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1921, ON 17 FEBRUARY 2017

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

SUBMISSIONS ON THE ISSUE OF COSTS IN RELATION TO TERMS OF
REFERENCE (n) AND (o), REPORT ON MATTERS RELATING TO GARDA
KEITH HARRISON, CONTACTS BETWEEN MEMBERS OF AN GARDA
SÍOCHÁNA AND TUSLA IN RELATION TO GARDA KEITH HARRISON

HELD IN THE FOUR COURTS, DUBLIN 7
ON FRIDAY, 1ST NOVEMBER 2019

COSTS APPLICATION

Gwen Malone Stenography
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1 THE HEARING COMMENCED ON FRIDAY, 1ST DAY OF
2 NOVEMBER, 2019 AS FOLLOWS:

3
4 JUSTICE CHARLETON: So Ms. Leader.

5
6 SUBMISSION BY MS. LEADER:

7
8 MS. LEADER: Yes, sir. I just will outline my
9 understanding of the law in relation to costs when it
10 comes to tribunals, sir, and you will be aware that
11 Section 3 of the Tribunals of Inquiry (Evidence)
12 (Amendment) Act 1997 is the relevant statutory
13 jurisdiction for costs and what it says is:

14
15 "Section 6 of the Tribunals of Inquiry (Evidence)
16 (Amendment) Act, 1979, is hereby amended by the
17 substitution for subsection (1) of the following
18 subsection:

19
20 (1) Where a tribunal or, if the tribunal consists of
21 more than one member, the chairperson of the tribunal,
22 is of opinion that, having regard to the findings of
23 the tribunal and all other relevant matters (including
24 the terms of the resolution passed by each House of the
25 Oireachtas relating to the establishment of the
26 tribunal or failing to cooperate with or provide
27 assistance to, or knowingly giving false or misleading
28 information to, the tribunal), there are sufficient
29 reasons rendering it equitable to do so, the tribunal,

1 or the chairperson, as the case may be, may, either of
2 the tribunal's or the chairperson's own motion, as the
3 case may be, or on application by any person appearing
4 before the tribunal, order that the whole or part of
5 the costs;

6
7 (a) of any person appearing before the tribunal by
8 counsel or solicitor, as taxed by a Taxing Master of
9 the High Court, shall be paid to the person by any
10 other person named in the order."

11
12 Now that section has been considered by the Supreme
13 Court, in particular in the decision of Murphy -v-
14 Flood which is [2010] 3IR at 136. what the Supreme
15 Court said in relation to that section of the Act is
16 that:

17
18 "It gives to the Chairperson a statutory power in
19 relation to costs. This includes a specific reference
20 enabling regard to be had to cooperate with the
21 tribunal."

22
23 At paragraph 37 of that judgment it sets out:

24
25 "The power and authority of the tribunal is limited to
26 that given to it by the terms of reference and the law,
27 and so the tribunal may make findings of a lack of
28 cooperation. There may be degrees of lack of
29 cooperation from minor to major. I would not attempt a

1 list of activities or omission which may be deemed to
2 be a lack of cooperation. "

3
4 Later on in that judgment, Ms. Justice Denham endorsed
5 the following paragraph from Mr. Justice Geoghegan's
6 prior judgment in Haughey -v- Justice Moriarty & Others
7 which is in the Irish Reports 1999 at page 14. what he
8 said there is:

9
10 "As the question of costs does not really arise yet, I
11 am reluctant to make any comments on it, but as it has
12 featured so prominently in the arguments I think I
13 should say this; in my opinion power to award costs
14 under the Act of 1997 is confined to instances of
15 non-cooperation with or obstruction of the tribunal,
16 but that of course include the adducing of deliberately
17 false evidence and that is why the statutory provisions
18 specifically requires regard to be had to the findings
19 of the tribunal as well as other relevant matters. "

20
21 So just to conclude the reference to the Murphy
22 judgment at paragraph 63 of the judgment Ms. Justice
23 Denham said she was of the opinion that:

24
25 "The issue for a Chairman is whether a party has
26 cooperated with a tribunal when it comes to the matter
27 of costs. Ordinarily any party permitted to be
28 represented at a tribunal should have their costs paid
29 out of public funds. However, this may be lost if the

1 party fails to cooperate with the tribunal, plus the
2 Chairman has to consider the conduct of or on behalf of
3 a party before the tribunal. The power to award costs
4 is affected by lack of cooperation, by non-cooperation
5 with a tribunal. Non-cooperation could include failing
6 to provide assistance or knowingly giving false or
7 misleading information. Fundamentally the issue is
8 whether a party has cooperated with a tribunal as to be
9 entitled to his or her costs."

10
11 So therefore the position would appear to be, sir, you
12 have a discretion with regard to the award of costs and
13 the relevant matter to be considered in exercising that
14 discretion is whether or not parties cooperated with
15 the Tribunal.

16
17 Now on a prior occasion, sir, in dealing with issues of
18 costs relating to the Tribunal you asked the parties to
19 address four particular matters with regard to today's
20 hearing, sir. It may be appropriate for me to run
21 through those four particular matters at this stage.

22
23 The first thing you asked the parties about is whether
24 they had any different view to the law to the view
25 which I have just expressed, sir, in other words
26 whether cooperation is the matter which has to be
27 addressed at this hearing and whether the truth with
28 regard to telling the truth to the Tribunal is a matter
29 which has to be addressed at this stage.

1 The second thing, sir, is whether they have any issues
2 with regard to fair procedures in relation to the costs
3 hearing. In that regard, sir, a number of letters have
4 been sent to the parties which appear here today, first
5 of all a letter asking them in relation to their
6 application for costs, asking for submissions dealing
7 with their application for costs which the Tribunal has
8 received and which are included in the papers before
9 you, sir. A further letter has been sent with regard
10 to whether they have any application in relation to any
11 other party, et cetera. Also, a letter has been sent
12 to both of the parties before the Tribunal dated 22nd
13 October I think, sir, yes 2019 setting out what I just
14 set out before you today, sir, and also the particular
15 matters which have to be addressed or which we're
16 suggesting should be addressed by them in furthering
17 their application for costs.

18
19 The third thing, sir, that you asked the parties to
20 address in relation to any award of costs which you
21 might make is what percentage below which would be
22 disproportionate or unreasonable in relation to an
23 award of costs. So you expressed it in these terms:

24
25 "The third question is what percentage below which you
26 would be acting unreasonably, therefore flying in the
27 face of fundamental reason and common sense and
28 disproportionately in the sense of Meadows as flying in
29 the face of fundamental reason and common sense in

1 going" --
2
3 MR. HARTY: Sorry, I'm loath to interrupt. I wonder
4 could I have the date of that letter because I appear
5 to be missing...
6 MS. LEADER: I think it's 22nd October.
7 MR. JUSTICE CHARLETON: Yes, it is. I don't know,
8 Ms. Mullen, do you have it?
9 MS. LEADER: Of this year. I beg you pardon, 2019.
10 MR. JUSTICE CHARLETON: Ms. Mullen, I don't know if you
11 have another copy of it. Can you find it, Mr. Harty?
12 MR. HARTY: No, the last letter I have from the
13 Tribunal is 19th October and then 7th November. I
14 appear not to have received a letter on --
15 MR. JUSTICE CHARLETON: 7th November is next week.
16 MR. HARTY: Sorry, 7th November of last year. Excuse
17 me, sorry.
18 MR. JUSTICE CHARLETON: 7th November, has that been
19 furnished?
20 MS. LEADER: It starts "thank you for" --
21 MR. HARTY: Sorry, 22nd October, excuse me. I have it.
22 MS. LEADER: Thank you. Yes, so I was dealing with the
23 third question in relation to the percentage below
24 which, and I think I have set that out.
25 MR. JUSTICE CHARLETON: Sure.
26 MS. LEADER: And then the final question, sir, that you
27 asked the parties to address is whether in view of the
28 fact that it is a matter of public money, in other
29 words taxpayers' money, is there any sense in which

1 compassion or mercy comes into consideration in any
2 order that the Tribunal may make?
3 MR. HARTY: Sorry, sir, that is not the letter I have
4 dated 22nd October.
5 MS. LEADER: No, no, it wasn't.
6 MR. JUSTICE CHARLETON: What Ms. Leader is doing is
7 filling you in on -- we had a costs hearing in relation
8 to the other module.
9 MR. HARTY: Yes. But the important thing is none of
10 these questions were actually asked of me --
11 MS. LEADER: No.
12 MR. HARTY: -- before now.
13 MR. JUSTICE CHARLETON: I'm going to ask you --
14 MR. HARTY: I'm sorry, but my understanding is they
15 were sent a letter but if they're not --
16 MR. JUSTICE CHARLETON: There seems to be some
17 misunderstanding.
18 MS. LEADER: Yes.
19 MR. JUSTICE CHARLETON: But what Ms. Leader was saying
20 and it was explained to me on the last occasion there
21 was a costs hearing which was in relation, if you like,
22 to the Maurice McCabe aspect of things, I came out and
23 asked those questions of parties.
24 MS. LEADER: Yes.
25 MR. HARTY: Sorry, I'm taking the letter.
26 MR. JUSTICE CHARLETON: It's not in the letter, but
27 it's actually on the transcript that's on the website.
28 MS. LEADER: On the website, yes. It's just to save
29 you asking the questions now, sir.

1 MR. JUSTICE CHARLETON: well, thanks.

2 MS. LEADER: It may be appropriate for the parties to
3 address those matters.

4 MR. JUSTICE CHARLETON: I think it is and thank you for
5 reminding me. So, Mr. Hartnett.

6

7 SUBMISSION BY MR. HARTNETT:

8

9 MR. HARTNETT: Very good. Firstly, sir, if I could
10 bring you to the letter which invited us to the
11 Tribunal, if you like, which is dated August 2017 and
12 it states that:

13

14 "The Tribunal has identified you as a person whose
15 reputation and/or good name will be at issue in the
16 forthcoming hearings and who also, possibly, may be the
17 subject of critical comment. Accordingly, the Tribunal
18 is hereby formally notifying you of same."

19

20 Then it goes on to say that we were provided with a
21 copy of materials which reflects on your good name so
22 as you are afforded the means to defend same. Now,
23 clearly an issue arose at that stage in relation to a
24 right to a good name, et cetera. And I submit that in
25 the general constitutional atmosphere that we must, as
26 a matter of right, be entitled to legal representation
27 where these issues are clearly demarcated at the very
28 beginning. As a result of that letter my client,
29 Marisa Simms, instructed Mr. Mullaney, a Sligo

1 solicitor, who instructed counsel. Mr. Mullaney spent
2 four weeks here representing Ms. Simms, as he was
3 obliged to do having been instructed by her, away from
4 his practice in Sligo and indeed counsel attended as
5 well.

6
7 I submit that the question of good name being at stake
8 is very significant and if one was to draw an analogy
9 with legal aid, certainly the courts have decided where
10 one's right to liberty and good name is at stake, one
11 has a right to representation. I submit, by analogy,
12 the same applies here and I also submit that in the
13 public interest those who may find themselves in a
14 similar position should be in a position where they can
15 obtain legal advice and legal aid from a solicitor and
16 counsel. If one was to, if you like, lose the
17 possibility of costs based on the finding of the
18 Tribunal, it might be very difficult for people to
19 obtain representation and that would not be, in my
20 submission, in the interests of justice.

