying the various version of the document. It should be clarified

21 however further annotations contained on the enclosed copies of the various

22 draft agreements are indeed contemporaneous and are contained and are clearly

23 identifiable on the originals versions presently in the Tribunal's possession.

24

14:23:32 25 I subsequently received instructions from Mr. O' Callaghan that instead of a

26 straight forward purchase the agreement with were Gilmartin was to be changed

27 to an option agreement, following these instructions I began the preparation of

28 the appropriate option agreement. I made handwritten amendments to draft A

29 which were subsequently retyped into the document which I refer to draft B and

14:23:53 30 that's to be found at page 3935 and 4625, which is to be found at annexed to

14:24:02 1 the present statement as appended JD2.
2
3 Again, subsequent amends were made by me and redrafts of the documents done and
4 these subsequent redrafts are referred to as drafts C and D and are to be found
14:24:14 5 herewith as appendix JD3 and JD4 respectively. I do not believe that drafts B,
6 C and D were sent to Seamus Maguire."
7
8 I should say that drafts B is to be found at page 3935, draft C is 3940 and
9 draft D is at 3945 and lest there be any confusion I should stress --
14:24:39 10
11 CHAIRMAN: Sorry Mr. Gallagher --
12
13 MR. GALLAGHER: I should say for the information of all concerned, that there
14 are more than, there is more than one copy of each of the drafts in the
14:25:23 15 agreement and they have different page numbers, so it's important to bear that
16 in mind when reading the transcript.
17
18 The final draft which I prepared and which I referred to as draft E was, I
19 believe, sent to Seamus Maguire and I have attached a copy of draft D here to
14:25:42 20 as appendix JD5, that's to be found at page 3951:
21
22 "On the 31st January 1989, I attended the office of the Seamus Maguire
23 solicitor in Dublin with Mr. Owen O'Callaghan for the purposes of completion of
24 the agreement between O'Callaghan Properties and Mr. Gilmartin. We arrived at
14:26:00 25 Mr. Maguire's office at approximately 10.30 that morning. A considerable
26 discussion ensued regarding Draft E, a number of amendments were made to that
27 draft document again, which would be evident from my handwritten notes to the
28 draft E referred to in appendix JD5. All these amendments were made at the
29 request of Mr. Maguire or Mr. Gilmartin and all these amendment for the benefit
14:26:17 30 of Mr. Gilmartin.

14:26:18 1
2 When agreement had been reached, Mr. Seamus Maguire arranged for the documents
3 to be retyped by his secretary in his office. This was retyped on judicature
4 paper, the original of which has been given to the Tribunal and a copy which is
14:26:32 5 annexed in appendix JD6. That's to be found at page 3959.
6 It will be noted all amendments made in hand to draft E have now been
7 incorporated into judicature paper which was intended to be the final version
8 for execution subject to each side's final review of the document before
9 signing.
14:26:50 10 After this document was typed, I separately consulted with Mr. O' Callaghan and
11 went through the document with him in detail. Neither Mr. Maguire nor
12 Mr. Gilmartin was present at the time and I can only assume that they were
13 likewise reviewing the document.
14 In the course of reviewing the document, I noticed some typing errors and
14:27:07 15 corrections which were required to be made. I made these amendments in my own
16 hand on this document and discussed them with Seamus Maguire.
17
18 A further version of the document was then typed up in Seamus Maguire's office.
19 This version which proved to be the final version incorporated the small number
14:27:23 20 of amendments which were required and apart from that is identical to the
21 previous version attached at JD6 to be found at page 3960.
22
23 Once I had checked that the appropriate amendments had been made the document
24 and a counterpart were then signed by Mr. O' Callaghan and Mr. Gilmartin in the
14:27:48 25 presence of Seamus Maguire and myself. Seamus Maguire and I duly witnessed the
26 agreements.
27
28 As I have stated in my previous statement to the Tribunal, during the course of
29 the discussions on the agreement that day, Seamus Maguire advised Tom Gilmartin
14:28:03 30 that the agreement should include a clause making it conditional upon Tom

14:28:07 1 Gilmartin obtaining planning permission for the Quarryvale site.

2

3 Tom Gilmartin's response to this, was that this was not part of his agreement
4 with Owen O'Callaghan and he did not expect Owen O'Callaghan to wait for his
14:28:18 5 money.

6 Moreover, Tom Gilmartin said that he was prepared to take the risk. When the
7 final engrossments were prepared for signing, Seamus Maguire again told Tom
8 Gilmartin that it would be unwise for him to sign any agreement which was not
9 subject to planning. I reminded Seamus Maguire that Tom Gilmartin had early
14:28:36 10 said that it was not a term of the agreement and Tom Gilmartin agreed with
11 this."

12

13 CHAIRMAN: All right. Mr. Gallagher, I am going to rise for a few minutes.

14

14:29:07 15 **THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND**

16 **RESUMED AS FOLLOWS:**

17

18 CHAIRMAN: Now, Mr. Gallagher.

19

14:33:40 20 MR. GALLAGHER: I'll continue with your statement, Mr. Deane, on page 4610.

21

22 "Owen O'Callaghan and I left the office of Seamus Maguire following the
23 conclusion of the meeting at 2.30/3.00 p.m. I took the original copy of the
24 agreement with me and I have supplied same to the Tribunal. I attach appendix
14:34:10 25 JD7 hereto a copy of the said agreement".

26

27 I think that has been supplied to the Tribunal and we have the original
28 document you referred to.

29

14:34:15 30 "I should say by way of conclusion that I heard of and read the allegations

14:34:20 1 made about me for the first time recently by Mr. Gilmartin during the course of
2 his evidence to the this Tribunal. These are serious allegations which have
3 profound implications for me as a solicitor, for my colleagues and my family.
4 They were ventilated for the first time at a public hearing of this Tribunal
14:34:37 5 without any prior notice to me or it would appear the Tribunal. I regard this
6 as most unfair. These allegations are totally false and without any
7 foundation.

8
9 For the avoidance of any doubt on the matter, I never made any alteration
14:34:51 10 whatsoever to the signed agreement I took away from Seamus Maguire's office on
11 the 31st January 1989. A copy of which is exhibited JD7 which is a true and
12 complete copy of the agreement signed by both parties".

13
14 Now the third statement you made related to the meeting in Buswells Hotel, it's
14:35:08 15 a short statement dated the 12th March 2004 to be found on page 4085.

16
17 You made this statement in response to a request by the Tribunal which was
18 dated the 9th March 2004 and which is to be found at page 4089 and in this
19 statement you say as follows:

14:35:34 20
21 "On the day of the meeting in question, I accompanied Owen O'Callaghan to a
22 meeting with Tom Gilmartin at Mr. Gilmartin's office on St. Stephen's green,
23 Dublin. After that meeting had ended, the three of us walked together to
24 Buswells Hotel. Tom Gilmartin was meeting Finbar Hanrahan in Buswells Hotel
14:35:53 25 but I do not know who arranged meeting as I had no involvement in the
26 arrangement of the meeting.

27
28 When we arrived at Buswells Hotel, Owen O'Callaghan identified Finbar Hanrahan
29 to Tom Gilmartin who then proceeded over to where Finbar Hanrahan was seated.
14:36:08 30 Owen O'Callaghan and I did not accompany him however, and instead went to the

14:36:15 1 bar where, I believe we ordered coffees. During the course of the discussions
2 between Tom Gilmartin and Finbar Hanrahan, Owen O'Callaghan and I remained at
3 the bar, which was situated some distance away from Mr. Gilmartin and
4 Mr. Hanrahan and consequently there was no question of being able to hear what
14:36:31 5 they were discussing.

6
7 After a while I saw Tom Gilmartin get up and leave the hotel. Owen O'Callaghan
8 followed Tom Gilmartin out and I remained behind to pay for the coffees. I
9 then followed both Tom and Owen out on to the street.

14:36:44 10
11 Outside I found Tom Gilmartin together with Owen O'Callaghan and I could see
12 that Tom Gilmartin was annoyed. My recollection is Owen O'Callaghan informed
13 me that Tom had just told Owen that he had been asked by Finbar Hanrahan for
14 100,000 pounds in return for his support. I believe that at that time Tom
14:37:02 15 Gilmartin and Owen O'Callaghan departed together. It is my recollection that I
16 went to Dublin Airport to get my flight home to Cork.

17
18 With regard to the purported date of this meeting, being the 28th December
19 1988, I do not believe that the meeting took place on this date. It was and is
14:37:16 20 my usual practice to take a week off as holiday between Christmas and the New
21 Year and I have no recollection of breaking that arrangement to be present at a
22 meeting in Dublin in any year on the 28th December.

23
24 Finally, I should say that with regard to the characterisation of the meeting
14:37:31 25 in Buswells, in Tom Gilmartin's statement as being a meeting I attended "In the
26 company of Mr. Lawlor, Mr. O' Callaghan and Mr. Ambrose Kelly", I confirm that
27 this is not correct as neither Mr. Lawlor nor Mr. Kelly were present." That's
28 signed John Deane and dated the 12th March 2004.

