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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 THURSDAY, 8TH MARCH 2018 - DAY 61

61

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Services certify the
following to be a
verbatim transcript of
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in the above-named
action.

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1 THE HEARING RESUMED, AS FOLLOWS, ON THURSDAY, 8TH MARCH
2 2018:

3
4 CHAIRMAN: Ladies and gentlemen, today we are on
5 submissions in relation to the particular modules - in 10:01
6 other words, we are going back from the general to the
7 particular. I thought we would sit, maybe, until 1:00
8 o'clock because we might be finished by then, I don't
9 know, I am not trying to put people under pressure.
10 The other thing was, given that cross-examination as to 10:02
11 credit is so important, I asked Mr. McGuinness to
12 prepare a submission on that I think which may help
13 people and I think it could be distributed,
14 Mr. McGuinness, in the event that we have it.

15 MR. MCGUINNESS: Chairman, I think it has been 10:02
16 distributed already this morning by Ms. Mullan and if
17 anybody doesn't have a copy and the parties don't have
18 a copy we can rectify that, but I think we have all got
19 them.

20 CHAIRMAN: And Ms. Downes has a copy. If you would 10:02
21 like to go through, if you feel the highlights are
22 important, but I am going to leave it to you, and then
23 everyone else-- this is a legal submission purely,
24 obviously, everyone else is making submissions on fact
25 or law if they want. 10:02
26
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28
29

1 SUBMISSION BY MR. MCGUINNESS

2 MR. MCGUINNESS: Yes. Thank you, Chairman. On day 57,
3 Chairman, you outlined a series of eleven questions
4 which you considered the Tribunal would have to ask
5 itself and which you were anxious to have the parties' 10:03
6 submissions on when all of the evidence relating to the
7 O'Higgins Commission of Investigation had concluded.
8 The third of those questions that you asked what are
9 the limits, appropriately, of cross-examination,
10 cross-examination as to credibility and 10:03
11 cross-examination as to credit?

12
13 You stated, sir:

14
15 "Cross-examination as to credit is something which 10:03
16 involves putting to a witness or alluding to something
17 that is outside the facts in issue but which undermines
18 the creditworthiness of a witness such as, for
19 instance, that the witness had behaved inappropriately
20 in a completely different setting, the classic example 10:03
21 being that he had slept with his best friend's
22 girlfriend which has nothing to do with, for instance,
23 the civil or criminal law because it's a lawful
24 activity, but which may make the tribunal in fact think
25 less of the person, and in that context may make the 10:03
26 tribunal in fact consider that the person is therefore
27 less worthy of being believed in terms of their
28 evidence."
29

1 You indicated, sir, that you would be grateful to be
2 addressed on that issue:

3
4 "Because it seems to me that if there is a duty on a
5 tribunal to disclose material potentially undermining 10:04
6 credit - and I am not saying credibility, I am saying
7 credit - then there seems to be an entitlement to
8 deploy it. And if it can be lawfully deployed then the
9 answer to question number 2 may be in the negative, if
10 indeed anything like that happened." 10:04

11
12 I propose, therefore, Chairman to address you on those
13 inter-related legal issues. However, with scrupulous
14 regard to our published rules of procedure, which do
15 not envisage Tribunal counsel addressing the Tribunal 10:04
16 as to what conclusions it should draw on the facts in
17 relation to any of the allegations contained in the
18 terms of reference. I do not propose to address you on
19 the facts. These are matters for the parties alone to
20 address you on. 10:04

21
22 Turning then to the first issue; namely,
23 cross-examination as to credit. Phipson on Evidence,
24 under the heading "Cross-examination as to Credit" says
25 at paragraph 12.36, that is the 2018 edition: 10:05

26
27 "The credibility of a witness depends on his knowledge
28 of the facts, his intelligence, his disinterestedness,
29 his integrity, his veracity. Proportionate to these is

1 the degree of credit his testimony deserves from the
2 Court or jury. Amongst the more obvious matters
3 affecting the weight of a witness's evidence may be
4 classed as means of knowledge, opportunities of
5 observation, reasons for recollection or belief, 10:05
6 experience, powers of memory and perception, and any
7 special circumstances affecting his competency to speak
8 to the particular case, all of which may be enquired
9 into either in direct examination to enhance or in
10 cross-examination to impeach the value of his 10:05
11 testimony. So all questions may be asked in
12 cross-examination which tend to expose the errors,
13 omissions, inconsistencies, exaggerations or
14 improbabilities of the witness's testimony.

15
16 The witness is in general compellable to answer all
17 questions relevant merely as affecting credit but the
18 judge has a discretion to excuse an answer when the
19 truth of the matter suggested would not, in his
20 opinion, affect the credibility of the witness as to 10:06
21 the subject matter of his testimony."

22
23 In another leading textbook, May on Criminal Evidence
24 under the heading "Cross-examination as to Credit" it
25 is stated: 10:06
26

27 "The purpose of cross-examination as to credit is to
28 show that the witness should not be believed on his
29 oath. "Generally speaking, questions may be put to a

1 witness as to any improper conduct of which he may have
2 been guilty for the purpose of testing his credit."

3
4 Accordingly, a witness may be cross-examined about his
5 previous convictions and antecedents. However, such 10:06
6 cross-examination may not be conducted without
7 restriction. For instance, a witness must not be asked
8 to draw an inference of fact discreditable to himself,
9 nor asked questions about his religious belief in order
10 to discredit him, nor asked about disparaging comments 10:06
11 made by the court about his conduct and testimony in
12 other trials. The cross-examination must be relevant
13 to the standing of the witness with the tribunal of
14 fact. The judge will stop questioning which has no
15 such relevance and which is purely vexatious." 10:07

16
17 The authors continue:

18
19 "Guidance as to when such questioning is proper is to
20 be found in the judgment of Lord Justice Sankey in 10:07
21 Hobbs v. Tinlin."

22
23 where the quotation is from:

24
25 "The court can always exercise its discretion to decide 10:07
26 whether a question as to credit is one which the
27 witness should be compelled to answer. In the exercise
28 of its discretion the court should have regard to the
29 following considerations:

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1. Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the creditability of the witness on the matter to which he testifies.

10:07

2. Such questions are improper if the imputation which they convey relate to matters so remote in time or of such a character that the truth of the imputation would not affect or would affect in a slight degree the opinion of the court as to the credibility of the witness on the matter to which he testifies.

10:07

3. Such questions are improper if there is a great disproportion between the importance of the imputation made against a witness's character and the importance of his evidence."

10:08

Paragraph 21-31:

10:08

"The general rule is that an answer to a question relating to credit or other collateral matter is final. The answer must be accepted and the other party may not call evidence to contradict the answer. The reason for the rule is to avoid multiplicity of side issues which might blur the issue which the jury has to decide.

10:08

The test as to whether a matter is collateral or not

1 was put by Pollock CB in Attorney General v. Hitchcock:
2 "If the answer of a witness is a matter which you would
3 be allowed on your own part to prove in evidence if it
4 had such a connection with the issues that you would
5 have allowed to give it in evidence, then it is a
6 matter on which you may contradict."

10:08

7
8 A distinction must be made thus between matters in
9 issue and matters going to credit only."

10:09

10
11 The authors of May also suggests that allegations of
12 fabrication of statements and threats by witnesses are
13 very much matters in issue, and at paragraph 21.33
14 suggest that the facts showing that the witness is
15 biased or partial in relation to the parties may be
16 elicited in cross-examination and if such allegations
17 are denied evidence may be called to prove them.

10:09

18
19 In another contemporary treaties on evidence, Cross and
20 Tapper on Evidence, from 2010, the authors appear to go
21 further in relation to cross-examination on
22 discreditable acts. At page 358 they say:

10:09

23
24 "If the character of a testifying witness is relevant
25 to the issue then he may be cross-examined about it and
26 any denial rebutted and in such case the judge should
27 be particularly careful to ensure the jury understands
28 the evidence being regarded as going both to credit and
29 to issue.

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The traditional rule of the scope of cross-examination on rebuttal was laid down by Mr. Justice Laurence in the case of Harris v. Tippet, where he said:

"I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty for the purpose of trying his credit, but where questions are irrelevant to the issue on the record you cannot call witnesses to contradict the answers he gives."

There are thus two issues. First, whether cross-examination about the discreditable matter is to be allowed at all. Second, if it is, whether a denial can be rebutted."

Cross and Tapper continue, on page 359:

"As will be seen below, it has now been accepted in criminal proceedings and in civil proceedings in other jurisdictions that a more liberal approach to rebuttal has been adopted and it is submitted that in light of the increasing case management powers of the judge under civil procedure rules a similar liberality may be expected here and rebuttal allowed where the issue is central and does not raise a spectre of prolonged and expensive ventilation."

It is stated at page 362:

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"If a question is allowed then, as stated above, the rule used to be that the witness's denial could not be rebutted on a purely collateral matter, but here, as elsewhere, there are now signs of a more liberal approach to rebuttal, certainly in criminal cases. Thus, in R v. Busby it was suggested that a police witness for the prosecution had fabricated an oral confession and threatened a potential witness for the defence so as to prevent him from testifying. Both allegations were denied by the police officer and the defence proposed the call who had been threatened to rebut the denial of a threat. The judge refused applying the traditional collateral rule but the Court of Appeal quashed the conviction on the basis that the defence should have been allowed to rebut the denial because it went to a fact in issue."

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10:11

10:11

"This seems quite contrary to the decision in Harris v. Tippet and to most tests for the distinction between credit and issue. It should be noted that the argument was that the testimony of someone who would tamper with potential witnesses in the way alleged was likely to be unreliable and ought not to be believed in conflict with the testimony of the accused who alleged that the witness's evidence of an oral confession was fabricated. It did not suggest that there was any special animus against the accused or that the witness's testimony had been secured by corruption. A

10:11

10:12

1 similar approach is also apparent in the Divisional
2 Court's agreement that "a matter going to the credit of
3 a witness in a criminal trial cannot be said to be
4 collateral to the vital issue, especially where the
5 witness in question provides the only evidence upon
6 that issue". This is especially likely to be the case
7 where the issue arises in a sexual where there is a
8 clear conflict of evidence as to truth of an allegation
9 about sexual contact in private. It remains the case,
10 however, in cases in which rebuttal may be time
11 consuming, confusing and inconclusive rebuttal is less
12 likely to be allowed. So too the more remote the issue
13 from the central issues of the trial, the less the
14 court will be inclined to allow rebuttal."

10:12

10:12

15
16 It has been suggested in the case of R v. Funderbunk
17 that the list of exceptions to the rules against
18 rebuttal are not closed. Mr. Justice Henry said that
19 the list of exceptions to the rules that answers going
20 to credit are final may not be closed. His Lordship,
21 having listed to the four exceptions at page 470, in
22 addition includes:

10:13

10:13

- 23 (a) matters going to an issue in the case;
24 (b) previous inconsistent statements relating to an
25 issue in the case, and
26 (c) matters tending to show that the police are
27 prepared to go to improper lengths to secure a
28 conviction.

10:13

1 In Ireland, the traditional rationale for the rule was
2 considered by Mr. Justice Hardiman in the case of DPP
3 v. Nevin. And there is a quotation there from the
4 unreported judgment, which I don't think I need to open
5 in full. 10:13

6
7 In the Irish textbooks, in particular in their book
8 Evidence in Criminal Trials by Heffernan and Ni
9 Raifeartaigh, in their chapter relating to the
10 examination of witnesses they say at paragraph 2.94 in 10:14
11 relation to the rule:

12
13 "Even so, there are cogent objections to the rule which
14 explains existence of exceptions that condition its
15 application. The effect of depriving a party of the 10:14
16 opportunity to rebut a particular fact by adducing
17 additional evidence may be profound, particularly since
18 the rule immunises false or dishonest answers from
19 rebuttal as much as true or honest answers. Ensuring
20 fairness in the application of the rule is fraught with 10:14
21 the definitional difficulty of determining whether a
22 matter is directly relevant or merely collateral to the
23 proceedings. The courts will deem a matter collateral
24 if it goes exclusively to credit, whereas they will
25 permit rebuttal evidence in relation to a matter which 10:14
26 the cross-examining party could introduce as part of
27 its case in chief. This rather circular formula is a
28 reiteration of the touchstone evidentiary evidence,
29 i.e. a matter transcends the collateral if it's

1 relevant to a fact in issue in proceedings.

2
3 2.95 The laundry list of statutory and common law
4 exceptions to the rule on finality of answers to
5 collateral questions include the following, all matters 10:15
6 which may bear in some way on the reliability of the
7 witness's testimony

8 (a) any previous convictions of the witness;

9 (b) any bias the witness may harbour either in favour
10 or against a party; 10:15

11 (c) a reputation for mendacity on the part of the
12 witness;

13 (d) a physical or mental disability or condition
14 affecting the witness;

15 (e) a previous inconsistent statement made by the 10:15
16 witness."

17
18 It should of course be noted that all of the exceptions
19 relating to the issue is obviously set in the context
20 of primarily criminal proceedings and the common law 10:15
21 and statutory provisions as they relate to examination
22 and cross-examination of witnesses in court.

23
24 In that regard, the Supreme Court in the case of
25 O'Callaghan v. Mahon, which is in the 2006 Irish 10:16
26 Report, in the judgment of Mr. Justice Geoghegan, which
27 was concurred in by the judgment of the Chief Justice,
28 Ms. Justice Denham and Mr. Justice Fennelly, said at
29 paragraph 125 of that judgment:

1
2 "In that regard, having regard to the clear views of
3 this court in *In Re Haughey*, it would not seem to me to
4 be necessary to consider to what extent the numerous
5 cases and statutes relating to the law of evidence for 10:16
6 the purpose of the courts must necessarily be applied
7 to every cross-examination in a tribunal."

8
9 This brings me, Chairman, to consider the issue of the
10 right to cross-examine. The right to cross-examine and 10:16
11 the constitutional basis of it is comprehensively
12 described in Mr. McGrath's book on evidence, the second
13 edition, which is quoted from here at paragraphs 3-86:

14
15 "Cross-examination is considered to be of pivotal 10:17
16 importance in the trial process. Wigmore has described
17 cross-examination as "the great legal engine ever
18 invented for the discovery of truth". That view is
19 echoed by Hardiman J in *Maguire v. Ardagh* where he
20 said: "where a person is accused on the basis of false 10:17
21 statements of fact or denied his civil or
22 constitutional rights on the same basis,
23 cross-examination of the perpetrators of these
24 falsehoods is the greatest weapon available to him for
25 his own vindication. Falsehoods may arrive through 10:17
26 deliberate calculated perjury (as in the case of
27 Parnell), through misapprehension, through incomplete
28 knowledge, through bias or prejudice, through failure
29 or memory or delusion. In some cases a witness may not

1 be aware that his evidence is false. A witness may be
2 telling the literal truth but refrain or be compelled
3 to refrain from giving a context which puts it in a
4 completely different light. When a witness called to
5 prove of fact favourable to one side may have a great 10:17
6 deal of information which he is not invited to give in
7 evidence favourable to the other party.""

8
9 At paragraph 3-87 it is stated:

10
11 "Given that effective cross-examination depends on the 10:18
12 availability of material to challenge a witness's
13 account and credibility, the right to cross-examine
14 underpins procedural protections such as disclosure of
15 materials that can be used for the purpose of 10:18
16 cross-examination and access by an expert to a
17 plaintiff or complainant to conduct an assessment.
18 Concerns about the attenuation of the right to
19 cross-examination also subtend the hearsay rule."

20
21 This brings me to consider the extent of the Tribunal's 10:18
22 obligation to disclose material. And the heading is:

23
24 "A duty to disclose all possible relevant material for
25 the purpose of cross-examination." 10:18

26
27 The right to cross-examination is similarly considered
28 in Heffernan and Ni Raifeartaigh's book, already
29 referred to. Under the heading "Rights ancillary to

1 cross-examination" the authors say in paragraph 2.78:

2
3 "Protecting the right to cross-examine in a real and
4 meaningful sense assumes an obligation on the part of
5 the authorities to ensure that certain secondary, 10:19
6 predicate entitlements are put in place. The courts
7 have acknowledged in particular that the right,
8 guarantees access to any information that is relevant
9 and necessary for the conduct of cross-examination in a
10 complete unfettered sense." 10:19

11
12 The authors refer to the leading of case of O'Callaghan
13 v. Mahon, where both the High Court and Supreme Court
14 in turn held that the failure to furnish the plaintiff
15 with the necessary documentation had impaired his right 10:19
16 to cross-examine the notice party and as such amounted
17 to an unconstitutional breach of natural justice and
18 fair procedures. The leading judgment of the Court was
19 given as I previously said by Mr. Justice Geoghegan.
20 Mr. Justice Geoghegan said the following: 10:19

21
22 "A tribunal set up under the Tribunals of Inquiry
23 Evidence Act 1921 is in my view perfectly entitled to
24 formulate a policy and indeed the efficient execution
25 of its work required that there be such a policy. A 10:20
26 literal application of court procedures will often then
27 not be either necessary, desirable or efficient. The
28 Tribunal is also perfectly entitled to conduct separate
29 hearings of separate modules and to try as far as

1 possible to discipline counsel and the witnesses of the
2 evidence at any given time is confined to the evidence
3 relevant to that module.
4

5 124. This Tribunal did not claim that it was 10:20
6 absolutely hidebound by its own policy or of any rules
7 or systems which it may have devised and quite rightly
8 so, because whereas the Tribunal undoubtedly have the
9 latitude, which I have suggested, and which may not be
10 available to a court of law, it is always bound to 10:20
11 ensure as far as possible in compliance with the
12 constitutional rights and obligations and that of
13 course includes the vindication of a person's good
14 name. For all of the reasons put forward by Hardiman
15 J, much more eloquently than I would be able to do, it 10:20
16 was absolutely essential that the documents and
17 materials which were sought for the purpose of carrying
18 out worthwhile cross-examination in the extraordinary
19 circumstances where wild allegations were flying around
20 the Tribunal against the applicant of which he had no 10:21
21 prior notice, be duly produced. The Tribunal relies on
22 an understanding of confidentiality. It is not
23 suggested, however, that the confidentiality was
24 absolute, nor could it have been. The Tribunal could
25 not possibly ensure absolute confidentiality relating 10:21
26 to information which, for instance, might turn out to
27 be highly relevant to the very matters that it was
28 investigated. Any such confidentiality must
29 necessarily be limited to information in the event

1 found not to have been necessary to be used at an oral
2 hearing. If however the information becomes absolutely
3 essential for the purpose of cross-examination pursuant
4 to a re Haughey right then the tribunal is not entitled
5 to maintain the confidentiality and can be judicially 10:21
6 reviewed for doing so.

7
8 125. The facts of this case are unusual. In general
9 it is most undesirable that judicial reviews should be
10 held in relation to particular rulings by a tribunal 10:22
11 while the hearings are still running. As I have
12 already indicated, there is, in my view, a wide
13 latitude given to tribunals to fashion their own
14 procedures and the court should not lightly interfere.
15 It is for this reason that I prefer to base my 10:22
16 conclusions on narrower grounds than those put forward
17 by Mr. Justice Hardiman, in particular having regard to
18 the clear views of this court in In Re Haughey. It
19 would not seem to me to be necessary to consider to
20 what extent the numerous cases and statutes relating to 10:22
21 the law of evidence for the purpose of the courts must
22 necessarily be applied to every cross-examination in a
23 tribunal. I am satisfied that in this case the
24 Tribunal applied its own policies too rigidly and in
25 the event infringed the Constitution." 10:22
26

27 A number of paragraphs from the judgment of Mr. Justice
28 Hardiman may also serve to illustrate the principle
29 decided by the Supreme Court. And I quote there

1 paragraph 47 in relation to previous statements. But
2 at paragraph 54 he considers the issue of disclosure of
3 material for comparison in a cross-examination.
4

5 Paragraph 54:

10:23

6
7 "A major issue in civil and criminal procedural law is
8 the extent to which either side must make disclosure to
9 the other. This has led to the development of an
10 impressive body of jurisprudence, both in the United
11 Kingdom and Strasbourg. The latter has significantly
12 influenced the former and will no doubt influence our
13 jurisprudence too, in particular through the concept of
14 égalité des armes, which might be regarded as the
15 opposite of that state of imbalance and disadvantage
16 described by Chief Justice Ó Dálaigh as clocha
17 ceangailte agus madraí scaoilte. For present purposes
18 it is unnecessary to go into any great detail on this
19 topic, save to refer to the extensive discussion of it
20 in Blackstone, Criminal Practice (2002) at page 1170,
21 and footnotes, and the appendices showing the codes and
22 practice applying in this regard in the United Kingdom.
23

10:23

10:23

10:23

24 55. It was indeed a United Kingdom case that gave rise
25 to the most comprehensive articulation of the
26 Strasbourg jurisprudence on the topic of disclosure.
27 Rowe and Davis v. United Kingdom. In holding
28 unanimously that the then United Kingdom practices in
29 relation to disclosure constituted a violation of

10:24

1 Article 1 of the Convention the European Court of Human
2 Rights held at paragraph 60:

3 "It is a fundamental aspect of the right to a fair
4 trial that criminal proceedings, including the elements
5 of such proceedings which relate to procedure, should 10:24
6 be adversarial and that there should be an equality of
7 arms between the prosecution and defence. The right to
8 an adversarial trial means in a criminal case that both
9 prosecution and defence must be given the opportunity
10 to have knowledge of and comment on the observations 10:24
11 filed and the evidence adduced by the other party. In
12 addition, Article 6(1) requires, as indeed does English
13 law, that the prosecution authorities should disclose
14 to the defence all material evidence in their
15 possession for or against an accused." 10:24

16
17 In the following paragraph it is acknowledged that:-

18 "In some cases it may be necessary to withhold certain
19 evidence from the defence so as to preserve the
20 fundamental rights of another individual or to 10:25
21 safeguard an important public interest. However, only
22 such measures restricting the rights of the defence
23 which are strictly necessary are permissible under
24 Article 6(1). Moreover, in order to ensure that the
25 accused receives a fair trial, any difficulties caused 10:25
26 to the defence by a limitation on its rights must be
27 sufficiently counterbalanced by the procedures followed
28 by the judicial authorities.""

1 He then refers to his own judgment in the case of
2 Maguire v. Ardagh and continues at paragraph 58:

3
4 "I have already contrasted the situation which arose
5 before the Tribunal, where allegations of great gravity 10:25
6 and involving (if true) great turpitude and depending
7 in large measure on the credibility of a single
8 witness, were made without notice, which other
9 situations which might arise before an inquiry of some
10 sort. The requirements of natural justice will 10:26
11 naturally vary depending on the gravity of what is
12 alleged, whether or not personal responsibility is to
13 be established, whether there is a "paper trail" or
14 other body of uncontradicted evidence or corroboration
15 available, whether the inquiry sits in public or in 10:26
16 private and other matters. Inquiries which do not seek
17 to fix individuals with responsibility for grave
18 wrongdoing or which, like the Oireachtas DIRT inquiry,
19 have a large volume of uncontradicted material before
20 it, are in obvious contrast to what the facts of this 10:26
21 case reveal. No doubt any court asked to review a
22 procedural decision of such an inquiring body would
23 give full weight to those factors and refrain from
24 interfering lightly with their legitimate procedural
25 discretions. But this Tribunal is at another extreme 10:26
26 and features:-

- 27 - very grave allegations, some of which, if true, would
28 constitute breaches of the criminal law;
29 - clear and obvious attacks on the good name of the

1 applicant which is constitutionally protected;
2 - the personal credibility of the notice party as a
3 vital factor;
4 - little or nothing in the way of paper trail or
5 corroboration; 10:27
6 - immediate and extensive media coverage of un-notified
7 allegations."

8
9 He proceeds to express his conclusion on the first
10 issue at paragraph 79: 10:27

11
12 "For the reasons set out above, I consider that in the
13 six of this case material communicated privately to the
14 Tribunal recording or related to allegations made by
15 the notice party about the applicant, or evidencing an 10:27
16 omission to make them in appropriate circumstances,
17 have a significant and proper potential use in
18 cross-examination of the notice party. To deprive him
19 of them would tend to undermine "the truth-eliciting
20 processes of a confrontation which are inherent in an 10:27
21 oral hearing"."

22
23 And that is a quotation from Mr. Justice Henchy's
24 judgment in the well-known case of Kiely v. Minister
25 for Social Welfare. 10:27

26
27 "I, therefore, consider that the applicant is entitled
28 to the material which he seeks, unless its provision to
29 him is precluded, as the Tribunal claims, by

1 confidentiality."

2
3 In relation to confidentiality, he said at paragraph
4 80:

5
6 "In the Attorney General v. Guardian Newspapers (No.
7 2) - the Spycatcher case - Lord Goff made the following
8 statement of principle at page 281:-

9 "I start with the broad principle (which I do not
10 intend in any way to be definitive) that a duty of
11 confidence arises when confidentiality information
12 comes to the knowledge of a person (the confidante) in
13 circumstances where he has notice, or is held to have
14 agreed, that the information is confidential. With the
15 effect that it should be just in all the circumstances
16 that he should be precluded from disclosing the
17 information to others."

18
19 81. To this very general statement Lord Goff
20 recognised certain limitations amongst which were:

21 1. The general principle is premised upon the
22 information being confidential and can therefore have
23 no application once the information has entered the
24 public domain; and

25 2. Confidentiality may be negated by public interest.
26 Lord Goff, however, did not address the very vexed
27 question as to the origin and nature of duties of
28 confidence more precisely saying only at page 281 'I
29 have deliberately avoided the fundamental question

1 whether, contract apart, the duty lies simply in the
2 notion of an obligation of conscience arising from the
3 circumstances in or through which the information
4 communicated or obtained or whether confidentiality
5 information may also be regarded as property.'"

10:29

6
7 He goes on to consider in some detail the nature of a
8 claim to confidentiality, and continues at paragraph 84
9 of his judgment:

10
11 "It is a public interest in the proper and efficient
12 running of the Tribunal which is the basis of the
13 refusal to disclose the notice party's prior statements
14 in the present case. Since confidentiality is not a
15 separate heading of privilege it may be regarded as a
16 necessary but not in itself a sufficient basis for a
17 claim to public interest immunity from disclosure.
18 where the purpose for which disclosure is sought
19 relates to the defence of a person accused in a
20 statutory public tribunal of grave wrongdoing, the
21 element over and above confidentiality which requires
22 to be established is that the public interest in
23 preserving the secrecy of the document overrides the
24 public interest in providing the person impugned with
25 fair procedures in his own defence."

10:29

10:29

10:30

10:30

26
27 And he quotes from Lord Templeman in his judgment in
28 the case of R v. Chief Constable of West Midlands at
29 paragraph 280.

1 At paragraph 85 he continued:

2
3 "Ironically, a common ground of attack on tribunals of
4 inquiry in this jurisdiction has been that they trench
5 on rights to confidentiality and to privacy. This 10:30
6 ground of attack was considered in Haughey v. Moriarty
7 under the heading "Right to Privacy". The Supreme
8 Court in that case fully acknowledged the right to
9 privacy and confidentiality inhering in the citizen and
10 was prepared to assume that this right extended to 10:30
11 privacy and confidentiality of a citizen's banking
12 records and transactions. It was this privacy that the
13 Tribunal chaired by Moriarty J was about to invade."

14
15 And the Court quoted Mr. Justice Lynch's judgment in 10:31
16 the National Irish Bank case. That, I don't need to
17 read, it's there on the page that all the parties have.

18
19 He then refers to a judgment at paragraph 88, a
20 judgment of Mrs. Justice Denham, The People (DPP) v. 10:31
21 GK, unreported decision of the Court of Criminal
22 Appeal, a case in which I in fact appeared for the
23 appellant in that case.

24
25 "'To withhold a transcript of the evidence given at the 10:31
26 first trial from an accused person in such a case is
27 tantamount to denying him/her the opportunity of
28 exposing an unreliable witness for what he/she is, in
29 that, in the absence of a capacity to compare evidence

1 given at successive trials by the same witness
2 (evidence which is hotly contested) the accused is, in
3 effect, limited in his/her capacity to defend
4 himself/herself, which offends against all principles
5 of justice, as they are recognised in this 10:32
6 jurisdiction.'

7
8 In my view, the maintenance of what Denham J describe
9 as the principles of justice, as they are recognised in
10 this jurisdiction, is every bit as much a part of the 10:32
11 public interest as the exposure of wrongdoing. Indeed
12 in many cases the exposure of the unreliability of a
13 witness will itself amount to a detection of wrongdoing
14 of a particularly noxious sort, one that taints public
15 interest. This of course will not be so in every case 10:32
16 where evidence proves unreliable."

17
18 He then goes on to consider the argument based upon the
19 scope and the nature of the claimed confidentiality at
20 paragraphs 89 and 90 and 91, and at paragraph 104 he 10:32
21 concludes --

22 CHAIRMAN: Just before you go on to that,
23 Mr. McGuinness, may I just ask you: As I understand
24 the case that you are talking about, the Tribunal had,
25 I suppose, what might be called private conversations 10:33
26 with particular witnesses, isn't that correct?

27 MR. MCGUINNESS: Yes, it had recorded interviews and
28 statements which were not disclosed made by the notice
29 party, the production of which was refused by the

1 Tribunal.

2 CHAIRMAN: Yes. I mean, any one of those would come
3 under the heading of prior inconsistent statements or
4 matters that could be, I suppose, examined from the
5 point of view of prior inconsistent statements. 10:33

6 MR. MCGUINNESS: Well, some of them were not related to
7 the issues at all. So they were just part of the
8 narrative of accusations that the notice party had made
9 against a variety of persons, including the applicant.

10 CHAIRMAN: Right. So I suppose in those circumstances, 10:33
11 the claim that could be made is, look, even if it's in
12 confidence, the point is that if you wildly make
13 allegations against 25 people, of which, for instance,
14 the Tribunal is examining only the case of two, then it
15 may be relevant to say that you, I suppose, operate a 10:34
16 machine gun approach without thinking in relation to
17 what you say about other people. I mean, at the very
18 least you could make that point.

19 MR. MCGUINNESS: Yes.

20 CHAIRMAN: But without the material you couldn't make 10:34
21 it at all.

22 MR. MCGUINNESS: You couldn't begin to make it because
23 you wouldn't have any material which would be
24 sufficient to persuade the Tribunal or the Court that
25 you should be allowed to embark on that process. 10:34

26 CHAIRMAN: And could I just tease this out then with
27 you. In the event that the Tribunal here has not
28 conducted any interviews with anybody which are in
29 confidence, everything is done on a tape with their

1 permission or is typed up from notes, so it doesn't
2 arise here, but the Tribunal obviously limits what goes
3 out to people on the basis of what is relevant to the
4 term of reference, what could be reasonably be regarded
5 as relevant to the term of reference; we have that 10:34
6 duty, isn't that correct?

7 MR. MCGUINNESS: Yes. And matters obviously have been
8 redacted in different documents as either not relating
9 to any of the parties at all or containing material
10 which might be considered to infringe that other 10:35
11 party's privacy. But parties who received the
12 documents are obviously aware of redactions and issues
13 can be raised in relation to that.

14 CHAIRMAN: So, in the event, I mean, for instance, it
15 would be a matter of public knowledge in relation to 10:35
16 any witness who has given evidence or has been giving
17 evidence - for instance, Sergeant McCabe, I just take
18 that as an instance - that there was a disciplinary
19 matter brought against him in relation to the
20 disappearance of the Father Molloy computer, which was 10:35
21 then dropped 16 months later. So that is a relevant
22 fact, but nobody has sought to deploy it in relation to
23 cross-examination, for instance, as to credit, but the
24 fact is there, in the event that people seek to ask,
25 and they would need to ask my permission, to explore 10:35
26 it. Similarly in relation to other witnesses who may
27 be coming, there have been disciplinary investigations
28 which have been discontinued and in the event that it
29 is thought to be of any use to the Tribunal from the

1 point of credibility or credit to deploy those, those
2 redactions made in relation to that are obvious and
3 people can ask as to whether they want the documents,
4 in which case it may be necessary to have a hearing.
5 MR. MCGUINNESS: If that arises, indeed. 10:36
6 CHAIRMAN: Yes. But there is no secret about anything.
7 MR. MCGUINNESS: Obviously from the point of view of
8 complying with the requirements of the principle
9 underlying in O'Callaghan v. Mahon, all material that
10 is in any way reasonably or potentially even capable of 10:36
11 going to credit in the possession of the Tribunal must
12 be disclosed.
13 CHAIRMAN: Okay.
14 MR. MCGUINNESS: At paragraph 104 Mr. Justice Hardiman
15 continues: 10:37
16
17 "In those circumstances, I do not believe that
18 confidentiality arises automatically or by necessary
19 inference when a person makes very grave allegations to
20 a tribunal which to his knowledge has been established, 10:37
21 if there is sufficient evidence, to hold a full public
22 inquiry. On the contrary, I believe that such a person
23 in communicating with the tribunal is clearly and
24 obviously taking a step likely, in this case certain,
25 to lead to his giving evidence in public. It may also 10:37
26 be noted that the notice party has, years before this
27 Tribunal was established, made complaints about the
28 same subject matter to politicians, to public officials
29 and to an assistant commissioner and other members of

1 An Garda Síochána.

2
3 105. I do, however, believe that the Tribunal owes an
4 obligation to those who gave information in its
5 preliminary investigative stage, as well as to others, 10:37
6 to keep such information confidential unless and until
7 it decides to hold an inquiry in public into the
8 relevant subject matter, and even after that any person
9 impugned in such material has had an a proper
10 opportunity for confrontation, challenge and rebuttal." 10:37
11

12 Then he refers to the well-known case of Stringer v.
13 Irish Times and Mr. Justice Carney's judgment.

14 CHAIRMAN: So again, if I might tease that out. We are
15 not inquiring under any circumstances, for instance, in 10:38
16 relation to the Molloy computer, so it is not the
17 subject of our inquiry. We are inquiring into
18 obviously the matters that are within the terms of
19 reference.

20 MR. MCGUINNESS: I don't want to get involved in 10:38
21 discussing any of the facts relating to --

22 CHAIRMAN: No, I don't want you to. But in the event
23 that something in relation to credit comes up, how do
24 people know that it's there?

25 MR. MCGUINNESS: well, through the disclosure of 10:38
26 material which relates to it, which is in the
27 possession of the Tribunal. Obviously in the case of
28 the Commission, it was one of the central issues in one
29 of the modules relating to that investigation, so it

1 was a central issue in that.

2 CHAIRMAN: And in the light of what you have said, how
3 reasonable is it for me to say that in the event that
4 people wish to pursue cross-examination as to credit,
5 in other words in relation to a matter which is not 10:39
6 within the terms of reference and which would not
7 reasonably make more certain or less certain a fact in
8 issue, that I rule that an application should be made
9 to me before any such thing takes place?

10 MR. MCGUINNESS: Well, I'm not sure, Chairman, that the 10:39
11 authorities require an application to be made. There
12 is the right to attempt to impeach the credit of a
13 witness.

14 CHAIRMAN: There is, but the trial judge has limits.
15 And I notice that Mr. Justice O'Higgins, in relation to 10:39
16 a particular thing, which was in relation to a real or
17 perceived grievance, simply ruled this is as far as you
18 can go and no further. Is that reasonable or
19 unreasonable?

20 MR. MCGUINNESS: Again, without commenting on that 10:39
21 particular ruling in any sense --

22 CHAIRMAN: I meant the legal aspect of it as opposed to
23 the factual aspect.

24 MR. MCGUINNESS: I do come to that in the submissions,
25 Chairman, which outline the remaining discretion and 10:40
26 power of either a trial judge or the chairman of a
27 tribunal to deal with the matter when it arises in
28 cross-examination.

29 CHAIRMAN: Very good.

1 MR. MCGUINNESS: So at paragraph 108, Mr. Justice
2 Hardiman continues:

3
4 "Quite apart from this, having regard to the central
5 importance of cross-examination in ensuring the 10:40
6 constitutional rights of an impugned party, and the
7 central importance of the deployment of material
8 showing inconsistency in cross-examination, I cannot
9 hold that a policy adopted by the Tribunal can limit
10 these rights. To invoke the criteria for the existence 10:40
11 of confidentiality set out in the citations above from
12 Lord Goff, I do not believe that it "would be just in
13 all the circumstances" to keep prior statements secret
14 from an impugned party. Indeed, I believe it would be
15 positively and very gravely unjust. For the same 10:40
16 reason, I do not believe that the secrecy of these
17 perhaps vital materials can possibly arise from any
18 "obligation of conscience arising from the
19 circumstances in or through which the information was
20 communicated". Indeed, I believe that every prompting 10:41
21 of what I might call a legally informed conscience
22 impels one in quite another direction."

23
24 He goes on then to consider some of the particular
25 facts relating to the matter at paragraphs 109, 10 and 10:41
26 11, which I don't need to quote. They are there in the
27 text. But at paragraph 112 he continues:

28
29 "112. A full and unhampered right to cross-examine a

1 person who makes grave allegations against another at a
2 tribunal of inquiry is an important constitutional
3 right. It cannot be impinged upon without a firm basis
4 in law which must itself be consistent with the
5 Constitution. The only basis suggested here is a 10:41
6 unilateral policy of confidentiality adopted by the
7 Tribunal, never communicated to the applicant and
8 doubtfully, if at all, communicated to the notice
9 party. The Tribunal's status as master of its own
10 procedures does not extend to interference with so 10:42
11 vital a constitutional right: Such interference could
12 not possibly be described as procedural in nature.

13
14 117. As noted above, the Tribunal has not confined its
15 private inquiries to the sole question of whether there 10:42
16 is sufficient evidence to warrant proceeding to public
17 inquiry. It has also used the private inquiry for
18 'information gathering' purposes. This in itself has
19 not been challenged in these proceedings and I make no
20 comment on it. But I am deeply concerned that, if the 10:42
21 information gathered in the private phase is to be
22 shrouded in permanent secrecy, there is a grave danger
23 of a shift in the very nature of the Tribunal itself.
24 This procedure would alter the Tribunal from being a
25 public inquiry with a private, limited, preliminary 10:42
26 phase to one in which a good deal of the real business
27 would be done in private. Specifically a tribunal
28 would itself in private have assessed contradictions in
29 a witness's evidence and have formed the view, without

1 submissions of any kind, that they were not
2 sufficiently 'gross, glaring or significant' to warrant
3 exploration in public. There would be a danger perhaps
4 if these procedures became general, that a tribunal
5 might itself become invested in the evidence of a 10:43
6 particular witness to a point where it became
7 insensitive as to contradictions in his or evidence.
8 There is also a danger on the same basis of the public
9 perception of an element of preselection or management
10 of the evidence presented in public and an element of 10:43
11 protection of a particular witness which might be
12 wholly unconscious on the part of a hypothetical
13 tribunal. None of these comments relate to this
14 tribunal. In the present case, the tribunal's
15 principal concern, undoubtedly, is that the truth of 10:43
16 the matters within its remit should emerge so that it
17 has nothing to fear from the disclosure of the notice
18 party's prior statements or documents evidencing prior
19 statements of his. Apart altogether from the private
20 interests of the applicant I believe that the public 10:43
21 generally is entitled to information which may possibly
22 have a very strong bearing one way or the other, on his
23 credibility as a witness."

24
25 The result of the Supreme Court was to remit the matter 10:44
26 to the High Court to consider the documents improperly
27 withheld. This became a matter of a separate judgment
28 by Mr. Justice O'Neill which is recorded in the same
29 volume of the Irish Reports, wherein he adjudicated

1 upon the production and redaction of the documents in
2 question. For the sake of completeness, it may be
3 noted that an appeal was taken to the Supreme Court
4 from that, where an extempore judgment was delivered
5 which allowed the applicant to use the disclosed 10:44
6 statements for the purpose of bringing further judicial
7 review proceedings seeking an order of prohibition
8 against the Tribunal in addition to using the
9 statements to cross-examine the notice party. That
10 subsequent case is reported in the [2008]2IR, and there 10:44
11 the Supreme Court, in the judgment of Mrs. Justice
12 Denham, the Chief Justice, with whom the others agreed
13 and Mr. Justice Hardiman dissented, dismissed the
14 application to prohibit the continued investigation by
15 the Tribunal of the applicant's affairs on the grounds 10:44
16 of alleged bias, prejudgment and unfairness.

17
18 So I intend to draw together the strands of what this
19 leads me to.

20 10:45
21 Given the origin, nature and the importance of the
22 right of cross-examination and the equally important
23 ancillary right not to be deprived of material which is
24 relevant and necessary to be considered by any party in
25 full exercising the rights to cross-examine a party who 10:45
26 has made allegations relating to him, it is now beyond
27 argument that tribunals such as this are bound to
28 disclose any such material in its possession which is
29 in any way relevant to the possibility of confronting

1 and impugning a witness by the use of such material.
2 This does not of course mean that a judge does not have
3 a general supervisory jurisdiction in relation to
4 cross-examination of a witness and may disallow
5 questions which he or she considers to be improper. 10:45
6 Similarly a trial judge may disallow questions which he
7 regards as vexatious or irrelevant to any matter at
8 such or curtail cross-examination which is repetitive
9 or excessive in length. Insofar as the distinction
10 between cross-examination in relation to facts in issue 10:46
11 and cross-examination as to credibility, Mr. McGrath
12 draws attention at paragraph 3-101 to the case of DPP
13 v. Piotrowski. There it was held that a trial judge
14 would have greater latitude to intervene and control
15 cross-examination in the case of the latter. 10:46
16 The quotation from the judgment of the Court of Criminal
17 Appeal is as follows:

18
19 "The defence is, of course, entitled to some latitude
20 in pursuing issues concerning the credibility of
21 important prosecution evidence. However, it is also
22 true that the trial judge has an important role in
23 ensuring that the case is confined to questions which
24 are at least of sufficient relevance to the issues
25 which the jury has to decide to make their pursuit
26 material. If the issues being pursued by
27 cross-examination are directly relevant to the facts of
28 the case in the sense of the facts which are alleged to
29 constitute the offence charged or the guilt of the

1 accused in respect of that offence, then wide latitude
2 must be allowed. Where the issues raised simply go to
3 general credibility not directly connected with the
4 offence but connected with matters which may have some
5 indirect bearing on the credibility of witnesses in
6 relation to the offence, then it seems to this Court
7 that the trial judge is entitled to exercise a greater
8 degree of control over the extent to which such issues
9 can be pursued."

