

TRIBUNAL OF INQUIRY INTO PROTECTED DISCLOSURES MADE UNDER
THE PROTECTED DISCLOSURES ACT 2014 AND CERTAIN OTHER
MATTERS FOLLOWING RESOLUTIONS PASSED BY DÁIL ÉIREANN AND
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CHAIRMAN OF DIVISION (P): MR. JUSTICE SEAN RYAN,
FORMER PRESIDENT OF THE COURT OF APPEAL

HEARING HELD IN DUBLIN CASTLE
ON FRIDAY, 22ND JULY 2022 - DAY 190

190

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Services certify the
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their stenographic notes
in the above-named
action.

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I N D E X

PAGE

SUBMISSION BY MR. COSTELLOE	6
SUBMISSION BY MR. FITZGERALD	36
SUBMISSION BY MR. MCGARRY	62
SUBMISSION BY MR. HARTY	64
SUBMISSION BY MR. CARROLL	69

1 THE HEARING RESUMED, AS FOLLOWS, ON FRIDAY, 22ND JULY
2 2022:

3
4 CHAIRMAN: Good morning, everybody. Good morning,
5 Mr. Barry. 10:31

6
7 The reason we're here this morning is that the tribunal
8 would like the help of the various teams. We've have
9 received the submissions on time and thank you very
10 much for doing that, we appreciate that it's not the 10:31
11 easiest thing with other demands on counsel's time and
12 lawyers' time in general, it's not the easiest thing to
13 do. We appreciate that, thank you very much for that.

14
15 Obviously we're not here to dictate to people what they 10:32
16 can say or don't say, but what would be particularly
17 helpful to us would be have comments by the various
18 team leaders on the other submissions. In other words,
19 the people have not seen, you haven't seen the others'
20 submissions at a time when you had an opportunity to 10:32
21 comment on them, so what we would find valuable is to
22 have your comments. But that is not a way of dictating
23 what you say; you may wish to emphasise something you
24 have previously thought of or that you think wasn't
25 highlighted enough, so anyway. 10:32

26
27 So the way that we propose to do it is to start with
28 Mr. Barry's team and go around the houses, so to speak,
29 and I propose to come back to Mr. Costelloe, if there

1 is anything that has arisen that he hasn't an
2 opportunity of dealing with, he can do so. And
3 realistically if anybody else hasn't had an opportunity
4 we will go around, to a sufficient extent, to make sure
5 that everybody is happy with that.

10:33

6
7 So, Mr. Costelloe, if you are comfortable, would you
8 like to make whatever submissions you feel are
9 appropriate?

10
11 SUBMISSION BY MR. COSTELLOE:

10:33

12 MR. COSTELLOE: Thank you very much, Chairman. I have
13 had the benefit of the assistance of your legal team
14 who had given me forewarning or foreknowledge of the
15 fact that this was likely to be the way in which the
16 tribunal would want us to approach oral submissions
17 today and of course we have transcripts from prior
18 modules, so I knew that this was how you would likely
19 want us to deal with things today. And I can say, and
20 I want to stress that this is not because we feel in
21 any way constrained, timewise, whatsoever, we do not,
22 we fully appreciate the amount of time that has been
23 given to all of the issues, but with that observation,
24 I am going to say that my plan is to be very brief;
25 largely because you will have seen that the written
26 submissions -- I don't know if you have had a chance to
27 read them or not yesterday, but that the written legal
28 submissions which have been filed on my client's behalf
29 are extensive, I hope you would agree - they certainly

10:33

10:33

10:34

1 are lengthy, whether you accept that they are extensive
2 or not is obviously a matter for you, but they are
3 certainly lengthy - and we feel that we have addressed
4 the issues as substantially as we can in those
5 submissions. So really, all I am about to do now is to 10:34
6 address one or two matters which we noted in the
7 written submissions of my friends' clients and
8 obviously then of course if I can give any assistance
9 to the Chair I will try and do so.

10
11 Again in that context, before I go any further, we took 10:34
12 the view that there was very little benefit in
13 identifying where we said X and where another party or
14 parties said Y and merely making the submission that
15 you should choose X over Y, because, frankly, first of 10:35
16 all, that is not our job. That is obviously your job,
17 Chairman, respectfully, you will have to decide on the
18 evidence you heard, how you resolve those conflicts,
19 both in relation to submissions and where they arise in
20 relation to in relation to conflicts in relation to the 10:35
21 evidence.

22
23 what I do want to say at the outset, though, is that
24 with the exception of one of the other parties it seems
25 to me, and I am making this submission to you, that as 10:35
26 regards item 1 of the schedule of items which is
27 whether or not the various complaints listed in item 1
28 can amount to protected disclosures, I am submitting to
29 you that it seems that all of the parties, bar one -

1 obviously I'm excluding from that submission your own
2 counsel, that's not a matter for me to comment upon -
3 but all of the parties representing people who have
4 given evidence are parties who are concerned with the
5 module, bar one, seem to me to be of the view that they 10:36
6 can and should be considered to be protected
7 disclosures.

8
9 Now, obviously, it is apparent that the legal team for
10 Mr. Comyns has taken a different view. They are 10:36
11 perfectly entitled to do so. I just wish to flag that
12 they do so without reference to the more recent Supreme
13 Court decision of Baranya, which is referred to
14 extensively in the written legal submissions which we
15 have filed and also in the written legal submissions 10:36
16 filed on behalf of An Garda Síochána. And it is worth
17 observing, I think, given that that particular party,
18 An Garda Síochána, represent so many people who are
19 concerned with this module, that they have taken the
20 view that they are indeed protected disclosures also. 10:36

21
22 I don't want to go into it in any great deal detail,
23 because we have expended quite a bit of effort and
24 certainly a great deal of ink in setting out our
25 position in the written submissions as to why we are of 10:37
26 that view. But it is our respectful submission to you,
27 Chairman, that based on the Baranya decision and in
28 light of the legislation and indeed prior findings of
29 the tribunal itself, that the various complaints

1 itemised in item 1 can in fact amount to protected
2 disclosures. And then, you will have to decide,
3 obviously, whether or not you accept that submission
4 and if you do, what does that mean from the point of
5 view of the ultimate conclusion that you must draw. 10:37

6
7 As I say, finally, on that point, it is our submission
8 that frankly there can be no real merit to a suggestion
9 that the complaints beginning 2nd October 2012 and
10 thereafter, as itemised in item 1, could amount to 10:37
11 protected disclosures as defined by the legislation and
12 interpreted by the Supreme Court.

13
14 There is another issue then which follows immediately
15 as to whether or not matters arising from incidents or 10:38
16 matters arising prior to the first of those dates,
17 being 2nd October 2012, can in fact be considered by
18 the tribunal. It seems to be unanimously the point of
19 view of all of my friends that their clients are of the
20 view that they cannot. We have, I hope, put out a 10:38
21 slightly more nuanced position. It is, if I summarise
22 it this way, to say that while many of the complaints
23 which arise prior to October 2012 are included in that
24 first complaint, that substantial document, the
25 complaint of the 2nd October 2012, we're of the view 10:38
26 that those complaints are admissible to the extent that
27 they're of assistance to you in carrying out your task
28 in determining whether Sergeant Barry was in fact
29 targeted or discredited, because they go to the state

1 of mind of various parties and various people.

2
3 Of course the primary factor here is the regulation
4 warning issued to my client by Superintendent Comyns,
5 as he then was, Mr. Comyns now, wherein he refers to 10:39
6 two occasions upon which he says that my client was
7 late and as a result he issued a certain regulatory
8 warning.

9
10 I want to pause there for a moment, you may have heard 10:39
11 it in the manner in which I laid emphasis on the two as
12 opposed to one, because it seems to us that in the
13 submissions filed on behalf of Mr. Comyns much is said
14 about the second of the two occasions upon which he was
15 allegedly late, but nothing at all is said about the 10:39
16 first. And of course that particular regulation
17 warning, if you will, or regulation disciplinary
18 matter, refers to two instances where it is alleged
19 that he was late. My client gave evidence, and indeed
20 it is within the papers, in any event, that on the 10:40
21 first occasion he wasn't late at all, that he was there
22 talking to a member of the public and that wasn't
23 something that was addressed on the submissions filed
24 by Mr. Comyns' legal team on his behalf.

25
26 Then of course, and I am not going to go into this in
27 any great detail, it is a matter upon which you
28 yourself interjected at one stage during the course of
29 the oral evidence, Chairman, but my client's position

1 remains that he was late on the second occasion but it
2 was due to reasons entirely outside his control, in
3 that the gentleman who was giving him a lift to work
4 had car trouble and they had no alternative but to
5 bring the car to the garage and then make their way to 10:40
6 work.

7
8 And what flows from that, is that my client is
9 submitting to you that how those two instances were
10 dealt with by Superintendent Comyns is indicative of 10:40
11 the state of mind of Superintendent Comyns and from
12 which you can infer how Superintendent Comyns viewed my
13 client at a time where my client was very clearly
14 putting it about that he was not prepared to -- or he
15 viewed the manner in which he had been directed to deal 10:41
16 with a serious incident investigation preceding those
17 dates as being something that put him in conflict with
18 Superintendent Comyns, and it is our position that
19 everything that flows thereafter can be viewed in that
20 context. And that is what we say about item 2. 10:41

21
22 Dealing somewhat more specifically with the submissions
23 made on behalf of An Garda Síochána, I have to say that
24 I was a little bit surprised when I noted that there is
25 an assertion being made, it's quite clearly, in fact 10:41
26 it's expressly being made in those submissions, that
27 that Mr. Barry is repositioning himself now during his
28 submissions to the tribunal and during his evidence in
29 saying that he would have been willing to transfer to

1 Mallow - sorry, I should have said at the outset that I
2 am dealing with that particular issue right now - but
3 that the legal team on behalf of An Garda Síochána take
4 issue with that because they say that this is just a
5 modern development, a recent development rather, it's a 10:42
6 repositioning by Mr. Barry to try and explain away his
7 actions, and it's something that you should discount,
8 they are saying that in fact the actual case is that he
9 was never at any time prepared to move whatsoever and
10 that was just something that was set in stone. 10:42

11
12 Now, we would make a couple of points: one general, one
13 in a general context and one in a specific context.
14 The first being that there are undoubtedly instances
15 where a tribunal of fact, be it a court or a tribunal 10:43
16 such as this, would have to make determinations based
17 on express knowledge, matters do not need to be
18 inferred, matters which are apparent based on either
19 documents or testimony or other real evidence that may
20 be available to the fact-finder, but equally, and this 10:43
21 is such a case in our submission, there must be
22 instances where the finder of fact will have to make
23 its determination based on matters that it can infer
24 from the evidence that it has before it. And indeed,
25 it would be most unusual to ever encounter, we would 10:43
26 submit, a situation where there would be letters
27 setting out clearly a plan to victimise or target
28 somebody as a result of a complaint that they had made,
29 or matters of that ilk. And certainly, that's not what

1 we are saying has happened here. But what we are
2 saying is that contrary to the suggestion, indeed the
3 submission made on behalf of the legal representatives
4 of An Garda Síochána that there's no evidence that the
5 actions taken, identified by Mr. Barry as being taken 10:44
6 against him as a result of his protected disclosures,
7 we say that in fact you have to infer that various
8 acts, various events that occurred after those
9 protected disclosures were done as a result of the fact
10 that he was making those complaints, those protected 10:44
11 disclosures.

12
13 That's a submission that we make in general. And
14 again, I would make a more specific submission in
15 relation to what I said to you a moment ago about the 10:44
16 contention that Mr. Barry is repositioning himself now,
17 or that perhaps could be viewed as a somewhat delicate
18 way of saying that he has come up with a new story now
19 in order to justify his behaviour back then, and this
20 is in the context of whether or not he was ever 10:44
21 prepared to accept a transfer.

22
23 The submissions filed on behalf of An Garda Síochána go
24 to great length to try and point all of the instances
25 where Mr. Barry in writing, either directly or on his 10:45
26 behalf, said he wouldn't accept a transfer, but that
27 completely misses the oral testimony which you have
28 heard, not just for Mr. Barry, but indeed also from
29 Inspector O'Sullivan which is crucial; which is that

1 he, first of all, would have been willing to accept a
2 transfer if it was not at his expense but rather, at
3 the expense of the public purse and, secondly, that he
4 was never going to put it down in writing, as he
5 testified to you, as he gave in evidence to you, that 10:45
6 he was never going to put it down in writing because he
7 felt that if he did so that could be used against him.
8

9 And while, perhaps, I can understand that An Garda
10 Síochána would highlight the fact that, well, it's just 10:45
11 Mr. Barry saying that now, I cannot understand, nor can
12 I agree with the fact that they don't reference the
13 very crucial testimony of Inspector O'Sullivan who
14 seemed to acknowledge, in my respectful submission, to
15 you that in fact there was a point at which the issue 10:46
16 of being transferred at the expensive of the public
17 purse versus private expense was raised, which does
18 appear to coincide exactly, to get exactly with what
19 Mr. Barry was saying to you a month and a half ago or
20 seven weeks ago, however long it was. 10:46
21

22 So this idea that it is a modern or a recent
23 repositioning I say is just not borne out by that fact.
24

25 In relation to their submission at page 8, paragraph 10:46
26 26, that the investigation was frustrated by
27 Mr. Barry's refusal to cooperate with it, I would
28 respectfully submit that this is unfounded, it's an
29 unfounded suggestion that he somehow acted

1 inappropriately. Because really, what is being said
2 there is that he didn't engage with Inspector
3 O'Sullivan when Inspector O'Sullivan was sent to speak
4 to him about his complaint, and he has said very, very
5 clearly, and I'd submit to you quite understandably, 10:47
6 that the reason he didn't want to engage with Inspector
7 O'Sullivan was because he was of the view that
8 Inspector O'Sullivan was connected with the source or
9 the origin of his issues and the complaints that flowed
10 therefrom Superintendent Comyns. And that, rather than 10:47
11 not wanting to discuss it, he just didn't want to
12 discuss it with Inspector O'Sullivan, that he wanted to
13 speak to somebody who was not connected with
14 Superintendent Comyns.

15
16 I have already dealt with the issue of the suggestion
17 being that Mr. Barry is belatedly repositioning himself
18 in the context of transfer, so I won't mention that
19 again.

20
21 In the context of what's submitted at page 12,
22 paragraph 41 of the submissions on behalf of An Garda
23 Síochána, I don't wish to sound -- this isn't meant
24 pejoratively, but it was the best way I could think of
25 to describe my response to what I read there, because 10:47
26 it seems to me that this assertion at this particular
27 point of the submissions on behalf of An Garda Síochána
28 is rather a blaze description concerning the decision
29 to transfer Mr. Barry to Fermoy.

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It must be apparent, Chairman, that we on behalf of Mr. Barry place very significant emphasis upon the circumstances around the efforts to transfer Mr. Barry to Fermoy Garda Station after the complaints had been made and well after the relevant parties were aware of the fact that Mr. Barry had made these complaints. It's quite surprising, in my respectful submission, that the submissions of An Garda Síochána in this context, while they stress the fact that Chief Superintendent Dillane was looking for a sergeant to fill in a vacancy and he had to work within the resources that he had, and that essentially was all that was going on, it completely, completely ignores the facts that, first of all, Superintendent Comyns stated that he would have been happier, would have preferred a different sergeant to be transferred, Chief Superintendent Dillane stated to you that he took the view that that sergeant shouldn't be transferred because he was a fixture in the local community and that it might be more arduous for that particular sergeant to be transferred but then had to acknowledge that he never even spoke to that sergeant and asked him whether or not he would be willing to transfer. And again, one must recognise that this is happening in the context of everything that has been going on over the preceding year and a half two years. And it seems extraordinary that Chief Superintendent Dillane knowing that Superintendent Comyns would prefer a different

1 sergeant and not even speaking to the particular
2 sergeant who was an alternative, still made the
3 decision that he would transfer Mr. Barry rather than
4 that other sergeant, who is just as amenable, in our
5 respectful submission, to a transfer. 10:50

6
7 Finally on that point we would say, and this is a core
8 submission which we would make in the written legal
9 submissions, that that effort to transfer our client to
10 Fermoy is a flagrant disregard of the medical 10:50
11 certificate which at that point in time everyone knew
12 about and certainly Chief Superintendent Dillane knew
13 about, and it was something that shouldn't have been
14 attempted and the effort that was put in to trying to
15 transfer him to Fermoy at that stage we say is an 10:50
16 effort at victimising him which we say is a result of
17 what had been going on before, specifically the fact
18 that Mr. Barry had made protected disclosures.

19
20 At page 20, and I will just deal with this very 10:50
21 briefly, because again I think it's almost a point that
22 almost doesn't need to be made but nonetheless I find
23 myself having to make it because it is glossed over
24 completely in the written submissions on behalf of An
25 Garda Síochána, where they deal with the issue of the 10:51
26 circular and the fire and what was done or what wasn't
27 done. with all due respect to An Garda Síochána, it's
28 our contention that they have completely missed the
29 point with regard to how they deal with issue in their

1 submissions. Because what we have said is that the
2 fact that Mr. Barry is obviously being criticised for
3 not complying with a circular is clearly wrong and
4 clearly inappropriate, because the circular itself does
5 not place a burden on Sergeant Barry, as he then was, 10:51
6 to comply with the requirements of that circular.

7
8 And there's a significant amount of detail in relation
9 to this set out in our written submissions and you
10 heard quite a bit about it obviously in evidence before 10:51
11 you. But the point being, and this is the last thing I
12 will say on it, is that Mr. Barry was criticised for
13 failing to comply with a requirement in a circular but
14 obviously it has to be the case, in our respectful
15 submission, the circular does not include such a 10:52
16 requirement and, therefore, the criticism is unfair and
17 unwarranted.

18
19 In respect of Mr. Barry's non-attendance at the case
20 conference, just a couple of submissions in respect of 10:52
21 that. Mr. Barry has expressly asked that I would refer
22 the tribunal to the fact that when a new superintendent
23 arrived thereafter, after Superintendent Comyns left,
24 the only requirement was that he attend the PAF
25 meetings and not the morning briefings. I just make 10:52
26 that point, because I have received express
27 instructions to do so.

28
29 But in relation to his non-attendance at the case

1 conference, which is dealt with at page 23 of my
2 friends' submissions, they simply ignore our contention
3 that Chief Superintendent Dillane should have made
4 contact with Mr. Barry about his alleged non-attendance
5 rather than criticising Mr. Barry in an open letter 10:52
6 which goes to HRM. And it certainly must be accepted,
7 in our respectful submission, that Mr. Barry was never
8 given an opportunity at that time to explain why in
9 fact he hadn't attended at the case conference.

10
11 Very briefly in respect of the complaint about Chief
12 Superintendent Kehoe and her investigation. You will
13 readily understand that I am keeping this brief because
14 the significant part of that complaint has been
15 withdrawn and I want to again state that on the record. 10:53
16 But just in relation to the manner in which the
17 investigation was conducted, there is a submission made
18 on behalf of my friends' clients that, well, this is
19 entirely wrong -- I am paraphrasing of course,
20 Chairman, but what it amounts to is that this complaint 10:53
21 is entirely wrong and cannot even be considered by you
22 because Chief Superintendent Kehoe gave evidence to say
23 that she wasn't even aware until she received materials
24 from the tribunal in November 2020 that protected
25 disclosures had been made. Now that is totally missing 10:53
26 the point, which is that she had been tasked as far as
27 back as 2013, I think, with investigating the
28 complaints which had been sent to HRM in October of
29 2012 and, as I've already pointed out at the outset, it

1 has to be, in our respectful submission, the case that
2 that complaint can amount to a protected disclosure.

3
4 So in a nutshell, even though Chief Superintendent
5 Dillane might not have addressed her mind to the fact 10:54
6 that this comes within a legal definition of,
7 quote-unquote, protected disclosures that does not in
8 any way mean that she wasn't aware of the nature of the
9 complaint. She had to have been; she was investigating
10 it. And it's what flows from that in relation to the 10:54
11 timeline of the investigation that we make complaint
12 about.

13
14 So insofar as my friends say that you can't even
15 consider that, you can't even consider that complaint, 10:54
16 what's left of that complaint, we say that that's
17 premised on a misunderstanding of the facts, it does
18 not allow for the fact that Chief Superintendent Kehoe
19 knew what was the nature of the complaints that had
20 been filed on the 2nd October 2012. 10:55

21 CHAIRMAN: Mr. Costelloe, Chief Superintendent Kehoe,
22 assuming -- there's two possibilities: She did know or
23 didn't know. Those are the two exclusive
24 possibilities. There is no other.

25 MR. COSTELLOE: well again, I think what I am saying is 10:55
26 that she knew --

27 CHAIRMAN: Sorry, I understand that.

28 MR. COSTELLOE: Please continue, I beg your pardon,
29 Chairman.

1 CHAIRMAN: No, I invited you to agree that there is
2 only two possibilities: she knew or she didn't know.
3 Are we agreed on that?
4 MR. COSTELLOE: About the nature of the complaints,
5 yes. 10:55
6 CHAIRMAN: About the disclosures.
7 MR. COSTELLOE: Yes.
8 CHAIRMAN: Yes.
9 MR. COSTELLOE: Yes.
10 CHAIRMAN: So... 10:55
11 MR. COSTELLOE: I think the issue, Chairman, is that --
12 CHAIRMAN: I was going to ask you this: If she didn't
13 know about it, does it follow she must be exonerated?
14 If she didn't know about it.
15 MR. COSTELLOE: If she had no knowledge of what we say 10:56
16 amounts to protected disclosures, then that complaint
17 could not stand, I would agree with that.
18 CHAIRMAN: Okay.
19 MR. COSTELLOE: But if you forgive the syllogism,
20 sometimes they are unhelpful -- well, let me put it 10:56
21 slightly differently. What I am saying is that trying
22 to artificially force an interpretation of the words
23 "protected disclosure" onto the state of knowledge of
24 Chief Superintendent Kehoe in the context of what she
25 knew back as far as 2013 versus what she knew when she 10:56
26 received the materials is entirely unhelpful in our
27 respectful submission, because the reality is she knew
28 about what was set out in the complaint of the 2nd
29 October 2012.

1 CHAIRMAN: So knowledge, therefore -- so it doesn't
2 matter whether it's called a protected disclosure.
3 MR. COSTELLOE: That's it exactly. That's our
4 submission.
5 CHAIRMAN: The fact is, you say, that that one is easy, 10:56
6 because she was investigating the complaint, so she has
7 to know the complaint.
8 MR. COSTELLOE: That's our submission exactly,
9 Chairman.
10 CHAIRMAN: Okay. 10:56
11 MR. COSTELLOE: Yes.
12 CHAIRMAN: So that part is clear, you would say. She
13 doesn't have to say 'Is this a protected disclosure?',
14 she doesn't have to say that. But the tribunal does
15 have to say did she delay in her investigation because 10:57
16 these complaints were made?
17 MR. COSTELLOE: Well, that's exactly right.
18 CHAIRMAN: You agree, that's the test?
19 MR. COSTELLOE: What we're saying is that the
20 contention that the door should be shut even before 10:57
21 there is a consideration of whether or not the delay
22 amounts to victimisation or targeting is wrong, whether
23 or not you -- so if you accept that, you then go on to
24 consider, we respectfully submit, you go on to consider
25 if in fact -- 10:57
26 CHAIRMAN: The connection, yes.
27 MR. COSTELLOE: -- first of all, if there is delay, and
28 if there is delay does it amount to --
29 CHAIRMAN: Was there unreasonable/excessive delay and

1 if so, was it related to the matters being complained
2 of by Mr. Barry?
3 MR. COSTELLOE: Yes, Chairman.
4 CHAIRMAN: I see that point.
5 MR. COSTELLOE: And could I say that, I am assuming, 10:58
6 but you can tell me if I made an assumption too far,
7 but I am assuming that it is obvious from the manner in
8 which I have made that submission that I have made no
9 further submission about the nature of the
10 investigation or than what's in the written legal 10:58
11 submissions. All I am saying right now is to deal with
12 the gate keeping point that is being made by my
13 friends.
14 CHAIRMAN: You are responding to the point that is made
15 here. 10:58
16 MR. COSTELLOE: Yes.
17 CHAIRMAN: That it's outside of consideration in
18 limine - I am sorry, I will stop being silly and
19 Latiny - that it is out of consideration from the
20 start. 10:58
21 MR. COSTELLOE: Yes.
22 CHAIRMAN: It doesn't get through the starting point.
23 MR. COSTELLOE: Yes.
24 CHAIRMAN: Okay, I have that point.
25 MR. COSTELLOE: And then finally on this part of my 10:58
26 submission on behalf of my client again, I have
27 specific instruction to mention this, and I do think it
28 is worthwhile just drawing attention to it. It doesn't
29 arise specifically from the manner in which the written

1 legal submissions are set out on behalf of An Garda
2 Síochána, but it does occur to us, and certainly it
3 occurred to Mr. Barry who reiterated it to us in his
4 instructions, that the submissions filed on behalf of
5 An Garda Síochána somewhat gloss over the fact that 10:59
6 while An Garda Síochána, and other parties, have
7 consistently made the contention that Mr. Barry was
8 saying that he wasn't going to go anywhere, that
9 Superintendent Comyns was the one who had to go and
10 that aspect of the testimony is quoted in some of the 10:59
11 submissions before you by some of the parties, it seems
12 to completely ignore the fact that when Mr. Dillane was
13 being cross-examined, not by me, but by counsel on
14 behalf of An Garda Síochána, Day 185, page 95, you will
15 see that he seems to reconsider that position and you 10:59
16 will see that he says in fact, I don't recall whether
17 he actually said anything like that, either in April of
18 2012 -- sorry in October of -- the 13th October 2012 or
19 the 9th April 2013. And it's set out quite clearly in
20 page 95 and 96 of Day 185 what he actually had to say 11:00
21 about that.

22
23 So insofar as my friends place reliance on other parts
24 of the evidence which refers to people saying he very
25 clearly said he wasn't the one who was going to go, it 11:00
26 was Superintendent Comyns had to go, that seems to be
27 contradicted by the man himself when he's giving his
28 evidence in cross-examination.

