

**THE TRIBUNAL RESUMED AS FOLLOWS ON MONDAY 11TH OF OCTOBER,
2004, AT 10:30 A.M:**

10:20:50 1
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3
4 MR. CHAIRMAN: Good morning.

10:39:10 5
6 MR. O'NEILL: Good morning.

7
8 MR. CHAIRMAN: I have two rulings to give. One, in respect of the application
9 of Mr. John Finnegan for his costs. And the other, the application of
10:39:20 10 Mr. John Mulhern for his costs. I will read the ruling in the John Finnegan
11 application first.

12
13 Oral submissions were made on behalf of Mr. Finnegan on the 7th of September
14 2004 in support of his application for the payment of his legal costs in
10:39:38 15 respect of his representation before the Tribunal arising from the
16 investigation into matters reported upon in the Tribunal Second Interim Report.
17 I have considered the submissions together with written submissions submitted
18 on behalf of Mr. Finnegan and submissions earlier made by the Minister for
19 Finance and the Attorney General on the principles which I should apply.

10:39:59 20
21 Mr. Finnegan was granted limited representation by the Tribunal and he had the
22 benefit of representation by Senior Counsel and by a firm of solicitors. Mr.
23 Finnegan gave oral evidence to the Tribunal over a period of 14 days. His
24 involvement in the Tribunal related to the Brennan and McGowan module. In the
10:40:16 25 Second Interim Report adverse findings were made against Mr. Finnegan on the
26 issue of co-operation as follows.

27
28 This is a quotation. "The Tribunal is satisfied that Mr. John Finnegan
29 obstructed and hindered the Tribunal by:

10:40:30 30 A. Failing to provide a truthful account of the circumstances in which 10,000

10:40:34 1 pounds from a fund beneficially owned by him was paid to Mr. Ray Burke in
2 November 1984.

3 B. Falsely maintaining that the 10,000 pounds payment to Mr. Burke was a sum
4 which was intended to be paid to a fund for the provision of future expenses by
10:40:50 5 Canio Limited at a time when he knew this to be false.

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

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

10:41:08 10 E. Failing to provide the Tribunal with a truthful account of the purposes for
11 which the Amber Trust and Fox Town Investments Limited had been formed".
12

13 The Tribunal also made adverse findings concerning Mr. Finnegan and others
14 relating to substantive matters which were investigated by the Tribunal insofar
10:41:29 15 as these involve Mr. Finnegan they can be summarised as follows:

16 1. Monies paid to Mr. Burke's offshore accounts were not the proceeds of
17 political fundraising, and that the source of 60,000 sterling pounds of these
18 funds was a company controlled by Mr. Brennan, Mr, McGowan and Mr. Finnegan
19 called Canio Limited

10:41:48 20 2. The claim by Mr. Finnegan that he was totally unaware that 60,000 pounds
21 sterling paid to Mr. Burke's company, Caviar, had been paid by Canio in 1984
22 was inherently implausible.

23 3. Mr. Finnegan was aware that of the 60,000 pounds sterling payment to Caviar,
24 10,000 sterling was his money and that this money was not paid as a political
10:42:10 25 donation to Mr. Burke or to Fianna Fail.

26 4. There was no legitimate reason for the payment of these monies to
27 Mr. Burke.

28 5. The payment of 60,000 pounds sterling to Caviar Ltd by Canio Ltd inclusive
29 of 10,000 pounds sterling beneficially owned by Mr. Finnegan was a corrupt
10:42:28 30 payment. And that Mr. Burke acted in the interest of amongst others

10:42:33 1 Mr. Finnegan in the performance of his public duties.

2

3 It was further held by the Tribunal that the inability to conclude what the

4 true nature of the circumstances were in relation to the payment of 60,000

10:42:45 5 pounds sterling to Mr. Burke's Caviar account stemmed from the fact that

6 Mr. Finnegan and others had failed to give any comprehensible account of what

7 their relationship was with Mr. Burke at this time. And this failure hindered

8 and obstructed the Tribunal.

9

10:43:03 10 While it is unnecessary to expressly rule on each of the submissions made on

11 behalf of Mr. Finnegan in his application for costs, I believe it to be

12 appropriate to address some of them in some detail.

13 1. In his oral submissions on the 7th of September 2004 Mr. Hussey raised a

14 number of issues relating to the procedures and conduct of the Tribunal in so

10:43:23 15 far as they effected his client.

16

17 The context in which these matters were referred to by Mr. Hussey was such as

18 to severely criticise the manner in which the Tribunal dealt with Mr. Finnegan.

19 One such criticism was Mr. Hussey's most serious allegation that the Tribunal

10:43:40 20 orchestrated demands for documentation and information from Mr. Finnegan in a

21 manner which was oppressive and which made it difficult or impossible for him,

22 Mr. Finnegan, to comply with such demands, and that this was done for the

23 purpose of ensuring that Mr. Finnegan would ultimately be denied his costs.

24

10:44:01 25 Having perused the correspondence between the Tribunal and Mr. Finnegan's

26 solicitors I am absolutely satisfied that there is no evidence whatsoever to

27 support this contention. Indeed on the contrary, it is clear that the

28 Tribunal did not act unreasonably in its demands of Mr. Finnegan and on

29 occasion extended the period of time for the compliance of such demands.

10:44:22 30

10:44:22 1 I have already stated that criticisms made of the Tribunal in respect of its
2 prior procedures and conduct are not matters which I can now consider when
3 determining an application for costs. If there was any merit in such
4 complaints they should have been raised at the time and should have been the
10:44:38 5 subject of judicial review if not dealt with appropriately at that time.

6
7 I therefore accept that the Tribunal's procedures and conduct relating to its
8 dealings with Mr. Finnegan were appropriate and fair.

9
10:44:52 10 Furthermore, and most importantly insofar as the allegation of Mr. Hussey that
11 demands of Mr. Finnegan for documentation and information were oppressive and
12 designed to ensure that Mr. Finnegan would not receive costs is concerned; I
13 note that there is no criticism or adverse finding against Mr. Finnegan in the
14 Second Interim Report to the effect that he failed to provide documentation to
10:45:12 15 the Tribunal within prescribed periods of time.

16
17 2. Mr. Hussey submitted that he had not been permitted to properly "protect
18 his clients' interests". And that his client's "interests" were different to
19 those of the Tribunal.

10:45:30 20
21 Again, this criticism is not one for consideration by me in dealing with an
22 application for costs. Any wrongful interference with Mr. Finnegan's
23 constitutionally protected rights should have resulted in an immediate
24 application to the courts for redress.

10:45:47 25
26 In any event, irrespective of the definition of the term "clients interests"
27 which is appropriate, it is absolutely clear that it was Mr. Finnegan's legal
28 duty to cooperate with the Tribunal and to provide it with truthful information
29 and evidence, even though in so doing his own interests might be damaged.

10:46:05 30

10:46:05 1 Mr. Finnegan was granted limited representation on this basis. While it may
2 have been in his private interests not to cooperate with the Tribunal such a
3 stance cannot be condoned. He was not entitled to put his private personal
4 interests over his obligation to provide full information to the Tribunal upon
10:46:24 5 relevant inquiry being made of him.
6

7 3. Mr. Hussey submitted that in circumstances where the evidence of one
8 witness is simply preferred to that of another and an adverse finding is made
9 on that basis alone, that the latter should not be refused his costs.

10:46:40 10 Without expanding on the validity or otherwise of such an argument it can not
11 be reasonably contended that this is an accurate or fair summary or assessment
12 of the basis on which the adverse findings were made against Mr. Finnegan in
13 the Second Interim Report.
14

10:46:54 15 The facts are that the report of the Tribunal found conclusively that Mr.
16 Finnegan had obstructed and hindered the Tribunal, that he gave evidence that
17 he knew to be false. That he failed to make proper discovery of documents and
18 very seriously that he made a deliberate decision to withhold information from
19 the Tribunal.
10:47:10 20

21
22 My task is to determine whether it is fair and reasonable that Mr. Finnegan
23 should be paid all or a portion of his cost by the Minister For Finance. I
24 must have regard to certain matters as laid down in legislation. And I do so
10:47:24 25 in the light of my interpretation of these requirements in the principles
26 enunciated in my ruling on the 30th of June 2004. I stated then and I do so
27 again now that the principles enunciated were never intended to be exhaustive.
28

29 The case being made on behalf of Mr. Finnegan for the payment of the costs by
10:47:41 30 the State must be considered by me on the merits of Mr. Finnegan's application

10:47:46 1 and his specific relationship with the Tribunal which culminated in the Second
2 Interim Report. And more particularly the findings of the Tribunal insofar as
3 they relate to him.
4

10:47:56 5 I have had the benefit of reading transcripts of relevant evidence, reading
6 correspondence and relevant documentation. These assisted me in determining
7 whether there were instances or occasions where Mr. Finnegan cooperated with
8 the Tribunal in a meaningful way or whether it is the case that Mr. Finnegan's
9 failure to cooperate, in whatever guise, was a feature of his evidence and
10:48:18 10 dealings with the Tribunal insofar as it related to the issues being inquired
11 into by the Tribunal.
12

13 It is clear that Mr. Finnegan was a very important witness in the Brennan and
14 McGowan module. His evidence, if given truthfully, had the potential to
10:48:36 15 assist the Tribunal in a very real way. Full cooperation on the part of
16 Mr. Finnegan would have significantly eased the work of the Tribunal.
17

18 Therefore, having regard to the findings of the Second Interim Report of the
19 Tribunal, and particularly having regard to the significant degree of
10:48:51 20 non-cooperation on the part of Mr. Finnegan, and the fact that his
21 non-cooperation stemmed from a deliberate decision on his part to deal with the
22 Tribunal on this basis. I conclude that Mr. Finnegan is not entitled to an
23 award of costs. And I therefore refuse the application.
24

10:49:08 25 And now the Ruling on the application of Mr. John Mulhern.
26

27 Counsel on behalf of Mr. Mulhern made oral submissions to me on the 21st of
28 September 2004 in support of his application for costs arising from his
29 involvement with the Tribunal.
10:49:28 30

10:49:28 1 In the course of its investigation in the Century Radio module which concluded
2 with the Tribunal's Second Interim Report, I have also had the benefit of
3 written submissions made by Mr. Mulhern's legal advisors and submissions made
4 on behalf of the Minister for Finance and the Attorney General and on the
10:49:47 5 principles to be applied in dealing with such applications.
6

7 Mr. Mulhern was granted legal representation by the Tribunal on the 10th of
8 November 2000 and was represented at the Tribunal hearings by senior and junior
9 counsel and by his solicitors. Mr. Mulhern gave evidence for one day and
10:50:03 10 engaged in private meetings with the Tribunal and through his solicitors in
11 correspondence with the Tribunal.
12

13 The estimate of costs submitted by Mr. Mulhern amounts to 182,000 euro
14 approximately. It is a matter for the Taxing Master of the High Court to
10:50:18 15 determine the actual amount of any costs awarded.
16

17 Although no specific adverse finding was made against Mr. Mulhern in chapter 17
18 of the report that he hindered, obstructed or failed to cooperate with the
19 Tribunal, it is nevertheless clear from the body of the report that part of
10:50:35 20 Mr. Mulhern's evidence was rejected by the Tribunal on the basis that the
21 Tribunal was satisfied that Mr. Mulhern was not telling the full story as he
22 believed and understood it to be.
23

24 In particular in relation to his prior knowledge of the 35,000 pounds payment
10:50:49 25 to Mr. Burke. The conclusions of the Tribunal are quite clearly adverse
26 findings against Mr. Mulhern in relation to his legal obligation to cooperate
27 with the Tribunal by providing a full and accurate account of matters within
28 his knowledge which were relevant to the Tribunal's investigations in the
29 Century Radio module.
30

10:51:08 30

10:51:08 1 The Tribunal found the facts to be and I quote from paragraph 740 of the
2 report:

3
4 "Although Mr. Mulhern's involvement as a shareholder in Century was disguised
10:51:18 5 from both the IRTC and stockbrokers who had placed Century shares. The
6 Tribunal is satisfied that Mr. Mulhern was kept abreast of affairs within the
7 company by Mr. Stafford and Mr. Barry. The Tribunal is satisfied that having
8 regard to the nature of the relationship which existed between Mr. Barry and
9 Mr. Burke, Mr. Barry would have made Mr. Burke aware of Mr. Mulhern's
10:51:41 10 involvement with Century.

11
12 Mr. Mulhern acknowledges that he was aware of the payment in 1989. He said
13 that he had been made aware of it by Mr. Stafford before the end of 1989,
14 either some weeks or indeed after the payment had been made. He said that he
10:51:57 15 came from a "different school" to Mr. Barry and in his opinion it should not
16 have been made as this was an infant business and having regard to the size of
17 the donation the company could not afford this disbursement. He took the view
18 that once it had been done he could not change it and stated that he may have
19 expressed his displeasure to Mr. Barry that the payment had been made."

10:52:20 20
21 Paragraph 741 of the report. "The Tribunal is not satisfied that this affords
22 the explanation for Mr. Ahern's unhappiness with the payment. The Tribunal
23 believes on the balance of probabilities that Mr. Mulhern would, in those
24 circumstances, have sought to know the full details of how and why a payment
10:52:37 25 was made to Mr. Burke, what the motivation of Mr. Barry in making the payment
26 on behalf of Century was, and Mr. Barry's explanation for not informing him in
27 advance that he intended to make the payment. Apparently, none of these
28 issues were raised by Mr. Mulhern with Mr. Barry."

10:52:56 30 742. "The Tribunal believes it probable that Mr. Barry would have informed

10:53:01 1 Mr. Mulhern that the request had been made of him by Mr. Burke for the money.
2 If such is the case it must have been clear to Mr. Mulhern that this was an
3 improper payment, not only because of its size but because it had been
4 effectively demanded by Mr. Barry in circumstances where Century and Mr. Burke
10:53:18 5 had unfinished business."

6
7 743. "The Tribunal is not satisfied that Mr. Mulhern's account of his
8 knowledge of this payment is full or accurate and believes on the balance of
9 probabilities that he was made aware of the fact that a payment was sought
10:53:31 10 prior to it having been made and that he acquiesced in the payment, albeit
11 reluctantly ".

12
13 In essence the Tribunal concluded that Mr. Mulhern knew of Mr. Burke's request
14 for the payment of 35,000 pounds prior to the payment being made. And that he
10:53:47 15 knew it was an improper payment to make, although his evidence was that he only
16 learned of the payment weeks after the event.

17
18 Although the Tribunal rejected much of the evidence of Mr. Mulhern, it did not
19 make any express finding of hindrance and/or obstruction and/or
10:54:05 20 non-cooperation. This coupled with the fact that Mr. Mulhern's involvement in
21 the circumstances surrounding the payment to Mr. Burke was minimal, leads me to
22 the conclusion that it would be unfair and unreasonable to deny Mr. Mulhern an
23 award of any costs.

24
10:54:21 25 I must, however, have regard for the fact that it was at all times open to
26 Mr. Mulhern to comply with his obligations and to give a full and accurate
27 amount of all relevant matters to the Tribunal. The fact that the Tribunal
28 found that he did otherwise, understandably obviously means that he failed to
29 fully assist the Tribunal. And was therefore partially at least responsible
10:54:41 30 for incurring a significant proportion of his own costs.

10:54:46 1
2 It is extremely difficult and probably impossible for me to decide in precise
3 terms the extent to which Mr. Mulhern's approach to the Tribunal and his lack
4 of candour with the Tribunal was responsible for him incurring his own costs or
10:55:01 5 the extent to which an award of costs should reflect this.

6
7 In all the circumstances I believe it to be fair, reasonable and equitable that
8 Mr. Mulhern be awarded 25% of his costs on a party and party basis and subject
9 to taxation by the Taxing Master of the High Court.

10:55:18 10
11 That concludes the ruling. And I will sit again in about ten minutes.

12
13 MR. O'NEILL: May it please Your Lordship.

14
10:55:30 15 **THE TRIBUNAL ADJOURNED FOR A SHORT BREAK**

16 **AND RESUMED AGAIN AS FOLLOWS:**

17
18 MR. CHAIRMAN: Good morning. The first application listed for hearing today
19 is that of Mr. John Caldwell. I will briefly outline Mr. Caldwell's
11:08:50 20 involvement with the Tribunal in respect of this issue.

21
22 The Tribunal has been dealing with Mr. John Caldwell in relation to a number of
23 issues since June 2000. However, the present application for costs is limited
24 to one matter only. Namely, his involvement in the Brennan and McGowan module
11:09:05 25 which was reported upon in the Second Interim Report of the Tribunal.