21
22 It might be noted that the section which is opened by
23 My Friend, Ms. Leader, does refer to other matters in
24 general that the Tribunal can take into account and I
25 submit that that is one of them.

26 MR. JUSTICE CHARLETON: Help me on that, where is the
27 piece you're referring to?

28 MR. HARTNETT: I shall find it now.

29 MR. JUSTICE CHARLETON: This is Section 3, it's

1 possibly in the letter to you I think.

2 MR. HARTNETT: It's in the actual section where it says
3 on the third line "all other relevant matters", on the
4 third line of section 3 or section 6 as it is but
5 amended by section 3.

6 MR. JUSTICE CHARLETON: Okay, just give me a second.

7
8 "Where a Tribunal consists of more than one person, the
9 chairperson of the Tribunal, is of opinion that, having
10 regard to the findings of the Tribunal and all other
11 relevant matters (including the terms of the
12 resolution..." et cetera. "...there are sufficient
13 reasons rendering it equitable to do so."

14
15 Is that --

16 MR. HARTNETT: Yes.

17 MR. JUSTICE CHARLETON: So you're saying there is a
18 general kind of discretion?

19 MR. HARTNETT: Yes, and I submit the matter I have just
20 mentioned must be something you can take into
21 consideration and I say should take into consideration.
22 The question arises within that as whether this Court
23 should take account of compassion and mercy and I
24 submit again a court certainly would be obliged, it
25 just strikes me, I think the preamble refers to
26 concepts of charity, I think that any court will always
27 be driven or be conscious of the concepts of compassion
28 and mercy in making any decision and I submit that,
29 again by analogy, the same should apply to a tribunal

1 which is carrying out a quasi judicial function. I
2 suppose a judicial function.

3
4 So the question again, although I don't wish to repeat
5 myself, should a person be required to attend without
6 legal representation? And I submit that the answer to
7 that must be no.

8
9 Now, there can be different forms of non-cooperation
10 clearly and that was referred to by Ms. Justice Denham.
11 There have been tribunals in the past where people have
12 destroyed documents; where people have failed to
13 disclose cheque books payment stubs, et cetera, et
14 cetera, very clear, if you like, obstruction or
15 non-cooperation and I submit that they qualitatively
16 must be distinguished from a situation where, for
17 instance, evidence of a witness is rejected by the
18 Tribunal, that there is a significant difference. If
19 somebody has set out to destroy documentation, if
20 somebody has set out to, for instance, suppress the
21 existence of a bank account, then clearly that would
22 be, in my submission, a much more serious matter which
23 a tribunal could take into account. Again, just to
24 repeat myself, I submit that there is a difference
25 between that and the acceptance or rejection of
26 evidence that is given before a tribunal.

27
28 So there is a public interest, in my submission, in
29 anybody who is called as a witness whose good name is

1 at stake, as it was here, in having, if you like, legal
2 representation and having an appropriate system whereby
3 that can be obtained. And in those circumstances I
4 submit, I ask for costs on behalf of Marisa Simms.
5 MR. JUSTICE CHARLETON: Mr. Hartnett, again can you
6 help me on just a couple of matters?
7 MR. HARTNETT: Yes.
8 MR. JUSTICE CHARLETON: Firstly, is there any shaft of
9 light, if I could put it that way, in terms of the
10 evidence of your client whereby it could be said this
11 at least elucidated an important matter, as opposed to
12 the Tribunal's findings which really speak for
13 themselves.
14 MR. HARTNETT: Just going to the actual findings one
15 will remember in fact under examination by counsel for
16 the Tribunal, Ms. Leader, questions were asked about
17 the interaction between a social worker and my client
18 and she indicated that in fact it was a feeling she had
19 and did not say that it was a statement.
20 MR. JUSTICE CHARLETON: You're talking about when a
21 social worker visited the house?
22 MR. HARTNETT: Yes.
23 MR. JUSTICE CHARLETON: Had a chat with the children.
24 was introduced as this is a cousin of mine who has come
25 to say hello type thing, but she didn't in fact say
26 that she was sent by the Gardaí.
27 MR. HARTNETT: Yes.
28 MR. JUSTICE CHARLETON: And that she was here
29 effectively to destroy their lives et cetera, et

1 cetera. It was just something that was internal to
2 her. In other words she didn't repeat that but it was
3 in the letter.

4 MR. HARTNETT: Yes, that was clearly, that was a
5 finding by the Tribunal based on that evidence and that
6 clearly is a matter that aided the Tribunal and I'd ask
7 you to take that into account. I can't think of any
8 other bits and pieces, but again I go back to --

9 MR. JUSTICE CHARLETON: One might think, perhaps, of
10 the Inter Certificate papers, the bag.

11 MR. HARTNETT: Yes, I have to say I didn't apply my
12 mind entirely to the factual aspect.

13 MR. JUSTICE CHARLETON: I'm just trying to think it
14 through. There's the Inter Certificate papers.

15 MR. HARTNETT: Yes.

16 MR. JUSTICE CHARLETON: And what happened to them or
17 what was threatened to happen to them.

18 MR. HARTNETT: Yes.

19 MR. JUSTICE CHARLETON: The evidence on that came from
20 Ms. Simms, but also came from her mother.

21 MR. HARTNETT: Yes. I'm afraid I have to admit --

22 MR. JUSTICE CHARLETON: It didn't -- no, I'm sure you
23 remember. Look, all these details come to us,

24 Mr. Hartnett --

25 MR. HARTNETT: Yes.

26 MR. JUSTICE CHARLETON: -- and like legal cases we're
27 better off if, like the river outside, they pass
28 through and don't stay on top of us.

29 MR. HARTNETT: One wouldn't want to collect it all.

1 MR. JUSTICE CHARLETON: Yes, I know exactly what you
2 mean.
3 MR. HARTNETT: My megabytes are limited.
4 MR. JUSTICE CHARLETON: I'm just trying to think it
5 through.
6 MR. HARTNETT: Yes.
7 MR. JUSTICE CHARLETON: That is one and then there was
8 a contradiction in the evidence.
9 MR. HARTNETT: Yes.
10 MR. JUSTICE CHARLETON: So that's --
11 MR. HARTNETT: well --
12 MR. JUSTICE CHARLETON: Then there's the general
13 domestic situation.
14 MR. HARTNETT: Yes.
15 MR. JUSTICE CHARLETON: And what about then the text
16 messages? would you say anything about the text
17 messages?
18 MR. HARTNETT: well, they're there.
19 MR. JUSTICE CHARLETON: Yes.
20 MR. HARTNETT: Made available.
21 MR. JUSTICE CHARLETON: Mm.
22 MR. HARTNETT: So again I draw a very specific
23 difference between tribunals in the past where people
24 may have set out to destroy the trail.
25 MR. JUSTICE CHARLETON: Yes.
26 MR. HARTNETT: And where material, as in this case, it
27 was made readily available, voluntarily in cooperation
28 with the Tribunal.
29 MR. JUSTICE CHARLETON: So in other words what you're

1 saying is, if a person says: Look, this is what I
2 think about it, this is how I feel about it, this is
3 how I see it, but here is the documentary evidence and
4 if that contradicts what they say that is substantial
5 cooperation. Is that the point you're making?

6 MR. HARTNETT: That is my submission.

7 MR. JUSTICE CHARLETON: Yeah. Can you help me then
8 on -- you've given me a submission then on number four,
9 compassion or mercy. Would you like, because everybody
10 else did on the last occasion, to say what percentage
11 below which the Tribunal would fall and fly in the face
12 of fundamental reason and common sense, in other words
13 become unreasonable and subject to a judicial review?

14 MR. HARTNETT: Yes. Without, if you like, throwing
15 away any argument I might have in relation to whether
16 we're entitled to the whole of our costs.

17 MR. JUSTICE CHARLETON: Mm.

18 MR. HARTNETT: If the Tribunal was to decide that there
19 should be a proportion, I would submit that 25% would
20 be the maximum that should be applied to that.

21 MR. JUSTICE CHARLETON: All right.

22 MR. HARTNETT: In view of the circumstances.

23 MR. JUSTICE CHARLETON: All right. It's good to have
24 your submission on that in any event.

25 MR. HARTNETT: But that's as a fallback position.

26 MR. JUSTICE CHARLETON: No, I appreciate it's a
27 fallback position and I appreciate that you don't want
28 to do it, but everybody else did and I have asked and
29 thank you for answering.

1 MR. HARTNETT: Yes.

2 MR. JUSTICE CHARLETON: And then, have you any issue
3 with the fair procedures that were involved?

4 MR. HARTNETT: In relation to these costs matters?

5 MR. JUSTICE CHARLETON: Yes.

6 MR. HARTNETT: No, none whatsoever.

7 MR. JUSTICE CHARLETON: I think we followed the Ryan
8 judgment.

9 MR. HARTNETT: I have no dispute on that.

10 MR. JUSTICE CHARLETON: Then the first thing is, have
11 you any difference with Ms. Leader in terms of the law
12 that was outlined by her? I don't think you have from
13 what you've said save for --

14 MR. HARTNETT: The law is there. There are
15 interpretations of it.

16 MR. JUSTICE CHARLETON: Yes.

17 MR. HARTNETT: And clearly there is a big issue on the
18 whole question of what is a substantive finding. And I
19 think that that is always out there and I suspect, I
20 think there was an opportunity for clarification before
21 the Supreme Court on that, but the case was settled
22 prior to hearing I think the case of Fox.

23 MR. JUSTICE CHARLETON: That is right, Cllr. Fox.

24 MR. HARTNETT: Yes, so I think that there was to be an
25 argument in relation to the judgment. Interesting that
26 two judgments by Judge Baker, Chawke and Fox, and the
27 Fox case was in some way compromised prior to hearing.

28 MR. JUSTICE CHARLETON: Yes. Well it wasn't my fault,
29 but there you go. All right. Thank you Mr. Hartnett.

1 So Mr. Harty.

2
3 SUBMISSION BY MR. HARTY:

4
5 MR. HARTY: Firstly, Judge, as a matter of courtesy,
6 the Court will be aware of the matters that were before
7 the High Court, in both matters a notice of appeal has
8 been prepared and is about to be lodged.

9 MR. JUSTICE CHARLETON: It's nothing to do with this.

10 MR. HARTY: well, it is, in fact, in that one of the
11 reliefs sought in those is a declaration in relation to
12 our client's entitlement. It obviously doesn't bind
13 the Court in relation to that but it is relevant -- or
14 it doesn't bind the Tribunal but it is relevant and is
15 a matter of courtesy.

16 MR. JUSTICE CHARLETON: But is it relevant?

17 MR. HARTY: Yes.

18 MR. JUSTICE CHARLETON: As I understand the Orange
19 case, if a public official - and in that instance it
20 was to do with communications regulation - is to be
21 stopped from doing what their statutory duty requires,
22 there has to be an actual order of the Court, but is
23 there an order of the Court --

24 MR. HARTY: No, there's no order.

25 MR. JUSTICE CHARLETON: -- to stop me dealing with
26 costs?

27 MR. HARTY: None at all. It's simply as a matter of
28 courtesy and indicating to the Tribunal that this is
29 not a waiver of my position in respect of those

1 proceedings.

