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SEANAD ÉIREANN ON 16 FEBRUARY 2017

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1921, ON 17 FEBRUARY 2017

SOLE MEMBER: MR. JUSTICE PETER CHARLETON, JUDGE OF THE
SUPREME COURT

HELD IN DUBLIN CASTLE
ON WEDNESDAY, 17TH JANUARY 2018 - DAY 42

42

Gwen Malone Stenography
Services certify the
following to be a
verbatim transcript of
their stenographic notes
in the above-named
action.

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SERVICES

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1 THE HEARING RESUMED ON WEDNESDAY, 17TH DAY OF
2 JANUARY, 2018 AS FOLLOWS:

3
4 CHAIRMAN: Ladies and gentlemen, before we continue
5 today, there's just two matters I would like to 10:01
6 mention. Firstly, I have had communication from a
7 party who has not, I think, been mentioned on the
8 transcript in this Tribunal, but instead, a reference
9 which was potentially relevant to him came up on a
10 document which of course was then put on the screens 10:01
11 that are linked to the computer system, whereby the
12 Tribunal is in a position to share the documents with
13 the public. That person of course was John Wilson, who
14 is a garda, who also made a protected disclosure. And
15 Mr. Marrinan, in examining a witness, did not read out 10:02
16 what was an apparently derogatory comment - if was
17 taken at face value it certainly was a derogatory
18 comment - about John Wilson, but nonetheless, the
19 matter was reported. Now I want to say just two
20 things. The first and the most important thing is that 10:02
21 I have no reason to believe that John Wilson is
22 anything other than a person of exemplary character and
23 that is the presumption from which every judge starts
24 in relation to every witness, and then it's a question
25 of what is written on the blank sheet in terms of their 10:02
26 evidence and how it fits in with other evidence and
27 facts on the ground.

28
29 Of course, what was put on the screen was potentially

1 relevant in the sense that it was a reference
2 apparently being made to two people who had made
3 protected disclosures and the manner in which they were
4 being discussed did not appear to be complimentary. Of
5 course, that is no more than a report of what somebody 10:03
6 thought or said, there is no sense in which this
7 Tribunal is in any way addressing anything to do with
8 John Wilson and the Tribunal has no reason to believe
9 that anything that was on the screen could be true or
10 is true, and I am happy to make that correction now. 10:03
11

12 The second matter that arises from that, however, is
13 this: Given that Mr. Marrinan didn't read it out, it
14 didn't actually become, as it seems to me, part of the
15 public hearing and I have a doubt as to whether the 10:03
16 press were entitled to report it, but apparently the
17 manner in which it was done, and has gone on to the
18 worldwide web, was by way of someone taking a
19 screenshot, simply by using a mobile phone and pointing
20 it at the screen. That's just not allowed, I'm sorry. 10:03
21 I would like to be in a position where everything is
22 broadcast, but at the moment the Tribunal is not doing
23 that and therefore I would ask people not to use their
24 mobile devices to take screenshots or to take
25 photographs inside the Tribunal, please. The Tribunal 10:04
26 would of course reserve the right, given that
27 everything that I do and everyone else is doing is
28 being recorded, in the event that a controversy arises,
29 for instance, in relation to whether a

1 cross-examination was, for instance, brutal, and I am
2 not saying that would ever happen because it's up to me
3 to control that and I hope I have got a degree of
4 control over what is happening, but the Tribunal of
5 course has the entitlement to put any such excerpt on 10:04
6 the web itself on its own website, should that arise.
7 I doubt it will. But that's what I wanted to say this
8 morning. So, thank you.

9 MR. MCGUINNESS: Chairman, I am going to resume the
10 evidence of Ms. Anmarie Ryan, please, if she would 10:05
11 return to the witness stand.

12
13 MS. ANNMARIE RYAN CONTINUED TO BE DIRECTLY EXAMINED BY
14 MR. MCGUINNESS:

15 1 Q. MR. MCGUINNESS: Ms. Ryan, thank you for returning 10:05
16 again today. Could I just pick up where we left off on
17 Monday evening? I had been asking you about the events
18 of the first day and particularly, that is the 14th
19 May, and I had referred you to what are Superintendent
20 Healy's notes at page 3817, it's in volume 7. And it's 10:05
21 the typed version of his notes for that day. And it's
22 towards the end of that page.

23 A. Yes.

24 2 Q. And that phrase is there "permission/instructions to 10:06
25 use Cunningham invest" and I think you were obviously
26 making the point that there was no question and no
27 discussion about ever putting the allegation that had
28 been made against Sergeant McCabe to him, but it arose
29 then in the context of counsel seeking instructions

1 concerning Sergeant McCabe's motivation, is that
2 correct?

3 A. That is correct.

4 3 Q. And at this stage, was this after day 1 had concluded?
5 A. Yes, it was. It would have been six o'clock, half six. 10:07
6 It may have even been near seven.

7 4 Q. Yes.
8 A. It was -- I remember specifically standing there and
9 senior counsel was adamant that he needs the
10 Commissioner's instructions. 10:07

11 5 Q. Yes.
12 A. And I specifically recall, this is important, I need
13 the Commissioner's instructions.

14 6 Q. All right. And did Superintendent Healy make a note of
15 what he was to seek instructions on? 10:07
16 A. I don't know.

17 7 Q. Okay.
18 A. I wouldn't know of anybody's notes.

19 8 Q. Okay.
20 A. I am not aware -- 10:07

21 9 Q. Insofar as the events of that day were concerned, the
22 only issue that had arisen of concern was
23 Superintendent Healy not being permitted to attend for
24 the first portion and Mr. Smyth on your direction, as
25 it were, making an application for him to be permitted 10:08
26 to attend for the remainder of it?

27 A. Yes, that morning I did not anticipate that happening,
28 but initially Judge O'Higgins had refused his
29 attendance there and there was a short recess sometime

1 that morning.

2 10 Q. Yes.

3 A. And I approached Colm Smyth and I asked if he would go
4 in immediately and make an application, as I was not in
5 a position to proceed. And arising out of that
6 application, I instructed counsel that if Chief
7 Superintendent Healy is refused permission to be in
8 attendance that I would require him to seek an urgent,
9 an immediate adjournment as I would have had to take
10 matters further.

10:08

10:08

11 11 Q. Yes. Now, on the following morning, did Chief
12 Superintendent Healy come back with instructions from
13 the Commissioner?

14 A. The following morning -- my day, I usually got over
15 there about quarter to nine every morning. Most
16 mornings I would rarely have had a minute to sit, I
17 would have been getting ready, quite often getting
18 documentation ready or copies of material that may be
19 handed out during that day. It would be very regular
20 that I would not have sat any morning hardly over
21 there, never mind that morning. Counsel and the client
22 were always -- I had a consultation room for all of the
23 attendants over there and counsel and the client every
24 morning would be in attendance, sitting there talking,
25 but I would rarely have ever captured what exactly was
26 going on any morning due to having to get other matters
27 done.

10:09

10:09

10:09

28 12 Q. Yes. You do obviously record in your statement that on
29 the morning of the 15th, Chief Superintendent Fergus

1 Healy informed counsel he had spoken to the
2 Commissioner and the Commissioner's instructions were
3 to proceed in accordance with counsel's advices?
4 A. Yes, I have made reference to that, and it was in the
5 afternoon during evidence this issue arose. whilst I 10:10
6 was over there, I -- the front benches, where I had
7 three counsel, they usually sat at the top, there would
8 have been room to squeeze myself in, but I had a lot of
9 documentation and it wasn't feasible to actually sit at
10 the table, they weren't long enough, but I always sat 10:10
11 at the very back row, primarily because my client could
12 feed instructions to me or clarification to me and
13 every single day I would have been up and down to
14 counsel or passing with a message.
15 13 Q. Yes. Yes. 10:10
16 A. When this arose that afternoon, I was not aware of it.
17 I had been aware of what Fergus Healy had been asked to
18 do the evening before but I was not aware of any
19 instruction coming back.
20 14 Q. All right. 10:11
21 A. I had thought I would probably have a consultation
22 coming back in relation to it.
23 15 Q. Okay. Just to be clear that I'm understanding you
24 correctly, that you weren't aware that counsel had been
25 instructed perhaps directly by Chief Superintendent 10:11
26 Healy until it perhaps arose during the course of the
27 day's proceedings?
28 A. Yes, you are correct. I looked at Chief Superintendent
29 Healy and he came over and whatever he said it was

1 like, no, I have spoken to Colm, he is aware, because I
2 had no instruction about that.

3 16 Q. All right. Okay.

4 A. That's how quick it happened.

5 17 Q. Okay. So the Tribunal has seen, and the transcript for 10:11
6 that portion of day 2 from page 178 onwards was opened
7 to the Chairman, it was where Chief Superintendent
8 Rooney was being cross-examined by Mr. Smyth --

9 A. He was.

10 18 Q. -- and there was an objection taken to that and 10:12
11 Mr. Smyth made the case that it was relevant to
12 motivation as set out on the transcript. But from your
13 point of view, is it correct to say that Chief
14 Superintendent Healy made you aware that they were the
15 Commissioner's instructions and, therefore, Mr. Smyth 10:12
16 was acting in accordance with them?

17 A. Oh, yes, I immediately -- I remember specifically
18 looking to say 'what's going on here?' at the client,
19 and Chief Superintendent Healy told me, no, no, no, I
20 spoke to Colm or I spoke to the Commissioner last 10:12
21 night - I don't know if he met her now or if he
22 telephoned her, I know none of that - he spoke to her
23 last night and she is aware, she has given the go-ahead
24 and I have spoken to Colm, Colm is aware. Because as I
25 said, my concern was, I had no note, I had not heard 10:12
26 that instruction coming to counsel.

27 19 Q. All right. Well, just to be clear, did you have an
28 understanding of the limits of what that related to,
29 instructions on motivation or what it didn't relate to?

1 A. Arising out of talk, it was to put the whole matter
2 before Judge O'Higgins to find out what is here and
3 to -- the Gardaí had difficulties controlling -- or not
4 controlling, but trying to put these allegations that
5 had been lingering for many, many years there, they 10:13
6 had -- were now 2008, now 2015, and my understanding in
7 relation to this was they wanted to get it all out and
8 put it to the Tribunal, Judge O'Higgins, and arising at
9 out of consultations, it was counsel's advices that
10 motivation -- 10:14

11 20 Q. Was relevant?

12 A. -- was relevant.

13 21 Q. Or potentially relevant?

14 A. Potentially relevant, but relevant. It had to be
15 raised. 10:14

16 22 Q. Okay.

17 A. Not that -- he was advising that it's an issue.

18 23 Q. The former Commissioner has said in a number of her
19 statements that her concern was that at one level, that
20 everything of possible relevance and in terms of the 10:14
21 exposition of the truth would be made known to Judge
22 O'Higgins, was that how it was described by Chief
23 Superintendent Healy on that day or at any stage?

24 A. Yes, it was to get to the bottom, get to the truth, put
25 it all out, whatever, to get to the bottom of it, that 10:14
26 was -- they wanted Judge O'Higgins to see it all, deal
27 with it all and hopefully come to a conclusion.

28 24 Q. Okay. Well, I mean, was it clear to you that if
29 Sergeant McCabe's motivation was being questioned, that

1 that necessarily meant perhaps suggesting that he was
2 acting from improper motives or was ill motivated in
3 some other respect?

4 A. It was my -- and I am just trying to think at that
5 point in time. 10:15

6 25 Q. Yes.

7 A. It was my understanding that it was to put all of the
8 evidence before Judge O'Higgins and for him to decide
9 in relation to all of this, whatever he finds.

10 26 Q. Right. well, obviously Judge O'Higgins was considering 10:15
11 the matter and in debating the matter, raised the issue
12 of whether Sergeant McCabe's integrity was being
13 challenged. And I think Judge O'Higgins used the word
14 integrity a number of times, but Mr. Smyth used the
15 word back to him and seemed to confirm that it was 10:16
16 being challenged?

17 A. Yeah.

18 27 Q. Was that clearly in your view within the scope of
19 Mr. Smyth's instructions?

20 A. At that point in time, I had -- I did not consider what 10:16
21 was within that scope.

22 28 Q. All right.

23 A. I know it wasn't raised in relation to motivation and
24 credibility, whatever the evidence will be.

25 29 Q. Well, your note at the time, perhaps we could look at 10:16
26 page 3767.

27 A. 3767.

28 30 Q. And you have noted there:
29

1 "Judge asked do we believe the question of motive is
2 relevant in this module. Colm Smyth sayings yes, as
3 McCabe and Lorraine Browne went to encourage her to go
4 to GSOC. Missed some --"

10:17

6 Is that some "of the argument", is it?

7 A. It would be some of the evidence usually.

8 31 Q. As you were making calls.

10 "Went back and informed him of Commissioner's
11 instructions as per Fergus Healy."

10:17

13 So you must have spoken to the chief superintendent
14 then at that point, is that right?

15 A. This went on that afternoon, it probably felt like
16 hours. There was question of it. I recall counsel was
17 sitting inside the room for a while and then there
18 was -- I was outside the room with Fergus Healy, and I
19 recall that the Commissioner had confirmed her
20 instructions last night. But later on then, how long
21 later I would have to look at the transcripts, they
22 will tell the time, but there was -- the Judge wanted
23 to ensure that the Commissioner, he wanted
24 reconfirmation from the Commissioner, and I do know, I
25 do recall that day there was difficulty getting through
26 to the Commissioner and it was Fergus Healy now who
27 would have been calling the Commissioner at that stage,
28 and there was probably a couple of calls but eventually
29 the reconfirmation came through.

10:17

10:17

10:18

1 32 Q. Yes. Well, the note goes on, it seems to be saying:
2
3 "Commission asked do we want five minutes. We say yes.
4 Before rising the judge asked do(es) this have to be
5 introduced in this module. Fergus made numerous calls 10:18
6 directly to the Commissioner. Appears she consulted
7 with others - perhaps the Minister."
8
9 Now, I think that's -- what is that based on, actually,
10 if I could just ask you? 10:18
11 A. During those phone calls, there was concern that the
12 Commissioner initially, even though apparently Fergus
13 Healy had spoken to her the night before, when she was
14 being asked again there -- I was informed when Fergus
15 Healy got off the phone that she wanted an adjournment 10:19
16 or she seemed to be somewhat maybe a bit hesitant, I
17 don't know, but I did seek an adjournment and an
18 adjournment was not forthcoming. What went on in the
19 phone calls, I don't know, but when the final
20 confirmation did come, I recall Fergus Healy saying 10:19
21 that she is confident, I was aware that -- I'm not
22 aware from Fergus Healy, he informed that she was
23 speaking to others and arising out of the confidence,
24 perhaps the Minister. I don't know who said what --
25 33 Q. All right. 10:20
26 A. -- on that phone calls or contract.
27 34 Q. We know from the Commissioner's phone records that
28 thank she spoke to Mr. Waters for approximately 14
29 minutes. Now, neither of them apparently recall any

1 conversation on this issue, but do you recall
2 Mr. Waters' name being mentioned by Chief
3 Superintendent Healy?

4 A. No, I recall Chief Superintendent Healy's saying that
5 she was -- wanted to speak to the Department. My 10:20
6 understanding that day is that perhaps the Commissioner
7 may have been somewhere even with people. I was
8 looking for an immediate consultation and I inferred --
9 I know it's a busy job, I fully understand that.

10 35 Q. Yes. 10:20

11 A. I don't -- I don't know who she spoke to but I know
12 there was reference made to the Department, the
13 Department is Department, there was no names mentioned
14 there --

15 36 Q. Yes. 10:21

16 A. -- but perhaps the Minister.

17 37 Q. Yes. And was there any mention made to your
18 recollection of speaking to Ken O'Leary?

19 A. Absolutely no name mentioned that day.

20 38 Q. No name mentioned. 10:21

21 A. I would be sure that I would have written a name down.

22 39 Q. Okay.

23 A. Or would have taken note of it.

24 40 Q. Yes. At page 3819, if we could turn to that, this is
25 Superintendent Healy's notes again from that date. But 10:21
26 towards the bottom of that, he says:
27
28 "Rang the Commissioner at 15:37 and explained the
29 current developments of Colm Rooney's evidence."

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Now, was that during one of the breaks?

A. It probably was. Because I do know I was in and out of the room a number of times during that period. I know at times Fergus Healy was waiting for a call or trying to call and I was there once or twice when he was speaking with whom I understand, to the Commissioner on the phone. What time they were, I don't know, I didn't record, but it would have been during that period, and I presume that was when we were waiting for firm confirmation. 10:22

41 Q. Yes.

A. Or reconfirmation.

42 Q. You had received, or had you received, the email of advices from counsel at that point? 10:23

A. I recall -- yes, I recall that day, I had no IT facilities down there, so I was not in a position to send emails, receive emails. Counsel, I do recall counsel sitting down together and drafting that and Garret Byrne, who has IT facilities in the Distillery Building, it was his computer that that was sent to. 10:23

43 Q. Yes.

A. I do recall when I became aware that it was sent, I did not know when it was sent, I believe there may have been a copy of it in the consultation room so I was aware of the content of it. 10:23

44 Q. Yes.

A. But when I knew it was an email sent I asked Garret Byrne to resend it to me and he said he already had.

1 45 Q. Yes. Well, perhaps we could look at that email, it's
2 at page 667 of the documents.

3 A. Which volume?

4 46 Q. It should be volume 1B, if it's there in front of you.
5 This is sent by Mr. Byrne BL on the 15th May at 15:29, 10:24
6 it's sent to Garda Healy, Chief Superintendent Healy,
7 and also cc'ed to yourself, Michael MacNamee and Colm
8 Smyth. And, do you recall seeing that on the
9 afternoon, apart from your own email, seeing it there?

10 A. Yes, I do recall being aware of it. 10:24

11 47 Q. Yes.

12 A. I presume counsel may have had a copy of it printed
13 off.

14 48 Q. Yes. In any event, perhaps you would just read it for
15 the record. 10:25

16

17 "Chief Superintendent Healy, as counsel appointed to
18 represent the interests of An Garda Síochána, before
19 the O'Higgins Commission, it's our view that it is
20 appropriate and necessary that the conduct of any 10:25
21 member of the force be challenged by way of
22 cross-examination if and to the extent necessary. It
23 is likely that in the course of the process, which is a
24 private hearing, it will become necessary to put to
25 Sergeant Maurice McCabe certain background issues which 10:25
26 touch upon and concern the history of his dealings with
27 members of Garda management. In particular we consider
28 it necessary and in the interests of fair and balanced
29 examination of the subject matter of the investigation

1 that specific issues be put to Sergeant McCabe
2 regarding his conduct and interactions with senior
3 management following the completion of a formal Garda
4 investigation into a complaint against Sergeant McCabe
5 which resulted in a direction by the DPP that no 10:25
6 further action was to be taken against Sergeant McCabe.
7 The purpose of such a line of inquiry is to open to the
8 Commission of Investigation the full factual background
9 surrounding the complaints made by Sergeant McCabe so
10 that all the circumstances are clearly put before the 10:26
11 Commission for consideration."
12

13 Now, firstly, did you participate in any discussion
14 about the appropriate advice that would be given to the
15 Commission? 10:26

16 A. No, I had no participation in that.

17 49 Q. So this is counsel's advice, as it were, formed on
18 their own but jointly together?

19 A. Yes.

20 50 Q. Yes. 10:26

21 A. I do recall.

22 CHAIRMAN: Before you go on, can I just ask you one
23 thing: I had noted this as having been sent on 15th
24 May at 15:29, just looking at the top of the email it
25 indicates a different date and a different time? Now, 10:26
26 I don't know, maybe it's --

27 MR. MCDOWELL: A different version --

28 CHAIRMAN: Yes, I appreciate emails can be sent around
29 and around.

1 MR. MCGUINNESS: It's retrieved at a later date, but --
2 don't be concerned, Chairman, about the --
3 MR. MCDOWELL: That is on the following Tuesday, the
4 19th -- It's 2017 rather, so it's a long time.
5 CHAIRMAN: It's a long time ago, yeah. But do we have 10:27
6 the original in some place, no doubt?
7 MR. MCGUINNESS: Yes, we have a number of different
8 versions and we will be coming to them with Chief
9 Superintendent Healy.
10 CHAIRMAN: Thank you. I just wanted to make sure. 10:27
11 Thank you.
12 51 Q. MR. MCGUINNESS: Now, you didn't send this on to
13 Mr. Ruane at any stage, is that right?
14 A. No, I -- when I became aware that I had it, I only sent
15 it on to one other party or two parties, yeah. 10:27
16 52 Q. Yes.
17 A. Not Mr. Ruane, no.
18 53 Q. Now, it seems to be the case -- perhaps you are aware
19 of it or not, but did Chief Superintendent Healy read
20 out the advice to the Commissioner over the phone? 10:27
21 A. I know he was very detailed in relation to the matter.
22 Did he have counsel's advices in front of him? I would
23 not be in a position to confirm that.
24 54 Q. All right. The second page of his notes for that day,
25 if we go to page 3825 -- 10:28
26 A. On volume?
27 55 Q. 3825, volume 7. This is a continuation of his notes:
28
29 "Made several telephone conversations with Commissioner

1 O'Sullivan to get instructions on the questioning of
2 Sergeant Maurice McCabe at the Commission. The
3 requirement was to question the motive of the member
4 for the making of various complaints. Commissioner
5 sought time to speak to DOJ, then returned with 10:28
6 instruction that is we:
7 1. In the light of developments on the front, that
8 Sergeant McCabe had issues with now working in
9 Mullingar and his welfare, could we seek a deferral
10 until we seek advice?" 10:29
11
12 Now, that would seem to be perhaps the catalyst for you
13 speaking to Mr. Gillane.
14 A. I do recall that I was requested to get -- seek an
15 adjournment and I did go to Sean Gillane, or 10:29
16 Mr. Gillane, requesting an adjournment.
17 56 Q. Yes.
18 A. I believe that I would not have told him why, but that
19 I am having difficulty and I may need extra time, and I
20 was firmly told there will be no adjournment. 10:29
21 57 Q. Yes. Now --
22 A. By Judge O'Higgins.
23 58 Q. Now it doesn't appear obviously from the transcript
24 that a formal application was made?
25 A. This was during the period when Judge O'Higgins had 10:29
26 rose, because if Judge O'Higgins was sitting there, I
27 have no doubt that I would have gone to Colm Smyth and
28 asked him to make the application, I expect it was
29 during that period.

1 59 Q. Well, that is what I am going to ask you. Did you
2 consult with your counsel over whether they would apply
3 or whether you should apply formally for an adjournment
4 or not?
5 A. Arising out of a conversation or requesting from Sean 10:30
6 Gillane, it was quite clear there was no adjournment
7 forthcoming.
8 60 Q. Yes.
9 A. A formal application was not made.
10 61 Q. Yes. Was the Commissioner, to your knowledge, through 10:30
11 Chief Superintendent Healy, unwilling to want to be
12 seen to apply for an adjournment?
13 A. I don't know. I didn't -- I can't recall if that
14 happened.
15 62 Q. All right. 10:30
16 A. I have no knowledge if that was the case.
17 63 Q. Well, the answer from Mr. Gillane, did you understand
18 that to be an answer based upon the instructions of
19 Judge O'Higgins?
20 A. Oh, it was a firm no, there will be no adjournment. I 10:31
21 was told take the time, but it's proceeding today.
22 64 Q. Okay. Chief Superintendent Healy notes then:
23
24 "Commissioner then rang a second time and advised that
25 on reflection it came out in the course of 10:31
26 questioning --"
27 CHAIRMAN: No, if you look at it, the handwritten one
28 says "if". There is an "if" missing on that. But the
29 word "if" is in handwriting.

1 MR. MCGUINNESS: Yes.
2
3 "...counsel should explore it and it was her view that
4 if he (counsel) was advising that we explore the area
5 of motive and that it was necessary then she was
6 inclined to give instructions to him to explore that
7 issue. It would be remiss of her not to instruct him
8 to proceed. Therefore, Commissioner instructed counsel
9 to pursue that specific line of questioning."
10
11 Now, obviously this is Chief Superintendent Healy's
12 note, but did he pass on that instruction to counsel,
13 in your presence?
14 A. He did, and also, I do recall -- there was a lot
15 happening during this period. 10:32
16 65 Q. Yes.
17 A. I do recall when the day finished for Fergus Healy, I
18 wrote down, I got him to quote, it would be in my file,
19 a specific quote on what I was told after, but yes.
20 66 Q. Yes. 10:32
21 A. She was happy to -- she confirmed to proceed, and it
22 was in accordance with that.
23 67 Q. Yes. In any event, Mr. Smyth went back in and the
24 Commission resumed and he confirmed his instructions?
25 A. Prior to Mr. Smyth going back in -- 10:32
26 68 Q. Yes.
27 A. -- I recall a second conversation with Mr. Gillane. I
28 did have, I suppose, the reconfirmation at this stage,
29 but I do recall asking Mr. Gillane is there no chance

1 of an adjournment. And I was again firmly told no.

2 69 Q. Yes. And at that stage, can you help the Tribunal, why
3 were you then raising for a second time the question of
4 an adjournment?

5 A. I can't recall if it was -- if I was instructed to see. 10:33
6 I was aware the Commissioner wanted an adjournment, and
7 it may possibly have been just the way I don't
8 particularly like taking no for an answer. I may have
9 just asked a second time. I cannot recall.

10 70 Q. The transcript in volume 2 there shows that at page 10:33
11 670, that the Commission resumed and then Mr. Smyth was
12 saying "I'm' getting more instructions" and the Judge
13 rose a second time at that point in time.

14 A. Oh, sorry, this was the second time that the evidence I
15 am after giving, the first time it was confirmed from 10:34
16 the night before. The calls took part during the
17 second adjournment.

18 71 Q. The second time?

19 A. Yes, I beg your pardon.

20 72 Q. That's fine. 10:34

21 A. I should have clarified that.

22 73 Q. Well, it's just at this point you appear to have access
23 to your email and you sent counsel's advices on to
24 Chief Superintendent Healy and also copied them to
25 Mr. Dreelan at that point in time? 10:34

26 A. Yeah.

27 74 Q. Is that right?

28 A. I arranged for them to be sent on. I had no access to
29 my emails from the Distillery Building, but I phoned

1 back to the office, probably did not comply with IT but
2 I requested a colleague to send the email from my
3 computer when I became aware that counsel had already
4 sent it to me.

5 75 Q. Okay. 10:35

6 A. And I called out the people to send it to, to put them
7 in.

8 76 Q. And had you consulted with Mr. Flemming at that point
9 in time?

10 A. I recall initially at that point in time, I had 10:35

11 difficulty calling -- calling people, I know I got
12 voicemails. And I do recall firstly trying to call
13 Mr. Billy Fogarty and I specifically remember getting a
14 voicemail that he was out that day or was not
15 available. Then I do recall leaving a voicemail, be 10:35
16 it, who it was to, to please come back to me urgently,
17 or to that effect.

18 77 Q. Okay. Could I ask you to look at the email that you
19 had forwarded, it's at page 689 of the volume 1B there?

20 A. 689? 10:36

21 78 Q. Yes.

22 A. Yes.

23 79 Q. And that would appear to represent then the results of
24 your phone call to your colleague in the Chief State's
25 Office, it was forwarded on to Mr. Dreelan? 10:36

26 A. Fergus Healy, because I had not sight of the email and
27 I wanted to primarily ensure that the client had the
28 email. No doubt I wasn't questioning that counsel had
29 not sent it on, but I suppose it's me just

1 double-checking to ensure. And while they were there,
2 I asked for it to be sent on to Michael Dreelan.

3 80 Q. Yes.

4 A. And you'll see there is no writing because I have a
5 colleague who is just gone into the computer just to 10:37
6 bang it on.

7 81 Q. Yes. Now, you took some handwritten notes, but had you
8 spoken to Mr. Dreelan either before this or after this?

9 A. No, I had spoken to Mr. Dreelan before this.

10 82 Q. Yes. And what had you conveyed to Mr. Dreelan at that 10:37
11 stage?

12 A. I had informed generally Mr. Dreelan what was going on
13 in relation to -- arising out of evidences that we were
14 going to, on the instructions of counsel, and it was my
15 understanding that the Commissioner, I had been 10:38
16 informed, was happy to proceed, that this was what was
17 going down, so...

18 83 Q. Yes.

19 A. Going to propose to --

20 84 Q. Yes. And can I just be clear or ask you to be clear at 10:38
21 this stage: was there any question of the Commissioner
22 seeking advice from the Attorney General's office at
23 that stage? Or any talk about that?

24 A. Absolutely none.

25 CHAIRMAN: And Mr. Dreelan works for the Attorney 10:38
26 General's office.

27 MR. MCGUINNESS: Yes.

28 A. Yes. No, I don't even know if they were aware who I
29 was ringing. There wasn't much privacy over there, but

1 I would have been discreet as much as possible.

2 85 Q. But your contact with Mr. Dreelan, it was just in the
3 context, was it, of normal, as it were, reporting up
4 the line to the Attorney's office?

5 A. I would ring the Attorney General's office if I had a 10:38
6 concern or... depending; it was a matter that I took on
7 myself to inform them of what was happening.

8 86 Q. Yes. But you weren't seeking any direction or you
9 weren't seeking any formal advice from the Attorney's
10 office, is that right? 10:39

11 A. I was seeking no direction and no advice. I hadn't
12 been requested to seek their advice, so it wouldn't be
13 appropriate. I didn't even raise -- I put them on
14 notice, really.

15 87 Q. Yes. I think you have some handwritten notes then, I 10:39
16 think they are on the next page, 690. Perhaps we would
17 just look at those. Is that your handwriting?

