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1921, ON 17 FEBRUARY 2017

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

HELD IN DUBLIN CASTLE
ON FRIDAY, 26TH JANUARY 2018 - DAY 49

49

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

GWEN MALONE STENOGRAPHY
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INDEX

WITNESS	PAGE
MR. COLM SMYTH	
CROSS-EXAMINED BY MR. MCDOWELL	5
CROSS-EXAMINED BY MR. MCCANN	49
CROSS-EXAMINED BY MR. DIGNAM	52
EXAMINED BY MR. SREENAN	58
QUESTIONED BY THE CHAIRMAN	111
MR. MICHAEL MACNAMEE	
DIRECTLY EXAMINED BY MR. MCGUINNESS	118
CROSS-EXAMINED BY MR. MCDOWELL	158
EXAMINED BY MR. SREENAN	177
MR. GARRET BYRNE	
DIRECTLY EXAMINED BY MS. LEADER	184
CROSS-EXAMINED BY MR. MCDOWELL	199
CROSS-EXAMINED BY MR. DIGNAM	211
EXAMINED BY MR. SREENAN	212
RE-EXAMINED BY MS. LEADER	213

1 THE HEARING RESUMED ON FRIDAY, 26TH JANUARY 2018,
2 AS FOLLOWS:

3
4 MR. COLM SMYTH CONTINUED TO BE CROSS-EXAMINED BY
5 MR. MCDOWELL:

09:53

6 1 Q. MR. MCDOWELL: Morning, Mr. Smyth?

7 A. Good morning, Mr. McDowell.

8 2 Q. Just in relation to the letter of the 18th of May?

9 A. Yes.

10 3 Q. The letter to the Commission itself, I wanted to ask
11 you a few questions. I think you have very fairly
12 indicated that this was drafted by one of your fellow
13 counsel, is that right?

10:09

14 A. But I take responsibility for it.

15 4 Q. I'm not suggesting --

10:09

16 A. It was drafted, yes.

17 5 Q. And I fully accept that you are doing the right thing
18 in saying that it was a corporate effort and all the
19 rest of it. But it was, as we are agreed, I think
20 everyone is agreed, it was emphasised to the people to
21 whom it was circulated that it had to be right in every
22 particular, isn't that right?

10:09

23 A. Absolutely, and -- yes.

24 6 Q. I see. And further from that, it was drafted, I
25 presume you would say, very carefully?

10:10

26 A. Within our instructions.

27 7 Q. Yes. And I just want to be absolutely clear, because
28 yesterday I think you said this, but I want to be 100
29 percent clear, it was drafted strictly in accordance

1 with your instructions?

2 A. You can take it, and I am very careful about what I can
3 say, that was done that way.

4 8 Q. Yes. I don't want to penetrate --

5 A. Yes. 10:10

6 9 Q. -- the privilege of either Chief Superintendent Rooney
7 or Superintendent Cunningham.

8 A. Yes.

9 10 Q. But I do want to be very, very clear that it was not a
10 mistake of counsel as far as you are concerned? 10:10

11 A. As far as I am concerned, we did what we did, it's
12 plain to see that we did it on instructions.

13 11 Q. And from that point of view, this was not a clerical
14 error of "to" appearing rather where "against" might
15 have appeared, or vice versa, isn't that right? 10:11

16 A. Mr. McDowell, I can speak for myself in respect of
17 this, I was left in no doubt about this; my clear
18 perception was that this was "against" rather than "to"
19 at the time.

20 12 Q. Yes. And that perception, in your mind, continued on 10:11
21 through June because submissions were put in on 11th
22 June, again on a corporate effort, which said that the
23 allegation of lack of support from Superintendent
24 Clancy was part of -- that that allegation was
25 motivated by a desire to get the DPP's directions? 10:11

26 A. As I say, it is what it is and it's on that basis.

27 13 Q. Yes. And am I right in thinking, just I am not
28 challenging your evidence in any respect --

29 A. Sure.

1 14 Q. -- I think you told the Tribunal yesterday, Mr. Smyth,
2 that you think you didn't see the transcript that
3 Sergeant McCabe provided of his meeting with
4 Superintendent Cunningham, until 24th June, day five of
5 the Tribunal, when it resumed? 10:12

6 A. I think when we resumed is my understanding of it, my
7 memory of it, the Commission made it available to us,
8 and it was only at that stage that I became aware of
9 the difficulty that had arisen.

10 15 Q. Yes. Now, I just wanted to be clear about that. 10:12

11 A. Yes.

12 16 Q. So that the misstatement in the letter of the 19th, I
13 am not going to call it just an error, it was a
14 misstatement --

15 A. Yes. 10:12

16 17 Q. -- on instructions, was only detected by you on the
17 24th June?

18 A. That is correct, when we became aware of the
19 transcript.

20 18 Q. I see. And again, I don't want to pierce your veil of 10:12
21 duty to your clients --

22 A. Yes.

23 19 Q. -- but at any point in the intervening period had
24 anybody pointed out to you that there was a
25 question-mark over the documents you have produced or, 10:13
26 alternatively, the questions which you on foot of those
27 documents put to Sergeant McCabe?

28 A. Well, if it had been done, I wouldn't have -- I
29 certainly would have acted in a different -- obviously

1 I would have acted in a certain way.

2 20 Q. Yes. So we can draw -- we can take it from that, and I
3 do not want to tear down the privilege, but we can take
4 it from that that at no point were you alerted to the
5 fact that something had gone wrong? 10:13

6 A. That is my position. I was not.

7 21 Q. And on that day, in the course of a discussion with
8 Mr. Justice O'Higgins, the fact that Superintendent
9 Cunningham's report -- which you hadn't seen up to that
10 point, is that right? 10:14

11 A. I hadn't seen -- apparently there was a report sent in
12 by Superintendent Cunningham which I hadn't seen.
13 Again that would have revealed a different picture to
14 us than what was contained in the letter.

15 22 Q. Yes. 10:14

16 A. And I hadn't seen that, as far as --

17 23 Q. And the difference, so to speak, between what was in
18 the transcript and what was in Superintendent
19 Cunningham's report, which coincided, they both -- they
20 were both to the same effect, it only became apparent 10:14
21 in the course of the transactions at the Commission on
22 the 24th June in the course of submissions?

23 A. This was thrashed out then and it became patently
24 obvious that a significant mistake had been made. And
25 that, as I say, what transpired was that the note of 10:14
26 Superintendent Cunningham and the transcript were
27 compatible. If we had known that to begin with, things
28 would be much different.

29 24 Q. And again, just going back to it, as a misstatement of

1 the facts on instructions, I think you'd agree with me
2 that it was a fairly serious misstatement of the facts?

3 A. Well, anything of that nature, you can't be putting to
4 a witness something that is clearly wrong.

5 25 Q. Yes. 10:15

6 A. And, as I said, I apologised for that yesterday and I
7 indicated --

8 26 Q. I fully accept that.

9 A. Oh no, I understand. I am not trying to labour the
10 point, but of course in any of our dealings with the 10:15
11 court and with clients we have to act in good faith and
12 you have to act on proper and sound instructions. You
13 can't be -- we can't be making things up. Of course,
14 anything, regardless of the content of it, the fact is
15 it was wrong and it shouldn't have been wrong. 10:15

16 27 Q. I see. Without getting unduly argumentative with you,
17 could I suggest to you that there was a theme in your
18 conduct of the Commission that Sergeant McCabe was
19 making or had made complaints in respect of matters in
20 which he personally had some degree of responsibility? 10:16

21 A. Well, we had this debate or this conversation yesterday
22 evening.

23 28 Q. Yes. I am trying to recast it in more --

24 A. I know, I appreciate that.

25 29 Q. -- cool terms. 10:16

26 A. And of course it was important, I mean to me, to find
27 out where the responsibilities lay -- or, not for me,
28 but it was to explore that for the benefit of my
29 clients and the Commission. And in that, I did discuss

1 with him his role and his responsibilities and that's
2 how it came up in that context, and where his
3 responsibility lay for some of the matters of which he
4 was complaining.

5 30 Q. Yes. 10:17

6 A. And in that context I certainly did put questions to
7 him.

8 31 Q. Yes. And I have got to suggest to you that it was a
9 vigorous -- that you presented your point of view
10 vigorously to him on occasion. 10:17

11 A. Well, I would hope that I was in no way rude or
12 unpleasant to Sergeant McCabe. It was my perception
13 that I was not being that way.

14 32 Q. Yes.

15 A. It may be that if that was the case, I can only -- only 10:17
16 rely on, as we call, the referee or the judge to step
17 in and say look, you are being unfair or you are being
18 rude and wouldn't tolerate it. And if any indication
19 was given to me that that was the case, it's very
20 difficult to assess how one is performing in any case. 10:17

21 33 Q. Exactly.

22 A. You know, I mean because you are caught up in the drama
23 of the moment, if I might put it that way. It's really
24 for the judge who is level headed and who is trying to
25 be objective -- fair to everybody, if he felt that 10:18
26 there was a problem and I would deserve, if it was the
27 case, I would deserve a rap on the knuckles. But I
28 don't ever recall getting a rap on the knuckles. Now I
29 haven't read this transcript from page to page.

1 34 Q. I am not going to go through to find instances, but I
2 am suggesting to you on a number of occasions Sergeant
3 McCabe became visibly upset.

4 A. Now, I will accept that there were a couple of
5 occasions when Sergeant McCabe became upset. But, 10:18
6 Mr. McDowell, I will not accept responsibility that
7 that was caused by anything that I said to him. I
8 mean, we can all be caught up -- I mean, I fully
9 appreciate that Sergeant McCabe is a man who has been
10 under a lot of strain, for one reason -- I mean, I 10:18
11 fully accept this. This has been, for all of us
12 involved in this process, I now can fully appreciate
13 what the position is. And one can become, when one is
14 trying to make their point and so on and so forth in
15 the belief that they are right, the suggestion that 10:19
16 somebody is saying they could be wrong, I understand
17 people can be upset about that, and some -- and people
18 can become emotional. But it was never my intention to
19 cause any upset to him by any question. And in
20 fairness, if the judge felt that I was being -- he 10:19
21 certainly would have stepped in and said, look, this is
22 really oppressive, nobody like -- I know Judge
23 O'Higgins for a long time, we was my Circuit judge for
24 two-and-a-half years, he is a man for whom I have the
25 greatest respect and he is one of the finest 10:19
26 individuals I have ever had the honour of appearing
27 before, he would not allow, knowing that man as we all
28 do, as barristers here, any kind of oppression or bad
29 behaviour by counsel.

1 35 Q. Yes. And can I then could I ask you to go to page 4849
2 in volume 9 -- or 4847 in volume 9, please.

3 A. Yes.

4 36 Q. This and the following pages are circulated by your
5 solicitors the day before yesterday in the afternoon. 10:20

6 A. Is this the Byrne/McGinn?

7 37 Q. Yes, an extract from what appears to be the
8 introduction to the Byrne/McGinn report.

9 A. Yes.

10 38 Q. And can I just ask you this, without prying: Have you 10:20
11 read this before?

12 A. There were -- first of all, I want to say there was a
13 document circulated while I was in the witness
14 document, while I was not in contact with anybody or
15 could not be in contact with anybody. This came as a 10:21
16 surprise to me that this was circulated, I have to say.

17 39 Q. I see.

18 A. But I do recall, and I tried to remember did I see this
19 before, I know a document was handed to me before,
20 where I read certain information concerning Sergeant 10:21
21 McCabe. And I know you mentioned yesterday a number of
22 comments and so on that were contained --

23 40 Q. I want to bring you through it very quickly, if I may.

24 A. No but, I just want to say --

25 CHAIRMAN: Let's hear the end of the answer, if you 10:21
26 wouldn't mind, Mr. McDowell.

27 A. I just want to say, Mr. McDowell, that at the time that
28 I saw that document during the Commission, I made it my
29 firm intention that I was not going to deploy any of

1 the content of that in my examination of Sergeant
2 McCabe.

3 41 Q. MR. MCDOWELL: I see.

4 A. And I mean, some of the words that were mentioned
5 yesterday were never put. 10:21

6 42 Q. I appreciate that. But you do remember now when your
7 memory was jogged that you did have access to --

8 A. I had access to some documents that were given to me
9 which revealed the background or whatever it may be in
10 relation to Sergeant McCabe. I never wanted or sought 10:22
11 the Byrne/McGinn report. Not that I never wanted, I
12 didn't seek it. But it was circulated to my two
13 colleagues, who wanted to read it, and I had too much
14 to read as it was, but if there was anything they
15 wanted to bring to my attention they would. But I did 10:22
16 see, I do recall seeing, which I now believe are these
17 documents which you circulate.

18 43 Q. I see. And I think that it appears to be from the fact
19 that there is a roman numeral down on the bottom
20 right-hand corner, it appears to be from a preface to 10:22
21 the Byrne/McGinn report?

22 A. The vii, is it? Yes, I see what you are saying. Well,
23 presumably it does.

24 44 Q. Yes. And it appears to be part of the preface to the
25 Byrne/McGinn report, it starts on page -- 10:23
26 A. Probably is a preface of some kind.

27 45 Q. viii.

28 A. Yes.

29 46 Q. And if we could just look at it, states at the top of

1 page 4849:
2
3 "Background to Sergeant Maurice McCabe.
4 To assist the reader the following background details
5 of Sergeant Maurice McCabe may provide an understanding 10:23
6 or context in which his allegations were made."
7
8 And it then gives his career history in An Garda
9 Síochána and personal history, and it states at the
10 fourth paragraph: 10:23
11
12 "On September 2004 a vacancy arose to fill the
13 position --"
14 MR. SREENAN: Chairman, sorry, can I just intervene in
15 relation to a ruling that the Chair made earlier? I 10:24
16 just notice that this document, which has been redacted
17 by the Tribunal, does not seem to have been entirely
18 redacted in accordance with the wishes of the Tribunal,
19 as indicated previously.
20 CHAIRMAN: What is the problem? 10:24
21 MR. SREENAN: Perhaps that can be just looked at before
22 it's put on the screen or else not put on the screen.
23 CHAIRMAN: Just let's see.
24 MR. SREENAN: I am just looking at the very start of
25 the sixth paragraph. 10:24
26 CHAIRMAN: Mr. Sreenan, just give me a chance to get to
27 it.
28 MR. SREENAN: And the fifth paragraph.
29 MR. MCDOWELL: Yes. There seems to be a reference to

1 sergeant where Mr. D's name --

2 CHAIRMAN: Yes. Well, it has of course been mentioned
3 on a number of occasions, but I have simply indicated
4 to the media - and I am afraid it is a ruling - that
5 you can't mention a rank in relation to the father of 10:24
6 Mr. D. So, can we leave it on the screen on that
7 basis?

8 MR. SREENAN: Absolutely, Chairman. I thought I should
9 just draw the Tribunal's attention to that.

10 CHAIRMAN: That is fair enough, Mr. Sreenan. I wasn't 10:25
11 terribly worried about it. That is the ruling.
12 Everybody has abided by it and been completely
13 responsible and I would like to thank them for it. But
14 I mean, I don't know how many sergeants there are in
15 Cavan-Monaghan, which is the area we are talking about. 10:25
16 I can't imagine there is more than a couple of dozen in
17 which case it certainly narrows it down. So, let's
18 just leave it on the basis that he is a garda of some
19 rank.

20 MR. MCDOWELL: I am grateful to Mr. Sreenan, I hadn't 10:25
21 noticed that.

22 47 Q. But in any event, at paragraph 4 it says:

23
24 "Sergeant McCabe alleges that he was being undermined
25 and ridiculed by Mr. D after his appointment and 10:25
26 believed that Mr. D was not supervising or managing his
27 unit properly. He alleges that Mr. D went drinking
28 while on duty, while on over time and allowed certain
29 Garda members to take the working weekends off and yet

1 allowed them to claim allowances. Mr. D was
2 subsequently appointed to another position."

3
4 which we won't mention.

5
6 "Sergeant McCabe alleges that Mr. D and two other
7 members of the crime unit --"

8
9 And he describes a scene at a suicide, isn't that
10 right?

11 A. Yes.

12 48 Q. And then there is other matter which I don't think we
13 have to get into the detail of?

14 A. No.

15 CHAIRMAN: That was all in Superintendent Cunningham's
16 report on the D investigation, yes.

17 MR. McDOWELL: It was, yes.

18 49 Q. And we get down to the next page, page ix, the second
19 paragraph:

20
21 "On 25th February 2008 Sergeant McCabe forwarded a
22 written report --"

23
24 which is appendix to the Byrne/McGinn report I suppose.

25
26 "-- to Superintendent Clancy in which he sought to have
27 the DPP's direction conveyed to the D family so that he
28 could be exonerated."
29

1 Now, I just want to stop there. You are aware now, and
2 I think you probably were aware after the 24th June
3 2015 --

4 A. Yes.

5 50 Q. -- that that communication to Superintendent Clancy was 10:27
6 in response to a request by Superintendent Clancy that
7 he should put the grounds for this action to ask that
8 the DPP's directions be conveyed to the D family, that
9 he should set out the grounds on which he was doing so?

10 A. Yeah, I think that is recorded in the transcript, that 10:27
11 we had this debate yesterday about what Sergeant McCabe
12 saw the position to be and he said it was exactly it,
13 what he wanted, said he wanted to --

14 51 Q. And then they cite a paragraph of the letter, having 10:28
15 set out the difficulties that he was experiencing in
16 Bailieboro Garda Station relating to the outcome of the
17 D matter, he says:

18
19 "I am very a dedicated member of An Garda Síochána and
20 each officer I have worked with can vouch for this. I 10:28
21 am married with five children and this scurrilous
22 allegation has ruined my life forever. I am a
23 completely changed person in that I don't trust anyone
24 any more."

25 A. I see that. 10:28

26 52 Q. Yes. And then they said:

27

28 "These comments made tend to suggest that Sergeant
29 McCabe was under an inordinate amount of stress. The

1 fact that he didn't trust anybody anymore was
2 corroborated by the fact that he started recording
3 conversations with people, both within and without the
4 Garda organisation, without their knowledge. while not
5 justifying any wrongdoing that may be brought to 10:28
6 attention by this investigation, it is obvious that the
7 D allegation had an undermining impact on Sergeant
8 McCabe regardless of the fact that the DPP directed no
9 prosecution in the matter."

10
11 So, we stop there. I think that that is what you
12 understood to be the case as well, isn't that right?

13 A. I was getting a picture of what was going on in the
14 background. I didn't get it from this document.

15 53 Q. No, but that is the picture -- 10:29

16 A. There is a picture given about the wrongdoing.

17 54 Q. "The position in which he found himself came to a head
18 on 4th March 2008 --"

19
20 And that is after the 25th February report. 10:29

21
22 "-- when he vacated the position of sergeant in charge
23 Bailieboro. Throughout this investigation he
24 repeatedly asserted that his decision to resign as
25 sergeant in charge was tantamount to constructive 10:29
26 dismissal on the part of Superintendent Clancy and his
27 perception that Superintendent Clancy failed to support
28 him in his position as sergeant in charge. At no time
29 has Sergeant McCabe ever attributed the weakening of

1 his position as sergeant in charge to the fact that an
2 allegation was made against him by Ms. D.
3 Notwithstanding the fact that the DPP directed no
4 prosecution against Sergeant McCabe, this report will
5 show that he had effectively lost control of the 10:29
6 station at that stage and that his position as sergeant
7 in charge was untenable."

8
9 Now, I will stop there, to say was that your
10 understanding of the situation as counsel in the 10:30
11 O'Higgins Commission?

12 A. In a way, I have to say, Mr. McDowell, this exercise is
13 a little bit unfair to me because Byrne and McGinn were
14 not my clients.

15 55 Q. I know that. 10:30

16 A. No, no. But I point is, I hadn't gone through or
17 parsed, I hadn't got instructions from them. So what
18 is contained here may not be --

19 56 Q. I should stop there and say that Byrne and McGinn had
20 separate representation. 10:30

21 A. I appreciate that. So what I am trying to say is what
22 they had written down here I hadn't a chance to discuss
23 with them. The nuances, there may be material in here
24 which was not -- which I would say was not exactly
25 instructed to me. So they may have particular views or 10:30
26 opinions about Sergeant McCabe that may not be held by
27 my clients. So when you say to me, you read out a
28 document and say was that what you understood, I have
29 to say, now, it is not exactly fair because some of it

1 would maybe -- maybe the opinions of Byrne and McGinn
2 may not be the opinions of my clients necessarily.

3 57 Q. I accept that.

4 A. Do you follow? So it's not really a fair exercise.

5 58 Q. No, no, sorry, I am not trying to put anything unfairly 10:31
6 to you.

7 A. I mean, what I am trying to say is, if I agree with
8 this, you are saying, well, Mr. Smyth agreed with all
9 of this. I don't necessarily agree with the opinions
10 and views of Byrne and McGinn. 10:31

11 59 Q. I fully accept the distinction.

12 A. As put by the client.

13 60 Q. But this document has been circulated by your
14 solicitors, not on your say-so, but I mean, it
15 presumably is relevant to something we are going to 10:31
16 hear about.

17 A. But I never read the Byrne/McGinn, nor did I seek it
18 and really I am getting this -- I paid very little
19 attention to these pages that were handed to me I have
20 to tell. 10:31

21 61 Q. You are in precisely the same position as Sergeant
22 McCabe, who has been fastidiously denied access to the
23 Byrne and McGinn report for seven years.

24 A. Well, I can't get into that debate. I don't know
25 anything about -- 10:32

26 CHAIRMAN: Mr. McDowell, I think --

27 MR. MCDOWELL: I am not suggesting this Tribunal is
28 fastidiously denying -- but he does seek access to it.

29 CHAIRMAN: Mr. McDowell, I am not touchy, but, you

1 know, I am not denying anybody anything.

2 MR. MCDOWELL: I am not suggesting you are, Judge.

3 CHAIRMAN: No. And if you want all eleven volumes of
4 the Byrne/McGinn report and want to peruse the whole
5 lot of them, well then do. I haven't. 10:32

6 MR. MCDOWELL: My client would like to see it, Judge.

7 CHAIRMAN: It's not a question of would he like to see
8 it. I mean, that is all very well. The question is,
9 is it relevant to anything going on here?

10 MR. MCDOWELL: He can't make -- he can't have a view on 10:32
11 that until he sees it, Judge. He can't.

12 CHAIRMAN: Well, I think it's your view that counts as
13 to whether something is relevant. Now, from what I
14 hear, you have got the highlight, but I mean, I may be
15 wrong about that because as I said I haven't read it 10:32
16 myself. Now, if we can get it, for instance, in
17 electronic format from the Gardaí as opposed to loading
18 you down with yet another donkey's cart of documents, I
19 personally, you know, can't see the relevance of it.
20 If it was deployed, it was deployed. If it wasn't 10:33
21 deployed, it wasn't deployed. The question is, were
22 unjustified grounds used to challenge the credibility
23 of Sergeant McCabe?

24 MR. MCDOWELL: Yes, yes. And in that context, Judge,
25 what -- well, we will come to that in a moment. I 10:33
26 don't want to delay with this witness too much.

27 CHAIRMAN: But it doesn't seem to have been deployed at
28 all. And the other thing is this: As I said
29 yesterday, Mr. McDowell, people have opinions, and the

1 first thing judges do is ignore everybody's opinion and
2 see what the facts are. And then the other thing is
3 this: You know, it may be, I could well be driven
4 paranoid, for instance, if I was here for another two
5 or three years, but then people would have driven me 10:33
6 paranoid and they could say oh, he was paranoid right
7 from the beginning. You know, I am aware of all of
8 these nuances.

9 MR. MCDOWELL: I accept, I accept the points the
10 Tribunal is making. Well, just on this issue, it is my 10:34
11 view that my client should be entitled to see this
12 document because it was the framework -- it was given
13 to counsel --

14 CHAIRMAN: Let's find how much was given to counsel and
15 then let's go back to it, but I am certainly not going 10:34
16 to deprive you of anything. We don't have any secrets
17 in the Tribunal, Mr. McDowell.

18 MR. MCDOWELL: I am not implying that you are keeping
19 anything secret. But I mean, Sergeant McCabe protested
20 on many occasions before the O'Higgins Commission that 10:34
21 he had been given no opportunity to see it or to
22 respond to it.

23 CHAIRMAN: Well, I know, but I mean, everything that I
24 see indicates to me that Mr. Justice O'Higgins did a
25 great job, you know, so -- 10:34

26 MR. MCDOWELL: I am not criticising Mr. Justice
27 O'Higgins at all. It's quite clear that he used the --
28 portions of the Byrne/McGinn report as a framework, as
29 a useful framework document.

1 CHAIRMAN: That would seem correct. It seems he did,
2 he filleted out the relevant bits and pieces or
3 certainly counsel on his behalf did. But,
4 Mr. McDowell, let's go back to this. But as I say, we
5 have no secrets and if I can get you that on a memory 10:35
6 stick, well then, if you think you can use it for other
7 modules.
8 MR. MCDOWELL: I would appreciate it, Judge, because
9 it's like being in a submarine without a periscope.
10 CHAIRMAN: I am not sure it's that bad, Mr. McDowell, 10:35
11 seriously.
12 MR. MCDOWELL: When you see a document, Judge, which
13 says that this report will show that Sergeant McCabe
14 had effectively lost control of the station.
15 CHAIRMAN: But we have all read Garda reports. 10:35
16 MR. MCDOWELL: Sorry, Judge?
17 CHAIRMAN: No but, we've all read Garda reports and
18 they say things like that, you know.
19 MR. MCDOWELL: Sorry, Judge, the relevance is this --
20 and maybe I am not making myself clear, but the 10:36
21 relevance is this: That if it were the case that due
22 to his own inadequacies he had lost control of
23 Bailieboro Garda Station, if that were the case, of
24 course it would colour the question as to whether he
25 was now thrashing around accusing other people of poor 10:36
26 policing. Nothing could be more central or relevant to
27 that point. That if everybody believed that it was his
28 fault or largely his fault or his inadequacy that
29 policing standards had collapsed in the station, if

1 that were the truth, that it would colour the whole way
2 in which he was approached and indeed it would justify
3 putting to him that his own responsibilities had not
4 been lived up to. Do you follow me, Judge?

5 CHAIRMAN: No, I do, I follow that. And equally, I 10:36
6 think I follow, as Mr. Smyth said yesterday, you know,
7 it is very upsetting to be accused of an offence of
8 this kind. And you know my views in relation to
9 provability and non-provability in relation to this
10 kind of offence. It's very upsetting to be 10:37
11 investigated and it's also very upsetting to have the
12 incidents that happened afterwards happen. You know,
13 that is so. So --

14 MR. McDOWELL: Judge, I think we are missing each other
15 on this. I just want to be very, very clear. I am not 10:37
16 saying that in relation to the poor policing standards,
17 the Byrne/McGinn report apparently to the satisfaction
18 of its own authors, demonstrates that Sergeant McCabe
19 had lost control as the sergeant in charge of the
20 station. 10:37

21 CHAIRMAN: Right. No, I get that, Mr. McDowell, and I
22 think the question --

23 MR. McDOWELL: That is the issue that is of
24 significance here, because.

25 CHAIRMAN: All right. That is fair enough. 10:37

26 MR. McDOWELL: Because if Mr. Smyth was putting to
27 Sergeant McCabe repeatedly in the course of the
28 O'Higgins Commission that he himself bore
29 responsibility for poor policing standards --

1 CHAIRMAN: well, that certainly is one I think that did
2 come up from time to time, but as for losing control of
3 the station, I don't think that is ever mentioned in
4 the transcript.

5 MR. MCDOWELL: No. But poor policing standards and 10:38
6 control of the station and control of what probationers
7 were doing and control of how prosecutions were going
8 and control of whether deadlines for prosecutions were
9 being met, all of these things feed into -- if a man
10 has lost control of a station he is in a very poor 10:38
11 position, may I put it this way, Judge, to start
12 criticising anybody else in the station for the chaos.

13 CHAIRMAN: Mr. McDowell, I hear what you say and it
14 could well be a good point, but I think, you know,
15 deploy has now become a very popular word before this 10:38
16 Tribunal, I think the issue is what was deployed. So I
17 think if we stick to that.

18 MR. MCDOWELL: Exactly. But if the narrative was that
19 the man had lost control and was personally culpable
20 for the inadequacies of the policing, that is something 10:38
21 which is relevant to the points I have already put to
22 Mr. Smyth. And that is, that it was a theme of his
23 examination of witnesses and cross-examination of
24 Sergeant McCabe that Sergeant McCabe was personally
25 responsible for these -- 10:39

26 CHAIRMAN: well, let's here the answer to that
27 question. I do want to hear the answer to that
28 question.

29 A. Yes. I want to make it clear to you, Mr. McDowell, and

1 Chairman, rather, I did not use any of the content of
2 this document. It meant nothing to me. I deliberately
3 made a conscious decision not to use anything contained
4 here. I never was of the view -- well, I never, for
5 example, considered paranoia as -- I never deployed 10:39
6 that word, for example, against Sergeant McCabe. In
7 relation to losing control --

8 62 Q. MR. MCDOWELL: That is fully accepted.

9 A. Yeah. But in relation to losing control of the
10 station, my questions to Sergeant McCabe were quite 10:39
11 simply this: Sergeant McCabe had said in his own
12 evidence that he had failed, he told Judge O'Higgins
13 that he had failed and Judge O'Higgins wanted to hear
14 all about that I presume, and arising out of what he
15 said in that respect I explored it with him, what did 10:39
16 he mean by failing. It wasn't that I would ever start
17 my question by saying, look, isn't it plain, Sergeant
18 McCabe, that you lost control of the station? I never
19 said that to him. And it would be improper to say
20 that. And it's for that reason -- this is the danger, 10:40
21 this was, as far as I was concerned Byrne and McGinn
22 was history to me. I was dealing with what Guerin was
23 about.

24 63 Q. Yes.

25 A. What is the issue with Guerin? That is what the 10:40
26 seminal document as far as I was concerned that led to
27 the Commission, and all the things around that, to
28 Guerin.

29 64 Q. Yes. I take your point, Mr. Smyth. I'm just putting

1 the proposition to you that Sergeant McCabe volunteered
2 under cross-examination that by the period that he left
3 he had failed in his role as sergeant in charge due to
4 the circumstances which he outlined, isn't that right?
5 A. His case was very simple in one way. He said, look, I 10:41
6 have been trying to get cooperation from the people
7 upstairs, for want of a better word, the senior
8 management, and they just won't do anything for me,
9 they won't listen to me, there are things going on
10 below downstairs that I am concerned about them and 10:41
11 senior management will not cooperate. And that was the
12 theme of what I took Sergeant McCabe to be saying. And
13 I had to explore on behalf of my client because there
14 was issues surrounding malpractice and serious issues
15 that had to be explored, and it was in that context 10:41
16 that I probed Sergeant McCabe about that.

17 65 Q. Yes.

18 A. The interaction between himself and upstairs if I put
19 it that way, and you may recall, and we don't need to
20 go into this too much, but you may recall there was a 10:41
21 suggestion that they weren't turning up on time and
22 they weren't dressing up properly and they were --
23 apparently they were out in the public area when they
24 shouldn't be, all sorts of that. Now, I know that
25 Superintendent Clancy -- and you may recall this 10:42
26 because it stuck in my memory, I think it was
27 Superintendent Clancy who came in, if it wasn't him it
28 was -- I can't remember, but I think it was
29 Superintendent Clancy, came in actually on a Christmas

1 Eve morning and I remember him saying that if one
2 particular morning you were ever going to see slackness
3 in respect of staff, it would be Christmas Eve morning,
4 and he was actually astounded, they had actually all
5 turned up on time. So the test was -- he had actually 10:42
6 carried out a test to see if what Sergeant McCabe was
7 saying was correct. Now, there were plenty of issues
8 surrounding that, Mr. McDowell, we don't need to be
9 tedious about this and go on about it forever, but if
10 you can point to me a specific example in the 10:42
11 transcripts where I may have erred or may have gone
12 offshore I would be delighted to deal with it and I am
13 not being in any way impertinent to you.

14 66 Q. I am not trying to rerun the O'Higgins Commission.
15 A. I know that, but if there is any particular part of the 10:42
16 transcript --

17 CHAIRMAN: Let's just leave it at this, please,
18 gentlemen, rather than having a conversation. And you
19 know, this is actually very weird, you were on one side
20 of the case, Mr. McDowell was on the other side, there 10:43
21 is a transcript but he is cross-examining you as to
22 what you did. Now, I think we really have to focus on
23 the term of reference and can we just move on, on that
24 basis, please, gentlemen?

25 67 Q. MR. MCDOWELL: Now, could I ask you about -- well, 10:43
26 sorry, the next sentence is something on which you
27 expressed no view and you never deployed it yourself,
28 is that what you are saying?
29 A. Which is the next sentence?

1 68 Q. The one about paranoia.

2 A. Yeah, no, I never -- there is no question about that.

3 69 Q. I see. Well, you said yesterday that your view of
4 Sergeant McCabe -- sorry, the Commissioner's view of
5 Sergeant McCabe was that he was a fine upstanding 10:43
6 member of the force and there was no negative view of
7 him, is that right?

8 A. Well, can I say this: It wasn't just -- you have heard
9 the Commissioner O'Sullivan's evidence in that regard,
10 the Chairman has heard it, but what I wanted to 10:44
11 emphasise was that I saw no spite or ill-will towards
12 Sergeant McCabe from the clients, the other clients
13 that I was representing, the people who had been
14 accused. And that I can tell you, Mr. McDowell, I
15 would be awake to any such spite or hostility to him, 10:44
16 because clearly, I would be dealing with people who
17 were, to say the least of it, weren't balanced in their
18 view and would be skewing their instructions to counsel
19 so I had to be awake to that.

20 70 Q. I accept that. 10:44

21 A. That I wasn't be used. Now, I don't mean to use the
22 word again in that respect, I could be used as a
23 mouthpiece and that would be wrong and I would not
24 tolerate that.

25 71 Q. I see. I see. I was going to bring you then to day 31 10:44
26 of the transcript. on day 31 of the transcript there
27 was a discussion between yourself and sergeant --
28 sorry, Mr. Justice O'Higgins, there was a discussion
29 between you as to whether or not it was necessary for

1 Superintendent Cunningham to give evidence the
2 following day.

3 A. Yes.

4 CHAIRMAN: What is the date of that, Mr. McDowell,
5 please? 10:45

6 MR. MCDOWELL: It's the day before -- it is day 31,
7 page 252.

8 CHAIRMAN: And the actual date is?

9 MR. MCDOWELL: It was in December.

10 CHAIRMAN: Oh, yes, it's later then. 10:45

11 MR. MCDOWELL: Yes.

12 72 Q. And perhaps we could go to -- could we go to page, the
13 page is 2770 in volume 4.

14 A. Did you say volume 4, Mr. McDowell?

15 73 Q. In volume 4, Judge. Perhaps we could start at page 10:46
16 2759.

17 A. 2759.

18 74 Q. Which is the 8th December, Judge. I am sorry, it was
19 the 8th December was the date.

20 CHAIRMAN: Yes, this has been opened before, 10:47
21 Mr. McDowell.

22 75 Q. MR. MCDOWELL: And Superintendent Cunningham wished to
23 give evidence on that day, isn't that right?

24 A. This is page 2759?

25 76 Q. Yes. He had asked the previous day to be called to 10:47
26 give further evidence at the end of the Commission?

27 A. Is that what the transcript says? I can't --

28 77 Q. You may take it, it does. I don't want to bring you to
29 a portion of the transcript that is not in the books.

1 But you may take it that on the previous day,
2 Mr. Justice O'Higgins said he didn't consider it
3 necessary that he should give evidence but if he wanted
4 to be called again, he could, the following day. And
5 he was called the following day. 10:48

6 A. By the Commission? He was called by the Commission?

7 78 Q. Yes, at his request.

8 A. Okay. I wasn't --

9 79 Q. And I have got to suggest to you that he then dealt
10 with, at some considerable length, his dealings with 10:48
11 Sergeant McCabe. And if I could bring you to page
12 2766 -- or 2765. He advanced an allegation against
13 Sergeant McCabe to the effect that he had wrongly
14 interfered in a dangerous driving case. Do you
15 remember that? 10:49

16 A. At page 2765?

17 80 Q. Yes, at question 19.

18 A. Question 19?

19 81 Q. Yes.

20 A. In relation to "...sergeant in charge that I..." is 10:49
21 that what you are talking about, "...that I am
22 corrupt..."?

23 82 Q. This is the incident to which Mr. Sreenan made
24 reference.

25 A. Yes. 10:50

26 83 Q. And this was during the management module. He was
27 reminded at question 21 on page 2766 by Mr. Gillane
28 that this was an incident which is not within the terms
29 of reference of the Commission, but he was making

1 complaint about Sergeant McCabe interfering in a
2 driving case.

3 A. Can I just say, Mr. McDowell, really, you have to
4 contextualise where this is coming into play here.
5 This, as I understand, comes into play in a situation 10:50
6 where there is -- am I not right in this, that where
7 there was issues around support? Your client was
8 maintaining that he had no support from the
9 superintendents and so on and so forth and he said he
10 just couldn't simply carry on. And I didn't call 10:51
11 this -- I can't -- I couldn't have called this witness,
12 he was called by the Commission, and he was giving
13 information as to what he -- he was contextualising
14 himself what he understood the position to be in trying
15 to defend himself in relation to the charges that were 10:51
16 being made against him as I understand it. And he was
17 referring to incidents and he was referring to the fact
18 that he was being accused of cover-up and lies, which
19 was the case.

20 84 Q. Yes. 10:51

21 A. And he was essentially trying to put his case forward,
22 as I understand it. But Mr. McDowell, he wasn't -- I
23 had no hand, act -- he was called by the Commission.

24 85 Q. Yes. But I think it is relevant to point out that he
25 made a series of complaints against Sergeant McCabe and 10:51
26 at page 2770, he -- sorry, at page 2769, he says,
27 having been told that the Commission understands his
28 position, he says:
29

1 "It doesn't, it doesn't in one way feel --"

2
3 This is at line 18.

4
5 "It doesn't, it doesn't in one way feel artificial
6 because, Judge, you have been very clear in all of your
7 remarks and you have been very fair in relation to
8 these modules, you have been very clear to everybody
9 that you have given them the opportunity to illicit
10 whatever information they have which will assist you in
11 the investigation. I am trying to do exactly that
12 because I have since my promotion to superintendent not
13 only not been supported by Sergeant Maurice McCabe but
14 I have been undermined at every turn by him."

15
16 You would agree with me that this indicated a
17 considerable degree of hostility by Superintendent
18 Cunningham to Sergeant McCabe?

19 A. Well, I think to be fair, to ask me to cast an
20 opinion -- but I have to tell you and I have stressed 10:53
21 already, day one of my evidence, that I was dealing
22 with people from my observation who were highly
23 stressed and who had dealt with these difficulties for
24 eight -- up to that point seven years, since 2008. I
25 do not agree with you, Mr. McDowell. 10:53

26 86 Q. Yes.

27 A. Mr. McDowell, I do not agree with you that it
28 demonstrates hostility. What I see here and what I
29 remember is a man who was trying to defend himself

1 against the allocations made by your client. There was
2 no hostility. he had no spite or ill-will, I can tell
3 you that, or hostility towards Sergeant McCabe. In
4 fact, he considered Sergeant McCabe -- he invited
5 Sergeant McCabe to please remain on in his position as 10:53
6 a sergeant in charge of the station. Because you
7 remember he had resigned that position because of his
8 difficulties, as he perceived it, with Superintendent
9 Clancy. And when Superintendent Cunningham came into
10 being -- into place, he said will you not stay on, I 10:53
11 want you to stay on. He had a great regard for him.
12 But the problems continued on the watch of
13 Superintendent Cunningham, as we all know. And I think
14 this was a man more demonstrating his frustration and
15 how he felt and how emotionally caught up in the thing 10:54
16 he was with the various issues that he raised rather
17 than a man who was displaying hostility. Because I
18 have to emphasise I never -- I never observed in
19 consultation with these people hostility or ill-will or
20 spite towards Sergeant McCabe. In fact, quite the 10:54
21 contrary.

22 87 Q. Do you think that in any of the written submissions
23 that were put into the Commission of Investigation,
24 that anything favourable to Sergeant McCabe was ever
25 included? 10:54

26 A. Well, I think -- I suppose submissions are prepared on
27 the basis of what evidence has been, obviously based on
28 the transcripts of evidence, based on people trying to
29 contextualise their position within the evidence,

1 trying to focus, I suppose, the judge or the chairman,
2 who has to deal with these matters in certain areas
3 that are more -- that puts forward the position in a
4 better light of one party or the other. I mean, I
5 don't ever -- I mean, if you are asking me were they 10:55
6 going to submit submissions, they were really
7 addressing issues of serious concern to them, they were
8 trying to defend themselves in relation to serious
9 allegations of criminal corruption and malpractice,
10 now, in fairness. And they had to address those issues 10:55
11 in the light of the evidence that was given, to try and
12 demonstrate that there was no issue here of criminal
13 corruption or what I would describe -- or the serious
14 malpractice, what was described by Sergeant McCabe.
15 And that is the basis on which these submissions were 10:55
16 done.

17 88 Q. I see.

18 A. I mean, it's their only chance, they had to try and
19 defend themselves I suppose in the best way they could
20 and counsel had to assist them. And I know that 10:55
21 Mr. Byrne and Mr. MacNamee are very fair, they are
22 very -- I have to say, I was very lucky to be assisted
23 by these two people. They are excellent lawyers, they
24 are well balanced, they have a very sound temperament
25 in every respect. They weren't in any way caught up in 10:56
26 any hostility or any ill-will towards Sergeant McCabe.

27 89 Q. No one is suggesting that counsel was spiteful or
28 whatever.

29 A. I know, but when you use the word negative --

1 CHAIRMAN: Gentlemen, can we please get back to the
2 point which is --

3 90 Q. MR. MCDOWELL: I am suggesting to you that although you
4 said yesterday that you had never said anything bad
5 about Sergeant McCabe, I suggest to you nothing 10:56
6 favourable to him was ever submitted to the Commission.

7 A. But can I say this, Mr. McDowell: we have been in the
8 practice of law for a long time. I mean, you know the
9 position; parties get entrenched in position in respect
10 of their view and so on. And that is the way -- that's 10:56
11 the way it is. It's one party sees their case through
12 a certain set of lenses and the other through another
13 set of lenses and so on. I mean, I don't think you
14 could ever say that this Commission was ever going to
15 be a great demonstration of reconciliation between the 10:57
16 parties. I mean, it was an attempt by a commission to
17 try to get to the root of the problem and present and
18 produce a report based on solid evidence presented,
19 what is the realistic position here, and that is as I
20 saw it. 10:57

21 91 Q. And in that context, do you accept that Sergeant McCabe
22 was in the position that Chief Superintendent Rooney
23 had effectively discounted all his complaints as
24 lacking substance in his circular to the Monaghan
25 division, Cavan-Monaghan division? 10:57

26 A. Well, you are asking me to trespass into an area which
27 is none of my concern, in this way --

28 92 Q. Maybe I am and maybe I shouldn't --

29 CHAIRMAN: Gentlemen, seriously, I am actually looking

1 into were unfair grounds used to discredit Sergeant
2 McCabe before the O'Higgins Commission. I respect that
3 there is a background to all of this but I am also
4 aware of that letter. I am also aware of, you know,
5 the first blush look at the Pulse thing and what the 10:58
6 result of that was. Now, I am not going to give a view
7 about any of that but I am aware of all of that. But
8 that particular letter wasn't mentioned anywhere in the
9 transcript nor --

10 MR. MCDOWELL: The reason it wasn't mentioned was it 10:58
11 was ruled out by Mr. Justice O'Higgins.

12 CHAIRMAN: But I mean, he was right. I wish I could be
13 so strict, but people might not listen to me.

14 MR. MCDOWELL: Well, in respect of motivation perhaps,
15 Judge, it was relevant, I think, if you think about it. 10:58

16 CHAIRMAN: The one thing I am not going to do is, I am
17 not going to second-guess Mr. Justice O'Higgins in his
18 conduct of the --

19 MR. MCDOWELL: No, I am saying in relation to
20 motivation, as we are discussing it here, and in 10:58
21 relation to the question of whether he was
22 ill-motivated in any respect, that letter must be
23 relevant, Judge.

24 CHAIRMAN: Well, I mean, then the question seems to be,
25 Mr. Smyth, you would have been aware of that letter 10:59
26 which could have been pinned up in every Garda station
27 in Cavan-Monaghan for all I am aware --

28 A. It could be.

29 CHAIRMAN: -- but certainly within the text of it, it

1 says, you know, tell all the members involved the
2 following. Now, was that ever given to you, that
3 particular letter?

4 A. The concern -- I think the judge had concern about this
5 letter because it was a subject of other proceedings. 10:59

6 CHAIRMAN: Yes.

7 A. And he simply would not allow people to explore or go
8 near it in any respect.

9 CHAIRMAN: And you didn't either.

10 A. And I didn't either. 10:59

11 CHAIRMAN: All right. So you actually did what the
12 judge told you to do.

13 A. Yes. I did what I was told to do. And we didn't
14 explore it down. And it was closed down on the basis
15 there was an objection taken. 10:59

16 93 Q. MR. MCDOWELL: The point I am trying --

17 CHAIRMAN: I think the point you are trying to make, is
18 it could have been used.

19 MR. MCDOWELL: No, I am not.

20 94 Q. The point I am trying to make is that when it came to 10:59
21 considering Sergeant McCabe's motivation, and as to
22 whether he was being fair in suggesting that his
23 superiors were covering up his allegations of poor
24 policing, that letter was something which in the full
25 light of day, was very pertinent? 11:00

26 A. The difficulty we have now is that it was not dealt
27 with at the Commission.

28 95 Q. Exactly.

29 A. And the point I am making -- sorry, it's not for me to

1 make any point but --

2 96 Q. well, I was going to put to you that that reflects the
3 fact that Mr. Justice O'Higgins was not concerned with
4 motivation?

5 A. well, no. I think, to be fair now, Mr. McDowell, I was 11:00
6 there as well at the Commission, and we can go back on
7 the transcript if needs be. Mr. Justice O'Higgins
8 closed this down because it was the subject of other
9 proceedings.

10 97 Q. Yes. 11:00

11 A. And they are extant and they were extant at the time.

12 98 Q. Yes.

13 A. You know, you can't -- he didn't want anybody to start
14 trespassing into an area that was the subject of
15 judicial proceedings, and that is the reason, not 11:00
16 because of issues around motivation and you know that
17 to be --

18 99 Q. well, we know that Mr. Justice O'Higgins in the end
19 said that the questioning of Sergeant McCabe's
20 motivation by some people, and we know who they were, 11:01
21 was unfair and wrong.

22 A. well, I don't know --

23 100 Q. We know that in the end he felt that. And I am
24 suggesting to you --

25 A. where is that referred to? 11:01

26 101 Q. what I am putting to you, Mr. Smyth, is this: That in
27 fact Mr. Justice O'Higgins did not consider and at no
28 stage felt relevant to his Commission Sergeant McCabe's
29 motivation, despite your persistent effort to raise it?

1 A. He said that -- he said -- it's in the transcript, that
2 he said that he wasn't ruling out motivation. And in
3 fact, he at one stage indicated that motivation at this
4 stage is peripheral. So there were issues around
5 motivation, Mr. McDowell, it's not something that I 11:01
6 persisted with when the judge said it's of no
7 relevance. It was relevant.

8 102 Q. I see.

9 A. You know that.

10 103 Q. Well, okay. Well, maybe we can agree on this 11:02
11 proposition: That he signalled strongly to you that
12 motivation was at best peripheral?

13 A. And I think at one stage, if I can find reference to
14 it, he said that motivation has not been ruled out.

15 104 Q. Yes. But that is because he was told -- you signalled 11:02
16 to him if he ruled it out completely there could be a
17 challenge to his findings.

18 CHAIRMAN: Well now, Mr. McDowell. I have read that
19 bit, but I mean, you are now asking me to believe that
20 Mr. Justice O'Higgins is like a shivering toad at the 11:02
21 bottom of a hole and is worried about these things. He
22 wasn't. I mean, that point was made. But as
23 Ms. Leader said in opening the case, what could
24 possibly be the grounds for judicial review, you know?
25 And I read it and thought exactly the same thing. 11:02
26 Maybe people were a wee bit upset that they were being
27 shut down, and that happens in court cases, and maybe
28 they say things that are a bit exaggerated. That's my
29 reading of it.

1 105 Q. MR. McDOWELL: well, all I am suggesting to you, I
2 mean, you did, in one way or another, persist
3 throughout with a questioning of Sergeant McCabe's
4 motivation, and you did it even on the last day --
5 sorry, not on the last day, on 4th December? 11:03

6 A. 4th December. Em, in what way, though? I mean,
7 look --

8 106 Q. You said that his motivation in respect of the
9 allegations he had made was still and his credibility
10 was still on the table? 11:03

11 A. But credibility in relation to the allegations and
12 whether or not there was any evidence to support the
13 allegations he was making. And I mean, obviously if
14 there is no evidence to support the allegations, you
15 have to ask the question, why was the allegation made 11:03
16 in the first place? Of course, Mr. McDowell. I mean,
17 I don't think there is anything necessarily oppressive
18 by that approach. It's just natural justice, I would
19 have thought.

20 107 Q. What I am suggesting to you, very simply, is, that 11:04
21 motivation -- your assault on his motivation was
22 persisted with throughout the proceedings and in the
23 end the Chairman said that challenges to his motivation
24 were unfair and wrong.

25 A. First of all, I believed that what I was doing was 11:04
26 correct and in the best interests of the clients.

27 108 Q. Yes.

28 A. Secondly, I don't see how in any way I was being
29 oppressive in asking and probing him to see what facts

1 were there to support the allegations, and if they are
2 not there, why were they made in the first place. Now
3 I know what you are saying, to answer the last part of
4 your question, Judge O'Higgins did state that in his
5 conclusions, that he said some people cast aspersions 11:05
6 on the motives and that that was wrong. But I don't
7 think he ever said that I was wrong in probing the
8 issue with Sergeant McCabe. And I think that's the
9 real crux of the matter. If barristers, engaged by the
10 Commissioner, if he had said that they were wrong, that 11:05
11 they were absolutely wrong in the manner in which they
12 conducted the advocacy in this case and that the way
13 they did it was unfair, well then your point is well
14 made, but that is not what he said. He said some
15 people. He didn't say -- if he had -- I don't think 11:05
16 that Judge O'Higgins would -- if he wanted to say
17 something adverse, make adverse comment about the
18 barrister he would have said it. But he didn't.

19 109 Q. well, the full paragraph was:

20
21 "Some people wrongly and unfairly cast aspersions on 11:05
22 Sergeant McCabe's motives, others were ambivalent about
23 them. Sergeant McCabe acted out of genuine and
24 legitimate concerns and the Commission unreservedly
25 accepts his bona fides." 11:06
26

27 If I stop there. It was the Commissioner's case, was
28 it not, that he was not acting out of a genuine and
29 legitimate concerns?

1 A. It was a Commissioner's case?

2 110 Q. Yes, that he was not acting out of bona fide and acting
3 out of genuine and legitimate concern?

4 A. But that is not so, Mr. McDowell. That is not so. She
5 never made that case to me, she never gave me those 11:06
6 instructions. You know that. We have been through
7 that. And can I say this to you: At the end of the
8 day, Judge O'Higgins found that your client, that his
9 allegations of corruption were unfounded and he used
10 the word exaggeration. Now look, those are the facts. 11:06
11 I mean, in the light of that, where are we going with
12 this?

13 111 Q. I am suggesting to you that you have -- and we will
14 come to this in submissions later, but I just want to
15 be clear about it. There were two grounds: You were 11:07
16 assailing his credibility where it was inappropriate, I
17 am suggesting, and secondly, that you were assailing
18 his motivation where it was inappropriate, that is what
19 I am suggesting to you.

20 A. Well, these are really military terms; assault, 11:07
21 assailing and so on. All I was doing was probing the
22 evidence. I mean, it's important because what the
23 media will pick up and what they put out there is that
24 I attacked this man.

25 112 Q. Okay. 11:07

26 A. We didn't attack the man.

27 113 Q. Can we use a neutral term --

28 A. We probed him.

29 114 Q. -- you were challenging --

1 A. Or challenging, yeah.

2 115 Q. -- his credibility and challenging his motivation?

3 A. Arising on foot of the allegations that he was making.

4 No more, no less than that.

5 116 Q. And we will be submitting to this Tribunal -- I just 11:07

6 want to be fair to you.

7 A. That is okay.

8 117 Q. The case law --

9 A. You have to do your duty, Mr. McDowell. I accept that.

10 118 Q. I have to do my duty by my client and in respect -- 11:07

11 A. Absolutely.

12 119 Q. I am at the end going to suggest that it was wrong to

13 challenge his credibility and it was wrong to challenge

14 his motivation.

15 A. Mr. McDowell, at the risk again of being utterly 11:08

16 tedious here, what was I faced with? I have a duty to

17 act in the best interests of my client, regardless of

18 the consequences that may befall me. That is the

19 central ethic that we all abide by, and you have it as

20 well, you are bound by it as well. I was met with 11:08

21 serious allegations of criminal conduct by these

22 guards, corruption, as well as serious malpractice. Am

23 I to sit on my hands and not try and probe these

24 allegations? Try and find what is the -- if there is

25 no evidence to stack them up why were they made in the 11:08

26 first place? And I indicated fairly to you that that

27 was that was going to be the position all the way

28 through. Now, if I am wrong in that and if this

29 Tribunal makes that finding against me I fully respect

1 the Chairman for that finding, but if you are asking
2 me, Mr. McDowell, would I do it again, yes, I would.
3 Knowing now what I have gone through personally myself,
4 and having regard to the personal consequences for me,
5 they are secondary to the interests of my client. But 11:09
6 Mr. McDowell, as I said yesterday, can I just say this,
7 the consequences for me not doing it, if it all went
8 wrong in some way, would be even greater than what I am
9 suffering now. And that's how I feel about it. But my
10 conscience is clear on it. But if the Tribunal finds 11:09
11 to the contrary, I fully respect it, but my conscience
12 will remain clear.

13 120 Q. Well, I am not attacking your conscience; I am querying
14 the line that you were instructed to take by the
15 Commissioner. 11:09

16 A. But I have dealt with that and I have been asked
17 questions of whether I fell on my sword. I fell on my
18 sword for no person. I stand fearlessly in the
19 interests of my client. I put the case made by the
20 Commissioner, which was she asked me to test the truth 11:09
21 of the allegations, and I believe I abided by those
22 instructions fully.

23 121 Q. I see. And just briefly then, can we come to the
24 consultations prior to the 4th November. I think we
25 dealt with yesterday the question of whether or not the 11:10
26 Commissioner was cross-examined on these issues?

27 A. Yes.

28 122 Q. But on the different issue of whether there was a
29 discussion about withdrawing anything, have you any

1 explanation as to why Chief Superintendent Healy's note
2 would record at that consultation "would the
3 Commissioner considering withdrawing?"?

4 A. I can tell you, Mr. McDowell, that the meetings, these
5 two meetings, or certainly the one, certainly on the 11:10
6 eve of her arrival at the Commission to give evidence,
7 now we weren't coaching her, but we were informing her
8 that she was likely -- we anticipated that there was
9 going to be a challenge by yourself.

10 123 Q. Yes. 11:10

11 A. And I know I have your explanation -- the Tribunal has
12 your explanation about all of that. We anticipated a
13 serious challenge because you had flagged it very early
14 on, that you would do that. When you got the
15 opportunity you would cross-examine her and she would 11:11
16 not like -- she would not, I think, enjoy the
17 experience, is I think how you put it.

18 124 Q. Yes.

19 A. So, I think that is a fair declaration of intent on
20 your part and you have got to do your duty, as much as 11:11
21 I had.

22 125 Q. Yes.

23 A. So we had to inform her of this impending doom and we
24 had to put her in the picture as to what the questions
25 were likely to be. And in that context, I said to her, 11:11
26 it's likely that Mr. McDowell will insist, as you are
27 still insisting today, and I accept that, that she was
28 acting -- that she believed that Maurice McCabe was
29 acting mala fides, and in that context, Mr. McDowell

1 will press you to withdraw any such allegation and so
2 on and so forth. And that is the type of questions you
3 are going to be asked. Will you now withdraw your
4 allegation? I can tell you that there was no question
5 of -- I think the way that you are reading that is, and 11:12
6 you have to obviously see it from your client's
7 perspective, you see it in a different light. I see it
8 in reality for what it was. That is the context. It
9 was in the context of this vigorous cross-examination
10 that we were anticipating and the questions that might 11:12
11 be put to her. And I think she recites in that that
12 all along she was only interested in the truth,
13 getting -- I may be wrong in that, I haven't got them
14 up in front of me here but there are references within
15 the consultation which puts the other side of the story 11:12
16 if I might say.

17 126 Q. Can I ask you this question and this, you will be glad
18 to know is the final question I want to put to you: At
19 any point was it queried by anybody, either by the
20 Commissioner herself or by counsel on behalf of the 11:12
21 Commissioner, that you had in fact stated that you were
22 going to challenge Sergeant McCabe's integrity?

23 A. Sergeant McCabe's, sorry?

24 127 Q. Integrity.

25 A. No, she never asked me -- sorry. 11:13

26 128 Q. I am saying -- I didn't ask you what she asked you, I
27 am saying was it ever put to you that you had in fact
28 done that, that the transcript showed that you had done
29 it?

1 A. No.

2 129 Q. And how would this be dealt with?

3 A. No, that is not so. That is absolutely not so. Never.

4 That is not so. And my colleagues will -- they can say

5 what they want to say, I hadn't anticipated you were 11:13

6 going to ask me that question, you can ask them when

7 they come into the witness-box. No one had ever said

8 to me that you have challenged this man's integrity.

9 130 Q. Nobody ever drew that portion to --

10 A. Nobody ever drew that to my attention. 11:13

11 131 Q. -- to your attention?

12 A. No, no. Nobody ever said that I challenged his

13 integrity in the sense of attacking his character o

14 otherwise. Never put to me.

15 132 Q. And nobody ever asked you on that occasion -- 11:13

16 A. Of the meeting? of the consultations?

17 133 Q. In preparation for that day on 4th December, nobody

18 ever pointed out, well, if Mr. McDowell is going to ask

19 the Commissioner about this --

20 A. No. 11:14

21 134 Q. -- how does my statement on day 3 -- day 2 and day 3

22 that I was challenging his integrity, how is that going

23 to stack up that?

24 A. That didn't arise, Mr. McDowell, I can tell you. If it

25 did arise I would tell you it did arise, but it did not 11:14

26 arise.

27 135 Q. So it appears that nobody had read the transcript?

28 A. Well, Mr. McDowell, we had a debate about the

29 transcript, you have heard what I said in my answers on

1 those points. If you want to rehearse them again, so
2 be it. But I have made my position clear.

3 136 Q. I am asking a slightly different question. I am saying
4 nobody ever discussed your remarks --

5 A. No. 11:14

6 137 Q. -- on the transcript with you or queried them at any
7 point?

8 A. No, they did not.

9 138 Q. At any point --

10 A. At any point. 11:14

11 139 Q. -- over the six or eight months?

12 A. Absolutely.

13 140 Q. I see. Thank you.

14

15 11:14

16 THE WITNESS WAS CROSS-EXAMINED BY MR. MCCANN:

17 141 Q. MR. MCCANN: Mr. Smyth, I am at you two o'clock. You
18 have found me now. Mr. Smyth, just really one issue I
19 want to address with you, and that is: In your
20 evidence yesterday you said that, so going back to the 11:15
21 15th May 2015 and that afternoon when you were being
22 asked to reconfirm your instructions --

23 A. Yes.

24 142 Q. -- that is the period we are talking about?

25 A. Yes. 11:15

26 143 Q. And I think you told the Tribunal that during the
27 flurry of telephone calls between Chief Superintendent
28 Healy and the Commissioner, and if I just might
29 identify the time for you there, those telephone calls

1 took place between 15:23 and 16:13, so over an hour --
2 an hour or so. And I think you've said that you
3 understood as a result of what people might have said
4 or what you -- for whatever reason, that the
5 Commissioner and the Minister might have been together 11:15
6 in the one place at that time?

7 A. That is my -- that is what I was told.

8 144 Q. Yes.

9 A. That she was with the Minister.

10 145 Q. Yes. Okay. And I think we know that, I think we know, 11:16
11 we know now from the Commissioner's evidence that she
12 was in Garda Headquarters, she had been at a security
13 briefing, I think we know that?

14 A. All right.

15 146 Q. And we also know, we also know that she was making 11:16
16 telephone calls from her landline during that period?

17 A. All right.

18 147 Q. So we can locate her at Garda Headquarters. And then,
19 it will be a matter for evidence in due course but the
20 Minister will be saying, and her diary is in the 11:16
21 Tribunal papers at 3389, she will be saying that -- you
22 may not -- you may remember, but this was the -- the
23 Minister was in campaign mode that week.

