

1 THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 20TH JANUARY,
2 1999 AT 10AM:

3 .

4 CHAIRMAN: Good morning, everyone.

5 .

6 MR. GALLAGHER: Mr. Gogarty please.

7 .

8 CONTINUATION OF DIRECT EXAMINATION OF MR. GOGARTY BY MR.

9 GALLAGHER:

10

11 1 Q. MR. GALLAGHER: Good morning, Mr. Gogarty.

12 A. Good morning.

13 2 Q. Towards the end of your evidence yesterday, you identified

14 two letters of the 10th July, 1989, one written by Michael

15 Bailey to you and another written in your handwriting to

16 Mr. Murphy. Can you tell the Tribunal why you sent that

17 letter to Mr. Murphy?

18 A. Which letter was it? Could I have a look at it? (Document

19 handed to witness.)

20 3 Q. The reference is Book 4, 903.

21 A. I was updating him on the situation about the lands. I

22 was telling him that a closing letter from Mr. Bailey who

23 now was making an offer for the outright purchase of the

24 lands and that I explained to Mr. Bailey that I was no

25 longer a director of the vending companies but that I was

26 continuing pro tem as an executive employee of JMSE and

27 that I would post his letter on to you and also to DMB,

28 that was Duffy Mangan and Butler and Mr. Copsey and he

29 again asked me to hold on a copy to DMB and I would said,

30 "I await your instructions and perhaps you would clarify

31 that with Mr. Bailey yourself" and I copied that letter to

32 Mr. R J Copsey.

1 4 Q. Did you receive any reply to that letter that you can
2 recall?

3 A. Not in writing, not in writing.

4 5 Q. Did you receive any other verbal reply?

5 A. I would say I did. He replied by ringing me, you know.

6 6 Q. Mr. Gogarty, I now want to go on to deal with the rest of
7 the correspondence dealing with the various lands up to
8 1992 or thereabouts when the transactions were finally
9 completed and then I intend to come back to deal with the
10 question of your pension and the question of the accounts
11 and other matters that were raised but we will try to get
12 the lands out of the way in the first instance if you don't
13 mind.

14 A. Fair enough. Fair enough.

15 .

16 MR. MCGONIGAL: Mr. Chairman, as a matter of
17 clarification, first of all, two things. First of all, Mr.
18 Chairman, I want to make clear I am appearing with Mr.
19 James McGowan and Mr. Gerry Danaher for Mr. Burke...

20
21 The second thing that I want is to draw your attention to
22 and seek some clarification on is in relation to some
23 evidence which was given by Mr. Gogarty yesterday and I can
24 probably best deal with it by referring you to the
25 transcript of yesterday, Mr. Chairman. And in particular,
26 in the first instance, the Question 71, which was in the
27 following terms:

28 "And at that meeting, did he indicate the method by which
29 this rezoning would be achieved or what if anything would
30 have to be done to secure it?"

31 And the answer was; "He went into great detail how he would
32 go about, that there were five or six councillors that

1 would organise or maximise the votes of Dublin County
2 Council and that he also was in a position to cross the
3 political divide. They are the words he says, political
4 divide, cross the political divide and rely on close
5 liaison with people in the County Council including Mr.
6 Redmond and he mentioned that he had access to information
7 about about roads and sewages and all that type of thing
8 and the projections of them and he has also mentioned a
9 planning officer, I think she was a temporary planning
10 officer or something like that, you know."

11 .

12 The second reference I want to draw your attention to is

13 Question 173 in the following terms:

14 "So far as you are concerned, what was he expected to do?"

15 Well, it's a pity having to say these things. What I
16 expected him to do and Bailey expected him to do was
17 influence Fianna Fail councillors and at that time,
18 according to Mr. Bailey, they had a majority in Dublin
19 County Council but in addition to that according to Mr.
20 Bailey, Burke could control the Fianna Fail vote on the
21 council and Bailey could cross the political divide for
22 further votes and he named people that I don't want to be
23 naming either but I am only telling you. It's hearsay on
24 my part and I am only telling you that's how it happened
25 and that it would take two meetings of the council to do
26 that and that could be done, not immediately, but over a
27 period of years as he said in his letter. It didn't
28 bother my head afterwards what happened the land at all, I
29 don't know what happened to the lands even to this day, I
30 have no interest in them, either vested or otherwise."

31 .

32 Now it seems to me, Mr. Chairman, in both those responses

1 that Mr. Gogarty was, in effect, identifying what could
2 possibly be said to be the core point that arises in this
3 Tribunal and what we want clarification on, Mr. Chairman,
4 is whether it is the intention of your leading counsel to
5 ask Mr. Gogarty to explain fully and in depth both of those
6 answers.

7 .

8 The only person that has been identified before this
9 Tribunal has been my client and I take, Mr. Chairman, that
10 we are in agreement that this is not an inquiry solely into
11 Mr. Burke. It seems to me that if part of this inquiry is
12 to enquire into the nature and extent of any lobbying,
13 influencing or any inappropriate conduct on the part of Mr.
14 Burke or any other councillor, then it is imperative that
15 that inquiry be seen to be done in public.

16

17 The assurance that I am therefore seeking at this stage,
18 Mr. Chairman, from you, is that is it your intention to
19 publicly enquire fully into those two answers.

20 .

21 You will appreciate, Mr. Chairman, that if you have already
22 inquired privately into those two answers, then it's
23 imperative that the results of those inquiries be made
24 public, particularly if your inquiries have resulted in
25 showing that there is no truth in those answers. If, on
26 the other hand, there has been no private inquiry into
27 those two answers, then I will be respectfully asking the
28 Tribunal to explain why there has been no 'in private'
29 inquiry into those two answers. Those answers do not
30 appear in his evidence for the first time yesterday, they
31 appeared in the affidavit which was prepared by McCann
32 Fitzgerald, there were indications of those answers,

1 together with names in the statement and it would seem to
2 me, Mr. Chairman, therefore that one might have anticipated
3 that a private inquiry had already been conducted but at
4 this stage, Mr. Chairman, what I am seeking is an
5 assurance, an undertaking that there will be a public
6 inquiry into those two answers and a full public inquiry.

7 .

8 CHAIRMAN: First of all, I can assure you, Mr. McGonigal,
9 there will be a public inquiry into every detail of those
10 answers. I, at the moment, I lean to my counsel to
11 proceed in whatever matters he wishes but I can give you
12 total assurance the matter will be dealt with.

13 .

14 MR. MCGONIGAL: Without wishing to take up too much time,
15 Mr. Chairman, could I therefore invite Mr. Gallagher to
16 indicate now when he intends to deal fully with those two
17 answers. It is a very, very important question, Mr.
18 Chairman. If you agree with me that it goes to the heart
19 of the matter, then it seems to me important that it should
20 be done at the earliest possible time and since these
21 matters appear to be fresh in Mr. Gogarty's mind now, it
22 would seem to be now is the appropriate time.

23

24 However, if there is some particular reason which Mr.
25 Gallagher wishes to tell you, Mr. Chairman, as to why it is
26 inappropriate to deal with it now, then let us explore
27 that.

28 .

29 CHAIRMAN: Well in essence, this hearing is essentially
30 devoted to Mr. Gogarty's evidence, where Mr. Gogarty's
31 evidence gives rise to any other appropriate evidence to be
32 called and to inquire into it, it will be done in toto.

1 .

2 MR. McGONIGAL: It seems to me, Mr. Chairman, there is,
3 particularly in the question and answer at 173, evidence
4 which Mr. Gogarty is well able to give and is well capable
5 of giving and can be given within the rules of evidence of
6 Tribunals. Any conversation between him and Mr. Bailey
7 concerning the political divide would be a relevant public
8 matter to be dealt with in the inquiry and it seems to me
9 appropriate that all of these matters should be dealt with
10 by Mr. Gogarty at this time, particularly, Mr. Chairman,
11 when the witness is anxious to tell the truth, warts and
12 all.

13 .

14 It doesn't seem to be appropriate we should leave some
15 warts till later.

16 .

17 MR. GALLAGHER: Sir, Mr. McGonigal has asked me to
18 indicate when this matter will be dealt with. This matter
19 will be dealt with when the investigations have been
20 completed and when the Tribunal is in a position to lead
21 evidence or to deal with the matters having first apprised
22 all concerned that the matter will be or may arise. The
23 investigations are continuing, as has been made clear, and
24 at the appropriate time, evidence will be called. Mr.
25 McGonigal need have no fear of this but at the moment, I
26 have other evidence I want to deal with it, I will deal
27 with it and I want to deal with it in the order that I and
28 my colleagues deem appropriate at this stage. We will
29 come to all of these matters all in good time.

30 .

31 MR. McGONIGAL: I am not sure, Mr. Chairman, that I fully
32 understand what Mr. Gallagher is saying. I understood

1 that the reason why Mr. Gogarty was now giving evidence was
2 because there was a serious concern on the part of the
3 Tribunal that Mr. Gogarty's health would not stand up to
4 him giving his evidence. Part of the giving of his
5 evidence requires an explanation of answers which he
6 gives. I would have anticipated that in the course of
7 their private inquiries, the Tribunal would already have
8 investigated some or all of these matters and I say that
9 bearing this in mind, Mr. Chairman, that it was originally
10 intended that Mr. Gogarty would give evidence in
11 November. That was adjourned because particular
12 information became available to the Tribunal apparently for
13 the first time. During that time, Mr. Chairman, it would
14 have been clear to the Tribunal team, from that material,
15 that it was essential to make necessary inquiries because
16 Mr. Gogarty would be giving relevant evidence in relation
17 to those matters and one would have anticipated that
18 everybody involved at this stage would have been alerted or
19 notified.
20 .
21 If Mr. Gallagher is saying that there are people who Mr.
22 Gogarty can name who have not been alerted or notified,
23 then, Mr. Chairman, I would respectfully invite Mr.
24 Gallagher to explain how he intends to recall Mr. Gogarty
25 or why Mr. Gogarty should be recalled, particularly having
26 regard to his health, particularly having regard to the
27 pressure that was put on this Tribunal to sit because of
28 Mr. Gogarty's health and in those circumstances, Mr.
29 Chairman, if Mr. Gallagher is saying that there is a
30 possibility or probability that he will be recalling Mr.
31 Gogarty to give material evidence in relation to
32 allegations of influencing or otherwise councillors, then

1 it seems to me that that should only and properly be done
2 before any cross-examination of Mr. Gogarty takes place.

3 .

4 It is, Mr. Chairman, unfortunate, to say the least, that
5 the Tribunal has been forced to kick off with Mr. Gogarty,
6 particularly it is now clear that the Tribunal have not
7 finished their inquiries into all of Mr. Gogarty's
8 evidence. It seems to me, Mr. Chairman, that the parties
9 that you have now before the Tribunal may not be all the
10 parties that should be before the Tribunal and it seems to
11 me that it is putting them at a distinct disadvantage. It
12 is certainly putting my client, Mr. Chairman, at a distinct
13 disadvantage in the sense that the Tribunal is now focused
14 totally on Mr. Burke.

15 .

16 In the absence of other persons who may be relevant, it
17 seems to me, Mr. Chairman, that this is a matter of such
18 importance that you, Mr. Chairman, at this stage, must
19 seriously consider what is fair procedure, what is
20 constitutionally just, not only in relation to those who
21 are now before you but also in relation to those who are
22 not now before you but possibly should be before you to
23 enable them to deal with material evidence in relation to
24 allegations that may be going to be made.

25 .

26 I don't think, Mr. Chairman, that if the central point of
27 this Tribunal is going to be passed on the sixth day
28 without any serious attempt to discuss it in public, that
29 the credibility of this Tribunal can survive.

30 .

31 CHAIRMAN: I hear what you say and all steps will be taken
32 to comply with your request. Mr. Gallagher, proceed.

1 .

2 7 Q. MR. GALLAGHER: Mr. Gogarty, I now want to go on to the
3 events that followed the writing of the letter of the 10th
4 July, 1989. You have given evidence that you were in
5 touch with Duffy Mangan and Butler in connection with the
6 lands in County Dublin. Were you also in contact with
7 auctioneers in Longford in relation to other lands?

8 A. That's correct.

9 8 Q. And did you receive a communication from Quinn and company
10 in County Longford on the 31st July or thereabouts?

11 A. Mr. Murphy --

12 9 Q. Of 1989.

13 A. Mr. Murphy was dealing more personally with the Longford
14 lands. You know, he was more familiar with them than I
15 was and he would have known the locality there.

16 10 Q. Sorry, Mr. Gogarty, the reference is the 7th January, page
17 75. (Document handed to witness.)

18 A. I recognise that letter.

19 11 Q. Yes. In what circumstances was that letter written to
20 you?

21 A. Because Mr. Murphy had told me to instruct Mr. -- to
22 contact Mr. Quinn to try and dispose of the lands at the
23 best possible price and to come back to us on it and agree
24 a fee to sell the lands and he mentioned a party that would
25 be interested, a local party that he knew, I think it was a
26 Mr. McGeraghty.

27 12 Q. It's a letter of the 31st July, 1989 from Quinn Auctioneers
28 and it's a Market Value Report on 7 acres Abbeycartron,
29 Longford. It's addressed to you. Would you read the
30 letter please?

31 A. It's the 31st July, 1989.

32 Mr. Jim Gogarty,

00010

1 Renvyle,
2 Sheilmartin Road,
3 Sutton,
4 County Dublin.

5
6 Re: Market valuation report, re: Circa 7 acres,
7 Abbeycartron Longford.

8
9 Dear Mr. Gogarty,
10 Further to our recent telephone conversation today, this
11 letter is to confirm that in the event of a phased sale of
12 sites, the anticipated price of £8/9,000 per site would
13 include all services completed i.e. sewage, water, roads,
14 footpath, ESB, telephone lines.

15
16 Furthermore it would be prudent to allow a period of say
17 eight to nine months in order to obtain full planning
18 permission for this development, as one has to allow for
19 the preparation detailed plans, the application, a possible
20 appeal to An Bord Pleanala by third party objectors,
21 amendments to plans, etc..

22
23 Obviously the Council will also impose planning charges
24 such as contribution to sewage and water.

25
26 Finally in the long-term, we understand Longford County
27 Council proposes to install a new main sewage however the
28 best estimate of timing for this contract would be two and
29 a half years ahead.

30
31 Trusting the above information will prove helpful."

32 .

1 That was because Mr. Murphy was thinking of two
2 alternatives, he was hopeful that if he could deal with an
3 individual site, that it would maximize the value of the
4 lands and he was trying to get a report from Mr. Quinn
5 about the alternatives to do that.

6 13 Q. What did you do with that letter when you received it?

7 A. I would have discussed that with Mr. Murphy senior.

8 14 Q. Can I refer you to a letter of the 9th August, 1989?

9 A. I beg your pardon?

10 15 Q. Can I refer you to a letter of the 9th August, 1989. It's
11 the same book, page 77. (Document handed to witness.)

12 A. Yes, the 9th August, 1989.

13 16 Q. Yes.

14 A. It's to Mr. Murphy.

15 17 Q. It's a letter from you, is it?

16 A. From me to Mr. Murphy, yes.

17 "Re: Lands at Abbeycartron.

18 Dear Joe,

19 Reference of previous telephones conversations. I now
20 enclose Messrs. Quinn's report and valuation on the
21 above. I also have spoken subsequently to Mr. Quinn as
22 you suggested and he said that in considering an early sale
23 without regard to any potential, the price would, in his
24 opinion, need to be discounted down to between 20 and
25 £25,000 and I confirmed your advice that we will proceed on
26 this basis."

27 That was an outright sale as distinct from getting the full
28 potential if they were to develop sites.

29 18 Q. Did you get any response to that?

30 A. Not in writing, you know, no. But the response was to go
31 ahead with the sale, to sell the lands and it's still
32 coming back to me there was a man in the background that

1 Mr. Murphy knew personally that was interested in them
2 lands because I think he was -- I didn't manage these
3 lands at all, he used to come to a local arrangement with,
4 for letting them, grazing them or something, I didn't know
5 much about that at all and as well as that, there was
6 another man what was administering the Grafton Construction
7 Company who had overall control of the companies that were
8 dealing with plans, you know, Brendan Devine would be a man
9 that would know a bit about that.

10 19 Q. I want to bring you to a letter of the 15th August of 1989,
11 reference, page 82. (Document handed to witness.)

12 A. This is a letter by me to Quinn Auctioneers, 51 Main Street
13 long, Longford, County Longford and attention Mr. Pat
14 Quinn, August 1989.

15 "Re: Valuation of lands at Abbeycartron.

16 Dear Mr. Quinn,

17 Thank you for your quotes and valuations on above and
18 enclosed herewith our cheque for £312.50 inclusive of VAT
19 in settlement of your fee... That in your opinion for an
20 early sale without any regard for any development potential
21 value the price would need to be discounted down to between
22 20 and £25,000. I have passed your opinion on to Mr.
23 Murphy.

24 Yours faithfully,

25 Jim Gogarty."

26 20 Q. Can I now refer you to a letter of the 7th September, 1989,
27 the reference is Document 1009 in Book 4. It's a letter
28 from -- (document handed to witness.)

29 A. This is a letter from Jim Farrell & Associates, M.I.A.V.I.,
30 Auctioneers and Valuers, Property Consultants and Licensed
31 Specialists, 77 Merrion Square, Dublin.

32 21 Q. It's a letter addressed to you at 23 Baggot Street, Dublin

1 2?

2 A. Yes. 23 Lower Baggot Street, that was the offices of, it
3 was owned by Wexburn Limited, a Murphy company, and was
4 where, from there all the management of the Gaiety Theatre
5 and Conroy's practice, architectural practice, Conroy
6 Madden & Associates, there was also Joe Dowling's school of
7 acting and, you know, there was different floors, you
8 know. That was that premises in Baggot street.

9 22 Q. Was that premises referred to in the letter of the 10th
10 July, 1989 from -- Mr. Gogarty, sorry, was that the
11 premises referred to in the letter of the 10th July, 1989
12 from Michael Bailey to you?

13 A. In the offer?

14 23 Q. Yes.

15 A. That was it, yes, I think he was offered £250,000.

16 24 Q. Would you read the letter now from Jim Farrell?

17 A. "Dear Mr. Gogarty,
18 I refer to your conversation of the 6th inst with our Mr.
19 Rory Bland. I confirm we received a cash offer of £300,000
20 for the above, subject to contract.

21

22 Our client has informed us that this offer only remains
23 valid up and until close of business on Friday, 15th
24 September, 1989.

25

26 We advise that in the event of your acceptance,
27 professional fees would be payable to our company on the
28 close of sale at the standard recommended institute rate
29 plus VAT.

30 James Farrell."

31 25 Q. Was the premises sold as a result of that letter or what
32 happened?

1 A. That premises was sold by public auction.

2 26 Q. I beg your pardon, Mr. Gogarty?

3 A. That premises was sold by public auction. Mr. Murphy was,

4 he felt that it was worth much more than £250,000 and there

5 was discussions with Duffy Mangan and Butler and they felt

6 strongly that it should go to auction to try and maximise

7 the value of it and I think there's some correspondence

8 there why they showed it to a number of people, it occurs

9 in --

10 27 Q. We will come to it in due course.

11 A. It occurs in Duffy Mangan and Butler's report.

12 28 Q. We will come to it in due course.

13 A. Yes.

14 29 Q. On the 29th September, 1989 did you write to Mr. Murphy and

15 to Duffy Mangan and Butler? I will hand you a copy of the

16 letters to be found in the reference book at page 90.

17 (Document handed to witness.)

18 A. Yes, I recognise my writing. It's a bad letter. I will

19 read it. It's to Jim --

20 30 Q. Perhaps I can get you a better copy.

21 A. It's to my address.

22 "Dear Joe,

23 Further to our telephone conversation on Tuesday last, the

24 26th inst, I confirm as follows:

25

26 1: Baggot Street auction is fixed for the 20th October

27 next with a reserve of £350,000. There are so far 19

28 inquiries but no firm bids apart from the one for

29 £300,000."

30 I think that's the one Mr. Park or something, I think

31 that's the one --

32 "... which I advised you of before you decided to go to

1 auction.

2

3 2: Duffy had an offer of £2,300,000 for all the lands
4 excluding Abbeycartron and if he gets a quick deposit, he
5 should sell." It was confirmed, McArdle told me.

6

7 "3: You are to contact Mr. McDowell to see if he is
8 interested in Abbeycartron and you will let me now how you
9 get on. Regards..."

10 And I copied that to Duffy Mangan and Butler.

11 31 Q. Now, can I refer you to a letter of the 6th, 1989, page 116
12 in the reference book. (Document handed to witness.)

13 A. Yes. This is dated the 6th November, 1989 from Mr. Duffy
14 Mangan and Butler Limited, Auctioneers, 34 North Frederick
15 Street, Dublin and it's reference Mr. Kevin Duffy.

16 "Re: Lands of Lajos Holdings Limited and Helmdale
17 Limited.

18 Dear Kevin,

19 Reference our meeting this morning, I confirm instructions
20 on the above advice -- on the advice of Mr. Dennis
21 McArdle, solicitor for the vendor, that you suspend all
22 negotiations and dealings in connection with the sale of
23 the above lands until further notice.

24 Yours faithfully,

25 Jim Gogarty."

26 32 Q. Can you say why that letter was written and --

27 A. Well, my recollection is that was written because Senior
28 was involved in the purchase back of 4 acres in Santry, you
29 see, and those negotiations were going on for some time,
30 and my recollection is this, you see, that those 4 acres
31 are referred to in the Duffy Mangan and Butler schedule as
32 being owned by O'Shea and Shanahan but they weren't owned

1 by Murphys at this time but there was negotiations or, in
2 fact, I think there was actually a contract entered into by
3 them early, maybe going back to April.

4

5 I tell you what happened. These -- they had reached
6 agreement - Frankie Reynolds would know this - they had
7 reached agreement to buy the 4 acres from O'Shea and
8 Shanahan and I remember that if my recollection is right,
9 that Dennis McArdle wanted me to sign the contract and I
10 refused for personal reasons but anyway, I think he bought
11 it in trust, Dennis McArdle, the solicitor.

12 .

13 Now, what happened was seemingly that during the course of
14 that, that it was a part of a contract, you see, that
15 O'Shea and Shanahan would deliver vacant possession and
16 there was a house on the property called Poppintree House
17 in which there was a caretaker who was there on a
18 caretaker's agreement, he was there for years looking after
19 the house and the property, there was stables and there was
20 joinery works and that on it, and it's my understanding is
21 that he refused to give up possession because he would be
22 thrown out on the road and my recollection is this, that --
23 Frankie Reynolds would fill you in on this -- that he was
24 negotiating with the man because he knew him. You see,
25 Frankie Reynolds worked for O'Shea and Shanahan before he
26 ever came to Murphys and he knew this caretaker because he
27 was working there with O'Shea and Shanahan and Frankie came
28 to us, Murphys were still using those premises for storing
29 stuff, plant and equipment and he knew that man for years
30 and I understand he had negotiated with him but they
31 weren't concluded, you see the point. So, they had to put
32 a stay on the sale because these lands were included in the

1 sale, in the offer of the sale to Bailey and they couldn't
2 conclude it so these were held up and seemingly on advice,
3 McArdle then told me to tell Duffy to suspend all
4 negotiations and dealings in connection with the sale of
5 the above lands until further notice. I think that would
6 correctly reflect the situation there.

7 33 Q. When you said, you mentioned the Duffy Mangan Butler
8 schedule, did you mean the report that had been reported on
9 the 28th March, 1989?

10 A. The valuation?

11 34 Q. The valuation.

12 A. Yes, where they were valuing all the lands, including lands
13 that weren't in Murphys, what do you call it, portfolio of
14 lands but they were hoping to get them and buy them and
15 sell them because it would help to enhance the value of the
16 Poppintree lands because this 4 acres was in the middle of
17 them, you see.

18 35 Q. Yes. I think that the lands, the premises at Lower Baggot
19 Street was in fact subsequently sold. Perhaps I can refer
20 you to the document at page 124 in the reference book.
21 (Document handed to witness.)

22 A. Yes, they were subsequently sold, you see. This is a
23 letter from Dennis McArdle to me. It's dated the 15th
24 November, 1989. Now, at this time you must remember that
25 I wasn't a director of the Murphy Group. I was an
26 executive employee. In fact, I wasn't even an employee, I
27 was a consultant at this stage but Joe still wanted me to
28 keep an eye on things.

29 36 Q. All right. Would you read the letter?

30 A. "Re: Wexburn Limited sale at 23 Lower Baggot Street.

31 Dear Jim,

32 The contract has now been signed by the purchaser and I

1 sent it to Roger Copsey for sealing by Wexburn. I enclose
2 copy letter received by the purchaser solicitors and should
3 be obliged if you telephone me in relation to points 1, 4
4 and 5."

