

THE TRIBUNAL RESUMED AS FOLLOWS ON

MONDAY, 26TH JULY, 2004 AT 10.30 AM:

CHAIRMAN: Good morning, Mr. O'Neill. Mr. Hayden.

MR. O'NEILL: Morning, Mr. Chairman. Today's sittings of the Tribunal has been convened to consider an application for legal costs, which has been brought by Mr. Tom Brennan and Mr. Joseph McGowan.

Mr. Brennan and Mr. McGowan and companies associated with them played a central role in the matters which were inquired into by the Tribunal between December 1999 and the publication of the Second Interim Report of the Tribunal in, September 2002.

The Tribunal's interest in the affairs of Mr. McGowan, Mr. Brennan and their companies, arose from the Tribunal's investigations into payments and benefits received by Mr. Ray Burke, which were being inquired into pursuant to clauses E1 and E2 of the Tribunal's amended Terms of Reference.

The Tribunal's inquiries of Mr. McGowan and Mr. Brennan included the examination of payments made by their companies to Mr. Burke's auctioneering firm, payments made to offshore bank accounts connected with Mr. Burke and the examination of the circumstances in which Mr. Burke acquired his dwelling house Briargate from Oak Park Developments Limited, a company connected with Mr. Tom Brennan.

The findings of the Tribunal in relation to these matters are contained in chapters 2 and 4 of the Second Interim Report of the Tribunal. The Tribunal concluded that Mr. Tom Brennan and Mr. Joseph McGowan failed to cooperate with the Tribunal in it's inquiries. It found that they had colluded together with

11:04:09 1 Mr. Burke to present false evidence to the Tribunal and that they had
2 obstructed and hindered the Tribunal.

3
4 At chapter 17, at 17.06 of the Second Interim Report the Tribunal stated that
11:04:22 5 that it was satisfy that had these two witnesses colluded in their evidence and
6 that the evidence of each was adopted as accurate by the other. The Tribunal
7 believed that these witnesses obstructed and hindered the Tribunal by:

8
9 A. Failing to give the Tribunal a truthful account of the circumstances in
11:04:39 10 which their monies were paid to Mr. Burke outside the jurisdiction.

11
12 B. Falsely maintained that the monies paid to Mr. Burke were the proceeds of
13 fundraising activities in the United Kingdom, at a time when they knew this not
14 to be the case.

11:04:54 15
16 C. Failing to give the Tribunal a truthful account of the real purpose for
17 which these monies were paid to Mr. Burke.

18
19 D. Colluding with Mr. Burke to give a false account as to how these funds were
11:05:06 20 raised, so as to prevent the Tribunal from establishing the true source and
21 purpose of such payments.

22
23 E. Failing to give the Tribunal a truthful account as to the real purpose for
24 which offshore corporate entities were maintained by them from which monies
11:05:22 25 were paid to Mr. Burke.

26
27 F. Failing to give the Tribunal a truthful account of the nature and extent of
28 their dealings with Bedell & Cristin advocates.

29
11:05:32 30 G. Failing to provide the Tribunal with a truthful account of their

11:05:36 1 relationship with Mr. John Finnegan and the land transactions which resulted in
2 2,661,875 pounds and 96 pence sterling being sent to Jersey.

3
4 The conclusions upon the substantive issues involving Messrs Brennan and
11:05:56 5 McGowan were, that the true circumstances in which Mr. Burke acquired his
6 property Briargate were such as to amount to conferring upon him of a
7 substantial benefit and that the motive for providing such benefit was improper
8 motive connected with Mr. Burke's position as an elected representative of
9 Dublin County Council.

11:06:16 10
11 In relation to the payments made to offshore bank accounts connected with
12 Mr. Burke, the Tribunal concluded that such payments were made by the payers
13 with the intention of securing some as yet unidentified benefit for them and
14 that they were corrupt payments.

11:06:32 15
16 In reporting upon the conduct of the parties the Tribunal was satisfied that
17 Mr. Brennan did not give a truthful account of how Mr. Burke came to acquire
18 the prior Briargate. The Tribunal concluded that the fact that Mr. Brennan,
19 Mr. McGowan and Mr. Burke all gave the same false explanation for the offshore
11:06:52 20 payments was indicative of collusion between them to present an account of
21 events to the Tribunal which they knew to be false.

22
23 The Tribunal's involvement with Mr. Brennan and Mr. McGowan commenced with a
24 letter of the 15th December 1999 addressed to each of them, indicating that the
11:07:11 25 Tribunal had been provided with information suggesting that they & companies
26 associated with them had made payments to Mr. Burke. The Tribunal requested a
27 detailed narrative statement from each of them setting out details of any such
28 payments. This request was clear and unambiguous, it provided an opportunity
29 to Mr. Brennan and Mr. McGowan to assist the Tribunal by giving a truthful
11:07:37 30 account of their payments to Mr. Burke. It is now common case that substantial

11:07:43 1 payments were made to Mr. Burke by Messrs Brennan and McGowan and by companies
2 connected with them. The response to the Tribunal's written request for
3 information from Mr. Brennan and McGowan was provided by Miley & Miley
4 Solicitors, acting on their behalf on the 9th March 2000, when they stated that
11:08:02 5 their clients would prefer not to make a statement at this stage but would be
6 happy to attend the Tribunal when requested to give verbal evidence.

7
8 It was pointed out to them by the Tribunal that the Tribunal's preference was
9 insofar as the co-operation of persons concerned with the Tribunal would
11:08:19 10 permit, to assemble the information which it requires for the purpose of it's
11 functions in private, and in confidence prior to calling evidence at a public
12 sitting of the Tribunal. But that in view of their refusal to voluntarily
13 provide statements to the Tribunal, the Tribunal had no option but to resort to
14 the exercise of it's statutory powers to obtain the information which it
11:08:41 15 required.

16
17 Accordingly, a summons issued against both, requiring their attendance before
18 public sessions of the Tribunal on the 10th April 2000. They were advised that
19 at such session they would be asked to give evidence in relation to any
11:08:56 20 payments made by each or either of them, either on their own behalf or behalf
21 of each other or on behalf of any other entity or company, with which either of
22 them had any involvement or interest.

23
24 On day 144, that is the 10th April 2000, Mr. Joe McGowan and Mr. Tom Brennan
11:09:17 25 attended the public sessions of the Tribunal and answered questions put to them
26 in relation to political funding of Mr. Burke. This provided a second
27 opportunity to Mr. Brennan and Mr. McGowan to assist the Tribunal by giving a
28 truthful account of their payments to Mr. Burke.

29
11:09:33 30 Mr. McGowan gave evidence to the Tribunal at that time, that he had been

11:09:38 1 involved in fundraising activities on behalf of Mr. Burke/Fianna Fail from 1972
2 onwards. In 1975 or thereabouts, fundraising activities transferred to the UK.
3 A target of 10,000 pounds sterling per annum was set and this was achieved from
4 individual donations made to a fund.

11:10:01 5
6 In the event that the annual target was not met Mr. Brennan and Mr. McGowan
7 would make up the shortfall. In one exceptional year an amount of 20,000
8 pounds sterling was raised in this fundraising.

11:10:15 9
10 The de facto treasurer of the fund was said to be Mr. Ernest Ottiwell, he was
11 solely responsible for the fund and for it's onward payment to Mr. Burke. When
12 Mr. McGowan's fundraising activities ceased in 1984 or thereabouts, the
13 accumulated fund was paid to Mr. Burke by Mr. Ottiwell. The amount involved
14 was in excess of 50,000 pounds.

11:10:41 15
16 Mr. McGowan said that he had no knowledge of any monies being paid to Mr. Burke
17 out of the jurisdiction other than the proceeds of the fundraising activities
18 already mentioned and he was not aware of any Channel Islands involvement. He
19 did not pay any money offshore to Mr. Burke other than in relation to the
11:10:59 20 Cheltenham and Ascot fundraising events.

21
22 Mr. Burke did not dispute that UK fundraising events were the source of the
23 offshore payments connected with Mr. Brennan and Mr. McGowan.
24

11:11:11 25 Neither Mr. McGowan nor Mr. Brennan disclosed to the Tribunal at that time the
26 substantial payments, which are set out in chapter 4 of the Second Interim
27 Report.

28 These payments were:
29 50,000 pounds sterling in December 1982.
11:11:27 30 35,000 pounds sterling in April 1984.

11:11:32 1 60,000 pounds sterling in November 1984.

2 And 15,000 pound sterling in April 1985.

3

4 These payments had no connection with fundraising activities conducted after

11:11:45 5 race meetings in Cheltenham or Ascot, they had no connection with Mr. Earnest

6 Ottiwell or accounts operated by him. The payments were established by the

7 Tribunal to be payments made from Channel Islands accounts operated on be half

8 of Mr. Brennan, Mr. McGowan and companies connected with them.

9

11:12:08 10 The true source of the payments came to light following the Tribunal's

11 examination of the role played by Bedell & Cristin advocates of Jersey, in the

12 affairs of Mr. Burke, Mr. Brennan and Mr. McGowan.

13

14 The company Caviar Limited, which Mr. Burke initially revealed as the company

11:12:23 15 set up to hold his offshore account, was set up by Bedell & Cristin at the

16 request of Mr. Burke's Irish solicitor, Mr. Oliver Conlon, Bedell & Cristin

17 were already acting on behalf of Mr. Brennan and Mr. McGowan and their

18 companies.

19

11:12:39 20 Mr. Burke's Caviar file with Bedell & Cristin was made available to the

21 Tribunal and it contained a reference to associated file, file number C758.

22 The Tribunal obtained this file and discovered that the 60,000 pounds

23 previously attributed by Mr. Burke to the proceeds of the Brennan and McGowan

24 fundraising activities in the UK, was in fact a payment made by a company

11:13:04 25 called Canio Limited.

26

27 The funds were not sourced from individual donations to a political fund, but

28 they were part of the proceeds of monies borrowed upon the security of Canio's

29 interest in development lands at Sandyford County Dublin, through which a

11:13:22 30 motorway was intended to run.

11:13:23 1
2 This file also established that the sum of 15,000 pound which was lodged to the
3 Caviar account in April 1985, was not a re-lodgement of funds which Mr. Burke
4 had earlier taken from his AIB account, which had been his evidence before the
11:13:41 5 Tribunal to that date, but was a separate and distinct payment made by Canio
6 Limited.

7
8 The revelation by Mr. Burke of a further bank account held by him in the Isle
9 of Man in the name of PD Burke of Hampshire, established that 50,000 pound
11:13:57 10 sterling had been paid to him by Mr. Tom Brennan's company Kalabradi Limited in
11 December 1982. This information required the Tribunal to conduct detailed
12 investigations into the relationship between Messrs Brennan and McGowan and
13 Mr. Burke in an effort to establish why these previously undisclosed or wrongly
14 attributed payments were made by them to him.

11:14:25 15
16 These inquiries revealed that 6 Canio was a company which was owned equally by
17 Mr. Brennan, Mr. McGowan and by Mr. John Finnegan. All of whom had contributed
18 to the £60,000 sterling payment which was paid to the Caviar account.

11:14:42 20 In his evidence, Mr. Finnegan denied any knowledge of such payment, although it
21 could be established from the Bedell & Cristin files that each of these three
22 beneficial owners was to have made a 20,000 pound contribution to the £60,000
23 payment.

11:14:58 25 The sum actually paid was made up of two payments of 25,000 pound each by
26 Mr. Brennan and Mr. McGowan, and the payment of the balance of 10,000 pounds
27 was made by Mr. Finnegan.

28
29 All three persons were questioned as to the nature of the transactions or
11:15:16 30 transaction which resulted in this payment to Mr. Burke. Their relationship

11:15:19 1 inter se was examined and it was established that all three had been involved
2 in a series of land transactions, which had resulted in more than 2 and a half
3 million pounds sterling being transferred from Ireland to Jersey of which 1.9
4 million pound was divided between them.

11:15:38 5
6 The conclusion reached by the Tribunal after detailed examination of these
7 lands transactions, was that Messrs Brennan and McGowan had deliberately
8 withheld from the Tribunal any information which would allow the Tribunal to
9 establish what the true relationship was between them. And of Mr. Finnegan, in
11:15:56 10 relation to Canio and that they had failed to give a truthful account of the
11 circumstances which lead to Mr. Burke receiving funds from Canio.

12
13 The Tribunal's inquiries into the sources of the funds which were lodged to
14 Mr. Burke's offshore account in the Isle of Man and Jersey, establish that
11:16:14 15 Mr. McGowan's evidence of the payments having been made through Mr. Ottiwell
16 could not be true. Mr. Brennan and Mr. McGowan do not now dispute that the
17 payments of 50,000 pound in December 1982, 60,000 pounds in November 1984 and
18 15,000 pounds in April 1985 were made by Kalabracki and Canio respectively,
19 although they continue to main thane that these were legitimate political
11:16:44 20 donations.

21 This evidence was rejected by the Tribunal in it's Second Interim Report.

22
23 A third area of examination into the affairs of Messrs Brennan and McGowan
24 involved the examination of the circumstances in which Mr. Burke acquired his
11:17:00 25 home Briargate from Oak Park Developments Limited. This inquiry was prompted
26 by the evidence which had established that Mr. Burke was in receipt of the very
27 large sums of money from the Brennan and McGowan interests between 1982 and
28 1985, which they had not disclosed to the Tribunal.

29
11:17:18 30 At the request of the Tribunal, Mr. Burke provided a statement as to the

11:17:23 1 circumstances in which he acquired Briargate. The statement dated 24th May
2 2001. Having examined all the evidence on this issue, the Tribunal reported
3 it's conclusion that the acquisition of Briargate was not a normal commercial
4 transaction as claimed by Mr. Burke. But that it involved the conferring upon
11:17:42 5 him of a substantial benefit for an improper motive connected with his public
6 office.

