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

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

The Hon Mr Justice Peter Charleton

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Ruling as to costs application of Irish Examiner Limited, Tim Vaughan, Mick Clifford, Juno McEnroe, Daniel McConnell and Cormac O'Keeffe.

The tribunal sat on Thursday 16 May 2019 to hear an application for the tribunal to discharge the costs of Irish Examiner Limited from public funds. This is the tribunal's ruling on that application.

Law as to costs at a tribunal

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

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

public inquiry nature of the tribunal in jeopardy of not finding where the truth lies. But, tribunal costs are not dependent on whether a person did something wrong but rather on cooperation, central to which is telling the truth. As McCarthy J said:

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

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

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

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

> Where a tribunal, or, if the tribunal consists of more than one member, the chairman of the tribunal, is of the opinion that, having regard to the findings of

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[4] [1992] 2 IR 605.
[5] [2010] IR 136; see also dicta of Hardiman J at paragraph 176 of the judgment, page 189.
[6] ibid at 164; see also Fennelly J at paragraph [358], at 229-330.

> the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal or the chairman, as the case may be, may by order direct that the whole or part of the costs
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> > (a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order:
> >
> > (b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.

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

> If it be the case that the amendment to s. 6(1) has the effect of investing in the Tribunal the power to refuse to award costs by reason of the substantive findings it has made, it is difficult to see how its findings could any longer be described as being devoid of legal consequence, made in *vacuo* or sterile. I cannot accept the submission made on behalf of the defendants that the necessary intervention of the Taxing Master or of processes of execution alters that fundamental fact. It is incumbent on this court to address, only in the last resort, a question as to the constitutional validity of a statute. To that end, the court must, so far as the words used by the legislature so permit, interpret those words so that they do not conflict with the Constitution. In the present case, that task is simplified by the availability of the judgments in *Goodman International v. Mr. Justice Hamilton* [1992] 2 I.R. 542. The link created by s. 6(1) of the Act of 1979, as interpreted by the Tribunal and as upheld by Smyth J., appears to empower the Tribunal to penalise a witness before it in respect of costs by reason of its substantive findings. Clearly, this court, when delivering judgment in that case did not contemplate any such possibility. The *dictum* of McCarthy J. avoids conferring that power on the Tribunal. If this court had thought otherwise, the result of *Goodman International v. Mr. Justice Hamilton* might well have been otherwise. At the very least, the reasons given by Finlay C.J. would of necessity have had to be different.

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[7] [2010] IR 136.

> The Oireachtas can be taken to have been aware in 1997 of the decision in *Goodman International v. Mr. Justice Hamilton* [1992] 2 I.R. 542. If the legislature had intended to negative the effect of the judgment of McCarthy J., it could have adopted clear wording to that effect. In fact, it has left intact the words which were interpreted by McCarthy J. I agree that if the section, in its present form, were the only matter to be interpreted, it is at least open to the meaning that the Tribunal may have regard to its substantive findings when deciding on costs. The matter is not, however, *res integra* . This court has said, *per* McCarthy J., that a tribunal may not have regard to its substantive findings when deciding on costs. The words which he interpreted are still in this section. The additional words interpolated in 1997 do not inevitably reverse the principle enunciated by the court in 1992. It is possible, without doing violence to language, to interpret the words in parentheses as qualifying both "the findings of the Tribunal" and "all other relevant matters". In the light of the decision in *Goodman International v. Mr. Justice Hamilton* and the obligation to interpret in conformity with the Constitution, I think that is the correct interpretation.
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> I am satisfied, therefore, that the Tribunal, in making a decision as to whether to award costs is not entitled to have regard to its substantive findings on the subject matter of its terms of reference

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

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

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

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

Tribunal letter of 18 October 2018

On 18 October 2018, the tribunal wrote to the solicitors representing Irish Examiner Limited as follows:

> Dear Mr Broderick,
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> We refer to previous correspondence and to your representation before the tribunal.
> The report of the tribunal was published on 11th October 2018 and you have been furnished with a copy of the report on behalf of your client or clients. The tribunal report, in any event, appears on www.disclosurestribunal.ie and has done since publication.
> The tribunal intends dealing with any issue as to legal costs arising from representation before the tribunal at the earliest possible time. Accordingly, the tribunal would be obliged if you would indicate the following:
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> 1. Whether your client or clients seek an order for costs from the tribunal;
> 2. Whether your client or clients intend seeking an order for costs against any other party or parties to the tribunal - in which case please identify that party or those parties;
> 3. Whether your client or clients intend making submissions that any other party or parties should not receive costs or that such costs ought to be reduced to a stated percentage of costs;
> 4. In the case of paragraphs 1 and 2 above, please furnish brief submissions setting out the basis upon which your client or clients argue that there is an entitlement to such orders;
> 5. In the case of paragraph3 above, please furnish brief submissions as to why such other party or parties should not receive costs or should only receive a stated percentage of their full costs.
> 6. In all such submissions, please state clearly the facts, circumstances and principles of law upon which you propose to rely.
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> The tribunal now regards it as essential that all orders related to its work should be finalized. The tribunal would therefore be much obliged to receive submissions within 21 days from the date of this letter.
>
> Yours truly,
>
> Elizabeth Mullan
> Solicitor to the Tribunal
>
> 18th October 2018

Submissions as to costs

By letter dated 7 November 2018, the solicitors on behalf of Irish Examiner Limited sought costs in these terms:

Introduction

1. These written submissions are furnished to the Tribunal of Inquiry in support of the application for costs on behalf of the Irish Examiner Limited, Tim Vaughan, Mick Clifford, Juno McEnroe, Daniel McConnell & Cormac O'Keeffe, each of whom were granted representation before the Tribunal and each of whom attended voluntarily and gave evidence before the Tribunal.

Jurisdiction of the Tribunal in respect of costs

2. The Tribunal's jurisdiction in respect of costs is contained in s. 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, as amended, which provides:

> (1) Where a Tribunal or, if the Tribunal consists of more than one member, the chairperson of the Tribunal, is of opinion that, having regard to the findings of the Tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the Tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the Tribunal), there are sufficient reasons rendering it equitable to do so, the Tribunal, or the chairperson, as the case may be, may, either of the Tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the Tribunal, order that the whole or part of the costs—
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> (a) of any person appearing before the Tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;
>
> (b) incurred by the Tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.

3. As can be seen, s. 6 gives the Tribunal a wide discretion in respect of the Orders that it can make as to costs. However, it is submitted that this discretion is to be exercised in accordance with the principles set out in the relevant case law, which is discussed below.

Applicable case law

4. Section 6 of the 1979 Act was considered by the Supreme Court in Goodman International v Mr. Justice Hamilton [1992] 2 IR 542. In analysing s. 6, McCarthy J. stated at p. 605 of the report:

> "Section 6: The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds.

The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression "the findings of the Tribunal" should be read as the findings as to the conduct of the parties at the Tribunal. In all other cases the allowance of costs at public expense lies within the discretion of the Tribunal, or, where appropriate, its Chairman."

5. In his judgement Finlay C.J. expressly agreed with the construction placed on s. 6 by McCarthy J., while O'Flaherty and Egan JJ. also agreed in general terms with the judgment of McCarthy J.

6. In *Murphy v. Flood* [2010] 3 I.R. 136, the Supreme Court confirmed and developed the principles laid down in *Goodman International v. Mr. Justice Hamilton* [1992] 2 IR 542. Ordinarily, a party permitted to be represented should get their costs. In her judgment in that case, Denham J. held at p. 164 that in applying the relevant principles to the construction of s. 6(1):

> [79] ... the issue for a chairman is whether a party has cooperated with a tribunal.
>
> [80] Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to cooperate with the tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a tribunal. The power to award costs is affected by a lack of cooperation, by non-cooperation, with a tribunal. Non-cooperation could include failing to provide assistance or knowingly giving false or misleading information.
>
> [81] Fundamentally the issue is whether a party has cooperated with a tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a tribunal." (underlined for emphasis).

