

A P P E A R A N C E S

The Sole Member:

His Honour Judge Peter Smithwick

For the Tribunal:

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Mr. Justin Dillon, SC
Mr. Dara Hayes, BL
Mr. Fintan Valentine, BL

Instructed by:

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NOTICE:

**A WORD INDEX IS PROVIDED AT THE BACK OF THIS TRANSCRIPT.
THIS IS A USEFUL INDEXING SYSTEM, WHICH ALLOWS YOU TO QUICKLY SEE
THE WORDS USED IN THE TRANSCRIPT, WHERE THEY OCCUR AND HOW OFTEN.**

EXAMPLE: - DOYLE [2] 30:28 45:17

**THE WORD "DOYLE" OCCURS TWICE
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1 THE TRIBUNAL RESUMED ON MONDAY, THE 13TH OF FEBRUARY, 2012,
2 AT 11 A.M. AS FOLLOWS:

3

4 CHAIRMAN: Good morning.

5

6 MR. O'CALLAGHAN: Good morning, Chairman. Chairman, I want
7 to thank the Tribunal for facilitating the parties by
8 sitting today to hear my application.

9

10 CHAIRMAN: Yes.

11

12 SUBMISSIONS BY MR. O'CALLAGHAN:

13

14 MR. O'CALLAGHAN: The application I wish to make to you,
15 Chairman, is to gain access to the transcript of the
16 interview conducted by Tribunal counsel with the former
17 Assistant Commissioner, Mr. Pat O'Toole, and which was
18 deployed and used by Mr. Dillon in his examination of
19 Mr. O'Toole last Friday.

20

21 For the purpose of that application, Chairman, I have put
22 together some short submissions which I have handed up to
23 you, and I also have a booklet of authorities to which I
24 will be referring in due course. I have given the book of
25 authorities and submission to Mr. Dillon, and I think the
26 other parties have the submission as well.

27

28 Chairman, before I commence my application, I just wish to
29 make one preliminary, yet very important, point, in respect
30 of my client and his position before the Tribunal.

1
2 The Tribunal will be aware that, for over 90 years, there
3 has been Tribunals of Inquiry legislation on the statute
4 books of this country. During that time, very important
5 matters of urgent public importance have been inquired into
6 and reported upon by those tribunals of inquiry; for
7 instance, the Whiddy and Stardust Tribunals reported upon
8 major accidents causing fatalities; the Locke's Distillery
9 and Beef Tribunal reported on decisions of Government that
10 were controversial; the Flood, Mahon, McCracken and
11 Moriarty Tribunals have reported on payments to
12 politicians, and there have also been tribunals in respect
13 of national outrages, such as the infection of our blood
14 products.

15
16 I have to say, though, Chairman, that I don't think any
17 party appearing before any of the tribunals set up in this
18 State over the past 90 years has ever been subject to as
19 grave an allegation as Mr. Corrigan, and indeed the other
20 Gardaí who were before you over the past year or so, Messrs
21 Colton and Hickey. The Abbeylara Inquiry was an
22 investigation and report upon Gardaí and their role in the
23 killing of Mr. John Carthy; that was obviously an extremely
24 serious matter. But Mr. Corrigan is being effectively
25 inquired into, as the Oireachtas has required you to do,
26 Chairman, he is being inquired into whether or not he
27 colluded in the murder of two senior RUC officers, and I
28 don't think an allegation of such gravity has ever been
29 inquired into and reported upon by a tribunal.

30

1 I'd like to point out, Chairman, that, in the case of
2 *Maguire v. Ardagh*, Judge Hardiman stated, and I will be
3 opening this presently; he stated:

4

5 *"The hearing of very grave allegations before a tribunal of*
6 *inquiry which not merely sits in public but whose*
7 *proceedings are, in practice, accorded enormous publicity,*
8 *attracts, for persons whose reputations are impugned,*
9 *procedural rights analogous to those of a defendant in a*
10 *criminal trial."*

11

12 And there is no doubt that, in the public mind,
13 Mr. Corrigan is an individual against whom grave
14 allegations have been made. There is no sanction that this
15 Tribunal can impose upon Mr. Corrigan at the end of its
16 deliberations, but, notwithstanding that, in accordance
17 with what Mr. Justice Hardiman stated, the process of this
18 Tribunal is not a legally sterile process, but, rather, it
19 is a process that can impinge greatly on the constitutional
20 rights of individuals.

21

22 And you, Chairman, are in a position, and you have a
23 responsibility, and it's a responsibility you have carried
24 out with diligence and obedience to date, you have a
25 responsibility to ensure that the constitutional rights of
26 individuals who come before your Inquiry are protected and
27 that they are given procedural fairness.

28

29 And that brings me to the application before the Tribunal
30 this morning. It is important, at the outset, to

1 understand how this application arose.

2

3 If I could ask you, Chairman, to look at page 4 of the
4 submissions that have been handed up to you, you will see
5 that we have replicated the section of the transcript from
6 last Friday where Mr. Dillon questioned Mr. O'Toole on a
7 particular issue pertaining to the O'Dea investigation.
8 Mr. Dillon was questioning Mr. O'Toole on whether he
9 believed part of the reason for the O'Dea investigation was
10 that collusion allegation. In a statement provided to the
11 Tribunal on the 29th of May, 2011, Mr. O'Dea stated that he
12 thought part of the reason for the investigation was the
13 collusion allegation. He then, giving his evidence, said
14 he thought that was incorrect. For the purpose of
15 challenging the witness, as Mr. Dillon is perfectly
16 entitled to do, Mr. Dillon referred him to an interview
17 which he gave to the Tribunal at some unspecified date
18 prior to him giving evidence. I just wish to open up the
19 exchange, which is at page 4 of our submissions.

20 Mr. Dillon commences at question 62, stating:

21

22 *"Question: Now, do you remember signing a statement to the*
23 *Tribunal?*

24 *Answer: I do, yes.*

25 *Question: And do you remember you said to the Tribunal in*
26 *your signed statement: 'If I remember correctly, part of*
27 *the reason for that investigation by Mr. O'Dea was the*
28 *collusion allegation'. Do you remember that?*

29 *Answer: Yes, I said that or I put that, if I remember*
30 *correctly, yes.*

1 Question: Yes. And when you met the Tribunal, because
2 that is the origin of that sentence: 'But, also, it was
3 doubly awful for the guards because at the time there was a
4 suggestion that there might have been collusion?

5 Answer: Yes, yes.

6 Question: That is the reason Assistant Commissioner O'Dea
7 went to Dundalk, this allegation?

8 Answer: He was dispatched, yes, yes. I don't remember how
9 long they were there, or anything else, but I understood at
10 the time that they interviewed everybody, and there was
11 regular contact with the RUC, as they then were, at the
12 time, and everything else'."

13

14 And that section there, those four questions, Chairman, are
15 an extract from the interview conducted by Tribunal counsel
16 with Mr. O'Toole at some unspecified date in the past.

17

18 Mr. Dillon then continued in his examination of Mr. O'Toole
19 by -- sorry, Mr. O'Toole then answered by stating:

20

21 "Oh, yes, but I know now that that statement I put in
22 there, I did qualify it at the very start, if I remember
23 correctly, but that was not correct, because I have since
24 checked on the terms of reference. The terms of reference
25 were quite clear: to establish the arrangements and
26 circumstances surrounding the meeting.

27 Question: Well, why did you tell the Tribunal, both at
28 interview and written statement, that the purpose of the
29 investigation was to investigate a leak?

30 Answer: I said that if I remember correctly, and obviously

1 I didn't.

2 Question: Well, why didn't you say you couldn't remember
3 correctly?

4 Answer: That is what I said at the time, Chairman,
5 unfortunately, and I brought it to your notice and that was
6 wrong -- that that was wrong.

7 Question: I am sorry, you brought it to the Tribunal's
8 notice this morning.

9 Answer: This morning, yes."

10

11 So, Chairman, what happened last Friday was that
12 Mr. Dillon, as he is perfectly entitled to do, he deployed
13 and he invoked the interview between Mr. O'Toole and
14 Tribunal counsel for the purpose of challenging the
15 credibility of the witness and the accuracy of the evidence
16 which he was giving.

17

18 The evidence he was giving, we say, is important, Chairman,
19 because it relates to whether or not Mr. O'Dea was
20 investigating an allegation of collusion back in 1989. We
21 say it is beneficial to our case if there was no such
22 investigation back in 1989 because it indicates that there
23 was not a real concern at the time that there was
24 collusion, notwithstanding the fact that there may have
25 been some newspaper reports.

26

27 Chairman, the basis for my application this morning is on
28 three grounds, and I will just give a very brief summary of
29 the three grounds and then look at some of the authorities
30 supporting them.

1

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The first and most simple ground upon which we rely is that Mr. Dillon deployed the document and used the document in his cross-examination of Mr. O'Toole. Mr. O'Toole was cross-examined on it for the purpose of challenging his credibility, and, accordingly, other parties are entitled to the document which has been put into evidence.

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I will open authorities in due course substantiating that.

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Second, there was also a wealth of Tribunal of Inquiry law from the High and the Supreme Courts, indicating that parties before a tribunal are entitled to documents such as interviews between tribunal counsel and witnesses, and we say, on those grounds, we are entitled to the transcript of the interview.

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Third, Mr. O'Toole himself gave the interview to the Tribunal. He was not compelled to give an interview. He is absolutely entitled, we say, to a copy of that interview, and we say, with respect to Tribunal counsel, that it is legally unstatable to refuse a person who volunteered to give an interview to the Tribunal, a copy of the transcript of that interview.

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Well, now, Chairman, what I propose to do now is just deal with the first issue, which is what I have referred to in my submissions as the deployment issue; namely, the document has been used and deployed by Tribunal counsel, and, therefore, it has been put into evidence.

26

27

28

29

30

1 The Tribunal will be aware, Chairman, that, on very many
2 occasions when witnesses are giving evidence, documents are
3 put to them or they are questioned upon documents, and, on
4 virtually every occasion, there was no row between the
5 parties here because all of us have those documents. I
6 have to say, last Friday when Mr. Dillon referred to this
7 transcript of the interview with Mr. O'Toole, I had
8 incorrectly assumed that this was a document that we had
9 somewhere within the large amount of documentation
10 available to the parties.

11
12 No explanation has been furnished as to why this document
13 is not being produced to the parties. We assume, however,
14 that the reason it's not being given is because the
15 Tribunal wants to withhold its disclosure on grounds of
16 either confidentiality, and that is a term that is being
17 relied upon by other tribunals in seeking to withhold
18 documents, or, alternatively, it is being precluded from
19 disclosure on the grounds of legal professional privilege.

20
21 One thing is clear, however, is that even if the document
22 was confidential or was protected by legal professional
23 privilege, once it is invoked and used and put into
24 evidence, well, then, all the parties are entitled to that
25 document. Mr. Dillon, as a very experienced Senior Counsel
26 in the field of criminal law, will know that a document
27 that is invoked in that way is in the field and the parties
28 are entitled to it.

29
30 Now, Judge, I just want to refer you to some authorities

1 which I say substantiate the claim I am making, and if I
2 could ask you to look at the book of authorities and, in
3 particular, the first tab, which is a case in which you had
4 a former involvement yourself - I think you were one of the
5 Respondents, although you had no direct involvement in it -
6 the case of *Hannigan v. DPP and His Honour Judge Smithwick*,
7 from 2001. I just want to open the headnote and then open
8 the relevant part of the decision of Mr. Justice Hardiman.
9 This was a case where the applicant appealed against the
10 order of the High Court refusing him inspection of a
11 document disclosed by the First Respondent during the
12 course of Judicial Review proceedings over which the First
13 Respondent claimed privilege. This document was a letter
14 between the First Respondent and the Gardai containing
15 directions as to the prosecution of the appellant in the
16 District Court proceedings impugned in the Judicial Review.
17 A considerable portion of the letter in question was
18 referred to in an affidavit which formed part of the JR
19 proceedings. The applicant argued that the document was
20 relevant and that privilege on the basis of public policy
21 did not apply, or, alternatively, that privilege has been
22 waived. The Respondents, while conceding the relevance of
23 the document, contended that the disclosure of the document
24 could adversely affect the freedom of communications
25 between the Gardaí and the First Respondent. And the
26 Supreme Court allowed the appeal, held that the document,
27 which had been referred to and summarised, was deployed in
28 the proceedings. Privilege was, therefore, waived, and the
29 applicant was entitled to have access to it.

30

1 If I could ask you, Chairman, to have a look at page 383,
2 there is the relevant section from the decision of
3 Mr. Justice Hardiman, and if I could open the third
4 paragraph down on page 383, Judge Hardiman says as follows:

5
6 *"Secondly, the affidavit of Superintendent Brennan*
7 *specifically referred to and summarises the contents of the*
8 *document at issue. This, presumably, was for the purpose*
9 *of rebutting the applicant's point that summary disposal*
10 *was at first available but that the First Respondent*
11 *withdrew his consent to it when it became clear that the*
12 *applicant was not going to plead guilty. Superintendent*
13 *Brennan did not merely mention the existence of the*
14 *document but relied on a summary of its contents. This*
15 *reference to the letter in some degree of detail seems to*
16 *me to support, if support is necessary, the view that the*
17 *letter has or may have a degree of relevance beyond the*
18 *merely tangential. It also appears to support the*
19 *proposition that disclosure of the terms of the letter may*
20 *occur without deleterious effect from the First*
21 *Respondent's point of view. Apart from these observations,*
22 *the status of a document from the point of view of*
23 *privilege or immunity from disclosure, changes once it has*
24 *been referred to in the Pleadings or affidavit. Matthews*
25 *and Malek's 'Discovery' at paragraph 9.15 stated:*

26 *'The general rule is that, where privileged material is*
27 *deployed in court in an interlocutory application,*
28 *privilege in that and any associated material is waived...'*
29 *The basis of this rule is discussed in Nenea Karteria*
30 *Maritime Company [1981] Company Law Reports, 139,*

1 as follows:

2 '... the opposite party must have the opportunity of
3 satisfying themselves that what the party has chosen to
4 release from privilege represents the whole of the material
5 relevant to the issue in question'."

