

11:26:07

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THE TRIBUNAL RESUMED AS FOLLOWS ON MONDAY,

2

25TH JULY, 2005, AT 11:00 A.M.:

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4

CHAIRMAN: Good morning.

11:26:36

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This morning there are five applications for costs. All but one this

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morning are parties who did not have a grant and were not granted,

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formally granted legal representation in the course of the modules with

9

which we're concerned.

11:27:01

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The, I think Mr. Downes, Mr. Gerard Downes is a party who did have a grant

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of representation.

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14

Parties making applications this morning need not, if they, unless they

11:27:17

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wish to do so, open in any detail any written submissions that they have

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made. All of these have been read by me and will be considered before

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any Ruling is made. Equally, oral submissions are not necessary unless

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parties wish to make them.

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11:27:35

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There is a sitting of the Tribunal at I think, a quarter past two this

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afternoon when the Minister, through his counsel, Mr. Collins will

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apparently make additional submissions. Hopefully, and depending on what

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may be involved in those submissions, my present intention would be to

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give a Ruling in relation to these, and a number of other applications,

11:28:03

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over the last couple of weeks before the end of this week and parties will

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be advised in due course as to the date of that, on which the Ruling is to

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be made.

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Mr. Kavanagh will call out the applicants in their turn. And perhaps

11:28:18

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when they are making their applications they might identify themselves for

11:28:23 1 the record.
2
3 REGISTRAR: Is there any appearance by or on behalf of ING Barings?
4
11:28:30 5 MR. BYRNE: Yes.
6
7 CHAIRMAN: Do you wish to make your application?
8
9 MR. BYRNE: Yes, please.
11:28:37 10
11 CHAIRMAN: Could you just identify yourself.
12
13 MR. BYRNE: My name is Jim Byrne. I am the Chief Operating Officer of
14 ING Bank NB, Dublin branch, which previously traded under the trade name
11:28:51 15 ING Bearing.
16
17 And I would like to apply for the costs we incurred in complying with the
18 Tribunal's requests for the information.
19
11:28:57 20 We have had 43 requests of for information, all of which have been
21 responded to. As we don't have an internal legal department, on the first
22 occasion we were required to swear an affidavit we sought legal advice.
23
24 Subsequent requests for information were dealt with internally using the
11:29:17 25 modus operandi that we had previously established and were appropriately
26 sworn in front of a Commissioner for Oaths. In all we swore affidavits
27 in respect of 56 parties.
28
29 We are seeking the costs we incurred in obtaining that initial legal
11:29:28 30 advice. We have not sought any other costs either internal or external

11:29:33 1 for complying with all of the Tribunal's requests for information.
2
3 Mr. Chairman , that is our submission.
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11:29:37 5 CHAIRMAN: All right. Thank you very much.
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7 REGISTRAR: Investec.
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9 MS. GIBBONS: Sheila Gibbons, from McCann Fitzgerald, on behalf of the
11:29:46 10 Irish branch of Investec Bank (UK Limited).
11
12 Investec cooperated with the Tribunal and provided assistance in relation
13 to the works leading to the Second and Third Interim Reports.
14
11:29:57 15 I'm applying for the costs that they incurred in doing so, some
16 administration and legal costs. In this regard, I would like to adopt
17 the submissions made by Mr. Owens on the 12th of July.
18
19 I submit that it would be just and equitable to allow my client's their
11:30:15 20 costs particularly in light of the former Chairman's statement of the 4th
21 of February, '98. And I would respectfully ask the Tribunal to exercise
22 its discretion to grant us those costs.
23
24 Thank you, Chairman.
11:30:24 25
26 CHAIRMAN: Thank you very much.
27
28 REGISTRAR: Hugh O'Neill, solicitor.
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11:30:27 30 MS. GIBBONS: Helen Gibbons, of Noel Smyth & Partners, on behalf of Hugh

11:30:32 1 O'Neill, a partner in the office.
2
3 He appeared before the Tribunal both in private interview and subsequently
4 at public hearing on the 25th of May, 2001.

11:30:39 5
6 He co-operated fully with the Tribunal and assisted the Tribunal. He
7 provided a written submission on which he spent considerable time and on
8 which engaged Mr. Anthony Ashton, Senior Counsel. Hugh O'Neill has
9 written to the Tribunal regarding the costs and has furnished the fee note
10 of Anthony Ashton senior counsel. And it those costs alone that he is
11 looking to have awarded by the Tribunal.
12
13 And we would request that the Chairman exercise his discretion in favour
14 of Hugh O'Neill, who wasn't granted representation when he appeared.

11:31:16 15 Thank you.
16
17 CHAIRMAN: Thank you very much.
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19 REGISTRAR: Arthur Cox, Eugene Fanning.

11:31:24 20
21 CHAIRMAN: I will put it back to 2:15.
22
23 REGISTRAR: Reg Gerard Downes.
24

11:31:30 25 MR. LEONARD: Brian Leonard, instructed by Brian Rigney, on behalf of
26 Mr. Downes.
27
28 CHAIRMAN: Sorry. Just before you begin. I should have said in my
29 opening few words. That I am satisfied that all of the parties making
30 applications today fully cooperated with the Tribunal, so that is not an

11:31:44

11:31:47 1 issue. All right.

2

3 MR. LEONARD: Thank you. I heard your opening remarks, Chairman, to the

4 effect that the written submission which we have made, which is quite a

11:31:59 5 lengthy. We filed a written submission of 14 pages in length. And have

6 annexed to it, a book of attendances and most of the correspondence that

7 we had with the Tribunal. And in the light of your remarks, I don't

8 propose to go through it in any enormous detail. It would take up a

9 great de deal of time and I don't think the time would be very productive.

11:32:23 10

11 But, first of all, what I would like to do is to draw your attention to

12 two small mistakes in the submission. First of all, at page 10. The

13 third paragraph of page 10 says "for reasons which are unclear, the

14 Tribunal called on counsel for the Baileys to cross-examine Mr. Gogarty at

11:32:42 15 that stage". That remark is not quite strictly speaking accurate.

16 Because actually Mr. Gogarty was in cross-examination by Mr. Cooney at

17 that stage. What I should have said was that having said that we were

18 about to be called to give evidence, Mr. Cooney completed his

19 cross-examination on behalf of the Murphys and the Baileys were then

11:33:12 20 called to give the cross-examination. So the sentence is slightly

21 misleading. And perhaps you might make a note of that.

22

23 The other thing is that --

24

11:33:21 25 CHAIRMAN: Sorry, did you say page 10?

26

27 MR. LEONARD: Page 10, on the third paragraph, "for reasons which are

28 unclear, the Tribunal called on counsel to the Baileys to cross-examine

29 Mr. Gogarty at that stage". But actually the Gogarty cross-examination

11:33:37 30 was continuing at that stage. It was at the conclusion of the

11:33:42 1 cross-examination of Mr. Gogarty by the Murphys that the Baileys were
2 called upon, notwithstanding that we had been given the impression that we
3 would be called upon. I'll come back to that later.

11:33:56 5 It's not a correct statement of the events which actually happened.

6
7 And the other small thing is on page 14 of the submission. In a
8 paragraph which is numbered 15. There's an important, fairly obvious
9 omission. It says "the team retained by Mr. Downes not managed". It
10 should say not "only" managed.

11
12 CHAIRMAN: Uh-huh.

13
14 MR. LEONARD: I think it's fairly clear from the context.

11:34:29 15
16 Now, if I could just summarise the situation then from my client's point
17 of view.

18
19 Mr. Downes was a quite modest, mild, chartered accountant, who was
11:34:47 20 headhunted by I think it was Mr. Conroy to come and work for the JMSE group
21 of companies. And was employed by that firm in its capacity as the
22 Financial Controller in charge of the finances of the company and he was
23 also a Director of the company.