18 A. That is my handwriting.

19 88 Q. Yes. And I think that's headed:
20 10:39
21 "Module 1. Day 2. 15/5/15.
22 During the afternoon hearing the Judge rose for the
23 State to discuss a matter with client re introduction
24 of evidence re McCabe's DPP finding."
25 10:39
26 Now, that's obviously, I suppose, a shorthand note of
27 what was intended, but --

28 A. It would.

29 89 Q. -- I'm just wondering, did you tell Mr. Dreelan in the

1 course of your phone call with him, your first one or
2 your subsequent ones, that they were trying to
3 introduce evidence of the DPP's finding?
4 A. No, it was clearly -- I recall, the conversation was
5 arising out of that allegation. 10:40
6 90 Q. Yes.
7 A. It was due to his dealings with management and it
8 was --
9 91 Q. Yes.
10 A. That matter, his motivation in that respect. 10:40
11 92 Q. You may have seen an email that Mr. Flahive of the
12 Department subsequently wrote, and it's open to an
13 interpretation that there was some misunderstanding
14 perhaps on his part, that there was, it was intended to
15 introduce the issue relating to the sergeant's -- the 10:40
16 allegation made against the sergeant but you never
17 obviously said anything like that to Mr. Dreelan?
18 A. Absolutely not. It was clearly in relation to the way
19 I was being informed. It was in relation to his
20 dealings with management and the numerous allegations 10:41
21 of a serious nature against certain individuals and it
22 was in that context it was arising, and it was, I
23 suppose I call it, a sea change and I would be fairly
24 straight talking with Michael Dreelan or whoever, so...
25 93 Q. Yes. Yes /your note, anyway, goes on here in the next 10:41
26 portion, it goes on to say:
27
28 "Fergus Healy made contact by phone with the
29 Commissioner. Fergus --"

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If we scroll down the screen, please.

"Fergus had spoken to the Commissioner the evening before, the 14th --"

10:42

Go up to the middle of the page, perhaps.

"Fergus had spoken to the Commissioner the evening before, 14/5/15, on this matter. The Commissioner requested counsel's advices and Fergus relayed same to her."

10:42

Now may I just stop you there. On one view it would perhaps seem a little unusual that counsel's advices would be composed in haste in the middle of either the Commission's hearings or in the course of a short recess. Had you, in fact, made the request for counsel's advices to be put in writing or did that in fact first come from the Commissioner as a request?

10:42

10:42

A. It may have come from counsel or may have come from the Commissioner, I do recall counsel sitting together in relation to their advices.

94 Q. Yes.

A. Who requested it, I would not be in a position to confirm that.

10:43

95 Q. All right. It goes on to say then:

"Fergus relayed same to her."

1 A. Yes.

2 96 Q. And obviously we know that it was sent to Chief
3 Superintendent Healy at 15:29 and apart from yourself
4 as well, but does that help you recall whether Chief
5 Superintendent Healy read out the advices to her? 10:43

6 A. I do recall I was aware of the content of the advices
7 down there, so there was definitely copies printed off.

8 97 Q. Yes.

9 A. I would not be in a position to remember, to be able to
10 say definitively, but yes, I do recall reading the 10:43
11 advices so there would have been copies.

12 98 Q. Okay. It then goes on to say:
13
14 "The Commissioner, after consideration instructed
15 to --" 10:44
16
17 And then there is a quotation.
18
19 "-- in the light of the objections being raised by
20 McCabe's SC and in order to consider the matter further 10:44
21 for us, if possible, seek an adjournment. Or if not
22 possible to go ahead and pursue questions as advised by
23 counsel."

24 A. Mm-hmm.

25 99 Q. So the Commissioner was, it would appear, anxious to 10:44
26 seek an adjournment at that point in time?

27 A. Yes.

28 100 Q. But do you recall the sequence of events as recorded in
29 Chief Superintendent Healy's notes? He appears to have

1 regarded the Commissioner's instructions as stopping
2 there first and then the Commissioner subsequently
3 phoning back to say, on reflection, proceed?
4 A. I do recall it went from being very hesitant to coming
5 to firm confirmation. 10:45
6 101 Q. Yes.
7 A. There was a lot of calls going on during that time. As
8 I said, I didn't speak to the Commissioner that day
9 so...
10 102 Q. All right. 10:45
11 A. I presume Fergus Healy was dealing with her, but I was
12 in and out of the room and there were a lot of calls.
13 What was said in each call, I cannot recall.
14 103 Q. All right. Okay. If we could go down the page then
15 slightly: 10:45
16
17 "During this time I telephoned Michael Dreehan AGO and
18 informed him of above."
19
20 And that was your first phone call to Mr. Dreehan then, 10:45
21 I think?
22 A. This note here, just to clarify it, when Judge
23 O'Higgins rose that afternoon, I had been aware that
24 Fergus had read out stuff, probably that quote, but I
25 had not note of it. 10:45
26 104 Q. Yes.
27 A. And I specifically, that evening, in the Distillery
28 Building was making this note when it was in my head.
29 105 Q. Yes. Yes.

1 A. This here, my notes on what happened would be, when I
2 am taking note of the evidence and going in and going
3 out.

4 106 Q. Yes.

5 A. That would probably give a better reflection of 10:46
6 timewise, but this one here is just generally what
7 happened. Because so much went on, I wasn't too sure
8 what was caught in the other notes or not caught in the
9 other notes.

10 107 Q. Yes. All right. well, in any event, it goes down 10:46
11 towards the end, it records:
12
13 "Garret Byrne BL sent email with counsel's advices to
14 myself and Fergus Healy."
15
16 And then on the next page, 691: 10:46
17
18 "I immediately had email advices sent to Michael
19 Dreehan."
20
21 And so, that would appear to reflect -- 10:46
22 A. It possibly was later.

23 108 Q. Then being sent on at 16:33?

24 A. I must have became aware of them at that stage, that
25 they were sitting in my inbox, so -- or it was. 10:47

26 109 Q. Yes.

27
28 "I followed this up by a further telephone call to
29 Michael Dreehan."

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So that would appear to be a second telephone call to Mr. Dreelan at that point.

A. It could have been even a third call.

110 Q. All right. Well, I think there was a third call later after the Commission had risen for the day? 10:47

A. Yes. I telephoned over, I was not sending the email or was not putting any wording in the email, so I would have been phoning over to say advices are here, and putting him on notice that what they are there -- it's probably just the way I ensure he is getting it. 10:47

111 Q. Yes. Well, if one turns on to page 695 of that book, the Tribunal then appears to resume at that stage, and this is Mr. Smyth then actually confirming for the second time that his instructions, he says there at the top of the page, are reconfirmed. And that is what happened in the face of the Tribunal or the Commission? 10:48

A. Yes, that is.

112 Q. And there then followed an issue about notice, as a result of which I think the Commission rose that day, having directed the Commissioner, Mr. Smyth acting on the Commissioner's behalf, to provide in some short form notice to Sergeant McCabe of what issues they intended to raise relating to motivation, isn't that correct? 10:48

A. That is correct.

113 Q. Okay. And then that was the end obviously of day 2 of the Commission at that stage?

A. Of the hearings.

1 114 Q. Of the hearings?
2 A. Of evidence, yes.
3 115 Q. Of the hearings. Now, at that stage, just turning back
4 a couple of pages, it's recorded:
5
6 "I further phoned Michael Dreelan AGO at 5:55pm and
7 again gave him full details of events."
8
9 And would that have included, as it were, details of
10 what had happened in the last session of the Commission 10:49
11 that day?
12 A. I recall that conversation to Michael, to Michael
13 Dreelan, to confirm that it settled -- my primary
14 concern in relation to all of this during that
15 afternoon is that it would be running to the High Court 10:49
16 and there could be a judicial review arising out of it,
17 and I had concerns in it getting into the public
18 domain, that is the primary reason why I was informing
19 Michael Dreelan in relation to what was going on and at
20 that stage confirming to him that it settled, 10:50
21 hopefully.
22 116 Q. Yes. Well, obviously you previously mentioned the
23 issue of a judicial review relating to the fees issue
24 but this was a judicial review perhaps relating to the
25 more substantive matters? 10:50
26 A. Very much so. It was anticipated that afternoon during
27 that period -- I recall reference in relation to this
28 could end up over there. I am well aware from the
29 outset the sensitivities in relation to the issues,

1 before I spoke to a client or met with a client, and,
2 yes, it was definitely a matter that I would not want
3 the Attorney General to be hearing from some colleague
4 in the Law Library or the Four Courts, what was going
5 on, so I was phoning Michael to keep him informed in 10:50
6 relation to what was going on, or Mr. Dreelan.

7 117 Q. Yes. Certainly if one looks at page 743 of the same
8 book, Mr. Dreelan, on receipt of your earlier email,
9 appears to have sent that on to Mr. Barrett some four
10 minutes after your colleague had sent it on to him, and 10:51
11 Mr. Barrett then at 16:43 replies to Mr. Dreelan and
12 copies that to you, saying:

13

14 "Very well. It was prudent of Annmarie to bring this
15 development to the attention of the office. It's not 10:51
16 proposed to second-guess the advices of counsel below
17 or the decision of the Garda Commissioner."

18

19 And obviously Mr. Dreelan had that and I don't know
20 whether you had that when you spoke to Mr. Dreelan at 10:52
21 17:55?

22 A. I would not have seen that until I returned to the
23 office. As I said I had no access to IT from the
24 Distillery Building.

25 118 Q. All right. And at page 692, you appear to have spoken 10:52
26 to Chief Superintendent Healy after having spoken to
27 Mr. Dreelan?

28 A. This would have been later on that evening when I came
29 back.

1 119 Q. Yes.

2 A. I recall my last conversation with Michael Dreelan was
3 when I was down there in the Distillery Buildings, to
4 let him know that I believed the matter was not going
5 to appear -- there was concerns that it would appear in 10:53
6 the media, it was a private commission, from my point
7 of view.

8 120 Q. Yes.

9 A. And it was in relation to a matter, I suppose, that, in
10 my opinion, it was a highly sensitive matter so... 10:53

11 121 Q. Obviously you had mentioned the question of a possible
12 judicial review to Mr. Dreelan. Now, at that doesn't
13 appear in his statement, but it appears in
14 Mr. Barrett's statement as having been a concern, but
15 you certainly mentioned that as a concern to 10:53
16 Mr. Dreelan, isn't that right?

17 A. I presume I did. My primary concern ringing him that
18 day is, as I said, this could get into the media.

19 122 Q. Yes. But this is a note then of your phone call with
20 Chief Superintendent Healy that evening, and I think 10:54
21 that's your handwriting, is that correct?

22 A. Yes, that is my handwriting.

23 123 Q. And you say:
24
25 "I telephoned FH and informed him of AGO's comments." 10:54
26
27 And presumably you got these from Mr. Dreelan, as it
28 were?

29 A. I did not speak to Mr. Dreelan that evening after I had

1 called him from down there --

2 124 Q. Yes.

3 A. -- to let him know. It was in control. I may have
4 actually told him that we are drafting letters over the
5 weekend, I don't believe I would have gone into the 10:54
6 details.

7 125 Q. The detail?

8 A. And I don't believe he probably would have been aware
9 of the detail.

10 126 Q. Yes. 10:54

11 A. But --

12 127 Q. But certainly you had spoken to Mr. Dreelan three times
13 on your own notes that afternoon, the last one at five
14 to six. You hadn't spoken to any other official in the
15 Attorney General's office? 10:55

16 A. No, I hadn't spoken to any other official there. No.

17 128 Q. Okay. So whatever you have recorded here must have
18 obviously emanated from your collective conversations,
19 as it were, with Mr. Dreelan?

20 A. No, it's arising out of a sight of a series of emails 10:55
21 that I had sight of on returning to the office.

22 129 Q. All right. All right. In any event, what you have
23 recorded here is:

24

25 "AGO's comments - not directing - Commissioner's 10:55
26 decision - line of questioning may have some validity.
27 Political dynamite!! He will brief Commissioner. I
28 will circulate draft letter once I get it from
29 counsel."

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And does that reflect your understanding that you weren't being directed or the Commissioner wasn't being directed in any way or shape or fashion by the Attorney's office?

10:56

A. This had not arisen during the day or before this. My dealings with the Attorney General's office, as you know, they nominate counsel. It wouldn't be the Attorney's job to get involved with commissions unless there was legal issues that perhaps may have to be brought to their attention. But I'm just ensuring, arising out of the sensitivities of the issue, that the client were aware that the Attorney General's office were not directing and that it was the Commissioner's decision.

10:56

10:56

130 Q. Yes. And the phrase there "political dynamite" was that something that you said or Chief Superintendent Healy said or was it just your own thinking on the matter?

A. It would be arising out of the content of material and arising out of what went on that day, but they are my specific words. I cannot discuss the content, I understand they are privileged, and I cannot put it any further than that.

10:57

CHAIRMAN: Just hang on a minute. Vis-à-vis - just help me on this - the question of privilege, Ms. Ryan is speaking to Chief Superintendent Healy, Chief Superintendent Healy is the Garda liaison person, so he is not simply representing just the Commissioner but is

10:57

1 also representing other superintendents and chief
2 superintendents who were given representation, is that
3 correct? That is correct I think.

4 MR. MCGUINNESS: Yes.

5 CHAIRMAN: But I think then the reference to privilege 10:57
6 is that this was a conversation with him on behalf of
7 all of the Gardaí who were represented? Am I right in
8 thinking that or was it just on behalf of the Garda
9 Commissioner?

10 A. Yes. No, this, the content and where I am deriving 10:58
11 privilege here is in relation to the content of the
12 series of emails that I had sight of that evening.

13 CHAIRMAN: All right.

14 A. On my computer.

15 131 Q. MR. MCGUINNESS: I think the privilege arises from the 10:58
16 fact that they were coming from the Attorney General's
17 office, is that correct?

18 A. Yes, they were.

19 132 Q. That is the issue of privilege you are referring to?

20 CHAIRMAN: Okay, all right. I had misunderstood that. 10:58

21 A. That is the privilege.

22 CHAIRMAN: So the one that we have seen not going to
23 second-guess, it's a matter -- not going to
24 second-guess the advices of counsel or the Garda
25 Commissioner, that is basically it, is it? 10:58

26 A. This was arising, as I said, my conversation with
27 Fergus Healy and what -- I don't have the content of
28 documents in front of me but it's my note taking of
29 what I must have informed --

1 CHAIRMAN: And when you say "political dynamite" you
2 think that was a thought going on in your own head?
3 Well, you were being prudent in thinking that this
4 could blow up or was it him saying it to you or you
5 saying it to him? 10:59

6 A. No, it was -- it was me saying it, and I cannot put it
7 any further than that.

8 CHAIRMAN: You were saying it to him?

9 A. Yes.

10 CHAIRMAN: Okay, fair enough. 10:59

11 133 Q. MR. MCGUINNESS: Now, it would appear that Chief
12 Superintendent Healy sent on counsel's advices to the
13 Commissioner that evening. Could you turn perhaps to
14 page 750 in that book?

15 A. 715? 10:59

16 134 Q. 750.

17 A. Oh, 750, yes.

18 135 Q. This forwarded the advice that had been sent on to you,
19 copied to you earlier that day from counsel, which you
20 had probably seen when you got back to the office but 11:00
21 it would appear to have been forwarded on by Chief
22 Superintendent Healy to the Commissioner herself,
23 saying:

24

25 "Commissioner 11:00
26 Further to our telephone conversations of even date,
27 please see the attached letter from counsel appointed
28 to represent your interests and those members of the
29 organisation at superintendent rank and higher, serving

1 and retired, that have sought and been granted
2 representation at the Commission of Investigation. I
3 trust this letter grants comfort for the decision that
4 has now been taken.

5 Fergus Healy
6 Chief Superintendent"

11:00

7
8 Did Superintendent Healy convey to you that the letter
9 was or would be of -- the letter of advice would be of
10 comfort to the Commissioner?

11:00

11 A. I do not recall. I do not recall specifically. He may
12 have. If he said so, I have no reason to disbelieve.
13 I recall he was -- I had a few phone calls on the
14 Friday evening with him.

15 136 Q. Yes. And was that discussed as one of the phone calls,
16 as one of the issues in one of the phone calls?

11:01

17 A. I recall when I came back to the office and I had sight
18 of the series of emails and my primary reason for
19 calling him was to ensure that this was the
20 Commissioner's decision.

11:01

21 137 Q. Yes. But were you concerned about the decision? Was
22 that why you made the phone call?

23 A. I suppose, I am using my own experience, I knew it was
24 a highly sensitive matter and I wanted the consultation
25 with the Commissioner and I would have been on the
26 phone to Fergus keeping the pressure on to see where
27 are we that evening, or that day. It's the
28 Commissioner's decision, I just wanted to ensure -- I
29 had nothing in writing from the Commissioner. I was

11:02

1 conscious of that.

2 138 Q. Yes. And in fact, did you ever get anything in writing
3 from the Commissioner in relation to her instructions?
4 A. No. No.

5 139 Q. Was that a matter of surprise to you? 11:02
6 A. It's -- I didn't get it, so...

7 140 Q. Okay. Now, I think obviously the process of preparing
8 the letter that Judge O'Higgins had contemplated, was
9 ongoing over that weekend, isn't that correct?
10 A. It was. It was Saturday evening/night and quite a lot 11:03
11 of Sunday.

12 141 Q. And I think you spoke to Mr. Ruane late on that
13 Saturday night, the 16th May, isn't that correct?
14 A. That is correct.

15 142 Q. And he has provided notes and there is a typewritten 11:03
16 copy at page 3759?
17 A. In the same booklet?

18 143 Q. It's in volume 7.
19 A. volume 7.

20 144 Q. And can you just help the Tribunal, this is obviously 11:04
21 late on the Saturday night, and what was the purpose in
22 ringing him to talk to him about this? You hadn't sent
23 on the advices to him directly, as I understand it?
24 A. No.

25 145 Q. Okay. And was that a deliberate decision or did you 11:04
26 just assume that Chief Superintendent Healy might do it
27 or...
28 A. Well, the liaison officer that I am dealing with, with
29 the Commissioner, I would always follow the line of

1 authority for dealing directly, regardless of what
2 client, so it was through the liaison officer, so --

3 146 Q. Yes. But the purpose of the phone call then, given
4 that was Chief Superintendent Healy was the liaison
5 officer, etcetera, why did you make this phone call 11:04
6 then, can you recall?

7 A. I suppose I just want to ensure that the Commissioner's
8 aware, I phoned Ken Ruane that evening in relation to
9 it.

10 147 Q. Yes. 11:05

11 A. And I had no direct contact with the Commissioner -
12 email, phone - at any stage during this Commission of
13 Investigation, the O'Higgins Commission hearings.

14 148 Q. Yes. Well, it says: 11:05

15
16 "Phone call AM Ryan CSSO. Contentious issue arisen.
17 Chief superintendent FH can fill me in. Instructions
18 taken from Commissioner. Counsel advised full
19 background to issues necessary to explore. File to DPP
20 and directions issued. MMCD - are these the 11:05
21 instructions of Commissioner? CS advised these are
22 relevant matters. Talk to CS, FH."
23

24 It would appear --

25 CHAIRMAN: Maybe just say again for the record, I might 11:05
26 be aware, but others won't, Ken Ruane is?

27 MR. MCGUINNESS: He is the Head of Legal Affairs in An
28 Garda Síochána.

29 CHAIRMAN: Who has given evidence last.

1 MR. MCGUINNESS: Yes.

2 149 Q. And perhaps there is an interpretation that you were
3 anxious to fill him in on what had happened because he
4 hadn't been privy to it?

5 A. I would expect that is why I would have called him. I 11:06
6 do know it was playing -- I do know that Friday evening
7 I had concerns that I had not met with the
8 Commissioner, I am well aware of what -- from my
9 knowledge at that stage, that it was going to be a
10 sensitive matter and I was not happy that -- not that I 11:06
11 am calling into question Ken Ruane or Chief
12 Superintendent Healy, but I would have preferred to
13 deal directly with the Commissioner in relation to this
14 matter. And from that, I would expect I would have
15 been cautious to ring Ken Ruane, knowing his position 11:06
16 down there, dealing with Ken Ruane a lot throughout the
17 years, I believe that is the reason I would have taken
18 it to his attention. I do recall speaking to him, what
19 time it was I don't know, time didn't really matter
20 that weekend. 11:07

21 150 Q. Yes. Obviously we have previously touched upon the
22 availability of counsel who had confirmed they would
23 meet the Commissioner, you were anxious for that to
24 happen, it didn't happen for whatever reason, were you
25 ever given a reason as to why it didn't happen at that 11:07
26 point?

27 A. Yes, I was. I was informed that she was very busy.

28 151 Q. All right. In any event, were you, as it were,
29 expecting that Mr. Ruane would intervene either in

1 relation to the instructions or as to whether they were
2 either appropriate or necessary or --

3 A. No. I was bringing it to his attention to ensure, in
4 light of his position down there, to let him know what
5 had gone on. Perhaps I probably should have called him 11:08
6 Friday or earlier on that day. I had a lot going on,
7 it probably dawned on me, I had better call him. It's
8 my understanding I might have called him and he rang me
9 back. Getting in touch with people is not always --
10 they see me ringing and they don't be inclined to pick 11:08
11 up the phones.

12 152 Q. Well, in urgent matters --

13 A. I would have left an urgent message, I believe.

14 153 Q. Yes. And I think if you look at page 762 of volume 1B
15 there. 11:08

16 A. Sorry, volume 1B. 762?

17 154 Q. Yes.

18 A. Sorry, it goes to 754.

19 155 Q. I'm sorry, if you take up the next volume, 1C. Thank
20 you. 11:09

21 A. volume 1C. No, I can look at it on screen maybe.

22 156 Q. I am sorry, it's volume 2, part A, page 762.

23 A. Yes.

24 157 Q. And I think it doesn't come out very well on this copy
25 of it but at the top there is in handwriting: 11:09
26
27 "DOC is to show motivation behind McCabe."
28
29 And I think that is your handwriting, is it?

1 A. Yes, the handwriting, sorry. It's all of my
2 handwriting.

3 158 Q. Just to identify this, this is an email from
4 Mr. MacNamee to both yourself and Chief Superintendent
5 Healy, which is a draft wording to be incorporated into 11:10
6 a letter to the Commission, and I suppose just to be
7 comprehensive, it says:
8
9 "Dear Annmarie and Fergus
10 I attach for your immediate attention a draft wording 11:10
11 to be incorporated into our letter to the Commission.
12
13 It is of the utmost importance that the content be as
14 factually accurate as possible, such that there are no
15 misstatements and nothing that cannot be rectified in 11:10
16 oral or documentary evidence (with the exception of the
17 facts alleged, recited or admitted by McCabe himself).
18
19 You will note the various comments and insertions and
20 notes made in the text and please respond to these with 11:11
21 any particular observations or changes or suggestions
22 in the actual document. In certain situations I have
23 left issues for Colm to decide. If Fergus has any view
24 on any of those issues then such a view will bind us
25 and does not require counsel's approval. 11:11
26
27 Fergus should obtain the required instructions and
28 insert these into the text where indicated. Also, if
29 the sequencing or paragraph needs to be switched around

1 please do this in accordance with the instructions to
2 the extent possible. Once this is complete Fergus
3 should rename the document, send it back to me so I can
4 draft the full letter to Annmarie.

5
6 I am available at any time for a telephone call.

7
8 Please text me when emailing me back."

9
10 And that's from junior counsel enclosing I think, was 11:11
11 it, the first draft of the letter that came to be
12 furnished to the Commission on the morning of the 18th?

13 A. It appears to be, yes.

14 159 Q. Yes. Your handwritten note then at the top says:

15
16 "Spoke to Fergus Healy at 9:30pm. I pointed out my two 11:11
17 concerns. I asked him to speak with Michael Clancy and
18 get his views before we send it to Noel and Colm. He
19 will come back to me in the morning."

20
21 And can you recollect what your two concerns were at 11:12
22 this point in time, that you refer to there?

23 A. I would have to look at the file. I have other
24 markings on documentation, but I do recall that I had
25 not spoken to Michael Clancy, or chief superintendent 11:12
26 Michael Clancy, nor had I met him at that stage, so I
27 do recall that I did not want to circulate the letter I
28 got Michael Clancy's -- he wasn't involved in Module 1,
29 so I was not in a position to take him into Module 1.

1 But I do recall asking Fergus to look at the Michael
2 Clancy parts before I circulated to two others because
3 there's sort of three authors compiling the material.
4 CHAIRMAN: Yes, and the Noel is Noel Cunningham, I
5 presume, is it? 11:13

6 A. And as Colm Rooney and Noel Cunningham and Michael
7 Clancy was where the knowledge.

8 160 Q. MR. MCGUINNESS: The other note you have towards the
9 bottom of the page then relates to, certainly one of
10 the phone calls with Mr. Ruane: 11:13

11
12 "Ken Ruane phoned me at 23:05. I relayed to him brief
13 overview of what happened yesterday. I asked him to
14 speak with Fergus. I told him I needed McCabe's two
15 statements of claims/PI summons. He will get those to 11:13
16 me on Monday."
17

18 And I think a lot of work took place in preparing the
19 draft for completion for Monday morning?

20 A. There was a lot of circulation of the draft and -- 11:14

21 161 Q. Yes.

22 A. Yes.

23 162 Q. And if one turns to page 765, this is 9:32 on the
24 Monday morning, you were in a position to I think
25 circulate the letter that was the final version there, 11:14
26 is that correct?

27 A. It had more or less -- that was the actual engrossed
28 letter.

29 163 Q. Yes.

1 A. The final version was probably sent around 1:00, 2:00am
2 on the 18th May, it was the early hours. I would have
3 to check the file to see precisely timings.

4 164 Q. Yes.

5 CHAIRMAN: Was sent to the Commission at one or two 11:14
6 o'clock in the morning?

7 A. No. I was circulating it to, at that hour in the
8 morning, the early hours -- late Sunday night early
9 hours of Monday morning.

10 CHAIRMAN: To Superintendent Rooney -- Chief 11:15
11 Superintendent Rooney and Superintendent Cunningham? I
12 am sorry, I just didn't get it.

13 A. To all three involved. Chief superintendent or former
14 Chief Superintendent Colm Rooney, Superintendent Noel
15 Cunningham and Fergus Healy. And Chief Superintendent 11:15
16 Fergus Healy was dealing with parts relating to a
17 witness -- or sorry, a client that I understood that I
18 would be representing in relation to other matters that
19 were to come, but not in respect of that module. And,
20 as I said, I had not met with Chief Superintendent 11:15
21 Michael Clancy until Module 2, just beforehand. Or a
22 short while before the commencement of Module 2's
23 hearings.

24 165 Q. MR. MCGUINNESS: Yes. In any event, I think the
25 unsigned copy of the letter is to be found at page 766, 11:16
26 if one turns on. 767, 768, 769 and there's redactions
27 of names then in the final paragraph, 19, and we don't
28 need to read the whole of the letter, but in the last
29 sentence of paragraph 19 there it says:

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"In the course of this meeting, Sergeant McCabe advised Superintendent Cunningham the only reason he made the complaint against Superintendent Clancy was to a force him to allow Sergeant McCabe to have the full directions, full DPP directions conveyed to him."

11:16

And the word "against" there I think turned out to be incorrect?

A. There appears to be "against" twice in that paragraph, that is incorrect from my recollection. That transpired when evidence was called sometime in June.

11:17

166 Q. Yes?

A. Which was dealt with on transcript, that I am sure you have had sight of.

11:17

167 Q. Yes. In any event, obviously the draft that had been provided by counsel had been circulated to a number of officers?

A. Yes.

168 Q. And it would appear that none of them had picked up on that, as such?

11:17

A. Well, I have, obviously there's privilege in relation to these matters --

169 Q. Yes.

A. -- but, no, I have double-checked what has come back to me and, no, that matter -- there is no reference whatsoever to "against".

11:17

170 Q. We don't need to go any further into it, but Mr. Smyth put the contents of paragraph 19 to Sergeant McCabe and

1 he said that was absolutely false.

2 A. Yes, I do recall that.

3 171 Q. And he was correct in saying that. The error came to
4 light then in the course of the Tribunal hearings,
5 isn't that correct?

11:18

6 A. Yes, that's correct.

7 172 Q. And Superintendent Cunningham, in his evidence,
8 referred to the fact that his report was in fact
9 consistent with what Sergeant McCabe had said at their
10 Mullingar meeting?

11:18

11 A. It was. Obviously Superintendent Cunningham would not
12 have been -- would have been giving evidence, if it
13 came around to it, based on his Garda report
14 documentation. And yes, his Garda report documentation
15 reflected what was in the transcript that we received
16 of the Mullingar meeting. I do recall that from down
17 there that day when it transpired. It was sometime
18 later that we received the -- this wasn't that same
19 weekend or same week, it was a few weeks later. But,
20 yes, that is when it came to notice, during his
21 evidence.

11:18

11:19

22 173 Q. Yes. And on the morning of the 18th, which was day 3
23 then of the Commission, you deal with this at paragraph
24 18 of your statement, in which you say:

25

11:19

26 "Early morning the 18th May 2015 I had further
27 telephone conversations with Chief Superintendent
28 Healy, former Chief Superintendent Rooney and
29 Superintendent Cunningham. The letter was addressed to

1 the Commission and hand-delivered to Mr. O'Hagan at
2 10:00am on the 18th May 2015. On the directions of
3 Mr. Justice O'Higgins I also handed copies of same to
4 Sergeant McCabe's legal team."

11:19

6 And I think your notes at 3769 relate to that.

7 A. What booklet is that, Mr. McGuinness?

8 174 Q. It's in Volume 7, Ms. Ryan. And --

9 A. Sorry, 3789.

10 175 Q. 3769, sorry, I beg your pardon. And there is a
11 reference there to the documents and that they were
12 provided to Sergeant McCabe's team at that point.

11:20

13 A. That morning, when I went over, I was delayed
14 unfortunately due to matters outside of my control
15 arriving at the Commission. I believe every traffic
16 light was red on the way over.

11:21

17 176 Q. Right.