24 A. All right.

25 148 Q. It was the marriage equality referendum. The vote was 11:16
26 taking place either on the Friday -- I think on the
27 Saturday, and the Minister was that afternoon at 15:00
28 hours -- sorry, at 14:00 to 15:00 in her diary, she was
29 at Newcastle National School in Dublin 22, and then at

1 15:30 she was in her constituency office in Clondalkin.
2 And so, knowing those things now you would accept,
3 Mr. Smyth, that you may have been wrong?
4 A. Oh --
5 CHAIRMAN: I have never believed, Mr. McCann, that the 11:17
6 Minister and the Garda Commissioner were sitting
7 together, chatting having tea, discussing matters of
8 State with other officials or whatever together at this
9 time.
10 MR. MCCANN: Very good. 11:17
11 CHAIRMAN: I never, ever believed that. If I do, you
12 can judicially review.
13 MR. McDOWELL: Chairman, nobody is suggesting that that
14 is the case.
15 CHAIRMAN: No. You are clarifying that and that is 11:17
16 fair enough.
17 MR. MCCANN: Absolutely. It's certainly important from
18 my client's point of view to do that.
19 149 Q. And then just a final question for you: As far as you
20 were concerned, you were not taking instructions 11:17
21 directly or indirectly from the Department of Justice
22 or the Minister?
23 A. I was not, I wasn't in any way involved -- they were
24 not my client, I wouldn't take any instructions from
25 them. 11:18
26 150 Q. Thank you very much.
27 A. Well, maybe in the future.
28 151 Q. We all hope that. Thank you very much, Mr. Smyth.
29

1 THE WITNESS WAS CROSS-EXAMINED BY MR. DIGNAM:

- 2 152 Q. MR. DIGNAM: Mr. Smyth, there are three areas that I
3 want to cover on behalf of An Garda Síochána and I will
4 be very brief. Firstly, just in relation to -- you
5 have been very clear about your desire to get firm 11:18
6 instructions on the 13th/14th May, and can I take it
7 that whilst you were looking for those instructions you
8 were also advising that those instructions should be
9 given? In other words, that the Commissioner, the
10 then-Commissioner -- 11:18
11 A. Absolutely.
- 12 153 Q. -- should adopt the course that was being suggested by
13 you?
14 A. Absolutely, yes.
- 15 154 Q. In relation to the letter of the 18th May, I think you 11:18
16 have said, but I just ask you to confirm, that
17 Ms. O'Sullivan, the former Commissioner, didn't give
18 any instructions in relation to the contents of that
19 letter?
20 A. Absolutely none. 11:18
- 21 155 Q. And if I could refer you, Mr. Smyth, to -- in fact I
22 don't need to open the transcript but Ms. Ryan when she
23 was giving evidence on day 43, on page 58, she
24 indicated that when she circulated the letter of the
25 18th May she also attached Superintendent Cunningham's 11:19
26 report of September 2008 with that letter.
27 A. Yes.
- 28 156 Q. Do you remember that?
29 A. I just don't have the memory of that, but if that is

1 what she says, as I say, she was quite -- if Ms. Ryan
2 says that is it, I believe it.

3 157 Q. Again, I don't want to trouble you with going through
4 the core booklets but on page 771 we find the letter of
5 the 18th May 2015, which is the letter which contains 11:19
6 the mistake in paragraph 19, where the word "against"
7 rather than "to" is used. And then on page 776, we
8 find the report of Superintendent Cunningham on the
9 12th September 2008. So this was the report --

10 A. Yes. 11:19

11 158 Q. Perhaps if I could just jog your memory, Mr. Smyth,
12 this is the report that Superintendent Cunningham sent
13 to Chief Superintendent Rooney following his meeting of
14 the 25th August --

15 A. Yes. 11:20

16 159 Q. -- 2008 with Sergeant McCabe.

17 A. Yes.

18 160 Q. And if I could just ask you to refer to the second
19 paragraph of that report, which reads:
20
21 "Superintendent Cunningham explained to Sergeant McCabe
22 that his function on this date was to investigate the
23 allegations made by him in his report of 25th February
24 2008 to Superintendent Clancy and to obtain a statement
25 from Sergeant McCabe supporting these allegations." 11:20

26 A. I see that.

27 161 Q. If I could then direct you to the final paragraph on
28 that first page of the report, I don't need to read the
29 whole paragraph -- sorry, the paragraph ends on the

1 same page:
2
3 "Sergeant McCabe stated that he highlighted these
4 allegations to Superintendent Cunningham in 2006 at the
5 time of the Ms. D investigation. Superintendent 11:20
6 Cunningham informed Sergeant McCabe that he was aware
7 of some of the details but not all of the allegations
8 which are included in his report --"
9
10 And again 11:21
11
12 "-- to Superintendent Clancy."
13 A. Absolutely.
14 162 Q. Yes.
15 A. And we would have been very pleased to have all of 11:21
16 these documents before that letter was drafted.
17 163 Q. And I think Ms. Ryan's evidence is that that was handed
18 in to Mr. Justice O'Higgins, to the Commission, and
19 then it was directed that it be circulated to the
20 parties -- 11:21
21 A. Yes.
22 164 Q. -- before the Commission.
23 CHAIRMAN: Mr. Dignam, can I just make sure that I
24 understand what you are saying? Okay, I do understand
25 the letter of 12th September 2008, and if you wouldn't 11:21
26 mind just reminding me of the particular page reference
27 you are going on.
28 MR. DIGNAM: It's page 776 of the core booklets.
29 CHAIRMAN: 776, yes. And that is the one that is

1 countersigned by Sergeant Yvonne Martin.

2 MR. DIGNAM: Yes.

3 CHAIRMAN: Yes. So that was handed in on 18th of May,
4 together with a letter effectively which contradicted
5 it. But you are not saying that counsel had that 11:21
6 before the weekend in drafting the letter?

7 MR. DIGNAM: No, Judge. Sorry, Judge, the copy that I
8 am referring to at page 776, I don't see Sergeant
9 Martin's signature on that copy, but certainly that is
10 the report that was signed by Sergeant Martin. I am 11:22
11 not sure where the actual --

12 MR. McDOWELL: Judge, just to be clear, there were two
13 things: There were notes, manuscript notes which
14 Sergeant Martin countersigned, which are not relevant
15 to this, really, and there was a report -- 11:22

16 CHAIRMAN: Yes.

17 MR. McDOWELL: -- which it was stated that Sergeant
18 Martin -- wrongly stated that Sergeant Martin had
19 approved its contents, or would approve its contents.

20 CHAIRMAN: Yes. Well, I think the point all along is 11:22
21 that the Cunningham/Martin report said the right thing,
22 which later accorded with the transcript of the
23 conversation that had been recorded. That is the point
24 and that has been got very badly wrong by a number of
25 people all the way through. Vis-à-vis the letter going 11:22
26 in on 18th of May on behalf of the Garda Commissioner
27 and clients from the Garda team, if you like, to the
28 O'Higgins Commission, that gets that wrong, but in
29 addition, the letter or the report of Superintendent

1 Cunningham was also handed in and that, in fact, was
2 what, on I think the 4th November that Mr. Justice
3 O'Higgins then referred to and said, look, you are all
4 getting this wrong.
5 MR. DIGNAM: Precisely. I think Judge O'Higgins raised 11:23
6 that on 24th of June.
7 CHAIRMAN: 24th June, correct, yes.
8 MR. DIGNAM: I don't need to pursue that. I think you
9 have the point I was coming to with Mr. Smyth.
10 CHAIRMAN: I think I do, but it helps to get the 11:23
11 sequence.
12 MR. DIGNAM: Yes.
13 165 Q. And then finally, Mr. Smyth, on page -- sorry,
14 yesterday Mr. McDowell read out a portion of the
15 transcript of day 1 of the O'Higgins Commission, page 11:23
16 162. If I could just ask you to look at page 162. And
17 just for completeness, Mr. Smyth, at page 165 of
18 yesterday's transcript - bear with me, Mr. Smyth.
19 Sorry, Judge - beginning at the top of the page,
20 Mr. McDowell introduced the section from day 1 of the 11:24
21 O'Higgins Commission and he started at lines 26 on page
22 162 of that transcript, and he read that:
23
24 "Certain witness, in particular the Garda witnesses,
25 need have no fears they will not be heard on wider
26 issues, structural, organisational, or otherwise, which
27 may fall within the scope of the Commission's terms of
28 reference. They will be given an opportunity to do so
29 as other modules unfold. The scope of this phase of

1 the hearings shall not include the investigation of the
2 Minister for Justice and Equality or by the Department
3 of Justice and Equality in relation to the incident.
4 The issues for the Minister and the Department will be
5 the subject of hearings later in the year."

6
7 Now, if I could just ask you to then look at page 162
8 of the core booklets, which is the page that
9 Mr. McDowell is quoting from. Sorry, Chairman. So
10 what Mr. Justice O'Higgins said at page 162, I will
11 begin where Mr. McDowell started:

11:26

12
13 "Certain witness, in particular the Garda witnesses,
14 need have no fears they will not be heard on wider
15 issues, structural, organisational, or otherwise, which
16 may fall within the scope of the Commission's terms of
17 reference. They will be given an opportunity to do so
18 as other modules unfold. The scope of this phase of
19 the hearings shall not include the investigation of the
20 Minister for Justice and Equality or by the Department
21 of Justice and Equality in relation to the incident.
22 The issues for the Minister and the Department will be
23 the subject of hearings later in the year."

24
25 Now, if you look immediately before where I started
26 there, Mr. Smyth, Mr. Justice O'Higgins said:

11:27

27
28 "The scope of this module is to hear evidence into the
29 investigation by An Garda Síochána of a public order

1 incident and possible sexual assault on a bus at
2 Kingscourt, Co. Cavan on 25th February 2007. Evidence
3 will also be taken concerning the investigation by An
4 Garda Síochána of complaints made by Sergeant Maurice
5 McCabe in relation to that incident and into the
6 investigation by An Garda Síochána and by the Garda
7 Síochána Ombudsman commission of Garda disciplinary
8 issues arising from the incident. This module is,
9 therefore, quite limited in scope."

10 11:27

11 Now, did you understand from that that Mr. Justice
12 O'Higgins would be looking at the Garda authority's
13 consideration of Sergeant McCabe's complaints in
14 relation to that the investigation of the Kingscourt
15 incident?

11:27

16 A. I assume that that is what he intended to do.

17 166 Q. Thank you.

18
19 THE WITNESS WAS EXAMINED BY MR. SREENAN:

20 167 Q. MR. SREENAN: Mr. Smyth, could I ask you to look at
21 page 153 of the core book? This is the cover page for
22 the documents circulated by the O'Higgins Commission
23 for Module 1, and you'll see headed: "O'Higgins
24 Commission of Investigation, Module 1, terms of
25 reference 1(a), (j) and (k)."

11:27

26 A. Yes.

27 168 Q. And if we can then look at the terms of reference for
28 the O'Higgins Commission, I think you are familiar with
29 them, 1(a) we know is the Kingscourt incident, but (j)

11:28

1 is the investigation by An Garda Síochána and the
2 Minister of complaints made by Sergeant McCabe in
3 relation to the incidents (a) to (i). And (k) then was
4 the investigation by An Garda Síochána --

5 A. Yeah. 11:28

6 169 Q. -- and GSOC of Garda disciplinary issues arising out of
7 that.

8 A. Yes.

9 170 Q. So the first module, as I understand it, addressed
10 those three terms of reference. 11:29

11 A. Yes.

12 171 Q. And if we then look at the Brief Proven Facts document,
13 which is 4739 --

14 CHAIRMAN: Sorry, your point here, maybe the witness
15 could answer that, the question you are asking is 11:29
16 whether it was wider than what happened on the bus, is
17 that the question you are asking?

18 MR. SREENAN: It is, Chairman.

19 CHAIRMAN: And what is your answer to that, Mr. Smyth?

20 A. Well, I expected that was the case; that it was wider 11:29
21 than what was envisaged about the bus. That it was
22 malpractice and corruption issues were going to be
23 involved in.

24 172 Q. MR. SREENAN: And in fact I understand that all of the
25 papers circulated for the different modules for the 11:29
26 Tribunal included (j) as well, is that correct?

27 A. Absolutely. There were excerpts from -- in every
28 module containing the statement from Sergeant McCabe of
29 wrongdoing and so on.

1 173 Q. So the allegations of corruption and serious misconduct
2 at senior Garda level, as I understand it were
3 something that permeated or ran through the various
4 modules?
5 A. They were all linked back to the -- as I say, to the 11:30
6 proven facts document, as I saw it. That was the
7 seminal document that I was presented with from the
8 beginning.
9 174 Q. And that seminal document is at 4739, if we can just
10 look at that for a moment, where it starts, and this is 11:30
11 Sergeant McCabe's document:
12
13 "I brought several issues to superintendent and he
14 ignored every one of them."
15
16 The superintendent referred to there is a 11:30
17 superintendent who was your client or one of your
18 clients?
19 A. Yes, Superintendent Clancy.
20 175 Q. And this document is one of the documents that would 11:30
21 have been provided to you at the very beginning of the
22 O'Higgins Commission?
23 A. Yeah, that is so.
24 176 Q. You already indicated that the task with which counsel
25 was faced was unusual, in that you had a very limited 11:31
26 period of time in which to prepare for the commencement
27 of this commission of inquiry?
28 A. That is correct.
29 177 Q. And also, that you were not briefed in the traditional

1 way of receiving a set of instructions to counsel
2 associated with proofs of evidence of witnesses or
3 potential witnesses?

4 A. That is correct.

5 178 Q. So at the beginning, I take it, your evidence is that 11:31
6 you had a very limited amount of information available
7 to you, but principally the Guerin Report?

8 A. Well, we were relying on I think Chief Superintendent
9 Healy to give us all the background information and
10 then to direct what materials we would need for the 11:31
11 next meeting.

12 179 Q. And one of the documents, as we say, we are looking at
13 it here is this "Brief Proven Facts pertaining to my
14 complaint" document, and we have looked at a long list
15 of those bullet-points there, but the sixth 11:31
16 bullet-point is "supporting corruption to save
17 themselves"?

18 A. Yes, that was a particularly serious allegation.

19 180 Q. And on the second page of that document there is:
20 "List of evidence and list of witnesses supporting my 11:32
21 complaint."

22 A. Yes.

23 181 Q. And that runs to a very large number of bullet-points
24 but it refers to an undefined number of exhibits, 120
25 text messages, 70 voice recordings, reference to 11:32
26 victims of crime, injured parties, 80 members of the
27 public, two District judges, two State solicitors, 14
28 solicitors, etcetera. Did you know anything about the
29 detail of this evidence and list of witnesses that you

1 might be forced to deal with in the course of the
2 Commission at some stage as further documents were
3 circulated?

4 A. Well, as I say, the big concern for us on reading this,
5 this had, if I might put it this way, there was 11:33
6 something of an imprimatur about this because we had
7 the Guerin Report which as I said was prepared under
8 warrant from the Government and these were matters
9 which were very serious and it wasn't just a crank's
10 charter. I can tell you now we didn't consider this to 11:33
11 be a crank's -- nor could it be, nor could it be,
12 because it had the imprimatur, as I say, of an
13 independent investigation by senior counsel Guerin. So
14 this was very serious and, as I said at the outset, red
15 alert. 11:33

16 182 Q. And in that report of senior counsel, Mr. Guerin,
17 effectively concluded in its recommendations to
18 Government that there was sufficient evidence in
19 relation to certain matters to justify the Government
20 in deciding to set up a commission of inquiry? 11:33

21 A. Yes. Now in fairness -- that is correct, but I think
22 in fairness, I think there were matters also at that
23 stage before the, is it the Confidential Recipient
24 which had been referred corruption issues, which I
25 can't second-guess what he thought about that, but they 11:34
26 were serious issues -- I think it's chapter 19, page
27 314 of Guerin, which refers to further serious issues
28 of perversion of the course of justice by my clients,
29 which was also very much in my mind. That this was

1 matter was now gone to the Confidential Recipient and
2 there are serious issues at play, and we have to be
3 very careful.

4 183 Q. If I could ask you then to turn perhaps to the day that
5 a lot of attention has been focused on, 15th May 2015, 11:34
6 day 2, and we might go to page 663 of the Tribunal's
7 books. And as I understand it, we are looking here at
8 a part of the transcript where Chief Superintendent
9 Colm Rooney is being cross-examined by you, I think, is
10 that correct? 11:35

11 A. That's correct, that's correct.

12 184 Q. And this is the point at which Mr. McDowell's objection
13 is first made.

14 A. Yes.

15 185 Q. Not when Superintendent Cunningham or Chief 11:35
16 Superintendent Clancy is giving evidence?

17 A. That is correct. And I think I made the point, for
18 what it was worth, that it was prematurely. But
19 anyway, it is what it is, he made his objection and he
20 was entitled to make the objection. 11:35

21 186 Q. The question at 787 is:
22
23 "Before you retired did you have contact with him?"
24
25 And the answer: 11:35
26
27 "Yeah. Sergeant McCabe came to see me, sought an
28 appointment to come and see me in my office in
29 Monaghan. He contacted my office and made an

1 appointment and I saw him. He came to me, he was very
2 angry, he was very annoyed and he was very upset.

3 MR. JUSTICE O'HIGGINS: When was this?

4 A. It was late 2006.

5 MR. JUSTICE O'HIGGINS: Very angry?"

11:36

6

7 And you then asked the question:

8

9 "Q. Do you think in December or November, was it late
10 in 2006, was it wintertime?

11:36

11 A. No, I am sorry, Judge, it was 2007.

12 Q. Was it late in 2007?

13 A. It was probably late 2007, yes, definitely. He
14 came to my office and he was in that state and he
15 demanded of me that I write to the Director of Public
16 Prosecutions and I challenge a decision that the
17 Director of Public Prosecutions had made in respect of
18 him."

11:36

19

20 And Mr. Gillane then intervenes for the Tribunal, and
21 says:

11:36

22

23 "I don't mean to cut across the witness, but I think
24 just in relation to this matter, unless the parties
25 have a different view, I think it's evidence concerning
26 a matter that the Commission isn't directed to
27 investigate. Whether it's relevant or not is a matter
28 for the parties.

11:36

29 MR. JUSTICE O'HIGGINS: Yes.

1 MR. SMYTH: Can I say, judge, perhaps you should hear
2 us, since this is a private hearing. The relevance may
3 be in the context of motivation for certain facts or
4 certain matters or indeed credibility in relation to
5 certain matters." 11:37

6
7 Can I just pause there and ask you, is it the case that
8 the issue in respect of which the dispute then arises
9 between yourself and Mr. McDowell arises in the context
10 of Chief Superintendent Rooney giving evidence of a 11:37
11 conversation that he had with Sergeant McCabe in
12 relation to the DPP --

13 A. Yes.

14 187 Q. -- or the DPP's directions rather?

15 A. Yes, it was his objection in relation to the leading of 11:37
16 this evidence. You see, the matter, I think, in this
17 way could be best explained; there was obviously an
18 overriding concern by Mr. Justice O'Higgins not to
19 delve into certain areas and of course that was never
20 my intention. And I think Mr. McDowell read the 11:37
21 situation, he was concerned too and undoubtedly
22 objected at what he saw was the relevant time. And
23 that was what occurred here. But it was my intention
24 to lay the groundwork for what was to follow in
25 relation to this famous letter that was written 11:38
26 ultimately setting out the complaints that were made.
27 Why Sergeant McCabe wanted to get access to the -- or
28 not why he wanted, but he was making allegations
29 essentially to get access to the directions of the DPP.

1 188 Q. Okay. So the evidence from Chief Superintendent Rooney
2 was in the context of the request made to him which, as
3 I understand your evidence, then leads on to the issue
4 being raised at the Mullingar meeting --

5 A. Yes. 11:38

6 189 Q. -- based on the complaint that had been made and that
7 was being investigated by Superintendent Cunningham, is
8 that so?

9 A. Yes. But I think an important point needs to be made
10 before I leave the witness-box: Superintendent 11:38

11 Cunningham did not know at the stage in Mullingar when
12 he met with Sergeant McCabe in relation to the letter
13 which was written in relation to the complaints against
14 a colleague, he did not know that superintendent --
15 first of all, Chief Superintendent Rooney in this 11:39
16 instance and also that Superintendent Clancy had
17 refused his request to assist him in getting access to
18 the directions.

19 CHAIRMAN: So we are talking about 25th August 2008?

20 A. Yes. I think it's important, Superintendent Cunningham 11:39
21 did not know at that point there had been a refusal for
22 these directions by these two officers.

23 190 Q. MR. SREENAN: And in terms of your understanding of
24 your instructions at that stage, you understood that
25 Superintendent Cunningham was at that meeting 11:39
26 investigating a complaint that had been made against
27 Superintendent Clancy, although that was in fact
28 incorrect, as we now know.

29 A. No, he was there to address the -- he couldn't have

1 been there to address an issue in relation to
2 superintendent Clancy because he was only an inspector
3 at that time. He couldn't have been investigating
4 that. And obviously, that was another error that
5 should have been spotted. But the fact of the matter 11:40
6 is that he was there to investigate the complaints that
7 were made by the sergeant, I think it was against the
8 colleague, Mr. D, as I understand it.

9 191 Q. Yes. Those were the facts, but in fact, your
10 understanding, as I understand it, at the time was that 11:40
11 the complaint in February 2008 had been against
12 Superintendent Clancy?

13 A. Oh, yes. That was my understanding. That is the
14 error. I mean, that is the point. But of course that
15 it was against Clancy, yes. 11:40

16 192 Q. And that was your understanding at the time you raised
17 this question with Chief Superintendent Rooney?

18 A. Yes, yes.

19 193 Q. And when you raised this issue, you have indicated
20 already to the Court -- or to the Tribunal that you 11:41
21 never intended to raise the original allegation?

22 A. Absolutely not.

23 194 Q. Were you conscious of dealing with this matter
24 discreetly?

25 A. Absolutely. 11:41

26 195 Q. And was that your intention?

27 A. Absolutely my intention.

28 196 Q. And do you consider that you did deal with it
29 discreetly?

1 A. I do. I did deal with it discreetly. In fact, as I
2 say, I never got to deal with it -- with the issues
3 surrounding the transcript and the official and
4 transcript and so on, when the error was uncovered.

5 CHAIRMAN: In fact, you did deal with it, I think, on 11:41
6 the Monday, I think you put it to --

7 A. Yes, I put the incorrect --

8 CHAIRMAN: -- and he said that is absolutely false.

9 A. That is absolutely correct; I put the incorrect
10 version, Chairman. That is correct. 11:41

11 CHAIRMAN: You didn't press the point, Mr. Smyth. You
12 simply put the point and you left the point and that
13 was it.

14 A. Put the point. Yes.

15 197 Q. MR. SREENAN: When we return to the transcript, 11:41
16 Mr. McDowell then intervenes and asks to be heard, and
17 Mr. Justice O'Higgins says:

18
19 "The matter is délicat, I will rise for ten minutes."

20 11:42

21 And Mr. McDowell says:

22
23 "I want Mr. Smyth to inform -- since this process is
24 happening now in front of my client, I want Mr. Smyth
25 to formally inform you, Judge, that he is asking these
26 questions on the firm instructions of the Commissioners
27 and that he knows the answers that he is seeking from
28 this witness and that on his view as a professional
29 senior counsel it is relevant to the module."

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So that is how the issue is raised at that stage.

A. Yes.

198 Q. And you have already indicated that you have never been asked to confirm your instructions like that before? 11:42

A. Well, it is what it is. It was unusual, I have to say. But look, we will move on.

199 Q. Okay. Now, I don't necessarily know what was in Mr. McDowell's mind at that stage as to what he thought perhaps that you were pursuing, but if I can just ask you to turn then perhaps to the period after that brief adjournment, which seems to take place at 15:10, and we resume the transcript on page 671. And Mr. Justice O'Higgins has come back at that stage, Mr. Gillane has made a submission and Mr. McDowell says at 15:39: 11:43

"Judge, in relation to the line of questioning which we had arrived at just before the Commission rose, I apprehend that Mr. Smyth is asking this witness questions which relate to my client, his motivation and his character." 11:43

Now I think that is the first use of the term "character" and it wasn't used by you, is that correct?

A. No, it wasn't used. 11:44

200 Q. And then going over to the next page, he refers to the limited role that his client had in terms of the adequacy of the investigation by Garda Ferghal McCarthy. And at line 18 he accepts that you are

1 entitled to pursue a line of questions on that matter,
2 or at line 3 on page 673 of the book, that there may be
3 some responsibility of his client. But I think that
4 was not the matter you were pursuing at that point in
5 time?

11:44

6 A. No. That was not the matter, no.

7 201 Q. And then if we go to page 675, and we are still with
8 Mr. McDowell, he says at line 4:

9
10 "Secondly, if my client's credibility is being called
11 into issue or his motivation, bearing in mind that my
12 client has been told by his own legal advisers that his
13 presence here is largely marginal and his contribution
14 on the facts is going to be to the marginal in the
15 whole process, that if a collateral attack on his
16 credibility is now going to be launched that Mr. Smyth
17 fully establishes his entitlement to do that bearing in
18 mind what the Commission has indicated is the extent of
19 this module."

11:45

11:45

20
21 And again, the reference there is credibility and
22 motivation by Mr. McDowell.

11:45

23 A. Yes. That's correct.

24 202 Q. And just to see how the debate proceeds, going to page
25 276, at line 8, Mr. McDowell says he finds it
26 astonishing that the Commissioner should feel in some
27 sense upholding her rights "involves questioning the
28 motive and the credibility and the behaviour of
29 Sergeant McCabe in this matter". Again, the reference

11:45

1 there "motive and credibility", but he adds in
2 "behaviour".

3 A. Yes.

4 203 Q. Yes. And going to page 677 -- sorry, I should stay
5 with 676 for the moment because again at line 23, the 11:46
6 terms used by Mr. McDowell are "credibility, motivation
7 and behaviour".

8 A. Yes.

9 204 Q. On page 677, Mr. McDowell, at line 4 is now using the
10 terms "motives" or "behaviour" or "standards" or 11:46
11 "credibility", isn't that right?

12 A. That's correct.

13 205 Q. And Mr. Justice O'Higgins says at line 9:
14
15 "First of all, insofar as you canvassed the question 11:46
16 about the efforts to put responsibility on Sergeant
17 McCabe in relation to these matters, they are matters
18 to be considered by this module and no doubt you will
19 make those points in relation, they will be better made
20 in relation to your submissions on the module rather 11:46
21 than in the course of this application."

22
23 And that is Mr. Justice O'Higgins to Mr. McDowell,
24 isn't it?

25 A. Yes. 11:47

26 206 Q. And Mr. McDowell says:
27
28 "I only say in relation to that, that we have had no
29 notice that that was their intention."

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And then we have Mr. Justice O'Higgins.

A. Yes.

207 Q. And this passage now that we are looking at was opened by Mr. McGuinness on behalf of the Tribunal during your earlier examination, but can I just ask you to confirm that before that, despite the lengthy intervention by Mr. McDowell, Mr. McDowell never used the words integrity or malice or bad faith? 11:47

A. Not at that point. 11:47

208 Q. No. And Mr. Justice O'Higgins is then coming in with questions of his own to you. Mr. McDowell having made his objection, saying:

"Secondly, the matters that you have raised are important in relation to this. It's an inquiry, it's not an adversarial thing." 11:47

I think in fairness Mr. Justice O'Higgins is at this stage addressing himself to Mr. McDowell. 11:48

A. Yes.

209 Q. He says: "The question of credibility of witnesses can be probed in the normal fashion in relation to clearly the accuracy of somebody's memory bears on the credibility of their evidence and so forth, but if it goes beyond that, if it is the Commissioner's case that she wishes to impugn the motivation and the integrity of Sergeant McCabe, if those are the instructions that you have, Mr. Smyth, I think you should say so in so 11:48

1 many words. If they are not your instructions this is
2 a different matter. If those are your instructions,
3 that Sergeant McCabe acted out of improper motivation
4 and that his character is so be it, if those are your
5 instructions but if not, if they are I think the
6 Commission, bearing the nature of the inquiry, should
7 be apprised of that."

11:48

8
9 Now, am I right in saying that this is the first
10 introduction of the word "integrity" and it's
11 introduced by Mr. Justice O'Higgins?

11:48

12 A. Yes, that's as I said before, yes.

13 210 Q. It's not your word?

14 A. No, at that point certainly --

15 211 Q. And likewise, the term "improper motivation" introduced
16 by Mr. Justice O'Higgins?

11:49

17 A. No, I never introduced that.

18 212 Q. And further down, still with Judge O'Higgins, line 17,
19 he is saying:

20
21 "I think in view of that particular nature of the
22 matters under discussion that it's not unreasonable of
23 Mr. McDowell to say whether an attack on the integrity
24 and motivation of Sergeant McCabe forms part of your
25 case, or whether you are saying that no, he is
26 inaccurate or mistaken."

11:49

11:49

27
28 Now, again, I think it's the second use of the word
29 "integrity", again it's by Judge O'Higgins, but again

1 Mr. McDowell had not in fact asked to find out whether
2 an attack on the integrity of his client was part of
3 the case.

4 A. No. The Judge was probing at this point as to what the
5 position was. 11:49

6 213 Q. And then at line 28, again in argument with the Judge,
7 you say:
8
9 "I appreciate that but my instructions are to challenge
10 the integrity certainly of Sergeant McCabe, and his 11:49
11 motivation."
12

13 And Judge O'Higgins asks:
14
15 "The integrity?" 11:50
16

17 And then you clarify that, you say:
18
19 "His motivation and his credibility in mounting these
20 allegations of corruption and malpractice." 11:50
21

22 214 Q. And you have already said, and you said it to Judge
23 O'Higgins subsequently, that to say that you had
24 instructions specifically to challenge his integrity,
25 that you were in error in saying that at line 29 on 11:50
26 page 678 of the book, but you clarified that saying
27 it's his motivation and credibility in mounting these
28 allegations of corruption and malpractice.
29

A. That is correct.

1 215 Q. But I think Mr. Justice O'Higgins then pursued the
2 matter and at line 6, he questions you further, and
3 says:

4
5 "Well, there is a difference in relation to the 11:50
6 question of credibility, as I have already indicated,
7 that is an everyday matter. One can suggest to a
8 witness that his evidence shouldn't be believed because
9 of something, but an attack on somebody's credibility,
10 on he is motivation or integrity is something that 11:51
11 really doesn't form part of this inquiry, it would be
12 necessary I think for you to go further and say that
13 the complaints and actions of Sergeant McCabe on your
14 instructions were motivated by -- his motivation was
15 dishonest or wrong. In other words, that he made these 11:51
16 allegations not in good faith but because he was
17 motivated by malice or some such motive that impinges
18 on his integrity. If those are your instructions from
19 the Commissioner, so be it.

20 MR. SMYTH: So be it, that is the position, Judge. 11:51

21 MR. JUSTICE O'HIGGINS: Yes.

22 ...the evidence will demonstrate that, Judge."
23

24 And you have already said that you were responding
25 there out of frustration, really, to the Judge at that 11:51
26 stage, at the extent to which he was apparently putting
27 words in your mouth?

28 A. Yes. There was a debate about my instructions which --
29 anyway, look, it's unusual but, as I say, I moved on.

1 216 Q. Yes. 11:52

2 CHAIRMAN: I am not sure it's fair to say, Mr. Sreenan,
3 that the Judge was putting words in anybody's mouth. I
4 mean, I think you read the textbooks on this matter and
5 you will appreciate that there are various words used 11:52
6 for various concepts, but we are all aware of the
7 concepts.

8 MR. SREENAN: Then I withdraw it, Chairman.

9 CHAIRMAN: Yes, I don't think it was, but certainly
10 there were words coming and going, Mr. Smyth certainly 11:52
11 hadn't used mala fides, integrity, behaviour or attack.
12 They were used by other people. And one of those
13 certainly, integrity one, was taken up in the course of
14 argument in answer to the Judge. It's maybe fair to
15 say that. 11:52

16 MR. SREENAN: Yes, I think that is a better way to put
17 it, Chairman.

18 217 Q. The words good -- "not in good faith" or "motivated by
19 malice", those were not your words?

20 A. No. No, they were not. 11:52

21 218 Q. And then if I can ask you to turn to page 682, the
22 bottom of 681, this debate has continued with
23 Mr. McDowell joining in and making submissions, but
24 Mr. Justice O'Higgins, at the back of bottom of 681,
25 start of 682, is saying, and addressing himself to you: 11:53
26
27 "...you are saying that Garda McCabe's complaints on
28 your instruction are motivated, that they are not
29 properly motivated, that they are not genuine, that

1 they are done for improper motives."

2

3

And you say:

4

5

"Whatever the reasons are for it on his side and it runs right through all of this.

11:53

6

7

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

8

9

MR. SMYTH: Right the way through.

10

MR. JUSTICE O'HIGGINS: Full stop.

11

MR. SMYTH: Yes, full stop."

12

13

It can be hard sometimes to get the impression of what's going on there from the transcript, but I think we have heard the audio recording at the beginning and essentially there is a conversation going on here I think with one person to some extent punctuating what is being said by the other.

11:54

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A. Yes.

20

219

Q. When you say "right the way through" what were you referring to?

11:54

21

22

A. I was going back again to the proven facts document, that as far as I was concerned we had to put this in train, there had to be a credibility and motivation for what I was seeing in the proven facts document and these were going to be issues that were coming through, right the way through all the modules.

11:54

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Q. And then at page 683, continuing the argument which seems to be going on, line 14, Mr. Justice O'Higgins:

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"And he said --"

And the "he" I think he is referring to is Mr. McDowell.

11:54

"He said if you are so instructed that the integrity and motivation of Sergeant McCabe is on the instructions of the Commissioner to be attacked or to be questioned, you are entitled to do it and the question then arises in relation to the question of notice."

11:54

Now, again, that is Mr. Justice O'Higgins' summation of the matter. I don't think, with respect to McDowell, it accurately summarises what Mr. McDowell's position was.

11:55

A. Yeah.

221 Q. But at that stage the issue seems to turn to notice of exactly what is to be put?

11:55

A. Yes.

222 Q. Then we go to page 685. In the course of debate on the particular Kingscourt matter, you say at line 20 to the Judge:

11:55

"Yes. well, not necessarily the supervision, Judge, but the whole issue surrounding the reason why for nearly one year, or in fact it was over one year, it was May 2008, for the first time that Sergeant McCabe

1 has any hand, act or part in relation to what happened
2 in relation to the incident in Kingscourt, he marches
3 off or rings up or makes contact in some shape or form,
4 I don't know how precisely he does it, as he hasn't
5 given evidence, but we know from Regina McArdle that 11:56
6 both himself and Regina McArdle make contact with a
7 member of the public and encourages them to go to
8 GSOC."
9
10 That was in relation to a subsequent involvement after 11:56
11 the incident, sometime after the incident --
12 A. Yes.
13 223 Q. -- you understood Sergeant McCabe had with Lorraine
14 Browne, is that so?
15 A. I am sorry, what did you say, Mr. Sreenan? what was 11:56
16 your question?
17 224 Q. That's what you understood was the subsequent encounter
18 in relation to the Kingscourt incident?
19 A. Yes.
20 225 Q. And then if we go to page 687, Mr. Justice O'Higgins, 11:56
21 again, and if I can just pause there. You were in the
22 position, as I understand it, Mr. Smyth, at that stage,
23 that Sergeant McCabe had not given evidence in the
24 O'Higgins Commission, so you didn't know exactly what
25 he would be saying when he came to give evidence? 11:57
26 A. Well, that's so. That is correct.
27 226 Q. And in the normal course of events one could tailor
28 one's cross-examination then on the basis of what
29 actually was said?

1 A. That is so.

2 227 Q. But you had the Brief Proven Facts document and were
3 trying to anticipate the scope of what you might have
4 to --

5 A. That's correct. 11:57

6 228 Q. -- represent the interests of your client --

7 A. Anticipation.

8 229 Q. -- in relation to?

9 A. Anticipation.

10 230 Q. Yes. Then Mr. Justice O'Higgins on line 21, again he 11:57
11 says:

12

13 "If that were the case it might be that issues of
14 integrity, motivation and so forth, that you say you
15 were instructed or to be levied against you might not 11:57
16 arise in this particular module, in other words
17 Mr. Gillane is indicating that as far as Sergeant
18 McCabe is concerned, in relation to this module, he
19 will be essentially be confining himself to the
20 circumstances of meeting Lorraine Browne and 11:57
21 encouraging her or otherwise to go to GSOC."

22

23 And then he just says he is going to rise, would ten
24 minutes be enough, and that is at 16:10, isn't that so?

25 A. Yes. 11:58

26 231 Q. So the issues then at that point seem to be notice to
27 Mr. McDowell of what is to be put and the limits of any
28 cross-examination on that module, is that so?

29 A. Yes.

1 232 Q. And you then return at page 695, and I appreciate,
2 Mr. Smyth, that this is to some extent, as you
3 indicate, very artificial because we are here micro
4 analysing --
5 A. Yes. 11:58

6 233 Q. -- transcripts and interleaving bits of instructions
7 between that, but this is a very dynamic situation --
8 A. Yes.

9 234 Q. -- that you were caught in at the time?
10 A. Absolutely. 11:58

11 235 Q. Yes. And you had to respond at the time?
12 A. Yes.

13 236 Q. And you got your instructions there obviously, because
14 at the top of that page, line 5 you say:
15
16 "My instructions are reconfirmed. 11:58
17 MR. JUSTICE O'HIGGINS: Very good. Your instructions,
18 as I understand them, are that Sergeant McCabe acted as
19 he did for improper motives.
20 MR. SMYTH: Yeah. 11:59
21 MR. JUSTICE O'HIGGINS: Okay. And that his integrity
22 is being challenged in that respect.
23 MR. SMYTH: In that respect."
24 A. In that respect.

25 237 Q. In other words -- 11:59
26 A. "In that respect", I did say in my evidence that I had
27 concerns about the word "improper" at that stage, that
28 certainly was something that should have -- insofar as
29 his motives were concerned, but "in that respect" his

1 allegations, his allegations.

2 238 Q. In respect of the allegations --

3 A. Yes.

4 239 Q. -- of corruption and malpractice that he had levelled,
5 is that it? 11:59

6 A. That's correct.

7 240 Q. And then if we go to the letter of the 18th May, I
8 don't think we need to turn it up for this purpose, but
9 the -- I think you have already confirmed, and I
10 appreciate you have to respect the privilege of other 11:59
11 clients --

12 A. Yes.

13 241 Q. -- but the matters contained therein were not based on
14 any instructions from the Commissioner?

15 A. No, they were not. 12:00

16 242 Q. And in particular, the contents of paragraph 19 were
17 not based on any instructions from the Commissioner?

18 A. No, they were not.

19 243 Q. And in fact, I think although you weren't aware of it
20 at that time, had there been in the month prior to the 12:00
21 28th February complaint, which was the subject of the
22 Mullingar meeting -- sorry, 25th February complaint, I
23 think, the subject of the Mullingar meeting, a 28th of
24 January complaint also by Sergeant McCabe?

25 A. There had been, but I was not aware of if at that 12:00
26 stage. That did not come into play until the second
27 module, so I wasn't aware of -- all I have to -- I
28 suspect that the people -- well, the people -- my
29 clients were obviously aware of that complaint in

1 January. Certainly Superintendent Clancy was not
2 present at the consultation, the first one, because he
3 was obviously on matters -- he was not due until the
4 second module, but the point I am making is that the --
5 you are asking me, Mr. Sreenan, what was the point? 12:01

6 244 Q. The point I was asking you about was that, although the
7 Mullingar meeting was about a complaint that Sergeant
8 McCabe had made on the 25th February 2008 --

9 A. Yes.

10 245 Q. -- which Superintendent Cunningham was -- 12:01

11 A. They were allegations made in January of which I was
12 not -- of which we were not aware of. And I suspect
13 that the conflation arose here because -- well, it may
14 be that they may be, conflating the complaint which was
15 made a couple of weeks earlier when they were giving -- 12:01
16 instructions may be given.

17 CHAIRMAN: As I understand it, the meeting on 28th of
18 January 2008, Maurice McCabe with Superintendent
19 Clancy, was about supervision, non-completion of work
20 and the use of Pulse. 12:02

21 A. But I think --

22 CHAIRMAN: I think that is correct. And the 25th
23 February was in relation to the D family and the
24 problems in relation to the D family.

25 246 Q. MR. SREENAN: Yes. The 25th February complaint was in 12:02
26 fact in relation to the D family. The 28th January
27 2008 complaint was in relation to Superintendent
28 Clancy.

29 CHAIRMAN: No. It was a letter to Superintendent

1 Clancy complaining about poor supervision,
2 non-completion of work and the Pulse records being
3 incorrect. And I am using "incorrect" advisedly.
4 MR. SREENAN: Yes. But perhaps I should clarify it
5 with the witness, question to the witness, Chairman, 12:02
6 rather than answering it myself.
7 CHAIRMAN: Sure, yes.

8 247 Q. MR. SREENAN: When you became aware of the 25th January
9 2008 complaint, who was that complaint about or
10 against? 12:03

11 A. It was about Clancy, and it came up in -- I think there
12 was a statement, I may be wrong, my memory may be
13 faulty but as I understand it the construction around
14 that was that that a complaint against Clancy, whether
15 or not that was something that was contained in 12:03
16 Sergeant McCabe's statement or whatever he had said
17 about that matter, why he brought the complaints to him
18 at that stage, there was an issue around that. And the
19 general consensus was that it was a complaint against
20 Clancy. 12:03

21 248 Q. Well, one way or the other, by the time the 18th May
22 2015 letter was drafted, had you or your co-counsel
23 been briefed with either of those letters of complaint?

24 A. No. No, we had not those letters. We didn't have
25 them. 12:03

26 249 Q. Now, can I then just ask you to turn to page 797 of the
27 book. This is Mr. Justice O'Higgins' ruling on the
28 matters dealt with in the letter of the 18th May. And
29 just to be clear, your evidence is you had not received

1 the attachments to the letter of 18th May, is that so?

2 A. No, I hadn't got the attachments.

3 250 Q. No. He says that:

4

5 "It would appear on the face of it, Mr. Smyth, that the 12:04
6 contents of this document are irrelevant to the terms
7 of reference in relation to this module."

8

9 Mr. McDowell then intervenes and line 24, Mr. Justice
10 O'Higgins says: 12:04

11

12 "It would seem to me that the matters contained in this
13 document are irrelevant to any findings that I might
14 have to make in this module."

15

12:05

16 And again, what he was referring to was in that module.
17 And you respond by saying:

18

19 "Well thus far, Judge, you are hearing the evidence of
20 Colm Rooney, ex-Chief Superintendent Colm Rooney. He 12:05
21 will be giving evidence in other modules, I assume
22 related modules. I am laying the ground for -- in this
23 module and other modules for a conversation that
24 Sergeant McCabe had with ex-Chief Superintendent Rooney
25 and in particular without saying too much to offend the 12:05
26 sensitivities of Mr. McDowell in relation to this --
27 MR. JUSTICE O'HIGGINS: It's not just the sensitivities
28 of Mr. McDowell."
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And then:

"These things are dealt with."

And at line 15 you say:

12:05

"It's relevant in this way, Judge, because I say that Sergeant McCabe was motivated to do certain things, to make certain allegations based on the fact that he required clarification from the DPP on certain matters touching on his situation."

12:05

At line 27 you say:

"Because he made complaints directed to Superintendent Clancy, there was a letter of the 28th February 2008 --"

12:05

I think it should be the 25th of February, in fact.

12:06

-- he told Inspector -- Superintendent Cunningham, who will be one of the next witnesses in this module, that he was withdrawing, he only made those complaints on the basis that he wished Superintendent Clancy to seek further clarification from the DPP."

12:06

A. Yes.

251 Q. And again, at line 16 in response to a question from Judge O'Higgins you say:

1 "It flows right through all modules, the motivation and
2 credibility of Sergeant McCabe."

3
4 So you are back again to the issue of --

5 A. In making the allegations. 12:06

6 252 Q. In making the allegations, which is specifically what
7 you say, sorry, I should have completed the sentence.

8
9 "The motivation and credibility of Sergeant McCabe in
10 making the allegations he made. And he withdrew, he 12:06
11 was prepared to -- the only reason we have Yvonne
12 apparently Sergeant Yvonne Martin who is a witness to a
13 statement that he made. The only reason he made the
14 allegation she made on 28th of February in a letter
15 which was sent to Superintendent Clancy ultimately was
16 that he was making those allegations to force the hand
17 of Superintendent Clancy to seek further clarification
18 from the DPP."

19
20 So again, there, in argument, you are dealing with it 12:07
21 as issues of credible and motivation, isn't that so?

22 A. That is correct.

23 253 Q. And then Mr. Justice O'Higgins, going over to page 800,
24 says that he thinks:

25
26 "...the contents of the document are irrelevant to any 12:07
27 matters that he has to inquire into in this module in
28 relation to the question motivation, the motivation I
29 am not certain that it can be excluded as a background

1 consideration. I will allow you to establish this much
2 and no more, that Sergeant McCabe had a real or
3 perceived grievance against somebody."
4

5 You say at line 10: 12:07

6
7 "And I am permitted to pursue with this witness the
8 conversation he had with Sergeant McCabe."
9

10 And Mr. Justice O'Higgins rules out the conversation 12:07
11 with Chief Superintendent Rooney.

12 A. Yes.

13 254 Q. And says, at paragraph 18:

14
15 "His motivation, as I say, is only peripheral, very 12:08
16 peripheral, but his motivation you are suggesting was
17 that out of a grievance he had, the details of the
18 grievance don't seem me to be irrelevant."

19 A. Don't seem to be relevant, yes.

20 255 Q. That is, I think, what you referred to earlier in your 12:08
21 system, that Mr. Justice O'Higgins wasn't ruling out
22 motivation entirely but in relation to that module he
23 was saying that it was peripheral, certainly in
24 relation to that module?

25 A. That's correct. 12:08

26 256 Q. Yes. But he would allow it to the extent of suggesting
27 that there was a grievance?

28 A. That is correct.

29 257 Q. And you made it clear that you did not intend, at line

1 22, to go into the details of the background, but you
2 needed to establish that there was a grievance:

3
4 "It has to be sanitised, it has to be sanitised in some
5 shape or form, I don't want to parade all of the 12:09
6 background information."

7
8 You said.

9 A. That is correct.

10 258 Q. And Mr. Justice O'Higgins concludes that section by 12:09
11 saying:

12
13 "I will allow you to establish that he had a grievance,
14 real or perceived, and no further, so the contents of
15 this document are irrelevant for this module." 12:09

16
17 And that is his ruling.

18 A. That is the position.

19 259 Q. Could I ask to you turn to page 977 of the book, again 12:09
20 we are on day 3. Mr. Justice O'Higgins at line 21
21 returns to his view about motivation and says:

22
23 "The matter was canvassed on Friday as well. It was
24 decided that in relation to the question of motivation
25 that it wasn't entirely irrelevant, but was peripheral 12:09
26 and perhaps it might be more germane, might be more
27 germane to another module rather than this."

28
29 And that was the position that he articulated, I think

1 the words speak for themselves.

2 A. That's correct, they speak for themselves.

3 260 Q. And obviously Mr. Justice O'Higgins had a lot more
4 information as to the evidence that might be tendered
5 in other modules, it wouldn't have been circulated to 12:10
6 you at that stage?

7 A. Well obviously so, yes.

8 261 Q. So you didn't know just how relevant it would or would
9 not be necessarily on the basis of the evidence that
10 might or might not be tendered? 12:10

11 A. No, I had no idea.

12 262 Q. On page 978, Mr. Justice O'Higgins says, line 17, to
13 you:
14
15 "I am not precluding you, as I said, from raising
16 issues in relation to credibility based on your
17 assertion that there is bad and improper motivation for
18 this, I am not precluding you from making that but I
19 would repeat that in the conflict the question of
20 credibility in relation to this particular module seems
21 only to arise in relation to conflict and the conflict
22 in relation to facts seem to be very limited, it seems
23 to be more a degree of would you agree with an emphasis
24 rather than facts."
25

26 A. Yes.

27 263 Q. And again, that's Mr. Justice O'Higgins there using the
28 words bad and improper motivation, rather than you?

29 A. That is correct.

1 264 Q. And then if we go to page 979, we see -- we have been
2 looking all along simply at the argument, I shouldn't
3 say simply, but we have been looking at the argument or
4 the interchange between yourself and the Chairman of
5 the Commission and Mr. McDowell, but we will look now 12:11
6 to see at what is actually happening in
7 cross-examination and what is actually put, on page 979
8 you say, at line 2:

9
10 "I don't want to waste more time on it, just very 12:11
11 briefly two questions I want to ask you, Sergeant
12 McCabe. The first one is: On 26th February 2008 you
13 sent a letter to Superintendent Clancy containing a
14 number of complaints that you had, is that correct?

15 A. Yeah. 12:12

16 Q. One matter I want to ask you again, just arising,
17 finally, out of that, I think that Superintendent
18 Cunningham met you for the purpose of discussing
19 that..."

20 12:12

21 And he agreed with that and he identified the date of
22 the meeting, the 25th August 2008. And going over the
23 page, line 7, question 733, you put the question:

24
25 "In the course that have meeting, Sergeant, you advised 12:12
26 Superintendent Cunningham that the only reason you made
27 a complaint against Superintendent Clancy was to force
28 him to allow you to have the full authority directions
29 conveyed to you."

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And the answer is:

"That is absolutely false.

Q. Right."

12:12

And you asked one more question and then you essentially leave it, as I understand it. But when you put it to Sergeant McCabe there in question 733 that the only reason he made a complaint against Superintendent Clancy was to force him to allow Sergeant McCabe to have the full authority directions conveyed to you and he says that is absolutely false, you accept that you were wrong to describe it as a complaint against Superintendent Clancy, but those were your instructions?

12:12

12:13

A. Those were my instructions, yeah. That's correct.

265 Q. And that was made clear subsequently I think?

A. Yes.

266 Q. And spotted first by the Judge.

12:13

A. Yes.

267 Q. But when, in fact, the transcript -- it transpired, as I understand it, that Sergeant McCabe had recorded that meeting with Superintendent Cunningham, although Superintendent Cunningham didn't know it at the time?

12:13

A. Yes.

268 Q. And Superintendent Cunningham had also his own notes of the meeting?

A. That's correct.

1 269 Q. And both the transcript of the recording made by
2 Sergeant McCabe and Superintendent Cunningham's notes
3 were in agreement?
4 A. That's correct.

5 270 Q. And they were in agreement with the fact that the 12:13
6 complaint was not about Superintendent Clancy but
7 rather to him?
8 A. That is correct.

9 271 Q. But they were also in agreement that Sergeant McCabe
10 did say that the only reason he had made the complaint 12:14
11 was in relation to, in order to have the directions of
12 the DPP conveyed, was to the D family?
13 CHAIRMAN: Again -- yes?

14 A. Well, in fact what he said was that he was requested by
15 Superintendent Clancy to make the complaint against the 12:14
16 colleague -- the person for the purpose of --
17 CHAIRMAN: And again it's not about Superintendent
18 Clancy, it's about the D family, the incident in the
19 court, running up and down the street, etcetera,
20 etcetera. 12:14
21 MR. SREENAN: Yes.

22 CHAIRMAN: That is what it's about. I am sure you know
23 that, Mr. Sreenan, but I just don't want you to be
24 misled on that.

25 MR. SREENAN: No sorry, I thought I had correctly 12:14
26 stated it but obviously I didn't.

27 CHAIRMAN: You did, but there was a certain ambiguity
28 there, hence the intervention.

29 MR. SREENAN: Thank you, Chairman.

1 272 Q. So the complaint that was the subject of the Mullingar
2 meeting was not about Superintendent Clancy, as it
3 transpired?
4 A. That's correct.

5 273 Q. Right. 12:15
6 A. That is correct.

7 274 Q. And insofar as you put that question at question 733,
8 you referred to the full authority directions. Was the
9 use of that word "authority" conscious and deliberate
10 on your part? 12:15
11 A. Absolutely. I was trying to sanitise the thing at that
12 point.

13 275 Q. In other words, in the cross-examination, you didn't
14 wish to specifically refer to --
15 A. No. 12:15

16 276 Q. -- the DPP, is that it?
17 A. Absolutely correct, yes.

18 277 Q. And can I then just ask you to turn to page 1465 of the
19 book. We have the observations of Mr. Justice
20 O'Higgins where he identifies, on 24th June 2015, this 12:16
21 is on day 5, that the statement in paragraph 19 appears
22 to be incorrect, and he says at line 17:
23
24 "It does not appear that Superintendent Cunningham was
25 not appointed to investigate a complaint against
26 Superintendent Clancy. The meeting was not about
27 complaints against Superintendent Clancy but concerned
28 a request to him. No complaints were made about him.
29 Neither in the report of Superintendent Cunningham nor

1 in his note of the meeting is there reference to a
2 complaint about Superintendent Clancy. Neither is such
3 a contention supported by the transcript of the
4 recording of the meeting."
5

12:16

6 Now, that is the 24th June 2015.

7 A. That's correct.

8 278 Q. And it's identified there, on the basis of both
9 transcripts, what the error was, isn't that so?

10 A. At that point, yes.

12:17

11 279 Q. But as of that date, the submissions of the 11th June
12 2015 had already gone in, and they were based on the
13 original error in the letter of the 18th May?

14 A. That is correct. That is the position.

15 280 Q. All right. And that position is then accepted, going
16 to page 1493, you point out at paragraph 20 to the
17 Judge that at that stage you didn't have the
18 transcript, and Mr. Justice O'Higgins says:

12:17

19
20 "Does it change anything? As Superintendent Cunningham
21 put in his report. He said in his report what he
22 thought the motivation of Sergeant McCabe in making the
23 observations and the request on February, the 28th, he
24 says what he thought. The transcript would appear to
25 offer some support for Superintendent Cunningham's view
26 of it."

27
28 So in terms of Superintendent Cunningham's view of the
29 motivation for that complaint, the Judge is indicating

1 that the transcript offers some support for that.

2 A. The Judge had made that observation, that's correct.

3 281 Q. Yes.

4 CHAIRMAN: well, I suppose the issue would then arise
5 as to which view it was, but I can see. 12:18

6 MR. SREENAN: Yes. I suppose, I would simply suggest,
7 Chairman, that it offers some support for the fact that
8 Mr. Justice O'Higgins wasn't completely ruling out the
9 question of motivation.

10 282 Q. And then if I could ask you perhaps to turn to page 12:18
11 2024 of the core book. This is a letter of the 6th
12 July 2015 that you wrote to your instructing solicitor,
13 describing the then-state of the evidence before the
14 O'Higgins Commission, is that right?

15 A. I was asked by Annmarie Ryan to write that letter. 12:19

16 283 Q. Yes. And you outline the evidence that is given at
17 that stage and the position on the evidence as to
18 motive in relation to complaints about Chief
19 Superintendent Michael Clancy and Superintendent
20 Cunningham, and you say in the middle of the second 12:19
21 paragraph:

22
23 "You will recall that in a previous module that he
24 withdrew allegations of cover-up against Chief
25 Superintendent McGinn and Assistant Commissioner 12:19
26 Byrne".

27
28 And that was a previous module of the O'Higgins
29 Commission, is that right?

1 A. That's correct.

2 284 Q. You say in that statement, commencing on the last line
3 of the first page:

4

5 "Sergeant McCabe states the following: 12:20

6

7 'Superintendent Clancy was a man who cared more what
8 Chief Superintendent Colm Rooney would think of the
9 decision he made rather than caring for what happened
10 to victims of crime or injured parties.'

11

12 This statement was made in the context of the release
13 of Jerry McGrath from custody in Bailieboro Garda
14 Station."

15

16 And as we know, Jerry McGrath is the person who, as I
17 understand it, went on to commit a crime of murder in
18 Limerick?

19 A. That is so.

20 285 Q. And dreadful and tragic consequences. 12:20

21 A. Yes.

22 286 Q. And to the fact that Jerry McGrath was out on bail. So
23 that allegation made in that context. And you say:

24

25 "I asked Sergeant McCabe to withdraw this statement and 12:20

26 he refused to do so. Judge O'Higgins intervened and
27 asked Sergeant McCabe to consider that his allegation
28 against Superintendent Clancy were harsh -- his
29 allegations against Superintendent Clancy were harsh.

1 Despite this intervention, Sergeant McCabe again
2 refused to withdraw the allegation and stated that it
3 was a matter for the Commission as to whether or not
4 the statement was harsh."

12:21

5
6 Is that correct?

7 A. That is correct.

8 CHAIRMAN: Well, that letter has been produced. So
9 far, there has been no cross-examination to indicate
10 that anything in it is incorrect.

12:21

11 MR. SREENAN: No. But I thought, for completeness,
12 perhaps I should have drawn it up, but --

13 CHAIRMAN: So I would be entitled to rely on the text
14 of that letter as to what had occurred.

15 MR. SREENAN: In those circumstances, I don't need to
16 open it further, Chairman.

12:21

17 CHAIRMAN: Well, there was no cross -- there was
18 cross-examination on an awful lot of things, but that
19 letter was never mentioned in cross-examination.

20 MR. SREENAN: No, that's correct, that's correct,
21 Chairman.

12:21

22 MR. MCDOWELL: Well, it was never --

23 CHAIRMAN: It's not a blame-game, Mr. McDowell. It
24 just never was.

25 MR. MCDOWELL: No, no, I am just saying that -- I am
26 not saying that I accept that everything that Mr. Smyth
27 said in that letter is correct, but I would have to
28 look at each one of them.

12:21

29 CHAIRMAN: Well, I mean, everything else that

1 apparently was incorrect has been pointed out so far,
2 but that was -- it wasn't even glossed over. It just
3 didn't come up at all.

4 MR. McDOWELL: We are dealing with the Commissioner's
5 instructions on motivation. I just can't say just off 12:22
6 the top of my head that everything in that is conceded
7 as correct.

8 CHAIRMAN: No, well, I think that's what Mr. Smyth
9 genuinely believed, having been -- and you will
10 appreciate, Mr. McDowell, that an advocate appearing in 12:22
11 a case -- well, as the old phrase, it's the person who
12 believes that all their geese are swans. So take --
13 putting that caveat on it, that is what he genuinely
14 believed at that point.

15 MR. McDOWELL: That was a report by Mr. Smyth, 12:22
16 doubtless made in good faith to -- for the purpose of
17 his client at that point. I did not pursue the content
18 of that letter because, as has been pointed out on a
19 number of occasions, Mr. Smyth's view of these matters
20 is not the relevant view, and it's his client's view of 12:23
21 the matter that is the relevant view.

22 CHAIRMAN: It's true. But he is saying to his client,
23 look, it seems to me that there is some kind of
24 disharmony between Superintendent Clancy and Sergeant
25 McCabe. 12:23

26 MR. McDOWELL: Well, we might even adopt his word
27 "animus".

28 CHAIRMAN: Well, it has a technical meaning in -- only
29 in psychology. I know what you mean.

1 MR. MCDOWELL: Well, all I am saying is, Judge, I just
2 don't want it to be, without me reading this letter
3 very carefully again, to say that I concede that the
4 Tribunal should accept everything in it is absolutely
5 correct.

12:23

6 CHAIRMAN: All right. I think it may be fair to say as
7 well that, look, if there is someone sitting up in
8 Dublin Castle, for instance, and they have counsel
9 representing them somewhere else and counsel writes the
10 following letter saying this is my view of what has
11 happened so far, that informs the person's decision as
12 to where they go from there and as to whether, for
13 instance, any issue in relation to credibility, and if
14 there is no credibility in relation to particular
15 facts, motive for making those allegations might arise.

12:24

12:24

16 MR. MCDOWELL: I accept that that is a reasonable view
17 of it. All I am saying is that I have never gone
18 through it line by line or debated it with Mr. Smyth.

19 CHAIRMAN: No. And thank you for that clarification.

20 287 Q. MR. SREENAN: Mr. Smyth, insofar as that letter records
21 the evidence given and the state of evidence before the
22 O'Higgins Commission at that time, is it accurate?

12:24

23 A. I am satisfied it's accurate.

24 288 Q. And I think it's correct to say that nowhere in that
25 letter do you use the word -- or the words "integrity",
26 "mala fides" or "malice"?

12:24

27 A. Not at all, no.

28 289 Q. Just on one other point. The O'Higgins Commission was,
29 of course, at all times supposed to be a private

1 hearing, isn't that correct?

2 A. That is correct.

3 290 Q. And as far as you were concerned on the 15th May 2015,
4 were people respecting that privacy?

5 A. Absolutely. 12:25

6 291 Q. Yes. And we know that, subsequently, there were a lot
7 of leaks in relation to evidence given, or supposedly
8 given but not given, and questions supposedly put and
9 not put, at the O'Higgins Commission, but can I ask you
10 to confirm that those leaks didn't come from you or, to 12:25
11 your knowledge, anyone on your team?

12 A. I can absolutely guarantee they didn't come from our
13 team.

14 292 Q. Yes. If I could ask you to turn to page 1944. I think
15 that is an example of you -- of cross-examining 12:26
16 Sergeant McCabe in relation to allegations that he had
17 made and then subsequently withdrew, is that right?

18 A. Is that the context -- yes, if that is what you say the
19 context is. I am seeing it on the screen, yes.

20 293 Q. I mean, just by way of example, question 168, you ask 12:26
21 the question:
22
23 "why then did you make an allegation which you now have
24 to withdraw in the face, a considerable time after you
25 have made the allegation, may I say, after two
26 investigations you are telling this Commission that you
27 did not have access --"

28 A. Yes, I understand the context. It was he made -- this
29 is the one where he made the apology, I think, to

1 Superintendent Cunningham.

2 294 Q. Yes, I think so, yes.

3 A. Yes.

4 295 Q. And you say:

5

6 "After two investigations --"

7 CHAIRMAN: Maybe just give me the date of that,

8 Mr. Sreenan, if you wouldn't mind, please, for the

9 convenience of my note. Simply, what is the date that

10 is happening on?

11 MR. SREENAN: The date?

12 CHAIRMAN: The date of that transcript.

13 MR. SREENAN: Sorry, Judge, it's day 10.

14 CHAIRMAN: And it's, therefore, November, is it?

15 MR. SREENAN: Day 10. And I will get the date --

16 CHAIRMAN: Do you remember what date it was?

17 A. I can't, Judge. What volume is it, Mr. Sreenan?

18 MR. SREENAN: It's, I am told, the 1st July.

19 CHAIRMAN: Thank you.

20 296 Q. MR. SREENAN: So the question you pose then:

21

22 "Why then did you make an allegation which you now have

23 to withdraw in the face, a considerable time after you

24 have made the allegation, may I say, after two

25 investigations you are telling this Commission that you

26 did not have access to this file but yet you were

27 prepared to make an unfounded allegation against my

28 client, Noel Cunningham, to the effect that he

29 permitted as a Superintendent a gross dereliction of

12:27

12:27

12:27

12:28

1 duty. why did you not seek out the information that
2 supported that criticism before you made it?"

