

TRIBUNAL OF INQUIRY INTO PROTECTED DISCLOSURES MADE UNDER
THE PROTECTED DISCLOSURES ACT 2014 AND CERTAIN OTHER
MATTERS FOLLOWING RESOLUTIONS PASSED BY DÁIL ÉIREANN AND
SEANAD ÉIREANN ON 16 FEBRUARY 2017

ESTABLISHED BY INSTRUMENT MADE BY THE MINISTER FOR JUSTICE
AND EQUALITY UNDER THE TRIBUNALS OF INQUIRY (EVIDENCE) ACT
1921, ON 17 FEBRUARY 2017, AS AMENDED ON 7 DECEMBER 2018

CHAIRMAN OF DIVISION (P): MR. JUSTICE SEAN RYAN,
FORMER PRESIDENT OF THE COURT OF APPEAL

HEARING HELD IN DUBLIN CASTLE
ON WEDNESDAY, 30TH MARCH 2022 - DAY 173

173

Gwen Malone Stenography
Services certify the
following to be a
verbatim transcript of
their stenographic notes
in the above-named
action.

GWEN MALONE STENOGRAPHY
SERVICES

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TAKE NOTICE - PURSUANT TO ORDER DATED THE 1ST DAY OF
FEBRUARY 2022 OF MR. JUSTICE RYAN OF THE DISCLOSURES
TRIBUNAL

IT IS HEREBY ORDERED THAT THE IDENTIFICATION BY NAME OF
MR. 'A' OR OF ANY OTHER SUSPECT WHETHER DIRECTLY OR
INDIRECTLY IN CONNECTION WITH INVESTIGATIONS UNDERTAKEN BY
AN GARDA SÍOCHÁNA IS HEREBY PROHIBITED;

AND IT IS FURTHER ORDERED THAT ANY INTERESTED PARTY IN
THIS MATTER BE AT LIBERTY TO APPLY ON THE GIVING OF 2 DAYS
NOTICE IN WRITING TO THE TRIBUNAL

I NDEX

PAGE

SUBMISSION BY MR. O'DWYER.....	6
SUBMISSION BY MR. MCGARRY	64
SUBMISSION BY MR. O'HIGGINS	66
SUBMISSION BY MR. O'DWYER	135

1 THE HEARING RESUMED, AS FOLLOWS, ON WEDNESDAY, 30TH
2 MARCH 2022:

3
4 CHAIRMAN: Good morning, can everybody hear me, okay?
5 Now, Mr. McGuinness, take it away. 10:30

6 MR. MCGUINNESS: Chairman, thank you. At this stage,
7 Chairman, I am going to ask the legal team for Sergeant
8 Hughes to make such final oral submissions as they
9 think proper.

10 CHAIRMAN: Yes, I think principally, if I can just 10:31
11 indicate -- I think we have the written submissions
12 received, thank you very much, and I appreciate that
13 the time was foreshortened for reasons outside our
14 control, but everybody was able to comply with that and
15 thank you very much, that's appreciated. 10:31

16
17 I think the principal thing from the Tribunal's point
18 of view is to get each side's comments on the other
19 side's submissions. We have your submissions, now I am
20 not constraining people as to what they say, but what I 10:31
21 am particularly interested in is to know is what A says
22 about B's submissions and what B says about A's
23 submissions. I think probably the best way to do it,
24 subject to any observations, is to ask Sergeant
25 Hughes's team to go first and then I will ask the Garda 10:32
26 team and I will ask Commissioner Fanning's team and
27 come back then to Mr. Hughes's team. Is that
28 satisfactory? Okay.
29

1 Now, gentlemen, yes.

2

3 SUBMISSION By MR. O' DWYER:

4 MR. O' DWYER: Morning, Chairman. I am going to be
5 speaking on behalf of Sergeant Hughes this morning. I 10:32
6 am concerned, you may have noticed, sorry Chairman,
7 that Sergeant Hughes isn't here, but he's unwell, but
8 was going to try and log in and I just wanted to make
9 sure he was able to...

10 CHAIRMAN: well, nobody wants to disappoint anybody, 10:32
11 but essentially, I mean the transcript will be
12 available.

13 MR. O' DWYER: Yes.

14 CHAIRMAN: I don't know whether a recording of it will
15 be available, and there's no -- he won't be required to 10:33
16 participate in it, so while I am sorry, certainly sorry
17 to hear he's under the weather or unwell, I am
18 certainly sorry to hear that and would send him the
19 best wishes of everybody, I am sure everybody would
20 wish to send him that, but I don't think it is a reason 10:33
21 for holding up the proceedings.

22 MR. O' DWYER: No, I meant that more --

23 CHAIRMAN: I know you are not asking that, you're just
24 drawing attention to that.

25 MR. O' DWYER: -- I suppose more by way of an apology 10:33
26 for not being here.

27 CHAIRMAN: Oh, there is no apology necessary, but thank
28 you very much for saying it all the same. Okay
29 Mr. O'Dwyer, yes.

1 MR. O'DWYER: So, Chairman, I have heard your
2 preliminary remarks and we had understood -- I mean,
3 you mentioned before that we're here to provide a brief
4 reply to the written submissions, obviously primarily
5 of An Garda Síochána, and not to just reiterate our own 10:34
6 submissions, so I hope I am going to be able to do that
7 in 40 or 50 minutes this morning.
8 CHAIRMAN: well, don't feel under pressure,
9 Mr. O'Dwyer. I mean, that's what I am hoping to get.
10 MR. O'DWYER: Yes. 10:34
11 CHAIRMAN: In other words, your observations, but I
12 mean, do it your own way.
13 MR. O'DWYER: Yes, Chair.
14 CHAIRMAN: Okay.
15 MR. O'DWYER: what I want to do is try to deal with the 10:34
16 protected disclosures in the case first, and I might as
17 well flag, and you will have seen from the submissions,
18 Chairman, that I am going to refer to the very recent
19 decision of the Supreme Court in Baranya v. Rosderra
20 Meats. I am sure, Chairman, you're probably familiar 10:35
21 with that, but we try --
22 CHAIRMAN: I am now.
23 MR. O'DWYER: It's an unusual situation in that, in
24 effect it was delivered after the preliminary hearing,
25 as you know. 10:35
26 CHAIRMAN: Yes.
27 MR. O'DWYER: And what we have done this morning, just
28 in case anyone hadn't got it, we sent it through to the
29 Tribunal, but I suppose I am not going to be referring

1 to it on screen or anything like that, but I do want to
2 at least mention how we think it affects --

3 CHAIRMAN: Yes.

4 MR. O'DWYER: -- the protected disclosures in this case
5 and certainly Superintendent Curran's, but also we want 10:35
6 to mention a previous disclosure and how it may affect
7 that, and that's the disclosure to Inspector Cryan
8 about which we heard quite a bit of evidence. This was
9 almost immediately after the murder of Ms. Saulite.
10 You may remember, Judge, there was a conversation -- 10:36
11 well, a few conversations actually over the telephone
12 between Sergeant Hughes and Inspector Cryan and there
13 was evidence from Inspector Cryan on that. So I am
14 just going to mention that.

15
16 And I'm sorry, Judge, it wouldn't normally obviously 10:36
17 arise in this way, but the fact of the matter is that
18 the Supreme Court has delivered what we think is a
19 relevant decision --

20 CHAIRMAN: Yes.

21 MR. O'DWYER: -- a very important decision in the area
22 of protected disclosures. The decision was delivered
23 in December but didn't even come to our attention until
24 well into the hearing, so this just seems to be the
25 best opportunity -- well, it is in our submissions, but 10:36
26 this seems to be the best opportunity to say something
27 about it.

28
29 After that, Chairman, dealing with the protected

1 disclosures, I intended to go on and just deal with a
2 few of the other points raised by An Garda Síochána
3 about the disciplinary investigation, about the injury
4 on duty suffered by Sergeant Hughes and the possible
5 referral to GSOC.

10:37

6
7 I suppose, before I deal with those issues in brief, I
8 just want to begin by pointing out that certainly in
9 our view, in the early parts of An Garda Síochána's
10 submissions they seem to attempt to paint Sergeant
11 Hughes as a person or someone who is entirely detached
12 from reality, in that he was somebody who was making
13 unfounded allegations against almost everyone he would
14 meet within An Garda Síochána. They refer to him, this
15 is a quote from the third paragraph of their

10:37

16 submissions, as "having a solipsistic outlook, whereby
17 personal setbacks in his life became translated into an
18 imagined campaign of targeting against him". And they
19 go on to say that he claimed without identifying any
20 facts in support of what were sweeping allegations
21 against management. And I just, I suppose, wanted to
22 say, firstly, we think that's particularly unfair to
23 Sergeant Hughes. In respect of the allegation -- in
24 respect of withdrawing the allegation against Assistant
25 Commissioner Kathleen Clancy that she targeted Sergeant
26 Hughes by reason of a protected disclosure, I mean that
27 was done in good faith; it was done on the basis that,
28 having looked at the information made available for the
29 Tribunal and having considered the statements made and

10:38

10:38

10:38

1 some of the oral evidence we heard, that Assistant
2 Commissioner Clancy did not herself deliberately target
3 Sergeant Hughes by reason of a protected disclosure.
4 But that we still maintained the claim that the human
5 resource department of An Garda Síochána, over which 10:39
6 she presided, failed to establish whether his
7 work-related stress and psychiatric condition was due
8 to an injury on duty, as it should have done. And it
9 is still respectfully submitted that there's ample
10 evidence that this was the case. 10:39

11
12 So, in other words, we were quite clear about what the
13 allegation that was being withdrawn against Assistant
14 Commissioner Clancy was and the reason for that. And I
15 hope the Tribunal will accept that that was done in 10:40
16 entirely good faith. It wasn't as though we were
17 saying that the allegation is completely unfounded in
18 the first place. I mean, really withdrawal very much
19 arose from what had transpired at the Tribunal and what
20 Sergeant Hughes had seen in the evidence that the 10:40
21 Tribunal had gathered, including, as we know, an awful
22 lot of information that he hadn't seen before, you
23 know, so otherwise that only came to light in the
24 course of the Tribunal's investigation.

25 10:40
26 And we know in respect of Assistant Commissioner Clancy
27 that it became apparent from that information that she
28 experienced very considerable difficulty getting
29 reports from local management and indeed, this

1 continued to be the case, perhaps even more so, for
2 Assistant Commissioner Fanning. And at one stage with
3 him, as you may remember, Chairman, it appeared to be
4 that local management in respect of Sergeant Hughes
5 just stopped communicating with him in response to his 10:41
6 requests.

7
8 You know I don't mean overcomplicate the issue, but we
9 are looking at that from the point of view of Sergeant
10 Hughes and that's still a failing of the human resource 10:41
11 department not to sort that out, but nonetheless, if
12 there's any link to a protected disclosure it's on
13 behalf of the local management who wouldn't do the
14 necessary investigations and prepare the necessary
15 reports as they were requested to do on so many 10:41
16 occasions, both by Assistant Commissioner Clancy and by
17 Assistant Commissioner Fanning.

18
19 It is important to highlight in that respect that much
20 of the information before the Tribunal wasn't actually 10:41
21 with Sergeant Hughes before the Tribunal managed to
22 gather all of it. And we know there's many of examples
23 of that, where he didn't know about documents, about
24 letters being sent to different people, about him, but
25 he didn't know about them until many years later. 10:42
26 First of all in his court case, he saw some of them in
27 his High Court case, but then in other situations the
28 first time he saw them was almost arriving in the
29 Tribunal, and certainly from our point of view he was

1 very facilitative and understanding when we gave him
2 legal advice seeing those as new lawyers acting in the
3 Tribunal and we tried to do, I suppose, effectively the
4 right thing, where possible, Judge, in respect of
5 withdrawing allegations.

10:42

6
7 I could probably point out, although I see my friend is
8 here for Fintan Fanning, but that we would be willing,
9 which we hadn't had the opportunity, I suppose, to do
10 before, just the way things fell during the hearing of
11 the Tribunal, that we would be prepared, or Sergeant
12 Hughes would be prepared and had intended to treat
13 Fintan Fanning in the same way he had Assistant
14 Commissioner Clancy; as in, accept that he had not
15 formally -- if the Tribunal wants to know it, and just
16 to assist my friend Mr. McGarry, because I know they
17 asked for this -- would we accept that he had not
18 targeted, not deliberately targeted Sergeant Hughes by
19 reason of a protected disclosure, as had been
20 originally -- and where Sergeant Hughes is happy do
21 that. Just you may remember, Judge, it didn't fall in
22 the more formal way that it fell with Assistant
23 Commissioner Clancy, but I hope that's in aid of my
24 friend and that might in some ways address the
25 submissions of Assistant Commissioner Fanning or some
26 of the submissions of Assistant Commissioner Fanning.

10:43

10:43

10:43

10:44

27
28 we understand he had the same difficulties that
29 Assistant Commissioner Clancy had with getting the

1 information he needed.

2
3 I'll make a couple more points about his submissions,
4 Judge, at the very end, or Chairman, but just that you
5 are aware of that. 10:44

6
7 I think, Judge, I have just been highlighting that a
8 lot of the information wasn't aware before -- or
9 Sergeant Hughes wasn't aware of a lot of the
10 information until the Tribunal did its investigation. 10:44

11 But I also wanted to, I suppose, highlight that there
12 does appear to be -- I mean, in making those types of
13 submissions, there does appear to be a complete lack of
14 understanding - and this is on behalf of the Guards -
15 that, you know, at the material times when Sergeant 10:45

16 Hughes was looking at a lot of these events, I mean
17 I've a list of factors that just don't seem to feature
18 in that type of analysis to say, well, you know, he was
19 making these allegations willy-nilly, he probably had
20 PTSD. I mean, I think that's accepted. He was in -- 10:45

21 and we didn't have much evidence about this, but I know
22 the evidence was given in brief, he was in really quite
23 dire circumstances financially and had to re-mortgage
24 his house. He was involved in High Court, long-running
25 High Court litigation himself against An Garda 10:45

26 Síochána, which was, it seems was, I suppose as they
27 say, fought to the gates of the court or to the doors
28 of the court, when the case ended up settling in his
29 favour. And of course there was no admission of guilt

1 or apology to him in respect of that. And also I
2 suppose, quite fundamentally, I mean he was the one who
3 was accused of knowing about a real and immediate
4 threat to the life - this is in the context of the
5 disciplinary investigation - knowing about a real and 10:46
6 immediate threat to the life of Ms. Saulite and that
7 the claim was, or the allegation was, he'd failed in
8 his duty to take measures that might have prevented her
9 death. And we know from the evidence that that really
10 affected him, that allegation hanging over him really 10:46
11 affected him in a serious way. And he was somebody who
12 had been a guard for a long time and took his, I
13 suppose, position very seriously and originally, you
14 know, was getting on well in his job and seemed to
15 enjoy his work, and then he had this really serious 10:47
16 allegation made against him.

17
18 Also, Judge, in the context of when some of these, I
19 suppose, allegations were being formulated in his mind,
20 you may remember one of the things that came up again 10:47
21 and again was that he wasn't receiving feedback in
22 respect of a lot of the matters. So say, for example,
23 although we haven't really gone into it in too much
24 detail, there was The Sun article. You may remember
25 there was an investigation I think by Inspector Denedy 10:47
26 I think it was - they never told him anything, they
27 never gave him any result of it. We know that he never
28 received -- he obviously knew that there was a
29 fact-finding investigation, he never received either of

1 Inspector Mangan's report, never really received any
2 update in respect of that, never knew that Inspector
3 Mangan -- I know this is our submission, but that
4 Inspector Mangan had effectively exonerated him in
5 respect of the victim impact statement. 10:48

6
7 So, you know, if you look at it from his point of view
8 in any sense you might understand why he felt, he may
9 have felt isolated and may have made some allegations.
10 But I suppose the most important point in a way, 10:48
11 Chairman, is that he did remain - how can I put it -
12 quite steadfast in respect of all of his, what we might
13 call his main allegations or the main issues in the
14 case. I mean, in relation to the disciplinary
15 investigation, in relation to the confidential 10:49
16 recipient report, in relation to The Star newspaper, in
17 relation to most of those matters he's been absolutely
18 steadfast and hasn't in any way withdrawn any of them
19 or indicated that he would do so and has been quite, I
20 suppose, consistent in relation to those allegations in 10:49
21 his evidence and was very clear in his evidence to the
22 Tribunal, even at this juncture, so many years later,
23 about those allegations. The injury on duty as well,
24 Judge, The Star article investigation, the failure to
25 refer to GSOC, all of those things, he's effectively 10:50
26 maintained throughout this whole process but also
27 before this whole process began in his complaints to a
28 range of different people, including the Minister and
29 the AG and others.

1
2 Moving on to the submissions, that was a general point
3 at the beginning of An Garda Síochána's submissions but
4 moving on from that, there's a submission about the
5 standard of proof. And I mean we say that the standard 10:50
6 of proof is undoubtedly the balance of probabilities.
7 An Garda Síochána's submissions, it is very
8 respectfully submitted, seem to come perilously close
9 to suggesting that there should be an intermediate
10 standard between the civil standard and the criminal 10:51
11 standard applied in relation to allegations of
12 targeting and discrediting. And we would just say, I
13 mean there is quite a bit of case law about this and
14 what's absolutely clear, I think, is that there is no
15 intermediate standard. And I mean even if there were 10:51
16 to be one, as has been suggested in various cases along
17 the line that there should be, for example, in mental
18 health cases and things like that, even if there were
19 to be, it would have to be debatable whether that sort
20 of higher intermediate standard would apply to a 10:51
21 finding by the Tribunal effectively that an employee
22 has been targeted and discredited by an employer,
23 whether that would be one of the areas that there would
24 be the need for such an intermediate standard. But we
25 don't know need to address because of course the 10:52
26 Supreme Court on a number of occasions, but I suppose
27 most significantly in the Ansbacher case, in Banco
28 Ambrosiano v. Ansbacher, Henchy J, and we're in an
29 unusual position, Judge, I can't give you the case.

1 CHAIRMAN: That is all right.

2 MR. O'DWYER: But I can read an extract. It is very
3 short.

4 CHAIRMAN: It is an interesting -- I mean, people have
5 been wrestling with trying to describe this, 10:52
6 Mr. O'Dwyer.

7 MR. O'DWYER: Yes.

8 CHAIRMAN: Everybody agrees that the criminal standard
9 is appropriate for criminal cases, only criminal cases,
10 and that the civil standards, and people wrestle then 10:53
11 with the difficulty of trying to describe them without
12 saying there's a graduated system. I was asked in the
13 Court of Criminal Appeal many years ago and
14 anticipating this I said, well, if I turned round and
15 walked out of this room, I said, this court, and if my 10:53
16 gown knocked over somebody's glass and if that became
17 an issue, was I careless, or whatever it was, that'd be
18 one thing, but if somebody suggested I had stolen
19 something from a person's handbag on the way out of the
20 room, the facts call for an approach, the facts 10:53
21 determine a certain approach. It's not that the
22 standard is the same. Did you scrape my car
23 accidentally as you parked this morning? You know what
24 I mean. Or, did you deliberately damage my car? I
25 mean, standard of proof, the same; approach, calls 10:54
26 for -- I mean, what I am trying to say is that the
27 issue, the issue determines an approach to some extent,
28 although it is clear which is more probable than not,
29 but to decide which is more probable than not is more

1 difficult, in the allegation that you deliberately
2 strike my car as compared with that you inadvertently
3 bumped into it.

4 MR. O' DWYER: Yes, Judge.

5 CHAIRMAN: That is my understanding of the situation in 10:54
6 practical terms. I'll be accused of too practical and
7 pragmatic a view, but that's the view I take of it and
8 I think we tried to express that in the previous report
9 that we put.

10 MR. O' DWYER: Yes, Judge. 10:55

11 CHAIRMAN: So I have the point, I am aware of the point
12 and the essential point is you're making a very serious
13 allegation against somebody, the Tribunal is going to
14 be, it's going to approach it with respect to the level
15 of seriousness of the allegation. And I don't think 10:55
16 anybody would quarrel with that, I think. But if you
17 want to disagree, that's my general view.

18 MR. O' DWYER: Oh no.

19 CHAIRMAN: For what it is worth, and we said that in
20 the previous -- or we tried to say that, but I can tell 10:55
21 you this: The difficulty of defining, it's a matter of
22 semantics here, there's a difficulty of defining what
23 you say without saying I have a different standard of
24 proof.

25 MR. O' DWYER: Yes, Judge. 10:55

26 CHAIRMAN: So that's the difficulty.

27 MR. O' DWYER: That's really our --

28 CHAIRMAN: So everybody says, oh, the standard of proof
29 is absolutely the same and then they try to explain how

1 it's more difficult to decide whether I stole the
2 woman's, the person's handbag or I knocked over the
3 glass. wrestle with the difficulty.

4 MR. O'DWYER: Absolutely. And, Judge, that's really
5 our point. We do, and we did look at, you know, some 10:56
6 other cases and decisions of the Supreme Court. Tara
7 Mines, there was quite a good statement, but it really
8 just reflects what you've said in that case --

9 CHAIRMAN: I mean if I said anything wrong, that's the
10 approach that seems to me and, frankly, I think, may I 10:56
11 say, for what it's worth, we're talking about matters
12 at a level of seriousness, but I don't think that the
13 report of the Tribunal will have to describe any
14 difficulty about issues of proof. I mean, we know what
15 has to be proved and it is a matter of logic and 10:57
16 judgment to determine whether it has been established
17 and I think, frankly, I'd be very surprised -- I don't
18 anticipate having a chapter on the standard of proof.

19
20 I have given you my view, that is my provisional view 10:57
21 obviously, but if, on reflection, you want to add
22 anything to that to disagree with that please let me
23 know, because I am letting you know what my view is and
24 for the Garda team as well. That is the general
25 approach. It was explained to some extent at least in 10:57
26 the Keogh Report. So we said what the law is and then
27 we applied the law.

28 MR. O'DWYER: I think that reflects what I was going to
29 submit. Only finally --

1 CHAIRMAN: Feel completely free to amplify,
2 distinguish, disagree or whatever it is, but that is
3 the approach that I think is called for.

4 MR. O' DWYER: I suppose what we were attempting to do
5 is point out that there did seem to be a suggestion 10:58
6 certainly again that one might apply a different
7 somewhat higher standard.

8 CHAIRMAN: Yes, if it's medical negligence and it was
9 alleged negligence of a medical man --

10 MR. O' DWYER: Yes. 10:58

11 CHAIRMAN: -- as was the case in all those cases, then
12 you had to be jolly careful to make sure that the case
13 was properly proved. Because a blot on escutcheon of a
14 medical man could prove to be so disastrous. We have
15 moved away from that though. 10:58

16 MR. O' DWYER: Yes. I might only refer to one very
17 recent, it's only because it is so recent, and it is
18 from one of your successors on the Court of Appeal in a
19 case called GV v. Mental Health Tribunal. And in that
20 Mr. Justice McCarthy -- that was about the Mental 10:59
21 Health Tribunal and whether there should be a
22 different, an intermediate standard of proof to apply
23 there. I will just read the quote, Judge, but I think
24 it reflects what you said but it is in somewhat
25 trenchant terms. He said at paragraph 27: 10:59
26

27 "There's no authority for the approach taken by
28 O'Neill J that common law at this standard is unknown.
29 The ordinary standard of proof in civil matters, namely

1 proof on the balance of probabilities, applies.
2 There's no reason to suppose that because of the
3 importance of the issues a different standard applies."

4
5 And I think that's put in a pretty pithy way. But 10:59
6 that's our -- I mean, we are making that submission in
7 reply to something we picked up from their submissions.

8 CHAIRMAN: Okay.

9 MR. O'DWYER: They may not be making that, but that's
10 certainly what it seemed to suggest to us. 11:00

11
12 Judge, moving on to the protected disclosures
13 themselves, we know it's not disputed and couldn't be
14 disputed that a protected disclosure took place to the
15 confidential recipient in September of 2008. We know 11:00
16 that. But we also know that the Tribunal accepted on a
17 preliminary basis that a protected disclosure may have
18 been made by Sergeant Hughes to Superintendent Curran
19 on the 23rd April. And I'll move on to deal with the
20 effect perhaps this Baranya decision may have on that, 11:00
21 but before I do I wanted to mention again the
22 disclosure to Inspector Cryan. And you did find as
23 part, in the preliminary investigation, you may
24 remember --

25 CHAIRMAN: That's right. We said that wasn't a 11:01
26 protected disclosure.

27 MR. O'DWYER: Yes, Judge. And you said that it was
28 more in the way of a -- it was at most I think a -- I
29 will find it now in a moment, but certainly that it

1 didn't disclose wrongdoing on behalf of the employer.
2 CHAIRMAN: That's right.
3 MR. O'DWYER: And, Judge, absolutely of course you
4 would have relied upon Baranya because it was
5 practically, I think there is only one High Court case, 11:01
6 or there was only one other High Court case on
7 protected disclosures that appears anywhere in anyone's
8 submissions. A High Court case now.
9 CHAIRMAN: well, we cited it as part of the law.
10 MR. O'DWYER: Yes, you cited it. 11:01
11 CHAIRMAN: Yes.
12 MR. O'DWYER: Now, obviously that same Baranya decision
13 was overturned by the Supreme Court --
14 CHAIRMAN: Yes.
15 MR. O'DWYER: -- so that has to affect, I suppose, how 11:02
16 the court -- I mean it is unfortunate the timing, that
17 it came about a month later, more than a month later, I
18 mean the court may or may not -- or the Tribunal may or
19 may not decide that it's particularly relevant, but we
20 would certainly submit that it's relevant in respect of 11:02
21 what we might call the Curran disclosure, but also in
22 respect of the Cryan disclosure. Because, if you look
23 at what -- and you had said about that, that it was at
24 most an expression of concern. And I suppose, I mean
25 without -- I am not going to open it at length, I mean 11:02
26 I can't, because I mean you may have it in front of you
27 but nobody else does, but I mean in Baranya it does
28 seem just to very briefly -- I mean, I know the Chair
29 will probably be familiar with the facts in it, but you

1 may remember it was that the applicant, who I think was
2 a Hungarian man, who was working in a meat plant --
3 CHAIRMAN: Yes.
4 MR. O'DWYER: -- asked, made a request, an oral request
5 to be moved, because he said that the work scoring big 11:03
6 heavy carcasses was affecting his, well was --
7 CHAIRMAN: Hurting his back, wasn't it?
8 MR. O'DWYER: was causing him pain. Yes, exactly, was
9 hurting his back.
10 CHAIRMAN: Sorry, I forget exactly. What was it? 11:03
11 Causing him pain?
12 MR. O'DWYER: Yes, it was causing him pain.
13 CHAIRMAN: Causing him pain, I am sorry, yes.
14 MR. O'DWYER: But the pain was in his back. And he
15 claimed that that was a protected disclosure. Now he 11:03
16 also said he said the work was causing him pain and his
17 employer absolutely denied that. So otherwise that
18 extra element, the employer said, Rosderra Meat said,
19 wasn't there. So otherwise he just said, I want to
20 move, this work is causing me pain -- or, sorry, I have 11:04
21 got a pain, you know I have been caused pain by this.
22 And sorry the respondent's position was, Rosderra
23 Meat's position was that he had made a complaint that
24 he was in pain but he had not connected this directly
25 to -- So, he just simply said that he was in pain and 11:04
26 he wanted to move jobs. And the respondent claimed in
27 that case, and this was effectively -- I mean, I know
28 it is a slightly convoluted process, but it was
29 effectively upheld in the High Court by Ms. Justice

1 O'Regan, the decision of the Labour Court in respect of
2 this, but it was claimed by the respondent, and
3 accepted, that no protected disclosure had taken place
4 as no wrongdoing on the part of the employer had been
5 alleged in that disclosure to the respondent. And the 11:05
6 WRC, the Labour Court, indeed the High Court agreed
7 with the respondent on that; that no protected
8 disclosure had taken place. And I think both the
9 Labour Court and the WRC said that that was more in the
10 nature of a grievance, that is what they actually 11:05
11 found, rather than a protected disclosure. And Judge
12 O'Regan decided no error of law had taken place or had
13 been made by the Labour Court. And in finding that no
14 relevant wrongdoing had been disclosed, on appeal the
15 Supreme Court considered whether that -- 11:05
16 CHAIRMAN: We have read that.
17 MR. O'DWYER: Yes.
18 CHAIRMAN: Can you tell me, Mr. O'Dwyer --
19 MR. O'DWYER: Yes.
20 CHAIRMAN: -- does the Supreme Court's judgment affect 11:06
21 the Tribunal's decision? Because the next thing is:
22 If so, in what way? I mean, what is it about that
23 judgment that affects the decision that the Tribunal
24 made?
25 MR. O'DWYER: well, we say that both disclosures -- so 11:06
26 the one you didn't accept --
27 CHAIRMAN: Let's say the Inspector Cryan issue, yes.
28 Let's say, let's take that one and just concentrate on
29 that one for a moment.

1 MR. O' DWYER: okay.

2 CHAIRMAN: The same rule, the same point will apply, I
3 am sure, to the Curran one, but let's take the Cryan
4 one.

5 MR. O' DWYER: But there is a difference obviously 11:06
6 between those that I mean An Garda Síochána are saying
7 in general terms that the Curran, you know although the
8 Tribunal had accepted it on a preliminary basis, that
9 in fact he didn't -- you know, that that was on the
10 basis of what Sergeant Hughes had said rather than -- 11:06
11 CHAIRMAN: That's right, but we had said, taking the
12 approach that the Tribunal took, and the preliminary
13 hearing, was to say, assuming, taking Sergeant Hughes's
14 case alone, in other words taking it at its height
15 would be the way you would express it in a direction 11:07
16 application in court, but taking it alone, what were
17 the circumstances? And he had said, his first one, as
18 he had explained in his interview, was the Mangan
19 report. And the Tribunal said there is nothing in the
20 Mangan report that comes within the definition of a 11:07
21 protected disclosure. Simply nothing. Not a word in
22 it. That was the Tribunal -- rightly or wrongly that's
23 what the Tribunal decided.

24 MR. O' DWYER: Despite my valiant attempts was I think
25 how the Tribunal put it. 11:07

26 CHAIRMAN: Despite your valiant attempts. But that's
27 how we -- Okay, so take the Mangan -- sorry, take the
28 Inspector Cryan/Sergeant Hughes encounter, and we have
29 Inspector Cryan's note about that. So in what way does

1 the Baranya case affect the Tribunal's decision?

2 Because that is really the crunch question.

3 MR. O'DWYER: Yes, Judge. Well just to look, you may
4 remember Inspector Cryan gave evidence, and I suppose
5 this maybe lent it some prominence, that perhaps we
6 had -- I mean even in the preliminary hearing, to be
7 fair, I don't think I made any particular submission
8 about that, about Cryan's conversation or any --

11:08

9 certainly no strong submission about Cryan, and indeed
10 in the decision of the Tribunal, it isn't really --
11 it's put in with the verbal disclosure shall we say,
12 the alleged disclosure, but it didn't dealt with
13 separately as such.

11:08

14 CHAIRMAN: Absolutely.

15 MR. O'DWYER: And I would say that I suppose that our
16 focus was drawn to this because in the oral evidence,
17 just as these things go, it became more significant and
18 there was quite a lot of talk about it, you may
19 remember, with Inspector Cryan. And I suppose what
20 was --

11:09

11:09

21 CHAIRMAN: Okay.

22 MR. O'DWYER: I mean we learned that Inspector Cryan
23 had written -- I mean we knew I suppose, but it came to
24 be the focus of attention that Inspector Cryan had
25 actually written this down. He had written down what
26 Sergeant Hughes had told him and that he was freely
27 accepting, that Inspector Cryan was accepting that he
28 had told him about, and I'll use his -- at Day 166,
29 page 105, he says, this is Inspector Cryan:

11:09

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"21st was a Tuesday and he, Sergeant Hughes, said they --"

CHAIRMAN: You can take it I know that.

MR. O'DWYER: Yes.

11:10

CHAIRMAN: I know what the transcript says.

MR. O'DWYER: Yes. And then he went on to say, in respect of the confidential recipient --

CHAIRMAN: I am sorry. If there's some bit you want to refer to, Mr. O'Dwyer, refer to it. Don't mind my impatience.

11:10

MR. O'DWYER: Yes. I suppose it is the fact that Inspector Cryan was making it very clear on a number of occasions, including in his oral evidence, that Sergeant Hughes that raised a failure to coordinate, and that's how he described it, that's how --

11:10

CHAIRMAN: He said the same people should have investigated all three. That's what he said.

MR. O'DWYER: Yes. And he also said the investigation should have been coordinated. That's how Inspector Cryan described what he said.

11:10

CHAIRMAN: Okay.

MR. O'DWYER: So that being so, I mean that would appear to, I mean that's really the crux of the --

CHAIRMAN: Here's the question: where in the Supreme Court judgment -- what part of the Supreme Court judgment undermines that?

11:11

MR. O'DWYER: Well the Supreme Court judgment, I mean what you may -- I mean the Tribunal itself referred to

1 the fact that there isn't, that even if -- so if he did
2 mention that that it isn't necessarily, I mean it isn't
3 clearly an allegation of wrongdoing, and we would
4 simply say that if you look at the Baranya decision
5 what was actually said in that --

11:11

6 CHAIRMAN: The question is: what bit of the Baranya
7 judgment are you relying on?

8 MR. O'DWYER: well, Baranya seems --

9 CHAIRMAN: I mean I know what the case -- sorry,
10 Mr. O'Dwyer, I want you to point to a specific line or
11 sentence or statement in Baranya that I can say we'll
12 have to reconsider this because of that. In general
13 terms, if you are just saying in general terms, Baranya
14 introduces a looser or appears to suggest a looser
15 notion of protected disclosure, okay, I mean I can live
16 with that.

11:11

11:12

17 MR. O'DWYER: Yes. And we are certainly saying that,
18 Judge. But perhaps if I can -- I mean I have a couple
19 of paragraphs within it.

20 CHAIRMAN: Thanks, please.

11:12

21 MR. O'DWYER: If you don't mind me reading them out.

22 CHAIRMAN: Certainly or even tell me what they are.
23 Tell me what number they are.

24 MR. O'DWYER: So, I mean we know what the disclosure
25 that the gentleman made, that Mr. Baranya made, and
26 what Judge Hogan said from paragraph 40 onwards, so on
27 paragraph 40 he said:

11:12

28
29 "Taken in isolation it might be said that such a

1 communication itself did not amount to a protected
2 disclosure because it did not allege wrongdoing in the
3 sense envisaged in section 5(3)(d) of the 2014 Act."

4
5 Now that's the same finding that the Tribunal seems to 11:13
6 have made in respect of this disclosure in the
7 preliminary finding, as in, you referred to this not -
8 this is Sergeant Hughes's disclosure - did not allege
9 wrongdoing. I mean that's what's said in the
10 preliminary decision. Now admittedly, and I do accept 11:13
11 primarily possibly through our fault, it hadn't really
12 been highlighted as such. And this is part of a
13 decision, about three different conversations, but
14 nonetheless that's what the Tribunal seems to have
15 found. 11:13

16
17 And then Judge Hogan goes on to say, or Mr. Justice
18 Hogan goes on to say:

19
20 "An employee might, for example, be in pain for any 11:13
21 number of reasons which were unconnected with workplace
22 health or safety. A complaint of that particular kind
23 would accordingly not amount to a protected disclosure.

24
25 Yet these words cannot be taken purely in isolation --" 11:14

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27 And this, I suppose, is the point.

28
29 "-- as there was the context of the complaints --"

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And this is where the Supreme Court seems to have differed, very much differed from Ms. Justice O'Regan.

-- as there was the context of complaints which had been made by Mr. Baranya in the months which preceded his dismissal. Accordingly, on one view of the evidence --"

11:14

This is, sorry, paragraph 41.

11:14

-- it might be said that a complaint that he was in pain could only realistically be linked to (an implied) complaint in respect of workplace health and safety, although this would ultimately be a matter for the Labour Court to assess. To my mind no precise form of words is required for this purpose: It would suffice that it was clear from the general context in which the communication had been made that a complaint in relation to workplace health or safety had been made by the worker concerned, either expressly or by necessary implication and that it tended to show that health or safety had been or would be endangered."

CHAIRMAN: So the implications, you say the inferences or the implications -- the inferences to be drawn or the implications contained are sufficient, you don't stop simply at the words, you say, well, what are the implications of that or what might be.

11:15

MR. O'DWYER: Exactly.

1 CHAIRMAN: I have that point. Okay. Let me ask you
2 something else, Mr. O'Dwyer.
3 MR. O'DWYER: Of course.
4 CHAIRMAN: Assuming the Tribunal said yes, Mr. O'Dwyer
5 is right about that in the Baranya case and that the 11:15
6 inference is that there is at least a possible
7 inference of a protected disclosure, let's assume
8 that --
9 MR. O'DWYER: Yes.
10 CHAIRMAN: -- how do you say this Tribunal should deal 11:15
11 with that now?
12 MR. O'DWYER: well, Judge, we thought about this and
13 obviously it's not entirely -- you know, it's just the
14 way this happened to fall that this decision came out
15 after. So, obviously the Tribunal can't be faulted for 11:15
16 relying on a High Court decision that was subsequently
17 overturned, but that does have an effect --
18 CHAIRMAN: Sorry, I have no problem with any of that,
19 Mr. O'Dwyer. Tell me, what do we need to do?
20 MR. O'DWYER: well, Judge, I think you, the Tribunal -- 11:16
21 CHAIRMAN: I'm sorry, I don't mean to be blunt. But it
22 is an obvious question. Assuming we agree with you --
23 MR. O'DWYER: I accept that.
24 CHAIRMAN: -- assuming we accept that proposition, and
25 there's another point I want to ask you about 11:16
26 context --
27 MR. O'DWYER: Yes.
28 CHAIRMAN: -- but assuming we agree with you, what
29 happens? what do we do?

1 MR. O'DWYER: well, in this particular, I mean there's
2 no question that there would need to be any extra
3 evidence, because we heard all of the evidence about
4 this anyway. I mean that was part of the point, I
5 suppose, with Inspector Cryan. That's why he was being 11:16
6 asked questions about this particular time.
7 CHAIRMAN: Okay.
8 MR. O'DWYER: And what happened and indeed, if you look
9 at the press release and other things. There must have
10 been a reason we were dealing with -- we heard all of 11:16
11 the evidence about these. I am simply, I am suggesting
12 and I certainly think it would be open to the Tribunal,
13 now I'm not -- I mean obviously --
14 CHAIRMAN: No, tell me, what do you suggest we need to
15 do in order to -- 11:17
16 MR. O'DWYER: I suggest that the Tribunal can in its
17 report, the report you're going to do at the end, could
18 accept that that was a protected disclosure.
19 CHAIRMAN: And so, let's assume that that's right.
20 MR. O'DWYER: That pushes -- I mean I suppose the key 11:17
21 point, Judge, is that pushes the time back by a month.
22 It's the 21st November, so it's two days after the
23 murder.
24 CHAIRMAN: Absolutely.
25 MR. O'DWYER: Yes. 11:17
26 CHAIRMAN: So that bring in the --
27 MR. O'DWYER: That would bring in everything.
28 CHAIRMAN: That would bring in everything.
29 MR. O'DWYER: Yes. So it would be a really

1 important --

2 CHAIRMAN: But wouldn't it be necessary to show a
3 connection between that conversation and Assistant
4 Commissioner McHugh's decision to institute the
5 fact-find investigation? 11:17

6 MR. O'DWYER: Yes. I mean that would -- I mean if we
7 were -- if that was one of the things or I mean you
8 could say the same thing about the press release. You
9 know, would there have to be a link? I mean, if we
10 pushed it back to then, would the press release -- 11:18

11 CHAIRMAN: But you have to, we have to have a
12 connection between the --

13 MR. O'DWYER: Yes.

14 CHAIRMAN: I mean our jurisdiction is defined, as I
15 understand -- sorry, as we understand it, the 11:18
16 jurisdiction is defined by a connection between
17 whistleblowing and victimisation, by which I mean
18 targeting or discrediting.

19 MR. O'DWYER: Yes, Judge.

20 CHAIRMAN: So you have to have two things: You have to 11:18
21 have whistleblowing, you have to have a protected
22 disclosure and then you have to have a connection
23 between that and --

24 MR. O'DWYER: If you were to accept that that was a
25 protected disclosure -- 11:18

26 CHAIRMAN: Yes, okay.

27 MR. O'DWYER: -- then I mean it does, I mean it
28 would -- we have pointed to several events or several
29 things that happened, including first of all the press

1 release, the fact-finding investigations and what
2 happened with those. Now we have referred to them --
3 CHAIRMAN: Where would we find the connection?
4 MR. O'DWYER: -- initially as scapegoating.
5 CHAIRMAN: Yes, I understand. 11:19
6 MR. O'DWYER: which is a slightly different thing. But
7 yet, I mean the Tribunal would have to, I mean I know
8 has to take the second step to at least indicate that
9 you may find, and that would be an important finding,
10 that there was an -- 11:19
11 CHAIRMAN: Let me stop you for a second, Mr. O'Dwyer.
12 MR. O'DWYER: Yes.
13 CHAIRMAN: Let me stop you for a second.
14 MR. O'DWYER: Yes.
15 CHAIRMAN: You may want to come back to this, you may 11:19
16 want to talk to Mr. Lynn, your colleagues, I
17 understand.
18 MR. O'DWYER: Yes.
19 CHAIRMAN: My question is this: Okay, assuming you say
20 we don't need to have new evidence -- 11:19
21 MR. O'DWYER: Yes.
22 CHAIRMAN: -- that's your position, we don't need new
23 evidence --
24 MR. O'DWYER: Yes.
25 CHAIRMAN: -- we can proceed on the basis of the 11:19
26 Baranya case and the emphasis in Baranya on inferences
27 to be drawn from the statements.
28 MR. O'DWYER: Yes.
29 CHAIRMAN: That's your point.

1 MR. O' DWYER: Yes.

2 CHAIRMAN: And my question is, okay, assuming that were
3 to be the case and we don't have any more evidence and
4 we look at this, is there any evidence to suggest to a
5 connection between that revelation, that conversation 11:20
6 with Inspector Cryan and the initiation of the
7 fact-finding, or indeed the press release?
8 MR. O' DWYER: Yes.

9 CHAIRMAN: Now you don't have to answer that at this
10 moment, you can consider that and we'll leave that. 11:20
11 MR. O' DWYER: Okay.

12 CHAIRMAN: But I have another question for you about
13 context.

14 MR. O' DWYER: Yes.

15 CHAIRMAN: Inspector Cryan described a context in which 11:20
16 Sergeant Hughes was extremely upset and was concerned
17 about himself and was concerned as he records, as he
18 records, about his own responsibility. And he advised
19 him to get a doctor and so on.

20 MR. O' DWYER: Yes. 11:21

21 CHAIRMAN: Is that relevant as a matter of
22 consideration in a -- you say context, and I am
23 following your point, is that relevant context on the
24 question of protected disclosure?

25 MR. O' DWYER: Yes. And what would I think be relevant 11:21
26 context too is that Inspector Cryan, you may remember,
27 described Inspector Cryan's view that he was, I think,
28 blowing off steam.

29 CHAIRMAN: Venting.

1 MR. O' DWYER: So that's context as well.

2 CHAIRMAN: Yes.

3 MR. O' DWYER: I mean, of course I'd have to accept, in
4 a strange way that creates a difficulty for us, not
5 that the Tribunal would say, well -- I mean the 11:21
6 Tribunal may well find that was not the right view to
7 take, you know, that that was an unfair assessment of
8 what he was saying or just, you know, that wasn't
9 really --

10 CHAIRMAN: Okay. 11:22

11 MR. O' DWYER: No, but I suppose, I mean I want to try
12 and answer your question --

13 CHAIRMAN: I wanted to raise the question with you so
14 that you know that that's an issue?

15 MR. O' DWYER: I suppose the flip side of that, I mean 11:22
16 being frank, is: I mean, if Inspector Cryan sort of
17 effectively dismissed these things then I suppose it
18 makes it more difficult for us to say that that
19 disclosure would therefore have gone, you know would
20 have gone to other people who may have -- yeah, I mean 11:22
21 that that --

22 CHAIRMAN: Okay.

23 MR. O' DWYER: So both aspects of context apply.

24 CHAIRMAN: It comes in both senses, you have to look at
25 the thing. 11:22

26 MR. O' DWYER: Yes.

27 CHAIRMAN: Okay. Thank you very much. So that's the
28 question of Baranya.

29 MR. O' DWYER: Yes. And, Chairman, to finish in respect

1 of the protected disclosures, I mean the submissions of
2 An Garda Síochána, they do, you know they also make a
3 number of submissions about the disclosure to
4 Superintendent Curran, and we'd say Baranya does have a
5 bearing on that as well because there is an issue 11:23
6 about, for instance, they say, they criticise at
7 paragraph 39 in their --

8 CHAIRMAN: Yes.

9 MR. O'DWYER: -- they say that, they criticise that the
10 alleged protected disclosures were made orally and not 11:23
11 in writing. And again, I mean clearly Baranya, that
12 disclosure was made orally to his employer, so really
13 there's no requirement. And what they try to do -- I
14 mean what they are trying to do, I think, in the
15 submissions is try to say, well, he didn't mention -- 11:24
16 you know, even if you take his case at its height -- or
17 fairly much at its height, he didn't mention, as he
18 originally said he did, he didn't mention -- sorry, I
19 am trying to remember how he termed it.

20 CHAIRMAN: Take your time. 11:24

21 MR. O'DWYER: He didn't mention -- well, it wasn't in
22 writing and he didn't mention the systems failure.

23 CHAIRMAN: where is that?

24 MR. O'DWYER: Paragraph 39.

25 CHAIRMAN: Oh 39, sorry, I misheard you. 11:24

26 MR. O'DWYER: And Baranya would certainly make clear
27 that there's no requirement at all. And also that,
28 even if, and this leads on to our next point about the
29 current disclosures, that even if Sergeant Hughes only

1 outlined, and this is where Superintendent Curran's
2 evidence to the Tribunal is very important, even if he
3 outlined -- you may remember there was a dispute about
4 the four, about whether in that conversation they
5 had -- 11:25

6 CHAIRMAN: Oh, yes.

7 MR. O'DWYER: -- whether he mentioned the various
8 investigations, and it turned out, and there was -- in
9 cross-examination he was asked about -- originally he
10 said in his evidence, no, no, he didn't mention 11:25
11 anything about John Hennessy or these other issues, and
12 you may remember his note only mentioned a couple -- I
13 mean what seems to have happened was that he took a
14 very short note, I think Sergeant Hughes said on the
15 back of an envelope, he said I did take a note on a 11:25
16 piece of paper or whatever, but it was a rough note.

17 CHAIRMAN: Yes.

18 MR. O'DWYER: But that was converted later on into a
19 slightly more --

20 CHAIRMAN: That's right. 11:25

21 MR. O'DWYER: -- I mean a more substantial report. But
22 he didn't mention, in that report he didn't mention
23 these various --

24 CHAIRMAN: That's right.

25 MR. O'DWYER: -- mentioned Sergeant Hughes. 11:26

26 CHAIRMAN: He mentioned the four items.

27 MR. O'DWYER: No, but that's what, in cross-examination
28 he accepted that he had previously said that Sergeant
29 Hughes had mentioned the four items and they don't

1 appear.

2 CHAIRMAN: And that was in his answers to the
3 question --

4 MR. O'DWYER: Confidential recipient.

5 CHAIRMAN: Can you refer me to the reference that 11:26
6 you're relying on there?

7 MR. O'DWYER: I can. Yes, Chairman.

8 CHAIRMAN: I mean, I am recalling Mr. Lynn's
9 cross-examination, if I am right --

10 MR. O'DWYER: That's right, yes. 11:26

11 CHAIRMAN: -- and Mr. Lynn suggested that maybe the
12 reason he didn't record these things was because they
13 weren't within his bailiwick particularly, or rather as
14 he saw it.

15 MR. O'DWYER: Yes. 11:26

16 CHAIRMAN: I hope I am not wrong, but I think that's
17 essentially the point.

18 MR. O'DWYER: Yes. Well the exchanges --

19 CHAIRMAN: But you say that yes, there was, that Chief
20 Superintendent Curran did oscillate between one view 11:27
21 and another on the thing and he made a reference, and
22 you say that's referred to where in the transcript?

23 MR. O'DWYER: Day 107, question 35 -- sorry, Day 170.

24 CHAIRMAN: Day 170, yes.

25 MR. O'DWYER: Question, sorry, I haven't got the page 11:27
26 number but question 352.

27 CHAIRMAN: That's fine.

28 MR. O'DWYER: And it goes on, it continues to 365.

29 CHAIRMAN: Thanks very much. It is just to have a note

1 of it. Thanks very much.

2 MR. O'DWYER: And you're exactly right, Chairman, that
3 he did originally indicate, and this was put to him by
4 Mr. Lynn, that in fact these other things had been
5 mentioned. Now, again, we would say going by Baranya, 11:27
6 if that was the case that that would again in context
7 and everything else indicate even if he hadn't used the
8 words 'systems failure' - sorry, that is what I was
9 grasping for earlier, Sergeant Hughes's expression, the
10 systems failure - that in fact clearly by speaking 11:28
11 about these four investigations he was making the same
12 point that he seems to have made in reality to several
13 different people. I know some of them --

14 CHAIRMAN: Okay.

15 MR. O'DWYER: -- qualify as a protected disclosure 11:28
16 because of his two -- Della Murray, for example, who
17 was in a counselling context and things like that, but
18 certainly this one --

19 CHAIRMAN: This was a confidential --

20 MR. O'DWYER: Exactly, confidential. 11:28

21 CHAIRMAN: You agree with that?

22 MR. O'DWYER: Yeah. So, therefore, it couldn't.

23 CHAIRMAN: Okay. It's the Curran conversation.

24 MR. O'DWYER: Yes.

25 CHAIRMAN: So you are saying that Baranya has an impact 11:28
26 on the conversation with Inspector Cryan and you're
27 saying it has an impact on the conversation with
28 Superintendent Curran.

