

00001

1 THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 30TH JANUARY 2003

2 AT 10.30 AM:

3

4 CHAIRMAN: Good morning, everyone.

5

6 MR. GALLAGHER: Chairman, members of the Tribunal, yesterday I concluded my --

7 that portion of my submission by opening to the Tribunal the ruling of

8 Mr. Justice O'Sullivan in the case of Sherwin and Independent Newspapers and I

9 now want to turn, if I may, please, to the letter of the 28th January 2003 from

10 Egan Cosgrave & Associates and in effect to the submissions contained therein

11 as elaborated on by Mr. O'Higgins yesterday.

12

13 The first thing that he said in that letter is that there's an obligation on

14 the Tribunal to conduct its inquiries in an inquisitorial form. I have no

15 difficulty with that. It goes on to say that "this involves testing and

16 challenging the credibility of witnesses who appear before it", and I have no

17 difficulty with that either.

18

19 In this case, clearly the testing and challenging of the credibility of

20 witnesses will be an important part of the work of this Tribunal. It is

21 inevitable that credibility is going to be central to the module which we are

22 dealing with and indeed future modules. In the present module you have heard

23 the evidence of Mr. Dunlop in relation to payments which he alleges were made

24 to Councillor Cosgrave, Councillor Lydon, the late Councillor Hand and two

25 others. You have heard of course his acknowledgment of telling lies to the

26 Tribunal on an earlier occasion, and I will come to that in just a few moments

27 but centrally insofar as Councillor Cosgrave was concerned, my understanding of

28 the evidence of Mr. Dunlop was he says that he paid approximately 14,000 pounds

29 to Councillor Cosgrave over a period of years in return for Councillor Cosgrave

30 signing motions and supporting motions seeking the rezoning of lands in the

1 Carrickmines area in County Dublin.

2

3 If I am in error in relation to any of the figures give, no doubt the Tribunal
4 will correct me or will be aware of the true position on detailed examination
5 of the transcript or, indeed, of their notes.

6

7 For his part, Councillor Cosgrave has told the Tribunal in statements and
8 letters furnished to the Tribunal that he has received certain monies from
9 Mr. Dunlop. He has confirmed that in February 2000, he said he thinks he got a
10 donation from Mr. Dunlop. At a later stage he says he received several
11 donations that were given to him in general, sorry given to him in relation to
12 the 1992 general election/1993 Seanad election, 1977 Seanad election and 1999
13 local elections. "These were not given to me for as a result of any vote by
14 me. They were bona fides electoral donations for assistance at these electoral
15 campaigns, I did not issue a receipt for any of these donation and I am not
16 sure to what accounts, if any, they were lodged."

17

18 And on a subsequent occasion, Mr. Cosgrave confirmed that he received several
19 legitimate political donations from Mr. Dunlop "in connection with me being a
20 candidate in the Dail and Seanad elections of 1992 and 1993 and in relation to
21 the Seanad elections of 1997 and the local elections of 1999. I do not have
22 records of these donations and I believe most of them were paid by cash, being
23 the sums of five hundred to a thousand pounds and there was also, I believe, a
24 cash donation."

25

26 Now, I have only put short passages from his statement but it is clear that in
27 his written statements, and I assume that the evidence that he will give to
28 this Tribunal, that Councillor Cosgrave will say yes, I got money from
29 Mr. Dunlop but it was legitimate money, it was given to me legitimately, it was
30 given to me for the purposes of my election campaign in 1992 and 1993. And he

1 will say that he never, ever received an improper payment or a bribe or a
2 bung, call it what one wishes, he steadfastly contends that he is absolutely
3 innocent of any wrongdoing and that is a issue that will come before this
4 Tribunal, and that raises an issue for this Tribunal and these, and the issue
5 will be will it believe Mr. Cosgrave or will it believe Mr. Dunlop and it is a
6 fact that Mr. Dunlop has confirmed here that he has lied, Mr. Cosgrave has not
7 given evidence, he will give evidence, he will be examined on his evidence,
8 material will be put to him and it will be a matter for the Tribunal to decide
9 on his credibility as against Mr. Dunlop's credibility, there's no question
10 about that.

11

12 But it is clear and it is accepted that in dealing with Mr. Dunlop who is a
13 Tribunal witness, the same as Mr. Cosgrave will be a Tribunal witness, the same
14 as Senator Lydon will be a Tribunal witness, it is accepted by Mr. O'Higgins
15 that Mr. Dunlop was questioned about inconsistencies, about lies he told to the
16 Tribunal on a previous occasion. Now Mr. Dunlop has frankly admitted that he
17 did lie to the Tribunal on previous occasions. And it is my respectful
18 submission that Mr. Dunlop was examined in relation to these matters in a
19 meaningful way, contrary to what has been said in the letter of the 28th
20 January 2003.

21

22 It is suggested that Mr. Frank Dunlop has been found to have lied on oath on a
23 previous occasion. No such finding has been made. There has been an admission
24 by Mr. Dunlop that he lied but this Tribunal has not made any such finding. It
25 is suggested that there was, in the circumstances, an obligation to thoroughly
26 investigate why this had occurred, why he had lied on a previous occasion, and
27 I think that as I hopefully will show the Tribunal, he was asked for his
28 explanation and he gave an explanation. He explained, as I will quote from the
29 Tribunal, why he had lied and why he was in error in thinking that he could lie
30 and not be discovered to have lied.

1

2 It's suggested that a number of lies were isolated with which -- those which
3 conflicted with his testimony in this module and that is so; they do conflict
4 with his testimony in this module. He readily acknowledges that. But I am
5 only dealing with this module. This Tribunal is only dealing with this module.
6 And it can not and should not, in my respectful submission, allow a far and
7 wide ranging trawl through other material which may never otherwise see the
8 light of day, in order to have Mr. Dunlop cross-examined at this stage. It may
9 well be that at some future date, material which is relevant to the credibility
10 of Mr. Dunlop or which is relevant to the credibility of Mr. Cosgrave or which
11 is relevant to the credibility of Mr. Lydon or to any one of the other
12 councillors who are named, may have to be put to them in the light of what they
13 may say in this module, and it is my understanding that the Tribunal will
14 permit that, will facilitate that and will not shut anybody out for asking the
15 legitimate questions within reason and in the manner that was envisaged in the
16 cases that have been opened by My Friend, Mr. O'Higgins. They are relevant,
17 once the cross-examination is not too lengthy and once it is conducted in a
18 professional and proper manner and my understanding is that the intention of
19 the Tribunal and what the Tribunal has already said is that nobody will be
20 deprived of a right to cross-examine or to reopen a cross-examination at an
21 appropriate time in a future module if something should arise in a future
22 module which affects the credibility of any person who has already given
23 evidence or who has already been cross-examined, wholly or in part.

24

25 Now, the letter goes on and Mr. O'Higgins submits that Mr. Dunlop should have
26 been questioned as to why he so comprehensively lied in the first place. There
27 seems to be a contradiction in that first paragraph because there's an
28 acknowledgment that he was questioned about the lies which conflicted with the
29 his testimony in this module and given that we are dealing with this module, I
30 find it difficult to understand how we can be expected to deal with other

1 modules which are not on the agenda at this stage. And I just want to deal
2 with, if I may, some of the questions that were put to Mr. Dunlop in the course
3 of his evidence and to show that he was asked. It isn't really, I would have
4 respectfully submitted a question of whether a person has lied once or twice or
5 three times or four or five or six times. There is no magic rule, there's no
6 scale that determines whether a person is to be believed or not, depending on
7 the number of times they have lied or not. It may be quite sufficient for a
8 Tribunal, for a court, for anybody else to make up their minds that somebody is
9 not to be believed on the basis of a single untruthful or inaccurate answer.
10 So. It is not, in my respectful submission, necessary to go through each and
11 every question and each and every answer to establish whether it was truthful
12 or not truthful to enable the Tribunal make up its mind as to the truthfulness
13 of the evidence it is hearing and has heard in this module this year and in
14 December of last year.

15

16 However, I do want to draw attention to the questions that were put. The war
17 as, Mr. O'Higgins described it, can be a long drawn out boring repetitive
18 matter or it can be done quickly and in a way that's to the point and elicits
19 the information that is appropriate to be elicited.

20

21 In his, in the course of the examination of Mr. Dunlop, I asked at question 82,
22 I put it to him that an answer he had given was incorrect. I said: "It is not
23 a truthful answer." And he replied: "Not a truthful answer." Question 84:
24 "Was that a truthful answer?" Answer: "No, it was not." Question: "It was
25 not a truthful answer. Sorry," he went on to say. I went on and said: "It is
26 a lie therefore." Mr. Dunlop: "It is not a truthful answer and I am accepting
27 the language that you are now using Mr. Gallagher, yes I did lie."

