**Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters**

Established by the Minister for Justice and Equality under the Tribunals of Inquiry (Evidence) Act 1921, on 17th February 2017 by instrument

**The Hon Mr Justice Peter Charleton**

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## Ruling as to costs application of Marisa Simms

The tribunal sat on Friday the 1st of November 2019 to hear an application for the tribunal to discharge the costs of Marisa Simms from public funds. This is the tribunal's ruling on that application.

## Law as to costs at a tribunal

Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 gives a tribunal express power to make an order for costs (either in favour of or against a party to the tribunal) when the tribunal is "of opinion that, having regard to the findings of the tribunal and all other relevant matters there are sufficient reasons rendering it equitable to do so." Section 6 of the 1979 Act was considered in *Goodman International v Hamilton.*[1] Hederman J in his judgment said it was clear that the various amendments contained in the 1979 legislation were made "to give tribunals set up under the relevant legislation further efficacy."[2] McCarthy J, in his judgment, said that the 1979 Act as a whole "must be construed as subject to the constitutional framework and, in particular, involving fair procedures."[3] A tribunal is not a contest between parties. It is a public inquiry that is called by the Oireachtas into matters of public moment. A person represented before a tribunal is there because he or she has something to answer to, or is a witness to a public issue, or is an expert. If a person claims that some dreadful wrong has been committed by a public institution, the Oireachtas is the party setting up the inquiry. If a person sues the public institution, that individual is a litigant. Costs are awarded at the discretion of the court depending on the outcome. If the person is a witness at a tribunal, he or she is there because of what he or she said. That person is obliged to tell the truth, in accordance with an oath or affirmation. To fail to tell the complete truth is to put the public inquiry nature of the tribunal in jeopardy of not finding where the truth lies. Tribunal costs are not dependent on whether a person did something wrong but rather on cooperation, central to which is telling the truth. As McCarthy J said:

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[1] [1992] 2 IR 542.
[2] [1992] 2 IR 601.
[3] [1992] 2 IR 605.

> The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression "the findings of the tribunal" should be read as the findings as to the conduct of the parties at the tribunal. In all other cases the allowance of costs at public expense lies within the discretion of the Tribunal.[4]

The above fits in with the rationale behind costs orders in the first place. In litigation, for the reasons set out above, costs orders follow the event, that is the finding of criminal or civil responsibility. But as tribunals are set up in the public interest by the Oireachtas, the public should bear the costs of same subject to what findings the tribunal makes about the conduct of a particular party before it. Such reasoning is consistent with what Denham J said in *Murphy and Others v Mahon and Others*[5] as follows:

> Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to cooperate with the tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a tribunal. The power to award costs is affected by a lack of cooperation, by non-cooperation with a tribunal. Non-cooperation could include failing to provide assistance or knowingly giving false or misleading information.
>
> Fundamentally the issue is whether a party has cooperated with a tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a tribunal.[6]

A subsequent amendment was made to section 6 of the 1979 Act by the Tribunals of Inquiry (Evidence) (Amendment) Act 1997. This added to section 6 of the 1979 Act by providing what "relevant matters" a tribunal could have regard to when making orders for costs. The relevant matters include the terms of reference of the tribunal, failing to co-operate with or provide assistance to the tribunal, or knowingly giving false or misleading information to the tribunal. Section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 which deals with costs now reads as follows:

> Where a tribunal, or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal or the chairperson, as the case may be, may, either of the tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs

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[4] [1992] 2 IR 605.

[5] [2010] IR 136; see also dicta of Hardiman J at paragraph 176 of the judgment, page 189.

[6] ibid at 164; see also Fennelly J at paragraph [358], at 229-330.

> (a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order:
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> (b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.