2 MR. JUSTICE CHARLETON: Oh no, I appreciate that fully.

3 MR. HARTY: Absolutely not. No, there is no
4 restriction on the Tribunal delay.

5
6 Tribunals of inquiry, as the Tribunal itself so
7 eloquently set out on a number of occasions, are
8 established by the Oireachtas to inquire into matters
9 of public concern. They are an instrument, a special
10 instrument which has been constitutionally permitted to
11 allow the Oireachtas to engage in these investigations.
12 At its heart citizens and individual citizens are not
13 to bear the brunt or the expense of the desire of the
14 body politic to investigate. And that is the principle
15 upon which the provision for costs has been laid out
16 for two reasons; firstly because the individual
17 reputation is to be protected; secondly, so as to
18 ensure that if an individual, in order to protect their
19 reputation, requires legal representation, that that
20 representation is met at the expense of the body
21 politic which wished to carry out the inquiry. That is
22 the manner in which it has been established and it is
23 under the Tribunals of Inquiry Act which predate even I
24 think the Constitution it is therefore a common law
25 precept which is only bolstered by the Constitution
26 system under which we now live.

27 MR. JUSTICE CHARLETON: Sorry, would just help me on
28 that if you wouldn't mind?

29 MR. HARTY: well, the Tribunals of Inquiry Act predates

1 the Constitution, I understand. It's a --

2 MR. JUSTICE CHARLETON: I see. Now I get you, yes.

3 MR. HARTY: The reality is, is that the Oireachtas is
4 not permitted to carry out this exceptional power at
5 the cost of the behest -- at the cost or to the
6 detriment of individuals. Tribunals are legally
7 neutral. They cannot affect the rights between
8 individuals or individuals and the State. Tribunals --
9 that legal neutrality must, as a matter of first
10 principles, go so far as to the issue of costs, because
11 it certainly could not be acceptable for the State to
12 require an individual to come before a tribunal
13 willy-nilly at that individual's expense because that
14 would then be the State both intervening and affecting
15 greatly the constitutional entitlements of that
16 individual, and it would be utterly disproportionate to
17 the purpose of tribunals of inquiry in the first place,
18 which are to carry out legally neutral fact-finding
19 exercises.

20
21 Now, it is a fact-finding exercise and in the way of
22 the world generally the finding of facts involves the
23 preferring of one person's version of events to
24 another's. That, in and of itself, does not give rise
25 to a risk in respect of costs because 50% of the people
26 before a tribunal would therefore be at risk in
27 relation to their costs.

28
29 The finding in relation to the case law, which has been

1 relied upon and it is, I would agree for the most part,
2 an accurate summation of the law, it is not simply that
3 evidence was not accepted, it is not simply that
4 evidence was untrue; it is that that evidence being not
5 accepted and untrue amounted to non-cooperation. It's
6 not an either or. It's accumulative. It is only when
7 the evidence which is not accepted amounts to
8 non-cooperation, or misdirects the work of the
9 Tribunal, therefore, adding to the load that the
10 question of a costs order against any individual
11 arises.

12 MR. JUSTICE CHARLETON: It's not a costs order against
13 -- no one has asked for a costs order against you.

14 MR. HARTY: Sorry, a refusal of a person's costs.

15 MR. JUSTICE CHARLETON: It is your right in the
16 Tribunals of Inquiry Acts that one party can look for
17 costs as against, but nobody did and we wrote to
18 absolutely everybody. So the Garda Commissioner didn't
19 look for costs against you, for instance.

20 MR. HARTY: No, and I didn't look for costs against the
21 Garda Commissioner either. Circumstances were the
22 Garda Commissioner made false allegations against my
23 client and initial statements submitted, which
24 allegations were not accepted by the Tribunal and
25 didn't form part of the report.

26 MR. JUSTICE CHARLETON: Sorry, help me about that.

27 MR. HARTY: Oh, there was a suggestion that my client
28 took a garda car, a patrol car, wrongly, without
29 permission, to travel to Marisa Simms' house to

1 intervene in the incident with Marisa Simms'
2 ex-husband. That was set out in the initial statement
3 submitted by the Garda Commissioner in respect of this.
4 It was not substantiated by the Sergeant at the station
5 at the time who said that in fact my client requested
6 permission to use the patrol car and was given
7 permission to use the patrol car. It didn't form part
8 of the report, then it didn't form part of the terms of
9 reference either. But it was evidence given.

10
11 Similarly, the Garda Commissioner in its initial
12 statement suggested that my client, in moving to
13 Donegal, had breached the provisions of the Garda Code.
14 That, similarly, was not correct and was a false
15 allegation.

16
17 Perhaps most significantly, the initial statement
18 suggested by the Garda Commissioner said that the
19 matter never left Donegal and never went up the ranks
20 and was only --

21 MR. JUSTICE CHARLETON: Mr. Harty, if you were going to
22 attack the Garda Commissioner it may be that the Garda
23 Commissioner ought to be here.

24 MR. HARTY: No, you said to me the Garda Commissioner
25 didn't ask for their costs against me. I'm simply
26 saying I didn't ask for my costs against them.

27 MR. JUSTICE CHARLETON: Mr. Harty, you're being
28 argumentive and it doesn't really help. I mean, look,
29 there's fundamental principles I'm bound by.

1 MR. HARTY: Yes.

2 MR. JUSTICE CHARLETON: And we all know what they are.

3 You said you weren't asking for costs against the Garda

4 Commissioner. I said I was puzzled by that statement.

5 And then you entered into, effectively, an attack on

6 the character of the Garda Commissioner and his conduct

7 at the Tribunal. So I'd just ask you to be aware of

8 the fact that the Garda Commissioner isn't here. If

9 you want to persist in it, if you feel it's going to in

10 any way impact on my assessment as to costs well then

11 I'll adjourn and we can get the Garda Commissioner in

12 here. That's all I'm saying, Mr. Harty.

13 MR. HARTY: I hadn't intended to name names. I had

14 intended to raise the fact that certain parties had

15 been given costs in circumstances where they set out in

16 statements matters which were factually untrue against

17 my client.

18 MR. JUSTICE CHARLETON: Who has been given costs?

19 MR. HARTY: Yet again the Tribunal asked me not to name

20 names. I've already indicated that the first statement

21 submitted on behalf of the Garda Commissioner sets out

22 false matters.

23 MR. JUSTICE CHARLETON: I didn't give the Garda

24 Commissioner any costs.

25 MR. HARTY: No. The person who set that out in that

26 statement, which was submitted by the Garda

27 Commissioner at that time, was given their costs.

28 MR. JUSTICE CHARLETON: Are you talking about the

29 Association of Garda Sergeants?

1 MR. HARTY: No, I'm talking about the Donegal division,
2 matters which were submitted by the Donegal division,
3 which was the first statement received from the Garda
4 Commissioner.

5 MR. JUSTICE CHARLETON: Sorry, I'm mystified. But
6 anyway let's carry on, Mr. Harty.

7 MR. HARTY: well, what I can say is that in terms of
8 this exercise whereby we're apparently assessing each
9 person's evidence line-by-line and picking out both
10 bits that we say are true and untrue, that exercise has
11 to be a universal exercise then and must be applied
12 universally, to all witnesses before a tribunal if that
13 is the manner on which we are simply, this is to be
14 done.

15
16 In relation to that test -- and I say that is not the
17 test. It is manifestly not the test. The first thing
18 is that the untruth must be related to the actual terms
19 of reference, not simply the evidence called before the
20 Tribunal. It is not open to the Tribunal to call
21 evidence, dislike evidence in relation to peripheral
22 matters which are not central to the function of the
23 Tribunal, and then to fix the person who has given that
24 evidence with the costs of that appearance.

25
26 So the Tribunal must firstly be satisfied that the
27 evidence which it is unhappy about is evidence which is
28 central to the terms of reference, core to the terms of
29 reference. We cannot have a situation where a tribunal

1 can call evidence and dislike the evidence of the
2 manner in which a witness dealt with something entirely
3 peripheral to the terms of reference and relying on
4 that, therefore, effectively penalise that person in
5 respect of costs.

6 MR. JUSTICE CHARLETON: would you help me, what do you
7 mean by that?

8 MR. HARTY: well, very simply, there is a suggestion in
9 your letter to my solicitor that the Tribunal didn't
10 like the evidence of my client in respect of PULSE
11 checks which occurred a number of years before any
12 matters which the Oireachtas asked the investigation,
13 the Tribunal to investigate into. Similarly, the
14 hostile reception in Donegal Town is utterly irrelevant
15 to interaction between members of An Garda Síochána and
16 Tusla, or the HSE in respect of Garda Keith Harrison in
17 that Sergeant Durkin at no stage had any interaction
18 with Tusla, or the HSE in relation to my client.

19 MR. JUSTICE CHARLETON: Mr. Harty, it was your client
20 saying these things, you know.

21 MR. HARTY: In fact my client didn't say these things
22 in evidence. It was contained in a statement.

23 MR. JUSTICE CHARLETON: How did they suddenly appear
24 before the Tribunal?

25 MR. HARTY: They appeared, sir, because when the
26 Tribunal was engaging in its editing of the statements
27 at the start it removed some matters from my client's
28 statement and left other matters in. It removed the
29 matters which predated his move to Donegal and it

1 removed matters which post-dated his suspension in
2 Donegal.

3 MR. JUSTICE CHARLETON: what's your problem with that?

4 MR. HARTY: well, the Tribunal didn't remove other
5 matters, but it was entirely open to the Tribunal to
6 say these are not relevant to the terms of reference --

7 MR. JUSTICE CHARLETON: Mr. Harty, before you start
8 shouting at me - and you already are raising your voice
9 - I was asked to inquire into what happened vis-á-vis
10 your client and Tusla. That happened in Donegal.

11 MR. HARTY: Mm-hmm.

12 MR. JUSTICE CHARLETON: what therefore happened or
13 didn't happen for instance in Athlone, or what happened
14 or didn't happen in Galway University, or what happened
15 or didn't happen in relation to his first marriage was
16 neither here nor there. Now what you're saying is the
17 Tribunal was canvassing irrelevant material --

18 MR. HARTY: Mm-hmm.

19 MR. JUSTICE CHARLETON: -- including checks in relation
20 to PULSE --

21 MR. HARTY: Mm.

22 MR. JUSTICE CHARLETON: which the Tribunal felt fed
23 into the whole issue of the domestic circumstances
24 under which complaints were made about your client.
25 You're also saying that his relationship with other
26 members of the Garda Síochána in Donegal is irrelevant
27 in the context where your client was making an
28 allegation that Garda Headquarters had engineered a
29 situation where all of his colleagues or many of his

1 clients were turned against him, specifically
2 Sergeant Durkin who was bullying him and engineered a
3 situation where social workers called to his house.
4 That's what your client was saying.

5 MR. HARTY: And the Tribunal will be well aware that I
6 objected at all stages to any line of questioning in
7 relation to that on the basis of the fact that it was a
8 matter for High Court proceedings which were then
9 extant. I didn't accept it was relevant, my client
10 didn't accept it was relevant, and the matter was left
11 there. And it rested there until such time as the
12 Tribunal report came out and then was added to by this
13 to be contained in this letter. But it has little or
14 nothing to do with the job of the Tribunal --

15 MR. JUSTICE CHARLETON: Mr. Harty, your memory is
16 defective.

17 MR. HARTY: My memory is exact and I can look at the
18 transcript and show where I objected to the questioning
19 being put to my client, where I objected to being asked
20 to apologise, or my client to apologise to
21 Sergeant Durkin. My memory is very clear in relation
22 to it.