29
14:37:52 30 Mr. Deane, can I ask you, are these statements an accurate account of the

- 14:38:01 1 evidence that you are giving to the Tribunal in relation to the matters that
2 are dealt with here?
- 3 A Yes.
- 4 Q 213 In your first statement at page 4584, you confirm that you are a solicitor,
14:38:24 5 that you qualified in 1972, and you commenced your own practice in 1976 and you
6 have known Mr. O' Callaghan personally as well as acting as his solicitor for a
7 considerable number of years and you have, you are and have been a director of
8 Riga Limited since its incorporation. Am I correct in thinking that Riga
9 Limited was incorporated on the 23rd June of 1982?
- 14:38:48 10 A Yes, I think that's correct.
- 11 Q 214 So you have been a director with Mr. O' Callaghan in Riga Limited since 1982?
- 12 A That's correct.
- 13 Q 215 And am I correct in thinking that Riga Limited is a development company that
14 has carried out developments, the majority of them major retail developments
14:39:14 15 and that it also holds some investment properties?
- 16 A That's correct.
- 17 Q 216 Am I correct in thinking that O'Callaghan Properties is an investment company
18 which does not carry out development work itself?
- 19 A That's correct.
- 14:39:26 20 Q 217 And is it the case that letters which were written on behalf, on O'Callaghan
21 Properties Limited notepaper, were in fact at times written on behalf of Riga?
- 22 A That is correct.
- 23 Q 218 Can you explain why it was that that happened?
- 24 A The name O'Callaghan Properties would have been the public name with which
14:40:01 25 everybody would be familiar with, various entities or special purpose vehicles
26 were from time to time used for special projects, and the generic name
27 O'Callaghan Properties continued to be used.
- 28 Q 219 Is there not a danger that somebody would be misled if, for example, a letter
29 is written on the headed notepaper of O'Callaghan Properties Limited, might be
14:40:23 30 misled into believing that they were dealing with that company when in fact

- 14:40:27 1 they were dealing with a different legal entity?
- 2 A That is a possibility, but I think in all the documentation that is done for
- 3 commercial developments, it's made clear as to who the parties are at the time
- 4 of signing of any such documentation.
- 14:40:40 5 Q 220 I see. Take the contracts that were signed in relation to the Neilstown lands,
- 6 they were signed by on behalf of O'Callaghan Properties Limited?
- 7 A That's correct.
- 8 Q 221 Was it at all times intended that these developments would be carried out by
- 9 Riga Limited?
- 14:40:56 10 A That's correct.
- 11 Q 222 Why then was Riga Limited not described as the party contracting in relation to
- 12 those lands?
- 13 A My recollection is that at the time Mr. Gubay wanted the main O'Callaghan
- 14 Properties Company as the purchaser of the property and that was the reason
- 15 that that company was used on that specific occasion.
- 14:41:12 16 Q 223 Can you point out to any documentation or request that was made by Mr. on or
- 17 behalf of Mr. Gubay to that effect?
- 18 A No, I can't.
- 19 Q 224 Tell me, are you involved with Mr. O' Callaghan in any properties, any other
- 14:41:32 20 developments companies or companies of any description?
- 21 A There are a number of companies within a group of companies and I'm director of
- 22 each of those companies. So there would be several companies.
- 23 Q 225 And how long have you been a director of those companies?
- 24 A The first time I became a director of any one of the companies was with the
- 14:41:51 25 formation of Riga and since then, as other companies were incorporated,
- 26 generally I became a director of those companies.
- 27 Q 226 Would you name out some of the companies that for example you and Mr. O'
- 28 Callaghan had have been or are directors are presumably are joint shareholders
- 29 in, is that correct?
- 14:42:08 30 A Yes.

- 14:42:09 1 Q 227 Would you tell the Tribunal the names of these companies and approximately when
2 they were incorporated?
3 A I would need to research that, chairman, I just cannot give the dates of when
4 these --
- 14:42:19 5 Q 228 Well, can you tell the names of the companies?
6 A I can give you some of the names. The main holding company is a company called
7 Ellen Dale Limited, underneath that there is companies called Riga Limited,
8 Riga Developments Limited, there are various management companies involved in
9 the management of various shopping centres, the names of some of those now
10 escape me.
11
12 There were companies formed, there's a development company for Arthurs Quay
13 development called Berryvale Limited, there was, I think that company also
14 probably did the development in Athlone. And there would have been various
15 other subsidiary companies from time to time for various special purposes.
- 14:43:00 16 Q 229 Is Cadnam Construction Limited one of those companies?
17 A Yes, that was involved in the Limerick project.
18 Q 230 Was that in the mid 1980s?
19 A Yes. Arthurs Quay in Limerick I think open in 1999 so yes, 1980s would be
20 correct.
- 14:43:24 21 Q 231 So, can the Tribunal can take it that you and Mr. O' Callaghan were business
22 partners from the early 1980s?
23 A That is correct.
24 Q 232 You also acted as solicitor for the various companies in which you were
25 effectively a 50 percent shareholder?
26 A That is correct.
27 Q 233 You said you first heard of the Quarryvale site from Owen O'Callaghan following
28 a discussion he had with an anchor tenant, it would appear from what Mr. O'
29 Callaghan wrote on the 4th November 1988, 1940 please, that he had heard about
14:44:13 30 the Quarryvale site from Mr. Tom Gilmartin -- sorry, 1941. You have seen this

14:44:23 1 memorandum?

2 A Yes.

3 Q 234 I take it that you have read the brief for the purpose of familiarising

4 yourself with the various documents?

14:44:29 5 A Yes, I have.

6 Q 235 So you are familiar with this document which was copied to you?

7 A I am familiar with the documents, that's correct.

8 Q 236 And this is a memo written by Mr. O' Callaghan to Edward D Lyons of Mason Owen

9 and Lyons in connection with the proposed acquisition of the Merrygrove lands

14:44:49 10 at Neilstown.

11 A Yes.

12 Q 237 Isn't that right?

13 A Yes.

14 Q 238 And in the first paragraph, he refers to Mr. Liam Lawlor, said he met with Liam

14:44:59 15 Lawlor last Wednesday, "Liam Lawlor told me that Flynn and McSharry asked me to

16 look after Gilmartin and would preferred if nothing happened on the Clondalkin

17 site and was under the impression like everyone else that the site was going

18 nowhere.

19

14:45:12 20 Lawlor is quite confident that Gilmartin will get his permission but that we

21 are in the driving seat for the time being".

22

23 Now can the Tribunal take it when Mr. O' Callaghan's, you understood Mr. O'

24 Callaghan's reference to the Clondalkin site to be the Neilstown site?

14:45:29 25 A That's correct.

26 Q 239 And when you talked about Gilmartin getting permission, that was for the

27 Quarryvale site?

28 A That would be my understanding, yes.

29 Q 240 And page 1941, Mr. O' Callaghan was conveying to you that he had spoken to

14:45:46 30 Mr. Hanrahan in Cork that morning, that morning in Cork.

14:45:49 1 A Yes.

2 Q 241 Were you present at that meeting, do you know anything about it?

3 A No, I had never met Mr. Hanrahan.

4 Q 242 Right. You knew he was a Dublin County Councillor because he were told that in

14:46:01 5 the memorandum I take it?

6 A That's the only reason I know it.

7 Q 243 And Mr. O' Callaghan was telling you and others that Finbar Hanrahan was our

8 main supporter in Lucan, it was he who told me about the Gilmartin some three

9 months ago?

14:46:15 10 A That is correct.

11 Q 244 That would suggest that approximately in August or September or thereabouts of

12 1988, Mr. Hanrahan had told Mr. O' Callaghan of Mr. Gilmartin's interest in the

13 Quarryvale site.

14 A Yes.

14:46:35 15 Q 245 And Mr. O'Callaghan was suggesting that Mr. Kelly and Mr. Lyons should open

16 negotiations with Mr. Redmond and Mr. Morrissey on the road and the Gilmartin

17 situation.

18 A That's what the document says.

19 Q 246 What steps were taken following the sending of that memorandum?

14:46:59 20 A I'm personally not aware of any steps which were taken.

21 Q 247 Did you not consult with your partner, Mr. O' Callaghan, at that time about

22 this transaction and the probability as it appeared at that time from

23 Mr. Lawlor's point of view, that Mr. Gilmartin would get his permission?

24 A I was certainly aware of the Gilmartin site and the implications which the

14:47:25 25 Gilmartin site had in respect of the Neilstown site. As regards meeting with

26 Mr. Redmond or Mr. Morrissey in relation to those two issues, I'm not aware

27 that any meeting took place with those two people.

28 Q 248 Were you aware that whether or not Mr. Kelly and/or Mr. Lyons on your behalf or

29 on behalf of one of the companies with which you were associated contacted

14:47:50 30 either of those gentlemen or indeed anybody else?

14:47:52 1 A I am not aware that those two gentlemen were contacted by anybody.

2 Q 249 I think O'Callaghan's companies and presumably the company with which you were
3 associated applied for planning permission in relation to Cooldrinagh lands in
4 1988?

14:48:26 5 A Subject to checking the date, yes.

6 Q 250 Do you know -- well perhaps we can have 1627. You are aware that a planning
7 application was submitted in relation to the lands?

8 A Yes, I am.

9 Q 251 Was this the first development that had been carried out by any company, what
10 one might call an O'Callaghan company in shorthand, in the Dublin area?

11 A Yes, I believe that was the first development which was proposed. It didn't
12 actually happen or go ahead.

13 Q 252 But what role did you have to play in that?

14 A I had very little to do with that because it didn't proceed after a very short
15 period of initial discussion.

14:49:04 16 Q 253 Did you have any role in the negotiations that led up to the acquisition of the
17 land or an option on the land?

18 A I would have been involved in what were whatever the legal negotiations were.

19 Q 254 Did you travel to Dublin for that purpose?

14:49:18 20 A It would be quite likely that I did travel to Dublin.

21 Q 255 Did you have any meetings or dealings with any architects in relation to the
22 development?

23 A Yes, I certainly met with Ambrose Kelly in relation to that.

24 Q 256 And what was the purpose of that meeting?

14:49:36 25 A The meeting I recall having with Mr. Kelly was a site visit and a general
26 discussion about the prospects for development.

