

1 **THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY,**

2 **7TH SEPTEMBER 2004 AT 10.30 A.M:**

4 CHAIRMAN: Good morning.

6 This is the ruling of the Tribunal in relation to an application for costs by
7 Mr. Thomas Brennan and Mr. Joseph McGowan. Subsequent to my ruling on the
8 principles which are to apply in respect of certain applications for costs,
9 Mr. Brennan and Mr. McGowan through their counsel, Mr. Hayden, made oral
10 submissions to me on the 26th July 2004 in support of an application for costs.

12 I have considered these and the written submissions made prior to that date.

14 The applicants were granted limited legal representation by the Tribunal on the
15 10th April 2000 and had the benefit of such representation in the course of the
16 Tribunal's private and public inquiries relevant to themselves, leading to the
17 publication of the Second Interim Report, the applicants were directly involved
18 in giving evidence in public over a period of 67 days.

20 The applicants submitted an estimated account of their costs in a sum exceeding
21 2.6 million euro. My task is to determine the applicants' entitlement if such
22 exists, to all or portion of their costs. It is the task of the Taxing Master
23 of the High Court to determine the amounts payable where an award of costs is
24 made. As with any other witness or party from whom the Tribunal sought
25 information or documentation, the applicants had a legal obligation to
26 cooperate with the Tribunal in every respect and to provide the Tribunal with
27 truthful information on oath and otherwise.

29 In its Second Interim Report the Tribunal made certain findings relating to the
30 issue of cooperation of the applicants with the Tribunal.

1
2 The following summary of these findings was set out in the Second Interim
3 Report, chapter 17, paragraph 1706 and I quote "The Tribunal is satisfied that
4 these two witness colluded in their evidence and that the evidence of each was
5 adopted as accurate by the other".
6

7 The Tribunal believes that these witnesses obstructed and hindered the Tribunal
8 by:

- 9 A. Failing to give the Tribunal a truthful account of the circumstances in
10 which their monies were paid to Mr. Burke outside the jurisdiction.
- 11 B. Falsely maintaining that the monies paid to Mr. Burke were the proceeds of
12 fund-raising activities in the UK at a time when they knew this not to be the
13 case.
- 14 C. Failing to give the Tribunal a truthful account of the real purpose for
15 which these monies were paid to Mr. Burke.
- 16 D. Colluding with Mr. Burke to give a false account as to how these funds were
17 raised so as to prevent the Tribunal from establishing the true source and
18 purpose for such payments.
- 19 E. Failing to give the Tribunal a truthful account as to the real purpose for
20 which offshore corporate entities were maintained by them from which monies
21 were paid to Mr. Burke.
- 22 F. Failing to give the Tribunal a truthful account of the nature and extent of
23 their dealings with Bedell Cristen Advocates.
- 24 G. Failing to provide the Tribunal with a truthful account of their
25 relationship with John Finnegan and the land transactions which resulted in
26 2,661,875.96 being sent to Jersey.

27
28 The applicants were at all times aware of the fact that their involvement with
29 the Tribunal related to the Tribunal's inquiries concerning significant
30 payments of money to Mr. Raphael Burke and the circumstances in which Mr. Burke

1 came to acquire ownership of the property known as Briargate, Malahide Road,
2 Swords, County Dublin.
3

4 I have no doubt whatsoever that the applicants were at all times aware that the
5 Tribunal's inquiries were not simply directed to themselves personally and in
6 respect of their own personal affairs, either individually, collectively or
7 with others, but also directed to them in their capacity as directors,
8 shareholders or beneficial owners of companies and other entities wholly or
9 partly controlled by them or on their behalf or on behalf of either of them.

10 It is clear from a perusal of the transcripts of evidence, documentation and
11 the correspondence between the Tribunal and the applicants and others, that a
12 significant portion of the overall investigation which involved the applicants
13 and their associated companies, trusts and other entities and land holdings was
14 expended in the quest for information which might link them in some way to the
15 payment of money by the conferring of other benefits on Mr. Burke and that
16 ultimately no such link was established between many of these companies or
17 other entities and Mr. Raphael Burke.

19 The applicants have inter alia submitted that in the circumstances such as
20 those outlined above, they are entitled to their costs on the basis that such
21 inquiries were unnecessary, were outside the Tribunal's Terms of Reference,
22 provided no useful information to the Tribunal and in any event, were conducted
23 with the cooperation of the applicants.

25 I believe that this submission can only be properly considered and indeed must
26 be considered in the context of the findings of the Tribunal as already
27 outlined. It is not possible to divorce one from the other. I believe that
28 the questions that must be raised in my approach to the determination of the
29 costs application by the applicants and which are based on the principles

1 enunciated by me in my ruling of the 30th June 2004 include the following:

2
3 1. What was the extent of the applicants' non-cooperation as found by the
4 Tribunal?

5
6 2. Did the applicants' non-cooperation touch upon all of the issues being
7 investigated by the Tribunal in relation to payments and/or other favours
8 provided to Mr. Burke. Alternatively, was the applicants' non-cooperation
9 isolated or occasional or largely irrelevant to at least some of the issues
10 under investigation?

11
12 3. What was the extent of the collusion as found by the Tribunal? Did this
13 collusion relate to all or only some of the issues under investigation?

14
15 4. Was the non-cooperation on the part of the applicants designed to mislead
16 the Tribunal? Was the Tribunal misled in all or some of the issues under
17 investigation? Was information and evidence given to Tribunal in the knowledge
18 that it was false?

19
20 5. Having regard to the degree of cooperation and information forthcoming from
21 the applicants, was it reasonable for the Tribunal to investigate details of
22 companies and other entities connected to one or both of the applicants and
23 their accounts in circumstances where ultimately in relation to some of these
24 companies and other entities, payments to Mr. Burke were not identified.

25
26 In seeking answers to these questions, I have had regard not only to the
27 findings of the Tribunal and the relevant information in the Second Interim
28 Report, but also to transcripts of evidence, the documentation furnished to the
29 Tribunal, and the correspondence between the Tribunal and the applicants'
30 solicitors and others.

1
2 I believe the following to be a correct, fair and reasonable response to the
3 aforementioned questions.
4

5 1. The applicants' non-cooperation was extensive, effectively unrelenting and
6 affected all the Tribunal's inquiries relating to the applicants and Mr. Burke.
7

8 2. The applicants' non-cooperation directly and significantly touched upon the
9 substantive issues relating to the investigation into payments made or favours
10 granted to Mr. Burke and the reasons for same. Furthermore, this fact was at
11 all times known to the applicants. In the course of both the private and
12 public inquiries, there certainly were occasions when the applicants cooperated
13 with the Tribunal and provided the Tribunal with truthful information but such
14 cooperation and such truthful information was provided in circumstances in
15 which the Tribunal was being knowingly misdirected and misled as to the
16 fundamental thrust of its inquiries, namely the source and purpose of payments
17 made to Mr. Burke. Therefore the contention that such episodes or instances of
18 cooperation or truthful evidence justify an award of costs in respect of them
19 is unsustainable, given the applicants underlying and collusive attempts to
20 mislead the Tribunal.

21
22 3. The collusion found by the Tribunal as against both applicants was
23 widespread and clearly designed to conceal the true nature of their
24 relationship with Mr. Burke and misdirecting the Tribunal in its inquiries.
25

26 4. The applicants provided false and misleading information and evidence to
27 the Tribunal in circumstances where they knew same to be false and misleading.
28 And in respect of crucial aspects of the Tribunal's inquiries.
29

30 5. It cannot seriously be contended that the Tribunal's trawl of the details

1 of companies and other entities connected to either or both applicants was
2 unreasonable or unnecessary given the applicants' overall attitude to the
3 Tribunal and their clearly planned strategy to mislead the Tribunal in all
4 material respects.

5

6 I should say at this point that I make no criticism of the applicants'
7 solicitors and counsel in their dealings with the Tribunal and neither is there
8 any reason to doubt that the information furnished by them to the Tribunal was
9 furnished in the belief that their clients were providing them with truthful
10 information. However, the application for costs is the applicants' application
11 and not the application of their legal representatives. It is the behaviour of
12 the applicants in their dealings with the Tribunal and the Tribunal's findings
13 relating to them that ultimately must determine the outcome of the costs
14 application.

15

16 I repeat a sentiment expressed in the ruling of Mr. Burke's costs yesterday as
17 it applies equally to the application of Mr. Brennan and Mr. McGowan. The
18 effect of the non-cooperation of Mr. Brennan and Mr. McGowan on the work of the
19 Tribunal relevant to the module in question, while impossible to measure in
20 absolute terms, is nevertheless clearly of such magnitude that it fundamentally
21 challenged the very purpose of the creation of the Tribunal and for this reason
22 must be viewed with the utmost seriousness.

23

24 One of the submissions made on behalf of the applicants which I think deserves
25 particular comment was that the mere rejection by the Tribunal of the evidence
26 of one party should not in itself result in a refusal of costs to that party.

27

28 I do not have any particular difficulty with the contention that this should be
29 a matter for consideration to be taken into account when determining an
30 entitlement of that party to costs. But I do want to emphasise that in the

1 case of the applicants, the Tribunal did not merely reject the important parts
2 of their evidence, it went much further. It found that the applicants had
3 knowingly given false evidence and had colluded with others to mislead the
4 Tribunal. These are significantly more serious matters than a mere rejection
5 of their evidence.

6

7 The relevant legislation provides that where I am of the opinion that there are
8 sufficient reasons rendering it equitable for me to do so, I may award costs to
9 any party. I must, of course, exercise this discretion in a manner which is
10 impartial and fair.

11

12 In this instance, I am satisfied that it is fair and reasonable that I should
13 refuse to award costs to Mr. Brennan and Mr. McGowan.

14

15 The substantive findings against one or both applicants relating to the
16 circumstances surrounding the transfer of Briargate, Malahide Road, Swords, Co
17 Dublin from Oak Park Developments Limited to Mr. Burke in 1973 and the payment
18 of money to Mr. Burke have not been taken into account by me in determining
19 this application for costs, as I regard it as unnecessary to do so, given the
20 fact that the Tribunal's other findings to which I have already extensively
21 referred and the background to such findings as evidenced in the documentation
22 correspondence and transcripts demonstrate by themselves a clear disentitlement
23 to costs by either applicant.

24 And that concludes the ruling.

25

26 I just finally, and this is not part of the ruling I have just made or indeed
27 part of Mr. Burke's ruling yesterday, it's simply for the purposes of
28 clarification, the applications and the rulings on costs being dealt with
29 during this month of September and into October relate only to applications for
30 costs to be paid by the Minister for Finance, such applications being made by

1 certain parties. The relevant legislation provides that the Tribunal is
2 empowered to direct parties to pay costs incurred by the Tribunal or by other
3 parties, and the Tribunal will consider at a later date whether it is
4 appropriate to consider if any such order should be made, and any parties
5 against whom such an order might be made will be notified in due course and
6 will be invited to make submissions in relation thereto.

7

8 I'll rise until 11.

9

10 MR. HUSSEY: Excuse me sir, before you rise, I had asked the staff to put
11 something on to, something that I could put on screen, if I could make sure
12 that that's in place before you sit again, if you wouldn't mind.

13

14 CHAIRMAN: All right.

15

16 **THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED AS FOLLOWS:**

17

18 CHAIRMAN: Now, Mr. O'Neill.

19

20 MR. O'NEILL: Good morning, Mr. Chairman, the first application listed for
21 hearing this morning is that of Mr. John Finnegan and I'll outline briefly the
22 background to Mr. Finnegan's involvement with the Tribunal.

23

24 Mr. John Finnegan is a Dublin estate agent whose involvement with the Tribunal
25 arose as a result of the discovery of a payment of 60,000 pounds sterling
26 having been paid to the Jersey bank account of Caviar Limited, a Jersey company
27 owned by Mr. Ray Burke. In the course of the public hearings held in the
28 Brennan and McGowan module, Mr. Burke, Mr. Brennan and Mr. McGowan had all
29 maintained that the monies paid into Mr. Burke's Caviar account were the
30 proceeds of political fund-raising activities conducted in the UK after race

1 meetings in the late 1970s and early 1980s and that the cumulative proceeds of
2 these events were paid by the de facto treasurer of the fund, a Mr. Ernest
3 Ottiwell to Mr. Burke.

4

5 However, in the course of the Tribunal's ongoing investigation into the affairs
6 of Mr. Burke, it was established that the money in the Caviar account came from
7 Jersey companies and not from Mr. Ottiwell. The source of the 60,000 pounds
8 sterling payment made in November 1984 to the Caviar account was established to
9 be part of the proceeds of a loan which had been taken out by Canio Limited
10 from Lombard and Ulster Bank in Dublin, which was secured upon 86 acres of
11 potential development land at Sandyford, County Dublin. It followed that the
12 payment could not be the proceeds of fund-raising activities in the UK, as was
13 claimed to that point. The Tribunal's investigations established that the net
14 proceeds of the loan raised in Dublin were taken to Jersey and there divided
15 into three equal shares after the deduction of certain expenses and after the
16 deduction of the 60,000 pound payment to Mr. Burke's company.

17

18 The breakdown of the 60,000 pound payment to Mr. Burke showed that 25,000
19 pounds each was contributed to by Mr. Brennan and Mr. McGowan through their
20 companies and the balance of 10,000 pounds was contributed through
21 Mr. Finnegan's company. The three companies involved with these three
22 individuals were Kalabradi Limited, Gash Investments Limited and Foxtown
23 Investments.

24

25 These three companies owned a Jersey company called Ardcarn in equal shares and
26 this company in turn owned Canio Limited, the company whose funds were used to
27 pay Mr. Burke's company, Caviar limited. The three companies themselves were
28 ultimately beneficially owned by the three individuals or trusts, connected
29 with them.