7
8 Notwithstanding the findings of the Tribunal in it's Second Interim Report
9 Mr. Brennan and Mr. McGowan are now applying to have their costs paid by the
11:17:58 10 Minister for Finance.

11
12 The awarding of costs to persons granted legal representations before the
13 Tribunal is discretionary. The principals upon which such applications will be
14 determined are referred to in your ruling of the 30th June 2004 (sic), which
11:18:14 15 was delivered following submissions having been made by all interested parties
16 including the present applicants.

17
18 Prior to making their submissions to you, a number of parties requested that
19 their submissions should be adjourned pending the determination of court
11:18:28 20 proceedings recently commenced by them, challenging the constitutionality of
21 the legislation under which you act, and the validity of the Second Interim
22 Report of the Tribunal. You declined to accede to these applications and
23 proceeded to make your ruling.

24
11:18:43 25 All the parties involved in making submissions to you were informed that their
26 individual applications for costs would be listed for hearing after the ruling
27 on principles to be applied to their applications had been delivered.

28
29 The present applicants were furnished with the ruling on 30th June 2004. They
11:19:01 30 were informed in the ruling if they had an application to make for their costs

11:19:05 1 notice of such application should be given within 7 day. The Tribunal received
2 notice of their application on the 2nd of July 2004, and wrote the applicants
3 solicitor's on the 7th July 2004 informing them of today's hearing date for
4 their application.

11:19:22 5
6 On the 12th July, the applicants responded indicating their dissatisfaction
7 with the proposed hear date given it's proximity to the legal term and
8 counsel's commitment and sought specific details of what were described as the
9 purported non co-operation, obstruction or collusion of their clients. They
11:19:42 10 proposed that this hearing be adjourned pending consideration of further
11 details to be provided by the Tribunal.

12
13 This proposal was rejected. You ruled that they had adequate notice of the
14 date of hearing, and sufficient detail of the Tribunal's findings to enable
11:20:01 15 them to make their application for costs today.

16
17 On the 22nd July, the applicant's solicitors inquired of the Tribunal
18 solicitor, Ms. Gribbin whether she had authority to accept High Court
19 proceedings in her response of the same date, Ms. Gribbin confirmed that she
11:20:18 20 had instructions to accept service on behalf of the Tribunal and informed the
21 applicant's solicitor of your decision to deal with their costs application
22 today as already indicated.

23
24 On the 23rd July, the High Court writ was received. The claims inter alia that
11:20:35 25 the legislation is unconstitutional, that the Tribunal acted ultra vires it's
26 powers that the applicants rights under it's convention of human rights is
27 infringed and seeks various other declarations, including one to the effect
28 that you are not entitled to refuse the applicants their costs.

29
11:20:52 30 No injunctive relieve was sought in these proceedings and in particular no

11:20:56 1 application has been brought to the High Court to restrain you from proceeding
2 to hear the applications claim for costs today.

3
4 That represents the background sir, of the application which is currently
11:21:05 5 before you.

6
7 CHAIRMAN: Thank you Mr. O'Neill. Mr. Hayden?

8
9 MR. HAYDEN: Thank you sir. In fairness, Mr. O'Neill has fairly set out the
11:21:14 10 correspondence between the parties leading up to today's date and the overview
11 is as one would expect, a correct and fair summary of the actual terms of the
12 Second Interim Report.

13
14 That being said just for the record, so that you are aware of where the
11:21:33 15 applicants come from, I appear today under protest and reserve my position, in
16 light of the issuance of the plenary proceedings, but the view was taken that
17 the opportunity was being afforded to make submissions but doing so in the
18 context of those plenary proceedings.

19
11:21:50 20 And Mr. O'Neill has made reference to a number of relieves claimed there is a
21 far greater extent claimed, than merely the issue in relation to simplicitor
22 the jurisdiction on findings in relation to obstruction and the jurisdiction of
23 the Tribunal to make such findings. They also go in part to contend that on
24 the basis of your ruling handed down, the detail as to the events that are, not
11:22:17 25 the events but conduct and action for which you sir will have to consider, as
26 to whether Messrs Brennan and McGowan will or will not be afforded costs, is
27 inadequate, in the context of what appears to be as I understand the ruling,
28 your view that it is for the applicant to make application and therefore if
29 consideration of events that might disentitle him deal with those
11:22:47 30 disentitlements.

11:22:48 1
2 You may recollect sir on the day we were here making the general submissions an
3 interchange between yourself and myself resulted in you sir indicating on one
4 of the occasions that following which was on day 491 you indicate:

11:23:09 5
6 "Yes, but the extent to which the report doesn't go into very great detail as
7 to the extent of non-cooperation or obstruction or whatever, is based on a
8 summary of evidence. So no matter what he is doing, dealing with the costs of
9 determining the cost whether somebody who has heard the evidence or somebody
11:23:22 10 who is coming in after the event, as I am, it has to be approached on the basis
11 of the extent to which there was non co-operation or the extent to which there
12 was obstruction".

13
14 That was part of the topic in the correspondence between the parties from early
11:23:36 15 July to today's date. The Tribunal replied on your behalf sir, indicating
16 that's not what -- our interpretation which was that this was a reference by
17 you to the effect of the report itself is not, does not give great detail in a
18 number of respects -- in other respects it does but when one reads through it,
19 certainly a lot of the days in question are not gone into in detail.

11:24:00 20
21 The Tribunal in response or your solicitor in response, indicated no that's not
22 what you meant when you said that, you meant something else, but a query has
23 been raised if the not what appeared to be in plain English what does it mean.
24 That's where the correspondence ends.

11:24:18 25
26 Why I bring this up is that part of the plenary proceedings is, if any party is
27 to face what is potentially a sanction and you sir, in your ruling acknowledge
28 that, to disentitled a person to costs can in itself amount to a sanction or a
29 fine. The submission is that by not giving me the detail, in order that I can
11:24:38 30 address the point as to what misconduct, what obstruction, what hindrances, in

11:24:45 1 particular reference to particular actions, then the applicants entitlements
2 under the act, under the constitution and under the convention, have all been
3 infringed.

11:24:57 5 That being said, I will make the best of the position as I can, effectively in
6 the dark as to what parameters you sir, may or may not use or what conduct you
7 may or may not address when it comes to making your decision

8
9 CHAIRMAN: Surely the parameters are clear from the ruling that was made which
11:25:15 10 indicated, which stated more than -- which stated in clear terms what
11 principles would apply and what would have to be taken into account by me in
12 deciding on individual applications for costs. And the reference to the report
13 was that you quoted, is in fact, was in fact a reference by me to the fact that
14 the report and the findings in the report, simply contain a summary of the
11:25:45 15 evidence on which those findings were made, but that in order to get the true
16 picture, as to the extent of co-operation, that it would in some cases be
17 necessary for me to examine in greater detail, what in fact the evidence was
18 and what happened, which lead to the conclusions of the Tribunal. Because the
19 conclusions could be based on a relatively small amount of evidence and it
11:26:24 20 wouldn't be clear from the report that a large section of evidence was in fact
21 co-operation or did amount to co-operation.

22
23 MR. HAYDEN: Precisely, that's my issue. That whilst as Mr. O'Neill gave
24 examples in relation to particular events a moment ago, in the conclusion
11:26:44 25 aspects of it, when one looks at the extent of the days involved and neither
26 yourself or Mr. O'Neill had the benefit of being here for the distance, during
27 all of that --

28
29 CHAIRMAN: Yes, I would have to be --

11:27:03 30

11:27:03 1 MR. HAYDEN: You sir, would have to, in my respectful submission, and again
2 this is more to do with general principles than specifics in our case, but I
3 don't think it is possible sir, for you to avoid the chore of having to read
4 all of the transcripts, I am not suggesting you wouldn't have --

11:27:14 5
6 CHAIRMAN: But that's the purpose of these submissions or the opportunity to
7 make submissions, for you to indicate and highlight the --

8
9 MR. HAYDEN: In that regard, this is the issue that is between us and it is in
11:27:29 10 that regard that I say I appear under protest. If there are particular
11 specific events which you sir, have formed the view may or -- may ground a
12 refusal to grant costs for a particular day, then short of me reading out 67
13 days worth of transcripts, which is not in my respectful submission of benefit
14 to anybody, because it's just repeating the same again, through no fault of
11:27:55 15 Messrs Brennan and McGowan, I could have understood sir if you had been present
16 as the Chairman, but other than I understand what you are saying, other than me
17 reading out 6 or 7 days of transcripts, there is no way in which I can know on
18 day 298, or whatever day, half that day the questions were all completely
19 satisfactory in the afternoon there was one question unsatisfactory and the
11:28:22 20 rest of the afternoon was satisfactory.

21
22 I can give examples of that and quite a detailed, slightly going ahead of
23 myself in the submission, just so I understand your, where the Tribunal is
24 coming from. Short of me doing that, if that is what I have to do, then that
11:28:38 25 is what I have to do, but that's going to take 6 or 7 days or whatever length
26 of time it takes to read which I don't think is of benefit to anybody,
27 because -- I would suspect in any event you are going to have to read them
28 yourself for a number of reasons, not just simply that, also the issue in
29 relation to proportionality, because it may be that people were late in
11:29:01 30 furnishing discovery, or were slow in getting all the documents together, but

11:29:08 1 ultimately I think, and the question is specifically asked of Mr. Hanratty by
2 me, I can point it out when going through the opening -- he was specifically
3 asked; point to one application, one request for discovery that Mr. Walsh
4 didn't make absolute efforts on behalf of the Brennan and McGowan to produce
11:29:26 5 the documentation and there was no reply to that.

6
7 There was lot of correspondence and there is, I have a sample of the
8 correspondence prepared for the purpose of today, but there was a vast amount
9 of requests on one 8 day period alone there was 15 letters from the Tribunal
11:29:41 10 requesting different documents and, in the course of requesting a narrative
11 which was also furnished, all of those as best Mr. Walsh could, complied with.
12 And in that regard all through it, the request would issue and was best
13 possible of Mr. Miley and Miley and Walsh would assist, if that assistance
14 wasn't acceptable, I don't know.

11:30:08 15
16 If Mr. Walsh's efforts on behalf of the applicants were less than was expected
17 or required by the Tribunal I don't know, because there is no detail given in
18 the interim report. I have as Mr. O'Neill has read out, the various section 7
19 and 6 and so forth, but those events set out in 17.6 for example, bare little
11:30:33 20 reference in time terms to the vast amount of inquiry that went on in relation
21 to the commercial relationship between the parties and the commercial
22 transactions between Messrs Brennan and McGowan and Finnegan and then the
23 corporate structures, you will of course see when reading through the
24 transcript, the recurrent mantra of mine, was that this appears to be a revenue
11:31:01 25 inquiry. This is nothing to do with the Terms of Reference.

26 So in that regard I am at a complete disadvantage. I will proceed today.

27
28 CHAIRMAN: But you are entitled, Mr. Hayden, to highlight by way of submission
29 to me that say, a particular aspect of the Tribunal's inquiries which lasted
11:31:26 30 for example for 7 days or 12 days or whatever, lead to no adverse findings and

11:31:34 1 contained nothing which mislead or was designed to mislead the Tribunal and
2 that would be a submission in that example. I am just taking it as an example,
3 because I haven't read -- and that would be a submission in support of your
4 client's being paid their costs in respect of that particular issue or issues.

11:32:02 5 That's the purpose of the submissions, it's for the parties to indicate say, I
6 mean they have to accept that the purpose of without prejudice to your
7 proceedings and other parties in the same way, you have to accept for the
8 purposes of today's application that the findings are valid and that the, both
9 in relation to corruption and obstruction and so on, but there may be aspects
11:32:35 10 of the evidence or aspects of the inquiry which in respect of which there were
11 no adverse findings and you would be entitled to submit that well in respect of
12 those you are entitled to your costs.

13
14 And then it would be a matter for me then to consider that. But that's the
11:32:56 15 purpose of making the submissions, but I mean as I understand the
16 correspondence from your solicitor, over the last two or three weeks, it was in
17 support of the contention, that I have to indicate to you where I think you are
18 entitled to costs and where I think you are not entitled to costs and then you
19 would be entitled to make submissions based on those preliminary findings.

11:33:23 20
21 MR. HAYDEN: No, what the correspondence is, is a request for details of where
22 the aspects of hindrance and obstruction. If it is only the matters as
23 identified in the interim report, then that's a matter that identifies for
24 example Briargate, however --

11:33:43 25
26 CHAIRMAN: But the report doesn't say for example that the issue in relation
27 to Briargate was based on say two days evidence.

28
29 MR. HAYDEN: No. And Briargate went on for an awful lot longer than that.

11:33:59 30

11:33:59 1 CHAIRMAN: Yes, but that's just an example, so it's not clear from the report
2 that out of 60 or 70 days, that two days was spent in relation to or was
3 expended by the Tribunal in relation to investigating Briargate. For example,
4 I don't know, it may have been much more than that. So you would be entitled
11:34:20 5 to submit that that's all that should be -- that only costs in relation to
6 those two days should be denied to you, because of the findings of the
7 Tribunal. That would be an example of a submission that you might wish to
8 make.

11:34:35 10 But the point I want to emphasise is that it's a matter for the parties, there
11 is no automatic -- there is no automatic entitlement to costs under the
12 legislation, so it's a matter for the parties to satisfy me that they are
13 entitled to their costs in respect of all or portion of the, of their
14 involvement in the Tribunal. Having accepted, for the sake of argument, having
11:35:06 15 accepted that the findings are valid and so on.

