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

HELD IN DUBLIN CASTLE
ON THURSDAY, 25TH JANUARY 2018 - DAY 48

48

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1 THE HEARING RESUMED ON THURSDAY, 25TH JANUARY 2018,
2 AS FOLLOWS:

3
4 MR. McDOWELL: Chairperson, before we proceed further
5 there is a matter that I want to raise with the 10:00
6 Tribunal. My client, Judge, made a statement to this
7 Tribunal on the 15th March 2017 in relation to a number
8 of issues, but one of the issues, the things that he
9 informed this Tribunal, was that he had never seen the
10 Byrne/McGinn report and was only given a summary of it, 10:01
11 a very short summary of what was in it. And to this --
12 until yesterday, he was in that position. Yesterday,
13 Gleeson McGrath Baldwin solicitors, on behalf of
14 counsel appearing on -- appearing on behalf of counsel
15 in the O'Higgins matter, circulated a document which 10:01
16 now appears at paragraphs 4849 to - I just want to be
17 precise about it -- 4851.

18 CHAIRMAN: Mr. Smyth, you don't have to sit there if
19 you don't want to. But if you want to sit there, you
20 are more than welcome. 10:01

21 MR. SMYTH: I will stay here for the moment.

22 MR. McDOWELL: Might as well hear it, in any event. In
23 any event, Chairman, this document appears to be, on
24 the face of it, an extract from the Byrne/McGinn report
25 from 2011, and it appears to set out -- it's an extract 10:02
26 from the introduction to the report, I gather, because
27 it's in roman numerals at the bottom, and it appears to
28 set out a factual account of the dealings between
29 Sergeant McCabe, Superintendent Clancy and other

1 matters which go back to 2004, 2006, 2008, and cover
2 the territory that we are dealing with now, Judge.
3 CHAIRMAN: Yes, I haven't actually read that yet.
4 MR. McDOWELL: well, it's important that you should,
5 Judge, because if, it could be brought up -- 10:03
6 CHAIRMAN: Is it in volume 8?
7 MR. McDOWELL: It's 4849 in the last book, it's just a
8 recent addition.
9 CHAIRMAN: Yes. Yes. So this is Byrne and McGinn. I
10 mean, I suppose I know about Byrne and McGinn, it's 10:03
11 11th October 2010 was when the report was made to
12 Sergeant McCabe.
13 MR. McDOWELL: Yes. You will recall, Judge, that I
14 asked on numerous occasions what instructions had been
15 given to counsel in respect of these factual matters, 10:03
16 and both Chief Superintendent Healy and the
17 Commissioner, both of them agreed with me repeatedly
18 that the only source of factual instruction to counsel
19 on these matters was the three witnesses which we
20 discussed yesterday; Superintendent Clancy, 10:04
21 Superintendent Rooney and Superintendent Cunningham --
22 Superintendent Rooney and Chief Superintendent
23 Cunningham. Almost as soon as the Commissioner leaves
24 the witness-box at this Tribunal, without being asked
25 any questions by counsel for the barristers appearing, 10:04
26 the solicitors for the same people circulate this
27 document. Now, I'm presuming that it doesn't come from
28 Rooney, Clancy and Cunningham, because they have
29 claimed privilege throughout, and I have not been

1 allowed to ask about anything that they told counsel or
2 instructions they gave to counsel. It would appear to
3 me, subject to correction now, that it must have been
4 furnished and briefed to counsel by the Commissioner.
5 If counsel are in possession of it, and are going to 10:05
6 rely on it now as part of a defence of their
7 instructions, it would appear that they were given it
8 by Commissioner O'Sullivan or people acting on her
9 behalf, that they were furnished with it.

10 CHAIRMAN: Well, I am not sure about that, 10:06
11 Mr. McDowell.

12 MR. MCDOWELL: Sorry, Judge?

13 CHAIRMAN: I am not sure about that.

14 MR. MCDOWELL: I am at a loss to understand where it
15 came from then. 10:06

16 CHAIRMAN: No, again, I suppose it's again, if you
17 like, the tidy legal mind. I am sorry, that was a
18 phrase used against John Kelly, I think, on the Late
19 Late Show about 40 years ago by Gay Byrne; it's all
20 very well in your tidy legal mind. But look, trying 10:06
21 to, I suppose, pin things down in terms of this I
22 suppose if there is no legal professional privilege
23 attaching and the Commissioner didn't claim any, I need
24 to know where the instructions came from. Now she is
25 saying in terms of the facts on the ground the 10:06
26 instructions actually came from the individuals who
27 were represented, whom counsel met. Again, looking
28 back in relation to how this is to be joined into what
29 the law says, well, what the law says is, it's improper

1 for counsel to proceed on a line of inquiry into, let
2 us say, discreditable conduct or anything like that
3 without actually getting instructions on the matter.
4 And I suppose one of the best ways of getting
5 instructions is to sit down and talk to people, but 10:07
6 another way is to be briefed with documents. And as I
7 understand it, there was certainly one legal case that
8 was briefed to counsel and that is in relation to the
9 defamation cases and the systemic failure letter of the
10 4th July 2011. And I asked were there others, and 10:07
11 apparently there are two others; one against Tusla,
12 which is probably a recent of recent origin in any
13 event, and the other was the false imprisonment case
14 arising out of the meeting of 11th October 2010.
15 MR. MCDOWELL: well, the first thing I would ask this 10:07
16 Tribunal to do now is to ascertain whether the document
17 circulated by Gleeson McGrath & Baldwin was furnished
18 to their clients by the Commissioner, or persons acting
19 on behalf of the Commissioner.
20 CHAIRMAN: well, I mean, they can tell me that if they 10:07
21 wish.
22 MR. MCDOWELL: Sorry --
23 CHAIRMAN: Mr. McDowell, I appreciate where you are
24 coming from, but what is more in my mind is this: I
25 mean, why should I read this, unless it was part of the 10:08
26 briefing material to counsel before the O'Higgins
27 Commission?
28 MR. MCDOWELL: Exactly. And why should it be
29 circulated? And then, Judge, and this is the important

1 point, how is it that I am now in the position that I
2 have seen the back of the former Commissioner and Chief
3 Superintendent Healy, if this document was given by
4 either of them or on their behalf to counsel? Because
5 these are factual instructions of the clearest kind. 10:08
6 And, Judge, I just ask you, in particular, to look at
7 the second-last paragraph of -- yes, the second-last --
8 the third-last paragraph on page 4850.
9 CHAIRMAN: Yes, why don't you just -- I will just read
10 the thing, it will only take me a couple of minutes and 10:09
11 then we can proceed.
12 MR. MCDOWELL: If you read, Chairman, the whole of that
13 page.
14 CHAIRMAN: Mm-hmm. Well, I will have a look at it now,
15 Mr. McDowell, if you don't mind. 10:09
16 MR. MCDOWELL: Sorry, I have no objection to anyone
17 seeing what I am talking about.
18 CHAIRMAN: Let's leave it off the screen just for the
19 moment. Let's see where we are at.
20 MR. MCDOWELL: Fair enough. 10:09
21 CHAIRMAN: All right. Well, I mean, not a lot of this
22 comes as a surprise, I would have to say, in terms of
23 various facts that other people have said in the course
24 of various statements or various reports, etcetera.
25 MR. MCDOWELL: First of all, Judge, you will see from 10:12
26 the cover page, that this was a confidential report
27 apparently dated 2011, I think, or 2010, and given --
28 2010, and given to the Commissioner, which, almost
29 eight years later, my client has never seen, until

1 today -- until yesterday.

2 CHAIRMAN: Yes. No, I didn't see the Byrne/McGinn
3 report either. But I am not complaining about it. A
4 lot of it is actually quoted in Mr. Justice O'Higgins's
5 report and he says look, this is what Byrne/McGinn 10:13
6 found, this is what I'm finding.

7 MR. MCDOWELL: Yes. But he was dealing with the actual
8 complaints, he wasn't dealing with this question of
9 motivation, Judge, or anything like that.

10 CHAIRMAN: In bullet-points, Mr. McDowell, would you 10:13
11 mind just telling me what --

12 MR. MCDOWELL: Where I am going?

13 CHAIRMAN: Yes, what is your point on this.

14 MR. MCDOWELL: The former Commissioner and Chief
15 Superintendent Healy led me to believe that the only 10:13
16 source of information about these matters covered in
17 this territory was the three witnesses who --

18 CHAIRMAN: Was the live people?

19 MR. MCDOWELL: Yes.

20 CHAIRMAN: Yes. I didn't quite get that, Mr. McDowell. 10:13
21 I actually assumed and thought that there would be
22 briefing material as well.

23 MR. MCDOWELL: Exactly.

24 CHAIRMAN: That is what I assumed.

25 MR. MCDOWELL: Exactly. And I was left with the 10:14
26 position that she claimed that she had given no
27 instructions on these matters other than making these
28 witnesses available to Mr. Smyth and his fellow
29 colleagues. That was her evidence.

1 CHAIRMAN: No, but there was also --

2 MR. MCDOWELL: The point that arises from that --

3 CHAIRMAN: I don't mean to cut across you, but I think
4 there also was evidence in relation to briefing on the
5 legal cases. 10:14

6 MR. MCDOWELL: Yes.

7 CHAIRMAN: And I think one of the barristers, certainly
8 mentions briefing material, including certain
9 documents?

10 MR. MCDOWELL: Yes. And I checked Annmarie Ryan's 10:14
11 email, Judge, which is to -- to counsel, the first one
12 at any rate, which is at page 4046 in volume 8, and it
13 doesn't include, on the face of it, the Byrne/McGinn
14 report or anything to do with it. It has the Guerin
15 Report in it. So, I am just making this point, Judge, 10:14
16 but you are asking me to put it in bullet-points. I
17 have conducted a cross-examination of Commissioner
18 O'Sullivan and I have met and I have respected fully,
19 every time I came to the stone wall that what other
20 people told counsel was privileged and I couldn't go 10:15
21 there, I asked her what she, what her instructions were
22 to her counsel, and she told me that in relation to all
23 of these matters, it came from -- it must have come
24 from the mouths of those three witnesses. But it now
25 transpires that that is completely untrue. If -- now, 10:15
26 Judge, if, if, I am saying, if this material was given
27 to counsel by or on her authority, because this -- if
28 it was given by or on her authority to counsel, and I
29 am not saying she wouldn't have been entitled to do it,

1 but if it was done, it completely undermines the
2 proposition that all of this territory was the subject
3 of privileged instruction. And, Judge, without
4 canvassing in too much detail, it shows -- for my
5 client to see this for the first time yesterday and to 10:16
6 see the analysis of him, and in particular, I mean,
7 there is no point in avoiding it, the allegation that
8 he was a paranoid, and that he lost control of his
9 station and should not be put back in it - this is
10 fairly shocking stuff, Judge. And I have no doubt that 10:16
11 it's very relevant, if this was part of Mr. Smyth's
12 instructions, if it was --

13 CHAIRMAN: well, let's find out about that first.

14 MR. MCDOWELL: I want to know where this document came
15 from. 10:16

16 CHAIRMAN: All right. well, let's find out about it.
17 So, Mr. Sreenan, I think you are -- you are not the
18 origin of the document but you are the conduit through
19 which the document came, your solicitor.

20 MR. SREENAN: Yes, Chairman. 10:17

21 CHAIRMAN: And what is the situation in terms of my
22 tiresome reiteration of the ruling in Browne v. Dunn;
23 your instructions on this are?

24 MR. SREENAN: well, I have my understanding of my
25 instructions but may I say, Chairman, that Mr. McDowell 10:17
26 has raised this matter now without any advance warning
27 to me --

28 CHAIRMAN: I think we should get over those things and
29 just deal with what is there. I certainly amn't

1 thinking any less of you for anything, Mr. Sreenan,
2 that is the way I look at things.

3 MR. SREENAN: I am grateful for that, Chairman, but
4 before I answer the Tribunal's question I would like to
5 verify and reconfirm my understanding of my 10:17
6 instructions by talking to my three clients together
7 including Mr. Smyth, who is currently in the
8 witness-box.

9 CHAIRMAN: Okay. So, what do you want me to do? Do
10 you want me to rise? 10:17

11 MR. SREENAN: Well, it's a matter for the Tribunal, I
12 think, but it seems to me that Mr. McDowell is
13 essentially rehearsing a line of cross-examination that
14 he may wish to engage in with my clients and try and
15 find out the answers in advance. If the Tribunal 10:18
16 thinks it's an appropriate way to proceed I am happy to
17 take instructions.

18 CHAIRMAN: No, no, no. Well, this is the situation as
19 I see it, Mr. Sreenan, having been absorbed in this
20 matter now for very close to a year: I know there was 10:18
21 a Byrne and McGinn report, I know the date when it was
22 revealed to Sergeant McCabe that I think eleven out of
23 34 of his complaints were being upheld in the Byrne and
24 McGinn analysis, I know that there was an assistant
25 commissioner then who did an analysis of that, it was a 10:18
26 desk study and said, well, that's fine, it wasn't I
27 suppose a re-examination of it. As a matter of plain
28 and practical common sense, I know that when we come to
29 the point where the O'Higgins Commission is set up,

1 there are various stances being taken on both sides; on
2 the one hand counsel for the Garda Commissioner is
3 saying, look, there was a lot more in this than merely
4 Mr. Justice O'Higgins inquiring into ten individual
5 incidents, there was an allegation of corruption as 10:19
6 well and besides that, the whole interaction with the
7 Department of Justice and with senior Garda management
8 and their reaction to complaints is important, that is
9 the case that's made on behalf of the Garda
10 Commissioner and it seems from the limited evidence so 10:19
11 far that counsel who are representing the Garda
12 Commissioner are taking a similar view, and on the
13 other hand, on behalf of Sergeant McCabe, the case
14 being made is this was an inquiry and he was merely
15 there as a witness of fact. Now, I asked the Garda 10:19
16 Commissioner certain questions on that right at the
17 end.

18
19 The next, I suppose, practical matter is this: I mean,
20 I have been a practising lawyer, I know how cases are 10:19
21 built up. So, you get some background material,
22 sometimes it's in short supply, and nowadays with
23 email, etcetera, usually there is a great deal of it.
24 You read it, and then you sit down and you talk to your
25 client and you try, insofar as is possible, to get a 10:20
26 coherent account of events given that people aren't
27 normally trained in giving a chronological and detailed
28 exposition of anything that is important. And then
29 having done that, you proceed to conduct the case as

1 best you may. Now, there was a particular issue here,
2 which is in relation to cross-examination as to credit,
3 which is a term of reference before me.

4
5 So in the light of that, I think what I need to know 10:20
6 is: what was actually briefed to counsel? who were
7 the briefing personnel involved? what were the
8 documents? And who were the individuals from whom
9 instructions were being taken? The next thing I think
10 I need to know, which is number two, is: what is this 10:21
11 being deployed in aid of? And then I suppose it will
12 be easy for me to say in terms of simply relevance and
13 jurisdiction of the term of reference as to where we go
14 from here. That's what I would like to know and I
15 would also like the assistance of counsel for the Garda 10:21
16 Commissioner, if I may, please. If my voice is
17 expressing any annoyance, I don't think it is, I'm not;
18 I just want to know, I just want to know where we are
19 and where we are going. And it would help me, and I am
20 certainly not blaming anyone for this coming in late or 10:21
21 anything else like that, I just want to know where we
22 stand, that is all. So I will rise for ten minutes.

23
24 THE HEARING ADJOURNED BRIEFLY AND THEN RESUMED

25 AS FOLLOWS: 10:32

26 MR. MCGUINNESS: Chairman, might I just say one matter,
27 lest it might influence the approach of parties here
28 today, and it's this: That it's certainly my intention
29 to explore as fully as is necessary and insofar as I

1 legally can any relevant instructions given to counsel
2 either at the so-called hand-over consultation of the
3 11th May and the other consultations on 12th, 13th and
4 14th, prior to the inquiry commencing, so that the
5 matter will be inquired into on your behalf in that 10:33
6 manner. So that may or may not affect what parties --
7 what the parties wish to express to you at the moment.
8 CHAIRMAN: No, I appreciate that, Mr. McGuinness. Now,
9 where do we stand, first of all, Mr. Sreenan, please?
10 MR. SREENAN: Chairman, I have taken instructions on 10:33
11 this. The position is that, as the Tribunal is aware
12 from the testimony that has been given, my clients were
13 briefed initially with very limited material. In the
14 course of the hearing of the Tribunal, sometime after
15 June, junior counsel, Mr. Byrne, requested a copy of 10:33
16 the Byrne McGinn report, which was provided to him and
17 a copy of it was also provided to Mr. MacNamee, the
18 other junior counsel. Mr. Smyth, as far as he can
19 recollect, did not receive a full copy of the Byrne and
20 McGinn report. It was used to some extent by Mr. Byrne 10:34
21 as a reference source in respect of evidence given by
22 Assistant Commissioner Byrne before the O'Higgins
23 Tribunal on day 32, the transcript of which was not
24 circulated by Mr. Justice O'Higgins when it came to
25 drafting submissions. But with each module before the 10:34
26 O'Higgins Commission, the Commission circulated to the
27 parties a core book and included in that core book on
28 each occasion was an excerpt from the Byrne and McGinn
29 report of the relevant pages to deal with that

1 particular module. So Mr. McDowell and his client
2 would have seen those excerpts, not the entire report,
3 but those excerpts as circulated and the Commission
4 itself had the entire of the Byrne/McGinn report. And
5 when Assistant Commissioner Byrne was testifying he 10:35
6 referred to his conclusions on page, I think it was 7
7 or 9 of the report, the part that has been circulated.
8 And accordingly, it was used as a convenient summary of
9 the testimony that he had given to the Tribunal -- or
10 to the Commission in that respect. 10:35
11 CHAIRMAN: All right. No, I understand that. I am
12 familiar with reading Garda reports and the background
13 to the deceased, for instance, is something that
14 happens in relation to, if it's a murder. This thing,
15 background to Sergeant McCabe was known to -- was part 10:35
16 of the briefing material to counsel, as and from
17 sometime in June.
18 MR. SREENAN: Sometime after June, Chairman.
19 CHAIRMAN: Yes. But as regards any reference to
20 individual incidents, the Byrne and McGinn report was 10:36
21 simply deployed as a handy reckoner in terms of a
22 series of facts and their finding on that.
23 MR. SREENAN: Yes. Well, both deployed by the
24 Commission and used as a reference source by junior
25 counsel. 10:36
26 CHAIRMAN: Sure.
27 MR. SREENAN: Mr. Smyth himself did not use it, other
28 than to the extent to which he was aware of the
29 briefing material circulated by the Commission itself

1 in its core book.

2 CHAIRMAN: All right. Who would have been responsible
3 then for circulating it on behalf of the Garda, on your
4 instructions?

5 MR. SREENAN: They requested it from Ms. Annmarie Ryan 10:36
6 of the Chief State Solicitor's Office and she supplied
7 it to the two junior counsel.

8 CHAIRMAN: So they would have had the entire
9 Byrne/McGinn report?

10 MR. SREENAN: Yes. And their evidence, Chairman, will 10:36
11 be that the nature, the dynamic nature of that
12 Commission and their late instructions meant that they
13 were getting briefing documents on an ongoing basis so
14 that, although you very properly described, what should
15 be the appropriate way in which counsel would be 10:37
16 briefed and then consider papers and then consult with
17 witnesses in that order - because of the constraints of
18 time that is not the way it was operating on this
19 occasion.

20 CHAIRMAN: No, I can understand. It's catch-up and 10:37
21 it's not an ideal world.

22 MR. SREENAN: No.

23 CHAIRMAN: So given that is the situation,
24 Mr. McDowell?

25 MR. MCDOWELL: Judge, there's a number of things which 10:37
26 flow from that. I don't know why it was circulated
27 yesterday. I don't know with what in mind this
28 material, which is highly offensive and highly damaging
29 to my client, was circulated yesterday.

1 CHAIRMAN: well, I think I can gather why it was
2 circulated yesterday myself.

3 MR. MCDOWELL: Was it to assist this witness's
4 examination?

5 CHAIRMAN: No, I wouldn't imagine so, Mr. McDowell. I 10:37
6 think the probable reason it was circulated yesterday
7 was that at some stage reference is going to be made to
8 what the instructions were.

9 MR. MCDOWELL: Exactly. Well, that is the first thing.

10 CHAIRMAN: And that is not legal professional 10:38
11 privilege. This is a matter of fact. This is just a
12 fact.

13 MR. MCDOWELL: Exactly. And the second then, Judge,
14 is, and there is a lot of issues which arise here: I
15 was never aware, and neither was my client, that the 10:38
16 Commissioner had access to this document and to this
17 allegation that he was acting in a paranoid way. My
18 client was never aware of that, until yesterday. A
19 whole series of questions arise from that, as to how
20 the Commissioner dealt with my client. And I have 10:38
21 never -- I am now in the position that the ship has
22 sailed as far as the Commissioner is concerned. I was
23 never in a position to ask her did she hand this to the
24 Department of Justice, for instance. Was the
25 Department of Justice informed that Assistant 10:38
26 Commissioner Byrne was writing everything off to my
27 client's paranoia? There are a whole series of
28 issues --

29 CHAIRMAN: Mr. McDowell, that is part of it certainly,

1 but it's not quite what is said. I mean, I suppose
2 being used to listening to what people say about
3 things, I tend to say, well, that is all very well but
4 what is the truth of the matter? And I would say a
5 judge -- one would hope, Mr. McDowell, that a judge 10:39
6 would be in the same position or indeed any rational
7 person would be in the same position.

8 MR. MCDOWELL: I am not doubting your rationality for a
9 second.

10 CHAIRMAN: No, I know you are not. 10:39

11 MR. MCDOWELL: But I am doubting the veracity of what I
12 was told, that counsel for the Tribunal -- or sorry,
13 for the Commissioner at the Commission were entirely
14 dependent on what three people told them.

15 CHAIRMAN: I didn't honestly think that on the basis of 10:39
16 the evidence.

17 MR. MCDOWELL: It seemed implausible, but every time I
18 came up against it I was told that privilege had been
19 claimed and pages were excised from the book for
20 privilege, and I have had no inkling as to whether 10:40
21 this, what we are dealing with here was discussed with
22 counsel at any stage or whether the gist of this was
23 given to counsel at any stage.

24 CHAIRMAN: well, I wasn't thinking that, Mr. McDowell.
25 But I suppose one of the things that I suppose one 10:40
26 might have asked was: was the Byrne/McGinn report in
27 full given to counsel? It would be a useful thing to
28 have, certainly, if you are going into this. I mean,
29 isn't that --

1 MR. MCDOWELL: And the strange thing, Judge, is I
2 appear to be the only person -- or sorry, my client
3 appears to be the only person who has never been
4 furnished with a copy of this. Presumably it was
5 discovered to the Tribunal. 10:40

6 CHAIRMAN: Well, do we have the Byrne and McGinn
7 report?

8 MR. MCDOWELL: It was discovered to the Commission,
9 presumably. Mr. Justice O'Higgins probably very
10 charitably -- 10:40

11 CHAIRMAN: Well, I can tell you, I have read the whole
12 of the O'Higgins Report, but I didn't read the
13 Byrne/McGinn report. But there is a statement I think
14 from Chief Superintendent McGinn and Assistant
15 Commissioner Byrne in relation to their approach to 10:41
16 things. That may be deployed later on or not. I don't
17 know.

18 MR. MCDOWELL: It may well be, Judge, that Mr. Justice
19 O'Higgins, out of common decency, decided that my
20 client should not be exposed to this kind of damaging 10:41
21 and offensive material, but --

22 CHAIRMAN: Well, maybe he simply thought that is one
23 person's opinion, I am going to make my own mind up.

24 MR. MCDOWELL: Exactly. But it was the opinion
25 furnished to the Commissioner at the time, Martin 10:41
26 Callinan. And we don't know what he did with it, or --
27 but if, if he accepted what Assistant Commissioner
28 Byrne was saying he was effectively discounting my
29 client as somebody who was acting in a paranoid manner.

1 CHAIRMAN: Yes. well, you keep coming back to that
2 word, Mr. McDowell. There are times I feel somewhat
3 paranoid as well, I must say, that everybody is against
4 me.
5 MR. MCDOWELL: The old phrase, Judge, that just because 10:42
6 you are paranoid doesn't mean they are not trying to
7 get you, applies here very much.
8 CHAIRMAN: well, there is another phrase as well: Just
9 because you are paranoid doesn't mean that everybody
10 doesn't hate you. 10:42
11 MR. MCDOWELL: Exactly.
12 CHAIRMAN: well, that is the way it is. Look, someone
13 expresses an opinion, I mean, I am inclined to --
14 MR. MCDOWELL: No, but, Judge, this isn't just an
15 opinion. 10:42
16 CHAIRMAN: No, but what are we going to do,
17 Mr. McDowell? I mean, you are representing Sergeant
18 McCabe.
19 MR. MCDOWELL: If you look at those four pages, Judge,
20 if you look at those four pages, it does appear that 10:42
21 Annmarie Ryan was given this material by Fergus Healy,
22 who was the Commissioner's liaison officer with the
23 O'Higgins Commission. It does appear that, contrary to
24 what has been said here, it is very likely that
25 Commissioner O'Sullivan was aware of this material. 10:43
26 CHAIRMAN: Maybe so. Look --
27 MR. MCDOWELL: If she was so aware, Judge -- if I can
28 just finish on this. If she was so aware, the
29 instructions she gave to her counsel have to be read in

1 the light of a statement by Assistant Commissioner
2 Byrne to her predecessor, that all of this, all of the
3 material that had gone to the O'Higgins Commission came
4 from the mind of a paranoid man, or a paranoic,
5 whatever you want to call him. And that, Judge, 10:43
6 utterly changes the, if I may say so, the absolutely
7 anodyne and hands-off evidence that you have heard in
8 relation to this.

9 CHAIRMAN: Well, in an ideal world, therefore, what
10 would you like to happen, Mr. McDowell? 10:44

11 MR. MCDOWELL: I would like to have her back, Judge,
12 and ask her about this and I would also like to have a
13 copy of the full report, because I don't like having
14 four pages of an analysis put before me, because
15 presumably the whole report justifies the conclusions 10:44
16 that a lot of Sergeant McCabe's allegations which
17 Mr. Justice O'Higgins upheld, presumably the reasoning
18 as to why they were dismissed will appear.

19 CHAIRMAN: Yes. And do you know, when I read through
20 the transcript and I see what Mr. Justice O'Higgins did 10:44
21 and the ruling that he actually made, I mean, there is
22 a certain latitude that has to be made in relation to
23 people who feel they need to make a case, and I think
24 judges tend to allow that, whether it's admissible or
25 relevant or not, once it doesn't go on too long, but he 10:45
26 made a ruling, the effect of which was to steer this
27 thing in a particular direction. Now, I'm left at the
28 stage where I'm now looking at whether there were any
29 unjustified grounds relied on by Commissioner

1 O'Sullivan to discredit Sergeant Maurice McCabe before
2 the Commission.

3 MR. MCDOWELL: Well, it would appear from what
4 Mr. Sreenan has just told you that this material was
5 relied on at a later stage, this report was relied on, 10:45
6 rather, at a later stage in relation to the submissions
7 which were ultimately made after June, towards the end
8 of that year.

9 CHAIRMAN: Yes. That could well be the case. I think
10 the right thing to do, Mr. McDowell, is for me to 10:45
11 simply note what you say, it may be necessary for
12 Commissioner O'Sullivan to return, it may be that you
13 wish to ask certain other witnesses about this, and we
14 will continue with this and --

15 MR. MCDOWELL: I am not trying to delay anything. 10:45

16 CHAIRMAN: I know you are not. But in the event that
17 an application is made in relation to the recall of
18 Commissioner O'Sullivan, well then, I will hear it at
19 the time and in the light of what we have heard. I am
20 not saying yes or no in relation to this, I am not 10:46
21 making any comment about this. It's part of the
22 material that is being put before me and I will
23 consider it in due course.

24 MR. MCDOWELL: Yes.

25 CHAIRMAN: Yes. So maybe if we can go on then, 10:46
26 Mr. McGuinness.

27 MR. MCGUINNESS: Just before I resume with, Mr. Smyth,
28 I should say to the parties here that Ms. O'Sullivan is
29 a witness who has travelled into the State from abroad

1 to give evidence, and if Mr. Smyth is not finished by
2 lunchtime I am going to stand him down to put in
3 Ms. O'Sullivan I think very briefly after the lunch
4 break.

5 CHAIRMAN: Who is Ms. O'Sullivan?

10:46

6 MR. MCGUINNESS: She is a witness from the Department
7 of Justice. She is on the witness list for today after
8 Mr. Smyth.

9 CHAIRMAN: I know. Well, there is a bit of a mix-up
10 with the surnames, Mr. McGuinness. Yes. Okay.

10:47

11
12

13 MR. COLM SMYTH CONTINUED TO BE EXAMINED BY

14 MR. MCGUINNESS:

15 1 Q. MR. MCGUINNESS: Thank you. Mr. Smyth, can we just
16 resume from where we left off yesterday?

10:46

17 A. Yes.

18 2 Q. You had given an answer which related to the obvious
19 stress and effect that you saw on persons you were
20 dealing with who had been involved in dealing with the
21 complaints of malpractice, etcetera?

10:47

22 A. Yes.

23 3 Q. But I just want to go back to the nature of the
24 inquiry. You obviously heard Mr. Gillane say at the
25 opening of the inquiry that it was inquisitorial?

10:47

26 A. Yes.

27 4 Q. That the core booklet was neither a book of evidence
28 nor a statement of claim?

29 A. Yes.

1 5 Q. And you probably will have heard Mr. McDowell repeating
2 submissions here, perhaps twice or more, as to what he
3 said in the Commission; that Sergeant McCabe was
4 approaching it, he says, apparently on the basis that
5 he wasn't there to be making accusations or to lay all 10:48
6 about him, I think was a phrase he used at one stage,
7 but did you see the inquiry in a different way? Did
8 you perceive it to be a different sort of inquiry?
9 A. No, I did not.

10 6 Q. All right. But from the point of view of the parties 10:48
11 whom you were representing, did you see it as a
12 necessary part of that representation that you would
13 have to, as it were, test any allegations, if one uses
14 that word, or test the evidence that was being given in
15 relation to each of the incidents? 10:48
16 A. I thought it was necessary in the best interests of my
17 client as I am ethically bound to do so, regardless of
18 the consequences to myself, to test the veracity of
19 those allegations.

20 7 Q. Yes. 10:49
21 A. And it was in that context that credibility and
22 motivation was raised.

23 8 Q. Yes. I will come back to what you understood that to
24 embrace in due course. But from the point of view of
25 the structure of the hearings, unlike the Fennelly 10:49
26 Commission, Mr. Justice O'Higgins adopted a sort of a
27 multiparty hearing approach at which he permitted
28 persons to attend and listen to evidence that was
29 relevant to them and to permit cross-examination then.

1 A. Yeah.

2 9 Q. So were you seeing it as part of, as it were, the
3 Defence of your clients' interests that you would be
4 enabled to cross-examine and briefed in an appropriate
5 way to permit you to do so? 10:49

6 A. Well, clearly, as I said yesterday, the principal
7 document that sprung out at us was this proven facts
8 document, which set out a list of serious malpractice
9 on the part of my clients, but more importantly it set
10 out serious criminal issues touching on their behaviour 10:50
11 and their -- in their capacity as senior officers
12 within An Garda Síochána. And more importantly, the
13 document set out quite clearly how these facts would be
14 proven. There was listed -- a list of witnesses, two
15 district judges, there were 14 solicitors, two State 10:50
16 solicitors, a number of high-ranking members of An
17 Garda Síochána, about the rank of chief superintendent
18 I understand, there were victims of crime, which were
19 about 80 in number, all of this was to be supported by
20 70 audio recordings, considerable number of text 10:50
21 messages, I think about 120, if my memory serves me
22 correctly, from the document I read the other day, and
23 all of this was presented to us as a menu of accusation
24 against my clients which would have had the most
25 serious consequences for them in the event that there 10:51
26 was to be a finding in the Commission of corruption
27 against any of them. And bear in mind, I felt I was
28 acting in the best interests of my clients, and
29 ethically bound to do so, regardless of the

1 consequences for myself to raise the issue of
2 credibility and motivation in that context.

