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 John Barrett

The tribunal sat on Thursday 16 May 2019 to hear an application for the tribunal to discharge the costs of John Barrett 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 public inquiry nature of the tribunal in jeopardy of not finding where the truth lies. Tribunal costs are not dependent on whether a person did something wrong but rather on cooperation, central to which is telling the truth. As McCarthy J said:

> 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

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

> 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 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:
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> (b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.

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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 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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> 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

[7] [2010] IR 136.

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

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

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

Tribunal letter of 18 October 2018

On 18 October 2018, the tribunal wrote to the solicitors representing John Barrett as follows:

> Dear Mr Quinn,
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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;

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

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.

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 14 November 2018, the solicitors on behalf of John Barrett sought costs in these terms:

SUBMISSION ON COSTS

A. Introduction:

1. An application for the legal costs of John Barrett arising from his legal representation before the Tribunal of lnquiry is made in this submission. It is provided in response to the letter from the Solicitor to the Tribunal of the 18th October 2018. It is noted that the Tribunal intends to deal with legal costs arising from representation at the earliest possible time and has outlined a number of questions in the letter for the purposes of any such application for costs. Hereunder, this submission addresses each of those questions and, thereafter, short legal submissions are made in respect of the issues which arise.

B. Questions posed in letter of 18 October 2018:

2. The submission addresses each of the questions at I - 6 as follows.

1. Whether your client or clients seek an order for costs from the Tribunal:

Mr. Barrett is seeking the legal costs arising from his representation before the Tribunal by his solicitors, Noble Law, his Senior Counsel Mr. John Rogers, S.C. and his Junior Counsel Mr. Tony McGillicuddy, BL.

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:

Mr. Barrett is not seeking an order for costs against any other party or parties to the Tribunal.

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 on a stated percentage of costs:

Mr. Barrett will not be making any submissions that any other party or parties should not receive costs or that such costs ought to be reduced on 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:

Submissions on this point are outlined in the next section of this submission.

5. In the case of paragraph 3 above, please furnish brief submissions as to why such other party or parties should not receive costs or should only receive a stated percentage of their full costs:

No such submissions are made herein.

However, if any other party makes a submission that Mr. Barrett should not receive costs or that such costs should be reduced on a stated percentage then it is submitted that Mr. Barrett should be furnished with a copy of any such submissions and provided with an opportunity to respond to same by the Tribunal.

6. In all such submissions, please state clearly the facts, circumstances and principles of law upon which you propose to rely:

This is addressed in the next section of the submission.

C. Submissions on Point 1 of Tribunal Letter of 18 October 2018:

(i) Factual Submissions:

3. Mr. John Barrett gave evidence to the Tribunal in respect of two particular aspects of its work. Firstly, he attended and gave evidence from Day 53 - 55 of the Tribunal in respect of Term of Reference (e). Further, his legal team appeared throughout that period from Days 53 - 57 inclusive in respect of the evidence of Mr. Barrett and Mr. Cyril Dunne. Thereafter, legal submissions were made in respect of that aspect of the Tribunal's work on Day 61 of the Tribunal proceedings.

4. It is submitted that Mr. Barrett co-operated with the Tribunal in its inquiries on this aspect of its Terms of Reference. Mr. Barrett had furnished a statement to the Tribunal in April 2017. Thereafter, he provided a timeline of events, through his solicitor, to the Tribunal on the 17th January 2018 which the Tribunal acknowledged as being helpful at page 169 of its Third Interim Report.

5. Furthermore, when requested at the end of his evidence on Day 53 of the Tribunal to provide further documentation he agreed to do so (see pages 208 - 209 of the Transcript). Such documentation was made available to all relevant legal teams on the morning of the resumption of his evidence (Day 54 of the Tribunal) and he was cross-examined on it during the proceedings on that date.

6. Secondly, Mr. Barrett gave evidence on Days 93 - 94 inclusive of the Tribunal in respect of Term of Reference (h). Again, it is submitted that Mr. Barrett co-operated with the Tribunal in its inquiries relating to this Term of Reference.

