

1 THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 21ST JANUARY

2 1999, AT 10AM:

3 .

4 MR. GALLAGHER: Mr. Gogarty please.

5 .

6 MR. McGONIGAL: Mr. Chairman, before Mr. Gogarty continues

7 with his evidence, or before he comes to the witness-box,

8 there is a matter which I wish to draw to your attention.

9 I regret I have to draw it to your attention but it seems

10 significant and you should be made aware of it.

11 .

12 Apparently, Mr. Chairman, on last night, on the Vincent

13 Browne radio programme, the journalist, Katie Hannon

14 claimed to have been given information as to why Mr.

15 Gogarty had not been asked the names of the councillors

16 allegedly named by Mr. Bailey by what she termed "one of

17 the Tribunal's solicitors." The essence of her remarks

18 were that she had been told that in relation to Mr. Burke,

19 it was possible to stand the allegations up because he had

20 received money but that in relation to the others, it was

21 hearsay and that the investigations were continuing.

22 .

23 Mr. Browne apparently pointed out that the contents of this

24 alleged conversation were also hearsay as far as Mr. Burke

25 was concerned.

26 .

27 On reading that, Mr. Chairman, I am quite certain that you

28 appreciate the significance and seriousness of what has

29 taken place. I wish to know, Mr. Chairman, whether this

30 is true, whether one of the Tribunal solicitors spoke to

31 one or more members of the press and gave this

32 information. I want to know, Mr. Chairman, on whose

1 authority that was done. I want to know, Mr. Chairman, why
2 this information was given to the press, a member of the
3 press privately and why the Tribunal was not told in public
4 session this or some proper account of why questions were
5 not being asked.

6 .

7 The issues, Mr. Chairman, are first of all, the truth of
8 whether this took place; secondly, Mr. Chairman, if it is
9 true, that a member of the Tribunal team spoke to the press
10 and gave this information, it seems to me to prima facie
11 constitute a leak of a most significant kind. And having
12 regard to statements already made by you, Mr. Chairman, I
13 will invite you to consider seriously that aspect of this
14 matter.

15 .

16 Thirdly, Mr. Chairman, the contents of what was said
17 concern me deeply. First of all, it would I appear that
18 the Tribunal is in possession of evidence which they have
19 not furnished to me, as Mr. Burke's representative, in
20 relation to matters which may or may not certain improper
21 actions on the part of Mr. Burke.

22 .

23 Secondly, it seems from the statement that the Tribunal may
24 already have formed a view as to the facts that they intend
25 to find against Mr. Burke based solely on the premises that
26 he is a person who has received money.

27 .

28 Thirdly, Mr. Chairman, it appears to be the position, if
29 these remarks are true, that the Tribunal has also formed a
30 view that it does not intend to find adverse facts against
31 anybody whom they are not able to establish has received
32 money.

1 .

2 These matters, Mr. Chairman, cannot be more serious, allied
3 to the matters which I raised yesterday, I indicated that
4 the credibility of this Tribunal was at stake. There are
5 few matters, Mr. Chairman, for which the judiciary and
6 Irish bar are renowned. Two of them immediately come to
7 mind, one is their independence, secondly is their
8 integrity.

9 .

10 If there is any truth whatsoever in this statement, Mr.
11 Chairman, both of those principles are soundly and roundly
12 being attacked and it is for you, Mr. Chairman,
13 regrettably, to deal with it properly and immediately, not
14 only by carrying out an instant investigation into these
15 matters but also, Mr. Chairman, to deal once and for all
16 with the questions which I asked yesterday should asked,
17 Mr. Gogarty should be asked to explain his answers which I
18 identified yesterday and let us have the detail.

19 .

20 If any investigations have been carried out by this
21 Tribunal into those allegations, then the first
22 investigation would have been to notify those persons who
23 were identified in the Garda statements of the making of
24 the allegations, so they presumably already are on notice
25 of the nature of that evidence. If they are not, then
26 that itself is a disgrace.

27 .

28 So now, Mr. Chairman, I want you to do two things. I want
29 you to carry out an immediate investigation, without
30 continuing the Tribunal, into this programme. And
31 secondly, Mr. Chairman, after that has been fully explored
32 by you, I want you to recall Mr. Gogarty and immediately

1 ask him to give the detailed answers to the two questions

2 which I identified yesterday.

3 .

4 CHAIRMAN: This is obviously a very, very serious

5 matter. I have no notice whatsoever of it. I did not

6 hear the programme and I have just walked into the building

7 and literally, the first information I have and the first

8 intimation I have is what Mr. McGonigal has said. I

9 accept the seriousness of what he is saying and the need to

10 investigate it. I propose to rise for ten minutes, first

11 of all to inquire preliminarily whether I can deal with the

12 entire matter in the morning immediately. I do not know

13 but I will have to find that out. And I do not intend to

14 rush into anything unless and until I have satisfied myself

15 as to what is the circumstances. I appreciate the

16 courtesy and I appreciate the terms of the strictures which

17 are being set by Mr. McGonigal, he is perfectly entitled to

18 make them. I am, likewise, entitled to look into them and

19 find out what is the basis and what is -- because I

20 certainly have no knowledge of them.

21 .

22 In those circumstances, it is now twenty minutes past ten,

23 I will sit again at eleven o'clock.

24 .

25 THE TRIBUNAL ADJOURNED FOR A BREAK AND RESUMED AS FOLLOWS:

26 .

27 CHAIRMAN: I have considered what Mr. McGonigal has said,

28 and I have taken the first essential step which is to get a

29 transcript of the radio programme and to find out precisely

30 what was said.

31 .

32 When I obtain that, which is, I am told, will be somewhere

1 around one o'clock, I propose to interview the journalist
2 concerned and find out where she says she got it from.
3 She has nominated what can only be one of two people. I
4 have also seen those people and made my necessary inquiries
5 which clearly indicate that they did not state anything.
6 That's the furthest I can bring it at the moment. I shall
7 bring it to a total and full conclusion when I have the
8 opportunity of looking into the full facts. The Tribunal
9 proceeds now. Mr. Gogarty, would you come to the
10 witness-box please.

11 .

12 MR. McGONIGAL: Before you do, Mr. Chairman, might I just
13 respond to what you have said --

14 .

15 CHAIRMAN: No, you may not. I have made a ruling. That
16 is what I am going to do, and I am going to do it. That's
17 the end of the matter.

18 .

19 MR. McGONIGAL: It really is only --

20 .

21 CHAIRMAN: I beg your pardon?

22 .

23 MR. McGONIGAL: It is really only the beginning of the
24 matter.

25 .

26 CHAIRMAN: That may well be true when we know the full
27 facts.

28 .

29 MR. McGONIGAL: May I explain something, Mr. Chairman?

30 .

31 CHAIRMAN: I have made a ruling that the Tribunal is going
32 to proceed. The matter is going to be dealt with when I

1 have had an opportunity of finding out independently what
2 was said. Now until that is done, I am not going to do
3 anything else whatsoever and I am not going to take
4 dictation from you or any other counsel. This Tribunal is
5 now going on now.

6 .

7 MR. MCGONIGAL: I am not trying to dictate anything, Mr.
8 Chairman.

9 .

10 CHAIRMAN: Mr. McGonigal, I have said that the Tribunal is
11 going to proceed and the evidence of Mr. Gogarty continues
12 until one o'clock.

13 .

14 MR. MCGONIGAL: May I ask a question in relation to Mr.
15 Gogarty's evidence?

16 .

17 CHAIRMAN: No, I don't see any reason why you should.

18 .

19 MR. MCGONIGAL: It's for clarification.

20 .

21 CHAIRMAN: No.

22 .

23 MR. MCGONIGAL: Is there any useful purpose, Mr. Chairman,
24 in me being here at all?

25 .

26 CHAIRMAN: Yes, in due course of time when I have the
27 necessary information and I am in a position to consider
28 the situation. I am not going to do it until I have
29 that.

30 .

31 MR. MCGONIGAL: I understood yesterday afternoon, Mr.
32 Chairman, when you came out and you made some preliminary

1 remarks to hearing the issue on cross-examination, that you
2 said, and I am not quoting you, that you were seeking the
3 guidance and assistance of persons before you --

4 .

5 CHAIRMAN: On that occasion, yes.

6 .

7 MR. McGONIGAL: I am here, as I understand it, Mr.

8 Chairman, partly to assist you and it is in that connection

9 that I wish to seek clarification in relation to Mr.

10 Gogarty's evidence and by doing so, I think I can assist

11 what I see as being one of the core issues of this

12 Tribunal.

13 .

14 CHAIRMAN: At the moment, as I understand it, your right

15 of standing up at the moment was to make a complaint about

16 what happened on Radio Eireann on RTE last night. Until I

17 know and have a full transcript of the programme, I cannot

18 make any decision as to whether what you have said is a

19 fair interpretation, whether it's accurate or otherwise.

20 I am entitled to know the facts and I don't intend to act

21 until I do know the facts.

22 .

23 MR. McGONIGAL: Absolutely. But, Mr. Chairman, you have

24 indicated, as I understand it, that you have interviewed

25 the correspondent in question.

26 .

27 CHAIRMAN: No, I did not. I said I would wish to

28 interview her.

29 .

30 MR. McGONIGAL: And I had understood that you had

31 indicated that one of two people had been identified.

32 .

1 CHAIRMAN: There are only two solicitors to the
2 Tribunal.

3 .

4 MR. McGONIGAL: But nobody has been identified to you.

5 .

6 CHAIRMAN: No, but --

7 .

8 MR. McGONIGAL: Moving on from that, Mr. Chairman, may I
9 ask a question in relation to Mr. Gogarty's evidence?

10 .

11 CHAIRMAN: Well, as you are not actually on your feet to
12 cross-examine Mr. Gogarty or otherwise at the moment, he is
13 under the control of the counsel for the -- I don't see why
14 you should intervene.

15 .

16 MR. McGONIGAL: I am hoping that I won't have to
17 cross-examine, Mr. Gogarty, and I am hoping I will be able
18 to achieve that objective by indicating to you some of the
19 questions that I think should be asked by the Tribunal and
20 I am simply asking for clarification as to whether I can
21 invite you, Mr. Chairman, in view of the remarks which were
22 made to now put to Mr. Gogarty and to ask him to clarify
23 the two questions which I identified yesterday.

24 .

25 It's clear from the programme, whatever its source, that it
26 is essential, absolutely essential that this matter be gone
27 into fully now by this Tribunal. And Mr. Chairman --

28 .

29 CHAIRMAN: Mr. McGonigal, I have repeated and I require
30 you now to resume your seat. I will not be directed by
31 you or anybody else as to how or where and what manner this
32 Tribunal is going to be conducted. One thing I can say

1 with absolute certainty, that all information at my
2 disposal, in its appropriate course, will be put before the
3 Tribunal in public, if I determine that it is -- that it
4 should be put before the public. I am the person under
5 the Section who makes that determination. And until I do
6 so, it is not for anybody to direct me what to do. That
7 is an end to this discussion, Mr. McGonigal. Now, would
8 you please resume your seat.

9 .

10 MR. MCGONIGAL: I am seeking clarification.

11 .

12 CHAIRMAN: I am not prepared to go any further than what I
13 have said at this moment.

14 .

15 MR. MCGONIGAL: May I ask one more question?

16 .

17 CHAIRMAN: No is the answer to that.

18 .

19 MR. GALLAGHER: Mr. Gogarty, yesterday, the --

20 .

21 MR. MCGONIGAL: I think Mr. Chairman that unless you are
22 prepared to indicate that these questions are going to be
23 asked today, that certainly so far as today is concerned,
24 that there is no useful purpose that I can serve at this
25 time. If I am to understand that you are taking up the
26 matter of the radio at two o'clock, then of course I will
27 be here to try and assist the Tribunal in relation to that
28 matter. But otherwise --

29 .

30 CHAIRMAN: Mr. McGonigal, you must make your own -- I
31 determine when and in what order evidence is adduced before
32 this Tribunal and I do not take dictation from you.

1 .

2 MR. MCGONIGAL: I am not trying to dictate. I am trying
3 to find out what your order is.

4 .

5 CHAIRMAN: My order is that I will bring it out in due
6 course. That is an end to this discussion, Mr.
7 McGonigal. Please sit down.

8 .

9 MR. MCGONIGAL: May it please you, Mr. Chairman.

10 .

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

12 GALLAGHER:

13 .

14 1 Q. Mr. Gogarty, good morning. Yesterday, Mr. Gogarty, we had
15 reached a stage where we were discussing -- you were giving
16 evidence rather in relation to correspondence which was
17 passing between your solicitors, McCann Fitzgerald, in the
18 person of Mr. Sheedy and Mr. Oakley of Pickering Kenyon,
19 and we know that on the 3rd July of 1989, a letter was sent
20 by Mr. Oakley to Mr. Sheedy in relation to the question of
21 the agreement as to your pension and as to your leaving of
22 the company.

23 .

24 I am referring to page 891 in Book 4. Sir, you will
25 recall yesterday evening that there is an issue in relation
26 to two letters which had been written, both dated 29th June
27 of 1989 and which were different and it appears from this
28 letter of the 3rd July that there had been telephone
29 conversations between Mr. Oakley and Mr. Sheedy and --

30 A. Excuse me --

31 2 Q. Can I refer the Tribunal also to page 879 in Book 4 which
32 is the amended letter referred to in the letter of the 3rd

1 July. The letter of the 3rd July is in the following
2 terms "Further to our telephone conversations last week, I
3 enclose herewith an amended copy of my letter of the 29th
4 June as agreed. I have attempted to contact Mr. Copsey
5 following our earlier conversation this afternoon but
6 unfortunately he is in a meeting. I will therefore
7 contact you in respect of the question of our client's
8 professional costs as soon as possible.

9 .
10 However, this does not seem to me to be a matter that
11 should delay the preparation of the necessary documentation
12 and, subject to this point being clarified, I would be
13 grateful if you would confirm your client's acceptance of
14 terms contained in the attached revised letter of the 29th
15 June 1989 as soon as possible."

16 .
17 That attached revised letter is to be found on page 879 of
18 book number 4. (Document handed to witness.) And I think
19 it is identical to the earlier letter which is to be found
20 at page 875, save insofar as paragraphs 3 and 4 are
21 concerned.

22 .
23 Paragraph 3 of the revised letter reads as follows:
24 "Mr. Gogarty will have sole rights of negotiation of the
25 claim in respect of the Electricity Supply Board
26 contract. He will be paid a commission of 50 percent of
27 the net amount recovered after taking into account
28 litigation or arbitration costs in respect of the claim.
29 But his commission shall only be payable in respect of any
30 net offer and settlement made in excess of that already
31 offered by the Electricity Supply Board of £43,000."

32 .

1 And 4: "I am instructed that the contents of this paragraph
2 were not discussed or agreed between Mr. Gogarty and Mr.
3 Murphy and do not form part of any settlement. The above
4 represents the complete agreement on all matters between
5 our respective clients. Confirming on behalf of your
6 clients that the above heads of agreement are approved, I
7 will arrange for the necessary documentation, including a
8 consultancy agreement, to be drafted and forwarded to you
9 for approval."

10 .

11 That's signed by Mr. Oakley. The next letter then
12 is -- the next document is a letter of the 5th July, at
13 page 895, from Mr. Oakley to Mr. Sheedy.

14 .

15 "I refer to previous correspondence concerning the above
16 and our last telephone conversation in connection with the
17 professional expenses incurred by Mr. Gogarty.

18 .

19 I am instructed by Mr. Copsey that at no stage has he
20 discussed with Mr. Gogarty the payment of these expenses,
21 let alone agreed with him that they should be borne by my
22 clients.

23 .

24 You mentioned to me in the course of our telephone
25 conversation that it is not unusual for the legal and
26 professional expenses to be borne by the company in the
27 case of redundancy. I think it fair to point out that
28 this is not a case of redundancy nor could it be under the
29 prevailing law. In the circumstances, therefore, I
30 believe that the proper case is for each party to bear
31 their own costs.

32 .

1 As indicated in previous correspondence, upon your client's
2 confirmation that the heads of agreement are acceptable to
3 him, I will arrange for the necessary documentation to be
4 drafted.

5 .

6 As a result, the substantial costs will fall upon the
7 company in any event."

8 .

9 The next letter is a letter dated 6th July, 1989 from Mr.
10 Sheedy to Mr. Oakley. It's document 255 and it's at
11 897. (Document handed to witness.)

12 .

13 "Dear Mr. Oakley,

14 Thank you for your letter of the 5th July. I confirm our
15 client's acceptance of your client's offer as set out in
16 the heads of agreement, the final details of which we
17 agreed on the telephone on Monday last.

18 .

19 Mr. Gogarty is now prepared to implement his part of the
20 agreement and has instructed me to tender his resignation
21 as a director of all the companies within the Lajos
22 group. Please now let me have the draft documentation
23 for approval."

24 .

25 Mr. Gogarty, can you say when you tendered your resignation
26 and signed the necessary documents to resign as a director
27 of the various company?

28 A. I beg your pardon?

29 3 Q. When did you sign the documents of resignation from the
30 Lajos group of companies, do you remember?

31 A. To resign my directorship?

32 4 Q. Your directorship.

1 A. I don't remember ever signing them afterwards. You see
2 what happened was that there was a fateful meeting on the
3 3rd July, where I was threatened about the accounts and
4 that it was then I decided that, after talking to Joe Snr,
5 that he was still insisting that I had to sign the accounts
6 and the affidavit. I said I must get out. And I said as
7 much to the them at the board meeting but then on the 6th
8 July, this 6th July, following a letter from Copsey which I
9 gave to Mr. Sheedy, he was requiring me as a director of
10 Lajos Holdings Limited to attend a meeting at his office
11 and the meeting was, it was, I'd say it was an important
12 meeting of Lajos Holdings Limited and as I was a director,
13 he required me to attend for the purpose that they were
14 going to sell -- they were selling all the shares in AGSE
15 out of Lajos and out of the trust into a UK company and
16 into a UK trust which would completely distance AGSE from
17 the Irish trust and from control or even any relation to it
18 whatsoever.
19 .
20 I thought there was some significance in that, and I spoke
21 to Mr. Sheedy about it and asked him for his advice and he
22 advised that I go along and sign that.

23 5 Q. When was that?

24 A. That was -- it took place on the 6th July, in Copsey's
25 office -- in Copsey's office.

26 6 Q. I see. We will come back to some of these documents at a
27 later stage but I just want to go on now to the --

28 A. Sorry, just if I just continue to clarify the situation.
29 After the meeting in Copsey's office, he said, "Jim", he
30 says, "I know about your problems but I want to clarify my
31 position" and he said to me would I go down to him -- down
32 with him to what he called was his archives, it was down, I

1 think it was the basement, you know, and he says he
2 referred to the fact that twelve months before that, I and
3 John Lane were very anxious and tried to press Murphy and
4 him to take the amnesty and do other things, you see, and
5 he says, I have to tell you that my reluctance to do that
6 was because Murphy Snr was up to his neck in the slush fund
7 and the thing, you know. And he showed me documentation
8 in the archives. I just looked at them and I kept his
9 word that that was the reason for the delay and that and of
10 course, I says -- I left him then and came away and I then
11 had another chat with Mr. Sheedy and there was some
12 confirmation then of my resignation as a director but I had
13 to stay on as an employee because I felt that I had rights
14 as an employee to my pension which were causing serious
15 problems.

16 .

17 Am I straying too much?

18 Q. Just for the moment, bear with me and answer the
19 questions. Where was this meeting that -- with Mr. Copsey
20 that you have referred to? Where was it held?

21 A. It was in his offices, I think, in Pembroke Lane or
22 Pembroke Court or something.

23 Q. When you say he took you to the basement, you think, where
24 was that basement?

25 A. In his offices, underneath his offices.

26 Q. In any event, I think you resigned sometime in or about
27 July of 1989?

28 A. I beg your pardon?

29 Q. You resigned in or about July of 1989?

30 A. My directorships of all the companies.

31 Q. And I think that was noted in minutes of the company of a
32 meeting held on the 27th July 1989, at page 930.

1 A. Have you the minutes of that meeting?

212 Q. Yes, we have. (Document handed to witness.)

3 A. The only one that stood up for me that time --

413 Q. The bottom of page 930. These are minutes which were
5 signed by Gay Grehan and Frank Reynolds on the 28th July,
6 1989, copy to Roger Copsey.

7 A. I should mention that why I said that the only one that
8 supported me at that time, I think, because Frank Reynolds
9 was on holidays sometime before that, you know, but at the
10 meeting which was on the 3rd July, that's my recollection,
11 that Gay Grehan, give him his due, stuck his neck out and
12 risked his position to criticize Murphy's and Copsey's
13 conduct in trying to force me to sign accounts which they
14 all knew were wrong. And I think that's recorded
15 someplace, you know.

16 .

17 MR. COONEY: Mr. Chairman, may I intervene for a moment?

18 This is a classic example of something about which I have
19 complained on the earlier occasions. This witness is
20 given a document and instead of the document being opened
21 to him, he sees it as an opportunity to make the most
22 derogatory remarks about my clients.

23 .