29 MR. O'DWYER: Yes. And I suppose in some ways perhaps

1 the Curran one is more important because that is a
2 conversation which the, I know on a preliminary basis
3 but the Tribunal has accepted may have been a protected
4 disclosure.
5 CHAIRMAN: Yes. 11:29
6 MR. O'DWYER: we said that the Tribunal would certainly
7 be entitled --
8 CHAIRMAN: The decision said it has the capacity --
9 MR. O'DWYER: Yes.
10 CHAIRMAN: -- it could be a protected disclosure. 11:29
11 MR. O'DWYER: Yes.
12 CHAIRMAN: And you say Baranya makes could be -- yes,
13 it is, okay.
14 MR. O'DWYER: If you accept --
15 CHAIRMAN: Of course. 11:29
16 MR. O'DWYER: -- that Sergeant Hughes did say those
17 things.
18 CHAIRMAN: All right.
19 MR. O'DWYER: which is something in the submissions of
20 An Garda Síochána, that they are effectively saying he 11:29
21 didn't. what was only -- you know, it was only the
22 matters that are referred to in that report.
23
24 So that is in respect of protected disclosures.
25 CHAIRMAN: Okay. 11:29
26 MR. O'DWYER: I mean I have already gone on longer that
27 I said I would. I gave you the page number or the page
28 number and the reference for those, for that discussion
29 in Mr. Lynn's cross-examination of Superintendent

1 Curran.

2

3 Very briefly, Judge, the next point that's mentioned in
4 the submissions is about the disciplinary
5 investigation. And obviously, I mean there is going to 11:30
6 be black and white and I am not going to rehearse all
7 of our submissions as compared with theirs; we
8 obviously have different views about that, or very
9 different views about that. But one of the things
10 that's said that we thought we should highlight is 11:30
11 that, one of the things that's said against that,
12 against the disciplinary investigation possibly being
13 targeting and discrediting, is that it's said that
14 those proceedings - now this is An Garda Síochána's
15 words, I know there was a bit of debate as to whether 11:30
16 the investigation is actually proceedings - but that
17 those proceedings - and this is a quote at paragraph 71
18 - "appear to have been conducted privately as between
19 Sergeant Hughes and his supervisors".

20 CHAIRMAN: Yes. 11:31

21 MR. O'DWYER: Meaning discrediting couldn't arise. We
22 spent quite a time in the evidence, you may remember, I
23 mean it seems that -- and unfortunately I couldn't find
24 the exact quote, but I think just time didn't allow for
25 it, but I mean this came up several times, there was 11:31
26 different ways in which the disciplinary proceedings,
27 where clearly other people got to know about them and
28 I'm sure --

29 CHAIRMAN: It's really a targeting case, isn't it?

1 MR. O'DWYER: Yes. But targeting and --
2 CHAIRMAN: It's hard to think, it seems to me, but you
3 put me right, Mr. O'Dwyer, it's hard to think that it
4 could be cleared of targeting and yet indicted for
5 discrediting. 11:32
6 MR. O'DWYER: Yes.
7 CHAIRMAN: I mean basically I think they're two
8 separate things. And I think what Sergeant Hughes was
9 saying was, look, they got at me because I was raising
10 these issues -- 11:32
11 MR. O'DWYER: Yes.
12 CHAIRMAN: -- and one of the ways they got at me was
13 they produced this disciplinary thing that should never
14 have happened.
15 MR. O'DWYER: Yes. 11:32
16 CHAIRMAN: And he made his case about that and he said
17 that it should have been -- even if it had been begun
18 it should have been killed off straightaway.
19 MR. O'DWYER: Discontinued, yeah.
20 CHAIRMAN: Those are the points made. But his case was 11:32
21 targeting really I think.
22 MR. O'DWYER: Yes, Judge. But I mean there was
23 evidence about this and the evidence made it fairly
24 clear that a lot, quite of a few other people,
25 unfortunately I can't remember the quote, I think it 11:32
26 was from Chief Superintendent Feehan, where he refers
27 to --
28 CHAIRMAN: He said hundreds of people.
29 MR. O'DWYER: You got it, Chairman.

1 CHAIRMAN: He said hundreds of people would know.
2 MR. O' DWYER: So, therefore --
3 CHAIRMAN: This was the question, when the question
4 arose as to whether he should have quizzed his own team
5 as to see who might have leaked the story of the 11:33
6 disciplinary investigation.
7 MR. O' DWYER: He said I couldn't have done that because
8 there was hundreds of -- or words to that effect.
9 CHAIRMAN: He said lots of people would have known
10 about a disciplinary investigation. 11:33
11 MR. O' DWYER: Yes.
12 CHAIRMAN: Okay.
13 MR. O' DWYER: No, I think he did use the term -- I
14 think he did say hundreds.
15 CHAIRMAN: I think he did, did he? He certainly 11:33
16 indicated a large number of people would have been
17 aware. And I mean, I reckon anybody who knows anything
18 about a large organisation would have little difficulty
19 about understanding how news travels.
20 MR. O' DWYER: Spreads. 11:33
21 CHAIRMAN: Exactly. Especially adverse news or hostile
22 news. Anyway, you don't agree with that.
23 MR. O' DWYER: Yes. And we also point to, you may
24 remember the disclosure to ██████████ who was the friend of
25 Ms. Saulite. 11:34
26 CHAIRMAN: You made that.
27 MR. O' DWYER: And then of course there was the leak to
28 The Star you know itself, you know, which was about the
29 disciplinary proceedings. So therefore, we don't think

1 that that particular submission really can -- I mean,
2 if that's the basis of it, that nobody else knew about
3 it, I mean that's clearly contradicted.

4 CHAIRMAN: So, you don't agree with that, okay.

5 MR. O'DWYER: Then our next point, I mean following 11:34
6 their subs, is about the injury on duty which is
7 obviously a main part.

8 CHAIRMAN: Right, yes.

9 MR. O'DWYER: I have written a piece about this to help
10 me, because there is quite a bit about this, but it 11:35
11 seems again, and I don't want to rehearse the
12 submissions all over again, but there is a real
13 conflict between the submissions I suppose as you
14 probably noticed. But, I mean, An Garda Síochána begin
15 with a statement that there's no express requirement, 11:35
16 because we complained that he'd never been interviewed
17 under 11.37, you may remember this, and I mean that was
18 one of his -- that there was never a report done under
19 11.37, certainly not a formal report. And you may
20 remember Inspector Cryan gave evidence that even though 11:35
21 he actually spoken with him and visited him that he
22 never did any of these reports. An Garda Síochána
23 begin with a statement that 11.37 doesn't specifically
24 require that somebody is interviewed but it does
25 require that a full, that a report is prepared. And I 11:36
26 mean it would seem to flow from that, we respectfully
27 say, that the person would have to be interviewed in
28 some way or another to allow you to do a report.

29 CHAIRMAN: Okay.

1 MR. O'DWYER: And that really the two are interlinked.
2 And in any event there wasn't a report done. So
3 really, any point about trying to say that 11.37 was
4 actually complied with wouldn't appear to be
5 well-founded. 11:36
6
7 Then we go on of course to point out that whatever
8 about 11.37, that 11.39, which involves, you may
9 remember, the visit to the home, would involve a report
10 and an investigation of sorts. Because that seems to 11:36
11 be the purpose of it.
12 CHAIRMAN: Of absence of --
13 MR. O'DWYER: Exactly, yes. Go out when he's at home,
14 when he's been at home for quite a long time, that you
15 would go out. And that didn't happen either, you may 11:37
16 remember.
17 CHAIRMAN: And what do you say to the evidence that
18 Sergeant Hughes didn't like people coming to his home?
19 MR. O'DWYER: Well that's --
20 CHAIRMAN: Was that not to be respected? 11:37
21 MR. O'DWYER: Well people did actually go.
22 CHAIRMAN: Or was somebody to clump his way up the
23 driveway citing with 11.37 in his back pocket?
24 MR. O'DWYER: Yes.
25 CHAIRMAN: It doesn't seem unreasonable that he'd 11:37
26 prefer to -- he's a more private person, he doesn't
27 want --
28 MR. O'DWYER: But you may remember, Judge, that on
29 various --

1 CHAIRMAN: It doesn't seem a problem.

2 MR. O'DWYER: Yes, Judge. I mean think you'd have to
3 look at the evidence in respect of that.

4 CHAIRMAN: Yes.

5 MR. O'DWYER: He certainly didn't seem, I mean part of 11:37
6 his complaint has always been that they didn't do this,
7 so you know it --

8 CHAIRMAN: Because when he met Sergeant Hanrahan he met
9 him in the hotel and Sergeant Hanrahan and he had a
10 good relationship. 11:38

11 MR. O'DWYER: Yes.

12 CHAIRMAN: In fact, one of the problems arose from a
13 misunderstanding of a note by Sergeant Hanrahan.

14 MR. O'DWYER: That's right.

15 CHAIRMAN: And Sergeant Hughes was indignant about it, 11:38
16 that it went up the line and got repeated that he must
17 only communicate by phone and so on.

18 MR. O'DWYER: That's right.

19 CHAIRMAN: And he said that's completely wrong and so
20 on. Anyway. 11:38

21 MR. O'DWYER: Yes. But I mean my memory, for what it's
22 worth, of the evidence was that he said that that was
23 just because at that particular meeting in the hotel.
24 Well for a start the hotel is I suppose, it's not like
25 coming to the station, it is a different -- 11:38

26 CHAIRMAN: But if he wanted to meet in the hotel, if he
27 wanted to meet anywhere else, that was entirely a
28 matter for him.

29 MR. O'DWYER: Yes. I suppose the point is he was

1 willing to meet. I think, my memory, for what it is
2 worth, of the evidence, was that he said that that was
3 more convenient.

4 CHAIRMAN: Ah yes.

5 MR. O' DWYER: And while he didn't particularly -- you 11:38
6 may remember --

7 CHAIRMAN: It should have been a visit, you say, under
8 11.39 --

9 MR. O' DWYER: Yes.

10 CHAIRMAN: -- and there could have been an 11:39
11 investigation under 11.37.

12 MR. O' DWYER: Yes. And he often, Sergeant Hughes has
13 claimed many times that if those type of
14 investigations, he would have obviously -- he would
15 have raised his various workplace issues, including 11:39
16 primarily that nobody was looking at these, at his
17 allegations in respect of a systems failure.

18 CHAIRMAN: But the critical question was injury on
19 duty, isn't that right?

20 MR. O' DWYER: Yes. But what we do refer in our 11:39
21 submission, just because this isn't really dealt with
22 in the An Garda Síochána, I mean we do, there is a case
23 that the court, I mean Gao which is a decision of
24 Mr. Justice Coffey quite recently about some of this.

25 CHAIRMAN: Yes, about protected disclosures. 11:39

26 MR. O' DWYER: Yes, the Judge, with all due respects,
27 seems to slightly move the goalposts a little bit. It
28 is in our submission and I don't want to rehearse it.

29 CHAIRMAN: Yes.

1 MR. O'DWYER: But what he says is, actually the duty to
2 go and investigate and interview the people doesn't
3 necessarily arise from 11.37, that actually it arises
4 from a general duty to look after the welfare of your
5 employees plus the new, you know the Directive of 2010. 11:40

6 CHAIRMAN: Okay. Mr. O'Dwyer let me ask you a
7 question.

8 MR. O'DWYER: Yes.

9 CHAIRMAN: We know that Human Resources Management on a
10 number of occasions looked for -- 11:40

11 MR. O'DWYER: Yes.

12 CHAIRMAN: -- reports, reports as to what? What was
13 the report to do? So it goes down to the chief
14 superintendent and let's say he sends it to the
15 superintendent, what's the superintendent to 11:40
16 investigate, in this case?

17 MR. O'DWYER: Well in this case I think what the
18 superintendent should have done, well (a) is respond to
19 these, would be I mean an obvious point, to respond to
20 these letters, but also that what was required was that 11:41
21 he would explain or might be able to investigate and
22 explain what were his workplace issues. He was
23 claiming all the time I have workplace -- you know, I
24 am suffering from stress but not just as a result - and
25 this is where I think there is an important 11:41
26 distinction - not just as a result -- it appears that
27 he may well have had PTSD as a result of what happened
28 with Ms. Saulite and everything around that, but after
29 that, he's claiming he's under stress at work, that

1 there's work-place stress issues, serious work-place
2 stress issues, and part of those, one of those issues
3 is that they are not listening to him about his --
4 CHAIRMAN: Yes. They weren't investigating his
5 substantive complaints, so to speak -- 11:42
6 MR. O'DWYER: Yes.
7 CHAIRMAN: -- about the pre-murder policing.
8 MR. O'DWYER: Yes, that's one of the things. And
9 there's several. You may remember, he had alleged that
10 he was bullied and isolated and other matters as well. 11:42
11 You know they're connected but they're not quite the
12 same thing. But I am just pointing out, and you may
13 remember this, there was quite a bit, Mr. Marrinan --
14 CHAIRMAN: The question was: why is this man out of
15 work? 11:42
16 MR. O'DWYER: Yes, exactly. And what are his work -- I
17 mean it is clear he is making complaints about things
18 that are happening or have happened in the workplace,
19 not just the fact, you know not just what happened in
20 respect of the murder, if you follow what I mean. 11:42
21 CHAIRMAN: Yes, I do. He said --
22 MR. O'DWYER: He's making a series of complaints
23 that post-date the --
24 CHAIRMAN: Number one, he said the policing before the
25 murder. 11:42
26 MR. O'DWYER: Yes.
27 CHAIRMAN: Number two, the way he was treated --
28 MR. O'DWYER: Yes.
29 CHAIRMAN: -- subsequent to the murder.

1 MR. O'DWYER: Yes.

2 CHAIRMAN: And number three was incidents antecedent to
3 the murder where he claimed it was bullying and so on,
4 which is outside the remit of the Tribunal but those
5 were things he mentioned between 2003 and 2005 as I 11:43
6 understand it.

7 MR. O'DWYER: well that was a pre -- yeah, there's that
8 but also the --

9 CHAIRMAN: Those are the issues that he was alleging
10 were contributing, were causing him to be out of work. 11:43

11 MR. O'DWYER: Yes exactly. well there was other -- I
12 think, I don't think --

13 CHAIRMAN: There may have been another one.

14 MR. O'DWYER: I know there was confusion about this,
15 but when he was talking about bullying, I mean I think 11:43
16 if you went back over the evidence he wasn't just
17 talking about the historical, which I know the Tribunal
18 is not dealing with, the issue he had with another,
19 with a detective in the past, but prior to the murder,
20 quite a while -- 11:43

21 CHAIRMAN: Can you tell me, who was Sergeant Hughes
22 alleging was bullying him post the murder?

23 MR. O'DWYER: I mean one of the things, for example, I
24 mean I'm not -- I mean one of the claims he made --

25 CHAIRMAN: Because I'm not clear, in my own mind I'm 11:44
26 not clear on that.

27 MR. O'DWYER: Sorry I don't want to try -- I know there
28 were other matters he mentioned, but I think one of
29 them that is in my mind, you may remember, he said that

1 after, you know he was -- now whether or not -- I mean
2 this may or may not be true, but certainly he felt that
3 he was isolated after the murder. You may remember
4 when he went in and people wouldn't let him in, he
5 felt -- 11:44

6 CHAIRMAN: Sorry, I do understand that he said that and
7 he felt, he sensed that he had been isolated, I'm not
8 sure to what extent he accepted - but that's another
9 matter for evidence --

10 MR. O'DWYER: Yes. 11:44

11 CHAIRMAN: -- that he accepted that he might have been
12 invited to go to the meeting or that it was his
13 obligation to go to the meeting.

14 MR. O'DWYER: Yes.

15 CHAIRMAN: And there was a discussion about that 11:44
16 involving Detective Inspector O'Sullivan particularly
17 because he was the first one who met him on the morning
18 after the murder.

19 MR. O'DWYER: That's right.

20 CHAIRMAN: And they had the conversation about the 11:45
21 draft victim impact, isn't that right?

22 MR. O'DWYER: That's correct.

23 CHAIRMAN: Sorry I'm just trying to think, let's go
24 back for a second. I am wondering about what was to be
25 investigated, if you like -- 11:45

26 MR. O'DWYER: Yes.

27 CHAIRMAN: -- when the HRM sends down and says there
28 should be an investigation and it comes down to
29 Superintendent Curran, what is he to investigate?

1 That's the question in my mind. You say there wasn't
2 an investigation. I don't think there's any dispute
3 that there wasn't an investigation. I think that's
4 correct.

5 MR. O'DWYER: Yes. Yes, Mr. Chairman, I mean 11:45
6 unfortunately, as you know, there's a lot of evidence
7 this case, I just can't remember precisely what --

8 CHAIRMAN: Maybe you would like to come back to that.

9 MR. O'DWYER: Yes.

10 CHAIRMAN: Here's a point that's possibly relevant. I 11:46
11 am not entirely sure what was to be investigated.

12 MR. O'DWYER: Yes.

13 CHAIRMAN: I may as well tell you that, and I would
14 appreciate your help on this. Sergeant Hughes appeared
15 to be making the case, and I appreciate there are other 11:46
16 things like the way he was treated, the way he was
17 this --

18 MR. O'DWYER: His pay.

19 CHAIRMAN: -- I am not sure bullying, of course he
20 said -- sorry. 11:46

21 MR. O'DWYER: Yes.

22 CHAIRMAN: You've just reminded. Three things he said:
23 Pre-murder policing, discipline, unreasonable
24 discipline, and pay.

25 MR. O'DWYER: Yes. 11:46

26 CHAIRMAN: Those were the three elements that he said
27 were causing him to be stressed and troubled and so on.

28 MR. O'DWYER: Yes. And I suppose, I mean, and I think
29 Mr. Marrinan put it to Chief Superintendent Phillips at

1 one stage that surely he could have, I mean he knew
2 these things, why could he not put them -- nobody was
3 asking him to diagnose Sergeant Hughes, you know to
4 actually say, well, I think he has X condition or Y
5 condition, nobody was asking for that. 11:47

6 CHAIRMAN: what were they asking him to do?

7 MR. O' DWYER: well, what is the cause?

8 CHAIRMAN: what is the cause of his problems?

9 MR. O' DWYER: what is the cause of his problems in
10 respect of workplace stress? so, what is he claiming? 11:47

11 CHAIRMAN: He's claiming they didn't have an
12 investigation into the pre-murder policing.

13 MR. O' DWYER: well he's claiming all these different --
14 yeah, that might --

15 CHAIRMAN: How can that be an account of illness? 11:47

16 MR. O' DWYER: No, but what he is being asked is what is
17 the cause --

18 CHAIRMAN: How can he say I'm ill because you won't
19 conduct an investigation?

20 MR. O' DWYER: No, but what he can say and which he is 11:48
21 saying is, I am suffering from --

22 CHAIRMAN: we're not short of medical reports, so we
23 don't need to get into a medical discussion. So don't
24 worry about that.

25 MR. O' DWYER: No, but he is explaining and he's 11:48
26 complaining, he's complaining about work -- I mean the
27 sick certs, as you know, always refer to stress,
28 workplace stress. He's making complaints that he has,
29 that this is causing him, that this is so serious, the

1 workplace stress, that he's staying off work and is
2 having various effects. I mean that's the point of
3 medical certs. What I think the chief inspector is
4 being asked to do -- or the chief superintendent,
5 sorry, is being asked to do is, will he look at these 11:48
6 complaints he's saying arise from his interactions in
7 the workplace or arise from, you know that are causing
8 him or he says are causing him the stress. So, you
9 might have a medical definition --

10 CHAIRMAN: All right. Thank you very much. 11:49

11 MR. O'DWYER: -- you know he has this condition, he has
12 that condition, but he's saying that -- sorry,
13 Chairman.

14 CHAIRMAN: No, thank you very much. You're assisting
15 me on that. Thank you very much. Okay, yes. 11:49

16 MR. O'DWYER: And one other thing that I will mention
17 that has come through on a message is that you may
18 remember there was the back to work interviews, there
19 was meant to be an interview that took place when he
20 took -- and that was another -- 11:49

21 CHAIRMAN: That didn't take place.

22 MR. O'DWYER: That didn't take place, yes. And that
23 would have been another opportunity, I suppose, for him
24 to talk about these issues.

25 CHAIRMAN: Okay. 11:49

26 MR. O'DWYER: So I mean I suppose there's a fundamental
27 disagreement as to whether these reports could have
28 been, we say they could and they should have been
29 provided, there should have been an investigation. I

1 don't know, I mean reading An Garda Síochána's
2 submissions I don't know how far they're going in
3 disagreeing with that. Certainly from 2010 on, they
4 say in fact at paragraph 95 "the fact of the matter is
5 that sufficient information was reported up to permit 11:50
6 the determination to be made that Sergeant Hughes did
7 in fact suffer an injury on duty, that in itself would
8 suggest that the investigation was sufficient". I mean
9 that would obviously directly contradict what was
10 happening with Assistant Commissioner Fanning, writing 11:50
11 saying I need these reports to complete the picture so
12 that we can decide on this issue.

13 CHAIRMAN: Okay.

14 MR. O'DWYER: But then at paragraph 109 in their
15 submissions An Garda Síochána appear to concede that 11:51
16 there were quite serious failings in the determination
17 on the injury on duty issue. They note confusion as to
18 who was ultimately responsible for making the
19 determination and submit that this caused delay, but I
20 suppose we would point out that it should be recalled 11:51
21 that it didn't just result in delay, it resulted in no
22 determination ever being made over all of the years,
23 leaving him obviously on, for a very long time on
24 halfway. They go on to say there was no clear guidance
25 in the area at the time. I mean that can't be laid at 11:51
26 Sergeant Hughes's door.

27 CHAIRMAN: Indeed.

28 MR. O'DWYER: As to what constituted an injury on duty.
29 And you will have seen in our own submissions we do

1 point, I mean this wasn't as a mysterious or as
2 difficult as it appeared because there was, we pointed
3 it out, there was a wealth of English authority about
4 this and about this very area that could easily have
5 been looked at to clarify.

11:52

6
7 So I mean, Chairman, you'll obviously be aware that
8 we've withdrawn the complaint against Assistant
9 Commissioner Catherine Clancy, but, as I explained
10 earlier, that's on the basis that she, the complaint
11 that she had targeted and discredited him.

11:52

12 CHAIRMAN: Yes, but you made somewhat of a
13 qualification about that, about the system,
14 Mr. O'Dwyer.

15 MR. O'DWYER: Yes. I mean, at the end of the day, I
16 suppose the complaint that is being maintained and
17 you'll see it in our submissions --

11:53

18 CHAIRMAN: That's right.

19 MR. O'DWYER: -- is that there was this system that was
20 effectively --

11:53

21 CHAIRMAN: But how could that be targeting?

22 MR. O'DWYER: No, no, it's not. That's what we're
23 saying.

24 CHAIRMAN: Or discrediting?

25 MR. O'DWYER: Yes, no, we're saying that they didn't --

11:53

26 CHAIRMAN: If Assistant Commissioner Clancy didn't
27 target or discredit --

28 MR. O'DWYER: Because of any protected disclosure, yes.

29 CHAIRMAN: -- if she didn't target him because of any

1 protected disclosure, and if the same for Assistant
2 Commissioner Fanning --

3 MR. O' DWYER: Yes.

4 CHAIRMAN: -- how could the system be targeting him?

5 MR. O' DWYER: No, because what was happening, and this 11:53
6 is -- I mean, the point that was repeatedly made was,
7 the source of the difficulty in respect of, it seems,
8 HRM was that the local management wouldn't provide the
9 necessary --

10 CHAIRMAN: Okay. 11:54

11 MR. O' DWYER: So we're saying that --

12 CHAIRMAN: So does that mean that we can exonerate
13 Assistant Commissioner Clancy and Assistant
14 Commissioner Fanning full stop without any quibbles
15 about -- sorry, quibbles sounds wrong -- 11:54

16 MR. O' DWYER: Yes.

17 CHAIRMAN: -- without any qualifications, I should say,
18 about the system? I mean you may criticise the system,
19 that's okay, but if I put it down on my spreadsheet
20 'targeting: yes/no' I am writing no for Assistant 11:54
21 Commissioner Clancy and 'Fanning F' my box is no --

22 MR. O' DWYER: Yes.

23 CHAIRMAN: -- and I don't have to have an asterisk to
24 say but they stood over a system, admitted --

25 MR. O' DWYER: well, they were part of a system. They 11:54
26 were in charge of HRM.

27 CHAIRMAN: Okay. So what?

28 MR. O' DWYER: Yeah, I suppose in the context of the
29 Tribunal, yes.

1 CHAIRMAN: I mean that's the end of it really. Even if
2 the system --

3 MR. O'DWYER: On a personal basis.

4 CHAIRMAN: Even if the system was clumsy, but systems
5 don't target people. 11:55

6 MR. O'DWYER: Yes.

7 CHAIRMAN: They may be wrong, they may be clumsy, they
8 may be inept, they not be helpful, but they don't
9 target people.

10 MR. O'DWYER: Yes. 11:55

11 CHAIRMAN: I mean what the deputies, what the
12 Oireachtas had in mind when they said targeting of
13 whistleblowers, they didn't say, look, the system might
14 be targeting them.

15 MR. O'DWYER: No. 11:55

16 CHAIRMAN: I may as well tell you, that's my
17 understanding. I don't think you need to trouble
18 yourself too much, Mr. O'Dwyer. We don't need to
19 trouble ourselves about frankly quibbles that I am
20 raising about issues. 11:55

21 MR. O'DWYER: Yes.

22 CHAIRMAN: I think I know your position on Assistant
23 Commissioners Clancy and Fanning and that's been clear
24 and you've written that.

25 MR. O'DWYER: Yes. And that's why we did that. 11:56

26 CHAIRMAN: Yes.

27 MR. O'DWYER: I mean, it is trying in good faith --

28 CHAIRMAN: I am going to come back to you at a later
29 stage on the question I raised about the necessity for

1 a connection between, assuming the Tribunal agrees with
2 you --

3 MR. O' DWYER: Yes.

4 CHAIRMAN: -- in light of Baranya, about the Inspector
5 Cryan comment, it'll apply a fortiori, if you like, to 11:56
6 Curran, to Superintendent Curran, but the Inspector
7 Cryan conversation, where am I going to find a
8 connection between that and the instigation of the
9 disciplinary -- sorry, of the fact-finding, which gave
10 rise in turn to the disciplinary? Okay? 11:56

11 MR. O' DWYER: Yes, thank you.

12 CHAIRMAN: I will come back to you on that. If you
13 want to deal with it now, well and good, but I am happy
14 to -- you might want to have a think about it and come
15 back to me. 11:57

16 MR. O' DWYER: Yes. If you wouldn't mind I might do
17 that, Chair. I wouldn't mind having a --

18 CHAIRMAN: I raised it and I'd like your help on that.
19 Okay.

20 MR. O' DWYER: I mean in respect of An Garda Síochána's 11:57
21 submission that's our reply. There is one thing I
22 should have mentioned in respect of the submissions
23 about the disclosure to Superintendent Curran, which
24 was, you may have noted in the submissions there's
25 great reliance on evidence from the High Court. 11:57

26 CHAIRMAN: Oh yes, what do you say about that?

27 MR. O' DWYER: Just simply that that, I mean when the
28 individuals gave evidence to the Tribunal it seems very
29 strange to rely on evidence -- I mean there's long

1 passages --

2 CHAIRMAN: what do you say about --

3 MR. O'DWYER: what we say about that is that wasn't

4 actually put to --

5 CHAIRMAN: Yes. 11:57

6 MR. O'DWYER: -- Sergeant Hughes.

7 CHAIRMAN: well sorry, I should have went, because it

8 was in my head to ask you what you said about that.

9 MR. O'DWYER: That's what we say about that. That it

10 should have been -- that that wasn't put -- I mean 11:58

11 those long pieces of evidence, I mean they could have

12 been put and 'this is what contradicts...' It's very

13 unclear. I mean, is that what is meant by it? But I

14 assume that is the intention of it, that somehow that

15 contradicts what he may have said or maybe even what 11:58

16 Superintendent Curran said in his evidence, but one way

17 or the other it should probably, we would submit have

18 been put.

19 CHAIRMAN: Do you say it is admissible, Mr. O'Dwyer?

20 MR. O'DWYER: well we say it should have been put that, 11:58

21 that it shouldn't be -- so therefore, you know, that

22 you have evidence about all of this.

23 CHAIRMAN: The question in my mind was: A previous

24 inconsistent statement can always, if necessary, having

25 been proved to that effect, can always be put to a 11:59

26 witness either in a civil or criminal case.

27 MR. O'DWYER: That's right, yeah. I'd accept that, but

28 these weren't.

29 CHAIRMAN: I learned very early on circuit, that was

1 Lord Denman's act in the middle of 19th Century
2 apparently, from a Mr. Cummin and others. And I said
3 at one stage in court 'Oh, that's Lord Denman's Act'
4 and the judge rather to my embarrassment said 'Well,
5 what's that?', so I had to look it up. Anyway. There 11:59
6 it was. So a previous inconsistent statement, whereas
7 out of the blue you say you can't simply produce or at
8 least you query whether you can produce --
9 MR. O'DWYER: well that seems to be the purpose of it,
10 but I mean, yes. 11:59
11 CHAIRMAN: That is what I was going to ask and I'll be
12 interested to know, because I mean, I'm not sure it's
13 desperately --
14 MR. O'DWYER: No.
15 CHAIRMAN: It's not crucial. I couldn't imagine that 11:59
16 the Tribunal will be coming one side or the other,
17 depending on the evidence. And certainly it was a
18 possibility that somebody would be referring to the
19 evidence because we circulated it, we knew that it
20 could be relevant. Okay. 12:00
21 MR. O'DWYER: It's just if that is the purpose of it
22 then --
23 CHAIRMAN: Okay.
24 MR. O'DWYER: I mean, perhaps we will leave it. We
25 have a very short comment about the submissions of... 12:00
26 CHAIRMAN: By all means do, yes, of course.
27 MR. O'DWYER: This is Assistant Commissioner Fanning.
28 CHAIRMAN: Certainly. Of course.
29 MR. O'DWYER: I can do them at the end, just to

1 separate them.

2 CHAIRMAN: No, it is best to do it now, Mr. O'Dwyer.

3 MR. O'DWYER: I mean based on what we said --

4 CHAIRMAN: Thanks very much, sorry. Yes, Mr. O'Dwyer.

5 MR. O'DWYER: I have written down a comment just to say 12:00
6 that in relation -- I mean we're not entirely -- I mean
7 obviously Assistant Commissioner Fanning is saying very
8 strongly that he was trying to get these reports and we
9 know about all of these efforts to get these reports
10 from local management. He submits at paragraph 9 of 12:01
11 his submissions that the decision to cut Sergeant
12 Hughes's pay was in accordance with provisions of
13 Directive 139/10 and Code 11.37. That submission
14 doesn't address the substance of Sergeant Hughes's
15 complaint in this regard. The decision to cut pay 12:01
16 arises out of an automatic classification of --

17 CHAIRMAN: You don't disagree with that, I take it?
18 Your case is injury on duty should have averted these
19 reductions?

20 MR. O'DWYER: Yes. 12:01

21 CHAIRMAN: The reduction -- my understanding is the
22 reductions applied across the public sector, public
23 service.

24 MR. O'DWYER: Yes.

25 CHAIRMAN: And they were automatic, but you say subject 12:01
26 to --

27 MR. O'DWYER: Yes. I mean, especially where you have
28 asked so early on for a determination on particular
29 issue.

1 CHAIRMAN: Yes.

2 MR. O'DWYER: And I suppose what we say is that the
3 ultimate responsibility to ensure compliance with the
4 Directive rested in the Assistant Commissioner in HRM.

5 CHAIRMAN: But the reality is you have no complaint 12:02
6 with Assistant Commissioner Fanning?

7 MR. O'DWYER: well in a similar -- we've the same --
8 yes, I mean we wanted to I suppose emphasise that
9 we're -- the same applies to him as applied to
10 Assistant Commissioner Clancy. 12:02

11 CHAIRMAN: Okay. Thanks very much.

12 MR. O'DWYER: Thank you, Chairman.

13 CHAIRMAN: Is it best that -- Mr. McGarry, you don't
14 have a lot to say, I imagine, do you? I mean we have
15 your submission, thanks very much. But I think you're 12:02
16 comforted by the fact that Mr. O'Dwyer is confirming
17 what I think was clear from an early stage in the
18 hearings, that nobody was alleging any targeting or
19 discrediting on the part of Assistant Commissioner
20 Fanning, insofar as he's referred to, he's referred to, 12:03
21 and he did things or said things and he's recorded as
22 doing them, and he doesn't dispute that he did those
23 things, and nobody else disputes it. So, thanks very
24 much for your submissions. Do you want to add anything
25 to them? 12:03

26

27 SUBMISSION BY MR. MCGARRY

28 MR. MCGARRY: Chairman, thank you. And obviously we
29 have put in, as you have seen, the written submission

1 and I am very grateful to my friends for clarifying the
2 situation this morning. We had I think hoped when the
3 decision was taken not to insist that Assistant
4 Commissioner Fanning be called to give evidence, that
5 it would ultimately be the case that the assertions 12:03
6 that were made by Sergeant Hughes in his own evidence
7 about the role of Assistant Commissioner Fanning would
8 be effectively withdrawn or disavowed in some way. I
9 think the effect of what Mr. O'Dwyer has said this
10 morning is to that effect. It's to clarify that there 12:04
11 isn't any -- I appreciate that Mr. O'Dwyer has sought
12 to perhaps caveat that to a very minor extent in
13 relation to the comments he made about the system. And
14 obviously to the extent that there is anything
15 outstanding, obviously we accept and acknowledge the 12:04
16 clarification to the extent that there is anything - we
17 don't think that there is anything outstanding in
18 relation to Assistant Commissioner Fanning - obviously
19 he wasn't called to give evidence and nothing was put
20 to him in relation to it, so even if anything was 12:04
21 outstanding we submit, and we say this in our
22 submission, that there is no evidence at all to support
23 any suggestion that Assistant Commissioner Fanning was
24 in any way involved in targeting or discrediting. And
25 I think that's the import of what Mr. O'Dwyer has said 12:04
26 to the Tribunal this morning.

27 CHAIRMAN: well, that is my understanding of the
28 situation, Mr. McGarry.

29 MR. MCGARRY: Yes.

1 CHAIRMAN: And as far as I am concerned, the Tribunal
2 will not be making any -- there will be references to
3 Assistant Commissioner Fanning, but there will not and
4 could not, in the circumstances there could not be a
5 finding of any misconduct, targeting, any adverse 12:05
6 finding against Assistant Commissioner Fanning. So I
7 think that disposes of that. There is nobody in
8 dispute about that, unless Mr. Murphy is going to come
9 and in say -- I'm perfectly sure that he is not. So
10 you may take it that that is clear. 12:05

11 MR. MCGARRY: Thank you, Chairman.

12 CHAIRMAN: Okay. Thank you very much. Now,
13 Mr. O'Higgins.

14
15 SUBMISSION BY MR. O'HIGGINS: 12:05

16 MR. O'HIGGINS: May it please you, Chairman, I might
17 start with I suppose our bottom line position and I'll
18 hopefully peel it back.

19 CHAIRMAN: Thanks very much.

20 MR. O'HIGGINS: On behalf of An Garda Síochána and in 12:05
21 particular Garda management it is my submission,
22 Chairman, that the allegations of corruption and the
23 allegations of malpractice, the allegations of willful
24 targeting and discrediting that were made against my
25 various clients should never have been made. 12:06

26
27 These allegations were damaging and they were likely to
28 cause and did cause distress for the individuals
29 concerned. And a matter that was raised in

1 cross-examination once or twice with the sergeant was
2 one wondering did the sergeant perhaps at any point
3 stop to think about the impact of these allegations
4 upon civilians and upon members whom he was accusing of
5 such egregious wrongdoing? 12:06

6
7 Because I think a good starting point is a
8 consideration actually of the nature of the allegations
9 which, as it were, earned him a starting position in
10 the Tribunal. And I think it is legitimate to query 12:07
11 did he stop to consider that the stressed caused in
12 particular to retired members, many of whom he had
13 never met, and who had to deal with these allegations
14 maybe 15 years later and pore through volumes of
15 material and review documentation from many years 12:07
16 previous, and perhaps also the feelings of the family
17 members of those individuals, many of whom would have
18 been perplexed and unclear why their loved one would
19 have been dragged into this allegation of a high level
20 conspiracy. Because in my submission, and you heard 12:07
21 the evidence, many of my witnesses, my clients, were
22 actually at a loss to understand why they were being
23 drawn into these far-reaching allegations. Many of my
24 clients learned for the first time on reading Tribunal
25 materials that they were the subject of very serious 12:08
26 allegations.

27
28 And let's just look at them: Engaged in a conspiracy
29 with Garda management and willfully targeted and

1 discrediting a Garda sergeant who was, he paints,
2 blowing a whistle on a cover-up of institutional
3 failings in the force arising from the death of Baiba
4 Saulite in November of 2006.

5
6 So an interesting issue raised in my friend's
7 submissions, in Mr. O'Dwyer's submissions, and I think
8 also raised by yourself, Chairman in exchanges, was
9 this issue as to whether an individual may be the
10 subject of targeting by virtue of negligence or breach 12:08
11 of duty. And that indeed at a level of principle is an
12 interesting issue. And it's somewhat grey, there's no
13 argument to be made either side of the margins. But in
14 point of fact here, Chairman, it is my submission that
15 in fact it doesn't seem that you have to decide that 12:09
16 interesting legal issue, because of course that's not
17 the case Sergeant Hughes makes. The case he makes is
18 more far-reaching than a mere failure to spot danger
19 signs from Ms. Saulite. It is more far-reaching than a
20 failure to coordinate investigations. 12:09

21
22 The claim made is that management were actually aware
23 of a specific threat to the life of Ms. Saulite. And
24 the claim made was that they had received a request for
25 protection from Garda investigators and had refused 12:09
26 that request. And Sergeant Hughes's claim and, if you
27 like, whole narrative was that in order to cover up not
28 just their systemic failures, but their actual
29 knowledge of a request for protection, to protect her

1 management organised and willfully targeted the
2 sergeant and organised a discrediting of him.

3
4 And so it came to pass that the sergeant invoked the
5 confidential recipient mechanism, which of course, as 12:10
6 everybody is aware, has two central themes, which are
7 almost as high in their, in the hierarchy of egregious
8 malpractice. One is corruption and the second is
9 malpractice. And that is the level of matters as they
10 were put. And in my submission, Chairman, it is 12:10
11 regrettably necessary for you. You'll have the benefit
12 of the 30-plus volumes of documentation, but actually,
13 there are some set piece, if I can use that expression,
14 set piece conflicts between individuals that are key to
15 a consideration of whether these claims, these high 12:11
16 claims are proven. And I'll just list a few of the set
17 piece disputes.

18
19 There's of course a very big one, I'll call it the
20 Walter O'Sullivan dispute between himself and the 12:11
21 sergeant. This isn't just a dispute concerning the
22 bombshell conversation of the 20th November - and that
23 looms large - it's also a dispute as to what was or
24 wasn't said later on in September/October a year later
25 in 2007. I'll come back to that. So that is one set 12:11
26 piece that you will have to assess and see who is the
27 better side of.

28
29 A second set piece is of course the conversations with

1 Michael Cryan, particularly on the Wednesday, Inspector
2 Cryan, on the Wednesday after the murder. More
3 particularly there's the disputed conversation with
4 Superintendent Curran in April of 2007. And of course
5 this is a foundation stone for the high level 12:12
6 allegations that have been levied. Because of course
7 the architecture of the complaint begins to collapse
8 if, Chairman, you conclude that there was not a
9 disclosure of relevant wrongdoing in the course of that
10 allegation. And of course, as you have made clear in 12:12
11 exchanges with Mr. O'Dwyer, even if there is, that's
12 not the end of it because leg two of the assessment is
13 of course the question of a nexus or a connection. And
14 it'll be for you to decide whether there has been, not
15 so much the quality of the evidence, but has there been 12:13
16 any evidence of an awareness by the alleged targeters
17 of the alleged system complaints or system errors that
18 it is said by Sergeant Hughes he relayed to
19 Superintendent Curran in this April '07 meeting. And
20 I'll come back to that, because it's a key exchange. 12:13

21
22 Down the list, but nonetheless important, of the set
23 pieces we have Chief Superintendent Feehan's
24 conversation with him in November of 2007, when
25 Sergeant Hughes claims he told him the disciplinary 12:13
26 investigation represented targeting of him or was
27 targeting of him. And I'll bring you to that.

28
29 There's also disputes, interestingly, and this was a

1 theme developed in cross-examination and I am not going
2 to bore you with lengthy excerpts from the transcript
3 which you have already read, but there's also evidence
4 of disputes, interestingly, between the sergeant and
5 his own medical practitioners as to what he said and 12:14
6 didn't say at times. These aren't key factual matters
7 but they form an important context, insofar as it was
8 urged upon the sergeant that in fact much of what we
9 saw playing out before us and many of the origins of
10 his overall complaint appeared to stem from a sense of 12:14
11 personal guilt on his part, morphing into an anger, a
12 vengefulness against Garda management. And that wasn't
13 a theory plucked from thin air; that was something
14 built upon what it appears he had relayed to various
15 medical professionals during the relevant period, 12:15
16 particularly in the period 2007/2008, when he was
17 drinking heavily, when his perspective appeared to
18 become distorted and when, to borrow language of one of
19 the medical reports, when he was ruminating obsess
20 ively on his personal situation. And it was urged, it 12:15
21 was suggested to him, you'll recall, that he developed
22 something of a problematic persecution complex,
23 effectively, and that this perhaps lay at the root of
24 his difficulties.

25
26 In any event, coming back to the walter O'Sullivan set
27 piece, Inspector O'Sullivan, the conversation on the
28 20th November. You will have this already from a lot
29 of the exchanges in cross-examination and also from the

1 way Inspector O'Sullivan gave his evidence: Low-key
2 manner, not condemning anybody, clear, no such
3 information was relayed to him, he made abundantly
4 clear in the conversation of the 20th November. No
5 such information. And it is interesting that the 12:16
6 sergeant actually drives this issue centre stage,
7 because of course it is key. It gives the motive for
8 the cover-up, it builds the basis for the theory and if
9 it unravels it's a major hole in his entire account,
10 and it'll be for you to assess that, Chairman. 12:17

11
12 One matter, one way that it's put is, you will have
13 seen, and I am not going to in any sense open up,
14 regurgitate our submissions, but it is clear that this
15 disputed claim formed the bedrock of Sergeant Hughes's 12:17
16 account of a cover-up. The conflict on the evidence is
17 stark. Inspector O'Sullivan's account was, I suggest,
18 clear. On the other hand, the evidence offered by
19 Sergeant Hughes on this issue was vague, illogical and
20 in my respectful submission simply lacking credibility. 12:17
21 It was unsupported by a jot of objective evidence and I
22 suggest that all independent pointers suggest that his
23 recollection was flawed or worse than flawed. The
24 absence of any mention of the bombshell information in
25 the weeks and months that followed really is revealing. 12:18
26 And there is no doubt but that for a man who was under
27 pressure, who was confiding in colleagues that he felt
28 professional exposure, such a person would undoubtedly
29 have been anxious to switch the spotlight off

1 themselves if they feel that trouble is on the horizon
2 for them, over the 14th November conversation with
3 Ms. Saulite and the contents of the victim impact
4 report. Such a person would undoubtedly deploy the
5 seismic information that was allegedly confided on the 12:18
6 20th November by the inspector.

7
8 And what is abundantly clear, even if it was wasn't
9 said to colleagues, as one would expect it to have been
10 said, the information would have been front and centre 12:19
11 of his report to Inspector Mangan, which was a
12 fact-finding report into of course the level of
13 knowledge in An Garda Síochána. That was burningly
14 relevant to the fact-finding exercise. And it is
15 revealing as well that we learned in cross-examination 12:19
16 that the sergeant claims that he did tell somebody of
17 it and that somebody was Garda Nyhan, from whom we did
18 not hear and whom the sergeant did not insist be heard
19 on this issue. And very importantly, we know from the
20 Mangan report, and it was touched on in 12:19
21 cross-examination, we know that nowhere in Garda
22 Nyhan's report to Inspector Mangan is there any mention
23 of the bombshell information.

24
25 So that issue, and perhaps I am pronouncing the plainly 12:20
26 obvious, it's not terribly helpful and I'll move off
27 this pretty soon, but in all the detail, in all the
28 wood here, in this forest of detail, it is sometimes
29 necessary to step back and assess what are the core

1 issues. And one of the core issues is whether it is
2 correct for the sergeant to insist that he relay this
3 information to his inspector a day after the murder.
4 And in my respectful submission the issue is not so
5 much who has the better side of it on that evidential 12:20
6 dispute, the issue, the more realistic question is:
7 what are the implications of the necessary and
8 inevitable conclusion that Sergeant Hughes is incorrect
9 in making that allegation? That's the more interesting
10 issue. What in fact does that do for his entire story? 12:21
11 And in my submission it has a devastating impact on his
12 story. It has a devastating impact on his credibility.
13 But that of course a matter for you, Chairman.

14
15 Inspector O'Sullivan's role in matters is also very 12:21
16 important for the conversations of a year later, of
17 approximately a year later, because we have again the
18 disputed conversations in and around the efforts he
19 made to seek a statement from the sergeant but also to
20 chase him up for the statement. And we know that these 12:21
21 were, that there were a number of calls. And I would
22 invite you to contrast again the clarity of Inspector
23 O'Sullivan's evidence on this issue versus the unclear
24 evidence and poor recollection offered by the sergeant
25 with respect to this issue. 12:22
26

27 And if we look at just very briefly, for a moment, Day
28 164, we know that this issue was gone through in some
29 detail. On Day 164 of the hearings it was suggested to

1 the sergeant that there's something of an interesting
2 coincidence of time, between the September/October --
3 sorry, just call it October, conversations that he's
4 having with the inspector, where, on the inspector's
5 case, he inserts into one of these conversations a 12:23
6 claim that he told, a referral to the related
7 conversation of the 20th November, and the inspector
8 says you didn't say that to me, and the sergeant
9 insists, no, no, I said this to you in this earlier
10 conversation. And I think it is useful to just step 12:23
11 back and assess the timing of this. This appears to be
12 the first time it's been suggested by the sergeant that
13 he's had this conversation and this information was
14 relayed to him, and he's claiming it occurred in the
15 context of the inspector chasing up with him for the 12:23
16 statement for the file to the DPP. And of course this
17 is something that is completely disputed by the
18 inspector and said that simply didn't happen.
19 CHAIRMAN: I'm sorry, would you forgive me for
20 interrupting, Mr. O'Higgins. 12:24
21 MR. O'HIGGINS: Certainly.
22 CHAIRMAN: I thought it was the other way round. It
23 wasn't -- am I totally wrong on this? Please correct
24 me if I am wrong. I thought the evidence is, which is
25 in dispute, Sergeant Hughes's evidence that in a 12:24
26 conversation the day after the murder, Monday the 20th
27 November '06, that Detective Inspector O'Sullivan in
28 reassuring him about the non-importance of the victim
29 impact statement he said that -- I thought the evidence

1 was that Sergeant Hughes said that Inspector O'Sullivan
2 said to him after all, or words to that effect, there
3 was a request to the Commissioner's office for
4 protection and it was refused, and that Sergeant Hughes
5 agreed, didn't mention this in the management report, 12:25
6 and the next time it came up, and there's dispute as
7 far as I can understand about how many phone calls
8 there were between Inspector O'Sullivan and Sergeant
9 Hughes seeking a statement, but Sergeant Hughes said of
10 course I will have to put in all this stuff about the 12:25
11 policing pre-murder, I am not diminishing it by saying
12 that, but he said, that he, in one of the conversations
13 or the only one, whichever is correct, that Sergeant
14 Hughes said to Inspector O'Sullivan that he, Inspector
15 O'Sullivan, had said at their meeting about the request 12:26
16 for protection. So, in other words, that you have it
17 that it was Sergeant Hughes saying something and the
18 inspector saying, no, you didn't say it; it was the
19 other way round, I thought, that Sergeant Hughes said
20 to the inspector, you said about -- he says in a second 12:26
21 or third phone call, and said, according to the
22 detective inspector for the first time you said, when
23 we spoke on the Monday, you said about management,
24 about people looking for protection and so on. Am I
25 right about that? 12:26
26 MR. O'HIGGINS: You are, Chairman. I have been
27 unclear, I must have been unclear in conveying what I
28 was saying. Just taking it in stages.
29 CHAIRMAN: I am sorry to be drearily pedantic.

1 MR. O' HIGGINS: Not at all.

2 CHAIRMAN: And if I may say, you inadvertently were
3 saying that it was something that Sergeant Hughes said
4 that he, Sergeant Hughes, had said to the inspector,
5 whereas it was the other way round. 12:27

6 MR. O' HIGGINS: Oh no.

7 CHAIRMAN: That he was attributing to the inspector an
8 alleged statement that the inspector was denying.

9 MR. O' HIGGINS: No, no.

10 CHAIRMAN: Are we agreed on that, that is the 12:27
11 situation?

12 MR. O' HIGGINS: We're ad idem. If I conveyed that that
13 is a --

14 CHAIRMAN: That's all right. No, it's not a criticism.
15 I just want to be clear because I got a little confused 12:27
16 as to where we were. That is my understanding.

17 MR. O' HIGGINS: Number one, 20th November Sergeant
18 Hughes insists Walter O'Sullivan said in reassuring
19 him --

20 CHAIRMAN: Question for the Tribunal. 12:27

21 MR. O' HIGGINS: Protection.

22 CHAIRMAN: If and insofar it is relevant.

23 MR. O' HIGGINS: Yes.

24 CHAIRMAN: But assuming it is relevant, question, the
25 dispute between the question, did Detective Inspector 12:28
26 O'Sullivan say that there had been a request made to
27 the Commissioner, he didn't specify by whom, there had
28 been a request made to the Commissioner's office for
29 personal protection for Baiba Saulite -- for John

1 Hennessy, I am sorry, for John Hennessy, and it was
2 refused.

3 MR. O'HIGGINS: Yes. So that's the first. The second
4 one then is, it's connected to it, it's the series of,
5 well, the three phone calls that occurred in September 12:28
6 and October of 2007, in the context of the inspector
7 chasing up with him.