6

7 Mr. Justice Hardiman continues: "It appears to me that
8 this document was indeed deployed in the present
9 proceedings and that no other conclusion is open on the
10 basis of a reading of paragraph 9 of the Superintendent's
11 affidavit. Complex issues may occasionally arise as to
12 whether a reference by a witness as opposed to a party, can
13 have the effect of waiving privilege. These do not seem to
14 arise here because of the Superintendent's express
15 statement at paragraph 1, that he made the affidavit on
16 behalf of the First Respondent. Accordingly, the position
17 seems to be that the document in question was referred to
18 and its contents summarised for litigious purposes by the
19 party entitled to claim privilege in it. This deployment
20 seems inconsistent with an assertion either of irrelevance
21 or harmful effects following from its disclosure."

22

23 The situation here, Chairman, I say, is even more
24 pronounced than in the *Hannigan* case. In *Hannigan*,
25 Mr. Justice Hardiman was referring to the fact that a
26 document had been referred to in an affidavit. Last
27 Friday, a document was put into evidence and put to a
28 witness for the purpose of undermining his credibility.
29 That document, therefore, was clearly deployed by
30 Mr. Dillon in his examination of Mr. -- his examination of

1 Mr. O'Toole, and, therefore, we say that any
2 confidentiality or privilege that may attach to it, and we
3 are not accepting that there is such an attachment, but
4 that is no longer tenable once it has been deployed.

5
6 At tab 2, Judge, there is a further decision of the Supreme
7 Court delivered by Mr. Justice Finnegan on the 4th of
8 March, 2009, in proceedings entitled *Redfern v. O'Mahony*
9 *and McFeeley*, and I would simply ask the Court to go to
10 page 18 of the decision of Mr. Justice Finnegan. This was
11 a case where one of the parties had sought access to an
12 opinion of a senior counsel that had been referred to in an
13 affidavit of discovery and in respect of which privilege
14 had been made. At the top of page 18, Mr. Justice Finnegan
15 says:

16
17 *"There is one other area in which legal professional can be*
18 *lost on the basis of unfairness, and that is in relation to*
19 *partial disclosure of legal advice, see R. v. Secretary of*
20 *State for Transport and Others, and cases therein referred*
21 *to. Where a party deploys, in court, material which would*
22 *otherwise be privileged, the other party and the court must*
23 *have an opportunity of satisfying themselves that what the*
24 *party has chosen to release from privilege represents the*
25 *whole of the material relevant to the issue in question.*
26 *To allow an individual item to be plucked out of context*
27 *would be to risk injustice to its real weight or meaning*
28 *being misunderstood."*

29
30 And effectively, Chairman, what Mr. Dillon did last

1 Friday - as I say, I am not criticising him for this; he is
2 perfectly entitled to do it - but he sought to challenge
3 Mr. O'Toole's evidence by saying to him, "You gave a
4 different answer to us in an interview back some time ago".
5 He then went further and read out sections of that
6 interview. In effect, what Mr. Dillon was doing was, he
7 was cherry-picking a part of the interview. And based on
8 the authority that I have opened to you there, that is not
9 permissible. Once he deploys it, we are entitled to see
10 the whole document to ensure that a full account of the
11 document is made available to the relevant parties.
12

13 At tab 3, Judge, there is a further decision of the High
14 Court in a case called *Hansfield Developments v. Irish*
15 *Asphalt*. Again, this is a challenge to a claim for
16 privilege made over documents, and a decision has been
17 given by Mr. Justice McKechnie. If I could ask the Court
18 to go to page 33, the Tribunal will see that Mr. Justice
19 McKechnie referred to the decision of the Supreme Court in
20 the case of *Fyffes v. DCC* and that judgment of Fennelly.
21 And at paragraph 58, on page 33, Mr. Justice McKechnie
22 says:

23
24 "*Fennelly J in the Supreme Court, dealing with this*
25 *question in Fyffes v. DCC, considered the Australian case*
26 *of AG v. Maurice, as being of a especial importance, and*
27 *commented 'The language of the judges in the latter case is*
28 *revealing. The question whether a waiver should be implied*
29 *depends on whether it would be unfair or misleading to*
30 *allow a party to refer to or use material and yet assert*

1 that that material, or material associated with it, is
2 privileged from production. The holder of the privilege
3 should not be able to abuse it by using it to create an
4 inaccurate perception of the protected communication. In
5 order to ensure that the opposing litigant is not misled by
6 an inaccurate perception of the disclosed documentation,
7 fairness will usually require that waiver as to one part
8 should result in waiver as to the rest. Ordinary notions
9 of fairness require that an assertion of the effect of
10 privileged material or disclosure of part of its content in
11 the course of proceedings be treated as a waiver of any
12 right to resist scrutiny of the propriety of the use he has
13 made of the material by reliance on professional privilege.
14 These dicta all concern attempts to abuse privilege by
15 making partial and selective disclosure'."

16
17 And again, Chairman, we say that the attempt to use part of
18 the interview with Mr. O'Toole is unfair. We are
19 entitled to see it all. You cannot have partial or
20 selective disclosure.

21
22 At page 35, Mr. Justice McKechnie sets out the basis for
23 his conclusion. At paragraph 61, he states:

24
25 *"It is therefore clear that a party may not make selective*
26 *disclosure with regards to a group of documents of a*
27 *similar nature. The question which arises in this case is*
28 *whether the documents over which the plaintiffs still claim*
29 *privilege are of such a similar nature to the ones which*
30 *they have produced or expressly waived privilege over, that*

1 *this might give rise to unfairness by presenting a partisan*
2 *or biased view of their case to the court and the other*
3 *party. The plaintiffs argue that there are justifiable*
4 *differences between their disclosed documents and those*
5 *over which privilege is maintained. They claim that the*
6 *remaining privileged documents are drafts which involved*
7 *consultation with their legal advisors and which, unlike*
8 *many of the documents which they produced for inspection,*
9 *were never sent to any parties. The Helsingor documents*
10 *discovered must also be included in this heading of*
11 *complaint. In those circumstances, it is argued there are*
12 *sufficient differences between them to justify a continuing*
13 *claim of privilege."*

14
15 The last part isn't that relevant for the submission I
16 make; it's really the first sentence of paragraph 61 upon
17 which I reply here.

18
19 At tab 4 of the book before you, Chairman, we have an
20 excerpt from Dr. Heffernan's book on 'Legal Professional
21 Privilege', which is from 2011, and you will see, at page
22 156, she refers to a selection entitled "*Deploying*
23 *Privileged Materials in Proceedings*".

24
25 CHAIRMAN: Sorry, what was the page?

26
27 MR. O'CALLAGHAN: 156, Chairman. The numbering is at the
28 bottom. And you will see paragraph 6.37; I am not going to
29 open it all, I will just open the first three lines on that
30 page, where she says:

1

2

"Whereas the principles that apply to proceedings between the client and lawyer are reasonably well settled, the rules that govern the deployment of privileged material in other proceedings are somewhat uncertain."

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7

And then she talks about the *Hannigan* case, and, at the end of that paragraph, she quotes Judge Hardiman's observation, which I have read out, where he says:

10

11

"The status of a document from the point of view of privilege or immunity from disclosure changes once it has been referred to in Pleadings or affidavits. Referring with approval to the relevant discussion in Matthews and Malek's, Hardiman stated, 'The general rules that where privileged material is deployed in court in an interlocutory application, privilege in that and any associated material is waived'."

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She then continues in paragraph 6.38:

21

22

*"The English courts have emphasised the principle of fairness as the underlying rationale underpinning the legal rules in this area. Lord Denning placed the principle in context in *Burnell v. British Transport Commission*, where he stated, 'It would be most unfair that cross-examining counsel should use part of the document which was to his advantage, and not allow anyone, not even the judge or the opposing counsel, a sight of the rest of the document, much of which might have been against him'."*

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And that is the core of my application under this first

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heading, Judge, that it is unfair that one party would be

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allowed to rely upon part of a document, but then

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restrain -- then seeking to restrain itself from having to

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hand over that document.

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Dr. Heffernan continues: *"Thus, where a party has deployed*

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a significant part of legal advice received, fairness may

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require that she disclose the advice in its totality. In

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essence, a party will not be permitted to gain an advantage

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in litigation by cherry-picking, selecting favourable

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aspects of relevant information for presentation to the

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court while withholding unfavourable aspects."

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16

At tab 5, there is a decision of the High Court,

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Mr. Justice Clarke, from the 7th of September, 2007, in a

18

case called *Byrne v. Shannon Foynes Port Company*. And

19

again, it's about discovery. If I could ask the Tribunal

20

to go to page 825 - the pagination is on the top right-hand

21

corner - and, at the bottom, there is the reference by

22

Mr. Justice Clarke to the law on deployment of a document,

23

and he starts by stating:

24

25

"In Hannigan v. DPP, Hardiman, speaking for the Supreme

26

Court, stated the following at page 283:

27

'Apart from these observations, the status of the document

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from the point of view of privilege or immunity from

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disclosure, changes once it has been referred to in

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Pleadings or affidavit'."

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And then he quotes from *Matthews and Malek* again, which I have already opened to you.

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And on page 826, Mr. Justice Clarke again contains the quote from the *Nenea Karteria Maritime* case that was referred to by Mr. Justice Hardiman. And just above paragraph 49, he states:

9

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"On the facts of the case in question, Hardiman J was satisfied that the document, the entirety of which was sought to be disclosed, had been deployed. However, it is important to note that the test is to the effect that the document concerned was deployed. It is clear from Marubeni Corporation v. Alafouz [1988] that a mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege and that this is so even if the document referred to is being relied on for some purpose, for reliance in itself is not the test. Properly speaking, the test is whether the contents of the document are being relied on rather than its effect. As thus put, the test is as to whether the party concerned has placed reliance on the content of the document concerned. It does not seem to me that the mere disclosure of the existence of the document, without claiming privilege in respect of it in an affidavit of discovery, can be said to amount to the placing of reliance on the document in the proceedings so as to, properly speaking, suggest that the document has been deployed. Obviously, if the document is relied on as to its contents in an interlocutory application or a

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1 *fortiori* at trial, then it follows that it has been
2 deployed."

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4 And I say that, Judge, here, although this is a tribunal of
5 inquiry, not a trial, but, here, the document has been
6 relied upon in this hearing and it's being relied upon for
7 the purpose of challenging the credibility of a witness,
8 and, therefore, my client, on the basis of constitutional
9 justice, is entitled to have access to that document. If
10 Mr. Dillon says that the document is confidential to the
11 Tribunal or it's legally professionally privileged, well,
12 then, that claim to confidentiality or legal professional
13 privilege has been waived by the use of the document.

14

15 Mr. Justice Clarke continues at paragraph 51. He says:

16

17 *"I am therefore satisfied that where reliance is placed*
18 *upon the contents of the document in either an*
19 *interlocutory application or at trial, the party concerned*
20 *will be taken not only to have waived any privilege that*
21 *might attach to that document, but also to any other*
22 *documents which are connected to the document in question,*
23 *in such a manner as would make it unjust to allow the*
24 *document concerned to be deployed in that fashion without*
25 *also disclosing the content of the other documentation."*

26

27 Then, Judge, at tab 6, there is a decision of Mr. Justice
28 Cooke from the 18th of May, 2009, in the case of *Ryanair*
29 *Limited and Ryanair Direct Limited v. Murray's Europcar*
30 *Limited and Europcar (UK) Limited*. And on the second page,

1 at paragraph 5, Mr. Justice Cooke deals with an application
2 which arose in the context of Ryanair referring in an
3 affidavit to a report they had obtained from a consultant
4 who was a member of the Competition Authority. After that,
5 the other parties sought access to it. And he says at
6 paragraph 5:

7
8 *"The First-Named Defendant now applies for an order*
9 *permitting inspection of that report on the basis that any*
10 *privilege that might have been claimed in it has been*
11 *waived by its being thus deployed in that affidavit in*
12 *support of the claim to reinstate the action. The law on*
13 *the issue was clear from the authorities opened to the*
14 *court and especially the decision of the High Court in*
15 *Byrne v. Shannon and the Supreme Court in Hannigan. The*
16 *authorities cite the well-known statement: The general*
17 *rule is that where privileged material is deployed in court*
18 *in an interlocutory application, privilege in that and any*
19 *associated material is waived. It is also clear, however,*
20 *that a mere reference to a document is not sufficient to*
21 *treat it as deployed in that sense."*

22 And he goes on at paragraph 7, he says: *"As thus put, the*
23 *test is as to whether the party concerned has placed*
24 *reliance on the content of the document concerned. It does*
25 *not seem to me that the mere disclosure of the existence of*
26 *the document, without claiming any privilege in respect of*
27 *it in an affidavit of discovery, can be said to amounting*
28 *to the placing of reliance on the document in the*
29 *proceedings so as to, properly speaking, suggest that the*
30 *document is being deployed."*

1

2

Of course, the circumstances here are different, Chairman.