24 Now we have here, and he has in his hand, the minutes of
25 the board of directors meeting of the 27th July. This
26 records in a factual and accurate manner what occurred on
27 that occasion and I respectfully suggest, Mr. Chairman,
28 that instead of allowing the witness to make these ambling
29 attacks on my clients, that he be asked to go through these
30 minutes which set out in factual and accurate manner what
31 occurred on that day and covers topics like the accounts
32 which he says he refused to sign and his pension and other

1 allied matters.

2 .

3 MR. GALLAGHER: I should say, Sir, that I intend to deal

4 with the accounts as a separate topic. Perhaps we will

5 just deal with the resignation at the moment. I will come

6 back to them in due course.

7 .

8 MR. COONEY: With respect, Mr. Chairman, the minutes have

9 now been put into evidence and to deal with the matter is

10 for counsel and this is a state with which Mr. Gogarty has

11 sought to beat us over the last two weeks. There is a

12 factual statement relating to the true position about the

13 accounts in these minutes. These should now be put on

14 record with respect, Mr. Chairman.

15 A. Will I read these minutes? I'd like to read them.

16 .

17 MR. GALLAGHER: Yes, please read these minutes.

18 A. Minutes of a meeting of directors of JMSE Limited at Santry

19 on the 27th July, 1989.

20 Present: Roger Copsey, Gay Grehan and Frank Reynolds.

21 .

22 The following matters were set out as the agenda of the

23 meeting by Mr. Copsey:

24 No formal notice of the meeting had been given.

25 .

26 1: Signing of accounts to the 31st May, 1988.

27 .

28 2: Approval of the 1987 previously assigned accounts.

29 .

30 3: Mr. Gogarty's resignation.

31 .

32 Accounts:

1 Mr. Copsey stated that he wished to get the accounts in
2 question signed as a matter of urgency and he said he would
3 like to read through and explain a report by Mr. Bates,
4 JMSE auditor, on the 1987/88 accounts.

5 .

6 GG stated that as a result of legal advice sought by him,
7 that it would not be appropriate for anyone to expect
8 either Frank Reynolds or himself to sign these accounts as
9 neither were directors of JMSE for the said period.

10 .

11 It was also pointed out that Mr. Gogarty resigned as
12 chairman and director of JMSE as a result of his
13 dissatisfaction with these accounts and other matters.

14 .

15 Roger Copsey said that as Gay Grehan and Frank Reynolds
16 were now directors of JMSE, that they had a responsibility
17 to ensure that these accounts were signed. He also
18 pointed out that in fact Frank Reynolds was employed in the
19 company in the period in question.

20 .

21 Gay Grehan stated that it would be unfair of Roger Copsey
22 to expect Frank Reynolds to sign these accounts as he was
23 not a director for the said period. Frank Reynolds
24 suggested that as Roger Copsey was appointed a director of
25 JMSE at an earlier date, that would he not sign these
26 accounts with some other directors still in office since
27 that period.

28 .

29 Frank Reynolds and Gay Grehan then pointed out that they
30 were appointed to the board of JMSE in December '88.

31 Frank Reynolds and Gay Grehan then pointed out that they
32 were appointed to the board of JMSE in December '88" -- in

1 fact that was formally but they had been nominated in
2 October -- "and at a subsequent meeting in March, they
3 were appointed as signatory to the company cheques etc..

4 .

5 At no stage since their appointment have they had any
6 proper board meetings or did they receive minutes of the
7 two meetings mentioned.

8 .

9 Frank Reynolds and Gay Grehan also pointed out that they
10 felt that they are being left out of all important company
11 decision making and that an /AOE like group meets on
12 occasions and make decisions relating to JMSE without
13 consultations with the board of directors.

14 .

15 Frank Reynolds and Gay Grehan referred to Mr. Murphy's
16 request for them to join the board of directors and get
17 involved in the decision making and direction of the
18 company. This, in fact, did not happen. And has even
19 been confirmed in action minutes that no board meeting will
20 take place, only the minimum to comply with the company
21 regulations.

22 .

23 2: Frank Reynolds and Gay Grehan suggested that this was
24 totally out of line with company regulations and in this
25 case, we were only being used to sign controversial
26 accounts and be a party to the controversial issues."

27 .

28 That's not my words, that's theirs, that's
29 theirs -- theirs.

30 .

31 "We then carried on with a review of the report on the
32 said accounts --

1 .

2 MR. GALLAGHER: Mr. Gogarty, would you like me to continue
3 reading them --

4 A. No, I will read them, I will read them. I will read them
5 because they are very relevant. Just give me a chance...

6 .

7 "We then carried on with a review of the report on the
8 said accounts and a number of issues which were raised.

9 Mr. Copsey was requested to furnish the following
10 information:

11 .

12 A: Frank Reynolds and Gay Grehan had not yet been given
13 copies of the '87/'88 accounts in question and have asked
14 for copies as a priority.

15 .

16 B: Copies of 1989 management accounts up to the end of
17 February 1989, if it is not possible to get the '89 final
18 accounts completed.

19 .

20 C: Copies of solicitors' reports to Roger Copsey as he had
21 received legal advice as he had his own reservations on the
22 accounts."

23 .

24 Copsey had his own reservations on the accounts and he was
25 kicking it back to me. To me. To me. Oh my God...

26 .

27 4: A copy of the Ernst & Whinney report on the '87 accounts
28 which he was behind hiding behind" -- and I haven't seen it
29 to date after all them years.

3014 Q. Mr. Gogarty...

31 A. Sorry, this is relevant. Relevant.

32 .

1 "Mr. Sweeney's severance package:" They were anxious to
2 make his package, they didn't do mine.

315 Q. Mr. Gogarty, please...

4 A. "Frank Reynolds asked for clarification on Marcus Sweeney's
5 package and the up-to-date position on same. Roger Copsey
6 outlined the bones of this deal as follows:

7 .

8 1: £60,000 payment to him.

9 .

10 A: £40,000 paid into his pension fund.

11 .

12 B: £20,000 paid against receipts in connection with legal
13 fees and other vouched pensions" -- they couldn't pay my
14 legal fees. Sorry... Anyway.

15 .

16 C: Saab Turbo -- value: £12,000 and

17 .

18 D: £6,000 of a loan be forgiven." Forgiven.

19 .

20 Frank Reynolds and Gay Grehan agreed to this deal as long
21 as it was a full and final settlement with Marcus Sweeney,
22 that he would have no further dealings with the former
23 company or its officers after July 1989.

24 .

25 Frank Reynolds asked could we not make it a condition of
26 his package that he would not have any dealings with the
27 company staff in relation to helping them or encouraging
28 them to find employment with other companies. Roger
29 Copsey suggested that this was not possible as his contract
30 of employment was terminated with this company. Roger
31 Copsey, to give signed copies of the settlement agreement
32 to Frank Reynolds and Gay Grehan as soon as it is

1 completed.
2 .
3 Mr. Gogarty's resignation:
4 .
5 Roger Copsey stated that he and other directors wished to
6 accept Mr. Gogarty's resignation from the companies.
7 Roger Copsey also showed us a copy of a solicitor's letter
8 from Mr. G offering his resignation. Gay Grehan and Frank
9 Reynolds suggested that it was a very sad day to see Mr.
10 Gogarty end his days with the company like this after all
11 he did in building up and securing the companies. Gay
12 Grehan and Frank Reynolds also hoped that this not to
13 affect his pension package in any way. Roger Copsey and
14 Gay Grehan agreed that this had been a prudent meeting on
15 the 3rd July 1989 and said it would be honoured as full and
16 sanctions as same even with Mr. Murphy.
17 .
18 Roger Copsey suggested that we would have no say -- we
19 would have no say as such in a final decision -- " Frank
20 Reynolds and Gay Grehan would have no say in a final
21 decision -- "in accepting Mr. Gogarty's resignation as it
22 is Mr. Murphy who will pay his pension, not Gay Grehan,
23 Frank Reynolds or Roger Copsey." -- Think about all of
24 what I was going through.

2516 Q. Mr. Gogarty...

26 A. Sorry. Other matters --

2717 Q. Sorry, there is an NB --

28 A. Sorry, there is an NB. "Gay Grehan and Frank Reynolds are
29 unsure of the validity of all the decisions and matters
30 decided on and discussed at this meeting because all the
31 other directors were not present and we had no
32 communication for any of them regarding their wishes on

1 these matters.

2 .

3 Wages and pensions:

4 .

5 Frank Reynolds and Gay Grehan advised Roger Copsey that

6 their pension has not been implemented as agreed in line

7 with works manager. Wage increases have been paid to

8 JMSE's hourly staff and to AGSE senior management since

9 June last. The AGSE -- management are the... We have

10 discussed this with... Partner and he is considering it

11 presently.

12 .

13 JMSE accountant:

14 .

15 The recruitment of a JMSE company accountant was mentioned

16 once again to Roger Copsey. Mr. Murphy's wishes on this

17 issue were outlined as discussed at the meeting of

18 directors on the 3rd July, 1989 when Mr. Murphy and Mr.

19 Gogarty and Roger Copsey and Gay Grehan were present. RC

20 told GG to fire ahead with the appointment in this

21 instance."

22 .

23 And that's signed Gay Grehan, and Frank Reynolds on the

24 28/7/89 and is copied to Roger Copsey.

2518 Q. Now, page 950 of Book 4, there is an unsigned -- there are

26 unsigned minutes of the same meeting. Do you know

27 anything about those minutes? (Document handed to

28 witness.) They are different minutes.

29 A. Well yes, because you see, this row was going on and I

30 didn't want to be involved in it but, do you see, there is

31 different minutes. I don't want to be saying too much,

32 you see Copsey was taking issue with -- Copsey was with

1 Frank Reynolds and Gay Grehan, you know. Will I read

2 it?

319 Q. No. Just, do you know the circumstances in which those

4 second set of minutes in relation to the meeting of the

5 27th July, 1989 came into being?

6 A. Well what I know would be that I had a very good

7 relationship with Frank Reynolds and Gay Grehan at these

8 periods in time and they were filling me in, as genuine

9 co-directors up to that time and as reasonably good

10 partners, you know. And they were filling me in on the

11 problems they were having, apart from my own problems, and

12 they thought that I could maybe help with some advice, but

13 what could I do? What could I do?

14 .

15 CHAIRMAN: Mr. Gallagher, that's not an answer to the

16 question, does he know how the minutes came into

17 existence?

18 .

19 MR. GALLAGHER: Perhaps we can pass from them to this

20 extent, the retirement terms for J. Gogarty on page 953 --

21 A. I beg your pardon?

2220 Q. The minutes before you, Mr. Gogarty, start at page 950, on

23 the top right hand corner.

24 A. Oh sorry, yes, I have them here.

2521 Q. If you go to page 953.

26 A. Sorry, Roger Copsey was there, Gay Grehan, Frank

27 Reynolds. The meeting commenced with Roger Copsey in the

28 chair.

2922 Q. Sorry, Mr. Gogarty, if you just bear with me for a moment

30 please. I want you to go on -- these are other minutes of

31 the same meeting, the meeting that you have just read.

32 Would you go on to page 953 --

1 A. I want to keep my train of thought.

223 Q. I appreciate that.

3 A. It would help me if I could just read these.

424 Q. Will you just wait until I ask you the question. If you
5 just go onto the matter dealing with the retirement terms
6 for J. Gogarty on page 953. The retirement terms for J.
7 Gogarty.

8 A. Down at the bottom of the page.

925 Q. Mr. Gogarty, I had sought to deal with that specifically
10 but Mr. Cooney has asked that you should read out the
11 matter dealing with the accounts. I had wished to come
12 back to that at a later stage but perhaps you would read
13 it.

14 A. We are jumping from Billy to Jack you know.

1526 Q. Mr. Cooney has asked that you read it so if you would read
16 it please.

17 A. The whole lot?

1827 Q. Yes.

19 A. As I say, it was supposed to be minutes of a board meeting
20 of the Joseph Murphy Structural Engineers held at Santry on
21 the 27th July 1989.

22 "Present: RJ Copsey, Gay Grehan and Frank Reynolds.

23 .

24 There being a quorum present the meeting commenced with R.
25 Copsey in the chair" -- no better man.

26

27 "The following matters were discussed:

28 .

29 A: A report by Bates & Company on the work in progress in
30 respect of '87 accounts and the '88 accounts.

31 .

32 B: Resignation of James Gogarty as a director of the

1 company.

2 .

3 C: Position of Gay Grehan and Frank Reynolds as

4 directors.

5 .

6 D: The settlement with Marcus Sweeney.

7 .

8 E: Retirement terms with James Gogarty.

9 .

10 The 1987 and '88 accounts:

11 .

12 J. Gogarty had expressed reservations on the value of the

13 work in progress in respect of the 1987 accounts for the

14 company." I expressed reservations about more than

15 that --

1628 Q. Mr. Gogarty...

17 A. "These accounts had been approved at board level and

18 certified by the auditor of the company." Oh Lord, oh

19 Lord.

20 .

21 "Mr. Gogarty had apparently been specifically excluded

22 from the meeting which approved the accounts and felt the

23 amount of stock shown in balance sheet was extremely high,

24 especially in relation to the turnover in the period. He

25 quite positively felt that the stock was overstated."

26 .

27 So was the work in progress too.

28 .

29 "R. Copsy reported that he had requested that Mr. Gogarty

30 cooperate with the company's auditors, Bates & Company, in

31 order to carry out an in-depth investigation on any matters

32 which gave him cause for concern and report to the board.

1 .

2 A comprehensive report on the stock's figures for 1987 and
3 '88 from Bates & Company was tabled.

4 .

5 A lengthy discussion ensued and the following conclusions
6 were reached:

7 .

8 A: The size of the stock figure on the balance sheet as at
9 the 31/5/87 was misleading because of the items included
10 under the heading stock. The majority of the balance
11 sheet comprised items which would normally have been shown
12 as debtors rather than stock. These items related to the
13 measurements underpaid at the year end and claims in
14 respect of the contracts outstanding. It was agreed that
15 future accounts of the company would display the items in a
16 less confusing fashion.

17 .

18 B: Each of the items comprised a stock figure as at the
19 31/5/87 appeared reasonable to the board and were
20 specifically confirmed" -- it wasn't the board, I wasn't
21 there -- "to the board in Bates company report. It was
22 unanimously decided that the board had no reason to believe
23 that the stock figure in the accounts of the 31/5/87 were
24 incorrect.

25 .

26 In view of the fact that none of the present board were
27 directors or actively involved in the management of the
28 company at senior level during the period covered by the
29 accounts, it was decided that the 1988 accounts and the
30 management accounts to the 28th February, 1989 should be
31 scrutinised by the board members prior to reaching a final
32 conclusion on the '87 accounts.

1 .

2 It was noted that there was a significant difference
3 between the total of the stock at the 31/5/87 and the
4 31/5/88. This difference arose as follows:

5 .

6 There were no claims in '88 and claims in excess of
7 £300,000 in '87. The '87 claims related to ESB and these
8 were clear during the period covered by the '88 accounts.
9 Messrs Grehan and Reynolds agreed to check that the claims
10 position at the 31/5/88 was correctly known at nil.

11 .

12 B: Measurements in respect of contracts presented to the
13 client at the year end but not paid amounted to in excess
14 of £600,000 in '87 and only 154,000 in '88. It was noted
15 that that figure appeared exceptionally low and Messrs
16 Grehan and Reynolds undertook to check that the '88 figure
17 was correct.

18 .

19 The position of Gay Grehan and Frank Reynolds as directors:

20 9: -- "

2129 Q. Mr. Gogarty...

22 A. Sorry, am I missing something?

2330 Q. You have missed a page I think. 952.

24 A. Sorry. I am losing my head -- I am sorry.

25 "5: It was agreed that Roger Copsey would send the
26 following information to Gay Grehan and Frank Reynolds:

27 .

28 A: Copies of the audited accounts to the 31st May 1987,
29 copies of the final draft accounts to the 31st May, '88 and
30 copies of the management accounts to the 28th February,
31 1989

32 .

1 6: Gay Grehan stated that he had sought separate legal
2 advise regarding the advisability of him signing the
3 accounts to the 31st May, 1987. That advice had been that
4 it would not be legally possible for him to sign the
5 accounts. R. Copsey stated that in his opinion that
6 advice was incorrect" -- oh, he was a genius, that advice
7 was incorrect -- "that that advice was incorrect and
8 contrary to the advice given by the company solicitors.
9 .

10 That advice had been that in the circumstances where
11 information had come to the board, that past accounts might
12 be wrong. It was proper for the board to investigate the
13 matter and to involve the auditors of the company. If the
14 board had no factual information that the accounts were
15 incorrect, it was the duty of the present board to finalize
16 the accounts of the company.
17 .

18 The minutes approving the accounts should make note of the
19 lack of the director's firsthand knowledge or involvement
20 in the preparation of the accounts and the reliance on
21 present figures as far as they relate to previous accounts
22 together with reports from independent experts. The
23 responsibility of a director who signed the accounts is no
24 different from the responsibility of a director who
25 approved the signature of the accounts. It was agreed
26 that R. Copsey would obtain a letter from the company
27 solicitors setting out that advice.
28 .

29 It was approved that the 1988 accounts should not be
30 approved by the board until all of the above information
31 had been made available and scrutinised.
32 .

1 8: Resignation of James Gogarty:

2 .

3 The resignation of James Gogarty as executive chairman and
4 director of the company in the form of a letter from McCann
5 Fitzgerald was tabled. It was noted that Mr. Gogarty's
6 resignation had also been given verbally to the company
7 accountant and directors of the company and in view of his
8 obvious wish to resign, the board reluctantly accepted his
9 resignation.

10 .

11 R. Copsey stated that Mr. Joseph Murphy had been informed
12 of this resignation and he reluctantly agreed to accept my
13 resignation.

14 .

15 9: Gay Grehan and Frank Reynolds stated that they felt that
16 monthly board meetings of the company should take place
17 rather than management meetings which were contemplated by
18 the chief executive, Mr. Tim Parker.

19 .

20 They further felt that they had not been kept fully
21 informed of all matters regarding the company and indeed
22 had only been asked to act in the capacity of directors for
23 the purpose of signing the '88 accounts.

24 .

25 R. Copsey undertook to inform Mr. Parker of this
26 situation. Mention of made of an 'elite board' and R.
27 Copsey explained that this terminology was misleading and
28 in so much as a group of people met with members of Murphy
29 family as shareholders, only to keep them informed of
30 actions taken or to obtain the opinion of the shareholders
31 as to the future development of the company.

32 .

1 Settlement with Marcus Sweeney:

2 .

3 Each of the board members had received a copy of the
4 proposed terms of settlement with Marcus Sweeney. The
5 negotiations had been carried out on behalf of the company
6 by R. Copsey in consultation with the company solicitors,
7 Gerard Scallan and O'Brien. The legal advice had been
8 that pension premiums of £58,000 were due by the company on
9 behalf of Mr. Sweeney and that a court of law would award
10 damages in respect of breach of contract by the company of
11 between 60 and £80,000.

12 .

13 The proposed settlement which had been verbally by Mr.
14 Sweeney amounted to the total cost to the company of
15 £80,000 and it was financially agreed that the proposed
16 settlement should be implemented.

17 .

18 11: Retirement terms of Mr. Jim Gogarty:

19 .

20 It was understood that retirement terms had been agreed
21 between Mr. J. Murphy and Mr. J. Gogarty subject to
22 completion of agreement to be drawn between respective
23 solicitors. This agreement has not yet been received by
24 the company and it was therefore agreed that it was not
25 appropriate to discuss the terms of the retirement package
26 and how that may involve the company.

27 .

28 However, it was noted that JMSE would not be able to afford
29 a substantial lump sum in respect of a retirement
30 annuity. There had been no further meeting -- there would
31 be no further meeting.

32 .

1 The business closed."

2 .

3 Should I get a break?

4 .

5 CHAIRMAN: Yes, ten minutes.

6 .

7 THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED

8 AS FOLLOWS:

9

1031 Q. MR. GALLAGHER: Mr. Gogarty, I now want to turn to -- are

11 you all right?

12 A. Not too bad.

1332 Q. I now want to turn to other correspondence which I will

14 read into the record and perhaps if anything arises I will

15 ask you to comment on it.

16 .

17 The next letter is at page 936, Book 4. It's a letter of

18 the 2nd August 1989 from your solicitors to Mr. Oakley.

19 As part the continuing correspondence between the two

20 firms.

21 .

22 And Mr. Sheedy says as follows:

23 .

24 "Mr. Gogarty is now becoming concerned that we have not

25 received the draft documentation from you. Almost four

26 weeks have now lapsed since your client's offer was

27 accepted by us on Mr. Gogarty behalf.

28 .

29 "I wrote to you on the 14th July and telephoned your office

30 on two occasions since then. Please now let me have the

31 draft documentation.

32 .

1 "If for some reason you are not in a position to prepare
2 the documentation, I think Mr. Gogarty should be made aware
3 of the reasons why.

4 .

5 "When speaking with Mr. Gogarty yesterday, he mentioned
6 that he had seen a copy of the accounts for JMSE Limited
7 and other accounts for the period ending the 31th May,
8 1988. The copies contained a full auditor's report and a
9 report of directors. It also bore the printed names of
10 Mr. Gogarty and Mr. Copsy, thus indicating that they had
11 signed the accounts.

12 .