7. Mr. Barrett was interviewed by the Tribunal investigators on the 26th April 2018. Furthermore, his Solicitor provided relevant documentation to the Tribunal investigators on the 26th April 2018. That was followed by the giving of evidence before the Tribunal on the days outlined above. Mr. Barrett's legal team did not appear at the Tribunal to make oral submissions in relation to this module. Rather, a letter dated the 26th June 2018 was furnished to the Tribunal setting out Mr. Barrett's position and the Tribunal acknowledged this in its letter of the 28th June 2018.

8. Arising from the foregoing, it is contended that Mr. Barrett co-operated with the Tribunal at all times in relation to its work. All reasonable queries which were raised by the Tribunal were addressed by Mr. Barrett and/or his Solicitor. Indeed, Mr. Barrett's Solicitor also provided a timeline of relevant dates and materials to the Tribunal to assist it in its work in January 2018. This is referred to in the Tribunal Report itself. As regards the second Term of Reference, no complaint was made at any stage to Mr. Barrett and/or his Solicitor that he had failed to co-operate with the investigations being carried out in respect of that matter and it is respectfully contended that no such complaint could exist.

9. A short summary of the interactions between Mr. Barrett and/or his Solicitor with the Tribunal is attached to this submission to set out the engagement between Mr. Barrett and the Tribunal.

(ii) Legal Submissions:

10. Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 (hereafter the 1979 Act) as amended by s.3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 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

(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."

11. It is submitted that this provision enables the Tribunal to make an order for costs in favour of Mr. Barrett relating to his co-operation with and provision of assistance to the Tribunal. In addition, it is submitted that there are sufficient reasons rendering it equitable for the Tribunal to order that the costs ought to be granted to Mr. Barrett and no reasons exist or can be advanced as to why such an order should be refused to Mr. Barrett.

12. In Goodman International v. Hamilton [1992] 2 I.R. 542 the Supreme Court upheld the constitutionality of the Tribunals of Inquiry legislation on the basis that the findings of a Tribunal of Inquiry were legally sterile and, thus, did not constitute an administration of justice such that the Tribunal of Inquiry fell foul of Article 34 of the Constitution. The judgment of McCarthy J. in that case contain the bedrock position in relation to the adjudication of applications for costs by person before a Tribunal where the constitutional position of a Tribunal of Inquiry meant that its findings were circumscribed in their effect for cost issues.

13. McCarthy J. stated at p. 605 of Goodman:

"5. No challenge was made to the constitutional validity of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, but it must be construed as subject to the constitutional framework and, in particular, involving fair procedures ....

(c) 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." (emphasis added)

14. In Haughey v. Flood [1999] 3 I.R. 1 Geoghegan J. (in the High Court) made the following observations about the issue of costs at a Tribunal which addressed the 1979 Act (as amended by the 1997 Act). Geoghegan J. stated as follows at page14:

"The absence of a right of appeal from a costs order and the absence of an advance indemnity in relation to costs are not grounds for impugning the resolutions whether under the Constitution or otherwise. Costs will be dealt with by the Tribunal at the end of the entire inquiry, and I have no reason to believe that the sole member will not deal with the costs issue in a correct and constitutional manner. If he imposes a costs obligation in excess of or without jurisdiction, judicial review will lie as a remedy. I do not accept the submission made by counsel for the plaintiff that because the report will have gone to the

Oireachtas judicial review cannot lie. A party wrongly ordered to pay costs will not be divested of his own personal constitutional rights and any attempt actually to recover those costs from him must surely be subject to the superintendence of the courts and at the very least the courts would have power to grant injunctive relief. 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 1997is confined to instances of non-cooperation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory position specifically requires regard to be had to the findings of the Tribunal as well as all other relevant matters. I merely express that view by way of obiter dicta because, in my opinion, the issue of costs can only properly come before the High Court by way of some kind of judicial review or injunctive proceedings after costs have been awarded. I accept that the first plaintiff and perhaps the other plaintiffs may have to incur cost in providing the Tribunal with the necessary information and without there being any advance guarantee of indemnity, but there is a guarantee that justice will be done in relation to costs at the end of the Tribunal. It would not be practical or reasonable to expect an advance promise of indemnity. Any monetary loss incurred on this account is simply an unfortunate consequence of the legitimate right to hold such an inquiry. " (Emphasis added)