1 In effect, Kalabraki was Mr. Brennan, Gash was Mr. McGowan and Foxtown was

2 Mr. Finnegan.

3
4 To the point in time when the Tribunal established that the 60,000 pounds
5 payment was made by Canio, neither Mr. Burke or Mr. Brennan or Mr. McGowan had,
6 in their evidence or in correspondence with the Tribunal, made any reference
7 whatsoever to Mr. John Finnegan or any company of his having any involvement in
8 the payment of monies to Mr. Burke. Once the Canio file was discovered to the
9 Tribunal, the existence of Mr. Finnegan became apparent and he was immediately
10 contacted by the Tribunal, seeking a narrative statement as to his involvement.
11 This occurred during the course of the then public inquiry into the Brennan and
12 McGowan module.

13
14 Mr. Finnegan was the subject of Orders for Discovery and ultimately he gave
15 evidence before the Tribunal in its public sessions.

16
17 Mr. Finnegan applied for and was granted legal representation before the
18 Tribunal and it is in respect of his involvement with the Tribunal that he now
19 seeks payment of his legal costs. The inquiries made of Mr. Finnegan by the
20 Tribunal were directed towards establishing why the funds of Canio were paid to
21 Mr. Burke and what, if anything, Mr. Burke did in return for such payment.

22
23 At the conclusion of the Brennan and McGowan module, the Tribunal was unable to
24 identify the purpose for which these monies had been paid but concluded that
25 the payment of 60,000 pounds to Mr. Burke in November 1984 was a corrupt
26 payment made by Mr. Brennan, Mr. McGowan and Mr. Finnegan.

27
28 In response to the inquiries of the Tribunal made of Mr. Finnegan, he had
29 indicated to the Tribunal that he was unaware of the fact that his monies had
30 been subject of the payment to Mr. Burke. He claimed that the payment of

10,000 pounds of his money to Mr. Burke was a payment which was made without
his knowledge or authority. He said that he had authorised a deduction of
10,000 pounds to be made from his share of the Canio money, solely on the basis
that it would be lodged to a retention fund of 30,000 pounds, which was to be
set up to meet future expenses; such as architects' expenses in relation to the
Canio lands at Sandyford.

Mr. Brennan and Mr. McGowan and Mr. Finnegan had contributed equally to the
acquisition of the Canio lands which comprised as I say, approximately 86 acres
of land at Sandyford. These lands had development potential and at one time
were being considered for acquisition by Dublin County Council. There was also
a proposal to locate part of the Southeastern Motorway through part of these
lands.

As part of its inquiry the Tribunal sought to establish the nature of the
ownership structures through which Mr. Finnegan held his interest in the
company which paid Mr. Burke the 60,000 pounds in November 1984.
Mr. Finnegan's interests were held by Foxtown Investments Limited, which had
been set up by Mr. Des Trainor of Guinness and Mahon Ireland Limited in 1972.
The company was registered in Jersey.

Foxtown was owned by College Trustees Limited through nominees. College
Trustees Limited was a subsidiary of Guinness and Mahon, Channel Islands
Limited.

The trustees of Mr. Finnegan's trust changed over time. College Trustees were
replaced by Sovereign Management Limited and that company in turn was taken
over by Credit Suisse and Credit Suisse Trust Limited became the trustee of
Mr. Finnegan's trust. Mr. Finnegan's settlement of his assets in Jersey was
part of the Amber Trust.

1
2 Mr. Finnegan, in evidence, was unable to comply with, or in correspondence and
3 subsequently, was unable to comply with Tribunal requests for documentation
4 concerning Foxtown and the Amber Trust.

5
6 MR. HUSSEY: I am Sorry sir, I am going to have to interrupt here, what Mr.
7 O'Neill says is that Mr. Finnegan was unable then, and subsequently, to comply,
8 and I note that that actually was contained in the Interim Report that was
9 published here.

10
11 CHAIRMAN: Sorry, Mr. Hussey, just to --

12
13 MR. HUSSEY: I'm sorry My Lord, just let's --

14
15 CHAIRMAN: Wait now, you can reply to Mr. O'Neill.

16
17 MR. HUSSEY: Yes, but I just, at this point --

18
19 MR. O'NEILL: I can assure my friend, Mr. Hussey, that I'm dealing specifically
20 with his client and with his role at the Tribunal and I will be coming to the
21 point at which documentation which was sought from Mr. Finnegan was ultimately
22 discovered to the Tribunal. That will --

23
24 MR. HUSSEY: It's just when he said "and subsequently failed to comply", I just
25 wanted to clear the record on that. Thank you. And thanks to Mr. O'Neill.

26
27 MR. O'NEILL: There's a difference between "subsequent" and "ultimate" and it
28 ultimately was complied with, but was not complied within the period of time
29 which was expected.

1 MR. HUSSEY: I beg your pardon, my Lord, again, at the date --
2

3 CHAIRMAN: Sorry.
4

5 MR. HUSSEY: At the date of the publication, I want to set the record straight
6 --
7

8 CHAIRMAN: Mr. Hussey, you can deal with, if Mr. O'Neill says something you
9 feel is inaccurate, you can raise it in a few moments and I would prefer if Mr.
10 O' Neill was allowed -- that's my ruling now. I want to leave it at that.
11 I'll give you an opportunity to respond later.
12

13 MR. O'NEILL: Mr. Finnegan was initially unable to comply with the Tribunal's
14 request for documentation concerning Foxtown and Amber because Credit Suisse
15 maintained that they could not provide him with the documentation relating to
16 the trust, notwithstanding that he was the settlor of the trust and within the
17 class of persons entitled to benefit under the trust. Ultimately the files of
18 Credit Suisse were discovered to the Tribunal in September 2002. Legal
19 proceedings having been commenced in the courts in Guernsey by Mr. Finnegan at
20 the instance of the Tribunal to compel Credit Suisse to provide the documents
21 to him.

22
23 The Tribunal's investigations established that the Canio land transaction was
24 but one of a series of land transactions involving Mr. Brennan, Mr. McGowan and
25 Mr. Finnegan, which involved corporate entities set up in Jersey through which
26 substantial funds were routed and subsequently distributed between Mr. Brennan,
27 Mr. McGowan and Mr. Finnegan, or companies connected with them.
28

29 The Tribunal held that its capacity to establish the purpose for which
30 Mr. Burke had been paid monies by Canio was hindered and obstructed by the

1 failure of the parties to provide a comprehensible account of their
2 relationship and the underlying purpose of the payment.

4 Mr. Finnegan's explanation for the payment of his share was expressly rejected.

5 The Tribunal holding in paragraph 4.65 of the Second Interim Report that
6 Mr. Finnegan had given a false and misleading account of the true circumstances
7 in which his funds came to be paid to Mr. Burke.

8
9 The Tribunal's findings in relation to cooperation by Mr. Finnegan with the
10 Tribunal are to be found at paragraph 17.07 of the Second Interim Report, where
11 it is stated that the Tribunal was satisfied that Mr. Finnegan obstructed and
12 hindered the Tribunal by:

13 A. Failing to provide a truthful account of the circumstances in which 10,000
14 pounds from a fund beneficially owned by him was paid to Mr. Burke in November
15 1984.

16 B. Falsely maintaining that the 10,000 pounds payment to Mr. Burke was a sum
17 which was intended to be paid to a fund for the provision of future expenses of
18 Canio Limited at a time when he knew this to be false.

19 C. Failing to give a truthful account of the circumstances in which Canio
20 Limited was formed, or the nature and extent of his dealings with Mr. Tom
21 Brennan, Mr. Joseph McGowan and their related companies.

22 D. Failing to make proper discovery of documents to the Tribunal.

23 E. Failing to provide the Tribunal with a truthful account of the purpose for
24 which the Amber Trust and Foxtown Investments Limited had been formed.

25
26 The finding of the Tribunal on the substantive issue was that the payment of
27 60,000 pounds to Mr. Burke was a corrupt payment.

28
29 Mr. Finnegan has lodged written submissions in respect of his application for
30 costs and is represented, as you see here today, by Mr. Hussey. That's the

1 history of matters.
2

3 CHAIRMAN: Thank you. Now Mr. Hussey?
4

5 MR. HUSSEY: Yes, sir, thank you.
6

7 Now, just for the record, the documents recovered from Credit Suisse which were
8 the subject of litigation in Guernsey, in respect of which lawyers for this
9 Tribunal were party, were recovered and deposited with this Tribunal some weeks
10 prior to the publication of the interim report.

11
12 At the time, it wasn't known that the interim report was imminent. Indeed, I
13 think people will remember the surprise that it came out with such speed. I
14 just, for the record I wish to have that stated because in the report itself,
15 it stated that Mr. Finnegan is currently engaged in litigation in Guernsey for
16 recovery of documentation from Credit Suisse; and for the record, I wish to
17 have that corrected, that in actual fact, that litigation had ended with the
18 cooperation and approval of the lawyers for this Tribunal in Guernsey and the
19 documents were with this Tribunal at the time of the publication of the Interim
20 Report.

21
22 Indeed the progress of the Credit Suisse, the application to the Guernsey court
23 for these documents was plagued with the interference by lawyers for the
24 Tribunal, and the correspondence will show you this when you look at it, sir.
25 Within days of one instruction coming from the Tribunal, please accept these
26 documents, please settle the case, those instructions were countermanded with
27 instructions to proceed with the case and ultimately, that case was settled on
28 terms agreed by all parties and approved by the lawyers in Guernsey on behalf
29 of this Tribunal. So to say that in that respect, that Mr. Finnegan failed to
30 cooperate with the Tribunal is, in the first instance, it's wrong, it's

1 inaccurate within the terms of the report itself and I'm glad to hear Mr.

2 O'Neill clarify the matter this morning.

3
4 But I wish to reiterate that the Tribunal lawyers themselves, their Guernsey
5 lawyers, were involved throughout the application for the Credit Suisse
6 documents and in that respect, if in no other respect, my client, I submit, is
7 entitled to the costs incurred by him in complying with the order to pursue the
8 Credit Suisse documents. That's just one point, before I start with my real
9 submissions.

10
11 I have asked this morning for four pages of documents to be available for to
12 put up on the screen. And it's to do with the principle of representation
13 before a Tribunal and the rights of a party and the rights of the party's
14 representative before a Tribunal.

15
16 I'll explain why I'm putting these up before I put them up. Purely personally
17 speaking, and I'm speaking as a senior counsel with patents of precedence from
18 the government. I was invited to take a brief for this case, the estimate of
19 time to deal with the brief was three weeks. That's fine, I'll take that.

20 Nine months later, I'm still sitting here before this Tribunal dealing with
21 matters that have come up. The first day I arrived here, I asked for limited
22 representation on behalf of my client. I had understood my job here was to
23 protect my client in the protections that are supposedly accorded to a client
24 who has an interest in the matters before a Tribunal that were adumbrated by
25 the Chief Justice O'Dalaigh in the case of in re: Haughey, which everybody
26 knows about.

27
28 However, not long after I was here and within the first couple of days, I
29 realised that I was not going to be able to represent my client in the way that
30 I wished to represent him. I was not in a position to protect my client's

1 interests in a way that I wished to protect his interests. Indeed following my
2 experience here, I was asked by further people will I take on a brief for this
3 Tribunal and I advised people, with the best of intentions and the best of
4 legal advice, not to appear before the Tribunal with a lawyer, you are better
5 protected if you appear without a lawyer. And the reason for that has now
6 become clear. In order to explain what I mean, I first of all am going to have
7 the book that I asked for to be put into the system this morning, this is the
8 consultation paper on public inquiries, including tribunals of inquiry and it's
9 page 183 and 184 which outlines the basic principles of representation.

10

11 At paragraph 7.14, there's "The classic statement of the rights derived from
12 this principle is to be found in the judgment of O'Dalaigh CJ in re: Haughey.
13 The case concerned an investigation by the Dail Committee of the Public
14 Accounts into the expenditure of certain grant aid in Northern Ireland relief.
15 In the course of this investigation, Chief Superintendent Fleming of the
16 Gardai gave evidence, the gist of which was that Mr. Padraig Haughey was deeply
17 involved in assisting the Irish Republican Army with the importation of illegal
18 arms and had paid public funds intended for the Red Cross over to that
19 organisation. Clearly, these were extremely serious allegations. The Chief
20 Superintendent told the committee that his information was from confidential
21 sources, whose identities he was not prepared to reveal. On being summoned to
22 appear before the committee, Mr. Haughey, on the basis of legal advice,
23 declined to answer any questions put to him. This resulted in the chairman of
24 the committee exercising his power of certifying to the High Court that Mr.
25 Haughey was guilty of the offence as an aspect of the case which is dealt with
26 elsewhere. Here we are concerned with another argument made on behalf of Mr.
27 Haughey, namely the contention that his rights under Article 1431 of the
28 Constitution had been disregarded in the proceedings before the committee. In
29 his seminal passage O' Dalaigh CJ accepted counsel's submission that " and this
30 where the core of, where I felt my representation was to cover, "In all the

circumstances the minimum protection which the State should afford his client was:

- A. He should be furnished with a copy of the evidence which reflected on his good name.
 - B. That he should be allowed to cross-examine by counsel his accuser or accusers.
 - C. That he should be allowed to give rebutting evidence.
 - D. That he should be permitted to address, again by counsel, the committee in his own defence."

I'll come back to that in the light of what I want to say about how the Tribunal conducted itself.

But I move on to the next page of the submission.

"These protections which it should be noted implicitly include the right to legal representation, are classically the protections necessary to allow a person to make his case as best he may.