3

This document wasn't simply referred to in an affidavit; it

4

was expressly invoked and used at the hearing before you

5

last Friday.

6

7

So that is my first ground, Chairman. I say that, on any

8

principle of law of evidence, if a document is invoked and

9

deployed, well, then, it is in the game, and parties are,

10

therefore, entitled to have access to it. There is no

11

difference, I say, to the fact that this is a tribunal of

12

inquiry and the authorities that I have opened to the Court

13

relate to adversarial litigation. The principles remain

14

the same. The principle behind them in the cases I have

15

opened is a principle of fairness and what a party is

16

entitled to achieve in order to ensure fairness. We are in

17

a position where grave allegations have been made against

18

us, and we are entitled, we say, to have access to a

19

document that is being deployed by the Tribunal for the

20

purpose of seeking to undermine the evidence of a witness

21

before it.

22

23

The second ground upon which I rely, Chairman, in my

24

application, is that there has been a body of law about

25

tribunals of inquiry and when individuals before those

26

tribunals are entitled to have given to them, documents

27

that were generated by the Tribunal during its private

28

inquiries. The first case I refer you to is at tab 7, and

29

it's the case of Owen O'Callaghan v. The Judges in the

30

Mahon Tribunal, and Mr. Gilmartin is a Notice Party in the

1 proceedings. The decision was given by Mr. Justice O'Neill
2 on the 7th of July, 2004. The Tribunal may be aware that
3 Mr. Gilmartin had been making allegations against
4 Mr. O'Callaghan. It subsequently became apparent that
5 Mr. Gilmartin, in previous interviews with the Tribunal,
6 had made other allegations about individuals, and an
7 application was brought by Mr. O'Callaghan seeking to gain
8 access to documents evidencing the previous interviews
9 conducted by Mr. Gilmartin with the Tribunal.

10
11 Now, if I could ask the Court to have a look at page 4 of
12 that decision of Mr. Justice O'Neill, he gives the
13 background to how the case arose. He says, at the top of
14 page 4:

15
16 *"During the course of cross-examination of the Notice*
17 *Party" -- that is Mr. Gilmartin -- "by counsel for An*
18 *Taoiseach, it emerged that the Notice Party, in addition to*
19 *the written statement which had been a circulated, had*
20 *provided other written and oral material which was recorded*
21 *by the Tribunal. This material had not been circulated to*
22 *the applicant or anyone else."*

23
24 So that is on all fours with what we have here, Chairman.
25 There is other material recording what Mr. O'Toole said to
26 the Tribunal, which the Tribunal have and which hasn't been
27 circulated to anyone else.

28
29 Then, Mr. Justice O'Neill continues:
30

1 *"In further cross-examination of the Notice Party, the*
2 *Notice Party accepted that there may have been*
3 *inconsistencies between this other material and his oral*
4 *evidence and statement as circulated."*

5
6 And then at the bottom of that page, you will see that the
7 Tribunal gave its ruling as to whether or not it would give
8 the material over to Mr. O'Callaghan, and it refused to
9 hand over the material to him, and it gave its reasons on
10 pages 4 and 5. And if you look at page 5, you will see, at
11 the top there, the Tribunal Chairman states the following:

12
13 *"In addition to this statement, the Tribunal has further*
14 *documentation which includes details of communications*
15 *between Mr. Gilmartin and his solicitors and members of the*
16 *Tribunal's legal team. In addition, the Tribunal has been*
17 *provided with a document prepared following the*
18 *question-and-answer interview between Mr. Noel Smyth, a*
19 *solicitor then acting on behalf of Mr. Gilmartin, and*
20 *Mr. Gilmartin. This document was provided to the Tribunal*
21 *by Mr. Smyth at the request of Mr. Gilmartin in 1998. The*
22 *Tribunal legal team was neither present at this interview*
23 *nor instrumental in the preparation of the record of such*
24 *interview. The document was provided to the Tribunal upon*
25 *express terms as to confidentiality, which would be set out*
26 *in detail later in this ruling."*

27
28 And then it continues at the last paragraph on page 4:

29
30 *"The Tribunal recognises that it has a duty of*

1 *confidentiality to persons from whom it has received*
2 *documents or information in confidence."*

3

4 Now, can we just compare that to what we have here,
5 Chairman. Mr. O'Toole is the party who gave the interview
6 to the Tribunal. The Tribunal recorded a transcript of the
7 interview. He is seeking access to the document. So there
8 is no issue here of the party who was giving the
9 information, seeking to maintain confidentiality over it.
10 So, there is no justification, I suggest, in respect of the
11 confidentiality ground.

12

13 If could I ask you then to -- if I could ask you then to go
14 to page 17 of Mr. Justice O'Neill's judgment --

15

16 MR. DILLON: Forgive me for interrupting; I may have
17 misheard, and it is important. Is Mr. O'Callaghan
18 suggesting that Mr. O'Toole has asked for access to this
19 document?

20

21 MR. O'CALLAGHAN: That was my understanding, that, last
22 Friday, that Mr. O'Toole's counsel initiated it by stating
23 he'd like access to it.

24

25 MR. DILLON: Mr. O'Toole's counsel? Mr. O'Toole does not
26 have counsel.

27

28 CHAIRMAN: No, he doesn't have counsel.

29

30 MR. McGUINNESS: Mr. Durack and myself are representing

1 Mr. O'Toole, and we have consulted with him previously, and
2 Mr. Durack made the application on Friday afternoon.

3

4 MR. DILLON: I am very surprised to hear that. I am sorry,
5 now, to be interrupting, Mr. O'Callaghan, but it's an
6 important point that has been raised. Mr. McGuinness and
7 his colleagues are here on behalf of the Garda
8 Commissioner. They are not here on behalf of Mr. O'Toole.
9 He is not their client; he is a witness for the Tribunal.
10 And I am very surprised to hear that said. If need be, I
11 will ask Mr. Mills to produce the grant of representation
12 which was specifically applied for by the Garda
13 Commissioner. He did not seek representation to apply for
14 former members of the Force or even existing members of the
15 Force. A very important point here. And now, it's being
16 suggested that there is somebody who has status to appear
17 and act on behalf of Mr. O'Toole, who is a Tribunal
18 witness. Now, can I come back to -- is it being suggested
19 that Mr. O'Toole sought access?

20

21 MR. O'CALLAGHAN: I'd assumed that, Mr. Dillon, because
22 Mr. Durack made the application. But if Mr. Dillon is
23 stating that if Mr. O'Toole seeks access, he will be given
24 it, well, then, maybe that negates the whole purpose of the
25 application. If the Tribunal is prepared to give it to
26 Mr. O'Toole, then I think the other parties have to be
27 given it as well. And I don't know, like I don't know what
28 is in this document. If there are matters which are
29 sensitive from an intelligence or confidentiality point of
30 viewer, they can obviously be dealt with in the ordinary

1 course. But I do say, and that was my third ground, if an
2 individual gives an interview to the Tribunal, he is
3 absolutely entitled to be given access to it. I was at
4 page --

5

6 MR. DILLON: Sorry, I thought it was important to clarify
7 that point.

8

9 MR. O'CALLAGHAN: Oh, yes. Page 17, Chairman, of
10 Mr. Justice O'Neill's decision, at the bottom of it, he
11 states:

12

13 *"In this case, therefore, I must consider whether, on the*
14 *facts put in evidence before me, there has been a breach of*
15 *the applicant's right to fair procedures with the*
16 *consequence that there has been a failure to vindicate the*
17 *applicant's constitutional right to his good name. In*
18 *approaching this question, I must consider, in very*
19 *practical terms, the degree, if any, to which the ruling of*
20 *the Tribunal hampers the cross-examination by counsel for*
21 *the applicant of the Notice Party, or whether the*
22 *assurances given by the Tribunal as to the content of the*
23 *undisclosed material lead to a conclusion that there has*
24 *been no significant impairment of the capacity of*
25 *the applicant to conduct a full and meaningful and*
26 *effective cross-examination of the Notice Party.*
27 *The first thing to be said in this context is that this*
28 *court fully accepts the assurance or guarantee given by the*
29 *Tribunal to the effect that the undisclosed or unrecorded*
30 *statements of the Notice Party do not contain material*

1 *which is either glaringly or grossly or significantly*
2 *inconsistent with the statement of the Notice Party of 25*
3 *May, 2001, or the oral evidence given by the Notice Party."*

4
5 And he then gives his conclusion, Chairman, at page 24. If
6 I can start at the second paragraph down on page 24,
7 Mr. Justice O'Neill states:

8
9 *"I am of the opinion that it would be very damaging to the*
10 *public interest in this regard if there was a withholding*
11 *from disclosure of material in the possession of the*
12 *Tribunal relevant to the subject matter or a particular*
13 *module and which a person affected by the allegations made*
14 *in the inquiry might need to establish the truth and*
15 *vindicate his or her good name."*

16
17 And that is the crux of the judgment. And I say my client,
18 Mr. Corrigan, is entitled to the document because it might,
19 not that it must, he might need it *"to establish the truth*
20 *and to vindicate his or her good name"*.

21
22 The issue in dispute is whether or not Mr. O'Dea went, in
23 March 1989, to Dundalk, to inquire into allegations about a
24 mole. The evidence given by Mr. O'Toole is that he doesn't
25 think that was the terms of his inquiry. If that is
26 correct, I believe that is of benefit and of advantage to
27 my client, Chairman, because it indicates, at the time back
28 in March 1989, that the issue of there being a mole was not
29 a credible issue. Now, it's a matter ultimately for you to
30 determine, but I think it assists my claim and my defence

1 in this Tribunal if that can be established.

2

3 Mr. Justice O'Neill continues at page 24, third paragraph:

4

5 *"Thus, in my view, where a public inquiry takes place, the*
6 *public interest, in the full public and untrammled*
7 *ventilation of all relevant and admissible evidence so that*
8 *the truth can be ascertained and rendered apparent, must*
9 *supercede any public interest in the use of confidentiality*
10 *to obtain information in the initial private investigative*
11 *stage of inquiry. Necessarily, in my view, the balance is*
12 *tilted in favour of the public interest in the fullest*
13 *disclosure. Were it not to permit disclosure, is, in fact,*
14 *a breach of the constitutional right to fair procedures of*
15 *a person against whom damaging allegations are made."*

16

17 And, Chairman, in this situation here, there was no
18 counterweighting argument in favour of confidentiality.
19 The individual who gave the statement to the Tribunal
20 counsel, Mr. O'Toole, is not seeking to assert the
21 confidentiality of that document. He is not concerned, if
22 this document comes out, that it may be -- affect him
23 negatively, and, in fact, it's being used by the Tribunal
24 to seek to question his credibility as a witness, and,
25 therefore, basic fairness requires that he, and indeed my
26 client, be given access to it.

27

28 Judge, then there was the Supreme Court decision, which is
29 at tab 8, in the *O'Callaghan v. Mahon* decision. And
30 unfortunately, the page-numbering isn't very good in the

1 copy I have handed up to the Court, so rather than go by
2 page-numbering, I am going to refer to paragraph-numbering.
3 And I want to refer to the decision of Mr. Justice
4 Hardiman, which is in around 15 pages, and it's at
5 paragraph 57, which is on the right-hand side of one of the
6 pages which has been handed in. It's paragraph 57 of
7 Mr. Justice Hardiman's decision, and the paragraph numbers
8 are on the left-hand side, is in a section entitled
9 "*Disclosure of Material for Comparison*". And Mr. Justice
10 Hardiman states, at paragraph 56 in his judgment, he says:

11
12 "*For the reasons set out in my judgment in Maguire v.*
13 *Ardagh, I consider that the hearing of very grave*
14 *allegations before a tribunal of inquiry which not merely*
15 *sits in public but whose proceedings are, in practice,*
16 *accorded enormous publicity, attracts, for persons whose*
17 *reputations are impugned, procedural rights analogous to,*
18 *though often varying in detail from, those of a defendant*
19 *in a criminal trial.*"

20
21 And I place huge reliance upon that judgment of the Supreme
22 Court, Chairman.

23
24 Mr. Dillon, as an experienced criminal Senior Counsel, will
25 know that if a document -- if this was a criminal trial and
26 if that document had been put in by the prosecutor in a
27 criminal trial to cross-examine an accused, the accused and
28 other parties would be immediately entitled to it, and
29 those rights available in a criminal trial should also
30 operate in respect of a tribunal of inquiry where grave

1 allegations are made against parties.

