

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

**21ST SEPTEMBER 2004 AT 11.00 A.M.:**

CHAIRMAN: Good morning. Firstly, I will give my rulings on two applications for costs, one by Mr. Hugh Owens and one of Mr. PJ Mara. First the application for costs by Mr. Hugh Owens.

Counsel on behalf of Mr. Hugh Owens made an application for costs to me on the 6th September 2004, making oral submissions to me on that date, in support of the application and having previously made written submissions. I have considered these submissions together with submissions made on behalf of the Minister for Finance and the Attorney General.

The Tribunal granted limited representation to Mr. Owens and he has had the benefit of representation by counsel and solicitor in the course of private and public inquiries conducted by the Tribunal, insofar as they have related to him.

Mr. Owens gave evidence under oath to the Tribunal over two days on the 30th and 31st October 2001. Mr. Owens also provided the Tribunal with a written narrative statement and through his solicitors was engaged in correspondence with the Tribunal over an extended period of time.

Mr. Owens has submitted a costs bill to the Tribunal which is slightly in excess of 125,000 euro. Mr. Owens' involvement in the inquiries of the Tribunal arose from his professional relationship with Mr. Tom Brennan and Mr. Joseph McGowan and companies, and other entities connected to either or both of these gentlemen. Mr. Owens was at all material times aware that the Tribunal's relevant inquiries were concerned with the investigation of the extent and nature of payments made by his former clients or companies or

10:38:59 1 entities connected to them, to Mr. Raphael Burke.

2

3 In its Second Interim Report published in September 2002, the Tribunal made the  
4 following adverse finding against Mr. Owens on the issue of cooperation with

10:39:11 5 the Tribunal in relation to the Brennan and McGowan module.

6

7 Paragraph 17.09 of the report, "Mr. Owens was an accountant and adviser to

8 Messrs. Brennan and McGowan, the Tribunal is satisfied that he failed to

9 cooperate with the Tribunal by failing to provide a full explanation of the

10:39:29 10 schemes which he had devised for Messrs. Brennan and McGowan in relation to the

11 land transactions with which they were involved with Mr. Finnegan and which

12 resulted in funds being distributed in Jersey from which Mr. Burke received

13 60,000 pounds sterling in November 1984."

14

10:39:48 15 Although Mr. Owens' involvement with Mr. Brennan and Mr. McGowan was in his

16 professional capacity as an accountant and therefore limited to that extent,

17 his value as a witness to the relevant financial affairs of his former clients

18 was of significance and always had the potential of providing extremely useful

19 information to the Tribunal in its private and public inquiries.

10:40:10 20

21 I have no doubt that Mr. Owens was at all times aware of his value as a

22 witness. He must have been aware of his obligation to cooperate with the

23 Tribunal and to provide it with information which he believed to be truthful

24 and accurate.

10:40:23 25

26 The adverse finding made against Mr. Owens by Mr. Justice Flood is confirmation

27 that Mr. Owens failed in his legal obligation to cooperate with the Tribunal,

28 and while his evidence on its own might not be said to be crucial to the work

29 of the Tribunal, it is nevertheless a fact that his cooperation would as a

10:40:43 30 matter of probability have significantly assisted the Tribunal in finding the

10:40:48 1 truth of the nature and extent of payments made to Mr. Burke by his former  
2 clients.  
3  
4 Mr. Owens now submits that he should recover his legal costs from the State  
10:40:58 5 through his counsel, he has argued that inter alia there were no consequences  
6 for the Tribunal's work by reason of Mr. Owens' non-cooperation. This  
7 submission is not, I believe, borne out by the facts.  
8  
9 Equally, submissions made to the effect that because it was never put to Mr.  
10:41:14 10 Owens by lawyers for the Tribunal that his evidence was unsatisfactory, should  
11 support an application for cost is without merit.  
12  
13 On the basis of the foregoing, Mr. Owens could not realistically have any  
14 expectation for an award of costs to be made by the Minister for Finance.  
10:41:31 15  
16 However, when enunciating principles that should be taken into account in  
17 determining whether an award of all or a portion of a party's costs is  
18 warranted, I indicated that consideration would be given to an individual's  
19 personal financial circumstances, and the likely effect that a refusal of an  
10:41:49 20 award of costs might have on that individual's personal financial  
21 circumstances. In this instance, I am dealing with a 74 year old retired  
22 individual and whom I accept would likely find the discharge of all of his  
23 costs a very great financial burden.  
24  
10:42:04 25 Accepting that this is the case, and having regard to the fact that Mr. Owens'  
26 overall role in the Tribunal's investigations was limited, although important,  
27 and having regard also to the fact that there was no adverse finding against  
28 him in relation to any substantive issue being inquired into by the Tribunal, I  
29 propose to award Mr. Owens 30 percent of such costs as are assessed by the  
10:42:30 30 Taxing Master. Costs are to be assessed on a party and party basis.

10:42:34 1  
2 The ruling of the Tribunal on the application for costs by Mr. PJ Mara:  
3  
4 Mr. PJ Mara, through his senior counsel, applied on the 7th September 2004 for  
10:42:52 5 an order directing the Minister for Finance to pay his legal costs associated  
6 with the work of the Tribunal, leading to its Second Interim Report subject to  
7 taxation by the Taxing Master of the High Court. Mr. Mara has submitted an  
8 estimated costs bill to the Tribunal in excessive of 80,000 euro, exclusive of  
9 counsel's fees which have not yet been specified.

10:43:12 10  
11 In support of his application for costs, Mr. Mara's legal representatives made  
12 both written and oral submissions. I have carefully considered these  
13 submissions and submissions made on behalf of the Minister for Finance and the  
14 Attorney General.

10:43:26 15  
16 In its Second Interim Report, the following adverse finding was made against  
17 Mr. Mara in relation to his cooperation with the Tribunal in the course of  
18 their investigations into the Century Radio Module. At page 144, paragraph  
19 17.13 and I quote:

10:43:44 20  
21 "The Tribunal is satisfied that Mr. PJ Mara failed to cooperate with the  
22 Tribunal by A, failing to provide the Tribunal with details of an account in  
23 the name of Pullman Limited, operated by him, in the name of the Royal Bank of  
24 Scotland in the Isle of Man, when swearing his Affidavit of Discovery made  
10:44:04 25 pursuant an order for the Tribunal requiring him to discover inter alia any  
26 such account."  
27  
28 No adverse finding relating to any substantive matter being investigated by the  
29 Tribunal was made against Mr. Mara. Mr. Mara's involvement with the Tribunal  
10:44:20 30 arose in the course of the Tribunal's inquiries in the Century Radio Module and

10:44:25 1 in particular, his role in the promoters of the radio station. His involvement  
2 initially arose because of information furnished by Mr. James Stafford  
3 concerning allegations that Mr. Mara was to receive substantial payments  
4 connected to the granting of a broadcasting licence to Century Radio. Mr. Mara  
10:44:44 5 was the subject of a number of discovery orders and requests for documentation  
6 by the Tribunal in 2000 and 2001. Particularly relating to details of bank  
7 accounts. While it has been contended on business half that ultimately nothing  
8 of substance turned on the information furnished to the Tribunal on foot of  
9 such orders and requests, and no adverse findings on any substantive matter was  
10:45:08 10 made against Mr. Mara based on any of this material, I accept that it was  
11 nevertheless necessary and appropriate that the Tribunal sought this  
12 documentation and that it did so in compliance with its Terms of Reference.

13  
14 There was at all times a legal obligation on Mr. Mara to fully comply with all  
10:45:26 15 such orders made irrespective of the perceived or actual relevancy of the  
16 documentation sought or furnished, subject to his rights to challenge to any  
17 such order in the High Court. No such challenge was taken by him.

18  
19 The adverse finding made against Mr. Mara relates to his failure to provide the  
10:45:43 20 Tribunal with full and comprehensive details of his bank accounts and in  
21 particular, failing to acknowledge the existence of an account with Bank of  
22 Scotland in the name of Pullman Limited. This failure was clearly in breach of  
23 the Order for Discovery made on the 7th December 2000.

24  
10:46:00 25 Mr. Mara was given reasonable notice of the Tribunal's intention to make the  
26 order and was afforded an opportunity to state his reasons for objecting to any  
27 such order being made.

28  
29 The power to make orders for discovery and production of documents is essential  
10:46:16 30 to the work of the Tribunal, without such powers the Tribunal would be severely

10:46:22 1           handicapped and restricted in its ability to investigate. It therefore follows  
2           any failure to fully and comprehensively comply with such orders is a matter of  
3           extreme seriousness, even where ultimately compliance yields no worthwhile  
4           information or additional information to that already in the Tribunal's  
10:46:40 5           possession. In determining an individual's entitlement to recover his costs it  
6           is incumbent on the Tribunal to act in a manner which is fair, reasonable and  
7           proportionate.