3
4 And Sergeant McCabe's answer was:

5
6 "A very good question. When I was interviewed in
7 relation to Byrne McGinn I expected them to come back
8 to me in a month or two or three or six month and say:
9 Hold on here, Maurice, you are wrong, and that is what
10 they should have done. I would have said: Yes, I am
11 sorry."

12
13 So again, we don't need to open the whole of that
14 passage, but that is perhaps an example of a
15 cross-examination in relation to an allegation against 12:28
16 one of your clients that he had withdrawn, is that
17 right?

18 A. That is the position, yes.

19 297 Q. Could I ask you then to turn to 2568. This is day 27,
20 Judge, and I will get you the date of day 27. 12:29

21 CHAIRMAN: Is this the 4th November? No?

22 MR. SREENAN: It's probably a little before that, I
23 suspect, Judge. Page 2569.

24 CHAIRMAN: Somebody can come back and tell me,
25 Mr. Sreenan. Don't worry. Mr. Sreenan, are you going 12:30
26 to be much longer?

27 MR. SREENAN: The 22nd of October, I am told.

28 CHAIRMAN: Thank you. Will you be much longer,
29 Mr. Sreenan?

1 MR. SREENAN: I could be another 15 or 20 minutes,
2 Chairman.

3 CHAIRMAN: Let's -- sorry, Ms. Downes, is that all
4 right with you?

5 STENOGRAPHER: Yes. 12:30

6 CHAIRMAN: I really want to finish and let's actually
7 get Mr. Smyth out of the witness-box. I feel we will
8 have actually done something then.

9 MR. SREENAN: So do I, Chairman.

10 298 Q. Can I ask you just to go to page 2569. 12:30

11 A. Yes.

12 299 Q. This is Sergeant McCabe being examined not by you or
13 cross-examined by you, but by Mr. Gillane, who is
14 counsel for the Tribunal.

15 A. Yes. 12:30

16 300 Q. And he seems here to be cross-examined by the Tribunal
17 counsel on an issue of motivation. Mr. Justice
18 O'Higgins says at line 21:

19

20 "Just in relation to that specific question Mr. Gillane 12:31
21 was asking you about --"

22

23 And this, Judge, relates to the letter that was sent
24 through the Confidential Recipient in -- to the
25 Minister in January of 2012, I think 23rd January 2012. 12:31
26 Mr. Justice O'Higgins says:

27

28 "Just in relation to the specific question Mr. Gillane
29 was asking you, was this complaint against Commissioner

1 Callinan a technique, a device, legitimate, but a way
2 of getting your concerns about Chief Superintendent
3 Clancy revisited?

4 A. It was that I couldn't believe he was actually on a
5 promotion list.

6 MR. GILLANE: All right, well just to flesh out this
7 issue, and I will come back to the promotion list in a
8 moment just to hear what you have to say in relation to
9 that. It seems here at this stage, and I know there
10 are other events, it maybe difficult to see that
11 Commissioner Callinan had done anything wrong, if I can
12 put it that way at this stage. It might be suggested
13 that Commissioner Callinan is complained about at this
14 stage because it would mean that the complaint would
15 then necessarily have to find its way to the Minister's
16 desk.

17 A. Yes.

18 MR. JUSTICE O'HIGGINS: That was the purpose of it?

19 A. Yes, that was the purpose of it."
20

21 You remember that evidence, do you?

22 A. I do remember that, yes.

23 301 Q. So he was being questioned there by Tribunal counsel
24 and by Judge O'Higgins in relation to his motivation
25 for making the complaint against former Commissioner
26 Callinan to the Confidential Recipient?

27 A. That is correct.

28 302 Q. And then if we can go to the transcript, which is in
29 book 7, and we have looked at this already, on page

12:32

1 3508, Mr. McDowell put it to you yesterday that at that
2 stage Mr. Justice O'Higgins raised the issue which was
3 dormant for some time, and Mr. McDowell described the
4 issue that had been dormant as one of motivation, but I
5 think the record shows that the issue that was dormant 12:33
6 was, in fact, not motivation but what was described by
7 Judge O'Higgins as the question of integrity?

8 A. Yes.

9 303 Q. He says at line 11:
10
11 "Before we commence, there is one matter that I would
12 like a bit of assistance and clarification on from you,
13 Mr. Smyth. It is in relation to a question that has
14 been dormant for some time concerning the integrity of
15 Sergeant McCabe and his mala fides or bona fides in 12:34
16 making his complaints."

17 CHAIRMAN: You can take it that I have read this
18 multiple times, Mr. Sreenan. And the question you want
19 to ask about it is?

20 304 Q. MR. SREENAN: The question is: In that intervening 12:34
21 period and having regard to the fact that Judge
22 O'Higgins describes it as dormant, had there been any
23 cross-examination by you on the issue of integrity or
24 mala fides in the intervening period?

25 A. No, there had been none in relation to the man's mala 12:34
26 fides or character, none.

27 305 Q. And at any stage did you put it to Sergeant McCabe that
28 he was malicious?

29 A. I never did.

1 306 Q. Or that he was acting in bad faith?
2 A. Absolutely never did.
3 307 Q. Or that he was lacking in integrity?
4 A. I never put that to him.
5 308 Q. It was suggested to you that Sergeant McCabe, 12:35
6 understandably, had become upset at times. I think the
7 first time Sergeant McCabe became upset was on day 3
8 when he was under questioning by Mr. Gillane for the
9 Tribunal, is that right?
10 A. I think that is -- -- I have no memory. 12:35
11 CHAIRMAN: But, honestly, you know, in court cases
12 people do become upset. Indeed, I think, according to
13 what I heard at home, it was reported yesterday that
14 you were upset. I actually was looking at you, and we
15 are right beside each other, you were never upset. You 12:35
16 did get a little cross on one occasion, but these
17 things --
18 A. It was reported widely that I was very upset and
19 apologised for being upset.
20 CHAIRMAN: Well, don't worry about it. I don't know -- 12:35
21 well, fortunately I am never going to write a report
22 about people being upset or not upset. But, look, the
23 reality of it is, in court cases people sometimes do
24 get upset.
25 MR. SREENAN: Yes. But just insofar as there was some 12:36
26 suggestion by Mr. --
27 CHAIRMAN: You are saying it's Mr. Gillane's fault for
28 him being upset?
29 MR. SREENAN: I am saying it is --

1 CHAIRMAN: I know you are not doing that, Mr. Sreenan.
2 I am going to correct myself immediately. The plain
3 reality of things is that when people have to speak
4 about matters that are close to their heart, they may
5 get upset, and I understand that, but, on the other 12:36
6 hand, I appreciate the reason you are asking the
7 question, which is in the context of what Mr. Smyth
8 called the military terms deployed in cross-examination
9 this morning, and there was no military assault or
10 assault or vicious attack, is what -- the point you are 12:36
11 trying to get across here.

12 MR. SREENAN: And indeed the suggestion that might have
13 emerged from the cross-examination, that it was
14 Mr. Smyth who was responsible for making Sergeant
15 McCabe upset in the first instance. 12:36

16 CHAIRMAN: Well, did you ever upset Sergeant McCabe?

17 A. I am satisfied I did not.

18 309 Q. MR. SREENAN: Can I ask you to look at the O'Higgins
19 Commission report. You indicated on a number of
20 occasions that the O'Higgins Commission did not uphold 12:37
21 the allegations of serious wrongdoing and corruption
22 made against your clients.

23 A. That's correct.

24 310 Q. Can I just ask -- this starts on page 4370. It's
25 volume 8, I'm told. And if I could just refer you to 12:37
26 paragraph 3.5 and 3.6 by way of example:

27

28 "Sergeant McCabe made complaints of corruption under
29 the Garda Síochána (Confidential Reporting of

1 Corruption or Malpractice) Regulations 2007 against the
2 then-Garda Commissioner Martin Callinan. The charter
3 established under those regulations does not define
4 corruption or malpractice, but includes not only
5 matters which constitute criminal behaviour but also 12:37
6 other conduct, such as breaches of discipline, abuse of
7 authority and a range of other matters. It was
8 submitted on behalf of Sergeant McCabe that he had not
9 intended to make allegations of criminal conduct
10 against the Commissioner, but rather, of an abuse of 12:38
11 power only. The allegation was understood by the
12 Commissioner to be one of criminal conduct. The
13 hurtful allegation was based on the belief, unsupported
14 by any evidence, that the Commissioner had put
15 Superintendent Clancy on a promotion list. The 12:38
16 complaint was in part a device to ensure that the
17 complaint came before the Minister for Justice and
18 Equality. At that time, a complaint against the
19 Commissioner had to be referred to the Minister. The
20 matter is dealt with in chapter 13 of the report where 12:38
21 the former Commissioner is vindicated. Complaints of
22 corruption in the context of the charter were also made
23 against Assistant Commissioner Byrne, Chief
24 Superintendent Rooney, Superintendent Clancy. In each
25 case, the Commission has found those hurtful complaints 12:38
26 unfounded and those against whom such complaints were
27 made had to live for many years under the strain of
28 those allegations. No direct allegation of corruption
29 was levelled against Superintendent Cunningham, but so

1 far as may be implied, they are also unfounded."

2
3 Now, he goes on in paragraph 3.9 to say:

4
5 "There were a large number of complaints against Chief 12:39
6 Superintendent Clancy examined in detail in this
7 report. He is exonerated of any wrongdoing and is the
8 subject of only occasional and very mild criticism."

9
10 Now, those were the ultimate findings of the O'Higgins 12:39
11 Commission, and Mr. Justice O'Higgins goes into
12 considerably greater detail in subsequent chapters in
13 elucidating the basis for those findings. But those
14 were the findings against the persons who you and your
15 colleagues were instructed to challenge the allegations 12:39
16 that had been made against them?

17 A. That is so.

18 311 Q. And insofar as paragraph 3.5 refers to the motivation
19 for the complaint to the Confidential Recipient,
20 including a complaint against former Commissioner 12:40
21 Callinan, who was also a client of yours --

22 A. Yes.

23 312 Q. -- that paragraph dealing with that motivation follows
24 immediately after paragraph 3.4, which you were
25 referred to by My Friend, Mr. McDowell? 12:40

26 A. Yes.

27 MR. SREENAN: And, Chairman, if I could just clarify,
28 there are a number of other passages in this report
29 that go into more detail. I am taking it that, in

1 closing, I can refer to those and I don't need to bring
2 the witness to them particularly --

3 CHAIRMAN: NO, absolutely. And those passages were
4 referred to earlier on by Mr. Murphy certainly on a
5 number of occasions. 12:40

6 MR. SREENAN: Then that ends my examination of this
7 witness.

8 CHAIRMAN: Yes. Well, thank you very much. Did you
9 have anything else, Mr. McGuinness?

10 MR. MCGUINNESS: No, Chairman. 12:41

11

12 MR. COLM SMYTH WAS QUESTIONED BY THE CHAIRMAN:

13

14 313 Q. CHAIRMAN: I just wanted to ask you a couple of things,
15 Mr. Smyth, and I don't need to turn into a law lecture, 12:41
16 or anything else like that. But this whole thing about
17 cross-examination as to credit, cross-examination as to
18 credibility, et cetera, it seems to, because of the
19 closeness of the concepts, cause some confusion. Now,
20 you will appreciate that cross-examination on the facts 12:41
21 is cross-examination as to whether, for instance, the
22 witness really perceived the man with a knife going
23 into the house.

24 A. Yes.

25 314 Q. CHAIRMAN: And that simply as to whether the person was 12:41
26 there, what they saw, and then if you pursue that by
27 saying to the person, look, were you tired? Do you
28 normally wear glasses? Were you wearing your glasses
29 on the day? When did you first of all make a report of

1 this? what you are, in effect, looking at there is, you
2 are looking at the weight to be attached to what the
3 witness said, isn't that right?

4 A. That's correct.

5 315 Q. CHAIRMAN: Well, the textbooks refer to that as 12:42
6 cross-examination as to credibility.

7 A. Yes.

8 316 Q. CHAIRMAN: Now, cross-examination as to credit is
9 somewhat different, which is to suggest that the man
10 who is the witness saying that the man with the knife 12:42
11 went into the house, actually, for instance, hates the
12 accused because the accused slept with his girlfriend.
13 Did you ever or were you ever instructed to pursue an
14 issue as to credit, that is to say that there was
15 something about Sergeant McCabe's character that 12:42
16 rendered his evidence less trustworthy?

17 A. I was never instructed to do that, Judge.

18 317 Q. CHAIRMAN: Now, when you refer to cross-examination as
19 to credibility, using the word correctly, and I am
20 using "weight" interchangeably, you said on a number of 12:43
21 occasions I needed to probe what was behind those
22 allegations, that is to say the allegations against the
23 senior officers you were representing. What did you
24 mean by that?

25 A. To see what the facts were, what was he relying on, 12:43
26 what were the facts that suggested, for example, that
27 this man was presiding over dereliction of duty, what
28 are the facts -- in one instance I asked him to name
29 the people who were derelict in their duty, that

1 superintendent was presiding over, and he couldn't do
2 that. But that is just an example of what I was trying
3 to do, and to find out -- but probe him in relation to
4 the evidence that he had to support such a contention,
5 or allegation, rather.

12:43

6 318 Q. CHAIRMAN: Now, there was just two other things. You
7 have covered that, I'm sure, pretty thoroughly in
8 answer to Mr. McGuinness, but I just wanted to make
9 sure that my understanding is correct. Reference has
10 been made to public statements made by the Commissioner 12:44
11 in relation to supporting Sergeant McCabe and putting
12 in place, you know, particular structures in that
13 regard.

14 A. Yes.

15 319 Q. CHAIRMAN: And there has been mention indeed of a man 12:44
16 called Oliver Connolly [sic], who is very well known in
17 the industrial relations and has done great work in
18 that respect.

19 A. Yes.

20 320 Q. CHAIRMAN: Were you ever instructed that this was what 12:44
21 the Commissioner was saying?

22 A. Never. I had no idea of the public statements. I
23 wasn't even aware of it as a citizen.

24 321 Q. CHAIRMAN: And were you at that stage -- you weren't
25 following in any particular detail the news on those 12:44
26 events?

27 A. Not in -- no more than the ordinary citizen. I had a
28 fleeting interest in looking at the news and whatever
29 it may be. I had no view on it one way or the other

1 and I wasn't up to date with the details.

2 322 Q. CHAIRMAN: Now, in the event that you had had a
3 consultation, let us say, before --

4 MR. McDOWELL: Sorry, Judge, I think you meant Kieran
5 Mulvey rather than Oliver Connolly. 12:45

6 CHAIRMAN: Did I? Yes, I am sorry, you are absolutely
7 right. I did mean Kieran Mulvey. And Oliver Connolly
8 is, of course, the Confidential Recipient at that time.
9 But in the event that you had been aware of the detail
10 of what the Commissioner was saying and then there was 12:45
11 an issue in relation to credibility and if credibility
12 didn't stack up, in other words the motivation for
13 making the complaint would be questioned in the event
14 that there was no evidence behind it, would you have
15 felt from, I suppose, the wider responsibility that 12:45
16 sometimes might seem to be there, would you have felt
17 it worthwhile to point out to the Commissioner, look,
18 you are saying the one thing, and then, on the other
19 hand, you have to be very careful as to how this other
20 thing stacks up in the event that I have to chase 12:45
21 whatever facts are behind an allegation?

22 A. Clearly, Judge, she would have to be advised that there
23 was a certain conflict in what she was saying, if -- if
24 I was aware of that, we would certainly have discussed
25 it, and she might want to consider her position 12:46
26 vis-à-vis that.

27 323 Q. CHAIRMAN: Yes. But you weren't?

28 A. But I wasn't made aware of any of that. It didn't form
29 part of my instructions. And I am not just saying that

1 in hindsight. It's something you would have to
2 obviously consider.

3 324 Q. CHAIRMAN: Now, I think sometimes I speak before
4 engaging my brain, and I said on an earlier occasion it
5 seemed to me that Annmarie Ryan was begging to have a 12:46
6 consultation, which had to be done, very, very
7 unusually for a client. Normally the solicitor
8 interacts directly with the client?

9 A. That's correct.

10 325 Q. CHAIRMAN: On this occasion it had to be done through 12:46
11 Chief Superintendent Healy. Was my characterisation to
12 say that on that particular weekend when this issue
13 came up, the 15th, in other words, to the 18th, that
14 you felt from Annmarie Ryan that she was desperate to
15 get a consultation to get you face-to-face with the 12:47
16 Commissioner?

17 A. She certainly was -- I think she communicated with me a
18 number of times over that weekend. It's clear that she
19 was trying to get a consultation arranged. That is
20 fair to say. 12:47

21 326 Q. CHAIRMAN: Yes. And in the event, for whatever reason,
22 it didn't transpire?

23 A. That's correct.

24 CHAIRMAN: That is all I wanted to ask. Thank you. So
25 will we break? It's what, it's ten to one. So ten to 12:47
26 two. Thank you.

27
28 THE HEARING ADJOURNED FOR LUNCH
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1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

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3 CHAIRMAN: I just want to say something before we go
4 on. I think it is correctly said that if the word "if"
5 is included in an apology, it is not an apology at all. 13:54
6 Now, there is a correction that I want to make. I had
7 indicated that it had been reported that a portion of
8 the O'Higgins Commission transcript had gone missing
9 and that had been reported in the media. Now,
10 apparently it was first reported in a particular place, 13:54
11 and I didn't actually see that. What I actually saw
12 was, if you like, a report way down the line which was
13 possibly based upon that statement, and it seems that
14 the implication that occurred way down the line was
15 that portions of the transcript had not been given to 13:55
16 the Tribunal. Well, they had, all of the portions of
17 the transcript. But looking back, although the facts
18 are uncertain, it seems that in relation to one day or
19 another day, and I have two numbers in my mind, I think
20 it's 3 and 28, there was a separate storage of one of 13:55
21 the portions of the transcript by the O'Higgins
22 Commission, or the non-release thereof to the parties,
23 which possibly led to the later down the line piece
24 which I read, which may or may not have been accurate,
25 I don't know, I thought it was inaccurate at the time, 13:55
26 but certainly in terms of the original source, which
27 was the 'Prime Time' programme, they having
28 corresponded with me, I'm satisfied that they, in fact,
29 got it right and I would like to apologise to the

1 journalist in question for getting it wrong. And while
2 I didn't mention her or even think of her in this
3 context, it's right that I correct that now.

4 MR. MCGUINNESS: Chairman, the next witness is
5 Mr. Michael MacNamee.

13:56

6
7 MR. MICHAEL MacNAMEE, HAVING BEEN SWORN, WAS DIRECTLY
8 EXAMINED BY MR. MCGUINNESS AS FOLLOWS:

9
10 MR. MCGUINNESS: Mr. MacNamee has provided a statement
11 to the Tribunal, which is at page 3323.

13:56

12 Mr. MacNamee, you're a barrister-at-law?

13 A. That's correct, Mr. McGuinness.

14 327 Q. Practising as such?

15 A. Yes.

13:56

16 328 Q. And how long have you been in practice?

17 A. This is my 22nd year of practice.

18 329 Q. And what area of practice have you had and where have
19 you practiced?

20 A. I would describe my practice as a general common law
21 practice with an emphasis on employment law and issues
22 related thereto.

13:57

23 330 Q. Now, I think at the end of April 2015 you received a
24 phone call from Ms. Annmarie Ryan asking you to take a
25 brief in the Commission, is that correct?

13:57

26 A. That's correct, Mr. Chairman, yes.

27 331 Q. And I think that was followed up with confirmation of
28 that and a letter of instruction which was couriered
29 out to you with some materials, and the Tribunal has

1 seen those. I don't intend to re-open them at this
2 point.

3 A. Yes, that's correct, yes.

4 332 Q. Obviously the issue of who you would be representing
5 wasn't dealt with in that letter, but can you recollect 13:57
6 when that was clarified for you for the first time?

7 A. Yes. We were to be appointed to represent the
8 interests of the Commissioner of An Garda Síochána, in
9 addition to any members who sought representation over
10 the rank of inspector - in other words, 13:58
11 superintendents, chief superintendents and assistant
12 commissioners - unless those individuals had a conflict
13 of interest, in which case a decision was to be taken
14 as to what to do with that, and I wasn't aware of what
15 the decision was to be at that time. 13:58

16 333 Q. Yes. I'm not suggesting that it was part of your duty
17 to question your decision as to who you were
18 representing, but when you got the papers did you
19 quickly discern that there was no complaint against the
20 then-current Commissioner? 13:58

21 A. Yes, there was nothing that I could see that was laid
22 directly at the door of the Commissioner.

23 334 Q. Yes.

24 A. It was, in the main, allegations and criticisms of
25 certain senior officers. 13:58

26 335 Q. Yes. But in that context, did it cross your mind as to
27 what role you would have to act on behalf of the
28 Commissioner?

29 A. Yes. The role was to act on behalf of the

1 Commissioner, the entire -- and the entire force,
2 except to say this: that the rank and file members
3 were individually represented by their union and they
4 had fielded a full legal team to represent rank and
5 file members. The sergeants and inspectors were 13:59
6 represented by the AGSI, who had also fielded a full
7 team. In addition, the Byrne and McGinn officers were
8 also separately represented. And generally the victims
9 of the various crimes which were the subject matter of
10 the modules, would always be represented as well, 13:59
11 usually by solicitor and counsel. which then left the
12 Commissioner and the officers that I've just mentioned.
13 And in relation to how that was to be dealt with, my
14 understanding, and I proceeded on this basis, was that
15 we were to receive instructions from any officers who 13:59
16 were coming under our wing, who were to require
17 representation, and we proceeded on that basis.

18 336 Q. Yes. But presumably you saw an obvious distinction
19 between the rank and file, as you say, and the senior
20 officers and the position of the Commissioner in that? 14:00

21 A. Yes.

22 337 Q. All of those officers, high or low, were implicated or
23 were related in some way to the incidents or the
24 investigations or the complaints, whereas the
25 Commissioner was not? 14:00

26 A. That is so, yes.

27 338 Q. What role did you see for the Commissioner, acting on
28 her behalf --

29 A. Well, this was --

1 339 Q. -- in each of the modules?
2 A. This was a Commission of Investigation which was
3 exclusively related -- almost exclusively related to
4 the conduct of various investigations by members of An
5 Garda Síochána, and the Commissioner's role, I think, 14:00
6 as I understood it, was to oversee the Commission and
7 to provide whatever assistance that she personally
8 could or, through any of her officers, to provide such
9 assistance to the Commission as they required.

10 340 Q. Well, on one view, that might be done perhaps entirely 14:00
11 by an appropriate liaison officer simply acting as
12 such. But did you consider there to be anything
13 unusual or different about being asked to represent the
14 Commissioner in those circumstances?

15 A. As I understood it, it was the precedent that was 14:01
16 already in being and that this is the way things were
17 done, so I didn't question it, although I did have to
18 think about how, in my own mind, it worked, because we
19 were receiving specific instructions at all times from
20 specific officers, but we were not receiving any 14:01
21 instructions from the Commissioner in relation to the
22 issues which were the subject matter of the complaints
23 that we were to deal with.

24 341 Q. And I think it's correct to say that at no stage up
25 until you consulted with the Commissioner in October 14:01
26 and early November did you receive any factual
27 instructions from her?

28 A. That is absolutely correct, yes.

29 342 Q. And you received nothing in writing?

1 A. No, nothing in writing.

2 343 Q. And prior to commencing upon the work necessitated by
3 the hearings in the Commission, did you consider it
4 less than satisfactory that you hadn't received any
5 briefing as to how the Commissioner would be 14:02
6 approaching the hearings in general, and in particular
7 dealing with Sergeant McCabe?

8 A. Less than satisfactory, that would sound pejorative. I
9 don't want to criticise anybody. I took the brief on
10 the basis that I would receive instructions, and I did 14:02
11 receive instructions to the best extent possible.
12 However, there was an issue with the totality of the
13 instructions. We didn't have full instructions at any
14 stage. And I'll say that one of the issues there was
15 that the documentation wasn't coming from the 14:02
16 Commission in advance, it was coming in advance of each
17 module, and in advance of Module 1 we only had the core
18 booklet for Module 1. So there was an issue with
19 getting instructions which were highly complicated,
20 involving very complex investigations, at a very late 14:03
21 stage, which required full engagement with those
22 instructions to bring ourselves up to speed.

23 344 Q. Yes.

24 A. So was it unsatisfactory? It was very challenging.

25 345 Q. I mean, from the point of view of An Garda Síochána, 14:03
26 they had, from the publication date, essentially, of
27 the Guerin Report and certainly from the laying of the
28 terms of reference before the House, they had some very
29 considerable period to plan for Commission hearings

1 which was inevitably going to take place at least from
2 the end of 2014 onwards, I take it you'd agree with
3 that?

4 A. I'm not fully au fait with it, Mr. McGuinness, to be
5 frank. 14:03

6 346 Q. Yes.

7 A. As I said, I took the matter as I found it. But it is
8 my understanding that there was -- there were
9 difficulties collating documentation and forwarding the
10 documentation to the Commission. So insofar as that 14:04
11 was the case, I think the Commission was certainly --
12 or, rather, Mr. Justice O'Higgins was very anxious to
13 proceed, he had a tight time-line, and I think the
14 documentation issue probably set him back somewhat.

15 CHAIRMAN: So, Mr. McGuinness, it seems that this 14:04
16 witness is agreeing with everything that Mr. Smyth said
17 in that regard and it has not been challenged.

18 MR. MCGUINNESS: Yes. It doesn't appear to have --

19 347 Q. Obviously from your point of view, you're briefed and
20 you get the Module 1 documents? 14:04

21 A. Yes.

22 348 Q. Was it perhaps as few as three days before the
23 hearings?

24 A. I think that is about right, yes.

25 349 Q. And certainly in terms of the totality of events, 14:04
26 certainly matters stemmed from perhaps 2005 to 2015, a
27 ten-year period, that was coming into focus in
28 different modules, in different respects?

29 A. Yes.

1 350 Q. Arising out of different issues that had been raised?
2 A. Yes.

3 351 Q. And presumably you had no familiarity with any of the
4 events --
5 A. No. 14:05

6 352 Q. -- prior to that?
7 A. None whatsoever.

8 353 Q. Just to deal with one thing, first of all. Were you
9 briefed with the Byrne/McGinn report by the
10 Commissioner at the start? 14:05
11 A. No, Mr. Chairman, I was not.

12 354 Q. Did you seek that at some stage?
13 A. I recall getting it from Annmarie Ryan, from the Chief
14 State Solicitor's Office. I can't recall whether it
15 was before June. It was some time as the investigation 14:05
16 was proceeding. I got it in a box. I brought it back
17 home where it was put with the other boxes, and, to be
18 frank, I never opened it and I never read it. The only
19 access I had to it or the only information I had about
20 it was in relation to the segments or excerpts from 14:05
21 that report, which were subsequently inserted into each
22 of the individual core module booklets.

23 355 Q. Yes.
24 A. But I never actually read the document from cover to
25 cover. It remained in the box, and it went back with 14:06
26 all my other papers, once the case, as I thought, was
27 finished.

28 CHAIRMAN: I'm sorry, I don't understand. So you got a
29 box?

1 A. Yes.

2 CHAIRMAN: It takes a box --

3 A. Yes.

4 CHAIRMAN: -- to put Byrne/McGinn in, but you didn't
5 actually ever read it? 14:06

6 A. That's correct, sir, yes.

7 CHAIRMAN: Were you curious enough to kind of take out
8 the start and read that?

9 A. If I had the time to be curious, sir, I would have been
10 curious, and I certainly was anxious to read as much as 14:06
11 I could. There was already voluminous documentation to
12 be read, and it was coming at us before every module.
13 I never got the chance.

14 CHAIRMAN: The answer seems to be no.

15 A. No. 14:06

16 356 Q. MR. MCGUINNESS: Your solicitors have circulated an
17 extract from the day that Assistant Commissioner Byrne
18 gave evidence, and he, I think, quoted from and
19 rehearsed part of the contents of his findings at page
20 ix, ix of that on that day. Now, he was, of course, 14:06
21 represented by different --

22 A. Yes.

23 357 Q. -- persons before the Commission, isn't that right?

24 A. Yes, that's correct.

25 358 Q. But if I am correct, Mr. Byrne, Assistant Commissioner 14:07
26 Byrne, he gave evidence of what he had recorded in that
27 about his view that Sergeant McCabe had lost control as
28 sergeant in charge and his position became untenable,
29 and I think Mr. McDowell cross-examined him on that, on

1 the day, isn't that correct?

2 A. I think he did, yes.

3 359 Q. But just going back to the issue of instructions, do
4 you recall any discussion about seeking instructions on
5 the evening of the 13th, after you'd finished that 14:07
6 day's round of consultations?

7 A. It became apparent relatively soon after we engaged
8 with our clients that there was an issue in relation to
9 events that had occurred prior to the events that were
10 the subject matter of the immediate module. It was 14:07
11 apparent to us that our clients had read the Guerin
12 Report and had identified themselves. The individual
13 officers, Mr. Chairman, were -- the nomenclature was --

14 360 Q. There were code names?

15 A. Alpha, tango, et cetera - phonetic alphabet, 14:08
16 effectively.

17 361 Q. They were code names?

18 A. They were indeed, yes.

19 362 Q. Code names put by Mr. Guerin in his report in relation
20 to some of the officers? 14:08

21 A. Correct, yes. And the individual officers had been
22 able to identify themselves from those code names and
23 were in a position to advise us that there were serious
24 allegations to be made against them, and they were
25 anxious to advise us as to the background -- their 14:08
26 understanding of the background to those allegations.

27 363 Q. Just to be clear, the Commissioner had no input into
28 any of those consultations with those officers and no
29 input into any instructions in relation to those

1 issues, is that right?

2 A. That is correct, Mr. Chairman.

3 364 Q. But just going back to my question, was there some
4 discussion on this evening of the 13th of getting
5 instructions from the Commissioner? 14:09

6 A. I don't think it was ever a question of getting
7 instructions from the Commissioner because the
8 Commissioner, as we've both agreed, was not really
9 involved in this issue --

10 365 Q. Yes. 14:09

11 A. -- at any stage. The instructions were to be sought
12 from certain individuals. It became clear who they
13 where. I think there is no doubt about that at this
14 stage, who they were. Does that answer your question?

15 366 Q. Yes. But was Mr. Smyth talking about getting 14:09
16 instructions from the Commissioner?

17 A. No, at no stage -- no. The Commissioner was not
18 required to give us instructions because the
19 Commissioner had no direct knowledge of these issues as
20 she wasn't in any way involved. 14:09

21 367 Q. Yes.

22 A. But we obviously, we did want to speak to the
23 Commissioner at some stage, that was very important.

24 368 Q. Yes. But the Tribunal has heard, and I'm sure you have 14:09
25 been here for it, that the issue of the Commissioner's
26 instructions certainly arose on the 14th May, isn't
27 that right?

28 A. Yes, that's correct.

29 369 Q. Now, could you explain the context in which that arose

1 and the reasons for that?

2 A. The issue arose when questions were put to Chief
3 Superintendent Colm Rooney in relation to a meeting
4 which he had with Sergeant McCabe, and effectively the
5 issue went from there. That was the first time it was 14:10
6 opened and it was opened by Mr. Smyth examining
7 Mr. Rooney directly.

8 CHAIRMAN: And again, I have read this transcript.

9 MR. MCGUINNESS: Yes.

10 CHAIRMAN: It literally doesn't [inaudible] this point. 14:10

11 MR. MCGUINNESS: Chairman, I hadn't got to the stage
12 where I was going to tell you --

13 CHAIRMAN: Yes. No, I know you're asking a different
14 question, Mr. McGuinness. I'm just pointing that out
15 to the witness. 14:10

16 MR. MCGUINNESS: I'm not intending to open the
17 transcripts that are so well known, unless necessary.

18 370 Q. But was there discussion amongst you, as counsel, as to
19 what instructions you were seeking from the
20 Commissioner? 14:10

21 A. Yes. We had sought instructions from the Commissioner
22 to explore the factual background to the complaints and
23 to explore any possible issues of motivation for making
24 those complaints, and we required instructions from the
25 Commissioner to explore that in the Commission, which 14:11
26 was a private hearing, and it was considered that if
27 issues of this nature were to be explored, this was the
28 opportunity where it should be done.

29 371 Q. Just to tease that out slightly. In circumstances

1 where the Commissioner had no involvement and gave you
2 no factual instructions, what do you think she could
3 instruct you to do insofar as exploring the motivation
4 for Sergeant McCabe's reports or complaints or actions?
5 A. Well, we took instructions from those who were in a 14:11
6 position to give us factual instructions. We
7 implemented those instructions and we acted at all
8 times upon those instructions.
9 372 Q. Yes.
10 A. We had the approval of the Commissioner to take those 14:11
11 instructions and to act upon them.
12 373 Q. So you saw it as a, as it were, a supervening level of
13 authority based upon the foundation of the officers'
14 instructions, is that a way it could be put?
15 A. I think that puts it very well, yes. 14:12
16 374 Q. All right. And the reference to motivation was -- were
17 you concerned to be allowed to suggest that he was
18 improperly motivated?
19 A. We were instructed to explore the factual background
20 and possible reasons for his motivation. 14:12
21 375 Q. Yeah. I mean, had you reached any sort of tentative or
22 prima facie conclusion as to whether he might have been
23 motivated in relation to different matters at different
24 times?
25 A. We received very firm instructions from three 14:12
26 particular clients - well, two at one stage and then
27 from a third.
28 376 Q. I don't want to --
29 A. Yes.

1 377 Q. And I can't --

2 A. No, I wasn't going to go into those instructions. But
3 from those instructions, we were able to ascertain that
4 this was a serious issue, which clients who were at all
5 times in full jeopardy as a result of the allegations 14:13
6 of corruption and malpractice made against them, they
7 drew to our attention. As practitioners, we listened
8 carefully to what they were saying, and our concern
9 was, these are clients who are raising a very serious
10 issue, which we feel, as a duty to our clients, we need 14:13
11 to act upon to the extent that we may. We then looked
12 at the terms of reference, and it was obvious that
13 there wasn't a specific module which dealt with this
14 issue particularly. It was possibly tangentially
15 related to the end of the terms of reference. And our 14:13
16 difficulty was how to raise it, when to raise it, and
17 that was a challenge for us, because this was an
18 inquisitorial proceeding. There were no pleadings as
19 such and there was very little communication in terms
20 of formal communication, and to flag this issue in 14:14
21 advance was a concern. We were concerned that if it
22 wasn't raised as early as possible, that we would be
23 accused of leaving it in abeyance and then bringing it
24 in at a later stage, but we were also concerned that it
25 hadn't been formally notified. And probably the most 14:14
26 important aspect of it is the time element, the pace of
27 this Commission, I think that's clearly established and
28 I won't go over there again, but the pace of the
29 Commission was very, very fast, and the question of how

1 best to raise this issue, and whether or not we would
2 be allowed to raise the issue.

3 378 Q. Yes.

4 A. But I think, as Mr. Smyth said yesterday, we took a
5 view that to explore this issue was a matter of
6 professional obligation and that we had to do that at
7 whatever cost to ourselves, and that was the way that
8 we approached the matter and that was the basis upon
9 which we sought the instructions to proceed.

14:14

10 CHAIRMAN: Well, I'm not sure -- I'm mean, this idea of
11 cost to yourself has been raised on a number of
12 occasions by people.

14:15

13 A. Yes.

14 CHAIRMAN: But I don't -- what's the cost to yourself
15 about raising an issue? I mean, it's been
16 emphasised --

14:15

17 A. Other than the fact that I'm sitting here explaining
18 it, Judge.

19 CHAIRMAN: -- this is in private.

20 A. Yes.

14:15

21 CHAIRMAN: I mean, unless you're anticipating leaks of
22 a selective variety that led everybody astray, I can't
23 see why this kind of --

24 A. No, nobody anticipated the leaks. Nobody anticipated
25 any leaks.

14:15

26 CHAIRMAN: Well, then, I don't think there's any cost
27 to a barrister doing a case. I certainly have never
28 felt that.

29 A. Very well. It did exercise us, Judge, and we were

1 concerned.

2 CHAIRMAN: Okay.

3 379 Q. MR. MCGUINNESS: But would you accept the view or the
4 proposition that if you're exploring somebody's
5 motivation, you're perhaps suggesting that they were 14:15
6 improperly motivated or might have been improperly
7 motivated?

8 A. The whole issue is very difficult to parse. The
9 instructions that we had were that there were grounds
10 to explore the motivation. How that was to play out or 14:16
11 how that was to be interpreted, we couldn't predict.

12 380 Q. Yes.

13 A. But it was very important that, in exploring the
14 motivation, that we were careful not to impugn Sergeant
15 McCabe's integrity or his honesty or his bona fides. 14:16

16 381 Q. But you sought instructions on the issue of motivation
17 and credibility. Would they not inevitably impinge
18 upon his integrity or his honesty, if this was the road
19 that the Garda Commissioner was going down and was
20 knowingly going to authorise you to go down? 14:16

21 A. Yes. We had no way of knowing how the various
22 allegations made against Superintendent Clancy,
23 Superintendent Cunningham and Chief Superintendent
24 Rooney were going to fare in relation to being
25 challenged in the individual hearings, and this issue 14:17
26 appeared to us to be a very important issue which could
27 be put and had to be put. As to what we were
28 attempting to establish, we were attempting to
29 establish the facts.

1 382 Q. All right. I mean, was there any sort of overall
2 thesis with a conclusion that Sergeant McCabe had made
3 these complaints for ill motives or ulterior motives?
4 A. There was never any suggestion of ulterior motives, and
5 without going into detail as to what I was told by 14:17
6 clients who have asserted privilege, there was
7 certainly the case that individuals who knew Sergeant
8 McCabe for a long time had noted that his attitude had
9 changed, that his demeanour had changed following the
10 unfortunate events which we have been discussing all 14:17
11 along, and that was a very serious issue which we were
12 clearly put on notice of inquiring into further, as to
13 why the behaviour changed and what was the reason for
14 that.

15 383 Q. But whether he changed or not, and he may indeed -- he 14:18
16 seems to have accepted he changed to some degree, would
17 that matter really or count at all where the Commission
18 was charged with looking at the investigations in
19 relation to the facts?

20 A. And I think it's important to point this out: the 14:18
21 individual modules concerned individual investigations.

22 384 Q. Yes.
23 A. And the possible shortcomings of those investigations.
24 But I am at pains to point out that, from the very
25 outset, when we had a document which was described as 14:18
26 Brief Proven Facts, amongst the details in that
27 document was a considerable list of serious charges
28 that were to be laid against some of our officer
29 clients, and, on that basis, that that seemed to be a

1 very serious matter which required as much possible
2 protection or as much possible action to defend those
3 clients as was required.

4 385 Q. well, would it follow that you obviously, perhaps 14:19
5 having regard to the nature of the inquiry, you didn't
6 and couldn't necessarily see Sergeant McCabe as an
7 accuser, but he was, perhaps to use a neutral word, the
8 progenitor of these concerns, and you, on behalf of all
9 your clients, were entitled to explore them?

10 A. I think that is a fair comment. He wasn't seen as an 14:19
11 accuser. However, he had made a great deal of
12 statements. There were, as far as I can gather, at
13 least three sets of statements, if not more, which had
14 extended the allegations beyond allegations of
15 incompetence. They went way beyond that. They went to 14:19
16 the point of suppressing documentation, covering up and
17 corruption.

18 386 Q. well, I think in the Module 5 hearing, the core booklet
19 of documents included some 290 tab documents and there
20 was a supplemental one which included perhaps 10 or 12 14:20
21 statements made by Sergeant McCabe, is that right, do
22 you recall?

23 A. That is correct, yes.

24 387 Q. But can you tell the Chairman about getting the
25 instructions on the morning of the 15th? Were you 14:20
26 present when --

27 A. No, I wasn't present. I understood that Chief
28 Superintendent Healy had given verbal instructions to
29 my leader, Mr. Smyth, and he told me some time before

1 we went into the hearing room itself that he had gotten
2 the approval from Chief Superintendent Fergus Healy to
3 explore the issues.

4 388 Q. And how did he describe the approval of the
5 instructions, insofar as you can recollect? 14:20

6 A. Again, if you'll bear in mind that we were --

7 389 Q. Yes.

8 A. -- quite engaged in the process, and it was fast-paced,
9 I think he said something like we have the instructions
10 or we got the instructions from the Commissioner. 14:21

11 390 Q. Nothing more descriptive?

12 A. That's about it.

13 391 Q. And he didn't convey to you, did he, that there was any
14 restraint in terms of not going after his integrity or
15 not accusing him of mala fides or -- 14:21

16 A. Well, he didn't get time, but it was clearly understood
17 that the instructions sought were on a limited basis to
18 explore factual matters related to motivation, and it
19 was understood by all that we were not to challenge.

20 392 Q. And credibility, that was included also, was it? 14:21

21 A. Yes.

22 393 Q. I'm not going to open the transcript of the day --

23 A. Yes.

24 394 Q. -- but obviously the issue arose and there was a number
25 of adjournments and a request for an adjournment of the 14:21
26 Tribunal, but were you present when Chief
27 Superintendent Healy conveyed the re-confirmed
28 instructions?

29 A. The recollection I have of the afternoon, and it was a

1 busy afternoon, as we know, was that a decision was --
2 we were asked whether we would confirm or provide
3 written confirmation of the advices that we were giving
4 upon which the instructions were to emanate.

5 395 Q. Yeah. 14:22

6 A. Myself and Mr. Garret Byrne adjourned to his desk,
7 which was actually close to the hearing room itself.

8 396 Q. Yes.

9 A. In the same building.

10 397 Q. Yes. 14:22

11 A. Mr. Byrne had his laptop out, and, between the two of
12 us, we drafted the wording of the email, which
13 subsequently was sent from Garret Byrne's computer.

14 398 Q. Presumably Mr. Smyth sanctioned that or settled it or
15 expressed his -- 14:22

16 A. Well, he was shown the document, and I don't think we
17 had a hard copy, it was being emailed at the time.

18 399 Q. Yes.

19 A. He certainly was aware of the document and he read it.

20 400 Q. Can I just ask you of your recollection of, when you 14:22
21 got the request to put your advice in writing, was that
22 at the first adjournment that day, which appears to
23 have been some time after three o'clock?

24 A. I think it probably was very close. There were a few
25 adjournments. I don't want to take a chance. 14:23

26 401 Q. Yes.

27 A. It was sometime towards the afternoon, yes. I can't
28 say when.

29 402 Q. But certainly, you weren't drafting that while the

1 Commission was sitting?

2 A. Oh, good Lord, no, no. No, the whole point was, it was
3 an emergency exercise; we had to go and do it
4 straightaway.

5 403 Q. Okay. And that appears to have been sent by you, I 14:23
6 think, is it, at 15:29?

7 A. It was sent from Garret Byrne's computer at that time,
8 that's correct, yes.

9 404 Q. From Barrett Byrne's computer at 15:29. But was it
10 printed off or paper copies? 14:23

11 A. No, I don't believe so, not at that time.

12 405 Q. But Chief Superintendent Healy appears to have relayed
13 it to the Commissioner over the phone? Did he have
14 access to the laptop?

15 CHAIRMAN: Anmarie Ryan's evidence was that it was 14:23
16 printed and a number of copies were circulating.

17 A. Very well.

18 CHAIRMAN: And she took one and read it over the phone.
19 That is what her evidence was.

20 MR. MCGUINNESS: Yes, I'm just trying to clarify that. 14:24

21 CHAIRMAN: Yes.

22 406 Q. MR. MCGUINNESS: Do you recollect that?

23 A. I don't recollect it, but if that is what Anmarie Ryan
24 says, then her memory is probably better than mine.

25 CHAIRMAN: You're in the Distillery. 14:24

26 A. Yes.

27 CHAIRMAN: I presume there's a printer in the
28 Distillery, and all you've got to do is take out a
29 thumb drive, put it on and go to a printer?

1 A. Yeah. I've no doubt it was printed, sir. I just don't
2 recall myself getting a copy of the document.
3 CHAIRMAN: That is fine, that is fine.

4 407 Q. MR. MCGUINNESS: Now, I'm not going to take you through
5 the transcripts for the interchanges that afternoon, 14:24
6 but did you understand that you had been advised to
7 proceed in accordance with the advices in writing, or
8 were the terms "motivation" and "credibility" used to
9 confirm what you were to do?

10 A. I think it was more the latter. We already had 14:24
11 instructions to proceed. This was just simply a
12 confirmation document to confirm those instructions.

13 408 Q. Yes. So the Tribunal may take it that you saw no
14 difference in your position from, as it were, the
15 beginning of the interchange about what you were 14:25
16 authorised to do --

17 A. Yeah.

18 409 Q. -- than at the end?

19 A. I agree with that, there was no difference.

20 410 Q. And from the point of view of the various exchanges and 14:25
21 interchanges, did you have any concern or worry that
22 Mr. Smyth was at any stage exceeding his instructions
23 in what he was saying in the course of argument or
24 debate with the Judge?

25 A. It was a very fraught afternoon. Mr. Smyth was, though 14:25
26 he was seated, he was on his feet, as such, if I can
27 use that expression amongst barristers in the room.

28 411 Q. Yes.

29 A. Mr. Smyth was on his feet, Mr. Smyth was engaging with

1 the Judge. The Judge was putting propositions to
2 Mr. Smyth which he was engaging with. I do recall the
3 word "integrity" being used. I remember being somewhat
4 concerned about it, but I did not think it appropriate
5 to intervene. The only other suggestion I could have 14:25
6 had, having thought about this, was that I might have
7 suggested reading out the email, but of course that
8 would have gotten us into difficulty with legal
9 professional privilege because it would have been
10 reading out advices that had been given, and at that 14:26
11 stage there was no question of privilege being waived.
12 412 Q. Yes. Well, can I ask you, did you discuss those
13 concerns with Mr. Smyth?
14 A. My recollection of that evening is that I had other
15 fish to fry, Mr. McGuinness. 14:26
16 413 Q. Yes.
17 A. I was dispatched -- or, rather, I undertook to do a
18 certain drafting exercise, which I'm sure we'll get to
19 shortly. It occupied my mind that evening, I have to
20 say. That was the main thing I was occupied with. 14:26
21 414 Q. Well, had you any knowledge of or any interaction with
22 Ms. Ryan insofar as her contacts with the Attorney
23 General's office were concerned?
24 A. I have to say I have very little knowledge of what
25 Ms. Ryan was doing. We were all in a large 14:26
26 consultation room and there was quite a lot going on.
27 I was aware she was on the phone, but a lot of people
28 were on the phone. I don't know who she was speaking
29 to or what she was doing.

1 415 Q. But did she convey to you at any stage before you went
2 off that evening that she had been speaking to
3 Mr. Dreehan?
4 A. I have no knowledge of that, Mr. McGuinness.
5 416 Q. And had received -- 14:27
6 A. No.
7 417 Q. -- emails back --
8 A. No.
9 418 Q. -- and was saying that it was really a matter for the
10 Commissioner? 14:27
11 A. No, I've no recollection whatsoever, but that's not to
12 say it didn't happen. I just wasn't aware of it.
13 419 Q. All right. In terms of the letter that was to be
14 drafted, were you the primary drafter of that, then?
15 A. Yes. 14:27
16 420 Q. All right. And without going into any instructions, we
17 know, obviously, that Ms. Ryan arrived with the letter
18 and also with Superintendent Cunningham's report
19 relating to the August --
20 A. Yeah. 14:27
21 421 Q. -- 25th meeting of 2008, isn't that right?
22 A. Yes.
23 422 Q. And had you seen that report just physically before
24 then?
25 A. Now, doing the best I can, I have to say I didn't. 14:27
26 423 Q. All right.
27 A. If I can bring it back a little bit, if I may --
28 424 Q. Yes.
29 A. -- just to give you the context, very briefly, if I

1 may, Chairman. That afternoon, we had been hearing
2 about the motivational issues, the background issues
3 for quite some time. They had been on my mind as an
4 issue that needed to be tackled and pinned down very
5 carefully and that was a fortiori on my mind following 14:28
6 the direction from Mr. Justice O'Higgins to put these
7 instructions into a letter, and, on that basis, I think
8 Mr. Byrne was occupied doing something else, Mr. Smyth
9 was occupied doing something else, and it struck me
10 that it would be appropriate for me to undertake the 14:28
11 instructions that were required.

12 425 Q. Yes.

13 A. Now, I'm not going to go into the instructions --

14 426 Q. No.

15 A. -- except to say that I had instructions available to 14:28
16 me from two of my clients.

17 427 Q. Yes.

18 A. And a third of those clients, Superintendent
19 Cunningham, was, at that time, as we will have heard,
20 was busy on protecting -- or, rather, providing 14:28
21 security for the visit of the Prince of Wales. So he
22 was on that detachment all weekend and he was
23 unavailable to us physically. So what I did was, I
24 took instructions from Superintendent Cunningham and
25 superintendent Rooney. 14:29

26 428 Q. Yes.

27 A. Mr. Smyth sat in with me for a minute, but he was
28 otherwise occupied, and Ms. Ryan did not sit in with me
29 while I was taking these instructions. I took out my

1 notebook and I wrote down longhand the instructions
2 that were being given to me.

3 429 Q. Is this from Chief Superintendent Clancy?
4 A. No, no, no. From Chief Superintendent Rooney, who was
5 present, and Superintendent Cunningham, who was also 14:29
6 present.

7 430 Q. All right.
8 A. Now, when I got back home that evening, I knew that
9 there was a job to be done, so I started to uplift my
10 manual or manuscript notes into the draft of the 14:29
11 letter, and that then was -- it took me quite some time
12 to do that.

13 CHAIRMAN: Mr. McGuinness, there is a confusion now as
14 to who was absent.

15 A. Yes, I will clarify that, Mr. Chairman. I have no 14:30
16 difficulty with that. I'm just about to get to that.
17 Superintendent Clancy was not available that weekend.

18 CHAIRMAN: You said Superintendent Cunningham wasn't
19 available.

20 A. I am sorry. I beg your pardon. I am sorry, Judge. So 14:30
21 the parties I had present before me on Friday evening
22 were Chief Superintendent Rooney and Superintendent
23 Cunningham.

24 431 Q. MR. MCGUINNESS: Yes.
25 A. Superintendent Clancy, as I said, was elsewhere. 14:30
26 432 Q. Yes.
27 A. And he was unavailable. So what I decided to do was to
28 do the best I could drafting the master draft, if you
29 want to call it that, which was then sent to Annmarie

1 Ryan and to Chief Superintendent Fergus Healy.

2 433 Q. Yes.

3 A. The purpose of the latter's involvement was so that he
4 could, in turn, distribute that to the relevant members
5 who had given me the instructions. This would have 14:30
6 included, and did include, Superintendent Clancy, who
7 was asked when he could and when he was free to look at
8 the draft and to give an input into the draft. And
9 again, without going into the details of what I was
10 told by my clients, I got feedback from each of the 14:31
11 three clients, by email, which I wove together -- or
12 wove into the draft itself, and that is how the
13 exercise was undertaken. I would have undertaken a
14 consultation with those clients if it had been
15 possible. The proper way -- the best way to have done 14:31
16 this, if time had permitted, would have been to ask for
17 individual statements from each of the three
18 contributors, to have asked for all of the
19 documentation from each of the contributors, to have
20 executed the draft, sent it out to them and then 14:31
21 possibly to have met them yet again to sign off on it.

22 434 Q. Yes. Now, I think you've probably the statement that
23 was volunteered by Superintendent Cunningham in which
24 he says that he had been unable to print it off for
25 whatever reason and read it on his small phone screen 14:31
26 and didn't pick up on the error, as it were, and I
27 don't know whether that was ever brought to your
28 attention or not?

29 A. Yes, it was.

1 435 Q. But it did contain the error --
2 CHAIRMAN: No, sorry, it was the statement of
3 Superintendent Cunningham that was brought to your
4 attention, not the error, at the time? I'm sorry, I'm
5 just not following. 14:32
6 MR. MCGUINNESS: The assertion that he hadn't been able
7 to print it off and didn't read it from his phone, that
8 was said to you at the time, is that what you are
9 telling me?
10 A. No. 14:32
11 436 Q. Yes.
12 A. I have read that in his statement that has been
13 produced for this Tribunal.
14 437 Q. Well, that is what I was asking you.
15 A. Yes. 14:32
16 438 Q. Was that brought to your attention at the time --
17 A. No.
18 439 Q. -- that he had perhaps not read it?
19 A. No, it was not brought to my attention at the time.
20 440 Q. It is just a minor factual issue. 14:32
21 CHAIRMAN: Yes.
22 441 Q. MR. MCGUINNESS: In any event, we know what happened;
23 Mr. Smyth, obviously in good faith, took the letter and
24 the factual content of paragraph 19 of draft and he put
25 it to Sergeant McCabe, and we have seen what happened, 14:32
26 in the transcript.
27 A. Yes.
28 442 Q. The Judge ruled that the contents were not relevant or
29 admissible.

1 A. Yes.

2 443 Q. And other than to say that it might perhaps relate to
3 the issue of a perceived or real grievance that
4 Sergeant McCabe was believed to have had, isn't that
5 right? 14:33

6 A. That's correct, yes.

7 444 Q. And on one view, if that was being -- the error was
8 discovered, was there any question of redrafting the
9 letter to put the issue of motivation correctly, as it
10 were? 14:33

11 A. Okay, I'll deal with that on the following basis,
12 Mr. McGuinness: I was disappointed, as you can well
13 imagine, when the error came to light. And as a
14 practitioner, personally I was anxious to have it put
15 right. Two things happened: we got on with the rest 14:33
16 of the modules and we became immersed in them very,
17 very quickly.

18 445 Q. Yes.

19 A. And secondly, I was unsure as to the status of the
20 issue at all. It would appear, and I think we worked 14:33
21 on the assumption that the issue was either off the
22 table completely or certainly in abeyance, but it did
23 not have -- it didn't occupy our minds because we had
24 our minds occupied on the next module or the module
25 after that. 14:34

26 446 Q. Yes. But if you could follow this line of thought with
27 me: the requirement to provide the letter had been
28 brought about by Mr. Justice O'Higgins taking the view
29 that Sergeant McCabe was entitled to be told what was

1 the basis upon which his motivation and credibility --

2 A. Yes.

3 447 Q. -- was being attacked, isn't that right?

4 A. Yes.

5 448 Q. That letter was now out of the picture, out of the 14:34
6 Commission, effectively, isn't that right?

7 A. That's correct.

8 449 Q. As the basis for that?

9 A. Yes.

10 450 Q. There was no other letter then, drafted or redrafted, 14:34
11 or proposed or sent to the Commission --

12 A. Yes.

13 451 Q. -- notifying the Commission and/or Sergeant McCabe as
14 to the basis upon which his motivation and credibility
15 would then be challenged, isn't that right? 14:35

16 A. Well, I don't -- I don't recall having any clear
17 picture as to how the issue was then going to be
18 resolved.

19 452 Q. Yes.

20 A. I think what happened is, we got on -- everybody got on 14:35
21 with the work that we were doing.

22 453 Q. Yes.

23 A. And it was, I wouldn't say forgotten about, but it was
24 certainly off the table and it was not front of mind.

25 454 Q. Yes. 14:35

26 A. I'm not sure if that answers your question? I hope it
27 does.

28 455 Q. But Mr. Smyth in his evidence, which I think you were
29 here for the whole of it --

1 A. Mm-hmm.

2 456 Q. -- I think was telling the Tribunal that, you know, the
3 letter was gone as such, but the whole issue of
4 motivation and credibility was still to be pursued all
5 the way through, throughout the modules and in 14:35
6 submissions; was that your understanding?

7 A. Yes, it was my understanding. As to the extent to
8 which it was to be explored, remained to be seen.

9 457 Q. Yes. Well, perhaps, maybe it's more accurate to say
10 that the means by which it could be explored was 14:36
11 limited to an examination of the factual matters
12 relating to each individual incident?

13 A. That's how it developed, yes, that's right.

14 458 Q. And perhaps how it should have started in the first
15 place? 14:36

16 A. I don't think I would agree with that.

17 459 Q. All right.

18 A. Because -- and effectively what we were faced with was
19 a situation where we had very -- a very large number of
20 allegations, they were serious allegations. We had 14:36
21 instructions to the effect that those allegations were
22 incorrect. And insofar as we might have thought, if we
23 rely on pure factual challenges, our clients, who were
24 in jeopardy, would be all right, we weren't prepared to
25 take that risk with those particular clients because 14:36
26 they had so much riding on the outcome of the
27 Commission of Investigation and, in particular, in
28 relation to the allegations against them. I should say
29 there was a fourth one, former Commissioner Callinan as

1 well.

2 460 Q. Yes.

3 A. We took a view that with clients in maximum jeopardy,
4 we had to deploy, if I can use that word, Mr. Chairman,
5 all the resources that were available and appropriate 14:37
6 to us to vindicate the rights of those particular
7 clients.

8 461 Q. But you mentioned this earlier, the question of a
9 motivational module.

10 A. Yes. 14:37

11 462 Q. Was that discussed amongst you at the beginning or can
12 you recollect at what stage, or did it come back into
13 play, or did it arise at this stage after the letter
14 had been ruled out?

15 A. My recollection is that I wasn't sure what was to 14:37
16 become of the issue, and I think I was the one who
17 certainly suggested or thought that it would be an idea
18 to have a motivational module. Now, I wasn't aware
19 that that had been considered at the planning stage of
20 this and ruled out, I wasn't aware of that at all. And 14:37
21 it struck me as being perhaps a way of dealing with it
22 as fairly as possible, because in that way all the
23 evidence could be gotten out and there would be a
24 finding one way or the other which would then at least
25 give us clarity. That wasn't -- that didn't happen, 14:38
26 and I don't think it ever -- it didn't ever happen.

27 463 Q. Okay. But was it mooted with the Commission, to your
28 knowledge?

29 A. The best that I can say is that I recall making a phone

1 call to one of the Commissioner's [sic] counsel
2 suggesting it, but I heard nothing back.

3 464 Q. All right. Well, in any event, you were obviously also
4 involved in drafting the Module 1 submissions?

5 A. I would say that they were in the main drafted by my 14:38
6 colleague, Garret Byrne, and I had a look at them but I
7 don't recall having a significant input. Now, that's
8 not to say that I don't take responsibility for them,
9 which I do, but I don't recall having a strong input
10 into those submissions. 14:38

11 465 Q. Obviously they were sort of provisional and were, I
12 think, lodged on that basis, given that the evidence in
13 Module 1 hadn't concluded?

14 A. Yes.

15 466 Q. And, inter alia, Superintendent Cunningham's evidence, 14:39
16 with others, was left over, isn't that right, to the
17 24th?

18 A. Yes, that's correct. Yes.

19 467 Q. Is there any reason that you know of why they weren't
20 revised after the 24th, or was there any necessity seen 14:39
21 to revise them after the clarification on the 24th?

22 A. I can see why you would wonder why the thing was left
23 where it was. That is what happened.

24 468 Q. All right.

25 A. It was literally left hanging. 14:39

26 469 Q. Okay.

27 A. And I was conscious of it. I was very conscious of the
28 fact that there was an error. I was minded to want --
29 I wanted to correct it, I wanted to streamline it and

1 make it as fair as possible. The opportunity didn't
2 arise and I personally didn't seek it. And as I said,
3 we simply got on with the rest of the work and the
4 issue seemed to just stay there.

5 470 Q. All right. It was going at a cracking pace?

14:39

6 A. It was.

7 471 Q. I think anyone around there knew that?

8 A. Yes.

9 472 Q. But just bringing you forward to October and then
10 November in advance of the Commissioner's --

14:40

11 CHAIRMAN: Mr. McGuinness, if you don't mind me
12 intervening here, there is just one point that I am a
13 little bit uncertain about, and that is this: What I
14 am being told is that on the morning of Monday 18th May
15 2015, the submissions on behalf of the Garda
16 Commissioner were handed in, and we have had a lot of
17 focus on that letter, the accuracy or inaccuracy
18 thereof, but, in addition to that, it seems Anmarie
19 Ryan also handed in the letter -- or the report of the
20 meeting from Superintendent Cunningham of 25th August
21 '08, and I'm just wondering, if that was handed in to
22 the Commission, was it not handed in to you? Because
23 it does -- there's a big contrast between that --

14:40

14:40

24 A. Yes.

25 CHAIRMAN: -- and the submission.

14:40

26 A. I can understand your question, Mr. Chairman. And the
27 situation was that I was sitting in my work position,
28 with Mr. Smyth, ready to get on with the work. The
29 delivery and the signing-off was being done in my

1 absence. And there was also a delay, I think
2 Annmarie Ryan gave evidence --
3 CHAIRMAN: No, but it's just did Annmarie Ryan also
4 hand you the report from Superintendent Cunningham?
5 A. No, sir, she didn't. 14:41
6 CHAIRMAN: She didn't. But it was handed into the
7 Commission?
8 A. I understand that. And just to say, I didn't actually
9 see the attachments to the letter, nor did I see the
10 final draft that morning. 14:41
11 CHAIRMAN: No, and I understand. And she perhaps
12 arrived late and there was a lot of things happening.
13 A. That's correct.
14 CHAIRMAN: But that is how the thing transpired?
15 A. That's correct. 14:41
16 CHAIRMAN: So Mr. Justice O'Higgins would have got two
17 contradictory documents.
18 A. I don't quite follow, sorry, sir.
19 CHAIRMAN: Well, the letter of the 25th August 2008,
20 that, as I understand, Superintendent Cunningham's 14:41
21 report of that date has a different reportage of what
22 happened at the meeting than the document you put in.
23 A. Yes, I think the enclosures to the letter would
24 certainly have been quite complicated and they would
25 have given a fuller picture than the one that I had. 14:41
26 CHAIRMAN: The basic point is, you didn't get it?
27 A. That's correct, sir, yes.
28 CHAIRMAN: All right.
29 473 Q. MR. MCGUINNESS: Just in preparation for the

1 Commissioner's appearance then, you did consult with
2 her on two occasions?

3 A. Yes.

4 474 Q. You've seen the notes of the meetings made by a number
5 of different people, Chief Superintendent Healy and 14:42
6 Inspector McNamara and Ms. Ryan, is that right?