The central question in any particular case ought to be what procedural rights are necessary to afford protection to the substantive right threatened by the inquiry, having due regard to the public interest in the inquiry carrying out its work as thoroughly and expeditiously as possible. In general the commission takes the view that this will require an inquiry to adopt a flexible approach to its procedures, according more or fewer constitutional justice rights to different persons as their circumstances dictate. Moreover we believe that where the inquiry is engaged in a private information gathering procedure, constitutional protection exists only in an attenuated form. The issue is dealt with in detail in chapter 9 and 10. We turn now to the consider certain of the individual aspects comprising that each side must be heard, layman's constitutional justice."

1
2 Now, I had understood my position here was to protect the client's rights as
3 adumbrated in the O'Dalaigh C J statement. I'll just give you some instances.

4 First of all, you may recall that during the evidence I think of Mr. Brennan,
5 and maybe Mr. McGowan, I absented myself from this Tribunal for two weeks to
6 seek a judicial review to prevent a line of questioning which I was unhappy
7 with carrying on by this Tribunal.

8
9 That judicial review application was unsuccessful and I came back up to the
10 Tribunal. I have made submissions concerning the continued -- I beg your
11 pardon, concerning the submissions that were made to the High Court and then
12 the submissions that were made by counsel for the Tribunal to the High Court
13 and submissions made by counsel for the Tribunal here. I have already made
14 submissions on these and I don't intend to repeat them but it was quite clear
15 that the instructions given to counsel in the High Court were different to the
16 instructions of counsel here, and in any event that's already in the record and
17 I don't wish to repeat that.

18
19 But when I came back up to this Tribunal, having absented myself for two weeks,
20 having been requested did I wish the Tribunal to stop while the judicial review
21 application was in progress and I said no, I don't wish the Tribunal to stop,
22 it can continue its inquiry, I don't wish to stop the Tribunal in its tracks, I
23 just simply want this particular issue to be addressed by the High Court and it
24 was and on a certain basis, the matter was to proceed.

25
26 On my return -- during my sojourn here, counsel for the Tribunal sitting in Mr.
27 O'Neill's chair were Ms. Dillon and Mr. Hanratty. I was met with Mr. Hanratty
28 and Mr. Hanratty said to me "listen", he said, "we will stop all this
29 peripheral S", a four letter word beginning with S, a four letter word
30 beginning with S, "we will stop all this peripheral if you give us something on

1 Burke" and I have to say I was flabbergasted.
2

3 MR. O'NEILL: I'm slow to interrupt, sir, but allegations are now being made by
4 my friend against a colleague of his without notice, I'm sure to the colleague,
5 certainly without notice to the Tribunal, and it seems to me to fly in the face
6 of fundamental fairness that this type of allegation should be made in the body
7 of an application for costs.

8

9 MR. HUSSEY: Sorry, my Lord, I'm not making allegations against anybody, I am
10 simply saying the conduct of the Tribunal --

11

12 CHAIRMAN: Yes, but were these matters which were raised with Judge Flood at
13 the time?

14

15 MR. HUSSEY: Certain matters were raised, as I say, I don't know to what extent
16 you have perused the transcripts of these matters, my Lord, but these were
17 matters that were aired at the time. I want to draw your attention to one
18 other matter just before I --

19

20 MR. O'NEILL: Before we leave this one sir, I think you should make a ruling on
21 the issue as to whether or not my friend is entitled to use this opportunity to
22 address you on costs as a wide ranging criticism of his professional colleagues
23 in relation to matters which they discussed, at a minimum two or three years
24 ago, without notice having been given to that colleague who I'm quite sure
25 would have to learn of these allegations which were being made against him.
26 They suggest that he was acting in a way which was improper and it's now being
27 attributed in some way as being an attitude of the Tribunal to act in this
28 fashion and as I say, I can't answer the matter which has been raised because
29 I'm not the person who was in the seat as Mr. Hussey says at the time and
30 therefore I can't refute what he says but I think it's entirely inappropriate

1 that this should be aired at this point in the manner which it is. If there is
2 a criticism of Mr. Hanratty, it's something that should have been made firstly
3 at the time, there seems to be an acknowledgement there wasn't. If it's now
4 going to be made, I wonder what context it is being made and whether it's
5 appropriate that it be made now. I suggest that it's not.

6

7 MR. HUSSEY: Well, my Lord, sir, I understood Mr. Hanratty not to be acting on
8 a frolic of his own. I understood him to be acting for the Tribunal in making
9 such a statement. So it's not a criticism of Mr. Hanratty, it's simply saying
10 this is now this Tribunal and Tribunal counsel have --

11

12 CHAIRMAN: But it's a criticism, it is a criticism of Mr. Hanratty. It would
13 suggest that he was engaging in incorrect behaviour in making that sort of an
14 approach but --

15

16 MR. HUSSEY: Sorry, I had never, never thought that Mr. Hanratty was acting on
17 his own in respect of that. I always thought and understood him to be acting
18 for the Tribunal and it's the Tribunal, it's the approach of the Tribunal that
19 I'm now drawing and I assumed the Tribunal knew what its officers were doing or
20 what its counsel were doing or what its counsel were saying but it's not
21 something that's now come of the blue or the Tribunal can say it's taken by
22 surprise or anything like that.

23

24 CHAIRMAN: But Mr. Hussey, as I understand your submissions they are largely
25 an attack on the procedures.

26

27 MR. HUSSEY: And I'll explain why.

28

29 CHAIRMAN: I want to make my position clear here, the procedures adopted by
30 the Tribunal were not challenged.

1

2 MR. HUSSEY: Oh, they were.

3

4 CHAIRMAN: In respect of your client.

5

6 MR. HUSSEY: Yes.

7

8 CHAIRMAN: But they weren't successfully challenged.

9

10 MR. HUSSEY: No, they weren't successfully challenged.

11

12 CHAIRMAN: So I have to take them as having been carried out correctly.

13

14 MR. HUSSEY: Sorry sir, I am not asking you to review anything or any of the
15 findings indeed, I am merely explaining how, as I understand it, my role here
16 and how that role was subverted and I'll now put up the next document which I
17 asked to be copied this morning.

18

19 CHAIRMAN: But your submission is to the effect that you were not in a
20 position to properly conduct a defence of your client, to use that term.

21

22 MR. HUSSEY: Yes.

23

24 CHAIRMAN: That's not a matter which I'm in a position to rule on or to take
25 into account.

26

27 MR. HUSSEY: Except --

28

29 CHAIRMAN: Wait now, in a sense that I have to take the procedures other than
30 those which were successful, I have to take the procedures as having been

1 conducted properly and in accordance with the law and that the findings were
2 made by Judge Flood and they were made in a manner which was proper and --
3

4 MR. HUSSEY: I completely appreciate that. The reason I'm exploring this
5 avenue at all is because of what I want to put up next, which is page 54 of day
6 515, the transcript of the evidence or transcript of the submissions that were
7 made then.

8
9 Because it is to do with costs, it seems. We scroll down to the bottom of the
10 page, Mr. O'Neill, this was part of a submission, sir, this is my highlighting
11 at the side, just so that you know. This is part of a submission made by Mr.
12 O'Neill on behalf of the Tribunal, I take it, on the day that Brennan and
13 McGowan were making their submissions to the Tribunal in respect of their --
14 and this was the approach of Mr. O'Neill at the tail end of the day, I think
15 you may remember it. Probably the last day of sitting of it and yesterday and
16 it says firstly, I think it's correct to say, that the entitlement of any party
17 to their legal costs before a Tribunal is on the basis that the solicitor is
18 acting on the instructions of the client to advance the inquiry and to assist
19 the Tribunal and not on the basis that the solicitor is acting to protect an
20 entirely private interest of an individual." That's, explained on the next
21 page. He says " in other words -- sorry, page 55 and again that's my
22 highlighting at the side. "In other words if one is seeking to recover the
23 cost of one's solicitor" And I take it that's solicitor and counsel, "Before a
24 Tribunal, it is on the basis that you engage that solicitor for the purpose of
25 facilitating the Tribunal in its investigations and that the advice which you
26 are receiving from your solicitor is directed towards that provision."

27
28 Now, you see --
29

30 MR. O'NEILL: I would invite Mr. Hussey to continue to read the rest of the

1 paragraph which puts that statement in context. And it will then, I think
2 become apparent what was being addressed in what I said in that submission to
3 you.

4

5 MR. HUSSEY: Yes, it was to do with--

6

7 MR. O'NEILL: If he just reads the balance--

8

9 MR. HUSSEY: "Now it seems clear to me having looked at the attendances that
10 are in the booklet of documentation which we have been furnished today, that
11 Messrs. Brennan and McGowan in dealing with their solicitors were equally
12 concealing from them the fact that they had made payments to Mr. Burke through
13 their offshore accounts. If that is the case, it is clear that the engagement
14 of Miley & Miley was not for the purposes of assisting them in their dealings
15 with the solicitor, but rather as a barrier to prevent the Tribunal obtaining
16 the information to which it was entitled. It is clear I see from one of the
17 attendances referred to" and I don't know whether Mr O' Neill wishes me to read
18 on --

19

20 MR. O'NEILL: I think that sets the context in which the other statement was
21 made.

22

23 MR. HUSSEY: Yes, but in no circumstances in my submission, is a solicitor or
24 counsel acting in a Tribunal, there to do anything other than afford his
25 clients the protections that were afforded and the O'dalaigh C J principles,
26 not as an extra officer of the Tribunal, as Mr. O'Neill is suggesting here.

27

28 If the Tribunal expect solicitor and counsel for parties who have been given
29 representation -- as I say, representation was granted to me certainly, and I
30 think it was actually stated in the grant of representation "to protect your

1 client's interests." That was the representation that was granted to me. Not
2 -- "and we are now seconding you to become an assistant and an officer of the
3 Tribunal to further our inquiry". That's not the purpose. The Tribunal have
4 enough stuff and enough senior counsel on their staff to further the inquiries;
5 and of course as counsel, as in any court of law, counsel owe its duties to the
6 Court and owes duties to the public and owes duties to its client, but as I say
7 in the first instance that is not the basis of an entitlement to costs, what
8 Mr. O'Neill has stated there. He says the entitlement to their legal costs
9 before a Tribunal is on this basis.

10

11 CHAIRMAN: Well surely you have to define what you mean by "client's
12 interests"? If the client decides that -- I am not making any particular
13 observation on Mr. Finnegan, but if a client decides it's in his interests not
14 to provide the Tribunal with truthful evidence, are you suggesting that a
15 solicitor or counsel advocating or seeking to protect that interest should be
16 entitled to his costs?

17

18 MR. HUSSEY: No, of course not. Of course not. Of course not. That is -- you
19 are suggesting that the solicitor or counsel might collude with that?

20

21 CHAIRMAN: No, no. But if the client uses, or abuses, his legal
22 representation by using his solicitor or counsel to provide incorrect
23 information to the Tribunal, the client may see that as protecting his
24 interests, depending on how you define the word "interests". But are you
25 suggesting in those circumstances, where a solicitor or a barrister innocently
26 then protects his client's interests in that way, that the lawyer should
27 recover his costs? Isn't that the dilemma in --

28

29 MR. HUSSEY: Well if I put it like this, can I just digress a moment? Suppose,
30 for example, that a person is identified by the Tribunal as some person whose

1 interests require to be protected, as Mr. Finnegan was in this case. And
2 suppose that person to be impecunious, they can't afford a lawyer, can't afford
3 counsel, can't afford a solicitor; but yet it's some person who was identified
4 by the Tribunal as requiring protection. What is the Tribunal to do in that
5 instance? I would suggest it's for the Tribunal in that instance to appoint
6 counsel for that person so that that person's interests are protected.

7

8 CHAIRMAN: But that's --

9

10 MR. HUSSEY: I'm just saying that's the duty on the State, to afford the
11 re:Haughey protection rights.

12

13 CHAIRMAN: Yes. But the question I raised was what happens in a situation
14 where a client abuses his legal representation in such a way as to provide the
15 Tribunal, through his lawyers, with incorrect information? Now, the issue is
16 is that person entitled to a recover costs?

17

18 MR. HUSSEY: Well, can I just go back to my question because I think if you
19 follow through the question, we have an impecunious person requiring to be
20 protected. I suggest the State must give him representation, must give him a
21 lawyer for to represent his interests. If that person gives incorrect
22 information and incorrect, misleading, information to the Tribunal, that
23 doesn't disentitle the lawyer, who has been now imposed by the State on the
24 situation in order to protect that interest, from an entitlement to his hire --
25 in my submission.

26

27 CHAIRMAN: Yes but that's hypothetical, that doesn't arise in this Tribunal
28 and it doesn't arise in Mr. Finnegan's case.

29

30 MR. HUSSEY: Sorry sir, what has that got to do with it? If Mr. Finnegan was

1 identified as a person by this Tribunal whose rights are to be protected.
2

3 CHAIRMAN: Well you are saying irrespective of instructions given to you by
4 Mr. Finnegan and whether these instructions were, contained the truth or
5 something less than the truth, you would --
6

7 MR. HUSSEY: I'll deal with the evidence that was given in a moment. Just
8 dealing with principles at the moment and what representation means.
9

10 CHAIRMAN: Yes, but I mean are you suggesting that in those circumstances,
11 that that client's solicitor and barrister would be entitled, as of right, to
12 their costs?
13

14 MR. HUSSEY: Just for the moment, I select the impecunious client just for the
15 moment; and even if that client gives misleading evidence to the Tribunal, the
16 imposed public defender, or whatever you would like to call that person who
17 might be in that role, would still be entitled to be paid, regardless.
18

19 CHAIRMAN: Yes, but that doesn't arise, it's completely hypothetical.
20

21 MR. HUSSEY: Sorry, it's not completely hypothetical.
22

23 CHAIRMAN: It doesn't arise in this case. Mr. Finnegan was, as were all the
24 other interested parties, afforded an opportunity to be legally represented.
25

26 MR. HUSSEY: No. No, I'm sorry sir, Mr. Finnegan, you might remember,
27 Mr. Finnegan was superimposed into, there was a Brennan and McGowan module,
28 evidence was given and during the currency of that, Mr. Justice Flood, the
29 previous chairman of this Tribunal, identified Mr. Finnegan as a person whose
30 interests required to be protected.