2

3 Mr. Justice Hardiman continues at paragraph 57:

4

5 *"In saying this, I bear in mind and do not in any way*
6 *differ from what was said by Henchy J in Kiely v. Minister*
7 *for Social Welfare. Having reviewed certain English cases*
8 *on fair procedures, including one which said that a*
9 *requirement that a decision-maker base his decision on*
10 *evidence means that he must not spin a coin or consult an*
11 *astrologer but he may take into account any material which,*
12 *as a matter of reason, has some probative value. Henchy J*
13 *continued at page 281: With great respect, I cannot accept*
14 *that those decisions or those dicta correctly represent the*
15 *law in this State. I do not think it is open to judges*
16 *here to adopt such a laissez faire attitude to the vagaries*
17 *of tribunals exercising quasi-judicial functions. This*
18 *Court has held in such cases as In Re Haughey that Article*
19 *40 Section 3 of the Constitution implies a guarantee to the*
20 *citizen of basic fairness of procedures. The rules of*
21 *natural justice must be construed accordingly. Tribunals*
22 *exercising quasi-judicial functions are frequently allowed*
23 *to act informally, to receive unsworn evidence, to act on*
24 *hearsay, to depart from the Rules of Evidence, to ignore*
25 *courtroom procedures, and the like, but they may not act in*
26 *such a way as to imperil a fair hearing or a fair result.*
27 *I do not attempt an exposition of what they must not do,*
28 *for, to quote the frequently cited dictum of Tucker LJ in*
29 *Russell v. Duke of Norfolk, 'there are, in my view, no*
30 *words which are of universal application to every kind of*

1 *inquiry and every kind of domestic tribunal. The*
2 *requirements of natural justice must depend on the*
3 *circumstances of the case, the nature of the inquiry, the*
4 *rules under which the tribunal is acting, the subject*
5 *matter that is being dealt with, and so forth."*

6

7 And Mr. Justice Hardiman continues there, and I will just
8 open the next paragraph of paragraph 58. He says:

9

10 *"I have already contrasted the situation which arose before*
11 *the Tribunal where allegations of great gravity, and*
12 *involving, if true, great turpitude and depending in large*
13 *measure on the credibility of a single witness, were made*
14 *without notice, with other situations which might arise*
15 *before an inquiry of some sort. The requirements of*
16 *natural justice will naturally vary depending on the*
17 *gravity of what is alleged, whether or not personal*
18 *responsibility is to be established, whether there is a*
19 *paper trial or other body of uncontradicted evidence or*
20 *corroboration available, whether the inquiry sits in public*
21 *or in private, and other matters."*

22

23 I will just stop there, Chairman, and state that the
24 gravity of what is being alleged in this Tribunal is more
25 grave than any allegation made in any other tribunal in the
26 history of this State, and, because of that, the
27 requirements of natural justice should be operated in
28 favour of parties who are subject to those allegations.

29

30 Chairman, if I could ask you to move forward then to

1 paragraph 74 of Mr. Justice Hardiman's decision, which is
2 paragraph 74. Judge Hardiman states:

3
4 *"I cannot regard the willingness of the Tribunal to make*
5 *such disclosure only in what they regard as exceptional*
6 *circumstances as adequately protecting the applicant's*
7 *position. Firstly, extraordinary though the manner of the*
8 *making of these allegations was, it was not considered*
9 *sufficiently exceptional for the Tribunal to depart from*
10 *its policy. Secondly, it is of the essence of the right to*
11 *cross-examine that, unless there is good reason to the*
12 *contrary, the cross-examiner, the advocate selected by the*
13 *person impugned, should have access to the materials for*
14 *cross-examination. Study and assessment of these materials*
15 *is a vital part of the process of cross-examination. It is*
16 *also a vital factor in the formulation of the advice an*
17 *advocate gives to his client. The client is entitled to*
18 *have cross-examination, including its vital preparatory*
19 *stages, conducted by counsel, and not by a third party,*
20 *however august."*

21
22 And he goes on: *"The reason for this is that counsel who*
23 *enjoys the confidence of his client and who is privy to his*
24 *client's instruction, is in a unique position to assess the*
25 *usefulness or otherwise of particular material for the*
26 *purposes of cross-examination. A fact or assertion*
27 *contained in a prior statement may mean nothing to a person*
28 *without the factual instructions of the particular client,*
29 *and a great deal to a person with those instructions. A*
30 *statement, even an apparently unimportant one, may suggest*

1 *a means of inquiry or contradiction to properly-instructed*
2 *counsel, although it would mean nothing at all to a third*
3 *party."*

4

5 I rely upon that, Chairman, for the purpose of saying that
6 it is not for the Tribunal, and Mr. Dillon hasn't stated
7 this yet, but it's not for Tribunal counsel to assess the
8 importance or usefulness of the document which is being
9 restricted from the parties. It is for us to be able to
10 look at this interview with Mr. O'Toole, to use it for the
11 purpose of cross-examining him. It's obviously of
12 importance; Mr. Dillon sought to reply upon it, and, if he
13 has relied upon it, he can't, on simple rules of fair
14 procedures, then say, well, no one is entitled to look at
15 this. The witness has had his credibility challenged on
16 foot of it, and fairness dictates the parties are entitled
17 to look at this document to see if it is fully
18 representative of what Mr. Dillon has said, or, rather, has
19 he cherry-picked, to use the words that are used in some of
20 the authorities.

21

22 I will now ask the Tribunal to look at paragraph 94 of
23 Mr. Justice Hardiman's decision. It's a few pages forward,
24 the bottom left-hand part of the page. If I could -- it's
25 only the last sentence in paragraph 94 that I wish to open
26 to you, Chairman. It's at the bottom of the page.

27 Mr. Justice Hardiman says:

28

29 *"If material tending to undermine the evidence given in*
30 *public was to remain confidential, this would smack of a*

1 *form of management of the material to be revealed to the*
2 *public, inconsistent with the public nature of the full*
3 *inquiry."*

4

5 If I could just pause there and go back and look at what
6 Mr. Hardiman is stating there. He says: "*If material*
7 *tending to undermine the evidence given in public was to*
8 *remain confidential."* The material that Mr. Dillon relied
9 upon in the transcript of the interview, was used in order
10 to undermine the evidence given by Mr. O'Toole. Now,
11 Mr. Dillon is stating that that material which he relied
12 upon to undermine the evidence of Mr. O'Toole, should
13 remain confidential. Well, that is what is happening here,
14 and what Mr. Justice Hardiman says is that that "*would*
15 *smack of a form of management of the material to be*
16 *revealed to the public, inconsistent with the public nature*
17 *of the inquiry."*

18

19 And then at page -- sorry, at paragraph 112, a number of
20 pages forward, Mr. Justice Hardiman states:

21

22 "*A full and unhampered right to cross-examine a person who*
23 *makes grave allegations against another at a tribunal of*
24 *inquiry is an important constitutional right. It cannot be*
25 *impugned upon without a firm basis in law, which must*
26 *itself be consistent with the Constitution. The only basis*
27 *suggested here is a unilateral policy of confidentiality*
28 *adopted by the Tribunal, never communicated to the*
29 *applicant, and doubtfully, if at all, communicated to the*
30 *Notice Party."*

1

2

An argument I suspect Mr. Dillon will make is that

3

Mr. O'Toole is not making any allegation negative to my

4

client, and that, therefore, there is no necessity for me

5

to get the document. That is an interesting point,

6

Chairman, that was considered by Mr. Justice Hedigan in a

7

decision recently, that I will refer you to in due course,

8

but we say that, ultimately, any document which can be used

9

for our benefit, should be disclosed to us, and it's not

10

relevant, we say, the fact that an individual such as

11

Mr. O'Toole isn't making serious allegations against

12

Mr. Corrigan. We are entitled to see it.

13

14

Now, as a result of the Supreme Court decision, Chairman,

15

the case, *O'Callaghan v. Mahon*, was sent back to the High

16

Court to Mr. Justice O'Neill, and if you look at the

17

very -- second-last page in tab 8, you will see that

18

Mr. Justice O'Neill, you are actually able to see the

19

numbers in this one, it's page 92, which is the second-last

20

page in tab 8, and Mr. Justice O'Neill concludes by

21

stating, at paragraph 37 --

22

23

CHAIRMAN: I haven't quite got that yet.

24

25

MR. O'CALLAGHAN: It's page 92, the second-last page in tab

26

8, and it's paragraph 37. And this is now, it's gone back

27

to the High Court after the Supreme Court upholding

28

Mr. Justice O'Neill, and he has to now determine the nature

29

of the disclosure made, and it's an application by the

30

Tribunal as to whether the disclosure they have made is in

1 compliance with the order.

2

3 CHAIRMAN: Sorry, Mr. O'Callaghan, I haven't yet got it.

4

5 MR. O'CALLAGHAN: It's at the very back of tab 8, Chairman.

6

7 CHAIRMAN: Well, in fact, in my book, it's tab 10.

8

9 MR. O'CALLAGHAN: That is a different -- that is *Murphy v.*
10 *Flood* in tab 10, I think. Perhaps we will have a look at
11 the book. *O'Callaghan v. Mahon*, tab 8, second-last page.

12

13 CHAIRMAN: Yes, I have got O'Callaghan's case, yes.

14

15 MR. O'CALLAGHAN: Yes. It's *O'Callaghan* that I want to
16 refer to.

17

18 CHAIRMAN: Well, at the very last page of *O'Callaghan* -- on
19 the very last page, did you say?

20

21 MR. O'CALLAGHAN: It's the second-last page, which is page
22 93.

23

24 CHAIRMAN: Well, the second-last page of *O'Callaghan* is
25 page 203.

26

27 MR. O'CALLAGHAN: Sorry about that, Chairman. I apologise
28 for that, Chairman.

29

(Document handed to the Chairman)

30

1 Left-hand side. At paragraph 37, left-hand side, he says:

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"In my view, this question has to be approached from the point of view of vindicating the applicant's constitutional right to his good name and, in particular, his right to conduct a worthwhile or meaningful cross-examination for the purposes of the defence of his good name. In the course of his judgment quoted above, Hardiman said that having regard to the nature of the allegations and the circumstances prevailing, that a very full scope for the exercise of his right to cross-examination should be afforded to the applicant... talked in terms of the applicant being put in a position to conduct a worthwhile cross-examination."

I say, Chairman, we are entitled to be given a very full scope in terms of our cross-examination. I have yet to cross-examine Mr. O'Toole. He was cross-examined on the basis of a prior inconsistent statement. The fact that Mr. O'Dea wasn't investigating a mole at the time, we say is beneficial to our case, if I can put it like that. It shows that there wasn't a genuine concern at the time, irrespective of what was in newspaper articles. That issue, I suggest, is of benefit to Mr. Corrigan.

Chairman, that is the only part of *O'Callaghan v. Mahon* to which I wish to refer.

Then, there are other decisions in the booklet. At tab 9 of the book, there should be the case of *O'Brien v.*

1 Moriarty, which I hope is there.

2

3 CHAIRMAN: Tab 9?

4

5 MR. O'CALLAGHAN: Yes.

6

7 CHAIRMAN: No, tab 9 is the High Court proceedings before

8 Mr. Justice O'Neill of *O'Callaghan v. The Mahon Tribunal*.

9

10 MR. O'CALLAGHAN: I apologise, Chairman. In one of the
11 tabs, there should be *O'Brien v. Moriarty*. I am handing
12 up the authorities. I apologise. We will put them
13 together correctly.

14 (Documents handed to the Chairman)

15 I apologise about that, Chairman.

16

17 This is a decision of Mr. Justice Quirke in the case of
18 *O'Brien v. Moriarty*, and if I could ask the Tribunal to go
19 to page 495. Mr. Justice Quirke, at paragraph 95, states:

20

21 *"Whilst the Tribunal's inquiry is inquisitorial in nature,*
22 *it is now well settled that a significant duty of*
23 *disclosure attaches to tribunals which are inquisitional in*
24 *nature. The rights and interests of the applicant may be*
25 *fundamentally affected by findings and recommendations made*
26 *by the Tribunal in its report. His interest may also be*
27 *affected by the public nature of the Tribunal's hearings*
28 *and the publicity which they attract. The duty of*
29 *disclosure which rests upon the Respondent includes*
30 *disclosure of witness statements made to tribunals sought*

1 *by parties seeking to cross-examine."*

2

3 And that is the basis of what we are dealing with here,
4 Chairman.

5

6 He continues: "*I am satisfied that it it extends also to*
7 *documents obtained by a tribunal of inquiry by way of*
8 *expert professional advice upon which a tribunal itself*
9 *intends to rely in evidence. Reference has been made to a*
10 *significant body of case law dealing with the duty of*
11 *disclosure which rests upon decision-makers to disclose to*
12 *all parties having an interest in the decision any expert*
13 *or other advice or information received by the*
14 *decision-maker which is relevant to the matter in issue."*

15

16 I rely upon that citation from Mr. Justice Quirke,
17 Chairman, because it shows that there is a duty of
18 disclosure on tribunals even though they are inquisitorial
19 in nature. It is not an answer to my application,
20 Chairman, to state this is a tribunal of inquiry;
21 therefore, the authorities which have been opened in
22 respect of deployment of a document don't apply. Tribunals
23 of inquiry are covered and are referred to in terms of the
24 judgments of the Superior Courts on procedural fairness,
25 and there are rights and interests that attach to parties
26 that appear before tribunals of inquiry. That has been
27 recognised by Mr. Justice Quirke in his judgment.

28

29 And, with trepidation, I was going to ask you to go to tab
30 10, Chairman, but these are all in my submissions, by the

1 way, which I handed up.