8 CHAIRMAN: Correct. And the inspector says that in the
9 last of those phone calls Sergeant Hughes mentioned
10 this alleged comment by the inspector on the 20th 12:28
11 November.

12 MR. O'HIGGINS: Yes. So the alleged comment being one
13 made by the inspector.

14 CHAIRMAN: Correct.

15 MR. O'HIGGINS: And suggested by the sergeant. 12:28

16 CHAIRMAN: Okay.

17 MR. O'HIGGINS: And the relevant page reference for the
18 latter is Day 164, cross-examined on it on page 18.

19 CHAIRMAN: Thank you.

20 MR. O'HIGGINS: And subsequently. And I would ask you 12:29
21 to take into account, and I know you will in assessing
22 all the evidence, that a major point of credibility is
23 perhaps again an obvious point: If indeed it had been
24 said, if Walter O'Sullivan had said what was attributed
25 to him on the 20th November, it makes simply no sense 12:29
26 that the sergeant then or in the ample opportunities
27 after that, that the sergeant didn't canvass it with
28 him and ask who sought the protection, why was it
29 turned down, what is the basis for your information,

1 can you tell me a bit more and so forth. It was simply
2 left, the trail was not explored, even though, as early
3 as the following Friday, if not before, there was a
4 personal opportunity to have a discussion with the
5 inspector, it seems largely in private, where all of 12:30
6 this could have been gone through in the context of
7 preparing for the bail application in relation to --
8 that Mr. A was making, and in the doubtless several
9 opportunities in the intervening 12 months before for
10 the first time in October 2007 claiming for the first 12:30
11 time to the inspector that he said these seismic things
12 a year earlier.

13 CHAIRMAN: Say that again, Mr. O'Higgins, sorry. I was
14 just checking something, I am sorry.

15 MR. O'HIGGINS: I am saying there was ample opportunity 12:30
16 in that approximate period of 12 months --

17 CHAIRMAN: Yes, I follow.

18 MR. O'HIGGINS: -- to explore with the inspector what
19 he says he said.

20 CHAIRMAN: I mean, I think that was fairly well covered 12:30
21 in examination of Sergeant Hughes.

22 MR. O'HIGGINS: Yes.

23 CHAIRMAN: I think we were over that ground, fairly
24 thoroughly, about -- and I think there it is. That's
25 what it stands -- I mean... 12:31

26 MR. O'HIGGINS: Another major, again if I can use that
27 awful expression, set piece factual dispute is
28 Superintendent Curran, April 2007. And if we'd briefly
29 go, if you don't mind, Chairman, to page 159 of the

1 transcript, Day 159 of the transcript.

2 CHAIRMAN:

3 MR. O'HIGGINS: This is Mr. Marrinan putting
4 effectively the account to the sergeant and more
5 specifically putting to him the reasonably detailed 12:32
6 report that he sent up to his own superiors on the day
7 after the discussion he'd had with the sergeant. And
8 it's on page 65.

9 CHAIRMAN: Yes.

10 MR. O'HIGGINS: It starts on page 64 and we have it on 12:32
11 page 65 of Day 159. And Mr. Marrinan is carefully
12 bringing the sergeant through the report that I
13 mentioned. The report is on page 1067 of the material
14 and it's referenced on page 65 of that transcript. And
15 the report was dated 24th April, we know. And it 12:32
16 brings him through the range of matters faithfully
17 recorded by the superintendent as to what was said by
18 the sergeant in this conversation. And you yourself,
19 Chairman, it's recorded on page 67, asked him, if I may
20 say reasonable questions: 12:32
21

22 "Do you accept this was an accurate report as he
23 remembered it?"

24

25 That was misheard and then you repeated the question. 12:33
26 And he said, I think it's fair to say from page 68
27 onwards he confirms that he is not challenging what is
28 said in the report of the superintendent. I think
29 that's important, Chairman. That's a matter for you to

1 assess, but I think that is an important
2 acknowledgment.

3
4 And he also confirms on page 68 that he doesn't
5 disagree with the contents, and he says:

12:33

6
7 "It's just, I don't recollect it fully, that
8 chronology."

9
10 And that's on page 68, line 8.

12:33

11
12 And Mr. Marrinan put to him line 16:

13
14 "This would appear to reflect the conversation because
15 it reflects the letter that was sent by Mr. Costello on
16 your behalf expressing the very concerns that you'd
17 expressed through Mr. Costello at the time.

18 A. Yes.

19 Q. So this appears to be relatively accurate."

20
12:34

21 Mr. Marrinan was asking him. And then, line 27, at the
22 bottom of the same page:

23
24 "It seems to be, yeah, to reflect exactly the Séan
25 Costello."

12:34

26
27 Over the page it's asked:

28
29 "You're not contesting that these were discussed in

1 terms, perhaps not specifically the terms as outlined,
2 but they were discussed in terms?

3 A. I am not disputing that, no."
4

5 And then at the bottom of page 69 it's put to him, 12:34
6 where the superintendent has noted at line 25:

7
8 "I read over the list of issues with Sergeant Hughes,
9 he requests some communication regarding each matter
10 raised." 12:34

11
12 He's asked:

13
14 "All right?

15 A. Not precisely." 12:34
16

17 Then you take over asking some questions. And I think
18 it's important that Mr. Marrinan comes back to it on
19 page 71, I am not going to bore you with the whole
20 thing, but we've a very important detail, Chairman, on 12:34
21 page 74 that I will ask you to specifically note. And
22 on page 74 Mr. Marrinan asks him the following question
23 at line 7:

24
25 "Just one matter: You don't say that you raised with 12:35
26 him --"

27
28 Superintendent Curran that is.
29

1 "-- was what had been said allegedly by Detective
2 Inspector Walter O' Sullivan to you about the fact that
3 an application had been made for security for Baiba
4 Saulite. On your account, you don't mention that to
5 him."

12:35

6
7 And the following interesting answer appears from
8 Sergeant Hughes:

9
10 "Sorry, I overlooked that as well."

12:35

11
12 And he says:

13
14 "I would have discussed that with him as well at the
15 time in relation to that."

12:35

16
17 And Mr. Marrinan asks him:

18
19 "Q. But it doesn't appear that you did on any account
20 that you have given to anybody to date?"

12:35

21 A. Yeah, I will have to consult my notes on that.

22 Q. Would you mind doing that and have a look at that?

23 A. I will.

24 Q. Because it is not part of any of the statements
25 that you have made at any time to the Tribunal."

12:36

26
27 And then you intercede and ask:

28
29 "Was that in the note that you gave us? Did you give

1 those notes to the Tribunal?

2 A. I'll have to check, Mr. Chairman."

3
4 So it's a matter of detail I appreciate, it doesn't
5 turn the case one way or the other, but it is very 12:36
6 interesting that there's an attempt by Sergeant Hughes
7 to introduce quite a new far-reaching allegation that
8 in point of fact he discussed with Mark Curran in April
9 '07 the bombshell information, and in my submission
10 that is worth stepping back from and pausing. Isn't 12:36
11 that an extraordinary allegation to introduce for the
12 first time, it never appearing even in the materials
13 for the Tribunal, and it gives some idea of the lack of
14 credibility of that insistence of that particular
15 account. 12:37

16
17 It also arose, in my submission, his claim, which is
18 much in dispute, that he says to Walter O'Sullivan,
19 matters that are said to ground a protected disclosure.
20 Because of course an issue that you have held over, 12:37
21 Chairman, until the conclusion of the evidence was
22 heard, in your preliminary ruling you held over the
23 claim as to whether the April '07 conversation did or
24 didn't amount to a PD, to a protected disclosure.

25 12:37
26 And in my submission, now that we've heard the
27 evidence, and quite properly it was acknowledged by
28 counsel on behalf of the Commissioner, at the time of
29 the preliminary hearing, that taking the sergeant's

1 claim at its height, that could at a level of principle
2 amount to a protected disclosure, because he was
3 insisting that there were system criticisms being made
4 and there were allegations, if you like, of wrongdoing
5 in that sense.

12:38

6
7 But in my submission, Chairman, now that you've heard
8 the evidence, it is open to you, in my submission I go
9 further, you ought -- sorry, insofar as you ought do
10 anything, the facts are a matter for you, but in
11 considering the legal issue as to whether the April '07
12 conversation did or didn't amount to a protected
13 disclosure, you are entitled to assess the lack of
14 credibility in the sergeant's insistence that a
15 completely different standout matter was the subject of
16 discussion between him and his superintendent that
17 magically does not appear in the report that gets sent
18 up, that magically gets omitted even though he
19 maintains it was the main aspect of what he was telling
20 the superintendent.

12:38

12:38

12:39

21
22 And very fairly I do acknowledge, on one view the
23 sergeant has more reason to remember the conversation,
24 because this was his big reveal, on one view, but in my
25 submission it is telling that the superintendent gave
26 again his evidence in a low key fashion, wasn't
27 insistent that he'd a tremendous recollection of
28 things, he was reliant upon the report, but he made it
29 perfectly clear he was not, the overarching message was

12:39

1 the concern in relation to his personal safety and he
2 said that the system failure complaints came later.
3 Started coming into the equation in December of that
4 year. Not during this conversation in April. And in
5 my submission that is significant and ought be 12:40
6 preferred as being far more likely a reliable account
7 of what transpired at this disputed meeting.

8
9 The report is there. And I think it's very telling
10 that there's largely uncontradicted evidence. Largely 12:40
11 uncontradicted. That the report was read back to the
12 sergeant and he was asked to indicate if he was
13 satisfied with it as representing a complete account of
14 what was said. Because of course it was in the
15 superintendent's interest to make sure that he was 12:40
16 sending up, reporting up, the man's concerns. And the
17 superintendent had no, certainly no animus, but
18 equally, there was no reason he would have left it out,
19 because he does include in the report criticisms that
20 were being levied. He does include materials that 12:41
21 perhaps management wouldn't have been delighted to
22 receive. So I say on any reasonable view of this
23 exchange the superintendent has the better of it, in my
24 submission.

25 12:41
26 And I ask you to take into account as well where this
27 was coming from. It is for you to assess the demeanour
28 and manner in which the superintendent gave his
29 evidence, but in my submission there was ample material

1 before you enable you be satisfied that actually
2 insofar as he could, the superintendent was looking out
3 for the sergeant. He was somebody who had concern for
4 him, he was somebody who organised that his inspectors,
5 more than one inspector would check in with the man who 12:41
6 was off, particularly when he was off duty at home,
7 sick, suffering from stress. The inspector, the
8 superintendent at least was concerned for his welfare,
9 made that clear on a number of occasions and the
10 correspondence that he sent forth speaks of that 12:42
11 concern, speaks of that human decency and speaks of
12 that reasonableness on the part of Mark Curran. And I
13 say that is again an important aspect of context that
14 enable you, as it were, referee the dispute of fact
15 that exists in relation to the April 2007 discussion. 12:42

16
17 Now it's important obviously to bring it back to the
18 core allegation each time. Undoubtedly, it befalls
19 Sergeant Hughes's side to satisfy you on the evidence,
20 Chairman, not just that these system complaints, these 12:43
21 allegations of alleged wrongdoing were made in the
22 April '07 conversation, but that the alleged targeters
23 were aware of this and in my submission, there is not a
24 scintilla of evidence that they were aware, that the
25 likes of -- and that goes as well to the claimed 12:43
26 protected disclosure to Inspector Mangan and the
27 claimed protected disclosure to Inspector Cryan.
28 There's no evidence that, to take a few examples,
29 retired Assistant Commissioner Al McHugh; retired

1 Assistant Commissioner Michael Feehan; retired
2 Superintendent Fergus Dwyer, who dealt with the CRO
3 investigation; Christy Mangan, chief superintendent;
4 Catherine Clancy, in respect of whom in fairness, but I
5 would say belatedly, there has been an abandonment of 12:44
6 the allegations; Dr. Quigley, the civilian. I mean, an
7 extraordinary state of affairs that a civilian doctor
8 is embroiled in this allegation of high conspiracy, far
9 more stressful for him. Bad enough for the Garda
10 clients to deal with these unsubstantiated evidence, 12:44
11 they're used to giving evidence at least, Dr. Quigley
12 is not used to give evidence and accounting for himself
13 as to how he is or isn't guilty of the most egregious
14 wrongdoing in relation to a patient for whom he had the
15 greatest of concern. He was sending letters backwards 12:44
16 and forwards on the man's behalf to his GP, arranging
17 for him to be seen by a specialist, sending letters on
18 his behalf, the man is suffering because his salary has
19 been cut. And yet in the teeth of all of these
20 demonstrations of goodwill and decency by Dr. Quigley 12:45
21 he's accused of engaged in targeting.

22
23 Retired Garda Commissioner Noel Conroy, retired Garda
24 Commissioner Fachtna Murphy - the allegations against
25 them were eventually abandoned. But of course there is 12:45
26 a difficulty with that. It's a sad reality of -- and I
27 don't mean this criticism of journalists, but it is the
28 way of the world, high allegations get carried on the
29 wind far and wide, quiet acquittals or declarations of

1 no evidence don't tend to get carried so far. That's
2 the world we live in.

3
4 So coming into this Tribunal, Noel Conroy and Fachtna
5 Murphy were facing allegations that they were involved 12:46
6 in a conspiracy, and in my submission it doesn't appear
7 to have bothered the maker of those allegations, who
8 appeared to be indifferent to that state of affairs,
9 even though with a shrug of the shoulders the
10 allegations are abandoned. And I say that's unfair, if 12:46
11 we are talking about unfairness.

12
13 I mentioned, Chairman, in despatches that I was going
14 to deal briefly with a separate set piece and that is
15 the Chief Superintendent Feehan conversation of 12:46
16 November 2007, where the sergeant had claimed he told
17 Chief Superintendent Feehan the disciplinary
18 investigation was targeting of him.

19 CHAIRMAN: Yes.

20 MR. O'HIGGINS: I will just mention the references and 12:46
21 I won't spend too long on it.

22 CHAIRMAN: Chief Superintendent Feehan said that
23 Sergeant Hughes didn't mention anything about
24 targeting, moreover he said the description of the
25 conversation by internal logic militated, so to speak, 12:47
26 against that interpretation, because it didn't fit
27 Sergeant Hughes's description of the sequence of the
28 conversation, did not fit with an allegation of
29 targeting being made.

1 MR. O' HIGGINS: Yes.

2 CHAIRMAN: That's really the distinction, isn't that
3 right?

4 MR. O' HIGGINS: You have the clear distinction.

5 CHAIRMAN: So, he said two points: He said I don't 12:48
6 agree with it as a matter of memory and also, he or
7 somebody said, when you look at it logically and you
8 take each alleged element of the conversation together,
9 the one about the targeting doesn't make sense because
10 it doesn't fit into the conversation. Isn't that it? 12:48

11 MR. O' HIGGINS: Yes. The general thrust, as I
12 understood it, of the sergeant's position was, on his
13 announcing, revealing his, that's targeting,
14 illogically the chief superintendent had said and so I
15 am sending -- raised the issue about sending him to the 12:48
16 CMO.

17 CHAIRMAN: About?

18 MR. O' HIGGINS: Sending him to the CMO.

19 CHAIRMAN: Oh yes.

20 MR. O' HIGGINS: So, total disconnect. 12:48

21 CHAIRMAN: He said it was a non sequitur effectively in
22 the context, or at least that's the issue, that is the
23 point that was made about it.

24 MR. O' HIGGINS: Yes. And just those are the two
25 points, you have them, but there is a third one, a 12:48
26 small point. He actually had done a note at the time
27 which was produced to the Tribunal and there's no
28 mention of that being said in the note.

29 CHAIRMAN: No.

1 MR. O'HIGGINS: So if you like it is something of a
2 mirror of the note that Mark Curran sent up following
3 the April '07 meeting --

4 CHAIRMAN: Yes,

5 MR. O'HIGGINS: Insofar as there is documentary 12:49
6 pointers, they point against the sergeant's account.

7 CHAIRMAN: Okay.

8 MR. O'HIGGINS: Now could I -- and sorry, another set
9 piece, and I want to be fair to the sergeant here,
10 because Superintendent Dennedy wasn't called and we 12:49
11 didn't ask for him to be called, but nonetheless there
12 was an important of sorts, to a degree an important

13 report from him and it is dealt with on Day 163, page
14 71, that, to the effect that he, like Inspector Michael
15 Cryan, recorded, interestingly, what the sergeant 12:49
16 himself had said on another occasion. And

17 Superintendent Dennedy, it seems, had recorded what the
18 sergeant said Baiba Saulite had said to him in
19 conversation on the 14th November, five days before she
20 was murdered. And the sergeant, he says in his report, 12:50
21 reported to him, and this is why it is interesting, it

22 chimes exactly with what the sergeant, what Inspector
23 Cryan says the sergeant told him on the Wednesday after
24 the murder; namely, that amongst the things Baiba
25 Saulite said to him, in the Garda station, she also 12:50
26 said she expressed fear for her own safety. And while

27 I appreciate you're not inquiring into that underlying
28 matter, it is relevant in context. Because one thing
29 that is abundantly clear is that the sergeant, for

1 better or for worse, was, if I may say, anxious to
2 minimise, to minimise and reduce what he said was said
3 to him in this conversation with her on the 14th --
4 CHAIRMAN: However, Mr. O'Higgins, is it not the case,
5 and I do recall reading the sergeant Dennedy comment or 12:51
6 observational report --
7 MR. O'HIGGINS: Yes.
8 CHAIRMAN: -- am I right, that was not referred to in
9 the Mangan fact-finding report?
10 MR. O'HIGGINS: That's so. And also it should be noted 12:51
11 and I emphasised in cross-examination I hope, I think I
12 did, that actually Superintendent Dennedy doesn't
13 actually say it was on the 14th November this was said.
14 He does an A, B, C and D of what he records the
15 sergeant saying to him, but it does seem from the 12:51
16 context fairly clear that he's referring to the
17 sergeant saying this was said on the 14th November. So
18 it comes with that caveat as well.
19 CHAIRMAN: So if it wasn't mentioned to -- sorry, if
20 it's not mentioned in the Mangan -- my understanding 12:52
21 is: Assistant Commissioner McHugh ordered a
22 fact-finding investigation.
23 MR. O'HIGGINS: That's right.
24 CHAIRMAN: He received the Mangan report and on the
25 basis of the -- I am sorry, it was the Feehan report, 12:52
26 strictly speaking, carried out by Inspector Mangan on
27 behalf of Chief Superintendent Feehan.
28 MR. O'HIGGINS: Yes.
29 CHAIRMAN: we'll call it the Mangan report just for a

1 moment. On receipt of that Mangan report, as endorsed
2 by Chief Superintendent Feehan, and maybe in its second
3 edition, taking account of its recommendation and so
4 on, he recorded the disciplinary investigation, that's
5 my understanding, on the basis of the Mangan materials. 12:53
6 MR. O'HIGGINS: Yes. But in my submission, Chairman --
7 CHAIRMAN: So if this was outside it, then it was
8 outside it.
9 MR. O'HIGGINS: well except that it's, in my
10 submission, relevant to the approach, understanding and 12:53
11 whole origin of the sergeant's complaint and as to his
12 feelings of personal guilt and apprehension for his own
13 professional exposure. He knew what he knew as to what
14 she had said on the 14th November.
15 CHAIRMAN: I am slow to get into that, Mr. O'Higgins, 12:53
16 because I have psychiatric reports reflecting the
17 sergeant's angst, including concern about his own role.
18 It's not throughout the reports, but I think it is
19 Dr. Fernandez who after his third meeting I think he
20 refers to it, but I may be wrong about that, but it's 12:54
21 certainly referred to in the psychiatric reports. I am
22 not getting into Sergeant Denedy.
23 MR. O'HIGGINS: May it please you, Chairman.
24 CHAIRMAN: I mean it invites the Tribunal to engage in
25 an exercise of psychiatric exploration and I think I 12:54
26 have a sufficient, I have a sufficient tendency to do
27 that, which I will try to discipline, so I don't need
28 any more encouragement.
29 MR. O'HIGGINS: Yes. But if I can do it this way, I

1 will stop talking about superintendent --
2 CHAIRMAN: No, it's all right.
3 MR. O'HIGGINS: I see, if I may, the --
4 CHAIRMAN: I just want to tell you the way I see it.
5 MR. O'HIGGINS: -- sense in your caution of that and I 12:54
6 acknowledge that, and I'll stop there.
7 CHAIRMAN: Sorry, don't apologise at all. It's an
8 exchange. I am telling you here is the way I see it.
9 MR. O'HIGGINS: Yes. But in my submission, Chairman,
10 it is interesting and educative that the sergeant felt 12:55
11 it necessary to deny that Ms. Saulite had expressed
12 fears for her own safety and that insofar as he himself
13 said that to Inspector Cryan on the Wednesday after the
14 murder, and that was in the context where the inspector
15 out of decency is writing down at the man's request his 12:55
16 version.
17 CHAIRMAN: Yes.
18 MR. O'HIGGINS: This is his -- please write these
19 things down. I'm not in a good way, please write these
20 things down. And one of the details that is included 12:55
21 in the note, and it's interesting that the sergeant is
22 determined and insistent, and on some matters in
23 fairness he's reasonably not so insistent but on this
24 he is absolutely insistent, he never said to Cryan that
25 she had expressed concerns for her own safety. And I 12:56
26 say that does go to credibility. Because it is
27 entirely consistent with what she herself had said in
28 the victim impact report, so it is not surprising she
29 would have said this on the 14th November. But you

1 perhaps don't have to decide that for the reasons
2 you're indicating. But I say at a very minimum it is
3 relevant on the question of credibility. Because there
4 are, unfortunately, a number of set piece disputes here
5 that will involve an assessment of credibility. 12:56

6 CHAIRMAN: Okay, just to conclude this, Mr. O'Higgins,
7 let me tell you, if you want to come back on this, by
8 all means come back on this, but as far as I am
9 concerned, the Tribunal is not -- sorry, I am not
10 taking account of what Sergeant Dennedy in a different 12:57
11 context, it seems to me, recorded, reported as being
12 said. And I don't know that there was a huge amount of
13 cross-examination of Sergeant Hughes on the Dennedy, is
14 that right? Am I wrong about that?

15 MR. O'HIGGINS: Sorry, Chairman, I should indicate, I 12:57
16 was referring there to Michael Cryan's note.

17 CHAIRMAN: No, sorry, I have no problem with Inspector
18 Cryan's note, no problem.

19 MR. O'HIGGINS: Yes.

20 CHAIRMAN: But I am really indicating that I want to 12:57
21 close the door on Sergeant Dennedy, not out of any
22 disrespect to Sergeant Dennedy or any disagreement with
23 him --

24 MR. O'HIGGINS: Yes.

25 CHAIRMAN: -- but because in the course of the evidence 12:57
26 and in fairness and in logic I am not sure it would be
27 fair to base any conclusion on Sergeant Dennedy's
28 report, which, as I say, does not imply any disrespect,
29 disagreement or disparagement of Sergeant Dennedy, but

1 I am not going there.

2 MR. O'HIGGINS: May it please you, Chairman. It was
3 the subject of cross-examination, I completely
4 acknowledge your ruling on that, so I will move off
5 that. I am simply suggesting -- 12:58

6 CHAIRMAN: No, Cryan, I have no problem. That is
7 legitimate, logical, rational and in the case because
8 that was specifically addressed so I have no difficulty
9 with that.

10 MR. O'HIGGINS: Yes, I will confine it to that then. 12:58
11 So I say that one of the matters in dispute concerns
12 whether Inspector Cryan was correct or incorrect in
13 giving evidence that the sergeant told him in his
14 pouring out of detail on the wednesday, when he was
15 taking down the man's account, whether he did or didn't 12:59
16 say to him that Baiba Saulite had expressed concern for
17 her own safety. And I say --

18 CHAIRMAN: I thought Sergeant Hughes accepted -- did he
19 accept the account written by Inspector Cryan? I
20 thought he did, maybe I am wrong. Look, I can't 12:59
21 remember everything. But I thought that he either
22 broadly or specifically, but my impression was that it
23 was said, I think reasonably, that Inspector Cryan had
24 a meticulous approach to recording things. And so,
25 broadly speaking I thought -- am I right about that? I 12:59
26 am asking Mr. Marrinan and Mr. McGuinness.

27 MR. MCGUINNESS: Yes, Chairman. The evidence on the
28 day of the writing of the note was that Sergeant Hughes
29 read the account.

1 CHAIRMAN: That's right.

2 MR. MCGUINNESS: And was happy with it.

3 CHAIRMAN: Yes.

4 MR. MCGUINNESS: And Inspector Cryan gave evidence to
5 that effect. 13:00

6 CHAIRMAN: Yeah, I don't think there was any dispute,
7 Mr. O'Higgins, about the accuracy of what Inspector
8 Cryan wrote at the request of Sergeant Hughes. And it
9 was a nice encounter, that they were --

10 MR. O'HIGGINS: Yes. 13:00

11 CHAIRMAN: It was a sympathetic encounter that I
12 recall. Anyway, you can make the assumption that that
13 is not in dispute.

14 MR. O'HIGGINS: Sorry, I am just looking for the page
15 reference. It was my recollection, Chairman, and I 13:00
16 might come back to it, but it is my recollection that
17 he did accept --

18 CHAIRMAN: Yes.

19 MR. O'HIGGINS: -- otherwise the correctness of the
20 note, but in relation to that individual detail, that 13:01
21 part of the note that recorded --

22 CHAIRMAN: I see. Okay, let me just stop you for a
23 moment, Mr. O'Higgins. I am assuming that you have
24 some time to go, Mr. O'Higgins?

25 MR. O'HIGGINS: Yes, Chairman. 13:01

26 CHAIRMAN: I don't mind if you have, that's not a
27 problem. But do I break for lunch now, which it seems
28 to me probably a good idea and we'll reassemble at two
29 o'clock. And, Mr. O'Higgins, obviously I would like

1 your views on the Baranya case.

2 MR. O'HIGGINS: Yes.

3 CHAIRMAN: And the question is, assuming -- now we know
4 Mr. O'Dwyer says there's no need to reassemble the
5 inquiry, we don't have to call any new evidence, that's 13:01
6 his position. And the question, my question to him is:
7 In what way, assuming the Tribunal accepts his
8 proposition about Baranya, in what way? So I would
9 like you to deal with two things: Does Baranya affect
10 the decision on Inspector Cryan and if so, in what way 13:02
11 should the Tribunal be affected or behave, conduct
12 itself in light of that? Okay?

13 MR. O'HIGGINS: Thank you, Chairman.

14 CHAIRMAN: Okay. So if we said about, whatever it is,
15 a little after two, maybe five past two or thereabouts. 13:02
16 Just give me a moment to collect my materials. Thanks
17 very much people.

18

19 THE HEARING THEN ADJOURNED FOR LUNCH AND RESUMED AS
20 FOLLOWS: 13:02

21

22 CHAIRMAN: Now thanks, Mr. O'Higgins, when you're
23 ready.

24 MR. O'HIGGINS: Thank you, Chairman. Just before I
25 move off the issue concerning whether or not the 14:11
26 sergeant had disputed what was recorded by Inspector
27 Cryan as to him saying that on the 14th November
28 Ms. Saulite had said she expressed a fear for her own
29 safety, it isn't the top issue in the case but just

1 insofar as I mentioned it --

2 CHAIRMAN: Yes.

3 MR. O'HIGGINS: -- can I just mention briefly a few
4 page references to you that may be of assistance in
5 relation to that?

14:12

6 CHAIRMAN: Yes.

7 MR. O'HIGGINS: It's in transcript 163, Day 163 -- it's
8 elsewhere actually, sorry Chairman. Sorry, transcript,
9 Day 162, excuse me, so page 45 of 162. And he's asked,
10 on line 20:

14:13

11

12 "All right. In your conversation with Inspector Cryan
13 on the 22nd November, that's the Wednesday after the
14 murder on the 19th, Inspector Cryan records you as
15 saying to him that Ms. Saulite had told you at the
16 meeting on the 14th November that she feared for her
17 own safety, Declan's safety, John's safety and your
18 safety?

14:13

19 A. No, I did not relay that to Inspector Cryan on that
20 occasion.

14:13

21 Q. Inspector Cryan's notes indicates that you told him
22 that she even mentioned a man's name."

23

24 we will leave that out because it is problematic, a
25 confidential area. There's reference on the next page,
26 46, to the Superintendent Dennedy, I will just mention
27 that, I am not reiterating that. He comes back to the
28 detail in relation to denying this aspect of Inspector
29 Cryan's note on page 124, or at least I came back to it

14:13

1 with him. And on page 124 he's asked, the question
2 reads out the note, the relevant bit of the note from
3 the inspector, and the note reads:

4
5 "' Sergeant Hughes asked what did she mean and she said 14:14
6 she feared for her own safety, Declan's safety, John's
7 safety and Liam's safety.' That's in quotes. Do you
8 see that there?

9 A. I do

10 Q. How did it come to pass that the inspector taking 14:14
11 down what you are saying has noted that?

12 A. Well, I don't know how he included that, because
13 she never said to us in any shape or form that she
14 feared for her own safety, never made any formal
15 complaint in that regard or remark like that. If she 14:14
16 had, and I understand from what she was saying that she
17 was making a formal complaint, I would have
18 investigated it."

19
20 And then it's put: 14:14

21
22 "But, sergeant, I mean it is not hugely controversial,
23 she has been saying that over a period.

24 A. Yes, but she didn't say it to -- I didn't relate
25 that to Inspector Cryan that morning." 14:15

26
27 So it's there in the transcript.

28 CHAIRMAN: Thank you very much.

29 MR. O'HIGGINS: Hopefully that is of assistance.

1 CHAIRMAN: Thank you.

2 MR. O'HIGGINS: Can I bring you, Chairman, to a matter
3 that I think it is fair to say from the
4 cross-examination and from the backwards and forwards
5 exchanges, a major development of the entire saga was 14:15
6 of source the decision to initiate a fact-finding and
7 then the subsequent investigation. And that, being
8 fair to the sergeant, from his point of view, that
9 really poisoned things and was one of his major, he
10 points to that as being a major instrument of the 14:15
11 oppression that he says he was subjected to.

12
13 So in my submission you're entitled to take into
14 account, first of all, is it correct or not, as it was
15 put, that the inspector, Inspector Mangan, did or 14:16
16 didn't have the lens too narrow and only from kick off
17 focused on the two or that Chief Superintendent Feehan
18 had done that or that Assistant Commissioner McHugh had
19 organised that state of affairs? And in that
20 connection, in my submission you're entitled to have 14:16
21 regard to the range of matters that the inspector
22 indicates he had regard to in compiling his report and
23 the number of reports he obtained and from whom. And
24 in that connection you will be aware, Chairman, that,
25 as well as any getting reports from Garda Nyhan and 14:16
26 Sergeant Hughes, the inspector also spoke with
27 Detective Superintendent Byrne and also carried out an
28 analysis of Pulse records, also got a report from
29 Detective Sergeant Kieran McEaney, also interviewed

1 or discussed, had a discussion with the clerical or
2 staff member in the office and also looked at records
3 in the office. And in my submission it simply isn't
4 fair or available on the facts to suggest that
5 Inspector Mangan drew the lens too narrow and focused 14:17
6 unduly on two gentlemen. That's point number one.
7

8 Point number two: In my submission there was ample
9 basis to actually distinguish the role played by the
10 sergeant and his colleague over the role played by 14:17
11 other persons. And that is for obvious -- a number of
12 obvious reasons. In the first instance, Sergeant
13 Hughes himself, and perhaps he's not terribly anxious
14 to accept this, but it is perfectly clear, that he told
15 a number of different persons, and told Inspector 14:18
16 Mangan in the report to Inspector Mangan, that in the
17 conversation on the 14th November Ms. Saulite had
18 relayed two matters which actually caused him concern.
19 One was that she had stopped bringing her children to
20 see Mr. A in prison, another was that she had changed 14:18
21 her mobile number. And I say that's, again it's not a
22 top-end case turning issue, but it shows that there was
23 a basis for the sergeant's own apprehensions as to his
24 professional position. He had queried with her the
25 wisdom of doing these things and this is disclosed in 14:19
26 the Mangan report -- sorry, in his report to Inspector
27 Mangan.
28

29 And in my submission, the sergeant also recognised and

1 acknowledged, in fairness to him, that the victim
2 impact report and the conversation he had on the 14th
3 November with the deceased, did present professional
4 difficulties for his position. He wasn't perhaps
5 enthusiastic to accept that in cross-examination but I 14:19
6 think at the end of it, it's a matter for you to
7 assess, but at the end of it I think he does
8 acknowledge that.

9
10 And in my submission, that again speaks to the 14:19
11 reasonableness of the decision to initiate at least a
12 fact-finding exercise and thereafter a fuller
13 investigation under the disciplinary regulations.

14
15 Inspector Mangan, we know, at one point, and maybe 14:19
16 still, was included in the list of targeters. And in
17 my submission, that is wholly unworthy, in
18 circumstances where the sergeant's position is
19 illustrated really by the somewhat wild allegation he
20 makes that included in this alleged cover-up was the 14:20
21 inspector, in circumstances where we see on Day 162,
22 page 98, that in fact when pressed on the point he
23 seems to belatedly acknowledge that what the inspector
24 was doing -- that the allegation he was making against
25 the inspector was really quite unfair. On page 98, for 14:20
26 instance, he's asked:

27
28 "You're aware, sergeant, this was a fact-finding, it's
29 a preliminary report to see if there's something to

1 look into in depth, in modern parlance a scoping
2 exercise, isn't that right?

3 A. Yes, to find the level of threat known to members
4 of An Garda Síochána prior to her murder.

5 Q. No, no --

14:21

6 A. Level of knowledge rather.

7 Q. No, it was to gather facts to see if they warranted
8 an inquiry, that's what he was doing, no more than
9 that.

10 A. Yes. "

14:21

11

12 And you see in the last sentence:

13

14 "' In order to clearly outline the facts in existence I
15 respectfully suggest this matter be formally
16 investigated. ' "

14:21

17

18 That's a quote from Inspector Mangan's report to Chief
19 Superintendent Feehan. Then the question continues:

20

21 "That's all he was doing. He wasn't reaching a
22 conclusion for or against you, he wasn't condemning
23 you, he was simply indicating it was appropriate to
24 proceed to investigation. "

14:21

25

26 And in fairness to the witness, Chairman, the answer
27 given was:

28

29 "I accept that. "

14:21

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And in my submission that's an important concession. If the sergeant is accepting that in point of fact all the inspector was doing was simply indicating it was appropriate to proceed to an investigation and wasn't reaching a conclusion, then in my submission, without more, he ought to have been removed from the list of targeters. Because it is wholly illogical and unsustainable, leaving aside the other difficulties with the overall theory, it is illogical to continue with an allegation against the inspector in circumstances where that acknowledgment is being made.

14:22

14:22

If we add to that the concern which he undoubtedly expressed for his own position to Inspector O'Sullivan, to Inspector Cryan in the aftermath and if we add to that the actual contents of the victim impact report itself, we then have another important concession: In fairness to the sergeant, though again belated, he acknowledges, something perhaps he ought to have acknowledged from kick-off; namely, he ought to have read the victim impact report. He acknowledges that on the transcript.

14:22

14:23

And on page 136 of the same transcript, Day 162, he's asked further these questions, and very briefly I will just reprise them:

14:23

"Q. And it was legitimate for him to carry out

1 fact-finding to that end?

2 A. That's accepted, yeah. That's correct.

3 Q. So he asked Chief Superintendent Feehan this --"

4

5 This is Al McHugh.

14:23

6

7 "-- he asked Chief Superintendent Feehan to carry out

8 the fact-finding and I am suggesting to you that

9 fact-findings are actually quite common in An Garda

10 Síochána, fact-finding investigations?

14:23

11 A. Yes, I'd accept that.

12 Q. And I'm suggesting to you that for the reasons

13 already we've gone over identified by Inspector Mangan

14 there was a legitimate rationale for further inquiry

15 after the initial fact-finding.

14:23

16 A. Absolutely."

17

18 And that's the top of page 137 on Day 162.

19

20 So in my submission then, the fact the outcome -- also

14:24

21 again we lose sight of these facts because there's so

22 much detail. The outcome of the disciplinary was a

23 discontinuance. We all know that. Of the disciplinary

24 proceedings. And in my submission that's a major

25 problem for the sergeant's overall thesis of targeting.

14:24

26 And faced with that difficulty, the sergeant seeks to

27 turn the fact that he was cleared of wrongdoing on its

28 head and, as it were, use the acquittal against Garda

29 management. And so, the argument moves from the more

1 normal 'I was wrongly convicted of disciplinary
2 breaches' to the rather more ambitious case that he's
3 now making 'I was targeted even though I was cleared of
4 any wrongdoing, but I was targeted nonetheless because
5 the process should never have started'. But in my 14:25
6 submission, Chairman, that is to ignore his own
7 evidence, his own concern for his own professional
8 position, the inconvenient reality that there was ample
9 justification for investigating his knowledge and
10 conduct in the period following the murder. 14:25

11
12 Undoubtedly it was legitimate for the full facts to be
13 looked into.

14
15 And contrary to what was alleged, the inspector had 14:25
16 received reports from a range of persons. And I won't
17 read anything out here, but Day 162, page 90, the
18 Mangan sources are outlined in detail. So you have
19 that page reference.

20 14:25
21 Another instrument of the alleged oppression was the
22 press release, which, as we know, was a couple of days
23 after the murder. And this has featured also in
24 Mr. O'Dwyer's submission and also in the written
25 submission from Sergeant Hughes's side. And again, 14:26
26 it's a matter for you, Chairman, but in my submission
27 there was very cogent evidence from Superintendent
28 Kevin Donohue, now retired. The complaint is that, as
29 I understand it, is that in the course of preparing --

1 that the press release included the following words
2 within its text:

3
4 "In the course of preparing a document for court use,
5 in the sentencing of Mr. A --" 14:26

6
7 It didn't say Mr. A in the text, because that wasn't
8 clear at that point.

9
10 "-- Ms. Saulite expressed concerns for her safety." 14:26

11
12 So that's his beef. The difficulty with that of
13 course, Chairman, is that Sergeant Hughes may not be
14 willing to accept this. That is one hundred percent
15 factually correct. It is correct that in the course of 14:26
16 preparing a document for court use for the sentencing
17 Ms. Saulite has expressed those concerns.

18
19 Now I do acknowledge the press release contained
20 incorrect information that Ms. Saulite had been given 14:27
21 crime prevention advice. And the witness, more
22 importantly, acknowledged that. That was incorrect.
23 And it was acknowledged by gardaí in their evidence to
24 be incorrect. But it was an entirely bona fide error
25 and in my submission there isn't any basis for 14:27
26 suggesting otherwise.

27
28 Importantly it is not an error which in any way
29 reflected badly upon Sergeant Hughes or in any way

1 could be said to have discredited Sergeant Hughes. It
2 is in fact irrelevant to the allegation of targeting or
3 scapegoating, in my submission. And it is a matter for
4 you what to make of Superintendent Donohue's evidence,
5 but the way he gave his evidence, in a straightforward 14:27
6 manner, it would appear with no axe to grind, no
7 connection for or against Sergeant Hughes, readily
8 accepting the contents were provided to him by Garda
9 colleagues. And one other important issue of detail:
10 The evidence indicates it wasn't Chief Superintendent 14:28
11 Phillips or Assistant Commissioner McHugh who had
12 provided him information for the press release. He
13 didn't speak to either. But apparently Sergeant Hughes
14 doesn't accept that.

15
16 And I think it is appropriate again to step back from 14:28
17 the overall allegation and assess, if you like, the
18 grand conspiracy that's alleged. The conspiracy that's
19 alleged to target him he says actually commenced with
20 this press release, which issued within three days of 14:28
21 the murder. So as well as the press release then, we
22 have Inspector Mangan's report, which I have dealt with
23 reasonably briefly, which did nothing more than
24 recommend a more fuller investigate. But even in the
25 context of that report, it is clear, and I think in 14:29
26 fairness to the sergeant he acknowledged this in
27 cross-examination, that it is replete with references
28 which are actually in ease of the sergeant. There's
29 references to reasons why one mightn't focus unduly on

1 the victim impact, there's a suggestion that it is not
2 admissible, that it was written in handwriting on hotel
3 notepaper but that it wasn't in the correct form for a
4 victim impact report.

5
6 And then we have the third instance of alleged
7 oppression: Chief Superintendent Feehan's report under
8 the Garda Discipline Regulations, as directed should
9 take place by Assistant Commissioner McHugh. In my
10 submission, Chairman, it is a matter for you, but all
11 the pointers I suggest tend to indicate it was a
12 rational decision to commence that investigation, the
13 decision to do so was based upon reasonable
14 considerations and most importantly of all, ultimately
15 resulted in the sergeant being cleared of any
16 wrongdoing. And it is noteworthy that the Feehan
17 report to Assistant Commissioner McHugh, which is
18 reproduced at pages 1963 to 1981 of the materials,
19 considered a wide spectrum of reports and personnel.
20 It looked at information held by Gardaí other than
21 Sergeant Hughes and Garda Nyhan.

22
23 Sergeant Hughes in his submissions says because the
24 disciplinary proceedings were taken against two gardaí
25 only, and not anyone else, that in and of itself, it
26 seems, amounts to targeting. But in that connection,
27 it's relevant perhaps to look at page 118 of the
28 transcript. And I say that completely ignores the
29 factual context. Garda Nyhan and Sergeant Hughes were

1 the two gardaí who had the closest and, importantly,
2 the most contemporaneous dealings with the deceased:
3 They had visited her home on the 11th October 2006;
4 they had visited her home again on another occasion,
5 the date wasn't given but it was confirmed; they had 14:31
6 the discussion they had with her, lasting it seems 45
7 minutes on the 14th November, at Swords Garda Station,
8 which the sergeant was anxious to reduce to being a
9 casual or informal chat where she told them what she
10 told them; and of course then we had the victim impact 14:32
11 report which was unique to the two gardaí and not any
12 other guard.

13
14 we also have the acknowledgment, at page 52, that the
15 victim impact report of the -- it was said on the 20th 14:32
16 November:

17
18 "The content of the victim impact was of concern to me,
19 you could say professionally or personally."

20
21 Indeed on page 149 the sergeant concedes finally that
22 he ought to have read the victim impact statement.
23 That is Day 162, page 149.

24
25 So, in my submission, for all these reasons there was 14:32
26 ample basis, in fact not only was it a legitimate
27 decision to bring it but it would have been highly
28 questionable not to have brought, to at least have
29 opened an investigation, a fact-finding, and

1 thereafter, when that had been looked into and found to
2 warrant further investigation, it was entirely
3 legitimate and I say warranted to commence the
4 disciplinary regulations. It wasn't the preferment of
5 the discipline, it was simply the commencement of 14:33
6 investigation which ultimately resulted in an
7 acquittal.

8
9 In relation to that, it is said, and I think it perhaps
10 filters down to this at the end, that the targeting 14:33
11 that's now suggested was that, well, that decision to
12 clear him, to discontinue against him, should have
13 happened much earlier. But in my submission that's a
14 submission made by a party where the ground is moving
15 from underneath them. That's something of a desperate 14:33
16 submission. Because it fails to recognise it
17 necessarily takes time for facts to be inquired into,
18 particularly if there is meant to be an in depth and
19 comprehensive investigation carried out. These things
20 take time. 14:34

21
22 It is an unfortunate aspect of Garda life that there
23 will be from time to time disciplinary investigations.
24 A number of the witnesses commented upon that. It's an
25 aspect of the hierarchical disciplined force. And that 14:34
26 is Garda life. It doesn't mean that groundless
27 investigations should happen, but it does mean that it
28 is something that's not normally an aspect to the same
29 extent in civilian life that is an aspect in Garda

1 life. And it comes with the terrain.

2
3 In my submission there is no evidence that any of these
4 investigations were carried out otherwise than in a
5 fair manner, in a reasonable manner, taking into
6 account relevant considerations. 14:34

7
8 And there's one other important detail: Chairman,
9 you're not sitting here as a judicial review judge, nor
10 are you sitting, presiding over this Tribunal as an 14:35
11 appellate court. As a matter of fact, no judicial
12 review was brought, seeking to stop either the
13 fact-finding or seeking to stop the disciplinary. I
14 think that's relevant. Particularly in circumstances
15 where it is pretty clear from the off the sergeant had 14:35
16 the benefit of legal advice. But he's now saying,
17 effectively, that there was some sort of void or
18 invalid decision made in the first place. In my
19 submission it is of note that no such case was made by
20 way of judicial review. 14:35

21
22 Could I move now then, Chairman, to just mention a few
23 page references for you in relation to some of the set
24 piece, and I'll just do this by page references, so it
25 doesn't take up time. 14:36

26
27 It is my submission that, and it was put during
28 cross-examination that there were a number of
29 situations in respect of which the sergeant was in

1 denial of matters and was in denial of his feelings of
2 personal guilt and in denial in relation to certain
3 contents of medical reports put to him. For instance,
4 he seemed to have been in denial about the need to see
5 a psychiatrist and who was responsible for sending him 14:36
6 to a psychiatrist. I will simply give you the page
7 references: Day 163, that features largely. It was
8 apparently a mistake by Dr. Griffin, the psychiatrist,
9 that Sergeant Hughes had felt he didn't have a future
10 -- had said he didn't have a future in the Gardaí. 14:36
11 That was a mistake according to the sergeant. Day 163,
12 page 14. There was a denial about his obsessional
13 ruminating about his various issues in 2007/2008.
14 That's Day 163, page 15.
15 CHAIRMAN: 5-0 or 1-5? 14:37
16 MR. O'HIGGINS: 1-5, sorry.
17 CHAIRMAN: Thank you.
18 MR. O'HIGGINS: Denial about thoughts of vengefulness
19 to Garda authorities; denies what Dr. Devitt attributed
20 to him in 2010, page 29 on the same transcript, Day 14:37
21 163, page 29; denial of drinking levels, Day 163, page
22 30; and then on pages 32 and 33 denial of anger levels
23 and denial of further drinking levels; page 39, there's
24 backwards and forwards about obsessional mistrust
25 issues and these worsening into the year 2011; and on 14:37
26 page 40 there is an initial denial that he himself
27 sought to be medically discharged, which on page 41 he
28 eventually accepted; page 52, a denial as to his
29 refusal to provide a statement for the investigation -

1 I think that's an important one, because that was an
2 issue between us for quite some time; and then -- well,
3 I might just pause on that one for a moment.
4

5 In my submission, Chairman, that area of dispute in and 14:38
6 around the provision of a statement, that's a
7 significant issue. Because you'll recall that the
8 sergeant, for better or for worse, perhaps by way of
9 attack being the best form of defence, for whatever
10 reason, decided to turn what in my submission on any 14:38
11 fair reading was a major area of weakness for him: why
12 in heaven's name did he not provide a statement to help
13 the investigation? He sought to turn that into a point
14 of criticism or attack on management, that somehow they
15 excluded him from the investigation. And in my 14:39
16 submission, that is almost perverse and it is not borne
17 out by the facts and it is not borne out by the
18 exchanges in September and October of 2007 with
19 Inspector O'Sullivan and it is not borne out by the
20 transcript. And it is dealt with on page 52 of the 14:39
21 same transcript as well.

22
23 The court will be aware, you, Chairman, will be aware
24 that the Inspector O'Sullivan conversations in
25 September and October '07: call 1 was 20th September; 14:39
26 call 2, early October; call 3, later in October. And
27 of interest is that it approximates to the disputed
28 conversation with Chief Superintendent Feehan on the
29 8th November 2007, the same year. So it would seem at

1 that stage the ruminating, the obsessing, the
2 difficulties at home, not being able to not disturb
3 other family members with minute detail about his
4 campaign as recorded in the medicals, all of this is
5 coming to a boil in late autumn/winter of 2007. And 14:40
6 it's of note that that is the same time that he forms
7 the position and insists to Walter O'Sullivan that he
8 had said these things earlier on the day after the
9 murder and also claims that he said something disputed
10 by Chief Superintendent Feehan; namely, that he had 14:40
11 said that the disciplinary investigation represented
12 targeting of him.

13
14 Chairman, I want to now, with your leave, move to some
15 areas that you indicated you would like some submission 14:40
16 on.

17 CHAIRMAN: Thank you.

18 MR. O'HIGGINS: I want to deal first of all, if I may,
19 with the Baranya case.

20 CHAIRMAN: Thank you. 14:40

21 MR. O'HIGGINS: And I have just a few brief things to
22 say in relation to this. First of all, Chairman, it is
23 right and proper, in my submission, that you would have
24 regard to what is undoubtedly a development in the law.
25 That, you know, the law as to be declared today is 14:41
26 different now that we have the Supreme Court view of
27 matters.

28 CHAIRMAN: Yes.

29 MR. O'HIGGINS: That represents the law. The reason

1 it's come up in particular is this submission by
2 Mr. O'Dwyer that, interestingly not so much the Mangan,
3 which is interesting, not so much the Mangan discussion
4 representing a protected disclosure --

5 CHAIRMAN: No. It's Inspector Cryan and Superintendent 14:41
6 Curran.

7 MR. O'HIGGINS: Superintendent Curran, yes. Just
8 taking those individually.

9
10 First of all, Inspector Cryan. As I understand it, the 14:42
11 candidate words being relied upon in support of the
12 proposition that there was a disclosure made to
13 Inspector Cryan that amounts to a protected disclosure,
14 is this conversation, I am going to call it the venting
15 conversation -- 14:42

16 CHAIRMAN: Yes.

17 MR. O'HIGGINS: -- where, on the inspector's evidence,
18 the sergeant was venting or letting off steam, is
19 another way it was put in the question. In my
20 submission, it is open to you, Chairman, and more than 14:42
21 open to you, to form the view that the conversation
22 with Inspector Cryan was in the context that the
23 inspector clearly didn't receive what was being said as
24 a complaint let alone a protected disclosure. He
25 viewed it as the sergeant venting or blowing off steam 14:43
26 in a situation of shock over Ms. Saulite's death, in
27 the context where, according to his answer, he was
28 blaming himself, the sergeant was blaming himself for
29 not doing more, and in the context where the sergeant

1 is also saying the investigations should have been more
2 coordinated, that's the bit that's relied upon, and
3 also indicating -- and also in the context where the
4 sergeant is indicating that he's refusing to talk to
5 anybody not in uniform. Another point of context. And 14:43
6 I will just bring you to those individual references so
7 you have the page references that in my submission are
8 relevant.