11:35:06 25 Now, he became a victim of the warfare which broke out in the Murphy group
26 of companies. Arising, I think it's fair to say, directly out of the
27 fact that Mr. Gogarty hadn't been provided with a pension. Mr. Downes'
28 concern about that, of course, had been that as a prudent person in the
29 financial management of the Murphy group of companies, Mr. Gogarty having
11:35:35 30 worked there for thirty years I think it was at that stage. No provision

11:35:40 1 had ever been made for a pension. And whether Mr. Gogarty had passed
2 retirement age, quite reasonably he was very anxious to receive a pension.
3 And that in a sense gave rise to a terrible row and as a result of which
4 Mr. Downes ultimately lost his job. He was left in very poor financial
11:36:04 5 circumstances. He got a very small handout. He was unemployed for a
6 period. And he ended up doing voluntary work in Africa. And when the
7 allegations that were made by Mr. Gogarty that gave rise to the formation
8 of this Tribunal. A letter was written to Mr. Downes by the Tribunal
9 referring to Mr. Gogarty's affidavit and it was the Tribunal which
11:36:35 10 asserted that because allegations had been made by Mr. Gogarty against Mr.
11 Downes that the Tribunal gave Mr. Downes limited representation.

12
13 Now, Mr. Downes and Mr. Sweeney, who was a co-worker with him in the
14 company, I think it's fair to say are the only two people against whom
11:36:58 15 specific allegations were made by Mr. Gogarty which was not accepted by
16 the Tribunal. And it would be my submission, having regard to the
17 findings of the Tribunal in general terms, that it was as a result of the
18 hard work that was done on behalf of Mr. Downes that the Tribunal
19 ultimately became convinced of the total innocence of Mr. Downes in any
11:37:28 20 wrongdoing of any sort.

21
22 Now, there were two categories of allegations made by Mr. Gogarty. The
23 first related to Mr. Downes' character competence and honesty with respect
24 to his relationship with his employer. And the second allegation related
11:37:51 25 to his willing participation in a slush fund.

26
27 Now, no allegation from a planning point of view I think could be more
28 important than that a large company sets up the secret slush fund whose
29 purpose is to make payments to persons who could be of unstated but
11:38:19 30 clearly implied to be dishonest and corrupt payments of benefit to the

11:38:26 1 Murphy group of companies.

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3 Now, the dual nature of the allegations made against Mr. Downes put
4 himself in a difficulty. But it was a difficulty which was well

11:38:39 5 recognised by the Tribunal. Mr. Hanratty, at one stage, referred to
6 single issue Tribunals and multiple issue Tribunals where people have
7 different issues to defend.

8

9 What we set out to do at the outset of Mr. Downes' case was, first of all,
11:39:01 10 to cooperate as fully as we could and to give as much assistance as we
11 could to the Tribunal in relation to the allegations which were the
12 corruption allegations in the planning process.

13

14 The other thing that we set out to do was to vindicate our client's
11:39:21 15 character and reputation. And the most vile allegations had been made.
16 And it would took a great deal of work to defend Mr. Downes' character and
17 reputation properly.

18

19 Now, there were two or three-ways in which this became important. The
11:39:40 20 first thing was that when we did our initial statement we asserted boldly
21 that there was no slush fund, which in fact there wasn't. If one looks
22 at the actual findings and the evidence given about them, source of the
23 fund which were used to pay Mr. Burke, they weren't drawn out of any
24 secret accounts, they were drawn out of the company funds. But having
11:40:07 25 said to the Tribunal that there wasn't a slush fund, what Mr. Downes then
26 did was, through his counsel, we contacted the Tribunal privately and
27 informed them of an irregularity, a minor irregularity, in the affairs of
28 JMSE. And as a result of that information the Tribunal then subpoenaed
29 Mr. Downes to give evidence in private, which he willingly did, and gave
11:40:38 30 as much information as he could to the Tribunal about this minor

11:40:43 1 irregularity in the accounting procedures of JMSE. And I don't think I
2 need to go into that any further.
3
4 Now, that was at the outset of the Tribunal, before any evidence was given
11:40:55 5 by Mr. Gogarty. If the Tribunal had been satisfied with the explanation
6 that had been given at that stage, Mr. Downes could perhaps have been let
7 out of the Tribunal. But the Tribunal in its discretion didn't feel free
8 to do that. We were left with the impression that there was some other
9 possibility of an improper fund left hanging over Mr. Downes' position.
11:41:24 10
11 Now, as the events unfolded one of the rather strange features of this
12 Tribunal is that Mr. Gogarty wasn't really pressed or led, by
13 Mr. Gallagher, if I remember rightly, on any detail about evidence of a
14 slush fund. So that at the conclusion of Mr. Gogarty's evidence nothing
11:41:51 15 much more had been said by Mr. Gogarty about slush funds or improper
16 behaviour than before. But Mr. Gogarty, who was -- well an unusual and
17 forthright and abrupt, rather abrasive type of a person, he had managed
18 from time to time during his direct evidence to continue to make
19 derogatory remarks and allegations about Mr. Downes, the slush fund, the
11:42:25 20 chancers, the people that were ripping off JMSE.
21
22 Now, that more or less was the state of play at the conclusion of
23 Mr. Gogarty's evidence. I'm not absolutely certain but I think it was at
24 that stage that counsel acting for Mr. Sweeney applied to be discharged
11:42:45 25 from -- have Mr. Sweeney discharged from the Tribunal on the grounds that
26 no admissible evidence had been given regarding any improper behaviour by
27 Mr. Sweeney. And the Chairman rejected that application. And had that
28 application succeeded, rest assured that Mr. Downes would have made a
29 similar application but that wasn't the position.
11:43:17 30

11:43:17 1 So we were left with the situation then that these allegations about a
2 slush fund were still up in the air. Mr. Cooney, on behalf of the JMSE
3 group of companies, then proceeded to cross-examine Mr. Gogarty over a
4 period of days. And while that cross-examination was proceeding on the
11:43:44 5 25th of February it was of 1999, the Tribunal wrote to Mr. Rigney saying
6 "I am directed by the Sole Member to advise you that in the event that you
7 wish to exercise your client's right to examine Mr. Gogarty, you may be
8 required to commence your examination of Mr. Gogarty tomorrow morning or
9 shortly thereafter and you should be ready to do so".

11:44:13 10
11 Now, in fact, the Gogarty cross-examination lasted by Mr. Cooney lasted
12 for several more days. I had hoped that in the natural sequence of
13 events that Mr. Downes would have been allowed cross-examine Mr. Gogarty
14 immediately upon the conclusion of the JMSE evidence. But that wasn't to
11:44:41 15 be. The Tribunal let Mr. Allen cross-examine Mr. Gogarty at that stage.
16 And with the benefit of hindsight, nothing much emerged during the course
17 of the cross-examination by Mr. Allen on behalf of the Baileys in relation
18 to Mr. Gogarty and the source of funds of direct impact that related to
19 Mr. Downes in any way.

11:45:17 20
21 But one has to bear in mind that the fundamental finding of fact of the
22 Tribunal in relation to Mr. Gogarty's evidence was that a corrupt payment
23 had been made by JMSE. And as we know, it was -- that finding of fact
24 means that a group of persons engaged in a corrupt practice went to
11:45:50 25 Mr. Burke, these included the Baileys. So it would be my submission that
26 it was perfectly reasonable, having regard to the letter of the 25th of
27 February, and the crucial role of the Baileys in this entire matter, that
28 we should have been present for the cross-examination of Mr. Gogarty by
29 both of those parties.