5 37 Q. Now, can I refer you to a letter of the 14th November, 1989
6 from J.J. O'Connor and company of 9 Clare Street to be
7 found at Book 4, page 1130. (Document handed to
8 witness.)

9 This is a letter that was enclosed with the letter to you
10 from McArdle and Company.

11 A. Oh yes -- this is a letter from O'Connors to McArdle.

12 38 Q. Yes.

13 A. And they raised four points -- six points. He says, 1,
14 4, 5 and 6. Do I read it?

15 39 Q. Well, they raised a number of points.

16 A. It says; "We refer to the above and to our telephone
17 conversations with Mr. McArdle. Enclosed herewith is a
18 contract in duplicate completed by Mrs. Wejchert" -- they
19 were architects on behalf of the purchasing company --
20 "together with a cheque for £31,000 in favour of your firm
21 pursuant to the terms of the contract. The following
22 supplementary points arise:

23

24 1: There are a number of minor items in the house, light
25 fittings etc., and it is assumed that the items there as of
26 this stage shall remain, although we have not specified,
27 separately, the various miscellaneous articles such as
28 lights and so forth.

29

30 2: You will note the minor adjustments made to the
31 contract in respect of searches, (see page 3).

32

1 3: Completion has been fixed as at the 12th December
2 next.

3
4 4: It is understood that the vendors would have no
5 objection to the purchasers or their engineers having
6 access up to the completion date for the purpose of making
7 measurements and inspections but not for the purpose of
8 dealing with any actual work and we take it that you will
9 instruct the auctioneers to make the keys available on loan
10 in this connection.

11
12 5: There are apparently a number of telephone lines at the
13 house and the purchasers would wish to take over these
14 lines but we would need to have details of the numbers
15 involved so as to pass the particulars to Messrs.
16 Wejchert. The latter would then arrange with the Telecom
17 office for transfer of existing A & D Wejchert numbers to
18 number 23 Lower Baggot Street.

19
20 6: If the vendor's insurance is for a figure below
21 £350,000, then we request that on the basis that
22 apportioned premiums would be shared between the parties
23 between this date and actual completion, arrangements be
24 made for the purchaser's name to be joined in the insurance
25 to completion."

26 It says there's a second page, sorry.

27
28 "Assuming matters are to proceed, please let us have
29 copies of the supplementary documents of title so that we
30 can deal with requisitions and draft deeds.

31 Yours faithfully...."

32 40 Q. Did you furnish the information that was sought by McArdle

1 and Company at that time, can you recall?

2 A. I would say I would, yes.

3 41 Q. Now, in November of 1989, did you receive a letter dated
4 the 17th November from Quinn Auctioneers in connection with
5 the Longford property? (Document handed to witness.)

6 A. Yes, this is a letter from Quinn Auctioneers, 51 Main
7 Street, Longford.

8 42 Q. Is it addressed to you or Frank Reynolds?

9 A. Frank Reynolds knew all about this. He'd help you out
10 later on.

11 " Re: Lands at Abbeycartron, Longford.

12 Dear Jim,

13 This fax is to confirm following negotiations by private
14 treaty and competition between two parties, we have managed
15 to obtain a sum of £34,000. I am now in receipt of a 10
16 percent deposit which is held by us strictly on a booking
17 deposit basis and the purchase is subject only to sight of
18 a satisfactory contract.

19

20 For the record, the purchaser is Frank Gearty (in trust)" -
21 there's the man that Joe knew well -- "Messrs. E.C. Gearty
22 & Co., Solicitors, Church Street, Longford and you should
23 instruct Dennis McArdle, solicitor, to forward contracts
24 and copy documents immediately.
25 Patrick Quinn for Quinn brothers."

26 Yes.

27 43 Q. Now we know that the letter was written on the 27th
28 November, 1989 from Duffy Mangan Butler to you and Michael
29 and Thomas Bailey. A copy of that letter I think was sent
30 to them in connection with the sale of the lands which were
31 referred to or most of the lands that were referred to in
32 the letters of the 10th July of 1989. Can you outline to

1 the Tribunal the circumstances that led up to the writing
2 of that letter? (Document handed to witness.)

3 A. Wait until I read it now. Well that, you see, that would
4 follow on from Joe's acceptance of the, to go ahead with a
5 quick sale to Bailey on the basis of the offer, 2.3
6 million.

7 44 Q. And can you recall when and in what circumstances their
8 offer was accepted?

9 A. Well, it was accepted here by Duffy Mangan and Butler.

10 45 Q. Yes.

11 A. Will I read it?

12 "Re: Lands at Lajos Holdings Limited...

13 Dear Mr. Gogarty,

14 We confirm in accordance with instructions, having this day
15 Monday the 27th November, 1989 at this office, sold the
16 above lands (as more particularly described in the attached
17 schedule) in trust to Messrs. Michael and Thomas Bailey of
18 Kilmonan House, The Ward, County Dublin for a sum of
19 £2,300,000, subject only to;

20

21 1: Deposit of 10 percent, being £230,000 on exchange of
22 contracts:

23

24 2: Marketable title.

25

26 3: Current lands zoning, that's agricultural/amenity.

27

28 4: Closing dates of sales, four months from date of
29 deposit and exchange of contracts.

30

31 We also confirm having on the same day advised the vendor's

32 solicitors, Messrs. McArdle and Company of 30 Upper

1 Fitzwilliam Street, Dublin 2, of the foregoing sale and
2 conditions and have been advised in turn by Mr. Dennis
3 McArdle that he had arranged a meeting at his offices with
4 the solicitor, Mr. Smith of Messrs. Smith Foy and Partners
5 of 59 Fitzwilliam Square, Dublin 2 at 5pm on Friday, 1st
6 December, 1989 to exchange contracts and take the deposit
7 as stated.

8 Yours sincerely,

9 Kevin P Duffy."

10 Copies to Messrs. Michael and Thomas Bailey, Killnamona
11 House, The Ward, County Dublin.

12 46 Q. Do you recall that sale being concluded, that agreement
13 being reached?

14 A. I beg your pardon?

15 47 Q. Do you remember when that agreement was reached?

16 A. I have a fair recollection of it, yes.

17 48 Q. What happened, can you say?

18 A. Well, as far as I was concerned, the deposit was paid, I
19 think, and sure hands shaken on the deal, you know.

20 49 Q. Did you have any further involvement in relation to the
21 sale of those lands after you receive that letter?

22 A. I would have had and with Frankie Reynolds, you see. The
23 sale was to be completed in four months and that was the
24 end of April but it wasn't completed because the house in
25 Poppintree that was on the 4 acres that we referred to
26 earlier, was destroyed by fire and vandalized and also, the
27 joinery works and outhouses were destroyed and the
28 purchaser couldn't get vacant possession in accordance with
29 the conditions of contract and he was refusing to close the
30 sale.

31 50 Q. Yes. I think the contract was signed on the 19th November
32 of 1989 -- 19th December, sorry, of 1989 with a closing

1 date of the 30th April, 1990?

2 A. Now, Frankie Reynolds came into this fairly actively then
3 because he was physically responsible for the security of
4 these premises, you see, and he will fill you in on the
5 details of it because there was a problem with liability
6 under the insurance, some insurance clause whereby for some
7 reason that should be explained legally, the liability for
8 the, for this damage wasn't passed on to the purchaser,
9 that's what was being argued, that the vendor was liable
10 for these and this gave rise to the purchaser refusing to
11 close because, claiming that he wasn't getting value in
12 accordance with the contract and getting the physical
13 possession of it, the property that they had bought and I
14 think there is some correspondence with Frank Reynolds and
15 the insurers on that and Mr. McArdle would have been
16 involved.

17 51 Q. Did you continue to be involved in any way in relation to
18 the management of the lands or otherwise after that time?

19 A. I beg your pardon?

20 52 Q. Did you continue to be involved with the control or
21 management of the lands until the sale was closed?

22 A. No, I wouldn't say I had, no. Frankie Reynolds would be
23 the man there, you see. The sale wasn't closed for a few
24 years after that.

25 53 Q. I understand that.

26 A. Oh sure it had, in effect, finished me with them on the
27 contract arrangements, you know, because I believe there
28 was an ongoing dispute between the vendors and the
29 purchasers and this involved Murphy junior and Murphy
30 senior. As I say, the lands were sold outright but I
31 don't want to be saying too much, it was evident to me that
32 there was sour grapes with Junior having lost control over

1 any potential in the lands because of the outright sale and
2 seemingly, he thought that when this problem arose --

3 .

4 MR. COONEY: How can he -- he says "sour grapes and he
5 thought," how can this witness give evidence on this?

6 .

7 CHAIRMAN: I agree with you.

8 .

9 MR. COONEY: Well that's a surprise.

10 .

11 CHAIRMAN: Mr. Cooney, I will require a minimum of
12 respect.

13 .

14 MR. COONEY: Yes indeed, Mr. Chairman.

15 .

16 MR. GALLAGHER: Mr. Gogarty, would you just confine
17 yourself to what your knowledge was of the operations and
18 the control of the lands at that time. You were aware
19 that the sale did not close because there were problems?

20 A. Yes.

21 54 Q. And I think there was an arbitration arranged between the
22 parties?

23 A. Well, as I say, prior to that, I had no control of the
24 lands then, I was only in construction but it was, I don't
25 know how I will put it but there was a dispute with Murphy
26 junior on the failure, about the failure of the purchaser
27 to complete the purchase.

28 55 Q. Yes.

29 A. And he felt it was a breach of contract.

30 56 Q. Yes.

31 A. And he organised an opinion to be got from senior counsel
32 and I attended that consultation in McArdle's office. He

1 was then a senior counsel, he was a judge later on, a well
2 known judge and that was Mr. McCracken, he was the senior
3 counsel and he advised Murphy and his opinion is on the
4 record, some place there on the record and his opinion --

5 .

6 CHAIRMAN: Mr. Gallagher, you are letting your witness --

7 .

8 57 Q. MR. GALLAGHER: Mr. Gogarty, Mr. McCracken as he then was,
9 gave an opinion and I think there were some other opinions
10 obtained.

11 A. Well, Mr. Murphy junior wasn't satisfied with McCracken's
12 opinion.

13 58 Q. He got another opinion?

14 A. He got another opinion.

15 59 Q. And following that opinion, what happened?

16 A. Well, this other senior counsel that gave his opinion
17 concurred basically with Mr. McCracken that, in effect,
18 there was three options; they could go to court or they
19 could go to arbitration or they could negotiate a
20 compromise and the advice, my understanding was that they
21 would negotiate a compromise because they referred to the
22 cost of --

23 .

24 CHAIRMAN: Could we tidy this down to what actually
25 happened.

26 .

27 60 Q. MR. GALLAGHER: Mr. Gogarty, would you tell the Tribunal
28 what happened as a result of that opinion and as a result
29 of the obtaining of the advises from two senior counsel?

30 A. Well, Mr. Murphy and Frank, Junior and Frank Reynolds
31 decided to try and get a compromise with Baileys and they
32 organised a meeting with Baileys in the Swiss Cottage after

1 those opinions, around about the ends of July 1989 -- 1990
2 and Frank Reynolds drove me and Junior to the Swiss Cottage
3 where we had some sandwiches and we were adjourned to a
4 table where we had the sandwiches and that and Michael
5 Bailey was there and his brother Thomas Bailey was there
6 and they produced a whole sheaf of drawings, a big role of
7 drawings and they lay them on the table and these drawings
8 showed projected developments of these lands including
9 industrial, commercial and leisure facilities on the lands,
10 how they were going to develop them. And these documents
11 were studied by Frank Reynolds and Junior and I had a look
12 at them as well and they were quite impressive, quite
13 impressive, and Michael Bailey says to Junior, "You can
14 have a half share in this development for 8 million," for 8
15 million. So the value of the lands had jumped from 2.3
16 million to the 16 million with no rezoning but that's
17 another day but Junior was shocked, he says, "I couldn't go
18 along with that," he said, "I would have to talk to me
19 father" so the meeting ended there. We came away.

20 .

21 CHAIRMAN: Mr. Gallagher, I think this sounds like a
22 change of topic, might we rise or do you want to continue
23 for a short period?

24 .

25 MR. GALLAGHER: Just for a short period.

26 61 Q. Following that meeting, was there any response that you
27 were aware of from Mr. Murphy senior or Mr. Murphy junior
28 in relation to the offer to sell 50 percent of the lands
29 for £8 million?

30 A. Not that I can recollect.

31 62 Q. I think the sale of the lands eventually took place in
32 September of 1991 or thereabouts; is that correct?

1 A. I couldn't tell you.

2 63 Q. Well, we will get --

3 A. Because I understood it went to arbitration from before
4 that, I don't know.

5 64 Q. Sorry, in fact I said September, 1991, I think that's
6 incorrect. There was an arbitration, we can refer you to
7 page 252 of the reference book.

8 .

9 MR. ALLEN: Sorry, Chairman, just before Mr. Gallagher
10 continues, there is one matter that I just want to refer to
11 because it seems to me no doubt been inadvertently
12 misleading. The witness indicated that as a result of
13 this meeting or at the meeting in the Swiss Cottage that
14 the value of the lands had risen to £8 million, 16 in
15 fact.

16

17 Now, I just want to make it clear, Sir, because that's the
18 sort of thing that captures headlines, there is no
19 substance whatever to such a suggestion as is clear from
20 the fact that the lands were, the transaction was
21 subsequently completed -- I appreciate, Sir, you have
22 indicated very fairly that you will weigh the evidence --
23 .

24 CHAIRMAN: Well, the point about it is this; all that was
25 said was they were offered a 50 percent interest and the
26 lands were offered to Mr. Murphy junior for a sum of £8
27 million. If you double that, you get the 16 million but I
28 mean it doesn't necessarily follow it's the value of the
29 lands, merely what he was offered and he refused it and we
30 will leave it at that.

31 .

32 MR. ALLEN: The offer was for 50 percent of the

1 development, of the proposed development.

2 .

3 CHAIRMAN: Yes.

4 .

5 MR. ALLEN: We are ad idem, Chairman.

6 .

7 CHAIRMAN: If you want to come in on this, it will cost

8 you 8 million and if you don't, so be it.

9 .

10 MR. ALLEN: And they didn't.

11 .

12 CHAIRMAN: Yes, end of story.

13 .

14 MR. ALLEN: Thank you very much, Chairman.

15 .

16 65 Q. MR. GALLAGHER: Mr. Gogarty, I think the evidence will

17 show in due course and you are not the man to deal with it,

18 that the sale did in fact close in September, 1991, without

19 prejudice to --

20 A. I beg your pardon?

21 66 Q. The sale of the lands did close in September, 1991 without

22 prejudice to an outstanding arbitration which --

23 A. Well, I don't know now.

24 67 Q. All right.

25 .

26 CHAIRMAN: I am sure yourself and counsel for Bovale can

27 agree a date of conveyance, when they closed the sale.

28 .

29 MR. ALLEN: Absolutely.

30 .

31 MR. GALLAGHER: It's an agreed date -- I think that's as

32 far as I wish deal with it --

1 .

2 CHAIRMAN: If this is an appropriate, it's now twenty past

3 eleven, we will sit again at 25 to 12.

4

5

6

7 THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED

8 AS FOLLOWS:

9 .

10 68 Q. MR. GALLAGHER: Mr. Gogarty, before the break, you told us

11 about, among other things --

12 A. I beg your pardon?

13 69 Q. Before the break, you told us, among other things, about

14 the meeting in the Swiss Cottage where there had been a

15 discussion in relation to the lands and you say that

16 certain drawings were produced?

17 A. Yes.

18 70 Q. Did you have any other meetings with Mr. Michael Bailey in

19 or around that time?

20 A. Shortly afterwards, yes.

21 71 Q. When was that?

22 A. It was in August, 1989. I got a telephone call from him

23 shortly after that meeting in the Swiss Cottage.

24 72 Q. But I thought you said the meeting in the Swiss Cottage was

25 1990?

26 A. Sorry, yes, 1990.

27 73 Q. Now when when did you have the meeting with Bailey that you

28 are referring to?

29 A. About a week or ten days after that.

30 74 Q. In what year?

31 A. 1990.

32 75 Q. And where did the meeting take place?

1 A. In the Skylon Hotel.

2 76 Q. Is that in Drumcondra?

3 A. Yes, up near Whitehall.

4 77 Q. And how did that meeting come about?

5 A. Well, he telephoned me to enquire had I any information
6 from the meeting in the Swiss Cottage about Murphy's
7 reaction to it, because Junior rejected his offer and he
8 said he he would have to talk to his father and I said I
9 hadn't heard anything since, I had no contact. He then
10 asked, he was anxious to meet me, would I meet him and he
11 pressed me and I agreed to meet him in the Skylon Hotel on
12 the Swords Road. It was about the end of August, 1990.

13 78 Q. What happened at that meeting?

14 A. Well, we went in and we sat down and we went over to a
15 corner of the lounge, it's quite an open place but in the
16 corner we had some tea and biscuits and we talked about it
17 and I had no information on it and the conversation wasn't
18 too long and he then started about my differences with the
19 Murphys and my legal hassles with them and that he didn't
20 want to get involved in court cases or he didn't want
21 anything dragged in about Ray Burke or himself, that they
22 would never get another bit of planning permission, it
23 would surface in court cases, you know, and it developed
24 along those lines and he said that I should forget about
25 the whole thing and enjoy myself and when we stood up to
26 leave, he took out a small envelope out of his pocket and
27 put it into my vest pocket and he said, "I will be in touch
28 with you later on," he says, you know. We came out into
29 the car park and we shook hands and left and that was all
30 that... I went home then and I opened the envelope and it
31 was a cheque for £50,000 and it was dated the 30th
32 September, 1990. I was shocked at what was in it. I had

1 no -- Baileys didn't owe me any money but I put it in my
2 pocket anyway, told my wife about it and I challenged him
3 about it later on and I forget about the incident then and
4 I don't know, we didn't know what happened to the cheque
5 because we used to have a little box, a tin box, you know,
6 on which we had documents and that was in it and we didn't
7 know where it went but it didn't surface until sometime
8 later, some years afterwards.

9 79 Q. Did I understand you to say that you challenged him about
10 it?

11 A. Yes, why was he giving me money?

12 80 Q. When did you challenge him about it?

13 A. I would say shortly after that, shortly after that.

14 81 Q. And did you do it personally or did you do it by telephone
15 or letter?

16 A. Telephone, telephone.

17 82 Q. And can you remember what was said?

18 A. Well, he said that it was meant to, I was meant to forget
19 about the whole thing and enjoy myself. I said, I had no
20 need for it, all I wanted was a bit of piece and quiet. I
21 had resolved my differences with Murphys and as far as I
22 was concerned, I had my pension now. That was the whole
23 lot of it.

24 83 Q. We'll arrange to have the cheque now -- (Document handed
25 to witness.) It's to be found at Exhibit JG6 in the
26 affidavit of Mr. Gogarty which has been circulated. Can
27 you identify that cheque, Mr. Gogarty?

28 A. That was the cheque I am talking about, Bovale Developments
29 Limited, House Builders, the 30/9/90, Montrose Branch,
30 Stillorgan Road, Dublin 4. Pay Jim Gogarty £50,000,
31 £50,000. I never lodged that cheque or it was never
32 cashed.

1 84 Q. Who is it signed by?

2 A. It's signed by Michael Bailey and Tom Bailey.

3 85 Q. Can you identify the number of the cheque please?

4 A. Well there's a lot of letters here, 500285690. 35, 59,

5 799, 36302.

6 86 Q. Do you say that that's the cheque that was given to you by

7 Michael Bailey at the meeting in the Skylon Hotel?

8 A. In 1990, late August, early September 1990.

9 87 Q. You are aware, are you, that Mr. Bailey is alleged to have

10 said that that cheque was given to you a year earlier or a

11 considerable time earlier?

12 A. Oh I heard that, yes. I heard that.

13 88 Q. What do you say to that suggestion?

14 A. I don't believe that. I am satisfied, as far as I am

15 concerned, it was at the Swiss Cottage meeting -- after

16 the Swiss Cottage meeting.

17 89 Q. Well, it's suggested that this cheque was paid to you in

18 connection with the sale or the anticipated purchase of 23

19 Lower Baggot Street?

20 A. I believe it was suggested but I can't see the logic to it

21 having regard to the circumstances, you know. Baggot

22 Street was sold by public auction, anybody could have bid

23 on it. Bailey, all right, put in a bid before the

24 auction, sometime before the auction but to Murphy, it was

25 a ridiculous bid, £250,000 and I think that Mr. Kevin Duffy

26 will, in a statement, I believe, that he would, he

27 confirmed that Bailey had no interest in Baggot Street,

28 showed no interest in it so I don't know what is behind all

29 that, you know.

30 90 Q. But in so far as you were concerned --

31 .

32 MR. ALLEN: Sorry, Chairman, if I might, just before this

1 questioning continues, apologise for interrupting My
2 Friend, I have concern in relation to this, Sir. Mr.
3 Gallagher has put it to the witness, as I understand it,
4 assuming that I have taken a correct note of the question
5 and heard it correctly, has put it to the witness that it
6 has been suggested and it was said and somebody said.
7 Now, in my respectful submission, Sir, he should identify
8 the sources of these particular allegations, if they be
9 allegations. The factual basis for, Sir, for his, for
10 what he is putting to the witness. The witness, in my
11 respectful submission, Sir, is put in a position, Mr.
12 Gogarty is put in a position where really he has no,
13 nothing open to him other than to speculate, as it were, on
14 this material. If Mr. Gallagher is putting something to
15 the witness, I would respectfully say he should indicate
16 who said what, when and where.
17 .
18 I have a feeling in the back of my mind, for example, that
19 he is now quoting, without giving him the credit to which
20 he is undoubtedly entitled, Mr. Frank Connolly. If that
21 would be the case, I would like that to be on the record,
22 if that is the source of these suggestions, it may be I am
23 wrong in which case I apologise in advance to Mr. Connolly
24 but with respect, Sir, I don't think it's fair for Mr.
25 Gallagher, I think it's an unsatisfactory manner of
26 proceeding, Sir, that he should talk in the most vague and
27 general of terms about matters which are now of enormous
28 relevance and which will become of even greater relevance
29 when the opposite to Mr. Gogarty's story unfolds. That,
30 Sir, is why I am labouring this point. I am not trying to
31 hold up matters. This is a critical issue. This will
32 become a critical issue as far as Mr. Gogarty's credibility

1 is concerned because he will be put to the test on this.

2 .

3 MR. GALLAGHER: Sir, I labour under some little difficulty

4 in this, in that whilst Mr. Bailey has chosen to furnish

5 his statement to the Tribunal in relation to certain

6 matters in rebuttal of material that's furnished to him, he

7 chose, has expressly chosen to reserve his position and his

8 story in relation to the circumstances in which this cheque

9 is alleged to have been furnished to Mr. Gogarty so I am

10 not in a position to put Mr. Bailey's version of events.

11

12 What I am putting to this witness is what I understand was

13 reported in the media, among other reports, and that is a

14 report in the Sunday Business Post in August of 1997, I

15 believe. The fact is that such a suggestion has been

16 made. Mr. Connolly has, in fact, said that Mr. Bailey

17 claims that he gave Mr. Gogarty the cheque for £50,000 in

18 1989 in order to get his assistance for Bailey's efforts to

19 purchase a JMSE owned property at 23 Lower Baggot Street.

20 He said the dated cheque in September, 1990 as incentive to

21 Gogarty to assist him. When he failed to secure the

22 property, he cancelled the cheque. What have you to say to

23 that, Mr. Gogarty?

24 .

25 CHAIRMAN: Just a moment, Mr. Gogarty. First of all, Mr.

26 Allen, may I point out to you the source has now been

27 identified on the basis of the allegation, put it that

28 way.

29 .

30 MR. ALLEN: Well, with respect, Sir, not as fully as I

31 would wish it. If you just bear with me, please, Sir, I

32 will ask you to bear with me for a moment.

1

2 Mr. Gallagher, in the course of his response, suggested
3 that he was at a disadvantage, albeit slight, in that in
4 the statement furnished on behalf of Mr. Bailey, put
5 forward by Mr. Bailey to the Tribunal, Mr. Bailey expressly
6 reserved his position on this particular matter. He did
7 so for reasons which are set out in the document.

8

9 Mr. Gallagher was under no disability in relation to this
10 question, because what he was doing was putting unsourced
11 material to the witness and asking him to comment and
12 speculate on it. I accept, Sir, fully what you say.