29 CHAIRMAN: I think it was Inspector O'Sullivan who gave

1 that evidence.

2 MR. COSTELLOE: What did I say? Sorry, did I say
3 Dillane?

4 CHAIRMAN: I think you're absolutely right,
5 Mr. Costelloe. But you are right in saying that Chief 11:00
6 Superintendent Dillane did not say that Mr. Barry said
7 'I am not going anywhere, the super has to go', or
8 words to that effect.

9 MR. COSTELLOE: Yes.

10 CHAIRMAN: You're absolutely right in saying that. 11:00
11 That Chief Superintendent Dillane, at least I will be
12 corrected if I am wrong, but I understood that he did
13 not say that, but Inspector O'Sullivan --

14 MR. COSTELLOE: Yes.

15 CHAIRMAN: -- who was at the same meeting said, he gave 11:01
16 that evidence.

17 MR. COSTELLOE: Yes. Sorry, I beg your pardon. I am
18 grateful for your interjection, because obviously I was
19 very clumsily making my points.

20 CHAIRMAN: No, no, I was trying to clarify it for 11:01
21 myself, Mr. Costelloe, no.

22 MR. COSTELLOE: Well again, I think it's very helpful
23 because the person who convenes the meeting, the person
24 who is there really, I'm not speaking pejoratively, but
25 Inspector O'Sullivan was there as prover, he was there 11:01
26 as a witness as to what was going on.

27 CHAIRMAN: The principle, you say --

28 MR. COSTELLOE: The principle: In cross-examination by
29 Mr. O'Higgins at page 95 of Day 185 says actually I

1 don't remember him saying any such thing.

2 CHAIRMAN: Okay, thank you very much.

3 MR. COSTELLOE: Yes. I have already dealt with the
4 issues of transfers and what Inspector O'Sullivan said
5 about recalling that, so I won't labour that point any 11:02
6 further.

7
8 In respect of the submissions filed on behalf of
9 Superintendent Comyns, I have already dealt with the
10 Regulation 10 notice and I am not going to go back over 11:02
11 that again, except to say that it seems to us that they
12 are all based, all of the other submissions and
13 specifically the submissions on behalf of
14 Superintendent Comyns, refer to the second late
15 incident, not both of them and the fact that Mr. Barry 11:02
16 gave an explanation for both and in fact said that he
17 wasn't actually late at all the first time, what we say
18 about that.

19
20 I have already addressed the issue about whether or not 11:02
21 they can be protected disclosures. And again, it
22 really does seem to me, Chairman, you may disagree
23 obviously, but it seems to me, and I am making the
24 submission to you, that it is only Superintendent
25 Comyns who is suggesting that the various complaints 11:03
26 set out and itemised as item 1, in the schedule of item
27 1, could not amount to protected disclosure. And
28 regrettably that submission upon behalf of
29 Superintendent Comyns doesn't address the jurisprudence

1 of Baranya, the most recent decision by Mr. Justice
2 Hogan in the Supreme Court on the issue.

3 CHAIRMAN: I think anybody can be forgiven about not
4 knowing about Baranya, because the tribunal itself
5 wasn't aware of Baranya, and we gave a decision in a 11:03
6 preliminary case, in another hearing, on the 12th
7 November in which we excluded certain encounters as
8 being protected disclosures and then at the submissions
9 they referred to Baranya, which was delivered on the
10 1st December of 2021. We came out on the 12th 11:04
11 November, at least the decision was made before the
12 Baranya decision was made. So that demanded a
13 re-consideration.

14 MR. COSTELLOE: Yes, Chairman, I won't make a big deal
15 about it except to say that the very last transcript of 11:04
16 the last module deals at length with Baranya. So
17 frankly, six months before you heard any evidence in
18 relation to any evidence -- or three months before you
19 heard any evidence in relation to this particular
20 module Baranya was well known to everybody. But look, 11:04
21 we made that point.

22 CHAIRMAN: In a word, you say that submission made on
23 behalf of Superintendent Comyns is inconsistent with
24 Baranya v. Rosderra Irish Meats Company. Baranya is
25 what we will call it. You say that is inconsistent 11:05
26 that decision of the Supreme Court.

27 MR. COSTELLOE: Yes, and I obviously don't speak for my
28 friends who represent other parties, but I have made
29 the point to you that we don't appear to be alone in

1 that submission, so that's all I will say about that.

2 CHAIRMAN: Okay.

3 MR. COSTELLOE: At page 15 of the submissions filed on
4 behalf of Superintendent Comyns there is the issue --
5 there is the assertion that Superintendent Comyns had 11:05
6 nothing to do with putting in place temporary workplace
7 arrangements. This is in the context of the medical
8 certificate and what flowed therefrom. This is one of
9 those instances where things are really quite black and
10 white, or binary, however one wishes to deal with it. 11:05
11 All I am going to say is that we absolutely do not
12 accept that submission and we have made the point in
13 our own written legal submissions that he was the line
14 manager, he was well able to put in place temporary
15 workplace arrangements and the very fact that 11:06
16 ultimately Inspector O'Sullivan is interposed between
17 himself and Mr. Barry indicates that that is something
18 that could have been done much, much earlier on, which
19 may very well have obviated the need for you to have to
20 heard seven weeks' worth of evidence and this becoming 11:06
21 the issue that it has become. But regrettably we just
22 can't simply accept that assertion at page 15 of the
23 submissions on behalf of Superintendent Comyns.

24
25 In relation to the annual leave application, again 11:06
26 there is a submission made that Superintendent Comyns
27 never refused to grant annual leave. We submit that on
28 the evidence that's factually incorrect. He did. He
29 stated in correspondence that if he was to reconsider

1 whether to grant leave he will need details provided of
2 the cover and then expresses his dissatisfaction with
3 the detail of the cover that's provided.

4
5 Again the submissions make the point that there were 11:07
6 issues with cover provided for the 13th July 2013, but
7 if this was the case we submit how can Superintendent
8 Comyns justify his refusal of leave for all of the
9 other days upon which it was sought? That's what we
10 say about that. 11:07

11
12 In relation to the Haddington Road aspect of the
13 submissions on behalf of Superintendent Comyns at page
14 28, we respectfully say that this submission made on
15 behalf of Superintendent Comyns seems to misunderstand 11:07
16 the point that we are trying to make on behalf of
17 Mr. Barry, which was that he had to have his hours, his
18 Haddington Road hours pre-approved by Superintendent
19 Comyns or Inspector O'Sullivan, whereas other gardaí
20 could get pre-approved by the sergeant in charge and 11:07
21 then have hours certified later by Superintendent
22 Comyns or Inspector O'Sullivan.

23
24 There is a conflict in the evidence there, Chairman. I
25 am just going to pause for a moment and acknowledge 11:07
26 that there is a conflict in the evidence there.
27 Ultimately that's for you to resolve. I say no more
28 about that, except it is clearly part of your function,
29 in my respectful submission.

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I would draw your attention to the various documents, including the A84s, and in particular those which were put to the witness dealing with the prearranged operation in respect of the Road Safety Authority, and in the context of what was being said by the witness at the time, that really all that was happening was that they would get pre-approval, they would go out and do it and then the form would be filled in, because it would arise on an urgent level. And that does not appear in any way to work in the context of that particular operation as is described on that particular form. This was a preplanned operation and there was no suggestion that it arose as an emergency.

At page 31 of the same submissions there's a submission that deals with the unit changes. Certain aspects of the original complaints by Mr. Barry were withdrawn and were not dealt with at all in evidence and obviously I am making no submission at all about that right now, but what we do say is that this particular submission at page 31 on behalf of Superintendent Comyns does not deal with the movement of two gardaí off his unit, and what we say was the inability of Superintendent Comyns to give an explanation why those gardaí were moved from unit B, Mr. Barry's unit, which we say was a result of what was going on at the time; the victimisation of Mr. Barry in light of the complaints that he had made. And that's what we say about that.

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very, very briefly, Chairman, in respect of Inspector O'Sullivan, a point is made that - and this is at page 7 of the submissions on his behalf - he was not directed to attend at the meeting on the 29th March 2013 by any person. We submit, Chairman, that that is very hard to understand, it's very difficult to account for why he would have been there otherwise, the idea that -- well, again, this is dealt with at length in our submissions and I don't want to traverse ground that you're going to have to deal with anyway in the written submissions. But we say that there would be very little point indeed at calling in at nine o'clock to say hello when the unit would have been parading in Fermoy, unless it was a pre-orchestrated effort at finding my client and speaking to him, which is obviously a finding of fact that you will or won't make in light of the conflict of the evidence that we say arises from the circumstances and the actual meeting versus the evidence of Inspector O'Sullivan.

I don't feel that there's a great deal to be gained by going into what has been said about Inspector O'Sullivan's engagement with Dr. Kiely, because frankly what is set out at page 12 and thereafter in the written submissions filed on behalf of Inspector O'Sullivan is that really Dr. Kiely's account, both in her material supplied to you and her oral evidence, should be discounted, because frankly, you know,

1 everything that she said is based on the notes that she
2 took way back then. Now, aside from the fact that
3 she's a doctor, apparently in good standing, who made
4 herself available to give evidence and to respond to
5 cross-examination, which should go a long way towards 11:11
6 convincing, I would respectfully submit, the tribunal
7 that she's telling the truth and she is accurately
8 recalling what was happening at the time, the
9 submission being made there completely flies in the
10 face of the fact that, and somewhat ironically flies in 11:11
11 the face of the fact that Inspector O'Sullivan's --
12 they suggest that Inspector O'Sullivan's account should
13 be preferred over Dr. Kiely, but Inspector O'Sullivan
14 didn't take a single note, didn't make a single record
15 in relation to his engagement with Dr. Kiely. 11:12

16
17 So you should discount what Dr. Kiely has to say
18 because everything she is saying is premised on notes
19 that she has taken at the time, whereas you should
20 believe everything that Inspector O'Sullivan has to say 11:12
21 because he didn't take any notes, it seems to us to be
22 entirely illogical and is a point that we submit should
23 be discounted.

24
25 Finally, Chairman, just in respect of Superintendent 11:12
26 Quilter, one very brief point is that, at page 8 of the
27 submissions in respect of Superintendent Quilter, the
28 point is made that he didn't know the specifics of what
29 Mr. Barry had alleged against Superintendent Comyns

1 until October 2014. Again this point is covered in our
2 written submissions, but a person can be targeted --
3 one person can target another for a protected
4 disclosure even if they do not know all of the specific
5 details of what was contained in the disclosure. And 11:12
6 that seems to be well settled law and accordingly we
7 would suggest that that submission made at page 8 on
8 behalf of Superintendent Quilter is unsustainable.

9
10 So that is all I wish to say. Thank you. 11:13

11 CHAIRMAN: Can you help me with one point,
12 Mr. Costelloe?

13 MR. COSTELLOE: I will certainly try.

14 CHAIRMAN: You said in relation to Mr. Barry's attitude
15 to transfer to Mallow -- 11:13

16 MR. COSTELLOE: Yes.

17 CHAIRMAN: -- and you made a submission about his
18 position in relation to a written indication of such,
19 when you made that submission --

20 MR. COSTELLOE: Yes. 11:13

21 CHAIRMAN: -- but you also said that the evidence of
22 Inspector O'Sullivan corroborated that.

23 MR. COSTELLOE: Yes.

24 CHAIRMAN: Could you just refer me to the evidence of
25 Inspector O'Sullivan? 11:13

26 MR. COSTELLOE: I will get you the exact pages.

27 CHAIRMAN: Yes.

28 MR. COSTELLOE: It's in both the direct examination
29 conducted by your counsel --

1 CHAIRMAN: Yes.

2 MR. COSTELLOE: -- and I picked up on it the following
3 morning --

4 CHAIRMAN: That is fine.

5 MR. COSTELLOE: -- the following afternoon almost 11:13
6 immediately.

7 CHAIRMAN: Just remind me about it.

8 MR. COSTELLOE: I will get it for you, Chairman, I have
9 them here.

10 CHAIRMAN: If you can remind me what he said, or the 11:14
11 general nature. I mean, I don't expect you to be able
12 to --

13 MR. COSTELLOE: Yes. Well, I will get you the exact
14 reference, but essentially what Inspector O'Sullivan
15 said, first of all, it emerged almost as a -- I 11:14
16 wouldn't say stream of consciousness, but it emerged
17 somewhat incongruously in the direct evidence that he
18 was giving your counsel, wherein he recalled that there
19 had been some mention of my client not being prepared
20 to move unless it was at the public purse expense. 11:14
21 That he referenced that.

22 CHAIRMAN: Yes.

23 MR. COSTELLOE: And then I picked up on that in
24 cross-examination the next day, and we might try and
25 find that exact reference, and I put it to him and he 11:14
26 agreed that he had some recollection of that.

27 CHAIRMAN: And where is the Mallow after that?

28 MR. COSTELLOE: Sorry, I didn't mean to say that it was
29 Mallow specifically.

1 CHAIRMAN: Sorry, what you said was that Inspector
2 O'Sullivan's evidence offered confirmation or
3 corroboration, and you're saying in a general way --
4 MR. COSTELLOE: Yes.
5 CHAIRMAN: -- that this was -- I mean, I just want to 11:15
6 make sure I have the point.
7 MR. COSTELLOE: No, I understand your question more
8 fully now, Chairman. Sorry, I misunderstood. The
9 Mallow part of it is Mr. Barry, that is his evidence.
10 CHAIRMAN: Yes. 11:15
11 MR. COSTELLOE: But the part about --
12 CHAIRMAN: Yes.
13 MR. COSTELLOE: Essentially --
14 CHAIRMAN: Let me stop you for a second.
15 MR. COSTELLOE: Yes. 11:15
16 CHAIRMAN: Obviously Mr. Barry made a significant point
17 about not being willing to go at his own expense and
18 that any movement would have to be on the basis of
19 public expense.
20 MR. COSTELLOE: Yes. 11:15
21 CHAIRMAN: And what you are saying is that Inspector
22 O'Sullivan confirms in some shape or form, confirms the
23 part about the public expense as opposed to private
24 expense and thereby he at least confirms a part of
25 Mr. Barry's contention in evidence, is that right? 11:15
26 MR. COSTELLOE: Yes, that is exactly right, Chairman.
27 I couldn't put it any higher than that, but that is a
28 submission.
29 CHAIRMAN: That is very helpful.

1 MR. COSTELLOE: I am grateful to Mr. Perry, I do have
2 it here but it would take me a while to find it, it is
3 Day 187, pages 121 and going into 122.

4 CHAIRMAN: Thanks very much. I just wanted to clarify
5 that, because my note said, my note said reminded me of 11:16
6 the evidence on this, and you have done that, thank you
7 very much.

8 MR. COSTELLOE: Thank you.

9 CHAIRMAN: Thank you, Mr. Costelloe. Now I propose to
10 move to An Garda Síochána next, unless there is any 11:16
11 objection to that.

12
13 SUBMISSION BY MR. FITZGERALD

14 MR. FITZGERALD: Thank you, Chairman. John Fitzgerald
15 on behalf of the commissioner. I appear with 11:16
16 Mr. O'Higgins and Mr. McGuinness who are present here
17 today and obviously the court is aware that there is a
18 wider team who have been here on other days. It is on
19 behalf of those obviously that submissions were filed.

20
21 I note the Chair's position in relation to the purpose
22 of this morning's hearing being obviously not to simply
23 rehash those submissions but to reply. And on behalf
24 of the commissioner I only propose to reply to the
25 submissions that have been filed on behalf of 11:17
26 Mr. Barry.

27
28 In relation to the submissions that have been filed on
29 behalf other parties I don't propose to reply, but

1 obviously if the Chair is of the view that we are
2 missing anything there we are happy to address any
3 points as we go along.

4
5 In terms of, before I go through, I suppose, 11:17
6 Mr. Barry's submissions, I would, however, ask if I
7 could make a few very brief points, because I think
8 there's a number of points that could be made in
9 relation to each and every issue, and rather than doing
10 so, it might perhaps save time -- 11:17

11 CHAIRMAN: It is your choice how you present your
12 argument.

13 MR. FITZGERALD: Yes.

14 CHAIRMAN: Yes, I indicated the particular thing that
15 would be helpful to us. So proceed as you see fit, 11:18
16 Mr. Fitzgerald.

17 MR. FITZGERALD: I am obliged, Chairman. And some of
18 these points do in fact appear in our submissions but
19 it is only to avoid --

20 CHAIRMAN: Don't qualify or explain. 11:18

21 MR. FITZGERALD: The first point: we just wish to make
22 it clear on behalf of the commissioner that the
23 situation that developed in Mitchelstown and Fermoy
24 Garda Station between the personnel there was a
25 difficult and complex one, and was one that in the 11:18
26 context of a disciplined force created obvious
27 difficulties in my respectful submission. And, in
28 other words, in a hierarchical organisation where an
29 inferior officer refuses to work with one of his

1 superior officers, that's always going to create a
2 difficulty. And in terms of how the force sought to
3 deal with that, there is a huge volume of material that
4 the tribunal has been asked to consider, and it is the
5 commissioner's position that on any reasonable reading 11:19
6 of that huge volume of material, that what comes out of
7 it is strenuous and extensive efforts on behalf of
8 various levels of the force up to a very high level to
9 address this, and I don't say this pejoratively, but it
10 was a local difficulty and to address that difficulty, 11:19
11 and to seek to accommodate both parties or both sides
12 if I can put it that way. And in short, I suppose, if
13 the volume of correspondence demonstrates anything it
14 is respectfully submitted on behalf of the
15 commissioner, is that it demonstrates this: It 11:20
16 demonstrates those efforts.

17
18 It is perhaps easy, with the benefit of hindsight some
19 years later, to cavil at certain aspects of how things
20 were done, and I wish to make it clear before saying 11:20
21 this, it is the position of the commissioner that
22 everything was done to the best of the force's ability,
23 and no criticism is accepted. But if criticism is
24 found subsequently, it must be considered in the
25 context of a difficult situation, in which all parties, 11:20
26 including, as I said, very senior members of the force,
27 were doing their best to deal with this difficult
28 situation. And it was a difficulty that wasn't aided
29 in the commissioner's submission by Mr. Barry's refusal

1 to consider what will be asserted were reasonable
2 accommodations, and in fact it was a situation that
3 operated not just to the detriment of Mr. Barry, as he
4 perceives it, but in fact it was a difficulty for a
5 wide number of members of the force.

11:21

6
7 Obviously in considering how those members dealt with
8 it, I am sure I don't need to remind the tribunal that
9 the tribunal's not effectively sitting here as an
10 appellate court to decide if everything was done right,
11 but to consider obviously the sole issue of whether
12 those efforts to deal with the situation amounted to
13 some form of targeting or discrediting of Sergeant
14 Barry, as he then was.

11:21

15
16 In that regard we say obviously the evidence is key.
17 And Mr. Costelloe in his remarks to the Chair made the
18 point, well, if you look at the paperwork, you're not
19 going to see evidence of a plan. I have to say, I have
20 been involved in cases where that does appear, but it
21 doesn't here. And instead, I think equally to simply
22 say, well, the paperwork mightn't support the case I am
23 making, if that's what is being said on behalf of
24 Mr. Barry, but sure it wouldn't and that's the end of
25 the matter, well that can never be right in my
26 respectful submission. That, if there's a lack of
27 evidence, that is something that the tribunal must
28 consider. And in fact what seems to be put forward in
29 support of Mr. Barry's case is that the evidence is

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11:22

1 effectively the subsequent events and that they are in
2 itself suggestive of a campaign.

3
4 well, again, without dealing with this in a granular
5 way in respect of each of the suggested elements of 11:23
6 that claim, it's the commissioner's position that in
7 all of those cases it involves a considerable leap
8 between what happened and what is alleged to be

9 targeting. Because one submission that the
10 commissioner, or one submission on behalf of Mr. Barry 11:23
11 that the commissioner would agree with, is the
12 suggestion at paragraph 18 of his submissions that
13 targeting is intentional conduct.

14
15 So efforts to address a difficult situation, that with 11:23
16 the benefit of hindsight could perhaps in a council of
17 perfection have been done better, are very, very far
18 away from evidence of intentional conduct. And that is
19 an omnibus, I suppose, position of the commissioner
20 that applies equally to all of the specific complaints 11:24
21 made.

22
23 The fact that Mr. Barry believed that those subsequent
24 encounters amounted to some form of targeting is not
25 evidence. His subjective belief is no doubt 11:24
26 regrettable, and, as I said, on behalf of the wider
27 force created real difficulties, but it is not in and
28 of itself evidence of such intentional conduct.

29

1 The perhaps third general point I would wish to make,
2 and this is made in our submissions, it's in relation
3 to the relevance of the pre-2012 matters. Just, we
4 have referred in our submissions to some of the conduct
5 that went on before October 2012 and we have done so in 11:25
6 a very refined way, or a very particular way, in that
7 it is respectfully submitted that those instances or
8 those incidents can be of assistance, in our respectful
9 submission, to the Chair in considering the
10 reasonableness of the conduct later. But they are not, 11:25
11 the validity or otherwise of those complaints is not a
12 matter for consideration by the tribunal.

13
14 And I suppose specifically in that context in which we
15 say it might be relevant, is that Mr. Barry clearly 11:25
16 seemed to have a difficulty with Superintendent Comyns
17 from the time of his arrival in the station,
18 Superintendent Comyns had a task to do which was coming
19 on high in limited budgetary circumstances and this
20 seems to have created a tension, but it is a tension 11:25
21 that Mr. Barry himself dates back to a previous attempt
22 to remove him or to transfer him in 2004. We say they
23 are matters that can be properly in our respectful
24 submission considered by you, Chairman, in considering
25 the reasonableness of what happened later. And I 11:26
26 suppose also, most particularly, the reasonableness of
27 Mr. Barry's belief that the later interactions with
28 Superintendent Comyns and Chief Superintendent Dillane
29 were all related to the protected disclosures. In

1 fact, we would say these pre-2012 incidents are
2 strongly suggestive of the opposite. He had a
3 difficult relationship with Superintendent Comyns that
4 predated and was entirely separate to any difficulty
5 that he claims arose in response to his protected
6 disclosures.

11:26

7
8 The final general point I wish to make, is that we
9 accept, we have no difficulty with the point made on
10 behalf of Mr. Barry that general awareness on behalf of
11 members of the contents of a disclosure is enough. We
12 don't make the case that the parties should be aware of
13 the details in order for it to constitute an admissible
14 complaint.

11:26

15
16 I just simply observe, however, in that regard that in
17 the light of that, it's perhaps surprising, having made
18 that submission, that Mr. Barry did, that it's one with
19 which we agree, at paragraph 50 of Mr. Barry's
20 submissions he then cavils with Mr. Dillane's evidence
21 that he was not aware of the detail and says, well, in
22 fact, he was. We simply say two things in relation to
23 that: Firstly, if it is not relevant one wonders why
24 the point is being made; but, secondly, and perhaps
25 more importantly, the evidence put forward to
26 contradict the evidence of Mr. Dillane on that point is
27 a report of the 27th April 2015, which doesn't contain
28 anything like the detail that's asserted in the
29 submissions. I just simply make that point for the

11:27

11:27

11:27

1 sake of completeness.

2
3 So to deal then with the individual instances or the
4 individual issues. Obviously on behalf of the force,
5 the commissioner, I propose to only deal with issues 3 11:28
6 and 4 and in fact some of those I don't propose to deal
7 with at all, they're dealt with in our submissions.
8 But just, the points made obviously apply to all. But
9 insofar as Issue 3A, the issue of ordinary sick leave,
10 is concerned, Mr. Barry at paragraph 58 of his 11:28
11 submission says, well, the difficulty with this is that
12 Mr. Dillane, while he couldn't initially, and while the
13 initial classification of the leave predates the
14 matters that the tribunal is concerned with, the real
15 fault is in not revisiting it later. And I just draw 11:29
16 the Chair's attention, if I may, to the evidence, and I
17 don't propose to read it out, but just for the
18 assistance of the Chair, to the evidence that was given
19 by Mr. Dillane to your counsel on Day 183 at page 170,
20 where he said he couldn't investigate it as it had to 11:29
21 be by someone outside his division, that it was
22 something that Mr. Barry himself could raise with the
23 CMO if he wanted to obtain the 11.37 as it's referred
24 to.

25
26 I would also refer you, Chairman, to the transcript at
27 Day 184 at page 189, where, in answer to a question
28 from Mr. Costelloe, Mr. Dillane said that when he first
29 met -- he was asked, why didn't you issue an 11.37 and

1 he said, the first time that I met him, I told him I
2 had no knowledge of his issue, and he said he didn't
3 want to discuss it with me, so what could he do. And
4 that matter wasn't pursued further. That's the state
5 of the evidence. And it's the commissioner's position 11:30
6 that it is an entirely reasonable position for
7 Mr. Dillane to have adopted. He had exhausted what he
8 could do and he couldn't do any more.

9
10 In relation to Issue 3B, the work arrangements issue, 11:30
11 and the issue of transfers, well, this is perhaps where
12 the greater part of Mr. Dillane's evidence was
13 concerned with. At paragraph 61 of the submissions
14 filed on behalf of Mr. Barry a number of options are
15 put forward, such as, by allocating Sergeant Barry a 11:31
16 role which would not involve obligatory interactions, a
17 change in rosters, et cetera, these options, it must be
18 emphasised, were put to Dr. Oghuvbu in his evidence on
19 Day 189 but weren't put in this kind of detail to
20 Mr. Dillane. And it's perhaps also worth observing, 11:31
21 insofar as the case is made that there was only ever --
22 transfer was always the only option on the table,
23 that's not Dr. Oghuvbu's evidence of his recollection
24 of what was discussed at the case conference on the 8th
25 April 2013, and he made that clear at page 127 of the 11:31
26 transcript on Day 189 of the hearings. That, as far as
27 he was concerned it wasn't the only option. But I
28 think equally it's perhaps clear from the evidence that
29 it was the best option. And that's a position that the

1 commissioner is happy to stand over. If there is a
2 difficulty between two parties in a hierarchical
3 organisation, separating them would seem to be
4 naturally the best option. And yet, as I said, it was
5 one, and I will come to the Mallow issue in a moment, 11:32
6 but it was one which, for the avoidance of all doubt,
7 it is the commissioner's position that Mr. Barry
8 refused to entertain.