The effect of the above amendment was considered by the Supreme Court in *Murphy and Others v Mahon and Others.*[7] Here an order for costs was quashed on the basis that the tribunal made findings of obstruction, hindering and substantive findings of corruption which are criminal offences and used same to ground a costs order. As to whether the 1997 amendment changed the view held up to then that the phrase the "findings of the tribunal" did not mean the findings of the tribunal relating to the subject matter of the inquiry, but rather the conduct of the parties before the tribunal, the court was of the view that it did not. In this regard Fennelly J said at paragraphs 125 to 127 as follows:

> If it be the case that the amendment to s. 6(1) has the effect of investing in the Tribunal the power to refuse to award costs by reason of the substantive findings it has made, it is difficult to see how its findings could any longer be described as being devoid of legal consequence, made *in vacuo* or sterile. I cannot accept the submission made on behalf of the respondents that the necessary intervention of the Taxing Master or of processes of execution alters that fundamental fact. It is incumbent on this Court to address, only in the last resort, a question as to the constitutional validity of a statute. To that end, the Court must, so far as the words used by the legislature so permit, interpret those words so that they do not conflict with the Constitution. In the present case, that task is simplified by the availability of the judgments in *Goodman v. Hamilton* The link created by s. 6(1) of the Act of 1979, as interpreted by the Tribunal and as upheld by Smyth J., appears to empower the Tribunal to penalise a witness before it in respect of costs by reason of its substantive findings. Clearly, this Court, when delivering judgment in that case did not contemplate any such possibility. The *dictum* of McCarthy J. avoids conferring that power on the Tribunal. If this Court had thought otherwise, the result of *Goodman v. Hamilton* might well have been otherwise. At the very least, the reasons given by Finlay C.J. would of necessity have had to be different.
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> The Oireachtas can be taken to have been aware in 1997 of the decision in *Goodman v. Hamilton* . If the legislature had intended to negative the effect of the judgment of McCarthy J., it could have adopted clear wording to that effect. In fact, it has left intact the words which were interpreted by McCarthy J. I agree that if the section, in its present form, were the only matter to be interpreted, it is at least open to the meaning that the Tribunal may have regard to its substantive findings when deciding on costs. The matter is not, however, *res in tegra.* This Court has said, *per* McCarthy J., that a tribunal may not have regard to its substantive findings when deciding on costs. The words which he interpreted are still in this section. The additional words interpolated in 1997 do not inevitably reverse the principle enunciated by the court in 1992. It is possible, without doing violence to language, to interpret the words in parentheses as qualifying both "the findings of the Tribunal" and "all other relevant matters". In the light of the decision in *Goodman v. Hamilton* and the

[7] [2010] IR 136.

> obligation to interpret in conformity with the Constitution, I think that is the correct interpretation.
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> I am satisfied, therefore, that the Tribunal, in making a decision as to whether to award costs is not entitled to have regard to its substantive findings on the subject matter of its terms of reference.

It is accepted by all the parties making submissions that deceit before a tribunal can entitle it to discount an award of costs or to refuse costs to a party. In that regard, a tribunal report should not be parsed or analysed to seek gradations of acceptance or rejection of a witness's evidence. If evidence is rejected but not described specifically as mistaken, it comes within the comment of Geoghegan J in *Haughey v Moriarty*[8] as follows:

> As the question of costs does not really arise yet, I am reluctant to make any comments on it but as it has featured so prominently in the arguments I think I should say this. In my opinion, power to award costs under the Act of 1997 is confined to instances of non-co-operation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory provision specifically requires regard to be had to the findings of the Tribunal as well as all other relevant matters. However, I merely express that view by way of *obiter dicta*...[9]

It is part of the exercise of judicial restraint not to take the character of a witness beyond what is necessary to the decision. Instead a clear choice as between evidence is to be made, or in accepting as true or rejecting evidence. For a judge, and tribunal chair-people are judges or retired judges in modern times, to say that evidence is rejected or not accepted is to indicate that that test is met. If testimony is described as mistaken or as a failure of recollection, then the test is not met. In construing a tribunal report, the entire report needs to be considered to give the necessary context.

