

1 THE TRIBUNAL RESUMED AS FOLLOWS ON MONDAY, 8TH FEBRUARY,
2 1999 AT 10:30AM.

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4 MR. HANRATTY: Sir, before Mr. Gallagher continues with
5 the evidence, can I just deal with the outstanding matters
6 from last week, perhaps starting with the Order for
7 Discovery. As you are aware, Sir, that has now been dealt
8 with in a private sitting of the Tribunal and the documents
9 will be discovered, subject to the right of Mr. Bailey's
10 lawyers to make submissions as to what can be --

11 .

12 CHAIRMAN: That order has been made, thank you.

13 .

14 MR. HANRATTY: The point is, Sir, when the order is
15 complied with and some documents will become available and
16 the question will then arise whether the Tribunal can
17 re-interview and in a letter of the 5th February, 1999 you
18 recall, Sir, the first question that was put last week to
19 the lawyers for Bailey/Bovale would be whether they would
20 be willing to consent that the facility that the transcript
21 of the interviews held last year, but sent back as a result
22 of the Supreme Court decision, could be used and in answer
23 to that, they have said no, they will not so consent and
24 sited the reason the interviews were made on foot of orders
25 that ought not to have been made and the second matter is
26 whether or not they would be prepared to indicate whether
27 what appears in the Irish Independent of last week is, in
28 fact, their client's case and again they have indicated in
29 this same letter they are not prepared to indicate it is
30 their client's case and the third matter they were asked,
31 having regard to what has emerged in the public arena,
32 would they be prepared to furnish an additional statement

1 to the Tribunal and the answer is no, they are not prepared
2 to furnish an additional statement to the Tribunal. That
3 is the up to date position, Sir.

4 .

5 CHAIRMAN: I don't know if there's anything I can do about
6 that. That's their attitude and so be it. Thank you.
7 Can we go on with the evidence.

8 .

9 MR. GALLAGHER: Mr. Gogarty please.

10 .

11 CONTINUATION OF EXAMINATION OF JAMES GOGARTY BY MR.

12 GALLAGHER:

13 .

14 1 Q. Good morning, Mr. Gogarty.

15 A. Good morning.

16 2 Q. Last week, Mr. Gogarty, we were dealing with your various,
17 with your meetings with Mr. Redmond and matters arising
18 there from. I just want to briefly take you back to
19 clarify something if you would please, you said that the
20 first meeting with Mr. Redmond was organised by Mr.
21 Bailey.

22 A. That's correct.

23 3 Q. Can you tell me where you first met Mr. Bailey to the best
24 of your recollection?

25 A. In Santry.

26 4 Q. In Santry?

27 A. Yes.

28 5 Q. In your offices in Santry?

29 A. Frank Reynolds' office.

30 6 Q. I see.

31 .

32 CHAIRMAN: Mr. Gallagher, could you be kind enough to flag

1 me as to what paragraph approximately, I have just lost it

2 there.

3 .

4 MR. GALLAGHER: Sorry, paragraph 43 of the --

5 .

6 CHAIRMAN: That's all right. Thank you.

7 .

8 7 Q. MR. GALLAGHER: And you gave evidence that Mr. Bailey

9 indicated to you that he had an interest in the Forest Road

10 lands, is that correct?

11 A. That's correct.

12 8 Q. When did he indicate that to you?

13 A. At that meeting.

14 9 Q. And how did he express that interest, what did he say to

15 you in relation to the lands?

16 A. Well my recollection was that he knew the lands, he knew

17 the lands from earlier, some earlier knowledge he had of

18 them, you know, and that he was interested in lands in

19 general around north County Dublin and --

2010 Q. Did he express a specific interest in the Forest Road

21 lands?

22 A. Oh yes.

2311 Q. And can you recall what he said about the Forest Road lands

24 at that time?

25 A. Well, it was a general discussion that first of all he

26 mentioned about that he had organised a meeting for me with

27 Mr. Redmond in relation to the planning permission running

28 out and that he was very interested in talking to him and

29 he was very interested in the lands to acquire them.

3012 Q. And do you say that he said that the meeting he had

31 arranged was in relation to the planning permission running

32 out.

1 A. That's right. That's right.

213 Q. So are you saying that Mr. Bailey knew at that time that
3 the planning permission was running out?

4 A. Oh yes. Oh yes.

514 Q. What else was said, Mr. Gogarty?

6 A. Not a whole lot else, general conversation about lands and
7 this building interest, you know, I didn't know much about
8 it at all at that time.

915 Q. So far as you were concerned at that time, how important
10 was it to arrive at some arrangement in relation to the
11 planning permission that was expiring or obtaining a new
12 permission or even extension of the existing permission?

13 A. Well Senior was very anxious that the planning permission
14 wouldn't run out until something was done to keep it
15 ongoing. I got I thought by getting permission or getting
16 the services extended for the access to the services, you
17 know, he was very anxious on that concern and he told me
18 that, you see the trouble with Conroy was at this stage,
19 you know, there was trouble between our side and Conroy's
20 side, you know, and threatening injunctions on both sides
21 and he knew that Conroy had had a relationship with Mr.
22 Redmond and that he was anxious to know what the up-to-date
23 position was because I understood with him that he knew
24 that Conroy had been advancing that proposition about how
25 he'd go about getting, validating the permission in an
26 ongoing way.

2716 Q. Now you gave evidence here earlier about the meeting in Mr.
28 Burke's house and events in, the discussions in the car on
29 the return from Mr. Burke's house. Can you tell us how
30 the next meeting with Mr. Redmond in the Clontarf Castle
31 arose?

32 A. Well it arose from a discussion coming back from Mr.

1 Burke's house, that Bailey raised the question that there
2 was one outstanding issue and it was the question of
3 Murphys either honouring some commitment, agreement with
4 Redmond on a consultancy basis or to pay him off,
5 compensate him for the loss of it.

617 Q. Are you sure that that was raised by Mr. Bailey?

7 A. Oh yes, yes.

818 Q. Had you known anything about it up to then?

9 A. Well I had known about it from the earlier '88 meetings
10 where Mr. Redmond said it himself and that is also, I
11 didn't mention before but there was another man, Mr.
12 Conroy's partner in Conroy Manahan also told me that Liam
13 Conroy had an arrangement with Redmond for a consultancy
14 when he retired.

1519 Q. Now to come back to the journey, you in the car, you said
16 Mr. Bailey raised this as an, as I understand you, the last
17 outstanding issue?

18 A. Yes, that's right, and the question that seemingly Mr.
19 Redmond had put a figure of £25,000 on it and Junior says
20 his father wouldn't pay that kind of money and he intimated
21 that Bailey, to Bailey that he'd have another chat with
22 Redmond to see could he strike some kind of a compromise.

2320 Q. And so far as you were concerned on that occasion, what
24 steps were to be taken and by whom?

25 A. Well, Bailey was to have another chat with Mr. Redmond on
26 it and he apparently did because they were arranging a
27 meeting and the figure of £15,000 was mentioned and Frank
28 Reynolds told me, Frank rang me and told me about that and
29 that that was agreed that that would be the offer and then
30 he organised that I go into the office and Junior and
31 himself, he drove us to Clontarf Castle.

3221 Q. You said that Frank Reynolds told you about this?

1 A. Yes.

222 Q. When approximately did this happen?

3 A. Shortly after the drive back in the car.

423 Q. Well that was in June of 1989.

5 A. Yes, yes.

624 Q. Approximately when, days or weeks or months?

7 A. It was near the end of June.

825 Q. Around the end of June 1989?

9 A. Yes.

1026 Q. And had you known of anything about the discussions that

11 you believe took place between Mr. Bailey and Mr. Redmond

12 in that intervening period?

13 A. No, only that the figure of £15,000 was mentioned, that

14 Redmond would accept and that Murphys would agree to.

1527 Q. And who told you this?

16 A. Frank Reynolds.

1728 Q. Where did he tell it to you?

18 A. In Santry.

1929 Q. And can you recall what circumstances this meeting took

20 place or where it took place, who organised it, who

21 attended it, what time it took place at?

22 A. Oh I couldn't say who organised it, Murphys organised with

23 Bailey but it was Frank Reynolds told me lunch time, it was

24 at lunch time when we went to the castle and Mr. Redmond

25 and Bailey were there. It was lunch time.

2630 Q. Yes. Did you have lunch there or was this a luncheon

27 appointment?

28 A. Well it wasn't a luncheon appointment, we had sandwiches.

2931 Q. And do you recall meeting Mr. Redmond there that day?

30 A. Yes, he was there that day and Mr. Bailey was there.

3132 Q. Were they together?

32 A. Together, yes.

133 Q. And can you recall what was said?

2 A. Well, I wasn't so much interested except that they were
3 talking about what Redmond said he had done and stuck his
4 neck out and put himself at risk over the years and that
5 but he was satisfied now, he was sorry that he couldn't
6 look forward to being a consultant to the group as he had
7 agreed with Mr. Conroy.