15. While it is acknowledged that the comments of Geoghegan J. are obiter, nevertheless it is submitted that they follow the clear reasoning postulated on this issue by McCarthy J. in Goodman. The effect of that reasoning is that a person who has co-operated with a Tribunal in its inquiries should be granted an order for his/her costs. The comments of Geoghegan J. were also approved by Fennelly J. in Murphy v. Flood (which is discussed further below).

16. Further support for this is found in the decision of the Supreme Court in Murphy v. Flood [2010] 3 LR. 136. Denham J. addressed the costs issue as follows at paragraph 80 of the judgment (page 164) as follows:

"Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to cooperate with the tribunal. Thus a chairman has to consider the conduct of, or on behalf of a party before a tribunal. The power to award costs is affected by a lack of cooperation, by non-cooperation, with a tribunal. Non-cooperation could include failing to provide assistance or knowingly giving false or misleading information."

17. Denham J. further stated at paragraph 82 as follows:

"The distinction between the administration of justice and the authority of a tribunal has to be drawn clearly. A tribunal is not administering justice, it is a fact finding inquiry, reporting to the legislature. A decision on costs grounded on a substantive finding of a tribunal would import a liability for a party. I am of the opinion that s. 6(1) of the Act of 1997 should be construed in light of the well-established case law, and that consequently a chairman may not have regard to the substantive findings of a tribunal when determining the issue of costs. "

18. Fennelly J. also addressed this issue in his judgment in Murphy v. Flood at paragraph 358 onwards, wherein he stated:

> "The key point made by McCarthy J. was that costs might be disallowed "because of the conduct of or on behalf of that party at, during or in connection with the inquiry", but not by reference to the findings made "as to the subject matter of the inquiry". It is true that the judge spoke of "a single disaster" when expressing his view that a party should normally be represented at public cost and counsel for the defendants relied strongly on this point. I see no reason, however, to restrict the principle in that way. There is no distinction of principle, so far as costs are concerned, between an inquiry into a single disaster and one into corruption whether in the beef industry or in the planning process. A tribunal of inquiry is established to serve the public interest. It 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.

19. Arising from these statements by Denham J. and Fennelly J. it is contended that the legal position outlined by McCarthy J. in Goodman was affirmed. Indeed, Fennelly J. outlined the public interest that applies in making cost orders in favour of persons who co-operate with Tribunals and stated that a "presumption" applies in favour of reimbursement in such circumstances. It is submitted that this is a clear statement of the legal position and applies to this Tribunal and to Mr. Barrett's application.

20. Furthermore, Fennelly J. addressed the amendment made to the 1979 Act in the 1997 Act. It is submitted that his judgment is clear to the effect the 1997 Act did <u>not</u> effect a change in the legal position. Fennelly J. stated at paragraph 365 - 370 as follows (please note paragraph 370 appears next in the Irish Reports):

> [365] 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.

[370] 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.
(Emphasis added)

21. Thus, it is submitted that the 1997 Act and its amendments do not affect the reasoning of McCarthy J. in Goodman and Fennelly J. has expressly confirmed that in Murphy v. Flood.