18 A. And when I got there, the letter -- I had to get
19 documentation from the client that morning, the letter
20 was handed first to Mr. O'Hagan, for the attention of
21 Judge O'Higgins, and a short while later, like within
22 minutes probably or whatever, I had the documentation
23 copied that accompanied that letter, and the file would
24 show what documents they were.

11:21

25 177 Q. Yes. In any event, Judge O'Higgins ruled on that day
26 in relation to the issue of motivation and ruled
27 effectively that the Commissioner was entitled simply
28 to put it no more than that Sergeant McCabe was
29 perceived to have a grievance, real or perceived, isn't

11:21

1 that correct?

2 A. That is -- I would have to check notes but whatever is
3 on the transcript.

4 178 Q. Yes. But am I correct in saying that the issue of
5 motivation then being pursued by Mr. Smyth on behalf of 11:22
6 the Commissioner didn't really raise its head again
7 after that point in time, in the hearings?

8 A. In the hearings.

9 179 Q. In the hearings.

10 A. It did not raise its head. 11:22

11 180 Q. And you refer in your statement then to counsel having
12 drafted submissions in relation to Module 1, that is at
13 paragraph 19 of your statement.

14 A. Yes.

15 181 Q. And I think you received draft submissions at Module 1, 11:23
16 if we could go to page 1374 of the documents. In
17 volume 2, part B, I'm afraid.

18 A. 1374?

19 182 Q. 1374. That is Mr. Byrne, I think, sending you on the
20 draft submissions for Module 1. 11:24

21 A. That is correct.

22 183 Q. And the module, the Module 1 submissions themselves are
23 at 1439 in the same book. And are those the Module 1
24 submissions that were lodged on behalf of the
25 Commissioner? 11:24

26 A. I take it they are.

27 184 Q. Yes. Now, they are dated the 11th June, and they deal
28 in some detail with the motivation issue relating to
29 Sergeant McCabe at paragraph 63 onwards. Paragraph 63

1 to 72. Is that correct?

2 A. That is correct.

3 185 Q. And I think these were filed, as it were, in advance of
4 the issue about the transcript of the Mullingar meeting
5 being sorted out, which it was in June, after these 11:26
6 were lodged, isn't that correct?

7 A. I was constantly under pressure from the Commission to
8 file these. I believe I may have a note on the file
9 reserving my position to amend them following evidence
10 that I was aware of that may be heard, but the note on 11:26
11 my file, I don't know, but I know there is some
12 reference there. But, yes, we were under pressure to
13 file submissions by the Commission.

14 186 Q. Yes. In any event, you had sent them on to Chief
15 Superintendent Healy and was it your understanding that 11:26
16 they had the approval of the Commissioner at that
17 point?

18 A. I had no direct dealings with the Commissioner during
19 this entire matter, so I presume.

20 187 Q. Yes. But were they, as it were, cleared by 11:27
21 Superintendent Healy on behalf of the Commissioner?

22 A. Yes. It would have been sent to Superintendent Healy
23 and I'm sure my file will show what came back, but --

24 188 Q. Yes.

25 A. -- yes, they would never have been filed until I get 11:27
26 the go-ahead to put this submission and any submission
27 in.

28 189 Q. You sent the submissions on to Mr. Dreehan, do you
29 recall doing that?

1 A. No, I didn't send the submission to Mr. Dreelan.

2 190 Q. I'm sorry.

3 A. I recall asking Mr. Dreelan does he want to see the
4 submission, is my understanding.

5 191 Q. Right.

11:27

6 A. And no, they would not be aware of what the evidence
7 were --

8 CHAIRMAN: Sorry for interrupting. But I take it that
9 the point of sending the submissions to Chief
10 Superintendent Healy was for him to come back to you,
11 presumably after having checked with anyone who was
12 involved, as to whether these were correct and to say
13 to you yes, you have the go ahead on that?

11:28

14 A. Yes, initially when we got the submission, I recall
15 speaking to Chief Superintendent Healy, I am acting for
16 a lot of people here, I suppose, just conscious how are
17 we going to get these agreed so quickly and get them
18 before -- get them lodged with the Commission. Counsel
19 advised that they want -- they would want all clients
20 to ensure that they are happy with the content of same,
21 and arising out of that it would have been circulated
22 to all witnesses until final confirmation came that
23 submissions were ready to be lodged, well, not lodged
24 but submitted to the Commission.

11:28

11:28

25 CHAIRMAN: Yes.

11:29

26 A. And that was the way all submissions were throughout
27 it. They may have changed somewhat in the way we dealt
28 with them, that I probably would have been sending
29 submissions as it went on directly to clients but the

1 final drafts would have been all coming back and always
2 have been recirculated, that would be circulated to
3 Chief Superintendent Healy. Timing was a huge problem
4 in relation to it, so --

5 CHAIRMAN: Yes, but the point was, that something that 11:29
6 is being sent in on behalf of multiple clients, your
7 expectation was the advices of counsel were Chief
8 Superintendent Healy knew that nothing was to go in on
9 their behalf unless it had been checked by them and
10 they were happy factually with what was being said on 11:29
11 their behalf in writing in the submission?

12 A. Yes. There is an email on my file in relation to
13 Module 1, the first submissions we are doing from
14 counsel advising that. I don't know the full content
15 of it but I am aware there is an email from counsel in 11:30
16 relation to that. And going forward that is what was
17 done, that style in respect of all submissions lodged.
18 CHAIRMAN: Okay.

19 A. But yes, counsel had requested that and the client had
20 taken on board their advices and that's the style. 11:30

21 192 Q. MR. MCGUINNESS: I had perhaps misread one of your
22 emails to Mr. Dreelan, and I think you are correct in
23 what you are saying, you didn't actually send him the
24 submissions. Could I ask you to look at volume 2, part
25 C, at page 1455? And if we go down to the bottom of 11:30
26 that page --

27 A. 1455?

28 193 Q. Yes. 12th of June 2015. It's from you to Mr. Dreelan:
29

1 "Dear Michael --"

2

3

It must read.

4

5

-- I have submitted submissions to the Commission in
respect of module 1. Please confirm if you require me
to send you a copy --"

11:31

6

7

8

9

Presumably.

10

11

-- through ACME for noting."

12

13

And then Mr. Dreelan replies:

14

15

"Thank you, Annmarie

16

I have no particular legal interest, but I think that I
should probably remain in touch with the Garda view so
that I can properly contextualise matters which may
arise. This material is all quite sensitive and if you
have any sensitivity concerns we might discuss. It's
probably not vital that I read the subs."

11:31

17

18

19

20

21

22

23

And then you have noted that. But insofar as he said
he probably should remain in touch with the Garda view,
is it your evidence you didn't send the submissions on
to him?

11:32

24

25

26

27

A. No. And that's why I would have sent the email first,
because I was quite aware from the outset that the
Attorney General's office were not directing in this

28

29

1 matter nor providing advices, so I didn't think it was
2 appropriate for me to send submissions to him but I
3 would have sent the email to just ensure is he happy
4 with the way I had proposed to deal with submissions,
5 as in, to not forward them to the Attorney General's 11:32
6 office. So yes, that is what that email is about.

7 194 Q. Yes.

8 A. Michael would have been aware probably in relation to
9 matters, a few other matters. But, no, that's what
10 that was. I was giving them the opportunity to ensure 11:32
11 that they were happy that I go this way.

12 195 Q. Okay. Just on an unrelated note, Mr. Ruane has told us
13 of a conversation he had with Chief Superintendent
14 Fergus Healy on or about 26th May in which Chief
15 Superintendent Healy referred to a meeting of the 11:33
16 Commissioner with counsel, apparently on the 21st May.
17 Were you aware of any such meeting?

18 A. I became aware of it. When it was, I actually would
19 have put it more July. I know it was summertime, but
20 as I said, time -- 11:33

21 196 Q. Are you in a position to say from what you did learn of
22 it whether it was a meeting in the sense of a
23 consultation or simply a meet and greet by the
24 Commissioner with Mr. Smyth or with others?

25 A. It was my awareness that I -- it was -- I suppose I 11:33
26 wasn't put out, but I would expect to be at a meeting.
27 But, no, it was my understanding that the Commissioner
28 did not know or had not met Mr. Smyth and it was a cup
29 of tea type meeting is the way I think it was described

1 to me.

2 197 Q. Okay. We have the Commissioner's e-calendar which
3 shows a meeting put in her diary apparently for between
4 4:30 and 5:30 on the afternoon of 21st May 2015, but is
5 it your understanding that that meeting with Mr. Smyth 11:34
6 did take place?

7 A. I don't know what day or what time it took place.

8 198 Q. But it was your understanding that whenever it took
9 place it did take place?

10 A. I know I was aware that a meeting took place. Whether 11:34
11 it was May, June, July, I don't know, it was that
12 period I became aware of it.

13 199 Q. Okay.

14 A. Or...

15 200 Q. In any event, just going back to the narrative, after 11:34
16 the Module 1 submissions were put in, the Tribunal
17 resumed on day 5, which was the 24th June. And in that
18 volume that's in front of you, volume 2, part C, the
19 transcript for that day commences at page 1460. And
20 the transcript shows at page 1464 that Judge O'Higgins 11:35
21 raised the correctness of this paragraph 19 that we
22 have seen in the letter, isn't that correct?

23 A. Yes, this matter was all dealt with on evidence --

24 201 Q. Yes.

25 A. -- on that day. 11:35

26 202 Q. And I think the Judge noted in relation to the
27 transcript of Sergeant McCabe, he noted at page 34, if
28 one goes to page 1493.

29 A. 1493. Yes.

1 203 Q. That he is debating the issue with Mr. Smyth, but he
2 says:

3
4 "MR. JUSTICE O'HIGGINS: Does it change anything? As
5 Superintendent Cunningham put in his report. He said
6 in his report what he thought the motivation of
7 Sergeant McCabe in making the observations and the
8 request on February the 28th, he says what he thought.
9 The transcript would appear to offer some support for
10 Superintendent Cunningham's view of it."
11

12 And that would appear to be correct in that
13 superintendent's report -- Superintendent Cunningham's
14 report of 2008 was consistent with the transcript that
15 Sergeant McCabe had?

11:36

16 A. Yes. After that, when we were looking at it, yes, the
17 Garda reports prepared by -- or report and handwritten
18 notes prepared by Chief Superintendent Cunningham
19 appeared to tally with what -- or did so, with what was
20 in the transcript of so-called Mullingar meeting. We
21 have never heard the actual recording of the Mullingar
22 meeting, it was a transcript that we received from the
23 Commission, I understand prepared by Sergeant McCabe.
24 But yes, it does confirm the Garda report prepared by
25 Superintendent Cunningham reflects what is in the
26 transcript of the meeting.

11:37

11:37

27 204 Q. Yes. Just, there was reference earlier in one of the
28 consultations to Sergeant Martin, and were you aware
29 that Chief Superintendent Healy phoned Sergeant Martin?

1 A. No, I have -- I don't know who Sergeant Martin is, I
2 know her name is there. I have never met her.
3 CHAIRMAN: Well, as I understand it, Sergeant Martin
4 had nothing to do with anything, save for the fact that
5 she was at the Mullingar meeting and took a note which 11:38
6 was accurate.
7 MR. MCGUINNESS: And which she signed.
8 A. Absolutely. I had no dealings with --
9 CHAIRMAN: She has been, however, traversed in various
10 places wrongly. 11:38
11 A. Oh, totally so.
12 CHAIRMAN: But that is all she ever did.
13 A. Yes. I had no dealings with Sergeant Martin. She was
14 named in that letter arising out of Garda
15 documentation, a report prepared by Superintendent 11:38
16 Cunningham and Garda Martin had signed her signature to
17 handwritten notes prepared during that conversation
18 where Sergeant McCabe had recorded. And that was
19 Sergeant Martin's role, I understood it. And as I
20 said, I had no dealings with Sergeant Martin during 11:38
21 this entire investigation, Commission, and nor had I
22 dealings with any solicitor on her behalf and nor do I
23 know even if she was down there or called and nor do I
24 know if Fergus Healy ever called her.
25 205 Q. MR. MCGUINNESS: And certainly you never spoke to her 11:38
26 or sought a statement from her?
27 A. I have no dealings.
28 206 Q. No. Or discussed --
29 A. Absolutely none.

1 207 Q. Or discussed what she might say, if anything, about
2 this?

3 A. No. I would be very surprised if she was aware of the
4 content of that letter prepared on 18th of May 2015,
5 because that letter was prepared for the Commission and 11:39
6 on direction by Judge O'Higgins it was only given to
7 Sergeant McCabe's legal team. And I understand my
8 notes reflect that I gave three copies together with
9 the documents to Sergeant McCabe's legal team that
10 morning on the 18th May 2015. 11:39

11 208 Q. The issue of Sergeant McCabe's motivation appears to
12 have been touched upon in advices of Mr. Smyth that
13 were sent to you in July. Can you help us understand
14 the context in which that was written? Could I ask you
15 to look at, it's in volume 3, I am going to ask you to 11:40
16 change volumes.

17 A. What page?

18 209 Q. And page 2022. There had apparently arisen some media
19 queries from Mr. Burke of RTÉ about what the position
20 of the Commissioner at the Commission was and how she 11:40
21 was dealing with Sergeant McCabe, but at the bottom of
22 this, it's an email from you to Chief Superintendent
23 Healy of the 6th July 2015 at 18:13, and you say:

24

25 "Dear Fergus 11:41
26 Further to the hearings in Module 1 and Module 2, I
27 attach a letter from Colm Smyth dated 6th inst. setting
28 out his views on issues today and in particular
29 Sergeant McCabe's motivation for bringing the

1 complaints in the first place."

2

3 And you attach or forward on Mr. Smyth's advice. Was
4 his advices sought by the Commissioner in relation to
5 Sergeant McCabe's motivation at that point?

11:41

6 A. I don't believe -- I would not be in a position to say,
7 maybe my file could reflect that. I'm aware there is a
8 letter there, I haven't probably read it since back
9 then.

10 210 Q. Yes.

11:41

11 A. But I --

12 211 Q. All right.

13 A. I don't know. I would have to check the file to see if
14 there is any reference.

15 212 Q. All right. Well, perhaps if you would look at the
16 first page of the advices at 2024. He appears to be
17 expressing a view about Sergeant McCabe as he saw it
18 and his attitude to Superintendent Clancy and
19 Superintendent Cunningham there. Was this advices that
20 was sought by you, to your recollection, or not?

11:42

11:42

21 A. I must have sought them. I do recall getting them, I
22 recall reading them.

23 213 Q. Yes.

24 A. I must have, yes.

25 214 Q. All right.

11:42

26 A. Well, sorry, I am not in a position to actually confirm
27 it. I would have to look at the file to see if there
28 is any reference to how it arose. But yes, I do
29 recall.

1 215 Q. Okay. In any event, just moving on to much a later
2 module, firstly can you confirm that no -- did any
3 issue relating to the motivation or otherwise of
4 Sergeant McCabe actually surface from June onwards in
5 the Commission hearings? 11:43

6 A. Motivation was -- did it surface? I don't recall if it
7 actually surfaced, but from evidence, it was -- it
8 was -- we never raised it, but Sergeant McCabe had made
9 serious allegations, which you are aware, some --
10 primarily I think all of the allegations he made 11:44
11 against Assistant Commissioner Derek Byrne were
12 withdrawn throughout the entire period as they arose.
13 There was very few or if any, one or two maybe,
14 withdrawn against members that I was representing on
15 behalf of the Commissioner. 11:44

16 216 Q. Yes.

17 A. I don't know if it specifically raised its head
18 verbally. It was always probably --

19 217 Q. Obviously the transcript itself shows what happened on
20 the various days, but -- 11:44

21 A. Yes.

22 218 Q. -- in terms of the examination or cross-examination of
23 Sergeant McCabe on behalf of the Commissioner, was
24 there anything improper, in your view, in any of that
25 cross-examination, from this point onwards or at all? 11:44

26 A. The way counsel cross-examines on a matter is a matter
27 for counsel.

28 219 Q. Yes.

29 A. Did any matter stand out? No, it was in accordance

1 with the evidence.

2 220 Q. Yes.

3 A. I don't know.

4 221 Q. Yes. Now, moving on to October. I think you had
5 consultations with the Commissioner in October and in 11:45
6 early November, isn't that correct?

7 A. That is correct.

8 222 Q. And --

9 A. What booklet am I --

10 223 Q. I think you had a preparatory meeting with the 11:45
11 Commissioner, if we go back to book 7, perhaps.

12 A. Sorry, I am going to close over some of these books at
13 this stage.

14 224 Q. Yes. Thank you. Page 3803.

15 A. Sorry, 38 -- 11:46

16 225 Q. 3803.

17 A. 3803.

18 226 Q. And have you got that page, Ms. Ryan?

19 A. I do.

20 227 Q. Thank you. I think these represent your notes of a 11:46
21 consultation with the Commissioner held on the evening
22 of the 20th October 2015, is that correct?

23 A. That is correct.

24 228 Q. Okay. And you list the persons present, who included
25 the three counsel, Chief Superintendent Healy and 11:47
26 Inspector McNamara, and it says there "Discussed
27 McCabe's motivation". And then there's various
28 headings.
29

1 "Responsible for corporate body, duty to all employees,
2 cannot be a one-sided tribunal/show. Commissioner has
3 a responsibility."
4

5 who were you recording there or what were you
6 reflecting there in your notes? 11:47

7 A. I was recalling, it would have been primarily Colm
8 Smyth, the majority of the time if not practically all
9 the time, who did the talking on behalf of counsel, but
10 I do recall these matters would have been raised 11:47
11 previously through conversations, but that day when we
12 met the Commissioner. It was, I know Colm Smyth was
13 talking in relation to matters and was also giving
14 examples that I would have been well familiar with at
15 the time, in relation to what had transpired from 11:48
16 evidence. And arising out of that or probably all the
17 same conversation blended in together --

18 229 Q. Yes.

19 A. -- these were issues that I wrote down.

20 230 Q. Okay. Well, does this reflect what the Commissioner
21 was sort of saying about her position or -- 11:48

22 A. No, very much so, Judge, and another matter that is - I
23 don't know if I have it written down. Sorry, I have a
24 slight cold - the welfare of Sergeant McCabe and also
25 the welfare of other officers or other Garda members 11:48
26 during the course of the O'Higgins Commission, where
27 many of them were under serious pressure and fairly
28 obvious to the naked eye, like, the pressure that
29 people were under.

1 231 Q. Yes.

2 A. The welfare would have been raised as well and I
3 believe in relation to all of that I would have been
4 taking down notes of specifics. Like, there would have
5 been a lot of matters said but I wasn't writing down 11:49
6 what was already in transcripts, that I am aware of.
7 It's matters that were dealing with the Commissioner,
8 and I am just recording the notes to reflect that.

9 232 Q. Okay. You then say:

10
11 "Role in Module 5 is during her time as Assistant
12 Commissioner HRM"
13
14 And it then says:
15
16 "Colm Smyth SC can refuse/object to this line of 11:49
17 questioning as no doubt McDowell will try this line of
18 questioning. So either deal with it head on or Colm
19 object, legal/client privilege."
20
21 Does that relate to a possible questioning of 11:49
22 Commissioner O'Sullivan about her instructions to her
23 team?

24 A. Yes, it does.

25 233 Q. Okay. And obviously there had been some media comment 11:49
26 in the summer, in July, about the Commissioner's
27 instructions and how Sergeant McCabe was being treated.
28 Was that a matter of concern to the Commissioner at
29 this point or was it something being raised --

1 A. I don't know if they were raised at that point. My
2 understanding is that there was two or three media
3 leaks or reference in media or queries from journalists
4 in relation to the matter that would have been brought
5 to my attention and I would have brought them to the 11:50
6 attention of David O'Hagan during it. But, no, this
7 was primarily -- it had not been anticipated that
8 Commissioner O'Sullivan would be called as a witness
9 until I received notification either by email from
10 David O'Hagan or quite often sometimes he'd call me 11:50
11 before sending it to let me know who is on the list.

12 234 Q. Yes.

13 A. I would immediately get on the phone to Fergus Healy
14 and inform him, but that was the first time that Nóirín
15 O'Sullivan or the only time that she is on any witness 11:51
16 list for these, and arising out of this, this module,
17 we were consulting with her. The Commissioner wanted
18 the consultation. We arranged the consultation, I
19 remember it was late enough that evening, there was
20 probably another one or two consultations after meeting 11:51
21 Commissioner O'Sullivan on the same night. But
22 Mr. McDowell was always, I believe he actually said
23 there was always -- he was going to question her, I
24 don't know what wording or what way he was going to put
25 it, but we were well aware and well conscious that 11:51
26 Mr. McDowell will raise this matter and in light of
27 media leaks, it was very much live. So oh, yes, it was
28 expected Mr. McDowell would raise it. Obviously on the
29 day he didn't.

1 235 Q. Yes.

2 A. But yes, we were very much prepared in relation to that
3 matter.

4 236 Q. Okay. Well, certainly he had said at an earlier stage
5 that if these were the Commissioner's instructions, he 11:51
6 would want to cross-examine her and she mightn't enjoy
7 it so --

8 A. Is that the wording? I do know --

9 237 Q. Words to that effect, yes. So, was it anticipated he
10 would take that line of action? 11:52

11 A. Oh, very much so.

12 238 Q. He didn't in the end.

13 A. We were actually surprised in the end, there was no
14 questions at all in relation to the questioning of
15 motivation when Commissioner O'Sullivan was taking the 11:52
16 stand and during evidence. Judge O'Higgins had raised
17 it with Colm Smyth just moments prior to Commissioner
18 O'Sullivan and Commissioner O'Sullivan was in the room
19 at that stage before she took the oath.

20 239 Q. Well, I will come to that in due course, but it's 11:52
21 quoted here then in the middle:
22
23 "Commissioner wouldn't want to set precedent at meeting
24 head on."
25 11:52
26 what does that reflect?

27 A. It's solicitor-client privilege, that is what was
28 arising out of. So, was she going to justify what her
29 advices were and what her instructions were to us

1 arising out of this.

2 240 Q. Yes. But what was her decision? Was she going to --
3 the conclusion of the meeting, was Mr. Smyth going to
4 object on the basis of legal professional privilege or
5 was the Commissioner going to answer the questions? 11:53

6 A. I believe that it was going to be answered along the
7 lines that "responsibility for corporate bodies, duty
8 to all employees, cannot be a one-sided tribunal/show
9 and the Commissioner has a responsibility". But that
10 was recording what way this was going to be approached, 11:53
11 as we said, we anticipated that Sergeant McCabe's legal
12 team were going to raise this when Commissioner
13 O'Sullivan or during Commissioner O'Sullivan's evidence
14 and it did not happen.

15 241 Q. Okay. There was a second meeting with the Commissioner 11:53
16 prior to her giving evidence, and perhaps you'd turn to
17 page 3805:

18
19 "Motivation, we questioned this. No particular mala
20 fides against McCabe, just his motivation. NB, in 11:54
21 initial letter from counsel re motivation email? And
22 letter from us to Commission."

23
24 There is reference then to documents, Derek's report to
25 F Murphy. Various tabbed documents. 11:54

26
27 "Supports in place for McCabe. NB, we gave him back
28 Pulse but with conditions. Kieran Kenny gave McCabe
29 the letter. At this very same time directive sent to

1 all members re data protection. Disgusting remark by
2 Martin not intended at the individuals."

3
4 was that the remark before the PAC that was being
5 referred to there? 11:55

6 A. It was. That remark, it was arising out of, we had a
7 discussion prior to that, this was the second
8 consultation that we had with Commissioner O'Sullivan.
9 I understand she was giving evidence the next morning,
10 it was relatively late evening, late night in Garda HQ. 11:55
11 And, we were discussing primarily at this, again
12 revisiting the question of motivation in relation to
13 this matter because we did anticipate it was going to
14 be raised the next day. And also, we were discussing
15 the evidence and in particular the evidence of Sergeant 11:55
16 McCabe during Module 5 and there was talk of action or
17 actions or lack of action. And arising out of that,
18 the Commissioner O'Sullivan was saying that disgusting
19 remark was not intended at the individuals, it was
20 intended at the actions or along those lines or the way 11:56
21 they were going about matters, but it was never
22 intended -- is my understanding, arising from what I
23 gleaned from that conversation, that that is where that
24 was taken up. Because the evidence during Module 5
25 was -- speaks for itself, I don't need to refer to it. 11:56

26 CHAIRMAN: What is the date of this again, please,
27 Mr. McGuinness?

28 MR. MCGUINNESS: This is a meeting on the 3/11.

29 CHAIRMAN: Yes, that is what I thought.

1 MR. MCGUINNESS: Prior to the Commissioner's appearance
2 on day 29, the next day.

3 CHAIRMAN: Yes.

4 242 Q. MR. MCGUINNESS: But was this perhaps not a rowing back 11:56
5 of the Commissioner's position or an attempt to change
6 it or to persuade the Judge that the Commissioner was
7 changing her position, that she had never called into
8 account his good faith?

9 A. No, Judge, I believe -- or Chairman, I believe that the
10 question of integrity never particularly arose. I do 11:57
11 remember some discussion in relation to the matter.

12 243 Q. Yes.

13 A. I actually remember this consultation, I took the
14 transcript of Module 2 with me, I believe senior
15 counsel had asked for it and I had it in one of the, I 11:57
16 call them, wheelie bins that I put all matters in. I
17 do recall, I do recall they were discussing it and what
18 it was.

19 244 Q. Yes. But Mr. Smyth had clearly agreed with the Judge
20 that he was challenging Sergeant McCabe's integrity 11:57
21 right the way through, he said?

22 A. Yes, that was module -- in the early days. I don't
23 believe that was particularly -- I don't recall any
24 conversation arising out of that until this time or the
25 next morning, actually, when I am in evidence -- 11:58
26 evidence is starting around ten o'clock or so.

27 CHAIRMAN: Yes, but I mean, the whole ramification of
28 what Martin Callinan, the Commissioner, had said before
29 the Public Accounts Committee, it was on 23rd of

1 January 2014 was still resonating, is that what you are
2 saying?

3 A. I had absolutely no knowledge of -- oh, sorry, the
4 comments, the disgusting comments, it arose out of --
5 there was detailed discussions that day -- or not 11:58
6 detailed, but Sergeant McCabe's evidence relating to
7 Module 5 was discussed, I believe you know what I'm
8 saying is in it, and there's evidence that transpired
9 out of that where Sergeant McCabe was not aware of the
10 numerous letters that the Minister, Department of 11:58
11 Justice, had sent to his solicitors. And there was
12 complete and utter shock that he'd made an allegation
13 against the former Commissioner, Martin Callinan, what
14 appeared to be where he referred to "he" and "we", that
15 they made it primarily to get it on to a Minister's 11:59
16 desk and then, from there, there's numerous letters
17 being sent by the Minister, his officials, to Sergeant
18 McCabe's solicitors and Sergeant McCabe, in his direct
19 uncontested evidence, was not aware of any of those
20 letters. 11:59

21 245 Q. MR. MCGUINNESS: All right.

22 A. And that evening, arising out of that, or this
23 consultation, senior counsel had referred to that
24 matter and the actions in relation to what is going on
25 here, and that's where that comment in relation to 11:59
26 Martin arose, that Commissioner O'Sullivan, it was not
27 about the people themselves, it was about their actions
28 and Martin Callinan, according to Commissioner
29 O'Sullivan, or what I gleaned or what I was told during

1 that consultation, that his disgusting comment of
2 course in hindsight and at the time, not the best word
3 to use, but they were not -- it was not at the
4 individuals, it was at -- in relation to their actions
5 during this. 12:00

6 246 Q. Yes. Did Commissioner O'Sullivan say that she had
7 passed him a note at the PAC meeting telling him to
8 withdraw it?

9 A. I don't believe I -- we even asked that. We didn't
10 discuss the actual meeting. I don't know what happened 12:00
11 at that meeting, but that was the way the comment was
12 said, but it was arising out of evidence heard during
13 the O'Higgins Commission.

14 247 Q. Okay. Well, can I ask you to look at Inspector
15 McNamara's note of this same consultation. It's at 12:00
16 page 104, which is in the first volume of documents.

17 A. Volume 1.

18 CHAIRMAN: 1A.

19 248 Q. MR. MCGUINNESS: 1A.

20 A. Sorry, 104, A. 12:01

21 249 Q. This is Inspector McNamara's notes of the same meeting,
22 it would appear. And there is reference there to, it
23 would appear to be "Counsel: Motivation - bad faith".
24 Was Mr. Smyth saying that?

25 A. Possibly so. As I said, there was a detailed 12:02
26 discussion or -- from my recollection of it, like, at a
27 lot of these consultations we are not talking just with
28 Commissioner O'Sullivan, we are talking about evidence.
29 It's all arising out of the consultations, what

1 evidence is happening. But, yes, I presume Colm Smyth
2 was doing a lot of the talking, from my recollection,
3 in relation to matters and motivation. Judge
4 O'Higgins' report found that it was not done in bad
5 faith. And I understand the Commissioner, it was never 12:02
6 against the individuals themselves, it was against the
7 motivation in why these allegations and the credibility
8 of the evidence, and that was what was my understanding
9 in relation to the matter.

10 250 Q. Well, can I just ask you a few questions about this. 12:03
11 We know, obviously, Judge O'Higgins recorded at chapter
12 3 that he said some people wrongly questioned Sergeant
13 McCabe's motivation. But the phrase here:

14
15 "Mala fides introduced by judge. It was posed as a 12:03
16 question by judge - never a problem until Ms. D case -
17 initially view was questioning his motivation and not
18 on issue of mala fides."

19
20 Is that Mr. Smyth speaking, as far as you would 12:03
21 interpret that?