23 MR. JUSTICE CHARLETON: You're saying --

24 MR. HARTY: It's not saying --

25 MR. JUSTICE CHARLETON: No, you're saying allegations
26 of bullying by your client against colleagues was
27 irrelevant to the claim you were making. You're saying
28 the extent to which your client was checking up on his
29 ex-girlfriend, who was then becoming his domestic

1 partner or was in the course of re-communicating with
2 the person who would become his domestic partner, is
3 not relevant to the domestic circumstances which led to
4 his relations making complaints to the Gardaí about his
5 conduct towards her when in fact they started living
6 together.

7 MR. HARTY: I am saying --

8 MR. JUSTICE CHARLETON: You've made that submission. I
9 understand it.

10 MR. HARTY: And I am saying --

11 MR. JUSTICE CHARLETON: I'm not saying I accept it, but
12 I do understand it.

13 MR. HARTY: I'm saying that the Tribunal, when it makes
14 a ruling on this matter, must relate it clearly to how
15 these individual matters relate to a percentage costs
16 penalty against my client. That involves an analysis
17 of the centrality of the evidence, the time taken to
18 get the evidence and the difficulty or otherwise that
19 arose as a result of the evidence being given by my
20 client. Those matters must be undertaken in terms of
21 an analysis and a ruling in respect of costs and that
22 is what the Ryan judgment says. It doesn't require a
23 precise analysis, but it does require an analysis.

24
25 In relation to the other matters which are sent out in
26 the letter, and I will say this, it is manifest from
27 the letter sent to us that both the issue in respect of
28 Sergeant Durkin and the issues in respect of
29 Donna McTeague are expressed in manners which would

1 suggest that the Tribunal wishes to express its
2 disapproval of my client's evidence.

3 MR. JUSTICE CHARLETON: Just hang on a minute, what are
4 you actually saying?

5 MR. HARTY: I'm saying that it suggests, and if I read
6 the letters.

7 MR. JUSTICE CHARLETON: You're talking about the letter
8 now of 22nd October 2019?

9 MR. HARTY: Exactly. "Garda Harrison maintained to the
10 Tribunal that Tusla" --

11 MR. JUSTICE CHARLETON: Just give me which page are you
12 on there.

13 MR. HARTY: Page 3.

14
15 "Garda Harrison maintained to the Tribunal that Tusla
16 intervened in his family life as Gardaí manipulated
17 social services to that end. Furthermore,
18 Garda Harrison accused Tusla of going along with this
19 garda manipulation. These allegations were completely
20 rejected by the Tribunal as false. The following is
21 the relevant extract from the report, in particular" --

22
23 MR. JUSTICE CHARLETON: Sorry, just hang on. Do you
24 want to say something?

25 MR. HARTY: I want to say something about the entire
26 paragraph. I'll read the entire paragraph.

27 MR. JUSTICE CHARLETON: I've actually read the
28 paragraph before going out.

29 MR. HARTY: well, no, I'd prefer to read it. I think

1 it's probably --

2 MR. JUSTICE CHARLETON: You're telling me stuff I
3 already know.

4 MR. HARTY: I know, and it's perhaps of assistance if I
5 read it.

6 MR. JUSTICE CHARLETON: You're actually now quoting the
7 Tribunal Report, but if you feel you should please
8 carry on.

9 MR. HARTY: Thank you.

10

11 "In particular, it is alleged that Donna McTeague had
12 apologised over a telephone to do a home visit. It was
13 claimed that in the aftermath of the meeting,
14 Donna McTeague apologised to Mari sa Simms claiming she
15 didn't have any choice in the matter, that her team
16 leader had been in contact with the Gardaí and as a
17 result had to do the visit. It is further claimed that
18 after the visit, before leaving, Donna McTeague was
19 again apologising but guaranteeing that this was the
20 end of it.

21

22 There is no mistake in any of these matters. The fact
23 is that at the hearing that they were reduced by
24 Mari sa Simms to give some kind of a feeling which she
25 had in consequence of the meeting when the allegations
26 as made were specific, and the fact that Garda Kei th
27 Harrison notwithstanding this reduction claimed he had
28 been told the immediate conversation surrounding the
29 alleged events by Mari sa Simms, that social services

1 ... action described the determination to pursue
2 damaging and hurtful allegations, notwithstanding the
3 fact they knew that they were untrue."
4

5 Now, in relation to that the characterisation of the
6 allegations as damaging and hurtful is utterly
7 irrelevant to what this Tribunal is to be assessing in
8 terms of cooperation or non-cooperation.

9 MR. JUSTICE CHARLETON: well, Mr. Harty, just let me
10 give you an example. That's the witness stand over
11 there in this court and this court will have seen a
12 lot. Let's suppose a woman comes into this court and
13 makes an allegation against another person to the
14 effect that that person told malicious lies about her,
15 in consequence of which she had a terrible row with her
16 husband and her marriage broke up.

17 MR. HARTY: Mm-hmm.

18 MR. JUSTICE CHARLETON: Let's suppose that in fact what
19 she said was true --

20 MR. HARTY: Mm-hmm.

21 MR. JUSTICE CHARLETON: -- that the other person did in
22 fact tell lies about her and it did in fact have an
23 affect on her life.

24 MR. HARTY: Mm-hmm.

25 MR. JUSTICE CHARLETON: I suppose the difference
26 between where I'm sitting between where you're sitting
27 or your solicitor is sitting is that I can see
28 everybody's face in the court. I can see what's going
29 on.

1 MR. HARTY: Mm-hmm.

2 MR. JUSTICE CHARLETON: I can see the upset, for
3 instance, of the people against whom allegations are
4 made.

5 MR. HARTY: Mm.

6 MR. JUSTICE CHARLETON: Certainly, looking back to the
7 Tribunal, I can recall people being in tears in
8 consequence of what your client was saying about them.
9 Those are facts.

10 MR. HARTY: Mm-hmm.

11 MR. JUSTICE CHARLETON: But these are human things, you
12 know. When people say wrong things - by wrong I just
13 mean incorrect or untrue, whether maliciously or
14 mistakenly, people get upset.

15 MR. HARTY: Mm-hmm.

16 MR. JUSTICE CHARLETON: Now you seem to be turning that
17 into something else. I don't know what it is and maybe
18 you'd help me, if you really want to turn it into
19 something else maybe you'd tell me. You've given me a
20 big long passage --

21 MR. HARTY: Mm-hmm.

22 MR. JUSTICE CHARLETON: -- and you seem to be drawing
23 some kind of an inference or saying the Tribunal should
24 draw some kind of an inference from that. I actually
25 don't know what you're saying.

26 MR. HARTY: Well there are a number of things to be
27 said. Firstly, the Tribunal did not find that it
28 wasn't said by Marisa Simms to Keith Harrison. And it
29 didn't find that.

1 MR. JUSTICE CHARLETON: She said it in evidence.
2 MR. HARTY: She said it in evidence but when he
3 reported that that was what he had said to her she had
4 said to him - and that's all he ever reported. That is
5 all he ever reported. He never said it was said to him
6 by Donna McTeague. He said it was said to him by
7 Marisa Simms. She did not say she didn't say it to him
8 and Keith Harrison did not say she didn't say it to
9 him.
10 MR. JUSTICE CHARLETON: So your point is what?
11 MR. HARTY: My point is that there is no finding of an
12 untruth on the part of Keith Harrison there, firstly.
13 MR. JUSTICE CHARLETON: Okay.
14 MR. HARTY: Secondly, in relation to that, the manner
15 in which it was expressed would suggest costs as a
16 means of retributive justice.
17 MR. JUSTICE CHARLETON: Now, maybe you'd help me on
18 that particular point.
19 MR. HARTY: Because the emphasis on damaging and
20 hurtful allegations in that instance, and similarly in
21 relation to the bullying in Donegal, the question of
22 whether or not that was hurtful to Sergeant Durkin,
23 despite being irrelevant, was what exercised the mind
24 of the Tribunal when the matter was being raised. And
25 yet again it is not relevant to the issue of costs.
26 MR. JUSTICE CHARLETON: So what are you saying?
27 MR. HARTY: I'm saying the issue of costs has to do
28 with whether or not non-cooperation occurred, which
29 would be a remarkable suggestion against my client. My

1 client, who was obliged to go through thousands of
2 pages of documents, faced a situation whereby An Garda
3 Síochána had six counsel; the Tribunal had three
4 counsel; Tusla had three counsel; individual members of
5 the Donegal division had counsel, each of them
6 cross-examining, calling witnesses that he was obliged
7 to cross-examine. A vast panoply of State-funded
8 lawyers ranged against him and he cooperated fully.
9 You didn't like some of his answers but that is not the
10 same thing as saying that he didn't cooperate.

11 MR. JUSTICE CHARLETON: Mr. Harty, you really have to
12 be careful of how you use language here. That's what
13 law is about; how you use language. I didn't like
14 things. I don't like or dislike anybody. And even if
15 I liked or disliked anybody, I've taken an oath to
16 judge cases in accordance with the evidence. That's my
17 oath. That's what I do. No question of liking or
18 disliking anybody, or liking or disliking anybody's
19 evidence. What courts have done, except in the most
20 exceptional circumstances, has always been to spare
21 people's feelings and to say the evidence of
22 Mrs. O'Toole is preferred to the evidence of
23 Mrs. O'Neill. And the reason that they do that is in
24 order to maintain an objective balance between people.
25 But if you're saying to me that I made findings of fact
26 because I either liked somebody or didn't like
27 somebody, well that has nothing to do with anything on
28 earth.

29 MR. HARTY: with all due respect, sir, firstly the

1 suggestion that is made in the opening of your sentence
2 that I don't know what law is, is inappropriate.
3 Secondly, sir, I never said you liked or disliked any
4 particular person. I said you liked or disliked their
5 evidence.
6 MR. JUSTICE CHARLETON: You don't make assessments of
7 evidence upon the basis of you like that evidence.
8 MR. HARTY: One prefers one set of evidence over
9 another.
10 MR. JUSTICE CHARLETON: Nobody does.
11 MR. HARTY: That is liking or disliking. And if the
12 Court wishes me to --
13 MR. JUSTICE CHARLETON: All right, if that's --
14 MR. HARTY: -- produce a copy of the Oxford English
15 Dictionary to show that that's what the word "like"
16 means.
17 MR. JUSTICE CHARLETON: Mr. Harty, if that's what you
18 meant I understand.
19 MR. HARTY: And, sir, I fully understand how words
20 impact on law. And insofar as the Court wished to
21 suggest something otherwise to me, I will say to you I
22 don't accept that.
23 MR. JUSTICE CHARLETON: well we're getting a bit --
24 MR. HARTY: we are getting a bit, sir.
25 MR. JUSTICE CHARLETON: we are a bit out of the boat.
26 MR. HARTY: we are entirely out of the boat. If the
27 Tribunal wishes to leave it hang there, that apparently
28 I don't understand what law is about we'll leave it
29 hang there.