9
10 So it's Day 166, the examination of Inspector Cryan and 14:43
11 cross-examination of him. Day 166, page 61 and I think
12 this is cross-examination.

13 CHAIRMAN: That's the cross-examination.

14 MR. O'HIGGINS: Yes.

15 CHAIRMAN: It goes from page 56 to 61. So far as 14:44
16 relevant in this one.

17 MR. O'HIGGINS: Thank you. So I think the particular
18 important bits are, two-thirds of the way down on page
19 61, line 18.

20 CHAIRMAN: Yes. 14:44

21 MR. O'HIGGINS: Starting with the second line:

22
23 "You thought he was venting or letting off steam. That
24 was your view, you didn't see these as complaints at
25 all? 14:44

26 A. No. My view then and view now is that he was
27 blaming himself for not doing enough, for not reading
28 the victim impact report and his mistake was that had
29 he read it he could have prevented it."

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Now I should, in fairness, there's more from Inspector Cryan by way of Mr. O'Dwyer's point, page 106 is also relied upon or should be relied up as well.

CHAIRMAN: Page 106?

14:45

MR. O'HIGGINS: Yes. This is Mr. McGuinness asking questions.

CHAIRMAN: Yes, one second now. Day 166, is that correct?

MR. O'HIGGINS: Day 166, that's right.

14:45

CHAIRMAN: We are talking about Day 166 and you just said page 106, is that right?

MR. O'HIGGINS: So, Day 166, page 106.

CHAIRMAN: Thank you very much. Page 106. That is fine, thanks very much.

14:45

MR. O'HIGGINS: The first bit I read was page 61. The reference that's relevant on page 106 is Mr. McGuinness asking questions in redirect, I think it is. It's located as being a conversation that occurred, according to line 7, on the 21st November. Line 9:

14:45

"Yeah, and he said they should have been coordinating investigations, yeah. There was no reason to say it to me before that.

Q. Yes?

14:46

A. Because she hadn't been murdered.

Q. You go on to say --"

Then there is a longer quote from his note. And the

1 quote says the following:

2
3 "" He didn't outline why he thought this or what form
4 the coordinated investigation should have taken place.
5 The child abduction case was now complete and despite 14:46
6 him believing that there should be a coordinated
7 investigation he is refusing to talk to anyone who is
8 not in uniform. ""

9
10 That's where I am picking up the uniform reference. 14:46

11
12 So, as far as I can see, Chairman, they are the two
13 pieces that are relevant to that discussion and
14 certainly the first of them is the piece relied upon in
15 Mr. O'Dwyer's written submissions. 14:46

16
17 I say firstly there doesn't appear to be wrongdoing
18 disclosed to Inspector Cryan, unlike Mr. Baranya of the
19 Supreme Court case, who was saying the work practice
20 was causing him pain and he wanted to move to another 14:47
21 area. That is point number one. Secondly, Chairman,
22 it's my submission that there's no disclosure of
23 information in the normally accepted sense of that
24 expression. Rather, it's an expression of an opinion.
25 Basically the man is saying there should have been 14:47
26 better coordination. It's a bit like saying, I don't
27 want to trivialise the issue, but it's a little bit
28 like opining, 'Ah, the Commissioner's useless, he
29 doesn't control his staff', or 'The judge is useless,

1 doesn't keep order'. This is an opinion from the --
2 CHAIRMAN: They should have coordinated it. One person
3 should have or one group of people should have been in
4 charge, there should have been coordination.
5 MR. O'HIGGINS: In my opinion. 14:48
6 CHAIRMAN: Just if you take that as -- that's not
7 exactly what the words are but, the question, I
8 suppose the question, and I think that the Tribunal
9 sort of took this view in the original preliminary
10 ruling, but Mr. O'Dwyer says that the Supreme Court 14:48
11 decision indicates that you have to take also what the
12 implications are. So if somebody says there should
13 have been coordination indicating thereby that there
14 wasn't coordination, there shouldn't be coordination.
15 Is it not inferable from that, that if there had been 14:49
16 coordination there would have been a better outcome? I
17 mean that is what I am looking at now in light of --
18 and Mr. Justice Hogan describes it as primary or
19 secondary facts, I would call it inferences. So he
20 says there should have been coordination and I think 14:49
21 the point that is made, I think Mr. O'Dwyer's essential
22 point is, that that implies that there was something
23 wrong, admittedly perhaps a bit unclear, not absolutely
24 obviously but it implies there was something done wrong
25 and if it hadn't been done wrong and had been done 14:49
26 right, the outcome would have been different. That's
27 essentially what he is saying.
28 MR. O'HIGGINS: If I can say --
29 CHAIRMAN: It does appear to have a certain degree

1 of -- as I say, in light of, I mean the point about the
2 Supreme Court, I am understanding, is that it's opening
3 a door to a level of inference frankly that somewhat
4 perhaps surprises me, certainly that would not have
5 reflected the position in the preliminary decision. I 14:50
6 think that's a reasonable conclusion. What do you say
7 to that?

8 MR. O'HIGGINS: Well, Judge, if we contrast it with the
9 facts in Baranya, it might be useful, very briefly.

10 CHAIRMAN: Yes. 14:50

11 MR. O'HIGGINS: We see from the first page, paragraph 4
12 of Judge Hogan's decision, what Mr. Baranya actually
13 done, he was very clearly making a complaint, there's
14 no doubt about it.

15 CHAIRMAN: Yes. 14:50

16 MR. O'HIGGINS: He's complaining, and he was alerting
17 them to concern for his own safety: This is causing me
18 pain, these work practices. It's very clear. And not
19 only that, he has a specific request: Arising from my
20 complaint I am suggesting a remedy - lift me out of 14:51
21 here, I want to move. And all of that is set out at
22 paragraph 4.

23 CHAIRMAN: Yes.

24 MR. O'HIGGINS: "He contends --" second line of it,
25 this is Judge Hogan's decision: 14:51

26
27 "He contends that upon his return to work he informed
28 his employer that he no longer wanted to do this type
29 of work as it caused him a good deal of pain. It's the

1 events of the 15th September 2015 which however are
2 critical. It is common case that on that day
3 Mr. Baranya said that he was in pain and indicated to
4 his supervisor that he wished for to a change of role.
5 The exact words which uttered are a matter of dispute. 14:51
6 Did he, as Mr. Baranya claims, go further and say that
7 he was in pain as a result of work or did he, as
8 Rosderra maintain, simply say that he was in pain?"

9
10 He says he will come back to that. 14:51

11 CHAIRMAN: And that's what the judge says has to be
12 decided by the fact-finder.

13 MR. O'HIGGINS: Yes.

14 CHAIRMAN: He said that: Just what did he say?

15 MR. O'HIGGINS: So what do we not have here in 14:52
16 contrast?

17 CHAIRMAN: Yes.

18 MR. O'HIGGINS: In the first instance, we don't seem to
19 have a complaint in the normal sense of that
20 expression, we don't have certainly an allegation of 14:52
21 wrongdoing; we don't seem to have a crisp disclosure of
22 information as distinct from an opinion; and thirdly,
23 there's no suggestion of a breach of a legal obligation
24 being made.

25
26 I want to say to you something in relation to that. 14:52
27 And I shouldn't mislead. Because Judge Hogan says
28 that's not required but it's usually there. The latter
29 point. No suggestion of breach of a legal obligation.

1 He says that at paragraph 28.

2 CHAIRMAN: No, but isn't it the implication that the
3 safety or life of somebody was endangered, isn't that
4 one of the -- isn't that the essence of this one? I
5 mean this case mightn't be here if that weren't, 14:53
6 provision weren't in the Protected Disclosures Act.
7 Isn't that a relevant wrongdoing?

8 MR. O' HIGGINS: Save that importantly all of that must
9 be considered in the context in which the words were
10 uttered. 14:53

11 CHAIRMAN: Oh precisely. I don't think anybody would
12 dispute that, Mr. O'Higgins.

13 MR. O' HIGGINS: Yes.

14 CHAIRMAN: But if he says there was a failure to do
15 proper policing, as a result of which people were 14:53
16 endangered or more endangered than they otherwise would
17 have been, or something of that kind, that would be a
18 protected disclosure, it seems clear.

19 MR. O' HIGGINS: Certainly if he developed it in that
20 way. 14:54

21 CHAIRMAN: You say you might say, well, there should be
22 a fact declared. well, the fact that he declares is
23 there was a lack of coordination, there should have
24 been a person in charge of -- I mean this is -- I am
25 just trying to work out. There should have been a 14:54
26 unified approach to the various incidents that happened
27 as a result of which it would have been apparent that
28 there was a level of threat to Mr. Hennessy and from
29 which it ought to have been inferred that there was a

1 level of threat to Ms. Saulite. That's what he is
2 saying.

3 MR. O'HIGGINS: But that's, if I may say, the
4 construction being urged now.

5 CHAIRMAN: Sorry, correct, and that's what I am
6 endeavouring to put. 14:55

7 MR. O'HIGGINS: Yes.

8 CHAIRMAN: And where is that wrong, Mr. O'Higgins?

9 MR. O'HIGGINS: Can I just say, before answering that,
10 could I just say, it does have -- perhaps this is an 14:55
11 unhelpful comment, but it does have the sheen of a
12 search for evidence on transcript. Because ahead of
13 that it was thought the Mangan candidate PD was more
14 encouraging, but now we have, arising from pretty well
15 a single line in the inspector's evidence, we have 14:55
16 'Ah-ha, we have magicked, landed by chance, there's our
17 PD', and in my submission you're entitled to take that
18 into account. It has the ring of something that was
19 thought up on the bus home.

20 CHAIRMAN: And I am surprised that my understanding of 14:55
21 protected disclosures was different, but the Supreme
22 Court has said what it says it means. Perhaps I'm a
23 little surprised, but they're not worrying about
24 whether I am surprised or not, in their wisdom.

25 MR. O'HIGGINS: In my submission, Chairman, one thing 14:56
26 about which there can be far less debate, I won't say
27 no debate, but far less debate, is this: Whatever view
28 you take around the margins of that issue, viewing the
29 line in context, could it amount to a protected

1 disclosure, notwithstanding that there doesn't appear
2 to be a complaint or new information, or a suggestion
3 that the law has been breached, even if you side with
4 that and don't regard it as too much of a stretch, if
5 we go with that, in my submission, where the claim that 14:56
6 this is a protected disclosure falls very clearly is at
7 hurdle number two. And hurdle number two we know is
8 the requirement to show the connection --

9 CHAIRMAN: I understand that and I want to hear what
10 you have to say about that, Mr. O'Higgins. I suppose, 14:57
11 do you accept that this judgment appears to affect the
12 Tribunal's preliminary decision?

13 MR. O'HIGGINS: If I could put it this way: I do
14 completely accept that you not only can but should take
15 into account the Supreme Court decision and you have an 14:57
16 opportunity now, when before giving your final report,
17 if you wish to, if you think it appropriate, to --

18 CHAIRMAN: To sort of go back up river a little bit --

19 MR. O'HIGGINS: Yes.

20 CHAIRMAN: -- to beyond the provision, the preliminary 14:57
21 and say, well, the situation appears to have been
22 different, so we now have to look with a new light on
23 the Sergeant Hughes/Inspector Cryan.

24 MR. O'HIGGINS: No difficulty with that approach,
25 Chairman, but could I say this: I am making that 14:58
26 acknowledgment in the context where it is my submission
27 that whatever the Supreme Court decision does in
28 relation to the law, it doesn't obviously affect the
29 evidential landscape. And it is my submission that the

1 evidential landscape in fact has improved in our
2 direction --

3 CHAIRMAN: And you say --

4 MR. O' HIGGINS: -- since the preliminary hearing.

5 CHAIRMAN: Okay, applying, even accepting all the 14:58
6 inferential, the inferential approach that the Supreme
7 Court endorses or declares, you say, even accepting
8 that, you have to look at the exchange in context. And
9 that exchange includes the condition of Sergeant Hughes
10 when he spoke to Inspector Cryan, the sympathy or 14:59
11 otherwise, the response of Inspector Cryan to Sergeant
12 Hughes's predicament, the nature of the conversation
13 and exchanges between them, and whether that was
14 principally a confessional acknowledging approach, if
15 that evidence is accepted, or was it an occasion when a 14:59
16 complaint was being made? If I am understanding,
17 that's part of the context and it's legitimate on your
18 view to look at that.

19 MR. O' HIGGINS: Yes.

20 CHAIRMAN: You say looking at all of that, was this 15:00
21 a -- although the words taken in isolation may well
22 qualify under Baranya, certainly on a certain
23 inferential basis --

24 MR. O' HIGGINS: Yes.

25 CHAIRMAN: -- nonetheless it doesn't qualify for other 15:00
26 reasons, i.e. the context is not such as to be an
27 occasion of a protected disclosure.

28 MR. O' HIGGINS: That is my respectful submission. And
29 one additional, one way of putting it perhaps would be

1 that at a level of principle, if you take the view, as
2 a matter of law, with the guidance you have from the
3 Supreme Court, that in principle, even if stretched,
4 the line attributed to the inspector could amount to a
5 protected disclosure, the question for you, in my 15:00
6 submission, effectively is a matter of the practice on
7 the facts here as you find them was it in fact a
8 protected disclosure.

9 CHAIRMAN: All right.

10 MR. O'HIGGINS: That still remains open to you. 15:01

11 CHAIRMAN: And there the parties are in disagreement.
12 Mr. O'Dwyer says there's a clear statement, there's a
13 statement, it's a clear statement, maybe it's not a
14 very full complaint but it undoubtedly represents a
15 complaint. There's the distinction between the two. 15:01
16 But point one: You're both agreed, if I understand,
17 that Baranya is relevant and Baranya should be taken
18 into account and Baranya represents a new situation
19 that wasn't taken into account when the Tribunal gave
20 its preliminary decision. So therefore we can't ignore 15:01
21 Baranya, we have to take it into account. So that's
22 from your position, yes, we do take it into account.

23 MR. O'HIGGINS: Thank you, Chairman. And just before I
24 move off Baranya then can I --

25 CHAIRMAN: Are you happy also -- sorry, just let me get 15:02
26 something else out of the way. Are you happy with
27 Mr. O'Dwyer's submission that the matter may be dealt
28 with without any further evidence? There's no need to
29 reopen the inquiry, according to him he is quite

1 satisfied with that, that the existing evidence can be
2 reviewed by reference to Baranya without returning to
3 evidence? Are you happy with that?

4 MR. O' HIGGINS: I am happy with that, Chairman.

5 CHAIRMAN: Okay. So there we are. Now you're going to 15:02
6 move on to the question of the connection between
7 anything that Inspector Cryan - I am sorry I keep
8 forgetting names - received. Okay. If he didn't
9 receive it as a protected disclosure what follows or
10 what do you want to go on to say? 15:03

11 MR. O' HIGGINS: well I suppose I can be very brief with
12 that. My simple submission is that there is no
13 evidence before you that on foot of that conversation
14 taking place, and the inspector receiving that
15 protected disclosure, that targeting took place. I am 15:03
16 not aware of any evidential nugget or issue which
17 connects any of the alleged targeters or even the
18 instruments of targeting such as the disciplinary or
19 the fact-finding or the CRO, the rejection of the CRO,
20 the allegations he makes in the context of the CRO 15:03
21 investigation.

22
23 Just before I move off Baranya, Chairman, can I just,
24 you will be aware of this, it may be that the last
25 sentence of paragraph 28 of Judge Hogan's decision on 15:04
26 one view could be regarded as the ratio of the
27 particular case, where he says that a complaint --

28
29 "It follows that a complaint made by an employee that

1 his or her own personal health was being affected by
2 being required to work in a particular manner or in
3 respect of a particular task can in principle amount to
4 a protected disclosure."

5
6 That on one view is the ratio decidendi, but that is a
7 matter for you.

8
9 Could I, ahead of that, in addition to that actually,
10 just draw to your attention what I regard as a quite
11 interesting additional guidance provided by Judge
12 Charleton in his separate judgment.

13 CHAIRMAN: Yes, I read that too.

14 MR. O'HIGGINS: In the case, which you will have read.

15 CHAIRMAN: If he really thought that I wondered why he
16 didn't dissent. I think that as a matter of
17 construction, as opposed to a matter of interpretation,
18 he might have come to a different conclusion, but he
19 didn't. He agreed with Judge Hogan. So, there it is.

20 MR. O'HIGGINS: Yes. I think there's interesting
21 contents in a very short paragraph, paragraph 4, where
22 he says the following.

23 CHAIRMAN: Yes.

24 MR. O'HIGGINS: "Normally, and on any use of what has
25 now become an ordinary term of speech, a whistleblower
26 is someone who, despite not being authorised and
27 perhaps despite being expressly prohibited or actively
28 bullied makes public some significant information about
29 an organisation which discloses wrongdoing within its

1 confines that impacts on public safety or on the public
2 interest in matters of safety or compliance of tax
3 paying. While whistleblowers are seen in the public
4 mind as being motivated by the noble sentiments --"

15:05

5
6 This is the bit I particularly rely upon.

7
8 "-- what matters most is that their point of view is
9 reasonably held, whether what impels their revelation
10 is bitterness or genuine selflessness."

15:06

11
12 And it is there.

13 CHAIRMAN: I thought the Act had something about that,
14 didn't it? The Act assumes that it is in good faith.
15 I mean it is possible, I suppose, but doesn't the Act,
16 the 2014 Act presume it is in good faith?

15:06

17 MR. MCGUINNESS: It provides that motivation is
18 irrelevant.

19 CHAIRMAN: Motivation is irrelevant. There we are.
20 Motivation is irrelevant. And whistleblower, by the
21 way, I think is used in the European Directive from
22 which this is derived. That's my understanding. So,
23 whistleblower, people were wondering about how -- is
24 that an official word or not. So yes, it is endorsed
25 by the European, by the European Court of Justice, or
26 sorry, the European Commission at any rate. Anyway,
27 sorry about that, Mr. O'Higgins.

15:06

28 MR. O'HIGGINS: Not at all, Chairman. So then, that's
29 the Inspector Cryan piece.

1
2 The Superintendent Curran one, if I can just briefly
3 deal with that. I have already made submissions on
4 that. But first of all I say the sergeant's case
5 falls, fails on the factual front. In my submission it 15:07
6 is open to you and it would be reasonable for you to
7 conclude that in fact what the sergeant insists he said
8 to the superintendent in April '07 in fact he didn't
9 say, because it simply isn't recorded in an otherwise
10 very complete and pro Sergeant Hughes report. And I 15:07
11 think that is an important factual issue that falls to
12 you to decide. And if I am correct in my submission
13 that the better view on that is that those things
14 weren't said concerning system failures or such and so
15 forth well then that completely falls apart, and it 15:07
16 doesn't even get out of the blocks.
17 CHAIRMAN: Am I right in thinking Superintendent
18 Curran, Chief Superintendent Curran now, said he had no
19 recollection of his conversation and relied entirely on
20 his note? 15:08
21 MR. O'HIGGINS: well he --
22 CHAIRMAN: Am I right about that?
23 MR. O'HIGGINS: well he did say that, plus he also said
24 that the talk by Sergeant Hughes of system failings did
25 come later. So he acknowledges it came but it was 15:08
26 November/December he says.
27 CHAIRMAN: Indeed. And when Sergeant Hughes mentioned
28 the Inspector O'Sullivan incident he sent off a note to
29 Inspector O'Sullivan to check it and Inspector

1 O'Sullivan denied it in response, am I right about
2 that?

3 MR. O'HIGGINS: Yes.

4 CHAIRMAN: So he said no, this didn't happen at the
5 time. Sorry where I am going is this, Mr. O'Higgins: 15:08
6 I thought that Chief Superintendent Curran said, look,
7 I don't remember any of this, I rely entirely on my
8 note of it. Fair enough. And so, he gave evidence on
9 that basis. But had he not responded to a
10 questionnaire by the Tribunal that seemed to open the 15:09
11 door somewhat? I am just remembering Mr. Lynn's
12 cross-examination, and I thought that there was -- now
13 I am not asking you to debate this, clearly it is a
14 matter of fact to be analysed and to be looked at. But
15 I thought that -- that's what I referred to earlier, 15:09
16 where Mr. Lynn was suggesting to him, if I recall, that
17 as to the first conversation, the 23rd April 2007, that
18 it was perhaps understandable that he wouldn't have
19 written down references to matters that he,
20 Superintendent Curran, felt were outside his bailiwick. 15:09
21 Now I may have that slightly wrong, but that's
22 essentially the point. And that was Mr. Lynn's
23 position. But didn't Superintendent Curran give a
24 somewhat different answer in his response to the
25 questionnaire? Am I wrong? Maybe I am. 15:10

26 MR. O'HIGGINS: No, you may be correct, Chairman.

27 Mr. O'Dwyer may have a page reference for that.

28 CHAIRMAN: I am not asking you for --

29 MR. O'DWYER: I made reference to it this morning.

1 CHAIRMAN: You did. So I mean basically there was
2 some -- it was the subject of Mr. Lynn's
3 cross-examination.
4 MR. O' HIGGINS: Yes.
5 CHAIRMAN: Was a distinction between the position that 15:10
6 said, look, I wrote, I don't remember, there's what I
7 wrote down, I am good at kind of taking note and so on
8 and I am writing it down and therefore I am relying on
9 that, and he drew some, he paid some attention. I
10 haven't got it in front of me, because I haven't been 15:10
11 just reading that particular thing recently. But you
12 say overall that this, the inference is, or the
13 conclusion should be drawn that he didn't make, that
14 Sergeant Hughes didn't make a protected disclosure to
15 Superintendent Curran on the 23rd April 2007. 15:11
16 MR. O' HIGGINS: Yes.
17 CHAIRMAN: That's basically it.
18 MR. O' HIGGINS: And I make the same point in relation
19 to, hurdle number two has not been crossed concerning
20 the absence of evidence as to a connection. 15:11
21 CHAIRMAN: And again, there's no connection.
22 MR. O' HIGGINS: Yes.
23 CHAIRMAN: He did give evidence that he had not
24 discussed the matter with Assistant Commissioner
25 McHugh. In fact, he may have said that he had no 15:11
26 conversation whatsoever with Assistant Commissioner
27 McHugh. And Assistant Commissioner McHugh said he
28 hadn't had any conversation about it. He said he
29 wasn't aware of any complaints.

1 MR. O' HIGGINS: Yes.

2 CHAIRMAN: That's the state of the evidence if I
3 recall, but all that has to be checked.

4 MR. O' HIGGINS: If I can give you a page reference on
5 that. In his evidence on Day 167, page 99, line 28, 15:12
6 down to page 102, Assistant Commissioner McHugh stated
7 that a grave injustice would be done to him if he was
8 accused of targeting or discrediting Sergeant Hughes
9 about something he knew nothing about.

10 CHAIRMAN: That's A/C McHugh. Thank you. 15:12

11 MR. O' HIGGINS: Yes.

12 CHAIRMAN: Thanks very much.

13 MR. O' HIGGINS: Chairman, those are my submissions.

14 CHAIRMAN: Thanks very much. Now Mr. O'Dwyer, I said I
15 would come back to you. 15:12

16

17 SUBMISSION BY MR. O' DWYER:

18 MR. O' DWYER: It is not really a criticism I suppose,
19 but almost everything that Mr. O'Higgins said wasn't
20 really a reply to our, you know wasn't a reply to our 15:12
21 submissions as such. I think he only mentioned our
22 submissions once in the whole reply, so I am at
23 something of a disadvantage I suppose because that's
24 what we tried to do, is respond to their submissions.
25 That is what I thought the point was. 15:13

26 CHAIRMAN: Can I help you and tell you what I would
27 like to hear from you?

28 MR. O' DWYER: Yes, sure.

29 CHAIRMAN: Mr. O'Higgins makes submissions about

1 Baranya.
2 MR. O' DWYER: Yes.
3 CHAIRMAN: There's effectively complete agreement on
4 Baranya that it does affect it, it is relevant and the
5 Tribunal should revisit the issue and back-up, so to 15:13
6 speak, go up river of the preliminary ruling.
7 Everybody is happy with that. I can tell you the
8 Tribunal will have no difficulty with that.
9
10 Now we know the debate about whether the Hughes/Cryan 15:13
11 conversation on the Wednesday following the murder was
12 a protected disclosure, in fact, having regard to the
13 rules.
14 MR. O' DWYER: Yes.
15 CHAIRMAN: But what do you say about this point that 15:14
16 Mr. O'Higgins emphasises: He says there's no
17 connection between anything that was said on that
18 occasion and any action that took place; in other
19 words, there's no evidence that Inspector Cryan went
20 and told A/C McHugh or anybody else, he didn't take it 15:14
21 as a protected disclosure, and therefore that that
22 means there's an absence of a connection and that means
23 that it's essentially irrelevant? That's his point.
24 MR. O' DWYER: Yes, Chairman. well, that I think is
25 very much the point you were asking me about earlier, 15:14
26 isn't it?
27 CHAIRMAN: Correct. That is why I decided to give you
28 an opportunity and I said, look, I'll leave that --
29 MR. O' DWYER: Yes.

1 CHAIRMAN: -- I'll hear the other submissions and I'll
2 come back to you on that.

3 MR. O'DWYER: Yes.

4 CHAIRMAN: Because I didn't want to sort of jump it on
5 without giving you a chance to have a think about it 15:15
6 and possibly have a word with your colleagues.

7 MR. O'DWYER: Yes, Chairman. And I did do that. And I
8 suppose, I mean first of all if I can just say, I mean
9 just to go back a little bit on what Mr. O'Higgins
10 said, I mean first of all, although I think you said it 15:15
11 there, Chairman, that I think the Tribunal could
12 certainly find that the disclosure, shall we say, to
13 Detective Inspector, at the time, Cryan, was a
14 protected disclosure, because it did --

15 CHAIRMAN: Okay. 15:15

16 MR. O'DWYER: -- by implication, and that was the
17 implication and context we were talking about. So he
18 didn't actually say, as we know, that this led to the,
19 you know that this effectively meant that Ms. Saulite
20 wasn't protected and she could have been protected. He 15:16
21 didn't say that. There's no doubt about that. But
22 nonetheless that could, as I think you pointed out,
23 Chairman, that could be an implication of what he said.
24 And I urge upon the Tribunal to consider that and agree
25 that that is the case, that looking at Baranya -- and 15:16
26 remembering Baranya, while Mr. Baranya said that he
27 mentioned it was his work that was causing the pain
28 that was absolutely disputed by his employer, but the
29 whole point was Mr. Justice Hogan said, well, even if

1 he didn't, he said he was in pain, you can, by the
2 context of saying him saying that and looking at other
3 things going on at the time, you can tell what he means
4 by that, and it means the health and safety. And I
5 know, I understand the Tribunal thinks, well, compared 15:16
6 with a lot of other decisions, including the High Court
7 decision in that case, that is quite a jump, but that
8 is what the Supreme Court found. And, as you say, I
9 mean Mr. Justice Charleton gave another decision in
10 that he did not disagree one iota. He says at the very 15:17
11 start, I agree with absolutely everything -- well words
12 to that effect --

13 CHAIRMAN: Yes.

14 MR. O'HIGGINS: Mr. Justice Hogan said. So I mean
15 that's where we're at. I'd say it is directly 15:17
16 comparable. But I would say, what Mr. O'Higgins
17 started talking about, oh well, the context includes
18 what -- well, I think this is what he was saying --
19 include that of course Detective Inspector Cryan didn't
20 think that this was a protected disclosure, but I say 15:17
21 that's completely irrelevant. He thought he was
22 blowing off steam. That's not Sergeant Hughes's fault.
23 I mean, he shouldn't have -- well, it's irrelevant what
24 he thought. I mean the fact of the matter is -- and
25 it's also irrelevant in a way, I think, what is -- he 15:17
26 may, I think we can all take it that he wasn't in a
27 great condition emotionally, I mean this was
28 immediately after the murder. I mean, even Sergeant
29 Hughes, I don't think, would dispute that. But that's

1 irrelevant. He either made a complaint -- and it seems
2 to now be accepted that he did make a complaint or at
3 least there's an allegation of wrongdoing implied in
4 it. So if that's the case I think then it does qualify
5 as a protected disclosure. 15:18

6
7 The second point that the Tribunal, that the Chairman
8 is making, I mean is relevant, of course: Do we have
9 the follow-on from that? But I don't think the
10 follow-on is necessary for it to be a protected 15:18
11 disclosure, if you follow what I mean. So, if you
12 decide it as protected disclosure --

13 CHAIRMAN: That's right, you don't --

14 MR. O'DWYER: Yes, exactly.

15 CHAIRMAN: It is either a protected disclosure or it's 15:18
16 not a protected disclosure.

17 MR. O'DWYER: Yes.

18 CHAIRMAN: Consequences are not -- it's not dependent
19 on consequences.

20 MR. O'DWYER: Yes. 15:18

21 CHAIRMAN: I think that is clear. I don't think
22 anybody would dispute that.

23 MR. O'DWYER: So if that's the case and you were to
24 accept, which obviously we'd urge upon you that it was,
25 if you were to accept that, the question then arises of 15:19
26 course, as it does again if you're to accept even that
27 the Curran disclosure was a protected disclosure, I
28 mean you've the same issue: How does that translate
29 into, say, for example, the fact-finding? You know, as

1 all we're really doing is pushing back the time a
2 little bit in terms of the startling point.
3 CHAIRMAN: You say the same issue arises --
4 MR. O'DWYER: Always arises.
5 CHAIRMAN: -- in respect of that one and every other 15:19
6 disclosure, including the 16th September 2008 --
7 MR. O'DWYER: Yes.
8 CHAIRMAN: -- disclosure to the confidential recipient.
9 MR. O'DWYER: Yes.
10 CHAIRMAN: You say the same issue arises, that the 15:19
11 Tribunal's jurisdiction depends on a connection between
12 that and conduct as asserted and alleged by Sergeant
13 Hughes.
14 MR. O'DWYER: Yes. But I mean there is some evidence,
15 I mean it's not to say -- you may remember, and just 15:19
16 sorry because this has arisen today I mean I haven't
17 had the time to go back and look at the evidence, but
18 you may remember - you seem, Chairman, to have an
19 excellent memory for this stuff - I mean Detective
20 Inspector Cryan did say that he met, you may remember 15:20
21 the next day that he met with Walter O'Sullivan and
22 that he met with Inspectors Waters, and they had a
23 conversation and there was issues about what was said
24 at that.
25
26 I mean, one of the things I was going to go on about 15:20
27 is, I won't, because I don't want to keep us here all
28 afternoon, but I mean in our submissions you will see
29 that we do actually raise a number of issues about

1 then, I think he was detective inspector at that stage,
2 sorry, walter O'Sullivan's evidence about that, about
3 what happened at that particular time. I am just
4 saying in our submissions we have that.

5 CHAIRMAN: Yes.

15:20

6 MR. O'DWYER: Some of what he said seems to be
7 contradicted by what other guards said subsequently --

8 CHAIRMAN: Yes.

9 MR. O'DWYER: -- including particularly actually
10 Detective Inspector Cryan. But nonetheless I suppose
11 what I am trying to say is: First of all, there is
12 some link that at least --

15:21

13 CHAIRMAN: Okay.

14 MR. O'DWYER: -- at least there was conversations
15 happening between people who are alleged to have -- but
16 also, our point in response in relation to this
17 particular difficulty is that it'll be very rare
18 obviously that you're going to get evidence that
19 somebody actually let slip, oh yes, I did that because,
20 you know, I found out about the protected disclosure
21 and that's why I did, I targeted the person, that's why
22 I -- I mean, you're never, I perhaps very rarely, and
23 usually completely by accident would that happen.

15:21

15:21

24
25 So we would say that, I mean if you are accept that
26 targeting discrediting occurred, so in other words if
27 you have one end and you have the other, that a
28 protected disclosure happened within, shall we say, the
29 environs, it's the same station --

15:21

1 CHAIRMAN: You say it's not that hard to add two and
2 two.

3 MR. O'DWYER: well, I think the Tribunal is perfectly
4 entitled, and has to, in a way, because of the nature
5 of these, I mean I hate to, I don't want to mention 15:22
6 refugee law or anything like this, but there is this
7 idea that you're not going to get somebody and say,
8 'well actually I tortured that man' because you're not
9 going to get actual evidence.

10 CHAIRMAN: Not often, Mr. O'Dwyer. 15:22

11 MR. O'DWYER: Not often, exactly. 'I tortured that man
12 because he was a sonny or because he was a...' So
13 there has to be a level at which the Tribunal links one
14 to the other, without necessarily having --

15 CHAIRMAN: Okay. Let me ask you a more specific 15:22
16 question.

17 MR. O'DWYER: Yes.

18 CHAIRMAN: And I do appreciate your point that says,
19 look, somebody is not going to say I did this because I
20 didn't like the fact that he made a protected 15:23
21 disclosure or he was complaining, okay, I have that.
22 But let's take the 23rd April 2007 conversation between
23 Sergeant Hughes and Superintendent Curran. Do we not,
24 does the Tribunal not have to have some evidence that
25 Superintendent Curran communicated that to Assistant 15:23
26 Commissioner McHugh? Now he says he didn't have any
27 contact with him, and Assistant Commissioner McHugh
28 says he had no contact with him at all.

29 MR. O'DWYER: Yes.

1 CHAIRMAN: So how could the Tribunal draw an inference
2 that notwithstanding what they did, how could it
3 draw -- is it possible to draw that inference?
4 MR. O'DWYER: well, I think it is possible to draw that
5 inference. I accept, I mean I couldn't -- 15:24
6 CHAIRMAN: Now a short time later, I agree --
7 MR. O'DWYER: A short time later, when you look at the
8 timing --
9 CHAIRMAN: -- the thing starts, that's 23rd April. In
10 June, Sergeant Hughes is served with discipline papers. 15:24
11 MR. O'DWYER: May.
12 CHAIRMAN: I'm sorry, May, at the behest of Assistant
13 Commissioner McHugh. I think it is June. Do not
14 worry. It is not vital.
15 MR. O'DWYER: Yes. 15:24
16 CHAIRMAN: The point doesn't depend on the coincidence
17 of dates essentially. So, question: In face of a
18 denial by Superintendent Curran of any contact, I think
19 it is any contact, certainly he denies any relevant
20 contact with the assistant commissioner, and Assistant 15:25
21 Commissioner McHugh saying I had no contact with him, I
22 knew nothing about the complaints that he was making,
23 Sergeant Hughes was making, now on what basis -- so
24 let's say the Tribunal writes 'the Tribunal is
25 satisfied that there was a connection between these 15:25
26 events because...', what's the because?
27 Notwithstanding the evidence of the denials. And I
28 know this is not easy, but the Tribunal does need some
29 basis in evidence, isn't that right? And the fact of

1 the disciplinary charge, it's difficult to see that as
2 being evidence of a connection between the two. You
3 can say that's unfair, that's unreasonable, you know.
4 I mean, I am not trying to give you a hard time,
5 Mr. O'Dwyer. I am trying to express, to be honest 15:26
6 express a question in my head. We do have to find a
7 connection.
8 MR. O'DWYER: No, I understand that, Judge. And I mean
9 in the face of absolute, you know, denial, I mean
10 certainly in the case of Mr. McHugh -- 15:26
11 CHAIRMAN: I see your point about the other one. You
12 say in respect of Inspector Cryan - and I have been
13 calling him Inspector Crean and it's Inspector Cryan, I
14 apologise for that - you say, look, at a high level
15 there's people in contact, there's people in touch, and 15:26
16 therefore information seeps around the place.
17 MR. O'DWYER: Yes.
18 CHAIRMAN: From which it is possible for the Tribunal
19 to infer. I have that. Okay.
20 MR. O'DWYER: I mean another point we try to make is 15:26
21 that I mean it wouldn't necessarily, given there were
22 these other, I mean we know he was telling other people
23 that information was, I mean admittedly, for example
24 the Della Kilroy --
25 CHAIRMAN: Sorry, who? 15:27
26 MR. O'DWYER: You may Della Kilroy.
27 CHAIRMAN: I think you mean Inspector Della Murray.
28 MR. O'DWYER: Sorry, Della Murray.
29 CHAIRMAN: wasn't that a confidential?

1 MR. O'DWYER: No, it was a confidential. But I am just
2 saying --

3 CHAIRMAN: I can't get her involved. I can't nail
4 Inspector Murray. Sorry, I shouldn't have said that, I
5 shouldn't have used that expression. I mean I can't 15:27
6 indict, I can't blame.

7 MR. O'DWYER: No, of course not. And in fact you may
8 remember, to be fair, despite all of Mr. O'Higgins's
9 complaints about Sergeant Hughes's allegations, you may
10 remember he was very complimentary about -- I have to 15:27
11 say. I am simply making the point that he's making
12 these disclosures -- if you accept he's making these
13 disclosures, he's made it to Cryan, he's made it to
14 Curran, he may have made it to other people as well, in
15 one form or another, or perhaps not -- it mightn't even 15:28
16 qualify as a protected disclosure, but he may have
17 discussed some parts of these issues, that would make
18 its way...

19 CHAIRMAN: Okay.

20 MR. O'DWYER: Unfortunately, I mean if you are to say, 15:28
21 I mean another way of looking at it might be, if you
22 were to accept, and I am not going to rehearse all our
23 evidence again, obviously, but I think we deal in our
24 submissions with the fact-finding, I mean we deal very
25 extensively with them and what was involved and the 15:28
26 reports and how they seem to be targeted in, certainly
27 the reports. I mean there's no denying, despite what
28 Mr. O'Higgins said, I mean the first report doesn't
29 even mention another guard.

1 CHAIRMAN: Sorry, I have no difficulty and I understand
2 the point you make and the point that Sergeant Hughes
3 emphasised, that whatever the original brief, first of
4 all he says the press release, although not by name it
5 focused on the victim impact people. 15:29

6 MR. O'DWYER: Yes.

7 CHAIRMAN: That's the reality. That's what he says
8 about that.

9 MR. O'DWYER: Yes.

10 CHAIRMAN: And he says that the fact-finding 15:29
11 investigation in effect focused on him and Garda Nyhan,
12 and so on. And then he says, when he comes to the --
13 well, it could scarcely be denied that the --

14 MR. O'DWYER: The disciplinary.

15 CHAIRMAN: -- that the disciplinary investigation 15:29
16 focused exclusively, because it named only two people.
17 So there's no question that that focusing was on,
18 whether it was targeting is another day's work, but it
19 says it -- anyway, he says that entirely. He says from
20 the start, more or less -- 15:29

21 MR. O'DWYER: So those things --

22 CHAIRMAN: -- there was a focus on him.

23 MR. O'DWYER: Those things happen, I mean obviously,
24 and we have always submitted that, you know, the timing
25 of it, the disciplinary, so you go from two 15:29
26 fact-finding -- or, in fact, three fact-finding
27 reports, one, the first of which doesn't make any
28 recommendation about doing anything further with
29 Sergeant Hughes at all, then that's changed, literally

1 two paragraphs of it are changed, one to introduce a
2 recommendation that there might be an investigation, a
3 full investigation, and then you have Inspector
4 Feehan's sort of report of the reports of the other two
5 reports. Because he doesn't interview anyone else or 15:30
6 do anything like that, he just uses that those reports.
7 But I mean his entire recommendation section - I am
8 absolutely clear, this is all in our subs - deals only
9 with Sergeant Hughes, any what he calls views or
10 recommendations relate completely to Sergeant Hughes 15:30
11 and almost by -- you know, perhaps Garda Nyhan to a far
12 lesser extent but that's it. So it is focused in on
13 those. So you have that. But he still only says
14 further investigation. Nobody has suggested
15 disciplinary. 15:31

16
17 Then you have the report to Curran and then you have,
18 almost immediately after, I said May, I think maybe the
19 document, the actual underlying document before it was
20 served on Sergeant Hughes was in May, because you may 15:31
21 remember --

22 CHAIRMAN: I think, sorry, I am pretty sure that is
23 correct. I think the decision was in May but the
24 document was served in June. The papers were served on
25 Sergeant Hughes in June but the decision was made in 15:31
26 May.

27 MR. O' DWYER: Yes.

28 CHAIRMAN: Possibly the 17th May. That's only a date
29 that comes into my head.

1 MR. O' DWYER: well actually the only reason why I
2 remember that and why we think it is significant is
3 something else completely, which is about GSOC and the
4 foundation of GSOC. You may remember A/C McHugh, it
5 was put to A/C McHugh that why didn't he, if this is 15:31
6 what he actually thought, that Sergeant Hughes had
7 breached Article 2 of ECHR, such a serious matter, why,
8 since GSOC seemed to have authority to deal with that,
9 didn't he go -- and you may remember Inspector Cryan
10 said, oh, today of course that would definitely be 15:32
11 referred to GSOC. That was his evidence. That's in
12 our submissions. That's what Inspector Cryan said in
13 his evidence. But that's why the date sticks in my
14 mind. Because A/C McHugh said, well, actually --
15 CHAIRMAN: And what date was it? 15:32
16 MR. O' DWYER: He said it was set up on the -- I think
17 he said, well, we issued those proceedings on whatever
18 date and GSOC was set up a couple of days later.
19 CHAIRMAN: Okay.
20 MR. O' DWYER: well, sorry, was established. It was 15:32
21 already in -- the Act was already in place but just
22 the --
23 CHAIRMAN: I understand.
24 MR. O' DWYER: You know what I mean?
25 CHAIRMAN: I know exactly what you mean. 15:32
26 MR. O' DWYER: so that's why the date was stuck in my
27 mind and that is why it is, I suppose, significant in a
28 different way.
29 CHAIRMAN: Okay.

1 MR. O'DWYER: But I mean there does appear to be a real
2 coincidence in the timing. I think the Tribunal has to
3 look in some --

4 CHAIRMAN: I mean is the timing -- is that --

5 MR. O'DWYER: I mean, where's -- 15:33

6 CHAIRMAN: What would I write, Mr. O'Dwyer? The
7 meeting with Superintendent Cryan happened on the 23rd
8 October. He says he had no communication with
9 Assistant Commissioner McHugh, Assistant Commissioner
10 McHugh denies knowing anything about Sergeant Hughes's 15:33
11 things, okay.

12 MR. O'DWYER: Yes.

13 CHAIRMAN: I don't agree with this, look at the dates,
14 23rd April. Let's say it's 17th May, for the sake of
15 argument. 15:33

16 MR. O'DWYER: Yes.

17 CHAIRMAN: It's some date in May. What's the
18 connection? One happens after the other?

19 MR. O'DWYER: Yes. No, I understand.

20 CHAIRMAN: Post hoc, ergo propter hoc, that's what I 15:33
21 say. So, no smoke without fire.

22 MR. O'DWYER: Yes. It's an inference that the
23 Tribunal, I mean I can't -- there isn't evidence
24 case --

25 CHAIRMAN: No, no, I understand. Your real case is, 15:34
26 look, the first point you made, you're not going to get
27 somebody acknowledging I did this because of that --

28 MR. O'DWYER: Yes.

29 CHAIRMAN: -- so therefore the search is on for

1 inferences, the search is on for evidences that point
2 yes/no. Now I am alerting you to a difficulty that I
3 arises on an evidential basis, that just suppose
4 somebody were to write in a tribunal 'Officer A denied
5 having any contact with officer B, officer B denied 15:34
6 having any knowledge of the matter at all as well as
7 having any contact, nevertheless the Tribunal is
8 satisfied that this event must have happened in
9 relation to the allegation made to officer A', there
10 has to be reasons for that. And if there weren't any 15:35
11 of us I was going to say, any of you would be very
12 happy to look for judicial review on the basis of
13 irrationality and logical fallacies and all the rest of
14 it that we know and love. And you'd be perfectly right
15 to do so. In the days, there were days when I would 15:35
16 have been doing so. So I am just pointing out to you
17 that there is a limit to how I can infer -- sorry, how
18 an inference can be made in face of clear evidence.
19 MR. O' DWYER: Yes.
20 CHAIRMAN: There has to be pretty clear material from 15:35
21 which inferences can be drawn.
22 MR. O' DWYER: Yes.
23 CHAIRMAN: That's really what I am tediously pointing
24 out.
25 MR. O' DWYER: And I do get that. I am not trying to 15:35
26 dodge the point.
27 CHAIRMAN: No, no, no, I understand that. It is an
28 issue.
29 MR. O' DWYER: It is a difficulty. It's an issue.

1 CHAIRMAN: I am not expecting you to say oh well, you
2 are clearly right. I may as well tell you, that is an
3 issue in a case of this kind.

4 MR. O'DWYER: I mean I would just point out that there
5 is obviously, I mean when you look, if you sift through 15:36
6 the evidence you do see that all of these various
7 individuals were obviously communicating with each
8 other through the course of work but also in the course
9 of dealing with the murder itself, because you've got
10 to remember that is going on at the same time, so all 15:36
11 these individuals are in communication.

12 CHAIRMAN: Anyway.

13 MR. LYNN: And so, if there's evidence of that, the
14 difficulty of course is that, yes, the main players, or
15 certainly the main two players deny that they were in 15:36
16 communication with each other. Yes, I accept that.

17 CHAIRMAN: Thanks very much for your help, Mr. O'Dwyer.
18 I am sorry for challenging you with matters that seem
19 to me to be relevant and so on. You have been most
20 helpful. Thank you very much. 15:37
21

22 Once again thanks for getting in the submissions on
23 time and for the quality of the submissions which I
24 have no difficulty in acknowledging. So, thank you
25 very much for that. 15:37
26

27 Now nobody else needs to say anything? Nobody is
28 entitled to say anything. And so, it's obvious from
29 the submissions that the Tribunal will do its best to

1 produce a report. I had hoped to produce a report
2 before we start on our next case on the 3rd May, I am
3 not certain that that will be the case, so maybe we
4 will produce a report, a joint report -- our original
5 idea was maybe we would produce a joint report, but 15:37
6 obviously we're working as hard as we can (a) on this
7 case and (b) on preparing for the next one as well.
8 So, thank you very much indeed for all your help.
9 Okay. Thank you.