27 Q 257 And was this before any contract was signed for the acquisition of the site?

28 A Yes, I believe it would be.

29 Q 258 And did you establish what the zoning of the site was?

14:49:52 30 A I believe the site was not properly zoned for retail purposes.

- 14:49:58 1 Q 259 It was zoned for agricultural purposes?
- 2 A I think so that's correct -- it certainly wasn't properly zoned for --
- 3 Q 260 How was it proposed to deal with that planning impediment so far as any
- 4 potential developer was concerned?
- 14:50:12 5 A Well that was an issue which Mr. O' Callaghan was dealing with himself but my
- 6 understanding was it would be necessary to get the zoning changed.
- 7 Q 261 Well what steps did you decide to take to get the zoning changed?
- 8 A From what I can recall, there were -- Mr. O' Callaghan had discussions with the
- 9 architect, Mr. Kelly, and the solicitor for the vendor, Mr. Paul Smithwick in
- 14:50:42 10 relation to the zoning and/or the change in zoning and as far as I can recall,
- 11 an application was either made or drafted to have the zoning changed. And that
- 12 that subsequently was not proceeded with. That's as far as I recall.
- 13 Q 262 There was an application for planning permission, we know, from Mr. Kelly who
- 14 gave evidence last week, that there was an application for planning permission
- 14:51:05 15 submitted in respect of this site, that this was an application by O'Callaghan
- 16 Properties Limited and that that application was the subject of a Section 4
- 17 motion which was signed by, if you look at the screen, you will see it was
- 18 signed by Finbar Hanrahan, Paddy Hickey and Sean Walsh. Did you know any one
- 19 of those gentlemen before that motion was signed?
- 14:51:38 20 A No, and I don't know any of them now, I don't believe I have ever met any of
- 21 them.
- 22 Q 263 Do you know how it came to pass that they signed a Section 4 motion for a
- 23 company that had never carried out development in Dublin before that time?
- 24 A No, I have no person knowledge of how that came about.
- 14:51:58 25 Q 264 Do you have any knowledge either as a partner in the O'Callaghan companies or
- 26 as a solicitor as to how that came about?
- 27 A My only recollection of that was that there were discussions with the solicitor
- 28 for the vendor with Mr. O' Callaghan and as a result of those discussions, a
- 29 motion was lodged, the actual detail of how it came about, I don't have any
- 14:52:24 30 firm knowledge.

- 14:52:24 1 Q 265 Have you any, have you discussed it with Mr. O' Callaghan or Mr. Kelly indeed
2 how it came to pass how a Section 4 motion came to be drafted and signed and
3 submitted to the County Council in respect of the planning application by
4 O'Callaghan Properties?
- 14:52:40 5 A Yes, I have discussed it with Mr. O' Callaghan since and --
- 6 Q 266 What he has he told you?
- 7 A He has told me exactly as I have told you, that the discussions were had with
8 Mr. Kelly and with the solicitor for the vendor, Mr. Smithwick, and as a result
9 of that, the motion was drafted and prepared and lodged and that is as much as
10 I know about it.
- 11 Q 267 Do you know that the former owners of the lands objected to the planning
12 application and pointed out there was a dispute in relation to the property and
13 in relation to the --
- 14 A All my dealings were with Mr. Smithwick who was the solicitor for the I believe
15 to be the solicitor for the vendor.
- 14:53:22 16 Q 268 The question was did you know that the former owners of the lands, Mr. and Mrs.
17 Burke were objecting?
- 18 A I don't recall any such objection.
- 19 Q 269 I see. Do you recall that the application was strongly opposed by the county
20 council and was withdrawn eventually?
- 14:53:38 21 A That is the reason I understand it was withdrawn.
- 22 Q 270 Now, when did you first become aware of the Neilstown lands?
- 23 A Following the Cooldrinagh site and the fact that that did not go ahead, we were
24 still looking for a site in Dublin and Mr. Kelly, our architect, drew our
25 attention to the Neilstown site.
- 14:54:09 26 Q 271 I think you were in communication with Ivor Fitzpatrick and Company,
27 Solicitors, on the 3rd October 1988, may I have 4530 please. Tab number 1. I
28 can give you a hard copy of the documents if you would prefer to see them, they
29 are on screen so it may be as easy?
- 14:54:49 30 A If I could have the hard copies as well please.

14:54:52 1 Q 272 We'll give you a copy. This is on tab number 1. (documents handed to witness)
2 You refer to a meeting with Mr. Fitzpatrick and you sent Mr. Fitzpatrick sent
3 draft special conditions and a draft option agreement to you?
4 A That is correct.

14:55:15 5 Q 273 And the option agreement the terms an the special conditions are to be found on
6 the succeeding pages in tab number 1, isn't that right?
7 A Sorry --

8 Q 274 Just to confirm it. I think on the 7th October then, Ivor Fitzpatrick sent, on
9 tab number 3, Ivor Fitzpatrick wrote to you at page 2538 and said:
10
11 "In consideration of you handing over the sum of 325,000 pounds we undertake to
12 hold the said sum in trust and to return to you on demand subject to the
13 following conditions" and you set that out.
14
15 I think that at that time and indeed on that date, Ivor Fitzpatrick wrote to
16 the corporation enclosing contracts in duplicate and signed and sealed by
17 Merrygrove, that's to be found at page 1914. It's on screen, it may not be in
18 that folder.
19

14:56:14 20 The contract is to be found at 3387 and 3398. The contract in question was one
21 that provided for the purchase of the Neilstown lands by Merrygrove for the sum
22 of 3 million pounds, is that right?
23 A That's correct.

14:57:10 24 Q 275 "With a deposit of 300,000 pounds payable on signing and two further payments
25 of 1.35 million payable on receipt of planning permission with the second 1.35
26 million pounds payable from not later than 12 months from receipt of planning
27 permission or any earlier date that the purchaser might elect."
28
29 That's to be found at tab 2 on page 3394, those special conditions. You have
14:57:33 30 those?

- 14:57:33 1 A Yes.
- 2 Q 276 And it provided that condition 2, that "The purchaser" -- that's Merrygrove
3 Estates Limited, and that was Mr. Gubay's company -- "shall apply for planning
4 permission for development within two months of the date hereof or within such
14:57:50 5 extended period as the corporation may agree."
6
7 From the reading of the documentation, it appears that all the contracts, all
8 the relevant documents were signed by on behalf of Mr. Gubay and associated
9 companies on the 14th of October of 1988, and the contract in question was
14:58:11 10 signed and sealed by Dublin Corporation on the 21st of November 1988. If you
11 look at page 3387. You will see at tab number 2.
12 A Yes.
- 13 Q 277 Is that correct?
- 14 A Yes. The incorporation of the Merrygrove contract is dated 21st November 1988.
- 14:58:38 15 Q 278 And there was an acceptance, an agreement between Ivor Fitzpatrick on behalf of
16 Merrygrove and the corporation that the contract would be dated the 21st
17 November 1988 and that would be treated as the contract date?
18 A Yes, I think that's correct.
- 19 Q 279 Yes. Now, the contract provided that "Merrygrove was to construct a portion of
14:59:02 20 the Fonthill Road". That's to be found on page 3394 and also provided that
21 "The purchaser, that's Merrygrove, would use its best endeavours to apply and
22 obtain Land Commission consent to the transaction."
23 That's to be found at condition 8 on page 3395.
- 24 A Yes.
- 14:59:26 25 Q 280 And that was to be done within three months from the date of the agreement
26 which is three months from the date of the 21st November 1988. I think on that
27 date, you handed over 325,000 pounds to Ivor Fitzpatrick on trust in connection
28 with that particular transaction.
- 29 A Yes, that amount was handed over, yes.
- 14:59:57 30 Q 281 And on the same date, an option agreement was entered into between Celtic

- 15:00:03 1 Nominees and Buckfast as grantees and O'Callaghan Properties as grantors, is
2 that right? It's tab 4, 3978?
- 3 A I am not sure of the date of that but around that time would certainly be --
- 4 Q 282 You paid as we see on page --
- 15:00:25 5 A On the 7th October.
- 6 Q 283 Yes, on the 7th October. So there was an option agreement, two option
7 agreements, effectively, one was an option agreement between Celtic Nominees
8 and Buckfast as I say and O'Callaghan Properties, whereby O'Callaghan
9 Properties gave Celtic Nominees Limited and Buckfast Limited an option to
10 require O'Callaghan Properties to purchase or procure the purchase of the
11 entire issued share capital of Bardwell Limited, that's an Isle of Man company,
12 in a manner provided in the option agreement for the sum of 500,000 pounds. Is
13 that right?
- 14 A Correct.
- 15:01:07 15 Q 284 And at an earlier stage, I referred to that as a reverse option, where Mr. O'
16 Callaghan was or O'Callaghan Properties, more correctly, were giving an option
17 to Gubay controlled companies to require O'Callaghan Properties to pay 500,000
18 pounds to acquire the controlling, the company which had controlled and held
19 the entire share capital in Merrygrove Limited?
- 15:01:39 20 A That's correct.
- 21 Q 285 Isn't that correct?
- 22 A That's correct.
- 23 Q 286 And O'Callaghan Properties signed the documentation with Merrygrove on the 7th
24 October 1988, may I have 4539 please. You will see on that you confirm a
15:02:10 25 meeting that took place on Friday, following which intensive, sorry at which
26 following intensive negotiations outlined signed the contract documentation.
27 So the.
28 Contract documentation, that is the option agreement involving Celtic Nominees
29 and the option agreement between Merrygrove Estates Limited and O'Callaghan
15:02:31 30 Properties were both signed on the 7th October by O'Callaghan Properties?