7 A. That's right, yes.

8 475 Q. And can I ask you, was there a discussion of the
9 Commissioner withdrawing anything, at that?

10 A. I have very, very poor recollection of these two 14:42
11 consultations, except to say that I don't recall us
12 getting into any huge detail. There was a discussion
13 as to what might arise, what questions Mr. McDowell
14 might put, but I don't recall any of us giving the
15 Commissioner advice on how to deal with those 14:42
16 questions. There was certainly discussion about legal
17 professional privilege. There, I think, was a
18 discussion about, if that privilege was not relied
19 upon, what the Commissioner would say, but I don't
20 recall personally or my colleagues giving the 14:43
21 Commissioner advice on the issue specifically. It was
22 discussed. And I don't think any of us anticipated
23 what was going to happen the next day.

24 476 Q. Okay. Well, that is what I am wondering. Well, was it
25 part of discussion at the consultation or consultations 14:43
26 that the Commissioner would take the initiative in
27 telling the Commission that she was modifying her
28 position vis-à-vis Sergeant McCabe?

29 A. No, the impression that I had, Mr. McGuinness, is that

1 we had discussed the issue with the Commissioner, we'd
2 given her some brief advice in relation to legal
3 professional privilege, but I don't recall us giving
4 any specific advice as to how she should handle the
5 issue, whether she should waive privilege or whether 14:44
6 she should make a statement. I don't recall anything
7 of that nature.

8 477 Q. But can you remember what she decided to do on that?
9 A. No. She did not make a decision as to what to do that
10 evening, to my knowledge. 14:44

11 478 Q. Yes. But she got into the box then and gave evidence,
12 as it were?
13 A. Yes.

14 479 Q. And did she not tell you before she actually stepped up
15 to give evidence what she was going to do, was she 14:44
16 going to waive her privilege in the box or was she
17 going to assert it?
18 A. No, I was not aware of what decision she had made at
19 that point in time.

20 480 Q. All right. Well, the issue of waiver then, was any 14:44
21 view being advocated to her or just the options being
22 put to her?
23 A. The options.

24 481 Q. Right. So when Mr. Justice O'Higgins raised the issue
25 on the morning of day 29, that was a complete surprise 14:44
26 then?
27 A. A total surprise, yes.

28 482 Q. And did it convey to you that certainly whatever had
29 been going on in the various modules between day 5 and

1 day 29, that he seemed to think that the issue hadn't
2 surfaced in any of the modules, do you take that point?

3 A. He did use the phrase that it's been in abeyance, I
4 think he used that word.

5 483 Q. Dormant. 14:45

6 A. It hadn't specifically arisen, as I recall, in any of
7 the modules. I'm sorry, I've lost the train of
8 thought, what was your actual question?

9 484 Q. Well, the question was: Did you take it from his
10 raising the issue, and this issue of dormancy in 14:45
11 particular, that he didn't regard the issue of
12 motivation as having been in play for the last several
13 months?

14 A. You're asking me to express an opinion on what the
15 Judge thought, Mr. McGuinness. I'll do my best. I 14:45
16 think it hadn't arisen, and I think his main concern
17 with it was not whether it had arisen in the past but
18 that it was about to rise now, in other words that
19 morning, and that there was to be a robust
20 cross-examination of the Commissioner. 14:46

21 485 Q. Yes. But on a procedural point, had the Commission
22 not, in advance of every module, in notification sent
23 out with the core booklets and the statements of fact,
24 made it quite clear to all of the parties that they
25 weren't -- they were only going to be allowed raise 14:46
26 issues connected with that module, explore the issues?

27 A. Yes, that's correct.

28 486 Q. Yes. So, on one view, Mr. McDowell, unless he was
29 intending to do it improperly, couldn't have raised the

1 issue of what Commissioner O'Sullivan's instructions
2 were about challenging Sergeant McCabe's integrity or
3 motivation?
4 A. Well, he had raised it once before.
5 487 Q. Right. 14:47
6 A. And we were concerned that he was going to raise it
7 again.
8 488 Q. You think he was going to go outside the terms of the
9 module and do it?
10 A. I can't say what he was going to do. 14:47
11 489 Q. All right. Is that what you feared --
12 A. But obviously we were trying to look around corners and
13 we were trying to anticipate what might happen.
14 490 Q. All right.
15 A. And there had been a basis when Mr. McDowell had said 14:47
16 that he would be planning to cross-examine the
17 Commissioner and that she wouldn't enjoy the
18 experience. Whether he could do it, whether he
19 intended to do it, I simply cannot say.
20 491 Q. But when Mr. Smyth clarified matters on day 29, as 14:47
21 recorded, did you think he was doing that on the
22 Commissioner's instructions?
23 A. Again, I think it's idle for me to speculate. I had
24 absolutely no notice that this was going to happen. I
25 didn't know what to expect and I didn't know, and 14:47
26 Mr. Smyth didn't know either.
27 492 Q. Yes. But was he getting those instructions on his feet
28 while he was, as it were, addressing Mr. Justice
29 O'Higgins, or was he doing that himself, as it were?

1 A. My recollection is that Ms. Ryan approached where
2 myself and Mr. Smyth were sitting, and I think
3 Mr. Byrne as well, on possibly three occasions, saying
4 can we ask for some time, but I don't know whether
5 Mr. Smyth applied for the time, but I do recall that he 14:48
6 engaged with the Chairman directly and we didn't break
7 for specific instructions.

8 493 Q. Okay. In the intervening period between day 2, day 3,
9 day 5 until day 29, had anyone, in particular Chief
10 Superintendent Healy, raised the issue with you about 14:48
11 Mr. Smyth going too far or acting outside his
12 instructions?

13 A. I don't recall Chief Superintendent Healy raising that
14 issue with me.

15 494 Q. Okay. I take it you'd remember it if he had done it in 14:48
16 your presence?

17 A. Yes, I think I would. Yes, I would.

18 495 Q. And you would expect to know about it, surely?
19 A. Yes.

20 496 Q. And you don't know about it, is that it? 14:49
21 A. It was on my mind, but I don't recall it being
22 discussed by Chief Superintendent Healy and I don't
23 recall any queries coming from the Commissioner in
24 relation to it.

25 497 Q. And just jumping ahead then to the overview of 14:49
26 submissions --

27 A. Yes.

28 498 Q. -- did you have a substantial part in drafting those?
29 A. What I'll say is that Mr. Byrne took charge of that.

1 499 Q. Yes.

2 A. And I would have had an input into it, but again, I
3 will take responsibility and stand over the document.
4 If you want to question me on it, I will happily answer
5 questions. 14:49

6 500 Q. Okay. But are you satisfied that the observations on
7 Sergeant McCabe's motivations were included on the
8 basis of your overall instructions from the
9 Commissioner?

10 A. They were based on instructions received from the 14:49
11 clients that I have mentioned. They were approved by
12 our client/clients, but the material in the actual
13 submissions was based on those instructions.

14 501 Q. Yes.

15 A. But it also did mention evidence that was available 14:50
16 from another member of the force who was separately
17 represented. That was Assistant Commissioner Derek
18 Byrne.

19 502 Q. Yes. But obviously, as I understand it, you're saying,
20 quite clearly, they obviously had the imprimatur of the 14:50
21 Commissioner herself?

22 A. As I understand it, all submissions delivered were
23 approved, and I can't say, because I wasn't involved
24 directly when they were being approved, I can't say
25 whether they were approved by the Commissioner, by 14:50
26 Chief Superintendent Healy or who they were approved
27 by, but I do know they were approved before they were
28 delivered.

29 MR. MCGUINNESS: Okay. Thank you, Mr. MacNamee.

1 CHAIRMAN: Mr. McGuinness, could I just query that last
2 point with you. I didn't understand the Commissioner
3 to be saying that she had read any of the two sets of
4 submissions and had approved them. I didn't understand
5 her to say that. In fact, I was understanding her to 14:50
6 say the opposite, but I may be picking it up wrong,
7 that can be the problem.
8 MR. MCGUINNESS: well, obviously I can't speak for the
9 Commissioner.
10 503 Q. But it was your understanding that they had the 14:51
11 approval of HQ, if I could put it that way?
12 A. That would be fair.
13 CHAIRMAN: Yes, well that could be Chief Superintendent
14 Healy or something like that.
15 MR. MCGUINNESS: Acting on her behalf. 14:51
16 A. That is quite possible.
17 CHAIRMAN: Yes. Thank you for clarifying it.
18 MR. MCGUINNESS: Thank you.
19
20 MR. MICHAEL MacNAMEE WAS CROSS-EXAMINED BY 14:51
21 MR. MCDOWELL:
22
23 MR. MCDOWELL: Good afternoon, Mr. MacNamee.
24 A. Good afternoon, Mr. McDowell.
25 504 Q. I'm not going to keep you long at all. Could I ask you 14:51
26 firstly to look at page 694.
27 A. Which volume is it?
28 505 Q. Of volume 1B. Just to explain to you what this is.
29 This is a note of --

1 A. This is Chief Superintendent Healy's diary from the
2 15th, if I'm not mistaken.

3 506 Q. It's his diary note on the 15th extended on to the
4 Tuesday --

5 A. Yes. 14:52

6 507 Q. -- the following Tuesday, do you follow that?

7 A. I see.

8 508 Q. And I'm only interested in what appears at 1400 onwards
9 there on the left-hand margin:
10
11 "Commissioner then rang a second time and --"
12
13 Something.
14
15 " -- that, on reflection, that if it came out in the 14:52
16 course of questioning then counsel should explore it
17 and it was her view that if he (counsel) was advising
18 that we should explore the area of motive and that it
19 may be --" sorry.

20 A. Necessary? 14:53

21 509 Q. I will have to get the typewritten copy.

22 A. No, no.

23 510 Q. Just, my eyesight doesn't quite deal with it.

24 A. Nor mine.

25 511 Q. But the real question is, that I want to come to, is 14:53
26 that did you ever get this idea that there was a
27 conditional approval given to going further with it,
28 that it was only to proceed that day if it came out in
29 the course of questioning?

1 A. I don't think I was privy to this communication.

2 512 Q. No. But you were presumably privy to - maybe you
3 weren't - to Chief Superintendent Healy coming back
4 with the Commissioner's second thoughts on the matter?

5 A. I have to say, Mr. McDowell, I think it would be unsafe 14:54
6 for me to offer a view on that. I don't recall. I was
7 quite busy with other matters --

8 513 Q. Yes, I can imagine.

9 A. -- as I think I've discussed.

10 514 Q. I can imagine. But does it follow from that that you 14:54
11 never had any impression that the Commissioner, who was
12 looking for an adjournment to consider this matter more
13 fully, only authorised the matter to proceed on the
14 basis if it came out in questioning, that never -- you
15 don't seem to have been aware of that conditionality? 14:54

16 A. I wasn't aware of that. I can't help you with that.
17 I'm not saying it didn't happen.

18 515 Q. Yes.

19 A. I'm not saying it -- it wasn't imparted to me.

20 516 Q. Yes. So you thought you'd got the green light the 14:54
21 second time?

22 A. I think that's fair enough, the green light, yes, I
23 think so.

24 517 Q. Now, could I --

25 A. In fact, if I can just clarify that. 14:54

26 518 Q. Yes.

27 A. My recollection is: Proceed as suggested, or words
28 that effect. Proceed as suggested.

29 519 Q. Proceed as suggested?

1 A. Yes. Something like that.

2 520 Q. So you've no recollection of any sense that there was,
3 so to speak, a conditionality or a leash being put on
4 the use of this line of questioning?

5 A. No, I don't have that recollection. 14:55

6 521 Q. Or it being confined to an authority to proceed that
7 afternoon if it came out in the course of questioning,
8 but not otherwise?

9 A. No, I don't recall that. It actually had come out in
10 the course of questioning earlier on, already. 14:55

11 522 Q. Well, the only question that was put to Chief
12 Superintendent Rooney --

13 A. Yes.

14 523 Q. -- was to ask him about this meeting --

15 A. Yes. 14:55

16 524 Q. -- and Sergeant McCabe, as he claimed at the time,
17 angrily making a demand of him, isn't that right?

18 A. That's right.

19 525 Q. So that was hardly in the course of questioning, that
20 was Mr. Smyth eliciting this for the first time? 14:55

21 A. Okay. That is so, yes.

22 526 Q. Do you follow my point?

23 A. I do, I do, yes.

24 527 Q. And what you are saying is that you never had any sense
25 that the Commissioner was playing for time and saying,
26 you can proceed if it comes out in the course of
27 questioning? 14:55

28 A. No, I don't recall the Commissioner playing for time.
29 I would say that clearly in any case of this nature,

1 time would have been welcome.

2 528 Q. Yes.

3 A. But I don't recall her playing for time.

4 CHAIRMAN: Vis-à-vis Mr. Smith eliciting anything,
5 Mr. McDowell, all he said was: Before you retired, did 14:56
6 you have contact with Sergeant McCabe? It seems to me
7 to be one of the more innocuous questions I've ever
8 heard in my life.

9 MR. MCDOWELL: No, I think it went slightly further
10 than that. I think he actually managed to elicit from 14:56
11 him that Sergeant McCabe had approached him.

12 CHAIRMAN: The witness said that, there was certainly
13 no question of putting words in his mouth. I have just
14 checked the transcript. He didn't say, didn't he come
15 in to you very angry or something like that. 14:56

16 MR. MCDOWELL: No, no, he didn't ask him that. He just
17 asked him about that meeting.

18 CHAIRMAN: He simply said: Before you retired, did you
19 have contact with him?

20 MR. MCDOWELL: Yes. 14:56

21 CHAIRMAN: That's all.

22 MR. MCDOWELL: Well, he elicited.

23 CHAIRMAN: But it's there in black and white,
24 Mr. McDowell.

25 MR. MCDOWELL: Well, we'll see. 14:57

26 CHAIRMAN: It came out, is certainly the --

27 MR. MCDOWELL: Because you'll recall, Chairman, that he
28 had to be directed several times to what meeting -- or
29 he had to be given a hint as to what meeting he was

1 being asked about.

2 CHAIRMAN: I'm not sure that is the case. If
3 necessary, we can go back on it, Mr. McDowell.

4 MR. McDOWELL: It's not all that hugely important.

5 CHAIRMAN: No.

14:57

6 529 Q. MR. McDOWELL: In any event, the only reason I'm
7 putting it to you is that it would appear, if that note
8 were correct, that there was a conditionality to the
9 Commissioner's authorisation, but you, you are saying
10 that you and your fellow counsel thought you'd got an
11 unambiguous green light from the Commissioner to
12 proceed?

14:57

13 A. We were told to proceed as instructed, or as advised,
14 yes.

15 530 Q. Now, could I ask you one other question, which it's not
16 just purely for the purposes of personal curiosity, but
17 at what stage did you and your fellow counsel become
18 aware that this was not going to be like the
19 Grangegorman Commission or the Dublin Archdiocese
20 Commission, that it was going to follow the internal
21 format of a tribunal, although strictly in private? At
22 what time did you -- at what stage did you become aware
23 that the room was going to resemble this rather than a
24 small dining-room table with witnesses coming into it?

14:57

14:58

25 A. I think it was fairly obvious from day 1.

14:58

26 531 Q. Yes.

27 A. It was very disorganised, you'll recall it yourself,
28 Mr. McDowell, the room was full of lawyers.

29 532 Q. Yes.

1 A. To the extent that I could barely get sitting with my
2 leader, that is how busy the room was. Yes, I do
3 recall that.

4 533 Q. I'm just wondering were you aware in advance that it
5 was going to be a matter of putting questions to 14:58
6 witnesses in front of 40 or 50 people, or was it going
7 to be done in a private room where some people might be
8 allowed to be there and others not?

9 A. I think, Mr. McDowell, I've a tendency not to be too
10 optimistic when I approach my work. I was expecting it 14:58
11 to be pretty busy, and it was, and it was a busy room
12 with lots of lawyers there.

13 534 Q. But the format did not come as a surprise to you, in
14 other words?

15 A. No, I don't think it was a surprise, no. 14:59

16 535 Q. Well, could I ask you about your recollection, I just
17 want to be clear about this, in relation to
18 Ms. Annmarie Ryan's desire for an urgent consultation
19 with the Commissioner. You may have been intending to
20 mention that with Mr. McGuinness? 14:59

21 A. Right.

22 536 Q. What's your memory of that issue?

23 A. Now, my memory, as I think I've said already, was that
24 my head was in other areas, I had other fish to fry at
25 the time. From my point of view, I would have liked a 14:59
26 consultation with Superintendent Clancy in particular,
27 because he was absent. I would have also liked a
28 formal consultation and more time to talk to Chief
29 Superintendent Rooney and Superintendent Cunningham.

1 was I concerned about a consultation with the
2 Commissioner? I'll be frank with you, Mr. McDowell, I
3 had other fish to fry and it didn't really strike me.
4 If there was a consultation set up, it would have
5 been -- clearly, I would have gone to attend that. But 15:00
6 I think the way I had it in my mind was, this was my
7 job, I was doing this part of the work. So in terms of
8 me demanding a consultation, no, I didn't. I wasn't
9 looking for one. And whether I knew about whether
10 Annmarie was looking for one, I can't say. I think she 15:00
11 did mention that she was looking for a consultation and
12 I recall that the Commissioner was unavailable.

13 537 Q. I see. And could I ask you then whether, when it came
14 to at the end of day 2, which is Friday, the 15th, when
15 the Chairman had directed that a document be drafted 15:00
16 setting out the basis for putting these matters into
17 evidence, isn't that right, and what would be put to
18 Sergeant McCabe, do I understand it that you and two
19 witnesses secluded yourself in a room where you could
20 actually take down instructions from him in peace, is 15:01
21 that the idea?

22 A. It may have been a table in the corner of a larger room
23 where other matters were going on, or it could have
24 been a side room. It's more likely to have been a side
25 room because I needed quiet and peace to kind of 15:01
26 concentrate on what I was hearing.

27 538 Q. And I'm not going to trespass into your privilege with
28 those two people, but over the course of the following
29 48 hours, or even more, you generated, firstly, a

1 primary text in manuscript, is that right?

2 A. When I say that, what I did was I wrote down the
3 instructions that I received on the Friday.

4 539 Q. Yes.

5 A. I then put them into a word document. 15:02

6 540 Q. Then into a draft, the first draft --

7 A. Yes.

8 541 Q. -- of the letter of the 18th, is that right?

9 A. Yes, yes.

10 542 Q. And now we're talking about -- are we talking Friday 15:02
11 evening or Saturday?

12 A. The email that was put up there, the one where I say
13 it's of the utmost importance --

14 543 Q. Yes.

15 A. -- that email, that's what I call it, it went out on 15:02
16 the Saturday evening, I think, at 9:45.

17 544 Q. So you were working across the Saturday on it --

18 A. Oh, yes, absolutely, yes.

19 545 Q. -- at some points?

20 A. Yes. 15:02

21 546 Q. And then we get to the point where you said that you
22 got input from each of the three people --

23 A. Yes.

24 547 Q. -- who you were relying on, is that right?

25 A. That's right, yes, yes. 15:02

26 548 Q. And none of them was -- none of them was saying they
27 had nothing to do with the letter or was --

28 A. Oh, no, no, there was active input from all three
29 contributors.

1 549 Q. All three had an input into it?
2 A. Yes.
3 550 Q. And then the final text is produced and circulated on
4 the Monday morning, isn't that right?
5 A. That's correct, yes. 15:03
6 551 Q. And again without trespassing on your client's
7 privilege in any way or asking you to compromise it, do
8 you agree with Mr. Smyth's evidence here today that
9 what was in the letter of the 18th May faithfully
10 reflected the instructions you received? 15:03
11 MR. DIGNAM: Chairman, just in relation to that
12 question, I didn't object when it was asked of
13 Mr. Smyth because he had frankly said that he wasn't
14 involved in drafting the letter, and simply signed off
15 on the final draft of it, but, in fact, while the 15:03
16 question is prefaced with saying that Mr. McDowell
17 didn't want to trespass into privilege, the effect of
18 that question is, in fact, to trespass into privilege.
19 CHAIRMAN: Sorry, Mr. Sreenan, what's your view on
20 that? I know you're not the client, but it's the duty 15:03
21 of the lawyer to uphold the privilege in the event that
22 it is there.
23 MR. SREENAN: I'm concerned that Mr. McDowell is
24 pushing the witness into an area which is properly
25 covered by privilege. 15:04
26 MR. McDOWELL: Well, maybe I will rephrase my question
27 and get around it.
28 CHAIRMAN: Well, I know, but I am always suspicious of
29 rephrased questions like, in consequence of the

1 whatever, did such and such happen? I mean, I got it
2 fairly -- no, my thinking at the moment is this:
3 they're careful, but they're rushed. There has been
4 mention of the possibility of something being conflated
5 with something else. 15:04
6 MR. MCDOWELL: Yes.
7 CHAIRMAN: Now, Mr. Smyth, I think, I don't know, it's
8 certainly not a criticism, but I actually was worried
9 when that came out, but it came slightly sideways, I
10 didn't have a chance to say anything. But it is 15:04
11 actually my job to uphold the law.
12 MR. MCDOWELL: Oh, I accept that.
13 CHAIRMAN: And I just worry about that.
14 MR. MCDOWELL: Well, maybe if you would rule on whether
15 I can ask this question. 15:04
16 CHAIRMAN: Well, I'm listening very carefully,
17 Mr. McDowell.
18 552 Q. MR. MCDOWELL: On the 24th June, when it became fully
19 apparent that the letter was contained in error, did
20 you have any sense that it was your error? 15:05
21 MR. DIGNAM: Judge --
22 CHAIRMAN: I think it's the same question,
23 Mr. McDowell.
24 MR. DIGNAM: Yes.
25 CHAIRMAN: It's intensely clever, and you know -- 15:05
26 MR. DIGNAM: Judge, if it's of any assistance --
27 MR. MCDOWELL: Judge, may I make a submission to you on
28 the matter? I think I'm entitled to ask this witness
29 whether the error was his error, full stop, as far as

1 he's concerned. I think I'm entitled to ask him that.
2 CHAIRMAN: Then I do think we have to go into the whole
3 consultation. I mean, I think that is the problem. I
4 mean, in the event that anyone else is here, I mean, if
5 they have a privilege which they don't want to waive, 15:05
6 they're absolutely entitled to that. The one thing
7 that should never ever happen is that people are put
8 under pressure to waive a privilege. I mean, that's
9 just wrong.
10 MR. MCDOWELL: well, Judge -- 15:06
11 CHAIRMAN: I mean, if it spontaneously happens, that is
12 a different thing. I mean, just take an instance,
13 Mr. McDowell, of let's suppose there's a boardroom and
14 there's five people and there's a leak of a document,
15 if someone goes around and gives a waiver of privilege 15:06
16 to every one of those, I mean how is that not, as the
17 French would say, harcèlement morale?
18 MR. MCDOWELL: well, I didn't realise, Judge, that you
19 were uncomfortable with what Mr. Smyth had said so --
20 CHAIRMAN: It's not a question of being uncomfortable; 15:06
21 it's a question of the harp, even though it's not here,
22 being above my head, and that is what I go by all the
23 time. I just follow that.
24 MR. MCDOWELL: I see.
25 CHAIRMAN: So that is the position that we're in. I 15:06
26 mean, you may ask me at the end in submissions to raise
27 an inference that it wasn't an error, that it was
28 deliberate. I mean, you're entitled to do that, based
29 upon this fact, that fact and the other fact, from

1 which a fact may be inferred. But I actually -- I
2 don't know if we reach that stage or whether that is
3 going to happen. But we just can't go into a
4 consultation that lawyers were having with their client
5 for the purpose of receiving legal advice. And in this 15:07
6 instance, which is the second aspect of the privilege,
7 for the purpose of litigation, which this was, they
8 were involved in. Their reputations were in jeopardy,
9 that is certainly the case. I can't either be happy
10 about it or unhappy about it. If it's the law, it's 15:07
11 the law, and that's it.

12 MR. MCDOWELL: Sorry, can I ask the witness this:
13 Insofar as you realise -- sorry, can I ask the witness
14 this, and I'm asking you, Judge, can I put this
15 question to him: Insofar as you realise there was an 15:07
16 error on the 24th June, was it a clerical error or an
17 error as to meaning?

18 CHAIRMAN: It's the same thing. Honestly it is. And I
19 know notices for particulars, Mr. McDowell, lawyers are
20 taskmasters at saying the same thing 15 different ways. 15:08
21 It seems legitimate to ask the following question: who
22 was in the room when the question was asked by
23 Mr. Smyth on the Monday the 18th?

24 MR. MCDOWELL: Yes.

25 CHAIRMAN: And was there any approach in relation to 15:08
26 whether an error was made. I don't know, but, for all
27 I know, the answer to that may be that the room was as
28 chaotic as has been described and no one was paying any
29 particular attention. I don't know.

1 MR. MCDOWELL: Of course, if I ask a question, Judge,
2 of this witness: who was in the room on the 18th and
3 did any of them come to correct the error? That
4 effectively means that none of them did, and we're back
5 to privilege then. 15:08

6 CHAIRMAN: Well, I think -- I don't know. Are we?

7 MR. DIGNAM: No, Judge, I have no difficulty with that
8 question being asked, and, in fact, I don't think
9 there's been any evidence that the error was corrected
10 before the 24th June. I think the evidence is to the 15:08
11 contrary.

12 CHAIRMAN: No. I think, yes, it is the case that the
13 error wasn't corrected.

14 MR. DIGNAM: That's right.

15 CHAIRMAN: Now, how obvious the error was when it came 15:09
16 through, but, I mean, again, I'm looking at the
17 transcript, well I'm not physically looking at it now,
18 but God knows I can practically see in front of my
19 eyes, and the question was asked twice. Now, I don't
20 know who was in the room. And I certainly know it 15:09
21 wasn't corrected. But that can be asked, Mr. McDowell.

22 MR. MCDOWELL: Judge, obviously I don't want to waste
23 the Tribunal's time on this, but I do want to put it on
24 the record --

25 CHAIRMAN: Yes. 15:09

26 MR. MCDOWELL: -- that former Chief Superintendent
27 Rooney has, in my submission, clearly waived privilege
28 in this by giving a contrary account as to the
29 instructions he gave to his counsel.

1 CHAIRMAN: And we will have to look at that down the
2 way, Mr. McDowell.

3 MR. MCDOWELL: But I want to reserve that point, Judge.

4 CHAIRMAN: No, I think you are reserving that point,
5 and I do think we need to look at that down the way. 15:09
6 And I don't know whether it is the same as informer's
7 privilege, where the informer can't waive privilege in
8 relation to one particular fact that the informer
9 reports on. If it is to go in at all, the whole thing
10 goes in. 15:10

11 MR. MCDOWELL: Exactly.

12 CHAIRMAN: But I don't know if that is the case. I'm
13 not agreeing with you, Mr. McDowell.

14 MR. MCDOWELL: But my submission will be perhaps in
15 colourful layman's terms, that once you expose a bit of 15:10
16 ankle, it may have to go up the knee, Judge. That is
17 what I am going to say.

18 CHAIRMAN: I'm not sure that legal submission is really
19 helping me in any way, Mr. McDowell.

20 MR. MCDOWELL: It's hardly a legal submission. In any 15:10
21 event, very well, I will move on from that.

22 553 Q. But it is clear, is it not, from your submission of
23 the -- your legal submission on the 11th June, that at
24 that point you were making a submission that the
25 complaint that Superintendent Clancy had failed to give 15:10
26 support, that that complaint was motivated by -- or,
27 sorry, that that complaint was motivated by a desire on
28 Sergeant McCabe's part to have the DPP's directions
29 conveyed to the D family?

1 A. Your question is, was that put into the submission in
2 June?

3 554 Q. June, yes. You're 11th June submission?

4 A. That's a matter of record. It's in the submission, as
5 I understand it. 15:11

6 555 Q. And it was repeated. It wasn't just a "to" or
7 "against", it was clear that it was --

8 A. Oh, it was certainly repeated. That's correct, yes.
9 CHAIRMAN: And as I understand the evidence in relation
10 to that legal submission, that submission was 15:11
11 circulated among the parties who were involved.
12 MR. MCDOWELL: Yes.

13 CHAIRMAN: And nihil obstat at least, I mean, nothing
14 stands in the way, was obtained.

15 MR. MCDOWELL: Exactly. 15:11

16 CHAIRMAN: Am I right in thinking that? The clients
17 got the submission prior to it being lodged?

18 A. Yes. Oh, yes.

19 CHAIRMAN: And in the event that there was any query by
20 email or any other way -- 15:11

21 A. That was the way that that was done, Judge, yes.

22 CHAIRMAN: -- as to a particular paragraph, you read in
23 whatever the change that was necessary. Yes.

24 A. Yes.

25 556 Q. MR. MCDOWELL: Did I understand your evidence -- can I 15:11
26 move on from that now, because I think I've got as
27 little as I am going to get out of that line of
28 questioning. Could I ask you, Mr. MacNamee, in
29 relation to the debate which took place, and we don't

1 have to go into the detail of it, on day 2 and day 3,
2 that you were apprehensive about the introduction of
3 the term "integrity" into the issue?
4 A. Yes, it was introduced by the Judge, in fact, rather
5 than by Mr. Smyth. 15:12
6 557 Q. And you were apprehensive about that. Did you think
7 that that was in conformity with the green light you'd
8 got on the previous Friday? I don't want you to be
9 critical of Mr. Smyth, but from your own point of view,
10 did you consider that that was part of the green light 15:12
11 that had been given to you?
12 A. The best answer I can give you, Mr. McDowell, is that
13 it would have been easier if the word hadn't emerged in
14 the debate. It would have been simpler.
15 558 Q. I see. And the same applies to the use by the 15:13
16 Commission Chairman of the term "bad faith" on
17 occasions, is that right?
18 A. Yes, except I can say for absolute certainty that that
19 phrase was never used by anybody on my team.
20 559 Q. Yes. And did you, in your own mind, draw any 15:13
21 distinction between the issue of credibility and
22 creditworthiness and credit in relation to the line of
23 questioning you were engaging on?
24 A. The distinction between the phrases clearly would be
25 familiar to me because of what I do it for a living, 15:13
26 but I don't think I had come across a situation where
27 the differences were so nuanced and so complex. We're
28 looking at the difference between credit and
29 credibility, and the Chairman has given some useful

1 indications in that regard. I think the purpose of the
2 exercise was to test the facts, was to test the basis
3 of the allegations, and the idea was to have as wide a
4 latitude as possible to test those allegations because
5 of their severity.

15:14

6 560 Q. Yes. And you said that you had in your own mind at any
7 rate the notion of having a special module or where the
8 question of motivation would have been concentrated on,
9 is that right?

10 A. Just, to my mind, it would have been maybe a more
11 structured way to deal with the issue. It would have
12 allowed all of the evidence, including that of your own
13 client and indeed others who hadn't been called or
14 hadn't even been aware of the fact that they were being
15 brought into the matter. It was just a thought that I
16 expressed. I don't think I did anything about it other
17 than what I said. It just seemed to me to be a more
18 appropriate way to deal with an issue, out of fairness
19 to everybody, but it was also apparent that the
20 Commissioner [sic] had -- was constrained by his terms
21 of reference, and I think, in the end, he chose not to
22 make any findings about the issue at all, which I think
23 was probably the fairest thing that he could have done.
24 The issue, in other words, did not arise in his final
25 report at all except to the extent it was very briefly
26 mentioned at the start.

15:14

15:15

15:15

15:15

27 561 Q. Would you agree with the following proposition: that
28 whoever was responsible for the error, or however it
29 came into being, that the imputation in paragraph 19

1 and in the written submissions of the 11th June, that
2 they were as they were written, imputations of bad
3 faith?
4 A. I would not agree with that. They were simply -- they
5 were a factual recitation of the instructions that I 15:16
6 had received.
7 562 Q. No, no. I don't want to -- I don't want to get you to
8 breach your privilege again.
9 A. I understand.
10 563 Q. And I'm not trying to provoke you into doing that. I'm 15:16
11 suggesting that if it were the case that Sergeant
12 McCabe had made complaints against Superintendent
13 Clancy with a view to forcing him to give him private
14 satisfaction in respect of a different matter
15 completely, which was the D direction from the DPP, 15:16
16 that that would be an accusation of acting in bad faith
17 against Sergeant McCabe?
18 A. I don't agree that it would amount to acting in bad
19 faith. It would perhaps amount to looking for
20 assistance, or trying to address an issue that was on 15:16
21 his mind.
22 564 Q. But if his sole motive, which is what was put in the
23 letter, if his sole motive in making an accusation
24 against Superintendent Clancy was to force his hand on
25 the D allegations, that would be an accusation of bad 15:17
26 faith, wouldn't it?
27 A. It would be an accusation that your client would have
28 to deal with in evidence.
29 565 Q. Yes. But wouldn't it be an accusation of bad faith?

1 A. I'm not going to agree with that, Mr. McDowell.

2 566 Q. Well, would you agree that it would be improper motive
3 to say I am accusing you of misbehaviour on a number of
4 issues because I want to force your hand on a different
5 issue? 15:17

6 A. It would have required a full exploration of the facts,
7 a presentation of the facts as set out in a letter or
8 as corrected and to allow your client an opportunity to
9 address the issues that have been raised. It did not
10 make an imputation and it didn't use phrases such as 15:18
11 "bad faith".

12 567 Q. No, I'm saying the imputation, not the explicit
13 message, was that he was making these allegations
14 against Superintendent Clancy for lack of support
15 because he wanted Superintendent Clancy in respect of a 15:18
16 private matter, which was his desire to have the D
17 ruling of the DPP conveyed to the D family, complied
18 with by Superintendent Clancy?

19 A. It would have represented an unusual stratagem which
20 would have required explanation from Sergeant McCabe. 15:18

21 568 Q. But anyway, we know that it was, in the heel of the
22 hunt, found to be an error, is that right?

23 A. Yes.

24 MR. MCDOWELL: I see. Thank you.

25 MR. DIGNAM: I have no questions, Chairman. 15:18

26 CHAIRMAN: You have no questions?

27 MR. DIGNAM: No, Chairman.

28 CHAIRMAN: And, Mr. Sreenan, have you any questions?

29 MR. MICHAEL MacNAMEE WAS EXAMINED BY MR. SREENAN:

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MR. SREENAN: Can I just ask for document 762 to be put on the screen.

CHAIRMAN: Can you say that again, please, Mr. Sreenan?

569 Q. MR. SREENAN: Document 762 -- sorry, page 762 of the book. This is your email on Saturday evening, 9.45pm. 15:19

A. Yes.

570 Q. Sending the draft to Annmarie Ryan and Fergus Healy, copying it to Garret Byrne and Colm Smyth, and in your second paragraph you say: 15:19

"It is of the Utmost --"

And utmost in upper case.

" -- importance that the content be as factually accurate as possible such that there are no misstatements and nothing that cannot be backed up by oral or documentary evidence with the exception of the facts alleged, recited or admitted by McCabe himself." 15:19

That is what you said.

A. That is correct, yes.

571 Q. And thereafter, did you leave the finalisation of the draft or at least bring it into the forum where it was submitted to the Commission to your instructing solicitor? 15:19

A. Now, as I understand it, Mr. Sreenan, there are several other emails but they're all redacted because of

1 privilege. This is obviously not the first time I saw
2 the document. This is, I think, the first time I sent
3 my first draft. I would then have received
4 instructions by email making amendments or raising
5 questions on the draft that I had been -- I had
6 originally sent. 15:20

7 572 Q. Who ultimately finalised it and put it onto the
8 letterhead of the Chief State Solicitor's Office?

9 A. I don't recall having received a final, final draft, if
10 I can put it to you that way. I think it was finalised 15:20
11 very late on Monday -- very early on Monday morning,
12 and by the time I got to the Tribunal, the letter had
13 been printed, signed and submitted.

14 573 Q. And then if I could ask that page 3508 of the book be
15 put up. This is the transcript of the hearing before 15:20
16 the Commission when Garda Commissioner O'Sullivan was
17 due to testify on the 4th November 2015?

18 A. Yes.

19 574 Q. And it was put to you by Mr. McGuinness, it was
20 suggested to you that the Judge thought that the issue 15:21
21 of motivation had been dormant for some time, but I
22 think the words used by the Judge, we can see here,
23 line 13:

24
25 "It is in relation to a question that has been dormant 15:21
26 for some time concerning the integrity of Sergeant
27 McCabe and his mala fides or bona fides in making his
28 complaints."

29 A. Yes.

1 575 Q. So do I understand it what was being referred to as
2 being dormant was the issue of Sergeant McCabe's
3 integrity or bona fides or mala fides in making the
4 complaints?

5 A. Yes.

15:21

6 576 Q. And finally if I can put this question to you. We know
7 that this hearing in the --

8 CHAIRMAN: I'm sorry, Mr. Sreenan, I beg your pardon, I
9 know that is there, but the question you wanted to ask
10 the witness on it was what? If you wouldn't mind just
11 helping me on that. What was the point you were
12 making?

15:21

13 MR. SREENAN: Sorry, it was a point of clarification,
14 Chairman, that Judge O'Higgins was not indicating that
15 the question of motivation had been dormant in the
16 intervening period; what he was indicating was that the
17 issue of Sergeant McCabe's integrity and bona fides or
18 mala fides had been dormant. Does that clarify?

15:22

19 CHAIRMAN: Maybe I will just look at it. Just give me
20 one second, if you wouldn't mind.

15:22

21 MR. SREENAN: Yes. It's line 13.

22 CHAIRMAN: No, I know. Forget about the lines. I have
23 it all printed out separately. Yes:

24
25 "Concerning the integrity of Sergeant McCabe and his
26 mala fides or bona fides in making the complaint, a
27 question that has been dormant for some time."

15:22

28
29 And the point you wanted to make, Mr. Sreenan? I want

1 to get it -- what was --

2 MR. SREENAN: I was really correcting the record,
3 Chairman, because Mr. McGuinness had mistakenly
4 suggested to the witness that the Judge had referred to
5 the issue of motivation as being the issue that was 15:22
6 dormant, whereas motivation was being canvassed at
7 various times in the intervening days, as we can see
8 from the transcript.

9 CHAIRMAN: Well, I think the whole issue, it's fair to
10 say, was raised there, and that was what Mr. McGuinness 15:23
11 was getting at. I think that is fair to say.

12 MR. SREENAN: Very well. Can I just turn, so,
13 Chairman --

14 CHAIRMAN: And it also seems to me, I may be wrong
15 about this, that the reason for going there was -- 15:23
16 well, there's two possibilities. Mr. Justice O'Higgins
17 was reading all the papers himself and then re-read
18 that because the Commissioner was coming in, and read
19 the letter and also the Superintendent Cunningham
20 report of the meeting in Mullingar in August 2008, or 15:23
21 else perhaps he had a chat with counsel who referred
22 it -- that to him and then he read it, but certainly
23 that's probably how it arose. It wasn't, I think, in
24 consequence of talk between counsel.

25 MR. SREENAN: No. It seems to be coincident, at least, 15:23
26 with the fact that the Commissioner was --

27 CHAIRMAN: Well, there's probably no coincidence about
28 it at all. I'm sure the Judge knew what he was doing.

29 MR. SREENAN: I'm sure he did, Chairman.

1 CHAIRMAN: Yes. So, in any event, the correction was
2 that what the Judge raised was mala fides, integrity,
3 that brings in the whole concept that had been raised.
4 MR. SREENAN: Yes, the whole concept. But issues of
5 motivation had been canvassed in the intervening 15:24
6 period.

7 577 Q. And the proceedings before the Commission were, of
8 course, intended to be private, isn't that so?

9 A. They were intended to be private, that's correct, yes.

10 578 Q. And again, as far as you were concerned, I take it, at 15:24
11 that time, you expected everybody to respect the
12 privacy of the proceedings?

13 A. I most certainly did.

14 579 Q. And can you confirm that any leaks - we know there were
15 leaks - didn't come from you or, to your knowledge, 15:24
16 anybody on your legal team?

17 A. I can absolutely confirm that, Mr. Sreenan.

18 CHAIRMAN: Well, I'm taking it that it's like the known
19 unknowns and the famous comment, I'm never going to
20 know that but I'm not required to inquire into it, and 15:24
21 let's suppose everybody in the room is called, I just
22 don't want that to happen, Mr. Sreenan, I'm assuming
23 that everybody acts properly. And besides, it's none
24 of my business. If the Oireachtas made it my business,
25 I'd make it my business, and I wouldn't dream of 15:25
26 assuming that anybody had done that.

27 MR. SREENAN: Yes.

28 CHAIRMAN: It's just not the right thing to do.

29 MR. SREENAN: No. But I suppose, Chairman, it might

1 only be fair to observe that, from the point of view of
2 my clients, this particular module comes about as a
3 result of the reporting of what was allegedly said or
4 done at the Commission, which was supposed to be in
5 private.

15:25

6 CHAIRMAN: Well, yes, I appreciate that, and I think
7 the other problem which it may be the media people
8 have, is that if they get snippets, they're snippets,
9 and I think you know my views on that, Mr. Sreenan.

10 Even in the High Court, if it's a question of somebody
11 opening a passage from a judgment, I always asked for
12 the headnote to be opened as well, just to try and put
13 it into context. After all, people do spend an awful
14 lot of time summarising what, supposedly, the decision
15 is about and it's usually a very good guide.

15:25

16 MR. SREENAN: Yes.

17 CHAIRMAN: But I do take your point, but I wouldn't
18 ever dream of thinking that anybody here had done that.

19 MR. SREENAN: Thank you, Chairman. I have no further
20 questions.

15:26

21 CHAIRMAN: Thank you, Mr. Sreenan.

22 A. Thank you, Mr. Chairman.

23
24 THE WITNESS THEN WITHDREW

15:26

25
26 MS. LEADER: Yes, the next witness, sir, is Mr. Byrne,
27 barrister-at-law.

28 MR. McDOWELL: Chairman, could I be of some assistance,
29 perhaps, in relation -- in relation to this witness

1 anyway, if he's asked whether he's in general agreement
2 with the two other witnesses, I'm happy to take his
3 evidence as given.

4 CHAIRMAN: well, I'm just wondering, Mr. McDowell, why
5 should he not have to suffer like the others? I think 15:26
6 what we will do is, we will fly through his evidence.
7 All right.

8
9 MR. GARRET BYRNE, HAVING BEEN SWORN, WAS DIRECTLY
10 EXAMINED BY MS. LEADER AS FOLLOWS: 15:27

11
12 MS. LEADER: Mr. Byrne.

13 A. Ms. Leader, good afternoon.

14 580 Q. You're a barrister-at-law. How long have you been in
15 practice? 15:27

16 A. Since 2006.

17 581 Q. Okay. Now, we've heard a lot of evidence in relation
18 to the Commissioner's instructions and, as I understand
19 the situation, you were specifically involved in two
20 aspects, those being the email that was sent to the 15:27
21 Commissioner on the Friday afternoon and the drafting
22 of submissions?

23 A. That's right. I mean, I wouldn't say I drafted every
24 single set of submissions, but I think the ones we've
25 been talking about in the last couple of days, 15:27
26 certainly those two.

27 582 Q. And in relation to the obtaining of instructions and
28 the various meetings, are you at divergence from the
29 evidence given by Mr. Smyth?

1 A. No, I'm not.

2 583 Q. Okay. If we could just turn to that email on the 15th
3 May 2015 at page 689 at the materials, which also
4 should be on the screen in front of you.

5 A. I will take the hard copy, if that is okay. 15:28

6 584 Q. Yes.

7 A. I have it now.

8 585 Q. Could you first of all explain to the Tribunal how it
9 came about that you ended up drafting that email at
10 that time on the 15th May? 15:28

11 A. My memory is that after the first adjournment that
12 afternoon, during Chief Superintendent Rooney's
13 evidence, we all went back out into the consultation
14 room we had in the arbitration centre, and it was
15 suggested, but I can't remember whether it was by Chief 15:28
16 Superintendent Healy himself or by Ms. Ryan to me on
17 behalf of Chief Superintendent Healy, that he or the
18 Commissioner wanted our advices to date to be put in
19 writing.

20 586 Q. Okay. And the email has already been opened in detail 15:29
21 to the Tribunal, but if I could ask you this question
22 Mr. Byrne --

23 A. Sure.

24 587 Q. -- was it your understanding that you were getting
25 permission from the Commissioner to put to Sergeant 15:29
26 McCabe questions in relation to the aftermath of the D
27 investigation?

28 A. That's correct. And the "aftermath" being, I suppose,
29 the important word.

1 588 Q. And in relation to the word "motivation" that doesn't
2 appear in that email, and I don't know if you would
3 care to tell the Tribunal is there any particular
4 reason for that?

5 A. No, I think is the answer. I mean, Mr. MacNamee and I 15:29
6 sat down to put the advices in writing. My memory is
7 that he did a lot of the writing. I have a picture in
8 my head of his notepad with a lot of this written out
9 longhand, which the two of us had been working on
10 together, him writing it by hand, which I then 15:30
11 transcribed into an email. I'm not sure either of us
12 specifically discussed the word "motivation" or the
13 word "credibility" and there certainly was no
14 deliberate exclusion of either of those words, but this
15 is sort of the end result of those discussions. 15:30

16 589 Q. The finished product, so to speak?

17 A. Yes, yes.

18 590 Q. You emailed it then to Chief Superintendent Healy and
19 to Ms. Ryan, is that correct?

20 A. Yes, just as an intermediate step, I suppose, is that 15:30
21 having -- myself and Mr. MacNamee having drafted it, it
22 seems Mr. MacNamee doesn't remember this part of it,
23 but I did actually print it off because I wanted it to
24 be reviewed and settled by Mr. Smyth, and I was
25 conscious that I was putting his name on it so I didn't 15:30
26 want to send it without his express approval. So I
27 printed off what was the draft, the unsent draft.

28 591 Q. Yes.

29 A. Because obviously my desk was in the, you know the

1 Shanley room up in the Distillery Building, which is, I
2 mean, about 15 feet from where the Commission was
3 sitting, and I printed that off in one of the printers
4 in that room, took it over to Mr. Smyth, he read it and
5 approved it, and then I went back to my desk and sent 15:31
6 it.

7 592 Q. Okay. So there was a hard copy of that email available
8 on that afternoon?

9 A. There was at least one. I may have even printed some
10 time. I think I did print more than one copy of it, 15:31
11 because I was conscious that there was more than one
12 person who wanted to see it.

13 593 Q. Do you remember if you made a copy of it available to
14 Ms. Ryan in particular?

15 A. I think I probably gave them all to Ms. Ryan. I don't 15:31
16 think I gave it to Chief Superintendent Healy directly,
17 but maybe -- I'm not absolutely certain on that.

18 594 Q. And were you present when Chief Superintendent Healy
19 was making various phone calls to the Commissioner that
20 afternoon? 15:31

21 A. No, I wasn't. I think for a lot of them I would have
22 been off -- well, I'm not sure the time exactly works
23 in terms of this. And I suppose, actually, that's one
24 thing that did occur to me as we were going through all
25 the timing on this. We're looking at a lot of 15:32
26 different clocks, if you know what I mean.

27 595 Q. Yes.

28 A. So the 15:29 is on my computer, I think there is a note
29 in Chief Superintendent Healy's handwritten note where

1 he says 15:37 or something, that's probably his watch.
2 There's the times on Vodafone, or whatever, for the
3 Commissioner's phone calls and for Chief Superintendent
4 Healy's phone calls, so there may be -- and of course
5 the transcript has its own time. So everything might 15:32
6 be out by a couple of minutes here or there.

7 596 Q. Yes.
8 A. But roughly they must be within a few minutes of each
9 other. So I wasn't with Chief Superintendent Healy, I
10 think, for any of this, and partially because I was 15:32
11 over at my desk and partially also probably because I
12 just gave him privacy to have the conversation.

13 597 Q. Yes. Have you any specific memory of a hard copy of
14 that email being given to Chief Superintendent Healy?
15 A. No, I think, is the answer to that. I presume he did, 15:32
16 but I don't remember it being handed to him.

17 598 Q. If I can just turn then to the submissions which were
18 submitted --
19 A. Yes.

20 599 Q. -- at the end of Module 1, which appear at page 1439, 15:33
21 volume 2B of the materials.
22 A. I have those. Thank you.

23 600 Q. Yes. Now, they deal with the module itself and
24 evidence that was given, and then there is a section of
25 those submissions which appears beginning on page 1451, 15:34
26 which is headed "Other"?
27 A. Yes, I have those.

28 601 Q. Now, first of all in relation to the inclusion of that
29 section of the submissions, Mr. Justice O'Higgins made

1 a ruling at the end of day 3, as I understand it, which
2 said that the letter of the 18th wasn't admissible,
3 save insofar as to say that Sergeant McCabe had a
4 grievance with certain people, that grievance, be it
5 real or perceived? 15:34

6 A. Yes.

7 602 Q. Was any thought given to not including this section of
8 the submissions, in view of that ruling?

9 A. In view of that ruling, no. I mean, I think there was
10 a discussion as to whether they ought to be included in 15:34
11 the submissions of this module because we should
12 maybe -- by doing it separately from just the
13 submissions on this, and that was partly covered by the
14 fact or partly by reason of the fact that we knew that
15 Superintendent Cunningham hadn't given evidence -- oh, 15:35
16 sorry, he had given evidence, but he was due to give
17 more evidence on day 5, on the resumed first day of
18 what would be Module 2.

19 603 Q. Yes.

20 A. So we were conscious of that, that maybe that we didn't 15:35
21 have the finalised picture to be making submissions on
22 it. That was sort of one point.

23 604 Q. Yes.

24 A. But in terms of including it, I suppose the Judge had
25 said he was excluding it except in relation to 15:35
26 establishing there was a grievance.

27 605 Q. Yes.

28 A. And we knew that the superintendent was coming back to
29 give evidence in relation to those interactions, so it

1 completely off the table and therefore would be
2 appropriate to make submissions in relation to it.

3 611 Q. Now --

4 A. And, of course, if the Judge disagreed with me, he was
5 entirely free just to ignore that section of the
6 submissions. 15:37

7 612 Q. Yes. Now, in relation to the --

8 CHAIRMAN: Sorry, there's just one point there,
9 Ms. Leader, I'm sorry, I am going back and looking at
10 it again. I appreciate what you said about the Judge's 15:37
11 ruling, but he seemed to say -- well, he does say:

12
13 "So the contents of this document --"

14
15 Referring to the letter. 15:37

16
17 "-- are irrelevant for this module."

18
19 I don't know where were we in terms of the submissions?
20 Had Module 1 finished at that point? 15:37

21 A. No, I --

22 MS. LEADER: well, factually, sir, Superintendent
23 Cunningham was to return to give evidence in relation
24 to Module 1. These submissions were completed, as I
25 understand it, and filed -- 15:38

26 CHAIRMAN: On the 11th June.

27 MS. LEADER: -- on the 11th June. Superintendent
28 Cunningham was coming back on either the 22nd or 23rd
29 June, and you will see that these submissions relate to

1 Module 1.

2 CHAIRMAN: Yes. Okay. Well, thank you for that.

3 MS. LEADER: Yes.

4 CHAIRMAN: So it was the answer -- the question asked
5 and the answer given which was permitted by the Judge 15:38
6 then, seems to be the answer to that.

7 MS. LEADER: Yes.

8 CHAIRMAN: Okay.

9 613 Q. MS. LEADER: So if I can then continue in relation to
10 these submissions in relation to Module 1. They 15:38
11 contain the same, if I can put it,
12 mistake/misunderstanding that was contained in the
13 letter of the 18th May in relation to a complaint made
14 to Superintendent Clancy, which appeared as a complaint
15 made against Superintendent Clancy? 15:38

16 A. Exactly.

17 614 Q. Now, as you understood it, that was the state of the
18 evidence when these submissions were submitted, is that
19 correct?

20 A. Yes, subject just to the small caveat that you will see 15:39
21 part of the submissions are drafted in anticipation of
22 what Superintendent Cunningham's evidence would be --

23 615 Q. Yes.

24 A. -- rather than what it already had been. But other
25 than that, yes, I agree. 15:39

26 616 Q. And that appears at paragraph 70, at the bottom of page
27 1452, I think?

28 A. Exactly.

29 617 Q. Yes.

1 A. So it's written in the future tense there, "will give
2 evidence".

3 618 Q. "It is understood that Superintendent Cunningham and
4 Sergeant Martin will give evidence of what Sergeant
5 McCabe said at that meeting." 15:39

6 A. Exactly.

7 619 Q. It continues on in that way. Now, just to be very
8 clear in relation to Sergeant Martin, you had never
9 spoken to her, seen a statement from her, nor taken any
10 instructions from her? 15:39

11 A. No.

12 620 Q. Isn't that correct?

13 A. That's correct.

14 621 Q. Thank you. And any understanding that you had in
15 relation to what she may be saying was based on 15:39
16 something totally -- nothing she had said to you?

17 A. Nothing from her.

18 622 Q. From her?

19 A. Absolutely. I realise we're trespassing on another
20 issue. 15:40

21 623 Q. Yes.

22 A. But nothing from her.

23 624 Q. Yes. So in relation to these submissions, they turned
24 out to be factually incorrect, that's the case?

25 A. Absolutely. 15:40

26 625 Q. And that became clear on day 5?

27 A. On day 5, yes.

28 626 Q. On day 5. Now, was a transcript of Sergeant McCabe's
29 tape ever made available to you before day 5?

1 A. It was. I've seen it in your core book, and I can't
2 remember exactly where it is.

3 627 Q. Yes.

4 A. But there is a letter, I think, from Ms. Ryan to
5 Mr. O'Hagan, I think dated 17th June. 15:40

6 628 Q. I think my note of it is, if we go to volume -- I think
7 the 19th June was the day Ms. Ryan sent it to Chief
8 Superintendent Healy.

9 CHAIRMAN: Yes. And day 5 is the 24th June. Am I
10 right about that? 15:41

11 MS. LEADER: Yes.

12 CHAIRMAN: All right.

13 A. Sorry, Judge, yes.

14 629 Q. MS. LEADER: So volume 8, 4072.

15 A. There's even, which is probably even slightly more 15:41
16 helpful in that sense, is, I think there's something in
17 volume 1, of a letter from her to Mr. O'Hagan on, I
18 think, the 17th June --

19 630 Q. Yes.

20 A. -- asking for the transcript. 15:41

21 631 Q. Yes.

22 A. So obviously she couldn't have had it at that date.

23 632 Q. Yes.

24 A. So we received it some point thereafter. And if you
25 are saying there is an email to Chief Superintendent 15:41
26 Healy of the 19th --

27 633 Q. On the 19th.

28 A. -- she must have received it in between those two
29 dates.

1 634 Q. 4072, volume 8.
2 CHAIRMAN: Sorry, when did you say she was looking for
3 it?
4 A. She was looking for it, I think, in a letter dated 17th
5 June. 15:41
6 MS. LEADER: 17th.
7 CHAIRMAN: To Mr. O'Hagan?
8 A. To Mr. O'Hagan.
9 CHAIRMAN: Who is the solicitor to the tribunal.
10 A. Who is the solicitor to the Commission. 15:41
11 CHAIRMAN: To the Commission, yes.
12 MS. LEADER: And by the 19th June she had received it.
13 That's at page 4072 in volume 8.
14 A. I see that, yes, here on the screen.
15 635 Q. Yes. So the 19th June, and she sent it. It went to 15:41
16 Chief Superintendent Healy and Ms. Ryan from
17 Mr. O'Hagan, who was the solicitor to the Commission?
18 A. I see. So, in fact, that is an email from Mr. O'Hagan,
19 so that must be it.
20 636 Q. Yes. 15:42
21 A. Yes.
22 637 Q. So did you actually listen or look at the transcript
23 afterwards?
24 A. I did -- sorry, I didn't listen to it, we never got it
25 on the audio recording. 15:42
26 638 Q. Sorry, yes.
27 A. But I did read it. But I'm not sure if we read it in
28 advance of the 24th, in advance of day 5. My memory of
29 that is not entirely clear. Obviously I did read it at

1 some stage and I did compare it to Superintendent
2 Cunningham's note, but did we do it before the 24th or
3 on the 24th, I'm afraid I can't be clear on that.

4 639 Q. Prior to Mr. Justice O'Higgins pointing out the error
5 in paragraph 19 on the 24th June, was it apparent to 15:42
6 you that there was an error in that letter?

7 A. I don't think so.

8 640 Q. Yes.

9 A. I am trying to remember at what point we became aware
10 of the mistake or error, or however you want to 15:43
11 describe it. I honestly can't say exactly when we
12 became aware of it. I have a memory and I don't think
13 I'm trespassing on privilege to say I have a memory of
14 standing around discussing it in that room, in the
15 Commission room, which would suggest that we were all 15:43
16 there only because it was day 5.

17 641 Q. Yes. Okay. Was there any thought given to correcting
18 those submissions after the error became apparent,
19 which had to be, at the latest, on the 24th June?

20 A. Honestly, no. I mean, I think I'm sort of, in a sense, 15:43
21 thinking back and reconstructing what we were thinking,
22 but I think the simplest answer is that the matter
23 became clear in the back and forth with the Judge and
24 the transcript on that day, and we moved swiftly on to
25 the hearing of Module 2, Part 1 -- is it 2, Part 1, I 15:44
26 think is what we did first?

27 642 Q. Yes.

28 A. It just --

29 643 Q. Perhaps it was just one of those things?

1 A. It just slipped our minds. We just didn't do it. Now,
2 did I ever think about it afterwards, changing it? I
3 suppose the view -- again, I'm, to a certain extent,
4 putting thoughts back in my own head, but I suppose we
5 thought that the Judge had the point so why would we be 15:44
6 making alternative submissions to him on something he
7 already knew.

8 644 Q. If we can just turn to the overview submissions then.
9 They're at page 2897 of the materials.

10 A. What book is that, sorry, Ms. Leader? 15:44

11 645 Q. Volume 5.

12 A. I'm sorry, 2897, is that it?

13 646 Q. Yes, yes.

14 A. I have those yes.

15 647 Q. These are submissions which would appear to have been 15:45
16 completed on 1st February 2016 and they contain a
17 commentary on the motivation of Sergeant McCabe?

18 A. That's right. I can't remember whose idea it was but
19 if it was my idea obviously then that's that, but if it
20 was somebody else's idea it was something I certainly 15:45
21 very much agreed with, that in addition to making
22 submissions on the individual modules --

23 648 Q. Yes?

24 A. -- that the Judge had been making comments along the
25 way about general themes and also just as I a general 15:46
26 summing up ourselves it made sense to do a set of
27 submissions on what we perceived to be the overall
28 picture that had emerged from the individual modules,
29 which may not be immediately clear from reading

1 submissions on each individual module at the time.

2 649 Q. So, these were thematic submissions?

3 A. In a sense. I mean, you can see the things that we
4 wanted to cover. It's there on page 2897; the context,
5 summary of the evidence against the main members of the 15:46
6 An Garda Síochána who we were representing, some
7 general issues arising, then we just decided to include
8 a point about the motivation, and then the effect of
9 the allegations, and then we made submissions on what
10 we hoped we could persuade the Judge to put in as 15:46
11 findings in the report, and recommendations in the
12 report.

13 650 Q. Okay. And if we could just go to the commentary on the
14 motivation of Sergeant McCabe, obviously by very virtue
15 of the fact that these submissions, or this paragraph 15:47
16 is included in those submissions, there was no sense
17 that anybody was going outside instructions furnished
18 by the Commissioner of An Garda Síochána at that stage?

19 A. No, that's not the view that we had.

20 651 Q. Yes. You were very comfortable putting these in as 15:47
21 representing your instructions?

22 A. That's correct. I mean, I would have drafted them on
23 the understanding that they would have been checked
24 before they went in and approved either by her or
25 probably more likely on her behalf, but they were 15:47
26 drafted on that basis.

27 652 Q. And in relation to the evidential basis of this
28 particular section of the submissions, everybody was
29 happy that each paragraph of those submissions could be

1 stood over by reference to evidence, is that correct?

2 A. I think that is correct, yes.

3 653 Q. Yes. But the actual reference to the evidence wasn't
4 included in each of the paragraphs?

5 A. No. And maybe that might have been better if we had 15:48
6 done it that way, but we hadn't been doing specific
7 references to transcripts or to sections of transcripts
8 as we were going up to then, so we didn't. We
9 continued on with that approach again.

10 654 Q. Thanks very much. If you would answer any questions 15:48
11 anybody else might have.

12

13 THE WITNESS WAS THEN CROSS-EXAMINED BY MR. McDOWELL:

14 655 Q. MR. McDOWELL: Very briefly, Mr. Byrne. In relation to 15:48
15 the letter of the 18th May which is at page 771 of the
16 book.

17 A. Sorry, excuse me.

18 656 Q. It's book 2A, the first part.

19 A. Yes, I have it, Mr. McDowell.

20 657 Q. Apart from paragraph 19 I just want to ask you about 15:49
21 paragraph 16. It reads:

22

23 "Sergeant McCabe sought an appointment to see Chief
24 Superintendent Colm Rooney and this was facilitated in
25 June/July 2007. At the meeting Sergeant McCabe 15:49
26 expressed anger and annoyance towards the Director of
27 Public Prosecutions. He demanded that Chief
28 Superintendent Rooney communicate with the Director of
29 Public Prosecutions to seek a declaration of his

1 innocence from the Director of Public Prosecutions in
2 relation to the allegations."

3
4 Now obviously those instructions do not come from the
5 Commissioner, isn't that right? 15:49

6 A. I would imagine so.

7 658 Q. And could I just ask you then to go to book 2B, when
8 Superintendent Colm Rooney on day 4 -- we're at pages
9 1113 and 1114.

10 A. Yes, I have those. 15:50

11 659 Q. At page 1113 he was asked at question 48:

12
13 "Secondly, this is, Sergeant McCabe will say that at
14 the time he knew and he said this in evidence
15 yesterday, that he knew the substance of the DPP's 15:50
16 directions."