22 A. Yes, I would expect it is.

23 251 Q. And then there is:

24
25 "CS: But know now number of withdrawals - his evidence 12:03
26 in this case is bad faith. Advice is, what is written
27 is written. Commissioner has tried to keep the
28 balance. Only talking about it now after."
29

1 Is this Mr. Smyth speaking here?

2 A. I would expect this is all arising out of evidence and
3 obviously the O'Higgins Report, his findings, but at
4 the time from the evidence there in front of us, it's a
5 matter for Judge O'Higgins how he found it, but the 12:04
6 evidence speaks for itself.

7 252 Q. And what do you understand that last phrase to mean,
8 "only talking about it now" afterwards -- "after".

9 A. Only talking about it now afterwards." Maybe it's -- I
10 don't know -- 12:04

11 253 Q. We will hear from Inspector McNamara himself.

12 A. I don't know.

13 254 Q. But you are not clear --

14 A. If I just read it, maybe I can put some context to it.
15 I don't know. 12:04

16 255 Q. All right. It goes on to say then, it seems to be a
17 quote from the Commissioner next:
18
19 "Commissioner: We didn't question his mala fides, we
20 questioned his motivation. It may well be mala fides, 12:05
21 but that is a matter for the Commission. CS challenged
22 credibility to hold the balance between establishing
23 facts and good name of those involved to assist the
24 Commission."
25 12:05

26 So did the Commissioner appear to believe that she
27 hadn't challenged his bona fides or had suggested --
28 hadn't suggested he was acting mala fide?

29 A. It would appear to be the case, yes. As I said --

1 256 Q. But she is there saying "we questioned his motivation".
2 That must mean that she knew, surely, she was
3 suggesting that he had been improperly motivated and --
4 or was acting from ill-considered or deliberately
5 improper motives, is that not obvious? 12:05

6 A. At the end of the day, arising out of all of it, my
7 interpretation of it was to put all of the evidence or
8 all matters, all recordings, everything, try and get it
9 out before Judge O'Higgins. An Garda Síochána had
10 difficulties. They had carried out reports. These 12:06
11 matters are going on all these years, and they just
12 wanted it dealt with by Judge O'Higgins and try to come
13 to an end to it, and it was a matter for Judge
14 O'Higgins in relation to how he found the evidence or
15 whether he even found that it was mala fides, or what, 12:06
16 but it was the client's instructions to test in
17 relation to motivation and to test the credibility in
18 relation to his evidence, bearing in mind that there
19 was at this stage, to my knowledge, it was more than
20 say at the beginning, weren't long in learning or 12:06
21 reading the documents, keeping up to speed with
22 matters, but, yes, I...

23 257 Q. We know --

24 A. This is what happened.

25 258 Q. We know obviously that on the morning of the 4th the 12:07
26 Judge seemed to raise the issue of this issue that had
27 been lying dormant for several months, the question of
28 motivation.

29 A. Yes.

1 259 Q. Was there some discussion between Mr. Smyth and
2 Mr. Gillane before the sitting about whether the
3 Commissioner wanted to clarify her position?
4 A. I'm not aware of any of that. I actually believe
5 that -- I actually got the impression that the Judge 12:07
6 must have read the situation similar to ourselves, that
7 this was going to be an issue that we definitely
8 expected Sergeant McCabe's legal representatives to
9 raise with Commissioner O'Sullivan. We were 100%
10 expecting it, so perhaps the Judge may have been, I 12:08
11 don't know. I'm not aware of any talk beforehand.
12 260 Q. All right.
13 A. I wasn't informed.
14 261 Q. But certainly, in any event, Commissioner O'Sullivan
15 was present in the hearing room when the Judge came out 12:08
16 for the start of day 29.
17 A. Yes.
18 262 Q. And was sitting there --
19 A. She was.
20 263 Q. -- in his view, obviously. 12:08
21 A. Yes.
22 264 Q. But he had ruled out the relevance of matters way back
23 effectively between the beginning of day 2 and the end
24 of day 5.
25 A. He did. 12:08
26 265 Q. All of this was entirely peripheral, in his view, isn't
27 that more or less right?
28 A. Yes.
29 266 Q. Yes.

1 A. We went with the Judge's rulings, whatever.

2 267 Q. So Mr. Smyth then, when he made his submission or
3 clarified his instructions, he was doing that directly
4 on the instructions of the Commissioner that day or the
5 previous day, is that right? 12:09

6 A. I will tell you, I know the previous evening I had
7 transcript Module 2, bearing in mind now counsel
8 probably would have had copies of it, if not two copies
9 of it, but they were -- I provided Colm Smyth, the
10 evening before, with the transcript, and I know he had 12:09
11 it highlighted from that consultation. He clarified
12 the position that morning, but Commissioner O'Sullivan,
13 as I believe I -- maybe I have already told you, where
14 I positioned myself in the room, but I -- when Colm
15 Smyth was clarifying the matter, Commissioner 12:09
16 O'Sullivan -- or Chief Superintendent Fergus Healy got
17 me to run up to clarify matters that it was a bit of
18 confusion over. I don't know if Colm Smyth was reading
19 from the transcript or what, but, no, it was firmly
20 to -- integrity was not -- not a matter that must be 12:09
21 mentioned and neither was it discussed. It would be a
22 matter for Colm Smyth in relation to that. But I do
23 remember having to go up in relation to clarifying it
24 with Colm, and I would be under the -- like, I would be
25 under the impression, perhaps, Colm Smyth, he had the 12:10
26 transcript arising out of it, as we expected Sergeant
27 McCabe's legal team to be raising it. Perhaps it may
28 have taken us short that we didn't expect it to be
29 raised there and then that moment --

1 268 Q. Yes.

2 A. -- as a direct question.

3 269 Q. But, I mean, it looks like a very deliberate and
4 intentional attempt to reverse the Commissioner's
5 position as in some way to portray that she hadn't been 12:10
6 challenging his integrity or wasn't suggesting that he
7 was ill-motivated?

8 A. No, not at all. It was to put all the evidence before
9 Judge O'Higgins and for -- let him decide.

10 270 Q. All right. 12:10

11 A. It was never to -- even if you look at the notes that
12 came through there are on Module 1, like integrity was
13 never mentioned from the Commissioner's side, no.

14 271 Q. Okay. well, obviously the transcript speaks for
15 itself, and the Judge -- 12:11

16 A. Yes, it is, and I am aware of that transcript from day
17 2.

18 272 Q. Yes. Just passing on from that. At page -- paragraph
19 25 of your statement, you refer to all of the written
20 submissions that were lodged on behalf of the 12:11
21 Commissioner, inter alia, isn't that correct?

22 A. Yes.

23 273 Q. And they are all in the papers provided to the Tribunal
24 and the parties, and I'm not going to ask you to
25 comment on any of them, except to look at the last one, 12:11
26 which was an overview submissions. It's at page 2897
27 of the Tribunal's papers, volume 5. I'm afraid I will
28 have to ask you to look at volume 5.

29 A. 289?

1 274 Q. 2897. And these were dated 1st February 2016.
2 A. Yes, I believe there was a lot of --
3 275 Q. And at page 8 of those submissions, from paragraph 39
4 onwards --
5 A. Page 8? 12:12
6 276 Q. Page 8, yes.
7 A. Yes.
8 277 Q. Paragraph 39 onwards, there is commentary there on the
9 motivation of Sergeant McCabe. Now, obviously these
10 are drafted by counsel, but they are no doubt 12:12
11 authorised and cleared by Chief Superintendent Healy --
12 A. Yes.
13 278 Q. -- on behalf of the Commissioner?
14 A. The file will show precisely in relation to him.
15 279 Q. So the Commissioner, as of 1st February 2016 and 12:13
16 leading into the run-up to the report, was still
17 sanctioning commentary on the motivation of Sergeant
18 McCabe, isn't that correct?
19 A. It was -- motivation was never -- the issue of
20 motivation, is my understanding, that it was never 12:13
21 dropped; it was dormant. It didn't raise its head
22 during evidence after Module 1, or not that I can
23 recall. It was clarified in relation to Module 5, but
24 it was left hanging there --
25 280 Q. Yes. 12:13
26 A. -- I believe.
27 281 Q. Yes. But there is a basic point here, Ms. Ryan, and
28 you may not agree with me, but obviously the Commission
29 investigated each of the specific modules dealing with

1 a wide variety of incidents?

2 A. Yes.

3 282 Q. And the Commission and all of the other members of An
4 Garda Síochána had a right to make submissions about
5 the investigation of those incidents, and they did so, 12:14
6 isn't that correct?

7 A. That is correct.

8 283 Q. Now, this is a different matter; this is sort of an
9 overview, unrelated to any particular investigation
10 that Sergeant McCabe had originally complained of? 12:14

11 A. Mm-hmm.

12 284 Q. And the Commissioner here is trying to, is she not,
13 trying to sway the Judge against Sergeant McCabe in a
14 very general way by reference to these comments on
15 motivation, isn't that right? 12:14

16 A. My understanding out of what was happening is, this was
17 solely in relation to evidence given or what was dealt
18 with, it's not probably dealt with in the specific
19 terms, but there was -- in each term of reference or
20 module, module term of reference, there was serious 12:15
21 allegations of corruption/malpractice made against
22 specific individual, senior officers. A lot of those
23 allegations where, even during evidence, there was
24 no -- there did not appear -- even during evidence,
25 there did not appear to be any evidence to back them 12:15
26 up.

27 285 Q. Yes.

28 A. And there was no withdrawal of them, and this here was
29 what I interpreted dealing with the motivation in

1 relation to the allegations of that matter, and that is
2 what --

3 286 Q. All right.

4 A. This --

5 287 Q. The conclusion -- 12:15

6 A. -- is my understanding of it.

7 288 Q. The conclusion perhaps is that his motivation was
8 questioned from beginning to end, on the Commissioner's
9 instructions?

10 A. There was allegations that were all unfounded or -- I 12:16
11 don't want to be repeating what is in the report.

12 289 Q. Yes.

13 A. That arose in all modules.

14 290 Q. I am not suggesting it wasn't a difficult position for
15 the Commissioner. 12:16

16 A. Oh, no doubt it was.

17 291 Q. I'm -- the Commissioner was obviously facing into the
18 Commission looking at whether 12 incidents had been
19 properly investigated, and the truth or veracity or
20 accuracy or exaggeration, or otherwise, of Sergeant 12:16
21 McCabe might be relevant to any factual issues, isn't
22 that right, and was relevant to some factual issues?

23 A. Yes.

24 292 Q. But this appears to have gone beyond that, am I -- 12:17
25 perhaps you'd disagree with the suggestion that this
26 appeared to have been an overlay of suggesting that
27 everything he had complained about was ill-motivated
28 and was, in fact, improperly made?

29 A. No, no, there had been a detailed investigation carried

1 out by Assistant Commissioner Derek Byrne and Chief
2 Superintendent Terry McGinn. These allegations, most
3 of them - well, during evidence, more came around, was
4 my understanding from all of the consultations that was
5 discussed, to my knowledge at this stage, as time went 12:17
6 on, that commonly known as the Byrne/McGinn Report had
7 dealt with numerous allegations made by Maurice McCabe,
8 and indeed had agreed that there was problems with
9 various allegations, many of them that -- I had the
10 Byrne/McGinn Report, I do remember reading it at a 12:17
11 later stage. Initially, whenever I got it, it was
12 probably May/June or some stage, July, but a lot of
13 these allegations had been upheld by Maurice McCabe and
14 indeed there was problems found --

15 293 Q. Yes. 12:18

16 A. -- at these investigations. Obviously, there was some
17 other matters that weren't necessarily complained of by
18 Maurice McCabe that indeed Judge O'Higgins found during
19 his investigations, and Judge O'Higgins dealt with them
20 in his evidence. The allegations of corruption, 12:18
21 that the Byrne and McGinn Report had found that there
22 was no corruption against senior members at the time,
23 were still being made or before the evidence in the
24 O'Higgins Commission, and there still, in 2015, there
25 was no evidence there to back up any of these matters, 12:18
26 and it's arising in that context that it was always in
27 relation to -- he was given the opportunity to withdraw
28 allegations.

29 294 Q. Yes.

1 A. And none of them -- well, sorry, Assistant Commissioner
2 Byrne was --

3 295 Q. Some of them were withdrawn.

4 A. Yes.

5 296 Q. And he did apologise even to Superintendent Cunningham 12:19
6 at one stage isn't that right?

7 A. He did, he apologised just before giving evidence. He
8 became aware, as far as I recall, a conversation or it
9 was said -- the transcript might say it -- during
10 evidence he must have become aware of something, but, 12:19
11 yes, an apology, it's my recollection, I can't remember
12 which module, but, yes, he did apologise in relation
13 to -- I don't know what wording. I am sure
14 Superintendent Cunningham will be able to tell you
15 that. 12:19

16 297 Q. Yes.

17 A. But there is -- I do recollect some matter there.

18 298 Q. Just passing on then to matters subsequent to the 1st
19 February when these were filed. You detail in your
20 statement consultations that you had at paragraphs 26, 12:19
21 27, 28, of your statement, in relation to the draft
22 reports, on receipt of the final report and then
23 subsequent to the publication of the final report.

24 A. Oh, sorry, my statement.

25 299 Q. Final report. Your own statement. 12:20

26 A. Yes.

27 300 Q. And the chronology is as set out there, and I can't ask
28 you, obviously, any questions about your consultations
29 with the legal team at that point in time after the

1 hearings had ceased.

2 A. Yes.

3 301 Q. And I have no quibble with that at all. But the
4 Tribunal has discovered emails from the Commissioner,
5 as she then was, in May 2016, sending the legal advice 12:20
6 of her counsel to the Minister and asking her to give
7 consideration to publishing it in the House. Were you
8 aware of that at the time or consulted about that at
9 the time?

10 A. My file would show, I think it was towards the latter 12:20
11 end of May that I believe the Commissioner had other
12 legal representation or other legal advice.

13 302 Q. All right.

14 A. We were not advising at that date. I don't know. My
15 file would show the date that -- my last consultation 12:21
16 or last few --

17 303 Q. All right. You weren't involved in any issue as to
18 whether she had waived privilege by doing that?

19 A. No, no, no, I had no --

20 304 Q. So far as publishing it to the Minister is concerned. 12:21
21 Publishing it onwards is a completely different issue
22 but --

23 A. Yes. No, what date was that?

24 305 Q. On the 17th May 2016.

25 A. No, we probably would have still had details -- I would 12:21
26 have -- my consultations, as I understand, are
27 privileged. I haven't read them because -- but I can
28 deal with them if you want to put them before me. I --
29 there is material on my file relating to that. I would

1 have to have a look at it. Like, it's a matter for the
2 client.

3 306 Q. All right. will leave that for the moment.

4 A. Yes.

5 307 Q. Thank you for the moment, Ms. Ryan. Thank you.

12:21

6 A. Thank you.

7 CHAIRMAN: Do you want to take a break?

8 A. Yes, I do.

9 CHAIRMAN: We will take a break now for an hour.

10

12:22

11 THE HEARING ADJOURNED FOR LUNCH

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1 THE TRIBUNAL RESUMED, AS FOLLOWS, AFTER LUNCH:

2
3 MS. ANNMARIE RYAN WAS CROSS-EXAMINED BY MR. MCDOWELL:

4
5 308 Q. MR. MCDOWELL: Ms. Ryan, as I understand it, you were 13:28
6 asked at a relatively late stage to become involved in
7 the O'Higgins Commission, is that right?

8 A. Yes, I'd say very late in the day.

9 309 Q. And that lateness was itself compounded by a subsequent 13:28
10 delay on the part of the Gardaí in furnishing you with
11 any materials, written and documentary, on which you
12 were to instruct counsel, is that right?

13 A. Yes, totally.

14 310 Q. And when the materials became available to you, and 13:29
15 when all of the housekeeping matters were sorted out
16 and you had a number of consultations with counsel,
17 these were very shortly before the commencement of the
18 O'Higgins hearings, isn't that right?

19 A. Yes. There was an introductory consultation, was the 13:29
20 initial one, overview, and then Module 1, as you know,
21 was for first hearings.

22 311 Q. Yes.

23 A. And there was consultations the two nights preceding
24 that.

25 312 Q. Yes. 13:29

26 A. Late into the evenings.

27 313 Q. And am I right in thinking that no issue of the
28 motivation, integrity or credibility of Sergeant McCabe
29 was dealt with until the 13th May 2015?

1 A. Yes. Arising out of consultations, counsel did mention
2 in relation to, we'll see where the evidence is going,
3 motivation, in his opinion, he will be -- he will seek
4 instructions, but he believed that it would become
5 relevant, and that was a reference late on the night 13:30
6 before the first day of hearings.

7 314 Q. I see.

8 A. It was definitely --

9 315 Q. I think you've told the Tribunal that, on that
10 occasion, you weren't even sure if the case was going 13:30
11 to start the following morning, isn't that right?

12 A. No, we did not expect it to. We thought there may be
13 an opening statement.

14 316 Q. Yes.

15 A. See where matters are. We had no indication really of 13:30
16 how matters -- we didn't believe it would start and we
17 were aware of other issues.

18 317 Q. I think you mentioned a judicial review about fees as
19 another ground?

20 A. That was actually talk, perhaps. That would hold it 13:31
21 up. That you wouldn't be in a position to turn up
22 arising out of that.

23 318 Q. So, the following morning, the 14th -- sorry, could we
24 deal with what happened on the 13th. As I understood
25 your evidence, you said that as you were wrapping up 13:31
26 the meeting and preparing to go home after it --

27 A. Yes.

28 319 Q. -- and standing, putting on your coat, that the
29 question of motivation was mentioned for the first

1 time?

2 A. Firstly, I will clarify; I do recall I had a taxi
3 outside, I kept putting it back 15, 20 minutes. I was
4 putting on my coat to probably go back to the office.

5 320 Q. Yes. 13:31

6 A. I wasn't going home. But, yes, it was -- I
7 specifically do recall counsel mentioning it - well,
8 we'll see where it goes.

9 321 Q. I see.

10 A. But there was a vague mention -- or there was a mention 13:31
11 of it late that evening. But, yes, it was when I was
12 anxious to get back to the office. It was late at
13 night. I had to be in early in the morning, so --

14 322 Q. And on the following day, the 14th, the first day of
15 the Commission of Investigation -- 13:32

16 A. Yes.

17 323 Q. -- at that point, when the actual hearing commenced,
18 had you any feedback by that point about motivation,
19 credibility or integrity?

20 A. No, absolutely none at that point. Not that I'm aware 13:32
21 of. I had no knowledge of it.

22 324 Q. And did I understand you to say that while Lorraine
23 Browne was giving evidence and Sergeant McArdle was
24 giving evidence, this issue was not present in your
25 mind, the question of Sergeant McCabe's motivation, 13:32
26 credibility or integrity?

27 A. No, it wasn't present on my mind. I was there
28 listening to the evidence. I had the core booklet. I
29 was taking notes of what's going on.

1 325 Q. Yes.

2 A. Quite often, I didn't even know, I believe, at that
3 stage, who was doing transcripts, were we getting
4 transcripts.

5 326 Q. Yes. 13:33

6 A. I believe I sought clarification that day. But, no,
7 I'm listening to the evidence, I'm there taking notes
8 in case they have to refer back to anything.

9 327 Q. And was I correct in taking from your evidence that,
10 due to space issues, you were sitting towards the back 13:33
11 of the Commission on the 15th, is that right?

12 A. Yes. On the 14th I recall that we all went in there
13 and I don't -- in my recollection, I don't even believe
14 my three counsel were sitting in the same row.

15 328 Q. Yes. 13:33

16 A. I don't know where I sat. The second day we knew to
17 get in there and get a desk or table.

18 329 Q. Yeah.

19 A. And, yes, I always sat at the back. Initially I sat at
20 the back because there was no room on the front, and, 13:34
21 in fact, it was fairly obvious from day 1, it actually
22 suited me to be sitting at the back because the client
23 was sitting right behind me and if I needed
24 clarification, a nod up from counsel or a nod down from
25 counsel, I was in a position to try and be as discreet 13:34
26 as possible.

27 330 Q. I see. And just to remind ourselves, Module 1
28 concerned an incident on the Kingscourt bus, is that
29 right, where Lorraine Browne was the driver, is that

1 right?

2 A. That is correct. It was the description.

3 331 Q. And it was in the course of Superintendent Rooney
4 giving evidence on the second day, that's the 15th May,
5 that questions were put to him about his prior dealings 13:34
6 with Sergeant McCabe, is that right?

7 A. The transcripts will show exactly.

8 332 Q. Yes.

9 A. I haven't read transcripts since back in 2015, so --
10 yes. 13:35

11 333 Q. You've described looking back --

12 A. Yes.

13 334 Q. -- at superintendent -- is it Chief Superintendent or
14 Superintendent Healy?

15 A. Chief Superintendent Healy, yes. 13:35

16 335 Q. You describe looking back to him when your counsel
17 raised this issue?

18 A. Oh, sorry, when he actually raised this issue on it?
19 Oh, sorry, I thought you were talking about what Chief
20 Superintendent Rooney was saying in his evidence. Oh! 13:35
21 what do you want me to clarify?

22 336 Q. When your counsel raised Chief Superintendent Rooney's
23 prior dealings with Sergeant McCabe --

24 A. Yes.

25 337 Q. -- you were sitting at some distance from your counsel, 13:35
26 is that right?

27 A. I was sitting -- you're familiar obviously with the
28 layout.

29 338 Q. Yes.

1 A. I was sitting in the row on the right-hand side towards
2 the door and I recall looking back and Fergus Healy
3 came over to me.

4 339 Q. Yes.

5 A. I have no knowledge of -- 13:36

6 340 Q. Yes. I just want to inquire into that incident.

7 A. Yes.

8 341 Q. Are we to draw the picture that this took you by
9 surprise and you looked back to --

10 A. Yeah. 13:36

11 342 Q. -- Fergus Healy questioningly as to what this was
12 about?

13 A. Yeah. That morning I'm sure taxis had been -- are
14 ordered by the office. I was usually over there
15 between quarter to nine, sometimes half eight, nine 13:36
16 o'clock in the mornings. When I went over there, I
17 would be very busy. I understand from what Fergus
18 Healy told me is that I spoke to Colm this morning on
19 it.

20 343 Q. Yes. 13:36

21 A. So I have no knowledge in relation to what he spoke to
22 Colm Smyth about it or what Colm Smyth interpreted out
23 of that.

24 344 Q. I see.

25 A. That was the first note in relation to it. I would 13:36
26 have been there that morning.

27 345 Q. Yes.

28 A. But obviously I was busy doing other matters.

29 346 Q. Well, was that the first notice that you had that

1 Sergeant McCabe's motivation was to be the subject of
2 evidence and cross-examination?

3 A. I don't even know if Fergus Healy even told me that.
4 He says, no, no, no, he says, or along those lines, I
5 spoke to Colm, Colm knows. 13:37

6 347 Q. Yes.

7 A. It was during evidence. I don't believe much more than
8 that was said to me. I just was not aware until then,
9 but I didn't get details of what he said. He just -- I
10 just -- yes. 13:37

11 348 Q. He reassured you that --

12 A. He had spoken to --

13 349 Q. -- he had spoken to counsel?

14 A. Yes.

15 350 Q. And that counsel and himself were ad idem, or he gave 13:37
16 you to believe that he was agreeable to this line of
17 question, is that right?

18 A. Yes, he obviously must have consulted directly with
19 counsel at some stage that day or that morning.

20 351 Q. Did he tell you at that point that this was on the 13:37
21 instructions of the Commissioner?

22 A. No. It was: No, no, no, I have spoken with counsel.
23 I don't believe much was said to me bar he spoke to
24 counsel.

25 352 Q. I see. 13:38

26 A. The Commissioner's okay or -- I don't know what he
27 said. There was no detail.

28 353 Q. But he seemed to imply that the Commissioner was
29 agreeable to counsel raising this issue?

1 A. Well, that's all that was said to me, so --

2 354 Q. Yes.

3 A. -- I can't put it much further than that.

4 355 Q. When that happened, firstly I take it you were
5 surprised? 13:38

6 A. I was surprised that I didn't have note of it, that it
7 happened without recording it. As I said, down there,
8 I have only two hands. There was -- there was an awful
9 lot to be done. I usually, rarely in the mornings
10 would get sitting for five minutes down there and -- 13:38
11 but not to hear that. I would have expected or -- how
12 I didn't hear the conversation, but obviously it
13 happened whatever I was doing.

14 356 Q. We know that on the evening of the 13th, motivation had
15 been raised. 13:39

16 A. Yes.

17 357 Q. We know that from your own notes and emails that Chief
18 Superintendent Healy had discussed the matter with the
19 Commissioner --

20 A. Yes. 13:39

21 358 Q. -- some time on the 14th, is that right?

22 A. Well, I was told that: No, no, no, I spoke to her last
23 night or --

24 359 Q. Yes. So that was --

25 A. Whether he met or spoke to her, I don't know. 13:39

26 360 Q. I see. Yes. And I am just trying to gather from
27 you --

28 A. Mm-hmm.

29 361 Q. -- because it's of some importance, was it your

1 understanding that Superintendent Healy, Chief
2 Superintendent Healy had conveyed counsel's oral
3 advices to the Commissioner some time on the evening of
4 the 14th?

5 A. My recollection is, he told me: I've spoken to the 13:39
6 Commissioner. I don't know if it was -- no, I think it
7 was: I spoke to her, I spoke to the Commissioner last
8 night or yesterday. No, no, no, he was -- he spoke to
9 the Commissioner. How he spoke to her, I -- he
10 probably met her, I don't know. 13:40

11 362 Q. You see, what I'm trying to drive at --

12 A. Yes.

13 363 Q. -- and I'm not trying to trap you in any way.

14 A. Oh, no. Whatever knowledge I have.

15 364 Q. I'm just merely inquiring from you -- 13:40

16 A. Yes.

17 365 Q. -- was it your understanding that, somehow, counsel's
18 view that this should be raised had been communicated
19 to the Commissioner some time on the 14th May, and on
20 the 15th May counsel was carrying through on advice 13:40
21 that had been given orally to the Commission?

22 A. It would appear to be. As I said, I wasn't involved in
23 any of those discussions, so, yes, I was made aware
24 that he had spoken to the Commissioner. In relation to
25 what was said to who or what, that'd be a matter for 13:40
26 the individuals who said it.

27 366 Q. You see, the reason I'm asking you this, and again I'm
28 not trying to put words in your mouth in any way, is
29 that what we have been -- what has been variously

1 described as the advice of counsel or the letter of
2 comfort, seems to have been the first formal expression
3 of a view by counsel that it was appropriate to raise a
4 number of issues going back to the allegations against
5 Sergeant McCabe in relation to motivation, isn't that 13:41
6 right?

7 A. Yes, that was the first formal writing in relation to
8 that matter.

9 367 Q. And what I am trying to work out is, what happened
10 before that which would have given the green light to 13:41
11 the barristers to go ahead without any letter of
12 comfort or any formal advice that this was relevant?

13 A. That would be a matter obviously for counsel to advise
14 in relation to that. All I know is that I attended a
15 lot of consultations. 13:42

16 368 Q. Yes.

17 A. We're starting the next day, or on the Thursday, and
18 evidence was given, and it would be a matter for you to
19 ask counsel how they advised. All I know was that that
20 letter is there in relation to that and I'm not in a 13:42
21 position to put it much further.

22 369 Q. But is it the case that at a consultation, say, on the
23 13th or 14th, that it was indicated that Superintendent
24 Healy would raise with the Commissioner whether this
25 line should be pursued, or did it come as a surprise to 13:42
26 you that he had raised it --

27 A. No.

28 370 Q. -- and that it had been agreed?

29 A. No. On the 13th, as I said, I wanted to get back to

1 the office to try and do matters.

2 371 Q. Yes.

3 A. I know there was reference to, we'll see where it goes,
4 but it was the advices of counsel that he does believe
5 that the motivation and the credibility of the evidence 13:43
6 will need to be tested.

7 372 Q. That was the 13th?

8 A. Yeah, but we'll see where we go, there was a reference
9 to it. I recall standing in the room when it was said.
10 It was -- I gather I was ready to go. I wasn't leaving 13:43
11 in the middle of a consultation, so it must have been
12 last minutes.

13 373 Q. Yes.

14 A. And I'd say it was after ten o'clock or --

15 374 Q. Yes. So the Tribunal is to take it then that 13:43
16 Superintendent Healy at some stage on the 14th had a
17 discussion with the Commissioner on this issue?

18 A. I recall on the 14th Colm Smyth saying now this is
19 going to come up, this has come up in evidence and he
20 says, I need her firm instructions. 13:43

21 375 Q. Yes.

22 A. It would have been put, sorry, strong enough like that.

23 376 Q. What was going to come up in --

24 A. In relation to the evidence, from whatever was said
25 that day, arising out of that, it was Colm Smyth's 13:44
26 advice that the motivation and the credibility of these
27 matters be put, and he wanted firm instructions from
28 the Commissioner in relation to that.

29 377 Q. And then, I just want to put it in context, so he did

1 seek those instructions on the 14th?

2 A. Yes.

3 378 Q. And you understand that on the morning of the 15th,
4 before you had time to settle down at the Tribunal --

5 A. Yes. 13:44

6 379 Q. -- there'd been a conversation giving him those
7 instructions, is that right?

8 A. Well, I know, I know -- I didn't -- I don't know what
9 time he spoke to Colm Smyth, that is Chief
10 Superintendent Fergus Healy, I know I have no record of 13:44
11 it, but I didn't become aware until the afternoon,
12 during evidence.

13 380 Q. I see.

14 A. So --

15 381 Q. I understand. 13:44

16 A. -- sometime earlier that morning or before that, I
17 presume, the conversation --

18 382 Q. At any point was there any discussion on the 15th May
19 as to whether motivation was in any way remotely
20 relevant to the investigation of the Kingscourt 13:45
21 incident?

22 A. I do recall gleaning from consultations and (inaudible)
23 said yes, counsel had advised that it was relevant in
24 relation to an approach. I'm sure my notes would
25 probably show it. But it is relevant in relation to an 13:45
26 approach to Ms. Browne, is it?