13 "This is a matter of serious concern to our client who has
14 not, in fact, signed these accounts.

15 .

16 "The copy seen by Mr. Gogarty is marked 'draft' and 'to
17 third party' would appear to be copies of properly adopted
18 and signed accounts. Mr. Gogarty is most concerned that
19 printed copies of account particularly those of JMSE may be
20 in circulation in the form in which he has seen them.

21 .

22 "I would be grateful if you would make inquiries of your
23 client and let me have your confirmation that copies of
24 these accounts have not been released to any third party.

25 .

26 "Yours sincerely, Gerard Sheedy."

27 .

28 This was replied to by a letter of the 7th August, 1989 at
29 page 943 from Pickering Kenyon in the following terms:

30 .

31 "Dear Mr. Sheedy,

32 "Thank you for your letter of the 2nd August. Apologise

1 for the delay in producing a settlement agreement, a copy
2 of which is now enclosed --

3 A. Excuse me, hold on a second now.

4 (Document handed to witness).

533 Q. "Thank you for your letter of the 2nd August. Apologize
6 for the delay in producing a settlement agreement, a copy
7 of which is now enclosed. The agreement substantially
8 follows the heads of agreement approved earlier with one
9 exception in relation to clause 3, (V).

10 .

11 "It had been our understanding that the only offer made by
12 the Electricity Board in settlement of the claim against
13 them was the sum of approximately £45,000. However, we
14 understand that further discussions have, in fact, taken
15 place with the Electricity Supply Board as a result of
16 which an oral offer has been made of £130,000.

17 .

18 "This, however, was not disclosed by your client in the
19 course of earlier discussions with Mr. Murphy.

20 .

21 "In view of the generous settlement that had been offered
22 in respect of your client's pension, we feel sure that your
23 client would wish for his commission to be based on the
24 actual offer made by the Electricity Supply Board even
25 though the offer concerned is not in writing.

26 .

27 "We therefore look forward to your client's approval of
28 this settlement agreement. At the same time we would ask
29 you to confirm that your client approves the draft
30 affidavit forwarded to you some weeks ago and will swear
31 the approved affidavit" --

32 A. Sorry, would you repeat that last paragraph?

134 Q. "At the same time we would ask you to confirm that your
2 client approves the draft affidavit forwarded to you some
3 weeks ago and will swear the approved affidavit on or
4 before completion of the settlement agreement. We look
5 forward to hearing from you as soon as possible."

6 A. On or before I got my pension --

7 .

8 CHAIRMAN: Mr. Gogarty, you are not speaking into the
9 microphone and I can't hear you -- it's all right, I
10 appreciate the problem. I sometimes do it myself. Would
11 be kind enough to repeat your last answer.

12 A. I beg your pardon.

13 .

14 CHAIRMAN: Would you be kind enough to repeat your last
15 answer, the last answer you gave. You were asked -- I
16 think you made a comment in relation to the last paragraph
17 of the letter of the 7th August. The last paragraph
18 being, "At the same time, we will ask you to confirm that
19 your client approves the draft affidavit forwarded to you
20 some weeks ago and will swear the approved affidavit on or
21 before the completion of the settlement agreement," and you
22 made a comment which I did not hear.

23 A. I asked for it to be repeated.

24 .

25 CHAIRMAN: Oh, I beg your pardon. We have now repeated
26 it for you.

27 A. Because it was so significant at the time.

28 .

29 CHAIRMAN: I see.

30 .

3135 Q. MR. GALLAGHER: Mr. Gogarty, what affidavit was being
32 referred to so far as you were concerned?

1 A. This is their affidavit or the draft affidavit to that they
2 wanted me to sign and swear in support of Mr. Murphy in his
3 case against Conroy and responding to Conroy's affidavit.

436 Q. I see.

5 A. That's what it was, to make a condition, of I doing that on
6 or before they finalize my pension.

737 Q. Now we know the agreement was ultimately signed on the 3rd

8 October. I should say that I am endeavouring to deal with
9 the correspondence dealing with the agreement, the
10 severance agreement initially, and we will perhaps come to
11 the other correspondence at a later stage.

12 .

13 If we can go to page -- now, the next letter is a letter of
14 the 13th October from Mr. Sheedy to -- in response to that
15 letter, to the letter I have just read.

16 .

17 The next letter is a letter of the 15th August from
18 Mr. Sheedy to Mr. Oakley and it's in the following terms:

19 .

20 "Dear Mr. Oakley,

21 "Thank you for your letter of the 7th August. In this
22 letter I will deal firstly with the points raised in your
23 letter and then with your draft agreement.

24 .

25 "Mr. Gogarty is most concerned and upset that there should
26 be any allegation of non-disclosure by him in relation to
27 the negotiations with the ESB. He has instructed me to
28 state most emphatically that at no time has he concealed
29 any relevant information from his colleagues at the Lajos
30 group and in particular from Mr. Murphy himself. When
31 Mr. Gogarty first became involved in the situation
32 concerning the contract with the ESB he had a number of

1 discussions with Mr. Marcus Sweeney, Mr. Tim O'Keefe and
2 Mr. Damien Allen in that regard. In the course of any of
3 those discussions, reference was never made to any offer by
4 the ESB, nor indeed had any offer been made by the ESB
5 other than the sum of £43,000.

6 .
7 "Mr. Sweeney, in the course of a conversation with
8 Mr. Gogarty, and Mr. Gogarty believes either Mr. Allen or
9 Mr. O' Keefe, Mr. Sweeney mentioned that he might well be
10 able to negotiate an increase in the offer from the ESB to
11 the sum of £130,000. That sum represented Mr. Sweeney's
12 expectation of the possible settlement figure and at no
13 time subsequently has such a figure been mentioned by
14 Mr. Gogarty with the ESB or by any representatives of the
15 ESB to Mr. Gogarty.

16 .
17 "Mr. Gogarty has been negotiating with the ESB since March
18 last year and should any settlement figure in excess of
19 £43,000 be agreed with the ESB, this would arise solely
20 from the efforts of Mr. Gogarty.

21 .
22 "Accordingly, the terms of the agreement must remain as we
23 have previously agreed in writing, namely, that Mr. Gogarty
24 will receive 50 percent of any sums recovered from the ESB
25 in excess of £43,000 in relation to this particular
26 contract. The terms of the agreement between Mr. Gogarty
27 and the company have been agreed by us on behalf of our
28 clients in writing and in those circumstances it is not
29 open to either party to renegotiate any of these agreed
30 terms. Mr. Gogarty feels that as a matter of principle
31 and personal honour, the implications relating to his
32 conduct heavily outweigh the financial consequences for him

1 in relation to your proposed amendment of the terms which
2 have been agreed.
3 .
4 "We are quite surprised by the contents of the penultimate
5 paragraph of your letter. Firstly, we have never seen,
6 nor has Mr. Gogarty seen, the affidavit which you have
7 drafted for Mr. Gogarty to complete. Secondly, the
8 financial arrangements between Mr. Gogarty and Lajos
9 Holdings Limited have nothing whatsoever to do with the
10 proceedings to which Mr. Gogarty's affidavits will relate.
11 Mr. Gogarty has and will continue to offer every possible
12 assistance to your clients by making available to them all
13 of the information which he possesses relating to the
14 affairs of Lajos Holdings Limited and its subsidiary
15 companies and also by completing an affidavit setting out
16 the relevant facts accurately and comprehensively.
17 Your letter might well be interpreted by as an attempt by
18 your clients to make the completion of the financial
19 arrangements between Mr. Sweeney and Lajos Holdings Limited
20 dependent upon the swearing of an affidavit by
21 Mr. Gogarty. We would be most concerned that the other
22 party or parties to the relevant proceedings might
23 endeavour to impugn Mr. Gogarty's motivation in completing
24 an affidavit in those circumstances and we must advise
25 Mr. Gogarty to avoid any action on his part which might
26 place him in that position.
27 .
28 "I have the following comments to make on your draft
29 agreement.
30 .
31 "1: Mr. Gogarty has resigned as a director of all the
32 companies and accordingly should be referred to as

1 'Mr. Gogarty' and not the 'Director.'
2 .
3 "2: We cannot agree to have the agreement governed by the
4 laws of England or have any disputes arising from the
5 agreements resolved by the English courts. All parties to
6 the agreement are resident in Ireland and all sums of money
7 referred to in the draft are quoted in Irish pounds.
8 Similarly, the reference in the definition of 'Associated
9 Company' to the Institute of Chartered Accountants in
10 England should refer to the same institute in Ireland.
11 .
12 "3: ESB should be referred to as the Electricity Supply
13 Board of Lower Fitzwilliam Street Dublin 2.
14 .
15 4: The recital is incorrect as it refers to Mr. Gogarty
16 being agreed to resign as executive director of the
17 company. Mr. Gogarty has resigned as a director and has
18 agreed to resign as an executive of the company.
19 .
20 "In the following I will use the paragraph numbering in
21 your draft affidavit.
22 .
23 "1: This clause requires expansion to provide for the
24 payment to Mr. Gogarty in the most tax-efficient manner of
25 the balance, if any, between the amount which can be
26 invested by the company in order to provide a pension for
27 Mr. Gogarty and his wife and the sum of £300,000.
28 .
29 3. (i): The words, 'as a director' in the fourth line
30 should be deleted. The reference in paragraph 2 as amended
31 will refer to the resignation of Mr. Gogarty as an
32 executive.

1 .
2 (ii): There would be considerable and adverse tax
3 implications if Mr. Gogarty's car were to be passed over to
4 him without charge on the completion of the agreement. We
5 would suggest that the existing arrangements should be
6 allowed to continue for the period of Mr. Gogarty's
7 consultancy; i.e., that the company continue to lease the
8 car and pay the tax and insurance and maintenance charges
9 thereon. At the end of the period of five years, the car
10 would then be transferred to Mr. Gogarty for a nominal
11 sum.

12 .
13 (iv): Mr. Gogarty is to be given exclusive negotiation
14 rights with the ESB and arising from that exclusive
15 authority to conclude an agreement with the ESB on behalf
16 of Lajos Holdings.

17 .
18 (v): It has been agreed that all of the expenses incurred
19 by Mr. Gogarty arising from his negotiations with the ESB,
20 with particular reference to professional fees, will be
21 discharged by Lajos Holdings Limited and that such expenses
22 shall not be deducted in calculating the net sum received
23 by way of settlement from the ESB. The agreement is that
24 should litigation arise, the cost of such litigation would
25 be deducted from the settlement figure prior to calculating
26 Mr. Gogarty's 50 percent of the settlement figure in excess
27 of £43,000.

28 .
29 "The agreement should provide for the payment to
30 Mr. Gogarty of the sum due to him within seven days from
31 the date of the payment by the ESB of the sum agreed in
32 settlement.

1 .

2 (vi): For the protection of both your clients and

3 Mr. Gogarty, I feel that a complete consultancy agreement

4 should be completed by them. Accordingly, I have drafted

5 such an agreement, a copy of which I enclose herewith.

6 .

7 Please let me hear from you in response to this letter at

8 your earliest convenience.

9 .

10 I note that you have not responded to the reference in my

11 previous letter to the publication of the accounts of the

12 company. Perhaps you are now in a position to do so."

13 .

14 "Yours sincerely."

15 .

16 The next letter is at page 989 and it's a reminder of the

17 1st September from Mr. Sheedy to Mr. Oakley.

18 .

19 "Dear Mr. Oakley,

20 "I refer to your letter of the 15th August last and will be

21 obliged to hear from you. "

22 .

23 Then there is a consultancy agreement draft at

24 page -- (Document handed to witness.)

25 .

26 There is a consultancy agreement, draft consultancy

27 agreement, between Lajos Holdings Limited and yourself.

28 That is a draft and I intend to pass from it at the

29 moment. If it should arise we can come back to it,

30 Mr. Gogarty.

31 .

32 The next letter is a letter at page 11003 --

1 A. You are going very fast for me.

238 Q. Sorry?

3 A. You are going very fast for me.

439 Q. Sorry, Mr. Gogarty. I said that I am not going to deal

5 with the draft consultancy agreement for the moment,

6 because it's -- it doesn't seem to be germane just right

7 now. If it arises we can come back to it.

8 .

9 I am now going on to a letter of the 7th September, 1989 --

10 (document handed to witness) -- from Mr. Oakley to

11 Mr. Sheedy, which is in the following terms:

12 .

13 "Thank you for your letter of the 15th August which

14 arrived during my absence on holiday.

15 .

16 "I therefore apologise for the delay in replying.

17 .

18 "With regard to the ESB claim the figure of £130,000 came,

19 in fact, from your client in a conversation with the

20 finance director, Mr. Copsey. In the light of that

21 conversation, full details of which we have obtained, we do

22 not believe that your client can now deny, in light of the

23 admission made by him, that he is aware in reality that

24 there is already an offer from the ESB of £130,000 on the

25 table."

26 .

27 Can I pause there Mr. Gogarty and ask you for your

28 observations on that paragraph.

29 A. A damned lie. A damned lie.

3040 Q. Did you tell Mr. Copsey that there was an offer of £130,000

31 on the table?

32 A. No.

141 Q. So far as you are concerned, was there an offer of £130,000
2 on the table?

3 A. Not in my belief, and I honestly would believe that, and I
4 believe if you bring in the ESB they will acknowledge that,
5 they will acknowledge that. It's this thing of
6 Mr. Sweeney wheeling and dealing. He'd sell his mother
7 today and he'd sell her next week.

842 Q. Mr. Gogarty, continuing on with the quotation from the
9 letter: "The figures in the heads of agreement were
10 inserted on the basis that they genuinely represented the
11 only offer made by ESB. In the light of the admissions
12 made by your client referred to above, I believe as a
13 matter of law the figure inserted in the heads of agreement
14 is unenforceable.

15 .

16 "With regard to the affidavit, I met Mr. Gogarty in Dublin
17 on the 26th April, 1989 when I took detailed notes from him
18 with the express purpose of preparing an affidavit for use
19 in the Isle of Man proceedings. This was, of course,
20 prior to any discussions between our clients in May 1989.

21 As such, both the requirement for the affidavit and the
22 detailed discussions leading up to the drafting of the
23 same, pre-date any discussions between our respective
24 clients in connection with the proposed settlement.

25 .

26 "For the avoidance of doubt, the two issues are entirely
27 unrelated.

28 .

29 "Unfortunately, the need for the affidavit in relation to
30 the Isle of Man proceedings is urgent.

31 .

32 "At my discussions with Mr. Gogarty in April he gave me

1 your business card and asked me to forward a copy of the
2 affidavit to you direct which according to my records was
3 done. I can only assume that it has been lost in the
4 post.

5 .

6 "I accordingly enclose a further copy.

7 .

8 "Dealing now with the comments made on the draft agreement,
9 I enclose herewith an amended agreement incorporating some
10 of the suggestions made by you. My replies to your
11 numbered paragraphs are as follows:

12 .

13 1: I understand that Mr. Gogarty has in fact resigned as a
14 director. However, I am also informed that he has not for
15 many years had any executive responsibilities within the
16 company.

17 .

18 This seems to me to create a difficulty in that strictly
19 speaking there is no resignation to provide a counter part
20 to the pension arrangements in the settlement agreement.

21 Perhaps in the circumstances, it will be better to retain
22 the current draft even though in reality Mr. Gogarty has
23 already resigned as a director.

24 .

25 2: I have no objection to the agreement being governed by
26 the laws of Ireland. Perhaps you would kindly amend the
27 definition clauses accordingly equivalent statutory
28 provisions.

29 .

30 3: Noted and agreed.

31 .

32 4: See the comments in respect of subparagraph 1 above.

1 .
2 Dealing with the specific variations suggested by you, I
3 will comment as follows using the paragraph numberings in
4 the draft agreement.

5 .
6 Paragraph 1: As I understand my instructions, the
7 obligation on the company as to make available the sum of
8 £300,000 for the purchase of purchasing a pension. As I
9 have explained to you throughout the company desires to
10 ensure that from its point of view, this is done the in the
11 most tax efficient way to the company. The company's
12 obligation will be to use its best endeavours to give
13 effect to the policy preferences of Mr. Gogarty.

14 Presumably those advisers to Mr. Gogarty will ensure that
15 the policy preference is put forward in the most tax
16 efficient in the circumstances. However, at the end of
17 day my clients are not prepared to accept an obligation
18 that commits them over and above that already contained in
19 the draft agreement.

20 .
21 Paragraph 3:

22 I: See the general comment number 1 above.

23 .
24 II: The agreed heads of agreement provide for the transfer
25 of the car at this stage and my clients are not prepared to
26 consider the alternative.

27 .
28 IV: It is agreed that Mr. Copsey is to be given exclusive
29 negotiation rights with the ESB. However, as he has no
30 authority to bind the company, any settlement must be
31 approved by the Board of Directors. He can not,
32 therefore, have exclusive authority to conclude an

1 agreement with ESB.
2 .
3 V: It is accepted that the general and reasonable
4 expenseness incurred by Mr. Gogarty in negotiating a
5 settlement with ESB will be borne by the company. I am
6 quite clear as to what you mean by professional fees
7 incurred. In an earlier telephone conversation with me
8 you mentioned that Mr. Gogarty had already approached
9 Mr. Max. Abrahamson in this regard. Whilst I do not
10 believe that my clients will object to your clients seeking
11 professional advice from time to time, they clearly wish to
12 avoid a situation where in effect the negotiations are
13 being conducted not by Mr. Gogarty, but by, for example,
14 Mr. Abrahamson. The general position seems to be me to be
15 one that is capable of resolution within the parameters
16 outlined above. It is agreed that any litigation or
17 arbitration costs will be deducted from any settlement
18 prior to your client's entitlement to any commission.
19
20 "I have no objection to the timetable for payment of
21 commission.
22 .
23 VI: I am considering the consultancy agreement with my
24 clients. By way of general comment only, I wonder whether
25 in the circumstances a written agreement may cause certain
26 complications with the Revenue authorities in the light of
27 Mr. Gogarty's alleged previous employment.
28 .
29 "I am writing to you separately in respect of the position
30 concerning the company's accounts."
31 .
32 There is a reply to that letter, to be found on page 1012

1 in Book 4. It's a letter of the 13th September, and it's
2 from Mr. Sheedy to Mr. Oakley.

3 .

4 (Document handed to witness.)

5 .

6 "Dear Mr. Oakley:

7 "Thank you for your letter of the 7th September.

8

9 "I have discussed the contents of your letter with
10 Mr. Gogarty. On the subject of the claim against the ESB,
11 Mr. Gogarty has instructed me to object in the strongest
12 possible manner to any suggestion or implication of any
13 nondisclosure by him to his fellow directors of any
14 relevant information concerning his negotiations with the
15 ESB. However, as stated in my letter of the 15th August,
16 Mr. Gogarty was aware that Mr. Sweeney had mentioned a
17 figure of £130,000 as being the amount which the ESB was
18 likely to pay. If, in fact, Mr. Sweeney's comments arose
19 from discussions between Mr. Sweeney and an official of the
20 ESB and if that sum had been discussed between Mr. Sweeney
21 and an official of the ESB, Mr. Gogarty is prepared to
22 accept that figure as the base from which he will now
23 negotiate and the inclusion of that figure in the agreement
24 with Lajos Holdings Limited.

25 .

26 "The consideration for the provision of £300,000 by the
27 company for the purchase of a pension on Mr. Gogarty's
28 behalf is Mr. Gogarty's resignation as an employee of all
29 the companies in the group. I do not understand your
30 comment to the effect that Mr. Gogarty has not had any
31 executive responsibilities within the company for many
32 years. He has been an executive director and has

1 continued his activities as an executive following his
2 resignation as a director.

3 .

4 I have amended the agreement to include the relevant
5 reference under Irish legislation.

6 .

7 With regard to the sum of £300,000, we are in agreement
8 that all or the greater part of the sum should be used by
9 the company to purchase a pension for Mr. Gogarty and his
10 wife in the most tax efficient way for the company.

11 .

12 The point which I made in my previous letter and which
13 reflects the agreement which we made previously, is merely
14 that in the event that the company cannot expend the entire
15 £300,000 on the purchase of a pension for Mr. Gogarty and
16 his wife, the unexpended portion will be paid to him in
17 cash.

18 .

19 Mr. Gogarty accepts the company's decision with regard to
20 the car which will be transferred to him at no cost.

21 .

22 I understand your client's position with regard to
23 Mr. Gogarty authority to complete an agreement with the
24 ESB. This is unlikely to cause any difficulty as
25 both Mr. Gogarty and the directors of the company had a
26 common objective in obtaining the maximum amount of
27 compensation from the ESB.

28 .

29 There is no question of Mr. Gogarty engaging any third
30 party to carry out negotiations with the ESB on his
31 behalf.

32 .

1 However, from time to time, he may require professional
2 advice on specific points to assist him in his negotiations
3 with the ESB and any fees arising from such consultations
4 will be part of the general and reasonable expenses
5 incurred by him in the course of his negotiations.

6 .
7 Perhaps the form of consultancy agreement which I drafted
8 is too elaborate for our respective clients requirement. I
9 am prepared to accept the terms relating to Mr. Gogarty's
10 consultancy in the terms contained in your draft
11 agreement.