8  
9           I believe it is fair, reasonable and proportionate to award Mr. Mara his costs  
10:46:53 10          on a party and party basis with the exception of the costs associated with the  
11          said Order for Discovery made on the 7th December 2000.

12  
13          The award of costs is subject to taxation by the Master of the High Court. And  
14          that concludes the ruling.

10:47:12 15  
16          We are sitting again at 11.

17  
18          MR. O'NEILL: 11 o'clock, sir, yes.

19  
10:47:21 20          **THE TRIBUNAL THEN ADJOURNED UNTIL 11 O'clock.**

21  
22  
23  
24          CHAIRMAN: Good morning.

11:06:35 25  
26          MR. O'NEILL: Good morning. Sir, the sequence of hearings scheduled for today  
27          involved firstly, Mr. Michael Foley, secondly, Mr. John Mulhern's application  
28          and thirdly the application of Mr. Oliver Barry.

29  
11:06:48 30          I think it may, from a housekeeping point of view, prove more effective if that

11:06:53 1 order was to be reversed and if Mr. Barry's application was to proceed in the  
2 first instance. I have discussed this with my colleagues who are happy to  
3 adopt that course but subject only to being allowed perhaps ten minutes to put  
4 their affairs in order so as to ensure that the matter can proceed  
11:07:16 5 expeditiously. I should say that Mr. Foley's application will not involve any  
6 oral submissions to you today, the solicitors acting on his behalf have  
7 indicated that they are happy to rely upon the written submissions that they  
8 have submitted on the issue to the Tribunal and that they will not be appearing  
9 here today to make further submissions or elaborations on those submissions so  
11:07:37 10 that Mr. Barry and Mr. Mulhern's applications will then proceed.

11

12 CHAIRMAN: Do you want me to rise?

13

14 MR. O'NEILL: I would invite you to rise for 10 minutes.

11:07:55 15

16

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

17

**AND RESUMED AS FOLLOWS:**

18

19 MR. O'NEILL: Thank you, Mr. Chairman. I'll outline the background to this  
11:20:31 20 current application which is being made by Mr. Oliver Barry for his legal costs  
21 to be discharged by the Minister for Finance through the Tribunal.

22

23 The involvement of Mr. Barry in the matters reported on in the Second Interim  
24 Report arise exclusively from the Century Module of the report. The findings  
11:20:48 25 of the Tribunal in respect of Mr. Oliver Barry in the Century Module are  
26 contained in chapters 5 to 10 of the report and the conclusions on cooperation  
27 at chapter 17. Adverse findings were made against Mr. Barry both in respect of  
28 matters of cooperation with the Tribunal and also on the substantive issues.

29

11:21:09 30

The background to his involvement with the Tribunal is as follows:

11:21:13 1  
2 In the course of the Tribunal's inquiries into Mr. Ray Burke's finances, it  
3 emerged that a lodgment of 39,500 pounds had been made to one of Mr. Burke's  
4 bank accounts on the 31st May of 1989.

11:21:27 5  
6 Mr. Burke informed the Tribunal that this lodgment was made up of political  
7 donations received by him, one of which was a donation in the sum of 35,000  
8 pounds from Mr. Oliver Barry who was involved in the entertainment business.

11:21:41 9  
10 At the time of this payment, Mr. Barry was centrally involved with a company  
11 called Century Communications Limited, which in January 1989 had been awarded a  
12 first independent national sound broadcasting contract in the State.

13  
14 As Minister for Communications at the date of the payment to Mr. Burke who was  
11:22:01 15 responsible for matters relating to the grant of broadcasting licences. This  
16 connection caused what was later to be called the Century Module Inquiry to be  
17 undertaken. The Tribunal investigated the purpose of this payment and its  
18 possible connections with any actions or decisions taken by Mr. Burke in the  
19 exercise of his public duties as Minister for Communications, which may have  
20 been affected by this payment.

21  
22 At the time the broadcasting licences were granted, it was anticipated that  
23 those who were awarded sound broadcasting licences would choose to use the  
24 pre-existing National Transmission Network which was vested in RTE to broadcast  
11:22:42 25 their signals.

26  
27 For Century the use of the RTE transmission facility was essential as to  
28 construct its own transmission network would have taken too long and would have  
29 been too costly to give effect to their plans.

11:23:01 30

11:23:01 1 Section 16 of the Radio and Television Act of 1988 provided as follows:

2

3 "1. The minister may at the request of the commission and after consultation

4 with RTE, require the latter to cooperate with sound broadcasting contractors

11:23:10 5 in the use of any mast, tower, site or other installation or facilities needed

6 in connection with the provision of transmission facilities for sound

7 broadcasting services to be established under this act.

8

9 2. The sound broadcasting contractor shall make to RTE such periodic or other

11:23:28 10 payments in respect of any facilities provided in pursuance of sub-section 1,

11 as the minister after consultation with RTE and the commission direct.

12

13 Mr. Burke had stated to the Dail that the thrust of Section 16 was that there

14 should be this type of cooperation between RTE and broadcasters and that any

11:23:47 15 such cooperation should be rendered on a commercial basis.

16

17 Following consultation with and analysis by the Department of Communications,

18 agreement was reached with RTE as to the appropriate charges that should be

19 levied on any licensee seeking to use the RTE transmission facilities. The

11:24:05 20 minister then wrote to the chairman of the IRTC, indicating that the sum agreed

21 was not unreasonable in Irish circumstances. Century, however, was not

22 prepared to pay the amount which had been agreed between the department and RTE

23 and approved by the minister and sought a Ministerial Directive pursuant to

24 Section 16 of the 1988 Act.

11:24:23 25

26 Despite having previously determined that the figures which had been agreed

27 with RTE were not unreasonable and despite the absence of any further

28 information to suggest otherwise, Mr. Burke issued a directive on the 14th

29 March 1989, providing that the charges payable to RTE would be substantially

11:24:40 30 less than those which had been agreed. The Tribunal held that Mr. Burke's

11:24:43 1 directive was a total reversal of his previous position. It was contrary to  
2 the advices of his department and was unsupported by any independent evaluation  
3 of the argument advanced by Century. It conferred a substantial benefit upon  
4 Century. The Tribunal held that it was satisfied that Mr. Burke's directive  
11:25:02 5 was heavily weighted in Century's favour in circumstances where there was  
6 clearly sufficient evidence available to the minister to support Century's  
7 contentions. The Tribunal held that it was satisfied in giving his directive,  
8 Mr. Burke did not act in the public interest but was acting to serve the  
9 private interests of the promoters of the Century Radio.

11:25:20 10  
11 Sometime later on the 26th May 1989, Mr. Barry paid over the sum of 35,000  
12 pounds in cash to Mr. Burke. The Tribunal found that this payment to Mr. Burke  
13 was made following upon a specific request for payment of 30,000 pounds in cash  
14 made by Mr. Burke nominally for Fianna Fail.

11:25:42 15  
16 Mr. Barry's evidence was that he had made the payment to Mr. Burke on behalf of  
17 Century because he felt it was in the company's best interests to do so.  
18 Mr. Burke had been Minister for Communications in the outgoing government and  
19 he had introduced commercial broadcasting into the State.

11:25:57 20  
21 Mr. Barry said that he felt that it would have been disadvantageous to his  
22 investment in Century if Fianna Fail did not get back into power. Once  
23 Mr. Burke had made a demand of him for 30,000 pounds, he felt that it was in  
24 Century's interest to make a payment to Mr. Burke in the sum of 35,000 pounds.  
11:26:16 25 The Tribunal held that it was clear from Mr. Barry's evidence that whilst the  
26 demand was made of him personally by Mr. Burke, it was his decision to make the  
27 payment on behalf of Century. In doing so, he claimed that it was less of a  
28 financial burden upon him as the other two promoters would share in the  
29 contribution. Mr. Burke's assistance was again sought after the 35,000 pounds  
11:26:37 30 payment had been made to him. In an endeavour to save Century from the

11:26:42 1 financial crisis in which it found itself only three months after going on air.  
2 Century had failed to attract audiences or to reach advertising revenue  
3 targets. On the 19th December 1989, two meetings were held which were attended  
4 by Mr. Burke, Mr. Barry and Mr. Stafford. Mr. Burke was appraised of the dire  
11:27:03 5 financial position of Century at that time, which Mr. Stafford claimed was due  
6 to purported abuses of the dominant position by RTE.

7  
8 Mr. Barry and Mr. Stafford threatened to liquidate Century unless something was  
9 done by Burke. On the second meeting that day which was also attended by the  
11:27:24 10 Secretary General of the Department of Communications, Mr. Burke as Minister  
11 for Communications gave assurances that he would take such measures as were  
12 necessary to curb RTE's advertising times, possibly by up to 50 percent.