16
17 MR. HAYDEN: But I am not sort of, I am not at odds in the context, with where
18 you see my submissions, whether it's acceptable or not, accepted or not by you
19 sir obviously is entirely a matter for you, I am just identifying why the
11:35:29 20 plenary proceedings are in being, and to complete the position as to why they
21 issued.

22
23 And part of that is that in your own ruling in this matter, one of the issues
24 Section 3, item 3 under the heading "All other relevant matters".
11:35:44 25 "The nature and extent of any non co-operation of failing to assist the
26 Tribunal by the applicant for costs" and the difficulty as I see it, from
27 Brennan and McGowan's point of view is that, other than what is in the interim
28 report, I don't know, nor could I hope to know, whether or not it comes to your
29 view, all of the matters using Briargate as an example, quite an amount of
11:36:11 30 information or quite an amount of discovery was sought, the NIB discovery which

11:36:17 1 was subject matter of somewhat tendentious correspondence at one stage, all of
2 that between inquiry and discovery was assisted, sorry was complied with -- the
3 request for discovery was complied with fully as best --
4

11:36:32 5 CHAIRMAN: But why can't you make a submission on that basis? That the, all
6 of your discovery was complied with fully, and that you didn't in anyway
7 mislead the Tribunal insofar as, that you didn't conceal any documentation or
8 whatever? That's an example of a submission, but I mean that's a matter for
9 you to indicate to me.

11:37:01 10
11 The reason you are here and with a small number of other parties making these
12 applications, is that there were findings, adverse findings made. Which
13 questions your entitlement to costs. That's the basis of these applications,
14 to give the parties an opportunity to indicate or to submit to the Tribunal
11:37:25 15 that in respect of most or a certain amount of the work of the Tribunal, that
16 there was co-operation and therefore entitlement to costs.
17

18 MR. HAYDEN: Well that's where I am. Obviously thereafter I will proceed under
19 protest, but proceed I shall. It is up to you sir, I didn't mean that in any
11:37:53 20 sort of --
21

22 CHAIRMAN: That's fine.
23

24 MR. HAYDEN: That being the case I think it's of assistance if I say the, at
11:38:06 25 the very outset the initial statement -- I have prepared a booklet which, of
26 relevant, it's about a fifth of all of the correspondence between the parties,
27 but I will hand up a copy.
28

29 CHAIRMAN: Do you have a copy for --
11:38:30 30

11:38:30 1 MR. HAYDEN: I am just --
2 I suppose at the very outset if I could refer you to page 112 of that booklet?
3 And the opening statement of your predecessor on the 14th January 1998 and
4 paragraph 1 if I could just refer you to it:

11:39:04 5
6 "I draw the attention of the parties interested in the business of the Tribunal
7 to the fact that the nature of the Tribunal is primarily an inquisitorial
8 rather than adversarial one consequent to the evidence before the Tribunal we
9 will be led by Counsel of the Tribunal"

11:39:16 10
11 Then if you turn to 116 at 14 "Without fettering my discretion in anyway, I
12 will indicate that in general, where any person or body whether represented
13 before the Tribunal or not has realistically and reasonably incurred any legal
14 expenses who fully and promptly assisting the Tribunal in it's works. I would
11:39:32 15 be favourably disposed towards providing for indemnity in respect of such
16 expenses".
17

18 That was the opening statement which set the background to which the
19 application, the Tribunal was to proceed.

11:39:45 20
21 That position is mirrored, obviously in relation to submissions, but is also
22 mirrored by the Minister for Finance, in their submissions made to you sir, at
23 page 17 of their submissions, where the following is stated at Section 5:
24

11:40:04 25 "Where a person has incurred expenses in respect of attendance before the
26 Tribunal for the purpose of giving evidence to it, it appears to the Minister
27 then as a matter of general principle, subject to comments below, those
28 expenses should be reimbursed by an order under section 6. Expenses in this
29 context is intended to mean only the direct cost of attending to give evidence,
11:40:24 30 in other words the witness expenses would be recoverable in court proceedings

11:40:29 1 by a witness and whom subpoena was served. The Minister submits that in
2 general it would be equitable that such directs costs of assisting the Tribunal
3 in relation to the provision of evidence to which should not be borne by the
4 parties concerned".

11:40:39 5
6 Add to that also and the booklet of correspondence, which I have given to you,
7 shows the vast amount of discovery requested and as best possible complied
8 with, and in fact ultimately the correspondence resulted in, or the -- resulted
9 in the question being put directly by to Mr. Hanratty by me as to whether there
11:41:03 10 is noncompliance in relation to any order for discoveries and no example has
11 been given. Difficulties arise over the passage of time, but ultimately I
12 think it was accepted and in fact, maybe a comment made by your predecessor,
13 that assistance was or best efforts were made by Mr. Walsh to assist in
14 relation to all the discovery.

11:41:24 15
16 But also in relation to the evidence requested by information, substantial
17 expenses was incurred by Messrs Brennan and McGowan because of the nature of
18 the inquiry that was advanced on the commercial transactions between the
19 various Brennan and McGowan companies and that incurred substantial expense in
11:41:41 20 the context of Grant Thornton and I think details of that have already been
21 furnished to you sir.

22
23 Similarly so in relation to Messrs Bedell & Cristin who I think levied a fee,
24 you sir, will see when going through the documentation that a request was made
11:42:01 25 for consent forms to be granted full access to the files of Bedell & Cristin,
26 which were furnished without objection by Brennan and McGowan, however, the
27 firm of Bedell and Cristin, whilst answering any queries raised and furnishing
28 any document requested that they had in their possession, levied a substantial
29 fee in that regard to Messrs Brennan and McGowan and in fact, as it presently
11:42:29 30 stands, I understand from the details furnished to you, Messrs Bedell &

11:42:31 1 Cristian have already charged and deducted from the applicant's, a sum of 63,
2 041 Euro for replying to queries and assisting the Tribunal in that regard.

3
4 Again, Mr. Martin Bullock, who was also an individual whose name will appear
11:42:54 5 when you read through the transcripts, an as individual who carried out works
6 in the Isle of Man, has already levied a fee of 23, 640 Euro. And Messrs Grant
7 Thornton have levied a fee inclusive of VAT which has been discharged of
8 61,851.54. So, regardless of any of their own time and regardless of any fees
9 levied in relation to legal advice or legal assistance, fees of that amount
11:43:26 10 have already been, are already liabilities levied against and discharged by the
11 applicants. Those queries all relate to matters post day 144 in relation to
12 compliance with requests of orders for discovery.

13
14 Then if I can just, following on from the opening statement, going to your own
11:43:54 15 ruling on the matter, at page 8 of that, the bottom of page 7 goes through
16 relevant matters as to what is to be considered and without delaying, they
17 speak for themselves.

18 But if I can just indicate one of the issues number 3 the nature and extent of
19 none co-operation or failure to assist the Tribunal, by the applicant of costs,
11:44:22 20 must be governed both in the context of what complaint is made of me but also
21 must be governed by the concept of proportionality. And that ultimately it
22 cannot be, in my respectful submission, a question of an absolute approach in
23 relation to refusal, just because the ultimate decision, ultimate conclusion or
24 ultimate recommendation or not recommendation, conclusion reached by the
11:44:49 25 Tribunal, happens to be an adverse one to the applicant, so to give the example
26 of Briargate, if Briargate took 6 days -- just I don't know off the top of my
27 head, quite an amount of that was enquiring into the business transactions of
28 the various, of Oak Park, of the banks, you will see from the transcript an
29 afternoon spent with the representatives from the various banks, all of that
11:45:18 30 was done and complied with as best Messrs Brennan and McGowan could. But not

11:45:24 1 in the context of refusing to give access to documentation or any information
2 or failing to reply to queries.

3
4 In fact, you will see that at one stage Mr. Hanratty identified to Mr. Brennan
11:45:39 5 that he had indicated to him on a number of occasions when asked the question
6 that he didn't know the answer to, that he would get back to him on that and
7 that resulted in a letter going to I think four pages of scheduled questions,
8 all of which were replied to. And that all flowed, in my respectful
9 submission, from the fact that at the very outset, what -- from the second
11:46:03 10 attendance at the Tribunal, no fore warning of the nature of the commercial
11 questions in particular, were furnished.

12
13 Now, that was a subject matter of a very clear and open request from Miley &
14 Miley, indicating that this goes back over the business relationship of the
11:46:20 15 parties of over 30 years and it is unrealistic to expect parties to be in a
16 position to remember detail going back over that number of years. And in fact,
17 the correspondence in question culminating in that is at page 118, again the
18 booklet of correspondence I furnished to you sir, on the basis that it does go
19 through the efforts made by Brennan and McGowan, regardless of the conclusion
11:47:03 20 that the Tribunal came to, because you have to form the opinion under section
21 6, not accept the conclusions of the report.

22
23 But what that letter says on page 180, is at the bottom two paragraphs I
24 suppose it's easy to open the whole letter:

11:47:24 25
26 "Thank you for your letter of the 11inst, I note that the public sitting will
27 resume on 15th May next. I am concerned to ascertain precisely the nature of
28 the matters which will be discussed with my clients".

11:47:32 29
30 As I say this is the end of a long line of letters which I don't think I need

11:47:35 1 open to you in public session but which I will have furnished will urge you to
2 read through:
3
4 "I note from your letter of the 27th, that the Sole Member has decided upon the
11:47:44 5 resumption of the evidence at the public hearing. That my client will be
6 called upon to give evidence in relation to the following matters; The dealing
7 of Mr. Burke; The dealings with Mr. Finnegan; The relation to administration
8 of the financial affairs from the commencement of their operations in Ireland
9 whether jointly or otherwise".
11:47:59 10
11 And that particular phrase comes from page 140 of the report, of that booklet
12 and that's a letter of the 27th April 2001.
13
14 That letter on the 27th April 2001, is from the Tribunal to Miley & Miley and
11:48:25 15 this is leading up to there had been a lot of correspondence before that
16 dealing with issues of questions raised and correspondence and discovery
17 sought, then:
18
19 "I am directed by the Sole Member to write to you concerning the above matter.
11:48:38 20 Since the date on which your clients previously gave evidence at the public
21 sitting of the Tribunal a considerable amount of additional information has
22 come to light. They are aware of the progress of the inquiries of the Tribunal
23 from the date of the Tribunal's knowledge of the payments made to Mr. Burke
24 through Canio '84/85. Since that time, information has been received by the
11:48:53 25 Tribunal from various sources relating to payments, the affairs of Canio
26 Limited and related matters, the progress of inquiries set out in the detailed
27 correspondence which I have had with you".
28
29 And you will see when you read that detailed correspondence, which is
11:49:05 30 included, Sir, that a lot of the information was furnished by, in addition by

11:49:09 1 Mr. Walsh of Miley & Miley, and all of the detail as best he could in relation
2 to it Bedell & Cristin in relation to file requests from Grant Thorntons were
3 furnished.

11:49:23 5 The Sole Member goes on to say:
6 "Upon the resumption of the evidence of the public hearings, yours client will
7 be called to give evidence in relation to the following".

8
9 That's where the three items in the letter that I referred to a moment ago come
11:49:35 10 from, it goes in addition to identify the following:

11 "A request was made on the next page for voluntary written narrative and -- at
12 the time of day 144, the applicants had an entitlement to make themselves
13 available to give a statement either in private or public session and the offer
14 was made in private session but the Tribunal chose to go by way of public
11:50:04 15 session or give a statement, that remains their entitlement they had always
16 made them saves available in that regard and that was the ruling of the High
17 Court, not in any cases they were involved in but in relation to - not a
18 related case but a case involving the Tribunal elsewhere.

19
11:50:21 20 That being the parameters in my respectful submission, to deal with that you
21 will see on page 144 with the letter of the 27th, that the second paragraph:

22
23 "I can confirm that my clients are quite happy to provide a written narrative
24 and/or attend a private session to piece together for the benefit of the
11:50:43 25 Tribunal, the numerous and complex commercial transactions over the years".

26
27 So this is how Brennan and McGowan dealt with it, from the time that it was
28 identified to them that part and parcel of what the Tribunal wanted to inquire
29 into, was how the administration of their financial affairs intermingled and
11:51:02 30 from the commencement of their operations in Ireland, whether jointly or

11:51:06 1 otherwise was to operate. That wasn't, a private meeting was not acceptable or
2 was not availed of by the Tribunal.

3
4 Further correspondence back and forth after that, resulted in a situation
11:51:23 5 whereby you will see on page 154, it begins at 152, that what is happening is
6 Miley & Miley are responding to queries that emanated from the Tribunal,
7 including as it turned out a question of deutschmarks 700,000, that came
8 through the account with Messrs Brennan and McGowan had no idea, and ultimately
9 it was established had nothing to do with them, it ended up being a sum in
11:51:55 10 relation to Mr. Caldwell, but as much effort was put into trying to find out
11 about that including seeking files from Binchys as anything else, but when one
12 comes to the letter of the 2nd May 2001, there is then the efforts made to
13 comply to the timetable, which I will urge you to look at when going through
14 the correspondence, because the timetable sometimes relate to having replies
11:52:17 15 back with in two days including correspondence and files produced from Bedell &
16 Cristin who are in Jersey, within a 3 day period.

17
18 That line of correspondence coming up to the 2nd May 2001, resulted in a letter
19 from Mr. Walsh, which if I could draw your attention in particular to page 154
11:52:42 20 under the title of matters generally? And what is stated there:

21
22 "I must point out at this stage, that the partners of Miley & Miley are
23 becoming increasingly concerned by the volume and tone of the letters which we
24 are receiving from the Tribunal solicitors in relation to the matter generally.