11:46:18 30

11:46:18 1 The Tribunal was kind enough to let us cross-examine Mr. Gogarty on both
2 fronts. I think it was on Monday the 12th of April, 1999. And Mr.
3 Downes was well pleased with that cross-examination for a number of
4 reasons. First of all, the Chairman of the Tribunal was kind enough to
11:46:43 5 afford us facilities to put all of the matters relating to Mr. Downes'
6 character to Mr. Gogarty to show that he was not either a dishonest,
7 incompetent or corrupt person. And also to put to Mr. Gogarty that there
8 wasn't a slush fund. And my memory of Mr. Gogarty's comment about the
9 slush fund in his transcript of evidence was that he said "it's not me
11:47:13 10 that said there was a slush fund. It was Frankie that said there was a
11 slush fund" Frankie being Mr. Reynolds, the managing director.
12
13 So in one way he was withdrawing the allegation of even any knowledge of
14 the existence of a slush fund himself. And secondly, it was a difficult
11:47:40 15 and troublesome morning in some ways. But that related to Mr. Gogarty's
16 character. The unfortunate Chairman, I think to be colloquial blew a
17 fuse with Mr. Gogarty's interventions on a number of occasions. I won't
18 go through any of those. I had to implore upon the Chairman to control
19 Mr. Gogarty on a number of occasions and he did his best to do that.
11:48:11 20 Towards the end of my cross-examination of Mr. Gogarty, I tried to get him
21 to resile from the awful allegations that he had made.
22
23 And it's on page 79 of the transcript. I suggested to him that "this
24 company was not being ripped off in any way by Mr. Downes. A person live
11:48:31 25 ago modest life on a modest salary" and the answer was "I'm not saying he
26 was. I'm saying he was doing his bidding. Conroy's bidding and the
27 words of cocksy". And I won't repeat the balance of the sentence. It
28 was just too offensive and it doesn't bear repeating at this stage. And
29 it's quite -- and the Chairman was absolutely horrified at what he had
11:48:55 30 said. The Chairman said "that is an outrageous statement to make. That

11:48:59 1 is an outrageous statement to make about anything." And the answer was
2 "it was Copsy that made that statement. Well it's a more outrageous
3 statement to attribute to somebody else. I'm telling the truth".
4

11:49:16 5 So in the one breath he had withdrawn the allegations and on the other he
6 manages to be grossly offensive about my client at the same stage.
7

8 The Tribunal broke up in a state of a complete uproar on that occasion
9 because we were just coming to the end of a difficult morning with
11:49:41 10 Mr. Gogarty intervening in the most vehement way. But I had finished and
11 the Tribunal got up and left the stage here and came back the following
12 morning and to thank the Tribunal and said that we would be leaving the
13 Tribunal at that stage unless something else arose.
14

11:50:02 15 Now, that brings -- the next thing that happened I think is we were -- we
16 were called again to attend before the Tribunal. And then on the 7th of
17 May something arose in relation to the cross-examination of Mr. Devine.
18 And having been brought back to the Tribunal to give Mr. Downes his
19 evidence. We were advised on the 7th of May that Mr. Downes wouldn't be
11:50:47 20 required to give evidence that day and he wouldn't be required until after
21 he returned.
22

23 We took the opportunity then to cross-examine Mr. Devine in relation to
24 our client's character. He was the person who from a leading firm of
11:51:07 25 chartered accountants who following allegations made by Mr. Gogarty had
26 carried out an investigation into the books and records. And
27 particularly the audited accounts of the firm.
28

29 And Mr. Rigney's attendance at the 10th of May refers to the
11:51:26 30 cross-examination of Mr. Downes on that occasion. Just to read a couple

11:51:30 1 of lines from that attendance. This is in cross-examination by myself
2 confirmed that as far as he was concerned that Mr. Downes was both an
3 honest and a competent accountant. And then a few lines further down
4 "Mr. Leonard then questioned Mr. Devine in relation to the audited
11:51:53 5 accounts of the company which were subsequently investigated by Ernst &
6 Vinny and he confirmed that he told Mr. Murphy that he was satisfied that
7 the accounts of the companies as audited were correct".

8
9 This was being done to vindicate Mr. Downes' representation. Now, a
11:52:10 10 person by the name of Lane, I don't remember his Christian name, sorry,
11 had been the source of a suggestion that information if certain
12 information provided by Mr. Gogarty to him was correct that it would have
13 shown up that there was serious fraud in the accounts of JMSE.

14
11:52:39 15 And we took the opportunity to cross-examination Mr. Lane at one stage.
16 Now, before -- I'm not sure now if it's before or after that. But
17 sometime in month of June 1999 the Tribunal sent us a letter -- yes, it
18 was on the 29th of June. "I am directed by the Sole Member of the
19 Tribunal to furnish to you the enclosed copy documents item 2 copy
11:53:15 20 invoices relating Pro-Eng Consultants Limited."

21
22 Now, this had arisen during the cross-examination of Mr. Gogarty. And
23 there was the underlying hint I think that these invoices in some way
24 could possibly have been the source of a secret slush fund by the issuing
11:53:41 25 of false invoices and payment to a company. And I think surmising from
26 what was going on that the Tribunal was concerned about that and they
27 asked us to comment on them.

28
29 Now, Mr. Downes was friendly with Mr. Liam Conroy's widow. And he
11:54:05 30 contacted her to find out if she could assist in any way in relation to

11:54:09 1 this. And on the 1st of July, 1999, we wrote to the Tribunal and said
2 "Mr. Downes rang Mr. Conroy's widow. She was kind enough to confirm that
3 Mr. Liam Conroy and Mr. J Murphy, senior, had entered into a written
4 agreement setting out the basis upon which Mr. Conway was to and then
11:54:29 5 became director and part-time executive certain companies under Mr. J
6 Murphy's control. The agreement itself provided inter alia that an annual
7 management fee of 30,000 pounds would be paid to Pro-Eng Limited.
8 Mrs. Conroy was kind enough to furnish us with a copy of that document and
9 has authorised us to send a further copy thereof to the Tribunal. Mr.
11:54:54 10 Downes believes that the Pro-Eng invoice related to that agreement".
11
12 Now, the importance of that in the context of a Tribunal which was
13 investigating the existence of a slush fund closed off the possibility
14 that this -- that these invoices were the source of a secret slush fund.
11:55:22 15
16 Mr. Lane, on being cross-examined by me, he stuck by his opinion but
17 qualified it to the extent that his opinion was based purely on the
18 accuracy if they were accurate of certain documents and allegations that
19 Mr. Gogarty had made to him.
11:55:48 20
21 Now, I think if I could refer just very briefly to one thing that happened
22 at page 11 of the statement. The submission which is made before you
23 here today, Sir.
24
11:56:09 25 At the conclusion of the evidence -- sorry, of my cross-examination of
26 Mr. Lane the Chairman seemed to be indicating to me that he was absolutely
27 and utterly satisfied with Mr. Downes. And I quoted a small excerpt from
28 the transcript. "Mr. Chairman, before you move onto the next witness, in
29 light of the comments that you're make not guilty relation to Mr. Downes'
11:56:40 30 honesty and his character and his integrity, I'm beginning to wonder. I

11:56:45 1 was delighted to hear it said I'm beginning to wonder what useful role we
2 could play in relation to the matters which are the subject matter of the
3 Tribunal. And I wonder would you give consideration possibly to Mr.
4 Downes' overall position. And the necessity for calling him as a witness
11:57:01 5 or do you still require Mr. Downes to give evidence as a witness.
6 "Chairman: Mr. Leonard, I in no way are going to pre judge any aspect of
7 this Tribunal. I can't do it. I have to see the information coming
8 out. It's a matter for you to decide whether you are going to stay or
9 go. That's your affair.
11:57:27 10 Well it would be our intention from only the witnesses we feel might
11 adversely effect our clients. You will be given copies of their evidence
12 on all occasions" etc. etc..
13
14 And so Mr. Downes then gave evidence some short -- some few days later.
11:57:50 15 And I don't think I need comment on his evidence at all. It was fully
16 accepted by the Tribunal but we were still left with this cloud hanging
17 over Mr. Downes and the slush fund. And for that reason a decision was
18 taken to come back to the Tribunal much later and see if Mr. Copsey, who
19 had taken over as the managing director of the firm, could assist in
11:58:21 20 relation to our client's integrity. And he also, Mr. Copsey in his
21 evidence gave evidence about the relationship with Mr. Conroy. I think
22 the Pro-Eng invoices and then in relation to Mr. Downes' position. And I
23 cross-examined him very briefly on that.
24
11:58:41 25 And just one short passage from that. It's an attendance of the 16th of
26 December, 1999, from Mr. Rigney's. In further cross-examination
27 Mr. Copsey said that Mr. Downes was an honourable person and the only
28 mistake he made was to back the wrong side.
29
11:59:09 30 That, Sir, is a summary of the way that we approached our work here in the

11:59:18 1 Tribunal and I think Mr. Copsey's brief remarks, as well as those of
2 Mr. Devine, vindicated my client's reputation and the hard work he had put
3 in to defending his character and representation.
4

11:59:37 5 Now, the submission that we made reviews the evidence in some fair detail
6 over 14 pages. And in the last two pages of our submission we make some
7 broad comments which I think I would urge upon you, Sir, to read carefully
8 and take into account in coming to your decision in relation to the
9 application for costs made on behalf of Mr. Downes.

