

10:55:42

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THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY,

2

28TH JULY, 2005, AT 11:00 A.M.:

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CHAIRMAN: Good morning.

11:02:32

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I believe it is important to emphasise that in regard to all of the

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applications with which I am now concerned, that the applicants

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co-operated fully with the work of the Tribunal. In the great majority

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of cases the co-operation and assistance provided was of very great

11:02:47

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significance and in some cases was essential in order to allow the

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Tribunal to complete its mandate from the Oireachtas. The various parties

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concerned are to be commended for their compliance with their obligation

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to provide information and documentation to the Tribunal in circumstances

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where to do so was often inconvenient, time-consuming and costly, both as

11:03:07

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regards their own involvement and the involvement of their professional

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advisors.

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There is no doubt that these parties did incur costs and expenses in

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complying with the Tribunal's requests and orders, whether as witnesses

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before the Tribunal or as providers of documents and material to the

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Tribunal. The range of costs claimed by these parties extends at the

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lower end from hundreds of Euro to hundreds of thousands of Euro at the

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higher end. The profile of individuals and corporations who sought to

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recover their costs is equally diverse, ranging from private individuals

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with limited resources to wealthy individuals and large corporations.

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The Tribunals of Inquiry (Evidence) Act 1921 which establishes the

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legislative framework which allows for Tribunals of inquiry to be set up

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were silent on subject of costs or expenses. This Act did not empower a

11:04:05

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tribunal to award any costs to parties who appeared before it, the Act did

11:04:05 1 however, provide for the grant of representation to interested parties.
2 Section 2 (B) provided that and I quote:
3 "A Tribunal shall have the power to authorise the representation before
4 them of any person appearing to them to be interested to be by counsel or
11:04:22 5 solicitor or otherwise or to refuse to allow such representation".
6
7 This position in relation to representation and in relation to costs
8 remained unaltered until 1979 when the Tribunals of Inquiry (Evidence)
9 (Amendment) Act 1979 was passed which made express provision for the award
11:04:40 10 of costs by a Tribunal of Inquiry as follows.
11
12 Section 6 (1) and I quote:
13 "Where a Tribunal of the opinion that having regard to the findings of the
14 Tribunal and all other relevant matters there are sufficient reasons
11:04:54 15 rendering it equitable to do so. The Tribunal may by order direct that
16 the whole or part of the costs of any person appearing before the Tribunal
17 by counsel or solicitor as taxed by a Taxing Master of the High Court
18 shall be paid to the person by any other person named in the order."
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11:05:12 20 This legislative provision remained unaltered until a Tribunal of Inquiry
21 (Evidence) (Amendment) Act 1997 which followed immediately upon the report
22 of the Tribunal of Inquiry into the Dunnes payments, the McCracken
23 Tribunal. Section 3 of that Act substituted a new Section 6 in the 1979
24 Act as follows and I quote:
11:05:32 25 "Where a Tribunal or if a Tribunal consists of more than one member, the
26 chairperson of the Tribunal is of the opinion that having regard to the
27 findings of the Tribunal and all other relevant matters, including the
28 terms of the resolution passed by each House of the Oireachtas relating to
29 the establishment of the Tribunal or failing to cooperate with or provide
11:05:52 30 assistance to or knowingly give false or misleading information to the

11:05:56 1 Tribunal, there are sufficient reasons rendering it equitable to do. The
2 Tribunal or the Chairperson, as the case may be, may either of the
3 Tribunal's or the Chairperson's own motion as the case may be, or on
4 application by any person appearing before the Tribunal order that the
11:06:12 5 whole or that the part of the costs:
6 A, of any person appearing before the Tribunal by counsel or solicitor is
7 taxed by a Taxing Master of the High Court, should be paid to the person
8 or any other person named in the order.
9 Or B, incurred by the Tribunal as named as aforesaid shall be paid to the
11:06:33 10 Minister for Finance by any other person named in the order ".
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12 This Section represents the current legislative provision which allows me
13 to consider applications for costs.
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11:06:41 15 While the 1997 Act extends the powers given to the Chairperson or Tribunal
16 in relation to costs it does not alter the eligibility provision for
17 applicants applying for their costs. Both the original Section 6 and its
18 amended version provide that costs may only be awarded to any person
19 appearing before the Tribunal by counsel or solicitor. In detailed
11:07:02 20 submissions furnished in writing on behalf of the Minister for Finance and
21 articulated by counsel on his behalf at public hearings of the Tribunal on
22 Monday the 11th and Monday 25th of July, 2005, it has been argued that in
23 effect the words any person appearing before the Tribunal by counsel or
24 solicitor should only be read and interpreted as being synonymous with and
11:07:27 25 meaning any person appearing before the Tribunal by counsel or solicitor
26 to whom a grant of representation has been made by the Tribunal.
27
28 It has been argued on behalf of many of the applicants, all of whom were
29 in receipt of the Minister's written submissions, that the term "any
11:07:43 30 person appearing before the Tribunal by counsel or solicitor" should not

11:07:48 1 be construed or interpreted in the form suggested by the Minister and that
2 the range of persons eligible to apply for their costs was not limited
3 solely to those parties to whom a grant of representation had been made by
4 the Tribunal.

