

1 THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 17TH OCTOBER 2003

2 AT 10.30 AM:

3
4 CHAIRMAN: Good morning, ladies and gentlemen. You will have noticed that I am
5 sitting today without my colleagues, Judges Faherty and Keys. I do so because
6 today's hearings concern or concern solely with the issue relating to costs.

7
8 The Tribunal legislation providing for costs makes it clear that where a
9 Tribunal comprised more than one member, then the chairperson of the Tribunal
10 alone has the function of deciding upon costs.

11
12 Having received written submissions from the parties concerned, namely Mr. Liam
13 Lawlor, the Attorney General representing the public interest and the Minister
14 for Finance, I indicated in correspondence to the parties that I would sit
15 today to determine as a preliminary issue whether or not to defer the question
16 of costs arising from Mr. Lawlor's non-compliance with the Tribunal's Order of
17 the 12th March 2003 to a later date. I will therefore proceed now by first
18 taking the attendances of the legal representatives present. I will then ask
19 Counsel to the Tribunal, Mr. O'Neill, to outline the factual history leading to
20 this hearing and to address me on the legislative provisions under which I am
21 empowered to act in deciding the issues of costs. Thereafter I propose to
22 invite submissions from counsel for the public interest and for counsel on
23 behalf of the Minister for Finance and from Mr. Liam Lawlor in that order. So,
24 Mr. O'Neill.

25
26 MR. LAWLOR: I just wish to make a short submission before you proceed. I
27 communicated with the solicitor for the Tribunal this morning to outline I
28 wished to make a short statement.

29
30 CHAIRMAN: Well I would prefer, you will be given an opportunity to make a

1 statement but I would prefer that Mr. O'Neill would first of all deal with the
2 history of the matter so that anybody following the proceedings will then know
3 exactly why we are here today.

4

5 MR. LAWLOR: I don't appear to have any submissions from the Department of
6 Finance, I received no documentation whatsoever.

7

8 MR. O'NEILL: That's so, it's not intended to circulate the respective
9 submissions though I will refer to them.

10

11 MR. LAWLOR: I got one submission regarding Tony Seddon's appearance. If I got
12 one, why didn't I get the rest of them?

13

14 CHAIRMAN: If you just let Mr. O'Neill open the matter, Mr. Lawlor, and then
15 you will be given an opportunity to say what you want to say.

16

17 MR. LAWLOR: I just want to make a submission, Chairman.

18

19 CHAIRMAN: Well after Mr. O'Neill's one.

20

21 MR. O'NEILL: I think you did indicate, Sir, that you were going to take the
22 attendances at this point and I can see my colleagues, Mr. O'Reilly and
23 Mr. Collins, are ready.

24

25 CHAIRMAN: Mr. O'Reilly?

26

27 MR. O'REILLY: May it please you, Sir. I appear on behalf of the Attorney
28 General acting on behalf of the public interest with Eamon Galligan and with
29 your permission, Sir, when it comes to submissions, I would request that
30 Mr. Maurice Collins, who appears for the Minister, might address the Tribunal

1 first after Mr. O'Neill.

2

3 CHAIRMAN: Good.

4

5 MR. COLLINS: Sir, I appear with Mr. Brian Kennedy on behalf of the Minister
6 for Finance.

7

8 CHAIRMAN: Very good.

9

10 MR. O'NEILL: Mr. Chairman, I propose to set out the history of events leading
11 to today's hearing. On the 24th September 2003, you delivered the ruling of
12 the Tribunal in relation to Mr. Liam Lawlor's non-compliance with the order of
13 the Tribunal 12th March 2003 which had obliged him to make discovery and
14 produce all documentation relating to the sale of approximately one acre of
15 land adjoining his home at Somerton, Lucan, County Dublin. At the conclusion
16 of the delivery of your ruling, you indicated you proposed to consider whether
17 orders for costs should be made solely in respect of the compliance hearings
18 which involved Mr. Lawlor which had concluded on that date.

19

20 At the time, Mr. Lawlor was invited to make submissions on the issue of costs
21 and, in particular, submissions as to why he should not pay the costs incurred
22 by the Tribunal and by other parties in connection with the compliance hearing.
23 The 7th October 2003 was fixed as the date for hearing of any oral submissions
24 which Mr. Lawlor might choose to make in relation to costs.