11:52:58 25 You must accept that following on the instruction of our clients, we have made
26 every effort to assist the Tribunal in it's inquiry and this has involved many
27 hours of office time dedicated exclusively to Tribunal work. The type of time
28 constraints now being imposed upon this office by the Tribunal are unreasonable
29 and unacceptable. But I shall continue to deal with the issues raised by the
11:53:16 30 Tribunal as expeditiously as possible. I can only do so taking into account

11:53:20 1 the resources of this office and it's obligation to other parties and to other
2 clients".

3
4 That is something that I would urge on you sir, to take into account.

11:53:29 5 That the Tribunal is dedicated simply and solely to the matters relating to the
6 Tribunal, and when one reads through the correspondence in the booklet you will
7 see the sort of timetables imposed and the complaints then made if they are not
8 adhered to. And as Mr. Walsh goes on say:

9
11:53:50 10 "I am to some degree in a similar position to yourselves in that I am
11 endeavouring to piece together a narrative as requested by you from a number of
12 sources relating to varied and complex commercial transactions. I can report
13 however, that substantial progress has been made to date and I will revert to
14 you further as soon as all relevant information is to hand. In the course of
11:54:05 15 my inquiries I am taking into account additional queries which are raised on a
16 day to day basis"

17
18 CHAIRMAN: Which letter is that?

19
11:54:16 20 MR. HAYDEN: 152 I will reading from the bottom of 154 to 155.

21
22 As an indication, and it is only an indication, and not exclusive of how it was
23 approached by Mr. Walsh and Miley & Miley on the instructions of his client,
24 that in the course of carrying out his inquiries he continued at page 164, on
11:54:42 25 the 8th May 2001 where he states -- this is a letter to the Tribunal from Miley
26 & Miley, following on telephone conversations in relation to the affidavits of
27 discovery:

28
29 "Please note, that since preparing the original catalogue of files, we have
11:54:58 30 discovered a further record book containing files in relation to Grange

11:55:00 1 Developments Limited and Greenmount Properties. I have highlighted in dark
2 print in the Affidavit of Discovery of Thomas Brennan, the additional files
3 discovered and if you require to inspect any of these files please advise, I
4 have also included current active files".

11:55:12 5
6 So what you will see from the approach in Miley & Miley, that not only are they
7 providing the information, but are continuing their inquiries even after
8 affidavits are discovered, if any additional information is, once it is
9 provided, once they become aware of it, it has been provided to the Tribunal
11:55:34 10 expeditiously and in a way that makes it at least easy for the Tribunal to
11 identify immediately what additional information has been included.

12
13 That sort of effort doesn't come without substantial amounts of time and man
14 hours put in by Miley & Miley in relation to seeking to assist the Tribunal.
11:55:54 15 And that assistance was on the expressed instructions of Brennan and McGowan.
16 And throughout when a request for consent to access to consent forms or
17 request, they are furnished forthwith.

18
19 If I could then ask you to look at the document -- the document at page 180,
11:56:22 20 where I had commenced this particular section and where I had referred to you
21 the section A B and C, if I can draw your attention particularly to the final
22 paragraphs of that page:

23
24 "I have noted the volume of documentation which was contained in the CD rom,
11:56:37 25 which you kindly furnished to me. It is clear the majority of document
26 contained therein is of no relevance to the Tribunal's inquiries. In relation
27 to the administration of my client's business affairs, it is absolutely
28 essential that I obtain in advance details of any questions which the Tribunal
29 propose to put to my client in relation to their business affairs.

11:57:05 30

11:57:05 1 In view of the volume and complexity of their business transactions, it is
2 unfair to expect my client to address question in the witness box relating to
3 such matters without opportunity of referring to the appropriate files in order
4 to provide accurate answers. In the absence of such advance warning of
11:57:17 5 questions, the exercise will prove extremely frustrating both for the Sole
6 Member and the witnesses."

7
8 And that letter I think sir is of some assistance in this regard, in that as I
9 have identified to you the discovery was furnished, questions were raised, the
11:57:35 10 offer was made for private session, so that at least if there was aspects of
11 the documentation or the business relationships requiring clarification it
12 could be done efficiently and expeditiously, and not in, even though the
13 opening statement seemed to suggest or was an inquisitorial rather than
14 adversarial system, not in a manner as it did in fact unfold, which you will
11:58:02 15 see from the transcript, was more of an inquisitorial, an adversarial system
16 than inquisitorial and that will come clearly through when you see sir, reading
17 the transcripts.

18
19 The amount of objection made in relation to inquiries that turned, or seemed to
11:58:21 20 turn on issues of revenue inquiry. With respect whilst issue was not taken
21 with the letter of the 27th April, which I have opened to you saying the
22 relationship with Mr. Finnegan was part of the inquiry and the administration
23 of the companies are coming within the inquiry, none of those matters come
24 within the terms of reference, yet the bulk of the days spent related almost
11:58:46 25 solely to a detailed examination of the commercial structures and tax
26 structures operated by Brennan and McGowan.

27
28 If that was the choice of the Tribunal, as it was, it cannot be a penalty
29 imposed on Brennan and McGowan by way of a refusal to grant costs. It is in
11:59:16 30 that context that the plenary proceedings have issued and that my objection was

11:59:20 1 made, proceeding on, today, not objection but reserving my position having
2 issued the plenary proceedings that all these inquire which we have gone into,
3 if all the discovery which is gone into in relation to the tax structure,
4 business structure, the whole thing, all the issues about Monkstown, leasehold,
11:59:39 5 freehold interests, Glencrea, all of that process, whilst extremely time
6 consuming, have nothing to do with the terms of inquiry, but nonetheless, my
7 clients regardless of that, provided as best they could, given that it's over a
8 period of 30 years. They in my respectful submission, for that, inequity, are
9 entitled to their costs.

12:00:14 10
11 In fact you sir, in your own submission, sorry your own ruling say on page 8
12 the following:

13
14 This is having gone through the list of other relevant matters, one of the
12:00:33 15 issues was the nature and extent of non co-operation, the others, are "reasons
16 why such persons either failed to assist or did not cooperate with the Tribunal
17 or knowingly provided false information of the personal circumstances"" --
18 well, "and the consequences for the applicant of any order refusing costs in
19 whole or in part and the nature and extent of any claim for costs, you sir,
12:00:55 20 then come to the position whereby the list is not intended to be exhaustive, so
21 obviously there are other matters that you may or may not take into account in
22 due course. And it may be appropriate in circumstances of any individual
23 application to have regard for further matters as yet unascertained.
24 In exercising my discretion I shall be mindful fact that the power to award or
12:01:16 25 refuse costs should not be used as a mean of inflicting penalty on any party".

26
27 And it cannot, in my respectful submission, I think that is a correct
28 statement. And to refuse costs in circumstances whereby all of this was
29 embarked upon at the Tribunal's request and complied with by the applicants is
12:01:38 30 in fact, inflicting a penalty.

12:01:41 1
2 And in the context of the findings set out at paragraph 17.06 of the Second
3 Interim Report. The issue or part of the difficulty is that 17.06 which
4 Mr. O'Neill referred you to sir, are items of obstruction and hindrances. They
12:02:02 5 are criminal offences under section 6 of the Act. Sorry not section 6, section
6 3 of the Tribunal's of Inquiry Evidence (Amendment) Act 1979, which inserts a
7 new subsection 2.

8
9 And when one looks at section 3, of the '79 Act, D specifically deals with
12:02:32 10 obstruction and hindrance.

11
12 Now, if these were matters that related to criminal complaints they can not be
13 used, cannot be the case in my respectful submission that to refuse costs by
14 you is in essence a penalty because to do so would be a usurpation of the
12:02:57 15 function of the court

16
17 CHAIRMAN: But they are not --

18
19 MR. HAYDEN: And the Tribunal, sorry, the Tribunal had it's choice. And in
12:03:03 20 fact you will see in the transcript at one stage an issue of section, being
21 sent to the High Court by, contended for by Mr. Hanratty in relation to Mr.
22 Brennan, an order for discovery of the Northern Bank and noncompliance, but
23 that compliance was as best Brennan and McGowan could, it was made. But if
24 it's the case that what is being contended for is, if there is a finding such
12:03:34 25 as the findings set out at 17.06, that anything to do with those are
26 automatically, not automatically but are considered as perhaps giving rise to
27 grounds, not grounds but giving rise to a refusal to grand costs, if that is
28 the approach taken by you sir, it has to be in the context that non
29 co-operation is one thing, and the views expressed on that can be addressed in
12:04:05 30 procedure under the '21 Act or '79 Act, but hindrances and obstruction are

12:04:12 1 specifically mentioned in the Act. They are mentioned in the Act as criminal
2 offences, there are not be any other method of penalising a party for criminal
3 offence other than by compliance with the constitutional rights in that regard.
4

12:04:24 5 And in that regard in correspondence from the Tribunal, in relation to the
6 attendance of Brennan and McGowan at the outset was specifically on the basis
7 that there was no allegations being made against them. And that's so stated in
8 the correspondence from the Tribunal. At some stage, if allegations are made
9 against them and resulted in these, again the findings are the findings, but
12:04:57 10 the Tribunal at some stage, if Brennan and McGowan went from being witnesses to
11 being the accused, resulting in findings that gave rise to entitlement in
12 effect, not entitlement but position whereby they could be penalised should
13 have been warned, they were not so done.
14

12:05:14 15 Now, I still am bound by Mr, as you sir said, the findings are the findings,
16 but when it comes to you forming a view on costs, you must form the opinion
17 that is the finding one, whereby you can effectively impose a sanction for a
18 criminal offence? And that's what's the, one of the matters at issue, one of
19 the matters at issue in relation to the plenary proceedings, but also in
12:05:49 20 relation to why the request was made of the Tribunal for the details of what
21 conduct is to be considered, is being considered as giving rise to a difficulty
22 in relation to the applicants making or seeking their costs and it must be so,
23 where under subsection 1 of the 2004 Act the, amendment under section 1 of the
24 2004 Act when it comes to your position is as follows:

12:06:20 25
26 "Where a Tribunal or the Tribunal consist of more than one member, the
27 Chairperson of the Tribunal is of the opinion that having regard to the
28 findings of the Tribunal and all other relevant matters, including the terms
29 of -- the resolution passed by each House of the Oireachtas, the establishment
12:06:35 30 of the Tribunal of failing to cooperate with or failing to provide assistance

12:06:39 1 or to knowingly give false or misleading information to the Tribunal, there are
2 sufficient reasons rendering equitable to do so. The Tribunal or Chairperson
3 as the case may be, may either the Tribunal or the Chairperson own motion, as
4 the case may be or on application by any person appearing before the Tribunal
12:06:53 5 or the whole or any part of the costs". Then it goes to the -- the
6 categories under A, B -- A and B.

7
8 But what the section does, in allowing you to determine the matter as distinct
9 from maybe, perhaps it might have proceeded with Mr. Justice Flood, there has
10 to be reasons rendering it inequitable to do so. Sorry that there are
11 sufficient reasons rendering it equitable to do so. The Tribunal or
12 Chairperson, as the case may be, so therefore there has to be reasons why I am
13 disentitled. Not that I have to show you reasons as to why I am entitled,
14 other than in the general principles that are applicable, that is as matter of
12:07:17 15 course, it's a matter of discretion and that in the norm as was said at the
16 opening statement, and was indicated by Minister, a party should get their
17 costs, but that's in the context of the discretion vested in you, but the Act
18 specifically constrains you, because of the position you find yourself in,
19 being parachuted in to deal with the costs application. This is all more so
12:08:00 20 the case when for example in the case of Mr. Brennan, neither yourself nor the
21 counsel who cross examined are part of the -- sorry your predecessor or the
22 counsel who examined him are part of the Tribunal any more.

23
24 Hence, the issue in relation to, if you are adopting an approach involving a
12:08:25 25 criminal sanction, the reasons apart from, if I can say you can't so do, even
26 in that regard in relation to refusing the applicant the costs, you must have
27 reasons so to refuse.

28
29 Now, that is my respectful submission in the context of why we find ourselves
12:08:47 30 where we are today. And if that's the case I think I have, if I can just move

12:08:58 1 on then from the point of view that other than a fine, if I can go back to
2 where I was bringing you through before, as to the compliance with the request
3 for the Tribunal -- the Tribunal commenced with the correspondence as
4 Mr. O'Neill rightly points out, but in this regard to see the approach adopted
12:09:29 5 by Brennan and McGowan, you sir, have the benefit of actual discovery of the
6 legal advices and the attendances furnished by Miley & Miley to Brennan and
7 McGowan.

8
9 I say that certainly, in my respectful submission, puts them in a position
10 whereby they have made as full and frank a disclosure, as to how they were
11 approaching their return to the Tribunal and the details in relation to that.

12
13 In relation to the position of, as to payments by Messrs Brennan and McGowan
14 and/or their companies, again the report is the report, but when you read
12:10:22 15 through the evidence before you, and in this regard sir, regardless of the fact
16 of what conclusion the report comes to, you must form the opinion in relation
17 to whether they had incorrectly answered questions or whether, and in
18 particular for example question 512 on day 144, which is the issue as to
19 whether Mr. Brennan personally paid monies as distinct from any of his
12:10:53 20 companies, that's something you have to, you ought to take into account in the
21 context of coming to the view subsequently, did Mr. Brennan or indeed
22 Mr. McGowan assist, as best they could?