9
10 And the point is further made in terms of, before 11:32
11 dealing with the matter we should -- the point is made
12 in relation to what options were available. The option
13 of working under Inspector O'Sullivan, which a limited
14 form of which was eventually adopted in April 2014.
15 And this is put forward at paragraph 66 of Mr. Barry's 11:32
16 submissions as being in some way indicative of, well,
17 isn't this what could have been done in April 2013, a
18 year earlier. Well, on Day 184, at page 10,
19 Mr. Dillane gave his evidence on this, that it simply
20 wasn't practical. And I have to say, it is an entirely 11:33
21 reasonable response that to use -- when all other
22 options have failed, when the transfer options have
23 failed and Inspector O'Sullivan is interposed a year
24 later, to use that as some form of, well, this could
25 have been done all along is, in my respectful 11:33
26 submission, simply a denial of the reality of the
27 situation in any garda station, where somebody has to
28 be interposed between two parties. And in fact, the
29 evidence, it was not just the evidence of Chief

1 Superintendent Dillane but also the evidence of
2 Superintendent Comyns that they didn't see how that
3 could work in practice. And, In fact, it is perhaps
4 striking that in their own submissions at paragraph 67,
5 Mr. Barry's team seem to accept this, because they 11:34
6 refer to the solution adopted in April 2014 as being
7 subpar in many respects.

8
9 So it was a solution. The solution adopted in April
10 2014, far from demonstrating some form of 11:34
11 inflexibility, or over attachment to the transfer
12 option in 2013, is in fact indicative of the length to
13 which An Garda Síochána were to go to achieve the best
14 workable solution in the circumstances, and those
15 circumstances were changing throughout that time. 11:34

16
17 It's also put forward at paragraph 68, quite baldly,
18 that Mr. Dillane didn't consider other options and in
19 fact, Mr. Dillane, his evidence is clear that he did
20 consider other options, but that as far as he was 11:35
21 concerned a transfer was the best option.

22
23 From paragraph 69 of Mr. Barry's submissions the
24 criticism is made of the transfer to Fermoy, and
25 Mr. Dillane deals with this on Day 184, at page 60, 11:35
26 when he says, he gives in some detail the reasons why
27 he did so. And again, I suppose this is where, having
28 said I would make general points that I would try to
29 avoid coming back to, but I think this is where in fact

1 those general points might have particular application.
2 It is very easily now to say that was not a good idea,
3 but in the situation he was in, dealing with Sergeant
4 Quinn who, for reasons he said had a particular
5 attachment to the Mitchelstown area, unlike Mr. Barry, 11:36
6 who was travelling past Fermoy on his way to get to
7 Mitchelstown, that this was the best solution available
8 to him in the limited situation in which he found
9 himself. And in fact his understanding was, on the
10 basis where his understanding was at the time, he had 11:36
11 understood from the various exchanges with Dr. Oghuvbu
12 and Dr. Kiely that it was a management and not a
13 medical issue; and his understanding of that,
14 therefore, was that there wasn't a medical issue with
15 him stationing Mr. Barry in Fermoy, but once that was 11:36
16 subsequently clarified, following a meeting on the 3rd
17 April 2014, he immediately withdrew the request for a
18 transfer.

19
20 So again, it's the commissioner's position that what 11:37
21 that situation demonstrates is an effort to do the best
22 in a difficult situation, rather than being anywhere
23 close or even approaching targeting.

24
25 And insofar as there's a suggestion throughout 11:37
26 Mr. Barry's evidence that Mr. Dillane and
27 Superintendent Comyns were in some way in cahoots, in
28 fact the evidence here shows that Superintendent Comyns
29 didn't want Sergeant Barry to be transferred to Fermoy,

1 he wanted Sergeant Quinn, but for reasons, taking the
2 global situation, where he had to take, not just
3 Sergeant Barry's welfare and priorities into account,
4 but also those of Sergeant Quinn, with those limited
5 results available to him Mr. Dillane made the decision 11:37
6 he did, which, as I said, in our respectful submission,
7 is indicative of the opposite of the case of collusion
8 that Mr. Barry seeks to make.

9
10 The other issue, or the issue that has occupied some 11:38
11 considerable portion of Mr. Costelloe's oral
12 submissions to you this morning is the Mallow issue,
13 which is deal with from paragraph 70 the written
14 submissions, and we have dealt with it, and I am not
15 going to obviously dwell on them, from paragraph 29 we 11:38
16 have also dealt with them in some detail. And it is
17 perhaps interesting, the reference in the exchange that
18 you had with Mr. Costelloe, I didn't wish to interrupt,
19 but the reference to the questioning of Inspector
20 O'Sullivan is at Day 187 at page 121, and you're 11:38
21 entirely right, Chairman, that there's nothing in there
22 about Mallow. In fact, it is an issue of private
23 versus public expense. But it's worth contrasting that
24 very limited reference with the very large claim that's
25 made based on it in paragraph 70. In other words, the 11:39
26 claim is made that Inspector O'Sullivan's evidence
27 supports Mr. Barry's claim that Mallow was always an
28 issue that was being considered, it doesn't do that, I
29 think that should be made clear.

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In fact, it is made at some length in our submissions so I won't dwell on it here, but there is an utter silence in all of the considerable volume of correspondence, up and down the line with An Garda Síochána, and to and from Mr. Barry's, there's an utter absolute silence in respect of the Mallow issue. And it's on that basis that the commissioner makes the assertion that there is an element of repositioning going on here. It is not one that was made lightly, but it is one which it is the commissioner's position is an entirely reasonable one to make on the evidence.

11:39

11:40

In relation to the issue of transfer not being an option, et cetera, or the "I'm going nowhere", because this was also a point that Mr. Costelloe referred to in his oral submissions, again it's perhaps important to be clear about the detail where Mr. Costelloe says, or said in his opening remarks to you, Chairman, that Mr. Dillane had in fact departed from his evidence on this. The evidence in fact is at, Mr. Dillane's evidence can be found at Day 185 on page 95, where he gives his account of the meeting of the 9th April, and he repeats emphatically that at that meeting Mr. Barry said "I'm going nowhere". What he was a little bit unclear about, was whether he mentioned Superintendent Comyns. So he had said in his statement, words to the effect of, the superintendent can move but I'm going nowhere, in his evidence to the tribunal he said, I

11:40

11:40

11:41

1 can't quite remember what he said about the
2 superintendent, but he did say "I'm going nowhere".
3 And I should say, that evidence was also supported by
4 Inspector O'Sullivan and his evidence on Day 187 at
5 page 120.

11:41

6
7 Insofar as there was a submission, therefore, that
8 Mr. Dillane was in some way unclear about the "I'm
9 going nowhere" comment, he was not.

10 CHAIRMAN: Sorry, my understanding of Mr. Costelloe's
11 position was he was addressing the question the
12 superintendent will have to go.

11:41

13 MR FITZGERALD: Yes.

14 CHAIRMAN: And my understanding is that he referred, I
15 thought correctly, to the fact that Chief
16 Superintendent Dillane did not recall that being said.

11:42

17 MR FITZGERALD: Yes.

18 CHAIRMAN: Didn't hear that being said, did not say
19 that was said.

20 MR FITZGERALD: Yes.

11:42

21 CHAIRMAN: Whereas Inspector O'Sullivan -- that is all
22 he is saying, from my understanding. He is saying that
23 it is significant because such a senior person in such
24 a particular location, if it had been said he would
25 have -- that's the implication of Mr. Costelloe --

11:42

26 MR FITZGERALD: Yes.

27 CHAIRMAN: For what it's worth, it's an inference he
28 says that is legitimate to draw.

29 MR FITZGERALD: Yes.

1 CHAIRMAN: That's where we are going. I mean, he is
2 simply saying that it is significant that the chief
3 superintendent didn't say it or didn't remember it.
4 MR FITZGERALD: Yes. And I think we're understanding
5 each other perfectly. 11:42
6 CHAIRMAN: Yes.
7 MR FITZGERALD: I don't cavil with that. But the point
8 I am seeking to make is: He stood by what I would
9 respectfully submit is the more important part of his
10 evidence; namely, that Mr. Barry indicated he was going 11:43
11 nowhere. Because in the context of, well, he was
12 willing to move to Mallow --
13 CHAIRMAN: Sorry, I don't want to get into a
14 discussion, Mr. Fitzgerald, I don't want to stop you
15 for a moment. 11:43
16 MR FITZGERALD: Yes.
17 CHAIRMAN: I have the point. All I am saying is,
18 Mr. Costelloe's point, if I understand it, was
19 restricted to the fact that Chief Superintendent
20 Dillane did not recall that being said. 11:43
21 MR FITZGERALD: Yes.
22 CHAIRMAN: And said he didn't recall that being said.
23 MR FITZGERALD: Yes.
24 CHAIRMAN: That's all. That's where we are. And what
25 other inferences, conclusions, deductions, or whatever, 11:43
26 that's another day's work.
27 MR FITZGERALD: Yes. All I wish to do, Chairman, is to
28 make it clear that his evidence in relation to his
29 memory of the meeting of the 9th April 2013 was limited

1 to that specific issue but he stood by his statement in
2 relation to the other issue.

3 CHAIRMAN: Indeed.

4 MR FITZGERALD: I want to be absolutely clear about
5 that. Because it is that issue that the commissioner 11:44
6 respectfully submits is the more important one when
7 considered in the light of the Mallow issue, and the
8 commissioner has also made the point in his submissions
9 that in fact not only is there silence in relation to
10 the paper record on the Mallow issue, but in fact the 11:44
11 paper record supports precisely the opposite. And we
12 have referred to the PIAB form, for instance, where he
13 is seeking to resist a transfer, there's reference to
14 "a transfer is not an option to me", there's reference
15 to his desire to stay and continue to serve the people 11:44
16 of Mitchelstown, et cetera. So, in fact, it is not
17 just a question of the dog not barking in the
18 nighttime; there is evidence to directly contradict, in
19 fact, what the commissioner says is the repositioning
20 by Mr. Barry in his oral evidence to the tribunal. 11:45

21
22 The 3C issue in relation to the failing to carry out an
23 investigation into the work-related stress. Well
24 again, just to very briefly say that Mr. Dillane did
25 what he was required to do by appointing Inspector 11:45
26 O'Sullivan to investigate this, but again, it was an
27 investigation that very quickly foundered on
28 Mr. Barry's refusal to deal with Inspector O'Sullivan.
29 And, insofar as criticism is made that nothing else was

1 done, well, I would just draw your attention to a
2 letter from Mr. Dillane to the A/C of the Southern
3 Region at page 386 of the papers, to the effect that,
4 where he requests somebody from another division to be
5 appointed to investigate the matter.

11:46

6
7 In other words, this is again an instance where
8 management were doing their best to deal with an issue
9 and were being met with a blank refusal to deal with
10 the options that were being offered to him.

11:46

11
12 Insofar as issue 3D is put, I don't have anything to
13 say on the substance of the issues raised there, but I
14 just do draw the tribunal's attention to the language
15 used in paragraphs 85 and paragraphs 91 of Mr. Barry's
16 submissions, where he uses the phrase "may well have
17 been" intended to penalise Sergeant Barry. And I don't
18 wish to be too finicky about picking up on wording, but
19 it is instructive, I suppose, that that seems to be the
20 height of the case being made. And just to return, I
21 suppose, to the point made at the outset in relation to
22 the correct way in which, in the commissioner's
23 submissions, inferences should be drawn from evidence.

11:46

11:47

24
25 In relation to 3E, I don't have anything to add.

11:47

26
27 In 3F, the visit of Inspector O'Sullivan to Dr. Kiely.
28 Well again, there is criticism made of this, and it's
29 dealt with at paragraphs 57 and 58 of our submissions.

1 I just would make the point that insofar as this is
2 being put forward that really what was going on here
3 was some attempt to target Mr. Barry and that their
4 supposed concern about the contents of the certificate
5 was not genuine, it is just simply worth observing that 11:47
6 at page 3851 of the papers, Mr. Dillane did query the
7 feasibility of that option with Dr. Oghuvbu internally.
8 So it wasn't a question of let's target this man via
9 his doctor, but there was a separate, contemporaneous
10 record to support the evidence of Mr. Dillane which it 11:48
11 is put forward in any event is an entirely reasonable
12 concern to have, of, if there is a medical certificate
13 that says he is fit or work but not fit for work in his
14 workplace that that is a difficulty. And that is one
15 that I think all the evidence of Mr. Dillane and 11:48
16 Superintendent Comyns was, it was something they had
17 never seen before and was surprising, unworkable, and
18 the commissioner entirely stands over their evidence in
19 that regard.

20
21 At paragraph 136 of Mr. Barry's evidence he talks about
22 the meeting in the car park, on the 9th April 2013,
23 which he characterises at paragraph 136 of his
24 submissions as an attempt to intimidate him. Well, we
25 would simply say there's itemised -- interestingly, 11:49
26 unlike some of the other points raised, the reasons to
27 support that general characterisation are itemised in
28 Mr. Barry's submissions, to include matters such as
29 that the visit was unannounced, and to point to the

1 fact that Mr. Dillane had brought Inspector O'Sullivan
2 with him in some way to intimidate him. well, it's
3 just worth --

4 CHAIRMAN: That's not the meeting in the -- oh, the
5 meeting in the car park of the station? 11:49

6 MR FITZGERALD: Yes.

7 CHAIRMAN: I'm sorry, I'm thinking of the filling
8 station. I'm sorry.

9 MR FITZGERALD: Sorry.

10 CHAIRMAN: I am with you. It's my mistake. I 11:49
11 understand.

12 MR FITZGERALD: It is just perhaps worth observing that
13 insofar as criticism is made of Mr. Dillane for
14 bringing Inspector O'Sullivan with him, Inspector
15 O'Sullivan was the person who Mr. Barry's own 11:50
16 solicitors had suggested in a letter less than two
17 months earlier, on the 14th February 2013, should be
18 interposed between Superintendent Comyns and --

19 CHAIRMAN: I'm sorry for interrupting you. My mind was
20 elsewhere, the car park was confusing me. I was just 11:50
21 making a mistake. I'm sorry.

22 MR FITZGERALD: There's no difficulty. Just observing,
23 I suppose really two points: Firstly, the intimidation
24 or the attempted intimidation charge is itemised, it's
25 particularised unusually in this portion of Mr. Barry's 11:50
26 submissions. When one looks at each one of those, they
27 are, in the commissioner's respectful submission,
28 trivial matters and, in fact, I just highlight the fact
29 that complaint is made that Mr. Dillane saw fit to

1 bring Inspector O'Sullivan with him, I just make the
2 point that Inspector O'Sullivan was the very party who
3 Mr. Barry's own solicitors had suggested on the 14th
4 February should be interposed.

5 CHAIRMAN: Yes, I understand. 11:51

6 MR FITZGERALD: So it seems to be a situation where
7 Mr. Dillane was going to be criticised either way. He
8 brought Mr. O'Sullivan who, it might have been thought,
9 was a welcome party and now he is being criticised that
10 his recruitment of Inspector O'Sullivan for that 11:51
11 meeting was in some way an intimidating gesture. It is
12 obviously rejected in full.

13
14 The fatal fire incident at issue 3H is dealt with at
15 paragraph 143 of Mr. Barry's submissions and is replied 11:51
16 to or dealt with at paragraph 66 of our submissions. I
17 just simply say in relation to that, the submission was
18 made here this morning that in some way the
19 commissioner has glossed over this or that it was
20 clearly wrong to criticise Mr. Barry because there's 11:52
21 nothing in the minute of the 3rd August 2012 that
22 specifically says the sergeant in charge should submit
23 the report. Well again, and this is where again it may
24 be helpful to go back to the general: is criticism of
25 inferior officers by superiors officers, where a report 11:52
26 isn't being transferred, is that targeting? Of course
27 it is not. Because in fact the initial target of the
28 criticism was Superintendent Comyns, because that was
29 the first port of call, that Mr. Dillane went to him to

1 say why don't I have this report, and, as in any
2 organisation, the criticism then went down the line.
3 And we haven't heard anything from Superintendent
4 Comyns, well, that was an attempt to intimidate me or
5 target me or discredit me, in fact it was an entirely 11:52
6 understandable query being raised by a superior officer
7 of a more junior officer as to why something that
8 should be done wasn't done.

9
10 In fact, the evidence as to whether it was Sergeant 11:53
11 Barry's responsibility to submit the report seems to be
12 unanimous, from Mr. Dillane, Superintendent Comyns and
13 Inspector O'Sullivan, that their understanding all was
14 that it was the sergeant on duty, as the senior officer
15 present, whose responsibility it was. And again it is 11:53
16 respectfully submitted on behalf of the commissioner
17 that just makes sense; that the more senior officer
18 present would take responsibility for it.

19
20 In relation to Issues 4A and B, the Certificate of 11:53
21 Service, I don't propose to say much on that, other
22 than again it seems to be an instance where Mr. Dillane
23 was going to be criticised by whatever he did. He
24 initially gave a very good certification. He gave a
25 reason for that; namely, where Mr. Barry wasn't 11:54
26 attending meetings and compared that to a sergeant who
27 was attending every meeting. And doesn't that seem
28 entirely reasonable? He changed his mind, having taken
29 a broader view. So he's criticised for taking the

1 first course of action, he changed his mind, having
2 canvassed the matter widely, and he's criticised for
3 that. Neither criticism, just for the sake of clarity,
4 is accepted or is considered reasonable on behalf of
5 the commissioner.

11:54

6
7 In relation to Issue 4D, the failure to attend the
8 conference on the 2nd February, at paragraph 178 of
9 Mr. Barry's submissions it's considered that
10 Mr. Dillane's criticisms were "pitched at a high level"
11 is the phrase used. Well, in fact, the commissioner
12 would take issue with that. It was an entirely
13 reasonable criticism to make. And in fact it's worth
14 observing that insofar as a campaign of intimidation is
15 alleged to have been taking place, Mr. Barry was never
16 disciplined for failing to attend that meeting.

11:54

11:55

17
18 The force majeure leave at issue 4H is dealt with at
19 paragraph 208 of Mr. Barry's submissions. Again at
20 paragraph 210, the submission was put forward by
21 Mr. Barry that the decision to institute a disciplinary
22 investigation was entirely without justification. And
23 the basis of that emerges, it seems, from Mr. Barry's
24 evidence at page 128 on Day 176: that he had told
25 Inspector O'Sullivan that his wife was sick and,
26 therefore, if he didn't appear for work Inspector
27 O'Sullivan should know that he is in fact going to
28 invoke force majeure leave. And leaving aside the fact
29 that Inspector O'Sullivan rejected that, I think the

11:55

11:56

1 phrase used was 110%, even if correct, it's worth
2 pausing to consider the reasonableness of that position
3 in our respectful submission. That, something that is
4 brought in, in an emergency situation can be brought
5 instead on a contingent basis - if I don't appear, it 11:56
6 is because my wife is sick - at any point in the
7 future.

8
9 Insofar, therefore, as the decision to institute
10 disciplinary proceedings is considered to be or 11:56
11 asserted to be entirely without justification, I would
12 say the opposite, because the evidence was heard and
13 emerged on that, in relation to attending the medical
14 appointment while he was in fact on leave. To contrast
15 that with the language used in the form, which is a 11:57
16 declaration that is stated to be true and complete,
17 that his, I think, attendance at the home was
18 indispensable, I think if one contrasts those two
19 situations I think in fact not only can there be no
20 criticism of the decision to institute disciplinary 11:57
21 proceedings but in fact that, I say perhaps
22 Mr. Barry -- it could have gone the other way, perhaps
23 to put it very much at the least.

24
25 The final issue that I propose to deal with is 11:57
26 Catherine Kehoe which were largely withdrawn. Just
27 simply to draw, for the sake of emphasis, your
28 attention, Chairman, to the remarks made as to the
29 nature of the withdrawal of those allegations, the

1 nature of the allegations, first of all, which included
2 letters to the Minister for Justice, including
3 accusations of bias and prejudice, which were withdrawn
4 on the first occasion when those allegations were going
5 to be subjected to any degree of scrutiny, and they 11:58
6 were withdrawn without explanation or without apology,
7 despite the fact that Catherine Kehoe had deal with
8 those allegations more than a year, much more than a
9 year, and considered that she was going to have to face
10 those allegations which had been made to very senior 11:58
11 parties in a public hearing and then suddenly found out
12 at the last minute, well actually, no, she didn't.

13
14 Insofar, therefore, as those allegations of bias and
15 prejudice, while they might support an allegation of 11:58
16 targeting, if they had in fact been pursued, their
17 withdrawal in the commissioner's position does in fact
18 have a knock-on effect on the remaining allegation,
19 namely of delay. Because if is a question that delay
20 was accidental or the delay was undesirable, that is 11:59
21 obviously not targeting. If there is even an
22 allegation -- and none of this is accepted for the
23 avoidance of all doubt. But even if there were an
24 allegation that matters could have proceeded more
25 quickly, if there is no allegation of bias being made, 11:59
26 or of prejudice, well, it is respectfully suggested
27 that it is more likely that any delay that might be the
28 subject of criticism falls on the other side of the
29 line, the accidental as opposed to the targeting side

1 of the line.

2

3 But I suppose it is also worth observing that on behalf
4 of Chief Superintendent Kehoe she conducted a very
5 thorough investigation in a complex matter, three 11:59
6 overlapping issues, and at each step of the way, rather
7 than seek to stay on the matter and continue her
8 campaign of harassment or targeting against Mr. Barry,
9 she very conscientiously sought to question whether she
10 should continue to involve herself in an investigation 12:00
11 lest there be an apprehension of bias. And again, this
12 is a clearly illustration where the paper record is
13 utterly contradictory of the inferences that Mr. Barry
14 is asking the tribunal to draw from the fact of the
15 length of time of the investigation, as I say any 12:00
16 criticism which is not accepted.

17

18 So those are the -- I'm sorry, Mr. O'Higgins just draws
19 to my attention, that insofar as criticism is made in
20 the written submissions of Chief Superintendent Kehoe, 12:00
21 it's four lines at paragraph 261. It doesn't amount to
22 a whole lot in Mr. Barry's submissions in the final
23 analysis.

24

25 So those are the submissions on behalf of the 12:01
26 commissioner, Chairman. And obviously we're available
27 for any questions that the tribunal might have in
28 relation to any other portion.

29 CHAIRMAN: Thanks very much, Mr. Fitzgerald. Very

1 good. Now, Mr. Harty, I think you should go next, if
2 that is agreeable?

3 MR. HARTY: well, if it is not a difficulty for the
4 tribunal, I understand Mr. McGarry has a scheduling
5 difficulty. 12:01

6 CHAIRMAN: If you are happy with that, Mr. Harty?

7 MR. HARTY: Yes, I am.

8 CHAIRMAN: You would be entitled to go next, if you
9 wanted to. Mr. McGarry? Yes.

10 MR. MCGARRY: I am sorry, Chairman, I will actually be 12:01
11 very, very brief.

12 CHAIRMAN: I would have thought so, Mr. McGarry.

13 MR. MCGARRY: Yes.

14 CHAIRMAN: I am sorry, Mr. McGarry.

15 MR. MCGARRY: And I'm grateful to Mr. Harty. Just a 12:01
16 couple of observations, Chairman.

17 CHAIRMAN: Thank you. Just move a tiny bit closer to
18 the microphone.

19

20 SUBMISSION BY MR. MCGARRY 12:01

21 MR. MCGARRY: we have lodged submissions, as the
22 tribunal, knows on behalf of Assistant Commissioner
23 Fanning, Inspector O'Sullivan, Superintendent Golden
24 and Sergeants Quinn and Dunne. Insofar as Assistant
25 Commissioner Fanning is concerned, the same comments 12:02
26 that were made by Mr. Fitzgerald in respect of
27 Catherine Kehoe also apply in respect of Assistant
28 Commissioner Fanning. In fact, the allegation,
29 specific allegation of targeting and discrediting

1 levelled against Assistant Commissioner Fanning was
2 only withdrawn at the very end of the evidence before
3 the tribunal. And it's worth observing, I think, again
4 without much in the way of explanation or contrition,
5 it's worth observing that the very same allegation of 12:02
6 targeting and discrediting had been made as against
7 Superintendent Grogan, but that in fact had been
8 withdrawn much, much earlier in the course of
9 proceedings. And obviously we refer to that in our
10 submissions. 12:02

11
12 Insofar as Inspector O'Sullivan is concerned, and I
13 appreciate that there isn't a specific allegation of
14 targeting or discrediting levelled against Inspector
15 O'Sullivan, although it certainly appears from the 12:03
16 submissions that there is a good deal that Mr. Barry
17 says about differences in the evidence between him and
18 Inspector O'Sullivan, there's just a couple of things.
19 I don't propose to say anything about the issue that
20 was raised this morning about the transfer at own 12:03
21 expense. Mr. Fitzgerald again has I think more
22 coherently identified the problem with the emphasis
23 that has been placed by Mr. Costelloe on that issue.

24
25 There's just one issue that emerges from the 12:03
26 submissions. The tribunal, when it's looking at the
27 submissions, will observe that at paragraphs 103-106 of
28 Mr. Barry's submissions he refers to a further meeting
29 on the 6th April which it is said amounts to a further

1 instance of targeting. This is a meeting at which it
2 is suggested that he was again inspected by Inspector
3 O'Sullivan in full uniform. That's not part of the
4 terms of reference, it's not part of the agreed issues,
5 and no evidence in the form of oral evidence by any of 12:04
6 the witnesses was given to the tribunal about that, and
7 Inspector O'Sullivan wasn't asked any questions about
8 that. So in our submission to the extent that that is
9 sought to be introduced now as an additional issue,
10 that's improper and can't be done. 12:04

11
12 So I don't think I need to say anything else. Those
13 are the only submissions that I wanted to make. Thank
14 you, Chairman.

15 CHAIRMAN: Thank you very much, Mr. McGarry. Obviously 12:04
16 you are free to go if you choose to do so. No problem.
17 Now Mr. Harty.