834 Q. Did he elaborate on the word putting himself on risk over
9 the years?

10 A. Well he mentioned in particular Turvey House.

1135 Q. And did he elaborate on that or did you understand what the
12 reference to Turvey House was?

13 A. Well it dawned on me then that it was in relation to what
14 occurred some years earlier where Turvey House was the
15 house on about 155 acres of land in Turvey Avenue, Donabate
16 and was owned by Turvey Estates Limited. Now my
17 recollection is it was a very fine house originally, years
18 ago, you know, and it was listed for preservation but it
19 was let go to a bit of rack and ruin because my
20 instructions from Senior was to look after it, to do the
21 minimum work on it to keep it safe from the public which
22 meant that because the public were -- because it was
23 being -- there was trespassing and the roof was being
24 stripped and led taken off and windows being damaged and
25 that kind of thing so what I did and Frank Reynolds, I'd
26 tell Frank Reynolds and Frank Reynolds would organise
27 barricading the windows and boarding them up, you know, at
28 ground floor level to a certain height which would help to
29 minimize the dangers to trespassers and young people, you
30 know, and that was going on for some years.
31 .
32 Now and then, there was a lot of what would I call it,

1 trespass and refuse dumped, you know, along the lands and
2 you would get a letter from the County Council to "clear it
3 or else" and also be letters from the County Council about
4 the danger of the premises to trespassers and to "attend to
5 it or else" and Frankie would do it and look after it and
6 get the lads in Murphys to work on it, you know, so that
7 was going on for a long time and then my recollection is
8 that the council issued a demolition order on it, there was
9 some correspondence -- I think it's on the file, I'd have
10 to see the file -- some of the letters were between me and
11 the council, you know, and I think I met an officer from
12 the council at one time to try and see what would satisfy
13 them and I also was very concerned, on our side, to ensure
14 that we were properly covered by insurance so I thought I
15 took all the steps I could to reasonably satisfy the
16 council. In the end, they issued this demolition order
17 and I did discuss it with Frankie and we organised a
18 contractor to do that but Frankie could explain to you how
19 he carried it out. It was demolished overnight and I
20 think there was a bit of furor at the time because I think
21 some of the environmental groups were very annoyed over it,
22 it being a listed building, that it was done and I think
23 there was reference in the papers at the time for it and
24 why it precipitated action to be done and then I think the
25 question arose in the media in correspondence that there
26 was a row between the Office of Public Works and the County
27 Council as to the responsibility for issuing a demolition
28 order. I think at the time that the Office of Public
29 Works claimed that it was their prerogative and that the
30 Council had no authority to issue a demolition order so
31 there was a row between them anyway. I don't know how it
32 finished but it finished up it was demolished overnight.

136 Q. What role, if any, did Mr. Redmond play in that or -- what
2 do you understand was his reference to sticking his neck
3 out?

4 A. I don't know, that's just what he said. I don't know what
5 role he played but he said he stuck his neck out or put
6 himself on risk on Turvey House. He would have to explain
7 it himself.

837 Q. You saw you met Mr. Redmond in Clontarf Castle in or about
9 the end of June 1989?

10 A. That's right.

1138 Q. Did you meet him at any time subsequent to that, that you
12 can recall?

13 A. I did -- I didn't meet him but he contacted me.

1439 Q. When did he contact you and in what circumstances?

15 A. Well, I was very sick at the time, I was in bed and I think
16 it was about the 12th August 1997 and I was upstairs in bed
17 and Anna, there was a knock at the door seemingly and Anna
18 answered it and after a while, she come up to tell me that
19 a man had called to the house and was very insistent that
20 he get to see me and she explained to him that I was seeing
21 nobody, that I wasn't well, I was in bed and I couldn't see
22 anybody and he was very persistent and at that time, I
23 think she mentioned that he said he was a particular friend
24 of Matt O'Shea's and that didn't ring a great bell with
25 Anna but he was so persistent and Anna said to him if you
26 want to leave a message, I will give it to him and he said
27 i will do it and he says I have no pen or paper and Anna
28 says I will get a pen and paper and she seemingly came in
29 and she got a little pad and she brought it out to him with
30 the pen and he wrote a note on it and something to the
31 effect that "Sorry you are sick," Jim, or "This is George,
32 sorry you are sick, Jim, I would have liked to have speak

1 to you", something to that effect.
2 .
3 She told me that and she showed me the note and I thought
4 about it for a while and it struck me that it must be
5 George Redmond and I got up to get the telephone directory
6 and I looked it up. He put a number on it as well too and
7 I looked it up and the number was George Redmond and it
8 dawned on me it was George Redmond that had called. I
9 then wrote on the back of it the date and the time, I
10 think, and I contacted my solicitor at the time, Kevin
11 O'Leary, and I think I sent him on a copy. I told him I
12 was worried over it, you know. That was the last I heard
13 of it.
1440 Q. Are you saying that this was a call out of the blue so far
15 as you were concerned?
16 A. Out of the blue, I hadn't met him for over ten years before
17 that. Nearly ten years.
1841 Q. You hadn't met him since you last met him in Clontarf
19 Castle?
20 A. Yes.
2142 Q. Had you spoken with him on the telephone?
22 A. Never.
2343 Q. Had you written to him?
24 A. No.
2544 Q. Had he written to you?
26 A. No.
2745 Q. Had he telephoned you?
28 A. No.
2946 Q. Right. I want to hand you now a sheet of paper, it's from
30 a pad and perhaps you can identify that. (Document handed
31 to witness.)
32 A. Yes, I can identify it. That's the original. It's on a

1 note, a written note that I had in the house and at the
2 bottom of the house in print is Capco 10, "The World's Most
3 Widely-Used ACE Inhibitor" but the writing is in red ink
4 and it's it just starts off, "George, 8214390" and a stroke
5 under that around it says "Jim, I would like to talk to you
6 for a few minutes. Sorry you are unwell."

747 Q. Is there anything written on the back of it?

8 A. Oh sorry. Yes, on the back of it, that's my handwriting,
9 7:30pm, Tuesday, the 12th August 1997.

1048 Q. I think this was two days after there had been an article,
11 an extensive article in the Sunday Business Post by Frank
12 Connolly, is that correct?

13 A. Something like that, I think that might be correct, yes.

1449 Q. In any event, did you telephone Mr. Redmond after you
15 received his call?

16 A. Oh God, not at all, no.

1750 Q. Have you spoken with him since?

18 A. No.

1951 Q. There are a number of things, Mr. Gogarty, I want to put to
20 you that have emerged in some of the statements that have
21 been furnished and that seem to differ from the accounts
22 that you have given in some respects and I want to give you
23 an opportunity of dealing with it. I should, Sir, say
24 before I deal with this and I am not proposing to put every
25 contradictory account or statement that's to be found in
26 the various statements that have been furnished because I
27 anticipate that this would be done by my colleagues who
28 appear for various parties.

29 .

30 So insofar as it is not done, my colleague, Mr. Hanratty or
31 Mr. O'Neill or someone on the team will, in effect, ask
32 questions at the end of the examination of Mr. Gogarty at

1 the end of cross-examination of Mr. Gogarty and hopefully
2 in that way, we will ensure that every matter is covered so
3 the fact that I am now selecting a number of matters to put
4 to Mr. Gogarty does not mean that I am, in selecting in
5 that sense I am putting to him matters that have been
6 included in statements by persons who have not to date been
7 granted representation and it is in that context and for
8 that reason that I put it to him.

9 .

10 MR. COONEY: In fairness, Mr. Gallagher embarks on this
11 endeavour -- perhaps you might hear me on this. It seems
12 Mr. Gallagher is now going to put matters to Mr. Gogarty
13 which are contradictory to the accounts of the events Mr.
14 Gogarty has already given. That is in essence a
15 cross-examination, Mr. Chairman. I understand and it
16 seems clear that Mr. Gallagher has been engaged in the last
17 few weeks, has been bringing Mr. Gogarty on his direct
18 evidence. He now proposes to embark on what is clearly
19 cross-examination and also Mr. Gallagher says it appears it
20 will be very limited cross-examination, it won't be
21 cross-examination in the full sense of the word.

22 .

23 It seems to me, Mr. Chairman, all Mr. Gallagher will be
24 doing is giving Mr. Gogarty an uncontested opportunity to
25 deny matters which conflict or are inconsistent with the
26 evidence already given. In my respectful submission,
27 these are matters which reflect on Mr. Gogarty's
28 credibility and it should be for the parties who are
29 directly implicated in these particular matters to
30 challenge him on these, otherwise the exercise upon which
31 Mr. Gallagher is now going to embark is quite futile and
32 useless and it seems obvious, Mr. Chairman, he should now

1 change from the mode of direct examination to
2 cross-examination which has no purpose other than perhaps
3 to establish Mr. Gogarty's credibility.

4 .

5 In my respectful submission, Mr. Chairman, that's not
6 proper procedure and not necessarily a fair procedure
7 either. I don't know precisely what inconsistencies or
8 conflicts he intends to deal but it seems to me that if he
9 intends to put some conflict to Mr. Gogarty, he should put
10 them all and that would be an impracticality, it should be
11 for the parties who are affected by Mr. Gogarty's
12 allegations and who can defend them at least in part by
13 pointing to inconsistencies with what he said in the
14 witness-box and other occasions.

15 .

16 I think what Mr. Gallagher is about to do is fraught with
17 difficulty and it would be better to leave it to the other
18 parties, with respect.

19 .

20 MR. GALLAGHER: Sir, I am not trying to establish
21 anybody's credibility. My job here and the job for my
22 colleagues is to present such evidence as we can obtain to
23 you so that you can make a decision, so that you can find
24 facts as far as it is possible to do so. We have not
25 taken sides. We are not on the one side or the other side,
26 we are strictly in the middle and that's where we want to
27 be and that's where we intend to stay so far as we possibly
28 can.

29 .