7. Similarly in his judgment, Fennelly J. emphasised that the ordinary presumption should be in favour of reimbursement. At p. 230 he states that:

> "'(358] ...A tribunal of inquiry is established to serve the public interest. If is in the public interest that every person in possession of relevant information should cooperate with the inquiry. It is beyond question that the obligation to cooperate may impose greatly on individuals and expose them to very substantial legal expense. They must incur those costs without any advance assurance of reimbursement. I think that the ordinary presumption should be in favour of reimbursement. Otherwise, the obligation to cooperate with Tribunals would impose loss without compensation on individuals."

8. 'This Tribunal of Inquiry characterised the "presumption" referred to by Fennelly J. above as the "default position" in its "Third interim report of the tribunal of inquiry into protected disclosures made under the Protected Disclosures Act

2014 and certain other matters" published on 11 October 2018, where it stated at p. 15:

> "The default position for costs is that as a tribunal of inquiry is set up in the public interest, the Minister for Finance, in other words the taxpayers of Ireland, should ordinarily pay the legal costs of all of the parties granted representation."

9. In her judgment in *Fox v. Judge Alan Mahon* [2014] IEHC 397, Baker J. stated at p. 6:

> "11. ...the statutory considerations require and empower the tribunal to have regard to the conduct of persons before it for the purposes of the costs decision. One statutory basis to which the tribunal must, by legislation, have regard is a failure to co-operate with or provide assistance to or knowingly giving false or misleading information to the tribunal. The tribunal retains a discretion where there are 'sufficient reasons rendering it equitable to do so' to award costs, but it is constrained by statute to have regard to the failure to co-operate of a person..."

The proper approach of the Tribunal to costs

10. In its recent judgment in Lowry v. Mr. Justice Moriarty [2018] IECA 66, the Court of Appeal (Ryan P, Finlay Geoghegan and Edwards JJ.) made reference at pp. 9-10 (para. 11) to the well-known dictum of McCarthy J. in Goodman International v. Mr Justice Hamilton [1992] 2 IR 542 (cited above at para. 4) and then quoted from the "General Ruling on Costs" of the Moriarty Tribunal issued on 31 October 2013 in which the Tribunal had set out its approach to the question of costs as follows:

> "21...[i]n essence, the starting point is that every person appearing before a Tribunal of Inquiry by solicitor or counsel has an entitlement to be reimbursed by the State his or her costs of so appearing. When a person applies to the Tribunal for a costs order, the Tribunal should grant that order unless satisfied that the applicant in the course of his or her dealings with the Tribunal failed to cooperate with or provide assistance to, or knowingly gave false and misleading information to the Tribunal, in which case all or part of the costs sought by the applicant may be refused. The Tribunal may only have regard to the conduct of, or on behalf of, that person at, during or in connection with the inquiry in determining whether to disallow any portion of his or her costs. The Tribunal may not have any regard to its substantive findings as to the subject matter of the inquiry so as to disallow all or any part of an applicant's costs." [Emphasis added.]

11. In light of the principles laid down in the case law referred to above, the Irish Examiner parties gratefully adopts the above extract from the General Ruling on Costs of Moriarty J. made on 31 October 2013 as an accurate statement of how a tribunal should properly approach the question of costs pursuant to s. 6 of the 1979 Act.

Application of the above principles

12. Each of the parties hereto co-operated with the Tribunal, attended for interview when requested and attended and gave evidence to the Tribunal. While three of the parties (Juno McEnroe, Daniel McConnell and Cormac O'Keeffe) invoked journalistic privilege in relation to certain aspects of their evidence it is respectfully submitted that this invocation cannot fall into the category of "failing to co-operate" with the Tribunal within the meaning of the above jurisprudence.