11:08:02 5
6 The grant of full or limited representation by a Tribunal of Inquiry has
7 been attributed a particular distinctive meaning and effect. Where such
8 a grant is made by a Tribunal it has the effect of permitting the party to
9 whom the grant has been made the right to participate in a public hearing
11:08:15 10 of the Tribunal, including cross-examination of witnesses by a solicitor
11 or barrister engaged by that party to the extent allowed by the grant of
12 representation.

13
14 Traditionally a grant of representation to a party was only made by a
11:08:31 15 tribunal where the Tribunal was satisfied that that particular party had a
16 specific interest in the subject matter of the public hearing and that the
17 parties should have in justice the facility or right to defend his
18 interests and his good name in the course of the inquiry. In this most
19 usual form a grants of representation was made to parties against whom
11:08:52 20 there was a possibility of an adverse finding being made by the Tribunal
21 or where the good name, representation or other interests of that party
22 was otherwise potentially threatened.

23
24 It has always been the practice of Tribunals that the granted
11:09:03 25 representation for party should only be made after careful consideration
26 of their individual entitlement to participate in the public hearings of
27 the Tribunal.

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29 This is done inter alia to ensure that the work of the Tribunal is not
11:09:16 30 hampered by a multiplicity of unnecessary representation.

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Before interpreting the statutory provisions I believe that it is

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appropriate that I should make reference to the circumstances in which

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parties and their legal advisors came to be involved in the workings of

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the Tribunal. This usually arises as a result of direct communication

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between the Tribunal through the Tribunal's solicitor and the individual

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or institution from whom information or assistance is sought. Any party

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required by the Tribunal to engage with it, for whatever reason, is

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entitled to seek and to take advice from lawyer and to seek to be

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represented by that lawyer in its dealings with the Tribunal. It could

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only be in the rarest of circumstances that a Tribunal could properly

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decline to deal with a solicitor engaged to act for a person. In

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practice, many parties who are required to have contact with the Tribunal

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do so through a solicitor. In many instances, this involvement is

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justified, advisable and beneficial not only to the party in question but

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also to the Tribunal in that it frequently results in a more efficient and

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structured exchange of information to the Tribunal from that party.

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A brief analysis of the various forms in which the interaction or

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engagement between the Tribunal and its legal team and the individuals and

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their legal representatives indicates a variety of circumstances in which

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it might be contended that there is in effect an appearance before the

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Tribunal by counsel or solicitor.

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11:10:39

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1. The interviewing of potential witnesses and other parties who are in

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possession of information at the Tribunal's offices in private session is

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a frequent and often vitally important aspect of the Tribunal's work. In

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many instances the party attending is represented by a solicitor and in

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some instances by a solicitor and counsel. These legal representatives

11:11:02

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are present throughout and the interview. And where it is appropriate to

11:11:06

1 do so participate in advising their clients as to the legal obligations.
2 In such cases the Tribunal does not have a practice of granting legal
3 representation in advance of such private meetings, although they are
4 prearranged in the knowledge that the party's legal advisors will be

11:11:21

5 present. In these circumstances it is arguable that there has been an
6 appearance before the Tribunal by solicitor or counsel, notwithstanding
7 that there is no formal grant of representation.

8

9 2. In the making of and the compliance with orders for discovery and/or
10 production of documents there is often prolonged interchange between the
11 Tribunal lawyers and the parties subject to such order in advance of the
12 making of such Order and subsequently compliance with such orders is often
13 complex, technical and time-consuming. It is understandable that many
14 parties seek legal advice and the involvement of their solicitors in

11:11:59

15 representing them in their discovery of production obligations with the
16 Tribunal. Where this happens, communication takes place directly between
17 the Tribunal's solicitor and the party's solicitors, notwithstanding that
18 no formal grant of representation is sought by the party or considered by
19 the Tribunal at that time.

11:12:15

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21 The effect of the involvement of the solicitor in these circumstances is
22 that the solicitor has come on record for his client and is thereafter
23 treated by the Tribunal as being in the position equivalent to that of a
24 solicitor for a party in ordinary civil litigation.