18
19 SUBMISSION BY MR. HARTY:

20 MR. HARTY: Thank you, Chairman. I can tell the 12:04
21 tribunal that my submission will be very short. I
22 adopt everything that has been said on behalf of An
23 Garda Síochána in relation to the submissions on behalf
24 of Mr. Barry.

25
26 In relation to the submission made by Mr. Barry, what I 12:05
27 would suggest is that it fails to engage fully with the
28 evidence that was heard by the tribunal in relation to
29 a number of substantial issues. And in relation to

1 Mr. Costelloe's submission that the absence of
2 documentary evidence does not mean that a version of
3 events isn't true, the corollary is also true, which is
4 the presence of documentary evidence means that that
5 thing is true or is likely to be true or is something 12:05
6 of which the tribunal can raise proper inferences.

7
8 And in that regard what I would say in relation to
9 Mr. Barry's submission is that it is noteworthy that he
10 at no stage refers to the fact that he says that this 12:06
11 detriment was being caused to him before he made a
12 protected disclosure. And that is a fact which is
13 inconvenient in the circumstances of the submissions
14 made to the tribunal.

15 12:06
16 And in that regard I would remind the tribunal of the
17 PIAB form, at page 5758 of the book of documents, which
18 recites the injury as:

19
20 "... a series of incidents and circumstances of 12:06
21 bullying, harassment and victimisation. The
22 accumulation of same resulted in psychological injury
23 diagnosed on the 7th August 2012."

24
25 It goes on, and it states: 12:06

26
27 "I have suffered detriment --"

28
29 And the tribunal will obviously be aware of the import

1 of the word "detriment". It is not a phrase used in
2 personal injuries. It's a word which comes expressly
3 from the Protected Disclosures Act.
4

5 "I have suffered detriment --

12:07

6
7 A brief description of how the accident occurred: I
8 have suffered detriment through unfair treatment by
9 Superintendent Comyns, I have suffered detriment via
10 Superintendent Comyns' application of me of unnecessary 12:07
11 administrative burdens which were not universally
12 applied in the force or by Superintendent Comyns to
13 other members and further, Superintendent Comyns'
14 imposition of discipline and reprimand via ostensibly
15 objective criteria. "

12:07

16
17 So that paragraph makes it clear that at the time of
18 filling out the PIAB form on the 23rd July 2014,
19 Mr. Barry was of the view that he was being penalised
20 and subject to a detriment for a protected disclosure 12:07
21 that he didn't make at the time the alleged detriment
22 was being caused. And I think that is of crucial
23 importance and it ought to have been addressed in
24 Sergeant Barry's submission to the tribunal, because it
25 makes it patently clear that in order for Mr. Barry's 12:08
26 case to be correct he would need to satisfy this
27 tribunal that not only did he make a protected
28 disclosure, but that my client knew he was going to
29 make a protected disclosure, for a period of some two

1 years prior even to the events the subject-matter of
2 the alleged protected disclosure. Because it's very
3 clear in relation to that, and I will also draw the
4 tribunal's attention to another piece of documentary
5 evidence, which is not referred to, which is the 12:08
6 attendance note with Dr. Kiely on the first day at page
7 4771. And that attendance note, apologies, reads in
8 relation to the first complaint raised by Mr. Barry:

9
10 "Has new superintendent at station in Mitchelstown, he 12:09
11 wants one of the sergeants to move to Fermoy, and Paul
12 feels he often picks on little things to try to
13 encourage the move."

14
15 That piece of evidence is a piece of evidence which 12:09
16 ought to have been dealt with front on in the
17 submissions, because it makes it clear that the
18 incidents for which this tribunal is dealing and indeed
19 the considerable amount of investment of time and
20 energy on the part of my client in the following years, 12:10
21 relates not to any protected disclosure, but to
22 Mr. Barry's resistance to being moved to Fermoy Garda
23 Station.

24
25 And I would say in relation to Mr. Barry's submissions 12:10
26 to the tribunal, those ought to have been dealt with as
27 actual evidence, of what actually Mr. Barry was
28 complaining of.
29

1 Aside from that, there is the issue, and Mr. Costelloe
2 criticised me in relation to my submission failing to
3 have regard to Baranya. The tribunal will be glad to
4 know that even I am humbled enough to accept that the
5 Supreme Court states the law, and I clearly accept that 12:10
6 Baranya is the law.

7
8 The one thing I will say in relation to Baranya: It is
9 a matter for this tribunal as to whether or not in fact
10 they were protected disclosures. Baranya dealt with 12:11
11 the incorrect distinction between a grievance and a
12 protected disclosure.

13 CHAIRMAN: Clearly.

14 MR. HARTY: And it is a matter for the tribunal as to
15 whether or not those various pieces of correspondence 12:11
16 or documentation amounted to actual protected
17 disclosure, that is a matter for the tribunal. And it
18 is a matter of fact. Simply because it is a grievance
19 does not mean it must also be a protected disclosure,
20 in exactly the same way as the Supreme Court has stated 12:11
21 that simply because it is a grievance does not mean it
22 cannot be a protected disclosure. The issue of whether
23 it is a protected disclosure is a matter for the
24 tribunal on the evidence. I don't think I need to add
25 any more in relation to that. And unless the tribunal 12:11
26 has any further questions I will remain short.

27 CHAIRMAN: Thanks very much, Mr. Harty. Thank you.

28 MR. HARTY: Thank you, Chairman.

29 CHAIRMAN: Just to mention, I think we all have to

1 recognise that Baranya changed the general
2 understanding that existed prior, including the
3 distinction between a grievance and a complaint and a
4 disclosure that was previously understood and that was
5 reflected in the working document that Mr. Justice 12:12
6 Hogan rejected as being declared was not in conformity
7 with the law. So it came as news to all of us.

8
9 Okay, thank you very much. Anybody else now?

10 MR. CARROLL: Yes, Chairman, Mr. Carroll on behalf 12:12
11 off --

12 CHAIRMAN: Sorry, Mr. Carroll, you're sitting there,
13 straight in front me. Certainly, Mr. Carroll. Forgive
14 me for appearing to overlook you.

15
16 SUBMISSION BY MR. CARROLL: 12:12

17 MR. CARROLL: I have a very short oral submission on
18 behalf of retired Superintendent John Quilter.

19 CHAIRMAN: Yes.

20 MR. CARROLL: with four brief points. The first point 12:13
21 arising from what Mr. Costelloe said earlier in his
22 oral submission which was the only point he made in
23 relation to Issue 8 and my client and our submissions.
24 That point in page 8 of our submissions, that relates
25 to the knowledge of Mr. Quilter in relation to the 12:13
26 protected disclosure or the complaints; we don't make
27 the point that person has to have full knowledge or
28 detailed knowledge. We don't make that point, that's
29 not the point. The point is slightly more nuanced and

1 it is an attempt to say to the tribunal that the state
2 of knowledge, the state of evidence as to Mr. Quilter's
3 knowledge at the time of the Fota event is something
4 that can be taken into assessment. It is a factor that
5 can be taken into the assessment of the issue of 12:13
6 targeting or discrediting and moreover, the issue of
7 targeting or discrediting because the disclosure. And
8 clearly the more a person knows or the more detail they
9 have, one could maybe infer that the more likely they
10 are to get involved in some nefarious conspiracy and so 12:14
11 forth.

12
13 So it is that nuanced point, rather than saying one has
14 to know all the details in order to be involved in
15 targeting or discrediting. 12:14

16
17 And I suppose the point about it is the evidence in
18 relation to Mr. Quilter's knowledge, there was some
19 cross-examination about it, was that he was aware, he
20 wasn't sure whether it was through conversations with 12:14
21 Superintendent Comyns or through PAF meetings that he
22 was aware, to some extent, but there's clear evidence
23 he was not aware of the extent of what was being
24 alleged or moreover, in particular, the criminal,
25 what's being called the criminal aspect, which didn't 12:14
26 come to his attention until October '14, when he was
27 written to by Chief Superintendent Kehoe.

28
29 It is just in the assessment we make that submission,

1 not in any sort of submission other than that. So
2 that's that point.

3
4 The three points, brief points I want to make in
5 relation to the written submissions of Mr. Barry are as 12:15
6 follows.

7
8 Firstly, we do submit that there is a repositioning,
9 and it's a matter ultimately for the tribunal, of
10 matters that relate to this event and in particular 12:15
11 relate to my client. And that's set out in our
12 statement or in our submission as to the starting point
13 being this conspiracy involving Superintendent Comyns
14 and my client, and in effect Chief Superintendent
15 Dillane and things then moving on to a position that's 12:15
16 in the written submission, at paragraph 269 of
17 Mr. Barry's written submission in relation to
18 Mr. Quilter, at paragraph 169 in relation to Chief
19 Superintendent Dillane. And effectively the end point
20 of it is: well, they knew stuff and they persisted in 12:16
21 keeping him on duty. And the only point, and it's made
22 in Superintendent Comyns's submission I think but not
23 in ours, because it is only arising really now on foot
24 of seeing Mr. Barry's submission, is, there was never
25 any request not to be on duty that day. There was 12:16
26 never any evidence that Mr. Barry actually requested I
27 don't want to do this, I don't want to be on duty. So
28 that's just a simple point.
29

1 The second point arising out of the submissions relates
2 to paragraph 264 and 268 of Mr. Barry's submissions and
3 it relates to a reliance on a statement by Inspector
4 Healy. Now the reliance is on a line where in his
5 statement he says:

12:16

6
7 "I believe his wife had booked a holiday at short
8 notice for the same week of the event."

9
10 And the reliance within Mr. Barry's submission is that 12:17
11 this should be somewhat preferred over sworn testimony
12 of Mr. Quilter, Chief Superintendent Dillane and
13 Superintendent Comyns about the sequencing of the Fota
14 event, the sequencing of when it was known that
15 Superintendent Quilter wouldn't be available, when 12:17
16 Superintendent Comyns came into the picture and so
17 forth. And it is put in at some point as saying in
18 striking contrast. Inspector Healy in simple point was
19 not called. The tribunal at some point sent around a
20 list of witnesses, it was agreed by all parties that 12:17
21 there would be no need to call the following witnesses.
22 So it is somewhat unusual that my friends in their
23 submission now seek to rely on this aspect to attack
24 the credibility of my client when they didn't even seek
25 that this witness would be called in evidence. 12:17

26
27 And moreover, you will recall, the tribunal will recall
28 that when Superintendent Quilter gave evidence, there
29 was a question about -- it was put to him what

1 Inspector Healy had said in his statement and he said,
2 well, he is incorrect about that, about the timing of
3 his wife or the booking of the holiday, that it was
4 short notice, but you'll recollect that - and it's in
5 Inspector Healy's statement as well - Inspector Healy 12:18
6 didn't even recall the meeting with Mr. Barry at the
7 time, the meeting that was held before the event; that
8 that wasn't something that Inspector Healy even at that
9 point had remembered.

10
11 So just in terms of that being used as sort of an
12 attack upon the credibility of my client I say that's
13 not sustainable.

14
15 The final point then relates back to, I think it's at 12:18
16 paragraph 271 of Mr. Barry's submission, and it relates
17 to, I will just go to that, it relates to a reliance in
18 their submission on -- the specific line is at 271:

19
20 "It would seem highly unusual that they would not 12:19
21 discuss the nature of the allegations that have been
22 made against Superintendent Comyns."

23
24 This relates to conversations put between
25 Superintendent Comyns and my client, Superintendent 12:19
26 Quilter. But I made this point in the course of the
27 examination of Superintendent Quilter, and the tribunal
28 may recollect it, it's at page -- I will just give you
29 the reference

1 CHAIRMAN: Yes, thank you

2 MR. CARROLL: At page 128 of Day 185 and the point was
3 simply this: That not one question was put to
4 Superintendent Comyns relating to any conversation or
5 knowledge passed on to Superintendent Quilter. Not one 12:19
6 question. Cross-examination of Superintendent Comyns
7 was at Day 183. Mr. Costelloe from page 5 to page 133
8 had extensive cross-examination of Superintendent
9 Comyns and not once suggested a conspiracy with Chief
10 Superintendent Quilter but moreover not once even 12:20
11 suggested that he had told Superintendent Quilter X, Y,
12 Z. Not at all. Not a single question.
13

14 Now, I made that point at the time and rightly so the
15 tribunal says, well, it is not a matter of objecting in 12:20
16 terms of the cross-examination, but in due course the
17 relevance and materiality of that may come to bear.
18 And I do say it is relevant in terms of the tribunal's
19 assessment of this issue that that cross-examination
20 was never put. 12:20
21

22 So they're the points that arise out of the written
23 submissions of Mr. Barry and I stand over our own
24 submissions which I won't repeat to the tribunal.

25 CHAIRMAN: Thank you very much. So I hope I haven't 12:20
26 forgotten anybody else. Mr. McGuinness, do you want to
27 add anything?

28 MR. MCGUINNESS: Nothing, Chairman.

29 CHAIRMAN: Thank you very much.

1 MR. MCGUINNESS: The parties have made their
2 submissions.

3 CHAIRMAN: Thank you very much. Mr. Costelloe, do you
4 want to return to anything?

5 MR. COSTELLOE: No. 12:21

6 CHAIRMAN: I think the position is clear. There's
7 nothing obvious, I have to say, that strikes me, that I
8 would have to come back to you about.

9 MR. COSTELLOE: would you allow me to make one
10 observation, it's not a replying submission? 12:21

11 CHAIRMAN: Of course. Please.

12 MR. COSTELLOE: It is just that it has been very much
13 apparent to me, and certainly it has been apparent to
14 my client, the civility with which these proceedings
15 have been conducted, and I would hate to think that I 12:21
16 let the side down today in that I might have been
17 perceived as making a personal slight on Mr. Harty, who
18 is a man who is well able to handle himself, but
19 insofar as he referred to it being a personal remark,
20 if I said it, I hope the tribunal will accept, that 12:21
21 Mr. Harty was understanding, that I wasn't criticising
22 him personally at all.

23 CHAIRMAN: Did you make a personal remark about
24 Mr. Harty?

25 MR. COSTELLOE: I was referring to Baranya and the fact 12:21
26 that it wasn't dealt with in the submissions on behalf
27 of his client.

28 CHAIRMAN: Oh, Mr. Costelloe, you can consider yourself
29 forgiven in advance, because I'm perfectly sure that

1 Mr. Harty won't take any -- I mean, it is perfectly
2 legitimate to say, Baranya, you said, undermines the
3 proposition that was put in their submissions. A
4 perfectly -- nothing personal about that.

5 MR. COSTELLOE: well, I hope that that's the import of 12:22
6 that.

7 CHAIRMAN: Are you happy with that?

8 MR. HARTY: sorry, it's perhaps an inelegancy in the
9 way I approached the matter in reply, Chairman, and
10 certainly I did not take any personally from what was 12:22
11 said.

12 CHAIRMAN: I didn't think it was either inelegant or I
13 didn't think Mr. Costelloe said anything personal and
14 so on. There's no way that you interfered in any way.
15 And may I say, because this is the last sitting, if 12:22
16 everybody is finished, may I say I want to thank
17 everybody for their participation in the matter and for
18 the way they conducted themselves. So I am grateful to
19 counsel for the tone in which they approached the
20 matter and did their jobs very professionally and 12:23
21 expertly, as I would have expected, and without
22 unnecessary dramatics, histrionics or any other of the
23 devices that sometimes we all had to get up with. So
24 anyway, thank you very much to everybody.

25 12:23

26 We will proceed with our work and we expect that we
27 will produce the report, we're thinking it'll be later
28 in the year, probably October, is what we are planning
29 and what we are intending. Thank you very much indeed

1 again. Thank you, Mr. Barry, for your participation.
2 Thank you.

3
4 THE TRIBUNAL THEN CONCLUDED

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	2	3C [1] - 52:22 3D [1] - 53:12 3E [1] - 53:25 3F [1] - 53:27 3H [1] - 56:14 3rd [2] - 47:16, 56:21	9	[3] - 14:14, 16:22, 29:25 Act [1] - 66:3 acted [1] - 14:29 action [1] - 58:1 actions [2] - 12:7, 13:5 acts [1] - 13:8 actual [4] - 12:8, 31:19, 67:27, 68:16 add [3] - 53:25, 68:24, 74:27 additional [1] - 64:9 address [6] - 7:6, 26:29, 37:2, 38:9, 38:10, 40:15 addressed [5] - 7:3, 10:23, 20:5, 26:20, 66:23 addressing [1] - 50:11 administrative [1] - 66:11 admissible [2] - 9:26, 42:13 adopt [1] - 64:22 adopted [4] - 44:7, 45:14, 46:6, 46:9 advance [1] - 75:29 afternoon [1] - 34:5 ago [3] - 13:15, 14:19, 14:20 agree [7] - 6:29, 14:12, 21:1, 21:17, 22:18, 40:11, 42:19 agreeable [1] - 62:2 agreed [4] - 21:3, 34:26, 64:4, 72:20 aided [1] - 38:28 allegation [9] - 60:15, 60:18, 60:22, 60:24, 60:25, 62:28, 62:29, 63:5, 63:13 allegations [7] - 59:29, 60:1, 60:4, 60:8, 60:10, 60:14, 73:21 alleged [8] - 10:18, 19:4,	32:29, 40:8, 58:15, 66:21, 67:2, 70:24 allegedly [1] - 10:15 allocating [1] - 44:15 allow [2] - 20:18, 75:9 almost [4] - 17:21, 17:22, 34:5, 34:15 alone [1] - 27:29 alternative [2] - 11:4, 17:2 amenable [1] - 17:4 amount [10] - 6:22, 7:28, 9:1, 9:10, 18:8, 20:2, 22:28, 26:27, 61:21, 67:19 amounted [3] - 39:12, 40:24, 68:16 amounts [4] - 19:20, 21:16, 22:22, 63:29 analysis [1] - 61:23 ANDREW [1] - 3:3 annual [2] - 28:25, 28:27 answer [1] - 43:27 ANTHONY [1] - 3:1 anyway [3] - 5:25, 31:11, 76:24 apologies [1] - 67:7 apology [1] - 60:6 apparent [5] - 8:9, 12:18, 16:2, 75:13 appear [8] - 14:18, 27:29, 30:11, 36:15, 37:18, 39:20, 58:26, 59:5 appearing [1] - 69:14 appellate [1] - 39:10 application [3] - 28:25, 47:1, 66:10
'14 [1] - 70:26 'is [1] - 22:13	2 [2] - 3:10, 11:20 20 [1] - 17:20 2004 [1] - 41:22 2012 [12] - 9:9, 9:17, 9:23, 9:25, 19:29, 20:20, 21:29, 24:18, 41:5, 56:21, 65:23 2013 [11] - 19:27, 21:25, 24:19, 29:6, 31:6, 44:25, 45:17, 46:12, 51:29, 54:22, 55:17 2014 [6] - 33:1, 45:14, 46:6, 46:10, 47:17, 66:18 2015 [1] - 42:27 2020 [1] - 19:24 2021 [1] - 27:10 2022 [1] - 5:2 208 [1] - 58:19 21 [1] - 3:10 210 [1] - 58:20 22ND [1] - 5:1 23 [1] - 19:1 23rd [1] - 66:18 26 [1] - 14:26 261 [1] - 61:21 264 [1] - 72:2 268 [1] - 72:2 269 [1] - 71:16 271 [2] - 73:16, 73:18 27th [1] - 42:27 28 [1] - 29:14 29 [1] - 48:15 29th [1] - 31:5 2nd [6] - 9:9, 9:17, 9:25, 20:20, 21:28, 58:8	4 4 [1] - 43:6 41 [1] - 15:22 4771 [1] - 67:7 4A [1] - 57:20 4D [1] - 58:7 4H [1] - 58:18	91 [1] - 53:15 95 [4] - 24:14, 24:20, 25:29, 49:22 96 [1] - 24:20 9th [4] - 24:19, 49:23, 51:29, 54:22	32:29, 40:8, 58:15, 66:21, 67:2, 70:24 allegedly [1] - 10:15 allocating [1] - 44:15 allow [2] - 20:18, 75:9 almost [4] - 17:21, 17:22, 34:5, 34:15 alone [1] - 27:29 alternative [2] - 11:4, 17:2 amenable [1] - 17:4 amount [10] - 6:22, 7:28, 9:1, 9:10, 18:8, 20:2, 22:28, 26:27, 61:21, 67:19 amounted [3] - 39:12, 40:24, 68:16 amounts [4] - 19:20, 21:16, 22:22, 63:29 analysis [1] - 61:23 ANDREW [1] - 3:3 annual [2] - 28:25, 28:27 answer [1] - 43:27 ANTHONY [1] - 3:1 anyway [3] - 5:25, 31:11, 76:24 apologies [1] - 67:7 apology [1] - 60:6 apparent [5] - 8:9, 12:18, 16:2, 75:13 appear [8] - 14:18, 27:29, 30:11, 36:15, 37:18, 39:20, 58:26, 59:5 appearing [1] - 69:14 appellate [1] - 39:10 application [3] - 28:25, 47:1, 66:10	
1	3	5 5 [1] - 74:7 50 [1] - 42:19 57 [1] - 53:29 5758 [1] - 65:17 58 [2] - 43:10, 53:29	A A/C [1] - 53:2 A84s [1] - 30:3 ability [1] - 38:22 able [3] - 28:14, 34:11, 75:18 absence [1] - 65:1 absolute [1] - 49:7 absolutely [4] - 25:4, 25:10, 28:11, 52:4 accept [13] - 7:1, 9:3, 13:21, 13:26, 14:1, 22:23, 28:12, 28:22, 42:9, 46:5, 68:4, 68:5, 75:20 accepted [5] - 19:6, 38:23, 58:4, 60:22, 61:16 accident [1] - 66:7 accidental [2] - 60:20, 60:29 accommodate [1] - 38:11 accommodatio ns [1] - 39:2 accordingly [1] - 33:6 account [5] - 31:7, 31:27, 32:12, 48:3, 49:23 accumulation [1] - 65:22 accurately [1] - 32:7 accusations [1] - 60:3 achieve [1] - 46:13 acknowledge		
1 1 [6] - 7:26, 7:27, 9:1, 9:10, 26:26, 26:27 10 [2] - 26:10, 45:18 103-106 [1] - 63:27 11.37 [2] - 43:23, 43:29 110% [1] - 59:1 12 [2] - 15:21, 31:25 120 [1] - 50:5 121 [2] - 36:3, 48:20 122 [1] - 36:3 127 [1] - 44:25 128 [2] - 58:24, 74:2 12th [2] - 27:6, 27:10 133 [1] - 74:7 136 [2] - 54:21, 54:23 13th [2] - 24:18, 29:6 143 [1] - 56:15 14th [2] - 55:17, 56:3 15 [2] - 28:3, 28:22 169 [1] - 71:18 170 [1] - 43:19 176 [1] - 58:24 178 [1] - 58:8 18 [1] - 40:12 183 [2] - 43:19, 74:7 184 [3] - 43:27, 45:18, 46:25 185 [5] - 24:14, 24:20, 25:29, 49:22, 74:2 187 [3] - 36:3, 48:20, 50:4 189 [3] - 43:27, 44:19, 44:26 1st [1] - 27:10	3 [1] - 43:5 31 [2] - 30:16, 30:22 32 [1] - 3:4 36 [1] - 4:5 3851 [1] - 54:6 386 [1] - 53:3 3A [1] - 43:9 3B [1] - 44:10	6 6 [1] - 4:4 60 [1] - 46:25 61 [1] - 44:13 62 [1] - 4:6 64 [1] - 4:7 66 [2] - 45:15, 56:16 67 [1] - 46:4 68 [1] - 46:17 69 [2] - 4:8, 46:23 6th [1] - 63:29	9 91 [1] - 53:15 95 [4] - 24:14, 24:20, 25:29, 49:22 96 [1] - 24:20 9th [4] - 24:19, 49:23, 51:29, 54:22	32:29, 40:8, 58:15, 66:21, 67:2, 70:24 allegedly [1] - 10:15 allocating [1] - 44:15 allow [2] - 20:18, 75:9 almost [4] - 17:21, 17:22, 34:5, 34:15 alone [1] - 27:29 alternative [2] - 11:4, 17:2 amenable [1] - 17:4 amount [10] - 6:22, 7:28, 9:1, 9:10, 18:8, 20:2, 22:28, 26:27, 61:21, 67:19 amounted [3] - 39:12, 40:24, 68:16 amounts [4] - 19:20, 21:16, 22:22, 63:29 analysis [1] - 61:23 ANDREW [1] - 3:3 annual [2] - 28:25, 28:27 answer [1] - 43:27 ANTHONY [1] - 3:1 anyway [3] - 5:25, 31:11, 76:24 apologies [1] - 67:7 apology [1] - 60:6 apparent [5] - 8:9, 12:18, 16:2, 75:13 appear [8] - 14:18, 27:29, 30:11, 36:15, 37:18, 39:20, 58:26, 59:5 appearing [1] - 69:14 appellate [1] - 39:10 application [3] - 28:25, 47:1, 66:10	
		7 7 [2] - 3:5, 31:4 70 [2] - 48:13, 48:25 7th [1] - 65:23	A A/C [1] - 53:2 A84s [1] - 30:3 ability [1] - 38:22 able [3] - 28:14, 34:11, 75:18 absence [1] - 65:1 absolute [1] - 49:7 absolutely [4] - 25:4, 25:10, 28:11, 52:4 accept [13] - 7:1, 9:3, 13:21, 13:26, 14:1, 22:23, 28:12, 28:22, 42:9, 46:5, 68:4, 68:5, 75:20 accepted [5] - 19:6, 38:23, 58:4, 60:22, 61:16 accident [1] - 66:7 accidental [2] - 60:20, 60:29 accommodate [1] - 38:11 accommodatio ns [1] - 39:2 accordingly [1] - 33:6 account [5] - 31:7, 31:27, 32:12, 48:3, 49:23 accumulation [1] - 65:22 accurately [1] - 32:7 accusations [1] - 60:3 achieve [1] - 46:13 acknowledge		
		8 8 [5] - 14:25, 32:26, 33:7, 69:23, 69:24 85 [1] - 53:15 8th [1] - 44:24	9 91 [1] - 53:15 95 [4] - 24:14, 24:20, 25:29, 49:22 96 [1] - 24:20 9th [4] - 24:19, 49:23, 51:29, 54:22	32:29, 40:8, 58:15, 66:21, 67:2, 70:24 allegedly [1] - 10:15 allocating [1] - 44:15 allow [2] - 20:18, 75:9 almost [4] - 17:21, 17:22, 34:5, 34:15 alone [1] - 27:29 alternative [2] - 11:4, 17:2 amenable [1] - 17:4 amount [10] - 6:22, 7:28, 9:1, 9:10, 18:8, 20:2, 22:28, 26:27, 61:21, 67:19 amounted [3] - 39:12, 40:24, 68:16 amounts [4] - 19:20, 21:16, 22:22, 63:29 analysis [1] - 61:23 ANDREW [1] - 3:3 annual [2] - 28:25, 28:27 answer [1] - 43:27 ANTHONY [1] - 3:1 anyway [3] - 5:25, 31:11, 76:24 apologies [1] - 67:7 apology [1] - 60:6 apparent [5] - 8:9, 12:18, 16:2, 75:13 appear [8] - 14:18, 27:29, 30:11, 36:15, 37:18, 39:20, 58:26, 59:5 appearing [1] - 69:14 appellate [1] - 39:10 application [3] - 28:25, 47:1, 66:10	