13  
14 Despite advices from his department that a reduction in RTE's advertising time  
11:27:37 15 would not necessarily result in an inflow of advertising revenue to Century,  
16 due to Century's lack of programming appeal and concerns within the department  
17 that the reduction of income to RTE, then estimated to be in the region of 12  
18 to 14 million pounds, legislation to curb RTE's advertising ability with the  
19 aim of assisting Century was introduced by Mr. Burke. By December 1989,  
11:28:03 20 Century was seriously in breach of the undertakings given to its bank at the  
21 time of taking out its loans facilities in October 1989. However, Mr. Barry  
22 and Mr. Stafford advised the bank that the Minister, Mr. Burke, would be  
23 pleased to meet with the representatives from the bank to offer reassurances  
24 with regards to steps that would be taken to curb RTE's advertising times.

11:28:25 25 This offer was taken up by the bank on the 22nd December 1989.

26  
27 In the course of that meeting, Mr. Burke gave assurances to the bank and  
28 confirmed a commitment to Century. The Tribunal held that the assurances given  
29 to the bank by a cabinet minister influenced the bank in their decision to  
11:28:42 30 continue providing finance to Century. The proposal to divert licence fee

11:28:47 1 income away from RTE and towards the independent broadcasters, where Century  
2 was likely to be the main beneficiary, was put before the Dail by Mr. Burke on  
3 the 29th May 1990. The Tribunal was satisfied that Messrs. Barry and Stafford  
4 were the instigators of this proposal. It was considered that the speed with  
11:29:05 5 which Mr. Burke adopted this proposal was indicative of his overriding desire  
6 to assist Century's promoters. The Tribunal held that Mr. Burke's decision to  
7 do so was motivated by the payment made to him on Century's behalf.

8  
9 In the same speech to the Dail, Mr. Burke also outlined the government's  
11:29:26 10 intention to develop plans for an alternative use for 2FM. 2FM was Century's  
11 main competitor and in a memorandum of a meeting with Century's public  
12 relations firm, it was stated:

13  
14 "The most practical and beneficial solution based on the information available  
11:29:48 15 to us is that the transfer of 2FM to Century is both in the best interests of  
16 Radio 1 and Century. It allows Radio 1 to compete in the open market with  
17 Century."

18  
19 In the absence of any investigation being carried out within his own  
11:30:04 20 department, to establish the viability and consequences of moves to alter 2FM's  
21 radio programme content, the Tribunal held that it was satisfied that the only  
22 factors which caused this matter to be raised in the Dail were the persistent  
23 attempts by Mr. Stafford and Mr. Barry to have the minister alter the status of  
24 2FM to their company's advantage. The Tribunal concluded that the payment of  
11:30:27 25 35,000 pounds to Mr. Burke by Mr. Barry in May 1989 had the effect of ensuring  
26 that the decisions made by Mr. Burke in his capacity as Minister for  
27 Communications, would reflect favourably upon those who had paid him this sum.  
28 The Tribunal further concluded that the assurances given to Century's bankers  
29 were given to advance the private interest of Century's promoters and not to  
11:30:51 30 advance the public interest.

11:30:53 1  
2 The Tribunal was satisfied that Mr. Burke's decision in relation to the  
3 proposed capping of RTE's advertising income, the diversion of licence fee  
4 income from RTE and the possible reorganisation of 2FM, were all motivated by a  
11:31:07 5 desire on his part to benefit those who had paid monies to him and that the  
6 proposals on such issues would not have been advanced by Mr. Burke at that  
7 time, were it not for the fact that he had been paid 35,000 pounds.

8  
9 In all these circumstances, the Tribunal's conclusion on the substantive issues  
11:31:23 10 arising from the payment of 35,000 pounds to Mr. Burke, was that the payment to  
11 Mr. Burke was a corrupt payment which ensured that he was available to serve  
12 the interests of Century's promoters and not the public interest.

13  
14 Mr. Barry was also involved with the Tribunal in its inquiry into the alleged  
11:31:43 15 rumours of demands for payment to Mr. Mara and Mr. Burke being made for  
16 broadcasting licences, upon which no findings reached by the Tribunal due to  
17 the conflicts of evidence and the absence of any contemporaneous documentation  
18 to support any single version of events.

19  
11:32:03 20 The Tribunal could not reconcile the evidence of the four participants at the  
21 meeting in March 1990, i.e. Mr. Barry, Mr. Stafford, Mr. Mara and Mr. Desmond,  
22 nor could it pronounce with any degree of certainty on the likely explanation  
23 for the meeting, which undoubtedly took place in Mr. Desmond's office. The  
24 Tribunal is not satisfied that Mr. Stafford's allegation that 30,000 pounds was  
11:32:28 25 demanded of Century by Mr. Mara had been substantiated having regard to the  
26 standard of proof required to make such a finding.

27  
28 On the issue of cooperation, the Tribunal held that Mr. Oliver Barry had  
29 obstructed and hindered the Tribunal by:

11:32:46 30 A. Failing to provide a truthful account as to why he had paid Mr. Burke

11:32:50 1 35,000 pounds in May 1989.  
2 B. Failing to provide the Tribunal with a truthful account of the role played  
3 by him and by Mr. Stafford in ensuring that Mr. Burke issued a directive in  
4 March 1989 to RTE concerning transmission charges.

11:33:05 5 C. Failing to give a truthful account of the role played by him and by  
6 Mr. Stafford in ensuring that Mr. Burke would introduce legislation to cap  
7 RTE's advertising income, or to redistribute RTE's licence fee income and to  
8 change the role of 2FM.

9 D. Failing to provide a truthful account of the reimbursement to him of the  
11:33:28 10 35,000 pounds which had been paid personally to Mr. Burke in May 1989 and,  
11 E. Failing to comply with the Tribunal's orders for discovery within the time  
12 limited for so doing or within a reasonable time thereafter.

13  
14 This application for legal costs arises from the fact that Mr. Barry was  
11:33:44 15 granted limited legal representation by the Tribunal on the 9th February 2000,  
16 he was represented by both senior and junior counsel and by solicitors during  
17 the course of the Tribunal's hearing.

18  
19 Mr. Barry's then solicitor, Mr. John O'Connor, was written to on the 13th  
11:34:04 20 November 2002 by the Tribunal requesting that if an application for costs was  
21 being made by Mr. Barry, that the details and the basis of any such application  
22 and an estimate of the amount of such costs should be furnished to the  
23 Tribunal. Mr. Barry provided submissions to the Tribunal in relation to the  
24 application being made by him. On the 2nd December 2002, and subsequent  
11:34:29 25 submissions were also provided on behalf of Mr. Barry in respect of the  
26 submissions on the principles to be exercised by you, Mr. Chairman, in the  
27 exercise of your discretion in respect of the applications for costs. These  
28 were made on the 8th May 2003, through Mr. Ivor Fitzpatrick, solicitor, now  
29 acting on behalf of Mr. Barry, and subsequent submissions were made on the 4th  
11:34:54 30 June, 2004.

11:34:56 1 Mr. Faulknan and Mr. Cush appear today on behalf of Mr. Barry in this  
2 application.

3  
4 CHAIRMAN: How many days do we know did Mr. Barry give evidence?

11:35:09 5  
6 MR. O'NEILL: The Century Module which involved Mr. Barry had 85 days of  
7 evidence in relation to the substantive issues and that was whilst Mr. John  
8 O'Connor's firm was representing him. Prior to that, there had been discovery  
9 issues in which LK Shields, solicitors, were representing his interests through  
10 and represented by Mr. Colm Allen, senior counsel, and I think those involved  
11 two days of hearings, so I think it would be fair to say that there were 87  
12 days of public hearings directly involved with the Radio Module and Mr. Barry's  
13 particular involvement.

11:35:48 15 CHAIRMAN: Is there a figure for costs, was there a figure?

16  
17 MR. O'NEILL: The estimate which had been provided by Mr. O'Connor and this was  
18 provided in December of 2002, there's the breakdown, I think totalled 611,000  
19 euro approximately. As between solicitors and counsel, I think that breakdown  
20 is probably 300,000 for the solicitors --

21  
22 CHAIRMAN: Is this euro?

23  
24 MR. O'NEILL: This is euro, yes, sir. There were a number of counsel involved  
11:36:31 25 in view of the change of solicitors over time. There were three firms of  
26 solicitors involved and I think a total of six counsel advised at various  
27 stages. Counsel's fees I think broke down as brief fees for senior counsel of  
28 26,500 pounds and daily rates varying from 2,100 pounds per day to 3,100 pounds  
29 per day, depending on which counsel was involved.

11:37:09 30

11:37:09 1 There were then fees to witnesses, including accountants and others which were  
2 estimated at 38,400.00, that was a rough summary.  
3  
4 CHAIRMAN: All right. Mr. Cush?