13

14 He has now, after a fashion, sought to redress that by
15 talking about Mr. Connolly and talking about the Sunday
16 Business Post. I would ask you, Sir, with the greatest of
17 respect, because of the specific importance of this matter,
18 that Mr. Gallagher, anything that Mr. Gallagher wants to
19 put to Mr. Gogarty in relation to this matter, be put to
20 him and that the source of what he is putting to him be
21 identified. That's the only point I wish to make, Sir,
22 and I accept what you say, of course, he has gone halfway
23 to meeting that obligation but I want the whole cake, warts
24 and all.

25

26 MR. GALLAGHER: The difficulties with putting the whole
27 case, warts and all is Mr. Bailey has said contrary to what
28 is suggested at paragraph 64 and 65 of Mr. Gogarty's
29 affidavit, "I never offered to pay or paid Mr. Gogarty
30 money in return for his agreeing to forget about pursuing
31 proceedings and simply to enjoy life. It is my intention
32 to supplement evidence of this particular aspect of Mr.

1 Gogarty's allegation when giving oral evidence to the
2 Tribunal."
3 I have this difficulty; whilst I know Mr. Bailey denies
4 that he offered or paid money to Mr. Gogarty in those
5 circumstances, I don't know the circumstances in which Mr.
6 Bailey says he gave them. But I want to put to you what
7 Mr. Bailey has said insofar as I can.

8

9 MR. ALLEN: Sorry, Sir, to deal with that if I may --

10 .

11 CHAIRMAN: This is becoming a ping pong adventure --

12

13 MR. ALLEN: With respect, I would ask you to bear with me,

14 I repeat and I emphasise the importance of this point.

15

16 CHAIRMAN: No doubt you are garnishing the point but you

17 have complained the source of the allegation was not

18 furnished. -- The source of the allegation is now being

19 produced to you, again validly so done. There is a limit

20 on the amount of information which is available to the

21 Tribunal, they have shown what, I beg your pardon, what

22 information they do have, as I understand it, namely they

23 quote from a journal where apparently the statement was

24 made by you to the journal.

25

26 MR. ALLEN: No, sir, with respect, it is said --

27

28 CHAIRMAN: I may be wrong in that.

29

30 MR. ALLEN: I am sorry, I shouldn't have interrupted

31 you. It is said in the newspaper that my client did say

32 such a thing. I don't know about you, Sir, but I do not

1 believe everything I read in the newspapers. Therefore
2 the fact that it appears in something as the Sunday
3 Business Post doesn't necessarily mean that it is true.

4

5 Now, I accept that that deals with the source point which I
6 made to you and this is the last, I won't rise to my feet
7 on this point again but I do want to get it on the record
8 at this point, Sir, that for the first time, Mr. Gallagher
9 has indicated that he is at a disability, I am talking
10 about his last contribution because he doesn't have the
11 full story. Last week, he was explaining to you, Sir, in
12 response to a submission from myself and Mr. Cooney that he
13 was under no obligation to tell or put the full story.

14 Thank you, Sir.

15

16 CHAIRMAN: Well Mr. Gallagher --

17

18 91 Q. MR. GALLAGHER: Mr. Gogarty, Mr. Bailey has decided that
19 he offered to pay or paid to you money in return for you
20 forgetting about proceedings or advised you to simply enjoy
21 life. Have you any observation to make on that?

22 A. Well, that's not what he put into the media, that's what I
23 am saying.

24 92 Q. What did he say to you?

25 A. I have told you what he said to me, to enjoy life and not
26 to involve him in my troubles with Murphy or to bring Ray
27 Burke into the matter because it would destroy Ray Burke
28 and his company wouldn't get any rezoning ever again and to
29 keep him out of the squabbles that I had with Murphys over
30 fraud and pensions and all that type of thing, you know.

31 And Frank Connolly told me that he told --

32 93 Q. Leave that for the moment, please. Now, having received

1 this cheque, you say at the end of August or early in
2 September of 1990, did you cash it or did you intend to
3 negotiate?

4 A. Never, never, never.

5 94 Q. Would you perhaps hand that cheque to the sole member.

6 (Cheque handed to Chairman.)

7

8 CHAIRMAN: Mr. Registrar, would you be kind enough to mark
9 that as an exhibit, whatever is, an appropriate number,
10 stamp it with the Tribunal stamp as an exhibit and it's
11 available for inspection from the registrar.

12

13 MR. ALLEN: Thank you, Sir.

14

15 95 Q. MR. GALLAGHER: Did you have any further dealings with Mr.

16 Michael Bailey or with Mr. Thomas Bailey?

17 A. The sequence I had was that the arbitration proceedings,
18 they tried to -- at that time I wasn't too well and I was
19 waiting for a bed to go into hospital and they tried to
20 subpoena me in connection with the arbitration and my wife
21 passed them on to my solicitor to deal with them at that
22 time. I never attended the arbitration but I went in to
23 hospital around that time. That was the arbitration. I
24 don't know what happened on it.

25 96 Q. Did you have any later dealings with Mr. Bailey?

26 A. Yes. I think the next time was in August, 1996, I am
27 jumping now, 1996 when he phoned me. At that time we were
28 still living in Renvyle, Sheilmartin Road, Sutton and he
29 asked me to meet him because he was anxious to meet me
30 because he had something interesting to talk to me about
31 and he pressed me and I met him in the Sutton Castle Hotel
32 in Sutton and --

1 97 Q. What time of the day or night did you meet him or can you
2 remember?

3 A. I beg your pardon?

4 98 Q. Can you remember the date on which you met him and what
5 time?

6 A. It was evening time in August, 1996.

7 99 Q. Was there anybody else present?

8 A. No. Michael Bailey. It started off and he says that he
9 was having a problem with the County Council on a site in
10 Palmerstown that they were developing and he said that
11 there was a wall there which the County Council were saying
12 was a dangerous wall and would have to be taken down and
13 rebuilt and he was fairly emphatic that in his opinion it
14 wasn't dangerous but he wanted an engineer's survey and
15 report to submit to the County Council and he was anxious
16 that I would do that for him and he would be very obliged
17 if I did and I said I was completely retired from work and
18 that as well as that, I had no professional indemnity, it
19 had lapsed, it was finished and so he then says that he
20 heard that our house was up for sale in Sutton and I said
21 it was, it was my wife's house actually but -- he asked me
22 what we were asking for it and I told him and he said, "Oh
23 God it's worth more than that." I says it is --

2 100 Q. How much did you tell him you were asking for it?

25 A. We were asking £250,000 for it. And he said that he had
26 some clients who would be very interested and would pay
27 more than that, well more than that and I said to him, "If
28 that's the case," I says, "We have an auctioneer retained
29 in Sutton and that's the man that you would want to contact
30 because he has the sole agency of selling the house."

3 101 Q. Who was that agent?

32 A. J B Kelly in Sutton. He had the exclusive right to sell

1 the house, you know.

102 Q. Did anything else happen at that meeting?

3 A. That's what he said but I said if he wants to do it, that
4 our agent had the sole right to sell the house and he then
5 raised the matter again of my rows with Murphys, you know,
6 and he wanted me to forget about it because he said that it
7 was only causing trouble and Ray Burke, he referred to Ray
8 Burke again, and that my solicitors were only down, out to
9 do Ray Burke because that time, I had changed my solicitors
10 and I had gone to Donnelly Neary and Donnelly in Newry who
11 were acting for a consortium that were pursuing corruption
12 in the planning process and he says that Neary were only
13 out to do down Ray Burke and himself and he pleaded with me
14 to get rid of them, get rid of them, get rid of them.

1 103 Q. Was there -- did anything else happen at that meeting or
16 can you recall anything else that was said?

17 A. At the moment, I can't.

1 104 Q. Well, following that?

19 A. What? He asked me where we were thinking of going to when
20 we sold the house and I said we hadn't decided and I did
21 say our wish would be if we could settle down in Galway.
22 He said that at that time they were developing property in
23 Kilmainham and he could interest me in a house there if I
24 wanted and I said we wouldn't be staying in Dublin, we were
25 trying to get out of the city. That's about all.

2 105 Q. Following that meeting, did anything else happen in
27 relation to your house?

28 A. We sold the house. We sold the house. And when we were
29 selling the house, you see, we engaged a solicitor and we
30 had to get all relevant documentation, title documentation
31 and that type of thing, you see, and all that stuff with
32 other stuff was in an envelope and it was in the Ulster

1 Bank for some years and we got that to get the title
2 documents out of it to give to the solicitor. And among
3 the documents in the envelope, there was the cheque.

106 Q. Is that the cheque you have just referred to and handed in?

5 A. Yes, so it surfaced that time and I told Frank Connolly
6 about that.

107 Q. All right.

8 A. And I gave him the number of it.

108 Q. All right. Did you -- following a meeting with Mr.

10 Bailey, were you contacted by anybody?

11 A. Oh yes. About a fortnight afterwards, there was a call to
12 the house from an auctioneer, I am almost a hundred percent
13 certain it was Farrell and Cleere, that's my
14 recollection. It was a lady. She said she was an
15 auctioneer in Farrell and Cleere and she had instructions
16 to survey my house because she had potential purchasers and
17 I said, "Who gave you them instructions?" And she says,
18 "Mr. Bailey." I says, "I never gave Mr. Bailey any
19 instructions to that effect" and "Well," she says, "He did"
20 and I says, "Who would be liable for fees on that type of
21 thing?" And she said, "You would be liable" and I said, "We
22 have already an auctioneer" and I gave her the name of the
23 auctioneer and anything that would be done has to be done
24 through Mr. Kelly so I never heard any more.

2 109 Q. Well now, I think you sold that house in November, 1996?

26 A. The end of October, I would say.

2 110 Q. All right.

28 A. Sorry, October 1996 because we moved to Clontarf, I would
29 say, towards the end of October, 1996.

3 111 Q. Did you have any subsequent conversation with Mr. Bailey?

31 A. Yes. You see, as a result of the papers, you know,
32 appearing in the papers, you know, all this stuff, you see,

1 and --

2

3 MR. ALLEN: Sorry to interrupt you, Mr. Gogarty says "As a
4 result of it appearing in the papers all this stuff".

5

6 CHAIRMAN: Just a moment, I want to find out myself.
7 Could we clarify that? I just don't understand it.

8

9 MR. GALLAGHER: What stuff are you referring to appearing
10 in the papers?

11 A. I am talking about the whole episode I have been telling
12 you about in the box here for the last week or ten days,
13 all that thing and the repercussions on him on it being out
14 in the open about himself and Burke and all that type of
15 thing and that he was under stress from it, but he said
16 that he was very annoyed because of what was published in
17 the Business Post and that I had given Frank Connolly
18 information about the cheques and the circumstances and
19 that he was warning me what I was doing and as a last
20 chance, he had set up a meeting with Junior to meet me and
21 I should meet Junior, failure to meet him would be at my
22 own peril. I said I was finished with Junior and finished
23 with him and I left down the receiver.

2 112 Q. And did you have any further meetings or discussions with
25 Mr. Bailey after that?

26 A. That was the last of it. That was the last of it.

2 113 Q. Mr. Gogarty, I now want to turn to the events which led up
28 to --

29

30 MR. ALLEN: Sorry, Sir, before Mr. Gallagher proceeds on
31 to another matter, could I just have some clarification
32 from you, Sir, as to the last piece of evidence which was

1 given by Mr. Gogarty. I am not talking about his
2 definition of stuff, I am talking about the allegation
3 which he has made to the effect that he was threatened by
4 Mr. Bailey. Is Mr. Gallagher going to put to Mr. Gogarty,
5 given that he has told us that he is here to produce all of
6 the evidence available, is he going to put to Mr. Gogarty
7 that Mr. Bailey, in a statement submitted to him, furnished
8 by him to the Tribunal, specifically denies this allegation
9 of a threat or any kind of a threat and the reason I ask
10 you this, Sir, is that manifestly, cross-examination hasn't
11 begun and do bear with me, Sir, I think it is a reasonable
12 point to make, cross-examination has not begun.

13
14 I see at least one reporter last night who made the point
15 that only one side of the story had been heard but it is
16 precisely on that aspect of the situation, Sir, that I wish
17 to address you very briefly. You have told us quite
18 rightly, in my respectful submission, that the purpose of
19 these public hearings is to lay before you, Sir, to have
20 laid before you, and the public in general who have a
21 specific and unchallengeable right to know, all of the
22 facts, because as you told us, when you opened these public
23 hearings, this is not a trial, there is no jury and what I
24 have to do is hear all of the facts.

25
26 Now, one of the facts -- the only facts we have been
27 getting so far are what Mr. Gogarty has chosen to
28 characterize as facts. Nothing has been put to him by
29 leading counsel for the Tribunal of the other material
30 which is within the possession of the Tribunal which
31 contradicts what Mr. Gogarty has to say.

32

1 And I raise this point, Sir, I appreciate you may wish to
2 do with at another time but I raise it now and I have
3 raised it before by the way on a number of occasions
4 because it seems to me to be unhelpful and I don't say that
5 in any aggressive or abrasive fashion, Sir, but it is
6 unhelpful and going beyond that, unfair to my client that
7 allegations of this sort should be made by Mr. Gogarty,
8 carried in the national media today or tomorrow and no
9 doubt over the weekend, without Mr. Gallagher having had
10 the courtesy of putting it at its kindest, I believe it is
11 an absolute obligation to put to Mr. Gogarty that of course
12 Mr. Gogarty, you are only one witness in this matter and
13 Mr. Bailey denies what you say and indeed worse, Mr. Bailey
14 says that a lot of what you have said, not a lot but in
15 each and every of the allegations that you have made
16 against Mr. Bailey is a lie and a falsehood.

17

18 CHAIRMAN: Just a moment please. Are we not, in fact,
19 rehearsing your cross-examination, giving you a first
20 run. I am looking here at the transcript, run that
21 transcript back a little bit further --

22

23 MR. ALLEN: Sir, if I might --

24

25 CHAIRMAN: Just a moment, I want to get the thread.

26 Mr. Gogarty's answer was, Mr. Gallagher's question; "What
27 stuff are you referring to appearing in the papers?"

28 Answer: "I am talking about the whole episode that I have
29 been telling you about in the box here for the last week or
30 10 days. All that thing and suggestions, a lot of
31 suggestions being out in the open about himself and Burke
32 and all that type of thing and that he was under stress," -

1 that's Mr. Bailey was under stress from it. "He said that
2 he was very annoyed because what was published in the
3 Business Post and that I had given Frank Connolly
4 information about the cheque, cheques and the circumstances
5 that he was warning me and, and in the circumstances that
6 he was warning me what I was doing was a last chance to set
7 up a meeting with Junior and failure to meet him would be
8 at my own peril. I said I had finished with Junior and
9 finished with him and left down the receiver."
10 That appears to be end of what you have been describing as
11 a threat.

12

13 MR. ALLEN: Yes.

14

15 CHAIRMAN: "Did you have any further discussions?"

16 A: That was the last.

17 Q: Mr. Gogarty I now want to turn to the events that led
18 up" -- Mr. Gallagher asked the question, "and did you have
19 any further meetings or discussions with Mr. Bailey after
20 that?" "That was the last of it. That was the last of
21 it."

22 "Mr. Gogarty, I now want you to turn to the event that led
23 up to.." And you intervene. "Sorry, Sir, before Mr.
24 Gallagher proceeds with the matter, could I have some
25 clarification by you, Sir, of the last piece of evidence
26 given by Mr. Gogarty. I am not talking about the
27 definition of stuff. I am talking about the allegation he
28 made to the effect that he was threatened by Mr. Bailey.
29 If Mr. Gallagher is going to put to Mr. Gogarty... That he
30 is here to produce all the evidence available, is he going
31 to put to Mr. Gogarty that Mr. Bailey in a statement
32 submitted by him to the Tribunal specifically denying the

1 allegation." Mr. Gallagher put that, it's not a matter
2 for your cross-examination.

3
4 MR. ALLEN: With respect, Sir, I am pleased with the point
5 you have raised and I think you have knit the point very
6 well and I accept there may be differences between us on
7 this but I wish to make absolutely clear and I have
8 endeavoured on a number of occasions to make clear before,
9 Sir, it is my respectful submission and I believe those of
10 others of the legal representatives not including your own
11 legal team, that it is the function of counsel to the
12 Tribunal to lay before this Tribunal all the evidence,
13 warts and all, to adopt Mr. Gogarty's phrase.

14
15 Now, that has not been done and is not being done save for
16 this singular inconsistency in relation to the approach
17 that has been adopted by Mr. Gallagher in relation to the
18 last questioning. On the one hand apparently he feels
19 justified and entitled in putting to Mr. Gogarty what a Mr.
20 Frank Connolly, who is a journalist in the Sunday Business
21 Post, told Mr. Gogarty and what Mr. Gogarty told Mr. Frank
22 Connolly. On the other hand, he does not feel that he has
23 any obligation whatever to put to Mr. Gogarty that your
24 allegations in these regards are denied.

25
26 Now the point I wish to make, Sir, and I accept if you take
27 that position because I must, the point I wish to make is
28 that my understanding of the nature of the Tribunal, given
29 my acceptance that a Tribunal in the main sets out its own
30 procedures, but those procedures themselves must be fair
31 and involve an exposition of all of the evidence and when
32 you say, Sir, that it is for me to establish what I wish to

1 establish or seek to establish by the purpose of
2 cross-examination, I say with deep respect, Sir, that that
3 actually creates an adversarial situation.

4

5 It seems to me that it behoves Mr. Gallagher as lead
6 counsel to this Tribunal who is taking this witness through
7 his evidence, which it must be recognised if it were to go
8 untested and unchallenged, is deeply damaging to those
9 against whom he has made unfounded allegations, that Mr.
10 Gallagher, as counsel to this Tribunal, as counsel to you,
11 Sir, would be found... by Oireachtas Eireann to enquire
12 into these matters must set out in public all of the
13 evidence. It's not for me to come up with a kosh to be
14 seen to be attacking Mr. Gogarty. I want to hear counsel
15 to the Tribunal put to Mr. Gogarty what other people are
16 saying about Mr. Gogarty.

17

18 CHAIRMAN: Mr. Allen --

19

20 MR. ALLEN: I accept that may require consideration, Sir,
21 or indeed you may be able to dispose of rather more
22 quickly.

23

24 CHAIRMAN: Mr. Allen, as I understand the procedure and I
25 hope I have got it right, counsel for the Tribunal leads
26 the witness on the witness's evidence. It is open to
27 inquiries -- the work used in adversarial circumstances in
28 cross-examination, it is open to the impugned person, if I
29 may use that phrase, to question the witness. It is open
30 to him to advance his own version in response if he wished
31 to do so and it is open at the end of the day to the final
32 examination of tidying up of counsel for the Tribunal if

1 there are any loose ends which require to be clarified,
2 surely that's the point in time, which -- the point being
3 made by you and fairly made, that counsel for the Tribunal
4 is obliged to tidy it up. It's not entitled to juggle
5 around and turn both sides of the coin. He is presenting
6 to the Court in the first instance the witness's evidence
7 as tendered to him by the witness in the form of
8 statements. If unusual circumstances, to use that neutral
9 phrase, arises during the course of the evidence and as a
10 result of your endeavours to clarify it, he is entitled to
11 re-examine the witness on what he will presumably or one of
12 the members of the team re-examine the witness to finally
13 clarify the situation. That's how a Tribunal works.

14

15 It's not like he examines him on what the witness's case
16 is, then goes and looks at your statements and says now, we
17 will go down through this and put everything that your
18 client, if he has made a statement on the limited occasions
19 which we have got them from some people, not necessarily
20 your client, he is not obliged to put them to him because
21 presumably he is, that's what you are there to do and
22 ultimately we tidy it up and we get the whole picture --
23 isn't that the reality? I am not suggesting you have an
24 obligation to point to Mr. Gallagher or whoever is in
25 charge of the witness to the error of his ways which
26 certainly you are entitled to say to Mr. Gogarty, is it not
27 true that you are aware from documents sent to the Tribunal
28 that this is challenged and challenged in the following
29 manner. If that doesn't clear the matter, the Tribunal
30 team should tidy it up. Isn't that the reality?

31

32 MR. ALLEN: With respect, Sir, that perhaps it could be

1 argued should be the reality but I want to advance it a
2 little further because it does seem to be of particular
3 importance. What you have said, Sir, is my respectful
4 submission, is entirely inconsistent with the approach
5 adopted by Mr. Gallagher now to the extent of when you talk
6 about tidying up, I would have to respectfully disagree
7 with you, Sir, that an exercise where somebody says,
8 alleges against my client that he threatened him, that
9 tidying that up three or four weeks down the road is a
10 tidying up exercise.

11

12 CHAIRMAN: Not three or four weeks down the road. At
13 least I sincerely hope we won't have Mr. Gogarty in the
14 witness-box --

15

16 MR. ALLEN: Well, at the present rate.

17

18 CHAIRMAN: You may have some basis for that.

19

20 MR. ALLEN: I have said nothing thus far and we are two
21 weeks into it.

22

23 CHAIRMAN: What I am saying to you is this, that this
24 procedure was outlined to you over three months -- it's a
25 procedure which is certainly to be found in jurisprudence
26 of Tribunals. It's to be found in a variety of decisions
27 in the High and Supreme Courts. It follows from the
28 Appeals Court in England and it follows the Canadian
29 decision in Red Cross -v- Canada. That's the source of
30 the... procedures. I see nothing unfair at the moment in
31 those proceedings and I think we will let the matter
32 rest.

1

2 MR. ALLEN: I will let the matter rest, Sir, with your
3 permission if I can just conclude on two points. One of
4 the reasons I raised it, I raised it specifically for two
5 very particular reasons; one because it seemed to me if
6 that be the established procedure, Mr. Gallagher had
7 departed from it by putting material which he has for Mr.
8 Connolly who, as we know, has furnished a Statement of
9 Evidence to this Tribunal and whom we believe is going to
10 be called to give evidence.

11

12 Now, he has put Mr. Connolly -- he has put some of Mr.
13 Connolly's material to Mr. Gogarty and it seems to me it
14 must follow as night follows day that what's sauce for the
15 goose is sauce for the gander so he has departed from it in
16 that way but I am afraid, Sir, to put it a little further
17 than that, you will find in the transcript Mr. Gallagher
18 has said himself in legal submissions to you in response to
19 a submission from Mr. Cooney that all the evidence, all the
20 evidence before the Tribunal, all the evidence in the
21 possession of the Tribunal would be in the fullness of time
22 laid before this Tribunal by counsel to the Tribunal.
23 That's not what happened and I close on that point, Sir.

24

25 CHAIRMAN: So be it.

26

27 MR. GALLAGHER: Sir, I would just like to say that Mr.
28 Allen has once again taken an opportunity to address the
29 Tribunal. He has done so and he has criticised me for
30 introducing material and for quoting Mr. Frank Connolly in
31 relation to matters which were referred to by Mr. Gogarty
32 in his evidence. I did, Sir, you will recall, so,

1 specifically because Mr. Allen wanted the source of that
2 information put to Mr. Gogarty. I didn't introduce it,
3 Mr. Allen insisted that it be introduced and I did so.
4 That's the first thing.
5
6 The second thing is this; Mr. Allen criticised me for
7 failing to put a rebuttal or a denial by Mr. Bailey in
8 relation to a threat that was alleged to have been made.
9 Mr. Gogarty did not say that he was threatened by Mr.
10 Bailey. What Mr. Gogarty said is that, "If he failed to
11 meet Mr. Murphy, the failure would be at his own peril."
12 They are his -- no threat in those words that I understand
13 and therefore there was no need to put anything to Mr.
14 Gogarty in those circumstances. If Mr. Allen has a look
15 at what Mr. Bailey has said, he has denied an allegation of
16 a threat and he has, but he has not denied any allegation
17 of a meeting. I don't believe that it is necessary when I
18 have somebody as loquacious and capable and competent and
19 experienced as Mr. Allen to look after his client, that I
20 should put every rejoinder to Mr. Gogarty or indeed to
21 anybody, I think that it would unnecessarily prolong the
22 proceedings but if there is anything that is overlooked by
23 counsel to the Tribunal or anybody else, hopefully it will
24 be picked up and it will be introduced at some stage to the
25 Tribunal and be considered by the Tribunal.
26
27 All evidence, as I have said, will be put before the
28 Tribunal in the fullness of time. The fact that it isn't
29 being put in the order that Mr. Allen might like it to be
30 put or otherwise would not deflect the Tribunal team from
31 putting the evidence forward as they consider appropriate
32 and as they consider is in the sequence that is appropriate

1 and convenient at the particular time.