1
2 Arising out of that determination, I attended on Mr. Finnegan's instructions of
3 course, to seek the representation which was identified as was necessary. In
4 my submission, it is irrelevant whether Mr. Finnegan is a multimillionaire or a
5 pauper. Justice is supposed to be blind to these matters.

6
7 In those circumstances, if his rights are to be protected, if he is identified
8 as a person who needs to be protected, and representation is granted, in my
9 respectful submission, I am entitled to be paid.

10
11 And I would ask the Tribunal, I have isolated two paragraphs, I can't foresee
12 anything else of great relevance in the transcript of the Brennan and McGowan
13 application for costs, except these two paragraphs. I would ask the Tribunal
14 in its determination to either accept or reject that as a statement of
15 representation before it. I was going to ask it as a preliminary but I think I
16 will just proceed with the rest of my submission.

17
18 I will just move on to the next item. The report of the Tribunal, the findings
19 of the report of the Tribunal relevant to Mr. Finnegan are contained, there's
20 only a few pages, page 28, 29, 30, and 31, 32 and 33 and 34, so there's only
21 five pages. And then there's the further page, page 142, where the
22 determination about the conduct before this Tribunal is criticised.

23
24 So I'm not going to ask you to read an awful lot, there's only a paragraph
25 that's been quoted fully by Mr. O'Neill in his opening, that's page 142, but
26 the pages concerning Mr. Finnegan in the substantive report, if I put it like
27 that, I do wish to address you in respect of that, because it has been said by
28 the Tribunal that Mr. Finnegan gave false evidence, and of course I am not
29 asking you to revise that or review that, I'm just simply analysing how the
30 Tribunal came to that conclusion.

In respect of the transcripts and again I am not going to refer to them at length, I'll just indicate to you, sir, where you might look at the transcripts of the evidence and I'll keep it to an absolute minimum; and just by the way, I would say that when I partook in this Tribunal, by way of cross-examination of witnesses and even examining my own witness, you will find that the cross-examinations were kept to an absolute minimum, no histrionics, no time wasting in any respect, I would say in any cross-examination of any witness. And that is something which I think you, sir, should take into account.

The first piece of transcript that I draw your attention to, sir, is the cross-examination by me of Mr. Howard. Mr. Howard, you might recall, was the partner in Bedell & Cristen solicitors, the Jersey solicitors. He was the present partner, he wasn't the partner at the time when these events took place, and essentially he was here simply to prove the documents that were produced by the Brennan and McGowan people from Bedell & Cristen solicitors.

As I understood it at the time, when I was cross-examining Mr. Howard, and I understand that Mr. Wheeler, who was the partner in Bedell & Cristen who was dealing with the matters at the time, I am talking about '84/'85, that sort of time. That Mr. Wheeler was rostered to give evidence before this Tribunal. I examined -- I cross-examined Mr. Howard concerning the behaviour of Mr. Wheeler. Arising out of that cross-examination, and you will see I question the integrity of the solicitor at the time and Mr. Howard gave certain answers to my questions which supported my questioning. Mr. Wheeler, arising out of that cross-examination I believe, Mr. Wheeler refused to give evidence to the Tribunal, "went to ground" was how Ms. Dillon put it to me. Mr. Wheeler went to ground. He was not available and he didn't give evidence to this Tribunal. That's the first point.

1 The second point is Mr. Barry, who is referred to in these submissions, was a
2 person appointed by Mr. Finnegan to protect Mr. Finnegan's interests in Jersey
3 in the College Trustees, Sovereign Trustee, Credit Suisse sequence of trusts.
4 He was placed there in order to protect Mr. Finnegan's interests concerning
5 Mr. Wheeler's dealings, not only with him but also with Messrs. Brennan and
6 McGowan, some five or six months prior to the matters ultimately found against
7 Mr. Finnegan, this payment of the 10,000 pounds sterling.

8

9 During the currency of this Tribunal, this module, Mr. Barry instructed my
10 client, who in turn instructed me, that he was available to speak with the
11 Tribunal concerning the matters that had arisen. Mr. Barry's address and
12 contact phone number was made available to the Tribunal for Mr. Barry to give
13 evidence to the Tribunal. Mr. Barry was never contacted by the Tribunal to
14 give evidence.

15

16 MR. O'NEILL: That is an untrue statement, sir.

17

18 MR. HUSSEY: I'm sorry.

19

20 MR. O'NEILL: Untrue; and irrelevant in this submission I should also submit.
21 We seem to be going into a review of the report of some years ago of bringing
22 in extraneous matters which is irrelevant to this application.

23

24 MR. HUSSEY: Absolutely not, sorry my Lord. Absolutely not.

25

26 CHAIRMAN: Wait now Mr. Hussey, I'm really not interested in hearing
27 submissions that go to the merit or questioning the merit of the findings of
28 Judge Flood.

29

30 MR. HUSSEY: Yes.

1

2 CHAIRMAN: I have no role in that.

3

4 MR. HUSSEY: Of course not, I completely understand that.

5

6 CHAIRMAN: What you are now embarking on, as I understand it, is a criticism
7 of the Tribunal and the way they conducted their business which led to these
8 findings.

9

10 MR. HUSSEY: No. No, I am dealing with the findings that my client somehow
11 gave false evidence.

12

13 CHAIRMAN: Wait now, but according to the, according to Judge Flood, he did
14 and this is -- so there's very little point in making submissions which --

15

16 MR. HUSSEY: Sorry my Lord, I beg to differ with you because if there's a
17 direct finding that this man gave false evidence, that is one thing. If on the
18 other hand the finding is based on an analysis of evidence, "I prefer this to
19 that", then it's very significant as far as an application to costs is
20 concerned. In my submission.

21

22 CHAIRMAN: How can it be? If I read in black and white that there was a
23 finding, an adverse finding against your client, I have to take that as having
24 been reasonably concluded, based on proper evidence or proper consideration.

25

26 MR. HUSSEY: Sorry my Lord, I am not asking you to review and say Mr. Justice
27 Flood got it wrong, I am not asking you to do that.

28

29 CHAIRMAN: But you are suggesting that the adverse findings should in some way
30 be reconsidered by me.

1

2 MR. HUSSEY: No, I am not. The adverse findings are there, there is absolutely
3 nothing I can do that. That is there, I cannot review it, I cannot revise it
4 and I cannot ask you to revise that. However, in applying for costs, there's a
5 difference, in my submission, between somebody who has deliberately set out to
6 circumvent the Tribunal and somebody who simply gave evidence that was not
7 accepted by the Tribunal as true. And that's why I want to go through this
8 analysis, because in my submission, there's a very big difference between a
9 finding "this man is an absolutely liar and has told these absolute falsehoods"
10 and somebody who says "well no, I prefer this evidence to that evidence" and
11 whose findings are based on that class of level of proof rather than an
12 absolute lie. As we had in the previous ruling that you made this morning.
13 These were self confessed liars.

14

15 In this instance, we are not -- I -- in my submission, we are not dealing with
16 that class of thing and I want to analyse it to show you that it was not that
17 Mr. Finnegan gave misleading evidence. It was that -- sorry, that the evidence
18 that he gave was -- sorry, the evidence of -- other evidence that existed was
19 preferred to his evidence.

20

21 MR. O'NEILL: I think if my friend is going to move on that analysis, it's a
22 false analysis to move on, given the express wording of the Second Interim
23 Report and in particular the findings in paragraph 7, sorry 4.7.3 which are on
24 page 33 of the report, which clearly identify the manner in which Mr. Finnegan
25 dealt with this Tribunal.

26

27 I quote: "The Tribunal believes that Mr. Finnegan's failure to engage with the
28 issues raised with him by this Tribunal is consistent with a deliberate
29 decision on his part to withhold any information which might lead the Tribunal
30 to establish the true circumstances which led to Mr. Burke being paid monies by

1 Canio which were partly funded by him. The Tribunal is satisfied that as part
2 of Mr. Finnegan's obstruction of the Tribunal, he challenged Mr. McGowan's
3 evidence that he, Mr. Finnegan, was aware of the fact that the payment had been
4 made as a political donation, by representing that this money had been paid
5 into a retention fund when he was aware that this was not, had not in fact
6 taken place."

7

8 So to suggest it's the preference of one series of events as opposed to
9 another, and that the Tribunal did not make a finding in the strongest possible
10 terms, is erroneous, and any argument that uses that as foundation for the
11 argument is of itself a vacuous argument and I don't believe that the Tribunal
12 should be troubled with such a proposition.

13

14 It is stated in the clearest possible terms that Mr. Finnegan chose a
15 particular course of obstruction with the Tribunal by failing to instruct his
16 lawyers of what the true facts were, which is confirmed in the paragraph above
17 at paragraph 4.7.2 from which it's clear that Mr. Hussey received no
18 instructions from his client for the first four months of this Tribunal which
19 would allow him to engage with the Tribunal on the issues that concerned it.
20 He learned for the first time four months after the Tribunal became involved
21 with his client, on the 21st September 2001, that his client, Mr. Finnegan, was
22 a one third beneficial owner of Canio, for the first time. That is the level
23 of cooperation that Mr. Finnegan had with his lawyers. They were engaged for
24 the purpose of protecting his interests, as he identified it. That is, not to
25 give evidence any information to the Tribunal which they did not have from
26 other sources and that is abundantly clear and quoted in the report itself.

27

28 MR. HUSSEY: Where is that?

29

30 MR. O'NEILL: It's paragraph 4.7.2 which says follows:

1 "The Tribunal does not accept that those who profess to be ignorant of these
2 transactions were as ignorant as they claimed. The Tribunal finds that the
3 claimed ignorance of the events in which these parties had participated and had
4 profited so, is not credible. The level at which Mr. Finnegan was prepared to
5 cooperate with the Tribunal's inquiries into the affairs with which he was so
6 closely linked, can be measured from the submissions made on his behalf for the
7 first time on the 21st September 2001, some four months after the Tribunal had
8 commenced public hearings into the matters with which he was involved. On that
9 day, it was first suggested to the Tribunal that Mr. Finnegan had made
10 financial contributions in connection with the Jersey part of these
11 transactions, but not in connection with the actual purchases of the lands
12 involved. It was submitted by counsel on his behalf, Mr. Hussey, at that time
13 as follows: 'he has given as much information as he possibly can from his
14 recollection of events. I explained I think yesterday that Mr. Finnegan up
15 until yesterday was unable to instruct me in any way in relation to these
16 transactions outside the bounds of the documents which had been furnished from
17 this Tribunal to Messrs. Kennedy McGonigal and Ballagh, his solicitors. I have
18 explained this, I have been at pains to explain this, I think I introduced this
19 when I was cross-examining Mr. Brennan that I had no further information than
20 the Tribunal had in respect of these transactions" and later: "He has been
21 unable to assist me or instruct me in respect of these transactions therefore I
22 was unable until now to suggest that Mr. Brennan's testimony was untrue. I felt
23 it was my professional standing not to contradict the witness who had given
24 sworn testimony unless I had a firm basis to do that."

25
26 From that it's abundantly clear that the role which Mr. Hussey identified as
27 being his in representation the interests of Mr. Finnegan for the first four
28 months of the Tribunal was to see what the Tribunal would put up and then
29 cross-examine the witnesses on that, without having any instructions from his
30 client as to what the underlying transactions were; and those were the

1 conclusions of the Tribunal, that those, that that information and instruction
2 was deliberately withheld, as part of Mr. Finnegan's policy of non-cooperation
3 with the Tribunal.

4

5 MR. HUSSEY: My Lord, if I am not to be allowed to deal with matters in the
6 report, and if I am just to accept that there was findings against
7 Mr. Finnegan, that's a given, that's a given fact.

8

9 MR. O'NEILL: These are the matters in the report.

10

11 CHAIRMAN: But it's important though if you are making submissions to me,
12 particularly having regard to the fact that I haven't been involved in hearing
13 the evidence, that --

14

15 MR. HUSSEY: That I draw your attention to certain matters.

16

17 CHAIRMAN: Yes; and it is now clear that the submission that this was a case,
18 that Mr. Finnegan's situation was a case of one, of merely a rejection of his
19 evidence or a preference of someone's evidence over and above, that's not the
20 case.

21

22 MR. HUSSEY: I'm sorry my Lord, I'm sorry, sir. Can I just analyse that for a
23 moment because it is the case?

24

25 CHAIRMAN: Well it can't --

26

27 MR. HUSSEY: Sorry, the conclusions were made. But can I just analyse, just
28 briefly, please, just allow me briefly to analyse the actual, the substantive
29 report. I am not going to expand beyond the report itself, just those two
30 pages. If you let me please.

1

2 CHAIRMAN: But page 33 is one of the parts of the report.

3

4 MR. HUSSEY: I understand. I understand. What I'm saying is that if evidence
5 is, if one person's evidence is preferred over another person's evidence, in
6 other words my client's evidence is rejected, that is not enough of a basis to
7 refuse my client costs. And I wish to explain that statement then by reference
8 to what I want to refer your lordship to, so that you will know what I'm
9 talking about.

10

11 It's just a mere rejection of evidence is not a sufficient reason to refuse
12 costs. And I just -- the nub of the case, as far as Mr. Finnegan was
13 concerned, was that he stated, he still states, that he did not know Mr. Burke
14 and did not make any payment to Mr. Burke. Now I know the findings are
15 otherwise.

16

17 The evidence that was presented against that statement was, in the first
18 instance by Mr. McGowan, this must trustworthy and credible witness. When he
19 said that he informed Mr. Finnegan and it's at paragraph 4.43, in order for
20 Mr. Finnegan to make the contribution, you might remember they were trying to
21 get him a make to a contribution of 20,000 but in fact Mr. Finnegan said no,
22 10,000 was sufficient for the purposes that Mr. Finnegan says, but ultimately
23 60,000 of the trio's money went to Mr. Burke, to Caviar Limited.