12 .
13 Mr. Gogarty accepts that by and large your draft affidavit
14 is in order. However, although Mr. Gogarty is conscious
15 of the urgency in relation to the affidavit, there are some
16 inaccuracies which he is in the course of correcting. And
17 I will write to you again on the subject in due course.

18 .
19 Mr. Gogarty requires confirmation from our clients that
20 they will undertake responsibility for the discharge of the
21 fees which will become due to this firm by Mr. Gogarty for
22 advice given to him in relation to the affidavit and its
23 contents.

24 .
25 The draft agreement should be amended by including the
26 definition of 'a subsidiary company or holding company,'
27 as:

28 .
29 Means a company which is a subsidiary company or a holding
30 company as defined in Section 155 of the Companies Act
31 1963.

32 .

1 I enclose a copy of that section.

2 .

3 'Associated' company may be given the definition which you

4 drafted merely replacing the word 'England' with 'Ireland.'

5 .

6 Please now prepare the engrossments of the agreement.

7 Presumably you will forward these to Mr. Copsey so that

8 Mr. Gogarty and he can meet and exchange signed copies."

9 .

10 Yours sincerely, Gerald B Sheedy."

11 .

12 Now, Sir, I understand, it's after one o'clock.

13 .

14 CHAIRMAN: I think in the circumstances, Mr. Gogarty has

15 been not so well early in the morning now. I will adjourn

16 until tomorrow morning. Is that agreed?

17 .

18 MR. CALLANAN: Just, in relation to that, Mr. Chairman,

19 inquire as to the position, because Mr. Gogarty's

20 preference would be to have Friday and Monday to himself if

21 that was possible. Obviously he is anxious to assist the

22 Tribunal in any way he can, but I know that is his personal

23 wish.

24 .

25 CHAIRMAN: Well, as I indicated at the outset, I would

26 wish to, in every way, assist Mr. Gogarty insofar as it

27 relates to his matter of health. He is the man who is

28 undoubtedly -- he was clearly not well this morning and I

29 am certainly quite happy to give him Friday off. That's

30 Friday, Saturday, Sunday, I suppose -- Monday now, I would

31 expect Tuesday, Wednesday, Thursday and Friday, if that was

32 the situation. We must keep moving, but at the same time,

1 I have to have regard for his health.
2 .
3 MR. CALLANAN: Yes, it does seem as Mr. Gogarty's direct
4 evidence would go well into next week in any event.
5 .
6 CHAIRMAN: I will certainly expect him to finish his
7 direct evidence, if he is given until Tuesday morning,
8 without a further break.
9 .
10 MR. CALLANAN: I think that hopefully that can be realised
11 as an objective.
12 .
13 MR. GALLAGHER: I wonder, Sir, if it were, you were to
14 adjourn until Monday morning and perhaps tomorrow
15 Mr. Callanan may be able to get instructions as to whether
16 Mr. Gogarty feels capable of resuming on Monday rather than
17 Tuesday.
18 .
19 MR. CALLANAN: This is a matter I have discussed at some
20 length, as has my solicitor with Mr. Gogarty, and that was
21 his, very much his wish, to have the --
22 .
23 CHAIRMAN: I place great reliance on Mr. Sheedy and his
24 assessment of the situation and his endeavours to both
25 facilitate both the Tribunal and Mr. Gogarty. Have you
26 anything?
27 .
28 MR. COONEY: I have nothing to say on this,
29 Mr. Chairman. We will be ready to resume whenever
30 Mr. Gogarty --
31 .
32 CHAIRMAN: I think it might be the sensible thing to do is

1 leave it till Tuesday morning.

2 .

3 MR. ALLEN: Sorry, Chairman --

4 .

5 CHAIRMAN: Do you want to deal with this matter?

6 .

7 MR. ALLEN: Absolutely not.

8 .

9 CHAIRMAN: We will adjourn then, as far as Mr. Gogarty is

10 concerned, until Tuesday morning at ten o'clock. My

11 apologies Mr. Allen.

12 .

13 MR. ALLEN: Not at all, Mr. Chairman. I just wanted to

14 clarify, I know the original intention was that

15 Mr. Hanratty would resume his rebuttal argument at two

16 o'clock, as I understood it, or whatever time you thought

17 it appropriate. I wonder could you just give us any

18 guidance as to what will now happen.

19 .

20 MR. GALLAGHER: I think Mr. Hanratty would be anxious to

21 continue, I understand, perhaps at a quarter past two or

22 whatever time.

23 .

24 CHAIRMAN: I think that would be the most appropriate

25 thing to do and we will deal with any other matter that has

26 arisen today, if it is possible to deal with it this

27 afternoon. It may not be possible because we still

28 haven't received a transcript as such. But we expect to

29 have it over lunch.

30 .

31 THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

32

1 THE TRIBUNAL RESUMED AS FOLLOWS AT 2:15PM:

2 .

3 CHAIRMAN: Mr. McAleese, I think you want to say

4 something.

5

6 MR. McALEESE: That's right, Judge, I received

7 instructions from Katie Hannon the journalist who made the

8 comment on the Vincent Brown show last night and I can tell

9 you I have listened to a taped recording of the relevant

10 portion of the Vincent Brown show and the statement was

11 made during the course of a discussion as to the evidence

12 which might or might not be admissible in front of this

13 Tribunal and the statement and I quote is as follows:

14

15 "I was discussing this with one of the people, the

16 solicitors to the Tribunal today and the explanation given

17 is that he was there, he was present. He saw money being

18 handed over to Ray Burke, he could follow through on

19 that."

20 .

21 Miss Hannon was, of course, referring to Mr. Gogarty's

22 evidence.

23

24 Now I wish to make it perfectly clear to the Tribunal that

25 my client did not speak to either of the solicitors to the

26 Tribunal yesterday. Her phraseology was clumsy. She

27 discussed the hearsay evidence rule with other journalists

28 and solicitors at the Tribunal. She is happy to clarify

29 that she did not discuss these matters with any member of

30 the Tribunal's legal team and she wishes to apologise to

31 the solicitors for the Tribunal, Miss Mary Cummins and Miss

32 Moy-Anne Howard and she wishes to apologise to the Tribunal

1 and its counsel for creating an incorrect impression.

2 .

3 It was, as mentioned, Judge, entirely unintended and my

4 client is here. She is very, very regretful at what has

5 happened.

6 .

7 CHAIRMAN: Thank you Mr. McAleese. I also have listened

8 to the tape recording of the Vincent Brown radio programme

9 transmitted last evening and as I say, I have had full

10 explanation by Miss Hannon's solicitor in the circumstances

11 in which she came to state as she did on the programme. I

12 unequivocally accept her explanation. I think she is a

13 very brave young woman to admit a mistake in public and I

14 deeply regret that she has caused herself embarrassment and

15 I suppose caused others embarrassment.

16 .

17 In the circumstances, it is clear to me there is no factual

18 basis for the concerns expressed by Mr. McGonigal this

19 morning and I now propose to resume the business of the

20 Tribunal.

21

22 MR. McALEESE: Thank you, Chairman.

23 .

24 MR. HANRATTY: Sir, if you recall, I was making

25 submissions to you yesterday in reply to the submissions

26 which had been made by principally, counsel for JMSE, Mr.

27 Bailey, Bovale, and for Mr. Burke and also Mr. Feeney on

28 behalf of Mr. Redmond in relation to the question of

29 cross-examination and you recall, Sir, that you invited

30 discussion and submissions from counsel as to how best to

31 proceed, given the state of play, as it were, with regard

32 to the receipt of statements by the Tribunal from the

1 various parties who were informed that they would be
2 required to give evidence to the Tribunal.

3 .

4 Now, all of this, as you were aware, arose I think in
5 fairness repeating from a letter which was written by the
6 Tribunal to all of the parties who were involved with the
7 Tribunal on the 18th January, 1999 and I think it's such an
8 important letter that I propose to read it again onto the
9 record, Sir.

10 .

11 In this instance I am reading from the letter which was
12 sent to all of the parties.

13 It's entitled:

14

15 "Re: Public sittings commenced 12th January, 1999.

16

17 Your clients, Michael Bailey Thomas Bailey, Bovale
18 Developments Limited.

19

20 Dear sirs I refer to previous correspondence regarding
21 procedural applications to the examination of witnesses at
22 the above sittings and in particular cross-examination by
23 persons who have not furnished a statement of evidence in
24 respect of the issues outlined in the affidavit by Mr.
25 James Gogarty.

26

27 A number of the persons referred in Mr. Gogarty's affidavit
28 of the 12th October, 1998 have furnished statements to the
29 Tribunal refuting Mr. Gogarty's allegations but have not
30 furnished any statement of the evidence they propose to
31 give on particular issues raised in his affidavit.

32

1 I am directed by the sole member to confirm that such
2 persons who have not furnished a statement of their
3 evidence on a particular issue in advance shall not be
4 entitled to cross-examine Mr. Gogarty on those issue until
5 after they have given their own oral evidence on the
6 issue."

7

8 As you are aware, Sir, the problem which has arisen is that
9 originally what was requested by the Tribunal of the
10 parties who were being required to give evidence was a
11 detailed narrative statement of their own involvement in
12 the events referred to in Mr. Gogarty's affidavit.

13

14 A number of parties cooperated with the Tribunal by
15 submitting, on a timely basis, a detailed narrative
16 statement of their involvement in these events.

17

18 Unfortunately, a number of other parties did not, in
19 invaring degrees, comply with that requirement and this
20 particular letter, which is in the form of a circular
21 letter is the culmination of the difficulties to which that
22 gave rise.

23

24 In the submissions which you heard yesterday, reference was
25 made to the legal principles which apply which are set out
26 in the case of, principally in the case in Re Haughey but
27 also I think and importantly have the case of Kiely -v-
28 Minister for Social Welfare and I intend to turn to those
29 again but to put my submissions into context and my
30 submission suggesting that I will be make to the Tribunal
31 as to how best it should proceed in the circumstances in
32 which it finds itself, I propose to open extracts from the

1 correspondence with each of the three principal parties,
2 that is JMSE, Bailey/Bovale and Mr. Burke, specifically on
3 the issue of statements which has been exchanged between
4 them and the Tribunal since October of this year when the
5 request was first made to provide statements to the
6 Tribunal.

7

8 And I think it will become apparent from the correspondence
9 and indeed from the statements themselves, the context in
10 which any decisions which ought to be made as to the
11 appropriate procedure to be adopted should be considered
12 and obviously, Sir, as you have yourself repeatedly
13 asserted to the various public sittings which this Tribunal
14 has had, the object of the exercise is to achieve a fair
15 result among all the parties.

16

17 The object of the exercise, Sir, in the first instance, is
18 that you are mandated by the Oireachtas to conduct a public
19 inquiry into the matters referred to in your Terms of
20 Reference. Obviously you have to and you are mandated to
21 conduct as comprehensive an inquiry as you can into the
22 events referred to in the Terms of Reference and that in
23 the first instance I think means hearing all of the
24 evidence which becomes available to the Tribunal in
25 relation to those issues from whatever source it becomes
26 available.

27

28 The real question which you have to consider in this
29 particular context is by what procedure or by what means or
30 perhaps by what procedural means you should achieve that
31 objective. This is not a single issue inquiry and that of
32 itself gives rise to its own difficulties.

1

2 In a single issue inquiry, and I will be referring you to a
3 passage in academic text books on tribunals of inquiry, it
4 is easy to adopt the adversarial system where one party can
5 be pitted as against each other and the Tribunal can, as it
6 were, sit in the middle and determine the issue.

7

8 This is a multiple issue inquiry, even in this particular
9 segment of the inquiry which is being held to take the
10 evidence of Mr. Gogarty out of turn as you have said and on
11 an urgency basis.

12

13 But within the evidence of Mr. Gogarty, and the issues
14 which arise out of his evidence and the related evidence
15 which has to be called, there are a myriad of factual
16 issues, some of which affect some parties and some of which
17 do not affect other parties, and it is in that context that
18 you have to come up with a procedure which is, which will
19 in the first instance, enable you to conduct an efficacious
20 inquiry but at the same time achieving a fair procedure for
21 all of the parties who are involved.

22

23 So, if I might leave the legal authorities and there aren't
24 terribly many of them to which I intend to refer until
25 after I've dealt briefly with the relative extracts of the
26 correspondence and if I may, Sir, I intend to take the
27 correspondence in the in order which the parties made their
28 submissions yesterday, starting with JMSE.

29

30 Sir, the correspondence started by letter dated the 27th
31 October of 1998 addressed to, I am sorry, the 20th October
32 1998 from the solicitor to the Tribunal addressed to

1 Messrs. Fitzsimmons Redmond, solicitors for JMSE. It
2 referred to the fact that the Tribunal had decided to take
3 Mr. Gogarty's evidence at that stage on the 16th November,
4 1998. It outlined some procedural matters and the
5 particular passage to which I would like to refer is just
6 beyond the middle of the second page where it says,

7

8 "In addition, the sole member requires Joseph Murphy
9 senior, Joseph Murphy junior, Frank Reynolds and Roger
10 Copesey to give evidence at these sittings to deal with the
11 matters referred to in Mr. Gogarty's statement.

12

13

14 Please let me have the statement of the evidence intended
15 to be given by these individuals. I would like to have
16 these statements on or before the 9th November 1998.

17

18 In view of the urgency of the matter, the Tribunal would
19 appreciate your cooperation in this regard."

20

21 There was other correspondence exchanged between the
22 Tribunal and the solicitors for this party which has no
23 relevance but if I can move on to a letter, another letter
24 from the Tribunal dated the 2nd November, 1998 to Messrs.
25 Fitzsimmons Redmond.

26 It's entitled, "Re evidence of Mr. James Gogarty.

27 Your clients Joseph Murphy Structural Engineers Limited and
28 others."

29 It refers to previous correspondence and it deals with a
30 considerable number of other matters that were being
31 discussed between the Tribunal and these parties. But in
32 the fourth paragraph of that letter, it is stated,

1
2 "I further note" - this is in reference to a previous
3 communication from Mr. Fitzsimmons -- "that statements of
4 evidence requested of Mr. Joseph Murphy senior, Mr. Joseph
5 Murphy junior, Mr. Frank Reynolds and Mr. Roger Copsy are
6 in the course of preparing and may be expected by the 9th
7 approximately."

8
9 So at that stage, it was clear that there was no or
10 appeared to be no problem in obtaining narrative statements
11 as requested by the Tribunal.

12
13 The Tribunal wrote again on the 23rd November, 1998 to
14 Messrs. Fitzsimmons Redmond and again, there were a number
15 of issues dealt with in the letter but on the top of the
16 second page, it is stated,

17
18 "Once statements of evidence have been furnished to the
19 Tribunal, they shall be circulated immediately to you" --
20 this was in reference to statements Messrs. Fitzsimons
21 Redmond received -- "In this regard, I wish to point out
22 that your client's statements of evidence are now requested
23 as a matter of urgency. Please advise me as to when you
24 will furnish them to the Tribunal as parties whose
25 interests may be affected by their content must be
26 circulated with copies thereof in advance of the
27 hearing."

28
29 Then, Sir, there was another letter from the Tribunal in
30 which again the question of statements was referred to.
31 It's dated the 25th November, 1998 and it says,

32

1 "Dear Sir, I refer to my letters to you dated the 25th
2 September, 1998 requesting your clients, Mr. Joseph Murphy
3 senior, Mr. Joseph Murphy junior, Mr. Roger Copsey and Mr.
4 Frank Reynolds to attend for interview by counsel to the
5 Tribunal. You contacted me by telephone on the 30th
6 September and subsequently by letter of the same date
7 explain various difficulties which you had in connection
8 with the matter including the absence of your clients
9 abroad, the absence of one of your senior counsel until the
10 8th November" - I presume that should be November -- "and
11 your own absence until the 30th," I presume November."

12

13

14 "Finally you inform the Tribunal by letter dated the 14th
15 November that you have arranged consultation for the
16 following Tuesday, I think that was October, the 20th
17 October, with senior and junior counsel to deal with all
18 matters concerning your clients arising from the Tribunal's
19 correspondence following from which you have to revert to
20 me.

21

22 You did not in fact revert concerning the proposed
23 interviews. I have been asked by the sole member to ask
24 you to arrange these interviews as a matter of urgency.
25 The sole member wishes to have these interviews completed
26 by the middle of December. Your clients' cooperation in
27 this regard is invited in view of their professed intention
28 to assist the Tribunal.

29

30 In the case of Mr. Murphy senior, arrangements can be made
31 for his interview to take place in Guernsey if necessary.
32 I also await your client's detailed narrative statements as

1 a matter of urgency.

2

3 You said in your letter of the 27th ult, you would
4 endeavour to have these with the Tribunal by the 9th
5 inst."

6

7 Now at that stage as you can see from that letter, Sir, the
8 Tribunal was seeking not just these narrative statements
9 but wished to interview these specified individuals as
10 well.

11

12 The Tribunal wrote again on the 4th December, 1998 to
13 Messrs. Fitzsimons Redmond and that was the letter in which
14 the summons to attend was served on the solicitor for these
15 parties. The summons was enclosed with that letter. In
16 the last paragraph of that letter it says,

17

18 "You might please let me have at your earliest convenience
19 and, in any event, not later than Thursday next, a
20 statement of your clients' version of the events relating
21 to your clients which are described in the affidavit of Mr.
22 Gogarty."

23

24 There was then a further letter from the Tribunal to
25 Messrs. Fitzsimons Redmond on the 8th December, 1998.

26

27 "Dear Mr. Fitzsimons,

28 As you are aware, I wrote to you on the instructions of the
29 sole member of the Tribunal on the 25th day of September,
30 1998 requesting that your client, Joseph Murphy senior,
31 attend the offices of the Tribunal on Friday, 9th October
32 1998 at 9:30am to answer questions to be put to him by

1 counsel to the Tribunal.

2

3 In that letter, (a copy of which I enclosed for your
4 convenience), I also asked you to forward a written
5 narrative account of Mr. Murphy's knowledge of the matters
6 set out in the letter or any of them.

7

8 A significant volume of correspondence has been exchanged
9 between the Tribunal and your offices since the 25th
10 September, 1998 regarding the attendance of your client to
11 answer questions to be put to him by counsel to the
12 Tribunal but your client has not furnished narrative
13 accounts as requested nor did he attend for interview on
14 Friday 9th October, 1998 or at any time since then.

15

16 On the 20th October, 1998, your firm was informed that the
17 Tribunal intended to sit in public on Monday, 16th
18 November, 1998 to take the evidence of James Gogarty whose
19 - affidavit was furnished to you on that date - and a
20 request was again made for statements to be furnished by
21 you in respect of Joseph Murphy senior, Joseph Murphy
22 junior, Frank Reynolds and Roger Copsey. You were
23 requested to furnish such statements on or before the 9th
24 November, 1998. On the 27th October, 1998, you replied
25 that matter had been put in hand and that you would
26 endeavour to let the Tribunal have the statements in
27 question on or before the deadline imposed by the sole
28 member, that is on or before 9th November.

29

30 At the public sittings on the 10th November 1998 - when he
31 encountered the postponement of the hearings - the sole
32 member stated inter alia as follows:

1 This is quotation from your own statement, Sir, at that
2 sitting:

3
4 "The obligation to apply fair procedures requires that any
5 persons that may be adversely affected by all evidence of
6 others at the Tribunal shall have sufficient notice of such
7 matters as affect them. It follows that if parties fail
8 to supply the information sought from them in sufficient
9 time prior to the hearing, their entitlement to have
10 evidence led on any matter which may adversely affect
11 thirds parties may be limited."

12

13 And that was, I think, Sir, the first time that you flagged
14 that in the event that statements were not forthcoming, you
15 would have to look carefully at the procedural implications
16 of that situation.

17

18 The letter then goes on, "Because of the limited time now
19 available to the Tribunal prior to the commencement of its
20 public sittings on the 12th January, 1999 and because your
21 client has not made himself available to answer questions
22 as requested in my letter of the 25th September, 1998, the
23 sole member will consider, not earlier than twelve noon on
24 Friday next the 11th December, 1998, whether it is
25 necessary for the purpose of his functions to make an order
26 requiring your client to attend at the offices of the
27 Tribunal on such dates and at such times as the sole member
28 may direct to answer questions to be put to him by counsel
29 to the Tribunal - in the presence of a stenographer - in
30 relation to the matters mentioned in my letter of the 25th
31 September last, and related matters including matters
32 arising from the contents of the affidavit of James Gogarty

1 subsequently furnished to your client.

2

3 If your client is not prepared to consent to the making of
4 such an order and wishes to make submissions as to why such
5 an order should not be made against him or wishes to make
6 submissions as to the nature and extent of any such order,
7 please let me have any such submissions in writing by
8 return so that they can be considered by the sole member
9 before he makes any decision on the matter.

10

11 Please ensure that any such submissions reach me not later
12 than 11am on Friday, 11th December, 1998.

13

14 The Tribunal intends to furnish to all parties concerned a
15 note or statement of the evidence which will be given by
16 all witnesses including your clients who will be called by
17 the Tribunal to give evidence. If for any reason the
18 Tribunal is not in a position to give all parties a note or
19 statement of such evidence before the evidence is called,
20 the Tribunal will make such orders as may be just and
21 necessary to ensure that all parties concerned will have
22 prior notice of the evidence to be given by other
23 persons."