- 15:02:37 1 A Yes, I think that's correct.
- 2 Q 287 Isn't that right, isn't that what that letter says?
- 3 A Yes.
- 4 Q 288 And if we look at tab number 6, we see there's an agreement for sale between
- 15:02:50 5 Merrygrove Estates and O'Callaghan Properties?
- 6 A That's correct.
- 7 Q 289 That's page 4541. This is an undated agreement but you say it was executed by
- 8 O'Callaghan Properties on the 7th October 1988?
- 9 A I believe around that date, that's correct.
- 15:03:07 10 Q 290 Well according to your letter, it's not about that date, your letter, if it's
- 11 accurate, confirms that following incentive negotiations our clients signed the
- 12 contract documentation?
- 13 A Yes, that's correct.
- 14 Q 291 And that's the 7th --
- 15:03:19 15 A Yes.
- 16 Q 292 And you are referring to the 7th October?
- 17 A Yes.
- 18 Q 293 So, for the purposes of identifying the date on which the various documents
- 19 were executed, the Tribunal can take it that this Merrygrove Estates and
- 15:03:39 20 O'Callaghan Properties agreement, which was undated and the other option
- 21 agreement, the reverse option agreement between Celtic Nominees, Buckfast
- 22 Limited and O'Callaghan Properties were both executed by O'Callaghan Properties
- 23 on the 7th October 1988?
- 24 A Yes, that's correct.
- 15:03:55 25 Q 294 Now, can you tell the Tribunal why it was that the date, the 7th October 1988
- 26 was never inserted on either of those agreements?
- 27 A The normal practice, when you execute a contract for sale is that the purchaser
- 28 signs first.
- 29 Q 295 Yes.
- 15:04:12 30 A It's then sent -- in this case obviously it was probably to hand the vendor's

- 15:04:17 1 solicitor -- they then get it executed by their client and it is at that stage
2 normally that the date or the certainly that was the practice that at that
3 stage normally the date is inserted when the contract, as it were, becomes
4 binding.
- 15:04:29 5 Q 296 But why was it that that date, whether the 7th October or the 14th October
6 which we know is the date by which Merrygrove, sorry, yes Merrygrove and the
7 Gubay companies had executed all their documents, Isle of Man companies, why is
8 it that that date, the 14th October or indeed the 7th October was not inserted
9 in this agreement and in the reverse option agreement?
- 15:04:53 10 A I'm not sure whether it was or not. Certainly not on this copy here.
- 11 Q 297 You can take it from me, Mr. Deane, that in the various drafts that you have
12 furnished to the Tribunal and that we'll come to in due course, nowhere --
- 13 A No, I appreciate that.
- 14 Q 298 And including JD7, which you said is the final concluded agreement --
- 15:05:17 15 A Yes.
- 16 Q 299 -- was the date or dates of those contracts inserted and perhaps if I can show
17 you just --
- 18 A I accept that it's in the signed option agreement, that those contracts as they
19 are, are in those documents.
- 15:05:30 20 Q 300 But can you explain why that is so? Why was that allowed to happen? Why would
21 you as an experienced conveyancer allow that to happen?
- 22 A There's something I would need to check, but I have a feeling that what
23 happened was, that these documents were copied at the time they were signed by
24 both parties, before a date was inserted and that those copies were then
15:05:53 25 attached to various documents and that I believe is what happened.
- 26 Q 301 We know, for example, that -- and we'll come to it in due course -- we know
27 that you sent copies of those two options, the agreement for sale with
28 Merrygrove Estates, the Dublin Corporation to Merrygrove Estates and the
29 reverse option agreement, they were all three were sent to Mr. Maguire by you,
15:06:17 30 by fax, on the 16th of January of 1989.

- 15:06:21 1 A That's correct.
- 2 Q 302 And those two agreements did not have any date as the date of the agreement,
3 they remained as they appeared on screen on 3399?
- 4 A No, I accept that.
- 15:06:38 5 Q 303 And why is that?
- 6 A Because again, as I say, they were copies of the documents before the dates
7 were agreed to be put into them.
- 8 Q 304 But where's the -- where's the -- the documents had been executed on the 17th,
9 sorry, on the 7th by O'Callaghan Properties, presumably you had a role in the
10 execution of those?
- 11 A Correct.
- 12 Q 305 Does your signature appear anywhere on that?
- 13 A It appears as a witness to the document, down at the bottom right-hand side
14 corner is my signature.
- 15:07:08 15 Q 306 Yes, witness.
- 16 A Yes.
- 17 Q 307 Now, that was signed or witnessed by you on the 7th October. The vendors
18 signed on the 14th October and I'll turn up the documentation, the letter of
19 confirmation, if you wish, in a moment, but they confirm that all the documents
15:07:26 20 had been signed by the 14th October and you may remember that there was a bit
21 of tension between yourselves, your office and the Ivor Fitzpatrick office in
22 connection with what was done or was to be done by a particular time and
23 whether or not it was done, isn't that is correct?
- 24 A That is correct.
- 15:07:40 25 Q 308 So you had to get personal with Mr. Fitzpatrick and deal with him personally
26 and apologies passed and everything was fixed up?
- 27 A That is correct.
- 28 Q 309 And what I want to know is why it was that at no stage in October, November,
29 December, or January was the date inserted? Why was the date not inserted in
15:08:06 30 either of those two agreements?

- 15:08:07 1 A We were working on copies of those agreements before the dates had been agreed.
- 2 Q 310 But where was the original of those agreements on which the dates had been
3 inserted?
- 4 A I would need to check with the office to see are they there.
- 15:08:21 5 Q 311 Perhaps if you check, may I have the -- I'm handing to you an original bound
6 document which was furnished by your office, by your solicitors, and which was
7 handed to Mr. Seamus Maguire for perusal on the last day, it's as received by
8 the Tribunal. It is bound and it is the option agreement which I think you
9 have referred to as JD7, is that correct? (document handed to witness)
- 15:09:21 10 A That's correct.
- 11 Q 312 It is also I think for ease of reference to the Tribunal, a copy of it is to be
12 found at tab E on the red folder. Now, attached to that original document
13 which you say was signed by Mr. O' Callaghan and Mr. Gilmartin on the 31st
14 January 1988 are the agreements which are referred to in that option agreement
15 and they, the agreements in question are the agreement for sale between
16 Merrygrove Estates Limited and O'Callaghan Properties Limited and the reverse
17 option agreement, Celtic Nominees Limited, Buckfast, O'Callaghan Properties?
- 15:09:55 18 A That is correct.
- 19 Q 313 And the dates of those agreements are not inserted there?
- 15:10:12 20 A That is correct.
- 21 Q 314 Why was that so?
- 22 A Because the copies that were sent to Seamus Maguire at the time were the
23 undated copies which were on the file I was dealing with at the time.
- 24 Q 315 But you knew, Mr. Deane, from the 14th October that the documents had been
15:10:28 25 executed by the other parties on that date, why did you not put in the date or
26 some date that was appropriate?
- 27 A As I say, that's what happened, I don't have an explanation as to why the
28 undated copy was sent, other than that was what was sent and this is what was
29 here.
- 15:10:45 30

15:10:45 1 CHAIRMAN: Sorry Mr. Gallagher. Mr. Deane, just on a point of interest, what
2 is the legal effect, if a date is not put in, assuming it's not put in?
3 A I think the.
4

15:10:55 5 CHAIRMAN: Other than stamping the document and so on.
6 A I don't think it has any particular legal effect. Or legal adverse effect. I
7 think the date can be dealt with by way of affidavit or whoever.
8

9 CHAIRMAN: By reference to other documents?
10 A Exactly.
11

12 MR. GALLAGHER: The agreement for sale between Merrygrove Estates and
13 O'Callaghan Properties was the agreement for the sale of three folios, 489, 491
14 and 1233 and it was subject to a number of conditions and they are to be found
15:11:36 15 at pages 4543 and they are also to be found at page 3402 in tab 6. Do you have
16 that in front of you? They are the special conditions. You have them there,
17 Mr. Deane?
18 A I think so, yes.

19 Q 316 I'll go through them briefly, if I may and see whether you agree or disagree
15:12:13 20 with them, there was an inducement fee of 25,000 pounds which was
21 non-refundable?
22 A Yes.

23 Q 317 The purchase price was 3.5 million pounds, there was 100,000 pounds deposit
24 payable on execution of the agreement, there was 1.825 million pounds payable
15:12:32 25 on receipt of planning permission and the balance of the purchase price, 1.35
26 million pounds was to be paid not later than 12 months from the date of receipt
27 of the planning permission.
28

29 And O'Callaghan Properties, the purchaser, was to apply for full planning
15:12:48 30 permission for a development of the lands to a design and quality and level of

- 15:12:54 1 detail to be approved by Mr. Edward Lyons, isn't that right, that's to be found
2 at page 3403
- 3 A That's correct.
- 4 Q 318 And the vendor inserted a condition and the purchaser agreed to a condition
15:13:11 5 which made time of the essence in that respect?
- 6 A That is correct.
- 7 Q 319 What was the significance of that making time of the essence in that agreement
8 which was not to be found in the earlier agreement from Dublin Corporation to
9 Merrygrove?
- 15:13:25 10 A That was the clause that the vendors wanted to insert.
- 11 Q 320 But what was the legal effect of it?
- 12 A The legal effect is that time limits must be adhered to in a strict sense.
- 13 Q 321 And what is the consequence, if it isn't adhered to in a strict sense?
- 14 A If it isn't, it gives rise to a possible claim for damages.
- 15:13:48 15 Q 322 What affects the contract in terms of the validity of the contract, is the
16 contract rescinded?
- 17 A Not necessarily.
- 18 Q 323 But does it give rise or may give rise to a claim for rescission?
- 19 A It may give rise to a claim for rescission.
- 15:14:03 20 Q 324 And if it is if rescission is claimed, then does rescission automatically
21 follow on that basis?
- 22 A In general terms, probably yes, but in this situation --
- 23 Q 325 Just take general terms. In general terms, the insertion of such a term means
24 that if the vendor decides to treat time of the essence in its strict form,
15:14:35 25 that vendor is entitled to rescind the contract and this contract comes to an
26 end?
- 27 A In general terms, yes.
- 28 Q 326 Yes. Now, if we look at page -- 4543, the 14th October, we see that all these
29 various documents were executed. This is a letter from Mr. Fitzpatrick to you
15:14:56 30 and I don't want to get into it, but you can take it from me that he confirmed