30 It is a question of putting before you matters that are
31 material, that are relevant and that should be put to
32 witnesses. Every other witness will be treated in the

1 same way. It's not as if this witness is our witness and
2 we are putting him on as a plaintiff so that he can be
3 cross-examined by the defendants. We are not against him,
4 we are not for him, we are here for the establishment of
5 the truth insofar as it can be established and in that
6 regard we would welcome all the help we can get and we are
7 upset we are not always getting the help we would like to
8 get. We are endeavouring to establish the truth. We are
9 not for anybody, we are not against anybody and I submit it
10 is appropriate these matters should be put to Mr. Gogarty
11 because it is our job to try to establish the truth for you
12 so far as we can do so.

13 .

14 MR. COONEY: Mr. Chairman, I understand -- I will be very
15 brief -- that you have ruled and we have no, I have no
16 objection that the order of examination of Mr. Gogarty and
17 all other witnesses will be that the witness's direct
18 evidence will be led by the Tribunal and then parties who
19 are affected by that evidence will have a right to
20 cross-examine the particular witness and then the witness's
21 own counsel can then cross-examine him in this instance.

22 .

23 CHAIRMAN: Examine him in this case, which would be either
24 Mr. Callanan or Mr. O' Moore.

25 .

26 MR. COONEY: And finally counsel for the Tribunal would
27 return to that witness for the final examination and that
28 final examination could take the form of cross-examination
29 if the Tribunal felt important to do it so I really think
30 in view of that order of examination which has already been
31 set out is that any attempt of cross-examination of Mr.
32 Gogarty at this stage is unnecessary and particularly if

1 it's going to be a very selective one, as Mr. Gallagher has
2 already indicated, it should be and I think that order of
3 examination, Mr. Chairman, would achieve the objective in
4 establishing the truth which Mr. Gallagher just confirmed
5 and do so without causing any difficulty.

6 .

7 MR. GALLAGHER: I don't propose to cross-examine, I
8 propose to put to the witness a version that is different
9 from the version he has given and to give an explanation
10 for it, if he is capable of doing it and if it's not so, so
11 be it.

12 .

13 MR. COONEY: Well that's the essence of
14 cross-examination.

15 .

16 CHAIRMAN: That's an interesting discussion as to what it
17 is but the question is what's the most appropriate way to
18 proceed. Mr. Gallagher is undoubtedly correct that what
19 we are here to do is to establish all the known evidence
20 and that evidence may in certain instances be in
21 conflict. We are not here as adversarial plaintiff or
22 prosecution presenting a case, we are trying to establish
23 all the known information about the circumstances of the
24 circumstances. And as I understand what has been carried
25 by previous tribunals, including the Salmon Tribunal in
26 England, was achieve that objective and achieve in the
27 manner which has been described.

28 .

29 What Mr. Gallagher, as I understand, wants to do is he
30 wants to, I suppose, flag that there were, that there are
31 other portions of the facts as given by Mr. Gogarty,
32 without being pejorative of Mr. Gogarty or otherwise,

1 flagging their existence. Undoubtedly this can be
2 achieved in the sense of producing all the evidence and in
3 the manner in which it has been indicated. Mr. Gallagher,
4 I think the simpler way of dealing with this is that we
5 conclude the examination in the broadest sense of the word
6 of Mr. Gogarty at this moment in time. Cross-examination,
7 correction, examination by parties presenting under facets
8 or approaches to the evidence will no doubt take place and
9 I don't purport to know what they are, it's one of the
10 reasons why it would be desirable to have the narrative
11 statement but we don't have it and it's too late now.
12 It's just a matter that no doubt the individual witness's
13 own counsel will look after a large part of this matter and
14 anything that remains over and unsaid or which is cast in a
15 light which you believe not to be fair or not to be
16 accurate can be dealt with by the counsel who winds up on
17 behalf of the Tribunal, otherwise we are going to have the
18 matter dealt with on two occasions; your approach -- and I
19 don't mean your version -- your approach and the approach
20 of some other counsel here for other person. I think the
21 fairer thing to do is let the cross-examination proceed.
22 If you and your colleagues as independent counsel see it
23 unfairly, note it and correct it.
24 .
25 At the end of the day, there's no jury here, it's all going
26 to be considered as a package of evidence and sorted out by
27 me. I am not doing it on a daily basis. There's no jury
28 as such. I am going to have to go to go back and read
29 these pages of transcript one after the other and I think
30 it would be perfectly adequate to do as I suggest. If
31 there's any other aspect you want to bring --
32 .

1 MR. GALLAGHER: I would like to think and reflect on this
2 for a moment. The duty of counsel to the Tribunal is to
3 bring to the attention of the Tribunal all material
4 matters. It is not to call witnesses to have them recite
5 parrot-like such statements if any as they chose to give to
6 the Tribunal or to accept such statements as to give to the
7 Tribunal without question. Our function, our role is to
8 present such evidence and to ask questions in relation to
9 it, ask critical searching questions if it is thought
10 appropriate to do so in a particular case.

11 .

12 In relation to this witness, Mr. Cooney does not want me to
13 embark upon cross-examination and he is perfectly entitled
14 to that view but it is not, Sir, to be taken that it is the
15 intention of counsel for the Tribunal to call witnesses to
16 recite parrot-like what they have chosen to give or not
17 give to this Tribunal. I will not participate in that
18 kind of an operation because I don't think it is
19 appropriate and it not conducive to obtaining and getting
20 at the truth of the matter.

21 .

22 People cannot simply be put up and allowed to give such
23 answers as they wish in an unchallenged way. It may be,
24 for example, that at a later stage if a witness gives a
25 version or indeed any witness gives a version, gives an
26 answer to a question that the Tribunal might have knowledge
27 of other persons who may be questioning or cross-examining
28 such witness to, they may not have the conflicting evidence
29 or conflicting version to be able to put it to such a
30 witness so it's important, in order for the truth to
31 emerge, that counsel to the Tribunal should be entitled to
32 ask questions, searching questions from witnesses which may

1 reflect or conflict with what they have said and which, to
2 use Mr. Cooney's expression, may amount to
3 cross-examination of the witness.

4 .

5 It has been said, I think, by Lord Scott that in his view
6 to the way to conduct a tribunal of inquiry is to ensure
7 that once the counsel to the Tribunal had finished
8 questioning, that there were no further questions to be
9 asked.

10 .

11 Now, I want to flag it is certainly my intention and
12 certainly my colleague's intention, where conflicts arise
13 where questions have to be answered, it is not our
14 intention to have the matter pass without comment or
15 questioning and to be dealt with solely on
16 cross-examination because to do so, in my respectful
17 submission, would be an abdication of our responsibility to
18 you, Sir, to the Oireachtas and to the people represented
19 by the Oireachtas.

20 .

21 If you rule that I should not ask Mr. Gogarty questions in
22 this matter, so be it but not to be taken, in my respectful
23 submission, as a precedent and I wanted to flag that it
24 will not be treated as a precedent.

25 .

26 MR. CALLANAN: Mr. Chairman, if I could be briefly heard in
27 relation to this.

28 .

29 CHAIRMAN: I beg your pardon --

30 .

31 MR. CALLANAN: In relation to Mr. Cooney's objections it
32 seems to me there's absolutely nothing improper, untoward

1 or unusual about the course of action which Mr. Gallagher
2 proposes taking. Day in day out in the courts, it is
3 usual and proper for somebody conducting
4 examination-in-chief, I accept there is no complete
5 comparison with adversarial interpartes procedure but not
6 merely take a particular witness through a narrative
7 account but to put to that witness major areas of factual
8 conflict which can be readily identified so as to indicate
9 disagreements which exist in that regard. And again, while
10 the analogy is not complete or perfect, I have never ever
11 heard objection taken in civil proceedings to such a course
12 of action being followed. It would be remarkable in
13 ordinary civil proceedings to have counsel objecting to the
14 putting of disparities, possible disparities to a witness
15 on the grounds that if somebody preempted a
16 cross-examination, and I have never before heard such a
17 point taken, it doesn't seem to me to have any merit and in
18 that respect, at least, I say that the ordinary standard
19 observed in civil proceedings would be equally applicable
20 in the Tribunal.
21 .
22 I might also say that at the outset, my understanding of
23 Mr. Cooney's position was that he indeed believed it was
24 incumbent upon Mr. Gallagher to put virtually everything to
25 the witness, that it was incumbent upon him not simply to
26 accept Mr. Gogarty's testimony on a narrow range of issues
27 but to put a variety of matters to him, some of which might
28 seem to be adverse to Mr. Gogarty. That was Mr. Cooney's
29 requirement at the outset and he now appears to be resiling
30 from that when that principle does not, as he sees it,
31 serve the immediate interests of his client and in those
32 circumstances, in my submission, there is absolutely

1 nothing wrong with what Mr. Gallagher is proceeding and he
2 should be permitted to proceed as indicated. Thank you.

3 .

4 MR. GALLAGHER: I should say, before Mr. Cooney replies, I
5 should have asked you to reconsider what you said about not
6 putting to this witness conflicting versions and matters
7 that require clarification and will have to be clarified
8 one way or the other.

9 .