3 10 Q. Well, could I just tease that out now because you have
4 used the phrase "my clients" there and will you accept
5 that from me that that document didn't, on its face, 10:51
6 appears to raise any allegations as against the
7 Commissioner?

8 A. No, there were no --

9 11 Q. In particular Commissioner O'Sullivan?

10 A. That's correct. There were no allegations of 10:51
11 corruption or of malpractice on the part of
12 Commissioner O'Sullivan. They were directed against
13 the other nominated clients, who were, as I said, the
14 Clancy, Cunningham, former Commissioner I think
15 Callinan was included in that, and I think Chief 10:52
16 Superintendent Rooney, but more particularly, as he was
17 at the time of the allegations, Superintendent Clancy,
18 later Chief Superintendent Clancy, he seemed to be the
19 focus of attention for much of the --

20 12 Q. But certainly in your two previous answers when you are 10:52
21 stressing the issue of my clients, are you including
22 Commissioner O'Sullivan in that?

23 A. Yes, I am. She was my client, she was my primary
24 client.

25 13 Q. She wasn't the target, as it were, if I can use that 10:52
26 word, or the object of any of the complaints?

27 A. No, she wasn't. No, she was not.

28 14 Q. Did you see it as necessary on her behalf then to
29 engage in an examination of motivation and credibility?

1 A. On her behalf, and this is the reason why we sought
2 instructions from the Commissioner in this respect, we
3 wanted to know if we had clearance in relation to
4 credibility and motivation. Because, as I said to you
5 yesterday, in the event that there was a conflict 10:53
6 between the primary client, the Commissioner, and these
7 four people, who were also my clients, against whom
8 serious allegations had been made, well obviously
9 issues would arise in respect of that. And we would
10 have to continue to represent the primary client, being 10:53
11 the Commissioner, or completely vacate from the
12 proceedings altogether and that other parties -- other
13 lawyers could come in to represent both the senior
14 Gardaí, another set of lawyers to represent the
15 Commissioner in the event that we found ourselves 10:53
16 conflicted by what we had been told by either.

17 15 Q. Okay. Well, I will come back to the issue as to
18 whether you perceived yourself to have any such
19 conflict at any particular time. But can I ask you to
20 look at Inspector McNamara's typed notes of the first 10:54
21 consultation on the 11th May of 2015. They are at page
22 71 of book 1, going on to page 72 and 3. Now it
23 appears that a portion of this meeting started, if one
24 goes down to the very bottom of that page on the
25 screen, the meeting started in the Chief State 10:54
26 Solicitor's room. You joined it at a slightly later
27 stage with your other counsel, but on page 73 -- 72,
28 the middle of page 72, there is a list of personnel
29 then who are represented by different parties. And had

1 you joined the consultation at that stage, do you
2 think?

3 A. If -- I will be bound by what the note says in that
4 respect. I don't have a memory as to what time I
5 joined the consultation. 10:55

6 16 Q. Okay. well, just turning on to page 73, there is
7 mention of "McCabe's JR adjourned for some day this
8 week". were you briefed about that at that time?

9 A. Well, I understand that there was an application being
10 made by Mr. McDowell in relation to another matter 10:55
11 touching on this -- touching on the Commission, which
12 perhaps, and I have to say I was hopeful that he might
13 succeed because it would give me some breathing space
14 in an adjournment to deal with the matter properly,
15 but -- and we thought, even up to the Monday, that that 10:55
16 might be so, but it didn't happen. I don't know what
17 happened in relation to that, but Mr. McDowell can deal
18 with that if he is ever asked about it.

19 17 Q. Okay. well, it records then:

20 10:55

21 "Chief Superintendent CPE representing --"

22

23 Presumably that is the Commissioner. were you
24 introduced to Chief Superintendent Healy when you
25 arrived? 10:56

26 A. Yes.

27 18 Q. Then it says:

28

29 "Need to get filings - Lorraine Browne."

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And then:

"McCabe - full dossier of all the legal actions -
alleged causes of action accrued."

10:56

And then there is a reference to Mr. Wilson. What
discussion was there about getting files, can you
recollect?

A. Well, look, we were coming into this, as I say, in the
normal way. Any barrister here present in this room
knows the routine: You get a briefing document, you
get, whether it be a bankers box of documents or
whether it be a smaller type briefing document, you
know what the case is about, you know the background,
it's all set out to you in black and white. We were
coming into this completely and utterly -- we had no
clue other than what was in Seán Guerin's report,
senior counsel, that this Commission was being set up
on the basis of that. We needed to know -- we saw this
document, which -- with the risk of being tedious, this
proven facts document, and I said look, we need to get
some background, we need to know where we are going
with this, what is this all about, we need to know what
is the background to this man. I was told, without
digressing too far, about his background in a general
way. I did not glean that from any document that has
been mentioned by Mr. McDowell this morning. I didn't
ask for the Byrne/McGinn report. I never got the

10:56

10:56

10:56

10:57

1 Byrne/McGinn report. And insofar as I saw that
2 document that Mr. McDowell had, I did not deploy any of
3 the negative material to which he refers against his
4 client. Nor would I do so.

5 19 Q. All right. Thank you for that. But do you recollect 10:57
6 was there a discussion at this meeting, the first
7 meeting on 11th, about Sergeant McCabe's brief
8 statement of facts document? Were you discussing it at
9 this first meeting?

10 A. The brief -- the statement of facts, proven facts? 10:57

11 20 Q. Yes.

12 A. Well, obviously I was very much concerned about it and
13 I wanted to know what the background was. I was given
14 the background that this was a man who was highly
15 regarded by An Garda Síochána -- by the authority, that 10:58
16 he was a man who had served for a number of years in
17 Bailieboro, for ten years, I understand, and I am open
18 to correction on that, that from my memory, he was a
19 man then who went to Clones and he came back, he
20 entered a competition for the position of sergeant in 10:58
21 charge in Bailieboro, and he was highly regarded and he
22 succeeded in that competition and that was a post which
23 was highly prestigious. I then found that I was led to
24 believe then that everything was going along very well,
25 he was highly regarded by his superintendent, he was 10:58
26 the eyes and ears and had the back of his
27 superintendent, who had great respect for him. I must
28 say that was the position I was led to believe. And
29 then suddenly something happened in relation to these

1 other matters, or this matter, which had to be
2 considered by, who I keep calling the authority but it
3 was, as we all know, it's out in the open, it's the
4 DPP.

5 21 Q. Yes. 10:59

6 A. I had no interest in what it was all about, other than
7 it was an allegation made by a young lady.

8 22 Q. Yes.

9 A. I wasn't voyeuristic, I didn't inquire into what it
10 involved. I was told that since that time, since the 10:59

11 time of that investigation, this man's personality
12 changed significantly. I was told that from then on,

13 and it seems to be borne out by documents that

14 allegations were being made against certain

15 high-ranking members of An Garda Síochána, 10:59

16 superintendents and such like.

17 23 Q. Yes.

18 A. So that was the general background to it.

19 24 Q. Yes.

20 A. And -- 10:59

21 25 Q. I don't want to telescope all the consultations into
22 one or get --

23 A. I appreciate that.

24 26 Q. --- or get mixed up. Was this discussed at this point?

25 A. Well, from my memory, I don't know if the full detail 10:59

26 in relation -- in fairness I want to be fair, in

27 relation to it, but this was the general outline of

28 what was being told to me. Now, obviously they didn't

29 come to that consultation with all of this

1 documentation which informed me of that one way or the
2 other. So as I said yesterday, this was a meeting
3 which was, I suppose, a meeting about another meeting,
4 which was to be more thorough, if you like, because we
5 hadn't got briefing material. 11:00

6 27 Q. Yes. But the reference here, just, and perhaps it's
7 unfair to ask you to comment on what somebody else
8 intended "full dossier of all the legal actions" and
9 then "alleged causes of action accrued", was that
10 something that you sort of were made aware of or 11:00
11 requested and did that embrace the DPP's investigation?

12 A. Well, no, I think -- I think that that may have
13 referred to -- there was another -- giving us the full
14 background, there seemed to have been some -- and I am
15 open to correction on this again, doing the best I can 11:00
16 with my memory.

17 28 Q. Yes.

18 A. There seemed to be some employment issues that this
19 sergeant may have been raising in respect of his -- or
20 there may have been other actions in relation to -- 11:01
21 there was some issue, I think, in relation to I think
22 another client that I was representing, and I think it
23 was mentioned here yesterday. I think that they may
24 have been the matters that we were trying to get
25 information on. 11:01

26 29 Q. All right. And then there is a reference obviously to
27 an adjournment there, which --

28 A. Well, as I said yesterday --

29 30 Q. A hope.

1 A. Hope, hope.

2 31 Q. Hopeful.

3 A. And hoping that Mr. McDowell would finally get it on
4 the judicial review and might get the adjournment that
5 I so anxiously needed. 11:01

6 32 Q. Yes. Ms. Ryan has fuller notes at page 3777, and we
7 might perhaps just turn to those. It's a more, if I
8 can put it this way, orderly structured note, as you
9 would expect from Ms. Ryan. She lists all who were
10 present there. 11:02

11 A. Yes.

12 33 Q. And none of your other -- none of your other clients, I
13 suppose none of your clients were there as such.

14 A. Absolutely. As I said, this was a meeting about
15 setting up a meeting with the relevant clients. 11:02

16 34 Q. Yes. Okay. She lists then at the bottom of that who
17 you would be representing, superintendents and upwards?

18 A. Yes.

19 35 Q. Who was scheduled for different days, consultations to
20 be arranged. And then on the next page, there is 11:02
21 obviously a reference to the probationer, at the top of
22 that page. There is reference to the Chief
23 Superintendent McGinn in Donegal and the outcome of the
24 Byrne/McGinn report. And did that give rise to a
25 request for the Byrne/McGinn report? 11:02

26 A. I did not request -- I never got -- you know, the
27 documents you listed yesterday, I got my briefing
28 documents from Annmarie Ryan.

29 36 Q. Yes.

1 A. And you listed them yesterday.

2 37 Q. Yes.

3 A. I have no recollection of ever asking for the

4 Byrne/McGinn report.

5 38 Q. Yes, 11:03

6 A. I understand that my two colleagues may have, and

7 certainly Mr. Byrne asked for that report.

8 39 Q. At a later stage?

9 A. At a later stage, as I understand it.

10 40 Q. All right. So, as far as you were concerned, it had no 11:03

11 impact in terms of either your giving advice on the

12 14th or seeking advice or giving written advice on the

13 15th or seeking instructions on the 15th?

14 A. Well, rightly or wrongly, Mr. McGuinness, can I say

15 this, this is rather like -- there was a situation -- 11:03

16 the Byrne/McGinn report was challenged by Sergeant

17 McCabe in a sense, he didn't -- what should I -- get a

18 you neutral word -- he didn't accept the results of the

19 Byrne/McGinn report. And so, what I was dealing with

20 was issues arising as a result of an independent review 11:03

21 which Mr. Guerin conducted under warrant from An

22 Taoiseach.

23 41 Q. Yes.

24 A. And I was more concerned myself with the contents of

25 that, I have to say. well, maybe rightly or wrongly 11:04

26 but that is how I saw it.

27 42 Q. That was the latest word, as it were, is that --

28 A. I'm sorry?

29 43 Q. Did you regard Mr. Guerin's report at that stage as the

1 latest word on the allegations?

2 A. Absolutely, absolutely. And, if you like, the
3 allegations that were being made at that point, and
4 they were fresh in time as well, like. I suppose it
5 may be a wrong analogy but when you come to somebody 11:04
6 doing a Circuit Court appeal to the High Court, the
7 judge will always say, I have no interest in what
8 happened in the court below. It was more or less in
9 that context that I saw this. Because clearly there
10 was no acceptance of the Byrne/McGinn, I respected the 11:04
11 position on that. I did not glean any material from
12 Byrne and McGinn, rightly or wrongly, and any negative
13 information that was contained therein. I was more
14 concerned with what was in Guerin's report, and the
15 up-to-date, if you like, allegations that were being 11:04
16 made.

17 44 Q. Okay. The next heading there "outcome of McCabe
18 investigations", does that relate to the Byrne/McGinn
19 findings? Do you recall being briefed about the
20 findings, as it were, that so many were upheld or not 11:05
21 upheld or?

22 A. I think there may, in a general, have been reference to
23 the number of complaints and the number that were
24 upheld by Byrne/McGinn, but beyond that, as I say, I
25 can't say there was any other discussion, as far as I 11:05
26 am concerned, about it.

27 45 Q. Can I ask you, who was the source of the information at
28 this meeting about matters? Was it Chief
29 Superintendent Healy?

1 A. Absolutely, I relied on Chief Superintendent Healy to
2 fill me in on the background and to give me the
3 background details insofar as he could.

4 46 Q. Yes. And did he tell you, for instance, for example,
5 that he had had some personal involvement in the sense 11:05
6 that he had been superintendent in the Cavan-Monaghan
7 division, in fact, in 2006 but left in 2007?

8 A. Do you know, Mr. McGuinness, I really don't have a
9 recall of that. But I understand from his evidence
10 that he had that information available to him and was 11:06
11 able to deploy it.

12 47 Q. We also heard from his evidence that he had been
13 dealing with communications with GSOC in relation to
14 their investigation in relation to Ms. D's complaint
15 about the matter not having been properly investigated 11:06
16 very close to this point in time in March 2015. Did he
17 mention anything to you about the detail of --

18 A. Again he never mentioned anything --

19 48 Q. -- the investigation from?

20 A. From my recall, he never mentioned any that have detail 11:06
21 to me.

22 49 Q. All right. There seems to be recorded there an account
23 of what happened when Sergeant McCabe was told of the
24 outcome of the Byrne/McGinn --

25 A. I understand that. 11:06

26 50 Q. -- etcetera, et cetera.

27 A. I was made aware --

28 51 Q. Skip over that. It goes down to:
29

1 "Daughter was a minor at the time of incident.
2 Daughter of work colleague in Bailieboro late '06/early
3 '07. McCabe from outset was subject of allegation.
4 File sent to DPP. DPP found no crime. Allegation of
5 indecent assault made against him. Mr. McCabe had 11:07
6 issues with way this issue was investigated. McCabe
7 sought access to this file and was refused the file."
8
9 All of that came presumably from Chief Superintendent
10 Healy? 11:07
11 A. I would think so, yes.
12 52 Q. And obviously this was fresh knowledge to you?
13 A. Absolutely.
14 53 Q. Yes. Did it appear relevant to you at that stage?
15 A. No. As I say, not at that stage. Because the fact 11:07
16 that this incident really wasn't of concern to me at
17 that stage, it was -- as I say, I can deal with that
18 later if you ask me further about it, but it had no
19 concern to me. Because I was not going to deploy the
20 fact that this man had this difficulty or whatever it 11:07
21 may be, how you would describe it. It was not going to
22 deploy it against him as far as I was concerned.
23 54 Q. Can I take it, were you ever instructed to do so
24 impliedly or expressly?
25 A. I was never instructed, nor would I do so, to use any 11:07
26 allegation of this nature against him.
27 55 Q. All right.
28 A. I want to put that firmly on the record.
29 56 Q. Could we skip down to the very last third of that page?

1 Further down, please. There is a reference there to a
2 remark, and I think Chief Superintendent Healy said he
3 wasn't quoting it exactly but it's recorded there. Did
4 you take account that have or --

5 A. Sorry, which remark? 11:08

6 57 Q. "McCabe said to Derek Byrne "I will bring this job to
7 its knees"."

8 A. Ok, no, I did not deploy that against Sergeant McCabe
9 in any of my cross-examination against him.

10 58 Q. Okay. But did you understand it to -- was it being 11:08
11 conveyed to you or did you take it as an indication
12 that perhaps Sergeant McCabe had a grudge against the
13 Guards?

14 A. As I say, think point, Mr. McGuinness, this was all
15 background information to myself and my two colleagues 11:08
16 who were faced with this, again at the risk of being
17 tedious, this very difficult task. This was a meeting
18 about a further involved meeting that we were going to
19 have with the various clients, I hadn't exactly -- or I
20 don't think we had at that point made any assessment of 11:09
21 all of what we were hearing. So, it was just
22 background information. And as I say, none of that was
23 used against Sergeant McCabe; the fact that he said "I
24 will bring this job to its knees", that was never
25 spoken by me. 11:09

26 59 Q. At the bottom of the page there, that last sentence:
27
28 "Noel Cunningham will give us full details of this."
29

1 obviously that information was provided by Chief
2 Superintendent Healy, but did you understand that it
3 was being imparted to you as something that was
4 relevant?

5 A. No, I think what that meant, Mr. McGuinness, was this: 11:09
6 Chief Superintendent Healy was not involved in any way
7 with the investigation of this matter, and that the
8 person responsible who was appointed to carry out that
9 particular investigation, was Superintendent Noel
10 Cunningham. And I think what that means is that he 11:10
11 would be in a better position to explain to us what
12 that investigation was about or otherwise, or what
13 relevance it may have, if any. And as far as I was
14 concerned, from what I was hearing at that point, I was
15 satisfied it didn't have any relevance. 11:10

16 60 Q. Okay. On the next page, 3799, there seems to be more
17 substantive detail about the module coming up, what had
18 to be done. There is reference halfway down then, if
19 we go down the page, to the two juniors going out to
20 speak to counsel to see if there is any possibility of 11:10
21 an adjournment from the Commission. And there was a
22 very firm answer.

23 A. Yeah, they saw their opposite numbers. I know that
24 Annmarie Ryan I think maybe consulted with Mr. O'Hagan
25 and I certainly tried to get the -- laid this 11:11
26 application at the door of Mr. Gillane, and while he
27 was very pleasant about it he said to me in no
28 uncertain terms the judge was not for turning.

29 61 Q. Yes. That is the end of Ms. Ryan's note. Mr. Ruane

1 had a note which he gave evidence about, at page 3755.
2 And at the bottom of that he lists who is present and
3 then he lists your arrival with junior counsel at 2:20
4 and then it would appear you were present for all of
5 the other discussion on the next page? 11:11

6 A. Yes.

7 62 Q. And at the top of page 3757 there appears to be --
8 obviously a discussion has gone on to Sergeant McCabe
9 at this stage. There is reference to Pulse data.
10 11:12

11 "The Commissioner barred two members from Pulse in
12 Mullingar traffic unit. Allegation file DPP doubtful
13 crime at all. Indecent assault. Highly thought of
14 role sergeant."

15 A. Yes. 11:12

16 63 Q. And can you recollect who said that? would that have
17 been Chief Superintendent Healy?

18 A. What was coming to us was that this man was highly
19 thought of, that this man was highly regarded by all --
20 right through the organisation, people who had contact 11:12
21 with him --

22 64 Q. Okay.

23 A. -- until a certain point.

24 65 Q. Mr. Ruane records himself there as I think referring to
25 the litigation that is pending and presumably you would 11:12
26 expect to be informed or briefed of any such issues,
27 there is nothing irregular --

28 A. In relation to litigation?

29 66 Q. Yes.

1 A. Yes, as I say, it was background, we needed to know the
2 background information.

3 67 Q. Yes. It seems to record you there as referring to the
4 "N Cunningham investigation MMC".

5 A. It may well be -- 11:13

6 68 Q. Do you recollect bringing that up?

7 A. It may well be that was raised in the context that
8 maybe -- I don't know what way that was brought up.
9 That Noel Cunningham obviously can fill in more
10 background about that, about the investigation. 11:13

11 69 Q. It may have been a question?

12 A. It may have been.

13 70 Q. And Chief Superintendent Healy then appears to be
14 saying what it related to?

15 A. Yes. 11:13

16 71 Q. Chief Superintendent Healy has his own notes of that
17 meeting at 3813.

18 A. Yes.

19 72 Q. They are not very detailed. There is, however, a
20 reference at the bottom of that statement of facts. 11:14
21 "Core", presumably that means core documents. I am
22 just waiting for it to be rotated there. And it says
23 at the very last sentence:
24
25 "what is emerging from the statement of facts." 11:14
26
27 And do you recollect, is that something that you would
28 have started the discussion about or --

29 A. The statement of facts in --

1 73 Q. Yes.

2 A. I am at a bit of a loss to know what the statement of
3 facts refers to. Is it something in the core booklet
4 or --

5 74 Q. Well, I mean, do you recall, did you raise the issue of 11:14
6 Sergeant McCabe's brief statement of proven facts or is
7 that the Commission's statement of facts?

8 A. It may well have been, because that is the point I am
9 making, Mr. McGuinness. Because I think the Commission
10 would refer to the statement of facts. What I'm -- the 11:15
11 document I have been referring to previously was the
12 proven facts statement or document. So I take it that
13 that relates to what the Commission was telling us.

14 75 Q. All right. Now, I think the consultation broke up and
15 you had arranged for a meeting the next day and you met 11:15
16 on the 12th with a number of officers, is that correct?

17 A. If my memory is jogged, I would say --

18 76 Q. Yes. Perhaps we will look at Inspector McNamara's
19 notes, page 73. There is assistant commissioner,
20 retired Assistant Commissioner Clancy there, 11:16
21 apparently, do you recollect meeting her?

22 A. Yes. She was -- I recollect that lady.

23 77 Q. There is some reference there, it would appear, to Noel
24 Cunningham, "consultation with Superintendent NC"?

25 A. Yes. 11:16

26 78 Q. It's not quite clear what is -- do you recollect what
27 that might relate to? Is that "no prosecution",
28 perhaps?

29 A. I have no recollection of what that is. But I just

1 want to make it clear, Mr. McGuinness, there was no
2 preponderance of views in relation to this incident or
3 whatever you are going to call it, relating to the
4 personal matter with Sergeant McCabe, there was no
5 preponderance or weight put on -- at anything at that 11:16
6 stage. There was nobody building up a case to put
7 against him in relation to that. I want to make that
8 clear.

9 79 Q. Yes, yes.

10 A. And if people want to mention something they may 11:17
11 mention it but --

12 80 Q. It does seem to have -- or, as it were, the follow-on
13 consequences perhaps seem to have been discussed. And
14 if we go to the top of page 74 there, it says:
15 11:17

16 "Letter of demand from Sergeant McCabe for file of
17 superintendent to DPP... and any report... got no
18 support. Meeting in Mullingar. Sergeant Yvonne Martin
19 present. He said reason for making complaints to
20 Superintendent Clancy was to force his hand to get a 11:17
21 copy of the file. Sergeant Yvonne Martin, Delvin."
22

23 And who explained that to you or how did you --

24 A. It may have -- it must have been, it must have been
25 Noel Cunningham. 11:18

26 81 Q. It must have been --

27 A. Well --

28 82 Q. Yes.

29 A. I don't know. I mean, of the people who were present,

1 if it's the Mullingar meeting, he was the person at the
2 Mullingar meeting.

3 83 Q. Yes.

4 A. Yvonne Martin -- well, Sergeant Martin wasn't there, so
5 I assume it's Superintendent Cunningham. 11:18

6 84 Q. Yes. Obviously, it seems to be correctly recorded
7 there about the --

8 A. That is so.

9 85 Q. -- complaints being made to Superintendent Clancy?
10 A. Yes. 11:18

11 86 Q. Now, I suppose just to be clear, when it ultimately
12 came to the drafting of the letter of the 18th May, I
13 think none of the counsel would have had these notes?

14 A. No, they wouldn't -- we wouldn't have had the notes,
15 obviously, no. 11:18

16 87 Q. All right. Now, Ms. Ryan's note is at 3780, but it
17 doesn't relate to that, but we had received a statement
18 from Superintendent Cunningham in which he proffered as
19 a waiver of his privilege for that --

20 A. Yes. 11:19

21 88 Q. -- solicitor's note, and that is at 4291. Perhaps we
22 might just look at that. And if one scrolls down the
23 solicitor's note should be further on, on the next
24 page, perhaps. And this is Ms. Ryan's handwritten
25 note, it says: 11:19

26

27 "Up to 2008, over 26 years service, Noel never had one
28 single complaint against him by anyone. Since then
29 there have been numerous complaints from public about

1 him. Question about whether McCabe behind these
2 allegations -- these --"

3
4 Maybe that is a full stop.

5
6 "Allegation that Noel didn't carry out proper
7 investigation. No adverse --"

8 A. Finding.

9 89 Q. "-- finding to date but some still ongoing."

10
11 And then scroll down.

12
13 "Noel met with McCabe in Mullingar, Yvonne Martin in
14 2008 about complaint to Mike Clancy, McCabe linked his
15 deep -- wanted his DPP file. Noel made report of this
16 meeting the next day. He has copy of this. Sent the
17 report to Monaghan. This was his reason for making
18 complaint to Mick Clancy. Gardaí to send on report by
19 Noel. Counsel want this."

20
21 And did you recollect that being discussed in those
22 terms?

23 A. Well, I see there maybe I requested that report.

24 90 Q. Yes, that is your initials there, CS?

25 A. Yes.

26 91 Q. "Counsel want this." And certainly Chief
27 Superintendent Healy's note saying "get copy of the
28 report", but he has got March 2008 in his note, whereas
29 you clearly wanted the report relating to the August

1 meeting?

2 A. August meeting in Bloomfield Hotel -- or in Mullingar
3 station.

4 92 Q. Do you recollect when you got that?

5 A. We certainly didn't get until after the -- I think 11:21
6 leading up to this, where the letter was drafted, where
7 matters kicked off at the Commission, we didn't have
8 any of the notes prepared at that meeting.

9 93 Q. Yes.

10 A. Nor I don't think -- we certainly didn't have the 11:22
11 report.

12 CHAIRMAN: Maybe just help me on this one. The report
13 we are talking about is the report by Sergeant McCabe
14 about the D family, is that what we are talking about?

15 MR. MCGUINNESS: Well, that is not the report I am 11:22
16 talking about, Chairman. It's the report of
17 Superintendent Cunningham, consequent upon his meeting
18 in August 2008 with Sergeant McCabe.

19 CHAIRMAN: With Sergeant McCabe?

20 MR. MCGUINNESS: Yes. Mullingar. 11:22

21 A. I didn't have that report at the time.

22 CHAIRMAN: Well, you would need two things for that,
23 Mr. McGuinness. I presume you would need what Sergeant
24 McCabe had written out, in other words bad relations
25 with the D family and with his colleague, and then the 11:22
26 report by Superintendent Cunningham in consequence of
27 that.

28 MR. MCGUINNESS: Yes.

29 CHAIRMAN: Which was also signed by Sergeant Martin.

1 94 Q. MR. MCGUINNESS: Yes. It's just, I am trying to elicit
2 from the witness, was your request relating to both
3 reports or simply the report of the meeting that
4 Superintendent Cunningham had with --
5 A. Clearly I would want to see the notes of the meeting as 11:23
6 well.
7 95 Q. All right.
8 A. But certainly the report would be a comprehensive
9 account of what took place, but the notes would be very
10 relevant. 11:23
11 96 Q. Yes. I think you had a consultation the next day, on
12 13th May, and if we could look at Inspector McNamara's
13 notes, they are at page 74. They are very brief. It
14 says there:
15
16 "Ordering of material, examination of material."
17
18 Do you recollect that meeting yourself?
19 A. What date was this meeting?
20 97 Q. This is the 13th May, which would have -- 11:24
21 A. Yes.
22 98 Q. -- the Wednesday.
23 A. Yes, yes, I think there was a meeting in Headquarters,
24 yes.
25 99 Q. There is a better note perhaps, Ms. Ryan's note at page 11:24
26 3781. This is a note of a consultation first with
27 Chief Superintendent Heller in relation to, it seems,
28 the Module 1 issues. Was there any discussion at that
29 meeting about Sergeant McCabe's motivation that you are

1 aware of?

2 A. I can't recall at that time.

3 100 Q. Okay.

4 A. I just can't recall at that time. If it's not recorded
5 in the notes then my memory is certainly not going back 11:25
6 that far.

7 101 Q. Yes. It would appear you had a separate consultation
8 with retired Superintendent Maura Lernihan as well that
9 day?

10 A. Yes. 11:25

11 102 Q. And if we turn to the next page, 3782, there is a
12 reference there in the third sentence:
13
14 "We showed Maura copies of docs that Noel Cunningham
15 gave us yesterday, i.e. his review meeting with 11:25
16 management on the day after bus incident."
17

18 were those documents purely related then to the Module
19 1 Kingscourt bus issue?

20 A. I would say so, yes. 11:26

21 103 Q. Okay. There is a reference then further down the page
22 to Maurice McCabe and "need to find out about his sick
23 leave record". Was that relevant to when he was on
24 duty or was that part of the issue in Kingscourt?

25 A. It may have been. I just can't recall at this stage. 11:26
26 There may have been some issue as to maybe -- maybe an
27 arising issue as to when he was or was not in the
28 station. I do not know, I can't recall at this stage.
29 But it would have been something that perhaps some of

1 us considered relevant.

2 104 Q. Ms. Ryan has given evidence that at the end of this
3 day, following the consultations, you raised the issue
4 of credibility or motivation, about where this evidence
5 was going and what it would be leading to. Do you 11:27
6 recollect that?

7 A. If that is what she has recorded, she has a clear note
8 of it, it must -- it must have been so.

9 105 Q. She is not saying she has a note of it, but it seems to
10 have been sort of a reference to -- some mention of the 11:27
11 issue of motivation at that point in time. Do you have
12 any clear recollection of that yourself?

13 A. I don't have a clear recollection. There may have well
14 been an issue. that issue may have come up.

15 CHAIRMAN: Was it in the context of how did all of this 11:27
16 come about, type of thing?

17 A. Well, we were still leading -- we were still getting to
18 grips with that, as to why all this came about, as to
19 why this man changed and what could possibly have given
20 rise to it. We were running out of time, of course, at 11:27
21 this stage, we were fast approaching the hearing date,
22 and I know that a decision was made whether -- I mean,
23 you may have more notes or whatever, to assist me on
24 that, but a decision certainly was made on credibility
25 and motivation in advance of the hearing. 11:28

26 106 Q. MR. MCGUINNESS: Chief Superintendent Healy then had
27 notes which he made on the 14th, which, according to
28 his evidence, relate to the day at the Commission, but
29 also his consultation with the Commissioner later that

1 evening. And perhaps could I ask you to look at those,
2 at 3817.

3 A. Sure.

4 107 Q. The piece about the hearing seems to be in the middle
5 there.

11:28

6
7 "An opening statement from the judge.

8 2. Out.

9 3. Lorraine Browne gave evidence.

10 4. Ferghal McCarthy.

11:28

11 5. Regina McArdle."

12

13 And according to Superintendent Healy then the matters
14 at the bottom were written by him as prompts to enable
15 him to speak to the Commissioner about advices that
16 counsel, presumably you and the others, had given to
17 him, seeking instructions on credibility and
18 motivation.

11:29

19 A. Yes.

20 108 Q. And what is your recollection of the advice that you
21 gave on that day to seek instructions?

11:29

22 A. From the Commissioner?

23 109 Q. From the Commissioner.