28

29 At question 88, question: "Was that evidence correct?" Mr. Dunlop: "No."

30 Later in question 89: "Was that evidence true?" Mr. Dunlop: "No." Question

1 90: "Was that true or false?" Answer: "False."

2

3 Question 94: "Doesn't it follow that your answer then to that question where
4 you said that one politician whom you named had received money from you was
5 false?" Answer: "Yes, it does."

6

7 Question 95: "Was this a truthful answer?" Answer: "No." Question: "Was it
8 a lie?" Answer: "Yes." Question 97: "Was that a truthful answer?" Answer:
9 "No." Question: "Was it a lie?" Answer: "Yes." Question 99: "That is not
10 a complete or truthful answer? " That was by way of a question. Mr. Dunlop:
11 "No."

12

13 Question 102: "So you lied to your legal advisers in relation to that?"
14 Answer: "Yes." Question 104: "And that what you swore in your affidavit is
15 incorrect?" Answer: "Correct."

16

17 Question 105: "Was that a deliberate omission on your part?" Answer: "The
18 simple answer is yes." Question 107: "So you swore two affidavits to the
19 Tribunal which I suggest to your knowledge were incorrect." Mr. Dunlop:
20 "Correct."

21

22 Was 109: "Was that an emphatic lie, Mr. Dunlop?" Mr. Dunlop replied: "Yes."

23

24 Question 111, I asked him if he could give the Tribunal any reasons why he says
25 the Tribunal should now accept that the evidence he has given here -- and I
26 then asked him about the evidence he gave on days 147 and 148 and he answered
27 as follows: "Any evidence, Mr. Gallagher, given by me here in public or in
28 writing subsequent to the admonition of the then Sole Member to reflect on the
29 evidence I have given prior to that, to the best very of my ability and
30 knowledge any evidence that I have given subsequently is the truth and I have

1 made every endeavour to ensure and to cooperate with the Tribunal on that
2 basis."

3

4 And he goes on, question 114 to say: "To the very best of my ability,
5 knowledge and belief, the evidence that I gave after the admonition was true
6 and if there were any errors or inconsistencies, they were not of a deliberate
7 nature by me."

8

9 Question 110: "Can you give the Tribunal any reason why they should accept
10 that you are now telling the truth given that you acknowledge that you lied to
11 the Tribunal on the two days prior to the 19th April 2000?" Answer: "Well,
12 the only answer I can give you to that question is a straightforward, that as
13 far as I am concerned, it is the truth and since that date, following the
14 admonition of the then Sole Member, I have fully cooperated with the Tribunal
15 in thousands of questions in the production of documentation, and I would ask
16 you to allow me to say that I, and not in any mitigation of what I said in
17 those two days, I just having reflected as the Sole Member advised, I believe I
18 know that an attempt by me was ill conceived, misguided and wrong. There is no
19 other word to use, that it is wrong for me to deny or to conceal my involvement
20 or participation albeit with others but I am speaking only for myself on
21 matters that are subject to the investigation of the Tribunal."

22

23 Then I went on and asked him about the description of him as self confessed
24 perjurer. He says: "While I am not going to dispute the fact that I have
25 admitted to you here now in public that I told lies and misled the Tribunal on
26 the first two days of public sittings in relation to my evidence, I am not
27 going to enter into a dispute with Mr. Cosgrave about the type of language that
28 he used."

29

30 So, it is my respectful submission that every inconsistency in the evidence of

1 Mr. Dunlop which arose with the evidence that he gave on the first two days, in
2 April 2000 and the evidence he gave in this module was fully and properly
3 explored and highlighted. But if I am wrong in that it is open to Mr.
4 O'Higgins to ask any question that he feels should have been asked by me. It
5 is open to Mr. O'Dulachain, it is open to any other counsel, Mr. O Tuathail,
6 Mr. Finlay or anybody else to ask any questions that they are permitted to ask
7 by the Tribunal and that are relevant and that I have failed to put. And of
8 course in this letter and indeed in the submissions that have been made, what
9 has also been over looked is that this Tribunal of three eminently qualified
10 and experienced lawyers may ask any question that they individually or
11 collectively think should be asked and any question that I may have omitted to
12 ask.

13

14 So, it is not a question of Mr. Dunlop having, as it were, left the witness
15 stand, left the arena and gone out of Tribunal permanently or anything of that
16 nature, he still remains to be questioned and I would have thought, quite
17 frankly, that instead of complaining and criticising the alleged failure to put
18 the appropriate questions to Mr. Dunlop, that that alleged omission might be
19 highlighted by asking him appropriate questions when the time for
20 cross-examination came around.

21

22 Now, the second paragraph of that letter goes on to deal -- it doesn't, it
23 makes a contention, it says "Mr. Cosgrave contends this Tribunal has material
24 which affects the credibility of Mr. Dunlop." I don't know the basis on what
25 that contention is made. It is, in my respectful submission, an attempt to see
26 the documentation which the Tribunal ruled should not be seen, the material
27 that should not be made available and it is, it's a trawling exercise, it is an
28 assertion made without any basis of fact or without any knowledge on the part,
29 as I understand it, of Mr. Cosgrave or his legal team.

30

1 He goes on to say that he is entitled to this unspecified material. And he
2 says that its retention is unlawful. Well, the position insofar as this
3 Tribunal is concerned and the position as a matter of law in my respectful
4 submission, is that it is a matter for the Tribunal to decide in the first
5 instance what material it will circulate or put into public circulation or into
6 evidence in public. It is not for any witness or for any legal team acting for
7 any witness to direct or set out what material should or should not be
8 circulated. That is not to say that the Tribunal would not have regard and
9 give careful consideration to any reasonable and balanced application that
10 might be made where the production of any identified material which the
11 Tribunal might have, might not otherwise circulate or might have decided not to
12 circulate but it is a matter entirely for the Tribunal and as I have already
13 indicated, it is my respectful submission that the Tribunal should not, as a
14 matter of -- in the public interests, disclose the confidential material to any
15 person other than such material as it feels it has to publish or circulate in
16 order to carry out its mandate, that is to investigate the matters in public,
17 which it is mandated by the Oireachtas to investigate.

18

19 Again, I want to emphasise that the fact that material has not been circulated
20 at this stage and the fact that material may be circulated at a later stage
21 does not mean that parties will in any way be prevented or precluded from
22 cross-examining on such material, if they contend it is relevant to the
23 credibility of any witness and no decision should be stressed, and this is very
24 important, the Tribunal has indicated that no decision in relation to the
25 credibility of any witness will be reached until it has heard all the evidence
26 that is relevant to that witness.

27

28 So, what is happening, in effect, is that the counsel for parties who have
29 representation here are being afforded an opportunity, a number of
30 opportunities -- as many opportunities as are necessary, to cross-examine, at

1 an appropriate time, as determined by this Tribunal. They are not and will not
2 be prevented or precluded in any way from carrying out their cross-examination.
3 What they are being asked to do is to confine their cross-examination in the
4 first instance to the evidence that is given in this module and the second
5 module, if any party who is a party or who is referred to or who is a witness
6 or against whom allegations have been made to in the first module wishes to
7 revisit any part of the evidence given in the first module, when
8 cross-examining in the second module, then they will be permitted to do so, and
9 so on.

10

11 I now want to turn to the Abbeylara judgments that were opened yesterday in
12 part by My Friend, Mr. O'Higgins. Let me say in the first instance that is it
13 is my submission that the judgment in the Abbeylara case by the Supreme Court
14 is clearly and easily distinguishable from the situation that obtains here.

15 The Abbeylara challenge in the courts arose from the ruling by the Dail
16 subcommittees which set out the procedures that it intended to follow in
17 relation to the hearing of evidence and the treatment of witnesses before it
18 and in summary, what it decided and the procedure it decided to follow was as
19 follows: "1: They would be cross-examined only if permitted by the
20 committee." That is not the situation here. In Abbeylara, the Gardai and
21 others did not know when they went in to face that committee and their legal
22 advisors, did not know whether their legal advisors would at the end of the
23 evidence be permitted to cross-examine. That is not the case here. It is
24 distinguishable, clearly distinguishable on that point.

25

26 The second ruling of the subcommittee was that all cross-examination of
27 witnesses would be deferred until all the witnesses had been heard. In other
28 words, witnesses would be called sequentially and no cross-examination by any
29 counsel on behalf of any party would be permitted, if at all, until all of the
30 evidence had been heard and until all the witnesses had been examined or

1 cross-examined as the case may be by members of the committee. That is not
2 what is proposed here. This is not what is happening here. And, therefore,
3 Abbeylara is clearly distinguishable on that ground, that second ground.