24

25 Mr. McGowan, the height of Mr. McGowan's evidence was that he informed
26 Mr. Finnegan that the money was going to Fianna Fail. That's his evidence and
27 that's contained in 4.43. The only information, the only evidence that was
28 given that this money was going to anybody, or that Mr. Finnegan knew this
29 money was going to anybody, was Mr. McGowan's evidence that the money was going
30 to Fianna Fail, not specifically to Mr. Burke.

1
2 Your Lordship should bear that in mind when you analyse the rest of the
3 evidence.

4
5 The next paragraph, 4.44 "If Mr. Finnegan's evidence is correct, it follows
6 that Mr. McGowan had obtained 10,000 sterling from him on false pretences and
7 that the 10,000 pounds intended by Mr. Finnegan to meet future expenses of the
8 company had been misappropriated and given to Mr. Burke without his knowledge".
9 The height of Mr. McGowan's evidence would have been that "I obtained it for
10 Fianna Fail from Mr. Finnegan", not that "I obtained it for Mr. Burke".

11
12 The next conclusion reached by the Tribunal is 4.45. "The Tribunal considers
13 it inherently implausible that Mr. Brennan or Mr. McGowan would have defrauded
14 Mr. Finnegan of this relatively small sum."

15
16 Now, on Mr. McGowan's own evidence he defrauded Mr. Finnegan of that sum on the
17 basis that it was going to Fianna Fail, not to Mr. Burke. So it's by a process
18 of deduction that the Tribunal comes to its conclusion and this is the process
19 that it has gone through; in other words I prefer this evidence to
20 Mr. Finnegan's evidence, it is inherently implausible. That's the word that
21 was used.

22
23 Now, when we see and you have, your Lordship has ruled this morning on the
24 plausibility or otherwise of Mr. Brennan or Mr. McGowan, and then to turn
25 around and say it's inherently implausible that they would behave in this way
26 beggars my belief, but however. As I say it's a process of deduction that
27 finds that Mr. Finnegan knew, not that he absolutely knew. And I just want to
28 refer you to some other highlights in the report.

29
30 Page 30, 4.48: "The distribution document prepared by Mr. Wheeler is at

1 appendix E and the Tribunal is satisfied on the balance of probables that
2 Mr. Wheeler would not have made such deduction of payment without the express
3 authority of Canio and its owners."

4

5 Now we knew in the evidence, from the evidence, that that deduction was made on
6 the authority of Mr. Brennan and Mr. McGowan. The Tribunal states that the
7 Tribunal is satisfied on the balance of probabilities that Mr. Wheeler would
8 not have, this was a witness who was rostered to appear here, didn't appear
9 here because I cross-examined his partner and yet the Tribunal decides I prefer
10 to believe that he might have done rather than what was actually done, you
11 understand? So I'm making a very big clear distinction between a deductive
12 finding and an absolute finding and a deductive find is a preference of one
13 evidence over another and a preference of one evidence over another does not
14 disentitle my clients to costs.

15

16 Paragraph 4.49 goes on, at the end it says "Mr. Barry thereafter monitored the
17 activities of Bedell & Cristen and the Tribunal is satisfied that his client's
18 interests were suitably protected by him."

19

20 Mr. Barry -- sorry, Mr. O'Neill is correct, I knew Mr. Barry was contacted by
21 this Tribunal in early days. These matters came to be under consideration and
22 we offered to bring Mr. Barry here and we offered to give the Tribunal his
23 phone number and his -- he was actually on holidays I think at the time, we
24 gave him his holiday phone number to the Tribunal and thereafter, Mr. Barry was
25 not contacted and I just come back to --

26

27 MR. O'NEILL: Again, that's incorrect.

28

29 MR. HUSSEY: Well, I beg your pardon, that was my understanding of the
30 situation.

1

2 CHAIRMAN: But whether it's correct or not, Mr. Hussey, it's an effective
3 criticism -- I don't blame you for making criticism that you feel should be
4 made but it's not a matter that I can take into account.

5

6 MR. HUSSEY: Sorry, I'm merely making the submission on the basis that it was
7 not an absolute finding against my client. It was a deductive finding. And
8 the deductive and these are the deductions that were made. And on that basis
9 alone, I say simply because my client's evidence wasn't accepted by the
10 Tribunal is not a basis for the Tribunal to refuse him costs. Even though, of
11 course, once the Tribunal made a finding, then that has certain conclusive
12 findings and consequent findings, I completely understand that, but when you
13 analyse and you see that the actual initial finding against Mr. Finnegan was a
14 deductive finding, then I say that that is not sufficiently strong, if you
15 like, to refuse him his costs.

16

17 I just move on. In any event, Mr. Barry was not called by the Tribunal and I
18 just remind you, sir, of the Re Haughey rights. I'm entitled, I should be
19 allowed to give rebutting evidence. I had requested that Mr. Barry be called.
20 Again, I think it was Mr. Hanratty said you cannot advise this Tribunal's
21 proofs. Right. So I had no forewarning before the publication of this that
22 these were, that these matters were going to be said about me or about my
23 client.

24

25 CHAIRMAN: Yes but again that's not a matter that I can take up.

26

27 MR. HUSSEY: I'm only saying, I'm only saying that I had offered Mr. Barry to
28 the Tribunal and the Tribunal didn't accept it and I say that was a denial of
29 certain things but yet the Tribunal was able to make its deductive, by way of a
30 deductive reasoning, makes findings against me and of course that led to

1 consequent findings.
2

3 CHAIRMAN: Yes.
4

5 MR. HUSSEY: Because and -- sorry, sir, if your lordship feels absolutely
6 hamstrung by the findings, then I'm afraid it seems I'm a bit like the swimmer
7 in the Liffey going through the motions.
8

9 CHAIRMAN: Well, depends how you define the word 'hamstrung'. The findings
10 are there, I have to accept that them. I can't consider whether or not they
11 were properly --
12

13 MR. HUSSEY: Oh, of course, I completely understand that.
14

15 CHAIRMAN: So questions as to the absence of witnesses, whether the Tribunal
16 failed or didn't fail to call a witness, they are not matters of any relevance
17 to me in my consideration.
18

19 MR. HUSSEY: No, the mere -- the point -- I don't know, maybe I am not making
20 myself clear. The point I'm making is this: That there is a world of a
21 difference between somebody who comes along and deliberately sets out to
22 circumvent the Tribunal and somebody who comes along and gives his evidence 20,
23 25 years later over matters that happened so long ago and his evidence, sorry,
24 other evidence is preferred to his evidence. I say there is a world of a
25 difference between a finding on the balance of probabilities and the finding,
26 an absolute finding and I say because of that difference, my client is not to
27 be disentitled to costs.
28

29 It happens every single day of the week in the courts, where a judge will say
30 well everybody is here doing their best but I prefer the evidence of this

1 person over that person. That is not to make a criminal or a perjurer of the
2 person whose evidence has not been preferred.

3

4 I just go down to 4.42, as I say, I have alerted you, my lord, and I would like
5 you to have a look at the cross-examination of Mr. Howard by me, that's the
6 Bedell & Cristen lawyer, the cross-examination of him. The cross-examination,
7 again by me, of Mr. Owens who was the accountant who set up the schemes that
8 were part of the Brennan and McGowan and what his comment was about the
9 activities of Mr. Wheeler and I beg your pardon, and again that portion of the
10 cross-examination of Mr. McGowan concerning his evidence of the payment, that
11 the payment was to, that he informed Mr. Finnegan that the payment was to
12 Fianna Fail. That was the height of the information that was furnished, if it
13 was furnished, which Mr. Finnegan denied, of course.

14

15 So the height of the evidence was that it was a donation to Fianna Fail. That
16 was the height of the information that Mr. Finnegan would have known and that's
17 the height of the evidence. Now I know the findings have been, have moved on
18 from there but, as I say, it's a question of the weight of evidence rather than
19 an absolute finding and as I say, the Tribunal itself has adopted a deductive
20 role in how it came to its, how it came to its conclusion.

21

22 I just highlighted, there's a situation there, 4.46, "The Tribunal is satisfied
23 on the balance of probabilities that the factual position was that the
24 decision-making power." It's all on the balance of probabilities. 4.58, "The
25 Tribunal is satisfied on the balance of probabilities that Mr. Wheeler would
26 not have told either Mr. Barry or Mr. Finnegan." Right, so again it's all on
27 on this, it's all in the balance.

28

29 4.59, "If Mr. Finnegan's account is true, this would involve an admission by
30 Mr. Wheeler that he had transferred the funds without proper authority. Such a

1 scenario is highly improbable." An admission by him might be highly
2 improbable but again, we didn't have Mr. Wheeler and as I say, Mr. Wheeler was
3 rostered and he didn't appear so it's a bit like hamlet without the prince so
4 the deductive reason that the Tribunal conducted to find against my client was
5 all in this maybe, probably, on the balance of, he wouldn't have, but no
6 evidence from these people. Mr. Barry wouldn't have, Mr. Wheeler wouldn't have
7 but we didn't hear from either Mr. Barry or Mr. Wheeler, do you understand?

8

9 So I am asking the Tribunal to make a distinction between findings on the
10 balance of evidence. I still obviously disagree with the findings, but that's
11 obviously, we are beyond that point.

12

13 Having made the findings on the balance of probabilities, then of course the
14 Tribunal consequently has to make its findings that well, on the balance of
15 probabilities, I don't believe that, so therefore you obstructed me by not
16 telling me the truth. So that's only a consequential finding determinate on
17 the original finding and not a new finding, do you understand? Do I make
18 sense? And I am asking the Tribunal to make that distinction. Again at 4.41,
19 I see "The Tribunal believes that on the balance of probabilities, a truthful
20 explanation" and "established the true purpose of the payment to Mr. Burke"

21

22 Even at the end, at 4.43 which is the paragraph referred to Mr. O'Neill
23 earlier, "the Tribunal is satisfied as part of Mr. Finnegan's obstruction of
24 the Tribunal that he was aware of the fact that the payment had been made as
25 political donation." Even at that stage the Tribunal itself seems to accept
26 that the height of Mr. Finnegan's knowledge, if he had knowledge at all of
27 this, was that it was going to a political donation and not going to Mr. Burke
28 but going to Fianna Fail.

29

30 Mr. Finnegan at all times denied that he knew Mr. Burke and indeed Mr. Burke

1 denied that he knew Mr. Finnegan. I have to regard that as water under the
2 bridge at this point.

3

4 If I can move on to another point, sir, and it's to do with the correspondence
5 that we obtained from the Tribunal throughout the currency of the hearing. And
6 I think you may find some reference to this and I will invite you to reread the
7 written submissions that I have made, that I have put in in respect of the
8 application for the principles to be applied. I'd ask you to re-read the
9 written submissions in the light of my submissions that I have made this
10 morning, and I think then the written submissions, if I can quote from those
11 for the moment, "The correspondence from the Tribunal amounted up to 200
12 different demands, sometimes arriving like confetti, four or five in one day
13 and often arriving at the most inopportune times." We found that, for
14 example, we might get five letters from the Tribunal demanding answers to this
15 and information about that and discovery about something else. They would
16 arrive after close of business on a Friday afternoon, Friday evening, to be
17 answered by the following Tuesday or Wednesday.

18

19 Now obviously this wouldn't arrive until the Monday morning or I certainly
20 wouldn't get it until the Monday afternoon or the Tuesday morning and it became
21 impossible, it just became an impossibility to comply with these incessant
22 demands for new information and new statements and new discovery and whatever.

23

24 We had a small team, senior counsel, no junior counsel, and a solicitor and I
25 had the personal assistant of my client helping us out, it was of great
26 assistance to me. And we were here every day dealing with the Tribunal. There
27 was nobody else dealing with the correspondence in the back room, if you like,
28 unlike the level of assistance that the Tribunal had. It became an
29 impossibility to comply with minor, minor, I am only -- just as, I am not
30 talking about major things, just simply the sheer human impossibility to meet

1 the requirements of the Tribunal.
2

3 I had seen that sort of behaviour from major firms of lawyers, major firms of
4 solicitors, and said this is just oppressive. And I recognised it to be, it
5 was self fulfilling in its establishment of a default. You couldn't but be in
6 default because of it was so oppressive. You will see in paragraph 1 of my
7 written submissions, which have been in the Tribunal for some time, I suggested
8 to Ms. Dillon at the time, we were only three or four weeks into, or my
9 particular participation in the Tribunal was only three or four weeks, and I
10 said "look at, this is impossible, I am here trying to deal with the Tribunal
11 during the day and then I am going home and I'm finding letters that have to be
12 dealt with, numerous letters that have to be dealt with at night quite apart
13 from the preparation for the following day" and I challenged her, "is this
14 about costs", I says to her, you are creating a default. "Is this about costs"
15 and she said "smart boy".
16

17 CHAIRMAN: Well, Mr. Hussey --
18

19 MR. HUSSEY: I'm just simply saying --
20

21 CHAIRMAN: Are you suggesting that because you were unable to deal with issues
22 as quickly as was required by the Tribunal, that this in some way resulted in
23 your client not being in a position to give evidence which he might have been
24 able to give?
25

26 MR. HUSSEY: No, absolutely not, I am not saying that. I am merely saying that
27 the behaviour of the Tribunal was in itself self fulfilling, that I couldn't
28 possibly but be in default and the, I couldn't possibly then but be the subject
29 of a hindrance or obstruction finding. As I say, I confronted Ms. Dillon with
30 that one morning and she said "smart boy" and I thought that would be the end

1 of that.
2

3 MR. O'NEILL: I should say of course there's been no finding of the Tribunal
4 made against Mr. Hussey for his behaviour before the Tribunal or that of his
5 solicitors, and there was no finding in relation to matters touching directly
6 upon costs.