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11 THE HEARING THEN CONCLUDED
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15:38

	100:1 135 [1] - 4:7 136 [1] - 105:25 137 [1] - 106:18 139/10 [1] - 63:13 14 [1] - 114:12 149 [2] - 111:21, 111:23 14th [12] - 73:2, 91:19, 92:3, 92:13, 92:17, 93:14, 94:29, 98:27, 99:16, 102:17, 103:2, 111:7 15 [2] - 67:14, 114:14 159 [3] - 79:29, 80:1, 80:11 15th [1] - 123:1 16 [1] - 81:12 162 [7] - 99:9, 103:21, 105:25, 106:18, 107:17, 111:23 163 [8] - 91:13, 99:7, 114:7, 114:11, 114:14, 114:21 164 [3] - 74:28, 74:29, 78:18 166 [7] - 26:28, 118:10, 118:11, 119:8, 119:10, 119:11, 119:13 167 [1] - 135:5 16th [1] - 140:6 170 [2] - 39:23, 39:24 17th [2] - 147:28, 149:14 18 [2] - 78:18, 118:19 1963 [1] - 110:18 1981 [1] - 110:18 19th [2] - 62:1, 99:14 1ST [1] - 3:1	2007 [14] - 69:25, 70:4, 70:24, 78:6, 79:10, 79:28, 87:15, 89:16, 115:18, 115:29, 116:5, 133:17, 134:15, 142:22 2007/2008 [2] - 71:16, 114:13 2008 [2] - 21:15, 140:6 2010 [3] - 49:5, 56:3, 114:20 2011 [1] - 114:25 2014 [2] - 29:3, 131:16 2015 [1] - 123:1 2022 [2] - 3:2, 5:2 20th [11] - 69:22, 71:28, 72:4, 73:6, 75:7, 75:26, 77:17, 78:10, 78:25, 111:15, 115:25 21st [3] - 27:2, 32:22, 119:20 22nd [1] - 99:13 23rd [7] - 21:19, 133:17, 134:15, 142:22, 143:9, 149:7, 149:14 24th [1] - 80:15 25 [1] - 82:6 27 [2] - 20:25, 81:21 28 [3] - 124:1, 129:25, 135:5 29 [2] - 114:20, 114:21	4 4 [3] - 122:11, 122:22, 130:21 40 [4] - 7:7, 28:26, 28:27, 114:26 41 [2] - 30:10, 114:27 45 [2] - 99:9, 111:6 46 [1] - 99:26	90 [1] - 107:17 95 [1] - 56:4 98 [2] - 103:22, 103:25 99 [1] - 135:5	96:18, 106:2, 114:28, 120:23, 127:15, 139:2 accepting [6] - 26:27, 105:3, 109:8, 127:5, 127:7 accepts [1] - 98:7 accident [1] - 141:23 accidentally [1] - 17:23 accordance [1] - 63:12 according [5] - 76:21, 114:11, 117:27, 119:20, 128:29 accordingly [2] - 29:23, 30:7 account [26] - 54:15, 72:9, 72:16, 72:17, 78:21, 80:4, 83:4, 83:19, 84:15, 86:6, 86:13, 86:26, 91:6, 93:3, 95:10, 96:15, 96:19, 96:29, 101:14, 113:6, 125:18, 126:15, 128:18, 128:19, 128:21, 128:22 accounting [1] - 88:12 accuracy [1] - 97:7 accurate [2] - 80:22, 81:19 accused [4] - 14:3, 18:6, 88:21, 135:8 accusing [1] - 67:4 acknowledge [7] - 65:15, 85:22, 94:6, 96:4, 103:8, 103:23, 108:19 acknowledged [6] - 84:27, 103:1, 105:21, 108:22, 108:23, 109:26 acknowledges [3] - 105:20, 105:22, 132:25 acknowledging [3] - 127:14, 149:27, 151:24 acknowledgme
'06 [1] - 75:27 '07 [8] - 70:19, 84:9, 84:23, 85:11, 87:22, 91:3, 115:25, 132:8 'A' [1] - 3:6 'ah [2] - 120:28, 125:16 'ah-ha [1] - 125:16 'fanning [1] - 58:21 'he [1] - 120:3 'in [1] - 104:14 'officer [1] - 150:4 'oh [1] - 62:3 'Sergeant [1] - 100:5 'systems [1] - 40:8 'targeting [1] - 58:20 'the [2] - 120:29, 143:24 'this [1] - 61:12 'well [2] - 62:4, 142:8					
1 1 [1] - 115:25 1-5 [2] - 114:15, 114:16 102 [1] - 135:6 105 [1] - 26:29 106 [6] - 119:3, 119:5, 119:12, 119:13, 119:14, 119:17 1067 [1] - 80:13 107 [1] - 39:23 109 [1] - 56:14 11.37 [9] - 45:17, 45:19, 45:23, 46:3, 46:8, 46:23, 48:11, 49:3, 63:13 11.39 [2] - 46:8, 48:8 118 [1] - 110:27 11th [1] - 111:3 12 [2] - 79:9, 79:16 124 [2] - 99:29,					
	2 2 [3] - 3:11, 115:26, 148:7 20 [1] - 99:10 2003 [1] - 51:5 2005 [1] - 51:5 2006 [2] - 68:4, 111:3				
	3 3 [1] - 115:26 30 [1] - 114:22 30-plus [1] - 69:12 30TH [1] - 5:1 32 [1] - 114:22 33 [1] - 114:22 35 [1] - 39:23 352 [1] - 39:26 365 [1] - 39:28 39 [4] - 37:7, 37:24, 37:25, 114:23 3rd [1] - 152:2				
		5(3)(d) [1] - 29:3 5-0 [1] - 114:15 50 [1] - 7:7 52 [3] - 111:14, 114:28, 115:20 56 [1] - 118:15			
		6 6 [1] - 4:4 61 [4] - 118:11, 118:15, 118:19, 119:16 64 [2] - 4:5, 80:10 65 [3] - 80:8, 80:11, 80:14 66 [1] - 4:6 67 [1] - 80:19 68 [3] - 80:26, 81:4, 81:10 69 [1] - 82:5			
		7 7 [2] - 82:23, 119:20 71 [3] - 42:17, 82:19, 91:14 74 [2] - 82:21, 82:22			
		8 8 [1] - 81:10 8th [1] - 115:29			
		9 9 [2] - 63:10, 119:20			
		A A' [1] - 150:9 A's [1] - 5:22 a. [1] - 142:12 A/C [5] - 135:10, 136:20, 148:4, 148:5, 148:14 abandoned [2] - 88:25, 89:10 abandonment [1] - 88:5 abduction [1] - 120:5 able [5] - 5:14, 6:9, 7:6, 49:21, 116:2 absence [4] - 46:12, 72:24, 134:20, 136:22 absolute [1] - 144:9 absolutely [14] - 15:17, 16:14, 18:29, 19:4, 22:3, 23:17, 26:14, 32:24, 94:24, 106:16, 121:23, 137:28, 138:11, 147:8 abundantly [3] - 72:3, 73:8, 91:29 accept [32] - 10:15, 12:14, 12:17, 24:26, 29:10, 31:23, 31:24, 32:18, 33:24, 36:3, 41:14, 61:27, 65:15, 80:22, 96:19, 97:17, 102:14, 103:5, 104:29, 106:11, 108:14, 109:14, 126:11, 126:14, 139:24, 139:25, 139:26, 141:25, 143:5, 145:12, 145:22, 151:16 accepted [14] - 13:20, 21:16, 24:3, 25:8, 38:28, 41:3, 52:8, 52:11,			

<p>nt [4] - 81:2, 105:12, 111:14, 126:26</p> <p>acquittal [2] - 106:28, 112:7</p> <p>acquittals [1] - 88:29</p> <p>Act [7] - 29:3, 124:6, 131:13, 131:14, 131:15, 131:16, 148:21</p> <p>act [1] - 62:1</p> <p>act' [1] - 62:3</p> <p>acting [1] - 12:2</p> <p>action [1] - 136:18</p> <p>actively [1] - 130:27</p> <p>actual [4] - 68:28, 105:17, 142:9, 147:19</p> <p>ad [1] - 77:12</p> <p>add [5] - 19:21, 64:24, 105:14, 105:16, 142:1</p> <p>addition [1] - 130:9</p> <p>additional [2] - 127:29, 130:11</p> <p>address [3] - 12:24, 16:25, 63:14</p> <p>addressed [1] - 96:8</p> <p>ADJOURNED [1] - 98:19</p> <p>admissible [2] - 61:19, 110:2</p> <p>admission [1] - 13:29</p> <p>admitted [1] - 58:24</p> <p>admittedly [3] - 29:10, 121:23, 144:23</p> <p>adverse [2] - 44:21, 66:5</p> <p>advice [3] - 12:2, 108:21, 113:16</p> <p>advised [1] - 35:18</p> <p>affairs [3] - 88:7, 89:8, 101:19</p> <p>affect [8] - 8:6, 22:15, 24:20, 26:1, 98:9, 126:11, 126:28, 136:4</p> <p>affected [4] - 14:10, 14:11,</p>	<p>98:11, 130:1</p> <p>affecting [1] - 23:6</p> <p>affects [2] - 8:2, 24:23</p> <p>aftermath [1] - 105:16</p> <p>afternoon [1] - 140:28</p> <p>AG [1] - 15:29</p> <p>ago [1] - 17:13</p> <p>agree [10] - 31:22, 31:28, 40:21, 44:22, 45:4, 90:6, 137:24, 138:11, 143:6, 149:13</p> <p>agreed [5] - 24:6, 76:5, 77:10, 128:16, 130:19</p> <p>agreement [1] - 136:3</p> <p>agrees [2] - 17:8, 60:1</p> <p>ahead [2] - 125:12, 130:9</p> <p>aid [1] - 12:23</p> <p>air [1] - 71:13</p> <p>Al [2] - 87:29, 106:5</p> <p>alerting [2] - 122:16, 150:2</p> <p>allegation [27] - 9:23, 9:24, 10:13, 10:17, 14:7, 14:10, 14:16, 18:1, 18:13, 18:15, 28:3, 67:19, 70:10, 74:9, 84:7, 84:11, 87:18, 88:8, 89:28, 103:19, 103:24, 105:11, 109:2, 109:17, 123:20, 139:3, 150:9</p> <p>allegations [31] - 9:13, 9:20, 12:5, 13:19, 14:19, 15:9, 15:13, 15:20, 15:23, 16:11, 48:17, 66:22, 66:23, 66:27, 67:3, 67:8, 67:13, 67:23, 67:26, 70:6, 85:4, 87:21, 88:6, 88:24, 88:28, 89:5, 89:7, 89:10, 129:20, 145:9</p>	<p>allege [2] - 29:2, 29:8</p> <p>alleged [22] - 20:9, 24:5, 26:12, 37:10, 50:9, 70:16, 70:17, 77:8, 78:10, 78:12, 87:21, 87:22, 90:8, 103:20, 107:15, 107:21, 109:18, 109:19, 110:6, 129:17, 140:12, 141:15</p> <p>allegedly [2] - 73:5, 83:1</p> <p>alleging [3] - 51:9, 51:22, 64:18</p> <p>allow [2] - 42:24, 45:28</p> <p>almost [8] - 8:9, 9:13, 11:28, 69:7, 115:16, 135:19, 147:11, 147:18</p> <p>alone [3] - 25:14, 25:16, 117:24</p> <p>ambitious [1] - 107:2</p> <p>Ambrosiano [1] - 16:28</p> <p>amount [9] - 29:1, 29:23, 84:24, 85:2, 85:12, 95:12, 125:29, 128:4, 130:3</p> <p>amounts [2] - 110:26, 117:13</p> <p>ample [7] - 10:9, 78:26, 79:15, 86:29, 102:8, 107:8, 111:26</p> <p>amplify [1] - 20:1</p> <p>AN [1] - 3:8</p> <p>analysed [1] - 133:14</p> <p>analysis [2] - 13:18, 101:28</p> <p>AND [2] - 3:10, 98:19</p> <p>anger [2] - 71:11, 114:22</p> <p>angst [1] - 93:17</p> <p>animus [1] - 86:17</p> <p>announcing [1] - 90:13</p>	<p>Ansbacher [2] - 16:27, 16:28</p> <p>answer [6] - 35:9, 36:12, 83:7, 104:26, 117:27, 133:24</p> <p>answering [1] - 125:9</p> <p>answers [1] - 39:2</p> <p>antecedent [1] - 51:2</p> <p>anticipate [1] - 19:18</p> <p>anticipating [1] - 17:14</p> <p>anxious [4] - 72:29, 92:1, 102:13, 111:8</p> <p>ANY [2] - 3:6, 3:10</p> <p>anyway [8] - 32:4, 44:22, 47:20, 62:5, 97:12, 131:26, 146:19, 151:12</p> <p>apart [1] - 132:15</p> <p>apologise [2] - 94:7, 144:14</p> <p>apology [3] - 6:25, 6:27, 14:1</p> <p>apparent [2] - 10:27, 124:27</p> <p>Appeal [2] - 17:13, 20:18</p> <p>appeal [1] - 24:14</p> <p>appear [16] - 13:12, 13:13, 27:24, 39:1, 42:18, 46:4, 56:15, 81:14, 83:19, 85:17, 89:6, 109:6, 120:17, 121:29, 126:1, 149:1</p> <p>appeared [6] - 11:3, 53:14, 57:2, 71:10, 71:17, 89:8</p> <p>appearing [1] - 84:12</p> <p>appellate [1] - 113:11</p> <p>applicant [1] - 23:1</p> <p>application [3] - 25:16, 79:7, 83:3</p> <p>applied [4] -</p>	<p>16:11, 19:27, 63:22, 64:9</p> <p>applies [3] - 21:1, 21:3, 64:9</p> <p>APPLY [1] - 3:11</p> <p>apply [6] - 16:20, 20:6, 20:22, 25:2, 36:23, 60:5</p> <p>applying [1] - 127:5</p> <p>appreciate [7] - 5:12, 53:14, 53:15, 65:11, 84:4, 91:27, 142:18</p> <p>appreciated [1] - 5:15</p> <p>apprehension [1] - 93:12</p> <p>apprehensions [1] - 102:23</p> <p>approach [16] - 17:20, 17:21, 17:25, 17:27, 18:14, 19:10, 19:25, 20:3, 20:27, 25:12, 93:10, 96:24, 124:26, 126:24, 127:6, 127:14</p> <p>appropriate [5] - 17:9, 104:23, 105:5, 109:16, 126:17</p> <p>approximate [1] - 79:16</p> <p>approximates [1] - 115:27</p> <p>April [18] - 21:19, 70:4, 70:19, 79:28, 80:15, 84:8, 84:23, 85:11, 86:4, 87:15, 87:22, 91:3, 132:8, 133:17, 134:15, 142:22, 143:9, 149:14</p> <p>architecture [1] - 70:7</p> <p>area [7] - 8:21, 56:25, 57:4, 99:25, 115:5, 115:11, 120:21</p> <p>areas [2] - 16:23, 116:15</p> <p>argument [3] - 68:13, 106:29, 149:15</p>	<p>arise [5] - 8:17, 42:21, 49:3, 55:6, 55:7</p> <p>arisen [1] - 140:16</p> <p>arises [7] - 49:3, 63:16, 139:25, 140:3, 140:4, 140:10, 150:3</p> <p>arising [3] - 68:3, 122:19, 125:14</p> <p>arose [4] - 10:19, 44:4, 47:12, 84:17</p> <p>arranging [1] - 88:16</p> <p>arriving [1] - 11:28</p> <p>Article [1] - 148:7</p> <p>article [2] - 14:24, 15:24</p> <p>AS [2] - 5:1, 98:19</p> <p>aside [1] - 105:9</p> <p>aspect [7] - 85:19, 87:13, 99:28, 112:22, 112:25, 112:28, 112:29</p> <p>aspects [1] - 36:23</p> <p>asserted [1] - 140:12</p> <p>assertions [1] - 65:5</p> <p>assess [10] - 30:16, 69:26, 72:10, 73:29, 75:11, 81:1, 85:13, 86:27, 103:7, 109:17</p> <p>assessing [1] - 78:21</p> <p>assessment [3] - 36:7, 70:12, 95:5</p> <p>assist [1] - 12:16</p> <p>assistance [2] - 99:4, 100:29</p> <p>assistant [2] - 64:4, 143:20</p> <p>Assistant [49] - 9:24, 10:1, 10:13, 10:26, 11:2, 11:16, 11:17, 12:13, 12:22, 12:25, 12:26, 12:29, 33:3,</p>
--	--	--	--	---	---

56:10, 57:8, 57:26, 58:1, 58:13, 58:20, 59:22, 62:27, 63:7, 64:6, 64:10, 64:19, 65:3, 65:7, 65:18, 65:23, 66:3, 66:6, 87:29, 88:1, 92:21, 101:18, 109:11, 110:9, 110:17, 134:24, 134:26, 134:27, 135:6, 142:25, 142:27, 143:12, 143:20, 149:9 assisting [1] - 55:14 assume [3] - 31:7, 32:19, 61:14 assumes [1] - 131:14 assuming [12] - 25:13, 31:4, 31:22, 31:24, 31:28, 34:19, 35:2, 60:1, 77:24, 97:23, 98:3, 98:7 assumption [1] - 97:12 asterisk [1] - 58:23 AT [1] - 3:11 attack [2] - 115:9, 115:14 attempt [2] - 9:10, 84:6 attempting [1] - 20:4 attempts [2] - 25:24, 25:26 attention [5] - 6:24, 8:23, 26:24, 130:10, 134:9 attributed [3] - 78:24, 114:19, 128:4 attributing [1] - 77:7 authorised [1] - 130:26 authorities [1] - 114:19 authority [3] - 20:27, 57:3, 148:8 automatic [2] - 63:16, 63:25 autumn/winter	[1] - 116:5 available [4] - 6:12, 6:15, 9:28, 102:4 averted [1] - 63:18 aware [17] - 13:5, 13:8, 13:9, 18:11, 44:17, 57:7, 68:22, 69:6, 87:23, 87:24, 101:24, 103:28, 115:23, 129:16, 129:24, 134:29 awareness [1] - 70:16 awful [2] - 10:21, 79:27 axe [1] - 109:6	128:24, 129:2, 129:23, 136:1, 136:4, 137:25, 137:26 base [1] - 95:27 based [2] - 63:3, 110:13 basis [23] - 9:27, 21:17, 25:8, 25:10, 34:25, 41:2, 45:2, 57:10, 59:3, 72:8, 78:29, 92:25, 93:5, 102:9, 102:23, 108:25, 111:26, 127:23, 133:9, 143:23, 143:29, 150:3, 150:12 BE [1] - 3:11 bearing [1] - 37:5 became [4] - 9:17, 10:27, 17:16, 26:17 because.. [1] - 143:26 become [2] - 71:18, 130:25 bedrock [1] - 72:15 beef [1] - 108:12 befalls [1] - 87:18 began [1] - 15:27 begin [3] - 9:8, 45:14, 45:23 beginning [1] - 16:3 begins [1] - 70:7 begun [1] - 43:17 behalf [10] - 6:5, 11:13, 13:14, 22:1, 66:20, 81:16, 84:28, 88:16, 88:18, 92:27 behave [1] - 98:11 behest [1] - 143:12 belated [1] - 105:19 belatedly [2] - 88:5, 103:23 benefit [2] - 69:11, 113:16 best [8] - 5:23, 6:19, 8:25, 8:26,	63:2, 64:13, 115:9, 151:29 better [8] - 69:27, 74:5, 86:23, 92:1, 115:8, 120:26, 121:16, 132:13 between [32] - 8:12, 16:10, 25:6, 33:3, 33:12, 33:16, 33:23, 35:5, 39:20, 42:18, 45:13, 51:5, 60:1, 60:8, 69:14, 69:20, 71:4, 75:2, 76:8, 77:25, 85:16, 115:2, 127:13, 128:15, 129:6, 134:5, 136:17, 140:11, 141:15, 142:22, 143:25, 144:2 beyond [1] - 126:20 big [3] - 23:5, 69:19, 85:24 bit [19] - 8:8, 16:13, 27:9, 28:6, 42:15, 45:10, 48:27, 50:13, 79:1, 100:2, 118:2, 119:16, 120:26, 120:27, 121:23, 126:18, 131:6, 137:9, 140:2 bits [1] - 118:18 bitterness [1] - 131:10 black [1] - 42:6 blame [1] - 145:6 blaming [3] - 117:28, 118:27 blocks [1] - 132:16 blot [1] - 20:13 blowing [4] - 35:28, 68:2, 117:25, 138:22 blue [1] - 62:7 blunt [1] - 31:21 boil [1] - 116:5 bombshell [4] - 69:22, 72:24, 73:23, 84:9 bona [1] - 108:24 bore [2] - 71:2,	82:19 borne [3] - 115:16, 115:17, 115:19 borrow [1] - 71:18 bothered [1] - 89:7 bottom [3] - 66:17, 81:22, 82:5 box [1] - 58:21 breach [3] - 68:10, 123:23, 123:29 breached [2] - 126:3, 148:7 breaches' [1] - 107:2 break [1] - 97:27 brief [6] - 7:3, 9:7, 13:22, 116:21, 129:11, 146:3 briefly [10] - 22:28, 42:3, 74:27, 79:28, 89:14, 99:3, 105:26, 109:23, 122:9, 132:2 bring [8] - 32:26, 32:27, 32:28, 70:27, 87:17, 101:2, 111:27, 118:6 bringing [2] - 80:12, 102:19 brings [1] - 80:16 broadly [2] - 96:22, 96:25 brought [2] - 111:28, 113:12 builds [1] - 72:8 built [1] - 71:14 bullied [2] - 50:10, 130:28 bullying [4] - 51:3, 51:15, 51:22, 53:19 bumped [1] - 18:3 burningly [1] - 73:13 bus [1] - 125:19 BY [9] - 3:5, 3:7, 4:4, 4:5, 4:6, 4:7, 64:27, 66:15, 135:17 Byrne [1] -	101:27
C					
campaign [2] - 9:18, 116:4 candidate [2] - 117:11, 125:13 cannot [1] - 29:25 canvass [1] - 78:27 capacity [1] - 41:8 car [3] - 17:22, 17:24, 18:2 carcasses [1] - 23:6 careful [1] - 20:12 carefully [1] - 80:11 careless [1] - 17:17 carried [6] - 88:28, 89:1, 92:26, 101:27, 112:19, 113:4 carry [2] - 105:29, 106:7 case [69] - 7:16, 7:28, 8:4, 10:10, 11:1, 11:26, 11:27, 13:28, 15:14, 16:13, 16:27, 16:29, 19:8, 20:11, 20:12, 20:19, 22:5, 22:6, 22:8, 23:27, 25:14, 26:1, 28:9, 31:5, 34:26, 35:3, 37:16, 40:6, 42:29, 43:16, 43:20, 48:22, 49:16, 49:17, 53:7, 53:15, 61:26, 63:18, 65:5, 68:17, 75:5, 84:5, 92:4, 96:7, 98:1, 98:29, 102:22, 107:2, 113:19, 116:19, 120:5, 120:19, 123:2, 124:5, 129:27, 130:14, 132:4, 137:25, 138:7, 139:4, 139:23, 144:10, 149:24, 149:25,					

<p>151:3, 152:2, 152:3, 152:7 cases [6] - 16:16, 16:18, 17:9, 19:6, 20:11 casual [1] - 111:9 Catherine [2] - 57:9, 88:4 caused [5] - 23:21, 56:19, 67:11, 102:18, 122:29 causing [14] - 23:8, 23:11, 23:12, 23:13, 23:16, 23:20, 51:10, 53:27, 54:29, 55:7, 55:8, 120:20, 122:17, 137:27 caution [1] - 94:5 caveat [2] - 65:12, 92:18 central [1] - 69:6 centre [2] - 72:6, 73:10 Century [1] - 62:1 certain [5] - 17:21, 114:2, 121:29, 127:22, 152:3 certainly [36] - 6:16, 6:18, 8:5, 9:8, 11:29, 20:6, 21:10, 21:29, 22:20, 26:9, 28:17, 28:22, 32:12, 37:26, 40:18, 41:6, 44:15, 45:19, 47:5, 52:2, 56:3, 62:17, 62:28, 75:21, 86:17, 93:21, 120:14, 122:4, 123:20, 124:19, 127:22, 137:12, 143:19, 144:10, 145:26, 151:15 certs [2] - 54:27, 55:3 chair [3] - 7:13, 22:28, 60:17 CHAIRMAN [430] - 5:4, 5:10, 6:10, 6:14, 6:23, 6:27, 7:8, 7:11, 7:14,</p>	<p>7:22, 7:26, 8:3, 8:20, 17:1, 17:4, 17:8, 18:5, 18:11, 18:19, 18:26, 18:28, 19:9, 20:1, 20:8, 20:11, 21:8, 21:25, 22:2, 22:9, 22:11, 22:14, 23:3, 23:7, 23:10, 23:13, 24:16, 24:18, 24:20, 24:27, 25:2, 25:11, 25:26, 26:14, 26:21, 27:4, 27:6, 27:9, 27:17, 27:22, 27:25, 28:6, 28:9, 28:20, 28:22, 30:24, 31:1, 31:4, 31:10, 31:18, 31:21, 31:24, 31:28, 32:7, 32:14, 32:19, 32:24, 32:26, 32:28, 33:2, 33:11, 33:14, 33:20, 33:26, 34:3, 34:5, 34:11, 34:13, 34:15, 34:19, 34:22, 34:25, 34:29, 35:2, 35:9, 35:12, 35:15, 35:21, 35:29, 36:2, 36:10, 36:13, 36:22, 36:24, 36:27, 37:8, 37:20, 37:23, 37:25, 38:6, 38:17, 38:20, 38:24, 38:26, 39:2, 39:5, 39:8, 39:11, 39:16, 39:19, 39:24, 39:27, 39:29, 40:14, 40:19, 40:21, 40:23, 40:25, 41:5, 41:8, 41:10, 41:12, 41:15, 41:18, 41:25, 42:20, 42:29, 43:2, 43:7, 43:12, 43:16, 43:20, 43:28, 44:1, 44:3, 44:9, 44:12, 44:15, 44:21, 44:26, 45:4, 45:8, 45:29, 46:12, 46:17, 46:20, 46:22, 46:25, 47:1, 47:4,</p>	<p>47:8, 47:12, 47:15, 47:19, 47:26, 48:4, 48:7, 48:10, 48:18, 48:25, 48:29, 49:6, 49:9, 49:12, 50:4, 50:7, 50:14, 50:21, 50:24, 50:27, 50:29, 51:2, 51:9, 51:13, 51:21, 51:25, 52:6, 52:11, 52:15, 52:20, 52:23, 52:27, 53:8, 53:10, 53:13, 53:19, 53:22, 53:26, 54:6, 54:8, 54:11, 54:15, 54:18, 54:22, 55:10, 55:14, 55:21, 55:25, 56:13, 56:27, 57:12, 57:18, 57:21, 57:24, 57:26, 57:29, 58:4, 58:10, 58:12, 58:17, 58:23, 58:27, 59:1, 59:4, 59:7, 59:11, 59:16, 59:22, 59:26, 59:28, 60:4, 60:12, 60:18, 60:26, 61:2, 61:5, 61:7, 61:19, 61:23, 61:29, 62:11, 62:15, 62:23, 62:26, 62:28, 63:2, 63:4, 63:17, 63:21, 63:25, 64:1, 64:5, 64:11, 64:13, 65:27, 66:1, 66:12, 66:19, 75:19, 75:22, 76:29, 77:2, 77:7, 77:10, 77:14, 77:20, 77:22, 77:24, 78:8, 78:14, 78:16, 78:19, 79:13, 79:17, 79:20, 79:23, 80:2, 80:9, 89:19, 89:22, 90:2, 90:5, 90:17, 90:19, 90:21, 90:29, 91:4, 91:7, 92:4, 92:8, 92:19, 92:24, 92:29, 93:7, 93:15,</p>	<p>93:24, 94:2, 94:4, 94:7, 94:17, 95:6, 95:17, 95:20, 95:25, 96:6, 96:18, 97:1, 97:3, 97:6, 97:11, 97:18, 97:22, 97:26, 98:3, 98:14, 98:22, 99:2, 99:6, 100:28, 101:1, 114:15, 114:17, 116:17, 116:20, 116:28, 117:5, 117:16, 118:13, 118:15, 118:20, 119:5, 119:8, 119:11, 119:14, 121:2, 121:6, 121:29, 122:10, 122:15, 122:23, 123:11, 123:14, 123:17, 124:2, 124:11, 124:14, 124:21, 125:5, 125:8, 125:20, 126:9, 126:18, 126:20, 127:3, 127:5, 127:20, 127:25, 128:9, 128:11, 128:25, 129:5, 130:13, 130:15, 130:23, 131:13, 131:19, 132:17, 132:22, 132:27, 133:4, 133:28, 134:1, 134:5, 134:17, 134:21, 134:23, 135:2, 135:10, 135:12, 135:14, 135:26, 135:29, 136:3, 136:15, 136:27, 137:1, 137:4, 137:15, 138:13, 139:13, 139:15, 139:18, 139:21, 140:3, 140:5, 140:8, 140:10, 141:5, 141:8, 141:13, 142:1, 142:10, 142:15, 142:18, 143:1, 143:6, 143:9, 143:12, 143:16, 144:11, 144:18, 144:25, 144:27, 144:29, 145:3, 145:19, 146:1, 146:7, 146:10, 146:15,</p>	<p>146:22, 147:22, 147:28, 148:15, 148:19, 148:23, 148:25, 148:29, 149:4, 149:6, 149:13, 149:17, 149:20, 149:25, 149:29, 150:20, 150:23, 150:27, 151:1, 151:12, 151:17 Chairman [80] - 5:6, 5:7, 6:4, 6:6, 7:1, 7:18, 7:20, 8:29, 11:3, 13:4, 15:11, 36:29, 39:7, 40:2, 43:29, 53:5, 55:13, 57:7, 64:12, 64:28, 66:11, 66:16, 66:22, 68:8, 68:14, 69:10, 70:8, 72:10, 74:13, 76:26, 79:29, 80:19, 80:29, 82:20, 84:2, 84:21, 85:7, 87:20, 89:13, 93:6, 93:23, 94:9, 95:15, 96:2, 96:27, 97:15, 97:25, 98:13, 98:24, 99:8, 101:2, 101:24, 104:26, 107:6, 107:26, 108:13, 110:10, 113:8, 113:22, 115:5, 115:23, 116:14, 116:22, 117:20, 120:12, 120:21, 125:25, 126:25, 128:23, 129:4, 129:23, 131:28, 133:26, 135:13, 136:24, 137:7, 137:11, 137:23, 139:7, 140:18 challenging [2] - 80:27, 151:18 chance [2] - 125:16, 137:5 change [1] - 123:4 changed [3] - 102:20, 146:29, 147:1 chapter [1] - 19:18 charge [4] -</p>	<p>58:26, 121:4, 124:24, 144:1 Charleton [2] - 130:12, 138:9 chase [1] - 74:20 chasing [2] - 75:15, 78:7 chat [1] - 111:9 check [3] - 84:2, 87:5, 132:29 checked [1] - 135:3 checking [1] - 79:14 chief [5] - 49:13, 55:3, 55:4, 88:3, 90:14 Chief [19] - 39:19, 43:26, 53:29, 70:23, 89:15, 89:17, 89:22, 92:27, 93:2, 101:17, 104:18, 106:3, 106:7, 109:10, 110:7, 115:28, 116:10, 132:18, 133:6 child [1] - 120:5 children [1] - 102:19 chimes [1] - 91:22 Christy [1] - 88:3 chronology [1] - 81:8 circuit [1] - 61:29 circulated [1] - 62:19 circumstances [7] - 13:23, 25:17, 66:4, 103:18, 103:21, 105:12, 113:14 cited [2] - 22:9, 22:10 citing [1] - 46:23 civil [4] - 16:10, 17:10, 20:29, 61:26 civilian [3] - 88:6, 88:7, 112:29 civilians [1] - 67:4 claim [11] - 10:4, 14:7, 68:22, 68:24, 68:26,</p>
--	--	---	---	---	--

<p>72:15, 75:6, 84:17, 84:23, 85:1, 126:5</p> <p>claimed [9] - 9:19, 23:15, 23:26, 24:2, 48:13, 51:3, 87:25, 87:27, 89:16</p> <p>claiming [7] - 49:23, 49:29, 54:10, 54:11, 54:13, 75:14, 79:10</p> <p>claims [7] - 51:24, 69:15, 69:16, 70:25, 73:16, 116:9, 123:6</p> <p>Clancy [15] - 9:25, 10:2, 10:14, 10:26, 11:16, 12:14, 12:23, 12:29, 57:9, 57:26, 58:13, 58:21, 59:23, 64:10, 88:4</p> <p>clarification [1] - 65:16</p> <p>clarify [2] - 57:5, 65:10</p> <p>clarifying [1] - 65:1</p> <p>clarity [1] - 74:22</p> <p>classification [1] - 63:16</p> <p>clear [40] - 10:12, 15:21, 16:14, 17:28, 27:13, 30:18, 37:26, 43:24, 50:17, 51:25, 51:26, 56:24, 59:23, 64:17, 66:10, 70:10, 72:2, 72:4, 72:14, 72:18, 73:8, 77:15, 85:29, 87:9, 90:4, 91:29, 92:16, 102:14, 108:8, 109:25, 112:12, 113:15, 122:18, 124:18, 128:12, 128:13, 139:21, 147:8, 150:18, 150:20</p> <p>cleared [4] - 43:4, 106:27, 107:3, 110:15</p>	<p>clearly [11] - 28:3, 37:11, 40:10, 42:27, 45:3, 104:14, 117:23, 122:13, 126:6, 133:13, 151:2</p> <p>clerical [1] - 102:1</p> <p>clients [4] - 66:25, 67:21, 67:24, 88:10</p> <p>close [2] - 16:8, 95:21</p> <p>closest [1] - 111:1</p> <p>clump [1] - 46:22</p> <p>clumsy [2] - 59:4, 59:7</p> <p>CMO [2] - 90:16, 90:18</p> <p>Code [1] - 63:13</p> <p>Coffey [1] - 48:24</p> <p>cogent [1] - 107:27</p> <p>coincidence [3] - 75:2, 143:16, 149:2</p> <p>collapse [1] - 70:7</p> <p>colleague [1] - 102:10</p> <p>colleagues [5] - 34:16, 72:27, 73:9, 109:9, 137:6</p> <p>collect [1] - 98:16</p> <p>comforted [1] - 64:16</p> <p>coming [8] - 46:18, 47:25, 62:16, 71:26, 86:3, 86:27, 89:4, 116:5</p> <p>commence [2] - 110:12, 112:3</p> <p>commenced [1] - 109:19</p> <p>commencemen [1] - 112:5</p> <p>comment [7] - 60:5, 62:25, 63:5, 78:10, 78:12, 92:5, 125:11</p> <p>commented [1] - 112:24</p> <p>comments [2] -</p>	<p>5:18, 65:13</p> <p>Commission [1] - 131:26</p> <p>commissioner [4] - 64:4, 77:27, 84:28, 143:20</p> <p>Commissioner [51] - 5:26, 9:25, 10:2, 10:14, 10:26, 11:2, 11:16, 11:17, 12:14, 12:23, 12:25, 12:26, 12:29, 33:4, 56:10, 57:9, 57:26, 58:2, 58:13, 58:14, 58:21, 62:27, 63:7, 64:6, 64:10, 64:19, 65:4, 65:7, 65:18, 65:23, 66:3, 66:6, 87:29, 88:1, 88:23, 88:24, 92:21, 101:18, 109:11, 110:9, 110:17, 134:24, 134:26, 134:27, 135:6, 142:26, 142:27, 143:13, 143:21, 149:9</p> <p>commissioner' [3] - 76:3, 77:28, 120:28</p> <p>Commissioner [1] - 59:23</p> <p>common [3] - 20:28, 106:9, 123:2</p> <p>communicate [1] - 47:17</p> <p>communicated [1] - 142:25</p> <p>communicatin [2] - 11:5, 151:7</p> <p>communicatio [6] - 29:1, 30:19, 82:9, 149:8, 151:11, 151:16</p> <p>comparable [1] - 138:16</p> <p>compared [3] - 18:2, 42:7, 138:5</p> <p>compiling [1] - 101:22</p> <p>complained [1] - 45:16</p> <p>complaining [4] - 54:26, 122:16, 142:21</p>	<p>complaint [29] - 23:23, 29:22, 30:12, 30:14, 30:19, 47:6, 57:8, 57:10, 57:16, 63:15, 64:5, 70:7, 71:10, 93:11, 100:15, 100:17, 107:28, 117:24, 122:13, 122:20, 123:19, 126:2, 127:16, 128:14, 128:15, 129:27, 129:29, 139:1, 139:2</p> <p>complaints [15] - 15:27, 29:29, 30:5, 50:5, 50:17, 50:22, 54:28, 55:6, 70:17, 86:2, 87:20, 118:24, 134:29, 143:22, 145:9</p> <p>complete [6] - 13:13, 56:11, 86:13, 120:5, 132:10, 136:3</p> <p>completely [13] - 10:17, 20:1, 47:19, 75:17, 85:15, 96:3, 110:28, 126:14, 132:15, 138:21, 141:23, 147:10, 148:3</p> <p>complex [1] - 71:22</p> <p>compliance [2] - 64:3, 131:2</p> <p>complied [1] - 46:4</p> <p>complimentary [1] - 145:10</p> <p>comply [1] - 5:14</p> <p>comprehensiv [1] - 112:19</p> <p>concede [1] - 56:15</p> <p>concedes [1] - 111:21</p> <p>concentrate [1] - 24:28</p> <p>concern [12] - 22:24, 86:1, 87:3, 87:11, 88:15, 93:17, 96:16, 102:18, 105:14, 107:7, 111:18, 122:17</p>	<p>concerned [8] - 6:6, 30:21, 35:16, 35:17, 66:1, 66:29, 87:8, 95:9</p> <p>concerning [4] - 69:21, 98:25, 132:14, 134:19</p> <p>concerns [6] - 81:16, 86:16, 94:25, 96:11, 108:10, 108:17</p> <p>concession [2] - 105:2, 105:18</p> <p>conclude [3] - 70:8, 95:6, 132:7</p> <p>CONCLUDED [1] - 152:11</p> <p>conclusion [8] - 74:8, 84:21, 95:27, 104:22, 105:6, 122:6, 130:18, 134:13</p> <p>condemning [2] - 72:2, 104:22</p> <p>condition [7] - 10:7, 54:4, 54:5, 55:11, 55:12, 127:9, 138:27</p> <p>conduct [4] - 54:19, 98:11, 107:10, 140:12</p> <p>conducted [1] - 42:18</p> <p>confessional [1] - 127:14</p> <p>confided [1] - 73:5</p> <p>confidential [11] - 15:15, 21:15, 27:8, 39:4, 40:19, 40:20, 69:5, 99:25, 140:8, 144:29, 145:1</p> <p>confiding [1] - 72:27</p> <p>confine [1] - 96:10</p> <p>confines [1] - 131:1</p> <p>confirmed [1] - 111:5</p> <p>confirming [1] - 64:16</p> <p>confirms [2] - 80:27, 81:4</p> <p>conflict [2] - 45:13, 72:16</p> <p>conflicts [1] - 69:14</p> <p>confused [1] -</p>	<p>77:15</p> <p>confusion [2] - 51:14, 56:17</p> <p>connected [3] - 23:24, 50:11, 78:4</p> <p>CONNECTION [1] - 3:7</p> <p>connection [24] - 33:3, 33:12, 33:16, 33:22, 34:3, 35:5, 60:1, 60:8, 70:13, 101:20, 101:24, 109:7, 110:26, 126:8, 129:6, 134:20, 134:21, 136:17, 136:22, 140:11, 143:25, 144:2, 144:7, 149:18</p> <p>connects [1] - 129:17</p> <p>Conroy [2] - 88:23, 89:4</p> <p>consequences [2] - 139:18, 139:19</p> <p>consider [3] - 35:10, 67:11, 137:24</p> <p>considerable [1] - 10:28</p> <p>consideration [3] - 35:22, 67:8, 69:15</p> <p>considerations [2] - 110:14, 113:6</p> <p>considered [4] - 9:29, 24:15, 110:19, 124:9</p> <p>considering [1] - 85:11</p> <p>consistent [2] - 15:20, 94:27</p> <p>conspiracy [6] - 67:20, 67:28, 88:8, 89:6, 109:18</p> <p>constituted [1] - 56:28</p> <p>constraining [1] - 5:20</p> <p>construction [2] - 125:4, 130:17</p> <p>consult [1] - 83:21</p> <p>contact [9] - 142:27, 142:28, 143:18, 143:19,</p>
---	--	---	--	---	--

<p>143:20, 143:21, 144:15, 150:5, 150:7</p> <p>contained [2] - 30:26, 108:19</p> <p>contemporaneous [1] - 111:2</p> <p>contends [2] - 122:24, 122:27</p> <p>content [1] - 111:18</p> <p>contents [6] - 73:3, 81:5, 105:17, 109:8, 114:3, 130:21</p> <p>contesting [1] - 81:29</p> <p>context [43] - 14:4, 14:18, 29:29, 30:5, 30:18, 31:26, 35:13, 35:15, 35:22, 35:23, 35:26, 36:1, 36:23, 40:6, 40:17, 58:28, 71:7, 75:15, 78:6, 79:6, 87:13, 90:22, 91:28, 92:16, 94:14, 95:11, 109:25, 110:29, 117:22, 117:27, 117:29, 118:3, 118:5, 124:9, 125:29, 126:26, 127:8, 127:17, 127:26, 129:20, 137:17, 138:2, 138:17</p> <p>continue [1] - 105:10</p> <p>continued [1] - 11:1</p> <p>continues [2] - 39:28, 104:19</p> <p>contradict [1] - 56:9</p> <p>contradicted [2] - 45:3, 141:7</p> <p>contradicts [1] - 61:15</p> <p>contradicts.. [1] - 61:12</p> <p>contrary [1] - 107:15</p> <p>contrast [3] - 74:22, 122:8, 123:16</p> <p>contributing [1] - 51:10</p>	<p>control [2] - 5:14, 120:29</p> <p>controversial [1] - 100:22</p> <p>convenient [1] - 48:3</p> <p>conversation [52] - 8:10, 26:8, 33:3, 35:5, 38:4, 40:23, 40:26, 40:27, 41:2, 52:20, 60:7, 69:22, 70:3, 70:24, 71:27, 72:4, 73:2, 75:7, 75:10, 75:13, 75:26, 80:18, 81:14, 84:23, 85:12, 85:23, 86:4, 87:22, 89:15, 89:25, 89:28, 90:8, 90:10, 91:19, 92:3, 99:12, 102:17, 103:2, 115:28, 117:14, 117:15, 117:21, 119:19, 127:12, 129:13, 132:19, 133:17, 134:26, 134:28, 136:11, 140:23, 142:22</p> <p>conversations [10] - 8:11, 29:13, 69:29, 74:16, 74:18, 75:3, 75:5, 76:12, 115:24, 141:14</p> <p>converted [1] - 38:18</p> <p>conveyed [1] - 77:12</p> <p>conveying [1] - 76:27</p> <p>convicted [1] - 107:1</p> <p>convoluted [1] - 23:28</p> <p>coordinate [2] - 27:15, 68:20</p> <p>coordinated [5] - 27:20, 118:2, 120:4, 120:6, 121:2</p> <p>coordinating [1] - 119:22</p> <p>coordination [8] - 120:26, 121:4, 121:13, 121:14, 121:16, 121:20,</p>	<p>124:23</p> <p>core [3] - 73:29, 74:1, 87:18</p> <p>correct [19] - 52:22, 53:4, 74:2, 75:23, 76:13, 78:8, 78:14, 96:12, 101:14, 106:2, 108:15, 110:3, 119:9, 125:5, 132:12, 133:26, 136:27, 147:23</p> <p>correctness [1] - 97:19</p> <p>correspondence [1] - 87:10</p> <p>corruption [2] - 66:22, 69:8</p> <p>Costello [3] - 81:15, 81:17, 81:25</p> <p>counsel [1] - 84:28</p> <p>counselling [1] - 40:17</p> <p>couple [5] - 13:3, 28:18, 38:12, 107:22, 148:18</p> <p>course [43] - 10:24, 13:29, 16:25, 22:3, 31:3, 36:3, 41:15, 44:27, 46:7, 53:19, 62:26, 62:28, 68:16, 69:5, 69:19, 69:29, 70:4, 70:6, 70:9, 70:10, 70:13, 72:7, 73:12, 74:13, 75:16, 76:10, 84:20, 86:14, 88:25, 95:25, 107:29, 108:4, 108:13, 108:15, 111:10, 138:19, 139:8, 139:26, 145:7, 148:10, 151:8, 151:14</p> <p>Court [39] - 7:19, 8:18, 11:27, 13:24, 13:25, 16:26, 17:13, 19:6, 20:18, 22:5, 22:6, 22:8, 22:13, 23:29, 24:1, 24:6, 24:9, 24:13, 24:15, 27:26,</p>	<p>27:28, 30:2, 30:16, 31:16, 60:25, 116:26, 120:19, 121:10, 122:2, 125:22, 126:15, 126:27, 127:7, 128:3, 131:25, 138:6, 138:8</p> <p>court [13] - 11:26, 13:27, 13:28, 17:15, 22:16, 22:18, 25:16, 48:23, 62:3, 108:4, 108:16, 113:11, 115:23</p> <p>Court's [1] - 24:20</p> <p>cover [5] - 68:2, 68:27, 72:8, 72:16, 103:20</p> <p>cover-up [4] - 68:2, 72:8, 72:16, 103:20</p> <p>covered [1] - 79:20</p> <p>Crean [1] - 144:13</p> <p>creates [1] - 36:4</p> <p>credibility [8] - 72:20, 74:12, 78:22, 84:14, 85:14, 94:26, 95:3, 95:5</p> <p>crime [1] - 108:21</p> <p>criminal [5] - 16:10, 17:8, 17:9, 61:26</p> <p>Criminal [1] - 17:13</p> <p>crisp [1] - 123:21</p> <p>critical [2] - 48:18, 123:2</p> <p>criticise [3] - 37:6, 37:9, 58:18</p> <p>criticism [4] - 77:14, 88:27, 115:14, 135:18</p> <p>criticisms [2] - 85:3, 86:19</p> <p>CRO [4] - 88:2, 129:19, 129:20</p> <p>cross [22] - 38:9, 38:27, 39:9, 41:29, 67:1, 71:1, 71:29, 73:15,</p>	<p>73:21, 78:18, 92:11, 95:13, 96:3, 101:4, 103:5, 109:27, 113:28, 118:11, 118:12, 118:13, 133:12, 134:3</p> <p>cross-examination [21] - 38:9, 38:27, 39:9, 41:29, 67:1, 71:1, 71:29, 73:15, 73:21, 92:11, 95:13, 96:3, 101:4, 103:5, 109:27, 113:28, 118:11, 118:12, 118:13, 133:12, 134:3</p> <p>cross-examined [1] - 78:18</p> <p>crossed [1] - 134:19</p> <p>crucial [1] - 62:15</p> <p>crunch [1] - 26:2</p> <p>crux [1] - 27:24</p> <p>Cryan [68] - 8:7, 8:12, 8:13, 21:22, 22:22, 24:27, 25:3, 26:4, 26:9, 26:19, 26:22, 26:24, 26:27, 26:29, 27:13, 27:21, 32:5, 35:6, 35:15, 35:26, 36:16, 40:26, 45:20, 60:5, 60:7, 70:1, 70:2, 87:27, 91:15, 91:23, 94:13, 94:24, 96:6, 96:12, 96:19, 96:23, 97:4, 97:8, 98:10, 98:27, 99:12, 99:14, 99:19, 100:25, 105:16, 117:5, 117:10, 117:13, 117:22, 118:10, 119:3, 120:18, 126:23, 127:10, 127:11, 129:7, 131:29, 136:19, 137:13, 138:19, 140:20, 141:10, 144:12, 144:13, 145:13, 148:9, 148:12, 149:7</p>	<p>Cryan's [7] - 25:29, 26:8, 35:27, 95:16, 95:18, 99:21, 99:29</p> <p>Cryan/Sergeant [1] - 25:28</p> <p>Cummin [1] - 62:2</p> <p>Curran [37] - 21:18, 22:21, 25:3, 25:7, 37:4, 39:20, 40:23, 40:28, 41:1, 42:1, 52:29, 60:6, 60:23, 61:16, 70:4, 70:19, 79:28, 82:28, 84:8, 87:12, 91:2, 117:6, 117:7, 132:2, 132:18, 133:6, 133:20, 133:23, 134:15, 139:27, 142:23, 142:25, 143:18, 145:14, 147:17</p> <p>Curran's [2] - 8:5, 38:1</p> <p>current [1] - 37:29</p> <p>cut [3] - 63:11, 63:15, 88:19</p>
D					
<p>damage [1] - 17:24</p> <p>damaging [1] - 66:27</p> <p>danger [1] - 68:18</p> <p>date [9] - 50:23, 83:20, 111:5, 147:28, 148:13, 148:15, 148:18, 148:26, 149:17</p> <p>DATED [1] - 3:1</p> <p>dated [1] - 80:15</p> <p>dates [2] - 143:17, 149:13</p> <p>DAY [1] - 3:1</p> <p>day's [1] - 146:18</p> <p>days [7] - 32:22, 91:19, 107:22, 109:20, 148:18, 150:15</p> <p>DAYS [1] - 3:11</p>					

<p>deal [16] - 7:15, 9:1, 9:7, 21:19, 31:10, 60:13, 67:13, 88:10, 89:14, 98:9, 116:18, 122:29, 132:3, 145:23, 145:24, 148:8</p> <p>dealing [4] - 8:29, 32:10, 51:18, 151:9</p> <p>dealings [1] - 111:2</p> <p>deals [1] - 147:8</p> <p>dealt [7] - 26:12, 48:21, 88:2, 91:13, 109:22, 115:20, 128:27</p> <p>death [3] - 14:9, 68:3, 117:26</p> <p>debatable [1] - 16:19</p> <p>debate [6] - 42:15, 125:26, 125:27, 133:13, 136:10</p> <p>deceased [2] - 103:3, 111:2</p> <p>December [2] - 8:23, 86:3</p> <p>decency [3] - 87:11, 88:20, 94:15</p> <p>decide [9] - 17:29, 19:1, 22:19, 56:12, 68:15, 70:14, 95:1, 132:12, 139:12</p> <p>decided [5] - 24:12, 25:23, 115:10, 123:12, 136:27</p> <p>decidendi [1] - 130:6</p> <p>decision [43] - 7:19, 8:19, 8:21, 8:22, 21:20, 22:12, 24:1, 24:21, 24:23, 26:1, 26:10, 28:4, 29:10, 29:13, 31:14, 31:16, 33:4, 41:8, 48:23, 63:11, 63:15, 65:3, 98:10, 101:6, 103:11, 110:12, 110:13, 111:27, 112:11, 113:18, 121:11,</p>	<p>122:5, 122:12, 122:25, 126:12, 126:15, 126:27, 128:20, 129:25, 138:7, 138:9, 147:23, 147:25</p> <p>decisions [2] - 19:6, 138:6</p> <p>Declan's [2] - 99:17, 100:6</p> <p>declarations [1] - 88:29</p> <p>declared [2] - 116:25, 124:22</p> <p>declares [2] - 124:22, 127:7</p> <p>defence [1] - 115:9</p> <p>defined [2] - 33:14, 33:16</p> <p>defining [2] - 18:21, 18:22</p> <p>definitely [1] - 148:10</p> <p>definition [2] - 25:20, 55:9</p> <p>degree [2] - 91:12, 121:29</p> <p>delay [2] - 56:19, 56:21</p> <p>deliberately [4] - 10:2, 12:18, 17:24, 18:1</p> <p>delighted [1] - 86:21</p> <p>delivered [3] - 7:24, 8:18, 8:22</p> <p>Della [5] - 40:16, 144:24, 144:26, 144:27, 144:28</p> <p>demeanour [1] - 86:27</p> <p>demonstration [1] - 88:20</p> <p>denial [13] - 114:1, 114:2, 114:4, 114:12, 114:18, 114:21, 114:22, 114:23, 114:26, 114:28, 143:18, 144:9</p> <p>denials [1] - 143:27</p> <p>denied [5] - 23:17, 133:1, 146:13, 150:4, 150:5</p> <p>denies [3] - 114:19, 143:19, 149:10</p>	<p>Denman's [2] - 62:1, 62:3</p> <p>Dennedy [12] - 14:25, 91:10, 91:17, 92:5, 92:12, 93:22, 95:10, 95:13, 95:21, 95:22, 95:29, 99:26</p> <p>Dennedy's [1] - 95:27</p> <p>deny [2] - 94:11, 151:15</p> <p>denying [3] - 77:8, 99:28, 145:27</p> <p>department [2] - 10:5, 11:11</p> <p>dependent [1] - 139:18</p> <p>deploy [1] - 73:4</p> <p>depth [2] - 104:1, 112:18</p> <p>deputies [1] - 59:11</p> <p>derived [1] - 131:22</p> <p>describe [3] - 17:5, 17:11, 19:13</p> <p>described [4] - 27:16, 27:21, 35:15, 35:27</p> <p>describes [1] - 121:18</p> <p>description [2] - 89:24, 89:27</p> <p>despatches [1] - 89:13</p> <p>desperate [1] - 112:15</p> <p>desperately [1] - 62:13</p> <p>despite [7] - 25:24, 25:26, 120:5, 130:26, 130:27, 145:8, 145:27</p> <p>detached [1] - 9:11</p> <p>detail [14] - 14:24, 73:27, 73:28, 74:29, 82:20, 84:4, 96:14, 97:20, 99:28, 106:22, 107:18, 109:9, 113:8, 116:3</p> <p>detailed [1] - 80:5</p>	<p>details [1] - 94:20</p> <p>detective [6] - 51:19, 52:16, 76:22, 101:29, 137:13, 141:1</p> <p>Detective [7] - 75:27, 77:25, 83:1, 101:27, 138:19, 140:19, 141:10</p> <p>determination [5] - 56:6, 56:16, 56:19, 56:22, 63:28</p> <p>determine [2] - 17:21, 19:16</p> <p>determined [1] - 94:22</p> <p>determines [1] - 17:27</p> <p>devastating [2] - 74:11, 74:12</p> <p>developed [3] - 71:1, 71:21, 124:19</p> <p>development [2] - 101:5, 116:24</p> <p>Devitt [1] - 114:19</p> <p>diagnose [1] - 54:3</p> <p>differed [2] - 30:3</p> <p>difference [1] - 25:5</p> <p>different [24] - 11:24, 15:28, 18:23, 20:6, 20:22, 21:3, 29:13, 34:6, 40:13, 42:8, 42:9, 42:26, 47:25, 54:13, 85:15, 95:10, 102:15, 116:26, 121:26, 125:21, 126:22, 130:18, 133:24, 148:28</p> <p>difficult [5] - 18:1, 19:1, 36:18, 57:2, 144:1</p> <p>difficulties [5] - 12:28, 71:24, 103:4, 105:9, 116:2</p> <p>difficulty [22] - 10:28, 17:11, 18:21, 18:22, 18:26, 19:3,</p>	<p>19:14, 36:4, 44:18, 58:7, 88:26, 96:8, 106:26, 108:12, 126:24, 136:8, 141:17, 146:1, 150:2, 150:29, 151:14, 151:24</p> <p>diminishing [1] - 76:11</p> <p>dire [1] - 13:23</p> <p>directed [1] - 110:8</p> <p>direction [2] - 25:15, 127:2</p> <p>Directive [1] - 64:4</p> <p>directive [3] - 49:5, 63:13, 131:21</p> <p>DIRECTLY [1] - 3:6</p> <p>directly [3] - 23:24, 56:9, 138:15</p> <p>disadvantage [1] - 135:23</p> <p>disagree [6] - 18:17, 19:22, 20:2, 63:17, 81:5, 138:10</p> <p>disagreeing [1] - 56:3</p> <p>disagreement [4] - 55:27, 95:22, 95:29, 128:11</p> <p>disappoint [1] - 6:10</p> <p>disastrous [1] - 20:14</p> <p>disavowed [1] - 65:8</p> <p>discharged [1] - 114:27</p> <p>disciplinary [30] - 9:3, 14:5, 15:14, 42:4, 42:12, 42:26, 43:13, 44:6, 44:10, 44:29, 60:9, 60:10, 70:25, 89:17, 93:4, 103:13, 106:22, 106:23, 107:1, 110:24, 112:4, 112:23, 113:13, 116:11, 129:18, 144:1, 146:14, 146:15, 146:25, 147:15</p>	<p>discipline [6] - 53:23, 53:24, 93:27, 110:8, 112:5, 143:10</p> <p>disciplined [1] - 112:25</p> <p>disclose [1] - 22:1</p> <p>disclosed [3] - 24:14, 102:25, 120:18</p> <p>discloses [1] - 130:29</p> <p>disclosure [82] - 8:6, 8:7, 9:26, 10:3, 11:12, 12:19, 21:14, 21:17, 21:22, 21:26, 22:21, 22:22, 23:15, 24:3, 24:5, 24:8, 24:11, 25:21, 26:11, 26:12, 28:15, 28:24, 29:2, 29:6, 29:8, 29:23, 31:7, 32:18, 33:22, 33:25, 35:24, 36:19, 37:3, 37:12, 40:15, 41:4, 41:10, 44:24, 57:28, 58:1, 60:23, 70:9, 84:19, 84:24, 85:2, 85:13, 87:26, 87:27, 117:4, 117:12, 117:13, 117:24, 120:22, 123:21, 124:18, 126:1, 126:6, 127:27, 128:5, 128:8, 129:9, 129:15, 130:4, 134:14, 136:12, 136:21, 137:12, 137:14, 138:20, 139:5, 139:11, 139:12, 139:15, 139:16, 139:27, 140:6, 140:8, 141:20, 141:28, 142:21, 145:16</p> <p>disclosures [15] - 7:16, 8:4, 8:22, 9:1, 21:12, 22:7, 24:25, 37:1, 37:10, 37:29, 41:24, 48:25, 125:21, 145:12,</p>
---	---	---	--	--	--