4

5 Thirdly, the subcommittee ruled that cross-examination, if permitted by the
6 subcommittee, would be strictly limited in time and would have to conclude
7 within one day, all the cross-examination of all the witnesses by or on behalf
8 of all the parties, would have to conclude in one day. That is not what is
9 proposed here. There is no restriction on time, subject to the
10 cross-examination being relevant and subject to it being conducted in a proper
11 professional manner in terms of not having undue repetition and matters of that
12 nature and subject, of course, to any ruling the Tribunal may make, if it
13 considers, for example, that the issue being dealt with in cross-examination
14 has already been covered by somebody else or that it doesn't need to do it.

15 But subject to that over all right of control, my understanding is that counsel
16 will have absolute freedom to cross-examine in relation to the evidence that
17 has been given and to cross-examine as soon as is feasible and is practicable
18 after the evidence has been given. There is no deferment, there will be no
19 deferment of cross-examination and cross-examination can be resumed, subject to
20 any ruling the Tribunal may make, if anything further arises that relates to or
21 may conceivably relate to the credibility of any witness, not only Mr. Dunlop
22 but any witness.

23

24 The other matter in which the Abbeylara ruling, expressly or by implication
25 differed from the procedure here is that it appears, the procedure adopted by
26 the subcommittee appears to have been one which discouraged, to put it at its
27 lowest, the participation of lawyers in the cross-examination process. That is
28 that there appeared to be a desire, if possible, to restrain or restrict the
29 role of lawyers representing the legitimate interests of their respective
30 clients and that is not proposed here. Therefore, it is, in my respectful

1 submission, clearly distinguishable on that score also.
2
3 Everybody coming here will have full opportunity of defending themselves by
4 giving evidence on their own behalf and by cross-examining. And I should say
5 that the Abbeylara judgment of the Supreme Court followed and adopted the
6 ruling of the Supreme Court in re: Haughey and the principles laid out in that
7 decision were referred to in many of the judgments that -- perhaps in all of
8 the judgments that were delivered by the Supreme Court and these four
9 principles in re: Haughey case are worth repeating. They are described as the
10 minimum protection that a person at risk of having his rights jeopardised is
11 entitled to. First, that he should be furnished with a copy of the evidence
12 that reflected on his good name.
13
14 In this case, in this module in relation to Carrickmines, Senator Cosgrave or
15 Councillor Cosgrave and Senator Lydon and all other persons who are alleged to
16 have received monies improperly or otherwise from Mr. Dunlop have been
17 circulated with his statement. They knew in broad terms what he was going to
18 say. Clearly there were issues that he was going to be asked about in the
19 course of the Tribunal, otherwise it would be a pointless exercise in having a
20 public hearing of the Tribunal other than to call Mr. Dunlop to say is that
21 your statement and if he replies, yes sit down and thank you very much.
22 Clearly he was going to be questioned about it but the important thing in terms
23 of protection of the rights of individuals is that they were furnished with a
24 copy of Mr. Dunlop's statement before the hearing, well in advance of the
25 hearing.
26
27 The second protection was that such a person, and I quote, "should be allowed
28 to cross-examine by counsel his accuser or accusers." And that second
29 protection is being afforded to all persons who come before this Tribunal. Mr.
30 O'Higgins and every other counsel who appears here is entitled to cross-examine

1 Mr. Dunlop and will be permitted to do so.

2

3 The third protection that is guaranteed to any such person is that, and I
4 quote, "he should be allowed to give rebutting evidence". And Councillor
5 Cosgrave and Senator Lydon and all of the other persons who are named and have
6 been named by Mr. Dunlop in his evidence will in due course be called to give
7 evidence on oath so that they can vindicate their good name and that they can
8 rebut, as they do in their statements, the evidence that has been given by
9 Mr. Dunlop in public here.

10

11 And the fourth protection was that such person should be permitted to address,
12 again by counsel, the committee in his own defence. And that of course has
13 been afforded to all concerned here. I should say that rather unusually, after
14 the opening statements in which I read not only the statement of Mr. Dunlop but
15 all the statements of everybody else so that the public could be aware that
16 Mr. Dunlop's allegations were being denied and could be aware at the earliest
17 possible time that Mr. Dunlop's allegations were denied, unusually, certainly
18 in my experience, the Tribunal invited counsel for all persons who are named in
19 Mr. Dunlop's statement to make a brief statement outlining their client's
20 position and giving them -- thereby giving them an opportunity to state in
21 public that their clients denied and rejected the evidence of Mr. Dunlop.

22

23 And that was done in order to ensure that allegations by Mr. Dunlop were not
24 left in air, in mid air and could be -- and could not be challenged for a long
25 time and would not appear to be challenged. It was done to ensure fairness
26 insofar as it could possibly be achieved and to ensure that the case of the
27 respective witnesses, the persons who are being mentioned, would be made public
28 at the earliest possible moment. So, I respectfully submit that the
29 protections set out in in re: Haughey are clearly being afforded to all persons
30 at the Tribunal. I say that that will continue to be the case and that the

1 decision of the Supreme Court has, is clearly distinguishable in this case and
2 has no application insofar as the day to day operation of the Tribunal is
3 concerned because the Tribunal is not acting or operating nor is it proposed to
4 act or operate in the manner which the subcommittee of the Oireachtas proposed
5 to act.

6

7 I should say that in the course of her judgment, Mrs. Justice McGuinness, and I
8 just happened to open the page but I think it is a passage that nonetheless
9 should be opened, it's a very brief passage. "As regards cross-examination,
10 clearly any court and any inquiry must have the right to control
11 cross-examination, for instance, both as to relevance and as to length. What
12 O'Dalaigh CJ has laid stress on the importance of cross-examination and it does
13 seem to me that cross-examination so limited in time and even more damagingly
14 postponed or to the completion of all evidence-in-chief could adequately meet
15 the standards set by court in in re: Haughey."

16

17 Now, the third paragraph in the letter of the 28th January 2003 in the matter
18 in which Mr. O'Higgins dealt with reads as follows:

19

20 "3: Private meetings.

21 Mr. Cosgrave seeks clarification of the following:

22 1. The conduct of Mr. Dunlop has clearly established prima facie the
23 commission of a number of criminal offences, that is offences contrary to
24 Section 2 of the Tribunals of Inquiries Evidence Act as amended, perjury
25 corruption and fraudulent conversion.

26

27 Mr. Cosgrave wishes to establish the following:

- 28 (i) Has the Tribunal referred these apparent breaches to the office of the
29 Director of Public Prosecutions?
30 (ii) If the answer is no, would the Tribunal explain why not?"

1

2 I would just like to pause there for a moment and say that I don't propose
3 to -- these are questions that are addressed to the Tribunal and I don't think
4 it's appropriate for me to make any response to them, except to say that I was
5 somewhat surprised by the form and tenor of the question.

6

7 The third point then is raised and which Mr. Cosgrave wishes to establish is as
8 follows:

9 "(iii) What discussions, if any, occurred between Mr. Dunlop and the Tribunal
10 regarding criminal prosecution in the future and the potential effect on such
11 prosecution of his giving evidence to the Tribunal."

12

13 I think it's important and appropriate that I should say and make it clear, as
14 leader of the legal team, that no discussions of any description took place
15 between Mr. Dunlop and the Tribunal regarding criminal prosecutions in the
16 future and no discussions took place about the potential effect on such
17 prosecution of his giving further evidence to the Tribunal. And just let me
18 add, because it occurs to me that there was a comment by My Friend, Mr.
19 O'Dulachain, yesterday that appears that Mr. Dunlop is in a witness protection
20 programme. Mr. O'Dulachain didn't have the duty or perhaps privilege of being
21 here when evidence was given in the year 2000 by Mr. Dunlop but if he had, he
22 would see that Mr. Dunlop did not get any special treatment from this Tribunal.
23 He was treated as a witness. He continues to be treated as a witness. He will
24 continue to be treated as every other witness would be treated.

25

26 Mr. Dunlop is not in any witness protection programme or anything of that any
27 nature. Mr. Dunlop, like every other witness, is a witness of the Tribunal.
28 He is not my witness, I am not trying to show that he is a liar or that he is
29 to be believed, that's not my duty. My job is to try to establish the facts
30 insofar as I can elicit them for the Tribunal, not to establish them but to

1 obtain evidence and present evidence so that the Tribunal can make up its mind
2 as to what happened or did not happen.

3

4 I again repeat, there are no -- I think it's in appropriate that these
5 questions should be asked, I should say. I wouldn't normally respond to them
6 but because there's an implication, in my view, that there has been some sort
7 of a deal done with Mr. Dunlop or with his legal advisors, I think it is
8 absolutely necessary that I should say that no deal has been done. There has
9 been no discussions about a deal and there has been no discussions about the
10 potential effect of a prosecution on his giving evidence to this Tribunal.

11

12 The fourth question that's asked, that Mr. Cosgrave wishes to have answered is
13 as follows: -- I should say, while I'm at it, there has been no deal to --
14 perhaps I better not.

15

16 Number (iv) "Whether there have been discussions in private touching on the
17 Carrickmines module." There have been discussions in private about many
18 things and I'm not going to tell anybody about what has happened in private.