<p>applied [1] - 66:12</p> <p>applies [1] - 40:20</p> <p>apply [2] - 43:8, 62:27</p> <p>appointed [1] - 53:5</p> <p>appointing [1] - 52:25</p> <p>appointment [1] - 59:14</p> <p>appreciate [4] - 5:10, 5:13, 6:22, 63:13</p> <p>apprehension [1] - 61:11</p> <p>approach [1] - 6:16</p> <p>approached [2] - 76:9, 76:19</p> <p>approaching [1] - 47:23</p> <p>appropriate [1] - 6:9</p> <p>approval [1] - 30:8</p> <p>approved [2] - 29:18, 29:20</p> <p>April [13] - 24:17, 24:19, 42:27, 44:25, 45:14, 45:17, 46:6, 46:9, 47:17, 49:23, 51:29, 54:22, 63:29</p> <p>ar [1] - 26:26</p> <p>arduous [1] - 16:21</p> <p>area [1] - 47:5</p> <p>argument [1] - 37:12</p> <p>arise [5] - 7:19, 9:23, 23:29, 30:10, 74:22</p> <p>arisen [1] - 6:1</p> <p>arises [1] - 31:19</p> <p>arising [5] - 9:15, 9:16, 69:21, 71:23, 72:1</p> <p>arose [2] - 30:14, 42:5</p> <p>ARRAN [1] - 3:4</p> <p>arrangements [3] - 28:7, 28:15, 44:10</p> <p>arrival [1] - 41:17</p> <p>arrived [1] -</p>	<p>18:23</p> <p>artificially [1] - 21:22</p> <p>AS [1] - 5:1</p> <p>aside [3] - 32:2, 58:28, 68:1</p> <p>aspect [4] - 24:10, 29:12, 70:25, 72:23</p> <p>aspects [2] - 30:17, 38:19</p> <p>asserted [3] - 39:1, 42:28, 59:11</p> <p>assertion [5] - 11:25, 15:26, 28:5, 28:22, 49:9</p> <p>assessment [4] - 70:4, 70:5, 70:29, 74:19</p> <p>assistance [5] - 6:13, 7:8, 9:27, 41:8, 43:18</p> <p>Assistant [4] - 62:22, 62:24, 62:27, 63:1</p> <p>assuming [3] - 20:22, 23:5, 23:7</p> <p>assumption [1] - 23:6</p> <p>attachment [2] - 46:11, 47:5</p> <p>attack [2] - 72:23, 73:12</p> <p>attempt [5] - 41:21, 54:3, 54:24, 57:4, 70:1</p> <p>attempted [2] - 17:14, 55:24</p> <p>attend [4] - 18:24, 31:5, 58:7, 58:16</p> <p>attendance [6] - 18:19, 18:29, 19:4, 59:17, 67:6, 67:7</p> <p>attended [1] - 19:9</p> <p>attending [3] - 57:26, 57:27, 59:13</p> <p>attention [9] - 23:28, 30:2, 43:16, 53:1, 53:14, 59:28, 61:19, 67:4, 70:26</p> <p>attitude [1] - 33:14</p> <p>August [2] -</p>	<p>56:21, 65:23</p> <p>authority [1] - 30:5</p> <p>available [7] - 12:20, 32:4, 45:12, 47:7, 48:5, 61:26, 72:15</p> <p>avoid [2] - 37:19, 46:29</p> <p>avoidance [2] - 45:6, 60:23</p> <p>aware [11] - 16:6, 19:23, 20:8, 27:5, 36:17, 42:12, 42:21, 65:29, 70:19, 70:22, 70:23</p> <p>awareness [1] - 42:10</p>	<p>48:8, 49:24, 51:10, 52:20, 53:17, 54:3, 56:20, 57:25, 58:15, 58:21, 59:22, 61:8, 61:13, 63:16, 64:24, 64:26, 66:19, 67:8, 67:27, 71:5, 71:26, 73:6, 74:23, 77:1</p> <p>Barry's [42] - 5:28, 14:27, 18:19, 30:26, 33:14, 35:25, 37:6, 38:29, 39:29, 41:27, 42:19, 45:15, 46:5, 46:23, 47:26, 48:3, 48:27, 49:6, 52:28, 53:15, 54:21, 54:28, 55:15, 55:25, 56:3, 56:15, 57:11, 58:9, 58:19, 58:23, 61:22, 63:28, 65:9, 66:24, 66:25, 67:22, 67:25, 71:17, 71:24, 72:2, 72:10, 73:16</p> <p>based [7] - 8:27, 12:16, 12:18, 12:23, 26:12, 32:1, 48:25</p> <p>basis [5] - 35:18, 47:10, 49:8, 58:23, 59:5</p> <p>bear [1] - 74:17</p> <p>become [1] - 28:21</p> <p>becoming [1] - 28:20</p> <p>beg [2] - 20:28, 25:17</p> <p>beginning [1] - 9:9</p> <p>behalf [56] - 6:28, 8:16, 10:13, 10:24, 11:23, 12:3, 13:3, 13:23, 13:26, 15:22, 15:27, 16:2, 17:24, 19:18, 23:26, 24:1, 24:4, 24:14, 26:8, 26:13, 26:28,</p>	<p>27:23, 28:4, 28:23, 29:13, 29:15, 29:16, 30:22, 31:4, 31:26, 33:8, 36:15, 36:19, 36:23, 36:25, 36:29, 37:22, 38:7, 38:14, 39:23, 40:10, 40:26, 42:10, 43:4, 44:14, 57:16, 58:4, 61:3, 61:25, 62:22, 64:22, 64:23, 69:10, 69:18, 75:26</p> <p>behaviour [1] - 13:19</p> <p>belatedly [1] - 15:17</p> <p>belief [2] - 40:25, 41:27</p> <p>benefit [4] - 6:13, 7:12, 38:18, 40:16</p> <p>best [10] - 15:24, 38:22, 38:27, 44:29, 45:4, 46:13, 46:21, 47:7, 47:21, 53:8</p> <p>better [1] - 40:17</p> <p>between [10] - 28:16, 37:24, 40:8, 45:2, 45:28, 55:18, 63:17, 68:11, 69:3, 73:24</p> <p>bias [4] - 60:3, 60:14, 60:25, 61:11</p> <p>big [1] - 27:14</p> <p>binary [1] - 28:10</p> <p>bit [5] - 8:23, 11:24, 18:10, 49:25, 62:17</p> <p>BL [2] - 3:2, 3:7</p> <p>black [1] - 28:9</p> <p>blank [1] - 53:9</p> <p>blaze [1] - 15:28</p> <p>book [1] - 65:17</p> <p>booked [1] - 72:7</p> <p>booking [1] - 73:3</p> <p>borne [1] - 14:23</p> <p>BREFFNI [1] - 3:7</p> <p>brief [8] - 6:24,</p>	<p>19:13, 32:26, 37:7, 62:11, 66:7, 69:20, 71:4</p> <p>briefings [1] - 18:25</p> <p>briefly [4] - 17:21, 19:11, 31:2, 52:24</p> <p>bring [2] - 11:5, 56:1</p> <p>bringing [1] - 55:14</p> <p>broader [1] - 57:29</p> <p>brought [4] - 55:1, 56:8, 59:4</p> <p>budgetary [1] - 41:19</p> <p>bullying [1] - 65:21</p> <p>burden [1] - 18:5</p> <p>burdens [1] - 66:11</p> <p>BY [12] - 3:3, 3:8, 4:4, 4:5, 4:6, 4:7, 4:8, 6:11, 36:13, 62:20, 64:19, 69:16</p>
B					
<p>baldly [1] - 46:17</p> <p>bar [2] - 7:29, 8:5</p> <p>Baranya [18] - 8:13, 8:27, 27:1, 27:4, 27:5, 27:9, 27:12, 27:16, 27:20, 27:24, 68:3, 68:6, 68:8, 68:10, 69:1, 75:25, 76:2</p> <p>barking [1] - 52:17</p> <p>Barry [78] - 5:5, 9:28, 11:27, 12:6, 13:5, 13:16, 13:25, 13:28, 14:11, 14:19, 15:17, 15:29, 16:3, 16:4, 16:7, 17:3, 17:18, 18:2, 18:5, 18:12, 18:21, 19:4, 19:5, 19:7, 23:2, 24:3, 24:7, 25:6, 26:15, 28:17, 29:17, 30:18, 30:28, 32:29, 35:9, 35:16, 36:26, 39:3, 39:14, 39:24, 40:10, 40:23, 41:15, 41:21, 42:10, 42:18, 43:10, 43:22, 44:14, 44:15, 45:7, 47:5, 47:15, 47:29,</p>	C				
<p>cahoots [1] - 47:27</p> <p>campaign [3] - 40:2, 58:14, 61:8</p> <p>cannot [4] - 9:20, 14:11, 19:21, 68:22</p> <p>canvassed [1] - 58:2</p> <p>car [5] - 11:4, 11:5, 54:22, 55:5, 55:20</p> <p>CARROLL [7] - 3:7, 4:8, 69:10, 69:16, 69:17, 69:20, 74:2</p> <p>Carroll [3] - 69:10, 69:12, 69:13</p> <p>carry [1] - 52:22</p> <p>carrying [1] - 9:27</p> <p>case [17] - 12:8, 12:21, 18:14, 18:19, 18:29, 19:9, 20:1, 27:6, 29:7, 39:22, 39:29, 42:12,</p>					

<p>44:21, 44:24, 48:7, 53:20, 66:26 cases [2] - 39:20, 40:7 Catherine [3] - 59:26, 60:7, 62:27 caused [2] - 65:11, 66:22 cavil [2] - 38:19, 51:7 cavils [1] - 42:20 certain [4] - 10:7, 27:7, 30:17, 38:19 certainly [12] - 6:29, 7:3, 8:24, 12:29, 17:12, 19:6, 24:2, 33:13, 63:15, 69:13, 75:13, 76:10 certificate [5] - 17:11, 28:8, 54:4, 54:12, 57:20 certification [1] - 57:24 certified [1] - 29:21 cetera [3] - 44:17, 49:15, 52:16 chair [5] - 7:9, 37:1, 39:17, 41:9, 43:18 chair's [2] - 36:21, 43:16 CHAIRMAN [95] - 5:4, 20:21, 20:27, 21:1, 21:6, 21:8, 21:10, 21:12, 21:18, 22:1, 22:5, 22:10, 22:12, 22:18, 22:26, 22:29, 23:4, 23:14, 23:17, 23:22, 23:24, 24:29, 25:4, 25:10, 25:15, 25:20, 25:27, 26:2, 27:3, 27:22, 28:2, 33:11, 33:14, 33:17, 33:21, 33:24, 33:27, 34:1, 34:4, 34:7, 34:10, 34:22, 34:27, 35:1, 35:5, 35:10, 35:12, 35:14, 35:16,</p>	<p>35:21, 35:29, 36:4, 36:9, 37:11, 37:14, 37:20, 50:10, 50:14, 50:18, 50:21, 50:27, 51:1, 51:6, 51:13, 51:17, 51:22, 51:24, 52:3, 55:4, 55:7, 55:10, 55:19, 56:5, 61:29, 62:6, 62:8, 62:12, 62:14, 62:17, 64:15, 68:13, 68:27, 68:29, 69:12, 69:19, 74:1, 74:25, 74:29, 75:3, 75:6, 75:11, 75:23, 75:28, 76:7, 76:12 Chairman [36] - 6:12, 7:17, 8:27, 10:29, 16:2, 19:20, 20:29, 21:11, 22:9, 23:3, 26:22, 27:14, 29:24, 31:2, 31:6, 32:25, 34:8, 35:8, 35:26, 36:14, 37:17, 41:24, 43:26, 48:21, 49:19, 51:27, 59:28, 61:26, 62:10, 62:16, 64:14, 64:20, 68:28, 69:10, 74:28, 76:9 CHAMBERS [1] - 3:9 chance [1] - 6:26 change [1] - 44:17 changed [3] - 57:28, 58:1, 69:1 changes [1] - 30:17 changing [1] - 46:15 characterisation [1] - 54:27 characterises [1] - 54:23 charge [3] - 29:20, 55:24, 56:22 chief [1] - 51:2 Chief [24] - 16:10, 16:17,</p>	<p>16:28, 17:12, 19:3, 19:11, 19:22, 20:4, 20:18, 20:21, 21:24, 25:5, 25:11, 41:28, 45:29, 50:15, 51:19, 61:4, 61:20, 70:27, 71:14, 71:18, 72:12, 74:9 choice [1] - 37:11 choose [2] - 7:15, 64:16 circular [6] - 17:26, 18:3, 18:4, 18:6, 18:13, 18:15 circumstances [7] - 16:4, 31:19, 41:19, 46:14, 46:15, 65:13, 65:20 civility [1] - 75:14 claim [4] - 40:6, 48:24, 48:26, 48:27 claims [1] - 42:5 clarified [1] - 47:16 clarify [2] - 25:20, 36:4 clarity [1] - 58:3 classification [1] - 43:13 clear [16] - 22:12, 37:22, 38:20, 44:25, 44:28, 46:19, 48:29, 49:18, 51:28, 52:4, 66:17, 66:25, 67:3, 67:17, 70:22, 75:6 clearly [15] - 11:13, 11:25, 12:27, 15:5, 18:3, 18:4, 24:19, 24:25, 29:28, 41:15, 56:20, 61:12, 68:5, 68:13, 70:8 client [20] - 10:4, 10:6, 10:19, 11:8, 11:13, 17:9, 23:26, 31:16, 34:19, 66:28, 67:20, 69:23,</p>	<p>71:11, 71:14, 72:24, 73:12, 73:25, 75:14, 75:27 client's [2] - 6:28, 10:29 clients [3] - 7:7, 9:19, 19:18 close [1] - 47:23 closer [1] - 62:17 clumsily [1] - 25:19 CMO [1] - 43:23 coherently [1] - 63:22 coincide [1] - 14:18 collusion [1] - 48:7 comfortable [1] - 6:7 coming [2] - 41:18, 46:29 comment [3] - 5:21, 8:2, 50:9 comments [3] - 5:17, 5:22, 62:25 commissioner [20] - 36:15, 36:24, 37:22, 38:15, 38:21, 40:10, 40:11, 40:19, 43:5, 45:1, 49:8, 52:5, 52:8, 52:19, 54:18, 56:19, 57:16, 58:5, 58:11, 61:26 Commissioner [4] - 62:22, 62:25, 62:28, 63:1 commissioner's [10] - 38:5, 38:29, 40:6, 44:5, 45:7, 47:20, 49:11, 53:22, 55:27, 60:17 community [1] - 16:20 company [1] - 27:24 COMPANY [1] - 3:3 compared [1] - 57:26 complained [1] - 23:1 complaining [1] - 67:28</p>	<p>complaint [20] - 9:24, 9:25, 12:28, 15:4, 19:11, 19:14, 19:20, 20:2, 20:9, 20:11, 20:15, 20:16, 21:16, 21:28, 22:6, 22:7, 42:14, 55:29, 67:8, 69:3 complaints [19] - 7:27, 8:29, 9:9, 9:22, 9:26, 13:10, 15:9, 16:5, 16:7, 19:28, 20:19, 21:4, 22:16, 26:25, 30:18, 30:28, 40:20, 41:11, 69:26 complete [1] - 59:16 completely [7] - 13:27, 16:14, 17:24, 17:28, 24:12, 32:9 completeness [1] - 43:1 complex [2] - 37:25, 61:5 comply [2] - 18:6, 18:13 complying [1] - 18:3 Comyns [56] - 8:10, 10:4, 10:5, 10:13, 11:10, 11:11, 11:12, 11:18, 15:10, 15:14, 16:15, 16:29, 18:23, 24:9, 24:26, 26:9, 26:14, 26:25, 26:29, 27:23, 28:4, 28:5, 28:23, 28:26, 29:8, 29:13, 29:15, 29:19, 29:22, 30:22, 30:24, 32:29, 41:16, 41:18, 41:28, 42:3, 46:2, 47:27, 47:28, 49:27, 54:16, 55:18, 56:28, 57:4, 57:12, 66:9, 66:12, 70:21, 71:13, 72:13, 72:16, 73:22, 73:25, 74:4, 74:6, 74:9 Comyns' [3] -</p>	<p>10:24, 66:10, 66:13 Comyns's [1] - 71:22 concern [2] - 54:4, 54:12 concerned [9] - 8:4, 8:19, 43:10, 43:14, 44:13, 44:27, 46:21, 62:25, 63:12 concerning [1] - 15:28 CONCLUDED [1] - 77:4 conclusion [1] - 9:5 conclusions [1] - 51:25 conduct [5] - 40:13, 40:18, 40:28, 41:4, 41:10 conducted [5] - 19:17, 33:29, 61:4, 75:15, 76:18 conference [5] - 18:20, 19:1, 19:9, 44:24, 58:8 confirmation [1] - 35:2 confirms [3] - 35:22, 35:24 conflict [4] - 11:17, 29:24, 29:26, 31:18 conflicts [2] - 7:18, 7:20 conformity [1] - 69:6 confusing [1] - 55:20 connected [2] - 15:8, 15:13 connection [1] - 22:26 conscientiously [1] - 61:9 consciousness [1] - 34:16 consider [12] - 20:15, 22:24, 38:4, 39:1, 39:11, 39:28, 46:18, 46:20, 59:2, 75:28 considerable [4] - 40:7, 48:11, 49:4, 67:19</p>
--	--	--	--	---	--

<p>consideration [5] - 22:21, 23:17, 23:19, 27:13, 41:12</p> <p>considered [11] - 8:6, 9:17, 19:21, 38:24, 41:24, 48:28, 52:7, 58:4, 58:9, 59:10, 60:9</p> <p>considering [3] - 39:7, 41:9, 41:24</p> <p>consistently [1] - 24:7</p> <p>conspiracy [3] - 70:10, 71:13, 74:9</p> <p>constitute [1] - 42:13</p> <p>constrained [1] - 6:21</p> <p>contact [1] - 19:4</p> <p>contain [1] - 42:27</p> <p>contained [1] - 33:5</p> <p>contemporaneous [1] - 54:9</p> <p>contention [6] - 13:16, 17:28, 19:2, 22:20, 24:7, 35:25</p> <p>contents [2] - 42:11, 54:4</p> <p>context [17] - 7:11, 11:20, 12:13, 13:20, 15:18, 15:21, 16:10, 16:26, 21:24, 28:7, 30:6, 30:11, 37:26, 38:25, 41:14, 51:11</p> <p>contingent [1] - 59:5</p> <p>continue [4] - 20:28, 52:15, 61:7, 61:10</p> <p>contradict [2] - 42:26, 52:18</p> <p>contradicted [1] - 24:27</p> <p>contradictory [1] - 61:13</p> <p>contrary [1] - 13:2</p> <p>contrast [2] - 59:14, 72:18</p> <p>contrasting [1] -</p>	<p>48:23</p> <p>contrasts [1] - 59:18</p> <p>contrition [1] - 63:4</p> <p>control [1] - 11:2</p> <p>convenes [1] - 25:23</p> <p>conversation [1] - 74:4</p> <p>conversations [2] - 70:20, 73:24</p> <p>convincing [1] - 32:6</p> <p>cooperate [1] - 14:27</p> <p>core [1] - 17:7</p> <p>corollary [1] - 65:3</p> <p>correct [3] - 53:22, 59:1, 66:26</p> <p>corrected [1] - 25:12</p> <p>correctly [1] - 50:15</p> <p>correspondence [4] - 28:29, 38:13, 49:5, 68:15</p> <p>corroborated [1] - 33:22</p> <p>corroboration [1] - 35:3</p> <p>COSTELLO [1] - 3:3</p> <p>Costelloe [20] - 5:29, 6:7, 20:21, 25:5, 25:21, 33:12, 36:9, 39:17, 43:28, 48:18, 49:16, 49:18, 50:25, 63:23, 68:1, 69:21, 74:7, 75:3, 75:28, 76:13</p> <p>COSTELLOE [59] - 4:4, 6:11, 6:12, 20:25, 20:28, 21:4, 21:7, 21:9, 21:11, 21:15, 21:19, 22:3, 22:8, 22:11, 22:17, 22:19, 22:27, 23:3, 23:5, 23:16, 23:21, 23:23, 23:25, 25:2, 25:9, 25:14, 25:17, 25:22, 25:28, 26:3,</p>	<p>27:14, 27:27, 28:3, 33:13, 33:16, 33:20, 33:23, 33:26, 33:28, 34:2, 34:5, 34:8, 34:13, 34:23, 34:28, 35:4, 35:7, 35:11, 35:13, 35:15, 35:20, 35:26, 36:1, 36:8, 75:5, 75:9, 75:12, 75:25, 76:5</p> <p>Costelloe's [4] - 48:11, 50:10, 51:18, 65:1</p> <p>council [1] - 40:16</p> <p>counsel [6] - 8:2, 24:13, 33:29, 34:18, 43:19, 76:19</p> <p>counsel's [1] - 5:11</p> <p>couple [4] - 12:12, 18:20, 62:16, 63:18</p> <p>course [13] - 6:17, 7:8, 10:3, 10:16, 10:26, 10:28, 19:19, 56:26, 58:1, 63:8, 73:26, 74:16, 75:11</p> <p>Court [6] - 8:13, 9:12, 27:2, 27:26, 68:5, 68:20</p> <p>court [3] - 12:15, 36:17, 39:10</p> <p>cover [3] - 29:2, 29:3, 29:6</p> <p>covered [1] - 33:1</p> <p>create [1] - 38:1</p> <p>created [3] - 37:26, 40:27, 41:20</p> <p>credibility [2] - 72:24, 73:12</p> <p>criminal [2] - 70:24, 70:25</p> <p>criteria [1] - 66:15</p> <p>criticise [1] - 56:20</p> <p>criticised [8] - 18:2, 18:12, 56:7, 56:9, 57:23, 57:29, 58:2, 68:2</p> <p>criticising [2] -</p>	<p>19:5, 75:21</p> <p>criticism [16] - 18:16, 38:23, 46:24, 52:29, 53:28, 55:13, 56:24, 56:28, 57:2, 58:3, 58:13, 59:20, 60:28, 61:16, 61:19</p> <p>criticisms [1] - 58:10</p> <p>cross [10] - 24:13, 24:28, 25:28, 32:5, 34:24, 34:24, 70:19, 74:6, 74:8, 74:16, 74:19</p> <p>cross-examination [9] - 24:28, 25:28, 32:5, 34:24, 70:19, 74:6, 74:8, 74:16, 74:19</p> <p>cross-examined [1] - 24:13</p> <p>crucial [3] - 13:29, 14:13, 66:22</p>	<p>48:16, 53:29, 56:14, 56:16, 58:18, 67:16, 67:26, 68:10, 75:26</p> <p>December [1] - 27:10</p> <p>decide [3] - 7:17, 9:2, 39:10</p> <p>decision [13] - 8:13, 8:27, 15:28, 17:3, 27:1, 27:5, 27:11, 27:12, 27:26, 48:5, 58:21, 59:9, 59:20</p> <p>declaration [1] - 59:16</p> <p>declared [1] - 69:6</p> <p>deductions [1] - 51:25</p> <p>defined [1] - 9:11</p> <p>definition [1] - 20:6</p> <p>degree [1] - 60:5</p> <p>delay [9] - 22:15, 22:21, 22:27, 22:28, 22:29, 60:19, 60:20, 60:27</p> <p>delicate [1] - 13:17</p> <p>delivered [1] - 27:9</p> <p>demanded [1] - 27:12</p> <p>demands [1] - 5:11</p> <p>demonstrates [4] - 38:13, 38:15, 38:16, 47:21</p> <p>demonstrating [1] - 46:10</p> <p>denial [1] - 45:26</p> <p>departed [1] - 49:20</p> <p>describe [1] - 15:25</p> <p>described [1] - 30:12</p> <p>description [2] - 15:28, 66:7</p> <p>desire [1] - 52:15</p> <p>despite [1] - 60:7</p> <p>detail [11] - 8:22,</p>	<p>10:27, 18:8, 29:3, 42:21, 42:28, 44:19, 46:26, 48:16, 49:18, 70:8</p> <p>detailed [1] - 69:28</p> <p>details [4] - 29:1, 33:5, 42:13, 70:14</p> <p>determination [1] - 12:23</p> <p>determinations [1] - 12:16</p> <p>determining [1] - 9:28</p> <p>detriment [8] - 39:3, 65:11, 65:27, 66:5, 66:8, 66:9, 66:20, 66:21</p> <p>detriment" [1] - 66:1</p> <p>developed [1] - 37:23</p> <p>development [2] - 12:5</p> <p>devices [1] - 76:23</p> <p>diagnosed [1] - 65:23</p> <p>dictate [1] - 5:15</p> <p>dictating [1] - 5:22</p> <p>differences [1] - 63:17</p> <p>different [3] - 8:10, 16:17, 16:29</p> <p>differently [1] - 21:21</p> <p>difficult [7] - 31:7, 37:25, 38:25, 38:27, 40:15, 42:3, 47:22</p> <p>difficulties [2] - 37:27, 40:27</p> <p>difficulty [14] - 38:2, 38:10, 38:28, 39:4, 41:16, 42:4, 42:9, 43:11, 45:2, 54:14, 55:22, 62:3, 62:5</p> <p>Dillane [43] - 16:11, 16:18, 16:28, 17:12, 19:3, 20:5, 24:12, 25:3, 25:6, 25:11,</p>
D					
<p>dates [3] - 9:16, 11:17, 41:21</p> <p>day's [1] - 51:26</p> <p>days [2] - 29:9, 36:18</p> <p>deal [26] - 6:19, 8:22, 8:24, 11:15, 17:20, 17:25, 17:29, 23:11, 27:14, 28:10, 30:23, 31:11, 31:22, 38:3, 38:27, 39:12, 43:3, 43:5, 43:6, 48:13, 52:28, 53:8, 53:9, 59:25, 60:7, 63:16</p> <p>dealing [8] - 6:2, 11:22, 12:2, 30:4, 40:4, 45:11, 47:3, 67:18</p> <p>deals [3] - 27:16, 30:17, 46:25</p> <p>dealt [19] - 11:10, 15:16, 19:1, 26:3, 26:9, 30:19, 31:9, 39:7, 43:7, 48:14,</p>					