10 CHAIRMAN: That's not what I said. I said they could be
11 clarified by the counsel for the Tribunal at the end of
12 their, any clarifications you required. Under no
13 circumstances am I to be understood by anything I have said
14 this morning being any way trying to exclude any factual
15 information, whether it be in conflict with any witness. I
16 am not just discussing Mr. Gogarty, I am discussing all
17 witnesses. Once a witness gives his evidence, if there is
18 evidence in conflict, whether it's put in cross-examination
19 or not, it is the duty of counsel for the Tribunal,
20 provided they are aware of the evidence as a conflict, to
21 certainly address the witness in the box, present him with
22 the evidence in conflict at some point in time but what I
23 want to avoid is the double effort of Mr. Gallagher, or
24 counsel for the Tribunal, saying the following are matters
25 in dispute X, Y and Z, what's your answer. Well, just as
26 much as Mr. Cooney objects to somebody flagging matters
27 that or giving advance notice of the basis on which he is
28 going to cross-examine, that's giving advance notice of
29 what the possible answer is, I accept there's a degree of
30 futility in it. At the same time, I want to preserve the
31 independence of the Tribunal as it gets out all the
32 facts. I select at the end of day what I believe to be

1 the truth. That's a different matter. The exposure of
2 everything, understanding what happened, be it in conflict
3 or otherwise, is fundamental to the Tribunal.

4 .

5 MR. GALLAGHER: Sir, can I point out to you if the matter
6 is going to be dealt with in that way and I am not, whoever
7 happens to be leading the witness and asking questions from
8 a witness, if that isn't dealt with at the outset at that
9 stage and it is left as it were to the sweeper-up on behalf
10 of the Tribunal's legal team to elicit matters that have
11 not been elicited already, you will then find yourself in
12 the situation where other counsel will quite legitimately
13 say that's a matter that hasn't been raised already and I
14 want an opportunity to cross-examine it and you have the
15 possibility, the terrible spectre of re-examination and
16 re-examination on re-examination and that is why I say it
17 it's important that all the material evidence should be
18 dealt with at the outset from all witnesses, otherwise the
19 procedure is likely to be less effective than would
20 otherwise be the case.

21 .

22 The fact is that not all evidence will necessarily emerge
23 if questions, probing questions are not allowed to be asked
24 and I think that before you rule on this matter, perhaps
25 you might wish to reflect on it because it is an important
26 issue, it is something that is going to have implications
27 for the entire running of the Tribunal and it is not a
28 decision that should be taken lightly, in my respectful
29 submission.

30 .

31 Can I also at this stage flag to Mr. Cooney that I am
32 moving on to a matter that I know he will wish to make some

1 submissions on in relation to the Moneypoint issue.

2 .

3 MR. COONEY: Mr. Chairman, this is quite an extraordinary

4 performance.

5 .

6 CHAIRMAN: It's not a question of extraordinary. As a

7 matter of fact, there is no question of commentary and we

8 must get away from this commentary between counsel whether

9 they are good or bad.

10 .

11 MR. COONEY: Some adjective has to be described to counsel

12 for the Tribunal who has already heard you make a ruling,

13 Mr. Chairman. He has heard you rule.

14 .

15 CHAIRMAN: No, I have not made a ruling, I have simply

16 addressed the possibilities. I am listening to you to

17 hear you in reply before I determine --

18 .

19 MR. COONEY: Perhaps I am mistaken but I thought you

20 already ruled on this, Chairman, and despite the fact --

21 .

22 CHAIRMAN: You mean this morning?

23 .

24 MR. COONEY: You made a ruling --

25 .

26 CHAIRMAN: I discussed the purpose of the exercise and how

27 we should carry it out.

28 .

29 MR. COONEY: Very well. Perhaps I am mistaken.

30 .

31 CHAIRMAN: The answer is I haven't.

32 .

1 MR. COONEY: I misunderstood and I thought Mr. Gallagher
2 before -- that you had made a ruling, Mr. Chairman.

3 .

4 CHAIRMAN: I have canvassed.

5 .

6 MR. COONEY: Well I misunderstood what you said, Mr.
7 Chairman, but it seems to me, Mr. Chairman, to be
8 rather obvious that Mr. Callanan supports Mr. Gallagher in
9 Mr. Gallagher's attempt to put what must be selected parts
10 of contradictory evidence to Mr. Gogarty. Why would Mr.
11 Callanan do that lest he believed the exercise was going to
12 assist his client? The other matter is you do know and I
13 am not in any way criticising, is that there had been
14 presumably a considerable number of consultations with the
15 Tribunal team. Again, I don't criticize this, this is what
16 I expect but it seems to me, Mr. Chairman, what Mr.
17 Gallagher was proposing to do is somewhat unfair in he has
18 had the opportunity of consulting with Mr. Gogarty and
19 during these consultations has perhaps discussed these
20 apparent contradiction between what Mr. Gogarty said in the
21 witness box and what appears in documentation.

22 .

23 If that is the case, Mr. Chairman, it's double unfair as
24 Mr. Callanan perhaps unintentionally said effectively what
25 Mr. Gallagher is trying to do is preempt a
26 cross-examination. I don't think there's a necessity to
27 preempt cross-examination --

28 .

29 CHAIRMAN: He could be preempting cross-examination by not
30 going into the matters. It's a matter for you or any of
31 the other persons to discuss.

32 .

1 MR. COONEY: It's strange Mr. Callanan should use the
2 phrase preempt --

3 .

4 CHAIRMAN: Mr. Callanan made his submissions and I will
5 consider those.

6 .

7 MR. COONEY: I am merely attempting to, effectively Mr.
8 Mr. Chairman, what I think Mr. Gallagher may attempt to do,
9 perhaps unintentionally, is in some way undermine the
10 cross-examination.

11 .

12 CHAIRMAN: That is not the intention of anybody on the
13 part of the Tribunal. The Tribunal is going to listen to
14 everybody here and determine the facts.

15 .

16 MR. COONEY: Of course.

17 .

18 CHAIRMAN: We are not going to in any way be pejorative of
19 your conduct of cross-examination. It's the matter you
20 approach to the case and so be it. I am going to rise and
21 I will think about the matter for a moment but I am going
22 to talk to Mr. Gallagher and see if we could reach a list
23 of matters which will be dealt with, flagged to you so that
24 we know where we are going. We are not going in a kind of
25 hunting expedition where nobody knows where the quarry
26 lies.

27 .

28 MR. COONEY: If Mr. Gallagher would tell us --

29 .

30 CHAIRMAN: We will find that out.

31 .

32 CHAIRMAN: Then you will be aware as far as we are

1 concerned we have outlined at least the entire of our store
2 of information, if I may use that phrase.

3 .

4 MR. COONEY: Most of the information we have is
5 information supplied by the Tribunal through documents
6 eventually discovered.

7 .

8 CHAIRMAN: We don't have the benefit of the storage of
9 information you may have.

10 .

11 MR. COONEY: Mr. Chairman, I respectfully ask you to not
12 make that sort of statement.

13 .

14 CHAIRMAN: We asked you for a narrative statement.

15 .

16 MR. COONEY: May I point out we have supplied you with
17 thousands of documents, including documents which are
18 critical to the matters you have to inquire into and
19 secondly, Mr. Chairman, this is about the third or fourth
20 time at least during the course of this Tribunal which you
21 have quietly criticised statements furnished by my
22 clients. I have asked you on innumerable times to
23 identify what way they are inadequate. I have to say with
24 respect I received no response but I don't want to be
25 diverted into that particular argument.

26 .

27 Mr. Chairman, could I ask you when you rule this matter
28 what's the necessity for counsel for the Tribunal who have
29 been leading this witness through direct evidence for four
30 weeks to attempt in part a cross-examination when he will
31 be faced with cross-examination by parties who are
32 interested and that cross-examination will be followed by a

1 kindly cross-examination from his own counsel and by a
2 final cross-examination by counsel for the Tribunal. I
3 really don't see there's much point in it, Mr. Chairman.

4 .

5 CHAIRMAN: Thank you. I am going to rise for ten minutes
6 and consider this matter.

7

8 THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED

9 AS FOLLOWS:

10 .

11 CHAIRMAN: I have given thought to the submissions by all
12 counsel concerned.

13 .

14 The nature of a Tribunal is this; it is an inquiry as to
15 fact. It has no prosecutor, no plaintiff, it simply tries
16 to elicit all the facts and all the facts in the -- all the
17 facts or tamed facts or versions of the facts which are in
18 the possession of the Tribunal should, produced in public
19 before anybody so that all parties know the state of
20 information of the Tribunal in relation to what they
21 believe to be relevant facts.

22 .

23 Accordingly, it appears to me, that the correct process to
24 proceed is to allow counsel for the Tribunal to put to a
25 particular witness any contradictory version which the
26 Tribunal is aware of, just simply that this man, XY has
27 said something to the contrary to what you have, have you
28 any comment? It's not a matter of cross-examination and
29 cross-examination should not be proceeded with. It's
30 simply advising him that within the knowledge of the
31 Tribunal, a contradictory version or a version contrary to
32 the remainder of the evidence which he has given is

1 available to him.
2 .
3 Cross-examination or examination of the witness by persons
4 or counsel other than the Tribunal counsel is essentially
5 to enable them to point out or highlight items in the
6 Tribunal's witness's evidence which is adverse to the man
7 who is seeking to cross-examine and to endeavour to show
8 that the version given by the Tribunal's witness is not
9 correct or is at least not the full story.
10 .
11 The whole right of cross-examination as we call it here in
12 this country, by other participants is in relation to the
13 adverse effect the Tribunal's witness has upon their
14 character. That is the reason why he has a right of
15 cross-examination. It's not an adversarial system.
16 .
17 Second reason I have decided to follow this course of
18 action is this; one can see the situation arising that the
19 principal examination has taken place, cross-examination is
20 taking place by both the adversely affected person and the
21 witness's own counsel. You then have a situation where an
22 item of evidence is left unstated, something that the
23 Tribunal knows, and it's introduced by the last counsel who
24 is the Tribunal counsel and the next thing that I am going
25 to be faced with is Mr. Cooney or whoever happens to be the
26 adversely affected person's counsel, saying, I never knew
27 about that, that was never flagged to me. I want to
28 cross-examine again.
29 .
30 That's just not an acceptable form of procedure.
31 .
32 Now, I am going to require Mr. Gallagher to confine himself

1 simply to stating the essence of the adverse statement,
2 make a simple inquiry to a witness in the witness-box, it
3 happens to be Mr. Gogarty on this occasion, have you any
4 comment to make about this statement? Whether it's going
5 to be pursued further in cross-examination is an entirely
6 different matter and that's a matter for each individual
7 counsel insofar as the evidence can be said to adversely
8 affect his or her client.