19

20 Now, I should say that this Tribunal is not a Tribunal set up to investigate or
21 to establish whether or not people should or should not be prosecuted. That is
22 not the role of the Tribunal. It's not my role, it's not the role of any
23 member of the legal team. And I think that I will not say anything further in
24 relation to that letter at this stage but I would conclude with the following
25 observations. The Tribunal must and will observe fair procedures and must and
26 will observe and respect the constitutional rights of all persons, including
27 those who may be the subject of investigations in private, whose names may
28 never be mentioned in the public hearings of the Tribunal and the Tribunal must
29 always bear in mind, in my respectful submission the necessity to protect
30 persons whose affairs or whose dealings or whose finances or whatever happen to

1 be investigated in private, because it is necessary for the purposes of
2 elimination or otherwise, and whose names would never appear in public, they
3 must be protected and they are entitled to protection. They have a
4 constitutional right to be protected.

5

6 I'd also say that in my respectful submission the decision of the Tribunal to
7 hear evidence in modules was the only rational and sensible way to conduct the
8 public hearings, having regard to the multiplicity of issues, to the hundreds
9 of witnesses likely to be called and the duty of the Tribunal to do its utmost
10 to prevent unfairness and to protect insofar as it can the rights of all
11 persons who whom it has dealings, whether public or private.

12

13 In my respectful submission, the Tribunal has dealt almost entirely with, in
14 its ruling, the substantive issues that have been raised in the letter in
15 question and in the submissions by Mr. O'Higgins and, in respectful submission,
16 it should not accede to the application.

17

18 That's the end of my submission.

19

20 CHAIRMAN: Mr. O'Higgins, do you wish to respond in any way?

21

22 MR. O'HIGGINS: Yes, Mr. Chairman, I would wish to exercise a right of reply.

23 I would imagine I would be about five minutes. I don't know whether the

24 Tribunal would wish to hear me now or to take a short break.

25

26 CHAIRMAN: We'll take a short break. The invitation to respond equally applies
27 to anybody else, again, with a request for brevity. We'll break for ten or 15
28 minutes.

29

30

1 THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK

2 AND RESUMED AS FOLLOWS:

3

4

5 MR. O'HIGGINS: Thank you, Mr. Chairman. I reply on behalf of Mr. Cosgrave
6 as follows:

7

8 Mr. Chairman, pivotal to our submission was that this being an inquisitorial
9 forum, as opposed to an adversarial forum, there is a very high obligation on
10 the Tribunal to investigate all matters relating to credibility. Unlike an
11 adversarial system where each side can identify the strengths and weaknesses of
12 their case and promote the strengths, that option is not open in this
13 particular situation.

14

15 That was, I think, one of the central pivots of our submission and
16 Mr. Gallagher does not seem to challenge it as a proposition. Either he made
17 my submissions in that regard and in exercising the right of reply, it's not
18 appropriate to use it as a platform to re-state them and I'm not going to do
19 that but I'm setting out the basic principle because it does not appear to be
20 contradicted or challenged.

21

22 Now, insofar as Mr. Gallagher did make reference in his submissions to what the
23 role of a Tribunal was, mindful of relaying the premise on which we argued our
24 case, I specifically reply as follows:

25

26 Mr. Gallagher at one point said yesterday that it wasn't the function of a
27 Tribunal to investigate criminal offences and I would wish to emphasise of
28 course we were not suggesting or requesting that they should investigate
29 criminal offences.

30

1 What we were suggesting was, that having been confronted with a man who had
2 come down here and in a very systematic way attempted to hoodwink this
3 Tribunal, that there ought to have been an immediate and full investigation
4 into that as to not merely the fact of lies being told but for what purpose,
5 how the lies had been prepared, what interests were at stake, what interests it
6 was sought to protect by advancing lies and so forth.

7

8 That's not investigating crime, that's investigating a matter, in our
9 submission, central to the witness' testimony. Mr. Gallagher then went on to
10 say and express that of course it was open if criminal behaviour was
11 identified, to refer the matter to the Gardai but he was silent as to whether
12 in fact that had been done or not and the Tribunal will note that we wish to be
13 apprised of whether that was done or not and I will return to that in a moment
14 because it more properly comes under the third heading.

15

16 Now, the next proposition that was advanced by him was that really this was an
17 issue of credibility between Mr. Dunlop and the witnesses and the Tribunal had
18 heard Mr. Dunlop and had heard him examined and in due course would hear him
19 cross-examined and in further due course would hear the councillors against
20 whom allegations have been made and it was at that point that the Tribunal
21 would treat the issue of credibility. But in my respectful submission, that
22 argument is fatally flawed for this reason: It is true to say that in any
23 contest where witnesses are conflicting on evidence and it's not a conflict
24 that arises out of error or mistake, in other words where a witness comes and
25 gives a particular account and the contradiction is so great that it can't be
26 explained simply by error, one person must be telling the truth and the other
27 person telling a lie or each party telling some lies or something of that sort.
28 Once you are into an area of that person's credibility, their willingness to
29 tell the truth, it is true to say in an ordinary situation a Tribunal or court
30 or jury tasked with a fact finding submission, all being equal, having to hear

1 the witness and hear the others and subject to the requisite proof, will have
2 to make findings of credibility.

3

4 That's all very well but that, in my respect position submission, Mr. Chairman,
5 is certainly not the position here because it's not two conflicting accounts.

6 One of the persons comes into this module carrying a flaw, carrying essentially
7 two flaws. One that they have been engaged in very serious and reprehensible
8 acts over a long period. Two, that on a previous occasion under oath there was
9 widespread untruths told and a question about it. It comes back to what we say
10 is central. You can't actually assess the man's credibility without knowing
11 why all the lies were told in the first place and what the underlying motives
12 were. Because if a person simply comes and says scrub version A, I am not
13 telling the truth, in my respectful submission, it is simply not logically or
14 judicially possible to say I will accept version B without knowing all of the
15 background or a substantial amount of the background as to what was motivating
16 the teller of the lie in the first place. In my respectful submission, it is a
17 fundamental step in assessing the credibility of that person, you must know
18 what preceded it and that is why the lie has been told and that is has not been
19 done, in my respectful submission.

20

21 It is unfortunate if this Tribunal has demonstrated one thing it has
22 demonstrated in the course of its hearings many things, it's the labyrinthine
23 complex nature of what was going on in the planning process, with allegations
24 and counter allegations and central to a number of interests, sometimes
25 competing interests, sometimes moneyed interests, sometimes very very powerful
26 interests and I pose this question, thus far, the whole direction of this
27 Tribunal has been what I would respectfully identify as the base of the apex of
28 the councillors and you have Mr. Dunlop asserting 1.5 million good, 2,000
29 pounds bad and it is repeated like an animal farm mantra 1.5 million is clean
30 but I invite you that 2,000 pounds is dirty. And that is not just simply

1 because he says I gave a corrupt payment, I have no complaint about that, that
2 prima facie is evidence of it being a corrupt payment but he goes much further
3 than that. He doesn't just simply say to this Tribunal "I paid a man 2,000 and
4 it was corrupt and it was for support" but he invites you to say the whole
5 culture was corrupt and I can't even tell you, I won't even tell you, I leave
6 you guessing as to whether contributions which coincided with election
7 payments." That was just a flag of convenience and the Tribunal is being
8 directed and invited and steered that all those 2,000 and 1,500 and 1,000
9 payments are absolutely corrupt but yet the moneyed men who are paying
10 substantial amounts of money to him are being given an encomium and I for one
11 find that a matter for concern. And I say respectfully that if this matter had
12 been investigated as to why he came down here and which interests were being
13 protected, the thrust of this whole hearing might not necessarily be going
14 where it is now.

15

16 Now, I advanced the proposition that there was a strong investigative role for
17 this Tribunal and in the course of the submissions yesterday, Mr. Gallagher
18 made reference to a decision in the High Court which was actually heard during
19 the course of a defamation case, the Tribunal legal team was invited to make
20 submission to the judge as to whether in the course of a defamation action a
21 plaintiff should have access to a particular document. And Mr. Gallagher very
22 kindly made available to me yesterday evening the transcript, it is a short
23 transcript of the submissions made by the parties in that case and I would ask
24 that the Tribunal would also consider those short submissions made by all the
25 parties because it does seem to be of assistance, and in particular I would
26 draw to the Tribunal's attention a passage on page three of that transcript and
27 I hasten to add that this is a submission being made by the Tribunal's own
28 barrister. It is not being made by any counsel who is hostile or inimicable
29 (?) to the interests of the Tribunal. On the contrary, he is a barrister who
30 is there to assert the rights of the Tribunal and to clarify for the judge what

1 the role of the Tribunal is.