13. Each of these three parties adopted their position on claiming journalistic privilege in a considered manner and having taken legal advice and in the context of the clear principles enunciated by the European Court of Human Rights that, inter alia, the privilege is not the privilege of the alleged source.

14. Equally they did not act contrary to any direction or ruling in relation to their assertion of privilege. While each of these parties appreciates that their invocation of privilege was not received favorably by the Tribunal it is respectfully submitted that such a scenario does not fall into the category of "failing to co-operate" with the Tribunal as contemplated by the jurisprudence described above.

15. Consequently, having regard to those principles and in light of the co-operation and assistance afforded by the Irish Examiner and its related parties to the Inquiry, it is respectfully submitted that the ordinary or default position applies in this case and that the Irish Examiner and the related parties are, accordingly, entitled to their costs.

Tribunal gives notice as to concerns

In accordance with the requirements of natural justice, the tribunal gave notice of its concerns as to why it might consider not awarding Irish Examiner Limited costs or only a percentage of the costs. That was done by letter dated 8 May 2019 and was in the following terms:

> Dear Sir,
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> Thank you for your submissions, received on the 8th of November 2018, in support of your application for costs in respect of the above named.
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> As you are aware, section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 provides as follows:
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> > *"(1) Section 6 of the Tribunals of Inquiry (Evidence) Amendment Act 1979, is hereby amended by the substitution for subsection (1) of the following subsection:*
> >
> > *"(1) Where a tribunal or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading*

information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal, or the chairperson, as the case may be, may, either of the tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs -

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

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

"30. Further, section 6 of the act of 1979, as inserted by section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, gives to the statutory power in relation to costs.

This includes a specific reference enabling regard to be had to a failure to co-operate with the tribunal...

37. The power and authority of the Tribunal is limited to that given to it by the terms of reference and the law, and so the tribunal may make findings of a lack of co-operation, from minor to major. I would not attempt a list of activities or omissions which may be deemed to be a lack of co-operation..."

Later in that judgment Ms. Justice Denham endorsed the following paragraph of Geoghegan J's judgment in Haughey v Mr Justice Moriarty and Others [1999] 3 IR 1 (at page 14):

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

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

"...I am of the opinion that the issue for a chairman is whether a party has co-operated with a tribunal.

Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to co-operate with the tribunal. This a chairman has to consider the conduct of, or on behalf of, a party before a tribunal. The power to award costs is affected by lack of co-operation, by non-

cooperation, with a tribunal. Non-co-operation could include failing to provide assistance or knowingly giving false or misleading information.

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

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

As you are aware the third interim report of the tribunal was published in October 2018. The following paragraphs appeared at pages 6 to 7 thereof:

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

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

You will no doubt be familiar with the third interim report of the tribunal and what follows is a concise indication of what would appear to be relevant matters in relation to whether or not your client co-operated with the tribunal.

- Juno McEnroe, Daniel McConnell and Cormac O'Keeffe were nominated by David Taylor as journalists he had negatively briefed about Maurice McCabe.
- At page 275 of the report it is noted that the above three journalists "refused to answer any questions relevant to Superintendent David Taylor, notwithstanding that he had waived any claim he had to journalistic privilege."
- At page 281 of the report, under the heading "Tribunal interaction with journalists", the tribunal noted that "Ultimately three journalists from the Irish examiner, Cormac O'Keeffe, Juno McEnroe, and Daniel McConnell, refused to give evidence to the tribunal about the content of their dealings with Superintendent Taylor. This, obviously, and without justification frustrated the work of the Tribunal."
- At page 285 of the report it is noted that "while Juno McEnroe told the Tribunal that he did not become aware of the Ms D allegation until sometime after July 2014, following Superintendent Taylor's time as

Garda Press Officer he would not discuss any conversations [he] might have had with a source or sources."