9 .

10 Accordingly, that's how I propose to proceed.

11 .

12 MR. COONEY: You did say before the break that
13 Mr. Gallagher should indicate the various topics which he
14 intended to raise. Perhaps could he that and also,
15 Mr. Chairman, I'd like to be informed if any of these
16 topics have already been discussed by any member of the
17 Tribunal with Mr. Gogarty or any member of his legal team
18 at any time since the establishment of this Tribunal.

19 .

20 CHAIRMAN: First of all, I want to deal with that. I want
21 to make it quite clear that under no circumstances is the
22 investigative process and the steps in the investigative
23 process which was conducted by this Tribunal going to be
24 put out in public and that's the end of that. That was
25 carried out in confidence. The essence of what was
26 distilled has been published to you, circulated in the form
27 of statements. That's an end to that. That's my
28 ruling.

29 .

30 MR. COONEY: Well, Mr. Chairman, I am not asking for that,
31 Mr. Chairman. What I am asking you specifically, and I'd
32 like this on the record, Mr. Chairman, is first of all

1 Mr. Gallagher to indicate to me as I think you said he

2 should --

3 .

4 CHAIRMAN: He will try to.

5 .

6 MR. COONEY: The different topics which he now intends to

7 raise with Mr. Gogarty and then I'd like to know,

8 Mr. Chairman, just whether these topics have already been

9 discussed with Mr. Gogarty or with members of his legal

10 team. I think, Mr. Chairman, in fairness, I am entitled

11 to --

12 .

13 CHAIRMAN: The answer to that is no. That's part and

14 parcel of the investigative process. What happened in the

15 course of our investigations is published to you in the

16 factual information which we gleaned and that's it.

17 .

18 MR. COONEY: We haven't been told, Mr. Chairman, whether

19 or not these specific topics were discussed between the

20 witness --

21 .

22 CHAIRMAN: It's not a question of specific topics. It's

23 a question of what evidential base we have to come before

24 the Tribunal, or come before the public. That has been

25 actually flagged to you. You got a full statement, very

26 full in the case of --

27 .

28 MR. COONEY: Sir, with respect, Mr. Chairman, that's not

29 what I am asking. What I am now discussing, Mr. Chairman,

30 is what Mr. Gallagher is proposing to do and that is raise

31 specific topics with Mr. Gogarty for the purpose of asking

32 Mr. Gogarty to explain an inconsistency between given

1 accounts which he has given --

2 .

3 CHAIRMAN: I think you and I are at cross purposes.

4 .

5 CHAIRMAN: What I understand Mr. Gallagher is going to do

6 is going to illustrate from statements made on another

7 occasion by a witness, it happens to be Mr. Gogarty in this

8 instance, which is at variance with the actual evidence he

9 has given to date. That's all I understand. Am I right

10 in that, Mr. Gallagher?

11 .

12 MR. GALLAGHER: I am going to put certain things to Mr.

13 Gogarty that have arisen in other statements and in other

14 material. I am --

15 .

16 MR. COONEY: But statements by whom, Mr. Chairman?

17 .

18 MR. GALLAGHER: I will ask the questions.

19 .

20 MR. COONEY: Mr. Chairman, statements by whom? Are they

21 other statements by Mr. Gogarty or are they statements by

22 people and on what occasions?

23 .

24 CHAIRMAN: I can't be absolutely occlusive on this --

25 .

26 MR. COONEY: What Mr. Gallagher said before the break was

27 that these were statements by people who are not

28 represented. Who are these people, Mr. Chairman?

29 .

30 CHAIRMAN: They were statements that were made to another

31 person which we are aware of about a topic he has given

32 evidence on.

1 .

2 MR. COONEY: Do you know who they are, Mr. Chairman, may I
3 ask with respect?

4 .

5 CHAIRMAN: I don't purport to know them absolutely all.

6 .

7 MR. COONEY: Surely, Chairman. We are reaching a stage
8 of --

9 .

10 CHAIRMAN: Look, Mr. Cooney --

11 .

12 MR. COONEY: Mr. Chairman, you can not shut me down, with
13 respect, Mr. Chairman. This is a matter of great
14 importance to me and as this goes on, it seems to me to be
15 more and more relevant to the question of fair
16 procedures. Now, it's passing strange, Mr. Chairman, that
17 counsel for the Tribunal know and you know who these people
18 are and what statements they have made. We haven't been
19 given these statements. We know nothing about them and it
20 seems to me very odd, Mr. Chairman, at the very least, that
21 matters which other people have given statements about to
22 this Tribunal will now be put to this witness and we have
23 no notice of this whatsoever and to be done in a form of
24 cross-examination, Mr. Chairman. Now, if there are such
25 people who have made such statements, Mr. Chairman, who
26 have not been furnished to us, surely we are entitled to
27 know the identity of these people and what they have said
28 which is inconsistent with what Mr. Gogarty has sworn in
29 the witness-box. That's the first point.

30 .

31 The second point which becomes more relevant in view of
32 this information, Mr. Chairman, is that we should know

1 whether or not these matters have already been canvassed
2 specifically -- these specific matters, not generally, but
3 these specific matters have already been canvassed with Mr.
4 Gogarty in consultation, either with him directly or with
5 any single member of his legal team, Mr. Chairman. I
6 think we are entitled to know that in fairness. Why
7 shouldn't we know this, Mr. Chairman?

8 .

9 CHAIRMAN: Mr. Gallagher, as I --

10 .

11 MR. GALLAGHER: Can I just respond?

12 .

13 CHAIRMAN: First of all, I want to know something. As I
14 understand it, the matters which you are going to put to
15 Mr. Gogarty are in fact part and parcel of the, I will
16 refer to, in one or more of the statements which have been
17 circulated to everybody; is that or is that not correct?

18 .

19 MR. GALLAGHER: That is correct, yes.

20 .

21 CHAIRMAN: Yes, that's what I understood it to be.

22 .

23 Now, secondly, insofar as they are disclosed in the
24 statements, as I understand it, I stand subject to
25 correction, these came from the third party source which we
26 know from, as appears from the statement.

27 .

28 MR. GALLAGHER: Yes, sir.

29 .

30 CHAIRMAN: It's not a question of consultation with Mr.
31 Gogarty. So far as I know, there have been no
32 consultations about any of the evidence that's presently

1 before the Tribunal in that sense. The affidavit was
2 constructed or drafted by Mr. Gogarty's counsel and
3 solicitor. We had no participation in that at all.

4 .

5 MR. COONEY: Who are these people? Are those statements
6 are now going to be put to Mr. Gogarty?

7 .

8 MR. GALLAGHER: Mr. Cooney is determined, it seems to me,
9 to dictate how this Tribunal will operate. He is
10 determined to dictate what questions will be put to what
11 witnesses. He is determined to elicit what information is
12 available to the Tribunal and in what circumstances this
13 information came to the Tribunal's knowledge.

14 .

15 So far as I am concerned, I will conduct the questioning of
16 witnesses as I and my colleagues think is appropriate
17 subject, of course, to your direction. We are not going
18 to be dictated to and we are not going to be led by what
19 Mr. Cooney perceives to be the appropriate way of doing
20 things.

21 .

22 Now, what I am purporting to do is to ensure insofar as
23 there can be, there will be fair procedures. I reject, as
24 I have constantly rejected, any suggestion that there would
25 not be fair procedures. His client will be treated just
26 in the same way as Mr. Gogarty and any other witness will
27 be treated.

28 .

29 So far as I am concerned, I wanted to put to Mr. Gogarty, I
30 think it's appropriate to do so, certain matters that are
31 contained in statements that have been circulated to Mr.
32 Cooney and to every other interested party which appear to

1 be different to the version given by Mr. Gogarty in one or
2 other respects. I think it's fair to Mr. Cooney's clients
3 that that should be done. It's fair to Mr. Gogarty that
4 that should be done and it is fair to you, Sir, that it
5 should be done and it is therefore for that reason that I
6 propose to do it.

7 .

8 The other treatment of the exercise here is to try to
9 elicit the truth. Not to suppress the truth. Not to use
10 rules of cross-examination or of evidence which are
11 appropriate in courts to suppress or to avoid establishing
12 the truth. Your job and you have charged us with
13 assisting you in that is to seek to establish the truth and
14 establish facts. That is what we are trying to do and I
15 have sought or I am seeking to put to Mr. Gogarty some
16 questions contained in some witness's statements which
17 appear on the face of it, to represent a somewhat different
18 version or perhaps an entirely different version to the
19 version that Mr. Gogarty has given in respect of a central
20 aspect of this. I do not intend, as I would be entitled
21 to, I do not intend to go through every statement to put
22 every conflicting or contrary version to this witness.
23 But I reserve that right to, in future if it should become
24 necessary and appropriate to do so.