22. A more recent assessment of the issue was carried out by Baker J. in Chawke v. Judge Mahon [2014] 1 I.R. 788 at pp. 794-795, wherein Baker J. outlined a two-step process as follows at paragraph 15 onwards:

> "The two stage process
> [15] The jurisdiction of tribunals of inquiry in respect of costs has been considered in a number of cases. It has been made clear in these cases that the decision to award costs is one which must be separated from the substantive decisions of a tribunal itself. The clear statement of McCarthy J. in Goodman International v. Mr. Justice Hamilton [1992] 2 I.R. 542 sets out the different process or decision making activities involved in the making of findings by a tribunal on the one part, and its determination on costs on the other, at p. 605
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> [16] This statement of the process with which a tribunal engages for the purposes of coming to a decision with regard to costs finds legislative expression in s. 6 of the Act of 1979, as amended by the Act of 1997. The matter was considered by the Supreme Court in Murphy v. Flood [2010] IESC 21, [2010] 3 I.R. 136. The plaintiffs in those proceedings were persons against whom the Flood tribunal had made findings of obstruction and hindrance, and the Supreme Court held that this finding was ultra vires the tribunal, the finding amounting to criminal offences. The Supreme Court also held that the tribunal had erred in relying on this finding in its decision to refuse the plaintiffs their costs.
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> [17] As a matter of law and in accordance with the statutory regime provided by the Acts, the Tribunal must decouple its findings in its substantive report from those matters which guide its discretion in its costs decision. The legislation and the case law clearly envisage a two stage process, the second stage being the decision or determination with regard to the conduct or behaviour of a witness which leads a tribunal to its decision on costs. In that context the Tribunal came to consider the question of cooperation and costs, after it had published its substantive report. "
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> (Emphasis added)

23. Reference is also made to the judgment of Baker J. in Fox v. Judge Mahon [2014] IEHC 397 as another example of a case where the substantive finding of a Tribunal cannot form part of the decision-making process in relation to costs. Further support for this is also provided in the decision of Lowry v. Mr. Justice Moriarty IECA 66 (unreported) Court of Appeal 15th March 2018.

24.It is submitted that the foregoing case law shows that the findings of the Tribunal are not relevant to the issues of whether a person had co-operated or provided assistance to

the Tribunal. That stems from the fact that the findings of the Tribunal itself are legally sterile and cannot be used against a person in respect of an application for costs.

25. Arising from the foregoing, it is submitted that Mr. Barrett's position is that he should be granted his costs in accordance with the "presumption" referred to by Fennelly J. in paragraph 358 of his judgment in Murphy v. Flood. Mr. Barrett co-operated with and provided assistance to the Tribunal. His conduct at the Tribunal could not in any way be suggested to be obstructive of the Tribunal in its inquiries and investigations. While the Tribunal has made findings as regards the evidence that Mr. Barrett provided to it, it is submitted that the relevant distinction is that there was no allegation at any stage that Mr. Barrett had hidden anything from the Tribunal or hindered its inquiries or that he failed to provide relevant documentation or assistance throughout.

26.Finally, while it is noted that the Tribunal made an adverse comment about the manner in which Mr. Barrett's Counsel cross-examined Cyril Dunne (see page 171 of the Third Interim Report) it is submitted that the manner in which such cross-examination was conducted was relating to the evidence of both persons and where credit was a central feature of the factual dispute between the evidence of both men. It is submitted that the cut and thrust of the examination and cross- examination of witnesses does not operate, in any manner whatsoever, to oust the general principle that Mr. Barrett ought to be granted his legal costs.

27. Accordingly, Mr. Barrett applies for his legal costs and for same to be taxed by the Taxing Master pursuant to s.6 of the 1979 Act (as amended).

D. Conclusion:

28. For the reasons outlined herein, it is contended that Mr. Barrett is entitled to the legal costs for his representation at the Tribunal as set out in the submission and in the attached schedule setting out the matters pertaining thereto.