**Tribunal letter of the 19th of October 2018**

On the 19th of October 2018, the tribunal wrote to the solicitors representing Marisa Simms as follows:

> Dear Mr. Mullaney,
>
> We refer to previous correspondence and to your representation before the tribunal. We also refer to the submission concerning costs furnished dated the 3rd of January 2018.
>
> However, in light of the report of the tribunal published on 11th October 2018 which is available on www.disclosurestribunal.ie and has been since publication the Chairman has directed me to write to you in the following terms.
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> The tribunal intends dealing with any issue as to legal costs arising from representation before the tribunal at the earliest possible time. Accordingly, the tribunal would be obliged if you would indicate the following:
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> 1. Whether your client seeks an order for costs from the tribunal;

[8] [1999] 3 IR 1.
[9] ibid at 14.

2. Whether your client intend seeking an order for costs against any other party or parties to the tribunal - in which case please identify that party or those parties;
3. Whether your client intends making submissions that any other party or parties should not receive costs or that such costs ought to be reduced to a stated percentage of costs;
4. In the case of paragraphs 1 and 2 above, please furnish brief submissions setting out the basis upon which your client argues that there is an entitlement to such orders;
5. In the case of paragraph 3 above, please furnish brief submissions as to why such other party or parties should not receive costs or should only receive a stated percentage of their full costs.
6. In all such submissions, please state clearly the facts, circumstances and principles of law upon which you propose to rely.

The tribunal now regards it as essential that all orders related to its work should be finalized. The tribunal would therefore be much obliged to receive submissions within 21 days from the date of this letter.

Yours truly,

Elizabeth Mullan
Solicitor to the Tribunal

**Submissions as to costs**

By letter dated the 19th December 2018 the solicitors on behalf of Marisa Simms sought costs in these terms:

Dear Sir,

We reply to your letter of the 19th of October last. We have previously made, in our letter of the 3rd January 2018, submission on behalf of our client in respect of costs.

We reply to your specific requests contained in your letter of the 19th of October as follows. Using the same numbering system set out therein:

1. Our client seeks an order for her costs from the Tribunal.

2. Our client does not seek an order for costs against any other party or parties to the Tribunal.

3. Our client does not want to make any submissions on this point.

4. We refer to our submissions already made on our letter of the 3rd of January 2018.

5. Not applicable in light of our instructions at paragraph 3 above.

6. We refer to our submissions already made in our letter of the 3rd January 2018.

Should the tribunal require further or specific information or submission in relation to matters we would be most grateful if such might be indicated to us.

Our client received a notification from the Tribunal dated the 8th August 2017 indicating that she was required as a witness at a hearing commencing in September of that year and that issues might arise reflecting on her good name. In these circumstances, we submit that it was appropriate and necessary that she would be represented and an application was made to the tribunal for an Order allowing representation. We submit that arising from basic constitutional principles and from the decision in In Re Haughey that such representation was appropriate. The Tribunal appeared to agree that this was the case by virtue of the making of an order for representation by letter dated the 28th August 2017.

Subsequently our client attended at the hearing of the Tribunal for the purposes of cross-examination by counsel for the Tribunal and by various other represented parties between the 18th September 2017 and the 23rd of October 2017. During this time she was represented by Counsel and Solicitor pursuant to the order of the Tribunal.

This Tribunal is referred to the judgement of *Goodman International v. Mr. Justice Hamilton.* It is respectfully submitted that this is authority for the proposition that the question of whether a represented party at a Tribunal was entitled to be indemnified as to costs of representation did not depend on the substantive findings about the matter under investigation but referred to the conduct of the witness before the Tribunal.

Our client is a school teacher with young dependents who lives in rented accommodation. There seems little doubt that she lacks the means to discharge her own costs of her necessary participation in the Tribunal and that a refusal to grant her such costs would create an onerous burden on her.

It is submitted that our client co-operated with this Tribunal and that her legal representatives at all times acted in good faith and with due deference to their obligations to the tribunal and our client.

In the circumstances as previously outlined, we would therefore respectfully ask that the Tribunal make an order granting the costs of our clients representation.