11:37:24 5  
6 MR. CUSH: Thank you, sir. I am grateful for the few minutes I was afforded  
7 by reason of the change in scheduling. Sir, taking the findings of the  
8 Tribunal of course as read and I just want to say at the outset I am not here  
9 to challenge those findings, but I will be asking you to look at them in some  
11:37:48 10 detail. And I am of course abiding by the principles that you yourself have  
11 outlined in your previous ruling and I won't be endeavouring to go behind that.  
12  
13 If I just say, sir, that I am in a somewhat similar position to yourself in  
14 that I personally had no dealings whatsoever with the Century Module either on  
11:38:13 15 behalf of Mr. Barry or any other client, and I have been instructed only in  
16 relation to this aspect of matters. And like yourself, therefore, I start my  
17 investigation of this issue by looking to the report and when I look to page  
18 143 of the report, which contains the findings in relation to cooperation of  
19 the Tribunal, I see listed what appeared to be five distinct findings and Mr.  
11:38:47 20 O'Neill has summarised them accurately.  
21  
22 This is paragraph 17.11 and what I'm proposing to do Sir, and I will be just a  
23 little time with this, perhaps my whole submission might be 40-odd minutes.  
24  
11:39:10 25 If we look to the A to D, for example, in paragraph 17.11, those findings  
26 appear at first reading to be significant findings stretching over a broad  
27 aspect of the Tribunal's work. And then E is clearly a stand alone finding  
28 because it relates to discovery. But A to D would appear to be separate and  
29 distinct findings of a failure to give a truthful account in relation to a  
11:39:43 30 variety of matters.

11:39:45 1  
2 But, Sir, it's in my respectful submission, when one goes to the report, one in  
3 fact finds, what I submit, must be the true picture. That in substance, this  
4 is one finding, best summarised, I respectfully suggest, in paragraphs A and D,  
11:40:16 5 particularly A, Sir, why he paid Mr. Burke 35,000 in May 1989. And I say that,  
6 Sir, because when one looks to paragraph B and C, and one goes back to the  
7 report B, dealing with transmission charges and C, dealing with advertising cap  
8 and the like. One finds in the body of the report a significant and detailed  
9 account of the Tribunal's examination and of its findings. But nowhere in B  
11:40:53 10 and C, and I will be bringing you through this, Sir, is there a single  
11 statement to the effect that there is a portion of Mr. Barry's evidence which  
12 is not accepted.

13  
14 Now, quite clearly in relation to A, the Tribunal says we don't accept his  
11:41:10 15 explanation as to why he paid the money and I will come back to that in some  
16 detail but in B and C, there is nothing in the report that I can see to say  
17 what he said about the facts or some part of his evidence is not to be believed  
18 and I think on analysis, one will see that really, findings A to D are but a  
19 number of elements of the same finding.

11:41:35 20  
21 So, if I may, sir, spend a little time on that, ultimately with a view to  
22 asking you to attach the appropriate weight to these findings, not to undermine  
23 them or second guess them but in this application for costs, to attach what you  
24 find is the appropriate weight. And then having done that, which would be the  
11:41:57 25 bulk of the time, I want to spend a little time outlining a couple of matters  
26 in Mr. Barry's favour but don't find their way into the report as it were for  
27 example, time spent on issues in respect of which there were no adverse  
28 findings at all, either in substance or in relation to his levels of  
29 cooperation.

11:42:16 30

11:42:16 1 Sir, if I could take the payment first of all to Mr. Burke. And the Tribunal's  
2 report there begins on page 47, sir and the first question which the Tribunal  
3 set out to resolve is articulated in paragraph 7.06 whether the payment was  
4 sought from Mr. Barry by Mr. Burke or whether it was volunteered by Mr. Barry  
11:43:10 5 to Mr. Burke. Because at the very outset there was no dispute but that the  
6 payment had been made, but this was the first factual issue to be resolved.  
7  
8 You see, sir, that Mr. Barry's version of events is summarised in 7.03. He  
9 says Mr. Burke asked him for 30,000 pounds in cash as a contribution for the  
11:43:25 10 Fianna Fail party and specified that the payment should be made in cash. A  
11 little further down, the last sentence in that paragraph, sir, reads:  
12  
13 "The Tribunal considers that had such a request been made by the minister, it  
14 would in effect have constituted a demand for payment which could not have been  
11:43:45 15 refused by Mr. Barry, given his company's ongoing relationship with the  
16 Department of Communications". And then Mr. Burke's version is set out. And  
17 he said the exact opposite. He said "I didn't seek this payment at all, it was  
18 volunteered to me."  
19  
11:44:04 20 Now on that factual controversy, the Tribunal found in favour of Mr. Barry.  
21 And you see that over the page, sir, in paragraph 7.08, the last sentence, the  
22 Tribunal is satisfied that 35,000 paid to Mr. Burke was paid following upon his  
23 having sought a payment of 30,000 in cash, not only for Fianna Fail from  
24 Mr. Barry as claimed by Mr. Barry and the sum was not volunteered by Mr. Barry  
11:44:41 25 as claimed by Mr. Burke."  
26  
27 That's a significant factual controversy resolved in Mr. Barry's favour.  
28  
29 Another matter that's of some significance in relation to Mr. Barry's motive,  
11:44:59 30 is the finding at 7.09 the first sentence reads:

11:45:09 1  
2 "The Tribunal concludes that Mr. Burke has endeavoured to conceal from the  
3 Tribunal the true nature of the payment made to him. On Mr. Burke's own  
4 admission, no part of the 35,000 pounds received from Mr. Barry went directly  
11:45:21 5 to the Fianna Fail party. Although the Tribunal is satisfied that this was the  
6 stated reason given by him when the demand for payment was made of Mr. Barry."  
7  
8 Again, that's precisely what Mr. Barry said was the request made of him. And  
9 the Tribunal upheld his version in that regard, namely that it was a payment  
11:45:43 10 for Fianna Fail. So that factual controversy is resolved entirely in  
11 Mr. Barry's favour. The Tribunal then goes on towards the end of that page in  
12 paragraph 7.12, to consider what was Mr. Barry's motive. And this gives rise  
13 to the first adverse finding, sir, but it's instructed on my respectful  
14 submission on what weight is to be attached to this adverse finding.  
11:46:16 15  
16 To look at precisely what was the difference between Mr. Barry's version and  
17 what the Tribunal held to be the fact. Because Mr. Barry said, he made payment  
18 to Mr. Burke on behalf of Century because it was felt, because he felt it was  
19 in the company's best interests so to do. Mr. Burke had been Minister for  
11:46:35 20 Communications in the outgoing government, he had introduced commercial  
21 broadcasting in the State, he felt it would be disadvantageous to his  
22 investment in Century if Fianna Fail did not get back into power. Whilst  
23 Mr. Burke had made a demand of him for 30,000, he felt it was in Century's  
24 interest to make a payment to Mr. Burke in the sum of 35.  
11:46:55 25  
26 Now pause there for a moment, that's his version events, bear in mind the  
27 Tribunal itself held earlier in paragraph 7.03, that had Mr. Burke made such a  
28 demand in effect in commercial reality terms, it couldn't have been refused.  
29 That's what the Tribunal said. Now, that, in my respectful submission, sir, is  
11:47:32 30 a very significant admission made by Mr. Barry. He is saying openly to the

11:47:37 1 Tribunal, I paid Mr. Burke money because he asked me for it, I felt it was in  
2 the company's interests, he said it was for Fianna Fail and I felt it was in  
3 the company's interest that a payment be made via him to Fianna Fail.

11:47:51 5 He says that's why I made it. Now, every factual ingredient of that version of  
6 events is upheld in Mr. Barry's favour. And even had the Tribunal accepted  
7 that, I suspect, sir, eventually that the Tribunal would nonetheless have  
8 criticised the payment and perhaps eventually they did, it was quite  
9 inappropriate for a company in active commercial dealings with the Minister for  
11:48:36 10 Communications, to make such a large political donation through the Minister  
11 for Communications. But what the Tribunal in fact did was to say, we don't  
12 accept that your motive was a payment to Fianna Fail, instead we find that your  
13 motive was a payment to Mr. Burke.

11:48:53 15 That's the only difference between Mr. Barry's version and the Tribunal's  
16 findings. And you see that, sir, in paragraph 7.26:

17  
18 "The Tribunal is satisfied that at the time of the payment of the monies to  
19 Mr. Burke, Mr. Barry knew that the sum was a payment to Mr. Burke to be used  
11:49:25 20 for his own purposes, and that it was not a political donation to either Fianna  
21 Fail or to Mr. Burke, although Mr. Burke used those words making his demand of  
22 Mr. Barry for 30,000 pounds in cash."

23  
24 Now, that finding, sir, is based largely on the analysis that appears in the  
11:49:46 25 previous page, page 49, in relation to the accounting treatment of this payment  
26 in the books of Mr. Barry and in companies with which he was associated.