24 A. Well, you know, respecting the privilege of the
25 witnesses concerned, it became necessary, in my view,
26 to seek permission from the Commissioner in respect of
27 credibility and motivation in relation to the question
28 of what turned out to be the incorrect version which
29 was set out in the letter ultimately over the weekend,

11:29

1 commencing on the -- I think it was that weekend after
2 the 15th. We asked, there seemed to be a suggestion --
3 well, there was need to seek permission from her in
4 relation to credibility and motivation in relation to
5 -- how best should I word this? In relation to, there 11:30
6 was a question about how Sergeant McCabe wished to get
7 access to certain -- to directions.

8 110 Q. Yes.

9 A. And the reason for that. And what I was not aware of
10 at the time, was that complaints had been made against 11:30
11 Superintendent Clancy a couple of weeks earlier,
12 sometime at the end of January, I was not aware of that
13 until the second module. And I think what happened,
14 there may and there must have been some conflation
15 between what was said before in relation to allegations 11:31
16 and what was occurring now.

17 111 Q. Yes.

18 A. And it was considered that while on the face of it,
19 Sergeant McCabe was making allegations and we were led
20 to believe by his counsel that he was making 11:31
21 allegations against Superintendent Clancy to get access
22 to this file.

23 112 Q. Yes.

24 A. To get access to the directions, rather.

25 113 Q. Yes. I just want to tease that out a little bit. But 11:31
26 I should have asked you, did you keep any notes
27 yourself of any matters?

28 A. Whatever notes I have or had, sorry, were boxed,
29 contained, dispatched, because there was -- the whole

1 thing was highly secretive, there was a risk that
2 things may get out.

3 114 Q. Yes.

4 A. As it happened, sadly, that is what happened. But the
5 leaks did not come from my source; I disposed, through 11:32
6 shredding at the Law Library, I was authorised to do
7 that through the service we have there.

8 115 Q. Yes.

9 A. And other documents were sent back or given back to
10 Annmarie insofar as she could carry them at a 11:32
11 particular time as modules ended.

12 116 Q. So you have retained no papers and have no notes of any
13 matters?

14 A. I have no notes.

15 117 Q. And to your knowledge, do your juniors have notes in 11:32
16 particular of this period?

17 A. Well, I think that that is a question that perhaps is
18 best answered by them.

19 118 Q. Yes.

20 A. And I don't mean to be impertinent about that. Because 11:32
21 I don't immediately know, I presume they may have, I
22 don't know.

23 119 Q. All right. But leaving aside now what happened in
24 relation to the letter, because that wasn't an issue
25 obviously on the 14th, but Ms. Ryan has recorded at 11:32
26 paragraph 9 of her statement, and perhaps we would just
27 look at, at page 3271. It's paragraph 9. Now, it
28 says:
29

1 "Following consultations with all witnesses, counsel
2 advised that Sergeant McCabe should be challenged on
3 his motivation in making numerous complaints of serious
4 allegations of corruption against several senior
5 officers. At the request of counsel, Chief 11:33
6 Superintendent Fergus Healy was to discuss this issue
7 with the Commissioner."
8

9 Now, the issue as you have put it relates to
10 credibility and motivation, isn't that right? 11:34

11 A. Yes.

12 120 Q. And at that point in time, just to understand the basis
13 for your request, did you think it was necessary
14 because of a belief on your part that Sergeant
15 McCabe's -- the entirety of Sergeant McCabe's 11:34
16 complaints were fuelled by this dispute over getting
17 access to the DPP's file?

18 A. No, not necessarily. No, not necessarily, because as I
19 said to you, there were other separate matters which he
20 had alleged. He had alleged criminal conduct on the 11:34
21 part of the clients that I had mentioned, and I thought
22 it necessary to get instructions in relation to the
23 credibility. In other words, as to the facts of those
24 allegations when they came up. And if there was no
25 evidence to support those allegations, well then you 11:35
26 would have to ask why were they made in the first
27 place? In other words, what was the motivation? So
28 that's the context of what is recorded there.

29 121 Q. Yes. But the request doesn't seem to have been

1 formulated -- perhaps you might correct me on that,
2 formulated or transmitted on the basis that there was
3 any distinction between Sergeant McCabe's complaints.
4 Were you seeking instructions to question his
5 credibility and motivation in relation to all of his 11:35
6 complaints that were relevant to the Commission?

7 A. Yes, absolutely. Because of course right the way
8 through, as I saw it, because there was no point in
9 raising it halfway through because the corpus or body
10 of allegations that were contained in the Module 1 ran 11:35
11 all the way through the entire Commission, as I saw it.
12 So if we were going to raise it, we had to raise it
13 from the beginning.

14 122 Q. Okay. well, in the context of the Commissioner not
15 being, as it were, factually involved in any of the 11:36
16 incidents under investigation, and knowing nothing and
17 giving you no instructions, why would you need to seek
18 instructions from the Commissioner to choose to
19 challenge his credibility or motivation --

20 A. Because -- 11:36

21 123 Q. -- in relation to incidents that she had no knowledge
22 of or involvement in and couldn't be a witness to?

23 A. Because she was the primary client and we had to
24 consider these issues in the realm of conflict. If,
25 for example, Commissioner O'Sullivan said to me that 11:36
26 she was not permitting me to do that, she is the
27 primary client, I had an obligation to represent her
28 primarily. And the others were there by nomination.
29 And in the event of a conflict, if Commissioner

1 O'Sullivan said to me I am not permitting you to do
2 that, that is fair enough, well then a conflict arises
3 and those men would have to be represented by somebody
4 else.

5 124 Q. All right. But in essence, did you want to be free to 11:37
6 make the case to the Commission that all of Sergeant
7 McCabe's complaints were groundless and motivated by
8 frustration or anger or revenge or --

9 A. No.

10 125 Q. -- whatever label you might want to put on it? 11:37

11 A. No, I never used the word revenge against Sergeant
12 McCabe, never.

13 126 Q. No.

14 A. As the Commissioner said --

15 127 Q. Yes. 11:37

16 A. -- and she is absolutely 100 percent accurate in this,
17 she wanted me to test the allegations and she gave me
18 instructions to do that by credibility, and to test the
19 credibility and motivation of the allegations as raised
20 by Sergeant McCabe. 11:37

21 128 Q. Now, I mean, I can apply a number of different
22 adjectives in relation to the matter, and embittered,
23 frustrated, but were you seeking instructions, leave
24 aside the use of any adjective, to make the case that
25 Sergeant McCabe had made these complaints to get back 11:38
26 at the Guards?

27 A. No. I want to make it perfectly clear, I wasn't making
28 any case that the man was embittered. I wanted to test
29 the evidence, as I was instructed to do. I said that

1 it was necessary to do so to see where, when these
2 allegations came up, as I presumed they were coming up,
3 the criminal conduct allegations, so on and so forth,
4 were very much uppermost in my mind, but I wanted to
5 test them, test them on the facts and if there is no 11:38
6 evidence to support them, what is the point of making
7 them? what motivated the man to do that? And that is
8 something -- but I hadn't formed a view as to why he
9 was making these at that time.

10 129 Q. Yes. 11:38

11 A. And that is maybe -- can I say, Mr. McGuinness --

12 130 Q. Yes.

13 A. -- that is why I didn't contaminate my mind with
14 matters contained in the Byrne/McGinn report. I wanted
15 to come to this with a fresh mind. I wanted to be 11:38
16 fair.

17 131 Q. Yes.

18 A. And it was my duty, in the best interests of my client,
19 to be fair, and also to be fair to Sergeant McCabe
20 because I was bearing in mind that this is an inquiry. 11:39
21 I didn't come to this with embittered notions myself
22 about Sergeant McCabe.

23 132 Q. Yes. Well, this is the point I am coming to: You
24 hadn't formed any judgement?

25 A. No, I did not. 11:39

26 133 Q. And were you seeking to achieve any particular result
27 for the Commissioner or were you just simply seeking to
28 allow the Commission to examine Sergeant McCabe's
29 behaviour and complaints in the way that the Commission

1 might consider it appropriate?

2 A. well, achieving a result for the Commissioner was
3 not -- she was not accused of any criminal conduct.

4 134 Q. All right.

5 A. So clearly I needed the green light to deal with the 11:39
6 issues that affected the remaining clients against whom
7 these serious allegations had been made. So I wasn't
8 trying to achieve anything for my primary client, the
9 primary client, as she has correctly said on many
10 occasions, had a duty to all members of the force, and 11:40
11 she had a duty to Sergeant McCabe and she had a duty to
12 these people against whom these allegations were made
13 and she had to hold the line between the two. That has
14 always been her position.

15 135 Q. But in seeking and receiving instructions to question 11:40
16 his motivation, would seem to suggest that at some
17 level a decision had been made that he was improperly
18 motivated or had an ulterior motive or may have had?

19 A. well, do you know, Mr. McGuinness, I hadn't formed that
20 view. I had not formed that view. And to do so would 11:40
21 be very wrong. Because my job was to test the
22 evidence. I mean, if someone makes allegations, if you
23 take it in the criminal context, of which this is not
24 in the criminal context, innocence is presumed. I
25 mean, I couldn't come to this with a view that this man 11:40
26 was guilty of something that he -- that what has been
27 suggested here earlier, the negative matters that were
28 referred to by Mr. McDowell, I wasn't interested in any
29 of that.

1 136 Q. Yes.

2 A. I wanted to test the evidence, and I wanted to see on
3 what basis are you saying, for example, that people --
4 or this officer suppressed that document which was done
5 to cover up wrongdoing in that particular -- I wanted 11:41
6 to know what the facts were on that, I wanted to know
7 exactly if that case was being made.

8 137 Q. Yes.

9 A. And, in due course, how it was he was making that case.

10 138 Q. But could you not always make that case based upon 11:41
11 relevant instructions relating to each particular
12 module on the facts of that case? why did you need
13 this overlay of permission on one view, on one
14 interpretation, to go and attack Sergeant McCabe at the
15 inquiry? 11:41

16 A. Well, sorry, Mr. McGuinness, I take exception to your
17 suggestion that I attacked anybody.

18 139 Q. I am suggesting that one interpretation of it, and one
19 possible interpretation that may be put forward, is
20 that this was, in some way, seeking a sanction to go 11:42
21 after Sergeant McCabe and suggest that he was actually
22 ill-motivated or had some ulterior motive?

23 A. Well no, Mr. McGuinness, I want to put it firmly on the
24 record here, there has been intemperate language used
25 in respect of myself, both in Dáil Éireann and in other 11:42
26 places, and in the media, that I went after this man,
27 that I attacked him; I did not go after this man or
28 attack him. I want that to be clearly put on the
29 record. I have suffered personally because of serious

1 allegations made by certain elements of the media about
2 my behaviour at that Commission. Now, can I just say
3 this: If you use the criminal analogy, or the book of
4 evidence analogy, if I had a book of evidence on all
5 matters, all modules, if it came in a complete package 11:42
6 to me, I would have the opportunity of reading and
7 getting an idea of where this was going, but I was
8 getting this in segments, and I don't want to sing the
9 song of oh poor me, I was coming to this with less than
10 48 hours to deal with it. 11:43

11 140 Q. Yes.

12 A. I asked for an adjournment. This was something that
13 very much was going to have serious effect on the
14 management of An Garda Síochána, it was going to have
15 repercussions politically and for Government. And a 11:43
16 Minister for Justice was forced out of office on a
17 wrong premise as a result of this. This had
18 wide-ranging consequences. And I was asked to take
19 this on with less than 48 to prepare. Mr. McGuinness,
20 can I say to you, I am sorry to get -- what I find 11:43
21 frustrating about this is that people who arranged up
22 here today to ask me questions, the staff available to
23 the Commissioner, my former client, it's nowhere
24 resembles what I had to contend with. I had two junior
25 counsel and I had a very assiduous and hard-working 11:43
26 solicitor. That is the extent of it. And we had to
27 deal with a massive amount of documentation. The
28 people who were lined up against me today to ask
29 questions have had months of preparation, you have hung

1 on every word that I have used in that Commission, and
2 you are free -- and you are well prepared, I had to
3 take this on the hoof. And to come back to your
4 question; the reality of life is, I had to raise this
5 at this stage because I did not know what was coming
6 down the track against these clients. 11:44

7 141 Q. All right. Yes. I mean, obviously one does have to
8 look at it from the perspective of what was happening
9 then at that time and what people knew at that time.
10 You couldn't foresee necessarily what evidence might
11 emerge at the Commission? 11:44

12 A. Of course.

13 142 Q. You couldn't foresee what documents might be relied
14 upon and you couldn't necessarily foresee any
15 particular outcome of the Commission? 11:44

16 A. Of course I couldn't. I had no idea what was coming in
17 the next module.

18 143 Q. Yes. But obviously then your judgement as to seeking
19 instructions in relation to credibility then, why did
20 you seek instructions to, as it were, test his
21 credibility? 11:44

22 A. Because, with the risk again of being very tedious, I
23 was told that the proven facts here by Sergeant McCabe,
24 he had produced a document where he listed out serious
25 allegations against these people, I needed to have
26 permission from my primary client, the Commissioner, to
27 deal with those issues and to seek permission to test
28 the credibility of these allegations. And if there is
29 no evidence to back them up, then I have to say, I 11:45

1 asked the simple question, why are these allegations
2 being made? what is the motivation? And it's a pure
3 and simple approach taken to that, and that is what I
4 took.

5 144 Q. Okay. would you accept, and you can answer this in 11:45
6 whatever way you think appropriate, but would you
7 accept that if one is seeking and receiving
8 instructions to challenge somebody's motivation or
9 challenge their credibility, that it necessarily calls
10 their integrity into being -- 11:45

11 A. Can I say this, and this is, as I say --

12 145 Q. -- in to question?

13 A. This is what I want to deal with. Because firstly, my
14 former client, the Commissioner, Commissioner
15 O'Sullivan, who I consider to be a very good and decent 11:46
16 person, I have to put that on the record. She is a
17 lady who gave me straightforward instructions, she has
18 never wavered. I do not want and never wanted this
19 man's character to be attacked and nor would I, because
20 I didn't see any reason for it. But as a lawyer 11:46
21 looking at this, and Commissioner O'Sullivan is not a
22 lawyer, if I challenge, which is the better word,
23 somebody's credibility on the facts and if there is no
24 evidence to support it - what was your motivation for
25 making these allegations in the first place? - it 11:46
26 necessarily seems to me, as a lawyer, that there are
27 issues of integrity surrounding those allegations.
28 Not the character, but issues of integrity surrounding
29 the allegations. And I know I am going to be asked

1 questions of this probably all day long about my, what
2 I said or what I didn't say to the Commission, but
3 that's as I understand the position. But Commissioner
4 O'Sullivan never used the word integrity.

5 146 Q. All right.

11:47

6 A. And when I said at the Commission on day 29 that that
7 was an error on my part, I meant an error because she
8 never said to me the word integrity.

9 147 Q. Yes.

10 A. That was my -- and can I say this: I was being asked
11 at the Commission, I had to -- I had to revisit my
12 instructions, which is most unusual, I never had to
13 encounter it before, I was sent out of the room to get
14 them re-confirmed. My instructions were being
15 interpreted by the judge. He introduced the word
16 integrity. The word malice was used -- was introduced
17 by him. I never used the word malice. And where I
18 fell into the trap in all of this is that I was trying
19 to interpret what the judge's interpretation was of
20 integrity. And my interpretation of integrity is what
21 I have just given to you.

11:47

11:47

11:48

22 148 Q. Yes.

23 A. And it's as simple as that, Mr. McGuinness.

24 149 Q. Yes. Well, obviously, I want to be fair to you as to
25 any other witness, but I understand what you are saying
26 is that where questions of credibility do arise and if
27 questions of credibility call into question why some
28 particular allegation was made, it does raise the issue
29 of motivation, and in those circumstances it

11:48

1 necessarily impinges on the integrity of whoever has
2 made the allegation?

3 A. As to the -- only, and I said that at the Commission,
4 in that respect. In that respect. In respect of the
5 allegations. And that may well be lawyer language. It 11:48
6 wasn't Commissioner O'Sullivan's language. She never
7 gave me instructions at any stage and that is clear --

8 150 Q. Okay.

9 A. -- to challenge this man's character.

10 151 Q. We will come back to that in a minute. I am just 11:49
11 obviously still dealing with the basis upon which you
12 were seeking the instructions. Can you recollect how
13 you put it to Chief Superintendent Healy on the 14th?

14 A. Well, my colleagues may back me up on this, you can ask
15 them the same questions -- 11:49

16 152 Q. Yes.

17 A. -- I don't know what way they will answer it, but my
18 understanding of it is simple: This man has made
19 serious allegations. They will, if proven, have
20 serious consequences for one or other or more of them. 11:49
21 I need to be able to challenge these allegations as
22 they come up in turn, if they do, and I need to know on
23 what basis they are being made, I need to know the
24 facts, I need to challenge the credibility of these
25 allegations, and I need to know if there is no evidence 11:49
26 to support them, it follows naturally that there will
27 be motivation issues raised as to why. Why would
28 anyone make these allegations if there is no evidence
29 to support them? Why? And the question must be there

1 has to be a reason and I needed permission, the green
2 light, to explore that, with Sergeant McCabe.

3 153 Q. In other words, you wanted to be free at the end of the
4 day, should the evidence support it, to be able to make
5 a case that certain allegations were baseless or appear 11:50
6 to have been ill-motivated or appear to have no basis
7 for them?

8 A. At this point I wasn't making any assessment that this
9 man --

10 154 Q. Yes, I understand. 11:50

11 A. -- Sergeant McCabe was ill-motivated. I was merely
12 seeking to explore all issues relating to these
13 allegations. I had made no prejudgment about this.

14 155 Q. Okay. Now, what did Superintendent Healy tell you the
15 next morning? 11:50

16 A. He gave me the go-ahead. He said that the Commissioner
17 has said that you have instructions to do exactly as
18 you said.

19 156 Q. To challenge the motivation --

20 A. Insofar as it related to the allegations contained in 11:50
21 -- allegations of corruption and malpractice.

22 157 Q. Okay. Well, did that embrace then, in your
23 understanding, all of the allegations under scrutiny by
24 the Commission?

25 A. All of the allegations. 11:51

26 158 Q. Yes. So --

27 A. And may I say, Mr. McGuinness, it's been quoted in the
28 press that all of these allegations have been upheld.
29 None of these allegations were upheld against my

1 clients. None of the corruption allegations. And
2 insofar as serious malpractice is concerned, none of
3 those were upheld against my clients. The malpractice
4 was held against the rank of middle management,
5 including sergeant and sergeant in charge. And it's 11:51
6 easy for people to have hindsight and say that I acted
7 in an improper way. If I had sat on my hands,
8 Mr. McGuinness, and not taken any action, and if, for
9 any reason, those clients were found guilty of
10 corruption, the consequences for me would be far more 11:52
11 severe than the consequences which I now suffer, having
12 to answer up for my actions as a professional lawyer of
13 nearly 40 years' standing, as to how I dealt with this
14 matter. I mean, this has weighed heavily on me.

15 159 Q.

Yes. 11:52

16 CHAIRMAN: Sorry, if I can just intervene. Mr. Smyth,
17 I will appreciate very readily that being in the public
18 eye is not an easy thing and being in the public eye in
19 a bad way is a very nasty experience. I can appreciate
20 as well that although I am not following media reports 11:52
21 that I am aware that in respect of some things wrong
22 facts were reported as facts where they are not. Now,
23 I am not saying what they were, but I appreciate if
24 that happens to anybody, it's a very unpleasant
25 experience. However, what I'm doing here is not 11:53
26 judging the media and I wouldn't have the competency to
27 do that because as I say, I am not following it, but
28 rather I am simply trying to get to the bottom of the
29 questions that are asked of me by the Oireachtas to

1 give an answer to. And what it now boils down to in
2 relation to this is whether there were any unjustified
3 grounds relied upon by your client to discredit
4 Sergeant McCabe at the O'Higgins Commission, and let's
5 focus on that. 11:53

6 160 Q. MR. MCGUINNESS: One thing that I just want to be clear
7 about is: When Chief Superintendent Healy came back to
8 you on the morning of the 15th, did he tell you that
9 the Commissioner had given instructions that Sergeant
10 McCabe's integrity was not to be challenged? 11:54

11 A. He told me that, as I had requested, I was given
12 permission to challenge credibility and motivation
13 relating to the allegations of corruption and
14 malpractice.

15 161 Q. Okay. And it would appear -- 11:54

16 A. I did not ask for instructions about integrity.

17 162 Q. I understand that. But the confirmation of instructs
18 came back with no restriction, as it were, that you
19 weren't to do this or that, in particular you weren't
20 to challenge his integrity or suggest that he was 11:54
21 acting mala fides?

22 A. I never suggested he was acting mala fides, I never
23 suggested that to him.

24 163 Q. I understand that. I am just trying to --

25 A. Nor did I seek any kind of concession that if -- do I 11:54
26 have liberty to be wide-ranging --

27 164 Q. Yes.

28 A. -- in relation to other matters.

29 165 Q. I am just trying to be clear and to ask you to be clear

1 about what specifically Chief Superintendent Healy said
2 and whether, in particular, he conveyed to you any
3 restriction on your instructions or any limits to it?
4 A. I got permission for the instructions that I sought.
5 166 Q. Okay. 11:55
6 A. And there was no question of anybody -- if you are
7 asking me was I at liberty to trespass into other
8 areas, I did not seek that and I didn't do it.
9 167 Q. All right. Well, the next day, or that day, the row
10 blew up, if I can put it this way, and I am sure you 11:55
11 don't forget that. But if we could look at page --
12 it's 178 to 179 of the transcript. At page 663.
13 CHAIRMAN: So this is Friday, 15th May?
14 MR. MCGUINNESS: The Friday, yes.
15 CHAIRMAN: 2015. PM. 11:56
16 168 Q. MR. MCGUINNESS: And the issue arose in the context of
17 the cross-examination of Chief Superintendent Rooney,
18 isn't that correct?
19 A. Yes.
20 169 Q. And Mr. Gillane objects, at the top of the next page, 11:56
21 179?
22 A. Yes.
23 170 Q. And he says:
24
25 "I don't mean to cut across the witness but I think
26 just in relation to this matter, unless the parties
27 have a different view, I think it's evidence concerning
28 a matter that the Commission isn't directed to
29 investigate, whether it's relevant or not is a matter

1 for the parties."

2

3

And then you reply:

4

5

"Can I say, Judge, perhaps you should hear us since

6

this is a private hearing. The relevance may be in

7

context of motivation for certain facts or for certain

8

matters or, indeed, credibility in relation to the

9

certain matters."

10

11:57

11

And the issue was stated by you there, and that

12

certainly appears to be consistent with what the

13

instructions you sought were and what the confirmation

14

given by Chief Superintendent Healy was, you'd agree

15

with that, I take it?

11:57

16

A. Yes.

17

171 Q. And obviously it's fair to say you don't make the case

18

or are recorded there as saying that you wished to make

19

a positive case that Sergeant McCabe was ill-motivated

20

or was acting mala fides --

11:58

21

A. No.

22

172 Q. -- or that you wanted to challenge his integrity?

23

A. No, no.

24

173 Q. At that stage, the Tribunal rose, according to the

25

transcript, at 15:10, and Mr. McDowell had raised that

11:58

26

issue of the Commissioner's instructions at that point

27

in time?

28

A. Yes.

29

174 Q. Now, you hadn't consulted with the Commissioner

1 yourself obviously at that point in time?

2 A. No.

3 175 Q. And did you give advice that the Commissioner should
4 reconfirm her instructions?

5 A. At that point?

11:58

6 176 Q. Yes.

7 A. No. The judge requested ultimately that they should be
8 reconfirmed.

9 177 Q. We have Ms. Ryan's note at 3767. And it appears there
10 in the middle of that:

11:59

11

12 "Went back to Colm Smyth and informed him of
13 Commissioner's instructions as per Fergus Healy.
14 Commission asked do we want five minutes. We say yes.
15 Before rising, Judge asked: Does this have to be
16 introduced in this module?"

17

18 It then records that he made numerous calls directly to
19 the Commissioner. Were any of the calls made in your
20 presence or --

11:59

21 A. No, these calls were not made in my presence.

22 178 Q. All right. Okay. And were you informed at any stage
23 that the Commissioner consulted with anyone else?

24 A. There was a reference, I asked -- I remember Fergus
25 Healy talking to me. I said, what is the position? I
26 said, we need to move this along. Some words of that
27 nature and he informed me that he had phoned the
28 Commissioner -- or phoned the -- yes, phoned the
29 Commissioner and she was ringing back, as I understand

12:00

1 it -- or no, that he rang the Commissioner and said she
2 wasn't -- it may be that she wasn't able to talk, that
3 she was -- I understood it to be that she was with the
4 Minister. But that may be my interpretation of it, but
5 that's as I understood it. 12:00

6 179 Q. Yes. And was it at that stage that you were asked to
7 put your advices in writing, do you recollect?

8 A. I think we were requested to put advices in writing by
9 the judge?

10 180 Q. No, no, advice -- your advices to the Commissioner in 12:00
11 writing?

12 A. Yes. Well, I think what happened next was that we --
13 when the Commissioner was freed up, we got a call to --
14 she dealt with the matter and she said that she was
15 giving us permission and she requested -- she 12:01
16 requested -- yes, I think what you could describe it as
17 a letter of -- I am describing it as a letter of
18 comfort perhaps for the advices given, or for the oral
19 advices and then she wanted to follow up by letter, to
20 be advised as to the reasoning and so on. 12:01

21 181 Q. Yes. You were describing it as a letter of comfort.
22 Was that the way you saw it?

23 A. Well, that is the way I saw it.

24 182 Q. Or was that the way it was conveyed to you as a request
25 for a letter of comfort? 12:01

26 A. Well, she certainly wanted a letter setting out -- from
27 memory, she certainly requested a letter and would have
28 been entitled to one, obviously, setting out the
29 reasons for this, and why we were doing it, so that she

1 was clear in her mind as well, she was giving the oral
2 advices based on -- or giving the oral instructions
3 based on my oral advices and she wanted obviously a
4 paper trail in relation to that. That is as I saw it.

5 183 Q. Yes. There is everything to be said for having a 12:02
6 degree of certainty about what advice is --

7 A. Yes.

8 184 Q. -- and what advice has been proffered?

9 A. Yes.

10 185 Q. But the Commissioner seemed to make it clear yesterday 12:02
11 that, from the time the terms of reference were
12 published, that she saw the Commission as, I won't say
13 an ideal opportunity, but the appropriate opportunity
14 where everything concerning all the suggestions of
15 either malpractice or irregularities or corruption, 12:02
16 etcetera, to do with Bailieboro and arising from
17 Sergeant McCabe's complaints, as being appropriate to
18 be considered by the Commission, including Sergeant
19 McCabe's involvement in it all?

20 A. Yes. As I understand, I think in fact the words were 12:03
21 she welcomed this opportunity for the matters to be
22 aired in this way.

23 186 Q. So she appears, would you agree from having her
24 evidence yesterday that she appears to have in fact
25 been of the mindset that all of the matters connected 12:03
26 with Sergeant McCabe's complaints, the appropriate
27 place was the Commission, where they could all be aired
28 fully?

29 A. That is as I understood it, yes.

1 187 Q. And did you understand that the instruction that she
2 gave to you, through Chief Superintendent Healy on the
3 15th, was consistent with that intention?
4 A. That is as I understood it, yes, because she had a
5 clearance to deal with the credibility and motivations 12:03
6 of all matters raised.
7 188 Q. And obviously she has told the Tribunal that one of her
8 intentions was that the respected High Court judge,
9 former High Court judge, could look into the matter and
10 make recommendations and findings which would be of 12:04
11 benefit to the force and to everyone?
12 A. Precisely.
13 189 Q. Without any impediment to him as to how he should
14 inquire, other than the terms of reference, obviously?
15 A. Yes. 12:04
16 190 Q. Is that the way you saw it?
17 A. That is the way I saw it.
18 191 Q. But the letter of advices that was sent in your name
19 and the name of your other counsel, I think Mr. Byrne
20 did that up on his laptop, is that right? 12:04
21 A. Yes, Mr. Byrne was responsible for the drafting of
22 that.
23 192 Q. And perhaps we'll just look at that at page 667. It
24 says:
25 12:05
26 "Dear Chief Superintendent Healy
27 As counsel appointed to represent the interests of An
28 Garda Síochána before the O'Higgins Commission, it's
29 our view that it's appropriate and necessary that the

1 conduct of any member of the force be challenged by
2 cross-examination if and to the extent necessary."

3 A. Yes.

4 193 Q. Now, just pausing there.

5 A. Sure.

12:05

6 194 Q. You don't mention Sergeant McCabe expressly in that.
7 Did you consider that it was part of your brief to
8 necessarily challenge the evidence of any member
9 insofar as it was relevant to the issue?

10 A. As I say, absolutely. Absolutely.

12:05

11 195 Q. "It's likely that in the course of the process which is
12 a private hearing it will be necessary to put to
13 Sergeant McCabe certain background issues which touch
14 upon and concern the history of his dealings with
15 members of Garda management."

12:05

16
17 and what did you envisage as being embraced in that at
18 that point in time?

19 A. Well, there were issues running right through the
20 modules. I mean, for example, to take one example, I
21 mean there was allegations of dereliction of duty being
22 presided over by Superintendent Clancy, for example,
23 and the whole interaction around that and as to how
24 Superintendent Clancy on the one hand was making -- you
25 know, he was there doing his job with at a senior
26 management level and Sergeant McCabe as sergeant in
27 charge was running the station, and there was
28 interaction between the two. And Sergeant McCabe was
29 satisfied that Superintendent Cunningham was presiding

12:06

12:06

1 over this dereliction of duty, and, you know, probing
2 questions were asked in respect of that. So that's the
3 type of thing that was envisaged, as it happened, but
4 not obviously at that stage. That hadn't come up at
5 that stage. Do you follow? 12:06

6 196 Q. Yes.

7 A. But that is the type of thing that we were seeking
8 liberty for.

9 197 Q. Yes. It continues on:
10 12:06

11 "In particular, we consider it necessary and in the
12 interests of a fair and balanced examination of the
13 subject matter of the investigation, that specific
14 issues be put to Sergeant McCabe regarding his conduct
15 and interactions with senior management following the 12:07
16 completion of a formal Garda investigation into a
17 complaint against Sergeant McCabe which resulted in a
18 direction by the DPP that no further action was to be
19 taken against Sergeant McCabe."

20 A. Yes. 12:07

21 198 Q. Now, can I ask you, can you recall at this point in
22 time, the reference there to specific issues to be put
23 to Sergeant McCabe, what had you in mind at that point?

24 A. This was the interaction regarding his -- this is the
25 investigation, and it envisaged what took place at this 12:07
26 Mullingar meeting in August of 2008, and the reasons he
27 wanted to get access to the file, as I understand it.
28 Now, as it happened, arising out of that interaction -
29 I don't know if you want me to deal with the

1 interaction in particular or are you just asking me
2 about the letter - but that is what we had in mind, to
3 deal with that interaction as between, for example,
4 Cunningham and Yvonne Martin and Sergeant McCabe at
5 that point in relation to what he wanted, vis-á-vis 12:08
6 this file and what had been said at that meeting. And
7 we were always led to believe that there was -- he said
8 at that meeting, as I understand it, that he made
9 allegations against Superintendent Clancy for the
10 purpose of getting access to the full directions, not 12:08
11 just the letter which says there will be no prosecution
12 or there will be a prosecution under a section
13 whatever, but the full reporting, as I understand it,
14 as the DPP sometimes does, and to which no citizen is
15 entitled. So that is as I understood it. But as it 12:08
16 turned out of course, Mr. McGuinness, that was wrong.
17 But I won't jump the gun on that, I want to come back
18 to that for a particular reason as well.