17
18 And Colm Rooney said:

19
20 "Yes, Judge, I accept that." 15:50

21
22 And he said:

23
24 "And he will say that the only issue that he complained
25 to you about was that this direction having been given 15:51
26 and he being aware of it and formally through the state
27 solicitor, though he never mentioned how he was aware
28 of it to you, that Superintendent Cunningham had sat on
29 it for three weeks.

1 A. No, definitely not, Judge. That is not what the
2 meeting was about.

3 Q. Was that mentioned at the meeting?"

4

5 The Judge asked him and he said:

15:51

6

7 "A. Sorry?"

8 Q. Was that mentioned at the meeting?"

9 A. No. Well, I have absolutely no recollection that
10 it was a complaint, if you like, from Sergeant McCabe
11 in relation to Inspector Cunningham, because if it was
12 his complaint I would certainly have acted on it by
13 issuing a written report to Inspector Cunningham to
14 sort the matter out."

15:51

15

16 And later then we go to, over the next two pages there
17 is a discussion about whether he did or he did not
18 express anger or annoyance towards DPP, and at question
19 53 he was asked:

15:51

20

21 "I've got to suggest to you (a) that he never expressed
22 annoyance or anger towards DPP and had no reason to."

23

24 And Chief Superintendent Rooney, retired said:

25

26 "No. He certainly didn't use those words to me, Judge.
27 Those were my interpretation of what Sergeant McCabe
28 was saying to me. From what he was saying I took it he
29 was angry with the Director of Public Prosecutions that

15:52

1 may not --"

2

3

And I said:

4

5

"Sorry, let's stop there for a second. We were given a 15:52

6

letter yesterday stating that he had sought a meeting

7

with you in June or July, which was facilitated, and it

8

can only be on the account that you gave to the Chief

9

State Solicitor's Office: 'At the meeting Sergeant

10

McCabe expressed anger and annoyance towards the 15:52

11

Director of Public Prosecutions.' Now neither that is

12

true or it's not true, is it true?"

13

14

And what he answered, he said:

15

15:52

16

"What I said, Judge, is that he did not use those words

17

to me. It was my interpretation of the form of the

18

conversation that he appeared to me to be annoyed with

19

the Director of Public Prosecutions. That was my

20

interpretation of what was coming across to me. That 15:52

21

may or may not be what Sergeant McCabe actually meant."

22

23

And Mr. Justice O'Higgins said:

24

25

"Forget about what words he used. Did he express anger 15:53

26

and annoyance at the DPP or did you just infer that he

27

was angry?

28

A. I would have inferred rather than he actually said

29

it, Judge."

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Do you remember that?

A. I do.

660 Q. So there is that letter within 24 hours of its final approval by Chief Superintendent Rooney being resiled from?

15:53

A. Em, I'm not sure if it is being resiled from.

CHAIRMAN: I think the point that is being said Mr. Byrne is this: That we know the DPP has a policy, indeed there is a document there, and I think it changes sometimes, there's a new version of it, and vis-à-vis victims, victims charters, all the rest of it, I know there is a pilot scheme now, but it was always the case that people who said they were the victims of crime were told we're not prosecuting because of insufficient evidence and that was it.

15:53

There was no reasons given. Now obviously what I am inferring is that the Garda authority said, look, as much as we can do, that's what we told you, to Sergeant McCabe, you may know more in consequence of what the state solicitor told you on ringing you up, we haven't got a problem with that, but we can't do any more vis-à-vis Ms. D. That is what I understood. Now, I don't think there was ever any evidence, certainly I haven't heard it so far, that Sergeant McCabe asked that somebody write to the DPP and get him to change his policy or that the DPP had been written to, refused to change its policy and that Sergeant McCabe was angry in consequence of that. I don't think that's there

15:53

15:54

15:54

1 anywhere. That is what you are being asked about
2 essentially.

3 A. Yes. Now I mean, in terms of the very specific
4 question about resiling from, I mean I'm not sure
5 whether it was described as Chief Superintendent Rooney 15:54
6 inferring anger from Sergeant McCabe in relation to the
7 DPP or stating that he said that he was angry about it.
8 I'm not sure the letter of the 18th actually says that.
9 But in a more general sense, I think the point about
10 Sergeant McCabe being aware of the details of the DPP's 15:55
11 directions by having had it read to him I think only
12 became known to anybody but Sergeant McCabe during the
13 Commission when he said it in his evidence. So it may
14 be that people's understanding of the conversations
15 they had with Sergeant McCabe in relation to the DPP, 15:55
16 in relation to the DPP's directions, would have been
17 influenced by the fact that they didn't really he knew
18 the full directions.

19 CHAIRMAN: Yes, maybe not. We're speculating a bit.

20 A. I certainly am, yes. 15:55

21 CHAIRMAN: Mr. McDowell, I take the point that there is
22 a contrast between the submission on 18th and that
23 particular evidence.

24 MR. MCDOWELL: And the evidence on the 19th.

25 CHAIRMAN: Yes, I take the point. Where I go with that 15:55
26 is a different matter.

27 MR. MCDOWELL: It is indeed.

28 661 Q. Just on one other topic, Mr. Byrne: The last witness
29 said that he didn't read any of the Byrne/McGinn report

1 and kept it sealed up and sent back, and the witness
2 before him, Mr. Smyth said that he hadn't read the
3 passage that was circulated by your solicitor, was it
4 your idea to circulate this passage?

5 A. It was. Or at least rather I discussed it with my 15:56
6 lawyers as to whether it would be appropriate to do it.
7 What had happened in the background to that is that at
8 some point I think either during or after Module 2 I
9 was conscious of the fact that we were getting excerpts
10 from the Byrne/McGinn report and people were talking 15:56
11 about it in general terms and I didn't have it. So I
12 asked Ms. Ryan for a copy of the Byrne/McGinn report.
13 And she provided it to me on that request. So that
14 would have been probably some time in July. It may
15 have been September. But probably some time in July. 15:56
16 And I'm not sure if I then actually spent a lot of time
17 looking at it. I do remember looking at the bit, the
18 second page in it, which is included, the one behind
19 the cover page in relation to the finding, the summary
20 finding in relation to Superintendent Clancy, now Chief 15:57
21 Superintendent Clancy, and the question of malice. I'm
22 not sure how much further I went into it in terms of
23 the preface. But the reason I asked, or discussed it
24 with my legal team for the last day or two, was because
25 you had been asking questions in relation to the 15:57
26 motivation --

27 CHAIRMAN: You realise you don't have to tell us any of
28 it.

29 A. I'm aware of that detail.

1 CHAIRMAN: Yes.

2 A. But just I think it is relevant just to say that the
3 reason I felt it was important or useful to have it
4 before the Tribunal was because you have been asking
5 questions in relation to the motivation submissions, 15:57
6 which being in the overview submissions, so I was
7 conscious that that was -- the primary basis of me
8 drafting that was that section of the Byrne/McGinn
9 report. I think also circulated with that section of
10 the Byrne/McGinn report was an excerpt from the 15:58
11 evidence, is it day 31 or 32, of Assistant Commissioner
12 Derek Byrne, where he had referred to that. So there
13 is a back and forth where he discusses his view on the
14 motivation issue with I think it was Mr. Gillane who
15 was asking him questions and Mr. Justice O'Higgins 15:58
16 asked him some questions on top of that as well. If
17 you remember at the end of that day Mr. Justice
18 O'Higgins decided not to circulate the transcript for
19 that day, so we didn't actually have a transcript at
20 the time. But I knew that Assistant Commissioner Byrne 15:58
21 had said effectively this is all in the Byrne/McGinn
22 report, I think you will see from the transcript, he
23 says at page ix or page 9. So I knew that was there
24 and that was the basis for me using that to draft a lot
25 of the section of those submissions. 15:59

26 CHAIRMAN: So you looked at it, but you seem to be the
27 only one that looked at it.

28 A. That does seem to be the case. I'm not sure I would
29 have discussed it with -- I'm sorry, I didn't discuss

1 it with Mr. Smyth or Mr. MacNamee.

2 662 Q. MR. MCDOWELL: Could I ask you to look at page 4848?

3 A. Do you know where that would be, Mr. McDowell?

4 MS. LEADER: Volume 9.

5 663 Q. MR. MCDOWELL: It's in volume 9 I think. I think there 15:59

6 are a number of bullet-points on that, this is before

7 we get to the background to Sergeant Maurice McCabe

8 bit.

9 A. I'm sorry, Mr. McDowell, say that again.

10 664 Q. This seems to be part of the foreword to the report 15:59

11 which --

12 A. Yes.

13 665 Q. -- precedes the background to Sergeant Maurice McCabe

14 which has already been discussed today.

15 A. Yes. 16:00

16 666 Q. The first bullet-point deals with a recommendation that

17 there should be a professional standards review of

18 Bailieboro Garda Station, isn't that right?

19 A. That's correct.

20 667 Q. And then there's a paragraph on motivation and I just 16:00

21 want -- this is Superintendent Byrne's summation:

22

23 "Serjeant McCabe as the confidential reporter has made

24 a significant effort to malign and impugn the character

25 and professionalism of Superintendent Michael Clancy, 16:00

26 which efforts are not substantiated by the outcome of

27 this investigation. The evidence available to this

28 investigation is significantly weighted in favour of

29 Superintendent Clancy who is found to be a very

1 honourable, effective and experienced district officer,
2 who is very professional in the discharge of his
3 functions. It is not definitively established why
4 Sergeant McCabe made this personal attack on
5 Superintendent Clancy and no mala fides is established. 16:00
6 In this regard it is appropriate that both
7 Superintendent Clancy and Sergeant McCabe be advised of
8 the findings in the investigation."
9
10 was that relevant to your view on how you draft the 16:01
11 final submission?
12 A. Absolutely. Because of the fact that they say no mala
13 fides.
14 668 Q. Could I ask you one final question, and maybe it's the
15 €64,000 question, Mr. Byrne: Motives, someone can do 16:01
16 something motivated in bad faith, someone can do
17 something bona fide, acting in good faith --
18 A. Yes.
19 669 Q. -- is it too binary to say that when you are motivated
20 to do something you are doing it either in good faith 16:01
21 or bad faith?
22 A. That's probably a philosophical question that is above
23 my pay grade.
24 670 Q. I don't want to trap you too quickly.
25 A. But. 16:01
26 671 Q. What I am really putting to you is this: That, if no
27 mala fides were established was that an acceptance that
28 he was acting bona fide?
29 A. Em, I think that's probably a matter for Assistant

1 Commissioner Byrne --

2 672 Q. well, you were --

3 A. -- in terms of his view.

4 673 Q. You were relying on this page, I assume, and this
5 paragraph to assist you with your submission? 16:02

6 A. Yes. But I was going to say, in terms of my view on
7 it, I felt that there was in the most neutral sense an
8 ulterior motive maybe, if you might put it like that,
9 in terms of what we felt at the time, but that that was
10 not a malign ulterior motive, if you know what I mean. 16:02

11 So I think that would put it in the category of good
12 faith or certainly not bad faith.

13 674 Q. well, I follow your point, that neither being malign
14 nor benign it was ulterior, is that the issue that you
15 were concerned with? 16:02

16 A. Yes, that there were other considerations in his mind.

17 675 Q. Yes. And were they to --

18 A. Or rather his mind was affected by other considerations
19 maybe.

20 676 Q. And were they to force a decision on the D -- revealing 16:03
21 the D reasoning to --

22 A. Oh, by this stage, absolutely not. No.

23 677 Q. I see.

24 A. By the time you get to the later submissions obviously,
25 I mean after day 5, after 24th June, the question of 16:03
26 forcing anything in relation to the D investigation.

27 678 Q. That was abandoned?

28 A. We accepted that was not the case, yes.

29 679 Q. So you were searching for some hidden ulterior motive

1 is that right? Perhaps hidden is the wrong term.
2 unclear ulterior motive, is that right?

3 A. I wouldn't put it in those terms at all. I think there
4 was, as Mr. Smyth put into his advices in July, it was
5 relatively clear that there was some degree of a 16:03
6 grievance or an attitude that Sergeant McCabe had
7 against particularly Superintendent Clancy and to a
8 lesser extent Superintendent Cunningham and that that
9 was affecting his view of those two men and that needed
10 to be taken into account or needed to be put in its 16:04
11 proper context. That was about it.

12 680 Q. To go back to a word that Mr. Smyth used, and I
13 understand from the Chairman that there may be a
14 technical meaning of which I am unaware, would the word
15 animus be what you had in your mind? 16:04

16 A. No. The very word animus, no. And the idea that he
17 had kind of a deliberate negative intention against
18 them, I don't think so. In fact, I don't believe so.
19 My sense of it -- and again, we're now getting into
20 sort of my subjective view rather than what our 16:04
21 instructions were, but my subjective view of it was
22 that in the circumstances where Sergeant McCabe had
23 found himself in this very stressful situation,
24 etcetera, etcetera, had taken an unnecessarily negative
25 view of the two officers and that had affected his 16:05
26 judgment in relation to the allegations he was making
27 against them.

28 681 Q. Thank you.

29 A. Thank you.

1

2

THE WITNESS WAS THEN CROSS-EXAMINED BY MR. DIGNAM:

3

682 Q. MR. DIGNAM: Mr. Byrne, I just have two or three very
4 brief questions. Firstly, just in relation to that
5 paragraph that Mr. McDowell has just read out to you,
6 the Chairman has this point, but is it correct to say
7 that Superintendent Clancy, there were in fact no
8 findings of corruption or malpractice against him in
9 the O'Higgins report?

16:05

10

A. Absolutely. And you can probably nearly go even
11 further to say that he was very much vindicated by the
12 report.

16:05

11

12

13

683 Q. Turning to paragraph 70 of the submissions that were
14 opened to you on page 1439, paragraph 70 is on page
15 1452.

16:05

16

A. Yes, sorry, Mr. Dignam.

17

684 Q. If I can draw your attention to the final sentence in
18 paragraph 70:

19

20

"This is recorded in a report of the meeting prepared
21 jointly by Sergeant Martin and Superintendent
22 Cunningham."

16:06

23

A. Yes.

24

685 Q. Do you recall what document you were referring to, the
25 team rather was referring to in that paragraph?

16:06

26

A. In a sense I was referring to the letter of the 18th of
27 May, in that I don't think I had those documents in
28 front of me when I was writing that submission. But in
29 a more general sense I would have been referring to

1 Superintendent Cunningham's report of, I think it was,
2 12th May September 2008 of that meeting.

3 686 Q. And do you recall having that report of the 12th
4 September 2008 before you wrote these, before these
5 submissions were written by the legal team? 16:06

6 A. I don't know if I physically had it, but I have to
7 accept that it would have been available to me if I had
8 asked for it.

9 687 Q. Thank you.

10 16:07

11 THE WITNESS WAS THEN EXAMINED BY MR. SREENAN:

12 688 Q. MR. SREENAN: Mr. Byrne, just one matter. You refer to
13 the Byrne/McGinn report and the extent to which you
14 relied on it, because I think you said day 32
15 transcript had not been circulated, but Assistant 16:07
16 Commissioner Derek Byrne had given evidence to that
17 effect and referred to his report, is that so?

18 A. That's correct.

19 689 Q. And I don't think the transcript itself is in the core
20 book but the reference I think is on day 32, starting 16:07
21 on page 147, going to page 152, and Assistant
22 Commissioner Byrne is there being examined by
23 Mr. Gillane and Judge O'Higgins is recorded as
24 expressing interest in what Assistant Commissioner
25 Byrne is saying? 16:07

26 A. That's correct.

27 690 Q. And it was left that these matters were dealt with in
28 his report and Judge O'Higgins indicated that they had
29 the report?

1 A. That is right, and that he didn't need to be referred
2 to it specifically.

3 691 Q. Thank you.

4

5 THE WITNESS WAS THEN RE-EXAMINED BY MS. LEADER:

16:08

6 692 Q. MS. LEADER: Just to clear that up. I think the
7 transcript of Assistant Commissioner Byrne's evidence
8 appears at page 4852 of the materials and at 4853 --
9 which is in volume 9, Mr. Byrne, volume 9?

10 A. Yes. Yes, Ms. Leader, I have it now.

16:08

11 693 Q. -- assistant commissioner Byrne referred directly to
12 the paragraph at number 9 of his report, is that
13 correct?

14 A. Yes.

15 694 Q. It is at line 13 of the transcript.

16:08

16 A. That's right. And I think does he say further on,
17 maybe, that --

18 695 Q. Yes.

19 A. -- to the Judge effectively that's there and it's
20 available.

16:09

21 696 Q. So, he directly refers to it. And it turned out that
22 that transcript wasn't available to you when you were
23 drafting submissions, but you did have an actual copy
24 of what Assistant Commissioner Byrne had referred to in
25 his evidence?

16:09

26 A. That's right.

27 697 Q. And it is in those circumstances that you referred back
28 to it?

29 A. Yes. Just, it seemed to me that given that I was

1 likely to be asked about the motivation submissions
2 that in fairness to everybody that they should have
3 that basis of it in advance.

4 698 Q. Thank you very much, Mr. Byrne.

5 A. Thank you.

16:09

6
7 THE WITNESS THEN WITHDREW

8
9 CHAIRMAN: We might go off transcript now. Thank you
10 very much, Ms. Kelly.

16:09

11
12 THE HEARING THEN ADJOURNED UNTIL MONDAY, 29TH JANUARY
13 2018 AT 10:00AM

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23
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26
27
28
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'**08** [1] - 150:21
'**at** [1] - 202:9
'**Prime** [1] - 117:27
'**Superintendent** [1] - 97:7

1

1 [18] - 56:15, 56:20, 58:23, 58:24, 122:17, 122:18, 123:20, 149:4, 149:13, 163:25, 188:20, 191:20, 191:24, 192:1, 192:10, 194:17, 196:25
1(a) [2] - 58:25, 58:29
10 [4] - 88:5, 102:13, 102:15, 134:20
100 [1] - 5:28
10:00AM [1] - 214:13
11 [1] - 106:9
111 [1] - 4:8
1113 [2] - 200:9, 200:11
1114 [1] - 200:9
118 [1] - 4:11
11th [7] - 6:21, 95:11, 172:23, 173:3, 176:1, 191:26, 191:27
12 [1] - 134:20
120 [1] - 61:24
12th [4] - 53:9, 54:25, 212:2, 212:3
13 [4] - 109:20, 179:23, 180:21, 213:15
13th [2] - 126:5, 127:4
13th/14th [1] - 52:6
14 [3] - 2:25, 61:27, 77:29
1400 [1] - 159:8
1439 [2] - 188:20, 211:14
1451 [1] - 188:25
1452 [2] - 192:27, 211:15
1465 [1] - 94:18
147 [1] - 212:21
1493 [1] - 95:16
14:00 [1] - 50:28
14th [1] - 127:26
15 [4] - 86:5, 104:1, 170:20, 187:2
152 [1] - 212:21

153 [1] - 58:21
158 [1] - 4:12
15:00 [2] - 50:27, 50:28
15:10 [1] - 69:12
15:23 [1] - 50:1
15:29 [3] - 137:6, 137:9, 187:28
15:30 [1] - 51:1
15:37 [1] - 188:1
15:39 [1] - 69:15
15th [10] - 49:21, 63:5, 101:3, 115:13, 134:25, 159:2, 159:3, 165:14, 185:2, 185:10
16 [3] - 1:6, 86:27, 199:21
162 [5] - 56:16, 56:22, 57:7, 57:10
165 [1] - 56:17
168 [1] - 101:20
16:10 [1] - 80:24
16:13 [1] - 50:1
17 [4] - 1:10, 73:18, 90:12, 94:22
177 [1] - 4:13
17th [4] - 194:5, 194:18, 195:4, 195:6
18 [3] - 33:3, 69:29, 88:13
184 [1] - 4:16
18th [23] - 5:8, 52:15, 52:25, 53:5, 55:3, 55:26, 82:7, 84:21, 84:28, 85:1, 95:13, 115:13, 150:14, 166:8, 167:9, 170:23, 171:2, 189:2, 192:13, 199:15, 204:8, 204:22, 211:26
19 [10] - 31:17, 31:18, 53:6, 62:26, 82:16, 94:21, 144:24, 175:29, 196:5, 199:20
1921 [1] - 1:10
1944 [1] - 101:14
199 [1] - 4:17
19th [7] - 7:12, 194:7, 194:26, 194:27, 195:12, 195:15, 204:24
1B [1] - 158:28
1st [2] - 102:18, 197:16

2

2 [11] - 3:7, 48:21, 63:6, 91:8, 156:8,

165:14, 174:1, 189:18, 196:25, 205:8
20 [3] - 78:23, 95:16, 104:1
2004 [1] - 14:12
2005 [1] - 123:26
2006 [4] - 54:4, 64:4, 64:10, 184:16
2007 [6] - 58:2, 64:11, 64:12, 64:13, 109:1, 199:25
2008 [23] - 16:21, 18:18, 33:24, 52:26, 53:9, 53:16, 53:24, 54:25, 66:19, 67:11, 78:29, 83:8, 83:18, 83:27, 84:9, 86:17, 91:12, 91:22, 140:21, 151:19, 181:20, 212:2, 212:4
2012 [2] - 104:25
2014 [2] - 1:4, 123:2
2015 [15] - 17:3, 49:21, 53:5, 63:5, 84:22, 94:20, 95:6, 95:12, 96:12, 101:3, 118:23, 123:26, 150:15, 179:17, 185:3
2016 [1] - 197:16
2017 [2] - 1:6, 1:10
2018 [3] - 1:18, 5:1, 214:13
2024 [1] - 96:11
21 [4] - 31:27, 80:10, 89:20, 104:18
211 [1] - 4:18
212 [1] - 4:19
213 [1] - 4:20
22 [2] - 50:29, 89:1
22nd [3] - 103:27, 118:17, 191:28
23 [1] - 71:5
23rd [2] - 104:25, 191:28
24 [2] - 85:9, 203:4
24th [21] - 7:4, 7:17, 8:22, 17:2, 56:6, 56:7, 94:20, 95:6, 149:17, 149:20, 149:21, 168:18, 170:16, 171:10, 194:9, 195:28, 196:2, 196:3, 196:5, 196:19, 209:25
252 [1] - 30:7
2568 [1] - 103:19
2569 [2] - 103:23, 104:10
25th [16] - 16:21, 18:20, 53:14, 53:23, 58:2, 66:19, 82:22,

83:8, 83:22, 83:25, 84:8, 86:19, 91:22, 140:21, 150:20, 151:19
26 [1] - 56:21
26th [1] - 91:12
26TH [2] - 1:18, 5:1
27 [3] - 86:13, 103:19, 103:20
2759 [3] - 30:16, 30:17, 30:24
276 [1] - 70:25
2765 [2] - 31:12, 31:16
2766 [2] - 31:12, 31:27
2769 [1] - 32:26
2770 [2] - 30:13, 32:26
28 [2] - 74:6, 117:20
2897 [3] - 197:9, 197:12, 198:4
28th [7] - 82:21, 82:23, 83:17, 83:26, 86:16, 87:14, 95:23
29 [6] - 3:7, 74:25, 153:25, 154:1, 155:20, 156:9
290 [1] - 134:19
29TH [1] - 214:12
2A [1] - 199:18
2B [2] - 188:21, 200:7

3

3 [11] - 48:21, 70:2, 89:20, 107:7, 117:20, 156:8, 174:1, 189:1, 190:12, 190:15
3.4 [1] - 110:24
3.5 [2] - 108:26, 110:18
3.6 [1] - 108:26
3.9 [1] - 110:3
31 [4] - 29:25, 29:26, 30:6, 206:11
314 [1] - 62:27
32 [4] - 2:12, 206:11, 212:14, 212:20
3323 [1] - 118:11
3389 [1] - 50:21
3508 [2] - 106:1, 179:14

4

4 [8] - 15:22, 30:13,

30:14, 30:15, 70:8, 71:9, 190:24, 200:8
40 [1] - 164:6
4072 [3] - 194:14, 195:1, 195:13
43 [1] - 52:23
4370 [1] - 108:24
4739 [2] - 59:13, 60:9
48 [2] - 165:29, 200:11
4847 [1] - 12:2
4848 [1] - 207:2
4849 [2] - 12:1, 14:1
4852 [1] - 213:8
4853 [1] - 213:8
49 [2] - 1:18, 4:5
4th [8] - 18:18, 41:5, 41:6, 45:24, 48:17, 56:2, 103:21, 179:17

5

5 [16] - 4:4, 81:14, 94:21, 134:18, 153:29, 156:9, 189:17, 193:26, 193:27, 193:28, 193:29, 194:9, 195:28, 196:16, 197:11, 209:25
50 [1] - 164:6
52 [1] - 4:6
53 [1] - 201:19
58 [2] - 4:7, 52:23

6

6 [1] - 75:2
663 [1] - 63:6
671 [1] - 69:13
673 [1] - 70:2
675 [1] - 70:7
676 [1] - 71:5
677 [2] - 71:4, 71:9
678 [1] - 74:26
681 [2] - 76:22, 76:24
682 [2] - 76:21, 76:25
683 [1] - 77:28
685 [1] - 78:22
687 [1] - 79:20
689 [1] - 185:3
694 [1] - 158:26
695 [1] - 81:1
6th [1] - 96:11

7

7 [3] - 2:13, 91:23,

105:29
70 [5] - 61:25,
192:26, 211:13,
211:14, 211:18
733 [3] - 91:23, 92:9,
94:7
762 [3] - 178:2, 178:5
771 [2] - 53:4, 199:15
776 [4] - 53:7, 54:28,
54:29, 55:8
787 [1] - 63:21
797 [1] - 84:26

8

8 [7] - 2:20, 3:16,
70:25, 108:25,
194:14, 195:1, 195:13
80 [1] - 61:26
800 [1] - 87:23
8th [2] - 30:18, 30:19

9

9 [9] - 12:2, 71:13,
206:23, 207:4, 207:5,
213:9, 213:12
9.45pm [1] - 178:6
977 [1] - 89:19
978 [1] - 90:12
979 [2] - 91:1, 91:7
9:45 [1] - 166:16

A

abandoned [1] -
209:27
abeyance [3] -
130:23, 145:22, 154:3
abide [1] - 44:19
abided [2] - 15:12,
45:21
able [3] - 126:22,
130:3, 144:6
above-named [1] -
1:27
absence [1] - 151:1
absent [2] - 142:14,
164:27
absolute [1] - 174:18
absolutely [4] -
5:23, 5:27, 15:8,
42:11, 44:11, 48:3,
49:12, 51:17, 52:11,
52:14, 52:20, 54:13,
59:27, 67:22, 67:25,
67:27, 68:8, 68:9,
81:10, 92:4, 92:13,

94:11, 94:17, 100:4,
101:5, 101:12, 107:2,
111:3, 114:6, 121:28,
155:24, 166:18,
169:6, 182:17,
187:17, 193:19,
193:25, 201:9,
208:12, 209:22,
211:10
abuse [2] - 109:6,
109:10
accept [22] - 5:17,
9:8, 11:4, 11:6, 11:11,
20:3, 20:11, 22:9,
29:20, 36:21, 44:9,
46:27, 51:2, 92:14,
98:26, 100:4, 100:16,
132:3, 168:12,
200:20, 212:7
acceptance [1] -
208:27
accepted [4] - 26:8,
95:15, 133:16, 209:28
accepts [2] - 42:25,
69:29
access [11] - 13:7,
13:8, 20:22, 20:28,
65:27, 65:29, 66:17,
101:27, 102:26,
124:19, 137:14
accordance [3] -
5:29, 14:18, 138:7
accorded [1] - 55:22
according [1] -
107:12
account [3] - 171:28,
202:8, 210:10
accuracy [2] - 72:24,
150:17
accurate [5] -
100:22, 100:23,
117:24, 147:9, 178:17
accurately [1] -
78:16
accusation [5] -
176:16, 176:23,
176:25, 176:27,
176:29
accused [6] - 24:7,
29:14, 32:18, 112:12,
130:23
accuser [2] - 134:7,
134:11
accusing [3] - 23:25,
135:15, 177:3
ACT [2] - 1:4, 1:9
act [9] - 9:11, 9:12,
32:23, 44:17, 79:1,
119:27, 119:29,
129:11, 130:11

acted [7] - 7:29, 8:1,
42:23, 73:3, 81:18,
129:7, 201:12
acting [14] - 42:28,
43:2, 46:28, 46:29,
107:1, 120:27,
121:11, 156:11,
158:15, 176:16,
176:18, 208:17,
208:28
action [3] - 1:28,
17:7, 134:2
actions [2] - 75:13,
129:4
active [1] - 166:28
acts [1] - 182:23
actual [6] - 30:8,
55:11, 154:8, 157:12,
199:3, 213:23
addition [5] - 55:29,
119:9, 120:7, 150:18,
197:21
address [6] - 35:10,
49:19, 66:29, 67:1,
176:20, 177:9
addressed [1] - 59:9
addressing [4] -
35:7, 72:20, 76:25,
155:28
adds [1] - 71:1
adequacy [1] - 69:28
ADJOURNED [2] -
115:28, 214:12
adjourned [1] -
136:6
adjournment [5] -
69:12, 135:25,
136:22, 160:12,
185:11
adjournments [2] -
135:25, 136:25
admissible [2] -
144:29, 189:2
admitted [1] - 178:20
adopt [2] - 52:12,
99:26
advance [10] -
122:16, 122:17,
130:21, 150:10,
154:22, 164:4,
195:28, 214:3
advanced [1] - 31:12
adversarial [1] -
72:17
adverse [2] - 42:17
advice [6] - 136:21,
152:15, 152:21,
153:2, 153:4, 170:5
advice [6] - 136:3,
138:7, 139:10,

185:18, 186:6, 210:4
advise [2] - 126:23,
126:25
advised [5] - 91:25,
114:22, 138:6,
163:13, 208:7
advisedly [1] - 84:3
advisers [1] - 70:12
advising [2] - 52:8,
159:17
advocacy [1] - 42:12
advocate [1] - 99:10
advocated [1] -
153:21
affected [2] - 209:18,
210:25
affecting [1] - 210:9
afraid [2] - 15:4,
196:3
AFTER [1] - 117:1
aftermath [2] -
185:26, 185:28
afternoon [17] - 12:5,
49:21, 50:27, 135:29,
136:1, 136:27, 138:5,
138:25, 141:1,
158:23, 158:24,
161:7, 184:13,
184:21, 185:12,
187:8, 187:20
afterwards [3] -
24:12, 195:23, 197:2
agree [18] - 9:1, 20:7,
20:9, 33:16, 33:25,
33:27, 40:10, 90:23,
123:2, 138:19,
147:16, 167:8,
175:27, 176:4,
176:18, 177:1, 177:2,
192:25
agreed [6] - 5:19,
5:20, 20:8, 91:21,
127:8, 197:21
agreeing [2] -
123:16, 172:13
agreement [4] - 93:3,
93:5, 93:9, 184:1
AGSI [1] - 120:6
ahead [1] - 156:25
alert [1] - 62:15
alerted [1] - 8:4
alia [1] - 149:15
allegation [26] -
6:23, 6:24, 17:22,
18:7, 19:2, 31:12,
41:15, 47:1, 47:4,
61:18, 67:21, 87:14,
97:23, 97:27, 98:2,
101:23, 101:25,
102:22, 102:24,

102:27, 103:15,
109:11, 109:13,
109:28, 113:5, 114:21
allegations [59] -
14:6, 35:9, 38:23,
41:9, 41:11, 41:13,
41:14, 42:1, 43:9,
44:3, 44:21, 44:24,
45:21, 53:23, 53:25,
54:4, 54:7, 60:1,
65:28, 74:20, 74:28,
75:16, 82:1, 82:2,
83:11, 86:9, 87:5,
87:6, 87:10, 87:16,
96:24, 97:29, 100:15,
101:16, 108:21,
109:9, 109:28,
110:15, 112:22,
119:24, 126:24,
126:26, 130:5,
132:22, 134:14,
147:20, 147:21,
147:28, 175:3, 175:4,
176:25, 177:13,
198:9, 200:2, 210:26
alleged [1] - 178:20
allegedly [1] - 183:3
alleges [3] - 15:24,
15:27, 16:6
allocations [1] - 34:1
allow [8] - 11:27,
38:7, 88:1, 88:26,
89:13, 91:28, 92:11,
177:8
allowances [1] -
16:1
allowed [8] - 15:28,
16:1, 129:17, 131:2,
154:25, 164:8,
175:12, 190:17
almost [1] - 121:3
alpha [1] - 126:15
alphabet [1] - 126:15
alternative [1] -
197:6
alternatively [1] -
7:26
ambiguity [1] - 93:27
ambivalent [1] -
42:22
amendments [1] -
179:4
amount [4] - 17:29,
61:6, 176:18, 176:19
analysing [1] - 81:4
AND [3] - 1:4, 1:5,
1:9
anger [6] - 199:26,
201:18, 201:22,
202:10, 202:25, 204:6

ANGLESEA^[1] - 3:7
angrily^[1] - 161:17
angry^[7] - 64:2,
64:5, 162:15, 201:29,
202:27, 203:28, 204:7
animus^[2] - 210:15,
210:16
animus^[1] - 99:27
ankle^[1] - 172:16
Annmarie^[14] -
96:15, 115:5, 115:14,
118:24, 124:13,
137:15, 137:23,
142:29, 150:18,
151:2, 151:3, 164:18,
165:10, 178:8
annoyance^[5] -
199:26, 201:18,
201:22, 202:10,
202:26
annoyed^[2] - 64:2,
202:18
answer^[23] - 12:25,
25:26, 25:27, 42:3,
59:15, 59:19, 63:25,
76:14, 92:2, 103:4,
113:8, 125:14,
127:14, 157:4,
170:27, 174:12,
186:5, 188:15, 192:4,
192:5, 192:6, 196:22,
199:10
answered^[1] -
202:14
answering^[1] - 84:6
answers^[3] - 48:29,
68:27, 146:26
anticipate^[2] - 80:3,
155:13
anticipated^[6] -
46:8, 46:12, 48:5,
131:24, 152:22
anticipating^[2] -
47:10, 131:21
anticipation^[3] -
80:7, 80:9, 192:21
anxious^[4] - 123:12,
125:10, 126:25,
145:14
anyway^[4] - 63:19,
75:29, 177:21, 184:1
apart^[1] - 199:20
apologise^[1] -
117:29
apologised^[2] - 9:6,
107:19
apology^[3] - 101:29,
117:5
apparent^[7] - 8:20,
126:7, 126:11,
168:19, 175:19,
196:5, 196:18
appear^[9] - 85:5,
94:24, 95:24, 123:18,
145:20, 163:7, 186:2,
188:20, 197:15
appearance^[1] -
152:1
APPEARANCES^[1] -
2:1
appeared^[4] - 6:15,
132:26, 192:14,
202:18
appearing^[3] - 6:14,
11:26, 99:10
appendix^[1] - 16:24
application^[1] -
71:21
applied^[1] - 156:5
applies^[1] - 174:15
appointed^[3] - 16:2,
94:25, 119:7
appointment^[4] -
15:25, 63:28, 64:1,
199:23
appreciate^[15] -
9:24, 11:9, 11:12,
13:6, 19:21, 23:8,
74:9, 76:5, 81:1,
82:10, 99:10, 108:6,
111:20, 183:6, 191:10
apprehend^[1] -
69:19
apprehensive^[2] -
174:2, 174:6
apprised^[1] - 73:7
approach^[4] - 41:18,
164:10, 170:25, 199:9
approached^[4] -
24:2, 131:8, 156:1,
162:11
approaching^[1] -
122:6
appropriate^[9] -
121:11, 139:4,
141:10, 148:5,
175:18, 190:1, 191:2,
205:6, 208:6
approval^[7] -
129:10, 135:2, 135:4,
158:11, 159:27,
186:26, 203:5
approve^[1] - 55:19
approved^[10] -
55:19, 157:11,
157:23, 157:24,
157:25, 157:26,
157:27, 158:4, 187:5,
198:24
April^[1] - 118:23
arbitration^[1] -
185:14
Archdiocese^[1] -
163:19
area^[7] - 15:15,
27:23, 36:26, 39:14,
118:18, 159:18,
167:24
areas^[4] - 35:2,
52:2, 65:19, 164:24
argument^[7] - 74:6,
76:14, 77:28, 87:20,
91:2, 91:3, 138:23
argumentative^[1] -
9:16
arise^[12] - 48:24,
48:25, 48:26, 80:16,
90:21, 96:4, 100:15,
148:13, 150:2,
152:13, 175:24
arisen^[4] - 7:9,
154:6, 154:16, 154:17
arises^[3] - 65:8,
65:9, 78:11
arising^[7] - 26:14,
44:3, 58:8, 59:6,
91:16, 124:1, 198:7
arose^[7] - 14:12,
83:13, 127:26,
127:29, 128:2,
135:24, 181:23
ARRAN^[1] - 2:12
arranged^[1] -
115:19
arrival^[1] - 46:6
arrived^[3] - 69:18,
140:17, 151:12
articulated^[1] -
89:29
artificial^[2] - 33:5,
81:3
AS^[4] - 5:2, 117:1,
118:8, 184:10
ascertain^[1] - 130:3
aspect^[2] - 130:26,
170:6
aspects^[1] - 184:20
aspersions^[2] -
42:5, 42:21
assailing^[3] - 43:16,
43:17, 43:21
assault^[5] - 41:21,
43:20, 58:1, 108:9,
108:10
assert^[1] - 153:17
asserted^[2] - 18:24,
133:6
assertion^[2] - 90:17,
144:6
assess^[1] - 10:20
assist^[5] - 14:4,
33:10, 35:20, 66:17,
209:5
assistance^[6] -
106:12, 121:7, 121:9,
168:26, 176:20,
183:28
Assistant^[5] - 96:25,
109:23, 125:17,
125:25, 157:17
assistant^[10] -
119:11, 206:11,
206:20, 208:29,
212:15, 212:21,
212:24, 213:7,
213:11, 213:24
assisted^[1] - 35:22
associated^[1] - 61:2
assume^[3] - 58:16,
85:21, 209:4
assuming^[2] -
182:22, 182:26
assumption^[1] -
145:21
astounding^[1] -
70:26
astounded^[1] - 28:4
astray^[1] - 131:22
AT^[1] - 214:13
attached^[2] - 52:25,
112:2
attachments^[3] -
85:1, 85:2, 151:9
attack^[8] - 43:26,
70:15, 73:23, 74:2,
75:9, 76:11, 108:10,
208:4
attacked^[3] - 43:24,
78:9, 146:3
attacking^[4] - 45:13,
48:13, 77:7, 77:8
attempt^[1] - 36:16
attempting^[2] -
132:28
attend^[1] - 165:5
attention^[14] -
13:15, 15:9, 18:6,
20:19, 48:10, 48:11,
63:5, 130:7, 143:28,
144:4, 144:16,
144:19, 170:29,
211:17
attitude^[2] - 133:8,
210:6
Attorney^[1] - 139:22
attributed^[1] - 18:29
au^[1] - 123:4
audio^[2] - 77:15,
195:25
August^[7] - 53:14,
66:19, 91:22, 140:19,
150:20, 151:19,
181:20
authorisation^[1] -
163:9
authorise^[1] -
132:20
authorised^[2] -
138:16, 160:13
authority^[8] - 91:28,
92:12, 94:8, 94:9,
109:7, 129:13, 161:6,
203:18
authority's^[1] -
58:12
authors^[1] - 24:18
available^[14] - 7:7,
61:6, 141:15, 142:17,
142:19, 148:5,
157:15, 187:7,
187:13, 193:29,
207:27, 212:7,
213:20, 213:22
awake^[2] - 29:15,
29:19
aware^[42] - 7:8,
7:18, 17:1, 17:2, 22:7,
37:4, 37:7, 37:25,
37:27, 54:6, 76:6,
82:19, 82:25, 82:27,
82:29, 83:12, 84:8,
113:23, 114:9,
114:24, 114:28,
119:14, 136:19,
139:27, 140:12,
148:18, 148:20,
153:18, 160:15,
160:16, 163:18,
163:22, 164:4,
175:14, 190:23,
196:9, 196:12,
200:26, 200:27,
204:10, 205:29
awful^[2] - 98:18,
183:13

B

backed^[1] - 178:18
background^[17] -
13:9, 14:3, 14:4,
18:14, 37:3, 61:9,
87:29, 89:1, 89:6,
126:25, 126:26,
128:22, 129:19,
141:2, 205:7, 207:7,
207:13
bad^[17] - 11:28,
23:10, 36:4, 72:9,
90:17, 90:28, 107:1,

174:16, 176:2,
176:16, 176:18,
176:25, 176:29,
177:11, 208:16,
208:21, 209:12
badly [1] - 55:24
bail [1] - 97:22
Baillieboro [5] -
17:16, 18:23, 23:23,
97:13, 207:18
balanced [2] - 29:17,
35:24
BALDWIN [1] - 3:6
barely [1] - 164:1
BARRETT [1] - 2:22
Barrett [1] - 137:9
barrister [5] - 42:18,
118:12, 131:27,
183:27, 184:14
barrister-at-law [3] -
118:12, 183:27,
184:14
barristers [3] -
11:28, 42:9, 138:27
based [16] - 34:27,
34:28, 36:18, 66:6,
82:13, 82:17, 86:9,
90:16, 95:12, 109:13,
117:13, 129:13,
157:10, 157:13,
169:28, 193:15
basic [1] - 151:26
basis [34] - 6:26,
15:7, 15:18, 28:24,
34:27, 35:15, 38:14,
79:28, 86:24, 90:9,
95:8, 110:13, 120:14,
120:17, 122:10,
131:8, 133:29,
135:17, 141:7,
145:11, 146:1, 146:8,
146:14, 149:12,
155:15, 157:8,
160:14, 165:16,
175:2, 198:26,
198:27, 206:7,
206:24, 214:3
BE [1] - 5:4
bear [2] - 56:18,
135:6
bearing [3] - 70:11,
70:17, 73:6
bears [1] - 72:24
became [19] - 7:8,
7:18, 8:20, 8:23, 11:3,
11:5, 84:8, 107:7,
125:28, 126:7,
127:12, 145:16,
168:18, 193:26,
196:9, 196:12,
196:18, 196:23,
204:12
become [10] - 11:13,
11:18, 25:15, 107:6,
107:12, 148:16,
163:17, 163:22,
190:22, 190:23
BEEN [2] - 118:7,
184:9
befall [1] - 44:18
beg [2] - 142:20,
180:8
begging [1] - 115:5
begin [2] - 8:27,
57:11
beginning [1] -
22:7, 56:19, 60:8,
60:21, 61:5, 77:15,
138:15, 148:11,
188:25, 190:15,
190:24
behalf [15] - 23:3,
27:13, 47:20, 52:3,
55:26, 72:5, 109:8,
119:27, 119:29,
120:28, 134:8,
150:15, 158:15,
185:17, 198:25
behaviour [6] -
11:29, 70:28, 71:10,
76:11, 109:5, 133:13
behaviour" [2] -
71:2, 71:7
behind [4] - 112:21,
114:14, 114:21,
205:18
belief [3] - 11:15,
105:4, 109:13
believes [1] - 99:12
below [1] - 27:10
benefit [1] - 9:28
benign [1] - 209:14
beside [1] - 107:15
best [13] - 35:19,
40:12, 41:26, 44:17,
65:17, 122:11, 131:1,
140:25, 142:28,
143:15, 148:29,
154:15, 174:12
better [6] - 27:7,
35:4, 71:19, 76:16,
137:24, 199:5
between [22] - 8:17,
27:18, 29:27, 29:29,
36:15, 49:27, 50:1,
65:9, 81:7, 91:4,
99:24, 120:19,
136:11, 150:23,
153:29, 156:8,
174:21, 174:24,
174:28, 181:24,
194:28, 204:22
beyond [3] - 72:26,
134:14, 134:15
big [2] - 62:4, 150:23
binary [1] - 208:19
bit [11] - 19:13,
40:19, 40:26, 40:28,
106:12, 140:27,
150:13, 172:15,
204:19, 205:17, 207:8
bits [2] - 23:2, 81:6
BL [9] - 2:7, 2:10,
2:16, 2:17, 3:3, 3:3,
3:4, 3:4, 3:12
black [1] - 162:23
blame [1] - 98:23
blame-game [1] -
98:23
blush [1] - 37:5
boardroom [1] -
169:13
bona [10] - 42:25,
43:2, 106:15, 132:15,
179:27, 180:3,
180:17, 180:26,
208:17, 208:28
book [16] - 58:21,
70:2, 74:26, 84:27,
89:19, 94:19, 96:11,
105:29, 178:6,
179:14, 194:1,
197:10, 199:16,
199:18, 200:7, 212:20
booklet [2] - 122:18,
134:18
booklets [5] - 53:4,
54:28, 57:8, 124:22,
154:23
books [2] - 30:29,
63:7
bore [1] - 24:28
bottom [5] - 13:19,
40:21, 76:22, 76:24,
192:26
bound [1] - 44:20
box [9] - 48:7, 66:10,
104:7, 124:16,
124:25, 124:29,
125:2, 153:11, 153:16
boxes [1] - 124:17
brain [1] - 115:4
breach [1] - 176:8
breaches [1] - 109:6
break [2] - 115:25,
156:6
BREFFNI [1] - 2:10
brief [6] - 52:4,
69:11, 118:25, 122:9,
153:2, 211:4
Brief [4] - 59:12,
61:13, 80:2, 133:26
briefed [4] - 60:29,
84:23, 123:19, 124:9
briefing [2] - 50:13,
122:5
briefly [5] - 45:23,
91:11, 140:29,
175:25, 199:14
bring [9] - 12:23,
13:15, 29:25, 30:28,
31:11, 111:1, 122:22,
140:27, 178:25
bringing [2] -
130:23, 150:9
brings [1] - 182:3
brought [10] - 18:5,
60:13, 84:17, 124:16,
143:27, 144:3,
144:16, 144:19,
145:28, 175:15
Browne [2] - 79:14,
80:20
building [1] - 136:9
BUILDING [1] - 2:24
Building [1] - 187:1
bullet [5] - 61:15,
61:16, 61:23, 207:6,
207:16
bullet-point [2] -
61:16, 207:16
bullet-points [3] -
61:15, 61:23, 207:6
bus [3] - 58:1, 59:16,
59:21
business [3] -
182:24, 182:25
busy [6] - 136:1,
141:20, 160:7, 164:2,
164:11
BY [34] - 1:5, 1:8,
2:11, 2:18, 2:23, 3:5,
3:13, 4:4, 4:5, 4:6,
4:7, 4:8, 4:11, 4:12,
4:13, 4:16, 4:17, 4:18,
4:19, 4:20, 5:4, 49:16,
52:1, 58:19, 111:12,
118:8, 158:20,
177:29, 184:10,
199:13, 211:2,
212:11, 213:5
Byrne [40] - 19:13,
19:19, 20:1, 20:10,
20:23, 26:21, 35:21,
103:7, 109:23, 120:7,
125:17, 125:25,
125:26, 136:6,
136:11, 141:8, 149:6,
156:3, 156:29,
157:18, 178:9,
183:26, 184:12,
185:22, 199:14,
203:9, 204:28,
206:12, 206:20,
208:15, 209:1, 211:3,
212:12, 212:16,
212:22, 212:25,
213:9, 213:11,
213:24, 214:4
BYRNE [3] - 3:3,
4:15, 184:9
Byrne" [1] - 96:26
Byrne's [5] - 136:13,
137:7, 137:9, 207:21,
213:7
Byrne/McGinn [19] -
12:6, 12:8, 13:11,
13:21, 13:25, 16:24,
20:17, 21:4, 22:28,
24:17, 124:9, 125:4,
204:29, 205:10,
205:12, 206:8,
206:10, 206:21,
212:13

C

Callinan [7] - 105:1,
105:11, 105:13,
105:26, 109:2,
110:21, 117:29
campaign [1] - 50:23
cannot [2] - 155:19,
178:18
canvassed [4] -
71:15, 89:23, 181:6,
182:5
care [1] - 186:3
cared [1] - 97:7
career [1] - 14:8
careful [5] - 6:2,
63:3, 114:19, 132:14,
168:3
carefully [5] - 5:25,
100:3, 130:8, 141:5,
168:16
caring [1] - 97:9
carried [1] - 28:6
carry [1] - 32:10
cart [1] - 21:18
case [47] - 10:15,
10:19, 10:20, 10:27,
15:17, 18:12, 23:21,
23:23, 27:5, 28:20,
31:14, 32:2, 32:19,
32:21, 36:11, 40:23,
42:12, 42:27, 43:1,
43:5, 44:8, 45:19,
51:14, 59:20, 65:7,

72:26, 73:25, 74:3,
80:13, 99:11, 109:25,
119:13, 123:11,
124:26, 131:27,
133:7, 161:29, 163:2,
170:9, 171:12,
172:12, 176:11,
178:14, 193:24,
203:14, 206:28,
209:28
cases [3] - 40:27,
107:11, 107:23
cast [3] - 33:19, 42:5,
42:21
CASTLE [1] - 1:17
Castle [1] - 100:8
category [1] - 209:11
CATHERINE [1] - 3:4
caught [5] - 10:22,
11:8, 34:15, 35:25,
81:9
caused [1] - 11:7
Cavan [4] - 15:15,
36:25, 37:27, 58:2
Cavan-Monaghan
[3] - 15:15, 36:25,
37:27
caveat [2] - 99:13,
192:20
central [2] - 23:26,
44:19
centre [1] - 185:14
certain [22] - 8:1,
12:20, 15:28, 35:2,
36:12, 62:19, 65:3,
65:4, 65:5, 65:19,
86:8, 86:9, 86:10,
87:29, 93:27, 114:23,
119:25, 127:12,
139:18, 187:17,
189:4, 197:3
Certain [2] - 56:24,
57:13
CERTAIN [1] - 1:4
certainly [56] - 7:29,
10:6, 11:21, 15:17,
22:15, 23:3, 25:1,
37:29, 46:5, 51:17,
55:9, 73:14, 74:10,
76:9, 76:10, 76:13,
81:28, 83:1, 88:23,
111:4, 114:24,
115:17, 117:26,
122:27, 123:11,
123:25, 123:26,
125:10, 127:26,
131:27, 133:7,
136:19, 136:29,
145:22, 146:24,
148:17, 151:24,
152:16, 153:28,
162:12, 162:26,
168:8, 170:9, 171:20,
173:8, 181:22,
182:13, 184:26,
186:13, 197:20,
201:12, 201:26,
203:24, 204:20,
209:12
certainty [1] - 174:18
certify [1] - 1:25
cetera [2] - 111:18,
126:15
Chair [1] - 14:15
chairman [1] - 35:1
CHAIRMAN [222] -
4:8, 12:25, 14:20,
14:23, 14:26, 15:2,
15:10, 16:15, 20:26,
20:29, 21:3, 21:7,
21:12, 21:27, 22:14,
22:23, 23:1, 23:10,
23:15, 23:17, 24:5,
24:21, 24:25, 25:1,
25:13, 25:26, 28:17,
30:4, 30:8, 30:10,
30:20, 36:1, 36:29,
37:12, 37:16, 37:24,
37:29, 38:6, 38:9,
38:11, 38:17, 40:18,
51:5, 51:11, 51:15,
54:23, 54:29, 55:3,
55:16, 55:20, 56:7,
56:10, 59:14, 59:19,
66:19, 68:5, 68:8,
68:11, 76:2, 76:9,
83:17, 83:22, 83:29,
84:7, 93:13, 93:17,
93:22, 93:27, 96:4,
98:8, 98:13, 98:17,
98:23, 98:29, 99:8,
99:22, 99:28, 100:6,
100:19, 102:7,
102:12, 102:14,
102:16, 102:19,
103:21, 103:24,
103:28, 104:3, 104:6,
106:17, 107:11,
107:20, 107:27,
108:1, 108:16, 111:3,
111:8, 111:12,
111:14, 111:25,
112:5, 112:8, 112:18,
113:6, 113:15,
113:20, 113:24,
114:2, 114:6, 114:27,
115:3, 115:10,
115:21, 115:24,
117:3, 123:15,
124:28, 125:2, 125:4,
125:7, 125:14, 128:8,
128:10, 128:13,
131:10, 131:14,
131:19, 131:21,
131:26, 132:2,
137:15, 137:18,
137:21, 137:25,
137:27, 138:3,
142:13, 142:18,
144:2, 144:21,
150:11, 150:25,
151:3, 151:6, 151:11,
151:14, 151:16,
151:19, 151:26,
151:28, 158:1,
158:13, 158:17,
162:4, 162:12,
162:18, 162:21,
162:23, 162:26,
163:2, 163:5, 167:19,
167:28, 168:7,
168:13, 168:16,
168:22, 168:25,
169:2, 169:11,
169:20, 169:25,
170:18, 170:25,
171:6, 171:12,
171:15, 171:25,
172:1, 172:4, 172:12,
172:18, 173:9,
173:13, 173:16,
173:19, 173:22,
177:26, 177:28,
178:4, 180:8, 180:19,
180:22, 181:9,
181:14, 181:27,
182:1, 182:18,
182:28, 183:6,
183:17, 183:21,
184:4, 191:8, 191:26,
192:2, 192:4, 192:8,
194:9, 194:12, 195:2,
195:7, 195:9, 195:11,
203:8, 204:19,
204:21, 204:25,
205:27, 206:1,
206:26, 214:9
Chairman [51] -
14:14, 15:8, 26:1,
29:10, 41:23, 45:1,
51:13, 57:9, 59:18,
68:10, 76:8, 76:17,
84:5, 91:4, 93:29,
96:7, 98:16, 98:21,
104:2, 104:9, 110:27,
111:10, 118:4,
118:26, 124:11,
126:13, 127:2,
128:11, 134:24,
141:1, 142:15, 148:4,
150:26, 156:6,
162:27, 165:15,
167:11, 174:16,
174:29, 177:25,
177:27, 180:14,
181:3, 181:13,
181:29, 182:29,
183:19, 183:22,
183:28, 210:13, 211:6
challenge [13] -
21:22, 40:17, 44:13,
46:9, 46:13, 47:22,
64:16, 74:9, 74:24,
110:15, 130:17,
135:19
challenged [6] -
48:8, 48:12, 81:22,
123:17, 132:25,
146:15
challenges [2] -
41:23, 147:23
challenging [7] -
6:28, 43:29, 44:1,
44:2, 48:22, 122:24,
155:2
chance [6] - 14:26,
19:22, 35:18, 125:13,
136:25, 168:10
change [4] - 95:20,
173:23, 203:26,
203:28
changed [6] - 17:23,
133:9, 133:13,
133:15, 133:16
changes [1] - 203:11
changing [1] - 197:2
chaos [1] - 25:12
chaotic [1] - 170:28
chapter [2] - 62:26,
109:20
chapters [1] - 110:12
character [7] - 48:13,
69:21, 69:24, 73:4,
106:26, 112:15,
207:24
characterisation [1]
- 115:11
charge [11] - 18:22,
18:25, 18:28, 19:1,
19:7, 24:19, 27:3,
31:20, 34:6, 125:28,
156:29
charged [1] - 133:18
charges [2] - 32:15,
133:27
CHARLES [1] - 3:13
CHARLETON [2] -
1:12, 2:2
charter [3] - 62:10,
109:2, 109:22
charters [1] - 203:12
chase [1] - 114:20
chat [1] - 181:21
chatting [1] - 51:7
checked [2] -
162:14, 198:23
Chief [64] - 6:6,
36:22, 46:1, 49:27,
53:13, 61:8, 63:8,
63:15, 65:10, 66:1,
66:15, 67:17, 85:20,
85:24, 88:11, 96:18,
96:24, 97:8, 105:2,
109:23, 110:5,
115:11, 124:13,
128:2, 132:23,
134:27, 135:2,
135:26, 137:12,
142:3, 142:4, 142:22,
143:1, 152:5, 156:9,
156:13, 156:22,
157:26, 158:13,
159:1, 160:3, 161:11,
164:28, 171:26,
179:8, 185:12,
185:15, 185:17,
186:18, 187:16,
187:18, 187:29,
188:3, 188:9, 188:14,
194:7, 194:25,
195:16, 199:23,
199:27, 201:24,
202:8, 203:5, 204:5
chief [2] - 119:11,
205:20
CHIEF [2] - 2:18,
3:14
children [1] - 17:21
chose [1] - 175:21
Christmas [2] -
27:29, 28:3
CHRISTOPHER [1] -
3:11
Circuit [1] - 11:23
circulate [1] - 36:24
circulate [3] - 13:17,
205:4, 206:18
circulated [18] -
5:21, 12:4, 12:13,
12:16, 13:12, 20:13,
52:24, 54:19, 58:22,
59:25, 62:3, 90:5,
125:16, 167:3,
173:11, 205:3, 206:9,
212:15
circulating [1] -
137:16
circumstances [7] -
27:4, 80:20, 98:15,
121:14, 128:29,
210:22, 213:27

cite [1] - 17:14
citizen [2] - 113:23, 113:27
claim [1] - 16:1
claimed [1] - 161:16
Clancy [72] - 6:24, 16:26, 17:5, 17:6, 18:26, 18:27, 27:25, 27:27, 27:29, 34:9, 53:24, 54:12, 60:19, 63:16, 66:16, 66:27, 67:2, 67:12, 67:15, 83:1, 83:19, 83:28, 84:1, 84:11, 84:14, 84:20, 86:16, 86:24, 87:15, 87:17, 91:13, 91:27, 92:11, 92:15, 93:6, 93:15, 93:18, 94:2, 94:26, 94:27, 95:2, 96:19, 97:7, 97:28, 97:29, 99:24, 105:3, 109:15, 109:24, 110:6, 132:22, 142:3, 142:17, 142:25, 143:6, 164:26, 172:25, 176:13, 176:24, 177:14, 177:15, 177:18, 192:14, 192:15, 205:20, 205:21, 207:25, 207:29, 208:5, 208:7, 210:7, 211:7
clarification [7] - 86:10, 86:25, 87:17, 100:19, 106:12, 149:21, 180:13
clarified [3] - 74:26, 119:6, 155:20
clarify [7] - 74:17, 84:4, 110:27, 137:20, 142:15, 160:25, 180:18
clarifying [2] - 51:15, 158:17
clarity [1] - 148:25
CLARKE [1] - 3:5
clear [36] - 5:27, 5:29, 6:9, 6:17, 7:10, 22:27, 23:20, 24:15, 25:29, 33:6, 33:8, 43:15, 45:10, 45:12, 49:2, 52:5, 55:12, 84:29, 88:29, 92:18, 115:18, 126:27, 127:12, 146:16, 154:24, 164:17, 172:22, 173:7, 193:8, 193:26, 195:29, 196:3, 196:23, 197:29, 210:5, 213:6
clearly [12] - 9:4, 29:16, 72:23, 114:22, 130:27, 133:12, 135:16, 157:20, 161:29, 165:5, 171:27, 174:24
clerical [2] - 6:13, 170:16
clever [1] - 168:25
client [31] - 20:12, 21:6, 22:11, 27:13, 32:7, 34:1, 43:8, 44:10, 44:17, 45:5, 45:19, 51:24, 60:17, 68:24, 69:20, 69:27, 70:3, 70:12, 74:2, 80:6, 99:17, 99:22, 102:28, 110:21, 115:7, 115:8, 167:20, 170:4, 175:13, 176:27, 177:8
client's [5] - 47:6, 51:18, 70:10, 99:20, 167:6
client/clients [1] - 157:12
clients [38] - 7:21, 9:11, 9:29, 19:14, 19:27, 20:2, 29:12, 41:26, 55:27, 60:18, 62:28, 82:11, 82:29, 103:16, 108:22, 126:8, 126:11, 129:26, 130:4, 130:9, 130:10, 133:6, 133:29, 134:3, 134:9, 141:16, 141:18, 143:10, 143:11, 143:14, 147:23, 147:25, 148:3, 148:7, 157:11, 173:16, 183:2
clocks [1] - 187:26
Clondalkin [1] - 51:1
close [3] - 108:4, 136:7, 136:24
closed [2] - 38:14, 39:8
closeness [1] - 111:19
closing [1] - 111:1
co [1] - 84:22
Co [1] - 58:2
co-counsel [1] - 84:22
coaching [1] - 46:7
code [4] - 126:14, 126:17, 126:19, 126:22
coincided [1] - 8:19
coincidence [1] - 181:27
coincident [1] - 181:25
collapsed [1] - 23:29
collateral [1] - 70:15
collating [1] - 123:9
colleague [4] - 66:14, 67:8, 93:16, 149:6
colleagues [4] - 13:13, 48:4, 110:15, 152:20
COLM [4] - 3:2, 4:3, 5:4, 111:12
Colm [9] - 63:9, 85:20, 97:8, 128:3, 178:9, 199:24, 200:8, 200:18
colour [2] - 23:24, 24:1
colourful [1] - 172:15
comfortable [1] - 198:20
coming [17] - 32:4, 56:9, 72:11, 76:10, 77:26, 120:16, 122:15, 122:16, 123:27, 125:12, 156:23, 160:3, 163:24, 181:18, 189:28, 191:28, 202:20
commence [1] - 106:11
commencement [1] - 60:26
commencing [2] - 97:2, 122:2
comment [3] - 42:17, 134:10, 182:19
commentary [2] - 197:17, 198:13
comments [3] - 12:22, 17:28, 197:24
commission [4] - 36:16, 58:7, 60:27, 62:20
Commission [94] - 5:10, 7:7, 8:21, 9:18, 9:29, 12:28, 19:11, 22:20, 24:28, 26:27, 28:14, 30:26, 31:6, 31:29, 32:12, 32:23, 32:27, 34:23, 36:6, 36:14, 37:2, 38:27, 39:6, 39:28, 42:24, 46:6, 54:18, 54:22, 55:28, 56:15, 56:21, 58:22, 58:24, 58:28, 60:22, 62:2, 64:26, 69:18, 70:18, 73:6, 79:24, 91:5, 96:14, 96:29, 98:3, 100:22, 100:28, 101:9, 101:26, 102:25, 108:19, 108:20, 109:25, 110:11, 117:8, 117:22, 118:25, 121:2, 121:6, 121:9, 122:3, 122:16, 122:29, 123:10, 123:11, 125:23, 128:25, 130:27, 130:29, 133:17, 137:1, 146:6, 146:11, 146:13, 147:27, 148:27, 150:22, 151:7, 152:27, 154:21, 163:19, 163:20, 174:16, 178:26, 179:16, 182:7, 183:4, 187:2, 195:10, 195:11, 195:17, 196:15, 204:13
Commission's [2] - 56:27, 57:16
COMMISSIONER [1] - 2:15
commissioner [9] - 206:11, 206:20, 209:1, 212:16, 212:22, 212:24, 213:7, 213:11, 213:24
Commissioner [108] - 29:9, 42:10, 45:15, 45:20, 45:26, 46:3, 47:20, 47:21, 48:19, 49:28, 50:5, 51:6, 52:9, 52:10, 52:17, 55:26, 70:26, 75:19, 78:9, 82:14, 82:17, 96:25, 104:29, 105:11, 105:13, 105:25, 109:2, 109:10, 109:12, 109:14, 109:19, 109:21, 109:23, 110:20, 113:10, 113:21, 114:10, 114:17, 115:16, 119:8, 119:20, 119:22, 119:28, 120:1, 120:12, 120:20, 120:25, 120:27, 121:14, 121:21, 121:25, 122:5, 124:10, 125:17, 125:25, 126:27, 127:5, 127:7, 127:8, 127:16, 127:17, 127:19, 127:23, 128:20, 128:21, 128:25, 129:1, 129:10, 132:19, 135:10, 137:13, 140:10, 147:29, 150:16, 152:9, 152:15, 152:19, 152:21, 152:26, 153:1, 154:20, 155:1, 155:17, 156:23, 157:9, 157:17, 157:21, 157:25, 158:2, 158:9, 159:11, 160:11, 161:25, 161:28, 163:11, 164:19, 165:2, 165:12, 175:20, 179:16, 181:18, 181:26, 184:21, 185:18, 185:25, 187:19, 198:18, 200:5
Commissioner's [16] - 29:4, 42:27, 43:1, 50:11, 72:26, 99:4, 121:5, 127:25, 149:1, 150:10, 152:1, 155:22, 160:4, 163:9, 184:18, 188:3
Commissioners [1] - 68:26
commissioners [1] - 119:12
commit [1] - 97:17
common [1] - 118:20
communicate [1] - 199:28
communicated [1] - 115:17
communication [4] - 17:5, 130:19, 130:20, 160:1
COMPANY [1] - 2:11
compare [1] - 196:1
compatible [1] - 8:27
complained [2] - 105:13, 200:24
complaining [2] - 10:4, 84:1
complaint [47] - 32:1, 61:14, 61:21, 66:6, 66:26, 67:11, 82:21, 82:22, 82:24, 82:29, 83:7, 83:14, 83:25, 83:27, 84:9, 84:14, 84:19, 84:23,