15:15:01 1 that all the documents have been executed by his clients on that date.
2
3 On the 21st November, we know that the corporation land contract was provided,
4 was executed and was signed and I think, if we may have 4549, you at that stage
15:15:36 5 were writing to Ivor Fitzpatrick telling them that you hoped to have the
6 planning documentation submitted by the 7th December 1988?
7 A That is correct.
8 Q 327 I think that was in respect or in response to an earlier letter from Ivor
9 Fitzpatrick referring to the fact that planning permission had to be applied
15:15:55 10 for in accordance with the terms of the contract?
11 A That is correct.
12 Q 328 May I have page 4547 at tab 9 please. Ivor Fitzpatrick on the 21st November
13 1988 were reminding you of the planning permission obligations contained in the
14 contract and seeking confirmation that your clients were acting in accordance
15:16:22 15 herewith and that comes back to the provision that made time of the essence in
16 the contract.
17 A Yes.
18 Q 329 Isn't that right?
19 A They were talking about the contract, yes.
15:16:31 20 Q 330 They were talking about that specific provision?
21 A Correct.
22 Q 331 They were talk being the planning permission and you were telling them, on the
23 30th of November that the you hoped to have the permission submitted or the
24 application submitted by the 7th of December?
15:16:46 25 A That's correct.
26 Q 332 Am I correct in thinking that the application was not submitted by the 7th of
27 December?
28 A Yes.
29 Q 333 And I am I correct in thinking that it was not submitted for a considerable
15:17:00 30 time afterwards?

- 15:17:00 1 A That is correct.
- 2 Q 334 In other words, it was not submitted in accordance with the terms set out in
3 the agreement between Merrygrove and O'Callaghan Properties?
4 A That is correct.
- 15:17:11 5 Q 335 Would you tell the Tribunal of your earliest knowledge, the first time you had
6 knowledge of Mr. Gilmartin being interested in the Neilstown lands?
7 A I think they -- the first time I heard of the possible arrangements between
8 Mr. Gilmartin and Mr. O' Callaghan would have been early in January 1989.
- 9 Q 336 Well we know that Mr. O' Callaghan was telling you and others on the 4th of
15:18:01 10 November, Friday the 4th of November of the meeting he had had two days earlier
11 with Mr. Lawlor and he was talking about the Gilmartin lands and that it
12 appeared that they were likely to get, that planning permission was likely to
13 be forthcoming for those lands. Did you not have any further discussions with
14 Mr. O' Callaghan in relation to those lands in the intervening period?
- 15:18:31 15 A I understood your question to be when did I first become aware of Mr. Gilmartin
16 having an interest in the Balgaddy lands, if I misinterpreted your question,
17 I'm sorry.
- 18 Q 337 All right. Well when did you first become aware of his interest in the
19 Balgaddy lands?
- 15:18:46 20 A I first became aware of Mr. Gilmartin's interest in acquiring the Balgaddy
21 lands in early January of 1989.
- 22 Q 338 Unless anybody reading the transcript might be confused, when you talk about
23 the Balgaddy lands, they are --
24 A It's Neilstown.
- 15:19:01 25 Q 339 It's the same lands as the Neilstown lands, they are interchangeably called
26 Neilstown, Balgaddy or Neilstown/Balgaddy sometimes?
27 A That's correct.
- 28 Q 340 And what did you learn at that time?
29 A Well, Mr. O' Callaghan rang me to tell me he had had a discussion with
15:19:19 30 Mr. Gilmartin, as a result of which Mr. Gilmartin was to acquire the interest

- 15:19:23 1 of O'Callaghan Properties in the Balgaddy lands.
- 2 Q 341 And was this something that pleased you?
- 3 A Yes, it resolved a difficulty.
- 4 Q 342 How did it resolve the difficulty?
- 15:19:36 5 A There were two parcels of land, one called the Gilmartin lands, which was in a
6 very good location but was not properly zoned for retail. The other was the
7 Neilstown lands, which were properly zoned but its location wasn't as good and
8 clearly there was the possibility that both sides could destroy the other. So
9 it made sense for one party to withdraw in favour of the other.
- 15:20:08 10 Q 343 And did Mr. O' Callaghan tell you the terms that had been negotiated at that
11 time?
- 12 A Yes, he did.
- 13 Q 344 What were those terms?
- 14 A Those terms were as set out in the draft document A as I call it. And could I
15:20:19 15 see that document, so I can refer to it?
- 16 Q 345 Yes indeed.
- 17 A Basically it was --
- 18 Q 346 Tab A, it's on -- it's page 3931. I should also say that it's on page 4620 as
19 JD1, that's exhibited with your last?
- 15:20:53 20 A Is it on the hard copy here?
- 21 Q 347 I don't -- if there's a hard copy --
- 22 A No, it's okay.
- 23 Q 348 As part of tab A there should be a divider in tab A?
- 24 A Maybe I can do it on screen.
- 15:21:09 25 Q 349 It's on screen.
- 26 A I'll try it with this. The purchase price was to be three and a half million
27 pounds. It was to be a contract to purchase rather than what subsequently
28 transpired which was an option agreement and they were staged payments which
29 had yet to be agreed.
- 15:21:33 30 Q 350 What did Mr. O' Callaghan tell you had been agreed with Mr. Gilmartin?

- 15:21:38 1 A That Mr. Gilmartin was buying the interest in the Balgaddy lands which
2 O'Callaghan Properties had for 3.5 million pounds.
- 3 Q 351 Did you make any note or attendance of that?
- 4 A No, I don't believe I did.
- 15:21:50 5 Q 352 And how were you able to recall the details of what had been agreed with
6 Mr. Gilmartin and to reduce them to a draft in the form that we see on that
7 draft A, if you hadn't made a note or attendance?
- 8 A I don't have a note or attendance. Very often if I get a phone call from a
9 client in general I would make a note on a note pad of what had been said and
10 when I finished the draft of the documents in accordance with it, I simply
11 cross it out and go on to the next item.
- 12 Q 353 And you wouldn't keep an attendance or a note of that in case anybody, any
13 confusion arose as to whether or not you had got the instructions correct or
14 otherwise?
- 15:22:31 15 A Well over the years I have never had any confusion with Mr. O' Callaghan over I
16 instructions nor indeed with other clients, in general I would not be a person
17 who keeps a lot of attendances.
- 18 Q 354 Well, this agreement was one which provided for the sale of 3.5 million pounds?
- 19 A That's correct.
- 15:22:50 20 Q 355 In other words, there was to be a premium or there was to be a payment to
21 O'Callaghan Properties of 500,000 pounds over and above what they were obliged
22 to pay -- sorry, I beg your pardon, over what Merrygrove were obliged to pay to
23 Dublin Corporation.
- 24 A Could you repeat the question because I don't think I agree with that.
- 15:23:16 25 Q 356 There was to be a payment to O'Callaghan Properties of 500,000 pounds more than
26 Dublin Corporation had sold the land for or had agreed to sell the land for?
- 27 A No --
- 28 Q 357 I thought the contract price for the Dublin Corporation was 3 million?
- 29 A That is correct.
- 15:23:33 30 Q 358 And Mr. Gilmartin is paying 3.5 million?

15:23:36 1 A No, I don't see it that way. The sequence of events were that Dublin
2 Corporation contract was for 3 million.

3 Q 359 Yes.

4 A The Gubay contract, in other words, Merrygrove to O'Callaghan Properties was
15:23:49 5 3.5 million.

6 Q 360 Yes.

7 A And what this document did was sold the O'Callaghan Properties' interest in
8 those contracts for 3.5 million pounds.

9 Q 361 Yes. I accept that it was the same price as --

15:24:05 10 A No, it's not the same price.

11 Q 362 Well sorry, if I am confused in this, perhaps you would clarify it for me, I
12 understood O'Callaghan Properties had agreed to buy the Merrygrove contract for
13 3.5 million?

14 A That is correct, to buy the lands from Merrygrove for 3.5 million, thus giving
15:24:25 15 Merrygrove effectively a 500,000 profit on the lands which they were buying
16 from Dublin Corporation.

17 Q 363 Indeed.

18 A I would agree with that.

19 Q 364 And we know that the reverse option agreement provide for 500,000 pounds?

15:24:38 20 A That's just an aside to it.

21 Q 365 This draft now was one which provided that Mr. Gilmartin or a company nominated
22 by him was to acquire the lands in question for 3.5 million.

23

24 MR. SREENAN: Chairman, that is not correct, if one looks at clause 3 of the
15:24:57 25 document on screen, that's not what it says.

26

27 Q 366 MR. GALLAGHER: Well perhaps Mr. Deane, you would tell the Tribunal what your
28 instructions were from Mr. O' Callaghan about what was to happen.

29 A In simple terms, O'Callaghan Properties were to make a profit out of the deal.

15:25:15 30 Q 367 How were they to achieve that?

15:25:16 1 A They were to achieve that because they were effectively paying the money which
2 was being paid by O'Callaghan Properties were paying 500,000 pounds payment to
3 Mr. Gubay and they were getting 3.5 million from Mr. Gilmartin, therefore they
4 were making a 3 million pounds profit.