12:00:11 10
11 I don't think I need go through them in detail.
12

13 CHAIRMAN: Yes. Could I just ask you Mr. Leonard, maybe you can't
14 answer this off the top of your head. How many days to you say it was
12:00:23 15 that you attended and obviously you, presumably, would say that you only
16 attended days where it was necessary or where you felt it was appropriate
17 to attend. Approximately.
18

19 MR. LEONARD: It's something in the region of in total 40 days.

12:00:50 20
21 CHAIRMAN: All right.
22

23 MR. LEONARD: And we ran up
24

12:01:01 25 CHAIRMAN: And --
26

27 MR. LEONARD: And if I could --
28

29 CHAIRMAN: Would your solicitor have attended in addition to those 40
12:01:10 30 days.

12:01:10

1

2

MR. LEONARD: I'm not sure about that. Could I put it like this. We were 16 days here when Mr. Gogarty ceased giving direct evidence.

3

4

Cross-examination by Mr. Cooney for JMSE and by Mr. Allen for the Baileys took another 17 days.

12:01:42

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6

7

Now, not all of those days -- various things happened on various occasions

8

during that time. For example, on the 19th of February -- during the

9

course of Mr. Cooney's cross examination Mr. Gogarty didn't attend at the

12:02:12

10

Tribunal and there were other hiccups during that particular period of

11

time. But it was during that period from, shall I say, 16 to day 33 that

12

JMSE and the Baileys were cross-examining Mr. Gogarty in relation to his

13

affidavit.

14

12:02:30

15

CHAIRMAN: All right.

16

17

MR. LEONARD: When Mr. Gogarty was cross-examined by us on the 12th of

18

April that was the 34th day we were here. And after that we were here

19

from time to time on a number of days for specific purposes. But we

12:02:50

20

bailed out effectively at that stage and came back for limited periods

21

thereafter.

22

23

CHAIRMAN: But you think that approximately you were here for about 40

24

days?

12:03:07

25

26

MR. LEONARD: Something in that region.

27

28

MR. O'NEILL: I think it's 43 days. I can give My Friend a list of the

29

dates.

12:03:15

30

12:03:15

1 CHAIRMAN: I'm not looking for precise.

2

3 MR. LEONARD: Well my list goes down to 44 because I marked it in a green
4 pen so I don't dissent from what My Friend says at all.

12:03:28

5

6 But I know that we spent a lot of time here. And I appreciate your
7 concern. But if you look at the nature of the allegations that were
8 made, the primary players in the alleged improper practice were Murphies
9 and the Baileys in relation to the payment of improper funds and the slush
10 fund.

12:03:57

11

12

13 So Gogarty, Mr. Gogarty, I should say, sorry. He was a key player. It
14 was his allegations. We operated within the remit, I would suggest, of
15 the actual retainer which the Tribunal itself gave to us which we've
16 quoted in our submission.

12:04:17

17

18

19 And at page 2 some of Mr. Gogarty's evidence relate to you. "You would
20 be entitled to attend at these sittings and cross-examine him on his
21 evidence ". Now, his evidence relating to the slush fund and the monies
22 were crucial to the heart of the allegations against Mr. Downes.

12:04:41

23

24

25 So it's my assertion that it was desirable to be present here for the
26 cross-examination by Mr. Gogarty -- by Mr. Cooney on behalf of my client's
27 employers. It has to be remembered that my client's employers were the
28 persons who were found guilty of serious wrongdoing by the Tribunal. And
29 to have an independent person here on behalf of Mr. Downes, was absolutely
30 essential to defend Mr. Downes' legitimate interests.

12:05:09

31

32

33 Now, in the letter that you wrote to us. You used the word "necessary".

12:05:30

34

35 But in the context of what's happening, I would respectfully urge upon you

12:05:39 1 to approach it from a slightly different perspective. Was it desirable
2 in Mr. Downes' interest to be present here to defend his own character and
3 reputation or how could we safely dip in and out of Mr. Gogarty's evidence
4 or Mr. Gogarty's cross-examination by his, as was found, corrupt employer.

12:06:06 5
6 That's the approach that I take to it.

7
8 CHAIRMAN: All right. Thank you.

9
12:06:10 10 MR. LEONARD: Thank you very much. I appreciate the time, the hearing
11 that you have given to me. Thank you very much.

12
13 CHAIRMAN: Hopefully I'll be, subject to anything that might be made by
14 way of submissions this afternoon, which might require me to give more
12:06:27 15 time to the -- before give ago Ruling. But my current intention is to be
16 in a position to give a Ruling towards the end of the week. And we'll
17 informed you as to when.

18
19 MR. LEONARD: Thank you very much. I appreciate that.

12:06:57 20
21 **THE TRIBUNAL THEN ADJOURNED.**

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12:07:15

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THE TRIBUNAL RESUMED AS FOLLOWS AT 2:15 P.M.

2

3

REGISTRAR: Is there any appearance by or on behalf of Arthur Cox.

4

14:24:22

5

MS. O'ROURKE: I appear on behalf of Arthur Cox.

6

7

I am formally applying for the costs of Arthur Cox. I think previously,

8

written submissions have been furnished to the Tribunal and I don't

9

propose going through those written submissions, save to say that in

14:24:35

10

circumstances where the Applicant fully cooperated with the Tribunal.

11

It's equitable I respectfully submit that it be awarded its costs. Thank

12

you.

13

14

CHAIRMAN: All right. Thank you very much.

14:24:47

15

16

REGISTRAR: Any appearance by or on behalf of Sean Connolly?

17

Submissions on behalf of the Minister for Finance?

18

19

MR. COLLINS: Good afternoon, Sir.

14:25:02

20

21

Thank you very much again for facilitating the Minister's submissions.

22

I'm sorry that it's only now that the written submissions

23

24

CHAIRMAN: That's all right.

14:25:15

25

26

MR. COLLINS: There was something of a breakdown of communications

27

between a number of parties on our side of the house this morning.

28

29

Sir, I know you haven't had an opportunity to look at those submissions

14:25:23

30

but I know you will have.

14:25:24

1

CHAIRMAN: But I in fact have read them.

2

3

4

MR. COLLINS: Very good, Sir.

14:25:29

5

6

I am not going to -- I think at this stage you've heard submissions from a

7

wide variety of parties. I've obviously the read the transcripts of all

8

of those hearings. I've also seen the various witness submissions that

9

have been made on behalf of the applicants for costs.

14:25:47

10

11

I think it's fairly clear at this stage what the issues are and I think,

12

Sir, it's equally clear to you what the position of the Minister is on

13

those issues and I'm not going to detain you unnecessarily by going over

14

ground which I've covered either in the written submissions or previously

14:26:05

15

in the oral submissions on the 11th of July.

16

17

The -- what I propose to do today is just to touch on those areas which

18

respond particularly to submissions that have been made to you. And

19

obviously, address any queries or questions you may have as best I can.

14:26:26

20

21

The first point that has been made in the written submissions. And I

22

suppose it's highlighted by the very brief oral submission you've just

23

heard, Sir. Is the question what is the first question before you. And

24

that is a question of jurisdiction or power or authority, however one

14:26:47

25

wants to characterise it. It's not a question of whether, at this stage,

26

whether parties have co-operated or not, or whether it is equitable or not

27

to make orders for costs in favour of the applicants with which we are

28

concerned.