11:12:29

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26 The Tribunal does not have a formal procedure in place whereby the
27 solicitor acting for a party is required to complete a written entry of
28 appearance or other formal record of the fact that that solicitor is
29 representing the interests of the party. The Tribunal proceeds on the

11:12:44

30 basis that once communication has been received from a solicitor acting on

11:12:49 1 behalf of that party, that further communications are conducted through
2 the solicitor and not directly with the party involved. The Tribunal
3 considers in such circumstances that the party is represented by that
4 solicitor.

11:13:02 5
6 3. In the course of its public hearing witnesses summoned to appear
7 before the Tribunal often attend in the company of their solicitor.
8 Frequently the solicitor will announce his presence to the Tribunal but
9 will not seek a formal grant of representation. It may be indicated that
11:13:18 10 the solicitor wishes to reserve the right to apply for a grant of
11 representation in the event of matters arising which require such an
12 application to be made.

13
14 The presence of such a solicitor is noted by the Tribunal, albeit that he
11:13:32 15 has neither applied for nor has been granted representation to appear.
16 In fact, a solicitor may never make such representation but will
17 nonetheless have attended throughout the hearing of his client's evidence.
18 And may in some circumstances have remained to hear the evidence of other
19 witnesses whose testimony might effect his client's interests. In such
11:13:50 20 instances the party will have appeared at the Tribunal with his solicitor,
21 albeit that no representation was granted.

22
23 4. In the fourth category parties are those who have formally been
24 granted representation by the Tribunal at a public hearing with the
11:14:06 25 consequence of that party through that's solicitor or counsel has the
26 right to actively participate in the relevant public hearing. It is only
27 this last category parties who would be entitled to apply for their costs
28 if the interpretation urged upon me on behalf of the Minister for Finance
29 is the correct one notwithstanding the extent to which a party may have
11:14:24 30 involved his legal advisors in representing his interests in dealing with

11:14:29 1 the Tribunal to date.

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3 It is evident to me that in this Tribunal and probably more so than any

4 other Tribunals in the past, there has been a considerable interaction

11:14:39 5 with a variety of parties who were never envisaged as having a role in the

6 public sessions of the Tribunal but whose input was limited to the

7 identification, sourcing and provision to the Tribunal of documentary

8 evidence and records.

9

11:14:52 10 Many of the parties within this category of persons played as an important

11 a role and vital a role in the Tribunal's work in its efforts to determine

12 the substantive issues considered by the Tribunal as the role played by

13 those witnesses who actually gave evidence in public and had formally been

14 granted representation.

11:15:11 15

16 A considerable volume of the Tribunal's work was money trails and land

17 ownership issues. The Tribunal was heavily dependent on documentation

18 and the willing cooperation of financial institutions, lawyers,

19 accountants, stockbrokers and auctioneers who represented the interests of

11:15:29 20 parties whose affairs were subject to the scrutiny of the Tribunal. Many

21 or all of these parties are duties of confidentiality to their clients

22 whose affairs were the subject of the Tribunals scrutiny and were

23 reasonably entitled to engage legal advisors for the purpose of advice and

24 assistance. These parties would not have had in the normal course a

11:15:47 25 reason for applying for representation before the Tribunal.

26

27 It would also follow from the submissions made to me on behalf the of the

28 Minister for Finance that where the Tribunal had conducted extensive

29 private investigations in the course of its inquiry but had determined

11:16:08 30 that the matter did not merit public inquiry, the parties who had engaged

11:16:08 1 with the Tribunal through their lawyers could not seek recompense for the
2 costs involved because no opportunity for granting representation would
3 arise given that there would be no public inquiry.
4

11:16:15 5 I intend to briefly examine the extent to which applications for costs
6 have been considered in respect of the involvement of persons, of a person
7 in Tribunals of inquiry in the past.
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11:16:35 9 Mr. Justice Gannon in 1977 held that the State was under -- was not under
10 any constitutional duty to discharge the cost of a party who had been
11 legally represented at a Tribunal of Inquiry. The Tribunals of Inquiry
12 Evidence Amendment Act 1979 followed and was amended in 1997 once Mr.
13 Justice McCracken had highlighted the lacuna which existed in the 1979 Act
14 which had made no provision for the Tribunal to order that the costs of
11:16:56 15 the Tribunal itself would be paid by a party:
16

17 In considering the applications for costs made to him Mr. Justice
18 McCracken as Chairman of the Dunnes Payments Tribunal, took the view that
19 only those parties who were granted representation by the Tribunal were
11:17:10 20 entitled to be considered for an award of costs under the then Section 6
21 provision. In dealing with applications for costs by a small number of
22 parties in relation to the costs incurred by them in making discovery but
23 who had neither sought nor been granted legal representation, Mr. Justice
24 McCracken directed payment of these costs under Section 4 of the 1979 Act.