27  
28 And from that circumstantial evidence, and that's what it is, the Tribunal made  
29 the finding that it did in rejecting what Mr. Barry said his motive for the  
11:50:21 30 payment was. So, it is of course open to the Tribunal to reject his evidence

11:50:44 1 in relation to his motive and it isn't open to me in this application to  
2 challenge that finding. But it is, sir, open to you to consider what weight is  
3 to be attached to the finding, bearing in mind that particular analysis,  
4 bearing in mind everything that Mr. Barry volunteered on the facts and bearing  
11:51:06 5 in mind that his version, although challenged by others, was accepted.  
6

7 I do say, sir, and I don't expect you to entertain it here, but I do say that  
8 having made that finding in substance, it is not appropriate for the Tribunal  
9 to have automatically translated that rejection of his version of events into a  
11:51:39 10 finding of obstruction and hindrance, which is a criminal offence. I don't  
11 expect you to accept that for a moment but again, sir, I ask you to attach some  
12 weight to that, because it is the fact that this finding that we have just  
13 looked at in the report, without more, there's nothing more in this one,  
14 translates automatically into the sentence on page 143:

11:52:14 15  
16 "The Tribunal is satisfied that Mr. Oliver Barry obstructed and hindered the  
17 Tribunal by failing to provide a truthful account as to why he paid Mr. Burke  
18 35,000 pounds in May 1989."  
19

11:52:27 20 Now, of course if that were correct principle, it would mean that every person  
21 who proffered a version of events which the Tribunal on the balance of  
22 probabilities didn't accept, would thereby be guilty of obstructing and  
23 hindering the Tribunal and that's an appalling vista, sir.  
24

11:52:51 25 But I ask you, sir, in this particular circumstance, when you see that  
26 Mr. Barry was upheld on almost all the essential elements bar his own stated  
27 motive to be careful to attach the appropriate weight to that finding against  
28 him and I respectfully suggest that its relatively small weight should be  
29 attached to it, in the circumstances where so much has been found in his favour  
11:53:18 30 on that controversy. That's what I say, it goes to the question of weight,

11:53:23 1 sir.

2

3 If I could ask you then, sir, to just -- the next finding against Mr. Barry,

4 subparagraph B, "is that he failed to give a truthful account of the role

11:53:38 5 played by him and Mr. Stafford in ensuring Mr. Burke issued a directive in

6 March 1989 to RTE concerning transmission charges."

7

8 Now, the Tribunal's examination and findings are detailed in relation to

9 transmission charges, are detailed on pages 39 to 46. And having read and

11:54:15 10 reread that section of the report, sir, I find a number of, a relatively small

11 number of references to Mr. Barry. There is not a single reference to his

12 evidence to the Tribunal, still less a finding that his evidence was being

13 rejected in any fashion and to just look at it, sir, the ministerial directive

14 was outlined and indeed Mr. O'Neill summarised some of this, this morning in

11:54:59 15 the opening paragraphs, there's reference then to the generality of RTE

16 transmission charges, that page, 39 ends with a reference to the act and

17 paragraph 6.09 tells us that the Tribunal has sought to establish the

18 circumstances leading to the making of the directive and Mr. Burke's motive in

19 doing it. The following paragraph set out the position of RTE and we come then

11:55:25 20 to 6.15, page 41, and Century's position in relation to transmission charges.

21

22 And here we find I think the first reference to Mr. Barry at all, being

23 paragraph 6.17 simply matters of fact, documents sent to him, in the last

24 sentence there, "there was a meeting in November 1988, Mr. Barry, Mr. Stafford

11:55:50 25 were aware of RTE's estimated costs of the service".

26

27 And 6.19, it is said that meetings took place between Century and RTE in

28 November 1988. Towards the end of that paragraph, it said "the Tribunal is

29 satisfied that Mr. Burke and Mr. Barry were in regular contact at the time and

11:56:10 30 concluded probably that Mr. Burke was made aware by Mr. Barry the disquiet at

11:56:11 1 the level of transmission charges being sought by RTE." And in a general way,  
2 sir, could I say Mr. Barry never sought to suggest that he didn't put pressure  
3 on the minister to do various things in Century's favour.  
4

11:56:26 5 He made no secret of the fact he was constantly banging away at him to do this  
6 and to do that.  
7

8 Now, there is, sir, a finding -- moving over the page -- in 6.28, that might  
9 look like a finding critical of Mr. Barry and I suppose -- sorry in yes, 6.28  
10 and 6.29 -- this is in relation to negotiations between RTE and Century on

11 transmission charges and the thrust of what's said here is, that Century wrote  
12 to the IRTC and suggested that there were ongoing negotiations and ultimately  
13 the finding of the Tribunal is that there weren't in fact any real negotiations  
14 between Century and RTE. So the letter, sir, is set out in 6.28 and we see on

11:57:06 15 that paragraph that it was signed by Mr. Barry, this is a letter in 1989 and  
16 then at 6.29, it is said:

17 "The letter sent in February 1989 was coming by a schedule setting out the  
18 headings in which they were calculated to 375,000 charged. The letter written  
19 by Century on 17th and 20th February 1989 at the IRTC seriously misrepresented  
20 the factual position pertaining at that time."  
21

22 Now, Mr. Barry signed the letter and here, the Tribunal is saying it serious  
23 misrepresented the position. That, I suppose, might be said to be an adverse  
24 finding but, sir, it's got nothing to do with his evidence. That's a finding

11:58:26 25 that a letter which he co-signed in 1989 misrepresented the position in  
26 relation to then commercial dealings. And if you look at the transcripts,  
27 Mr. Barry himself said look this is the cut and thrust of bargaining, he used  
28 that phrase.  
29

11:58:45 30 This is not an adverse finding in relation to Mr. Barry's evidence. And up to

11:58:51 1 this point, there isn't a single reference to his evidence, sir. When we go  
2 on, through that section, pages 43, Mr. Burke's consideration of the IRTC  
3 letter, nothing there about Mr. Barry or his evidence, nothing at all, and  
4 ultimately the finding of the Tribunal is detailed in 6.45 and it's a finding  
11:59:29 5 qua Mr. Burke. It's a finding to the effect that his directive was heavily  
6 weighted in Century's favour in circumstances where there was insufficient  
7 evidence available to the minister to support the basis of that directive,  
8 namely Century's contentions.  
9

11:59:45 10 But none of that is a rejection of Mr. Barry's evidence. It's evidence not  
11 even referred to. And then Mr. Burke's justification for his decision is  
12 detailed in 6.46, in 6.47 it's rejected by the Tribunal and ultimately, the  
13 conclusion of that section is that, in 6.48, the Tribunal is satisfied in  
14 giving his directive, Mr. Burke did not act in a public interest, he was acting  
12:00:20 15 in the private interests of the promoters of Century Radio.  
16

17 So there's nothing, sir, in the Tribunal's report which says, here's  
18 Mr. Barry's evidence in relation to this and we reject it. And I suppose there  
19 are two ways of interpreting the report. One is that the finding on page 143  
12:00:51 20 is a stand alone finding. But, sir, that of course just simply cannot be,  
21 couldn't have a finding in a report, you weren't truthful, full stop. Without  
22 ever saying in what respect or what piece of evidence wasn't truthful.  
23

24 And to put that 100-odd pages away from a section where you detail it, what was  
12:01:25 25 the evidence and made no criticism. So the only way to make sense of that  
26 finding of subparagraph B, is to say it must be simply another aspect of a  
27 rejection of Mr. Barry's evidence in relation to motive. That he made a  
28 payment to Mr. Burke for favours as opposed to Fianna Fail for the reasons he  
29 outlined and that this was part of it. So that everything hinges, everything  
12:02:13 30 in B stems from A. And no other way, in my respectful submission, of making

12:02:20 1 any sense of this finding.  
2  
3 Now, sir, if I want to if I may endeavour to make a somewhat similar analysis  
4 in relation to the finding at C, and I won't delay on this, but if I just say  
12:02:42 5 to you, sir, that the matters detailed in C, legislation to cap RTE's  
6 advertising income to distribute its licence fee income and change the whole of  
7 2FM those matters were dealt with at some length on pages 54 to 63. And the  
8 only references that I can see here to Mr. Barry's evidence are references to  
9 an acceptance of his evidence and a preference for his evidence over that of  
12:03:34 10 Mr. Burke and you see that, sir, in paragraphs 8.24 and 8.25 on page 57.  
11  
12 Now, all of this surrounds whether or not Mr. Burke gave assurances in relation  
13 to the curtailment of RTE's advertising revenue. There is one other reference  
14 to Mr. Barry's evidence, which details at 8.21, where the Tribunal says it's  
12:04:25 15 satisfied that Mr. Barry, and Mr. Stafford threatened to liquidate Century but  
16 from recollection, I think I'm correct in saying that was in fact his own  
17 evidence, yes, it was, sir. That that's not a rejection of his evidence,  
18 that's in fact acceptance of his evidence. And then in relation to whether or  
19 not Mr. Burke had given assurances, you see in 8.24, further support for  
12:04:51 20 Messrs. Barry and Stafford's contention. So his evidence is being accepted.  
21 8.25, still further support for Messrs. Barry and Stafford's contention, again  
22 his evidence is being accepted.  
23  
24 There is again a description on the following pages of the meeting between  
12:05:08 25 Century's bankers and Mr. Burke and detailed analysis of that and nothing said  
26 by Mr. Barry there is rejected. In fact, his evidence he felt they were put  
27 out of the room at one stage so the bankers could speak frankly to the  
28 minister, all that is accepted.  
29  
12:05:26 30 There's a section then dealing with pressure exerted upon Mr. Burke to deliver