1 MR. JUSTICE CHARLETON: I never said you didn't
2 understand what law is about. It's clear you're an
3 extremely good lawyer, Mr. Harty. But to use language
4 to a judge to say that a finding was made because the
5 evidence wasn't likeable. Evidence may be highly
6 unlikable but nonetheless it may be a fact.
7 MR. HARTY: It would be better not to paraphrase me,
8 sir, where I said the evidence wasn't liked, not
9 likeable.
10 MR. JUSTICE CHARLETON: we'll have a transcript in due
11 course --
12 MR. HARTY: Yes, we will.
13 MR. JUSTICE CHARLETON: And you can read it all and
14 admire the way you put things. Now, let's get on with
15 things.
16 MR. HARTY: Right. So in respect of both of those
17 categories, it is obviously an attempt at retributive
18 justice by way of costs. And that's the manner in
19 which they're expressed.
20 MR. JUSTICE CHARLETON: what do you mean by that? what
21 is retributive --
22 MR. HARTY: what I mean is that he is to be punished
23 for the evidence he against --
24 MR. JUSTICE CHARLETON: Mr. Harty, stop shouting at me.
25 what do you mean? By the way, I have an entitlement to
26 put this entire transcript out on air on the Tribunal
27 website. You're being recorded. Everybody is being
28 recorded. what do you mean by "retributive justice"?
29 MR. HARTY: what I mean, sir, is that two of the

1 categories that you rely upon are premised on the hurt
2 feelings of the witnesses. That the costs that you are
3 seeking to reduce are on the basis of people's feelings
4 being hurt. So that is costs, punishment, not for the
5 cooperation, not for the involvement of the evidence in
6 the findings of the report, but for the impact that it
7 had on certain witnesses.

8 MR. JUSTICE CHARLETON: So what you're saying is that
9 were the Tribunal, as a matter of law, to approach the
10 award or non-award of costs on the basis that witnesses
11 were hurt --

12 MR. HARTY: Mm-hmm.

13 MR. JUSTICE CHARLETON: -- that would be to turn the
14 exercise on costs into a question of just desserts in
15 consequence of causing shame or embarrassment to
16 somebody.

17 MR. HARTY: Yes.

18 MR. JUSTICE CHARLETON: But whereas the true exercise
19 is the degree of cooperation by a person whether they
20 caused hurt or not.

21 MR. HARTY: Exactly. Exactly.

22 MR. JUSTICE CHARLETON: And you're saying that the
23 Tribunal's letter indicates a tone of retribution --

24 MR. HARTY: Yes.

25 MR. JUSTICE CHARLETON: -- against your client which is
26 inappropriate?

27 MR. HARTY: Exactly.

28 MR. JUSTICE CHARLETON: well, retribution for what?

29 MR. HARTY: I've just read it out, sir.

1 MR. JUSTICE CHARLETON: No, but retribution for what?
2 MR. HARTY: For apparently hurting the feelings of
3 Donna McTeague and not withdrawing an allegation when
4 Marisa Simms withdrew it the day before.
5 MR. JUSTICE CHARLETON: So you accept that Marisa Simms
6 withdrew that allegation?
7 MR. HARTY: That's what the letter says. That's what
8 the report says.
9 MR. JUSTICE CHARLETON: You seem to accept that.
10 MR. HARTY: I don't have to accept or reject it. The
11 findings are there.
12 MR. JUSTICE CHARLETON: Okay, you accept the finding.
13 MR. HARTY: The findings are there. I don't have to
14 accept or reject it.
15 MR. JUSTICE CHARLETON: All right. So did you want to
16 mention the next matter?
17 MR. HARTY: Yes. The checking on PULSE. That was a
18 matter which took approximately ten minutes to be dealt
19 with, both in cross-examination of my client and in the
20 examination I think it was of Chief Superintendent
21 Sheridan. Ten minutes.
22 MR. JUSTICE CHARLETON: Mm.
23 MR. HARTY: So ten minutes out of 19 days' hearing, as
24 a matter of mathematical analysis we're certainly
25 talking about less than a percentage point. At most.
26 MR. JUSTICE CHARLETON: Mm-hmm. Okay.
27 MR. HARTY: And, in any event, I say it wasn't central
28 to what the Oireachtas asked the Tribunal to inquire
29 into.

1 And in relation to the fourth category, because I've
2 dealt with the third, the rejection of Garda Harrison's
3 evidence in relation to the texts on the phone as
4 ridiculous and nonsense. The Tribunal didn't accept
5 his evidence. So be it. The Tribunal, the Chairman of
6 the Tribunal is a fan of the films of Kurosawa and the
7 Chairman of the Tribunal will be well aware, therefore,
8 of Mr. Kurosawa's greatest work, a film by the name of
9 Rashomon. And the whole point --

10 MR. JUSTICE CHARLETON: Rashomon, yes.

11 MR. HARTY: Yes. Rashomon --

12 MR. JUSTICE CHARLETON: This is the one where --

13 MR. HARTY: Everything is about --

14 MR. JUSTICE CHARLETON: --someone is killed under the
15 tree and then four different witnesses give their own
16 view about things.

17 MR. HARTY: Yes.

18 MR. JUSTICE CHARLETON: Yeah. Sorry.

19 MR. HARTY: And central to Mr. Kurosawa's view of the
20 world is the importance of perspective.

21 MR. JUSTICE CHARLETON: Okay.

22 MR. HARTY: And how people can have different versions
23 of events without necessarily seeking to mislead or to
24 lie. Central to Rashomon is the idea that you, the
25 viewer, and to a certain extent, in this instance, the
26 Chairman of the Tribunal was Mr. Kurosawa's camera lens
27 - best able to view each person's version of events and
28 to assess what probably happened. But simply because
29 the camera determines that something could not have

1 happened in that way, or did not happen in that way
2 does not mean that a witness is not cooperating, not
3 doing their best to give their version of events.
4 witnesses are mistaken. witnesses do mis-recollect how
5 things happen. witnesses do, in attempting to deal
6 with matters or recall them later, do construct a
7 version of events in a manner which is entirely
8 innocent, a version of events which they can live with,
9 or which they can accept happened, without seeking to
10 mislead anybody. There is no absolute need to lie
11 deliberately. There can be the accidental lie. The
12 unintentional lie.

13
14 In assessing the question of costs the accidental or
15 unintended lie cannot be a basis for a reduction in
16 costs. The incorrect recollection of what took place
17 cannot be a basis for reduction in costs. The
18 imperfect recollection of what occurred cannot be the
19 basis. And if it is to be the basis then each and
20 every witness will have to have their evidence assessed
21 in its entirety so that when the Tribunal, for example,
22 was unable to resolve who called who in the January of
23 2014 between the guards and Tusla. And that was
24 central, but neither witness could satisfy you as to
25 who made the call.

26 MR. JUSTICE CHARLETON: At the end of the day was it so
27 important in the sense that if there is an allegation
28 of a child witnessing a row, a serious row, aren't the
29 Gardaí obliged to actually call the social workers then

1 under the guidelines?

2 MR. HARTY: This is the call three months later. This
3 is the call in January as opposed to October.

4 MR. JUSTICE CHARLETON: Mm.

5 MR. HARTY: So no, they're not.

6 MR. JUSTICE CHARLETON: There was a lot of stuff going
7 on though, Mr. Harty, that went over several months.

8 MR. HARTY: what I'm --

9 MR. JUSTICE CHARLETON: It wasn't exactly the happiest
10 of relationships. I know things are better now.

11 MR. HARTY: It wasn't the happiest of relationships but
12 it also was a situation where this Tribunal was tasked
13 with investigating the interactions between the Garda
14 Síochána and Tusla in relation to Garda Keith Harrison.
15 A central interaction was the one which took place in
16 January of 2014, and from the evidence given by both
17 Tusla and An Garda Síochána this Tribunal could not
18 resolve who called who.

19 MR. JUSTICE CHARLETON: So what's your point on that?

20 MR. HARTY: My point is that that should be visited in
21 costs if we are simply to deal with imperfect
22 recollection.

23 MR. JUSTICE CHARLETON: Visited in costs? How do you
24 mean?

25 MR. HARTY: Against the witnesses who gave that
26 evidence, if we are simply dealing with imperfect
27 recollection.

28 MR. JUSTICE CHARLETON: So what are you saying? Are
29 you saying I shouldn't have awarded Tusla costs? They

1 didn't look for costs.

2 MR. HARTY: I'm picking it as an example, sir.

3 MR. JUSTICE CHARLETON: Mm.

4 MR. HARTY: It's not an unreasonable example to select.

5 And it's not --

6 MR. JUSTICE CHARLETON: Look, Mr. Harty, my difficulty,

7 and it's my fault, was simply in understanding the

8 submission and therefore I asked a question on it.

9 MR. HARTY: The situation is, sir, that there's a

10 variety of evidence such as, for example, the

11 allegation made by the Chief Superintendent in Donegal

12 that my client had driven a garda car without

13 permission from Buncrana Garda Station to Donegal Town

14 when in fact he had been given that permission. But

15 that allegation was made full square on a statement

16 submitted by Chief Superintendent McGinn. I do know

17 that Chief Superintendent McGinn applied for her costs.

18 MR. JUSTICE CHARLETON: Was it all the way from

19 Buncrana to Donegal?

20 MR. HARTY: I can't remember, whichever station it was.

21 MR. JUSTICE CHARLETON: I thought it was Letterkenny

22 out to where they lived which is -- I mean Buncrana to

23 Donegal Town --

24 MR. HARTY: I can read it.

25 MR. JUSTICE CHARLETON: You're talking about an hour

26 and a bit. Don't worry about it, Mr. Harty, I have the

27 submission. I understand.

28 MR. HARTY: I don't want to be wrong. To Churchill.

29 61km away. So Buncrana to Churchill.

1 MR. JUSTICE CHARLETON: Yeah.

2 MR. HARTY: 61km.

3 MR. JUSTICE CHARLETON: Yeah.

4 MR. HARTY: And that was an allegation made that he did
5 so illegally, wrongfully, unlawfully.

6 MR. JUSTICE CHARLETON: All right.

7 MR. HARTY: That wasn't visited in costs. Now, I
8 wouldn't have said it should be visited in costs, but
9 if we're engaging in an exercise whereby any individual
10 on truth is something which must be visited in costs
11 and must be assessed in that light, then that exercise
12 has to take place in respect of every witness.

13

14 There are other, just from that statement alone, there
15 is the suggestion that my client had broke the Garda
16 Code, which was unfounded. And there was also nothing
17 in that statement indicating the interaction which took
18 place between the Donegal division and the district
19 after this, which interaction was only uncovered as a
20 result of the evidence given.

21 MR. JUSTICE CHARLETON: I'm just not following that
22 point, I'm sorry.

23 MR. HARTY: It was dealt with between Chief
24 Superintendent McGinn and Assistant Commissioner Kenny.
25 The Tribunal will recall that that was only revealed in
26 the evidence of Chief Superintendent McGinn as a result
27 of cross-examination.

28 MR. JUSTICE CHARLETON: what are you -- I'm sorry, I
29 don't know --

1 MR. HARTY: Her statement makes no reference to this
2 matter.
3 MR. JUSTICE CHARLETON: To which?
4 MR. HARTY: To dealing with the matter of Assistant
5 Commissioner Kenny.
6 MR. JUSTICE CHARLETON: What matter of Assistant
7 Commissioner Kenny?
8 MR. HARTY: My client.
9 MR. JUSTICE CHARLETON: I know, but what are you
10 talking about? I'm sorry, it's my fault. I'm lost. I
11 don't know what you're talking. Sorry, Chief
12 Superintendent McGinn --
13 MR. HARTY: Chief Superintendent McGinn --
14 MR. JUSTICE CHARLETON: -- and Assistant Commissioner
15 Kenny would be the superior officer --
16 MR. HARTY: Exactly.
17 MR. JUSTICE CHARLETON: -- did what?
18 MR. HARTY: They discussed and raised the issues of
19 Keith Harrison at regional path meetings I think were
20 the ones afterwards --
21 MR. JUSTICE CHARLETON: Mm.
22 MR. HARTY: In the statement delivered first by Chief
23 Superintendent McGinn to the Tribunal no mention is
24 made of this and it was only during the course of the
25 evidence of Chief Superintendent McGinn that this came
26 to light, by which stage Assistant Commissioner Kenny
27 was out of the country, if I recall, on an extended
28 vacation.
29 MR. JUSTICE CHARLETON: He might have been, but your

1 point is?