11:17:32 25 In relation to those parties who did not have legal representation who
26 appeared before the Tribunal but who were not granted orders for costs
27 under Section 4, Mr. Justice McCracken indicated that their recompense
28 could only arise on the basis of ex gratia payment from the Minister for
29 Finance.
30

11:17:49

11:17:49 1 In 1999 Miss Justice Laffoy had had reason to analyse the legal power of a
2 Tribunal of Inquiry to award costs and in so doing in the case of Goodman
3 versus the Minister for Finance [1999] 3 Irish Reports 356 she held that
4 Section 4 of the 1979 Act which provides and I quote:

11:18:09 5 "A Tribunal may make such orders as it considers necessary for the
6 purposes of its functions and it shall have in their relation to their
7 making all such powers, rights and privileges as are vested in the High
8 Court or a Judge of that court in respect of the making of orders"
9 was not a Section which had application to the power to award costs and
11:18:28 10 that the Tribunal's power to award costs was limited to the provision of
11 Section 6.

12
13 It is now clear that it is not open to a Tribunal of Inquiry to adopt the
14 costs of making discovery as the expense of a Tribunal and therefore
11:18:42 15 payable under Section 4 of the Tribunals of Inquiry Evidence Act. And
16 that the only power to award costs to an applicant arises under Section 6
17 of the 1979 Act as inserted by Section 3 of the 1997 Act.

18
19 The question of interpreting the provisions of Section 6 arises in view of
11:19:03 20 the divergent interpretations which are urged on me by the applicants and
21 by the Minister for Finance.

22
23 I adopt the following as a reasonably brief and accurate statement of the
24 rules of statutory interpretation in English law which is contained in
11:19:18 25 Cross on statutory interpretation third edition page 49.

26
27 1. The judge must give effect to the grammatical and ordinary or where
28 appropriate the technical meaning of words in the general context of the
29 statute. He must also determine the extent of general words of reference
11:19:33 30 to that context.

- 11:19:36 1
- 2 2. If the judge considers that the application of the words and their
- 3 grammatical and ordinary meaning or ordinary sense would produce result
- 4 contrary to the purpose of the statute, he may apply them in any secondary
- 11:19:49 5 meaning which they are capable of bearing.
- 6
- 7 3. The judge may read the words which he considers to be necessarily
- 8 implied by words which are already in the statute. When he has limited
- 9 power to add to, alter or ignore statutory words in order to prevent
- 11:20:02 10 provision from being unintelligible, absurd or totally unreasonable,
- 11 unworkable or totally irreconcilable with the rest of the statute.
- 12
- 13 4. In applying the above rules the judge may resort to construction and
- 14 presumptions mention in the chapters 5 to 7 of the textbook.
- 11:20:20 15
- 16 5. The judge must interpret its statute so as too give effect directly
- 17 applicable European law and insofar as this is not possible must refrain
- 18 from applying the statutory provisions which conflict with that law.
- 19
- 11:20:33 20 In the case of Maunsell and Olins [1975] Appeal Cases 375 it was stated at
- 21 page 392 and I quote:
- 22 "In statutes dealing with ordinary people in their every day lives, the
- 23 language is presumed to be used in its primary ordinary sense unless this
- 24 stultifies the purpose of the statute or otherwise produces some
- 11:21:01 25 injustice, absurdity, anomaly or contradiction. In such cases some
- 26 secondary, ordinary sense may be preferred to so as to obviate the
- 27 injustice, absurdity, anomaly or contradiction or fulfil a purpose of the
- 28 statute".
- 29
- 11:21:14 30 In the Supreme Court in this country in Crilly versus T & J Farrington

11:21:20 1 Limited [2001] 1 ILRM 161 Murray J, as he then was, cited with approval
2 the Judgement by Lord Nicholas in R V Secretary of State for the
3 Environment [2001] 2 DPP 15 where he stated at page 37 the following and I
4 quote:

11:21:39 5 "Statutory interpretation is an exercise which requires the court to
6 identify the meaning borne by the words in question in the particular
7 context. The task of the court is often said to ascertain the intention
8 of Parliament expressed in the language under consideration. This is
9 correct and may be helpful so long as it is remembered that the intention
11:21:59 10 of Parliament is an objective concept not subject. The phrase is a
11 shorthand reference to the intention which the court reasonably imputes to
12 Parliament in respect of the language used. It is not the subjective
13 intention of the Minister or other persons who promoted the legislation.
14 Nor is it the subject of intention of the draughtsman or of individual
11:22:24 15 members or even of a majority of individual members of either House.
16 These individuals will often have wildly varying intentions. Their
17 understanding of the legislation and the words used may be impressively
18 complete or woefully inadequate. Thus, when the courts say that such and
19 such a meaning cannot be what Parliament intended, they are saying only
11:22:44 20 that the words under consideration cannot reasonably be taken as used by
21 Parliament without meaning. As Lord Read said "we often say that we are
22 looking for the intention of Parliament but that is not quite accurate.
23 We are seeking the meaning of the words which Parliament use".
24

11:23:00 25 In her judgement in that case Miss Justice Denham stated at page 163.
26 And I quote:
27 "If there is a plain intention expressed by the words of a statute, then
28 the court could not speculate but rather construe the Act as enacted,
29 dealing with the fundamental concepts, the balancing of rights and power
11:23:19 30 under the Constitution, the primary and literal approach to the

11:23:23 1 construction to the statute is appropriate".
2
3 I note that Section 6 in either its original or subsequent amended form
4 does not have within it any reference to the term "representation or grant
11:23:36 5 of representation". It does not state that only a party who is granted
6 representation is eligible for consideration for an award of costs in
7 their favour. While I note that in practice Tribunals to date in
8 referring to Section 6 have appeared to interpreted as meaning only those
9 parties who had been granted representation to appear by counsel or
11:23:56 10 solicitor were entitled to be considered for costs. It appears to me
11 that these considerations were in the main made in circumstances where
12 there was no real issue as to the interpretation of the words appearing
13 before the Tribunal by counsel or solicitor".
14
11:24:10 15 In particular, they were not dealing specifically with circumstances in
16 which extensive dealings had taken place between solicitors acting on
17 behalf of parties and the Tribunal on matters upon which a grant of
18 representation to participate in the proceedings of the Tribunal would not
19 normally have been granted.
11:24:27 20
21 Mr. Justice McCracken, in particular, was mindful of the importance of
22 such participation and believed it was capable of being addressed by means
23 of Section 4 of the Act. It is now clear and accepted that the only
24 facility to award costs arises under Section 6.
11:24:47 25
26 The 1921 Act in its amended form continues to represent the law in
27 relation to Tribunals and it expressly deals with representation in
28 Section 2 of that Act. It is clear from the provisions of Section 2 (A)
29 that the Section is intended to address representation in the context of
11:25:01 30 the public hearings of the Tribunal. If it was intended in the amending

11:25:05 1 legislation in 1979 that the Tribunals' power to award costs would be
2 limited to or linked to the right of representation at a public hearing,
3 it was open to the legislature to so provide.
4

11:25:17 5 Section 6 does not do so but refers to parties who have appeared before
6 the Tribunal by counsel or solicitor. In failing to so limit the range
7 of persons eligible to apply for costs, it is reasonable to conclude that
8 the legislature intended that a wider category of parties should be
9 considered eligible for applying for recompense of their costs before a
11:25:40 10 Tribunal over and above those parties who are entitled to participate in
11 the public hearings by virtue of a grant of representation.
12

13 I believe it reasonable to conclude that if the intention of the Tribunal
14 was to restrict the award of costs to those parties who had been granted
11:25:55 15 representation, that such intention would be clearly expressed, given the
16 fact that the term "granted representation" has been in common use in
17 connection with Tribunals since 1921. That should read I believe it
18 reasonable to conclude that if it is the intention of the legislature was
19 to restrict an award of costs to those parties who had been granted
11:26:18 20 representation would be clearly expressed given the fact that the term of
21 representation had been in common use in connection with Tribunals since
22 1921.
23

24 I am satisfied that on proper construction of Section 6 the Section means
11:26:33 25 that the Chairperson of a Tribunal has the power to consider an award of
26 costs to any person who has appeared before the Tribunal by counsel or
27 solicitor and is not limited to considering applications by parties who
28 have been granted representation to appear at the public hearing of the
29 Tribunal by counsel or solicitor.
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11:26:52