12:05:35 1 on his commitment to cap RTE's revenue and as a matter of fact, I think  
2 Mr. Stafford was the person with principal dealings there but there isn't a  
3 reference at all to Mr. Barry's evidence or a rejection of it. The analysis  
4 goes on then to deal with the steps taken by the department to implement  
12:05:58 5 Mr. Burke's wish to control the advertising revenue. None of that touches upon  
6 Mr. Barry's evidence, still less is it a rejection, and it goes on and right to  
7 the end of that section, right up to page 63, there is nothing that involves a  
8 rejection of his evidence.  
9  
12:06:15 10 Now, over the page, the next chapter, sir, deals with the specific matters,  
11 that's the whole background, page 64 and 65 then deal with the redirection of  
12 the licensing, coming under 2FM ship and the capping on the revenue. And you  
13 see there the principle, if you take 2FM, sir, 9.12,  
14  
12:07:06 15 "the Tribunal is satisfied that the only factors which caused this matter to be  
16 raised in the Dail were the persistent attempts of Mr. Stafford and Mr. Barry  
17 to have the minister alter the status of 2FM to their company's advantage."  
18 That's a finding in relation to Mr. Burke, it's not a finding that rejects any  
19 evidence from Mr. Barry.  
12:07:23 20  
21 9.08, if you see the directed proportion of the licence fee income, it says  
22 "The Tribunal is satisfied on the balance of probabilities that Messrs Barry  
23 and Stafford were the instigators of this proposal." And Mr. Barry said  
24 "absolutely" that's one of the things he was on about.  
12:07:39 25  
26 That's not a finding adverse to, that's a finding of fact, supporting his  
27 version of events. So, in this section, not a single reference to his evidence  
28 in fact but not even is there something from which an inference can be drawn as  
29 something he said but being rejected as untrue. And again, I suggest, sir,  
12:08:15 30 that the only sense that could possibly be made therefore of subparagraph C is

12:08:27 1 to say, that it hinges on the whole question of motive for making the payment.  
2 No other possible explanation for it.  
3  
4 And that linking of A, B, and C on page 143, not only is it consistent with the  
12:09:02 5 substantive findings of the Tribunal, but when one sees the positioning of  
6 subparagraph D, it seems to make sense, sir. Because that reimbursement of the  
7 35,000 there referred to in subparagraph D, that was, we saw that, sir, that  
8 was linked to the motive. That was the basis upon which his stated intention  
9 was rejected. And it's an odd place to put it, separated by B and C, unless as  
12:09:33 10 I have suggested, B and C are all part of the one finding.  
11  
12 So, just taking those findings that are, A to D inclusive, that appear to be  
13 many and varied and significant in stretching over a significant portion of the  
14 Tribunal's workings, I respectfully suggest that they all come back to the  
12:10:03 15 rejection of his evidence in relation to motive, which I do suggest must have  
16 been a knife edge decision given his admission that he paid it for Century, he  
17 paid it to promote Century to help interests, he did it because Mr. Burke asked  
18 him to do it, and he did it in circumstances in which Mr. Burke said it was for  
19 Fianna Fail. All of those things were accepted by the Tribunal.  
12:10:33 20  
21 So that analysis, sir, I would respectfully suggest should be borne in mind by  
22 you, sir, in considering applications for costs as to what weight should be  
23 attached to these findings A to D.  
24  
12:10:50 25 The other finding adverse to Mr. Barry, sir, is that he failed to comply with  
26 the Tribunal's Order for Discovery within the time limited for so doing or  
27 within a reasonable time thereafter. And there should be no doubt that that  
28 was the case. But again, without wanting to sound like I'm stating the  
29 obvious, sir, this is a failure to do something in time, it's not a failure to  
12:11:23 30 comply simpliciter, in fact, compliance is inherent to this finding, it's just

12:11:33 1 not compliance with time. That's a significant point.

2

3 Secondly, sir, I don't know if you are familiar with a separate ruling of the

4 Tribunal in relation to Mr. Barry's non-compliance made back in February of

12:11:52 5 2000, but it was made at a time when undoubtedly the Tribunal was annoyed with

6 Mr. Barry. No doubt about that, sir. But it was also made in the context in

7 which Mr. Barry's legal advisers acknowledged to the Tribunal and this is

8 recorded in that ruling, that they had provided him with certain advice and

9 that he had acted on it. And it was accompanied by an apology in his behalf.

12:12:33 10

11 Now, from that time forward, the non-compliance, sir, stretched from -- the

12 order was made in December, the 10th December, and the time limited for making

13 discovery I think was seven days running up to just the week before Christmas.

14 It wasn't dealt with before Christmas. It wasn't dealt with in early January

12:12:55 15 and there followed some heated correspondence with the Tribunal for which the

16 Tribunal cannot be in any way criticised, I don't mean to suggest that, but it

17 was attended also by another controversy about failure to attend on foot of a

18 witness summons. And again that was just a mistake frankly on the part of

19 advice given to Mr. Barry and all of that, I would like to think, was put to

12:13:19 20 bed in early February and thereafter, substantial further discovery was made by

21 Mr. Barry. He was often asked questions in relation to documents and he

22 provided answers as best he could. In other words, going beyond mere

23 compliance with discovery obligations.

24

12:13:41 25 So, sir, there was a failure to comply, it was for a very limited period --

26 sorry there was a failure to comply within time, but it was for a limited

27 period in particular circumstances and again, I respectfully suggest, not too

28 much weight should be attached to that.

29

12:13:57 30 Those are the findings adverse to Mr. Barry and if I could just then mention a

12:14:04 1 few things which I'd like you sir, to consider in the balance. The first thing  
2 is that the whole thing just took a great deal longer than Mr. Barry  
3 anticipated. I suppose that's probably true of virtually everything that the  
4 Tribunal has had to do and it's not a criticism of the Tribunal but from  
12:14:29 5 Mr. Barry's perspective, some indications were given to him at the outset as to  
6 the length of time something will take, this is something he has detailed in  
7 correspondence himself to the Tribunal.

8  
9 He engaged lawyers in that approximate expectation and the whole thing went on  
12:14:47 10 a great deal longer than expected and that added to his expense. He himself  
11 gave evidence over 14 days. But 87-odd days I think was spent, as Mr. O'Neill  
12 outlined in relation to the module generally, and there were significant  
13 controversies between him, Mr. Burke, him and Mr. Stafford and him and  
14 Mr. Mulhern. Every one of those factual controversies, sir, was resolved in  
12:15:32 15 Mr. Barry's favour.

16  
17 There was an unresolved conflict in his evidence in relation to the PJ Mara  
18 matter that Mr. O'Neill mentioned to you and the Tribunal simply identified the  
19 conflicts of evidence said there was no corroborating material and didn't  
12:16:02 20 resolve it, but of the conflicts which the Tribunal did resolve, every one was  
21 resolved in Mr. Barry's favour.

22  
23 It should also be borne in mind, sir, that there were issues inquired into by  
24 the Tribunal, which naturally enough once the report comes out and they don't  
12:16:27 25 find their way into the report, one tends to forget about them, but there were  
26 matters of some concern to Mr. Barry because there was a suggestion made at one  
27 stage that there were other payments to Mr. Burke effected by Mr. Barry. And  
28 that was something actually referred to in the opening statement of the  
29 Tribunal, properly inquired into by the Tribunal and on our analysis, of his  
12:17:00 30 own 14 days in the witness-box, 3.25 days were spent examining that matter.

12:17:15 1 And extensive discovery was made in relation to that aspect of the matter and  
2 ultimately, there was no finding at all in relation to that which one must  
3 infer that there's nothing adverse to be said about Mr. Barry in relation to  
4 that but a substantial portion of time was spent dealing with that and  
12:17:34 5 substantial cost was incurred dealing with it.

6  
7 Similarly, just bearing in mind what I was saying about the factual  
8 controversies with other persons before the Tribunal being resolved in his  
9 favour, it appears to us that leaving aside the Tribunal's examination and  
12:17:52 10 re-examination, other parties cross-examined Mr. Barry for a day, largely  
11 Mr. Burke, Mr. Stafford and Mr. Mulhern and very briefly I think Mr. Mara.