- On the same page of the report, the tribunal said as follows in relation to Cormac O'Keeffe: "... for reasons of journalistic privilege" he would not answer as to whether or not Superintendent Taylor had briefed him negatively about Maurice McCabe and drawn his attention to the Ms D. allegation as motivation for his complaints. The tribunal does not accept that any issue of journalistic privilege arose on this evidence. The tribunal considers that the privilege had been waived by Superintendent Taylor and that his evidence was given for reasons best known to Cormac O'Keeffe."
- Finally, the tribunal said as follows to in relation to Daniel McConnell: "[he] would neither confirm nor deny" that any such negative briefing occurred "for reasons of journalistic privilege." The tribunal considers that the privilege to have been waived and that this evidence was given for reasons best known to himself." (page 285/286 of the report)

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

To that end a hearing has been convened for Thursday the 16th of May next at 10 a.m. at the Hugh Kennedy courtroom at the Four Courts.

Yours truly,

Elizabeth Mullan
Solicitor to the Tribunal

8th May 2019

Hearing of 16 May 2019

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

Decision

The issues relevant to Irish Examiner Limited are those stated in the tribunal's letter of 8 May 2019 but should again be repeated:

- Juno McEnroe, Daniel McConnell and Cormac O'Keeffe were nominated by David Taylor as journalists he had negatively briefed about Maurice McCabe.
- At page 275 of the report it is noted that the above three journalists "refused to answer any questions relevant to Superintendent David Taylor, notwithstanding that he had waived any claim he had to journalistic privilege."
- At page 281 of the report, under the heading "Tribunal interaction with journalists", the tribunal noted that "Ultimately three journalists from the Irish examiner, Cormac O'Keeffe, Juno McEnroe, and Daniel McConnell, refused to give evidence to the tribunal about the content of their dealings with Superintendent Taylor. This, obviously, and without justification frustrated the work of the Tribunal."
- At page 285 of the report it is noted that "while Juno McEnroe told the Tribunal that he did not become aware of the Ms D allegation until sometime after July 2014, following Superintendent Taylor's time as Garda Press Officer he would not discuss any conversations [he] might have had with a source or sources."
- On the same page of the report, the tribunal said as follows in relation to Cormac O'Keeffe: "... for reasons of journalistic privilege" he would not answer as to whether or not Superintendent Taylor had briefed him negatively about Maurice McCabe and drawn his attention to the Ms D. allegation as motivation for his complaints. The tribunal does not accept that any issue of journalistic privilege arose on this evidence. The tribunal considers that the privilege had been waived by Superintendent Taylor and that his evidence was given for reasons best known to Cormac O'Keeffe."
- Finally, the tribunal said as follows to in relation to Daniel McConnell: "[he] would neither confirm nor deny" that any such negative briefing occurred "for reasons of journalistic privilege." The tribunal considers that the privilege to have been waived and that this evidence was given for reasons best known to himself." (page 285/286 of the report)

For the reasons set out above, evidence which is mistaken remains evidence which does not impact on entitlement to costs. Evidence which is rejected does. There was a great deal of discussion at the tribunal about journalistic privilege. That is a principle to be upheld but it is not an absolute value in all circumstances. Doing the best that is possible and in the knowledge of having sat through all of the evidence and having considered all of the documents, in the context of the report and of the entirety of this document and the concerns therein expressed, taking all of the factors into account, it can be justified to make some award of costs. The reality was that notwithstanding what happened before the tribunal, through questions put, the tribunal was able to come to some knowledge of where the truth lay on the various allegations. Furthermore, Tim Vaughan and Michael Clifford were as helpful as they could be and added some really useful facts to assist the tribunal as to background and atmosphere at the time. What was really important was to get some notion of attitudes as of that time as opposed to how people might describe relations later on. Michael Clifford's testimony as to his dealings with Superintendent

Taylor assisted the tribunal in coming to its conclusions as to Superintendent's Taylors use of electronic communication. For this the full text of the tribunal report needs to be read; as in all of the costs rulings. The tribunal can thus find some reason to award some costs but it cannot be the full award of costs given the circumstances. Hence, taking everything into account, the tribunal awards the applicants 80% of their costs.

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

31 July 2019