2 MR. HARTY: My point is that it wasn't revealed in the
3 statement. That was a matter which, if we are to look
4 at every single bit of evidence and say: You are
5 entitled to costs or you are not entitled to your
6 costs, then we need to look at why those -- I picked
7 the first statement against my client contained in the
8 booklet and went through that one. I'm sure if I'd
9 gone through all this I would have found other matters
10 that weren't supported by the evidence called before
11 the Tribunal.

12 MR. JUSTICE CHARLETON: what? How do you mean?

13 MR. HARTY: what I'm saying is that the Tribunal has
14 picked out four isolated bits of evidence as a manner
15 in which to say that my client is not entitled to his
16 costs.

17 MR. JUSTICE CHARLETON: well, I mean you -- it says "in
18 the light of the above" and I think it also refers to
19 the entire of the report. well, the letter does.

20 MR. HARTY: Yes, it does. well, in light of the above
21 my client is entitled to his costs in their entirety.
22 The Tribunal is not entitled to select him as a person
23 not to get his costs in circumstances where the
24 Tribunal has not assessed the evidence of other
25 witnesses, and assessed whether or not they should have
26 a reduction in their costs.

27 MR. JUSTICE CHARLETON: well, I actually have.

28 MR. HARTY: In respect of this module.

29 MR. JUSTICE CHARLETON: well, I actually have in

1 relation to, I think there was maybe eight different
2 individuals and there was eight different individual
3 assessments.

4 MR. HARTY: I know for a fact that Chief Superintendent
5 --

6 MR. JUSTICE CHARLETON: It's the same tribunal.

7 MR. HARTY: I know for a fact that in relation to this
8 module, this evidence of Chief Superintendent Terry
9 McGinn was certainly not assessed to see whether or not
10 she should suffer a reduction in her costs.

11 MR. JUSTICE CHARLETON: Right. You didn't look for
12 costs against her in any event.

13 MR. HARTY: I didn't look for costs against her and I
14 didn't believe that my client had not cooperated with
15 the Tribunal; nor do I find that if my client had -- if
16 there is non-cooperation on the part of my client there
17 is therefore non-cooperation on the part of Chief
18 Superintendent Terry McGinn.

19 MR. JUSTICE CHARLETON: All right.

20 MR. HARTY: And a number of other witnesses who gave
21 evidence which evidence was not accepted by the
22 Tribunal. My client did cooperate fully. He is
23 entitled to his costs in its entirety.

24
25 There is -- the question of mercy, or otherwise, is I
26 would submit not a relevant test.

27 MR. JUSTICE CHARLETON: Mm.

28 MR. HARTY: The question is justice. Sorry, as set out
29 in the section, perhaps if I could take it. Equity,

1 not mercy, is the test. It is equitable to do so. And
2 only equity is the test.

3 MR. JUSTICE CHARLETON: Do you disagree with
4 Mr. Hartnett's submission in that regard?

5 MR. HARTY: I do.

6 MR. JUSTICE CHARLETON: well, where do you say he got
7 it from?

8 MR. HARTY: well, I'd say very simply that the section
9 says "equity", therefore that the test is equity, not
10 mercy. I'm careful in my words. I think they're
11 different things.

12 MR. JUSTICE CHARLETON: Right.

13 MR. HARTY: And in terms of equity, the Tribunal will
14 have to look at all of the evidence that was put before
15 it; all of the evidence which was accepted or not
16 accepted, and then engage in the equitable exercises if
17 that is the what the Tribunal says is the test by way
18 of non-cooperation evidence which is not accepted.

19 MR. JUSTICE CHARLETON: So what do you think I ought to
20 do?

21 MR. HARTY: well, everybody is entitled --

22 MR. JUSTICE CHARLETON: No, just -- so I should produce
23 another tribunal report?

24 MR. HARTY: well, in fact I would go with my first
25 proposition which is that it's only if the evidence in
26 and of itself was noncooperative to the point that it
27 impeded the work of the Tribunal.

28 MR. JUSTICE CHARLETON: Mm.

29 MR. HARTY: And it is only if it impeded the work of

1 the tribunal that you then engage in this exercise.

2 MR. JUSTICE CHARLETON: So let me give you a
3 proposition then. Let's suppose somebody goes on the
4 television tonight and says that three TDs have been
5 accepting bribes and obviously that's -- maybe you want
6 to talk to your solicitor, I don't know?

7 MR. HARTY: No.

8 MR. JUSTICE CHARLETON: All right. Well let me give a
9 proposition then. I'll start again. Let's suppose a
10 person goes on the television tonight and says that
11 three TDs are accepting bribes to, let's say, vote in
12 relation to legislation in a particular way.

13 MR. HARTY: Mm.

14 MR. JUSTICE CHARLETON: And let's suppose, as would be
15 the case, it's covered by Prime Time, or whatever. And
16 let's suppose that there's public disquiet, editorials
17 in various newspapers and a tribunal of inquiry is
18 established and the terms of reference, et cetera, as
19 to whether this is true or not. The Tribunal is there
20 and the witness comes up, who is making the
21 allegations, and the witness is asked: well, on what
22 basis do you make these allegations? And you say:
23 None whatsoever, I was just going to make -- I wanted
24 to make a fuss. In other words I was suffering from
25 the her Herostratus syndrome - to use a term from Amion
26 psychology. In those circumstances, according to
27 Ms. Justice Denham, that witness - even though they've
28 made serious allegations - would be entitled to their
29 costs because they have fully cooperated in the sense

1 that they had said: There's no need to go any further,
2 you don't have to be here for the next two years, you
3 don't have to gather vast amounts of materials and
4 distribute them to everybody electronically or
5 otherwise; instead this whole thing is at an end and I
6 was in the wrong.

7 MR. HARTY: Mm-hmm.

8 MR. JUSTICE CHARLETON: And that would be cooperation,
9 wouldn't it?

10 MR. HARTY: Yes.

11 MR. JUSTICE CHARLETON: But on the other hand, if the
12 person persisted in the allegation, and claimed there
13 was evidence here, there, and everywhere, the Tribunal
14 looked at it and had to hear all the evidence and in
15 the event that, for instance, the TDs - two of whom
16 were women, let us say - were deeply upset and the one
17 who was a man was in tears listening to this and their
18 political careers were ruined; would you say that was
19 cooperation even though the Tribunal, at the end of the
20 day, found that none of this happened, that they had
21 not accepted bribes? Would you say that was
22 cooperation by the person making the allegation?

23 MR. HARTY: It depends on whether or not the person
24 gave their truthful evidence. And whether or not
25 people are crying, anywhere, is irrelevant to the
26 assessment of the equity of a person's entitlement to
27 their costs. The situation is absolutely -- it is no
28 role for the Chairman of the Tribunal to decide to
29 punish people for giving a version of events which is

1 not accepted. No role. And it is certainly not the
2 role for the Chairman of the Tribunal to decide to
3 punish people for giving the version of events which
4 hurts other people. It is absolutely outside the role.
5 MR. JUSTICE CHARLETON: No, you're absolutely right
6 about that. It can't anything to do with the court
7 case, the fact that evidence hurts other people. It's
8 everything to do with whether or not something is
9 truly. But lies do hurt other people.
10 MR. HARTY: It's not a court case, firstly, it is a
11 tribunal of inquiry. It is a unique creature, entirely
12 of statute.
13 MR. JUSTICE CHARLETON: No, look, Mr. Harty, I know all
14 about tribunals of inquiry, you don't need to tell me
15 about that.
16 MR. HARTY: well, we appear --
17 MR. JUSTICE CHARLETON: It's not a court case, but it
18 has every single indicia of a court case and it has
19 every single right attached to a murder trial. In fact
20 it has even more rights than are attached to a murder
21 trial.
22 MR. HARTY: with a couple of differences in terms of a
23 civil court case.
24 MR. JUSTICE CHARLETON: All right. Fine. Okay. well,
25 there's an article in the Dublin University Law Journal
26 by me and --
27 MR. HARTY: I've read it.
28 MR. JUSTICE CHARLETON: -- Paul Carey and Ciara
29 Herlihy.

1 MR. HARTY: I've read it.
2 MR. JUSTICE CHARLETON: well, it's surprising that you
3 have since it's not out.
4 MR. HARTY: I listened to the paper --
5 MR. JUSTICE CHARLETON: Yes, it's coming out. It's
6 different. Anyway, look, let's go on. It's not out
7 yet, Mr. Harty.
8 MR. HARTY: well, I listened to the paper certainly.
9 MR. JUSTICE CHARLETON: You may well have a version of
10 it.
11 MR. HARTY: well, I understood that that was the same
12 paper.
13 MR. JUSTICE CHARLETON: well, it's nice to know --
14 MR. HARTY: It was the one --
15 MR. JUSTICE CHARLETON: It's nice to know you're
16 following my academic pursuits. But in any event --
17 MR. HARTY: And in relation to that, sir, what I will
18 say --
19 MR. JUSTICE CHARLETON: what I'm saying to you,
20 Mr. Harty, is this, it's very simple: Evidence may be
21 hurtful. That's tough.
22 MR. HARTY: Yes.
23 MR. JUSTICE CHARLETON: As my mother used to say: The
24 truth hurts. Of course it's something that many
25 mothers in this country used to say to many children
26 and I'm sure it helped me along the way. On the other
27 hand, if evidence is untrue and it's hurtful, it's the
28 untruth that matters.
29 MR. HARTY: And that is not one which is empowered --

1 the Tribunal is empowered to award costs in relation
2 to.
3 MR. JUSTICE CHARLETON: No, I agree. I'm not entitled
4 to award costs simply because evidence is hurtful. But
5 I think I am in relation to evidence which is untrue.
6 MR. HARTY: well, it is untrue and hurtful to somebody
7 --
8 MR. JUSTICE CHARLETON: Do you accept that?
9 MR. HARTY: But --
10 MR. JUSTICE CHARLETON: But do you accept that?
11 MR. HARTY: No.
12 MR. JUSTICE CHARLETON: As a legal proposition?
13 MR. HARTY: No.
14 MR. JUSTICE CHARLETON: So people can come in to a
15 tribunal of inquiry and tell the most egregious lies in
16 the instance given in relation to the three TDs and
17 they should be awarded their costs?
18 MR. HARTY: You --
19 MR. JUSTICE CHARLETON: It doesn't matter that it's
20 hurtful, it doesn't matter that it's untrue, it doesn't
21 matter that it causes public chaos, it doesn't matter
22 that it causes a diminution in respect for democracy in
23 our country, they should be awarded their costs? But
24 why? First tell me why?
25 MR. HARTY: Firstly, sir, you've actually put two
26 entirely different questions to me. The first question
27 is whether or not simply because evidence is untrue are
28 you entitled to award costs against someone? The
29 answer to that is, no. It is a different thing --

1 MR. JUSTICE CHARLETON: In the ordinary way, the cases
2 that have been heard in this Order 99 Rule 1, if people
3 come in and make untrue allegations and lose their
4 case, costs follow the event. Now, why is a tribunal
5 of inquiry different?
6 MR. HARTY: Because it is a tribunal of inquiry and not
7 a court of law.
8 MR. JUSTICE CHARLETON: All right.
9 MR. HARTY: Because they are established --
10 MR. JUSTICE CHARLETON: Just --
11 MR. HARTY: No, sorry, I'd be grateful, sir, if you'd
12 let me answer each question that you pose to me.
13 MR. JUSTICE CHARLETON: I'm just trying to get to the
14 heart of it, Mr. Hartly, and the heart of it seems to
15 be: why should a person who tells nothing but lie -
16 and I'm taking the case up of three TDs, why should
17 they be awarded costs? Just please tell me why that
18 should be the case?
19 MR. HARTY: The hypothetical question that you are
20 asking now I don't propose to answer because it is
21 entirely a hypothetical. You did ask me an actual
22 question which is: whether or not simply because
23 somebody tells an untruth --
24 MR. JUSTICE CHARLETON: You don't feel hypotheses are
25 useful in discussing legal matters?
26 MR. HARTY: I'm answering the questions in the order in
27 which I was asked them.
28 MR. JUSTICE CHARLETON: All right. You carry on.
29 MR. HARTY: The first question you said: Where a

1 person gives untrue evidence they should be disentitled
2 to their costs. The answer to that is absolutely not.
3 That is an absolutely incorrect proposition.