25

26 Subsequent to the delivery of the Tribunal's ruling on the 24th September, all
27 parties who had been legally represented before the Tribunal at that time were
28 written to and inquiries were made of them as to whether they had any
29 applications to make in respect of the costs incurred by them. Mr. Lawlor
30 sought an adjournment for some weeks in order to prepare his submission and

1 having considered this application, you directed that the matter would be, in
2 fact, adjourned from the 7th but would be listed for hearing today, the 17th
3 October 2003.

4
5 On the 9th October, Mr. Lawlor wrote to the Tribunal expressing the opinion
6 that it was not in order for the Tribunal to consider costs for compliance in
7 isolation from the matters of fact into which the Tribunal is inquiring. And
8 he quoted an extract from the report of the Law Reform Commission in support of
9 his contention. He further submitted that there was no basis upon which the
10 compliance hearings could be considered as a separate module of the Tribunal;
11 Compliance could not be a module in itself, and that the Tribunal had not
12 indicated in the course of the compliance hearing that it considered that the
13 hearings were a separate module. In those circumstances, he contended that the
14 Chairman's statement that the compliance hearing was effectively a module in
15 its own right was a belated and qualified interpretation which could not
16 support the holding of the separate costs hearing.

17
18 On the 10th October, Mr. Lawlor was informed that you did not consider that the
19 views expressed in the Law Reform Commission's paper were in conflict with your
20 intended determination of the costs issue arising from Mr. Lawlor's failure to
21 comply with the Tribunal's order and that the cost issues would be determined
22 on the 17th October as already advised.

23
24 On the 15th October, the Chief State Solicitor, on behalf of the Minister for
25 Finance, communicated with the solicitor to the Tribunal expressing the view
26 that having regard to the wording of Section 6 of the Tribunals of Inquiry
27 Evidence (Amendment) Act 1979 or rather 1997, as inserted by the 1997 Act, it
28 was not appropriate to address separately the costs involved in a phase of the
29 Tribunal which was concerned solely with issues of compliance rather than the
30 investigation of a substantive matters on which a report had been submitted to

1 the Clerk of the Dail and these views were adopted by the Attorney General
2 acting on behalf of the public interest.

3
4 In the light of the views expressed in those submissions, you informed all the
5 affected parties you would sit today to determine as a preliminary issue
6 whether or not you should proceed to determine the issue of costs arising from
7 Mr. Lawlor's non-compliance at this time or whether you should defer the
8 decision pending further findings of the Tribunal. The parties were informed
9 of this and informed of their entitlement to make submissions on that issue
10 today. The parties attending you see are three, Mr. Lawlor, the Attorney
11 General on behalf of the public interest; and Counsel on behalf of the Minister
12 for Finance.

13
14 I would propose, with your permission, Sir, firstly to outline the submission,
15 to read the submission rather, which is contained within Mr. Lawlor's letter of
16 the 9th October, the Tribunal's response of the 10th and the submissions
17 contained in correspondence from the Minister for Finance in that order.

18
19 The letter from Mr. Lawlor is dated October 9th, 2003 and it's headed "Re:
20 Tribunal's Order for Discovery date 12th March 2003 and Ruling of the 24th
21 September 2003". It's addressed to you as Chairman.

22
23 "Dear Chairman, I refer to the above order and associated ruling. Following
24 that ruling, you indicated that you would determine the costs for the
25 compliance hearings alone on Tuesday, 7th October 2003. As you will be aware,
26 because I cannot meet the exorbitant costs involved, I am not legally
27 represented before the Tribunal. However, based on my own research, I believe
28 it is not in order for the Tribunal to consider costs for compliance in
29 isolation from the matters of fact into which the Tribunal is inquiring.

1 This matter has been considered in recent times by the Law Reform Commission
2 under the presidency of the honourable Mr. Justice Declan Budd. In a detailed
3 examination of the relevant section of the 1997 Act, the Commission concluded,
4 "It is critical that there can therefore be no room for the suggestion from the
5 phrase "the findings of the Tribunal" should be taken to mean a finding as to
6 whether a person has failed to cooperate with the Tribunal. Instead, this key
7 phrase must bear its natural meaning i.e. the findings of the Tribunal as to
8 the substantive issue. The second point tending in same direction concerns the
9 phrase "Including the terms of the resolution relating to the establishment of
10 the Tribunal." These words too make it clear that in awarding costs, the
11 Tribunal must take into account facts found in relation to the subject matter
12 which it was mandated by its Terms of Reference to explore.