91:27, 92:10, 92:15,
93:6, 93:10, 93:15,
94:1, 94:25, 95:2,
95:29, 104:29,
105:14, 105:25,
109:16, 109:17,
109:18, 110:19,
110:20, 114:13,
119:19, 172:25,
172:26, 172:27,
180:26, 192:13,
192:14, 201:10,
201:12

complaints [33] -
9:19, 32:25, 36:23,
58:4, 58:13, 59:2,
65:26, 66:13, 67:6,
75:13, 76:27, 84:17,
86:15, 86:23, 91:14,
94:27, 94:28, 96:18,
106:16, 108:28,
109:21, 109:25,
109:26, 110:5,
120:24, 121:22,
128:22, 128:24,
129:4, 133:3, 176:12,
179:28, 180:4

complete [1] -
153:25

completed [3] - 87:7,
191:24, 197:16

completely [8] -
15:12, 17:23, 40:16,
96:8, 145:22, 176:15,
190:2, 191:1

completeness [2] -
56:17, 98:11

completion [2] -
83:19, 84:2

complex [2] -
122:20, 174:27

complicated [2] -
122:19, 151:24

complied [1] -
177:17

compromise [1] -
167:7

computer [4] -
136:13, 137:7, 137:9,
187:28

concede [1] - 100:3

conceded [1] - 99:6

concentrate [1] -
165:26

concentrated [1] -
175:8

concept [2] - 182:3,
182:4

concepts [3] - 76:6,
76:7, 111:19

concern [11] - 35:7,
36:27, 38:4, 43:3,
62:4, 65:18, 130:8,
130:21, 138:21,
154:16

concerned [26] -
6:10, 6:11, 26:21,
26:26, 27:10, 39:3,
51:20, 65:21, 77:23,
80:18, 81:29, 94:27,
101:3, 129:17,
130:21, 130:24,
132:1, 133:21, 139:4,
139:23, 155:6, 165:1,
167:23, 169:1,
182:10, 209:15

concerning [6] -
12:20, 58:3, 64:25,
106:14, 179:26,
180:25

concerns [6] - 42:24,
42:29, 81:27, 105:2,
134:8, 139:13

concluded [2] -
62:17, 149:13

concludes [1] -
89:10

conclusion [2] -
129:22, 133:2

conclusions [1] -
42:5

conditional [1] -
159:27

conditionality [3] -
160:15, 161:3, 163:8

conduct [7] - 9:18,
37:18, 44:21, 109:6,
109:9, 109:12, 121:4

conducted [1] -
42:12

Confidential [7] -
62:23, 63:1, 104:24,
105:26, 108:29,
110:19, 114:8

confidential [1] -
207:23

confined [1] - 161:6

confining [1] - 80:19

confirm [9] - 52:16,
69:5, 72:6, 101:10,
136:2, 138:9, 138:12,
182:14, 182:17

confirmation [3] -
118:27, 136:3, 138:12

confirmed [2] - 82:9,
135:27

conflated [1] - 168:4

conflating [1] - 83:14

conflation [1] - 83:13

conflict [5] - 90:19,
90:21, 114:23, 119:12

conformity [1] -
174:7

confusion [2] -
111:19, 142:13

connected [1] -
154:26

Connolly [3] -
113:16, 114:5, 114:7

CONOR [1] - 2:16

conscience [3] -
45:10, 45:11, 45:13

conscious [10] -
26:3, 67:23, 94:9,
149:27, 186:25,
187:11, 189:20,
205:9, 206:7

consensus [1] -
84:19

consequence [4] -
167:29, 181:24,
203:20, 203:29

consequences [4] -
44:18, 45:4, 45:7,
97:20

consider [11] - 31:2,
39:27, 62:10, 67:28,
97:27, 114:25, 115:2,
121:12, 122:3,
160:12, 174:10

considerable [6] -
31:10, 33:17, 101:24,
102:23, 122:29,
133:27

considerably [1] -
110:12

consideration [2] -
58:13, 88:1

considerations [2] -
209:16, 209:18

considered [5] -
26:5, 34:4, 71:18,
128:26, 148:19

considering [2] -
38:21, 46:3

constituency [1] -
51:1

constitute [1] - 109:5

constrained [1] -
175:20

construction [1] -
84:13

constructive [1] -
18:25

consult [1] - 152:1

consultation [21] -
34:19, 46:2, 47:15,
83:2, 114:3, 115:6,
115:15, 115:19,
139:26, 143:14,
152:25, 164:18,
164:26, 164:28,
165:1, 165:4, 165:8,
165:11, 169:3, 170:4,
185:13

consultations [6] -
45:24, 48:16, 126:6,
126:28, 152:11,
152:25

consulted [1] -
121:25

contact [7] - 12:14,
12:15, 63:23, 79:3,
79:6, 162:6, 162:19

contacted [1] - 63:29

contacts [1] - 139:22

contain [3] - 144:1,
192:11, 197:16

contained [9] - 8:14,
12:22, 19:18, 26:3,
82:13, 84:15, 85:12,
168:19, 192:12

containing [2] -
59:28, 91:13

contains [1] - 53:5

content [6] - 9:14,
13:1, 26:1, 99:17,
144:24, 178:16

contention [2] -
95:3, 113:4

contents [10] -
52:18, 55:19, 82:16,
85:6, 87:26, 89:14,
125:19, 144:28,
191:13

context [27] - 10:2,
10:6, 14:6, 21:24,
27:15, 36:21, 46:25,
46:29, 47:8, 47:9,
65:3, 65:9, 66:2,
97:12, 97:23, 101:18,
101:19, 101:28,
108:7, 109:22, 118:3,
119:26, 127:29,
140:29, 183:13,
198:4, 210:11

contextualise [2] -
32:4, 34:29

contextualising [1] -
32:13

continue [1] - 192:9

continued [4] - 6:20,
34:12, 76:22, 199:9

CONTINUED [1] -
5:4

continues [1] - 193:7

continuing [1] -
77:28

contradicted [1] -
55:4

contradictory [1] -
151:17

contrary [4] - 34:21,
45:11, 171:11, 171:28

contrast [2] - 150:23,
204:22

contribution [1] -
70:13

contributors [3] -
143:18, 143:19,
166:29

control [15] - 19:5,
23:14, 23:22, 24:19,
25:2, 25:6, 25:7, 25:8,
25:10, 25:19, 26:7,
26:9, 26:18, 125:27

convenience [1] -
102:9

conversation [10] -
9:21, 28:18, 55:23,
65:11, 77:16, 85:23,
88:8, 88:10, 188:12,
202:18

conversations [2] -
18:3, 204:14

convey [3] - 135:13,
140:1, 153:28

conveyed [8] -
16:27, 17:8, 91:29,
92:13, 93:12, 135:27,
172:29, 177:17

cool [1] - 9:25

cooperate [1] - 27:11

cooperation [1] -
27:6

copies [2] - 137:10,
137:16

copy [12] - 55:7,
55:9, 136:17, 138:2,
159:21, 185:5, 187:7,
187:10, 187:13,
188:13, 205:12,
213:23

copying [1] - 178:9

core [11] - 53:4,
54:28, 57:8, 58:21,
96:11, 122:17,
124:22, 134:18,
154:23, 194:1, 212:19

corner [2] - 13:20,
165:22

corners [1] - 155:12

corporate [2] - 5:18,
6:22

correct [101] - 7:18,
23:1, 28:7, 41:26,
56:7, 59:26, 60:28,
61:4, 62:21, 63:10,
63:11, 63:17, 68:9,
68:10, 69:24, 70:23,

71:12, 74:29, 79:26,
80:5, 82:6, 83:22,
87:22, 88:25, 88:28,
89:9, 90:2, 90:29,
91:14, 92:17, 92:29,
93:4, 93:8, 94:4, 94:6,
94:17, 95:7, 95:14,
96:2, 97:1, 98:6, 98:7,
98:20, 98:27, 99:7,
100:5, 100:24, 101:1,
101:2, 105:27, 108:2,
108:23, 112:4, 113:9,
115:9, 115:23, 118:3,
118:13, 118:25,
118:26, 119:3,
121:24, 121:28,
125:6, 125:24,
125:25, 126:1,
126:21, 127:2,
127:28, 134:23,
137:8, 145:6, 146:7,
149:18, 149:29,
151:13, 151:15,
151:27, 154:27,
163:8, 167:5, 171:3,
173:8, 178:23, 182:9,
185:28, 186:19,
192:19, 193:12,
193:13, 198:22,
199:1, 199:2, 207:19,
211:6, 212:18,
212:26, 213:13
corrected [4] -
171:9, 171:13,
171:21, 177:8
correcting [2] -
181:2, 196:17
correction [2] -
117:6, 182:1
correctly [4] - 93:25,
112:19, 117:4, 145:9
corresponded [1] -
117:28
corroborated [1] -
18:2
corrupt. [1] - 31:22
corruption [19] -
35:9, 35:13, 43:9,
44:22, 59:22, 60:1,
61:16, 62:24, 74:20,
74:28, 82:4, 108:21,
108:28, 109:4,
109:22, 109:28,
130:6, 134:17, 211:8
Corruption [1] -
109:1
cost [4] - 131:7,
131:11, 131:14,
131:26
COSTELLO [1] -

2:11
counsel [33] - 5:13,
6:10, 11:29, 19:10,
22:13, 22:14, 23:3,
29:18, 35:20, 35:27,
47:20, 55:5, 60:24,
61:1, 62:13, 62:16,
68:29, 84:22, 100:8,
100:9, 104:14,
104:17, 105:23,
120:11, 128:18,
149:1, 159:16,
159:17, 163:10,
163:17, 171:29,
181:21, 181:24
count [1] - 133:17
countersigned [2] -
55:1, 55:14
counts [1] - 21:12
couple [6] - 11:4,
15:16, 83:15, 111:14,
184:25, 188:6
couriered [1] -
118:28
course [37] - 8:7,
8:21, 8:22, 9:10, 9:13,
9:26, 15:2, 23:24,
24:27, 41:16, 50:19,
52:12, 62:1, 62:28,
65:19, 67:14, 71:21,
76:13, 78:22, 79:27,
91:25, 100:29, 114:8,
125:20, 138:23,
139:7, 159:16,
159:29, 161:7,
161:10, 161:19,
161:26, 165:28,
171:1, 182:8, 188:4,
191:4
Court [2] - 67:20,
183:10
COURT [2] - 1:13,
2:3
court [5] - 9:11,
40:27, 93:19, 107:11,
107:23
cover [8] - 32:18,
52:3, 58:21, 96:24,
124:24, 124:25,
198:4, 205:19
cover-up [2] - 32:18,
96:24
covered [3] - 113:7,
167:25, 189:13
covering [2] - 38:23,
134:16
cracking [1] - 150:5
crank's [2] - 62:9,
62:11
credibility [41] -

21:22, 41:9, 41:11,
43:16, 44:2, 44:13,
65:4, 70:10, 70:16,
70:21, 70:28, 71:1,
71:6, 71:11, 72:22,
72:25, 74:19, 74:27,
75:6, 75:9, 77:24,
87:2, 87:9, 90:16,
90:20, 100:13,
100:14, 111:18,
112:6, 112:19,
114:11, 132:17,
135:20, 138:8, 146:1,
146:14, 147:4,
174:21, 174:29,
186:13
credible [1] - 87:21
credit [5] - 111:17,
112:8, 112:14,
174:22, 174:28
creditworthiness [1]
- 174:22
crime [5] - 16:7,
61:26, 97:10, 97:17,
203:15
crimes [1] - 120:9
criminal [6] - 35:9,
35:12, 44:21, 109:5,
109:9, 109:12
critical [1] - 174:9
criticise [1] - 122:9
criticising [2] -
22:26, 25:12
criticism [3] - 103:2,
110:8, 168:8
criticisms [1] -
119:24
cross [34] - 25:23,
27:2, 28:21, 45:26,
46:15, 47:9, 63:9,
79:28, 80:28, 91:7,
94:13, 98:9, 98:17,
98:18, 98:19, 101:15,
103:15, 104:13,
104:16, 106:23,
107:16, 108:8,
108:13, 111:17,
111:20, 111:21,
112:6, 112:8, 112:18,
119:26, 125:29,
154:20, 155:16
CROSS [12] - 4:4,
4:5, 4:6, 4:12, 4:17,
4:18, 5:4, 49:16, 52:1,
158:20, 199:13, 211:2
cross-examination
[22] - 25:23, 27:2,
47:9, 79:28, 80:28,
91:7, 94:13, 98:9,
98:18, 98:19, 103:15,

106:23, 108:8,
108:13, 111:17,
111:20, 111:21,
112:6, 112:8, 112:18,
154:20
cross-examine [2] -
46:15, 155:16
CROSS-EXAMINED
[12] - 4:4, 4:5, 4:6,
4:12, 4:17, 4:18, 5:4,
49:16, 52:1, 158:20,
199:13, 211:2
cross-examined [5]
- 45:26, 63:9, 104:13,
104:16, 125:29
cross-examining [2]
- 28:21, 101:15
crux [1] - 42:9
culpable [1] - 25:19
Cunningham [57] -
6:7, 7:4, 8:12, 8:26,
30:1, 30:22, 33:18,
34:9, 34:13, 53:8,
53:12, 53:21, 54:4,
54:6, 56:1, 63:15,
66:7, 66:11, 66:20,
66:25, 83:10, 86:21,
91:18, 91:26, 92:24,
92:25, 92:27, 94:24,
94:29, 95:20, 96:20,
102:1, 102:28,
109:29, 132:23,
141:19, 141:24,
142:5, 142:18,
142:23, 143:23,
144:3, 150:20, 151:4,
164:29, 181:19,
189:15, 190:10,
190:27, 191:23,
191:28, 193:3,
200:28, 201:11,
201:13, 210:8, 211:22
Cunningham's [14] -
8:9, 8:19, 16:15,
52:25, 93:2, 95:25,
95:28, 140:18,
149:15, 151:20,
190:26, 192:22,
196:2, 212:1
**Cunningham/
Martin** [1] - 55:21
curiosity [1] - 163:16
curious [3] - 125:7,
125:9, 125:10
current [1] - 119:20
custody [1] - 97:13
cut [1] - 64:23

D

D's [1] - 15:1
danger [1] - 26:20
dangerous [1] -
31:14
date [18] - 30:4, 30:8,
30:19, 53:22, 91:21,
95:11, 102:7, 102:9,
102:11, 102:12,
102:15, 102:16,
103:20, 114:1,
122:26, 151:21,
185:18, 194:22
dated [2] - 194:5,
195:4
dates [1] - 194:29
DAY [1] - 1:18
day's [1] - 126:6
days [3] - 123:22,
181:7, 184:25
deadlines [1] - 25:8
deal [17] - 28:12,
35:2, 62:1, 67:28,
68:1, 68:2, 68:5,
121:23, 124:8,
134:11, 145:11,
152:15, 159:23,
175:11, 175:18,
176:28, 188:23
dealing [9] - 26:22,
29:16, 33:21, 67:23,
87:20, 99:4, 110:23,
122:7, 148:21
dealings [2] - 9:10,
31:10
deals [1] - 207:16
dealt [13] - 31:9,
33:23, 38:26, 45:16,
45:25, 48:2, 84:28,
86:3, 109:20, 119:5,
120:13, 130:13,
212:27
debate [11] - 9:21,
17:11, 20:24, 48:28,
70:24, 75:28, 76:22,
78:22, 138:24,
173:29, 174:14
debated [1] - 100:18
December [7] - 30:9,
30:18, 30:19, 41:5,
41:6, 48:17, 64:9
decided [5] - 89:24,
142:27, 153:8, 198:7,
206:18
deciding [1] - 62:20
decision [13] - 18:24,
26:3, 64:16, 97:9,
100:11, 119:13,

119:15, 119:17,
136:1, 153:9, 153:18,
183:14, 209:20
declaration [2] -
46:19, 199:29
dedicated [1] - 17:19
defend [5] - 32:15,
33:29, 35:8, 35:19,
134:2
deferred [1] - 190:28
define [1] - 109:3
definitely [2] - 64:13,
201:1
definitively [1] -
208:3
degree [5] - 9:20,
33:17, 90:23, 133:16,
210:5
delay [2] - 21:26,
151:1
deliberate [4] - 94:9,
169:28, 186:14,
210:17
deliberately [1] -
26:2
delighted [1] - 28:12
delivered [3] -
157:22, 157:28,
190:12
delivery [1] - 150:29
delve [1] - 65:19
demand [1] - 161:17
demanding [2] -
64:15, 199:27
demanding [1] -
165:8
demeanour [1] -
133:9
demonstrate [2] -
35:12, 75:22
demonstrates [2] -
24:18, 33:28
demonstrating [1] -
34:14
demonstration [1] -
36:15
denied [1] - 20:22
denying [2] - 20:28,
21:1
Department [5] -
51:21, 57:2, 57:4,
57:20, 57:22
deploy [3] - 12:29,
25:15, 148:4
deployed [9] - 21:20,
21:21, 21:27, 25:16,
26:5, 28:27, 108:8
deprive [1] - 22:16
Derek [3] - 157:17,
206:12, 212:16
derelict [1] - 112:29
dereliction [2] -
102:29, 112:27
describe [5] - 35:13,
92:14, 118:20, 135:4,
196:11
described [6] -
35:14, 106:3, 106:6,
133:25, 170:28, 204:5
describes [2] - 16:9,
106:22
describing [1] -
96:13
descriptive [1] -
135:11
deserve [2] - 10:26,
10:27
desire [5] - 6:25,
52:5, 164:18, 172:27,
177:16
desk [5] - 105:16,
136:6, 186:29, 187:5,
188:11
desperate [1] -
115:14
despite [3] - 39:29,
72:7, 98:1
detachment [1] -
141:22
detail [12] - 16:13,
61:29, 110:6, 110:12,
110:29, 113:25,
114:9, 133:5, 152:12,
174:1, 185:20, 205:29
details [8] - 14:4,
54:7, 88:17, 89:1,
114:1, 133:26, 143:9,
204:10
detected [1] - 7:16
developed [1] -
147:13
device [2] - 105:1,
109:16
DIARMAID [1] - 2:6
diary [4] - 50:20,
50:28, 159:1, 159:3
difference [5] - 8:17,
75:5, 138:14, 138:19,
174:28
differences [1] -
174:27
different [26] - 7:29,
8:13, 8:28, 45:28,
47:7, 49:3, 59:25,
64:25, 73:2, 112:9,
121:13, 123:28,
124:1, 125:21,
128:13, 129:23,
151:21, 152:5,
169:12, 170:20,
176:14, 177:4,
187:26, 204:26
difficult [3] - 10:20,
105:10, 132:8
difficulties [5] -
17:15, 33:23, 34:8,
123:9, 190:25
difficulty [6] - 7:9,
38:26, 130:16, 139:8,
142:16, 171:7
DIGNAM [21] - 2:16,
4:6, 4:18, 52:1, 52:2,
54:28, 55:2, 55:7,
56:5, 56:8, 56:12,
167:11, 168:21,
168:24, 168:26,
171:7, 171:14,
177:25, 177:27,
211:2, 211:3
Dignam [2] - 54:23,
211:16
dining [1] - 163:24
dining-room [1] -
163:24
direct [4] - 53:27,
61:10, 109:28, 127:19
directed [7] - 18:8,
19:3, 54:19, 64:26,
86:15, 162:28, 165:15
direction [4] - 16:27,
141:6, 176:15, 200:25
directions [15] -
6:25, 17:8, 65:14,
65:29, 66:18, 66:22,
91:28, 92:12, 93:11,
94:8, 172:28, 200:16,
204:11, 204:16,
204:18
directly [9] - 51:21,
115:8, 119:22, 128:7,
156:6, 157:24,
187:16, 213:11,
213:21
DIRECTLY [4] - 4:11,
4:16, 118:7, 184:9
director [1] - 202:19
Director [7] - 64:15,
64:17, 199:26,
199:28, 200:1,
201:29, 202:11
disagreed [1] - 191:4
disappointed [1] -
145:12
discern [1] - 119:19
discharge [1] - 208:2
disciplinary [2] -
58:7, 59:6
discipline [1] - 109:6
DISCLOSURES [2] -
1:3, 1:4
discounted [1] -
36:23
discovered [1] -
145:8
discredit [1] - 37:1
discreetly [3] -
67:24, 67:29, 68:1
discuss [4] - 9:29,
19:22, 139:12, 206:29
discussed [12] -
49:4, 114:24, 148:11,
152:22, 153:1,
156:22, 160:9,
186:12, 205:5,
205:23, 206:29,
207:14
discusses [1] -
206:13
discussing [5] -
37:20, 51:7, 91:18,
133:10, 196:14
discussion [15] -
8:7, 29:27, 29:28,
45:29, 73:22, 126:4,
127:4, 128:18, 152:8,
152:12, 152:16,
152:18, 152:25,
189:10, 201:17
discussions [1] -
186:15
disharmony [1] -
99:24
dishonest [1] - 75:15
dismissal [1] - 18:26
disorganised [1] -
163:27
dispatched [1] -
139:17
displaying [1] -
34:17
dispute [1] - 65:8
Distillery [3] -
137:25, 137:28, 187:1
distinction [4] -
20:11, 120:18,
174:21, 174:24
distribute [1] - 143:4
district [1] - 208:1
District [1] - 61:27
divergence [1] -
184:28
division [2] - 36:25
document [46] -
12:13, 12:14, 12:19,
12:28, 14:16, 18:14,
19:28, 20:13, 22:12,
22:29, 23:12, 26:2,
26:26, 59:12, 60:6,
60:7, 60:9, 60:11,
60:20, 61:14, 61:19,
77:22, 77:25, 80:2,
85:6, 85:13, 87:26,
89:15, 124:24,
133:25, 133:27,
136:16, 136:19,
138:2, 138:12,
151:22, 157:3,
165:15, 166:5,
169:14, 178:2, 178:5,
179:2, 191:13,
203:10, 211:24
documentary [1] -
178:19
documentation [7] -
122:15, 123:9,
123:10, 123:14,
125:11, 134:16,
143:19
documents [15] -
7:25, 7:27, 13:8,
13:17, 21:18, 54:16,
58:22, 60:20, 61:12,
62:2, 123:20, 134:19,
151:17, 211:27
DONAL [1] - 2:16
DONALD [1] - 2:18
done [26] - 6:3, 7:28,
35:16, 47:28, 77:1,
103:10, 104:8,
105:11, 113:17,
115:6, 115:10,
121:10, 121:17,
128:28, 142:9,
143:15, 150:29,
156:15, 164:7,
173:21, 175:23,
182:26, 183:4,
183:18, 199:6
donkey's [1] - 21:18
DONNELLY [1] - 3:4
doom [1] - 46:23
door [1] - 119:22
dormancy [1] -
154:10
dormant [13] - 106:3,
106:4, 106:5, 106:14,
106:22, 154:5,
179:21, 179:25,
180:2, 180:15,
180:18, 180:27, 181:6
doubt [4] - 6:17,
71:18, 127:13, 138:1
doubtless [1] - 99:16
down [24] - 8:3,
13:19, 15:17, 16:18,
19:22, 21:18, 38:14,
39:8, 40:27, 73:18,
93:19, 117:12,
117:14, 117:23,
132:19, 132:20,

141:4, 142:1, 165:20,
166:2, 172:1, 172:5,
186:6
Downes [1] - 104:3
downstairs [1] -
27:10
dozen [1] - 15:16
DPP [19] - 18:8, 19:3,
65:12, 65:29, 86:10,
86:25, 87:18, 93:12,
94:16, 176:15,
177:17, 201:18,
201:22, 202:26,
203:9, 203:26,
203:27, 204:7, 204:15
DPP's [8] - 6:25,
16:27, 17:8, 65:14,
172:28, 200:15,
204:10, 204:16
draft [20] - 142:10,
142:28, 143:8,
143:12, 143:20,
144:24, 151:10,
166:6, 167:15, 178:8,
178:25, 179:3, 179:5,
179:9, 186:27,
206:24, 208:10
drafted [16] - 5:12,
5:16, 5:24, 5:29,
54:16, 84:22, 136:12,
140:14, 146:10,
149:5, 165:15,
184:23, 186:21,
192:21, 198:22,
198:26
drafter [1] - 140:14
drafting [1] - 55:6,
136:29, 139:18,
142:28, 149:4,
156:28, 167:14,
184:21, 185:9, 206:8,
213:23
drama [1] - 10:22
draw [4] - 8:2, 15:9,
174:20, 211:17
drawn [1] - 98:12
dreadful [1] - 97:20
dream [2] - 182:25,
183:18
Dreelan [1] - 140:3
dress [1] - 27:22
drew [3] - 48:9,
48:10, 130:7
drinking [1] - 15:27
drive [1] - 137:29
driven [2] - 22:3,
22:5
driving [2] - 31:14,
32:2
Dublin [3] - 50:29,

100:8, 163:19
DUBLIN [6] - 1:17,
2:13, 2:20, 2:25, 3:7,
3:16
due [6] - 23:21, 27:3,
50:19, 83:3, 179:17,
189:16
DUNDRUM [1] - 2:25
during [8] - 12:28,
31:26, 49:26, 50:16,
72:5, 185:12, 204:12,
205:8
duty [12] - 7:21,
15:28, 44:9, 44:10,
44:16, 46:20, 103:1,
112:27, 112:29,
119:16, 130:10,
167:20
dynamic [1] - 81:7
DÁIL [1] - 1:5
délicat [1] - 68:19

E

early [4] - 46:13,
121:26, 130:22,
179:11
easier [1] - 174:13
effect [9] - 8:20,
31:13, 102:28, 112:1,
147:21, 160:28,
167:17, 198:8, 212:17
effective [1] - 208:1
effectively [12] -
19:5, 23:14, 36:23,
55:4, 62:17, 126:16,
128:4, 146:6, 147:18,
171:4, 206:21, 213:19
effort [4] - 5:18, 6:22,
39:29, 207:24
efforts [2] - 71:16,
207:26
eight [2] - 33:24,
49:11
either [15] - 6:6,
38:9, 38:10, 47:19,
50:26, 84:23, 145:21,
155:26, 170:9,
186:11, 186:14,
191:28, 198:24,
205:8, 208:20
electronic [1] - 21:17
element [1] - 130:26
eleven [1] - 21:3
elicit [1] - 162:10
elicited [1] - 162:22
eliciting [2] - 161:20,
162:4
ELIZABETH [1] - 2:7

ELLEN [1] - 3:4
elsewhere [1] -
142:25
elucidating [1] -
110:13
em [3] - 41:6, 203:7,
208:29
email [18] - 136:12,
139:7, 143:11,
166:12, 166:15,
173:20, 178:6, 179:4,
184:20, 185:2, 185:9,
185:20, 186:2,
186:11, 187:7,
188:14, 194:25,
195:18
emailed [2] - 136:17,
186:18
emails [2] - 140:7,
178:29
emanate [1] - 136:4
emerged [3] -
108:13, 174:13,
197:28
emergency [1] -
137:3
emotional [1] - 11:18
emotionally [1] -
34:15
emphasis [2] -
90:23, 118:21
emphasise [2] -
29:11, 34:18
emphasised [2] -
5:20, 131:16
employment [1] -
118:21
enclosures [1] -
151:23
encounter [1] -
79:17
encourages [1] -
79:7
encouraging [1] -
80:21
end [18] - 12:25,
30:26, 39:18, 39:23,
41:23, 43:7, 44:12,
118:23, 123:2,
130:15, 138:18,
165:14, 169:26,
175:21, 186:15,
188:20, 189:1, 206:17
ended [1] - 185:9
ends [2] - 53:29,
111:6
engaged [4] - 42:9,
126:7, 135:8, 156:6
engagement [1] -
122:21

engaging [4] - 115:4,
138:29, 139:2, 174:23
enjoy [2] - 46:16,
155:17
ensure [1] - 109:16
entire [2] - 120:1
entirely [6] - 14:17,
88:22, 89:25, 121:10,
191:5, 195:29
entitled [11] - 22:11,
63:20, 70:1, 78:10,
98:13, 134:9, 145:29,
168:28, 169:1, 169:6,
169:28
entitlement [1] -
70:17
entrenched [1] -
36:9
envisaged [1] -
59:21
Equality [5] - 57:2,
57:3, 57:20, 57:21,
109:18
equality [1] - 50:25
EQUALITY [1] - 1:9
equally [1] - 24:5
erred [1] - 28:11
error [33] - 6:14,
7:13, 67:4, 67:14,
68:4, 74:25, 95:9,
95:13, 143:26, 144:1,
144:4, 145:7, 145:13,
149:28, 168:19,
168:20, 168:29,
169:27, 170:16,
170:17, 170:26,
171:3, 171:9, 171:13,
171:15, 175:28,
177:22, 196:4, 196:6,
196:10, 196:18
essentially [7] -
32:21, 65:29, 77:16,
80:19, 92:8, 122:26,
204:2
establish [5] - 88:1,
89:2, 89:13, 132:28,
132:29
ESTABLISHED [1] -
1:8
established [5] -
109:3, 130:27, 208:3,
208:5, 208:27
establishes [1] -
70:17
establishing [1] -
189:26
et [2] - 111:18,
126:15
etcetera [5] - 61:28,
93:19, 93:20, 210:24

ethic [1] - 44:19
Eve [2] - 28:1, 28:3
eve [1] - 46:6
evening [12] - 9:22,
126:5, 127:4, 139:14,
139:19, 140:2, 142:8,
142:21, 153:10,
166:11, 166:16, 178:6
event [14] - 15:22,
114:2, 114:9, 114:13,
114:20, 115:21,
144:22, 149:3, 163:6,
167:21, 169:4,
172:21, 173:19, 182:1
events [8] - 79:27,
105:10, 113:26,
123:25, 124:4, 126:9,
133:10
everyday [1] - 75:7
evidence [110] -
6:28, 26:12, 29:9,
30:1, 30:23, 30:26,
31:3, 33:21, 34:27,
34:28, 34:29, 35:11,
36:18, 41:12, 41:14,
43:22, 44:25, 46:6,
49:20, 50:11, 50:19,
52:23, 54:17, 57:28,
61:2, 61:5, 61:20,
61:29, 62:18, 63:16,
64:25, 65:10, 65:16,
66:1, 66:3, 72:25,
75:8, 75:22, 79:5,
79:23, 79:25, 81:26,
84:29, 85:19, 85:21,
90:4, 90:9, 96:13,
96:16, 96:17, 100:21,
101:7, 105:21,
109:14, 112:16,
113:4, 114:14,
125:18, 125:26,
137:15, 137:19,
146:28, 148:23,
149:12, 149:15,
151:2, 153:11,
153:15, 157:15,
165:17, 167:8, 171:9,
171:10, 173:9,
173:25, 175:12,
176:28, 178:19,
184:3, 184:6, 184:17,
184:29, 185:13,
188:24, 189:15,
189:16, 189:17,
189:29, 190:11,
190:26, 190:27,
191:23, 192:18,
192:22, 193:4, 198:5,
199:1, 199:3, 200:14,
203:16, 203:24,

204:13, 204:23,
204:24, 206:11,
207:27, 212:16,
213:7, 213:25
EVIDENCE [1] - 1:9
Evidence [1] - 58:2
evidence" [1] - 193:2
evidential [1] -
198:27
ex [2] - 85:20, 85:24
ex-Chief [2] - 85:20,
85:24
exactly [18] - 10:21,
17:12, 19:24, 19:29,
25:18, 33:11, 38:28,
40:25, 78:20, 79:24,
172:11, 173:15,
187:22, 192:16,
192:28, 193:6, 194:2,
196:11
exaggerated [1] -
40:28
exaggeration [1] -
43:10
examination [27] -
13:1, 25:23, 27:2,
47:9, 72:6, 79:28,
80:28, 91:7, 94:13,
98:9, 98:18, 98:19,
103:15, 106:23,
108:8, 108:13, 111:6,
111:17, 111:20,
111:21, 112:6, 112:8,
112:18, 147:11,
154:20
examine [2] - 46:15,
155:16
EXAMINED [24] -
4:4, 4:5, 4:6, 4:7,
4:11, 4:12, 4:13, 4:16,
4:17, 4:18, 4:19, 4:20,
5:4, 49:16, 52:1,
58:19, 118:8, 158:20,
177:29, 184:10,
199:13, 211:2,
212:11, 213:5
examined [8] -
45:26, 63:9, 104:12,
104:13, 104:16,
110:6, 125:29, 212:22
examining [3] -
28:21, 101:15, 128:6
example [9] - 26:5,
26:6, 28:10, 101:15,
101:20, 103:14,
108:26, 112:26, 113:2
exceeding [1] -
138:22
excellent [1] - 35:23
except [6] - 120:2,
141:15, 152:11,
174:18, 175:25,
189:25
exception [1] -
178:19
excerpt [1] - 206:10
excerpts [3] - 59:27,
124:20, 205:9
exchanges [1] -
138:20
excluded [1] - 87:29
excluding [1] -
189:25
exclusion [1] -
186:14
exclusively [2] -
121:3
excuse [1] - 199:17
executed [1] -
143:20
exercise [7] - 19:12,
20:4, 131:29, 137:3,
139:18, 143:13, 175:2
exhibits [1] - 61:24
existence [1] -
190:23
exonerated [2] -
16:28, 110:7
expect [2] - 155:25,
156:18
expected [3] - 59:20,
103:7, 182:11
expecting [1] -
164:10
experience [2] -
46:17, 155:18
experienced [1] -
208:1
experiencing [1] -
17:15
explain [3] - 127:29,
158:28, 185:8
explained [2] -
53:21, 65:17
explaining [1] -
131:17
explanation [4] -
46:1, 46:11, 46:12,
177:20
explicit [1] - 177:12
exploration [1] -
177:6
explore [16] - 9:28,
27:13, 38:7, 38:14,
128:22, 128:23,
128:25, 129:19,
131:5, 132:10, 134:9,
135:3, 135:18,
154:26, 159:16,
159:18
explored [5] - 26:15,
27:15, 128:27, 147:8,
147:10
exploring [3] - 129:3,
132:4, 132:13
expose [1] - 172:15
express [4] - 154:14,
186:26, 201:18,
202:25
expressed [6] -
28:27, 136:15,
175:16, 199:26,
201:21, 202:10
expressing [1] -
212:24
expression [1] -
138:27
extant [2] - 39:11
extended [2] -
134:14, 159:3
extent [13] - 70:18,
75:26, 77:17, 81:2,
88:26, 122:11,
130:11, 147:7, 164:1,
175:25, 197:3, 210:8,
212:13
extract [2] - 12:7,
125:17
eyes [1] - 171:19
eyesight [1] - 159:23

F

face [5] - 85:5,
101:24, 102:23,
115:15
face-to-face [1] -
115:15
faced [3] - 44:16,
60:25, 147:18
facie [1] - 129:22
facilitated [2] -
199:24, 202:7
fact [64] - 8:5, 8:8,
9:14, 13:18, 18:1,
18:2, 18:8, 19:1, 19:3,
32:17, 34:4, 34:20,
39:3, 39:27, 40:3,
47:21, 47:27, 52:21,
56:1, 59:24, 66:27,
67:5, 67:9, 68:1, 68:5,
74:1, 78:28, 82:19,
83:26, 86:9, 86:19,
92:22, 93:5, 93:14,
96:7, 97:22, 106:6,
106:21, 117:28,
131:17, 149:28,
154:23, 158:5,
160:25, 167:15,
167:18, 169:29,
170:1, 171:8, 172:8,
174:4, 175:14,
181:26, 189:14,
195:18, 198:15,
204:17, 205:9,
208:12, 210:18, 211:7
Facts [4] - 59:12,
61:13, 80:2, 133:26
facts [26] - 9:1, 9:2,
22:2, 41:29, 43:10,
60:6, 65:3, 67:9,
70:14, 77:22, 77:25,
90:22, 90:24, 100:15,
111:20, 112:25,
112:26, 112:28,
114:21, 117:17,
132:29, 133:19,
175:2, 177:6, 177:7,
178:20
factual [11] - 121:26,
128:22, 129:2, 129:6,
129:19, 135:18,
144:20, 144:24,
147:11, 147:23, 176:5
factually [3] -
178:16, 191:22,
193:24
failed [5] - 18:27,
26:12, 26:13, 27:3,
172:25
failing [1] - 26:16
fair [24] - 10:25,
15:10, 19:29, 20:4,
24:25, 33:7, 33:19,
35:21, 38:22, 39:5,
44:6, 46:19, 51:16,
76:2, 76:14, 100:6,
115:20, 134:10,
150:1, 158:12,
160:22, 181:9,
181:11, 183:1
fairest [1] - 175:23
fairly [6] - 5:11, 9:2,
44:26, 148:22,
163:25, 168:2
fairness [7] - 11:20,
35:10, 62:21, 62:22,
72:19, 175:18, 214:2
fait [1] - 123:4
faith [19] - 9:11, 72:9,
75:16, 76:18, 99:16,
107:1, 144:23,
174:16, 176:3,
176:16, 176:19,
176:26, 176:29,
208:16, 208:17,
208:20, 208:21,
209:12
faith" [1] - 177:11
faithfully [1] - 167:9
fall [2] - 56:27, 57:16
false [3] - 68:8, 92:4,
92:13
familiar [2] - 58:28,
174:25
familiarity [1] - 124:3
family [9] - 16:27,
17:8, 83:23, 83:24,
83:26, 93:12, 93:18,
172:29, 177:17
famous [2] - 65:25,
182:19
far [19] - 6:10, 6:11,
8:16, 26:21, 26:26,
51:19, 77:23, 80:17,
85:19, 98:9, 99:1,
100:11, 101:3, 110:1,
134:12, 156:11,
168:29, 182:10,
203:25
fare [1] - 132:24
fashion [1] - 72:23
fast [2] - 130:29,
135:8
fast-paced [1] -
135:8
fastidiously [2] -
20:22, 20:28
father [1] - 15:5
fault [3] - 23:28,
107:27
faulty [1] - 84:13
favour [1] - 207:28
favourable [2] -
34:24, 36:6
feared [1] - 155:11
fearlessly [1] - 45:18
fears [2] - 56:25,
57:14
FEBRUARY [2] - 1:6,
1:10
February [16] -
16:21, 18:20, 53:23,
58:2, 67:11, 82:21,
82:22, 83:8, 83:23,
83:25, 86:16, 86:19,
87:14, 91:12, 95:23,
197:16
feed [1] - 25:9
feedback [1] -
143:10
feet [4] - 138:26,
138:29, 155:27, 187:2
FELIX [1] - 2:23
fell [2] - 45:17
fellow [3] - 5:12,
163:10, 163:17
felt [12] - 10:25,
11:20, 34:15, 39:23,

39:28, 114:15,
114:16, 115:14,
131:28, 206:3, 209:7,
209:9
Ferghal [1] - 69:28
Fergus [3] - 135:2,
143:1, 178:8
few [4] - 5:11,
123:22, 136:24, 188:8
fide [3] - 43:2,
208:17, 208:28
fides [22] - 42:25,
46:29, 76:11, 100:26,
106:15, 106:24,
106:26, 132:15,
135:15, 179:27,
180:3, 180:17,
180:18, 180:26,
182:2, 208:5, 208:13,
208:27
fielded [2] - 120:4,
120:6
fifth [1] - 14:28
file [4] - 102:26,
120:2, 120:5, 120:19
filed [1] - 191:25
fill [1] - 14:12
filleted [1] - 23:2
final [13] - 47:18,
51:19, 53:27, 151:10,
167:3, 167:15,
175:24, 179:9, 203:4,
208:11, 208:14,
211:17
finalisation [1] -
178:24
finalised [3] - 179:7,
179:10, 189:21
finally [3] - 56:13,
91:17, 180:6
findings [10] - 40:17,
85:13, 110:10,
110:13, 110:14,
125:19, 175:22,
198:11, 208:8, 211:8
fine [3] - 29:5, 138:3
finest [1] - 11:25
finish [1] - 104:6
finished [4] - 124:27,
126:5, 186:16, 191:20
firm [4] - 12:29, 52:5,
68:26, 129:25
first [40] - 12:12,
22:1, 37:5, 41:16,
41:25, 42:2, 44:26,
53:28, 59:9, 63:13,
66:15, 69:23, 71:15,
73:9, 78:29, 83:2,
91:12, 92:20, 97:3,
107:7, 108:15,
111:29, 117:10,
119:6, 124:8, 128:5,
136:22, 147:14,
161:20, 166:6, 179:1,
179:2, 179:3, 185:8,
185:11, 188:28,
189:17, 196:26,
199:18, 207:16
firstly [4] - 52:4,
158:26, 165:29, 211:4
fish [3] - 139:15,
164:24, 165:3
FITZGERALD [2] -
2:17, 3:9
five [3] - 7:4, 17:21,
169:14
flag [1] - 130:20
flagged [1] - 46:13
FLAHIVE [1] - 3:10
fleeting [1] - 113:28
flesh [1] - 105:6
flows [1] - 87:1
fluid [1] - 190:12
flurry [1] - 49:27
fly [1] - 184:6
focus [4] - 28:22,
35:1, 123:27, 150:17
focused [1] - 63:5
follow [14] - 20:4,
24:4, 24:5, 24:6,
65:24, 134:4, 145:26,
151:18, 159:6,
160:10, 161:22,
163:20, 169:23,
209:13
followed [1] - 118:27
FOLLOWING [1] -
1:5
following [19] - 1:26,
12:4, 14:4, 30:2, 31:4,
31:5, 38:2, 53:13,
97:5, 100:10, 113:25,
133:9, 141:5, 144:5,
145:11, 159:6,
165:28, 170:21,
175:27
follows [1] - 110:23
FOLLOWS [4] - 5:2,
117:1, 118:8, 184:10
foot [2] - 7:26, 44:3
FOR [8] - 1:8, 2:6,
2:9, 2:15, 2:22, 3:2,
3:9, 115:28
force [9] - 29:6,
87:16, 91:27, 92:11,
120:1, 157:16,
176:24, 177:4, 209:20
forced [1] - 62:1
forcing [2] - 176:13,
209:26
forever [2] - 17:22,
28:9
foreword [1] -
207:10
forget [2] - 180:22,
202:25
forgotten [1] -
146:23
form [5] - 75:11,
79:3, 89:5, 114:28,
202:17
formal [2] - 130:20,
164:28
formally [3] - 68:25,
130:25, 200:26
format [3] - 21:17,
163:21, 164:13
formed [1] - 190:5
former [6] - 52:17,
105:25, 109:21,
110:20, 147:29,
171:26
forms [1] - 73:24
forth [7] - 11:14,
32:9, 47:2, 72:25,
80:14, 196:23, 206:13
fortiori [1] - 141:5
fortunately [1] -
107:21
forum [1] - 178:25
forward [3] - 32:21,
35:3, 150:9
forwarded [1] -
16:21
forwarding [1] -
123:9
foundation [1] -
129:13
fourth [2] - 14:10,
147:29
framework [3] -
22:12, 22:28, 22:29
FRANCES [1] - 3:9
frank [3] - 123:5,
124:18, 165:2
FRANKFORT [1] -
2:24
frankly [1] - 167:13
fraught [1] - 138:25
free [2] - 143:7,
191:5
French [1] - 169:17
FRIDAY [2] - 1:18,
5:1
Friday [8] - 50:26,
89:23, 142:21,
165:14, 166:3,
166:10, 174:8, 184:21
Friend [1] - 110:25
front [7] - 47:14,
68:24, 146:24, 164:6,
171:18, 185:4, 211:28
frustration [2] -
34:14, 75:25
fry [3] - 139:15,
164:24, 165:3
full [15] - 38:24,
42:19, 77:11, 91:28,
92:12, 94:8, 120:4,
120:6, 122:13,
122:21, 130:5,
163:28, 168:29,
177:6, 204:18
Full [1] - 77:10
fuller [1] - 151:25
fully [14] - 5:17, 9:8,
11:8, 11:11, 11:12,
20:11, 26:8, 44:29,
45:11, 45:22, 70:17,
123:4, 160:13, 168:18
function [1] - 53:22
functions [1] - 208:3
furnished [1] -
198:17
future [2] - 51:27,
193:1

G

game [1] - 98:23
garda [1] - 15:18
Garda [42] - 14:8,
15:29, 17:16, 17:19,
18:4, 23:15, 23:17,
23:23, 37:26, 50:12,
50:18, 51:6, 52:3,
55:26, 55:27, 56:24,
57:13, 57:29, 58:4,
58:6, 58:7, 58:12,
59:1, 59:4, 59:6, 60:2,
69:28, 76:27, 97:13,
108:29, 109:2, 119:8,
121:5, 122:25,
132:19, 150:15,
179:16, 198:6,
198:18, 203:18,
207:18
Gardaí [1] - 21:17
GARRET [3] - 3:3,
4:15, 184:9
Garret [5] - 136:6,
136:13, 137:7, 149:6,
178:9
gather [1] - 134:12
geese [1] - 99:12
general [10] - 84:19,
118:20, 122:6, 184:1,
197:25, 198:7, 204:9,
205:11, 211:29
General's [1] -
139:23
generally [1] - 120:8
generated [1] -
165:29
gentlemen [4] -
28:18, 28:24, 36:1,
36:29
genuine [4] - 42:23,
42:28, 43:3, 76:29
genuinely [2] - 99:9,
99:13
GERALDINE [1] - 3:5
GERARD [1] - 3:12
germane [2] - 89:26,
89:27
GILLANE [1] - 105:6
Gillane [10] - 31:27,
64:20, 69:14, 80:17,
104:13, 104:20,
104:28, 107:8,
206:14, 212:23
Gillane's [1] - 107:27
girlfriend [1] -
112:12
given [47] - 10:19,
13:8, 18:16, 22:12,
22:14, 22:21, 33:9,
35:11, 38:2, 52:9,
56:28, 57:17, 79:5,
79:23, 83:16, 96:16,
100:21, 101:7, 101:8,
117:15, 134:28,
139:10, 142:2, 143:5,
149:12, 151:25,
153:2, 159:27,
162:29, 174:11,
174:29, 184:3,
184:29, 188:14,
188:24, 189:7,
189:15, 189:16,
190:14, 192:5,
196:17, 200:25,
202:5, 203:17,
212:16, 213:29
glad [1] - 47:17
glasses [2] - 111:28
GLEESON [2] - 3:4,
3:6
glossed [1] - 99:2
God [1] - 171:18
GORDON [1] - 2:10
Government [3] -
62:8, 62:18, 62:19
grade [1] - 208:23
Grangegorman [1] -
163:19
grateful [1] - 15:20
great [5] - 22:25,
34:11, 36:15, 113:17,

134:11
greater [2] - 45:8,
 110:12
greatest [1] - 11:25
green [5] - 160:20,
 160:22, 163:11,
 174:7, 174:10
grievance [11] - 88:3,
 88:17, 88:18, 88:27,
 89:2, 89:13, 145:3,
 189:4, 189:26, 210:6
gross [1] - 102:29
ground [1] - 85:22
grounds [7] - 17:7,
 17:9, 21:22, 37:1,
 40:24, 43:15, 132:9
groundwork [1] -
 65:24
GSOC [3] - 59:6,
 79:8, 80:21
guarantee [1] -
 101:12
guards [1] - 44:22
Guerin [11] - 26:22,
 26:25, 26:28, 61:7,
 62:7, 62:13, 62:16,
 62:27, 122:27,
 126:11, 126:19
guess [2] - 37:17,
 62:25
guide [1] - 183:15
GWEN [1] - 1:30
Gwen [1] - 1:25

H

half [1] - 11:24
HALIDAY [1] - 2:12
hand [11] - 13:20,
 32:23, 79:1, 87:16,
 108:6, 114:19, 151:4,
 159:9, 176:24, 177:4,
 186:10
handed [11] - 12:19,
 20:19, 54:17, 55:3,
 56:1, 150:16, 150:19,
 150:21, 150:22,
 151:6, 188:16
handle [1] - 153:4
hands [1] - 44:23
handwritten [1] -
 187:29
hanging [1] - 149:25
happily [1] - 157:4
happy [3] - 170:9,
 184:2, 198:29
harcèlement [1] -
 169:17
hard [5] - 77:13,

136:17, 185:5, 187:7,
 188:13
hardly [2] - 161:19,
 172:20
harp [1] - 169:21
harsh [3] - 97:28,
 97:29, 98:4
hates [1] - 112:11
HAVING [2] - 118:7,
 184:9
head [6] - 18:17,
 99:6, 164:24, 169:22,
 186:8, 197:4
headed [3] - 10:24,
 58:23, 188:26
headnote [1] -
 183:12
Headquarters [2] -
 50:12, 50:18
Healy [26] - 49:28,
 61:9, 115:11, 134:28,
 135:2, 135:27,
 137:12, 143:1, 152:5,
 156:10, 156:13,
 156:22, 157:26,
 158:14, 160:3, 178:8,
 185:16, 185:17,
 186:18, 187:16,
 187:18, 188:9,
 188:14, 194:8,
 194:26, 195:16
Healy's [4] - 46:1,
 159:1, 187:29, 188:4
hear [9] - 12:25,
 20:16, 21:14, 25:13,
 25:27, 26:13, 57:28,
 65:1, 105:8
heard [14] - 29:8,
 29:10, 48:29, 56:25,
 57:14, 68:16, 77:15,
 107:13, 127:24,
 141:19, 149:2, 162:8,
 184:17, 203:25
hearing [12] - 65:2,
 85:19, 101:1, 128:26,
 134:18, 135:1, 136:7,
 141:1, 165:26,
 179:15, 180:7, 196:25
HEARING [4] - 5:1,
 115:28, 117:1, 214:12
hearings [9] - 57:1,
 57:5, 57:19, 57:23,
 122:3, 122:6, 122:29,
 123:23, 132:25
heart [1] - 108:4
heel [1] - 177:21
HELD [1] - 1:17
held [1] - 19:26
help [1] - 160:16
helpful [1] - 194:16

helping [2] - 172:19,
 180:11
helps [1] - 56:10
hence [1] - 93:28
herself [2] - 47:20,
 157:21
hidden [2] - 209:29,
 210:1
High [1] - 183:10
high [1] - 120:22
highlight [1] - 21:14
highlighted [1] -
 54:3
highly [2] - 33:22,
 122:19
himself [15] - 18:17,
 24:28, 27:18, 32:14,
 32:15, 33:29, 72:20,
 76:25, 79:6, 80:19,
 155:29, 178:20,
 181:17, 185:16,
 210:23
hindsight [1] - 115:1
hint [1] - 162:29
history [3] - 14:8,
 14:9, 26:22
hmm [1] - 147:1
hold [1] - 103:9
hole [1] - 40:21
home [3] - 107:13,
 124:17, 142:8
honestly [4] -
 107:11, 170:18,
 196:11, 196:20
honesty [2] - 132:15,
 132:18
honour [1] - 11:26
honourable [1] -
 208:1
hope [3] - 10:11,
 51:28, 146:26
hoped [1] - 198:10
hostility [8] - 29:15,
 33:17, 33:28, 34:2,
 34:3, 34:17, 34:19,
 35:26
hour [2] - 50:1, 50:2
hours [3] - 50:28,
 165:29, 203:4
House [1] - 122:28
house [2] - 111:23,
 112:11
HOUSE [3] - 2:12,
 2:19, 3:15
HQ [1] - 158:11
huge [1] - 152:12
hugely [1] - 163:4
hunt [1] - 177:22
hurtful [2] - 109:13,
 109:25

I

i [1] - 59:3
I. [1] - 31:20
idea [12] - 90:11,
 113:22, 131:10,
 148:17, 159:26,
 165:21, 175:3,
 197:18, 197:19,
 197:20, 205:4, 210:16
identified [3] - 91:21,
 95:8, 126:12
identifies [1] - 94:20
identify [2] - 49:29,
 126:22
idle [1] - 155:23
ignore [2] - 22:1,
 191:5
ignored [1] - 60:14
ill [6] - 29:11, 34:2,
 34:19, 35:26, 37:22,
 133:3
ill-motivated [1] -
 37:22
ill-will [4] - 29:11,
 34:2, 34:19, 35:26
illicit [1] - 33:9
imagine [5] - 15:16,
 145:13, 160:8,
 160:10, 200:6
immediate [1] -
 126:10
immediately [4] -
 57:25, 108:2, 110:24,
 197:29
immersed [1] -
 145:16
impact [1] - 18:7
imparted [1] - 160:19
impending [1] -
 46:23
impertinent [1] -
 28:13
impinge [1] - 132:17
impinges [1] - 75:17
implemented [1] -
 129:7
implicated [1] -
 120:22
implication [1] -
 117:14
implied [1] - 110:1
implying [1] - 22:18
importance [2] -
 166:13, 178:16
important [14] - 9:26,
 43:22, 51:17, 66:9,
 66:20, 72:16, 127:23,
 130:26, 132:13,

132:26, 133:20,
 163:4, 185:29, 206:3
impression [3] -
 77:13, 152:29, 160:11
imprimatur [3] -
 62:6, 62:12, 157:20
improper [9] - 26:19,
 73:3, 73:15, 77:1,
 81:19, 81:27, 90:17,
 90:28, 177:2
improperly [4] -
 129:18, 132:6, 154:29
impugn [3] - 72:27,
 132:14, 207:24
imputation [3] -
 175:29, 177:10,
 177:12
imputations [1] -
 176:2
IN [1] - 1:17
inaccuracy [1] -
 150:17
inaccurate [2] -
 73:26, 117:25
inadequacies [2] -
 23:22, 25:20
inadequacy [1] -
 23:28
inappropriate [2] -
 43:16, 43:18
inaudible [1] -
 128:10
incident [15] - 31:23,
 31:28, 57:3, 57:21,
 58:1, 58:5, 58:8,
 58:15, 58:29, 79:2,
 79:11, 79:18, 93:18,
 147:12
incidents [4] - 24:12,
 32:17, 59:3, 120:23
include [4] - 57:1,
 57:19, 143:6, 198:7
included [13] -
 34:25, 54:8, 59:26,
 117:5, 134:19,
 134:20, 135:20,
 143:6, 157:7, 189:10,
 198:16, 199:4, 205:18
includes [1] - 109:4
including [5] -
 110:20, 175:12,
 189:7, 189:24, 190:5
inclusion [1] -
 188:28
incompetence [1] -
 134:15
incorrect [10] -
 66:28, 68:7, 68:9,
 84:3, 94:22, 98:10,
 99:1, 147:22, 193:24

indeed ^[10] - 24:2, 65:4, 107:12, 108:12, 113:15, 126:18, 133:15, 175:13, 203:10, 204:27
independent ^[1] - 62:13
INDEX ^[1] - 4:1
indicate ^[2] - 81:3, 98:9
indicated ^[16] - 5:12, 9:7, 14:19, 15:3, 33:16, 40:3, 44:26, 52:24, 60:24, 67:19, 69:4, 70:18, 75:6, 108:19, 117:7, 212:28
indicates ^[1] - 22:24
indicating ^[4] - 80:17, 95:29, 180:14, 180:16
indication ^[1] - 10:18
indications ^[1] - 175:1
indirectly ^[1] - 51:21
individual ^[11] - 124:22, 126:12, 126:21, 132:25, 133:21, 143:17, 147:12, 197:22, 197:28, 198:1
individually ^[1] - 120:3
individuals ^[4] - 11:26, 119:12, 127:12, 133:7
industrial ^[1] - 113:17
ine ^[1] - 33:3
inevitably ^[2] - 123:1, 132:17
infer ^[1] - 202:26
inference ^[1] - 169:27
inferred ^[2] - 170:1, 202:28
inferring ^[2] - 203:18, 204:6
influenced ^[1] - 204:17
inform ^[4] - 6:28, 46:23, 68:23, 68:25
information ^[9] - 12:20, 32:13, 33:10, 61:6, 61:9, 89:6, 90:4, 103:1, 124:19
informed ^[1] - 54:6
informer ^[2] - 172:7, 172:8
informer's ^[1] - 172:6
informing ^[1] - 46:7
informs ^[1] - 100:11
initiative ^[1] - 152:26
injured ^[2] - 61:26, 97:10
innocence ^[1] - 200:1
innocuous ^[1] - 162:7
inordinate ^[1] - 17:29
input ^[9] - 126:27, 126:29, 143:8, 149:7, 149:9, 157:2, 166:22, 166:28, 167:1
inquire ^[2] - 87:27, 182:20
inquiring ^[1] - 133:12
inquiry ^[6] - 60:27, 62:20, 72:16, 73:6, 75:11, 134:5
INQUIRY ^[2] - 1:3, 1:9
inquisitorial ^[1] - 130:18
inserted ^[1] - 124:21
insist ^[1] - 46:26
insisting ^[1] - 46:27
insofar ^[14] - 71:15, 81:28, 94:7, 100:20, 107:25, 110:18, 123:10, 129:3, 135:5, 139:22, 147:22, 170:13, 170:15, 189:3
Inspector ^[3] - 86:21, 152:6, 201:11
inspector ^[3] - 67:2, 119:10, 201:13
inspectors ^[1] - 120:5
instance ^[11] - 21:16, 22:4, 66:16, 100:8, 100:13, 108:15, 111:21, 112:11, 112:28, 169:12, 170:6
instances ^[1] - 11:1
instruct ^[1] - 129:3
INSTRUCTED ^[5] - 2:11, 2:18, 2:23, 3:5, 3:13
instructed ^[10] - 19:25, 45:14, 78:7, 80:15, 110:15, 112:13, 112:17, 113:20, 129:19, 163:13
instructing ^[2] - 96:12, 178:26
instruction ^[2] - 76:28, 118:28
instructions ^[120] - 5:26, 6:1, 6:12, 7:16, 9:1, 9:12, 19:17, 29:18, 43:6, 45:22, 49:22, 51:20, 51:24, 52:6, 52:7, 52:8, 52:18, 61:1, 66:24, 68:26, 69:5, 72:28, 73:1, 73:2, 73:5, 74:9, 74:24, 75:14, 75:18, 75:28, 78:9, 81:6, 81:13, 81:16, 81:17, 82:14, 82:17, 83:16, 92:16, 92:17, 99:5, 114:29, 120:15, 121:19, 121:21, 121:27, 122:10, 122:11, 122:13, 122:19, 122:22, 126:3, 126:4, 126:29, 127:5, 127:7, 127:11, 127:16, 127:18, 127:26, 128:19, 128:21, 128:24, 129:2, 129:5, 129:6, 129:7, 129:8, 129:11, 129:14, 129:25, 130:2, 130:3, 131:9, 132:9, 132:16, 134:25, 134:28, 135:5, 135:9, 135:10, 135:17, 135:28, 136:4, 138:11, 138:12, 138:22, 140:16, 141:7, 141:11, 141:13, 141:15, 141:24, 141:29, 142:1, 143:5, 147:21, 155:1, 155:22, 155:27, 156:7, 156:12, 157:8, 157:10, 157:13, 165:20, 166:3, 167:10, 171:29, 176:5, 179:4, 184:18, 184:27, 190:21, 193:10, 198:17, 198:21, 200:4, 210:21
INSTRUMENT ^[1] - 1:8
insufficient ^[1] - 203:16
integrity ^[38] - 47:22, 47:24, 48:8, 48:13, 48:22, 72:9, 72:27, 73:10, 73:23, 73:29, 74:2, 74:10, 74:15, 74:24, 75:10, 75:18, 76:11, 76:13, 77:8, 78:7, 80:14, 81:21, 100:25, 106:7, 106:14, 106:23, 107:3, 132:15, 132:18, 135:14, 139:3, 155:2, 174:3, 179:26, 180:3, 180:17, 180:25, 182:2
intend ^[2] - 88:29, 119:1
intended ^[6] - 58:16, 67:21, 109:9, 155:19, 182:8, 182:9
intending ^[3] - 128:16, 154:29, 164:19
intensely ^[1] - 168:25
intent ^[1] - 46:19
intention ^[8] - 11:18, 12:29, 65:20, 65:23, 67:26, 67:27, 71:29, 210:17
inter ^[1] - 149:15
interaction ^[2] - 27:18, 139:21
interactions ^[1] - 189:29
interacts ^[1] - 115:8
interchange ^[2] - 91:4, 138:15
interchangeably ^[1] - 112:20
interchanges ^[2] - 138:5, 138:21
interest ^[3] - 113:28, 119:13, 212:24
interested ^[2] - 47:12, 159:8
interests ^[6] - 41:26, 44:17, 45:5, 45:19, 80:6, 119:8
interfered ^[1] - 31:14
interfering ^[1] - 32:1
interleaving ^[1] - 81:6
intermediate ^[1] - 186:20
internal ^[1] - 163:20
interpretation ^[3] - 201:27, 202:17, 202:20
interpreted ^[1] - 132:11
intervene ^[2] - 14:14, 139:5
intervened ^[1] - 97:26
intervenes ^[3] - 64:20, 68:16, 85:9
intervening ^[8] - 7:23, 106:20, 106:24, 150:12, 156:8, 180:16, 181:7, 182:5
intervention ^[3] - 72:7, 93:28, 98:1
interviewed ^[1] - 103:6
INTO ^[1] - 1:3
introduced ^[5] - 56:20, 73:11, 73:15, 73:17, 174:4
introduction ^[3] - 12:8, 73:10, 174:2
investigate ^[4] - 53:22, 64:27, 67:6, 94:25
investigated ^[2] - 24:11, 66:7
investigating ^[2] - 66:26, 67:3
Investigation ^[4] - 34:23, 58:24, 121:2, 147:27
investigation ^[21] - 16:16, 18:6, 18:23, 33:11, 54:5, 57:1, 57:19, 57:29, 58:3, 58:6, 58:14, 59:1, 59:4, 62:13, 69:28, 124:15, 185:27, 207:27, 207:28, 208:8, 209:26
investigations ^[9] - 101:26, 102:6, 102:25, 120:24, 121:4, 122:20, 133:18, 133:21, 133:23
invited ^[1] - 34:4
involved ^[12] - 11:12, 38:1, 51:23, 59:23, 127:9, 127:20, 149:4, 157:23, 167:14, 170:8, 173:11, 184:19
involvement ^[3] - 79:10, 129:1, 143:3
involves ^[1] - 70:27
involving ^[1] - 122:20
irrelevant ^[7] - 85:6, 85:13, 87:26, 88:18, 89:15, 89:25, 191:17
issue ^[94] - 22:10, 24:23, 25:16, 26:25, 35:12, 42:8, 45:28, 49:18, 65:8, 66:3, 67:1, 67:19, 69:2, 70:11, 78:19, 78:27, 84:18, 87:4, 96:4, 100:13, 104:17,