2

3 CHAIRMAN: Yes, of course you did, yes.

4

5 MR. O'CALLAGHAN: And it's the case of *Murphy v. Flood*. If
6 I could just hand that up to you now.

7 (Document handed to the Chairman)

8 And there is just one section in it to which I beg you to
9 refer. It's at page 198 of Mr. Justice Hardiman's
10 decision. This was the case brought by Mr. Murphy, who was
11 referred to negatively in a Tribunal report, and who
12 challenged the fact that he wasn't given particular
13 information by the Tribunal. He didn't -- he didn't seek
14 to challenge the whole result of the Tribunal, but he
15 challenged part of it. At paragraph 212, Mr. Justice
16 Hardiman states, and this is at page 198, Chairman, page
17 198, paragraph 212, Mr. Justice Hardiman says:

18

19 *"I have to say that I simply do not understand the basis on*
20 *which, to take the simplest example, the allegation made*
21 *about the other politician was redacted. If the ordinary*
22 *disclosure rules applied as expounded in O'Callaghan v.*
23 *Mahon then anything capable of supporting the plaintiff's*
24 *case, or undermining that of their accuser, should have*
25 *been produced."*

26

27 I rely upon that, Chairman, because it shows that, in many
28 respects, the discovery and disclosure obligations of a
29 tribunal are similar to the discovery obligations in
30 adversarial litigation. If there is a document that is

1 capable, not that it must support but that it's capable of
2 supporting my client's case here, which is that there was
3 no collusion, or that it undermines the accusers, the -- I
4 suppose Mr. Fulton is the only accuser here who has come in
5 and made a direct allegation against my client; if that is
6 available, it should be produced.

7

8 So, Chairman, that is the second ground upon which I have
9 relied, that there is a body of tribunal case-law which
10 says that tribunals have to comply with rules of fair
11 procedures. There is an established precedent that
12 tribunals should provide statements with witnesses whom the
13 tribunal has interviewed, in order to facilitate parties to
14 cross-examine that witness.

15

16 The third ground upon which I rely is, I suppose, the most
17 simple ground of all. Mr. O'Toole is a witness who has
18 come before the Tribunal to assist it. He assisted the
19 Tribunal previously by giving an interview to Tribunal
20 counsel. He, absolutely, is entitled to a copy of that
21 document. It's a matter, I suppose, to be advanced by
22 counsel for the Garda Siochana, and I know there may be an
23 issue as to whether or not he appears for him, but
24 certainly, an individual who provides a witness statement
25 or who provides an interview to the Tribunal, is absolutely
26 entitled to it. It is legally unstatable to suggest that
27 somebody who volunteers an interview with the Tribunal, a
28 transcript is kept of it, and then the Tribunal states that
29 you are not entitled to be given a copy of that. If
30 Mr. O'Toole is given a copy of it in order to answer

1 questions that have been put to him by Mr. Dillon, well,
2 then, the other parties who are here for the examination of
3 Mr. O'Toole should also be given access to it.

4
5 Chairman, they are the grounds upon which I make my
6 application. As I say, there are three grounds. They are
7 set out in the submissions that have been put in to the
8 Chairman. I am sure Mr. Dillon will have observations to
9 make, and I can reply in due course, if that is OK with the
10 Tribunal.

11
12 **SUBMISSIONS BY MR. CALLAN:**

13
14 MR. CALLAN: Mr. Chairman, on behalf of Mr. Coffey and
15 myself, we support the submission 100 percent, the most
16 impressive submission I have heard in many years on a
17 matter of this kind. And I would just make one point. If
18 you visualise this situation, Mr. Chairman: Suppose that
19 Mr. Dillon had not raised this matter in cross-examination
20 and that you and that the -- the issue of the contradiction
21 had not emerged, and suppose, later on, in two or
22 three months, in whatever time it will be, that you give
23 your decision, it emerged that that contradiction was there
24 and it hadn't been put before you and hadn't been tested in
25 cross-examination in the way Mr. O'Callaghan had said, you
26 would feel, and everybody else connected with the Tribunal,
27 and the public, would feel, that this hadn't been a proper
28 inquiry. It's absolutely clear that this -- that had
29 Mr. Dillon not elected to bring it out by
30 cross-examination, by cross-examination, he would have been

1 obliged to disclose it to have a proper inquiry, and, of
2 course, once he raised it in cross-examination, it was
3 going to be disclosed. That is all I would add to what I
4 have said is a most impressive -- I almost should apologise
5 for adding anything to Mr. O'Callaghan's and Mr. Lehane's
6 submission. Thank you very much.

7

8 MR. DILLON: I would like to remind you, Chairman, that, on
9 Friday, Mr. Coffey, on behalf of Mr. Colton, said he was
10 going to have no questions, so I don't understand why a
11 submission is being made on behalf of Mr. Colton. Anyway,
12 I will leave it at that.

13

14 CHAIRMAN: Well, it hasn't been lengthy.

15

16 **SUBMISSIONS BY MR. McGUINNESS:**

17

18 MR. McGUINNESS: Chairman, may I just draw your attention
19 to a couple of other matters from a couple of learned
20 textbooks in the matter, which are relevant to the matter.
21 The first is an extract from Mr. McGrath's book on
22 'Evidence'.

23 (Document handed to the Chairman)

24

25 And it's at paragraph 362, and it quotes Section 5 of the
26 Criminal Procedure Act, 1865, as follows there:

27

28 *"A witness may be cross-examined as to previous statements*
29 *made by him in writing or reduced into writing relative to*
30 *the subject matter of the indictment or proceeding without*

1 such writing being shown to him, but if it is intended to
2 contradict such witness by the writing, his attention must,
3 before such contradictory proof can be given, be called to
4 those parts of the writing which are to be used for the
5 purpose of so contradicting him, provided always that it
6 should be competent for the judge, at any time during the
7 trial, to require the production of the writing for his
8 inspection, and he may thereupon make such use of it for
9 the purpose of the trial as he thinks fit."

10
11 That is the section. Just for the avoidance of doubt, the
12 Criminal Procedure Act of 1865 applies to civil proceedings
13 also, as provided for by that Act.

14 The author goes on to say:

15
16 "Although Section 5 expressly provides that a witness may
17 be cross-examined on a previous inconsistent statement made
18 by him or her, without it being shown to the witness, it
19 appears that the cross-examining party must have a copy of
20 the document in court even if he or she does not intend to
21 contradict the witness with it. If the cross-examining
22 party wishes to contradict the witness using the document,
23 the document should first be given to the witness with an
24 invitation to read the document or the relevant portion of
25 it. The witness should then be asked whether he or she
26 wishes to change his or her evidence in the light of the
27 contents of the statement. If the witness declines to
28 change his or her evidence, then the cross-examining party
29 can accept that answer and is under no obligation to prove
30 the document. However, if the cross-examining party wishes

1 to contradict a witness using the document, the document
2 must be proved in evidence. The cross-examining party will
3 then read the statement or the relevant portions aloud to
4 the witness and put it to him or her that the earlier
5 statement is truthful, rather than the testimony of the
6 witness. The document may then be inspected by the
7 Tribunal fact, although the trial judge, in exercise of his
8 or her discretion under Section 5, may decide not to leave
9 the entirety of the document to the jury but only those
10 portions that were the subject of cross-examination."
11

12 Now, there is another extract from Mr. McGrath's book on
13 the next page, and it's in the context of where documents
14 are produced to refresh the memory of a witness, and I draw
15 attention to this because it's not clear, and I don't want
16 to make an assumption that Mr. Dillon was attempting to
17 impeach the credit of his own witness or whether he was
18 trying to prove that he had made an inconsistent statement
19 or whether he was inviting the witness to refresh his
20 memory. But on the right-hand side, it's under the heading
21 "D. Cross-examination on the Document," it says:

22
23 "A document used to refresh memory, or at least those
24 portions that refer to the subject matter of the
25 proceedings, must be produced for inspection by the
26 opposing party. The opposing party is entitled to
27 cross-examine the witness on the contents of the document
28 and, in general, such cross-examination will not make the
29 document admissible in evidence. However, the document may
30 become admissible as evidence going to the credibility of

1 the witness but not as the evidence of the truth of its
2 contents where (a) the cross-examination goes beyond the
3 parts of the document used by the witness to refresh his or
4 her memory and raises new matters; (b) the nature of the
5 cross-examination involved the suggestion that the witness
6 has fabricated his or her evidence, in which case the
7 document is admissible to rebut the express or implied
8 suggestion that the document is concocted and for the
9 purpose of allowing the jury to assess whether the document
10 is genuine; (c) the document is inconsistent with the
11 witness's evidence, in which case it can be admitted as
12 evidence of that inconsistency; and (d) the document tends
13 to contradict the evidence and undermine the credibility of
14 the witness."

15
16 So, leaving aside a technical legal issue about the
17 applicability of the statutory provision I have referred
18 to, that is the purpose and the principle and the rationale
19 behind either introducing a document to a witness, a
20 document which purports to record something he said before,
21 or using the document to refresh a witness's memory. And
22 in my submission, it establishes that, in terms of fair and
23 proper procedures, once such a document is deployed, as it
24 was deployed, and the contents of interview were put to the
25 witness, it makes it a relevant issue as to what the
26 witness has said on a previous occasion, and the very
27 purpose of cross-examination of a witness is so that one
28 can elicit evidence from the witness, good, bad or
29 indifferent to one's cause, if I could call it a cause.
30 And the right to cross-examine, whether it's

1 Mr. O'Callaghan's or anyone else's or myself and
2 Mr. Durack, is obviously a right which is dependent upon --
3 the proper exercise and the full exercise of it is
4 dependent upon the material which the witness has given an
5 account of, being made available. And in my submission,
6 it's a fair procedure to require it to be made available
7 where counsel for the Tribunal has deployed it, and it's
8 not -- it's not fair for him, and him only, to have access
9 to that document, and then to put it back under some cloak
10 of secrecy which may be alleged to attach to it.

11
12 More importantly, from the point of view of fair
13 procedures, there is another extract from another book,
14 Mr. Keane's book on 'Evidence'. It's the seventh edition
15 of Mr. Keane's book on 'Evidence'.

16 (Document handed to the Chairman)

17 It's published by Oxford, 2008. Again, it deals with this
18 issue of previous inconsistent statements, and it quotes
19 Section 4 of the Act, and then, after that, it says:

20
21 *"This section assumes correctly the existence of a*
22 *common-law right to cross-examine a witness about a former*
23 *inconsistent statement. It is not confined to previous*
24 *statements made on oath."*

25
26 So I just open it for that purpose. The right to
27 cross-examine must extend to other occasions on which the
28 witness has given an account of events, and that is a very
29 simple proposition, but it's supported by the judgment of
30 Mr. Justice Hardiman in the *O'Brien* -- or, sorry, the

1 O'Callaghan case itself. And if I could refer you to --
2 you have got my copy there, Chairman, but it's at page 57
3 of the judgment in the bound book of the Irish Reports.

4

5 CHAIRMAN: Sorry, are you referring to the Irish Reports?

6

7 MR. McGUINNESS: Yes, the Irish Reports.

8

9 CHAIRMAN: Volume 2?

10

11 MR. McGUINNESS: Yes. Page 57.

12

13 CHAIRMAN: Oh, page 57, yes.

14

15 MR. McGUINNESS: And, Chairman, you will see there that
16 Mr. Justice Hardiman refers to a case of *DPP v. GK*, which
17 was a decision of the Court of Criminal Appeal, and there,
18 what happened in that case was that the -- Mr. Justice
19 Carney, in the Central Criminal Court, refused to provide a
20 transcript of a previous trial for the purposes of a
21 retrial, but I appeared in that matter, in fact, and the
22 Court of Criminal Appeal set aside the conviction on the
23 basis that the transcript of what the witness had said in
24 the previous trial, should be made available, and the
25 judgment of the Court is given in that case by Mrs. Justice
26 Denham.

27

28 But Mr. Justice Hardiman goes on to refer to another case,
29 *BJ v. The DPP*, and that is in the middle of page 57, and he
30 says:

1
2 *"This judgment was cited with approval by the Supreme Court*
3 *in BJ v. DPP. In that case, the first statement in the*
4 *nature of a complaint by a third party was not available*
5 *because the guard to whom it was made had omitted to record*
6 *it. Having cited a portion of the judgment in GK, the*
7 *judgment of the Court continued: In my view, there is no*
8 *rational basis for distinguishing between a previous*
9 *statement made by a witness in a trial and a previous*
10 *statement made in some other context."*

11
12 So, clearly, the Supreme Court have clearly extended the
13 right to receive an account, howsoever written, from a
14 transcript in a sworn case, to even unsworn material, such
15 as has been made use of here.

16
17 CHAIRMAN: Yes.

18
19 MR. MCGUINNESS: And, in my submission, there can be no
20 injustice if -- and there would be an injustice if it's
21 withheld, but there can be no injustice if it's provided to
22 the parties.

23
24 Insofar as the Commissioner is concerned, and the issue of
25 representation is concerned, myself and Mr. Durack and
26 Mr. Baker and Ms. Cummins are instructed on behalf of the
27 Commissioner, who has representation on behalf of An Garda
28 Siochana, and it's certainly always been our understanding
29 that that embraces current and past members, whether men of
30 low rank or men of high rank, and we have been consulted by

1 many of both categories, high and low, in relation to
2 matters that the Tribunal is concerned. And Ms. McKeivitt,
3 indeed, the Solicitor to the Tribunal, has been
4 corresponding with us in relation to Mr. O'Toole, and we
5 have consulted with Mr. O'Toole, indeed. So we certainly
6 stand in the position of people who are representing him.
7 And the importance of that is, I hope, manifest, Chairman,
8 because Mr. O'Toole, as I understand it, hadn't been given
9 any express notice that his credibility was going to be
10 impugned by Tribunal counsel within minutes of getting into
11 the box, and it went as far as - Mr. O'Callaghan has,
12 helpfully, quoted the portion of the transcript - it went
13 so far as Tribunal counsel suggesting to Mr. O'Toole that
14 he had been tailoring his evidence to match that of the
15 Minister for Justice. Now, these are matters which reflect
16 on the character and credibility and good name of
17 Mr. O'Toole. And it gives it an added impetus and
18 justification that when such a transcript is sprung and
19 deployed and used within minutes in an attempt to get the
20 Tribunal to take a view, and a harsh view, perhaps, of his
21 credibility, that the witness, and those who have advised
22 Mr. O'Toole, shouldn't have access to it. In my
23 submission, that couldn't be stood over.