10
11 Archbold says in relation to collateral evidence at
12 paragraph 8-293:

13
14 "Where evidence is admitted for the purposes of
15 contradicting the denial of a witness in relation to a 10:47
16 matter going to credit only under one of the above
17 exceptions and the other party seeks to call evidence
18 to rebut that evidence, it is for the judge to balance
19 the necessity of avoiding the pursuit of collateral
20 matters with the risk that the trial will get out of 10:47
21 hand and the requirements of fairness to the accused
22 and in particular that the whole picture should be
23 before the jury; whether the collateral matter should
24 be investigated at all is a matter for the judge who
25 should have regard to how extensive such an inquiry is 10:48
26 likely to become."

27
28 Thus, the role for a trial judge, and it is submitted,
29 also for the chairman of a tribunal, is not in any way

1 necessarily exhausted by simply complying with the
2 obligation of disclosure. Clearly a vital role still
3 persists in adjudicating upon what facts are or may be
4 in issue, what facts are or may be relevant to credit
5 and whether they are of sufficient relevancy to any of 10:48
6 the facts in issue or any of the matters to be decided
7 upon by a tribunal to allow them to be properly pursued
8 in the course of its inquiry.

9
10 They are my submissions, Chairman. 10:48

11 CHAIRMAN: What does all of that amount to,
12 Mr. McGuinness?

13 MR. MCGUINNESS: Well, it's intended to be an overview
14 of the circumstances in which a party may embark upon
15 cross-examination as to credit, the basis upon which it 10:48
16 proceeds and an examination of the rule relating to
17 finality on the exceptions where there is an argument
18 or suggestion that the collateral answer is a final
19 answer.

20 CHAIRMAN: In that respect, it's been very helpful and 10:49
21 thank you very much. In the event, therefore, would it
22 be fair to say that there are redactions in documents,
23 that if people wish to pursue any issue as to whether
24 there is a matter there which might bear on credit, an
25 application ought to be made to the Tribunal? 10:49

26 MR. MCGUINNESS: Yes, yes, that is an appropriate
27 course of action, where there is a basis for it or
28 where parties wish to pursue such an application.

29 CHAIRMAN: And we did indeed have that in an earlier

1 hearing.

2 MR. MCGUINNESS: We did, yes. And obviously it's a
3 matter for the Tribunal as to whether and in what
4 circumstances it might be necessary to invoke the
5 powers of section 2(1) to sit in private or not. But I 10:50
6 don't want to anticipate matters.

7 CHAIRMAN: Yes. And that might include such matters,
8 for instance, as disciplinary inquiries.

9 MR. MCGUINNESS: It could embrace many, many issues,
10 Chairman. 10:50

11 CHAIRMAN: Including -- yes. Thank you very much,
12 Mr. McGuinness. That has been very helpful.

13 Mr. McDowell, do you want to go -- in effect, I think
14 you are probably in the role of being the accuser here,
15 if I may use an analogy. And I don't mean to try and 10:50
16 turn everything into a criminal trial, which I hate,
17 but it could possibly be helpful if you went first;
18 would that be okay?

19 MR. MCDOWELL: Well, I am happy to go first.

20 CHAIRMAN: I will give you a right of reply at the end. 10:50

21 MR. MCDOWELL: And I would appreciate that.

22 CHAIRMAN: I think that is fair. And similarly, if
23 other people feel they need to reply to other people,
24 just ask.

25 10:50

26 SUBMISSION BY MR. MCDOWELL

27 MR. MCDOWELL: I am happy to go first, but that is
28 without prejudice to my quasi-accuser status as a
29 justification, which I wouldn't quite accept, Judge.

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Judge, I have prepared some written submissions and I rather foolishly underestimated the amount of parties here, so I will do my best to spread thinly. I am going to get further copies, Judge, sent up.

10:51

CHAIRMAN: You don't have to do this at all, it's a courtesy, but thank you.

MR. MCDOWELL: But it's just to other parties and I appreciate that I may be dividing a limited number of submissions among a great many legal practitioners.

10:51

CHAIRMAN: Okay. [Same handed] well, that is just too bad. So we will just carry on.

MR. MCDOWELL: There are more on the way. Firstly, Judge, could I just, Chairman, could I just remind the Tribunal of what paragraph [e], ground [e] says. It is:

10:52

"To investigate whether false allegations of sexual abuse or any other unjustifiable grounds were inappropriately relied upon by Commissioner O'Sullivan to discredit Sergeant McCabe at the Commission of Investigation into certain matters in the Cavan-Monaghan district under the chairmanship of Mr. Justice O'Higgins."

10:52

And then paragraph [h], to which I will come back later.

10:52

And, Judge, you cited some weeks ago eleven questions

1 that you'd like to have dealt with, and I hope, in the
2 course of this submission, to deal with all of them,
3 but if at the end there is any sense in which you
4 consider that I haven't dealt with any particular one
5 of them, I will deal with it at the end, Judge, ore
6 tenus, so to speak.

10:52

7
8 Firstly, there is a fundamental point that I want to
9 make to this Tribunal, and that is, the status -- in
10 relation to the status and participation of
11 Commissioner O'Sullivan in the O'Higgins Commission
12 proceedings. She was given -- granted a right of
13 participation in the O'Higgins Commission in virtue of
14 her statutory role as head of An Garda Síochána and her
15 statutory functions, duties and responsibilities
16 arising from that role. And Mr. Justice O'Higgins
17 decided to adopt a format for his Commission's hearings
18 which were in many respects analogous to the practice
19 of a tribunal of inquiry rather than the Fennelly or
20 Murphy Commissions of Investigation, with the obvious
21 exception that the hearings of the Commission were be
22 held in private and that only persons entitled to be
23 present at each module of the Commission's hearings
24 were the persons concerned with each module and their
25 legal representatives. And in addition to that she
26 permitted Commissioner O'Sullivan to have present an
27 officer of An Garda Síochána during the entire
28 proceedings of the Commission. Now, the Commissioner
29 in turn then chose to appoint a solicitor in the Chief

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1 State Solicitor's Office to act on her behalf in
2 relation to the Commission and at its inquiries and to
3 instruct counsel on her behalf for the purpose of the
4 Commission, and she decided that the same solicitor and
5 team of counsel would act on behalf of herself and all 10:54
6 witnesses of the rank of superintendent and upwards,
7 whether serving or retired. That decision was made
8 subject to a caveat, it appears from the evidence, that
9 if a conflict of interest arose, the matter could be
10 reviewed. 10:54

11
12 Now, in relation to the authority of the Commissioner's
13 legal representatives, we say that it's of fundamental
14 importance to a proper consideration of the terms of
15 reference that it be understood that the Commissioner, 10:55
16 in appointing a solicitor from the Chief State
17 Solicitor's Office to act on her behalf at the
18 Commission, was appointing that solicitor as a
19 professional person and as an officer of the courts in
20 every respect as her agent and attorney with full 10:55
21 authority to act in her stead and in respect of
22 decisions and the conduct of her case -- or the
23 proceedings in relation to the O'Higgins Commission.

24
25 Now I just want to emphasise, Judge, in case any 10:55
26 contrary impression appears: I am not challenging at
27 all the competence, integrity or experience or the
28 standards of Ms. Anmarie Ryan when I make those
29 remarks. I am saying that in appointing a solicitor to

1 act on her behalf, the Commissioner as a matter of law
2 gave her solicitor the normal legal authority and
3 agency that is given to any solicitor involved in
4 litigation or an analogous activity such as a tribunal
5 or similar forum, subject to the obligations of a 10:56
6 solicitor to act as an officer of the court, subject to
7 any specific instructions given by the Commissioner to
8 her solicitor in relation to the conduct of her
9 representation and in relation to the manner in which
10 such representation was to be carried out. And 10:56
11 therefore, for the purpose of terms of reference [e],
12 we are submitting that this Tribunal must proceed on
13 the basis that what was done at the O'Higgins
14 Commission by the legal team acting on behalf of the
15 Commissioner instructed by the solicitor appointed by 10:56
16 the Commissioner was done by Commissioner O'Sullivan
17 herself. And I will come back to the implications of
18 that submission later.

19
20 In particular, insofar as any grounds were relied upon 10:56
21 by those lawyers to discredit Sergeant Maurice McCabe
22 at the O'Higgins Commission, the use of those grounds
23 was as a matter of law made by or on behalf of
24 Commissioner O'Sullivan unless it's established that
25 the use of such grounds to discredit Sergeant McCabe 10:56
26 was not done within the authority that she gave to
27 those lawyers to conduct her case and was actually at
28 variance with the authority which she had given to
29 them.

1 CHAIRMAN: Sorry, you are saying it's presumed?

2 MR. McDOWELL: There is a presumption, yes. Yes, that
3 is what I am saying. So in short, in giving authority
4 to lawyers to act on behalf of the Commissioner,
5 Commissioner O'Sullivan remained responsible for the 10:57
6 use by those lawyers of any grounds to discredit
7 Sergeant McCabe. And we are saying it's not
8 permissible for a client to disown the actions of
9 lawyers acting on his or her behalf where those lawyers
10 act within their apparent authority and on foot of 10:57
11 their apparent instructions from their client. And in
12 this case we say that the term of reference must be
13 interpreted as requiring the Tribunal to investigate
14 whether the grounds used by lawyers representing
15 Commissioner O'Sullivan to discredit Sergeant McCabe 10:57
16 were justified, and it is submitted that it would be
17 entirely erroneous to interpret the terms of reference
18 as in some way distinguishing between the subjective
19 state of mind of the Commissioner in relation to the
20 instructions she was giving to her team of lawyers at 10:58
21 the Commission on the one hand and their conduct on
22 foot of those instructions in discrediting Sergeant
23 McCabe during the course of the Commission's hearing,
24 on the other. And that does address one of the eleven
25 questions that you posed, Chairman. 10:58

26
27 Insofar as the evidence in relation to this module
28 suggested that Commissioner O'Sullivan may have had one
29 view of her instructions to her lawyers and those

1 lawyers may have had a different view, it's submitted
2 that the Tribunal must investigate whether the lawyers
3 in question acting within their apparent authority
4 relied on unjustified grounds to discredit Sergeant
5 McCabe rather than simply confining itself to 10:58
6 considering whether the lawyers' conduct was in detail
7 and subjectively approved by the Commission.

8
9 This general issue we say must be resolved on the basis
10 that Commissioner O'Sullivan was legally responsible as 10:58
11 principal for what was done in her name by a team of
12 lawyers instructed by her.

13
14 And I stop there, Judge, just to make this point: That
15 I'm not suggesting that, on the basis of the 10:59
16 presumption that I have advanced that the Tribunal, in
17 its report, might not distinguish between her
18 subjective intentions and what was actually done, but
19 I'm saying that in interpreting the term of reference
20 as set out by the Oireachtas, the Tribunal should 10:59
21 approach it on the basis that that presumption applies,
22 until it is set -- displaced.

23
24 Now, the particular issues which arise in the evidence
25 have to be considered we submit in that light. And in 10:59
26 particular, when on day 2 of the Commission counsel
27 attempted to raise the dealings between Chief
28 Superintendent Rooney and Sergeant McCabe in respect of
29 the DPP's directions arising out of the Ms. D

1 allegation, objection was taken on the grounds of
2 relevance and counsel for the Commissioner was
3 specifically challenged as to whether he was doing so
4 on the express instructions of Commissioner O'Sullivan,
5 and as this Tribunal is well aware, on two occasions 11:00
6 after two short adjournments, counsel confirmed to the
7 O'Higgins Commission that he was acting on the express
8 instructions of Commissioner O'Sullivan. And this was
9 done in the presence of her personal representative
10 there, Chief Superintendent Healy, and in the presence 11:00
11 of the solicitor acting in this matter on behalf of
12 Commissioner O'Sullivan, Ms. Anmarie Ryan.

13
14 And I do say, Judge, that I add in there a coda, if I
15 may, that Ms. Ryan does appear to have been taken by 11:00
16 surprise by the development, but that, nonetheless, is
17 something which the Tribunal might perhaps consider.

18
19 In those circumstances, we say it cannot be in doubt
20 that Commissioner O'Sullivan was being represented at 11:01
21 the Commission as the author of the instructions by her
22 counsel. And furthermore, the Commission itself, the
23 O'Higgins Commission, and the other parties represented
24 before it, were not merely entitled but obliged to
25 accept that the course of conduct in question was being 11:01
26 personally mandated by Commissioner O'Sullivan or done
27 on her authority. And if there was any confusion as to
28 the state of knowledge of Commissioner O'Sullivan of
29 what had transpired and what was proposed to be

1 transacted at the Commission as of the afternoon of the
2 15th May 2015, her solicitor and her personal
3 representative, Chief Superintendent Healy, both became
4 aware that the Commission had directed that the
5 Commissioner should furnish a written outline of the 11:01
6 basis on which it was intended to discredit Sergeant
7 McCabe's testimony and the same was to be furnished by
8 Mondays, 18th May 2015. And the document therefore
9 that was furnished on Monday, 18th May 2015 was
10 expressly understood by everybody concerned to be 11:02
11 furnished on the instructions of the Commissioner of An
12 Garda Síochána and on behalf of nobody else, Judge. It
13 was not furnished and didn't purport to be furnished on
14 behalf of any other persons or parties, and in drafting
15 and submitting the letter we say that the lawyers 11:02
16 acting for the Commissioner were acting within their
17 ostensible authority on her behalf, and in furnishing
18 the letter in question Ms. Ryan, an experienced
19 professional and competent solicitor was acting as the
20 legal agent of the Commissioner and the letter in 11:02
21 question was submitted with the express authority of
22 the Commissioner and with the actual knowledge of Chief
23 Superintendent Healy, who had been authorised by the
24 Commissioner to act on her behalf. In these
25 circumstances we say that term of reference [e] 11:02
26 requires this Tribunal to examine whether what was done
27 by the Commissioner on the 15th May 2015 and on Monday,
28 18th May 2015 and on succeeding days, amounts to the
29 use of unjustified grounds, to use the quotation from

1 the term of reference, which were "inappropriately
2 relied upon" by her legal team to "discredit Sergeant
3 McCabe". And that, we say, is the net issue which the
4 Oireachtas has asked this Tribunal to determine in
5 paragraph [e].

11:03

6
7 And we say that it's fully accepted, in considering the
8 matters which arise in this module, that we are not in
9 any sense dealing in an appellate way or as an
10 appellate forum from the report of the O'Higgins
11 Commission or its findings. Sergeant McCabe has stated
12 in evidence that he fully accepts the findings of the
13 O'Higgins Report, including those findings which are
14 critical of himself. He doesn't seek to overturn any
15 such findings and these submissions are made on the
16 basis that the other relevant parties represented
17 before this Tribunal equally accept the findings of the
18 O'Higgins Commission report in accordance with the
19 evidence that was given to this Commission.

11:03

11:03

20
21 It is of course a separate issue for the consideration,
22 and this is what I just want to deal with in relation
23 to what Mr. McGuinness has said, as to whether Sergeant
24 McCabe was the subject of an attempt by lawyers acting
25 on behalf of Commissioner O'Sullivan to, first of all,
26 discredit him, secondly on the basis of unjustified
27 grounds, and thirdly, whether these were
28 inappropriately relied upon. And in these submissions
29 we are making the case that the Commissioner's legal

11:04

11:04

1 team did indeed attempt to discredit Sergeant McCabe on
2 the grounds set out and that the grounds in which they
3 did so were unjustified, and thirdly, it was wholly
4 inappropriate for them to rely on those unjustified
5 grounds.

11:04

6
7 Now, Judge, I then ask, and I think it's important that
8 what follows now be emphasised. On Thursday, 14th May
9 the Commission held its first hearing day in respect of
10 the Kingscourt module and Mr. Justice O'Higgins made an
11 opening statement in which he emphasised, among other
12 things, that nobody "should be ambushed or taken by
13 surprise". And he also said that if any party intended
14 to give evidence critical of another witness a prior
15 application under section 11 of the Commissions of
16 Investigation Act should be made to ensure that such
17 witness was allowed to deal with such matters. And
18 that, Judge, under the other rubric of commissions of
19 investigation would be something, private hearings
20 effectively at a dining-room table kind of format, that
21 would be easily done. But in the context of a
22 multiparty hearing analogous to a tribunal being held
23 in private, it was all the more important that any
24 party who wanted to criticise another witness was told
25 on day 1, in the opening address of the Chairman of
26 that Commission, that they had to seek prior permission
27 so to do and that nobody was to be ambushed.

11:05

11:05

11:05

11:06

28
29 Now, we say that this direction required that any party

1 should not embark upon the presentation of
2 evidence-in-chief or in cross-examination critical of
3 another witness, unless such prior consent had been
4 obtained by the Chairman of the Commission. And these
5 procedures, we say, were clearly explained and 11:06
6 apparently accepted by everybody but unfortunately on
7 the following day, in blatant disregard of those
8 directions, an attempt was made to elicit from retired
9 Chief Superintendent Rooney - and in his evidence he
10 says it came as a surprise to him - evidence of which 11:06
11 no prior notice had been given, the purpose of which
12 was to discredit Sergeant McCabe by impugning his
13 motivation and for the purpose of challenging his bona
14 fides.

15 11:07
16 Now, on the second day of the inquiry, counsel on
17 behalf of Commissioner O'Sullivan, as this Tribunal
18 well knows, attempted to elicit from Chief
19 Superintendent Rooney evidence concerning a meeting
20 that he had with Sergeant McCabe in 2007 in relation to 11:07
21 a wish on the part of Sergeant McCabe to have the DPP's
22 directions communicated to the D family arising out of
23 an investigation carried out by then Inspector Noel
24 Cunningham into Ms. D's claim of a sexual assault in
25 2006, which had been the subject of a direction by the 11:07
26 DPP which fully exonerated Sergeant McCabe. And it was
27 counsel for the Commission, Mr. Gillane, who objected
28 to this attempt, and counsel for the Commissioner,
29 Mr. Smyth, indicated at that point immediately that its

1 relevance was in the context of motivation where
2 certain facts or matters and indeed credibility in
3 relation to certain matters. Those are his words.
4 Counsel for Sergeant McCabe, that is myself, requested
5 that Mr. Smyth should inform the Commission as to 11:08
6 whether he was raising these issues on the firm
7 instructions of the Commissioner. There was a short
8 adjournment when the Commission's legal team,
9 Mr. Gillane, explained that he had interrupted on the
10 basis that he apprehended a line of questioning in 11:08
11 relation to an area or areas that were not relevant to
12 the module or to any module which the Commission was
13 concern. He submitted that Sergeant McCabe's counsel
14 might be invited to make a legal objection. Following
15 those submissions, the Chairman invited Mr. Smyth "if 11:08
16 it is the Commissioner's case that she wishes to impugn
17 the motivation and integrity of Sergeant McCabe, that
18 he should say so in so many words". And he stated to
19 Mr. Smyth:

20
21 "It is not unreasonable of Mr. McDowell to say whether
22 an attack on the integrity and motivation of Sergeant
23 McCabe forms part of your case or whether you are
24 saying that, no, he is inaccurate or mistaken."
25

26 And Mr. Smyth replied at page 189 that he had
27 instructions from the Commissioner that:
28

29 "This is an inquiry dealing with the allegations of

1 malpractice and corruption on a grand scale by members
2 of an Garda Síochána."

3
4 Mr. Justice O'Higgins reminded him that we were dealing
5 with module 1, to which he replied:

6
7 "I appreciate that, but my instructions are to
8 challenge the integrity, certainly, of Sergeant McCabe
9 and his motivation."

10
11 He was reminded by the Chairman there was a difference
12 between integrity, motivation and credibility and that
13 if he was going to challenge Sergeant McCabe's
14 integrity it would be necessary to go further and to
15 allege, in the judge's words, that:

16
17 "-- he made these allegations not in good faith but
18 because he was motivated by malice or some such motive,
19 and that impinges on his integrity. If those are your
20 instructions from the Commissioner, so be it."

21
22 And Mr. Smyth replied:

23
24 "So be it, that is the position, judge."

25
26 And he confirmed that those were his instructions from
27 the Commissioner and asserted that he could only act on
28 instructions.

1 The Chairman later said:

2

3 "It seems unless I am mistaken, Mr. Smyth... that in
4 relation to the matters under investigation subject
5 only perhaps to matters to deal with general staffing
6 levels, the condition of the Garda station in
7 Bailieborough that most of the matters deal with
8 factual issues and you are saying that Garda McCabe's
9 complaints on your instruction are motivated, that they
10 are not properly motivated, that they are not genuine,
11 that they are done for improper motives."

12

13 And Mr. Smyth replied:

14

15 "Whatever the reasons are for it on his side it runs 11:10
16 through all the --

17 Chairman: You are attacking his motivation and
18 integrity.

19 Mr. Smyth: Right the way through."

20

11:10

21 He went on to justify raising the issues in the
22 Kingscourt module in the context of Sergeant McCabe and
23 Sergeant McArdle's dealings with Ms. Lorraine Browne,
24 and Mr. Justice O'Higgins subsequently allowed a short
25 adjournment to enable him to take instructions after 11:10
26 which he informed the Commission that his instructions
27 were re-confirmed and that Sergeant McCabe acted as he
28 did for improper motives and that his integrity was
29 being challenged in that respect. The Commission was

1 informed on behalf of Sergeant McCabe that he proposed
2 to make no criticism of any other person in the room
3 save to say what he actually did and that it was not
4 his intention to proffer or volunteer criticism in
5 general terms of other people's behaviour. The 11:11
6 Commission was further informed it was not the function
7 of Sergeant McCabe to lay into everybody and to try and
8 attack their integrity or their reputation, or
9 whatever, and that he was present to answer questions
10 Mr. Gillane puts to him. Finally, the Chairman 11:11
11 adjourned the Commission until Monday, 18th May on the
12 basis that the Commissioner would furnish in writing
13 the basis on which the integrity and motivation and
14 credibility of Sergeant McCabe was to be carried out.

15
16 Now, Judge, I don't want to go into all of the things
17 that happened then in relation to Ms. Ryan and her
18 contacts with the Attorney General's office, her own
19 superiors and Mr. Ken Ruane, but I will come back to
20 her request for an immediate consultation with the 11:12
21 Commissioner arising out of the instructions that
22 Mr. Smyth said he had.

23
24 On Monday, 18th February the Chairman commenced by
25 stating that a letter had been received from the Chief 11:12
26 State Solicitor's Office referring to certain documents
27 on which the Commissioner wished to reply. He
28 expressed considerable annoyance that one of the
29 documents hadn't been given to the Commissioner as of

1 now. The CSSO letter of 18th May was distributed to
2 the parties, but the documents referred to therein were
3 not distributed. In the course of a discussion on the
4 letter of Mr. Smyth stated that the only reason
5 Sergeant McCabe had made allegations he made on the 11:12
6 28th February in a letter which was sent to
7 Superintendent Clancy ultimately was, that he was
8 making those allegations to force the hand of
9 Superintendent Clancy to seek further clarification
10 from the DPP when he knew that was clearly and patently 11:12
11 wrong. The letter from the Chief State Solicitor's
12 Office, among other incorrect and false statements of
13 facts, suggested that Sergeant McCabe had made such an
14 admission in a meeting in Mullingar, and I have
15 forgotten the date on that, Judge, but it's August 11:13
16 2008, and that evidence of such an admission by
17 Sergeant McCabe would be given by Superintendent
18 Cunningham and Sergeant Yvonne Martin. The Chairman
19 ruled that the contents of the letter were irrelevant
20 to the matters he had to inquire into in that module, 11:13
21 and stated that he would only permit counsel for the
22 Commissioner to establish this much and no more:

23
24 "That Sergeant McCabe had a real or perceived grievance
25 against somebody, full stop, no more and the contents 11:13
26 of this document I am ruling are irrelevant to this
27 module."

28
29 Now, counsel for the Commissioner, after a short

1 adjournment, made it clear that the Commissioner was
2 reserving her position in respect of that ruling,
3 hinting, as counsel for this Tribunal stated, at a
4 possible judicial review of the Commission if it made
5 any adverse findings against the Commissioner in that 11:14
6 module. And towards the close of proceedings on that
7 day, Sergeant McCabe was cross-examined by Mr. Smyth
8 and it was suggested that he had a personal grievance
9 with An Garda Síochána, and this he categorically
10 denied. But later in the course of submissions the 11:14
11 Chairman said, in the presence of counsel for the
12 Commissioner:

13
14 "Certainly there is no doubt that the integrity of the
15 witness is being impugned in no uncertain terms. 11:14
16 Secondly, in relation to the inquiry, it seems that the
17 case is being made that I cannot accept the evidence of
18 your client. That is the case that is being made."

19
20 And later, in relation to Sergeant McCabe's description 11:14
21 of Garda Ferghal McCarthy's behaviour as "disgraceful"
22 and his claim there was a failure to investigate a
23 hijack and false imprisonment and sexual assault, the
24 Chairman stated:

25
26 "As I understand it, the Commissioner is saying those 11:15
27 allegations are false and motivated by malice."
28

29 Subsequently counsel for the Commissioner put it to

1 Sergeant McCabe that:

2

3 "The only reason you made a complaint against
4 Superintendent Clancy was to allow you to have the full
5 authority directions conveyed to you." 11:15

6

7 Sergeant McCabe said:

8

9 "That is absolutely false.

10 Mr. Justice O'Higgins: The only reason? 11:15

11 Mr. Smyth: The only reason, and this will be the
12 evidence of Superintendent Cunningham, that the only
13 reason he wrote the list of complaints for
14 Superintendent Clancy, do you understand, that you made
15 complaints about Superintendent Clancy, was that you 11:15
16 wanted to put pressure on Superintendent Clancy to get
17 full directions from the authority conveyed to you."

18

19 To which Sergeant McCabe said:

20

21 "That is absolutely false, absolutely." 11:15

22

23 Now, those passages have already been opened, Chairman,
24 by counsel for the Tribunal, but we submit that there
25 can be no doubt from the statements made by the 11:15
26 Chairman that he understood that the Commissioner's
27 instructions were to impugn the integrity of Sergeant
28 McCabe and to accuse him of making complaints in bad
29 faith or mala fide, and that no attempt of any kind was

1 made by the Commissioner or through her legal team to
2 challenge or to correct the Chairman's impression of
3 her instructions or the case she was making or as
4 articulated by him, that is Mr. Justice O'Higgins, on
5 Friday, 15th May or on Monday, 18th May or Tuesday, 11:16
6 19th May 2015. And given that the proceedings were the
7 subject of a daily transcript made available to the
8 Commissioner and her legal team, any suggestion that
9 the Chairman's interpretation of the Commissioner's
10 instructions arose from some mere understanding or 11:16
11 inadvertence we say is unsustainable. There was every
12 opportunity to correct the record or to modify the
13 nature of the Commissioner's instructions as understood
14 by the Chairman but no such opportunity was taken at
15 any relevant time before November 2015 when the claim 11:16
16 was made for the first time that the attack on Sergeant
17 McCabe's integrity arose from an error by counsel in
18 interpreting his instructions.

19
20 Now, whatever about the opportunities for Commissioner 11:17
21 O'Sullivan to read the transcripts or the
22 reasonableness of expecting her to do so in detail,
23 Chief Superintendent Healy had every opportunity to
24 inform her of the manner in which her instructions were
25 being interpreted by the Chairman if he thought that 11:17
26 what was being done was not in conformity with her
27 instructions to counsel. And indeed, in this Tribunal,
28 on day 46, Commissioner O'Sullivan confirmed that she
29 was in fact reading the transcripts of the O'Higgins

1 Commission and that she had read the transcripts
2 available to her in May of 2015.

3
4 Now, then, Judge, we move to day 4, and on this day
5 Superintendent Rooney was cross-examined about the 11:17
6 claim in the CSSO letter that Sergeant McCabe had
7 expressed anger and annoyance towards the DPP, and we
8 say he completely failed to substantiate that claim.

9 When Superintendent Noel Cunningham was recalled it
10 became apparent that his report of the Mullingar 11:18
11 meeting attended by himself, Sergeant McCabe and
12 Sergeant Martin, hadn't been circulated or furnished to
13 Sergeant McCabe's legal team. Mr. Smyth stated at
14 pages 31 and 32 that the report and the signed notes
15 would be given to Sergeant McCabe's legal team at that 11:18
16 point.

17
18 Now, there was a short adjournment in the
19 cross-examination of Superintendent Cunningham,
20 following which Mr. Gillane said: 11:18

21
22 "Judge, in relation to the current position and the
23 circulation of some documents there, I think it is
24 appropriate to stand this witness down for present
25 purposes and have recalled hopefully later today. The 11:18
26 document circulated just put us on enquiry in relation
27 to some other matters."

28
29 And Superintendent Cunningham wasn't recalled as it

1 turned out, Judge, because of the sequence of the
2 hearings, until a month later, on 24th June 2015, which
3 was day 5. And from the foregoing, it's clear that the
4 report from Superintendent Cunningham and the notes
5 signed by him and Sergeant Martin were definitely not 11:19
6 circulated or available for study until Tuesday, 19th
7 May 2015, after the revelation by Sergeant McCabe his
8 tape-recording was made with Superintendent Cunningham.
9

10 Now, then, Judge, we go to the 11th June 2015, and on 11:19
11 that date counsel for the Garda Commissioner made
12 detailed written submissions in respect of Module 1,
13 but even though the evidence in respect of that module
14 would in fact only be completed later that month, on
15 24th June, which was day 5. These submissions, we are 11:19
16 submitting, Judge, are of great significance in
17 assessing what the understanding of the Commissioner's
18 legal team was in respect of the matters set out in the
19 Chief State Solicitor's Office of the 18th May. From
20 paragraphs 63 to 75, the submissions restate the 11:19
21 substance of the letter which had been ruled
22 inadmissible subject to the editorial change that the
23 actual reference to Ms. D's allegation was withdrawn,
24 but in every other respect reiterating the suggestion
25 that Sergeant McCabe was motivated to make the 11:20
26 allegations against Superintendent Clancy by reason of
27 an intention on his part to coerce him to distribute
28 the actual directions of the DPP to the D family, which
29 it was alleged he knew ought not and should not be

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done.

Now, we say that paragraphs 63 to 75 were given at a time when Sergeant McCabe had categorically rejected the allegations made in the Chief State Solicitor's letter and had produced a recording of the Mullingar meeting with Superintendent Cunningham and Sergeant Martin. And we say full reliance is placed on those submissions on the correctness of the Chief State Solicitor's Office letter and the submissions repeat their understanding that Superintendent Cunningham and Sergeant Martin would give evidence that Sergeant McCabe had admitted that the only reason that he had made complaints against Superintendent Clancy for lack of support was a bid by him to have the full DPP's directions conveyed to him and the complaining party in the D case. Counsel asserted that this admission was recorded in the report which they had finally circulated to the parties on the 19th May 2015. And that is the curious thing, Judge; that on 11th June the legal team seemed to believe that the document which they had handed out finally on the 16th June, was, in fact -- sorry, the 19th June, Judge, sorry, was in fact corroborative of their error.

11:21
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11:21

Now, I just want to draw the Tribunal's attention to what appears next. It was claimed that the interactions involving Sergeant McCabe and Superintendent Cunningham, as witnessed by Sergeant

1 Martin, were critical, and these are the words they
2 use:

3
4 "-- critical to the understanding of the behaviour of
5 Sergeant McCabe and of the responses of the various 11:22
6 officers to his complaints. It was claimed that these
7 issues would be relevant to subsequent modules but in
8 relation to this specific module, it is submitted that
9 Sergeant McCabe's disaffection motivated him to contact
10 Ms. Browne and to encourage a complaint to GSOC and to 11:23
11 include it in his Brief Proven Facts Pertaining to my
12 Complaint Document."

13
14 And that submission, Judge, actually indicates what was
15 in the minds of the people who drew up that submission. 11:23
16 They were making a clear charge against Sergeant McCabe
17 that he was acting improperly due to disaffection
18 originating in an attempt by him to coerce the hand of
19 Superintendent Clancy.

20 11:23
21 And I just remind the Tribunal in the next paragraph
22 that Chief Superintendent Healy conceded that the
23 charge of disaffection was an offensive suggestion to
24 make against any serving member of An Garda Síochána.
25 And also, I just remind this Tribunal that Mr. Smyth, 11:23
26 very fairly, conceded that there was nothing improper
27 in Sergeant McCabe's advice to Lorraine Browne that she
28 could refer the matter to GSOC. But the submission
29 goes on to say:

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It was further stated that:

"It would be unfair to lay any blame for this entirely at the door of garda McCarthy's unit sergeant, as the officers who complained of his conduct also have a role in his supervision, which cannot be ignored." 11:24

And that was clearly an attempt to say that Garda McCarthy's unfortunate handling of the case, which was inexcusable, really, was partly the responsibility of Sergeant McCabe and partly the responsibility of Sergeant McArdle. And I just ask to say was that a fair, reasonable or appropriate claim to make in the circumstance, especially when it was made in secret, because these submissions were not made on the basis of distribution to all the parties at the time. 11:25

Now, the submission also said that the Byrne/McGinn examination of the Kingscourt matter had been full and expeditious and as the Commission found, this was not correct. It was inadequate, as is evidenced by the fact that it never even had access to or considered the statement by Lorraine Browne, while nonetheless concluding that Sergeant McCabe had exaggerated the incident. It also wrongly claimed that Sergeant McCabe had been found to have exaggerated the matter by describing it as a sexual assault in the incident. The submission ended with the statement noting, and this is 11:25

1 very -- a very note worthy, Judge, if you want to look
2 at the character of the remarks that were being made
3 about Sergeant McCabe in this submission, it said that
4 the investigations had exonerated Sergeant McCarthy and
5 found that Sergeant McCabe's complaints were 11:26
6 exaggerated, but it was -- it ended with an
7 inexplicable and I say deeply prejudicial statement:

8
9 "This must also be seen in the context of Sergeant
10 McCabe's unfortunate response to the investigation 11:26
11 relating to him."
12

13 And I say that is a scandalous thing to have said about
14 Sergeant McCabe in the circumstance, and utterly
15 unwarranted. 11:26
16

17 Now the submission also made significant play of the
18 difficulty of dealing with the provisions of the Garda
19 Síochána Code in relation to corruption and malpractice
20 and sought to excuse the Garda authorities for using 11:26
21 the term corrupt in respect of -- in relation to Garda
22 McCarthy by reference to the confusing nature of the
23 relevant paragraph of the Garda Code. And much play,
24 as this Tribunal will note, was later made in the
25 Commission and at this Tribunal in respect of Sergeant 11:27
26 McCabe's use of the term corruption and corrupt in the
27 non-criminal sense provided by the same provisions in
28 the Garda Code. And the written submissions of the
29 11th June 2015, as I say, were made privately. No

1 attempt, however, was made to withdraw those
2 submissions when it became abundantly clear at the next
3 sitting day on 24th June 2015 that the submissions were
4 utterly erroneous and I say deeply damaging and
5 unjustifiable.

11:27

6
7 Now, Judge, we come to what actually happened on day 5,
8 24th June 2015. On that day, which was now more than a
9 month since the last sitting of the Commission and a
10 fortnight after the delivery of the written submissions
11 I have just been dealing with, the Chairman started the
12 proceedings by outlining what he said were concerns at
13 first blush of the Commission in relation to the
14 correctness of the matters stated in the CSSO letter of
15 18th May, in the light of the report made by
16 Superintendent Cunningham of the meeting in Mullingar
17 and of the transcript of the tape-recording made by
18 Sergeant McCabe at that meeting.

11:27

11:28

19 CHAIRMAN: Can I just, I don't want to interrupt you,
20 Mr. McDowell, clearly, but I think it is perhaps useful
21 to just ask where had the Commission got the
22 Superintendent Cunningham report at that stage?
23 Because this was day 5?

11:28

24 MR. McDOWELL: Well, you will recall, Judge, that
25 Ms. Ryan said that she had submitted both the notes and
26 the -- in her evidence here -- and the document --
27 sorry, the report document on the morning of the 18th.

11:28

28 CHAIRMAN: Yes, on the Monday.

29 MR. McDOWELL: But then, you do have to recall that

1 Mr. Justice O'Higgins said that there was a document
2 missing, and it's not quite clear to Sergeant McCabe's
3 legal team which document was missing on that day, and
4 which document they didn't have access to on that day.
5 But it is very clear that on day 4 the documents hadn't 11:29
6 been generally distributed among parties at the
7 Commission, because --

8 CHAIRMAN: Yes. Well, I must say I tend to wonder
9 about that, Mr. McDowell, if you wouldn't mind me
10 trying to tease this out. I mean the thought -- the 11:29
11 thought that, for instance, I don't know, Mr. McCann's
12 solicitor would approach Mr. Kavanagh and hand in a
13 document for me and it wouldn't be given to everybody
14 else in the room, is just -- well, you could use all
15 kinds of phrases like appalling vista, but I am sure 11:29
16 anyone else who would hear would be jumping up and down
17 and saying well, if you are going to see it why can't I
18 see it? And also, it's completely contrary to any
19 rules of procedure that are operated in any court
20 situation that I get a document but that, for instance, 11:30
21 the parties don't. I mean, it becomes kind of secret
22 justice. So if it was handed in by Annmarie Ryan on
23 the Monday, surely it was distributed to everybody?

24 MR. McDOWELL: Well it wasn't, Judge, because the -- I
25 just go back, Judge, to what happened -- could I bring 11:30
26 the -- could I bring you back, Judge, to what
27 happened -- could I just bring you back to page 12 of
28 that submission, Judge.

29 CHAIRMAN: Yes.

1 MR. MCDOWELL: Halfway down the page:

2
3 "On this day, when Superintendent Cunningham was
4 recalled, it became apparent, and this is noted in the
5 transcript, day 4 on page 31, that his report of the 11:31
6 Mullingar meeting attended by himself, Sergeant McCabe
7 and Sergeant Martin, had not been circulated or
8 furnished to Sergeant McCabe's legal team. Mr. Smyth
9 states --"

10
11 Now, it's Mr. Smyth who states this. 11:31

12
13 "-- at pages 31 and 32 that the report and the signed
14 notes would be given to Sergeant McCabe's legal team at
15 that point." 11:31

16
17 And that can be checked, Judge, it's there.

18 CHAIRMAN: No, I am aware of that, but I mean,
19 Mr. McDowell, it makes no sense to me that something
20 would be handed in, for instance, here to me, and not 11:31
21 be handed to everybody else in the room. It doesn't --
22 it makes no sense.

23 MR. MCDOWELL: I do ask, I do ask this Tribunal to look
24 at what happened the previous day, because Mr. Justice
25 O'Higgins said, expressed extreme annoyance that one of 11:31
26 the documents on which this Chief State Solicitor's
27 letter relied had not been handed in. And I have never
28 been in a position, Judge, to work out whether it was
29 the report or whether it was purely the notes that

1 weren't handed in. I don't know, Judge.

2 CHAIRMAN: Again, one --

3 MR. MCDOWELL: I am not trying to give evidence. I am
4 saying it's a mystery which appears from the
5 transcript, Judge. 11:32

6 CHAIRMAN: No, I appreciate that. But I mean, another
7 thing that has to be borne in mind is, Mr. McDowell,
8 even in the best organised court cases, such as
9 supposedly in the Commercial Court, or as one of my
10 colleagues has referred to it, the snob court, but it's 11:32
11 not of course, it's a court that is attempting to do
12 its very best with big cases, I mean it can get like
13 confetti at times with things raining down from
14 everywhere.

15 MR. MCDOWELL: I accept that. But it's clear that 11:32
16 Superintendent Cunningham was stood down on day 4
17 precisely because the documents which he was about to
18 be examined in relation to had not, even at that point,
19 been given to me or the other legal representatives
20 representing Sergeant McCabe. 11:33

21 CHAIRMAN: And in that regard does it make any
22 difference that Superintendent Cunningham said that he
23 made no attempt to conceal it and give it to Annmarie
24 Ryan?

25 MR. MCDOWELL: He said he did it, but only that morning 11:33
26 I think.

27 CHAIRMAN: Yes. No, he did, only that morning and he
28 was rushed, she was rushed, everyone he was rushed.

29 MR. MCDOWELL: I accept that. I am just -- I am not

1 trying to be critical of anybody in this respect. What
2 I am merely saying is that the sequence of events was
3 that Superintendent Cunningham was stood down as a
4 witness the following day, the 19th, because his
5 documents hadn't been circulated to the parties and it 11:33
6 was acknowledged by Mr. Smyth that they would now be
7 circulated to the parties. And I can put it no further
8 than that, Judge.

9 CHAIRMAN: No, I appreciate that. But that is
10 circulated by the Tribunal, which is a different thing 11:34
11 to someone coming up and apparently having a private
12 interaction with the judge, which just doesn't happen.