26
27 In this report the Tribunal found that Mr. Caldwell is legal advisor to Mr. Tom
28 Brennan and to Brennan and McGowan related companies in the 1980s, was in a
29 position to provide information which could assist the Tribunal in establishing
11:09:22 30 the nature and extent of Brennan and McGowan activities in the Channel Islands,

11:09:28 1 and that Mr. Caldwell had failed to co-operate with the Tribunal by:
2 A. Failing to provide a proper affidavit of discovery in compliance with an
3 order for discovery and production made against him on the 4th of April 2001.
4 B. Failing to comply with an order for discovery made against him on the 10th
11:09:44 5 of August 2001.
6 And C. Failing to comply with a witness summons requiring his attendance at
7 public sessions of the Tribunal on the 27th September 2001.
8
9 Mr. Caldwell's involvement with the Tribunal in the Brennan and McGowan module
11:10:00 10 arose from the fact that he had acted as solicitor on behalf of Messrs. Brennan
11 and McGowan and related companies.
12
13 The Tribunal's inquiries established that the company called Canio Ltd.
14 connected with Brennan and McGowan had paid Mr. Ray Burke 60,000 pounds in
11:10:16 15 Jersey in November 1984. And that the funds used to pay Mr. Burke had been
16 sourced from a loan raised in Ireland through Lombard & Ulster Bank upon the
17 security of certain lands at Sandyford, County Dublin.
18
19 Prior to this discovery by the Tribunal Messrs. Brennan and McGowan and
11:10:36 20 Mr. Burke were falsely maintaining that all funds paid offshore to Mr. Burke's
21 accounts were the proceeds of political fundraising activities conducted in the
22 UK on his behalf.
23
24 In correspondence with Mr. Caldwell commencing on the 30th of March 2001, the
11:10:51 25 Tribunal sought his assistance in it's inquiries into Canio Limited and into 15
26 other companies which were involved in Irish land transactions in which
27 Messrs. Brennan and McGowan appear to have been involved.
28
29 Mr. Caldwell was requested to provide a narrative statement of his dealings
11:11:09 30 with Mr. Brennan and McGowan and of his knowledge of these companies and their

11:11:13 1 financial affairs within 7 days, and also of his dealings with Bedell &
2 Cristen advocates in Jersey. He was also notified of the Tribunal's intention
3 to consider making an order for discovery requiring him to discover all
4 documents and records relating to the aforementioned matters. An order for
11:11:30 5 discovery was subsequently made and served upon Mr. Caldwell's solicitors on
6 the 4th of April 2001.

7
8 Mr. Caldwell neither provided this statement nor complied with the order for
9 discovery by the 4th of May 2001. And he was accordingly informed that the
11:11:45 10 Tribunal would consider taking all necessary steps to ensure compliance with
11 the order for discovery including applying to the High Court.

12
13 Subsequently, in purported compliance with the order of the 4th of April 2001
14 an affidavit was provided by Mr. Caldwell which merely endorsed the contents of
11:12:03 15 an affidavit sworn by another member of the firm Binchy Solicitors. This
16 affidavit has been reported upon in the Second Interim Report as not being a
17 proper affidavit of discovery.

18
19 No narrative statement was provided, as requested. Mr. Caldwell merely
11:12:20 20 provided a statement to the effect that he had not acted for the individuals or
21 entities listed. He did not indicate his state of knowledge of those entities
22 or the dealings which he had with those entities or individuals as had been
23 requested of him.

24
11:12:33 25 Despite further letters in May and June of 2001 from the Tribunal no further
26 statement was forthcoming.

27
28 The Tribunal made a further order for discovery on the 10th of August 2001 and
29 informed Mr. Caldwell that in view of the imminence of the date of
11:12:49 30 Mr. Caldwell's attendance to give evidence before the public session of the

11:12:53 1 Tribunal and the difficulties that would ensue in the absence of documentation
2 being discovered in compliance with the order by the date specified in the
3 order, the Sole Member would consider commencing proceedings in the High Court
4 pursuant to Section 4 of the Tribunals of Inquiries (Evidence) Act if he failed
11:13:09 5 to comply.

6
7 The 27th of September 2001 was fixed as the date for Mr. Caldwell to give
8 evidence before the Tribunal and a summons was sent to his solicitors. On the
9 6th of September 2001 Mr. Caldwell's then solicitor informed the Tribunal that
11:13:26 10 they had received instructions from their client not to accept any further
11 documentation or orders from the Tribunal on his behalf.

12
13 The Tribunal wrote to his then solicitors, Messrs. Cahill & Company, expressing
14 surprise and disappointment that Mr. Caldwell, as an officer of the High Court,
11:13:42 15 had failed to comply with the order of the Tribunal, especially in
16 circumstances where he had been informed that his failure to do so would have
17 to result in the Sole Member commencing enforcement proceedings in the High
18 Court against him.

19
11:13:56 20 On the 17th of September 2001 Mr. Caldwell wrote directly to the Tribunal
21 stating:
22
23 "I am mindful of the task that the Sole Member is seeking to perform and do not
24 wish to inconvenience, prevent or delay that task. However, I believe that I
11:14:12 25 can make no useful contribution by way of documentation as I have none, Or
26 evidence as I have none, into matters with which the Tribunal is concerned.
27 Any knowledge that I have has been gleaned from the media and information
28 provided by the Sole Member's inquiries."

29
11:14:28 30 He went on to state "Without any acknowledgement or admission of the

11:14:32 1 requirement to reply to or to comply with any of the matters raised and so as
2 to inform and assist the Sole Member, the following comments are provided to
3 you.

4 1. I am neither a citizen of Ireland nor have I for many years been a
11:14:48 5 resident of Ireland. I am no longer a holder of a practicing certificate as a
6 solicitor in Ireland.

7 2. No valid order or documents have been served on me which compel my
8 attendance before the Tribunal. The alleged order of the 10th August 2001 is
9 invalid as being outside the terms of reference, and therefore was made in
11:15:06 10 excess of jurisdiction and therefore has been invalidly served.

11 3. The Sole Member has already received all documents and records available
12 from Binchys, the firm in which I was formerly a partner. I have no other
13 documents independent of those documents.

14 4. The Sole Member has received from Messrs Miley & Miley, Kennedy and
11:15:28 15 McGonagle, Stokes Kennedy Crowley, Lombard & Ulster Banking et alios volumes
16 and volumes of documents and records which include dealings with Mr. Brennan
17 and Mr. McGowan et alios.

18 5. I have no documents or records in my possession relating to Mr. Brennan or
19 Mr. McGowan."

11:15:49 20
21 Mr. Caldwell said that he was not in a position to assist the Tribunal, nor
22 did he believe that he had any evidence or material relevant to its terms of
23 reference. The Tribunal replied Mr. Caldwell on the 19th September 2001 noting
24 his comments and stating that valid orders and summons had been served upon him
11:16:09 25 and notifying him that the Tribunal would take such steps as were necessary to
26 compel his attendance and compliance with its orders. It also stated that the
27 fact that some documents may have been discovered by other parties did not
28 excuse Mr. Caldwell of his obligation under the orders of the Tribunal.

29
11:16:27 30 On the 27th September 2001 Mr. Caldwell did not appear when called to give

11:16:32 1 evidence at a public session of the Tribunal. That day the Sole Member heard
2 evidence that Mr. Caldwell had applied for an Irish driving licence in April
3 2001, and in so doing he had given his address as Killiney, County Dublin.
4 Mr. Caldwell had applied for, and had been granted in the past, Irish passports
11:16:53 5 which were only available to Irish citizens. He had not made any declaration
6 of alienage to renounce his Irish citizenship. The Tribunal heard evidence
7 that Mr. Caldwell still held a current solicitor's practicing certificate in
8 Ireland and was on the then current register of electors with an address in
9 Killiney, County Dublin.

11:17:14 10
11 Following this evidence the Sole Member delivered a ruling on the 28th of
12 September 2001 in which he directed that proceedings pursuant to Section 4 of
13 the Tribunal's of Inquiry Evidence Amendment Acts for the enforcement of the
14 summons, should issue. Proceedings were duly issued and ultimately on the
11:17:30 15 16th of October 2001, Mr. Ian Finlay Senior Counsel, instructed by Miley &
16 Miley solicitors appeared on behalf of Mr. Caldwell in the High Court and
17 agreed to the making of an order in the terms of the special summons which had
18 been issued. An agreed order was handed into court that day which included a
19 provision that Mr. Caldwell would pay the Tribunal's costs of the High Court
11:17:53 20 proceedings.

21
22 On the 23rd of October 2001 the Tribunal wrote to Miley & Miley who were now
23 acting on behalf of Mr. Caldwell, informing them that Mr. Caldwell would be
24 called to give evidence on the 31st of October 2001; And that his evidence
11:18:05 25 would be confined to matters relating to the then current Brennan & McGowan
26 module. He was informed that Mr. Caldwell would be required to give evidence
27 in relation to work done and advices given to Messrs. Brennan and McGowan in
28 the course of various transactions which had been the subject of the Tribunal's
29 public inquiries since the 15th of May 2001.

11:18:26 30

11:18:26 1 Ultimately Mr. Caldwell gave evidence to the Tribunal on the 1st of October
2 2001 -- sorry, the 1st of November, I should say, 2001.

3
4 His evidence was completed by lunchtime on that day. An application was made
11:18:39 5 on that day by Mr. Finlay on behalf of his client for limited legal
6 representation, and this was granted. Following upon the publication of the
7 Second Interim Report it was indicated on Mr. Caldwell's behalf that he would
8 be making an application in respect of his cost. An outline of the basis of
9 costs was forwarded to the Tribunal on the 24th of March 2003.

11:18:59 10
11 However, it appears that a significant portion of these costs relate to the
12 High Court proceedings, which the Tribunal had to bring against Mr. Caldwell in
13 respect of which a consent order was made in favour of the Tribunal.

14
11:19:10 15 The estimate also appears to include fees being claimed in the respect of
16 matters which have not yet been reported upon by the Tribunal.

17
18 Mr. Finlay appears, Sir, on behalf of the applicant.

19
11:19:20 20 MR. CHAIRMAN: Thank you. Mr. Finlay, do you want to the say anything?

21
22 MR. FINLAY: Yes, Chairman. That's why I'm here this morning.

23
24 First, Chairman, on a point of clarification arising out of one of the last
11:19:44 25 observations made by Mr. O'Neill. The Tribunal wrote to Mr. Miley, as you
26 just heard, in relation to costs and there's a letter from Mr. Miley which
27 Mr. O'Neill has just referred to, which contains some estimated figures in
28 relation to various costs. And those -- that letter and those figures include
29 some estimated figures referable to the High Court litigation. But for the
11:20:27 30 avoidance of any doubt, those costs, those costs associated with the High Court

11:20:33 1 litigation do not in fact form part of any claim by Mr. Caldwell. They were
2 referred in that letter but they are not in fact being claimed by Mr. Caldwell.
3 So that Mr. Caldwell's application in relation to costs is confined solely to
4 costs incurred in relation to the Tribunal as distinct from the litigation to
11:21:01 5 which you've heard reference.
6

7 So I just wanted to make that point at the outset. And that point would be
8 relevant again in the context of one of the submissions that I will make in a
9 few moments.

11:21:15 10
11 As you know, Chairman, you have delivered a comprehensive ruling in relation to
12 the principles to be applied in respect of applications for costs. And you
13 refer in that ruling to your view, your ruling in relation to the phrase "all
14 other relevant matters ", you are very familiar with that I'm sure. And you
11:22:07 15 identify, page 7 of your ruling, a range of matters which are to be only taken
16 into account when you come to consider the question as to costs. And you also
17 at page 8 refer to the evidential base on which your decisions in that regard
18 will be reached.
19

11:22:41 20 And importantly for the purpose of this application, at least, you do not
21 confine yourself to the face of any historic record, any determination or
22 finding which predated your appointment to this Tribunal. And importantly,
23 you indicate that in the event that a previous report contains any finding
24 relating to cooperation or non-cooperation or a failure to assist. That you
11:23:29 25 will not confine yourself to that finding, but you will look at, or may look
26 at, and I quote "the nature and extent of any such non-cooperation or failure
27 to assist."
28

29 And amongst the other criteria to which you refer there is the reasons why such
11:24:00 30 persons either failed to assist or did not cooperate with the Tribunal or

11:24:04 1 knowingly provided false information. That's not an aspect with which we're
2 concerned today, but that's part of your ruling.

3
4 And you also refer to the consequences which may or may not have flowed from
11:24:25 5 any failure to assist or non-cooperation.

6
7 And then you refer at page 8 to the evidential base to which you may turn when
8 considering applications in relation to costs. And that evidential base
9 includes not only the reports which preceded your appointment, the interim
11:24:51 10 reports, but also relevant extracts from the transcripts, and where
11 appropriate, correspondence exchanged between the Applicant and the Tribunal,
12 and the role played by the Applicant in matters the subject of the inquiry.

13
14 And I mention those aspects of your ruling in particular because they are
11:25:23 15 relevant to the -- to some of the submissions I make this morning.

16
17 Mr. O'Neill has referred to a report of your predecessor, and to paragraph
18 17.08 of that report. And he has referred to a finding in relation to
19 cooperation, and it's with that finding that I would, principally, be
11:26:03 20 concerned this morning. There are three aspects to that finding, at 1708.

21 And they are as follows.

22 A. Failing to provide proper affidavit of discovery in compliance with an
23 order for discovery made against Mr. Caldwell on 4th April 2001.

24
11:26:23 25 B. Failing to comply with an order of discovery made against him on the 10th of
26 August 2001.

27 And C. Failing to comply with a witness summons requiring his attendance at a
28 public session of the Tribunal on the 27th September 2001.

29
11:26:36 30 And if I could deal with those in that order.

11:26:41 1 You will have noted immediately, Chairman, that the first stated finding
2 relates to failing to provide a proper affidavit of discovery, Not failing to
3 provide an affidavit of discovery, but failing to provide a proper affidavit of
4 discovery. And as we will see shortly, the finding relates to a matter of
11:27:16 5 form rather than a matter of substance. And that will become clear from a
6 number of documents to which I will be referring.

7
8 The first document which I would like to refer is the, that affidavit itself.
9 It was sworn on, I think the 4th of May 2001. It's Mr. Caldwell's affidavit
11:27:41 10 of the 4th of May.

11
12 And if I could, just might read the relevant sections of that. Paragraphs 2
13 and 3: "I have been served with an order of discovery, dated the 4th of April
14 2001 by the Tribunal of Inquiry into Certain Planning Matters and Payments
11:28:02 15 requiring me to make discovery on oath of all documents in my power, possession
16 and procurement in relation to my involvement in all or any of the matters
17 whether acting as solicitor or otherwise, relating to the affairs of Canio
18 Limited.

19
11:28:16 20 The Tribunal has also made an order dated the 9th of April 2001 directing my
21 colleague, Mr. Michael O'Hanrahan solicitor, of Binchy solicitors, to swear an
22 affidavit of discovery in exactly the same terms as the order.

23
24 In compliance with the order of the 9th of April 2001 Michael O'Hanrahan has
11:28:41 25 sworn an affidavit of discovery, Mr. O'Hanrahan's affidavit, dated the blank
26 day of May 2001, a copy of which I have read and considered in detail. Apart
27 from the documents referred to in Mr. O'Hanrahan's document" -- affidavit,
28 sorry. "Apart from the documents referred in Mr. O'Hanrahan's affidavit I
29 have no other documents falling within the terms of the order in my power,
11:29:15 30 possession or procurement. I have nothing to add to that affidavit and file

11:29:22 1 this affidavit for the sake of completeness."
2

3 So that was the affidavit that Mr. Caldwell swore in response to the Order.

4 And if one just pauses there to see what that affidavit avers to in terms of

11:29:41 5 substance, not of course form, but substance. Mr. Caldwell there swore that he

6 had considered the affidavit of Mr. Hanrahan which had been sworn on foot of an

7 identical order. And that he had, he Mr. Caldwell, had no documents in his

8 power, possession beyond those referred in Mr. O'Hanrahan's affidavit. So

9 that was what the Tribunal was told in that affidavit when it was received in

11:30:23 10 May.

11
12 Now, Chairman, as a litigator, a litigating counsel, you of course will see

13 that the form of that affidavit, the form of that affidavit was defective.

14 And anyone sitting with the relevant forms attached to the back of the Superior

11:30:51 15 Court Rules in front of them would see that the form of that affidavit does not

16 comply with the form set out in the rules. There is no issue about that.

17 There never has not been.

18
19 What is important is this, this will become apparent. Is that the substance

11:31:12 20 of that affidavit was correct. And when, as we shall see later Mr. Caldwell

21 rectified the formal position by swearing an affidavit which complied with the

22 form required by the Superior Court Rules, that formal affidavit which we will

23 see shortly, simply replicated the contents of Mr. O'Hanrahan's affidavit by

24 reference.

11:31:52 25
26 So the affidavit was a correct affidavit. It was true. It was true in

27 substance. But it was defective in form.

28
29 Now, that's the first important aspect of the stated finding of your

11:32:19 30 predecessor in relation to non-cooperation. He -- and when adopting your

11:32:24 1 ruling, when you look at what the nature of the particular non-cooperation was,
2 in this case one finds that it relates to a defect in form. Not in substance
3 but in form. I will come back to that later.
4

11:32:43 5 The other thing I might mention at this stage. And I will show Your Lordship
6 the evidence for it shortly. Is that not only was it a defect in form merely
7 and not in substance. But that Mr. Caldwell gave evidence to the Tribunal, in
8 circumstances which I will describe shortly, as to the reasons for that fact.
9 And the reasons -- the evidence that he gave, which was not challenged, was
11:33:18 10 that Mr. Caldwell was not a litigation solicitor. And that he had a genuine
11 belief that the affidavit sworn in this form satisfied the -- what he was
12 required to do. He believed, as a non-litigation solicitor, that this was a
13 valid affidavit. When later it was pointed out to him that the form of the
14 rules required otherwise he fully accepted that fact and in consequence swore a
11:34:01 15 further affidavit in the form required by the rules. And we will look that
16 the shortly. But he gave evidence on the 1st of November to that effect.
17

18 So the nature of the non-cooperation was that he swore an affidavit which did
19 not comply in form with the rules. You've just heard its contents, the
11:34:25 20 contents were correct. And his reason for doing that was that he did not, was
21 not aware that it was a non-complying affidavit in that sense. That in
22 summary is the circumstance surrounding this particular affidavit. I should
23 perhaps at this stage turn to the transcript of Mr. Caldwell's evidence on the
24 1st of November. And if I might, with your permission, read a very short
11:35:23 25 passage dealing exclusively with this first issue.