13
14 In short, mention of the Terms of Reference points the Tribunal in the
15 direction of its directions in findings of a substantive in issue as a relevant
16 factor to be taken into account in deciding on costs. This confirms the first
17 point."

18
19 The Commission further expressed the fear that this section could be
20 misinterpreted and recommended amending legislation to make the provision
21 clearer. Based on this very clear exposition of the relevant law, I request
22 that any hearing on costs be deferred until the findings on the relevant
23 substantive issues have been made. Without prejudice to the above, I would
24 still strongly contend that there is no basis on which the compliance hearing
25 can be considered a separate module of the Tribunal. The order of the Tribunal
26 must relate to its Terms of Reference and therefore, in the case of this
27 Tribunal, to a particular module of the inquiry. Compliance is therefore not a
28 module in itself. At no time either prior to or during the hearing of the
29 evidence at this compliance hearing was any indication given that the Tribunal
30 considered these hearings to be a separate module. The first mention of such

1 an approach was in the course of your ruling when you stated the compliance
2 hearing was effectively a module in its own right. Such a belated and
3 qualified interpretation cannot support the holding of a separate costs
4 hearing. I would appreciate an early response to this submission so that I can
5 assess what further action, if any, is required before October 17th, 2003.

6 Yours sincerely," it's signed for Liam A Lawlor, dictated by phone from the
7 United States, signed in the absence of Liam Lawlor.

8
9 To that letter a response was sent by the solicitor to the Tribunal on the 10th
10 October 2003 which reads as follows, "Dear Mr. Lawlor, I am directed by the
11 Chairman of the Tribunal to acknowledge receipt of your letter directed to him
12 dated the 9th inst. The Chairman has considered your submission that any
13 decision on the costs incurred in relation to the compliance hearing arising
14 from your failure to comply with the order of the 12th March 2003 be deferred.
15 The chairman has considered your submission, including the quoted reference to
16 the consultation paper on public inquiries, including Tribunals of inquiry,
17 published by the Law Reform Commission. The Chairman does not consider that
18 the views expressed therein are in conflict with his intended determination of
19 the cost issue arising from your failure to comply with the Tribunal's Order of
20 the 12th March 2003.

21
22 Your attention is drawn to the full contents of the paragraph of which you
23 quoted an extract only. It is clear that the authors of the report were
24 addressing a specific issue, namely whether a Tribunal of Inquiry in awarding
25 costs is entitled to consider its findings on the substantive issues or whether
26 it is limited, as had been contended for in the Beef Tribunal Report, to
27 considering whether or not a party had behaved before the Tribunal. The
28 authors of the Law Reform Commission report were citing the 1997 amendments to
29 the 1979 Act in support of their interpretation of the 1979 Act which was to
30 the effect that a Tribunal of Inquiry was not limited to considering only a

1 party's cooperation/behaviour before the Tribunal when considering whether or
2 not to make an award of costs.

3
4 The subject matter on which the Tribunal has pronounced its findings on the
5 24th September 2003, included the discovery and production of documents
6 relevant to the Tribunal's inquiry, the costs which were incurred in connection
7 with these findings are distinct from the ongoing inquiry of the Tribunal and
8 do not require consideration of further evidence in order to pronounce upon the
9 issue of the costs arising in relation thereto.

10
11 I am instructed to inform you that the Chairman does not consider that it is
12 necessary in advance of the compliance hearing to designate it as a separate
13 module in order to subsequently exercise his powers in relation to costs.

14 I am instructed to inform you that the Chairman will sit to determine the costs
15 issue arising from your failure to comply with the Order of the 12th March on
16 Friday, 17th October next at 10.30 am. Yours sincerely, Susan Gilvarry,
17 Solicitor to the Tribunal."

18
19 Subsequently as I indicated, communication was received from the Chief State
20 Solicitor in response the letter which had been sent to the Minister for
21 Finance arising from the ruling of the 24th September. That letter is dated
22 the 15th October 2003 and reads as follows:

23 "Dear Mr. Gribbin, I refer to your letter dated 26th September 2003 and to the
24 1st October 2003 addressed to the Secretary General of the Department of
25 Finance and to this office's reply on behalf of the Secretary General, dated
26 3rd October 2003. As you are aware under covering letter dated 11th May 2003,
27 the Minister for Finance made submissions as to issues of costs arising from
28 the second interim report of the Tribunal.