Yours faithfully,

Mullaneys Solicitors

Attached to the above letter was a copy of the submissions previously made which are dated the 3rd of January 2018 These submissions are in the following terms:

Dear Sir,

As you will be aware, we appeared on behalf of Marisa Simms at the tribunal established by the Minister for Justice and Equality under the Tribunals of Inquiry (Evidence) Act, 1921 on 17th February 2017.

Marisa Simms was written to by the Tribunal by letter of the 8th August 2017 and was therein informed that the Tribunal intended to commence hearings on Monday the 18th of September 2017 in relation to Term of Reference (n). That letter further indicated that Marisa Simms was identified by the Tribunal as a person whose reputation and/or good name would be at issue at its forthcoming hearings and that she might be the subject of critical comments.

This letter was accompanied by a booklet of documents which contained approximately 1,613 pages and it was indicated that this contained all the material which might reflect on her good name in order that she be afforded the means to defend herself.

Ms. Simms approached our office and sought advice as to whether it was appropriate that she be represented in these circumstances. She was advised that in the circumstances as outlined that it was appropriate that she be represented and, accordingly, by letter dated the 14th of August 2017 this firm sought representation for Ms. Simms at the hearings of this Tribunal. By letter dated the 28th August 2017 the Tribunal decided to grant representation to Ms. Simms under Term of Reference (n).

It is submitted that it appropriate that a person be represented by Solicitor and Counsel at a public Tribunal where issues in relation to their reputation and good name would be in issue. Accordingly, we submit that it was appropriate Ms. Simms be granted representation and appropriate that she should be awarded the costs of that representation.

We rely on the principles as established in the following cases:

*Murphy v Flood and others* [2010] 1 IR.R. 136;

*Goodman International v Mr. Justice Hamilton* [1992] 2I.R. 542;

*In Re; Haughy* [1971] IR 217.

We therefore respectfully apply to the Tribunal on behalf of our client for an order that the costs of the hearing be granted to her.

Yours faithfully

Mullaneys Solicitors

**Tribunal gives notice as to concerns**

In accordance with the requirements of natural justice, the tribunal gave notice of its concerns as to why it might consider not awarding Marisa Simms costs or only a percentage of her costs. That was done by letter dated 19th of October 2019 and was in the following terms:

Dear Sirs,

Thank you for your submissions in respect of your application for costs dated the 3rd January 2018 and 19 December 2018 respectively.

As you are aware Section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 provides as follows:

> *"(1) Section 6 of the Tribunals of Inquiry (Evidence) Amendment Act 1979, is hereby amended by the substitution for subsection (1) of the following subsection:*
>
> *"(1) Where a tribunal or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal, or the chairperson, as the case may be, may, either of the tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs -*
>
> *(a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;*

The Supreme Court (Denham J.) in Murphy –v- Flood [2010] 3 IR 136 and others has held as follows;

> *"30. Further, section 6 of the act of 1979, as inserted by section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, gives to the chairman a statutory power in relation to costs. This includes a specific reference enabling regard to be had to a failure to co-operate with the tribunal...*
>
> *37. The power and authority of the Tribunal is limited to that given to it by the terms of reference and the law, and so the tribunal may make findings of a lack of co-operation. There may be degrees of lack of co-operation, from minor to major. I would not attempt a list of activities or omissions which may be deemed to be a lack of co-operation..."*

Later in that judgement Ms. Justice Denham endorsed the following paragraph of Geoghegan J"s judgement in Haughty v Mr. Justice Moriarty and Others [1999] 3 I.R. 1 (at page 14);

> *"As the question of costs does not really arise yet, I am reluctant to make any comments on it but as it has features so prominently in the arguments I think I should say this. In my opinion, power to award costs under the Act of 1997 is confined to instances of non-co-operation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory provision specifically requires regard to be had to the findings of the Tribunal as well as other relevant matters"*;

Furthermore, commencing at paragraph 63 of the judgement, Ms. Justice Denham said as follows:

> *"...I am of the opinion that the issue for a chairman is whether a party has co-operated with a tribunal.*
>
> *Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to co-operate with the tribunal. Thus a*

*chairman has to consider the conduct of, or on behalf of, a party before a tribunal. The power to award costs is affected by lack of co-operation, by non-cooperation, with a tribunal. Non-co-operation could include failing to provide assistance or knowingly giving false or misleading information.*

*Fundamentally the issue is whether a party has co-operated with a tribunal so as to be entitled to his or her costs."*

In view of the above, the position would appear to be that the duty to co-operate with a tribunal includes the duty to give truthful evidence to the tribunal and that the giving of untruthful evidence to the tribunal is something the tribunal can have regard to in making any order as to costs.