2

3 CHAIRMAN: Thank you very much. We can proceed now.

4

114 Q. MR. GALLAGHER: Mr. Gogarty, I now want to turn to the
6 circumstances leading up to the events of 1989 and 1990
7 relating to your leaving the JMSE companies, the question
8 of your pension and the issue in relation to the ESB final
9 account and the settlement of that final account and the
10 events that gave rise to it and that followed it.

11

12 Now, for the sake of completeness and hopefully in the
13 event that we will have all the relevant documents and if I
14 omit any document because it is in some of the discovery
15 that hasn't been actually connected which stage, I know Mr.
16 Cooney will draw my attention to it.

17

18 The first letter is a letter that was, I think, requested
19 by one of the parties, requested, I was requested to put
20 this letter to you on a previous occasion and the document
21 is at page 854 of book 4. (Document handed to witness.)

22 It's a letter of the 26th May, 1989 from McCann Fitzgerald,
23 Mr. Sheedy of McCann Fitzgerald to Mr. Buckley. And it
24 refers to a meeting that you had with Mr. Murphy on Monday
25 last, which I believe is the 22nd May 1989. Do you
26 remember that meeting, Mr. Gogarty?

27 A. With Mr. Oakley, is it?

2 115 Q. The meeting with Mr. Murphy.

29 A. Oh yes. There was several meetings with Mr. Murphy.

3 116 Q. This is a meeting in London following which you instructed

31 Mr. Sheedy, who wrote this letter on the 26th May?

32 A. Yes.

117 Q. When did you first instruct Mr. Sheedy, can you remember?

2 A. I would say it was only about a week before that or a few
3 days before that, because I was concerned about what
4 happened in the Killiney Castle Hotel.

118 Q. What happened in the Killiney Castle Hotel?

6 A. I am mixing them up now -- well, I will come back to the
7 letter. That meeting was in London with Mr. Murphy and I
8 understood we had reached an amicable settlement under
9 various headings for my retirement package and I itemised
10 them to Mr. Sheedy and he wrote this letter as a result of
11 that.

1 119 Q. Perhaps I can read this letter quickly because it has

13 already been read and just for the record I will read it
14 again. It's a letter to Mr. Oakley.

15 "Dear Mr. Oakley,

16 I understand that Mr. Murphy and Mr. Gogarty had an
17 amicable and constructive discussion in London on Monday
18 last which resulted in a resolution of a number of issues
19 with them and agreement being reached that other matters
20 would be discussed at a later date. The effect of the
21 meeting has been to bring about a significant improvement
22 of the relationship between Mr. Murphy and Mr. Gogarty.
23 Hopefully this will lead to the restoration of the mutual
24 trust and understanding which had existed for many years.

25

26 In order to avoid any possible misunderstandings and in an
27 endeavor to build on a successful outcome of the meeting
28 between our respective clients, perhaps you would have your
29 client confirm the following heads of agreement:

30

31 1: A sum of £300,000 would be made available by JMSE

32 Limited for the purchase of a pension in Ireland for

1 Mr. Gogarty and his wife.

2

3 2: Mr. Gogarty will retire as a director from his
4 executive positions in JMSE and AGSE Limited. Mr.
5 Gogarty will be retained as a consultant by each of
6 these companies for a period of five years at his
7 current salary and on terms which will include the
8 provision of a company car and payment of Mr. Gogarty's
9 telephone charges and vouched expenses.

10

11 3: Mr. Gogarty will negotiate on behalf of JMSE with the
12 Electricity Supply Board (ESB) for payment by ESB of
13 monies due to JMSE in connection with goods and
14 services supplied in relation to the Moneypoint
15 Generating Station Project. By way of commission, 50
16 percent of the amounts recovered from the ESB by Mr.
17 Gogarty, will be paid to him. Any expenses incurred
18 by Mr. Gogarty in this connection will be undertaken by
19 JMSE Limited.

20

21 4: A sum of £70,000 will be paid to Mr. Gogarty.
22 This sum represents undrawn bonuses and salary
23 increases due to Mr. Gogarty and a sum for compensation
24 in relation to the Sutton site.

25

26 I am sure you will agree with me that the present spirit
27 and good will and cooperation which our clients' meeting
28 has engendered should be consolidated as quickly as
29 possible by way of confirmation of these heads of
30 agreement. Accordingly I look forward to hearing from you
31 when you have received your client's instructions and if
32 possible by the end of next week. Due to the postal

1 difficulties we are experiencing in Dublin, I suggest that
2 correspondence between us should be communicated by fax.
3 Yours sincerely,
4 Gerald B Sheedy,
5 McCann Fitzgerald."

6
7 Now, is that the letter that was written on your
8 instructions?

9 A. Yes, that's right.

1 120 Q. And so far as you were concerned, did that letter reflect
11 what had been agreed between yourself and Mr. Murphy's
12 heads of agreement?

13 A. Yes, yes.

1 121 Q. Did you have discussions then in relation to this matter
15 with Mr. Sheedy, ongoing discussions?

16 A. Ongoing, they were protracted.

1 122 Q. All right. And did you also have discussions with Mr.
18 Copsey in relation to these matters?

19 A. On occasions, yes, yes.

2 123 Q. Now, did you have a response or a letter of the 29th June
21 of 1989 from Pickering Kenyon to McCann Fitzgerald?
22 (Document handed to witness.)

23
24 MR. LEAHY: I think this is at Book 4, Page 36 of the
25 transcript, book 4, page 36 of the transcript of these
26 hearings, we have had them already.

27 .

28 CHAIRMAN: Transcript of the hearings, sorry, I beg your
29 pardon.

30

31 MR. GALLAGHER: I hadn't intended putting attendances by
32 Mr. Sheedy to the witness but I am happy to do so if Mr.

1 Cooney wishes me to do so. There's an attendance of the
2 26/5/1989. It's document 226, page 857 in book 4.

3

4 "Mr. Oakley telephoned in response to my fax. He has
5 discussed the contents of my letter with Mr. Murphy and
6 Points 1, 2 and 3 are agreed with regard to point 2, the
7 salary is agreed at £23,000 per annum.

8

9 Mr. Murphy is annoyed with point 4 because this point was
10 not even discussed with Mr. Gogarty. The financial
11 package which was offered in points 1, 2 and 3 is the final
12 offer from Mr. Murphy and there are no other financial
13 rewards to pass to Mr. Gogarty.

14

15 He asked me to obtain Mr. Gogarty's instructions and
16 telephone him before he writes to me to confirm our
17 agreement".

18

19 Now, have you that read, that attendance?

20 A. Yes.

2 124 Q. You understand Mr. Oakley is saying Mr. Murphy and yourself
22 did not even discuss Point 4 which is the suggestion that
23 £70,000 would be paid. What do you say to that?

24 A. That's incorrect.

2 125 Q. Do you say you did discuss it?

26 A. Oh yes.

2 126 Q. Did you agree with Mr. Murphy at that meeting?

28 A. Yes, and, in fact, I had agreed to it earlier with Mr.

29 Copsey who could confirm it.

3 127 Q. Can you say where you confirmed it with Mr. Copsey?

31 A. In Dublin, a way back in the previous October, around the
32 previous October.

128 Q. There's a second attendance of the 26th May of 1989, Mr.

2 Sheedy's and it's really you, re: Jim Gogarty. (Document
3 handed to witness.) It's page 858 in book 4 and I will
4 read it.

5 "Mr. Oakley telephoned to say that he had been speaking
6 with Mr. Murphy who instructed him as follows: (Paragraphs
7 numbered as in my letter).

8

9 1: Agreed.

10

11 2: Agreed subject to the current salary being mentioned
12 specifically at £23,000.

13

14 The company is not going to provide and maintain a car for
15 Mr. Gogarty. It will transfer his present car to him free
16 of cost and he will pay the cost of maintenance.

17

18 3: Agreed.

19

20 4: This subject was not even discussed between Mr. Murphy
21 and Mr. Gogarty on Monday last and is not agreed.

22

23 Mr. Murphy is prepared to offer points 1, 2 and 3 as final
24 offer to Mr. Gogarty and is not prepared to negotiate.

25

26 I telephoned Mr. Gogarty who said that his salary is
27 £23,500 per annum.

28

29 He was annoyed with the provision about the car and I
30 pointed out to him that petrol costs could be included
31 under vouched expenses. He accepted the provision about
32 the car.

1

2 He mentioned that the consultancy is to be with Lajos
3 Holdings Limited and not JMSE or AGSE.

4

5 He insisted that paragraph number 4 was discussed but I
6 persuaded him that there was no point in falling out over
7 that sum at this point.

8

9 After some discussion, he agreed the terms with the
10 intention of negotiating further with Mr. Murphy when these
11 terms had been incorporated into a signed agreement.

12

13 I telephoned Mr. Oakley who said he would take instructions
14 concerning the consultancy with Lajos Holdings Limited but
15 did not expect any difficulty.

16

17 I told him that Mr. Gogarty insisted that point number 4
18 had been discussed with Mr. Murphy and agreed with him but
19 that we were not insisting on this being included in the
20 agreement."

21 And it's initialed G B S, Mr. Sheedy's initials.

22 Have you any observations to make on that memorandum, Mr.

23 Gogarty?

24 A. Well, I have. I accepted Mr. Sheedy's advice and also my
25 accountant's advice, Mr. Howley because of the long drawn
26 situation and they were telling me and rightly so that I
27 wanted to get the basics right and get out and I had to eat
28 humble pie. That was the situation.

2 129 Q. Now, the next document I want to put to you is a letter of

30 the 15th June, 1989 from McCann Fitzgerald to Mr. Oakley

31 and -- the reference is page 866 in book 4. It's

32 document 233. I will read this letter to you, and then

1 you can comment.

2

3 Mr. Oakley, re: Joseph Murphy and James Gogarty.

4

5 "Dear Mr. Oakley,

6 Mr. Copsey, in the course of the conversation with Mr.

7 Gogarty on Friday last, stated that sometime ago, he had

8 provided with you the information which you required

9 concerning the Irish tax implications of the proposed

10 pension arrangements for Mr. Gogarty.

11

12 As you can imagine, this has caused Mr. Gogarty some

13 anxiety. If, in fact, you have all the information that

14 you require, please let me have your letter by way of

15 confirmation of the details of the agreement to be entered

16 into between Mr. Murphy and Mr. Gogarty.

17

18 Yours sincerely,

19 Gerard B Sheedy."

20

21 Have you any observation to make on that?

22 A. No.

2 130 Q. The next letter is document number 86, it's a letter of the

24 19th June, it's document 234 and it's page number 867.

25 It's a letter from Pickering Kenyon to Mr. Sheedy. It's

26 dated the 19th June and it's date stamped received the, I

27 think the 30th June, 1989.

28

29 "Dear Mr. Sheedy,

30 Thank you for your letter of the 15th June the contents of

31 which are noted.

32

1 I am still awaiting confirmation of a number of points not
2 solely relating to the tax implications from Mr. Copsey. I
3 spoke to him by telephone on Friday in an effort to agree
4 with him the contents of the letter which I shall be
5 sending you shortly.

6

7 He has promised to let me have his proposed amendments by
8 today."

9

10 What role, if any, did Mr. Copsey have in the discussions
11 and in the arrangements at that time?

12 A. Well, I think it refers to tax implications and my
13 understanding is that it wasn't my tax implications, it was
14 Murphy's tax implications, how they were going to put all
15 that through their books, I don't know.

1 131 Q. Now, the next document is page 871 of book 4, it's document
17 236 and it's a letter of the 27th June, 1989 from Mr.
18 Sheedy to Mr. Oakley.

19

20 "Dear Mr. Oakley,
21 Mr. Gogarty met with Mr. Copsey yesterday. In the course
22 of their discussion, Mr. Copsey stated that he had
23 responded to all your inquiries. Mr. Gogarty is now
24 becoming uneasy with the delay in finalising his agreement
25 with Mr. Murphy. I think it is in the best interests of
26 both our clients to have this agreement finalised without
27 further delay and I suggest we aim to have exchanged
28 letters confirming our respective clients' agreement by the
29 end of this week.

30

31 Yours sincerely,

32 Gerard B Sheedy."

1

2 The next letter is a letter of the 29th June and it's to be
3 found in book 4, page 875. It's also at page 879. It's
4 a letter from Pickering Kenyon to Mr. Sheedy. And it's
5 sent by fax on that date.

6

7 "Dear Mr. Sheedy,

8 I refer to your letter of the 26th May and our subsequent
9 telephone conversations. I have now express instructions
10 from Mr. Murphy in connection with the matters raised in
11 your letter of the 26th May upon which I will comment as
12 follows in respect of the numbered paragraphs of your
13 letter:

14

15 1A: The maximum sum of £300,000 will be provided to JMSE
16 to purchase a pension for Mr. Gogarty and his wife.

17 The actual amount of the pension would be equal to the
18 maximum allowable for tax purposes which as I
19 understand it, is a product of the number of years
20 service and his salary. The arrangements for the
21 pension will be agreed with Mr. Gogarty's pension
22 advisors. However it should be recorded that the
23 amount of the pension is recognised by the company and
24 I understand your client to be potentially less than
25 £300,000.

26

27 1B: The balance of the £300,000 would be paid to Mr.
28 Gogarty in the most tax efficient manner. This will
29 be done in liaison with Mr. Gogarty's advisors. One
30 possible solution actively being considered at present
31 is to make the whole of the balance tax efficient as
32 follows:

1

2 A: Increase Mr. Gogarty's salary for the last year of
3 employment.

4

5 B: Pay a tax-free lump sum upon retirement related to
6 his last year's salary.

7

8 1C: The increases in Mr. Gogarty's salary for the year of
9 retirement will be compensated for by decreasing the
10 amount of consultancy payments for the ensuing year as
11 referred to below.

12

13 2A: Mr. Gogarty will be retained as a consultant to any
14 company within the Lajos Group at his current salary
15 (£23,500) for a period of five years. His existing
16 company car will be transferred to him at no cost and
17 he will thereafter become responsible for all
18 expenses in connection therewith. His telephone
19 charges and vouched expenses will be paid for by the
20 companies.

21

22 2B: In order to achieve tax efficiency it may be
23 necessary for Mr. Gogarty to resign as a director
24 from any of the companies within the Lajos Group. I
25 understand that is acceptable to Mr. Gogarty.

26

27 2C: The consultancy payments will be guaranteed by Lajos
28 Holdings Limited but may be paid by any company
29 within the Lajos Group.

30

31 3: Mr. Gogarty will have sole rights of negotiation of
32 the claim in respect of the Electricity Supply Board

1 contract. He will be paid a commission of 50 percent
2 of the net amount recovered in respect of the claim
3 but his commission shall only be payable in respect of
4 any net offer in settlement made in excess of that
5 already offered by the electricity supply board of
6 £43,000.

7

8 4: I am instructed that the contents of this paragraph
9 were not discussed or agreed between Mr. Gogarty and
10 Mr. Murphy and do not form part of any settlement.

11

12 The above represents the complete agreement on all matters
13 between our respective clients. Upon confirmation on
14 behalf of your client that the above heads of agreement are
15 approved, I will arrange for the necessary documentation
16 including a consultancy agreement to be drafted and
17 forwarded to you for your approval.

18 Yours sincerely."

19

20 There's another letter I intend to read of the same date
21 from Mr. Sheedy to Mr. Oakley, the 29th June, 1989, page
22 877, document 241.

23 "Dear Mr. Oakley --

24

25 MR. LEONARD: Mr. Chairman, just for the sake of
26 completeness, there's another letter --

27

28 CHAIRMAN: I beg your pardon, Mr. Leonard, I was
29 concentrating.

30

31 MR. LEONARD: This is not strictly relevant to anything
32 but there is another letter posing to be virtually the same

1 of the same day of the 29th June, document 240 page 875
2 which is actually different to the letter Mr. Gallagher has
3 been reading.

4

5 MR. GALLAGHER: In due course, thank you to Mr. Leonard,
6 for drawing it to my attention and perhaps it will arise
7 and it may become clear when we come to it.

8 .

9 CHAIRMAN: First of all, I haven't found the letter you
10 are talking about so I can't tell you what paragraph 3
11 refers to.

12

13 MR. LEONARD: It's page 876 compared to page 880.
14 There's a significant difference between the two
15 paragraphs.

16

17 MR. GALLAGHER: The final paragraph, I think, that Mr. --

18

19 MR. LEONARD: Paragraph 3 --

20

21 MR. GALLAGHER: This is another letter of the 29th June
22 which --

23

24 CHAIRMAN: I think the difference is one is a fax.

25

26 MR. GALLAGHER: On the 3rd July --

27

28 MR. LEONARD: The contents are different, Sir.

29

30 MR. GALLAGHER: Yes they are and that will become clear
31 because there is the letter of the 3rd July, 1989 which
32 makes it clear that one letter was substituted for another

1 by agreement as I understand it and perhaps we can get that
2 clarified and we can refer Mr. Leonard to document 250,
3 page 89 in book 4.

4

5 The letter I was about to read is letter, page number 877,
6 book 4. It's from Mr. Sheedy to Mr. Oakley.

7

8 "Dear Mr. Oakley,

9 Thank you for your letter of the 29th June.

10

11 I confirm all details of your letter subject to paragraph
12 number 3 which deals with the electricity supply board,
13 (ESB) contract. Mr. Gogarty is adamant that the agreement
14 whereby he will negotiate with the ESB will form part of
15 his settlement. He also assures me he did discuss and
16 agree these details with Mr. Murphy.

17

18 There are two points in your paragraph number 3 which
19 require clarification firstly, the phrase net amount
20 recovered is not clear. What is meant by the word net?
21 Mr. Gogarty will be negotiating on behalf of the company
22 and will expect that all costs arising in connection with
23 those negotiations should be borne by the company as a
24 normal trading expense.

25

26 Secondly the amount offered by the ESB is £40,000 and
27 should be specifically mentioned in your letter.

28

29 I await hearing from you in relation with the ESB contract
30 and hopefully you will be able to take your client's
31 instructions and let me have an amended letter before close
32 of business tomorrow evening."

1

2 The next is a letter of the 3rd July 1989, page 891,
3 document 250, book 4. Letter from Mr. Oakley to Mr.
4 Sheedy.

5

6 "Further to our telephone conversations last week I
7 enclose herewith an amended copy of my letter of the 29th
8 June as agreed. I have attempted to contact Mr. Copsey
9 following our earlier conversation this afternoon but
10 unfortunately he is in a meeting.

11

12 I will therefore contact you in respect to the question of
13 your client's professional costs as soon as possible.

14

15 However this does not seem to be a matter that should delay
16 the preparation of the necessary documentation and subject
17 to this point being clarified, I would be grateful if you
18 would confirm your client's acceptance of the terms
19 contained in the attached revised letter of the 29th June
20 1989 as soon as possible."

21

22 CHAIRMAN: Mr. Gallagher, I don't want to break your
23 sequence for a matter of five or ten minutes but we are
24 just coming up to one o'clock. The witness has been under
25 examination for the morning. I will leave it entirely in
26 your hands.

27

28 MR. GALLAGHER: Well, I would like to just clarify
29 something with Mr. Cooney because there were a number of
30 letters passing at that time and just to be, to avoid any
31 confusion, perhaps Mr. Cooney and I can have a chat about
32 them and agree the sequence and I presume in due course --

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CHAIRMAN: Tomorrow morning. Very good. We are sitting at 2 o'clock to deal with a ruling, we are sitting at two o'clock to deal with a ruling.

MR. ALLEN: Just for clarification, I know that you, Sir, will give a ruling. I think, I just wanted to be clear that you will also be hearing submissions --

CHAIRMAN: Well that is true, yes, in relation to cross-examination.

CHAIRMAN: Yes. I want to hear submissions before coming to any finality although I have outlined the position already, I wish to, if necessary, revise the situation in the light of anything that may be said. Is two o'clock convenient or do you want to make it a quarter past?

MR. ALLEN: I would say 2:15.

CHAIRMAN: I will make it 2:15.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

1 THE TRIBUNAL RESUMED AS FOLLOWS AT 2.15:

2

3 REGISTRAR: Decision in relation to discovery and other
4 matters:

5 .

6 CHAIRMAN: Sequence of evidence:

7 .

8 The Tribunal decided to hear in public the evidence of Mr.
9 James Gogarty at a time which does not coincide with the
10 sequence in which the matters to which his evidence may
11 relate arise in the Terms of Reference set out in the
12 instrument of the Minister for the Environment and local
13 government establishing this Tribunal.

14 .

15 The reasons for this decision have been stated and made
16 known to all interested persons concerned with the evidence
17 of Mr. Gogarty. These reasons have also been stated by
18 the Tribunal at a public sitting of the Tribunal.

19 .

20 Mr. Gogarty is a person who is of advanced years being now
21 81 years of age. He does not enjoy a good standard of
22 health but appears to be able to give oral evidence in
23 public at this time. He may have evidence that is both
24 relevant and material to particular inquiries in this
25 public inquiry. The Tribunal considers that having regard
26 to the subject matter of this inquiry, it is in the public
27 interest that Mr. Gogarty's evidence should be heard in
28 public. The Tribunal, in consequence, decided that the
29 hearing of Mr. Gogarty's evidence should not be held over
30 until a time in the public hearings when the sequence of
31 subject matter of the Terms of Reference reached the
32 matters to which Mr. Gogarty's evidence may relate.

1 .
2 The Tribunal in the circumstances considers it be a matter
3 of plain common sense that Mr. Gogarty's evidence should be
4 heard in public. That means the Tribunal had to adduce
5 this evidence at the earliest appropriate opportunity.
6 The public hearing of that evidence has previously been
7 adjourned to take account of the constitutional rights and
8 fair procedural requirements of all persons whose interest
9 may be affected by that evidence. There is no mandatory
10 legal requirement having regard to the material
11 circumstances of Mr. Gogarty which dictates the sequence in
12 which his evidence is to be heard. If Mr. Gogarty's
13 evidence were not to be available to this Tribunal, it does
14 not require to be a genius to forecast the criticisms and
15 comments the Tribunal will receive in that situation.

16 .
17 The Tribunal has a duty to the Oireachtas to be as
18 effective as practicable in the discharge of its mandate.
19 Put simply, the public interest lies in the Tribunal
20 seeking to establish the truth or otherwise in public of
21 the matters detailed in the Terms of Reference.

22 .
23 The Tribunal is a master of its own procedures. There is
24 no single inflexible model of procedure for a Tribunal of
25 Inquiry. This Tribunal does not consider that the
26 adversarial model of procedure is appropriate to this
27 inquiry. The Supreme Court, in a line of recent cases,
28 has made clear that a Tribunal of Inquiry must respect the
29 constitutional entitlement of all persons concerned with
30 its work, to have their own constitutional rights respected
31 and that plainly includes the right to fair procedures.
32 The Tribunal fully accepts its duty in respect of those

1 constitutional rights.

2 .

3 The Tribunal does not accept, however, that its decision to
4 hear Mr. Gogarty's evidence in public violates the
5 constitutional rights of the interested persons who are
6 concerned with Mr. Gogarty's evidence.

7 .

8 Opening:

9 .

10 The Tribunal has decided not to require its leading counsel
11 to make a comprehensive opening speech at this time
12 detailing the circumstances that led to the establishment
13 of this Tribunal, the issues of fact which have to be
14 inquired into by the Tribunal and a resume of all the
15 evidence intended to be called before the Tribunal. The
16 reason for this decision is plain and clear. The evidence
17 of Mr. Gogarty is simply being taken out of turn so as to
18 ensure that that evidence, whatever its merit, is available
19 for future consideration by the Tribunal.

20 .

21 The Tribunal, in due course, may adopt to the extent it
22 considers appropriate, some of the more traditional aspects
23 of procedure in relation to the calling of evidence in the
24 public at a Tribunal. It seems to me that the dicta of
25 Mr. Justice O'Flaherty in the Supreme Court to the effect
26 that "Matters of procedure are the servants rather than the
27 masters of justice" is an appropriate consideration. I
28 know of no constitutional requirement that says that a
29 Tribunal can only hear evidence in public when leading
30 counsel to a Tribunal has made a full opening. In
31 addition, the personal circumstances of Mr. Gogarty are
32 such that his evidence should not be further delayed.

1 .

2 Disclosure of documentation:

3 .

4 The Tribunal has circulated to the appropriate interested
5 persons copies of documentation in its possession that it
6 considers may be relevant to the evidence that it believes
7 Mr. Gogarty may give at this public hearing.

8 These materials include documents that may be relevant to
9 either matters of substance or issues of credit. The fact
10 that an interested person is in possession of this category
11 of documentation does not relieve them of a requirement to
12 satisfy the Tribunal that a particular document is
13 relevant, admissible and probative before they seek to
14 introduce that document into evidence whether in
15 questioning a witness or otherwise.