41:28, 42:26, 43:12, 43:19, 43:28, 44:7, 44:20, 45:19, 46:1, 46:18, 46:19, 46:25, 47:26, 48:5, 49:20, 50:8, 50:16, 51:20, 52:24, 53:2, 54:6, 54:10, 54:15, 55:1, 55:13, 55:29, 56:7, 56:29, 57:12, 57:22, 71:15, 71:19, 72:12 Dillane's [4] - 42:20, 44:12, 49:21, 58:10 direct [2] - 33:28, 34:17 directed [2] - 11:15, 31:5 directly [2] - 13:25, 52:18 disagree [1] - 26:22 disciplinary [4] - 10:17, 58:21, 59:10, 59:20 discipline [1] - 66:14 disciplined [2] - 37:26, 58:16 disclosure [22] - 20:2, 21:23, 22:2, 22:13, 26:27, 33:4, 33:5, 42:11, 65:12, 66:20, 66:28, 66:29, 67:2, 67:21, 68:12, 68:17, 68:19, 68:22, 68:23, 69:4, 69:26, 70:7 Disclosures [1] - 66:3 disclosures [18] - 7:28, 8:7, 8:20, 9:2, 9:11, 13:6, 13:9, 13:11, 17:18, 19:25, 20:7, 21:6, 21:16, 26:21, 27:8, 41:29, 42:6, 68:10 discount [2] - 12:7, 32:17 discounted [2] - 31:29, 32:23	discredit [1] - 57:5 discredited [1] - 9:29 discrediting [7] - 39:13, 62:29, 63:6, 63:14, 70:6, 70:7, 70:15 discuss [4] - 15:11, 15:12, 44:3, 73:21 discussed [1] - 44:24 discussion [1] - 51:14 disregard [1] - 17:10 dissatisfaction [1] - 29:2 distinction [2] - 68:11, 69:3 division [2] - 43:21, 53:4 doctor [2] - 32:3, 54:9 document [2] - 9:24, 69:5 documentary [3] - 65:2, 65:4, 67:4 documentation [1] - 68:16 documents [3] - 12:19, 30:2, 65:17 dog [1] - 52:17 done [16] - 13:9, 17:26, 17:27, 28:18, 36:6, 38:20, 38:22, 39:10, 40:17, 41:5, 45:17, 45:25, 53:1, 57:8, 64:10 door [1] - 22:20 doubt [3] - 40:25, 45:6, 60:23 down [5] - 14:4, 14:6, 49:5, 57:2, 75:16 Dr [12] - 31:24, 31:27, 32:13, 32:15, 32:17, 44:18, 44:23, 47:11, 47:12, 53:27, 54:7, 67:6 dramatics [1] - 76:22 draw [9] - 9:5,	30:2, 43:15, 50:28, 53:1, 53:14, 59:27, 61:14, 67:3 drawing [1] - 23:28 drawn [1] - 53:23 draws [1] - 61:18 DUBLIN [2] - 3:5, 3:10 due [3] - 11:2, 17:27, 74:16 Dunne [1] - 62:24 during [3] - 10:28, 11:27, 11:28 duty [4] - 57:14, 71:21, 71:25, 71:27 dwell [2] - 48:15, 49:3	emerges [2] - 58:23, 63:25 emphasis [4] - 10:11, 16:3, 59:27, 63:22 emphasise [1] - 5:23 emphasised [1] - 44:18 emphatically [1] - 49:24 encounter [1] - 12:25 encounters [2] - 27:7, 40:24 encourage [1] - 67:13 end [3] - 39:24, 63:2, 71:19 energy [1] - 67:20 engage [3] - 15:2, 15:6, 64:27 engagement [2] - 31:24, 32:15 entertain [1] - 45:8 entirely [17] - 11:2, 19:19, 19:21, 21:26, 32:22, 42:4, 44:6, 45:20, 48:21, 49:12, 54:11, 54:18, 57:5, 57:28, 58:12, 58:22, 59:11 entitled [2] - 8:11, 62:8 equally [4] - 12:20, 39:21, 40:20, 44:28 essentially [3] - 16:13, 34:14, 35:13 et [3] - 44:17, 49:15, 52:16 event [7] - 10:20, 54:11, 70:3, 71:10, 72:8, 72:14, 73:7 events [4] - 13:8, 40:1, 65:3, 67:1 eventually [1] - 45:14 evidence [97] - 7:18, 7:21, 8:4, 10:19, 10:29, 11:28, 12:19, 12:24, 13:4, 14:5,	18:10, 19:22, 24:24, 24:28, 25:1, 25:16, 27:17, 27:18, 27:19, 28:20, 28:28, 29:24, 29:26, 30:19, 31:18, 31:20, 31:28, 32:4, 33:21, 33:24, 34:17, 35:2, 35:9, 35:25, 36:6, 39:16, 39:19, 39:27, 39:29, 40:18, 40:25, 40:28, 42:20, 42:25, 42:26, 43:16, 43:18, 44:5, 44:12, 44:18, 44:23, 44:28, 45:19, 45:29, 46:1, 46:19, 47:26, 47:28, 48:26, 49:12, 49:20, 49:21, 49:22, 49:29, 50:3, 50:4, 51:10, 51:28, 52:18, 52:20, 53:23, 54:10, 54:15, 54:18, 54:21, 57:10, 58:24, 59:12, 63:2, 63:17, 64:5, 64:28, 65:2, 65:4, 67:5, 67:15, 67:27, 68:24, 70:2, 70:17, 70:22, 71:26, 72:25, 72:28 exact [3] - 33:26, 34:13, 34:25 exactly [7] - 14:18, 22:3, 22:8, 22:17, 35:26, 68:20 examination [11] - 24:28, 25:28, 32:5, 33:28, 34:24, 70:19, 73:27, 74:6, 74:8, 74:16, 74:19 examined [1] - 24:13 except [3] - 26:11, 27:15, 29:28 exception [1] - 7:24	exchange [1] - 48:17 exchanges [1] - 47:11 excluded [1] - 27:7 excluding [1] - 8:1 exclusive [1] - 20:23 exhausted [1] - 44:7 existed [1] - 69:2 exonerated [1] - 21:13 expect [2] - 34:11, 76:26 expected [1] - 76:21 expended [1] - 8:23 expense [10] - 14:2, 14:3, 14:17, 34:20, 35:17, 35:19, 35:23, 35:24, 48:23, 63:21 expensive [1] - 14:16 expertly [1] - 76:21 explain [3] - 12:6, 19:8, 37:20 explanation [4] - 26:16, 30:25, 60:6, 63:4 express [2] - 12:17, 18:26 expresses [1] - 29:2 expressly [3] - 11:26, 18:21, 66:2 extensive [4] - 6:29, 7:1, 38:7, 74:8 extensively [1] - 8:14 extent [5] - 6:4, 9:26, 64:8, 70:22, 70:23 extraordinary [1] - 16:28	
		E				
		easiest [2] - 5:11, 5:12 easily [1] - 47:2 easy [2] - 22:5, 38:18 effect [5] - 25:8, 49:28, 53:3, 60:18, 71:14 effectively [3] - 39:9, 40:1, 71:19 effort [6] - 8:23, 17:9, 17:14, 17:16, 31:15, 47:21 efforts [5] - 16:4, 38:7, 38:16, 39:12, 40:15 either [5] - 12:18, 13:25, 24:17, 56:7, 76:12 element [1] - 49:9 elements [1] - 40:5 elsewhere [1] - 55:20 emerged [3] - 34:15, 34:16, 59:13 emergency [2] - 30:14, 59:4	F			
		face [3] - 32:10, 32:11, 60:9				

<p>fact [84] - 6:15, 9:1, 9:17, 9:28, 11:25, 12:8, 12:15, 12:20, 12:22, 13:7, 13:9, 14:10, 14:12, 14:15, 14:23, 16:7, 16:10, 17:17, 18:2, 18:22, 19:9, 20:5, 20:18, 22:5, 22:25, 24:5, 24:12, 24:16, 26:15, 26:16, 28:15, 31:17, 32:2, 32:10, 32:11, 37:18, 39:2, 39:4, 39:28, 40:23, 42:1, 42:22, 43:6, 45:28, 46:3, 46:12, 46:19, 46:29, 47:9, 47:28, 48:22, 49:2, 49:20, 49:21, 50:15, 51:19, 52:9, 52:10, 52:16, 52:19, 55:1, 55:28, 56:27, 57:5, 57:10, 58:11, 58:13, 58:27, 58:28, 59:14, 59:19, 59:21, 60:7, 60:16, 60:17, 61:14, 62:28, 63:7, 65:10, 65:12, 68:9, 68:18, 75:25</p> <p>fact-finder [1] - 12:20</p> <p>factor [2] - 10:3, 70:4</p> <p>facts [2] - 16:15, 20:17</p> <p>factually [1] - 28:28</p> <p>failed [2] - 45:22, 45:23</p> <p>failing [4] - 18:13, 52:22, 58:16, 68:2</p> <p>fails [1] - 64:27</p> <p>failure [1] - 58:7</p> <p>falls [1] - 60:28</p> <p>FANNING [1] - 3:1</p> <p>fanning [1] - 62:23</p>	<p>Fanning [3] - 62:25, 62:28, 63:1</p> <p>far [7] - 19:26, 21:25, 23:6, 40:17, 44:26, 46:10, 46:20</p> <p>fatal [1] - 56:14</p> <p>fault [1] - 43:15</p> <p>feasibility [1] - 54:7</p> <p>February [3] - 55:17, 56:4, 58:8</p> <p>felt [1] - 14:7</p> <p>Fermoy [12] - 15:29, 16:5, 17:10, 17:15, 31:15, 37:23, 46:24, 47:6, 47:15, 47:29, 67:11, 67:22</p> <p>few [1] - 37:7</p> <p>filed [15] - 6:28, 8:15, 8:16, 10:13, 10:23, 13:23, 20:20, 24:4, 26:8, 28:3, 31:26, 36:19, 36:25, 36:28, 44:14</p> <p>fill [1] - 16:12</p> <p>filled [1] - 30:9</p> <p>filling [2] - 55:7, 66:18</p> <p>final [4] - 42:8, 59:25, 61:22, 73:15</p> <p>finally [4] - 9:7, 17:7, 23:25, 32:25</p> <p>finder [2] - 12:20, 12:22</p> <p>findings [1] - 8:28</p> <p>fine [1] - 34:4</p> <p>finicky [1] - 53:18</p> <p>finished [1] - 76:16</p> <p>FINTAN [1] - 3:1</p> <p>fire [2] - 17:26, 56:14</p> <p>first [21] - 7:15, 9:16, 9:24, 10:16, 10:21, 12:14, 14:1, 16:15, 22:27, 26:17, 34:15, 37:21, 43:28, 44:1, 56:29, 58:1, 60:1, 60:4, 67:6, 67:8,</p>	<p>69:20</p> <p>firstly [3] - 42:23, 55:23, 71:8</p> <p>fit [4] - 37:15, 54:13, 55:29</p> <p>Fitzgerald [6] - 36:14, 37:16, 51:14, 61:29, 62:26, 63:21</p> <p>FITZGERALD [23] - 4:5, 36:13, 36:14, 37:13, 37:17, 37:21, 50:13, 50:17, 50:20, 50:26, 50:29, 51:4, 51:7, 51:16, 51:21, 51:23, 51:27, 52:4, 55:6, 55:9, 55:12, 55:22, 56:6</p> <p>fixture [1] - 16:20</p> <p>flag [1] - 8:11</p> <p>flagrant [1] - 17:10</p> <p>flies [2] - 32:9, 32:10</p> <p>flowed [2] - 15:9, 28:8</p> <p>flows [3] - 11:8, 11:19, 20:10</p> <p>follow [1] - 21:13</p> <p>following [5] - 34:2, 34:5, 47:16, 67:20, 72:21</p> <p>follows [2] - 9:14, 71:6</p> <p>FOLLOWS [1] - 5:1</p> <p>foot [1] - 71:23</p> <p>FOR [2] - 3:1, 3:7</p> <p>force [11] - 21:22, 37:26, 38:2, 38:8, 38:26, 39:5, 40:27, 43:4, 58:18, 58:28, 66:12</p> <p>force's [1] - 38:22</p> <p>foreknowledge [1] - 6:14</p> <p>forewarning [1] - 6:14</p> <p>forgive [2] - 21:19, 69:13</p> <p>forgiven [2] -</p>	<p>27:3, 75:29</p> <p>forgotten [1] - 74:26</p> <p>form [13] - 30:9, 30:13, 35:22, 39:13, 40:24, 45:14, 45:24, 46:10, 52:12, 59:15, 64:5, 65:17, 66:18</p> <p>forth [2] - 70:11, 72:17</p> <p>forward [8] - 39:28, 42:25, 44:15, 45:15, 46:17, 54:2, 54:11, 58:20</p> <p>Fota [2] - 70:3, 72:13</p> <p>founded [1] - 52:27</p> <p>four [2] - 61:21, 69:20</p> <p>frankly [5] - 7:15, 9:8, 27:17, 31:24, 31:29</p> <p>free [1] - 64:16</p> <p>FREEMAN [1] - 3:3</p> <p>FRIDAY [1] - 5:1</p> <p>friends [6] - 9:19, 20:14, 23:13, 24:23, 27:28, 72:22</p> <p>friends' [3] - 7:7, 19:2, 19:18</p> <p>front [2] - 67:16, 69:13</p> <p>frustrated [1] - 14:26</p> <p>full [3] - 56:12, 64:3, 69:27</p> <p>fully [3] - 6:22, 35:8, 64:27</p> <p>function [1] - 29:28</p> <p>future [1] - 59:7</p>	<p>17:25, 17:27, 24:1, 24:5, 24:6, 24:14, 36:10, 37:24, 46:13, 49:5, 64:23, 67:22</p> <p>gardaí [3] - 29:19, 30:23, 30:25</p> <p>gate [1] - 23:12</p> <p>gel [1] - 14:18</p> <p>general [14] - 5:12, 12:12, 12:13, 13:13, 34:11, 35:3, 41:1, 42:8, 42:10, 46:28, 47:1, 54:27, 56:24, 69:1</p> <p>gentleman [1] - 11:3</p> <p>genuine [1] - 54:5</p> <p>gesture [1] - 56:11</p> <p>given [7] - 6:14, 6:23, 8:4, 8:17, 19:8, 43:18, 64:6</p> <p>glad [1] - 68:3</p> <p>global [1] - 48:2</p> <p>gloss [1] - 24:5</p> <p>glossed [2] - 17:23, 56:19</p> <p>go' [1] - 25:7</p> <p>golden [1] - 62:23</p> <p>GORDON [1] - 3:7</p> <p>grant [2] - 28:27, 29:1</p> <p>granular [1] - 40:4</p> <p>grateful [4] - 25:18, 36:1, 62:15, 76:18</p> <p>great [5] - 8:22, 8:24, 10:27, 13:24, 31:22</p> <p>greater [1] - 44:12</p> <p>grievance [4] - 68:11, 68:18, 68:21, 69:3</p> <p>Grogan [1] - 63:7</p> <p>ground [1] - 31:10</p>	<p style="text-align: center;">H</p> <p>Haddington [2] - 29:12, 29:18</p> <p>half [2] - 14:19, 16:27</p> <p>HALIDAY [1] - 3:4</p> <p>HANAHOE [1] - 3:9</p> <p>handle [1] - 75:18</p> <p>happier [1] - 16:16</p> <p>happy [5] - 6:5, 37:2, 45:1, 62:6, 76:7</p> <p>harassment [2] - 61:8, 65:21</p> <p>hard [1] - 31:7</p> <p>Harty [9] - 62:1, 62:6, 62:15, 64:17, 68:27, 75:17, 75:21, 75:24, 76:1</p> <p>HARTY [8] - 4:7, 62:3, 62:7, 64:19, 64:20, 68:14, 68:28, 76:8</p> <p>hate [1] - 75:15</p> <p>Healy [5] - 72:4, 72:18, 73:1, 73:5, 73:8</p> <p>Healy's [1] - 73:5</p> <p>hear [1] - 50:18</p> <p>heard [10] - 7:18, 10:10, 13:28, 18:10, 27:17, 27:19, 28:20, 57:3, 59:12, 64:28</p> <p>HEARING [1] - 5:1</p> <p>hearing [3] - 27:6, 36:22, 60:11</p> <p>hearings [1] - 44:26</p> <p>height [1] - 53:20</p> <p>held [1] - 73:7</p> <p>hello [1] - 31:14</p> <p>help [2] - 5:8, 33:11</p> <p>helpful [5] - 5:17, 25:22, 35:29, 37:15, 56:24</p>
G					
<p>gained [1] - 31:22</p> <p>garage [1] - 11:5</p> <p>garda [1] - 45:27</p> <p>Garda [23] - 8:16, 8:18, 11:23, 12:3, 13:4, 13:23, 14:9, 15:22, 15:27, 16:5, 16:9,</p>					

<p>herself [2] - 32:4, 61:10</p> <p>hierarchical [2] - 37:28, 45:2</p> <p>high [3] - 38:8, 41:19, 58:10</p> <p>higher [1] - 35:27</p> <p>highlight [2] - 14:10, 55:28</p> <p>highlighted [1] - 5:25</p> <p>highly [1] - 73:20</p> <p>himself [9] - 11:27, 13:16, 15:17, 24:27, 28:17, 41:21, 43:22, 47:9, 75:18</p> <p>hindsight [2] - 38:18, 40:16</p> <p>histrionics [1] - 76:22</p> <p>Hogan [2] - 27:2, 69:6</p> <p>holiday [2] - 72:7, 73:3</p> <p>home [1] - 59:17</p> <p>hope [5] - 6:29, 9:20, 74:25, 75:20, 76:5</p> <p>hours [3] - 29:17, 29:18, 29:21</p> <p>HOUSE [1] - 3:4</p> <p>houses [1] - 5:28</p> <p>HRM [2] - 19:6, 19:28</p> <p>huge [2] - 38:3, 38:6</p> <p>humbled [1] - 68:4</p>	<p>32:22</p> <p>illustration [1] - 61:12</p> <p>immediately [3] - 9:14, 34:6, 47:17</p> <p>implication [1] - 50:25</p> <p>import [2] - 65:29, 76:5</p> <p>importance [1] - 66:23</p> <p>important [3] - 49:17, 51:9, 52:6</p> <p>importantly [1] - 42:25</p> <p>imposition [1] - 66:14</p> <p>improper [1] - 64:10</p> <p>inability [1] - 30:24</p> <p>inappropriate [1] - 18:4</p> <p>inappropriately [1] - 15:1</p> <p>incident [3] - 11:16, 26:15, 56:14</p> <p>incidents [5] - 9:15, 41:8, 42:1, 65:20, 67:18</p> <p>include [2] - 18:15, 54:28</p> <p>included [2] - 9:23, 60:1</p> <p>including [4] - 30:3, 38:26, 60:2, 69:2</p> <p>incongruously [1] - 34:17</p> <p>inconsistent [2] - 27:23, 27:25</p> <p>inconvenient [1] - 65:13</p> <p>incorrect [3] - 28:28, 68:11, 73:2</p> <p>indeed [10] - 8:20, 8:28, 10:19, 12:24, 13:2, 13:28, 31:13, 52:3, 67:18, 76:29</p> <p>INDEX [1] - 4:1</p> <p>indicated [2] - 37:14, 51:10</p> <p>indicates [1] - 28:17</p> <p>indication [1] -</p>	<p>33:18</p> <p>indicative [4] - 11:10, 45:16, 46:12, 48:7</p> <p>indispensable [1] - 59:18</p> <p>individual [2] - 43:3, 43:4</p> <p>inelegancy [1] - 76:8</p> <p>inelegant [1] - 76:12</p> <p>infer [4] - 11:12, 12:23, 13:7, 70:9</p> <p>inference [1] - 50:27</p> <p>inferences [4] - 51:25, 53:23, 61:13, 65:6</p> <p>inferior [2] - 37:29, 56:25</p> <p>inferred [1] - 12:18</p> <p>inflexibility [1] - 46:11</p> <p>initial [2] - 43:13, 56:27</p> <p>injuries [1] - 66:2</p> <p>injury [2] - 65:18, 65:22</p> <p>ink [1] - 8:24</p> <p>insofar [17] - 20:14, 24:23, 43:9, 44:21, 47:25, 50:7, 52:29, 53:12, 54:1, 55:13, 58:14, 59:9, 60:14, 61:19, 62:24, 63:12, 75:19</p> <p>inspected [1] - 64:2</p> <p>Inspector [1] - 53:27</p> <p>inspector [57] - 13:29, 14:13, 15:2, 15:3, 15:6, 15:8, 15:12, 24:29, 25:13, 25:25, 26:4, 28:16, 29:19, 29:22, 31:2, 31:20, 31:23, 31:26, 32:11, 32:12, 32:13, 32:20, 33:22, 33:25, 34:14, 35:1, 35:21,</p>	<p>45:13, 45:23, 48:19, 48:26, 50:4, 50:21, 52:25, 52:28, 55:1, 55:14, 56:1, 56:2, 56:10, 57:13, 58:25, 58:26, 58:29, 62:23, 63:12, 63:14, 63:18, 64:2, 64:7, 72:3, 72:18, 73:1, 73:5, 73:8</p> <p>instance [4] - 52:12, 53:7, 57:22, 64:1</p> <p>instances [8] - 10:18, 11:9, 12:14, 12:22, 13:24, 28:9, 41:7, 43:3</p> <p>instead [2] - 39:21, 59:5</p> <p>institute [3] - 58:21, 59:9, 59:20</p> <p>INSTRUCTED [2] - 3:3, 3:8</p> <p>instruction [1] - 23:27</p> <p>instructions [2] - 18:27, 24:4</p> <p>instructive [1] - 53:19</p> <p>intended [1] - 53:17</p> <p>intending [1] - 76:29</p> <p>intentional [3] - 40:13, 40:18, 40:28</p> <p>interactions [2] - 41:27, 44:16</p> <p>interesting [1] - 48:17</p> <p>interestingly [1] - 54:25</p> <p>interfered [1] - 76:14</p> <p>interjected [1] - 10:28</p> <p>interjection [1] - 25:18</p> <p>internally [1] - 54:7</p> <p>interposed [5] - 28:16, 45:23, 45:28, 55:18, 56:4</p> <p>interpretation</p>	<p>[1] - 21:22</p> <p>interpreted [1] - 9:12</p> <p>interrupt [1] - 48:18</p> <p>interrupting [1] - 55:19</p> <p>intimidate [3] - 54:24, 55:2, 57:4</p> <p>intimidating [1] - 56:11</p> <p>intimidation [3] - 55:23, 55:24, 58:14</p> <p>introduced [1] - 64:9</p> <p>investigate [3] - 43:20, 52:26, 53:5</p> <p>investigating [3] - 19:27, 20:9, 22:6</p> <p>investigation [13] - 11:16, 14:26, 19:12, 19:17, 20:11, 22:15, 23:10, 52:23, 52:27, 58:22, 61:5, 61:10, 61:15</p> <p>investment [1] - 67:19</p> <p>invited [1] - 21:1</p> <p>invoke [1] - 58:28</p> <p>involve [2] - 44:16, 61:10</p> <p>involved [3] - 39:20, 70:10, 70:14</p> <p>involves [1] - 40:7</p> <p>involving [1] - 71:13</p> <p>Irish [1] - 27:24</p> <p>ironically [1] - 32:10</p> <p>issue [53] - 9:14, 12:2, 12:4, 14:15, 15:16, 17:25, 17:29, 21:11, 26:20, 27:2, 28:4, 28:21, 37:9, 39:11, 43:9, 43:29, 44:2, 44:10, 44:11, 45:5, 47:13, 47:14, 48:10, 48:12, 48:22, 48:28, 49:7,</p>	<p>49:14, 52:1, 52:2, 52:5, 52:7, 52:10, 52:22, 53:8, 53:12, 56:14, 58:7, 58:12, 58:18, 59:25, 63:19, 63:23, 63:25, 64:9, 68:1, 68:22, 69:23, 70:5, 70:6, 74:19</p> <p>Issue [1] - 44:10</p> <p>issued [2] - 10:4, 10:7</p> <p>issues [12] - 6:23, 7:4, 15:9, 26:4, 29:6, 43:4, 43:5, 53:13, 57:20, 61:6, 64:4, 64:29</p> <p>it'll [1] - 76:27</p> <p>item [7] - 7:26, 7:27, 9:1, 9:10, 11:20, 26:26</p> <p>itemised [6] - 9:1, 9:10, 26:26, 54:25, 54:27, 55:24</p> <p>items [1] - 7:26</p> <p>itself [5] - 8:29, 18:4, 27:4, 40:2, 40:28</p>
J					
<p>job [2] - 7:16</p> <p>jobs [1] - 76:20</p> <p>JOHN [1] - 3:7</p> <p>John [2] - 36:14, 69:18</p> <p>July [2] - 29:6, 66:18</p> <p>JULY [1] - 5:1</p> <p>junior [1] - 57:7</p> <p>jurisprudence [1] - 26:29</p> <p>Justice [3] - 27:1, 60:2, 69:5</p> <p>justification [2] - 58:22, 59:11</p> <p>justify [2] - 13:19, 29:8</p>					
K					
<p>keeping [3] - 19:13, 23:12, 71:21</p> <p>Kehoe [11] - 19:12, 19:22,</p>					

