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 Superintendent David Taylor

The tribunal sat on Thursday 16 May 2019 to hear an application for the tribunal to discharge the costs of Superintendent David Taylor 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:

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

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

(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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> 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.

[7] [2010] IR 136.

> I am satisfied, therefore, that the Tribunal, in making a decision as to whether to award costs is not entitled to have regard to its substantive findings on the subject matter of its terms of reference

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

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

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

Tribunal letter of 18 October 2018

On 18 October 2018, the tribunal wrote to the solicitors representing Superintendent David Taylor as follows:

> Dear Sirs,
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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.
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> The tribunal intends dealing with any issue as to legal costs arising from representation before the tribunal at the earliest possible time. Accordingly, the tribunal would be obliged if you would indicate the following:
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> 1. Whether your client 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;

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

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 paragraph 3 above, please furnish brief submissions as to why such other party or parties should not receive costs or should only receive a stated percentage of their full costs.
6. In all such submissions, please state clearly the facts, circumstances and principles of law upon which you propose to rely.

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

Yours truly,

Elizabeth Mullan
Solicitor to the Tribunal

18th October 2018

Submissions as to costs

By letter dated 8 November 2018, the solicitors on behalf of Superintendent David Taylor sought costs in these terms:

Dear Ms. Mullan,

With reference to the above and your letter of the 18th October in relation to the issue of legal costs arising from representation before the tribunal, as you know, this office represented Superintendent David Taylor at the Tribunal and he was represented by Solicitor and Counsel during the period in which the Tribunal dealt with the matter.

In response to the particular matters raised, we confirm as follows:

1. Our client is seeking an Order for Costs from the Tribunal;
2. Our client does not intend seeking an Order for Costs against any other party or parties to the Tribunal;
3. Our client does not intend making a submission that any other party or parties should not receive their costs or that such costs ought to be reduced to a stated percentage of costs.
4. In the case of paragraph 1 above, we respectfully submit that Superintendent Taylor is entitled to an Order for his costs from the Tribunal for the reasons set out in the Submission below.
5. Not applicable.

Submission as per paragraph 4:

The Tribunal

The Tribunal was set up on the 17th February 2017 to inquire into matters relating to the treatment of Sergeant Maurice McCabe within An Garda Siochána. Sergeant Mc Cabe had brought into the public domain a number of instances in which it was alleged by him that An Garda Siochana had been acting improperly and in some instances unlawfully. He claimed to have been victimised and undermined within the force as a result.

The catalyst for the setting up of the tribunal was matters that were disclosed to Sergeant Mc Cabe by our client in September of the previous year. Those disclosures were in turn the subject of Protected Disclosures and subsequently formed the bedrock upon which the Tribunal came into being. Without our client first disclosing the relevant matters to Sergeant McCabe the likelihood is that no Tribunal or inquiry would have been ever set up and the important findings which have now been made in favour of Sergeant McCabe would not have occurred. The tribunal was in essence established to investigate if there was a smear campaign at the highest levels of An Garda Siochána against Sergeant McCabe.

By letter dated 10 March 2017 the Tribunal wrote to Supt. Taylor referring to the Opening Statement as delivered by the Chairman on 27 February 2017, and requested Supt. Taylor provide a Statement to the Tribunal by close of business on 13 March 2017, and also made further requests for information and clarification regarding discovery of records and any claim of privilege. It was clear from the very outset, and in particular from the content of the letter as issued by the Tribunal, that legal representation and advice was required by Supt. Taylor and he could not have been expected to engage with the Tribunal without same. This letter of request/direction was complied with and Statement delivered within the directed timescale. It was also confirmed that Supt. Taylor would make himself available for interview if required.

On the 30th March 2017 an application was made for representation on behalf of Superintendent Taylor in relation to all terms of reference apart from Term of Reference (N) which related to Garda Keith Harrison. At the oral hearing on the 3rd April 2017 the Tribunal granted such representation to Superintendent Taylor.

Superintendent Taylor has been represented by this office in the course of his dealings with the Tribunal. Two senior and one junior counsel were briefed. The office and his legal team have committed an enormous amount of time and resources to the brief. Our client and this office have assisted and fully co-operated with the Tribunal in its work including:

- Providing disclosure and discovery as requested by the Tribunal including full disclosure of all previous legal proceedings, including the Judicial Review taken in relation to the "Clerkin" investigation.
- Assisted the Tribunal with the provision of access to email accounts and conducted searches of same at the Tribunals request;
- Providing a waiver of any privilege relating to his communications with journalists,
- Attending for lengthy interviews on several occasions with the Tribunal investigators and co-operating with them in the making of statements.
- Responded to correspondence issued by the Tribunal;
- Consideration of large volumes of Tribunal material;

- Attending the hearings of the Tribunal held at Dublin Castle;
- Providing representation for Superintendent Taylor at the hearings in Dublin Castle by Solicitor and Counsel;
- Superintendent Taylor attended and gave evidence at the Tribunal as requested and was subjected to cross-examination;
- On a number of occasions, the Chairman sought clarification on points. Instructions were obtained on the same day, and in the course of hearing other witnesses, from Superintendent Taylor to clarify the request of the Chairman.