26
27 I was asking Mr. Caldwell some questions. And it runs as follows. This is
28 me speaking first.

29 "Mr. Caldwell, is it correct that you are not a litigation solicitor?

11:35:45 30 A: That's correct.

11:35:47 1 Q: And in relation to this affidavit of discovery which has been raised this
2 morning by Ms. Dillon on behalf of the Tribunal, is it correct when you swore
3 your affidavit of discovery on the 4th May 2001, that you were not then
4 familiar with the specific form of an affidavit of discovery which is required
11:36:04 5 by the rules of the Superior Courts?
6 A: That's correct."
7 I should have said that this commences at No. 437 on the 1st of November. Day
8 317.
9
11:36:18 10 "Question 439: And when you swore that affidavit, which as we have seen this
11 morning, makes specific reference to the affidavit of Michael O'Hanrahan which
12 had been sworn, was it your belief in swearing your affidavit that in so doing
13 you were complying with the order against you, in substance?
14 A: Yes, I believe that I was complying in substance with the order.
11:36:42 15 Q: Was it your understanding at that time that in relation to an affidavit of
16 discovery two persons could not in fact make discovery of the same set of
17 documents?
18 A: That was my understanding.
19 Q: Are you aware now, particularly in the light of matters arising today,
11:37:02 20 that the form of that affidavit of the 4th of May 2001 does not in fact comply
21 with the form prescribed by the High Court Rules?
22 A: Yes, I am now aware of that.
23 Q: And in that regard are you now prepared to rectify that deficiency?
24 A: I can put the affidavit of discovery into the proper format".
11:37:30 25
26 So that was Mr. Caldwell's evidence to the Tribunal on the 1st of November in
27 relation to the history and circumstances of swearing of that affidavit and his
28 reasons for doing it in that way. And at the end of my questioning of
29 Mr. Caldwell at No. 450, the Chairman asked the Tribunal's barrister whether
11:38:02 30 she wished to ask Mr. Caldwell any further questions and she said "no".

11:38:10 1
2 And then, Chairman, in relation to that affidavit. What happened was that
3 pursuant to all of that Mr. Caldwell swore a further affidavit. And I'm just
4 trying to get the date of it. It was the 26th of November 2001, Chairman.

11:38:47 5
6 And at this stage, as you know, by this stage of course Mr. Caldwell was now
7 being represented by and being advised by Mr. Miley and by myself, which had
8 not of course been the case at the time of the earlier events to which I have
9 referred. The time of the first affidavit.

11:39:15 10
11 And this affidavit follows the form prescribed in the Superior Court Rules as
12 you, Chairman, are well aware, it's a very technical form. It's not uncommon
13 to find mistakes in the adoption of that form when one is involved in
14 litigation in the High Court, it's a common event. But in any event, this
11:39:50 15 second affidavit followed carefully the format of the rules. And when one
16 comes to the second schedule -- sorry, I should of course say that in relation
17 to the first schedule there are no documents discovered. And in relation to
18 the second part of the first schedule there are no documents discovered. And
19 then in relation to the second schedule one finds a lengthy list of documents.

11:40:51 20
21 Now, Chairman, I may have slightly confused two affidavits for a moment, if I
22 have done that I apologise, if I have done that it is of no consequence.
23 What of course happened was that Mr. Caldwell swore two affidavits at that the
24 time. One as a further affidavit following the one of May to comply with the
11:41:22 25 format of the rules. And another one in relation to the order of the 10th of
26 August which I'm going to deal with shortly. The one I may just have referred
27 to may have been the second of those affidavits. I think in fact it -- no.
28 I think I am correct. I think that that is the one I've just referred is the
29 one relating to the 4th of April order.

11:41:51 30

11:41:51 1 So, as you will have just seen, Chairman, that confirms the fact, as had been
2 sworn to in the earlier affidavit that he did not have in his possession or
3 procurement any documents. That such documents as did exist were in the
4 possession of others and have been covered by the other affidavits and no
11:42:26 5 issue has ever been taken on that.

6
7 Perhaps for completeness, Chairman, I might just refer to two -- to the two
8 final categories of documents in the second schedule at W and X.

9
11:42:53 10 And one of them, W, refers to files, documents, financial records and other
11 written material destroyed by Binchy Solicitors. So once again documents that
12 he doesn't have in his possession but may once have existed and been destroyed.

13
14 So that was the history of the affidavit of discovery which is the subject of
11:43:19 15 the first finding to which I have referred. There is no question but its form
16 was defective. But I have attempted to explain to you this morning the reason
17 why that happened. You have seen Mr. Caldwell's sworn evidence, unchallenged,
18 as to the reasons for that event. And its contents were true. It was
19 entirely correct in substance. And the technical defect in form was remedied,
11:44:05 20 corrected, as soon as Mr. Caldwell came into the Tribunal in November of that
21 year.

22
23 And it's for that reason, with great respect Chairman, that I think it's
24 particularly relevant that you include it in your ruling as a criterion to be
11:44:34 25 adopted. The ability to look at the nature and extent of any cooperation as
26 so found, I think, with great respect, in relation to this issue, the use of
27 the term "cooperation" in the context of the finding made, is not a use of the
28 term as one would normally understand the word and nor is it a special use of
29 the term as permitted by any definition of the word "cooperation" to be found
11:45:15 30 in the Act, because there is none.

11:45:20 1 So it is a finding which in itself might present some difficulty.

2

3 The next finding which is referred to in the report relates to the second order
4 for discovery of the 10th of August 2001. And the last, as you heard, relates

11:45:47 5 to a failure to comply with a witness summons to appear on the 27th of

6 September.

7

8 Chairman, with your permission, I propose to try and deal with those together
9 for reasons which I hope will become apparent. Because they are connected in

11:46:07 10 terms of the circumstances and explanations given on oath in evidence. I

11 don't believe that it would be useful, or appropriate, for you to attempt to

12 consider them in complete isolation from each other.

13

14 What had happened, and one just needs to look at the circumstances here. what

11:46:29 15 had happened, as appears from the correspondence I think, is that I think on

16 the 31st of July, Chairman, of that year, the 31st of July 2001, Mr. Caldwell

17 or perhaps his then solicitors, Finbar Cahill, had been notified of the date

18 for his appearance. That was the 27th of September date, which was -- which

19 appears in the finding.

11:47:02 20

21 Now, that fact is important because it means that the notification of the

22 appearance date took place prior to the order for discovery. And that will

23 become relevant for reasons which I hope will appear. And the -- I think the

24 record shows, Chairman, that from that time on, the -- should I say the

11:47:39 25 predominant issue from Mr. Caldwell's point of view became whether or not he

26 would appear at the Tribunal.

27

28 And as has already been adverted to by Mr. O'Neill, Mr. Caldwell had a belief

29 as a lawyer, based on stated grounds, that a jurisdictional issue arose. And

11:48:17 30 that's most important, Chairman, because he was perfectly entitled as a lawyer

11:48:30 1 to form such a view. And as you've heard, that view was based, amongst other
2 matters, on the position that he was not a resident of this country. And
3 you've heard reference to his correspondence, which I may come back to. And
4 therefore issues of jurisdiction arose, extra territoriality of the Tribunal's
11:49:05 5 jurisdiction. An issue with which the Tribunal is acutely familiar, because
6 it has often referred to, in my recollection, that aspect or perhaps
7 predicament in the reach of its inquiries, the territoriality or otherwise of
8 its jurisdiction.

11:49:28 10 And what then happened, in summary Chairman, is that that issue went to
11 litigation and it was at that stage for the first time that Mr. Stephen Miley
12 and myself became involved on behalf of Mr. Caldwell.

14 And that litigation, that High Court litigation was compromised, it was
11:50:00 15 settled. The jurisdictional issue raised, the objections raised by
16 Mr. Caldwell, which led to that litigation, that question was not determined by
17 any court, either in Mr. Caldwell's favour or in favour of the Tribunal.
18 Mr. Caldwell took a decision, despite the belief that he had set out in open
19 correspondence to the Tribunal prior to the litigation, he took a decision
11:50:40 20 despite that to attend at and assist the Tribunal, something which he has
21 continued to do for the last three years, since the autumn of 2001.

23 Now, those facts are relevant as is also the following fact, Chairman. And
24 you've heard that Mr. Miley and myself only came into the litigation -- only
11:51:09 25 came into representing Mr. Caldwell just at the time of the litigation, it was
26 our first involvement. But critically, also in that litigation no issue was
27 raised by the Tribunal in relation to any question of outstanding discovery or
28 defective discovery. That was not the -- an issue litigated or the subject of
29 the litigation. And critically also, in addition to the fact that it didn't
11:51:46 30 form part of the claim, the consent order, the settlement of the case, the

11:51:52 1 consent order that was made, makes no reference to my recollection. I do not
2 have it in front of me, but that's my recollection and Mr. Miley's and I'm
3 sure we can find it if necessary this morning. The consent order makes no
4 reference at all to discovery. And if outstanding discovery or defective
11:52:17 5 discovery had been a live issue at the time of the litigation, at the time that
6 we were dealing with that. Clearly, it could have been readily dealt with and
7 covered in the terms of what was agreed. Even if it was a matter which wasn't
8 covered by the pleadings it could of course have been the subject of a
9 settlement outside the pleadings, but it wasn't raised at all, it wasn't an
11:52:49 10 issue. And thereafter, after that settlement, I think it was the 16th of
11 October to my recollection, after the 16th, Mr. Miley, on behalf of
12 Mr. Caldwell, immediately engaged with the solicitor or solicitors representing
13 the Tribunal with a view to progressing Mr. Caldwell's involvement with the
14 Tribunal, his assistance to the Tribunal, and the evidence that he was going
11:53:21 15 to give, and which he ultimately gave on the 1st of November.

16
17 And in that context, Chairman, important correspondence was exchanged between
18 the solicitors for the Tribunal and Mr. Miley. I just want to mention some of
19 that correspondence in a moment.

11:53:54 20
21 If it's of any assistance, Chairman, Mr. Miley has in a small little bundle,
22 some four or five letters which are the ones that I am going to refer to, if it
23 would be of assistance to hand them in?

24
11:54:15 25 MR. CHAIRMAN: Yes, certainly.

26 (Documents produced to Chairman)

27
28 MR. FINLAY: You have those Chairman?

29
11:54:44 30 MR. CHAIRMAN: Yes.

11:54:45 1
2 MR. FINLAY: You will see that the first one is dated the 16th, which is the
3 date on which we arrived at the consent order in the High Court. And it's a
4 letter from a solicitor to the Tribunal to Mr. Miley.

11:55:03 5
6 "Your client John Caldwell, re attendance to give evidence.
7 Dear Sirs, further to the order of the High Court today I confirm that your
8 client is required to give evidence at 10:30 on Wednesday the 31st of October
9 2001. As you are aware, the Tribunal regularly issues a witness schedule
11:55:18 10 which estimates the duration of the testimony of each witness and therefore the
11 likely date of commencement" and so on. Nothing turns on that.
12
13 Also a letter of receipt of the 17th of October, Chairman. And then just a
14 procedural letter of the 18th referring to an appearance.

11:55:33 15
16 And then a letter of the 18th of October, two days later, to Miley & Miley from
17 a Tribunal solicitor.
18 "Further to your commencing acting for Mr. Caldwell in his dealings with the
19 Tribunal, I am directed to furnish to you the enclosed folder comprising
11:55:48 20 documents circulated to other parties but not to Mr. Caldwell since the date on
21 which Cahill & Co informed the Tribunal that they had been instructed not to
22 accept any further communications from the Tribunal on behalf of Mr. Caldwell.
23 Documents included in the folder are listed in the schedule here to."
24

11:56:03 25 And there is a further discussion about access to documentation. And then
26 some confidentiality provisions in the usual form. Then a schedule of some
27 documents attached which were circulated. And then, My Lord, a letter of the
28 19th of October 2001 from Miley & Miley to the Tribunal.
29

11:56:27 30 "We acknowledge receipt of your letter of the 18th with enclosure, which we

11:56:29 1 note, for which we are obliged.

2 The writer has given some thought over the last few days as to how best Mr.

3 Caldwell may be of assistance to the Tribunal. And subject to your views we

4 propose the following:

11:56:42 5 1. You arrange for return of all materials furnished to you by Mr. Caldwell's

6 former solicitors Finbar Cahill & Co.

7 2. You send us all materials to which you wish Mr. Caldwell to have regard

8 when giving his evidence.

9 3. You identify so far as you are able to do at present, the areas, matters

11:56:59 10 and relevant documentation in respect of which you require Mr. Caldwell to give

11 evidence.

12 We expect Mr. Caldwell's evidence on the 31st inst will be confined to issues

13 relating to the current Brennan and McGowan module, and you might be kind

14 enough to confirm this to us. The more specific you can be in your response

11:57:17 15 to this proposal the better Mr. Caldwell will be able to focus his researches.

16 4. You confirm to us that insofar as you will require evidence from

17 Mr. Caldwell in relation to any of his clients or the clients of his former

18 practice, that such clients have waived all issues relating to solicitor client

19 privilege.

11:57:35 20

21 You confirm to us that the materials enclosed with your letter of the 18th and

22 those which we propose that you now send us together with such further material

23 as you might send to us in the future may be released into the custody of

24 Mr. Caldwell for examination by him. You will appreciate that Mr. Caldwell

11:57:51 25 spends most of his time outside of the jurisdiction and it's accordingly not

26 practical for him to attend at this office for the purpose of reviewing the

27 material ".

28

29 That was the letter of inquiry written in relation to what Mr. Caldwell and his

11:58:03 30 advisors might anticipate he would be required to deal with when he came to

11:58:08 1 give evidence in 10 days or so time after the 19th of October.
2
3 And then there was a letter of the 23rd of October. Moving on to two letters,
4 Chairman. In which a Tribunal solicitor thanks Mr. Miley for his letter of
11:58:27 5 the 19th and indicates that the Sole Member has directed that Mr. Caldwell's
6 change of solicitor should be dealt with as follows.
7 "Enclosed is a CD rom furnished under conditions of confidentiality containing
8 the brief of documents.
9 2. Cahill and Company will be requested to furnish materials previously
11:58:42 10 furnished to them on behalf of your client to you.
11 3. Mr. Caldwell's evidence on the 31st ins" -- I might just pause for a moment
12 there, Chairman. I think what in fact happened was that it moved back from
13 the 31st to the 1st. "Mr. Caldwell's evidence will be confined to issues
14 relating to the current Brennan and McGowan module. Perusal of the transcript
11:59:03 15 of which will highlight the references to Mr. Caldwell in evidence to date.
16 4. Mr. Caldwell will be required to give evidence to the Tribunal in relation
17 to work done for and advices given to Thomas Brennan and Joseph McGowan in the
18 course of various transactions which have been the subject of the Tribunal's
19 public inquiry since the 15th of May 2001 including" and he sets out four
11:59:21 20 topics there.
21 "5. All parties are referred to and work from the entire brief and not any
22 selected portions thereof in order to prepare for his evidence, therefore your
23 client should peruse the brief ".
24
11:59:33 25 And then 6. "It's confirmed that insofar as Mr. Caldwell will be required to
26 give evidence in relation to any of his clients presumably that such clients
27 have waived issues relating to solicitor/client privilege. Mr. Caldwell has,
28 in a narrative statement, indicated persons for whom he acted and did not act."
29 Therefore, Chairman, is a clear recognition that he has already furnished a
11:59:54 30 narrative statement and no point is being made about that narrative statement

11:59:59 1 or issue raised in relation to it.
2
3 And then there is a 7th paragraph relating to confidentiality. Nothing turns
4 on that.
12:00:07 5
6 And then there is a letter of the 23rd of October enclosing a copy of a letter
7 to Finbar Cahill and Company in relation to the circulation, release of
8 documents.
9
12:00:20 10 A then a further letter from Miley & Miley, The 25th of October thanking the
11 Tribunal for its letters and CD rom and so on, nothing much turns on that
12 letter, but you can see it.
13
14 Chairman, the reason that I mention all of that is as follows. Relevant to
12:00:43 15 what happened on the 1st of November and the transcript and the evidence that
16 Mr. Caldwell gave. And it's relevant, Chairman, to the reason why I said at
17 the outset that the order of the 10th of August and the issue of Mr. Caldwell's
18 participation in, and appearance at the Tribunal, are closely connected.
19 Because as you've seen from that correspondence, which in turn followed the
12:01:19 20 consent order, which in turn followed the litigation, nowhere in any of that to
21 Mr. Caldwell or to his knew advisors, Mr. Miley and myself, is there any
22 reference whatever to, or complaint about, discovery. No reference to
23 allegedly defective discovery, or that discovery is outstanding. If you read
24 that correspondence, looked at the consent order and were preparing for
12:01:54 25 Mr. Caldwell's appearance on the 1st of November, you would have had no
26 intimation whatever that that was an issue. No indication at all.
27
28 And as you've heard from Mr. O'Neill then on the 1st of November Mr. Caldwell
29 gave evidence and that was the only occasion, I think, on which he was asked to
12:02:17 30 give evidence, in the sense that it's the only occasion on which he gave

12:02:23 1 evidence in relation to that module. I don't recollect that he was asked to
2 give further evidence in that module. He only gave evidence in the morning
3 and I recollect that my examination finished before lunch or whatever. So it
4 was a short session.