15:25:37 5 Q 368 And did you discuss that 3 million pounds profit with Mr. O' Callaghan at that
6 time?
7 A Yes, indeed.

8 Q 369 Now that was the draft that you prepared, draft A, and that's, you say that
9 that's what that draft provides for, is that correct?

15:26:01 10 A Absolutely.

11 Q 370 And did you fax that to Mr. Deane, sorry, to Mr. Maguire, on the 16th of
12 January? 3959.
13 A I think it might have been the 19th January.

14 Q 371 Sorry:
15 A From recollection.

16 Q 372 I beg your pardon, you are correct. The 16th of January fax was one which
17 would appear to have sent the earlier agreements involving Dublin Corporation,
18 Merrygrove and Celtic Nominees.
19 A That's correct.

15:26:37 20 Q 373 And they went as we see on screen on the 16th January, 69 pages.
21 A That is correct.

22 Q 374 And if we look at 4590, we see that Mr. Maguire sent a fax to Mr. Gilmartin on
23 the following day with 67 pages.
24 A I see it on the screen but I have no knowledge of it.

15:27:02 25 Q 375 I know. Now, we will come to the subsequent drafts in a moment but you have
26 said and I think it appears to be borne out by the documentation circulated
27 that on the 19th January of 1989, you sent draft A by fax to Mr. Maguire?
28 A Yes, that's --
29 Q 376 That's to be found at tab 15.
15:27:31 30 A Yes.

- 15:27:39 1 Q 377 And that draft, draft A was accompanied by a letter which you sent to
2 Mr. Maguire dated the 19th of January which is to be found at page 3930.
- 3 A That is correct.
- 4 Q 378 And in that letter, you say as follows: "Dear Seamus, further to our recent
15:27:59 5 meeting I attached a very rough draft of the agreement between our respective
6 clients for the consideration of both Tom and yourself. I have not had an
7 opportunity of checking this draft, so please feel free to make any amendments
8 which you may consider to be appropriate. I understand from Tom that he will
9 very shortly be in contact with Owen O'Callaghan to finalise the financial
10 arrangements for the deal.
11
12 On the question of security for the out standing payment or debts due to my
13 client, I understand a bank guarantee might well be able available to cover
14 this situation. I have drafted the agreement on such the assumption that such
15:28:29 15 a guarantee would be available to my clients under the terms of the agreement
16 as my clients would be disposing of all their interest to their client
17 immediately as I understand this is the only practical course of action in view
18 of the particular circumstances of the case. "I will be in Limerick today at
19 meetings and I will arrange to telephone you during the course of the day that
15:28:51 20 discuss any points you may have in relation to this agreement."
21
22 Now, Mr. Maguire says that he has no recollection of having met you prior to
23 the sending of the receipt of that letter and he hadn't discussed his agreement
24 or this, any discussion any agreement with Mr. O' Callaghan with Mr. Gilmartin
15:29:14 25 prior to this time.
- 26 A Yes, I believe that to be correct.
- 27 Q 379 Now why then did you say further to our recent meeting?
- 28 A I don't recall ever meeting Seamus Maguire before the meeting on the 31st of
29 January.
- 15:29:27 30 Q 380 Mr. Maguire has so confirmed on oath to the Tribunal?

- 15:29:30 1 A I agree with that.
- 2 Q 381 The question is why did you --
- 3 A I think there may well be a word missing from that and it might refer to our
- 4 client's recent meeting but I have, I certainly don't recall meeting
- 15:29:41 5 Mr. Maguire.
- 6 Q 382 Well Mr. Maguire has said they never met Mr. O' Callaghan prior to the 31st of
- 7 January?
- 8 A I would agree with that.
- 9 Q 383 So putting in clients would not have --
- 15:29:51 10 A It would mean Tom Gilmartin and Owen O'Callaghan meeting.
- 11 Q 384 Our respective clients, the recently meeting of our respective clients?
- 12 A Our client's recent meeting --
- 13 Q 385 Am I correct in thinking on the 17th of January 1989 Ivor Fitzpatrick and
- 14 Company again wrote to you asking you to advise urgently in relation to the
- 15:30:20 15 planning application which must be lodged to the local authority within two
- 16 months of the 21st November last. That's on page 4550 on tab 13. Ivor
- 17 Fitzpatrick and Company were seeking to be advised of the present position in
- 18 relation to planning application which must be lodged?
- 19 A Yes.
- 15:30:47 20 Q 386 Were you aware that this related back again to the condition in the contract
- 21 which made time of the essence?
- 22 A Yes.
- 23 Q 387 And that you wrote back then on the -- sorry, that letter again reminded you
- 24 that time is of the essence in the contract.
- 15:31:13 25 A Yes, that's correct.
- 26 Q 388 And the letter also referred to the fact, that it was your client's duty under
- 27 the second long contract dated the 7th of October 1988 to obtain, to apply for
- 28 a Section 45 consent. And you were asked to confirm that that had been done.
- 29 A That is correct.
- 15:31:35 30 Q 389 And you replied on the 19th January 1989 at tab 14, 4552 and you told

15:31:48 1 Mr. Fitzpatrick as follows:

2

3 "Thank you for your recent letter in connection with the above development, I
4 have discussed the matter with Owen O'Callaghan in detail. You may probably be
15:31:59 5 aware that since his entry in the agreement with your client, another developer
6 is proposing to construct a major scheme very close to the Clondalkin town
7 centre. My clients had the original drawings ready to present to the planners
8 by the 7th of December last.

9

15:32:13 10 However due to the proposed scheme in the locality, my clients felt that in
11 order to protect their position, it would be necessary to increase the size of
12 the scheme substantially so as to rule out any possibility of the adjoining
13 scheme obtaining planning permission. The architects have been instructed to
14 prepare drawings for the revised scheme and Owen O'Callaghan is due to meet
15:32:33 15 them during the coming week to discuss progress on these drawings and it is
16 anticipated that a new planning application will be ready to be with the
17 planners within a period of three to four weeks. I trust the foregoing sets
18 out in detail the position in which my clients find themselves and have been
19 asked to assure you that you and your clients that all necessary steps will be
15:32:49 20 taken by them to obtain planning permission for a scheme at the Clondalkin town
21 centre at the earliest possible date. John W Dean."

22

23 I think that on the 20th of January, Ivor Fitzpatrick wrote to you at tab 16,
24 page 4553 and said that "Our clients are not prepared to agree to change the
15:33:18 25 terms of the contract. They insist that the terms be strictly complied with."

26

Isn't that right?

27

A Yes, that's correct.

28

Q 390 And on the 25th of January 1989, tab 17, Ivor Fitzpatrick wrote to you in the
29 following terms:

15:33:40 30

15:33:40 1 "We refer to previous correspondence resting with our letter of the 20th inst,
2 we note your client has not made application for full planning permission in
3 accordance with his obligations under the terms of the contract. Take notice
4 that our client is treating your client's breach as a rescission of the
15:33:58 5 contract."

6 A Yes.

7 Q 391 You received that on the 27th of January, it appears from the date stamp?

8 A That's correct.

9 Q 392 I take it that came as a great shock to you?

15:34:08 10 A Yes, I was surprised to receive it.

11 Q 393 Because you were aware of the implications of it?

12 A It's not so much the implications of it, it's the fact that we had written what
13 was a perfectly reasonable letter in the circumstances to them and this was
14 their response.

15:34:26 15 Q 394 But the implication was that they were walking away from the contract, they
16 were holding on to the deposit and your client was left 300,000 pounds shy?

17 A That's not the way I looked at it.

18 Q 395 I see. That was one way of looking at it certainly if they proceeded with
19 their claim for rescission?

15:34:40 20 A I don't believe they were entitled to -- and at that time I was very happy in
21 my own mind they were not entitled to rescind.

22 Q 396 I see.

23

24 MR. SREENAN: Chairman, I think for completeness Mr. Gallagher ought to draw
15:34:54 25 the attention of the witness to an intervening letter from Ivor Fitzpatrick and
26 company to Mr. Deane, it's 4771.

27

28 MR. GALLAGHER: I will deal with all those things in due course.

29

15:35:03 30 CHAIRMAN: What's the date of that letter?

15:35:04 1
2 MR. SREENAN: 20th January 1989. 4771 and it's part of this train of
3 correspondence, I don't see that it should be omitted from the picture for the
4 purposes of these questions.

15:35:15 5
6 MR. GALLAGHER: The letter that my friend has mentioned, is a letter that was
7 written to you on the 20th of January and in effect, in that letter, they asked
8 would your client be prepared to pay money for an extension of time.
9

15:35:42 10 CHAIRMAN: 4771.
11

12 MR. GALLAGHER: Is that the letter?
13 A Yes.
14 Q 397 And did you respond to that letter of the 20th -- sorry -- yes, sorry, it's on
15:36:09 15 screen, 4771. They wrote on a strictly without prejudicial basis to establish
16 whether your clients were prepared to pay money for the additional time sought.
17 A That is correct.
18 Q 398 And did you respond to that letter?
19 A I don't believe I responded in writing to that letter but it was the start of
15:36:45 20 without prejudice discussions.
21 Q 399 All right. But on the 25th of January, as we see on 4554, tab 17, you were
22 informed in writing that they were treating your client's breach as a
23 rescission of the contract.
24 A Yes, that's what the letter said.
15:37:00 25 Q 400 And I think the next relevant matter was the meeting in the offices of
26 Mr. Maguire on the 31st of January.
27 A Yes.
28 Q 401 Is that correct?
29 A That's when the meeting took place.
15:37:17 30 Q 402 Now the position, as it stood at that time then, was that you were in

15:37:26 1 possession of that letter claiming rescission of the contract?