By its report, dated the 11th October 2018, the Tribunal reported its findings and concluded, inter alia, that there had been a campaign of calumny against Sergeant Maurice McCabe.

While the Tribunal report is critical of Superintendent Taylor and found that his credibility as a witness was completely undermined by his own bitterness and by the untruthful nature of his affidavit in the judicial review proceedings that he intended to commence before the High Court, and while his motivation in bringing forward this allegation was to stop or undermine a criminal investigation being taken against him, the Tribunal has found that there was such a campaign not inconsistent with that alleged by Supt, Taylor in his original Protected Disclosure. The adverse findings made against our client are deeply regretted.

While Superintendent Taylor was a witness who lacked credibility, it remains the case that but for his decision to speak directly to Sgt. McCabe and make disclosures to him, and thereafter a Protected Disclosure, the campaign of calumny against Sergeant Maurice McCabe which the Tribunal found as a matter of fact to have occurred, would not have been uncovered.

Any party appearing before a Tribunal has an entitlement to legal representation to protect his good name. In this case, Supt. Taylor was required to have such representation, and the Orders were granted for all modules, save for the "Harrison" module (Term of Reference (N)). In this regard he was a central witness for the Tribunal, as evidenced by the questioning of witnesses and the requirement to take instructions on many occasions, in order to test the evidence of the witnesses before the Tribunal, and so legal representation was a requirement for him to assist with the work of the Tribunal, and did so assist the workings and operation of the Tribunal. The fact that adverse findings were made against him and his testimony does not detract from this.

It was also necessary, for the operation of the Tribunal, to have Supt. Taylor's case put to various witness as per the rule in Browne v Dunn, and this was a necessary part of the operation and function of the Tribunal and enabled the Tribunal to test the evidence as it was statutorily mandated to do.

Entitlement to an Order for Costs

It is submitted that in the normal course, a party appearing before a Tribunal is entitled to have its costs paid out of public funds. The entitlement to have costs paid out of public funds is provided in section 6(1) of the Tribunals of Inquiry (Evidence) Acts 1921-2004. This 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 (a) of any person appearing before the Tribunal by Counsel or Solicitor, as taxed by any other person named in the order.." (Emphasis added)

The law on costs in relation to a Tribunal of Inquiry was considered in the case of Murphy v Flood [2010] 3 IR 136. In considering the issue of whether to make an award of costs, Denham J stated that the key question related to co-operation and at page 164 to 165 she stated:

> [79] In applying these principles to the construction of s. 6(1) of the Act of 1997, I am of the opinion that the issue for a chairman is whether a party has cooperated with a tribunal.
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> [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.
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> [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.
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> [82] 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.

It is submitted that following the establishment of the Tribunal, Superintendent Taylor, and his professional advisors, fully cooperated with the tribunal and therefore, in the ordinary course, his costs should be paid by the Tribunal. The adverse findings of the Tribunal regarding Supt. Taylor do not disturb this fundamental principle. The evidence

of Supt. Taylor was rigorously tested through cross-examination and the Tribunal has made its findings. The Tribunal will be aware that in the Murphy case, significant adverse findings were made as against several of the parties, which the Court held was not a sufficient basis for refusing the said parties their Costs.

It must also be noted that the representation for any module which Supt. Taylor had an involvement reflected the level of his involvement. Hence in the "Tusla" module, Supt. Taylor's representation extended to Junior Counsel and Solicitor only. In the "O 'Higgins Commission" module, again more limited representation was in attendance, and withdrew when witnesses that were not relevant to Supt. Taylor were called.

It is clear that an ordinary person does not possess the means to attend at a tribunal for such a lengthy period with legal representation. The complexity of the issues involved and attendant costs are such that the fees could only be discharged by a very wealthy person or properly resourced commercial entity.

This firm was retained by Superintendent Taylor following a grant of legal representation. It accepted instructions from him in good faith and took the necessary steps as outlined above to ensure that he co-operated fully with the tribunal. It was also clear to all concerned from the outset that the involvement of Supt. Taylor in the Tribunal would be a lengthy and involved process.

We note that this course of conduct is, for instance, in contrast to some other witnesses or potential witnesses. There were many journalists who did not come forward at all, and of those that did some declined to make themselves available for interview by Tribunal investigators meaningfully or at all. Neither did they make available documentation, and first asserted a privilege with regard to their dealings with An Garda Siochana, which was then maintained in circumstances where the persons the subject of the privilege had very clearly given a waiver in respect of it. Moreover, we understand that it was often unclear right up until the very last moment whether they would give evidence at all before the Tribunal.