29
30 Those submissions set out the principles to be applied as to the issue of costs

1 as and when they arise before the Tribunal. It is submitted that those
2 submissions and the discussions of the principles set out therein are equally
3 applicable to the subject matter of your letter of the 26th September 2003.
4 One point however does occur, is that there is an issue as to the timing of
5 this hearing. Clearly the Tribunal has jurisdiction to award costs against an
6 uncooperative person as stated in our previous submissions. However the
7 statutory scheme in our view envisages this issue of costs being dealt with in
8 the context of the Tribunal having made findings in relation to the substantive
9 matters within its Terms of Reference and a report having been submitted to the
10 Clerk of the Dail.

11
12 The power of the Tribunal to make orders in relation to costs is that and only
13 that conferred by Section 6 of the Tribunals of Inquiry Evidence (Amendment)
14 Act 1979 as inserted by Section 3 of the Tribunals of Inquiry Evidence
15 (Amendment) Act 1997.

16
17 While there is nothing in Section 6 which would preclude the Tribunal from
18 addressing the issue of costs from time to time during its inquiries, we are of
19 the view that having regard to the wording of Section 6, it is not appropriate
20 to address separately the costs involved in the phase of the Tribunal which was
21 concerned solely with issues of compliance rather than the investigation of
22 substantive matters upon which the report has been submitted to the Clerk of
23 the Dail.

24
25 Subject to the above, the Minister is obviously anxious to assist the Tribunal
26 in exercising its jurisdiction in respect of costs under Section 6 and to this
27 end, I would refer you to the submissions already made to the Tribunal which it
28 is submitted ought to govern the jurisdiction in the matter, the subject matter
29 of the hearing of the 17th October 2003. Yours sincerely."

1 This letter was followed by a letter on behalf of the Attorney General of the
2 same date which reads: "Dear madam, we refer to the above matter and refer to
3 the letter from the Chief State Solicitor on behalf of the Minister for Finance
4 of today's date.

5
6 We have considered this letter in connection with Mr. James O'Reilly SC,
7 counsel instructed on behalf of the public interest. He is in agreement with
8 the views expressed in that letter and we adopt it as our submission. Yours
9 truly."

10

11 MR. LAWLOR: Sorry, can I be given copies of this correspondence?

12

13 CHAIRMAN: Well, that wouldn't normally be the practice, are there copies
14 available?

15

16 MR. O'NEILL: They can be made available, Sir, if you so direct.

17

18 CHAIRMAN: All right, they'll be given to Mr. Lawlor.

19

20 MR. O'NEILL: If I may, Mr. Chairman, I would like to turn to the legislative
21 provisions under which the a Tribunal of Inquiry is entitled to make its order
22 for costs. The power of the Tribunal to award costs stems from provision of
23 Section 3 of the 1997 Act which amends Section 6 of the 1979 Act so as to
24 provide as follows, "Where a Tribunal, or if a Tribunal consists of more than
25 one member, the chairperson of the Tribunal, is of the opinion that having
26 regard to the findings of the Tribunal and all other relevant matters,
27 including the terms of the resolution passed by each House of the Oireachtas
28 relating to the establishment of the Tribunal, or failing to cooperate with or
29 provide assistance to or knowingly giving false or misleading information to
30 the Tribunal, there are sufficient reasons rendering it equitable to do so, the

1 Tribunal or the chairperson, as the case may be, may either of the Tribunal's
2 or the Chairman person's own motion as the case may be, or on application by
3 any person appearing before the Tribunal, order that whole or part of the costs
4 (A) of any person appearing before the Tribunal by counsel or solicitor as
5 taxed by a Taxing Master of the High Court, shall be paid to that person by any
6 other person in the order and (B) incurred by the Tribunal as named aforesaid
7 shall be paid to the Minister for Finance by any other person named in the
8 Order."

9
10 It may prove helpful to review the earlier legislation which led to this.

11
12 CHAIRMAN: Just one thing, Mr. O'Neill, has Mr. Lawlor been given the copies of
13 the --

14
15 MR. O'NEILL: Of the correspondence? That is in hand now, Mr. Chairman.

16
17 CHAIRMAN: Thank you. (Documents handed to Mr. Lawlor.)

18
19 MR. O'NEILL: The current Tribunals of Inquiry have their origins in the
20 Tribunals of Inquiry Evidence Act 1921 which contained no provision whatsoever
21 for costs and consequently the Tribunal could neither order a party to pay
22 costs nor award a party the costs which that person had incurred in dealing
23 with a Tribunal.