4 MR. JUSTICE CHARLETON: well, a party I meant.

5 MR. HARTY: A party. well, firstly, there are no
6 parties, there are only witnesses before a tribunal.

7 MR. JUSTICE CHARLETON: Mm.

8 MR. HARTY: There are no parties. There are witnesses,
9 and where a witness gives untrue evidence, or argues a
10 case which is found to be untrue, that does not
11 disentitle that witness to their costs. That was the
12 first proposition that was put to me and the answer to
13 that is, absolutely there is no law to say that that is
14 the case.

15
16 The second proposition was where a person has told
17 egregious lies and has persisted with egregious lies,
18 giving rise to the entire tribunal having to take
19 place, then the Tribunal has to look at those lies.
20 Were they knowingly untrue? It has to find that the
21 person knew that they were egregious lies. The
22 Tribunal has to find that they were done for the
23 purpose, I'm told for the purpose of undermining the
24 work of the Tribunal.

25 MR. JUSTICE CHARLETON: Mm-hmm.

26 MR. HARTY: And in those circumstances the Court then
27 should look at the questions of costs. But they have
28 to be knowing non-cooperation, or increasing the
29 workload of the Tribunal knowingly. And that involves

1 findings made on, substantive findings of knowing
2 non-cooperation. In those circumstances, yes.

3
4 In relation to the hypothetical situation of the three
5 people who tell the -- lies told by the three people,
6 that is the test which has to take place. They have
7 know whether they are lies. They have to assess the
8 truth or accuracy of those lies. They do have to be
9 central lies to the questions that are being asked, and
10 then the Tribunal should look at the equity. And in
11 doing that they need to look at the lies told by other
12 witnesses and how those lies impacted on the work of
13 the Tribunal because equity involves between the
14 witnesses, not just between the Tribunal and the
15 individual witness. And the equitable assessment must
16 take place at that stage.

17
18 There was no finding of non-cooperation on the part of
19 my client. There was no suggestion, in the second
20 report, that my client had told lies. No finding to
21 that effect. And in the absence of those findings my
22 client is entitled to his costs.

23
24 The one other matter which I should raise, and my
25 solicitor does remind me, that these matters all arose
26 as a result of a protected disclosure. Protected
27 disclosure which was made to members of the Oireachtas
28 who, as a result, included my client in the terms of
29 reference. And this Court should be mindful of the

1 basic principles in respect of protected disclosure
2 which is that the person who makes a protected
3 disclosure ought not to be penalised as a result of
4 making that protected disclosure. And in assessing
5 whether or not my client is entitled to his costs, this
6 tribunal needs to be aware and alert to the purpose of
7 the Tribunal and the overall public good that arises
8 from people being, firstly, able to make protected
9 disclosures and, secondly, giving evidence such as
10 their recollection or their views before a tribunal of
11 inquiry, without fear of being penalised, save in
12 exceptional circumstances.

13 MR. JUSTICE CHARLETON: what would you say the
14 exceptional circumstances are?

15 MR. HARTY: Your egregious lies, where they knew they
16 were telling lies from the start; where they made it
17 all up; where they continued to add it altogether;
18 where such findings have been made.

19 MR. JUSTICE CHARLETON: And you would say in those
20 circumstances I would be entitled to award no costs?

21 MR. HARTY: You would be entitled to award no costs in
22 those circumstances.

23 MR. JUSTICE CHARLETON: All right.

24 MR. HARTY: But you would need to have made those
25 findings in your report.

26 MR. JUSTICE CHARLETON: Mr. Harty, can I ask you the
27 same four questions that -- in fact there's five, that
28 other people have been asked?

29 MR. HARTY: Yes.

1 MR. JUSTICE CHARLETON: Okay. You differ on the law in
2 relation to cooperation and truth from Ms. Leader's
3 outline?
4 MR. HARTY: I say that -- I don't think we differ
5 because I think we're both saying the same thing; the
6 one difference is that I'm saying that simply an
7 untruth isn't what the law says.
8 MR. JUSTICE CHARLETON: Okay. Untruth is not enough.
9 MR. HARTY: Yes.
10 MR. JUSTICE CHARLETON: And it has to be egregious
11 non-cooperation.
12 MR. HARTY: No.
13 MR. JUSTICE CHARLETON: Maybe you'd just help me. Just
14 say it again, if you wouldn't mind.
15 MR. HARTY: Non-cooperation, deliberately misleading
16 the Tribunal in its function is probably the primary
17 purpose of non-cooperation. So, for example, shredding
18 documents. For example, failing to reveal meetings
19 which took place at a senior level at an appropriate
20 time.
21 MR. JUSTICE CHARLETON: Well, your client wasn't at a
22 senior --
23 MR. HARTY: Well, I'm giving examples.
24 MR. JUSTICE CHARLETON: Okay.
25 MR. HARTY: My client didn't destroy any documents.
26 MR. JUSTICE CHARLETON: Sorry, shredding documents,
27 yes, okay. Concealing meetings.
28 MR. HARTY: Concealing meetings.
29 MR. JUSTICE CHARLETON: Yeah.

1 MR. HARTY: That would be serious non-cooperation --
2 MR. JUSTICE CHARLETON: Yeah.
3 MR. HARTY: -- which would have impeded the work of the
4 Tribunal.
5 MR. JUSTICE CHARLETON: Okay.
6 MR. HARTY: So giving evidence which is not accepted is
7 not sufficient.
8 MR. JUSTICE CHARLETON: Okay. All right. So have you
9 any issues with the fair procedures, the submissions
10 sought, et cetera, et cetera initially, the submissions
11 made, the letter of 22nd October; have you any issue
12 with the fact that we're attempting to follow fair
13 procedures but do you think we have fallen at any of
14 the hurdles?
15 MR. HARTY: what I would say is that there is one
16 matter which you haven't done, which is to indicate a
17 basis for a calculation of a proposal, but that is not
18 necessarily breaching fair procedures now.
19 MR. JUSTICE CHARLETON: Okay.
20 MR. HARTY: But if there is a proposal to reduce, a
21 mechanism by which that proposal is breached is a
22 matter which should be revealed and which I would be
23 entitled to argue on.
24 MR. JUSTICE CHARLETON: You better tell me now. Here's
25 your chance.
26 MR. HARTY: well, I don't know what mechanism you
27 propose to use to I can't argue on it.
28 MR. JUSTICE CHARLETON: well, what about Veolia Water?
29 You've read that case.

1 MR. HARTY: Not for a very long time. What are you
2 suggesting you're going to do?
3 MR. JUSTICE CHARLETON: Mr. Harty, it's not for you to
4 interrogate me. We're here in order to --
5 MR. HARTY: Well, what I'm saying is --
6 MR. JUSTICE CHARLETON: Sorry, Mr. Harty, just hang on
7 a wee moment now please. You're saying if a court, for
8 instance, says that witnesses -- if a court says a
9 party is entitled, because of various factors, to no
10 costs --
11 MR. HARTY: Mm-hmm.
12 MR. JUSTICE CHARLETON: -- is entitled 30% of their
13 costs.
14 MR. HARTY: Mm-hmm.
15 MR. JUSTICE CHARLETON: Is it entitled to 50% of their
16 costs.
17 MR. HARTY: Mm-hmm.
18 MR. JUSTICE CHARLETON: That there's some logarithm out
19 there, of which I'm unaware, that ought to be deployed
20 and you ought to have a chance to make submissions on
21 it. The letter actually says:
22
23 "The Tribunal in the circumstances is considering
24 whether to award your client's costs or whether in the
25 circumstances it is going to award your client's
26 reduced costs and asks for submissions on that."
27
28 Now, what more than that am I supposed to do?
29 MR. HARTY: What you're supposed to do, if you propose

1 to use a mechanism for calculating how my client's
2 costs should be reduced, I should be told that.
3 MR. JUSTICE CHARLETON: What are you talking about?
4 MR. HARTY: I'm not the one making the decision. It
5 would never have occurred to me --
6 MR. JUSTICE CHARLETON: But you say --
7 MR. HARTY: -- that my client should suffer a reduction
8 in his costs.
9 MR. JUSTICE CHARLETON: It never would have occurred to
10 you, no?
11 MR. HARTY: No. Not at all.
12 MR. JUSTICE CHARLETON: You're saying, therefore, if
13 there is to be a reduction there has to be what?
14 MR. HARTY: A mechanism.
15 MR. JUSTICE CHARLETON: What is the mechanism?
16 MR. HARTY: Well, I don't know. I don't propose to do
17 it. Perhaps if the Tribunal were to tell me what it
18 proposes to do. It put four items out there, is it
19 operating on the basis of 25% per item?
20 MR. JUSTICE CHARLETON: These are the kind of decisions
21 that are made every day by courts.
22 MR. HARTY: It's not a court.
23 MR. JUSTICE CHARLETON: You know you snapped at me
24 "this is not a court", and frankly you've done it
25 several times during the course of the Tribunal.
26 MR. HARTY: Mm-hmm. I'd ask --
27 MR. JUSTICE CHARLETON: Just hang on a minute,
28 Mr. Harty. Just please hang on a minute.
29 MR. HARTY: Mm-hmm.

1 MR. JUSTICE CHARLETON: You're saying that for some
2 reason that I unfortunately can't understand but I'm
3 trying to get to the bottom of, that this Tribunal is
4 in breach of fair procedures.

5 MR. HARTY: Mm-hmm.

6 MR. JUSTICE CHARLETON: Now, you'll be aware that the
7 original Act says that the Tribunal has the powers of
8 the High Court. It exercises the same jurisdiction in
9 relation to the matter over it. You're aware there's
10 further jurisdiction given. So what I'm saying to you
11 is, of course it's not a court, but I am a judge and
12 the reason I'm the Chairman of the Tribunal is because
13 I'm a judge.

14 MR. HARTY: Mm.

15 MR. JUSTICE CHARLETON: And judges, every day, and the
16 Supreme Court indeed not every day but certainly every
17 week, has to make decisions as to whether an award of
18 costs ought to be reduced.