2

3 And at page three, the counsel, Mr. Clarke, said: "There's also I think a
4 second side to the matter which is that clearly during its investigative stage
5 from the Tribunal's own perspective as opposed to the perspective of third
6 parties what maybe the subject matter of statements, the Tribunal is carrying
7 out an investigation.

8

9 Any person becoming aware of exactly how that investigation is going may
10 receive an advantage. Clearly, there are obligations in the Tribunal in
11 compliance with the obligations of natural justice at certain stages to bring
12 matters to a person's attention. However, in the ordinary way the Tribunal has
13 a large discretion in how it goes about gathering the evidence."

14

15 And here is a particular passage. "Clearly much in the same way as any other
16 regulatory or policing authority would be reluctant to allow the state of its
17 investigation to become a matter of public knowledge or information that might
18 allow those interested in its affairs to form a view as to where it was,
19 similarly in the case of a Tribunal the same considerations apply."

20

21 Now, that's Mr. Clarke telling a High Court judge that this Tribunal has a
22 strong investigative role and indeed at page 19 of that transcript, Mr. Clarke
23 says that the position of the Tribunal is "analogous with the position of the
24 director of consumer affairs or other what I might loosely call policing type
25 authorities".

26

27 I say respectfully that it is in absolute concurrence with the submission that
28 I made yesterday and it has with it the added resonance that in fact it is the
29 counsel's own Tribunal who made that submission in another forum.

30

1 Now, Mr. Gallagher says that the solution to the dilemma is that we can raise
2 all this in cross-examination and I respectfully disagree with that as a
3 solution to this problem. It's far too late for that.

4

5 Now, Mr. Gallagher had a huge brief, he had a difficult brief and he said at
6 the end of his examination, very fairly, if there's something I have left out I
7 will recall him or whatever and I have no doubt if one wanted to be petty about
8 it, that there were a few loose ends, if one trawled the transcript, where one
9 could make an application but I wouldn't do that, because although technically
10 one might make an argument it is a loosened and it's Mr. Gallagher's function
11 and Mr. Gallagher should do it, I recognise in the real world I can actually
12 deal with it in cross-examination myself and it is impossible to take a witness
13 over eight days and cover everything. It is part of human frailty that there
14 may be one or two loose ends and I don't doubt that they are there but that is
15 what anybody tasked with that responsibility would do and I do concede that the
16 areas that were covered were covered reasonably comprehensively.

17

18 But what I'm submitting to the Tribunal here is much more different. It's way
19 too late to ask him what was it all about in 2000 when he has had two years to
20 think about it. When, in my respectful submission, it ought to have been done
21 during the closed sessions and ought to have been fully investigated. And for
22 me simply to say well why did you do it, I'm at a loss, I'm exploring it on the
23 blind and most of all, Chairman, it's not my function. It is not my function
24 to do that. I am pushing it right across the line and I'm saying it is the
25 function of this Tribunal and it has not discharged that function or
26 responsibility for whatever reason. There were many, many judgments to be made
27 but in my respectful submission the call was on the wrong side of the line and
28 it is fatally flawed.

29

30 Moving onto the second heading, which was our request for documentation. Now,

1 as I understand it, the application is resisted on a number of basis. First of
2 all, it is said that we haven't identified particular documentation but with
3 respect, Chairman, we don't know what is there, so we couldn't identify
4 particular documents. This Tribunal has had 10 days of closed sessions. How
5 could we possibly know what was in it? But it is reasonable to speculate that
6 during the course of those 10 days, there were discussions touching upon acts
7 of dishonesty in which this witness played a very substantial part.

8

9 As I say, this isn't an adversarial system. This is a system where the
10 Tribunal finds itself, having cast upon its shoulders, an investigative role,
11 and it also finds itself tasked with drawing the line, having unearthed
12 information as to what information should issue forth.

13

14 And while Mr. Gallagher is absolutely right in enunciating the following, this
15 Tribunal is entitled to keep much of the material it receives confidential,
16 particularly in its preliminary stages. The Supreme Court has so ruled and
17 that is the law. And Mr. Gallagher is right in saying that ultimately it is
18 for the Tribunal to decide what it releases and what it doesn't release but as
19 he pointed out in the Lawlor case, every exercise of that right and every
20 exercise of that discretion, which undoubtedly is a wide discretion, must be
21 discharged and performed in accordance with natural constitutional justice and
22 fair procedures so it's not an unfettered right.

23

24 Now, we wrote three letters and on each occasion we invited a reply to a very
25 simple proposition. "Do you have material which is capable of undermining his
26 credibility?" On three occasions we got what I would respectfully categorize
27 as a non-reply to that and we kept on repeating it because the proposition was
28 so simple, have you got it, yes or no, if you have it will you give it to us,
29 yes or no, if you have it and you are not giving it to us, will you justify not
30 giving it over.

1

2 We repeated that submission yesterday and we are still waiting. We are still
3 waiting for Mr. Gallagher to confirm whether they have that material or not.
4 If they said that they didn't have it, we'd simply withdraw our submission and
5 say we have queried, we have got our answer, we have been told it does not
6 exist. We are now withdrawing that and may I say immediately while I'm on
7 that, Mr. Gallagher has given an assurance there were no discussions about
8 future criminal prosecution and I am now withdrawing my submission in its
9 entirety in that regard because we have canvassed it and we have got a reply
10 and it's a dead letter and had Mr. Gallagher indicated we don't have
11 credibility material, we've none, I would similarly withdraw that forthwith but
12 I cannot do that because no such assurance is given and the fact that three
13 letters failed to get the assurance, the fact that lengthy legal submissions on
14 both sides have failed to get the assurances and the fact that common sense
15 dictates the overwhelming likelihood, if not certainty of the existence of such
16 material, we must, by way of inference premise our application that such
17 material does exist.

18

19 Now, what does the Tribunal legal team say? Well, it says without confirming
20 expressly that such material exists, if it did exist which, we are not
21 accepting that it does, we would be entitled to not give it to you on the basis
22 of confidentiality. Now, again, Mr. Clarke's submissions to Mr. Justice
23 O'Sullivan are quite useful in that regard and there is contained at page 17 a
24 useful exchange I think between the judge and Mr. Clarke where Mr. Justice
25 O'Sullivan wishes to precis the thrust of what Mr. Clarke's submissions are and
26 the exchange is as follows: "The assertion of the general principle that the
27 public interest in prohibiting disclosure of this information is really, I
28 assume, resting on the particular mischiefs that are identified in A through to
29 F." And the Tribunal will recall Mr. Gallagher read out six principles
30 yesterday. Mr. Clarke: "Yes, the effect that it would have on the conduct of

1 the case." Mr. Justice O'Sullivan: "So if I look at it it says "disclosure of
2 material in the possession of the Tribunal obtained or generated in the course
3 of its working would prejudice the investigation to the Tribunal by breaching
4 the confidentiality that breaches it"." And the judge says that is an
5 assertion of a principle of confidentiality. My question is does that really
6 become specified and made specific in B, which is "to enable the Sole Member to
7 carry out its work, he must be able to give assurances that information
8 received in confidence will not be published unless and until the Sole Member
9 decides"?

10

11 If I might pause there for a moment, Mr. Chairman, the case as I understand it
12 is Mr. Gallagher isn't saying that if someone walks in off the street, this
13 Tribunal will be entitled to say I'm giving you an absolute blanket,
14 unconditional guarantee what you say to me will always remain confidential.
15 As I understand the level the confidentiality is pitched at what you say to me
16 would remain confidential up to and until such time as this Tribunal decides it
17 would be appropriate to disclose it. A case is not being made that a blanket
18 unconditional guarantee of confidentiality is being extended to anybody who
19 makes a statement but merely an assurance that it will not be unnecessarily
20 disclosed and will remain confidential until the members of the Tribunal think
21 it appropriate disclose it.

22

23 Mr. Clarke: "I think B is certainly the reason why A is so." Mr. Justice
24 O'Sullivan: "B is the reason for A." Counsel: "Yes, there may also be the
25 additional reason perhaps, My Lord, that also until the Tribunal reaches the
26 stage where it feels that it would have a public hearing on the issue, it would
27 wish all the relevant information in the interests of all the parties to remain
28 confidential because the rights of parties who may be subject to investigation
29 which never moves to a public phase would also be a factor." And I say that is
30 a very significant exchange between the Tribunal counsel and the judge because

1 accepted in it is that when matters become public, if there's something in that
2 statement which touches upon an aspect of a public hearing, at that stage it
3 will come for consideration to be disclosed, I don't say automatic disclosure
4 but it will certainly enter into the frame we are now entering on a public
5 hearing on the aspect of this material and at that stage the Tribunal must
6 address its mind, do I have to disclose it and the first answer it can give to
7 itself is I have a wide discretion whether so to do. The second answer is I
8 must disclose it if there's any chance of unfairness coming into it.