2 A Yes.

3 Q 403 Did you bring that letter or that claim to the attention of Mr. Maguire or

4 Mr. Gilmartin?

15:37:35 5 A I don't recall bringing that letter to the attention of Mr. Maguire or

6 Mr. Gilmartin.

7 Q 404 Mr. Maguire has said that he hasn't seen it and that he should have seen it.

8 A I think he actually said in response to the Tribunal's question or to maybe

9 your question that he might have seen it and he might have dealt with it and I

10 think in response to somebody else, he said he didn't see it.

11 Q 405 I think Mr. Maguire said that he should have seen it, he didn't see it but he

12 should have seen it?

13 A I think that was the second time. I may be wrong but that's my recollection of

14 his evidence.

15:38:07 15 Q 406 On day 495, page 113, he was asked about the letter and he said he had no

16 recollection of that and he was asked "That was never disclosed to you, was it?

17 Were you ever told that there was dispute between Merrygrove.

18 Answer: No I wasn't.

19 Question: Would you have considered that to be a significant matter?

15:38:40 20 Answer: Well I should have been told, I should have been shown that letter."

21

22 A Can I just ask who was asking those questions at this time?

23

24 MR. BARNIVILLE: That was Mr. O'Neill I think.

15:38:51 25 A The reference that I'm making to what he said was I think whoever was examining

26 him from the Tribunal I think asked, he was asked that question.

27

28 MR. GALLAGHER: That is his answer at that stage.

29 A Yes, no, I accept that, that's there in the transcript.

15:39:08 30 Q 407 Do you accept he should have been shown that letter?

- 15:39:10 1 A No, I don't, I think this was a matter for me to make a judgment on, as I saw
2 the matter at the time.
- 3 Q 408 I see. Did you think that it was possible for example that Mr. Gilmartin was
4 buying litigation at that time?
- 15:39:24 5 A I was convinced at the time that number one, the vendors had no right to
6 rescind that contract. And number two, that they were very anxious to complete
7 the transaction and it was my judgment that that transaction would complete and
8 in fact, within I think 14 days of the 31st of January, the transaction did
9 complete.
- 15:39:49 10 Q 409 So --
- 11 A So my judgment on that day was that that was not an issue.
- 12 Q 410 Did you not feel that you had an obligation to tell your colleague and to tell
13 the purchaser that this claim had been made about the rescission of the
14 contract?
- 15:40:06 15 A No, I felt that this was not, they were not entitled to rescind the contract,
16 that the contract could be completed and the contract was in fact completed.
- 17 Q 411 Yes but you didn't think either Mr. Maguire or Mr. Gilmartin had a duty to they
18 them?
- 19 A I don't recall telling them.
- 15:40:23 20 Q 412 Did you feel you had a duty to tell them?
- 21 A No.
- 22 Q 413 You didn't?
- 23 A No.
- 24 Q 414 I see. If we move on then to the 6th of February 1989. Tab 20, 4556, the
15:40:42 25 position is that Merrygrove issued High Court proceedings again O'Callaghan
26 Properties and you were asked to accept services, is that correct?
- 27 A That's correct.
- 28 Q 415 And we know that on the 10th of February 1989, Mr. Lyons sent a memo to
29 Mr. Gubay, that's at tab 21, page 2148, Indicating that Merrygrove had issued
15:41:06 30 proceedings against O'Callaghan Properties as a result of failure to submit

15:41:11 1 planning application has provided for in the agreement. Sorry I'm reading a
2 summary of it. O'Callaghan wants to pay, will pay 100,000 pounds cash now and
3 unconditionally, he was due to pay 500,000 pounds and litigation could take a
4 year to go through the courts.

15:41:28 5 A Yes. This is documents --

6 Q 416 That's a document that you wouldn't have seen of course, from Mr. Lyons to
7 Mr. Gubay at that time?

8 A Correct.

9 Q 417 And on the 14th February then, Mr. Lyons communicated with Ivor Fitzpatrick, at
15:41:44 10 tab 22 on page 4558, Mr. Gubay has decided to accept 460,000 pounds as damages
11 and in return, O'Callaghan "Will require Merrygrove for the purpose of pursuing
12 the deal with Dublin Corporation.

13 A Yes, that's right.

14 Q 418 And on the 17th February 1989, Ivor Fitzpatrick wrote to the secretary of
15:42:08 15 Merrygrove at his own office in Dublin 2 acknowledging their instructions --
16 sorry, acknowledging that their, that's Fitzpatrick's instruction to say
17 Merrygrove, to act on behalf of Merrygrove had been withdrawn and returning the
18 company seal and documents including the original plenary summons?

19 A That was the completion of the transaction.

15:42:29 20 Q 419 Did you at any stage tell Mr. Maguire or Mr. Gilmartin that the summons had
21 been issued, proceedings had been issued?

22 A No I don't recall doing so, I don't believe I did.

23 Q 420 Tell me, did you have any communication with Mr. Gilmartin or Mr. Maguire at
24 any time from early January until the 31st January other than the faxed
15:42:55 25 documents that we have seen on screen? That is draft A and the copies of the
26 various contracts which were the backing documents, if you like, the contracts
27 with the corporation etc?

28 A Could you just repeat the question for me please?

29 Q 421 The question is did you have any communication with Mr. Gilmartin or
15:43:20 30 Mr. Maguire at any time from early January until the 31st January other than

- 15:43:23 1 the communications that we have seen on screen, that is the faxed document an
2 the letter that you wrote on the 19th?
- 3 A I cannot be certain that I didn't have a telephone call with Mr. Maguire.
- 4 Q 422 You can't be certain that you didn't?
- 15:43:39 5 A It may have --
- 6 Q 423 Does that mean?
- 7 A May have had a telephone call with him.
- 8 Q 424 That means that you may not have had --
- 9 A Oh yes, absolutely.
- 15:43:48 10 Q 425 So you don't know?
- 11 A I can't recall exactly but I may have had.
- 12 Q 426 The answer is you don't know whether you had one or not?
- 13 A Absolutely.
- 14 Q 427 Now, do you recall having any discussion or letter or communication from Mr. O'
15 Callaghan in relation to the various, in relation to the various agreements
16 between early January and the 31st January?
- 17 A I would have had a number of discussions with Mr. O' Callaghan over that
18 period.
- 19 Q 428 And did you recall any of those discussions in writing or making a memo or a
15:44:22 20 note or did you write a letter of confirmation saying Dear Owen, I confirm our
21 instructions today when or --
- 22 A It would be a rare occasion I would write a confirmatory note on to Mr. O'
23 Callaghan, I don't believe I did on this occasion either, I did take some
24 handwritten notes which I believe have been discovered to the Tribunal.
- 15:44:43 25 Q 429 May I have 4780 please. Is that the handwritten note you are referring to?
- 26 A Yes. That is correct.
- 27 Q 430 That was produced to the Tribunal within the past week or so, with your
28 statement of the 16th if I am correct, I may be wrong about that, but it came
29 to my attention certainly fairly recently?
- 15:45:11 30 A I think that was actually produced to the Tribunal when we were asked to do

- 15:45:17 1 discovery on the Clondalkin site.
- 2 Q 431 Perhaps so, I'm not making any an issue of it. Can you tell me when that note
3 was made?
- 4 A There was no date on that note but I believe it to be the note that changed the
15:45:32 5 agreement between being an absolute contract to purchase and an option
6 agreement.
- 7 Q 432 What does this note, what do you claim it is? Is it an attendance on somebody?
- 8 A It is a conversation that I had with Mr. O' Callaghan and I made those notes
9 and obviously kept them on file at the time.
- 15:45:54 10 Q 433 And is this the only note that you have on your file of conversations in
11 relation to this agreement with Mr. Gilmartin at that time?
- 12 A Yes.
- 13 Q 434 And can you explain why it was that you kept this note but you didn't keep any
14 of the earlier notes or any of the subsequent notes?
- 15:46:13 15 A There is no explanation for it, that is the way the file was when I went to
16 look at it on discovery and I discovered it to the Tribunal as it was.
- 17 Q 435 I thought you said earlier that your practice was to scribble down a note of
18 what was said to you to translate it into a draft contract, a draft agreement
19 and then to destroy the scribbled notes?
- 15:46:35 20 A I think I said that that generally was my practice and that I rarely kept
21 attendances.
- 22 Q 436 I see.
- 23 A And this is one of those that I have kept.
- 24 Q 437 I see. Can you give a date for this?
- 15:46:46 25 A Not precisely, but I believe it was between the 19th of January, if that was
26 the date, the draft A was sent up and the 31st of January when we arranged to
27 meet in Mr. Maguire's office.
- 28 Q 438 Would you read for the Tribunal please what that says.
- 29 A It just it's headed "Gilmartin: we buy out Gubay 500, and that's the reference
15:47:16 30 to 500,000, he pays the cheques is reference to Tom Gilmartin. Tom Gilmartin

- 15:47:19 1 pays us 30,000 pounds, that reference should be to hold off for six months.
- 2 Q 439 Sorry?
- 3 A He pays us 300 and that's a reference to 300,000 to hold off for six months.
- 4 At the end of six months if he is in trouble, we take back site and go ahead.
- 15:47:39 5 If he wants to proceed, pay 2.7, 1.35 then and 1.35 end of December '89. He
- 6 procures extension of time from Dublin Corporation, wants to be able to say to
- 7 the minister on Thursday, deal is done.
- 8 Q 440 Who is the minister?
- 9 A I have no idea.
- 15:48:05 10 Q 441 And you would, it would appear, drafted number of amendments to the draft A
- 11 that we have seen on screen.
- 12 A That is correct.
- 13 Q 442 Draft A as we know is on page 3931 and it's also to be found at 4620. Draft B
- 14 is to be found at page 3935. And also at 4625. It's in the hard copy in front
- 15:48:58 15 of you if you want it, tab B at the front of the folder.
- 16 A Yes, I have it.
- 17 Q 443 Am I correct in thinking that both tab, draft A and draft B were draft
- 18 agreements and not option agreements?
- 19 A Draft A was a contract to purchase.
- 15:49:34 20 Q 444 That's right.
- 21 A What you see on draft B is draft A with my handwritten amendments converting it
- 22 to an option agreement. So, for example, if you were to compare paragraph 3 of
- 23 draft A and look at it at paragraph 3 of draft B you see the typing is
- 24 identical, I had simply taken the document and I hand wrote the amendments I
- 15:50:00 25 wanted made to the document on top of draft A.
- 26 The second page, 3936 probably was written on the reverse side of the page from
- 27 3931 as it were and so on. And if you actually look at the text of draft B,
- 28 the text of draft B is identical to the text of draft A. With my handwritten
- 29 amendments inserted.
- 15:50:30 30 Q 445 There's no reference for example at the top of 3935 to this being an option.