As you are aware the third interim report of the tribunal was published in October 2018. We draw you attention to the following paragraphs of the report contained in pages 6 to 7 of same which are set out hereunder:

*"The Tribunal is exercising the High Court discretion in relation to costs, as limited by that principle and informed by the relevant legislation.*

*Truth in that regard remains paramount. Even though a person is required in the public interest to appear and testify as to matters of public importance before a tribunal of inquiry, those giving evidence are still obliged to be witnesses of truth. If a person has engineered a situation unfairly or deceitfully which results in public expense of a tribunal of inquiry, that fact should be capable of being reflected in a costs order. Where a person makes serious and unjustifiable allegations against another party to the tribunal, an order as between those parties may be made, allowing also for an order, if appropriate, in a proportionate way against the Minister for Finance."*

You will no doubt be familiar with the second interim report of the tribunal. What follows should be read in the context of the entire report. In relation as to whether or not your client co-operated with the tribunal by telling the truth the following is a concise indication as what would appear to be relevant matters:

- Ms. Simms maintained to the Tribunal that Inspector Goretti Sheridan and Sergeant Brigid McGowan coerced a statement out of her, having induced her to go to the garda station through pressure and deception. Evidence of same was given by her to the tribunal. Having referred to all of the evidence which included text messages downloaded from the phone of Marisa Sims the tribunal said as follows:

"In evidence to the tribunal, Marisa Simms several times changed the nature of her testimony from that which appeared in her statement to the tribunal...what was presented in her statement to the gardaí as a threat to kill and burn her and other family member is now expected to be believed as a reference to social burning. In another significant respect the evidence has changed so that Marisa Simms now claims that as soon as any reference was made to her family, she took her children out to the car and that in consequence they were not there for what then happened. That is more than hard to believe.

It inexorably follows that the tribunal and any reasonable person must conclude that the allegations of Marisa Simms against Inspector Sheridan and Sergeant McGowan are false."

(Tribunal report pages 13 to 16, page 51-68)

- Ms. Simms maintained to the Tribunal that TUSLA intervened in her family life because the Gardaí manipulated social services to that end. Ms. Simms accused TUSLA of going along with this Garda manipulation of social services

These allegations were completely rejected by the tribunal as false. The following is the relevant extract from the tribunal report:

"In particular, it was alleged that Donna McTeague had apologised on the telephone for having to do a home visit. It was claimed that in the aftermath of the meeting Donna McTeague apologised to Marisa Simms, claiming that "she didn't have any choice in the matter that her team leader had been in contact with the Guards and as a result had to do the visit". It was further claimed that after the visit "before leaving" Donna McTeague was "again apologising but guaranteeing this was the end of it....

There is no mistaking any of these matters. The fact that at the hearing they were reduced by Marisa Simms to some kind of feeling which she had in consequence of the meeting when the allegations as made were specific and the fact that Garda Keith Harrison, notwithstanding this reduction, claimed he had been told in the immediate conversations surrounding the alleged events by Marisa Simms that social services has admitted to acting discreditably demonstrate their determination to persist in damaging and hurtful allegations notwithstanding the fact that they knew that they were untrue."

(Tribunal report page 18, 19, page 90 ,91)

In light of all of the above, the tribunal is presently considering what, if any, portion of costs should be ordered should be paid to you and in that regard, is inviting you to make oral submissions prior to making any decision on the matter.

To that end a hearing has been convened on Friday, 1st November 2019 at 9.30 am at High Court No. 10 at the Four Courts, Dublin 7.