19 199 Q. Yes. I was concerned to know whether the specific
20 issues were limited to that -- 12:09

21 A. No.

22 200 Q. -- as it were, Mullingar meeting, the outcome of it?

23 A. No. But it's quite clear that in the letter we say, we
24 point out:
25 12:09
26 "It will be necessary to put to Sergeant McCabe certain
27 background issues which touch upon and concern the
28 history of his dealing with members of Garda
29 management."

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And then, "in particular".

201 Q. Yes.

A. So it was a wide-ranging -- wide-ranging authority.

202 Q. Yes. But was it your intention to make the case essentially that because of Sergeant McCabe's frustrations about not getting access to the DPP's letter or file, it doesn't perhaps matter at this stage, that that was the reason for making all the complaints?

12:09

12:10

A. It could have been one aspect of it, Mr. McGuinness, because as I say, what troubled us initially is why does someone change from being someone who is well-liked and well-respected and someone who has been -- you know, senior management are very happy with Sergeant McCabe and suddenly all of this changes at the end of 2006 and kicking off in 2007, the train of allegations are fast approaching various stations. And I mean, they are allegations made against chief superintendents, superintendents, and so. Of course we were looking for the trigger and it seemed perhaps that this was the trigger. I don't know.

12:10

12:10

203 Q. The trigger for all of the complaints?

A. May it may well be and it may not -- you see, Mr. McGuinness, I don't know that, because as yet we had to see, as the modules went on, what is behind these things.

12:10

204 Q. Yes.

A. What has caused him to do this.

1 205 Q. That appears to be an important part of what you're
2 saying; that you weren't actually making a judgement
3 and you didn't have instructions to that effect but you
4 wanted to see what would emerge or might emerge?
5 A. Yes. 12:11
6 206 Q. Is that right?
7 A. That is what we wanted to see.
8 207 Q. Yes. I mean, I am --
9 A. We were desperately -- sorry to cut you off. We were
10 desperately seeking to find what is it that has caused 12:11
11 this fine, upstanding member of the force to suddenly
12 become like this. It just did not make sense to us.
13 208 Q. I mean, I am not passing any judgement in any way by
14 using the words I am about to use --
15 A. Sure. 12:11
16 209 Q. -- or suggesting that they are appropriate, but the
17 perception, was it this sort of thought process behind
18 it, that Sergeant McCabe had turned into a whinger, a
19 moaner, a complainer, arising from these things, and
20 that, for that reason, his complaints didn't have 12:11
21 veracity or accuracy or credibility?
22 A. I never viewed Sergeant McCabe in that light.
23 210 Q. Yes.
24 A. I never -- I never seen considered that he was a
25 whinger or a complainer. 12:12
26 211 Q. Yes.
27 A. Nor did I ever put it to him that he was a whinger or
28 complainer. I want to make that clear. But I also
29 want to say this: That the perception I had, and it

1 was said here yesterday by Mr. McDowell, I understand
2 in cross-examining the Commissioner, that there was a
3 certain spite or hostility.

4 212 Q. Yes.

5 A. From my observation, and I can't say anything else but 12:12
6 purely from my observation, I have to say, and I have
7 said it many times to my two colleagues, it is
8 remarkable, quite remarkable, that in all of what has
9 gone on since 2008 that the men of which I speak of,
10 that is Clancy, Cunningham, even Callinan, former 12:12
11 Commissioner Callinan, and I think is it Rooney, those
12 people who were brought in to focus, there was, from my
13 observation, no element of spite or hostility towards
14 Sergeant McCabe at any stage. And it is something, I
15 have to say, I would be well awake to because it would 12:13
16 something we would have to take into account; were we
17 getting a skewed view from these people? was there
18 something more behind them? I mean we had to look at
19 that.

20 213 Q. Yes? 12:13

21 A. We have to see, because we will -- I was ascribed
22 yesterday as a mouthpiece by Mr. McDowell. I am not a
23 mouthpiece for anyone. I was prepared to be objective,
24 as I had to be objective in these matters.

25 214 Q. Yes. 12:13

26 A. And I have to have a balanced view and if I saw any
27 hostility or spite coming from clients, I may have
28 taken another view altogether. That is all I am saying
29 on that point.

1 215 Q. Yes. Well, obviously the reference in my previous
2 question to complaints, complaints had been made, but
3 was it your view, as intended to be conveyed by this
4 advice, that the possible motivation for those
5 complaints should be a matter for the Commission to 12:13
6 assess on the basis of all of the facts?

7 A. Yes, and I appreciate that, and I have already
8 explained that I had -- this is why I was seeking
9 permission to do what I did and this is why I had to
10 make my case. I could sit on my hands and hope that it 12:14
11 would all be well on the day, and I know that there is
12 a view that if you had just kept quiet, sat on your
13 hands it would all work out in the end. I am afraid I
14 don't see that that is my duty, Mr. McGuinness, I see
15 my duty in a different light: I am bound, as you are 12:14
16 bound, by ethics of our profession. And the
17 fundamental ethic is that we must act in the best
18 interests of our client, regardless, and without regard
19 for the consequences that may befall us.

20 216 Q. All right. 12:14

21 A. And I take that very seriously.

22 217 Q. Yes. Going back to the advices and the final line is:
23
24 "The purpose of such a line of inquiry is to open to
25 the Commission of Investigation the full factual 12:14
26 background surrounding the complaints made by Sergeant
27 McCabe so that all of the circumstances are clearly put
28 before the Commission for consideration.""

29 A. Yes.

1 218 Q. And that I think probably neatly encapsulates what you
2 have said --

3 A. Yes.

4 219 Q. -- in a number of your answers. Now, one of the 12:15
5 striking things is that the advices don't refer in any
6 explicit way to the motivation, good or bad, of
7 Sergeant McCabe or the credibility of Sergeant McCabe
8 or his integrity or whether he was acting mala fides,
9 but this has been -- the advices that you have given
10 orally are being referred to as motivation/credibility 12:15
11 issues?

12 A. Correct, yes.

13 220 Q. Yes. Is there any reason why they are not, as it were,
14 sort of explicitly addressed in the written advices
15 or -- 12:15

16 A. As I say, the oral advices were given. We received,
17 orally from Fergus Healy, permission and the green
18 light. We were asked, asked to provide a letter of
19 comfort, as I call it, in relation to the reasoning
20 behind what we were doing. You make a fair point, 12:15
21 Mr. McGuinness, you make a very fair point. On
22 hindsight, it should, of course, include the words
23 "credibility" and "motivation", and I take
24 responsibility -- well, it's collective responsibility,
25 I suppose, but I, as a leader of the team, have to take 12:16
26 responsibility for that. It should have included the
27 word -- words "credibility" and "motivation", but as I
28 say, I already had my advices -- I already had my
29 instructions as per my advices.

1 221 Q. Yes, yes. It's just from the point of view of
2 understanding that and considering it, and it was read
3 over the phone to the Commissioner?

4 A. Yes.

5 222 Q. And it didn't, obviously, as read over, if read over 12:16
6 accurately, contain those matters. You weren't
7 intending to exclude those issues?

8 A. Oh, without -- not at all. Sure I was calling for
9 these at all times. This is why I wanted -- I wanted
10 instruction -- I wanted instructions on these matters. 12:16
11 And I know that Annmarie Ryan -- I mean, we could have
12 got them earlier, perhaps. The Commissioner is
13 responsible for An Garda Síochána, I know she was
14 busy --

15 CHAIRMAN: I think I understand matters up to this 12:17
16 point very well. Thank you.

17 223 Q. MR. MCGUINNESS: In any event, the Commission
18 recommenced, and we can perhaps go to page 671 of the
19 booklets, it's booklet 1A -- 1B. Mr. Gillane is taking
20 up the issue here. I don't intend to read what has 12:17
21 already been said there. Mr. McDowell intervenes at
22 the bottom of page 671, expressing his shock, going
23 over on to page 184 of the transcript, 674 of the book,
24 675. Judge O'Higgins, at page 676, there saying it's
25 in private. Mr. McDowell then raises the issue of 12:18
26 impugning his client's credibility, questioning his
27 client's motivation or behaviour. He says he is
28 looking for confirmation of instructions there. Judge
29 O'Higgins then raises the issue directing the

1 discussion, and at the bottom of page 188 says the
2 following:

3
4 "Secondly, the matters that you have raised are
5 important in relation to this -- it is an inquiry. It
6 is not an adversarial thing. The question of
7 credibility of witnesses can be probed in the normal
8 fashion in relation to clearly the accuracy of
9 somebody's memory bears on the credibility of their
10 evidence and so forth but if it goes beyond that, if it
11 is the Commissioner's case that she wishes to impugn
12 the motivation and the integrity of Sergeant McCabe, if
13 those are the instructions that you have, Mr. Smyth, I
14 think you should say so in so many words. If they are
15 not your instructions, that is a different matter

16
17 If those are your instructions that Sergeant McCabe
18 acted out of improper motivation and that his character
19 is -- so be it if those are your instructions but if
20 not -- if they are, I think the Commission bearing the
21 nature of the Inquiry should be appraised of that.

22
23 If that stage is arrived at, then the question of
24 notice to the other parties or whether they were taken
25 by surprise will be dealt with by the Commission. As I
26 indicated in my opening statement, nobody is going to
27 be ambushed. But that doesn't arise at the moment.

28
29 I think in view of the particular nature of the matters

1 under discussion that it is not unreasonable of
2 Mr. McDowell to say whether an attack on the integrity
3 and motivation of Sergeant McCabe forms part of your
4 case or whether you are saying that, no, he is
5 inaccurate or mistaken." 12:20

6
7 And then you say:

8
9 "Do you want me to respond?"

10
11 And the Judge says: "Please". 12:20

12
13 And you are quoted as saying:

14
15 "I have instructions from the Commissioner, Judge. 12:20
16 This is an inquiry dealing with the allegations of
17 malpractice and corruption on a grand scale by members
18 of an Garda Síochána.

19 MR. JUSTICE O'HIGGINS: No, this part of the Inquiry --

20 MR. SMYTH: I appreciate that but my instructions are
21 to challenge the integrity certainly of Sergeant McCabe
22 and his motivation.

23 MR. JUSTICE O'HIGGINS: The integrity?

24 MR. SMYTH: His motivation and his credibility in
25 mounting these allegations of corruption and
26 malpractice.

27 MR. JUSTICE O'HIGGINS: There is a difference. In
28 relation to the question of credibility, as I have
29 already indicated, that is an everyday matter. One can

1 suggest to a witness that his evidence shouldn't be
2 believed because of something but an attack on
3 somebody's credibility, on his motivation or integrity
4 is something that really doesn't form part of this
5 Inquiry. It would be necessary I think for you to go
6 further and say that the complaints and the actions of
7 Sergeant McCabe on your instructions were motivated by,
8 his motivation was dishonest or wrong. In other words,
9 that he made these allegations not in good faith but
10 because he was motivated by malice or some such motive
11 and that impinges on his integrity. If those are your
12 instructions from the Commissioner, so be it.

13 MR. SMYTH: So be it. That is the position, Judge.

14 MR. JUSTICE O'HIGGINS: Those are your --

15 MR. SMYTH: Yes, as the evidence will demonstrate,
16 Judge.

17 MR. JUSTICE O'HIGGINS: Okay, those are your --

18 MR. SMYTH: If we are allowed to proceed.

19 MR. JUSTICE O'HIGGINS: Those are your instructions
20 from the Commissioner.

21 MR. SMYTH: Those are my instructions, Judge.

22 MR. JUSTICE O'HIGGINS: Very good.

23 MR. SMYTH: I mean, this isn't something that I am
24 pulling out of the sky..."

25 CHAIRMAN: No, I have all of that, Mr. McGuinness. And 12:21
26 if you go on a few pages, Mr. Smyth says:

27

28 "Whatever the reasons are for it on his side and it
29 runs right through all of the --

1 MR. JUSTICE O'HIGGINS: But you are attacking his
2 motivation and you attacking his integrity.

3 MR. SMYTH: Right the way through.

4 MR. JUSTICE O'HIGGINS: Full stop."

5

6 That is the important bit.

7 MR. MCGUINNESS: Page 682.

8 224 Q. Now, obviously in the heat of advocacy you didn't
9 mention the word "integrity", as such, but you do
10 appear to have married yourself to it, if I could put
11 it that way? 12:22

12 A. Could you just go back to the top again, please, to
13 where I say what my instructions were?

14 225 Q. Yes.

15 A. Where I mention credibility and motivation in mounting 12:22
16 these -- those were my instructions. And in any event,
17 you know where it is. But those were my instructions
18 from the Commissioner. I had a situation where I was
19 faced by Judge O'Higgins, who was asking me
20 persistently about interpreting my instructions. 12:22

21 226 Q. Yes.

22 A. An element of frustration was certainly creeping in.
23 He was interpreting my instructions as including
24 malice. He mentioned the word "malice". I never
25 mentioned the word "malice". He first mentioned the 12:22
26 word "integrity", and he mentioned the word
27 "character". I never mentioned the word "character".
28 There was an element of frustration creeping in at that
29 point. I had to revisit, again, my instructions. I

1 was sent out of the room, and so on. So the point --
2 this matter was clarified in greater -- in great detail
3 on day 29 --

4 227 Q. Yes.

5 A. -- when Judge O'Higgins revisited the matter. 12:23

6 228 Q. Yes. But just in terms of the interchange there, I
7 mean, presumably you didn't believe that you were going
8 outside your instructions, and you didn't intend to?

9 A. I did not intend to go outside -- nor, may I say,
10 Mr. McGuinness, I did not go outside my instructions. 12:23

11 I never challenged this man on character. I never
12 challenged him -- it was suggested yesterday by

13 Mr. McDowell that I challenged -- that I said that this
14 man was not trustworthy. I never challenged him. I

15 never said he was untrustworthy. It was suggested that 12:23
16 I said he was malicious. I never put that to Sergeant

17 McCabe. It was suggested that he was acting out of
18 good faith -- or lack of good faith, and all that. I

19 never put any of those matters. And, in fact, can I
20 say, Mr. McGuinness, the invitation and the gauntlet 12:24

21 was thrown down to Mr. McDowell on day 29, on the eve
22 of the Commissioner giving her evidence, because

23 Mr. McDowell, with all due respect to him, had, and
24 perhaps rightly in his own way, blown a gasket on this;

25 he had said the Commissioner, when she is down here to 12:24
26 give evidence, or if -- I don't know -- in fairness to

27 him, he hadn't known at that stage she was coming down,
28 but I will insist on her coming down, I think is what

29 he said, and, when she does, I will be cross-examining

1 her and she will not like the experience. Now, on day
2 29, for whatever reason, this matter was raised by
3 Judge O'Higgins, just before the Commissioner stepped
4 into the witness-box, and he addressed this issue again
5 with me, as to what my instructions were. And I 12:24
6 explained to him in a polite way, as I am required to
7 do: I did not, Judge, use the word "malice"; that was
8 your interpretation of my instructions.

9 229 Q. Yes.

10 A. My instructions, I told him, extended to credibility 12:25
11 and motivation, and the Judge explained that he
12 understands the position. Mr. Gillane stepped in and
13 gave his version as to how he saw the position
14 vis-á-vis my instructions, or otherwise. Mr. McDowell
15 did not cross-examine Commissioner O'Sullivan. And to 12:25
16 my mind, he accepted the position as at that time.

17 230 Q. Yes. Well, we will come to that, Mr. Smyth. But just
18 sticking with the transcript here, I mean, what is
19 recorded is recorded?

20 A. Yes. 12:25

21 231 Q. And it does appear that you adopted the proposition
22 that you were attacking his integrity?

23 A. I have explained to you already, Mr. McGuinness, I did
24 not stray outside the instructions that I was given.

25 232 Q. Yes. 12:25

26 A. And whatever else -- however this may be interpreted --
27 as I say, Roger Casement was hanged on a comma. I may
28 be hanged on my version of what -- on a word that I
29 uttered in the Commission.

1 233 Q. Yes. I --
2 A. Can I say this, Mr. McGuinness - sorry to cut across
3 you - I have explained to you already that my
4 interpretation of the word "integrity" is -- came from
5 me, that was my word. 12:26
6 234 Q. Yes.
7 A. Firstly, it was the Judge's word, but my interpretation
8 of what the Judge saw as integrity, that's where I fell
9 into the trap, and I saw integrity as being something
10 that flows from someone or concerns allegations which 12:26
11 have not been stood up in evidence, have not stood the
12 test of credibility, there must be an issue of
13 integrity attaching in that respect.
14 235 Q. Yes. So I think if I am summarising your position
15 correctly, the freedom to challenge his motivation and 12:26
16 credibility could lead in a situation where, if the
17 allegations were found to be without foundation or were
18 rejected, they could reflect on the integrity of the
19 allegations?
20 A. On the allegations only, not on the character of the 12:27
21 individual, which I never challenged.
22 236 Q. All right. You draw that distinction?
23 A. Well, that is as I see it.
24 237 Q. Yes. All right.
25 A. I did not challenge his character. This man was of 12:27
26 fine upstanding character. He had no issues in
27 relation to -- and I said in that respect, in respect
28 of the allegations, but the Commissioner did not
29 instruct me to attack his character and I didn't do it.

1 238 Q. All right. Can I just ask you to look at, then, page
2 687. It follows the exchange that we have looked at
3 there, and just, it appears at some stage you are
4 actually getting instructions, and the Judge asks if
5 you would like to rise, and if you had five minutes. 12:27
6 And the Commission rises then and --
7 CHAIRMAN: The time of that one is?
8 MR. MCGUINNESS: Pardon, Judge?
9 CHAIRMAN: There is a time for that, isn't there? I am
10 just looking back. Anyway, sorry, please carry on. 12:28
11 239 Q. MR. MCGUINNESS: And it would appear that there was
12 some attempt to give you instructions and
13 Superintendent Healy had been on the phone a second
14 time. Had you been aware, prior to the exchange we
15 have looked at, that the Commissioner had wanted an 12:28
16 adjournment if possible?
17 A. I'm -- I have no recollection of that, Mr. McGuinness.
18 I am afraid I can't -- this was at a point -- sorry,
19 could you just refresh my memory again on this, please,
20 just if I could see -- 12:28
21 240 Q. Yes. Well, the issue of the instructions first arose,
22 it would appear, if we are looking at the time-line on
23 the transcript, 15:10, that is at page 664. There was
24 an adjournment then, your instructions are confirmed
25 and the tribunal -- or the Commission resumes at 15:36. 12:29
26 A. Yes.
27 241 Q. And --
28 A. And during that time I get my instructions
29 re-confirmed, is that the question?

1 242 Q. Yes. The Tribunal then rises again at 16:10.

2 A. Yes.

3 243 Q. And your confirmed instructions are re-confirmed in
4 that period. But could I ask you to look at Chief
5 Superintendent Healy's typed notes for that, at 3825, 12:29
6 and just to read it in whole. It said:
7
8 "Made several telephone conversations with Commissioner
9 O'Sullivan to get instructions to question Sergeant
10 Maurice McCabe on the Commission. The requirement was 12:30
11 to question the motive of the member for making various
12 complaints. Commissioner sought time to speak to DOJ.
13 Then returned with instructions that we:
14
15 1. In the light of developments on the front that 12:30
16 Sergeant McCabe had issues with now working in
17 Mullingar and his welfare, could we seek a deferral
18 until we seek advice."
19
20 Now, just stopping there. Do you recall being informed 12:30
21 of any concern that the Commissioner had about Sergeant
22 McCabe's welfare and working issues in Mullingar at
23 that point?
24 A. I do know that there was ongoing support for Sergeant
25 McCabe during the entire Commission. 12:30
26 244 Q. Yes.
27 A. As there was for other members --
28 245 Q. Yes.
29 A. -- who needed it, who needed that support. I'm not

1 aware of --

2 246 Q. Were you aware of any of the details of any of the
3 support that was being provided, in the period up to
4 the Commission or prior to --

5 A. No, I was not. I was not. I had -- I had no idea of 12:31
6 what was going on in the background. I do know at
7 this -- I know that, during the Commission, maybe not
8 at this point but during the Commission, there were
9 supports provided for not only Sergeant McCabe but for
10 another member who was upset. 12:31

11 247 Q. All right.

12 CHAIRMAN: All right, Mr. McGuinness, it's after half
13 past twelve now. Can I just ask you, just with a view
14 to seeing where we are going, you have other things to
15 go through, clearly; how long do you think you will be? 12:31

16 MR. MCGUINNESS: I think I won't be more than 30
17 minutes.

18 CHAIRMAN: Yes. That is great. I am just worried, if
19 someone has flown in to give evidence, it's not going
20 to disturb me in any way, and please excuse if this 12:31
21 happens, Mr. Smyth, but if she has to give evidence for
22 10 or 20 minutes, well why don't we do that immediately
23 after lunch --

24 MR. MCGUINNESS: I think so, Chairman.

25 CHAIRMAN: -- because otherwise anxiety levels do tend 12:31
26 to rise. And then, Mr. McDowell, do you think you will
27 be --

28 MR. MCDOWELL: I shouldn't be too long with this
29 witness.

1 CHAIRMAN: All right. Well, then you might finish
2 today, Mr. Smyth, with a bit of luck. Okay. So it's
3 half past one. Thank you.

4
5 THE HEARING ADJOURNED FOR LUNCH:

12:39

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1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

2
3 MR. MARRINAN: Fiona O'Sullivan, please.

4 CHAIRMAN: Just before we go on. Mr. O'Higgins, I see
5 you there, and I was wondering was there anything I
6 could do for you? 13:34

7 MR. MICHAEL O'HIGGINS: No.

8 CHAIRMAN: There is nothing here that's relevant to
9 David Taylor, who I think is your client, isn't that
10 right? 13:34

11 MR. MICHAEL O'HIGGINS: well, in the event, Chairman,
12 that anything arises, obviously it would be --
13 [inaudible - microphone not on] -- you gave the ruling.
14 I did speak to Mr. McGuinness over lunch about a
15 particular matter, but I indicated to him before we
16 started that I wasn't interested in pursuing it. 13:34

17 CHAIRMAN: Yes. But it is just as regards this module,
18 it's nothing to do with your client.

19 MR. MICHAEL O'HIGGINS: well --

20 CHAIRMAN: You are very welcome to be here, of course,
21 but you will appreciate it is not on the basis that I
22 could ever award costs in your favour for being here. 13:34

23 MR. MICHAEL O'HIGGINS: well, that matter hasn't
24 crossed my mind.

25 CHAIRMAN: No, I appreciate it wouldn't. 13:35

26 MR. MICHAEL O'HIGGINS: we're afforded representation,
27 and there are issues in some -- there are matters in
28 some of the witnesses' testimony which are relevant to
29 our client's case, of that I have no doubt.

1 CHAIRMAN: Like what?

2 MR. MICHAEL O'HIGGINS: well, Chairman, I don't want to
3 air them at this stage. I'm sure the Tribunal wants to
4 get on with its work, without me indicating or giving
5 the Tribunal a view as to how we're approaching our 13:35
6 case.

7 CHAIRMAN: Mr. O'Higgins, I don't think there is
8 anything relevant to your client here. As I say,
9 you're very welcome to stay, it's always a pleasure to
10 see you, but in the event that anything that comes up 13:35
11 that is potentially relevant to your client, according
12 to the analysis of the Tribunal, I will let you know.

13 MR. MICHAEL O'HIGGINS: Of course. And I note your
14 comments, Chairman, I take them on board, of course,
15 but we have our own assessment. 13:35

16 CHAIRMAN: well, it's my assessment that counts,
17 Mr. O'Higgins.

18 MR. MICHAEL O'HIGGINS: No, no, of course it is, in the
19 event that we are seeking to cross-examine, but we're
20 not. 13:36

21 CHAIRMAN: well, Mr. O'Higgins, it's very simple:
22 there is nothing to do with David Taylor now going on,
23 and there won't be. In the event that, very
24 unexpectedly, something comes up that is relevant to
25 David Taylor, we will let you know. 13:36

26 MR. MICHAEL O'HIGGINS: May it please the Tribunal.

27 MR. MARRINAN: Fiona O'Sullivan, please.

28

29

1 MS. FIONA O'SULLIVAN, HAVING BEEN SWORN, WAS DIRECTLY
2 EXAMINED BY MR. MARRINAN, AS FOLLOWS:
3

4 MR. MARRINAN: Ms. O'Sullivan's evidence is to be found
5 at page 3465, sir. 13:37

6 248 Q. I think, Ms. O'Sullivan, that you're an assistant
7 principal officer with the Department of Justice and
8 Equality, is that right?

9 A. That's correct, yeah. I'm on secondment at the moment
10 to the Department of Foreign Affairs and I'm posted in 13:37
11 Brussels, but I belong, so to say, to the Department of
12 Justice and Equality, yes.

13 249 Q. And I think that between June 2014 and July 2015 you
14 were the Press Officer in the Department of Justice, is
15 that so? 13:37

16 A. That's correct, yes.

17 250 Q. And on foot of that, I think that some -- or a number
18 of emails were copied to you, isn't that right?

19 A. That's correct, yes.

20 251 Q. And arising out of the disclosure of those emails to 13:37
21 the Tribunal, I think the position is that the Tribunal
22 wrote to you on the 4th December of 2017, requesting of
23 you whether or not you may have had discussions with
24 the former Minister for Justice, Frances Fitzgerald, or
25 the former Garda Commissioner, N6ir6in O'Sullivan? 13:38

26 A. That's correct yes.

27 252 Q. And I think that if we could just go, first of all, and
28 deal with the emails. I think they're at page 3484,
29 it's the first one. Have you got that?

1 A. I do.

2 253 Q. Yes. This is an email sent on the 4th July 2015 at
3 five minutes past eight, from Mr. Ken O'Leary to the
4 Minister, and it's signed at the end as "Ken O'Leary,
5 Deputy Secretary". And it concerns an issue in 13:39
6 relation to queries that had been received by the Garda
7 Commissioner in relation to press concerns in relation
8 to Sergeant McCabe, and queries. I'm not going to open
9 the email at this juncture. Mr. O'Leary will be giving
10 evidence tomorrow in relation to this. But you see 13:39
11 there that it has been copied -- sent to the Minister
12 but it has been copied to Marian Mannion, William
13 Lavelle, Noel Waters, who we've already heard from,
14 Dale Sunderland, and yourself, along with Michael
15 Flahive and Christopher Quattrociochi. Is that right? 13:40

16 A. Correct, yes.

17 254 Q. Do you have any recollection of receiving that email?

18 A. I don't recall receiving the email, no.

19 255 Q. And why would it have been copied to you by
20 Mr. O'Leary? 13:40

21 A. As you said, at the time I was Press Officer in the
22 Department of Justice and Equality, and I would assume
23 that as the email related to a media query, I was
24 copied for my information.

25 256 Q. And then if we just turn over two pages on yours and if 13:40
26 we could have page 3486 on the screen, please. This is
27 an email sent by Mr. O'Leary again to the Minister for
28 Justice and Equality on the same date, at half past
29 nine in the evening, correcting the information and

1 indicating that the queries came, in fact, from
2 Mr. John Burke, who is an investigative reporter with
3 'This Week'. Again, that has been copied to you. Did
4 you have -- or have you any recollection of ever having
5 received that email?

13:41

6 A. No, I don't recall receiving that email either. Like,
7 in my statement, I did do an email trawl around the
8 time of those emails to see if I had done anything with
9 them, so I did see that I had forwarded the first email
10 to my colleague, Andrew Kelly, who was the officer on
11 duty at the time from the Press Officer -- from the
12 Press Office, so he would have been dealing with any
13 out-of-hours queries that arose. So I definitely did
14 open the email and read it and forward it to him, but I
15 don't recall doing that. But from my email records, I
16 can see that I did do that with the first email, but I
17 did not forward the second email that we were just
18 discussing there, the 21:30.

13:41

13:42

19 257 Q. So, having received the email, you believe that you
20 would have read the email. Having read the email,
21 would there be any action required on your part?

13:42

22 A. No. The email was forwarded to the Minister, in the
23 first instance, and for her information, and generally
24 when people are cc'd on emails, it's for their
25 information also. As Press Officer with the Department
26 of Justice, I would have been dealing with queries that
27 were relevant to my department. This was a query that
28 was put to the Garda Press Office and it was something
29 that was simply just being forwarded for information.

13:42

1 258 Q. I suppose our principal concern would be whether or not
2 you discussed the matter with the Minister. Did you?
3 A. No, no.
4 259 Q. Either of the emails?
5 A. No. As I said, I don't recall receiving them, but I 13:43
6 don't think I would have had a conversation with the
7 Minister about them. As I said, the matter was
8 forwarded to the Minister by Ken. I was only in cc on
9 it, so I wouldn't have thought that there was any
10 follow-up necessary. And also within the first email 13:43
11 that Mr. O'Leary sent, it had some suggested lines for
12 the Minister. So, with that, I would have seen the
13 matter to be resolved, that there wouldn't have been
14 any further work necessary on my part.
15 MR. MARRINAN: Very well. Thank you very much. Would 13:43
16 you answer any questions.
17 CHAIRMAN: There isn't any questions. Yes. Thanks
18 very much for coming along.
19 MR. MARRINAN: Thank you very much for coming.
20 13:43
21 THE WITNESS THEN WITHDREW.
22
23 MR. MCGUINNESS: Chairman, if we might resume with the
24 evidence of Mr. Smyth.
25 CHAIRMAN: Yes. 13:44
26
27 MR. COLM SMYTH CONTINUED TO BE DIRECTLY EXAMINED BY
28 MR. MCGUINNESS:
29 260 Q. MR. MCGUINNESS: Mr. Smyth, just before lunch we were

1 looking at the transcript of day 2, 15th May, where you
2 were obviously on your feet in the Commission, and at
3 16:08, according to the transcript, you said you were
4 receiving instructions and you rose for five minutes?

5 A. Yes.

13:44

6 261 Q. And then I was asking you to comment on Chief
7 Superintendent Healy's typed notes at page 3825. I had
8 asked you about the first paragraph in the middle,
9 which reads:

10

11 "1. In the light of developments on the front that
12 Sergeant McCabe had issues with now working in
13 Mullingar and his welfare, could we seek a deferral
14 until we seek advice."

15

16 Were you informed of that, do you recall?

17 A. I cannot recall that, Mr. McGuinness, honestly.

18 262 Q. Yes. You may not have been, because the timing of the
19 phone calls show that the call from the Commissioner
20 commenced at 16:06, so if they are both accurate times,
21 this may have been relayed to Chief Superintendent
22 Healy while you were actually on your feet?

13:45

23 A. Yes.

24 263 Q. It then says:

25

26 "Commissioner then rang a second time and advised that,
27 on reflection --"

28

29 And the word "if" should be there.

13:45

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" -- that if it came out in the course of questioning then counsel should explore it. And it was her view that if he (counsel) was advising that we explore the motive and that it was necessary that she was inclined to give instructions to him to explore this issue, it would be remiss of her not to instruct counsel to proceed. Therefore, Commissioner instructed counsel to pursue that specific line of questioning." 13:46

And do you recall being informed of that in those terms? 13:46

A. I recall that whatever the original instructions were, were now re-confirmed.

264 Q. That is what was relayed to you, is that right? 13:46

A. Yes, that is what was relayed to me.

265 Q. Well, if we go to page 695, where the hearing recommences. You seem to say that in very plain terms. If we just turn that around. I'm sure you've seen this before, Mr. Smyth? 13:47

A. Yes, I have.

266 Q. At the top of that page it says:

"MR. JUSTICE O'HIGGINS: Yes.