<p>145:13 DISCLOSURES [1] - 3:2 Disclosures [1] - 124:6 disconnect [1] - 90:20 discontinuanc e [1] - 106:23 discontinue [1] - 112:12 discontinued [1] - 43:19 discredit [1] - 57:27 discredited [3] - 16:22, 57:11, 109:1 discrediting [13] - 16:12, 33:18, 42:13, 42:21, 43:5, 57:24, 64:19, 65:24, 66:24, 68:1, 69:2, 135:8, 141:26 discussed [7] - 81:29, 82:2, 83:14, 84:8, 102:1, 134:24, 145:17 discussion [11] - 41:28, 52:15, 54:23, 79:4, 80:7, 85:16, 87:15, 102:1, 111:6, 117:3, 120:13 dismissal [1] - 30:7 dismissed [1] - 36:17 disparagement [1] - 95:29 disposes [1] - 66:7 dispute [22] - 38:3, 53:2, 64:22, 66:8, 69:20, 69:21, 69:23, 74:6, 75:25, 76:6, 77:25, 79:27, 84:18, 87:14, 96:11, 97:6, 97:13, 115:5, 123:5, 124:12, 138:29, 139:22 disputed [11] - 21:13, 21:14, 70:3, 72:15, 74:18, 75:17, 86:7, 98:26,</p>	<p>115:27, 116:9, 137:28 disputes [5] - 64:23, 69:17, 70:29, 71:4, 95:4 disputing [1] - 82:3 disrespect [2] - 95:22, 95:28 dissent [1] - 130:16 distinct [1] - 123:22 distinction [5] - 49:26, 90:2, 90:4, 128:15, 134:5 distinguish [2] - 20:2, 102:9 distorted [1] - 71:18 distress [1] - 66:28 disturb [1] - 116:2 doctor [2] - 35:19, 88:7 document [5] - 108:4, 108:16, 147:19, 147:24 documentary [1] - 91:5 documentation [2] - 67:15, 69:12 documents [1] - 11:23 dodge [1] - 150:26 done [16] - 7:27, 9:27, 10:8, 10:15, 44:7, 45:18, 46:2, 49:18, 90:26, 101:18, 121:24, 121:25, 122:13, 135:7 Donohue [1] - 107:28 Donohue's [1] - 109:4 door [4] - 56:26, 95:21, 122:3, 133:11 doors [1] - 13:27 doubt [3] - 72:26, 122:14, 137:21 doubtless [1] - 79:8 down [20] - 26:25, 49:13, 52:27, 52:28,</p>	<p>58:19, 63:5, 70:22, 78:29, 94:15, 94:19, 94:20, 96:15, 100:11, 112:10, 118:18, 133:19, 134:7, 134:8, 135:6 DPP [1] - 75:16 Dr [6] - 88:6, 88:11, 88:20, 93:19, 114:8, 114:19 draft [1] - 52:21 dragged [1] - 67:19 draw [5] - 130:10, 143:1, 143:3, 143:4 drawing [1] - 6:24 drawn [6] - 26:16, 30:25, 34:27, 67:23, 134:13, 150:21 dreadily [1] - 76:29 drew [2] - 102:5, 134:9 drinking [3] - 71:17, 114:21, 114:23 drives [1] - 72:6 driveway [1] - 46:23 due [2] - 10:7, 48:26 during [4] - 12:10, 71:15, 86:4, 113:27 duty [14] - 9:4, 10:8, 14:8, 15:23, 45:6, 48:19, 49:1, 49:4, 56:7, 56:17, 56:28, 63:18, 68:11, 87:6 Dwyer [1] - 88:2</p>	<p>edition [1] - 93:3 educative [1] - 94:10 effect [12] - 7:24, 21:20, 31:17, 44:8, 61:25, 65:9, 65:10, 76:2, 91:14, 97:5, 138:12, 146:11 effectively [17] - 12:3, 15:4, 15:25, 16:21, 23:27, 23:29, 36:17, 41:20, 57:20, 65:8, 71:23, 80:4, 90:21, 113:17, 128:6, 136:3, 137:19 effects [1] - 55:2 efforts [2] - 63:9, 74:18 egregious [3] - 67:5, 69:7, 88:13 either [10] - 14:29, 30:21, 46:15, 61:26, 68:13, 96:21, 109:13, 113:12, 139:1, 139:15 element [2] - 23:18, 90:8 elements [1] - 53:26 elsewhere [1] - 99:8 embarrassmen t [1] - 62:4 embroiled [1] - 88:8 emotionally [1] - 138:27 emphasis [1] - 34:26 emphasise [1] - 64:8 emphasised [2] - 92:11, 146:3 emphases [1] - 136:16 employee [3] - 16:21, 29:20, 129:29 employees [1] - 49:5 employer [8] - 16:22, 22:1, 23:17, 23:18, 24:4, 37:12, 122:28, 137:28 enable [2] -</p>	<p>87:1, 87:14 encounter [3] - 25:28, 97:9, 97:11 encouragemen t [1] - 93:28 encouraging [1] - 125:14 end [12] - 13:4, 32:17, 57:15, 59:1, 62:29, 70:12, 102:22, 103:6, 103:7, 106:1, 112:10, 141:27 endangered [4] - 30:23, 124:3, 124:16 endeavouring [1] - 125:6 ended [1] - 13:28 endorsed [2] - 93:1, 131:24 endorses [1] - 127:7 engage [1] - 93:24 engaged [2] - 67:28, 88:21 English [1] - 57:3 enjoy [1] - 14:15 ensure [1] - 64:3 enthusiastic [1] - 103:5 entire [4] - 72:9, 74:10, 101:5, 147:7 entirely [12] - 9:11, 10:16, 31:13, 47:27, 53:11, 63:6, 94:27, 108:24, 112:2, 132:19, 133:7, 146:19 entitled [7] - 41:7, 85:13, 101:13, 101:20, 125:17, 142:4, 151:28 envelope [1] - 38:15 environs [1] - 141:29 envisaged [1] - 29:3 equally [1] - 86:18 equation [1] -</p>	<p>86:3 ergo [1] - 149:20 error [3] - 24:12, 108:24, 108:28 errors [1] - 70:17 escutcheon [1] - 20:13 especially [2] - 44:21, 63:27 essence [1] - 124:4 essential [2] - 18:12, 121:21 essentially [6] - 6:11, 39:17, 121:27, 133:22, 136:23, 143:17 establish [1] - 10:6 established [2] - 19:16, 148:20 European [4] - 131:21, 131:25, 131:26 event [3] - 46:2, 71:26, 150:8 events [4] - 13:16, 33:28, 123:1, 143:26 eventually [2] - 88:25, 114:28 evidence [115] - 8:8, 8:13, 10:1, 10:10, 10:20, 13:21, 13:22, 14:9, 15:21, 26:4, 26:16, 27:14, 30:8, 32:3, 32:11, 34:20, 34:23, 35:3, 35:4, 38:2, 38:10, 42:22, 43:23, 45:20, 46:17, 47:3, 47:22, 48:2, 51:16, 52:9, 53:6, 60:25, 60:28, 60:29, 61:11, 61:16, 61:22, 62:17, 62:19, 65:4, 65:6, 65:19, 65:22, 67:21, 70:15, 70:16, 71:3, 72:1, 72:16, 72:18, 72:21, 74:23, 74:24, 75:24, 75:25, 75:29, 78:22, 84:21, 84:27, 85:8, 85:26,</p>
E					
<p>early [6] - 9:9, 61:29, 63:28, 64:17, 79:2, 115:26 earned [1] - 67:9 ease [1] - 109:28 easily [1] - 57:4 easy [1] - 143:28 ECHR [1] - 148:7</p>					

<p>86:10, 86:29, 87:19, 87:24, 87:28, 88:10, 88:11, 88:12, 89:1, 95:25, 96:13, 96:27, 97:4, 98:5, 107:7, 107:27, 108:23, 109:4, 109:5, 109:10, 113:3, 117:17, 125:12, 125:15, 127:15, 128:28, 129:1, 129:3, 129:13, 133:8, 134:20, 134:23, 135:2, 135:5, 136:19, 140:14, 140:17, 141:2, 141:18, 142:9, 142:24, 143:27, 143:29, 144:2, 145:23, 148:11, 148:13, 149:23, 150:18, 151:6, 151:13</p> <p>evidences [1] - 150:1</p> <p>evidential [5] - 74:5, 126:29, 127:1, 129:16, 150:3</p> <p>exact [2] - 42:24, 123:5</p> <p>exactly [15] - 23:8, 23:10, 30:29, 40:2, 40:20, 44:21, 46:13, 50:16, 51:11, 81:24, 91:22, 121:7, 139:14, 142:11, 148:25</p> <p>examination [23] - 38:9, 38:27, 39:9, 41:29, 67:1, 71:1, 71:29, 73:15, 73:21, 79:21, 92:11, 95:13, 96:3, 101:4, 103:5, 109:27, 113:28, 118:10, 118:11, 118:12, 118:13, 133:12, 134:3</p> <p>examined [1] - 78:18</p> <p>example [7] - 14:22, 16:17, 29:20, 40:16, 51:23, 139:29,</p>	<p>144:23</p> <p>examples [2] - 11:22, 87:28</p> <p>excellent [1] - 140:19</p> <p>except [1] - 93:9</p> <p>excerpts [1] - 71:2</p> <p>exchange [5] - 70:20, 86:23, 94:8, 127:8, 127:9</p> <p>exchanges [7] - 39:18, 68:8, 70:11, 71:29, 101:5, 115:18, 127:13</p> <p>excluded [1] - 115:15</p> <p>exclusively [1] - 146:16</p> <p>excuse [1] - 99:9</p> <p>exercise [4] - 73:14, 93:25, 103:12, 104:2</p> <p>existence [1] - 104:14</p> <p>existing [1] - 129:1</p> <p>exists [1] - 87:15</p> <p>exonerate [1] - 58:12</p> <p>exonerated [1] - 15:4</p> <p>expect [1] - 73:9</p> <p>expecting [1] - 151:1</p> <p>experienced [1] - 10:28</p> <p>explain [3] - 18:29, 49:21, 49:22</p> <p>explained [3] - 19:25, 25:18, 57:9</p> <p>explaining [1] - 54:25</p> <p>exploration [1] - 93:25</p> <p>explore [1] - 79:18</p> <p>explored [1] - 79:2</p> <p>exposure [2] - 72:28, 93:13</p> <p>express [5] - 18:8, 25:15, 45:15, 144:5, 144:6</p> <p>expressed [9] -</p>	<p>81:17, 91:26, 94:11, 94:25, 96:16, 98:28, 105:15, 108:10, 108:17</p> <p>expressing [1] - 81:16</p> <p>expression [8] - 22:24, 40:9, 69:13, 79:27, 120:24, 123:20, 145:5</p> <p>expressly [2] - 30:21, 130:27</p> <p>extensively [1] - 145:25</p> <p>extent [8] - 17:27, 19:25, 52:8, 65:12, 65:14, 65:16, 112:29, 147:12</p> <p>extra [2] - 23:18, 32:2</p> <p>extract [1] - 17:2</p> <p>extraordinary [2] - 84:11, 88:7</p> <p>extremely [1] - 35:16</p>	<p>111:29, 113:11, 113:13, 123:12, 124:22, 127:1, 128:7, 129:19, 132:7, 132:8, 133:14, 134:25, 136:12, 138:24, 139:29, 142:20, 143:29, 145:7, 145:24, 146:10, 146:26</p> <p>fact-find [1] - 33:5</p> <p>fact-finder [1] - 123:12</p> <p>fact-finding [22] - 14:29, 34:1, 35:7, 60:9, 73:12, 73:14, 92:9, 92:22, 101:6, 103:12, 103:28, 106:1, 106:8, 106:15, 111:29, 113:13, 129:19, 139:29, 145:24, 146:10, 146:26</p> <p>fact-findings [2] - 106:9, 106:10</p> <p>factors [1] - 13:17</p> <p>facts [15] - 9:20, 17:20, 22:29, 85:10, 102:4, 104:7, 104:14, 106:21, 107:12, 112:17, 115:17, 121:19, 122:9, 128:7</p> <p>factual [5] - 71:6, 79:27, 110:29, 132:5, 132:11</p> <p>factually [1] - 108:15</p> <p>failed [2] - 10:6, 14:7</p> <p>failing [1] - 11:10</p> <p>failings [3] - 56:16, 68:3, 132:24</p> <p>fails [2] - 112:16, 132:5</p> <p>failure [9] - 15:24, 27:15, 37:22, 40:10, 48:17, 68:18, 68:20, 86:2, 124:14</p> <p>failure [1] - 40:8</p>	<p>failures [2] - 68:28, 132:14</p> <p>fair [11] - 26:7, 80:26, 91:9, 95:27, 101:3, 101:8, 102:4, 113:5, 115:11, 133:8, 145:8</p> <p>fairly [6] - 37:17, 43:23, 79:20, 79:23, 85:22, 92:16</p> <p>fairness [8] - 88:4, 94:23, 95:26, 103:1, 104:26, 105:19, 109:26, 119:2</p> <p>faith [5] - 9:27, 10:16, 59:27, 131:14, 131:16</p> <p>faithfully [1] - 80:16</p> <p>fall [2] - 12:21, 31:14</p> <p>fallacies [1] - 150:13</p> <p>falls [4] - 126:6, 132:5, 132:11, 132:15</p> <p>familiar [2] - 7:20, 22:29</p> <p>family [2] - 67:16, 116:3</p> <p>Fanning [19] - 11:2, 11:17, 12:8, 12:13, 12:25, 12:26, 56:10, 58:2, 58:14, 62:27, 63:7, 64:6, 64:20, 65:4, 65:7, 65:18, 65:23, 66:3, 66:6</p> <p>fanning [1] - 59:23</p> <p>Fanning's [1] - 5:26</p> <p>far [17] - 56:2, 66:1, 67:23, 68:18, 68:19, 76:7, 84:7, 86:6, 88:8, 88:29, 89:1, 95:8, 118:15, 120:12, 125:26, 125:27, 147:11</p> <p>far-reaching [4] - 67:23, 68:18, 68:19, 84:7</p> <p>fashion [1] - 85:26</p> <p>fault [2] - 29:11,</p>	<p>138:22</p> <p>faulted [1] - 31:15</p> <p>favour [1] - 13:29</p> <p>fear [2] - 91:26, 98:28</p> <p>feared [3] - 99:16, 100:6, 100:14</p> <p>fears [1] - 94:12</p> <p>feature [1] - 13:17</p> <p>featured [1] - 107:23</p> <p>features [1] - 114:7</p> <p>FEBRUARY [1] - 3:2</p> <p>feedback [1] - 14:21</p> <p>Feehan [15] - 43:26, 88:1, 89:15, 89:17, 89:22, 92:25, 92:27, 93:2, 101:17, 104:19, 106:3, 106:7, 110:16, 115:28, 116:10</p> <p>Feehan's [3] - 70:23, 110:7, 147:4</p> <p>feelings [3] - 67:16, 93:12, 114:1</p> <p>fell [2] - 12:10, 12:22</p> <p>felt [9] - 15:8, 15:9, 52:2, 52:5, 52:7, 72:27, 94:10, 114:9, 133:20</p> <p>Fergus [1] - 88:2</p> <p>Fernandez [1] - 93:19</p> <p>few [8] - 8:11, 9:2, 43:24, 69:16, 87:28, 99:3, 113:22, 116:21</p> <p>fide [1] - 108:24</p> <p>file [1] - 75:16</p> <p>filters [1] - 112:10</p> <p>final [2] - 5:8, 126:16</p> <p>finally [2] - 19:29, 111:21</p> <p>financially [1] - 13:23</p>
F					
<p>F' [1] - 58:21</p> <p>face [3] - 143:17, 144:9, 150:18</p> <p>faced [1] - 106:26</p> <p>Fachtna [2] - 88:24, 89:4</p> <p>facilitative [1] - 12:1</p> <p>facing [1] - 89:5</p> <p>fact [66] - 8:17, 14:29, 25:9, 27:12, 28:1, 33:5, 34:1, 35:7, 40:4, 40:10, 47:12, 50:19, 56:4, 56:7, 60:9, 64:16, 68:14, 68:15, 71:8, 73:12, 73:14, 74:10, 83:2, 84:8, 87:14, 92:9, 92:22, 101:6, 103:12, 103:22, 103:28, 105:3, 106:1, 106:8, 106:9, 106:10, 106:15, 106:20, 106:27, 109:2, 111:26,</p>					

<p>finder [1] - 123:12</p> <p>findings [2] - 106:9, 106:10</p> <p>fine [2] - 39:27, 119:15</p> <p>finish [1] - 36:29</p> <p>Fintan [2] - 12:8, 12:13</p> <p>fire [1] - 149:21</p> <p>first [34] - 5:25, 7:16, 10:18, 11:26, 11:28, 25:17, 33:29, 52:17, 67:24, 75:12, 76:22, 78:3, 79:10, 84:12, 101:14, 102:12, 113:18, 116:18, 116:22, 117:10, 119:16, 120:14, 122:11, 123:18, 132:4, 133:17, 137:8, 137:10, 141:11, 145:28, 146:3, 146:27, 149:26</p> <p>firstly [2] - 9:22, 120:17</p> <p>fit [3] - 89:26, 89:28, 90:10</p> <p>five [2] - 91:19, 98:15</p> <p>flag [1] - 7:17</p> <p>flawed [2] - 72:23</p> <p>flip [1] - 36:15</p> <p>flow [1] - 45:26</p> <p>focus [4] - 26:16, 26:24, 109:29, 146:22</p> <p>focused [6] - 101:17, 102:5, 146:5, 146:11, 146:16, 147:12</p> <p>focusing [1] - 146:17</p> <p>follow [5] - 50:20, 79:17, 139:9, 139:10, 139:11</p> <p>follow-on [2] - 139:9, 139:10</p> <p>followed [1] - 72:25</p> <p>following [11] - 35:23, 45:5, 79:3, 82:22, 83:7, 91:2, 107:10, 108:1, 120:1, 130:22,</p>	<p>136:11</p> <p>follows [2] - 129:9, 129:29</p> <p>FOLLOWS [2] - 5:1, 98:20</p> <p>foot [1] - 129:13</p> <p>FOR [1] - 98:19</p> <p>force [2] - 68:3, 112:25</p> <p>foreshortened [1] - 5:13</p> <p>forest [1] - 73:28</p> <p>forget [1] - 23:10</p> <p>forgetting [1] - 129:8</p> <p>forgive [1] - 75:19</p> <p>form [8] - 30:16, 71:7, 100:13, 110:3, 115:9, 117:21, 120:3, 145:15</p> <p>formal [4] - 12:22, 45:19, 100:14, 100:17</p> <p>formally [2] - 12:15, 104:15</p> <p>formed [1] - 72:15</p> <p>forms [1] - 116:6</p> <p>formulated [1] - 14:19</p> <p>forth [3] - 79:1, 87:10, 132:15</p> <p>fortiori [1] - 60:5</p> <p>forwards [3] - 88:16, 101:4, 114:24</p> <p>fought [1] - 13:27</p> <p>foundation [2] - 70:5, 148:4</p> <p>founded [1] - 46:5</p> <p>four [4] - 38:4, 38:26, 38:29, 40:11</p> <p>frank [1] - 36:16</p> <p>frankly [4] - 19:10, 19:17, 59:19, 122:3</p> <p>free [1] - 20:1</p> <p>freely [1] - 26:26</p> <p>Friday [1] - 79:3</p> <p>friend [4] - 12:7, 12:16, 12:24, 44:24</p> <p>friend's [1] - 68:6</p> <p>friends [1] - 65:1</p>	<p>front [4] - 22:26, 73:10, 132:5, 134:10</p> <p>full [5] - 45:25, 58:14, 107:12, 128:14, 147:3</p> <p>fuller [2] - 103:12, 109:24</p> <p>fully [1] - 81:7</p> <p>fundamental [1] - 55:26</p> <p>fundamentally [1] - 14:2</p> <p>FURTHER [1] - 3:10</p> <p>future [2] - 114:9, 114:10</p>	<p>30:18, 49:4, 90:11</p> <p>gentleman [1] - 28:25</p> <p>gentlemen [2] - 6:1, 102:6</p> <p>genuine [1] - 131:10</p> <p>given [7] - 13:22, 19:20, 83:20, 104:27, 108:20, 111:5, 144:21</p> <p>GIVING [1] - 3:11</p> <p>glass [2] - 17:16, 19:3</p> <p>goalposts [1] - 48:27</p> <p>goodwill [1] - 88:20</p> <p>gown [1] - 17:16</p> <p>GP [1] - 88:16</p> <p>graduated [1] - 17:12</p> <p>grand [1] - 109:18</p> <p>grasping [1] - 40:9</p> <p>grateful [1] - 65:1</p> <p>grave [1] - 135:7</p> <p>great [2] - 60:25, 138:27</p> <p>greatest [1] - 88:15</p> <p>grey [1] - 68:12</p> <p>grievance [1] - 24:10</p> <p>Griffin [1] - 114:8</p> <p>grind [1] - 109:6</p> <p>ground [3] - 79:23, 84:19, 112:14</p> <p>groundless [1] - 112:26</p> <p>group [1] - 121:3</p> <p>GSOC [7] - 9:5, 15:25, 148:3, 148:4, 148:8, 148:11, 148:18</p> <p>guard [3] - 14:12, 111:12, 145:29</p> <p>guards [1] - 14:17</p> <p>Guards [1] - 13:14</p> <p>guidance [3] -</p>	<p>56:24, 128:2, 130:11</p> <p>guilt [4] - 13:29, 71:11, 93:12, 114:2</p> <p>guilty [1] - 88:13</p> <p>GV [1] - 20:19</p>	<p>heaven's [1] - 115:12</p> <p>heavily [1] - 71:17</p> <p>heavy [1] - 23:6</p> <p>height [4] - 25:14, 37:16, 37:17, 85:1</p> <p>held [4] - 84:20, 84:22, 110:20, 131:9</p> <p>help [7] - 45:9, 53:14, 60:18, 115:12, 135:26, 151:17, 152:8</p> <p>helpful [3] - 59:8, 73:26, 151:20</p> <p>Henchy [1] - 16:28</p> <p>Hennessy [4] - 38:11, 78:1, 124:28</p> <p>HEREBY [2] - 3:5, 3:8</p> <p>herself [2] - 10:2, 94:27</p> <p>hierarchical [1] - 112:25</p> <p>hierarchy [1] - 69:7</p> <p>High [11] - 11:27, 13:24, 13:25, 22:5, 22:6, 22:8, 23:29, 24:6, 31:16, 60:25, 138:6</p> <p>high [7] - 67:19, 69:7, 69:15, 70:5, 88:8, 88:28, 144:14</p> <p>higher [2] - 16:20, 20:7</p> <p>highlight [3] - 11:19, 13:11, 42:10</p> <p>highlighted [1] - 29:12</p> <p>highlighting [1] - 13:7</p> <p>highly [1] - 111:27</p> <p>him [1] - 9:18</p> <p>himself [11] - 13:25, 35:17, 69:20, 88:12, 91:16, 94:12, 102:13, 114:26, 117:28, 118:27</p> <p>historical [1] -</p>
H					
<p>halfway [1] - 56:24</p> <p>hand [1] - 72:18</p> <p>handbag [2] - 17:19, 19:2</p> <p>handwriting [1] - 110:2</p> <p>hanging [1] - 14:10</p> <p>Hanrahan [3] - 47:8, 47:9, 47:13</p> <p>happy [9] - 12:20, 60:13, 97:2, 128:25, 128:26, 129:3, 129:4, 136:7, 150:12</p> <p>hard [5] - 43:2, 43:3, 142:1, 144:4, 152:6</p> <p>hate [1] - 142:5</p> <p>head [4] - 61:8, 106:28, 144:6, 147:29</p> <p>Health [2] - 20:19, 20:21</p> <p>health [7] - 16:18, 29:22, 30:14, 30:20, 30:22, 130:1, 138:4</p> <p>hear [7] - 5:4, 6:17, 6:18, 73:18, 126:9, 135:27, 137:1</p> <p>heard [10] - 7:1, 8:8, 10:1, 32:3, 32:10, 67:20, 73:18, 84:22, 84:26, 85:7</p> <p>hearing [7] - 7:24, 8:24, 12:10, 25:13, 26:6, 84:29, 127:4</p> <p>HEARING [3] - 5:1, 98:19, 152:11</p> <p>hearings [2] - 64:18, 74:29</p>					
G					
<p>Gao [1] - 48:23</p> <p>Garda [48] - 5:25, 7:5, 9:2, 9:9, 9:14, 10:5, 13:25, 16:3, 16:7, 19:24, 25:6, 37:2, 41:20, 42:14, 45:14, 45:22, 48:22, 56:1, 56:15, 60:20, 66:20, 66:21, 67:29, 68:1, 68:25, 71:12, 73:13, 73:17, 73:21, 88:9, 88:23, 91:25, 101:25, 104:4, 106:9, 106:28, 109:8, 110:8, 110:21, 110:29, 111:7, 112:22, 112:26, 112:29, 114:19, 146:11, 147:11</p> <p>GARDA [1] - 3:8</p> <p>gardaí [4] - 108:23, 110:24, 111:1, 111:11</p> <p>Gardaí [2] - 110:20, 114:10</p> <p>gates [1] - 13:27</p> <p>gather [2] - 11:22, 104:7</p> <p>gathered [1] - 10:21</p> <p>general [9] - 16:2, 18:17, 19:24, 25:7, 28:12, 28:13,</p>					

51:17 hoc [2] - 149:20 Hogan [8] - 28:26, 29:17, 29:18, 121:18, 123:27, 130:19, 137:29, 138:14 Hogan's [3] - 122:12, 122:25, 129:25 holding [1] - 6:21 hole [1] - 72:9 home [9] - 46:9, 46:13, 46:14, 46:18, 87:6, 111:3, 111:4, 116:2, 125:19 honest [1] - 144:5 hope [5] - 7:6, 10:15, 12:23, 39:16, 92:11 hoped [1] - 152:1 hopefully [2] - 66:18, 100:29 hoping [1] - 7:9 hopped [1] - 65:2 horizon [1] - 73:1 hostile [1] - 44:21 hotel [5] - 47:9, 47:23, 47:24, 47:26, 110:2 house [1] - 13:24 HRM [4] - 52:27, 58:8, 58:26, 64:4 huge [1] - 95:12 hugely [1] - 100:22 Hughes [96] - 5:8, 6:5, 6:7, 8:12, 9:4, 9:11, 9:23, 9:26, 10:3, 10:20, 11:4, 11:10, 11:21, 12:12, 12:18, 12:20, 13:9, 13:16, 21:18, 25:10, 25:28, 26:26, 27:2, 27:15, 35:16, 37:29, 38:14, 38:25, 38:29, 41:16, 42:19, 43:8, 46:18,	47:15, 48:12, 51:21, 53:14, 54:3, 56:6, 61:6, 65:6, 68:17, 70:18, 70:25, 72:19, 74:8, 76:1, 76:4, 76:9, 76:14, 76:17, 76:19, 77:3, 77:4, 77:18, 78:9, 79:21, 82:8, 83:8, 84:6, 89:23, 95:13, 96:18, 96:28, 97:8, 100:5, 101:26, 102:13, 108:13, 108:29, 109:1, 109:7, 109:13, 110:21, 110:23, 110:29, 114:9, 127:9, 132:10, 132:24, 132:27, 134:14, 135:8, 138:29, 140:13, 142:23, 143:10, 143:23, 146:2, 146:29, 147:9, 147:10, 147:20, 147:25, 148:6 Hughes's [18] - 5:25, 5:27, 25:13, 29:8, 40:9, 56:26, 63:12, 63:14, 68:26, 72:15, 75:25, 87:19, 89:27, 107:25, 127:12, 138:22, 145:9, 149:10 Hughes/Cryan [1] - 136:10 Hughes/inspector [1] - 126:23 human [3] - 10:4, 11:10, 87:11 Human [1] - 49:9 hundred [1] - 108:14 hundreds [4] - 43:28, 44:1, 44:8, 44:14 Hungarian [1] - 23:2 hurdle [3] - 126:7, 134:19 hurting [2] - 23:7, 23:9	I	30:26, 30:28, 74:7, 121:12 implied [2] - 30:13, 139:3 implies [2] - 121:22, 121:24 imply [1] - 95:28 import [1] - 65:25 importance [2] - 21:3, 75:28 important [26] - 8:21, 11:19, 15:10, 33:1, 34:9, 38:2, 41:1, 49:25, 70:22, 71:7, 74:16, 80:29, 81:1, 82:18, 82:20, 87:13, 87:17, 91:12, 105:2, 105:18, 109:9, 113:8, 115:1, 118:18, 132:11 importantly [6] - 73:19, 108:22, 108:28, 110:14, 111:1, 124:8 impression [1] - 96:22 improved [1] - 127:1 IN [3] - 3:7, 3:10, 3:12 inadvertently [2] - 8:9, 138:28, 147:18 impact [21] - 15:5, 40:25, 40:27, 52:21, 67:3, 73:3, 74:11, 74:12, 75:29, 94:28, 103:2, 105:17, 105:22, 110:1, 110:4, 111:10, 111:15, 111:18, 111:22, 118:28, 146:5 impacts [1] - 131:1 impatience [1] - 27:11 impels [1] - 131:9 implication [5] - 30:22, 124:2, 137:16, 137:17, 137:23 implications [6] - 30:24, 30:25,	74:8, 96:12, 108:20, 108:22, 108:24 indeed [11] - 10:29, 24:6, 26:9, 32:8, 35:7, 56:27, 68:11, 78:23, 111:21, 132:27, 152:8 independent [1] - 72:22 INDEX [1] - 4:1 indicate [7] - 5:11, 34:8, 40:3, 40:7, 86:12, 95:15, 110:11 indicated [4] - 15:19, 44:16, 116:15, 123:3 indicates [4] - 99:21, 101:22, 109:10, 121:11 indicating [7] - 95:2, 95:20, 104:23, 105:4, 118:3, 118:4, 121:13 indict [1] - 145:6 indicted [1] - 43:4 indifferent [1] - 89:8 indignant [1] - 47:15 INDIRECTLY [1] - 3:7 individual [3] - 68:9, 97:20, 118:6 individually [1] - 117:8 individuals [6] - 60:28, 66:28, 67:17, 69:14, 151:7, 151:11 inept [1] - 59:8 inevitable [1] - 74:8 infer [2] - 144:19, 150:17 inferable [1] - 121:15 inference [9] - 31:6, 31:7, 122:3, 134:12, 143:1, 143:3, 143:5, 149:22, 150:18 inferences [6] - 30:24, 30:25, 34:26, 121:19,	150:1, 150:21 inferential [3] - 127:6, 127:23 inferred [1] - 124:29 informal [1] - 111:9 information [27] - 9:28, 10:22, 10:27, 11:20, 13:1, 13:8, 13:10, 56:5, 72:3, 72:5, 72:24, 73:5, 73:10, 73:23, 74:3, 75:13, 78:29, 84:9, 108:20, 109:12, 110:20, 120:23, 123:22, 126:2, 130:28, 144:16, 144:23 informed [1] - 122:27 initial [2] - 106:15, 114:26 initiate [2] - 101:6, 103:11 initiation [1] - 35:6 injury [9] - 9:3, 10:8, 15:23, 45:6, 48:18, 56:7, 56:17, 56:28, 63:18 injustice [1] - 135:7 inquired [1] - 112:17 inquiring [1] - 91:27 inquiry [4] - 98:5, 104:8, 106:14, 128:29 inserts [1] - 75:5 insist [3] - 65:3, 73:18, 74:2 insistence [2] - 84:14, 85:14 insistent [4] - 85:27, 94:22, 94:23, 94:24 insisting [1] - 85:3 insists [4] - 75:9, 77:18, 116:7, 132:7 insofar [8] - 64:20, 71:7, 77:22, 85:9, 87:2, 91:5, 94:12, 99:1
---	---	----------	--	---	--

<p>Inspector ^[39] - 8:7, 8:12, 8:13, 14:25, 15:1, 15:2, 15:4, 21:22, 24:27, 25:28, 25:29, 26:4, 26:19, 26:22, 26:24, 26:27, 26:29, 27:13, 27:20, 32:5, 35:6, 35:15, 35:26, 36:16, 40:26, 45:20, 52:16, 60:4, 70:1, 73:22, 75:27, 77:25, 83:2, 94:13, 96:12, 117:5, 138:19, 140:20, 141:10</p> <p>inspector ^[104] - 35:27, 55:3, 60:6, 71:27, 72:1, 72:17, 73:6, 73:11, 74:3, 74:15, 74:22, 75:4, 75:7, 75:15, 75:18, 76:1, 76:8, 76:14, 76:18, 76:20, 76:22, 77:4, 77:7, 77:8, 78:6, 78:8, 78:10, 78:13, 79:5, 79:11, 79:18, 87:5, 87:7, 87:26, 87:27, 91:14, 91:22, 92:26, 94:14, 95:17, 96:19, 96:23, 97:4, 97:7, 98:10, 98:26, 99:12, 99:14, 99:19, 99:21, 99:28, 100:3, 100:10, 100:25, 101:15, 101:21, 101:26, 102:5, 102:15, 102:16, 102:26, 103:15, 103:21, 103:23, 103:25, 104:18, 105:4, 105:11, 105:15, 105:16, 106:13, 107:15, 109:22, 115:19, 115:24, 117:10, 117:13, 117:22, 117:23, 118:10, 119:2, 120:18, 127:10, 127:11, 128:4, 129:7, 129:14, 131:29, 132:28,</p>	<p>132:29, 136:19, 137:13, 141:1, 144:12, 144:13, 144:27, 145:4, 147:3, 148:9, 148:12</p> <p>inspector's ^[3] - 75:4, 117:17, 125:15</p> <p>Inspectors ^[1] - 140:22</p> <p>inspectors ^[1] - 87:4</p> <p>instance ^[6] - 37:6, 102:12, 103:26, 110:6, 114:3, 123:18</p> <p>instigation ^[1] - 60:8</p> <p>institute ^[1] - 33:4</p> <p>institutional ^[1] - 68:2</p> <p>instrument ^[2] - 101:10, 107:21</p> <p>instruments ^[1] - 129:18</p> <p>intended ^[2] - 9:1, 12:12</p> <p>intention ^[1] - 61:14</p> <p>interactions ^[1] - 55:6</p> <p>intercede ^[1] - 83:27</p> <p>interest ^[3] - 86:15, 115:27, 131:2</p> <p>INTERESTED ^[1] - 3:10</p> <p>interested ^[2] - 5:21, 62:12</p> <p>interesting ^[15] - 17:4, 68:6, 68:12, 68:16, 72:5, 74:9, 75:1, 83:7, 84:6, 91:21, 94:10, 94:21, 117:3, 130:11, 130:20</p> <p>interestingly ^[4] - 70:29, 71:4, 91:15, 117:2</p> <p>interlinked ^[1] - 46:1</p> <p>intermediate ^[5] - 16:9, 16:15, 16:20, 16:24, 20:22</p> <p>internal ^[1] - 89:25</p>	<p>interpretation ^[2] - 89:26, 130:17</p> <p>interrupting ^[1] - 75:20</p> <p>intervening ^[1] - 79:9</p> <p>interview ^[4] - 25:18, 49:2, 55:19, 147:5</p> <p>interviewed ^[4] - 45:16, 45:24, 45:27, 101:29</p> <p>interviews ^[1] - 55:18</p> <p>introduce ^[3] - 84:7, 84:11, 147:1</p> <p>introduces ^[1] - 28:14</p> <p>invalid ^[1] - 113:18</p> <p>investigate ^[5] - 49:2, 49:16, 49:21, 52:29, 109:24</p> <p>investigated ^[5] - 27:18, 52:25, 53:11, 100:18, 104:16</p> <p>investigating ^[2] - 50:4, 107:9</p> <p>investigation ^[5] - 9:3, 10:24, 13:10, 14:5, 14:25, 14:29, 15:15, 15:24, 21:23, 27:19, 33:5, 42:5, 42:12, 42:16, 44:6, 44:10, 46:10, 48:11, 52:28, 53:2, 53:3, 54:12, 54:19, 55:29, 56:8, 70:26, 88:3, 89:18, 92:22, 93:4, 101:7, 103:13, 104:24, 105:5, 110:12, 111:29, 112:2, 112:6, 112:19, 114:29, 115:13, 115:15, 116:11, 120:4, 120:7, 129:21, 146:11, 146:15, 147:2, 147:3, 147:14</p> <p>INVESTIGATION ^[1] - 3:7</p> <p>investigations ^[12] - 11:14, 34:1,</p>	<p>38:8, 40:11, 48:14, 68:20, 106:10, 112:23, 112:27, 113:4, 118:1, 119:23</p> <p>investigators ^[1] - 68:25</p> <p>invite ^[1] - 74:22</p> <p>invited ^[1] - 52:12</p> <p>invites ^[1] - 93:24</p> <p>invoked ^[1] - 69:4</p> <p>involve ^[2] - 46:9, 95:5</p> <p>involved ^[5] - 13:24, 65:24, 89:5, 145:3, 145:25</p> <p>involves ^[1] - 46:8</p> <p>involving ^[1] - 52:16</p> <p>iota ^[1] - 138:10</p> <p>irrationality ^[1] - 150:13</p> <p>irrelevant ^[9] - 109:2, 131:18, 131:19, 131:20, 136:23, 138:21, 138:23, 138:25, 139:1</p> <p>IS ^[3] - 3:5, 3:8, 3:10</p> <p>isolated ^[4] - 15:9, 50:10, 52:3, 52:7</p> <p>isolation ^[3] - 28:29, 29:25, 127:21</p> <p>issue ^[46] - 11:8, 17:17, 17:27, 24:27, 36:14, 37:5, 51:18, 56:12, 56:17, 63:29, 68:6, 68:9, 68:12, 68:16, 72:6, 72:19, 73:19, 73:25, 74:4, 74:6, 74:10, 74:23, 74:25, 74:28, 84:20, 85:11, 90:15, 90:22, 98:25, 98:29, 102:22, 109:9, 115:2, 115:7, 120:27, 125:28, 129:16, 132:11, 136:5,</p>	<p>139:28, 140:3, 140:10, 150:28, 150:29, 151:3</p> <p>issued ^[2] - 109:20, 148:17</p> <p>issues ^[22] - 9:7, 15:13, 19:14, 21:3, 38:11, 43:10, 48:15, 49:22, 50:1, 50:2, 51:9, 55:24, 59:20, 74:1, 82:8, 114:13, 114:25, 140:23, 140:29, 145:17</p> <p>IT ^[2] - 3:5, 3:10</p> <p>it'll ^[4] - 60:5, 70:14, 72:10, 141:17</p> <p>items ^[2] - 38:26, 38:29</p> <p>itself ^[8] - 27:29, 29:1, 44:28, 56:7, 98:12, 105:18, 110:25, 151:9</p> <p>ively ^[1] - 71:20</p>	<p>judge ^[6] - 48:26, 62:4, 113:9, 120:29, 122:12, 123:11</p> <p>judgment ^[9] - 19:16, 24:20, 24:23, 27:26, 27:27, 27:28, 28:7, 126:11, 130:12</p> <p>judicial ^[4] - 113:9, 113:11, 113:20, 150:12</p> <p>jump ^[2] - 137:4, 138:7</p> <p>juncture ^[1] - 15:22</p> <p>June ^[4] - 143:10, 143:13, 147:24, 147:25</p> <p>jurisdiction ^[3] - 33:14, 33:16, 140:11</p> <p>JUSTICE ^[1] - 3:2</p> <p>justice ^[4] - 20:20, 23:29, 30:3, 48:24</p> <p>Justice ^[6] - 29:17, 121:18, 131:25, 137:29, 138:9, 138:14</p> <p>justification ^[1] - 107:9</p>
J					K
<p>job ^[1] - 14:14</p> <p>jobs ^[1] - 23:26</p> <p>John ^[3] - 38:11, 77:29, 78:1</p> <p>John's ^[2] - 99:17, 100:6</p> <p>joint ^[2] - 152:4, 152:5</p> <p>jolly ^[1] - 20:12</p> <p>jot ^[1] - 72:21</p> <p>journalists ^[1] - 88:27</p> <p>Judge ^[37] - 8:10, 8:16, 12:4, 12:21, 13:4, 13:7, 14:18, 15:24, 16:29, 18:4, 18:10, 18:25, 19:4, 20:23, 21:12, 21:27, 22:3, 24:11, 26:3, 28:18, 28:26, 29:17, 31:12, 31:20, 32:21, 33:19, 42:3, 43:22, 46:28, 47:2, 122:8, 122:25, 123:27, 129:25, 130:11, 130:19, 144:8</p>	<p>job ^[1] - 14:14</p> <p>jobs ^[1] - 23:26</p> <p>John ^[3] - 38:11, 77:29, 78:1</p> <p>John's ^[2] - 99:17, 100:6</p> <p>joint ^[2] - 152:4, 152:5</p> <p>jolly ^[1] - 20:12</p> <p>jot ^[1] - 72:21</p> <p>journalists ^[1] - 88:27</p> <p>Judge ^[37] - 8:10, 8:16, 12:4, 12:21, 13:4, 13:7, 14:18, 15:24, 16:29, 18:4, 18:10, 18:25, 19:4, 20:23, 21:12, 21:27, 22:3, 24:11, 26:3, 28:18, 28:26, 29:17, 31:12, 31:20, 32:21, 33:19, 42:3, 43:22, 46:28, 47:2, 122:8, 122:25, 123:27, 129:25, 130:11, 130:19, 144:8</p>	<p>job ^[1] - 14:14</p> <p>jobs ^[1] - 23:26</p> <p>John ^[3] - 38:11, 77:29, 78:1</p> <p>John's ^[2] - 99:17, 100:6</p> <p>joint ^[2] - 152:4, 152:5</p> <p>jolly ^[1] - 20:12</p> <p>jot ^[1] - 72:21</p> <p>journalists ^[1] - 88:27</p> <p>Judge ^[37] - 8:10, 8:16, 12:4, 12:21, 13:4, 13:7, 14:18, 15:24, 16:29, 18:4, 18:10, 18:25, 19:4, 20:23, 21:12, 21:27, 22:3, 24:11, 26:3, 28:18, 28:26, 29:17, 31:12, 31:20, 32:21, 33:19, 42:3, 43:22, 46:28, 47:2, 122:8, 122:25, 123:27, 129:25, 130:11, 130:19, 144:8</p>	<p>job ^[1] - 14:14</p> <p>jobs ^[1] - 23:26</p> <p>John ^[3] - 38:11, 77:29, 78:1</p> <p>John's ^[2] - 99:17, 100:6</p> <p>joint ^[2] - 152:4, 152:5</p> <p>jolly ^[1] - 20:12</p> <p>jot ^[1] - 72:21</p> <p>journalists ^[1] - 88:27</p> <p>Judge ^[37] - 8:10, 8:16, 12:4, 12:21, 13:4, 13:7, 14:18, 15:24, 16:29, 18:4, 18:10, 18:25, 19:4, 20:23, 21:12, 21:27, 22:3, 24:11, 26:3, 28:18, 28:26, 29:17, 31:12, 31:20, 32:21, 33:19, 42:3, 43:22, 46:28, 47:2, 122:8, 122:25, 123:27, 129:25, 130:11, 130:19, 144:8</p>	<p>Kathleen ^[1] - 9:25</p> <p>keep ^[3] - 121:1, 129:7, 140:27</p> <p>Keogh ^[1] - 19:26</p> <p>Kevin ^[1] - 107:28</p> <p>key ^[7] - 32:20, 69:14, 70:20, 71:6, 72:1, 72:7, 85:26</p> <p>kick ^[2] - 101:16, 105:21</p> <p>kick-off ^[1] - 105:21</p> <p>Kieran ^[1] - 101:29</p> <p>killed ^[1] - 43:18</p> <p>Kilroy ^[2] - 144:24, 144:26</p> <p>kind ^[4] - 29:22,</p>	