20:18, 20:21, 21:24, 59:26, 60:7, 61:4, 61:20, 62:27, 70:27 key [1] - 39:16 Kiely [7] - 31:24, 32:13, 32:15, 32:17, 47:12, 53:27, 67:6 Kiely's [1] - 31:27 kind [1] - 44:19 knock [1] - 60:18 knock-on [1] - 60:18 knowing [2] - 16:28, 27:4 knowledge [12] - 12:17, 21:15, 21:23, 22:1, 44:2, 69:25, 69:27, 69:28, 70:2, 70:3, 70:18, 74:5 known [2] - 27:20, 72:14 knows [2] - 62:22, 70:8	28:27, 29:1, 29:8, 43:9, 43:13, 58:18, 58:28, 59:14 leaving [1] - 58:28 left [2] - 18:23, 20:16 legal [13] - 6:13, 6:27, 8:9, 8:14, 8:15, 10:24, 12:3, 13:3, 17:8, 20:6, 23:10, 24:1, 28:13 legislation [2] - 8:28, 9:11 legitimate [2] - 50:28, 76:2 length [6] - 13:24, 27:16, 31:9, 46:12, 49:2, 61:15 lengthy [2] - 7:1, 7:3 less [1] - 55:16 lest [1] - 61:11 letter [3] - 19:5, 53:2, 55:16 letters [2] - 12:26, 60:2 level [3] - 30:10, 38:8, 58:10 levelled [2] - 63:1, 63:14 levels [1] - 38:8 lift [1] - 11:3 light [5] - 8:28, 30:28, 31:18, 42:17, 52:7 lightly [1] - 49:10 likely [5] - 6:15, 6:18, 60:27, 65:5, 70:9 limine [1] - 23:18 limited [6] - 41:19, 45:13, 47:8, 48:4, 48:24, 51:29 line [7] - 28:13, 49:5, 57:2, 60:29, 61:1, 72:4, 73:18 lines [1] - 61:21 list [1] - 72:20 listed [1] - 7:27 local [2] - 16:20, 38:10 location [1] - 50:24	lodged [1] - 62:21 look [2] - 27:20, 39:18 looking [2] - 16:11, 63:26 looks [1] - 55:26	M	62:20, 62:21, 64:15 MCGARRY [2] - 3:1, 4:6 McGuinness [4] - 36:16, 74:26, 74:28, 75:1 ME [1] - 3:9 mean [10] - 9:4, 20:8, 34:11, 34:28, 35:5, 51:1, 65:2, 68:19, 68:21, 76:1 means [1] - 65:4 meant [1] - 15:23 meats [1] - 27:24 medical [6] - 17:10, 28:7, 47:13, 47:14, 54:12, 59:13 meeting [18] - 25:15, 25:23, 31:5, 31:19, 47:16, 49:23, 49:24, 51:29, 54:22, 55:4, 55:5, 56:11, 57:27, 58:16, 63:28, 64:1, 73:6, 73:7 meetings [3] - 18:25, 57:26, 70:21 member [1] - 10:22 members [5] - 38:26, 39:5, 39:7, 42:11, 66:13 memory [1] - 51:29 mention [4] - 15:18, 23:27, 34:19, 68:29 mentioned [1] - 49:26 merely [1] - 7:14 merit [1] - 9:8 met [3] - 43:29, 44:1, 53:9 microphone [1] - 62:18 might [11] - 16:21, 20:5, 34:24, 37:10, 41:15, 47:1, 56:8, 60:15, 60:27, 61:27, 75:16 mightn't [1] - 39:22	mind [6] - 10:1, 11:11, 20:5, 55:19, 57:28, 58:1 Minister [1] - 60:2 minute [2] - 56:21, 60:12 missed [1] - 17:28 misses [1] - 13:27 missing [2] - 19:25, 37:2 mistake [2] - 55:10, 55:21 misunderstand [1] - 29:15 misunderstand ing [1] - 20:17 misunderstood [1] - 35:8 Mitchelstown [5] - 37:23, 47:5, 47:7, 52:16, 67:10 modern [2] - 12:5, 14:22 module [4] - 8:5, 8:19, 27:16, 27:20 modules [1] - 6:18 moment [5] - 10:10, 13:15, 29:25, 45:5, 51:15 month [1] - 14:19 months [3] - 27:17, 27:18, 55:17 moreover [4] - 70:6, 70:24, 72:27, 74:10 morning [8] - 5:4, 5:7, 18:25, 34:3, 48:12, 56:18, 63:20 morning's [1] - 36:22 most [3] - 12:25, 27:1, 41:26 move [8] - 12:9, 34:20, 36:10, 49:28, 51:12, 62:17, 67:11, 67:13 moved [2] - 30:25, 67:22	movement [2] - 30:23, 35:18 moving [1] - 71:15 MR [110] - 3:1, 3:2, 3:3, 3:7, 3:7, 3:8, 4:4, 4:5, 4:6, 4:7, 4:8, 6:11, 6:12, 20:25, 20:28, 21:4, 21:7, 21:9, 21:11, 21:15, 21:19, 22:3, 22:8, 22:11, 22:17, 22:19, 22:27, 23:3, 23:5, 23:16, 23:21, 23:23, 23:25, 25:2, 25:9, 25:14, 25:17, 25:22, 25:28, 26:3, 27:14, 27:27, 28:3, 33:13, 33:16, 33:20, 33:23, 33:26, 33:28, 34:2, 34:5, 34:8, 34:13, 34:23, 34:28, 35:4, 35:7, 35:11, 35:13, 35:15, 35:20, 35:26, 36:1, 36:8, 36:13, 36:14, 37:13, 37:17, 37:21, 50:13, 50:17, 50:20, 50:26, 50:29, 51:4, 51:7, 51:16, 51:21, 51:23, 51:27, 52:4, 55:6, 55:9, 55:12, 55:22, 56:6, 62:3, 62:7, 62:10, 62:13, 62:15, 62:20, 62:21, 64:19, 64:20, 68:14, 68:28, 69:10, 69:16, 69:17, 69:20, 74:2, 74:28, 75:1, 75:5, 75:9, 75:12, 75:25, 76:5, 76:8 must [10] - 9:5, 12:21, 16:2, 16:25, 19:6, 21:13, 38:24, 39:27, 44:17, 68:19
L						
labour [1] - 26:5 lack [1] - 39:26 laid [1] - 10:11 language [2] - 53:14, 59:15 large [1] - 48:24 largely [2] - 6:25, 59:26 last [5] - 18:11, 27:15, 27:16, 60:12, 76:15 late [7] - 10:7, 10:15, 10:19, 10:21, 11:1, 26:14, 26:17 Latiny [1] - 23:19 law [4] - 33:6, 68:5, 68:6, 69:7 lawyers' [1] - 5:12 leaders [1] - 5:18 leap [1] - 40:7 least [4] - 25:11, 27:11, 35:24, 59:23 leave [9] - 28:25,						

N					
<p>namely [3] - 51:10, 57:25, 60:19</p> <p>naturally [1] - 45:4</p> <p>nature [8] - 20:8, 20:19, 21:4, 23:9, 34:11, 59:29, 60:1, 73:21</p> <p>need [9] - 12:17, 17:22, 28:19, 29:1, 39:8, 64:12, 66:26, 68:24, 72:21</p> <p>nefarious [1] - 70:10</p> <p>never [12] - 12:9, 14:4, 14:6, 16:23, 19:7, 28:27, 39:25, 54:17, 58:15, 71:24, 71:26, 74:20</p> <p>new [3] - 13:18, 18:22, 67:10</p> <p>news [1] - 69:7</p> <p>next [4] - 34:24, 36:10, 62:1, 62:8</p> <p>nighttime [1] - 52:18</p> <p>nine [1] - 31:13</p> <p>non [3] - 18:19, 18:29, 19:4</p> <p>non-attendance [3] - 18:19, 18:29, 19:4</p> <p>none [1] - 60:22</p> <p>nonetheless [1] - 17:22</p> <p>note [6] - 32:14, 36:5, 36:21, 67:6, 67:7</p> <p>noted [2] - 7:6, 11:24</p> <p>notes [3] - 32:1, 32:18, 32:21</p> <p>noteworthy [1] - 65:9</p> <p>nothing [8] - 10:15, 28:6, 48:21, 52:29, 56:21, 74:28, 75:7, 76:4</p> <p>notice [3] - 26:10, 72:8, 73:4</p> <p>November [3] - 19:24, 27:7,</p>	<p>27:11</p> <p>nowhere [4] - 49:15, 49:29, 50:9, 51:11</p> <p>nowhere" [2] - 49:25, 50:2</p> <p>nuanced [3] - 9:21, 69:29, 70:13</p> <p>number [4] - 37:8, 39:5, 44:14, 64:29</p> <p>nutshell [1] - 20:4</p>	<p>44:16</p> <p>obliged [1] - 37:17</p> <p>observation [2] - 6:23, 75:10</p> <p>observations [1] - 62:16</p> <p>observe [2] - 42:16, 63:27</p> <p>observing [9] - 8:17, 44:20, 54:5, 55:12, 55:22, 58:14, 61:3, 63:3, 63:5</p> <p>obtain [1] - 43:23</p> <p>obviated [1] - 28:19</p> <p>obvious [3] - 23:7, 37:26, 75:7</p> <p>obviously [32] - 5:15, 7:2, 7:8, 7:16, 8:1, 8:9, 9:3, 18:2, 18:10, 18:14, 25:18, 26:23, 27:27, 30:19, 31:17, 35:16, 36:17, 36:19, 36:22, 37:1, 39:7, 39:11, 39:16, 43:4, 43:8, 48:15, 56:12, 60:21, 61:26, 63:9, 64:15, 65:29</p> <p>occasion [3] - 10:21, 11:1, 60:4</p> <p>occasions [2] - 10:6, 10:14</p> <p>occupied [1] - 48:10</p> <p>occur [1] - 24:2</p> <p>occurred [3] - 13:8, 24:3, 66:7</p> <p>October [13] - 9:9, 9:17, 9:23, 9:25, 19:28, 20:20, 21:29, 24:18, 33:1, 41:5, 70:26, 76:28</p> <p>offered [2] - 35:2, 53:10</p> <p>officer [5] - 37:29, 57:6, 57:7, 57:14, 57:17</p> <p>officers [3] - 38:1, 56:25</p> <p>often [1] - 67:12</p> <p>Oghuvbu [3] - 44:18, 47:11,</p>	<p>54:7</p> <p>Oghuvbu's [1] - 44:23</p> <p>omnibus [1] - 40:19</p> <p>ON [1] - 5:1</p> <p>once [3] - 47:15, 74:9, 74:10</p> <p>one [43] - 7:6, 7:24, 7:29, 8:5, 10:12, 10:28, 12:12, 12:13, 16:25, 22:5, 24:9, 24:25, 28:8, 28:10, 32:26, 33:3, 33:11, 37:25, 37:29, 40:9, 40:10, 42:18, 42:23, 45:5, 45:6, 49:10, 49:11, 49:12, 52:6, 54:14, 55:26, 59:18, 63:25, 67:11, 68:8, 70:9, 70:13, 74:3, 74:5, 75:9</p> <p>open [1] - 19:5</p> <p>opening [1] - 49:19</p> <p>operated [1] - 39:3</p> <p>operation [3] - 30:5, 30:12, 30:13</p> <p>opportunity [4] - 5:20, 6:2, 6:3, 19:8</p> <p>opposed [3] - 10:12, 35:23, 60:29</p> <p>opposite [4] - 42:2, 48:7, 52:11, 59:12</p> <p>option [10] - 44:22, 44:27, 44:29, 45:4, 45:12, 46:12, 46:21, 49:15, 52:14, 54:7</p> <p>options [8] - 44:14, 44:17, 45:12, 45:22, 46:18, 46:20, 53:10</p> <p>oral [10] - 6:16, 10:29, 13:27, 31:28, 48:11, 49:17, 52:20, 64:5, 69:17, 69:22</p>	<p>orchestrated [1] - 31:15</p> <p>order [4] - 13:19, 42:13, 66:25, 70:14</p> <p>ordinary [1] - 43:9</p> <p>organisation [3] - 37:28, 45:3, 57:2</p> <p>origin [1] - 15:9</p> <p>original [1] - 30:18</p> <p>ostensibly [1] - 66:14</p> <p>others' [1] - 5:19</p> <p>otherwise [2] - 31:8, 41:11</p> <p>ought [3] - 66:23, 67:16, 67:26</p> <p>outset [4] - 7:23, 12:1, 19:29, 53:21</p> <p>outside [3] - 11:2, 23:17, 43:21</p> <p>overlapping [1] - 61:6</p> <p>overlook [1] - 69:14</p> <p>own [8] - 8:1, 28:13, 35:17, 46:4, 55:15, 56:3, 63:20, 74:23</p>	<p>33:26, 36:3</p> <p>paper [3] - 52:10, 52:11, 61:12</p> <p>papers [3] - 10:20, 53:3, 54:6</p> <p>paperwork [2] - 39:18, 39:22</p> <p>parading [1] - 31:14</p> <p>paragraph [26] - 14:25, 15:22, 40:12, 42:19, 43:10, 44:13, 45:15, 46:4, 46:17, 46:23, 48:13, 48:15, 48:25, 54:21, 54:23, 56:15, 56:16, 58:8, 58:19, 58:20, 61:21, 66:17, 71:16, 71:18, 72:2, 73:16</p> <p>paragraphs [4] - 53:15, 53:29, 63:27</p> <p>paraphrasing [1] - 19:19</p> <p>pardon [2] - 20:28, 25:17</p> <p>park [3] - 54:22, 55:5, 55:20</p> <p>PARLIAMENT [1] - 3:10</p> <p>part [13] - 19:14, 22:12, 23:25, 29:28, 35:9, 35:11, 35:23, 35:24, 44:12, 51:9, 64:3, 64:4, 67:20</p> <p>participation [2] - 76:17, 77:1</p> <p>particular [18] - 8:17, 10:16, 12:2, 15:26, 16:21, 17:1, 27:19, 30:3, 30:12, 30:21, 37:14, 41:6, 47:1, 47:4, 50:24, 70:24, 71:10</p> <p>particularised [1] - 55:25</p> <p>particularly [2] - 5:16, 41:26</p> <p>parties [19] - 7:14, 7:24, 7:29, 8:3, 8:4, 10:1, 16:6, 24:6, 24:11,</p>
	O				
	<p>O'BRIEN [1] - 3:2</p> <p>o'clock [1] - 31:13</p> <p>O'Higgins [3] - 25:29, 36:16, 61:18</p> <p>O'Sullivan [48] - 13:29, 14:13, 15:3, 15:7, 15:8, 15:12, 24:29, 25:13, 25:25, 26:4, 28:16, 29:19, 29:22, 31:3, 31:20, 31:27, 32:13, 32:20, 33:22, 33:25, 34:14, 35:22, 45:13, 45:23, 48:20, 50:4, 50:21, 52:26, 52:28, 53:27, 55:1, 55:14, 55:15, 56:1, 56:2, 56:8, 56:10, 57:13, 58:25, 58:27, 58:29, 62:23, 63:12, 63:15, 63:18, 64:3, 64:7</p> <p>O'SULLIVAN [1] - 3:1</p> <p>O'Sullivan's [5] - 31:24, 32:11, 32:12, 35:2, 48:26</p> <p>objecting [1] - 74:15</p> <p>objection [1] - 36:11</p> <p>objective [1] - 66:15</p> <p>obligatory [1] -</p>				
				P	
				<p>PAF [2] - 18:24, 70:21</p> <p>PAGE [1] - 4:2</p> <p>page [34] - 14:25, 15:21, 17:20, 19:1, 24:14, 24:20, 25:29, 28:3, 28:22, 29:13, 30:16, 30:22, 31:3, 31:25, 32:26, 33:7, 43:19, 43:27, 44:25, 45:18, 46:25, 48:20, 49:22, 50:5, 53:3, 54:6, 58:24, 65:17, 67:6, 69:24, 73:28, 74:2, 74:7</p> <p>pages [2] -</p>	

<p>27:28, 36:29, 38:11, 38:25, 42:12, 45:2, 45:28, 60:11, 72:20, 75:1</p> <p>parts [1] - 24:23</p> <p>party [4] - 7:13, 8:17, 56:2, 56:9</p> <p>passed [1] - 74:5</p> <p>past [1] - 47:6</p> <p>patently [1] - 66:25</p> <p>PATRICK [1] - 3:2</p> <p>Paul [1] - 67:11</p> <p>PAUL [2] - 3:1, 3:7</p> <p>pause [2] - 10:10, 29:25</p> <p>pausing [1] - 59:2</p> <p>pejoratively [3] - 15:24, 25:24, 38:9</p> <p>penalise [1] - 53:17</p> <p>penalised [1] - 66:19</p> <p>people [7] - 5:15, 5:19, 8:3, 8:18, 10:1, 24:24, 52:15</p> <p>perceived [1] - 75:17</p> <p>perceives [1] - 39:4</p> <p>perfection [1] - 40:17</p> <p>perfectly [5] - 8:11, 51:5, 75:29, 76:1, 76:4</p> <p>perhaps [18] - 13:17, 14:9, 37:10, 38:18, 40:16, 41:1, 42:17, 42:24, 44:11, 44:20, 44:28, 46:3, 48:17, 49:17, 55:12, 59:21, 59:22, 76:8</p> <p>period [1] - 66:29</p> <p>Perry [1] - 36:1</p> <p>persisted [1] - 71:20</p> <p>person [9] - 25:23, 31:6, 33:2, 33:3, 50:23,</p>	<p>55:15, 69:27, 70:8</p> <p>personal [6] - 66:2, 75:17, 75:19, 75:23, 76:4, 76:13</p> <p>personally [2] - 75:22, 76:10</p> <p>personnel [1] - 37:24</p> <p>phrase [4] - 53:16, 58:11, 59:1, 66:1</p> <p>PIAB [3] - 52:12, 65:17, 66:18</p> <p>picked [2] - 34:2, 34:23</p> <p>picking [1] - 53:18</p> <p>picks [1] - 67:12</p> <p>picture [1] - 72:16</p> <p>piece [3] - 67:4, 67:15</p> <p>pieces [1] - 68:15</p> <p>pitched [1] - 58:10</p> <p>place [6] - 16:3, 18:5, 24:23, 28:6, 28:14, 58:15</p> <p>placed [1] - 63:23</p> <p>plan [3] - 6:24, 12:27, 39:19</p> <p>planning [1] - 76:28</p> <p>point [76] - 9:4, 9:7, 9:18, 13:24, 14:15, 15:27, 17:7, 17:11, 17:21, 17:29, 18:11, 18:26, 19:26, 23:4, 23:12, 23:14, 23:22, 23:24, 26:5, 27:21, 27:29, 28:12, 29:5, 29:16, 31:3, 31:13, 32:22, 32:26, 32:28, 33:1, 33:11, 35:6, 35:16, 37:21, 39:18, 41:1, 42:8, 42:9, 42:24, 42:26, 42:29, 45:10, 45:11, 49:16, 51:7, 51:17, 51:18, 52:8, 53:21, 54:1,</p>	<p>54:29, 56:2, 59:6, 69:20, 69:22, 69:24, 69:27, 69:28, 69:29, 70:13, 70:17, 71:2, 71:12, 71:19, 71:21, 71:28, 72:1, 72:17, 72:18, 72:19, 73:9, 73:15, 73:26, 74:2, 74:14</p> <p>pointed [1] - 19:29</p> <p>points [15] - 12:12, 25:19, 37:3, 37:7, 37:8, 37:18, 43:8, 46:28, 47:1, 54:26, 55:23, 69:20, 71:4, 74:22</p> <p>port [1] - 56:29</p> <p>portion [3] - 48:11, 55:25, 61:28</p> <p>position [22] - 8:25, 9:21, 10:29, 11:18, 24:15, 33:18, 36:21, 38:5, 38:21, 40:6, 40:19, 44:5, 44:6, 44:29, 45:7, 47:20, 49:11, 50:11, 59:2, 60:17, 71:15, 75:6</p> <p>possibilities [3] - 20:22, 20:24, 21:2</p> <p>practical [1] - 45:20</p> <p>practice [1] - 46:3</p> <p>pre [4] - 29:18, 29:20, 30:8, 31:15</p> <p>pre-2012 [2] - 41:3, 42:1</p> <p>pre-approval [1] - 30:8</p> <p>pre-approved [2] - 29:18, 29:20</p> <p>pre-orchestrated [1] - 31:15</p> <p>prearranged [1] - 30:4</p> <p>preceding [2] - 11:16, 16:27</p>	<p>precisely [1] - 52:11</p> <p>predated [1] - 42:4</p> <p>predates [1] - 43:13</p> <p>prefer [1] - 16:29</p> <p>preferred [3] - 16:17, 32:13, 72:11</p> <p>prejudice [3] - 60:3, 60:15, 60:26</p> <p>preliminary [1] - 27:6</p> <p>premised [2] - 20:17, 32:18</p> <p>prepared [4] - 11:14, 12:9, 13:21, 34:19</p> <p>preplanned [1] - 30:13</p> <p>presence [1] - 65:4</p> <p>present [4] - 36:16, 37:11, 57:15, 57:18</p> <p>previous [1] - 41:21</p> <p>previously [2] - 5:24, 69:4</p> <p>primary [1] - 10:3</p> <p>principle [2] - 25:27, 25:28</p> <p>priorities [1] - 48:3</p> <p>private [3] - 14:17, 35:23, 48:22</p> <p>problem [2] - 63:22, 64:16</p> <p>proceed [2] - 37:15, 76:26</p> <p>proceeded [1] - 60:24</p> <p>proceedings [4] - 59:10, 59:21, 63:9, 75:14</p> <p>produce [1] - 76:27</p> <p>professionally [1] - 76:20</p> <p>proper [1] - 65:6</p> <p>properly [1] - 41:23</p> <p>propose [11] - 5:27, 5:29, 36:9, 36:24, 36:29, 43:5, 43:6, 43:17,</p>	<p>57:21, 59:25, 63:19</p> <p>proposition [1] - 76:3</p> <p>protected [35] - 7:28, 8:6, 8:20, 9:1, 9:11, 13:6, 13:9, 13:10, 17:18, 19:24, 20:2, 20:7, 21:16, 21:23, 22:2, 22:13, 26:21, 26:27, 27:8, 33:3, 41:29, 42:5, 65:12, 66:20, 66:27, 66:29, 67:2, 67:21, 68:10, 68:12, 68:16, 68:19, 68:22, 68:23, 69:26</p> <p>Protected [1] - 66:3</p> <p>prover [1] - 25:25</p> <p>provided [3] - 29:1, 29:3, 29:6</p> <p>psychological [1] - 65:22</p> <p>public [8] - 10:22, 14:3, 14:16, 34:20, 35:19, 35:23, 48:23, 60:11</p> <p>PURCELL [1] - 3:8</p> <p>purpose [1] - 36:21</p> <p>purse [3] - 14:3, 14:17, 34:20</p> <p>pursued [2] - 44:4, 60:16</p> <p>put [29] - 9:20, 11:17, 14:4, 14:6, 17:14, 21:20, 28:14, 30:4, 34:25, 35:27, 38:12, 39:28, 42:25, 44:15, 44:18, 44:19, 45:15, 46:17, 53:12, 54:2, 54:11, 58:20, 59:23, 72:17, 72:29, 73:24, 74:3, 74:20, 76:3</p> <p>putting [2] - 11:14, 28:6</p>	<p style="text-align: center;">Q</p> <p>qualify [1] - 37:20</p> <p>QUAY [1] - 3:4</p> <p>query [2] - 54:6, 57:6</p> <p>questioning [1] - 48:19</p> <p>questions [3] - 61:27, 64:7, 68:26</p> <p>quickly [2] - 52:27, 60:25</p> <p>Quilter [1] - 69:18</p> <p>quilter [13] - 32:26, 32:27, 33:8, 69:25, 71:18, 72:12, 72:15, 72:28, 73:26, 73:27, 74:5, 74:10, 74:11</p> <p>QUILTER [1] - 3:7</p> <p>quilter's [2] - 70:2, 70:18</p> <p>Quinn [4] - 47:4, 48:1, 48:4, 62:24</p> <p>quite [9] - 8:23, 11:25, 15:5, 16:8, 18:10, 24:19, 28:9, 46:17, 50:1</p> <p>quote [1] - 20:7</p> <p>quote-unquote [1] - 20:7</p> <p>quoted [1] - 24:10</p>
R					
<p>raise [2] - 43:22, 65:6</p> <p>raised [6] - 14:17, 53:13, 54:26, 57:6, 63:20, 67:8</p> <p>rather [10] - 12:5, 14:2, 15:10, 15:28, 17:3, 19:5, 37:9, 47:22, 61:6, 70:13</p> <p>re [1] - 27:13</p> <p>re-consideration [1] - 27:13</p> <p>read [3] - 6:27, 15:25, 43:17</p>					