MR. SMYTH: My instructions are re-confirmed. 13:47

MR. JUSTICE O'HIGGINS: Very good. Your instructions, as I understand them, are that Sergeant McCabe acted as he did for improper motives."

1 You're recorded as saying:

2

3

"Yeah.

4

MR. JUSTICE O'HIGGINS: Okay. And that his integrity
is being challenged in that respect."

13:47

6

7

And you say:

8

9

"In that respect."

10

13:47

11

So that was -- I think you qualify that, do you, by, as
you understood, the issue of integrity might arise?

12

13

A. Yes. I'm not so sure at that stage that I was -- I'm
comfortable with the word "improper motives", because I
don't -- I would say that that was -- if that is the
position, that was a mistake on my part, but to
explore, acted as he did for motives, whether they be
proper or improper, was a matter for -- yet to be
determined. But I wasn't making a judgement that he
was acting improperly.

13:47

20

13:48

21

267 Q. Yes, I understand that nuance. In any event, the
discussion turned to --

22

23

A. Sorry, yes, but in that respect --

24

268

Q. Yes.

25

A. -- only in relation to the allegations.

13:48

26

269

Q. Yes. At page 208, the issue of credibility is being
discussed by -- that is page 702 of the volume of our
documents. You're recorded as saying:

27

28

29

1 "I think the issue of credibility arises in all
2 modules. Sergeant McCabe has raised serious
3 allegations of malpractice and corruption against An
4 Garda Síochána."

13:48

5
6 And leaving aside the discussion about whether it arose
7 in the module or not, I think the upshot of that day
8 was that the Commissioner, or the legal team acting on
9 behalf of the Commissioner was directed to prepare a
10 document setting out --

13:49

11 A. That is correct.

12 270 Q. -- in form --

13 A. That is correct.

14 271 Q. -- the nature of what was going to be suggested in
15 relation to Sergeant McCabe. And I think the hearings
16 for that day concluded. And did you have any
17 discussion with Ms. Ryan as to seeking the directions
18 of the Attorney or consulting with the Attorney in any
19 respect?

13:49

20 A. No, I didn't, actually. I didn't.

13:49

21 272 Q. Were you aware that she would be reporting in normal
22 course up the line to the Attorney's office?

23 A. I was not.

24 273 Q. All right. And did she make you aware of any
25 discussions that she had with Mr. Dreehan on that day?

13:49

26 A. She didn't make me aware of any discussions she had
27 with Mr. Dreehan. I always knew that Annmarie Ryan was
28 always concerned about a motivation module, that this
29 was always hanging out there, there was some talk about

1 this. It never came to pass, that there was a
2 motivation module ever going to be considered, but I
3 think that there was some exchange about that. That
4 seemed to be in the background, but I did not know that
5 Ms. Ryan was actually, who she was communicating with 13:50
6 or whether she was communicating at all with anybody in
7 the AG's office.

8 274 Q. All right. Perhaps I can ask you to comment on some
9 notes of hers at page 692 of this volume. And this
10 follows a phone call -- a number of phone calls to 13:50
11 Mr. Dreelan, and she received some emails that were
12 copied to her from the Attorney's office. And then it
13 says:

14
15 "I telephoned FH and informed him of AGO's comments - 13:50
16 not directing - Commissioner decision - line of
17 questioning may have some validity."

18
19 And then she has recorded:

20
21 "Political dynamite! He'll brief Commissioner. I'll 13:51
22 circulate draft letter once I get it from counsel."

23
24 Did she make you aware of that at the time?

25 A. I certainly don't have any recollection of that, 13:51
26 Mr. McGuinness, as to what was going on in the
27 background.

28 275 Q. Pardon?

29 A. I had no idea what was going on in the background with

1 Ms. Ryan and the AG's office, or otherwise.

2 276 Q. All right. Her description of it there, was that
3 discussed with you and the other counsel at any stage?
4 A. I certainly heard the word "political dynamite".

5 277 Q. Yes. 13:51
6 A. That I remember.

7 278 Q. On that day or on the following Monday?
8 A. I think possibly it was -- I would imagine it must have
9 been that day, because it was foremost in her mind.

10 279 Q. Yes. And in what context was that, if you can 13:51
11 recollect?
12 A. I don't know in what context that came up. It was
13 probably that here we had -- really, Annmarie was --
14 Ms. Ryan was always of the view that this was a very
15 sensitive area to tread, given the, I suppose the wide 13:52
16 publicity she saw attaching to Sergeant McCabe, given
17 the political momentum behind Sergeant McCabe, given
18 the media momentum behind him, that whatever we --
19 maybe she was more prescient than any of the barristers
20 she was engaged with, because she probably could see 13:52
21 that perhaps we'd end up where we are today, for all I
22 know. She could see that this was a sensitive area. I
23 suspect that is what was in her mind.

24 280 Q. And just in terms of the apparent anxiety, is one
25 description of it, of the Commissioner to want time to 13:52
26 reflect on it and to consider Mullingar issue and
27 issues relating to Sergeant McCabe, were they of any
28 concern to you or were you aware of them in any real
29 sense?

1 A. Well, save this: if I was aware that the Commissioner
2 was under intense pressure at that time, I would have
3 perhaps sought a longer -- or sought an adjournment,
4 made some efforts to have that facilitated. I don't
5 appear to have done that -- 13:53

6 281 Q. Yes.

7 A. -- so therefore, I only assume -- if I was aware that
8 my client was in difficulty with seeking -- perhaps
9 getting more advice from, whoever she wanted to talk
10 to, whether it was me or somebody else, I certainly 13:53
11 would have investigated that for her.

12 282 Q. Yes.

13 A. And sought an adjournment of some half hour, or
14 whatever it may be. You certainly weren't going to get
15 longer than twenty or half an hour from the Commission. 13:53

16 283 Q. You think not?

17 A. I already --

18 CHAIRMAN: I take that as a given. I have read the
19 transcript.

20 284 Q. MR. MCGUINNESS: Insofar as the Commissioner is 13:53
21 concerned, she seemed to have, in her evidence, been
22 suggesting that she might have been willing to come
23 down to the Distillery if need be or -- did you get any
24 sense that she was anxious to make herself available on
25 that afternoon, if required? 13:54

26 A. Well, Chairman, I wasn't aware of that.

27 285 Q. Okay.

28 A. I wasn't aware of that.

29 286 Q. And in terms of consulting with her, did you have any

1 discussion with Ms. Ryan and your co-counsel about
2 wishing to consult with her over the weekend?

3 A. Well, Mr. McGuinness, can I say this: We were into,
4 whatever day it was, are we in day 3, 2 at this stage?

5 287 Q. Yes. 13:54

6 A. We haven't yet met the primary client.

7 288 Q. Yes.

8 A. It was in our minds that perhaps we should.

9 289 Q. Yes.

10 A. And -- 13:54

11 290 Q. Did you tell Ms. Ryan that you --

12 A. Sorry to cut across you, Mr. McGuinness. If for
13 nothing else but to apprise her of how matters were
14 proceeding and to seek further instructions it may
15 be -- or have concerns or -- 13:54

16 291 Q. Yes. But did you tell Ms. Ryan to try and organise a
17 consultation as soon as possible over the weekend, or
18 Monday morning even?

19 A. I think Ms. Ryan took -- she didn't need instructions
20 from us in that regard. She had a definite view on it. 13:55

21 292 Q. Yes.

22 A. And she sought -- had her own counsel on that, in the
23 sense that she went to look for time -- or look for --
24 the Commissioner to make time to talk to us.

25 293 Q. Yes. And were you informed of the results of her 13:55
26 inquiry seeking a consultation?

27 A. I think Annmarie, she told me that -- I think she may
28 have contacted me over the weekend. I said, look, I'm
29 available, I'm within 50 miles of Dublin, I can be

1 available on any day this week, you know, Saturday,
2 Sunday, if the Commissioner wishes to meet, I gave her
3 that clearance. So, to that extent, I was aware that
4 she was experiencing difficulty. But I want to
5 emphasise, Mr. McGuinness --

13:55

6 294 Q. Yes.

7 A. -- that, as I saw it, I suppose from the Commissioner's
8 point of view, there was no allegation against her of
9 serious criminal misconduct of any kind and, you know,
10 my concern was that we should meet the primary client
11 at the same time --

13:56

12 295 Q. Yes.

13 A. -- and if for nothing else, to update her on what the
14 position was, because we were doing it through the
15 conduit, which I didn't think was satisfactory.

13:56

16 296 Q. I understand that. Were you told that the Commissioner
17 wasn't available over the weekend?

18 A. I was informed by Ms. Ryan that the Commissioner wasn't
19 available. Now, what day that was -- Anmarie would
20 ring me quite regularly to update me, she was regularly
21 on to me about that over that weekend. How many times,
22 I don't know, but she was frequently in touch with me
23 to tell me that she was experiencing difficulty.

13:56

24 297 Q. Okay. Well, the issue of the letter arose, and did
25 you -- were the legal team liaising directly, as it
26 were, through Ms. Ryan with a number of contributors to
27 the letter?

13:56

28 A. Well, as it happened, it was a weekend of course. I
29 know that Mr. MacNamee can deal with this, he was

1 delegated to deal with the instructions surrounding
2 that and he was primarily responsible for the draft. I
3 think he sent me the first run of the letter, the
4 draft. I can't be certain that I saw the last draft,
5 but I don't think it varied greatly from the first. In 13:57
6 other words, what I am saying is, I impressed upon and
7 we all impressed, and Mr. MacNamee himself was very
8 much aware that it was very important that this had to
9 be right, there was no room for error.

10 298 Q. Yes. 13:57

11 A. It was of the utmost importance that the matters were
12 accurately described in that. And the salient part,
13 important part of that letter was the actual, what it
14 was that Sergeant McCabe wanted to achieve. We were
15 asked to lay out the background. The background was 13:58
16 never going to be put, I want to make that quite clear,
17 and it never was put, but we couldn't be more
18 particular about the manner in which we said to our
19 clients, and we -- I think he set it out in his email,
20 this is of the utmost importance that matters are 13:58
21 clearly and accurately set out.

22 299 Q. Yes.

23 A. And, as it was, they were not accurately set out. And
24 now, a matter came up I think yesterday, and the
25 question of an apology. Can I say this: it was remiss 13:58
26 of me not to apologise to Sergeant McCabe in relation
27 to that matter. It should have been done. And I'm not
28 making excuses for it, but I think it happened in the
29 context of the way matters were moving. Because this,

1 again, was revisited in June. We were dealing --
2 things were moving at a fast pace, but that is no
3 excuse. There should have been -- I regret that it was
4 done. It was done on the explicit instructions of the
5 client, who got it wrong.

13:59

6 300 Q. Yes.

7 A. And I should have apologised at the time.

8 301 Q. Yes. Well, the way you put it in your statement is
9 that:

10

13:59

11 "A misunderstanding in instructions which came from
12 client other than Commissioner O'Sullivan, resulted in
13 an inaccuracy relating to an interaction with Sergeant
14 McCabe on the 25th August 2008 in Mullingar Garda
15 station."

13:59

16 A. Yes, that does not remove the responsibility to
17 apologise for the false matter which was put.

18 CHAIRMAN: You have said it now, Mr. Smyth, and I do
19 understand.

20 A. But I want to make clear that what I meant by my
21 statement was as follows, and I want to clarify that,
22 lest it be seen to be in any way trying to weasel my
23 way out of something: the fact of the matter was,
24 there was a meeting in Mullingar.

13:59

25 302 Q. MR. MCGUINNESS: Yes.

13:59

26 A. There was a note taken of that meeting in Mullingar by
27 Superintendent Cunningham and witnessed by the
28 sergeant --

29 303 Q. Yes.

1 A. -- I can't remember --

2 304 Q. Sergeant Martin?

3 A. Sergeant Martin.

4 305 Q. Yes.

5 A. That note tallied, it was on all fours with what was 14:00
6 transcribed from the audio equipment used by Sergeant
7 McCabe, it was exactly on all fours with that. There
8 was no -- they were totally compatible. And what the
9 note and the transcription -- transcript from the audio
10 said was that Sergeant McCabe wanted to -- he wanted 14:00
11 to -- he was asked by Superintendent Clancy to make a
12 report of the difficulties that he was encountering
13 with Mr. D, who was a colleague --

14 306 Q. Yes.

15 A. -- a fellow guard, so that the DPP could be apprised of 14:00
16 those difficulties, and that, in that way, he could get
17 access to the DPP's -- or that both parties would be
18 given access to the DPP's directions. Now, that --
19 what I've just related to you there was put by way of
20 an overall assessment by Superintendent Cunningham to 14:00
21 Sergeant McCabe as to what he wanted to achieve, and
22 the reply from Sergeant McCabe was, that's exactly it.

23 307 Q. Yes.

24 A. So what was put, of course, we all know, and at the
25 risk of being tedious, was the wrong version. There 14:01
26 were no complaints made against Superintendent Clancy.
27 There were complaints made to Superintendent Clancy.
28 But the difference, of course, in the actual correct
29 document, was, he said they were made at the request,

1 as I outlined, to Superintendent Clancy.

2 308 Q. Yes. Well, we will come back to that in a minute. But
3 I wasn't quite clear what you had understood in your
4 statement as the misunderstanding in instructions. Was
5 that a misunderstanding of what counsel understood? 14:01

6 A. No. I think there was a misunderstanding as to the
7 precise -- the proper instructions should have been
8 that this, just as I have related to you, we weren't
9 given the correct version, and there was a clear
10 misunderstanding - not so much a misunderstanding, 14:01
11 there were clearly wrong instructions.

12 CHAIRMAN: All right. No, I understand that,
13 Mr. Smyth. We can move on. You're saying that you
14 didn't get Superintendent Cunningham's note from the
15 meeting in Mullingar. 14:02

16 A. I'm sorry, Judge?

17 CHAIRMAN: You didn't get the note.

18 A. I didn't get the note, I didn't get the note.

19 CHAIRMAN: All right. We can leave it at that.

20 309 Q. MR. MCGUINNESS: In any event, Ms. Ryan obviously 14:02
21 served the letter on the morning of the 18th.

22 A. Yes.

23 310 Q. And her evidence was -- it was uncontradicted, I think,
24 that she also sent in the documents, including
25 Superintendent Cunningham's report. And could I ask 14:02
26 you just to look at that, at page 776. That is in
27 volume 2. And do you recollect seeing that on the
28 morning of the 18th or not? You see the second --

29 A. I just want to -- sorry, refer me to the what -- second

1 paragraph, is it?

2 311 Q. Yes.

3

4 "Superintendent Cunningham explained to Sergeant McCabe
5 that his function on this was to investigate the 14:03
6 allegations made by him in his report of the 25th
7 February... to Superintendent Clancy."

8 A. No, I --

9 312 Q. And then if you go down to the third paragraph:

10

11 "Superintendent McCabe stated that this report was
12 composed by him to highlight matters that occurred in
13 Bailieboro district while he was sergeant in charge of
14 Bailieboro Garda Station. He stated the report was a
15 bid by him to have the full DPP directions conveyed to 14:03
16 him and the Ms. D family in relation to the allegations
17 made against him by Ms. D and the subsequent
18 investigation."

19

20 And do you recall seeing that on the morning of the 14:03
21 18th or not?

22 A. I don't recall seeing that document.

23 313 Q. All right. But that certainly is consistent with the
24 instruction -- or the information given to you at your
25 consultation on the 12th May, which has been noted by 14:03
26 Mr. McNamara and Ms. Ryan, isn't that correct? We
27 looked at them earlier this morning.

28 A. I didn't have the report and I didn't have the detail
29 about what he was trying to achieve. The difference

1 was that there is a lot of talk about a Mr. D and why
2 he wanted to get that. There was reference --
3 certainly there was reference in the note, the
4 consultation note, to "to Clancy".

5 CHAIRMAN: Sorry, I think I need to intervene just for 14:04
6 a second. Up to now we have scrupulously avoided using
7 any rank in relation to the D family and the father
8 thereof, because if the rank is given in a small
9 station, it's fairly obvious who it is. So I am simply
10 requiring that his rank not be reported, simply that he 14:04
11 is a member of the Gardaí, and that is up to now.

12 314 Q. MR. MCGUINNESS: In any event, Mr. Smyth, the draft,
13 which became the letter that was sent, contained the
14 "against" in the final paragraph?

15 A. Yes. 14:04

16 315 Q. And then on day 3 you put that final paragraph to
17 Sergeant McCabe?

18 A. Absolutely.

19 316 Q. On the basis that you thought it was correct,
20 obviously? 14:05

21 A. Yes.

22 317 Q. It proved not to be correct?

23 A. Yes.

24 318 Q. He said it was absolutely false?

25 A. Yes. And he was correct. 14:05

26 319 Q. There was agreement reached that Sergeant McCabe was
27 right about that?

28 A. Correct.

29 320 Q. Isn't that right?

1 A. That's correct.

2 321 Q. And in --

3 A. But not until the next -- I think it was June, or
4 something, that this came up again, raised its head.
5 This was May. 14:05

6 322 Q. Yes, yes.

7 A. But there was an agreement that that was -- he was
8 quite correct, it was wrong.

9 323 Q. Certainly then, Judge O'Higgins, having got the letter,
10 he ruled that the contents of it were inadmissible in 14:05
11 the Commission, isn't that right?

12 A. Yes, he ruled that he wasn't allowing any
13 cross-examination out of this document.

14 324 Q. And he ruled that insofar as the issue of motivation,
15 it was -- 14:05

16 A. Peripheral.

17 325 Q. -- peripheral at best?

18 A. That's what he said. He said it was peripheral.

19 326 Q. Okay. It's just, I'm not clear how it came to be
20 included as an issue, therefore, in the submissions 14:06
21 that were put in on Module 1, which were drafted and
22 sent in on the 11th June?

23 A. Well, the matter was revisited, as I say, at the
24 hearing which I think was after the -- am I not right
25 in saying that the matter -- Superintendent Cunningham 14:06
26 came back in June and the matter was --

27 327 Q. He did, he came on 24th June.

28 A. 24th June.

29 328 Q. But the motivation having been ruled to be peripheral

1 at best and the contents of the document irrelevant,
2 you seem to have sanctioned the draft which went in on
3 the 11th June which referred to these matters.

4 A. Could I see the particular --

5 329 Q. Yes. It's page 1439 of the subs. I think it starts at 14:06
6 paragraph 63, paragraph 63 to 72. You see, because
7 this records then the fact of the complaint there, the
8 investigation into the complaint, paragraph 65, the DPP
9 directions. And if one goes down then to paragraph --

10 A. Can I say, Mr. McGuinness, that if this is wrong, I 14:08
11 take responsibility for it, but could I ask you to
12 defer maybe to Mr. Byrne on that point, because he
13 drafted this document.

14 330 Q. All right. well, I think it's fair to note that
15 obviously the Commission was adjourned until 24th June. 14:08

16 A. Yes.

17 331 Q. And this reflected the erroneous drafting of the letter
18 also, isn't that right, as a matter of fact?

19 A. If that is what it says.

20 332 Q. Yes. 14:08

21 A. Yes.

22 333 Q. But this didn't become apparent to you perhaps then
23 until the 24th June, is that right?

24 A. I think that would be fair to say.

25 334 Q. All right. And on that day, then, the Judge raised the 14:08
26 issue, if we could look at page 1460. And this is day
27 5 then of the hearing, isn't that correct? The Judge
28 raises this issue about paragraph 19, and I'm sure
29 you've seen this transcript --

1 A. Yes.

2 335 Q. -- on many occasions. And it goes on to deal with that
3 issue and the issue of the tape, isn't that correct?

4 A. It would seem so.

5 336 Q. And if one turns to page 34 of the transcript, which is 14:10
6 at page 1493, the Judge is saying there in relation to
7 whether the transcript changed anything, he said:
8
9 "Does it change anything? As Superintendent Cunningham
10 put it in his report, he said in his report that what 14:10
11 he thought the motivation of Sergeant McCabe in making
12 the observations on the request on February 28th, he
13 says what he thought. The transcript would appear to
14 offer some support for Superintendent Cunningham's view
15 of it." 14:10
16
17 And do you agree with that?

18 A. Yes, I think the answer maybe to your earlier question
19 as well is reflected in this, we didn't have this
20 transcript until we resumed the hearing, as I 14:11
21 understand it. That's the transcript of the audio
22 prepared from Sergeant McCabe's equipment.

23 337 Q. Yes.

24 A. So --

25 338 Q. And there's an exchange between yourself and the Judge 14:11
26 at page 51, and perhaps you might like to comment on
27 that. It's page 1510. You agree with the Judge here:
28
29 "This document, the 28th February, and the subsequent

1 tape and the subsequent report are in the context not
2 of any complaint against Superintendent Clancy but a
3 request to Superintendent Clancy in relation to matters
4 arising out of the D family affair."

14:11

5
6 And you say:

7
8 "Directions of the DPP, and that deals with the
9 motivation."

14:11

10
11 Mr. Justice O'Higgins says:

12
13 "This does not deal with any complaint against
14 Superintendent Clancy with which we are concerned in
15 this investigation."

14:12

16
17 And you say:

18
19 "I think that that has been established."

14:12

20
21 And I think that ended the issue of the letter insofar
22 as the hearings were concerned, is that right?

23 A. As far as I'm aware, Mr. McGuinness, yes. We were not
24 allowed to proceed to cross-examine any more out of
25 the --

14:12

26 339 Q. I'm sorry?

27 A. We weren't allowed to proceed any more in relation to
28 the transcript.

29 340 Q. Yes. And where did that leave the testing of the

1 credibility and motivation then?

2 A. well, the credibility and motivation continued apace in
3 all the modules as it arose. We were awaiting whatever
4 allegations were going to be brought forward, and they
5 would be tested in the same way, the allegations would 14:12
6 be tested, and if there was no evidence to stack them
7 up, we would, as I said to you this morning, we would
8 say, if there is no evidence, why were they made in the
9 first place?

10 341 Q. well, isn't that really back to the position perhaps as 14:13
11 it should have been in the first place, that the
12 allegations were to be tested on the merits of the
13 facts relating to them and/or any defects in the
14 investigation, and not by reference to a so-called
15 general issue about credibility/motivation; are they 14:13
16 not separate matters?

17 A. what you have been dealing with is a specific issue --

18 342 Q. Yes.

19 A. -- that came up or was brought up at that time in
20 relation to this, these directions, as we call them. 14:13
21 That wouldn't have been -- that wouldn't necessarily --
22 while that might apply to whatever other allegations
23 were coming up, we had a -- if it was true, if the true
24 version was put or allowed to be put, I could foresee
25 that there would be -- I can't say what my instructions 14:13
26 were, but, at best, I can safely say there would have
27 been a complete conflict. And why do I say that? I
28 say it because what was in the correct version was a
29 suggestion that Superintendent Clancy had requested

1 Sergeant McCabe to write in to him the difficulties he
2 was having with D --

3 343 Q. Yes.

4 A. -- so that these could be contained -- or, sorry, could
5 be added or sent on to the DPP so that he could 14:14
6 consider them, and, having done that then, in the
7 hope -- the hope would be that the final directions
8 would be made available to both -- now the difficulty,
9 I can straightaway see with that. Superintendent
10 Clancy had already received serious complaints against 14:14
11 him in the earlier letter, which we didn't have, as I
12 say, in May, we came up in the second module, and it
13 was highly unlikely, in my view, or it was subject to,
14 as I say, a test, how could a man against whom he had
15 already made complaints be now requesting him to make 14:14
16 further complaints against another gentleman? I could
17 foresee serious difficulties on that, and I can't say
18 what my instructions are, but I can tell you, I could
19 see straightaway there are difficulties with that, with
20 the credibility of that position. 14:15

21 344 Q. Yes.

22 A. So if the correct version investigation --

23 345 Q. Yes.

24 A. -- Mr. McGuinness, had been put, or if we were allowed
25 to pursue the correct version, who knows what the 14:15
26 outcome could have been.

27 346 Q. Well, you see, there was no attempt to either say to
28 the Judge on day 5, look, we've got this wrong, allow
29 us to recast it in the way that is appropriate, having

1 regard to either the Commissioner's instructions or
2 your other clients' instructions?

3 A. But there was, Mr. McGuinness.

4 347 Q. I'm sorry?

5 A. There was. We weren't allowed to proceed. The Judge 14:15
6 closed it down.

7 348 Q. Yes.

8 A. It's on the transcript. He wouldn't allow us to
9 proceed to cross-examine out of that document.

10 349 Q. Okay. Well, did that result in the abandonment of the 14:15
11 Commissioner's position in challenging credibility and
12 motivation? Because there was now no subsisting
13 admissible letter before the Commission?

14 A. No, the Commission --

15 350 Q. And each module or each element of the inquiry would be 14:16
16 examined on its own merits?

17 A. Well, insofar as that document was concerned, we
18 couldn't be pursuing motivation or credibility --

19 351 Q. Yes.

20 A. -- because we weren't allowed to pursue it. But it 14:16
21 didn't close down my original point that, as I was
22 instructed to do, was to test every allegation as it
23 came up on credibility and motivation. I don't see,
24 Mr. McGuinness, where we're at odds on that.

25 352 Q. Okay. 14:16

26 A. I've said that --

27 353 Q. You see no conflict or incompatibility there?

28 A. Well, first of all, may I repeat, we weren't allowed to
29 pursue the issues arising on the correct version.

1 354 Q. Yes.
2 A. So that closed off that avenue, but that didn't mean
3 that I was closed off from pursuing every allegation on
4 the same basis of credibility and motivation. I had to
5 test all of the allegations. 14:16
6 355 Q. Yes.
7 A. If they came up.
8 356 Q. Yes.
9 A. And as they came up.
10 357 Q. And as they came up, solely by reference to the facts 14:17
11 in relation to each specific incidents?
12 A. Precisely.
13 358 Q. Yeah. And was that not the way --
14 A. Sorry.
15 359 Q. -- it should have originally been started and 14:17
16 commenced, that the issues arose, if they arose, in
17 relation to each particular investigation?
18 A. Well, the issues arose in each -- I don't quite follow.
19 Are you suggesting, Mr. McGuinness, that I had no basis
20 on which to challenge the credibility and motivation in 14:17
21 Module 1?
22 360 Q. Well, I am wondering where it stood at this point in
23 time in terms of your instructions to do it vis-à-vis
24 the Commissioner?
25 A. After -- 14:17
26 361 Q. Yes.
27 A. Before or after -- after the closing down of the
28 transcript?
29 362 Q. Yes.

1 A. I still had those instructions.

2 363 Q. So you certainly viewed yourself, from the point of
3 view of the Commissioner's instructions, as being
4 unimpeded from following through on those instructions?

5 A. Absolutely, because I made it clear all the way 14:17
6 through.

7 364 Q. All the way through.

8 CHAIRMAN: Well, you weren't quite closed down,
9 Mr. Smyth, because in the transcript there's a
10 reference to -- and Superintendent Cunningham saying 14:18
11 Sergeant McCabe was saying to me let's speak off the
12 record but he had a tape recording machine, equipment,
13 or something like that, so it was mentioned. But I
14 think certainly you were limited on that issue to a
15 grievance, real or perceived, and then that was it. 14:18

16 A. That's correct.

17 CHAIRMAN: But what you seem to be saying is that,
18 vis-à-vis every allegation made, it was what have you
19 got to support that?

20 A. Correct. 14:18

21 CHAIRMAN: And if you have nothing to support that,
22 aren't you shooting from the hip?

23 A. Yes.

24 365 Q. MR. MCGUINNESS: I think you did challenge Sergeant
25 McCabe on that issue, sort of shooting first and asking 14:18
26 questions later?

27 A. Well, now, I put it to him fairly. I said, look, would
28 you never consider what information or what -- I can't
29 remember what way I phrased it, but that before you

1 level criticism at somebody, would you not ensure that
2 you had something to level criticism about.

3 366 Q. Yes.

4 A. I think that might be an inarticulate way of saying
5 what I expressed at the time, but, in other words, 14:18
6 shooting from, and asking questions later.

7 367 Q. The Judge, I think we've noted already, the transcript
8 at day 18, page 2154, the Judge seemed to take up that
9 theme at one stage, in which he asked Sergeant McCabe
10 about that issue. That's at Volume 3 of our documents. 14:19
11 I don't know if you recall that exchange?

12 A. This exchange that is up on the screen at the moment?

13 368 Q. Page 2. The cross-examination starts at page 2154 and
14 the Judge intervenes, if we go to -- it's page 86 of
15 the internal transcript, at page 2235. Do you recall 14:20
16 that exchange?

17 A. Oh, yes. I think the Judge intervened at one stage,
18 yes, yes, I remember this.

19 369 Q. At question 369, Sergeant McCabe has said that he
20 didn't accept the proposition that was being put to -- 14:20
21 there, but he seemed to be thinking, the Judge seemed
22 to be thinking along the following lines. He said:
23

24 "Maybe you got the wrong end. Obviously each and every
25 module here concerns an incident and I will have to 14:20
26 make a report as to whether the investigation was good
27 or bad or indifferent as to whether GSOC, in the ones
28 that they were concerned with, dealt with the matter
29 well or otherwise. And I also have to report in

1 relation to complaints that you made."

2 A. Yeah.

3 370 Q. And Sergeant McCabe says:

4

5 "Yes."

14:21

6

7 And Mr. Justice O'Higgins:

8

9 "Whether those complaints were dealt with properly or
10 engaged with fully."

14:21

11 A. Yes.

12 371 Q. And he says: "Yes."

13 And Sergeant McCabe sets out what he was trying to do
14 there, and he wanted reasonable standards in the
15 matter. Did you ever seek instructions from the
16 Commissioner as to modifying your stance in any way, or
17 were you happy that she was content that you would
18 challenge his credibility and motivation all the way
19 through

14:21

20 A. Absolutely. Those were my instructions.

14:21

21 372 Q. Did you discuss that matter when you met the
22 Commissioner on 21st May, as I understand you did?

23 A. Where was that meeting?

24 373 Q. I think in the Commissioner's office.

25 A. Well, that was a meeting which was -- there was a
26 meeting -- Anmarie Ryan came to me and said that the
27 Commissioner wished to meet me. I expressed to
28 Anmarie that, was this a consultation, and she said it
29 wasn't a consultation, she just wanted to meet her

14:22

1 senior counsel.

2 374 Q. Yes.

3 A. I expressed to Ms. Ryan that I -- I asked her was she
4 going to be in attendance and she said she wouldn't be
5 in attendance, that it was wasn't a formal
6 consultation, and I said, you know, I had reluctance
7 about meeting a client in the absence of an attending
8 solicitor who could take a note of what was said.

14:22

9 375 Q. Yes.

10 A. And that is the cardinal rule. She said that this
11 wasn't a formal meeting, that she wasn't attending,
12 that the Commissioner just wanted to meet me personally
13 in her -- I then suggested to her that I could meet her
14 with my two colleagues, and she said no, she only
15 wishes to meet you alone. And I went on that -- I
16 indicated to her that, as far as I was concerned, there
17 would be no discussion. It wasn't a consultation,
18 there was no instructions to be taken, there was no
19 advice to be given. And on that basis and on those
20 parameters, I agreed to meet the Commissioner.

14:22

14:23

14:23

21 376 Q. Yes. And did you discuss any matters with the
22 Commissioner, in fact?

23 A. The meeting lasted, I think, in all, it couldn't have
24 lasted beyond 20 minutes. I was escorted to her office
25 by Chief Superintendent Healy. There was an
26 introduction. There was a general conversation with
27 her about -- I congratulated her, I do remember that,
28 congratulating her on her -- it was then her full
29 appointment. I can't remember the precise or full

14:23

1 details of what we discussed. There was a general
2 conversation. I think there was some mention of Kerry,
3 I think she may be from Kerry, and I think there was
4 also some mention about family. She said she had a
5 child attending university in America. I can't
6 remember now which State.