11:26:52 1 I am satisfied that the term "appearing before the Tribunal" is intended
2 to, and does include parties, who never applied for nor were granted
3 representation before the Tribunal. I believe that an appearance before
4 the Tribunal by a party can arise once that party or his solicitor has
11:27:09 5 communicated to the Tribunal that that solicitor is representing the
6 interests of a party and the parties dealing with the Tribunal. I believe
7 that it is a matter for an individual Tribunal to determine what
8 constitutes an appearance before it in any particular instance.
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11:27:24 10 I hold that the following parties have appeared before the Tribunal by
11 counsel or solicitor within the meaning of Section 6 of the Tribunals of
12 Inquiry (Evidence) (Amendment) Act 1979 as amended.
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14 The first three parties I am about to name in fact receive formal grants
11:27:42 15 of representation:
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17 Thomas Broughan, Gerard Brady, Gabrielle & Anne Grehan, ABN Amro Bank and
18 ABN Amro Stockbrokers Ireland Limited; Bank of Ireland and its subsidiary
19 and related companies; Simon Howard/Bedell & Cristen; Bloxham Stockbrokers.
11:28:02 20 William Brennan, Anne Burke, Patrick Taylor/Capital Radio plc; Neil Payne,
21 Liquidator for Century Communications Limited; Frank Finnegan, Fexco
22 Stockbroking Limited; Bank of America, Patricia Cooney; Joe Coulston/F&T
23 Buckley; Laurence Crowley; De Loitte & Touche; Diners Club International;
24 Duffy Mangan & Butler; Eircom; First Active plc; Flynn and O'Flaherty;
11:28:31 25 FM104; Grange Developments Limited; Grant Thornton; Hypo Real Estate;
26 International Fund Managers Ireland Limited; International Fund Services
27 Ireland Limited; Irish Life & Permanent; Irish Nationwide; KBC Bank; the
28 Labour Party; Lombard Ireland Limited & Ulster Bank Group; James Lyons;
29 Marks & Spencer Financial Services Limited; Paul McGuinness; Noreen Hynes;
11:28:57 30 Michael O'Shea; Tim McHale; Stephen Miley; Vivian Murray; National Irish

11:29:03 1 Bank; NCB Stockbrokers; Donagh O'Donoghue; Brian O'Halloran; Radio County
2 Sound Limited; Esmond Reilly; Scotia Bank (Ireland) Limited; Desmond
3 Turvey; AIB; EBS Building Society; Pascal Taggart; Maureen Redmond;
4 Bernard Cooke; Tom Moore; Donnelly Neary Donnelly Solicitors; Martin E
11:29:26 5 Marren & Co; Denis McArdle; Denis O'Brien; Vincent & Beatty Solicitors on
6 behalf of the Sacred Heart Nuns; TV3 and related companies; Money Markets
7 International Limited; Investec; Hugh O'Neill; Eugene Fanning on behalf of
8 Arthur Cox Solicitors and Sean Connolly.
9
11:29:46 10 It follows from the analysis of the interpretation of Section 6 that those
11 parties who did not have dealings with the Tribunal through counsel or
12 solicitor are not eligible for consideration of the reimbursement of their
13 costs under Section 6. I am, therefore, precluded from making any order
14 for costs in favour of those parties.
11:30:05 15
16 I do wish it to be known that those parties did in fact fully cooperate
17 with the Tribunal in its requests of them and I acknowledge that it is
18 probable that incurred expense in so doing.
19
11:30:24 20 In considering the applications of parties who were in a similar position
21 in the Dunnes Payments Tribunal, Mr. Justice McCracken made reference to
22 the fact that it was open to the Minister for Finance to make an ex gratia
23 payment in favour of such persons and I concur with that view.
24
11:30:31 25 The following applicants fall within this category:
26
27 BCP Stockbrokers; McLarens Loss Adjustors/Gerry Gorman; John Lane; Cremin
28 McCarthy & Co; Galvin Casey & Co; Hamill Spence (solicitor & counsel for
29 cost application only); Brian Phelan; Campbell O'Connor Stockbrokers; ING
11:30:53 30 Barings.

11:30:54

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The amount claimed in total by persons within this latter category is approximately 42,000 Euro. Excluding these applicants from the list of those persons who have applied for costs but who have not been granted

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11:31:08

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legal representation to appear at the Tribunal hearings of the Tribunal

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there are a total of 65 applicants. And I have named these applicants.

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The total amount claimed by these applicants in respect of both their

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legal cost and their own costs and expenses incurred in complying with the

11:31:28

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orders of the Tribunal amounts to approximately 2,265,000 Euro or

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thereabouts. This sum is an estimate only and it may well be subject to

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some reduction upon taxation of those costs by the Taxing Master of the

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High Court.

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11:31:43

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I have concluded that the parties eligible to make applications for costs

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are those parties other than the nine parties above who did not have any

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legal representation in their dealing with the Tribunal.