<p>readily [1] - 19:13</p> <p>reading [1] - 38:5</p> <p>reads [1] - 67:7</p> <p>real [4] - 9:8, 12:19, 40:27, 43:14</p> <p>realistically [1] - 6:3</p> <p>reality [2] - 21:27, 45:26</p> <p>really [10] - 7:5, 15:1, 25:24, 26:22, 28:9, 30:7, 31:27, 54:2, 55:23, 71:23</p> <p>reason [3] - 5:7, 15:6, 57:25</p> <p>reasonable [9] - 38:5, 39:1, 44:6, 45:21, 49:12, 54:11, 57:28, 58:4, 58:13</p> <p>reasonableness [4] - 41:10, 41:25, 41:26, 59:2</p> <p>reasons [5] - 11:2, 46:26, 47:4, 48:1, 54:26</p> <p>recalled [1] - 34:18</p> <p>recalling [2] - 26:5, 32:8</p> <p>received [4] - 5:9, 18:26, 19:23, 21:26</p> <p>recent [4] - 8:12, 12:5, 14:22, 27:1</p> <p>recites [1] - 65:18</p> <p>recognise [2] - 16:25, 69:1</p> <p>recollect [2] - 73:4, 73:28</p> <p>recollection [2] - 34:26, 44:23</p> <p>reconsider [2] - 24:15, 28:29</p> <p>record [6] - 19:15, 32:14, 52:10, 52:11, 54:10, 61:12</p> <p>recruitment [1] - 56:10</p> <p>refer [6] - 18:21, 26:14, 33:24, 43:26, 46:6, 63:9</p> <p>reference [11] -</p>	<p>8:12, 14:12, 34:14, 34:25, 48:17, 48:19, 48:24, 52:13, 52:14, 64:4, 73:29</p> <p>referenced [1] - 34:21</p> <p>referred [9] - 8:13, 27:9, 41:4, 43:23, 49:16, 50:14, 52:12, 67:5, 75:19</p> <p>referring [1] - 75:25</p> <p>refers [5] - 10:5, 10:18, 24:24, 63:28, 65:10</p> <p>refined [1] - 41:6</p> <p>reflected [1] - 69:5</p> <p>refusal [5] - 14:27, 29:8, 38:29, 52:28, 53:9</p> <p>refused [2] - 28:27, 45:8</p> <p>refuses [1] - 37:29</p> <p>regard [7] - 17:29, 39:16, 42:16, 54:19, 65:8, 65:16, 68:3</p> <p>regards [1] - 7:26</p> <p>Region [1] - 53:3</p> <p>regrettable [1] - 40:26</p> <p>regrettably [2] - 26:28, 28:21</p> <p>regulation [3] - 10:3, 10:16, 10:17</p> <p>Regulation [1] - 26:10</p> <p>regulatory [1] - 10:7</p> <p>rehash [1] - 36:23</p> <p>reiterated [1] - 24:3</p> <p>rejected [3] - 56:12, 58:29, 69:6</p> <p>relate [2] - 71:10, 71:11</p> <p>related [3] - 23:1, 41:29, 52:23</p>	<p>relates [8] - 67:21, 69:24, 72:1, 72:3, 73:15, 73:16, 73:17, 73:24</p> <p>relating [1] - 74:4</p> <p>relation [53] - 7:19, 7:20, 13:15, 14:25, 18:8, 18:29, 19:16, 20:10, 27:18, 27:19, 28:25, 29:12, 32:15, 33:14, 33:18, 36:21, 36:28, 37:9, 41:2, 42:22, 44:10, 45:12, 49:14, 51:28, 52:2, 52:9, 52:22, 53:21, 53:25, 56:17, 57:20, 58:7, 59:13, 61:28, 64:23, 64:26, 64:28, 64:29, 65:8, 67:3, 67:8, 67:25, 68:2, 68:8, 68:25, 69:23, 69:25, 70:18, 71:5, 71:17, 71:18</p> <p>relationship [1] - 42:3</p> <p>relevance [2] - 41:3, 74:17</p> <p>relevant [4] - 16:6, 41:15, 42:23, 74:18</p> <p>reliance [5] - 24:23, 72:3, 72:4, 72:10, 73:17</p> <p>rely [1] - 72:23</p> <p>remain [1] - 68:26</p> <p>remaining [1] - 60:18</p> <p>remains [1] - 11:1</p> <p>remark [2] - 75:19, 75:23</p> <p>remarks [3] - 39:17, 49:19, 59:28</p> <p>remember [3] - 26:1, 50:1, 51:3</p> <p>remembered [1] - 73:9</p> <p>remind [4] - 34:7, 34:10, 39:8, 65:16</p>	<p>reminded [1] - 36:5</p> <p>remove [1] - 41:22</p> <p>repeat [1] - 74:24</p> <p>repeats [1] - 49:24</p> <p>replied [1] - 56:15</p> <p>reply [4] - 36:23, 36:24, 36:29, 76:9</p> <p>replying [1] - 75:10</p> <p>report [6] - 42:27, 56:23, 56:25, 57:1, 57:11, 76:27</p> <p>repositioning [8] - 11:27, 12:6, 13:16, 14:23, 15:17, 49:9, 52:19, 71:8</p> <p>represent [2] - 8:18, 27:28</p> <p>representative [1] - 13:3</p> <p>representing [1] - 8:3</p> <p>reprimand [1] - 66:14</p> <p>request [2] - 47:17, 71:25</p> <p>requested [1] - 71:26</p> <p>requests [1] - 53:4</p> <p>required [1] - 52:25</p> <p>requirement [3] - 18:13, 18:16, 18:24</p> <p>requirements [1] - 18:6</p> <p>resist [1] - 52:13</p> <p>resistance [1] - 67:22</p> <p>resolve [2] - 7:18, 29:27</p> <p>resources [1] - 16:13</p> <p>respect [13] - 17:27, 18:19, 18:20, 19:11, 26:8, 30:5, 31:2, 32:25, 32:27, 40:5, 49:7, 62:26, 62:27</p> <p>respectful [17] -</p>	<p>8:26, 14:14, 16:8, 17:5, 18:14, 19:7, 20:1, 21:27, 29:29, 37:27, 39:26, 41:8, 41:23, 45:25, 48:6, 55:27, 59:3</p> <p>respectfully [11] - 7:17, 14:28, 22:24, 29:14, 32:6, 38:14, 41:7, 51:9, 52:6, 57:16, 60:26</p> <p>respects [1] - 46:7</p> <p>respond [1] - 32:4</p> <p>responding [1] - 23:14</p> <p>response [3] - 15:25, 42:5, 45:21</p> <p>responsibility [3] - 57:11, 57:15, 57:18</p> <p>restricted [1] - 51:19</p> <p>result [6] - 10:7, 12:28, 13:6, 13:9, 17:16, 30:26</p> <p>resulted [1] - 65:22</p> <p>results [1] - 48:5</p> <p>RESUMED [1] - 5:1</p> <p>retired [1] - 69:18</p> <p>return [2] - 53:20, 75:4</p> <p>revisiting [1] - 43:15</p> <p>rightly [1] - 74:14</p> <p>Road [2] - 29:12, 29:18</p> <p>road [1] - 30:5</p> <p>ROBERT [1] - 3:8</p> <p>role [1] - 44:16</p> <p>Rosderra [1] - 27:24</p> <p>rosters [1] - 44:17</p>	<p>satisfy [1] - 66:26</p> <p>save [1] - 37:10</p> <p>saw [1] - 55:29</p> <p>SC [2] - 3:1, 3:7</p> <p>schedule [2] - 7:26, 26:26</p> <p>scheduling [1] - 62:4</p> <p>scrutiny [1] - 60:5</p> <p>SEAN [1] - 3:3</p> <p>second [5] - 10:14, 11:1, 26:14, 35:14, 72:1</p> <p>secondly [2] - 14:3, 42:24</p> <p>see [6] - 23:4, 24:15, 24:16, 37:15, 39:19, 46:2</p> <p>seeing [1] - 71:24</p> <p>seek [4] - 38:11, 61:7, 72:23, 72:24</p> <p>seeking [2] - 51:8, 52:13</p> <p>seeks [1] - 48:8</p> <p>seem [6] - 8:5, 26:22, 45:3, 46:5, 57:27, 73:20</p> <p>senior [5] - 38:26, 50:23, 57:14, 57:17, 60:10</p> <p>sense [1] - 57:17</p> <p>sent [3] - 15:3, 19:28, 72:19</p> <p>separate [2] - 42:4, 54:9</p> <p>separating [1] - 45:3</p> <p>sequencing [2] - 72:13, 72:14</p> <p>sergeant [21] - 9:28, 16:11, 16:17, 16:19, 16:22, 16:23, 17:1, 17:2, 17:4, 18:5, 29:20, 39:13, 44:15, 47:29, 48:3, 53:17, 56:22, 57:10, 57:14, 57:26, 66:24</p> <p>Sergeant [3] - 47:3, 48:1, 48:4</p> <p>sergeants [2] -</p>
S					
<p>safety [1] - 30:5</p> <p>sake [3] - 43:1, 58:3, 59:27</p>					

<p>62:24, 67:11 series [1] - 65:20 serious [1] - 11:16 serve [1] - 52:15 service [1] - 57:21 set [8] - 12:10, 18:9, 21:28, 24:1, 24:19, 26:26, 31:25, 71:11 setting [2] - 8:24, 12:27 settled [1] - 33:6 seven [2] - 14:20, 28:20 shape [1] - 35:22 short [6] - 38:12, 64:21, 68:26, 69:17, 72:7, 73:4 shows [1] - 47:28 shut [1] - 22:20 sick [3] - 43:9, 58:25, 59:6 side [3] - 60:28, 60:29, 75:16 sides [1] - 38:11 significant [6] - 16:3, 18:8, 19:14, 35:16, 50:23, 51:2 silence [3] - 49:4, 49:7, 52:9 silly [1] - 23:18 simple [2] - 71:28, 72:18 simply [17] - 19:2, 28:22, 36:22, 39:21, 42:16, 42:22, 42:29, 45:19, 45:26, 51:2, 54:5, 54:25, 56:17, 59:27, 68:18, 68:21, 74:3 single [3] - 32:14, 74:12 sitting [3] - 39:9, 69:12, 76:15 situation [15] - 12:26, 37:23, 38:25, 38:28, 39:2, 39:12, 40:15, 45:27, 47:3, 47:8, 47:21, 47:22, 48:2, 56:6, 59:4</p>	<p>situations [1] - 59:19 six [1] - 27:17 slight [1] - 75:17 slightly [3] - 9:21, 21:21, 69:29 SMITHFIELD [1] - 3:5 so.. [1] - 21:10 sole [1] - 39:11 solicitors [2] - 55:16, 56:3 SOLICITORS [2] - 3:3, 3:9 solution [5] - 46:6, 46:9, 46:14, 47:7 someone [1] - 43:21 sometimes [2] - 21:20, 76:23 somewhat [7] - 11:22, 13:17, 24:5, 32:10, 34:17, 72:11, 72:22 sorry [21] - 12:1, 20:27, 23:18, 24:18, 25:2, 25:17, 34:28, 35:1, 35:8, 50:10, 51:13, 55:7, 55:8, 55:9, 55:19, 55:21, 61:18, 62:10, 62:14, 69:12, 76:8 sort [2] - 71:1, 73:11 sought [4] - 29:9, 38:2, 61:9, 64:9 sound [1] - 15:23 source [1] - 15:8 Southern [1] - 53:2 speaking [3] - 17:1, 25:24, 31:16 specific [9] - 12:13, 13:14, 23:27, 33:4, 40:20, 52:1, 62:29, 63:13, 73:18 specifically [7] - 11:22, 17:17, 23:29, 26:13, 34:29, 41:14,</p>	<p>56:22 specifics [1] - 32:28 stage [3] - 10:28, 17:15, 65:10 stand [3] - 21:17, 45:1, 74:23 standing [1] - 32:3 stands [1] - 54:18 start [2] - 5:27, 23:20 starting [2] - 23:22, 71:12 state [7] - 9:29, 11:11, 19:15, 21:23, 44:4, 70:1, 70:2 statement [7] - 49:27, 52:1, 71:12, 72:3, 72:5, 73:1, 73:5 states [2] - 65:25, 68:5 Station [3] - 16:5, 37:24, 67:23 station [5] - 41:17, 45:27, 55:5, 55:8, 67:10 stationing [1] - 47:15 stay [2] - 52:15, 61:7 step [1] - 61:6 still [1] - 17:2 stone [1] - 12:10 stood [2] - 51:8, 52:1 stop [3] - 23:18, 35:14, 51:14 story [1] - 13:18 straight [1] - 69:13 stream [1] - 34:16 STREET [1] - 3:10 strenuous [1] - 38:7 stress [3] - 6:20, 16:10, 52:23 strikes [1] - 75:7 striking [2] - 46:4, 72:18 strongly [1] - 42:2</p>	<p>stuff [1] - 71:20 subject [3] - 60:28, 66:20, 67:1 subject-matter [1] - 67:1 subjected [1] - 60:5 subjective [1] - 40:25 submission [78] - 7:14, 7:25, 8:1, 8:26, 9:3, 9:7, 12:21, 13:3, 13:13, 13:14, 14:14, 14:25, 16:8, 17:5, 17:8, 18:15, 19:7, 19:17, 20:1, 21:27, 22:4, 22:8, 23:8, 23:9, 23:26, 26:24, 26:28, 27:22, 28:1, 28:12, 28:26, 29:14, 29:29, 30:16, 30:20, 30:21, 32:9, 33:7, 33:17, 33:19, 35:28, 37:27, 38:29, 39:26, 40:9, 40:10, 41:9, 41:24, 42:18, 43:11, 45:26, 48:6, 50:7, 55:27, 56:17, 58:20, 59:3, 64:8, 64:21, 64:26, 65:1, 65:9, 66:24, 68:2, 69:17, 69:22, 70:29, 71:1, 71:12, 71:16, 71:17, 71:22, 71:24, 72:10, 72:23, 73:16, 73:18, 75:10 SUBMISSION [10] - 4:4, 4:5, 4:6, 4:7, 4:8, 6:11, 36:13, 62:20, 64:19, 69:16 submissions [103] - 5:9, 5:18, 5:20, 6:8, 6:16, 6:26, 6:28, 7:5, 7:7, 7:19, 8:14, 8:15, 8:25, 10:13, 10:23, 11:22, 11:26, 11:28, 13:23, 15:22, 15:27, 16:9, 17:9,</p>	<p>17:24, 18:1, 18:9, 18:20, 19:2, 23:11, 24:1, 24:4, 24:11, 26:8, 26:12, 26:13, 27:8, 28:3, 28:13, 28:23, 29:5, 29:13, 30:16, 31:4, 31:10, 31:12, 31:26, 32:27, 33:2, 36:19, 36:23, 36:25, 36:28, 37:6, 37:18, 40:12, 41:2, 41:4, 42:20, 42:29, 43:7, 44:13, 45:16, 46:4, 46:23, 48:12, 48:14, 49:2, 49:17, 52:8, 53:16, 53:23, 53:29, 54:24, 54:28, 55:26, 56:15, 56:16, 58:9, 58:19, 61:20, 61:22, 61:25, 62:21, 63:10, 63:16, 63:26, 63:27, 63:28, 64:13, 64:23, 65:13, 67:17, 67:25, 69:23, 69:24, 71:5, 72:1, 72:2, 74:23, 74:24, 75:2, 75:26, 76:3 submit [13] - 12:26, 14:28, 15:5, 22:24, 28:27, 29:7, 31:6, 32:6, 32:22, 51:9, 56:22, 57:11, 71:8 submits [1] - 52:6 submitted [4] - 15:21, 38:14, 41:7, 57:16 submitting [2] - 7:28, 11:9 subpar [1] - 46:7 subsequent [2] - 40:1, 40:23 subsequently [2] - 38:24, 47:16 substance [1] - 53:13 substantial [2] - 9:24, 64:29</p>	<p>substantially [1] - 7:4 suddenly [1] - 60:11 suffered [4] - 65:27, 66:5, 66:8, 66:9 sufficient [1] - 6:4 suggest [3] - 32:12, 33:7, 64:27 suggested [7] - 40:5, 55:16, 56:3, 60:26, 64:2, 74:9, 74:11 suggesting [1] - 26:25 suggestion [7] - 9:8, 13:2, 14:29, 15:16, 30:14, 40:12, 47:25 suggestive [2] - 40:2, 42:2 summarise [1] - 9:21 SUNLIGHT [1] - 3:9 super [1] - 25:7 superintendent [6] - 18:22, 49:28, 50:2, 50:12, 51:3, 67:10 Superintenden t [92] - 10:4, 11:10, 11:11, 11:12, 11:18, 15:10, 15:14, 16:11, 16:15, 16:18, 16:28, 16:29, 17:12, 18:23, 19:3, 19:12, 19:22, 20:4, 20:18, 20:21, 21:24, 24:9, 24:26, 25:6, 25:11, 26:9, 26:14, 26:24, 26:29, 27:23, 28:4, 28:5, 28:23, 28:26, 29:7, 29:13, 29:15, 29:18, 29:21, 30:22, 30:24, 32:25, 32:27, 32:29, 33:8, 41:16, 41:18, 41:28, 42:3, 46:1, 46:2, 47:27, 47:28, 49:26,</p>
--	---	---	---	---	---

50:16, 51:19, 54:16, 55:18, 56:28, 57:3, 57:12, 61:4, 61:20, 62:23, 63:7, 66:9, 66:10, 66:12, 66:13, 69:18, 70:21, 70:27, 71:13, 71:14, 71:19, 71:22, 72:12, 72:13, 72:15, 72:16, 72:28, 73:22, 73:25, 73:27, 74:4, 74:5, 74:6, 74:8, 74:10, 74:11 superior [2] - 38:1, 57:6 superiors [1] - 56:25 supplied [1] - 31:28 support [5] - 39:22, 39:29, 54:10, 54:27, 60:15 supported [1] - 50:3 supports [2] - 48:27, 52:11 suppose [11] - 37:5, 38:12, 40:19, 41:14, 41:26, 46:27, 53:19, 53:21, 55:23, 61:3, 70:17 supposed [1] - 54:4 Supreme [6] - 8:12, 9:12, 27:2, 27:26, 68:5, 68:20 surprised [1] - 11:24 surprising [3] - 16:8, 42:17, 54:17 sustainable [1] - 73:13 sworn [1] - 72:11 sylllogism [1] - 21:19 Síochána [20] - 8:16, 8:18, 11:23, 12:3, 13:4, 13:23, 14:10, 15:23, 15:27, 16:9,	17:25, 17:27, 24:2, 24:5, 24:6, 24:14, 36:10, 46:13, 49:6, 64:23 T table [1] - 44:22 talks [1] - 54:21 target [6] - 12:27, 33:3, 54:3, 54:8, 56:27, 57:5 targeted [2] - 9:29, 33:2 targeting [18] - 22:22, 39:13, 40:9, 40:13, 40:24, 47:23, 56:26, 60:16, 60:21, 60:29, 61:8, 62:29, 63:6, 63:14, 64:1, 70:6, 70:7, 70:15 task [2] - 9:27, 41:18 tasked [1] - 19:26 team [8] - 5:18, 5:28, 6:13, 8:9, 10:24, 12:3, 36:18, 46:5 teams [1] - 5:8 temporary [2] - 28:6, 28:14 tension [2] - 41:20 terms [7] - 37:5, 38:2, 45:10, 64:4, 73:11, 74:16, 74:18 test [1] - 22:18 testified [1] - 14:5 testimony [5] - 12:19, 13:27, 14:13, 24:10, 72:11 THE [2] - 5:1, 77:4 themselves [1] - 76:18 THEN [1] - 77:4 thereafter [4] - 9:10, 11:19, 18:23, 31:25 thereby [1] - 35:24 therefore [7] -	18:16, 22:1, 47:14, 50:7, 58:26, 59:9, 60:14 therefrom [2] - 15:10, 28:8 thinking [2] - 55:7, 76:27 third [1] - 41:1 thorough [1] - 61:5 three [3] - 27:18, 61:5, 71:4 throughout [2] - 46:15, 47:25 timeline [1] - 20:11 timewise [1] - 6:21 timing [1] - 73:2 tiny [1] - 62:17 today [4] - 6:17, 6:19, 36:17, 75:16 tone [1] - 76:19 took [3] - 7:11, 16:18, 32:2 totally [1] - 19:25 towards [1] - 32:5 transcript [3] - 27:15, 43:26, 44:26 transcripts [1] - 6:17 transfer [24] - 11:29, 13:21, 13:26, 14:2, 15:18, 15:29, 16:4, 16:24, 17:3, 17:5, 17:9, 17:15, 33:15, 41:22, 44:22, 45:22, 46:11, 46:21, 46:24, 47:18, 49:14, 52:13, 52:14, 63:20 transferred [6] - 14:16, 16:17, 16:19, 16:22, 47:29, 56:26 transfers [2] - 26:4, 44:11 travelling [1] - 47:6 traverse [1] - 31:10 treatment [1] - 66:8	TRIBUNAL [1] - 77:4 tribunal [50] - 5:7, 6:16, 8:29, 9:18, 11:28, 12:15, 18:22, 19:24, 22:14, 27:4, 32:6, 38:4, 39:8, 39:27, 41:12, 43:14, 49:29, 52:20, 61:14, 61:27, 62:4, 62:22, 63:3, 63:26, 64:6, 64:21, 64:28, 65:6, 65:14, 65:16, 65:29, 66:24, 66:27, 67:18, 67:26, 68:3, 68:9, 68:14, 68:17, 68:24, 68:25, 70:1, 71:9, 72:19, 72:27, 73:27, 74:15, 74:24, 75:20 tribunal's [4] - 39:9, 53:14, 67:4, 74:18 trivial [1] - 55:28 trouble [1] - 11:4 true [5] - 59:16, 65:3, 65:5 truth [1] - 32:7 try [7] - 7:9, 12:6, 13:24, 33:13, 34:24, 46:28, 67:12 trying [4] - 17:14, 21:21, 25:20, 29:16 two [18] - 7:6, 10:6, 10:11, 10:14, 10:18, 11:9, 16:27, 20:22, 20:23, 21:2, 30:23, 42:22, 45:2, 45:28, 55:16, 55:23, 59:18, 66:29	- 9:18 unannounced [1] - 54:29 unclear [2] - 49:26, 50:8 under [1] - 45:13 undermines [1] - 76:2 understandabl e [1] - 57:6 understandabl y [1] - 15:5 understood [3] - 25:12, 47:11, 69:4 undesirable [1] - 60:20 undoubtedly [1] - 12:14 unfair [2] - 18:16, 66:8 unfounded [2] - 14:28, 14:29 unhelpful [2] - 21:20, 21:26 uniform [1] - 64:3 unit [5] - 30:17, 30:23, 30:26, 31:14 universally [1] - 66:11 unless [4] - 31:15, 34:20, 36:10, 68:25 unlike [2] - 47:5, 54:26 unnecessary [2] - 66:10, 76:22 unquote [1] - 20:7 unreasonable/ excessive [1] - 22:29 unsustainable [1] - 33:8 unusual [3] - 12:25, 72:22, 73:20 unusually [1] - 55:25 unwarranted [1] - 18:17 unworkable [1] - 54:17 up [7] - 13:18, 34:2, 34:23, 38:8, 49:5, 53:18, 76:23 urgent [1] -	30:10 uses [1] - 53:16 utter [2] - 49:3, 49:6 utterly [1] - 61:13 V vacancy [1] - 16:12 validity [1] - 41:11 valuable [1] - 5:21 various [13] - 5:8, 5:17, 7:27, 8:29, 10:1, 13:7, 13:8, 26:25, 30:2, 38:8, 47:11, 68:15 version [1] - 65:2 versus [4] - 14:17, 21:25, 31:20, 48:23 via [3] - 54:8, 66:9, 66:14 victimisation [3] - 22:22, 30:27, 65:21 victimise [1] - 12:27 victimising [1] - 17:16 view [14] - 7:12, 8:5, 8:10, 8:20, 8:26, 9:5, 9:19, 9:20, 9:25, 15:7, 16:19, 37:1, 57:29, 66:19 viewed [4] - 11:12, 11:15, 11:19, 13:17 visit [2] - 53:27, 54:29 volume [4] - 38:3, 38:6, 38:13, 49:4
			U ultimate [1] - 9:5 ultimately [3] - 28:16, 29:27, 71:9 unanimous [1] - 57:12 unanimously [1]		W wants [1] - 67:11 warning [3] - 10:4, 10:8, 10:17 week [1] - 72:8 weeks [1] - 14:20 weeks' [1] -

<p>28:20 welcome [1] - 56:9 welfare [1] - 48:3 whatsoever [2] - 6:21, 12:9 whereas [3] - 29:19, 32:19, 50:21 wherein [2] - 10:5, 34:18 white [1] - 28:10 whole [1] - 61:22 wide [1] - 39:5 widely [1] - 58:2 wider [2] - 36:18, 40:26 wife [4] - 58:25, 59:6, 72:7, 73:3 willing [5] - 11:29, 14:1, 16:24, 35:17, 51:12 wish [11] - 5:23, 8:11, 15:23, 33:10, 37:21, 38:20, 41:1, 42:8, 48:18, 51:27, 53:18 wishes [1] - 28:10 withdrawal [2] - 59:29, 60:17 withdrawn [7] - 19:15, 30:18, 59:26, 60:3, 60:6, 63:2, 63:8 withdrew [1] - 47:17 witness [4] - 25:26, 30:4, 30:6, 72:25 witnesses [3] - 64:6, 72:20, 72:21 wonders [1] - 42:23 word [3] - 27:22, 66:1, 66:2 wording [1] - 53:18 words [7] - 5:18, 21:22, 25:8, 37:28, 48:25, 49:27, 53:7 work-related [1] - 52:23 workable [1] -</p>	<p>46:14 workplace [3] - 28:6, 28:15, 54:14 worth [13] - 8:16, 28:20, 44:20, 48:23, 50:27, 54:5, 55:3, 55:12, 58:13, 59:1, 61:3, 63:3, 63:5 worthwhile [1] - 23:28 writing [3] - 13:25, 14:4, 14:6 written [23] - 6:25, 6:27, 7:7, 8:14, 8:15, 8:25, 17:8, 17:24, 18:9, 23:10, 23:29, 28:13, 31:12, 31:26, 33:2, 33:18, 48:13, 61:20, 70:27, 71:5, 71:16, 71:17, 74:22</p>
Y	
<p>year [6] - 16:27, 45:18, 45:23, 60:8, 60:9, 76:28 years [4] - 16:27, 38:19, 67:1, 67:20 yesterday [1] - 6:27 yourself [2] - 10:28, 75:28</p>	