9

10 And it seems to me by way of observation, Chairman, that this Tribunal could
11 not rule, in effect, whether it ought to come into being or not to us or to any
12 other legal team without seeing the material. It doesn't rule on the blind but
13 the position that's been canvassed by Mr. Gallagher is no, no, confidential,
14 you can't even go behind it, whereas in fact my replying submission it is only
15 confidential subject to certain conditions. It is confidential in the
16 preliminary stage so as not to compromise the investigation. Once the matter
17 moves to a public hearing, it moves into a completely different category and at
18 the public hearing stage, it must be disclosed, if there's any danger of an
19 unfairness and I say, moving on to the next leg, that there is an unfairness.
20 I say the unfairness is that my cross-examination is being restricted and when
21 I complain it is being restricted the reply that I'm met with it is it's not
22 being restricted, there's an element of it potentially -- that is being
23 deferred and that brings us to the Abbeylara side of the submission made by
24 Mr. Gallagher.

25

26 Now, there are similarities with Abbeylara, there are dissimilarities on the
27 facts. One of the strong dissimilarities is that the Terms of Reference of
28 that Oireachtas committee effectively we are putting a stopwatch on
29 cross-examination, nothing like that is happening here. There isn't anything a
30 million miles approximating to any sort of restriction like that.

1

2 There is, however, a similarity, namely the deferment of cross-examination and
3 it's to be noted that the deferment in Abbeylara was estimated to be about nine
4 or 10 days. Here we are talking here years, but anyway, comparison between
5 facts are of limited assistance. I will make this concession. Abbeylara says
6 cross-examination may be restricted and it gives obvious examples of prolixity
7 and incompetence and irrelevance but I will make a further concession.
8 Abbeylara says that a cross-examination may be reasonably restricted. I think
9 it puts it in the negative, it may not be unreasonably restricted but it
10 follows from that you can't have a restriction if it is a reasonable one and in
11 my respectful submission, though I opened the case at some length yesterday,
12 having heard what Mr. Gallagher has to say, I think I would have to make a
13 concession that the law can probably be reduced down to that. If this Tribunal
14 can say that the cross-examination is a reasonable restriction in all the
15 circumstances, it will pass muster.

16

17 If it isn't reasonable, then there's a difficulty with that Tribunal. And I
18 say respectfully that it is in fact grossly unreasonable. I say so as a matter
19 of fact because even if the system were to operate as it is indicated in an
20 ideal way it might operate, it leaves a person, in this case my client, I am
21 making the submission, with a stain and a cloud hanging over them for a very
22 long time and that's not accepted but it seems to me there's an even bigger
23 flaw because the reply as posited by Mr. Gallagher is subsequent modules, it
24 seems to me, Mr. Chairman, that premise is completely and utterly surreal. How
25 does Mr. Cosgrave even know at this juncture whether he is going to be in
26 another module? No one has ever told him he will be. As he sits here dealing
27 with this module, that's it. And really what Mr. Gallagher is saying is if you
28 are in a subsequent module, you might get the chance to come again but that
29 presupposes that you are going to appear in a subsequent module and effectively
30 one cannot presuppose anything of the sort but even if it were the case that

1 someone were appearing in a subsequent module, one would have to ask in
2 practical terms where does it get you? For example, if you were in module 19,
3 you might be reasonably well positioned, because if you had the time, energy
4 and resources, you could comb the other 90 modules or the sections of it that
5 were relevant and hope that something might come out from what has gone before,
6 to increase your store of knowledge and to give further ammunition which could
7 be used to test the credibility of a witness. Maybe that's fine if you are in
8 module number 90. What if you are in module number 3? What if the killer
9 punch comes in module number 8, but it's only a killer punch for you because
10 that particular piece of information has come out then but to the other people
11 in number 8 it's of no consequence, it is a piece of collateral material which
12 is of no assistance to them there and then, if it comes up at any time after
13 number 3 you don't get the benefit of it.

14

15 Now, I do appreciate and I do appreciate this is a very difficult system to
16 manage and I am not, for the purpose of advancing my client's case, trying to
17 over simplify the difficulties which the Tribunal is facing. It is cumbersome,
18 there are 20 modules. The Bailey module went longer than people anticipated
19 and presumably people have reviewed that and looked at it and said in what way,
20 having learned from that, can we manage to telescope or truncate matters and
21 one way would be try keep the levels of representation down for each module so
22 you don't have 50 sets of cross-examination, for example. And I do see the
23 potential difficulty. And I don't in any way underestimate it and I make a
24 sensible concession that it is a substantial difficulty.

25

26 But what I do object to, Mr. Chairman, is that when we say we want the material
27 because it could assist us and the rest of us, the response, and it is the
28 stock response, there lies the path of damnation. Once we go down that road,
29 we will lose complete and utter control, we won't be able to control the way
30 that the matters are run, it would be unmanageable, unwieldy and implicit in it

1 all is in some way or another, professional lawyers, who litigate in fora every
2 day of the week are in some way or another not to be, I won't use the word
3 trusted but the simple case is if you give that information to lawyers they
4 will tie us all up in knots and we will be here forever and we'll never be able
5 to get to the kernel of the issue.

6

7 My response to that is in, for example, criminal cases there are boxes and
8 boxes of material disclosed, 98 percent of it is irrelevant, sometimes 99.9,
9 sometimes all of it. But that system has been introduced in the last ten years
10 in response to a number of injustices which were done to people, primarily in
11 another jurisdiction but we have also had our own fair share of them. What
12 happened was those injustice I assume came to light because after the event
13 people saw material and said if that material had been available at the time,
14 the approach would have been different, etc etc etc.

15

16 So the State took the view, well, we would give it to you and then the onus
17 then shifts on to you to see whether it will assist your case or not and you
18 won't be in an appellate court saying this was the absolute knock out blow that
19 would have assisted the defence. Rather you will have the material and it's up
20 to you whether to use it or not and experience has shown that the use of the
21 disclosure tool has not added in any appreciable way to the length of the
22 trial. In an occasional case the defence will use witnesses from the
23 disclosure and call them but if it is added one percent on average to the
24 length of cases, that's putting it at its height, in my respectful submission.

25

26 So, the picture canvassed that if you do this it's going to wreck everything,
27 in my respectful submission, it is an incorrect premise. And at one point
28 Mr. Gallagher says they want all this material, well we do but the Tribunal has
29 ruled we are not going to get it so you are stuck with that, instead we have
30 telescoped it and we have said Carrickmines 1 and credibility. That's the only

1 issue that we have focused. Insofar as it's a trawling exercise, I am sorry it
2 is it is a trawling exercise but I'm particularly sorry to say in our
3 submission, the trawling exercise is for the Tribunal. They have to trawl it
4 in the first instance and see is there material there. And if there isn't,
5 that's the end of it and if there is, they then have to decide well there's
6 force in our submission but you couldn't, as is being urged, simply say no, no,
7 everything is confidential, the Tribunal's work would be compromised. You
8 can't assess whether it would be compromised without seeing what the material
9 in issue is, in my submission.

10

11 Now, the final point, Mr. Chairman, as regard to category number 3, I have
12 withdrawn entirely in the light of what Mr. Gallagher has said, our issue about
13 discussions, that's gone.

14

15 Mr. Gallagher said, although he had his back to me, I think he had somewhat
16 raised eye because when he said there was a certain matter in there and he
17 wasn't going to comment upon it, he didn't think it was appropriate or
18 whatever, and I have to say I was concerned about that, that perhaps our letter
19 had been construed as in some way or another discourteous or in some way or
20 another overstepping the mark. If that be the case, let me apologise
21 unreservedly. And let me simply say the letter was written in response to a
22 question by the Tribunal to put your cards, as it were, face up and that's what
23 we did and if it suffers from being terse or from being brief, I would have to
24 say it's not a complaint that's usually directed at me.

25

26 But what I'm saying is this: In my respectful submission, Mr. Cosgrave should
27 not feel any embarrassment in posing the question. It is, in my respectful
28 submission, an appropriate question to ask. It is appropriate where this
29 Tribunal has made a decision in a number of other cases or a decision in
30 another instance to refer the conduct of a number of people who appeared before

1 this Tribunal to the Director of Public Prosecutions. It is the Tribunal who
2 has done that. And if it is done for those people we are entitled to know
3 whether it is done so for Mr. Dunlop. And insofar as the second aspect of it
4 is concerned, we would, in our respectful submission, if the Tribunal has
5 elected not to make the reference, we would in our respectful submission be
6 entitled to know the reasons why that is so, and again we wrote it in a letter
7 and in my submission yesterday, I invited the Tribunal to give its reasons.