Our involvement required very significant work and preparation. One solicitor was engaged virtually full-time for lengthy periods. On occasion more than one solicitor was involved. The time given over by counsel to read and familiarise themselves with the brief and appearing at hearings was also significant. They were not in a position to fulfil other commitments.

The default position is that a person granted legal representation is entitled to recover costs of that representation. It would only be in exceptional circumstances that position would be departed from. It is submitted that there are no such exceptional circumstances here.

Any refusal of an order for costs is likely to have an inhibiting effect on the willingness of persons to come forward into the future. It could undoubtedly discourage a person who has acted improperly, or who has for a variety of reasons a question mark over their credibility from coming forward at all. Even where that has occurred he or she might have difficulty retaining a solicitor and or counsel on the basis of an apprehension that an adverse finding in the report would double up as a finding of a lack of co-operation or obstruction of a tribunals work when the issue of costs was to be determined.

Our client has co-operated with the Tribunal. That co-operation is maintained. In the event that there is any matter arising in respect of which the Tribunal is considering disallowing costs we would be obliged to receive notice of any such issue(s) so as to

enable Superintendent Taylor to address you on it. We would also respectfully submit that we would be given an opportunity to make an oral address to the tribunal, and, if it should prove necessary, to call evidence.

It is submitted that any Order disallowing Superintendent Taylor his costs, or indeed making him the subject of a costs order against him, would amount to the imposition of a penalty and would be an administration of justice. It is further submitted that it would act as a deterrent to any person who wished to report wrongdoing from coming forward in the future. It is also submitted that such an Order would prevent persons of limited means from being provided with representation at a Tribunal in the future due to the uncertainty in relation to the payment of costs.

Opportunity to make submissions

In the event that the Tribunal does not propose to set out in advance the basis upon which an application for costs may be disallowed, we submit that our client has a right to make submission to the Chairman on the issue. We submit that in the interests of fair procedures and natural justice the Tribunal should agree to provide us with notice of any proposed decision in relation to costs, including its reasoning, which might impact on the rights of Superintendent Taylor, and afford us an opportunity to make representations, including any submissions that may be deemed necessary, to the Tribunal, in advance of any such order on costs being made by the Tribunal.

Yours faithfully,

M. E. Hanahoe Solicitors

Tribunal gives notice as to concerns

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

Dear Sirs,

Thank you for yours of the 8th of November last enclosing submissions relative to your application for an order for costs. You have requested that in the event of any matter arising in respect of which the tribunal is considering disallowing costs, you would be obliged to receive notice of such issue. It is in connection with same that I am now writing to you on behalf of the tribunal.

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.*
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> *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 has co-operated with the tribunal:

- That notwithstanding three interviews with tribunal investigators, Superintendent Taylor did not supply definite details as to which journalists he allegedly briefed and in what form or when. (page 28, page 211)
- That Superintendent Taylor deliberately omitted Eavan Murray and Debbie McCann as journalists he negatively briefed from the initial list of such journalists he supplied to the tribunal. (page 223/225)
- The evidence that Superintendent Taylor gave in relation to his conversation with Paul Williams and his visit to the D household was not accepted by the Tribunal (page 62).
- That Superintendent Taylor lied to the tribunal in his denials as to confirming any details about the garda investigation into Sergeant McCabe and furthermore that any encouragement he gave to the journalists Debbie McCann, Eavan Murray and Cathal Mahon to go to Cavan to find further details of the story was wrong. (page 225 and page 229)
- That Superintendent Taylor lied to the Tribunal in denying that he ever alleged to Sergeant McCabe that Sergeant McCabe's activity on PULSE was monitored by a person called Kieran in Garda headquarters. (page 237)
- That Superintendent Taylor did not tell the truth to the tribunal about the meeting in RTÉ with Philip Boucher-Hayes on the 17th of December 2013. (page 265)
- That Superintendent Taylor understood his role in the calumny of Sergeant McCabe (page 299).

Furthermore, the tribunal was mandated to investigate whether or not Superintendent Taylor had via text message briefed the media negatively about Sergeant McCabe. While Superintendent Taylor told both the tribunal and the tribunal investigators that he had never claimed that same had happened, but rather that he had updated former

Commissioner Callinan and the then Deputy Commissioner O'Sullivan in relation to ongoing media coverage of Sergeant McCabe, this evidence was not accepted by the tribunal. In relation to same and specifically in relation to the distribution of text messages which negatively briefed about Sergeant McCabe, the tribunal accepted that:

- On the 20th of September 2016 and the 21st of September 2016, Superintendent Taylor told Sergeant McCabe that he had sent numerous text messages to the media on the authority of former Commissioner Callinan and with the acquiescence of Deputy Commissioner O'Sullivan which text messages had the purpose of negatively briefing against Sergeant McCabe. (page 214)
- That Superintendent Taylor had lied to tribunal investigators when he told them that "in relation to hundreds of text messages" to the Commissioners, these were general in nature and not related to negative press briefings, in the sense that he had previously said the opposite. (page 216)
- That he had previously said to Michael Clifford that text messages were part of the campaign of negative briefing against Sergeant McCabe. (page 217-219)
- The evidence of Deputy Clare Daly, that in a meeting with Superintendent Taylor and Sergeant McCabe, Superintendent Taylor had told her that text messages were used in a campaign to negatively brief journalists against Sergeant McCabe.
- That in the same meeting Deputy Michael Wallace had got the impression that messages against Maurice McCabe were distributed through the head of the Garda Press Office by electronic means.

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 client and in that regard, is inviting you to make submissions prior to making any decision on the matter.

To that end a hearing has been convened for Thursday the 16th of May at 10a.m. at the Hugh Kennedy court 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 Superintendent David Taylor. 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 Superintendent David Taylor are those stated in the tribunal's letter of 8 May 2019 but should again be repeated:

- That notwithstanding three interviews with tribunal investigators, Superintendent Taylor did not supply definite details as to which journalists he allegedly briefed and in what form or when. (page 28, page 211)
- That Superintendent Taylor deliberately omitted Eavan Murray and Debbie McCann as journalists he negatively briefed from the initial list of such journalists he supplied to the tribunal. (page 223/225)
- The evidence that Superintendent Taylor gave in relation to his conversation with Paul Williams and his visit to the D household was not accepted by the Tribunal. (page 62)
- That Superintendent Taylor lied to the tribunal in his denials as to confirming any details about the garda investigation into Sergeant McCabe and furthermore that any encouragement he gave to the journalists Debbie McCann, Eavan Murray and Cathal Mahon to go to Cavan to find further details of the story was wrong. (page 225 and page 229)
- That Superintendent Taylor lied to the Tribunal in denying that he ever alleged to Sergeant McCabe that Sergeant McCabe's activity on PULSE was monitored by a person called Kieran in Garda headquarters. (page 237)
- That Superintendent Taylor did not tell the truth to the tribunal about the meeting in RTÉ with Philip Boucher-Hayes on the 17th of December 2013. (page 265)
- That Superintendent Taylor understood his role in the calumny of Sergeant McCabe. (page 299)

Furthermore, the tribunal was mandated to investigate whether or not Superintendent Taylor had via text message briefed the media negatively about Sergeant McCabe. While Superintendent Taylor told both the tribunal and the tribunal investigators that he had never claimed that same had happened, but rather that he had updated former Commissioner Callinan and the then Deputy Commissioner O'Sullivan in relation to ongoing media coverage of Sergeant McCabe, this evidence was not accepted by the tribunal. In relation to same and specifically in relation to the distribution of text messages which negatively briefed about Sergeant McCabe, the tribunal accepted that:

- On the 20th of September 2016 and the 21st of September 2016, Superintendent Taylor told Sergeant McCabe that he had sent numerous text messages to the media on the authority of former Commissioner Callinan and with the acquiescence of Deputy Commissioner O'Sullivan which text messages had the purpose of negatively briefing against Sergeant McCabe. (page 214)
- That Superintendent Taylor had lied to tribunal investigators when he told them that "in relation to hundreds of text messages" to the Commissioners, these were general in nature and not related to

negative press briefings, in the sense that he had previously said the opposite. (page 216)

- That he had previously said to Michael Clifford that text messages were part of the campaign of negative briefing against Sergeant McCabe. (page 217-219)
- The evidence of Deputy Clare Daly, that in a meeting with Superintendent Taylor and Sergeant McCabe, Superintendent Taylor had told her that text messages were used in a campaign to negatively brief journalists against Sergeant McCabe.
- That in the same meeting Deputy Michael Wallace had got the impression that messages against Maurice McCabe were distributed through the head of the Garda Press Office by electronic means.

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. What is crucial to Superintendent Taylor is that he stands alone of an indeterminate number in our police force who came forward and told some of the truth. As to the treatment of Sergeant Maurice McCabe, that version can be viewed as containing the gist of the truth. There were many obfuscations, elisions and refusals on the detail. But, where would the public interest be without such evidence as he did give? By going as far as he did, the tribunal was able to uncover what about his testimony should be rejected and what needed to be affirmed as containing a core of reality and as to what might be inferred by reference to other evidence.

A decision to refuse him costs on the basis of what was rejected would overlook the benefit of such cooperation as he did give to the tribunal's work, which is the public's work. 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, the benefit outweighs the detriment and so the tribunal awards David Taylor 70% 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.

Approved 31 July 2019

Peter Charleton.