105:7, 106:2, 106:4,
106:5, 106:23,
112:14, 114:11,
115:12, 119:4,
122:12, 122:18,
123:14, 126:3, 126:8,
127:9, 127:25, 128:2,
128:5, 130:4, 130:10,
130:14, 130:20,
131:1, 131:2, 131:5,
131:15, 132:8,
132:16, 132:25,
132:26, 133:11,
135:24, 141:4,
144:20, 145:3, 145:9,
145:20, 145:21,
146:17, 147:3,
148:16, 150:4,
152:21, 153:1, 153:5,
153:20, 153:24,
154:1, 154:10,
154:11, 155:1,
156:10, 156:14,
164:22, 174:3,
174:21, 175:11,
175:18, 175:22,
175:24, 176:20,
177:5, 179:20, 180:2,
180:17, 181:5, 181:9,
193:20, 200:24,
206:14, 209:14
issues [45] - 27:14,
28:7, 32:7, 34:16,
35:7, 35:10, 39:16,
40:4, 45:26, 56:26,
57:4, 57:15, 57:22,
58:8, 59:6, 59:22,
60:13, 62:24, 62:26,
62:27, 63:2, 68:2,
77:26, 80:13, 80:26,
87:21, 90:16, 118:21,
121:22, 122:14,
124:1, 127:1, 127:19,
128:23, 128:27,
135:3, 141:2, 154:26,
177:4, 177:9, 182:4,
198:7
issuing [1] - 201:13
itself [6] - 5:10,
135:1, 136:7, 143:12,
188:23, 212:19
ix [4] - 16:18, 125:20,
206:23

J

JANUARY [3] - 1:18,
5:1, 214:12
January [8] - 82:24,
83:1, 83:11, 83:18,

83:26, 84:8, 104:25
jeopardy [4] - 130:5,
147:24, 148:3, 170:8
Jerry [3] - 97:13,
97:16, 97:22
job [4] - 22:25,
142:9, 165:7, 168:11
jog [1] - 53:11
jogged [1] - 13:7
JOHN [3] - 2:17, 2:22
joining [1] - 76:23
jointly [1] - 211:21
journalist [1] - 118:1
judge [20] - 10:16,
10:24, 11:20, 11:23,
23:8, 23:12, 35:1,
38:4, 38:12, 40:6,
55:7, 65:1, 74:6,
75:25, 76:3, 76:14,
78:24, 78:26, 92:20,
97:26
JUDGE [2] - 1:12,
2:3
Judge [98] - 11:22,
21:2, 21:6, 21:11,
21:24, 23:16, 23:19,
24:4, 24:14, 25:11,
26:12, 26:13, 30:15,
30:18, 33:6, 37:15,
37:23, 42:4, 42:16,
43:8, 55:7, 55:12,
56:5, 56:19, 64:11,
68:25, 69:17, 73:18,
73:29, 74:4, 74:13,
74:22, 75:20, 75:22,
85:19, 86:7, 86:28,
95:17, 95:29, 96:2,
100:1, 102:13,
102:17, 103:20,
103:23, 104:23,
105:24, 106:7,
106:21, 112:17,
114:4, 114:22,
131:18, 131:29,
138:24, 139:1,
142:20, 144:28,
154:15, 168:21,
168:26, 168:27,
169:10, 169:18,
170:14, 171:1, 171:7,
171:22, 172:3,
172:16, 173:21,
174:4, 179:20,
179:22, 180:14,
181:4, 181:28, 182:2,
189:24, 190:4,
190:17, 191:4, 192:5,
194:13, 196:23,
197:5, 197:24,
198:10, 200:20,

201:1, 201:5, 201:26,
202:16, 202:29,
212:23, 212:28,
213:19
Judge's [2] - 190:3,
191:10
judges [2] - 22:1,
61:27
judgment [2] -
183:11, 210:26
judicial [2] - 39:15,
40:24
judicially [1] - 51:12
July [6] - 96:12,
102:18, 202:7,
205:14, 205:15, 210:4
jumping [1] - 156:25
June [34] - 6:21,
6:22, 7:4, 7:17, 8:22,
17:2, 56:6, 56:7,
94:20, 95:6, 95:11,
124:15, 168:18,
170:16, 171:10,
172:23, 173:2, 173:3,
176:1, 191:26,
191:27, 191:29,
194:5, 194:7, 194:9,
194:18, 195:5,
195:12, 195:15,
196:5, 196:19, 202:7,
209:25
June/July [1] -
199:25
Justice [68] - 8:8,
22:24, 22:26, 29:28,
31:2, 37:11, 37:17,
39:3, 39:7, 39:18,
39:27, 40:20, 51:21,
54:18, 56:2, 57:2,
57:3, 57:10, 57:20,
57:21, 57:26, 58:11,
65:18, 68:17, 69:13,
71:13, 71:23, 72:2,
72:11, 72:19, 73:11,
73:16, 75:1, 76:24,
77:29, 78:14, 79:20,
80:10, 84:27, 85:9,
87:23, 88:10, 88:21,
89:10, 89:20, 90:3,
90:12, 90:27, 94:19,
95:18, 96:8, 104:17,
104:26, 106:2,
109:17, 110:11,
123:12, 141:6,
145:28, 151:16,
153:24, 155:28,
181:16, 188:29,
196:4, 202:23,
206:15, 206:17
JUSTICE [13] - 1:8,

1:12, 2:2, 64:3, 64:5,
64:29, 75:21, 77:7,
77:10, 81:17, 81:21,
85:27, 105:18
justice [2] - 41:18,
62:28
justify [2] - 24:2,
62:19
justifying [1] - 18:5

K

k [1] - 58:25
KATHLEEN [1] - 2:7
KATHY [1] - 2:18
KAVANAGH [1] - 2:4
keep [1] - 158:25
keeping [1] - 22:18
Kelly [1] - 214:10
KEN [1] - 3:10
kept [1] - 205:1
Kieran [2] - 114:4,
114:7
kind [9] - 11:28,
13:26, 24:8, 24:10,
99:23, 125:7, 131:23,
165:25, 210:17
Kingscourt [6] -
58:2, 58:14, 58:29,
78:23, 79:2, 79:18
knee [1] - 172:16
knife [2] - 111:22,
112:10
knowing [4] - 11:27,
45:3, 51:2, 132:21
knowingly [1] -
132:20
knowledge [9] -
18:4, 101:11, 127:19,
139:21, 139:24,
140:4, 148:28,
153:10, 182:15
known [5] - 8:27,
113:16, 128:17,
182:18, 204:12
knows [2] - 68:27,
171:18
knuckles [2] - 10:27,
10:28

L

labour [1] - 9:9
lack [2] - 6:23,
177:14
lacking [2] - 36:24,
107:3
laid [2] - 119:21,
133:28
landline [1] - 50:16
laptop [2] - 136:11,
137:14
large [4] - 61:23,
110:5, 139:25, 147:19
largely [2] - 23:28,
70:13
larger [1] - 165:22
last [9] - 41:4, 41:5,
42:3, 97:2, 154:12,
158:1, 184:25,
204:28, 205:24
late [7] - 64:4, 64:9,
64:12, 64:13, 122:20,
151:12, 179:11
latest [1] - 196:19
latitude [1] - 175:4
latter [1] - 138:10
latter's [1] - 143:3
launched [1] - 70:16
law [11] - 36:8, 44:8,
111:15, 118:12,
118:20, 118:21,
168:11, 170:10,
170:11, 183:27,
184:14
lawyer [1] - 167:21
lawyers [6] - 35:23,
163:28, 164:12,
170:4, 170:19, 205:6
lay [3] - 9:27, 10:3,
65:24
laying [2] - 85:22,
122:27
layman's [1] - 172:15
LEADER [18] - 2:7,
4:16, 4:20, 183:26,
184:10, 184:12,
191:22, 191:27,
192:3, 192:7, 192:9,
194:11, 194:14,
195:6, 195:12, 207:4,
213:5, 213:6
leader [7] - 40:23,
134:29, 164:2,
184:13, 191:9,
197:10, 213:10
leading [1] - 65:15
leads [1] - 66:3
leak [1] - 169:14
leaks [7] - 101:7,
101:10, 131:21,
131:24, 131:25,
182:14, 182:15
leash [1] - 161:3
least [9] - 29:17,
123:1, 134:13,
148:24, 173:13,
178:25, 181:25,
187:9, 205:5

leave [6] - 15:6,
15:18, 28:17, 66:10,
92:8, 178:24
leaving [1] - 130:23
lecture [1] - 111:15
led [3] - 26:26,
117:23, 131:22
left [9] - 6:17, 27:2,
68:12, 120:11,
149:16, 149:22,
149:25, 159:9, 212:27
left-hand [1] - 159:9
legal [13] - 70:12,
120:4, 139:8, 152:16,
153:2, 170:5, 172:18,
172:20, 172:23,
173:10, 182:16,
205:24, 212:5
legitimate [5] -
42:24, 42:29, 43:3,
105:1, 170:21
length [1] - 31:10
lengthy [1] - 72:7
lenses [2] - 36:12,
36:13
less [4] - 44:4,
112:16, 122:4, 122:8
lesser [1] - 210:8
letter [86] - 5:8, 5:10,
7:12, 8:14, 17:14,
37:4, 37:8, 37:22,
37:25, 38:3, 38:5,
38:24, 52:15, 52:19,
52:24, 52:26, 53:4,
53:5, 54:16, 54:25,
55:4, 55:6, 55:25,
55:29, 65:25, 66:12,
82:7, 83:29, 84:22,
84:28, 85:1, 86:16,
87:14, 91:13, 95:13,
96:11, 96:15, 98:8,
98:14, 98:19, 98:27,
99:18, 100:2, 100:10,
100:20, 100:25,
104:23, 118:28,
119:5, 140:13,
140:17, 141:7,
142:11, 144:23,
145:9, 145:27, 146:5,
146:10, 147:3,
148:13, 150:17,
150:19, 151:9,
151:19, 151:23,
166:8, 166:27, 167:9,
167:14, 168:19,
176:23, 177:7,
179:12, 181:19,
189:2, 191:15,
192:13, 194:4,
194:17, 195:4, 196:6,

199:15, 202:6, 203:4,
204:8, 211:26
letterhead [1] - 179:8
letters [2] - 84:23,
84:24
level [3] - 10:24,
60:2, 129:12
levelled [2] - 82:4,
109:29
levied [1] - 80:15
liaison [1] - 121:11
lies [1] - 32:18
life [2] - 17:22, 162:8
light [12] - 35:4,
35:11, 38:25, 43:11,
47:7, 145:13, 160:20,
160:22, 163:11,
174:7, 174:10, 190:29
likely [6] - 46:8,
46:25, 46:26, 165:24,
198:25, 214:1
likewise [1] - 73:15
Limerick [1] - 97:18
limited [7] - 58:9,
60:25, 61:6, 69:27,
90:22, 135:17, 147:11
limits [1] - 80:27
line [45] - 45:14,
69:17, 69:29, 70:1,
70:2, 70:8, 70:25,
71:5, 71:9, 71:13,
73:18, 74:6, 74:25,
75:2, 77:29, 78:23,
80:10, 81:14, 85:9,
86:5, 86:13, 86:27,
88:5, 88:29, 89:20,
90:12, 91:8, 91:23,
94:22, 97:2, 100:18,
104:18, 106:9,
117:12, 117:14,
117:23, 123:13,
145:26, 161:4,
173:27, 174:22,
179:23, 180:21,
213:15
lines [2] - 56:21,
180:22
linked [1] - 60:5
list [8] - 61:14, 61:20,
61:29, 105:5, 105:7,
109:15, 133:27
listen [4] - 27:9,
37:13, 195:22, 195:24
listened [1] - 130:7
listening [1] - 168:16
literally [2] - 128:10,
149:25
litigation [1] - 170:7
LITTLE [2] - 2:19,
3:15

live [1] - 109:27
lived [1] - 24:4
living [1] - 174:25
loading [1] - 21:17
locate [1] - 50:18
lodged [2] - 149:12,
173:17
longhand [2] - 142:1,
186:9
look [36] - 10:17,
11:21, 13:29, 26:17,
27:5, 37:5, 41:7,
43:10, 56:3, 56:16,
57:7, 57:25, 58:20,
58:27, 59:12, 60:10,
69:7, 75:29, 91:5,
98:28, 99:23, 100:7,
107:22, 108:18,
111:27, 114:17,
143:7, 149:6, 155:12,
158:26, 172:1, 172:5,
180:19, 195:22,
203:18, 207:2
looked [6] - 14:21,
61:14, 105:29,
130:11, 206:26,
206:27
looking [29] - 14:24,
36:29, 52:7, 58:12,
61:12, 63:7, 72:4,
91:2, 91:3, 107:14,
112:1, 112:2, 113:28,
117:17, 133:18,
160:12, 165:9,
165:10, 165:11,
171:16, 171:17,
174:28, 176:19,
187:25, 191:9, 195:2,
195:4, 205:17
Lord [1] - 137:2
Lorraine [2] - 79:13,
80:20
losing [3] - 25:2,
26:7, 26:9
lost [9] - 19:5, 23:14,
23:22, 24:19, 25:10,
25:19, 26:18, 125:27,
154:7
low [1] - 120:22
lucky [1] - 35:22
LUNCH [2] - 115:28,
117:1

M

MacNamee [15] -
3:3, 35:21, 118:5,
118:7, 118:10,
118:12, 157:29,

158:20, 158:23,
173:28, 177:29,
186:5, 186:21,
186:22, 207:1
MACNAMEE [1] -
4:10
MADE [2] - 1:3, 1:8
main [5] - 119:24,
139:20, 149:5,
154:16, 198:5
maintaining [1] -
32:8
mala [15] - 46:29,
76:11, 100:26,
106:15, 106:24,
106:25, 135:15,
179:27, 180:3,
180:18, 180:26,
182:2, 208:5, 208:12,
208:27
malice [5] - 72:9,
75:17, 76:19, 100:26,
205:21
malicious [1] -
106:28
malign [3] - 207:24,
209:10, 209:13
MALONE [1] - 1:30
Malone [1] - 1:25
Malpractice [1] -
109:1
malpractice [11] -
27:14, 35:9, 35:14,
44:22, 59:22, 74:20,
74:28, 82:4, 109:4,
130:6, 211:8
man [16] - 11:9,
11:24, 11:27, 25:9,
25:19, 33:29, 34:14,
34:17, 43:24, 43:26,
97:7, 111:22, 112:9,
112:10, 112:27,
113:15
man's [2] - 48:8,
106:25
managed [1] -
162:10
management [3] -
27:8, 27:11, 31:26
managing [1] - 15:26
manner [1] - 42:11
manual [1] - 142:10
manuscript [3] -
55:13, 142:10, 166:1
March [1] - 18:18
marches [1] - 79:2
margin [1] - 159:9
marginal [2] - 70:13,
70:14
mark [1] - 7:25

marriage [1] - 50:25
married [1] - 17:21
MARRINAN [1] - 2:6
Martin [10] - 55:1,
55:10, 55:14, 55:18,
87:12, 109:2, 193:4,
193:8, 211:21
MARTIN [1] - 3:12
Martin's [1] - 55:9
master [1] - 142:28
material [2] - 19:23,
157:12
materials [6] - 61:10,
118:29, 185:3,
188:21, 197:9, 213:8
matter [52] - 16:12,
17:17, 18:9, 42:9,
50:19, 63:1, 64:24,
64:26, 64:27, 65:16,
67:5, 67:23, 68:19,
70:1, 70:4, 70:6, 73:2,
75:2, 75:7, 76:4,
78:15, 78:23, 84:17,
89:23, 91:16, 98:3,
99:21, 106:11,
109:20, 120:9,
121:22, 123:7,
126:10, 131:5, 131:8,
133:17, 134:1, 140:9,
160:4, 160:12,
160:13, 164:5,
168:28, 173:4,
175:15, 176:14,
177:16, 196:22,
201:14, 204:26,
208:29, 212:12
matter" [1] - 70:29
matters [32] - 9:19,
10:3, 35:2, 51:7, 62:8,
62:19, 62:22, 65:4,
65:5, 71:17, 72:15,
73:22, 82:13, 83:3,
84:28, 85:12, 86:10,
87:27, 99:19, 108:4,
109:5, 109:7, 123:26,
129:23, 135:18,
147:11, 155:20,
160:7, 165:16,
165:23, 212:27
MATTERS [1] - 1:5
Maurice [9] - 14:3,
14:5, 33:13, 46:28,
58:4, 83:18, 103:9,
207:7, 207:13
maximum [1] - 148:3
McArdle [2] - 79:5,
79:6
McCabe [165] - 2:9,
7:3, 7:27, 9:18, 10:12,
11:3, 11:5, 11:9,

12:21, 13:2, 13:10,
14:3, 14:5, 15:24,
16:6, 16:21, 17:11,
17:29, 18:8, 18:29,
19:4, 19:26, 20:22,
21:23, 22:19, 23:13,
24:18, 24:27, 25:24,
26:6, 26:10, 26:11,
26:18, 27:1, 27:12,
27:16, 28:6, 29:4,
29:5, 29:12, 31:11,
31:13, 32:1, 32:25,
33:13, 33:18, 34:3,
34:4, 34:5, 34:20,
34:24, 35:14, 35:26,
36:5, 36:21, 37:2,
42:8, 42:23, 46:28,
53:16, 53:21, 53:25,
54:3, 54:6, 58:5, 59:2,
59:28, 63:27, 65:11,
65:27, 66:12, 70:29,
71:17, 72:28, 73:3,
73:24, 74:10, 75:13,
78:8, 78:29, 79:13,
79:23, 80:18, 81:18,
82:24, 83:8, 83:18,
85:24, 86:8, 87:2,
87:9, 88:2, 88:8,
91:12, 92:9, 92:12,
92:23, 93:2, 93:9,
95:22, 97:5, 97:25,
97:27, 98:1, 99:25,
101:16, 104:12,
106:15, 106:27,
107:5, 107:7, 108:15,
108:16, 108:28,
109:8, 113:11, 122:7,
125:27, 128:4, 133:2,
133:8, 134:6, 134:21,
144:25, 145:4,
145:29, 146:13,
152:28, 161:16,
162:6, 162:11,
165:18, 176:12,
176:17, 177:20,
178:20, 179:27,
180:25, 185:26,
189:3, 193:5, 197:17,
198:14, 199:23,
199:25, 200:13,
201:10, 201:27,
202:10, 202:21,
203:20, 203:25,
203:28, 204:6,
204:10, 204:12,
204:15, 207:7,
207:13, 207:23,
208:4, 208:7, 210:6,
210:22
McCabe's [21] -
38:21, 39:19, 39:28,

41:3, 42:22, 47:22,
47:23, 58:13, 60:11,
76:27, 84:16, 103:4,
112:15, 129:4,
132:15, 155:2, 157:7,
172:28, 180:2,
180:17, 193:28
McCANN [1] - 49:16
MCCANN [2] - 3:12,
4:5
McCann [4] - 49:17,
51:5, 51:10, 51:17
McCarthy [1] - 69:29
McDowell [192] - 2:9,
5:6, 5:7, 6:16, 11:6,
12:26, 12:27, 13:3,
14:29, 15:20, 16:17,
19:12, 20:26, 20:27,
20:29, 21:2, 21:6,
21:10, 21:24, 21:29,
22:9, 22:17, 22:18,
22:26, 23:4, 23:8,
23:10, 23:12, 23:16,
23:19, 24:14, 24:21,
24:23, 24:26, 25:5,
25:13, 25:18, 25:29,
26:8, 28:8, 28:20,
28:25, 29:14, 30:4,
30:6, 30:9, 30:11,
30:14, 30:21, 30:22,
32:3, 32:22, 33:25,
33:27, 36:3, 36:7,
37:10, 37:14, 37:19,
38:16, 38:19, 39:5,
40:5, 40:18, 41:1,
41:16, 43:4, 44:9,
44:15, 45:2, 45:6,
46:4, 46:26, 46:29,
48:18, 48:24, 48:28,
51:13, 55:12, 55:17,
56:14, 56:20, 57:9,
57:11, 65:9, 65:20,
68:16, 68:21, 69:15,
70:8, 70:22, 70:25,
71:6, 71:9, 71:23,
71:26, 72:8, 72:12,
72:20, 73:23, 74:1,
76:23, 78:5, 78:15,
80:27, 85:9, 85:26,
85:28, 91:5, 98:22,
98:23, 98:25, 99:4,
99:10, 99:15, 99:26,
100:1, 100:16, 106:1,
106:3, 110:25, 114:4,
125:29, 152:13,
154:28, 155:15,
158:21, 158:23,
158:24, 160:5, 162:5,
162:9, 162:16,
162:20, 162:22,

162:24, 162:25,
162:27, 163:3, 163:4,
163:6, 163:28, 164:9,
165:2, 167:16,
167:23, 167:26,
168:6, 168:12,
168:14, 168:17,
168:18, 168:23,
168:27, 169:10,
169:13, 169:18,
169:24, 170:12,
170:19, 170:24,
171:1, 171:21,
171:22, 171:26,
172:2, 172:3, 172:11,
172:13, 172:14,
172:19, 172:20,
173:12, 173:15,
173:25, 174:12,
177:1, 177:24,
183:28, 184:4,
199:13, 199:14,
199:19, 204:21,
204:24, 204:27,
207:2, 207:3, 207:5,
207:9, 211:5
MCDOWELL [4] -
4:4, 4:12, 4:17, 5:5
McDowell's [3] -
63:12, 69:9, 78:16
McGARRY [1] - 2:10
McGinn [9] - 19:13,
19:19, 20:1, 20:10,
20:23, 26:21, 96:25,
103:7, 120:7
McGrath [3] - 97:13,
97:16, 97:22
MCGRATH [1] - 3:6
MCGUINNESS [2] -
2:6, 4:11
McGuinness [41] -
2:16, 72:5, 111:9,
111:10, 113:8, 118:4,
118:8, 118:10,
118:13, 123:4,
123:15, 123:18,
125:16, 128:9,
128:11, 128:14,
128:16, 132:3,
137:20, 137:22,
138:4, 139:15, 140:4,
142:13, 142:24,
144:6, 144:22,
145:12, 150:11,
151:29, 152:29,
154:15, 157:29,
158:1, 158:8, 158:15,
158:18, 164:20,
179:19, 181:3, 181:10
McNamara [1] -

152:6
McTIERNAN [1] -
2:23
mean [71] - 9:26,
10:22, 11:8, 11:10,
13:4, 15:14, 20:7,
20:14, 21:8, 21:14,
22:19, 22:23, 26:16,
29:21, 35:4, 35:5,
35:18, 36:8, 36:13,
36:16, 37:12, 37:24,
40:19, 40:22, 41:2,
41:6, 41:13, 41:16,
43:11, 43:22, 64:23,
67:14, 76:4, 98:29,
99:29, 101:20,
105:14, 112:24,
114:7, 122:25,
129:21, 131:10,
131:15, 131:21,
133:1, 168:1, 169:3,
169:4, 169:8, 169:11,
169:12, 169:16,
169:26, 169:28,
171:16, 173:13,
184:23, 186:5, 187:2,
187:26, 189:9,
190:14, 196:20,
198:3, 198:22, 204:3,
204:4, 209:10, 209:25
meaning [3] - 99:28,
170:17, 210:14
means [2] - 147:10,
171:4
meant [3] - 26:2,
114:4, 202:21
media [4] - 15:4,
43:23, 117:9, 183:7
MEEHAN [1] - 3:12
meeting [38] - 7:3,
48:16, 53:13, 61:11,
66:4, 66:25, 80:20,
82:22, 82:23, 83:7,
83:17, 91:22, 91:25,
92:24, 92:28, 94:2,
94:26, 95:1, 95:4,
128:3, 140:21,
150:20, 151:22,
161:14, 162:17,
162:28, 162:29,
181:20, 190:22,
193:5, 199:25, 201:2,
201:3, 201:8, 202:6,
202:9, 211:20, 212:2
meetings [4] - 46:4,
46:5, 152:4, 184:28
member [4] - 17:19,
29:6, 79:7, 157:16
MEMBER [2] - 1:12,
2:2

members [10] -
15:29, 16:7, 38:1,
61:26, 119:9, 120:2,
120:5, 121:4, 143:4,
198:5
memory [18] - 7:7,
13:7, 23:5, 27:26,
52:29, 53:11, 72:24,
84:12, 107:10,
137:24, 164:22,
164:23, 185:11,
186:6, 188:13,
195:28, 196:12,
196:13
men [1] - 210:9
mention [8] - 15:5,
16:4, 113:15, 118:2,
157:15, 164:20,
165:11, 168:4
mentioned [14] -
12:21, 13:4, 15:2,
25:3, 37:8, 37:10,
98:19, 120:12, 148:8,
157:11, 175:26,
200:27, 201:3, 201:8
message [1] -
177:13
messages [1] -
61:25
met [5] - 25:9, 44:20,
66:12, 91:18, 143:21
Michael [3] - 96:19,
118:5, 207:25
MICHAEL [7] - 2:9,
3:3, 3:10, 4:10, 118:7,
158:20, 177:29
micro [1] - 81:3
middle [1] - 96:20
might [42] - 6:14,
10:23, 37:13, 47:10,
47:16, 49:28, 50:3,
50:5, 62:1, 62:5, 63:6,
80:3, 80:13, 80:15,
85:13, 89:26, 90:4,
90:10, 99:26, 100:15,
105:12, 108:12,
114:16, 114:25,
121:10, 129:22,
132:6, 139:6, 145:2,
147:22, 152:13,
152:14, 155:13,
164:7, 182:29, 188:5,
199:5, 199:11, 209:8,
214:9
mild [1] - 110:8
military [3] - 43:20,
108:8, 108:9
mind [29] - 6:20,
12:26, 54:26, 62:29,
69:9, 70:11, 70:18,

102:8, 117:19,
119:26, 121:18,
135:6, 139:19, 141:3,
141:5, 146:24,
150:11, 156:21,
165:6, 174:20, 175:6,
175:10, 176:21,
180:10, 180:20,
190:3, 209:16,
209:18, 210:15
mind^[1] - 149:28
minds^[3] - 145:23,
145:24, 197:1
mine^[2] - 137:24,
159:24
MINISTER^[1] - 1:8
Minister^[15] - 50:5,
50:9, 50:20, 50:23,
50:27, 51:6, 51:22,
57:2, 57:4, 57:20,
57:22, 59:2, 104:25,
109:17, 109:19
Minister's^[1] -
105:15
minor^[1] - 144:20
minute^[1] - 141:27
minutes^[5] - 68:19,
80:24, 104:1, 188:6,
188:8
misbehaviour^[1] -
177:3
misconduct^[1] -
60:1
misled^[1] - 93:24
missing^[2] - 24:14,
117:8
misstatement^[4] -
7:12, 7:14, 8:29, 9:2
misstatements^[1] -
178:18
mistake^[4] - 6:10,
8:24, 53:6, 196:10
mistake/
misunderstanding^[1]
- 192:12
mistaken^[2] - 73:26,
159:2
mistakenly^[1] -
181:3
mode^[1] - 50:23
modifying^[1] -
152:27
Module^[15] - 58:23,
122:17, 122:18,
123:20, 134:18,
149:4, 149:13,
188:20, 189:18,
191:20, 191:24,
192:1, 192:10,
196:25, 205:8
module^[46] - 31:26,
57:28, 58:8, 58:24,
59:9, 59:28, 68:29,
70:19, 71:18, 71:20,
80:16, 80:18, 80:28,
82:27, 83:4, 85:7,
85:14, 85:16, 85:23,
86:22, 87:27, 88:22,
88:24, 89:15, 89:27,
90:20, 96:23, 96:28,
122:17, 124:22,
125:12, 126:10,
130:13, 145:24,
148:9, 148:18,
154:22, 154:26,
155:9, 175:7, 183:2,
188:23, 189:11,
191:17, 198:1
modules^[23] - 23:7,
33:8, 56:29, 57:18,
59:25, 60:4, 77:27,
85:21, 85:22, 85:23,
87:1, 90:5, 120:10,
121:1, 123:28,
133:21, 145:16,
147:5, 153:29, 154:2,
154:7, 197:22, 197:28
moment^[6] - 10:23,
21:25, 60:10, 71:5,
105:8, 168:2
Monaghan^[5] -
15:15, 36:24, 36:25,
37:27, 63:29
MONDAY^[1] -
214:12
Monday^[6] - 68:6,
150:14, 167:4,
170:23, 179:11
month^[3] - 82:20,
103:8
months^[2] - 49:11,
154:13
mooted^[1] - 148:27
morale^[1] - 169:17
morning^[13] - 5:6,
5:7, 28:1, 28:2, 28:3,
108:9, 134:25,
150:14, 151:10,
153:25, 154:19,
167:4, 179:11
most^[3] - 130:25,
182:13, 209:7
motivated^[16] -
6:25, 37:22, 75:14,
75:17, 76:18, 76:28,
76:29, 86:8, 129:18,
129:23, 132:6, 132:7,
172:26, 172:27,
208:16, 208:19
motivation^[93] -
37:14, 37:20, 38:21,
39:4, 39:16, 39:20,
39:29, 40:2, 40:3,
40:5, 40:12, 40:14,
41:4, 41:8, 41:21,
41:23, 43:18, 44:2,
44:14, 65:3, 69:20,
70:11, 70:22, 71:6,
72:27, 73:3, 73:15,
73:24, 74:11, 74:19,
74:27, 75:10, 75:14,
77:8, 77:24, 78:8,
80:14, 87:1, 87:9,
87:21, 87:28, 88:15,
88:16, 88:22, 89:21,
89:24, 90:17, 90:28,
95:22, 95:29, 96:9,
99:5, 104:17, 105:24,
106:4, 106:6, 110:18,
110:23, 114:12,
128:23, 129:3,
129:16, 129:20,
132:5, 132:10,
132:14, 132:16,
135:18, 138:8, 145:9,
146:1, 146:14, 147:4,
154:12, 155:3, 175:8,
179:21, 180:15,
181:5, 181:6, 182:5,
186:1, 186:12,
197:17, 198:8,
198:14, 205:26,
206:5, 206:14,
207:20, 214:1
motivational^[3] -
141:2, 148:9, 148:18
motivations^[1] -
157:7
motive^[13] - 70:28,
71:1, 75:17, 96:18,
100:15, 159:18,
176:22, 176:23,
177:2, 209:8, 209:10,
209:29, 210:2
motives^[10] - 42:6,
42:22, 71:10, 77:1,
81:19, 81:29, 133:3,
133:4, 208:15
mounting^[2] -
74:19, 74:27
mouth^[3] - 75:27,
76:3, 162:13
mouthpiece^[1] -
29:23
move^[4] - 28:23,
69:7, 172:21, 173:26
moved^[2] - 75:29,
196:24
MR^[251] - 1:12, 2:2,
2:4, 2:6, 2:6, 2:9,
2:10, 2:10, 2:15, 2:15,
2:16, 2:16, 2:17, 2:22,
2:23, 3:2, 3:3, 3:3,
3:6, 3:10, 3:10, 3:11,
3:11, 3:12, 3:12, 3:13,
4:3, 4:4, 4:5, 4:6, 4:7,
4:10, 4:11, 4:12, 4:13,
4:15, 4:17, 4:18, 4:19,
5:4, 5:5, 5:6, 13:3,
14:14, 14:21, 14:24,
14:28, 14:29, 15:8,
15:20, 16:17, 20:27,
21:2, 21:6, 21:10,
21:24, 22:9, 22:18,
22:26, 23:8, 23:12,
23:16, 23:19, 24:14,
24:23, 24:26, 25:5,
25:18, 26:8, 28:25,
30:6, 30:9, 30:11,
30:22, 36:3, 37:10,
37:14, 37:19, 38:16,
38:19, 41:1, 49:16,
49:17, 51:10, 51:13,
51:17, 52:1, 52:2,
54:28, 55:2, 55:7,
55:12, 55:17, 56:5,
56:8, 56:12, 58:19,
58:20, 59:18, 59:24,
64:3, 64:5, 64:29,
65:1, 66:23, 68:15,
75:20, 75:21, 76:8,
76:16, 77:7, 77:9,
77:10, 77:11, 81:17,
81:20, 81:21, 81:23,
83:25, 84:4, 84:8,
85:27, 93:21, 93:25,
93:29, 96:6, 98:11,
98:15, 98:20, 98:22,
98:25, 99:4, 99:15,
99:26, 100:1, 100:16,
100:20, 102:11,
102:13, 102:15,
102:18, 102:20,
103:22, 103:27,
104:1, 104:9, 105:6,
105:18, 106:20,
107:25, 107:29,
108:12, 108:18,
110:27, 111:6,
111:10, 111:12,
114:4, 118:4, 118:7,
118:8, 118:10,
123:18, 125:16,
128:9, 128:11,
128:16, 132:3,
137:20, 137:22,
138:4, 142:24, 144:6,
144:22, 151:29,
157:29, 158:8,
158:15, 158:18,
158:20, 158:21,
158:23, 162:9,
162:16, 162:20,
162:22, 162:25,
162:27, 163:4, 163:6,
167:11, 167:23,
167:26, 168:6,
168:12, 168:14,
168:18, 168:21,
168:24, 168:26,
168:27, 169:10,
169:18, 169:24,
170:12, 170:24,
171:1, 171:7, 171:14,
171:22, 171:26,
172:3, 172:11,
172:14, 172:20,
173:12, 173:15,
173:25, 177:24,
177:25, 177:27,
177:29, 178:2, 178:5,
180:13, 180:21,
181:2, 181:12,
181:25, 181:29,
182:4, 182:27,
182:29, 183:16,
183:19, 183:28,
184:9, 199:13,
199:14, 204:24,
204:27, 207:2, 207:5,
211:2, 211:3, 212:11,
212:12
MS^[24] - 2:7, 2:7,
2:18, 3:4, 3:4, 3:5,
3:9, 4:16, 4:20,
183:26, 184:10,
184:12, 191:22,
191:27, 192:3, 192:7,
192:9, 194:11,
194:14, 195:6,
195:12, 207:4, 213:5,
213:6
MULLAN^[1] - 2:7
Mullingar^[8] - 66:4,
66:11, 82:22, 82:23,
83:7, 94:1, 181:20,
190:22
multiple^[1] - 106:18
Mulvey^[2] - 114:5,
114:7
murder^[1] - 97:17
MURPHY^[1] - 2:15
Murphy^[1] - 111:4
must^[4] - 37:22,
188:8, 194:28, 195:19
MÍCHEÁL^[1] - 2:15

N

name^[3] - 15:1,
112:28, 186:25

named [1] - 1:27
names [4] - 126:14, 126:17, 126:19, 126:22
narrative [1] - 25:18
narrows [1] - 15:17
national [1] - 50:29
natural [1] - 41:18
nature [7] - 9:3, 73:6, 73:21, 128:27, 134:5, 153:7, 161:29
near [1] - 38:8
nearly [2] - 78:28, 211:10
necessarily [8] - 20:2, 20:9, 41:17, 69:8, 78:26, 90:9, 105:15, 134:6
necessary [7] - 29:29, 31:3, 75:12, 128:17, 159:20, 163:3, 173:23
necessitated [1] - 122:2
necessity [1] - 149:20
need [16] - 27:19, 28:8, 52:22, 53:28, 56:8, 56:25, 57:14, 61:10, 82:8, 98:15, 103:13, 111:1, 111:15, 130:10, 172:5, 213:1
needed [6] - 89:2, 112:21, 141:4, 165:25, 210:9, 210:10
needs [2] - 39:7, 66:9
negative [4] - 29:6, 35:29, 210:17, 210:24
neutral [3] - 43:27, 134:7, 209:7
never [54] - 11:18, 13:5, 13:10, 13:11, 20:17, 26:4, 26:5, 26:18, 28:27, 29:2, 34:18, 36:4, 43:5, 47:25, 48:3, 48:14, 51:5, 51:11, 65:19, 67:21, 68:2, 69:4, 72:8, 73:17, 98:19, 98:22, 98:24, 100:17, 106:29, 107:2, 107:4, 107:15, 107:21, 112:17, 113:22, 124:18, 124:24, 125:13, 131:27, 133:4, 160:11, 160:14, 161:24, 169:7, 174:19, 182:19, 193:8, 195:24, 200:27, 201:21
new [1] - 203:11
Newcastle [1] - 50:29
news [2] - 113:25, 113:28
next [11] - 16:18, 28:26, 28:29, 61:11, 69:26, 86:22, 118:4, 145:24, 152:23, 183:26, 201:16
nihil [1] - 173:13
NO [1] - 111:3
NOBLE [1] - 2:24
nobody [11] - 11:22, 48:9, 48:10, 48:12, 48:15, 48:17, 48:27, 49:4, 51:13, 131:24
Noel [1] - 102:28
NOEL [1] - 3:11
nomenclature [1] - 126:13
non [4] - 24:9, 83:19, 84:2, 117:22
non-completion [2] - 83:19, 84:2
non-provability [1] - 24:9
non-release [1] - 117:22
none [9] - 36:27, 52:20, 106:25, 106:26, 124:7, 166:26, 171:4, 182:23
normal [2] - 72:23, 79:27
normally [2] - 111:28, 115:7
note [11] - 8:25, 46:1, 95:1, 102:9, 158:29, 159:3, 163:7, 187:28, 187:29, 194:6, 196:2
notebook [1] - 142:1
noted [1] - 133:8
notepad [1] - 186:8
notes [7] - 1:27, 55:13, 92:27, 93:2, 142:10, 152:4
nothing [14] - 23:26, 26:2, 36:5, 119:21, 121:29, 122:1, 135:11, 149:2, 166:27, 173:13, 178:18, 193:16, 193:17, 193:22
notice [7] - 14:16, 71:29, 78:12, 78:19, 80:26, 133:12, 155:24
noticed [1] - 15:21
notices [1] - 170:19
notification [1] - 154:22
notified [1] - 130:25
notifying [1] - 146:13
notion [1] - 175:7
notwithstanding [1] - 19:3
November [8] - 45:24, 56:2, 64:9, 102:14, 103:21, 121:26, 150:10, 179:17
nowhere [1] - 100:24
nuanced [1] - 174:27
nuances [2] - 19:23, 22:8
number [22] - 11:2, 12:21, 15:3, 55:24, 61:23, 61:24, 91:14, 99:19, 108:19, 110:5, 110:28, 111:5, 112:20, 115:18, 131:11, 135:24, 137:16, 147:19, 152:4, 177:3, 207:6, 213:12
numbers [1] - 117:19
numeral [1] - 13:19

O

O'BRIEN [1] - 3:6
o'clock [2] - 49:17, 136:23
O'Hagan [6] - 194:5, 194:17, 195:7, 195:8, 195:17, 195:18
O'Higgins [103] - 8:8, 11:23, 19:11, 22:20, 22:24, 22:27, 24:28, 26:12, 26:13, 28:14, 29:28, 31:2, 37:2, 37:11, 37:17, 39:3, 39:7, 39:18, 39:27, 40:20, 42:4, 42:16, 43:8, 54:18, 55:28, 56:3, 56:5, 56:15, 56:21, 57:10, 57:26, 58:12, 58:22, 58:23, 58:28, 60:22, 65:18, 68:17, 69:14, 71:13, 71:23, 72:2, 72:11, 72:19, 73:11, 73:16, 73:18, 73:29, 74:13, 74:23, 75:1, 76:24, 77:29, 79:20, 79:24, 80:10, 85:10, 86:28, 87:23, 88:10, 88:21, 89:10, 89:20, 90:3, 90:12, 90:27, 94:20, 95:18, 96:8, 96:14, 96:28, 97:26, 100:22, 100:28, 101:9, 104:18, 104:26, 105:24, 106:2, 106:7, 106:22, 108:18, 108:20, 110:10, 110:11, 117:8, 117:21, 123:12, 141:6, 145:28, 151:16, 153:24, 155:29, 180:14, 181:16, 188:29, 196:4, 202:23, 206:15, 206:18, 211:9, 212:23, 212:28
O'HIGGINS [11] - 2:15, 64:3, 64:5, 64:29, 75:21, 77:7, 77:10, 81:17, 81:21, 85:27, 105:18
O'Higgins' [2] - 78:14, 84:27
O'LEARY [1] - 3:10
O'Sullivan [2] - 52:17, 179:16
O'Sullivan's [2] - 29:9, 155:1
object [1] - 167:12
objected [1] - 65:22
objection [6] - 38:15, 63:12, 63:19, 63:20, 65:15, 72:13
objective [1] - 10:25
obligation [1] - 131:6
observation [2] - 33:22, 96:2
observations [3] - 94:19, 95:23, 157:6
observe [1] - 183:1
observed [1] - 34:18
obstat [1] - 173:13
obtain [1] - 53:24
obtained [1] - 173:14
obtaining [1] - 184:27
obvious [6] - 8:24, 18:6, 120:18, 130:12, 163:25, 171:15
obviously [36] - 7:29, 34:27, 41:13, 47:6, 65:17, 67:4, 81:13, 82:29, 83:3, 90:3, 90:7, 93:26, 115:2, 119:4, 123:19, 127:22, 134:4, 135:24, 140:17, 144:23, 149:3, 149:11, 155:12, 157:19, 157:20, 158:8, 171:22, 179:1, 186:29, 194:22, 195:29, 197:19, 198:14, 200:4, 203:17, 209:24
occasion [5] - 10:10, 48:15, 107:16, 115:4, 115:10
occasional [1] - 110:8
occasions [12] - 11:2, 11:5, 15:3, 22:20, 99:19, 108:20, 111:5, 112:21, 131:12, 152:2, 156:3, 174:17
occupied [6] - 139:19, 139:20, 141:8, 141:9, 141:28, 145:24
occupy [1] - 145:23
occur [1] - 187:24
occurred [4] - 65:23, 98:14, 117:14, 126:9
October [3] - 103:27, 121:25, 150:9
OF [4] - 1:3, 1:9, 1:12, 2:3
offence [2] - 24:7, 24:10
offend [1] - 85:25
offer [2] - 95:25, 160:6
offers [2] - 96:1, 96:7
OFFICE [2] - 2:18, 3:14
Office [3] - 124:14, 179:8, 202:9
office [5] - 51:1, 63:28, 63:29, 64:14, 139:23
officer [4] - 17:20, 121:11, 133:28, 208:1
officers [15] - 66:22, 112:23, 119:25, 120:7, 120:12, 120:15, 120:20, 120:22, 121:8, 121:20, 126:13, 126:20, 126:21, 126:28, 210:25
officers' [1] - 129:13
official [1] - 68:3
officials [1] - 51:8
offshore [1] - 28:12
Oireachtas [1] - 182:24

old [1] - 99:11
Oliver [3] - 113:16, 114:5, 114:7
Ombudsman [1] - 58:7
ON [4] - 1:6, 1:10, 1:18, 5:1
once [3] - 124:26, 155:4, 172:15
One [1] - 91:16
one [93] - 5:12, 10:20, 11:10, 11:13, 11:25, 25:1, 27:5, 28:1, 28:19, 29:1, 33:1, 33:5, 33:21, 35:4, 35:27, 36:11, 37:16, 40:3, 40:13, 41:2, 46:5, 48:7, 49:18, 50:6, 54:29, 60:14, 60:17, 60:20, 61:12, 75:7, 76:12, 76:13, 77:17, 78:28, 79:27, 83:2, 84:21, 86:22, 91:12, 92:7, 98:28, 100:28, 101:29, 103:16, 106:4, 106:11, 107:16, 109:12, 112:28, 113:29, 114:18, 115:25, 117:18, 117:20, 121:10, 122:14, 124:8, 129:26, 134:20, 137:18, 145:7, 147:29, 148:16, 148:24, 149:1, 150:12, 151:25, 154:28, 162:7, 163:15, 165:9, 165:10, 166:12, 169:6, 169:16, 170:28, 172:8, 180:20, 187:3, 187:9, 187:10, 187:11, 187:23, 189:22, 191:8, 196:29, 204:28, 205:18, 206:27, 208:14, 212:12
one's [1] - 79:28
ones [1] - 184:24
onwards [2] - 123:2, 159:8
open [6] - 52:22, 98:16, 103:13, 119:1, 128:16, 135:22
opened [8] - 30:20, 72:4, 124:18, 128:6, 183:12, 185:20, 211:14

opening [2] - 40:23, 183:11
opinion [3] - 22:1, 33:20, 154:14
opinions [5] - 19:26, 20:1, 20:2, 20:9, 21:29
opportunity [8] - 22:21, 33:9, 46:15, 56:28, 57:17, 128:28, 150:1, 177:8
opposed [1] - 21:17
opposite [1] - 158:6
oppression [1] - 11:28
oppressive [3] - 11:22, 41:17, 41:29
optimistic [1] - 164:10
options [2] - 153:21, 153:23
oral [1] - 178:19
order [2] - 57:29, 93:11
ordinary [1] - 113:27
organisation [1] - 18:4
organisational [2] - 56:26, 57:15
original [3] - 67:21, 95:13, 117:26
originally [1] - 179:6
OSMOND [2] - 2:19, 3:15
OTHER [1] - 1:4
otherwise [6] - 48:14, 56:26, 57:15, 80:21, 141:28, 161:8
ought [1] - 189:10
ourselves [3] - 122:22, 131:7, 197:26
outcome [3] - 17:16, 147:26, 207:26
outline [1] - 96:16
outlined [1] - 27:4
outset [2] - 62:14, 133:25
outside [3] - 155:8, 156:11, 198:17
overall [3] - 133:1, 157:8, 197:27
overriding [1] - 65:18
oversee [1] - 121:6
overview [3] - 156:25, 197:8, 206:6
own [14] - 23:22, 24:3, 24:18, 26:11, 70:12, 72:12, 92:27, 121:18, 174:9,

174:20, 175:6, 175:12, 188:5, 197:4

P

pace [3] - 130:26, 130:28, 150:5
paced [1] - 135:8
page [94] - 10:29, 12:1, 13:25, 14:1, 16:18, 30:7, 30:12, 30:13, 30:15, 30:24, 31:11, 31:16, 31:27, 32:26, 52:23, 53:4, 53:7, 53:28, 54:1, 54:26, 54:28, 55:8, 56:13, 56:15, 56:16, 56:17, 56:19, 56:21, 57:7, 57:8, 57:10, 58:21, 61:19, 62:26, 63:6, 69:13, 69:26, 70:2, 70:7, 70:24, 71:4, 71:9, 74:26, 76:21, 77:28, 78:22, 79:20, 81:1, 81:14, 84:26, 87:23, 89:19, 90:12, 91:1, 91:7, 91:23, 94:18, 95:16, 96:10, 97:3, 101:14, 103:23, 104:10, 105:29, 108:24, 118:11, 125:19, 158:26, 178:5, 179:14, 185:3, 188:20, 188:25, 192:26, 195:13, 197:9, 198:4, 199:15, 200:11, 205:18, 205:19, 206:23, 207:2, 209:4, 211:14, 212:21, 213:8
PAGE [1] - 4:2
pages [4] - 12:4, 20:19, 200:8, 201:16
paid [1] - 20:18
pains [1] - 133:24
paper [1] - 137:10
papers [5] - 50:21, 59:25, 119:18, 124:26, 181:17
parade [1] - 89:5
paragraph [40] - 14:10, 14:25, 14:28, 15:22, 16:19, 17:14, 42:19, 53:6, 53:19, 53:27, 53:29, 82:16, 88:13, 94:21, 95:16, 96:21, 108:26, 110:3, 110:18, 110:23, 110:24, 144:24,

173:22, 175:29, 178:10, 192:26, 196:5, 198:15, 198:29, 199:20, 199:21, 207:20, 209:5, 211:5, 211:13, 211:14, 211:18, 211:25, 213:12
paragraphs [1] - 199:4
paranoia [2] - 26:5, 29:1
paranoid [3] - 22:4, 22:6
pardon [2] - 142:20, 180:8
parse [1] - 132:8
parsed [1] - 19:17
part [25] - 6:24, 13:24, 18:26, 28:15, 42:3, 46:20, 63:8, 73:24, 74:2, 75:11, 79:1, 94:10, 109:16, 114:29, 119:16, 125:19, 152:25, 156:28, 165:7, 172:28, 174:10, 186:22, 192:21, 199:18, 207:10
Part [2] - 196:25
partially [2] - 188:10, 188:11
particular [36] - 5:22, 19:25, 28:2, 28:15, 37:8, 38:3, 54:26, 56:24, 57:13, 73:21, 78:23, 80:16, 82:16, 85:25, 90:20, 100:14, 113:12, 113:25, 115:12, 117:10, 122:6, 129:26, 147:25, 147:27, 148:6, 154:11, 156:9, 164:26, 170:29, 172:8, 173:22, 183:2, 186:3, 187:14, 198:28, 204:23
particularly [4] - 61:18, 111:2, 130:14, 210:7
particulars [1] - 170:19
parties [11] - 36:9, 36:16, 54:20, 61:26, 64:24, 64:28, 97:10, 117:22, 142:21, 154:24, 173:11
partly [2] - 189:13, 189:14
party [2] - 35:4,

36:11
passage [5] - 72:4, 103:14, 183:11, 205:3, 205:4
passages [2] - 110:28, 111:3
PASSED [1] - 1:5
past [1] - 154:17
patently [1] - 8:23
PATRICK [2] - 2:6, 3:12
PAUL [2] - 2:10, 3:3
pause [2] - 65:7, 79:21
pay [1] - 208:23
paying [1] - 170:28
peace [2] - 165:20, 165:25
pejorative [1] - 122:8
penetrate [1] - 6:4
people [46] - 5:20, 11:17, 18:3, 21:29, 22:5, 23:25, 27:6, 29:13, 29:16, 33:22, 34:19, 34:28, 35:23, 37:13, 38:7, 39:20, 40:26, 42:5, 42:15, 42:21, 50:3, 55:25, 76:12, 82:28, 101:4, 107:12, 107:22, 107:23, 108:3, 112:29, 131:12, 139:27, 152:5, 164:6, 164:7, 165:28, 166:22, 169:7, 169:14, 183:7, 183:13, 189:4, 203:14, 205:10
people's [1] - 204:14
perceived [7] - 34:8, 88:3, 89:14, 111:22, 145:3, 189:5, 197:27
percent [1] - 5:29
perception [4] - 6:18, 6:20, 10:12, 18:27
performing [1] - 10:20
perhaps [33] - 14:21, 30:12, 30:15, 37:14, 53:11, 63:4, 65:1, 69:10, 69:11, 84:4, 89:26, 96:10, 98:12, 103:14, 121:10, 123:22, 123:26, 132:5, 134:4, 134:7, 134:20, 144:18, 145:2, 147:9, 147:14, 148:21, 151:11, 172:14, 176:19,

181:21, 183:29,
196:29, 210:1
period [13] - 7:23,
27:2, 49:24, 50:16,
60:26, 69:11, 106:21,
106:24, 122:29,
123:27, 156:8,
180:16, 182:6
peripheral [6] - 40:4,
40:12, 88:15, 88:16,
88:23, 89:25
periscope [1] - 23:9
permeated [1] - 60:3
permission [1] -
185:25
permitted [4] - 88:7,
102:29, 143:16, 192:5
persist [1] - 41:2
persisted [2] - 40:6,
41:22
persistent [1] - 39:29
person [9] - 17:23,
45:18, 77:17, 93:16,
97:16, 99:11, 111:25,
111:27, 187:12
person's [1] - 100:11
personal [4] - 14:9,
45:4, 163:16, 208:4
personally [9] - 9:20,
21:19, 25:19, 25:24,
45:3, 121:7, 145:14,
150:2, 152:20
persons [2] - 110:14,
125:23
perspective [1] -
47:7
persuade [1] -
198:10
pertaining [1] -
61:13
pertinent [1] - 38:25
peruse [1] - 21:4
perversion [1] -
62:28
PETER [3] - 1:12,
2:2, 2:4
phase [2] - 56:29,
57:18
philosophical [1] -
208:22
phone [11] - 118:24,
137:13, 137:18,
139:27, 139:28,
143:25, 144:7,
148:29, 187:19,
188:3, 188:4
phonetic [1] - 126:15
phrase [3] - 99:11,
154:3, 174:19
phrases [2] - 174:24,
177:10
physically [4] -
140:23, 141:23,
171:17, 212:6
pick [2] - 43:23,
143:26
picking [1] - 158:6
picture [12] - 8:13,
18:13, 18:15, 18:16,
46:24, 146:5, 146:17,
151:25, 186:7,
189:21, 190:4, 197:28
piece [1] - 117:23
pieces [1] - 23:2
pierce [1] - 7:20
pilot [1] - 203:13
pinned [2] - 37:26,
141:4
place [13] - 34:10,
41:16, 42:2, 44:26,
50:1, 50:6, 50:26,
69:12, 113:12,
117:10, 123:1,
147:15, 173:29
plain [3] - 6:12,
26:17, 108:2
plan [1] - 122:29
planning [2] -
148:19, 155:16
play [7] - 32:4, 32:5,
63:2, 82:26, 132:10,
148:13, 154:12
playing [3] - 161:25,
161:28, 162:3
pleadings [1] -
130:18
pleased [1] - 54:15
plenty [1] - 28:7
point [99] - 6:13,
7:23, 8:4, 8:10, 9:10,
10:9, 11:14, 19:16,
23:27, 25:14, 26:29,
28:10, 32:24, 33:24,
36:2, 38:16, 38:17,
38:20, 38:29, 39:1,
40:22, 42:13, 47:19,
49:7, 49:9, 49:10,
51:18, 55:20, 55:23,
56:9, 59:14, 61:16,
63:12, 63:17, 66:9,
66:21, 67:14, 68:11,
68:12, 68:14, 70:4,
72:10, 73:14, 74:4,
80:26, 83:4, 83:5,
83:6, 94:12, 95:10,
95:16, 99:14, 99:17,
100:28, 108:10,
114:17, 119:2,
122:25, 123:19,
128:10, 133:20,
133:24, 134:16,
137:2, 138:20,
150:12, 151:26,
153:19, 154:2,
154:21, 158:2,
161:22, 164:25,
166:21, 172:3, 172:4,
172:24, 174:9,
180:11, 180:13,
180:29, 183:1,
183:17, 189:22,
191:8, 191:20,
194:24, 196:9, 197:5,
198:8, 203:8, 204:9,
204:21, 204:25,
205:8, 207:16,
209:13, 211:6
pointed [4] - 7:24,
48:18, 99:1, 99:18
pointing [2] - 128:14,
196:4
points [8] - 22:9,
25:21, 49:1, 61:15,
61:23, 71:19, 166:19,
207:6
policing [7] - 23:26,
23:29, 24:16, 24:29,
25:5, 25:20, 38:24
policy [3] - 203:9,
203:27, 203:28
poor [8] - 23:25,
24:16, 24:29, 25:5,
25:10, 38:23, 84:1,
152:10
popular [1] - 25:15
portion [4] - 30:29,
48:9, 56:14, 117:7
portions [4] - 22:28,
117:15, 117:16,
117:21
pose [1] - 102:20
position [44] - 8:6,
11:13, 14:13, 16:2,
17:12, 18:17, 18:22,
18:28, 19:1, 19:6,
20:21, 25:11, 32:14,
32:28, 34:5, 34:7,
34:29, 35:3, 36:9,
36:19, 36:22, 44:27,
49:2, 74:5, 74:21,
75:20, 78:16, 79:22,
89:18, 89:29, 95:14,
95:15, 96:17, 103:18,
114:25, 120:20,
125:28, 126:23,
129:6, 138:14,
150:27, 152:28,
169:25
possibilities [1] -
181:16
possibility [1] -
168:4
possible [14] - 58:1,
122:11, 128:23,
129:20, 130:22,
133:23, 134:1, 134:2,
143:15, 148:22,
150:1, 158:16, 175:4,
178:17
possibly [6] - 40:24,
117:13, 117:23,
130:14, 143:21, 156:3
potential [1] - 61:3
POWER [1] - 3:12
power [1] - 109:11
practically [1] -
171:18
practice [7] - 36:8,
118:16, 118:17,
118:18, 118:20,
118:21, 184:15
practiced [1] -
118:19
practising [1] -
118:14
practitioner [1] -
145:14
practitioners [1] -
130:7
precedent [1] -
121:15
precedes [1] -
207:13
precise [1] - 190:13
precisely [3] - 20:21,
56:5, 79:4
precluding [2] -
90:15, 90:18
predict [1] - 132:11
preface [4] - 13:20,
13:24, 13:26, 205:23
prefaced [1] - 167:16
prematurely [1] -
63:18
preparation [2] -
48:17, 151:29
prepare [1] - 60:26
prepared [6] - 34:26,
62:7, 87:11, 102:27,
147:24, 211:20
presence [2] - 70:13,
156:16
present [9] - 36:17,
83:2, 134:26, 134:27,
135:26, 142:5, 142:6,
142:21, 187:18
presentation [1] -
177:7
presented [3] - 10:9,
36:18, 60:7
presiding [2] -
112:27, 113:1
press [2] - 47:1,
68:11
pressure [1] - 169:8
presumably [6] -
13:23, 20:15, 120:18,
124:3, 136:14, 160:2
presume [4] - 5:25,
26:14, 137:27, 188:15
pretty [2] - 113:7,
164:11
previous [5] - 30:25,
31:1, 96:23, 96:28,
174:8
previously [1] -
14:19
prima [1] - 129:22
primary [3] - 140:14,
166:1, 206:7
Prince [1] - 141:21
principally [1] - 61:7
print [4] - 143:24,
144:7, 186:23, 187:10
printed [8] - 137:10,
137:16, 138:1,
179:13, 180:23,
186:27, 187:3, 187:9
printer [2] - 137:27,
137:29
printers [1] - 187:3
privacy [3] - 101:4,
182:12, 188:12
private [11] - 65:2,
100:29, 128:26,
131:19, 163:21,
164:7, 176:13,
177:16, 182:8, 182:9,
183:5
privilege [28] - 6:6,
8:3, 82:10, 133:6,
139:9, 139:11,
152:17, 152:18,
153:3, 153:5, 153:16,
165:27, 167:7,
167:17, 167:18,
167:21, 167:25,
169:5, 169:8, 169:15,
170:6, 171:5, 171:27,
172:7, 176:8, 179:1,
196:13
privy [2] - 160:1,
160:2
probationers [1] -
25:6
probe [3] - 44:23,
112:21, 113:3
probed [3] - 27:16,
43:28, 72:23
probing [4] - 41:29,