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In respect of the remaining 65 parties -- I think 68 parties in fact,

11:32:03

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whatever the number, I have a discretion to award costs. Just as the

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grant of representation is not an automatic entitlement to an award of

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costs, an appearance before the Tribunal in either its public or private

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phase by a solicitor or counsel for a party who does not have a formal

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grant of representation is not an automatic entitlement that that party

11:32:23

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will receive an award of costs.

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I believe that it is appropriate in each instance, for example, to

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consider whether it was necessary, reasonable or appropriate that a

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particular party should have engaged the services of a solicitor in the

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first place or whether it is fair, reasonable that the costs should be

11:32:40 1 visited upon the public purse.

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While it is never the responsibility of the Tribunal to direct or to

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advise a party in the course of a private or public inquiry that he should

11:32:51

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engage a solicitor or counsel. The fact that such an engagement was

6

reasonable or appropriate must be established by that party if the costs

7

incurred in doing so are to be recoverable from the public purse.

8

9

I believe that in each instance in which legal advice was sought by the

11:33:08

10

present applicants it was reasonable for them to have done so. And I

11

will order that in such instance the Applicant will recover their costs to

12

include their legal expenses. The extent of the legal services provided

13

and the costs attributed thereto will be matters for assessment by the

14

Taxing Master of the High Court.

11:33:27

15

16

Insofar as it is necessary to address the arguments advanced by applicants

17

in relation to the existence or otherwise of a legitimate expectation on

18

their part entitled them to consider their expenses from the Minister for

19

Finance based upon their dealings with the Tribunal to date and its

11:33:42

20

pronouncements. I accept the submissions advanced by counsel on behalf

21

of the Minister for Finance that the power of the Tribunal to award costs

22

is limited to that provided for in Section 6 of the 1979 Act. And the

23

question of legitimate expectation cannot arise other than within

24

circumstances in which the Tribunal has the power to award costs.

11:34:03

25

26

In the circumstances applying here I believe that the Tribunal's

27

utterances in relation to the ultimate payment of costs have been in line

28

with the correct interpretation of Section 6 of the 1979 Act. Namely, it

29

is not necessary that a grant of representation be made to a party in

11:34:20

30

order to permit that party to make application for their legal expenses

11:34:24

1 incurred when cooperating with the Tribunal.

2

3 Although my interpretation of Section 6 is based upon its actual meaning
4 and is not coloured or influenced by examples of actual or potential

11:34:37

5 consequence that is might flow in the event that the Section is
6 interpreted in the manner suggested by counsel on behalf of the Minister
7 for Finance, I believe that I should comment on the consequences which
8 would flow or which would follow if that interpretation were to be
9 applied.

11:34:51

10
11 1. A party might avoid or delay co-operation with the Tribunal until the
12 commencement of public hearings in order to facilitate an application for
13 representation and thereby establish an entitlement to be eligible for
14 consideration for costs.

11:35:12

15
16 2. A large number of parties might apply for representation even where
17 it was unlikely that the same would be granted. In relation to the
18 second and third report matters, there could have been up to 100 such
19 applications instead of approximately 20 which were actually made. This
20 would cause significant additional time and add to the overall duration
21 and cost of the Tribunal if it was if it was to occur in every instance.

11:35:26

22
23 3. Co-operation of parties either in the course of private or public
24 inquiries might be compromised or delayed particularly in the area of
25 discovery. If parties did not have access to competent legal advice and
26 were unable or unwilling to engage a solicitor to interact with the
27 Tribunal, particularly in circumstances where the party did not have
28 financial capacity to engage legal advice.

11:35:45

29
30 4. An inability on the part of the Tribunal to entertain applications

11:36:00

11:36:05 1 for costs and reimbursements other than those made by person who had been
2 granted representation would inevitably impact on the capacity of the
3 Tribunal to enlist the support of individuals or corporations which were
4 based outside the State. This would be particularly detrimental to the
11:36:22 5 Tribunal giving the particular relevance of offshore activities to this
6 Tribunal.
7
8 5. Parties might be forced to incur personal debts to meet the costs of
9 lawyers in circumstances where they would be unable to apply for recovery
11:36:38 10 of these sums at the conclusion of the Tribunal.
11 By way of example. One of the present applicants for costs was obliged
12 to borrow money in order to discharge his own solicitor's costs. And
13 although this individual is now retired and was of limited means, he was
14 continuing to pay interest on loans. The probabilities are that in
11:37:01 15 individuals might balk at incurring such expense in the future with
16 consequence, delays and costs of the Tribunal endeavouring to obtain the
17 information sought from lay witnesses who did not have the benefit of
18 legal advice.
19
11:37:15 20 6. The capacity of person who are under administration or under
21 restraint to cooperate with the Tribunal in circumstances where their
22 costs might be visited upon, creditors or others is likely to be a
23 deterrent against compliance or co-operation.
24
11:37:30 25 It is noted that the liquidator of one of the companies involved in the
26 matter reported on in the Second and Third Interim Reports sought and
27 obtained the leave of the High Court to prolong the liquidation of the
28 company in order to cooperate with the Tribunal. This was permitted by
29 the Court on terms, one of which was that the cost associated with this
11:37:49 30 work would be recovered and would not dilute the funds available for

11:37:54

1 distribution to creditors.