24

25 Now, as you are aware, Sir, as a result of that letter and
26 in particular, as a result of the intimations in that
27 letter that in the event the parties did not consent to
28 attending to be interviewed by counsel for the Tribunal,
29 that the Tribunal would consider making an order directing
30 them to attend. Messrs. Fitzsimons Redmond intimated they
31 wished to make oral submissions to the Tribunal on the
32 question of the proposed orders.

1

2 A private sitting of the Tribunal was then subsequently
3 arranged, I think the following week, at which counsel on
4 behalf of all of these parties submitted to the Tribunal
5 that there was no legal basis for the Tribunal making such
6 an order and effectively, challenged the Tribunal's
7 jurisdiction to make that form of an order.

8 .

9 In the event, an agreement was reached or compromise was
10 reached between the Tribunal lawyers and the lawyers for
11 these parties, that statements, narrative statements would
12 be furnished by them to the Tribunal by the following
13 Wednesday including a statement from Mr. Tim O'Keefe, who
14 had recently become a client of that office as well.

15

16 The correspondence then, Sir, continued, and the one to
17 which I wish to particularly refer you is a letter from
18 Fitzsimons Redmond to the Tribunal dated the 9th December,
19 1998 and in paragraph headed the 'Statements of our
20 Clients' Mr. Fitzsimons says;

21

22 "Long prior to receipt of Mr. Gogarty's affidavit and
23 indeed prior to receipt of any request from the Tribunal
24 that our clients furnish statements, draft statements were
25 prepared on behalf of our clients. These draft statements
26 set out in some detail the understanding of our clients of
27 the matters into which the Tribunal is inquiring. The
28 draft statements made reference to numerous documents and
29 the documents were appended to the drafts.

30

31 As time went by and new matters emerged from the workings
32 of the Tribunal, often in the media, the necessity to

1 update the draft statements was noted. From the outset
2 therefore it was envisaged by our clients that detailed
3 statements would be furnished to the Tribunal at the
4 appropriate time. When the Tribunal initially requested
5 statements from our clients, our clients had not at that
6 time been furnished with any statement from Mr. Gogarty.

7

8 Having regard to the fact that the Tribunal was established
9 largely on the basis of the allegations made by Mr.
10 Gogarty, and having regard to the fact that Mr. Gogarty is,
11 to our knowledge, the only person ever to have made
12 allegations concerning the good name and reputation of our
13 clients, we were not prepared to furnish statements until
14 such time as we had seen the detail of the allegations
15 being made against our clients.

16

17 Furthermore, based upon reports circulating in the media
18 which we believe to have emanated from Mr. Gogarty, our
19 clients were of the belief Mr. Gogarty had already
20 published a number of conflicting version of events having
21 now had sight of Mr. Gogarty's affidavit and the statements
22 from the various Garda witnesses, it is clear that our
23 clients' apprehension in this regard was well founded.

24

25 Our clients have another very serious concern in relation
26 to any statements that may be furnished to the Tribunal.
27 It would appear to be the case that almost any significant
28 piece of information furnished to the Tribunal is shortly
29 thereafter circulated to the media. The most recent
30 examples of this leaking of information to the media
31 involved Mr. Gogarty's own affidavit and the statements of
32 the Garda witnesses. It is to be presumed that this

1 leaking of information has been effected by persons having
2 an interest to do so and is designed to serve their own
3 interests.

4
5 We well appreciate that any statement furnished by our
6 clients to the Tribunal must be circulated to the persons
7 affected by such statements. That being so, it seems to us
8 to be highly likely that the content of those statements or
9 at least selected portions of the contents will find their
10 way into the media. We are concerned that the persons who
11 will leak such information will do so to serve their own
12 ends and damage our clients.

13
14 In the light of what has transpired to date, the Tribunal
15 must accept that is a reasonable apprehension on the part
16 of our clients.

17
18 Having regard to the foregoing, our clients have decided on
19 advice from counsel to furnish the Tribunal with statements
20 dealing with the essential issues raised by Mr. Gogarty in
21 his affidavit insofar as they relate to our clients.

22 These statements will not be as detailed as the statements
23 we first envisaged furnishing to the Tribunal but they do
24 deal with the crucial issues involving Mr. Gogarty. The
25 statements will be furnished not later than the 17th
26 December, 1998."

27
28 So, as you can see, Sir, this is a clear example of the
29 real difficulties which the unauthorised disclosure of
30 confidential information has caused and here we have the
31 statements from one of the parties or the solicitor to a
32 number of the parties stating that they did in fact already

1 prepare detailed narrative statements but in the light of
2 these leaks, as they describe them, they felt it was
3 inappropriate to furnish such statements to the Tribunal
4 and furnished truncated statements dealing with what they
5 describe as the essential elements of Mr. Gogarty's
6 affidavit.

7

8 They go on: "It may be that we will be able to furnish
9 some of these statements before this date. We would
10 request the Tribunal to take every step in its power to
11 ensure that there is no leaking of the information
12 contained in these statements. Having regard to the many
13 conflicting versions of events proffered by Mr. Gogarty to
14 date, we do not believe that his latest affidavit
15 represents notice of the evidence which he is actually
16 likely to give in oral testimony. That being so, we
17 reserve our clients' entitlement to elaborate or expand
18 upon any aspect of the statements furnished by them to the
19 Tribunal in the light of the evidence actually proffered by
20 Mr. Gogarty before the Tribunal."

21

22 So, again, we have a statement that they are reserving the
23 right to effectively introduce new material which is not
24 referred to in the statements which they furnish to the
25 Tribunal and this was precisely the situation which the
26 Tribunal was seeking to avoid by requiring all of the
27 parties to submit detailed narrative statements.

28

29 It goes on; "They reserve also the entitlement to notify
30 the Tribunal of any rebuttal evidence that may be relevant
31 at that time."

32

1 They then go on to deal with the question of interviews of
2 their clients.

3
4 "We appreciate that the requests from the Tribunal to
5 interview our clients came at a time when the Tribunal did
6 not have the benefit of sight of statements from our
7 clients. We would respectfully question, however, the
8 entitlement of the Tribunal to make any order directing our
9 clients to attend for interview." I think this letter was
10 I think immediately before the sitting and I understand is
11 subject to correction on that, before the sitting which
12 legal submissions were made on this point.

13
14 "In our view, the Tribunal has no power to make such an
15 order. In any event, having had sight of the statements of
16 our clients, we anticipate that the Tribunal will not view
17 it as necessary to pursue this aspect of matters. In this
18 context therefore, we request the Tribunal to postpone
19 consideration of the making of any orders directed to our
20 clients until such time as the Tribunal has considered the
21 relevant statements. If, having considered the
22 statements, the Tribunal maintains the desire to interview
23 our clients, we will consider the request at that time and
24 make such representations as seem appropriate.

25 We would request the earliest possible confirmation from
26 the Tribunal that it is satisfied to adopt this course" and
27 I have already referred to what happened at the private
28 sitting.

29
30 There was then, Sir, a letter from the Tribunal to
31 Fitzsimons Redmond dated the 17th December, 1998 and I
32 think this was a time when some of the statements but not

1 all of them had been received by the Tribunal but in the
2 second page, third paragraph on the second page of that
3 letter is stated by Moy-Anne Howard, one of the solicitors
4 to the Tribunal;
5 "In general, the sole member has not decided the order of
6 witnesses. The sole member has decided that any party who
7 does not provide to the Tribunal a statement of the
8 evidence intended to be given may have their right to
9 examine other witnesses deferred until after their own
10 evidence has been given."

11

12 I pause there, Sir, to make a very important point. One
13 would have thought from listening to some of the
14 submissions yesterday and the tone of indignation which
15 accompanied those submissions, that the Tribunal was, in
16 effect, depriving these parties, not these particular
17 parties but parties of their right to cross-examine.

18

19 As can be clearly seen from this and other letters written
20 by the Tribunal there was never ever any suggestion anybody
21 would be deprived of his right to cross-examine. All that
22 was being said, a party not furnished a statement would
23 have the right to cross-examine any particular witness
24 deferred until after their own evidence-in-chief had been
25 heard.

26

27 The letter goes on:

28 "This procedure is being adopted to enable persons
29 affected by evidence which of which there has been no prior
30 circulation to the Tribunal, a reasonable opportunity to
31 consider such evidence before they are cross-examined on
32 their own evidence. This is intended to "level the

1 pitch" for those who have cooperated with the Tribunal by
2 providing a statement of their evidence in advance for
3 circulation to other affected parties."

4

5 And I think that's really all the correspondence, Sir, that
6 I wish to open in respect of these particular parties other
7 than to refer you of course to the letter of the 18th
8 January, 1999 which I opened at the very outset of my
9 submissions. And that, as I have indicated to you, is a
10 letter which was sent to all of the parties.

11 .

12 Now, in respect of the JMSE parties, Sir, as you are aware,
13 statements were received in the latter part of December
14 from the individuals from whom statements were requested.

15 I hope I am not doing any injustice to these statements by
16 describing them in a sort of global fashion but essentially
17 at the beginning of each statement, there was a narrative
18 history of that particular individual's involvement with
19 JMSE but then it went on to deal with the allegations of
20 Mr. Gogarty and essentially consisted of a traverse of the
21 allegations which Mr. Gogarty had made.

22

23 Now, they did not consist entirely of a traverse of the
24 allegations which Mr. Gogarty had made. In some cases
25 there were narrative accounts on particular issues and some
26 cases there were not narrative accounts on particular
27 issues and in other cases the matters were not dealt with
28 at all and I think what we received was accurately
29 described in that earlier letter from Messrs. Fitzsimons
30 Redmond where they did say that they were submitting
31 truncated statements.

32

1 I think, Sir, the overall impression that one gets from
2 reading these statements is an overwhelming suspicion that
3 when the time comes for Mr. Gogarty to be cross-examined,
4 we are going to be confronted with new material of which no
5 prior notice has been given, which undoubtedly will take
6 Mr. Gogarty by surprise and I am not just talking about the
7 ordinary cut and thrust of cross-examination, the
8 challenging of a witness on a particular proposition which
9 he puts up. I am talking about material which has not been
10 mentioned at all. I am talking perhaps about events which
11 are referred to in Mr. Gogarty's affidavit or details of
12 circumstances surrounding those events of which no prior
13 notice has been given.

14
15 And I think it's important at this particular point to make
16 the point that this exercise is not being engaged in purely
17 for Mr. Gogarty's benefit. This Tribunal has indicated
18 from the outset the procedures in general that it intended
19 to adopt. It indicated at the outset that the Tribunal has
20 no case to make against anybody. The Tribunal is entirely
21 neutral. It is conducting an inquiry into events referred
22 to in its terms of reference. Mr. Gogarty will be treated
23 no better or no worse than any other witness who is called
24 before this Tribunal. All witnesses before this Tribunal,
25 including Mr. Gogarty, are entitled to fair procedures and
26 those fair procedures include a proper statement in advance
27 of the evidence which affects him. We already know that
28 there are going to be serious challenges to Mr. Gogarty's
29 credibility from the other parties and they are entitled to
30 do that. But Mr. Gogarty is entitled, just as all of the
31 witnesses before this Tribunal are entitled, to advance
32 notice of any factual evidence which is intended to be

1 given to rebut the factual evidence which he has given.

2

3 I will come back to the content of the JMSE statements at
4 the conclusion of my opening of the correspondence, Sir, in
5 the context of the suggestions which I would propose to you
6 as a means of dealing with this situation.

7

8 If I can then move on to the correspondence from Michael
9 Bailey or the solicitor for Michael Bailey, Thomas Bailey
10 and Bovale Developments Limited. Again, Sir, this
11 correspondence started on the 20th October, and again by
12 letter of the 20th October which enclosed Mr. Gogarty's
13 affidavit, you specifically stated:

14

15 "In addition the sole member requires your client to give
16 evidence at these sittings to deal with the matters
17 referred to in Mr. Gogarty's statement relating to him.

18

19 Please let me have a statement of your client's evidence.

20 I would like to have this on or before the 9th November
21 1998.

22

23 In view of the urgency of the matter the Tribunal will
24 appreciate your cooperation in this regard."

25 .

26 There was then a letter from Gore Grimes, Sir, dated the
27 29th October, 1998, addressed to Moy-Anne Howard,
28 solicitor.

29

30 MR. LEAHY: Mr. Hanratty seems to be under the impression
31 that Gore Grimes represent my client. It's incorrect.

32

1 MR. HANRATTY: Sorry Sir, I started with the wrong book of
2 correspondence. If you bear with me, I will get the
3 correct one out. The passage I read out I think is
4 identical in the letter to Kevin Smith of Smith Foy and
5 Partners and that was responded to --

6 .
7 MR. LEAHY: If Mr. Hanratty is dealing with the
8 correspondence, the letter, the original of which I have is
9 marked strictly confidential. We understood it was a
10 letter written by the Tribunal's solicitor to us in the
11 course of the confidential part of this Tribunal's
12 proceedings.

13
14 CHAIRMAN: It's part of correspondence which --

15
16 MR. LEAHY: I am dealing at present with the issue of
17 confidentiality. I don't know if we are to be asked to
18 waive our confidentiality or if it is a matter that Mr.
19 Hanratty would simply propose to read out dealing with the
20 issue of confidentiality --

21
22 CHAIRMAN: I would have thought the issue of
23 confidentiality at this point has ceased. You are now in
24 the public domain.

25
26 MR. LEAHY: Very good, I propose to open letters as far as
27 back as January last year where we pointed out the fairness
28 of constitutional procedures and the reply we got --

29
30 CHAIRMAN: Certainly but you are now in the public
31 domain.

32

1 MR. LEAHY: I am obliged to you for releasing us from
2 that, Sir.

3
4 MR. HANRATTY: Presumably the letters My Friend proposes
5 to open are relevant to the issue the Tribunal is now
6 considering.

7
8 MR. LEAHY: Yes, fair procedures.

9 .
10 MR. HANRATTY: There was a reply, Sir, dated the 28th
11 October, 1998 from Smith Foy and Partners and again, there
12 were a number of issues canvassed in that letter and in
13 response to some communication from the Tribunal in the
14 very last paragraph of that letter, it's stated:

15
16 "In the circumstances, we wish to state categorically that
17 there has been no delay on the part of your client and no
18 unwillingness on the part of our clients to cooperate fully
19 with the Tribunal of Inquiry. All that has happened is
20 they have insisted on their constitutional and other rights
21 which were duly confirmed by the Supreme Court."

22
23 And as you are aware, Sir, this particular party has
24 repeatedly, and in some cases, indignantly asserted in
25 correspondence that they were cooperating with the
26 Tribunal. There were no statements of evidence enclosed
27 with that particular letter and there were further
28 correspondence ensued, the first of which I would like to
29 open is the letter of the, it's another letter of the 28th
30 October, 1998, the same day as the previous letter, just
31 one paragraph I refer you to the bottom on the first page,
32 it says:

1

2 "My clients are aware that this is a concern which is
3 shared by other affected parties and they respectfully
4 require of the sole member that he carry out investigation
5 in the leaking of information to the media and that he
6 would indicate the steps he intends to take in pursuit of
7 such investigation and further indicate what steps he
8 proposes to take to prevent further prejudicial and in many
9 instances entirely misleading newspaper coverage."

10 It wasn't at that stage stated the reason we hadn't the
11 statement from Mr. Bailey but in a letter of the 12th
12 November, 1998, where the matter was explicitly referred to
13 and on the second page, second last paragraph, it says:

14

15 "Finally, we take issue with the sole member's statement
16 that the failure of our clients to provide a Statement of
17 Evidence by the 9th November, 1998 in some way represents a
18 failure to cooperate with the Tribunal."

19

20 And again, there wasn't any statement actually provided
21 with that and the correspondence then continued with a
22 letter on this topic, at least there was other
23 correspondence which isn't relevant but the letter dated
24 16th November, 1998 from the Tribunal to Messrs. Smith Foy
25 and Partners and if I could turn to the last paragraph or
26 to a passage starting with the last paragraph on the third
27 page. It says:

28

29 "With regard to the matters referred to in the penultimate
30 paragraph of your letter on reply, your client, Mr. Bailey,
31 specifically referred to the terms of reference of
32 paragraph A.1 and as a director of the company involved in

1 the acquisition of the lands referred to in the letter of
2 the June 8th, 1989 must have played some part in relation
3 to the subsequent planning history of the lands and the
4 information sought to be obtained by the Tribunal in
5 contents of the direction of the Oireachtas in the
6 succeeding paragraphs and in particular paragraph 4a.

7

8 Consequent upon the said terms of reference the Tribunal
9 has a mandate to enquire into those matters and all persons
10 affected thereby have a duty to cooperate with the
11 Tribunal... As and from November 4th, 1997 that their
12 account of their involvement would be sought by the
13 Tribunal. By letter dated the 25th September 1998, the
14 Tribunal requested your client to furnish an account of
15 their involvement by way of narrative statement. Despite
16 that request, there has been no intimation that such a
17 statement is forthcoming. Certainly none has been
18 received to date. This is hardly a manifestation of
19 cooperation."

20

21 Then if I can move on, Sir, to another letter from the
22 Tribunal dated the 25th November, 1998 and it refers back,
23 again, to the letter of the 25th September 1998 where the
24 first request was made. It says:

25

26 "I refer to my letter to you of the 25th September, 1998
27 in which I communicated to you the request by the sole
28 member that your client Michael Bailey should attend to
29 answer questions to be put to him by counsel for the
30 Tribunal. You responded by letter dated the 13th October,
31 1998 giving three reasons as to why, in your view, such an
32 interview would be premature. These matters which you

1 gave as reasons for the interview being premature were
2 dealt with in subsequent correspondence particularly in my
3 letter to you of the 13th October. The documents issue
4 was dealt with in my letter of the 16th October and as you
5 were aware, the sole member gave his interpretation of the
6 terms of reference on the 21st October."

7

8 The interpretation of the terms of reference, Sir, was the
9 third reason advanced by Mr. Bailey's solicitor as to why
10 he thought it was premature that he should attend an
11 interview with counsel to the Tribunal. That matter, as
12 you can see from the letter, was finally dealt with on the
13 21st October and that, we thought, dealt with all of the
14 concerns expressed up to that point and all the impediments
15 expressed up to that point to Mr. Bailey attending for
16 interview.

17

18 The letter continues: " In these circumstances, would you
19 please indicate by return whether your client is willing to
20 attend to be interviewed by counsel to the Tribunal. It
21 is the wish of the Tribunal that this interview take place
22 without further delay. The sole member invites your
23 clients' cooperation in this regard having regard to your
24 clients' professed intention to assist the Tribunal. For
25 the same reason, may I have your clients' detailed
26 statement which was also requested in my letter of the 13th
27 October and which I have not yet received.

28 Yours faithfully,

29 Mary Cummins,

30 Solicitor to the Tribunal."

31

32 Can I then refer you, Sir, to a letter dated 26th November,

1 1998 from Messrs. Smith Foy and Partners to the Tribunal.

2

3 "Dear Miss Cummins,

4 I refer to your letter of the 25th November, 1998 delivered
5 by courier to my office in my absence yesterday.

6

7 You will have today received from us two other items of
8 correspondence directed to you, as solicitor to the sole
9 member, dealing with a wide range of matters.

10

11 It is not a question of our client being unwilling to
12 attend to be interviewed by counsel to the Tribunal. It
13 is a question of our clients' legitimate concerns as
14 identified by his legal advisors being addressed. You may
15 take it upon receipt of reply to the correspondence to
16 which I have referred, I shall be in contact with you as
17 soon as those replies have been canvassed with senior
18 counsel and will deal with the matter then. "

19 .

20 As I have already indicated to you, Sir, the three specific
21 matters that were adduced as impediments to Mr. Bailey's
22 attendance for interview had been dealt with in previous
23 correspondence and here we have an assertion that there was
24 still outstanding matters unspecified in this letter and
25 then there was a letter again from Smith Foy and Partners
26 dated the 4th, sorry, from the Tribunal dated the 4th
27 December, 1998 to Smith Foy and Partners --

28 .

29 MR. LEAHY: Is there a reason why the correspondence in
30 the meantime is being glossed over and not opened? If we
31 are having a full opening of the correspondence, let it be
32 full.

1

2 MR. HANRATTY: Sir, you are aware of the extent of the
3 correspondence and the length --

4

5 CHAIRMAN: Of course -- aware of the issue we are dealing
6 with.

7

8 MR. HANRATTY: I am taking out extracts dealing with the
9 specific issue of statements and attendance for interview
10 to give the Tribunal a version of events that can be
11 circulated to anybody who is affected by it.

12

13 CHAIRMAN: Mr. Leahy, if you feel offended, do feel free
14 when you get to your feet to entertain us with the balance
15 of the correspondence.

16

17 MR. LEAHY: Well Sir my difficulty is this, I don't want
18 to weary the Tribunal opening correspondence but it was
19 private correspondence is now being opened in public and if
20 it is being opened in public, let the public see the full
21 extent of the correspondence, not the edited highlights
22 being put --

23

24 CHAIRMAN: No. Mr. Hanratty is dealing with one issue
25 only. If you want to open up anything else, you are
26 welcome to do it.