25 .

26 In this case, I know that Mr. Cooney is anxious to get on
27 with cross-examination and on the basis that they will be
28 putting all material matters to Mr. Gogarty, I don't intend
29 to put all the Garda statements, and every other matter to
30 him at this stage. But I do wish to ask one or two
31 questions at this stage and I think it's appropriate to do
32 so.

1 .

2 I should say that there is one other matter that I will
3 flag and I will leave it perhaps because I know Mr. Cooney
4 wishes to make submissions on it and that's in relation to
5 the Moneypoint issue.

6 .

7 MR. COONEY: Mr. Chairman, I am asking for specific
8 information and what I get is a general speech from
9 Mr. Gallagher.

10 .

11 CHAIRMAN: Mr. Cooney, at this point in time the situation
12 is very simple. You have been sent, I think as far as I
13 know, 24 statements, witness statements. That's as far as
14 I know. I am not absolutely certain, 24 or 25. My book
15 goes up to 15. As I understand what Mr. Gallagher is
16 going to do is that from those statements, there are
17 certain incidences where the witness involved or the
18 declarant if I may call him such, is at variance in his
19 version of what Mr. Gogarty said about a particular
20 topic. Now, that's all that's involved. You have
21 them -- you have exactly the same book as I have. You
22 have exactly the same book as Mr. Gallagher has and what he
23 is going to do is address those topics.

24 .

25 Now, you have addressed me on the principle of fairness.
26 You say that you have no notice. First of all, I decline
27 to accept that but I do appreciate that there is 24
28 statements and that within 24 statements there may be odd
29 passages which you don't recognise. You have read your
30 brief and all that, I have no doubt but they don't come
31 readily to mind. So what I suggest is a very simple
32 matter is that we simply flag to you the particular

1 incidences which it's going to be done. There can't be
2 anything unfair about that. You are then in absolute
3 information what is going to be said. I am quite prepared
4 to do that for you, even though it seems to be literally an
5 excess of zeal to comfort you and your client, and your
6 colleagues. But that's undoubtedly clear.

7 .

8 The first thing is I want to ensure that the Tribunal is
9 the person that conveys the quality of information and it's
10 a matter for you to make what you will of it. Now that's
11 that. I am going to do that for you. It may involve a
12 journey through the day from what I know --

13 .

14 MR. COONEY: Mr. Chairman, I don't want to appear to be
15 the one to cause further delay in proceedings.

16 .

17 CHAIRMAN: That's all that's going to be done. There is
18 nothing unfair about it.

19 .

20 MR. COONEY: Mr. Chairman, may I say this and I say this
21 with respect, neither you nor Mr. Gallagher appear to
22 engage with the actual specific points which I have made
23 which are these, Mr. Chairman, and I would like a response
24 from Mr. Gallagher and you which doesn't go into a high
25 principled statement about the duty of the Tribunal. Duty
26 and fairness, Mr. Chairman, at the end of day, comes down
27 to specific acts carried out by the Tribunal.

28 .

29 Now, we are coming to the end of Mr. Gogarty's direct
30 evidence. You have already made a ruling about the order
31 of cross-examination and who can cross-examine with certain
32 limitations.

1 .

2 It now appears, Mr. Chairman, that Mr. Gallagher is going
3 to preempt the cross-examination by putting to Mr. Gogarty
4 certain inconsistencies which apparently arise between what
5 Mr. Gogarty has already sworn to and what is contained in
6 the written statements of witnesses which have been
7 circulated to us. Now, he is going to and I don't like
8 this word, but I will use it, he is going to cherry pick
9 among these inconsistencies. Now, why should counsel who
10 has led this witness through his direct evidence for four
11 weeks cherry pick pieces of information from the statements
12 of these witnesses for the purpose of putting it to this
13 witness? It can only be for the purpose of allowing this
14 witness to deny these matters or to explain away the
15 inconsistencies. Now, why should counsel for the Tribunal
16 do that, Mr. Chairman? Particularly when you have already
17 given to us the right to cross-examine, during which we
18 will mount a proper challenge to this witness in relation
19 to those inconsistencies. It seems to me that the purpose
20 of the exercise which Mr. Gallagher is about to embark upon
21 now is, as it were, to draw all the poison out of those
22 inconsistencies and to give Mr. Gogarty an opportunity to
23 avoid any embarrassment which potentially exists between
24 his sworn evidence and his earlier statements,
25 Mr. Chairman. That's the first point. However, you have
26 ruled Mr. Gallagher may do that so we must accept that
27 ruling and we do, Mr. Chairman.

28 .

29 I now move on to second point, Mr. Chairman, which arises
30 out of that rule you enforced and the acceptance of it.
31 It is this; it has been said to us on a couple of occasions
32 that at the very least we would be informed a) of the

1 identity of the witnesses and b) the passages in their
2 written statements which will be put to Mr. Gogarty. That
3 hasn't been done, Mr. Chairman. I respectfully ask that it
4 should be done.
5 .
6 I respectfully say, Mr. Chairman, what we are asking for
7 there is a very specific piece of information and it is no
8 good giving as a reply which is founded predominantly on
9 statements of high blown principle that we want the truth
10 to come out. Again Mr. Chairman, I also respectfully ask
11 this, have any of these inconsistencies which Mr. Gallagher
12 has extracted from these witness's statements and which he
13 is going to put to Mr. Gogarty, have they been previously
14 discussed with Mr. Gogarty or any member of his legal
15 team? Because if they have, Mr. Chairman, this is not an
16 attempt to put all the facts before the Tribunal. It's an
17 attempt to give Mr. Gogarty an opportunity to put a spin on
18 those inconsistencies to his favour. I respectfully
19 submit, Mr. Chairman, what I am asking for you now is not
20 an unnecessary intrusion into the pre-public hearing
21 investigative work of the Tribunal. It's a matter which
22 is one of common fairness between the parties,
23 Mr. Chairman. In other words, has Mr. Gallagher or any
24 member of the Tribunal's legal team discussed with Mr.
25 Gogarty or any member of his team, any one of the topics
26 and inconsistencies which Mr. Gallagher now proposes to put
27 to Mr. Gogarty? I think that's a matter of fairness and
28 we are entitled to that information.
29 .
30 MR. GALLAGHER: Sir, I regret that Mr. Cooney seems to be
31 imputing the motives --
32 .

1 CHAIRMAN: Don't mind the motives. Let's try to get down
2 to the realities of life.

3 .

4 MR. GALLAGHER: Sir, I must be allowed, if there is a
5 challenge, if there is an imputation, I must, in fairness,
6 be allowed to refer to it and deal with it. I don't -- I
7 didn't invite it, but I must be allowed, in fairness, to
8 answer it.

9 .

10 I am not seeking to cherry pick. I am seeking to
11 establish the truth insofar as I can. I am not prepared
12 to answer generally questions that are put by Mr. Cooney or
13 anybody else as to what was or was not discussed. But in
14 this case, I make an exception because there is an
15 imputation of mala fides or improper conduct or improper
16 motive by counsel to the Tribunal. The answer is no, it
17 has not been discussed with Mr. Gogarty and it has not been
18 discussed with counsel. And the questions will be put to
19 Mr. Gogarty and to Mr. Murphy and to everybody else fairly
20 and straight.

21 .

22 MR. COONEY: I accept what Mr. Gallagher says.

23 .

24 CHAIRMAN: Thank you very much, Mr. Cooney.

25 .

26 Now, first of all, I try to facilitate everybody, I suppose
27 in one sense, but the situation is, the identity of the
28 passages are there. You have got the 24 statements.
29 It's a matter to read your statements and find out what
30 they are going to say. If you put a particular question
31 arising out of Mr. X, surely we can identify it. Now, I
32 will do this. If necessary, I will adjourn, get the

1 passages marked and give them to you. And that's pushing
2 it a bit far.

3 .

4 MR. COONEY: Mr. Chairman, I know these statements
5 backwards. I am aware of all these inconsistencies and I
6 intend to put them to Mr. Gogarty. But the point is,
7 there are 25 statements. For instance, from Detective
8 Inspector Harrington, among the Garda statements there are
9 no less than four or five documents furnished by him.
10 Now, which passages from which of those documents does
11 Mr. Gallagher now intend to choose and put to this
12 witness?

13 .

14 MR. GALLAGHER: I don't intend to choose any.

15 .

16 MR. COONEY: Well, then we have gone one step forward
17 now. He is not going to put Detective Inspector
18 Harrington's evidence to the witness. Which of the Garda
19 statements does he intend to take extracts from for the
20 purpose of putting to Mr. Gogarty?

21 .

22 MR. GALLAGHER: This sounds like a cross-examination of
23 counsel. If it will assist Mr. Cooney, -- well, if --

24 .

25 CHAIRMAN: I am going to rise for a quarter of an hour,
26 get a list of the parts of the statements of which --

27 .

28 MR. GALLAGHER: I can tell you, Sir, without having to
29 rise, I can tell you exactly who they are. There is two
30 passages that I wanted to put. They are passages in the
31 statement of Deputy Tommy Brohane TD and a statement in the
32 evidence of Frank Connolly. And I also wanted to put to

1 this witness, something that isn't in the statement but I
2 better flag it in fairness to the witness, he should
3 perhaps know about it and perhaps other people might be
4 interested to know also. I am also going to put to him
5 the contents of the Irish Independent of, Sam Smyth's
6 article in the Irish Independent on last Wednesday, to see
7 what, if anything, he has to say about it. And there are
8 a number of other questions. There is the question of
9 Moneypoint. I know that as I said before, I understand
10 Mr. Cooney wishes to make submissions in relation to that
11 and perhaps you can hear Mr. Cooney and anybody else who
12 wishes to make submissions before we go into that aspect of
13 evidence. You can rule it in or rule it out as may be
14 appropriate.