23
24 It is specifically identified on the 5th April 2000 at page 14, where this
12:11:15 25 difficulty is coming from, because there had been requests as to what in fact
26 are the areas likely to be inquired into, as Mr. Walsh says:

27
28 "I confirm that my clients would be pleased to attend the Tribunal as requested
29 and assist the Tribunal as best they can, taking into account the passage of
12:11:36 30 time".

12:11:37 1
2 The matters moved on and in the correspondence subsequently to questions being
3 raised on 15th February 2001, page 44 where queries are raised and Mr. Walsh
4 replies saying:

12:11:55 5
6 "I shall of course endeavour to respond within the time stipulated but I am
7 also anxious to ensure that my reply is both comprehensive and accurate".
8

9 And that letter is, in fact you sir, have the benefit in the correspondence to
12:12:10 10 actually read the correspondence sent by Mr. Walsh to Grant and Thornton,
11 Bedell & Cristin, and you will see that the Tribunal raises it's question on
12 page -- on the 9th February 2001, there is a letter sent specifically from the
13 Tribunal to Mr. Walsh asking queries, raising questions in relation to
14 donations to Mr. Burke and Tribunal evidence.

12:12:44 15
16 You will see thereafter on the 12th February that Mr. Walsh wrote to Grant and
17 Thornton seeking as much detail as possible, to reply to that query, and a
18 reply, that question to Grant Thornton is page 38, and the reply on page 42
19 comes from Grant Thornton starting to give the details in relation to the
12:13:08 20 various accounts.

21
22 On the penultimate paragraph they state the following -- actually third last
23 paragraph:

24 "Following on the above I wish to convey that I do not have any tax files
12:13:23 25 including copies of tax computations in respect of the any of the afore mention
26 however I exact the Inspector of Taxes to whom these accounts and tax
27 computations may have retained their information indefinitely". Then this is
28 so identified as to where that likely information comes from.

29
12:13:37 30 "Finally, I would advise that we do not retain any bank statements, books of

12:13:40 1 accounts, financial statements in respect of these clients, all such documents
2 would have been returned".

3
4 And Mr. Walsh then writes to Ms. Howard on the 15th, before that letter he
12:13:53 5 gets, they are out of date, the sequence but he has written to Ms. Howard on
6 15th February saying we are trying to get a comprehensive a reply as possible.
7 Thereafter the correspondence continues on in the same vein, but specifically
8 on the 16th of March 2001, which is page 50, Mr. Miley states to the Tribunal
9 in the paragraph, this is in relation to C758, that account that Mr. O'Neill
10 has refer you to sir:

11
12 "Before I deal specifically with your request for assigned form of consent
13 relating to file C758 and any other files held by Bedell & Cristin in Jersey in
14 relation to my clients, I would like to point out to you as I have done in
12:14:35 15 earlier correspondence, I am anxious to ensure that my reply to the queries
16 raised by you in your earlier correspondence is true and accurate.

17
18 I am not happy at this stage to rely on recollection of individuals in relation
19 to events which occurred many years ago, and accordingly I thought it prudent
12:14:50 20 to apply to relevant sources for the information to assist in replying to your
21 queries."

22
23 That indicated even before the request was made for consent forms for access to
24 Bedell & Cristin and so forth, Mr. Walsh had already started on that process
12:15:01 25 and confirmed that he was not going to rely on people's recollections in any
26 event, in any form or fashion without enquiring of the various prior advisers,
27 what files do you have, where is the information?

28
29 That resulted in further correspondence on the 20th March which, at page 57,
12:15:25 30 what I would ask you to look to in that regard is the timetables being imposed,

12:15:34 1 when trying to get information from Jersey. Despite the timetables Mr. Walsh
2 continued to attempt to comply as best he could and that then continued on in
3 the correspondence. You will see a very detailed letter of queries being
4 raised on the 23rd of March 2001 from the Tribunal, which is page 62, then
12:16:12 5 reference is made at that stage, what seems to be the ultimate grounding for
6 enquiring into the whole business affairs of the various companies of Brennan
7 and McGowan. That's seen in paragraph 3.

8
9 "Arising from foregoing information it's clear to the Sole Member it is
12:16:29 10 necessary for the purpose of his function that he obtain analysis and review
11 all documents and records in the possession, power or procurement of your
12 clients relating to the matter set out above. It is clear that in order to
13 have a full understanding of the circumstances, considerations and motives for
14 the matters under inquiry by the Tribunal, it is not possible to eliminate from
12:16:57 15 the preliminary inquiries of the Tribunal any such documents or records".

16
17 So in other words everything. And everything as best possible could be
18 provided.

19
12:16:59 20 You will then see in fact, on the next page, six attendances from John Walsh on
21 his clients and that, this is not information that you sir, or the Tribunal
22 received for the first time, this was provided previously.

23
24 Significantly, the next document which does have a bearing as to how
12:17:20 25 Mr. Brennan was treated when being cross examined over the Kilnamanagh Estates,
26 and the allegations of perjury made against him by the Tribunal counsel, all
27 related to whether an affidavit was furnished in those proceedings incorrectly
28 stating the interest in Canio. From the very outset on 26th March 2001, this
29 goes towards matters coming into consideration as to the effect on parties,
12:17:47 30 because he was accused of perjury, having gone through the procedure where he

12:17:54 1 indicated no affidavit was ever furnished by him in those proceedings. That
2 allegation of perjury was stood over by the counsel to the Tribunal. But as
3 you see here in this letter of 26th March 2001, third paragraph:
4

12:18:11 5 "In relation to the AIF proceedings, Mr. McGowan has requested that I point out
6 to you that his replying affidavit filed in the aforementioned proceedings
7 contained an incorrect averment to that affect. He did not have the beneficial
8 interest in Canio Limited. This was subsequently corrected by him in evidence
9 when he was reminded by his advisors in Jersey as to the ownership and
12:18:26 10 structure of Canio".
11

12 So the Tribunal knew at the time that when the AIF proceedings went in and the
13 affidavit was incorrect, that was corrected before the court. Yet that was
14 still used as a mechanism for suggesting that Mr. McGowan was perjuring
12:18:48 15 himself, effectively.
16

17 If you then sir, turn to page 69 you will see the, sorry not 69, 70, you will
18 then see the inquiries that were made, the requests made and you will see on
19 page 72 from a practical point of view, this is the paragraph just above
12:19:18 20 "Please note", the letter emanates on 27th of March 2001, has to be provided
21 by, or orders are going to be made by the 30th March 2001, but if you just look
22 at the part above please note that:
23

24 "From the practical point of view, it appears to the Tribunal if you were to
12:19:37 25 issue a request of Mr. Howard in Bedell & Cristin to obtain a copy of files set
26 out above, there is no reason why those files would not be delivered to your
27 office by DHL on Thursday of this week and received by the Tribunal on Monday
28 2nd April".
29

12:19:48 30 In that regard, Mr. Walsh attempted to get the documentation over from Bedell &

12:19:54 1 Cristin as quickly as possible, however that resulted in more complaints made
2 by the Tribunal that he did not assist, or not furnishing documentation and
3 threats of orders.
4

12:20:05 5 That is the whole tenor in which the matters proceeded and that is what
6 resulted in the letter that I opened to you sir of, from the partners of Miley
7 & Miley saying the tone and numbers of the correspondence has certainly,
8 certainly -- that's the letter of page 154, that the concerns were being
9 expressed as to how in fact, a firm and the applicants were being approached by
12:20:36 10 the Tribunal in the context of the inquiries.
11

12 You will see then, just returning to page 73, you will see then in fact, again
13 this was all furnished previously, but you can see the advices and the result
14 of the advices given to Brennan and McGowan as to their obligation, which in my
12:20:57 15 respectful submission to the Tribunal, they did comply with.
16

17 Now, ultimately if the report comes to view it as to the conduct or in relation
18 to matters of the inquiry, your role sir in this, in light of the 2004 Act and
19 in light of the section 6 is to form the opinion as to whether they, the costs
12:21:27 20 should be awarded for their assistance.
21

22 If ultimately they are found to have been guilty of misconduct as a conclusion
23 of the process of inquiry, just by way, I am only saying this by way of
24 example, that is not a factor that ultimately should be capable of disentiing
12:21:49 25 a party to their costs. And if it is, under the act, you sir are obliged, in
26 my respectful submission, to give reasons as to what grounds, what conduct,
27 what action disentiing them to it.
28

29 And I would, I will be requesting in any event, when it comes to costs if you
12:22:12 30 are disentiing the applicants to cost I would seek specific reasons as to the

12:22:17 1 grounds on the specific events and specific days and specific conduct.
2
3 If you are giving me the costs, then you needn't worry, I will grateful accept
4 those.

12:22:30 5
6 But you can see the advices that were being given at page 73 and earlier from
7 the attendances with Mr. Miley, Mr. Walsh.
8
9 Then continuing through the correspondence, without opening the correspondence
12:22:50 10 in great detail, you will see the replies were furnished, 29th March 2001, page
11 77, going through the various questions raised, giving various information as
12 best as possible and enclosing the various consents required and requested by
13 the Tribunal for access to the various documents. Including 33 Bruton Street,
14 London, that resulted in another inquiry as to why that information wasn't
12:23:17 15 forthcoming, resulting in the complaints made as to why discovery wasn't made
16 and in the attendance from the official from AIB, who ultimately accepted that
17 they hadn't kept any files because there had been a move from the branch and
18 everything was destroyed, it wasn't a question of Messrs Brennan and McGowan
19 not furnishing or getting the information, it was a question of the bank not
12:23:38 20 having it. And likewise with the NIB in relation to requests.
21
22 Further questions are raised and all of these questions go in great detail
23 towards the commercial structures and tax structures that are in place and why
24 certain trusts, why certain transactions take place that commercial reality of
12:24:09 25 purpose behind them, which all go way outside, are not relevant in my
26 respectful submission to the Terms of Reference because the Terms of Reference
27 are in relation to payment to Mr. Burke. The details, the payments were paid
28 to Mr. Burke were identified. The source of the funds, what companies were
29 furnished, clearly were identify, and as I will quickly bring you through in a
12:24:33 30 moment, when one goes through the transcripts you will see that a lot of the

12:24:36 1 inquiries a lot of time taken up, was all to do with why did you split the
2 leasehold, freehold interest for example in relation to the Monkstown lands.
3 Now that was explained as best Mr. Brennan could and as Mr. Owens did, on the
4 basis of the legislation then provided allowed that, in the context of
12:25:01 5 incurring a liability to capital gains. What that has to do with the Terms of
6 Reference is beyond me, but nonetheless, despite that point Messrs Brennan and
7 McGowan were happy to proceed as best they could, to answer the questions.

8
9 And you sir, will see in the transcripts where objection is made by me as to
12:25:28 10 these revenue questions, it's indicated expressly by your predecessor, that I
11 am to wait and see and all will be revealed. Now, ultimately nothing in the
12 context of the commercial relationships were ever revealed, because nothing was
13 ever concluded as to why these transactions came within the Terms of Reference.

14
12:25:53 15 Now, reference is made to the fact that the explanation for the structures was
16 not given, and that's a conclusion in the report, but in relation to explaining
17 why the structures came into place, you sir, have to form an opinion in my
18 respectful submission as to the amount of time involved in identifying these
19 structures, in identifying the tax purposes behind them, and if there was
12:26:20 20 co-operation.

21
22 Again, the correspondence continues on, the correspondence of the 4th April in
23 reply to the Tribunal again adding further information. And specifically given
24 what was now happening a request was made for clarification on the issue of
12:26:45 25 legal costs, that's at page 113 and having answered the questions as best
26 possible:

27
28 "I would be obliged if you would clarify the position in relation to legal
29 costs, I received a bill for cost from Bedell & Cristin in relation to work
12:27:05 30 done by their office to date in relation to discover and other matters for the

12:27:09 1 inquiry. Will you please advise whether Bedell & Cristin can be apply to the
2 Tribunal to be certified for costs or should their fees form part of the costs
3 by Brennan and McGowan. In addition the firm of Grant Thornton have also
4 raised the issue of costs, again you might clarify the position in respect of
12:27:23 5 costs. I'm obliged".
6

7 That letter is addressed or the issues in that letter are referred to on the
8 it's not the next letter in sequence, but it's the --
9

12:27:52 10 MR. O'NEILL: I think page it's 111 sir, in his own book.
11

12 MR. HAYDEN: Yes, sorry. "The position in relation to all legal costs incurred
13 by persons involved in inquiries of the Tribunal in relation to costs at the
14 Tribunal, whether those inquiries are preliminary or the Sole Member will hear
12:28:15 15 application at the conclusion of the work of the Tribunal for reimbursement of
16 those costs".
17

18 It sets out there in those circumstances no decision will be taken under the
19 1997 Act is referred to, but were those costs incurred in the context of
12:28:28 20 inquiries made, absent any conduct or action by Brennan and McGowan, I
21 respectfully say yes, and did they come within the general principles as
22 applicable in the opening statement, whether they were reasonably incurred, and
23 in that regard on the timing issue, you will see from the correspondence that
24 the minute the request is made, and even in fact in the context of Grant
12:28:53 25 Thornton, before the letters arrive as to the commercial structures, Mr. Walsh
26 already got to Grant Thornton seeking as much detail as possible.
27

28 So, as I say even in that regard alone the impression given certainly by the
29 correspondence at page 111 in reply for specific requests, is if you are
12:29:16 30 incurring the costs, look at the general principles if you come within that you

12:29:21 1 can have a reasonable expectation of discharge of those third party costs.
2
3 I have already gone through the correspondence subsequent to that, in the light
4 of the particular letter at page 180, but that then brings me to the various
12:29:41 5 schedules and orders and by way of example on the 29th May 2001, the orders are
6 made of various documents and accounts to be furnished, that's at page 230, and
7 ultimately to the extent that the documents still existed and are capable of
8 being accessed by Brennan and McGowan those orders are complied with and no
9 issue is taken ultimately other than speed with their compliance.