12  
13 So significant proportions even of his own time in the witness-box and his own  
14 concern with the evidence of others spent on issues in respect of which there  
12:18:16 15 were no findings adverse to him. And we have endeavoured to do, I think it's  
16 probably slightly artificial, sir, we have endeavoured to try and break down  
17 the time spent on the payment to Mr. Burke and the transmission charges and the  
18 capping of the RTE and to try and isolate those aspects where his evidence was  
19 upheld expressly, but I think it's slightly artificial to do it as a mechanical  
12:18:47 20 timing exercise but, sir, I do ask you to take into account as I have already  
21 indicated all of the matters that were found in Mr. Barry's favour in relation  
22 to those issues.

23  
24 In short, sir, this power which you exercise, and the power to award costs is  
12:19:14 25 power derived from statute, it must be exercised in a constitutional manner, it  
26 must be exercised proportionately, and when you come to Mr. Barry's position  
27 and exercising the power proportionately, I suggest, sir, that there are two  
28 options open. Either you take his evidence in the round as it were, and you  
29 say well look, the overall thrust of his evidence has been accepted on many,  
12:19:43 30 many matters, although rejected in one significant aspect and taken in the

12:19:50 1 round, he should get his costs, that's one possibility and the other  
2 possibility is to say no, there must be some deduction from his costs referable  
3 to what has been found against him. And if that's the approach you favour,  
4 sir, then I do ask you to go back to the analysis which I say is the correct  
12:20:20 5 one and say that these four findings which appear significant, A to D, are in  
6 fact all but one finding on that small issue, small in terms of time and cost,  
7 but important, but small issue as to why he did it and to bear in mind the  
8 very frank admissions that he had made in relation to why he did it.  
9  
12:20:54 10 And then lastly sir, I don't know if this is a matter that has been touched  
11 upon, by other submissions or whether it's a matter you ruled on at all, the  
12 basis of costs, if you exercise your discretion in favour of an award of costs,  
13 the matter ultimately goes to taxation and in the absence of specifying in your  
14 order a basis for taxation, the Taxing Master is left in a difficulty and I  
12:21:24 15 think the matter was first argued before Mr. Justice McCracken, perhaps you are  
16 familiar with this, sir, but the argument being that party and party costs were  
17 not appropriate to the Tribunal, upheld by Mr. Justice McCracken and  
18 subsequently applied by Judge Lindsay in the Lindsay Tribunal and both of those  
19 Tribunals ordered solicitor and client costs.  
12:21:45 20  
21 Now, I don't think the matter has been argued before previous Tribunals and I  
22 don't think it has ever been rejected as a proposition in circumstances where  
23 it has been argued, I don't believe so but I stand to be corrected on that, and  
24 certainly our advice from costs counsel is to the effect that is the correct  
12:22:04 25 basis because this is not appropriate for a party and party order because there  
26 are no parties and the solicitor and client is the appropriate basis. But not,  
27 sir, the solicitor and own client basis, which is a basis for costs which  
28 exposes the payer of the costs to sums that might be quite extravagant,  
29 solicitor and client is a basis for costs which does depend on the costs being  
12:22:30 30 reasonable and affords protection and discretion to the Taxing Master. I just

12:22:37 1 add that, sir, to the basis of costs.

2

3

If you bear with me, Mr. Chairman, for a moment.

4

12:22:42 5 Sir, the -- again consistent with the principle you have outlined yourself,

6

sir, Mr. Barry is an individual, he is not a commercial organisation, in

7

particular sum for costs which he detailed way back in 2000, is obviously a

8

very significant sum. As a matter of fact, I think he also recorded to the

9

Tribunal the time that he had to cut back on his representation such was the

12:23:20 10 burden of endeavouring to carry that cost and the team he had originally

11

engaged was not only changed but the level of representation was pared back

12

significantly. So this was a very real burden for Mr. Barry.

13

14

Thank you, sir.

12:23:37 15

16

CHAIRMAN: Thank you. Thanks, Mr. Cush.

17

18

MR. O'NEILL: I have nothing to say other than I'm sure you will consider the

19

analysis which has been advanced.

12:23:46 20

21

CHAIRMAN: I will endeavour to give a ruling some time in October --

22

23

MR. CUSH: I'm much obliged.

24

12:23:53 25

CHAIRMAN: Now Mr.--

26

27

MR. O'NEILL: The next application sir is that of Mr. John Mulhern and

28

Mr. Mulhern was involved with the Tribunal again exclusively in the Century

29

Radio Module and it's not my intention to review the entire of Mr. Burke's

12:24:09 30

adverse findings in this submission, Mr. Mulhern played a peripheral role. His

12:24:17 1 involvement arose from the fact that he was an initial one third shareholder  
2 with Mr. Barry and Mr. Stafford in Century Radio, although this involvement had  
3 been concealed both from the IRTC and the stockbrokers who were facing Century  
4 shares. He was aware of the payment of 35,000 pounds which had been made by  
12:24:37 5 Mr. Barry to Mr. Burke in 1989. The Tribunal did not accept Mr. Mulhern's  
6 evidence that he had become aware of this payment only after the event and  
7 found that it was probable that Mr. Barry would have informed Mr. Mulhern that  
8 the request had been made of him by Mr. Burke for the money and if such was the  
9 case, that it must have been clear to Mr. Mulhern that this was an improper  
12:25:04 10 payment, not only because of the size, but because it had been effectively  
11 demanded of Mr. Barry in circumstances where Century and Mr. Burke had  
12 unfinished business.

13  
14 The report concluded at paragraph 7.43, that it was not satisfied that  
12:25:21 15 Mr. Mulhern's evidence and his knowledge of the payment was a full or accurate  
16 account and believed that on the balance of probabilities that Mr. Mulhern was  
17 made aware of the fact that a payment was being sought prior to it having been  
18 made. And that he acquiesced in this payment, albeit reluctantly. In  
19 recording this finding, the Tribunal did not make any further finding that this  
12:25:47 20 amounted to either hindering or obstructing of the Tribunal or indeed that it  
21 had amounted to non-cooperation with the Tribunal.

22  
23 Mr. Mulhern was granted limited representation before the Tribunal on the 10th  
24 November 2002. His attendance at the Tribunal as a witness was for one day  
12:26:16 25 only. He is currently represented by his original legal team which involved  
26 Mr. Hugh Mohan, senior counsel, and Mr. Gerry Charlton, barrister at law,  
27 instructed by Reddy Charlton & McKnight. And they are here to advance that  
28 application today.

12:26:27 30

12:26:27 1  
2 CHAIRMAN: Was a figure submitted for costs?  
3  
4 MR. O'NEILL: The estimate was approximately 173,000 euro. It's a VAT  
12:26:41 5 inclusive figure as far as I know, and it's broken down as between senior  
6 counsel's brief fee of 19,000 euro with a daily rate sought of 3,809 euro per  
7 day and for junior counsel, 15,363 euro on the brief and 3,072 euro per day, in  
8 addition amounts are charged for consultations, meetings preparation and the  
9 solicitor's fee is charge at 130,740 euro.

12:27:21 10  
11 CHAIRMAN: All right. Thank you. Mr. Mohan?  
12  
13 MR. MOHAN: Mr. Chairman, I am obliged for the opportunity to make oral  
14 submissions to you in relation to Mr. Mulhern's application for costs. You  
12:27:33 15 will have already I think, received some correspondence from my solicitors  
16 which really set out, I suppose the points which I wish to elaborate on here  
17 today.  
18  
19 Obviously in passing and at the outset I would say that what I'm about to  
12:27:49 20 submit to you and what indeed has been submitted in writing, is bearing in mind  
21 your own ruling on the principles by which you are to be guided by in deciding  
22 whether or not costs are to be awarded and also having regard to I suppose the  
23 statutory provisions and indeed your other previous rulings in relation to  
24 other applications for costs. The first thing which I wish to say and which is  
12:28:13 25 touched upon by Mr. O'Neill is in fact, if I can deal with it in two parts.  
26 One is the I suppose cooperation aspect of it and the other is I suppose the  
27 specific findings and it's the first part is very straightforward and very  
28 simply put and it is this.  
29  
12:28:32 30 That Mr. Mulhern cooperated at all times with the Tribunal. He met with them

12:28:37 1 for interviews, he gave them statements and in turn, gave evidence when  
2 requested. And it is obviously self-evident from the report that no issue is  
3 being made or no issue indeed can be made that he wasn't in any way cooperative  
4 with the Tribunal and I emphasise that because of course of the, this is one of  
12:28:58 5 the four provisions or issues set out in the statute which one specifically is  
6 referred to as the failure of a party to cooperate with the Tribunal.  
7 Mr. Mulhern cooperated at all stages

8  
9 And borrowing from that and going on to the next issue, which I think is tied  
12:29:15 10 in with that, is that there is no finding that Mr. Mulhern either obstructed or  
11 hindered the work of the Tribunal. There can be no issue on this, there's no  
12 finding that such was made and it's a stand alone point that he did not  
13 obstruct or hinder the work of the Tribunal. But it's appropriate at this  
14 stage to say that, that module I think lasted for 80-odd days, during those  
12:29:38 15 days, Mr. Mulhern was represented legally at those hearings and it took a full  
16 run in relation to it and it was acknowledged because of some suggestions or  
17 allegations that were in the course of being made or were going to be made, it  
18 was provided with a full transcript of all of those hearings and really because  
19 of his role as a -- in the Century Radio as an investor, albeit somebody who  
12:30:04 20 was not involved in a day to day running of it, but was required to attend and  
21 deal with it throughout that entire period of time.