15 .

16 The fact that I happened to take those two statements and
17 that I want to put them to Mr. Gogarty, the reason is
18 because they are in a way, central to the meeting that gave
19 rise to this Tribunal in the first instance and are
20 critical to that. There are many other contradictory
21 versions in other statements which I don't propose to put
22 to this witness at this stage, because primarily because of
23 objections by Mr. Cooney who says that he will deal with
24 all of those and the other counsel will deal with them in
25 cross-examination. But as I say, I reserve to the
26 Tribunal's legal team, the right to ask questions other
27 than the questions that are in statements from this witness
28 and other witnesses. Thank you, Sir.

29 .

30 MR. COONEY: Just if I could say, Mr. Chairman, could
31 Mr. Gallagher indicate which of the two passages in Deputy
32 Brohane's --

1 .

2 CHAIRMAN: We will get it marked for you.

3 .

4 MR. COONEY: And also Mr. Connolly.

5 .

6 CHAIRMAN: There is no reason why that shouldn't be
7 marked.

8 .

9 MR. COONEY: I have to say I am somewhat puzzled why Mr.
10 Connolly should be chosen --

11 .

12 CHAIRMAN: Don't worry about why it's being done. He is
13 being chosen. We are entitled, or counsel is entitled to
14 conduct his case in the manner he wishes. No doubt you
15 will make submissions in due course in relation to that.

16 .

17 MR. COONEY: I think, Mr. Chairman, the credibility of Mr.
18 Connolly will be in issue in this case --

19 .

20 CHAIRMAN: Mr. Connolly will be called as a witness. You
21 will have every opportunity of cross-examining Mr.
22 Connolly.

23 .

24 MR. COONEY: I appreciate that, Mr. Chairman, but why
25 should one passage out of his statement of evidence be put
26 to this witness before we have an opportunity to challenge
27 Mr. Connolly's credibility, Mr. Chairman?

28 .

29 CHAIRMAN: On the simple basis that we are here to
30 establish all the evidence, warts and all, as I may borrow
31 a phrase.

32 .

1 MR. COONEY: Of course.

2 .

3 CHAIRMAN: Warts and all.

4 .

5 MR. COONEY: I understand that, Mr. Chairman, and I have

6 heard that expression and I have heard expressions of good

7 intensions all during the Tribunal. It's a question of

8 translating these often stated good intentions into the

9 practicalities of fair procedures, Mr. Chairman. Now,

10 again I say this in respect to you, Mr. Chairman, I would

11 object to any part of Mr. Connolly's evidence particularly

12 being put to this witness so that he is going to deny it

13 before Mr. Connolly comes to the witness-box and gives his

14 evidence under oath and is subject to cross-examination,

15 Mr. Chairman. Because it's our view that Mr. Connolly has

16 a vested interest in the outcome of these proceedings,

17 Mr. Chairman.

18 .

19 CHAIRMAN: Mr. Cooney, the jury are not going to retire.

20 I have to be here. I have to listen to Mr. Connolly's

21 evidence. I have to assess Mr. Connolly's evidence. I

22 have to assess Mr. Gogarty's evidence. I haven't made my

23 mind up about Mr. Gogarty one way or the other. I have

24 listened to what has been said and no doubt you are going

25 to turn him up side down and all sorts of things when you

26 get moving. But that's neither here nor there. It's not

27 something finite that at the end of the week I will have

28 written in stone what Mr., what's his name, the

29 correspondent, has said about Mr. Frank Connolly. That's

30 the situation.

31 .

32 MR. COONEY: I understand that.

1 .

2 CHAIRMAN: That's the situation.

3 .

4 MR. COONEY: If that is the situation, why don't we adhere
5 to the normal procedures established --

6 .

7 CHAIRMAN: The answer is I have already told you why. We
8 are going to produce all the evidence, so far as we know
9 it, that seriously affects the issue, the issue being
10 shortly put, how did a sum of money get from point A to
11 point B to a person called C, if you like, call it that
12 way? That's the essential issue which we are dealing
13 it. It's hard to remember that's what we are talking
14 about.

15 .

16 MR. COONEY: All right.

17 .

18 MR. GALLAGHER: That also been --

19 .

20 CHAIRMAN: Now, could we get on -- could we select the
21 passages please and hand them to Mr. Cooney.

22 .

23 MR. GALLAGHER: In fairness to all concerned, here we have
24 a, what many would regard as an outrageous and perhaps
25 slanderous in other circumstances, claim in relation to
26 Frank Connolly, who is described as having a vested
27 interest in the outcome of these proceedings.

28 .

29 CHAIRMAN: Mr. Gallagher, I am not trying issues as to
30 whether Mr. Connolly has or has not a vested interest.

31 The fact that that comment was made doesn't give rise to a
32 debate in this forum. I will hear Mr. Connolly's

1 evidence. I will hear everybody's evidence. I will make
2 my own mind up about it and I will come to a firm decision,
3 I hope a fair decision. Now, could we get on with the
4 evidence?

5 .

6 MR. GALLAGHER: The evidence that I wish to put in
7 relation --

8 .

9 CHAIRMAN: Could you give him the two passages --
10 .

11 MR. GALLAGHER: Paragraph 40 of Deputy Tommy Brohane's
12 statement and paragraph 19 of Mr. Connolly's statement
13 relating to the meeting in the...

14 .

15 CHAIRMAN: Mr. Connolly's statement is, paragraph?

16 .

17 MR. GALLAGHER: Paragraph 19, on tab 3.

18 .

19 CHAIRMAN: Yes. Any other marker?

20 .

2152 Q. MR. GALLAGHER: No, just those for the moment. Mr.

22 Gogarty, you have told us in your evidence that you had a
23 number of meetings with Deputy Tommy Brohane and you wrote
24 to him and he wrote to you over a number of years. Deputy
25 Brohane alleges in his statement that he met you on Friday,
26 26th April, 1996, at the --

27 A. I haven't his whole statement.

2853 Q. Sorry, you haven't the statement, perhaps we will get you
29 the statement. Do you have the page commencing at
30 paragraph 40 on the top?

31 A. I don't see what context it's in.

3254 Q. Sorry --

1 A. Could I look at the whole statement? It would help me.

2 .

3 CHAIRMAN: Mr. Gogarty, would you be kind enough to let me

4 do the ruling as to what evidence will be admitted or dealt

5 with. I will be as fair as I can be to everybody including

6 your good self. Nobody will be endeavouring to do any

7 injury to you that I can stop. Now, could we go on to

8 paragraph 40.

9 .

10 MR. CALLANAN: Mr. Gogarty merely wanted to know the

11 context in which paragraph 40 arose rather than --

12 .

1355 Q. MR. GALLAGHER: Paragraph 39, it arose in the context of a

14 meeting on Friday April 26th, 1996 in the Marine Hotel.

15 Deputy Gogarty said that you met him in the Marine Hotel.

16 You went to his clinic in the Marine Hotel on that day and

17 on in the following paragraph he says; "Jim alleges that

18 £40,000 had been handed over to Mr. Ray Burke TD. 30,000

19 in cash and 10,000 in a cheque by Joe Murphy junior at a

20 house in Swords. Jim alleged that Mr. Mike Bailey and Mr.

21 Frank Reynolds were also present and that Mr. Mike Bailey

22 had threatened him."

23 .

24 Now, you, in your direct evidence here, did not allege that

25 Mr. Frank Reynolds was at that meeting.

26 A. That's correct. I corrected that sometime ago, yes.

2756 Q. What do you say about that?

28 A. Frank Reynolds wasn't there.

2957 Q. Do you accept that you told Tommy Brohane that Frank

30 Reynolds was there?

31 A. I may have, but I am on oath now and I am only -- I have

32 corrected it, Frank Reynolds wasn't there. He had

1 intended being there and told me he'd be there, but whether
2 by accident or design he wasn't able to travel. That's
3 what I am saying, you see. So...

458 Q. I see. And do you accept that you told Deputy Tommy
5 Brohane that Frank Reynolds was there?

6 A. I may have, yes. I may have. But I corrected that. I
7 mean, because I am on oath now. I am not denying anything
8 at all.

959 Q. Right. Can I refer you then to paragraph 15 of Mr.
10 Connolly's -- sorry, 19, of Mr. Connolly's statement in tab
11 3. At paragraph 17, just to put it in context, Mr.
12 Connolly is reciting the number of meetings that you had
13 and he said, paragraph 17, "At this meeting in March, 1996
14 which lasted between two and three hours, Gogarty went into
15 great details about his claim and showed me a large table
16 piled with documents containing information about the
17 activities of JMSE over the years." Then he goes on about
18 what your allegations were in summary, he described it as a
19 wide ranging conversation in the next paragraph and then at
20 the top of paragraph 19, he says, "During this meeting, he
21 mentioned that Frank Reynolds was also present at the
22 meeting in Ray Burke's house." Did you say that to him?