13 MR. McDOWELL: I accept that.

14 CHAIRMAN: It doesn't happen in this country,
15 Mr. McDowell. 11:34

16 MR. McDOWELL: I know that counsel sometimes
17 incorrectly says I haven't seen this and it turns out
18 it's sitting in front of them. That does happen. I
19 fully accept that, Judge. But on this occasion, if
20 this had happened, one would expect that the transcript 11:34
21 would have shown Mr. McDowell got this yesterday.

22 CHAIRMAN: Maybe so. But I mean, I certainly always
23 told people just don't hand in original documents to me
24 because they will be gone.

25 MR. McDOWELL: Well, Judge, all I can say is that it's 11:34
26 very clear, it's very clear that if the report in
27 question was available to the legal team representing
28 the Commissioner, they should have seen, before they
29 did the submissions on the 11th June, which is a

1 fortnight before day 5, that the error which this
2 Tribunal considers was an obvious error, they should
3 have been -- they should have cottoned on to it.
4 CHAIRMAN: I appreciate it. Similarly somebody should
5 have cottoned on to the fact that an inspector was 11:35
6 apparently investigating a chief superintendent which
7 is a ludicrous proposition. But anyway. Perhaps more
8 than one person perhaps should have seen that.
9 MR. McDOWELL: All I am saying, Judge, they were only
10 distributed on 19th of June and Mr. Gillane said 11:35
11 that -- or sorry, 19th May. And Mr. Gillane said, very
12 clearly, that he wanted to -- the witness stood down
13 because he wanted -- because certain matters had arisen
14 in relation to the documentation.
15 CHAIRMAN: Okay. Thanks. You were on, was it 16? the 11:36
16 charge of disaffection, you have just finished.
17 MR. McDOWELL: Sorry, yes.
18 CHAIRMAN: And you were going on to --
19 MR. McDOWELL: I am saying that on day 5, Judge,
20 Mr. Justice O'Higgins said, opened the proceedings by 11:36
21 expressing his doubts and he used the phrase "at first
22 blush" the Commission had concerns about the
23 correctness of matters stated in the CSSO letter of
24 18th May 2015 in the light of the report made by
25 Superintendent Cunningham of the meeting in Mullingar 11:36
26 with Sergeant McCabe and the transcript of the
27 tape-recording made by Sergeant McCabe at that meeting.
28
29 So at that stage Mr. Justice O'Higgins is saying, at

1 first blush, I have concerns about these matters which
2 I want to draw to the Commissioner's legal team's
3 attention. And then he set out the basis of the
4 Commission's concerns to Mr. Smyth. And again, Judge,
5 I am not making a personal criticism but Mr. Smyth at 11:37
6 that stage, rather than accepting the points being made
7 by the Chairman or addressing them, he took issue with
8 the Chairman on the basis that what the Chairman's
9 remarks that he had just heard, were findings and
10 Mr. Justice O'Higgins -- which had been made without 11:37
11 hearing Superintendent Cunningham, and Mr. Justice
12 O'Higgins made it clear to him they weren't findings,
13 they were simply expressions of concerns at first
14 blush. And he, Mr. Smyth then went on to say that he
15 wanted Superintendent Cunningham recalled to deal with 11:37
16 the transcript, which he claimed had been illegally
17 recorded, and Mr. Justice O'Higgins said he was not
18 going to determine the legality or illegality of a
19 recording in those circumstances. And then
20 Superintendent Cunningham was recalled and examined in 11:38
21 relation to the transcript. And eventually
22 Superintendent Cunningham accepted that it was wrong to
23 suggest that Sergeant McCabe had admitted making his
24 complaints about Superintendent Clancy as part of an
25 attempt to force Superintendent Clancy to convey the 11:38
26 DPP's directions to him and to the D family
27 CHAIRMAN: I am just wondering, why do you say
28 eventually?
29 MR. MCDOWELL: Eventually?

1 CHAIRMAN: Yes, I mean, the man had handed in the
2 letter saying precisely that and the notes in relation
3 of Annmarie Ryan in relation to this whole matter
4 clearly say complained to Superintendent Clancy.
5 MR. MCDOWELL: I am talking about Mr. Smyth. No, if 11:38
6 you look, Judge, I am not going to open the transcript
7 to you now, but if you look at the transcript,
8 Mr. O'Higgins has said there seems to be a mistake
9 here, and Mr. Smyth says -- Mr. Smyth doesn't say oh,
10 yes, there is a mistake, I am sorry about that or I 11:38
11 will have to look about that. He says firstly you have
12 made a finding against me. Mr. Justice O'Higgins says
13 I haven't made any findings. And he then, then there
14 is a discussion about the legality or illegality of the
15 tape-recording and he says he wants to call 11:39
16 Superintendent Cunningham to deal with what is on the
17 tape. And Superintendent Cunningham is asked, and I
18 asked the Tribunal, I am not going to -- it will take
19 about 20 minutes to do it -- but to look precisely at
20 the process whereby he is made to concentrate on this 11:39
21 error and eventually, he eventually understands the
22 point that is being made to him.
23 CHAIRMAN: Yes. I think that is a fair way of putting
24 it because there was a certain lack -- well, I mean,
25 God knows, the facts were flying about -- 11:39
26 MR. MCDOWELL: I don't think Superintendent Cunningham
27 really was alert to the distinction that was being
28 drawn at that stage.
29 CHAIRMAN: Yes.

1 MR. MCDOWELL: And Mr. Smyth finally conceded after an
2 hour's discussion that it had been established that the
3 contents of paragraph 19 were incorrect. That was the
4 first time that he accepted that his letter was
5 defective, Judge. And the Chairman's understanding of 11:40
6 the case that had been made up to that point was set
7 out on day 5 at page 49, and Mr. Smyth said in
8 response:

9
10 "The question was, that was, I think superintendent 11:40
11 puts it eloquently, indeed the differences between the
12 words "to" and "against", and certainly I put the
13 question, I used the word "against" and I have to
14 accept that the report was made to Superintendent
15 Clancy to force him to allow Sergeant McCabe to have 11:40
16 the full directions."

17
18 Now Mr. Smyth persists with that view of the matter and
19 the Chairman said:

20 11:40
21 "We are not dealing with anything to do with the D
22 family affair in this inquiry. Your case can only be
23 in relation to matters covered by this investigation
24 and the D family is not a matter within the remit.
25 Mr. Smyth: That is absolutely correct, but it's in the 11:41
26 context of motivation or credibility as you say, in
27 relation to the complaints made by Sergeant McCabe,
28 that is why it was raised."
29

1 And we point out at no point on day 5 were the other
2 major errors in the Chief State solicitor's letter
3 formally acknowledged or it's -- and I don't want to
4 use the term derogatory, but it's close in some
5 respects to nonsense, I think it's fair to say, the 11:41
6 Chief State solicitor's letter, when viewed clinically
7 and in the light of day in many respects. But at no
8 point was the letter formally acknowledged as being
9 seriously wrong in a series of respects, and nor was
10 the charge of disaffection withdrawn. And it's also 11:41
11 the case, Judge, that Mr. Justice O'Higgins had asked
12 Mr. Smyth about his challenge to Sergeant McCabe's bona
13 fides, his integrity and his credibility, and at no
14 point on that day was -- were those challenges
15 withdrawn, and we say that the general permission which 11:42
16 was given to the Commissioner's counsel on day 3 to
17 establish that Sergeant McCabe was motivated by a
18 grievance against An Garda Síochána on the grounds that
19 they provide -- that they have provided in writing,
20 that general licence, was, we consider, spent once the 11:42
21 grounds that he had furnished were effectively
22 abandoned. And at no point thereafter was any new or
23 different factual basis for a motivation or motivation
24 or different motivation from that charged in the Chief
25 State solicitor's letter ever advanced, nor was 11:42
26 permission sought from the Commission to sustain any
27 attack on the motivation of Sergeant McCabe. Instead,
28 the unfounded submissions made in the Chief State
29 solicitor's solicitor letter in relation to his

1 integrity, good faith, ill motivation and general lack
2 of credibility were left in some form of limbo,
3 although now completely unsupported by any statement of
4 facts as had been demanded by the Commission for their
5 making in the first place. 11:43

6
7 And we go on to say, Sergeant McCabe was thereafter
8 repeatedly the subject of cross-examination in
9 subsequent modules to the effect that he was personally
10 liable, one, for the instances of substandard policing 11:43
11 complained of by him caused by his failure to discharge
12 his duties as sergeant in charge properly, and
13 secondly, in relation to his own alleged involvement in
14 individual cases, such as releasing prisoners, losing a
15 computer, directing Mary Lynch not to attend court and 11:43
16 other matters.

17
18 Now, then we come, Judge, to what we say are relevant
19 issues to consider in interpreting the term of
20 reference (e), and there are three phrases that we ask 11:44
21 this Tribunal to deal with:

22
23 Firstly, the phrase "discredit";
24 Secondly, the phrase "unjustified grounds";
25 And thirdly, the phrase "inappropriately relied on". 11:44
26

27 And can I say, Judge, that arising out of the
28 questions, the eleven questions that you posed on the
29 last occasion in relation to cross-examination as to

1 credit and credibility, I researched the -- some of the
2 text that Mr. McGuinness has dealt with in some of the
3 case law on which he has relied and I have no dispute
4 with him in relation to the entitlement of people to
5 challenge, A, the credit in respect of an individual, 11:44
6 or B, their credibility in relation to a specific
7 issue, or C, their credibility by virtue of their
8 character, ill-motivation or hidden agendas or other
9 things of that kind. And I think the case law, insofar
10 as it is relevant to all of this, does permit great 11:45
11 latitude to somebody cross-examining somebody else or
12 seeking to impugn their evidence or discredit their
13 evidence.
14 CHAIRMAN: Yes, I agree with you, Mr. McDowell, but
15 there has to be a limit. 11:45
16 MR. MCDOWELL: Yes, exactly.
17 CHAIRMAN: I mean, things get off the rails very
18 quickly and, as some people say, things take on a life
19 of their own, and court cases should never do that.
20 MR. MCDOWELL: I fully accept that, Judge, and 11:45
21 obviously if -- if there can be substantial arguments
22 as to cross-examination as to credit and rebuttal --
23 evidence in rebuttal, virtually every tribunal and
24 court case would be snowed -- would be trapped in the
25 snows, effectively, of irrelevance. 11:46
26 CHAIRMAN: It's happened, it has happened.
27 MR. MCDOWELL: Not involving me, I hope.
28 CHAIRMAN: I have no idea.
29 MR. MCDOWELL: But I am making the point that I accept

1 the analysis put forward by Mr. McGuinness. And I
2 should say in that context, Judge, that, I mean, those
3 particular authorities to which he refers largely deal
4 with challenges, either judicial review or declaratory
5 challenges, in respect of tribunals, and I am not 11:46
6 suggesting, and it is not my purpose here to say that,
7 it's not my submission that anything that happened at
8 the O'Higgins Commission rendered it subject to
9 judicial review or was impermissible to such an extent
10 as would invalidate or call into question the findings 11:46
11 of the O'Higgins Commission, and, in that sense,
12 unjustified grounds and inappropriate reliance, I'm not
13 suggesting for one minute that it was illegal to do
14 what was done to my client, to such an extent that the
15 O'Higgins Commission was thereby invalidated, I am not 11:47
16 making that case.

17 CHAIRMAN: Yes. I don't mean to interrupt you,
18 Mr. McDowell, you obviously have more to get through,
19 but it would be completely wrong as well. I mean,
20 there was a case some years ago in relation to bank 11:47
21 accounts, where, apparently, the person making all the
22 allegations was found to be disaffected. I am not
23 going to mention any names, because we have had a
24 number of instances of bank accounts and foreign bank
25 accounts, et cetera. But if you don't explore that, 11:47
26 you are completely letting your client down. And if a
27 court was to rule it out unjustifiably, it would also
28 be letting the administration of justice down, which is
29 hard enough already.

1 MR. MCDOWELL: what we say is clearly the intended
2 purpose of the Chief State's solicitor letter of 18th
3 May was to discredit Sergeant McCabe by alleging his
4 complaints of bad policing being considered by the
5 O'Higgins Commission had been made in bad faith and by 11:48
6 an improper and ulterior motive. And then we say,
7 Judge, it was of course open to the Commissioner or any
8 witness to challenge Sergeant McCabe's credibility on
9 issues of fact by alleging that, for instance, his
10 evidence was unreliable or untruthful or exaggerated in 11:48
11 any instance and on any issue. And we also
12 acknowledge, Judge, that it was open to the
13 Commissioner if there were grounds, and I emphasise
14 that phrase, to seek to impugn Sergeant McCabe's
15 general credibility as a witness by establishing that 11:48
16 he was ill-motivated, disaffected or acting in bad
17 faith for an ulterior and/or improper motive, but any
18 such general attack had to be justified by reference to
19 the facts in issue in each relevant module, and I say
20 there also, if it was to be justifiable, it had to be 11:49
21 done on the basis of good grounds. And although, in
22 her evidence, former Commissioner O'Sullivan attempted
23 to raise doubts as to whether she, in fact,
24 subjectively intended that any such attack would be
25 generally made on Sergeant McCabe's character, 11:49
26 motivation, integrity or reliability, or his
27 credibility in respect of particular issues of fact
28 which required to be determined at the Commission,
29 there can be no doubt that the strategy evidenced by

1 the CSSO letter, and as confirmed in the written
2 submissions of the 11th May, was a strategy to
3 generally discredit Sergeant McCabe as a witness and to
4 impute to him ill-motivation and general disaffection
5 with a view to undermining his evidence. That was the 11:49
6 purpose of what was being done. And even if it was
7 done, Judge, on the mistaken "to" and "against" basis,
8 that was the purpose, that was the underlying strategy
9 which those letters -- which the letter and the
10 submission were furnished to sustain. 11:50

11
12 Now, we also say that clearly her representative,
13 acting as her eyes and the ears at the Commission,
14 could have had no doubt and mistake as to what was
15 being ostensibly deployed on her instructions. But 11:50
16 what we say is that it cannot be doubted that what was
17 done on Friday 15th May, Monday 18th May and Tuesday
18 19th May was done to discredit Sergeant McCabe.

19
20 And the next question, we say, is the question of 11:50
21 whether there were unjustified grounds. And we say
22 that it's abundantly clear that unjustified grounds
23 were used on the 15th May and -- during the period the
24 15th May to the 24th June to sustain the attempt to
25 discredit Sergeant McCabe. In effect, the 11:51
26 Commissioner's legal team were forced to concede that
27 the thesis laid out in their letter of the 18th May was
28 entirely false and without substance. But bearing in
29 mind that the ground rules of the Commission required

1 that any criticism of a witness would only be conducted
2 with the express prior consent of the Commission,
3 claims that Sergeant McCabe lacked integrity or lacked
4 credibility through ill-motivation or was generally
5 unworthy of belief, which the Chairman's submission of 11:51
6 the Commissioner's case on these issues clearly
7 demonstrates was his understanding of the
8 Commissioner's instruction, totally lacked any
9 plausible or stateable basis after the 24th June 2015,
10 when, with some considerable resistance, the 11:51
11 fundamental errors in the Chief State Solicitor's
12 Office were demonstrated beyond contradiction.
13 However, as noted, no retraction of any kind was made
14 until the date in November 2015, when it was claimed
15 that the attack on Sergeant McCabe's integrity was made 11:52
16 in error and the attack on his motivation was
17 somehow -- but the attack on his motivation was somehow
18 maintained, as was the attack on his general
19 credibility.

20
21 Now, in addition to that, Judge, there were sustained
22 attempts to lay responsibility on Sergeant McCabe as
23 member-in-charge, because from the very first day of
24 the Commission until the very last, a sustained attempt
25 was made to implicate Sergeant McCabe as being 11:52
26 personally responsible for the instances of poor
27 policing, which was on the basis that it was his
28 responsibility, as sergeant in charge, to -- of the
29 station, to maintain proper policing standards, and

1 this strategy was never abandoned and it -- we say it
2 implicitly suggested bad faith against Sergeant McCabe
3 in that he was portrayed as somebody who wished to
4 systematically blame others unfairly for his own
5 failings as sergeant in charge at Bailieboro. Now, the 11:53
6 transcripts of the O'Higgins Commission demonstrates
7 that in virtually every module, an attempt was made on
8 behalf of the Commissioner to establish personal
9 responsibility on the part of sergeant in charge of the
10 station for the supervision of all members of equal or 11:53
11 lower rank attached to that station, with a view to
12 attaching responsibility to Sergeant McCabe for each of
13 the shortcomings of policing being considered in that
14 module.

15
16 And the O'Higgins Commission report, in the end, didn't
17 uphold these attempts to impose responsibility on
18 Sergeant McCabe to prevent or deter poor standards of
19 policing in respect of the particular instances of poor
20 policing which Sergeant McCabe had -- about which he 11:53
21 had made complaint.

22
23 Now, in addition do that, then, Judge, there were the
24 efforts to implicate Sergeant McCabe as a wrongdoer.
25 In particular cases, it was -- untrue claims were made 11:54
26 that he was personally involved in decisions or
27 transactions in a discreditable manner. Now, examples
28 of this strategy are to be found in the attempt when he
29 drew to the -- one of the issues was the manner in

1 which Jerry McGrath had been released in the Mary Lynch
2 assault case, and, in that case, an attempt was made to
3 involve Sergeant McCabe by tendering evidence that
4 suggested that he was the person who had directed Mary
5 Lynch not to attend at the District Court to give 11:54
6 evidence when sentencing of Mr. McGrath was taking
7 place. That was found to be untrue. Likewise, in
8 relation to the loss of the Fr. Molloy computer, an
9 attempt was made not merely -- sorry, an attempt was
10 made, in the face of the dropping of the disciplinary 11:55
11 charge, nonetheless to adduce evidence suggestive that
12 Sergeant McCabe was the person responsible for the loss
13 of that computer. And in the third matter, where the
14 young lady was - in Cootehill I think it was, Judge -
15 assaulted and dragged up a laneway, or whatever, quite 11:55
16 apart from whether Sergeant McCabe was right or wrong
17 to surmise that that was an attempted rape or an
18 attempted sexual assault, quite apart from that, he
19 was -- and two of his colleagues gave evidence that he
20 was the person who directed the release of the alleged 11:55
21 perpetrator after twenty minutes' interrogation. And I
22 just make the point there, Judge, that if you look at
23 the transcript again, you will see that when he denied
24 that, the proposition was put to him that he was -- in
25 effect, that he was accusing his fellow gardaí of 11:56
26 perjury insofar as they said that he was the man who
27 had directed that release.

28
29 And at page 21, and we make the point, Judge, that

1 there is no indication that the Commissioner's legal
2 team took an equally strong approach against any other
3 witness or that they attempted to establish what turned
4 out to be unfounded allegations of fault against any
5 other witness. The fire power, if I may put it this 11:56
6 way, Judge, was very much directed at Sergeant McCabe
7 CHAIRMAN: well, I am just wondering, Mr. McDowell,
8 about, let's suppose one garda says about another, you
9 were the exhibits officer. Now, I am not -- this is a
10 hypothetical example. And says, okay, there was a 11:57
11 lovely computer which happens to contain child
12 pornography images and it is seized from a person in
13 the centre of Dublin who is running a worldwide
14 pornography --
15 MR. MCDOWELL: Network. 11:57
16 CHAIRMAN: -- against children network. But we know
17 you have children at school and they needed a computer,
18 and now, even though you are the exhibits officer, it's
19 disappeared. It's a very serious charge. So if the
20 person who is the garda against whom that charge is 11:57
21 made counters and says, well, I actually wasn't the
22 exhibits officer, it was you, and I am not saying you
23 pinched the computer, but what I am saying is, your
24 custody of the exhibits was so chaotic that it simply
25 couldn't be found and it could have been mixed in with 11:57
26 a general storeroom of Garda computers waiting for use.
27 MR. MCDOWELL: Went astray, Judge.
28 CHAIRMAN: Yes, from the -- or stray, as they say. But
29 why is that a problem?

1 MR. MCDOWELL: Well, Judge --

2 CHAIRMAN: So A accuses B of something, and B says,
3 well, no, it's not my responsibility -- it sounds like
4 a row between children really, but of course it's much
5 more serious. 11:58

6 MR. MCDOWELL: Well, in this particular case, Judge, I
7 mean, I would accept that proposition, that, I mean,
8 unless there are very good evidence depositories and
9 proper record-keeping, events of that kind could easily
10 happen. But in this particular case, the Tribunal will 11:58
11 remember that at a critical point -- or, sorry, at a
12 point where Sergeant McCabe was making his complaints
13 about penalty points and the abuse of the Pulse system,
14 this was suddenly launched against him on a
15 disciplinary basis, on the basis, as it later turned 11:58
16 out to be, of documents which had been altered to show
17 that he had received these matters into his own
18 custody, and I don't want to digress too much on that,
19 Judge.

20 CHAIRMAN: No, no. It's been mentioned before, yes. 11:59

21 MR. MCDOWELL: So Mr. Justice O'Higgins expressed
22 surprise that Sergeant McCabe was made the object of
23 disciplinary action, given that it was stated by the
24 people involved that disciplinary action was taken as a
25 matter of last resort. In any event, it was serious 11:59
26 from Sergeant McCabe's point of view, and I just ask
27 the court to remember that -- or, sorry, the Tribunal
28 to remember that Sergeant McCabe was making the point
29 that the loss of that computer was a probable reason as

1 to why a recommendation was made by the investigating
2 officers to go for a summary disposal of the case
3 against Fr. Molloy in circumstances where it was a very
4 serious case. In any event, I don't want to spend too
5 much time on that. But just to say that from the point 12:00
6 of view of Sergeant McCabe, the institution of a
7 disciplinary proceeding against him for loss of a
8 computer in a child sexual abuse case and child
9 grooming case was a very serious development and that's
10 the -- that's -- it was not something -- it took a 12:00
11 year-and-a-half to dispose -- or, sorry, 16 months to
12 dispose of the disciplinary case, and then only when it
13 became apparent that the documents suggesting that
14 Sergeant McCabe was the person responsible for the loss
15 were proven to be falsified and original correct 12:01
16 versions of the relevant documents were actually found
17 during the course of the O'Higgins Commission to exist
18 in Bailieboro Garda Station, which would have
19 exonerated Sergeant McCabe.

20
21 Now, the third point, Judge, in the terms of reference
22 (e) is the phrase "unjustifiably relied on", because
23 our submission is that no justification has been
24 advanced in respect of any attempt to impugn Sergeant
25 McCabe's integrity or to undermine his character or 12:02
26 credibility or to attack his general motivation in
27 making his complaints about low standards in policing
28 by the instances -- in the instances investigated by
29 the O'Higgins Commission. Now, we then go on to say,

1 Judge, that in fairness to my colleague, Mr. Smyth, on
2 day 48 at page 110, he apologised to Sergeant McCabe
3 for some of the errors that had been made in relation
4 to the Chief State solicitor's office letter, even
5 though he was not accepting that these errors were made 12:02
6 by counsel. And I say that that acknowledgement was in
7 stark contrast to the former Commissioner O'Sullivan,
8 who refused to make any apology in respect of the same
9 matter to Sergeant McCabe here, and that failure on the
10 part of Commissioner O'Sullivan also was in stark 12:02
11 contrast to the willingness of Sergeant McCabe, on a
12 number of occasions, to accept in his evidence to the
13 O'Higgins Commission that he'd made a number of
14 mistakes, some of them serious, and unjustified
15 assertions, some of them serious, and his willingness 12:03
16 to apologise and retract them when he was confronted
17 with them when giving evidence.

18
19 Now, I just want then, Judge, to go on to Ms. Annmarie
20 Ryan's evidence, if I may. She -- and again, I want to 12:03
21 make it quite clear, Judge, that nothing I am saying
22 about her in any sense is intended to detract from her
23 competence, her professionalism and her experience as a
24 law officer of the State.

25
26 She stated that her primary concern was to speak to the
27 Commissioner on the afternoon of Friday 15th May 2015.
28 She recalled in her testimony Chief Superintendent
29 Healy making a phone call for that purpose to the

1 Commissioner, whispering about an immediate
2 consultation. She recalled that he shook his head as
3 if to say no. She recalled, on page 106, speaking to
4 Mr. Smyth about trying to have a consultation with the
5 Commissioner. At page 121 of her transcript, she 12:04
6 indicated that she wanted such a consultation and that
7 her counsel had indicated that they would be available
8 to have a consultation with the Commissioner that
9 weekend. And I think Mr. Smyth said he would have
10 travelled the 50 miles or so to Dublin to attend it, if 12:04
11 required.

12
13 She recollects that Chief Superintendent Fergus Healy
14 told her that the Commissioner was busy, engaged or had
15 conferences or that she was out of -- she was busy for 12:04
16 the weekend. And we do say it is truly remarkable that
17 an experienced and competent solicitor, in the service
18 of the State, wasn't facilitated by the former
19 Commissioner with a consultation, and it's equally
20 remarkable that while Ms. Ryan was seeking an immediate 12:05
21 consultation with the Commissioner, that Commissioner
22 O'Sullivan was later to testify here that she was
23 completely available for such consultation, would have
24 gladly attended one immediately if requested to do so,
25 because Ms. Ryan was left by Chief Superintendent Healy 12:05
26 with the very clear impression that such a consultation
27 was impossible due to the Commissioner's commitments on
28 the 15th May and over the subsequent weekend. Chief
29 Superintendent Healy in no way denied that he had asked

1 for such a consultation and that he had told Ms. Ryan
2 the Commissioner was not available to have one. And we
3 make the point that it's extremely unsatisfactory that
4 counsel for the Commissioner, who also represented
5 Superintendent Healy at this Tribunal, at no point 12:05
6 intimated when Ms. Ryan or Mr. -- or Chief
7 Superintendent Healy were giving evidence, that the
8 Commissioner would state that she was completely
9 available for such a consultation and would have
10 attended it if she had been asked to do so. And by the 12:05
11 time that evidence was given by former Commissioner
12 O'Sullivan, both Ms. Ryan and Chief Superintendent
13 Healy had completed their evidence. And Commissioner
14 O'Sullivan seemed to be at a loss to explain how, in
15 these circumstances, Chief Superintendent Healy had 12:06
16 conveyed to Ms. Ryan that she was unavailable for a
17 consultation. And the term "chasm" was used the other
18 day, Judge, but I say that there is a chasm here
19 because the evidence of Commissioner O'Sullivan and
20 Chief Superintendent Healy simply can't be reconciled 12:06
21 on that issue. And it's equally submitted that, in
22 view of the evidence that was later to be given by
23 Commissioner O'Sullivan on the issue, it was incumbent
24 on her representatives to put her claim that she was
25 ready and willing to attend such a consultation at all 12:06
26 times, to Ms. Ryan, in fairness to her, and to Chief
27 Superintendent Healy, who was the intermediary.
28 Failure to do so has resulted in what I say is an
29 inexplicable query over whether Commissioner O'Sullivan

1 or Chief Superintendent Healy is to be relied on in
2 relation to this matter. It's hardly a matter, Judge,
3 on which it is just a matter of failure of memory,
4 because you have explicit evidence of Ms. Ryan saying
5 that she remembers Chief Superintendent Healy 12:07
6 whispering about this matter on the phone to the
7 Commissioner and shaking his head and indicating there
8 was no availability, and, on the other hand, the former
9 Commissioner telling us here in the witness-box that
10 she would have gladly gone down to the Distillery 12:07
11 Building that afternoon if she had been asked. These
12 two can't be reconciled.

13 CHAIRMAN: If you had a transcript reference for that,
14 it would help. I will search it, in any event.

15 MR. McDOWELL: Judge, day -- 12:07

16 CHAIRMAN: In the context of whispering.

17 MR. McDOWELL: Sorry, I will find the whispering
18 reference, Judge.

19 CHAIRMAN: You can carry on, Mr. McDowell.

20 MR. McDOWELL: Day 46, Judge, of -- at pages 117, 118, 12:07
21 119 and 120, Judge, is where this is dealt with.

22 CHAIRMAN: Okay. Thank you.

23 MR. McDOWELL: Now, it's submitted that either Chief
24 Superintendent Healy never conveyed Ms. Ryan's request
25 for an immediate consultation to Commissioner 12:08
26 O'Sullivan or else that Commissioner O'Sullivan's
27 evidence on the matter is simply not reliable. And in
28 the latter case, it would appear that Commissioner
29 O'Sullivan's non-availability for a consultation,

1 which, if her evidence is not reliable, was contrived,
2 and that she was satisfied to maintain a distance
3 between her and her lawyers in relation to the issue
4 once she had obtained what Chief Superintendent Healy
5 referred to as her letter of comfort in respect of 12:08
6 counsel's advices, that it was necessary to raise
7 Sergeant McCabe's dissatisfaction with the failure to
8 inform the D family of the DPP's direction in relation
9 to the course of proceedings in Module 1 of the
10 O'Higgins Commission. 12:09

11
12 And we submit that it's hard to see how Chief
13 Superintendent Healy would have had any motive of his
14 own to misrepresent the Commissioner's availability for
15 a consultation to Ms. Ryan or to misinform Ms. Ryan 12:09
16 about the availability of the Commissioner for such a
17 consultation. Because for a certainty, Ms. Ryan was
18 clear that she was anxious to establish contact with
19 the Commissioner and to ensure that the Commissioner
20 knew what was happening at the Commission, and it was 12:09
21 partly with that in mind that the Tribunal will recall
22 that she contacted Mr. Ruane later -- late on Saturday
23 the 16th May, after 11 o'clock I think it was, to
24 discuss the matter with him. And she had also made
25 contact with Mr. Dreehan of the Attorney General's 12:09
26 office and with her own superiors in the Chief State
27 Solicitor's Office, to inform her -- them of her
28 concern. Yes, Judge, Ms. Ryan, also at page 137 on day
29 41, stated:

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"I believe we were told that the Commissioner does not require a consultation."

That could have been in relation to an earlier stage. 12:10
No, disregard that, Judge. That may not be the correct time period.

Now, we then go on to say, Judge, it's equally 12:10
difficult to understand how, in this context, the Commissioner came to meet Mr. Smyth on the following Thursday, that is the 21st May, at Garda Headquarters, without the presence of Ms. Ryan or her instructing solicitor. The Commissioner's statement to the Tribunal makes no reference to this meeting. The 12:10
evidence given by Mr. Smyth, Chief Superintendent Healy and the Commissioner in relation to the genesis, purpose and happenings of that meeting are confused and contradictory. It was variously described as a simple meet-and-greet occasion, a casual occasion, a brief 12:11
occasion, but, on the other hand, by Chief Superintendent Healy as an occasion on which the issue of Sergeant McCabe's allegations of corruption were discussed between those in attendance. And bearing in mind that the Commissioner had become aware on Monday 12:11
the 18th May and/or the following morning that Sergeant McCabe had relinquished his position in charge of Mullingar traffic unit arising out of what happened on the 15th and the 18th May at the O'Higgins Commission,

1 it's respectfully submitted that the Commissioner must
2 have been aware that a controversy had arisen that day
3 and must have wondered how it was to be resolved, and
4 her evidence to the effect that nobody had mentioned to
5 her at any point that the Commission had requested a 12:11
6 written statement of grounds to question Sergeant
7 McCabe's motivation seems inexplicable in the light of
8 the sequence of events that had transpired. Likewise,
9 no reasonable excuse has been made or given as to why
10 Chief Superintendent Healy would not have informed the 12:12
11 Commissioner of the developments that had taken place
12 at the Commission during the days prior to the meeting
13 of the 21st May at Garda Headquarters. And if he had,
14 Judge, surely he would have mentioned: by the way,
15 Ms. Ryan was urgently seeking to have a consultation 12:12
16 with you in relation to these matters. But that didn't
17 happen and there is no explanation as to why that
18 happened.

19 CHAIRMAN: well, yes, but how does it help me to say
20 that the Commissioner relied on unjustified grounds? 12:12

21 MR. MCDOWELL: No, what --

22 CHAIRMAN: I mean, it may be stupid, it may be
23 discourteous to say --

24 MR. MCDOWELL: I am coming to the relevance of this,
25 Judge. This is relevant to the proposition, because it 12:12
26 was one -- it was -- and it was one of the issues which
27 was canvassed in your eleven questions, Judge, you
28 know, was Ms. O'Sullivan personally responsible for
29 what happened, did she have any knowledge of these

1 matters. And it's relevant to the question of her
2 exercising her responsibility once she had given
3 counsel the go-ahead to pursue their strategy in
4 respect of Sergeant McCabe on foot of the letter of
5 comfort. The issue is, was she distancing herself from 12:13
6 the process on the basis of having the letter of
7 comfort was -- which was, in effect, an insurance
8 policy on the -- that she could -- she'd rely on to say
9 that she acted simply on counsel's advice.

10
11 Now, then, Judge, I come on to the evidence in relation 12:13
12 to the Commissioner's contact with the Department of
13 Justice. We say that these contacts raise serious
14 questions of credibility. The Commissioner's
15 recollection of her dealings with the Department was, 12:14
16 in effect, negligible. Her recollection in relation to
17 her wish to have the matter adjourned for further
18 consideration as to how her counsel should proceed is
19 likewise defective. It's submitted that given that it
20 has been established that Commissioner O'Sullivan spoke 12:14
21 to Noel Waters, the Acting Secretary General of the
22 Department, during the very time when she was
23 considering her options and was receiving advice on the
24 situation that obtained that afternoon at the O'Higgins
25 Commission, the 15th May, and that she had, that day, a 12:14
26 further conversation with Mr. Ken O'Leary of the
27 Department of Justice in which she -- he clearly
28 recalled her seeking his advice or opinion in respect
29 of the issues that had arisen, and it's strange indeed

1 that it's claimed that these issues were never
2 discussed with her in the course of the six days
3 between Friday the 15th and Thursday the 21st May 2015,
4 or even in the interaction between herself and
5 Mr. Smyth on that day. None of these issues were again 12:15
6 revisited, and that she effectively remained in the
7 dark as to what had taken place during those days. And
8 we say that there is no good reason why she should have
9 been left in the dark or why she should have opted to
10 remain in the dark in respect of those issues, 12:15
11 especially when an experienced and competent Chief
12 State solicitor's legal representative, Ms. Ryan, was
13 urgently seeking a face-to-face consultation with her
14 to consider the situation which had arisen.

15
16 Judge, Ms. Ward tells me that on page 104 of day 43, at
17 question 16, the question is put to her:

18
19 "You were very anxious that Superintendent Healy should
20 arrange for you to have an immediate consultation at 12:16
21 which you would be present with the Commissioner?
22 A. Well, a consultation and I was -- and I expect to
23 be present for it. I remember Superintendent Healy on
24 the phone to the Commissioner and I recall,
25 question-mark, whispering. He shook his head as if to 12:16
26 say no."

27
28 That is what she stated.

29 CHAIRMAN: Okay. Thank you.

1 MR. MCDOWELL: And we say at the top of page 26, Judge:
2 One way or the other, Ms. Ryan's request for a
3 consultation was effectively ignored by the
4 Commissioner and/or Chief Superintendent Healy, in that
5 she was given the clear impression that a consultation 12:16
6 as requested by her was an impossibility, when, as it's
7 now claimed, exactly the opposite situation pertained.
8 And all of that we say, Judge, is relevant in
9 considering any suggestion that Commissioner O'Sullivan
10 should be regarded as somebody who was not responsible 12:16
11 for what was done in her name and ostensibly on her
12 explicit instructions in May and June of 2015 in
13 relation to a strategy to discredit Sergeant McCabe at
14 the Commission. It's definitely not the case that an
15 office-holder, we submit, such as the Commissioner for 12:17
16 An Garda Síochána, can absolve herself of
17 responsibility for what was done in her name by a
18 solicitor and counsel acting on her instructions in a
19 matter of public importance such as the proceedings
20 before the O'Higgins Commission. 12:17

21
22 And then, Judge, we deal with this question of the
23 letter of comfort as described by Chief Superintendent
24 Healy. Commissioner O'Sullivan in her evidence
25 suggested that she was in a dilemma having regard to 12:17
26 the duties she owed to the force in general, to some of
27 its senior officers whose behaviour had been heavily
28 criticised by Sergeant McCabe, and to Sergeant McCabe
29 as a whistleblower to whom she owed a duty of

1 protection. Now, the mere fact that these
2 circumstances may have provided a dilemma for the
3 Commissioner meant that her responsibility in how she
4 discharged her function as a party represented at the
5 Tribunal was all the greater and in no way diminished 12:17
6 by those circumstances. And we say it was her personal
7 duty in the circumstances to ensure not merely that she
8 addressed the issues properly and competently, but that
9 she also took reasonable steps to remain aware and
10 informed of the manner in which her legal team was 12:18
11 discharging its functions on her instructions and what
12 was happening at the Tribunal -- or the Commission,
13 rather. By no means was the letter of comfort an
14 absolution from personal responsibility on the part of
15 the Commissioner to ensure that Sergeant McCabe was not 12:18
16 subjected to an attack on his integrity, credibility
17 and motivation of the kind that is launched on him on
18 foot of the letter dated 18th May 2015.

19
20 Now, the Commissioner has laid great emphasis on, and 12:18
21 so have her lawyers here in cross-examination, in
22 relation to the protective steps taken by her and by
23 Garda management in respect of Sergeant McCabe as a
24 whistleblower in a vulnerable position. And while it's
25 clear that the Minister for Justice, Frances 12:19
26 Fitzgerald, was indeed very anxious to protect Sergeant
27 McCabe as a whistleblower and to ensure that An Garda
28 Síochána took adequate steps to protect him and while
29 the Commissioner set in train a series of initiatives

1 to protect him, none of these matters in any way
2 reduces the duty of care owed by the Commissioner to
3 ensure that Sergeant McCabe was fairly and properly
4 treated at the O'Higgins Commission. On the contrary,
5 we say all of the protective steps to which the 12:19
6 Commissioner has referred in her evidence if anything
7 emphasise the need to avoid doing to Sergeant McCabe
8 precisely what was done by the Commissioner's legal
9 team to him. It was not necessary or justifiable to
10 launch an attack, even in private, on his credibility, 12:19
11 motivation or integrity.

12
13 And, Judge, this is an important point: Even if, and
14 it is the case, that the O'Higgins Commission found
15 that some of Sergeant McCabe's allegations made before 12:19
16 the commencement of the Commission were unfounded and
17 careless of the reputation of other members of An Garda
18 Síochána, establishing that that was the case never
19 required a destructive attack on his integrity, his
20 good faith or his motivation in the manner contemplated 12:20
21 by the Chief State Solicitor's Office or by the
22 submissions made by counsel both orally and in writing.
23 For instance, establishing that Superintendent Clancy
24 was not seriously to blame for some of the matters
25 complained of by Sergeant McCabe could easily have been 12:20
26 done by simply addressing the facts concerning those
27 complaints and disproving or contradicting the
28 allegations made by Sergeant McCabe. It was never
29 necessary, we say, to set out to impugn Sergeant

1 McCabe's character, good faith, integrity and
2 creditworthiness to disprove the allegations which the
3 O'Higgins Commission found to be groundless or
4 unjustified on the facts. It wasn't necessary to
5 engage in a destructive assault on Sergeant McCabe's 12:20
6 integrity, credibility or motivation to establish that
7 he had made errors or exaggerations or misjudgments of
8 other people or their actions. In particular, it was
9 wholly unnecessary to revisit the circumstances of the
10 outcome of the Ms. D allegations in an attempt to 12:21
11 portray Sergeant McCabe as a disaffected, embittered or
12 unreliable member of An Garda Síochána, but that is
13 precisely what was done or attempted to be done in the
14 submissions and the CSSO letter and in the
15 cross-examination of Sergeant McCabe by the 12:21
16 Commissioner's legal team. And we say that
17 responsibility for adopting that strategy must lie
18 somewhere, and it was for that reason that her counsel
19 was expressly asked to confirm on day 2, Friday 15th
20 May, whether they were pursuing this strategy on the 12:21
21 express instructions of Commissioner O'Sullivan. That
22 was the purpose of that question, to find out is this
23 coming from Superintendent Cunningham or is this the
24 Commissioner's desire to put these points to Sergeant
25 McCabe about his motivation. And it's submitted that 12:21
26 responsibility must rest with former Commissioner
27 O'Sullivan for what was done in her name by lawyers
28 acting ostensibly on her instructions, especially when
29 Chief Superintendent Healy was at all relevant stages

1 during the evolution and implementation of the strategy
2 present as her personal representative.

3
4 Now, Judge, I will come on to the question of the
5 confusion and ambiguity in respect of the central 12:22
6 aspect of Commissioner O'Sullivan's instructions to her
7 lawyers.

8
9 Commissioner O'Sullivan's understanding of what she
10 meant by testing Sergeant McCabe's motivation was 12:22
11 deeply confusing and implausible, we submit. On the
12 one hand, she went to great lengths to assert before
13 the Tribunal that she valued Sergeant McCabe and
14 considered that he was acting in good faith and in the
15 interests of An Garda Síochána and that she was taking 12:22
16 all reasonable steps to protect him in the vulnerable
17 position in which he had found himself. On the other
18 hand, she seemed to think that she was authorising her
19 legal representatives to question his motivation
20 without actually stating what a process amounted to or 12:23
21 entailed, and we say that her evidence on this issue
22 was, with the greatest of respect to her, fuzzy and
23 utterly unclear in its meaning. These uncertainties
24 should have been and would have been resolved if the
25 Commissioner had taken the elementary step of meeting 12:23
26 with Ms. Ryan and her team of counsel in a formal
27 consultation at which she could have precisely stated
28 what she wished them to achieve, what she wished them
29 not to do, what she wished them to do and what

1 strategies she wished them to pursue.