7

8 MR. HUSSEY: No.
9

10 MR. O'NEILL: Mr. Hussey has chosen to use this opportunity again, I have to
11 say, to make suggestions of impropriety against his colleagues without notice
12 to them, without notice to me --

13

14 MR. HUSSEY: I'm sorry sir, this is in the written submission.
15

16 MR. O'NEILL: To use this platform --
17

18 MR. HUSSEY: This is in the written submission. I says "Indeed when confronted
19 by the suggestion that correspondence from the Tribunal was designed for the
20 purpose of avoiding payment of costs counsel for the Tribunal confirmed the
21 same". This has been in my written submissions whenever I put those in earlier
22 this year. This has been there. This is nothing, there's nothing new in this.
23 If Mr. O'Neill hasn't read the written submissions, or referred to that --
24

25 MR. O'NEILL: There's no reference to "smart boy" being made.
26

27 MR. HUSSEY: Counsel confirmed the same. I took the reference smart boy
28 meaning "yes, you have twigged, you are right". Confirming what I was saying
29 was correct.
30

1 MR. O'NEILL: That was not stated.
2

3 CHAIRMAN: Mr. Hussey, do I understand your submission to be on this subject
4 to the effect that because, that the Tribunal orchestrated matters in a way --
5

6 MR. HUSSEY: Oh absolutely.
7

8 CHAIRMAN: Wait now, orchestrated matters in a way so as to ensure that your
9 client could not be in a position to cooperate and that gave rise to the
10 findings in the report?

11 MR. HUSSEY: No --
12

14 CHAIRMAN: I would have to suggest if that was the case, that is a matter that
15 should have been dealt with in another way. It's not a matter that I can take
16 into account.

18 MR. HUSSEY: I see. I see. The -- I am more or less finished. I just wish to
19 say that regardless, I think Mr. O'Neill has reminded me that this might have
20 went on for 67 days. I was here for a certain amount of those days, obviously
21 not because my client, as I say, was parachuted into the middle of this or into
22 the beginning after it had started, and my attendance was obviously required to
23 hear the lengthy, lengthy, lengthy cases - examinations of Messrs. Brennan and
24 McGowan and of course I had to pick up on certain matters in the
25 cross-examination, but my presence was required to deal with those matters and
26 deal with the matters that they had asserted, and obviously we were trying to
27 find our way through a maze of evidence because there was so many statements
28 and so many misleading and so many lies told, that the, in my submission, my
29 presence here was necessary in order to protect my client's interests.
30

1 And for that, I suggest that I'm entitled to be paid the costs of the
2 attendance. Mr. Finnegan himself, I think, was in the witness-box for maybe 10
3 or 11 days, I think that was all out of those 67 days, but the attendance was
4 necessary and the representation was necessary throughout the period of the
5 module. It couldn't have been limited just to the three weeks of
6 Mr. Finnegan's evidence.

7

8 In the course of my submissions to this Tribunal, I have quoted, I think, from
9 Magna Carta; I have quoted from the Constitution; I have quoted from the
10 Supreme Court, the High Court, House of Lords. I am going to leave with this,
11 a quote from the basic authority from which all our laws are subject, I say
12 "the labourer is worthy of his hire" and I am applying for my costs.

13 Thank you sir.

14

15 MR. O'NEILL: I should say briefly in relation to the last points, of course
16 the labourer is entitled to his hire, it's a question of who pays the labourer,
17 and no doubt Mr. Finnegan will in due course be approached by his legal team
18 looking for the hire that they were engaged in by him to represent his
19 interests.

20

21 I think it is material for me to say since an extract from the transcript of
22 the Brennan and McGowan costs application was quoted to you, I think it's
23 appropriate that I should explain the context in which that statement was made
24 by me and recorded on the transcript. You will remember that the documentation
25 which was produced by Brennan and McGowan in the body of its costs application,
26 involved a production for the first time of some of the memoranda of
27 instruction taken by the solicitors who were instructed by Brennan and McGowan
28 to represent their interests before the Tribunal. That documentation would
29 have been privileged documentation, legally privileged documentation and would
30 not have been produced and was not produced in full to the Tribunal before that

1 time. So it gave the Tribunal an opportunity at that time to see what
2 instructions Brennan and McGowan had given to their own solicitors and it was
3 that memorandum that I was addressing in making the comments that I did which
4 were recorded on pages 54 and 55. There was, before you, for the first time, a
5 document which showed that Brennan and McGowan had actively misled their own
6 solicitors as to the funds which were in Jersey.

7

8 It was only subsequently when the Tribunal through its own efforts managed to
9 get the files from Jersey, that the lie which was included in their
10 instructions to their own solicitors was demonstrated. It was in that context
11 that I made the statement which I did, because at that time, before you,
12 Brennan and McGowan were making an application for their costs which included
13 the costs of instructing their own solicitors at a time when they were
14 instructing their solicitors with misinformation, in fact disinformation. Yet
15 they were pursuing a claim before the Tribunal to have those exact costs paid
16 for by the Minister for Finance. It was in that context that I indicated that
17 the costs of a solicitor who is making an application for costs on his client's
18 behalf before the Tribunal must relate to the assistance of the Tribunal, he
19 cannot be seeking costs in respect of those aspects where clearly his own
20 client was misleading him, and that I think explains my references to costs.

21

22 The second --

23

24 MR. HUSSEY: Sorry, I beg your pardon, will I have a right to reply to that?

25

26 CHAIRMAN: Yes, you can deal with it but --

27

28 MR. O'NEILL: Secondly, the second reference which has been put up to you on
29 screen here, are the references to the in re: Haughey rights. They are
30 cardinal rights in the Tribunal of Inquiry, they are known and recognised by

1 all practitioners who appear before a Tribunal. In the event that any one of
2 those rights is infringed, it is automatic that an application is made by way
3 of judicial review to one of the courts of justice in this land to review a
4 Tribunal decision if at any time it infringes upon any one of those rights.
5

6 There has been no effective challenge to the Tribunal by my friend in respect
7 of any breach of those rights. It is a given that those rights were applied to
8 his client and his client had the benefit of them throughout and until the
9 conclusion of the Tribunal and indeed, he is exercising one of those rights at
10 present in addressing this Tribunal in the context of costs. So there has been
11 no breach by the Tribunal of any one of its obligations towards Mr. Finnegan.
12

13 In the light of the submissions which were made by Mr. Hussey, it's perhaps
14 easy to forget that this is an application for costs which is being brought by
15 him on behalf of his client who is a person who has been found to have been in
16 substantial breach of his obligations to the Tribunal of Inquiry.

17
18 The obligation on his client was to cooperate with the Tribunal. The findings
19 of the Tribunal were that, not only did he not cooperate, but he went to hinder
20 and obstruct the Tribunal in a manner which is detailed at length in the
21 Second Interim Report. It is not open to my friend to go behind that. What he
22 is endeavouring to do is suggest that in some way the findings of the Tribunal
23 were as a result of a process of deduction. Of course, every decision-making
24 process must be as a result of a deductive process but in the context of his
25 submission, it is abundantly clear from what is reported upon in the second
26 report, that the findings were made, that Mr. Finnegan had consciously decided
27 not to give an explanation of his relationship with Messrs. Brennan and
28 McGowan, which would allow the Tribunal to pronounce upon the reasons for the
29 acknowledged payment of 60,000 pounds to Mr. Burke. That was the positive
30 finding. It was not a deduction. It was made after the evidence of

1 Mr. Finnegan had been considered.
2

3 And it is of course true to say that a lawyer who is engaged on behalf of a
4 client is there to represent the interests of that client and not the interests
5 of the Tribunal per se. But that has to be viewed in the context of obligation
6 which rests upon each person called before a Tribunal, that he must cooperate
7 with the Tribunal and one of the consequences of non-cooperation is that a
8 subsequent application for costs brought by a person who has been found not to
9 have cooperated with is one which will be critically reviewed by the chairman
10 in making any decision to award costs. The price, perhaps, of non-cooperation
11 is that one cannot at the same time be seeking to have somebody else pay for
12 that non-cooperation. It seems a pretty clear trade off. It is abundantly
13 clear from the findings in the report that Mr. Finnegan chose to use his legal
14 team in this instance to defend interests of his, without cooperating with the
15 Tribunal, and without facilitating the Tribunal with an explanation as to why
16 it was that his money was paid to Mr. Burke. It is on that basis that his
17 entitlement or his entitlement perhaps to make an application for costs should
18 be viewed.

19
20 There is of course no legal aid system applying to Tribunals of Inquiry. Legal
21 aid exists only in respect of criminal legal aid and to a certain extent, legal
22 aid in family law courts. It is not to be used as a measure for compensation
23 for legal teams who represent persons who have been found to be
24 non-cooperative. This is not an application for costs by the lawyers
25 themselves. It is an application for costs by Mr. Finnegan. It is
26 Mr. Finnegan's conduct which determines his entitlement to be recompensed for
27 the costs which he owes to his solicitors and to his counsel. There is no
28 direct link or entitlement for solicitors or counsel to recover their costs
29 directly from the Tribunal of Inquiry.

1 That's my submission in reply, sir.
2

3 CHAIRMAN: All right. Just, I don't want to reopen the whole -- do you want
4 to deal with the --
5

6 MR. HUSSEY: I just want to deal with the point that Mr. O'Neill was speaking
7 about the circumstances of the Brennan and McGowan attendances. If I can deal
8 with that? With your permission.
9

10 CHAIRMAN: Mr. O'Neill gave the context, the context --
11

12 MR. HUSSEY: Yes, yes, I beg your pardon, I have only read the transcript. I
13 don't know the background context how those things arose except in reading the
14 transcript of that day's hearing, I understood from the day's hearing that the
15 attendance that Mr. O'Neill was referring to especially in the light of
16 Mr. Hayden's submissions to the Tribunal, that that attendance had been long
17 since gone through by the Tribunal at hearing and it wasn't something that
18 newly came to the Tribunal on that particular day.
19

20 Now, as I say, I'm sure what I have read is an accurate account of the
21 transcript but I don't know what I was reading was the truth so maybe Mr.
22 O'Neill's account is more -- I understood that the attendance that Mr. O'Neill
23 was referring to was an attendance that had been gone through and was
24 cross-examined on in the course of the substantive hearing, it wasn't something
25 new on the day of the costs application. That's simply the --
26

27 CHAIRMAN: Thank you very much. Mr. Mara's application.
28

29 MR. O'NEILL: The next application before you sir, is the application of Mr. P
30 J Mara for his costs. I might just have one moment to assemble my papers.

1

2 MR. McMENAMIN: I would appreciate a similar five minutes to assemble my
3 papers.

4

5 CHAIRMAN: It's a quarter to one, I can sit at half one or twenty to two, if
6 that helps.

7

8 MR. McMENAMIN: Yes, Chairman.

9

10 CHAIRMAN: I'll sit at twenty to two.

11

12 **THE TRIBUNAL THEN ADJOURNED FOR LUNCH.**

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

1 **THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:**

2
3 CHAIRMAN: Now, Mr. O'Neill.

4
5 MR. O'NEILL: Good afternoon. Mr. Chairman, the next application for costs is
6 that of Mr. P J Mara and I'll outline briefly the involvement of Mr. Mara with
7 the affairs of the Tribunal. This involvement commenced on the 7th June 2000
8 when Mr. Mara was asked to provide a narrative statement to the Tribunal
9 setting out his involvement with Mr. James Stafford, Mr. Oliver Barry and
10 Mr. Dermot Desmond in the context of a meeting said to have taken place at
11 Mr. Desmond's office in early 1990.

12
13 The Tribunal had received information from Mr. James Stafford to the effect
14 that Mr. Desmond had stated that money was owed by Century Radio to Mr. Mara at
15 such meeting. At the time of the meeting in 1990, Mr. Mara was then government
16 press secretary. Mr. Mara complied expeditiously with the Tribunal's request
17 and provided his narrative statement to the Tribunal on the 14th June of 2000.
18 Mr. Mara was circulated then with copies of the statements provided to the
19 Tribunal by Mr. James Stafford, Mr. Laurence Crowley and Mr. Dermot Desmond
20 relating to the circumstances in which this admitted meeting took place and
21 what took place thereafter.

22
23 A summons was issued requiring Mr. Mara's attendance as a witness before the
24 Tribunal sessions intended to commence on the 18th July 2000. The statement
25 provided by Mr. Stafford to the Tribunal and circulated in advance of the
26 public hearings subsequently to Mr. Mara included a reference to there being a
27 rumour, which he understood from Mr. Barry was in circulation in 1988 to the
28 effect that Mr. Ray Burke and Mr. Mara expected to receive payment in respect
29 of the broadcasting licences which would be issued to successful applicants by
30 the IRTC.

1
2 On the 26th July 2000, McCann Fitzgerald solicitors were provided with the
3 Century Radio brief by the Tribunal at Mr. Mara's request. In September 2000,
4 the Tribunal notified Mr. Mara of the Tribunal's intention to consider making
5 an Order for Discovery for documents for a period commencing the 1st January
6 1988 and terminating on the 31st December 1991. This order would require him
7 to discover all documentation in relation to his accounts in financial
8 institutions, whether within the State or otherwise, in which he had maintained
9 accounts during this period. Mr. Mara consented to the terms of the order
10 which was subsequently made on the 2nd October 2000 and he also provided
11 written authorities directed to the financial institution which he named as the
12 source of his accounts within the jurisdiction during that period, authorising
13 them to provide the relevant details to the Tribunal.

14
15 As a result of further information received by the Tribunal from another
16 source, the Tribunal sought further information from Mr. Mara in relation to
17 any interests which he might have in companies involved in broadcasting. On
18 the 6th November 2000, a further Order for Discovery was made relating to
19 discovering documentation which would show any interest in or remuneration from
20 any broadcasting company or corporation to Mr. Mara.