12:02:39 5
6 But to -- I have to say the astonishment of Mr. Miley and of myself, the bulk
7 of that session, the bulk of his short evidence, his short evidence to the
8 Tribunal on the 1st of November 2001, was taken up not with the evidence which
9 had been discussed in the correspondence between Miley & Miley and the Tribunal
10 and which we had anticipated. But was in fact taken up with a
11 cross-examination of Mr. Caldwell in relation to discovery. The bulk of his
12 period in the witness box that morning was taken up in relation to
13 cross-examination for discovery. Something which Mr. Caldwell nor his
14 advisors, in the light of what occurred, were at all prepared.

12:03:39 15
16 Despite that, as you've seen, Mr. Caldwell in the passage that I've referred,
17 to gave an explanation when challenged for the history of that first affidavit,
18 the one of the 4th of May -- or the one of May. But he also was asked about
19 the order of the 10th of August. And he was cross-examined extensively about
12:04:13 20 that. His evidence to the Tribunal that day, Chairman, was in relation to the
21 10th of August order for discovery, was that he believed that once the issue
22 of his attendance arose, and the litigation arose, and the order that was made,
23 he believed that that issue had been overtaken by the litigation. And it's
24 with great respect, My Lord, I think it's quite clear, must be clear from his
12:04:53 25 evidence that that was a genuinely held belief. And as I've indicated to you
26 from the written record, from the date of the litigation onwards there is
27 nothing in the record to indicate otherwise. Everything points to the fact
28 that the concern was to do with his attendance and the issues were to do with
29 his evidence but there is no reference to discovery.

12:05:14 30

12:05:14 1 He also, in his evidence to the Tribunal that day and we'll see it in a moment,
2 indicated that in any event he believed that everything sought, the discovery
3 sought by the order of the 10th of August 2001 had already been made. And as
4 we shall see in a moment, Chairman, with respect, that was correct. We'll
12:05:39 5 come to that in a moment.

6
7 But in any event, as with the earlier affidavit which was defective in form,
8 Mr. Caldwell of course said that he would do an affidavit. And it's, I've
9 already mentioned the fact that there were two affidavits sworn following the
12:06:03 10 1st of November 2001, following the raising of this issue on the hearing of the
11 1st of November. As you've seen, we came to the Tribunal that day with no pre
12 knowledge that that would be an issue that day. But on the day, as I say,
13 Mr. Caldwell agreed, without demur, to do what was required to rectify the
14 situation. And he swore two affidavits. The one to which I have referred
12:06:27 15 already, to rectify the format of the earlier affidavit. And then a second
16 affidavit to deal with the order of the 10th of August 2001.

17
18 And I want to now just, if I may, refer to that affidavit. That affidavit is
19 the one of the -- I think the 4th of December 2001. Like the one of the 26th
12:06:57 20 of November, it's a lengthy affidavit. And again, it follows correctly the
21 form of the Superior Court Rules. And then in the second schedule, which runs
22 to many pages. I've counted them, it certainly runs to some 17 pages or so.
23 It simply replicates, replicates verbatim, the listings in the affidavits of
24 discovery already sworn. And I'm going to mention which ones those are.
12:07:43 25 The affidavit of Michael O'Hanrahan sworn on the 18th of April. The
26 affidavit of Michael O'Hanrahan sworn on the 4th of May. And then there have
27 been other affidavits sworn by former partners of Mr. Caldwell or members of
28 the firm of Binchy. Affidavit of Brendan Duke sworn on the 28th of May.
29 Affidavit of Brendan Duke sworn on the 13th of July. And then two affidavits
12:08:19 30 of Brendan Duke sworn on the 13th of September 2001. And he also refers to an

12:08:34 1 affidavit of Brendan Duke dated November 2001. And they are all, all of those
2 documents are listed in the second schedule.

3
4 So once again, in terms of the substance of this. It is of course correct
12:08:51 5 that Mr. Caldwell didn't swear an affidavit at the time in response to the
6 order of the 10th of August. At that time he was dealing with a request to,
7 or rather perhaps summons to appear at the Tribunal. That was the predominant
8 issue. He formed a legal view in relation to that. That became the subject
9 of litigation. The litigation was compromised without discovery ever being
10 raised as an issue. The ensuing correspondence between his new solicitors and
11 the Tribunal never mentioned that discovery was an issue. He came to the
12 Tribunal on the 1st of November unaware that it was an issue. It was then
13 raised in cross-examination and he gave the explanations to which I have
14 referred and the position was then completely rectified by the swearing of the
12:09:19 15 affidavits which we have seen.

16
17 And in that regard, Chairman, if I might just refer you to a short passage in
18 my questioning of Mr. Caldwell on that same day, day 317. It follows
19 immediately after the passage I referred to earlier earlier. And it starts at
12:10:13 20 question 443 on page 112 of the transcript.

21
22 MR. CHAIRMAN: Alright.

23
24 MR. FINLAY: And if I just might open that, Chairman, with your permission.

12:10:30 25
26 I don't know whether that comes up for you, Chairman. If I might quickly read
27 out the passage and I think you'll see the issue.

28
29 443 "Turning then to the order of the Tribunal of the 10th of August last,
12:10:53 30 which was referred to earlier, was it your understanding that the documents or

12:10:56 1 rather that the topics referable to documents listed in the that order had in
2 fact been made available to the Tribunal in any event through other affidavits
3 of discovery?

4 A: That was my understanding.

12:11:09 5 Q: You recollect and reference has been made to it this morning that
6 proceedings were brought against you in the High Court in the recent past. Is
7 it the case that in those proceedings no relief whatever or no claim whatever
8 was made against you by the Tribunal in relation to the issue of discovery?

9 A: Yes, that's my understanding, yes.

12:11:25 10 Q: Did you believe arising from that fact, that discovery was not an
11 outstanding issue on the Tribunal side as between you and the Tribunal?

12 A: That was my belief.

13 Q: Subsequent to the conclusion of those High Court proceedings I think it is
14 correct that there was correspondence between Miley & Miley, your present
12:11:41 15 solicitors, and the solicitors of the Tribunal preparatory to your appearing to
16 give evidence, isn't that correct?

17 A: That's correct. I wonder, with permission, might I briefly refer to page
18 294". And then Chairman I referred Mr. Caldwell to the -- to some of the
19 correspondence which we've just seen. The correspondence that I have opened.

12:12:01 20 I'm not, obviously, going to open all of that again. But if I could go on to
21 the end of question 448?

22

23 I asked Mr. Caldwell the following final question.

24 "Mr. Caldwell, when that letter was received by your solicitors and considered
12:12:18 25 by you for the purpose of your attendance here today was there anything in that
26 letter at that time that indicated to you that non-compliance with any order
27 for discovery was still a matter which was of particular concern to the
28 Tribunal?

29 A: There was nothing in that letter which indicated that to me.

12:12:33 30 Q: Despite all of that, it's now correct is it not, that you are going to

12:12:36 1 prepare and swear an affidavit in compliance with the outstanding order?

2 A: Yes, I will do that ".

3

4 As I just mentioned, after that sequence of questions the Tribunal's barrister

12:12:48 5 was asked by the Chairman whether she wished to ask any questions arising out

6 of my examination and she didn't wish to do so.

7

8 So that's the factual history, Chairman, of what occurred.

9

12:13:13 10 I should of course say prior to my examination of Mr. Caldwell that morning, he

11 had already been extensively cross-examined by Miss Dillon on the issues. I

12 have gone to my questioning as a summary of his evidence. There are pages and

13 pages of the transcript of the cross-examination of him by Ms. Dillon but I

14 don't think it's necessary for the present purposes to go into that. But just

12:13:34 15 for completeness I will mention to you Chairman that it is there.

16

17 Where then might that lead, Chairman, in terms of your approach to all of this?

18 I don't think I need to say much more in relation to the first finding. The

19 one about the order of the 4th of April.

12:13:56 20

21 In relation to the second two related issues. The order of the 10th and the

22 request to appear. There are a few words that I would very much like to say.

23

24 First of all, on the substantial side, the order of the 10th, when satisfied by

12:14:15 25 Mr. Caldwell in the circumstances I have just described, did no more than as he

26 had said, list what already been given to the Tribunal. And no issue has been

27 raised by that. He was correct in that belief that the Tribunal already had

28 everything which he listed in his subsequent affidavit.

29

12:14:38 30 But his sworn explanation for that, for those circumstances of delay in that

12:14:50 1 affidavit related to the litigation and the summons to appear. And it's in
2 relation to that in particular that I wish to say something.

3
4 As I clarified at the outset today, Mr. Caldwell is not applying for any costs
12:15:12 5 relating of course to the High Court litigation. But goes obviously further
6 than that. You have heard that under the consent order that was made between
7 us on the 16th of October 2001, Mr. Caldwell agreed to pay the Tribunal's costs
8 in relation to that litigation. Just another aspect to be aware of. And
9 it's relevant.

12:15:42 10
11 And I think it's probably correct to say the following; The evidence is, the
12 evidence is that Mr. Caldwell had a genuinely held belief, certainly on
13 statable grounds in relation to an important legal issue, a jurisdictional
14 issue. The jurisdiction of the Tribunal in the factual circumstances which
12:16:11 15 have been described.

16
17 Should, in addition to the litigation costs, which he is bearing, should a
18 party be further penalised and deprived of his costs in the Tribunal because he
19 has held a genuine belief in relation to a jurisdictional issue? And that is
12:16:48 20 particularly relevant where, despite that view which he had, he nevertheless
21 agreed to come into this Tribunal and to assist it. Now, just on that point,
22 you will be aware that since all of that happened three years ago, Mr. Caldwell
23 has been engaged in a three year period of effectively continuous involvement
24 with and assistance to the Tribunal, which is ongoing as I speak. And he has
12:17:24 25 discovered and produced to the Tribunal some tens of thousands of documents.
26 Nothing to do with the discovery we discussed this morning relating to
27 subsequent matters. He has discovered literally tens of thousands of
28 documents on foot of exceptionally complex affidavits. And he or his
29 solicitors have dealt with, responded to and written, hundreds and hundreds of
12:17:51 30 letters to the Tribunal. And he and his solicitors and counsel have spent

12:17:56 1 thousands, literally thousands of man hours on work occasioned by the requests
2 from the Tribunal since that time, since November 2001.

3
4 But if you were to take the view, Chairman, that someone who has a genuinely
12:18:23 5 held legal belief and resulting in litigation. That the penalty for taking
6 that view before the Tribunal is not merely to suffer the costs of the
7 litigation, but also to be subsequently deprived of your cost of assisting the
8 Tribunal, it seems to me that that would be a remarkable legal proposition.
9 And it seems to me that it would raise very serious questions under at least
10 two principles. The constitutional principle here of the right of access to
11 the courts. And secondly, and somewhat more recently in jurisprudential terms
12 the provisions of the European Convention on Human Rights and particularly
13 Article 6 which relates to the right of access to a court.

14
12:19:26 15 Because if one pauses to think -- if one just looks at the principle for a
16 moment and then applies the principle. It would, I think, necessarily mean
17 the following. A party before a Tribunal -- at any stage before a Tribunal --
18 who has or is advised that he has a statable legal case or challenge to an
19 order or decision or interim ruling, whatever it may be, of the Tribunal, is
12:19:58 20 faced with the following dilemma; If that party goes to the High Court to
21 challenge the Tribunal's ruling and he fails in that challenge in the High
22 Court, and then appeals to the Supreme Court and fails in the Supreme, and then
23 comes back into the Tribunal and spends another year assisting the Tribunal or
24 two years or five years, and incurs millions of euros in so doing, he will
12:20:35 25 know from the outset that the risk he takes in mounting that legal challenge is
26 not confined to the costs of that litigation but extends to the entire of the
27 costs that he may subsequently incur in assisting the Tribunal. And with
28 great respect, that in principle must be wrong.

12:20:57 30 And if I can demonstrate the attitude that has been taken or the construction

12:21:04 1 that has been placed recently on Article 6 and the right of access to the
2 courts, all be it in a very different but much more modest context. On the
3 11th May this year the Court of Appeal in England gave judgement in the joined
4 cases of Halsey and Steele in a landmark judgement relating to mediation in
12:21:31 5 civil litigation, and the approach to be taken by the courts in relation to
6 mediation as part of case management in England.

7
8 And the issue, or one of the issues before the court was, the extent to which a
9 court should or could compel parties before it to go to mediation prior to
12:21:57 10 trial.

11
12 Now, the issue was only whether parties should be or could be compelled to go
13 to mediation. Obviously no party can ever be compelled to conclude a
14 settlement in mediation. So the issue was merely whether the courts could
12:22:17 15 compel parties before it to attend mediation during the course of litigation.

16
17 And the approach which has been taken to date in England is that though the
18 courts should encourage mediation actively, the question is whether the court
19 could also compel. And in relation to compulsion. The Court Of Appeal said
12:22:44 20 the following, the unanimous decision of the Court of Appeal was in the
21 following terms:

22 "The court in Strasbourg has said in relation to Article 6 of the European
23 Convention of Human Rights that the right of access to a court may be waived,
24 for example by means of an arbitration agreement. But such waiver should be
12:23:00 25 subjected to particularly careful review to ensure that the claimant is not
26 subject to "restraint ". If that is the approach of the European Court of
27 Human Rights to an agreement to arbitrate, it seems to us likely that
28 compulsion of ADR", that's alternative dispute resolution, "compulsion of ADR
29 would be regarded as an unacceptable constraint on the right of access to the
12:23:28 30 court and therefore a violation of Article 6."

12:23:33 1
2 If that view, Chairman, is correct, to merely compel parties to go to
3 mediation, even though of course they can return to the litigation if the
4 mediation fails, if that compulsion constitutes a breach of Article as being an
12:23:47 5 unacceptable constraint on the right of access to the courts, how much more so
6 must be a principle which says this is a Tribunal of Inquiry established by,
7 under a statute by the Oireachtas, if you wish to challenge any ruling or
8 order of this Tribunal you are legally free to do so. You may go to the
9 court. But the price that you must pay is, in the event of failure, is not
12:24:18 10 merely the cost of litigating but all the costs that you will incur
11 subsequently in assisting this Tribunal, that would surely be regarded as a
12 savage constraint on the right of access to the courts and a prospect that
13 would intimidate almost any prospective litigant. It would be a complete
14 closure of realistic access to the courts.

12:24:49 15
16 And I mention that to you because it's relevant in the present case to the
17 extent that one of the findings made, as you've seen, was a non-cooperation
18 relating to appearance before the Tribunal. You have now heard the reasons
19 why Mr. Caldwell did not attend. The belief that he had, a belief relating a
12:25:12 20 legal ground. The way that was resolved, the financial basis on which it was
21 resolved, which was that the Tribunal's costs were paid and he, as you've heard
22 today, bears his own costs. It seems to me with the very greatest of respect,
23 for the reasons that I've just mentioned, that it would be wrong in principle
24 and dangerous to penalise him further on that alleged ground of
12:25:39 25 non-cooperation.

26
27 As I say, in relation to the connected issue of the 10th of August 2001
28 affidavit of discovery, he had, I respectfully submit, a genuinely held belief
29 that that issue had been overtaken by the much bigger issue of his attendance
12:26:01 30 in the litigation. And I have outlined the record and the relevant facts

12:26:05 1 surrounding the litigation, the subsequent correspondence and then what
2 happened on the 1st of November 2001.

3
4 I just might pause for a moment and confer briefly with Mr. Miley.

12:26:23 5 I hope that those observation may be of some assistance when you come to make
6 your ruling.

7
8 MR. CHAIRMAN: Thank you, very much, Mr. Finlay.

9 Do you want to say anything?

12:26:55 10
11 MR. O'NEILL: Just one matter, Sir, that I would like to draw to your
12 attention. It may be a matter that Mr. Finlay was unaware of because of the
13 fact that he and his solicitor only were instructed in the matter in October of
14 2001. For a brief period Mr. Caldwell was not legally represented insofar as
12:27:17 15 he had dispensed with the services of Messrs. Finbar Cahill and Company. And
16 he had yet to take up the services of Messrs. Miley & Miley.

17
18 And during that period there was some exchange of correspondence between
19 Mr. Caldwell and the Tribunal. I have -- in my short presse of events, I have
12:27:38 20 outlined what was said in that correspondence. But in the response of the
21 Tribunal to Mr. Caldwell's correspondence there was material which touched upon
22 his discovery obligation and therefore should have fixed in Mr. Caldwell's mind
23 in September of 2001 what his obligation was. And it may be that that letter
24 was not made available to Mr. Finlay and mightn't have been available to him,
12:28:10 25 in other words prior to his making submissions on the point as to what
26 Mr. Caldwell's appreciation of his position was. It may be that the
27 correspondence which passed between the Tribunal and Mr. Caldwell may effect
28 that. I'm not sure. But I think it would be appropriate if I was to furnish
29 him with a copy of a letter of the Tribunal which was sent to Mr. Caldwell on
12:28:35 30 the 19th of September 2001.

12:28:36 1
2 There is only one relevant passage in it dealing with the discovery obligation.
3 And that is on the second page of the letter, at paragraph two where it was
4 stated to him "that the fact that the Sole Member may have already received
12:28:52 5 some documents and records from various sources including Binchy and partners
6 does not excuse you from complying with the various summonses and orders of the
7 Tribunal."

8
9 So that as of that date certainly Mr. Caldwell was aware of the fact that the
12:29:11 10 orders of the 4th and -- of April and the 10th of August were orders that
11 required to be complied with him -- by him rather -- notwithstanding that
12 information may have come to the Tribunal from other sources. It's the only
13 factual matter that I would like to draw to your attention.