29

14:27:02

30

The first question that presents itself is whether in any circumstances

14:27:09 1 the Tribunal has power to make orders for costs in favour of these
2 applicants. And obviously, if the answer to that question is no, then no
3 subsequent question arises. And equally, Sir, the answer that the
4 Tribunal might be inclined to give to the second question cannot affect
14:27:37 5 the Tribunal's determination of the first question. The first question
6 is essentially one of legal principle and legal interpretation of the
7 Tribunal of Inquiries Evidence Acts.
8
9 The Minister repeats his suggestion that perhaps the Tribunal would
14:27:54 10 consider making an application for directions. But I'm not going to
11 press that because I've made that point and it's a matter for the Tribunal
12 to determine ultimately.
13
14 What is important from the Minister's perspective and in the Minister's
14:28:09 15 submission, is that the proper framework of analysis should be applied.
16 The first point that the Minister makes is that the power to make an order
17 for costs is an exclusively statutory power. The Tribunal has power to
18 make orders to the extent, and only to the extent that the Oireachtas has
19 provided in the Tribunal of Inquiries Evidence Acts.
14:28:36 20
21 If I may depart from the written submissions, just for a moment, Sir.
22 Much of the submissions made to you on behalf of the applicants
23 understandably, but I would say ultimately irrelevantly, focuses on the
24 fact that the Minister's argument, if correct, will leave parties who have
14:29:01 25 assisted the Tribunal, co-operated with it, provided information, be it
26 oral information or documentary information, to the Tribunal,
27 out-of-pocket. But it must be remembered that until the 1979 Act was
28 enacted, that was the position in respect of every individual involved in
29 a Tribunal of Inquiry, irrespective of whether they had provided merely
14:29:34 30 documentary information or whether they had been, so to speak, the subject

14:29:39 1 of the inquiry.

2

3 So there isn't any, I respectfully say, no presumption that mere

4 participation in a Tribunal, co-operation with it, leads to an entitlement

14:29:55 5 to have one's costs paid by the Minister for Finance. And of course

6 associated with that, is the fact that as matter of constitutional

7 principle there is no entitlement to costs. One is talking here about an

8 exclusively statutory right. The parameters of which are not fixed and

9 do not fall to be determined by reference to notions of equity or matters

14:30:24 10 of that kind. They are to be determined solely by reference to the

11 process of construing what the Oireachtas has enacted and determining from

12 the provisions of the Acts what is the intention of the Oireachtas.

13

14 Secondly, Sir, associated with that. And an important guide or limiting

14:30:49 15 principle is in that exercise of construction is the principle enunciated

16 by Mr. Justice Gannon in K Security. That if it is suggested, as it is

17 suggested by these applicants, that Section 6 and/or other provisions of

18 the Tribunals of Inquiry Evidence Acts gives this Tribunal the power to

19 make orders for costs in their favour, then they must satisfy the Tribunal

14:31:23 20 that there is to be found in those Acts a clearly expressed authority to

21 make those orders. It cannot be, as Mr. Justice Gannon says in terms, it

22 cannot be a matter merely of implication. One must look to see clear and

23 express, a clear and express grant of power, if as is suggested, the costs

24 of these applicants is to be met from public funds.

14:32:04 25

26 And, Sir, as you understand, the position of the Minister is that in fact

27 insofar as the provisions of the Acts are concerned, it is clear that

28 there is no such power. But at best it is a situation where there are

29 arguments either way but certainly it isn't the case in the Minister's

14:32:29 30 respectful submission that it can properly be said that either Section 6

14:32:34 1 of the 1979 Act is amended or any other provision of the Tribunal's Code,
2 clearly confers on the Tribunal a power to make Orders for costs in favour
3 of parties who have not sought to be and/or have not been granted
4 representation under Section 2 (B) of the 1921 Act.

14:33:00 5
6 Then, Sir, the next segment of the written submissions addresses the
7 arguments about legitimate expectation and estoppel. And all of the
8 authorities that are extracted there, Sir, are authorities that I opened
9 to you when I appeared before you on the last occasion. And I don't
10 think it's necessary and would be a waste of time for me to go through
11 those authorities again. What I do want to say in that respect, just a
12 number of brief observations.

13
14 Different parties have presented what is essentially the same argument; an
15 argument that they have a legitimate expectation to have their costs met
16 out of public funds in different ways. They rely on different
17 circumstances or different nuances of argument. Some rely on the
18 statement made by the former Chairperson, some rely on specific assurances
19 or representations which they say they were given by or on behalf of the
14:33:40 20 Tribunal at various stages. And the Minister doesn't express any view at
21 all any about of those matters, save to say that of course he is, in
22 common with everybody else, aware of what the former Chairperson said in
23 his public statement.

24
14:34:05 25 But it's not necessary, in the Minister's submission, to address any of
26 those nuances of detail or to enter into a balancing or weighing exercise
27 in respect of those individual submissions. Because the Minister
28 submits, the position is clear. If it be the case, and this part of the
29 submission proceeds on the hypothesis that the Acts do not give the
14:34:22 30 Tribunal the power to make orders for costs in favour of these applicants.

14:34:54 1 Then it follows, as a matter of law, that nothing in the dealings between
2 those applicants and the Tribunal can operate to confer on the Tribunal
3 the power that is absent from the Acts.
4

14:35:12 5 And I suppose the most salient passage is the passage from Wiley, because
6 that did, though presenting in a different way, it did concern a question
7 of public funds and public revenue.
8

14:35:37 9 The passage is set out at page 5 of the submissions. The passage of
10 Chief Justice Finlay. The underlying portion reads "I am quite satisfied
11 that quite independently of the more generally applicable principle of
12 legitimate expectation and the limit it may impose on that doctrine, that
13 this Applicant can could not pursue on the basis of expectation a remedy
14 which would involve the carrying out by the statutory authority, the
15 Revenue Commissioners, of activities which they are not empowered to carry
16 out payment or repayment of monies which they are not empowered to pay or
17 repay".
18

14:36:13 19 Precisely in this case, Sir, the legitimate expectation argument that is
20 made to you cannot empower the Tribunal to direct the payment of monies by
21 the Minister for Finance which the Tribunal is not otherwise empowered to
22 direct to be paid.
23

14:36:37 24 And again Mr. Finlay, Mr. Ian Finlay in his submissions to you, Sir,
25 sought to argue that his client had a legitimate expectation arising from
26 the fact that his client didn't consider it necessary to make an
27 application for representation on the basis of what he understood to be
28 arising from the Chairman's statement, the position that it wasn't
29 necessary to do so in order to be entitled to costs. But again, Sir,
14:37:04 30 that is no more than a differently presented legitimate expectation

14:37:10 1 argument, which fails fundamentally for the same reason as all of the
2 other arguments do because it cannot operate to give this Tribunal the
3 power to do what the Tribunal cannot otherwise do.
4

14:37:25 5 Then, Sir, the next issue addressed is the question of whether Section 6
6 of the 1979 Act gives the Tribunal power to make orders for costs in
7 favour of the applicants.
8

9 And I don't want to rehearse the arguments I've made already to you, Sir.

14:37:41 10 But it's the Minister's submission that I suppose one of the fundamental
11 ground rules of Tribunals of Inquiry established under the Acts is that
12 one cannot, a person cannot appear before the Tribunal by solicitor or
13 counsel except where, and to the extent that, the Tribunal has made an
14 order authorising the representation of that person pursuant to Section 2
15 (B). That is, as I say, a fundamental ground rule of Tribunals of
16 Inquiry established under this Code.
17

18 It can authorise representation, only where, and in respect of, persons
19 who appear to be interested in the Tribunal or it may refuse to allow such
20 representation.
21