27

28 MR. LEAHY: I am anxious that the replies to the letters
29 would be dealt with. It's the normal practice for counsel
30 when opening correspondence in any body or tribunal, to
31 open in its entirety and not do highlights. That's all I
32 ask. I don't particularly see the relevance but that's

1 all I ask --

2

3 CHAIRMAN: If you find the highlights are necessarily
4 pejorative, no doubt you will correct that when you come to
5 your feet.

6

7 MR. HANRATTY: Sir, this letter is a reply to the letter
8 which I have just opened. It says at the first line of
9 it:

10 "I am directed by the sole member of the Tribunal to reply
11 as follows to your letter of the 26th ult."

12

13 And if I may skip over a number of items which have no
14 relevance at all to the matter being considered today and
15 go directly to the matter which does. It's at the bottom
16 of the third page and it says:

17

18 "I am directed by the sole member to inform you that he
19 does not consider the fact of correspondence having passed
20 between your firm and the Tribunal's legal team affords any
21 justification for your continued failure to provide to the
22 Tribunal the narrative account of your clients' involvement
23 in the matters, the subject matter of this inquiry or your
24 continued failure to confirm that your clients will be made
25 available for interview by counsel on behalf of the
26 Tribunal.

27

28 Please advise me immediately as to whether it is your
29 clients' intention to comply with these requests.

30

31 You should note that in the event that no Statement of
32 Evidence from your client is furnished to the Tribunal in

1 sufficient time to allow for circulation to other persons
2 who may be affected by its contents, your clients'
3 entitlement to participate in proceedings may be subject to
4 such terms and conditions to the sole member seems just to
5 all parties including your clients."

6

7 MR. LEAHY: I should indicate there were two letters from
8 Smith Foy on the 26th November, one running to three pages,
9 the other running to four pages. Mr. Hanratty appears to
10 be unaware of the relevant one. I would ask he open the
11 two of them at this stage if he is going to do the
12 extracted highlights.

13

14 MR. HANRATTY: Perhaps if My Friend would identify which
15 one he is referring to and I will be happy to open it.

16

17 MR. LEAHY: It's a letter of the 26th November, 1998 to
18 Miss Cummins in response to a communication sent by you to
19 this firm at the direction of the sole member on the 16th
20 November. It's the germane one, Mr. Hanratty.

21

22 MR. HANRATTY: Could My Friend direct me to the passage
23 which deals with the question of statements or interviews?

24

25 MR. LEAHY: Mr. Hanratty is putting before you the
26 correspondence in the narrative form, the entire of the
27 letter is relevant insofar as the letter or its response is
28 relevant. If he doesn't have the letter, we will provide
29 him with a copy although it ill becomes criticism of us if
30 our correspondence isn't known to counsel for the
31 Tribunal.

32

1 MR. HANRATTY: Sir, as far as I can see, it's irrelevant
2 in its entirety and to satisfy My Friend I will read it out
3 to demonstrate that point. "I refer to your letter --

4 .

5 MR. LEAHY: It's the wrong letter, Sir.

6 .

7 MR. HANRATTY: You said there were two letters of the
8 26th. I have already opened the first one and this is the
9 other one.

10 .

11 MR. LEAHY: I will read it for you if you wish.

12

13 MR. HANRATTY: If you just refer me to it. My Friend can
14 open anything else in reply.

15

16 CHAIRMAN: You are referring to the one, "A limited amount
17 of additional documentation will follow shortly..." That's
18 the same letter.

19 .

20 MR. LEAHY: "We write in response to communication...

21 .

22 MR. HANRATTY: Yes, I have that. "And delivered by
23 courier late on the afternoon of that day to these offices.

24 You put us on notice in that letter, inter alia, that "we
25 were furnished on Friday last with the majority of the
26 relevant material." You went on to say:

27

28 "A limited amount of additional documentation will follow
29 shortly." This is obviously exchange concerning the
30 documentation which was being circulated to the parties
31 including Messrs. Smith Foy. "When, in light of the sole
32 member's stated perception of urgency of this matter, can

1 we expect to see this additional documentation?

2

3 You identify a second category of documents sought by this
4 firm on behalf of your clients being all documents which
5 exist in relation to the preparation of that affidavit."

6 (The affidavit being that of Mr. Gogarty.)

7 .

8 We note with interest your assertion that "It is as far as
9 the Tribunal is aware, a document prepared by Messrs.
10 McCann Fitzgerald, solicitors to Mr. Gogarty on Mr.
11 Gogarty's instructions."

12 .

13 "You go on to say, "such documents as may exist and come
14 within the said category are documents in possession of
15 Messrs. McCann Fitzgerald as solicitors for Mr. Gogarty.
16 If you require them, it's a matter to be dealt with between
17 your good selves and Messrs. McCann Fitzgerald. The
18 Tribunal considers these documents protected by legal
19 privilege."

20

21 "Our clients require a specific response from the sole
22 member to the following query -- the having regard to the
23 material which has been set forth above from your letter
24 written on the instructions of the sole member in what
25 conceivable circumstances could the sole member be in a
26 position to consider that these documents are "protected by
27 legal privilege".

28

29 "We now turn to the following paragraph in your letter
30 under reply which recites as follows:

31 "The Tribunal notes that you are prepared to make a formal
32 application for discovery. It is not within the province

1 of this letter to express any opinion as to the outcome of
2 such an application an alternative approach might be that
3 your clients would treat this letter as a formal decision
4 to refuse your request for the said information."
5

6 The attitude of the sole member in this regard almost
7 beggars belief. On the one hand, it is suggested that the
8 Tribunal would not be in a position to express any opinion
9 as to the outcome of such an application whilst at the same
10 time suggesting that your letter under reply should be
11 taken as a formal decision to refuse such a request. It
12 is noted in this context that the Tribunal would make no
13 point that no formal order refusing the application for
14 discovery was made in the event of this matter being taken
15 to the High Court. This is yet again an astonishing
16 proposition.

17
18 For the avoidance of doubt," to use Mr. Allen's hackneyed
19 phrase, "the following matters remain to be resolved as a
20 matter --

21 .
22 MR. LEAHY: Mr. Hanratty is not now quoting from the
23 letter and is commenting on the letter --

24
25 CHAIRMAN: I am afraid it's rather well known, it's almost
26 got into the jargon of legal procedure - 'for the avoidance
27 of doubt'.

28 .
29 MR. LEAHY: But not the context of the letter --

30 .
31 MR. HANRATTY: Mr. Allen has no inhibition about
32 commenting. "For the avoidance of doubt --

1 .
2 MR. ALLEN: With respect, Sir, if Mr. Hanratty would just
3 pause for a moment, I invite you to remind him that
4 yesterday you sat here and invited us to put behind us any
5 rancour and to come together in an atmosphere of
6 cooperation. It seems to me, Sir, and this is my final,
7 this will be final interjection on this matter, Mr. Leahy
8 will be replying -- it is undesirable, to say the least,
9 that Mr. Hanratty, for whatever disturbing reasons he may
10 have, should seek to introduce me personally into this
11 correspondence. Might I remind you, Sir, that phrase 'for
12 the avoidance of doubt', for example, appears from the
13 correspondence from Messrs. Pickering, solicitors. It is
14 not a phrase which is unique to me and even if it were,
15 Sir, it is not for Mr. Hanratty to seek to draw me into
16 this matter and quite frankly, if that's the best point,
17 wouldn't it be better if he went home now.

18
19 MR. HANRATTY: It seems Mr. Allen can't take as good as he
20 gives.

21
22 "For the avoidance of doubt, the following matters remain
23 to be resolved as a matter of urgency before our clients
24 will be in a position to prepare for public hearings on the
25 12th January, 1998.

26
27 1: Disclosure of documentation.

28
29 (i) Gogarty affidavit: Preparatory material: This firm
30 has written to McCann Fitzgerald seeking all materials in
31 possession of Mr. James Gogarty in relation to the
32 preparation of his affidavit dated 12th October, 1998. In

1 the event of McCann Fitzgerald failing to produce this
2 documentation, we intend to make a formal application to
3 the sole member for an Order of Discovery.

4 In this connection, you might indicate an appropriate date
5 in time for the bringing of such applications.

6 .

7 (ii) Documents in possession of the sole member:

8 Our clients require all sights of material in possession of
9 the sole member and/or his legal team in relation to Mr.
10 Gogarty. In particular, we require sight of all memoranda
11 and other materials prepared in respect of the meetings
12 held between the members of the Tribunal's legal team and
13 Mr. James Gogarty and his representatives.

14

15 This material, with respect, cannot be privileged. Our
16 client is entitled to know whether or not any accommodation
17 was reached between the sole member and Mr. James Gogarty
18 either as to the evidence which Mr. James Gogarty would be
19 permitted to give or as to the granting of any immunity
20 from prosecution. These matters clearly go to the
21 credibility of Mr. James Gogarty and under the rules of
22 natural and constitutional justice, our clients as the
23 subject of Mr. James Gogarty's allegations are entitled to
24 sight of same.

25

26 Furthermore, our client is also entitled to any documents
27 in the possession of the sole member relevant to Mr. James
28 Gogarty's testimony, for example, if the sole member has
29 conducted any inquiries as to allegations made or received
30 any statements in relation to same, these must be furnished
31 to our clients forthwith. The sole member was charged on
32 the 4th November, 1997 with carrying out an inquiry into

1 these matters and it is scarcely credible that the only
2 documentation within this time are the Gardai Siochana
3 files (which were apparently not disclosed until the 6th
4 December, 1998) and a statement from Sinead Collins
5 planning officer of the Fingal County Council dated
6 November, 1998 which deals with lands other the lands
7 specified in the Tribunal's terms of reference.

8

9 In the event of the sole member seeking to maintain a claim
10 of privilege over the said document, this claim must be
11 asserted in the ordinary way; specifically a schedule of
12 the documents should be prepared and furnished to our
13 clients and the precise basis on which privilege is being
14 claimed should be stated.

15

16 2: Terms of reference:

17 One would have hoped it would be unnecessary to remind the
18 sole member under the terms of the Supreme Court judgment
19 in Haughey -v- Moriarty, unreported 28th July, 1998 at page
20 178, a Tribunal is required to explain its terms of
21 reference to persons affected. Unfortunately the sole
22 member has to date failed to clarify the terms of reference
23 of the Tribunal. In particular, he has refused to respond
24 in any meaningful way to our client's request of the 3rd
25 November 1998 to explain how either the Forest Road lands,
26 or the disputes between Mr. James Gogarty and JMSE come
27 within the terms of reference. The terms of reference are
28 confined in the JMSE lands in north county Dublin referred
29 to in the letter of the 8th June, 1989.

30

31 With respect the response to your client's request for
32 clarification set out in you letter of the 16th November,

1 1998 is wholly inadequate. To characterise a request for
2 clarification of the terms of reference as a request for
3 adjudication on the relevance of evidence is entirely
4 misconceived. It remains the fact that the sole member
5 circulated Gogarty affidavit inter alia to persons who were
6 strangers to the allegations contained therein, thus
7 scandalizing our clients. In so doing, the sole member
8 clearly took the view that the entire of the affidavit was
9 relevant to the terms of reference of the Tribunal. Our
10 clients are entitled to know the basis for this view. To
11 suggest that the relevance of these matters now be
12 canvassed at public hearings of the Tribunal (and thus to
13 ventilate irrelevant allegations again in public) is
14 grossly unfair to our clients. Our clients are entitled
15 to know the basis on which the sole member regards the
16 allegations as relevant in terms of the reference in order
17 that they may if necessary test the legality of the sole
18 member's view in the High Court. In this context, we wish
19 to make the point in the strongest possible terms that this
20 is not an in terrorem threat. Neither our clients nor
21 their legal representatives have at any time made in
22 terrorem threats. They have simply outlined to the sole
23 member their determination that fair and proper procedures
24 will be complied with and that if they are advised such
25 fairness is not being adhered to, then they will assert
26 their rights in the High Court.

27

28 Kindly let us have a response to the various matters
29 canvassed in this letter as a matter of urgency in order we
30 may appropriately advise our clients and in particular,
31 that we may not be again and unfairly accused of delay".

32

1 As I anticipated at the start, that very long letter has
2 absolutely no relevance at all to the question of documents
3 or statements but it does indicate Mr. Bailey's concern for
4 fair procedures.

5
6 Can I continue with the relevant correspondence. I think I
7 have already read the letter dated the 4th December, 1998
8 from the Tribunal to Smith Foy which was a response to the
9 other letter from Smith Foy dated the 26th November and can
10 I now refer you to a letter dated 18th December from the
11 Tribunal to Messrs. Smith Foy and Partners.

12
13 That's simply a letter, Sir, in which the JMSE group had
14 individual statements were circularised to Messrs. Smith
15 Foy.

16 .
17 And then can I refer you to a letter of the 22nd December
18 of 1998 from the Tribunal to Messrs. Smith Foy. It says:

19
20 "I refer to previous correspondence regarding the
21 Tribunal's request that you furnish a narrative statement
22 of your client, Mr. Michael Bailey, in relation to the
23 matters set forth in the affidavit of Mr. James Gogarty
24 sworn on the 12th October, 1998.

25
26 The sole member has directed that I request that you
27 furnish your client's statement by return.

28
29 The sole member has decided that any party who does not
30 provide any statement to the Tribunal a statement of the
31 evidence intended to be given may have the right to examine
32 other witnesses deferred until after their own evidence has

1 been given.

2

3 This procedure is being adopted to enable persons affected
4 by evidence of which there has been no prior circulation to
5 the Tribunal a reasonable opportunity to consider such
6 evidence before they are cross-examined on their own
7 evidence.

8

9 This is intended to "level the pitch" for those who have
10 cooperated with the Tribunal by providing a statement of
11 their evidence in advance for circulation to other affected
12 parties."

13

14 And there's a response to that, Sir, which is dated the 6th
15 January, 1999. It says -- this is from Smith Foy to Miss
16 Howard:

17

18 "We refer to your letter dated 22nd December, 1998. We
19 note the sole member's intention to defer the right of a
20 person, who does not provide a Statement of Evidence, to
21 examine other witnesses until after their own evidence has
22 been given. With respect, any such restriction on our
23 client's right to cross-examine would be unwarranted and
24 would be in breach of the rules of natural and
25 constitutional justice. We would have thought it
26 unnecessary to remind you that the right of
27 cross-examination is one of the minimum procedural
28 safeguards prescribed by the Supreme Court in in re
29 Haughey, 1971, IR 217 and more recently reasserted by the
30 Supreme Court in Haughey -v- Mr. Justice Moriarty
31 unreported, 28th July, 1998. The allegations made against
32 our client (which are strenuously denied) are of the utmost

1 seriousness and include allegations of criminal conduct.
2 Furthermore, Mr. Michael Bailey is expressly named in the
3 terms of reference of the Tribunal and his conduct is the
4 very subject matter of the sole member's inquiry. In the
5 circumstances our clients cannot be regarded as mere
6 witnesses before the Tribunal but stand as accused persons
7 before it. As such, there can be no requirement on our
8 clients to either provide a written statement of their
9 evidence nor to give oral testimony as a condition
10 precedent to the exercise of their constitutional right to
11 challenge and test the accusations against them by
12 cross-examination."

13 .

14 Can I pause there again, Sir, to draw attention to the fact
15 that it appears from the terminology of that paragraph, it
16 is based on the misconception that the right to
17 cross-examine was being removed and as you will recall from
18 the previous letter, that is not what was said. It was
19 stated that if they did not provide written statements of
20 their version of events, their right to cross-examine would
21 be deferred until after Mr. Bailey's evidence-in-chief was
22 given.

23

24 It goes on: "Furthermore and given the fact that most of
25 the allegations against our clients have already been
26 wrongfully ventilated in public, it would be most unfair
27 were these allegations to be repeated in public hearings
28 before the Tribunal without affording our clients an
29 immediate right of cross-examination.

30

31 It is with respect that we note that once again, any
32 attempt by our clients to assert their rights in accordance

1 with proper and lawful procedures appears to attract either
2 expressly or by implication the allegation that they are
3 not cooperating with the Tribunal. This is both unfair
4 and unwarranted.

5

6 Our clients have, at all times, as advised by senior
7 counsel, afforded full cooperation to the Tribunal.

8 Insofar as that cooperation has been consistent with the
9 vindication of their constitutional rights. That will
10 remain the position.

11

12 Our leading counsel, Mr. Colm Allen, S.C. who has been on
13 vacation is due to return to this jurisdiction tomorrow
14 morning. When we have had an opportunity of consulting
15 with Mr. Allen, we will be in further contact with you."

16 .

17 And as you are aware, Sir, there was no statement of Mr.
18 Bailey's version of events enclosed i that letter but there
19 was assertion they had no legal obligation to provide such
20 a statement.

21 .

22 There was then a letter following then on the 7th January
23 from the Tribunal to Messrs. Smith Foy and it says:

24

25 "I refer to your letter of the 6th January, 1999 regarding
26 the above matter" -- and I regret to say the Tribunal now
27 has been infected by this phrase -- "for the avoidance of
28 doubt the Tribunal has not stated at any time it will not
29 afford your clients their right to cross-examine Mr.
30 Gogarty.

31

32 The Tribunal will commence a sitting in public on the 12th

1 January, 1999. Evidence will be given in public by Mr.
2 James Gogarty, some of which will affect your client. The
3 Tribunal will, therefore, call your client to hear his
4 version of the matters alleged by Mr. Gogarty. Your
5 client has had Mr. Gogarty's statements since the 20th
6 October, 1998. Despite repeated requests from the
7 Tribunal, your client has failed to furnish in advance of
8 the hearing his account of the evidence alleged by Mr.
9 Gogarty.

10
11 This contrasts sharply with the position adopted by many
12 other witnesses in respect of whom Mr. Gogarty will give
13 evidence. Their statements, together with that of Mr.
14 Gogarty, have been furnished to you.

15
16 Your client's blatant failure to cooperate by furnishing a
17 written statement is not understood and the penultimate
18 paragraph of your letter under reply which states "Our
19 clients have at all times, as advised by senior counsel,
20 afforded full cooperation to the Tribunal insofar as that
21 cooperation has been consistent with the vindication of the
22 constitutional rights" affords no explanation."

23
24 Then, Sir, there's the letter from the Tribunal dated the
25 13th January, 1999 which is, as you are aware, is the day
26 after the public sittings of this Tribunal in relation to
27 Mr. Gogarty's evidence started.

28 It says:

29
30 "I acknowledge the receipt of the statement of Michael
31 Bailey dated 11th January, 1999" -- as you are Mr. Bailey's
32 statement was received late in the afternoon of the 11th

1 January 1999. "I note that at paragraph 23 of his
2 statement, he has expressed his intention to supplement the
3 evidence in relation to dealing with the contents of
4 paragraphs 64 and 65 of Mr. Gogarty's affidavit when giving
5 oral evidence to the Tribunal. No reasons for this
6 intended course of action are advanced."

7

8 You recall, Sir, that paragraphs 64 and 65 of Mr. Gogarty's
9 affidavit deal with this important issue of the payment of
10 £50,000 by Mr. Bailey to Mr. Gogarty, the handing over a
11 cheque for £50,000 about which I believe evidence was given
12 and in the statement which was submitted to the Tribunal by
13 Mr. Bailey on the afternoon before the commencement of the
14 public sittings. Mr. Bailey said nothing about the £50,000
15 except he would supplement his evidence in relation to that
16 issue at the hearings of the Tribunal so that neither the
17 Tribunal nor indeed the witness were going to have any
18 advance notice of precisely what Mr. Bailey's case and
19 evidence in relation to this matter was going to be.

20 .

21 MR. LEAHY: ... what was contained in Mr. Bailey's
22 statement.

23

24 CHAIRMAN: You will have an opportunity of referring to
25 the particular portion at any time in --

26 .

27 MR. LEAHY: He denied the money was received for the
28 purpose stated by Mr. Gogarty. Mr. Hanratty did not say
29 that. He said it would be simply supplemented.

30 .

31 MR. HANRATTY: If I can just get out precisely what was
32 stated. Paragraph 23 of Mr. Bailey's statement, what he

1 says is as follows, you recall is, Sir, I think a detailed
2 account given by Mr. Gogarty in two paragraphs of his
3 affidavit and then his evidence, paragraph 64 and 65 where
4 he described a meeting between himself and Mr. Bailey where
5 he alleges that Mr. Bailey handed him, after a
6 conversation, a cheque or put it in his pocket, I think a
7 cheque for £50,000. The version of events that we have
8 received from Mr. Bailey in relation to that important
9 matter is as follows, paragraph 23:

10

11 "Contrary to what is suggested at paragraph 64 and 65 of
12 Mr. Gogarty's affidavit, I never offered to pay or paid Mr.
13 Gogarty money in return for his agreeing to forget about
14 pursuing proceedings from JMSE and simply to enjoy life."

15

16 So he has first of all denied he ever gave the money.

17

18 "It is my intention to supplement by evidence in relation
19 to this aspect of Mr. Gogarty's affidavit when giving oral
20 evidence to the Tribunal." And that's it.

21 .

22 MR. LEAHY: Mr. Hanratty reads that as a denying of money

23 being paid... I should also say paragraph 4 of Mr.

24 Gogarty's affidavit which has not been opened to you

25 reserves the right to supplement evidence as well but that

26 apparently is not the subject matter of --

27 .