14
12:29:34 15 MR. FINLAY: I am most obliged to Mr. O'Neill for bringing it to my attention.
16 If I may, in the very short time I have had to review it, I would like to very
17 briefly comment on it because it is relevant I think to what I said to you
18 earlier.

19
12:29:49 20 The first aspect of it that is clearly relevant, as has been helpfully
21 confirmed by Mr. O'Neill is that at this critical time, a time which is
22 critical for the purpose of the decisions which you have to make, Mr. Caldwell
23 was not advised. That's of critical importance. You have heard that he
24 became advised as of the 16th of October and what happened then. This
12:30:16 25 happened at a time when he was not being legally advised. That is critically
26 important also because in relation to discovery you've already heard that it
27 was his personal belief as a non-litigator -- sorry, he was not aware of the
28 format provision of the rules. He gave that evidence on the 1st of November.
29 He was of the belief that he had complied with the earlier order of the 4th of
12:30:41 30 April. And also significantly, Chairman, to someone reading paragraph 5, the

12:30:46 1 one just opened to you. There is no reference at all to discovery. The only
2 references there are to summonses and orders, undefined. The summons that he
3 was particularly concerned with there, as you know, was the summons to attend
4 and I have dealt with that already. Orders of the Tribunal, you have heard
12:31:05 5 what I have had to say about the order of the 4th of April. But in any event,
6 there is no reference, good, bad or indifferent to discovery in the passage
7 just opened. Which, with great respect, if anything only serves to
8 underscores the submissions I have already made. Thank you.

9
12:31:20 10 MR. CHAIRMAN: Thank you, Mr. Finlay. Thank you.
11 Now, the other application of Mr. Murphy -- or the Murphy interests.

12
13 MR. O'NEILL: Yes.

14
12:31:34 15 MR. FINLAY: I am terribly sorry to interrupt at this point, Chairman. I am
16 not just aware of the protocol on these occasions, and I am wondering if I am
17 required to continue to attend today?

18
19 MR. CHAIRMAN: Oh, no, you're not. I will endeavour to prepare a ruling
12:31:54 20 within a few weeks. And you will be informed. Mr. Miley will be informed in
21 advance of the date when I intend give that ruling.

22
23 MR. FINLAY: Thank you very much. Thank you.

24
12:32:06 25 MR. O'NEILL: The next applications are that of the Murphy interests in
26 respect of their application for costs.

27
28 And the findings of the Tribunal in respect of the Murphy interests in the
29 Gogarty module are to be found in both the Second and Third Interim Reports of
12:32:22 30 the Tribunal.

12:32:24 1
2 Adverse findings were made against the Murphy interests both in respect of the
3 substantive matters and also in respect of non-cooperation with the Tribunal.
4

12:32:33 5 The Murphy interests, which include Mr. Joseph Murphy senior, who is now
6 deceased, Mr. Joseph Murphy junior, Mr. Frank Reynolds, Mr. Roger Copsey,
7 Mr. Tim O'Keefe and Mr. John Bates together with a number of Murphy companies
8 were key participants in the matters being inquired into in the Gogarty module.
9

12:32:56 10 The core allegation in this module was made by Mr. James Gogarty and was that
11 he claimed to have witnessed the handing over of two envelopes believed by him
12 to contain 40, 000 pounds each to Mr. Ray Burke, then a Government minister, at
13 a meeting took place at Mr. Burke's home shortly before the general election in
14 1989. Mr. Gogarty claimed that the payments made to Mr. Burke to secure his
15 support and political influence on councillors to achieve rezoning and planning
16 changes, to alter the status of approximately 700 acres of land then owned by
17 the Murphy companies in North County Dublin, which were the subject of a joint
18 development proposal involving the Murphy interests and Michael Bailey and his
19 companies.

12:33:21 20
21 Mr. Michael Bailey a building and property speculator had purchased other lands
22 at Forest Road Swords, County Dublin, from the Murphy's in early 1988 which was
23 completed in 1989. He expressed an interest in acquiring the balance of the
24 Murphy's North Dublin lands and wrote a letter to Mr. Gogarty on the 8th of
12:34:02 25 June 1989 in which he set out various proposals in relation to the Murphy
26 lands.
27

28 This letter is appended to the Tribunal's terms of reference. One of the
29 proposals contained in Mr. Bailey's letter referred to, as a participation
12:34:16 30 proposal, entailed him receiving 50% of the land in return for procuring

12:34:22 1 planning permission and bylaw approval thereon.
2
3 Mr. Gogarty claimed that the payment of money to Mr. Burke in June 1989
4 followed upon an agreement having been reached between the Murphy interest and
12:34:36 5 Mr. Bailey to advance this participation proposal. Mr. Gogarty said he was
6 informed by Mr. Joseph Murphy junior and Mr. Reynolds that an agreement had
7 been reached with Mr. Bailey whereby a sum of 80, 000 pounds would be paid to
8 Mr. Burke and that this sum was required forthwith in view of the then
9 impending general election. He was told that 40, 000 pounds each would be
12:34:58 10 advanced by the Murphy interest and by Mr. Bailey to Mr. Burke. Mr. Gogarty
11 stated that he travelled to Mr. Burke's house with Mr. Murphy junior and Mr.
12 Michael Bailey and that there Mr. Joseph Murphy junior handed over the JMSE or
13 Murphy interest contribution and that Mr. Bailey handed over his envelope
14 thereafter.
12:35:19 15
16 The evidence of the Murphy interest was that Mr. Gogarty was in exclusive
17 charge of the lands owned by the Murphy companies in Ireland. Both Mr. Murphy
18 senior and junior denied any knowledge of payment of Murphy funds having been
19 made to Mr. Burke until learning of it in mid August 1997. Both denied any
12:35:40 20 knowledge of any proposals being advanced by Mr. Michael Bailey in relation to
21 the alteration of the planning status of the lands.
22
23 Mr. Joseph Murphy junior said that he did not meet with Mr. Michael Bailey at
24 any time in 1989. That he was unaware of the contents of the letter of the
12:35:58 25 8th of June 1989 until he saw extracts from it printed in Magill magazine in
26 September 1997.
27
28 Joseph Murphy junior denied that he had any knowledge of the assembly of the
29 funds to be paid to Mr. Burke. He denied attending any meeting in Mr. Burke's
12:36:15 30 home in June 1989. And claimed never to have met with Mr. Burke at any time

12:36:20 1 prior to, or subsequent to, that date.

2

3 The Tribunal concluded that the conflicts which were apparent from

4 consideration of the evidence of the parties could not be explained on the

12:36:30 5 basis that they were innocent failures of recollection, mistakes or miss

6 interpretation of facts. It concluded that the diversions in the accounts

7 given by the parties could only be explained on the basis that some party or

8 parties had deliberately set out to mislead the Tribunal as to the true

9 circumstances leading to the meeting with Mr. Burke and to the payment of

12:36:53 10 monies to him.

11

12 Having considered all of the evidence relating to the manner in which the

13 admitted payment of 30,000 pounds of JMSE funds was dealt with by Mr. Burke,

14 the Tribunal concluded that the payment did not have the hallmarks of a

12:37:08 15 legitimate political donation but it did have the hallmarks of a secret payment

16 made other than for legitimate political purposes.

17

18 Mr. Gogarty maintained that the money was paid by a bribe. The Murphy

19 interests did not offer an alternative explanation for the payment, but

12:37:23 20 contended that Mr. Gogarty's explanation was false and that his evidence should

21 be rejected in the total. The evidence offered on behalf of the Murphy

22 interests was that they were unaware until mid August 1997 that any of the

23 funds had been paid to Mr. Burke in 1989, and that whilst it was now clear that

24 Mr. Gogarty had paid 30,000 pounds of Murphy company money to Mr. Burke,

12:37:47 25 Mr. Gogarty had made this payment without their knowledge.

26

27 The Tribunal sought to establish from the JMSE personnel, other than

28 Mr. Gogarty, who were involved with these funds, whether there was evidence to

29 support or disprove the contention that Mr. Gogarty was acting on his own

12:38:04 30 behalf and without the knowledge of his employers when he attended the meeting

12:38:07 1 at Mr. Burke's house in June 1989 at which money was handed over to Mr. Burke.
2
3 Mr. Roger Copsey, financial director, claimed that James Gogarty told him prior
4 to the payment that the money was required for a political donation. The
12:38:22 5 explanation offered to the Tribunal by the Murphy interests for the absence of
6 any record of the monies being paid to Mr. Burke was that no one other than
7 Mr. Gogarty knew the identity of the recipient of the funds and nobody other
8 than Mr. Copsey knew that any political donation was being made, or was to be
9 made by Mr. Gogarty.

12:38:43 10
11 The expenditure of the 30,000 pounds by JMSE was accounted for in the books of
12 the Murphy company in the category of planning permission under the heading
13 "costs." The Tribunal concluded that the description planning permission was
14 a cynical use of these words which allowed those who knew of the bribe to
12:39:02 15 identify the source of the funds used to make it, while at the same time
16 appearing to be a legitimate heading of the expense to any person who was
17 unaware of the bribe.
18
19 On the substantive issues the Tribunal concluded that the following is the
12:39:16 20 probable sequence of events in relation to the assembly of the monies which
21 were paid to Mr. Burke and in relation to the subsequent accounting for
22 expenditure in the accounts of the Murphy companies.
23
24 Firstly, the directors of JMSE including Mr. Joseph Murphy senior, Mr. Murphy
12:39:32 25 junior, Mr. Roger Copsey and Mr. Frank Reynolds were at all material times
26 aware that Murphy funds were to be paid to Mr. Burke in connection with his
27 support for the intended rezoning and changes in the planning status of the
28 Murphy's North Dublin lands as envisaged in Mr. Michael Bailey's participation
29 proposal as set out in his letter of the 8th June 1989.
12:39:58 30

12:39:58 1 Secondly, the advice of Mr. Roger Copsey was sought by the directors of JMSE
2 other than Mr. James Gogarty, as to how such payments would best be funded
3 from the Murphy assets in Ireland. He advised that the 30,000 pounds of the
4 intended payment should be sourced from the funds on deposit at ICC Bank in the
12:40:16 5 solicitor/client account of the company's conveyancing solicitor Mr. Dennis
6 McArdle, because the funds could not be obtained in cash that day through
7 Mr. Denis McArdle however, the plan was altered so that the cash would be
8 collected from the JMSE account at Allied Irish Bank Talbot Street instead.
9

12:40:35 10 Thirdly, that Mr. Frank Reynolds was aware of the fact that the cash would be
11 collected from Allied Irish Banks Talbot Street and he brought Mr. Tim O'Keefe
12 to the bank for that purpose. Mr. James Gogarty was not made aware that
13 20,000 pounds in cash had been sourced from this JMSE account.
14

12:41:01 15 Fourthly, that Mr. Gogarty signed a cheque for 10,000 pounds on the JMSE
16 account which was counter signed by Mr. Frank Reynolds, not because cash could
17 not be obtained in the bank on that day as stated by him, but because the
18 Murphy interests of Mr. Burke wished 10,000 pounds of the payment to Mr. Burke
19 to be in the form of a cheque.

12:41:14 20
21 Fifthly, Mr. Roger Copsey directed that the payment of funds by JMSE be treated
22 in the accounts as an intercompany loan to Grafton, one of the Murphy
23 companies, in the expectation that an inter company transaction would not be
24 subject to outside scrutiny.

12:41:30 25
26 Sixthly, that the attribution of the words planning permission to this payment
27 by Mr. Tim O'Keefe was made so as to allow Mr. Roger Copsey to identify this
28 payment without naming Mr. Burke as the recipient.
29

12:41:42 30 Seventhly, that Mr. Roger Copsey and Tim O'Keefe deliberately left the payment

12:41:46 1 to Mr. Burke unaccounted for in the accounting records prepared for JMSE in
2 Grafton annual accounts for the year ending 1st of May 1990.

3
4 The Tribunal was satisfied that the payment to Mr. Burke was made with the
12:41:59 5 knowledge of Mr. Murphy senior, Mr. Murphy junior and Mr. Frank Reynolds. And
6 that Mr. Roger Copsey was involved at their behest in assembling the 30,000
7 which was sourced through the Murphy company bank account at AIB Talbot Street.

8
9 The participation proposal contained in the letter involved the Murphy's
12:42:19 10 conceding a 50% interest in their land to Mr. Bailey on the sole basis that he
11 would procure planning permission for its development and thereby increase its
12 folding 10 fold at least.

13
14 The Tribunal was satisfied that the letter of the 8th of June 1989 to
12:42:35 15 Mr. Gogarty from Mr. Michael Bailey, and the payment to Mr. Burke shortly
16 thereafter, were directly linked.

17
18 The Tribunal was satisfied that the Murphy interests were prepared to agree to
19 Mr. Bailey's participation proposal notwithstanding them conceding the 50%
12:42:50 20 interest in the lands because they would still receive at least five times more
21 than the agriculture value of the lands if his plan was successful.

22
23 The Tribunal was satisfied that the Murphy interest paid Mr. Burke as a part of
24 their agreement to proceed with the participation proposal which was advanced
12:43:08 25 by Mr. Bailey at an earlier meeting and which appeared in its sanitised form in
26 a letter of the 8th of June 1989 addressed to Mr. Gogarty.

27
28 The Tribunal was satisfied that Mr. Burke had paid -- that Mr. Burke was paid
29 not less than 30,000 pounds of JMSE money and that he may have been paid 40,000
12:43:27 30 pounds.

12:43:28 1
2 In respect of the matters of non-cooperation with the Tribunal. The Tribunal
3 made the following findings in relation to named individuals.
4

12:43:35 5 Mr. Murphy Senior: The Tribunal was satisfied that Mr. Joseph Murphy senior
6 obstructed and hindered the Tribunal by
7 A. Failing to give a truthful account of the circumstances in which the Murphy
8 North Dublin lands came to be sold.
9 B. Failing to give a truthful account of the circumstances in which Mr. James
12:43:55 10 Gogarty came to attend the meeting at Mr. Burke's home in June 1989 at which
11 Mr. Burke was paid money by JMSE.
12 Thirdly, failing to give a truthful account as to the circumstances in which
13 JMSE money came to be paid to Mr. Burke on his instruction and with his
14 authority.
12:44:12 15 D. Failing to provide proper discovery to the Tribunal in breach of an order
16 for discovery made against him.
17 E. Falsely claiming that he had no bank accounts in Ireland from 1976 onwards
18 when he knew this to be untrue.
19 F. Colluding with Mr. Joseph Murphy junior, Frank Reynolds and Roger Copsy to
12:44:34 20 give a false account of the role played by Mr. James Gogarty in connection with
21 the Murphy's North Dublin lands and his knowledge of the participation proposal
22 advanced by Mr. Michael Bailey in relation thereto.
23

24 Mr. Joseph Murphy Junior: The Tribunal was satisfied that Mr. Joseph Murphy
12:44:51 25 junior obstructed and hindered the Tribunal by:
26 A. Failing to give a truthful account of the circumstances in which he came to
27 attend a meeting at the home of Mr. Burke in June of 1989 at which he handed to
28 Mr. Burke a sum of not less than 30,000 pounds.
29 B. Failing to give a truthful account of his dealings with Mr. Michael Bailey
12:45:09 30 with regard to the participation proposal in which it was envisaged that

12:45:13 1 Mr. Michael Bailey would receive 50% of the value of the Murphy's north Dublin
2 lands in return for procuring planning permission and building bylaw approval
3 in respect thereafter thereof.

4 C. Giving a false account of the involvement of Mr. Gogarty in the sale of the
12:45:28 5 Murphy lands and the role played by him in connection with the payment of the
6 JMSE monies to Mr. Burke.

7 D. Giving a false account in his dealings with Mr. Michael Bailey subsequent
8 to the publication of the Sunday Business Post article.

9 And E. Falsely constructing an alibi which was untrue.

12:45:56 10
11 Mr. Roger Copsey: The Tribunal was satisfied that Mr. Roger Copsey obstructed
12 and hindered the Tribunal by:

13 A. Giving a false account of his involvement in the assembly of the funds paid
14 by JMSE to Mr. Burke.

12:46:01 15 B. Falsely attributing a role to Mr. Gogarty in the payment of the monies to
16 Mr. Burke which Mr. Gogarty had not exercised.

17 C. Failing to give a truthful account of his dealings with Mr. Joseph Murphy
18 senior, Mr. Joseph Murphy junior and Mr. Frank Reynolds in relation to the
19 pavement of JMSE monies to Mr. Burke.

12:46:21 20 D. Failing to provide to the Tribunal a true explanation for the accounting
21 entries made in the books of JMSE and Grafton in relation to the monies paid to
22 Mr. Burke.

23
24 In relation to Mr. Frank Reynolds: The Tribunal is satisfied that Mr. Frank

12:46:37 25 Reynolds obstructed and hindered the Tribunal by:

26 A. Failing to give a truthful account of his involvement in the assembly of the
27 funds which were paid to Mr. Burke by JMSE.

28 B. Falsely ascribing to Mr. Gogarty a role in the payment of the monies to
29 Mr. Burke which he knew to be untrue.

12:46:54 30 C. Failing to give a truthful account of his dealings with Mr. Michael Bailey.

12:46:59 1 D. Failing to give a truthful account of the steps taken by him subsequent to
2 the publication of the Gogarty allegations in the Sunday Business Post editions
3 of the 30th of March and the 6th of April 1996.

4 E. Colluding with Mr. Joseph Murphy senior and Joseph Murphy junior and
12:47:17 5 Mr. Roger Copsey to present a false account to the Tribunal of the role played
6 by Mr. James Gogarty in the payment of the JMSE monies to Mr. Ray Burke.