12:30:16 10
11 Then arising out of the discovery from that, a narrative was furnished sorry,
12 also in the context of the queries raised a narrative was furnished by Messrs
13 Brennan and McGowan, queries raised on that as you will see in the
14 correspondence, and continued queries raised at page 241 in relation to a
12:30:39 15 letter from the Tribunal to Mr. Walsh. These raised, having had sight of the
16 documents and a number of details as to additional matters that required
17 confirmation and clarification, a further letter on the same, that was 31st
18 May, a further letter on 1st June, a second letter on the 1st June raising
19 further queries and a third letter on the 1st June raising further queries and
12:31:06 20 a fourth letter is sent to National Irish Bank raising queries.
21
22 All of this information is being sought and Mr. Walsh then attempts as best he
23 can to get the information and in my respectful submission replied to the
24 requests made in part on the 6th June 2001, which is seen on page 257 but also,
12:31:31 25 when one moves on, that he is at this stage trying to track down Mr. Bullock,
26 which is at page 260, and also this issue in relation to a sum of deutschmarks
27 700,000, which ultimately proved not to be anything to do with Mr. Brennan and
28 was ultimately identified and confirmed by Bedell & Cristin as to have been
29 given Mr. Brennan's file number incorrectly.
12:32:02 30

12:32:02 1 Further reference as you will see going through the documents, for example are
2 at page 301, again I don't think I need read all of the letters, but the tenor
3 of it is that at that stage continuing to comply as best as possible with the
4 queries raised and additional authorities to Oliver Freeney and consenting to
12:32:29 5 full access to the offices in relation to Oliver Freeney, and also the
6 inquiries made of the National Irish Bank, and this was an issue as to
7 Mr. Brennan being accused of not complying with discovery and why can he not
8 get information from National Irish Bank. That lead to correspondence inter
9 parties, but ultimately that issue was resolved to the satisfaction of the
12:32:56 10 Chairman, that what efforts could have been made were made by Brennan and
11 McGowan in relation to discovery.

12
13 A further effort, example of effort, is at page 304 again replying to the
14 various questions raised, and on every occasion, a question is asked, an answer
12:33:17 15 is forthcoming, if that answer isn't accepted or gives rise to further
16 inquiries, those inquiries as best Mr. Walsh can, taking the instructions of
17 his clients, he attempts to address those.

18
19 But the issue in relation to the NIB inquiry is that through, at one stage for
12:33:40 20 approximately 8 days, the matter being adjourned back on a number of occasion
21 in relation to getting documents from National Irish or discovered from
22 National Irish, to the Tribunal by way of discovery, it then turns out as you
23 see on page 343, this was because Messrs Miley & Miley were pressing Matheson
24 Ormsby and Prentice who were acting on behalf of National Irish Bank for the
12:34:09 25 discovery, what appears to have been the case Mathson Ormsby and Prentice
26 already forwarded copies:

27
28 "We are instructed by the bank to forward to you, copies of documents to
29 furnish to the Tribunal, to the authority furnished by Oak Park developments"

12:34:26 30

12:34:26 1 Mr. Brennan was being asked to furnish them. Now he did try to get the
2 information but the context of assisting and in accordance of his obligations,
3 both their obligations, although NIB as Oak Parks and not Mr. McGowan.
4

12:34:48 5 This issue, clearly shows, that correspondence shows leading up to where I am,
6 there hasn't been a holding back or an effort to conceal or put obstacles in
7 the way. Further issues in relation to discover are set out on 3rd July 2001
8 page 345, and the matter continues on in relation to, as you will see
9 thereafter, the various schedules raised and queries raised by the Tribunal and
10 the answers that were furnished in due course.

11
12 Moving from that, if I may, if one looks at the actual transcripts themselves,
13 throughout the Tribunal itself, Messrs Brennan and McGowan have been treated
14 synonymously as one entity, for want of a better description, but both have
12:35:54 15 incurred costs, the figures furnished to you sir, relate to their joint costs,
16 in many aspects there is an overlap, in relation to what is perceived, but for
17 example one of the references made in the Tribunal is that they both endorsed
18 each other's version, but of course Mr. Brennan gave evidence first on the
19 2nd -- on the return day, gave evidence first. If it's the endorsement of the
12:36:23 20 evidence given at the day 144 again sir, Mr. Brennan gave evidence first
21 Mr. McGowan second. When the evidence of the parties came to return, came back
22 on the second occasion, Mr. Brennan gave his evidence first and Mr. McGowan
23 clearly apologised at the outset in relation to the evidence he had given.
24

12:36:51 25 Now, Mr. Brennan in my respectful submission, should be judged on what evidence
26 he gave, if he is asked specifically, do you agree with Mr. McGowan, that is
27 something obviously for you sir, to take into account, but you will search long
28 and hard to find that question. And vice versa. And in my respectful
29 submission you won't find the question.

12:37:17 30

12:37:17 1 Going to the transcripts, I think the parties were in attendance, physically
2 themselves days 144, 268, 269, 270, 271, 273, 274, 275, 276, 277, 278, 279,
3 280, all the way through to 286 and then 290, to 296, 298, 300 and 301. And
4 without dwelling on each in detail, when you look at say for example day 268
12:37:59 5 the issue is raised by me at that stage, that given what now appears to be the
6 professional relationship going back over the '70s and '80s. The details of
7 what were being inquired into, and it started off with Dublin Airport
8 Industrial Estate, the difficulty from Mr. Brennan's point of view, despite
9 coming beforehand, he was now being asked questions in the witness box for the
12:38:30 10 first time and was attempting, as was Mr. McGowan subsequently, attempting to
11 deal with the queries for the first time, yet the Airport Industrial Estate
12 event was nearly 30 years vintage at that stage.
13
14 Then it was, it continued throughout that day in relation to the question of
12:38:57 15 Caviar payments and so forth, but you will see in day 268 at -- and 270 that
16 what seemed to be the motivation around the payments and also the payments of
17 Briargate, were the Revenue Commissioners ever told? And Barden Estates came
18 into the equation at this stage. That had been a company that had reached a
19 revenue settlement of 2.2 million, but the bulk of the time was spent enquiring
12:39:37 20 into what were the revenue, what revenue knew or didn't know, and why in
21 relation to settling the matter, did you enlist the services of Mr. Burke for
22 the Revenue Commissioners.
23
24 It continued on day 271, the entire, or a lot of that day 271 was spent dealing
12:40:06 25 with the Jersey companies, that Equinus limited, and how they were set up and
26 why they were set up. But the whole matter was predicated upon why was this
27 done, and I specifically objected at that stage, to the fact that these seemed
28 to be revenue inquiries, I was told no they were not, wait and see. Barden
29 Investments came in, Erbus Investments came in, the schemes created -- this was
12:40:36 30 day 271, the schemes set up by Mr. Owens all inquired into. There was no fore

12:40:44 1 warning in the context of Mr. Brennan, but even that being said Mr. Brennan
2 answered the questions as best he could, he used the famous phrase "I will get
3 back to you on that" when Mr. Hanratty pointed out he had used on a number of
4 occasions, some days later, all of which resulted in those questions actually
12:41:03 5 being answered by Mr. Walsh in correspondence.

6
7 Specifically, on day 271, having gone through ErBus and then Bouganville
8 Developments at page 45, question 98, I asked where was all this going and at
9 that stage the Chairman specifically says "I think you will find out" and
12:41:31 10 thereafter the matter continued as before, but all of those questions and all
11 of those, all of that time and for the next number of days, in my respectful
12 submission, were all matters in which Mr. Brennan and subsequently when it came
13 to him being asked, Mr. McGowan, assisted, they didn't concede anything, they
14 answered what questions they could as best they could.

12:41:53 15
16 We then had an inquiry into the development of the property at Bellview avenue,
17 Developments, why the money was borrowed from Chase Manhattan Bank, why didn't
18 you proceed with your normal bank. At this point there was a suggestion by
19 Mr. Hanratty, that even though the Newtownpark Avenue and Bellview sites were
12:42:19 20 paid for, there was a suggestion by Mr. Hanratty that they were paid directly
21 to Brennan and McGowan, which wasn't the case. That's nothing to do with the
22 Terms of Reference but a period of time was spent as to why it was the case
23 that Messrs Brennan and McGowan did not get the monies personally.

24
12:42:36 25 Now, I could have understood that to be the question raised if there was some
26 linkage between funds, those funds and the funds paid to Mr. Burke, but they
27 never were nor were they ever capable of so doing. But the inquiry no less,
28 was to ensure, not ensure whether any direct benefit of the sale proceed of the
29 proceed land to Mr. Brennan and McGowan. That was in my respectful submission
12:43:06 30 and still is, a pure revenue inquiry.

12:43:09 1
2 Moved on from there to 67 St. Stephen's Green, which is Green Trees and the
3 whole inquiry and thereafter again, the same structures thereafter Sandyford
4 lands but question 194, it was specifically put the purpose of the scheme for
12:43:27 5 avoidance of Corporation tax. Now what that has to do with anything within the
6 terms of inquiry is a mystery. I as you will probably see when you see the
7 transcripts, I again objected and I was told, the Chairman's reply is, this is
8 195 -- I say, this again object, this as revenue inquiry outside the Terms of
9 Reference and the Chairman ruled against me saying it's not outside the Terms
10 of Reference.

11
12 We then go onto the Lansdowne Construction and involvement of Mr. Tracey and
13 the revenue, another great long inquiry in relation to that, question 238, I
14 again say this is a revenue inquiry still told no. Question 283, the reference
12:44:13 15 is made, you can't wash your hands of these structures. Nobody was trying to
16 wash their hands of the structures, it's just that it took up an inordinate
17 amount of time and the one person being asked was the individual who hadn't,
18 wasn't the accountant who organised them. He was the individual who was being
19 asked to give views on structures that had been put in place by professionals
12:44:38 20 20 and 25 years earlier. Without fore warning and circumstances whereby the
21 Tribunal had been asked either if you want to meet in private session to go
22 through this or give us fore warning and we'll at least as best we can answer
23 the questions. When the questions were asked in correspondence they were
24 answered.

12:44:56 25
26 273 again more of the same going through the orders of discovery and the issues
27 in relation to bank accounts and Mr. Brennan on that day end up being the
28 subject matter of ridicule on the basis of an attempt to comply with order he
29 had physically gone over to the Isle of Man to collect documents because he was
12:45:22 30 told to have them back by the Tuesday, and he gave the evidence of actually

12:45:26 1 getting as close to the island and was covered in fog and he had to come back,
2 that became another subject matter for Mr. Brennan being queried as to his
3 efforts made to get the documents in time. This question, these queries only
4 having arisen a week before, he went on the Monday because the Tribunal wasn't
12:45:54 5 sitting, to try and get them, the plane couldn't land, he came back and was
6 still accused of not making best efforts.

7
8 Also there had been discovery furnished on Tuesday and you will see sir, on day
9 273 that Miley & Miley were accused of not having furnished affidavit discovery
12:46:12 10 in time, which was not the case. That was subsequently, in fairness clarified.

11
12 Again day 274 you will see that the issue in relation to the tax payers of Oak
13 Park arising and then day 274 itself, the issues in relation to what you will
14 see on a number of occasions the Ansthal Foundation and Dr, St. Anthony's
12:46:43 15 Foundation, questions were raised these were trusts that had been set up by
16 Mr. Caldwell, difficulties were being experienced and you sir, have
17 correspondence in the booklet of the request made of Binchys to furnish the
18 information and give detail of what in fact these transactions were. What you
19 will see throughout that period, and that day that the inquiry was made of
12:47:08 20 Mr. Brennan as to what these Liechtenstein trusts represented, he wasn't the
21 individual who set them up and the individual who had wasn't replying. And in
22 relation to Mr. Brennan's performance you sir, will see from the
23 correspondence, that he was trying as best he could and ultimately the
24 information was furnished from Binchys.

12:47:34 25
26 But, it's also pointed out day 274, that even though such information as he had
27 and documentation as he had from Jersey had been furnish bid Mr. Walsh, he
28 himself was not happy with the extent and had already set in train further
29 inquiry. That's set out quite clearly in relation to additional information
12:47:55 30 being sought in relation to what you will see Sir, as Ficoil, that's one of the

12:48:01 1 transactions involved in relation to the sale of lands used Ficoil bonds which
2 caused some considerable confusion before the Tribunal and certainly
3 Mr. Brennan wasn't too clear as to how they worked. Ultimately, I think that
4 information was furnished at least from the point of view of what information
12:48:18 5 Messrs Brennan and McGowan could obtain to the satisfaction of the Tribunal.
6
7 These were all novel and new topics raised whilst in the box.
8
9 Moving on from there. If we go to day 275 it, was again Equinus and corporate
12:48:37 10 structures, day 276, same exercise and at that stage considerable detail was
11 gone into in relation to what you will see on the Newtownpark Avenue deal and
12 the Oak Park Construction deal. All those seem to be revenue connections and
13 again Mr. Hanratty, Counsel for the Tribunal brought up the issue in relation
14 to the Lansdowne liquidation, why was it liquidated, what did the revenue
12:49:10 15 liquidator know of it. Revenue inquiry all the way through. That's what most,
16 I objected then on page 80, saying that this is clearly a situation whereby,
17 you will see the level of detail being sought of Mr. Brennan in the witness
18 box, where a topic was being picked and the witness was being expected to know,
19 even though it spanned over 30 years the nth degree, that it was unrealistic.
12:49:42 20 In fact it flows back to the letter that Messrs Miley and Miley had written on
21 page 180, whereby if you didn't have some idea as to where the matter was going
22 the whole process, to use Mr. Walsh's line, "was going to end up in the
23 absence of such advance warning of questions the exercise will prove extremely
24 frustrating for the Sole Member and the witnesses." And that was borne out.
12:50:08 25
26 Day 277 is further corporate structures; Arippe, Greenmount -- all names that
27 had been subjected to the evidence would bring back memories of the corporate
28 structures involved and tax structures embarked upon which the various
29 accountants.
12:50:35 30

12:50:35 1 Why I say and why I keep emphasising this is in the context of what Brennan and
2 McGowan's position in relation to costs, is that you will see on page 277 that
3 Mr. Hanratty on page 45 in relation to Arippe that specifically said that the
4 whole purpose of Arippe, the acquisition of the Lansdowne Construction shares
12:50:56 5 and it's liquidation was in order to create a distribution in species to avoid
6 tax.