28 MR. HANRATTY: If I might just flick to the

29 correspondence, it's just I think that really brings us to

30 a conclusion except for again the circular letter that was

31 sent on the 18th January and just to remind you, Sir, the

32 operative part in the middle paragraph, sorry the last

1 paragraph:

2

3 "I am directed by the sole member to the Tribunal... in
4 advance shall not be entitled to cross-examine Mr. Gogarty
5 on that issue until after they have given their own oral
6 evidence on the issue." Now --

7 .

8 MR. LEAHY: Sir, we replied in detail to the last letter
9 from the Tribunal on the 18th January and that has not been
10 opened.

11

12 CHAIRMAN: Wait now just a moment.

13 In fact there was three letters on the 18th. Which one are
14 you referring to?

15 .

16 MR. LEAHY: The one regarding narrative statements,
17 Michael Bailey is the one in question.

18 .

19 MR. HANRATTY: If My Friend can refer me to the relevant
20 passage, Sir, there are two long letters of the 18th
21 January which I have.

22 .

23 MR. LEAHY: It's the letter in response to the letter, Mr.
24 Hanratty has opened to you from the Tribunal. That
25 appears to be the end of the matter. There is a two page
26 response to that entitled 'Re: Narrative statement of Mr.
27 Michael Bailey'. If we are going to have it, let's have
28 everything.

29 .

30 MR. HANRATTY: I found the letter My Friend is referring
31 to. It's the 18th January which is from Smith Foy and
32 Partners to Miss Cummins.

1

2 "We note the sole member intends not to permit our client
3 Mr. Michael Bailey to cross-examine... -- Sorry, Mr.
4 O'Neill reminds me, Sir, I didn't actually complete reading
5 the letter of the 13th January. Perhaps I will do that and
6 I will read the responding letter in its entirety.

7

8 Going back to the 13th January, 1999.

9 "I acknowledge receipt of the statement of Michael Bailey
10 dated 11th January, 1999. I note in paragraph 23 of his
11 statement he has expressed his intention to supplement his
12 evidence in relation to his dealing with the contents of
13 paragraphs 64 and 65 of Mr. Gogarty's affidavit when giving
14 oral evidence to the Tribunal. No reasons for this intended
15 course of action are advanced.

16

17 The intended course of action by your client is not
18 acceptable to the Tribunal. It has been made clear to you
19 at all times that the Statement of Evidence of witnesses
20 must be provided to the Tribunal in advance of the hearing
21 of such witness so as to permit circulation of such
22 statements to persons who may be affected by their
23 contents.

24

25 The present statement of your client does not deal with the
26 contents of paragraph 64 and 65 of Mr. Gogarty's affidavit
27 save to deny that your client ever offered to pay or paid
28 Mr. Gogarty money in return for his agreeing to forget
29 about pursuing proceedings against JMSE and 'simply to
30 enjoy life'.

31

32 In particular your client's statement does not state

1 whether in fact money was either offer or paid and if so
2 offered or paid, what your client's explanation for such
3 offer or payment was.

4

5 The tendering of evidence on this aspect for the first time
6 in the course of oral testimony by your client will defeat
7 the stated purpose of the procedures which have been
8 devised by the Tribunal so as to ensure constitutional
9 fairness to all parties. I now require you to furnish a
10 statement of your client's account of the matters dealt
11 with at paragraphs 64 and 65 of Mr. Gogarty's affidavit.

12 As you have been made aware, cross-examination of witnesses
13 by other interested parties is dependent upon compliance
14 with the procedures fixed by the Tribunal. Until such time
15 as your client has furnished a full statement dealing with
16 that aspect, he will not be permitted to cross-examine Mr.
17 Gogarty on this aspect of his evidence.

18

19 I await hearing from you as a matter of urgency."

20 .

21 And yes, this letter of the 18th then in reply to that.

22

23 "We note that the sole member intends not to permit our
24 client Mr. Michael Bailey to cross-examine Mr. James
25 Gogarty in connection with the allegations made in
26 paragraph 64 and 65 of his affidavit (in connection with
27 the alleged payment of £50,000) until such time our client
28 is furnished with what is described as a 'full statement'
29 dealing with those allegations.

30

31 As we indicated in our letter of the 6th January, 1999 our
32 clients cannot be regarded as mere witnesses before the

1 Tribunal but stand as accused persons before it. As such,
2 there can be no requirement on our clients to provide a
3 written statement of their evidence nor to give oral
4 testimony as a condition precedent to the exercise of their
5 constitutional right to challenge and test the accusations
6 against them by cross-examination nor do we know of any
7 statutory basis by which the sole member may seek to compel
8 the submission of such a Statement of Evidence.

9
10 Without prejudice to this contention, Mr. Michael Bailey,
11 as part of his continued cooperation with the Tribunal
12 voluntarily submitted a statement to the Tribunal on 11th
13 January, 1999. The position in connection with the
14 specific allegations contained in paragraph 64 and 65 of
15 the Gogarty affidavit is therefore as follows:

16
17 Mr. Michael Bailey has put both the Tribunal and Mr.
18 Gogarty on notice of the fact that he denies the
19 allegations contained therein and of his intention to
20 provide oral testimony on this issue. Out of fairness to
21 Mr. Gogarty, counsel retained by this firm will put to him
22 in cross-examination the version of events Mr. Michael
23 Bailey will be giving evidence in. Mr. Gogarty is
24 represented before the Tribunal by senior and junior
25 counsel who will be in a position to cross-examine Michael
26 Bailey in due course.

27
28 Furthermore, counsel for the Tribunal has stated that "Mr.
29 Gogarty's reputation of course has to be protected." (Day
30 2, page 10). And appeared to intend to seek to establish
31 his credibility themselves. In all the circumstances,
32 more than adequate fair procedures will be ensured for Mr.

1 Gogarty.
2 .
3 We would remind you that our client, Mr. Bailey, as a
4 private individual finds himself in the unique position of
5 being specifically named in the terms of reference of the
6 statutory Tribunal of Inquiry. Mr. Gogarty is the sole
7 accuser against Michael Bailey and accordingly, the
8 latter's entitlement to cross-examine Mr. Gogarty assumes a
9 particular importance and can be frustrated by any supposed
10 requirement to indicate in advance to Mr. Gogarty the
11 nature of that cross-examination. We would again refer
12 you to the decision in in re Haughey 1971, Irish Reports
13 217 and to the fact that the right to confront one's
14 accusers is one of the most basic requirements of fair
15 procedures. The inexplicable failure of counsel for the
16 Tribunal to make an opening statement has had the result
17 the right to cross examine has assumed an even greater
18 importance; the difficulty that the absence of an opening
19 statement has created has been expressly recognised by
20 counsel for the Tribunal (Day 1, Page 43) as has the
21 absolute nature of the right to rebut evidence, (Day 2,
22 Page 80).
23
24 Mr. Gogarty has chosen for his own reasons to make the most
25 serious allegations which are strenuously denied against,
26 Mr. Michael Bailey and as such an accuser, must be subject
27 to cross-examination in the ordinary way and is not
28 entitled to assistance in the form of advanced warning as
29 to the nature of that cross-examination. The right to
30 cross-examine is absolute and can not be made conditional
31 on the disclosure of the nature of that cross-examination.
32 Any matters arising out of this cross-examination can be

1 dealt with by way of re-examination by Mr. Gogarty's
2 counsel and/or counsel for the Tribunal."
3 .
4 And that then, I think, does bring us on to the last letter
5 in a series which is the circular letter of the 18th
6 January to which I referred and in which, in this case,
7 Messrs. Smith Foy were informed that "any person who has
8 not furnished to statement of their... will not be entitled
9 to cross-examine Mr. Gogarty on that issue until after they
10 have given their own..."

11 .
12 It seems to me, Sir, that is an entirely undesirable
13 situation that has arisen, we have now effectively a point
14 blank refusal by Mr. Bailey to furnish in advance his
15 account of that particular incident. He says that he is
16 not legally entitled to do so and he relies on the fact
17 that he is in the position of accused person before the
18 Tribunal and he is entitled to, as it were, keep his powder
19 dry on that issue until the time comes to cross-examine Mr.
20 Gogarty when Mr. Gogarty and, I have to say and I emphasise
21 the Tribunal itself, will be told for the first time by Mr.
22 Bailey what his version of those particular events are,
23 apart from the fact that he denies Mr. Gogarty's version of
24 events.

25 .
26 There's another unsatisfactory aspect to Mr. Bailey's
27 statement, Sir, and that is that you will recall the
28 evidence, the document which was put in evidence yesterday
29 which was the letter from Mr. Bailey to Mr. Gogarty was 8th
30 June, 1989. This very important letter from Mr. Bailey
31 outlined two alternative proposals, one an outright
32 purchase of the property and the other effectively a joint

1 venture arrangement.
2
3 There are a number of significant matters in that letter
4 which clearly are of interest to the Tribunal and merit
5 inquiry by the Tribunal. Mr. Bailey throws no light
6 whatsoever on that letter other than it was drafted by a
7 solicitor and signed by him. There are references in that
8 letter to the procurement of planning permission, there are
9 references in that letter to zoning, there are references
10 in that letter to the financial outlay that is going to be
11 required on Mr. Bailey's behalf in respect of the matters
12 that he was proposing to do and we have been given no
13 information at all in Mr. Bailey's statement about those
14 matters, which I think by any reasonable construction of
15 the terms of reference, are central to this inquiry.
16 .
17 And again, there is this lingering feeling, having read Mr.
18 Bailey's statement, that not only those two particular
19 issue which I have identified, namely the letter of the 8th
20 June and the question of paragraph 64 and 65 of Mr.
21 Gogarty's affidavit, the payment of £50,000, but one is
22 left with the lingering feeling that there are other
23 matters where in the course of Mr. Gogarty's
24 cross-examination, we are looking at the prospect of the
25 chaos which inevitably ensues where matters put to a
26 witness which are new of which he has had no prior notice
27 and which he is, in respect of which he is not in a
28 position to deal with or hasn't had a reasonable or fair
29 opportunity to deal with in advance, one can only imagine,
30 Sir, if Mr. Bailey was put in the same position, you would
31 be receiving, I would respectfully submit, lectures under
32 the various authorities now being relied on not to provide

1 a statement in re Haughey 1971 Irish Reports.

2 .

3 Again, Sir, I refer in my final submission with regard to
4 how best we can get around this particular problem, I will
5 refer back to Mr. Bailey's statement and finally can I
6 refer again as briefly as I can to the correspondence with
7 Messrs. Gore Grimes on behalf of --

8 .

9 CHAIRMAN: Would you like to take a break for ten
10 minutes?

11 .

12 MR. HANRATTY: Yes, sir, if I may.

13 .

14 THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED

15 AS FOLLOWS:

16

17 CHAIRMAN: Mr. Hanratty, when you are ready.

18

19 MR. HANRATTY: Sir, I was going to complete the
20 correspondence by opening, again, brief extracts from the
21 correspondence with the solicitors for Mr. Ray Burke.
22 Again on the specific issue of the question of furnishing a
23 Statement of Evidence to the Tribunal on any related matter
24 and again, Sir, that correspondence commenced with the
25 letter of the 20th October, 1998 addressed to Mr. David
26 Martin of Gore Grimes enclosing the affidavit of Mr.
27 Gogarty informing them of the proposed hearing as it then
28 was on the 16th November, 1998.

29 .

30 And again, on the second page, stating that:

31

32 "In addition, the sole member requires your client to give

1 evidence at these sittings to deal with the matters
2 referred to in Mr. Gogarty's statement relating to him.
3 Please let me have a statement of your client's evidence.
4 I would like to have this on or before 9th November,
5 1998.

6 In view of the urgency of the matter, the Tribunal would
7 appreciate your cooperation in this regard."

8 .

9 As far as I can ascertain from the correspondence and I
10 stand subject to correction, I don't think there was any
11 specific reference to that request in any of the subsequent
12 correspondence from Gore Grimes up to the 4th December of
13 1998, which is the next letter I was proposing to open.

14 .

15 MR. MCGONIGAL: I think the letter of the 9th October.

16 .

17 MR. HANRATTY: If My Friend could refer me to the passage
18 in the letter. As far as I can see, Sir, there's nothing
19 in this letter at all about a statement from Mr. Burke and
20 I don't propose to open it although My Friend suggests it
21 has a relevance. There was a letter written by the
22 Tribunal on the 4th December, 1998 to Mr. Burke as it was
23 to other parties, enclosing a summons to Mr. Burke to
24 attend at the hearings, at the sittings of the Tribunal on
25 the 12th January, 1999.

26 .

27 In a letter dated the 4th, also dated the 4th December,
28 1998 to Gore Grimes from the Tribunal, Sir, there were a
29 considerable number of matters again which were being
30 discussed between the parties but if I can refer to the, I
31 think it's the fourth last paragraph of that letter where
32 it's stated on behalf of the Tribunal in reference to a

1 previous exchange, "I note your rejection to the suggestion
2 that your client had failed to cooperate with the
3 Tribunal. In the light of that, I note with surprise your
4 assertion that your client is under no legal obligation to
5 furnish a statement to the Tribunal and your client's
6 intention to rely on that proposition.

7

8 As you are aware, the reason that the Tribunal required a
9 statement from your client was to circulate it to other
10 parties who may be affected by your client's evidence which
11 the Tribunal intends to call at the forthcoming public
12 hearing in January. Fair procedures apply to everybody.

13

14 In the light of what you have said concerning your client's
15 statement to Dail Eireann, it is the intention of the
16 Tribunal to treat your client's statement to Dail Eireann
17 (together with the questions and answers which followed the
18 statement) as his statement to the Tribunal and to
19 circulate this to all persons who may be affected by your
20 client's evidence unless I hear back from you to the
21 contrary before the close of business on Wednesday next,
22 the 9th December 1998.

23 .

24 As you are aware, the question of orders for the production
25 of documents by your client will be considered next
26 Tuesday. The Tribunal looks forward to your client's
27 cooperation in this regard."

28 .

29 To explain, that is a reference to a previous exchange from
30 the Tribunal to Mr. Burke's solicitors wherein Mr. Burke
31 had indicated in response to the request for a statement
32 that he had made a full statement to Dail Eireann and given

1 that we hadn't received a specific statement to the
2 Tribunal, the Tribunal was indicating in the absence of
3 such a statement and having regard to Mr. Burke's
4 solicitors comment that he had made a full statement to the
5 Dail Eireann, the Tribunal was proposing to circulate the
6 statement to Dail Eireann as his statement to the
7 Tribunal.

8 .

9 There was a response to that from Mr. Burke's solicitors by
10 letter dated 9th December, 1998 where he says:

11

12 "Dear Madam,

13 We refer to your letter of the 4th December in connection
14 with the above matter. We have only briefly had an
15 opportunity to discuss this matter with our client and
16 counsel today and we will reply further and more fully to
17 you within the next few days.

18

19 We note the Tribunal's intention to treat our client's Dail
20 statement as a statement to the Tribunal.

21

22 This is a matter for the Tribunal to deal with as they see
23 fit but our client's statement was a statement to the Dail
24 and we will not consent to it being used as a statement to
25 the Tribunal."

26 .

27 So here we have a rather odd situation Sir, when asked for
28 a statement, Mr. Burke's solicitor responded that he had
29 made a full statement to Dail Eireann and in those
30 circumstances, was not submitting a detailed narrative
31 statement as requested to the Tribunal. When the Tribunal
32 then said that it was circulated statement to Dail Eireann,

1 having regard to what his solicitor said, his solicitor
2 then comes back and said to the Tribunal that they will not
3 consent to his statement to Dail Eireann being
4 circulated.

5

6 MR. McGONIGAL: That is not so. That is not so. If Mr.
7 Hanratty reads the last paragraph, that's what we said.
8 Not what Mr. Hanratty said - "This is a matter for the
9 Tribunal to deal with as it sees fit." There's no refusal
10 there to the statement being circulated. Therefore it's
11 improper for Mr. Hanratty to suggest it is there.

12 .

13 MR. HANRATTY: I didn't suggest it was there, Sir, I said
14 what he said was that they would not consent to his
15 client's statement to Dail Eireann being circulated as a
16 statement to the Tribunal.

17 .

18 CHAIRMAN: He says very definite, he wouldn't consent to
19 it being used as statement to the Tribunal. Presumably,
20 we may not circulate it and may not make use of it.

21 .

22 MR. McGONIGAL: With respect, Mr. Chairman, what he said
23 is "We note the Tribunal's intention to treat our client's
24 Dail statement as a statement to the Tribunal. This is a
25 matter for the Tribunal to deal with as they see fit. Our
26 client's statement was a statement to the Dail and will not
27 consent to it being used as a statement to the Tribunal."
28 There is nothing there preventing the Tribunal from
29 circulating it if they saw fit.

30 .

31 MR. HANRATTY: Well, I think perhaps --

32 .

1 CHAIRMAN: Clarify one other thing for me --

2 .

3 MR. HANRATTY: I think it's dealt with in the next letter,

4 Sir, which is a reply to that letter and it's dated 15th

5 December, 1998. It's the letter from the Tribunal to Mr.

6 Burke's solicitors, Gore Grimes, and it says:

7

8 "Dear Sirs,

9 I refer to your letter of the 9th inst. I note that your

10 client does not consent to his statement to the Dail being

11 treated by the Tribunal as a statement to the Tribunal.

12 Since your client has declined to furnish a statement to

13 the Tribunal, this leaves the Tribunal in the position it

14 cannot circulate the statement of your client's evidence to

15 other parties who may be affected by his evidence.

16 To say the least, this is unhelpful. Please note that your

17 client's statement to the Dail will be put in evidence in

18 any event as a statement he made to the Dail.

19

20 In any event, your client will be called to give evidence

21 of his version of the events described in the Gogarty

22 affidavit which he was involved at the forthcoming sittings

23 on the 12th January.

24

25 The sole member has decided that any party who does not

26 provide to the Tribunal a statement of the evidence

27 intended to be given may have their right to examine other

28 witnesses deferred until after their own evidence has been

29 given.

30

31 This procedure is being adopted to enable persons affected

32 by evidence of which there has been no prior circulation to

1 the Tribunal a reasonable opportunity to consider such
2 evidence before they are cross-examined on their own
3 evidence. This is intended to "level the pitch" for those
4 who have cooperated with the Tribunal by providing a
5 statement of their evidence in advance for circulation to
6 other affected parties."

7 .

8 The next letter to which I would like to refer, Sir, is the
9 letter of the 18th December, 1998 and it's a letter from
10 Gore Grimes to the Tribunal. It says:

11

12 "Dear Sirs,

13 We refer to your letter dated 4th December in connection
14 with the above.

15

16 We return herewith summons in this matter. We have been
17 advised by counsel that it will be inappropriate for this
18 firm to accept service of this document".

19 .

20 MR. MCGONIGAL: Chairman, might I respectfully ask Mr.
21 Hanratty the relevance of that to the issues he is now
22 dealing with and why he has decided to open that letter,
23 particularly bearing in mind he has specifically refused to
24 open all the other correspondence?

25 .

26 MR. HANRATTY: The relevance is, in fact, it has been
27 opened in the context of the protestations which was in the
28 first letter that I opened that Mr. Burke was cooperating
29 with the Tribunal. The Tribunal specifically asked Mr.
30 Burke to cooperate with the Tribunal by providing a
31 statement of his evidence. The solicitors for Mr. Burke
32 indignantly rejected the suggestion that Mr. Burke was not

1 cooperating with the Tribunal and it's in the context of
2 cooperation simply that I open that letter as part of this
3 sequence of correspondence.

4 .

5 MR. McGONIGAL: I understood, Mr. Chairman, the issue you
6 are dealing with this afternoon is the issue in relation to
7 cross-examination. I wasn't aware the issue being dealt
8 with was also an issue of cooperation. If you are dealing
9 with the issue of cooperation then the entire
10 correspondence should be opened by Mr. Hanratty from
11 beginning to end because within that is the evidence in
12 relation to cooperation as to whether or not there was
13 proper cooperation.

14 .

15 CHAIRMAN: I hear what you say and I will take it into
16 account when considering my --

17 .

18 MR. HANRATTY: The matter is actually referred to --

19 .

20 MR. McGONIGAL: I want to see a level playing pitch, Mr.
21 Chairman.

22

23 MR. HANRATTY: The matter is referred to in the letter of
24 the 22nd December to Gore Grimes which says:

25

26 "Dear Sirs,

27 I refer to both of your letters of the 18th inst."

28 .

29 MR. McGONIGAL: Mr. Hanratty -- the letter of the 18th
30 which he should open.

31 .

32 MR. HANRATTY: If My Friend would bear with me I certainly

1 will. Mr. O'Neill draws my attention to the letter of the
2 15th December where the matter is actually referred to from
3 Gore Grimes to the Tribunal and it's a very long letter and
4 at the very end of it, there are seven full pages of text
5 in it but at the end of the last paragraph it says,
6 "In this regard, we note your comments that fair
7 procedures apply to everybody and that your reason for
8 seeking a statement from our client is to circulate it to
9 anybody who may be affected by our client's evidence.