124:17, 134:7, 151:3 knocked [2] - 17:16, 19:2 knowing [3] - 14:3, 14:5, 149:10 knowledge [5] - 68:29, 73:13, 104:6, 107:9, 150:6 known [2] - 44:9, 104:3 knows [1] - 44:17	26:22, 61:29, 67:24, 73:15 least [14] - 8:2, 19:25, 31:6, 34:8, 62:8, 87:8, 88:11, 90:22, 99:29, 103:11, 111:28, 139:3, 141:12, 141:14 leave [5] - 35:10, 62:24, 99:24, 116:14, 136:28 leaving [2] - 56:23, 105:9 led [1] - 137:18 left [2] - 79:2, 86:18 leg [1] - 70:12 legal [7] - 5:7, 12:2, 68:16, 85:11, 113:16, 123:23, 123:29 legitimate [8] - 67:10, 96:7, 105:29, 106:14, 107:12, 111:26, 112:3, 127:17 length [1] - 22:25 lengthy [1] - 71:2 lens [2] - 101:16, 102:5 lent [1] - 26:5 less [3] - 125:26, 125:27, 146:20 lesser [1] - 147:12 letter [1] - 81:15 letters [4] - 11:24, 49:20, 88:15, 88:17 letting [3] - 19:23, 117:18, 118:23 level [16] - 18:14, 19:12, 67:19, 68:11, 69:9, 70:5, 73:12, 85:1, 104:3, 104:6, 122:3, 124:28, 125:1, 128:1, 142:13, 144:14 levels [3] - 114:21, 114:22, 114:23 levied [2] - 70:6, 86:20 Liam's [1] -	100:7 LIBERTY [1] - 3:11 life [9] - 9:17, 14:4, 14:6, 68:23, 112:22, 112:26, 112:29, 113:1, 124:3 lift [1] - 122:20 light [6] - 10:23, 60:4, 98:12, 121:17, 122:1, 126:22 likely [2] - 66:27, 86:6 limit [1] - 150:17 line [19] - 16:17, 28:10, 47:16, 66:17, 81:10, 81:12, 81:21, 82:6, 82:23, 99:10, 118:19, 118:21, 119:20, 122:24, 125:15, 125:29, 128:4, 135:5 link [3] - 11:12, 33:9, 141:12 linked [1] - 30:13 links [1] - 142:13 list [6] - 13:17, 69:16, 70:22, 82:8, 103:16, 105:7 listening [1] - 50:3 literally [1] - 146:29 litigation [1] - 13:25 live [2] - 28:15, 89:2 local [5] - 10:29, 11:4, 11:13, 58:8, 63:10 located [1] - 119:19 log [1] - 6:8 logic [3] - 19:15, 89:25, 95:26 logical [2] - 96:7, 150:13 logically [1] - 90:7 long-running [1] - 13:24 look [36] - 15:7, 19:5, 22:22, 26:3, 28:4, 32:8, 35:4,	36:24, 43:9, 47:3, 49:4, 55:5, 59:13, 62:5, 67:28, 74:27, 83:22, 90:7, 96:20, 104:1, 110:27, 126:22, 127:8, 127:18, 133:6, 134:6, 136:28, 140:17, 142:19, 143:7, 144:14, 149:3, 149:13, 149:26, 150:12, 151:5 looked [8] - 9:28, 49:10, 57:5, 102:2, 107:13, 110:20, 112:1, 133:14 looking [11] - 11:9, 13:16, 48:16, 76:24, 87:2, 97:14, 121:17, 127:20, 137:25, 138:2, 145:21 looms [1] - 69:23 looser [2] - 28:14 Lord [2] - 62:1, 62:3 lose [1] - 106:21 loss [1] - 67:22 love [1] - 150:14 loved [1] - 67:18 low [2] - 72:1, 85:26 low-key [1] - 72:1 lunch [1] - 97:27 LUNCH [1] - 98:19 Lynn [4] - 34:16, 39:11, 40:4, 133:16 LYNN [1] - 151:13 Lynn's [5] - 39:8, 41:29, 133:11, 133:22, 134:2	main [6] - 15:13, 45:7, 85:19, 151:14, 151:15 maintain [1] - 123:8 maintained [3] - 10:4, 15:26, 57:16 maintains [1] - 85:19 major [8] - 72:9, 78:22, 79:26, 101:5, 101:9, 101:10, 106:24, 115:11 maker [1] - 89:7 malpractice [3] - 66:23, 69:8, 69:9 man [9] - 20:9, 20:14, 23:2, 50:14, 72:26, 87:5, 88:18, 120:25, 142:11 man' [1] - 142:8 man's [5] - 86:16, 88:16, 94:15, 96:15, 99:22 managed [1] - 11:21 Management [1] - 49:9 management [16] - 9:21, 10:29, 11:4, 11:13, 58:8, 63:10, 66:21, 67:29, 68:22, 69:1, 71:12, 76:5, 76:23, 86:21, 106:29, 115:14 Mangan [29] - 15:3, 15:4, 25:18, 25:20, 25:27, 73:11, 73:20, 73:22, 87:26, 88:3, 92:9, 92:20, 92:24, 92:26, 92:29, 93:1, 93:5, 101:15, 102:5, 102:16, 102:26, 102:27, 103:15, 106:13, 107:18, 117:2, 117:3, 125:13 Mangan's [3] - 15:1, 104:18, 109:22 manner [6] - 72:2, 86:28, 109:6, 113:5,	130:2 MARCH [1] - 5:2 margins [2] - 68:13, 125:28 Mark [3] - 84:8, 87:12, 91:2 Marrinan [10] - 50:13, 53:29, 80:3, 80:11, 81:12, 81:21, 82:18, 82:22, 83:17, 96:26 material [5] - 13:15, 67:15, 80:13, 86:29, 150:20 materials [6] - 67:25, 84:12, 86:20, 93:5, 98:16, 110:18 MATTER [1] - 3:11 matter [38] - 8:17, 18:21, 19:15, 30:15, 35:21, 47:28, 52:9, 56:4, 66:29, 72:12, 74:13, 80:29, 82:9, 82:25, 84:4, 85:10, 85:15, 90:6, 91:28, 101:2, 103:6, 104:15, 107:26, 109:3, 110:10, 113:11, 123:5, 128:2, 128:6, 128:27, 130:7, 130:16, 130:17, 133:14, 134:24, 138:24, 148:7, 150:6 matters [22] - 14:22, 15:17, 19:11, 20:29, 41:22, 50:10, 51:28, 69:9, 71:6, 74:15, 80:16, 84:19, 94:22, 96:11, 101:21, 102:18, 114:1, 116:27, 131:2, 131:8, 133:19, 151:18 McCarthy [1] - 20:20 McEaney [1] - 101:29 McGarry [8] - 4:5, 12:16, 64:13,
L					
Labour [5] - 24:1, 24:6, 24:9, 24:13, 30:16 lack [4] - 13:13, 84:13, 85:13, 124:23 lacking [1] - 72:20 laid [1] - 56:25 landed [1] - 125:16 landscape [2] - 126:29, 127:1 language [1] - 71:18 large [3] - 44:16, 44:18, 69:23 largely [4] - 79:5, 86:10, 114:7 last [3] - 78:9, 104:12, 129:24 lasting [1] - 111:6 late [1] - 116:5 latter [2] - 78:18, 123:28 law [13] - 16:13, 19:26, 19:27, 20:28, 22:9, 24:12, 116:24, 116:25, 116:29, 126:3, 126:28, 128:2, 142:6 lawyers [1] - 12:2 lay [1] - 71:23 leads [1] - 37:28 leak [1] - 44:27 leaked [1] - 44:5 learned [4] -					
			M		
			magically [2] - 85:17, 85:18 magicked [1] - 125:16		

<p>64:27, 64:28, 65:28, 65:29, 66:11</p> <p>McGuinness [9] - 5:5, 5:6, 96:26, 96:27, 97:2, 97:4, 119:6, 119:17, 131:17</p> <p>McHugh [23] - 87:29, 92:21, 101:18, 106:5, 109:11, 110:9, 110:17, 134:25, 134:27, 135:6, 135:10, 136:20, 142:26, 142:27, 143:13, 143:21, 144:10, 148:4, 148:5, 148:14, 149:9, 149:10</p> <p>McHugh's [1] - 33:4</p> <p>mean [191] - 6:11, 7:2, 7:9, 7:12, 9:26, 10:18, 11:8, 13:12, 13:16, 13:20, 14:2, 15:14, 16:5, 16:13, 16:15, 17:4, 17:24, 17:25, 17:26, 19:9, 19:14, 21:6, 22:16, 22:18, 22:24, 22:25, 22:26, 22:27, 22:28, 23:27, 24:22, 25:6, 26:6, 26:22, 26:23, 27:23, 27:24, 27:28, 27:29, 28:2, 28:9, 28:15, 28:18, 28:24, 29:9, 31:21, 32:1, 32:4, 32:13, 32:20, 33:6, 33:7, 33:9, 33:14, 33:17, 33:27, 34:7, 36:3, 36:5, 36:11, 36:15, 36:16, 36:20, 37:1, 37:11, 37:14, 38:13, 38:21, 39:8, 41:26, 42:5, 42:23, 42:25, 43:7, 43:22, 44:17, 45:1, 45:3, 45:5, 45:14, 45:17, 45:26, 47:2, 47:5, 47:21, 48:22, 48:23,</p>	<p>49:19, 50:17, 50:20, 51:15, 51:23, 51:24, 52:1, 53:5, 53:28, 54:1, 54:26, 55:2, 55:26, 56:1, 56:8, 56:25, 57:1, 57:7, 57:15, 58:6, 58:12, 58:18, 59:1, 59:11, 59:27, 60:20, 60:27, 60:29, 61:10, 61:11, 61:13, 62:10, 62:12, 62:24, 63:3, 63:6, 63:27, 64:8, 64:14, 79:20, 88:6, 88:27, 93:24, 100:5, 100:22, 112:26, 112:27, 121:17, 122:1, 124:5, 124:24, 131:15, 134:1, 137:8, 137:10, 138:9, 138:14, 138:23, 138:24, 138:27, 138:28, 139:8, 139:11, 139:28, 140:14, 140:15, 140:16, 140:19, 140:26, 140:28, 141:22, 141:25, 142:5, 143:5, 144:4, 144:8, 144:9, 144:20, 144:21, 144:22, 144:23, 144:27, 145:5, 145:20, 145:21, 145:24, 145:27, 145:28, 146:23, 147:7, 148:24, 148:25, 149:1, 149:4, 149:5, 149:23, 151:4, 151:5</p> <p>mean.. [1] - 79:25</p> <p>meaning [1] - 42:21</p> <p>means [7] - 62:26, 95:8, 125:22, 136:22, 138:3, 138:4</p> <p>meant [5] - 6:22, 55:19, 61:13, 112:18, 137:19</p> <p>measures [1] - 14:8</p>	<p>Meat [1] - 23:18</p> <p>meat [1] - 23:2</p> <p>Meat's [1] - 23:23</p> <p>Meats [1] - 7:20</p> <p>mechanism [1] - 69:5</p> <p>medical [11] - 20:8, 20:9, 20:14, 54:22, 54:23, 55:3, 55:9, 71:5, 71:15, 71:19, 114:3</p> <p>medically [1] - 114:27</p> <p>medicals [1] - 116:4</p> <p>meet [4] - 9:14, 47:26, 47:27, 48:1</p> <p>meeting [10] - 47:23, 52:12, 52:13, 70:19, 76:15, 86:7, 91:3, 93:19, 99:16, 149:7</p> <p>member [1] - 102:2</p> <p>members [5] - 67:4, 67:12, 67:17, 104:3, 116:3</p> <p>memory [4] - 47:21, 48:1, 90:6, 140:19</p> <p>Mental [2] - 20:19, 20:20</p> <p>mental [1] - 16:17</p> <p>mention [26] - 8:2, 8:6, 8:14, 21:21, 28:2, 37:15, 37:17, 37:18, 37:21, 37:22, 38:10, 38:22, 55:16, 72:24, 73:22, 76:5, 83:4, 89:20, 89:23, 90:28, 99:3, 99:26, 113:22, 142:5, 145:29</p> <p>mentioned [21] - 7:3, 38:7, 38:12, 38:25, 38:26, 38:29, 40:5, 42:3, 51:5, 51:28, 60:22, 78:9, 80:13, 89:13, 92:19, 92:20,</p>	<p>99:1, 99:22, 132:27, 135:21, 137:27</p> <p>mere [1] - 68:18</p> <p>message [2] - 55:17, 85:29</p> <p>met [7] - 47:8, 52:17, 67:13, 140:20, 140:21, 140:22</p> <p>meticulous [1] - 96:24</p> <p>Michael [4] - 70:1, 88:1, 91:14, 95:16</p> <p>middle [1] - 62:1</p> <p>might [28] - 7:16, 12:24, 14:8, 15:8, 15:12, 20:6, 20:16, 22:21, 28:29, 29:20, 30:12, 30:28, 44:5, 49:21, 52:11, 54:14, 55:9, 59:13, 60:14, 60:16, 66:16, 97:16, 115:3, 122:9, 124:21, 130:18, 145:21, 147:2</p> <p>mightn't [3] - 109:29, 124:5, 145:15</p> <p>militated [1] - 89:25</p> <p>mind [17] - 14:19, 27:10, 28:21, 30:16, 51:25, 51:29, 53:1, 59:12, 60:16, 60:17, 61:23, 79:29, 83:22, 97:26, 131:4, 148:14, 148:27</p> <p>Mines [1] - 19:7</p> <p>minimise [2] - 92:2</p> <p>minimum [1] - 95:2</p> <p>Minister [1] - 15:28</p> <p>minor [1] - 65:12</p> <p>minute [1] - 116:3</p> <p>minutes [2] - 7:7, 111:7</p> <p>mirror [1] - 91:2</p> <p>misconduct [1] - 66:5</p>	<p>misheard [2] - 37:25, 80:25</p> <p>mislead [1] - 123:27</p> <p>mistake [3] - 114:8, 114:11, 118:28</p> <p>mistrust [1] - 114:24</p> <p>misunderstand [1] - 47:13</p> <p>mobile [1] - 102:21</p> <p>modern [1] - 104:1</p> <p>moment [8] - 21:29, 24:29, 35:10, 74:27, 93:1, 97:23, 98:16, 115:3</p> <p>Monday [2] - 75:26, 76:23</p> <p>month [3] - 22:17, 32:21</p> <p>months [4] - 30:6, 72:25, 79:9, 79:16</p> <p>moreover [1] - 89:24</p> <p>morning [12] - 5:4, 6:4, 6:5, 7:7, 7:27, 17:23, 52:17, 65:2, 65:10, 65:26, 100:25, 133:29</p> <p>morphing [1] - 71:11</p> <p>mortgage [1] - 13:23</p> <p>most [10] - 15:10, 15:17, 16:27, 21:28, 22:24, 88:13, 110:14, 111:2, 131:8, 151:19</p> <p>motivated [1] - 131:4</p> <p>motivation [3] - 131:17, 131:19, 131:20</p> <p> motive [1] - 72:7</p> <p>move [14] - 21:19, 23:20, 23:26, 48:27, 73:26, 96:4, 98:25, 113:22, 116:14, 120:20, 122:21, 128:24, 129:6, 129:23</p> <p>moved [2] -</p>	<p>20:15, 23:5</p> <p>moves [1] - 106:29</p> <p>moving [4] - 16:2, 16:4, 21:12, 112:14</p> <p>MR [438] - 3:2, 3:6, 4:4, 4:5, 4:6, 4:7, 5:6, 6:3, 6:4, 6:13, 6:22, 6:25, 7:1, 7:10, 7:13, 7:15, 7:23, 7:27, 8:4, 8:21, 17:2, 17:7, 18:4, 18:10, 18:17, 18:25, 18:27, 19:4, 19:28, 20:4, 20:10, 20:16, 21:9, 21:27, 22:3, 22:10, 22:12, 22:15, 23:4, 23:8, 23:12, 23:14, 24:17, 24:19, 24:25, 25:1, 25:5, 25:24, 26:3, 26:15, 26:22, 27:5, 27:7, 27:12, 27:19, 27:23, 27:28, 28:8, 28:17, 28:21, 28:24, 30:29, 31:3, 31:9, 31:12, 31:20, 31:23, 31:27, 32:1, 32:8, 32:16, 32:20, 32:25, 32:27, 32:29, 33:6, 33:13, 33:19, 33:24, 33:27, 34:4, 34:6, 34:12, 34:14, 34:18, 34:21, 34:24, 34:28, 35:1, 35:8, 35:11, 35:14, 35:20, 35:25, 36:1, 36:3, 36:11, 36:15, 36:23, 36:26, 36:29, 37:9, 37:21, 37:24, 37:26, 38:7, 38:18, 38:21, 38:25, 38:27, 39:4, 39:7, 39:10, 39:15, 39:18, 39:23, 39:25, 39:28, 40:2, 40:15, 40:20, 40:22, 40:24, 40:29, 41:6, 41:9, 41:11, 41:14, 41:16,</p>
---	---	---	---	--	--

41:19, 41:26, 42:21, 43:1, 43:6, 43:11, 43:15, 43:19, 43:22, 43:29, 44:2, 44:7, 44:11, 44:13, 44:20, 44:23, 44:27, 45:5, 45:9, 46:1, 46:13, 46:19, 46:21, 46:24, 46:28, 47:2, 47:5, 47:11, 47:14, 47:18, 47:21, 47:29, 48:5, 48:9, 48:12, 48:20, 48:26, 49:1, 49:8, 49:11, 49:17, 50:6, 50:8, 50:16, 50:22, 50:26, 50:28, 51:1, 51:7, 51:11, 51:14, 51:23, 51:27, 52:10, 52:14, 52:19, 52:22, 52:26, 53:5, 53:9, 53:12, 53:18, 53:21, 53:25, 53:28, 54:7, 54:9, 54:13, 54:16, 54:20, 54:25, 55:11, 55:16, 55:22, 55:26, 56:14, 56:28, 57:15, 57:19, 57:22, 57:25, 57:28, 58:3, 58:5, 58:11, 58:16, 58:22, 58:25, 58:28, 59:3, 59:6, 59:10, 59:15, 59:21, 59:25, 59:27, 60:3, 60:11, 60:16, 60:20, 60:27, 61:3, 61:6, 61:9, 61:20, 61:27, 62:9, 62:14, 62:21, 62:24, 62:27, 62:29, 63:3, 63:5, 63:20, 63:24, 63:27, 64:2, 64:7, 64:12, 64:27, 64:28, 65:29, 66:11, 66:15, 66:16, 66:20, 75:21, 76:26, 77:1, 77:6, 77:9, 77:12, 77:17, 77:21, 77:23, 78:3, 78:12,	78:15, 78:17, 78:20, 79:15, 79:18, 79:22, 79:26, 80:3, 80:10, 89:20, 90:1, 90:4, 90:11, 90:18, 90:20, 90:24, 91:1, 91:5, 91:8, 92:7, 92:10, 92:23, 92:28, 93:6, 93:9, 93:23, 93:29, 94:3, 94:5, 94:9, 94:18, 95:15, 95:19, 95:24, 96:2, 96:10, 96:27, 97:2, 97:4, 97:10, 97:14, 97:19, 97:25, 98:2, 98:13, 98:24, 99:3, 99:7, 100:29, 101:2, 114:16, 114:18, 116:18, 116:21, 116:29, 117:7, 117:17, 118:14, 118:17, 118:21, 119:6, 119:10, 119:13, 119:16, 121:5, 121:28, 122:8, 122:11, 122:16, 122:24, 123:13, 123:15, 123:18, 124:8, 124:13, 124:19, 125:3, 125:7, 125:9, 125:25, 126:13, 126:19, 126:24, 127:4, 127:19, 127:24, 127:28, 128:10, 128:23, 129:4, 129:11, 130:14, 130:20, 130:24, 131:17, 131:28, 132:21, 132:23, 133:3, 133:26, 133:29, 134:4, 134:16, 134:18, 134:22, 135:1, 135:4, 135:11, 135:13, 135:17, 135:18, 135:28, 136:2, 136:14, 136:24, 136:29, 137:3, 137:7, 137:16, 138:14, 139:14, 139:17, 139:20, 139:23, 140:4, 140:7, 140:9, 140:14,	141:6, 141:9, 141:14, 142:3, 142:11, 142:17, 142:29, 143:4, 143:7, 143:11, 143:15, 144:8, 144:17, 144:20, 144:26, 144:28, 145:1, 145:7, 145:20, 146:6, 146:9, 146:14, 146:21, 146:23, 147:27, 148:1, 148:16, 148:20, 148:24, 148:26, 149:1, 149:5, 149:12, 149:16, 149:19, 149:22, 149:28, 150:19, 150:22, 150:25, 150:29, 151:4, 151:13 murder [28] - 8:9, 32:23, 50:7, 50:20, 50:25, 50:29, 51:3, 51:19, 51:22, 52:3, 52:18, 53:23, 54:12, 70:2, 74:3, 75:26, 76:11, 91:24, 94:14, 99:14, 104:4, 107:10, 107:23, 109:21, 116:9, 136:11, 138:28, 151:9 murdered [2] - 91:20, 119:26 Murphy [3] - 66:8, 88:24, 89:5 Murray [4] - 40:16, 144:27, 144:28, 145:4 must [5] - 32:9, 47:16, 76:27, 124:8, 150:8 mysterious [1] - 57:1	105:21, 116:10 names [1] - 129:8 narrative [1] - 68:27 narrow [2] - 101:16, 102:5 nature [4] - 24:10, 67:8, 127:12, 142:4 necessarily [5] - 28:2, 49:3, 112:17, 142:14, 144:21 necessary [12] - 6:27, 11:14, 30:21, 33:2, 58:9, 61:24, 69:11, 73:29, 74:7, 94:11, 139:10 necessity [1] - 59:29 need [16] - 16:24, 16:25, 31:19, 32:2, 32:14, 34:20, 34:22, 54:23, 56:11, 59:17, 59:18, 93:27, 98:4, 114:4, 128:28, 143:28 needed [1] - 13:1 needs [1] - 151:27 negligence [3] - 20:8, 20:9, 68:10 never [18] - 14:26, 14:27, 14:29, 15:1, 15:2, 43:13, 45:16, 45:18, 45:22, 66:25, 67:13, 84:12, 94:24, 100:13, 100:14, 107:5, 141:22 nevertheless [1] - 150:7 new [9] - 12:2, 34:20, 34:22, 49:5, 84:7, 98:5, 126:2, 126:22, 128:18 news [3] - 44:19, 44:21, 44:22 newspaper [1] - 15:16 next [9] - 24:21, 37:28, 42:3, 45:5, 76:6, 99:25,	140:21, 152:2, 152:7 nexus [1] - 70:13 nice [1] - 97:9 nilly [1] - 13:19 noble [1] - 131:4 nobody [12] - 6:10, 22:27, 45:2, 48:16, 54:2, 54:5, 64:18, 64:23, 66:7, 147:14, 151:27 Noel [2] - 88:23, 89:4 non [2] - 75:28, 90:21 non- importance [1] - 75:28 nonetheless [8] - 11:11, 29:14, 70:22, 91:11, 107:4, 127:25, 137:22, 141:10 normal [2] - 107:1, 123:19 normally [4] - 8:16, 112:28, 120:23, 130:24 note [30] - 25:29, 38:12, 38:14, 38:15, 38:16, 39:29, 47:13, 56:17, 82:21, 83:29, 90:26, 90:28, 91:2, 94:21, 95:16, 95:18, 96:28, 97:20, 97:21, 99:29, 100:2, 100:3, 113:19, 116:6, 119:29, 132:20, 132:28, 133:8, 134:7 noted [4] - 60:24, 82:6, 92:10, 100:11 notepaper [1] - 110:3 notes [3] - 83:21, 84:1, 99:21 noteworthy [1] - 110:16 nothing [6] - 25:19, 25:21, 65:19, 109:23, 135:9, 143:22 NOTICE [2] -	3:1, 3:12 noticed [2] - 6:6, 45:14 notion [1] - 28:15 notwithstandin g [3] - 126:1, 143:2, 143:27 November [28] - 32:22, 68:4, 69:22, 70:24, 71:28, 72:4, 73:2, 73:6, 75:7, 75:27, 77:17, 78:11, 78:25, 89:16, 91:19, 92:13, 92:17, 93:14, 94:29, 98:27, 99:13, 99:16, 102:17, 103:3, 111:7, 111:16, 115:29, 119:20 November/ December [1] - 132:26 nowhere [1] - 73:21 nugget [1] - 129:16 number [30] - 16:26, 27:13, 28:23, 29:21, 37:3, 39:26, 41:27, 41:28, 44:16, 49:10, 50:24, 50:27, 51:2, 74:21, 77:17, 87:9, 95:4, 101:23, 102:6, 102:8, 102:11, 102:15, 102:21, 112:24, 113:28, 120:21, 126:7, 134:19, 140:29 Nyhan [6] - 73:17, 101:25, 110:21, 110:29, 146:11, 147:11 Nyhan's [1] - 73:22
		N			O
		nail [1] - 145:3 name [3] - 99:22, 115:12, 146:4 NAME [1] - 3:5 named [1] - 146:16 namely [4] - 20:29, 91:24,			o'clock [1] - 97:29 O'DWYER [304] - 4:7, 6:3, 6:4, 6:13, 6:22, 6:25, 7:1, 7:10, 7:13, 7:15, 7:23, 7:27,

<p>8:4, 8:21, 17:2, 17:7, 18:4, 18:10, 18:18, 18:25, 18:27, 19:4, 19:28, 20:4, 20:10, 20:16, 21:9, 21:27, 22:3, 22:10, 22:12, 22:15, 23:4, 23:8, 23:12, 23:14, 24:17, 24:19, 24:25, 25:1, 25:5, 25:24, 26:3, 26:15, 26:22, 27:5, 27:7, 27:12, 27:19, 27:23, 27:28, 28:8, 28:17, 28:21, 28:24, 30:29, 31:3, 31:9, 31:12, 31:20, 31:23, 31:27, 32:1, 32:8, 32:16, 32:20, 32:25, 32:27, 32:29, 33:6, 33:13, 33:19, 33:24, 33:27, 34:4, 34:6, 34:12, 34:14, 34:18, 34:21, 34:24, 34:28, 35:1, 35:8, 35:11, 35:14, 35:20, 35:25, 36:1, 36:3, 36:11, 36:15, 36:23, 36:26, 36:29, 37:9, 37:21, 37:24, 37:26, 38:7, 38:18, 38:21, 38:25, 38:27, 39:4, 39:7, 39:10, 39:15, 39:18, 39:23, 39:25, 39:28, 40:2, 40:15, 40:20, 40:22, 40:24, 40:29, 41:6, 41:9, 41:11, 41:14, 41:16, 41:19, 41:26, 42:21, 43:1, 43:6, 43:11, 43:15, 43:19, 43:22, 43:29, 44:2, 44:7, 44:11, 44:13, 44:20, 44:23, 44:27, 45:5, 45:9, 46:1, 46:13, 46:19, 46:21, 46:24, 46:28, 47:2, 47:5, 47:11,</p>	<p>47:14, 47:18, 47:21, 47:29, 48:5, 48:9, 48:12, 48:20, 48:26, 49:1, 49:8, 49:11, 49:17, 50:6, 50:8, 50:16, 50:22, 50:26, 50:28, 51:1, 51:7, 51:11, 51:14, 51:23, 51:27, 52:10, 52:14, 52:19, 52:22, 52:26, 53:5, 53:9, 53:12, 53:18, 53:21, 53:25, 53:28, 54:7, 54:9, 54:13, 54:16, 54:20, 54:25, 55:11, 55:16, 55:22, 55:26, 56:14, 56:28, 57:15, 57:19, 57:22, 57:25, 57:28, 58:3, 58:5, 58:11, 58:16, 58:22, 58:25, 58:28, 59:3, 59:6, 59:10, 59:15, 59:21, 59:25, 59:27, 60:3, 60:11, 60:16, 60:20, 60:27, 61:3, 61:6, 61:9, 61:20, 61:27, 62:9, 62:14, 62:21, 62:24, 62:27, 62:29, 63:3, 63:5, 63:20, 63:24, 63:27, 64:2, 64:7, 64:12, 133:29, 135:17, 135:18, 135:28, 136:2, 136:14, 136:24, 136:29, 137:3, 137:7, 137:16, 139:14, 139:17, 139:20, 139:23, 140:4, 140:7, 140:9, 140:14, 141:6, 141:9, 141:14, 142:3, 142:11, 142:17, 142:29, 143:4, 143:7, 143:11, 143:15, 144:8, 144:17, 144:20, 144:26, 144:28, 145:1, 145:7, 145:20, 146:6, 146:9, 146:14,</p>	<p>146:21, 146:23, 147:27, 148:1, 148:16, 148:20, 148:24, 148:26, 149:1, 149:5, 149:12, 149:16, 149:19, 149:22, 149:28, 150:19, 150:22, 150:25, 150:29, 151:4</p> <p>O'Dwyer [32] - 6:29, 7:9, 17:6, 24:18, 27:10, 28:10, 31:2, 31:4, 31:19, 34:11, 43:3, 49:6, 57:14, 59:18, 61:19, 63:2, 63:4, 64:16, 65:9, 65:11, 65:25, 70:11, 98:4, 117:2, 121:10, 128:12, 133:27, 135:14, 142:10, 144:5, 149:6, 151:17</p> <p>O'Dwyer's [6] - 68:7, 107:24, 119:3, 120:15, 121:21, 128:27</p> <p>O'DWYER..... [1] - 4:4</p> <p>O'Higgins [22] - 66:13, 75:20, 79:13, 92:4, 93:15, 95:6, 97:7, 97:23, 97:24, 97:29, 98:22, 124:12, 125:8, 126:10, 131:27, 133:5, 135:19, 135:29, 136:16, 137:9, 138:16, 145:28</p> <p>O'HIGGINS [120] - 4:6, 66:15, 66:16, 66:20, 75:21, 76:26, 77:1, 77:6, 77:9, 77:12, 77:17, 77:21, 77:23, 78:3, 78:12, 78:15, 78:17, 78:20, 79:15, 79:18, 79:22, 79:26, 80:3, 80:10, 89:20, 90:1, 90:4, 90:11, 90:18, 90:20, 90:24, 91:1, 91:5,</p>	<p>91:8, 92:7, 92:10, 92:23, 92:28, 93:6, 93:9, 93:23, 93:29, 94:3, 94:5, 94:9, 94:18, 95:15, 95:19, 95:24, 96:2, 96:10, 97:10, 97:14, 97:19, 97:25, 98:2, 98:13, 98:24, 99:3, 99:7, 100:29, 101:2, 114:16, 114:18, 116:18, 116:21, 116:29, 117:7, 117:17, 118:14, 118:17, 118:21, 119:6, 119:10, 119:13, 119:16, 121:5, 121:28, 122:8, 122:11, 122:16, 122:24, 123:13, 123:15, 123:18, 124:8, 124:13, 124:19, 125:3, 125:7, 125:9, 125:25, 126:13, 126:19, 126:24, 127:4, 127:19, 127:24, 127:28, 128:10, 128:23, 129:4, 129:11, 130:14, 130:20, 130:24, 131:28, 132:21, 132:23, 133:3, 133:26, 134:4, 134:16, 134:18, 134:22, 135:1, 135:4, 135:11, 135:13, 138:14</p> <p>O'Higgins's [1] - 145:8</p> <p>O'Neill [1] - 20:28</p> <p>O'Regan [3] - 24:1, 24:12, 30:3</p> <p>O'Sullivan [23] - 52:16, 69:20, 71:26, 71:27, 72:1, 75:27, 76:1, 76:8, 76:14, 76:15, 77:18, 77:26, 78:24, 83:2, 84:18, 105:15, 115:19, 115:24, 116:7, 132:28, 132:29, 133:1, 140:21</p>	<p>O'Sullivan's [4] - 72:17, 74:15, 74:23, 141:2</p> <p>objective [1] - 72:21</p> <p>obligation [3] - 52:13, 123:23, 123:29</p> <p>observational [1] - 92:6</p> <p>observations [2] - 5:24, 7:11</p> <p>obsess [1] - 71:19</p> <p>obsessing [1] - 116:1</p> <p>obsessional [2] - 114:12, 114:24</p> <p>obtained [1] - 101:23</p> <p>obvious [7] - 31:22, 49:19, 73:26, 78:23, 102:11, 102:12, 151:28</p> <p>obviously [32] - 7:4, 8:16, 14:28, 19:21, 22:12, 25:5, 31:13, 31:15, 32:13, 42:5, 42:8, 45:7, 48:14, 56:9, 56:23, 57:7, 63:7, 64:28, 65:14, 65:15, 65:18, 87:17, 97:29, 121:24, 126:28, 139:24, 141:18, 145:23, 146:23, 151:5, 151:7, 152:6</p> <p>occasion [6] - 91:16, 99:20, 111:4, 127:15, 127:27, 136:18</p> <p>occasions [5] - 11:16, 16:26, 27:14, 49:10, 87:9</p> <p>occurred [4] - 75:14, 78:5, 119:19, 141:26</p> <p>October [9] - 75:3, 78:6, 79:10, 111:3, 115:18, 115:25, 115:26, 149:8</p> <p>OF [6] - 3:1, 3:2, 3:5, 3:6, 3:11</p> <p>of.. [1] - 62:25</p>	<p>offered [2] - 72:18, 74:24</p> <p>office [4] - 76:3, 77:28, 102:2, 102:3</p> <p>officer [3] - 150:5, 150:9</p> <p>official [1] - 131:24</p> <p>often [3] - 48:12, 142:10, 142:11</p> <p>Oireachtas [1] - 59:12</p> <p>omitted [1] - 85:18</p> <p>ON [2] - 3:11, 5:1</p> <p>once [3] - 67:1, 135:22, 151:22</p> <p>one [102] - 11:2, 14:2, 14:20, 16:16, 16:23, 17:18, 20:6, 20:16, 20:18, 22:5, 22:26, 24:26, 24:28, 24:29, 25:3, 25:4, 25:17, 30:7, 33:7, 39:20, 40:18, 41:1, 42:9, 42:11, 43:12, 45:18, 47:12, 50:2, 50:8, 50:24, 51:13, 51:23, 51:24, 51:28, 52:17, 54:1, 55:16, 60:21, 61:16, 62:3, 62:16, 67:2, 67:18, 69:8, 69:19, 69:25, 71:18, 72:12, 73:9, 74:1, 75:5, 76:12, 76:13, 77:17, 78:4, 78:12, 82:25, 84:5, 85:22, 85:24, 87:5, 90:9, 90:25, 91:28, 94:20, 96:11, 101:9, 102:6, 102:19, 103:15, 108:14, 109:9, 109:29, 113:8, 115:1, 115:3, 118:16, 119:8, 120:21, 121:2, 121:3, 124:4, 125:25, 127:29, 128:16, 129:26, 130:6, 132:2,</p>
--	---	---	--	--	---

138:10, 140:5, 140:26, 141:27, 142:13, 144:11, 145:15, 146:27, 147:1, 149:18, 152:7 onwards [2] - 28:26, 80:27 open [9] - 22:25, 32:12, 72:13, 85:8, 117:20, 117:21, 128:10, 132:6, 133:10 opened [1] - 111:29 opening [1] - 122:2 opining [1] - 120:28 opinion [4] - 120:24, 121:1, 121:5, 123:22 opportunities [2] - 78:26, 79:9 opportunity [8] - 8:25, 8:26, 12:9, 55:23, 79:4, 79:15, 126:16, 136:28 opposed [1] - 130:17 oppression [3] - 101:11, 107:21, 110:7 OR [2] - 3:6 oral [5] - 5:8, 10:1, 23:4, 26:16, 27:14 orally [2] - 37:10, 37:12 ORDER [1] - 3:1 order [3] - 32:15, 68:27, 104:14 order' [1] - 121:1 ordered [1] - 92:21 ORDERED [2] - 3:5, 3:10 ordinary [2] - 20:29, 130:25 organisation [2] - 44:18, 130:29 organised [4] - 69:1, 69:2, 87:4, 101:19 origin [1] - 93:11 original [3] - 121:9, 146:3, 152:4 originally [5] -	12:20, 14:13, 37:18, 38:9, 40:3 origins [1] - 71:9 oscillate [1] - 39:20 OTHER [1] - 3:6 otherwise [9] - 10:23, 23:17, 23:19, 97:19, 108:26, 113:4, 124:16, 127:11, 132:9 ought [8] - 85:9, 86:5, 105:7, 105:20, 105:21, 111:22, 124:29 ourselves [1] - 59:19 outcome [4] - 106:20, 106:22, 121:16, 121:26 outline [2] - 104:14, 120:3 outlined [4] - 38:1, 38:3, 82:1, 107:18 outlook [1] - 9:16 outside [5] - 5:13, 51:4, 93:7, 93:8, 133:20 outstanding [3] - 65:15, 65:17, 65:21 overall [5] - 71:10, 105:10, 106:25, 109:17, 134:12 overarching [1] - 85:29 overcomplicat e [1] - 11:8 overlooked [1] - 83:10 overturned [2] - 22:13, 31:17 own [26] - 7:5, 7:12, 35:18, 44:4, 51:25, 56:29, 65:6, 71:5, 80:6, 91:26, 93:12, 93:17, 94:12, 94:25, 96:17, 98:28, 99:17, 100:6, 100:14, 102:23, 105:15, 107:6, 107:7, 122:17, 130:1	P	page [68] - 26:29, 39:25, 41:27, 78:17, 78:18, 79:29, 80:8, 80:10, 80:11, 80:13, 80:14, 80:19, 80:26, 81:4, 81:10, 81:22, 81:27, 82:5, 82:19, 82:21, 82:22, 91:13, 97:14, 99:4, 99:9, 99:25, 99:29, 100:1, 103:22, 103:25, 105:25, 106:18, 107:17, 107:19, 110:27, 111:14, 111:21, 111:23, 113:23, 113:24, 114:6, 114:12, 114:14, 114:20, 114:21, 114:23, 114:26, 114:27, 114:28, 115:20, 118:7, 118:11, 118:15, 118:18, 119:3, 119:5, 119:12, 119:13, 119:14, 119:16, 119:17, 122:11, 133:27, 135:4, 135:5, 135:6 PAGE [1] - 4:2 pages [2] - 110:18, 114:22 paid [1] - 134:9 pain [21] - 23:8, 23:11, 23:12, 23:13, 23:14, 23:16, 23:20, 23:21, 23:24, 23:25, 29:20, 30:13, 120:20, 122:18, 122:29, 123:3, 123:7, 123:8, 137:27, 138:1 paint [1] - 9:10 paints [1] - 68:1 paper [1] - 38:16 papers [2] - 143:10, 147:24 paragraph [17] - 9:15, 20:25, 28:26, 28:27, 30:10, 37:7,	37:24, 42:17, 56:4, 56:14, 63:10, 122:11, 122:22, 124:1, 129:25, 130:21 paragraphs [2] - 28:19, 147:1 parked [1] - 17:23 parlance [1] - 104:1 part [16] - 21:23, 22:9, 24:4, 27:26, 29:12, 32:4, 45:7, 47:5, 50:2, 58:25, 64:19, 71:11, 83:24, 87:12, 97:21, 127:17 participate [1] - 6:16 particular [18] - 26:7, 29:22, 32:1, 32:6, 45:1, 47:23, 63:28, 66:21, 67:12, 84:14, 117:1, 118:17, 129:27, 130:2, 130:3, 134:11, 141:3, 141:17 particularly [14] - 5:21, 9:22, 22:19, 39:13, 48:5, 52:16, 70:1, 70:3, 71:16, 87:6, 112:18, 113:14, 131:6, 141:9 parties [1] - 128:11 parts [2] - 9:9, 145:17 party [1] - 112:14 PARTY [1] - 3:10 pass [2] - 69:4, 100:10 passages [1] - 61:1 past [2] - 51:19, 98:15 patient [1] - 88:14 pause [1] - 115:3 pausing [1] - 84:10 pay [4] - 53:18, 53:24, 63:12, 63:15 paying [1] - 131:3	PD [2] - 84:24, 125:13 PD' [1] - 125:17 pedantic [1] - 76:29 peel [1] - 66:18 people [32] - 5:20, 11:24, 15:28, 17:4, 17:10, 27:17, 36:20, 40:13, 42:27, 43:24, 43:28, 44:1, 44:9, 44:16, 46:18, 46:21, 49:2, 52:4, 59:5, 59:9, 76:24, 98:17, 121:3, 124:15, 131:23, 141:15, 144:15, 144:22, 145:14, 146:5, 146:16 percent [1] - 108:14 perfectly [5] - 66:9, 85:29, 102:14, 142:3, 150:14 perhaps [31] - 11:1, 21:20, 26:5, 28:18, 40:29, 62:24, 65:12, 67:2, 67:16, 71:23, 73:25, 78:23, 82:1, 86:21, 95:1, 102:13, 103:4, 105:20, 110:27, 112:9, 115:8, 121:23, 122:4, 125:10, 125:22, 127:29, 130:27, 133:18, 141:22, 145:15, 147:11 perilously [1] - 16:8 period [5] - 71:15, 71:16, 79:16, 100:23, 107:10 permit [1] - 56:5 perplexed [1] - 67:18 persecution [1] - 71:22 person [8] - 9:11, 45:27, 46:26, 72:28, 73:4, 121:2, 124:24, 141:21 person's [2] -	17:19, 19:2 personal [10] - 9:17, 59:3, 71:11, 71:20, 77:29, 79:4, 86:1, 93:12, 114:2, 130:1 personally [1] - 111:19 personnel [1] - 110:19 persons [3] - 102:11, 102:15, 107:16 perspective [1] - 71:17 perverse [1] - 115:16 Phillips [2] - 53:29, 109:11 phone [5] - 47:17, 76:7, 76:21, 78:5, 78:9 picked [1] - 21:7 picking [1] - 120:10 picture [1] - 56:11 piece [15] - 38:16, 45:9, 69:13, 69:14, 69:17, 69:26, 69:29, 71:27, 79:27, 89:14, 91:9, 95:4, 113:24, 120:14, 131:29 pieces [3] - 61:11, 70:23, 120:13 pithy [1] - 21:5 place [18] - 10:18, 21:14, 24:3, 24:8, 24:12, 50:1, 55:19, 55:21, 55:22, 110:9, 113:18, 120:4, 129:14, 129:15, 136:18, 144:16, 148:21 plainly [1] - 73:25 plant [1] - 23:2 played [2] - 102:9, 102:10 players [2] - 151:14, 151:15 playing [1] - 71:9 plucked [1] - 71:13
--	--	----------	--	---	--	---

<p>plus [2] - 49:5, 132:23</p> <p>pocket [1] - 46:23</p> <p>point [83] - 5:17, 11:9, 11:29, 12:7, 15:7, 15:10, 16:2, 18:11, 18:12, 19:5, 20:5, 25:2, 28:10, 29:27, 31:1, 31:25, 32:4, 32:21, 34:29, 35:23, 37:28, 39:17, 40:12, 42:3, 44:23, 45:5, 46:3, 46:7, 47:29, 49:19, 53:10, 55:2, 56:20, 57:1, 58:6, 67:2, 67:7, 68:14, 78:22, 78:23, 84:8, 90:23, 90:26, 91:6, 101:8, 102:6, 102:8, 103:15, 103:22, 105:3, 108:8, 115:13, 118:5, 119:3, 120:21, 121:21, 121:22, 122:1, 123:29, 128:16, 131:8, 133:22, 134:18, 135:25, 136:15, 136:23, 136:25, 137:29, 139:7, 140:2, 141:16, 142:18, 143:16, 144:11, 144:20, 145:11, 146:2, 149:26, 150:1, 150:26, 151:4</p> <p>pointed [3] - 33:28, 57:2, 137:22</p> <p>pointers [3] - 72:22, 91:6, 110:11</p> <p>pointing [4] - 9:8, 50:12, 150:16, 150:23</p> <p>points [6] - 9:2, 13:3, 43:20, 90:5, 90:25, 101:10</p> <p>poisoned [1] - 101:9</p> <p>policing [6] - 50:7, 50:24, 53:23, 54:12, 76:11, 124:15</p> <p>poor [1] - 74:24</p>	<p>pore [1] - 67:14</p> <p>position [20] - 14:13, 16:29, 23:22, 23:23, 34:22, 59:22, 66:17, 67:9, 90:12, 98:6, 102:24, 103:4, 103:18, 105:15, 107:8, 116:7, 122:5, 128:22, 133:23, 134:5</p> <p>possibility [1] - 62:18</p> <p>possible [7] - 9:4, 12:4, 31:6, 131:15, 143:3, 143:4, 144:18</p> <p>possibly [5] - 29:11, 42:12, 53:10, 137:6, 147:28</p> <p>post [3] - 50:23, 51:22, 149:20</p> <p>post-date [1] - 50:23</p> <p>pouring [1] - 96:14</p> <p>practical [2] - 18:6</p> <p>practically [1] - 22:5</p> <p>practice [2] - 120:19, 128:6</p> <p>practices [1] - 122:18</p> <p>practitioners [1] - 71:5</p> <p>pragmatic [1] - 18:7</p> <p>pre [5] - 50:7, 51:7, 53:23, 54:12, 76:11</p> <p>pre-murder [4] - 50:7, 53:23, 54:12, 76:11</p> <p>preceded [1] - 30:6</p> <p>precise [1] - 30:16</p> <p>precisely [3] - 53:7, 82:15, 124:11</p> <p>predicament [1] - 127:12</p> <p>prefer [1] - 46:26</p> <p>preferment [1] - 112:4</p> <p>preferred [1] - 86:6</p>	<p>preliminary [20] - 7:2, 7:24, 21:17, 21:23, 25:8, 25:12, 26:6, 29:7, 29:10, 41:2, 84:22, 84:29, 103:29, 121:9, 122:5, 126:12, 126:20, 127:4, 128:20, 136:6</p> <p>prepare [1] - 11:14</p> <p>prepared [3] - 12:11, 12:12, 45:25</p> <p>preparing [5] - 79:7, 107:29, 108:4, 108:16, 152:7</p> <p>present [1] - 103:3</p> <p>presided [1] - 10:6</p> <p>presiding [1] - 113:10</p> <p>press [12] - 32:9, 33:8, 33:10, 33:29, 35:7, 107:22, 108:1, 108:19, 109:12, 109:20, 109:21, 146:4</p> <p>pressed [1] - 103:22</p> <p>pressure [2] - 7:8, 72:27</p> <p>presume [1] - 131:16</p> <p>pretty [6] - 21:5, 73:27, 113:15, 125:14, 147:22, 150:20</p> <p>prevented [2] - 14:8, 118:29</p> <p>prevention [1] - 108:21</p> <p>previous [6] - 8:6, 18:8, 18:20, 61:23, 62:6, 67:16</p> <p>previously [1] - 38:28</p> <p>primarily [3] - 7:4, 29:11, 48:16</p> <p>primary [1] - 121:18</p> <p>principal [1] - 5:17</p> <p>principally [2] - 5:10, 127:14</p>	<p>principle [5] - 68:11, 85:1, 128:1, 128:3, 130:3</p> <p>prison [1] - 102:20</p> <p>private [2] - 46:26, 79:5</p> <p>privately [1] - 42:18</p> <p>pro [1] - 132:10</p> <p>probabilities [2] - 16:6, 21:1</p> <p>probable [2] - 17:28, 17:29</p> <p>problem [7] - 31:18, 47:1, 95:17, 95:18, 96:6, 97:27, 106:25</p> <p>problematic [2] - 71:22, 99:24</p> <p>problems [3] - 47:12, 54:8, 54:9</p> <p>proceed [3] - 34:25, 104:24, 105:5</p> <p>proceedings [9] - 6:21, 42:14, 42:16, 42:17, 42:26, 44:29, 106:24, 110:24, 148:17</p> <p>process [4] - 15:26, 15:27, 23:28, 107:5</p> <p>produce [6] - 62:7, 62:8, 152:1, 152:4, 152:5</p> <p>produced [2] - 43:13, 90:27</p> <p>professional [5] - 72:28, 93:13, 102:24, 103:3, 107:7</p> <p>professionally [1] - 111:19</p> <p>professionals [1] - 71:15</p> <p>prohibited [1] - 130:27</p> <p>PROHIBITED [1] - 3:8</p> <p>prominence [1] - 26:5</p> <p>pronouncing [1] - 73:25</p> <p>proof [10] - 16:5, 16:6, 17:25, 18:24, 18:28,</p>	<p>19:14, 19:18, 20:22, 20:29, 21:1</p> <p>proper [3] - 5:9, 116:23, 124:15</p> <p>properly [2] - 20:13, 84:27</p> <p>proposition [3] - 31:24, 98:8, 117:12</p> <p>propter [1] - 149:20</p> <p>protect [1] - 68:29</p> <p>protected [71] - 7:16, 8:4, 8:22, 8:29, 9:26, 10:3, 11:12, 12:19, 21:12, 21:14, 21:17, 21:26, 22:7, 23:15, 24:3, 24:7, 24:11, 25:21, 28:15, 29:1, 29:23, 31:7, 32:18, 33:21, 33:25, 35:24, 37:1, 37:10, 40:15, 41:3, 41:10, 41:24, 48:25, 57:28, 58:1, 84:19, 84:24, 85:2, 85:12, 87:26, 87:27, 117:4, 117:13, 117:24, 124:18, 125:21, 125:29, 126:6, 127:27, 128:5, 128:8, 129:9, 129:15, 130:4, 134:14, 136:12, 136:21, 137:14, 137:20, 138:20, 139:5, 139:10, 139:12, 139:15, 139:16, 139:27, 141:20, 141:28, 142:20, 145:16</p> <p>Protected [1] - 124:6</p> <p>protection [8] - 68:25, 68:29, 76:4, 76:16, 76:24, 77:21, 77:29, 78:28</p> <p>prove [1] - 20:14</p> <p>proved [3] - 19:15, 20:13, 61:25</p> <p>proven [1] -</p>	<p>69:16</p> <p>provide [4] - 7:3, 58:8, 114:29, 115:12</p> <p>provided [4] - 55:29, 109:8, 109:12, 130:11</p> <p>provides [1] - 131:17</p> <p>provision [3] - 115:6, 124:6, 126:20</p> <p>provisional [1] - 19:20</p> <p>provisions [1] - 63:12</p> <p>psychiatric [4] - 10:7, 93:16, 93:21, 93:25</p> <p>psychiatrist [3] - 114:5, 114:6, 114:8</p> <p>PTSD [2] - 13:20, 49:27</p> <p>public [6] - 63:22, 130:28, 131:1, 131:3</p> <p>Pulse [1] - 101:28</p> <p>purely [1] - 29:25</p> <p>purpose [4] - 30:17, 46:11, 62:9, 62:21</p> <p>PURSUANT [1] - 3:1</p> <p>pushed [1] - 33:10</p> <p>pushes [2] - 32:20, 32:21</p> <p>pushing [1] - 140:1</p> <p>put [31] - 15:11, 18:9, 21:5, 25:25, 26:11, 40:3, 43:3, 53:29, 54:2, 58:19, 61:4, 61:10, 61:12, 61:18, 61:20, 61:25, 64:29, 65:19, 69:10, 72:12, 76:10, 81:12, 82:5, 100:20, 101:15, 113:27, 114:3, 117:19, 125:6, 126:13, 148:5</p> <p>putting [3] - 80:3, 80:5, 127:29</p>
---	--	---	--	--	--