2
3 If her intended instructions to her legal team were
4 simply to uncover the truth, as it has been
5 characterised, it was wrong and inappropriate to set 12:23
6 out from day one of the Commission's hearings on a
7 mission to discredit Sergeant McCabe and to impugn his
8 motives and good faith. Discovering the truth and
9 impugning his character and motives and -- impugning
10 the character and motives of a witness in need of 12:24
11 protection are very different things. Protecting the
12 reputation of some gardaí did not necessitate attacking
13 the reputation, even in private, of another garda.
14 Searching for the truth did not involve, of necessity,
15 adopting a strategy to discredit Sergeant McCabe simply 12:24
16 because it was believed that some of his allegations
17 were unfounded or groundless. The CSSO letter, on any
18 view, was wholly unwarranted and wholly excessive and
19 internally contradictory, I'd add, as was the charge of
20 disaffection laid out in the submission of the 11th 12:24
21 June 2015. Nor -- and I make this point, Judge -- nor
22 did searching for the truth involve giving her legal
23 representatives some form of blank cheque to impugn the
24 character or motives of a witness as to fact to enable
25 some or all of his allegations to be disproved. And 12:25
26 with respect to Commissioner O'Sullivan, a search for
27 the truth in relation to Sergeant McCabe's allegations
28 at no point justified a radical challenge to his
29 character and reputation, even when conducted in the

1 privacy of a commission of investigation. Doing so in
2 private while appointing Sergeant McCabe publicly to
3 the Professional Standards Unit in relation to the
4 penalty points issue was, we submit, wholly inexcusable
5 and inexplicable. worse still was deploying such a 12:25
6 strategy in respect of a person who, because of his
7 role in the penalty points issue, was under great
8 stress and clearly vulnerable to victimisation and
9 retribution, including social retribution within the
10 force. One way, Judge, of testing the justification or 12:25
11 the appropriateness of the strategy deployed in respect
12 of discrediting Sergeant McCabe is to ask ourself the
13 hypothetical question: would this have been
14 countenanced for one minute if, instead of it being a
15 commission held in private, it was a tribunal being 12:26
16 held in public? would what was done to Sergeant McCabe
17 have been done in public? would the issues that were
18 raised against him by the series of allegations made
19 that he was personally responsible for low standards as
20 sergeant in charge, that he was personally implicated 12:26
21 in some of the wrongdoing about which he complained or
22 that he was motivated somehow by reason of
23 dissatisfaction of the outcome of the D case, would
24 that have ever been put to him if the -- if the
25 proceedings had been public? And I have got to suggest 12:26
26 and submit to this Tribunal that it wouldn't have been.
27 And the mere fact that the O'Higgins Commission was a
28 private occasion did not justify treating Sergeant
29 McCabe differently from how he would have been treated

1 as he was treated, for instance, here in this
2 commission -- in this Tribunal, rather.

3
4 Now, I just also want to draw attention to what was
5 done in the closing submission made by the Commissioner 12:27
6 -- on behalf of the Commissioner in February 2016. Two
7 points were made: one, that his allegations have led
8 to the resignation of a person who was identified by
9 the -- by Commissioner O'Sullivan as Martin Callinan,
10 which was wholly untrue; and secondly, that in the 12:27
11 attempt -- there was an attempt made to suggest that he
12 had aggravated the suffering of victims of crime based
13 on remarks made by a witness outside the terms of
14 reference of the O'Higgins Commission in circumstances
15 that Mr. Justice O'Higgins deemed unhelpful. That was 12:28
16 equally unwarranted, inappropriate and unjustified.
17 And the cumulative effect of what was done to Sergeant
18 McCabe in the context of the O'Higgins Commission by
19 way of cross-examination, submission and the tendering
20 of rejected evidence and conduct, although conducted in 12:28
21 private, was wholly at variance with the claimed
22 concern on the part of Commissioner O'Sullivan to value
23 whistleblowers and to respect them even when
24 disagreeing with them and to acknowledge the potential
25 value of their contribution to the well-being of An 12:28
26 Garda Síochána. I do make the point, Judge, in asking
27 was this a justifiable way to treat him, would anybody
28 in his circumstances who wished to whistle-blow,
29 consider doing so if they knew that that was the kind

1 of blizzard into which they were being asked to walk.

2
3 Now, I just want to then mention, Judge, the Rooney
4 circular. It must be remembered that Mr. Justice
5 O'Higgins made a ruling that for the purposes of his 12:29
6 Commission, that the Rooney circular to Garda stations
7 in the Cavan-Monaghan and Sligo region couldn't be
8 addressed for legal reasons, which was that there were
9 pending defamation proceedings, and, on that account,
10 the extent to which Sergeant McCabe's justified belief 12:29
11 that his complaints were being rejected, belittled or
12 publicly portrayed as unjustified, was never truly
13 addressed at the O'Higgins Commission. And I'm not in
14 any sense criticising Mr. Justice O'Higgins for that
15 ruling, Judge, I want to emphasise that, but I am 12:29
16 saying that an unintended consequence of saying that
17 Sergeant McCabe could not refer to that event at all,
18 was that, in effect, what was described here as a
19 ramping up of his allegations against senior officers
20 of the force and a claim that matters were being 12:30
21 covered up, appear somewhat naked because a part of
22 their context was not being considered in the evidence
23 before the O'Higgins Commission.

24 CHAIRMAN: Was this the Hillgrove Hotel, was it?

25 MR. MCDOWELL: No -- 12:30

26 CHAIRMAN: Am I getting the wrong thing?

27 MR. MCDOWELL: No, no, this is -- Mr. Justice O'Higgins
28 ruled that the Rooney letter, the Rooney circular --

29 CHAIRMAN: All right. Okay. I see --

1 MR. MCDOWELL: -- couldn't be addressed, one way or the
2 other, because there were pending defamation
3 proceedings, but, I mean, I am not challenging his
4 ruling, I am sure it was made --
5 CHAIRMAN: They are still pending, aren't they? 12:31
6 MR. MCDOWELL: They are still pending, indeed. But the
7 consequence was that a piece of the narrative --
8 CHAIRMAN: Of the jigsaw, yes. I understand.
9 MR. MCDOWELL: -- disappeared and made Sergeant McCabe
10 look somewhat kind of -- it made him appear as somebody 12:31
11 who was, out of the blue, ramping up his
12 dissatisfactions to include --
13 CHAIRMAN: No, I see that.
14 MR. MCDOWELL: You see the point.
15 CHAIRMAN: Yes, I do. No, I do see the point. There 12:31
16 was proceedings, there was false imprisonment
17 proceedings arising out of the Hillgrove Hotel as well,
18 so...
19 MR. MCDOWELL: They were -- there were no proceedings
20 there, Judge. 12:31
21 CHAIRMAN: Was there not?
22 MR. MCDOWELL: No, I don't think so.
23 CHAIRMAN: I think at one point we had a list of all
24 the proceedings, and that was one of them.
25 MR. MCDOWELL: Definitely not, Judge. I think. I say 12:31
26 definitely not --
27 CHAIRMAN: well, you are the one --
28 MR. MCDOWELL: I say definitely not.
29 CHAIRMAN: well, you are the one who is likely to know.

1 I thought there were proceedings arising out of the
2 Hillgrove Hotel.

3 MR. MCDOWELL: No, they don't exist. No such
4 proceedings exist or were ever started.

5 CHAIRMAN: There was a threat of false imprisonment 12:32
6 proceedings now. I have described it as a waving of
7 arms.

8 MR. MCDOWELL: What you are referring to, he complained
9 about it to the Director of Public Prosecutions, who
10 found there was no case. 12:32

11 CHAIRMAN: Okay.

12 MR. MCDOWELL: It was on the criminal side, Judge.

13 CHAIRMAN: Oh, was it? All right. I get you. That is
14 the confusion.

15 MR. MCDOWELL: And we say that while the Commission's 12:32
16 ruling that the circular should not be dealt with was
17 doubtless made on reasonable grounds, it had the
18 unintended effect of leaving the background to Sergeant
19 McCabe's actions and attitudes somewhat incomplete.

20 12:32
21 The circular in question was headed by reference to the
22 allegations of -- by Sergeant Maurice McCabe and was
23 given wide circulation among his colleagues in the
24 Northern Region of the force. Now, we want to make --
25 Chairman, we want to make one point here. The very 12:32
26 belated acknowledgement by Chief Superintendent Rooney
27 that his circular was unjustified, though welcome,
28 cannot take away from the fact that Sergeant McCabe's
29 colleagues, and, through them, their relatives and a

1 section of the public, were effectively informed that
2 the allegations attributed to Sergeant McCabe in the
3 heading on the circular note were absolutely
4 unwarranted and without substance. The fact that this
5 circular purported to be made with the agreement of the 12:33
6 assistant commissioner for the region and with the
7 agreement of the then-Commissioner of An Garda Síochána
8 greatly increased the sense of rejection, isolation and
9 disillusionment that inevitably flowed from the
10 issuance of the circular. When it was the subject of 12:33
11 complaint by Sergeant McCabe's solicitors to the
12 then-Commissioner, the terms of the circular were
13 effectively stood over by the Commissioner and his
14 deputy in their reply. No attempt was made at that
15 time or at any time since by the Garda authorities to 12:33
16 correct the unfairness and the injustice done to
17 Sergeant McCabe by the issuance of that circular. It's
18 never been retracted, except by Chief Superintendent
19 Rooney here personally.

20 12:34
21 It took seven years for any admission that the circular
22 had been unfair and unjust to Sergeant McCabe to be
23 made, and, even then, it was made personally by a
24 retired chief superintendent, Chief Superintendent
25 Rooney, and was not adopted by the present 12:34
26 Commissioner, or by former Commissioner O'Sullivan.
27 And knowing as he did that his claims of malpractice
28 had been effectively rubbished by that circular, and
29 even the very inadequate results of the Byrne/McGinn

1 investigation carried out have been effectively
2 concealed from the Rooney circular, it is, we submit,
3 little wonder that Sergeant McCabe came to the view
4 that his justified complaints were being ignored and
5 effectively covered up by the Garda establishment. 12:34
6 Likewise, by the time of the O'Higgins Commission,
7 Sergeant McCabe had performed a valued public service
8 in respect of the penalty points issue. He performed a
9 valuable duty in drawing his superiors' attention to
10 the falsification or alteration of Pulse records which 12:35
11 he discovered. Not all of this obviously was welcome
12 to many -- to some or many fellow members of An Garda
13 Síochána, but all of this underlined the necessity for
14 Commissioner O'Sullivan to exercise care and attention
15 in respect of the manner in which lawyers acting on her 12:35
16 behalf and on her instructions dealt with Sergeant
17 McCabe and vindicated his character and good name
18 rather than dealing with him as a hostile, disaffected
19 accuser. It is noteworthy that her legal team, in its
20 conduct before the Commission and its submissions to 12:35
21 the Commission, wholly or almost wholly failed to say
22 anything at all favourable about Sergeant McCabe.
23 Sergeant McCabe was the subject of findings in chapter
24 3 of the O'Higgins Commission report which the -- which
25 report good and bad, and the findings about him 12:35
26 Sergeant McCabe accepts. The O'Higgins Commission
27 concluded without naming them, that:

28
29 "Some people, wrongly and unfairly, cast aspersions on

1 Sergeant McCabe's motives, others were ambivalent about
2 them. Sergeant McCabe acted out of genuine and
3 legitimate concerns and the Commission unreservedly
4 accepts his bona fides. Sergeant McCabe has shown
5 courage and performed a genuine public service at
6 considerable personal cost...

12:36

7 while some of his complaints have not been upheld by
8 this Commission, Sergeant McCabe is a man of integrity
9 to whom the public can have trust in the exercise of
10 his duties."

12:36

11
12 Now, that was generous and decent of the Commission to
13 acknowledge that, Judge, but the Commission also held
14 that Sergeant McCabe was never less than truthful, even
15 if prone to exaggeration at times. And it went on, and
16 I fully acknowledge, to say that this claim of
17 corruption, even though he insisted that it was
18 corruption for the purposes of the Garda Code and not
19 criminal corruption, was hurtful to others and that
20 they should have had their characters vindicated, that
21 is fully accepted. But while the legal team for
22 Commissioner O'Sullivan were, of course, free to
23 challenge Sergeant McCabe in the same way as any other
24 witness in any other proceeding, it is submitted that
25 they were wholly unjustified in singling him out for a
26 radical attack on his motives, integrity and
27 credibility. Sergeant McCabe has never suggested that
28 Commissioner O'Sullivan used the Commission, the
29 O'Higgins Commission, to attempt to sustain the false

12:36

12:37

12:37

1 allegation of sexual assault on Ms. D as true. Nor is
2 he aware of any responsible person who has ever made
3 such a claim. There may be some misguided people have
4 thought that, Judge, but certainly he is not aware of
5 it. But what was done --

12:37

6 CHAIRMAN: Where did it come from? And why did the
7 Minister for Justice resign, apparently, over it?

8 MR. McDOWELL: I don't know why members of the
9 Oireachtas did put that in Judge.

10 CHAIRMAN: I am not -- look, I am not here to attribute
11 blame to anybody, but it is a plain reality, the
12 Minister for Justice resigned, apparently, over not
13 intervening to stop people accusing him of sexual
14 abuse, and nobody ever accused him of sexual abuse and
15 I have got a term of reference in front of me about
16 that.

12:38

12:38

17 MR. McDOWELL: I appreciate that, Judge.

18 CHAIRMAN: So where did it all come from?

19 MR. McDOWELL: Well, the terms of reference were drawn
20 up by the Department of Justice. I don't know. I am
21 not in a position to say that they were erecting a
22 straw man to have it knocked down. But Sergeant McCabe
23 has never made that claim anywhere, in any shape or
24 form, and does not make that claim. But what was done
25 to him was to cast him as a disaffected and unreliable
26 garda and witness by reference to an entirely false
27 suggestion that he had only made his complaint of poor
28 policing in an attempt to coerce Superintendent Clancy
29 to deliver the DPP's directions in the Ms. D case to

12:38

12:38

1 her family when he knew that course would have been
2 improper. And I do ask the Tribunal again to be
3 mindful that this latter accusation necessarily
4 involved raising the circumstances of the Ms. D
5 investigation at the various modules of the O'Higgins 12:39
6 Commission where it was intended to impugn his
7 motivation and good faith, and it amounted to an
8 accusation calculated on any view to seriously
9 embarrass Sergeant McCabe in the eyes of any person
10 present at the relevant hearings and to a charge of bad 12:39
11 faith against Sergeant McCabe in circumstances
12 originating -- sorry, originating in circumstances
13 surrounding Ms. D's allegation. And that accusation
14 and strategy was, of course, deeply hurtful and
15 embarrassing for Sergeant McCabe to deal with, and 12:39
16 would, if it had succeeded and had been -- and
17 persisted with as planned across all the modules of the
18 Commission, have rendered Sergeant McCabe's
19 participation at the Commission almost impossible to
20 endure. And we say that such a strategy, even if based 12:40
21 on a factually incorrect premise, was unjustifiable,
22 even under the fig-leaf of conducting a search for the
23 truth or even in circumstances of privacy, and as
24 counsel for the Tribunal stated that -- at the opening
25 of the module, any fair-minded person applying the 12:40
26 presumption of innocence and looking at the allegations
27 in context would not have mentioned the matter again.
28 Indeed, Sergeant McCabe was fully entitled, counsel
29 stated, insofar as he could, to leave it in the past

1 and to consign it to history. And by raising it
2 inferentially and referentially not as a substantial
3 allegation of sexual abuse but as the origin of an
4 allegation of disaffection and effectively disloyalty
5 to An Garda Síochána, as I indicated quite a number of 12:40
6 weeks ago to the -- to this Tribunal, it made Sergeant
7 McCabe's participation in the Commission embarrassing
8 and painful for him as long as it stood there.

9 CHAIRMAN: I mean, how does that square against the
10 fact that a responsible politician mentioned the matter 12:41
11 in the Dáil as being worthy of inclusion for actual
12 investigation by the O'Higgins Commission? And I
13 suppose in the event that anyone wanted to make the
14 case that there was a coincidence of the investigation
15 and the appearance of complaints, they could hardly do 12:41
16 it without saying, look, there was an investigation,
17 there was a complaint, but I don't think any member of
18 the Gardaí can be blamed for the fact that a young
19 woman comes forward and actually makes a complaint.

20 MR. McDOWELL: I agree, Chairman. But I will make this 12:42
21 point --

22 CHAIRMAN: I mean, I have no idea of the dynamic there,
23 and, fortunately, I don't have to have a conclusion on
24 it. We all know there have been cases in the past, and
25 while the vast, vast majority of sexual violence cases 12:42
26 against women are true when the accusation is made, I
27 mean, there are some, unfortunately, there aren't. And
28 I am not saying what this is in, by the way. I am
29 saying nothing.

1 MR. MCDOWELL: There is a couple of points that I
2 really do want to make, Chairman, in relation to this.
3 One is, I just want to remind you - and it's not in my
4 written submission, for which I apologise - that the
5 whole question of having the D allegation considered by 12:42
6 the O'Higgins Commission was actually canvassed and was
7 rejected, and obviously -- I mean, you don't need to
8 have a very fertile imagination to see that if it had
9 been, for whatever reason, included in the terms of
10 reference of the D investigation, Sergeant McCabe's 12:43
11 participation in the O'Higgins Commission would have
12 been utterly and completely transformed.

13 CHAIRMAN: I mean, if it had, Mr. McDowell, it would
14 have been something very funny going on, because, I
15 mean, the reality is, I think one of the barristers in 12:43
16 the Independent Review Mechanism read the file and took
17 the same view that I have publicly expressed, that
18 Superintendent Cunningham couldn't have done a better
19 job. He did a great job.

20 MR. MCDOWELL: Exactly. 12:43

21 CHAIRMAN: So there is nothing to investigate.

22 MR. MCDOWELL: No. But the point I am making is that,
23 for very good reason, it was not included, even though
24 a call for its inclusion was made in Dáil Éireann by
25 former Minister Shatter, for very good reason it was 12:43
26 not done, and I'm not complaining at all about that
27 decision. But I am just making the point that, from
28 the point of view of Sergeant McCabe, had it been done,
29 the O'Higgins Commission would have been an absolute

1 nightmare. And the fact that it was raised simply by
2 reference, in the context of motivation, to explain --
3 to explain a charge of disaffection against Sergeant
4 McCabe, was, nonetheless, embarrassing and bound to
5 embarrass him in respect of people attending the 12:44
6 hearing in the context of the Kingscourt matter. And
7 the second point, of course, I want to make, and I have
8 to acknowledge this, Judge, is that Mr. Justice
9 O'Higgins stamped it out, as effectively as he could,
10 all reference to Ms. D -- he made it very clear that he 12:45
11 did not want any reference to Ms. D, and with the
12 exception of a late reference to it on an occasion
13 where Mr. Justice O'Higgins was so concerned that he
14 directed that the transcript should not be circulated,
15 it didn't obtrude -- 12:45

16 CHAIRMAN: Are you sure that was the reason? I thought
17 that was a reference to it -- there was another case.
18 I mean, there was the missing transcript, is the
19 thing that has come in here, and of course there was
20 never a missing transcript. I believe there was one 12:45
21 transcript that was lost in the bottom of a box by
22 somebody and then there was the one that wasn't
23 circulated. But that mentioned a different case, which
24 was a really, really sad thing that happened --

25 MR. MCDOWELL: On day 31 -- 12:45

26 CHAIRMAN: -- to somebody else.

27 MR. MCDOWELL: -- Superintendent Cunningham made
28 reference to the Ms. D allegation and he also made
29 reference to a hit-and-run, and, in respect of both of

1 those matters, Mr. Justice O'Higgins directed that the
2 transcript should not be circulated for that day and he
3 commented that those remarks and that intervention were
4 not helpful.

5 CHAIRMAN: Yes. But I think he took it as his job, and 12:46
6 it is a kind of a mark of his approach to the -- his
7 job was that he was there to listen, and indeed he did
8 listen. He didn't shut down that desperately sad
9 thing.

10 MR. MCDOWELL: He didn't. But when he saw what had 12:46
11 happened, he directed that the transcript should not be
12 circulated.

13 CHAIRMAN: Well, yes. Fine.

14 MR. MCDOWELL: But in any event, Judge, I was just
15 going to deal with the question of the claim of 12:46
16 privilege. Obviously this Tribunal has carefully
17 upheld the right of legal privilege when invoked, and I
18 acknowledge that it's a doctrine of the law that no
19 adverse inference can be drawn from the invocation of
20 privilege, and I am not going to ask the Tribunal to 12:47
21 draw any such inference, but it is deeply
22 unsatisfactory, I nonetheless submit and comment, that
23 privilege was invoked when it isn't clear on what basis
24 and for what purpose that was done, given that there
25 was a clear divergence between the views of Chief 12:47
26 Superintendent Rooney and Superintendent Cunningham as
27 to what they were instructing to happen and the views
28 of counsel who claimed to be acting on foot of
29 instructions received. But the fact that that

1 conundrum, if I may use that phrase, cannot be
2 resolved, doesn't, and that there is a lack of clarity,
3 doesn't prevent, we submit, this Tribunal from
4 addressing the issues as fully as can be done in terms
5 of reference (e). Whatever the precise genesis of the 12:48
6 Chief State solicitor's letter and the submissions that
7 I have referred to, it's abundantly clear that the
8 underlying agenda or strategy deployed at the O'Higgins
9 Commission on behalf of the Commissioner was to
10 undermine Sergeant McCabe's credibility, good faith and 12:48
11 integrity by suggesting that his motivation in making
12 his complaints was in bad faith.

13
14 Now, Judge, I didn't deal in writing, but I will
15 just -- I did want to say that Sergeant McCabe and my 12:49
16 solicitors have apologised for the shouting reference,
17 but lest it be --

18 CHAIRMAN: I know, but, Mr. McDowell, it's very, very,
19 very, very different. I mean, there is enough to
20 decide here and enough people have been upset over -- 12:49
21 for well over a decade in relation to these matters,
22 but there is a long narrative about shouting and having
23 to ask people to stop shouting.

24 MR. MCDOWELL: Yes.

25 CHAIRMAN: And the only references in the transcript to 12:49
26 shouting are counsel saying, look, I am sorry, I have
27 been told by the Chairman to keep my voice up, so I am
28 going to keep my voice up and I hope you don't think I
29 am shouting at you or anything like that. I mean,

1 perfectly polite. And then suddenly I am faced with
2 this, apparently saying that people I have seen in
3 court --

4 MR. McDOWELL: I understand that --

5 CHAIRMAN: -- are, you know, grossly misbehaving. And 12:50
6 it's there. And it's not just a mistake; it's a big,
7 long narrative about it, so, I mean -- and then
8 somebody -- a solicitor apparently takes
9 responsibility. I just can't buy that, Mr. McDowell.
10 You know, I mean, something -- 12:50

11 MR. McDOWELL: Judge, can I just explain this to you,
12 and I just want -- because of the doubts that you
13 expressed, I want to deal with it, if I may, Judge.
14 There had been a number of occasions on which Sergeant
15 McCabe had requested Mr. Smyth to let him finish, and 12:50
16 on one occasion, on day 31, he said -- Sergeant McCabe
17 said: "Yes, but ease your voice slightly, please".
18 And in a bullet-point in a document in my solicitor's
19 office, the shouting reference was present and it was
20 misinterpreted as a quotation, but it wasn't. 12:51

21 CHAIRMAN: But that is not the way it comes across,
22 Mr. McDowell. It comes across -- I referred in the
23 past to Agatha Christie, but it's good because she
24 always has a narrative and it always makes sense. It
25 comes across as a narrative as if the witness is 12:51
26 reliving something. It's not a mistake coming in
27 the -- indeed, it's not even like the Ms. Y and Ms. D
28 word-processing error where something suddenly appears
29 in a document that doesn't make a great deal of sense

1 and there are two completely inconsistent names. It
2 comes in as a narrative. I mean, I don't want anyone
3 to admit, if it be the case, that they are sitting
4 there inventing a whole load of words for Sergeant
5 McCabe, but that is the way that it is, and --

12:52

6 MR. MCDOWELL: Can I simply say this, Judge --

7 CHAIRMAN: You know, sorry, there is two things. I
8 appreciate, for instance, with affidavits, which I tend
9 to have a bit of a problem with, that the client gives
10 the instructions and the lawyer writes out the words,
11 and then, of course, if there is a cross-examination as
12 to your prior inconsistent statements, they may not
13 even be your statements at all; it's something you have
14 signed on the basis of giving a narrative. But the

12:52

15 other thing I want to say: If I'm to excuse that,
16 Mr. Murphy's point is, surely I have to at least bear
17 in mind that mistakes can be made elsewhere. And then
18 the last point on my mind, Mr. McDowell, in relation to
19 that is, that the one thing that should never happen is
20 that something that is actually very small and perhaps
21 unimportant should suddenly assume an enormous
22 importance and overwhelm everything else, and this
23 seems to me to fit into that category.

12:52

24 MR. MCDOWELL: Well, that is what I am slightly afraid
25 of it. On the other hand, I don't want to be seen to
26 just run away from it, Judge, especially since you did
27 express reservations about it. But I just want to make
28 this point, Judge: At all material times, the
29 transcript was available in my solicitor's office. At

12:53

1 all material times, the accuracy or inaccuracy of what
2 was put, in inverted commas, was subject to clear
3 proof, one way or the other, and unfortunately it was
4 not checked and unfortunately it was transposed from a
5 bullet-point into a quotation. 12:53

6 CHAIRMAN: No, but what I am referring to is the actual
7 statement, which I think was actually made to the
8 Tribunal.

9 MR. McDOWELL: Sorry, Judge --

10 CHAIRMAN: There is no point in emphasising it, 12:53
11 Mr. McDowell, or going into it or embarrassing people,
12 and I don't want to do that, but, I mean, there will
13 come a point where I am asked to say, for instance, in
14 relation to other issues, look, here is what the person
15 said and this is what they are now saying. This is 12:54
16 coming down the tracks.

17 MR. McDOWELL: What I am really asking you to consider
18 is the following proposition, and I think it does
19 deserve some consideration: that if it was -- if it
20 was put there with a view to misleading anybody, if it 12:54
21 were, it was going to be immediately disproven simply
22 by reference to the -- Ms. Gwen Malone's
23 computer-driven record of the matter. It was not done
24 by Sergeant McCabe with a view to his deceiving
25 anybody. And if it -- it is an error which was not of 12:54
26 his making, and if it were done, Judge, and I just ask
27 you to accept this proposition, if it was done with a
28 view to misleading anybody or to mischaracterising
29 somebody or to be unfair to somebody else, it was being

1 done in a solicitor's office where the transcript
2 itself was available and a simple check would have
3 established whether it was right or wrong. So it
4 was -- it was an error, Judge.

5 CHAIRMAN: But, Mr. McDowell, the bullet-point 12:55
6 shouting, which was mistakenly taken down in
7 consultation, cannot be translated into the following:
8 "On several occasions I had to turn to Mr. Smyth and
9 say to him, 'Mr. Smyth, will you please stop shouting
10 at me'," that bit in inverted commas. It just -- that 12:55
11 just can't happen. Now, I asked -- there is a lot of
12 legislation, for instance, about, you know, people
13 exaggerating personal injury cases, and, I mean, it's a
14 comment that is worth making. There are, of course,
15 people who claim that they can't work at all and there 12:55
16 is videos of them carrying bags of cement. Everyone
17 has been in cases where that has occurred, but then
18 there is the other cases where people get very upset in
19 consequence of an accident and they can't cope with
20 their life, and to get that across to the judge they 12:55
21 give a narrative which is highly exaggerated, but it's
22 an expression of what they are feeling subjectively,
23 and there is a difference between the two. And I think
24 this may be an expression of what someone is feeling
25 subjectively. But, you know, the error thing, I am 12:56
26 finding it increasingly hard to imagine that that could
27 happen.

28 MR. McDOWELL: Well, Judge, could I just point out to
29 you that on day 10, for instance, at page 47 and 48,

1 Mr. Justice O'Higgins asked "for voices to be kept
2 down, please". And addressing, at page 49, Mr. Smyth,
3 he said: "would you please listen to me for a second
4 and just be nice and calm about it." And on --
5 CHAIRMAN: This is actually making matters worse, 12:56
6 Mr. McDowell. No, it's making matters a lot worse.
7 MR. MCDOWELL: I am not trying to make things worse. I
8 am just trying to say that Sergeant McCabe did not
9 intend -- that was included in a statement, not by him,
10 and was an error which was made, full stop, Judge. And 12:57
11 I ask the Tribunal just to remember that errors were
12 made in respect of him, which he has accepted.
13 CHAIRMAN: Absolutely. And, I mean, I --
14 MR. MCDOWELL: I would just ask that the -- in his
15 position, to accept that some of the errors that were 12:57
16 made in respect of him were wholly innocent and wholly
17 coincidental, has been difficult, as you can imagine.
18 CHAIRMAN: No, Mr. McDowell, I can accept that. But as
19 I say, I think perhaps this whole thing is being blown
20 out of proportion. I have mentioned it. But I 12:57
21 actually think the explanation makes things worse.
22 MR. MCDOWELL: It possibly does, Judge.
23 CHAIRMAN: And I think the whole question that I asked
24 him about, you know, how people feel inside and then
25 getting that across, I mean, dramatists do it all the 12:58
26 time, don't they? And --
27 MR. MCDOWELL: Well, I am not going to put my client in
28 the position of a dramatist, Judge.
29 CHAIRMAN: No, but it's a technique of conveying human

1 emotion, and sometimes people go too far in the
2 witness-box, that doesn't necessarily mean they are
3 lying, and I think a judge shouldn't ever come to that
4 conclusion. You need to be very careful, that's all.
5 MR. MCDOWELL: I respectfully agree, Judge. One thing 12:58
6 I just want to say is that you asked a number of
7 questions and I think I have dealt with all of them. I
8 don't think I have omitted any of them --
9 CHAIRMAN: Yes.
10 MR. MCDOWELL: -- in what I have submitted. I don't 12:58
11 think that I have avoided them.
12 CHAIRMAN: There is only one thing --
13 MR. MCDOWELL: I haven't followed each of your
14 questions.
15 CHAIRMAN: -- number 6, which was: "Is Mr. Smyth SC 12:59
16 correct in saying that his acceptance of 'integrity'
17 when that word was used by another party was a
18 mistake?"
19 MR. MCDOWELL: Well, Judge, very, very briefly, and I
20 know -- I am conscious of the fact I have taken an 12:59
21 enormous amount of time here today, but very, very
22 briefly, Judge, the problem with that is that although
23 he might have impulsively agreed to the proposition
24 that he was challenging Sergeant McCabe's integrity the
25 whole way, or the whole way through the proceedings, 12:59
26 the problem is that he and the Commissioner and
27 Superintendent Healy and Ms. Ryan were all furnished
28 with a written transcript of the events.
29 Sorry, they were all furnished with transcripts of what

1 had happened, and it is remarkable that if it was
2 wholly accidental, that it was not -- that it was not
3 picked up. And the second -- the second thing, Judge,
4 and I am not saying that in any way to disparage
5 Mr. Smyth, but I am saying this, Judge: that 13:00
6 Mr. Justice O'Higgins, on a number of occasions that I
7 have drawn the Tribunal's attention to in the written
8 submission, set out his understanding of what Mr. Smyth
9 was saying to him, and it is remarkable that nobody
10 ever retreated from those propositions or said you have 13:00
11 got that wrong, that overstates my position, I'm not
12 making that claim in respect of Sergeant McCabe. It is
13 truly remarkable that all of that -- all of that stayed
14 on the record, uncorrected, if it was a significant
15 misunderstanding of the case that was being made. And 13:01
16 Mr. Justice O'Higgins, on a number of occasions, at
17 least three, set out what he understood Mr. Smyth's
18 case to be in relation to credibility, motivation and
19 good faith, or bad faith, and on at least one occasion
20 he asked for correction if he was wrong and he was 13:01
21 not -- he was not corrected and it was not stated that
22 he was wrong.

23 CHAIRMAN: Okay.

24 MR. McDOWELL: So I would ask the Tribunal to take the
25 view that it is more likely that the -- Mr. Smyth's 13:01
26 acceptance of personal responsibility was a generous
27 concession to Ms. O'Sullivan rather than that he
28 couldn't -- that he wasn't aware that he had, so to
29 speak, put his foot in touch on a number of occasions

1 in relation to the allegations he was making. I won't
2 elaborate further.

3 CHAIRMAN: Yes, okay. There was just two other things.
4 I presume you don't want to make any comment on, and I
5 really have to kind of make a gesture here because I 13:02
6 was alarmed that when I read a bit out of the GRA
7 magazine, that it was apparently being ascribed to me
8 as my thoughts about some reference to the liberal east
9 coast pinko media, or something of that kind. Of
10 course I never said that; I was actually reading out a 13:02
11 document. You don't want to comment on whether there
12 is any evidence of the "dark truth" of "going after
13 Maurice McCabe at the Commission" at the "apex of the
14 Garda organisation"?

15 MR. McDOWELL: I don't really, Judge. 13:03

16 CHAIRMAN: That is fine.

17 MR. McDOWELL: What I would like to say, though, in
18 respect of term of reference (h), yesterday -- or the
19 day before yesterday Sergeant McCabe acknowledged that
20 he himself -- first of all, he is not in a position to 13:03
21 adduce evidence of what actually transpired between the
22 Commissioner and RTÉ, he is not in a position to do any
23 of that or to say precisely what happened.

24 CHAIRMAN: No, no.

25 MR. McDOWELL: He can only tell this Tribunal what he 13:03
26 was told and what he believes. And until some or all
27 of the members of the fourth estate give evidence here,
28 it's highly unlikely he is going to be able to make any
29 progress in respect of that.

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CHAIRMAN: All right. Okay. And then the other thing was - if you don't want to make any comment on it - did the Department and the Minister behave lawfully in leaving the strategy to the Garda Commissioner? You have nothing to say about that?

13:04

MR. McDOWELL: In my respectful submission, it would be inappropriate for Sergeant McCabe to make an accusation on that front. He has no evidence on that matter.

CHAIRMAN: Yes. No, that is grand. Thank you very much.

13:04

THE HEARING ADJOURNED FOR LUNCH

1 THE HEARING RESUMED, AS FOLLOWS, AFTER LUNCH:

2
3 CHAIRMAN: I'm sorry I was delayed a couple of minutes.
4 So I'm here to listen. Who is next? Mr. Sreenan, is
5 it? 14:36

6 MR. SREENAN: I think Mr. McGillicuddy has a short
7 submission, so he will go first.

8 CHAIRMAN: Yes, certainly.

9
10 SUBMISSION BY MR. MCGILLICUDDY: 14:36

11
12 MR. MCGILLICUDDY: May it please you, Chairman. My
13 name is Tony McGillicuddy and I appear instructed by
14 Mr. Quinn of Nolan Solicitors and I'm led by
15 Mr. Rogers, who regrettably could not be here today and 14:36
16 sends his regrets in that regard.

17
18 Our position is that we were here and we were granted
19 limited representation rights in respect of Mr. John
20 Barrett. Thus, he was a witness at the Tribunal 14:36
21 itself. We don't hold any interest in relation to any
22 particular outcome by the Tribunal in relation to the
23 matters of which it is investigating. Mr. Barrett
24 provided a statement on the 27th April 2017 to the
25 Tribunal and gave evidence thereafter. So it is for 14:37
26 the Tribunal to reach a decision on the central issues
27 in that regard and I don't propose to make submissions,
28 picking out various bits of the transcript or translating
29 other bits of the transcript in that regard, Chair,

1 because you have Mr. Barrett's evidence, you also have
2 the other evidence in the case. If it is of some small
3 assistance, I will just set out that, in relation to
4 Mr. Barrett, his own evidence began on day 53 at page
5 171 onwards, on that date. It continued on day 54 up 14:37
6 to page, approximately, 132. There was further
7 evidence in respect of Mr. Barrett on day 55, up to
8 approximately page 95. There was then evidence from
9 Mr. Cyril Dunne on day 56, from pages 55 onwards, and
10 then on day 7, I think the relevant evidence in respect 14:38
11 of matters pertaining to Mr. Barrett was from pages 1
12 to 108. That includes the evidence of Superintendent
13 McLoughlin, which began at page 96 onwards.

14
15 I have had sight of the Garda Commissioner's 14:38
16 submissions in respect of the matters that they
17 outline, and I am grateful for that.

18
19 As I have said, and I intend to maintain that approach,
20 Chair, you will consider the evidence of Mr. Barrett 14:38
21 and the other witnesses and will come to a conclusion
22 on that. I don't think it's either appropriate or
23 helpful to pull that apart in small bits because the
24 transcript speaks for itself and you have the relevant
25 documentation as well. 14:39

26
27 There are a number of small matters surrounding
28 Mr. Barrett's evidence, though, that I would like to
29 address very briefly, and I hope to deal with that in

1 regards to what is set out in the Garda Commissioner's
2 submissions where they make a summary of points at
3 paragraph 174 of their submissions, and there are
4 matters there that I would just like to address in very
5 brief format that you would consider in respect of
6 Mr. Barrett. 14:39

7
8 In paragraph 174 there's a number of matters outlined
9 on behalf of the Garda Commissioner, where it is
10 asserted that Mr. Barrett should not have done certain 14:39
11 things. And I'd ask you, Chair, to bear in mind the
12 following in that regards:

13
14 It is asserted that he should not have made his
15 assertion or contention about what was said to him 14:39
16 lightly. And in my respectful submission, it is not
17 something that he did lightly. He came forward and
18 provided a statement at an early stage, and I would
19 ask, Chair, that you consider, and you've heard lengthy
20 evidence in that regard, that his dealings with 14:40
21 Sergeant McCabe and the work that he had done as the
22 Human Resources Director in An Garda Síochána, a role
23 he is still in at the present time, is one that he has
24 tried to carry out with diligence and energy and
25 enthusiasm. So, in that regard, it's not entirely 14:40
26 clear to me as to why that remark is made in the Garda
27 Commissioner's submission, but I say that it is met by
28 considering the evidence Mr. Barrett gave about his
29 overall role in respect of Sergeant McCabe and his

1 overall role in the human resources directorate in An
2 Garda Síochána, a job he still holds

3
4 It is also asserted in paragraph 174 that he held back
5 matters in respect of the details of the date and the 14:41
6 alleged participation of the former Garda Commissioner
7 in relation to those matters. And again, I would just
8 reiterate that, Chair, that you consider that
9 Mr. Barrett came forward, provided a statement at an
10 early stage, and then during the course of his 14:41
11 evidence, when asked to obtain relevant documentation
12 in respect of emails and diary entries, that they were
13 provided overnight to the relevant parties and he was
14 cross-examined on them. He gave his answers in respect
15 of those matters. The Tribunal has that, and I ask you 14:41
16 to consider that, in that regard.

17
18 In relation to the next matter, a point is made that
19 Mr. Barrett should not have told the Tribunal that a
20 single email enabled him to triangulate the date, when 14:41
21 no such email existed. Subject to correction from any
22 other party, and the Tribunal will consider the
23 evidence itself, it had appeared to me that the
24 relevant evidence where the word "triangulation" was
25 mentioned was day 54 at page 47, and that, at that 14:42
26 stage, Mr. Barrett outlined that a particular email on
27 the 12th May 2015 had been used by him to triangulate
28 that the meeting had occurred on the 13th. So in that
29 regard, again, Chair, you will consider that evidence.

1 But I take issue in regard to that, because I think
2 Mr. Barrett's evidence was to the effect that there was
3 email correspondence, he produced it, and he identified
4 one, not on the date itself, but one from a preceding
5 date, which he used to triangulate his evidence. 14:43

6
7 The other matters which is referred to in that
8 paragraph is in relation to Mr. Barrett identifying a
9 conversation that he had with Superintendent McLoughlin
10 and that he had relayed the remark to superintendent 14:43
11 McLoughlin. And in that regard, again, those matters
12 were -- Superintendent McLoughlin made a statement to
13 the Tribunal. The contents of that statement were put
14 to Mr. Barrett, and Mr. Barrett gave his evidence in
15 respect of those matters, and the Tribunal will have 14:43
16 regard to that. I should note that, in relation to
17 Mr. Barrett, he did outline that Superintendent
18 McLoughlin was a person of high integrity and that is
19 something he said in the box. When Superintendent
20 McLoughlin was examined on this, on day 57 from pages 14:44
21 96 onwards, he outlined that he had no memory of that
22 conversation.

23
24 So I think they are the relevant matters. Rather than
25 a parsing or dealing with other matters, I think I can 14:44
26 deal with the issues I wanted to raise by reference to
27 that particular paragraph. And I don't wish to detain
28 the Tribunal any further, given the limited role I
29 have, unless you have any questions for me, Chair, at

1 this stage.

2 CHAIRMAN: Thank you, Mr. McGillicuddy.

3

4 SUBMISSION BY MR. SREENAN:

5

14:44

6 MR. SREENAN: Chair, if it is acceptable, I propose to
7 go next. My submissions are oral submissions in
8 closing, and I want to keep them as focused as
9 possible. As the Chair is aware, I and my colleagues
10 appear for former Commissioner O'Sullivan -- rather,
11 sorry, we appear as the -- for the counsel who appeared
12 for former Commissioner O'Sullivan. But apart from the
13 fact that they appeared for former Commissioner
14 O'Sullivan, it's important to bear in mind that they
15 also appeared for a number of individual senior gardaí,
16 including Superintendent Clancy, Superintendent
17 Cunningham, Chief Superintendent Rooney and former
18 Commissioner Callinan.