- 15:50:48 1 A No, it doesn't say that on the top of that one but I think as you go through
2 the document, I start making further amendments as I fine tune the draft.
- 3 Q 446 Indeed but the first agreement you say it's an agreement for sale, is that
4 correct, draft A?
- 15:51:06 5 A It's unconditional, it's not an option.
- 6 Q 447 It's not an option and draft B is unconditional, it's not an option?
7 A Well no, I disagree with you.
- 8 Q 448 At the top of it.
9 A I think to be fair, you have got to look at the context of this and it says on
15:51:20 10 the handwritten or sorry, if you go to the first page of it, 3935 --
- 11 Q 449 Yes, there is a reference in handwritten to an option?
12 A The vender has agreed for the purchaser to a grant to it, of the purchase. So
13 to be fair to it, that's how the document is starting to evolve, it's the final
14 version but it's how the document is starting to evolve from an unconditional
15:51:46 15 purchase into an option agreement.
- 16 Q 450 You made a further changes in that document at 3937 in tab B and then you
17 insert it further conditions at 3938?
18 A Yes.
- 19 Q 451 And they are reflected in draft D.
15:52:12 20 A Draft C, I think.
- 21 Q 452 Isn't that right?
22 A They would be -- I would have thought they were reflected maybe in draft C.
- 23 Q 453 Sorry, in draft C.
24 A Yes. Well, I think the very top, on my version 3940, I think --
- 15:52:48 25 Q 454 Yes.
26 A I think there's something missing off the top there, there's an insertion mark
27 which could well have written "Option" into that one.
- 28 Q 455 Sorry, 3940?
29 A Yes, that's the one here that I have.
- 15:53:04 30 Q 456 It refers to an option --

- 15:53:06 1 A I think that may well do, I need to see the original to check that. And draft
2 C was basically draft Bs handwritten amendments retyped as an original and then
3 I started to make further amendments.
- 4 Q 457 Were these amendments done on the instructions of Mr. O' Callaghan?
- 15:53:41 5 A Mr. O' Callaghan's instructions were as per that handwritten amendment or that
6 handwritten note, rather.
- 7 Q 458 Were any of those other alterations made as a result of instructions from
8 Mr. O'Callaghan or did you do them on your own initiative?
- 9 A They would have been both, they would have been generated initially, the ideas
10 and thoughts would have been generated on my own initiative and they would have
11 been discussed with Mr. O' Callaghan.
- 12 Q 459 Can the Tribunal take it you were in contact with Mr. O' Callaghan on a regular
13 basis as you were drafting and refining this document?
- 14 A Not on a regular basis, I would have taken the instructions as I went to draft
15 the first document, these thoughts would have occurred to me, I would have
16 discussed it with him and I would have proceeded to do the other drafts.
- 17 Q 460 Now you came to draft C, there were further changes in draft D rather.
- 18 A Draft D, could I have a page reference number please. I found it.
- 19 Q 461 It's on tab D, 3945 and subsequent pages.
- 15:55:00 20 A Yes, thank you.
- 21 Q 462 And it's also, this is JD4 referred to in your statement which is to be found
22 at --
- 23 A You see at the top of that, it now refers to option agreement.
- 24 Q 463 Yes indeed. Were those changes also made with in consultation with Mr. O'
25 Callaghan?
- 15:55:19 26 A No, they would have been made by me.
- 27 Q 464 Now, the draft at page 3948, which is draft D provided that Mr. Gilmartin would
28 procure the grant to O'Callaghan Properties of an option to purchase the
29 Gilmartin price at a price equal to the price paid by Mr. Gilmartin for the
15:56:08 30 lands, such option to be granted for the consideration of one pound and the

15:56:12 1 option period to be for a period of two months from the date of delivery of the
2 option to the vendor duly executed by the party granting the option. The
3 effect of that clause, if it had been carried through would be that
4 Mr. Gilmartin would in certain circumstances have to procure the grant to
15:56:34 5 O'Callaghan Properties of an option to purchase the lands for the same price as
6 he had paid for the lands on payment of an option fee of one pound.

7 A Yes, that is the effect.

8 Q 465 Did Mr. O' Callaghan tell you that that had been agreed with Mr. Gilmartin?

9 A No, I don't believe he did.

15:56:47 10 Q 466 And what circumstances therefore did it come to be inserted as a draft in the
11 agreement?

12 A I -- the issue -- when the document changed from an agreement to an option
13 agreement, certain consequences flowed from that. It was an unconditional
14 option, O'Callaghan Properties -- an unconditional agreement, O'Callaghan
15:57:08 15 Properties would have been paid their profit, would have completed the
16 transaction and would have gone away and had nothing more to do with the
17 Neilstown lands or the Barkhill lands, the Gilmartin lands.

18
19 Converting it to an option however, meant, that the problem of the conflict
15:57:23 20 between the two sites may not have been resolved if the option was not
21 exercised. And the same problem that had arisen as a result of which this
22 agreement was negotiated would again arise a couple of months later if the
23 option agreement wasn't exercised by virtue of the facts that two sides had
24 been in conflict.

15:57:44 25
26 I suggested that two things should happen, one, there should be a covenant
27 whereby the lands would not be used for retail purposes for a period of years
28 and secondly, that the ideal situation would be what Tom Gilmartin intended to
29 happen that both sides would end up under the same ownership would now happen
15:58:02 30 in reverse if Tom Gilmartin did not exercise the option and that was my

- 15:58:05 1 suggestion. It would have been discussed with Mr. O' Callaghan in principle of
2 what he thought about it but the drafting of it and that would have been left
3 to me.
- 4 Q 467 Did you send a copy of this draft to Mr. Maguire for his observation or to take
15:58:20 5 instructions from --
- 6 A I have no record on my file of having sent that --
- 7 Q 468 Do you have any recollection of having done so?
- 8 A I don't.
- 9 Q 469 To the best of your knowledge and belief, did you do so?
- 15:58:31 10 A To the best of my knowledge and belief, I don't believe I did.
- 11 Q 470 Why did you not do so?
- 12 A The only reason it wouldn't have been done was a question of timing, that I can
13 see. A meeting was requested by Mr. Gilmartin, that meeting was arranged and
14 with turned up on the day. The document was then gone through in great detail
15:58:56 15 by Mr. Gilmartin.
- 16 Q 471 Are you suggesting that Mr. Gilmartin was under pressure in terms of time at
17 that -- in January of 1989?
- 18 A I don't know whether he was under pressure or wasn't under pressure. All I
19 know was he wanted the meeting, the meeting was arranged and Owen O'Callaghan
15:59:13 20 and I travelled to Dublin.
- 21 Q 472 Was it not unusual for you as a solicitor not to forward to a colleague a draft
22 of the agreement that you were proposing to sign on that day?
- 23 A As I said to you, I can't say for certain that I did.
- 24 Q 473 Mr. Maguire says, he has no record of it and doesn't believe that --
- 15:59:37 25 A I'm just saying that I don't believe I did but I can't rule it out.
- 26 Q 474 All right, well on the assumption that Mr. Maguire is accurate, his
27 recollection is accurate and that you have no recollection of it and have no
28 record it of it, it is not unreasonable for the Tribunal to assume that it
29 didn't happen?
- 15:59:51 30 A Yes, that's correct.

- 15:59:52 1 Q 475 Isn't that right?
- 2 A Absolutely.
- 3 Q 476 So on the assumption that it didn't happen, can you explain to the Tribunal why
- 4 it was that you and Mr. O' Callaghan arrived with a new draft which had not
- 16:00:04 5 been seen by either Mr. Maguire or Mr. Gilmartin and one which included a
- 6 clause which would require Mr. Gilmartin to surrender his lands to O'Callaghan
- 7 Properties in certain circumstances on payment of an option fee of one pound,
- 8 without taking a profit?
- 9 A The reason why we turned up on that date, I just do not recall the exact
- 16:00:27 10 circumstances surrounding that. All I do know is that was a meeting was
- 11 arranged and we turned up that meeting. It was open to Mr. Gilmartin to review
- 12 the document with his solicitor, which he did. He went through it line by
- 13 line, the document was heavily amended, and all those amendments were in
- 14 Mr. Gilmartin's favour. There were clearly things there he disagreed with.
- 16:00:46 15 Negotiations were had and a compromise arranged and that's exactly what
- 16 happened.
- 17
- 18 CHAIRMAN: Mr. Gallagher, we are now at the meeting so it might be an
- 19 appropriate time to break until half ten tomorrow.
- 16:01:03 20 A That's fine, chairman.
- 21

22 **THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,**

23 **THURSDAY, 1ST JULY 2004 AT 10.30 A.M.**

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