Tony McGillicuddy

John Rogers SC

14 November 2018

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 John Barrett costs or only a percentage of his costs. That was done by letter dated 9 May 2019 and was in the following terms:

Dear Mr McTiernan,

Thank you for your submissions in respect of your application for costs received on the 15th of November last. I would also like to acknowledge your letter of 30th ult.,

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

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

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

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

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

"30. Further, section 6 of the act of 1979, as inserted by section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, gives to the 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. In relation to whether or not your client co-operated with the tribunal by telling the truth, the following is a concise indication of what would appear to be relevant matters:

- In relation to the evidence that Mr. Barrett gave to the tribunal about "going after Maurice" at the O'Higgins Commission of Investigation, which evidence was to the effect that Cyril Dunne told him with reference to Sergeant McCabe that "we are going after him in the Commission", the tribunal, having considered whether or not such a conversation took place but became distorted, was not satisfied that the conversation ever took place at all or in the manner as alleged. (page 181 of the report)
- In relation to the evidence that Mr. Barrett gave to the tribunal about his conversations with Sergeant McCabe in May, August and October 2016 and whether or not he had told Sergeant McCabe that Commissioner O'Sullivan had influenced the RTÉ broadcasts on the 9th of May 2016, which was denied by Mr. Barrett, the tribunal concluded that it "[was] satisfied that a comment to the effect that the 9 May 2016 broadcasts were influenced by "block 1" was made by John Barrett to Maurice and Lorraine McCabe at their meeting. Possibly, John Barrett does not fully remember making the remark or how serious it was likely to sound in the febrile atmosphere of the time. Perhaps he was speaking casually, but if so, it was loose speech in the wrong context."(page 190 of the report)

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

To that end a hearing has been convened for Thursday the 16th of May next at 10.00 am at the Hugh Kennedy court at the Four Courts.

Yours truly,

Elizabeth Mullan
Solicitor to the Tribunal

9th May 2019

Hearing of 16 May 2019

The tribunal held an oral hearing on the issue of costs and heard representations on behalf of John Barrett. 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 John Barrett are those stated in the tribunal's letter of 9 May 2019 but should again be repeated:

- In relation to the evidence that Mr. Barrett gave to the Tribunal about "going after Maurice" at the O'Higgins Commission of Investigation, which evidence was to the effect that Cyril Dunne told him with reference to Sergeant McCabe that "we are going after him in the Commission", the Tribunal, having considered whether or not such a conversation took place but became distorted, was not satisfied that the conversation ever took place at all or in the manner as alleged. (page 181 of the report)
- In relation to the evidence that Mr. Barrett gave to the Tribunal about his conversations with Sergeant McCabe in May, August and October 2016 and whether or not he had told Sergeant McCabe that Commissioner O'Sullivan had influenced the RTÉ broadcasts on the 9th of May 2016, which was denied by Mr. Barrett, the Tribunal concluded that it "[was] satisfied that a comment to the effect that the 9 May 2016 broadcasts were influenced by "block 1" was made by John Barrett to Maurice and Lorraine McCabe at their meeting. Possibly, John Barrett does not fully remember making the remark or how serious it was likely to sound in the febrile atmosphere of the time. Perhaps he was speaking casually, but if so, it was loose speech in the wrong context."(page 190 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. That is the situation here. It is hard to justify the award of any costs, given the turn which the evidence took. For this the full text of the tribunal report needs to be read; as in all of the costs rulings. It is possible as well, however, to look to the voluminous documentation produced by John Barrett and to the fact that by having him at the tribunal and answering questions in his very expansive way, the tribunal gained some benefit, namely that of getting into the mind of those working in headquarters, but only to a degree. 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, the tribunal cannot award full costs. What can be said in John Barrett's favour is in relation to RTÉ and the notion that our national broadcaster and upper echelons of the gardaí

were in conspiracy, that might have been just loose talk. The report refers in that regard. It may not have been deliberate. This could have been a mistake. While it needed investigating, it did not undermine the overall work of the tribunal. In that respect, the tribunal notes that handwritten notes were produced and that John Barrett is meticulous generally. So, the tribunal was facilitated to a degree. The circumstances are very unfortunate but there was something offered by John Barrett and while the tribunal may be searching earnestly for reasons to award any costs, taking into account all of the hearings, all of the documents furnished and whatever benefit resulted from his testimony, the tribunal awards him 60% of his 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 approved