24
25 I adopt the same position in relation to an issue of
26 privilege as Mr. O'Callaghan does. I don't accept that
27 there is any privilege attaching to the material such as
28 would justify its nondisclosure at this stage.

29
30 I do, however, want to adopt Mr. O'Callaghan's arguments in

1 that regard insofar as the judgments of the courts relating
2 to deploying privileged matters are applicable. If it is
3 privileged, they have been deployed.

4 Thank you, Chairman.

5

6

SUBMISSIONS BY MR. MacGUILL:

7

8 MR. MacGUILL: In respect of Mr. Hickey, Chairman, I would
9 also support the submissions made by Mr. O'Callaghan. And
10 this is an extremely important issue insofar as Mr. Hickey
11 is concerned, and the fact that the Tribunal, through their
12 counsel, have now brought to the public's attention the
13 fact that there is an inconsistency between the Tribunal's
14 earlier interviews and the evidence that has been heard
15 today, and, having brought the transcripts up to confront
16 the witness, we must all be put in a position of being able
17 to access those to assess the relevance of the evidence.

18

19 And I make this criticism from a very specific point of
20 view, which, as you will recall it, formed the part of
21 earlier correspondence on behalf of Mr. Hickey. Mr. Hickey
22 requested, but was denied, copies of the transcripts of his
23 own interviews with the Tribunal counsel, and we are very
24 concerned to establish precisely what was known to
25 interviewers on behalf of the Tribunal and at what point,
26 because that puts everything into a context. Our specific
27 complaint, you will recall, Chairman, is, it was put by a
28 Tribunal interviewer to Mr. Hickey that he had been
29 interviewed by Commissioner O'Dea, which he had not, in
30 fact, been, and that is very relevant to the pattern of

1 events that took place at this time. And in earlier
2 rulings, you had ruled against us being provided with
3 documents that were not critical of us or making
4 allegations against Mr. Hickey, where, in fact, the
5 significance of this element of evidence is that Mr. Hickey
6 was not considered relevant to the investigation at all at
7 the relevant time because it was clear he had not the means
8 of the knowledge that could have facilitated the wrongdoing
9 into which you are inquiring.

10
11 So, in that context, this is a massively central issue from
12 Mr. Hickey's point of view, and it's wholly wrong that the
13 Tribunal would keep in its pocket, so to speak,
14 inconsistencies arising from earlier interviews, when they
15 know them. They should have been disclosed to us months
16 ago, at the very beginning of this exercise, and were asked
17 for, and it would be a rudimentary part of disclosure in a
18 far less serious case than the work of this Tribunal. I
19 think Mr. O'Callaghan has very fairly set out the position.
20 The allegations made against each of the named members of
21 An Garda Siochana are extremely serious, and they are
22 routinely publicly pilloried by virtue of the association
23 of the work of this Tribunal with their three names, and
24 they must be given a fair opportunity to defend themselves,
25 and this is one example, and it's only one, of the examples
26 where it appears that the constitutional and natural
27 justice that they would get in another court, even a civil
28 court, is being denied them, in the misunderstood guise of
29 Tribunal confidentiality. I accept entirely what
30 Mr. O'Callaghan has said, I entirely accept the judgments

1 that he is relying on. There is no issue of privilege and
2 there is no issue of confidentiality, now that the Tribunal
3 have conducted themselves in the way they did in impugning
4 their own witness last week, and we would be anxious to
5 have the material and we will then reserve our position as
6 to what happens after that.

7

8 CHAIRMAN: Thank you, Mr. MacGuill. Anybody else wish to
9 say anything?

10

11 **SUBMISSIONS BY MR. DILLON:**

12

13 MR. DILLON: If I might reply at this point, Chairman. I
14 have already given you my views on the submission by
15 Mr. Callan, and I wasn't on notice that any issue was going
16 to be raised on behalf of Mr. Hickey. Specifically, last
17 Friday, you were told that it was not thought that there
18 were going to be any questions on behalf of Mr. Hickey, so,
19 quite frankly, I put Mr. Hickey and indeed Mr. Colton out
20 of mind for the purpose of this application. So I don't
21 propose dealing with the issue of Mr. Hickey, save for
22 this, and I do have to put this on the record at this
23 stage: It is submitted to you that it's clear that
24 Mr. Hickey did not have the means of knowledge. Nothing of
25 the sort is clear. That suggests that there is evidence
26 showing that he couldn't possibly have known. There is no
27 such evidence, I hasten to add, lest there be any confusion
28 on the matter. But, that said, as regards Mr. Hickey, I am
29 not in a position to deal with it today and I propose not
30 to deal with it today. I am on notice of the application

1 made on behalf of Mr. Corrigan and the Garda
2 Commissioner --

3

4 MR. MacGUILL: Sorry, Chairman, can I -- sorry,
5 Mr. Dillon --

6

7 MR. DILLON: Can I not finish my submission?

8

9 MR. MacGUILL: I was applying to the Chairman for leave to
10 intervene.

11

12 MR. DILLON: I'd rather he didn't, and I could finish my
13 submission.

14

15 MR. MacGUILL: Well, first of all, you indicated you were
16 not going to deal with my point today, but you left hanging
17 in the air an outrageous suggestion, Chairman, which was
18 that Mr. Hickey is here to prove his innocence. The idea
19 that your counsel could say there is no evidence that
20 Mr. Hickey did not have the means of knowledge, it's the
21 reverse: it is for the Tribunal to demonstrate that he
22 had. He wasn't on duty at the relevant time. We now know
23 that. But the idea that he should prove a negative or that
24 the perception of your counsel that his obligation is to do
25 so, is outrageous, Chairman.

26

27 CHAIRMAN: That is not putting it correctly. First of all,
28 Mr. Hickey hasn't yet given evidence, but, certainly, he
29 has not given evidence that he was over there, but I think
30 it's muddying waters to introduce that at this present

1 time. I'd prefer if we could deal with Mr. O'Callaghan's
2 application.

3

4 MR. MacGUILL: Chairman, I am very concerned that this
5 point is being missed by the Tribunal. We have
6 established, through a number of witnesses, that Mr. Hickey
7 was attached at the time to Unit C. Unit C were not on
8 duty on the day, either at the time of the first shift
9 finishing at -- he was not on the 6:00 to 2:00 shift, nor
10 was he on the 2:00 to 10:00 shift, the only material
11 members who could have known, even accidentally, the visit
12 was to take place. He came on duty after the murders.
13 That has been established. The investigation by Mr. O'Dea
14 did not include Mr. Hickey because he was not on duty.
15 That has been established. In the interviews, and this is
16 the criticism I make of Mr. Dillon, in the interviews with
17 Mr. Hickey, your Tribunal put to him that he had been on
18 duty, some 17 years after the event, with which he agreed,
19 and we only discovered after that that, at all times,
20 Tribunal personnel were in possession of the file showing
21 he wasn't. He was treated in a cavalier and unfair
22 fashion. And that is why the Tribunal and their approach
23 and the material that will be yielded from the transcript
24 of the interview with Mr. O'Toole, is vital.

25

26 CHAIRMAN: Well, I am not sure that it is, but I note what
27 you say, Mr. MacGuill.

28

29 MR. DILLON: Two things, Chairman, first of all, that must
30 be emphasised: There is a proper procedure for making

1 submissions. A party makes submissions and there is a
2 reply, and the party then can reply to that. Does not
3 interrupt while submissions are being made. That's the
4 first point. The second point is, and I have to say this
5 because the contrary is being purported to you: Mr. Hickey
6 has said in his statement that he was in the station on the
7 day - now, I can't put it any higher than that - and
8 Mr. MacGuill has to deal with that. Now, I propose leaving
9 it at that for the time being.

10
11 Now, I am going to deal with the applications made on
12 behalf of Mr. Corrigan and the Garda Commissioner. The
13 first thing I think I should say is this: that there is a
14 fundamental problem with these applications, and it goes to
15 the very heart of these applications, which is this:
16 It seeks to confuse a general allegation that has been made
17 with the particular evidence given by Mr. O'Toole.
18 Mr. O'Toole has made no allegation whatsoever of wrongdoing
19 by any party, and that is what we are considering today, is
20 the evidence of Mr. O'Toole, not the overall evidence that
21 is being considered by the Tribunal.

22
23 So, insofar as Mr. O'Toole has made no allegation against
24 any party, the Garda Commissioner or Mr. Corrigan, on what
25 basis is he going to be cross-examined? Is it to test the
26 credibility of his evidence to you, which is his evidence
27 to you, that the purpose of Assistant Commissioner O'Dea's
28 visit to Dundalk was to report on the circumstances and
29 arrangements? But that is exactly what they are going to
30 hear. They are hardly going to test the credibility of

1 that or the veracity of that. It's a complete nonsense.
2 Leave well enough alone.

3

4 Now, it is not correct to say that the transcript of
5 interview was introduced to impugn Mr. O'Toole. That is
6 not correct. The sequence of events was this: The
7 statement which was in the possession of all the parties
8 was initially put to him, and then, Chairman, so that you
9 should understand the position, that this wasn't just A
10 versus B or black versus white; that you should understand
11 that there was some consistency in what Mr. O'Toole said to
12 the Tribunal, in that, in the course of the private
13 investigation, he had said what is set out very helpfully
14 in Mr. O'Callaghan's submissions; namely, that the purpose
15 was to investigate or to look into the question of a leak.
16 That was the purpose of introducing it, to show to you
17 that there was a consistency, because you are entitled to
18 that, you are entitled to know that. And if you have that
19 knowledge, it has to be put before you in public. Does it
20 mean that the confidentiality of the document as a whole
21 has been waived? Of course not. But I accept that the
22 confidentiality of the two questions and answers that were
23 being put to him are in the public domain now. I have no
24 difficulty; I offered, on Friday, to photocopy the relevant
25 extracts and provide them to interested parties for their
26 use. What use they could possibly make of it, I do not
27 know, because cross-examination is for the purpose of
28 testing evidence which is prejudicial to your client. You
29 don't test evidence which supports your client. It never
30 happens that way. So that is the first and the absolutely

1 fundamental difficulty with these applications.
2 Mr. O'Toole, and it's important to remember we are focusing
3 on the evidence of Mr. O'Toole, has said absolutely nothing
4 to the prejudice of either the Garda Commissioner or
5 Mr. Corrigan. Quite the contrary. So, at that level
6 alone, these applications are flawed and should be refused.

7
8 Now, I will go on, however, to deal with the substantive
9 points that were made.

10
11 The first, on behalf of Mr. Corrigan, was that the document
12 was deployed. It wasn't deployed, Chairman. The document
13 was not deployed. Two questions and answers were put to
14 the witness, and that is all.

15
16 Secondly, you were invited to consider the authority of
17 DPP -- *Hannigan v. DPP*. And what I am about to say applies
18 to all the criminal authorities that have been opened to
19 you, and it comes from the decision of Ms. Justice Denham,
20 as she then was, in *O'Callaghan v. Mahon*, reported at
21 [2008] Irish Reports, Volume 2 of the 2008 Reports at
22 page -- well, the report starts at page 514, and the
23 passage I wish to open to you is paragraph 206 at page 579.
24 Now, maybe I should open the previous paragraph.

25
26 CHAIRMAN: Sorry, what year are the Reports?

27
28 MR. DILLON: 2008. Yes. "*The investigative stage is*
29 *necessarily held in private. Decisions as to the contents*
30 *of the briefs are -- also made at early stage are not*

1 *final. They may be added to at any time."*

2 Now, this is the point: "*To make the point that this*
3 *review relates to decision-making in a tribunal in a*
4 *different way. The decisions in issue do not arise in a*
5 *criminal trial. This is not a review of a criminal trial.*
6 *Rules of procedure appropriate in a criminal trial are not*
7 *appropriate in a tribunal at any stage of the procedure.*
8 *It would be entirely wrong to require of a tribunal that it*
9 *conduct its business in the manner of a criminal trial.*
10 *The protection of constitutional rights does not require an*
11 *entitlement to procedure as in a criminal trial at any*
12 *stage of a tribunal."*

13
14 So all the arguments grounded on the criminal law, such as
15 a witness is entitled to see a statement, that is a
16 provision of the criminal law; that does not arise
17 necessarily in the context of tribunal. It's a matter for
18 the tribunal.

19
20 Then, you go on to deal with a number -- you have to deal
21 with a number of other authorities which have been opened
22 to you at paragraph 17 to 21 of the submissions on behalf
23 of Mr. Corrigan. Now, just, perhaps, stand back for one
24 second. It's clear that confidentiality is not an
25 absolute, and that is made clear in the *O'Callaghan*
26 decision of [2006] Volume 2 of the Irish Reports, page 32,
27 large portions of which have already been opened to you.
28 And you may recall that, in the context of the evidence of
29 Kevin Fulton, which was -- in his evidence, there was a
30 witness whose evidence was crucial in impugning

1 Mr. Corrigan's good name. You undertook to review the
2 documentation from the private investigation so as to
3 identify in bringing to the attention of Mr. Corrigan's
4 legal team any inconsistencies. There was no objection to
5 that course of action at the time.