7
8 Now, with respect, what that has to do with the Terms of Reference is very
9 little, if in fact nothing. Now Mr -- I again objected and I was again as
12:51:19 10 successful as usual and the matter proceeded. What the Chairman said on that
11 occasion was as I have pointed out at the outset from Mr. Hanratty, Counsel --
12 went into the lines of inquire that I though were outside the Terms of
13 Reference inquiry, you sir quite rightly pointed out "we'll have to wait and
14 see." I have no difficulty we are waiting and seeing but sir this line of
12:51:51 15 inquiry is clearly a revenue investigation. To ask the witness to give
16 conclusions or accept assumptions as to the purpose behind structures set up on
17 the context of professional accountancy advice is outside the terms of
18 reference. That didn't result in any line of questioning being stopped and
19 the questions continued on.

12:51:57 20
21 Day 278; well in relation to the balance of 277 inquiries were made in relation
22 to Pembroke Estates which was Mr. Finnegan's area; and 278 was then the next
23 transaction. You will see that the days split up into various, numbers of days
24 split up into various transactions, it becomes the first issue in reference to
12:52:24 25 Smith's on the Green on this occasion, and again detailed inquiries is gone
26 into in relation to the corporate structure and why and wherefores of it. Then
27 you start hearing of, seeing in the transcripts the issue in relation to Green
28 Trees and the guarantees furnished by Keno, Whisper, Victa, Worland and
29 Glencrea. That set off another line of inquiry ultimately coming down on page
12:52:51 30 279 to why did you set up the Jersey based companies? And the reply was the

12:53:01 1 structures were set up by Mr. Hugh Owens. Mr. Owens gave evidence here to the
2 effect that the existing, as you will see when you read it, the existing
3 statutory structure in place in relation to revenue obligations permitted and
4 was entirely acceptable process, it was not tax evasion in any form or fashion.

12:53:27 5
6 If one goes to page -- day 279 page 110 another issue arises as to the purposes
7 behind the subsales. I again objected on that occasion and what Mr. Hanratty
8 indicated was the reason he was inquiring into all this was the question of the
9 commercial relationship within the partnership, to use the phrase in the
12:53:59 10 broadest sense between on the one hand Mr. Brennan and McGowan and on the other
11 hand Mr. Finnegan.

12
13 Now Messrs Brennan and McGowan indicated the payments had been made, they said
14 Mr. Finnegan agreed. What appears to have been the next number of days was
12:54:14 15 this issue in relation to the relationship between Brennan and McGowan on one
16 hand who are saying all three did what they did through their companies as
17 distinct from personally; and Mr. Finnegan saying "no I never made any
18 contribution towards Mr. Burke". Now that cannot be, in my respectful
19 submission, disallowed as costs on the part of Brennan and McGowan when in fact
12:54:37 20 they are telling the Chairman what the position was.

21
22 What Counsel for the Tribunal was saying at that stage is ultimately you are in
23 a position whereby we need to know exactly what's the position between you and
24 Mr. Finnegan therefore that's why we have to go forward with all of this.

12:54:57 25
26 As I have said to you, sir, earlier it's on day 279 question 155 Counsel for
27 the Tribunal take issue in relation to the discovery orders, this is in time
28 sequence, you will recollect the correspondence also, but page 156 I asked
29 specifically can any -- on any one occasion -- sorry.

12:55:23 30 "I wonder if on any occasion Counsel for the Tribunal can point to one such

12:55:28 1 request for discovery which hasn't resulted in Mr. Walsh making his best
2 efforts to get it." It does go on, the height of the complaint was there was
3 one joint affidavit sworn as distinct from two separate on one particular
4 Tuesday morning when the Chairman had previously said on Friday either an
12:55:53 5 affidavit was in or he was going down to the High Court. An affidavit was in.
6
7 Continuing on then is, on day 280 was the issue in relation to perjury by
8 Mr. Brennan. The allegation, even though the evidence was gone through and it
9 transpired no affidavit at all was sworn that was perjurous by Mr. Brennan then
12:56:19 10 the day, days continued through and you will see sir, inquiries into Arippe,
11 Victa, Rapallo then comes into the process in relation to yet another company.
12 All of these take time to inquire into, all of these are answered as best
13 Mr. Brennan and Mr. McGowan can, and the question is put on day 280, question
14 106 where a suggestion was made by Counsel for the Tribunal that payments were
12:57:02 15 made in a long term basis. I asked that -- are allegations being made, that's
16 not answered. Hence my reference in relation to Section 3 and whether if
17 allegations were being made, that was the time to identify if Brennan and
18 McGowan were going from witnesses assisting the Tribunal into persons accused,
19 that wasn't done.
12:57:32 20
21 Further details are gone into in relation to the businesses in question and
22 then Mr. Brennan finishes his evidence and I think Mr. McGowan gives evidence
23 which, to a lesser degree but nonetheless equally so, the inquiries go to the
24 business structure. Mr. McGowan has considerable difficulty in relation to
12:58:05 25 dealing with the affidavit that he had furnished in the AIF proceedings which
26 had already been clarified in the opening correspondence before we gave
27 evidence, even though he had sworn the affidavit he hadn't given that evidence
28 and in fact it had been corrected before it was given in evidence in the AIF
29 proceedings, unfortunately Mr. McGowan isn't say that in the sense of saying it
12:58:21 30 was cleared up until long into the affidavit. But an extreme amount of time

12:58:25 1 was spent going through the affidavits in the AIF proceedings which had nothing
2 to do with the terms of inquiry. Whether he swore an affidavit or not in those
3 proceedings wasn't a matter for the Tribunal, or within the Terms of Reference.

4 The time it took certainly was time that represents a period for which
12:58:48 5 Mr. McGowan seeks his costs. It had already been identified by the Tribunal
6 beforehand that he hadn't given that evidence in the context of the affidavit
7 hadn't been withdrawn before hearings in the AIF proceedings.

8
9 Again the issues are gone back to in lesser time frame, but in relation to the
12:59:10 10 Monkstown, the Jersey companies, Bouganville and so forth. But again I am
11 objecting in relation to matters that a lot of these issues are, go towards
12 Revenue inquiry, whether they are tax avoidance or tax evasion schemes, and
13 corporate structures unrelated to the Terms of Reference. You will see on
14 page, sorry on day 287; sorry 290. On day 290 at page 21 and 24 and also on
13:00:00 15 page 34 and 35 the issues, by way of example as to why I say these are not
16 proper questions, they are proper questions and so forth.

17
18 I again object on day 294 -- it's effectively the same corporate structures
19 gone through, enquiring as to why this was done, why that was done, although in
13:00:22 20 relation to Mr. Brennan, sorry Mr. McGowan, Carpent is a new company that you
21 will hear that deals with what became known as the Herbst replantation. That
22 was inquired into for a day or so and that never formed part of any subsequent
23 findings one way or another.

24
13:00:46 25 Substantial inquiries had gone into the agreement between Bouganville and
26 Rapallo as to why the transfer, why the surrender took place; again I objected
27 on the basis that this seemed to be an inquiry as the commerciality and
28 therefore a Revenue inquiry and that was discontinued.

29
13:01:01 30 Ultimately the balance of the evidence of Mr. McGowan followed in pretty broad

13:01:06 1 outline the same features as Mr. Brennan's. That being said, I am just
2 finished, so hopefully if you will bear with me for a minute -- the other
3 issues then in relation to our submissions; reference has been made in the
4 submission given in relation to principles, I would ask you to, sir look at
13:01:32 5 paragraphs 38 to 43 effectively; and effectively from 38 onwards deals
6 specifically with the specifics up to 52, the specifics in relation to the
7 individuals and the meat on that, those paragraphs are set out in the
8 correspondence furnished in relation to the submissions I have made today.
9

13:02:00 10 The issue also of proportionality is referred to, and ultimately I would refer
11 you to the conclusions in our original main submissions which is in the booklet
12 at page 474, it's page 50 of the submission, but 474 of the booklet. Paragraph
13 113.
14

13:02:45 15 Accordingly sir, finally, given the provisions of the 2004 Act if there are
16 days in which you are disallowing, I would respectfully request that and submit
17 that reasons should be furnished in any ruling in that regard in order for
18 compliance with the Act. Thank you.
19

13:03:07 20 CHAIRMAN: All right, thank you. Thank you Mr. Hayden. Do you want to say
21 anything?
22

23 MR. O'NEILL: just briefly sir if I may, raise one or two issues.
24

13:03:16 25 Firstly, I think it is correct to say that the entitlement of any party to
26 their legal costs before a Tribunal is on the basis that the solicitor is
27 acting on the instructions of the client to advance the inquiry and to assist
28 the Tribunal and not on the basis that the solicitor is acting to protect an
29 entirely private interest of an individual.
30

13:03:42 30

13:03:42 1 In other words, if one is seeking to recover the cost of one's solicitor before
2 a Tribunal it is on the basis that you engage that solicitor for the purpose of
3 facilitating the Tribunal in it's investigations and that that advice which you
4 are receiving from your solicitor is directed towards that provision.

13:04:04 5
6 Now it seems clear to me having looked at the attendances that are, in the
7 booklet of documentation which we have been furnished today, that Messrs
8 Brennan and McGowan in dealing with their solicitors were equally concealing
9 from them the fact that they had made payments to Mr. Burke through their
13:04:26 10 offshore accounts. If that is the case its clear that the engagement of Miley
11 & Miley was not for the purpose of assisting them in their dealings with the
12 solicitor, but rather as a barrier to prevent the Tribunal obtaining the
13 information to which it was entitled.
14

13:04:49 15 It is clear, I see, from one of the attendances which is referred to on page 40
16 of the document --
17

18 MR. HAYDEN: If I could just object at this stage? It is with respect and with
19 no intention to be obstructive, this was never an allegation made by the
13:05:04 20 Tribunal in relation to the matter being inquired into. We are here today
21 dealing with the question of costs. I specifically have a letter of 14th July
22 2004 and this is in the context of a professional reputation of Miley & Miley
23 who have at all times acted fully in compliance with their obligation and even
24 to the extent this was accepted by -- but an allegation --

13:05:27 25
26 MR. O'NEILL: I am not making an allegation against Miley & Miley.
27

28 CHAIRMAN: There is no allegation made. Mr. O'Neill is dealing with the issue
29 to which the extent of which your solicitors might have been misled by your
13:05:39 30 clients. That's not an allegation.

13:05:41 1
2 MR. O'NEILL: It's a matter which arises from the first time today and was not
3 raised in the course of the Tribunal because I only learn of it today in the
4 documentation which has been provided by the client.

13:05:53 5
6 MR. HAYDEN: No, sir that is not correct. Mr. O'Neill wasn't here during the
7 Tribunal. This issue came up, the very attendance he is talking about was went
8 through by Mr. Hanratty specifically, and the fact that he was --
9

13:06:05 10 CHAIRMAN: But there is no allegation being made by Mr. O'Neill against your
11 solicitor.
12

13 MR. HAYDEN: No sir, nor could there be. But what I would like to address is
14 this, the attendance that Mr. O'Neill may have only seen it himself for the
13:06:19 15 first time today, but Mr. Hanratty went through it specifically; the attendance
16 in relation to Miley and Miley not being informed fully, in fact what you will
17 see in the attendance when you read it, is that they went through it with him
18 but that he was not happy to accept the recollection of the individuals and it
19 is quite clear that Mr. Walsh informed the applicants of their obligations and
13:06:42 20 continued to inquire regardless of what was being said or not said. This issue
21 was raised before the previous Chairman, it is not open to my Friend to, in my
22 respectful submission, to make any such allegation today, particularly in
23 circumstances where --
24

13:06:57 25 CHAIRMAN: You say "any such," what allegation are you objecting to?
26

27 MR. HAYDEN: He is now, as I understand it, Miley & Miley were engaged by
28 Brennan and McGowan and then used as a foil so to speak in relation to --
29

13:07:11 30 CHAIRMAN: No, he is using suggesting that your clients in instructing your

13:07:17 1 solicitors was not up front in relation to them.

2

3 MR. HAYDEN: That was never an allegation made by --

4

13:07:27 5 CHAIRMAN: It doesn't have to be an allegation made. It's a matter of -- I

6 have to decide -- one of the issues I have to have decide is the extent of

7 their co-operation with the Tribunal. And while a firm of solicitors might in

8 themselves be very up front in assisting the Tribunal, it may be that their

9 clients had mislead them.

13:07:52 10

11 MR. HAYDEN: But even if one was to contemplate that for a moment, if one takes

12 away day 144, the first day, there can be no such allegation made, or even view

13 expressed by Mr. O'Neill in what is very difficult circumstances for my clients

14 because no doubt that will be an issue now, perhaps referred to in the

13:08:14 15 newspapers, that they have sought to mislead their solicitors. That was never

16 an allegation made.