Yours faithfully,

Elizabeth Mullan
Solicitor to the Tribunal

**Hearing of 1st November 2019**

The tribunal held an oral hearing on the issue of costs and heard representations on behalf of Marisa Simms. The transcript of the hearing is on the tribunal's website at www.disclosurestribunal.ie and should be considered in full as to the ruling in this case.

**Decision**

All of this should be read in the context of the report of the tribunal published on 30 November 2017. While there follows a summary of the argument presented at the oral hearing on costs on 1 November, all of what was said is taken into consideration and the full transcript is posted on www.disclosurestribunal.ie which is the tribunal's website.

The issues relevant to Marisa Simms are those stated in the tribunal's letter of the 22nd of October 2019, stated in the context of the entire tribunal report, but should again be repeated:

- Ms. Simms maintained to the Tribunal that Inspector Goretti Sheridan and Sergeant Brigid McGowan coerced a statement out of her, having induced her to go to the garda station through pressure and deception. Evidence of same was given by her to the tribunal. Having referred to all of the evidence which included text messages downloaded from the phone of Marisa Sims the tribunal said as follows:

  "In evidence to the tribunal, Marisa Simms several times changed the nature of her testimony from that which appeared in her statement to the tribunal...what was presented in her statement to the gardai as a threat to kill and burn her and other family member is now expected to be believed as a reference to social burning. In another significant respect the evidence has changed so that Marisa Simms now claims that as soon as any reference was made to her family, she took her children out to the car and that in consequence they were not there for what then happened. That is more than hard to believe.

  It inexorably follows that the tribunal and any reasonable person must conclude that the allegations of Marisa Simms against Inspector Sheridan and Sergeant McGowan are false."

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  There is no mistaking any of these matters. The fact that at the hearing they were reduced by Marisa Simms to some kind of feeling which she had in consequence of the meeting when the allegations as made were specific and the fact that Garda Keith Harrison, notwithstanding this reduction, claimed he had been told in the immediate conversations surrounding the alleged events by Marisa Simms that social services has

admitted to acting discreditably demonstrate their determination to persist in damaging and hurtful allegations notwithstanding the fact that they knew that they were untrue."

(Tribunal report page 18, 19, page 90 ,91)

It is very difficult to justify the award of any costs to Marisa Simms. Perhaps the best that might be said is that out of loyalty, and in the emotional circumstance fully detailed in the tribunal report, she went along with the account of her domestic partner Garda Keith Harrison. But, at the same time the tribunal cannot ignore the objective facts which it was the tribunal's duty to find and the degree of hurt that her allegations caused to both members of An Garda Síochána and to professional social workers. Were those she impugned to have behaved as badly as she claimed it would have been a national scandal. As the facts have been found in the tribunal's report, those she accused of wrongdoing did nothing of the kind and nothing even close to what she and her domestic partner alleged. Further, the tribunal cannot but be aware, from spending several weeks in preparation by a scrutiny of witness statements and of correspondence and by seeing the individuals during the course of the hearing, her allegations caused very real hurt. It was an awful experience for these diligent and kind people. The truth hurts at times; but these allegations were baseless and hurt for that reason. Those baseless allegations continued, with only minimal adjustments, throughout the hearings.