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19

20 So in terms of the submissions that have already been
21 made by My Friend, Mr. McDowell, he treats, throughout
22 those submissions, my clients, the senior and two
23 junior counsel who appeared for these persons,
24 essentially as appearing for Commissioner O'Sullivan,
25 but the group of clients that they represented was
26 broader than Commissioner O'Sullivan, and that is very
27 important in the context of the terms of reference that
28 you, sir, have to identify in this particular module.

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14:45

29

1 And that term of reference (e) is worth looking at with
2 some degree of scrutiny. And I appreciate it has
3 already received a lot of attention from you, Chairman,
4 but there are some aspects of the term of reference
5 that I would like to highlight. It calls upon you, 14:46
6 sir, to investigate whether the false allegations of
7 sexual abuse, or any other unjustified grounds, were
8 inappropriately relied upon by Commissioner O'Sullivan
9 to discredit Sergeant Maurice McCabe at the Commission
10 of Investigation. Now, there are a number of points I 14:46
11 think to be made about that. Firstly, we would urge
12 that, consistent with what I've just said, the term of
13 reference should not be interpreted on the false
14 premise that my clients had only one client, namely
15 Commissioner O'Sullivan. And having made that 14:47
16 observation in the first instance, the transcript
17 itself shows that false allegations of sexual abuse
18 were not relied upon at all by Commissioner O'Sullivan
19 to discredit Sergeant Maurice McCabe at the Commission
20 of Investigation. So that part of the term of 14:47
21 reference is easily answered.

22
23 There clearly were leaks relating to this, and those
24 leaks were false, and the end result was that it found
25 its way into this term of reference. But nobody here 14:47
26 has suggested, nor could they suggest, that
27 Commissioner O'Sullivan put or relied upon false
28 allegations of sexual abuse in order to discredit
29 Sergeant Maurice McCabe at the O'Higgins Commission.

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And that then leaves any other unjustified grounds, to which I will return in a moment. But first I ask the court -- or the Tribunal, to address the person who is the focus of this term of reference. The key aspect of the term of reference is that which identifies the person who is the focus of this term of reference, namely Commissioner O'Sullivan, and it asks the Tribunal to look at whether other unjustified grounds were inappropriately relied upon by Commissioner O'Sullivan, not by counsel for Commissioner O'Sullivan, acting outside the scope of their instructions, but by the Garda Commissioner herself. Obviously we've made it clear already that, as far as we're concerned, counsel, in representing Commissioner O'Sullivan, did not go outside the scope of their instructions, except insofar as Mr. Smyth, under questioning from Judge O'Higgins, referred to the question of integrity in a general sense.

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But if they went outside their instructions, then it's neither here nor there, in our submission, in terms of the task assigned to this Tribunal, which is focused on the Garda Commissioner's instructions; in other words, to take up on a point made by Mr. McDowell, her actual instructions. This is not, furthermore, an inquiry into private citizens; namely, my three clients, the three members of the Bar who acted for Commissioner O'Sullivan and the other senior gardaí. And it would

1 indeed be quite an unprecedented situation if a
2 tribunal of inquiry was set up into the manner in which
3 individual named barristers conducted a particular
4 case, while engaged in advocacy, written or oral.

14:50

5
6 Mr. Smyth, Mr. Byrne, Mr. McNamee are not the persons
7 named in this term of reference, either specifically or
8 by the generic term "counsel". And it is not, in our
9 submission, within the focus of this term of reference
10 for the Tribunal to focus its inquiry on Mr. Smyth,
11 Mr. Byrne and Mr. McNamee as such, but rather, to focus
12 its inquiry on Commissioner O'Sullivan and the grounds
13 that she relied upon through the instructions that she
14 gave to her counsel.

14:50

15
16 Of course it is the case that Commissioner O'Sullivan
17 might have relied upon false allegations of sexual
18 abuse or other unjustified grounds, through her agents,
19 to discredit Sergeant McCabe, and those agents can be
20 her counsel. But, however, and this we say is the key
21 point, the focus must be what she instructed them to
22 rely upon. And equally, the subject in focus of this
23 term of reference is Commissioner O'Sullivan and not
24 other senior gardaí such as Chief Superintendent
25 Rooney, Chief Superintendent Clancy or Superintendent
26 Cunningham or former Commissioner Callinan. The
27 inquiry is not directed to investigate whether false
28 allegations of sexual abuse or any other unjustified
29 grounds were inappropriately relied upon by any of

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14:51

1 those senior gardaí, either acting through their
2 instructions to counsel at the Commission of
3 Investigation or otherwise in their testimony. That is
4 not within the term of reference. And those matters
5 are simply outside the scope of this module. And it 14:52
6 would be inappropriate, in our respectful submission,
7 for you, sir, to adjudicate on such matters. And the
8 evidence shows, we say, that when we focus on
9 Commissioner O'Sullivan, she never gave instructions to
10 discredit Sergeant Maurice McCabe, but, rather, to 14:52
11 challenge his motivation and credibility. And the
12 evidence is clear that she never gave instructions to
13 challenge his integrity.

14
15 And returning now to the question of other unjustified 14:53
16 grounds inappropriately relied upon by Commissioner
17 O'Sullivan. This, we say, would require two things:
18 firstly, a ground would have to be identified by the
19 Tribunal, and this then would have to be established to
20 be unjustified; secondly, it would have to be 14:53
21 established that Commissioner O'Sullivan relied upon
22 this ground inappropriately. And a ground must be
23 distinguished from what is simply an approach to
24 cross-examination. To question Sergeant McCabe's
25 credibility or motivation is an approach to 14:53
26 cross-examination. It's not a ground in itself.
27 Grounds are things that would be relied upon in turn to
28 address motivation or credibility. And the fact is
29 that, based on the evidence, Commissioner O'Sullivan

1 did not identify any grounds upon which to discredit
2 Sergeant McCabe and did not instruct any particular
3 reliance on any ground as a way of discrediting
4 Sergeant McCabe. She simply gave instructions to
5 counsel who were acting not just for her but also for 14:54
6 other senior gardaí, to test the credibility of the
7 evidence and, if necessary in that context, to
8 challenge the credibility and motivation of Sergeant
9 McCabe for making certain allegations which he was
10 making, particularly those of corruption. And 14:54
11 furthermore, insofar as she might be held to have
12 relied upon some grounds, and we say that she herself
13 didn't identify any grounds as such, they certainly
14 weren't inappropriately relied upon by her, nor were
15 they unjustified, as we say is demonstrated ultimately 14:55
16 by the findings of the O'Higgins Commission to the
17 effect that the allegations of corruption made by
18 Sergeant McCabe were unfounded.

19
20 And I'd like to turn to another aspect of this term of 14:55
21 reference briefly, sir, and it is the words "to
22 discredit Sergeant Maurice McCabe". And there are at
23 least two common meanings that we come across in
24 practice to the words "to discredit". The first would
25 be to discredit assertions of fact or opinion. You 14:55
26 might speak of discrediting a rumour, or discrediting
27 evidence, or discrediting a theory, but the second
28 aspect or meaning of the words commonly employed is to
29 discredit a person by damaging his reputation generally

1 or undermining his reputation generally. For example,
2 we might say that, to his discredit, the swimming coach
3 was found to have sexually abused the pupils; we might
4 say, to his discredit, the politician or the judge was
5 found to have taken a bribe. So we have two common 14:56
6 ways in which the term "discredit" is employed. Here,
7 in the term of reference, it is employed in the second
8 sense, not the first. And we can tell that from the
9 fact that the terms of reference refer to "false
10 allegations of sexual abuse or any other unjustified 14:57
11 grounds". "Any other unjustified grounds" must be
12 understood in the context of the words that go before
13 it, "false allegations of sexual abuse". And "false
14 allegations of sexual abuse" are the sort of things
15 that are used to discredit a person, to damage their 14:57
16 repute generally. And secondly, we can see that the
17 terms of reference speak of discrediting Sergeant
18 Maurice McCabe, not discrediting his testimony or
19 discrediting his allegations, but to discredit him
20 personally; in other words, a type of ad hominem 14:58
21 attack.

22
23 So what this Tribunal is asked to focus upon and make
24 findings on in terms of terms of reference (e), we
25 would say is quite limited and deliberately limited, 14:58
26 and it refers to grounds inappropriately relied upon by
27 Commissioner O'Sullivan to discredit the person, not to
28 discredit his testimony. And whether or not she relied
29 on such grounds, such as deploying false allegations of

1 sexual abuse in order to discredit him generally. And
2 in that respect we would say that the evidence is that
3 neither Commissioner O'Sullivan, directly through her
4 instructions or counsel acting on her behalf, sought to
5 discredit the person. They sought to challenge the 14:59
6 credibility of his testimony and, in that context, to
7 challenge his motivation for the allegations that he is
8 making. And the context for the instructions given by
9 Commissioner O'Sullivan appears in perceptive terms in
10 the judgment of Mr. Justice Hardiman, which is quoted 14:59
11 in the document handed in this morning to the Tribunal
12 by Mr. McGuinness at page 20, at paragraph 112 of his
13 judgment in O'Callaghan v. Mahon, where he says:

14
15 "A full and unhampered right to cross-examine a person 15:00
16 who makes grave allegations against another at a
17 tribunal of inquiry is an important constitutional
18 right. It cannot be impinged upon without a firm basis
19 in law, which must itself be consistent with the
20 Constitution." 15:00

21
22 So the context in which the Commissioner gives
23 instructions to her counsel, the context in which the
24 other senior gardaí give instructions to their counsel,
25 is a context in which grave allegations have been made 15:00
26 against certain senior gardaí. Those allegations were
27 initially made by Sergeant Maurice McCabe, and the
28 Constitution recognises the full and unhampered right
29 to cross-examine in that respect. And Sergeant McCabe

1 cannot have come along to this Commission of Inquiry in
2 the expectation that his testimony was not going to be
3 tested or challenged, that counsel for the Garda
4 Commissioner, who has responsibilities not just to him
5 but other members of the force, was not going to 15:01
6 challenge or test the credibility of his evidence, that
7 they were simply there in order to give him a clap on
8 the back and say 'you're great, everything you said is
9 beyond question', of course he was going to be
10 challenged. But the instructions insofar as they were 15:01
11 given by Commissioner O'Sullivan, it's clear that they
12 were confined to motivation and credibility. And
13 motivation and credibility are often, although not
14 inevitably, intertwined. And again, returning to
15 Mr. McGuinness's helpful written document this morning, 15:02
16 he quotes at page 2 of the document from the 19th
17 edition, in 2018, of Phipson on Evidence at paragraph
18 12.36, and it's worth returning to that, and I will
19 return to the quote:

20
21 "The credibility of a witness depends on his knowledge 15:02
22 of the facts, his intelligence, his disinterestedness,
23 his integrity, his veracity."

24
25 Disinterestedness, of course, brings into play the 15:02
26 whole question of motivation. A person who has a
27 particular motivation or might have a particular
28 motivation for his allegations may not be
29 disinterested. And insofar as Phipson refers to the

1 credibility of a witness depending, inter alia, on his
2 disinterestedness, it recognises the connection between
3 credibility and motivation.

4
5 And the same paragraph of Phipson goes on to say:

15:03

6
7 "So all questions may be asked in cross-examination
8 which tend to expose the errors, omissions,
9 inconsistencies, exaggerations or improbabilities of
10 the witness's testimony."

15:03

11
12 And motive can provide an explanation for why a
13 person's perception or narrative might be unreliable,
14 careless, exaggerated, or untrue. And in that respect,
15 also, where one has somebody such as Sergeant McCabe,
16 who suddenly seems to advance allegations of
17 administrative incompetence and develop them into
18 allegations of corruption by senior officers, if one is
19 to consider the credibility of those allegations
20 against the senior officers, the first question that a
21 trier of fact is likely to ask in their own minds is:
22 why would a person like that suddenly start coming
23 forward with these allegations if they weren't true?
24 And if the advocate is to explore the credibility of
25 those allegations, the advocate has to ask himself and
26 also probe the question why would he be coming up with
27 these allegations of corruption if they weren't true?
28 Is there some explanation there for it? And if there
29 is, that needs to be explored and it's a matter then

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15:04

1 for the ultimate trier of fact to decide what weight
2 will be attached to that. But to completely ignore it
3 would be a dereliction of duty on the part of the
4 advocate to his clients, whose good name and reputation
5 might depend upon the outcome of that inquiry. And in 15:05
6 the context of the relevance of raising motivation
7 here, I'd ask the Tribunal to bear in mind the Brief
8 Proven Facts document, which was provided to my clients
9 at a very early stage of their instructions, and that
10 clearly demonstrated that counsel representing Messrs. 15:05
11 Cunningham, Clancy, Rooney, Callinan, etcetera, had to
12 be prepared for a large amount of evidence, allegedly
13 supporting accusations, which evidence had not yet been
14 provided to them. Large amounts of tape-recorded
15 conversations, witnesses who might yet come forward 15:06
16 supporting allegations. That Brief Proven Facts
17 document was quite wide in the scope of the allegations
18 that it was sketching out and with which counsel
19 potentially had to concern themselves in defending
20 their clients. 15:06

21
22 FIRE ALARM SOUNDS - TRIBUNAL EVACUATED.

23
24 THE HEARING RESUMED AS FOLLOWS:

25
26 CHAIRMAN: Please carry on, Mr. Sreenan.

27 MR. SREENAN: Thank you, Chairman.

28 CHAIRMAN: Bearing in mind at all times that I have
29 actually been here for the last six weeks.

1 MR. SREENAN: Yes, I appreciate that, Chairman. At the
2 same time, Chairman, you will appreciate that, in the
3 context of Mr. McDowell's detailed exposition of the
4 evidence, it is necessary for me, in fairness to my own
5 clients, to -- 15:17

6 CHAIRMAN: Mr. Sreenan, it is not a criticism.

7 MR. SREENAN: No.

8 CHAIRMAN: Concision, I know, is one of the great
9 hallmarks of an advocate.

10 MR. SREENAN: Thank you. Could I also draw your 15:17
11 attention, Chairman, to what was the scope of the
12 O'Higgins Commission itself in the module that we're
13 looking at in the context of the interchange that took
14 place initially with Mr. Justice O'Higgins. It's on
15 page 153 of the book circulated by this Tribunal. The 15:18
16 Tribunal has seen this already and it's not necessary
17 to turn it up, simply to give you the reference. But
18 in relation to what was described as Module 1, it was
19 described by the O'Higgins Commission itself as terms
20 of reference 1(a), (j) and (k). And we have already 15:18
21 seen that 1(a) related to the Kingscourt incident, but
22 (j) related to the investigation by An Garda Síochána
23 and the Minister of complaints made by Sergeant McCabe
24 in relation to the matters (a) to (i), and (k) related
25 to the investigation by An Garda Síochána and GSOC of 15:18
26 Garda disciplinary issues relating to the above
27 matters. And also the terms of reference of the
28 O'Higgins Commission provided that the Commission
29 should exercise discretion in relation to the scope and

1 intensity of the investigation it considers necessary
2 and appropriate, having regard to the general objective
3 of the investigation. So that when counsel came to
4 dealing with this particular module, it wasn't simply
5 something confined to 1(a), it also extended to (j) and 15:19
6 (k) and, of necessity, took in the general discretion
7 of the Commission.

8
9 So each of these modules cannot be hermetically sealed,
10 one from the other. 15:19

11
12 As I submitted, motivation was not relied upon to
13 discredit Sergeant Maurice McCabe, but rather to test
14 the credibility of his evidence. In other words,
15 motivation provided some explanation or a possible 15:19
16 explanation for why there was a sudden flood of
17 allegations of serious wrongdoing and corruption
18 against senior gardaí. And indeed the fact that
19 Assistant Commissioner Byrne had also looked at the
20 issue of motivation indicates its relevance in this 15:20
21 context. I would also point out that the O'Higgins
22 Commission itself didn't rule out motivation and it
23 considered motivation in its final report. All
24 Mr. Justice O'Higgins stated was that he did not see
25 motivation as being relevant to Module 1(a) other than 15:20
26 that Maurice McCabe had potentially a grievance which
27 led him to make complaints. In other words, the
28 O'Higgins Commission considered motivation to be
29 relevant even in Module 1(a) or Module 1 to a limited

1 extent, and otherwise it's clear that Mr. Justice
2 O'Higgins was not ruling out evidence on motivation
3 generally. And even if, and we say this is not the
4 case, even if motivation was relied upon by
5 Commissioner O'Sullivan to discredit Sergeant McCabe as 15:21
6 distinct from challenging his credibility, it was
7 neither unjustified nor inappropriately relied upon in
8 circumstances where it provided a possible explanation
9 for his sudden change of behaviour and the making of
10 allegations against senior officers, and to which 15:21
11 senior officers Commissioner O'Sullivan also owed a
12 duty of care and which senior officers were clear that
13 those allegations were untrue. So Mr. Justice
14 O'Higgins never said that motive was irrelevant, merely
15 that he didn't see its relevance to term of reference 15:21
16 1(a) except the limited extent of a possible grievance.
17 Nevertheless, Mr. Justice O'Higgins accepted that, even
18 for that module, the fact that Sergeant McCabe might
19 have considered that he had a grievance, might be
20 relevant and he allowed it. And finally, Mr. Justice 15:22
21 O'Higgins did not rule out motivation or direct counsel
22 not to raise it again.

23
24 And that brings me to the introduction of other terms
25 and in particular the term "integrity". And the first 15:22
26 thing I'd ask the Tribunal to bear in mind is the
27 timescale of the task that was presented to counsel and
28 the lack of availability of detailed instructions, and
29 that provides the context for the interchange which

1 happens then with Mr. Justice O'Higgins in one of the
2 first days of the hearing. This has been explained in
3 evidence. But the Tribunal will recall that
4 instructions were received by counsel very late in the
5 day, they didn't get a formal case to counsel, they 15:23
6 didn't get draft witness statements, they didn't have
7 the facility of consulting with all of their clients
8 before the Commission started to sit. They did receive
9 instructions that motivation and credibility were to be
10 tested and received those instructions from 15:23
11 Commissioner O'Sullivan. And integrity then is
12 something that is raised quite separately and, as we
13 have seen, raised by the Commission itself.

14
15 There are a number of things that must be observed 15:23
16 about this aspect of the evidence. First, the question
17 of challenging integrity was not an instruction from
18 the Commissioner. That is the Commissioner's evidence.
19 It's counsel's evidence. And in the context of the
20 term of reference, it is not something relied upon by 15:24
21 the Commissioner or that was relied upon by the
22 Commissioner. Secondly, we would say that regard has
23 to be had for the way in which it arose and the
24 pressures of advocacy under intense questioning by the
25 chairperson. If one looks at the transcript of the 15:24
26 hearing on the 5th May 2015, what one sees is that
27 counsel stated what his instructions were: to
28 challenge motivation and credibility. It's entirely
29 understandable that the chair of the Commission would

1 wish to probe and try and establish for itself just
2 what is the task that it faces in that respect, and the
3 chair of the Commission did raise various questions and
4 counsel tried to deal with them there and then on his
5 feet, and the chairperson did engage in robust argument 15:25
6 with counsel and did try to test the limits of those
7 instructions, but what is clear is that counsel wasn't
8 permitted simply to say "my instructions are to
9 challenge motivation and credibility". It is also
10 clear that it was the chairperson of the Commission who 15:25
11 first introduced the word "integrity". It was the
12 chairperson of the Commission who first introduced the
13 words "malice", "dishonest or wrong", "not in good
14 faith". And these were raised by the chairperson in
15 the context of trying to, I suppose, find what were the 15:25
16 edges of the envelope or the limits of the
17 instructions. One could say that these were all
18 emotive terms that were raised by the Commission, but
19 what is interesting is that in relation to those terms,
20 "malice", "dishonest or wrong", "not in good faith", 15:26
21 even under intense questioning and argument with the
22 Commission, counsel for the Commissioner did not adopt
23 them. And no matter how much counsel was pushed on the
24 issue, counsel did not adopt those terms. He did, of
25 course, say, on the date in question, that attacking 15:26
26 credibility and motivation extended to credibility, but
27 at the -- or extended to integrity, but the end of the
28 argument with the Judge made it clear that integrity
29 was being attacked only to the extent to which a motive

1 was improper, and it is wrong simply to pick out a word
2 here or a sentence there without looking at the whole
3 organic mass of the interchange between counsel and the
4 chairperson of the Commission. Of course, if a
5 person -- in one sense, if a person makes allegations 15:27
6 which are untrue and if their motive for making them is
7 not to have the allegations investigated as such, but
8 rather to pursue some personal objective, it might be
9 said in one sense that that reflects, in that respect
10 only, on his integrity. It doesn't mean that he's a 15:27
11 person lacking in integrity generally. But if one does
12 look at the transcript, and I just want to highlight
13 for you, sir, certain aspects of the transcript, as
14 Mr. McDowell did, one does see that essentially what it
15 boils down to is that, insofar as there is a discussion 15:28
16 about integrity, what Mr. Smyth says and what the
17 position the Judge comes to is, integrity is being
18 challenged in that respect only, only in respect to the
19 extent to which there might be a wrong motive for the
20 making of some allegation. And we see on the 15th May, 15:28
21 when the issue first arose, it arose in the context of
22 Chief Superintendent Colm Rooney giving evidence that
23 Sergeant McCabe came to him, probably in late 2007,
24 essentially demanding that he write to the DPP and
25 challenge the decision that the DPP had made in respect 15:28
26 of him, and then an issue immediately arose, and it may
27 be that the representatives of Sergeant McCabe, or
28 Sergeant McCabe himself, may have incorrectly
29 anticipated that it was intended to raise the

1 allegation of sexual assault, which it was not intended
2 to raise. What it was intended to raise was the fact
3 that Sergeant McCabe himself admitted that the purpose
4 of making a particular complaint was in order to have
5 the DPP's directions circulated to the D family and to 15:29
6 him. And when asked what the relevance of it was,
7 Mr. Smyth said, on that day, at 15:09:

8
9 "The relevance may be in the context of motivation for
10 certain facts or certain matters or indeed credibility 15:29
11 in relation to certain matters."
12

13 And after an adjournment, when the Commission resumed
14 at 15:51, Mr. Justice O'Higgins said:

15 15:29
16 "The question of credibility of witnesses can be probed
17 in the normal fashion in relation to clearly the
18 accuracy of somebody's memory, bears on the credibility
19 of their evidence and so forth, but if it goes beyond
20 that, if it is the Commissioner's case that she wishes 15:30
21 to impugn the motivation and the integrity of Sergeant
22 McCabe."
23

24 And that was the first mention of "integrity".

25 15:30
26 "If those are your instructions, that Sergeant McCabe
27 acted out of improper motivation and that his character
28 is, it is not unreasonable of Mr. McDowell to say
29 whether an attack on the integrity and motivation of

1 Sergeant McCabe forms part of your case."

2

3

And Mr. Smyth said:

4

5

"My instructions are to challenge the integrity

15:30

6

certainly of --"

7

CHAIRMAN: Mr. Sreenan, it may help you to know that I

8

actually went through the entire of the transcript,

9

word by word, in terms of the relevant bits, and marked

10

where everyone said whatever word is in issue for the

15:30

11

first time, who repeated it, how often they repeated

12

it, where and when, so it may help you, and also what

13

rulings were made by the trial judge. And I have

14

actually done a chart up in that respect, and I don't

15

think that is jumping the gun.

15:30

16

MR. SREENAN: No. Well, that does help me, Chairman.

17

CHAIRMAN: It is better than shooting yourself,

18

certainly, jumping the gun is, but...

19

MR. SREENAN: Yes. Well, I would hope neither to jump

20

the gun or shoot myself, Chairman.

15:31

21

CHAIRMAN: Right. So your point is?

22

MR. SREENAN: My point is, that when you look through

23

the interchange between Judge O'Higgins and counsel,

24

one sees that counsel was not coming into the

25

Commission saying, I'm here to challenge the integrity

15:31

26

of Sergeant McCabe. He comes in and he says my

27

instructions are to challenge his credibility and

28

motivation. He is probed on the question of the limits

29

of his instructions. He doesn't adopt any of the words

1 put to him, other than integrity, and it boils down, at
2 16:34 on that day, where Mr. Justice O'Higgins says:

3
4 "And that his integrity --"

5
6 Sorry, sorry, I should go slightly before that.

7 Mr. Justice O'Higgins says:

8
9 "Very good. Your instructions, as I understand them,
10 are that Sergeant McCabe acted as he did for improper
11 motives."

12
13 And Mr. Smyth said:

14
15 "Yeah."

16
17 And Mr. Justice O'Higgins said:

18
19 "And that his integrity is being challenged in that
20 respect?"

21
22 And Mr. Smyth said:

23
24 "In that respect."

25
26 And that is basically where it comes to, that insofar
27 as a person, out of improper motive, makes an
28 allegation, which turns out to be false, against
29 another colleague and was thought at that time against

1 a superior officer, then to that -- in that respect, to
2 that limited extent, it might reflect on his integrity.
3 But it doesn't mean that his integrity as a person is
4 generally being challenged, and that was then made
5 abundantly clear at a later stage. 15:32

6
7 Could I also make this observation, sir: that huge
8 attention has been paid in microscopic detail to the
9 exchange between Mr. Smyth, or the exchanges between
10 Mr. Smyth and Mr. Justice O'Higgins. But perhaps even 15:32
11 of greater relevance is, what was actually put to
12 Sergeant McCabe. And nothing has been identified by
13 this Tribunal in its opening, or by Mr. McDowell, we
14 would say, in cross-examination, of which complaint can
15 properly be made. It wasn't put to Sergeant McCabe 15:33
16 that he was malicious, it wasn't put to him that he
17 acted in bad faith and it wasn't put to him that he had
18 been guilty of any sexual assault. The exchange on the
19 15th May 2015 purely related to Chief Superintendent
20 Rooney referring to the fact that Sergeant McCabe had 15:33
21 asked him for the DPP's decision which was believed to
22 be relevant at the time to complaints about
23 Superintendent Clancy. But none of these matters, bad
24 faith, malice, or anything, were relied on in
25 cross-examination and none of them were suggested to 15:34
26 Sergeant McCabe by Mr. Smyth.

27
28 And all of that, of course, is subject to the fact that
29 Mr. Smyth, on behalf of his client, had both a right

1 and a duty to cross-examine, particularly on behalf of
2 the senior officers for whom he appeared, and the
3 pivotal importance of that right has been recognised in
4 the jurisprudence of our courts time and time again.
5 And if a cross-examination turns out that it's going 15:34
6 too far, then it's for the judge or the chairperson of
7 the commission or a tribunal to control it and put a
8 stop to it. Also, it is, of course, the case that the
9 Rules of Evidence do not fully apply to a tribunal. A
10 tribunal regularly entertains hearsay evidence, for 15:34
11 example, and it doesn't follow that the rules of
12 cross-examination, as they're understood, for example,
13 in criminal trials, are strictly applicable in
14 tribunals of inquiry, and again I emphasise that word,
15 "inquiry". 15:35

16
17 Now, interestingly, this morning, Mr. McDowell spent
18 some time on the topic of what he described as
19 sustained attempts to lay responsibility on Sergeant
20 McCabe as a Member in Charge of Bailieboro Garda 15:35
21 Station. And this was put forward as some potential
22 example of an justified ground, although we would say
23 (a) that it was not unjustified and (b) it wasn't
24 intended to discredit Sergeant McCabe, rather to
25 question or explore the extent of his own 15:35
26 responsibility. If there's to be an inquiry into
27 particular alleged deficiencies, one has to look at the
28 role of everybody involved. But insofar as my
29 colleague, Mr. McDowell, laid some emphasis on that

1 this morning, I would ask the Tribunal here to
2 remember, that was not the subject of any detailed
3 cross-examination of my client, Mr. Smyth, by
4 Mr. McDowell.

15:36

5
6 On page 202 of day 48 of the transcript before this
7 Tribunal, there was a very limited cross-examination of
8 Mr. Smyth by Mr. McDowell on the topic of
9 cross-examination of Maurice McCabe about his own
10 responsibility. And Mr. Smyth said, in answer, that he
11 was entitled to explore the responsibility of the
12 sergeant in charge of the Garda station, and said in
13 the course of his answer to Mr. McDowell:

15:36

14
15 "Are you suggesting that by doing that I am in some way
16 impugning his integrity?"

15:36

17
18 And Mr. McDowell is on record in the transcript as
19 saying:

20
21 "No, I'm not."

15:37

22
23 So why this emphasis is now placed on it is not
24 entirely clear to me, because it certainly was not a
25 basis of cross-examination of my client to suggest that
26 these were unjustified grounds used to discredit him.
27 It wasn't a line of cross-examination to discredit him
28 as a person. It was not inappropriate. And finally,
29 it cannot be suggested that, uniquely, Sergeant

15:37

1 McCabe's role in the incidents in question could not be
2 explored.

3
4 And on this particular topic of attempts to lay
5 responsibility on Sergeant McCabe, we would say that in 15:37
6 the absence of any detailed identification of what is
7 supposed to be inappropriate attempts by the Tribunal's
8 own counsel in its opening or by Mr. McDowell in
9 cross-examination or any detailed blow-by-blow
10 cross-examination on each topic, this Tribunal couldn't 15:38
11 fairly make any findings on that topic.

12
13 Now, can I turn now to the 18th May letter. And again,
14 the Tribunal -- this Tribunal is aware of the speed
15 with which this letter had to be put together under 15:38
16 pressure of time over a weekend. The O'Higgins
17 Commission was a commission that was operating at very
18 high speed. It is only paragraph 19 of that letter,
19 which has been the subject of criticism here. In
20 relation to the error in paragraph 19 of that letter, 15:39
21 it wasn't based on instructions from the Commissioner,
22 and, accordingly, it is quite simply irrelevant to the
23 terms of reference. Its source was instructions coming
24 from somebody else. It may be that those instructions
25 were misunderstood, but we can't go there because that 15:39
26 is a matter of privilege. But one way or the other, in
27 terms of term of reference (e) it is simply not based
28 on instructions from the Commissioner. And even if
29 that had been relied on by the Commissioner, which it

1 was not, the fact is that the error doesn't go to lack
2 of justification of the ground or inappropriateness of
3 the reliance, because Sergeant McCabe admitted, as
4 subsequently became clear, that he had made a complaint
5 against a colleague, Mr. D, for the purposes of 15:39
6 pursuing a personal objective of having the DPP's
7 decision in relation to him in a private capacity made
8 available and circulated. And the relevant point was
9 that he was prepared to make a complaint against a
10 colleague for the motive of getting access to the DPP's 15:40
11 decision in his own matter rather than having the
12 complaints investigated.

13 CHAIRMAN: Sorry, Mr. Sreenan, I'm not sure about that.
14 I mean, the plain reality is: let's take it that what
15 is in the letter is correct, or believed to be correct, 15:40
16 well then he a reason to complain.

17 MR. SREENAN: Well, I don't entirely follow, Chairman.
18 What's in the letter --

19 CHAIRMAN: Let's suppose that he knew that the D family
20 as upset, that is taking, if you like, a fundamental 15:40
21 fact with which nobody can disagree, and takes the
22 view, in the event that I put certain matters together,
23 the D family may get the letter that I have got and
24 maybe they'll be less upset. Now, there's nothing
25 wrong with that. 15:41

26 MR. SREENAN: There's nothing wrong, Chairman, with
27 Sergeant McCabe having the wish to have the DPP's
28 decision circulated to the D family. That's an
29 understandable desire on his behalf and one can readily

1 identify with it. But what Sergeant McCabe admitted at
2 the Mullingar meeting was that the complaints that were
3 the subject of the investigation being conducted by
4 Superintendent Cunningham at that meeting had been made
5 by him against Mr. D, but that his objective was to 15:41
6 have the DPP's decision circulated, that is why he made
7 those complaints. Now, he said it was suggested to him
8 by Chief Superintendent Clancy that do that, but the
9 fact is that both in terms of Superintendent
10 Cunningham's record of that meeting and in terms of the 15:42
11 tape-recording made by Sergeant McCabe at that meeting,
12 Sergeant McCabe accepted that the reason he made the
13 complaints against Mr. D, his colleague, was in order
14 to get the DPP's decision circulated.

15 CHAIRMAN: There may be a misunderstanding. I thought 15:42
16 you were saying that the complaint in relation to Mr. D
17 or the D family or their disquiet or whether it was
18 untrue, there is no suggestion of that.

19 MR. SREENAN: No.

20 CHAIRMAN: Okay. 15:42

21 MR. SREENAN: No. So, yes, there was an error in the
22 19th May letter, which was regrettable, that the
23 complaint was made about Superintendent Clancy, rather
24 than about Mr. D to Superintendent Clancy, but
25 ultimately, when that was cleared up, Mr. Justice 15:43
26 O'Higgins is on transcript, and you will have seen
27 this, sir, as saying, well, does it really matter, you
28 know, because the two accounts of the meeting coincide.
29 And generally in relation to this letter, can I point

1 out that this letter was not, as was described in the
2 course of the opening, counsel's letter to the
3 Tribunal. It is a letter from the Chief State
4 Solicitor's Office to Mr. Justice O'Higgins. A draft
5 was provided by counsel, under pressure, over a 15:43
6 weekend, with a clear warning to check that it was
7 factually correct before it was submitted. It was
8 checked and signed off on, and thereafter, counsel were
9 entitled to regard it as a checked version of facts
10 that was essentially part of their instructions. 15:44
11 Paragraph 19 itself was not based on instructions from
12 the Commissioner; paragraph 19 doesn't contain anything
13 to discredit Sergeant McCabe as a person generally,
14 but, rather, to undermine the credibility of his
15 testimony; paragraph 19 is not inappropriate or 15:44
16 unjustified, apart from the error, as to the person
17 about whom the complaint was made because Sergeant
18 McCabe admitted what we would say is inappropriate, or
19 arguably inappropriate motivation for making that
20 complaint against a colleague and that there was, in 15:44
21 fact, no difference between Superintendent Cunningham's
22 record of the Mullingar meeting and Sergeant McCabe's
23 tape, so that the production of the tape wasn't a
24 revelation that proved the untruth of something that
25 was said prior to that. And as for the attachments, 15:45
26 they were not given at the time to counsel. Our
27 understanding is that the letter of the 18th May and
28 three documents were handed in to Judge O'Higgins on
29 the morning, and subsequently it's a matter for the

1 Commission to circulate them. As for the submissions,
2 the written submissions put in, there were two sets:
3 one towards the end of the first module and the other
4 at the very end of the Commission.

5
6 And in relation to the first set of submissions, can I
7 just make a number of brief points. The first is that
8 the parts criticised in those submissions are not based
9 on instructions from the Commissioner. Secondly, the

10 submissions are addressing the credibility of Sergeant
11 McCabe's testimony rather than discrediting him as a
12 person. Thirdly, they were checked and signed off on
13 following warnings by counsel to ensure that they were
14 correct. Fourthly, the relevant parts of which

15 complaint is now made reflect instructions of persons
16 other than the Commissioner. And again, we have to
17 respect that privilege. And finally, of course, they
18 are only submissions. The Commission, namely

19 Mr. Justice O'Higgins, is free to reject them. And
20 insofar as we have the final set of submissions which
21 went in much later and addressed the issue of

22 credibility also and the issue of motivation, I simply
23 make one point in passing: Mr. McDowell, this morning,
24 criticised those submissions for the inclusion of
25 reference to the evidence in relation to the Sally
26 Shields hit-and-run which had been described as

27 evidence that was unhelpful by the Commission. But the
28 Commission did not rule the evidence inadmissible; it
29 said it was unhelpful. The evidence was given by a

1 client for whom counsel appeared, namely Superintendent
2 Cunningham. It was given in response to questions from
3 the Commission's own counsel, not questions from Colm
4 Smyth, and whether to act on that evidence or not was a
5 matter for the Commissioner, Mr. Justice O'Higgins. It 15:47
6 cannot be said that counsel are expected, or obliged
7 indeed, to ignore parts of the evidence in making
8 submissions.

9
10 And that leads me to the manner of the 15:47
11 cross-examination of Sergeant McCabe, which we say was,
12 at all times, when conducted by Mr. Smyth, proper and
13 respectful, and indeed when Sergeant McCabe
14 contradicted the allegation against him in relation to
15 the Mullingar meeting, when it was put to him that in 15:48
16 the course of an investigation into an allegation he
17 had made about Superintendent Clancy that he made the
18 admission in relation to the purpose of the complaint,
19 when Sergeant McCabe said no, that's false, or that's
20 wrong, Mr. Smyth accepted that answer and moved on. He 15:48
21 didn't unduly press Sergeant McCabe in relation to it.

22
23 And this question of shouting is something that I must,
24 in fairness to my client, deal with. Sergeant McCabe's
25 statement that was submitted to this Tribunal alleged, 15:48
26 at page 12, that the hearings were highly adversarial
27 and that he broke down on a number of occasions due to
28 the ferocity of the attack by counsel for the
29 Commissioner, that he had to seek medical attention,

1 "that her counsel didn't cross-examine anybody but me
2 in said fashion," that Sergeant McCabe had no issue
3 with the vigorous cross-examination he was subjected to
4 by the other legal teams representing Byrne/McGinn,
5 AGSI, and GRA, they were doing their job to protect 15:49
6 their clients and were thoroughly professional, but
7 that he took grave exception to the pejorative and
8 hostile tone adopted by Colm Smyth, Senior Counsel, "so
9 much so that on a number of occasions I had to say
10 'Mr. Smyth, please stop shouting'." 15:49

11
12 There are a number of aspects of that statement that
13 need to be highlighted. The reference to the ferocious
14 attack and highly adversarial approach leading to a
15 breakdown which required medical attention, the 15:49
16 distinction he draws with the conduct of other counsel,
17 the allegations that Mr. Smyth's behaviour was not
18 professional, the fact that on a number of occasions he
19 had to say "Mr. Smyth, please stop shouting", that
20 cannot properly be regarded as just a mistake. Counsel 15:50
21 and solicitor were there at the O'Higgins Commission.
22 This statement, before it went into the Tribunal, must
23 have been read over in many drafts by counsel and
24 solicitor, who had the unique advantage of being
25 present at the event that's there described, and it's 15:50
26 not taken out. It's then not backed up in
27 cross-examination of Mr. Smyth here and only withdrawn
28 on the 5th March. Now, that's a statement that itself
29 was made on the 15th March 2017. It's a very damaging

1 and hurtful allegation. It is an attack on the person
2 of Colm Smyth, Senior Counsel. It is utterly
3 unjustified and has been withdrawn late in the day.
4 The only explanation that we get is that a person,
5 we're not even told it's a solicitor made the mistake, 15:51
6 although how this could be a mistake, because it's a
7 series of quite a number of mistakes, if it is, is very
8 unclear and how it could not have been subsequently
9 picked up on, how it could have been left on the record
10 for nearly a year and how this Tribunal and those 15:51
11 appearing before it are put to the trouble and the
12 exercise of listening to the whole transcript,
13 investigating this, only to find that, at the very last
14 minute, it's withdrawn. And would it have been
15 withdrawn, I raise the rhetorical question, would it 15:51
16 have been withdrawn if this Tribunal had not gone to
17 the trouble of listening to those tapes and ensuring
18 that they were circulated to the parties? There was a
19 huge waste of cost involved.

20
21 And most importantly, it is typical of the fact, we
22 would respectfully submit, that Sergeant McCabe has
23 been shown, even before the O'Higgins Commission, to
24 make and to float false allegations which are often
25 based on exaggeration, which are then withdrawn at the 15:52
26 last minute and no explanation is given as to why they
27 are firstly made, secondly persisted in.

28
29 And I'd ask the Tribunal then to consider the report of

1 the O'Higgins Commission itself and the findings. And
2 those findings demonstrate that motive was relevant.
3 Mr. Justice O'Higgins himself condemns Sergeant McCabe
4 on the basis, inter alia, of motivation in relation to
5 one matter, certainly. And it shows that the challenge 15:53
6 to the credibility of Maurice McCabe's evidence was
7 justified. And in that respect, if I could just open a
8 very few extracts and then highlight the others simply
9 by giving you the reference, sir, of those that I would
10 like you, in time, just to review. I know you have 15:53
11 already looked at them. But if I could just open
12 paragraph 3.5, where Mr. Justice O'Higgins said:

13
14 "Sergeant McCabe made complaints of corruption under
15 the Garda Síochána (Confidential Reporting of 15:53
16 Corruption and Malpractice) Regulations 2007 against
17 the then-Garda Commissioner Martin Callinan. The
18 Charter established under those regulations doesn't
19 define corruption or malpractice, but includes not only
20 matters which constitute criminal behaviour but also 15:53
21 other conduct such as breaches of discipline and
22 breaches of authority and a range of other matters. It
23 was submitted on behalf of Sergeant McCabe that he
24 hadn't intended to make allegations of criminal conduct
25 against the Commissioner, but rather of an abuse of 15:54
26 power only. The allegation was understood by the
27 Commissioner to be one of criminal conduct. The
28 hurtful allegation was based on the belief, unsupported
29 by any evidence, that the Commissioner had put

1 Superintendent Clancy on a promotion list. The
2 complaint was in part a device to ensure that the
3 complaint came before the Minister for Justice and
4 Equality. At that time, a complaint against the
5 Commissioner had to be referred to the Minister. The 15:54
6 matter is dealt with in chapter 13 of this report where
7 the former Commissioner is vindicated. Complaints of
8 corruption in the context of the Charter were also made
9 against Assistant Commissioner Byrne, Chief
10 Superintendent Rooney and Superintendent Clancy. In 15:54
11 each case, the Commission has found those hurtful
12 complaints unfounded and those against whom such
13 complaints were made had to live for many years under
14 the strain of those allegations. No direct allegation
15 of corruption was levelled against Superintendent 15:55
16 Cunningham, but so far as any may be implied, they are
17 also unfounded.