14:24

7 CHAIRMAN: I'm not sure I really want to know these
8 personal details.

9 A. Well, that's the tenor of the discussion. There was no
10 consultation with the Commissioner. There was no
11 mention as to what was happening vis-à-vis the 18th or
12 the letter or anything else. Now, I did say to her, as
13 I was leaving, or about to leave, that matters were
14 proceeding and that we were working very hard and that
15 we would hope that all matters would be dealt with
16 expeditiously.

14:24

14:24

17 377 Q. MR. MCGUINNESS: Yes. Chief Superintendent Healy seems
18 to have suggested in his evidence that you raised the
19 issues of corruption as being one of the main factors
20 in the Commission and you had a discussion about that?

14:24

21 A. There may have been, there may have been, as I said,
22 about the -- there may have been the elephant --
23 certainly, there would have been some mention, there
24 was no point in meeting without some mention about the
25 Commission itself, but there was no discussion
26 backwards or forwards about what was happening. I may
27 have said that -- I suspect and I knew that she was
28 concerned about the -- about all matters that were
29 going on and the allegations that were made, and so on,

14:25

1 and she had an obligation to both parties. She never
2 mentioned Sergeant McCabe's name, she never mentioned
3 any of my clients' names. And I said to her, well,
4 obviously I understood that the most serious allegation
5 was corruption. And that's all we discussed. 14:25

6 378 Q. All right. So you had no discussion about the advices
7 that had been requested and given in writing?

8 A. No discussion.

9 379 Q. No discussion about her instructions?

10 A. No. 14:25

11 380 Q. Or the reconfirmation of instructions?

12 A. Absolutely not.

13 381 Q. And no discussion about the outcome of what had
14 happened on 18th May?

15 A. Absolutely not. 14:25

16 382 Q. All right. Well, you did meet her in actual
17 consultation then, I think on the 20th October 2015,
18 isn't that right?

19 A. Yes. I think we -- I can't remember was that in
20 Headquarters, or wherever it was, Garda Headquarters, 14:26
21 but we met her.

22 383 Q. Yes. Mr. McNamara has a note of it at page 100, and
23 there are other notes that I will ask you to comment
24 on, if you don't mind. In this meeting, down the page
25 there, it says: 14:26
26

27 "Meeting with counsel. 7:00pm. Meeting 2013 with
28 Sergeant McCabe, four months' delay, wanted interim
29 report."

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Can you recollect what that is about?

A. I have --

384 Q. Okay. It says then:

"Cannot be questioned on lawyer-client privilege.
Sought advice and gave instructions."

14:26

Can I ask you the context -- does that ring a bell with
you, by the way?

14:27

A. I don't know anything about a meeting in 2013. That
does not ring a bell with me, I must say. Maybe my
colleagues will be able to assist you better on that.
I don't have any recall of that.

385 Q. Okay. Well, then the next issue then:

14:27

"Cannot be questioned on lawyer-client privilege."

A. Is this in October?

386 Q. This is October.

A. Sorry, was that on the eve of her giving evidence?

14:27

387 Q. No. Apparently, you appear to have had two
consultations with her - one on the 20th and then one
on the eve of her appearance.

A. Which what was --

CHAIRMAN: Sorry, the year 2013 has been mentioned
twice now, and correctly taken down in the transcript.
It is, of course, 2015.

14:27

A. Okay.

CHAIRMAN: And it's about, it seems to be three weeks

1 before she gives her evidence before the Commission.

2 A. I honestly can't assist you on that, Mr. McGuinness, on
3 this particular one, but we will move down and see if
4 there is anything that comes to mind, if there is
5 anything else. 14:28

6 388 Q. MR. MCGUINNESS: Well, it says:

7
8 "And second choice, if Commission is going to force to
9 answer re instructions choice."

10 A. I'm wondering, I'm wondering is this in relation to the 14:28
11 consultation we had on the eve of her -- because I do
12 recall we had a consultation with her in relation to
13 that, and I'll tell you why, if it is -- it may be in
14 relation to this, because, as I said this morning,
15 there was -- Mr. McDowell had indicated that he would 14:28
16 be cross-examining if he got the opportunity and that
17 the Commissioner would not like the experience, so we
18 were anticipating that, because she was due to give --
19 due to give evidence, that there would be issue that we
20 had to -- that she had to address, and it was likely 14:28
21 that Mr. McDowell, who raised the issue of attacking
22 the character of Sergeant McCabe, that she could be
23 asked details of this. And it may be in that context
24 that she wouldn't be required, couldn't be compelled to
25 give details of what took place between herself and her 14:29
26 lawyers, I understand that, but -- and I think options
27 were laid out as to what way she might deal with
28 Mr. McDowell, but it was thought that the better
29 approach would be, if it happens, that you just answer

1 the questions as are asked. And as I said, it didn't
2 arise because the Judge intervened and the matter was
3 resolved.

4 389 Q. Yes.

5 A. And Mr. McDowell accepted the position, it seems. 14:29

6 390 Q. Yes. Well, we will come to that in a minute. But it
7 does appear to have been raised at this meeting of the
8 20th October --

9 A. It may well have been.

10 391 Q. -- because Ms. Ryan has a better note, and perhaps it 14:29
11 might be fairer to ask you to look at that first, at
12 page 3803:

13

14 "Consultation Commissioner 20/10/15 Bridewell station
15 7:00. Present: Anmarie Ryan, Colm Smyth, Garret 14:30
16 Byrne, Michael MacNamee, Fergus Healy, Michael
17 McNamara. Discussed McCabe's motivation."

18

19 The next -- is that correct? Do you recall that?

20 A. Yes, I now recall that now, because this is a meeting 14:30
21 we had with her, I think -- I thought it was on the eve
22 of her giving evidence, but, in any event, it was in
23 anticipation of her giving evidence.

24 392 Q. Yes.

25 A. And we were expecting that Mr. McDowell would -- 14:30
26 CHAIRMAN: We have that point, Mr. Smyth.

27 A. Okay. We were making her aware of that. And as it
28 says here, that -- is it the line --

29 393 Q. MR. MCGUINNESS: Yes.

1 A. The line of question -- no doubt Mr. McDowell will try
2 this line of question, so either deal with it head on
3 or object, or whatever it may be. We laid out the
4 options for her. Much preferable that she dealt with
5 it head on, but we had to lay out the options.

14:30

6 394 Q. First of all, what was the discussion about Sergeant
7 McCabe's motivation, do you recall?

8 A. Because we were referring back to -- this is what you
9 could call the row that took place and what was the
10 motivation, and Mr. McDowell was saying this is all
11 about his character, and so on and so forth, and we
12 anticipated Mr. McDowell would be saying to her that
13 she was making public statements about Sergeant McCabe
14 and, yes, she was coming in -- instructing me to come
15 in and put a different position and to essentially, as
16 he put it, attack his credibility and to attack him,
17 attack his character, and we discussed that with her.
18 And when you see "motivation", that was general
19 discussion around what our instructions were and what I
20 knew my instructions to be and what Mr. McDowell's
21 perception of what my instructions were, and as he had
22 outlined to the Judge.

14:31

14:31

14:31

23 395 Q. Yes. Obviously, Ms. Ryan has sort of bullet-pointed a
24 few headings. They look like they perhaps came from
25 the Commissioner. Would you care to comment on that?

14:32

26
27 "Responsible for corporate body, duty to all employees,
28 cannot be one-sided Tribunal, show Commissioner has
29 responsibility."

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I don't see how -- came from the Garda Commissioner, you mean?

396 Q. I'm just asking you?

A. Came from the Garda Commissioner?

14:32

397 Q. Do you think so?

A. I would say they certainly came from the Garda Commissioner, I would say, that she'd explained to us what her responsibility was and what her duty to everybody was. We were anticipating that it would be said to her how can she be making all these public statements and yet coming in here, as suggested by Mr. McDowell, attacking her, attacking one of her members.

14:32

398 Q. Yes. I presume you never foresaw that she would waive her privilege or had an expectation that these notes would be --

14:32

A. Oh, no -- absolute -- how do you mean?

399 Q. Well, first of all, was there a decision made at that time that she would stand on her privilege --

14:32

A. No, no.

400 Q. -- and refuse to answer questions?

A. It was my understanding that we laid out the options for her and it was my understanding that we had to explain to her what her options were.

14:33

401 Q. Yes.

A. But it was my understanding she was going to be giving evidence, and if she's dealt with by Mr. McDowell, she will have to deal with the questions, and that is what

1 she wanted to do.

2 402 Q. But that is what I am anxious to ascertain. Was it
3 your understanding that the Commissioner decided at
4 that meeting that if she were cross-examined by
5 Mr. McDowell about her instructions, that she was 14:33
6 prepared to meet it head on?

7 A. I have that impression, that that's my recall. Because
8 why would I say otherwise? Because we were
9 anticipating this onslaught, we prepped her for the
10 likelihood that she would be attacked -- challenged in 14:33
11 this way, and our belief, my belief is that she was
12 going to deal with it head on.

13 403 Q. Ms. Ryan seems to have noted correctly there that the
14 role, her role in Module 5, presumably referring to her
15 role, is during her time as AC in HRM? 14:33

16 A. Correct, correct.

17 404 Q. So it would perhaps be difficult to foresee how
18 Mr. McDowell could legitimately cross-examine her about
19 her instructions to counsel, particularly if they were
20 privileged. So I'm not quite clear how the discussion 14:34
21 arose at that time?

22 A. Because Mr. McDowell had already flagged well in
23 advance that, when the opportunity came, he would take
24 the opportunity to cross-examine. We had this belief
25 that he could seek to do it. 14:34

26 405 Q. So this wasn't -- this wasn't a discussion in
27 preparation for you standing up to clarify her
28 instructions?

29 A. Oh, no. Well, no, this was a prep -- she was about to

1 give evidence. As you say, it was in relation to her
2 time as AC of Human Resources.

3 406 Q. Yes.

4 A. But we did foresee that there could be a challenge --

5 407 Q. Yes. 14:34

6 A. -- on her original -- on her instructions to me.

7 408 Q. Yes. We all know what actually happened, Mr. Smyth,
8 and I just want to be --

9 A. Okay.

10 409 Q. I am trying to be clear about the purpose of this 14:34
11 meeting and the discussion that then took place at the
12 next meeting. Was it a preparation for the
13 Commissioner, and you, on her behalf, conveying to the
14 Commission a change in position vis-à-vis Sergeant
15 McCabe? 14:35

16 A. No, there was no question of changing. Changing of
17 position in relation to instructions?

18 410 Q. Yes.

19 A. No, there was no question of that.

20 411 Q. So all of this is a preparation just for dealing with a 14:35
21 line of possible cross-examination?

22 A. Absolutely, absolutely.

23 412 Q. Not a preparation for you clarifying her
24 instructions --

25 A. No, no. 14:35

26 413 Q. -- at the beginning of the module before she stepped
27 in?

28 A. Well, the preparation for that was very simple. It was
29 essentially, all she did in relation to her role as AC,

1 she was responsible for appointing, I think it was, I
2 think it's the McGinn/Byrne report, correct me if I am
3 wrong in that, but, because of her position, she had to
4 appoint people to carry out that function, as I
5 understand it, and that was her role, so there was 14:35
6 nothing much to consult about.

7 414 Q. Yes.

8 A. She could be asked questions surrounding that, but, I
9 mean, her role was essentially one of appointing
10 someone under the regulations to carry out an 14:35
11 investigation, under disciplinary procedure or
12 whatever, as I understood it.

13 415 Q. Okay.

14 A. And we took that opportunity to discuss with her, that
15 when she would be giving evidence, it was an innocuous, 14:36
16 it was a walk-on role, if I may put it that way, that
17 Mr. McDowell may take the opportunity --
18 CHAIRMAN: All right. I do understand.

19 416 Q. MR. MCGUINNESS: It's just that both you and the
20 Commissioner in evidence seem to have laid some 14:36
21 emphasis on the fact that Mr. McDowell never taxed her
22 about these issues and that your expected preparation
23 has gone to naught then?

24 A. Gone to naught. But what happened when she did -- when
25 she was ready to give evidence and when she appeared to 14:36
26 give evidence, matters took another turn.

27 417 Q. Yes.

28 A. That the Judge, without any forewarning to me
29 certainly, and I wouldn't expect it, needless to say --

1 418 Q. Yes.

2 A. -- introduced the topic himself, so that he must have
3 been in some way anticipating, and perhaps, I don't
4 know, perhaps he wanted to take the sting out of what
5 was to follow and brought the topic up himself and 14:37
6 asked me -- he said that: I want to revisit a matter
7 which I mentioned some time ago. I'm quoting as best I
8 can. I haven't got the transcript before me.

9 419 Q. Yes.

10 A. And he said: Look, I want to revisit this. And he 14:37
11 again, for the third visitation to my instructions, and
12 then we had the discussion which I set out earlier.
13 Now, I think he was either taking the sting out of what
14 was to follow, maybe he didn't want a confrontation --

15 420 Q. well, obviously -- 14:37

16 A. -- or maybe he was laying the ground out for
17 Mr. McDowell to see what the correct instructions were.
18 I do not know.

19 421 Q. All right. well, factually, I think, and perhaps we
20 will come to it in a moment, but, factually, 14:37
21 Commissioner O'Sullivan was present in the room sitting
22 at the back of the room?

23 A. Correct.

24 422 Q. The Judge could see her there, isn't that right?

25 A. Correct. 14:37

26 423 Q. But he certainly perceived, in his words, that the
27 issue of motivation had been dormant for some months,
28 and it didn't appear to him, therefore, that --

29 A. I don't agree with that, Mr. McGuinness, because I

1 think, you know, in every module that came up, we
2 addressed issues with Sergeant McCabe, and we can go
3 through the transcripts tediously, but I don't see that
4 things were -- I think it was more that the
5 Commissioner was always very anxious, I suppose, maybe 14:38
6 he was anxious to avoid a confrontation and to take the
7 sting out of what might follow, if there was a
8 confrontation.

9 424 Q. Okay.

10 A. And he took the opportunity to confirm with me, 14:38
11 finally, what is the position, I meant to revisit it,
12 I'm going to revisit it now, I think he said.

13 425 Q. Okay. Well, can I ask you to look at the notes of the
14 second consultation --

15 A. Yes. 14:38

16 426 Q. -- on the eve of her appearance. There's Inspector
17 McNamara's notes first at page 104.

18 A. Now, this would have been on the eve of her arrival at
19 the Commission.

20 427 Q. Yes, yes. 14:39

21 A. Yes. Yes, we would have had to -- sorry,
22 Mr. McGuinness -- we would have to meet her for the
23 walk-on role, in any event, so we dealt with the issue,
24 and then we said -- we met her a final time.

25 428 Q. But the first matter seems to be an issue in relation 14:39
26 to a HQ directive 105/08, and then it seems to be
27 counsel, perhaps counsel raising -- is it raising the
28 issue of motivation and bad faith?

29 A. Yes, because that came up in the context of where the

1 Judge had raised this as an issue. No one else had
2 raised it except -- well, Mr. McDowell had mentioned
3 character, I think, firstly. In fairness, I think I
4 got it wrong in the summation. I was suggesting to the
5 Judge Mr. McDowell had mentioned it first. I was wrong 14:39
6 in that, it was remiss of me to say that, but I only
7 realise that now. But he did raise issues on his
8 character. The Judge raised issues in relation to
9 malice or mala fides, and we were acquainting her of
10 this situation, that this could be presented if 14:39
11 Mr. McDowell got the chance to address her and to
12 confront her in relation to bad faith, mala fides and
13 the malice of Sergeant McCabe as he saw it, as he
14 perceived that we were suggesting.

15 429 Q. I mean, on a point of fact, when you agreed with the 14:40
16 Judge or appeared to agree with the Judge in his choice
17 of words on day 2 --

18 A. Yes.

19 430 Q. -- and day 3, relating to integrity and motives,
20 etcetera, nobody had come to you and said you'd acted 14:40
21 outside your instructions, isn't that correct?

22 A. No, nobody had said that to me.

23 431 Q. But the issue of withdrawals of something seems to have
24 been the discussion here?

25 A. You see? 14:40

26 432 Q. Because there's a "CS", which is presumably you there,
27 and just above that is:
28
29 "Initially view was questioning his motivations and not

1 on the issue of mala fides."
2 A. Yes, but you have to see that in terms of what is said
3 there. His evidence in this case is bad faith.
4 433 Q. Yes.
5 A. Put another way, that that would be what Mr. McDowell 14:40
6 will be saying, that his evidence -- it will be that it
7 is bad faith -- sorry, that Sergeant McCabe will say it
8 is bad faith.
9 434 Q. Yes. But, you see, I'm wondering is that sort of
10 loosely or quoting you in shorthand? 14:41
11 A. In what way now?
12 435 Q. In the way that you were drawing attention to the fact
13 he had withdrawn a number of claims, that perhaps this
14 bullet-point is meant to represent your view that his
15 evidence in the case is bad faith. Was that a view you 14:41
16 expressed at the consultation?
17 A. No, I never suggested that -- I never suggested that --
18 you mean that Sergeant McCabe in his evidence was --
19 436 Q. Yes.
20 A. -- was giving -- 14:41
21 437 Q. I'm just asking for your comment on the note as it is
22 there. I mean, one interpretation might be that --
23 A. My view on this is that -- my view on this is that it
24 would be perceived by Mr. McDowell that we were
25 suggesting that his evidence in this case is bad faith 14:41
26 and as perceived by -- you know, the Judge introduced
27 the term. There was discussion around that. We were
28 concerned about what Mr. McDowell would be doing the
29 next day.

1 438 Q. All right. Okay. It appears to quote the
2 Commissioner, if we just move on a little bit.
3 A. Yes.
4
5 "The Commissioner said we didn't question his mala 14:42
6 fides."
7 439 Q. "We questioned his motivation. It may well be mala
8 fides but that is a matter for the Commission."
9
10 Do you think that's something she said or somebody else 14:42
11 said?
12 A. No, I don't know how that could possibly come into the
13 frame. It may well be mala -- there was no mala fides.
14 440 Q. The issue of mala fides, in the Judge's mind certainly,
15 seems to have been triggered by your submission on 14:42
16 motivation and credibility and integrity, and it seems
17 to have been lurking there, but the Commissioner seems
18 to have been content to let the issue of mala fides
19 lurk in the Commission room --
20 A. No. 14:42
21 441 Q. -- and leaving it as a matter for the Commission?
22 A. I can tell you positively, Mr. McGuinness, that that is
23 not the case.
24 442 Q. Right. Okay. Ms. Ryan's note of that same
25 consultation is at 3803? 14:42
26 A. You can see there, Mr. McGuinness, by the way, you see
27 "I challenged his credibility".
28 443 Q. Yes, I saw that. Yes.
29 A. I didn't say I challenged his mala fides or malice, and

1 I never did it, in any event.
2 444 Q. I understand your evidence. Thank you. This is
3 Ms. Ryan's note. Sorry, 3805 it should be. There's a
4 heading there:

5
6 "Motivation: We questioned this. No particular mala
7 fides against Sergeant McCabe, just his motivation.
8 The initial letter from counsel re motivation, email
9 and letter from us to Commission."

10
11 There's then a mention to a report there. There's a
12 reference to:

13
14 "Supports in place for McCabe."

15
16 Do you think that is something the Commissioner was
17 referring to? Just go down the screen.

18 A. I would imagine that supports, and so on, would be in
19 her bailiwick.

20 445 Q. Yes. There's also a handwritten note from Chief
21 Superintendent Healy at 3944, where it says:

22
23 "Standing over the allegations of motivation."

24
25 And is that a correct statement of the position? 14:44

26 A. Yes. Standing over the credibility and motivation,
27 yes.

28 446 Q. "Mala fides - bad faith. Would the Commissioner
29 consider withdrawing?"

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Is the next note.

A. Again, I see that that was put in the context of the next morning, when she would be asked by Mr. McDowell to withdraw her allegations of bad faith because if he still persisted with his interpretation of what my instructions were. 14:44

447 Q. It says then:

"Whistleblowers may not always be right but we must listen to them." 14:45

A. Correct.

448 Q. And was that something said by the Commissioner?

A. Yes. And she wouldn't have said that in the context of at the same time as saying -- it just wouldn't make sense. 14:45

449 Q. The next sentence then:

"But the matter of mala fides is a matter for the Commission." 14:45

Is that something said by the Commissioner?

A. The matter of mala fides, the ultimate decision on mala fides, as to what I was putting or saying, to what his interpretation of what I was doing, was a matter for -- I was making my case that I was not making any case of bad faith against Sergeant McCabe. But ultimately, these matters would have to be decided by the Commissioner. I mean, as far as I was concerned, in 14:45

1 his submissions we made it quite clear that there was
2 no question of -- and you can search the transcript,
3 Mr. McGuinness, there's no case ever -- I never
4 suggested he was malicious, never suggested he was a
5 man not to be trusted. It didn't arise. And I know at 14:45
6 this meeting the Commissioner was not suggesting that
7 she would -- I mean, what is contended for there in
8 that note, you can read it in three or four different
9 ways, perhaps.

10 450 Q. Yes. 14:46

11 A. But I can tell you straight up that there was no
12 question of the Commissioner maintaining a line of mala
13 fides against Sergeant McCabe.

14 451 Q. Okay. well, she appeared the next day, and I think the
15 transcript -- the correct transcript is at page 3508. 14:46
16 You've seen this before?

17 A. Yes.

18 452 Q. And did this take you by surprise?

19 A. Absolutely by surprise.

20 453 Q. Okay. 14:46

21 A. Because Annmarie Ryan came up to me three times during
22 the currency of this exchange.

23 454 Q. And was she handing you some notes or suggestions?

24 A. No, no, she was just -- she was completely taken aback
25 by what was happening, as to why I was being put on the 14:46
26 spot again, the third visitation, and I said, look, I'm
27 going to deal with this.

28 455 Q. And what you said to the Commission there and then as
29 recorded, is that something then that you were

1 instructed to say on the day?

2 A. What does it say here?

3 456 Q. Yes, perhaps in fairness to you, we will open that. If
4 we go down the page. There's an exchange over several
5 pages, in fact. Perhaps we should open all of them. 14:47

6 CHAIRMAN: Well, the crucial point seems to be that
7 Mr. Justice O'Higgins specifically questioned the
8 integrity of Sergeant McCabe.

9 MR. MCGUINNESS: Yes, and motivation.

10 CHAIRMAN: Yes. And Mr. Smyth said in making the 14:47
11 allegations of corruption and malpractice.

12 MR. MCGUINNESS: Yes.

13 CHAIRMAN: "Yes, but I never used the words mala fides
14 and any reference to any question of integrity was a
15 mistake on my part." 14:47

16 MR. MCGUINNESS: Yes. And I'm just wondering, had you
17 had a discussion with the Commissioner about
18 withdrawing the challenge to his integrity insofar as
19 you had adopted what the Judge had been saying?

20 A. There was no discussion with the Commissioner, nor I 14:48
21 think, Mr. McGuinness, could there be a discussion with
22 the Commissioner about such -- are you talking about
23 the Commissioner, the Garda Commissioner?

24 457 Q. Yes.

25 A. No, I didn't have -- sorry, could you pose the question 14:48
26 again?

27 458 Q. Did you have a discussion with the Commissioner, your
28 client, about this and withdrawing the challenge to --

29 A. No.

1 459 Q. -- his integrity?
2 A. No, no, because it didn't arise. I didn't anticipate
3 that this was coming up.
4 460 Q. Yes. Well, I know you didn't anticipate it, but you
5 do, as it were, withdraw the challenge and said it was 14:48
6 your error to have made the challenge?
7 A. Well, as I explained earlier this morning, the error
8 was that I was conveying to the Judge that I had
9 instructions that the Garda Commissioner had used the
10 word "integrity". She'd never used the word 14:48
11 "integrity". And I explained to you this morning that
12 the use of the word by me was lawyer speak in the event
13 that a person hadn't any evidence to back up the
14 allegations they were making, and that, in those
15 circumstances, credibility -- or, sorry, integrity 14:49
16 could apply in that respect, but not as to character.
17 That's as I understood. It was my -- insofar as what I
18 was admitting to as an error --
19 461 Q. Yes.
20 A. -- was the fact that I conveyed -- in the event that I 14:49
21 conveyed to the Judge that the Commissioner had used --
22 she never used the word "integrity".
23 462 Q. All right.
24 A. And, in fact, it was the Judge who used it, and of
25 course I fell into the trap of trying to interpret what 14:49
26 he meant by "integrity", and of course I responded in
27 that way.
28 463 Q. Yes. Obviously you've seen this portion of the
29 transcript on a number of occasions?

1 A. I have seen it a few times.

2 464 Q. Is there anything else you would like to say in
3 relation to that?

4 A. No, it speaks for itself.

5 465 Q. Yes. 14:49

6 A. As to -- look, there was no -- it speaks for itself and
7 I had no pre-warning that this was going to happen,
8 that there was going to be -- and I still maintain in
9 my own mind, I might be only speculating, and I
10 shouldn't speculate, but I think the Commissioner [sic] 14:50
11 may have been trying to take the sting out of what
12 might have happened, just as the Commissioner was about
13 to get into the witness box.

14 CHAIRMAN: Yes. But essentially the question
15 Mr. McGuinness is asking you is, you're falling on your 14:50
16 own sword, it would seem, by saying, look, I made a
17 mistake in referring to integrity, and that was my
18 fall, and, in terms of mala fides, well, I never used
19 those words but other people may have used them in the
20 course of the exchange, but what Mr. McGuinness is 14:50
21 questioning you about is, are you falling on the sword
22 the Commissioner herself should properly have fallen on
23 if she had told you to interrogate --

24 A. No.

25 CHAIRMAN: -- witnesses in relation to the integrity of 14:50
26 Sergeant McCabe? That is the basic question.

27 A. No, I'm not falling on the sword for the Commissioner.

28 466 Q. MR. MCGUINNESS: Okay. And you're obviously -- I mean,
29 the bottom line, as it were, is that here you are, in

1 fact, reconfirming, in the presence of the
2 Commissioner, that you're challenging Sergeant McCabe's
3 credibility and motivation?
4 A. That is correct.
5 467 Q. Yeah. And certainly, as I understand your own personal 14:51
6 analysis of what that may lead to, is that if it is --
7 if the challenge is sustained and the credibility of
8 someone making allegations is found to be lacking, it
9 does reflect on their integrity?
10 A. In respect of the allegations. 14:51
11 468 Q. Yes. Okay. Now, can I just ask you a couple of
12 questions about the overview submissions that were
13 lodged. They are to be found at volume 5, 2897.
14 A. Mr. McGuinness, they were in the bailiwick of
15 Mr. Byrne. 14:52
16 469 Q. Pardon?
17 A. The submissions were drafted by Mr. Byrne, as I
18 understand it.
19 CHAIRMAN: Did you read through them?
20 A. Oh, I read through them and I take responsibility. 14:52
21 CHAIRMAN: And passed your quill pen down on the
22 bits you didn't agree with?
23 A. I accept responsibility for them.
24 CHAIRMAN: well, senior counsel quite often change a
25 word here and there just to show that they have read 14:52
26 it. Was that --
27 A. Yes. Well, I'm not so sure that it happened in this
28 case, Judge, that I made any amendments.
29 470 Q. MR. MCGUINNESS: It's just obviously they're quite

1 lengthy submissions, but they appear to have been put
2 in in addition, as it were, to submissions on
3 individual modules, is that right?
4 A. I'm not familiar -- I'm not necessarily certain about
5 that. 14:52
6 471 Q. Yes.
7 A. Are you saying this is an overview following on --
8 472 Q. Well, submissions were put in on all of the other
9 individual modules?
10 A. On all modules, correct, correct. 14:53
11 473 Q. And then this is sort of an overview?
12 A. Yes, at the end --
13 CHAIRMAN: And the date of this one, Mr. McGuinness?
14 MR. MCGUINNESS: It's 1st February.
15 CHAIRMAN: Of 2015? 14:53
16 MR. MCGUINNESS: 2016.
17 CHAIRMAN: Yes, yes.
18 A. So that would have been the overview towards the end of
19 the Commission?
20 474 Q. MR. MCGUINNESS: Yes. 14:53
21 A. Yes, I follow.
22 475 Q. Sort of final submissions, really?
23 A. Yes, absolutely, that's what I wasn't sure of, what you
24 were saying is, because I haven't got the date in front
25 of me. It's the final submissions. 14:53
26 476 Q. But at page 8 of the submissions, from paragraph 39
27 on --
28 A. Again, I haven't got paragraph 39.
29 477 Q. I'm sorry?

1 A. I haven't got paragraph 39.

2 478 Q. Yes. It might be easier if you take the volume.

3 A. Which volume is it?

4 479 Q. Volume 5.

5 A. What page is it again? 14:53

6 480 Q. Page 2904 now, it's page 8 of the submissions.

7 A. From paragraph 39?

8 481 Q. Yes. It's a commentary on the motivation of Sergeant
9 McCabe, and obviously this has gone in under your name
10 and other counsel's names and on behalf of the 14:54
11 Commissioner and others, isn't that right?

12 A. That would seem to be the case.

13 482 Q. And it recites a number of factual matters. I'm not
14 going to raise an issue as to whether all of them were
15 supported in evidence or not, but paragraph 44 seems to 14:54
16 take a fairly large swipe, if one could use the word,
17 at Sergeant McCabe, by saying that:

18

19 "Sergeant McCabe then takes the approach if anyone to
20 whom he makes a complaint does not agree with him, he 14:54
21 makes a further complaint, in some cases knowingly
22 without justification, to a further authority."

23

24 And there's three paragraphs on the effect of the
25 allegations, paragraphs 47, 48 and 49, which presumably 14:54
26 you've seen and you considered and you were happy to
27 put your name to?

28 A. Well, can I explain -- do you want me to explain that?

29 483 Q. Well, yes.

1 A. In respect of that, it has to be said that Sergeant
2 McCabe effectively admitted making a complaint against
3 Commissioner Callinan for the purpose of getting his
4 complaints onto the desk of the Minister. I
5 accepted -- there was clearly no case against 14:55
6 Commissioner Callinan. And he followed that up. He
7 already had -- there was a complaint -- then when that
8 complaint was made, it landed on the desk of the
9 Minister. The Minister then writes out, or the
10 official, it was made on -- I think it was a 14:55
11 confidential recipient thing, private and confidential,
12 made its way onto the Minister's desk. Letters were
13 written by the Minister to the effect that, look --
14 well, the Department, to the effect, would you mind
15 taking off the clause "private and confidential" 14:56
16 because we want to move this matter on. And I think
17 there were five reminders sent to Sergeant McCabe, and
18 he never gave consent to remove the "private and
19 confidential" clause, which meant that the Minister
20 came under attack and ultimately led to his -- came 14:56
21 under attack firstly in the Guerin investigation and
22 ultimately led to a lot of -- led to his having to
23 leave office when the Guerin Report was published. So
24 that tells us, number one, that he -- when you go to
25 paragraph 2, he was prepared to make complaints, and 14:56
26 you see from that that, in the first instance, there
27 was no justification for making a complaint about
28 Commissioner Callinan; it was done for the purpose of
29 getting it onto the Minister's desk. When it arrives

1 on the Minister's desk, he doesn't follow up.

2 484 Q. well, of course, the Minister wasn't a client of yours
3 in this.

4 A. No, he wasn't a client, but --

5 485 Q. He was separately represented? 14:57

6 A. -- at the same time, this is an overview of the
7 position as we see it at the end of the Commission.

8 486 Q. Yes.