22 But that is, in my respectful submission, a sine qua non representation
23 before the Tribunal. And what does representation before the Tribunal
24 mean? It means, and in fact it's dealt with in express terms by Section 2
14:38:58 25 (B) of the 1921 Act. It is representation by solicitor or counsel. By
26 counsel or solicitor, is in fact the order in which the words appear in
27 Section 2 (B). It follows, circumstances unless 2 (B) is to be rendered
28 nugatory, which of course it would not be an appropriate approach or an
29 appropriate effect that one can appear before a Tribunal by solicitor or
14:39:28 30 counsel, or by counsel or solicitor, only where that is authorised under

14:39:34 1 Section 2 (B). Otherwise Section 2 (B) are words writ on water.
2 Because if it be the case that anybody at all can choose to appear before
3 the Tribunal by solicitor or counsel, without looking for an authority
4 under Section 2 (B) or even in the face of a refusal of that
14:39:56 5 authorisation, then Section 2 (B) is effectively nullified.
6
7 If it be the case that Section 2 (B) permits a person to appear by counsel
8 or solicitor, only pursuant to an authorisation pursuant to Section 2 (B).
9 Then it must follow as a matter of logic and as a matter of appropriate
14:40:23 10 statutory construction all of the Acts fall in to be construed together.
11 That where Section 6 refers to the costs of any person appearing before
12 the Tribunal by counsel or solicitor. Precisely the same language. It
13 must mean only those persons who have sought and obtained an authority for
14 representation pursuant to Section 2 (B).
14:40:50 15
16 And that is, I think, with respect, in the first level an answer dictated
17 by the language of the Acts and by the structure of the Acts.
18
19 Now, Sir, it was suggested to you by Mr. Beatty on behalf of Vincent and
14:41:05 20 Beatty solicitors and an order of nuns that they had been representing.
21 That in suggesting that Section 6 of the 1979 Act was to be construed
22 inter alia by reference to Section 2 (B) of the 1921 Act that the Minister
23 was doing something inconsistent with the Minister's submission. That
24 the sole power to make an order for costs was the power granted by Section
14:41:32 25 6. And it was suggested, Sir, in the oral submissions, at least, that
26 the Minister can't have it both ways, as it was put.
27
28 But, Sir, there is a world of a difference between the Minister's
29 submission, which he maintains, that the only Section of the Tribunal Code
14:41:56 30 that gives the Tribunal power to make orders for costs is Section 6. And

14:41:59 1 the suggestion that Section 6 is to be some how construed in isolation
2 from all of the other provisions of the Acts. The first proposition or
3 submission is one which the Minister maintains. The second proposition
4 is one which would clearly be wrong and which the Minister does not
14:42:14 5 suggest or maintain. It's a matter of fundamental statutory construction
6 that one looks at a provision to be construed in the context in which it
7 finds itself and in the statute or statutes with which it must be read.

8
9 Secondly, Sir. Reinforcing that argument, as to the need for there to be
14:42:39 10 a grant of representation or an authorisation of representation is the
11 fundamental principle that there must be certainty as to who is appearing
12 before the Tribunal and to what extent they may appear. And that is of
13 course comes back to what I have described as one of the fundamental
14 ground rules of the Tribunal, the grant of representation. That is why
14:43:06 15 of course that historically Tribunals generally take applications for
16 representation at the first available opportunity. Though obviously in
17 no sense does it shut out parties from making applications subsequently.
18 It is for the very reason that it is desirable, indeed if not essential
19 that parties who wish to be represented will be told that they are or are
14:43:29 20 not allowed to be represented. And that the Tribunal will know who are
21 the parties before it, who are represented.

22
23 And of course there is nothing, and this is to perhaps address a different
24 argument that is made but there is nothing to prevent the Tribunal from
14:43:48 25 taking an application for representation at any time, even in the course
26 of a private hearing. And if the Tribunal were to be of the view that it
27 wouldn't be appropriate to deal with an application for representation at
28 a private hearing, it could adjourn a private hearing to allow a public
29 hearing to be held for that purpose.

14:44:11 30

14:44:11 1 So there isn't any practical difficulty in terms of saying an application
2 for representation must be made and allowed before any entitlement to look
3 for costs can arise under Section 6.

14:44:27 5 Sir, consistent with that submission, the Minister takes issue with the
6 suggestion that any other form of engagement with the Tribunal, be it by
7 way of meetings, be it by way of attending to give evidence in private
8 session, or making discovery or corresponding with the Tribunal in
9 relation to discovery or other matters, can constitute appearing before
14:44:56 10 the Tribunal by counsel or solicitor within the meaning of Section 6.

11
12 Apart from other considerations and apart from the difficulty in principle
13 that that presents, it's clear, Sir -- well what is clear is that a test
14 other than representation simply carries with it the inevitability of
14:45:23 15 constant contention as to where and at what point the line is to be drawn.
16 And without meaning to be facetious in any way. Is it sufficient to
17 write one letter by solicitor to the Tribunal is a more prolonged
18 engagement necessary? The answer I think is simply unclear and indicates
19 that certainly from a practical point of view, the answer suggested bit
14:45:58 20 Minister that appearing before the Tribunal means appearing before the
21 Tribunal pursuant to and in accordance with a grant of representation is
22 the appropriate answer.

23
24 Then, Sir, the argument is made by reference to K Security in paragraph
14:46:17 25 21. I need not repeat that I think. But there is an argument addressed
26 in paragraph 22, which I should touch on.

27
28 Mr. Gardiner appearing on behalf of the EBS sought to make an argument
29 which turned on an assertion or was founded on an assertion that the only
14:46:37 30 power given to the Tribunal under the 1921 Act was a power to compel the

14:46:43 1 attendance of persons for the purpose of giving evidence. And that it
2 was only on the enactment of the 1979 Act that the Tribunal was given the
3 power to compel the production of documents.
4

14:46:54 5 Sir, that simply isn't correct. Section 1.1 (B) of the 1921 Act gave to
6 the Tribunal and the Tribunal continues to have, the same power to compel
7 the production of documents as the High Court. And in fact, there is no
8 other section of any subsequent Act that deals expressly or specifically
9 with the production of documents to the Tribunal.

14:47:38 10
11 Then in 22 there is also addressed an argument which I think has been made
12 by a number of applicants. Which is to the effect that if representation
13 is a sine qua non for an entitlement to look for one's costs. Then
14 inevitably the practical result of that will be that parties, persons who
15 to date have not looked for representation would be forced to look for
16 representation in future, either in respect of this Tribunal are or in
17 respect of other Tribunals.

14:47:53 18
19 Sir, firstly, I suppose if that be so, then so be it. And that's not
14:48:11 20 intended to be a flippant observation. But it's to be presumed, Sir, and
21 of course the Minister has every confidence that the presumption is well
22 based. That in respect of this Tribunal and in other Tribunals
23 applications for representation when made will be dealt with properly.
24 And that only applications for representation that are appropriate will
14:48:34 25 result in representation being granted.

26
27 The minister doesn't believe, and contends to the contrary, that merely
28 being asked to produce evidence to the Tribunal, be it in the form of oral
29 evidence or documentary material, in circumstances where no allegation of
14:48:56 30 any description is made against one or where one has no involvement

14:49:01 1 whatever in the substance of the matters into which the Tribunal is
2 enquiring would make it appropriate for grant of representation to be made
3 in favour of a person.

14:49:14 5 And particularly are or specifically the Minister submits that it would
6 not be appropriate that a person against whom an order for discovery is
7 made by the Tribunal should be granted representation merely by virtue of
8 that order being made.

14:49:29 10 But, Sir, that isn't an issue which arises at the moment. And it is an
11 issue which in any event cannot effect the interpretation of the
12 provisions of the Act. It is I suppose an interorum type of argument,
13 which as I say is misplaced in the Minister's view. But which even if it
14 is true, cannot affect the legal issue.

14:49:53 15
16 If it be the case that applications for representation are made on behalf
17 of mere witnesses, if I can use that expression, or mere persons making
18 discovery, then those applications will be determined and determined
19 appropriately. And if they result in grants of representation, then so
14:50:14 20 be it.

21
22 The final point that's made in this section of the submissions is just
23 passing reference to the fact that to the interpretation, this
24 interpretation of the Minister urges on this Tribunal appears to have been
14:50:29 25 accepted by the Morris Tribunal. I think I handed in the on the last
26 occasion the Ruling of the Tribunal.