18
19 3.9. There were a large number of complaints against
20 Chief Superintendent Clancy examined in detail in this 15:55
21 report. He is exonerated of any wrongdoing and is the
22 subject of only occasional and very mild criticism."
23

24 Now, here, we have Mr. Justice O'Higgins, who,
25 admittedly earlier has indicated that that some people 15:55
26 wrongly and unfairly cast aspersions on Sergeant
27 McCabe's motives, in the immediate following paragraph
28 he condemns what Sergeant McCabe did in terms of making
29 allegations of corruption against former Commissioner

1 Callinan, partly on the basis of motive. He was
2 motivated in making that allegation in order to get his
3 complaints onto the Minister's desk and he knew that if
4 he included an allegation of corruption against a Garda
5 Commissioner, it had to, under the rules, go on to the 15:56
6 desk of the Minister.

7
8 So this is an example of Mr. Justice O'Higgins himself
9 finding the motive to be relevant.

10 15:56
11 Then if I could just draw attention to paragraph 4.23,
12 5.51 to 5.53, 5.71, 6.198, 6.202, 7.53 and 7.54, 7.62,
13 7.85, 8.48, 9.78 to 9.80, 9.116, 10.90 and 10.91,
14 11.101 through to 11.106, 13.10 and 13.17, 13.68,
15 13.78, 13.84, and I just perhaps pause at 13.84 because 15:58
16 in that paragraph Mr. Justice O'Higgins says:

17
18 "In evidence to the Commission Sergeant McCabe withdrew
19 all allegations of impropriety of any type against
20 Assistant Commissioner Byrne in the matters with which 15:58
21 this Commission is concerned. This is in contrast to
22 the position he adopted concerning the former
23 Commissioner. See paragraph 13.88."

24
25 And finally, 13.88 through to 13.91. In 13.89 15:58
26 Mr. Justice O'Higgins says:

27
28 "It must be stated clearly and unambiguously that there
29 is not a scintilla of evidence to support an allegation

1 of any type of corruption against the former
2 Commissioner. In the context of any such grave
3 allegations, the former Commissioner is entitled to
4 have his reputation vindicated in the matters under
5 consideration. Any aspersions cast on the integrity of 15:59
6 the former Commissioner were unfounded and were deeply
7 hurtful."

8
9 Now, I give the Tribunal those references in order to
10 save time in opening them and to ask the Tribunal to 15:59
11 pay particular attention to them, because they do
12 demonstrate, Chairman, that my clients, in representing
13 the senior gardaí, were entirely justified in
14 challenging the credibility and, to the extent
15 necessary, the motivation of Sergeant McCabe, and 15:59
16 ultimately vindicated their clients' reputation by so
17 doing.

18
19 And Mr. McDowell this morning, in reading from his
20 written submission, goes back on the issue of 16:00
21 motivation and does so in words that we would
22 respectfully submit are (a) extraordinary and (b) in
23 other respects exaggerated, and maintaining the
24 approach of his client even to this moment of
25 exaggeration. At the top of page 28 he says: 16:00

26
27 "Establishing that Superintendent Clancy was not
28 seriously to blame for some of the matters complained
29 of by Sergeant McCabe could easily have been done

1 simply by addressing the facts concerning those
2 complaints and disproving the allegations made by
3 Sergeant McCabe."

4
5 But even those words, Chairman, beg the question: If 16:01
6 they could easily be disproved by addressing the facts,
7 why were the allegations ever made in the first place?
8 why were they persisted in, resulting in internal
9 inquiries? How is it that Mr. Guerin was caused to
10 investigate them and he didn't easily dismiss them, 16:01
11 simply by addressing the facts? And then Mr. Justice
12 O'Higgins is caused to conduct an entire inquiry into
13 it without the allegations being withdrawn. Why the
14 enormous expenditure of public monies in investigating
15 these allegations, only for Mr. McDowell now to say, 16:02
16 many years later, well, my client came up with these
17 allegations against Superintendent Clancy, but sure,
18 they could all have been easily dismissed just by
19 addressing the relevant facts? That speaks volumes.

20
21 And he goes on then to refer to a submission saying 16:02
22 that it was never necessary to engage in a destructive
23 assault on Sergeant McCabe's integrity. There was no
24 destructive assault. You've listened to the tapes. He
25 says: 16:02

26
27 "It was wholly unnecessary to attempt to revisit the
28 circumstances of the outcome of the Ms. D allegations."
29

1 They didn't revisit the outcome of the Ms. D
2 allegations; they visited the fact that Sergeant McCabe
3 himself made complaints against a colleague for the
4 purpose of getting the DPP's decision circulated. And
5 then we find that Mr. McDowell, this morning, seems to 16:03
6 row back to some extent on the statement of his
7 solicitors in the letter of Monday this week, that the
8 allegation of shouting was all a mistake, made by some
9 person in the office, and make an assertion, well, that
10 Sergeant McCabe was treated differently because that 16:03
11 Commission of Inquiry was conducted in private rather
12 than in public. That wasn't put to Mr. Smyth when he
13 gave evidence. It wasn't put to him that he engaged in
14 an unjustified attack on Sergeant McCabe because of the
15 fact that the Commission was being conducted in 16:03
16 private, and he thought he could get away with it,
17 whereas he wouldn't have risked it in public. That
18 wasn't put to his face. But it's an allegation that
19 now reflects on his integrity, because it's an
20 allegation of unprofessional conduct. There's 16:04
21 absolutely no basis for it. So even within the past
22 few hours we find further exaggerated, baseless,
23 allegations being advanced by Sergeant McCabe through
24 his counsel.

25
26 And I just finish by addressing the last question, the
27 eleventh question, sir, that you raised. That question
28 asks: was there any proper basis to ask the Tribunal
29 to investigate this particular module or was it

1 entirely based on leaks and on conjecture? In our
2 respectful submission, there was no proper basis.
3 Ground (e) comes about entirely on the basis of leaks
4 of false allegations about the way in which Sergeant
5 McCabe was cross-examined at the O'Higgins Commission, 16:04
6 that have now been demonstrated to be false.

7
8 Subject to any questions, sir, those are my
9 submissions.

10 CHAIRMAN: Thank you. 16:05

11
12 SUBMISSION BY MR. MCCANN:

13
14 MR. MCCANN: Thank you, Chairman. I think we handed up
15 a speaking note to the registrar earlier and the 16:05
16 speaking note will now be circulated.

17
18 So, Chairman, it looks long, but I'm going to speak to
19 it, and I won't -- maybe a third to a quarter of the
20 document I will address to the court -- to you, 16:05
21 Chairman, rather, to the Tribunal.

22
23 Picking up at paragraph 3, Chairman, you'll see that we
24 say there that if the -- if, as is the case, the
25 wrongful sexual abuse allegation is out of the 16:05
26 equation, and that wasn't relied on at the O'Higgins
27 Commission, well then the only term of reference then
28 is whether or not and the only matter which the
29 Tribunal is left with is whether there were unjustified

1 grounds inappropriately relied on by Commissioner
2 O'Sullivan at the O'Higgins Commission. And on that
3 key point for you, Chairman, the Department, nor the
4 former Minister, are making no submissions on that
5 point. So whether or not, on that central matter, that 16:06
6 central issue for the Tribunal, is really a dispute
7 between Mr. Sreenan, Mr. Murphy, Mr. McGuinness, in a
8 kind of a way, and Mr. McDowell, and I'm not making any
9 submissions on that central point. To do so would be
10 mere opinion on the part of my clients. 16:06

11
12 Then the second, I think, key point I make on behalf of
13 the Department and Ms. Fitzgerald is this, Chairman;
14 and that is that if there were no wrongful or
15 unjustified grounds relied on inappropriately to 16:06
16 attempt to discredit Sergeant McCabe, if there was
17 no -- this is at paragraph 4 -- if there was no such
18 reliance, inappropriately, well then the question of
19 (h) falls away. So if there was no wrongful conduct by
20 the Commissioner at the O'Higgins Commission, well then 16:07
21 the contacts between members of An Garda Síochána and
22 my clients, for example, don't arise.

23
24 And that brings us then on to the question you asked at
25 the end of the -- I think it was day 58 of the 16:07
26 evidence, when the first -- when the substantial part
27 of the evidence before Sergeant McCabe's evidence was
28 concluded, you asked question 9, and that was
29 whether -- in relation to the conduct, whether it was

1 lawful of the Department. And the answer to the
2 question you asked, Chairman, is that both -- and you
3 asked also was it the fact that the Department and the
4 then-Commissioner -- sorry, the former Commissioner,
5 Shatter, were under investigation. The answer then is
6 at 7: 16:07

7
8 "Both the Department and Minister Shatter were, under
9 terms of reference (j) of the O'Higgins Commission,
10 were themselves under investigation at the O'Higgins
11 Commission." 16:08

12
13 That obviously had a curtailing effect on how they
14 could address the function at that Commission. And
15 therefore and in those circumstances, the Department
16 and Minister would submit, in those circumstances and
17 more generally, that they behaved lawfully, 16:08
18 appropriately and indeed commendably in leaving
19 questions of legal strategy to the Commissioner, that
20 is the Garda Commissioner, and maintaining an 16:08
21 appropriate distance from the O'Higgins Commission.
22 And that's, in due course, a finding I will be inviting
23 you, Chairman, to make.

24
25 Then we move on to paragraph 8. I say that without in 16:08
26 any way diminishing - this is on page 3, paragraph 8 -
27 without in any way diminishing either Sergeant McCabe
28 or his concerns or his complaints, it is the case, it
29 is the case that it doesn't -- it is the case that the

1 matters which were before the O'Higgins Commission and
2 the matters relating to Sergeant McCabe, important and
3 all as they were, they were not the most important
4 issues, or even the only issues being dealt with by the
5 Department at the time. 16:09

6
7 And then we go on to paragraph 9 to pick up from
8 something Mr. McGuinness made, a point Mr. McGuinness
9 made on day 48, and that is that it's important for
10 you, Chairman, and for all the participants indeed at 16:09
11 the Tribunal, not to look at matters from the
12 perspective of the time they occurred at and what
13 people knew at the time, at the time they occurred, and
14 I say, on behalf of my clients, to avoid hindsight by
15 you. That is not a phrase which Mr. McGuinness used, 16:09
16 but I think that is a concept he introduced on day 48.

17
18 In that regard, Chairman, and this is moving on to
19 paragraph 11 onwards, page 4, you will recall,
20 Chairman, that, on behalf of Mr. Waters, we, this legal 16:10
21 team here, were vigilant not to accept that the
22 contents of a telephone call between Mr. Waters, on the
23 one hand, and Commissioner O'Sullivan, on the other, as
24 the O'Higgins Commission blow-up was taking place, we
25 were vigilant to contest any assumption that that phone 16:10
26 call must have concerned the blow-up at the O'Higgins
27 Commission. And one might ask why were we so
28 concerned. And the reason is, that it is too easy, it
29 is just simply too easy to say, as a result of timing

1 and looking back at the timing, that it must have
2 concerned, either at all or exclusively, matters at the
3 O'Higgins Commission, especially where it was a lengthy
4 call. And, Chairman, I'm saying in relation to that,
5 is that there is a 14-minute call at what appears now, 16:11
6 from the perspective of today, to be at a critical
7 juncture, and on behalf of my clients, on behalf of
8 Mr. Waters in particular, I was concerned to ensure
9 that into that vacuum of 14 minutes that theorists
10 would not seek to pour more conspiracies. 16:11

11
12 Chairman, in my submission, the better view and the
13 correct adjudication is that we simply don't know what
14 was discussed. The evidence is that we don't know what
15 was discussed in that telephone call between the 16:11
16 Commissioner and Mr. Waters. It may have, it may have
17 peripherally dealt with matters that had occurred that
18 day at the O'Higgins Commission, or it may not. So I
19 think we have to try and avoid hindsight by us.

20
21 Then moving on, moving on to page 5, paragraph 17, just
22 there, it's just noted on behalf of Ms. Fitzgerald,
23 former Minister Fitzgerald, that she had made great
24 efforts to assist Sergeant McCabe with his workplace
25 issues. This is at paragraph 17. And I noticed, it 16:12
26 seemed to me in my submission that --

27 CHAIRMAN: Mr. McCann, I'm sorry to interrupt you, but
28 I think yours is numbered differently to mine.

29 MR. MCCANN: Sorry.

1 CHAIRMAN: It definitely is.

2 MR. MCCANN: It's paragraph 17.

3 CHAIRMAN: I know. And paragraph 17 reads "Tribunal
4 counsel opened letters to Ms. Fitzgerald."

5 MR. MCCANN: Yes, that is the one. I think I'm 16:12
6 speaking to that note rather than reading it verbatim,
7 Chairman.

8 CHAIRMAN: Sorting the work environment. Yes, well
9 that is a good way of putting it.

10 MR. MCCANN: So it's not actually in the text, but I am 16:12
11 speaking to the text.

12 CHAIRMAN: No, no, it is perfectly correct. Thank you.

13 MR. MCCANN: But -- at this point. So what I am saying
14 in relation to that, Chairman, is that having listened
15 carefully to Sergeant McCabe's evidence, he doesn't 16:13
16 make any criticism whatsoever of the former Minister,
17 nor indeed -- or indeed any of my clients. And
18 similarly, Mr. McDowell's submissions today, for
19 example, paragraph 27, or page 27, they acknowledge the
20 work that was carried out by my clients on behalf of 16:13
21 Sergeant McCabe. And then again insofar as
22 Mr. McDowell can be cast in the role of quasi-accuser,
23 that it's noteworthy that despite substantial and at
24 times heated cross-examination of witnesses on behalf
25 of my clients, that he has made, today, no criticism 16:13
26 whatsoever of any of my clients. So it would appear
27 that, at least as between myself and Mr. McDowell,
28 there is now a happy consensus and -- a happy consensus
29 between us.

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Then moving on to paragraph 20, and this is the, I suppose the key theme to -- running through these submissions, is that it's clear, this is paragraph 20, it is clear that, in general, the Department kept an appropriate distance from the Commission. That is from the O'Higgins Commission. Then just dealing with the quote, this is what Ms. Fitzgerald says, just the last sentence of the quote there at paragraph 20:

16:14

"I believe that it would have been totally incorrect for me to interfere with the Commission of Investigation chaired by an eminent judge, or with its work."

16:14

And similarly, Mr. Waters said something similar - this is quoted at page 21 - that it would have been wrong, wrong and then picking up the quote:

16:14

" -- for us inserting ourselves into an independent process which would have been quite improper and inappropriate and I would have thought that would have ultimately compromised the entire process."

16:14

Then, Chairman, just to take up that theme on paragraphs 22 and 23, you'll see there that the flow of information, the flow of information on the day of the row is all in one direction, so it's information from Ms. Ryan to Mr. Dreehan, Mr. Dreehan to Mr. Barrett,

16:14

1 Mr. Barrett to Mr. Flahive and from Mr. Flahive all the
2 way up to the Minister, ultimately. And similarly, the
3 flow of information is from the Commissioner to the
4 Assistant Secretary General, Mr. O'Leary, and then
5 ultimately into Mr. Flahive's note, and again up to -- 16:15
6 but the flow is in one direction only: it's coming
7 from the Commission via Ms. Ryan or via the
8 Commissioner herself, that is the Garda Commissioner,
9 to the Department, and there's no information or no
10 instructions or no advice except in the most general 16:15
11 sense from Mr. O'Leary coming in, in the reverse
12 direction.

13
14 That brings us to a somewhat novel point or a point we
15 haven't made before, Chairman, and that is at paragraph 16:15
16 27. We say that, arguably, that entire chain of
17 communications, that Anmarie Ryan communication
18 culminating with the Minister, that, arguably, does not
19 fall within your terms of reference in that it is not a
20 contact between members of An Garda Síochána and the 16:16
21 Department in our case. That it is a contact. It's a
22 contact, it's a contact acting on her own initiative,
23 without approval or instruction, though obviously not
24 wrongly. It was initiative taken by Ms. Ryan, by
25 herself, and so that that, arguably, was not a contact, 16:16
26 it's not a contact which falls within your terms of
27 reference. It is not a contact between members of An
28 Garda Síochána and the Department. On the other hand,
29 I do acknowledge that the phone call from the

1 Commissioner to Mr. O'Leary on the same day, or the
2 phone calls on the same day, they obviously do fall
3 within the terms of reference. It would be hard to
4 divide those things out. Similarly, the phone call,
5 depending on what findings you make about that phone
6 call between the Garda Commissioner and Secretary
7 General Waters, again if the contents of that call
8 related to the O'Higgins Commission, they would also
9 fall within the terms of reference.

16:17

10
11 Then moving on, Chairman, just to paragraph 44, this is
12 on page 9, Chairman. Just, you'll remember
13 Mr. Flahive's evidence, Chairman, and he explained in a
14 very calm and reasoned way, in my submission, what his
15 position was, and he explained to you, Chairman, "that
16 it was important for me to advise people of what was
17 happening -- "

16:17

16:17

18
19 And this is in relation to the email, the email of the
20 15th May 2015.

16:17

21
22 " -- of what was happening, at the same time I was very
23 clear in my mind, in fact I still am, that it would not
24 have been proper, even if possible, for the Minister to
25 intervene in the matter."

16:18

26
27 And I'm adding then on to that paragraph 44 now by way
28 of an oral submission, Mr. Flahive's evidence was that
29 it was simply not proper for the Minister to intervene.

1 He maintained that position. And I am inviting for
2 you, Chairman, to consider whether that position first
3 adopted by him and later approved by ultimately the
4 Minister and other officials, was ever realistically
5 challenged, and certainly no evidence to the contrary 16:18
6 was ever adduced.

7
8 So that is paragraph 44.

9 CHAIRMAN: Well, I haven't heard a proposition to the
10 effect that the Minister should have done the 16:18
11 following.

12 MR. MCCANN: Exactly, yes.

13 CHAIRMAN: The Minister was never asked the question,
14 would you not have done, let's take a range of A, B, C
15 or D, I can't imagine what they might be, but that was 16:18
16 never asked, but nonetheless, it is clear that in
17 relation to this particular term of reference, the
18 Minister had to resign in the context, it seems, of a
19 public discourse to the effect that Sergeant McCabe was
20 being accused of sexual abuse allegations - note the 16:19
21 plural, please - that she knew about it and she did
22 nothing to stop it.

23 MR. MCCANN: Yes. I think, Chairman, I am going to
24 avoid to deal with matters of -- I'm going to avoid
25 dealing with matters of public discourse. I don't want 16:19
26 to get into that.

27 CHAIRMAN: No, I know that, but, I mean --

28 MR. MCCANN: Even if it was in favour.

29 CHAIRMAN: -- in which case, what are we here for? I

1 mean, this has now gone on for two months --

2 MR. MCCANN: Yes.

3 CHAIRMAN: -- in relation to what was believed on the
4 limited material that was there.

5 MR. MCCANN: Yes. I want to try and avoid the 16:19
6 political --

7 CHAIRMAN: No, I know you are not, I know, but, I mean,
8 still and all, the evidence was, Mr. McCann, the
9 following, from Ken O'Leary: he was asked the
10 question, look, supposing the information that had come 16:19
11 to you was not that there was a row.

12 MR. MCCANN: Yes.

13 CHAIRMAN: Not that there was a question of what is the
14 proper approach in relation to Sergeant McCabe who was
15 making allegations and whether they were tested, not as 16:20
16 to how bad the row was, but if someone had contacted
17 the Department and said, oh, by the way, they have
18 started accusing Sergeant McCabe of sexually abusing
19 children, we have heard, of course, allegations in
20 relation to that. 16:20

21 MR. MCCANN: Yes.

22 CHAIRMAN: His own children, nieces, Ms. D, anything
23 else.

24 MR. MCCANN: Yes.

25 CHAIRMAN: What would you have done -- 16:20

26 MR. MCCANN: Yes.

27 CHAIRMAN: -- Mr. O'Leary? Mr. O'Leary said, that
28 would have been a game-changer, I would have gone
29 immediately in to the Minister.

1 MR. MCCANN: Yes.

2 CHAIRMAN: Now, do you want to make a submission on
3 that?

4 MR. MCCANN: Well, I recall, I recall that part of the
5 transcript and Mr. O'Leary's evidence. If my
6 recollection is correct and I am not confusing it with
7 something that is -- my recollection, that Mr. O'Leary
8 said it would have raised an issue about confidence in
9 the Commissioner, I think that may have been his
10 evidence.

16:20

16:21

11 CHAIRMAN: Yes, you are right.

12 MR. MCCANN: So, yes, that would have been completely
13 different. But just in relation to the question of the
14 general approach of the Department and the Minister, it
15 was one of appropriate distance and non-intervention,
16 and I think, and I will come to this in a few moments,
17 there were, in fact, by Ms. Leader, maybe Mr. Marrinan
18 and Mr. McGuinness, there was some correct and
19 appropriate testing of the evidence and the officials
20 from the Department and the Minister as to different
21 hypothetical circumstances and what might or might not
22 have been able to be done, and I will come to those in
23 a moment. But in a general way, Chairman, I'm saying
24 that the approach of non-intervention was correct and
25 appropriate, nobody has ever said it wasn't, and
26 there's been no evidence from either another
27 politician, there's been no legal argument, and there's
28 no contradictory evidence, say, for example, from a
29 public servant or a former public servant or a

16:21

16:21

16:21

1 political scientist to say that that approach of
2 distance from a quasi-judicial body such as a
3 commission of inquiry was not the correct approach. So
4 that is what I say arises out of the evidence there.

16:22

5
6 Chairman, I was then moving on to paragraph 55, it's on
7 page 13 and page 12, and again, we looked at the email
8 from Mr. Flahive at some length. I think I might have
9 made the point in cross-examination that between the
10 cross-examination of Mr. McGuinness, I think it was, of 16:22
11 Ms. Fitzgerald and Mr. McDowell in relation to the
12 email alone, that that had run for nearly an hour, just
13 dealing with the parsing and the dissecting of the
14 email, and I recall, again without being critical at
15 all, I think it is correct that Tribunal counsel 16:23
16 investigate these matters thoroughly, that, you know,
17 there was a -- the Minister was asked to look at the
18 first sentence and then there was a whole series of
19 questions asked about the first sentence. And the four
20 or five points I want to make about the email are: 16:23

21
22 1. Email communications, like all communications,
23 written communications, are consumed whole. So you
24 don't have to read the first sentence, put it down,
25 come back half an hour later and read the next 16:23
26 sentence, and so on. That the message, when consumed
27 as a whole, was that there was no role for the
28 Department or the Minister, that the email was for
29 information only, that it was that the D investigation

1 had been the matter of a row, that there may have been
2 a motivation point raised and, in any event, the matter
3 was not concluded.

4
5 And then, Chairman, if we turn to paragraph 46, just 16:24
6 there is one sentence there in the middle of the quote,
7 this is paragraph 56 on page 12, there is a quote there
8 from Ms. Fitzgerald's evidence, and I think it is
9 something which I am going to be asking the Tribunal to
10 endorse, and that is that the day of political 16:24
11 interference in something, or perhaps she meant to
12 say -- or maybe the transcript is inaccurate.

13
14 "The day of political interference in something well
15 gone, as far as I was concerned." 16:24

16
17 That is the middle of the quotation there, in the
18 middle of the body of that quotation at paragraph 46.
19 I will be asking you, Chairman, to accept and endorse
20 that as a concept, and to accept and endorse the 16:24
21 practical application of that concept in these
22 particular circumstances. I don't know whether you
23 have the quote there, Judge -- Chairman, on paragraph
24 56 in the middle of it - one, two, three, four, five,
25 six, seven, eight - line nine or so, Ms. Fitzgerald in 16:25
26 her evidence said:

27
28 "The day of political interference in something well
29 gone, as far as I'm concerned."

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It's probably supposed to read "is something well gone". This is on page 12. Then, Chairman, just moving forward to paragraph 58 on page 13, and that is again a quote from Ms. Fitzgerald, the final paragraph there, relating back to the Flahive email, and that she noted, and this had come through Mr. O'Leary, the comment made that the Commissioner, the Garda Commissioner was getting further legal advice. So Ms. Fitzgerald said:

"So I saw it as an issue that would develop further, you know. It was going to develop further, because the point was put in there as well. So it was, if you like, unfinished business down at the Commission, would have been the approach I would have taken to it."

And then moving on to paragraph 61, Chair, and that is on page 14. I'm submitting to you on behalf of my clients that it was appropriate, proper and a commendable course of action for the Minister to take, and I'm asking and inviting you, Chairman, to make such a finding, and I have set out the reasons why earlier.

Then moving on to paragraph 63, this is on page 14, just again dealing with the email 15th May, there was no information available to the Minister or the Department on the 15th May 2015 or why the Commission was in being, which would have enabled them to conclude

1 that the Garda Commissioner was going to
2 inappropriately rely on unjustified grounds to attack
3 Sergeant McCabe at the Commission. Quite properly,
4 having no knowledge of the details of the evidence
5 which might be presented to the Commission or of the 16:26
6 legal advice available to the Minister, neither the
7 Minister nor the Department were entitled to presume
8 that something untoward was going to happen at the
9 Commission. Indeed, the chairperson and the
10 Commission's lawyers were, of course, in a position to 16:27
11 protect the rights of the parties, including Sergeant
12 McCabe. In essence, the fact that it had been brought
13 to the attention that counsel for Sergeant McCabe had
14 objected to a particular line of questioning at the
15 Commission did not represent grounds for interfering in 16:27
16 what was uniquely a matter for the Commission and/or
17 the Garda Commissioner. In this connection, it is
18 worth bearing in mind that should the Minister or the
19 Department seek to interfere in the legal strategy to
20 be pursued by the Garda Commissioner, that would have 16:27
21 inevitably involved them making judgments on matters
22 which were, in fact, matters for the Commission
23 itself - for example, the veracity of evidence and so
24 on.

25
26 Then I want to read out paragraph 64 as well, Chairman:

27
28 "A further point which occurs is that it is difficult
29 to see how the Minister or the Department could have

1 intervened in the Commissioner's legal strategy without
2 effectively taking overall responsibility for that
3 strategy. How, in practice, could the Minister or the
4 Department take a position which would have the effect
5 of saying certain approaches should not be taken by the 16:28
6 Commissioner, yet still maintain that whatever strategy
7 may have been contemplated remained a matter for the
8 Garda Commissioner? That would have given rise to the
9 odd, not to say bizarre situation, that the Minister or
10 the Department were directing the legal strategy of the 16:28
11 Commissioner at Commission of Investigation established
12 by the Minister with the approval of the Oireachtas to
13 look into allegations of Garda misbehaviour and the
14 conduct of the Department and the Minister."

15
16 And then, Chair, you will see paragraph 65 we dealt
17 with -- that deals with the phone call of Mr. Waters.
18 We dealt with that earlier. And similarly we dealt
19 with paragraph 73 and following, the phone call between
20 Mr. O'Leary and the Commissioner, and moving on to page 16:28
21 18 and paragraph 82. Do you have that, Chairman? So
22 paragraph 82 is on page 18. And this is the email
23 thread of the 4th July 2015. And paragraph 82, we make
24 the following point, and it's -- the first point was
25 made about the emails of the 4th July 2015 from 16:29
26 Mr. O'Leary to the former Minister is that they do not
27 describe, nor do they purport to describe, events at
28 the O'Higgins Commission. They describe a press query
29 that came into the Garda Press Office from RTÉ.

1 Mr. O'Leary was merely notifying the Minister of a
2 media query and suggesting an answer she could give if
3 that query arose in a subsequent radio interview. And
4 Mr. O'Leary made the following point, this is a quote,
5 just the last sentence in that quote:

16:29

6
7 "What I was doing there was describing my understanding
8 of the press query, not any understanding of what
9 strategy was being followed at the Commission."

16:29

10
11 And you'll recall, Chair, that the evidence of
12 Mr. O'Leary was that he got a phone call from the Garda
13 Commissioner and that it was on the basis of the phone
14 call about the press query, so it's press query, phone
15 call to the Commissioner, phone call from the
16 Commissioner to Mr. O'Leary, and it was based on the
17 phone call that Mr. O'Leary wrote the first email. And
18 so, Chair, I was conscious, it was sprung on me
19 yesterday or the day before, that it was a mistake,
20 inverted commas, it was a mistake on the part of my
21 clients, mistake on the part of Mr. O'Leary, but, in
22 fact, I'm submitting that the better view is that while
23 Mr. O'Leary -- the better view is that the sequence was
24 an oral conversation between the Commissioner and
25 Mr. O'Leary, Mr. O'Leary then, on the basis of that,
26 writes the email, that is the email which contains the
27 phrase "aggressive stance" and that is based on the
28 phone call, and that's only an hour-and-a-half later
29 that he gets and is able to forward to the Minister the

16:30

16:30

16:30

1 actual query from Mr. Burke in RTÉ, which, as you've
2 described it, Chairman, was a more nuanced and less
3 worrying, contains less worrying material. And, of
4 course, you will see, moving on to paragraphs 87 --
5 sorry, paragraph 89 on page 20 as regards the July 16:31
6 email thread, the second email from Mr. O'Leary showed
7 that the actual query from the journalist, which was
8 attached, did not suggest any aggressive questioning of
9 Sergeant McCabe. It was speculation as to whether the
10 change from Mullingar was necessarily linked with the 16:31
11 matters at the O'Higgins Commission. So you will
12 recall, Chairman, that there were two queries from RTÉ;
13 one is the issue of motivation being raised against
14 Sergeant McCabe at the O'Higgins Commission, that was
15 the second query, and the first query was, is the 16:31
16 Commissioner aware that Sergeant McCabe has resigned
17 from his position in Mullingar. And the query itself
18 from RTÉ, Mr. Burke from RTÉ, said that the two matters
19 were not related.

20
21 And then, Chair, at page 21, at paragraph 95, we make
22 the following submission:

23
24 That the Tribunal has spent a number of weeks, and that
25 is weeks of hearing, and it's been weeks and months of 16:32
26 preparation for hearing and probably more weeks in
27 coming to conclusions, in carrying out an adjudication,
28 but the Tribunal has spent a number of weeks to
29 determine if inappropriate grounds were relied on by

1 the Commissioner at the O'Higgins Commission. While
2 the Department does not have a view on whether that
3 happened, the difficulty of the task facing the
4 Tribunal in establishing whether that happened or
5 didn't happen puts in perspective any suggestion that 16:32
6 the Minister or the Department would have been in a
7 position to conclude, on the basis of what they knew on
8 the 15th May 2015, that there was any action that they
9 could properly have taken in that regard.

10
11 Again, at paragraphs 96 and 97, my clients just make 16:32
12 the point that there is nothing sinister or untoward in
13 the fact that in 2016 when this matter then came into
14 the public domain or when the O'Higgins Commission
15 report was published, there was nothing untoward or 16:33
16 sinister about the fact that there was no reference
17 back to the emails which had occurred in July and May
18 2015.

19
20 Then in 2016, at paragraph 98, this is page 22, as 16:33
21 regards the contacts which occurred after the
22 publication of the O'Higgins Commission report at a
23 general level and as to jurisdiction, again, Chairman,
24 we raise the question as to whether or not these
25 contacts which occurred after the publication of the 16:33
26 O'Higgins Commission properly fall within your terms of
27 reference, and it would certainly be open to you,
28 Chairman, to take a view that you're asked to look at
29 what were the contacts between the Department in

1 relation to alleged unjustified grounds at the
2 O'Higgins Commission, but once the matter is concluded,
3 that that doesn't fall within your terms of reference.
4 That would be a view that would be open to you. So we
5 deal with that at paragraphs 99 and 100.

16:34

6
7 And then moving on to page 24, that is just dealing
8 with the publication of the legal advice, that is
9 dealing with the legal advice and whether or not it
10 should be published or not. And, of course, just to
11 remember, Chairman, that the legal advice -- sorry, the
12 legal advice of the 15th May 2015, that is the email
13 co-authored by the counsel, that that only came into
14 the possession of the Minister in 2016.

16:34

15
16 And then moving on forward and forward, Chairman, on to
17 page 28, can we just there look at the Garda Síochána
18 Act for a second, Chairman, and you will see there at
19 paragraphs 23 and 24, 25, that -- sorry, paragraphs
20 123, 124 and 125, that they deal with sections of the
21 Garda Síochána Act, and Section 26 deals with the
22 function of the Garda Commissioner, Section 24 - this
23 is now going backwards - section 24 deals with the
24 power of the Minister with the approval of the
25 government to require -- to issue directives which
26 would require the Garda Commissioner to act in a
27 certain way, and then the issue then is addressed on
28 the next page, paragraph 29, whether or not that
29 directive-issuing power could have been used. And on

16:35

16:35

16:35

1 paragraph 129, we say that:

2
3 "Given the information available to the Minister --"

4
5 This is page 29, paragraph 129:

16:36

6
7 "Given the information available to the Minister or the
8 Department in May 2015, what could the terms of any
9 such directive have been? In circumstances where the
10 Government had established the Commission was it then
11 to issue a directive to the Garda Commissioner which
12 would have had the effect of circumscribing the matters
13 which might be put before it. How could such a
14 directive have been phrased?"

16:36

15
16 And then bearing in mind, of course, that the Minister
17 and the Department were parties.

16:36

18
19 Then moving on to paragraph 130, this is on the same
20 page:

16:36

21
22 "It must be seriously doubted whether a directive could
23 be given to the Garda Commissioner in relation to
24 instructing counsel at an inquiry or the proceedings.
25 Apart from anything else, it would seem very strange
26 for the government as a whole -- "

16:36

27
28 And that's the requirement for section 24 to be
29 operative.

1
2 " -- to approve the giving of such a direction, in
3 circumstances where one or more ministers might
4 potentially have an interest in some module of the
5 inquiry. The intention of Section 25 was to enable the 16:37
6 Minister and the Government to have ultimate control
7 over the delivery of service of An Garda Síochána. It
8 was never intended as a vehicle by which the Garda
9 Commissioner could be legally constrained either in
10 making or challenging arguments at a statutory 16:37
11 inquiry."

12
13 And then moving back to our original overarching point
14 about having distance and non-intervention, this is
15 paragraph 133, he says: 16:37

16
17 "Quite apart from the legal relationship between the
18 Department and the Garda Síochána, the approach of the
19 Minister and the Department by way of a guiding
20 principle was that the Department and Minister should 16:37
21 seek to avoid any risk of political interference at a
22 Commission of Investigation. It is surely a good rule
23 of thumb and the Tribunal should be slow to jeopardise
24 any such instinct on the part of the Department and the
25 politicians." 16:37

26
27 And then, Chairman, there were two hypotheticals, and
28 again correctly explored and correctly raised by
29 Tribunal counsel. One was that, this is paragraph 132,

1 one was that, that the -- was there not a possibility,
2 this was raised again by way of hypothetical, was there
3 a possibility that the Department could have either
4 retained a solicitor or retained solicitor and counsel
5 and that those solicitor and counsel could have gone 16:38
6 and asked the solicitor and counsel for the Garda
7 Commissioner at the O'Higgins Commission what they were
8 at. And I'm saying in relation to that, that while
9 that would have had the appearance of being somehow
10 separate, that, in fact, it is, and would have been, a 16:38
11 direct -- sorry, it would have been an engagement,
12 albeit through agents, it would have been an engagement
13 directly through the Minister and/or the Department and
14 the Garda Commissioner. And that -- we say at the end
15 of paragraph 132 that even the raising of such a 16:38
16 question would surely be intended and to be understood
17 by the Commissioner as a signal that the existing
18 approach was not approved, and that this might have
19 unanticipated negative consequences for the other
20 parties at the O'Higgins Commission. 16:39

21
22 And then at paragraph 133 we say that another
23 hypothetical which was raised for some of the
24 witnesses, I can't remember which ones exactly now, on
25 behalf of the Department, was that another option would 16:39
26 have been for the Minister to instruct counsel to
27 appear at the O'Higgins Commission - Ms. Leader might
28 have raised this with some of the witnesses, one or
29 more witnesses on behalf of the Department - and again,

1 I just think, in my submission, when you look at this,
2 it's difficult to see how any such application can come
3 about. First, you have to write to the Commission, the
4 O'Higgins Commission, to indicate an intention to make
5 an application. You'd have to have some kind of 16:39
6 evidence to support it. I mean, what kind of evidence
7 could you put into any such affidavit? And in our
8 submission, any such affidavit would only contain
9 information which was partial and probably offensive,
10 offensive to the Commission. 16:40

11
12 And then moving on to paragraph 134, and we are on to
13 our last couple of paragraphs now, the only real basis
14 for such an application would be to say, in effect,
15 that the Minister, on the basis of her limited 16:40
16 information, had concerns about the running of the
17 Commission and was raising those concerns with the
18 Commission itself. However, would this not have,
19 either at that time or at some future point, risked the
20 various existence of the Commission? would any party, 16:40
21 either unhappy with the Commission or with the result
22 of the Commission's findings, not have a strong case
23 that there had been outside interference with the
24 Commission and that this would have been a basis for an
25 argument that the Commissioner was at least objectively 16:40
26 tainted by bias.

27
28 Just before coming to the last -- just before coming to
29 the last paragraph, I just wanted to move on to the

1 schedules. Just there was, page 31, just dealing with
2 the GSOC report there in one paragraph -- sorry, 32,
3 and it's paragraph 145, and we just say:

4
5 "In relation to the GSOC report --"

16:41

6
7 So you'll recall, I think when Mr. Power was giving
8 evidence and the day former Minister Fitzgerald was
9 giving evidence, there was -- GSOC report to the
10 Minister was put in evidence, and also a note that
11 Mr. Power later on had written about that, and, in
12 relation to that, it's submitted on behalf of my
13 clients that neither the GSOC report nor the summary,
14 that is the summary prepared by Mr. Power, constitute a
15 contact within the meaning of your Terms of Reference.
16 And indeed none of these documents come either directly
17 or indirectly from members of Garda Síochána, and
18 neither is the sentence in Mr. Power's email indicative
19 of any knowledge that would then -- that was then put
20 before the Minister and the Department, that would have
21 precipitated some form of action in relation to the
22 O'Higgins Commission, and, as has been consistently
23 stated by the Minister and Department, the Department
24 had no role in the O'Higgins Commission.

16:41

16:42

16:42

16:42

25
26 And then the final paragraph, I want to go back to page
27 30 then, Chairman, is to say that, in the Department's
28 submission, the Tribunal should give very considerable
29 weight to the views of Ms. Fitzgerald. She is an

1 experienced politician, in public life for a number of
2 years. She presented to the Tribunal, in our
3 submission, as a careful, thoughtful, resilient, calm
4 and reasoned witness. She gave clear evidence as to
5 the -- clear and sustained evidence as to the
6 appropriateness of her approach which was based on
7 legal constraints.

16:42

8 CHAIRMAN: What is sustained evidence, Mr. McCann?

9 MR. MCCANN: Well, I think sustained evidence is one
10 that --

16:43

11 CHAIRMAN: Is it evidence that goes on for a long time?

12 MR. MCCANN: Well, that can be one.

13 CHAIRMAN: Do you perhaps mean succinct? It could be
14 that it is the dragon lashing its tail. I mean, of
15 course, the dragon word to print computer system.

16:43

16 MR. MCCANN: So what I had in mind when I wrote this
17 was that the Minister was asked about this often and in
18 many different ways from many different people, and
19 that she was also invited by me to -- she was asked
20 whether, at the end of all this, and now a year, six
21 months later, you've lost your job, at least somehow
22 connected with the decision you took, and your reaction
23 to the email in May 2015, maybe also your reaction to
24 the email in July 2015, and the Minister was asked
25 would you have done anything differently, and the
26 sustainability of her position is that she didn't --
27 she hasn't altered her position, she says she has still
28 made the correct decision, so it was sustained in that
29 way. And she gave evidence as to the appropriateness

16:43

16:44

1 of her approach, this is the correct distance between
2 herself, the politicians, the Department and the
3 Commissioner, and she noted that it would have been
4 inappropriate for -- and I'm suggesting that it would
5 have been inappropriate for her to react to conjecture 16:44
6 and/or leaks and/or political discourse. And in
7 conclusion then, Chairman, I'm saying that the days of
8 political interference, the day of political
9 interference is something well gone, to quote the
10 former Minister, and I'm saying that is surely an 16:44
11 appropriate and laudable position.
12 And they are my submissions, Chairman.
13 CHAIRMAN: Okay. Thank you, Mr. McCann. I have only
14 just one question, which is this: You'll appreciate
15 that, under the terms of reference, the Minister was 16:45
16 under investigation. Now, a minister is a corporation
17 sole, so it doesn't matter who is in the job.
18 MR. MCCANN: Absolutely, yes.
19 CHAIRMAN: Whether it's Mr. Shatter or Ms. Fitzgerald.
20 MR. MCCANN: Yes. 16:45
21 CHAIRMAN: Or whether it's --
22 MR. MCCANN: Minister Flanagan, as it is now, Chairman.
23 CHAIRMAN: Yes, Minister Flanagan as of the current
24 time. It is still the Minister.
25 MR. MCCANN: Absolutely. 16:45
26 CHAIRMAN: And the Department is a corporation as well.
27 MR. MCCANN: Yes.
28 CHAIRMAN: Under the Constitution it exists as long as
29 the State exists, but of course it can be renamed,

1 etcetera.

2 MR. MCCANN: Yes. No, the Minister is always there,
3 yes.

4 CHAIRMAN: Yes. So under the terms of reference of the
5 O'Higgins Commission the, Minister and the Department 16:45
6 were under investigation. Under the terms of
7 reference, the Gardaí are under investigation in
8 relation to how they responded to all of the individual
9 named matters that happened: releasing the person who
10 later murdered on bail, the girl who was dragged up the 16:46
11 alleyway, the appalling behaviour on the bus.