2

3

7. It is probable that there would be very significant increase in the

4

costs incurred in running a Tribunal which was dealing with individuals

11:38:03

5

who did not have or could not afford legal representation, thereby

6

increasing the workload of the Tribunal's legal staff with the consequent

7

additional cost to and delay to the Tribunal.

8

9

A number of peripheral issues arise for determination from the submissions

11:38:18

10

made to me in the course of the applications for costs which may have

11

application to one or more applications and in respect of which I now Rule

12

as follows:

13

14

A. Some of the parties applying for their costs engaged independent

11:38:33

15

solicitors or firms of solicitors in their dealings with the Tribunal,

16

while other parties used in-house solicitors for this purpose. In

17

awarding costs to these applicants I am not making any distinction between

18

solicitors in independent practice and in-house solicitors insofar as the

19

order for costs is concerned.

11:38:48

20

21

It is matter for the Taxing Master of the High Court in assessing the

22

appropriate payments to be made in each case, to determine the extent to

23

which, if any, this distinction is relevant in assessing the amount of

24

costs to be paid in each case.

11:39:01

25

26

B. While acting as Chairperson of the Tribunal with the purpose of

27

determining costs in relation to past involvement of applicants. It is

28

not open to me to entertain applications for orders retrospectively

29

granting representation for costs.

11:39:16

30

11:39:16 1 As far as the term "appearing before the Tribunal by counsel or solicitor
2 is concerned" an appearance by a solicitor or counsel solely for the
3 purpose of applying for costs does not constitute an appearance entitling
4 that party to make application for legal costs incurred at a time when no
11:39:33 5 such legal representation existed or was not disclosed to the Tribunal at
6 that time.

7
8 C. Where an award of costs had been made such an award would include
9 costs of the application for costs. In circumstances where an application
11:39:53 10 for costs made by persons is refused, the costs of the application itself
11 is equally refused.

12
13 Finally, it should be noted that this Ruling is in respect of applications
14 for costs limited to the work carried out in connection with the matters
11:40:01 15 associated with the Second and Third Interim Reports. Applications in
16 respect of costs for other work unrelated to those matters will arise at a
17 future date and parties concerned will be afforded an opportunity to apply
18 for such costs.

19
11:40:15 20 In all cases which I have made an award for cost, the costs are payable by
21 the Minister for Finance on a party and party basis subject to taxation by
22 a Taxing Master of the High Court.

23
24 And then finally, I am going to deal very briefly separately with two
11:40:31 25 additional applications.

26
27 **The application for costs of Ireland on Sunday.**

28
29 This Applicant appeared by counsel and solicitor to make representation to
11:40:40 30 the Sole Member of the Tribunal on the 16th of December 1998 in relation

11:40:44 1 to publication of material in a matter which was Ruled upon by the Sole
2 Member on the 18th of December 1998.

3
4 This party was not concerned with the substantive matters under
11:40:55 5 investigation by the Tribunal and had only peripheral involvement. I'm
6 awarding this applicant its costs in respect of that matter, limited to
7 the appearance before the Tribunal on the 16th of December 1998. Such
8 costs to be taxed by the Taxing Master of the High Court.

9
11:41:11 10 **Application of Gerard Downes.**

11
12 This applicant was represented to the Tribunal by counsel and solicitor.
13 The actual involvement of the applicant as a witness in the matters under
14 inquiry was limited to the allegation that his former employers were said
11:41:27 15 to have operated a slush fund while he was an accountant in the firm.

16
17 The Tribunal concluded in its Second Interim Report that this was an
18 erroneous belief on the part of Mr. Gogarty and no adverse finding was
19 made against the applicant who fully cooperated with the Tribunal as a
11:41:41 20 witness and as a provider of documents. The applicant is, therefore,
21 entitled to his costs in relation to the matters in which he was involved
22 to the extent to be determined by the Taxing Master and assessed by him.

23
24 Thank you.

11:42:39 25
26 **THE TRIBUNAL THEN ADJOURNED.**

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29
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