27 383 Q. Yes.

28 A. And instead of going to the young garda, who was
29 only -- I think it's my recollection he was fairly new

1 in the force, or a probationer, and arising out of that
2 evidence I think there appeared to be some form of
3 encouragement, or whatever, to make a complaint to
4 GSOC.

5 384 Q. I see.

13:46

6 A. But I'm not in a -- it'd probably be more a matter for
7 counsel to give the background on that.

8 385 Q. Yes. Well, I am trying to be clear in my own mind.
9 Was the suggestion that if Sergeant McArdle and/or
10 Sergeant McCabe had told Ms. Browne she should raise
11 these matters with GSOC, that that was in some sense
12 getting back at the Gardaí or disloyal to the Gardaí,
13 was that the idea?

13:46

14 A. There's matters -- there's consultation notes that I'm
15 not in a position to discuss in relation to it, but I
16 don't know what way I can put that. Counsel's advices,
17 he's the best to advise as to how he saw it, but I can
18 only go with what knowledge I had and what was going
19 on.

13:46

20 386 Q. Well, we know, for instance, that in the written
21 submission in relation to Module 1, which was
22 subsequently put in around the 11th June --

13:47

23 A. Yes.

24 387 Q. -- at paragraph 36, it was submitted that:

25
26 "Sergeant McArdle accepts that she encouraged
27 Ms. Browne to make the complaint. Sergeant McCabe does
28 not. The GSOC report prepared by Kevin Duffy records
29 that the recommendation to make the complaint came

13:47

1 principally from Sergeant McArdle."

2
3 So just in relation to that issue, motivation could
4 only have arisen if it was thought that Sergeant McCabe
5 was somehow acting on foot of a grudge against the 13:48
6 Gardaí or certain members of the Gardaí, and somehow
7 persuading Mrs. Browne that she should go to GSOC
8 rather than dealing with it internally himself in the
9 force, is that it?

10 A. Well, that'd be a matter probably to ask counsel. 13:48

11 388 Q. Yes.

12 A. All I know is, the submissions were drafted,
13 circulated, approved, so --

14 389 Q. And did you understand that it was for the purpose of
15 querying why he went -- why he was alleged to have 13:48
16 encouraged Lorraine Browne, the driver of this bus, to
17 make her complaint to GSOC, that that was motivated by
18 ill will towards An Garda Síochána?

19 A. Again, I wouldn't be in a position to give evidence in
20 that regard. 13:49

21 390 Q. Well, how was it relevant to his motivation, whether he
22 did or did not --

23 A. Yeah.

24 391 Q. -- encourage Ms. Lorraine Browne to contact GSOC?

25 A. Again, I'm not advising in relation to that, so that'd 13:49
26 be a matter for counsel to --

27 392 Q. But you were at the consultations where these matters
28 were discussed, and I'm just asking you, in your own
29 mind, could you see any relevance at all to what

1 Mr. Justice O'Higgins was doing, which was determining
2 whether this was good or bad policing on the day,
3 whether Sergeant McCabe had been motivated by a grudge
4 to persuade Ms. Browne to go to GSOC?

5 A. I'd have to refer to my consultation notes in that 13:49
6 regard. I haven't even read them, probably, since
7 then, or back since 2015, so I'm not in a position to
8 provide any view arising out of the content of
9 consultation notes.

10 393 Q. But you are aware that on the 15th May, Mr. Smyth, 13:50
11 apparently on the oral instructions of the
12 Commissioner, relayed to him by Chief Superintendent
13 Healy, that he decided to bring up with Chief
14 Superintendent Rooney his dealings with Sergeant McCabe
15 in respect of the Ms. D allegation? 13:50

16 A. Again, in relation to how that arose is from
17 consultations and, again, counsel on matters that --
18 arising out of consultations and from evidence, it was
19 his advices. So again, it's a matter that you would
20 have to best put to counsel. 13:50

21 394 Q. I see. Well, when objection was taken to this line of
22 questioning, the alarm bells went off in your mind, did
23 they not?

24 A. There's no doubt I had not anticipated -- I had not
25 anticipated what was going to happen happened and the 13:51
26 main matter that I had concern with at that stage is
27 that I had not met with the Commissioner --

28 395 Q. Yes.

29 A. -- directly, and I was not comfortable with that.

1 396 Q. I see. well, would it be fair to say that that
2 situation you found alarming, that you weren't -- you
3 hadn't had an opportunity to consult with the
4 Commissioner, you hadn't any personal knowledge of
5 these instructions, and all you had was Chief 13:51
6 Superintendent Healy's say-so that this was what the
7 Commissioner wanted done?

8 A. Well, I found it alarming -- I won't say alarming. I
9 just was not happy that this was rising and that has
10 arisen. 13:52

11 397 Q. Well, can we say if you weren't happy, you were unhappy
12 with the situation that had arisen?

13 A. Oh, I was unhappy with the entire situation.

14 398 Q. Yes. And this unhappiness caused you to contact both
15 your own superior in the Chief State Solicitor's 13:52
16 Office, or to attempt to do so, and also to contact
17 Mr. Dreehan in the Attorney General's office, is that
18 right?

19 A. My main concern, I don't believe that I contacted them
20 straightaway. It was from -- reconfirmation was 13:52
21 required. The transcripts will show what was being
22 said.

23 399 Q. Yes.

24 A. I think I was in and out. But I had a concern that
25 this could be running over to the High Court by way of 13:53
26 judicial review, and the last thing I wanted was the
27 Attorney General to be hearing about this from other
28 sources, so I brought it to their attention in that
29 regard, and also to -- I didn't get back to the office

1 until seven, eight o'clock most evenings. By the time
2 I go back, there may not be anybody in the office, so I
3 called Paul Fleming as well to inform him on the phone.

4 400 Q. Yes. And you were present when the proceedings were
5 adjourned on two occasions to enable Mr. Smyth to get 13:53
6 instructions and confirmation of instructions, isn't
7 that right?

8 A. I was present for that entire day.

9 401 Q. Yes.

10 A. In the Distillery Building. 13:54

11 402 Q. And could I ask you in relation to that period, was
12 your concern that you had not had an opportunity to
13 speak to the Commissioner present in your mind during
14 that afternoon?

15 A. Oh, totally so. That was my primary concern initially. 13:54

16 403 Q. And am I right in thinking then your own statement
17 indicates it's so, that you were very anxious that
18 Superintendent Healy should arrange for you to have an
19 immediate consultation at which you would be present
20 with the Commissioner? 13:54

21 A. Well, a consultation, I'd expect to be present for
22 them.

23 404 Q. Yes.

24 A. I do recall Chief Superintendent Healy on the phone, I
25 presume to the Commissioner - well, I took it to be the 13:54
26 Commissioner - and I recall saying, like, whispering, I
27 believe I -- like, is she -- immediate consultation.

28 405 Q. Yes.

29 A. And I recall him saying whatever, he shook his head, he

1 shook his head as in to say no.

2 406 Q. I see.

3 A. And I can understand that. Not everybody is sitting
4 ready to --

5 407 Q. Have a consultation at the drop of a hat, I presume? 13:55

6 A. Drop of a hat, obviously. So it was asking for a lot.

7 408 Q. Well, you were present, according to your statement,
8 when he was calling the Commissioner, is that right?

9 A. I was in and out of the room quite a lot. He was
10 calling, not getting through, or waiting for calls and 13:55
11 on the phone. There was a lot happening during that
12 period.

13 409 Q. Yes.

14 A. Or there appeared to be.

15 410 Q. And we know that the first break was between 15:10, ten 13:55
16 past three, that day, and that the Tribunal resumed at
17 15:36, isn't that right?

18 A. I have nothing in front of me so --

19 411 Q. Yes.

20 A. -- I have no reason to believe it wasn't. 13:56

21 412 Q. Subsequently, Mr. Smyth sought a further short
22 adjournment from 16:08 to -- from 16:10 to 16:34, where
23 he stated that his instructions were re-confirmed.

24 A. I do recall, I do recall, I thought the second,
25 Chairman, it felt longer anyhow on the day. As I said, 13:56
26 I know there was an adjournment or adjournments, but --

27 413 Q. Yes. Now, could you then assist us as to -- did you
28 have any discussion with Mr. Smyth at this point about
29 the wisdom of doing this or its relevance?

1 A. Sorry, can you repeat that again?

2 414 Q. Did you have any discussion with Mr. Smyth as to the
3 wisdom of doing this without written instructions from
4 the Commissioner and about its relevance to Module 1?
5 Did you ask him anything about that? 13:57

6 A. No. I do recall speaking to Colm to say -- it could
7 have been later on, I do recall letting Colm know. He
8 initially was sitting in the Commission's room --
9 sorry, Colm Smyth -- letting him know that I'm trying
10 to see if she's -- I am going to try and see if I can 13:57
11 get a consultation with her.

12 415 Q. Yes.

13 A. I do recall saying that to Colm Smyth, and I recall he
14 was actually sitting in the room, up the bench -- not
15 the bench, but the front row. 13:57

16 416 Q. And can you recall when it was that the Commissioner
17 indicated through Chief Superintendent Healy that her
18 first preference would be for an adjournment of the
19 issue?

20 A. I do recall going to Séan Gillane to ask for an 13:58
21 adjournment.

22 417 Q. Was that your idea or the Commissioner's idea?

23 A. No, I was asked to look for an adjournment.

24 418 Q. Yes.

25 A. I might have been -- as I said, I was in and out of the 13:58
26 room when he was on the phone. No, I don't believe I
27 heard that. I think he came out of the room, in
28 relation to it. I know Chief Superintendent Healy
29 asked me to see can we get an adjournment here.

1 419 Q. And am I right in thinking that you sought an
2 adjournment on a second occasion, is that right?
3 A. I did. I definitely asked for an adjournment on the
4 second occasion, even when I had the instruction,
5 instructions re-confirmed. 13:58

6 420 Q. And was it communicated to you that the Commissioner's
7 preference was for an adjournment and that counsel
8 could pursue the matter that he had raised, if it
9 arose, in the course of the hearing?
10 A. My notes will show what was written down there. I 13:59
11 don't know what made me ask for a second adjournment.
12 It could have been the client asking, or it quite
13 possibly could be me just asking. I'm not in a
14 position to -- I cannot recall that.

15 421 Q. You see, it's quite important, because if the 13:59
16 Commissioner's attitude was, if this arises you may
17 persist with it but otherwise don't persist with it,
18 that's an important distinction?
19 A. Well, you'd have to ask counsel in relation to that. I
20 know I wrote down what it was. 13:59

21 422 Q. Well, what was communicated to you?
22 A. I believe I took a note of it. I believe something was
23 said and there was matters going on, and I remember
24 when I was finished I was like, Fergus, what was that
25 note you called out? Or Fergus Healy, I beg your 14:00
26 pardon, prefer the titles. Chief Superintendent Fergus
27 Healy, he gave me a quote from what it was.

28 423 Q. Yes.
29 A. And as I said, I haven't looked at the material, but my

1 file will record what is there.

2 424 Q. I see. But in any event, it does appear that, after
3 further objections, the Tribunal acceded to the
4 requests by Sergeant McCabe's counsel, myself in
5 particular, that if this line of questioning were to be 14:00
6 pursued and if matters were to be raised concerning
7 motivation and credibility and integrity, that Sergeant
8 McCabe should be given advance information of those
9 issues and it should be put in writing to him, isn't
10 that right? 14:01

11 A. Again, the transcripts will show exactly what was said.
12 I haven't looked at them since 2015.

13 425 Q. But you're aware of that?

14 A. Yeah.

15 426 Q. By the close of business that evening, you were -- 14:01
16 A. Oh, yes.

17 427 Q. You had put in train --
18 A. Oh, yes, I had.

19 428 Q. -- the composition of a letter, isn't that right?
20 A. Yes. 14:01

21 429 Q. And have you had an opportunity to look at that letter?
22 A. I haven't actually read it since May 2016, but I'm
23 aware -- sorry, I actually remember reading it in May
24 2016, with so much going on.

25 430 Q. Yes. 14:01
26 A. So that is the last time since I have read it.

27 431 Q. I want to ask you about the circumstances in which that
28 letter came to be drafted. First of all, you asked
29 counsel to draft it, is that right?

1 A. Yes, counsel would have drafted that letter, yes.

2 432 Q. And did you have another consultation immediately to
3 determine what would be in the letter or was counsel
4 told to go and prepare a draft for approval?

5 A. I recall counsel sitting with clients and -- 14:02

6 433 Q. Who were the clients?

7 A. -- they were concentrating on them and I wasn't -- is
8 it -- I know there's privilege in relation to matters.
9 Is it --

10 434 Q. You needn't say what went on. 14:02

11 A. I need direction here in relation to it.

12 435 Q. Well, are you saying that you believe it's privileged
13 as to who was there when the letter was drafted?

14 A. Well, maybe if the Chairman can give me direction or I
15 can tell you whatever knowledge, provided I'm in a 14:03
16 position to do so.

17 CHAIRMAN: I think the position is this: that matters
18 are somewhat complicated, Ms. Ryan, because of the fact
19 that the Commissioner has said, I'm waiving privilege,
20 but your instructions were coming from a number of 14:03
21 clients.

22 A. They were.

23 CHAIRMAN: Yes.

24 A. To compile matters.

25 CHAIRMAN: Now, in the event that you're in a position 14:03
26 where you can't answer a question because you were
27 being asked advice by anyone other than the
28 Commissioner, well then you can't answer the question.
29 That's it.

1 436 Q. MR. MCDOWELL: Let's take it step-by-step, first of
2 all. This was a letter to be sent on behalf of the
3 Commissioner, isn't that right?
4 A. Yes. I believe that's what Judge O'Higgins had
5 requested. 14:03
6 437 Q. Yes. Because you'll recall from the submissions and
7 argument that it had been ascertained that it was on
8 behalf of the Commissioner rather than any of the other
9 people who you were representing there, that this
10 question, this line of questioning was being put to 14:04
11 Chief Superintendent Rooney, isn't that right?
12 A. Yes. I know it was when he was giving evidence.
13 Transcripts will show that.
14 438 Q. So you were now composing a letter or setting in train
15 the composition of a letter which was to be sent by the 14:04
16 Commissioner to the Tribunal, or the Commission,
17 rather, outlining the facts which they proposed to rely
18 on to challenge Sergeant McCabe's motivation,
19 credibility and integrity, isn't that right?
20 A. Again, that'll be a matter for counsel. All I know is 14:04
21 what I did that weekend or that Friday.
22 439 Q. Yes.
23 A. Saturday, Sunday, Monday, in relation to compiling the
24 letter. I was involved in circulating various drafts.
25 440 Q. We will come to that in a moment, if we may. I was 14:05
26 merely asking you --
27 A. Yeah.
28 441 Q. -- are you saying that you believe it was privileged as
29 to who was in the room when the first drafting was

1 commenced on this, on this letter? Do you think that
2 that is a matter of privilege?

3 A. Well, perhaps that's a matter that -- that's not a
4 matter for me. I would prefer direction in that
5 regard, Chairman. 14:05

6 442 Q. Well, can we take it for certainty the Commissioner
7 wasn't in the room?

8 A. No, I could not get the Commissioner that day.

9 443 Q. I see. So counsel and yourself, on whom were you
10 relying for instructions to compose this letter? 14:05

11 A. In relation to composing the letter, there was a number
12 of people involved in relation to composing the letter.
13 It was circulated throughout.

14 444 Q. Yes. But on whom were you relying for instructions as
15 to what was to be in the letter? 14:06

16 A. There was a number of people involved in relation to
17 providing instructions in relation to that matter.

18 445 Q. Well, was Chief Superintendent Fergus Healy one of
19 those people?

20 A. All matters that I dealt with went through Chief 14:06
21 Superintendent Fergus Healy, or, if they didn't, they
22 might have been revised -- but, yeah, Fergus Healy
23 would be aware of all of what I was doing. He was my
24 contact, point of contact with the Commissioner.

25 446 Q. And is your reticence about saying who was there when 14:06
26 the process started, that other persons who you were
27 representing and who have a privileged relationship
28 with you, are the people that you're concerned to
29 protect, is that right?

1 A. Well, I'm not concerned to protect. I have
2 obligations, as you are well aware.

3 447 Q. Obligations, yes.

4 A. So, yes, I have to comply with my obligations.

5 448 Q. I see. Now, let's go forward a little bit with this 14:07
6 process. That's the Friday, Friday evening, Friday the
7 15th. When you contacted Mr. Dreelan in the Attorney
8 General's office, can you recall was that before or
9 after the drafting of the letter had commenced?

10 A. Oh, that was all before. 14:07

11 449 Q. Yes. And in relation to your dealings with
12 Mr. Dreelan, you were anxious to inform him of what had
13 happened and the line of questioning that was being
14 pursued, as I understand your evidence, because you
15 were concerned that if somebody attempted to judicially 14:08
16 review the matter, the Attorney General would read it
17 in the papers or be informed about it by a chance
18 meeting with some senior counsel?

19 A. Well, I don't know by who, but I wanted to ensure I --
20 I did believe that this could be running to the High 14:08
21 Court that day and I wanted to ensure that the Attorney
22 Generals [sic] were on notice of it. I did see from
23 the outset it was a sensitive matter, the entire
24 Commission of Investigation and what Judge O'Higgins
25 was looking into, and it's a private Commission, and I 14:08
26 had an obligation in relation to any matter if I
27 thought it's of concern, to bring it to the
28 attention -- to the Attorney General's office. But,
29 yes, I did feel that this could.

1 450 Q. And it was purely for information, is that right?

2 A. Oh, yes.

3 451 Q. The Attorney General's office, Mr. McGuinness elicited
4 from you, was neither directing the proceedings before
5 Mr. Justice O'Higgins or giving directions about them 14:09
6 or giving legal advice in relation to them, is that
7 right?

8 A. Well, I know the Attorney General's office were not
9 giving me direction, nor was the client seeking
10 instructions. What else they were doing, that was not 14:09
11 part of my dealings with them.

12 452 Q. They weren't legally advising you?

13 A. No. They were not legally advising me. There's no
14 legal issues. There's maybe one other matter raised
15 with them, again a general legal issue. But in 14:09
16 relation to the O'Higgins Commission of Investigation,
17 no, I never sought their advices and indeed never -- it
18 would not be appropriate. There was no issues -- it
19 was arising out of evidence, arising out of counsel's
20 advices and arising out of the Commissioner's 14:09
21 instructions, so, no, it would not be an issue that I
22 would have been looking for a direction from the
23 Attorney General's office.

24 453 Q. So I just want to be clear about this. It would appear
25 to be the case that privilege has been claimed over the 14:10
26 Attorney General's letter -- email to you of that day,
27 is that right?

28 A. I am aware that the Attorney General's office are
29 claiming privilege --

1 454 Q. Yes.

2 A. -- over.

3 455 Q. I just want to be clear about this. As far as you were
4 concerned, they weren't giving you legal advice and you
5 weren't seeking legal advice? 14:10

6 A. No. The communications that I had sight of that day
7 are not specifically addressed to me. So, no, they're
8 not advising me.

9 456 Q. I see.

10 CHAIRMAN: But I have what the attitude was, 14:11
11 Mr. McDowell. It's that it's not proposed to
12 second-guess the advices of counsel or the decision of
13 the Garda Commissioner, and that's it. I mean, nobody
14 asked for an analysis, it seems to me, such as you'd
15 find in Cross and Wilkinson or any textbook that 14:11
16 actually makes sense, as to what the difference is
17 being cross-examined on the issue, cross-examination as
18 to credit and when you can move from one to another,
19 and nobody ever sought that advice. I mean, that may
20 be part of the problem, I don't know. 14:11

21 MR. McDOWELL: Well, it is obviously.

22 CHAIRMAN: Yes.

23 MR. McDOWELL: But I'm not going to have a legal debate
24 with this witness about it.

25 CHAIRMAN: No, no. I mean, we're both aware of the 14:11
26 distinction, and you seem to be moving towards the
27 point where you might ask her about that. So in
28 relation to anything that happened on a bus in
29 Kingscourt.

1 MR. MCDOWELL: I will get to that.

2 CHAIRMAN: I mean, there was nothing to do with
3 Sergeant McCabe. As to whether anyone was entitled to,
4 you know, complain to GSOC, well everybody is entitled
5 to complain to GSOC. 14:11

6 MR. MCDOWELL: Yes.

7 CHAIRMAN: I couldn't because I haven't had any
8 interactions, thanks be to God, with the Gardaí, apart
9 from this - I don't mean that in any mean way - and I'm
10 not sure it is a breach of Garda discipline for a garda 14:12
11 to say to somebody, look, this is serious, why don't
12 you complain to GSOC? I don't think there's anything
13 wrong with any of that.

14 MR. MCDOWELL: I will come back to that, if I may,
15 Judge. 14:12

16 CHAIRMAN: Yes.

17 457 Q. MR. MCDOWELL: The point I'm raising with you is: You
18 had a conversation with Mr. Dreehan in which he said
19 that -- he made a number of remarks, which you noted,
20 isn't that right? 14:12

21 A. No, those remarks were not noted from a conversation
22 with Mr. Dreehan.

23 458 Q. Oh, I see. Well, sorry, you had a conversation with
24 Chief Superintendent Fergus Healy, right?

25 A. Yes. I had numerous conversations with Chief 14:12
26 Superintendent Fergus Healy.

27 459 Q. Yes. And you intimated to him that you had spoken to
28 Mr. Dreehan, isn't that right?

29 A. No, I don't believe I actually ever told Chief

1 Superintendent Healy who I spoke to.

2 460 Q. Yes. Perhaps we will look at page 692.

3 A. In volume what?

4 461 Q. I will get it for you now. Volume 1.

5 A. And which booklet? I apologise, I actually get -- 14:13

6 CHAIRMAN: You want to get --

7 A. 692.

8 462 Q. MR. McDOWELL: volume 1A, I think it is.

9 A. 1B.

10 463 Q. 1B, rather. 14:13

11 A. Yeah. 692, is that correct?

12 464 Q. Yes. You see, most of -- there's an email there,
13 nearly all of which has been blacked out, is that
14 right?

15 A. That is correct, yes. 14:14

16 465 Q. And at the bottom of it, it says:
17
18 "I telephoned FH."
19

20 That is Fergus Healy, is that right? 14:14

21 A. That is correct.

22 466 Q. "And informed him AGO's comments."
23 That's correct.

24 467 Q. I thought we were agreed that you did -- you were
25 trying to tell him what the AGO's comments were in 14:14
26 relation to the situation that had arisen?

27 A. Yes, it reads I informed him of his comments.

28 468 Q. And then you put a number of bullet-points there:
29

1 "Not directing, Commissioner's decision, line of
2 questioning, may have some validity."
3

4

And then the words:

5

14:14

6 "Political Dynamite!! He'll brief Commissioner."

7 A. That is "I'll brief". Maybe is it "he"?

8 469 Q. I think it's "He'll brief Commissioner."

9 A. Oh, yes. Sorry.

10 470 Q. "I'll circulate draft letter once I get it from
11 counsel."

14:15

12

13 Isn't that right?

14 A. That is correct.

15 471 Q. And when you were asked earlier about what you meant or
16 why you had written down "Political Dynamite", you said
17 it arose from your view of documentation which you
18 weren't in a position to disclose to us, isn't that
19 right?

20 A. There's a series of emails I had sight of --

14:15

21 472 Q. Yes.

22 A. -- that I believe there is a claim of privilege over --

23 473 Q. Yes.

24 A. -- by the Office of the Attorney General --

25 474 Q. Yes.

14:15

26 A. -- and I cannot put it further than that.

27 475 Q. Yes. And it was in the context of that, having seen
28 that material, that you wrote down "Political
29 Dynamite"?

1 A. Not -- yes, arising out of what -- all I had seen that
2 day and my knowledge, which was very limited, at that
3 stage, and I referred to this. They are my words, as
4 "Political Dynamite".

5 476 Q. Now, could you explain that to us, please? 14:16

6 A. I just saw this highly political before I ever came in,
7 on board, before I ever met a client. And what I'm
8 looking at it, material in relation to it, I could see
9 trouble brewing and I did -- it's not that I am great
10 reading into the future, far from it, but they are -- 14:16
11 that's what I wrote on the day at that point in time.

12 477 Q. I know you wrote it on the day, but I'm asking you why
13 you wrote it and what you meant by it on the date?

14 A. Well, we're all aware of what else had gone on prior to
15 it, that I'm -- there was a lot of media attention. 14:17
16 Balancing that with what I had heard and what I had
17 seen sight of, that is my words and that's what I
18 wrote. It's how I put it there.

19 478 Q. You see, you said in answer to Mr. McGuinness:

20 14:17
21 "It would be arising out of the content of material and
22 arising out of what went on that day but they are my
23 specific words. I cannot discuss the content. I
24 understand they are privileged and I cannot put it any
25 further than that." 14:18

26 A. That is it, as I said.

27 CHAIRMAN: well, I suppose what Mr. McDowell may be
28 asking you is this, and you may be able to answer this,
29 I don't know: Looking into your crystal ball, and I

1 know you're saying you're not a prophetess, I don't do
2 a crystal ball, but what were you thinking might
3 happen, I suppose? In other words, you go into the
4 Commission, you do such and such, and the following may
5 happen, which is political dynamite, or you go into the 14:18
6 Commission and you don't do something and what would
7 happen in consequence of that which would cause -
8 political dynamite are your words, a kind of a public
9 storm? If you can answer that, please do, but if you
10 can't, you can't. 14:18

11 A. It's not that I thought that if I -- I suppose some
12 people may call it, like -- give me another term.
13 Em... for instance, I don't know, there's other terms
14 for it. I saw it as trouble. I always saw it as
15 highly political, highly sensitive, and I don't know 14:19
16 what I was thinking that day, I'll tell you it today --

17 479 Q. MR. McDOWELL: Maybe I can assist you a bit. Was it
18 the fact that Sergeant McCabe's motivation was being
19 challenged that was political dynamite or was it the
20 fact that the reason his motivation was to be 14:19
21 challenged on the instructions that you had heard about
22 orally that day, was arising out of his
23 dissatisfaction, as it was alleged, in relation to the
24 Ms. D matter?

25 A. The Ms. D matter, I knew very little at that point in 14:20
26 time, so what exactly it was. Even the content of the
27 letter, I did not know what was going to be in that
28 letter until I received the first draft. So in
29 relation to all of that, no.

1 480 Q. Well, let's be clear about this. You did know a fair
2 amount about that Ms. D matter --

3 A. Yes.

4 481 Q. -- because we know that you attended consultations
5 where all of that was gone into, isn't that right? 14:20

6 A. Not in detail. I didn't know a lot of stuff until I
7 read that letter.

8 482 Q. Well, was it the Ms. D allegation aspect that made it
9 politically sensitive and political dynamite?

10 A. No. 14:20

11 483 Q. Or was it the fact that any challenge was going to be
12 made to the integrity or the credibility or the
13 motivation of Sergeant McCabe?

14 A. I was always conscious in relation to it getting into
15 the media, through whatever, brought by judicial 14:21
16 review, and, there's no doubt about it, I was aware, I
17 read a newspaper seven days a week, I'm aware of a
18 certain amount of background material, but arising out
19 of consultations and arising out of what I am hearing
20 and what counsel is advising and the instructions from 14:21
21 the Garda Commissioner, and arising out of content of
22 material that is privileged, they are -- that was my
23 knowledge as of that time.

24 484 Q. I see. And also, you said in the context of the
25 documentation you'd seen that day over which privilege 14:22
26 has been claimed by the Attorney General's office?

27 A. Balancing it all together.

28 485 Q. Yes. Now, at that time when you were speaking to
29 Fergus Healy, were you still hoping that at some stage

1 you'd be able to see -- have a consultation with the
2 Commissioner herself in relation to these matters?

3 A. I was -- I have to say, I rang Fergus Healy an awful
4 lot.

5 486 Q. Yes. 14:22

6 A. I know I wanted the consultation. Counsel had actually
7 said they would make themselves available. I knew
8 Friday did not suit. And counsel, the three counsel,
9 Mr. Smyth, Mr. Byrne and Mr. MacNamee, would make
10 themselves available over the weekend, just adequate 14:22
11 notice, Saturday or Sunday. I recall Fergus -- I spoke
12 to Fergus Healy on Friday evening, it could have been
13 after this matter, because I definitely wanted the
14 consultation, and I know Fergus told me she's busy
15 engaged or she has conferences. I know she was busy 14:23
16 for the weekend.

17 487 Q. Yes.

18 A. And I can understand, as I said, busy job.

19 488 Q. I wonder could we be shown photograph 745, please.

20 A. Which booklet is that? 14:23

21 489 Q. Or page 745, rather.

22 A. Oh, sorry, yes.

23 490 Q. And this is an email which Mr. Flahive sent to various
24 people in the Department of Justice on foot of his
25 telephone conversation with Mr. Barrett, who had been 14:24
26 speaking to Mr. Dreelan, isn't that right?

27 A. I don't know. I've no knowledge of whom Michael
28 Dreelan spoke. I can see from emails, but --

29 491 Q. Can I ask you to look at second-last paragraph:

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"Presumably the Garda Síochána are raising the matter on the basis they could argue and Sergeant McCabe would deny that it is potentially relevant to motivation. Richard advised me that counsel for Sergeant McCabe objected to this issue being raised, and asked whether the Garda Commissioner had authorised this approach. Richard also told me that the Garda Commissioner's authorisation had been confirmed."

14:24

And then he says, in brackets:

14:24

"(Although I understand separately that this may be subject to further legal advice)."

14:24

Was there a question of reconsidering the wisdom of the line of questioning over the weekend?

A. There was no question that was raised with me. If it had have arisen, I would have dealt with it. It would be recorded. But, no, it was not brought to my attention.