27
28 Then, Sir, the next question that's addressed is whether Section 4 of the
29 Act gives the Tribunal powers to make orders for costs in favour of the
14:50:43 30 applicants.

14:50:44 1
2 And that's addressed briefly, Sir, because in the Minister's submission it
3 is determined by the decision of Miss Justice Laffoy in Goodman versus the
4 Minister for Finance.

14:50:56 5
6 And then the next issue is in truth presented at least by some applicants
7 as bound up by Section 4. The purported analogy Order 31 Rule 29 of the
8 Rules of the Superior Courts.
9

14:51:13 10 The Minister respectfully says there is no cogent argument to be made to
11 the affect that the provisions of Order 31 Rule 29 are in some manner
12 applicable to the Tribunal so that the Tribunal has powers to make orders
13 for costs in favour of the applicants with which we are concerned.
14

14:51:31 15 Order 31 Rule 29 is a rule of court applicable to litigation inter-parties
16 between private parties. It provides that where party A seeks discovery
17 from a non-party it must bear the burden of the costs of that order in the
18 first instance subject to his right to recoup that cost from party B in
19 the event that he is successful in the proceedings.

14:51:51 20
21 There is no analogy with the proceedings before you, Sir. There is no
22 list inter-parties before you. You are not asked to determine any
23 dispute between parties. You are engaged in the a process of
24 investigation and reporting.

14:52:06 25
26 Secondly, Sir. And as pointed out in paragraph 27 of the submissions,
27 the powers of the Tribunal are defined by the provisions of the Tribunal
28 of Inquiry Evidence Acts. And if, as the Minister contends, those Acts
29 and the provisions of those Acts do not give a power to make orders in
30 favour of these applicants. Then Order 31 Rule 21 cannot be prayed and

14:52:29

14:52:39 1 aided to fill the gap, to so to speak.

2

3 Circumstances even looking again at Order 31 Rule 29. Order 31 Rule 29

4 does not permit a court to fix a non-party with any costs. It doesn't

14:52:54 5 compel the -- or permit the court to fix a party in the proceedings with

6 some of the costs of the court. And that seems to be the argument that

7 is made; that somehow the costs of making discovery can be assimilated

8 into the costs of the Tribunal. That seems to have been the approach

9 adopted by Mr. Justice McCracken in the McCracken Tribunal. But it

14:53:23 10 simply doesn't with stand analysis in the Minister's submission. The

11 court has no power to make an order the effect of which is to compel one

12 of the parties to underwrite part of the costs of the court itself. The

13 court only has power to deal with the costs of parties before it and to

14 direct one party to pay the costs of another.

14:53:44 15

16 But in any event, Sir, fundamentally the point is that the rules relate to

17 proceedings before a court. The proceedings before the Tribunal are

18 governed by, and only by, the provisions of the Tribunal, Tribunal of

19 Inquiries Evidence Acts.

14:54:00 20

21 Then, Sir, there is another argument that has been made. Is that there

22 is an inconsistency, this is a matter indeed that the Tribunal has raised

23 in correspondence with the Chief State Solicitor's office. There is an

24 inconsistency between the position that has been adopted by the Minister

14:54:15 25 in relation to these applicants and some of the statements made in the

26 earlier submissions made by the Minister in May of 2003 and June 2004.

27

28 Those earlier submissions, Sir, addressed the position of parties or

29 persons who have been granted representation. And to the extent that

14:54:35 30 they addressed anything other than that. Certainly the principle focus

14:54:38 1 of those submissions was the position of persons granted representation.
2 But in any event, Sir, for the avoidance of any doubt. The position of
3 the Minister in relation it persons who had not been granted legal
4 representation before the Tribunal, who have not had an order made in
14:54:58 5 their favour under Section 2 (B) of the 1921 Act, is as set out in the
6 oral submissions, written submissions 31st of May, oral submissions 11th
7 of July. These written submissions and these submission that is I am
8 making on the Minister's behalf today.

14:55:13 10 Obviously, Sir, if the Minister is -- if you believe the Minister to be
11 incorrect in the submissions that he makes to the effect that the Tribunal
12 has no power or jurisdiction to make orders for costs in favour of these
13 applicants, then on that analysis, and on that conclusion, the Tribunal is
14 faced with exercising that power if it comes to that. If it comes to
14:55:42 15 that the Minister as an alternative and without prejudice to his principal
16 contention would maintain that the principles set out in those earlier
17 submissions of May 2003 and June 2004 ought to guide the Tribunal in the
18 exercise of that power. But the Minister's first and principal
19 contention that in fact there is no such power. And therefore, the
14:56:05 20 question of discretion or judgement doesn't arise.

21
22 They are the only points I wish to make, Sir. Unless there is anything I
23 can assist you with.

14:56:20 25 CHAIRMAN: All right, Mr. Collins.

26
27 There is a footnote No. 8 on page 12. Which seems to be incomplete.

28
29 MR. COLLINS: Yes I'm very very sorry Sir. The only thing missing there
14:56:36 30 is those earlier submissions of May 2003 and June 2004.

14:56:42

1

2

CHAIRMAN: All right.

3

4

14:56:50

5

One of the matters which struck me rather forcefully was when I was looking at the 1921 Act and the 1979 Act. The 1979 Act introduced an entitlement to costs in certain circumstances for the first time.

6

7

8

14:57:20

10

Certainly in my experience where there is amending legislation introduced to add to or to extend provisions in an earlier statute, there is a tendency, understandably, on the part of the legislature to follow closely the wording in the earlier provision, the one that the legislature intends to extend or amend or add to in some way. In 1921 or at least in 1979 when the costs provision was introduced it did not follow the wording which was in Section 2 (B) of the 1921 Act. In that it didn't use the word "representation". And it's just one of -- appeared to for the first time they used the words "appearing before the Tribunal". In the earlier legislation they had made specific reference to "representation". It's just a comment more than anything.

11

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14:57:59

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14:58:18

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22

MR. COLLINS: I understand what you're saying, Sir. I think certainly the word "representation" isn't use in the Section 6. I suppose it would be --

23

24

14:58:29

25

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14:58:48

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CHAIRMAN: Were they thinking of something else.

MR. COLLINS: I don't think so, Sir. I think it isn't entirely correct to say albeit that it is certainly correct to say that the word "representation" isn't used. It's not entirely correct to say that the language of Section 6 doesn't reflect the language of Section 2 (B). Because what the critical -- I would say, what is the critical wording is

14:58:51 1 "appearing by counsel or solicitor". That's the wording of Section 6.
2 It's the costs of any person appearing before the Tribunal by counsel or
3 solicitor ". And by counsel or solicitor is a phrase that's used in
4 Section 2 (B) but more importantly, what Section 2 (B) provides
14:59:12 5 effectively is that one cannot appear before a Tribunal by counsel or a
6 solicitor except pursuant to Section 2 (B), except if he has an
7 authorisation.
8
9 Now, there is no particular formality about Section 2 (B) it doesn't
10 require any particular form of authorisation it simply gives the Tribunal
11 power to authorise the representation before them of persons by counsel or
12 solicitor. It follows from that, in the Minister's submission, that if
13 somebody has appeared before the Tribunal by counsel or solicitor, it can
14 only have been pursuant to an order of representation made pursuant to
14:59:26 15 Section 2 (B). And it therefore follows that a person to be entitled to
16 one's costs you have to be a person appearing before the Tribunal by
17 counsel or solicitor and that in turn means you are a person who has been
18 granted representation pursuant to Section 2 (B). I appreciate that
19 interest there is not an exact fit, Sir, linguistically. Logically and
15:00:13 20 conceptually there is an exact fit.
21
22 CHAIRMAN: The term "representation" has always been or certainly over
23 the decades has attracted a meaning when used in Tribunals as an
24 entitlement to be actively involved in the public hearings of a Tribunal.
15:00:37 25 That's its meaning. I think that's the meaning which is attached to it,
26 not just in this Tribunal but in other Tribunals.
27
28 So that the question of representation or being granted representation
29 wouldn't arise and wouldn't normally be expected to arise until there
15:00:55 30 would be a public hearing or certainly unless a public hearing was very