42:7, 43:21, 74:4
problem [7] - 10:26, 14:20, 36:17, 158:7, 169:3, 183:7, 203:22
problems [2] - 34:12, 83:24
procedural [1] - 154:21
proceed [13] - 123:13, 131:9, 138:7, 138:11, 159:28, 160:13, 160:27, 160:28, 160:29, 161:6, 161:26, 163:12, 163:13
proceeded [2] - 120:14, 120:17
proceeding [2] - 124:16, 130:18
proceedings [6] - 38:5, 39:9, 39:15, 41:22, 182:7, 182:12
proceeds [1] - 70:24
process [4] - 11:12, 68:23, 70:15, 135:8
produce [1] - 36:18
produced [4] - 7:25, 98:8, 144:13, 167:3
product [1] - 186:16
professional [7] - 68:28, 131:6, 139:9, 152:17, 153:3, 207:17, 208:2
professionalism [1] - 207:25
progenitor [1] - 134:8
programme [1] - 117:27
promotion [4] - 33:12, 105:5, 105:7, 109:15
proofs [1] - 61:2
proper [3] - 9:12, 143:15, 210:11
properly [5] - 15:27, 27:22, 76:29, 167:24, 182:23
proposed [1] - 146:11
proposition [4] - 27:1, 40:11, 132:4, 175:27
propositions [1] - 139:1
prosecuting [1] - 203:15
prosecution [2] - 18:9, 19:4
Prosecutions [8] - 64:16, 64:17, 199:27, 199:29, 200:1, 201:29, 202:11, 202:19
prosecutions [2] - 25:7, 25:8
PROTECTED [2] - 1:3, 1:4
protecting [1] - 141:20
protection [1] - 134:2
protested [1] - 22:19
provability [2] - 24:9
Proven [4] - 59:12, 61:13, 80:2, 133:26
proven [3] - 60:6, 77:22, 77:25
provide [5] - 14:5, 121:7, 121:8, 136:2, 145:27
provided [4] - 7:3, 60:21, 118:10, 205:13
providing [1] - 141:20
provisional [1] - 149:11
provoke [1] - 176:10
prying [1] - 12:10
psychology [1] - 99:29
Public [8] - 64:15, 64:17, 199:27, 199:29, 200:1, 201:29, 202:11, 202:19
public [6] - 27:23, 57:29, 61:27, 79:7, 113:10, 113:22
publication [1] - 122:26
Pulse [3] - 37:5, 83:20, 84:2
punctuating [1] - 77:17
pure [1] - 147:23
purely [1] - 163:16
purpose [10] - 82:8, 91:18, 93:16, 99:16, 105:18, 105:19, 143:3, 170:5, 170:7, 175:1
purposes [1] - 163:16
pursue [6] - 56:8, 70:1, 88:7, 99:17, 111:26, 112:13
pursued [2] - 75:1, 147:4
pursuing [2] - 69:10, 70:4
pushing [1] - 167:24
put [92] - 6:21, 7:27, 10:6, 10:23, 13:5, 14:22, 17:7, 20:5, 20:12, 25:11, 25:21, 27:18, 32:21, 34:23, 39:2, 43:23, 45:19, 46:17, 46:24, 47:11, 47:18, 47:27, 48:14, 62:5, 68:6, 68:7, 68:9, 68:12, 68:14, 71:16, 76:16, 77:23, 78:20, 80:27, 91:7, 91:23, 92:9, 94:7, 95:21, 101:8, 101:9, 105:12, 106:1, 106:27, 107:4, 109:14, 124:17, 125:4, 126:19, 128:2, 129:14, 132:27, 133:12, 136:21, 137:29, 141:6, 144:24, 145:9, 145:14, 151:22, 152:14, 153:22, 158:11, 161:3, 161:11, 165:17, 166:5, 166:12, 169:7, 170:14, 171:23, 173:1, 176:22, 178:2, 179:7, 179:10, 179:15, 179:19, 180:6, 183:12, 185:18, 185:25, 186:6, 192:11, 198:10, 209:8, 209:11, 210:3, 210:4, 210:10
puts [3] - 35:3, 47:15, 129:15
putting [19] - 9:3, 24:3, 24:26, 26:29, 39:26, 75:26, 76:3, 99:13, 113:11, 139:1, 162:13, 163:7, 164:5, 165:16, 186:25, 190:3, 197:4, 198:20, 208:26

Q

QUATTROCIOCCI [1] - 3:11
QUAY [1] - 2:12
queried [2] - 47:19, 49:6
queries [1] - 156:23
query [2] - 158:1, 173:19
querying [1] - 45:13

question-mark [1] - 7:25
QUESTIONED [2] - 4:8, 111:12
questioned [3] - 78:10, 105:23, 114:13
questioning [15] - 39:19, 41:3, 69:17, 70:27, 107:8, 159:16, 159:29, 160:14, 161:4, 161:7, 161:10, 161:19, 161:27, 173:28, 174:23
questions [34] - 5:11, 7:26, 10:6, 26:10, 45:17, 46:24, 47:2, 47:10, 68:26, 69:20, 70:1, 72:12, 75:2, 91:11, 101:8, 128:2, 152:13, 152:16, 157:5, 162:7, 164:5, 167:29, 177:25, 177:26, 177:28, 179:5, 183:20, 185:26, 199:10, 205:25, 206:5, 206:15, 206:16, 211:4
quickly [4] - 12:23, 119:19, 145:17, 208:24
quiet [1] - 165:25
quite [16] - 22:27, 26:10, 34:20, 53:1, 58:9, 135:8, 139:26, 141:3, 142:11, 151:18, 151:24, 154:24, 157:20, 158:16, 159:23, 160:7
quoted [1] - 125:18
quoting [1] - 57:9

R

raise [9] - 39:29, 67:21, 130:16, 131:1, 131:2, 154:25, 155:6, 169:26
raised [19] - 34:16, 56:5, 66:4, 67:16, 67:19, 69:2, 72:15, 106:2, 124:1, 130:22, 131:11, 153:24, 154:29, 155:4, 156:10, 177:9, 181:10, 182:2, 182:3
raising [6] - 90:15, 130:9, 131:15, 154:10, 156:13, 179:4
ran [1] - 60:3
rang [1] - 159:11
range [1] - 109:7
rank [6] - 15:5, 15:19, 119:10, 120:2, 120:4, 120:19
rap [2] - 10:27, 10:28
rate [1] - 175:7
rather [28] - 6:14, 6:18, 26:1, 28:18, 34:16, 53:7, 65:14, 71:20, 84:6, 89:27, 90:24, 90:28, 93:7, 97:9, 109:10, 113:5, 114:5, 123:12, 139:17, 141:20, 163:23, 174:4, 192:24, 202:28, 205:5, 209:18, 210:20, 211:25
rationale [3] - 190:5, 190:7, 190:8
RE [2] - 4:20, 213:5
re [3] - 119:1, 135:27, 181:17
re-confirmed [1] - 135:27
RE-EXAMINED [2] - 4:20, 213:5
re-open [1] - 119:1
re-read [1] - 181:17
reach [1] - 170:2
reached [1] - 129:21
read [47] - 10:29, 12:11, 12:20, 13:13, 13:14, 19:27, 20:17, 21:15, 23:15, 23:17, 40:18, 40:25, 48:27, 53:28, 56:14, 56:22, 65:20, 76:4, 106:17, 117:24, 124:18, 124:24, 125:5, 125:8, 125:10, 125:12, 126:11, 128:8, 136:19, 137:18, 143:25, 144:7, 144:12, 144:18, 158:3, 173:22, 181:17, 181:18, 181:22, 187:4, 195:27, 195:29, 204:11, 204:29, 205:2, 211:5
reader [1] - 14:4
reading [8] - 40:29, 47:5, 62:4, 100:2, 139:7, 139:10, 181:17, 197:29
reads [2] - 53:19, 199:21
ready [1] - 150:28

real [6] - 42:9, 88:2, 89:14, 145:3, 159:25, 189:5
realise [5] - 169:18, 170:13, 170:15, 193:19, 205:27
realistic [1] - 36:19
reality [3] - 47:8, 107:23, 108:3
really [22] - 10:23, 11:22, 20:4, 20:18, 28:22, 32:3, 35:6, 43:20, 49:18, 55:15, 75:11, 75:25, 104:6, 111:22, 127:8, 133:17, 140:9, 165:3, 172:18, 181:2, 204:17, 208:26
reason [23] - 11:10, 26:20, 37:10, 39:15, 50:4, 78:27, 87:11, 87:13, 91:26, 92:10, 93:10, 108:6, 115:21, 133:13, 143:25, 149:19, 163:6, 181:15, 186:4, 189:14, 201:22, 205:23, 206:3
reasonable [1] - 100:16
reasoning [1] - 209:21
reasons [4] - 77:5, 128:1, 129:20, 203:17
recast [1] - 9:23
receive [4] - 120:15, 121:26, 122:10, 122:11
received [15] - 84:29, 118:23, 121:29, 122:4, 129:25, 140:5, 157:10, 166:3, 167:10, 176:6, 179:3, 179:9, 194:24, 194:28, 195:12
receiving [4] - 61:1, 121:19, 121:20, 170:5
Recipient [6] - 62:23, 63:1, 104:24, 105:26, 110:19, 114:8
recitation [1] - 176:5
recited [1] - 178:20
recites [1] - 47:11
recollect [5] - 119:5, 135:5, 137:22, 137:23, 148:12
recollection [12] - 135:29, 136:20, 139:14, 140:11, 148:15, 152:10, 156:1, 160:27, 161:2, 161:5, 164:16, 201:9
recommendation [1] - 207:16
recommendations [2] - 62:17, 198:11
reconciliation [1] - 36:15
reconfirm [1] - 49:22
reconfirmed [1] - 81:16
reconstructing [1] - 196:21
record [5] - 46:2, 106:5, 171:24, 173:4, 181:2
recorded [7] - 17:10, 55:23, 92:23, 125:26, 155:21, 211:20, 212:23
recording [5] - 18:2, 77:15, 93:1, 95:4, 195:25
recordings [1] - 61:25
records [2] - 84:2, 100:20
red [1] - 62:14
redacted [3] - 14:16, 14:18, 178:29
redrafted [1] - 146:10
redrafting [1] - 145:8
refer [8] - 52:21, 53:18, 94:14, 108:25, 111:1, 112:5, 112:18, 212:12
referee [1] - 10:16
reference [25] - 14:29, 28:23, 31:24, 31:29, 40:13, 54:26, 56:28, 57:17, 58:25, 58:27, 59:10, 61:25, 70:21, 70:29, 85:7, 95:1, 113:9, 122:28, 129:16, 130:12, 130:15, 175:21, 199:1, 199:3, 212:20
references [2] - 47:14, 199:7
referendum [1] - 50:25
referred [18] - 39:25, 56:3, 60:16, 62:24, 88:20, 94:8, 109:19, 110:25, 111:4, 180:1, 181:4, 181:21, 206:12, 212:17, 213:1, 213:11, 213:24, 213:27, 45:12
remained [2] - 124:25, 147:8
remarks [2] - 33:7, 49:4
remember [25] - 12:18, 13:6, 27:28, 28:1, 31:15, 33:29, 34:7, 50:22, 52:28, 102:16, 105:21, 105:22, 139:3, 153:8, 156:15, 185:15, 186:22, 187:13, 188:16, 194:2, 196:9, 197:18, 203:2, 205:17, 206:17
reminded [1] - 31:27
reminding [1] - 54:26
rendered [1] - 112:16
repeat [1] - 90:19
repeated [2] - 173:6, 173:8
repeatedly [2] - 18:24, 24:27
rephrase [1] - 167:26
rephrased [1] - 167:29
report [72] - 8:9, 8:11, 8:19, 12:8, 13:11, 13:21, 13:25, 16:16, 16:22, 16:24, 18:20, 19:4, 20:23, 21:4, 22:28, 23:13, 24:17, 36:18, 52:26, 53:8, 53:9, 53:12, 53:19, 53:23, 53:28, 54:8, 55:10, 55:15, 55:21, 55:29, 62:16, 94:29, 95:21, 99:15, 107:21, 108:19, 109:20, 110:7, 110:28, 111:29, 117:12, 124:9, 124:21, 126:19, 140:18, 140:23, 150:19, 151:4, 151:21, 175:25, 181:20, 198:11, 198:12, 201:13, 204:29, 205:10, 205:12, 206:9, 206:10, 206:22, 207:10, 211:9, 211:12, 211:20, 212:1, 212:3, 212:13, 212:17, 212:28, 212:29, 213:12
Report [4] - 61:7, 90:16, 90:20, 90:21, 90:22, 93:11, 96:18, 100:13, 100:14, 101:7, 101:16, 103:7, 103:15, 104:20, 104:28, 105:8, 105:24, 106:13, 106:25, 113:3, 113:11, 114:11, 117:18, 120:13, 121:21, 124:20, 126:8, 126:19, 126:29, 128:3, 129:23, 132:24, 133:19, 147:28, 153:2, 156:24, 164:17, 167:11, 170:25, 172:8, 173:9, 173:29, 174:22, 179:25, 183:29, 184:17, 184:27, 185:26, 186:1, 188:28, 189:25, 189:29, 190:20, 190:28, 191:2, 191:7, 191:23, 192:9, 192:10, 192:13, 193:8, 193:15, 193:23, 198:27, 199:14, 200:2, 201:11, 204:6, 204:15, 204:16, 205:19, 205:20, 205:25, 206:5, 209:26, 210:26, 211:4
relations [1] - 113:17
relatively [2] - 126:7, 210:5
relayed [1] - 137:12
release [2] - 97:12, 117:22
relevance [5] - 21:19, 23:19, 23:21, 40:7, 65:2
relevant [24] - 20:15, 21:9, 21:13, 23:2, 23:26, 25:21, 32:24, 37:15, 37:23, 39:28, 40:7, 55:14, 64:27, 65:22, 68:29, 86:7, 88:19, 90:8, 99:20, 99:21, 143:4, 144:28, 206:2, 208:10
relied [2] - 152:18, 212:14
rely [3] - 10:16, 98:13, 147:23
relying [4] - 61:8, 112:25, 166:24, 209:4
remain [2] - 34:5,

62:7, 122:27, 126:12
reportage [1] -
 151:21
reported [5] -
 107:13, 107:18,
 117:7, 117:9, 117:10
reporter [1] - 207:23
reporting [1] - 183:3
Reporting [1] -
 108:29
reports [4] - 23:15,
 23:17, 129:4, 172:9
represent [4] - 80:6,
 119:7, 120:4, 121:13
representation [3] -
 19:20, 119:9, 120:17
represented [7] -
 120:3, 120:6, 120:8,
 120:10, 125:21,
 157:17, 177:19
representing [7] -
 29:13, 100:9, 112:23,
 119:4, 119:18, 198:6,
 198:21
reputations [1] -
 170:8
request [9] - 17:6,
 31:7, 66:2, 66:17,
 94:28, 95:23, 135:25,
 136:21, 205:13
requested [1] - 93:14
require [1] - 120:16
required [11] - 86:10,
 121:9, 122:21,
 127:18, 128:24,
 134:1, 134:3, 141:11,
 177:6, 177:20, 182:20
requirement [1] -
 145:27
rerun [1] - 28:14
resemble [1] -
 163:23
reserve [1] - 172:3
reserving [1] - 172:4
resign [1] - 18:24
resigned [1] - 34:7
resiled [2] - 203:5,
 203:7
resiling [1] - 204:4
RESOLUTIONS [1] -
 1:5
resolved [1] - 146:18
resources [1] - 148:5
respect [31] - 6:16,
 6:28, 9:19, 11:25,
 26:15, 28:3, 29:22,
 35:25, 36:9, 37:2,
 37:14, 37:22, 38:8,
 41:8, 44:10, 44:29,
 45:11, 64:17, 65:8,

78:15, 81:22, 81:23,
 81:24, 81:26, 81:29,
 82:2, 82:10, 113:18,
 176:14, 177:15,
 182:11
respecting [1] -
 101:4
respects [1] - 123:28
respond [3] - 22:22,
 81:11, 85:17
responding [1] -
 75:24
response [2] - 17:6,
 86:27
responsibilities [3] -
 9:27, 10:1, 24:3
responsibility [10] -
 5:14, 9:20, 10:3, 11:6,
 24:29, 70:3, 71:16,
 114:15, 149:8, 157:3
responsible [4] -
 15:13, 25:25, 108:14,
 175:28
rest [4] - 5:19,
 145:15, 150:3, 203:12
restraint [1] - 135:14
result [5] - 37:6,
 50:3, 130:5, 183:3,
 186:15
resume [1] - 69:13
RESUMED [2] - 5:1,
 117:1
resumed [3] - 7:5,
 7:6, 189:17
retired [4] - 63:23,
 162:5, 162:18, 201:24
return [3] - 68:15,
 81:1, 191:23
returns [1] - 89:21
revealed [2] - 8:13,
 13:9
revealing [1] -
 209:20
review [3] - 40:24,
 51:12, 207:17
reviewed [1] -
 186:24
revise [1] - 149:21
revised [1] - 149:20
revisited [1] - 105:3
ridiculed [1] - 15:25
riding [1] - 147:26
right-hand [1] -
 13:20
rights [2] - 70:27,
 148:6
ringing [1] - 203:21
rings [1] - 79:3
rise [3] - 68:19,
 80:23, 154:18

risk [2] - 44:15,
 147:25
road [1] - 132:18
ROAD [1] - 2:25
robust [1] - 154:19
ROGERS [1] - 2:22
role [7] - 10:1, 27:3,
 69:27, 119:27,
 119:29, 120:27, 121:5
roman [1] - 13:19
RONAN [1] - 3:6
room [24] - 135:1,
 136:7, 138:27,
 139:26, 163:23,
 163:24, 163:28,
 164:2, 164:7, 164:11,
 165:19, 165:22,
 165:24, 165:25,
 170:22, 170:27,
 171:2, 171:20,
 182:21, 185:14,
 187:1, 187:4, 196:14,
 196:15
Rooney [30] - 6:6,
 36:22, 53:13, 63:9,
 65:10, 66:1, 66:15,
 67:17, 85:20, 85:24,
 88:11, 97:8, 109:24,
 128:3, 128:7, 132:24,
 141:25, 142:4,
 142:22, 161:12,
 164:29, 171:27,
 199:24, 199:28,
 200:8, 200:18,
 201:24, 203:5, 204:5
Rooney's [1] -
 185:12
root [1] - 36:17
rose [1] - 69:18
roughly [1] - 188:8
round [1] - 126:6
rude [2] - 10:11,
 10:18
ruined [1] - 17:22
rule [1] - 168:14
ruled [6] - 37:11,
 40:14, 40:16, 144:28,
 148:14, 148:20
rules [1] - 88:10
ruling [15] - 14:15,
 15:4, 15:11, 40:2,
 84:27, 88:21, 89:17,
 96:8, 177:17, 189:1,
 189:8, 189:9, 190:11,
 190:14, 191:11
running [1] - 93:19
runs [2] - 61:23, 77:6
rushed [1] - 168:3
Ryan [27] - 52:22,
 53:1, 96:15, 115:5,

115:14, 118:24,
 124:13, 137:23,
 139:22, 139:25,
 140:17, 141:28,
 143:1, 150:19, 151:2,
 151:3, 152:6, 156:1,
 178:8, 185:16,
 186:19, 187:14,
 187:15, 194:4, 194:7,
 195:16, 205:12
Ryan's [3] - 54:17,
 137:15, 164:18

S

sanctioned [1] -
 136:14
sanitise [1] - 94:11
sanitised [2] - 89:4
sat [3] - 141:27,
 186:6, 200:28
satisfaction [2] -
 24:17, 176:14
satisfactory [2] -
 122:4, 122:8
satisfied [4] -
 100:23, 108:17,
 117:28, 157:6
Saturday [5] - 50:27,
 166:11, 166:16,
 166:17, 178:6
save [2] - 61:16,
 189:3
saw [13] - 12:28,
 17:12, 29:11, 36:20,
 60:6, 64:1, 65:22,
 111:26, 117:11,
 120:18, 129:12,
 138:13, 179:1
say-so [1] - 20:14
SC [11] - 2:6, 2:6,
 2:9, 2:10, 2:15, 2:15,
 2:16, 2:22, 3:2, 3:3,
 3:12
scene [1] - 16:9
scheme [1] - 203:13
school [1] - 50:29
scope [7] - 56:27,
 56:29, 57:16, 57:18,
 57:28, 58:9, 80:3
screen [8] - 14:22,
 15:6, 101:19, 143:25,
 178:3, 185:4, 195:14
scurrilous [1] -
 17:21
sealed [1] - 205:1
SEAN [1] - 2:11
SEANAD [1] - 1:6
searching [1] -

209:29
seated [1] - 138:26
secluded [1] -
 165:19
second [17] - 16:18,
 37:17, 53:18, 61:19,
 62:25, 73:28, 82:26,
 83:4, 96:20, 159:11,
 160:4, 160:21, 170:6,
 178:10, 180:20,
 202:5, 205:18
second-guess [2] -
 37:17, 62:25
secondary [1] - 45:5
secondly [6] - 41:28,
 43:17, 70:10, 72:15,
 145:19, 200:13
secret [1] - 22:19
secrets [2] - 22:16,
 23:5
section [11] - 56:20,
 89:10, 188:24,
 188:29, 189:7, 190:5,
 191:5, 198:28, 206:8,
 206:9, 206:25
sections [1] - 199:7
security [2] - 50:12,
 141:21
see [73] - 5:24, 6:12,
 7:2, 7:20, 9:16, 12:17,
 12:18, 13:3, 13:16,
 13:18, 13:22, 14:23,
 17:25, 21:6, 21:7,
 21:19, 22:2, 22:11,
 22:21, 22:24, 23:12,
 28:2, 28:6, 29:3,
 29:25, 33:28, 35:17,
 40:8, 41:28, 41:29,
 45:23, 47:6, 47:7,
 49:13, 53:26, 55:8,
 63:27, 63:28, 65:16,
 70:24, 91:1, 91:6,
 96:5, 105:10, 112:25,
 117:11, 119:21,
 120:27, 131:23,
 134:6, 149:22, 151:9,
 159:7, 162:25,
 165:13, 169:24,
 171:18, 174:15,
 177:24, 179:22,
 181:7, 187:12,
 191:29, 192:20,
 195:14, 195:18,
 198:3, 199:23,
 206:22, 209:23
seed [1] - 58:23
seeing [3] - 13:16,
 77:25, 101:19
seek [9] - 13:12,
 20:17, 20:28, 86:24,

87:17, 103:1, 124:12, 150:2, 199:29
seeking [3] - 68:27, 126:4, 128:19
seem [13] - 14:17, 21:27, 23:1, 80:26, 85:12, 88:18, 88:19, 90:22, 114:16, 160:15, 190:2, 206:26, 206:28
sees [2] - 21:11, 36:11
segments [1] - 124:20
selective [1] - 131:22
seminal [3] - 26:26, 60:7, 60:9
send [1] - 186:26
sending [1] - 178:8
senior [9] - 27:7, 27:11, 60:2, 62:13, 62:16, 68:29, 112:23, 119:25, 120:19
sense [15] - 48:13, 70:27, 161:2, 161:24, 168:20, 194:16, 196:20, 197:26, 198:3, 198:16, 204:9, 209:7, 210:19, 211:26, 211:29
sensitivities [2] - 85:26, 85:27
sent [19] - 8:11, 53:12, 87:15, 91:13, 104:23, 136:13, 137:5, 137:7, 142:29, 143:20, 146:11, 154:22, 179:2, 179:6, 184:20, 187:5, 194:7, 195:15, 205:1
sentence [4] - 28:26, 28:29, 87:7, 211:17
separate [2] - 19:20, 117:20
separately [4] - 120:8, 157:16, 180:23, 189:12
September [7] - 14:12, 52:26, 53:9, 54:25, 205:15, 212:2, 212:4
sequence [1] - 56:11
sergeant [14] - 15:1, 16:6, 18:22, 18:25, 18:28, 19:1, 19:6, 24:19, 27:3, 29:27, 31:20, 34:6, 67:7, 125:28
Sergeant [191] - 7:3, 7:27, 9:18, 10:12, 11:2, 11:5, 11:9, 12:20, 13:1, 13:10, 14:3, 14:5, 15:24, 16:21, 17:11, 17:28, 18:7, 18:29, 19:4, 19:26, 20:21, 21:23, 22:19, 23:13, 24:18, 24:27, 25:24, 26:6, 26:10, 26:11, 26:17, 27:1, 27:12, 27:16, 28:6, 29:4, 29:5, 29:12, 31:11, 31:13, 32:1, 32:25, 33:13, 33:18, 34:3, 34:4, 34:5, 34:20, 34:24, 35:14, 35:26, 36:5, 36:21, 37:1, 38:21, 39:19, 39:28, 41:3, 42:8, 42:22, 42:23, 47:22, 47:23, 53:16, 53:21, 53:25, 54:3, 54:6, 55:1, 55:8, 55:10, 55:14, 55:17, 55:18, 58:4, 58:13, 59:2, 59:28, 60:11, 63:27, 65:11, 65:27, 66:12, 70:29, 71:16, 72:28, 73:3, 73:24, 74:10, 75:13, 78:8, 78:29, 79:13, 79:23, 80:17, 81:18, 82:24, 83:7, 84:16, 85:24, 86:8, 87:2, 87:9, 87:12, 88:2, 88:8, 91:11, 91:25, 92:9, 92:12, 92:23, 93:2, 93:9, 95:22, 97:5, 97:25, 97:27, 98:1, 99:24, 101:16, 103:4, 104:12, 106:15, 106:27, 107:5, 107:7, 108:14, 108:16, 108:28, 109:8, 112:15, 113:11, 122:7, 125:27, 128:4, 129:4, 132:14, 133:2, 133:7, 134:6, 134:21, 144:25, 145:4, 145:29, 146:13, 152:28, 155:2, 157:7, 161:16, 162:6, 162:11, 165:18, 172:28, 176:11, 176:17, 177:20, 179:26, 180:2, 180:17, 180:25, 185:25, 189:3, 193:4, 193:8, 193:28, 197:17, 198:14, 199:23, 199:25, 200:13, 201:10, 201:27, 202:9, 202:21, 203:19, 203:25, 203:28, 204:6, 204:10, 204:12, 204:15, 207:7, 207:13, 207:23, 208:4, 208:7, 210:6, 210:22, 211:21
sergeants [2] - 15:14, 120:5
series [1] - 32:25
serious [23] - 9:2, 27:14, 35:7, 35:8, 35:13, 44:21, 44:22, 46:13, 60:1, 61:18, 62:9, 62:14, 62:26, 62:27, 63:2, 108:21, 126:23, 130:4, 130:9, 133:11, 133:27, 134:1, 147:20
seriously [2] - 23:11, 36:29
SERVICES [1] - 1:30
Services [1] - 1:25
set [11] - 17:9, 17:15, 36:12, 36:13, 61:1, 62:20, 123:14, 165:4, 177:7, 184:24, 197:26
sets [2] - 134:13, 158:3
setting [2] - 65:26, 165:16
settled [2] - 136:14, 186:24
seven [2] - 20:23, 33:24
several [4] - 60:13, 154:12, 162:28, 178:28
severity [1] - 175:5
sexual [1] - 58:1
SGT [1] - 2:9
shall [2] - 57:1, 57:19
SHANE [1] - 2:15
Shanley [1] - 187:1
shape [2] - 79:3, 89:5
SHIP [2] - 2:19, 3:15
shivering [1] - 40:20
shortcomings [1] - 133:23
shortly [1] - 139:19
show [2] - 19:5, 23:13
showed [1] - 47:28
shown [1] - 136:16
shows [1] - 106:5
shut [1] - 40:27
sic [3] - 113:16, 149:1, 175:20
side [6] - 28:19, 28:20, 47:15, 77:5, 165:24
sideways [1] - 168:9
sign [1] - 143:21
signalled [2] - 40:11, 40:15
signature [1] - 55:9
signed [3] - 55:10, 167:14, 179:13
significance [1] - 24:24
significant [3] - 8:24, 149:7, 207:24
significantly [1] - 207:28
signing [1] - 150:29
signing-off [1] - 150:29
simple [1] - 27:5
simpler [1] - 174:14
simplest [1] - 196:22
simply [18] - 15:3, 26:11, 32:10, 38:7, 41:20, 68:12, 91:2, 91:3, 96:6, 102:9, 111:25, 121:11, 138:11, 150:3, 155:19, 162:18, 167:14, 176:4
single [1] - 184:24
sit [2] - 44:23, 141:28
sitting [8] - 51:6, 100:7, 131:17, 137:1, 150:27, 156:2, 164:1, 187:3
situation [10] - 19:10, 32:5, 65:21, 81:7, 86:11, 147:19, 150:27, 174:26, 184:19, 210:23
six [2] - 49:11, 103:8
sixth [2] - 14:25, 61:15
skewing [1] - 29:18
slackness [1] - 28:2
slept [1] - 112:12
slightly [5] - 49:3, 128:29, 162:9, 168:9, 194:15
slipped [1] - 197:1
small [3] - 143:25, 163:24, 192:20
Smith [1] - 162:4
Smyth [81] - 5:6, 7:1, 20:8, 24:6, 24:26, 25:22, 26:29, 37:25, 39:26, 49:17, 49:18, 51:3, 51:28, 52:2, 52:21, 53:11, 56:9, 56:13, 56:17, 56:18, 57:26, 58:20, 59:19, 68:11, 68:23, 68:24, 69:19, 70:16, 72:29, 76:10, 79:22, 81:2, 85:5, 98:26, 99:8, 99:15, 100:18, 100:20, 104:7, 106:13, 108:7, 108:14, 111:15, 123:16, 127:15, 128:6, 131:4, 134:29, 136:14, 138:22, 138:25, 138:29, 139:2, 139:13, 141:8, 141:27, 144:23, 146:28, 150:28, 155:20, 155:26, 156:2, 156:5, 156:11, 161:20, 167:13, 168:7, 169:19, 170:23, 174:5, 174:9, 178:9, 184:29, 186:24, 187:4, 190:17, 205:2, 207:1, 210:4, 210:12
SMYTH [10] - 3:2, 4:3, 5:4, 65:1, 75:20, 77:9, 77:11, 81:20, 81:23, 111:12
Smyth's [2] - 99:19, 167:8
snippets [2] - 183:8
SOLE [2] - 1:12, 2:2
sole [2] - 176:22, 176:23
solicitor [10] - 96:12, 115:7, 120:11, 178:27, 195:9, 195:10, 195:17, 200:27, 203:21, 205:3
SOLICITOR [1] - 2:7
Solicitor's [3] - 124:14, 179:8, 202:9
SOLICITOR'S [2] - 2:18, 3:14
solicitors [5] - 12:5, 20:14, 61:27, 61:28, 125:16
SOLICITORS [1] - 2:24
solid [1] - 36:18
someone [4] - 100:7, 169:15, 208:15, 208:16
sometime [2] - 79:11, 136:27
sometimes [5] - 77:13, 107:23, 114:16, 115:3, 203:11

somewhat [4] - 112:9, 123:14, 139:3, 190:12
somewhere [1] - 100:9
soon [1] - 126:7
sorry [62] - 14:14, 20:5, 23:16, 23:19, 28:26, 29:4, 29:28, 30:18, 32:26, 38:29, 41:5, 47:23, 47:25, 50:28, 53:29, 56:13, 56:19, 57:9, 59:14, 64:11, 71:4, 79:15, 82:22, 87:7, 93:25, 102:13, 103:11, 104:3, 114:4, 114:6, 124:28, 142:20, 144:2, 144:4, 151:18, 154:7, 159:19, 167:19, 170:12, 170:13, 172:27, 178:5, 180:8, 180:13, 189:16, 190:1, 190:26, 191:8, 191:9, 194:13, 195:2, 195:24, 195:26, 197:10, 197:12, 199:17, 201:7, 202:5, 206:29, 207:9, 211:16
Sorry [1] - 55:7
sort [9] - 129:21, 133:1, 149:11, 186:15, 189:22, 190:22, 196:20, 201:14, 210:20
sorts [1] - 27:24
sought [11] - 13:10, 16:26, 63:27, 119:9, 127:11, 128:21, 131:9, 132:16, 135:17, 199:23, 202:6
sound [3] - 9:12, 35:24, 122:8
source [1] - 117:26
speaking [2] - 139:28, 140:2
special [1] - 175:7
specific [11] - 28:10, 104:20, 104:28, 121:19, 121:20, 130:13, 153:4, 156:7, 188:13, 199:6, 204:3
specifically [8] - 74:24, 87:6, 94:14, 152:21, 154:6, 184:19, 186:12, 213:2
speculate [1] - 155:23
speculating [1] - 204:19
speed [1] - 122:22
spend [1] - 183:13
spent [1] - 205:16
spite [4] - 29:11, 29:15, 34:2, 34:20
spiteful [1] - 35:27
spoken [1] - 193:9
spontaneously [1] - 169:11
spotted [2] - 67:5, 92:20
SREENAN [61] - 3:3, 4:7, 4:13, 4:19, 14:14, 14:21, 14:24, 14:28, 15:8, 58:19, 58:20, 59:18, 59:24, 66:23, 68:15, 76:8, 76:16, 83:25, 84:4, 84:8, 93:21, 93:25, 93:29, 96:6, 98:11, 98:15, 98:20, 100:20, 102:11, 102:13, 102:15, 102:18, 102:20, 103:22, 103:27, 104:1, 104:9, 106:20, 107:25, 107:29, 108:12, 108:18, 110:27, 111:6, 167:23, 177:29, 178:2, 178:5, 180:13, 180:21, 181:2, 181:12, 181:25, 181:29, 182:4, 182:27, 182:29, 183:16, 183:19, 212:11, 212:12
Sreenan [25] - 14:26, 15:10, 15:20, 31:23, 76:2, 79:15, 83:5, 93:23, 102:8, 102:17, 103:25, 103:29, 106:18, 108:1, 167:19, 177:28, 178:4, 178:28, 180:8, 180:29, 182:17, 182:22, 183:9, 183:21
stack [3] - 44:25, 48:23, 114:12
stacks [1] - 114:20
staff [1] - 28:3
stage [52] - 7:8, 19:6, 39:28, 40:3, 40:4, 40:13, 62:2, 62:23, 66:11, 66:24, 69:2, 69:9, 69:14, 72:20, 75:26, 78:19, 79:22, 81:27, 82:26, 84:18, 90:6, 95:17, 96:17, 105:9, 105:12, 105:14, 106:2, 106:27, 113:24, 121:24, 122:14, 122:21, 124:12, 127:11, 127:14, 127:17, 127:23, 128:11, 129:26, 130:24, 138:22, 139:11, 140:1, 148:12, 148:13, 148:19, 163:17, 163:22, 170:2, 196:1, 198:18, 209:22
stand [2] - 45:18, 157:3
standards [6] - 23:29, 24:16, 24:29, 25:5, 71:10, 207:17
standing [1] - 196:14
stands [1] - 173:14
start [9] - 14:24, 25:11, 26:16, 30:15, 39:13, 76:25, 124:10, 125:8, 175:26
started [6] - 18:2, 56:21, 57:11, 57:25, 142:9, 147:14
starting [1] - 212:20
starts [3] - 13:25, 60:10, 108:24
State [5] - 51:8, 61:27, 124:14, 179:8, 202:9
state [7] - 42:4, 64:14, 96:13, 100:21, 192:17, 200:26, 203:21
STATE [2] - 2:18, 3:14
statement [18] - 48:21, 53:24, 59:28, 84:12, 84:16, 87:13, 94:21, 97:2, 97:12, 97:25, 98:4, 117:13, 118:10, 143:22, 144:2, 144:12, 153:6, 193:9
statements [7] - 113:10, 113:22, 134:12, 134:13, 134:21, 143:17, 154:23
states [3] - 13:29, 14:9, 97:5
stating [2] - 202:6, 204:7
station [12] - 19:6, 23:14, 23:29, 24:20, 25:3, 25:6, 25:10, 25:12, 26:10, 26:18, 34:6, 37:26
Station [4] - 17:16, 23:23, 97:14, 207:18
status [1] - 145:19
stay [4] - 34:10, 34:11, 71:4, 150:4
stemmed [1] - 123:26
STENOGRAPHER [1] - 104:5
stenographic [1] - 1:27
STENOGRAPHY [1] - 1:30
stenography [1] - 1:25
step [2] - 10:16, 186:20
stepped [2] - 11:21, 153:14
stick [2] - 23:6, 25:17
still [6] - 41:9, 41:10, 46:27, 70:7, 73:18, 147:4
stood [1] - 199:1
stop [9] - 17:1, 18:11, 19:9, 19:19, 42:27, 77:10, 77:11, 168:29, 202:5
storage [1] - 117:20
story [1] - 47:15
straightaway [1] - 137:4
strain [2] - 11:10, 109:27
stratagem [1] - 177:19
streamline [1] - 149:29
street [1] - 93:19
STREET [3] - 2:19, 3:7, 3:15
stress [1] - 17:29
stressed [2] - 33:20, 33:23
stressful [1] - 210:23
strict [1] - 37:13
strictly [2] - 5:29, 163:21
strike [1] - 165:3
strong [1] - 149:9
strongly [1] - 40:11
struck [2] - 141:9, 148:21
structural [2] - 56:26, 57:15
structured [1] - 175:11
structures [1] - 113:12
stuck [1] - 27:26
subject [13] - 38:5, 39:8, 39:14, 57:5, 57:23, 82:21, 82:23, 94:1, 110:8, 120:9, 121:22, 126:10, 192:20
subjective [2] - 210:20, 210:21
submarine [1] - 23:9
submission [20] - 69:15, 150:25, 168:27, 171:27, 172:14, 172:18, 172:20, 172:22, 172:23, 172:24, 173:1, 173:3, 173:4, 173:10, 173:17, 204:22, 208:11, 209:5, 211:28
submissions [60] - 6:21, 8:22, 34:22, 34:26, 35:6, 35:15, 43:14, 71:20, 76:23, 95:11, 147:6, 149:4, 149:10, 150:15, 156:26, 157:13, 157:22, 158:4, 169:26, 176:1, 184:22, 184:24, 188:17, 188:25, 188:29, 189:8, 189:11, 189:13, 189:21, 190:6, 191:2, 191:6, 191:19, 191:24, 191:29, 192:10, 192:18, 192:21, 193:23, 196:18, 197:6, 197:8, 197:15, 197:22, 197:27, 198:1, 198:2, 198:9, 198:15, 198:16, 198:28, 198:29, 206:5, 206:6, 206:25, 209:24, 211:13, 212:5, 213:23, 214:1
submit [1] - 35:6
submitted [6] - 36:6, 109:8, 178:26, 179:13, 188:18, 192:18
submitting [1] - 44:5
subsequent [3] - 79:10, 79:17, 110:12
subsequently [7] - 16:2, 74:23, 92:18, 101:6, 101:17, 124:21, 136:13

substance [2] - 36:24, 200:15
substantial [1] - 156:28
substantiated [1] - 207:26
suffer [1] - 184:5
suffering [1] - 45:9
sufficient [1] - 62:18
suggest [12] - 9:17, 10:8, 17:28, 31:9, 36:5, 44:12, 75:7, 96:6, 112:9, 129:17, 196:15, 201:21
suggested [12] - 52:12, 105:12, 107:5, 112:26, 139:7, 148:17, 160:27, 160:28, 160:29, 179:20, 181:4, 185:15
suggesting [20] - 5:15, 11:2, 20:27, 21:2, 35:27, 36:3, 38:22, 39:24, 41:1, 41:20, 43:13, 43:17, 43:19, 51:13, 88:16, 88:26, 119:16, 132:5, 149:2, 176:11
suggestion [6] - 11:15, 27:21, 107:26, 108:12, 133:4, 139:5
suicide [1] - 16:9
summarises [1] - 78:16
summarising [1] - 183:14
summary [2] - 198:5, 205:19
summation [2] - 78:14, 207:21
summing [1] - 197:26
Superintendent [1] - 86:21
Superintendent [187] - 6:6, 6:7, 6:23, 7:4, 8:8, 8:12, 8:18, 8:26, 16:15, 16:26, 17:5, 17:6, 18:26, 18:27, 27:25, 27:27, 30:1, 30:22, 33:17, 34:8, 34:9, 34:13, 36:22, 46:1, 49:27, 52:25, 53:8, 53:12, 53:13, 53:21, 53:24, 54:4, 54:5, 54:12, 55:29, 60:19, 61:8, 63:8, 63:15, 63:16, 65:10, 66:1, 66:7, 66:10, 66:15, 66:16, 66:20, 66:25, 66:27, 67:2, 67:17, 83:1, 83:10, 83:18, 83:27, 83:29, 85:20, 85:24, 86:15, 86:24, 87:15, 87:17, 88:11, 91:13, 91:17, 91:26, 91:27, 92:11, 92:15, 92:24, 92:25, 92:27, 93:2, 93:6, 93:15, 93:17, 94:2, 94:24, 94:26, 94:27, 94:29, 95:2, 95:20, 95:25, 95:28, 96:19, 96:25, 97:8, 97:28, 97:29, 99:24, 102:1, 102:29, 105:2, 109:15, 109:24, 109:29, 110:6, 115:11, 128:3, 132:22, 132:23, 134:28, 135:2, 135:27, 137:12, 140:18, 141:18, 141:24, 142:3, 142:4, 142:5, 142:17, 142:18, 142:22, 142:25, 143:1, 143:6, 143:23, 144:3, 149:15, 150:20, 151:4, 151:20, 152:5, 156:10, 156:13, 156:22, 157:26, 158:13, 159:1, 160:3, 161:12, 164:26, 164:29, 171:26, 172:25, 176:12, 176:24, 177:14, 177:15, 177:18, 181:19, 185:12, 185:16, 185:17, 186:18, 187:16, 187:18, 187:29, 188:3, 188:9, 188:14, 189:15, 190:10, 190:25, 190:26, 191:22, 191:27, 192:14, 192:15, 192:22, 193:3, 194:8, 194:25, 195:16, 196:1, 199:24, 199:28, 200:28, 201:24, 203:5, 204:5, 205:20, 207:29, 208:5, 208:7, 210:7, 210:8, 211:7, 211:21, 212:1
superintendent [14] - 27:29, 33:12, 60:13, 60:16, 60:17, 66:14, 67:12, 113:1, 141:25, 189:28, 200:8, 205:21, 207:21, 207:25
superintendents [3] - 32:9, 119:11
superiors [1] - 38:23
supervening [1] - 129:12
supervising [1] - 15:26
supervision [3] - 78:26, 83:19, 84:1
supplemental [1] - 134:20
support [13] - 6:23, 18:27, 32:7, 32:8, 41:12, 41:14, 42:1, 95:25, 96:1, 96:7, 113:4, 172:26, 177:14
supported [3] - 33:13, 95:3, 103:2
supporting [4] - 53:25, 61:16, 61:20, 113:11
suppose [17] - 16:24, 34:26, 35:1, 35:19, 96:4, 96:6, 114:15, 169:13, 182:21, 182:29, 185:28, 186:20, 187:23, 189:24, 190:7, 197:3, 197:4
supposed [2] - 100:29, 183:4
supposedly [3] - 101:7, 101:8, 183:14
suppressing [1] - 134:16
SUPREME [2] - 1:13, 2:3
surely [1] - 156:18
surfaced [1] - 154:2
surprise [5] - 12:16, 153:25, 153:27, 164:13, 164:15
surrounding [4] - 27:14, 28:8, 68:3, 78:27
suspect [3] - 82:28, 83:12, 103:23
suspicious [1] - 167:28
swans [1] - 99:12
swiftly [1] - 196:24
sword [2] - 45:17, 45:18
SWORN [2] - 118:7, 184:9
system [1] - 88:21
Sióchána [15] - 14:9, 17:19, 52:3, 57:29, 58:4, 58:6, 58:7, 59:1, 59:4, 108:29, 119:8, 121:5, 122:25, 198:6, 198:18
T
tab [1] - 134:19
table [7] - 41:10, 145:22, 146:24, 163:24, 165:22, 190:2, 191:1
tackled [1] - 141:4
tailor [1] - 79:27
tangentially [1] - 130:14
tango [1] - 126:15
tantamount [1] - 18:25
tape [1] - 193:29
task [1] - 60:24
taskmasters [1] - 170:20
tea [1] - 51:7
team [10] - 55:27, 101:11, 101:13, 120:4, 120:7, 174:19, 182:16, 205:24, 211:25, 212:5
tear [1] - 8:3
tease [1] - 128:29
technical [3] - 99:28, 190:25, 210:14
technique [1] - 105:1
tedious [2] - 28:9, 44:16
telephone [3] - 49:27, 49:29, 50:16
temperament [1] - 35:24
ten [5] - 68:19, 80:23, 115:25, 123:27
ten-year [1] - 123:27
tend [1] - 17:28
tendency [1] - 164:9
tendered [2] - 90:4, 90:10
tense [1] - 193:1
tentative [1] - 129:21
term [7] - 28:23, 43:27, 69:23, 73:15, 174:3, 174:16, 210:1
terms [38] - 9:25, 31:28, 43:20, 56:27, 57:16, 58:24, 58:27, 59:10, 66:23, 69:27, 71:6, 71:10, 85:6, 95:28, 108:8, 117:26, 122:28, 123:25, 130:12, 130:15, 130:19, 135:14, 138:8, 140:13, 155:8, 165:7, 172:15, 175:20, 187:23, 189:24, 191:19, 204:3, 205:11, 205:22, 209:3, 209:6, 209:9, 210:3
terribly [1] - 15:11
test [6] - 28:5, 28:6, 45:20, 175:2, 175:4
testify [1] - 179:17
text [5] - 37:29, 61:25, 98:13, 166:1, 167:3
textbooks [2] - 76:4, 112:5
that.. [1] - 91:19
THE [22] - 1:4, 1:8, 1:9, 1:12, 2:3, 2:6, 2:15, 4:8, 5:1, 49:16, 52:1, 58:19, 111:12, 115:28, 117:1, 183:24, 199:13, 211:2, 212:11, 213:5, 214:7, 214:12
thematic [1] - 198:2
theme [3] - 9:17, 25:22, 27:12
themes [1] - 197:25
themselves [7] - 35:8, 35:19, 61:17, 90:1, 90:2, 126:12, 126:22
THEN [7] - 183:24, 199:13, 211:2, 212:11, 213:5, 214:7, 214:12
then-Commissioner [1] - 52:10
then-current [1] - 119:20
then-Garda [1] - 109:2
then-state [1] - 96:13
thereafter [2] - 178:24, 194:24
therefore [4] - 58:9, 102:14, 190:3, 191:1
therein [1] - 82:13
thereof [2] - 117:22, 150:18
thereto [1] - 118:22
thesis [1] - 133:2
thinking [6] - 6:27, 168:2, 173:16, 183:18, 196:21
thinks [1] - 87:24

third [2] - 129:27, 141:18
thoroughly [1] - 113:7
thoughts [2] - 160:4, 197:4
thrashed [1] - 8:23
thrashing [1] - 23:25
three [16] - 22:5, 52:2, 59:10, 103:8, 123:22, 129:25, 134:13, 136:23, 143:11, 143:17, 156:3, 166:22, 166:28, 167:1, 200:29, 211:3
throughout [4] - 18:23, 41:3, 41:22, 147:5
thumb [1] - 137:29
tight [1] - 123:13
Time [1] - 117:27
time-line [1] - 123:13
timing [1] - 187:25
tired [1] - 111:27
TO [1] - 5:4
toad [1] - 40:20
today [3] - 46:27, 167:8, 207:14
together [6] - 50:5, 51:7, 51:8, 55:4, 143:11, 186:10
tolerate [2] - 10:18, 29:24
took [17] - 27:12, 50:1, 122:9, 123:7, 129:5, 131:4, 137:18, 141:24, 141:29, 142:11, 144:23, 148:3, 156:29, 173:29, 187:4, 190:10, 201:28
top [5] - 13:29, 56:19, 81:14, 99:6, 206:16
topic [1] - 204:28
total [1] - 153:27
totality [2] - 122:12, 123:25
totally [1] - 193:16
touching [1] - 86:11
touchy [1] - 20:29
towards [9] - 29:11, 34:3, 34:20, 35:26, 136:27, 199:26, 201:18, 201:22, 202:10
traditional [1] - 60:29
tragic [1] - 97:20

train [2] - 77:24, 154:7
transactions [1] - 8:21
transcribed [1] - 186:11
transcript [66] - 1:26, 7:2, 7:19, 8:18, 8:26, 10:29, 17:10, 25:4, 28:16, 28:21, 29:26, 30:27, 30:29, 37:9, 39:7, 40:1, 47:28, 48:27, 48:29, 49:6, 52:22, 55:22, 56:15, 56:18, 56:22, 63:8, 68:3, 68:4, 68:15, 69:13, 77:14, 92:22, 93:1, 95:3, 95:18, 95:24, 96:1, 102:12, 105:28, 117:8, 117:15, 117:17, 117:21, 128:8, 135:22, 144:26, 162:14, 171:17, 179:15, 181:8, 188:5, 190:22, 193:28, 194:20, 195:22, 196:24, 206:18, 206:19, 206:22, 212:15, 212:19, 213:7, 213:15, 213:22, 214:9
transcripts [8] - 28:11, 34:28, 81:6, 95:9, 128:17, 138:5, 199:7
transpire [1] - 115:22
transpired [4] - 8:25, 92:22, 94:3, 151:14
trap [1] - 208:24
trespass [4] - 36:26, 165:27, 167:17, 167:18
trespassing [4] - 39:14, 167:6, 193:19, 196:13
TRIBUNAL [2] - 1:3, 2:6
tribunal [2] - 163:21, 195:9
Tribunal [36] - 7:1, 7:5, 14:17, 14:18, 20:27, 22:10, 22:17, 25:16, 44:5, 44:29, 45:10, 46:11, 49:26, 50:21, 59:26, 64:20, 67:20, 72:5, 100:4, 104:14, 104:16, 105:23, 107:9,

117:16, 118:11, 118:29, 127:24, 135:26, 138:13, 144:13, 147:2, 179:12, 185:8, 185:21, 186:3, 206:4
Tribunal's [3] - 15:9, 63:6, 171:23
TRIBUNALS [1] - 1:9
tried [1] - 12:18
trouble [1] - 53:3
true [4] - 99:22, 202:12
trust [2] - 17:23, 18:1
trustworthy [1] - 112:16
truth [3] - 24:1, 45:20, 47:12
try [6] - 35:11, 35:18, 36:17, 44:23, 44:24, 183:12
trying [30] - 9:9, 9:23, 10:24, 11:14, 19:21, 20:5, 20:7, 27:6, 28:14, 32:14, 32:21, 33:11, 33:29, 34:28, 35:1, 35:8, 38:16, 38:17, 38:20, 80:3, 94:11, 108:11, 113:2, 115:19, 137:20, 155:12, 155:13, 176:10, 176:20, 196:9
Tuesday [2] - 159:4, 159:6
turn [18] - 33:14, 63:4, 69:11, 76:21, 78:19, 82:8, 84:26, 89:19, 94:18, 96:10, 101:14, 103:19, 111:15, 143:4, 181:12, 185:2, 188:17, 197:8
turned [3] - 28:5, 193:23, 213:21
turning [2] - 27:21, 211:13
twice [1] - 171:19
two [41] - 11:24, 13:12, 16:6, 22:4, 35:23, 43:15, 46:5, 49:17, 55:12, 61:27, 66:22, 91:11, 101:25, 102:6, 102:24, 103:8, 113:6, 115:26, 117:19, 129:26, 136:11, 141:16, 145:15, 151:16, 152:2, 152:10, 158:3, 165:18, 165:28,

181:16, 184:2, 184:19, 184:26, 186:9, 194:28, 201:16, 205:24, 210:9, 210:25, 211:3
two-and-a-half [1] - 11:24
type [1] - 47:2
typewritten [1] - 159:21

U

ulterior [7] - 133:3, 133:4, 209:8, 209:10, 209:14, 209:29, 210:2
ultimate [1] - 110:10
ultimately [3] - 65:26, 87:15, 179:7
unable [1] - 143:24
unambiguous [1] - 163:11
unavailable [3] - 141:23, 142:27, 165:12
unaware [1] - 210:14
uncertain [2] - 117:18, 150:13
unclear [1] - 210:2
uncomfortable [2] - 169:19, 169:20
uncovered [1] - 68:4
undefined [1] - 61:24
under [11] - 11:10, 17:29, 27:2, 62:7, 73:22, 107:8, 108:28, 109:3, 109:27, 120:16, 169:8
UNDER [2] - 1:3, 1:9
undermined [2] - 15:24, 33:14
undermining [1] - 18:7
understandably [1] - 107:6
understood [18] - 18:12, 19:28, 32:14, 50:3, 66:24, 79:13, 79:17, 109:11, 121:6, 121:15, 134:27, 135:16, 135:19, 190:20, 190:29, 192:17, 193:3, 203:23
undertake [1] - 141:10
undertaken [2] - 143:13
undertook [1] - 139:17

undoubtedly [1] - 65:21
unduly [1] - 9:16
unfair [6] - 10:17, 19:13, 37:1, 39:21, 41:24, 42:13
unfairly [2] - 20:5, 42:21
unfold [2] - 56:29, 57:18
unfortunate [1] - 133:10
unfounded [4] - 43:9, 102:27, 109:26, 110:1
unhappy [1] - 170:10
union [1] - 120:3
unit [2] - 15:27, 16:7
unjustified [1] - 21:22
unknowns [1] - 182:19
unless [5] - 64:24, 119:12, 128:17, 131:21, 154:28
unnecessarily [1] - 210:24
unpleasant [1] - 10:12
unreasonable [1] - 73:22
unreservedly [1] - 42:24
unsafe [1] - 160:5
unsatisfactory [1] - 122:24
unsent [1] - 186:27
unsupported [1] - 109:13
unsure [1] - 145:19
untenable [2] - 19:7, 125:28
UNTIL [1] - 214:12
unusual [5] - 60:25, 69:6, 75:29, 121:13, 177:19
unusually [1] - 115:7
up [53] - 8:9, 9:13, 10:2, 10:22, 11:8, 24:4, 25:2, 27:21, 27:22, 28:5, 32:18, 33:24, 34:15, 35:25, 37:26, 38:23, 43:23, 44:25, 47:14, 48:23, 62:20, 76:13, 79:3, 82:8, 84:11, 93:19, 96:24, 98:12, 99:3, 100:7, 114:1, 114:12, 114:20, 115:13, 118:27, 121:24,

122:22, 134:16,
143:26, 153:14,
158:6, 165:4, 166:12,
172:16, 178:18,
179:15, 185:9, 187:1,
197:26, 199:8,
203:21, 205:1, 213:6
uphold [3] - 108:20,
167:21, 168:11
upholding [1] -
70:27
uplift [1] - 142:9
upper [1] - 178:14
upset [20] - 11:3,
11:5, 11:17, 11:19,
40:26, 64:2, 107:6,
107:7, 107:12,
107:14, 107:15,
107:18, 107:19,
107:22, 107:24,
107:28, 108:5,
108:15, 108:16
upsetting [3] - 24:7,
24:10, 24:11
upstairs [2] - 27:7,
27:18
upstanding [1] -
29:5
urgent [1] - 164:18
useful [3] - 22:29,
174:29, 206:3
Utmost [1] - 178:12
utmost [2] - 166:13,
178:14
utterly [1] - 44:15

V

vacancy [1] - 14:12
vacated [1] - 18:22
variety [1] - 131:22
various [12] - 34:16,
60:3, 76:5, 76:6,
120:9, 121:4, 132:21,
138:20, 153:29,
181:7, 184:28, 187:19
veil [1] - 7:20
verbal [1] - 134:28
verbatim [1] - 1:26
versa [1] - 6:15
version [2] - 68:10,
203:11
vice [1] - 6:15
vicious [1] - 108:10
victims [6] - 61:26,
97:10, 120:8, 203:12,
203:15
view [59] - 6:13,
10:9, 21:10, 21:12,

22:11, 26:4, 28:27,
29:3, 29:4, 29:6,
29:18, 36:10, 37:6,
51:18, 64:25, 68:28,
73:21, 89:21, 95:25,
95:28, 96:5, 99:19,
99:20, 99:21, 100:10,
100:16, 113:29,
121:10, 122:25,
123:19, 125:27,
131:5, 132:3, 138:20,
145:7, 145:28, 148:3,
153:21, 154:28,
159:17, 160:6,
164:25, 167:19,
174:9, 176:13, 183:1,
189:8, 189:9, 197:3,
198:19, 206:13,
208:10, 209:3, 209:6,
210:9, 210:20,
210:21, 210:25
views [4] - 19:25,
20:10, 24:8, 183:9
vigorous [2] - 10:9,
47:9
vigorously [1] -
10:10
vii [1] - 13:22
viii [1] - 13:27
vindicate [1] - 148:6
vindicated [2] -
109:21, 211:11
virtue [1] - 198:14
vis-à-vis [4] - 152:28,
162:4, 203:12, 203:23
vis-à-vis [2] - 55:25,
114:26
visibly [1] - 11:3
visit [1] - 141:21
Vodafone [1] - 188:2
voice [1] - 61:25
volume [12] - 12:2,
102:17, 158:27,
158:28, 188:21,
194:6, 197:11, 207:4,
207:5, 213:9
Volume [8] - 30:13,
30:14, 30:15, 108:25,
194:14, 194:17,
195:1, 195:13
volumes [1] - 21:3
voluminous [1] -
125:11
volunteered [2] -
27:1, 143:23
vote [1] - 50:25
vouch [1] - 17:20

W

waive [5] - 153:5,
153:16, 169:5, 169:8,
172:7
waived [2] - 139:11,
171:27
waiver [2] - 153:20,
169:15
Wales [1] - 141:21
WALLACE [1] - 3:13
warrant [1] - 62:8
WAS [12] - 49:16,
52:1, 58:19, 111:12,
118:7, 158:20,
177:29, 184:9,
199:13, 211:2,
212:11, 213:5
waste [2] - 91:10,
171:22
watch [2] - 34:12,
188:1
WATERS [1] - 3:11
ways [1] - 170:20
weakening [1] -
18:29
wear [1] - 111:28
wearing [1] - 111:28
wee [1] - 40:26
week [1] - 50:23
weekend [5] - 55:6,
115:12, 115:18,
141:22, 142:17
weekends [1] -
15:29
weeks [2] - 83:15,
200:29
weight [2] - 112:2,
112:20
weighted [1] -
207:28
weird [1] - 28:19
welcome [1] - 162:1
whatsoever [2] -
124:7, 140:11
whereas [2] -
120:24, 181:6
whilst [1] - 52:7
white [1] - 162:23
whole [16] - 21:4,
24:1, 53:29, 70:15,
78:27, 103:13,
111:16, 132:8, 137:2,
146:29, 147:3, 169:2,
172:9, 181:9, 182:3,
182:4
wide [1] - 175:3
widely [1] - 107:18
wider [5] - 56:25,

57:14, 59:16, 59:20,
114:15
wing [1] - 120:16
wintertime [1] -
64:10
wish [2] - 37:12,
94:14
wished [2] - 30:22,
86:24
wishes [2] - 14:18,
72:27
withdraw [7] - 47:1,
47:3, 76:8, 97:25,
98:2, 101:24, 102:23
withdrawing [4] -
45:29, 46:3, 86:23,
152:9
withdrawn [1] -
103:16
WITHDREW [2] -
183:24, 214:7
withdrew [3] - 87:10,
96:24, 101:17
WITNESS [10] - 4:2,
49:16, 52:1, 58:19,
183:24, 199:13,
211:2, 212:11, 213:5,
214:7
witness [38] - 9:4,
12:13, 21:26, 32:11,
48:7, 56:24, 57:13,
59:14, 64:23, 66:10,
68:28, 69:19, 75:8,
84:5, 87:12, 88:7,
104:7, 111:2, 111:7,
111:22, 112:3,
112:10, 118:4,
123:16, 128:15,
162:12, 167:24,
168:28, 170:12,
170:13, 171:2,
180:10, 181:4,
183:26, 183:29,
204:28, 205:1
witness-box [3] -
48:7, 66:10, 104:7
witnesses [13] -
25:23, 56:24, 57:13,
61:2, 61:3, 61:20,
61:29, 72:22, 86:22,
163:24, 164:6,
165:19, 184:2
wonder [1] - 149:22
wondering [4] -
150:21, 152:24,
164:4, 184:4
Word [1] - 166:5
word [28] - 25:15,
26:6, 27:7, 29:22,
35:29, 43:10, 53:6,

73:10, 73:13, 73:28,
81:27, 94:9, 99:26,
100:25, 112:19,
117:4, 134:7, 139:3,
148:4, 154:4, 174:13,
185:29, 186:1,
186:12, 186:13,
210:12, 210:14,
210:16
wording [1] - 136:12
words [30] - 13:4,
52:9, 72:8, 73:1,
75:15, 75:27, 76:3,
76:5, 76:10, 76:18,
76:19, 80:16, 81:25,
90:1, 90:28, 94:13,
100:25, 114:12,
115:13, 119:10,
154:18, 160:27,
162:13, 164:14,
175:24, 179:22,
186:14, 201:26,
202:16, 202:25
works [1] - 187:22
worried [3] - 15:11,
40:21, 168:8
worry [4] - 103:25,
107:20, 138:21,
168:13
worth [1] - 63:18
worthwhile [1] -
114:17
wove [2] - 143:11,
143:12
write [4] - 64:15,
96:15, 107:21, 203:26
writes [1] - 100:9
writing [9] - 121:29,
122:1, 136:21, 138:7,
185:19, 186:6, 186:7,
186:10, 211:28
written [13] - 16:22,
19:22, 34:22, 65:25,
66:13, 136:3, 176:1,
176:2, 186:8, 193:1,
201:13, 203:27, 212:5
wrongdoing [5] -
18:5, 18:16, 59:29,
108:21, 110:7
wrongly [3] - 31:13,
42:21, 55:18
wrote [4] - 96:12,
142:1, 166:2, 212:4

Y

year [6] - 57:5,
57:23, 78:28, 118:17,
123:27

years ^[5] - 11:24,
20:23, 22:5, 33:24,
109:27

yesterday ^[21] - 5:28,
7:1, 9:6, 9:21, 12:5,
12:21, 13:5, 17:11,
21:29, 24:6, 29:3,
36:4, 45:6, 45:25,
49:20, 56:14, 106:1,
107:13, 131:4,
200:15, 202:6

yesterday's ^[1] -
56:18

yourself ^[9] - 28:27,
29:27, 46:9, 65:9,
91:4, 131:11, 131:14,
163:27, 165:19

Yvonne ^[3] - 55:1,
87:11, 87:12

€

€64,000 ^[1] - 208:15

É

ÉIREANN ^[2] - 1:5,
1:6