8
9 Now, it does occur to me that it would be unusual in the course of an
10 adversarial contest in a court to say to a judge I am inviting you to explain
11 why this is this and why it is not so. Maybe it is semantic, the use of that
12 language, I hope it did not cause any offence or was misconstrued as in any way
13 discourteous, I must also say this on behalf of my client. It has been
14 emphasised to us, time and time again, this is not a court of law, and the
15 rules and procedures which apply in courts of law don't apply here and I say it
16 with the greatest deference to the eminence of the people sitting here that it
17 not being a court of law has advantages and disadvantages and what in fact this
18 Tribunal is a composition of persons who happen in the first instance to be a
19 distinguished former High Court judges, now retired and two serving
20 distinguished members of the Circuit Court, together with a reserve member, but
21 the fact that they are judges, in my respectful submission, is a coincidence.
22 This is a Tribunal, it's not a court of law and in those circumstances, in my
23 respectful submission, it's perfectly open for a witness who on the face of it
24 sees conduct which is different and requires an explanation, it is in my
25 respectful submission perfectly legitimate to ask the Tribunal what its stance
26 is and if there's an apparent contradiction, to invite the Tribunal to comment
27 upon it and our submission in that regard was no more or no less.

28

29 The final point I would make is whatever about the credibility issue, and
30 again, I don't wish to over simplify it, I do accept it is complex, and I do

1 accept that there are arguments on both sides. I have submitted the strikes of
2 our argument but I do understand the Tribunal is coming from, if you start on
3 credibility, OK, the relationship with the tax man, that's clearly something
4 that attaches to the potential alleged dishonesty. That's fairly easily
5 discernible. There may well have been matters that have been said during the
6 course of closed sessions which point to other dishonesty specifically but
7 after that it gets grey because the Tribunal may feel, well, is every act of
8 alleged corruption is that an act of dishonesty and if we do that, does that
9 mean we have to release all 20 modules? I do appreciate it's quite difficult
10 to draw where the line is. What I respectfully say is you cannot, to meet that
11 difficulty, just simply draw the line outside the pail, close up shop and say
12 sorry, confidential and that in my respectful submission does not address the
13 issue.

14

15 And indeed, Mr. Gallagher seemed to me became so emboldened by the end of his
16 submission that he felt free to tell this Tribunal that he wasn't even going to
17 confirm to us that there were discussions about the Carrickmines 1 module in
18 private. His words were there were discussions about many things and I am not
19 even obliged to tell you whether Carrickmines 1 module was discussed and I say
20 respectfully that is a proposition that could not hold water no more than a
21 sieve or a colander could. What is this about but Carrickmines module 1? What
22 is the ruling thus far about but to interpret them, it is you will get the
23 material generated for the Carrickmines 1 module but now we are told if there's
24 other Carrickmines 1 module material in existence, which by the way I am not
25 even confirming to you that there is, you just can't have it and it seems to me
26 to run in the teeth of the rulings, and I started out by saying that the
27 Supreme Court has firmly endorsed the right of this Tribunal to run things in
28 private up to a particular point and beyond, if called upon to decide where the
29 line is.

30

1 In recognising that, I also ask this Tribunal to bear in mind this is a
2 democracy. This is my client's reputation. This is his good name. That is a
3 public hearing. This is an open forum. We want the matters ventilated and for
4 a counsel for this Tribunal to say vis-a-vis the very module under discussion I
5 am not even going to confirm or deny that it was discussed, in my respectful
6 submission, one, moves out from the wide umbrella that was offered by the
7 Supreme Court and trespasses into an air of secrecy and to act in a way that
8 gives rise to potential unfairness of procedures and in a way, and I don't wish
9 to overstate this, is absolutely inconsistent with the democratic nature of how
10 matters of controversy which need to be resolved have hitherto been resolved in
11 this jurisdiction.

12

13 Thank you, Mr. Chairman.

14

15 JUDGE MAHON: Mr. O'Higgins, could I just ask you what you mean, it's just a
16 point of clarification, what do you mean by information or documents which
17 might touch on the credibility of Mr. Dunlop? This is the information and
18 documentation that you would want released to you. For example, if, say, in
19 relation to module 25 in two or three or four years' time, whatever, if it was
20 known to the Tribunal, and this is only an example, if it was known now that
21 Mr. Dunlop alleged that he paid Mr. X 2,000 corruptly and that this was alleged
22 by Mr. Dunlop and it was also known that this was denied by Mr. X, are you
23 suggesting that or is it part of your submission that that type of information
24 or those statements should be released to you now?

25

26 MR. O'HIGGINS: I think I am, Judge, but I think as I fairly conceded, one
27 could start at areas where it was easier to delineate than others and one would
28 be, for example, the tax relationship. The second would be if Mr. Dunlop
29 volunteered in the course of being examined by the Tribunal an act of
30 dishonesty that went generally to how he conducted his business. I do

1 appreciate it gets harder when you start to say well, does this mean that every
2 single allegation that this man has made against a person which has been denied
3 or put in issue, that that touches upon its credibility and does that mean that
4 we should receive that material and so meet your query, Judge, head on, in my
5 respectful submission it does. Because on an equality of arms principle, we
6 should know the full picture. We shouldn't be going round here in any way
7 blinkered but could I say this by way of reassurance, if that material is
8 released, it doesn't mean that Mr. Dunlop is necessarily or at all going to be
9 subject to a cross-examination on the lines of going through every single
10 allegation that has been made and denied. That is a kind of restriction which
11 the Supreme Court has identified.

12

13 JUDGE MAHON: What's the purpose then of releasing that type of documentation?

14 I assume the reason you would want it released would be that you would then
15 want to be in a position to put it to Mr. Dunlop that Mr. X denies he got money
16 from him.

17

18 MR. O'HIGGINS: Well, if I could put it in these terms, Judge. The
19 particular legal representatives of each particular person or entity, they
20 approach their brief from particular perspective and information which the
21 Tribunal might not immediately see as being of huge assistance can, from
22 another perspective, be of vital assistance and if I might give an example
23 about that. We asked for bank records and the answer we got was, as the
24 records don't make a connection, they don't confirm his account, they couldn't
25 help you basically was the answer.

26

27 Now, we are going to be in a position to actually demonstrate, I think, and
28 certainly undertake that that is our professional view, that that is actually
29 incorrect because it goes a little bit further than just simply saying the bank
30 records won't help you. And I'm quite sure the person who made that decision

1 did so utterly impartially and wasn't in any way attempting to be unfair to us
2 but no doubt was looking at it from a broader principle but this is the thin
3 end of the wedge, it's the bank statements now, it will be something else next
4 week and the bank statements is its own module and we want to keep control of
5 that because that was the interest they are there to protect and it's entirely
6 legitimate but we will be in a position to demonstrate that that particular
7 decision was wrong. I think we will be able to do that. And what I'm saying
8 to you is we are entitled to see all of those things. It may well be that the
9 overwhelming bulk of it will not assist us but I say that the decision in
10 respect of that as has in the first instance to be reached by us and not by
11 anybody else.

12

13 JUDGE MAHON: Thank you.

14

15 JUDGE FAHERTY: Just one question, Mr. O'Higgins. At point two in your
16 letter, the first subparagraph A, when you say, Judge Mahon has touched on
17 this, when you say material, are you making a distinction or encompassing all
18 the material the Tribunal has gathered in the course of investigations
19 vis-a-vis other modules with any material the Tribunal might have between
20 itself and Mr. Dunlop in private sessions. That hasn't been clear to me from
21 your answer to Judge Mahon.

22

23 MR. O'HIGGINS: I am saying this, Judge. First of all, I accept that there
24 are boxes of material which the Tribunal has which will be of no assistance in
25 touching on any shape or form on Mr. Dunlop's credibility and I don't want to
26 see those, but I think I can answer your question this way. If there is
27 material in the closed sessions which touches upon his credibility we are
28 asking to see that.

29

30 If there's material in the closed sessions relating at all to Carrickmines 1

1 module, it seems to me we are entitled to it as of right. It seems to me as
2 far as the larger subset of Tribunal material generally, my submission would be
3 we at this stage apropos the earlier ruling of the Tribunal, we are now
4 effectively restricted to saying we should only see such material as could
5 reasonably be capable of undermining his credibility and that involves in the
6 first instance a sifting process by the Tribunal. And incidentally I may be
7 repeating myself, it seems to me the Tribunal members cannot rule an
8 application without seeing the material in question in the first place but
9 that's another matter. I say it is a sifting process for the Tribunal. If
10 posing that question the answer is yes, then I say we should have it.

11

12 JUDGE FAHERTY: Thank you.

13

14 MR. O TUATHAIL: Mr. Chairman, members, Seamus O Tuathail for Don Lydon. I
15 will be very brief, Mr. Chairman. First of all, I want to support Mr.
16 O'Higgins' application in every detail insofar as it relates to my client's
17 position, mutatis mutandi and I'm indebted to Mr. O'Higgins in fact for making
18 these points to the Tribunal in that they have a benefit for all parties here,
19 certainly all of the parties who are facing these allegations, including my
20 client. Now, I just want to comment in relation to one of the matters raised
21 by Mr. Gallagher earlier this morning when he was commenting on the in re:
22 Haughey principles. The first principle he set out was that a copy of evidence
23 that reflects on a party's good name should be given to that party.