Q	R				
<p>qualification [1] - 57:13</p> <p>qualifications [1] - 58:17</p> <p>qualify [5] - 40:15, 127:22, 127:25, 139:4, 145:16</p> <p>quality [2] - 70:15, 151:23</p> <p>quarrel [1] - 18:16</p> <p>queried [1] - 102:24</p> <p>query [2] - 62:8, 67:10</p> <p>questionable [1] - 111:28</p> <p>questionnaire [2] - 133:10, 133:25</p> <p>questions [6] - 32:6, 80:20, 82:17, 105:26, 119:7, 119:18</p> <p>quibbles [3] - 58:14, 58:15, 59:19</p> <p>quiet [1] - 88:29</p> <p>Quigley [3] - 88:6, 88:11, 88:20</p> <p>quite [26] - 8:8, 10:12, 13:22, 14:2, 15:12, 15:19, 16:13, 19:7, 26:18, 42:22, 43:24, 45:10, 46:14, 48:24, 50:11, 50:13, 51:20, 56:16, 84:7, 84:27, 103:25, 106:9, 115:2, 128:29, 130:10, 138:7</p> <p>quizzed [1] - 44:4</p> <p>quote [8] - 9:15, 20:23, 42:17, 42:24, 43:25, 104:18, 119:29, 120:1</p> <p>quotes [1] - 100:7</p>	<p>raise [2] - 36:13, 140:29</p> <p>raised [11] - 9:2, 27:15, 48:15, 59:29, 60:18, 66:29, 68:6, 68:8, 82:10, 82:25, 90:15</p> <p>raising [2] - 43:9, 59:20</p> <p>range [4] - 15:28, 80:16, 101:21, 107:16</p> <p>rare [1] - 141:17</p> <p>rarely [1] - 141:22</p> <p>rate [1] - 131:26</p> <p>rather [7] - 24:11, 25:10, 39:13, 62:4, 104:6, 107:2, 120:24</p> <p>ratio [2] - 129:26, 130:6</p> <p>rational [2] - 96:7, 110:12</p> <p>rationale [1] - 106:14</p> <p>re [1] - 13:23</p> <p>re-mortgage [1] - 13:23</p> <p>reaching [6] - 67:23, 68:18, 68:19, 84:7, 104:21, 105:6</p> <p>read [14] - 17:2, 20:23, 24:16, 71:3, 82:8, 86:11, 96:29, 105:22, 107:17, 111:22, 118:29, 119:16, 130:13, 130:14</p> <p>readily [1] - 109:7</p> <p>reading [7] - 28:21, 56:1, 67:24, 92:5, 115:11, 118:27, 134:11</p> <p>reads [2] - 100:2, 100:3</p> <p>ready [1] - 98:23</p> <p>real [5] - 14:3, 14:5, 45:12, 149:1, 149:25</p> <p>realistic [1] - 74:6</p>	<p>realistically [1] - 30:13</p> <p>reality [6] - 9:12, 40:12, 64:5, 88:26, 107:8, 146:7</p> <p>really [35] - 10:18, 13:22, 14:9, 14:10, 14:15, 14:23, 15:1, 18:27, 19:4, 19:7, 26:2, 26:10, 27:24, 29:11, 32:29, 36:9, 37:12, 42:29, 43:21, 45:1, 46:1, 46:3, 48:21, 59:1, 72:25, 90:2, 95:20, 101:9, 103:19, 103:25, 130:15, 135:18, 135:20, 140:1, 150:23</p> <p>reason [14] - 6:20, 9:26, 10:3, 10:14, 12:19, 21:2, 32:10, 39:12, 85:23, 86:18, 115:10, 116:29, 119:23, 148:1</p> <p>reasonable [6] - 80:20, 86:22, 110:13, 113:5, 122:6, 132:6</p> <p>reasonableness [2] - 87:12, 103:11</p> <p>reasonably [5] - 80:5, 94:23, 96:23, 109:23, 131:9</p> <p>reasons [9] - 5:13, 29:21, 95:1, 102:12, 106:12, 109:29, 111:25, 127:26, 150:10</p> <p>reassemble [2] - 97:28, 98:4</p> <p>reassuring [2] - 75:28, 77:18</p> <p>recalled [1] - 56:20</p> <p>recalling [1] - 39:8</p> <p>receipt [1] - 93:1</p> <p>receive [3] - 86:22, 117:23, 129:9</p> <p>received [8] -</p>	<p>5:12, 14:28, 14:29, 15:1, 68:24, 92:24, 107:16, 129:8</p> <p>receiving [2] - 14:21, 129:14</p> <p>recent [3] - 7:18, 20:17</p> <p>recently [2] - 48:24, 134:11</p> <p>recipient [6] - 15:16, 21:15, 27:8, 39:4, 69:5, 140:8</p> <p>reckon [1] - 44:17</p> <p>recognise [1] - 112:16</p> <p>recognised [1] - 102:29</p> <p>recollect [1] - 81:7</p> <p>recollection [6] - 72:23, 74:24, 85:27, 97:15, 97:16, 132:19</p> <p>recommend [1] - 109:24</p> <p>recommendati on [4] - 93:3, 146:28, 147:2, 147:7</p> <p>recommendati ons [1] - 147:10</p> <p>reconsider [1] - 28:12</p> <p>record [1] - 39:12</p> <p>recorded [11] - 64:21, 80:17, 80:19, 91:15, 91:17, 93:4, 95:11, 97:21, 98:26, 116:4, 132:9</p> <p>recording [2] - 6:14, 96:24</p> <p>records [6] - 35:17, 35:18, 92:14, 99:14, 101:28, 102:2</p> <p>redirect [1] - 119:18</p> <p>reduce [2] - 92:2, 111:8</p> <p>reduction [1] - 63:21</p> <p>reductions [2] - 63:19, 63:22</p> <p>refer [9] - 7:18,</p>	<p>9:14, 15:25, 20:16, 27:10, 39:5, 48:20, 54:27</p> <p>referee [1] - 87:14</p> <p>reference [13] - 39:5, 39:21, 41:28, 78:17, 97:15, 99:25, 107:19, 119:17, 120:10, 129:2, 133:27, 133:29, 135:4</p> <p>referenced [1] - 80:14</p> <p>references [11] - 66:2, 89:20, 99:4, 109:27, 109:29, 113:23, 113:24, 114:7, 118:6, 118:7, 133:19</p> <p>referral [2] - 9:5, 75:6</p> <p>referred [11] - 27:29, 29:7, 34:2, 39:22, 41:22, 64:20, 92:8, 93:21, 133:15, 148:11</p> <p>referring [4] - 7:29, 62:18, 92:16, 95:16</p> <p>refers [2] - 43:26, 93:20</p> <p>reflect [2] - 81:14, 81:24</p> <p>reflected [2] - 108:29, 122:5</p> <p>reflecting [1] - 93:16</p> <p>reflection [1] - 19:21</p> <p>reflects [4] - 19:8, 19:28, 20:24, 81:15</p> <p>refugee [1] - 142:6</p> <p>refusal [1] - 114:29</p> <p>refused [3] - 68:25, 76:4, 78:2</p> <p>refusing [2] - 118:4, 120:7</p> <p>regard [8] - 63:15, 100:15, 101:21, 101:22, 116:24, 126:4, 130:10, 136:12</p> <p>regarded [1] -</p>	<p>129:26</p> <p>regarding [1] - 82:9</p> <p>regrettably [1] - 69:11</p> <p>regulations [3] - 103:13, 110:8, 112:4</p> <p>regurgitate [1] - 72:14</p> <p>rehearse [4] - 42:6, 45:11, 48:28, 145:22</p> <p>reiterate [1] - 7:5</p> <p>reiterating [1] - 99:27</p> <p>rejection [1] - 129:19</p> <p>relate [2] - 100:24, 147:10</p> <p>related [2] - 10:7, 75:6</p> <p>relation [28] - 15:14, 15:15, 15:16, 15:17, 15:20, 16:11, 30:20, 63:6, 65:13, 65:18, 65:20, 79:7, 83:15, 86:1, 87:15, 88:14, 97:20, 99:5, 99:28, 112:9, 113:23, 114:2, 116:22, 123:26, 126:28, 134:18, 141:16, 150:9</p> <p>relationship [1] - 47:10</p> <p>relatively [1] - 81:19</p> <p>relay [2] - 74:2, 99:19</p> <p>relayed [5] - 70:18, 71:14, 72:3, 75:14, 102:18</p> <p>release [12] - 32:9, 33:8, 33:10, 34:1, 35:7, 107:22, 108:1, 108:19, 109:12, 109:20, 109:21, 146:4</p> <p>relevant [32] - 8:19, 22:19, 22:20, 24:14, 35:21, 35:23, 35:25, 53:10, 62:20, 70:9,</p>

71:15, 73:14, 77:22, 77:24, 78:17, 91:28, 93:10, 95:3, 100:2, 110:27, 113:6, 113:14, 118:8, 118:16, 119:17, 120:13, 124:7, 128:17, 136:4, 139:8, 143:19, 151:19 reliable [1] - 86:6 reliance [1] - 60:25 reliant [1] - 85:28 relied [7] - 22:4, 117:11, 118:2, 119:4, 120:14, 132:19 rely [3] - 60:29, 131:6, 133:7 relying [4] - 28:7, 31:16, 39:6, 134:8 remain [1] - 15:11 remains [1] - 128:10 remark [1] - 100:15 remarks [1] - 7:2 remedy [1] - 122:20 remember [42] - 8:10, 11:3, 12:21, 14:20, 14:24, 21:24, 23:1, 26:4, 26:19, 35:26, 37:19, 38:3, 38:12, 42:22, 43:25, 44:24, 45:17, 45:20, 46:9, 46:16, 46:28, 48:6, 50:9, 50:13, 51:29, 52:3, 53:7, 55:18, 85:23, 96:21, 133:7, 134:6, 140:15, 140:18, 140:20, 145:8, 145:10, 147:21, 148:2, 148:4, 148:9, 151:10 remembered [1] - 80:23 remembering [2] - 133:11, 137:26	reminded [1] - 53:22 remit [1] - 51:4 removed [1] - 105:7 reopen [1] - 128:29 repeated [2] - 47:16, 80:25 repeatedly [1] - 58:6 replete [1] - 109:27 reply [6] - 7:4, 21:7, 60:21, 135:20, 135:22 report [74] - 15:11, 15:16, 18:8, 19:13, 19:26, 25:19, 25:20, 32:17, 38:21, 38:22, 41:22, 45:18, 45:19, 45:25, 45:28, 46:2, 46:9, 49:13, 73:4, 73:11, 73:12, 73:20, 73:22, 76:5, 80:6, 80:12, 80:13, 80:15, 80:22, 80:28, 85:17, 85:28, 86:9, 86:11, 86:19, 91:13, 91:20, 92:6, 92:9, 92:24, 92:25, 92:29, 93:1, 94:28, 95:28, 101:22, 101:28, 102:16, 102:26, 103:2, 103:29, 104:18, 105:17, 105:22, 109:22, 109:25, 110:4, 110:7, 110:17, 111:11, 111:15, 118:28, 126:16, 132:10, 145:28, 147:4, 147:17, 152:1, 152:4, 152:5 reported [3] - 56:5, 91:21, 95:11 reporting [1] - 86:16 reports [25] - 10:29, 11:15, 45:22, 49:12, 54:22, 55:27, 56:11, 63:8, 63:9,	71:19, 93:16, 93:18, 93:21, 101:23, 101:25, 107:16, 110:19, 114:3, 145:26, 145:27, 146:27, 147:4, 147:5, 147:6 represented [2] - 70:26, 116:11 representing [2] - 86:13, 117:4 represents [3] - 116:29, 128:14, 128:18 reprise [1] - 105:27 reproduced [1] - 110:18 request [12] - 23:4, 68:24, 68:26, 68:29, 76:3, 76:15, 77:26, 77:28, 94:15, 97:8, 122:19 requested [1] - 11:15 requests [2] - 11:6, 82:9 require [2] - 45:24, 45:25 required [5] - 6:15, 30:17, 49:20, 123:28, 130:2 requirement [4] - 37:13, 37:27, 45:15, 126:8 resource [2] - 10:5, 11:10 Resources [1] - 49:9 respect [33] - 9:23, 9:24, 10:26, 11:4, 11:19, 12:4, 14:1, 14:22, 15:2, 15:5, 15:12, 18:14, 22:20, 22:22, 24:1, 27:8, 29:6, 30:14, 36:29, 41:24, 47:3, 48:17, 50:20, 54:10, 58:7, 60:20, 60:22, 74:25, 88:4, 113:29, 130:3, 140:5, 144:12 respected [1] -	46:20 respectful [3] - 72:20, 74:4, 127:28 respectfully [4] - 10:9, 16:8, 45:26, 104:15 respects [1] - 48:26 respond [3] - 49:18, 49:19, 135:24 responded [1] - 133:9 respondent [4] - 23:26, 24:2, 24:5, 24:7 respondent's [1] - 23:22 response [5] - 11:5, 127:11, 133:1, 133:24, 141:16 responsibility [2] - 35:18, 64:3 responsible [2] - 56:18, 114:5 rest [1] - 150:13 rested [1] - 64:4 result [8] - 14:27, 49:24, 49:26, 49:27, 56:21, 123:7, 124:15, 124:27 resulted [3] - 56:21, 110:15, 112:6 RESUMED [2] - 5:1, 98:19 retired [7] - 67:12, 87:29, 88:1, 88:23, 107:28 return [1] - 122:27 returning [1] - 129:2 reveal [1] - 85:24 revealing [3] - 72:25, 73:15, 90:13 revelation [2] - 35:5, 131:9 review [5] - 67:15, 113:9, 113:12, 113:20, 150:12 reviewed [1] - 129:2	revisit [1] - 136:5 rightly [1] - 25:22 ring [1] - 125:18 rise [1] - 60:10 river [2] - 126:18, 136:6 role [6] - 65:7, 74:15, 93:17, 102:9, 102:10, 123:4 room [2] - 17:15, 17:20 root [1] - 71:23 Rosderra [4] - 7:19, 23:18, 23:22, 123:8 rough [1] - 38:16 round [4] - 17:14, 75:22, 76:19, 77:5 rule [1] - 25:2 rules [1] - 136:13 ruling [4] - 84:22, 96:4, 121:10, 136:6 ruminating [3] - 71:19, 114:13, 116:1 running [1] - 13:24 RYAN [1] - 3:2	150:8 satisfy [1] - 87:19 Saulite [22] - 8:9, 14:6, 44:25, 49:28, 68:4, 68:19, 68:23, 73:3, 77:29, 83:4, 91:18, 91:25, 94:11, 96:16, 98:28, 99:15, 102:17, 108:10, 108:17, 108:20, 125:1, 137:19 Saulite's [1] - 117:26 save [1] - 124:8 saw [4] - 11:26, 11:28, 39:14, 71:9 scapegoating [2] - 34:4, 109:3 scarcely [1] - 146:13 scintilla [1] - 87:24 scoping [1] - 104:1 scoring [1] - 23:5 scrape [1] - 17:22 screen [1] - 8:1 search [3] - 125:12, 149:29, 150:1 second [13] - 34:8, 34:11, 34:13, 52:24, 69:8, 69:29, 76:20, 78:3, 93:2, 118:21, 119:8, 122:24, 139:7 secondary [1] - 121:19 secondly [1] - 120:21 section [2] - 29:3, 147:7 sector [1] - 63:22 security [1] - 83:3 see [22] - 12:7, 44:5, 57:17, 69:26, 94:3, 94:4, 94:8, 97:22, 100:8, 102:20, 103:21, 103:29, 104:7, 104:12,
S					
<p>sad [1] - 88:26 safety [25] - 29:22, 30:14, 30:20, 30:23, 86:1, 91:26, 94:12, 94:25, 96:17, 98:29, 99:17, 99:18, 100:6, 100:7, 100:14, 108:10, 122:17, 124:3, 131:1, 131:2, 138:4 saga [1] - 101:5 sake [1] - 149:14 salary [1] - 88:18 satisfactory [1] - 5:28 satisfied [5] - 86:13, 87:1, 129:1, 143:25,</p>					

<p>114:4, 118:24, 120:12, 122:11, 140:28, 144:1, 144:11, 151:6 seeing [1] - 12:2 seek [1] - 74:19 seeking [3] - 76:9, 113:12, 113:13 seeks [1] - 106:26 seem [17] - 9:10, 13:17, 16:8, 20:5, 22:28, 45:26, 46:25, 47:1, 47:5, 68:15, 92:15, 115:29, 123:18, 123:21, 140:18, 145:26, 151:18 seeps [1] - 144:16 seismic [2] - 73:5, 79:11 selflessness [1] - 131:10 semantics [1] - 18:22 send [2] - 6:18, 6:20 sending [7] - 86:16, 88:15, 88:17, 90:15, 90:18, 114:5 sends [2] - 49:14, 52:27 sense [10] - 15:8, 29:3, 71:10, 72:13, 78:25, 85:5, 90:9, 94:5, 120:23, 123:19 sensed [1] - 52:7 senses [1] - 36:24 sent [8] - 7:28, 11:24, 80:6, 81:15, 85:17, 87:10, 91:2, 132:28 sentence [3] - 28:11, 104:12, 129:25 sentencing [2] - 108:5, 108:16 sentiments [1] - 131:4 separate [4] - 43:8, 63:1, 89:14, 130:12 separately [1] -</p>	<p>26:13 September [7] - 21:15, 78:5, 115:18, 115:25, 123:1, 140:6 September/ October [2] - 69:24, 75:2 sequence [1] - 89:27 sequitur [1] - 90:21 sergeant [67] - 67:1, 67:2, 68:1, 69:2, 69:4, 69:21, 71:4, 71:8, 72:6, 73:16, 73:18, 74:2, 74:19, 74:24, 75:1, 75:8, 75:12, 78:15, 78:26, 78:27, 80:4, 80:7, 80:12, 80:18, 85:23, 86:12, 87:3, 89:16, 91:9, 91:15, 91:18, 91:20, 91:22, 91:23, 91:29, 92:5, 92:15, 92:17, 93:22, 94:10, 94:21, 96:13, 98:26, 100:22, 101:8, 101:29, 102:10, 102:29, 103:28, 105:3, 105:19, 106:26, 109:26, 109:28, 110:15, 111:8, 111:21, 113:15, 113:29, 114:11, 115:8, 117:18, 117:25, 117:28, 117:29, 118:4, 132:7 Sergeant [120] - 5:7, 5:24, 6:5, 6:7, 8:12, 9:4, 9:10, 9:23, 9:25, 10:3, 10:20, 11:4, 11:9, 11:21, 12:11, 12:18, 12:20, 13:9, 13:15, 21:18, 25:10, 25:13, 26:26, 27:2, 27:15, 29:8, 35:16, 37:29, 38:14, 38:25, 38:28, 40:9, 41:16, 42:19,</p>	<p>43:8, 46:18, 47:8, 47:9, 47:13, 47:15, 48:12, 51:21, 53:14, 54:3, 56:6, 56:26, 61:6, 63:11, 63:14, 65:6, 68:17, 68:26, 70:18, 70:25, 72:15, 72:19, 74:8, 75:25, 76:1, 76:4, 76:8, 76:9, 76:13, 76:17, 76:19, 77:3, 77:4, 77:17, 78:9, 79:21, 82:8, 83:8, 84:6, 87:19, 89:23, 89:27, 95:10, 95:13, 95:21, 95:22, 95:27, 95:29, 96:18, 96:28, 97:8, 101:26, 102:12, 107:25, 108:13, 108:29, 109:1, 109:7, 109:13, 110:21, 110:23, 110:29, 114:9, 126:23, 127:9, 127:11, 132:10, 132:24, 132:27, 134:14, 135:8, 138:22, 138:28, 140:12, 142:23, 143:10, 143:23, 145:9, 146:2, 146:29, 147:9, 147:10, 147:20, 147:25, 148:6, 149:10 sergeant's [10] - 84:29, 85:14, 90:12, 91:6, 93:11, 93:17, 102:23, 103:18, 106:25, 132:4 series [2] - 50:22, 78:4 serious [8] - 14:11, 14:15, 18:12, 50:1, 54:29, 56:16, 67:25, 148:7 seriously [1] - 14:13 seriousness [2] - 18:15, 19:12 served [4] - 143:10, 147:20, 147:24</p>	<p>service [1] - 63:23 set [15] - 69:13, 69:14, 69:16, 69:25, 69:29, 70:22, 71:26, 79:27, 89:14, 91:8, 95:4, 113:23, 122:21, 148:16, 148:18 setbacks [1] - 9:17 settling [1] - 13:28 several [6] - 33:28, 40:12, 42:25, 50:9, 79:8 shall [3] - 26:11, 137:12, 141:28 shape [1] - 100:13 sheen [1] - 125:11 shock [1] - 117:26 short [7] - 17:3, 38:14, 54:22, 62:25, 130:21, 143:6, 143:7 shoulders [1] - 89:9 show [3] - 30:22, 33:2, 126:8 shows [1] - 102:22 shrug [1] - 89:9 sick [2] - 54:27, 87:7 side [8] - 36:15, 62:16, 68:13, 69:27, 74:5, 87:19, 107:25, 126:3 side's [2] - 5:18, 5:19 sift [1] - 151:5 sight [1] - 106:21 significant [6] - 26:17, 86:5, 115:7, 130:28, 148:2, 148:27 significantly [1] - 16:27 signs [1] - 68:19 similar [1] - 64:7 simple [1] - 129:12 simply [20] -</p>	<p>23:25, 25:21, 28:4, 30:27, 32:11, 60:27, 62:7, 72:20, 75:18, 78:25, 79:1, 96:5, 102:3, 104:23, 105:4, 112:5, 114:6, 123:8, 132:9, 145:11 single [1] - 125:15 sitting [2] - 113:9, 113:10 situation [9] - 7:23, 18:5, 65:2, 65:28, 71:20, 77:11, 117:26, 126:21, 128:18 situations [2] - 11:27, 113:29 slightly [5] - 23:28, 34:6, 38:19, 48:27, 133:21 slip [1] - 141:19 slow [1] - 93:15 small [1] - 90:26 smoke [1] - 149:21 solipsistic [1] - 9:16 someone [2] - 9:11, 130:26 sometimes [1] - 73:28 somewhat [8] - 20:7, 20:24, 57:12, 68:12, 103:19, 122:3, 133:11, 133:24 sonny [1] - 142:12 soon [1] - 73:27 sorry [68] - 6:6, 6:16, 6:18, 8:16, 23:10, 23:13, 23:20, 23:22, 25:27, 27:9, 28:9, 30:10, 31:18, 31:21, 33:15, 37:18, 37:25, 39:23, 39:25, 40:8, 51:27, 52:6, 52:23, 53:20, 55:5, 55:12, 58:15, 60:9, 61:7, 63:4, 75:3, 75:19, 76:29, 78:1, 79:13, 79:14,</p>	<p>83:10, 85:9, 91:8, 92:19, 92:25, 94:7, 95:9, 95:15, 95:17, 97:14, 99:8, 102:26, 114:16, 125:5, 128:25, 129:7, 131:26, 131:27, 133:5, 140:16, 141:2, 143:12, 144:25, 144:28, 145:4, 146:1, 147:22, 148:20, 150:17, 151:18 sort [8] - 11:11, 16:19, 36:16, 113:17, 121:9, 126:18, 137:4, 147:4 sorts [2] - 46:10, 91:12 sought [4] - 65:11, 78:28, 114:27, 115:13 sounds [1] - 58:15 source [2] - 58:7, 101:6 sources [1] - 107:18 speaking [4] - 6:5, 40:10, 92:26, 96:25 speaks [4] - 87:10, 87:11, 103:10 specialist [1] - 88:17 specific [4] - 28:10, 68:23, 122:19, 142:15 specifically [6] - 45:23, 80:5, 82:1, 82:21, 96:8, 96:22 specify [1] - 77:27 spectrum [1] - 110:19 speech [1] - 130:25 spend [1] - 89:21 spent [1] - 42:22 spoken [1] - 45:21 spot [1] - 68:18 spotlight [1] - 72:29 spreads [1] -</p>
---	--	---	---	---	---

<p>44:20 spreadsheet [1] - 58:19 staff [1] - 102:2 staff [1] - 120:29 stage [9] - 5:6, 11:2, 54:1, 59:29, 62:3, 64:17, 72:6, 116:1, 141:1 stages [1] - 76:28 standard [19] - 16:5, 16:10, 16:11, 16:15, 16:20, 16:24, 17:8, 17:22, 17:25, 18:23, 18:28, 19:18, 20:7, 20:22, 20:28, 20:29, 21:3 standards [1] - 17:10 standout [1] - 85:15 stands [1] - 79:25 star [3] - 15:16, 15:24, 44:28 stark [1] - 72:17 start [5] - 47:24, 66:17, 138:11, 146:20, 152:2 started [2] - 86:3, 138:17 started [1] - 107:5 starting [3] - 67:7, 67:9, 118:21 startling [1] - 140:2 starts [2] - 80:10, 143:9 state [4] - 88:7, 89:8, 101:19, 135:2 statement [20] - 15:5, 19:7, 28:11, 45:15, 45:23, 61:24, 62:6, 74:19, 74:20, 75:16, 75:29, 76:9, 77:8, 111:22, 114:29, 115:6, 115:12, 128:12, 128:13 statements [3] - 9:29, 34:27,</p>	<p>83:24 Station [1] - 111:7 station [3] - 47:25, 91:25, 141:29 staying [1] - 55:1 steadfast [2] - 15:12, 15:18 steam [5] - 35:28, 117:18, 117:25, 118:23, 138:22 stem [1] - 71:10 step [4] - 34:8, 73:29, 75:10, 109:16 stepping [1] - 84:10 sticks [1] - 148:13 still [6] - 10:4, 10:9, 11:10, 103:16, 128:10, 147:13 stole [1] - 19:1 stolen [1] - 17:18 stone [1] - 70:5 stood [1] - 58:24 stop [11] - 30:27, 34:11, 34:13, 58:14, 67:3, 67:11, 94:1, 94:6, 97:22, 113:12, 113:13 stopped [2] - 11:5, 102:19 story [3] - 44:5, 74:10, 74:12 straightaway [1] - 43:18 straightforward [1] - 109:5 strange [2] - 36:4, 60:29 stress [11] - 10:7, 49:24, 49:29, 50:1, 50:2, 54:10, 54:27, 54:28, 55:1, 55:8, 87:7 stressed [2] - 53:27, 67:11 stressful [1] - 88:9 stretch [1] - 126:4 stretched [1] -</p>	<p>128:3 strictly [1] - 92:26 strike [1] - 18:2 strong [1] - 26:9 strongly [1] - 63:8 stuck [1] - 148:26 stuff [2] - 76:10, 140:19 subject [7] - 5:24, 63:25, 67:25, 68:10, 85:15, 96:3, 134:2 subjected [1] - 101:11 SUBMISSION [8] - 4:4, 4:5, 4:6, 4:7, 6:3, 64:27, 66:15, 135:17 submission [79] - 15:3, 16:4, 21:6, 26:7, 26:9, 45:1, 48:21, 48:28, 60:21, 63:13, 64:15, 64:29, 65:22, 66:21, 67:20, 68:14, 69:10, 72:20, 74:4, 74:11, 84:9, 84:17, 84:26, 85:7, 85:8, 85:25, 86:5, 86:24, 86:29, 87:23, 89:6, 93:6, 93:10, 94:9, 101:13, 101:20, 102:3, 102:8, 102:29, 103:10, 103:17, 105:2, 105:6, 106:20, 106:24, 107:6, 107:24, 107:25, 107:26, 108:25, 109:3, 110:10, 111:25, 112:13, 112:14, 112:16, 113:3, 113:19, 113:27, 115:5, 115:10, 115:16, 116:15, 116:23, 117:1, 117:20, 118:7, 120:22, 125:17, 125:25, 126:5, 126:26, 126:29, 127:28, 128:6, 128:27, 129:12, 132:5, 132:12</p>	<p>submissions [57] - 5:8, 5:11, 5:19, 5:22, 5:23, 7:4, 7:6, 7:17, 8:25, 9:10, 9:16, 12:25, 12:26, 13:3, 13:13, 16:2, 16:3, 16:7, 21:7, 22:8, 37:1, 37:3, 37:15, 41:19, 42:4, 42:7, 45:12, 45:13, 56:2, 56:15, 56:29, 57:17, 60:22, 60:24, 62:25, 63:11, 64:24, 68:7, 72:14, 110:23, 120:15, 132:3, 135:13, 135:21, 135:22, 135:24, 135:29, 137:1, 140:28, 141:4, 145:24, 148:12, 151:22, 151:23, 151:29 submit [5] - 19:29, 22:20, 56:19, 61:17, 65:21 submits [1] - 63:10 submitted [3] - 10:9, 16:8, 146:24 subs [2] - 45:6, 147:8 subsequent [2] - 50:29, 101:7 subsequently [3] - 31:16, 78:20, 141:7 substance [1] - 63:14 substantial [1] - 38:21 substantive [1] - 50:5 successors [1] - 20:18 suffer [1] - 56:7 suffered [1] - 9:4 suffering [4] - 49:24, 54:21, 87:7, 88:18 suffice [1] - 30:17 sufficient [4] - 30:26, 56:5, 93:26 sufficient [1] -</p>	<p>56:8 suggest [12] - 21:10, 28:14, 32:14, 32:16, 35:4, 56:8, 72:17, 72:22, 102:4, 104:15, 110:11 suggested [9] - 16:16, 17:18, 39:11, 71:21, 74:29, 75:12, 78:15, 112:11, 147:14 suggesting [8] - 16:9, 32:11, 96:5, 106:8, 106:12, 108:26, 122:20, 133:16 suggestion [6] - 20:5, 65:23, 110:1, 123:23, 123:29, 126:2 Sun [1] - 14:24 superintendent [20] - 49:14, 49:15, 49:18, 55:4, 80:17, 80:28, 82:6, 85:16, 85:20, 85:25, 86:17, 86:23, 86:28, 87:2, 87:8, 88:3, 90:14, 94:1, 132:8 Superintenden t [52] - 8:5, 21:18, 37:4, 38:1, 39:20, 40:28, 41:29, 43:26, 52:29, 53:29, 60:6, 60:23, 61:16, 70:4, 70:19, 70:23, 79:28, 82:28, 88:2, 89:15, 89:17, 89:22, 91:10, 91:17, 92:12, 92:27, 93:2, 99:26, 101:17, 101:27, 104:19, 106:3, 106:7, 107:27, 109:4, 109:10, 110:7, 115:28, 116:10, 117:5, 117:7, 132:2, 132:17, 132:18, 133:6, 133:20, 133:23, 134:15, 142:23, 142:25, 143:18,</p>	<p>149:7 superintendent 's [1] - 86:15 superiors [1] - 80:6 supervisor [1] - 123:4 supervisors [1] - 42:19 support [3] - 9:20, 65:22, 117:11 suppose [52] - 6:25, 7:29, 9:7, 9:21, 12:3, 12:9, 13:11, 13:26, 14:2, 14:13, 14:19, 15:10, 15:20, 16:26, 20:4, 21:2, 22:15, 22:24, 26:4, 26:15, 26:19, 26:23, 27:12, 29:27, 32:5, 32:20, 36:11, 36:15, 36:17, 40:29, 45:13, 47:24, 47:29, 53:28, 55:23, 55:26, 56:20, 57:16, 58:28, 64:2, 64:8, 66:17, 121:8, 126:10, 129:11, 131:15, 135:18, 135:23, 137:8, 141:10, 148:27, 150:3 Supreme [21] - 7:19, 8:18, 16:26, 19:6, 22:13, 24:15, 24:20, 27:25, 27:26, 27:28, 30:2, 116:26, 120:19, 121:10, 122:2, 125:21, 126:15, 126:27, 127:6, 128:3, 138:8 surely [1] - 54:1 surprised [4] - 19:17, 125:20, 125:23, 125:24 surprises [1] - 122:4 surprising [1] - 94:28 SUSPECT [1] - 3:6 sweeping [1] - 9:20</p>
---	---	--	---	--	---

<p>switch [1] - 72:29</p> <p>Swords [1] - 111:7</p> <p>sympathetic [1] - 97:11</p> <p>sympathy [1] - 127:10</p> <p>system [19] - 17:12, 57:13, 57:19, 58:4, 58:18, 58:24, 58:25, 59:2, 59:4, 59:13, 65:13, 70:17, 85:3, 86:2, 87:20, 132:14, 132:24</p> <p>systemic [1] - 68:28</p> <p>systems [4] - 37:22, 40:10, 48:17, 59:4</p> <p>SÍOCHÁNA [1] - 3:8</p> <p>Séan [1] - 81:24</p> <p>Síochána [16] - 7:5, 9:2, 9:14, 10:5, 13:26, 25:6, 37:2, 41:20, 45:14, 45:22, 48:22, 56:15, 66:20, 73:13, 104:4, 106:10</p> <p>Síochána's [6] - 9:9, 16:3, 16:7, 42:14, 56:1, 60:20</p>	<p>42:29, 43:1, 43:4, 43:21, 57:21, 58:4, 59:12, 59:14, 64:18, 65:24, 66:5, 66:24, 68:10, 70:26, 70:27, 88:21, 89:18, 89:24, 89:29, 90:9, 90:13, 106:25, 109:2, 110:26, 112:10, 116:12, 129:15, 129:18, 135:8, 141:26, 146:18</p> <p>task [1] - 130:3</p> <p>tax [1] - 131:2</p> <p>team [7] - 5:7, 5:25, 5:26, 5:27, 19:24, 44:4</p> <p>tediously [1] - 150:23</p> <p>teeth [1] - 88:19</p> <p>telephone [1] - 8:11</p> <p>tend [2] - 89:1, 110:11</p> <p>tended [1] - 30:22</p> <p>tendency [1] - 93:26</p> <p>term [2] - 44:13, 130:25</p> <p>termed [1] - 37:19</p> <p>terms [9] - 18:6, 20:25, 25:7, 28:13, 82:1, 82:2, 140:2</p> <p>terrain [1] - 113:1</p> <p>terribly [2] - 73:26, 102:13</p> <p>text [2] - 108:2, 108:7</p> <p>THAT [2] - 3:5, 3:10</p> <p>that'd [1] - 17:17</p> <p>THE [8] - 3:1, 3:2, 3:5, 3:11, 3:12, 5:1, 98:19, 152:11</p> <p>theirs [1] - 42:7</p> <p>theme [1] - 71:1</p> <p>themes [1] - 69:6</p> <p>themselves [2] - 21:13, 73:1</p> <p>THEN [2] - 98:19, 152:11</p>	<p>theory [3] - 71:13, 72:8, 105:10</p> <p>thereabouts [1] - 98:15</p> <p>thereafter [2] - 103:12, 112:1</p> <p>thereby [1] - 121:13</p> <p>therefore [10] - 36:19, 40:22, 44:2, 44:29, 61:21, 128:20, 134:8, 136:21, 144:16, 149:29</p> <p>thesis [1] - 106:25</p> <p>thin [1] - 71:13</p> <p>thinking [1] - 132:17</p> <p>thinks [1] - 138:5</p> <p>third [5] - 9:15, 76:21, 90:25, 93:19, 110:6</p> <p>thirdly [1] - 123:22</p> <p>thirds [1] - 118:18</p> <p>THIS [1] - 3:11</p> <p>thoroughly [1] - 79:24</p> <p>thoughts [1] - 114:18</p> <p>threat [6] - 14:4, 14:6, 68:23, 104:3, 124:28, 125:1</p> <p>three [8] - 27:18, 29:13, 51:2, 53:22, 53:26, 78:5, 109:20, 146:26</p> <p>throughout [2] - 15:26, 93:18</p> <p>thrust [1] - 90:11</p> <p>timing [6] - 22:16, 75:11, 143:8, 146:24, 149:2, 149:4</p> <p>TO [3] - 3:1, 3:11, 3:12</p> <p>to.. [1] - 6:9</p> <p>today [3] - 116:25, 140:16, 148:10</p> <p>together [1] - 90:8</p> <p>took [9] - 14:12, 21:14, 25:12,</p>	<p>38:13, 55:19, 55:20, 121:9, 129:15, 136:18</p> <p>top [3] - 98:29, 102:22, 106:18</p> <p>top-end [1] - 102:22</p> <p>tortured [2] - 142:8, 142:11</p> <p>total [1] - 90:20</p> <p>totally [1] - 75:23</p> <p>touch [1] - 144:15</p> <p>touched [1] - 73:20</p> <p>trail [1] - 79:2</p> <p>transcript [17] - 6:11, 27:6, 39:22, 71:2, 80:1, 80:14, 99:7, 99:8, 100:27, 105:23, 105:25, 110:28, 114:20, 115:20, 115:21, 125:12</p> <p>translate [1] - 139:28</p> <p>translated [1] - 9:17</p> <p>transpired [2] - 10:19, 86:7</p> <p>travels [1] - 44:19</p> <p>treat [1] - 12:12</p> <p>treated [2] - 50:27, 53:16</p> <p>tremendous [1] - 85:27</p> <p>trenchant [1] - 20:25</p> <p>Tribunal [85] - 7:29, 9:29, 10:15, 10:19, 10:21, 11:20, 11:21, 11:29, 12:3, 12:11, 12:15, 13:10, 15:22, 16:21, 18:13, 19:13, 20:19, 20:21, 21:16, 22:18, 24:23, 25:8, 25:12, 25:19, 25:22, 25:23, 25:25, 26:10, 27:29, 29:5, 29:14, 31:4, 31:10, 31:15, 31:20, 32:12, 32:16, 34:7, 36:5, 36:6, 38:2, 41:3,</p>	<p>41:6, 51:4, 51:17, 58:29, 60:1, 60:28, 62:16, 65:26, 66:1, 67:10, 67:24, 77:20, 83:25, 84:1, 84:13, 89:4, 90:27, 93:24, 95:9, 98:7, 98:11, 113:10, 121:8, 128:19, 133:10, 136:5, 136:8, 137:11, 137:24, 138:5, 139:7, 142:3, 142:13, 142:24, 143:1, 143:24, 143:28, 144:18, 149:2, 149:23, 150:7, 151:29</p> <p>tribunal [1] - 150:4</p> <p>TRIBUNAL [2] - 3:3, 3:12</p> <p>Tribunal's [6] - 5:17, 10:24, 24:21, 26:1, 126:12, 140:11</p> <p>tried [4] - 12:3, 18:8, 18:20, 135:24</p> <p>trivialise [1] - 120:27</p> <p>trouble [3] - 59:17, 59:19, 73:1</p> <p>troubled [1] - 53:27</p> <p>true [1] - 52:2</p> <p>try [10] - 6:8, 7:15, 7:21, 18:29, 36:11, 37:13, 37:15, 51:27, 93:27, 144:20</p> <p>trying [14] - 17:5, 17:11, 17:26, 37:14, 37:19, 46:3, 52:23, 59:27, 63:8, 124:25, 141:11, 144:4, 144:5, 150:25</p> <p>Tuesday [1] - 27:2</p> <p>turn [5] - 60:10, 84:5, 106:27, 115:10, 115:13</p> <p>turned [3] - 17:14, 38:8, 78:29</p>	<p>turning [1] - 102:22</p> <p>twice [1] - 67:1</p> <p>two [35] - 32:22, 33:20, 40:16, 43:7, 46:1, 50:27, 69:6, 70:12, 90:5, 90:24, 97:28, 98:9, 98:15, 101:17, 102:6, 102:8, 102:18, 110:24, 111:1, 111:11, 118:18, 120:12, 126:7, 128:15, 134:19, 142:1, 142:2, 144:2, 146:16, 146:25, 147:1, 147:4, 151:15</p> <p>two-thirds [1] - 118:18</p> <p>type [3] - 13:18, 48:13, 122:28</p> <p>types [1] - 13:12</p>
T					
<p>TAKE [1] - 3:1</p> <p>Tara [1] - 19:6</p> <p>target [6] - 10:2, 57:27, 57:29, 59:5, 59:9, 109:19</p> <p>targeted [11] - 9:25, 12:18, 16:22, 57:11, 67:29, 69:1, 107:3, 107:4, 141:21, 145:26</p> <p>targeters [5] - 70:16, 87:22, 103:16, 105:8, 129:17</p> <p>targeting [35] - 9:18, 16:12, 33:18, 42:13,</p>					
U					
				<p>ultimate [1] - 64:3</p> <p>ultimately [5] - 30:15, 56:18, 65:5, 110:14, 112:6</p> <p>unclear [6] - 61:13, 67:18, 74:23, 76:27, 121:23</p> <p>unconnected [1] - 29:21</p> <p>uncontradicted [2] - 86:10, 86:11</p> <p>under [11] - 6:17, 7:8, 45:17, 45:18, 48:7, 48:11, 49:29, 72:26, 103:13, 110:7, 127:22</p> <p>underlying [2] - 91:27, 147:19</p> <p>undermines [1] - 27:27</p> <p>underneath [1] - 112:15</p> <p>understandabl e [1] - 133:18</p> <p>understood [2] - 7:2, 90:12</p> <p>UNDERTAKEN [1] - 3:7</p>	

<p>undoubtedly [8] - 16:6, 72:28, 73:4, 87:18, 105:14, 107:12, 116:24, 128:14</p> <p>unduly [2] - 102:6, 109:29</p> <p>unfair [5] - 9:22, 36:7, 89:10, 103:25, 144:3</p> <p>unfairness [1] - 89:11</p> <p>unfortunate [2] - 22:16, 112:22</p> <p>unfortunately [5] - 42:23, 43:25, 53:6, 95:4, 145:20</p> <p>unfounded [2] - 9:13, 10:17</p> <p>unhelpful [1] - 125:11</p> <p>unified [1] - 124:26</p> <p>uniform [3] - 118:5, 120:8, 120:10</p> <p>unique [1] - 111:11</p> <p>unknown [1] - 20:28</p> <p>unless [1] - 66:8</p> <p>unlike [1] - 120:18</p> <p>unravels [1] - 72:9</p> <p>unreasonable [3] - 46:25, 53:23, 144:3</p> <p>unsubstantiate [1] - 88:10</p> <p>unsupported [1] - 72:21</p> <p>unsustainable [1] - 105:9</p> <p>unusual [2] - 7:23, 16:29</p> <p>unwell [2] - 6:7, 6:17</p> <p>unworthy [1] - 103:17</p> <p>up [34] - 6:21, 13:28, 14:20, 21:7, 42:25, 46:22, 47:16, 56:5, 62:5, 68:2, 68:27, 72:8, 72:13, 72:16, 74:20, 75:15, 76:6, 78:7, 80:6,</p>	<p>85:18, 86:16, 91:2, 103:20, 113:25, 117:1, 119:4, 120:10, 125:19, 126:18, 136:5, 136:6, 148:16, 148:18</p> <p>update [1] - 15:2</p> <p>upheld [1] - 23:29</p> <p>upset [1] - 35:16</p> <p>urge [2] - 137:24, 139:24</p> <p>urged [3] - 71:8, 71:20, 125:4</p> <p>useful [2] - 75:10, 122:9</p> <p>useless [2] - 120:28, 120:29</p> <p>uses [1] - 147:6</p> <p>uttered [2] - 123:5, 124:10</p>	<p>view [32] - 5:18, 9:9, 11:9, 11:29, 15:7, 18:7, 18:17, 19:20, 19:23, 30:7, 35:27, 36:6, 39:20, 85:22, 85:24, 86:22, 101:8, 116:26, 117:21, 118:24, 118:26, 121:9, 125:27, 127:18, 128:1, 129:26, 130:6, 131:8, 132:13</p> <p>viewed [1] - 117:25</p> <p>viewing [1] - 125:28</p> <p>views [4] - 42:8, 42:9, 98:1, 147:9</p> <p>virtue [1] - 68:10</p> <p>visit [2] - 46:9, 48:7</p> <p>visited [3] - 45:21, 111:3, 111:4</p> <p>vital [1] - 143:14</p> <p>void [1] - 113:17</p> <p>volumes [2] - 67:14, 69:12</p>	<p>WEDNESDAY [1] - 5:1</p> <p>Wednesday [7] - 70:1, 70:2, 91:23, 94:13, 96:14, 99:13, 136:11</p> <p>weeks [1] - 72:25</p> <p>welfare [2] - 49:4, 87:8</p> <p>well-founded [1] - 46:5</p> <p>whatsoever [1] - 134:26</p> <p>whereas [2] - 62:6, 77:5</p> <p>whereby [1] - 9:16</p> <p>WHETHER [1] - 3:6</p> <p>whichever [1] - 76:13</p> <p>whistle [1] - 68:2</p> <p>whistleblower [3] - 130:25, 131:20, 131:23</p> <p>whistleblowers [2] - 59:13, 131:3</p> <p>whistleblowing [2] - 33:17, 33:21</p> <p>white [1] - 42:6</p> <p>whole [7] - 15:26, 15:27, 68:27, 82:19, 93:11, 135:22, 137:29</p> <p>wholly [2] - 103:17, 105:8</p> <p>wide [2] - 88:29, 110:19</p> <p>wild [1] - 103:19</p> <p>willful [1] - 66:23</p> <p>willfully [2] - 67:29, 69:1</p> <p>willing [3] - 12:8, 48:1, 108:14</p> <p>willy [1] - 13:19</p> <p>willy-nilly [1] - 13:19</p> <p>wind [1] - 88:29</p> <p>wisdom [2] - 102:25, 125:24</p> <p>wish [2] - 6:20, 126:17</p> <p>wished [1] - 123:4</p> <p>wishes [1] - 6:19</p>	<p>WITH [1] - 3:7</p> <p>withdrawal [1] - 10:18</p> <p>withdrawing [2] - 9:24, 12:5</p> <p>withdrawn [4] - 10:13, 15:18, 57:8, 65:8</p> <p>witness [3] - 61:26, 104:26, 108:21</p> <p>witnesses [2] - 67:21, 112:24</p> <p>woman's [1] - 19:2</p> <p>wondered [1] - 130:15</p> <p>wondering [3] - 52:24, 67:2, 131:23</p> <p>wood [1] - 73:28</p> <p>word [3] - 25:21, 131:24, 137:6</p> <p>words [20] - 7:11, 10:12, 25:14, 29:25, 30:17, 30:27, 40:8, 42:15, 44:8, 76:2, 76:16, 108:1, 117:11, 121:7, 123:5, 124:9, 127:21, 136:19, 138:11, 141:26</p> <p>work-place [2] - 50:1</p> <p>work-related [1] - 10:7</p> <p>worker [1] - 30:21</p> <p>workplace [11] - 29:21, 30:14, 30:20, 48:15, 49:22, 49:23, 50:18, 54:10, 54:28, 55:1, 55:7</p> <p>world [2] - 88:28, 89:2</p> <p>worry [2] - 54:24, 143:14</p> <p>worrying [1] - 125:23</p> <p>worse [3] - 72:23, 92:1, 115:8</p> <p>worsening [1] - 114:25</p> <p>worth [5] - 18:19, 19:11, 47:22, 48:2,</p>	<p>84:10</p> <p>WRC [2] - 24:6, 24:9</p> <p>wrestle [2] - 17:10, 19:3</p> <p>wrestling [1] - 17:5</p> <p>write [4] - 94:18, 94:19, 149:6, 150:4</p> <p>writes [1] - 143:24</p> <p>writing [7] - 37:11, 37:22, 56:10, 58:20, 94:15, 96:28, 134:8</p> <p>WRITING [1] - 3:12</p> <p>written [14] - 5:11, 7:4, 26:23, 26:25, 45:9, 59:24, 63:5, 64:29, 96:19, 107:24, 110:2, 120:15, 133:19</p> <p>wrongdoing [19] - 22:1, 24:4, 24:14, 28:3, 29:2, 29:9, 67:5, 70:9, 85:4, 87:21, 88:14, 106:27, 107:4, 110:16, 120:17, 123:21, 124:7, 130:29, 139:3</p> <p>wrongly [2] - 25:22, 107:1</p> <p>wrote [3] - 97:8, 134:6, 134:7</p>
V		W		Y	
<p>vague [1] - 72:19</p> <p>valiant [2] - 25:24, 25:26</p> <p>various [11] - 16:16, 38:7, 38:23, 46:29, 48:15, 55:2, 66:25, 71:14, 114:13, 124:26, 151:6</p> <p>vengefulness [2] - 71:12, 114:18</p> <p>venting [5] - 35:29, 117:14, 117:18, 117:25, 118:23</p> <p>verbal [1] - 26:11</p> <p>version [1] - 94:16</p> <p>versus [1] - 74:23</p> <p>victim [16] - 15:5, 52:21, 73:3, 75:28, 94:28, 103:1, 105:17, 105:22, 110:1, 110:4, 111:10, 111:15, 111:18, 111:22, 118:28, 146:5</p> <p>victimisation [1] - 33:17</p>	<p>vague [1] - 72:19</p> <p>valiant [2] - 25:24, 25:26</p> <p>various [11] - 16:16, 38:7, 38:23, 46:29, 48:15, 55:2, 66:25, 71:14, 114:13, 124:26, 151:6</p> <p>vengefulness [2] - 71:12, 114:18</p> <p>venting [5] - 35:29, 117:14, 117:18, 117:25, 118:23</p> <p>verbal [1] - 26:11</p> <p>version [1] - 94:16</p> <p>versus [1] - 74:23</p> <p>victim [16] - 15:5, 52:21, 73:3, 75:28, 94:28, 103:1, 105:17, 105:22, 110:1, 110:4, 111:10, 111:15, 111:18, 111:22, 118:28, 146:5</p> <p>victimisation [1] - 33:17</p>	<p>walked [1] - 17:15</p> <p>Walter [9] - 69:20, 71:26, 77:18, 78:24, 83:2, 84:18, 116:7, 140:21, 141:2</p> <p>wants [2] - 6:10, 12:15</p> <p>warrant [1] - 112:2</p> <p>warranted [2] - 104:7, 112:3</p> <p>waters [1] - 140:22</p> <p>way.. [1] - 145:18</p> <p>ways [4] - 12:24, 40:29, 42:26, 43:12</p> <p>weakness [1] - 115:11</p> <p>wealth [1] - 57:3</p> <p>weather [1] - 6:17</p>	<p>walked [1] - 17:15</p> <p>Walter [9] - 69:20, 71:26, 77:18, 78:24, 83:2, 84:18, 116:7, 140:21, 141:2</p> <p>wants [2] - 6:10, 12:15</p> <p>warrant [1] - 112:2</p> <p>warranted [2] - 104:7, 112:3</p> <p>waters [1] - 140:22</p> <p>way.. [1] - 145:18</p> <p>ways [4] - 12:24, 40:29, 42:26, 43:12</p> <p>weakness [1] - 115:11</p> <p>wealth [1] - 57:3</p> <p>weather [1] - 6:17</p>	<p>year [7] - 69:24, 74:16, 74:17, 79:12, 86:4, 114:25, 115:29</p> <p>years [6] - 11:25, 15:22, 17:13, 56:22, 67:14, 67:15</p> <p>yes/no [1] - 150:2</p> <p>yes/no' [1] - 58:20</p> <p>yourself [3] - 59:18, 68:8, 80:18</p>	<p>year [7] - 69:24, 74:16, 74:17, 79:12, 86:4, 114:25, 115:29</p> <p>years [6] - 11:25, 15:22, 17:13, 56:22, 67:14, 67:15</p> <p>yes/no [1] - 150:2</p> <p>yes/no' [1] - 58:20</p> <p>yourself [3] - 59:18, 68:8, 80:18</p>