19 MR. HARTY: Mm-hmm.

20 MR. JUSTICE CHARLETON: So what --

21 MR. HARTY: In the case of Lowry --

22 MR. JUSTICE CHARLETON: Sorry, I'm a bit lost for
23 words. What exactly are you saying about -- what
24 exactly are you saying that -- what? That you're not
25 getting fair procedures because you don't know of some
26 logarithm of some kind? I don't understand.

27 MR. HARTY: Firstly, I didn't mention the word
28 "logarithm".

29 MR. JUSTICE CHARLETON: No, I --

1 MR. HARTY: we --

2 MR. JUSTICE CHARLETON: No, no, you're absolutely

3 right. I mentioned "logarithm" but if you're saying is

4 there a mechanism?

5 MR. HARTY: In fact a better word; methodology. I'll

6 quote directly from Lowry -v- Moriarty:

7

8 "Neither was he given an indication of the methodology

9 of calculation of reduction or matters to which the

10 Tribunal would have regard set out in the General

11 Ruling so that he could address these in response with

12 a view to averting that outcome."

13

14 The methodology, not just the matters that you intend

15 to avert to, but also the methodology. There is no

16 mention in your letter of a methodology.

17 MR. JUSTICE CHARLETON: well, now, you have a chance to

18 make submissions. What --

19 MR. HARTY: No, I don't --

20 MR. JUSTICE CHARLETON: Just hang on --

21 MR. HARTY: -- propose to make submissions --

22 MR. JUSTICE CHARLETON: -- a minute, Mr. Harty --

23 MR. HARTY: I intend to rely on Lowry -v- Moriarty.

24 MR. JUSTICE CHARLETON: Mr. Harty, what methodology do

25 you suggest I apply?

26 MR. HARTY: well, I think you need --

27 MR. JUSTICE CHARLETON: One you've suggested is that

28 there are four issues in the Tribunal and if I find

29 against your client on all four it would be a complete

1 reduction of 100%; if I find in relation to three it
2 would be 75%; two 50%; one 25%. Is that your
3 submission?

4 MR. HARTY: I didn't make any such suggestion and
5 you're fully alert to the fact that what I said is I
6 have no idea what methodology you propose to use,
7 whether it is simply --

8 MR. JUSTICE CHARLETON: No, but you said --

9 MR. HARTY: No, sir, for the transcript and so there's
10 no confusion, I never suggested --

11 MR. JUSTICE CHARLETON: You see the transcript is going
12 to be a wee bit confused if you don't let me speak.
13 You've said there are four issues there. Is it to be
14 the case that if you find in relation to one you'll
15 reduce by 25%?

16 MR. HARTY: Yes.

17 MR. JUSTICE CHARLETON: Yes.

18 MR. HARTY: That wasn't me suggesting that as a
19 methodology. That was me asking was that the
20 methodology.

21 MR. JUSTICE CHARLETON: Oh, I see. What do you suggest
22 now? Because this is --

23 MR. HARTY: I don't suggest a methodology.

24 MR. JUSTICE CHARLETON: This is a question of fair
25 procedures. You're saying you're entitled to 100% of
26 your costs.

27 MR. HARTY: Yes.

28 MR. JUSTICE CHARLETON: You're saying there should be
29 no reduction.

1 MR. HARTY: Mm-hmm.

2 MR. JUSTICE CHARLETON: So if you're saying that, for
3 instance, I find that your client was, as you say,
4 deliberately misleading, was impeding the work of the
5 Tribunal --

6 MR. HARTY: Mm-hmm.

7 MR. JUSTICE CHARLETON: -- that I can award 100%
8 reduction of costs?

9 MR. HARTY: No, I don't say that. I don't say that. I
10 never said that.

11 MR. JUSTICE CHARLETON: well --

12 MR. HARTY: I never said that.

13 MR. JUSTICE CHARLETON: I'm inviting a submission.

14 MR. HARTY: No, I don't propose to make a submission.
15 I've already said plenty in relation to that.

16 MR. JUSTICE CHARLETON: Let's suppose a judge is
17 sitting here, Mr. Harty, and he says, he or she says to
18 a party: So if I'm to reduce costs, what do you
19 suggest I ought to do?

20 MR. HARTY: I suggest you shouldn't and, if you intend
21 to reduce costs you first have to tell me the
22 methodology you intend to use.

23 MR. JUSTICE CHARLETON: All right. well, I'm asking
24 you what methodology do you suggest?

25 MR. HARTY: I don't know what methodology to use.

26 MR. JUSTICE CHARLETON: This is fair procedures. I'm
27 hearing you, Mr. Harty, you see.

28 MR. HARTY: No.

29 MR. JUSTICE CHARLETON: So maybe you would tell me what

1 methodologies I ought to apply.

2 MR. HARTY: Perhaps if the Tribunal were listening to
3 me, the Tribunal would be aware of the fact that what I
4 am saying is that I don't know the methodology and I
5 cannot comment on it.

6 MR. JUSTICE CHARLETON: what do you suggest should be
7 the methodology?

8 MR. HARTY: well, I have suggested that I am entitled
9 to 100%. I'm not obliged to move off that position.
10 But if the Tribunal is moving off that position, it
11 must set out its methodology and its reasoning in
12 relation to it.

13 MR. JUSTICE CHARLETON: Have you read any of the
14 determinations which the Tribunal made in relation to
15 the witnesses in the Maurice McCabe matter?

16 MR. HARTY: Yes.

17 MR. JUSTICE CHARLETON: And is there anything wrong
18 with the methodology there?

19 MR. HARTY: There is no methodology set out there.

20 MR. JUSTICE CHARLETON: You're saying that all of those
21 are wrong?

22 MR. HARTY: Yes.

23 MR. JUSTICE CHARLETON: And you're saying they're wrong
24 because?

25 MR. HARTY: Because they don't actually set out a
26 methodology for the reduction.

27 MR. JUSTICE CHARLETON: well, what do you suggest as a
28 methodology?

29 MR. HARTY: well, there must be an assessment of how

1 the costs must be referred to in the -- how the costs
2 order relates to the evidence given and whether or not
3 that evidence impeded the work of the Tribunal.
4 MR. JUSTICE CHARLETON: So to the extent to which it
5 impeded the work of the Tribunal, there should be a
6 percentage reduction?
7 MR. HARTY: In the instant case, where four items have
8 been --
9 MR. JUSTICE CHARLETON: No, it refers to the entire of
10 the Tribunal Report.
11 MR. HARTY: Yeah.
12 MR. JUSTICE CHARLETON: And it instances four matters
13 which we would specifically like you to address.
14 MR. HARTY: Yes.
15 MR. JUSTICE CHARLETON: Now --
16 MR. HARTY: well, if the situation --
17 MR. JUSTICE CHARLETON: what is wrong with the
18 methodology used, for instance, in relation to the
19 other persons?
20 MR. HARTY: If anything other than a complete refusal
21 of costs is contemplated, the Tribunal must set out its
22 methodology as to why, how that calculation was arrived
23 at.
24 MR. JUSTICE CHARLETON: All right. And if it's 100% I
25 don't.
26 MR. HARTY: If it's 100% you don't.
27 MR. JUSTICE CHARLETON: Thank you. Right, the next
28 question --
29 MR. HARTY: Sorry.

1 MR. JUSTICE CHARLETON: What percentage below which the
2 Tribunal would fall so that the Tribunal would fall
3 into acting unreasonably in the sense of flying in the
4 face of fundamental reasoning and common sense?
5 MR. HARTY: In circumstances where the Tribunal hasn't
6 assessed the evidence given by each and every witness
7 who has applied to it and, rather, has selected a
8 number of witnesses for this issue, I suggest that
9 there is no reasonable position in which the Tribunal
10 can make a reduction.
11 MR. JUSTICE CHARLETON: Okay. You've addressed me on
12 the issue of compassion or mercy. You say it's a
13 matter of equity.
14 MR. HARTY: Mm-hmm.
15 MR. JUSTICE CHARLETON: Then the next matter and the
16 last matter I want to ask you about and this is a new
17 question, I asked Mr. Hartnett this this morning: Is
18 there any shaft of light in terms of your client's
19 evidence that I can actually identify whereby I can say
20 that evidence was helpful to the Tribunal, that
21 evidence was true, that evidence was accepted, that
22 evidence assisted in resolving a matter of public
23 disquiet? I mentioned a couple of things to
24 Mr. Hartnett, he mentioned a couple of things to me; is
25 there anything you would like to mention to me?
26 MR. HARTY: I'm saying my client assisted greatly to
27 the Tribunal at all times.
28 MR. JUSTICE CHARLETON: Do you want to address that
29 issue?

1 MR. HARTY: That is the issue: My client assisted
2 greatly at all times. There is -- the suggestion that
3 somehow my client acted entirely as a force of
4 penumbration during the course of the Tribunal is
5 entirely unfair. My client --

6 MR. JUSTICE CHARLETON: I was asking you is there any
7 -- is there any bright spot you can refer me to?

8 MR. HARTY: well, what I'm saying is that the
9 suggestion that there is no -- the suggesting that I'm
10 to identify bright spots, I say my client examined
11 every, dealt with every piece of evidence.

12 MR. JUSTICE CHARLETON: You know what I went through
13 with Mr. Hartnett. I mean, you know what I went
14 through with Mr. Hartnett. I mean I asked him about
15 the encounter in the kitchen between you and
16 Marisa Simms. I asked him about what was said by the
17 social workers as opposed to what was in the statement.
18 I asked him about the Leaving Certificate papers. I
19 mean, these things -- he mentioned the first matter.
20 Is there anything you can mention is what I'm asking
21 you?

22 MR. HARTY: My client gave evidence in relation to how
23 he was treated when he arrived first. How he was moved
24 because of who his girlfriend was related to. That was
25 a matter which was of some importance to the State to
26 know that this does happen or can happen, or be an
27 issue that needs to be determined. Whether he was
28 right to be aggrieved about it or not is an entirely
29 different matter. My client then gave evidence about

1 what occurred in relation to his difficulties with his
2 wife, with his partner, the rows he had with her, and
3 he dealt with those. He gave evidence which was not
4 found to be untruthful. It was found to be wrong, but
5 not untruthful. My client gave his evidence, I say, in
6 a truthful manner, albeit that it wasn't accepted as
7 being the correct version of events. And to quote the
8 third report: "It happens". They were the precise
9 words that the Tribunal used to sum up the case made by
10 my client in the third report. I can read the exact
11 phrase:

12
13 "The allegations were untrue. That happens."

14
15 It happens. It doesn't give rise to an order for
16 costs. It just happens. Evidence is accepted or not
17 accepted.

18 MR. JUSTICE CHARLETON: Thank you kindly for your
19 submissions, Mr. Harty.

20 MR. HARTNETT: One point of clarification. Mr. Barnes,
21 ever astute, feels that I may have suggested, when the
22 figure of 25% was mentioned, that I was suggesting that
23 was the figure to be awarded when in fact I was
24 referring to it as a potential deduction.

25 MR. JUSTICE CHARLETON: That's exactly what you said.

26 MR. HARTNETT: I'm very glad to hear that. Mr. Barnes
27 was concerned.

28 MR. JUSTICE CHARLETON: I'm sure I have taken many
29 things up wrong and will require many clarifications

1 over the course of the last hour-and-a-half. But there
2 you are. Thank you for your help. Just in case
3 there's any misunderstanding, my side of the Tribunal,
4 in other words I'm inviting them to a cup of Japanese
5 tea, nobody else.

6
7 THE HEARING WAS THEN CONCLUDED

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