12 MR. MCCANN: The bus.

13 CHAIRMAN: Etcetera. So can one party who is under
14 investigation direct or suggest to another party under
15 investigation by a commission of inquiry as to how they 16:46
16 ought to approach the commission of inquiry?

17 MR. MCCANN: Absolutely not.

18 CHAIRMAN: Why not?

19 MR. MCCANN: Because it would taint -- because it would
20 taint the approach of both parties, it would be 16:46
21 collusion between the parties, and in fact I think
22 you'll recall that Mr. Waters said that he, I think it
23 was Mr. Waters but it may have been other witnesses, or
24 perhaps it was Minister Fitzgerald, former Minister
25 Fitzgerald said, that she didn't know that various 16:47
26 officials from her Department, whether they were giving
27 evidence at the O'Higgins Commission or the fact that
28 they were giving evidence or the fact that they had
29 given evidence or that they were intended to give

1 evidence, so that there was an effort on the part of
2 the Department not to in any way interfere with the
3 evidence that was going to be given by the officials in
4 the Department or indeed by the Minister for the time
5 being. I'm not sure if I'm answering the question. 16:47

6 CHAIRMAN: As a matter of law, just let's take it like
7 this, I'm not going to refer to anybody in the room,
8 but you're appearing on behalf of the Department, the
9 Minister, the ex-Minister, etcetera, let's suppose
10 someone appearing on behalf of, well, a person who 16:47
11 makes a serious allegation against Commissioner
12 Callinan, and is therefore represented by Mr. Murphy.

13 MR. MCCANN: Yes.

14 CHAIRMAN: Supposing you have a problem or think you
15 might have problem with what they are doing, are you 16:48
16 entitled to go over to him on behalf of your client and
17 tell them to stop and do it different here? Because
18 the commission of inquiry is exactly the same and it
19 was run as a tribunal of inquiry although in private
20 and subject to the constraints of Section 11. Would 16:48
21 you be entitled, for instance, to go over to Mr. Murphy
22 and tell him not to do that on behalf of your client or
23 suggest that he does things different? I don't mean to
24 personalise it, I try not to.

25 MR. MCCANN: Yes, you're asking a question at a level 16:48
26 of theory. Well, I certainly know the following, and
27 that is that if I am unhappy with any line of
28 questioning or any approach, and I think it's contrary
29 to procedure or fairness, I am entitled to make an

1 objection. That is the first point. I think then it
2 must -- I think it follows that I am probably entitled
3 to voice that objection in private, in private to
4 counsel. I could say it to one of the counsel here, I
5 don't think that's fair or that's appropriate. I think 16:49
6 I'd be entitled to say that. But of course in those
7 circumstances, I'm here and I'm seeing everything, and,
8 yes, I think I can't see any difficulty with that.

9 CHAIRMAN: Well, would your client be entitled to write
10 to the Garda Commissioner and say "don't do the 16:49
11 following before the Disclosures Tribunal"? You're,
12 unfortunately, under investigation here and so is the
13 Garda Commissioner, so would you?

14 MR. MCCANN: At a level of practicality.

15 CHAIRMAN: No, no, forget about the practicality. It's 16:50
16 easy to do. You can ring somebody up and give out
17 buckets to them or you can write them a snorter of a
18 letter, which I think is the phrase that used to be
19 used. But are you legally entitled to do that, to
20 direct somebody else, you being under investigation, 16:50
21 they being under investigation, to take a particular
22 approach.

23 MR. MCCANN: I think it's -- again, I need to think
24 about this a bit further, but my off-the-top-of-my-head
25 reaction is that is something that is possible, but 16:50
26 that is possible and would be lawful, but I think and
27 my submission and my clients' approach is that, and
28 this is why we described it as a rule of thumb to our
29 approach, is that is something that should be avoided

1 if at all possible in almost every circumstance.

2 CHAIRMAN: Supposing you were doing that, would you
3 tell me about it, or would you just keep quiet about
4 it? I'm talking about your client now. Do you think
5 you would be under an obligation to disclose to me, as 16:51
6 Minister, that you had directed the Garda Commissioner
7 to take a particular approach? Would I not be entitled
8 to know that? And I suppose the second question is:
9 would I not be entitled to be very annoyed about it, in
10 a very quiet and understated way, of course? 16:51

11 MR. McCANN: I think that goes back to the question of
12 the rule of thumb is that whatever it being lawful
13 for -- and I didn't say in my submissions that it
14 wouldn't be unlawful for counsel on behalf of the
15 Department to have a conversation about strategy or to 16:51
16 suggest something to counsel for An Garda Síochána, but
17 I'm saying that whatever about the lawfulness or the
18 possibility of that, that that is something, as a
19 matter of policy, as a matter of good public
20 administration and good judgment, which should be 16:52
21 avoided in almost all circumstances. And then you
22 asked the next question: well, if you thought it was
23 necessary to go down that road, should you tell the
24 chairperson? I just think you'd have to -- again, I
25 think you'd have to know, I think the hypothetical 16:52
26 would have to have more information in it before I'd be
27 happy to give a view on that. But again, I think the
28 rule of thumb, as I described it as such, the rule of
29 thumb is that you try as hard as you possibly can to

1 avoid interfering in other people's legal strategies,
2 especially when you're a party, or indeed if you're
3 not, you try and avoid that, especially if you're a
4 political entity, the Department or the Minister. And
5 I think an additional reason why you do that is that 16:53
6 the consequences are difficult to anticipate, such as
7 the consequence of whether you have got to tell the
8 chairperson of the Commission of Inquiry, the
9 chairperson of the Tribunal, whether you have got to
10 tell other parties what the consequences might be. So 16:53
11 I think once you start going down that road and even
12 allowing for more factual information to be factored
13 into the hypotheticals, I think the thing just becomes
14 more complicated and more difficult, except in an
15 extraordinary situation. And an extraordinary 16:53
16 situation, like all extraordinary situations, I mean
17 all -- an exceptional case will bring an exceptional
18 reaction within the law.

19 CHAIRMAN: Okay.

20 MR. MCCANN: Thank you, Chairman. Mr. Chairman, I just 16:53
21 might say, because I think we would anticipate not
22 being here at the later modules and, in those
23 circumstances, we are very grateful to all the people
24 working for the Commission, so Mr. Barnes at the back
25 of the room, the stenographers, all of the people. 16:54

26 CHAIRMAN: I'm not sure -- Mr. Justice Murphy, who of
27 course is still alive but is an ex-judge, used to say
28 we don't accept thanks because we don't accept blame.
29 And I say the same thing. I don't want anyone to thank

1 me. If anyone blames me, off they go, but not here.
2 MR. MCCANN: And again to the solicitors for the
3 Commission.
4 CHAIRMAN: Okay.
5 MR. MCCANN: And Tribunal counsel. 16:54
6 CHAIRMAN: I want to talk to Ms. Kelly. Literally how
7 long is left? Mr. Ó Muirheartaigh, I know you are
8 sitting there, you don't want to say anything? And
9 does anybody else want to say anything apart from
10 Mr. Murphy? How long are you going to be, Mr. Murphy? 16:55
11 MR. MURPHY: I think that some of Mr. Sreenan's
12 submission are submissions I can adopt and I think that
13 that should shorten matters, but I think I would need
14 an hour realistically.
15 CHAIRMAN: Yes. And, Mr. McDowell, do you think you 16:55
16 need to say anything in reply?
17 MR. MCDOWELL: I won't be that length at all, Chairman.
18 I will be succinct, I hope.
19 CHAIRMAN: Yes, a couple of minutes. All right. Okay,
20 Mr. Murphy, I'm going to ask you to really try and pare 16:55
21 it down, if you don't mind. I appreciate what is at
22 stake.
23 MR. MURPHY: Yes.
24 CHAIRMAN: But, you know, a term of reference is a bit
25 like an indictment, and it's a question of saying, 16:55
26 okay, this is what you are obliged to inquire into, but
27 in the event that a term of reference actually contains
28 what is, in effect, an allegation, then the allegation
29 has to be shown, the elements thereof.

1 MR. MURPHY: You are going to take a short break,
2 Chairman?

3 CHAIRMAN: I'm taking a break until five past just so
4 that we can look at the stenography things. Thank you.

5 16:56

6 AFTER A SHORT ADJOURNMENT THE TRIBUNAL RESUMED

7 AS FOLLOWS:

8

9 MR. MURPHY: Thank you, Chairman. Chairman, I
10 understand that you preferred through your previous 17:11
11 indications for oral submissions, but in anticipation
12 that this might be a late sitting, we prepared a
13 written submission to shorten the oral submission, and
14 I hope that that will assist that task this evening.

15 17:11

16 First of all, Chairman, on behalf of my clients, can I
17 indicate that I fully accept the document in relation
18 to law which was prepared by Mr. McGuinness and which
19 was dealt with earlier this morning, so there is no
20 dispute between Mr. McGuinness and I in relation to the 17:12
21 appropriate law in relation to cross-examination as to
22 credibility or otherwise.

23

24 The first point we would propose to deal with, and we
25 will deal with the questions in sequence, Chairman, is 17:12
26 the question you have raised as to whether false
27 allegations of sexual abuse were relied upon by former
28 Commissioner O'Sullivan to discredit Sergeant McCabe at
29 the O'Higgins Commission. And the answer, very simply,

1 is that we say -- is no. That, first of all, there's
2 no evidence whatsoever to demonstrate that any such
3 allegations were relied upon by Commissioner
4 O'Sullivan. As, I think, in previous submissions that
5 have been made by Mr. Sreenan, it is her actions which 17:12
6 are central to the focus of this term of reference.
7 And in terms of the approach, we say that that is
8 ultimately a matter to be assessed by you as an
9 evidential matter and we say it has no substance
10 whatsoever. 17:12

11
12 The second question is whether any unjustified grounds
13 were relied upon inappropriately by Commissioner
14 O'Sullivan to discredit Sergeant McCabe. Again, we
15 respectfully say the answer to that is no. 17:12

16
17 And at paragraph 5 and 6, Chairman, you will see we
18 refer to the actual instructions that Ms. O'Sullivan
19 gave. And we make the point that Ms. O'Sullivan gave
20 no factual instructions to her legal team other than a 17:13
21 response to the request by email on 15th May 2015.
22 Ms. O'Sullivan has given the evidence of the advice she
23 was given, we outline that at paragraph 6, and that
24 advice was clear and unequivocal and in writing and she
25 followed it, and we say that was entirely reasonable 17:13
26 and legitimate for her to do.

27
28 From paragraphs 7, 8 and 9 we refer to Ms. O'Sullivan's
29 explanation for her decision to follow the advice, and

1 she indicated in particular, you will see at paragraph
2 7, Chairman, that her understanding was it was to put
3 before the Commission of Investigation the full
4 circumstances or background to the interactions that
5 had arisen between Sergeant McCabe and senior managers 17:13
6 after the non-refusal of Garda management to give the
7 DPP's directions to Sergeant McCabe. We say that the
8 evidence which you've exhaustively reviewed over the
9 course of the last few weeks indicates that there was a
10 patient assessment of the matter by the Commission, 17:14
11 that the evidence was tested, we say it was done in a
12 systematic and correct fashion at all stages under the
13 superintendence of a very experienced judge, a point I
14 will return to at a later stage.

15
16 Now, insofar as the concerns that the Commissioner had
17 in relation to the instructions, we say that the
18 instructions she gave don't constitute unjustified
19 grounds. We say that, at paragraph 12, that the
20 instructions were given in order to test very serious 17:14
21 allegations of widespread Garda corruption and
22 malpractice which had been made by Sergeant McCabe, and
23 those allegations, and each and every one of them, were
24 either withdrawn or rejected when they were so tested
25 before the O'Higgins Commission. And we say, 17:14
26 therefore, that it is clear that insofar as the
27 approach that was adopted, we say that this was one
28 which was adopted in relation to very serious
29 allegations, and there has been an attempt in the

1 course of submissions I think by Mr. McDowell to
2 suggest yesterday that perhaps his client didn't really
3 intend to use the word "corruption", but there is a
4 problem, and the problem is, Chairman, that the terms
5 of the Garda regulations at that time didn't have a 17:15
6 specific definition of "corruption". Therefore, as
7 Mr. Justice O'Higgins ruled, it was one which was
8 understood by those against whom the allegations were
9 made in its ordinary ways. But added to that, and one
10 we placed particular emphasis in the course of 17:15
11 questioning throughout the course of this module of
12 this Tribunal, Chairman, is that it is clear that
13 another word came into play by Mr. McCabe: perversion
14 of the course of justice. On no view could those words
15 indicate anything other than the most serious form of 17:15
16 criminality. And a number of witnesses, including
17 Commissioner O'Sullivan, have indicated that, for a
18 member of An Garda Síochána to be accused of that type
19 of badness, could not be regarded as anything other
20 than the most serious matter that needed to be dealt 17:15
21 with and tested.

22
23 And in those circumstances as we move through
24 paragraphs 12 and 13, we deal with the structure of the
25 modules and the point at paragraph 13 is that each of 17:15
26 the modules indicated the presence of the relevance of
27 clause (j) and (k). This was the way in which
28 Mr. Justice O'Higgins proceeded to carry out the
29 inquiry. So there has been criticism made, for

1 example, by Mr. McDowell that this was different to the
2 Murphy Commission or different to any other kind of
3 Commission, but the rules of the Commission of
4 Investigation Act give particular discretion and power
5 to the Commissioner in the interests of dealing with 17:16
6 the particular controversy which was put before him, to
7 decide which procedures to adopt. Those procedures
8 were adopted without challenge and without any form of
9 judicial review and they are there. And at the outset,
10 could I make a point that I know we have made at 17:16
11 interlocutory submissions, which is that, and I think
12 you, Chairman, have indicated you agree with this
13 point, that this process is not an appeal, and today
14 Mr. McDowell confirms that. Therefore, if that is so,
15 we would say that this is a situation where you should 17:16
16 not be invited to assess what took place on the basis
17 of some form of ersatz appeal or implicit appeal, but
18 instead focuses exclusively on a narrow term of
19 reference which is present.

20
21 But what is clear is that from the way in which
22 Sergeant McCabe made his allegations and then the way
23 in which Mr. Justice O'Higgins sought to approach it,
24 that the issue of alleged corruption was in every
25 single module, and that is evident from the figures and 17:17
26 the letters which we can show at paragraph 13, and
27 therefore there had to be a response to that. So the
28 legitimate need to test the evidence, I think, has,
29 over the course of this Tribunal, been I think

1 gradually accepted by Mr. McDowell. I understood his
2 submission today not to dispute the fact that people
3 were entitled to defend their good name. What we
4 respectfully say is that is what happened in this case.

17:17

5
6 And insofar as we have set out issues in relation to
7 matters, could I draw your attention, Chairman, to
8 paragraphs 18, and there we set out a brief summary of
9 the complaints. So we do so just to emphasise two
10 points. The first is, in his evidence to the Tribunal,
11 Sergeant McCabe sought for the first time to link the
12 making of these allegations to his belief that a letter
13 written by former Chief Superintendent Rooney on the
14 4th July reflected the views of Garda management. And
15 on Day 60, Sergeant McCabe said that it was only
16 following the letter that he made allegations of
17 corruptions. His words were:

17:17

17:17

18
19 "It was after the Rooney letter, it was the first time
20 that I alleged malpractice or corruption."

17:18

21
22 And it was put by counsel to Sergeant McCabe, and as
23 the following list of allegations make clear, this was
24 manifestly not the case and that the word "corruption"
25 seemed to predate the so-called Rooney letter. But we
26 go on to say, a second preliminary point, that insofar
27 as there are issues in relation to the question of
28 harassment and other matters, that we say that the
29 emphasis put by Sergeant McCabe on the comment of

17:18

1 former Commissioner Callinan to the Public Accounts
2 Committee on 23rd January 2014 where he says that this
3 then opened a floodgates list, well if one turns,
4 please, to pages 12 and 13, we set out for your
5 assistance the dates of previous complaints in relation 17:18
6 to harassment and complaints from 2008, 2009, 2010, and
7 turning over then to page 24, we deal with the 2012
8 complaint, so Oliver Connolly and the May complaint to
9 Oliver Connolly.

10
11 Now, as was noted in evidence yesterday, Chairman, and 17:18
12 it's a point I have sought to make throughout the
13 course of the hearings before you, and I think it seems
14 now to be established on the evidence beyond doubt,
15 that Sergeant McCabe started at a certain level of 17:19
16 complaint, local levels, but then those complaints
17 magnified to what I would suggest is a form of pyramid
18 of accusations, reaching to the very apex of An Garda
19 Síochána. And in those circumstances, by 2012,
20 certainly by May of that time, the entire focus had 17:19
21 changed from focus exclusively on the local management,
22 moving then to the middle management, then moving to
23 investigatory management, the assistant commissioner
24 level, then moving to the Commissioner himself at that
25 time. So this was a very serious situation which we 17:19
26 say again had to be dealt with formally and with a
27 great degree of attention, but in circumstances where
28 ultimately what we have relied upon, the collapse of
29 that upper pyramid of accusations of corruption, piece

1 by piece, withdrawn on some occasions by Mr. McCabe
2 himself and on other occasions by direction of the
3 final ruling of the Commission, demonstrates that these
4 were matters which had no substance, but they had to be
5 tested.

17:20

6
7 It's also important, insofar as that is the case, and
8 if I can draw your attention to paragraph 37, you will
9 see there that the point I made about corruption not
10 having the specific definition in the 2008 regulations
11 is correct, but one point we do make is that, as with
12 his less senior-ranking colleagues, Commissioner
13 Callinan had to wait until day 29 of the Commission to
14 get clarification of certain matters. And we say that
15 in terms of public confidence in An Garda Síochána, it
16 doesn't really make any difference as to whether an
17 allegation of corruption is made in a legal sense or in
18 a dictionary sense, either way, it could be enormously
19 damaging not just to the individual commissioner but
20 also to the public confidence in the force, which is An
21 Garda Síochána. And this is a point to which we will
22 return later on.

17:20

17:20

17:20

23
24 Insofar as the structure of the submission is
25 concerned, Chairman, throughout the course of -- I
26 won't go into any of these details, but from paragraphs
27 40 on through 70, we deal with each individual heading
28 within the Commission and we identify the complaint
29 that was made, what took place at the hearing, the

17:20

1 O'Higgins Commission report, and the conclusions in
2 relation to your second question. And we say at
3 paragraph 69 that, in summary, we submit that, in view
4 of the serious nature of the allegations made by
5 Sergeant McCabe, that former Commissioner O'Sullivan 17:21
6 was justified in testing the wider allegations of
7 corruption and malpractice at senior levels of An Garda
8 Síochána. The decision was made in accordance with
9 legal advice. It didn't intend or extend to
10 authorising any kind of gratuitous probe of an 17:21
11 allegation of sexual assault or to attack Mr. McCabe's
12 integrity. Instead, there was an instruction to
13 consider whether his attitude to his senior officers
14 had changed and why and, in the circumstances, what was
15 the nature of the allegations, what was the substance 17:21
16 of any of the allegations and exactly what was in issue
17 and what needed to be assessed.

18
19 So, in those circumstances, we say that the evidence
20 before you is that for Commissioner O'Sullivan at the 17:22
21 time, this was a very difficult decision. She had
22 taken very extensive measures, which I will come back
23 to later on, to support Mr. McCabe, to address his
24 other concerns, but we say that it was one which was
25 justified at the time, because the Commissioner said in 17:22
26 her evidence she owed a duty to the members who were
27 under accusation, also to the wider force to ensure
28 these matters would be clarified in the public interest
29 and that ultimately when we come to the conclusion of

1 Mr. Justice O'Higgins' assessment, paragraph 70, we
2 note that, more generally, that while Judge O'Higgins
3 did find, and our clients accept, that Sergeant McCabe
4 acted out of good motives, he also found that this
5 didn't mean that he was always correct in the 17:22
6 allegations that he made; rather, he found that on
7 occasion the allegations that he made were "overstated
8 or exaggerated, some were unfounded and some had even
9 been withdrawn". And it is for this reason we
10 respectfully submit that Ms. O'Sullivan was justified 17:22
11 in the manner in which she gave her instructions, and
12 this is in part identified and demonstrated by the
13 outcome of the O'Higgins Commission itself.

14
15 On the third question, Chairman, you raised the issue 17:23
16 as to what are the limits of (a) cross-examination, and
17 (b) cross-examination as to credibility and
18 cross-examination as to credit. Can I perhaps shorten
19 this submission by saying I fully adopt the submission
20 made by Mr. Sreenan in that regard and I respectfully 17:23
21 adopt and associate myself with his comments in
22 relation to those matters of law. And as a matter of
23 fact, I would also echo his submission that on the
24 basis of any examination of the transcript, what is
25 contained in the course of the terms of reference of 17:23
26 the Commission was something that required close
27 examination in a way which is slightly broader in
28 nature than a mere criminal trial -- or, sorry,
29 criminal trial, but we say that none of the clients who

1 we represent here today ever sought to introduce
2 irrelevant or extraneous matters in an attempt to
3 discredit Sergeant McCabe. Rather, they relied upon
4 matters which they believe might assist the Commission
5 in establishing whether the complaints were accurate or 17:23
6 true or not, and in some cases this involved an
7 understanding of the background of the complaints. In
8 other words, we say that what is truly involved in this
9 process in the Commission was a cross-examination as to
10 credibility and not credit. 17:24

11
12 If I can move to the fourth question, Chairman. That
13 fourth question is what evidence was there that the
14 18th May letter was (a) a mistake, (b) an uncorrected
15 mistake that was allowed to stay inaccurate due to 17:24
16 recklessness or inadvertence or deliberate, and, as a
17 supplementary question, what is any of this to do with
18 former Commissioner O'Sullivan?

19
20 So we say in relation to the first question that we 17:24
21 would indicate that, looking at the overall
22 circumstances of the evidence, that whatever errors
23 were made on the 18th May 2015, they had nothing to do
24 with input from the former Commissioner, and therefore
25 if one looks at the interpretation of your terms of 17:24
26 reference advocated by Mr. Sreenan, which I
27 respectfully adopt as well, we say that ultimately that
28 issue is not relevant to your assessment of what was
29 key and central to the determination of this term of

1 reference.

2
3 From paragraphs 74 onwards, Chairman, we deal with the
4 narrative, with which you are absolutely familiar, and
5 the question of "to" and "against", I don't propose to 17:25
6 deal with that, but ultimately that is a matter of
7 evidence for you to assess. But even if you assess it
8 in the manner which is being advocated by Mr. McDowell,
9 we say that is an exercise that isn't strictly
10 necessary at all, given the term of reference. In 17:25
11 fact, the focus should be narrower, to what was the
12 actual input of Commissioner O'Sullivan.

13
14 At paragraph 79 we make a point that you, Chairman,
15 have raised as a question, and I will deal with perhaps 17:25
16 later on, which is the question of the popular
17 narrative. And we do say there that the popular
18 narrative propagated a version of events which was
19 entirely inaccurate. It is suggested that but for
20 Sergeant McCabe's transcript of a secret 17:25
21 audio-recording of a meeting in Mullingar on 25th
22 August 2008, that the Commission would have been
23 deliberately misled. We say that the evidence before
24 you, Chairman, demonstrates that it is absolutely clear
25 that Superintendent Cunningham and Sergeant Martin were 17:25
26 both unfairly placed by some media at the centre of
27 this controversy. Now, you, Chairman, have referred to
28 Sergeant Martin's statement to this Tribunal and noted
29 the fact that she wasn't even a witness at the

1 Commission. This inaccurate and damaging narrative was
2 the subject of extensive media reportage as well as
3 media commentary, and we say that it also was a fact
4 which gave rise in part to the storm, as it were, of
5 political outrage which the Commissioner and the 17:26
6 Minister spoke about in the course of their evidence,
7 which we say was ill-informed and which led to
8 precipitative matters in relation to both
9 Superintendent Cunningham and Sergeant Martin, so that
10 it became then a very important feature, I think, for 17:26
11 you to assess what is the actual material in relation
12 to this particular question. And in the pages which
13 follow from paragraph 81 onwards, we canvass the facts
14 which took place, the quotations which took place, and
15 what we say ultimately, if we can move forward to 17:26
16 paragraph 91, that Mr. Justice O'Higgins clarified the
17 issue and he said the document of the 28th February and
18 the subsequent tape and the subsequent report were in
19 the context not of any complaint against Superintendent
20 Clancy but a request to Superintendent Clancy in 17:27
21 relation to the matters arising out of the D affair.
22 And then the Judge says:

23
24 "This doesn't deal with any complaint against
25 Superintendent Clancy with which we are concerned in 17:27
26 the investigation."
27

28 And Mr. Smyth responded:
29

1 "I think this has been established, Judge."

2
3 And in the report at paragraph 3.6, the finding of
4 Mr. Justice O'Higgins is also material perhaps to your
5 consideration here, because at paragraph 3.6 17:27
6 Mr. Justice O'Higgins said, and I quote:

7
8 "No direct allegation of corruption was levelled
9 against Superintendent Cunningham, but insofar as any
10 may be implied, they are also unfounded." 17:27

11
12 what makes it remarkable is to what occurred at the end
13 of the process, is that this further controversy arose
14 in such intense terms that both the Minister and
15 Commissioner have addressed in their evidence, which 17:28
16 led to a situation where it was perceived that public
17 confidence couldn't be observed by an investigation by
18 other gardaí of that new point. But all the time, the
19 still-small voice that was going unheard was that of
20 Superintendent Cunningham and, in the background, 17:28
21 Sergeant Martin, whose activities were entirely honest,
22 whose record of what took place in the meeting was
23 accurate and did not in any way disagree or differ from
24 the tape which Sergeant McCabe had held in his
25 possession. 17:28

26
27 Now, You may recall yesterday, Chairman, that Sergeant
28 McCabe seemed to be clinging all the time to what he
29 believed to be the importance of the tape. But we do

1 respectfully submit what I said to him in the
2 questioning yesterday, if there be no tape, the
3 documentation demonstrating the correct version of
4 events would have been before the Commission and the
5 witness who prepared them was there to give evidence to 17:28
6 the Commission, Superintendent Cunningham. We say that
7 there was and is no evidence of any cover-up, but we do
8 make one point at this stage: Mr. Justice O'Higgins
9 took the view that Sergeant McCabe was honest and had
10 genuine motives, but it was to be seen I think 17:29
11 yesterday from his approach towards the issue that
12 notwithstanding the fact that the obvious presence of a
13 document which he accepted in this Tribunal is
14 accurate, he still had this emotional feeling that this
15 caused him to have to go home and get his tapes and put 17:29
16 him out of his ordinary activity and that this was very
17 important. And this, with respect to Sergeant McCabe,
18 is an example of how the emotional participation of any
19 individual in a process of engagement and inquiry can
20 lead them to lose perspective or to feel that something 17:29
21 that is small is actually much larger, but yesterday
22 one could see that when confronted with something which
23 he accepted, namely the fact that his tape proved
24 exactly what Superintendent Cunningham's document
25 proved, he still seemed to feel that somehow it was 17:29
26 important, and we say that is misplaced and incorrect.

27
28 And insofar as the questions are concerned, insofar as
29 that is concerned, we have issues concerning the points

1 in relation to that material, but we do ask you,
2 Chairman, as part of your adjudicative function in this
3 process, to acknowledge that insofar as Superintendent
4 Cunningham did anything in relation to his report, it
5 was accurate, and that any media reportage to the 17:30
6 contrary is something which has no evidential
7 foundation whatsoever.

8
9 At paragraph 94 we address a question which I think
10 you've raised in part through the formulation of your 17:30
11 question, Chairman, and, having looked at the whole
12 approach adopted by the Commission, and if I can
13 summarise it, Mr. Justice O'Higgins saw nothing wrong
14 in Superintendent Cunningham's document. The matter
15 dropped, it was dealt with, and it was adjudicated by 17:30
16 him and that was the end of the matter. It formed no
17 part of the further controversy over the next 25 days
18 of the Commission, it formed no formal part of the
19 complex process of adjudication. And, in fact, we have
20 the quotation from Mr. Justice O'Higgins at the top, 17:30
21 Judge, at page 94, where he acknowledged this fact and
22 he said:

23
24 "The transcript would appear to offer some support for
25 the superintendent's view of it." 17:31
26

27 Effectively no difference, no contest, no problem, but
28 that's not how matters ended. And there the matter lay
29 as far as the Commission was concerned. But it does

1 appear that Sergeant McCabe had taken a serious view of
2 the letter of the 18th May of 2015, and we reference
3 the fact that John Barrett, following his meeting with
4 the McCabes on the 31st May, some 11 months after the
5 exchange in the Commission, recorded in a minute, which 17:31
6 is before the Tribunal in its papers, containing the
7 views of Mr. McCabe and suggested that the audio
8 recording had dramatic effect. And this is what
9 Mr. Barrett has noted:

10
11 "The views expressed by the McCabes --" and they are
12 quoted " -- their counsel as being of the same view,
13 was that when Maurice made it clear that he had a
14 recording of the Mullingar meeting, a complete U-turn
15 in the demeanour of the witnesses took place, which was 17:31
16 clearly observed by the judge. The media reported
17 that, after that point in the proceedings, counsel for
18 the Commissioner indicated that the original concerns
19 expressed by Colm Smyth, Senior Counsel, were
20 withdrawn." 17:32

21
22 Sergeant McCabe's protected disclosure attached the
23 further allegation in 2016, and the quote is:

24
25 "I'm currently on work-related stress leave - 17:32

26
27 1. Due to Commissioner Nóirín O'Sullivan's treatment
28 of me.
29

1 2. There was false evidence produced at the O'Higgins
2 Commission in an attempt to set me up.

3 3. To a disgraceful series broadcast in RTÉ."
4

5 It goes on to say:

17:32

6
7 "I'm now satisfied on impeccable authority that those
8 RTÉ broadcasts were planned or orchestrated by the
9 Commissioner Nóirín O'Sullivan personally using
10 briefing material prepared at Garda Headquarters."
11

17:32

12 Then it goes on to refer to Superintendent Cunningham.
13 We submit at paragraph 96 that the overwhelming
14 evidence on this issue is that the admitted errors of
15 the letter of the 18th May 2015, and you have all the
16 evidence about that, Chairman, and the subsequent
17 submissions of the 11th June 2015, were errors which
18 occurred innocently and because of the limited
19 timeframe in which the witnesses and lawyers were
20 working. The errors were corrected during the currency
21 of the O'Higgins Commission. It was held in private
22 session, not because of the transcript of the
23 recordings of the Mullingar meeting produced by
24 Sergeant McCabe, but because of the truthful sworn
25 evidence of Superintendent Cunningham, supported by
26 contemporary documentation, and we say that's evidenced
27 by a number of matters, and we then go through those
28 details at paragraph 97 through 99, and I don't propose
29 to rehearse or reprise those again.

17:32

17:32

17:33

1
2 we say that all of the evidence points in one
3 direction, in this case there was no criminality, no
4 deliberate plan to mislead the O'Higgins Commission, no
5 attempt to get Mr. McCabe, no attempt to give false 17:33
6 evidence. All of that was a view held by Mr. McCabe
7 without any substance.

8
9 At paragraph 101, we deal with the Annmarie Ryan
10 evidence. If I could pause at this point, Judge, 17:33
11 because we have a short extra memorandum just again for
12 your assistance and to try and clarify the point here
13 if I can. I think this is an important point because
14 Mr. McDowell has sought to raise it several times. If
15 I can just refer to the papers for ease of reference. 17:34
16 The simple point I wish to make here, Chairman, is
17 that, as you have indicated at all stages, you're going
18 to base your adjudication upon the evidence which
19 you've heard. The evidence, and the only evidence we
20 say in this regard, direct evidence, is from Annmarie 17:34
21 Ryan, and that evidence wasn't challenged and it wasn't
22 put to her that she was wrong. But if I can just very
23 briefly read to you and into the record what she has
24 said. In the course of the handwritten note which she
25 had of the 18/5/2015, which is at 3769 of the 17:34
26 Tribunal's papers, it says this:

27
28 "Noel Cunningham's documents referred to in our letter
29 18th May 2015, three documents handed to the Judge."

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Then underneath that it says:

"Handed to -- copy documents to McDowell with a cross through it. Then Judge/David O'Hagan directed me to give McCabe's legal team our letter of the 18/5/15 and docs --" as in documents " -- referred to in same to them, gave them three copies."

17:34

And then on day 42, page 52, when giving her evidence, she said:

17:35

"When I got there, the letter, I had to get documentation from the client that morning, the letter was handed first to Mr. O'Hagan for the attention of Judge O'Higgins and a short while later, like within minutes probably, or whatever, I had the documentation copied that accompanied that letter and the file will show what documents they were."

17:35

Again on the same day at page 62 she said, and I quote:

17:35

"And I understand my notes to reflect that I gave three copies together with the documents to Sergeant McCabe's legal team that morning on the 18th May 2015."

17:35

And day 42 at page 140 she said:

"All I did was circulate the matter, got it signed off,

1 handed the letter in and got the documentation which
2 followed a very short time later, probably a matter of
3 minutes."

4
5 And then finally on day 43 in response to 17:35
6 cross-examination by Ms. Gleeson, she said:

7
8 "On the 18th May 2015 I recall Mr. O'Hagan wanted the
9 letter immediately and, as I said, I was late for other
10 reasons, getting there out of my control, and I gave 17:36
11 the letter over, I was then copying the documentation.
12 There were three documents and they followed within a
13 couple of minutes and the hearings commenced, and I do
14 recall a part and then a copy, it was to be directed to
15 be given to Maurice McCabe's legal team. My notes show 17:36
16 that I gave over three copies and with the letter, with
17 the documentation, and no other party received that
18 letter or documentation."

19
20 And if I can pause at that point. That is the direct 17:36
21 evidence. So we would urge you to rely upon that
22 evidence from a witness who Mr. McDowell has also, I
23 think, accepted was very clear, very lucid and
24 indicated a very professional approach towards dealing
25 with the documentation at that time. 17:36
26

27 So ultimately, insofar as that is an issue -- just one
28 further point. That in the course of her testimony on
29 that day, the question was asked:

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"Would you agree, therefore, that the September 2008 report which revealed that mistake in relation to the complaint against Clancy was made available to everyone by your clients before the transcript of the Mullingar meeting was provided by Sergeant McCabe? 17:37

A. Yes, it was. I received it directly from the clients that morning of the 18th May 2015."

So ultimately, Chairman, not to waste any time on this, but that is an important point for your assessment, we say, and anything Mr. McDowell says is by way of submission, not by way of evidence. 17:37

Chairman, if I can move to the next question, question number 5, which is at page 47, paragraph 106: 17:37

"Was the challenge to Sergeant McCabe's credibility to involve querying firstly the evidence supporting an allegation and then in the absence of any such evidence, the reason for making the allegation. Alternatively, was it to challenge the bona fides or integrity of Sergeant McCabe?" 17:37

Now, again, the answer to that question may be quite simple in one sense, because Mr. Smyth, on day 29, indicated his response to that particular issue by saying that his instructions had never been to question the integrity of Mr. McCabe, and Mr. Sreenan's 17:38

1 submission in that regard is one which I would adopt.

2
3 Insofar as the former Commissioner then gave evidence
4 to the O'Higgins Commission, again, today, there was a
5 submission made by Mr. McDowell that somehow she hadn't 17:38
6 apologised, but a striking feature of that day was that
7 that former Commissioner O'Sullivan wasn't asked a
8 single question about this. Again, Mr. McDowell, in
9 terms of submissions, has suggested that perhaps there
10 was some letter circulating to indicate that the issue 17:38
11 couldn't be raised. That's never been produced, we've
12 never seen that document. And on the face of it, it
13 seems highly improbable that if a question was so
14 important and so material that it has now generated one
15 of the terms of reference of this inquiry, that it 17:38
16 couldn't have been raised at the time. And this comes
17 back to my point about the danger of this process being
18 perceived as by somebody, or anybody, as the point, a
19 type of ersatz appeal, notwithstanding express
20 observations to the contrary. And insofar as that is 17:39
21 the case, we say that if there was any concern,
22 Mr. Smyth frankly acknowledged the error and that is
23 something which was a matter of record and clearly
24 known, both to the Commission and to all the parties
25 who were there prior to the end of that process. And 17:39
26 the paragraphs that follow from paragraphs 108 to 109,
27 we flesh that out, Chairman, just to amplify and
28 reinforce that point.
29

1 The sixth question, Chairman, which was:

2
3 "Was Mr. Smyth correct in saying that impugning
4 Sergeant McCabe's integrity was a mistake on his part
5 or was it a question of the former Commissioner 17:39
6 supporting Sergeant McCabe in public while attacking
7 him in the private hearings of the Commission?"
8

9 There, Chairman, we point in the next paragraphs to the
10 Commissioner's evidence where she said she was, and 17:39
11 what she said was "almost an impossible dilemma". On
12 the one hand, she engaged in extensive efforts to
13 support Sergeant McCabe, who, she had acknowledged, had
14 pointed out deficiencies in Garda investigations and
15 structures and she was working to correct. Rather than 17:40
16 challenging the complaint, she had also said that she
17 accepted the findings of the Guerin Report. She was
18 taking steps to address those. She was also aware of
19 Sergeant McCabe's complaints about the difficulties he
20 confronted as a member of the force and she said she 17:40
21 did everything she could to assist at that time. And I
22 don't believe there is, between the parties, on this,
23 on the floor, as it were, any dispute that in the
24 period leading up to the Commission, that very, very
25 extensive efforts were being made by Commissioner 17:40
26 O'Sullivan, in a genuine way, to try and address
27 concerns made by -- expressed by Mr. McCabe. And you,
28 Chairman, have full detail of all of that information.
29

1 But we would respectfully submit that if one looks at
2 the other evidence in the background, the challenges
3 confronting the force, the limited resources, the
4 vacancies not filled, the gangland difficulties, all
5 those issues, a huge amount of time is spent by senior 17:40
6 management attempting to address Sergeant McCabe's
7 concerns in that regard, and that was evidence of bona
8 fides on the part, we say, of the former Commissioner.
9 But nonetheless, at paragraph 11, we say, side by side,
10 a totally separate process was continuing, because 17:40
11 Sergeant McCabe's complaints were still on track to be
12 heard by a commission, that had to be dealt with.
13 Sergeant McCabe had asked for it. He wanted this form
14 of inquiry, he'd lobbied for it. Ultimately we know
15 from Mr. Justice O'Higgins that he recounted how he 17:41
16 believed that there had been a determined strategy on
17 Mr. McCabe's part to get the Minister to consider
18 appointing such an inquiry. And as I've said in my
19 earlier submissions, once that particular junction was
20 arrived at, the Commissioner was confronted with a 17:41
21 decision as to how she could deal with the Commission
22 of Investigation. She followed the advice that she
23 received, but she never did so with any attention of
24 scuppering or destroying or damaging or acting -- the
25 previous efforts that she had made or in acting in any 17:41
26 form that may be regarded as two-faced.

27
28 At paragraph 112, Judge, in that regard, we list, over
29 the next few pages, the significant efforts to provide

1 support re welfare and the offer of mediation, and that
2 proceeds over the next three to four pages.

3 Ultimately, we say that that evidence, which I think is
4 not in dispute, if I can ask you to move all the way
5 forward to page 57 and 58 and 59, you will see again 17:42
6 all of the points of contact we can identify are
7 shortened and listed out at that time. And if we come
8 down to paragraph 144, we can see that Deputy

9 Commissioner Twomey reported to former Commissioner
10 O'Sullivan on 11th January 2016 concerning the progress 17:42
11 of workplace-related matters. This letter was written
12 following the conclusion of evidence in the O'Higgins
13 Commission in December of 2015. So we say that at one
14 point in the course of these hearings, it was suggested

15 that as a result of the approach adopted by 17:42
16 Commissioner O'Sullivan in the Commission, that the
17 entire outreach to Sergeant McCabe collapsed.

18 Yesterday, I think Mr. McCabe accepts that wasn't so,
19 although, correctly, he identified the fact that the
20 Mulvey mediation initiative did come to an end. But 17:42
21 the record and the document which we handed in to the
22 Tribunal, which was deployed in evidence yesterday,
23 shows a very detailed pattern of engagement by An Garda
24 Síochána from 2009 onwards and we would urge you to
25 take that into consideration as well. 17:43

26
27 And if we look also at paragraphs 146 and 148, we refer
28 to the documents from Mr. Barrett, his memoranda,
29 demonstrating the nature and the circumstances of his

1 contacts in 2016 and also the fact that Mr. Barrett
2 urged Mr. McCabe to return to work. And you will see
3 at paragraph 149, in particular, we have the extract
4 where Mr. Barrett expressed disappointment when
5 Mr. McCabe wouldn't return to work in 2016 and notes 17:43
6 the fact in his presence Mr. McCabe said that he was
7 being advised not to return to work while Nóirín
8 O'Sullivan was Commissioner of An Garda Síochána.
9 Yesterday he said that wasn't correct, but ultimately
10 he said yesterday that he made a decision that he 17:43
11 couldn't return to work. Either way, any objective
12 assessment of this outreach was that Mr. Barrett who
13 considerably evinced considerable sympathy and desire
14 to ensure that Mr. McCabe's concerns would be addressed
15 was there urging him to return to work but he said no, 17:44
16 and the basis seems to have been merely the presence of
17 Nóirín O'Sullivan as Commissioner of An Garda Síochána,
18 a factor which you can perhaps take into consideration
19 in your assessments. But we say that paragraphs 150
20 and 151 so that the attempts at the resolution of the 17:44
21 workplace issues concerning Sergeant McCabe were
22 directed from and involved the highest ranks of An
23 Garda Síochána, at the level of Commissioner, Assistant
24 Commissioner, civilian management personnel, the
25 potential external mediator, external workplace 17:44
26 specialist. None of this indicates any insouciance
27 towards the complaints that were made by Sergeant
28 McCabe at the time.
29

1 If I can move to the seventh question, briefly, that
2 asks:

3
4 "Whether there was any evidence of an aggressive stance
5 taken by counsel for the former Commissioner." 17:44

6
7 And we say the answer to that question is no. And we
8 say that that is also greatly supported by the
9 Chairman's decision to allow the parties to listen to
10 the audio tapes. Now, a point was made earlier in 17:45
11 submissions that the transcripts would have been
12 available. But transcripts are a two dimensional
13 instrument. In our submission it has been
14 extraordinarily helpful on this issue to hear the audio
15 tapes. And they have generated the withdrawal on the 17:45
16 5th March in the letter by Costello & Company of this
17 particular point about shouting. But ultimately we say
18 that nothing in the transcript or in the audio tapes
19 demonstrates anything other than a proper forensic
20 interaction between counsel and witnesses, but most 17:45
21 importantly again, this was a process that was
22 superintended by a retired judge with immense
23 experience. And in our submission any fair hearing -
24 and you, sir, have heard all this - demonstrates a
25 measured judicial assessment of all these matters, not 17:45
26 some type of event that was out of control or where
27 people were being treated unjustly or where their
28 rights were being trampled upon or where they found
29 themselves unable to make a case that they would wish

1 to make.