7
8 Mr. Tim O'Keefe: The Tribunal is satisfied that Mr. O'Keefe obstructed and
9 hindered the Tribunal by:

12:47:33 10 A. Failing to give a truthful account of his knowledge of the payment of monies
11 by JMSE to Mr. Burke.

12 B. By giving an explanation for his accounting entries and the preparation of
13 the Grafton/Reliable cash balance document which he knew to be false.

14
12:47:49 15 Mr. John Bates: The Tribunal is satisfied that Mr. John Bates obstructed and
16 hindered the Tribunal by:

17 A. Failing to give a truthful account of his reasons for treating the payment
18 of 30,000 pounds of the funds by Grafton Construction Limited to Mr. Burke as
19 payments involving land enhancement expenditure in the document prepared by him
12:48:08 20 in connection with the annual returns of Grafton Construction Company for the
21 year ended 31st of May 1990.

22
23 The Tribunal's substantive findings in its Third Interim Report which relate to
24 the Murphy's interest concern payments made to Mr. George Redmond while he was
12:48:28 25 the assistant city and county manager for Dublin and upon his retirement.

26
27 The allegation made by Mr. Gogarty was that two sums had been paid by JMSE to
28 Mr. Redmond. The first of these was for Mr. Redmond's assistance in ensuring
29 that contributions payable to Dublin County Council in respect of service
12:48:48 30 charges and levies connected with planning permission on lands owned by the

12:48:53 1 Murphy's would be maintained at a level which had been determined a number of
2 years earlier. The contribution ultimately paid was approximately half that
3 which one might have expected to pay.
4

12:49:03 5 The second sum was said to be compensation for Mr. Redmond not being engaged as
6 a consultant to the Murphy group of companies following upon his retirement in
7 June 1989. The Murphy's denied that they paid any money to Mr. Redmond at any
8 time.
9

12:49:20 10 In respect of the first allegation the Tribunal held that Mr. Redmond had
11 provided his advices to the Murphy interest on foot of an agreement with
12 Mr. Joseph Murphy junior that he would be financially rewarded if there was a
13 saving on the level of charges which would be payable under a fresh planning
14 application on these lands, and that he was so paid.

12:49:41 15
16 The Tribunal had no direct evidence as to the exact amount paid to Mr. Redmond
17 but concluded that he was paid at least 12, 246 pounds being 10% of the
18 notional saving on these charges as Mr. Gogarty claimed Mr. Redmond had sought
19 from the Murphy interests.

12:50:02 20
21 The Tribunal concluded that the payment was a clandestine payment and that the
22 Murphys had given false testimony to the Tribunal in which they denied the fact
23 of such payment.
24

12:50:12 25 The advice which Mr. Redmond gave was not serving any public interest but was
26 acting to serve the private interest of the Murphy land owning companies and
27 his own selfish interest. The Tribunal held that this payment amounted to an
28 inducement to Mr. Redmond to act unfaithfully and in circumstances which were
29 detrimental to his duties and obligations as assistant city and county manager.

12:50:36 30 It was satisfied that this payment was a corrupt payment.

12:50:45 1
2 In respect of Mr. Gogarty's second allegation of the payment by the Murphys to
3 Mr. Redmond, the Tribunal held that an offer of employment upon his retirement
4 was an inducement to Mr. Redmond made during the course of his employment with
12:50:55 5 Dublin County Council with the intention that he would thereafter favourably
6 consider any matters concerning the Murphy company's lands in the performance
7 of his official duties for Dublin County Council. The actual payment of
8 15,000 pounds to Mr. Redmond was made at a time after he had retired from
9 Dublin County Council. And the Tribunal therefore concluded that the payment
12:51:17 10 did not fall within the definition of corruption as provided for in the
11 Tribunals interpretation of its Terms of Reference.
12

13 In respect of cooperation with the Tribunal concerning the matters dealt with
14 in its Third Interim Report, the Tribunal held that Mr. Joseph Murphy junior
12:51:31 15 had hindered and obstructed the Tribunal by:
16 A. Failing to give a truthful account of the circumstances in which he came to
17 pay Mr. George Redmond a sum of not less than 12,246 pounds for divising the
18 strategy which resulted in the Forest Road service charges and levies being
19 fixed at their 1983 level in respect of any similar development taking place
12:51:54 20 within two years of the 21st of June 1988.

21 And B. Failing to give a truthful account of the circumstances in which he
22 came to pay Mr. George Redmond 15,000 pounds at the Clontarf Castle Hotel in
23 July 1989.
24

12:52:10 25 The Tribunal held that Mr. Frank Reynolds had hindered and obstructed the
26 Tribunal by failing to acknowledge that he had attended a meeting at the
27 Clontarf Castle Hotel where a payment of 15,000 pounds was made to Mr. George
28 Redmond by Mr. Joseph Murphy junior in the presence -- in his presence -- and
29 in the presence of Mr. Michael Bailey and Mr. James Gogarty.
12:52:34 30

12:52:34 1 The principles upon which you indicated that you would determine applications
2 such as the current application were set forth in your determination of the 30th
3 of June 2004, and in addition to the matters specifically referred in dealing
4 with Section 6.1 of the Tribunals of Inquiry Evidence Amendment Act 1979 you
12:52:56 5 indicated that you would have regard to the following.

6
7 Firstly, the extent to which the applicant for costs was responsible for
8 incurring such costs.

9 The extent to which the conduct of the applicant for costs was responsible for
10 costs being incurred by the Tribunal.

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

13 The consequences which flowed from the non-cooperation or failure to assist on
14 the part of the application, for the Tribunal or for other parties appearing
12:53:27 15 before the Tribunal.

16 The conduct of the applicant for costs before the Tribunal.

17 Whether the applicant for costs knowingly made false allegations of wrongdoing
18 on the part of others.

19 The reasons, if ascertained, why such persons either failed to assist or did
12:53:43 20 not cooperate with the Tribunal or knowingly provided false information to the
21 Tribunal.

22
23 These applications may have particular relevance to the present application for
24 costs.

12:53:55 25
26 The Murphy interests were granted limited legal representation for the Tribunal
27 on the 2nd of February 1998. They were attended by two senior counsel, one
28 junior counsel and by their solicitors. They were written to on the 13th of
29 November 2002 following upon the Second Interim Report and requests were made
12:54:20 30 of them, that if they intended making an application to seek costs, to provide

12:54:24 1 the Tribunal with the details of the basis of such claim and to give an
2 indication of the nature and amount of the claim being made. The sum being
3 sought by the Murphy interests has not been identified ahead to the Tribunal.
4 Outlined submissions in respect of the Murphy interests applications for costs
12:54:40 5 were provided to the Tribunal on the 8th of May 2003. Submissions on these
6 principles to be applied by the Tribunal in respect of any award of costs were
7 also provided on the 4th of June 2004.

8
9 And the parties are here present today represented by Mr. Cooney, Mr. Cush and
12:54:59 10 the solicitor and junior counsel.

11
12 MR. CHAIRMAN: All right. Thank you. Mr. Cooney, it is now just five to
13 one. So I was going to rise until, say ten to two if that suits you?
14 Does that suit the parties?

12:55:14 15
16 MR. COONEY: Yes.

17
18 MR. CHAIRMAN: Ten to two?

19
12:55:17 20 MR. COONEY: Yes.

21
22 **THE TRIBUNAL THEN ADJOURNED FOR LUNCH.**

23
24
25
26
27
28
29
30

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

13:56:04 1
2
3 CHAIRMAN: Mr. Cush?
4
13:56:06 5 MR. CUSH: Sir, this application is made on behalf of the Murphy companies, if
6 I may describe them that way. And they their principal beneficiary, namely,
7 Mr. Joseph Murphy junior. And I think the Tribunal will be aware, Sir, that
8 Mr. Murphy senior has passed away since giving evidence before the Tribunal.
9 And I want, if I may, to endeavour to divide this submission into really three
13:56:38 10 parts.
11
12 The first being to point to those matters which we say constituted positive
13 assistance provided by the Murphy's to the Tribunal. The second being to
14 point to those matters or investigations that were conducted by the Tribunal
13:57:00 15 which certainly couldn't be said to result in any adverse findings against the
16 Murphy's and may even be said to have some findings that are positive to their
17 interests. And then thirdly to look at the key adverse findings and to say
18 something about those in the context of this application for costs.
19
13:57:20 20 And in that latter context I will come back then to some of the substantive
21 issues that were agitated before the Tribunal.
22
23 Turning, Sir, to the first of these three parts, what we say is the positive
24 assistance to the Tribunal. I want to mention without going into any
13:57:46 25 particular detail three particular aspects. The first, Sir, is the discovery
26 provided by the Murphy's to the Tribunal.
27
28 By any analysis and any standard it was massive discovery. And what the
29 Murphy's in fact did was they had what might be described as a discovery team,
13:58:12 30 if you like, comprising a number of individuals and held up by Mr. Herbert

13:58:21 1 Senior Counsel, now judge of the High Court. What we would say about that,
2 Sir, is that exercise was fastidious in ensuring the discovery was complete and
3 accurate. And it is a matter of fact, Sir, that in the report there is no
4 finding of any nature by way of complaint about the discovery provided. And
13:58:49 5 Sir, you will know that within the report there are a number of different types
6 of complaint made about other parties discovery. Some are said to have failed
7 to comply. And others are said to have been late in their compliance. No
8 finding of any such nature is made against the Murphy's.
9

13:59:07 10 If you went a little further and went to look at the correspondence, you would
11 of course find some exchanges in relation to discovery as it was ongoing. But
12 even those must be seen against a certain misunderstanding whereby one arm of
13 the Tribunal, if you like, was requesting documentation in a particular way, in
14 other words, what was actually being said of the discovery team was "give us
13:59:37 15 the documentation and we, the Tribunal, will sort it." And some of the
16 discovery complaints seem to have been made in ignorance of that arrangement
17 and were ultimately dealt with when matters were clarified.
18

19 But, Sir, that was a massive exercise at very considerable cost. And if I can
13:59:55 20 just give you a very broad feel for our estimate of the extent of that
21 exercise. As I say, Mr. Herbert was the leader of the team. He spent, as I
22 said, between the offices of Fitzsimon and Redmond, JMSE offices and an
23 accountant's office, some seven days working on discovery.
24

14:00:22 25 Ms. Lorraine Byrne spent 29 days. Ms. Ann Duggan, 20 days. Mr. Paul Beagin,
26 10 days. He Sir is a solicitor. Mr. Dave Mulvihill, 6 days. Ms. Kerry
27 Dunne 5 days. Mr. Paul O'Sullivan, 3 days. Ms. Margaret Walsh 3 days. A
28 total, you will see, of some 73 working days spent on discovery. I don't have
29 any estimate of the cost associated with that, but obviously it's substantial.
14:00:56 30

14:00:56 1 Not only did that exercise produce no complaint on the part of the Tribunal,
2 but the documentation provided thereby was of use to the Tribunal. It did
3 form the basis of findings. And for example, some of that documentation was
4 used to grant findings against the Murphy's.

14:01:21 5
6 So I point to that in the realm, Sir, as being very considerable assistance
7 provided to the Tribunal, attracting no complaint and made use of by the
8 Tribunal.

9
14:01:32 10 The second matter is a smaller matter in its extent and ambit. But it
11 concerns telephone records. At a point in time there was an issue before the
12 Tribunal relating to alleged contact between Mr. Gogarty and Mr. Michael
13 Bailey. And as part of that dispute Mr. Bailey, or counsel on his behalf,
14 suggested that telephone records between the pair be examined. And once that
14:02:09 15 started it was expanded to include telephone records of other persons.

16
17 Those telephone records were then produced by Telecom and a call list, there
18 was an exercise to be done in short space of time because the evidence in
19 relation to the issue was ongoing, there was an adjournment to deal with it.

14:02:37 20 And each, I suppose of the interested parties prepared their analysis of what
21 was produced by Telecom. And to our examination, the information appeared
22 baffling. And prompted us to suggest to the Tribunal that there was an error.

23
24 That exercise was itself an intensive exercise conducted over a number of days,
14:03:03 25 we estimate five. And ultimately the Tribunal did indeed go back to Telecom
26 and Telecom did indeed confirm that they had made errors. And an entirely new
27 set of documentation was provided in relation to those telephone records.

28
29 I can't say that the Tribunal wouldn't have noticed this mistake for itself in
14:03:29 30 due course, or that some other party would not have noticed it in due course.

14:03:34 1 We certainly noticed it because of the work that we did and we brought it to
2 the notice of the Tribunal.

3
4 The third matter that I want to identify as being indicative of positive
14:03:45 5 assistance to the Tribunal relates to a period of legal argument about
6 procedural issues. There was a point in time at the beginning of the
7 Tribunal's workings when it was suggested on behalf of Counsel for the Tribunal
8 that a particular mode of inquiry might be followed, and in particular a mode
9 of inquiry favoured by Lord Justice Scott in England, might be operated. And
10 to be even more particular about it, suggestions were made as to how and in
11 what circumstances Mr. Gogarty might be cross-examined. That produced a
12 number of days legal debate in which we advocated that the usual rules in
13 relation to cross-examination should apply. And in the end that argument was
14 upheld by Mr. Justice Flood and he so ruled on the entire of the Tribunals
14:04:16 15 workings from there on in would be held on that basis, the basis which we had
16 advocated. Whilst a number of other parties supported us to a greater or
17 lesser extent, it was undoubtedly the Murphy interests who took that issue on
18 and who argued against the proposition being advanced by the Tribunal, which
19 ultimately found favour with the Chairman.

14:05:12 20
21 So those are three elements, I suggest, of positive assistance.

22
23 If I could move then just to identify rather than say very much about, a range
24 of issues in respect of which there were either neutral findings or either no
14:05:29 25 findings or perhaps even findings that might be said to be positive to the
26 Murphys.

27
28 Sir, you will have some feel I am sure for how the inquiries proceeded and how
29 the starting point was dictated entirely by Mr. Gogarty, the first witness
14:05:52 30 before the Tribunal. And who, on everybody's analysis, including the

14:05:58 1 Tribunal's, had an agenda. And that agenda was made manifest in the first
2 instance by the affidavit which he swore and put before the Tribunal. And
3 that affidavit covered a huge range of issues which the Tribunal was forced to
4 inquire into. And perfectly apparent to anybody here that the investigation
14:06:34 5 could not proceed with Mr. Gogarty's cooperation unless the issues which he
6 raised were inquired into. And for that reason the Tribunal was forced, and
7 those interested, including the Murphys, were forced into dealing with a whole
8 range of issues, which had the Tribunal had its own way, I suggest, may never
9 have been raised; and I will just list some of them briefly without saying too
14:07:08 10 much about it.

11
12 There was a good deal of time spent in relation to alleged malicious damage of
13 Mr. Gogarty's cars and his windows at home. And the link suggestion made by
14 him that there was an element of corruption in the Gardai. Linked partly to a
14:07:32 15 failure to prosecute that and failure to prosecute other things. And all of
16 that was inquired into to a certain extent. Not with anybody's enthusiasm
17 other than Mr. Gogarty's. Eventually the suggestion against the Gardai was
18 simply abandoned by Mr. Gogarty. And the Tribunal has found that his
19 allegations against Mr. Murphy junior, relating to the cars and the windows,
14:07:57 20 are unfounded. But five days were spent dealing with those issues. When I
21 say five days, I want to be accurate about that. There were five days on
22 which those issues were dealt with. I think in respect of some of those days
23 there may have been other issues dealt with as well. I'm not suggesting five
24 full days.

14:08:23 25
26 Another matter which the Tribunal was forced to inquire into because it fitted
27 with Mr. Gogarty's version of events. The whole issue surrounding the signing
28 of the JMSE accounts in 1988. Dealt with on page 85 of the report.

29
14:08:41 30 There was never a dispute between the parties before the Tribunal but that

14:08:45 1 there had been a row about the signing of the accounts. And there was never a
2 dispute about roughly what that row was about. And ordinarily one would have
3 thought that that was sufficient for the Tribunal to know those matters as a
4 matter of fact and not to be forced into enquiring about the merits of that
14:09:08 5 dispute. But the Tribunal was forced into that analysis. And in total, on
6 our the estimate, some 12 days were spent in relation to the JMSE accounts for
7 the year ending 1988.

8
9 And naturally enough, that period of time produces no finding one way or the
14:09:28 10 other in relation to the rights or wrongs of that dispute.

11
12 Another body of evidence and time which the Murphys were forced to endure, if
13 you like, concerned the allegation made by Mr. Bailey that he had paid
14 Mr. Gogarty approximately 162,000 pounds by way of a finder's fee. And that
14:10:05 15 he had done that over a period of years in dribs and drabs. And linked to
16 that there was, I think the admitted fact, that Mr. Bailey had proffered a
17 50,000 pounds cheque to Mr. Gogarty.

18
19 Now, this was an issue of interest to the Murphy's, no doubt about that. In a
14:10:31 20 sense that if it were true it was support for their version of events as
21 against Mr. Gogarty's. But they didn't agitate that issue, they didn't raise
22 that issue and they didn't contribute to that issue. That was a dispute
23 exclusively between the Baileys and Mr. Gogarty. And it was that dispute
24 which led to the examination of the Baileys' financial records and the kitten
14:11:03 25 notebook and all of those matters. Of interest to the Murphys, but not sir of
26 their making. And again by way of an estimate. We think some 16 odd days
27 were spent in dealing with that body of evidence.