16 .

17 The Tribunal has also included in the disclosed materials,
18 other documentation that may possibly have relevance to
19 either the substance or credit of any evidence that may be
20 sought to be introduced in evidence by any witness or by an
21 interested person. The Tribunal considers that much of
22 the documentation in this second category may not be
23 readily admissible in the absence of the person seeking to
24 adduce that documentation, having first established to the
25 satisfaction of the Tribunal a credible basis for its
26 introduction in evidence.

27 .

28 The general principle operated by the Tribunal in relation
29 to documentation sought to be adduced in evidence at a
30 public sitting is that all parties with an appropriate
31 interest in that documentation must, prior to the time at
32 which it's sought to be adduced, have been furnished with a

1 copy of that documentation.

2 .

3 Confidentiality:

4 .

5 This Tribunal, in common with other tribunals of inquiry,

6 has received a wide variety of documentation and

7 information in confidence from various persons. This

8 information was received on a specific confidential basis

9 that was published in the Tribunal's memorandum of

10 confidentiality at the commencement of this inquiry.

11 .

12 Large amounts of that documentation and information contain

13 confidential information that could not be relevant,

14 admissible or probative in evidence at a public sitting of

15 this Tribunal. The Tribunal does not intend to entertain

16 applications from any apparently interested person for what

17 in effect would be a trawl of the files of this Tribunal

18 under the guise of an application for disclosure of

19 information.

20 .

21 Firstly, the Tribunal has a continuing duty of confidence

22 to the person from whom it has received in confidence

23 documentation or information that is not appropriate to be

24 circulated to any interested person.

25 .

26 Secondly, the Tribunal is the proper authority to decide

27 what documentation or information is relevant, admissible

28 and probative in its proceedings.

29 .

30 Applications for disclosure:

31 .

32 Mr. Cooney, senior counsel, on behalf of Joseph Murphy

1 Structural Engineering Limited and other related persons,
2 Mr. Allen, senior counsel, on behalf of Bovale Developments
3 Limited and their related persons and Mr. Leonard, senior
4 counsel, on behalf of Mr. Downes, have made various
5 applications to the Tribunal for disclosure to them of
6 certain categories of confidential information in
7 possession of the Tribunal.

8 .

9 The first point to be made clear is that any document in
10 the possession of the Tribunal that is to be adduced in the
11 ordinary course of evidence at any proceedings of this
12 Tribunal will be made available to any appropriately
13 interested person. That is a requirement of
14 constitutional fair procedures as contemplated by the
15 Supreme Court in its recent decisions in this area.

16 By way of example, any document emanating from Mr. Gogarty,
17 Messrs Donnelly Neary and Donnelly, solicitors, or Messrs
18 Duffy Mangan and Butler, auctioneers, in the possession of
19 the Tribunal that is adduced in evidence, has or will make
20 available to those persons any documentation that is to be
21 adduced in evidence. In certain instances some
22 documentation is not yet in the possession of the
23 Tribunal. Where that is the case, the Tribunal will
24 provide appropriate documentation to properly interested
25 persons if and when the Tribunal comes into the possession
26 of that documentation.

27 .

28 The Tribunal has disclosed and will continue to disclose to
29 properly interested persons, additional documentation in
30 the possession of the Tribunal that may possibly have
31 relevance to evidence that may be adduced in evidence.

32 This category of documentation is considered by the

1 Tribunal to be unlikely to be admissible, relevant or
2 probative in the absence of a person satisfying the
3 Tribunal that there is a credible justification for its
4 introduction in evidence.

5 .

6 There is a third category of documentation in the
7 possession of the Tribunal that it considers, in the
8 absence of a persuasive justification to the contrary,
9 should not be disclosed to particular persons concerned
10 with this inquiry. In those circumstances, that
11 documentation continues to be confidential to the
12 Tribunal.

13 .

14 Third category of documentation:

15 .

16 In certain instances where persons interested have sought
17 disclosure to them of certain documentation that remains
18 confidential to the Tribunal, the Tribunal has refused to
19 disclose that documentation unless a clear and compelling
20 basis can be established by an interested party that they
21 should be provided with any of this category of
22 documentation.

23 .

24 In limited instances where certain interested persons have
25 made out a clear and compelling case, the legal
26 representatives of such persons have been permitted to
27 inspect specific confidential documentation under the
28 strict supervision of the Tribunal, at the Tribunal's
29 offices. In each case, this inspection has occurred only
30 after the person who provided the documentation concerned
31 agreed to a waiver of confidentiality limited to this
32 purpose.

1 .
2 Subsequent to this strict inspection process, the Tribunal
3 has entertained, in private, requests from these interested
4 persons for disclosure of limited elements of the
5 documentation inspected. Where the Tribunal has not done
6 so already, the Tribunal will directly notify the
7 interested person concerned of the decision of the Tribunal
8 in relation to those requests for additional disclosure, in
9 advance of the conclusion of Mr. Gogarty's direct
10 evidence.

11 .
12 I should indicate that this aspect of the Tribunal's work
13 has been considerably eased by the pragmatic approach of
14 both Mr. Cooney and Mr. Allen in relation to the resolution
15 of this matter.

16 .
17 Contact with Mr. Gogarty:
18 .
19 Mr. Cooney's clients have sought disclosure from me
20 personally as to whether I have had any meeting with Mr.
21 Gogarty for the purposes of interviewing him or otherwise
22 in relation to this inquiry. I am not satisfied that this
23 was a proper matter of disclosure. I consider this type
24 of request to be an attempt to seek improper access to
25 confidential preliminary investigative work of the
26 Tribunal.

27 .
28 In view of the fact that this submission has been made, I
29 wish to make clear that I have not interviewed Mr. Gogarty
30 at any time and I have entered into no agreements with him
31 in relation to the subject matter of this inquiry.

32 .

1 I have met Mr. Gogarty on one occasion. On the 12th
2 January, 1998, I attended at Mr. Gogarty's home in the
3 presence of Tribunal counsel by appointment. My meeting
4 with Mr. Gogarty was brief. At that meeting I explained
5 to Mr. Gogarty that the Tribunal counsel would be seeking
6 his cooperation in relation to this inquiry and the
7 Tribunal was independent in the exercise of its
8 functions.

9 .

10 Mr. Gogarty requested an order for representation before
11 the Tribunal. I granted that application and confined the
12 order to one of limited representation. Mr. Gogarty had
13 no legal representation at that time and indicated that he
14 wished to retain the service of McCann Fitzgerald,
15 solicitors, with whom he had a previous dealing. I made
16 clear to Mr. Gogarty that this order did not constitute an
17 automatic entitlement to an award of legal costs by the
18 Tribunal.

19 .

20 In my presence, Mr. Gogarty expressed concerns for his
21 personal safety. It was plain to me that these concerns,
22 whatever their basis, were real to Mr. Gogarty.

23 .

24 In the circumstances of Mr. Gogarty's age, my understanding
25 as to his condition of health and the fact that he had no
26 legal representation at the time, I considered it
27 appropriate that I should travel to his home to hear his
28 application for representation.

29 .

30 Security provision:

31 .

32 Mr. Cooney's clients have sought disclosure in relation to

1 the provision of security for Mr. Gogarty. Again I am not
2 satisfied that this was a proper matter of disclosure.

3 Again, in view of fact that this submission of made, I
4 repeat to Mr. Cooney's clients that I have not interviewed
5 Mr. Gogarty and I did not enter into any arrangements with
6 him.

7 .

8 Mr. Gogarty did express serious concerns about his personal
9 safety to the Tribunal. The Tribunal did request the
10 Garda Commissioner to make appropriate security provisions
11 for Mr. Gogarty and the Garda Commissioner did so. The
12 Tribunal has previously disclosed to Mr. Cooney's clients
13 confidential Garda Siochana documentation in relation to
14 that matter. The Tribunal made the decision to request
15 security independently of Mr. Gogarty and an Garda Siochana
16 with a view to having Mr. Gogarty's evidence available to
17 the Tribunal.

18 .

19 Mr. Gogarty's evidence:

20 .

21 The legal submissions canvassed in this decision were in
22 support of various applications to defer Mr. Gogarty's
23 direct evidence. On January 12th, 1999, I announced in
24 public my decision to proceed to hear the evidence of Mr.
25 Gogarty. At the time of that decision, I was not
26 satisfied that the legal submissions made to the Tribunal
27 warranted the further deferral of Mr. Gogarty's evidence.

28 .

29 I was impressed by the argument of Mr. O' Reilly, senior
30 counsel, who was instructed by the Attorney General to
31 represent an aspect of the public interest before the
32 Tribunal. Mr. O' Reilly emphasised to the Tribunal that

1 it was in the public interest that the Tribunal should
2 proceed as expeditiously as possible in its work and that
3 it was a matter for the Tribunal itself to determine its
4 own procedures.

5 .

6 Taking all matters into account, I was not satisfied it was
7 appropriate to further delay the hearing of Mr. Gogarty's
8 evidence.

9 .

10 That's the end of my decision.

11 .

12 MR. COONEY: I understand, Mr. Chairman, there is some
13 others matters to be discussed before you.

14 .

15 Just on a point of clarification, Mr. Chairman, arising out
16 of your judgement and it's a point that does need
17 clarification because it's been misreported. At no time,
18 and I have made a submission to you on the opening day of
19 the Tribunal, did I ask you to postpone the Tribunal other
20 than for a very short period of time which would enable
21 counsel for the Tribunal to make an opening statement.

22 That's the only deferral which I sought.

23 .

24 You will recall, Mr. Chairman, that I said that if the
25 documents were discovered to us, that we would arrange that
26 part of our legal team would examine those documents while
27 the hearing proceeded in public. So, I'd just like to
28 clarify that matter, because you seem to have repeated
29 again --

30 .

31 CHAIRMAN: If that's the poor scholar that I am, then I
32 stand corrected by the good scholar.

1 .

2 MR. COONEY: It's --

3 .

4 CHAIRMAN: I have no wish to any way impugn your
5 proposition in the world.

6 .

7 MR. COONEY: I appreciate that very much, Mr. Chairman.

8 I am very pleased to hear you say that, I must say.

9 .

10 What really concerned me, Mr. Chairman, was that in
11 subsequent report, words like obstruct, cripple, delay the
12 work of the Tribunal were used in relation to submissions
13 which we had made. I was a little bit concerned, Mr.
14 Chairman, that you had said in your judgement now might
15 give substance to those wholly untrue allegations.

16 .

17 CHAIRMAN: If that appears to be, I didn't intend it.

18 .

19 MR. COONEY: I know that you didn't.

20 .

21 CHAIRMAN: As I say, Dublin may be a literary scene but I
22 am not part of the literary scene as such.

23 .

24 MR. COONEY: I understand that, Chairman. I am very
25 grateful to you.

26 .

27 CHAIRMAN: Now the next matter, as far as I understand it,
28 is to consider the procedure which should be adopted in
29 relation to the examination and subsequent questioning,
30 because I design to accept the proposition of
31 cross-examining the subsequent questioner by persons
32 adversely affected by the testimony of a witness called by

1 the Tribunal.

2

3 I certainly, I don't have actually have the documents here
4 with me. But I certainly on at least two occasions have
5 outlined the procedure which I have considered should be
6 followed. And in broad, and I in no way state this
7 conclusively, purely for the purpose of assisting to date,
8 as I understand it, what I intended to do was this:

9

10 All witnesses except in exceptional circumstances would be
11 called by the Tribunal irrespective of what their situation
12 was in relation to the Terms of Reference.

13 .

14 Having been brought through their evidence as either
15 obtained by the Tribunal or supplied by the witness, if the
16 witness has or is given legal representation, that legal
17 representative would be invited after that point, i.e. the
18 conclusion of what might be described as the
19 evidence-in-chief, be invited to consider whether they wish
20 to question his own witness or await the conclusion of any
21 other questioning by any other parties, any other
22 interested parties, by the way, not just by any other
23 parties. And that on the conclusion of the witness' own
24 counsel or legal representative, as the case may be, that a
25 member of the legal team of the Tribunal would, as it were,
26 sum up and if there were any outstanding matters which
27 should be dealt with, for the assistance of the Tribunal,
28 ask any additional questions which might arise and be
29 relevant.

30 .

31 That is what I intended to do. That assumed that my
32 invitation, which was I think in every instance issued,

1 that each individual person who comes within the frame or
2 focus would furnish to the Tribunal what I describe as a
3 statement, sorry, a narrative statement, I had forgotten
4 the adjective, and the object of that exercise was to get,
5 in his own words from the witness concerned, their part and
6 participation in the events which were being inquired
7 into. Because I am essentially here to listen to all
8 participants, to hear from them, what their participation
9 was and accurately in their own words.

10 .

11 Unfortunately, and I say this very carefully, an
12 adversarial attitude has grown up and some witnesses have
13 furnished us with statements which certainly could not be
14 said to be narrative. They are essentially traverses of
15 statements of evidence they have already received from the
16 Tribunal -- from the Tribunal. They are in no way helpful
17 to the Tribunal in trying to establish what are the
18 differences between the narrative accounts of the
19 participants in the events which we are investigating.
20 That is a sad moment and does not assist my understanding
21 of each person's approach -- each person's understanding of
22 the part and parcel they played in the events into which I
23 am inquiring.

24 .

25 At the end of the day, I have to look carefully and very
26 carefully at each person's participation, for want of a
27 better word. Of what they have done, or what they thought
28 they were doing and come to a conclusion, as a matter of
29 fact, what actually did transpire.

30 .

31 That's all I have to do in this Tribunal. I want to
32 repeat, and repeat with great seriousness, that I do not

1 find responsibility in the civil sense of that word, I do
2 not find responsibility in the criminal sense of that
3 word. I have no such jurisdiction. My jurisdiction is
4 limited, to coming to assessing all the evidence with a
5 view to coming to a fair and reasonable, on the balance of
6 probabilities, what did actually occur. That's my
7 function.

8 .
9 I invite every person who is here today to approach the
10 functions, approach my functions in that context. There
11 may well be conflict between one, two, three, four, or
12 forty witnesses, I don't know. I am very much in the
13 situation of somebody who knows a broad parameter, I know
14 that a considerable amount of information is available to
15 me but I prefer to come here and listen to the evidence of
16 the individuals concerned, hopefully with a totally open
17 mind.

18 .
19 It does not assist, and I want to make that clear and I
20 regard it as being unhelpful, this form of traverse. In
21 those circumstances, as this Tribunal is bound to function
22 on fair procedures, it appears to me that what is good for
23 the goose is good for the gander.

24 .
25 If a person is obliged, as we are obliged, to furnish to
26 all interested parties or more accurately, all persons
27 adversely affected by any statement of evidence which is
28 tendered by the Tribunal, in other words which is has come
29 into the hands of the Tribunal, it is only reasonable, as a
30 matter of fair procedures, that the adversely affected
31 person, person's response should also be available to the
32 witness concerned, because it may adversely affect him and

1 may not necessarily be fair or otherwise, I don't know, I
2 have to hear it, I have to think about it.
3 .
4 In those circumstances, it seems to me that there should be
5 a total balance and, in this regard, of disclosure, we
6 should not be in a situation of adversarial ambush and
7 that's what it amounts to. Litigation is in fact a form of
8 adversarial ambush. The adversarial model does not apply
9 to a tribunal.
10 .
11 In those circumstances, I invite fair minded approach to
12 this problem. I am seeking assistance. I will listen to
13 what is being said to me and I will form a conclusion and
14 while I don't want to suggest that my conclusion is made in
15 advance, but what I am saying is in fact this:
16 That no person should be entitled to walk in and give an
17 adverse version of events to which has been given on oath
18 by a witness without first disclosing what his version of
19 those events are. Disclosing it either in the narrative
20 statement which I asked for and which is a simple matter to
21 be furnished. It doesn't require lawyers. It requires
22 to sit down, think out how you were involved, or what
23 happened in the course of involvement in the transactions
24 or events of the case. Or alternatively, that before that
25 person, either himself or by his representative,
26 cross-examines anybody else, he gives evidence on oath as
27 to what his recollection of his participation should
28 be -- sorry, I am not inflexible in that. I suggest that
29 that is the fair and equal way to do this matter.
30 .
31 I suggest, and I believe it to be the situation, that it is
32 consistent with all the jurisprudence and if anybody wants

1 to find the jurisprudence, they will find it in the Sammon
2 Report, in the terms of the In Re: Haughey, the more recent
3 judgements of the Supreme Court including Mrs. Justice
4 Denham as a judge of the High Court in Boylan -v- the Beef
5 Tribunal and in particular, in the decision of, the Red
6 Cross -v- the Canada Attorney General can be found in the
7 Canadian reports. I don't have the reference here with
8 me, we probably have it here behind me.

9 .
10 But I have no doubt that that is consistent with those.
11 It is also consistent with the views expressed by Lord
12 Justice Diplock, Lord Diplock in the House of Lords in
13 another case which is certainly referred to in the Museumed
14 Air case, that was a Privy Council case, the other is the
15 Commissioner of Social Welfare or something like that. It's
16 also reported in the All England Reports around 1988 I
17 think, but I will give you the necessary, if you want them,
18 I will give you the necessary --
19 that's what I want to discuss and I want to discuss it in a
20 courteous, helpful way and not in an adversarial
21 situation.

22 .
23 I am not setting up a situation which is absolutely
24 rigid. I want to hear what is to be said, come to a fair
25 conclusion as to what is fair and proper to achieve a fair
26 and give me a fair chance of understanding what -- and
27 above all, I want to try and eliminate ambush by
28 cross-examination in an adversarial mode.

29 .
30 With those opening remarks, I would invite your
31 assistance. And I take it that the people who are most
32 concerned are gentlemen on my left and my own counsel will

1 of course reply and if they make their views known,
2 gentlemen, in your order of seniority.
3 .
4 MR. COONEY: May it please you Mr. Chairman. I
5 appreciate your invitation to a discussion, but you will
6 understand, Mr. Chairman, I must make submissions on behalf
7 of my client.

8 .
9 CHAIRMAN: You must make -- you must assist in getting
10 this thing done in a fair and proper manner. It is not
11 adversarial. You and I are not in contest in any way.

12 .
13 MR. COONEY: Of course not, Mr. Chairman, and I don't
14 suggest that for a moment but the reality of the situation
15 which faces my clients is this, Mr. Chairman, that since
16 Tuesday last, they have been subjected, from that
17 witness-box, to the most damaging and grave allegations
18 possible to make. The degree of seriousness of what Mr.
19 Gogarty has been saying about my clients has varied
20 according to the identity of my client but he has made
21 allegations which could not -- which imaginably could not
22 be any more serious against my client, Mr. Joseph Murphy,
23 Junior.

24 .
25 That's the core of the case which Mr. Gogarty is making
26 against my client. He has also availed of the opportunity
27 while in the witness-box to speak in the most disparaging
28 terms about others of my clients, including Mr. Murphy Snr
29 by whom he quite gratuitously has made the most damaging
30 and hurtful allegations.

31 .
32 Mr. Gogarty did not just start making allegations on

1 Tuesday last in the witness-box. He started doing this in
2 August of 1996 when he first leaked, anonymously at the
3 time, to Mr. Frank Connolly, a journalist with the Sunday
4 Business Post. From that time down to the commencement of
5 this Tribunal, Mr. Chairman, either anonymously and then
6 subsequently with his identification known, Mr. Gogarty has
7 made allegations of the utmost seriousness against my
8 clients, including corruption and criminal activity.

9 .

10 Now, that's the situation which my clients are faced with,
11 Mr. Chairman. And as I understand your proposition, we
12 are not to be allowed to confront our accuser in the time
13 honoured tradition and fashion and to rebut as we think fit
14 but within the limits of legal practice and court practice,
15 his accusations.

16 .

17 Now with respect, Mr. Chairman, I have to say that I cannot
18 accept the ruling which is made as being a correct one. I
19 think it's well established in your jurisprudence that a
20 person whose constitutional rights have been affected has,
21 as a minimum right, the right to confront that person in
22 whatever Tribunal or form is available to him and as part
23 of that confrontation to cross-examine that person and to
24 test the accuracy and credibility of his allegations.

25 .

26 Can I refer you, Mr. Chairman, to the judgement in the
27 Haughey case. It's a case which has been cited so
28 often. I am sure you are fully familiar with it too.
29 But I want to cite one passage from the judgement of the
30 then Chief Justice Mr. Justice O'Dalaigh and he said, "That
31 a person in the position of the applicant", in that case,
32 that is Mr. Haughey who was appearing before a Dail

1 committee, "should be given the following procedure
2 safeguards.

3 .

4 MR. HANRATTY: I wonder if My Friend is referring to Hogan
5 and Moran, if he could give me the reference.

6 .

7 MR. COONEY: It's page 557. I am quoting from Hogan and
8 Moran.

9 .

10 CHAIRMAN: Would you give us -- because I don't have Hogan
11 and Moran --

12 .

13 MR. COONEY: It's 1971, Irish Reports, page 217. And the
14 passage -- at page 264.

15 .

16 Here in very simple terms, Mr. Chairman, the then Chief
17 Justice, speaking on behalf of the entire Supreme Court,
18 states that a person in a position that Mr. Haughey was in
19 at a time is entitled to these procedural safeguards.

20 "A, that he should be furnished with a copy of the
21 evidence which reflected on his good name.

22

23 B, that he should be allowed to cross-examine by counsel
24 his accuser or accusers.

25

26 C, that he should be allowed to give rebutting evidence and

27

28 D, that he should be permitted to address, again by
29 counsel, the Committee in his own defence."

30 .

31 Now, these are fundamental matters of constitutional
32 justice which everybody whose good name is in jeopardy of

1 being called into question is afforded, Mr. Chairman, and
2 that's irrespective of the type of tribunal in which he is
3 appearing and in which these allegations are being made.
4 That's whether it's a tribunal of this sort, whether it's
5 the High Court, the Supreme Court, the District Court or
6 whether it's a committee of the Dail which is considering
7 these sort of matters.

8 .
9 Anybody whose reputation and good name are at peril in the
10 course of those proceedings irrespective of the form is
11 entitled to these four basic rights of procedures of fair
12 play, Mr. Chairman. I think that follows as a matter of
13 fact.

14 .
15 The point was emphasised again, Mr. Chairman, if I may say
16 so, by Mr. Justice Barron in the case of Flanagan -v-
17 University College Dublin, which is reported at 1988, Irish
18 Reports at page 724.

19 .
20 MR. HANRATTY: Again if I could have the textbook page
21 reference.

22 .
23 MR. COONEY: It's 557.

24 .
25 CHAIRMAN: What's the Irish Reports page?

26 .
27 MR. COONEY: It's 1988 Irish Reports, page 724.

28 .
29 CHAIRMAN: That's the girl who was being improperly
30 disciplined in UCD -- expelled from UCD.

31 .
32 MR. COONEY: Yes, that's correct. And in the course of

1 his judgement, when Mr. Justice Barron said My Lord "In my
2 view the procedures must approach those of a court
3 hearing", he is referring to the procedures which had been
4 carried out by the disciplinary committee.

5 .

6 Then he continues "The applicant should have received in
7 writing details of the precise charge being made of the
8 basic fact alleged to constitute this alleged offence. At
9 the hearing itself, she should have been able to hear
10 evidence against her, to challenge that evidence on
11 cross-examination and to present her own evidence."

12 .

13 Now, if this is a right which a student in UCD is entitled
14 to have before a meeting of the college disciplinary
15 society, Mr. Chairman, I respectfully submit that even more
16 is a party whom representation is granted before this
17 Tribunal to have the same right of unimpeded and unlimited
18 cross-examination. That is unlimited subject to the usual
19 considerations of admissibility and relevance.

20 .

21 And in my respectful submission, Mr. Chairman, any attempt
22 to limit or impede or obstruct cross-examination of Mr.
23 Gogarty would be in breach of these fundamental procedures
24 of fair play, Mr. Chairman.

25 .

26 Now, you have made some comments about the desirability of
27 avoiding what you call trial by ambush, and that may very
28 well be the case and we know that, for instance, in the
29 civil jurisdiction in the United Kingdom, the rules have
30 been introduced, procedural rules have been introduced
31 which will avoid that. That simply is not the case in our
32 procedure, Mr. Chairman. And I cannot see anything wrong

1 in principle, Mr. Chairman, if in challenging a person who
2 makes a serious allegation as Mr. Gogarty has against my
3 client, if we catch him and demonstrate that part of or at
4 least of what he is saying is an outright lie, we are fully
5 entitled to do that in vindication of our good name, Mr.
6 Chairman.

7 .