9 A. So I know he wasn't a client of mine, but, but, but
10 Commissioner Callinan was a client of mine. 14:57

11 487 Q. Yes.

12 A. So they're interlinked in that way.

13 488 Q. Yes.

14 A. And he didn't -- he held -- he alleged corruption
15 against Commissioner Callinan. There was absolutely no 14:57
16 corruption. But he interpreted corruption in the
17 meaning of the Act, as he saw it, the regulations, as
18 they saw them. And he got it onto the Minister's desk,
19 and then he didn't follow up, despite five, if not six,
20 reminders. And if he had followed up, probably 14:57
21 Minister Shatter would not have had to resign. So this
22 is an overview in relation to what was going on in the
23 background.

24 489 Q. well, I don't want to engage in an issue about
25 Mr. Guerin's report and Minister Shatter. 14:58

26 A. But it just wasn't --

27 490 Q. None of that was within the terms of reference, isn't
28 that right?

29 A. well, Commissioner Callinan's matter was dealt with

1 within -- that was a matter which came up within the
2 Commission, and he was cross-examined by the
3 Commission's senior counsel, and that's when the matter
4 was brought to the attention of the Commission and he
5 said -- and I think he said, when he was asked the 14:58
6 question, he was asked the question, why did you not
7 reply? And then Mr. McDowell said, hands up. And that
8 was the end of that. And that was, unfortunately, the
9 end of Mr. Shatter.

10 491 Q. All right. Well, I don't want to stray outside our 14:58
11 terms of reference, but obviously Sergeant McCabe,
12 facing into the Commission, he couldn't have regarded
13 himself as being immune to questions, or he was,
14 perhaps, on your view, centrally relevant to all of the
15 modules -- 14:59

16 A. Well --

17 492 Q. -- but was it necessary to put in this sort of overview
18 of his motivation in addition, as an overlay, as it
19 were, in relation to each individual module where he
20 had had to give evidence, as it were, and subject 14:59
21 himself to scrutiny, was that entirely appropriate?

22 A. But it wasn't a question of him subjecting himself to
23 scrutiny. This is a man, in fairness, who had made
24 serious allegations all the way through, and none of
25 them were stacking up. I invited him to withdraw 14:59
26 allegations, and he steadfastly, in some instances,
27 refused, even when the Judge stepped in. You see my
28 letter in July --

29 493 Q. Yes.

1 A. -- which I wrote in --

2 494 Q. I think, in fairness to him, he did withdraw some
3 allegations?

4 A. He did, he withdrew cover-up as against -- I think he
5 withdrew an allegation against Superintendent 14:59
6 Cunningham. It was quite obvious it should never have
7 been made. He apologised to him.

8 495 Q. He did apologise.

9 A. And he withdrew an allegation of cover-up only, I
10 think, as against -- it may have been against 15:00
11 Superintendent Clancy in one of the matters. But he
12 steadfastly refused. I mean --

13 MR. MCGUINNESS: I'm going to leave it there,
14 Mr. Smyth. Thank you. There will be other questions,
15 and I may have some further ones at the end. Thank 15:00
16 you.

17 A. Thank you.

18

19 MR. COLM SMYTH WAS CROSS-EXAMINED BY MR. MCDOWELL:

20 15:00

21 MR. MCDOWELL: Good afternoon, Mr. Smyth.

22 A. Good afternoon, Mr. McDowell.

23 496 Q. There are just a few general questions I want to put to
24 you first. Do you accept now that Sergeant McCabe told
25 the O'Higgins Commission that he had the full DPP's 15:00
26 directions given to him by the State solicitor in 2007?

27 A. Mr. McDowell, as I understood, full DPP directions
28 would not necessarily be given to any party. You would
29 get -- you would either be told there was a prosecution

1 or there wasn't a prosecution. The actual full
2 document would never be given to any citizen.

3 497 Q. No. Do you accept that he had the full direction from
4 Rory Hayden, the state solicitor, who had read them to
5 him? 15:01

6 A. Yes, he was told by Rory Hayden.

7 498 Q. You accept that?

8 A. Yes, he was told by Rory Hayden. And he was told by
9 Superintendent Cunningham.

10 499 Q. Sorry, he wasn't told the same by Superintendent 15:01
11 Cunningham?

12 A. Sorry, Mr. McDowell, he was told by
13 Superintendent Cunningham as soon as
14 Superintendent Cunningham became aware.

15 CHAIRMAN: well, forgive me for being tiresome and 15:01
16 intervening at this point. Being given the DPP's
17 directions, I would imagine, is like being given a pen,
18 you get the piece of paper, and I do understand, and I
19 have always had the understanding, that when the State
20 solicitor got the letter, he immediately rang Sergeant 15:01
21 McCabe. They would have been on friendly terms.
22 There's nothing wrong or improper about that. It is
23 read over the telephone. I made the comment about four
24 days ago to say that unless he had a photographic
25 memory and then wrote it down himself, he didn't have 15:02
26 the actual text. He was certainly told it. But what
27 he was told by Superintendent Cunningham in the hotel,
28 and obviously there is a bit of to-ing and fro-ing in
29 relation to that and meeting and who was accompanying

1 him and whether it was necessary, etcetera, was the
2 general Garda shibboleth - insufficient evidence.

3 A. Yes.

4 CHAIRMAN: That is my understanding today. That is
5 what Superintendent Cunningham has told me.

15:02

6 A. Fair enough.

7 500 Q. MR. MCDOWELL: well, then, do you also accept that
8 various motivations that have been attributed to him,
9 such as that he wanted to challenge the DPP's
10 directions, is not correct?

15:02

11 A. No, he wanted to get access --

12 501 Q. Yes.

13 A. -- to the directions.

14 502 Q. And I was going to come to that. He never wanted
15 access to them, he just wanted --

15:02

16 A. well, sorry --

17 503 Q. Sorry, just let me finish.

18 A. Yes.

19 504 Q. He wanted them conveyed in the same terms to the D
20 family as they had been to him?

15:03

21 A. But they were conveyed to the D family.

22 505 Q. But not in the same terms. They were told there was
23 insufficient evidence?

24 A. well, I don't know what terms that -- Superintendent
25 Cunningham -- maybe it will be best addressed -- I
26 can't remember what he said in the Commission about
27 that, but he said that he went to the D family and he
28 went and he contacted Sergeant McCabe to convey the
29 decision.

15:03

1 506 Q. Yes. And we have had this in another module,
2 Mr. Smyth, you're probably unaware of that?
3 A. So be it. I'm unaware of that, so...
4 507 Q. But it is clear that he did not say --
5 A. Okay. 15:03
6 508 Q. -- to the D family --
7 A. Okay.
8 509 Q. -- he didn't convey to the D family --
9 A. The same.
10 510 Q. -- what Rory Hayden had conveyed to him? 15:03
11 A. I see. Well, I didn't know that.
12 511 Q. I see. Do you accept that he never wanted the DPP's
13 directions clarified, which a number of documents
14 suggested he did?
15 A. I think that if you look at the -- if you look at his 15:03
16 own transcript, which is the truth of what he wanted --
17 512 Q. Yes.
18 A. -- and which is compatible with the actual note of
19 Superintendent Cunningham, which he took on the day.
20 513 Q. He said very clearly in his own transcript that he 15:04
21 wanted the D family --
22 A. No.
23 514 Q. He wanted -- he wanted that the Gardaí would inform the
24 D family so that -- so that they would know what the
25 directions were? 15:04
26 A. No, Mr. McDowell, if you look, I think, I don't know if
27 the Commission -- or, sorry, if the Tribunal has the
28 actual transcript of the audio?
29 515 Q. They do. They do have it.

1 A. And if you look at, I think, from memory, it's page 18
2 of that, it shows exactly what he wanted.

3 516 Q. Yes.

4 A. I don't have it here with me.

5 517 Q. Well, we will come back to it. 15:04

6 A. No, no, I need it to be addressed now, Mr. McDowell.
7 Please.

8 518 Q. I will come to it.

9 A. No, but I need it to be addressed now because you asked
10 me the question. 15:05

11 519 Q. Okay.

12 A. Because what he wanted, he wanted the difficulties he
13 was having with D to be conveyed to the DPP, so that
14 the DPP would be made obviously aware of the
15 difficulties, and, to that end, the hope that he would 15:05
16 get the directions shown to both parties. That's
17 what's on the audio.

18 520 Q. Yes. So that he knew them himself, but he wanted them
19 shown to the other parties?

20 A. No, you see there is a crucial difference. He wanted 15:05
21 to make more -- he wanted to make known to the DPP the
22 difficulties he was having with D.

23 521 Q. Yes. And he wanted Superintendent Clancy to be in a
24 position to tell -- to ask the DPP for permission to
25 tell the D family, isn't that right? 15:05

26 A. No. Again, if you look at paragraph 18, I think it is
27 very important that you look at that because he said
28 that's exactly it. It's vitally important.

29 MR. MCGUINNESS: It commences at page 4156, Chairman.

1 MR. MCDOWELL: what book is that?
2 MR. MCGUINNESS: It is Volume 8, 4156.
3 CHAIRMAN: The idea you're trying to convey, Mr. Smyth,
4 is that the DPP might relax its usual rule, is --
5 MR. MCGUINNESS: 4156. 15:06
6 A. That is the kind of thing. I don't know what was in
7 his mind.
8 CHAIRMAN: That's what I always understood.
9 A. Yes. And that he might then release the --
10 522 Q. MR. MCDOWELL: I think the letter he wrote to 15:06
11 Superintendent Clancy --
12 A. But I think I just really need to see this, if it could
13 be possibly brought up, because I think it is very
14 important to clarify, because there has been a
15 misstatement, and I shudder to say it, but a lot has 15:06
16 been said about this tape and about where would Maurice
17 McCabe be today if he hadn't got this tape.
18 CHAIRMAN: Don't worry. We will get it up.
19 MR. MCDOWELL: I will come back to it, Mr. Smyth, I
20 will not try to -- 15:07
21 CHAIRMAN: Well, you know, we have been -- I'm sorry,
22 Mr. McDowell, it's not for me to interrupt your
23 cross-examination --
24 MR. MCDOWELL: I know that.
25 CHAIRMAN: -- and direct certain things, but I just 15:07
26 feel there's going to be an agitation in the room
27 unless we get rid of it. Why not get rid of it. And
28 if you won't get rid of it, I will get rid of it.
29 MR. MCDOWELL: If it will come up, I would be happy,

1 Judge, on the screen.

2 A. Which volume is it?

3 MR. MCDOWELL: It's on page 18 of this transcript, is
4 that right?

5 A. I think it's page 18. I might be wrong in that. Yes. 15:07
6 He says at the bottom of page 18:
7
8 "All I wanted was for --
9
10 MAURICE: All I wanted was for the DPP directions to be 15:07
11 shown to each party.
12
13 NOEL: Is that where this stands now, are you saying?
14 Do you want to make a report or statement to that
15 effect now to say to me that the reason you outlined 15:08
16 these was --"
17
18 These being the complaints against D.
19
20 " -- these was in response in a request from your 15:08
21 then-district officer, Superintendent Clancy, to
22 highlight the difficulties that you were having with
23 Mr. D in order that the DPP should be apprised of it,
24 or whatever, as a result of which the directions of the
25 DPP would be made known to each." 15:08
26
27 And he said:
28
29 "That's exactly it."

1 523 Q. That's what I am putting to you.

2 A. No, but the subtle difference is Mr. McDowell --

3 524 Q. If we can scroll back up.

4 A. No, no, I appreciate that, but this is summation.

5 525 Q. And he says: 15:08

6

7 "And so what do you want? All I wanted was for the DPP

8 directions to be shown to each party."

9 A. Yes, but in terms of what he wanted Superintendent

10 Clancy to do, there's an important difference, because 15:08

11 he wanted Clancy to acquaint the DPP of the

12 difficulties he was having with D.

13 526 Q. Yes.

14 A. So it's --

15 527 Q. Okay. There may not be much between us on that. 15:09

16 A. It may not be, but it is important.

17 528 Q. Let's be clear about this. He was not looking for -- I

18 mean, we have had various different iterations put in

19 writing, such as that he wanted to be exonerated, that

20 he wanted to challenge the DPP's directions. Those are 15:09

21 not true, are they? He didn't want to challenge any

22 DPP's direction?

23 A. I don't think that that's --

24 CHAIRMAN: well, I mean, the way I understand it now,

25 and maybe it would help if I say what I think I 15:09

26 understand about this.

27 MR. MCDOWELL: Yes.

28 CHAIRMAN: Just going back to what was happening, well

29 we know that the DPP made his -- her, in fact, decision

1 on 5th April 2007. We know that there was some delay
2 in relation to Superintendent Cunningham being on duty
3 in a particular place because of assignment to
4 somewhere else, we know that the protocol is you go to
5 the victim, alleged, first, then you go to the person 15:09
6 who is the alleged perpetrator, that came later, but
7 even though Superintendent Cunningham wasn't there, the
8 State solicitor rang up Sergeant McCabe and read out
9 the DPP's letter over the phone. So, in terms of the
10 way the letter is cast, it sounds like an exoneration. 15:10
11 MR. McDOWELL: Yes.
12 CHAIRMAN: So when, sometime later, Superintendent
13 Cunningham met him, he felt that all he could say to
14 him was lack of evidence. Similarly, I think in
15 relation to the D family, or Ms. D, I think all he 15:10
16 could say was lack of evidence. There was then two
17 incidents: one in the courthouse, where Sergeant
18 McCabe was attacked; and one in the main street of
19 Bailieboro, where he was attacked. By "attacked" I
20 don't mean with a machete, or anything like that. I 15:10
21 mean obviously attacked in the sense of verbally
22 confronted. Now, the aftermath of that was that
23 difficulties, as I understand it, continued, and
24 Sergeant McCabe then wrote an account of those
25 difficulties in January 2008, difficulties with the D 15:11
26 family. And then on the 25th August 2008 he made what
27 I would regard as the plea, using that in a legal
28 sense, to Superintendent Cunningham that would he,
29 through some agency, try and get the DPP to lessen the

1 strictures about telling people the result of a ruling
2 by the DPP's office as to prosecution or no
3 prosecution, under the Prosecution of Offenders Act
4 1974, and further, that the letter to Superintendent
5 Clancy complaining about D, the D family, the incidents 15:11
6 in the courtroom, the incident in Bailieboro town, was
7 related to that and not related to anything else. Now,
8 that is what I understand.

9 MR. MCDOWELL: Just with one correction, Judge, if I
10 might: that Superintendent Cunningham had arrived in 15:11
11 August 2008 to ask him to substantiate his complaints
12 on the instructions of Chief Superintendent Rooney, and
13 he made it very clear he did not want to start making
14 further complaints in the matter.

15 CHAIRMAN: All right. 15:12

16 MR. MCDOWELL: That he was now in Mullingar and that
17 this was -- there was no point in making complaints.

18 CHAIRMAN: No, I do, I do understand that, and, in
19 fact, we discussed this --

20 MR. MCDOWELL: Yes. 15:12

21 CHAIRMAN: -- not you and I, at an earlier stage, and I
22 think I indicated that in the letter in relation to the
23 D family, the attack in the courtroom, the attack in
24 the town, he said I do not want any prosecutions taken.
25 So, in other words, he wanted it to die. 15:12

26 MR. MCDOWELL: Yes.

27 CHAIRMAN: So maybe that helps, I don't know.

28 529 Q. MR. MCDOWELL: Now, could I ask you then to go to
29 volume 1A, please, and, in particular, could I ask you

1 to go to page 162. This is the first day of the
2 Commission, Mr. Smyth, and this is the opening of the
3 Commission by Mr. Justice O'Higgins. And could I ask
4 you to look at the lines 26 onwards on page 162. The
5 paragraph reads:

15:14

6
7 "Certain witness, in particular the Garda witnesses,
8 need have no fears they will not be heard on wider
9 issues, structural, organisational, or otherwise, which
10 may fall within the scope of the Commission's terms of
11 reference. They will be given an opportunity to do so
12 as other modules unfold. The scope of this phase of
13 the hearings shall not include the investigation of the
14 Minister for Justice and Equality or by the Department
15 of Justice and Equality in relation to the incident.
16 The issues for the Minister and the Department will be
17 the subject of hearings later in the year."

15:14

15:14

18
19 And then at line 6 he said:

20
21 "It is a Commission of Investigation and I intend that
22 the hearings be heard, as far as possible, in an
23 inquisitorial rather than an adversarial fashion. The
24 very fact that, under the Act, cross-examination is
25 permitted only on the direction of the Commission
26 underlines its inquisitorial nature and I earnestly ask
27 the legal advisers to bear this in mind at all times."

15:14

15:15

28 530 Q. You were there and you heard that, isn't that right?

29 A. Yes, absolutely.

1 531 Q. Yes. Could I ask you to go to the next page, 164, and
2 to line 12:

3
4 "The hearing will be led by counsel for the Commission,
5 Mr. Gillane. Parties whose interests, in the opinion 15:15
6 of the Commission, may be affected will be allowed
7 representation. On the direction of the Commission
8 cross-examination may be allowed in accordance with the
9 provisions of section 11(2)(c) of the Commissions of
10 Investigation Act 2004. That cross-examination should 15:15
11 be focused on the matter under inquiry in any
12 particular module."

13
14 You heard that as well?

15 A. Yes. 15:16

16 532 Q. And can I bring you to page 166, where Mr. Justice
17 O'Higgins said:

18
19 "I draw your attention --"

20
21 And this was addressed to all of the barristers there. 15:16

22
23 " -- to the fact that in the event of a version of
24 events being disputed or a person being criticised it
25 is necessary to put the matters in dispute on the basis 15:16
26 of such criticism to the relevant witness in order that
27 he or she can deal with it."

28
29 And later on he said:

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"It is not our intention that anyone should be ambushed or taken by surprise."

You recall that?

15:16

A. Yes.

533 Q. And you also recall that, and Mr. Justice O'Higgins made it clear, that if any person -- any witness proposed to criticise any other witness, permission from the Commission should be obtained and the factual basis for the criticism laid out in advance, isn't that right?

15:17

A. Yeah.

534 Q. Now, I fully appreciate that you were acting in rushed circumstances --

15:17

A. Absolutely.

535 Q. -- and preparing for this event. But I have to suggest to you that you didn't, and your legal team, I'm not attributing personal blame to you on this at all, but that you didn't seek permission to go into the question of motivation and/or tell the Commission in advance that you were going to rely on particular facts?

15:17

A. Well, of course the matter arose on cross-examination of Chief Superintendent Colm Rooney. The matter arose because, I suppose unlike other commissions, there was a stark difference here because Sergeant McCabe was coming in with a menu of accusations which he says were backed up by -- as I've already indicated -- I won't go there again, but you know the point I'm making in

15:18

1 relation to the proved facts, or the proved facts
2 document, I think it is called. So I'm on the back
3 foot in relation to the people that I'm representing.
4 I have no forewarning of what allegations, other than
5 they are allegations of a criminal nature, four or five 15:18
6 of them, if not six. The others are allegations of
7 serious malpractice at a high level of senior Gardaí.
8 But in relation to the criminal matters, we have more
9 concern -- I have a concern about everything, but
10 particularly about the criminal matters. I don't have 15:19
11 anything set out by you, Mr. McDowell, or your client,
12 as to how they are going to be stacked up. So you
13 understand the position I'm in. I'm trying to -- and I
14 do accept that, you know, in strict principle, I should
15 have put the -- you should have been put on notice, you 15:19
16 shouldn't have had to stand up and bring this to the
17 attention of the Commissioner, I fully accept that, and
18 it was remiss of me to do so.

19 536 Q. I just want to put that in the context, that when we
20 get to book 1B, which is what happened on Friday 15th, 15:19
21 the following day, you started to ask questions of
22 Chief Superintendent Cunningham, which led to an
23 objection firstly from Mr. Gillane, counsel for the
24 Commission, and secondly from me on behalf of Sergeant
25 McCabe, isn't that right? 15:19

26 MR. SREENAN: I think it is Chief Superintendent
27 Rooney.

28 MR. McDOWELL: Sorry, Chief Superintendent Rooney.

29 A. Chief Superintendent Rooney, yes. What page is that

1 Mr. McDowell?

2 537 Q. It's --

3 A. I recall it anyway. I know what it is. I think I know
4 what you are saying.

5 538 Q. We will get to the point. The objections are to be 15:20
6 found -- at page 166, you say:
7
8 "I have a few more questions to ask you --"
9 A. 166?

10 539 Q. No, no. 177 of the transcript would be the best one to 15:20
11 put to you.
12 A. Yes, yes.

13 540 Q. You said at question 782, line 23:
14
15 "Did you have any other contact with Sergeant McCabe, 15:21
16 to your recollection?"
17
18 And Chief Superintendent Rooney said to you:
19
20 "Is there any particular, I don't recall." 15:21
21
22 And then you said:
23
24 "At any time thereafter did you have any contact with
25 him in relation to it? 15:21
26 A. Oh, indeed I did, yes, I would have met -- "
27
28 And you said:
29

1 "Were you friendly with Sergeant McCabe?

2 A. I was, I was.

3 Q. Did you serve with him? He's not a contemporary
4 obviously?"

5 15:21

6 And there was discussion there. And then you said at
7 question 786:

8
9 "Did your friendship continue?"

10 15:21

11 And he answered:

12
13 "I haven't had any contact with him since I retired,
14 but there's nothing unusual about that, I haven't much
15 contact with anybody."

16 15:21

17 And then you asked him:

18
19 "But before you retired had you any contact with him?"

20 15:21

21 And he said:

22
23 "Yeah, Sergeant McCabe came to see me, sought an
24 appointment to come and see me in my office in
25 Monaghan. He contacted my office and made an
26 appointment and I saw him. He came to me. He was
27 very, very angry, he was very annoyed and very upset."

28 15:21

29 And the Judge asked you:

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"When was this?"

And he replied:

15:22

"It was in late 2006."

And Mr. Justice O'Higgins said:

"Very angry."

15:22

And you said:

"Do you think it was in November or was it late in 2006
or was it wintertime?"

15:22

And Chief Superintendent Rooney said:

"No, I'm sorry, Judge, it was 2007."

15:22

And you said:

"Was it late 2007?"

And at this stage you asked him:

15:22

"Was it probably late 2007?"

A. It was probably late 2007, yes, definitely. He
came to my office. He was in that state and he

1 demanded of me that I write to the Director of Public
2 Prosecutions and I challenge a decision of the Director
3 of Public Prosecutions had made in respect of him."
4

5 Now, we know that that is not true. 15:22

6 A. That is certainly not correct.

7 541 Q. Yes. And Mr. Gillane said:

8
9 "I don't mean to cut across the witness but I think
10 just in relation to this matter, unless the parties 15:23
11 have a different view, I think it is evidence
12 concerning a matter that the Commission isn't directed
13 to investigate. Whether it's relevant or not is a
14 matter for the parties."
15

16 So the first person to object was counsel for the
17 Commission. 15:23

18 A. Yes.

19 542 Q. And it was a few lines down that Mr. Justice O'Higgins
20 said: 15:23

21
22 "The matter is délicat. I will rise for ten minutes."
23

24 And I said:

25
26 "I want Mr. Smyth to inform, since this process is 15:23
27 happening now in front of my client, I want Mr. Smyth
28 to formally inform you, Judge, that he is asking these
29 questions on the firm instruction of the Commissioner

1 and that he knows the answers that he's seeking from
2 this witness, and that on his view as a professional
3 senior counsel, it is relevant to the module we're
4 dealing with now. I want that clarified, because I
5 will deal with it, I want to consult my own legal team, 15:23
6 but in any event --"

7
8 And Mr. Gillane says:

9
10 "I think Mr. McDowell wants to be heard on the issue." 15:23
11

12 And Mr. Justice O'Higgins said:

13
14 "I think that might be reasonable enough. But I intend
15 to abide my original intention and rise for ten 15:24
16 minutes. The matter can be clarified after that."

17
18 Now, just to be one hundred percent clear, you were
19 being asked to -- and it is quite unusual for one
20 counsel to ask another counsel to confirm that their 15:24
21 instructions -- the questions they are putting --

22 A. Yes.

23 543 Q. -- arise on instructions, isn't that right?

24 A. Yes.

25 544 Q. And we know that you at that stage sought 15:24
26 confirmation --

27 A. Yes.

28 545 Q. -- isn't that right?

29 A. That's so.

1 546 Q. And we also know, and we have heard from Ms. Ryan that
2 she was surprised that you were pursuing this line
3 because she hadn't advance notice of it. In her
4 statement, she says she did not expect you to take this
5 line. 15:25

6 A. Em, I'm not so certain about that, Mr. McDowell,
7 because it didn't come up out of --

8 547 Q. Well, in any event, she said she was taken by surprise.
9 A. Yes.

10 548 Q. Whether she is right or wrong about that, she said she 15:25
11 was not expecting -- what she actually said in her
12 statement was -- and we also know that Chief
13 Superintendent Rooney said that he was not expecting to
14 be cross-examined on this issue as well.

15 A. Well, I think that Ms. Ryan may have a different view 15:25
16 on that, but again, we cannot -- we cannot go there
17 because of privilege.

18 549 Q. I see. I see. Well, can we then go on to what
19 transpired thereafter. This is at page 695 of the
20 book, 200 of the transcript. You came back after this 15:25
21 adjournment and said:
22
23 "My instructions are re-confirmed.
24
25 MR. JUSTICE O'HIGGINS: Very good. Your instructions 15:26
26 as I understand them is --"
27
28 Sorry, maybe we're missing something here.
29

1 "Your instructions, as I understand them, are that
2 Sergeant McCabe acted as he did for improper motives."

3
4 And you said:

5
6 "Yes."

7
8 And Mr. Justice O'Higgins said:

9
10 "Okay. And that his integrity is being challenged in
11 that respect." 15:26

12
13 And you said:

14
15 "In that respect." 15:26

16
17 Have you any doubt that you led Mr. Justice O'Higgins
18 to believe that you were challenging Sergeant McCabe's
19 integrity?

20 A. As I said, as I said earlier to Mr. McGuinness, the 15:26
21 word "integrity" was raised first, in my view, by the
22 Judge, and that having been raised, I was interpreting
23 and he was interpreting what my instructions were, as I
24 took it, and I was trying to interpret what he meant by
25 "integrity". And as I saw "integrity", in lawyer 15:27
26 language, I just explained that earlier, that if
27 someone lacks any evidence for making serious criminal
28 conduct allegations, there must be motivation, why did
29 they do it. And it's in that respect that integrity

1 could come into play, but only in relation to the
2 allegations they're making, not in relation to their
3 character.

4 550 Q. Yes.

5 A. But the Commissioner did not instruct me --

15:27

6 551 Q. Sorry, I possibly skipped too far forward.

7 A. All right.

8 552 Q. At page 181, at page 670 of the book, the Tribunal
9 resumed. Do you see that?

10 A. Yes. 181, yes.

15:28

11 553 Q. And after some other matter was being discussed about
12 what was corrupt or improper conduct, Mr. Gillane, at
13 page 671, said:

14

15 "I wish to emphasise that I hold no brief for or
16 against any party before the Commission but I
17 interrupted on that basis."

15:28

18

19 which was that he had -- and he said in the previous
20 paragraph:

15:28

21

22 "That I apprehended a line of questioning in relation
23 to an area or areas that are not relevant to this
24 module or to any module to which the Commission is
25 concerned."

15:28

26

27 And then he went on to say:

28

29 "And I was mindful of the fact that the Oireachtas has

1 directed the Commission to exercise discretion in
2 relation to the scope and intensity of the
3 investigation that is considered necessary. In the
4 circumstances which arise, I recommend to the
5 Commission that Mr. McDowell might be invited to make 15:29
6 such a legal objection as arises, if it does arise, in
7 relation to the apprehended line of questioning, and
8 that Mr. Smyth might set out a basis for the line of
9 questioning if he wishes to pursue it, and that in
10 relation to both in terms of the topic that is to be 15:29
11 canvassed, no detail in relation to it is necessary and
12 it could be dealt with in legal terms."

13

14 Do you recall that happening?

15 A. Yes. 15:29

16 554 Q. And then what follows after that is a submission by me
17 for a number of pages, in which I conclude at page 187
18 by saying:

19

20 "I find it astonishing that the Commissioner should 15:29
21 feel that in some sense upholding her rights involves
22 questioning the motive and the credibility and the
23 behaviour of Sergeant McCabe in this matter. I find it
24 absolutely astonishing and happily this event is in
25 private, though semi-private, there are so many people 15:30
26 here but nonetheless it is self-contained."

27

28 And the Judge remind me it is in private. And I said:

29

1 "It is in private, but I find it, Judge, I find it
2 deeply wrong that the Commissioner would, without any
3 notice to me, who is a witness, a retired witness, with
4 a view to launching an attack on my client."
5

15:30

6 And I said:
7

8 "What I am asking for, firstly, is absolute firm
9 confirmation from Mr. Smyth that he is instructed by
10 nobody else but the Commissioner to impugn my client's
11 credibility."
12

15:30

13 Can I stop there? You had a number of clients.

14 A. Yes.

15 555 Q. So I mean, if, for instance, it was quite possible to
16 somebody who was not privy to your instructions that
17 one of your other clients was putting you up to this
18 line of cross-examination, isn't that right?
19

15:30

20 A. Well, there was nobody putting me up to anything.

21 556 Q. No. I'm saying --
22

15:30

23 A. The fact of the matter is that I had clients, I cannot
24 say what their instructions to me were.

25 557 Q. Exactly.
26

27 A. But I want you to understand, Mr. McDowell, I had to
28 defer to the Commissioner because she is my primary
29 client.
30

15:31

31 558 Q. Exactly. But the point I'm making to you is: That you
32 were being asked to state positively that this line of
33 questioning was being done on the instructions of the

1 Commissioner?

2 A. Yes, I was being asked. Because she is the primary
3 client.

4 559 Q. Yes. And Mr. Justice O'Higgins --

5 CHAIRMAN: I get the rest of it. Indeed we've heard 15:31
6 it.

7 MR. MCDOWELL: Yes.

8 CHAIRMAN: And then the next thing that happens is
9 Mr. Justice O'Higgins uses the word integrity, and at
10 15:54 Mr. Smyth says: 15:31

11

12 "Do you want me to respond?"

13

14 And he says, and he says:

15 15:31

16 "This is an inquiry in relation to allegations of
17 malpractice and corruption on a grand scale. My
18 instructions are to challenge the integrity certainly
19 of Sergeant McCabe and his motivation."

20 15:32

21 MR. MCDOWELL: Before that, Mr. Justice O'Higgins said:

22

23 "No. This part of the inquiry?"

24

25 And Mr. Smyth said: 15:32

26

27 "I appreciate that, but my instructions are to
28 challenge the integrity certainly of Sergeant McCabe
29 and his motivation."

1 CHAIRMAN: Yes. Sure. One comes back to the question
2 of where are the two witnesses conflicting so that you
3 will have any question in relation to where is one
4 witness coming from as opposed to doing their honest
5 best to recount facts.

15:32

6 560 Q. MR. McDOWELL: Exactly. And Mr. Justice O'Higgins
7 queries it, and says:

8
9 "The integrity?"

10
11 To you. And you answered:

15:32

12
13 "His motivation and his credibility in mounting these
14 allegations of corruption and malpractice."