10

11 We would respectfully point out that our client has made no
12 allegations against anybody and the only person who could
13 be affected by his evidence is Mr. Gogarty whose basic
14 allegations are and always have been rejected by our
15 client; a fact well known to Mr. Gogarty."

16 .

17 And I will then move on to the letter referred to by Mr.
18 McGonigal. There is one letter of the 18th December to
19 Messrs. Gore Grimes circulating statements of other
20 witnesses. Then there's the letter of the 18th December
21 which I have already read out, oh yes, there's another
22 letter of the 18th December from Gore Grimes to the
23 Tribunal referring to the Tribunal's letter of the 15th and
24 it says, "We must say that we are astounded by the
25 suggestions contained in your letter which run contrary to
26 the procedures laid down in in re Haughey, 1971 IR, and
27 Healy -v- Donaghue." - Healy -v- Donaghue is another Irish
28 authority as you are aware, Sir, on the question of fair
29 procedures.

30 .

31 The letter I was about to open was the 22nd December.

32 .

1 MR. MCGONIGAL: He should read out the last line.

2 .

3 MR. HANRATTY: Sorry. "We presume that it must be a

4 mistake and if it is not please confirm the procedure the

5 Tribunal proposes to adopt." I think the response to

6 that, and I am subject to correction from Mr. McGonigal, I

7 think the response to that is the Tribunal's letter of the

8 22nd December of 1998.

9

10 "Dear sirs,

11 I refer to both of your letters of the 18th inst. Dealing

12 firstly with services of the summons --

13 .

14 MR. MCGONIGAL: Are we reopening the issue of cooperation

15 or are we dealing with the issue of cross-examination?

16 .

17 CHAIRMAN: Can I just see what the letter says first of

18 all?

19 .

20 MR. HANRATTY: "Dealing firstly with service of the

21 summons, the position is that the summons was served

22 personally on your Mr. Martin on the 5th inst. It is

23 unacceptable for you to return this summons on the 18th

24 with a statement that you have been advised by counsel to

25 do so. The Tribunal has decided that the procedure which

26 it would adopt in relation to service summons is to serve a

27 summons on the solicitor for the persons named in the

28 summons where there is a solicitor acting. You are the

29 solicitor acting for Mr. Burke. You have been in

30 correspondence with the Tribunal on his behalf and you have

31 been given representation before the Tribunal.

32

1 As far as the Tribunal is concerned, your client has been
2 validly served with a summons and if he does not answer the
3 summons in accordance with its terms, enforcement steps
4 will be immediately implemented."

5 .

6 CHAIRMAN: Wait now, we are going too far as I
7 understand. Mr. McGonigal came in here within the last ten
8 days and said his client would be available to the Tribunal
9 on whatever days be nominated. That's my recollection of
10 what Mr. McGonigal did say. He came in here after his
11 permission for his counsel not to attend daily and we
12 indicated of course certainly that would be his right if he
13 wished to do so but we would require him to attend when
14 required to do so and we will notify him. As far as I
15 understand, Mr. McGonigal said that would be arranged. Am
16 I not correct?

17 .

18 MR. MCGONIGAL: Yes, Mr. Chairman, you are absolutely
19 correct.

20 .

21 CHAIRMAN: That issue is now a dead issue.

22 .

23 MR. MCGONIGAL: It's a dead issue.

24 .

25 MR. HANRATTY: There is a passage relevant and it's been
26 drawn to my attention, Sir, in a letter of the 21st
27 December and if you just bear with me while I find it.
28 It's a letter from the Tribunal to Mr. Martin of Gore
29 Grimes and if I can just, starting, Sir, just beyond the
30 middle of the second page of the letter.

31 .

32 CHAIRMAN: Your assertion.

1 .
2 MR. HANRATTY: No, "I refer to the statement in
3 continuation sheet 5 of your letter which reads as
4 follows:" - this is in reference to their letter of the
5 15th -- "We maintain and believe we are correct in
6 maintaining that we are entitled to have any statements
7 furnished by witnesses material to the issues which Mr.
8 Gogarty is raising and that these should be made available
9 to us prior to Mr. Gogarty giving evidence and prior to our
10 cross-examining Mr. Gogarty."

11 .
12 Might I respectfully remind you when the Tribunal sought a
13 statement of your own client's evidence, we were met in
14 your letter of the 24th November, with a flat refusal and
15 an assertion that your client was under no legal obligation
16 to furnish such a statement. In fact, in your letter
17 under reply you asked me to quote legal authority for the
18 requirement on your client to furnish such a statement.
19 You appear to consider that a different standard applies to
20 your client than to others who are involved in the
21 Tribunal.

22
23 As you are aware, your client will be required to give
24 evidence of his version of events referred to in Mr.
25 Gogarty's sworn statement. Your client was so far
26 unsuccessfully requested to furnish a statement of his
27 intended evidence so that it can be circulated to the other
28 parties involved. Their request for a statement is
29 repeated."

30 .
31 And going back then to the letter which I was on, the 22nd
32 December, the last paragraph on the first page, it says,

1 "With regard to your other letter of the 18th inst, I
2 confirm that there is no error. If you have any submission
3 to make on this proposed procedure, they will be heard at
4 the appropriate time. In the meantime, might I once again
5 ask your client to cooperate with the Tribunal by
6 furnishing a statement of his evidence for circulation to
7 other affected parties."

8

9 And there's a response to that dated 4th January, 1999 and
10 I think it's a response to that previous letter of the
11 previous day:

12

13 "We acknowledge receipt of your letters of the 21st and
14 22nd December 1998 in connection with the above. Please
15 note that our Mr. Martin is presently out of this office
16 and your correspondence will be brought to his immediate
17 attention upon his return on the 7th January."

18 .

19 And then I will finish that correspondence, Sir, by first
20 of all informing you that a short statement was received
21 from Mr. Burke on the afternoon of the 11th January, 1999,
22 the day before the public sittings and again, as with all
23 the other parties, this, what I describe as a circular
24 letter of the 18th January, 1999, was sent out which again
25 it was stated:

26

27 "I am directed by the sole member to confirm that such
28 persons who have not furnished a statement of their
29 evidence on a particular issue in advance shall not be
30 entitled to cross-examine Mr. Gogarty on that issue until
31 after they have given their own oral evidence on this
32 issue."

1 .
2 Now, I don't think it's unfair to characterize the
3 statement which we received from Mr. Burke as a minimalist
4 statement in that it says itself that it confines itself
5 exclusively to the allegations which Mr. Gogarty makes and
6 indeed, it confines itself to essentially to the meeting in
7 Mr. Burke's house. It does not provide the Tribunal with
8 any information by which it could further investigate the
9 voracity or otherwise of the allegations made, both in
10 relation to who may have been at this meeting or in
11 relation to the amount of money which may have been handed
12 over at this meeting, both of which are matters which are
13 as everybody is by now aware, seriously in controversy and
14 in respect of which you, Sir, are ultimately going to have
15 to try and get to the root of.

16 .
17 So, in general, Sir, I should say in fairness to Mr. Burke
18 that of course his involvement with Mr. Gogarty as such is
19 undoubtedly confined to the one meeting and therefore one
20 would expect that his statement, even a narrative statement
21 of what was presumably not much more than half an hour if
22 it was, that wouldn't be terribly long but I think the
23 complaint about it really is that it gives no other
24 material to the Tribunal by which the Tribunal could
25 advance the investigation or try and shed some light on
26 these events from information from Mr. Burke's
27 perspective.

28 .
29 The general situation, therefore, Sir, as I see it is that
30 you are in a situation where statements have been furnished
31 by some parties which are fair and reasonable narrative
32 statements. Statements have been furnished by other

1 parties, which in some cases do in respect of some issues

2 give a narrative account but in other cases do not.

3 .

4 In another case, particularly in Mr. Bailey's case, the

5 effective does not deal with two fairly serious issues that

6 affect him; the issue of the question of £50,000 and the

7 contents of his letter of the 8th June.

8 .

9 You, Sir, have indicated at all stages that you would like

10 to conduct the proceedings in accordance with the

11 principles of natural justice and that you would like to

12 adopt procedures which would ensure fair procedures for all

13 witnesses before the Tribunal. And while it does seem to

14 please some parties to be suggesting that the Tribunal is

15 taking, in effect, a partisan approach in favour of Mr.

16 Gogarty, that is utterly untrue. There is no basis for

17 that suggestion.

18 .

19 Mr. Gogarty's evidence is being laid out in its totality.

20 Any evidence which comes into the hands of the Tribunal

21 which may assist on the question of the credit of Mr.

22 Gogarty will also be laid out in its totality in due

23 course.

24 .

25 All of the evidence of all of the witnesses as it is

26 submitted to the Tribunal will be laid out by counsel to

27 the Tribunal, but the difficulty which arises and which I

28 think is apparent from the correspondence and perhaps from

29 the tenure of the correspondence is that the Tribunal does

30 not appear to have, in my respectful submission, received

31 the level of cooperation or anything like the level of

32 cooperation that it would like to have had from the other

1 parties who clearly do have information on the matters
2 which the Tribunal is investigating, which clearly is of
3 interest to the Tribunal and which clearly would assist the
4 Tribunal in the conduct of its investigation.

5 .

6 This is not a pitch battle between various individuals.

7 Of course individuals against whom allegations are made

8 resent the fact that those allegations are made, they

9 dislike the fact that these allegations are made in public

10 but that isn't necessarily incident of a public inquiry

11 into an important matter of public interest. It is an

12 inevitable consequence of that and that has been recognised

13 by the courts.

14 .

15 That does not mean that these parties are entitled to come

16 in here and wage a pitched battle, as it were, and as Mr.

17 Allen so colourfully described yesterday, ambush Mr.

18 Gogarty.

19

20 In my respectful submission, it is not the entitlement of

21 any party who is involved with this Tribunal to ambush

22 anybody. Anybody in respect of whom statements are made

23 which have the potential to affect their interests, whether

24 their reputation or otherwise, are entitled to come in here

25 and to cross-examine any witness who makes such statements

26 by putting to that witness the alternative version of

27 events but they are not entitled to ambush that witness,

28 they are not entitled to spring traps or to surprise that

29 witness or to pull rabbits out of the hat, not only to the

30 witness but also to the Tribunal.

31 .

32 They should recognise that the Tribunal has an obligation

1 and a determination to inquire into the matters referred to
2 in the terms of reference. They should recognise that in
3 the first instance they should cooperate with the Tribunal
4 by providing to the Tribunal all the information at their
5 disposal with regard to these matters.

6 .
7 They have been told repeatedly that their rights as
8 elucidated in Re Haughey, in Kiely -v- Minister for Social
9 Welfare and in the whole line of Irish jurisprudence on the
10 question of fair proceedings at hearings particularly in
11 tribunals, that all of these requirements will be complied
12 with.

13
14 They have been told their right to cross-examine will be
15 respected. They have been told their right to call
16 evidence in rebuttal will be respected. They have been
17 told that so far as it is within the power of the Tribunal,
18 they will be given advance notice of the evidence which
19 affects them. They have, in fact, been given advance
20 notice of Mr. Gogarty's evidence. And as far as I am
21 aware, Mr. Gogarty has not given any significant evidence
22 on any matter which he has not flagged in his affidavit.

23
24 The problem which you, Sir, now have is that it is in my
25 respectful submission, clear on any sensible analysis of
26 the advanced statements which have been provided to the
27 Tribunal that we are going to be faced with a situation
28 where things are going to be sprung on Mr. Gogarty of which
29 neither he nor the Tribunal has had any prior notice.

30 .
31 Now, one option which I think is available to you, Sir, is
32 to invite the parties who have submitted statements to

1 reconsider the statements that they have submitted. In
2 the case of JMSE, they could reconsider whether they will
3 not now at this stage, having regard to the fact that Mr.
4 Gogarty's evidence-in-chief is coming to a conclusion,
5 whether they should not now submit to the Tribunal the more
6 detailed statements which they have said in correspondence
7 they had already prepared but which they truncated for
8 reasons they set out in the correspondence.

9 .

10 Perhaps you might invite Mr. Bailey and his lawyers to
11 consider whether they would not submit a supplemental
12 statement to the Tribunal dealing specifically with this
13 important issue of £50,000 and the contents of the letter
14 of the 8th June, 1989.

15 .

16 And to consider when looking at their statement, whether
17 there is anything else that they ought to have provided by
18 way of information, not only to Mr. Gogarty but also to the
19 Tribunal itself.

20 .

21 That's one option. There is another option, Sir, which I
22 would invite you to contemplate and I would invite perhaps
23 My Friends to contemplate and that is that since
24 essentially the nature of the exercise in which we are
25 engaged here is in the first instance an inquiry. The
26 necessity to enquire as comprehensively as possible into
27 the matters which exercise the Oireachtas and which are
28 referred to in the terms of reference, that you ask every
29 witness before the Tribunal to give their
30 evidence-in-chief, to allow their evidence to be led before
31 anybody is allowed to cross-examine anybody else.

32 .

1 In that way, Sir, it seems to me that you would level the
2 playing pitch for everybody. Everybody would be given an
3 opportunity in due course to cross-examine any witness that
4 they wish, everybody would be given an opportunity in due
5 course to examine their own witness and everybody would be
6 given an opportunity to suggest other witnesses which they
7 believe may be of assistance to the Tribunal or may be of
8 assistance to the facts being adduced by their own
9 clients.

10 .

11 That you will have all of the ingredients of the case in
12 re: Haughey as referred to by My Friend Mr. Cooney would be
13 met. If I could just refer to that authority or that
14 passage to which Mr. Cooney referred to yesterday. He was
15 referring, I think, to the passage from in re: Haughey,
16 from page 263, page 567 on 'Hogan and Morgan on
17 Administrative Law', it's cited in the judgment of
18 O'Dalaigh J. "Emphasizing this factor, O'Dalaigh C J
19 writing in the Supreme Court majority in a much cited
20 passage held that the committee ought to have granted Mr.
21 Haughey the following procedural safeguards: A: That he
22 should be furnished with a copy of the evidence which
23 reflected on his good name" and that's what we have been
24 talking about here today and that is where our difficulty
25 lies.

26 .

27 "B: That he should be allowed to cross-examine by counsel
28 his accuser or accusers" -- that right will be furnished
29 to everybody in the scheme I am suggesting.

30 .

31 "C: That he should be allowed give rebutting evidence." --
32 And again the very proposition I am putting that each party

1 be asked in turn to give their version of events.
2 .
3 "D: That he should be permitted to address again by counsel
4 the committee in his own defence..." -- And again, Sir,
5 that requirement would be fully complied with.
6 .
7 Can I just, again for the sake of completeness, refer you
8 to the passage in Kiely -v- the Minister for Social
9 Welfare, No. 2 which was also a leading Irish case. This
10 is reported at 1977 Irish Reports, 276, on the question of
11 fair procedures. As I indicated to you very briefly, Sir,
12 yesterday, a lot of the objections which have been made to
13 this Tribunal, a lot of the points which have been taken,
14 both in oral submissions and indeed in correspondence, are
15 premised, in my respectful submission, on the fundamental
16 misconception that a tribunal of inquiry is bound by the
17 same rules of evidence as a court of law or by the same
18 rules of procedure as a court of law.
19 .
20 The courts have repeatedly underpinned the proposition that
21 a tribunal is not so constrained, is that the essence of a
22 tribunal of inquiry is that it must conduct an inquisition
23 into facts, to find facts, to report on those facts to Dail
24 Eireann, subject only to the overall constraint of
25 conducting the inquiry in a manner which is fair to
26 everybody and the passage from Kiely -v- The Minister for
27 Social Welfare is:
28 "Tribunals exercise quasi judicial functions are
29 frequently allowed to act informally - to receive unsworn
30 evidence, to act on hearsay, to depart from the rules of
31 evidence, to ignore courtroom procedures and the like - but
32 may not act in such a way as to imperil a fair hearing or

1 fair result."

2 .

3 Now it's quite clear, Sir, and I don't think anybody would
4 seriously dispute that the courts have repeatedly stated
5 that a tribunal can devise its own procedures. The
6 Tribunals of Inquiry (Evidence) Act 1921 does not set out
7 the procedures which a tribunal of inquiry established
8 under that Act should follow. It is left to the tribunal
9 itself to devise its own procedures having regard to the
10 nature of the particular matter that the tribunal is
11 inquiring into.

12 .

13 And obviously, different tribunals enquire into different
14 subject matters and these give rise to different procedural
15 requirements. In my respectful submission, Sir, there is
16 nothing to stop the Tribunal having a flexibility about the
17 procedures which it adopts and I think in this particular
18 instance, given the particular difficulty which this
19 Tribunal has encountered from a number of parties and given
20 the obligation which nevertheless it is under to, as it
21 were, provide a level playing pitch for all parties, that
22 the Tribunal has to be flexible in the procedure which it
23 adopts so that it can fairly achieve that result and could
24 I refer you to another passage in Smith and Morgan, page
25 301 of the current edition, this is in reference to a
26 criticism of a previous English inquiry, the Scott Inquiry,
27 which was made by, I think it's now Sir Geoffery Howe after
28 the inquiry was completed and there was a response from the
29 chairman of the inquiry to that criticism and it says;
30 referring to one of the features of the inquiry:

31

32 "This feature was criticised on the ground that such

1 persons were not permitted to defend themselves against
2 damage to their reputations arising out of either evidence
3 given at the inquiry or some comment in the ensuing
4 report. In effect, defending himself against this line of
5 attack, Sir Richard Scott stated:
6 "In summary, as a general rule, fairness at an inquiry
7 certainly requires that witnesses be given adequate witness
8 notice of the matters in respect of which questions will be
9 asked. It requires that adverse and damaging allegations,
10 if they are relevant but not otherwise) should be drawn to
11 the attention of the object of the allegations so that he
12 or she can, if desired, respond to them. It requires that
13 proposed criticisms be drawn to the object of the criticism
14 so he or she can, if desired, make representations in
15 response. It requires that legal assistance be available
16 to those involved both at the stage of giving evidence and
17 at the stage of responding to criticism. Fairness does
18 not, in my opinion, require that adversarial procedure such
19 as the right to cross-examine other witnesses, the right to
20 have examination in chief or a re-examination conducted
21 orally by a party's lawyer or the right for a party to
22 participate over and above the extent mentioned, in oral
23 hearings, should always be incorporated into the procedure
24 at inquisitorial inquiries. The golden rule, in my opinion,
25 is that there should be procedural flexibility with
26 procedures to achieve fairness tailored to suit the
27 circumstances of each inquiry."
28 .
29 And then commenting on that passage, the author of the text
30 book says:
31 "Perhaps it is most important in practice as the final
32 sentence of this quotation indicates, that the

1 circumstances of each inquiry be taken into account in
2 determining what is an appropriate procedure. "

3 .

4 And I respectfully commend that proposition to you, Sir.

5 You are faced with a particular difficulty here. You are

6 under an obligation to ensure fair procedures for

7 everybody. You have received cooperation in varying

8 degrees from the parties. You have not achieved our

9 objective of getting a full detailed narrative statement

10 from everybody in the manner which you wished and yet at

11 the same time, you have to inquire into the matters in the

12 terms of reference in a manner in fairness to everybody.

13 The suggestion you call everybody who has any evidence to

14 give to the inquiry first before anybody is cross-examined

15 is a meritorious one in those particular circumstances and

16 may well deal with the particular difficulty in which you

17 find yourself. It does not in any sense deprive any of

18 the parties of all of the rights which they are undoubtedly

19 entitled to and set out in re: Haughey and other cases to

20 which reference has been made.

21 .

22 So I will respectfully invite you, Sir, to consider that as

23 one of the alternatives, that should be considered as a

24 procedure for this inquiry.

25 .

26 CHAIRMAN: Thank you. Mr. Hanratty, it's just twenty

27 minutes to five now, I propose to rise until tomorrow

28 morning at ten o'clock. Might I invite those who have

29 been listening to Mr. Hanratty to give thought to the last

30 proposition which he adumbrated. It may appeal to you. I

31 don't know. I will hear what you have to say.

32 .

1 MR. COONEY: Just on that point, Mr. Chairman, I
2 understood that this inquiry was sitting prematurely for
3 the purpose of taking the evidence of Mr. Gogarty because
4 of his age and frailty. How does that tie in with this
5 proposition, Mr. Gogarty's cross-examination would be
6 postponed until every other --

7 .

8 CHAIRMAN: You can deal with that.

9 .

10 MR. COONEY: May I finish?

11 .

12 CHAIRMAN: You can deal with that on Monday. I am now
13 rising.

14 .

15 MR. COONEY: You have invited us to consider this
16 proposition overnight and if we were to consider it
17 overnight, we would like to know how it is intended Mr.
18 Gogarty would be --

19 .

20 CHAIRMAN: I will leave that for you to solve overnight.

21 .

22 MR. COONEY: For me to solve?

23

24 CHAIRMAN: Whatever.

25 .

26 MR. HANRATTY: Could I enquire do you intend to resume
27 this tomorrow or Monday?.

28 .

29 CHAIRMAN: I intend to resume it on Monday morning, not
30 tomorrow.

31 .

32 MR. HANRATTY: Is that at ten o'clock, Sir?

1

2 CHAIRMAN: Ten o'clock.

3

4 THE HEARING THEN ADJOURNED UNTIL MONDAY, 25TH JANUARY, 1999

5 AT 10AM.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32