6

7 The cornerstone law, if I can call it that, of -- in this
8 area of the law of tribunals, is that of *In Re Haughey*,
9 [1971] Irish Reports at page 217. This has already been
10 opened to you. And even though this related to an inquiry
11 by the Public Accounts Committee of the Oireachtas,
12 nonetheless the principles have applied in the context of
13 tribunals of inquiry. "*A party should be furnished with a*
14 *copy of the evidence which reflected on his good name.*"
15 That is all. Now, this Tribunal has gone well beyond that
16 in circulating to parties statements insofar as it is
17 possible. There have been occasions when it has not been
18 possible for reasons of security, but to circulate all
19 statements, irrespective of whether it reflected on the
20 good name of the party. "*That is a person whose good name*
21 *has been affected shall be allowed to cross-examine his*
22 *accuser/accusers.*"

23

24 Now, firstly, Mr. O'Toole has not made any -- or given any
25 evidence or made any statement which reflects on the good
26 name of any party. Secondly, he is not an accuser; he has
27 accused nobody of anything. He should be allowed to give
28 -- this is -- "*The person affected should be allowed to*
29 *give rebutting evidence.*" Well, that doesn't arise here,
30 anyway, because nothing has been said by Mr. O'Toole which

1 impugns the good name of anybody. *"And he should be*
2 *permitted to address, again by counsel, the Committee in*
3 *his defence."*

4
5 You will, in due course, have written submissions, I am
6 sure, from the parties.

7
8 Now, it's submitted that, notwithstanding this very liberal
9 approach by the Tribunal, it does not, of itself, of
10 course, give an entitlement to further documentation held
11 by the Tribunal. My submission is that disclosure of the
12 full transcript of the interview -- we have made disclosure
13 of two questions and answers, that remains in the public
14 domain, but disclosure of the full transcript is not
15 absolutely essential for the purpose of cross-examination
16 so as to vindicate the good name of the Commissioner or
17 Mr. Corrigan, because their names have not been impugned.
18 First of all, their names have not been impugned; and,
19 secondly, it's not absolutely essential, even if that had
20 happened. However, the key point is that their good names
21 have not been impugned, and that is the hurdle that both
22 the Garda Commissioner and Mr. Corrigan have to get over,
23 if they are to establish an entitlement - it's for you
24 still to rule on the entitlement - but even to establish an
25 entitlement to access to the full transcript.

26
27 Now, the *O'Callaghan* decision, that is the -- the one that
28 was reported in 2006, which has been opened to you
29 extensively, the majority decisions were those of -- that
30 was Mr. Justice Geoghegan, with whom the Chief Justice,

1 then-Chief Justice Murray, and I think it was Mr. Justice
2 Fennelly, agreed; Mr. Justice Hardiman was the minority
3 decision. But the -- that case, which did direct
4 disclosure of notes and memoranda, and what have you,
5 lying -- which lay behind the statement, that was made in
6 the very clear exceptional circumstances where
7 Mr. O'Callaghan, for the reasons best known to himself,
8 decided to make fresh allegations there and then in the
9 witness-box. Now, Mr. O'Toole has not done that, he has
10 done nothing of the sort. There has been no allegation
11 against anybody, let alone a fresh allegation.

12
13 So what you have is, you have two authorities; the first is
14 the *O'Callaghan* [sic] decision, which establishes that -- I
15 am terribly sorry, I did say *O'Callaghan*; I meant to say
16 the *Haughey* decision -- which establishes that, where a
17 person's good name is to be impugned, he should be
18 furnished with a copy of the evidence. That means the
19 statement. Because what evidence is given, certainly in
20 this Tribunal, is grounded on the statement prepared by the
21 witness. Now, there are occasions when, of course, when
22 witnesses don't prepare statements, but let's not go down
23 that blind alley.

24
25 Now, so you start on that premise, and then go after it on
26 to that, there is the requirement of a tribunal to disclose
27 any documentation that stands behind that statement. But,
28 only, it is restricted to the circumstances where the
29 witness who was giving evidence has made a fresh allegation
30 for the first time in the witness-box, of which nobody --

1 and it was quite clear from reading the judgment, the
2 judgment of Mr. Justice Hardiman, even the Tribunal counsel
3 were completely taken aback by what Mr. Gilmartin had to
4 say. That, simply, does not arise here.

5

6 Now, Mr. Justice Geoghegan went on to say that the facts of
7 this case, that is the *O'Callaghan* case, are unusual:

8

9 *"In general, it is most undesirable that Judicial Reviews*
10 *should be held in relation to particular rulings made by a*
11 *tribunal while the hearings are still running. As I have*
12 *already indicated, there is, in my view, a wide latitude*
13 *given to tribunals to fashion their own procedures and the*
14 *courts should not lightly interfere. For that reason, I*
15 *would prefer to base my conclusion on the narrow grounds*
16 *than those put forward by Hardiman J. In particular,*
17 *having regard to the clear views of this court in In Re*
18 *Haughey, it would not seem to me to be necessary to*
19 *consider to what extent the numerous cases and statutes*
20 *relating to the laws of evidence for the purpose of the*
21 *courts must necessarily be applied to every*
22 *cross-examination in a tribunal."*

23

24 So the majority view of the Supreme Court in *O'Callaghan* is
25 quite clear. Mr. Justice Geoghegan noted at an earlier
26 point in his judgment that, given the clear public interest
27 from time to time in having matters investigated by a
28 tribunal established under the Act of 1921, it may well be
29 that the requirements of the constitutional obligation to
30 vindicate, as far as possible, the good name of the citizen

1 are, in that context, somewhat less stringent than in other
2 circumstances. He went on to hold that he was expressing
3 no view as to whether all Rules of Evidence fashioned by
4 the courts or derived from the Common Law Procedure Acts
5 are necessarily and in all circumstances equally applicable
6 to a tribunal established under the Act of 1921.

7
8 Now, Mr. McGuinness opened to you the provisions of the
9 Criminal Procedure Act of 1865, stating that it applies
10 both in criminal and in civil matters. It was quite clear,
11 from what Mr. Justice Geoghegan says, that that is not
12 necessarily of application in this Tribunal. But more
13 importantly is this, and Mr. McGuinness put before you an
14 extract from Keane on 'Evidence', page 197, the section
15 which deals with previous inconsistent statements, and he
16 writes this: *"If it is put to a witness in*
17 *cross-examination that he has made a previous oral or*
18 *written statement inconsistent with his testimony and the*
19 *witness admits that he has made such a statement, no*
20 *further proof of the making of the statement is needed or*
21 *permitted."*

22
23 Now, I will pause there for a moment. Mr. O'Toole accepts
24 that he said what he said to the Tribunal prior to giving
25 his evidence. He didn't deny it. Because Mr. Keane goes
26 on to say: *"However, if the witness denies making the*
27 *statement or does not distinctly admit that he made it and*
28 *the statement is relative to the subject matter of the*
29 *indictment, then it may be proved against him."*

30

1 And then he goes on to deal with Sections 4 and 5 of the
2 Criminal Procedure Act. But Mr. O'Toole was very candid
3 with you. He said, "Yes, I did say that. I was mistaken.
4 I subsequently had a conversation. I" -- sorry, he became
5 aware of the evidence of the former Minister for Justice,
6 and he had a conversation with Ned O'Dea. And he said, "I
7 was wrong." He did not resile from the fact that he had
8 made an earlier prior inconsistent statement. So, in these
9 circumstances, "*further proof of the making of the*
10 *statement,*" which is what he said to the Tribunal, in his
11 written statement and in interview, is not needed or
12 permitted. That is the rule in the courts.

13
14 Insofar as the parties are urging you to apply the rules of
15 the courts, it seems to me they need to deal with that one.

16
17 Now, it is, of course, the case, that while the Tribunal's
18 proceedings are not a criminal trial, they are proceedings
19 to which the notion of due process is relevant. But then
20 he went on to say this is especially so, and this is the
21 particular circumstances of this case, and I am sorry for
22 harping on this point but it's very important:

23 "*As in relation to the applicant, grave allegations are*
24 *made without notice, in circumstances where the credibility*
25 *of the person making them is a serious issue.*"

26
27 So, first of all, Mr. O'Toole made no grave allegation. He
28 made no allegation, grave or otherwise, without notice.
29 And is it seriously contended that, having regard to the
30 evidence that he gave to you, that his credibility is a

1 serious issue? It isn't. It couldn't be. It just simply
2 couldn't be.

3

4 Insofar as the judgment of Mr. Justice Hardiman is relied
5 upon, it should be noted that he held that a very full
6 scope for the exercise of in *Re Haughey* rights on the --
7 sorry, there should be a very full scope of the *In Re*
8 *Haughey* rights on the part of a person impugned. Nobody is
9 impugned by the evidence of Mr. O'Toole. But he went on to
10 say: "*The discretion of a tribunal or similar body must be*
11 *very much greater in a less extreme situation and I don't*
12 *wish to say anything in this context to undermine that*
13 *discretion.*" So you are invited by Mr. Justice Hardiman
14 not to take the -- his views, where you are dealing with a
15 very much less extreme situation. We certainly are.
16 Because not one critical word, I will say it again, not one
17 word critical of the Garda Commissioner or Mr. Corrigan has
18 been uttered.

19

20 Now, there is an important passage in the judgment of
21 Mr. Justice Hardiman, and I mention this because the
22 parties are relying upon his judgment, and, as I say, it's
23 a minority judgment, but it's a very useful passage, I
24 believe, where he says -- he noted that -- he held that any
25 interest in the confidentiality of communications between
26 potential witnesses and the Tribunal during the preliminary
27 investigation was not absolute. However, he went on to
28 say: "*However, I do believe that the Tribunal owes an*
29 *obligation to those who gave information*" -- this is an
30 obligation of the Tribunal now -- "*an obligation to those*

1 *who gave information in its preliminary investigative*
2 *stage," as well as to others, "to keep such information*
3 *confidential unless and until it decides to hold an inquiry*
4 *in public into the relevant subject matter, and, even after*
5 *that, until any person impugned in such material has had a*
6 *proper opportunity for confrontation, challenge and*
7 *rebuttal."*

8
9 So, even Mr. Justice Hardiman says you have a duty to
10 maintain confidentiality as part of your -- as part of your
11 modus operandi, if I can put it that way, in terms of
12 conducting your inquiry.

13
14 Now, central to the issue you have to decide is whether
15 Mr. O'Toole has offered any evidence which impugns
16 Mr. Corrigan or the Commissioner. What the applicant, the
17 two applicants seek to do, is to ask you to breach the duty
18 of confidentiality in circumstances where Mr. Justice
19 Hardiman has suggested it should not be breached.
20 Mr. Justice Hardiman also emphasised that disclosure is to
21 be made to a person impugned by the evidence, bearing in
22 mind, of course, nobody is impugned here, and we have two
23 applicants but neither of them is impugned.

24
25 I think I have dealt with the specific points that have
26 been raised. If I haven't, I apologise. I am just going
27 back over my notes, because I believe that the -- the
28 crucial difficulty with these submissions is that they
29 repose upon the proposition that allegations are being
30 made - well, specifically against Mr. Corrigan, and this is

1 supported, as ever, by the Garda Commissioner, that no such
2 allegations are being made against him by Mr. O'Toole. If
3 such an allegation had been made then, yes, they would be
4 entitled to see that, there is no question about it. But
5 otherwise, you have a duty to maintain the confidentiality
6 unless and until it can be established that you are
7 required to waive that confidentiality because somebody's
8 name has been impugned. Nobody's name has been impugned.
9 For these reasons, I request that you refuse these
10 applications.

11
12 CHAIRMAN: Thank you very much.

13
14 **REPLYING SUBMISSIONS BY MR. O'CALLAGHAN:**

15
16 MR. O'CALLAGHAN: Chairman, I just have eight points in
17 reply to Mr. Dillon, and I will be quite brief.

18 Mr. Dillon's main point, if I fairly assess it, is that
19 Mr. O'Toole is not an accuser, he is not making allegations
20 against Mr. Corrigan; therefore, we are not entitled to the
21 protections that have been identified in the decisions of
22 the Superior Courts, and which I opened to you earlier on.

23
24 One decision I didn't open deals with that particular
25 point. I apologise to Mr. Dillon for this. It's the last
26 authority in the book that I handed up, Chairman, and it's
27 a case of *Denis O'Brien v. The Moriarty Tribunal*. It's at
28 tab 11 and it's a judgment of Mr. Justice Hedigan delivered
29 on the first day of February 2011. I don't know if you
30 happen to have that, Chairman.

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CHAIRMAN: I will just see. I think I have.

MR. O'CALLAGHAN: It's the very last case that was handed up to you by --

CHAIRMAN: Denis O'Brien?

MR. O'CALLAGHAN: Yes, a decision of Mr. Justice Hedigan delivered on the first day of February 2011. If I could ask you, Chairman, to go to page 22 of that. I should point out, in the Moriarty Tribunal, Judge Moriarty provided the parties with notes of interviews conducted by Tribunal counsel with witnesses. One of those witnesses was Mr. Michael Andersen. An issue arose in this case as to whether Mr. Michael Andersen, since he wasn't making any allegations against Mr. O'Brien, the extent to which he could be cross-examined. And if you look at page 22, at paragraph 6.5, Mr. Justice Hedigan states the following; he says: *"However, none of the cases deal with a right to cross-examine a witness who is not an accuser."*

That is the point that Mr. Dillon referred you to. And it is true that none of them, to this case, dealt with that issue. And he continues: *"It seems to me that there must be such a right, particularly when a reputation might be damaged by evidence."* So Mr. Justice Hedigan is stating that there is clearly a right to cross-examine a witness, but not simply just to cross-examine a witness against whom allegations are being made against another party or who -- what we would describe as an accuser. Simply because

1 Mr. O'Toole is not an accuser of Mr. Corrigan, does not
2 mean that my client is not entitled to cross-examine him in
3 order to extract from him evidence which we say would be
4 beneficial to Mr. Corrigan. That is my first point.