15:01:00 1 much in sight.
2
3 We have, in this particular Tribunal, a common occurrence where
4 individuals are required to -- well they are requested, they can't be
15:01:12 5 compelled. But following a request they attend before the Tribunal for
6 the purposes of being interviewed. Those interviews are often extensive
7 and sometimes last or continue for a number of days. And that would be
8 in circumstances where a private inquiry was under way. And where there
9 might never be a public inquiry relating that issue, it's just one of the
15:01:39 10 huge practical problems that arises given the interpretation that the
11 Minister places on the term "appearing before". Because in that case
12 there is a very definite appearance by an individual, usually with a
13 solicitor and often with counsel as well. In circumstances because of
14 the involvement of solicitor or barrister things are, at least the
15:02:02 15 business to be conducted is very much eased, not just for the party
16 concerned but also for the Tribunal.
17
18 That's an appearance.
19
15:02:10 20 MR. COLLINS: well, Sir, I would answer that in two ways, if I may.
21
22 Firstly, I understand what you've said about representation. I suppose
23 more fundamentally, I would submit that Section 2 (B) of the 1921 Act
24 contemplates that only persons with a, I suppose, a certain minimum
15:02:38 25 involvement or participation in the substantive inquiry of the Tribunal
26 will be allowed to be represented. And there are very many parties or
27 persons I'm aware of, you are more aware of than I, who have sought and
28 obtained representation before this Tribunal on the basis that they are,
29 to a greater or lesser extent, enmeshed into the events into which the
15:03:08 30 Tribunal is enquiring. They have rights of representation in the sense

15:03:13 1 that they may cross-examine witnesses, they may tender evidence themselves
2 or suggest to the Tribunal that evidence be led by them or on their
3 behalf. They may have access to documents. They may make submissions
4 to the Tribunal.

15:03:29 5
6 Why is that? It's because all of those persons are persons who may be
7 affected adversely or otherwise, but presumably adversely, by the findings
8 of the Tribunal in due course. That is, generally speaking, what the
9 core right of representation involves. And I suppose you could say that

15:03:49 10 it has a constitutional overlay now by virtue of the decision of the
11 Supreme Court in re Haughey. But the core of in re Haughey and I suppose
12 it reflects the section behind 2.1 (B) Mr. Haughey was not in that case a
13 mere witness. He was somebody against whom allegations of a dramatic and
14 grave kind were being made. He was, as the Supreme Court found, somewhat
15 in the position of an accused. And to a greater or lesser extent I

15:04:17 16 suppose, what is common amongst that persons who have sought and obtained
17 representation before this Tribunal is that they are or are potentially in
18 the position of being an accused to a certain extent. Using that
19 language use loosely because it is not in anything other than an
20 investigating and reporting process.

15:04:43 21
22 So there is nothing surprising, Sir, it seems to me about suggesting that
23 the legislature intended only that persons engaged in the Tribunal in that
24 way should be entitled to get their costs.

15:05:02 25
26 The second point is that while hesitating to suggest any expertise in the
27 procedures of the Tribunal it doesn't seem to me, Sir, that there is any
28 particular impediment to somebody called to give private evidence to the
29 Tribunal seeking prior to that being done representation before the
30 Tribunal. It's not to say that the Tribunal would consider it

15:05:34 1 appropriate to grant representation because as I've said, Sir, the
2 Minister's position would that people simply coming to the Tribunal to
3 give evidence to the Tribunal, be it in public or private session, or to
4 give documentary material to the Tribunal, again publicly or privately,
15:05:51 5 would not by virtue of that alone be entitled to be represented by
6 solicitor or counsel.

7
8 But if a different view was taken of that, or if there are different
9 circumstances, there is nothing to prevent an order for representation
10 being made by the Tribunal.

11
12 CHAIRMAN: But in practice while orders for representation are not
13 formally made in those circumstances or indeed when the Tribunal is
14 dealing with parties, through solicitors, other than parties attending or
15:06:06 15 in circumstances where they might attend physically in the offices of the
16 Tribunal, the practice is that the Tribunal in most cases permits, in the
17 sense that it doesn't raise any objection to the individual having the
18 representation of the solicitor or a counsel. And to that extent, the
19 Tribunal consents to that party appearing as represented by solicitor or
15:06:22 20 counsel while in those circumstances it doesn't specifically direct or it
21 doesn't specifically make a grant of representation. The de facto
22 position is that such parties are represented. And with the consent of
23 the Tribunal.

24
15:07:00 25 MR. COLLINS: Well, Sir --

26
27 CHAIRMAN: It's just one of the other potential difficulties that arises
28 from the Minister's interpretation of the particular provision in Section
29 6.

15:07:31 30

15:07:31 1 MR. COLLINS: Well, Sir, I suppose the Minister, just as everybody else
2 is left with the provision is as it is. It may be as matter of anecdotal
3 explanation in 1979 the Oireachtas didn't have at the forefront of its
4 mind the possibility that there would be extensive private sessions and
15:07:50 5 private inquiries. But fundamentally, the position is that, as far as
6 the Minister is concerned, that one must look to Section 6 for the reasons
7 I've indicated the Minister believes that it requires a grant of
8 representation or an authorisation of representation before an order for
9 costs can be made. If that has anomalous consequences or if it gives
15:08:13 10 rise to practical difficulties, then clearly the matter can be looked at
11 again. But it doesn't effect the interpretation of Section 6 in the
12 Minister's submissions, Sir.
13
14 CHAIRMAN: All right. Thank you very much for your assistance,
15:08:29 15 Mr. Collins.
16
17 MR. COLLINS: Thank you, Sir.
18
19 CHAIRMAN: And I have been saying this on a few occasions over the last
15:08:37 20 couple of weeks. It is still my intention that I would give a Ruling
21 towards the end of the week. I think I will make a decision and your
22 office will be or your solicitor's office will be contacted if I decide to
23 go ahead and do that Ruling before the end of the week. If not it will
24 have to wait until next term.
15:08:58 25
26 So anyway a decision will be made tomorrow and your solicitor will be
27 contacted.
28
29 MR. COLLINS: Thank you very much, Sir.
15:09:04 30

15:09:04 1 CHAIRMAN: Thank you.
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3 REGISTRAR: Is there any appearance by or on behalf of Sean Connolly?
4

15:09:26 5 CHAIRMAN: Mr. Connolly?
6
7 CHAIRMAN: Do you want to come up to one of the seats there and turn on
8 the microphone.
9

15:09:36 10 MR. CONNOLLY: Yes, Sir.
11
12 CHAIRMAN: You are making an application?
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14 MR. CONNOLLY: Yes, Sir.

15:09:44 15
16 CHAIRMAN: For your costs; is that right?
17
18 MR. CONNOLLY: Yes, that's exactly it. My legal costs.
19

15:09:51 20 CHAIRMAN: And I think have details been submitted to the Tribunal? I
21 haven't Mr. Connolly's papers with me.
22
23 MR. O'NEILL: I'm afraid I can't tell you the extent to which it's
24 detailed. Some detail has been provided. It's a matter which has been
15:10:15 25 adjourned from time to time until now.
26
27 Mr. Connolly is again one of those parties who falls within the category
28 of persons who did not have any formal grant of legal representation,
29 although he was a witness before the Tribunal in relation to IRTC matters.
15:10:34 30

15:10:34

1 CHAIRMAN: That's right. All right. I will look at the details that
2 you have submitted. And if I require -- I will take you as having made
3 your application for costs. If I think some further information is
4 required I might delay dealing with your application on this occasion.

15:10:52

5 But in any event, we will be in contact with you through the Tribunal.
6 Thanks.

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8 MR. CONNOLLY: Thank you, Sir.

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15:10:58

10 **THE TRIBUNAL THEN ADJOURNED.**

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