The tribunal accepts, and the case law indicates the following. If a person makes an allegation in public and the Oireachtas decides to set up a public inquiry, the person making the allegation in coming to the tribunal is entitled to costs provided he or she cooperates. In that respect cooperation must involve telling the truth as an objective reality. Any other interpretation, to the effect that turning up and repeating whatever wrong allegations led to the formation of the tribunal in the first place amounts to cooperation, is contrary to any reasoned interpretation of the law and of justice. Let it be clear: justice is based on first of all finding out the truth. Awards of damages or declarations of wrongdoing, the latter only being relevant to a tribunal, are as random as a lottery result unless the justice system first searches for the truth as diligently as possible. As was said in *Ó Gríofáin v Éire* [2009] IEHC 188 at paragraph 10: "Is é an ceartas an aidhm atá le gach imeacht dlíthiúil. Is í an fhírinne an cuspóir atá ag gach cleachtas breithiúnach." Or as translated: "Justice is the aim of every legal proceeding. Truth is the objective of every judicial exercise." If a person makes an allegation and a tribunal of inquiry is set up in consequence and if the individual tells the tribunal that the allegation was wrong, or based merely on what they thought, or that they made it up, or were badly mistaken, a tribunal can still conclude for their being awarded costs. Furthermore, the tribunal could very quickly report and many months or years of public time would be saved and the expenditure of public funds would be minimised. It is a very different situation for a person to make a series of allegations and to persist in the allegations where these have no foundation in reality and take serious work and costs to analyse and to find as being baseless. The example given at the costs hearing was of a person proclaiming on television that public representatives had taken bribes to vote on legislation in Dáil Éireann. That person wrongly persisting in such an allegation may give the appearance of cooperating by turning up over months to a tribunal of inquiry and of giving wrong evidence. If the evidence is rejected where the person could have cooperated with the tribunal by withdrawing baseless allegations and perhaps saying what motivated the allegations, then the tribunal work is required to continue over months and those at the receiving end of the allegations would be required to contest testimony and documents and to be represented. That is not cooperation. On the other hand, where the person, as Denham J states, says that the allegations are false and perhaps says what brought about his or her conduct in the first place, that is cooperation. This particular instance under consideration here was not an instance of someone correcting the record at the first available opportunity. Clearly, there is also the

situation where a person has serious allegations to make and while others contest his or her testimony, it turns out that the person should be vindicated. In that case, costs go to the person the truth of whose allegations is vindicated.

It is agreed by counsel for Marisa Simms that the law as outlined as to costs on behalf of the tribunal is accurately stated. Serious findings of fact were made against her involving the dismissal of her evidence. This was not the shredding of documents or the concealment of meetings, as her counsel required it to be before costs could be reduced, but it was, as the tribunal report has found, wrong. As a matter of charity, the tribunal was invited by her counsel to look for such aspects of the course of the tribunal as might be seen to be cooperation. Tacitly, some aspect of the recent decision in *Lowry v Mr Justice Moriarty* [2018] IECA 66 may have been played in aid but was not elaborated upon. Instead, reference was made to what as it turns out could not even be regarded fairly as aspects of assistance. These included: the testimony as to the destruction threatened against the public examination papers of secondary students; her limited testimony as to how bad were her domestic circumstances; the forwarding through the gardaí of the entire texts exchanged between herself and Garda Keith Harrison which undermined the testimony both of him and her; and the change of account as to the visit of the social worker to her home where, it emerged, it was not ever said that the social worker was there reluctantly or at the behest of some kind of conspiracy. This is very small stuff seen against the national scandal that she alleged together with her domestic partner Garda Keith Harrison. The allegation of threatened destruction of public examination papers was there all along. The texts were passed over in an exercise in cooperation with the gardaí, of a piece with her lengthy statement which she later claimed had somehow been coerced out of her or distorted by two serious-minded and diligent officers. It contained her relevant life history and should not have been used against those who took it down with great sympathy for her. The change in the social workers visit was just left in place up to her giving evidence and in all humanity it should have been withdrawn well before the tribunal began. Furthermore, there was nothing of a willing acceptance of wrongly making serious and deeply hurtful allegations against decent and hardworking people, whose only fault was to try to do their job. There is further the bleak picture of the minimisation of facts and the strident allegations against officers of An Garda Síochána where what was in fact involved was her finally unburdening herself to two kind and sympathetic women doing their duty well and conscientiously.