8 Now, the only other matter I refer to, Mr. Chairman, is
9 this and again I mentioned to you at the opening of the
10 Tribunal on Tuesday week last, is this: That one of the
11 four enumerated rights which a person has under our
12 constitution is his right to his good name. More than any
13 other right, the right of my clients' good names have been
14 traduced by the evidence of Mr. Gogarty and, in my
15 respectful submission, my clients have -- it's
16 constitutionally imperative that they be allowed to
17 vindicate their good names before this Tribunal and one of
18 the methods by which they will seek to do that is by
19 unimpeded cross-examination and therefore, Mr. Chairman, I
20 respectfully submit, I do so in the spirit of cooperation I
21 hope, I respectfully submit that in this particular
22 Tribunal in this particular instance, we must be allowed to
23 cross-examine Mr. Gogarty subject only to the ordinary
24 rules of evidence.

25 .

26 May it please you.

27 .

28 CHAIRMAN: Before you actually resume your seat, would you
29 mind if I ask you two questions?

30 .

31 The first one is, if, accepting the premises which you have
32 advanced, why should you not advise the Tribunal at least

1 of the -- again I don't want to use it because it's not
2 quite, it's a slight contrary in terms of phraseology -- of
3 your clients' name. Why?

4 .

5 MR. COONEY: We have done so.

6 .

7 CHAIRMAN: You have not. It's simple -- I will read the
8 statement if you want me to.

9 .

10 MR. COONEY: Whether Chairman, again, may I say not in any
11 spirit of confrontation, in what way do you say or indeed
12 can you say or how can you be in a position to say --

13 .

14 CHAIRMAN: What is to prevent you sending to the Tribunal
15 a narrative account of your meeting with, sorry, your
16 instance -- take for instance the events surrounding the
17 payment of the sum of money, the sequence from presumably
18 something being decided and something being done. Just
19 take that broad perspective. Is it too much to ask what
20 your account of that is and if you say, for instance, that
21 you are not involved, not only were you not involved, but
22 what reaction you had when you realised what had happened?
23 These were never told to us.

24 .

25 MR. COONEY: Are you referring to the payments to Mr.
26 Burke?

27 .

28 CHAIRMAN: Yes.

29 .

30 MR. COONEY: Well Mr. Chairman, we have told you in
31 simple, direct terms, we weren't there. That's all.

32 .

1 CHAIRMAN: But it was your money and you accept it was
2 your money.

3 .

4 MR. COONEY: Mr. Chairman, when we sought representation,
5 we told you that it was our money, but that it was paid at
6 the command of Mr. Gogarty who was then in an acrimonious
7 dispute with our company.

8 .

9 CHAIRMAN: Am I to understand, I make it clear about this,
10 that this was, if I may use the phrase, a frolic by Mr.
11 Gogarty?

12 .

13 MR. COONEY: Absolutely. He --

14 .

15 CHAIRMAN: Your -- why in the name of goodness couldn't
16 you have written a simple statement, "We have no
17 involvement in this, he did it by his own and we are not
18 involved"?

19 .

20 MR. COONEY: First of all, a number of reasons.
21 Effectively, that was plain from the information we have
22 already given to the Tribunal -- sorry, with respect, Mr.
23 Chairman, consider the statement you have got from Mr. O'
24 Keefe, who was our in-house accountant. May I
25 respectfully ask you, Mr. Chairman, if you recall what's in
26 that statement. That makes is abundantly clear that he
27 drew the money from the bank at the express instructions of
28 Mr. Gogarty and, having done so, came back and gave that
29 money to Mr. Gogarty. Nothing could be clearer than that,
30 Mr. Chairman.

31 .

32 CHAIRMAN: That's your situation.

1 .

2 MR. COONEY: No, that's --

3 .

4 CHAIRMAN: That's your situation, that it was a frolic of
5 his own without authority and without your say so?

6 .

7 MR. COONEY: That will be our evidence, Mr. Chairman.

8 That's the case I am going to make in cross-examination.

9 But my cross-examination, I can assure you, of Mr. Gogarty

10 won't just stop on that. I have other matters I have to

11 put to him which I do not intend to disclose to the

12 Tribunal beforehand, Mr. Chairman, and I will tell you

13 specifically why not.

14 .

15 It is my considered view, Mr. Chairman, and in the view of

16 most, if not all, of my colleagues here that Mr. Gogarty

17 has received favoured treatment from this Tribunal. For

18 this reason, apart altogether from the matters which you

19 have just adverted to in your judgement.

20 .

21 We know that there is in existence a book of documents,

22 memoranda, attendances on Mr. Gogarty, being taken by

23 counsel for the Tribunal over a long period of time. This

24 suggests to us that Mr. Gogarty has been in constant

25 communication with this Tribunal. Why should he be in

26 such constant regular communication with the Tribunal more

27 than any other party?

28 .

29 CHAIRMAN: Have you been in any way refused consultation

30 with the Tribunal? Have you requested it? Have you?

31 Have you been refused?

32 .

1 MR. COONEY: No, we haven't, Mr. Chairman --

2 .

3 CHAIRMAN: Have you even asked for it?

4 .

5 MR. COONEY: No. We have, and we have refused because the
6 request is --

7 .

8 CHAIRMAN: You have refused but we haven't refused you.

9 .

10 MR. COONEY: Please, Mr. Chairman, I am trying to
11 cooperate as you asked. We have refused because the
12 general tenor of the correspondence and approach which we
13 have received from the Tribunal through its solicitor, has
14 been accusatory and confrontational. And generally, the
15 attitude has been one which seems to suggest that we were
16 the guilty ones and had something to hide. Now that's the
17 attitude which comes very clearly from the correspondence
18 which we received from the Tribunal over a long number of
19 months. This did not impel or this did not induce trust
20 in us in the impartiality of that aspect of the Tribunal's
21 work and that's one of the reasons why we refused an
22 invitation to attend.

23 .

24 May I make another point, Mr. Chairman. Why, when he
25 eventually did get partial documentation, did this
26 documentation come in the form of schedules to an affidavit
27 made by Mr. Gogarty's own solicitors about a fortnight
28 ago? Why weren't we given the documentation in the
29 sequence in which it was given to the Tribunal since the
30 establishment of the Tribunal in November of 1997? Why
31 did it have to come in the form of a solicitor's
32 affidavit? I suggest, Mr. Chairman, because this was to

1 keep from us certain relevant documentation such as the
2 memoranda and attendances, made on Mr. Gogarty's
3 attendances, with the Tribunal team and also other
4 documentation which will be relevant -- other documentation
5 generated in the solicitor's office but which would be
6 relevant. This is the reason why, Mr. Chairman, we do not
7 believe we have been on a level playing pitch insofar as
8 this Tribunal is concerned, I regretfully and respectfully
9 have to say, Mr. Chairman.

10 .

11 CHAIRMAN: Anybody else?

12 .

13 MR. ALLEN: Yes, Chairman. Chairman, I accept your
14 invitation to assist you, which I understand to be the
15 invitation that you have extended to those members of the
16 bar who are here representing the various different
17 parties. As you are aware, I appear for Mr. Michael Bailey
18 Mr. Thomas Bailey and Bovale Developments Limited and
19 associated companies and certainly, I have no difficulty
20 whatever in associating myself publicly with your publicly
21 stated desire that these proceedings should be as free from
22 rancour, although I accept that that's not a word you used,
23 but that they be as non-adversarial as possible.

24 .

25 But I do think, Sir, and another matter that I wish to
26 refer to, Sir, is your oft and by the way I welcome it as
27 often as it is repeated, your oft repeated urging, as I
28 understand it to counsel, mostly on this side of the table
29 it has to be said, to deal with the reality of the
30 situation and to assist you in establishing the facts.

31 .

32 Now those, it seems to me, Sir, are in themselves and in

1 vacuo, entirely laudatory and they are objections which it
2 behoves us all to achieve or, I should say, to assist you
3 in achieving because you are -- you have been burdened with
4 a particularly heavy task in this regard. But I do think
5 that it is important, having regard to what has transpired
6 at these public sittings since they commenced on last
7 Tuesday, to put matters in context.

8 .
9 Quite rightly, you indicated to the members of the bar, the
10 legal teams, you drew attention quite rightly to Mr.
11 Gogarty's advanced years, to his frailty and you quite
12 rightly asserted the proposition that he was entitled to be
13 treated in a courteous manner.

14 .
15 Now having said that, Chairman, one still has to look at
16 the reality and, I believe, with respect, that I am looking
17 at the reality when I move to the following. As My
18 Friend, Mr. Cooney, has said, Mr. Gogarty has spent the
19 last number of days giving evidence of a particularly
20 poisonous nature. Now, if it be true, if the evidence be
21 true, for example, if his evidence of yesterday be true, he
22 has accused himself of being guilty of criminal
23 misconduct. But I am not concerned with what, with the
24 warts which Mr. Gogarty seeks to attach to himself.

25 .
26 I do feel, Sir, that in your approach to this matter and I
27 do believe it's reflected in the jurisprudence to which I
28 will refer you as quickly as possible, I do feel this. It
29 should also be remembered that my clients, and in
30 particular Mr. Michael Bailey, has a family. He has a
31 name. He has a right to the protection of his good
32 name. He has a mother who is a widowed mother who is a

1 lady of advanced years. He has a wife who is not immune
2 to distress and affront at the sort of mud slinging which
3 we have seen engaged in by Mr. Gogarty. And I associate
4 myself unreservedly and without apology with what Mr.
5 Cooney has had to say in that regard.

6 .

7 I find it embarrassing to listen to Mr. Gogarty talk about
8 a particular alleged situation, for example, regarding Mr.
9 Murphy Snr. You didn't need to know it. I certainly
10 didn't need to know it. I thought it was a gross and
11 indecent invasion of an elderly person's right to
12 privacy. But could I move on again, Sir, because it seems
13 to me that is the context in which we -- in which I invite
14 you to look at the matter.

15 .

16 And to set the factual background, Sir, it seems that I
17 should remind you that this Tribunal, through its legal
18 team, by letters dated 18th January, 1999, the 13th
19 January, '99 and the 22nd December, 1998, indicated that it
20 intended to restrict my clients' right to cross-examine Mr.
21 Gogarty by reference to the witness statement provided or
22 furnished by us, specifically in the earlier correspondence
23 because at that time no such statement had been
24 furnished. You indicated that persons -- this is relating
25 to my clients -- who have not furnished a statement of
26 their evidence on a particular issue in advance would not,
27 and I repeat, not be entitled to, and I quote, and I quote
28 this for a reason which I think you will understand, Sir,
29 "will not be entitled to cross-examine."

30 .

31 Now, you Sir in your opening remarks today indicated that
32 you didn't wish to use the word cross-examine and I accept

1 that, Sir. And I don't wish this to be seen as a cheap
2 jibe at you because it isn't either cheap or a jibe.

3 .

4 The fact of the matter is that the word which has been used
5 by the legal team throughout the correspondence has been
6 cross-examine. Now you, Sir, have said that when you
7 conjure up the concept of cross-examination, you conjure up
8 the adversarial model which you say is not desirable.

9 .

10 Now, I also feel, Sir, that I should refer you to a number
11 of Mr. Gallagher's utterances since the first day of this
12 hearing. And if I could refer you to page 43 of the
13 transcript of Day 1 -- my apologies to Mr. Gallagher, it
14 was Mr. Hanratty. The transcript of Day 1, page 43,
15 starting at line 15.

16 .

17 Now, this was -- this is Mr. Hanratty, counsel on behalf of
18 the Tribunal responding to Mr. Cooney's submission in
19 relation to an opening statement and Mr. Cooney's entirely
20 reasonable suggestion that there needed to be a contextual
21 basis for any evidence that was going to be adduced to
22 which Mr. Hanratty responded as follows: "It also ignores
23 the fact, it seems to me, Sir, that fair procedures are
24 more than adequately met by the fact and the ruling you
25 have made, namely that Mr. Gogarty can be cross-examined by
26 any of the witnesses or parties who disagree with his
27 evidence and may call evidence in rebuttal at this
28 sitting."

29 .

30 I then -- yes, I then would wish to refer you, Sir, to the
31 transcript of Day 2, page 8, at line 3, commencing at line
32 3. And here, it was Mr. Gallagher who made the following

1 contribution:

2

3 "The jurisprudence clearly sets out that the Tribunal
4 exercises its own rules as to what evidence it will admit,
5 subject only to the requirements of natural justice and of
6 course, on the basis that it will, in due course, decide
7 what weight should be attached to any particular piece of
8 evidence or segment of evidence. There is also, of
9 course" -- and I invite you to consider this with
10 particularity -- "There is also of course an absolute
11 right to rebut any evidence that is given and witnesses
12 will and can be called to do that."

13 .

14 And going down -- turning then to Day 5, page 10, we have
15 Mr. Gallagher submitting to you as follows, starting at
16 line 4, Mr. Gallagher: "Sir, I should say that Mr. Cooney
17 has interrupted this Tribunal on numerous occasions to make
18 numerous submissions. Mr. Cooney is aware of all the
19 documentation. He knows where this questioning is
20 leading. He knows that the lands were sold subsequently
21 and he knows that the lands were sold within months of this
22 report being received and professional advices being
23 furnished to his client." That report, you will recall,
24 was the Duffy Mangan Butler report, the first Duffy Mangan
25 Butler report.

26 .

27 Now, moving on to line 12, at page 10 of Day 5: "He will
28 have an opportunity to cross-examine Mr. Gogarty as to why
29 that happened. He will have an opportunity to call his
30 witnesses or have the Tribunal call witnesses to indicate
31 why that happened. It is relevant and it is in the
32 interests of endeavouring to ensure that we don't spend as

1 long as some people would like us to spend with this
2 witness, at the same time you telling through a whole lot
3 of chaff that there is there for anybody to cross-examine
4 and to assist anybody in their cross-examination in order
5 to deal with this."

6 .

7 And we now, dealing with that particular submission from
8 your own leading counsel, Sir, his explanation as to why he
9 was seek to go hurry the witness along was that anything
10 that we wished, that is those of us lined on this side of
11 the table, that we wished to pursue, could be in an
12 unfettered and untrammled way, pursued in
13 cross-examination. That is the submission which you have
14 received from your own leading counsel and I make no
15 further comment on it.

16 .

17 Now, may I resume the legal arguments, My Lord -- I beg
18 your pardon, Chairman, I was forgetting the forum -- the
19 stance, it seems to me, and I say this, with respect,
20 Chairman, adopted by the Tribunal offends, and I use that
21 term in the strictly legal sense, against the basic rules
22 of natural constitutional justice and fails to protect my
23 clients' constitutional rights. Pursuant to the
24 provisions of Article 43 of Bunrocht na hEireann, "A person
25 whose conduct is impugned as part of subject matter of
26 inquiry must be afforded reasonable means of defending
27 himself including the right to cross-examine his accusers."
28 And Mr. Cooney referred to a passage from the judgement of
29 O'Dalaigh, Chief Justice, as he then was. I want to refer
30 to that, to a somewhat more extensive passage for the
31 purpose of elaborating on my argument and I want to draw
32 your attention in particular, Chairman, if I may, to the

1 following passage; the citation is In Re: Haughey, 1971,
2 217, at page 264, if I could hand in a copy to you,
3 Chairman, of the report and I have taken the liberty of
4 asking Mr. Simons to underline the passage which I intend
5 to read to you, Sir, which I hope you will regard as an aid
6 rather than an obstruction.

7 .

8 The passage is as follows, Sir: -- Have you got it Sir,
9 it's at page 264 and it's marked.

10 .

11 CHAIRMAN: Are you going on to 264 first or 261?

12 .

13 MR. ALLEN: Yes, 264 My Lord -- I mean, Sir. Do you have
14 that, Sir?

15 .

16 CHAIRMAN: Yes, I have.

17 .

18 MR. ALLEN: The passage I want to quote is the following
19 passage, Sir, "For the Attorney General has urged that a
20 witness of the High Court is not allowed the protections
21 mentioned at B, that he should be allowed to cross-examine
22 by his counsel, his accusers and D, that he should be
23 permitted to address, again by counsel, the Committee in
24 his defence.

25 .

26 This is undoubtedly so and it was submitted that Mr.

27 Haughey could therefore not be in any better position.

28 The answer made by counsel for Mr. Haughey was that his

29 client is not just a witness but he has in effect become a

30 party, because his conduct has become the subject matter of

31 the committees of inquiry or examination by reason of the

32 charges which have been leveled against him. Counsel

1 points out that Mr. Haughey cannot, in defence of his good
2 name, make his accusers answerable in the civil courts as
3 they are protected by the unity granted by the statute and
4 counsel then urges that unless he is allowed on his
5 client's behalf to challenge and test the accusations by
6 cross-examination and further to address the Committee, his
7 client's good name is left unprotected. Counsel supports
8 his submissions by reference to the well established
9 procedure adopted by the several tribunals of inquiry set
10 up by Dail Eireann to inquire into matters of urgent public
11 importance.

12 .

13 In all these instances, the persons accused, in connection
14 with the subject matter of the inquiry, were granted the
15 rights of parties and were allowed to appear by counsel and
16 to cross-examine and address the Tribunal.

17 .

18 "In my opinion" -- and for the avoidance of doubt, this is
19 the opinion of the late Chief Justice O'Dalaigh and not my
20 own, although I happen to agree with it -- "In my opinion,
21 counsel is right in his submission that Mr. Haughey is more
22 than a mere witness. The true analogy in terms of High
23 Court procedure is not of a witness but of a party. Mr.
24 Haughey's conduct is the very subject matter of the
25 committee's examination and is to be the subject matter of
26 the committee's report."

27 .

28 And if I could pause there, Sir, for the purposes of
29 putting it to you that beyond any question or beyond any
30 room whatever for doubt, the position of my clients is on
31 all fours with that propounded for in the Haughey decision
32 which you have, yourself, Sir, rightly, in my respectful

1 view, referred to as forming part of the jurisprudence by
2 which you were guided and I welcome that indication, Sir.

3 .

4 In fact, it seems to me that the Supreme Court, in the
5 decision which I have referred you to, drew a direct
6 analogy in that case with the procedures to be adopted by
7 statutory tribunals of inquiry.

8 .

9 My clients, Mr. Michael Bailey and Mr. Thomas Bailey, are
10 private individuals. Mr. Michael Bailey, in particular,
11 finds himself in the unique position of being at the centre
12 of the inquiries of this Tribunal. Yesterday, in
13 particular, allegations of the grossest wrongdoing were
14 made against him by Mr. Gogarty with impunity.

15 .

16 So, it isn't correct to characterize my client as being
17 somebody whose sole role in life is to facilitate and
18 assist this Tribunal in narrative or in other form. He is
19 a person against whom serious allegations of a criminal
20 nature have been made and having achieved that wholly
21 unwanted and unsought after status, he has, in my
22 respectful submission, he attracts in my respectful
23 submission, particular privileges and the courts, in this
24 country, and you, Sir, in fairness in what you have said,
25 as I understand it, as I understand what you said in your
26 opening remarks, are intent on ensuring that fairness is
27 extended not simply to Mr. Gogarty, who it would appear is
28 conceived as being of assistance to the Tribunal, but to
29 those who are affected and afflicted by his unwanted and
30 unceasing attentions.

31 .

32 Now, moving on from that, as he is an accused person and he

1 stands as such through no fault of his own, he has, I say,
2 Sir, as a matter of law, an absolute right to cross-examine
3 his accusers which can not be made conditional on the
4 disclosure of the nature of that cross-examination. And
5 again, I would like, Sir, to refer you to a further passage
6 from In Re: Haughey, which in this instance you will find
7 at page 261 of the judgement which has been handed in to
8 you, Sir, which has been marked, I hope. "As to the
9 disallowance of cross-examination, an accused person has a
10 right to cross-examine every witness for the prosecution,
11 subject, in respect of any question asked, to the Court's
12 power of disallowance on the grounds of irrelevancy. An
13 accused, in advance of cross-examination, cannot be
14 required" -- and I emphasise this -- "cannot be required
15 to state what his purpose in cross-examining is.

16
17 Moreover, the right to cross-examine to credit narrows
18 considerably the scope of the irrelevancy rule. Mr.
19 Haughey, in my opinion, was wrongly denied the right to
20 cross-examine."

21 .
22 Now, of course I accept, Sir, that these comments were made
23 by the Supreme Court in the context of the contents of Mr.
24 Jock Haughey, in fairness to the other Mr. Haugheys,
25 criminal trial in the High Court. It is nonetheless clear
26 that the right to cross-examine referred to later in the
27 Supreme Court judgement to which I have already referred to
28 you, in the context of an inquiry is similar in nature.

29 .
30 The same lexicon of an accused's right to cross-examine is
31 employed throughout the judgement and the Supreme Court
32 equates the rights under Article 43 with those under

1 Article 38 (1) and if I could draw your attention, Sir, to
2 the following passage from the judgement which you will
3 find at page 264, marked in the copy provided to you.

4 .
5 "The provisions of Article 38 (1) of the constitution
6 apply only to trials of criminal charges in accordance with
7 Articles 38 but in proceedings before any tribunal where a
8 party to the proceedings is on risk of having his good name
9 or his person or property or any of his personal rights
10 jeopardised. The proceedings may be correctly classed as
11 proceedings which may affect his rights and in compliance
12 with the constitution, the state, either by its enactments
13 or through the courts, must outlaw any procedures which
14 will restrict or prevent the party concerned from
15 vindicating these rights."

16 .
17 Now, if I could just pause there for a moment, Sir, and
18 it's a rhetorical question of course because I accept that
19 the matter of principle that you are not here to answer
20 questions from me. I want to make it clear that it is a
21 rhetorical question. But could anybody be in a more
22 analogous position to that contemplated by the entirety of
23 the Supreme Court when they gave this landmark judgement
24 than Mr. Bailey, all of whose rights, all of whose rights
25 under the constitution are challenged here by Mr. Gogarty?
26 And challenged in a manner which frankly, is less than
27 satisfactory and has been less than satisfactory as it has
28 progressed.

29 .
30 And it further seems to me, Sir, that the view expressed by
31 the Tribunal in its correspondence with my clients, with my
32 clients' solicitors is based on a number of

1 misconceptions. And I would like to indicate to you what,
2 in my respectful submission, those misconceptions are.

3 .

4 The first and perhaps the most important of them, Sir, is
5 that there is any obligation on any party to provide or any
6 individual to provide a written statement of their evidence
7 in advance. There isn't. There is no law to support or
8 buttress that proposition. It simply does not exist.

9 You can not compel a person who is the subject of the sort
10 of allegations which are being made against my client, to
11 put in a rebuttal traverse or otherwise, and I say with
12 great respect, Sir, that to criticize an individual who
13 decides not so to do, having regard to the fact that that
14 is a legal right, in so doing so, Sir, and I am sure that
15 it isn't intentional, you are actually criticizing
16 individuals for exercising their legal rights. They have
17 been legitimately advised by counsel, I can only speak for
18 myself, that they are not obliged to furnish a statement.
19 That they are not obliged to give the goodies, if you will
20 excuse the 'lingua franca', to Mr. Gogarty so that he can
21 pass it on to Mr. Connolly or whoever.

22 .

23 Why should they expose themselves further in this way, when
24 they have had the sort of persecution to which they have
25 been subjected going back beyond 1996 from Mr. Gogarty?

26 So that's the first and it seems to be absolutely
27 fundamental misconception which has misdirected the
28 Tribunal and you will appreciate I am speaking as a matter
29 of law.

30 .

31 And the second miss conception I say, Sir, is that the
32 position -- Mr. Gogarty's position in these proceedings is

1 simple and is very easy to characterize. He is here as a
2 witness. He has apparently, in circumstances which I look
3 forward to investigating with Mr. Gogarty, proffered
4 himself as a witness. He is a witness before this
5 Tribunal.

6 .

7 The second fundamental misconception which has driven the
8 Tribunal, I say it as a matter of law, with respect, Sir,
9 is that Mr. Gogarty's position as a witness can in some way
10 be equated with Mr. Bailey's position who is a person who
11 stands accused. Mr. Bailey is not a witness. Mr. Bailey
12 is a person who stands accused by Mr. Gogarty. And Mr.
13 Bailey, in my respectful submission, has an absolute right
14 to challenge Mr. Gogarty to vindicate those most important
15 rights to which I have referred without giving Mr. Gogarty
16 the opportunity to prepare his defence in advance.

17 .

18 And if that be ambush, then Sir, let there be no doubt
19 about it, Mr. Gogarty is in for some big ambush.

20 .

21 Now, moving on, the third misconception, Sir, I say, is
22 that it is clear from something, that from a reference from
23 your own leading counsel, Mr. Gallagher, that
24 Mr. Gallagher, your counsel, is under the alarming
25 misconception that the Tribunal has some function in
26 establishing or vindicating Mr. Gogarty's credibility.