21
22 Details of Mr. Mara's involvement with broadcasters was provided to the
23 Tribunal on the 10th October 2000. On the 23rd November 2000, the Tribunal
24 wrote to McCann Fitzgerald solicitors noting that the four bank accounts which
25 had been identified to the Tribunal as Mr. Mara's and the information provided
26 by those banks to the Tribunal suggested that Mr. Mara had no current account
27 within the jurisdiction post May 1989 and that he had no account at all in the
28 jurisdiction post October of 1990.

29
30 As a result of that apparent anomaly to the Tribunal the period during which

1 Mr. Mara was required to provide the information which had extended until the
2 31st December 1991 was specifically drawn to his attention and Mr. Mara was
3 required to swear an affidavit which would identify any other accounts within
4 the jurisdiction or outside the jurisdiction for the period up until the 31st
5 December 1991.

6
7 The Tribunal also sought compliance of the order of the 6th November 2000
8 dealing with the documentation relating to broadcasting. Certain documentation
9 relating to invoices raised by Mr. Mara was provided by letter of the 27th
10 November 2000. In the light of the information provided to the Tribunal to
11 that date, the Tribunal notified McCann Fitzgerald of its intention to consider
12 making a further Order for Discovery which would, if made, have the effect of
13 extending the period for discovery of financial records from, to cover the
14 period from 1988 until December 2000.

15
16 Submissions were made on behalf of Mr. Mara expressing dissatisfaction with the
17 manner in which he had been treated by the Tribunal to that date and drawing
18 particular reference to the fact that he was yet to be called to give evidence
19 upon the initial issue with which he had been involved with the Tribunal and
20 further indicating that the making of a further Order for Discovery was both
21 unnecessary, outside the Terms of Reference of the Tribunal and
22 constitutionally unfair.

23
24 These submissions were considered by the Tribunal, and ultimately on the 7th
25 December 2000, an Order for Discovery was made which had the effect of
26 extending the period during which Mr. Mara was obliged to make discovery of his
27 financial records up until December of 2000.

28
29 In the Second Interim Report of the Tribunal, the finding was made that Mr.
30 Mara had failed to cooperate with the Tribunal. This Tribunal, this finding

1 rather, was limited to a finding that he had failed to comply with the order of
2 the 7th December 2000 in that he had failed to discover the documentation
3 relating to an offshore account which was held at the Bank of Scotland in the
4 Isle of Man, through a company by the name of Pullman Limited. This account
5 was one operated through Europlan Trust for Mr. Mara. It obviously fell within
6 the terms of the order but it was not discovered by Mr. Mara when he swore his
7 Affidavit of Discovery in compliance with the order of the 7th December 2000.

8

9 The existence of a payment by Europlan Trust to Mr. Mara's bank account at Bank
10 of Ireland Private Banking was evident to the Tribunal from an entry which
11 appeared in the body of the 357 pages of bank statements on that account which
12 had been furnished to the Tribunal by Mr. Mara and independently by Bank of
13 Ireland Private Banking with his consent.

14

15 There was, however, no documentation discovered at that time which suggested
16 that Europlan Trust Limited was a vehicle used to transfer Mr. Mara's own funds
17 from his offshore account to his account at Bank of Ireland Private Banking.

18

19 The discovery process undertaken by Mr. Mara in order to comply with the
20 Tribunal's order of the 7th December 2000 was the subject of extensive
21 correspondence between the solicitor to the Tribunal and Mr. Mara's solicitors,
22 between January of 2001 and the 27th July 2001, the date upon which the
23 existence of Mr. Mara's offshore account in the name of Pullman Limited was
24 first revealed in a letter of that date from Mr. Mara's solicitors to the
25 Tribunal solicitor. Among the matters raised in correspondence during this
26 period and prior to this disclosure was the specific request made of Mr. Mara
27 to identify all businesses operated by him or maintained by or for his benefit.
28 The response to this query was to state that the only effective business
29 operated and or maintained by or for the benefit of Mr. Mara during the period
30 from 1988 to the date of response was that of Mara Communications Limited.

1
2 This statement was untrue, given that Pullman Limited had raised invoices for
3 services provided by Mr. Mara. Information sought to establish the source of
4 the Europlan lodgment to the account of Bank of Ireland Private Banking was not
5 provided until the 27th April 2001.

6
7 Mr. Mara's explanation for his failure to discover the existence of Pullman
8 Limited to the Tribunal and its account in the Isle of Man was that he had
9 forgotten about this company until such time as his recollection was prompted
10 by the sight of the reference to the Europlan Trust lodgment contained within
11 the Bank of Ireland Private Banking bank statements.

12
13 The Tribunal in its Second Interim Report at paragraph 10.14 did not accept
14 this explanation for Mr. Mara's failure to disclose this account. The Tribunal
15 believed that it was unlikely that he could have forgotten about the existence
16 of an account which had been opened by him in the Isle of Man, given the steps
17 which would have had to have been taken to form the company there and to
18 maintain an account in that jurisdiction. The Tribunal also had regard to the
19 level of the turnover in the account between August 1993 and October 1997 and
20 to the fact that Mr. Mara had used Pullman Limited as a vehicle to bill for
21 services within the jurisdiction as late as September 1997.

22
23 The Tribunal could not make any finding on the substantive issues, the subject
24 matter of inquiries, with Mr. Mara, holding that it could not reconcile the
25 evidence of the four participants at the meeting in Mr. Desmond's offices in
26 1990, nor could it resolve the conflict of the evidence between Mr. Stafford
27 and Mr. Desmond as to what had occurred at a post-wedding reception at Kinsealy
28 in September 1990. It's likely that the issue which had probably concerned the
29 Tribunal in the present application is the extent, if any, to which the
30 admitted failure to discover the Pullman account until the 27th July 2001

1 should influence any decision to award costs to Mr. Mara, particularly any
2 costs claimed by him in respect of compliance with the discovery process
3 undertaken by him.

4

5 MR. McMENAMIN: Mr. Chairman, I propose in my submissions to divide what I have
6 to say under three headings, the first relating to the legal principles which
7 you set out in your determination of the 30th June 2004, the second to deal
8 with the factual background and context, particularly having regard to
9 Mr. Mara's level of cooperation and thirdly, the manner in which the legal
10 principles which you have set out in the determination of the 30th June 2004
11 apply in the case of Mr. Mara.

12

13 For the purposes of this application, I accept that I am bound by the
14 principles which you have set out in the adjudication of the 30th June 2004 and
15 in the course of those, you held that you could not entertain submissions
16 regarding jurisdiction to award costs, that you could not entertain submissions
17 regarding the validity of findings and furthermore, you indicated that these
18 two views were reinforced by the existence at that time of three different sets
19 of proceedings in the High Court which were then in being.

20

21 I wish very briefly to emphasise that we stand by the substance of our written
22 submissions and I wish it to be understood that nothing which is said today
23 should be seen as a deviation or a retreat or modification to what has already
24 been submitted regarding the procedure adopted in relation to the findings,
25 particularly the allegation of failure to cooperate was not specifically put as
26 a specific allegation of notice to Mr. Mara and secondly, our observations
27 regarding the standard of proof applied in the single finding which is the
28 basis of likelihood, we say that is the incorrect standard of proof.

29

30 Thirdly, although I do not have to argue this proposition today, I would draw

1 the attention of the Tribunal to the judgment of Mr. Justice McCarthy in
2 Goodman and Hamilton, volume 2, 1992 Irish Reports at 506 which deals at that
3 page with the question of the entitlement of witnesses to costs and in my
4 submission, the decision of the court and I emphasise the court, that is
5 Mr. Justice McCarthy, Mr. Justice O'Flaherty and Mr. Justice Egan who were the
6 majority, was to the effect that an award of costs should not be dependent upon
7 the findings of the Tribunal. However I do not feel that I have to argue that
8 proposition in the light of the circumstances which exist in this instance.

9

10 I want to secondly, therefore, having dealt very briefly with the legal
11 principles, make some remarks regarding the chronology of events, the procedure
12 adopted, the findings of the Tribunal on the sequence of events and also, the
13 allegations relating to Mr. Mara and these are factors which you have
14 identified, particularly the factual background and context and findings, has
15 been relevant features in the determination of what order should be made in
16 relation to costs.

17

18 The allegations, as Mr. O'Neill said, the allegations against Mr. Mara are set
19 out in chapter 10 of the report. They fell into three broad categories.
20 First, there was the shopping list rumour, whereby allegedly, Mr. Mara, along
21 with Mr. Ray Burke, was stated to be seeking to receive substantial sums of
22 money prior to the issuing of various radio and television licences. Secondly,
23 Mr. Stafford claimed that he had been informed by Oliver Barry of Mr. Mara's
24 expectation that he would receive payment of 30,000 pounds from Century and he
25 also claimed that he had attended a meeting involving Mr. Mara and Dermot
26 Desmond where Mr. Desmond requested that Mr. Stafford pay Mr. Mara 30,000
27 pounds. And thirdly, an alleged occurrence at a wedding in, I think,
28 Abbeyville, Kinsealy, a son of Mr. Haughey where it was alleged there was a
29 further discussion between Mr. Desmond and Mr. Stafford in relation to that
30 matter.

1
2 Mr. Mara denied the allegations made against him. There was no evidence of
3 wrongdoing in my submission against Mr. Mara. And there was no finding of
4 wrongdoing against Mr. Mara, save in the context of the failure to cooperate.
5 In other words, the substance of the matters which brought Mr. Mara before the
6 Tribunal were ones upon which he was exonerated, ones where he is entitled to
7 have his good name vindicated.

8
9 The indication of the intention to call Mr. Mara in July 2000 did attract a
10 very substantial amount of publicity and I think you will be aware, Chairman,
11 of the fact that Mr. Mara was not ultimately called until August of 2001
12 although the examination of Mr. Stafford and cross-examination of Mr. Stafford
13 took place on the 27th September 2000.

14
15 Mr. Mara had been summoned to appear on the 6th July, to appear before the
16 Tribunal and was due to give evidence on the 28th November 2000 and indeed had
17 been scheduled to attend even earlier and that the appearance of the 28th
18 November was postponed owing to a family bereavement of Mr. Justice Flood and
19 obviously we make no criticism in relation to that, quite obviously.

20
21 From that point on, he was included in various lists of witnesses to be called
22 but was not allocated a fixed date until July 2001. Now, he finally gave his
23 evidence before the Tribunal on the 1st August 2001. As Mr. O'Neill has
24 pointed out, the, and what was not previously, I think, made known publicly,
25 the allegations made against Mr. Mara or the issues raised, related not only to
26 those of Mr. Stafford but those which related to, those which apparently
27 emanated from another source regarding three other companies in the
28 communications field which I need not identify.

29
30 It does not need reiteration that each one of those issues were ones upon which

1 no finding of any adverse type was made against Mr. Mara. From September 2000
2 onwards, there was a protracted sequence of correspondence throughout this
3 period as identified by Mr. O'Neill between the solicitors for the Tribunal and
4 McCann Fitzgerald, then solicitors for Mr. Mara.

5
6 Following an Order for Discovery and production made by the Tribunal ultimately
7 on the 7th December 2000, Mr. Mara and his wife submitted affidavits of
8 discovery to the Tribunal on the 5th January 2001. Further correspondence
9 resulted in further affidavits of discovery being sworn on the 16th February
10 2001 and the 2nd March 2001.

11
12 Having said that, sir, even to this day, and I am not embarking on any critique
13 of the findings of the Tribunal but it is relevant as regards context. I do
14 not know and nor does anyone else on this side of the house, know the source of
15 the allegations, the extra allegations which were made subsequent to September
16 2000. It is evident that those allegations probably gave rise to a
17 prolongation of the work of the Tribunal by eight months. It is probable that
18 those allegations or those issues raised led to the necessity for the discovery
19 of over 1120 documents and details of 17,500 banking transactions going back to
20 1988, the expenditure of many hundreds of man hours and the necessity to
21 provide discovery sometimes within very short time spans.

22
23 It would appear also that those issues which were raised from another source,
24 as yet unidentified, were the basis for the direction of the Tribunal to
25 discover every cheque stub over a 12-year period in circumstances where
26 consents were furnished and also the voluminous correspondence which ensued
27 between Mr. Mara's then solicitors and the Tribunal, involving letters of
28 sometimes 17 pages and various annexes dealing with his financial affairs and
29 also his wife, the late Mrs. Breda Mara.

1 What is clear, however, that none of this process produced any evidence which
2 was relevant to the Tribunal's work. And further, what is evident is that as
3 and from the time when this process was embarked upon, up to July 2001, the
4 information which was available to the Tribunal regarding the substantive
5 issues before it were precisely the same.

6

7 On 11th September 2000 as Mr. O'Neill has indicated, the Tribunal indicated for
8 the first time that it was considering making an order that Mr. Mara would
9 discover in effect his financial transactions from 1st January 1988 to the 31st
10 December 1991. He agreed to do this. He had some difficulty obtaining
11 detailed account information for the period from a number of financial
12 institutions and an Order for Discovery was made on the 2nd October 2000, i e
13 some three weeks later.

14

15 Mr. Mara, as Mr. O'Neill fairly indicated provided consent forms for all
16 relevant bank accounts on the 4th December and he was then asked to provide
17 letters of consent concerning any accounts also in the name of Mrs. Breda Mara
18 which he did. And consequently from the 4th November 2000 onwards, we
19 submitted that the Tribunal had the ability to access every bank account held
20 by Mr. Mara and his wife for the relevant period and we understand that the
21 Tribunal acted on foot of these consents.