14:25

492 Q. But we know that the 15:29 letter of comfort sent to the Commissioner was the only formal advice tendered by counsel on the issue to the Commissioner, isn't that right?

14:25

A. It was. It was done during that day.

493 Q. Yes.

A. There wouldn't have been --

494 Q. After the process of challenging Sergeant McCabe's

1 motivation had already commenced by questions put to
2 Chief Superintendent Rooney?

3 A. Yes, as the timing of the email will show.

4 495 Q. I'm just wondering where the Department of Justice
5 might have got the separate understanding, and that is 14:26
6 separate from dealing with Mr. Barrett in the Attorney
7 General's office, that the matter might be the subject
8 of further legal advice?

9 A. Well, that'd be a matter you'd have to speak to Michael
10 Flahive about. I have never discussed this matter 14:26
11 with Michael --

12 496 Q. You weren't going to seek any further legal advice on
13 the matter?

14 A. I had no legal advice unless the Commissioner was going
15 to instruct another legal team. She was seeking it 14:26
16 from --

17 CHAIRMAN: Mr. McDowell, as I understand it at the
18 moment, throughout -- every day from the Friday,
19 Ms. Ryan was pestering people to try and get a
20 consultation. 14:26

21 MR. MCDOWELL: Yes.

22 CHAIRMAN: And what, hopefully, you get at a
23 consultation is not a packet of Rolo but legal advice,
24 if it had happened.

25 MR. MCDOWELL: Exactly. 14:27

26 497 Q. I now want to come to the point that the Chairman
27 raised earlier. At any point did the -- was there any
28 legal consideration, to your knowledge, by any of the
29 lawyers involved, about whether motive was in any way

1 relevant to the issues being considered by Mr. Justice
2 O'Higgins under his terms of reference?

3 A. Unless it's reflected in the file, I don't recall.
4 There was discussions with counsel and the client, so
5 it would probably be a matter for counsel and the 14:27
6 client to recall that better.

7 498 Q. Well, you see, Ms. Ryan, Mr. Justice O'Higgins had been
8 asked to conduct a Commission of Investigation into a
9 number of discrete issues laid out in his terms of
10 reference. 14:28

11 A. He did.

12 499 Q. Isn't that right?

13 A. That's correct.

14 500 Q. And nearly all of them were to do with issues of
15 policing standards or poor policing in respect of 14:28
16 individual incidents to which Sergeant McCabe had drawn
17 attention, isn't that right?

18 A. Yes. There was a number of them arising, primarily
19 most of them, bar one or two, from the Byrne/McGinn
20 review and then one or two separate ones, all in 14:28
21 relation to complaints he made, the allegations he set
22 out.

23 501 Q. Yes.

24 A. Yes.

25 502 Q. And I'm just querying if the letter of comfort was the 14:28
26 only intellectual exercise that was gone through by any
27 of the lawyers appearing for the Commissioner, as to
28 whether Sergeant McCabe's motives were relevant or not
29 to the O'Higgins Commission of Inquiry; how did you,

1 for instance, as an experienced solicitor, consider
2 that impugning his motivation was relevant at all?

3 A. I'll be honest with you, at that stage I don't believe
4 I gave any consideration to it. It was to do with
5 counsel and the client, and I was playing complete 14:29
6 catch-up, and there was a lot going on at that time.

7 503 Q. But you could see it was political dynamite?

8 A. Oh, there's no doubt about it, yes.

9 504 Q. Yes. And on the other hand, did nobody hesitate to
10 just say, why are we doing this? How will this assist 14:29
11 Mr. Justice O'Higgins in looking at the Kingscourt bus
12 module to establish that Sergeant McCabe has a grudge
13 and to try to establish why he has a grudge? Did
14 anybody ever ask themselves that question?

15 A. Well, I didn't, but the other people who are due to 14:30
16 give evidence I'm sure can answer on behalf of
17 themselves in that regard.

18 505 Q. Well, put it this way: You thought -- you were unhappy
19 about it being raised in the circumstances in which it
20 was raised, isn't that right? 14:30

21 A. No, I was unhappy that I had no note, I was not
22 involved. It's just my style, I like to know what is
23 going on, regardless of what case I am dealing with,
24 and I can appreciate this was a fast pace. I can
25 understand the environment, I'm sure -- 14:30

26 506 Q. Yes.

27 A. -- in relation to it, and, no, I would have preferred
28 to have been way more prepared to capture all of this,
29 but I did as good as I could.

1 507 Q. Well, let's move from the term 'unhappy'. You did not
2 understand why it was being raised?
3 A. No, I'm aware arising out of consultations, which are
4 privileged, and there are matters that I cannot put any
5 further, but it's what I gleaned from -- that would be 14:31
6 recorded in notes taken during consultations.
7 508 Q. Yes.
8 CHAIRMAN: Mr. McDowell, do you mind if I interrupt for
9 just a second, if you don't mind.
10 MR. MCDOWELL: No, no, certainly. 14:31
11 CHAIRMAN: And again, Ms. Ryan, you'll forgive me if I
12 speak as if I have a tidy legal mind. But just let's
13 take a couple of scenarios. Let's suppose there's a
14 road traffic accident in which two people, Mr. Smyth
15 and Ms. Jones, are witnesses, and the road traffic 14:31
16 accident happened at a junction, and they each give
17 evidence and one says that the car went through a red
18 light and the other said they didn't go through a red
19 light. Now, counsel questions as to, you know, did you
20 really have your eyes on the traffic lights, which bit 14:31
21 of the traffic light were you looking at, was there a
22 filter on the traffic light? All of those are
23 questions as to fact, do you understand?
24 A. I understand.
25 CHAIRMAN: It's nothing to do with whether Mr. Jones or 14:32
26 Ms. Smyth are good people, or bad people, or properly
27 motivated or improperly motivated. Does that make
28 sense to you?
29 A. Yes.

1 CHAIRMAN: Yes. And, I mean, even if you go on to ask,
2 'well, don't you normally wear glasses?', you're not
3 saying about that person that they are deliberately
4 lying, but that perhaps, you know, they might have seen
5 things a bit better had they been wearing their 14:32
6 glasses.

7 A. I understand.

8 CHAIRMAN: Yes.

9 A. I do myself.

10 CHAIRMAN: Let's take another scenario. Let's suppose 14:32
11 Mr. O'Neill and Mr. O'Toole go into a room and they
12 each come out and they have a completely different
13 account as to whether a contract was formed or not, to
14 supply, let us say, tractors, again they may be
15 questioned in relation to what they recall. That 14:32
16 doesn't necessarily mean either of them are liars.

17 A. Yes.

18 CHAIRMAN: But if you go a bit further and say there
19 was a series of litigation in this country between two
20 individuals who it was said couldn't stand each other - 14:33
21 I'm not going to mention any names, there's been a
22 number of such things, but it was always put in that
23 context - the reason you're giving this evidence that
24 you claim that Mr. O'Toole is under an obligation to
25 Mr. O'Neill to supply tractors is not because you 14:33
26 actually made an agreement with him, but because you
27 can't stand him and want to put him into trouble. Now,
28 that is an attack on someone's credibility, not on
29 their means of knowledge, not on the opportunity they

1 had to see things, but from the background of the fact
2 that they are giving evidence, either unconsciously or
3 consciously because of their feeling towards that
4 person. Now, what Mr. McDowell is asking you about is
5 this: If you adopt those distinctions, very simple 14:33
6 distinctions, between those three scenarios, what could
7 anyone ever imagine Sergeant McCabe's motivation had
8 anything to do with whether or not a pretty vicious
9 attack on a lady going about her business as a bus
10 driver in Cavan had to do with Sergeant McCabe's 14:34
11 motivation? Either it was the case that the
12 investigation was good or was bad, and it was nothing
13 to do with whether Sergeant McCabe thought it was good
14 or was bad or thought his senior officers were a bunch
15 of idiots or bunch of hypocrites. I'm speaking 14:34
16 rhetorically now. But do you see what I am talking
17 about?

18 A. I see what you are talking about.

19 CHAIRMAN: Yes. Well, that is what Mr. McDowell is
20 asking you about, and we maybe should kind of get to 14:34
21 that point.

22 509 Q. MR. MCDOWELL: I'm trying to.

23 A. Yes.

24 510 Q. Was it not abundantly clear to you that whether
25 Sergeant McCabe was well motivated or badly motivated, 14:34
26 had nothing to do with whether it was appropriate for
27 Ms. Lorraine Browne's -- the attack on her to be
28 effectively swept under the carpet and an offer of
29 compensation communicated through a probationer guard

1 to her?

2 A. No. An Garda Síochána, the findings of their report,
3 by the Byrne/McGinn report, found that there was
4 matters there. In relation to the motivation and the
5 credibility, counsel, as I said, will advise, but it 14:35
6 was about the serious allegations that were being met,
7 and it's my understanding that there was a long list of
8 allegations for that module, or brief matters, but
9 again, I'd have to refer to consultation notes, and I
10 am just going from memory at that time what was there. 14:35

11 511 Q. Well, I don't want to get involved into the minutiae of
12 the matter, but --

13 A. Yes.

14 512 Q. -- it would appear that the Byrne/McGinn report did not
15 uphold Sergeant McCabe's criticisms of that 14:35
16 investigation.

17 A. I believe they found it was problems with it, did they
18 not?

19 513 Q. And they found, and there was no disciplinary
20 investigation, no -- sorry, there was a disciplinary 14:36
21 investigation, and no breach of discipline was
22 uncovered. Just so that we know.

23 A. Yes. I do believe counsel prepared a document
24 comparing the three reports relating to all of these
25 matters, Byrne and McGinn, the probing report and then 14:36
26 the O'Higgins report. I cannot recall precisely, but
27 that document --

28 514 Q. I don't want to re-hear the O'Higgins Commission.
29 CHAIRMAN: No, I don't either, and I don't think you do

1 either, Mr. McDowell. But could I just address you for
2 a second. I'm acutely aware of the point which you
3 made in the earlier stages, and I'm bearing that in
4 mind, and I suppose I'm trying to tie this into this.
5 Look, if there is an assault -- if someone put urine in 14:36
6 a bottle in Cafolla's restaurant and took out the
7 vinegar so that people were putting urine on their
8 chips instead of vinegar, well, whether Sergeant McCabe
9 was motivated in saying the investigation into that was
10 a load of nonsense and was never conducted properly, it 14:37
11 doesn't matter, effectively, and that's the point you
12 made.

13 MR. MCDOWELL: That is the point I have made, yes.

14 CHAIRMAN: Whether he is ill-motivated or not. And I'm
15 still trying to find out what is the position of the 14:37
16 parties as to how this thing could ever have come into
17 this at all. That's the point you made, Mr. McDowell,
18 and that seems to me to be the centre of the thing.

19 515 Q. MR. MCDOWELL: And I'm suggesting to you, on the one
20 hand you can see here's political dynamite, you're 14:37
21 pleading, you're making phone calls in every
22 direction --

23 A. A number of phone calls.

24 516 Q. -- asking for assistance of some kind or reflection on
25 what is about to happen or -- and people to be aware of 14:37
26 what is about to happen, that's what you're pursuing as
27 one agenda. And at the second time -- on the second
28 agenda, nobody seems to be asking, why are we doing
29 this? How can it possibly affect the outcome of the

1 Commission's view of the Kingscourt bus incident and
2 Ms. Browne's treatment?

3 A. It's my understanding, arising out of consultations and
4 counsel's advices, that it was in relation to the
5 serious allegations that were made and they were 14:38
6 throughout. As we went on, we saw -- we gleaned even
7 more knowledge, but, from the outset, the knowledge as
8 of that time, there were serious allegations made
9 against individual members.

10 517 Q. I see. 14:38

11 A. And they were made, I understand, around 2008.

12 518 Q. I'm asking you --

13 A. And that was the matter.

14 519 Q. I'm asking you again; first of all, you'd agree with me
15 that Mr. Justice O'Higgins was not investigating the 14:39
16 language used by Sergeant McCabe or Sergeant McCabe's
17 views of what had happened, isn't that right?

18 A. Well, I know his language, or the views and parts of
19 the dossier were all in core booklets --

20 520 Q. Yes. 14:39

21 A. -- throughout all of it, so...

22 521 Q. Yes. I'm asking you again now to address the question
23 I'm putting to you, Ms. Ryan.

24 A. Yes.

25 522 Q. And that is, that this was not what was being 14:39
26 investigated by Mr. Justice O'Higgins; his terms of
27 reference did not ask him to inquire into the language
28 used by Sergeant McCabe?

29 A. I don't believe we were talking about the language we

1 used. It was just the allegations that were there.

2 523 Q. I see. Fair enough. Well, could I put it this way to
3 you: The Byrne/McGinn report, you knew, had found that
4 no malice on the part of Sergeant McCabe is established
5 in the making of his various complaints? 14:40

6 A. I was not aware of the Byrne/McGinn findings at that
7 stage. At that point in time, I knew there had been a
8 detailed, lengthy investigation carried out by
9 Assistant Commissioner Derek Byrne and Chief
10 Superintendent Terry McGinn and I was aware that they 14:40
11 indeed had found problems primarily relating to more
12 junior members of An Garda Síochána, in particular
13 probationer members and lack of supervision. But they
14 had found there were serious allegations as well that
15 formed part of their investigation and they had 14:40
16 found -- or not upheld any of those allegations in
17 relation to corruption, malpractice against senior
18 officers back then in 2008, that they were made, and
19 the report, I think, was 2010, their findings.

20 524 Q. And had any of that anything to do with the first 14:41
21 module and Lorraine Browne?

22 A. Yes. The brief proving facts document was in the core
23 booklet, and I understand that was the list that we
24 were looking at because it was in an awful lot of my
25 files. It carried through the way. And I know that 14:41
26 came from the Byrne/McGinn report, but I didn't know at
27 that point in time. Obviously as the time went on I
28 had more knowledge, but that was the document first
29 that counsel were looking at where they saw what are

1 all these complaints about.

2 525 Q. Yes.

3 A. And that was in the core booklet of Module 1.

4 MR. Ó HOISÍN: Chairman, I just wonder before

5 Mr. McDowell asks any more questions in relation to 14:41

6 this, could I just say this briefly. I can understand

7 that Mr. McDowell has asked questions in relation to

8 the relevance of the questions and motivation, and you,

9 Chairman, have also asked that, but my question to you,

10 Chair, is how it is relevant for this witness to give 14:42

11 an opinion on that in circumstances where it is very

12 clear on the evidence that this witness was not

13 involved in making decisions, that there was advice

14 received from counsel, and the role of this witness is

15 really not one which had to make a decision on that, on 14:42

16 questioning, on motivation. And to seek an opinion now

17 from the witness, in my respectful submission, is

18 really of very little value, and, what is more, it's

19 not something that this witness is on any notice of

20 that she was going to be required to give. She is a 14:42

21 witness who is here to assist the Tribunal, but has not

22 been furnished with the core book, has not been

23 furnished with any -- and is really disadvantaged in

24 relation to that, but it makes sense not perhaps to

25 have that documentation if her role is a relatively 14:43

26 limited one. But asking her for an opinion here, in my

27 respectful submission, for those two reasons, is of

28 little value, and I'm just trying to bring that to your

29 attention, Chairman.

1 CHAIRMAN: Mr. Ó hOisín, what opinion do you think she
2 is being asked?

3 MR. Ó HOISÍN: She is being asked an opinion as to the
4 basis upon which there could be a challenge to the
5 motivation of Sergeant McCabe in connection with Module 14:43
6 1 and the legal basis for that.

7 CHAIRMAN: Yes. I think that is a fair question,
8 Mr. Ó hOisín, and I'm not sure that it is as such an
9 opinion. It's a question of where, in terms of the
10 legal analysis that she was aware of, that this could 14:43
11 possibly come up. And, I mean, I keep coming back to
12 this particular point as the fulcrum of this whole
13 issue, and it seems to me to be a reasonable thing to
14 ask her, because, after all, as the person who was
15 there, she would have an idea. Now, that certainly 14:44
16 doesn't mean that anything that I would find in
17 consequence would be critical of her, not in the
18 slightest, but I'm still trying to grasp with that
19 fact, which seems to be the central fact and the same
20 thing. 14:44

21 MR. Ó HOISÍN: Chairman, could I just come back to you
22 on that point?

23 CHAIRMAN: Yes.

24 MR. Ó HOISÍN: Whether one uses the word 'opinion' or
25 one uses the word -- other terminology to refer to a 14:44
26 legal understanding of a justification for doing
27 something, the fact is, and this is -- there is no
28 issue or controversy about this, this witness did not
29 have a role in relation to making such judgements on

1 legal justification at the time. And in circumstances
2 where she had no role in relation to that, to ask her
3 now for that, in my respectful submission, is of little
4 value, and, for the procedural reason I referred to as
5 well, is really potentially unfair to the witness. 14:45

6 CHAIRMAN: Well, for a start, Mr. Ó hOisín, I
7 appreciate her role is limited, your role is limited.
8 I'm grateful for your assistance. I don't think there
9 is any procedural unfairness, because counsel for the
10 Tribunal open everything that is of relevance. That 14:45
11 has always been the case. But I really do want to try
12 and find out, and it's not a criticism, if it's not
13 there, it could be a mistake, everyone makes mistakes,
14 as to why issues as to credit could help in terms of
15 the terms of reference of the O'Higgins Commission. I 14:45
16 really need to look at that. And I think that is what
17 Mr. McDowell is exploring, and so therefore I am
18 against you on your objection.

19 526 Q. MR. McDOWELL: In any event, maybe we can leave it at
20 this level: that you did not see at the time how it 14:45
21 was particularly relevant, but you were relying on
22 counsel's view as to its relevance, is that right?

23 A. Yes. I was -- as I said, I was at a number of
24 consultations arising of, there, counsel's advice was
25 as what was put, and the documentation that I had at 14:46
26 that stage relating to that was all contained in the
27 core booklet at that point in time.

28 527 Q. Yes. Now, in the course of the weekend you said that
29 the letter was drafted and various drafts were

1 circulated?

2 A. That is correct.

3 528 Q. Now, leaving -- leaving your privileged witnesses out
4 of it, were drafts sent to Chief Superintendent Healy
5 for his consideration? 14:46

6 A. Yes, they were. Yes, they were.

7 529 Q. Did he make amendments to them?

8 A. Yes, Chief Superintendent Healy, I understand he had to
9 consult with -- well, I requested him to consult with
10 Chief Superintendent Michael Clancy to get knowledge, 14:47
11 and, arising therefrom, I got the drafts back and his
12 quotes back and it was circulated from there on. But
13 there was numerous circulations over that weekend. I
14 don't know offhand how many.

15 530 Q. Could I ask you to look at page 693. 14:47

16 A. Sorry?

17 531 Q. 693. Sorry, I will ask you, first of all, in relation
18 to the letter which was circulated, which was delivered
19 on the Monday morning --

20 A. Yes. 14:48

21 532 Q. -- you've indicated that that was the subject of
22 circulation to various witnesses, is that right?

23 A. Compiling that letter together, yes, my role, I
24 consistently circulated it throughout the weekend,
25 Saturday, Sunday, early hours of Monday morning. 14:48

26 533 Q. I think we know that counsel had advised you that this
27 was to be carefully checked, very carefully checked, as
28 to its factual accuracy, isn't that right?

29 A. That is correct.

1 534 Q. Did you communicate that to Chief Superintendent Healy?
2 A. That was communicated, yes.

3 535 Q. And did you -- you said you circulated it to other
4 persons?
5 A. That was communicated in the circulations. 14:49

6 536 Q. Everybody was told how important it was to check it, is
7 that right?
8 A. I complied with counsel's advices and, yes, I passed it
9 on --

10 537 Q. Yes. 14:49
11 A. -- in the circulations, or in the circulation.

12 538 Q. Yes. The letter itself commences with the paragraph:
13
14 "As directed by the Judge in the course of the hearing
15 on Friday 15th May 2015, we hereby provide the factual 14:49
16 issues to be put to Sergeant McCabe."
17
18 Right? And there are 20 paragraphs following that,
19 isn't that right?
20 A. I don't have the letter in front of me, but yes, I'm 14:50
21 familiar with the layout of the letter.

22 539 Q. I think it's at page 762 we're looking for. Do you see
23 that, 762?
24 A. Yes, I do.

25 540 Q. It says -- you were -- Michael MacNamee, barrister, is 14:51
26 writing to you on the evening of the Saturday, and he
27 is attaching for your immediate attention; he's also
28 writing to Fergus, as well, isn't that right?
29 A. The email is sent to myself and it's sent to Fergus

1 Healy and cc'd to Garret Byrne and Colm Smyth.

2 541 Q. Yes. And it says:

3

4 "It is of the utmost importance that the content be as 14:52
5 factually accurate as possible and that there are no
6 misstatements and nothing that cannot be backed up by
7 oral or documentary evidence with the exception of
8 facts alleged, recited or admitted by McCabe himself."
9

10 So it was very clear that counsel was going to rely on 14:52
11 yourself and Fergus Healy to ascertain whether each and
12 every word that was in the letter was correct, isn't
13 that right?

14 A. Well, as I said, when I got the draft I circulated all
15 of it and it was signed off, submitted. And that 14:52
16 morning, probably about ten o'clock or a couple of
17 minutes before it, I received documentation, there was
18 three documents. The young lady down there, she gave
19 me a swipe to do a bit of photocopying, got them in
20 order, and I recall I gave David O'Hagan the letter 14:53
21 first and the documents just followed --

22 542 Q. Yes.

23 A. -- a very short time later, whether it was two or three
24 minutes later, whatever, like five minutes later. As
25 for, they wanted the letter immediately. 14:53

26 543 Q. Okay.

27 A. I was late getting down that morning, I do recall that.

28 544 Q. Yes. Superintendent Cunningham has indicated in a
29 letter -- in a statement, which we have recently

1 received, that he was not given an opportunity to read
2 that letter and that it was given to him in
3 circumstances where you asked him simply to sign off on
4 it and that she gave you -- that you gave him no
5 opportunity to read it -- 14:53

6 MR. MCGUINNESS: Chairman, could I just intervene
7 there? That is a complete misstatement of
8 Superintendent Cunningham's position. The position is
9 that he recites in his statement that he received the
10 letter, he didn't have an opportunity to print it, and 14:54
11 read it from his phone, but he wasn't able to read it
12 from his own phone and he said he had bad eyesight and
13 he said that he didn't see the mistake in paragraph 19,
14 and that, had he seen the error, it would have been
15 clear to him. The issue about signing it is -- 14:54

16 CHAIRMAN: No, I got that.

17 MR. MCGUINNESS: -- follows that.

18 CHAIRMAN: No, I was familiar with that,
19 Mr. McGuinness.

20 MR. MCDOWELL: I was going to come to that, Judge. 14:54

21 CHAIRMAN: Yes. No, it is "against" and "to", and that
22 is the difference in the words.

23 MR. MCDOWELL: Sorry, Judge.

24 CHAIRMAN: well, anyway, studies indicate that if you
25 look at something on a screen you pay less attention 14:54
26 than if you look at it on a page, so...

27 MR. MCDOWELL: Indeed.

28 545 Q. I was going to ask you, was it sent to him -- were the
29 drafts sent to Superintendent Cunningham?

1 A. Well, since he said in his statement there, yes, I'm in
2 a position to confirm the draft, it was -- he was one
3 of the persons circulated on it.

4 546 Q. And he said that because -- presumably because it was a
5 weekend and because he claims he had only a phone and 14:55
6 poorish eyesight, he didn't pick up on what he says was
7 the error in it, is that right?

8 A. I will agree, he had poor eyesight. I have reference
9 to that. In relation to picking up nearer, I don't
10 know why. All I did was circulate the matter, got it 14:55
11 signed off, handed the letter in and got the
12 documentation which followed a very short time later,
13 probably a matter of minutes.

14 547 Q. What was your purpose in asking him to sign off on it?

15 A. Well, I wasn't -- that morning, I was late due to 14:55
16 unforeseen problems outside of my control, getting
17 down, of all mornings, to the Distillery, and I do
18 recall going into the Distillery consultation rooms, I
19 do recall David O'Hagan immediately, more or less,
20 requesting the letter and I do recall probably the 14:56
21 letter was handed over within five minutes of me being
22 inside there. They wanted the letter there and then.
23 I had intended to have a consultation down there that
24 morning, but due to a fire alarm and a small fire
25 within the Chancery Buildings, I lost out on time, 14:56
26 where I had to -- the building had to be evacuated and
27 I was standing out on the street for the best part of
28 40 minutes.

29 548 Q. It was not a good morning?

1 A. It definitely wasn't.

2 CHAIRMAN: No, it doesn't sound like a good morning.

3 But I think the whole point of it was, the letter was

4 definitely circulated at the weekend, with

5 instructions, read every single word and don't sign it 14:56

6 unless you can stand over it.

7 MR. MCDOWELL: Yes.

8 CHAIRMAN: And then the mistake, if it was a mistake,

9 Inspector Cunningham is saying, the mistake was made

10 because I was in a rush, I only had a small screen, 14:56

11 etcetera. And whereas I suppose Ms. Ryan might have

12 liked to sit down and read out the letter tediously and

13 saying to people, do you agree with this or do you not,

14 then there were other circumstances in between.

15 MR. MCDOWELL: That didn't happen. 14:57

16 CHAIRMAN: Yes, but, I mean, people have to take

17 responsibility themselves, you know.

18 MR. MCDOWELL: I accept that.

19 CHAIRMAN: If you are going to sign a letter, you're

20 signing a letter. 14:57

21 MR. MCDOWELL: I accept that, Judge.

22 CHAIRMAN: Yes.

23 549 Q. MR. MCDOWELL: Well, perhaps then if we go to page

24 1439. Before we go on to the letter, let's be clear

25 about this; it wasn't just paragraph 19 that was going 14:57

26 to be put to Sergeant McCabe, it was the entirety of

27 the letter. These were the facts which were to be put

28 to him to establish improper motivation on his part,

29 isn't that right?

1 A. I don't believe -- it's a matter for counsel how they
2 were going to approach that. I don't believe I have
3 any knowledge in relation to that. That was giving the
4 factual background. I know it was never -- well, I am
5 not aware, from my knowledge, that it was ever going to 14:57
6 be put in detail. That would be a matter for counsel.
7 I don't know what counsel was going to ask on his feet
8 or sitting.

9 550 Q. Well --

10 A. But I do know that Judge O'Higgins requested that. 14:58

11 551 Q. Yes. You were handing over a letter?

12 A. Yes.

13 552 Q. And the first paragraph is:

14

15 "As directed by the Judge in the course of the 14:58
16 hearing..."

17 A. Yes.

18 553 Q. "... on Friday, 15th May 2015, we hereby provide the
19 factual issues to be put to Sergeant McCabe."

20 A. Yes. 14:58

21 554 Q. And then there are 20 paragraphs after that.

22 A. Yes.

23 555 Q. And it wasn't simply that he was being asked to comment
24 on paragraph 19; it was proposed to bring him through
25 paragraphs 1 to 20 to establish his motivation, isn't 14:58
26 that right?

27 A. I presume so. That would be a matter for counsel --

28 556 Q. Yes.

29 A. -- what they proposed. As I said, I had no involvement

1 with the drafting or with the matter.

2 557 Q. And can we be clear on it, that, without wasting the
3 Tribunal's time, because the letter is available to the
4 Tribunal, that an entire history going back to his
5 relationship -- his dealings with Mr. D in 2004, and 14:59
6 the complaint, complaints he had against Mr. D and the
7 complaint made by Ms. D against him, that was all to be
8 put to him to establish his motivation?

9 A. All I can say is, obviously counsel must have said so.
10 I wasn't involved in taking that instructions or 14:59
11 putting that letter together.

12 558 Q. The purpose of the letter was to tell him the matters,
13 the factual issues which would be put to him?

14 A. Yes.

15 559 Q. And it was the entire history of his dealings with his 14:59
16 colleagues back to 2004 relating to the D matter, isn't
17 that right?

18 A. I know the content of the letter, but, as I said, I
19 wasn't involved when taking instructions with that, or
20 my sole involvement in relation to that was circulating 15:00
21 it, making a few amendments, typos, whatever, and
22 putting it on headed paper and putting it in that
23 Monday morning.

24 560 Q. Yes.

25 A. And getting the documentation that accompanied that 15:00
26 letter on the Monday.

27 561 Q. But in case it might be thought that somebody with poor
28 eyesight and looking at it in hurried circumstances
29 wouldn't pick up the difference between complaints made

1 to Superintendent Clancy and complaints about
2 Superintendent Clancy, in case that excusing
3 circumstances is being proposed by any witness as to
4 what happened, could I bring you then to page 1439, and
5 these are submissions which you tendered to the 15:01
6 Commission on the 11th June. And we know that
7 Mr. Justice O'Higgins had made it quite clear that he
8 believed that Ms. D's complaint was outside the terms
9 of reference of his Commission, isn't that right?