27 Now, I want to say before I develop this point, Sir, that I
28 understand you, in what you have said today, to reject that
29 submission. I don't mean that it was -- I don't say that
30 it was within your contemplation to reject it or that you
31 had had regard to it but, in effect, by what you have said,
32 you appear to have ruled it out. But I think it not

1 unimportant that we should record the following, page 10 of
2 Day 2, beginning with line 4, "... and it is here, that
3 this is such an inquiry that will or is likely to interfere
4 in some way with reputations of the individuals involved,
5 including the reputation of Mr. Gogarty and his reputation
6 of course has to be protected and he is entitled to the
7 same consideration and the same constitutional protections
8 as Mr. Murphy and any other person and in Goodman
9 International -v- Mr. Justice Hamilton at 1992, IR, 546,
10 the following passage appears at page 603" -- and this is
11 Mr. Justice Hederman dealing with the question of hearsay
12 evidence.
13 .
14 "With regard to the first, that there was a fear that
15 there might be an overuse of hearsay evidence, this,
16 because undoubtedly there was included much hearsay but the
17 Tribunal nevertheless will adopt the same approach as the
18 Tribunal of Inquiry into dealing with the Great Southern
19 Railway Stock" and the reference is given.
20 .
21 And if I could refer then to the transcript for Day 1, page
22 75, commencing at line 22, again this is Mr. Gallagher
23 responding to Mr. Cooney. "With respect to this
24 information, this witness' credibility has been challenged
25 not merely today but on other occasions in terms that were,
26 on one view, somewhat less than retrained. Credibility
27 will be crucial in the investigation, in the inquiry into
28 the determinations that you have to make and in order that
29 you can evaluate the various witnesses, it seems to me that
30 evidence should be heard because the evidence etc...."
31
32 You then indicate, Sir, as you will see, "Carry on for the

1 moment please but bring it back to the immediate subject
2 matter of the inquiry as soon as possible."

3 .

4 Now I want to pause there, Sir, because of course, through
5 nobody's fault, I do not have in front of me the transcript
6 of today's proceedings, in other words, this morning's
7 proceedings, no more than you may have yourself. But may
8 I remind you of Mr. Gallagher's contribution this morning,
9 when he said that the loquacious and I believe and regret
10 that he appeared to have been referring to me when he used
11 the word 'loquacious', that the loquacious and I think he
12 said highly intelligent Mr. Allen --

13 .

14 MR. HANRATTY: Sir, Mr. Gallagher denies that he said
15 highly intelligent of Mr. Allen.

16 .

17 MR. ALLEN: May I --

18 .

19 CHAIRMAN: You have your claim to fame but you do not
20 appear to be getting support.

21 .

22 MR. HANRATTY: Could I also say more seriously I thought
23 it was an application in relation to the letter the
24 Tribunal wrote in relation to cross-examination.

25 .

26 CHAIRMAN: However, Mr. Allen always likes to make his
27 point with grave emphasis.

28 .

29 MR. ALLEN: With respect, Sir, I think that nobody could
30 suggest for a moment that this is anything but a very
31 serious and, if I may say so, very polished submission on
32 the particular issue. Nothing that I have said is

1 not -- it's not something which isn't directly related to
2 the issue of cross-examination and to the fundamental
3 misunderstandings of the law which appear to afflict
4 Mr. Gallagher and Mr. Hanratty.

5 .

6 The point I wish to make to you, Sir, was that
7 Mr. Gallagher says on the one hand that I am here to
8 protect Mr. Bailey and so he has no need to do it, whilst
9 at the same time, he is saying, oh but we must look after
10 Mr. Gogarty's reputation and his credibility because it's
11 critical. And accordingly, Mr. Leahy reminds me, we are
12 restricted. That is what he has been saying.

13 .

14 Now I want to elaborate, if I may -- I am sorry, Sir --

15 .

16 CHAIRMAN: Go on. I wouldn't like to interfere with your
17 self-confidence.

18 .

19 MR. ALLEN: Believe me, Sir, that won't happen. I want
20 to elaborate, if I may briefly, insofar as it is possible
21 to do so having regard to the position which we find
22 ourselves, on what I have referred to and categorized as
23 the misconception under which this Tribunal appears to be
24 operating.

25 .

26 The first misconception which I identified to you, Sir, was
27 that there is no requirement to provide a written statement
28 and in support of that proposition, I would remind you
29 respectfully, Sir, that our client stands as an accused
30 person before this Tribunal and, as such, there can be no
31 requirement on him either to provide a written statement of
32 his evidence, nor to give oral testimony as a condition

1 precedent to the exercise of his constitutional right to
2 challenge and test the accusations against him by his
3 cross-examination.

4 .

5 It is clear from a number of Supreme Court decisions that
6 there is an obligation on a Tribunal of Inquiry to notify
7 an accused person of the allegations made against him in
8 advance, and a corollary constitutional right for the
9 accused person to test such evidence by
10 cross-examination.

11 .

12 And in that regard, Sir, if I might refer you to the
13 Supreme Court decision in Haughey -v- Mr. Justice
14 Moriarty, unreported, 28th July, 1998 at page 171. I
15 apologise, Sir, for the fact that I don't have a copy of
16 the judgement, but I believe you do.

17 .

18 If I may quote; "The Court is satisfied that the Tribunal
19 was entitled to conduct this preliminary investigation in
20 private for the purpose of ascertaining what evidence was
21 relevant to enable the Tribunal, in due course, to serve
22 copies of such evidence on the plaintiff applicants which
23 it is obliged to do in order to enable them to exercise
24 their constitutional right to be present at the hearing of
25 the Tribunal where such witnesses will give evidence on
26 oath and to be liable to cross-examination."

27 .

28 Now, this passage was most recently endorsed in a decision
29 which you have yourself referred to, Sir, during the course
30 of these proceedings, being that of the Supreme Court in
31 Redmond -v- Mr. Justice Flood, unreported, 6th January,
32 1999 at page 27 and also in Goodman International -v-

1 Hamilton, 1992, 2 IR, 542, and 609, the right to be heard
2 incorporates the right to be put to answer, to be told of
3 the allegation and to confront the witnesses.

4 .

5 Now, I would like to associate myself warmly, Sir, with My
6 Friend, Mr. Cooney's reliance of case of Flanagan -v- UCD,
7 because if my recollection serves me correctly, Mr. Cooney
8 appeared in that case for UCD and I appeared for Flanagan
9 and Flanagan won and the principles --

10 .

11 CHAIRMAN: You really don't lack confidence, do you? Or
12 lack endorsements, do you?

13 .

14 MR. ALLEN: The principles which Mr. Cooney, thanks to me,
15 has been able to rely upon from that judgement, I warmly
16 endorse.

17 .

18 Now --

19 .

20 CHAIRMAN: Are you going to seek sponsorship?

21 .

22 MR. ALLEN: I have that already, Sir.

23 .

24 CHAIRMAN: I see.

25 .

26 MR. ALLEN: "There is no statutory basis, Sir, which this
27 Tribunal or indeed any other tribunal may seek to compel
28 the submission of a statement of evidence by my clients.
29 Under the Tribunals of Inquiry (Evidence) Act 1921 to 1998
30 you, Sir, as the sole member, have powers analogous to that
31 of the High Court. There is no procedure whereby the Court
32 can compel a party to disclose in advance a statement of

1 evidence.

2 .

3 Now, without prejudice to this particular contention, Sir,

4 Mr. Michael Bailey, as part of his continued cooperation

5 with this Tribunal, voluntarily submitted a statement to

6 the Tribunal on the 11th January, 1999. The position in

7 connection with the specific allegations contained at

8 paragraph 64 and 65 of the Gogarty Affidavit is therefore

9 as follows: Mr. Michael Bailey has put both the Tribunal

10 and Mr. Gogarty on notice of the fact that he denies the

11 allegations contained therein and of his intention to

12 provide oral testimony on this issue. Out of fairness to

13 Mr. Gogarty, counsel to Mr. Bailey, being myself for the

14 avoidance of doubt, will put to him gently and quietly, in

15 cross-examination, the version of events which Mr. Michael

16 Bailey will be giving in evidence.

17 .

18 Mr. Gogarty is represented before the Tribunal by senior

19 and junior counsel who will be in a position to

20 cross-examine Mr. Michael Bailey in due course and in all

21 the circumstances, more than adequate fair procedures, I

22 say, will be observed and ensured for Mr. Gogarty.

23 .

24 If I then turn, Sir, to the position of a witness before

25 the Tribunal. As I have indicated, it appears to me that

26 this Tribunal appears to equate the position of Mr. Gogarty

27 as a witness with that of Mr. Bailey or any other accused

28 person before the Tribunal. This is manifestly not the

29 case.

30 .

31 Mr. Gogarty has chosen, for his own reasons, to make the

32 most serious allegations which are strenuously denied

1 against Mr. Michael Bailey and as such an accuser must be
2 subject to cross-examination in the ordinary way and is not
3 entitled, not entitled to assistance in the form of advance
4 warning as to the nature of that cross-examination.

5 .

6 The right to cross-examine is absolute and cannot be made
7 conditional on the disclosure of the nature of the
8 cross-examination.

9 .

10 If I could just pause there and make a point which seems to
11 me to be one of the considerable importance. You have
12 indicated your determination to ensure that there is no
13 ambushing here. With the greatest of respect, it is an
14 error, and I say that with respect, to equate the
15 legitimate cross-examination of Mr. Gogarty and the
16 legitimate and proper testing of the testimony which he has
17 given by putting to him matters and material, the putting
18 of which can be dealt with by all the counsel who
19 represented in this room, with ambush. It isn't ambush.
20 There is no such -- you simply cannot say that that
21 constitutes a form of ambush.

22 .

23 What it does constitute is this, it constitutes the
24 vindication of my clients' constitutional rights and puts
25 them in the position where they can get at -- and I don't
26 mean that in any aggressive or adversarial way -- these
27 tainted and appalling allegations which have been made
28 against them which are dreadful and have had dreadful
29 consequences for them.

30 .

31 Now it should also be noted, Sir, that Mr. Gogarty, insofar
32 as we have been told and we have no reason to believe that

1 anything would be held back from us, is the sole accuser
2 against Mr. Michael Bailey. And accordingly, Mr. Bailey's
3 entitlement to cross-examine Mr. Gogarty assumes a
4 particular importance and cannot be frustrated, I say, with
5 respect, Sir, with any supposed requirement to indicate in
6 advance to Mr. Gogarty the nature of that
7 cross-examination. To do so would be to perpetrate a
8 fundamental unfairness on Mr. Bailey and would be to fetter
9 his constitutional rights.

10 .

11 Now, I have already referred to the fact, Sir, and by
12 reference to the transcript that the Tribunal's legal team
13 appear to be of the view that they have some function in
14 establishing the credibility of Mr. Gogarty. And I have
15 given you the references.

16 .

17 Now, I want to make it clear, Sir, that from what you have
18 said today and indeed from what you have said before, you
19 do not see that as part of your function. I understand
20 you to say that what you seek to do is to establish all of
21 the facts and if I might adopt a phrase which Mr. Cooney,
22 with typical perspicacity used, and quity used on the
23 opening day of these proceedings, a perfectly innocent
24 expression --

25 .

26 CHAIRMAN: Let it be a rarity on that particular day --

27 .

28 MR. ALLEN: Let the chips fall where they will. That is
29 the reality, as I understand it, of what you were saying.

30 .

31 Now that however, and this does need to be made clear, is
32 not the position which is being advanced by your legal

1 team. That is not what they have contended for. They
2 may now seek to contend for it but they certainly have not
3 done so until now.

4 .

5 Sir, I want to make this clear, this does not represent an
6 attack on the legal team. I endeavoured on the first day
7 to indicate that there will be different views. One of
8 the great difficulties which I and my colleagues have had
9 in dealings with this Tribunal is that we have found that
10 any time we seek to assert a view which is contrary to that
11 of the Tribunal, we find ourselves accused of not
12 cooperating, of obstruction and of worse. That has
13 settled the atmosphere, certainly the early atmosphere of
14 these proceedings in a most unsatisfactory manner. That
15 was the background to it and there is no harm in laying
16 that ghost to rest now.

17 .

18 I am not attacking Mr. Hanratty, I am not attacking
19 Mr. Gallagher. I am saying they are wrong in law and I do
20 not expect or believe that either of them will now say that
21 I have attacked them. I haven't. I have said their view
22 of the law is wrong. And that they have been advising you
23 wrongly. That is not an attack on their competence, their
24 ability or their reputation. They, no doubt, will take
25 the view that my view on the law is wrong, but then of
26 course I am fortified by the Supreme Court and its
27 judgements.

28 .

29 You will be relieved to hear, Sir, that I think I can
30 conclude on that note and I hope that -- I was just saying
31 that I can conclude on that note and I hope that you will
32 feel that I have responded to your invitation to assist you

1 in as comprehensive a manner as I have within my
2 competence. I thank you for your patience and your
3 courtesy.

4 .

5 MR. MCGONIGAL: Mr. Chairman, in principle, I adopt the
6 arguments of both Mr. Cooney and Mr. Allen in relation --

7 .

8 CHAIRMAN: Far be it for me to in any way curtail any
9 counsel but could I have an indication of what sort of
10 period of time --

11 .

12 MR. MCGONIGAL: Oh very short. I hope. Certainly not
13 as long as Mr. Allen.

14 .

15 CHAIRMAN: Well he is a rarity.

16 .

17 MR. MCGONIGAL: But might I respectfully suggest, Mr.
18 Chairman, that we are slightly premature in trying to set
19 procedures in relation to cross-examination. My
20 difficulty in dealing with the question which you ask Mr.
21 Cooney which was, why should you not advise the Tribunal of
22 what your case is? The answer to that is, Mr. Chairman,
23 that I don't know what the case is being made against me.
24 And until I know what the case is that is being made
25 against me, I cannot determine the nature of the
26 cross-examination that I may have against any particular
27 witness.

28 .

29 What I mean by that in this particular case is that until
30 Mr. Gallagher has completed his direct -- his examination
31 of Mr. Gogarty, I will not be in a position to even begin
32 to make a decision as to what cross-examination may or may

1 not be necessary and I say that from this perspective.

2 .

3 CHAIRMAN: Mr. McGonigal, may I suggest that you and I are
4 slightly at cross purposes. I have never in any
5 suggestion said that you could be restricted from
6 cross-examination. I have said if the circumstances
7 precedent to commencing your cross-examination require that
8 we know the broad parameters of what your text is, as to
9 what you say was your participation in a sequence of
10 events -- that's all I have said. I have never suggested
11 that anybody isn't entitled. A great deal of time has been
12 wasted by a suggestion that you can limit a
13 cross-examination, in the sense of confinement. I think,
14 the proposition I am inquiring into, and I am inviting
15 assistance is that you claim that you are entitled to be
16 told by any particular witness what is said which is
17 adverse to you.

18 .

19 Now, what I want to know is why should the same reciprocal
20 right not exist to the other witness if we are not in an
21 adversarial situation, if we are in an inquiry situation?
22 That's all I am asking for, but we have had an elaboration
23 of that to date on a quite false premises. Now, that's
24 all I am saying to you.

25 .

26 You say, and I note with particularly -- I have noted what
27 you said that it is premature, you do not know what is
28 being alleged against you. Well take the situation that
29 you are adumbrating, that you can't know that until the
30 examination is completed. That, I think, is perfectly
31 simple but there is no good reason why I think you should
32 not be then asked to say, what's your broad principle?

00119

1 What's your answer in broad principle on oath? What's
2 your participation in the events of the day, if I may again
3 use the phrase? We simply then go to cross-examination on
4 both your client and, obviously Mr. Gogarty first and your
5 client second, as to the, shall we say, the defects, for
6 want of a better English word, which occur in your version
7 or his.

8 .

9 I am here to try and get reality as to what actually
10 transpired.

11 .

12 MR. MCGONIGAL: I have absolutely no difficulty with what
13 you are suggesting, Mr. Chairman. But --

14 .

15 CHAIRMAN: If I didn't state it originally, it is my fault
16 but that's what I intended to convey.

17 .

18 MR. MCGONIGAL: That's why I am saying the thing may be
19 premature. I think that the only time you may take a view
20 in relation to cross-examination is when a particular
21 question is asked, bearing in mind the principles that have
22 been relied on by Mr. Cooney and Mr. Allen because
23 fundamental to those submissions is the principle that no
24 person is legally obliged to make a statement to the
25 Tribunal --

26 .

27 CHAIRMAN: I again have no problem with regard to that
28 principle.

29 .

30 MR. MCGONIGAL: But what that means in my case, Mr.
31 Chairman, or indeed Mr. Cooney's or Mr. Allen's case is
32 that until a witness or witnesses have given evidence,

1 until they have been cross-examined, that is the stage at
2 which a person would be entitled to consider giving a
3 voluntary statement to the Tribunal and even at that stage,
4 depending on the advice that he takes and the view that he,
5 the client, has, he may or may not decide to give that
6 statement.

7 .

8 But if he decides not to give that statement, in my
9 respectful submission, there is no legal authority for
10 saying that a Tribunal could then stop somebody from asking
11 a question in cross-examination. Equally, there is no
12 legal authority, of which I am aware, that would enable a
13 Tribunal to say that that person must give evidence before
14 he cross-examines or tries to cross-examine a particular
15 witness.

16 .

17 CHAIRMAN: Again, accepting the broad premises, how do you
18 say that fits into the idea of fair procedures? The
19 concept of fair procedures where each party is expected to
20 be given a fair opportunity to know and understand what is
21 being alleged against him?

22 .

23 MR. MCGONIGAL: The principle behind the judgements which
24 are being relied on by Mr. Cooney and Mr. Allen, in my
25 respectful submission, are the fact that in all of those
26 cases, an allegation, a serious allegation is being made
27 against a person. When that allegation is made, that
28 person is entitled to all of the evidence upon which
29 supports that allegation. He is then entitled to hear the
30 witnesses and cross-examine the witnesses and only at that
31 stage does he consider the question of giving evidence.

32 .

1 CHAIRMAN: May I make this inquiry from you? If it is
2 alleged that witness X who has given evidence, it is
3 alleged by witness Y in relation to witness X that he is a
4 perjurer, can you think of anything more serious an
5 allegation to be made about anybody? Is he not entitled
6 to know in advance that that proposition is likely to be
7 propounded, if the principle of fair procedures is to be
8 observed on an equal basis on what has been described as a
9 level playing pitch?

10 .

11 MR. MCGONIGAL: As I understand the authorities, no, Mr.
12 Chairman. The position is very simple. The allegation
13 has been made against me in the first place. Mr. Gogarty
14 must give his evidence against me, together with the other
15 evidence that must be given. I must be entitled to
16 cross-examine those witnesses and only at that stage should
17 Mr. Burke be asked for a voluntary statement which he is
18 then entitled to consider giving, or not giving as the case
19 may be.

20 .

21 He can then be called as a witness to the Tribunal and as a
22 witness to the Tribunal, he then gives his evidence and the
23 Tribunal can give out the statement prior to that or if
24 there is no statement, they have to take him cold and ask
25 whatever questions they wish to ask him.

26 .

27 But there is a confusion here in this sense, Mr. Chairman.
28 There is a significant difference, as you appreciate,
29 between a court case and a Tribunal of Inquiry. There is
30 absolutely no necessity for any person to cross-examine any
31 of the Tribunal's witnesses. There is a statement in Sir
32 Richard Scott's article in the Arms to Iraq Inquiry, that

1 when the Tribunal counsel has finished its question, there
2 should be no questions for anyone else to ask because he
3 has then completed the inquiry in respect of this
4 witness.

5 .

6 Might I demonstrate that in this particular case, because
7 it is a particular concern that I have. I raised part of
8 my concerns this morning in relation to the County
9 Council. But there is more significant -- another
10 significant concern is this; that the Tribunal were
11 furnished with statements by the Guards of investigations
12 and statements which they took a long time ago. In the
13 statement of Inspector Harrington, there is a suggestion
14 that Mr. Gogarty at that time made an allegation that he
15 had been paid -- that he paid Mr. Burke £30,000. Now,
16 that piece of evidence has not yet been put by anybody to
17 Mr. Gogarty.

18 .

19 It is a contradiction of his evidence in the witness-box.
20 It's not clear to me how, at this moment in time, how the
21 Tribunal intend to deal with the contradictions which
22 appear in other statements with a witness which they have
23 in hand.

24 .

25 It seems to me that they should, at this stage, be putting
26 all of that evidence to Mr. Gogarty at this time because
27 this is, as you have rightly pointed out, an inquiry, the
28 purpose of which is to elucidate the facts.

29 .

30 The Tribunal have spent a considerable period of time
31 carrying out private investigations. Some of those
32 investigations we are aware of, some of them we are not.

1 Some of them may have been fruitful from the Tribunal's
2 point of view in getting evidence material to the issues
3 which it's inquiring into, some of it may not. But the
4 only people who have all of the evidence are the Tribunal
5 team. The fact that they have given copies of certain of
6 that material to other parties is irrelevant.

7 .

8 What is material is the fact that they have all of the
9 evidence. Therefore they are in a position to assimilate
10 and put together the contradictions which have appeared in
11 Mr. Gogarty's affidavit and are in a position to test it.

12 .

13 Now from my point of view, added to, for example, Inspector
14 Harrington's statement, they also have statements supplied
15 to them from Mr. Cooney's clients and Mr. Allen's
16 clients.

17 .

18 Now, they are evidence which support the suggestion that
19 £30,000 was paid, so far as my client is concerned, so far
20 as the vindication of my client's name and reputation are
21 concerned, is it not the position that the Tribunal should
22 be putting that evidence to Mr. Gogarty as well? They can
23 not expect or rely on Mr. Cooney or Mr. Allen to do that
24 work for them, nor should they be asking me to rely on Mr.
25 Cooney or Mr. Allen to cross-examine Mr. Gogarty on
26 material which they have and they know contradicts Mr.
27 Gogarty's evidence.

28 .

29 They must do the task which they have been asked to do and
30 that is to inquire into all of the evidence. So that it
31 seems to me, Mr. Chairman, at this particular time, that it
32 is totally premature to be considering what

1 cross-examination should or should not be given by any
2 particular party and that you should reserve that position
3 until at least Mr. Gogarty has finished his direct
4 evidence.

5 .

6 But there is one other matter that I want to flag at this
7 stage. I indicated this morning some of the concerns that
8 I had in relation to evidence, answers which had been given
9 by Mr. Gogarty yesterday and that they had not yet been
10 followed up.

11 .

12 Allied to that concern is, of course, the fact that where
13 an allegation of improper conduct has been made by my
14 client in relation to planning matters, it is clear from
15 the Terms of Reference that the Tribunal must, at this
16 stage, have carried out significant inquiries with county
17 councillors, planning officials and other persons. That
18 evidence is either in support or not in support of
19 allegations being made by Mr. Gogarty.

20 .

21 It seems to me fundamental that before I could even begin
22 to think of cross-examining Mr. Gogarty in relation to
23 those issues, that I must be made aware of that evidence.
24 Not that it has to be lead in evidence but that I must be
25 able to see it. I must see the statements. I must see
26 the investigation that the Tribunal has carried out with
27 the planning officials, with the county councillors.

28 .

29 Equally, Mr. Chairman, the significant portion of the land
30 which has been the subject matter of this inquiry is the
31 700-odd acres, 726 acres. There may well be a view in the
32 community that that land has been rezoned, planning

1 applications made here, there and everywhere. One of my
2 significant concerns is that that belief should be
3 disabused forthwith. It seems to me important, where the
4 only statement of opening, if you like, that we have had
5 has been the coloured map which has been to my right-hand
6 side. That map has been there for the last six days.
7 There have been marks on it, it has not been relied on at
8 all and yet I assume that it is central to the inquiry
9 which is being made.

10 .

11 Now, I understand that in respect of the lands, the subject
12 matter of this inquiry, that 90 percent of that land is
13 still agricultural land and that only a very small portion
14 of it was rezoned or dealt with by a planning
15 application.

16 .

17 Now, it seems to me fundamental to the Terms of Reference
18 which you have been given that that is something which
19 should be explained from the start, so that everybody
20 understands the background against which Mr. Gogarty is
21 making allegations. Because it is only if we understand
22 the background that we can begin to comprehend the nature,
23 strength or weakness of his evidence. So that those
24 matters, Mr. Chairman, are some of the matters which are
25 concerning me in relation to the question of
26 cross-examination.

27 .

28 The only other matter which is concerning me is that I am
29 aware or believe that Mr. Gogarty, a long time ago, with
30 Donnelly Neary and Donnelly, gave a statement to them which
31 was a considerably lengthy statement and it was referred to
32 in one of the newspapers as having been made.