28
29 There was a body of evidence and time and cost associated with what I think at
14:11:31 30 the time was known as the Grehan episode. That's another matter, Sir. That

14:11:36 1 was just an unfortunate episode relating to dealings between the Tribunal and
2 witnesses, two witnesses in particular. Ultimately, a submission was made by
3 counsel on behalf of those witnesses to the effect that the Chairman of the
4 Tribunal found himself in an invidious position whereby he was asked to make a
14:11:57 5 ruling on a dispute between the Tribunal, and particularly the Tribunal's team,
6 and witnesses. And it was suggested to him by counsel on behalf of the
7 witness that he ought to decline to get involved in that. And it was wondered
8 on behalf of counsel for the witnesses whether it was really necessary to go
9 down that road. And ultimately that submission was acceded to. The issue
14:12:27 10 died a death and no ruling was made. But approximately seven days, because
11 the witness was a witness relevant to the Murphy issues, and approximately
12 seven days of time was spent dealing with that, sir.

13
14 There were other issues involving time that potentially had a bearing on the
14:12:53 15 Murphy's but could never have been said to have resulted in any adverse
16 finding, for example the issue of the leaking of documentation, sir. Usually
17 it must be said of material adverse to the interest of the Murphys and about
18 which the Murphys voiced serious complaint. And days 8, 13 and 44 seem to
19 have been spent dealing with that, sir.

14:13:27 20
21 There was an issue concerning CAB and the Tribunal. Potentially of interest
22 to the Murphys in that it seemed to relate particularly to Mr. Redmond's
23 material. And of course allegations were made against the Murphys concerning
24 Mr. Redmond. Time spent dealing with that, nothing adverse said of the
14:13:51 25 Murphys. Other elements sir, dealings between Mr. Gogarty and various
26 journalists. Mr. Connolly for example, Mr. Cooper, Mr. John Ryan. Dealings
27 between himself and politicians including Mr. Tommy Broughan in particular.
28 And then the evidence of planners, Mr. Smith and Miss Collins in particular.
29 These are all people who took up time in giving evidence to the Tribunal on
14:14:21 30 issues that were of concern to the Murphys, none of which could be said to have

14:14:28 1 produced anything remotely adverse to the Murphys.
2
3 Sir, I ask you to bear all of that in mind before you ever turn to consider the
4 adverse findings. Now, when I speak of adverse findings I mean in particular
14:14:49 5 the findings of obstruction and hindrance. Because that's what they are, sir.
6 And just before I turn to those, sir. In relation to the payment to
7 Mr. Burke, that segment of the Tribunal, the second report.
8
9 Could I just as a preliminary matter remind you, sir, that there was in fact
14:15:13 10 virtually no dispute about the core elements of that payment prior to the
11 Tribunal commencing its workings. So the fact of the payment was not in
12 dispute. The owner of the monies used to make the payment was not in dispute.
13 The method by which the payment was made was not in dispute. The amount of
14 the payment was not really in dispute. Mr. Gogarty suggested 30, perhaps 35
14:15:57 15 perhaps 40,000. But straightaway before the Tribunal commenced its workings
16 the Murphys indicated that a sum of 30,000 had left their accounts. And
17 ultimately the finding was, well at least 30,000 was paid. So no real dispute
18 about the amount. The approximate date of the payment, some time in the first
19 fortnight in June 1989, that wasn't in dispute. And the fact that there was
14:16:24 20 roughly contemporaneous with the payment, some discussion between the Baileys
21 and at least Mr. Gogarty in relation to the lands. That wasn't in dispute.
22 And all of that was clarified by Mr. Cooney in a statement that he made to the
23 Tribunal on his very first sitting day, not being one of its substantive
24 hearing days. Well before that, sir.
14:16:55 25
26 What was really in dispute was who knew about the payment. That was the key
27 dispute. And that, sir, is not just my analysis. That's the analysis of the
28 report itself. And you will see that, sir, particularly on page 77. Sir, if
29 you have the report could I just ask you to have regard to page 77?
14:17:20 30

14:17:20 1 MR. CHAIRMAN: Uh-uh.

2

3 MR. CUSH: I'm looking, sir, at paragraph 11.23. Where they say "certain
4 facts were common case. Namely,

14:17:38 5 1. A meeting did in fact take place at the home of Mr. Burke in June 1989.

6 2. Mr. Gogarty, Mr. Bailey and Mr. Burke were present.

7 3. A substantial sum of money amounting to not less than 30,000 was paid to
8 Mr. Burke at this meeting, partly in cash and partly in cheque and the majority
9 of which was in cash.

14:17:57 10

11 The essential disputes between the parties arising from the evidence in
12 relation to the JMSE funded payment were:

13 1. Whether this payment was made as a political donation or as a bribe.

14 2. Whether this payment was made with the knowledge of the Murphy interest or
15 not. "

14:18:12

16

17 So, sir, the Murphys interests took the view -- the position before the
18 Tribunal that it was not made with their knowledge. That was the key issue
19 for the Murphy point of view. They did not involve themselves in the debate
20 as to whether it was made as a donation or as a bribe, because they said that
21 they knew nothing about it. So from the Murphy perspective that was the only
22 issue. And absolutely central to the resolution of that issue, sir, was the
23 resolution of the dispute about who attended the meeting.

14:18:32

24

14:19:04 25 You will recall, sir, that Mr. Burke himself and Mr. Bailey, both of whom were
26 admittedly at the meeting, said Mr. Gogarty was the only other party present,
27 and Mr. Gogarty said "yes, the three of us were present but so also was
28 Mr. Murphy junior." Leaving aside for the moment that he had also on other
29 occasions put Mr. Reynolds at the meeting also, this, the presence of

14:19:32 30 Mr. Murphy junior, was the key dispute between the parties. And if one thinks

14:19:42 1 about it for a moment, sir. If the issue and the only issue between the
2 parties is the knowledge of the Murphys as to the payment, you will see
3 immediately how the resolution of this issue, namely who was present at the
4 meeting, impacts upon that. Obviously, if Mr. Gogarty is correct in saying
14:20:06 5 that Mr. Murphy junior was there, or if the Tribunal so finds, it is absolutely
6 the end of the road for the Murphy contention. It is quite impossible to be
7 at a meeting at which the payment is made and then contend to the Tribunal that
8 you didn't know anything about it.

14:20:30 10 And if, on the other hand, the Tribunal have found that Mr. Murphy junior was
11 not at that meeting contrary to the evidence of Mr. Gogarty, that would have
12 been a finding of enormous damage to Mr. Gogarty. And you may or may not be
13 familiar, sir, with some of the colour which Mr. Gogarty was able to attach to
14 his evidence in relation to the meeting. Not just the meeting, but going to
14:21:10 15 the meeting and coming back from the meeting. And a great deal of that colour
16 was painted around Mr. Murphy junior. And if all of that was untrue, this was
17 a finding of enormous damage to Mr. Gogarty.

18
19 And it's interesting, sir, to look at the findings of obstruction and hindrance
14:21:27 20 that are made against Mr. Murphy junior. If you look, sir, to page 144 you
21 see those findings. And what I want to suggest sir, if I may, is that in
22 substance, at least three of these findings amount to exactly the same thing.
23 And in fact all of them, with the exception of D, amount to the same thing.
24 It's perhaps just prefacing it by reminding the Tribunal what Mr. Murphy
14:22:16 25 junior's contentions were and indeed are, to this day.

26
27 Firstly, he said he never met Mr. Burke, either at that time or subsequently.
28 Secondly, he said he had only met Mr. Bailey for the first time in 1992. And
29 thirdly, he said and says that he met Mr. Redmond for the first time at the
14:22:46 30 public hearings of this Tribunal.

14:22:49 1
2 But if we look at these findings, sir, at 17.16 on page 144.
3 (A) is that he failed to give a truthful account of the circumstances in which
4 he came to attend a meeting at the home of Mr. Burke in June 1989 at which he
14:23:07 5 handed to Mr. Burke a sum of not less than 30,000 pounds.
6
7 That finding is wholly dependent on the finding that he was at the meeting.
8
9 (C) Giving a false account of the involvement of Mr. Gogarty in the sale of
14:23:27 10 the Murphy lands and the role played by him in connection with the payment of
11 JMSE monies to Mr. Burke.
12
13 Well Mr. Murphy junior's account was that he knew nothing about it and he
14 wasn't there. So that depends on a finding that he was there.
14:23:47 15
16 And then (E) falsely constructing an alibi which was untrue.
17 That alibi, sir, we'll come to it in a moment, was the evidence offered on
18 Mr. Murphy junior's behalf in relation to his whereabouts at the time of the
19 alleged meeting.
14:24:09 20
21 And then (B) sir I respectfully suggest also must depend on Mr. Murphy junior's
22 involvement with the payment of the monies and the participation in the lands
23 that was the background to the payment of the monies, as so found by the
24 Tribunal.
14:24:24 25
26 (B) is failing to give a truthful account with his dealings with Mr. Bailey
27 with regard to the participation proposal in which it was envisaged that
28 Mr. Bailey would receive 50% of the value of the Murphy North Dublin lands in
29 return for procuring planning permission and building bylaw approval in respect
14:24:42 30 thereafter.

14:24:43 1
2 And D, sir, is the stand alone finding in relation to dealings with Mr. Bailey
3 subsequent to the Sunday Business Post articles. That's, I think, a period in
4 1996. That's undoubtedly a stand alone finding and I'll come back to it, if I
14:24:57 5 may.

6
7 Sir, I am suggesting, sir, that this meeting and Mr. Murphy junior's presence
8 at it or not being present, was absolutely central to the resolution of this
9 dispute. And that the Tribunal itself attached significance, sir, is to be --
14:25:20 10 or is clear from what the Tribunal said on page 129. And if we can just
11 direct your attention to paragraph 14.90, which is the first paragraph that the
12 Tribunal writes under the heading "The attendance of Mr. Joseph Murphy junior
13 at the meeting in Briargate, Swords in June 1989."

14
14:25:55 15 "Mr. Burke, Mr. Murphy junior and Mr. Bailey gave evidence to the Tribunal that
16 Mr. Murphy junior was not in attendance at the meeting in Mr. Burke's home at
17 which Mr. Burke received JMSE's funds. It was submitted on behalf of the
18 Murphy interests that if the Tribunal concluded that Mr. Murphy junior was not
19 at such a meeting, it followed that Mr. Gogarty had told a monstrous lie at the
14:26:17 20 Tribunal which ought, in turn, convince the Tribunal that the entire of his
21 story must be discounted.

22
23 The Tribunal does not accept the proposition that a resolution of this single
24 issue of fact must necessarily resolve the question as to whether the payment
14:26:31 25 made to Mr. Burke was made for a corrupt purpose or otherwise, although it
26 accepts that Mr. Gogarty's credibility as a witness will be damaged by such a
27 finding."

28
29 Now, if I can just pause there, sir. The first couple of sentences there
14:26:50 30 which record our submission to the Tribunal are undoubtedly accurate. The

14:27:02 1 next sentence. "The Tribunal does not accept the proposition" requires some
2 careful scrutiny in my respectful submission. It says "The Tribunal does not
3 accept the proposition that a resolution of this single issue of fact must
4 necessarily resolve the question as to whether the payment made to Mr. Burke
14:27:15 5 was made for a corrupt purpose or otherwise."

6
7 Now sir, the Murphy interests weren't advocating that the resolution of this
8 issue determined whether or not the payment was corrupt or not, as the author
9 of the report seems to believe. Instead they were advocating that the
14:27:43 10 resolution of this issue as to whether he was at the meeting pretty much
11 determined one way or another whether he knew about the payment. A completely
12 different issue.

13
14 But the second part of the sentence does at least acknowledge the significance
14:28:05 15 of the meeting when it goes on to say "although it accepts that Mr. Gogarty's
16 credibility as a witness would be damaged by such a finding."

17
18 Something of an understatement I suggest, but accurate nonetheless.

19
14:28:23 20 Sir, it's important then -- I should preface this analysis by saying we are
21 here, and because of your ruling we are bound by the findings in the report of
22 the Tribunal, although you know from what I said and the existence of
23 proceedings, that we don't accept them. For today's purposes we acknowledge
24 that we're bound by them. But you, sir, said on other occasions that you are
14:28:55 25 going to examine those findings and in part the evidence underlying those
26 findings with a view to assessing what weight you ought to attach to those
27 findings in the context of this application for costs. I should have said to
28 you, sir, that it's for that reason that I'm asking you to conduct this sort of
29 analysis in relation to this finding. I say it's absolutely central to the
14:29:23 30 resolution of the entire issue that faced the Tribunal on this question of

14:29:29 1 knowledge.
2
3 And the key, the key passages, sir, that resolve the issue as to Mr. Murphy
4 junior's presence follow in 1492 down to 1495.

14:29:49 5
6 I want if I may, sir, to ask you to look at these carefully. Mr. Gogarty's
7 evidence, this is 1492, was that Mr. Murphy junior had attended three meetings
8 in Dublin during the period between the end of May 1989 and the 15th of June
9 1989. The first of these meetings was said to have been a meeting a couple of
10 days before the 8th of June 1989, which took place at the premises of JMSE,
11 Shanowen Road, Santry, and which was attended by Mr. Joseph Murphy junior,
12 Frank Reynolds, Mr. James Gogarty on behalf of the Murphy interests and by
13 Mr. Michael Bailey. Mr. Gogarty said that it was at this meeting that
14 Mr. Bailey spoke of his acclaimed ability to procure planning permission
15 through the assistance of Mr. Burke and certain named county councillors and
16 officials.
17
18 The second meeting was said to have taken place on the afternoon of the 8th of
19 June 1989, was said to have been attended by Mr. Joseph Murphy junior, Mr.
14:30:36 20 Frank Reynolds and Mr. James Gogarty at which the assembled monies intended to
21 be paid to Mr. Burke were cashed out by Mr. Gogarty in anticipation of delivery
22 to Mr. Burke's home on the same date, a visit which was unexpectedly called
23 off.
24

14:30:50 25 The third meeting some days after the 8th of June 1989 was the meeting said to
26 have taken place in Mr. Burke's home which was said to have been attended by
27 Michael Bailey, Mr. Joseph Murphy junior and Mr. James Gogarty at which it was
28 said that two envelopes passed to Mr. Burke which were believed to contain
29 40,000 pounds each, the first envelope passed over by Mr. Joseph Murphy junior
14:31:10 30 and the second by Mr. Michael Bailey.

14:31:14 1
2 Just to pause there for a moment, My Lord. That is an absolutely accurate
3 account of what Mr. Gogarty was alleging. In that period Mr. Murphy junior
4 attended not just one meeting in Mr. Burke's house, but three meetings. And
14:31:28 5 he had details of what transpired at each of the meetings, although he never
6 had a precise date for any of them.

7
8 And the Tribunal then goes on "The documents provided by Mr. Joseph Murphy
9 junior to the Tribunal indicated that he had been in Ireland for some time
14:31:44 10 between 31st May 1989 and 6th June 1989 and again between the 10th of June 1989
11 and 12th of June 1989."

12
13 What we see here is the beginning of the scrutiny of the Tribunal of what the
14 Tribunal described as the alibi for Mr. Murphy junior. It says "He could
14:32:02 15 therefore have attended the first of the meetings alleged by Mr. Gogarty and
16 the third of those meetings.
17 Mr. Murphy junior also provided the Tribunal details of his whereabouts in
18 Ireland in the two periods of the 31 May - 6 June 1989; and the 10th of June
19 1989 and 12th of June 1989, which if true excluded the possibility of his
14:32:24 20 attendance at either meeting."

21
22 Now, sir, what we find in this analysis, having set up the possibility that one
23 or other thing happened, there is no finding in relation to the first and
24 second meetings. There is never a finding from the Tribunal in relation to
14:32:44 25 those meetings.

26
27 And it goes on "Two significant events took place in those periods from Mr.
28 Murphy junior's point of view. Firstly a friend of his was getting married in
29 Waterford on Saturday 3rd June 1989 and this accounts for the first visit and
14:32:57 30 secondly Mrs. Mary Elizabeth Flynn died on the 9th June 1989 which accounted

14:33:02 1 for a second visit. Persons who had been involved in or attended at one or
2 other of these two events were called in evidence and it was submitted on
3 behalf of Mr. Murphy junior that their evidence conclusively established that
4 he could not have attended the first or third alleged meetings in June as is
14:33:18 5 claimed by Mr. Gogarty.

6
7 Mr. Murphy's evidence in relation to the 8th of June, the date of the second
8 meeting, was that he was working in London. Evidence was given by witnesses
9 who had telephoned him that morning in London and that night in London. And
14:33:32 10 then the Tribunal says:

11
12 "In considering the evidence of the witnesses as to Mr. Murphy junior's
13 whereabouts the Tribunal has had regard to the fact that there had been a lapse
14 of almost nine years between the date of the event on which they were giving
14:33:42 15 evidence and their appearance in the witness box. The Tribunal has had regard
16 to the fact that details of the circumstances surrounding the events upon which
17 they gave evidence were themselves a relative insignificance at the time they
18 occurred, and consequently there was no reason for those concerned to commit
19 the precise details of the events to memory. The Tribunal has had regard to
14:33:59 20 the relationship between Mr. Joseph Murphy junior and the individuals
21 concerned, which is either that of close personal friendship or of
22 employer/employee in the case of significant witnesses.