24

25 Now, that didn't happen in the case of Senator Lydon and what did happen was
26 that in November, when the Tribunal opened, my solicitor of course stated that
27 we were coming to vindicate our client's good name but at that stage we had a
28 single bare allegation in front of us and it was only on the 17th December that
29 the detail that years of alleged conversations and other details, apparently
30 convincing, details were given in his evidence by Mr. Dunlop. Now, I protested

1 at that time and the ruling of the Tribunal at that time was that a witness was
2 entitled to flesh out the detail he had given in evidence but in fact we never
3 got a statement of his evidence until we got the transcript the next day or
4 until we heard it on the 17th December and that means that our investigation
5 time was severely curtailed and I'm -- I still say that that was a breach of
6 the first principle of the in re: Haughey because certainly in in re: Haughey
7 so far as I say it does apply -- the analogy would be almost with a book of
8 evidence situation, though that again in re: Haughey was dealing with the
9 public accounts committee which was set up at the time and we didn't get any
10 detail until the 17th December.

11

12 And also, whilst I should be careful and I am being careful because I am
13 engaged in cross-examination, I'll say nothing at all that arises from that
14 cross-examination to date, certainly in the absence of Mr. Dunlop's legal team,
15 it would be wrong of me, but we are aggrieved by that. And then also in
16 relation to the particular point that's being pressed here on Mr. O'Higgins'
17 submissions, that is that the material in the closed sessions which may help
18 us, which relate to the credibility of Mr. Dunlop and which may help my client
19 in undermining his credibility. That such material should be made available if
20 we are to be allowed to cross-examine with full freedom. And I accept that
21 Mr. Gallagher has a very difficult job in presenting evidence but his editing
22 so far as he may have had to edit his presentation does arise to a good extent
23 from what happened in those private sessions. And if that is so, and if there
24 is material there that may assist us and may be over looked, then we are
25 entitled to know that but only through the medium of the sieving suggested by
26 Mr. O'Higgins, that the Tribunal looks at this evidence in its totality and
27 then makes up its mind and then we can have access to that material. And it's
28 not enough that we know in broad terms, I think that was Mr. Gallagher's
29 description of the statement sent to us, that we know in broad terms what we
30 are accused of? If the evidence comes very late in the time, Mr. Dunlop having

1 been first contacted by the Tribunal in 1998, we only hear his particular
2 allegation on the -- we hear the allegation in 2002, late in 2002, and we have
3 the fully fleshed out version of it in December of 2002 and when I protested at
4 that stage, I think Mr. Gallagher's comment was that he was hearing it for the
5 first time at that time so that certainly that is a cause of grievance in our
6 camp and it may not be confined to our camp.

7

8 And then I should say finally that just one particular comment that was made
9 yesterday, Mr. Gallagher was saying that and I am quoting for ease from the
10 transcript, page 68, "but it seems to me that in a situation where an
11 allegation has been made by one individual that he did or did not do something
12 to another individual and there are only effectively two parties to the
13 transaction, two witnesses, the credibility of all concerned will arise before
14 any Tribunal or any forum could make a adjudication for determination on
15 whether or not what was alleged to have happened did in fact happen."

16

17 Now, given the relationship of the parties here, Mr. Dunlop's position and
18 background and my client's position and background, I say that that is a far
19 too narrow a characterization of what is happening here and the Tribunal has a
20 far wider horizon to look at when it comes onto the issue of any adjudication
21 on the relative credibilities involved here and the Tribunal is dealing with
22 allegations, very broadcast allegations against anything up to 78 individuals,
23 and, therefore, must look to the credibility of the person making the
24 allegation, his background and his motivations in the present. And I don't
25 want to be seen to accept the mantra that has been advanced here over a number
26 of days in evidence, that it takes two to tango, that it's as simple or as net
27 as that, it clearly is not. And the Tribunal in looking at the evidence or
28 looking at information which were given in closed sessions, should be very
29 alert to identify and communicate, in my submission, that material to the
30 parties and to all the parties it may concern.

1

2 And I have nothing further to say, Mr. Chairman.

3

4 MR. O'DULACHAIN: Mr. Chairman, I'll be quite brief. If I might proceed,
5 first of all, in relation to the phrase "witness protection programme" that I
6 used yesterday. I simply want to clarify I didn't want to use it in any
7 offensive way or indicate it was to be used in the context there was some
8 inducement or intention involved in the manner in which Mr. Dunlop was being
9 dealt with. What I did intend to communicate was that the effect of the
10 structures currently in place are that Mr. Dunlop is in effect protected from
11 effectively cross-examination and that arises for three particular reasons from
12 the purpose of cross-examination on behalf of the interests of Tom Hand.

13

14 One is as the representatives of Tom Hand, we have only been given a general
15 allegation and one specific allegation, specific to this module, we don't know
16 what the other allegations are. And that in the context of having to
17 cross-examine someone where all the indents relate to the same parties, relate
18 to similar dealings, relate to an allegation of a course of dealings and in
19 circumstances where Tom Hand has been specifically targeted and is the subject
20 of a particular sting in Mr. Dunlop's evidence. So effectively we are asked to
21 embark upon a cross-examination blind to the totality of the allegations being
22 made and supposed to deal with one specific allegation in vacuum.

23

24 Secondly, we are supposed to embark upon a cross-examination conscious that a
25 whole story has been put previously to the Inquiry, that there has been
26 mischief, that there has been a plot, there has been engagement with the media
27 and that there has been a whole objective to distort and misdirect this Inquiry
28 in circumstances where the detail of that can only be examined by the Inquiry
29 itself. So that there is a whole general question about Mr. Dunlop's
30 credibility relating to each allegation he makes against Mr. Hand, specifically

1 relating back again to the allegations that appeared, stories that appeared in
2 the Irish Independent in April 2000. So we are to embark upon a
3 cross-examination where there's a huge issue as to his motive and intention in
4 relation to Tom Hand generally that hasn't been explored and we are required to
5 get into the specifics of particular allegations when there is a very broad
6 issue as to his general motive which, I assume the Inquiry has gathered
7 information about but which hasn't been brought into the public domain prior to
8 the public scrutiny that we as a legal team are supposed to bring to
9 Mr. Dunlop's evidence insofar as it concerns Tom Hand.

10

11 Thirdly, in circumstances where a very limited disclosure is being made as a
12 matter of policy by the Tribunal in relation to the material collected from
13 Frank Dunlop and relating to his allegations.

14

15 So I say in this sense that before one can embark upon a specific module where
16 we are dealing with a witness whose general credibility is in issue, that the
17 issue of his general credibility, either has to be a component has repeated ad
18 nauseam between each module or at the very least, the Tribunal, by way of an
19 opening examination, should have gone into detail at this stage in its general
20 credibility, subject to the right to cross-examine in relation to that arising
21 from the individual modules by individual parties as it comes along.

22

23 But his general credibility and issues relating to that have been entirely left
24 at large and effectively we are left in a situation where effectively we are
25 attempting to sail a ship backwards in the hope that all the specific
26 cross-examinations will subsequently merge into an effective cross-examination,
27 and I think Mr. Gallagher tried to over emphasise the final role of the
28 Tribunal in making a determination. In my submission, there's a significant
29 distinction between making a decision on integrity and the process of testing
30 that integrity, and my concern is that our ability to effectively test that

1 integrity is frustrated by the procedures currently in place and by the lack of
2 examination of Mr. Dunlop that has been conducted to date and an examination
3 which effectively, I submit, can only be conducted effectively in the first
4 instance by the Tribunal itself.

5

6 And I submit that in the circumstances that Mr. Dunlop came to the Tribunal,
7 changed course halfway through evidence on oath, that there is a very special
8 duty in relation to the evidence of Frank Dunlop to bring into the open at the
9 outset of all these modules, at the commencement of a process of modules such
10 information that the Inquiry has relating to its credibility or that may go to
11 its credibility so that the parties in every single module will have the
12 benefit of the overview that the Tribunal must have in that it is now two and
13 three quarter years since Mr. Dunlop first gave evidence, first changed his
14 evidence and first embarked on a course of dealings with the Tribunal.

15

16 Thank you, Chairman and members.

17

18 CHAIRMAN: Is there anybody else who wants to respond? Well, we will hope to
19 decide upon the issues that have been raised by Tuesday morning but that could
20 be extended in certain events. We will advise the solicitors involved as of
21 Monday afternoon what the position is. Thank you.

22

23 MR. GALLAGHER: Sir, before you rise, can I take it there will be no sitting
24 tomorrow, is that the position?

25

26 CHAIRMAN: No sitting tomorrow.

27

28 MR. GALLAGHER: Thank you.

29

30 THE TRIBUNAL THEN ADJOURNED TO A DATE TO BE DECIDED.