Counsel for Marisa Simms accepts that there is no mathematical formula for going about reducing costs or only awarding a portion of costs. That is right. These are decision that the courts are called upon to make every day and in the interests of justice by taking all relevant factors into consideration and doing the best that is possible. A mathematical model would not assist that process since what is required is a common sense view of what the overall fairness of the situation requires. But, this is not an instance of where the approach of a party shows some substantial benefit in terms of the revelation of where the facts actually lay. It is thus not a case where a fractional, half or three-quarters, or as expressed in percentages 30% or 70%, or whatever, is appropriate. In substance all of the allegations with which the terms of reference, (n) and (o), were substantially concerned were unfounded. These should simply never have been made. In so far as they were initiated outside the tribunal, the reality remains that the tribunal was nonetheless set up and the tribunal must search to consider if there is some basis for awarding costs up to and including the brief fee on the first day of the tribunal when at that point the allegations should have clearly been not persisted in after legal advice.

The tribunal cannot find any basis for the award of costs based on cooperation within the meaning of the decisions which are outlined above. This was an instance where dreadful allegations were made against multiple individuals and as against the social work structures of the

State and as against the national police force. In reality, the situation of turmoil that then existed in Marisa Simms' and in Garda Keith Harrison's domestic circumstances, about which the relations of Marisa Simms complained and with good reason, caused completely proper and moderate interventions by gardaí and social services. It regrettably has to be recalled that the evidence of Marisa Simms exhibited almost no sense of the harm that was being done but what is important is not that the allegations hurt, because the truth can hurt but telling the truth can be justified, but that she had the means to back away from them. The tribunal does not ascribe any motivation to her as the tribunal's only task is to find facts and to report on what was a series of allegations of public moment but which had not substance whatever to them.

The submission made on behalf of Garda Keith Harrison that the award of costs by the tribunal is a matter of all or nothing, yes or no, is incorrect. On behalf of Marisa Simms, this was not submitted, and rightly so, because there is no legal basis for it. This was a dreadful circumstance of allegations being made without basis. But it remains the duty of the tribunal, despite the wrong done in making these allegations, to search for a basis on which some humane and lawful award of costs can be made. To return to the example of Denham J, quoted above, this was a case where incorrect and imagined allegations of a most hurtful kind were made against multiple parties and against the State apparatus of social work and policing. It was the Oireachtas which initiated the public tribunal. There could have been a scoping exercise. If in that exercise the astonishing texts exchanged between Marisa Simms and Garda Keith Harrison had come out, any basis for holding an inquiry might have dissipated. But the Oireachtas, having set up the tribunal, notwithstanding the baseless nature of the allegations, it might be argued that Marisa Simms was entitled to consult solicitors, that solicitors would instruct counsel and that the very extensive disclosure made by the tribunal would have to by analysed and that the opening speech of counsel for the tribunal, factual, objective and analytical in nature, would have to be considered. Hence, it is possible, though the tribunal has serious doubts which are not resolved fully on the case law, that in the particular circumstances of the potential national scandal that this series of allegations involved, that an award of costs should be made on a limited basis to the person making these scandalous allegations.

The tribunal, with considerable doubt, therefore rules that Marisa Simms is entitled to representation up to and including the opening day of the tribunal hearings but not any further costs beyond that point. All legal practitioners and judges will be familiar with situations where sense is achieved on the steps of the court. Practitioners also know that allegations can be withdrawn in a brief court hearing on the basis of a serious consideration of reality; an exercise that can be helped by legal advice. That should have happened here: but did not. That is not at all to suggest that any legal advice was below par. Legal advice helps people to see where they stand. Normally, in a civil case the party withdrawing an allegation will have to pay his or her own costs and that of the opposing party, but on occasion that situation can be compromised. Here, the Oireachtas set up the tribunal, so it is arguable that such a principle does not fully apply. The tribunal cannot make any award beyond that first day of the tribunal substantive hearing and it is for the taxing master, in default of agreement, to sort out the costs measure that the tribunal ruling entails on a party and party, and no other, basis. Thus the award of costs is in respect of all preparation for the tribunal and up to and including the first day of the tribunal's substantive hearings. No costs are awarded for any days after that. For the avoidance of doubt, that includes counsel's brief fee and such solicitor's fees as that entails. As of day 2 on; no costs.

All of the costs rulings of the tribunal are on a party and party basis; no other. In default of agreement on costs, same are to be referred to taxation.

Approved
Peter Charleton
4 December 2019