10 A. Whatever precisely is on the recording. It's a couple 15:02
11 of years ago.

12 562 Q. He made it very --

13 A. Yes, he didn't want to deal with this, he definitely --

14 563 Q. He made it very --

15 A. Yes, that is what I mean, he definitely did not want to 15:02
16 deal with this. He made it clear -- I can't
17 remember --

18 CHAIRMAN: But it's not in the terms of reference.

19 MR. MCDOWELL: Yes, I know.

20 CHAIRMAN: I just read the terms of reference. 15:02

21 A. Yes.

22 MR. MCDOWELL: I'm not suggesting otherwise, Judge.
23 I'm saying that he made it very clear that he didn't
24 want this matter ventilated, and that the most he would
25 permit is some reference to a grudge. 15:02

26 A. I don't believe he used a grudge. I know he allowed
27 something, but I'm going from recollection
28 two-and-a-half years ago and I can't -- I haven't read
29 these transcripts since 2015, so --

1 564 Q. I think he put it in terms that he would only allow a
2 most indirect reference to it if Mr. Smyth insisted?
3 A. As I said, whatever is recorded on the transcript will
4 reflect what he said. I'm not in a position to -- or I
5 cannot remember that, or recall exactly what he said. 15:03

6 565 Q. And, you see, then we come to, in this written
7 submissions document, to paragraph 63 -- sorry, 68
8 onwards. Sorry, maybe we should go back to the
9 previous page, page 63 -- or paragraph 63, rather.
10 This is 1439. 15:04

11 A. What paragraph?
12 566 Q. 63.
13 A. 1451.

14 567 Q. 1451, yes. And it recites this material again?
15 A. Yes. 15:04

16 CHAIRMAN: Yes.
17 568 Q. MR. McDOWELL: Isn't that right?
18 CHAIRMAN: Can I intervene, because what Mr. Justice
19 O'Higgins ruled was the following:
20 15:04
21 "You are permitted to establish --" this is referring
22 to your counsel, but he says:
23
24 "I think it has already been established that Sergeant
25 McCabe had a grievance, real or perceived, arising out 15:04
26 of conversation with Chief Superintendent Rooney."
27
28 And that was all. And he said motivation, it seemed to
29 him, was very peripheral, but any motivation that could

1 be relevant was a grievance arising out of that
2 conversation; in other words, I want you, please, to
3 circulate the DPP letter, and he said no, that is to
4 say Chief Superintendent Rooney. That was it, and that
5 was the only thing 15:05
6 MR. MCDOWELL: That was as far as he would allow the
7 matter go, isn't that right?
8 A. Apparently so, yes.
9 569 Q. And notwithstanding that, on the 11th June you put in
10 this lengthy submission re-opening this issue again? 15:05
11 A. As I said, Judge, it was drafted by counsel,
12 circulated, signed off by the client and submitted by
13 myself.
14 570 Q. Yes. Okay, we will take those steps now.
15 CHAIRMAN: Mr. McDowell, I'm sorry, I am sure I'm 15:05
16 frustrating you and everybody else, and please excuse
17 me for doing that, but I don't know if you are familiar
18 with a phrase that used to be used certainly in my
19 time: if you hire a dog, let it bark.
20 MR. MCDOWELL: Yes. 15:05
21 CHAIRMAN: And it's not usual that a solicitor acting
22 on behalf of a State client, when instructions had been
23 given by the State, whatever aspect of the State is
24 giving the instructions, to second-guess what counsel
25 is doing. 15:06
26 MR. MCDOWELL: I fully accept that, Judge, yes.
27 CHAIRMAN: And I don't think this lady can be blamed
28 for, if there is any blame attaching for anything that
29 happened, it seems to me that her conduct throughout

1 was exemplary and highly efficient and like a dog with
2 a bone in terms of trying to get things done properly.
3 MR. MCDOWELL: Chairman, I'm not suggesting that she is
4 blameworthy.

5 571 Q. I just want to understand that the submissions which 15:06
6 were circulated by you for comment and having been
7 drafted by counsel, reopened this entire issue again,
8 isn't that right?

9 A. They are on the submission, yes.

10 572 Q. Even though Mr. Justice O'Higgins had said he did not 15:06
11 want it to go further than an indirect reference to a
12 grievance?

13 A. As I said, counsel drafted the Commission arising
14 therefrom, so that'll be a matter that they may be in a
15 position to throw further light on their advices, and 15:06
16 the client received the drafts, signed off on them, and
17 I submitted them.

18 573 Q. Yes.

19 A. I wasn't making any call --

20 574 Q. Yes, exactly. 15:07

21 A. -- bar one or two spelling mistakes, whatever.

22 575 Q. I'm not suggesting that you should take your red pen
23 out to counsel's work, I'm not suggesting you should do
24 that.

25 A. Maybe I will do it in future. 15:07

26 576 Q. Except in the most extreme circumstances. But what I
27 am suggesting is that you have given evidence here that
28 this was signed off on behalf of the Commissioner by
29 Chief Superintendent Healy?

1 A. This submission and all submissions were signed off by
2 the client. I did not submit any submission without it
3 being signed off by the client first.

4 577 Q. And the client here is the Commissioner?
5 A. Well, the client is the Commissioner. I had no direct 15:07
6 contact with the Commissioner, so Chief Superintendent
7 Fergus Healy's dealings with the Commissioner, that is
8 a matter for him. He would not have discussed in
9 detail -- I am aware he had -- I was constantly
10 following up Chief Superintendent Healy on the phone. 15:08
11 He would be in -- I got the impression anyhow, or I was
12 informed, he was in regular contact with the
13 Commissioner.

14 578 Q. Yes. Okay. And they had the approval of the
15 Commissioner, isn't that right? 15:08
16 A. Well, as I said, I asked for it, I get it, and then I'm
17 ready to put it in. So what goes on in HQ when I'm not
18 there, I don't know.

19 579 Q. And I now have to suggest to you that whoever was
20 calling the shots, whether it was counsel, Chief 15:08
21 Superintendent Healy or the Commissioner, they were
22 re-opening this matter deliberately again,
23 notwithstanding the ruling that Mr. Justice O'Higgins
24 had made?

25 A. I don't know if anything was deliberate. That'd be a 15:08
26 matter for counsel. I'm not aware. I know what was
27 done, I know the matter was in submission, and the
28 submission was for Judge O'Higgins. We never
29 anticipated having the material arising out of the

1 Commission of Investigation that was conducted in
2 private and now all of the material before a tribunal,
3 and in a public tribunal at that. This submission was
4 to Justice O'Higgins in relation to that matter and
5 that is a matter that counsel and the client can deal 15:09
6 with. All I know is that they were put to Justice
7 O'Higgins -- or, sorry, submitted to the solicitor for
8 the O'Higgins Commission.

9 580 Q. Could I bring you to paragraph 69.

10 A. You can. 15:09

11 581 Q. It reads:

12
13 "Sergeant McCabe then made a series of complaints
14 against other officers in Bailieboro station, including
15 Superintendent Clancy, against whom he alleged a lack 15:09
16 of support. Chief Superintendent Rooney appointed
17 Superintendent Cunningham to investigate these
18 complaints. Superintendent Cunningham attempted to
19 meet Sergeant McCabe to discuss the complaints and
20 finally did so on the 25th August 2008. On this 15:10
21 occasion, Superintendent Cunningham was accompanied by
22 Sergeant Yvonne Martin."

23
24 The next paragraph:

25
26 "It is understood that Superintendent Cunningham and 15:10
27 Sergeant Martin will give evidence that Sergeant McCabe
28 said at this meeting that the complaint which he had
29 made --" and then they specify what the complaint is

1
2 " -- alleging lack of support as referred to in the
3 previous paragraph --" that is lack of support by
4 Superintendent Clancy "-- was a bid by him to have the
5 full DPP directions conveyed to him and to the 15:10
6 complaining party. This is recorded in a report of the
7 meeting prepared jointly by Sergeant Martin and
8 Superintendent Cunningham."
9

10 So it wasn't just simply a matter of "to" and "against" 15:10
11 being accidentally transferred. These submissions
12 clearly indicated that counsel who drafted them, at any
13 rate, believed that the accusation of lack of support
14 by Superintendent Clancy was motivated -- was motivated
15 by a failure to comply with Sergeant McCabe's desires 15:11
16 in relation to the DPP's directions, isn't that right?

17 A. It would appear so from the drafting, yes.

18 582 Q. So it isn't a matter that somebody carelessly put in
19 "against" rather than "to" in the first document.
20 Those two paragraphs clearly demonstrate that it was 15:11
21 counsel's understanding that the complaint against
22 Superintendent Clancy for a lack of support of Sergeant
23 McCabe in his dealings with the other officers in the
24 station was motivated by his -- by the failure to
25 comply with his requests about the DPP's directions? 15:12

26 A. I would expect for the mistake to be made twice, I
27 don't know, I have never discussed it with counsel,
28 but, from looking at it, it's not a drafting mistake on
29 one letter.

1 583 Q. No.

2 A. It is carried through, so counsel would be the best
3 place to give their view on that.

4 584 Q. But it's not -- I'm putting to you --

5 A. Yes. 15:12

6 585 Q. -- that it's not merely a clerical error that one word
7 slipped in in dictation rather than another, it's made
8 very clear --

9 A. Yeah.

10 586 Q. -- that it is the allegation of lack of support that 15:12
11 was motivated in this way, isn't that right?

12 A. It appears, yeah, that's what's there. As I said, I
13 don't have any of the documentation from any of that at
14 the time.

15 CHAIRMAN: If I may just state -- 15:12

16 MR. MCDOWELL: Sorry, Judge.

17 CHAIRMAN: -- that Sergeant Yvonne Martin, if you
18 actually read her statement, and she has -- I used the
19 word 'traversed' before, I meant to say traduced, in
20 other quarters, she never said this -- 15:12

21 MR. MCDOWELL: No.

22 CHAIRMAN: -- in her statement. And certain people
23 have attacked her --

24 MR. MCDOWELL: Yes.

25 CHAIRMAN: -- in relation to something without actually 15:13
26 looking at the facts. It's incorrect in that respect
27 as well.

28 MR. MCDOWELL: It's incorrect in that respect as well.

29 A. It is. As I said, Sergeant Martin, I don't know who

1 the lady is, I have never met her, but she had not
2 sight of these and I had no dealings whatsoever with
3 her, so what is referred to here presumably is arising
4 out of evidence that was given, the submission prepared
5 by counsel on foot of that evidence, I would expect so. 15:13
6 That's only my view. I don't know, I had no
7 involvement with the drafting. When I received the
8 draft, it was circulated and it was signed off.

9 587 Q. Yes. What I am coming to is this: In case anybody in
10 this Tribunal is advancing the proposition that 15:13
11 counsel, in a slip of the pen, so to speak, put in
12 "against" rather than "to" in the first letter, it's
13 very clear that counsel, or whoever drafted this,
14 believed that it was "against" rather than "to", from
15 those two paragraphs, isn't it? 15:14

16 A. Yes. It's definitely following through, no doubt about
17 it. The chances of the same error - must be related.

18 588 Q. Could I ask you about the general issue of bad faith or
19 motivation or credibility as it arose during the course
20 of, and I don't want to rehash the whole of the 15:14
21 O'Higgins Commission, but I just want to ask you a few
22 questions, and I take it you'll probably agree with
23 them; that a constant pattern of the cross-examination
24 of Sergeant McCabe throughout the O'Higgins Commission
25 was that he was the sergeant in charge and that 15:14
26 responsibility for poor policing rested substantially
27 with him?

28 A. I'm aware Sergeant McCabe was the sergeant in charge.

29 589 Q. No, I'm not asking you that. I'm saying that

1 Mr. Smyth, in virtually every module, sought to
2 establish personal culpability on the part of Sergeant
3 McCabe because he was the sergeant in charge at
4 Bailieboro Garda Station?

5 A. I'd have to go through all the transcripts again to 15:15
6 remember all of that. I can't remember precisely. But
7 I do know there was -- I do recall his role as sergeant
8 in charge was raised on numerous occasions. I do
9 recall one or two of the senior officers outlining the
10 role of a sergeant in charge, what that would involve. 15:15

11 590 Q. Yes.

12 A. There was -- there definitely was talk about the role
13 of sergeant in charge, and indeed in the Commissions of
14 Investigation Act I believe the first recommendation or
15 the second recommendation, there's definitely a 15:15
16 recommendation there, along the lines to ensure that --
17 recommending that the role of sergeant in charge be
18 clarified or specifically set out. So there appears to
19 have been confusion, I do recall, as to what the role
20 of sergeant in charge did involve, and I do believe or 15:16
21 I do recall it arose, but the transcripts will show
22 when it arose. I can't recall much further than that.

23 591 Q. I want to put it to you in general terms, because I
24 don't want to rehash the whole of the O'Higgins
25 Commission, and I wouldn't be allowed to even if I 15:16
26 wanted to, but I'm suggesting to you that a recurring
27 theme --

28 CHAIRMAN: I'm actually not allowed to either,
29 Mr. McDowell, I think that is the point.

1 MR. MCDOWELL: That is the point.

2 592 Q. A recurring theme of Mr. Smyth's and other barristers'
3 cross-examination of Sergeant McCabe was that he was
4 the sergeant in charge and it was his business to
5 maintain proper policing in his station? 15:16

6 A. Well, I do -- I suppose, I'm trying to recall what I
7 would have heard, but the sergeant in charge role, I
8 know I submitted -- during this entire period, I was
9 inundated with requests from the Commission for various
10 material, and I do remember a lot of material being 15:17
11 submitted and a detailed report and various of - I'd
12 have to check the boxes to see what's there - in
13 relation to the role of sergeant in charge and what it
14 specifically involved. At the time, I could have given
15 you a detailed answer, but it's over two years since 15:17
16 I've looked at that material.

17 593 Q. Well, I'm not asking you to do that.

18 A. Yes.

19 594 Q. I am just merely asking you to agree, and we will put
20 in a written submission or an oral submission to the 15:17
21 Commission -- this Tribunal in the fullness of time,
22 pointing out all of the occasions where Sergeant
23 McCabe's responsibility was -- as sergeant in charge
24 was explored in respect of each of the modules.

25 A. I do recall, yes, his role being the sergeant in charge 15:17
26 of the station. Obviously I do recall it was being
27 questioned or it did arise throughout and obviously --

28 595 Q. So that was one area on which counsel for the
29 Commissioner sought to explore the possibility that

1 Sergeant McCabe bore some or all of the responsibility
2 for some of the things about which he himself was
3 complaining?

4 A. Well, I do recall Sergeant McCabe saying that he was
5 doing the superintendent's job as opposed to the 15:18
6 sergeant in charge's job, so there was a lot of
7 confusion in relation to what his role was and all of
8 that. And I know all the detail and all the evidence
9 will be on transcripts.

10 596 Q. Yes. 15:18

11 A. So I'm not in a position to recall precisely what was
12 said.

13 597 Q. Yes.

14 A. And as I said, documentation was specifically requested
15 by the Commission during that period, probably the 15:18
16 latter end, maybe around October/November, I know it
17 was before Christmas, and they raised various questions
18 in relation to the role of sergeant in charge, and I
19 know a detailed reply and documentation went in. So
20 perhaps that would throw more light on you, that 15:19
21 documentation.

22 598 Q. Well, I am just putting it to you, and I will be
23 putting it to Mr. Smyth and I will be putting it to his
24 colleagues, that a recurring theme of the presentation
25 of the Commissioner's evidence and the 15:19
26 cross-examination of Sergeant McCabe and other
27 witnesses, was to the effect that Sergeant McCabe must
28 bear significant responsibility for the standards of
29 policing in the station which he was criticising in his

1 original complaints?

2 A. There definitely, from my recollection, from evidence
3 and recollection of some senior officers who gave
4 evidence, there was definitely, definitely confusion
5 there as to what the role of sergeant in charge meant 15:20
6 to Sergeant McCabe as opposed to what the role of
7 sergeant in charge meant to An Garda Síochána. So I
8 don't know what the role of sergeant in charge means.
9 It's on the documentation, so...

10 599 Q. I won't put it further than that, but I do want to give 15:20
11 you the opportunity to respond to the suggestion --

12 A. Yeah.

13 600 Q. -- that on many occasions during the O'Higgins
14 Commission, the issue of Sergeant McCabe's, his
15 responsibility for the incidents that he was 15:20
16 complaining about, because he was the sergeant in
17 charge, was raised and put to him?

18 A. As I said, I do recall sergeant in charge role coming
19 up an awful lot. Exactly what, I would have to read
20 through transcripts. 15:20

21 601 Q. Yes.

22 A. But, yes, I do recall, and, as I said, there was
23 specific documentation given into the Commission at the
24 request of the Commission in relation to the role of
25 sergeant in charge. 15:21

26 602 Q. And I don't know whether you were here when the
27 Chairman pointed out that on a number of occasions
28 there was direct conflict of testimony between Sergeant
29 McCabe and others such as in relation to the loss of

1 the police computer -- or the priest's computer,
2 rather, the release of Gerry McGrath, the release of
3 the man who was in custody for 22 minutes, there was a
4 direct conflict of evidence between Sergeant McCabe and
5 other witnesses, isn't that right? 15:21

6 A. There was, between various witnesses.

7 603 Q. Yes.

8 A. And it was down to Judge O'Higgins to hear that
9 evidence and whatever his findings were.

10 604 Q. Yes. 15:21

11 A. But, no, there was conflict between certain members of
12 An Garda Síochána at all ranks - garda, sergeant,
13 superintendent, I don't believe we had any
14 inspectors --

15 605 Q. Yes. 15:21

16 A. -- called to give evidence.

17 606 Q. Yes.

18 A. And upwards. But yes, there was a difference in
19 evidence throughout it. That is the nature of
20 evidence, so... 15:22

21 607 Q. Yes. And I have got to suggest to you that it just
22 simply doesn't come down to a matter of recollection,
23 one way or the other. For instance, in relation to the
24 loss of the priest's computer in the sexual abuse case,
25 it goes further than that, because if Sergeant McCabe 15:22
26 was, as being alleged, responsible for that, if he was
27 responsible, it would have been an act of utmost bad
28 faith for him to make a complaint in public arising out
29 of that issue. In other words, if he was the man who

1 lost that computer and he was to blame for its loss, it
2 would have been a matter of utmost bad faith on his
3 part to make a complaint about that investigation,
4 wouldn't it?

5 A. Totally so. I know it was a young garda who blamed him 15:23
6 or put him in the fix, but --

7 608 Q. We will come back to that in a moment. Just deal with
8 the issue.

9 A. Yeah.

10 609 Q. It would have been a very seriously wrong thing him for 15:23
11 him to do, to complain to the authorities about an
12 event where he was the person who was personally
13 responsible, isn't that right?

14 A. It would be very wrong for anybody to do that.

15 610 Q. And secondly, it would have been utterly bad faith for 15:23
16 Sergeant McCabe to complain about the man being let out
17 after 22 minutes of a cursory interview, on a very
18 serious assault on a young woman in the early hours of
19 a morning, wouldn't it, if he was the man who directed
20 his release, as was alleged? 15:23

21 A. He was. I know the evidence found that he wasn't in
22 the station at that time.

23 611 Q. Yes.

24 A. So all of that was put towards Judge O'Higgins.

25 612 Q. Yes, I know. But the point I'm making is slightly 15:24
26 different.

27 A. Mm-hmm.

28 613 Q. It's not simply that he was or was not the man who
29 directed the release.

1 A. Yes.

2 614 Q. It was that he was -- if he was the man who directed
3 the release, he was acting in total bad faith in
4 complaining about the behaviour of others in relation
5 to that investigation, isn't that the issue? 15:24

6 A. No, I don't -- I don't know. I'd have to look at all
7 the transcripts and look at it on the notes, but I
8 don't --

9 CHAIRMAN: well, I can take that as a given. Unless he
10 was making a pretty serious mistake, which would be 15:24
11 hard to explain if the person's mind was functioning
12 any way halfway normally. I do take the point.

13 615 Q. MR. McDOWELL: Yes. And to take another example, the
14 release of the man who went on to commit the murder
15 after the assault on Mary Lynch, the vicious assault on 15:24
16 Mary Lynch, the release of him on bail with a Section
17 2 --

18 A. Yes.

19 616 Q. -- minimal assault charge; you recall that incident,
20 you recall that whole module, do you? 15:25

21 A. I do. The main matter I recall out of that is the
22 medical report in relation to that man, yeah.

23 617 Q. Yes.

24 A. I do recall that specifically.

25 618 Q. And in relation to that, for instance, just to take 15:25
26 that, for instance, if Sergeant McCabe did, as some
27 Garda witnesses suggested, tell Mrs. Lynch not to
28 bother coming to the District Court, and then later
29 complained about that, that would have been an act of

1 very serious bad faith as well, wouldn't it?

2 A. It would. In relation to that, the evidence speaks for
3 itself; it's all on transcript and Judge O'Higgins'
4 finding is there. But, yes, there was people -- there
5 was conflict at all levels between them, and the 15:25
6 matters were put to Judge O'Higgins and he was there
7 and he came up with his report and his findings in
8 relation to that.

9 619 Q. And going back to the loss of the computer, just so
10 that we be clear about this, Sergeant McCabe denied 15:25
11 responsibility, denied he'd ever had that computer in
12 his custody, isn't that right?

13 A. I know there was a young garda who --

14 620 Q. No, first answer the question.

15 A. -- who put it into him, and, yes, I do -- in the 15:26
16 material, yes, he denied it from the outset. There
17 was -- yes.

18 621 Q. And he was confronted, was he not, by a statement by a
19 guard who claimed in her statement she'd given it to
20 him and by an exhibits chart showing that he had 15:26
21 received it, isn't that true?

22 A. Yes, I specifically remember that.

23 622 Q. And didn't it later emerge that both of those documents
24 were forgeries?

25 A. Well, the main thing, yes, it did, and the matter that 15:26
26 I do remember in relation to that is your counsel were
27 reluctant to cross-examine that garda who did that.

28 MR. MCGUINNESS: Chairman, I wonder is this now
29 straying into a re-running of it?

1 MR. MCDOWELL: No, I'm not --

2 MR. MCGUINNESS: He's trying to get the witness to
3 adopt a position in favour of his own client.

4 CHAIRMAN: Yes, I can see the point. And I suppose the
5 problem here is that the O'Higgins Report is a public 15:27
6 document, but one thing that we don't want to happen
7 is, we don't want to find ourselves re-running who had
8 custody of the computer. For all I know, it might have
9 been a really nice computer and somebody may have
10 needed one for their children, I have no idea. But it 15:27
11 disappeared out of Garda custody, and the question was,
12 who was the exhibits officer? That was resolved in
13 favour of Sergeant McCabe by saying that we wasn't --
14 yes --

15 MR. MCDOWELL: Exactly, exactly, Judge. But to deal 15:27
16 with Mr. McGuinness's observation just now. This was
17 not a case simply of one transposition of the word "to"
18 and "against"; this was a Commission in which
19 allegations of bad faith against Sergeant McCabe were
20 also put in the form of, you were the man who made the 15:27
21 decision about which you complained, you were the
22 person who lost the computer, you were the person who
23 directed the release of these people, so it's not
24 simply a question of --

25 CHAIRMAN: Mr. McDowell, I do understand that, and I 15:28
26 think it is something perhaps I should remind myself
27 of.

28 MR. MCDOWELL: Yes.

29 CHAIRMAN: You know, sometimes -- let's say sometimes

1 one is, to do a quote from Rumpole --
2 MR. MCDOWELL: Yes.
3 CHAIRMAN: -- how do you feel about appearing on behalf
4 of a blackmailer? And the answer of Mr. Rumpole was,
5 of course, glad of the money. Sometimes you do indeed 15:28
6 have to put things that may not be true or it may be
7 unpleasant, but counsel don't make up things; they just
8 take instructions, you know.
9 MR. MCDOWELL: Exactly. But the question that I'm now
10 coming to -- 15:28
11 MR. MCGUINNESS: Chairman, may I just say in response
12 to what Mr. McDowell has said.
13 CHAIRMAN: Yes.
14 MR. MCGUINNESS: He was going as far as attempting to
15 get the witness to agree with the proposition that what 15:28
16 had been involved in the matter on the part of another
17 person were forgeries, in the plural. Now, that's not
18 something that was so found by Judge O'Higgins. And
19 secondly, it's completely missing the point, which is
20 that there was a conflict of evidence on the issue, not 15:29
21 created by the Garda Commissioner, but created by the
22 accounts of a number of different Gardaí which related
23 to the issue of custody and control and charge and
24 responsibility for it.
25 CHAIRMAN: That, to me, Mr. McGuinness, it makes 15:29
26 perfect sense, and that indeed is the point I was
27 trying to make. I was trying to search back in my head
28 and see what Mr. Justice O'Higgins had found in
29 relation to that, but notwithstanding a particular

1 document he certainly found that Sergeant McCabe was
2 not the exhibits officer or delegated as the exhibits
3 officer.

4 MR. MCDOWELL: Sorry, Chairman --

5 CHAIRMAN: But I am not going to go in my report and
6 say, oh, so and so forged that document. I couldn't,
7 you know.

15:29

8 MR. MCDOWELL: I know the Tribunal is not going to do
9 that. But if Mr. McGuinness would just allow me to
10 finish on this. This isn't a case where an imputation
11 of bad faith arose on day 3, was all put to bed on day
12 5 and that was the end of the assault on Sergeant
13 McCabe's good faith at that Tribunal. I'm suggesting
14 to you that Mr. Smyth cross-examined Sergeant McCabe
15 with a view to establishing the various propositions I
16 have mentioned as true.

15:29

15:30

17 CHAIRMAN: Yes. But in the event that it was a
18 question of fact and there was a conflict and the
19 witnesses on his side, if you like, were saying that,
20 that was his obligation.

15:30

21 MR. MCDOWELL: Yes. I accept that, Judge, but --

22 CHAIRMAN: And sometimes it's not very nice.

23 MR. MCDOWELL: No, but, Judge --

24 CHAIRMAN: But if you have to do it.

25 MR. MCDOWELL: Judge, I think maybe I'm not
26 communicating myself very clearly. It isn't simply a
27 matter of who lost a computer.

15:30

28 CHAIRMAN: Yes.

29 MR. MCDOWELL: It's that you lost the computer, and

1 then you, in bad faith, because you had a grievance
2 against the Gardaí, made a complaint about the Gardaí
3 in respect of that issue. It was so that bad faith
4 applies to all of those cases, where he was supposed to
5 be responsible for the matter of which he was 15:30
6 complaining.

7 CHAIRMAN: Mr. McDowell, I do take that point. I think
8 that may well be a reasonable point. I can't decide it
9 now, obviously.

10 MR. MCDOWELL: And I was going to ask one question, 15:31
11 further question.

12 CHAIRMAN: But, I mean, I just don't know how you
13 ascribe that to the Garda Commissioner, which is what
14 I am supposed to be looking --

15 MR. MCDOWELL: Sorry, I was. I was going to do it this 15:31
16 way, Judge.

17 CHAIRMAN: Yes.

18 623 Q. MR. MCDOWELL: That if that was the case, how come,
19 when Sergeant McCabe's -- when the facts which proved
20 bad faith against Sergeant McCabe were to be put in 15:31
21 writing, none of this was included in the letter?

22 A. Sorry, could you say that again? You're speaking away
23 from the microphone.

24 CHAIRMAN: In other words, there was no reference to
25 the computer and there was no reference to letting the 15:31
26 young man who allegedly had in his mind to sexually
27 assault a young lady in Cootehill and Sergeant McCabe
28 letting him out after 22 minutes, being the allegation,
29 there was no reference to giving station bail to the

1 man who later murdered another young lady, none of that
2 was put into the submission on your side on behalf of
3 the Garda Commissioner and certain named Gardaí.

4 A. Well, I can tell you my counsel, nor I, had any papers
5 in relation to all those matters, so that was never
6 envisaged from the outset. 15:32

7 624 Q. MR. MCDOWELL: I see. So the only issue of bad faith
8 was the manner in which there was a disagreement about
9 the DPP's directions in respect of the allegation made
10 by Ms. D against Sergeant McCabe, that was the only -- 15:32
11 that was the only type of bad faith alleged against
12 Sergeant McCabe, at the outset?

13 A. I don't believe that there was actually --

14 MR. MURPHY: Sorry, Chairman.

15 CHAIRMAN: Yes. 15:32

16 MR. MURPHY: Mr. McDowell was going to lay a foundation
17 for this question. He's doing so in circumstances
18 where the person, the counsel he is speaking about, has
19 expressly, on the transcript, said he didn't use the
20 word "bad faith". 15:32

21 CHAIRMAN: No, I am aware of that. And, look, I'm also
22 aware of the transcript, and indeed have I it right in
23 front of me, and the point, I think, is this, and
24 unfortunately, looseness of language can lead to error,
25 perhaps on my part, perhaps more widely: Sergeant 15:33
26 McCabe was never accused of sexual abuse, no one ever
27 intended to accuse him of sexual abuse. Everyone
28 accepted what the DPP said. Any issue he had or any
29 issue that was to be put to him in relation to any

1 issue he was perceived to have, was in relation to
2 whether the DPP's direction should be circulated. It
3 wasn't about the D investigation, it wasn't about the D
4 complaint. It was about whether or not what the DPP
5 clearly said was this did not amount to a sexual 15:33
6 assault or indeed an assault at all, was to be given to
7 the D family and indeed to himself. That was, as far
8 as I see, the only thing.
9 MR. MCDOWELL: That's all.

10 625 Q. I'm just saying that the imputation of bad faith 15:33
11 against Sergeant McCabe continued quite independently
12 of the ruling, the ruling in respect of the relevance
13 or irrelevance of the Ms. D --
14 MR. MURPHY: Chairman, can I just object to that
15 question. It's more in the nature of a legal 15:34
16 submission, with respect.
17 CHAIRMAN: Mr. Murphy, I think you have got the bit
18 between your teeth now. I don't think there is
19 anything wrong with that question, frankly. Sorry,
20 maybe you would ask it again, Mr. McDowell. 15:34

21 626 Q. MR. MCDOWELL: I suggest to you that the imputations of
22 bad faith are not confined at all to the Ms. D
23 allegations, but continued in respect of a whole lot of
24 other issues throughout the Commission of
25 Investigation? 15:34
26 A. "Bad faith" wasn't mentioned to me, nor did I hear it
27 going forward, so I'm not in a position to say that.

28 627 Q. No.
29 A. And I have no knowledge in that regard.