23 A. I probably did, yeah I probably did.

2460 Q. And what's your explanation for...

25 A. I feel that I was misunderstood, because I corrected it,
26 even with Frank Connolly, when I realised I had said that
27 Frank Reynolds was there. I just repeated that it was in
28 my mind because Frank Reynolds was organising it with
29 Junior and Frank Reynolds with Bailey and Frank Reynolds
30 had indicated that he was going and up to the last few
31 minutes I understand he was going. Then my recollection
32 is, as I said, that by accident or design he wasn't able to

1 travel. That's what I am saying.

261 Q. Mr. Gogarty, I don't know whether you read the Irish

3 Independent on Wednesday last. (Document handed

4 witness.)

5 .

6 MR. CALLANAN: Before we pass that up, Mr. Gallagher,

7 Mr. Gallagher might read the following sentence in sentence

8 in parenthesis.

9 .

1062 Q. MR. GALLAGHER: Sorry this is part of the quotation. (In

11 a later discussion he said that Reynolds did not travel to

12 Burke's house.) In brackets. That's the end of that

13 quotation.

14 .

15 Have you read this article, Mr. Gogarty?

16 A. I haven't, no.

1763 Q. You haven't?

18 A. No.

1964 Q. Then perhaps we will pass from that and I will give you an

20 opportunity to read it because I think it might be fair.

21 Would you care to read it now, Mr. Gogarty?

22 A. I am a bit upset . I'd like to read it in my own time. I

23 will read it here if you give me time you know...

24 .

25 CHAIRMAN: Gentlemen, it's ten minutes to one. In what

26 has not been a particularly productive day we might leave

27 Mr. Gogarty till tomorrow morning to read the article.

28 .

29 MR. COONEY: Before you rise, could I mention another

30 matter which is quite unrelated to what has been going on

31 this morning? I will indicate and then perhaps you can

32 tell me --

1 .

2 CHAIRMAN: Perhaps we can let Mr. Gogarty go.

3 .

4 MR. COONEY: Yes.

5 .

6 CHAIRMAN: What is your problem?

7 .

8 MR. COONEY: It's just a matter of some justice, Mr.

9 Chairman. You recall, Mr. Chairman, that during the

10 course of his evidence, Mr. Gogarty has made a number of

11 fairly serious allegations about both Mr. Murphy Snr and

12 Mr. Murphy Jnr and we can deal with these when the time

13 comes. But there was one allegation which he made about

14 Mr. Joseph Murphy Jnr which was particularly serious and

15 one which if allowed stand uncorrected, can do a lot of

16 damage to Mr. Murphy's reputation and attach a stigma to

17 his name --

18 .

19 CHAIRMAN: Would you just hold on a moment till I

20 flag -- it's in Murphy's statement?

21 .

22 MR. COONEY: No, it's not in any of the statements but

23 it's something which Mr. Gogarty said about Mr. Murphy

24 Jnr. He said on two occasions that Mr. Murphy Jnr had

25 been convicted of assaulting a woman, Mr. Chairman. Now,

26 that's a very abhorrent charge to make which would

27 understandably attach a stigma to anybody who would

28 actually carry out such an act and it's one which has

29 caused great distress to Mr. Joseph Murphy Jnr and because

30 of that, I'd ask your permission if I may, Mr. Chairman, to

31 outline the facts of that particular case. I will be very

32 brief, Mr. Chairman, but I think the longer it remains

1 uncontradicted, the more deeply it becomes ingrained in
2 public's consciousness.

3 .

4 CHAIRMAN: Now, Mr. Cooney, I have to rely on you as a
5 member of the Senior Bar to present -- I have of course no
6 information obviously at this moment in time. I have no
7 wish that anybody's reputation is undeservedly tarnished,
8 not in the world. I am entirely dependent on you as a
9 member of the Senior Bar to be absolutely fair and
10 absolutely totally accurate in your statement.

11 .

12 MR. COONEY: I can give you my personal assurance, Mr.
13 Chairman, that what I am saying to you --

14 .

15 CHAIRMAN: I accept it.

16 .

17 MR. COONEY: Will be established by fact and evidence.

18 .

19 MR. GALLAGHER: Sir, can I just say this. We have -- I
20 have some slight difficulty with this procedure, because we
21 have now, Mr. Cooney, as I understand it, about to make a
22 statement on behalf of his client rebutting evidence, sworn
23 evidence. He does so in circumstances where, for example,
24 in relation to Mr. Connolly, he says that his credibility
25 is in issue and that he has a vested interest -- will be in
26 issue. Everybody, unfortunately virtually everybody
27 involved in this has their credibility, their character in
28 issue and it seems to me that to allow Mr. Cooney to make
29 his statement in open tribunal without having prior notice
30 of it is perhaps not a fair procedure in all the
31 circumstances. It may be desirable that it should be
32 done, Mr. Cooney and Mr. Murphy may desire that it should

1 be done but I think that the least that should happen is
2 that counsel to the Tribunal should have prior notice of
3 what Mr. Cooney seeks to say. He requires prior notice of
4 questions I am going to put to Mr. Gogarty in circumstances
5 where the statements have been circulated to him and his
6 clients and I think the minimum that should happen before
7 any such statement should be made is that counsel should be
8 advised of what is proposed to be said and if it is
9 appropriate that he might approach you in private to see if
10 it is appropriate to make a statement before actually
11 reading the statement.

12 .

13 MR. COONEY: Mr. Chairman, the reason I sought to
14 distinguish this particular allegation from any other
15 allegation is that it is particularly abhorrent.

16 .

17 CHAIRMAN: Nonetheless, if you want to do that, I have to
18 agree, it's my reaction that I don't want anybody unfairly
19 tarnished at all. And that's why -- that's my premises
20 from which I start from, but likewise, I do think it's a
21 matter of courtesy. You could have told, could have said,
22 well this man -- whatever your proof is I presume it's a
23 particular formal proof which I assume there is there, and
24 there is no conviction of such.

25 .

26 MR. COONEY: First of all, I can't understand
27 Mr. Gallagher's objection to this --

28 .

29 CHAIRMAN: Would you ever tell him? Would you ever share
30 it with him?

31 .

32 MR. COONEY: Of course I will, but can I just make this

1 point, Mr. Chairman, is that this particular allegation
2 made by Mr. Gogarty was entirely irrelevant to any matter
3 that the Tribunal has to --

4 .

5 CHAIRMAN: Mr. Cooney, I have no desire to go into a
6 debate about how it arose. What I want to know is what
7 are the facts which you say, you said it's unfair?

8 .

9 MR. COONEY: Yes, Mr. Chairman, I can't understand why
10 Mr. Gallagher would object to me making the statement since
11 it's not anything which is relevant to the Tribunal and to
12 the case which he has to present. That's all the point.
13 In other words, Mr. Gallagher's objection is a bit spiteful
14 if I may say so, Mr. Chairman.

15 .

16 CHAIRMAN: Could we stop this sniping between counsel.

17 .

18 MR. COONEY: Mr. Chairman, all I am asking is for some
19 elementary justice to my client --

20 .

21 CHAIRMAN: I am offering it to you. I am trying to give
22 you every possible consideration.

23 .

24 MR. COONEY: Mr. Chairman, I gave you my personal
25 assurance that the facts I outline to you briefly will be
26 corroborated by evidence if and when it's necessary.

27 .

28 CHAIRMAN: On this occasion only.

29 .

30 MR. COONEY: First of all, Mr. Chairman, Mr. Joseph Murphy
31 Jnr was never charged, much less convicted, of an assault
32 on a woman. He was charged with malicious damage to a

1 minor degree and it arose in these circumstances, Mr.
2 Chairman.
3 .
4 On the evening of the international rugby match between
5 Ireland and the New Zealand All Blacks in November of 1989,
6 he was in the Berkley Court Hotel with some friends.
7 Anybody who knows the Berkley Court Hotel on the evening of
8 an international match knows it's packed to the doors and
9 there is an air frivolity and of course there is a certain
10 amount of drinking going on. Mr. Murphy Jnr, in a silly
11 prank, took a fire extinguisher and he caused it to go off
12 and some of the water from that fire extinguisher landed
13 upon the coat of a lady guest which was lying on the back
14 of an adjacent chair. The hotel management were incensed
15 by this incident and insisted that he be charged with
16 malicious damage to the overcoat. He appeared in the
17 District Court on the following Monday morning. The
18 district Justice, having heard the evidence including the
19 evidence from the security man who was an off duty garda,
20 concluded that this was a trivial incident. He applied
21 the Probation Act and Mr. Murphy was required to pay £100
22 into the poor box. Those are the facts of the case, Mr.
23 Chairman. There was no question of assaulting a woman or
24 him being convicted of assaulting a woman. It was a silly
25 and trivial indent which Mr. Gogarty, I am afraid, has
26 misinterpreted. That's all I want to say. I am grateful
27 to for giving me the opportunity, and we will have
28 evidence.
29 .
30 CHAIRMAN: In due course you will tender your evidence on
31 that. I accept you, as a member of the bar telling me that
32 and that's the basis I accept it.

1 .

2 MR. COONEY: Of course, Mr. Chairman. I am very grateful
3 you gave me opportunity to do this. Mr. Murphy was very
4 distressed by this and it's something people have mentioned
5 to him over the last few days.

6 .

7 CHAIRMAN: All right. It must be ultimately dealt with
8 in the ordinary way.

9 .

10 MR. COONEY: Of course I understand that. For the moment
11 thank you very much. Tomorrow morning, ten o'clock.

12 .

13 THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
14 TUESDAY, 9TH FEBRUARY, 1999 AT 10AM:

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