23
24 The Tribunal is satisfied that Mr. Murphy junior was in Ireland during the
14:34:11 25 period from 31st of May 1989 to the 6th of June 1989, and that during that
26 period he attended the wedding in Waterford on Saturday the 3rd. However, it
27 is clear that notwithstanding the alibi evidence offered in relation to
28 Mr. Murphy junior's meetings with friends in Waterford, a meeting could have
29 taken place with Mr. Bailey on either the 31st of May or the 1st of June and
14:34:37 30 still have allowed Mr. Murphy junior to attend his meeting in Waterford later,

14:34:43 1 on the 1st of June."
2
3 Sir, that language that somebody "could have been at a meeting" we'll see is
4 the language that the Tribunal uses throughout this analysis. And what we
14:34:54 5 ultimately see, sir, is that the Tribunal concluded that Mr. Murphy junior had
6 failed to establish a negative. He had failed to establish that he could not
7 have attended the meetings. And that reversal of the onus of proof, that
8 analysis, seamlessly led to a finding that he was at the meeting with
9 Mr. Burke, and that seamlessly led to a finding that he had lied to the
14:35:26 10 Tribunal and constructed a false alibi. Every aspect of it built upon a
11 reversal of the onus of proof.
12
13 And it goes on: "The Tribunal is satisfied that Mr. Murphy junior could have
14 attended a meeting in Dublin on the 8th of June 1989 notwithstanding the
14:35:49 15 evidence that he had received telephone calls in London both that morning and
16 that night. A meeting could have taken place at JMSE's premises on the
17 afternoon of the 8th of June, provided Mr. Murphy junior had flown from London
18 to Dublin and returned on the same day." It could have happened is what it
19 says. Now, the Tribunal never goes on to find that the first and second
14:36:11 20 meeting did in fact happen. It never made such a finding. It just said it's
21 possible. You haven't established conclusively that it's impossible.
22
23 And then it goes on. "The Tribunal is not convinced by the alibi evidence
24 offered to the Tribunal that Mr. Murphy junior could not have attended a
14:36:34 25 meeting in Dublin in the week commencing the 12th of June 1989." Just pause
26 there for a moment, that is the third meeting with Mr. Burke. There is a
27 double negative in there. A double reversal of the onus of proof as it were.
28 "Not convinced by the alibi evidence that you could not have attended." It
29 goes on to say "And recognises that for such a meeting to have taken place on
14:36:58 30 the 12th of June it would involve a rejection of the alibi evidence offered as

14:37:02 1 to Mr. Murphy junior's evidence that day by Mr. Greene". He was one of the
2 witnesses. "The Tribunal believes that it is possible that Mr. Murphy junior
3 could have attended an afternoon meeting at the JMSE premises in Dublin on the
4 8th June and still have attended his work place in London earlier that day."

14:37:21 5 That's back to the second meeting. Then it returns to the third meeting.
6 "If Mr. Murphy junior returned to Ireland on either the 13th or 14th to attend
7 a meeting." That's the meeting with Mr. Burke, if he did. "It would involve
8 the rejection of the evidence of Mr. Mycroft, the JMSE engineer, insofar as he
9 believed Mr. Murphy junior was working all day in London, on each of those
10 days."

11
12 So all that the Tribunal has done here, sir, in relation to the third meeting
13 is to say that if Mr. Murphy junior was in fact at a meeting in Dublin on
14 either the 13th or the 14th, it involves a rejection of somebody's evidence,
15 either Mr. Greene or Mr. Mycroft or perhaps both.

16
17 Now, the report never goes on to make a finding that somebody's evidence has
18 been rejected. Still less does it identify who that might be. And then it
19 goes on 14.102 which one might think would be the conclusion of this analysis.

14:38:31 20
21 "The Tribunal is satisfied, on the balance of probabilities that there was a
22 series of meetings in the first two weeks of June which concerned the possible
23 acquisition of an interest in the Murphy lands by Mr. Bailey and that the
24 payment to Mr. Burke was made in connection with one of these proposals. The
14:38:45 25 Tribunal is satisfied that no other credible explanation for such payment is
26 revealed by the evidence."

27
28 No finding there that Mr. Murphy junior attended the third meeting. No
29 finding that it's either Mr. Mycroft or Mr. Greene, or both, whose evidence has
14:39:04 30 been rejected.

14:39:05 1
2 And what follows then in the subsequent paragraph, sir, is an analysis which
3 really goes on to other matters, 14.103 turns really to Mr. Bailey's position.
4 There are one or two references to Mr. Murphy junior. I will just identify
14:39:22 5 them if I may, so you can see that they have nothing to do with this third
6 meeting.
7
8 14.108 is a reference to Mr. Murphy junior having a desire to retain the lands
9 for the development potential rather than to sell them.
14:39:39 10 14.109 Bailey became aware of junior's wish to capitalise on the development
11 potential of the lands.
12 14.110 The Tribunal believes it's probable that Mr. Murphy junior discussed the
13 participation with Mr. Michael Bailey prior to the 8th of June 1989.
14
14:39:58 15 Sir, I believe that there is no further mention of Mr. Murphy junior in the
16 entire of that page. If I'm wrong about that as a point of detail, I am
17 certain that there is certainly no mention of him in relation to his alleged
18 attendance at the meeting.
19
14:40:15 20 If you turn over the page then. You see more of this analysis, particularly
21 Mr. Bailey's role. And you come down to what is the last paragraph dealing
22 with topic, 14.117. And if you were in any doubt up to this point, which I
23 respectfully suggest that you couldn't be, if you were in any doubt but that
24 this analysis involves the reversal of the onus of proof, we see it in here in
14:40:44 25 terms.
26
27 In weighing the evidence of the alibi witnesses in the totality of the evidence
28 surrounding the making of the payment to Mr. Burke, the Tribunal concludes that
29 the alibi evidence does not prove that Mr. Murphy junior could not have
14:41:05 30 attended at least three meetings in Dublin between the 31st of May and the 15th

14:41:10 1 of June."
2
3 Every accepted mode of fact-finding has been stood on its head by this
4 analysis. And that leads you, sir, to chapter 16, the summary conclusions.
14:41:41 5
6 On page 139 there's a heading "Payment to Mr. Burke at Briargate, Swords, in
7 the week prior to the 15th of June 1989." And without ever feeling the
8 necessity to articulate as a matter of probability that Mr. Murphy junior had
9 been there, simply it is said at 1617 "the parties present at the meeting were
14:42:07 10 Mr. Burke, Mr. Bailey, Mr. Murphy junior and Mr. Gogarty."
11
12 And from there, sir, you go to the next chapter, the one with which we are now
13 concerned and you come to the findings against Mr. Murphy junior on the heading
14 that I have already outlined to you, sir. They include as we see, falsely
14:42:28 15 constructing an alibi, which was untrue. Huge leaps here. Nowhere to be
16 found in the reasoning. And centrally dependent on a reversal of the onus of
17 proof.
18
19 So I say, sir, that that was the analysis that led to the key finding against
14:43:15 20 Mr. Murphy junior which was key, not just to him but to the entire of the
21 position taken up by him and the Murphy companies. And just to go back to
22 those if I may, and look at finding at (B). I do respectfully suggest that
23 that is also inextricably bound with the idea that Mr. Murphy junior was at the
24 meeting and therefore knew of the payment. But in looking for some language
14:43:52 25 in the body of the report, surrounding that finding, I think it's probably to
26 be found at paragraph 14.110 on page 131, there is one sentence, it says "The
27 Tribunal believes that it is probable that Mr. Murphy junior discussed the
28 participation proposal with Mr. Bailey prior to the 8th of June 1989."
29
14:44:22 30 That's the height of what I can find in the report to sustain that finding. It

14:44:27 1 is fairly stated to be merely a matter of probability. Mr. Murphy junior's
2 position was he hadn't, in fact he never spoke to Mr. Bailey prior to 1992.
3 His evidence isn't accepted in that regard, which is not surprising if you're
4 going to disbelieve him about not being at the meeting. But we have seen how
14:44:54 5 that's been achieved.

6
7 And again seamlessly, that preference for the evidence of one version over his
8 version translates itself into a finding of obstruction and hindrance.

9
14:45:08 10 And perhaps I ought to have mentioned this, in the context, sir, of the
11 reversal of the onus of proof. It is worth looking at paragraph 1703 of what
12 the Tribunal itself said at page 141.

13
14 "Any person duly summoned to do so, who gives evidence to the Tribunal which is
14:45:28 15 material to its inquiry, which that person wilfully knows to be false or does
16 not believe to be true or who by act or omission obstructs or hinders the
17 Tribunal in the performance of its functions, commits a criminal offence."
18 Well that's true. As statement of the law, that's true. You see, sir,
19 what's happened is that something that one might ordinarily expect to be proven
14:45:53 20 on a standard of beyond reasonable doubt is here found not by the application
21 even of the lower standard of the balance of probabilities, but by the
22 application of the reversal of the onus of proof.

23
24 There is a stand alone finding against Mr. Murphy junior which is at
14:46:13 25 subparagraph D. Giving a false account of his dealings to Mr. Bailey
26 subsequent to the publication of the Sunday Business Post articles. I think
27 the narrative for that is to be found at paragraph 13.23. What I found, sir,
28 in relation to it. Where it is said, and again this is an admitted fact in
29 itself that "Mr. Murphy junior and Mr. Bailey met at the Burlington Hotel for
14:46:49 30 over an hour, and sorry Mr. Gogarty, and whilst they say they discussed general

14:46:54 1 matters, they both claim no mention was made of the matter which ought to have
2 been of significant concern to both of them, namely the Gogarty allegation that
3 they were jointly involved in bribing a senior government minister, since the
4 claim purports this meeting was to endeavour to resolve Mr. Gogarty's ongoing
14:47:06 5 dispute with the Murphy interests. It's all the more incredible that these
6 parties could have not sought to have establish why he is making false
7 allegations against both of them and Mr. Burke if the allegations were false.
8 The Tribunal is satisfied the evidence given by both Mr. Bailey and Mr. Murphy
9 junior as to the purpose in their meeting in the Burlington Hotel and the
14:47:23 10 subject of their discussion was false, and the true position was the meeting
11 was set up in order to persuade Mr. Gogarty to desist from making further
12 allegations which they both believe to be true ".
13

14 That's a finding that it was open to the Tribunal to make, I can't argue
14:47:33 15 otherwise. It made it but I would ask you to note, sir, that it's a finding
16 by way of inference. And obviously must be seen in the light of the other
17 findings being made by the Tribunal which I respectfully suggest are so much
18 more obviously fallible. I say all of that again in the context of the level
19 of weight that you have to attach to these findings in the context of this
14:48:04 20 application for costs. I do respectfully suggest, sir, that the central
21 finding is enormously fallible and ought to attach relatively little weight in
22 your analysis.
23

24 And then this other finding at (D). It is not so obviously fallible. And
14:48:32 25 it's a finding which cannot be challenged, I feel. But it is, as I suggest,
26 sir, a finding by way of inference. And then subparagraph B I do respectfully
27 suggest is bound up with the finding in relation to the presence of Mr. Murphy
28 junior at Mr. Burke's house.
29

14:48:54 30 So overall, sir -- I should say something about the third report, sorry.

14:49:10 1
2 The third report, sir, concerns the alleged payments to Mr. Redmond. And
3 interestingly, there is an inextricable link between Mr. Gogarty's version of
4 the payment to Mr. Burke and what he says about the payments to Mr. Redmond.
14:49:50 5 And you see that, sir, from his own affidavit which the relevant part of which
6 is attached as an appendix to the third report. It's more obvious from a
7 review of the transcript where Mr. Gogarty was able to supply a deal of colour.
8 But what he said, sir, in relation to the Redmond payment, what came up was
9 that he says that in the car on the way back from Mr. Burke's house there was a
14:50:30 10 conversation in which Mr. Murphy junior allegedly said that he had made a
11 payment to Mr. Redmond.
12
13 So again if Mr. Murphy junior wasn't there, as he contends to this day, that
14 couldn't have got said. And it is the link into the Redmond payments. So
14:51:20 15 it's worth looking then at the Tribunal's analysis in relation to the Redmond
16 payments. You will see it on page 11 of the third report.
17
18 And under the heading "Who made the payment to Mr. Redmond on behalf of the
19 Murphy interests?" paragraph 334. "Mr. Gogarty's evidence was that he was
14:51:48 20 informed by Joseph Murphy junior sometime subsequent to the actual payment to
21 Mr. Redmond that he had paid Mr. Redmond. Mr. Joseph Murphy junior denied
22 that he had made any such payment and he was supported in this by Mr. Redmond.
23 The Tribunal accepts Mr. Gogarty's evidence that Mr. Murphy junior informed him
24 that he had paid Mr. Redmond and the Tribunal is satisfied on the balance of
14:52:13 25 probabilities that Mr. Murphy junior did so."
26
27 Now, just to put a little bit of detail on that which is in fact evident from
28 the earlier paragraphs perhaps 331 to 333. There wasn't a shred of evidence
29 available to the Tribunal of monies leaving the Murphy interests accounts, or
14:52:35 30 leaving at all, in relation to Mr. Redmond. It's quite distinct therefore

14:52:39 1 from the Mr. Burke payment where it was all perfectly obvious that the monies
2 had come from the Murphys.

3
4 There was no evidence as to what amount of money was paid. And you see here
14:52:51 5 the analysis whereby the Tribunal worked out that it must have been 12,246 or
6 more. There wasn't even an allegation from Mr. Gogarty that he was there and
7 it was paid. All of this predicated on the idea that Mr. Murphy junior said
8 he had paid it in the car, after the Burke meeting at which Mr. Murphy junior
9 was allegedly present. It is said that he told Mr. Gogarty he paid the
14:53:28 10 monies. And from that the Tribunal concludes that he did. One of the few
11 occasions on which the Tribunal said Mr. Murphy junior was telling the truth.

12
13 So again if you're looking to a finding. And if you're looking, sir, to
14 evidence underlying that finding with a view to seeing what weight you can
14:53:56 15 attach to it, in the context of this application for costs. You must bear
16 that in mind in my respectful submission. All of this stems from the first
17 analysis in relation to the Burke meeting and is itself subject to those flaws.

18
19 And that again leads seamlessly to a finding at 803 on page 20 that Mr. Murphy
14:54:22 20 junior had hindered and obstructed the Tribunal by failing to give a truthful
21 account of the circumstances in which at least 12,246 was paid to Mr. Redmond.

22
23 And the other payment, the Clontarf Castle payment, is an example. That's
24 dealt with, sir, on page -- sorry, I beg your pardon. On page 16, sir, of
14:54:56 25 that third report.

26
27 This is an example where everybody allegedly present denied that such a meeting
28 had taken place, including Mr. Redmond. Mr. Gogarty's evidence was preferred.
29 But even then the Tribunal went on to say well, given that Mr. Redmond had
14:55:24 30 resigned and this is, therefore had nothing to do with his official duties and

14:55:34 1 wasn't a corrupt payment.

2

3 But notwithstanding the fact that it wasn't a corrupt payment, because

4 Mr. Murphy junior denied that he had made such a payment, because that wasn't

14:55:48 5 accepted, he is found to have obstructed and hindered the Tribunal. That's

6 the second finding against him, the second of two findings against him in

7 relation to obstruction and hindrance.

8

9 So it really gets to this stage that if Mr. Murphy junior himself says

14:56:10 10 something in response to the many and varied allegations of Mr. Gogarty and if

11 Mr. Gogarty's evidence is preferred, notwithstanding perhaps the absence of

12 corroborating evidence in this context, Mr. Murphy junior has obstructed and

13 hindered the Tribunal. So again I ask you to bear that in mind in the context

14 of the weight that you attach to those findings which are adverse to Mr. Murphy

14:56:41 15 junior.

16

17 And finally, sir, as I say, that taken in the round, you are exercising a

18 statutory power. You are obliged to exercise that in a proportionate manner.

19 The exercise of the statutory power where it involves a power to award costs

14:57:06 20 ought not to be used as a penalty. That was in fact part of the submission

21 from the Minister for Finance and something which I think I'm correct in

22 saying, sir, that it is reflected in your findings, if not expressly.

23

24 As matter of fact the costs incurred by the Murphys in respect of this Tribunal

14:57:29 25 are very extensive, I don't know what they are but they are undoubtedly

26 extensive. I think they were in attendance for 180 days in total, sir.

27

28 And if you refuse them all of their costs you do so in circumstances where they

29 have been a positive assistance to the Tribunal in some respects. There are

14:57:56 30 other areas, substantial areas where the inquiry has produced at least neutral

14:58:03 1 findings in relation to the Murphys or perhaps no findings, and in some
2 represents positive findings. And yes, there are adverse findings. But
3 looked at critically the key adverse finding is that Mr. Murphy junior was at
4 the meeting and from that flowed the inevitable consequence that the Murphys
14:58:30 5 knew about the payment. And that was the only real issue before the Tribunal,
6 whether they knew about the payment or not.

7
8 And when you look at the manner in which the Tribunal went about its analysis
9 on that key finding, it is, sir, deeply flawed for the reasons that I've
14:58:48 10 suggested. You can't ignore it, bearing in mind your own rulings. But you
11 ought to bear that in mind in assessing the weight to be attached to it.

12
13 And then taking all of the three elements in the round and bearing in mind the
14 command to act proportionately I do suggest, sir, that some significant
14:59:11 15 proportion of the costs ought to be awarded in favour of the Murphys.

16
17 Thank you very much.

18
19 MR. CHAIRMAN: Thank you, Mr. Cush. Do you want to say anything, Mr. O'Neill?

14:59:22 20
21 MR. O'NEILL: Thank you very much.

22
23 MR. CHAIRMAN: I will endeavour to give a ruling as soon as possible but it
24 won't be before next month some time. Thank you.

15:04:49 25
26 **THE TRIBUNAL THEN ADJOURNED TO THE FOLLOWING DAY,**
27 **TUESDAY 12TH OCTOBER 2004 AT 10.30 AM.**
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