5
6 The second point: Mr. Dillon says, well, what would we use
7 this material for if we gained access to it. He says it
8 couldn't be deployed in any effective way. I say it's not
9 for Mr. Dillon to decide how I would seek to use this
10 material in the cross-examination of Mr. O'Toole. In
11 effect, he has fallen into the trap that Mr. Justice
12 Hardiman warned about in his *O'Callaghan* decision where he
13 said it's not for the Tribunal to be involved in management
14 of material; it is really a matter for counsel to the
15 affected party to decide how he wishes to use material
16 during the course of a cross-examination.

17
18 The third point that I wish to deal with is that Mr. Dillon
19 stated that the questions were introduced for the purpose
20 of revealing a prior inconsistent statement. Chairman, you
21 have not seen the full transcript of this interview. It is
22 imperative that you see it and that other parties have
23 access to it in order for you to form a fair conclusion on
24 the issues raised by it. One of the questions that the
25 Tribunal is considering is whether or not Mr. O'Dea did, in
26 fact, look into the issue of collusion back in March 1989.
27 We can't simply allow two questions to be cherry-picked out
28 of a detailed interview that Tribunal counsel conducted
29 with Mr. O'Toole for the purpose of saying, well, that,
30 obviously, Mr. O'Toole previously said that there was an

1 investigation into collusion. We need to see the whole
2 document, and you need to see the whole document.

3

4 The fourth point I wish to deal with is that Mr. Dillon
5 baldly stated the document was not deployed. I have to
6 respectfully disagree with Mr. Dillon. A lot of the
7 authorities we have looked at consider whether deployment
8 arises if a document is referred to in an affidavit of
9 discovery or if it's identified in an affidavit in an
10 interlocutory hearing. This example here is much more
11 clear. A document was used in the cross -- in the
12 examination of a witness, it was put into evidence, and, on
13 simple Rules of Evidence, it's gone into the mix of
14 evidence. All parties are entitled to it.

15

16 Mr. Dillon refers to the *O'Callaghan v. Mahon* decision and
17 the decision of Ms. Justice Denham where she stated that
18 all the rights in the criminal law do not apply to
19 tribunals. It's important to point out, Chairman, that
20 that decision to which Mr. Dillon referred was the second
21 in the *O'Callaghan v. Mahon* decisions. What happened was
22 that O'Callaghan went to court in the first instance saying
23 that he was entitled to these previous documents from Tom
24 Gilmartin. Once he got them, and once he was able to
25 reveal that, in fact, the Tribunal had been informed of
26 grave allegations against other people, Mr. O'Callaghan
27 brought a case seeking to get a declaration that the
28 Tribunal was, in effect, biased. So there is a chronology
29 in terms of the *O'Callaghan* cases. But what is important
30 is that the decision of Mr. Justice Hardiman in the

1 *O'Callaghan* case, and Mr. Justice Geoghegan, is really the
2 relevant one when you come to assess fair procedures before
3 a tribunal.

4

5 The fifth point I wish to make is that Mr. Dillon stated,
6 and I took a note of this, he said, "It is not absolutely
7 essential for the purpose of cross-examination" by
8 Mr. Corrigan. He was stating that the document which
9 records the interview "is not absolutely essential for the
10 purpose of cross-examination" by Mr. Corrigan. That is not
11 the test. The test is not whether the document is
12 absolutely essential for the cross-examination; the test is
13 whether the document may be of use to my client for the
14 purpose of cross-examining Mr. O'Toole.

15

16 The sixth point I'd make, and I didn't want to interrupt
17 Mr. Dillon at the time, but Mr. Dillon suggested to you,
18 Chairman, that Mr. Justice Hardiman's decision was a
19 minority decision. That is incorrect. At tab 8 of the
20 book dealing with the *O'Callaghan v. Mahon* decision, which
21 is in [2006] 2 Irish Reports, page 32, the footnote
22 records: "*Held by the Supreme Court: Murray CJ, Denham,*
23 *Hardiman, Geoghegan and Fennelly JJ in dismissing the*
24 *appeal.*" Mr. Justice Hardiman did not give a minority
25 judgment in this case, and that is recognised by
26 Mr. Justice Geoghegan at paragraph 124 of his decision
27 where he says the following; he says:

28

29 "*For all of the reasons put forward by Hardiman J much more*
30 *eloquently than I would be able to do, it was absolutely*

1 *essential that the documents and materials which were*
2 *sought for the purpose of carrying out a worthwhile*
3 *cross-examination in the extraordinary circumstances where*
4 *wild allegations were flying around the Tribunal against*
5 *the applicant and of which he had no prior notice, be duly*
6 *produced."*

7

8 So it wasn't a minority decision of Mr. Justice Hardiman;
9 it was a full, unanimous decision of the Supreme Court.

10

11 The seventh point I'd wish to make, Chairman, is that
12 Mr. Dillon, he may want to deal with it, at no stage did he
13 deal with my third point, which is that Mr. O'Toole --

14

15 MR. DILLON: That is correct, I am sorry.

16

17 MR. O'CALLAGHAN: -- which is that Mr. O'Toole is entitled
18 to a transcript of the note of his interview with Tribunal
19 counsel. And the relevance of that point, Chairman, is put
20 into strong focus when you consider that Mr. Dillon has
21 been stating to the Tribunal that -- to you, that it has a
22 duty to maintain confidentiality. What confidentiality are
23 we talking about? In the cases which we have looked at,
24 the confidentiality being protected is that confidentiality
25 of Mr. Gilmartin when he came to the Tribunal, to give
26 information about alleged wrongdoing. The confidentiality
27 in the interview between Mr. O'Toole and the Tribunal, is
28 not apparent. Mr. O'Toole is not seeking to exert a claim
29 of confidentiality over the document; in fact, we know,
30 from his counsel, that he wants it. So what

1 confidentiality is Mr. Dillon talking about? There is no
2 confidentiality that attaches to Tribunal counsel for the
3 purpose of -- I am not suggesting this applies here -- for
4 the purpose of their own convenience. If the witness who
5 is giving the interview wants it, it is legally unstatable
6 not to provide it to him.

7

8 And just the final point I would make is that Mr. Dillon
9 stated there is no grave allegation here. He is correct in
10 terms of Mr. O'Toole isn't making a grave allegation, but
11 the issue that the Tribunal is inquiring into is the
12 gravest of allegation, and Mr. O'Toole is a witness who is
13 giving evidence which we say could be to the benefit of
14 Mr. Corrigan. His credibility, Mr. O'Toole's, has been put
15 on the line by the fact that it is suggested that he gave a
16 prior inconsistent statement, and, for that reason, we say
17 that there is a grave allegation here which forms the
18 subject matter of your inquiry.

19

20 Finally, Chairman, it is a matter for you, in the exercise
21 of your discretion, as to whether or not the document
22 should be produced. I have to suggest to you that the
23 evidence in favour of producing it is overwhelming, but a
24 lot of authorities that we have opened refer to when the
25 courts intervene. We haven't got to that issue at all,
26 Chairman. You are in the position where you are now
27 exercising your discretion, and I say, on the basis of fair
28 procedures, that that exercise of your discretion should be
29 exercised in favour of parties who may be affected or who
30 may benefit from it. There is no downside to this document

1 coming out, and it concerns me that the Tribunal's only --
2 or Mr. Dillon's only grounds for seeking to restrain it
3 coming out, is some vague confidentiality where the other
4 party to the meeting wants the document disclosed.

5 Thanks, Chairman.

6

7 **REPLYING SUBMISSIONS BY MR. MCGUINNESS:**

8

9 MR. MCGUINNESS: Very few points, Chairman. Mr. Dillon has
10 explained the rationale for doing what he did, but it's
11 quite evidence from that that he did intend to impugn the
12 credibility and consistency of Mr. O'Toole, and he did go
13 as far as suggesting to him that he had tailored his
14 evidence. He didn't deal with that at all in his reply.
15 But, in those circumstances, Mr. O'Toole's good name is in
16 issue. And is it to be fair that his interviews that he
17 gave himself, are to be withheld from him or his counsel,
18 that he can't be examined at all upon what he has said in
19 his statements to the Tribunal? And, in essence,
20 Mr. Dillon is trying to do a Harry Potter three-card trick:
21 put the cloak of invisibility back on the statement that he
22 did deploy in public in this Tribunal.

23

24 **REPLYING SUBMISSIONS BY MR. DILLON:**

25

26 MR. DILLON: If you will allow me, Chairman. I do
27 appreciate that I said my piece, but Mr. O'Callaghan is
28 quite correct, I did not deal with his third ground, and I
29 am sorry about that. The other matter I wish to deal with,
30 however, is the authority which he opened, which he hadn't

1 opened during the course of his submission to you. It is
2 suggested that if Mr. O'Toole wishes access to his
3 statement or wishes to refer to his statement, then he has
4 a right to that. I have dealt with that already in the
5 context of the fact that rules of criminal procedure don't
6 apply in a tribunal, and there's authority for that, the
7 authority of Ms. Justice Denham.

8
9 But there is a more fundamental point here, which is that,
10 as mentioned by Mr. Justice Hardiman, you have a duty of
11 confidentiality, and you have -- because you cannot, in a
12 sense, make yourself the prisoner of a witness who decides,
13 I want this whole statement to go into the public domain.
14 Because there could well be matters in it - I am not saying
15 that there are in this case; I am taking a hypothetical
16 example, I wish to stress - there could be a statement in
17 which there are matters which the Tribunal has absolutely
18 no intention of relying upon, for one reason or another,
19 which could be very damaging, and then you find yourself
20 slap bang into the Gilmartin scenario, as I put it, and you
21 have a duty to avoid that. You have a duty maintain to
22 maintain the confidentiality. So the witness does not have
23 a free hand in the matter, with respect to
24 Mr. O'Callaghan's submission.

25
26 Now, as regards the -- I beg your pardon -- the authority
27 opened by Mr. O'Callaghan, now, he opened a sentence or
28 two, but, in fact, the full passage ought to be opened to
29 you, Judge -- sorry, Chairman -- *"Taking the first two*
30 *issues, i.e. limiting the nature of cross-examination, here*

1 the right pursued is to cross-examine a witness who not
2 only is not an accuser but who has given evidence
3 favourable to the position contended for by the applicant.
4 The right involved here is such as I think can arise only
5 in certain limited circumstances. I do not believe it is
6 possible to set out exhaustively what those circumstances
7 might be, but I do believe they must be clear and
8 compelling in order to constrain the High Court to
9 intervene in what must ordinarily be within the discretion
10 of a Tribunal, i.e. its procedures in controlling the
11 taking of evidence before it."

12 That is the full citation.

13 And I am grateful that you gave me liberty to deal with it.

14
15 CHAIRMAN: Thank you very much.

16
17 **SUBMISSIONS BY MR. ROBINSON:**

18
19 MR. ROBINSON: Sorry, Mr. Chairman, just very briefly. On
20 behalf of the PSNI, we would support the submissions made
21 by Mr. Dillon on this point, and when looking through the
22 authorities and the arguments presented by the applicants
23 in this case, there is a clear dissonance between the
24 rights afforded to parties in the case of *Re Haughey* and
25 the case of *O'Callaghan v. Mahon*, and the applications
26 today. The rules are there to ensure fairness and the
27 protection of parties, but when one clears away the smoke
28 of the application and looks at exactly what took place on
29 the last day, it was, simply, Mr. O'Toole was brought
30 through his comments and responses in an earlier interview

1 to clarify his statement to this Tribunal, and, when one
2 looks at the Haughey case, Mr. Dillon very clearly went
3 through the foundations of that case and the principles,
4 and they are that the applicant "*should be furnished with a*
5 *copy of the evidence which reflected on his good name.*"
6 And there appears to have been a scramble to obtain the
7 rest of that transcript of interview. But, taking a step
8 back from this, Mr. Corrigan has not been impugned;
9 therefore, the follow-on arguments simply do not arise. In
10 the *O'Callaghan v. Mahon* case, that was, very clearly, a
11 situation where one should look to previous inconsistent
12 statements, because we had the witness, Mr. Gilmartin,
13 expand and produce some very serious allegations against
14 the applicant in that case, and, by right, those
15 allegations ought to have been compared and contrasted with
16 earlier statements. That is so very distant from the
17 circumstances that arose on the last day.

18
19 So, from a perspective of my client, Mr. Chairman, we would
20 object to the provision of the rest of the transcript.

21
22 CHAIRMAN: Thank you very much, Mr. Robinson.

23 Well, I propose to give my decision -- I want to read the
24 authorities and also to read the transcript of the
25 proceedings on Friday last. I propose to give my decision
26 in this matter, my ruling, at 11 o'clock tomorrow morning.
27 I will be sitting for the purpose of the closed hearing at
28 half past ten, and then this will be the commencement of
29 the public sitting at 11 o'clock, I will give my ruling
30 then. Thank you very much for your help.

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THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY, THE
14TH OF FEBRUARY, 2012, AT 10:30 A.M..

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