2
3 And bearing in mind again, at every stage, not just at
4 the Commission, but in the prelude to the Commission,
5 and in relation to the HR issues and in relation to 17:46
6 matters going back it would seem as far as back as
7 2009, Sergeant McCabe has had access to legal advisers
8 who have been assiduous in giving assistance and advice
9 all the way through to the present day, the same legal
10 team. Ultimately this is not a case where an 17:46
11 individual member of the force bereft of professional
12 assistance was in a position to deal -- was not in a
13 position to deal with a complicated matter on his own,
14 instead he had all the advice that he could have
15 required. Which makes the submission that appears to 17:46
16 have come through his statement that matters were dealt
17 with in a sort of rough fashion at the Tribunal - and
18 Mr. Sreenan has referred to this, I won't repeat that
19 particular extract from the documents - it makes it all
20 the more puzzling. Because this is something where 17:46
21 there were other witnesses to this and it's difficult
22 to see how they couldn't also assess there wasn't an
23 approach taken that was somehow in violation of the
24 appropriate means of constitutional justice. And if
25 there had been, and Mr. McDowell again has very fairly 17:47
26 accepted this today, if there really had been then a
27 remedy would have been available and known to Sergeant
28 McCabe by way of judicial review. That never took
29 place. So the position is as we speak and certainly as

1 the evidence now stands, Sergeant McCabe accepts in
2 full the findings of the O'Higgins Commission, and the
3 report is a report based on a process which we say was
4 not flawed in the way in which has been suggested at
5 the moment, and that no act by former Commissioner 17:47
6 O'Sullivan and no omission by her in terms of her
7 direction caused anything that would have regarded or
8 resulted in that process being tainted by such degree
9 of unfairness or wrongful actions that it could be
10 undermined. 17:47

11
12 At number 8 the question, Judge, which you asked was:

13
14 "Is there any evidence of a dark truth of going after
15 Maurice McCabe at the Commission?" 17:48

16
17 Now we say that the only direct evidence that was given
18 of this alleged dark truth emanated from John Barrett
19 and we respectfully say his account is incorrect,
20 particularly when set against the evidence of the 17:48
21 person who is alleged to have disclosed this dark truth
22 to him, Cyril Dunne, and against subjective facts which
23 are entirely consistent with Mr. Barrett's accounts.
24 Mr. McGillicuddy has made his submission afternoon. In
25 response we set out from paragraphs 155 onwards the 17:48
26 nature of the history, what we say is the unusual
27 expansion of Mr. Barrett's evidence, we juxtapose that
28 with Mr. Cyril Dunne's evidence and we consider that in
29 those circumstances that -- if we turn to paragraph

1 173, that Mr. Cyril Dunne in his statement to the
2 Tribunal said that he was absolutely certain that he
3 never made the remarks alleged by Mr. Barrett, he
4 confirmed this unambiguously in his evidence. He
5 confirmed he had no knowledge concerning the 17:49
6 preparation in advance of it or the conduct or the
7 strategy of An Garda Síochána before the Commission.
8 And at paragraph 174 we note that Mr. Barrett offered
9 in evidence that Mr. Dunne was at the apex of An Garda
10 Síochána and that this evidence was offered in 17:49
11 conjunction with alleged remarks about going after
12 Sergeant McCabe. We say that he must have been fully
13 aware of the serious nature of the allegations he was
14 making, both against Mr. Dunne indirectly, the
15 executive and higher levels of An Garda Síochána, 17:49
16 including the former Commissioner, and we say he
17 shouldn't have held back, as he did, in letting the
18 Tribunal know in advance that he had additional detail
19 of what he claimed were ever significant matters, like
20 the date when the statement was made; the alleged 17:49
21 participation of the former Commissioner in the
22 meeting; and also, the evidence in relation to
23 Superintendent McLoughlin, we say, should not have told
24 the Tribunal that a single email helped him "to
25 triangulate the date" when no such email existed; that 17:49
26 he shouldn't have told the Tribunal that Superintendent
27 McLoughlin in a conversation that took place a few days
28 before he gave evidence had confirmed that he recalled
29 that Mr. Barrett had relayed the remarks made to

1 Mr. Dunne in a relatively short time after they were
2 allegedly made. And we also say that you, Chairman,
3 have contemporaneous notes and the evidence of Annmarie
4 Ryan, Chief Superintendent Healy, the evidence of the
5 barristers who represented the Garda Síochána during 17:50
6 the Commission, we say that this evidence reveals that
7 there was very little time to plan a solid strategy for
8 the hearings let alone to prepare some form of
9 elaborate process of trying to get Mr. McCabe. And we
10 say that by 13th May 2015 the legal team have given 17:50
11 evidence that they have received very little by way of
12 instruction, and we say that the evidence establishes
13 that even by 14th May 2015 that no instructions of any
14 kind had been given by or on behalf of the former
15 Commissioner as to the approach to be adopted to the 17:50
16 O'Higgins Commission. We say Mr. Barrett's evidence is
17 incorrect and we will invite you to disregard it for
18 the reasons which have been set out in the submissions
19 based on its content, the times and the flaws in the
20 evidence we have identified and which have been tested 17:50
21 in cross-examination.

22
23 Chairman, the ninth question:

24
25 "Did the Department and did the Minister behave 17:50
26 lawfully in leaving any question as to the strategy at
27 the Commission to the Garda Commissioner?"

28
29 And we say that this is a matter for the Department and

1 we say that perhaps in terms of our own observation
2 that our clients agree that the Department did not and
3 we respectfully say could not dictate the legal
4 strategy and simply did not seek to do so at that time.

17:51

5
6 The tenth question:

7
8 "Is there any way in which the Commission did not
9 appropriately handle matters?"

10
17:51

11 So we say that our clients agreed with the approach,
12 which says that the answer to this question is no. We
13 say that since the publication of the O'Higgins
14 Commission report our clients publicly repeatedly
15 accepted its findings. We have continued to do so
16 throughout the evidence to this Tribunal.

17:51

17
18 Pausing there for a moment, Chairman, what we say is
19 that the evidence demonstrates before you that there
20 was no deliberate plan to hurt Mr. McCabe, to damage
21 his feelings, there was no attempt to damage his
22 character or his reputation; what there was, was an
23 attempt in a private commission to deal with the very
24 serious matters he had raised in a situation where all
25 parties had legal representation and the matter was
26 under the superintendence of a highly experienced
27 judge. But there is nothing in the evidence to
28 demonstrate that. And although Mr. McCabe may have
29 harboured fears or apprehensions they were groundless.

17:51

17:52

1 And we say the evidence is what has to be looked at to
2 assess whether that submission is correct.

3
4 The eleventh question, I'm sorry, Chairman, I'm moving
5 as rapidly as I can through these queries, but in terms 17:52
6 of the eleventh question:

7
8 "Was there any proper basis to ask the Tribunal to
9 investigate this particular module or was it entirely
10 based on leaks and conjecture?" 17:52

11
12 You have the evidence of Commissioner O'Sullivan about
13 what happened in the aftermath of the publication of
14 the report. And it is one of the more astonishing
15 features of the evidence to see, and the Tribunal has 17:52
16 reviewed all the documents, the level of stampede which
17 seems to have been actuated at political level which
18 then gave rise to intense public debates, which gave
19 rise to intense public controversy, all of which was
20 generated, it would seem, by selective leaks of parts 17:53
21 of transcripts from the Commission's hearings. But the
22 evidence I think given by both former Minister
23 Fitzgerald and by former Commissioner O'Sullivan
24 demonstrate that that was, as Commissioner O'Sullivan
25 said, something of a vortex, an extraordinary public 17:53
26 event. And it was an event which had consequences.
27 One of which seems to have been the setting up of this
28 Tribunal. We say that if one looks at this particular
29 issue that's been brought before, we have a very

1 unusual scenario: we have before you a term of
2 reference that deals with a query about the conduct of
3 a party in a previous commission when that conduct
4 doesn't seem to have been the matter, the subject
5 matter a sustained protest at the end of the Commission 17:53
6 inviting the Commission to make findings in
7 circumstances where Commissioner O'Sullivan, who is the
8 subject of this term of reference, wasn't
9 cross-examined in that Commission about why she had
10 given instructions in the way she had. And although 17:53
11 she was there to give evidence, it was never said to
12 her that she acted in a way which was consistent with
13 this term of reference. Not at all. So what we have
14 here is I think what the French sometimes call *français*
15 *de scale*; the thoughts of a person as they leave 17:54
16 dinner, and walking down the stairs and thinking of
17 things they should have said afterwards. We have
18 effectively the creation of a new controversy. And we
19 say it is one which has absolutely no foundation that
20 would justify the level of time and effort that has 17:54
21 been spent in this case by the public authorities in
22 reviewing and investigating this.

23
24 You raised the question this morning, Chairman, which
25 was the issue of -- it's in today's transcript I think 17:54
26 at 13:03, and you said to Mr. McDowell:

27
28 "You don't want to comment on whether there is any
29 evidence of the "dark truth" of going after Maurice

1 McCabe at the Commission at the apex of the Garda
2 organisation?"

3
4 And Mr. McDowell said he didn't. But you then I think
5 raised the question as to how had this vortex been 17:54
6 created, what would have given rise to the perception
7 that people might have had. One example that I would
8 like to put before you, and perhaps I can circulate
9 copies, this is an extract of a -- this is a copy of a
10 statement issued on behalf of Mr. McCabe on the 13th 17:55
11 February 2017, and this extract is a from a book
12 published by Mr. Clifford, but it's a statement you
13 will see at page 337 of the book, I draw your attention
14 to the bottom of the page, and it says:

15
16 "Meanwhile the McCabes were not letting the matter 17:55
17 rest. On the 13th February 2017 solicitor Séan
18 Costello released a statement on behalf of Maurice and
19 Lorraine."

20
21 And you will see that in the first two paragraphs 17:55
22 Mr. McCabe indicated that he had experienced great
23 suffering and vilification, as he said it, for raising
24 certain issues, that this had affected his family life.
25 I would ask you to turn over to the following page and 17:56
26 turning down to the last paragraph which is headed "The
27 Need for a Public Inquiry", and it says:

28
29 "We are entitled to the truth today. Justice can

1 follow in its wake. Our experience of the O'Higgins
2 Commission of Investigation is too fresh in our minds
3 to allow for repetition. Although that Commission
4 investigated a number of serious instances of
5 malpractice in the policing function in Bailieboro and 17:56
6 upheld Maurice's complaints in respect of all of them,
7 the public has never been made aware that throughout
8 the proceedings before the Commission Maurice, at the
9 hands of the legal team representing the current
10 Commissioner, was cast in the role of culprit and/or 17:56
11 defendant, and as a person making his complaints in bad
12 faith and without cause. When challenged in that
13 respect, the legal team sought and obtained
14 confirmation from the present Commissioner that they
15 did so on her personal instructions. Because the 2004 17:56
16 Act prohibits under pain of criminal law the
17 publication of the actual evidence tendered to such
18 commissions the public has no appreciation of what was
19 done and attempted to be done to Maurice in the course
20 of its hearings." 17:56

21
22 And this paragraph is of particular importance I think
23 to your question this morning, Chairman, it says:

24
25 "For example, against the background of the current 17:57
26 Tusla controversy, the entirely false allegation made
27 of sexual abuse in 2006 against Maurice was repeatedly
28 the subject of attempts at introduction in the
29 proceedings for purposes of discrediting his motives

1 and testimony. The entire transcript of that
2 Commission, to which we still have access, is also in
3 the possession of the Minister for Justice and the
4 foregoing comments can easily be verified by inspecting
5 the same." 17:57

6
7 Then it goes on to say:

8
9 "We have consistently submitted that any further
10 inquiry into this must be a public inquiry. Now that 17:57
11 the truth has emerged of a false and shocking campaign
12 to vilify us and discredit us there is no reason to
13 have any secret or private inquiry under the 2004 Act."

14
15 So, if one looks at the question of dark truth that you 17:57
16 raised this morning, the paragraph beginning "for
17 example" and "which suggests that the entirely false
18 allegation was repeatedly the subject of attempts at
19 introduction" is perhaps the type of statement which
20 could give rise to members of the public taking a view 17:57
21 that perhaps allegations had been actually made or put
22 to Mr. McCabe, which, as you have indicated, is
23 completely without foundation. That never took place.
24 So insofar as these issues are concerned we cannot
25 control the public narrative: This particular 17:58
26 statement was carried in the Irish Examiner, we have
27 copies of that for the Tribunal if it wishes, but I
28 believe also in the Irish Times. But in terms of the
29 approach, words matter. And whereas Mr. McCabe

1 protests very much about the way in which words were
2 used, mistakes were made in using words, words matter
3 and the public's perception and response to words can
4 sometimes come well outside the scope of anything that
5 people intend to achieve about what they say, but can 17:58
6 result in something which leads to an unjust position
7 or unnecessary controversy.

8
9 If I could come to a conclusion very shortly, Chairman.
10 Yesterday during the course of interaction and 17:58
11 cross-examination with Sergeant McCabe I think,
12 Chairman, you had an opportunity to see Sergeant
13 McCabe's view of the entire process. On the one hand
14 there is a demand by him for perfection from everybody
15 around him, everything must be perfect, but if he makes 17:59
16 an error, and he made an error, which he acknowledged
17 yesterday, somehow a different standard is to apply.
18 You may recall yesterday that Sergeant McCabe indicated
19 that he believed that the Gardaí were senior and
20 therefore they should have got everything absolutely 17:59
21 right, but in the same breath he acknowledged that he
22 was a senior officer, that he must have signed off on
23 the statement, that he acknowledged that he said it was
24 a mistake.

25
26 And pausing there for a moment, two views of error:
27 Errors occur, but errors do not always indicate the
28 presence of malevolence or malice or spite or an
29 attempt to destroy other persons. We say the evidence

1 looked at objectively here in this case does not
2 demonstrate any reasonable foundation to say that
3 N6ir6n O'Sullivan in the directions that she gave and
4 the instructions that she gave, limited as they were,
5 amounted to the creation of any of these type of 17:59
6 suggestions, there was any dark truth subtending or
7 supporting her honest and sincere attempt to ensure
8 that the Commission of Investigation would resolve
9 matters and bring an end to fraction and strife which
10 had caused so much difficulty over so many years and 18:00
11 would bring peace both to Mr. McCabe and to the force
12 itself. That aspiration has obviously not been
13 realised but one wonders why not. And we would
14 respectfully say in this case the evidence would tend
15 to suggest that the Commission did its job effectively 18:00
16 and well, nobody here is complaining about its result,
17 but the events that took place before the Commission
18 which are now the subject matter of this adjudication
19 were at all times under the control and supervision of
20 Mr. Justice O'Higgins and he made no findings which 18:00
21 would be consistent with anything that is contained in
22 the complaint evinced in the term of reference.

23
24 Chairman, I am just inside the hour and those are my
25 submissions. 18:00

26 CHAIRMAN: Okay. Thank you, Mr. Murphy.

27
28 REPLYING SUBMISSION BY MR. MCDOWELL

29 MR. MCDOWELL: Chairman, a number of points arise,

1 firstly in relation to what Mr. Sreenan stated. He is
2 inviting this Tribunal in my respectful submission into
3 a fundamental legal error. And that is, that somehow
4 what was done on behalf of the Commissioner at the
5 Tribunal, the submissions made on behalf of the 18:01
6 Commissioner, the written Statement of Grounds produced
7 on behalf of the Commissioner were not in fact
8 personally authorised by her at all and that somehow
9 what you have to do is to look at what she thought she
10 was doing on the one hand and what was done in her name 18:01
11 on the other and consider only the first and not the
12 second. And that, in my respectful submission, is
13 entirely wrong for the reasons that I set out this
14 morning in my submission to this Tribunal on this
15 module. In my respectful submission, it is not open to 18:01
16 a Commissioner in her circumstance to say that when a
17 solicitor and team of counsel purport to act in her
18 name and confirm to a Tribunal that they are acting on
19 her instructions that they are not so doing. It is not
20 permissible for her to resile from responsibility for 18:02
21 the actions of the lawyers who were appointed by her
22 and who remained, via Chief Superintendent Healy, in
23 almost constant contact with her to the extent that
24 that was needed. That is the first point.

25
26 The second point that Mr. Sreenan utterly ignored was
27 that on Friday, 15th May 2015 her counsel, in breach of
28 the direction given by Mr. Justice O'Higgins, attempted
29 to introduce evidence relating to Sergeant McCabe for

1 the purpose of impugning his credibility, and this was
2 something which had been prohibited the day before.
3 The second point in relation to is that it was
4 Mr. Gillane who objected to that course of action. The
5 third point in relation to that is that at the request 18:03
6 of Mr. Gillane submissions were made by me on behalf of
7 Sergeant McCabe as to why that should not be permitted,
8 firstly, and, secondly, why if it were going to be done
9 on the basis of a challenge to his credibility the
10 factual basis for doing so should be set out in full, 18:03
11 in that Sergeant McCabe was entitled to be given notice
12 of such an assault on his credibility under the rules
13 established by the Commission itself.

14
15 Mr. Smyth on two separate occasions confirmed to the 18:04
16 Commission that he was acting on the instructions, the
17 direct instructions of the Commissioner in making these
18 points. It was never suggested, contrary to the
19 implication of some of Mr. Sreenan's submissions here
20 that in doing so, that he was acting on behalf of other 18:04
21 clients or making the particular submission in question
22 or raising the particular issue in respect of Sergeant
23 McCabe's alleged confession to bringing his complaints
24 this bad faith on behalf of any other person other than
25 the Commissioner. And it was for that particular 18:05
26 reason, Chairman, that the question was put to him that
27 he should particularise on whose behalf he was making
28 those submissions. The suggestion is made that you
29 should bear in mind that Mr. Smyth had other clients.

1 Yes, he did have other clients. But on this occasion
2 he expressly represented that he was making
3 this particular -- pursuing this particular line of
4 cross-examination on the direct instructions of the
5 Commissioner of An Garda Síochána. And nobody else. 18:05
6 And the only two other persons who have come before you
7 today have said that it was not done on their behalf
8 and not done on their instruction. Chief
9 Superintendent Rooney said that he was taken by
10 surprise by the matter being raised on the occasion 18:06
11 that it was done. Anmarie Ryan also expressed her
12 surprise at what was being done, and if it was being
13 done on behalf of her other clients she could not have
14 been surprised that it was being done at all. And in
15 that context, this Tribunal must in my respectful 18:06
16 submission take the view that what was stated to be the
17 Commissioner's instructions were authorised by her on
18 that occasion and that responsibility in respect of
19 them lies with her.

20
21 Now it simply is not acceptable in my respectful 18:06
22 submission for any party to a Tribunal to say that
23 lawyers acting on that party's behalf have acted, so to
24 speak, outside the scope of their instructions. And in
25 this particular case the logical and sensible and fair 18:07
26 view that must be taken is that in raising the question
27 of Sergeant McCabe's motivation and good faith and
28 integrity on that afternoon, that the counsel acting on
29 behalf of the Commissioner asserted that they were

1 acting on her express instructions and that she may not
2 resile from that.

3
4 So I just want to reiterate, Judge, what I stated this
5 morning in response to what Mr. Sreenan as said. There 18:08
6 is no opening for taking a view that because she had in
7 fact given limited and vague instructions to explore or
8 to establish the truth in a general way, that these
9 submissions were made on behalf of anybody else or made
10 on the authority of anybody else or on the instruction 18:08
11 of anybody else.

12
13 Now the second thing that Mr. Sreenan put to you was
14 that in some sense what was done in respect of Sergeant
15 McCabe was not to discredit the person but to discredit 18:08
16 his proposed evidence or his views or his assertions.
17 I stop there, Judge, to say that that again is inviting
18 you to make, in my respectful submission, a fundamental
19 error of fact and law. The letter which was furnished
20 on foot of the Commissioner and nobody else's desire to 18:09
21 raise this issue on Monday, 18th May 2015, was not
22 simply a challenge to the veracity of something that
23 Sergeant McCabe had said; it was a clear and
24 unequivocal statement that Sergeant McCabe had
25 confessed that the only reason that he had made any of 18:09
26 the complaints of poor policing to Superintendent
27 Clancy was that he wanted to pursue his own personal
28 agenda to have the D allegations disclosed to the D
29 family. That was an allegation of bad faith on

1 anybody's standard. It was not a statement about his
2 opinions or anything else, it was a direct suggestion
3 that he had confessed to Superintendent Cunningham,
4 witnessed by Sergeant Martin, that his only motive in
5 making his complaints which were the subject matter of 18:10
6 that Commission was an illicit and improper motive
7 which was designed to progress a private agenda of his
8 own.

9
10 So in respect of Mr. Sreenan's attempt to distinguish 18:10
11 between discrediting propositions and discrediting a
12 person, in my respectful submission, if the letter of
13 the 18th June -- or sorry, the 18th May 2015 had been
14 correct it could only have been an attempt to discredit
15 Sergeant McCabe as a person, as a person who had wholly 18:11
16 in bad faith invented and prosecuted complaints about
17 bad policing to pursue an improper personal agenda.

18
19 Now the next thing that I want to raise is that
20 Mr. Sreenan's submissions seem to misunderstand what in 18:11
21 fact was set out in the letter of the 18th May and seem
22 to, he seems to take the view that what was being put
23 thereafter was that Sergeant McCabe had a grievance and
24 that the grievance in question was a matter concerned
25 with mistakes that had been made. And I respectfully 18:12
26 submit that that is not what the letter of the 18th May
27 meant. The letter of the 18th May meant something very
28 different and I won't repeat it again. It was an
29 unambiguous claim that Sergeant McCabe had acted in bad

1 faith and for a wholly improper purpose. And again
2 Mr. Sreenan doesn't seem to have dealt with the
3 submissions made on the 11th June in any elaborate way,
4 but if there is any doubt as to what meaning was to be
5 attached to the letter of the 18th May, the submissions 18:13
6 of the 18th June make it very, very clear that the
7 purpose of both the letter and the submissions was to
8 subtend and support the proposition that Sergeant
9 McCabe was acting in bad faith, making his allegations
10 of poor policing in bad faith and in addition that he 18:13
11 was someone who was, as a result of earlier
12 interactions with his superiors a disaffected member of
13 An Garda Síochána.

14
15 Chairman, it is, in my respectful submission, 18:14
16 absolutely clear that over a number of days Mr. Justice
17 O'Higgins, who receives deservedly lavish praise here
18 from all sides, repeatedly put on the record what he
19 believed to be the case that was being made against
20 Sergeant McCabe by the Commissioner. And he invited on 18:14
21 at least one occasion, Mr. Smyth to correct him, if the
22 impression of what Mr. Smyth's case being made on
23 behalf of the Commissioner was wrong to say so. And he
24 stated on a number of occasions that Sergeant McCabe
25 was entitled to have a very clear statement made as to 18:14
26 whether or not his integrity, his credibility and his
27 motivation were being, were being challenged by the
28 Commissioner. And the answer he received on more than
29 one occasion was in the affirmative. And secondly,

1 insofar as any different impression was given to the
2 Commissioner -- sorry, to the Chairman of the
3 Commission, every opportunity was given over the
4 following five months for that, for any misimpression
5 to be corrected, and it was never availed of.

18:15

6
7 I want to deal, if I may, Chairman, with one matter,
8 and that is what is stated about Annmarie Ryan's
9 distribution of the report. Judge, on Tuesday, 19th
10 May during the course of the cross-examination of
11 Superintendent Cunningham, the record of the Commission
12 shows that I, as counsel for Sergeant McCabe, informed
13 the Commission that I had not received the report or
14 the notes which were countersigned by the two members
15 of An Garda Síochána. And the record clearly states
16 that Mr. Smyth informed the Tribunal, or the Commission
17 rather, that they would be given to me now. Mr. Murphy
18 has claimed that Ms. Ryan's notes confirm that this had
19 in fact been done on the prior day. The notes in
20 question actually have a line through the sentence
21 saying that it was given to me on that occasion, Judge.
22 I just ask you to confirm that from the exhibits.
23 There's crossed out, the suggestion that it was given
24 on the first day to me is in fact crossed out in
25 Ms. Ryan's notes. So I reiterate my submission that
26 that it was not until the report of Superintendent
27 Cunningham and the transcript of the tape recording was
28 made available that it became apparent, not merely to
29 Sergeant McCabe's legal representatives that there was

18:16

18:16

18:17

18:17

1 no evidence to support what was in the letter of the
2 18th May, but also that it became, that the same became
3 apparent to the lawyers acting on behalf of the
4 O'Higgins Commission. And I can't give evidence, but
5 the record -- I'm proceeding on the basis that the 18:18
6 record of the Commission speaks for itself and that it
7 makes absolutely clear that the distribution of the
8 report to Sergeant McCabe's legal representatives took
9 place on Tuesday, 19th May 2015, and that immediately
10 thereafter the witness under cross-examination was 18:19
11 stood down so that those records could be examined and
12 considered.

13
14 Now a lengthy submission has been made here on behalf
15 of the Department of Justice and it was suggested that 18:19
16 there was heated cross-examination which I cannot -- of
17 their witnesses which I cannot recall. But in any
18 event, what I would state is that Sergeant McCabe at
19 the time that this Tribunal was established was wholly
20 unaware of any suggestion that the Department of 18:20
21 Justice was in any way concerned and makes no complaint
22 whatsoever against the former Minister for Justice, an
23 Tánaiste, Frances Fitzgerald, in respect of anything
24 that she did or did not do in the matter, and in fact,
25 made it clear in evidence here that he had no complaint 18:20
26 to make in respect of the former Minister Fitzgerald.

27
28 Likewise, in relation to the interactions between the
29 Department of Justice and the Commissioner of An Garda

1 síochána, and the public controversy which broke out, I
2 think probably, from memory in November last, none of
3 this was known to Sergeant McCabe and none of the
4 political controversy which stemmed from it was
5 instigated or propagated by Sergeant McCabe and none of 18:21
6 the emails, or whatever, could possibly have been
7 within the knowledge of Sergeant McCabe or have been in
8 his mind at any stage in relation to the proceedings
9 before this Tribunal.

10
11 Chairman, Mr. Murphy has made a lengthy submission in
12 writing and in my respectful submission the points that
13 were made this morning all stand. A charge of
14 disaffection was made against Sergeant McCabe in a
15 letter -- or sorry, in a written submission, tendered 18:22
16 by the Commissioner on the 11th June 2015. The letter
17 of the 18th May 2015 was undoubtedly a letter which
18 challenged his integrity. The counsel retained by the
19 Commissioner, instructed by a solicitor, chosen by the
20 Commissioner, made it clear to Mr. Justice O'Higgins 18:23
21 that they were challenging the integrity and the good
22 faith of Sergeant McCabe. You say, Mr. Chairman, that
23 you have a chart of the various words that were used
24 and the occasions on which they were first introduced
25 and by whom, and I will defer to your analysis in 18:23
26 relation to those matters. But it doesn't matter,
27 Mr. Chairman, frankly, who introduced the term or in
28 what sequence exactly. The crucial point, and I'll
29 return to it again and again, if necessary, but only

1 once, I hope, and that is, that there can be no doubt
2 that Mr. Justice O'Higgins asked for a correction if
3 his understanding of the case being made on behalf of
4 the Commissioner was incorrect. And there can be no
5 doubt that he saw the case that was being made on 18:24
6 behalf of the Commissioner as one which challenged the
7 integrity of Sergeant McCabe. There can be no doubt
8 that he saw it as one which challenged his bona fides
9 and effectively accused him of acting mala fides in
10 these matters. And there can be no doubt that saw it 18:24
11 as one in which he was being invited to take the view
12 that he should not believe the evidence of Sergeant
13 McCabe. And he asked for correction if he was wrong in
14 that summation of what was put forward on behalf of the
15 Commissioner. And in those circumstances, as I said 18:24
16 earlier, it is not open, especially in the context of
17 written transcripts every day, a personal legal
18 representative there all the time, a highly qualified
19 solicitor, who was taken by surprise by the verbal
20 instructions that had gone to her counsel, bypassing 18:25
21 her in this matter, it is not open to the Commissioner
22 to resile from the consequences of the submissions that
23 were made on her behalf in writing as to why Sergeant
24 McCabe's credibility should be challenged by reference
25 to this false allegation that he had confessed to 18:25
26 making the complaints of poor policing solely for the
27 purpose of having his private agenda in respect of the
28 D allegations prosecuted or progressed in some way.
29

1 And I again go back, Judge, to the very simple
2 proposition: If it was not understood in that way,
3 that this was the Commissioner making this case as set
4 out in the letter of the 18th May, why then would
5 Sergeant McCabe have gone to his superiors on the 18:26
6 evening that he received that letter and resigned his
7 position as member in charge of the traffic unit in
8 Mullingar? How could it be that he could have
9 understood what was happening on the apparent
10 instructions of the Commissioner in any different way? 18:26
11 And again I note, I put some emphasis in the written
12 submissions and the oral submissions I made to the
13 Tribunal today about the complete gulf which exists
14 between the urgent wish of Annmarie Ryan to ask the
15 Commissioner to have a face-to-face consultation in 18:27
16 respect of her instructions, which Ms. Ryan believed
17 were political dynamite, and the actions of Chief
18 Superintendent Fergus Healy, about which Ms. Ryan has
19 given evidence, saying that no such consultation could
20 be arranged, and the subsequent evidence by former 18:27
21 Commissioner O'Sullivan that to the entire contrary she
22 was not only available and willing but absolutely
23 prepared to have such a consultation at any time. You
24 heard the evidence from Ms. Ryan that her counsel had
25 said that they were ready to travel that weekend to 18:28
26 such a consultation, and you heard, I've referred you
27 to the passage in her evidence where she says that she
28 witnessed Superintendent Healy whispering on the phone
29 to the Commissioner and shaking his head and informing

1 her that no such consultation could occur. And in my
2 respectful submission, Chairman, you must draw some
3 inferences from that complete chasm - to use the word
4 that has become slightly current - between the evidence
5 of the Commissioner on the one hand and the evidence of 18:28
6 Ms. Ryan on the other. And I made the point earlier
7 today, and it hasn't been answered in any respect at
8 all by anything that has been said or I think has been
9 written in the submissions that have been put before
10 you, as to how such contradictory evidence could have 18:29
11 been given in respect of the desire by Ms. Ryan to have
12 the most elementary safeguard that a solicitor in those
13 circumstances would wish to have, and that is a
14 face-to-face consultation with the person who was on
15 the face of it impugning the integrity and truthfulness 18:29
16 and creditability of Sergeant McCabe at that
17 Commission. There is simply no, there is simply no
18 reconciling the two versions and I say that it is
19 redolent of a willingness simply to take advantage of
20 the so-called letter of comfort and to walk away from 18:30
21 what happened that weekend, which was the preparation
22 of the letter of the 18th May and what later fell out
23 from the letter of the 18th May, namely the preparation
24 of the submissions on the 11th June, which, all of
25 which directly challenged the personal integrity of 18:30
26 Sergeant McCabe.

27 CHAIRMAN: Mr. McDowell, I think I do have those
28 points.

29 MR. MCDOWELL: Yes.

1 CHAIRMAN: I mean, I do know. Are you nearly done?
2 MR. MCDOWELL: Yes, I am very nearly done.
3 CHAIRMAN: Yes.
4 MR. MCDOWELL: Just one point that my solicitor
5 mentions to me and that is that Sergeant Yvonne Martin 18:31
6 says she never saw the letter of the 18th May, she says
7 she was never contacted in respect of her proposed
8 evidence at any stage whatsoever, she said that she was
9 effectively a stranger to all of this until it came --
10 CHAIRMAN: Look, if this is going to be something new 18:31
11 and something is going to be said --
12 MR. MCDOWELL: No, no.
13 CHAIRMAN: No, I mean, I think we really have to be
14 very careful. You know, it's all very well to say
15 people have constitutional rights, etcetera, etcetera, 18:31
16 etcetera, but we're actually all obliged to uphold
17 them. Now, if something is going to be said about
18 Yvonne Martin, she is not here.
19 MR. MCDOWELL: No, sorry, Judge, I'm not in any way
20 impugning her. I'm saying very simply this: That I 18:31
21 accept one hundred percent what her written account
22 given to this Tribunal was. But that in itself raises
23 very, very serious questions about how and why it was
24 suggested to Mr. Justice O'Higgins that she would say
25 certain things which she certainly would not have said 18:32
26 if the opportunity had been presented to her and if she
27 had been confronted with a request to testify before
28 him. That is what I am saying.
29 CHAIRMAN: It seems to me the more serious thing is:

1 why did anybody put her through a GSOC investigation?
2 MR. MCDOWELL: That is the other point I was going to
3 make to you, Judge. That is my second point here.
4 CHAIRMAN: Yes.
5 MR. MCDOWELL: why was it that in 2016, instead of -- 18:32
6 that this absolutely innocent person was the subject of
7 a reference to GSOC for the investigation of her
8 behaviour when there was absolutely no contact ever
9 made with her at the time and when by that time it was
10 quite apparent that she had absolutely no case to 18:33
11 answer? And again that, Judge, seems to suggest that a
12 great liberty was taken with her reputation for the
13 purpose of making it appear that the blame for the
14 wrong that had been already done to her lay elsewhere
15 and not with her at all. 18:33
16 CHAIRMAN: All right. Thank you very much,
17 Mr. McDowell.
18 MR. MCDOWELL: That is all Chairman.
19 CHAIRMAN: There was only one question. There is a
20 quote obviously from Mr. Clifford -- 18:33
21 MR. MCDOWELL: Sorry, I meant to do that.
22 CHAIRMAN: Yes. All I really want to know is: Was
23 that statement in fact issued by Sergeant McCabe? Is
24 it accurately quoted there?
25 MR. MCDOWELL: Yes. That statement was accurate and 18:33
26 was made by Sergeant McCabe. But I just want to make
27 one point, Judge. The paragraph on which Mr. Murphy
28 says:
29

1 "For example, against the background of the current
2 Tusla controversy, the entire false allegation made of
3 sexual abuse against Sergeant McCabe was repeatedly the
4 subject at introduction in the proceedings for the
5 purpose of discrediting his motives and testimony." 18:34

6
7 It was not done, Judge, and that paragraph does not
8 convey that it was done for the purpose of suggesting
9 that he was a child sexual abuser.

10 CHAIRMAN: Well, I was wondering, I had been wondering 18:34
11 for a long time where did the actual wording I am
12 dealing with about requiring me to investigate whether
13 false allegations, the false allegations, plural, of
14 sexual abuse were inappropriately relied upon by the
15 Commissioner, and that seems to be the origin of it. 18:34
16 Seems to be.

17 MR. McDOWELL: Well, you're saying that, but what I am
18 saying --

19 CHAIRMAN: I'm not saying that, Mr. McDowell. I'm
20 saying it seems to be. 18:34

21 MR. McDOWELL: Sorry, you're saying that it seems to
22 you. But I am saying, Chairman, that it was repeatedly
23 the subject of attempts at introduction --

24 CHAIRMAN: I don't see --

25 MR. McDOWELL: -- for the sole purpose of discrediting 18:35
26 his motives and his testimony.

27 CHAIRMAN: Mr. McDowell, I will think about what you
28 have said in that regard.

29

1 Now I want to, as the French say, je me donne la
2 parole, I'm je vais prendre la parole un moment. Okay,
3 so I just need to say thank you very much for all of
4 your submissions, but I just want to move forward.

18:35

5
6 One of the problems with this has been frankly a morass
7 of detail that has been introduced and it is actually
8 extremely hard to get to the bottom of it, but I will
9 do it as soon as possible. Similarly, in relation to
10 the other module that has finished, I have left
11 instructions with Ms. Mullan in relation to that. So,
12 what is important is we move forward and a very short -
13 and I don't mean to keep you, Ms. Kelly, it will be
14 very short - look at the Terms of Reference now will
15 probably help people in terms of going forward into the
16 future.

18:35

18:36

17
18 So term of reference [o] and term of reference [n] have
19 already been looked at in relation to the Keith
20 Harrison matter and if there is any further matter
21 which might inform term of reference [o] I will of
22 course look at it, but at the moment in terms of the
23 module that is finished on Tusla, there isn't any such
24 evidence. And then we go further and we go back and we
25 say, look, what about Bewley's Hotel, there's two terms
26 of reference there, there's terms of reference [l] and
27 [m], and essentially it's to say whether there was a
28 meeting at Bewley's Hotel on 24th January with Deputy
29 McGuinness and Commissioner Callinan and to look at the

18:36

18:36

1 purpose and the matters discussed at the meeting and
2 whether Commissioner O'Sullivan had any knowledge or
3 what knowledge she had of that meeting, and I presume
4 the contents of that meeting. So, that is one thing.
5 We have already started that. But it is through 18:37
6 hearsay. And then there is the question then, [k], of
7 whether Commissioner O'Sullivan influenced or attempted
8 to influence the broadcasts in relation to the early
9 leak of the O'Higgins Commission report on the 9th May
10 2016, and the evidence in relation to that seems to be 18:37
11 based on John Barrett saying that to Maurice McCabe. I
12 don't know if there is any other evidence apart from
13 that. It may be that that is a speculation by John
14 Barrett, I don't know, but that seems to be the only
15 thing there is involved in that. If we then go back 18:37
16 and say, term of reference [j], to examine all
17 electronic and paper files relating to Sergeant Maurice
18 McCabe held at Garda Headquarters and consider any
19 material therein relevant to the terms of reference.
20 Well, we have very good discovery from the Gardaí. It 18:37
21 continues from time to time, but there's been huge
22 efforts and there's been a vast amount of paper
23 examined, all of which I must say has been read by
24 counsel to the Tribunal. I am terribly grateful to
25 them for doing that, because it is not fair just to 18:38
26 leave it to a researcher and say well, tell me if
27 anything pops out. We have read everything. And then
28 you can say, what's that based on? Well, it's based on
29 the Oisin thing. And that seems to be based on David

1 Taylor talking to Maurice McCabe and now David Taylor
2 is saying that is in fact an assumption on his part.
3 And then you come to the main thing, where we've
4 already made a start, which is as to whether Martin
5 Callinan and/or Deputy Commissioner Nóirín O'Sullivan 18:38
6 asked David Taylor to brief the media negatively
7 against Sergeant McCabe, and this is to the effect that
8 he was making complaints of no substance, that he was
9 driven by agendas, and that an allegation of criminal
10 misconduct had been made against him, and whether, if 18:39
11 she wasn't doing that, and this seems to be the other
12 aspect of it, whether Commissioner O'Sullivan had any
13 knowledge of this attempt to discredit Sergeant McCabe
14 in that manner, not in any other manner, in that
15 manner. And then one can add into that paragraph [f] 18:39
16 which says, was there any attempt to entrap or falsely
17 accuse Sergeant McCabe of criminal misconduct? I can't
18 see at the moment any evidence of that, but it is
19 obviously important. And this is the last matter, term
20 of reference [i], to look at all the records relating 18:39
21 to telecommunications used by Superintendent Taylor,
22 former Commissioner Callinan, Commissioner O'Sullivan
23 in the period when Superintendent Taylor was Garda
24 Press Officer in relation to the matters in question.
25 Now, everything that I have said obviously involves 18:40
26 either an attempt by or knowledge of this attempt to
27 discredit Sergeant McCabe. So that is a block that we
28 have started to deal with and that we will deal with.
29 And I simply appeal to people in the future, let's try

1 and get to the point. We are starting off with
2 telecommunications records, and in that regard there
3 has been enormous efforts in conjunction with the
4 Forensic Service of Northern Ireland to get to the
5 bottom of anything that there is there, those continue, 18:40
6 but it means that people will have to watch the
7 Tribunal's website as to whether we are in a position
8 to actually start and introduce that evidence on the
9 day already announced or whether that has to be put
10 back. I don't know. But if people would be so kind as 18:40
11 to bear in mind that this is what the Terms of
12 Reference are about, I'm sure we'll get through the
13 rest of this a bit quicker than the two months that has
14 actually been spent on this, and which has delayed us
15 in actually getting to the point of this whole 18:41
16 Tribunal. So, thank you very much for your
17 submissions.

18
19 THE TRIBUNAL THEN ADJOURNED TO A DATE TO BE CONFIRMED

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