1 .
2 We have sought that statement and have not yet seen sight
3 of it. I assume that the Tribunal has it, but it may well
4 be material to the question of cross-examination of Mr.
5 Gogarty, to see what it was he was actually saying at that
6 time.

7 .
8 But in principle, Mr. Chairman, I support the legal
9 principles of Mr. Cooney and Mr. Allen, but I invite the
10 Tribunal at this stage to defer the question of how they
11 are going to deal with cross-examination until it arises
12 and until we see exactly how it is that Mr. Gallagher is
13 going to deal with Mr. Gogarty in relation to the matters
14 which I suggest he should deal with.

15 .
16 MR. FEENEY: Mr. Chairman, I have a very brief
17 application, a letter of the 18th January said in the first
18 paragraph that "The solicitor to the Tribunal referred to
19 previous correspondence regarding the procedure applicable
20 to cross-examination of witnesses at the above sittings
21 and, in particular, cross-examination by persons who had
22 not furnished a statement of evidence in respect of the
23 issues outlined in the affidavit of James Gogarty."
24 That was the matter. It is the affidavit of James
25 Gogarty. It is the matters outlined in that.

26 .
27 Now, the factual position is that my client I think, on any
28 examination, has made a full statement of evidence in
29 respect of issues. That does not mean that I do not have
30 an interest in relation to what has been discussed. Quite
31 clearly, on any interpretation, or any suggestion put
32 forward by you, Chairman, I would be entitled to fully

1 cross-examine Mr. Gogarty on behalf of my client.

2 .

3 But the position is that the allegation which Mr. Gogarty
4 has put and in respect of which you would, by your Terms of
5 Reference, have to make a finding, is that Mr. Cooney's
6 clients were involved in two incidents where payments were
7 made to my client.

8 .

9 I know from the statements of evidence that have been
10 submitted to the Tribunal and passed on to my solicitors,
11 that each and every person who is allegedly present or
12 involved in those two payments other than Mr. Gogarty
13 denies that they happened. And that brings us, I think,
14 to -- on the fundamental point in the analysis which you
15 Chairman were putting forward earlier, is where you suggest
16 that some narrative has got to be given as regards the two
17 incidents in respect of which allegations have been made
18 against my client. The narrative, Mr. Gogarty can give a
19 narrative describing something which he alleged happened.
20 It is impossible to give a narrative back other than to say
21 "In some instances, I wasn't there", or "In other
22 instances, I was there", but it never happened.

23 .

24 That is as full a narrative as you can legitimately give
25 and, in those circumstances, it is not just me on behalf of
26 my client requires to be in a position to cross-examine Mr.
27 Gogarty but clearly it is in my interests that the counsel
28 representing other parties who allegedly were present or
29 involved are equally in a position to fully cross-examine
30 Mr. Gogarty and cross-examine is not just narrative,
31 because you, Chairman, were dealing with narrative, but
32 there is also the important matter in relation to credit

1 and one of the ways, because a narrative where somebody
2 says you were there and somebody else says I wasn't there,
3 that of itself might not get you very far in the very
4 difficult and important task you have of deciding facts.

5 .

6 And this is one of the facts in relation to my client which
7 you have got to decide is were those two payments allegedly
8 made -- alleged by Mr. Gogarty made to my client. A
9 finding adverse to my client would have very serious
10 effects on his reputation; therefore he must be in a
11 position to fully challenge it.

12 .

13 Also, the other persons allegedly involved in those
14 payments must be, and I have an interest to that extent, in
15 a position to fully challenge. And it is not limited or
16 circumscribed in any way by a requirement or a necessity
17 for a narrative, particularly where the narrative can be no
18 more than "you did," "you didn't" and also it is essential
19 that counsel representing those persons allegedly involved
20 in that instance, can fully cross-examine as to credit.

21 Because if the narrative is "it did happen", "no, it
22 didn't", one of the ways in which your task is eased is if
23 a party is put to the test of his credit and how he
24 responds and to suggest that in advance you can some way
25 circumscribe the testing of that witness' credit is in
26 fact, I suggest, to hinder your ultimate task, because it
27 is by a witness' credit being tested and examined that you
28 would have some capacity ultimately to say, "I believe this
29 evidence" or "I don't".

30 .

31 So in those circumstances, I adopt the legal submissions
32 which were made. I have no intention of repeating them.

1 I think any analysis of In Re: Haughey allows counsel whose
2 client's reputation is at risk and that is the category
3 into which my client comes at the moment, Mr. Cooney's
4 client, Mr. Allen's clients, they are the parties involved
5 in the two instances in respect of which I am before the
6 Tribunal. In those circumstances, each and every one of
7 the counsel have a common interest in disputing not only
8 the factual evidence and it's not narrative, "it did" or
9 "it did not happen", but also being in a position to test
10 the credit of Mr. Gogarty and without that, if we are in
11 any way hindered, a fundamental requirement in relation to
12 natural justice would in fact be lost.

13 Thank you.

14 .

15 CHAIRMAN: Are you going to be long?

16 .

17 MR. HANRATTY: If it's of any assistance, I will make the
18 point and perhaps should have made it earlier, the Tribunal
19 wrote this letter of the 18th January to all of the
20 parties. The letter hasn't actually been opened, but it
21 was to flag the possibility that if there is any particular
22 issue which has not been flagged in advance in a statement,
23 that it would have consequences with regard to
24 cross-examination.

25 .

26 As far as we can see, we don't have a particular difficulty
27 with Mr. Redmond's statement, Mr. Downes' statement or Mr.
28 Sweeney's statement. I don't know if that is of any
29 assistance.

30 .

31 CHAIRMAN: I agree with that. That view.

32 .

1 MR. LEONARD: I am delighted to hear that insofar as it
2 goes, but you did invite us to enter into discussion with
3 you, Mr. Chairman, and just briefly --

4 .

5 CHAIRMAN: Before you do anything, would you ever turn on
6 your microphone because I can't hear you.

7 .

8 MR. LEONARD: I think I should have come clear -- can I
9 illustrate just very briefly the difficulties we have had
10 since the Tribunal started.

11 .

12 You know, Sir, why my client was granted limited
13 representation, there were two allegations made against Mr.
14 Downes and Mr. Sweeney in the same breath. One related to
15 their conduct as executives of Joseph Murphy Structural
16 Engineers and their good name has been impugned by Mr.
17 Gogarty on several occasions in giving evidence but he
18 hasn't backed up any of those matters which have been
19 extensively reported in the papers by giving specific
20 evidence of those allegations.

21 .

22 Now, the other matter which is referred to in Mr. Gogarty's
23 affidavit has not been addressed in any way by Mr. Gogarty
24 in evidence and that's, in a sense perhaps, the heart why
25 my client was brought before this Tribunal because, so far,
26 the only evidence given by Mr. Gogarty in respect of Mr.
27 Sweeney's activities or Mr. Downes' activities is comments
28 on matters found allegedly by Mr. Frank Reynolds. He
29 hasn't given one single piece of admissible evidence
30 against either Mr. Downes or Mr. Sweeney concerning their
31 particular activity.

32 .

1 Now, one of the matters which is clearly going to involve
2 an inquiry by you, Sir, is this; what motivated Mr. Gogarty
3 in engaging in this strenuous and lengthy vendetta against
4 a whole series of people --

5 .

6 CHAIRMAN: Surely this is going to the merits of the whole
7 matter, not going to the question as to whether or not
8 there should be an applicable procedure in relation to
9 cross-examination? I don't want to start an address on the
10 merits which will presumably be one day made to me when we
11 have heard all the evidence. I do want to keep the
12 control over what we are now discussing.

13 .

14 MR. LEONARD: I appreciate that. I will try and confine
15 myself, I will zone in on that as quickly as I can, but in
16 order then to try and defend Mr. Downes' reputation, I have
17 been afforded to date the facilities by the Tribunal of
18 inspecting several thousand pages of material which have
19 been discovered by Mr. Gogarty to the Tribunal and Mr.
20 Rigney and Mr. O'Leary and I have gone through that,
21 preparing an index of what appears to us to be the
22 documents which reflect on my client's credit and we will
23 be asking in due course for copies of those.

24 .

25 But as Mr. Gogarty has given evidence, Mr. Gogarty has
26 given evidence over the six days of the sittings of the
27 Tribunals of various matters and matters have arisen in Mr.
28 Gogarty's evidence which Mr. Downes fundamentally disagrees
29 with. These are matters which will go to --

30 .

31 CHAIRMAN: Mr. Leonard, we have a full statement here from
32 you. You are not in the fray at all as far as this

1 discussion is concerned.

2 .

3 MR. LEONARD: Sorry, My Lord?

4 .

5 CHAIRMAN: We have a full statement running to three or
6 four pages.

7 .

8 MR. HANRATTY: And we understand, Sir, we will be getting
9 a supplemental statement.

10 .

11 CHAIRMAN: What interest have you -- there is no way in
12 which I could confine you even on my terms from
13 cross-examining. Why are you making any submissions
14 for? You are not involved as far as I am concerned.

15 That's not -- this is not an application that you have no
16 responsibility. This is a matter dealing with
17 cross-examination and only that. Mr. Leonard, that is the
18 limit of what we are discussing here this afternoon. No
19 doubt others have strayed, but I don't think you can follow
20 the train of more furry dogs.

21 .

22 MR. LEONARD: I am not trying to stray outside the point of
23 cross-examination.

24 .

25 CHAIRMAN: There is really no point to this. You have a
26 long, absolutely narrative statement saying exactly who you
27 were, what you were, what your recollection is of the
28 various events. It's exactly what I am talking about,
29 that we do know what your participation, and I mean that in
30 an absolutely neutral sense, in the event which are being
31 discussed here. I don't have any problem with you.
32 Would you not worsen your position by possibly making a

1 foolish admission of some kind.

2 .

3 MR. LEONARD: I don't want to make any admission --

4 .

5 CHAIRMAN: Would you not let us deal with the matter which
6 doesn't concern you.

7 .

8 MR. LEONARD: There is an aspect of this which does concern
9 me --

10 .

11 CHAIRMAN: Well make it briefly, because I don't see it.

12 It has to be brief now.

13 .

14 MR. LEONARD: It will be brief.

15 .

16 CHAIRMAN: The Tribunal is sitting beyond its normal
17 hours, I do so with pleasure to hear relevant matters but
18 not hear matters which are not germane.

19 .

20 MR. LEONARD: No. Well I will try and confine myself --

21 .

22 CHAIRMAN: Would you ever tell me what you want to say
23 briefly, in principle.

24 .

25 MR. LEONARD: My concern is this -- as Mr. Gogarty gave
26 evidence of various matters, they related to matters which
27 are not in any way covered by my client's statement.

28 There are matters --

29 .

30 CHAIRMAN: Just to be clear about this. Your client is
31 not obliged to cover what Mr. Gogarty says. Your client
32 is obliged, as far as I am concerned, I withdraw the word

1 obliged, is invited to say how and where and what he
2 participated in. He may, probably has indicated perfectly
3 innocent participation. I am not here to convict
4 anybody. I am here to find the facts. I keep on telling
5 you that, but you don't listen.

6 .

7 MR. LEONARD: I am listening, but I am not making my point
8 to you perhaps sufficiently clearly. What I am saying is
9 this; Mr. Gogarty has made certain statements in his
10 evidence concerning Mr. Downes' role with a particular
11 person. Now, I have no notice of that. It's not in the
12 affidavit. It will come into issue in the cross-examining
13 of Mr. Gogarty because issue is going to be taken with
14 those matters.

15 .

16 Now, if you look at your letter, that's why I am concerned
17 about it, your letter refers to matters coming into issue
18 which have not been flagged in advance. And this is what
19 Mr. McGonigal was saying, that there are matters have now
20 come into the framework of reference which were not covered
21 by my client's statement which, if the Tribunal insisted on
22 being given details of in advance, would be fundamentally
23 unfair if Mr. Gogarty got to hear about what he was about
24 to cross-examined on, because he would then have advanced
25 warning --

26 .

27 CHAIRMAN: I follow that submission but I will give the
28 credit to which it's worth when I come to consider the
29 matter. You may well be right for all I know. I have go
30 to sit down and think this out, in the light of what have
31 been submitted --

32 .

1 MR. LEONARD: That's the point. I am sorry I was so
2 convoluted.

3 .

4 MR. O'DONOGHUE: I hadn't intended to make submissions.
5 Because of what Mr. Hanratty said, it is not necessary. I
6 too have one simple concern and that is this. That as a
7 result of Mr. Hanratty's intervention, that I be permitted
8 full and unfettered cross-examination of Mr. Gogarty
9 without any reference to --

10 .

11 CHAIRMAN: Insofar as it relates to you.

12 .

13 MR. O'DONOGHUE: Indeed, without reference whatsoever to
14 the contents of the letter to the Tribunal of the 18th
15 January, 1999.

16 .

17 CHAIRMAN: So long as the matter refers to you and has you
18 in the frame. Whatever he said, what you say brings you
19 within the frame and you want to contest, you are perfectly
20 entitled as far as I am concerned. It may well be that
21 you have at least given some broad indication of what your
22 position is.

23 .

24 MR. O'DONOGHUE: I don't want to alter it in any way. I
25 want to make it clear --

26 .

27 CHAIRMAN: As I said already, I am not trying to confine
28 the -- I am trying to organise there is no ambush. I may
29 be wrong in that. There have a lot of authorities been
30 propounded. I don't know what is going to be said
31 essentially in reply. I am going to have to sit down and
32 think about it.

1 .

2 MR. O'DONOGHUE: That leaves me with a concern. What I am
3 requesting of the Tribunal team is that they have
4 everything they want from me and that I have no regard to
5 the --

6 .

7 CHAIRMAN: Likewise, if you have material which you say
8 you require to see, if it's in the documentation which is
9 in circulation but hasn't gone to you, so be it, we will
10 get it to you.

11 .

12 MR. O'DONOGHUE: I am not making that point at all. I
13 apologise if I haven't made myself clear. I am saying
14 that I want it made clear to me by the Tribunal that I need
15 have no regard to the contents of the letter of the 18th
16 January. It does not apply to me.

17 .

18 CHAIRMAN: If it doesn't apply to you, it doesn't apply to
19 you. Now, Mr. Hanratty.

20 .

21 MR. O'DONOGHUE: I am not perhaps hearing you very well but
22 I need to know as a ruling from you --.

23 .

24 CHAIRMAN: It does not apply to you. I will cope with
25 that in my ruling. I cannot very well deal with it here
26 and now.

27 .

28 .

29 MR. O'DONOGHUE: Then Sir, I will have to make submissions
30 in relation to that because if it's a conditional matter,
31 then I will be adopting the submissions made by My Friends
32 earlier --

1 .

2 MR. HANRATTY: I think the position might be met, Sir, if
3 the Tribunal indicated that you would rule on My Friend's
4 submission at the termination of the submissions on this
5 point --

6 .

7 CHAIRMAN: All right then, I will do that.

8 .

9 MR. HANRATTY: Sir, as you can appreciate, I have to reply
10 to a number of parties. I also have to reply to a number
11 of specific allegations, and in Mr. Allen's case, invective
12 that he uttered in relation to counsel.

13 .

14 I was proposing, Sir, as part of my reply, hopefully
15 briefly, to open extracts from the correspondence in
16 respect of each of the three parties, the JMSE block of
17 parties, Mr. Bailey and Mr. Burke and it's quite clear and
18 I think, Sir, when that is done and you contrast the actual
19 content of what actually happened as disclosed in the
20 correspondence with the submissions that you have heard
21 here today, it will put in context the difficulties which
22 the Tribunal has had from these parties, the submissions
23 that they have made about their not being legally obliged,
24 accompanying as they did, protestations that they were
25 cooperating with the Tribunal as the Tribunal endeavoured
26 to get these statements.

27 .

28 So it's quite clear, Sir, I am not going to have time this
29 afternoon to open that correspondence. It's not going to
30 take terribly long but it certainly will take us -- it
31 would take certainly beyond five o'clock, so with your
32 permission, Sir, what I would propose to do is just to pick

1 out a couple of important points that I think should be
2 dealt with immediately and then if the matter could be
3 deferred until tomorrow so that I would have sufficient
4 time to make my submissions in reply and My Friends would
5 have their opportunity to reply to me.

6 .

7 CHAIRMAN: In relation to that, I'd be quite happy with
8 that, but may I say that the oral hearing will have to go
9 on at ten o'clock.

10 .

11 MR. HANRATTY: Oh yes, I was suggesting tomorrow afternoon
12 at two o'clock.

13 .

14 CHAIRMAN: The continuation will be tomorrow afternoon.
15 It couldn't be in the morning.

16 .

17 MR. HANRATTY: In that case, Sir, I can be very brief
18 today and I think you can rise.

19 .

20 It seems to me, Sir, that there are some fundamental
21 misconceptions flying around this room that really ought to
22 be put right at this stage.

23 .

24 I think it's indicative that nobody has actually bothered
25 to open the letter which gave rise to these applications
26 and, with your permission, I would now like to do so.

27 .

28 This was a letter from the Tribunal to the parties and it
29 was dated 18th January, 1999. I am reading the one
30 addressed to Messrs Fitzsimons Redmond in respect of JMSE
31 but the same letter was written to all of the parties.

32 It says

1 .

2 "Dear Sirs,

3 I refer to previous correspondence regarding the procedure
4 applicable to cross-examination of witnesses at the above
5 sittings and, in particular, cross-examination by persons
6 who have not furnished a statement of evidence in respect
7 of the issues outlined in the affidavit of Mr. James
8 Gogarty.

9 .

10 A number of persons referred to in Mr. Gogarty's affidavit
11 of the 12th October, 1998 have furnished written statements
12 to the Tribunal refuting Mr. Gogarty's allegations but have
13 not furnished any statement of the evidence they propose to
14 give on particular issues raised in his affidavit.

15 .

16 I am directed by the Sole Member to confirm that such
17 persons who have not furnished a statement of their
18 evidence on a particular issue in advance shall not be
19 entitled to cross-examine Mr. Gogarty on that issue until
20 after they have given their own oral evidence on the
21 issue."

22 .

23 Now, as you can see, Sir, there are two serious points
24 which need to be taken out of that letter.

25 .

26 The first one is that all that it is saying is that if
27 somebody wishes to cross-examine Mr. Gogarty or for that
28 matter any other witness to this Tribunal on something
29 which they have not themselves given advance notice of to
30 that witness, that their right to cross-examine will be
31 deferred.

32 .

1 There is no question and there never has been any
2 suggestion from this Tribunal that anybody's right to
3 cross-examine any witness will be removed. And one would
4 be forgiven for thinking, after Mr. Allen's submissions in
5 particular, that this was what the Tribunal was doing.

6 .
7 Mr. Allen's submissions contend the implication that that
8 is in fact what the Tribunal is doing. All that is
9 suggested in this letter is that if you do not give advance
10 notice of what you intend to say, your right to
11 cross-examine a particular witness will be deferred until
12 after your own evidence-in-chief has been given.

13 .
14 And just to show, Sir, what the intention of that
15 particular procedure was, if I can refer you to a passage
16 in, again a letter to Fitzsimons Redmond, although similar
17 statement was made to the other parties. In the case of
18 Fitzsimons Redmond, it's dated 17th December, 1998 and it
19 refers to the procedures which the Tribunal was proposing
20 to adopt.

21 .
22 It says: "In general, the Sole Member has not decided the
23 order of witnesses. The Sole Member has decided that any
24 party who does not provide to the Tribunal a statement of
25 the evidence intended to be given may have their right to
26 cross-examine other witnesses deferred until after their
27 own evidence has been given. This procedure is being
28 adopted to enable persons affected by evidence of which
29 there has been no prior circulation to the Tribunal, a
30 reasonable opportunity to consider such evidence before
31 they are cross-examined on their own evidence.

32 .

1 This is intended to "level the pitch" for those who have
2 cooperated with the Tribunal by providing a statement of
3 their evidence in advance for circulation to other affected
4 parties."

5 .

6 That is the sole intention, Sir, of the procedure which you
7 have adopted.

8 .

9 My Friends have relied on the authority of In Re: Haughey
10 and indeed it was my own intention to open that very
11 passage which Mr. Cooney opened at page 263 of the
12 judgement in In Re: Haughey reported at 1971 Irish
13 Reports. It was my intention, Sir, to reaffirm that this
14 Tribunal intends, as it has repeatedly stated it does, to
15 implement rigorously the principles of fair procedures as
16 enumerated in Re: Haughey.

17 .

18 And I would like to refer you to another passage from
19 another leading authority in this jurisdiction on the
20 question of fair procedures as they apply to Tribunals.

21 It's a passage from the judgement of Mr. Justice Henchy in
22 the case of Kiely -v- Minister for Social Welfare, 2,
23 which is reported 1977 IR at page 276, and it says
24 "Tribunals exercising quasi-judicial functions are
25 frequently allowed to act informally, to receive unsworn
26 evidence, to act on hearsay, to depart from the rules of
27 evidence, to ignore courtroom procedures and the like, but
28 they may not act in such a way as to imperil a fair hearing
29 or a fair result."

30 .

31 Now, Sir, as you will be unfortunately painfully aware,
32 every time this Tribunal has adopted a procedure for the

1 express purpose of achieving fairness between the parties,
2 but which departs from the strict rules of procedure as
3 they apply to courts, or the strict rules of evidence as
4 they apply to courts, the Tribunal has been met with a
5 chorus of righteous indignation from particularly Mr.
6 Cooney and Mr. Allen, premised on the misconception that
7 this Tribunal is bound by the strict rules of evidence and
8 the strict rules of procedure as they apply to courts.

9 .

10 The courts have repeatedly asserted, most recently in the
11 case of Haughey -v- the Moriarty Tribunal and Bailey -v-
12 Flood, the proceedings in which this Tribunal itself was
13 embroiled, the courts have repeatedly asserted that
14 Tribunals are masters of their own procedure. I would
15 have thought by now that all of the parties involved with
16 this Tribunal should understand that fundamental concept
17 and to try and shake themselves loose from the shackles of
18 the proposition that this Tribunal is strictly bound by the
19 strict rules of evidence as they apply to courts and the
20 strict rules of procedure as they apply to courts and not
21 to criticize this Tribunal every time it adopts a procedure
22 which, on the face of it, is reasonable, which is designed
23 to, as stated in the correspondence, level the playing
24 pitch, for parties who have cooperated with this Tribunal
25 by giving statements in advance of evidence they intend to
26 give.

27 .

28 So in my respectful submission, Sir, the measure which you
29 have indicated in your letter of the 18th January, which is
30 merely to defer cross-examination in certain circumstances
31 and to defer cross-examination only in respect of certain
32 issues, is an entirely reasonable procedure. It is a

1 procedure which, in my respectful submission, does in fact
2 achieve fairness to all of the witnesses who have to give
3 evidence before this Tribunal.

4 .

5 So I think I should leave my submissions at that for today,
6 Sir, and to put the matter in context and, in particular,
7 to put in context some of the submissions which have been
8 made here today. I will propose, with your permission,
9 tomorrow afternoon with the resumption of my reply to open
10 extracts from the correspondence with each of these three
11 parties to illustrate my point.

12 .

13 CHAIRMAN: Very good, Mr. Hanratty. Thank you. I will
14 adjourn this applications to, I suppose, ten past two
15 tomorrow afternoon.

16 .

17 MR. COONEY: I assume, Mr. Chairman, if Mr. Gogarty
18 finishes direct evidence, we won't be obliged to start
19 cross-examination until this ruling is given.

20 .

21 CHAIRMAN: As I understand it, Mr. Gogarty is asking for a
22 rest and if we could finish the evidence-in-chief, as such,
23 I think that's the point in which the rest should cut in
24 and rather than break, so -- that would be how it's
25 approaching, I will hear anybody to the contrary but that's
26 how broadly speaking we will approach it.

27 .

28 MR. COONEY: I understand that, Chairman, then you
29 visualise a day or two between the end of his
30 evidence-in-chief and cross-examination starting?

31 .

32 CHAIRMAN: I beg your pardon?

1 .

2 MR. COONEY: Do you visualise an interval of one day or
3 perhaps two?

4 .

5 CHAIRMAN: One day or two.

6 .

7 MR. COONEY: Between the --

8 .

9 CHAIRMAN: Very good. Thank you. So the hearing of the
10 ordinary matter at ten o'clock tomorrow morning and this at
11 ten past two tomorrow afternoon

12 .

13 THE HEARING THEN ADJOURNED UNTIL THE FOLLOWING DAY,
14 THURSDAY, 21ST JANUARY, 1999 AT 10AM.

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