15
16 And Mr. Justice O'Higgins then said:

15:32

17
18 "There is a difference. In relation to the question of
19 credibility, as I have already indicated, that is an
20 every day matter. One can suggest to a witness that
21 his evidence shouldn't be believed because of
22 something, but an attack on somebody's credibility or
23 on his motivation or integrity is something that really
24 doesn't form part of this inquiry. It would be
25 necessary, I think, for you to go further and say that
26 the complaints and the actions of Sergeant McCabe on
27 your instructions were motivated by his motivation was
28 dishonest other wrong. In other words, that he made
29 these allegations not in good faith, because he was

15:32

15:33

1 motivated by malice or some such motive that impinges
2 on his integrity. If those are your instructions from
3 the Commissioner so be it."

4
5 And you said:

15:33

6
7 "So be it. That is the position."

8 A. And I explained to Mr. McDowell earlier that that was
9 out of frustration, because I'd had several visitations
10 as to what my instructions were, I had never
11 encountered that before in any hearing, a judge asking
12 me and sending me out of the room to get confirmation.
13 But "so be it" was meant purely in the sense if the
14 judge was interpreting my instructions as that, that is
15 fair enough.

15:33

15:33

16 561 Q. I see.

17 A. But that's not how I interpreted my instructions. And
18 I never used, nor did I ever put mala fides, malice.
19 And you said yesterday, in fairness, to the
20 Commissioner that I put to Sergeant McCabe that he was
21 untrustworthy, that he was malicious. I did not. And
22 please refer me to any part of the transcript where I
23 put such a thing. I did not do it. And you know that.

15:33

24 562 Q. I'm suggesting to you that when the judge, when you
25 were asked by the presiding Chairman of the Commission,
26 in the plainest of terms whether Sergeant McCabe was
27 making these allegations not in good faith, but because
28 he was motivated by malice or some other such motive
29 that impinges on his integrity, and he asked:

15:34

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"If those are the instructions from the Commissioner so be it."

And you told him positively:

15:34

"So be it. That is the position."

A. And I have given you an explanation. Can I go further, Mr. McDowell?

563 Q. Yes.

15:34

A. The matter was then addressed on day 29 and you were present.

564 Q. We will come to it.

A. No, no. We will come to it now, Mr. McDowell. Because he revisited it on day 29 just before the Commissioner was due to give evidence. And the matter was clarified. By me. In the presence of the Commissioner. And if you took issue with that, if you had any doubt about it, you would have raised an objection and you would have cross-examined the Commissioner. But you did not. And you know that.

15:34

565 Q. You've made that point three times, Mr. Smyth, now.

A. It's a very important point.

566 Q. It is. And we will come to it later, because you will hear precisely what the situation was. Well, maybe we will deal with it now. The Commission had gone, through its solicitor, to Séan Costelloe, solicitor, and had emphasised that there was to be no cross-examination other than in relation to Module 5,

15:35

15:35

1 management matters.

2 A. well --

3 567 Q. And to emphasise that point had printed off the terms
4 and conditions -- sorry, the terms of reference of the
5 Commission and had delivered them to the solicitor to 15:35
6 make it very clear that that was the only basis on
7 which the Commissioner was to be cross-examined and the
8 only basis on which she was to give evidence?

9 A. Mr. McDowell, I have no knowledge of that.

10 568 Q. Yes, I know. 15:36

11 A. And I mean, you have to understand that.

12 569 Q. You have put it three times --

13 A. Yes.

14 570 Q. -- in your own evidence, but it's already been dealt
15 with in evidence before this Tribunal. 15:36

16 A. So be it. But I didn't know that. So be it.

17 571 Q. Now could I ask you then to look, to move to volume 2A,
18 please?

19 CHAIRMAN: which day are we moving to, Mr. McDowell?

20 MR. MCDOWELL: We're in day 3, Judge. 15:36

21 CHAIRMAN: That's the Monday 18th.

22 572 Q. MR. MCDOWELL: Monday 18th. I've got to suggest to you
23 that when you said "so be it", whether you were
24 frustrated or not, everybody present in that room was
25 led to believe by that remark that those were your 15:37
26 instructions.

27 A. But how could you be, Mr. McDowell? At the end of this
28 process how could you possibly be? Because you knew
29 that I never put an allegation as to your client's

1 character. I never said he was malicious. I never put
2 it to him that he was a whinger or anything else that
3 may be suggested. I never attacked his character in
4 one iota. You know that. And it suits you to say that
5 now.

15:37

6 CHAIRMAN: Listen, we're not going to have an argument.

7 MR. MCDOWELL: We will come to all of these matters.

8 CHAIRMAN: The other thing as well is: You know,
9 whether you made a mistake or not, Mr. Smyth, what I am
10 required to look into is whether the Commissioner
11 instructed you to use inappropriate grounds to
12 challenge the credibility of --

15:37

13 A. I appreciate that.

14 CHAIRMAN: -- Sergeant McCabe. So, in a way you have a
15 lesser part. And I don't want this to get off the
16 rails, because I have a nightmare looking at this
17 transcript, where we're having a Tribunal into a
18 transcript of a Commission that there may be a Tribunal
19 into this Tribunal, and my handling of this. So let's
20 please keep it on the rails, gentlemen.

15:37

21 573 Q. MR. MCDOWELL: Can I ask you to go to page 973? And
22 line 4 please.

23 A. Yes.

24 574 Q. And this is Mr. Justice O'Higgins giving his
25 understanding of what you were doing in respect of
26 Sergeant McCabe. And he said:

15:38

27

28 "Certainly there is no doubt that the integrity of the
29 witness is being impugned in no uncertain terms.

15:38

1 Secondly, in relation to the inquiry it seems to me the
2 case is being made that I cannot accept the evidence of
3 your client. This is the case that's being made."
4

5 Now, you heard that. 15:39

6 A. Yes. Just can I ask you, Mr. McDowell, is this in
7 relation to -- you refer me to the page, what are we
8 discussing here?

9 575 Q. I will read out the preceding matter. I said -- the
10 Judge said: 15:39

11
12 "It is not semi public."

13
14 And I said:

15 15:39
16 "It is, Judge. Because, as I say, she is entitled to
17 see everything although she's not here. If she's going
18 to impugn his integrity, is she asking to come along
19 and stand over these imputations or am I going to be
20 left dealing with somebody who sent in lawyers and 15:39
21 stayed up in the Phoenix Park and presented herself to
22 the public as somebody who values this man as a member
23 of the force and at the same time is launching a very
24 savage attack on him in private? I object to all of
25 that." 15:39

26
27 And Mr. Justice O'Higgins in response to that said, in
28 your presence:
29

1 "Certainly there is no doubt that the integrity of the
2 witness is being impugned in no uncertain terms.
3 Secondly, in relation to the inquiry it seems to me
4 that the case is being made that I cannot accept the
5 evidence of your client. That is the case that is
6 being made." 15:40

7
8 Now that was said in your presence. And I have got to
9 suggest to you --

10 A. Where -- 15:40

11 576 Q. -- that it is utterly, utterly unrealistic for you to
12 suggest that any other impression was given both to the
13 Chairman of the Commission and to all present but that
14 you were attacking Sergeant McCabe's integrity and
15 secondly, that you were saying that his words should
16 not be accepted? 15:40

17 A. Mr. McDowell, could you please refer me to any question
18 that I put to your client where I said his words should
19 not be accepted or that I was attacking your client's
20 character? Could you please do that? 15:40

21 577 Q. I will come to what you did and did not put to my
22 client. First of all, I am putting to you that you had
23 somehow persuaded the Chairman of the Commission that
24 those were your instructions and there can be no doubt
25 about it. 15:40

26 A. Sorry, Mr. McDowell, I think you persuaded the
27 Commissioner [sic] that I was impugning his integrity.
28 You cannot point me to any part of a transcript where I
29 impugned your client, or told him he was a liar, or

1 told him he was a person who couldn't be believed, or
2 told him he was a person being malicious or acting in
3 bad faith. There is nowhere in any of the transcripts
4 that I did that. You convinced the Commissioner [sic]
5 through your own advocacy of that fact. I left the 15:41
6 Commissioner [sic] in no doubt, through my questioning
7 and certain by clarification subsequently that there
8 was no question of attacking the man's integrity and
9 that all along I was instructed by the Commissioner
10 [sic] to deal only with credibility and motivation in 15:41
11 relation to allegations that he was making.

12 578 Q. Can we deal, for instance, with the first module and
13 your cross-examination of Sergeant McCabe?

14 A. The first module dealing with the Kingscourt.

15 579 Q. Kingscourt, yes? 15:41

16 A. Well, in relation to --

17 580 Q. First of all, can we deal with it --

18 A. Yes.

19 581 Q. And I just want to put it to you --

20 A. What question? 15:42

21 582 Q. That I want to put it to you that you asked questions
22 criticising him for allegedly telling Ms. Lorraine
23 Browne to go to GSOC?

24 A. Mr. McDowell, that is a very selective view of the
25 case. 15:42

26 583 Q. Did you --

27 A. Can I just explain to you what was being done there.
28 This was a young probationer, from my memory, he was
29 about three weeks out. He had, probably -- he was

1 under the tutelage of Regina McArdle who was his
2 training sergeant. There was an assessment to be done
3 in relation to his progress. Now when I say, he was
4 out very recently on probation from Templemore. There
5 was an assessment to be carried out, and your client 15:42
6 and Regina McArdle formed two of the three-people panel
7 of that assessment board. At that assessment board
8 meeting, your client and Regina McArdle were informed
9 that as to his progress, he indicated that he had been
10 involved in a public order incident, which was the 15:43
11 Kingscourt incident. The point being raised against
12 your client, as you well know, was that apparently it
13 was much over a year later when he took it upon himself
14 to go directly to GSOC, I was putting to your client
15 that in circumstances where he was sitting on a panel 15:43
16 reviewing this young man and was a sergeant in charge
17 of the station, where his training sergeant, who
18 apparently is friendly with your client, was also
19 sitting on the board, as a training sergeant, I
20 inquired on the credibility of that; how could it 15:43
21 follow that he could maintain that he didn't know
22 anything about the incident and that instead of calling
23 the young probationer in to question him as to what
24 this was all about -- I was not disputing that he was
25 entitled to go to GSOC, my only point to your client 15:43
26 was: why was it that he didn't take the matter in hand
27 knowing about the incident or Regina McArdle, why she
28 didn't take the matter in hand, and if they felt there
29 was a disciplinary issue in the first instance, why was

1 it not referred upstairs to the superintendent?
2 Instead of which they decided to bypass the
3 superintendent and make the complaint, ask the
4 client -- ask the victim rather to make the complaint
5 to GSOC. That is the context in which he was -- and 15:44
6 that, may I say, Mr. McDowell, was the kick off of my
7 instructions. This was the beginning of my
8 instructions on credibility. The matter didn't come to
9 light or it didn't dawn on you obviously the dramatic
10 intervention relating to Colm Rooney. But that is the 15:44
11 context in which I challenged his and Regina McArdle's,
12 by the way. Regina McArdle's credibility was
13 challenged as well.

14 584 Q. Let's stop there. Their credibility in relation to
15 what? 15:44

16 A. The credibility in relation to your client, as I
17 understand it -- I haven't got the transcript in front
18 of me, but my understanding of what he was saying was
19 that he had no knowledge of this incident. That when
20 he became aware of the incident he went to the victim 15:45
21 or himself and Regina McArdle went to the victim and
22 said, look, this is a matter for GSOC.

23 585 Q. I see.

24 A. And what I was trying to ascertain was how could that
25 be when he sat on the board and he knew that there was 15:45
26 an incident in Kingscourt.

27 586 Q. I see. So you're underlying point was that he was
28 making a complaint about behaviour that he himself
29 should have been, should have been in a position to

1 stop?

2 A. well, first of all --

3 587 Q. -- to rectify, is that right?

4 A. First of all, I was making the point that, as I
5 understood it, now I may be wrong and perhaps you will 15:45
6 correct me, he was trying to say that he knew nothing
7 about to the incident and when he became aware of it he
8 went to the victim and told her to go to GSOC. But he
9 sat on the board, as I understand it. He sat on the
10 board with Regina McArdle. He was informed about the 15:45
11 incident. And rather than take it in hand, or have
12 Regina McArdle take it in hand, the two of them decided
13 to go to this lady and say go off to GSOC. And the
14 major point of course was that they didn't direct it
15 upstairs to the superintendent who was in-house and 15:46
16 complain to him about it. That's as I understand it,
17 but if I'm wrong about that please correct me.

18 588 Q. How does that affect credibility, even if that were
19 true?

20 A. Because it shows, it shows in my view that he was by 15:46
21 passing the superintendent. The superintendent should
22 have been told about that disciplinary matter. He
23 himself should have taken it in hand or he should have
24 ensured that the training sergeant of that young man
25 took it in hand. But more importantly of course, they 15:46
26 were made aware of the incident and never followed it
27 up with the young probationer and they never brought
28 him in to question him.

29 589 Q. Mr. Smyth, do you believe that in those circumstances

1 Sergeant McCabe could make the complaint that he had
2 made in good faith?

3 A. Can I say to you, Mr. McDowell, your client made
4 serious allegations of criminal conduct - just let me
5 finish please - against my clients. That's the first 15:47
6 thing. He made serious allegations of malpractice of a
7 highly level against senior management. He's the
8 accuser. He accused my clients of serious wrongdoing.
9 And I in return wanted to explain in a simple way, what
10 was actually going on in this instance. 15:47

11 590 Q. Now --

12 A. That this is a situation where this man knew about this
13 young probationer's first public order incident, which
14 resulted in a very serious issue, where he saw himself
15 in a position to mediate and placate the victim by 15:47
16 taking €150 from somebody else and giving it to the
17 victim. He wasn't followed up. That's my point.

18 591 Q. Sorry, I asked you a different question.

19 A. All right.

20 592 Q. Do you believe that if is correct, which is hotly 15:47
21 disputed, that my client could have been behaving in
22 good complaint in making the complaint?

23 A. What I'm saying --

24 593 Q. Will you answer the question, please?

25 A. I will answer the question. There's no reason to raise 15:47
26 your voice to me, Mr. McDowell. What I'm saying to you
27 quite simply is this: It showed an animus on the part
28 of Sergeant McCabe that he was prepared not to go to
29 the superintendent, that he was prepared to bypass the

1 superintendent and go directly to GSOC to highlight
2 what otherwise could have been dealt with internally.
3 I'm not saying he shouldn't have gone to GSOC, but I
4 raise the issue in this way: why was it necessary to
5 deal with it in that way? It showed a certain animus 15:48
6 on the part of Sergeant McCabe. And that was the issue
7 that I raised, and it wasn't spotted by you until of
8 course the dramatic incident.

9 594 Q. And what do you mean by the term "animus"?
10 A. It shows that he was not referring the complaint 15:48
11 upstairs.

12 595 Q. What do you mean by the term "animus"?
13 A. It shows that he has an intention to bypass, in my view
14 that is what it was trying to show, that he had an
15 intention to bypass him. 15:48

16 596 Q. To act improperly?
17 A. It is a matter that will have to be decided on hearing
18 all the evidence, from Regina McCardle, she gave
19 evidence, your client was giving evidence also, and
20 also other people. 15:48

21 597 Q. Now you've had plenty of opportunity to consider the
22 question, I'm putting it to you for the third time: Do
23 you believe that if any of that was correct, which is
24 disputed, do you believe that my client in making the
25 complaint was acting in good faith? 15:49
26 A. He was acting properly by telling the victim to go to
27 GSOC. My point was, having known of the incident,
28 having sat on the board with the training sergeant, why
29 did they deal with it in that way? Was it to embarrass

1 the superintendent? Was it to create difficulty for
2 the superintendent who would have to fill out plenty of
3 forms in relation to GSOC investigation when he wasn't
4 made aware of it in the first place?

5 598 Q. Mr. Smyth, I asked you a simple question, do you 15:49
6 believe that in that context my client could have made
7 the complaint he did acting in good faith?

8 A. I think he acted to the detriment of Superintendent
9 Clancy by telling the victim to go to GSOC. I'm not
10 disputing he was entitled to do that. I've answered 15:49
11 that. But it shows that he was prepared to
12 embarrass -- while at the same time complaining about
13 inactivity by Superintendent Clancy.

14 599 Q. So --

15 A. When he didn't give him the chance to deal with the 15:50
16 issue.

17 600 Q. Now will you answer the question please --

18 A. Which is?

19 601 Q. -- we're going to it for the fifth time: Do you 15:50
20 believe that that behaviour was behaviour in good
21 faith?

22 A. I believe he was acting not in the interest of
23 Superintendent Clancy in doing that.

24 CHAIRMAN: All right. I feel I need to intervene here.
25 I'm going back to the term of reference, and it could 15:50
26 be that your question, Mr. McDowell, is related to it,
27 because it could be that you're asking me to raise an
28 inference or you feel an inference could be raised:
29

1 "Were any unjustified grounds relied on by Commissioner
2 O'Sullivan to discredit Sergeant Maurice McCabe at the
3 O'Higgins Commission?"
4

5 That's what I am actually inquiring into. Now let's 15:50
6 suppose that Mr. Smyth is in a case and let's suppose
7 he is prosecuting a man for rape, and let's suppose he
8 believes that the man in question is not only a rapist
9 but a serial rapist, a danger to the community, a
10 danger to society and the man is acquitted, two rules 15:51
11 apply: Firstly, he's not making the decision, and
12 secondly it's always been the case that counsel are
13 never allowed to express their own opinion --

14 MR. MCDOWELL: Exactly.

15 CHAIRMAN: -- in the course of a court case. 15:51

16 MR. MCDOWELL: Exactly.

17 CHAIRMAN: So whether he believes something or not is
18 neither here nor there.

19 MR. MCDOWELL: No.

20 CHAIRMAN: And also, I suppose -- 15:51

21 MR. MCDOWELL: I fully accept that.

22 CHAIRMAN: -- your mind can change.

23 MR. MCDOWELL: I fully accept that, Judge.

24 CHAIRMAN: Yes.

25 MR. MCDOWELL: But I mean -- 15:51

26 CHAIRMAN: So, what's it got to do with Commissioner
27 O'Sullivan if he believes, for instance, that Sergeant
28 McCabe is a really nice man --

29 MR. MCDOWELL: No, Judge, that's not the --

1 CHAIRMAN: -- or the opposite?

2 MR. McDOWELL: That is not the point. It's whether --
3 the term of reference isn't just what was going on in
4 Ms. O'Sullivan's mind, it's whether counsel instructed
5 by her relied on unjustified grounds. 15:51

6 CHAIRMAN: I wonder about that, Mr. McDowell.

7 MR. SREENAN: Chairman, I don't think so. I think the
8 term of reference refers to Commissioner O'Sullivan and
9 what was done by her. Obviously counsel acting within
10 her instructions is relevant to that question. But if 15:51
11 counsel was to act outside the scope of the
12 instructions that doesn't go to what Commissioner
13 O'Sullivan did.

14 CHAIRMAN: Are you saying that your instructions are
15 that counsel was acting outside their instructions, 15:52
16 Mr. Sreenan?

17 MR. SREENAN: Absolutely not, Chairman. But I'm
18 intervening in relation to what Mr. McDowell has
19 submitted in relation to the scope of this module --

20 CHAIRMAN: Yes. 15:52

21 MR. SREENAN: -- which in my respectful submission is
22 wrong and casts the module too wide. Because the
23 subject of this module is Commissioner O'Sullivan and
24 the instructions that she gave and in my submission
25 that is what the Tribunal is requested to address in 15:52
26 this aspect of the case, of the matter.

27 CHAIRMAN: Look, it is clear to me, and module (e), and
28 let's not go into a kind of pleading point here, but it
29 is asking me to investigate whether any unjustified

1 grounds were inappropriately relied on by Commissioner
2 O'Sullivan.

3 MR. MCDOWELL: Before the O'Higgins Commission.

4 CHAIRMAN: Well, yes.

5 MR. MCDOWELL: Yes. 15:53

6 CHAIRMAN: Yes.

7 MR. MCDOWELL: Unless we're going to say that nothing
8 that happened at the Commission is relevant --

9 CHAIRMAN: Oh no, we're not.

10 MR. MCDOWELL: -- it must be that if counsel were 15:53
11 operating on her instructions, Judge, she bears
12 responsibility for that.

13 CHAIRMAN: But I keep coming back, I suppose, to Cross
14 and Wilkins and what it says is: Cross-examination on
15 the fact is cross-examination on the fact. Were you 15:53
16 there? Cross-examination as to credibility is, for
17 instance, were you wearing your glasses? And the third
18 thing is, cross-examination as to credit is whether or
19 not you have some problem --

20 MR. MCDOWELL: Yes. 15:53

21 CHAIRMAN: -- bubbling around in the background, which
22 makes you consciously or unconsciously take a view of
23 things which may not be. Obviously the consciously one
24 is the very serious one, because it means you've a
25 motive to lie. If those instructions were given by 15:53
26 Commissioner O'Sullivan she would have to justify them.

27 MR. MCDOWELL: Yes.

28 CHAIRMAN: You're entitled to explore what happened,
29 Mr. McDowell, certainly. But it's with a view to

1 saying to me, look, from that you can raise an
2 inference that Commissioner O'Sullivan did the
3 following or that maybe the grounds for counsel's brief
4 on this were too wide. You might say that, I don't
5 know.

15:54

6 MR. McDOWELL: Well, the point I think, Judge, and I
7 don't want to get into a legal argument with
8 Mr. Sreenan here now, is that if inappropriate grounds
9 were relied on at the O'Higgins Commission and if they
10 were in accordance with the instructions of

15:54

11 Ms. O'Sullivan, that is the case made out, so to speak.
12 CHAIRMAN: Well, that is a finding that I would have
13 make, certainly, yes.

14 MR. McDOWELL: And that is the basis on which I am
15 operating.

15:54

16 CHAIRMAN: Yes.

17 MR. McDOWELL: And to put the opposite, I am saying
18 that it's a wrong approach to this module for the
19 Tribunal to do as Mr. Sreenan is suggesting and say it
20 doesn't matter what counsel does at the Tribunal even
21 if is in accordance with Ms. O'Sullivan's instructions,
22 because all that is relevant is her state of mind.

15:55

23 CHAIRMAN: Yes. Mr. Sreenan, would you like to reply
24 to that?

25 MR. SREENAN: Yes. I didn't make that submission that
26 has just been paraphrased by Mr. McDowell. My
27 submission, Chairman, is that the focus of this module
28 is whether or not Commissioner O'Sullivan
29 inappropriately relied on unjustified grounds in the

15:55

1 questioning of Sergeant McCabe. Accordingly, the focus
2 is on what Commissioner O'Sullivan did or did not and
3 the instructions she gave. The state of mind of
4 Mr. Smyth, which is what is being pursued in
5 cross-examination now, is of little, if any, relevance, 15:55
6 in my submission.

7 CHAIRMAN: You think it could ever be of relevance?
8 I'm not asking that by way of a joke, Mr. Sreenan. I'm
9 asking for your assistance on it.

10 MR. SREENAN: It's hard to see how it could ever be of 15:56
11 relevance, Chairman.

12 MR. MCDOWELL: Well, Judge, this --

13 CHAIRMAN: Could it be something from which an
14 inference could be raised in relation to a client,
15 given that the duty of counsel before cross-examining 15:56
16 on a matter of credit is to get specific instructions
17 from their client, that is clear.

18 MR. SREENAN: Yes, it is, Chairman. But it is still
19 hard to see how the state of mind of counsel is
20 relevant. Because this module is not set up to inquire 15:56
21 into counsel. Counsel is not the subject of the
22 module. Counsel are private clients. Of course what
23 they do in the context of representing the Commissioner
24 is very relevant to your inquiry here. But this is not
25 an inquiry into the instructions given by 15:56
26 Superintendent Cunningham or Chief Superintendent
27 Clancy. It relates to whether or not Commissioner
28 O'Sullivan inappropriately relied on unjustified
29 grounds.

1 CHAIRMAN: Can I leave it like this and say look, I see
2 your submission, I also see the terms of reference and
3 I'm sure we're not going to stay on this point too
4 long, Mr. McDowell.

5 MR. MCDOWELL: Yes.

15:57

6 CHAIRMAN: If that is all right. Can I just leave it
7 there in the interests of world peace as one might say.

8 MR. MCDOWELL: I think we can park that there. But it
9 is a matter of fundamental importance, as the Tribunal
10 will appreciate. I mean, if it is the case that, as

15:57

11 Mr. Sreenan says that counsel acting within
12 instructions, the purpose of questioning and the
13 purpose of behaviour and the line of questioning
14 adopted is irrelevant to this module, the only question
15 is, whether Commissioner O'Sullivan was conscious that
16 line of questioning was being done on her behalf.

15:57

17 CHAIRMAN: No.

18 MR. MCDOWELL: That would be a very subjective view of
19 the whole thing.

20 CHAIRMAN: No, Mr. McDowell, a classic example is two
21 people witness a traffic accident, one happens to be
22 the neighbour of one of the people involved and gives
23 evidence to the effect that the neighbour actually went
24 through a red light --

15:57

25 MR. MCDOWELL: Yes.

15:58

26 CHAIRMAN: -- whereas other witnesses are saying no,
27 the neighbour went through a green line. And then, on
28 specific instructions counsel are entitled to mention
29 that the particular neighbour who is giving that

1 evidence made an application for planning permission to
2 which the neighbour who she is putting in the wrong
3 objected.

4 MR. MCDOWELL: Yes.

5 CHAIRMAN: That is the classic example of 15:58
6 cross-examination as to credit. And the difficulty
7 with this is, I suppose, the specific facts and where
8 are the specific facts that were being put to undermine
9 credit. But you're entitled to say, look, this is what
10 happened and therefore you should raise an inference. 15:58
11 So I think you should just go on. You'll bear in mind
12 what my thinking is on the matter. I'm not shutting
13 you down.

14 MR. MCDOWELL: Yes. What I am really saying, Judge, is
15 that far from just asking the Tribunal to raise an 15:59
16 inference, what I am really saying, and I want to be
17 clear about this, is that the presumption is that if
18 counsel pursues a line of questioning with the witness
19 that they are acting on the instructions at the time.

20 CHAIRMAN: Well, I would very much hope so. 15:59

21 MR. MCDOWELL: Yes. And then Judge, then Judge, you'll
22 appreciate that in the particular case Mr. Smyth had
23 been asked to identify is this on the instructions of
24 the Commissioner, to the exclusion of his other
25 clients, so that it could be quite clearly understood 15:59
26 that the Commissioner was pursuing --

27 CHAIRMAN: Yes. No, there is nothing wrong with that
28 question.

29 MR. MCDOWELL: Yes.

1 CHAIRMAN: You please just carry on --

2 MR. MCDOWELL: Yes.

3 CHAIRMAN: -- and let's see where we're going on that.

4 I think the clarification on both sides is helpful.

5 Thank you. 15:59

6 602 Q. MR. MCDOWELL: I've got to suggest to you, Mr. Smyth,

7 that throughout the modules, and we needn't go through

8 each module one-by-one, but I do have a list of them,

9 of the occasions, on which it was put to Sergeant

10 McCabe that he bore responsibility for the bad or the 16:00

11 poor policing because he was the sergeant in charge at

12 Bailieboro, do you recall that happening on many

13 occasions?

14 A. Mr. McDowell, there were no findings against my

15 clients -- just listen to me for a minute, please. 16:00

16 There were no findings against my clients in relation

17 to malpractice, that were alleged by Sergeant McCabe.

18 The malpractice was found to be at sergeant or sergeant

19 in charge level. So that is the first part of the

20 question I'm going to answer. I'm entitled to ask 16:00

21 Sergeant McCabe what his responsibilities were in the

22 station and I did ask that question.

23 603 Q. Yes. I want to put it further than that, I know you

24 asked him what his responsibilities were --

25 A. Yes. 16:00

26 604 Q. -- but I think you did attempt on countless occasions

27 through him and through other witnesses to drive home

28 the point that if something had gone wrong in the

29 particular module you were dealing with it was the

1 responsibility of Sergeant McCabe as sergeant in
2 charge?

3 A. I drew attention to the Commission of the
4 responsibilities of sergeant in charge. You will
5 recall there was a major debate about the role of the 16:01
6 sergeant in charge and the definition of that role
7 within the policy of the Commissioner of An Garda
8 Síochána. I explored his role. He at one stage
9 indicated that he was in charge of some administration,
10 I think plumbing and electricity and all of that kind 16:01
11 of thing. He saw his role in relation to being aloof
12 from the overall situation in the station. And there
13 was a debate around that, Mr. McDowell, as you well
14 know, and the Commissioner was concerned to find out
15 what is the actual responsibility of the sergeant in 16:01
16 charge. But what are you trying to suggest is that by
17 doing that I am in some way impugning the integrity of
18 your client.

19 605 Q. No, I'm not.

20 A. I wasn't doing that. 16:01

21 606 Q. I'm not. I'm suggesting to you that in doing that you
22 were seeking to shift responsibility to Sergeant McCabe
23 in respect of these incidents?

24 A. That was entirely a matter for the Commission. My job
25 was only to ask the question. If the Commissioner 16:02
26 [sic] saw that that was something that he should look
27 at, that may be so. All I know is that there was a
28 finding ultimately that the problems were at sergeant
29 and sergeant in charge level, as you know.

1 607 Q. I will come back to that at a later point, if I may.
2 But the point I'm putting to you is that on many
3 occasions, Mr. Smyth, you sought, your line of
4 questioning was with a view to assigning responsibility
5 for the poor policing alleged by Sergeant McCabe with 16:02
6 Sergeant McCabe himself?

7 A. Not necessarily Sergeant McCabe, but at the area of
8 middle management, more so than where Sergeant McCabe
9 says it rested. Your client came into the Commission,
10 he came in making charges that it was my clients' 16:02
11 responsibility and their malpractice and that it had
12 nothing to do -- and I asked him on many occasions --
13 and you will recall on one occasion I asked him, he was
14 alleging serious dereliction of duty, and I asked him
15 please to name the people that he says were derelict in 16:03
16 their duty, and he said he wouldn't name them. And he
17 said I'm not blaming them because I'm blaming the
18 superintendent. So that is the difficulty I had and
19 you know well what I was trying to do, Mr. McDowell,
20 and you can look at snippets from the Tribunal. We 16:03
21 could be here for another 30 or 40 days trying to go
22 through it.

23 608 Q. That's the point. I'm trying to avoid that. I'm
24 trying to put to you, and maybe you will agree with me,
25 that you engaged in this line of questioning with a 16:03
26 view to bringing responsibility for the incidents which
27 Sergeant McCabe had complained about back on to
28 Sergeant McCabe himself, personally?

29 A. I was trying to do it in a sense that a lot of what he

1 was saying should have been the responsibility of unit
2 sergeants in charge and that is how the Commission
3 found it be.

4 609 Q. Now, on that Friday afternoon, 15th May, you were asked
5 to provide a written statement of the facts on which 16:04
6 you were going to rely in relation to your desire to --
7 A. That's correct.

8 610 Q. -- cross-examine Sergeant McCabe, isn't that right?
9 A. Yes, that's correct.

10 611 Q. Did you understand that to be the facts on which you 16:04
11 were going to rely not merely in relation to that
12 module but other modules or was it confined to that
13 module?
14 A. The judge specifically requested me when this issue
15 arose -- on which you took objection, you demanded that 16:04
16 you wanted notice of the line of questioning that I
17 intended, as I understand it, and the judge quite
18 rightly directed me to set out the background that led
19 up to this, that would justify this line of
20 questioning. 16:04

21 CHAIRMAN: All right. We've done more than five hours
22 today, so I think we should just take a break there.
23 We don't need to have this on the transcript. You'll
24 be back tomorrow, Mr. Smyth, if that is all right.
25 16:04

26 THE HEARING THEN ADJOURNED UNTIL FRIDAY, 26TH JANUARY
27 2018 AT 10:00AM
28
29

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