17

18 CHAIRMAN: But surely that's something I have -- you have presented me with --

19

13:08:26 20 MR. HAYDEN: But this issue was gone into by the previous Tribunal and no such

21 findings.

22

23 CHAIRMAN: Yes, but you presented me, if a finding of the Tribunal indicated

24 or if one of the conclusions was that your clients mislead the Tribunal in a

13:08:41 25 particular respect and its clear, and if it is, I don't know, but if it is

26 found to be clear from the correspondence and the attendances that in fact your

27 solicitors had also been mislead.

28

29 MR. HAYDEN: That's my point, this correspondence and these attendance were

13:08:56 30 before the Tribunal. This attendance that Mr. O'Neill speaks of was actually

13:09:01 1 gone through by Counsel and no view expressed.

2

3 CHAIRMAN: But that's, yes but that's -- it was never gone through insofar as
4 the issue of costs was concerned. And the impact that --

13:09:16 5

6 MR. HAYDEN: But the difficulty with that is this; on the 14th July, this is a
7 letter received by my solicitors from the Tribunal. "The Chairman points out
8 that contrary to what is claimed in your letter", our earlier letter, "your
9 clients do not have a case to meet in terms of submissions or arguments in
10 bringing their application to have their own costs paid by others it is for
11 your client to indicate why in all relevant circumstances it is equitable that
12 it should ordered that they should receive their costs."

13

14 Now I didn't take any issue, clearly a submission was made by Mr. O'Neill this
15 morning, I didn't take any issue this morning because we sought copies
16 beforehand; but if Mr. O'Neill now is suggesting that this is another topic, in
17 my respectful submission it is not open --

13:09:46 15

16

17

18 CHAIRMAN: What do you mean another topic?

19

13:10:00 20

21 MR. HAYDEN: Another grounds for refusing costs. It is something not open to
22 him because it is not his function, it was a matter for the Tribunal that heard
23 the evidence to come to that conclusion if they thought there was that event.
24 It is not open to you, sir, or open to Mr. O'Neill to make any such submission
25 in circumstances of costs.

13:10:16 25

26

27 CHAIRMAN: It is because -- I have to look at the totality of the evidence
28 that was heard by the Tribunal in order to determine the extent of non
29 co-operation in order to enable me to decide on costs. So one of the issues
30 that I would have to consider is the extent to which there might be evidence

13:10:36 30

13:10:41 1 from the correspondence and attendances that solicitors themselves were mislead
2 by clients. So I think it is a relevant issue, so I am going to allow Mr -- if
3 you want to respond to it in some shape or form?
4

13:10:56 5 MR. O'NEILL: The initial references to payments were in the very first
6 attendance taken and the only reference there to payments was reference to the
7 fact that Mr. McGowan is involved in fundraising activities in the UK. There
8 was no reference to the fact that either the company Kalabraki or the company
9 Canio had made the substantial payments which were subsequently found to have
13:11:24 10 been made by the Tribunal. So that the opportunity was there upon Mr. Brennan
11 and Mr. McGowan consulting with their solicitors to say "we have entities in
12 Jersey with which we had dealings, a firm of advocates in Jersey, and through
13 that company we made payments to Mr. Burke" they didn't do so.
14

13:11:47 15 When the Tribunal drew to the attention of the solicitors acting on behalf of
16 Brennan and McGowan, Messrs Miley & Miley, that the Tribunal had information to
17 indicate that there was an involvement in the company Kalabraki there then was
18 an attendance after that at which Kalabraki was discussed, and we see in the
19 documentation circulated to you today at page 40, the fact is raised as
13:12:18 20 follows; "we then discussed Kalabraki Limited. I had commissioned the
21 Companies Office search through City Law and Denis Cruise advised that there
22 was no company of that name on the Irish Register, he will arrange for a search
23 in the UK Register. Joe McGowan stated that neither Tom or himself had any
24 involvement in this company. It may have been Ernest Ottiwell company. It is
13:12:42 25 correct to say that there was a final payment in the region of 60,000 sterling
26 made to Ray Burke as suggested in the Tribunal's letter. This represented
27 whatever was left over after the fundraising years came to an end in 1984."
28

29 Now that was clearly addressing the Kalabraki issue, suggesting that it was a
13:13:04 30 payment which was made by Mr. Ottiwell, whereas in fact it's now acknowledged

13:13:09 1 it was a payment which was made by a company called Kalabraki, wholly owned by
2 Mr. Tom Brennan. A company which made the payment in 1982, sorry 19 -- yes
3 1982 Kalabraki made the payment and it was 50,000 payment not a 60,000 payment.
4

13:13:32 5 Now all of that indicates that to this point of time, February 2001, which was
6 almost two years after communications had commenced between the Tribunal's
7 solicitors and Brennan and McGowan, they had not told their own solicitors of
8 the fact that there were accounts in Jersey through which monies had been paid
9 to Mr. Burke. That I say is very significant from the point of view of
13:13:58 10 addressing what the relationship was between Messrs Brennan and McGowan and the
11 solicitors whose fees they are now seeking to recover from the Tribunal.
12

13 The only entitlement to those fees could be on the basis that they were
14 necessarily incurred in assisting the Tribunal. The premise is that full
13:14:23 15 instructions would be given by Messrs Brennan and McGowan to the solicitors as
16 to what their dealings were in relation to Mr. Burke and in particular the
17 payment or payments which were being inquired into, and that would have to be a
18 precondition of any fees being properly due to them. In fact they never
19 disclosed to their own solicitor these fees, or these payments rather, the
13:14:53 20 disclosures came from the Tribunal to their solicitors, their solicitors were
21 then obliged to follow them up.
22

23 Now in respect of the following up of those inquiries made of Messrs Brennan
24 and McGowan's solicitors by the Tribunal, it is claimed that the costs of so
13:15:11 25 doing should be borne by the Tribunal. Now those costs were involved in the
26 provision of documents under orders of discovery and on making inquiries of
27 their clients and persons named by their clients as having the professional
28 involvement with the companies which were attributed as being the companies
29 which made Mr. Burke the money. To say that one is entitled to be paid merely
13:15:44 30 because one has complied with an order for discovery or attended in the witness

13:15:50 1 box to give evidence is to fundamentally misconceive the purpose for which the
2 person is entitled to their costs, because they are entitled to their costs in
3 the event that they cooperate with the Tribunal and the Tribunal is satisfied
4 in it's discretion that they should get those costs.

13:16:11 5
6 The mere attendance as a witness to answer questions which do not advance the
7 knowledge of the Tribunal does not carry with it necessarily an entitlement to
8 costs. If one for example is to provide a train load of discovered documents
9 at huge cost to you in copying and furnishing them to the Tribunal, you cannot
10 claim that you are entitled to be recompensed the cost of those documents if in
11 fact in the witness box you do not give evidence as to how and why those
12 documents are, were, generated in the first instance.

13
14 There has been a finding in the Tribunal that the reason why the Tribunal has
13:17:00 15 been unable to determine why Mr. Burke was paid the very large sums of money he
16 was by Mr. Brennan & McGowan is that these payments were initially concealed
17 from the Tribunal, they were subsequently discovered by the Tribunal, but
18 whilst they were discovered no explanation justifying those payments has been
19 given by Messrs Brennan and McGowan, this is the finding of the Tribunal.

13:17:31 20
21 Criticism is levelled in the course of the submission which Mr. Hayden makes to
22 you about the range of the inquiry which commenced once the existence of Jersey
23 based corporate entities as payers to Mr. Burke was discovered. It is of
24 course correct to say that of the six essential land transactions that were
13:17:58 25 inquired into, it was only in respect of the Sandyford land transaction that
26 resulted in the 60,000 pounds payment to Mr. Burke that a connection could be
27 made between an Irish land transaction and Mr. Burke. But the fact that that
28 land transaction had not been disclosed to the Tribunal initially put the
29 Tribunal, legitimately on inquiry, to look into other similar land transactions
13:18:29 30 in which there may have been other payments to Mr. Burke. To understand those

13:18:36 1 transactions was a necessary requirement of the Tribunal. The fact that it did
2 not result in either payments being found or otherwise is because of the fact
3 that no adequate explanation for the existence of these companies was given to
4 the Tribunal. That was the conclusion of the Sole Member at the time.

13:19:00 5
6 So that to endeavour to look at the costs issue as a parsons egg in which there
7 are good parts and bad parts and to say that I am entitled to be paid for all
8 the parts where I haven't been found to be bad is to misconstrue the whole
9 concept of why a witness is before the Tribunal and why inquiries are made of a
13:19:24 10 person who is before the Tribunal. They are made for the purpose of
11 establishing the truth of a set of given circumstances. The obligation is to
12 furnish a full and truthful account as soon as possible after the inquiry is
13 made of you. In this instance it meant that once the correspondence commenced
14 in 1999 with Brennan and McGowan they were obliged to, forthwith, indicate to
13:19:50 15 the Tribunal the fact that they had made the payments in question.

16
17 Anything short of that and in particular the withholding of information as to
18 any payments at all which required the detailed examination which it did, does
19 not amount to co-operation, even though the solicitors engaged in the project
13:20:12 20 by the individuals were complying with the limited instructions they had from
21 their clients.

22
23 They are my submissions.

24
13:20:24 25 MR. HAYDEN: Just to be brief on that. Of all people Mr. O'Neill will clearly
26 recollect question 512 on day 144 where he specifically asked "did you
27 personally as distinct from any of your companies make the payment?" Not did
28 any of your companies make the payment, did you personally; that's the question
29 that was asked.

13:20:50 30

13:20:50 1 When one comes to the coming back in 2001 one has to approach it from the point
2 of view of what the question was actually, what was on the card at that point.
3 Mr. O'Neill is entirely entitled to make reference to day 144, I haven't drawn
4 back from that, that was the evidence that was given, and by the individuals.

13:21:09 5
6 But if its going to then be converted into a situation whereby there is a fault
7 you must see what was in fact inquired of the individuals. If it is going to
8 disentitle them to call costs thereafter.

9
13:21:21 10 I am all the more surprised this submission was made by Mr. O'Neill in
11 circumstances whereby you were asked, sir, what the position was in our
12 correspondence of the 12th July? 14th July the reply was "The Chairman points
13 out contrary to what is claimed in your letter, your clients do not have a case
14 to meet in terms of submissions or arguments". That's what I came here to
15 meet. For the avoidance of doubt that was followed by a correspondence to you

16 sir on the 16th July 2004, dealing specifically with that paragraph where we
17 state the following: "We note in the third paragraph of your letter that the
18 Chairman takes a view that our clients do not have a case to meet in terms of
19 submissions or arguments, may we assume therefore that no objection is being
20 made by any other party, including the Tribunal legal team to our client
21 getting their costs." That was never replied to. It seems today Mr. O'Neill
22 takes the view that it is his function to object to our clients getting costs.

23
24 My understanding would have been the function of Counsel in this instance would
13:22:15 25 be to present the facts, but thereafter wards it is for you to decide the
26 position.

27
28 CHAIRMAN: Yes, but the facts include facts related to the extent to which the
29 Tribunal was assisted by your clients, that's part and parcel of the facts.

13:22:33 30

13:22:33 1 MR. HAYDEN: Yes, sir but just in relation to concealment or misleading; and
2 phraseology used by Mr. O'Neill in that "concealing from the tribunal", the
3 correspondence began in February. On 16th March 2001 which is document 50
4 Mr. Walsh this is subsequent to the opinion, the attendance that we read out on
13:22:55 5 page 40. In fact the response of Mr. Walsh to that was not to be in anyway
6 mislead, or to seek to mislead the Tribunal. In fact what he says --
7

8 MR. O'NEILL: It has to be made perfectly clear sir I have not indicated that
9 Mr. Walsh at any time mislead the Tribunal. But what My Friend is now saying
13:23:16 10 is that this is to clarify Mr. Walsh didn't mislead the Tribunal. I have not
11 said that Mr. Walsh did, his clients did.
12

13 CHAIRMAN: There is no allegation against Mr. Walsh.
14

13:23:27 15 MR. HAYDEN: But where I am coming from is this; from that period in February
16 2001, whatever was asked, whatever was requested, whatever consents were
17 furnished, were signed, questions replied to, and in fact what Mr. Walsh
18 indicates to the Tribunal on the 16th March in the third paragraph:
19 "I am not happy at this stage to rely on the recollection of individuals".

13:23:51 20
21 CHAIRMAN: What are you reading from now?
22

23 MR. HAYDEN: This is page 50. "Which occurred many years ago, and accordingly
24 I thought it prudent to inquire to the relevant source of information to assist
13:24:00 25 in replying to your queries." That's, from every response thereafter by, from
26 the time of the -- from the time of the request, were specifically to assist
27 and try and give as much information and detail as could be garnered. But what
28 Mr. O'Neill seems to be suggesting is that you look at 144 therefore everything
29 after that is disallowed. If that's the case why are we here?
30

13:24:34

13:24:34 1 CHAIRMAN: I don't think that's the case, the point, being made by
2 Mr. O'Neill, as I understand it, was that I also have to take into account the
3 extent to which your solicitors might have been mislead, so --

4
13:24:47 5 MR. HAYDEN: Anyway that's -- again, just to thank you for the opportunity.

6
7 CHAIRMAN: Thank you. My plan would be to give a judgement sometime in
8 September, but whether that's possible or not remains to be seen. But you will
9 be notified in good time.

13:25:21 10

11 **THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,**
12 **TUESDAY 27TH JULY 2004.**

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