22

23 Mr. Mara's solicitors wrote to the Tribunal on the 9th October 2000 submitting
24 that the information sought by the Tribunal was excessively broad and outside
25 the Terms of Reference and these were readdressed to the Tribunal by
26 correspondence on the 10th November 2000. However, in order to demonstrate
27 Mr. Mara's good faith, the documentation sought was provided, notwithstanding
28 Mr. Mara's contention that the Tribunal was acting outside its Terms of
29 Reference.

1 Notwithstanding the provision of this information, further orders of discovery
2 were made by the Tribunal against Mr. Mara and his late wife on the 7th
3 December 2000. Again, Mr. Mara's solicitors reiterated their concerns by way
4 of letter dated the 8th December 2000, that the Tribunal was expanding its
5 inquiries into areas beyond its Terms of Reference and Mr. Mara's solicitors
6 wrote again in this regard on the 1st February 2001, on the 29th March 2001.
7

8 All the submissions by Mr. Mara to the Tribunal were made without prejudice to
9 his position that he did not fall within the Terms of Reference of the Tribunal
10 and many of the matters on which information was sought fell outside the Terms
11 of Reference.

12
13 The documents provided by Mr. Mara led to questions from the Tribunal about his
14 relationship with another communications company. He not only provided all the
15 information sought but asked that particular company to provide all relevant
16 documents held by them to the Tribunal and this was done.

17
18 On the 6th November 2000, the Tribunal ordered him to discover all records held
19 by him relating to any interest he had in or any payment he received from
20 another company involved in broadcasting and this information was given
21 initially by letter from Mr. Mara's solicitors on the 9th November.

22
23 Further queries on the operation of Mr. Mara's accounts within the relevant
24 periods were raised by the Tribunal and these were quickly addressed both in
25 correspondence and in an affidavit sworn by Mr. Mara on the 23rd November 2000.
26

27 As you may not be aware, Chairman, throughout October and November 2000,
28 Mr. Mara was in readiness to give evidence to the Tribunal, having been
29 informed that his evidence would be heard as I indicated on the 28th November,
30 that arrangement had to be postponed.

1
2 On the same date, i.e, the 28th November, the Tribunal first raised in
3 correspondence with Mr. Mara a further concern regarding an alleged beneficial
4 interest in another company and that he had received payments from yet another
5 company. On foot of these, I use the word "allegations" advisedly both of
6 which turned out to be wholly without substance. The Tribunal proposed to make
7 orders for discovery against Mr. Mara and his wife for all financial
8 transactions from 1988 onwards. The allegations about these two companies had
9 been given to the Tribunal prior to Mr. Mara's scheduled public appearance but
10 were nevertheless still advanced as reasons to further postpone it.

11
12 While Mr. Mara complained about this, he nonetheless provided affidavits from
13 his wife and himself to the Tribunal on the 1st December 2000, giving further
14 financial information and did so in the hope and expectation this would
15 accelerate his giving evidence.

16
17 On the 7th December 2000, the Tribunal confirmed its hope to call Mr. Mara to
18 give evidence before Christmas. However at the same time, the Tribunal then
19 made orders against Mr. Mara and Mrs. Mara seeking among other things all
20 documents relating to financial transactions carried out by them from the 1st
21 January 1988 to date.

22
23 In effect, therefore the Tribunal extended the time of period of discovery from
24 three to 12 years and it did so on foot of allegations or information which
25 transpired to be wholly unsubstantiated and groundless.

26
27 As I have indicated from that date to this, it is unclear what was the source
28 of this information.

29
30 Controversy did take place in January and February relating to the discovery

1 affidavit which is provided on the 5th January 2001. I do not think it is
2 necessary to go into that in any great detail now, save to say it was
3 maintained strongly by Mr. Mara's solicitors that the Affidavit of Discovery
4 provided was in compliance with the rules. It was maintained by counsel for the
5 Tribunal that it was not in compliance with the rules.

6

7 Regrettably, that matter which could have been dealt with, I would submit in
8 another way, again attracted a substantial degree of publicity.

9

10 On the 18th January 2001, it was suggested that Mr. Mara's affidavit was
11 inadequate and that it did not individually list many thousand financial
12 transactions that he and his wife had entered into between the years 1988 to
13 2001 and he was, he and his wife were required to individually list every
14 cheque stub they had completed over a 12-year period, despite the fact that the
15 Tribunal had access to most of the accounts in question and had the information
16 readily to hand on foot of the consents made.

17

18 I reiterate that none of the many thousands of financial transactions
19 discovered by Mr. and Mrs. Mara ever became the subject of public investigation
20 by the Tribunal, and when the entire discovery process had been completed
21 almost a year after it had started, the Tribunal was left precisely where it
22 was at its opening statement on the 18th July 2000, that is the statements
23 which proved to be ill-founded and unsubstantiated regarding, emanating from
24 Mr. Stafford and other information coming from an unidentified source which the
25 Tribunal did not see fit ever to deal with in public hearing at all.

26

27 The existence of the Isle of Man bank account held by Mr. Mara was not
28 disclosed to the Tribunal in these affidavits of discovery. Let me say that
29 Mr. Mara accepted this and apologised for it at the hearing of his evidence on
30 the 1st August. It is a matter for you, Chairman, to make a determination as

1 to whether this omission was or was not sufficient to justify being dealt with
2 over 18 pages out of the 75 pages of the transcript of his evidence. I say
3 that particularly in the light of the fact that, quite evidently, the Tribunal
4 became aware of the existence of the Pullman account on the 27th July 2001. It
5 was interesting, and I think one can draw inferences from this, that the
6 Tribunal and its counsel quite properly did not consider that anything raised
7 in the course of that letter justified the necessity of further investigation
8 or the need for further examination of documents.

9

10 In other words, by inference, what was being told to the Tribunal on the 27th
11 July was material which did not cause the Tribunal deep concern.

12

13 That was not to take away from the fact, and it must be accepted, that the
14 Tribunal should have been informed of that documentation. That is accepted and
15 must be accepted.

16

17 It is also relevant, I think Chairman, however, to point out that the
18 documentation in question, not only did not cause concern to the Tribunal but
19 also quite clearly related to matters which did not in any way and could not in
20 any way have caused, or come within the matters which were the subject matter
21 of consideration by the Tribunal.

22

23 A finding was made in chapter 17 of the report that Mr. Mara had failed to
24 cooperate with the Tribunal by failing to disclose the existence of this
25 account. Mr. Justice Flood did not accept Mr. Mara's explanation for failing
26 to disclose the account. At no stage prior to the interim report was an
27 indication given by the Tribunal that a potential finding of this type was
28 being considered, and for that reason our submissions to the Tribunal after
29 that part of the evidence was signed.

1 The situation as it existed at the time when Mr. Mara gave evidence was that
2 with the exception of this account, details of which were provided in the
3 letter of the 27th July from Mr. Mara's solicitor, and details of which had
4 already emerged on foot of the discovery process from the Bank of Ireland,
5 while it was considered and made the subject matter of rigorous
6 cross-examination, it was accepted, and I think it's accepted in the report,
7 that there was no link between any of Mr. Mara's financial records and any of
8 the matters which had caused concern to the Tribunal. No link at all. And
9 that finding is accepted by the Tribunal itself in its own findings.

10
11 I now want to turn very briefly to the particular facts and circumstances which
12 relate to Mr. Mara's position and the manner in which they relate to the
13 principles which you, sir, set out in your determination of the 30th June last.

14
15 It is not necessary, I think, for me to reiterate that the evidence that
16 Mr. Stafford on the 27th September 2000 was demonstrably unsatisfactory. That
17 the allegation of rumours was based on double hearsay and that the evidence
18 relating to the meeting which took place, allegedly, in circumstances which
19 were stated by Mr. Stafford to be "unusual" were the subject matter of evidence
20 from a number of different witnesses, all of whom differed from Mr. Stafford in
21 his interpretation. And they included persons of independence, such as
22 Mr. Laurence Crowley, Mr. Moore, an accountant, and other persons, none of whom
23 agreed with Mr. Stafford's testimony.

24
25 Insofar as the allegations were put to him regarding the substance of the
26 Tribunal's business, none of the allegations were substantiated.

27
28 It is perhaps, in hindsight, a matter for regret that none of these matters
29 were put to Mr. Mara in a private session at any stage. However, that was a
30 decision made by the Tribunal. It is also a matter for perhaps consideration

1 that these additional issues which arose apparently came to the attention of
2 the Tribunal after Mr. Stafford gave evidence on the 27th September 2000, in
3 circumstances where perhaps it might have been thought that his evidence was
4 less than satisfactory, even at that stage.

5
6 The correspondence which very recently took place between Messrs. Frys, who are
7 Mr. Mara's solicitors, and the Tribunal, very fairly indicates that the sole
8 source of the information to the Tribunal relating to this particular account
9 was the letter which came from Mr. Mara's solicitors on the 27th July 2001,
10 prior to his giving evidence. I think it's fair to say that the matter had
11 been slightly raised in a letter of the 1st May 2001 and that previously the
12 only, the last letter from the Tribunal was of the 6th April 2001.

13
14 I do not now intend to reiterate the point made in correspondence that there
15 was no evidential justification for Mr. Mara ever to be brought before the
16 Tribunal, or to be put to the expense running into six figures of vindicating
17 his good name, but I do want to draw attention now sir, to the distinguishing
18 features which in my respectful submission quite clearly identify Mr. Mara's
19 position as being an unusual and unique one, perhaps.

20
21 First of all, there was no finding at all of any policy of non-cooperation.
22 2. There was no finding against Mr. Mara relating to the substantive
23 allegations.
24 3. There was no finding of misleading the Tribunal on any relevant matter.
25 4. There was no dimension to his evidence such as would cast a shadow over his
26 testimony in the module as a whole.
27 5. His cooperation was not superficial cooperation.
28 6. His evidence was not such as to constitute a fundamental challenge to the
29 purpose of the creation of the Tribunal.
30 7. There was no evidence whatever of his testimony or any conduct on his part

1 having given -- had the effect of prolonging the work of the Tribunal.

2 8. None of the delays in calling him were of his making.

3 9. He did not make any allegation against any other person.

4
5 Therefore, save with the one isolated instance regarding the omission in the
6 Affidavit of Discovery, which was sworn in response to the order of the 7th
7 December 2000, in my respectful submission, Mr. Mara deserved to have his good
8 name vindicated.

9
10 The total number, taking the issues which were set out by you this morning,
11 Chairman, in your ruling, again applying those principles which broadly reflect
12 the principles you had earlier identified in your ruling of the 30th June and
13 your ruling relating to other respondents; there was no evidence of collusion,
14 there was no evidence that the omission of Mr. Mara touched on all issues,
15 there was no evidence that what was omitted related to all or some of the
16 issues, there was no evidence that what he did was designed to mislead on any
17 relevant matter before the Tribunal. And furthermore, it is a matter for you,
18 sir, to make a determination as to whether, having the benefit of hindsight,
19 the matters which were sought in any way advanced the work of the Tribunal or
20 in any way benefited the information which had been accumulated previously.

21
22 I say that the total number of transactions which would appear to have not been
23 the subject matter of disclosure would appear to constitute less than 10 out of
24 a total of 17,500 transactions. Not minimising what happened, but I do believe
25 that there should be no effort made to maximise what occurred. I do accept
26 that the matter should have been discovered, but it cannot be said, in my
27 submission, reasonably, that this in any way constituted a difficulty which
28 caused problems to the Tribunal at any stage.

29
30 I would respectfully submit that one cannot revisit and I cannot make any

1 submissions relating to the finding of failure of cooperation, but I think it
2 is only fair to reiterate the matters which I have outlined above regarding the
3 relevance or non-relevance of the material and the basis upon which the
4 decision was reached and the standard of proof which is applied.

5

6 In my respectful submissions therefore, Mr. Mara who was not a company or a
7 large company but a private citizen, is entitled to have an award of costs made
8 in his favour and I in due time, will be making the same application in
9 relation to Mrs. Breda Mara, who indeed was not even mentioned in the report,
10 but it has been indicated to us that that should be not be dealt with at this
11 stage.

12

13 In my respectful submission, the award of costs and in my submission, it should
14 be a full award of costs, would be just, fair and proportionate. If you are
15 against me on that, Chairman, and you feel that there is some question of, or
16 some issue which arises from the simple isolated area of non-disclosure, I will
17 say that the award of costs must be proportionate and that there is only one
18 isolated area where there was non-disclosure, in an area which in my submission
19 was not relevant to the work of the Tribunal and in no way constituted a
20 hindrance to the work of the Tribunal, nor indeed I would say could it have
21 been interpreted as a real figure of cooperation.

22

23 Effectively, therefore, chairman, the work of the Tribunal, which was rigorous,
24 which was thorough going and which took place over a period of two years, had a
25 very substantial effect on Mr. Mara's life. It is difficult perhaps to
26 overestimate the stress involved in being involved as a witness and having to
27 deal with correspondence and discovery under high pressure circumstances. I am
28 not making that as a misericordian plea because I accept it is a duty of every
29 citizen, who is called as a witness, to cooperate with the Tribunal in a manner
30 in which they should. I do, however, say, sir, that an award of costs in these

1 circumstances would in no way be unfair and the full order of costs would in
2 the circumstances be just and proportionate, and to use your own words, in your
3 determination of the 30th June "awards of costs should not be used as a
4 penalty".
5

6 Thank you very much for your attention. Just allow me one second just to
7 confirm that there aren't any other matters?
8

9 No. Thank you very much, Chairman.
10

11 CHAIRMAN: Thank you, Mr. McMenamin. All right. I will endeavour to give a
12 decision as quickly as possible. You will be informed. Thank you very much.
13

14 **THE TRIBUNAL THEN ADJOURNED UNTIL**
15 **MONDAY, 20TH SEPTEMBER 2004 AT 10.30 A.M.**
16

17
18
19
20
21
22
23
24
25
26
27
28
29
30