22  
23 As I say, he was represented at all stages during those days.

24  
12:30:17 25 I want to just touch, if I can now, on the second portion of it and that is the  
26 Tribunal's findings. And again, this is to be put in context and you have,  
27 it's been opened to you in the previous application in greater detail but to  
28 truncate it from Mr. Mulhern's perspective, the Tribunal Report found that  
29 Mr. Burke solicited money, 30,000 pounds in cash from Mr. Oliver Barry and in  
12:30:46 30 turn found that 35,000 pounds was in fact paid by Mr. Oliver Barry to Mr. Ray

12:30:49 1 Burke.

2

3 And the issue insofar as it concerns then, Mr. Mulhern which is dealt with at

4 pages 52 and 53 of the report was a concentration on whether or not he was

12:31:01 5 aware of the request of the payment prior to it being made. Now, Mr. Mulhern

6 as you will know, sir, was or gave his account that he was not made aware of

7 the payment until after it was made, the Tribunal for its part did find on the

8 balance of probabilities that he was aware. If I can quote I think it's at the

9 bottom of page 52 and I'll quote from paragraph 7.42 and it reads as follows:

12:31:24 10

11 "The Tribunal believes it probable that Mr. Barry would have informed

12 Mr. Mulhern that the request had been made of him by Mr. Burke for the money

13 and if such is the case, it must have been clear to Mr. Mulhern that this was

14 an improper payment, not only because of its size, but because it had been

12:31:41 15 effectively demanded of Mr. Barry in circumstances where Century and Mr. Burke

16 had unfinished business." It goes on to find that he acquiesced in the

17 payment and used the phrase albeit reluctantly.

18

19 I'd say to you sir, that insofar as that is the nub of what can be construed as

12:31:59 20 being adverse, if that's the correct word to use in the circumstances, it does

21 not amount to a finding of corruption on the part of Mr. Mulhern and certainly

22 there's no such express finding made against Mr. Mulhern. There's no doubt and

23 it is common case, what I mean by common case, it was a thread running through

24 the testimony given to Tribunal and it is manifest that this is accepted

12:32:24 25 implicitly in the Tribunal's report that Mr. Mulhern was not a prime mover, was

26 not directly involved in the running of Century Radio and was not involved in

27 the day to day running. He was an investor, he was a promotor but he was

28 somebody whose presence was not of, was in effect kept secret but was not

29 involved and was accepted as not being involved.

12:32:47 30

12:32:47 1 So therefore in the context of these findings it's important to parse them and  
2 find out what findings have been made as against Mr. Mulhern and there is no  
3 finding that he himself was guilty of a corrupt act in the payment of the  
4 money. What it does find on the balance of probabilities, is the way it puts  
12:33:08 5 it, was aware of the payment and in that regard, it goes on to say and I want  
6 to deal with this phrase and the phrase is "it must have been clear to  
7 Mr. Mulhern this was an improper payment."

8  
9 Now that phrase, if you like, is something that deserves some consideration in  
12:33:28 10 the context of what the Tribunal is imputing to Mr. Mulhern and it's a point  
11 which is made in the written submissions and it's my submission that it doesn't  
12 appear to be either a finding or fact or an inference on a fact so found. Is  
13 it suggesting that he ought to have been aware of it or should have been aware  
14 of it but was not aware of it, and it's important because being aware of it  
12:33:49 15 having been made but not having made it, the question then is begged, well what  
16 was his state of mind in relation to this and it is in my respectful  
17 submission, by virtue of the terminology or wording used, conjecture or  
18 speculation on the part of the Tribunal and that is necessarily so by virtue of  
19 I think the language which is being used.

12:34:07 20  
21 So it's in that context that that is if you like, the single adverse finding  
22 that is made against Mr. Mulhern, is that breaking it up into two parts, one on  
23 balance of probabilities was aware and that acquiesced reluctantly but was he  
24 aware that it was an improper payment, he finds he must have been -- was it  
12:34:30 25 because he ought to have been aware or not, it's not clear in relation to this.  
26 One point which I make, if I may in passing and that is at the end of that 7.42  
27 it says:

28  
29 "He must have been aware because of its size and I can understand that because  
12:34:45 30 it had effectively been demanded of Mr. Barry in circumstances where Century

12:34:46 1 and Mr. Burke had unfinished business."  
2  
3 I have tried to deal with that and nowhere is it clear from this report that  
4 unfinished business is with reference to Mr. Mulhern, where does that tie with  
12:35:00 5 Mr. Mulhern and it's an issue I raise in passing.  
6  
7 So in essence I say that there's a form of speculation in relation to what can  
8 only be considered, I suppose, the single adverse finding and in essence, I  
9 effectively said to you, sir, that it doesn't amount to a finding of any act of  
12:35:18 10 corruption on his part and more importantly what I do wish to say, while it  
11 goes on to say based upon that, that his account -- the phrase is that the  
12 Tribunal is not satisfied that his account was full or accurate, in my  
13 respectful submission that in turn, because of what I have said, does not  
14 amount to the provision of information by the person, by a person knowing it to  
12:35:54 15 be false or misleading. Again I think Mr. Cush has dealt with this point and  
16 you have dealt with it yourself in your own judgment, is this issue; When an  
17 account is not accepted on the balance of probabilities, that this is not a  
18 finding and it's the last but I think most important point I wish to emphasise.  
19  
12:36:05 20 That that is not a finding, that there has been a deliberate attempt by  
21 somebody to give false or misleading information when the Tribunal finds  
22 against somebody's account on the balance of probabilities and I place  
23 significant emphasis on your own rulings in that regard and indeed, sorry on  
24 two rulings of your own, one setting out the background and the ruling in  
12:36:29 25 relation to Mr. Burke's application, I think you referred to both of those,  
26 that that doesn't necessarily follow to be so. So that is the most important,  
27 the most important point in relation to this issue.  
28  
29 Finally, to just say that Mr. Mulhern was obviously notified that he was  
12:36:49 30 required to cooperate and as I say did cooperate and had numerous meetings,

12:36:55 1 obviously not just with the Tribunal and with his own legal advisers but  
2 throughout those 80-odd days, was representation on his behalf and did not make  
3 accusations against other parties which were involved and I suppose that's a  
4 factor which you have referred to in one of the points that you would take into  
12:37:12 5 account. But at the same time, was provided with the transcripts and  
6 necessitated significant hours work and days work and weeks work on the part of  
7 the legal team to deal with the issues before him at the time. I think that's  
8 manifest from his role and involvement obviously as promotor of Century at the  
9 time and albeit one he was not involved in the day to day running and I think  
12:37:35 10 ultimately, the issue where if you like he was not found to be hindering or  
11 obstructing, the only issue is he was aware of the payment according to the  
12 Tribunal, they found that on the balance of probabilities, but a very  
13 significant phrase based on the Tribunal's work is that he acquiesced albeit  
14 reluctantly, it is him being told of something that's happening, he is not a  
12:37:58 15 prime mover, not somebody who is guilty of an act of corruption and he is not  
16 somebody who -- that if you look at the two pages that you can point to and say  
17 this man came and deliberately gave false and misleading information, that's  
18 nowhere to be found, even in dealing with his testimony as set out in those two  
19 pages.

12:38:16 20  
21 Those points, sir, are made in the written submission which my solicitor has  
22 handed a copy up to you and indeed we have handed up to you a booklet of the  
23 statements, transcripts of the meetings, transcript of the proceedings, the  
24 findings and such like.

12:38:33 25  
26 We have separate, aside from that the various correspondence which was entered  
27 into between Mr. Mulhern and the Tribunal which is quite voluminous but we have  
28 copies of that should you wish to see it. May it please you, Mr. Chairman.

29

12:38:50 30 CHAIRMAN: Thank you Mr. Mohan. Do you want to --

12:38:53 1 MR. O'NEILL: I don't, sir.

2

3 CHAIRMAN: Again, as in the previous case, sir I will endeavour to give a ruling  
4 some time in October.

12:39:04 5

6 MR. MOHAN: Much obliged.

7

8 **THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY, WEDNESDAY,**

9 **22ND SEPTEMBER 2004 At 11.00 A.M.**

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