1 CHAIRMAN: Yes. It is just that I worry, Mr. McDowell;
2 there may or may not be a point in relation to the
3 reaction to the proposition by senior Gardaí - look, we
4 cannot circulate the DPP's letter exonerating you.
5 There may be that. Honestly, it would help me if your 15:34
6 solicitor wouldn't talk to you while I'm talking to
7 you, because although I know you're very intelligent, I
8 am not sure you can actually take in two things at the
9 one time. Now, I don't actually know what I wanted to
10 say, so I'm just going to leave it there. 15:35

11 MR. McDOWELL: Can we leave it at that. My solicitor
12 wants me to bring you to another subject now. It is
13 the case --

14 MS. GLEESON: Chairman, before Mr. McDowell -- Ellen
15 Gleeson for Colm Smyth, Michael MacNamee and Garret 15:35
16 Byrne. Just before Mr. McDowell moves to the next
17 topic, I want to clarify one matter arising from
18 Mr. McDowell's questioning of Ms. Ryan, and that is,
19 that the suggestion that Sergeant McCabe lost the
20 computer was never made by Colm Smyth; it was, in fact, 15:35
21 made by counsel for another party.

22 CHAIRMAN: Ms. Gleeson, thank you for that
23 clarification. Again, I think, no one obviously can
24 see how I'm thinking, maybe that is a very good thing,
25 it probably is, but, no, I was aware of that, and that 15:36
26 is indeed why I asked the question: how do you place
27 that at the door of the Garda Commissioner? Because it
28 seemed to me that these things were popping up every
29 now and then, people were saying, look, oh, I didn't

1 release the fellow from custody, it was Sergeant McCabe
2 who told me to do it, and that happens in relation to
3 every case. As to how the Garda Commissioner could
4 possibly be giving instructions to do that, well,
5 that's carrying a conspiracy theory perhaps a bit too 15:36
6 far.

7 MR. MCDOWELL: Judge, I don't want to get sidetracked.
8 CHAIRMAN: No, but, I mean, there was a general
9 unpleasantness.

10 MR. MCDOWELL: Yes. 15:36

11 CHAIRMAN: And perhaps some people said things about
12 Sergeant McCabe which perhaps they shouldn't have, I
13 don't know. But Mr. Justice O'Higgins resolved those
14 facts --

15 MR. MCDOWELL: He did. 15:36

16 CHAIRMAN: -- one way or the other.

17 MR. MCDOWELL: He did, and my client is very grateful
18 to him for having done that. Just in relation --

19 CHAIRMAN: No, he shouldn't be grateful to him --

20 MR. MCDOWELL: No. 15:36

21 CHAIRMAN: -- because he doesn't accept thanks or
22 doesn't accept blame, no more than I do.

23 MR. MCDOWELL: My client is happy that he did it.

24 CHAIRMAN: well, I am glad he is happy, but --

25 MR. MCDOWELL: You see, Judge, I don't want to get 15:37
26 involved in the computer too deeply, but it was the
27 case that An Garda Síochána in its corporate sense had
28 attempted to discipline Sergeant McCabe for the loss of
29 that computer.

1 CHAIRMAN: Yes.

2 628 Q. MR. McDOWELL: And it is the case that witnesses
3 produced documents which were -- which suggested that
4 Sergeant McCabe had custody of the computer, isn't that
5 right? 15:37

6 A. That is correct. And there's one point I want to
7 clarify with that, is: the witness who produced the
8 documents was not -- there was a reluctance by Sergeant
9 McCabe's legal team to even cross-examine that witness.
10 And I do believe there was -- Judge O'Higgins made 15:37
11 reference to it, and then there was a short
12 cross-examination of that witness.

13 629 Q. Yes.

14 A. But An Garda Síochána, in relation to the
15 investigation, were going on evidence that was produced 15:38
16 by another member of An Garda Síochána.

17 CHAIRMAN: And that, I think, terminated on the 6th
18 August 2013.

19 630 Q. MR. McDOWELL: Can I -- just so that that question and
20 that response of yours should not just be left lying 15:38
21 there --

22 A. No.

23 631 Q. -- let's be very clear.

24 A. Yes.

25 632 Q. The documentation that at that stage, that had been 15:38
26 produced to the Commission, suggested that the exhibits
27 chart and the exhibits officer's statement showed that
28 Sergeant McCabe had possession of the computer?

29 A. Yes.

1 633 Q. It later transpired that the true versions of those
2 documents showed the exact opposite, that he had not
3 got possession of them, and they were only uncovered
4 after that cross-examination, isn't that right?

5 A. I cannot recall. The transcripts will set out exactly 15:38
6 what was there.

7 634 Q. They were found -- they were found in Bailieboro Garda
8 Station well past that point.

9 A. I actually cannot recall. I just recall there was a
10 reluctance. 15:39

11 635 Q. You were quick to point out --

12 A. Yes.

13 636 Q. -- there was a failure to cross-examine the witness,
14 but at the point she was being cross-examined, the fact
15 that the documentation that was there was false was not 15:39
16 apparent?

17 A. I don't know, and I'd have to look at all of that
18 documentation again. I cannot recall.

19 CHAIRMAN: Mr. McDowell, you're saying it was false --
20 honestly, I can't make a decision as to whether it was 15:39
21 false or not, but I do appreciate, and very much
22 appreciate, certainly this was an area where there was
23 a conflict of fact. But again, the term of reference
24 says: "To investigate whether unjustified grounds were
25 inappropriately relied on by Commissioner O'Sullivan." 15:39
26 And I'm not sure she can be blamed for what a sergeant
27 thinks or does with an exhibits chart. I mean, it is a
28 bit far away from her pay grade, you know.

29 MR. MCDOWELL: We will come back to that, Judge. I

1 don't want to waste this witness's time.

2 637 Q. Now, could I ask you in relation to matters which --

3 CHAIRMAN: Sorry, Mr. McDowell, I am afraid

4 Mr. McGuinness has something to say. This may be a

5 point -- I don't know whether we ought to break, but I 15:40

6 wanted to go on until after four o'clock, if possible.

7 MR. MCGUINNESS: I just want to draw your attention to

8 the fact that the witness has resumed her evidence now

9 for two-and-a-quarter hours and it might be helpful to

10 have a break. 15:40

11 CHAIRMAN: I know, but, I mean, I really want to get

12 through things, and you don't want to be back here for

13 a third day, I'm sure. I don't want you back for a

14 third day, charming and all as everything is. But, I

15 mean, look, can we not try and make a bit of progress, 15:40

16 if at all possible. Mr. McDowell, will you be much

17 longer? I don't mean any disrespect in saying that.

18 MR. MCDOWELL: I will be a good deal longer, yes.

19 CHAIRMAN: Will you give me an estimate?

20 MR. MCDOWELL: Well, I would hope to be -- I would hope 15:40

21 to be finished within an hour.

22 CHAIRMAN: Yes. All right. Then, let's go, if it's

23 all right with you, we will go on for another ten or

24 fifteen minutes, is that all right? Yes. Okay. And

25 does anybody else have any questions to ask after that, 15:40

26 might I ask?

27 MR. MURPHY: Yes, Chairman, I will.

28 CHAIRMAN: You will, but they're not going to be very

29 long, I suppose?

1 MR. MURPHY: They will be within, I think, half an
2 hour.

3 MR. MCCANN: And, Judge, just for a matter of
4 completeness, I have a very small number of questions,
5 maybe three minutes, Judge. 15:41

6 CHAIRMAN: That is grand.

7 MR. MCCANN: Chairman.

8 CHAIRMAN: All right. We will definitely finish at
9 four o'clock, so if you look at your watch, Ms. Ryan,
10 if you carry a watch, I don't know. 15:41

11 A. I do.

12 CHAIRMAN: Well, let's try and make as much progress as
13 we can. Thank you.

14 638 Q. MR. MCDOWELL: Could I ask you now to look at page
15 3238. 15:41

16 CHAIRMAN: There is one thing I would just like to ask
17 you, Mr. McDowell, if I may. You know the
18 classification that we have between witnesses who may
19 be C witnesses, and C stands, it's a thing we used in
20 the Morris Tribunal, a witness who might be liable to 15:41
21 be criticised for something, and there's nothing in
22 your questions I've heard so far which would indicate
23 that Ms. Ryan carried out her duties as a solicitor in
24 any way other than an exemplary fashion. And, you
25 know, if it be the case the Garda Commissioner got the 15:42
26 wrong end of the stick or perhaps did something wrong,
27 I don't know, or counsel galloped away, again I don't
28 know, I'm not sure that the solicitor with carriage of
29 the case is going to be said to be responsible for

1 that. I just can't see how it would happen.

2 MR. MCDOWELL: Judge, I'm not suggesting that she is
3 responsible for what transpired.

4 CHAIRMAN: No.

5 MR. MCDOWELL: And I'm not asking -- I'm not asking the 15:42
6 Tribunal to draw adverse inferences about her
7 behaviour.

8 CHAIRMAN: No, no. Well, that is fine. It's just, I
9 was just wondering does Mr. Ó hOisín need to be here
10 for the rest of this particular section, that is all, 15:42
11 and it doesn't seem so, but we will come back to it.

12 A. Sorry, what page number? 3-2?

13 639 Q. MR. MCDOWELL: 3238.

14 A. 3238.

15 640 Q. You were asked today by Mr. McGuinness about your note 15:43
16 of a meeting on the 3rd November at Garda Headquarters
17 with Commissioner O'Sullivan.

18 A. I was.

19 641 Q. And you were also asked about, I think it is Michael
20 MacNamara's note? 15:43

21 A. There was another note. I can't recall whose note it
22 was.

23 642 Q. A typed note?

24 A. Yes.

25 643 Q. I think it was Michael MacNamara's typed note. Could I 15:43
26 now ask you to look at a note of the same meeting by
27 Chief Superintendent Fergus Healy. Have you had an
28 opportunity to see that before today?

29 A. No, and I'll tell you his writing is not too bad. No.

1 644 Q. I think we will make some progress with his writing.
2 It's headed:
3
4 "3/11/'15, Nóirín O'Sullivan."
5 15:43
6 And the first question is:
7
8 "Standing over the question of motivation."
9
10 And the next line is: 15:44
11
12 "Ma la fides bad faith. Would the Commissioner consider
13 withdrawing?"
14 A. Yes.
15 645 Q. Does that ring any bells with you? 15:44
16 A. I do know that day, as I said, my recollection of
17 events, counsel had asked me to take down a
18 transcript -- is this the first meeting or the second
19 meeting?
20 646 Q. This is the third. 15:44
21 A. This is the one in HQ?
22 647 Q. Yes.
23 A. Is it?
24 648 Q. I think so.
25 A. I know it was in HQ I took down transcript day 2, where 15:44
26 there was a discussion in relation to we anticipated --
27 we were expecting this issue to be raised.
28 649 Q. In cross-examination, yeah.
29 A. And the whole area was looked at. I do recall Colm

1 Smyth, I may even have given him a highlighter, I can't
2 remember, he was reading from a transcript, or parts of
3 a transcript, and I do know it was transcript 2, day 2.
4 650 Q. Yes. And it would appear that the question of whether
5 the Commissioner was standing over the allegation of 15:45
6 motivation in the context of mala fides, bad faith,
7 would the Commissioner consider withdrawing, was
8 discussed at that meeting?
9 A. It would appear from those notes. I have no
10 recollection. I can only go on my own notes at the 15:45
11 time.
12 651 Q. But does it --
13 A. At the time.
14 652 Q. -- jog your memory now at all looking at it?
15 A. No. But I do know there was detailed discussions that 15:46
16 night in relation to it. And I know I had Module 2's
17 transcript --
18 653 Q. Yes?
19 A. -- on it, and it took, went from there.
20 654 Q. And what follows, to the right there's: 15:46
21
22 "Malpractice cover up. Etcetera. Byrne/McGinn
23 withdrawal. Cunningham Clancy."
24
25 Then the next line is: 15:46
26
27 "whistleblowers may not always be right, but we must
28 listen to them."
29

1 Could the Commissioner have said that?

2 A. Em, she could have. I know, I believe I've seen it
3 subsequent, but yeah, I can't recall, I can only go by
4 what is on my notes, I can't stand over anybody else.
5 I have a good memory of that night and were we standing 15:47
6 by them, it could easily have been mentioned. It's
7 not --

8 655 Q. But "the matter of mala fides is a matter for the
9 Commission" is then put down?

10 A. Yeah, that was always -- I do remember the question of 15:47
11 that, put the evidence to Judge O'Higgins, before the
12 Commission, whole lot, and see what comes out.

13 656 Q. See whether he thinks Sergeant McCabe was acting mala
14 fides, is that it?

15 A. You have to put it into context in relation to my 15:47
16 understanding arising from the client. There was
17 serious allegations and at this stage -- of corruption,
18 at this stage now the knowledge at that point in time
19 had increased since the knowledge in May '15, and it
20 was always, it's my interpretation or understanding, or 15:48
21 my recollection, as far as I know from consultations,
22 it was to test the credibility of the evidence and his
23 motivation in mounting numerous allegations of a
24 serious nature of corruption, malpractice, against
25 several senior officers. 15:48

26 657 Q. Yes.

27 A. And that's arising out of the consultations that I
28 gleaned from --

29 658 Q. Now having seen that, that note, is it possible that at

1 that meeting there was discussion given to whether the
2 Commissioner would withdraw the allegation of bad faith
3 against Sergeant McCabe?

4 A. I know the next morning there appears to be some
5 confusion, it's all on transcript, but no, I don't 15:48
6 believe, I've no knowledge of Nóirín O'Sullivan ever
7 mentioning mala fides from the start. Counsel and the
8 Commissioner, Nóirín O'Sullivan, would be best --
9 former Commissioner, would be best placed in relation
10 to that. I know the morning that counsel was 15:49
11 clarifying it to the Judge, I got a tap to go up to
12 counsel, during his clarification --

13 659 Q. Yes.

14 A. -- can I even remember what it was? I usually take
15 notes of transcripts or evidence going on, so maybe if 15:49
16 I analyse what was said and what I have written down,
17 I'd say -- I can't remember, it was ten o'clock in the
18 morning, I was only sitting when I was up and down to
19 counsel.

20 660 Q. Yes. You see, I'm going to suggest to you that during 15:49
21 that meeting in Phoenix Park there was a discussion
22 about whether the allegation of bad faith against
23 Sergeant McCabe should be withdrawn?

24 A. Where is the withdrawn word?

25 661 Q. "Would the Commissioner consider withdrawing?" 15:50
26 CHAIRMAN: If you go up to the top. Go down four
27 lines.

28 A. Yeah.

29 CHAIRMAN: It says: "Mala fides. Bad faith. Would

1 the Commissioner consider withdrawing it?"

2 A. Yes, I see it there.

3 CHAIRMAN: Mr. McDowell's question is: If that is
4 there, if they are considering withdrawing it, does
5 that not mean that it was in there, in the Commission 15:50
6 up to that point?

7 A. It could be inferred as meaning that. I don't
8 believe -- have I reference in my notes to that? No,
9 I'd have to --

10 662 Q. MR. MCDOWELL: No? 15:51

11 A. No. I know there was talk in relation to the matter
12 for the next day and, as I said, transcript 2 is there.

13 663 Q. Well, the next, the next bullet-point there is:
14
15 "Whistleblowers may not always be right, but we must 15:51
16 listen to them."
17
18 Does that ring any bell with you?

19 A. I believe I've heard it since in statements and
20 whatever, yeah. I would imagine, yeah, I would expect 15:51
21 that probably maybe came from the Commissioner. I
22 don't know, I'm only speculating here, I'm not in a
23 position to -- I'm not in a position to say. The
24 author of these notes is probably best placed to give
25 their recollection. 15:51

26 664 Q. You see, the point is that within 15 hours, the issue
27 arises before the Commission about whether the
28 Commissioner is still maintaining her claims about the
29 motivation of Sergeant McCabe?

1 A. Yes, I do know it was clarified with counsel the next
2 morning.

3 665 Q. Yes, we have that.

4 A. Yes. Em...

5 666 Q. What I am suggesting to you is that it was discussed on 15:52
6 that occasion, the possibility of withdrawing the
7 accusation of bad faith against Sergeant McCabe?

8 A. As I said, I've no recollection, I could only go by
9 what is in my note, what I wrote down.

10 667 Q. Yes. 15:52

11 A. I actually have a good recollection of that meeting,
12 but my recollection is definitely the transcript day 2
13 was there, was being read, was being highlighted.

14 668 Q. Yes. And that was an occasion on which Mr. Smyth had 15:53
15 told Mr. Justice O'Higgins that the integrity of
16 Sergeant McCabe would be challenged the whole way
17 through, isn't that right?

18 A. Yes, there would have been reference in that. So
19 unless that is arising out of what was on a transcript,
20 because I do know -- my recollection is that there was 15:53
21 definitely was a reference and that I, specifically, as
22 I said, I repeated it twice already, that Module 2
23 transcript I had it with me at that meeting.

24 669 Q. I see.

25 A. But, as I said, what was said Colm Smyth, Commissioner 15:53
26 O'Sullivan, or former Commissioner O'Sullivan, whoever
27 owns these notes --

28 670 Q. We can take it they're supplied to us as Chief
29 Superintendent Healy's notes.

1 A. Oh sorry, I think you had said that. I don't recognise
2 the handwriting.

3 671 Q. You do recall a statement to the effect being made that
4 the matter of mala fides is a matter for the
5 Commission? 15:54

6 A. Yes. I do recall hearing that. It may even be
7 referenced in notes, or I do recall that being said,
8 yes.

9 672 Q. And who do you think said that?

10 A. I believe it probably was counsel, I don't know. I'm 15:54
11 just guessing, but it would be arising maybe out of
12 the --

13 673 Q. So can we take it from that --

14 A. I don't know.

15 674 Q. -- it would be wrong to think that the question of bad 15:54
16 faith had evaporated on day 5 once this "to" and
17 "against" issue had been resolved?

18 A. As I said, the "to" and "against" is on a letter,
19 you'll have to take it all into context, I'm listening
20 to all of this information, gleaning it from the 15:55
21 consultations, evidence down there, I'm here taking all
22 this down, it's a matter for the client what they're
23 doing, counsel advice is over, so precisely what went
24 on, there was an awful lot going on back then, the days
25 and weeks were flying by so I can't remember precisely 15:55
26 what I did on 3/11/15.

27 675 Q. On your evidence --

28 A. As in, all of this stuff, everything that was said. I
29 remember from my side what was on, I know that was in

1 HQ and I know there was a consultation straight before
2 that. I remember going down there and coming out in
3 relation to all of this. But I do recall specifically
4 having Module 2's core booklet there, and the matter
5 being dealt with. Or counsel referring to it. 15:55

6 676 Q. You see, we know, if this question is correct, that
7 counsel was saying that the question of bad faith was a
8 question for the Commission, mala fides is an issue for
9 the Commission. "But the matter of mala fides is a
10 matter for the Commission." And beside that is 15:56
11 "advices in writing". Does any of that jog your memory
12 as to what was being said at that date?

13 A. I would not be able to speculate. I'm just saying
14 definitely there was discussions in relation to what
15 was said as referred to in the transcript in Module 2, 15:56
16 so --

17 677 Q. And then, what appears underneath that? "Letter
18 from --"
19 CHAIRMAN: AGS, I think.

20 678 Q. MR. MCDOWELL: " -- AGS, via the Chief State 15:57
21 Solicitor's Office to the Commission."
22
23 That is a reference to the letter that you had
24 circulated.

25 A. I would expect, I do recall that letter was, yeah, 15:57
26 dealt with, or we did discuss it at that meeting. Or
27 there was reference to it, I don't believe it was
28 actually read. Not from my recollection. I don't even
29 know if I had a copy of it actually with me on the

1 meeting. I know I had it the next day, but --

2 679 Q. well, you see we know that Mr. Justice O'Higgins, when
3 the Commissioner was in the back of the hearing room,
4 asked off his own bat, so to speak, Mr. Smyth to
5 clarify the position in relation to these matters, 15:57
6 isn't that right?

7 A. That's my recollection, from the outset, he, Justice
8 O'Higgins, Mr. Justice O'Higgins, raised this issue,
9 yes.

10 680 Q. And you say, as I understood in your evidence earlier, 15:58
11 you were saying that you expected that this might arise
12 under cross-examination?

13 A. I would say, I can't speak on behalf of all, but oh
14 yes, we felt, so to speak, that you are going to attack
15 the Commissioner. 15:58

16 681 Q. On this issue?

17 A. In relation to day 2, that's why I had the transcript
18 down there.

19 682 Q. Yes. The imputation of bad faith against Sergeant
20 McCabe arising out of the D investigation and the DPP's 15:58
21 directions?

22 A. In relation to -- well, that's all there, that's what
23 it was.

24 683 Q. His dissatisfaction, his alleged dissatisfaction?

25 A. Yeah, I don't know, as I said, what your line may have 15:59
26 been, but there was felt -- when I say attack, that is
27 probably the wrong word to be used. But it was felt
28 that you were going to raise these issues and that's
29 why we were dealing with them or raised them with

1 Commissioner O'Sullivan and going through the matter
2 from my recollection.

3 684 Q. Yes.

4 A. Judge O'Higgins dealt with them then at the outset or
5 at the beginning, outset, on that morning. 15:59

6 685 Q. Were you aware that Judge O'Higgins caused his
7 solicitor, David O'Hagan, to remind all parties on the
8 morning of that hearing that they were there to deal
9 with that module alone and no other issues?

10 A. Was an email sent? 15:59

11 686 Q. No. The terms of reference were printed off and
12 delivered to each party to remind them of what was in
13 issue and what was not in issue?

14 CHAIRMAN: Snap, Mr. McDowell. I, in fact, just did
15 the same thing half an hour ago and I will gave them to 16:00
16 each party if they want them. Because it is actually
17 important.

18 MR. MCDOWELL: Yes.

19 CHAIRMAN: And maybe -- yes.

20 687 Q. MR. MCDOWELL: I'm suggesting to you that, were you 16:00
21 aware that the parties had been told to confine
22 themselves to the module which was in issue in what
23 they did and said?

24 A. Was there an email sent? If there was it would be on
25 the file. 16:00

26 688 Q. Yes. I think there was an email sent.

27 A. And am I on the circulation list?

28 689 Q. Yes.

29 A. Well, I would have received it then.

1 690 Q. And I'm instructed that it was also put on each
2 person's desk that morning.

3 A. I can't remember. As I said, I was carrying a lot, a
4 lot of documentation each day, so reading --

5 691 Q. You see, I'm suggesting to you that it is reasonable to 16:01
6 conclude that on the 4th November Mr. Justice O'Higgins
7 raised this issue with Mr. Smyth with a view to taking
8 that issue completely off the table?

9 A. That'd be a matter for Mr. Justice O'Higgins to
10 clarify. 16:01

11 692 Q. Were you surprised when he raised the issue himself at
12 the beginning and gave Mr. Smyth an opportunity to
13 correct his error?

14 A. Yes. My recollection was that we had expected yourself
15 to raise it. That is my recollection. 16:02

16 693 Q. I see. And just again would you assist the Tribunal
17 now and tell us when the matter was raised, did you
18 have to go forward to Mr. Smyth and give him
19 instructions about it?

20 A. Oh, I did. 16:02

21 694 Q. Yes.

22 A. I had to clarify what exactly, I don't know.

23 695 Q. And when he said for the first time that the imputation
24 against Sergeant McCabe's integrity was his own error?

25 A. If that's what Mr. Smyth said, that's what Mr. Smyth 16:02
26 said, that'd be --

27 CHAIRMAN: What you are saying is, Mr. McDowell, in the
28 light of this it is looks like a tactical retreat --

29 MR. MCDOWELL: Yes.

1 CHAIRMAN: -- or I perhaps should raise that inference.
2 MR. MCDOWELL: Yes, a preplanned withdrawal from the
3 issue.
4 CHAIRMAN: Yes. In other words, they were intent on
5 this attack, but when it didn't look as if it was going 16:03
6 to succeed they drew back from it.
7 MR. MCDOWELL: Yes.
8 CHAIRMAN: I don't know, can you help on that, as to
9 whether that was the case or not?
10 A. I do, as I said, know that we expected it be raised 16:03
11 that day, so it didn't take a surprise -- it was raised
12 one form or the other. I don't believe, as we have
13 heard, first matter, straightaway, Commissioner
14 O'Sullivan, but in relation to that, no, I'm not aware
15 if that was a matter -- 16:03
16 CHAIRMAN: It's not quite that.
17 A. Yeah.
18 CHAIRMAN: It's here, we're here in November and if you
19 go back to May, the word integrity is used.
20 A. Yes. 16:03
21 CHAIRMAN: Now, it's first used by the Judge, but it is
22 then picked up by Mr. Smyth. One can parse and analyse
23 this all day long --
24 A. Yes.
25 CHAIRMAN: -- he then said I'm standing over this. And 16:03
26 when you come to the day when the Commissioner gives
27 evidence, which is the 4th November, then any issue as
28 to integrity or bad faith, and I'm using the two
29 perhaps interchangeably and I think correctly, is

1 withdrawn for tactical reasons because it hadn't
2 perhaps worked up to that point or it wasn't seen to be
3 politic or whatever. Was there any sense of that?

4 A. No.

5 CHAIRMAN: In other words, make the man worried but 16:04
6 when it comes down to it we're not going to put the
7 horse over the huge fence, we're not going to try and
8 take this on. That is the point that Mr. McDowell is
9 making to you. Am I right, Mr. McDowell?

10 MR. MCDOWELL: Yes. 16:04

11 CHAIRMAN: Do you see that point?

12 A. I have no sense of that. My sense of it, that there
13 must have been confusion from the very start, it was
14 clarified that day. I was not absolutely -- there's no
15 sense that -- I expect Colm Smyth will give evidence in 16:04
16 that regard, it'll be a matter for him, but there was
17 nothing 'oh, I made a mistake, will you take the
18 blame?' I'm not aware of any innuendo arising out of
19 any conversations I had.

20 CHAIRMAN: It's not so much that. Look, the point is: 16:04
21 Was there -- and I'm phrasing this as a question, was
22 there a deliberate attempt to rattle Sergeant McCabe's
23 confidence on the 15th of May by using the word
24 integrity or agreeing with the word in relation to
25 integrity -- 16:05

26 A. No.

27 CHAIRMAN: -- the Judge in relation to integrity, or
28 agreeing with bad faith, leaving it there over the next
29 six months and withdrawing it in a tactical sense

1 because it wasn't going to work; when the Commissioner
2 came to give evidence on 4th November, was there any
3 sense of that happening?
4 A. No, there was no sense of that happening. Absolutely
5 not. I do believe that we were in limbo in relation to 16:05
6 the evidence as it went on and we felt that, will the
7 Judge want to deal with issues separately, or will
8 he -- it was hanging there and it was dormant for some
9 time and we probably -- it wasn't surfacing but as far
10 as I can recall from what I glean from consultations 16:05
11 and coming back, motivation was always in the
12 background.
13 CHAIRMAN: Okay. I think we will leave it there.
14 MR. MCDOWELL: Yes.
15 696 Q. Just one last thing, in relation to the use of the word 16:06
16 integrity on day whatever it was?
17 A. 2.
18 697 Q. Day 2, yes.
19 CHAIRMAN: On Friday, 15th May, yeah.
20 698 Q. MR. MCDOWELL: Friday, 15th May. In relation to the 16:06
21 use of those two, of those terms, and the use of them
22 by counsel and the statement that it would apply all
23 through the modules, was there ever any -- did you ever
24 discuss or was there ever any discussion until the end,
25 or the beginning of November, or late October, as to 16:06
26 whether those words should have been used?
27 A. I beg your pardons, those were what?
28 699 Q. The word integrity --
29 A. Yes.

1 700 Q. -- whether it should have been used. Were you
2 conscious of the fact that it had been used?
3 A. I don't believe I actually was. I cannot recall and I
4 don't believe I have reference there where integrity
5 was ever raised. And in relation to that transcript 16:07
6 for day 2, I didn't read it until some time later. I
7 wasn't getting -- well, I did get it, but I didn't get
8 sight of it until the Monday morning, but Monday
9 Tuesday I think, or Wednesday we're at hearings down
10 there, and then I had about 50-60 boxes of discovery to 16:07
11 try and get through. Reading the transcript on that
12 day, I missed information in and out. I'd have to say
13 I don't believe -- I didn't read it for quite some time
14 later on that. And no, I don't recall integrity being
15 raised until later on, until that day when the clarity 16:07
16 or until Colm Smyth clarified it on that day in
17 November, in the Distillery buildings before Judge
18 O'Higgins.

19 701 Q. When he said it was his mistake --
20 A. Mm-hmm. 16:08

21 702 Q. -- it must have rung a bell with you that he must have
22 said it beforehand?
23 A. Yes. I was aware that, I know I had given him the
24 transcript of day 2 the night before. Sorry "him",
25 Mr. Smyth. They're reading transcripts they're not 16:08
26 listening to what's there, any evidence they've already
27 heard, they're not taking notes, that's all fairly done
28 on transcript. Precisely what was read out of that
29 transcript I don't know.

1 CHAIRMAN: Mr. McDowell, my mind is collapsing now I'm
2 afraid so I think we're all going to have break no
3 matter what. So it is ten o'clock in the morning.
4 Sorry, Mr. McGuinness?
5 MR. MCGUINNESS: Yes, Chairman. Can I just draw to the 16:08
6 parties' attention that the Tribunal website and the
7 witness list will be updated towards the end of
8 business today.
9 CHAIRMAN: Yes. The other thing was, I said "snap" to
10 Mr. McDowell, Ms. Ní Ghabhann has in fact printed out 16:09
11 the O'Higgins terms of reference and we were going to
12 circulate them half an hour ago but you can have them
13 now, if you want. Because they're not in these papers.
14 MR. MCGUINNESS: They are in Volume 1.
15 MR. MCDOWELL: I found them in volume 1. 16:09
16 CHAIRMAN: They are?
17 MR. MCGUINNESS: One of the first documents in volume
18 1.
19 CHAIRMAN: Hogan-esque observation, Mr. McGuinness.
20 16:09
21 THE TRIBUNAL THEN ADJOURNED UNTIL THURSDAY, 18TH
22 JANUARY 2018 AT 10:00AM
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