24
25 This situation was addressed by the legislature when enacting the Tribunals of
26 Inquiry Evidence (Amendment) Act 1979, Section 6.1 of which provided as
27 follows: "Where a Tribunal, or if the Tribunal consisted of more than one
28 member, the Chairman of the Tribunal, is of the opinion that having regard to
29 the findings of the Tribunal and all other relevant matters, there are
30 sufficient reasons for rendering it equitable to do so, the Tribunal or the

1 Chairman, as the case may be, may by order direct that the whole or part of the
2 costs of any person appearing before the Tribunal by counsel or solicitor as
3 taxed by a Taxing Master of the High Court, shall be paid to the person by any
4 other person named in the order."

5
6 The effect of this legislative provision was there to allow a Tribunal to make
7 an order or an award of costs in favour of a party appearing before it and the
8 power which was given to Tribunal was one which allowed the Tribunal to make a
9 party appearing before it liable to pay the costs of an another party.

10 However, it did not contain any provision which allowed for the Tribunal's own
11 costs to be recovered from any party appearing before the Tribunal.

12
13 This lacuna in the legislation was identified by Mr. Justice McCracken when
14 Chairman of the Dunnes Inquiry and subsequent to the delivery of his report,
15 the Tribunals of Inquiry Evidence (Amendment) Act 1997 was enacted. This Act
16 expressly empowers the Tribunal to make an order requiring a party to pay the
17 costs incurred by the Tribunal itself. The methodology used by the legislature
18 to achieve this end was to take the original Section 6 of the 1979 Act, which I
19 have just quoted, and to add additional wording to it and to then substitute
20 the amended version for the original in the 1979 Act.

21
22 I say while the addition of additional wording to an existing section is
23 commonly used to give effect to new legislation upon issues which have already
24 been the subject of legislative attention, the resulting wording can often
25 appear unwieldy and indeed the Law Reform Commission in its report in
26 considering the present section, Section 6 as inserted by the 1997 Act,
27 expressed the view that it was a little cumbersome and loose.

28 As can be seen by comparing the original 1979 Act, provision with its
29 subsequent amended provision, the alterations to the original involved the
30 inclusion of the words "Including the terms of the resolution passed by each

1 House of the Oireachtas relating to the establishment of the Tribunal or
2 failing to cooperate with or provide assistance to or knowingly giving false or
3 misleading information to the Tribunal."

4
5 This new wording follows immediately upon the phrase "Having regard to the
6 findings of the Tribunal and all other relevant matters" of the -- sorry, "all
7 relevant matters" rather. The 1979 Act did not seek to define the "relevant
8 matters" which the Chairman should have regard to in deciding whether or not
9 there were sufficient reasons rendering it equitable for him to make an order
10 for costings. The 1997 wording, however, does set out a number of specific
11 matters which the Chairman should include in his consideration of this issue,
12 particularly the terms of the resolution of the houses of the Oireachtas and
13 the misconduct of parties appearing before the Tribunal.

14
15 It's hard to see how the fact that these are specifically referred to in the
16 section changes the existing legislation as the phrase "All relevant matters"
17 must of course include such matters as the resolutions of the Houses of the
18 Oireachtas and the conduct of the parties appearing before the Tribunal.
19 To that extent, it would appear to be surplus in the interpretation of the
20 section itself.

21
22 Now, the section, the original section that is in 1979 has been considered by a
23 number of Tribunals of Inquiry which have been set up since 1979. The Beef
24 Tribunal concluded that, "Ordinarily any party permitted to be represented at a
25 public inquiry should have their costs paid out of the public funds and it
26 interpreted Section 6 of the 1979 Act as meaning that in the exercise of its
27 discretion toward costs, the Tribunal cannot have regard to any of its findings
28 on the matter being inquired into but is only entitled to consider the conduct
29 of or on behalf of a party before the Tribunal when exercising the discretion
30 granted to the Tribunal or Chairman under Section 6."

1
2 The Beef Tribunal interpretation was that, however, unless the conduct of a
3 party so warranted it, a person permitted to be at the inquiry should have
4 their costs paid out of public funds. Now, this was obviously in conflict with
5 the expressions of the earlier Tribunals, in particular the Whiddy Tribunal,
6 which was presided over by Mr. Justice Costello and the Stardust Inquiry, which
7 was presided over by the then Mr. Justice Keane, both of those judges sitting
8 as sole members or rather, that is, chairmen of their particular inquiries,
9 rejected the suggestion that a person appearing at a public inquiry had an
10 automatic right to be paid their costs out of public funds, provided they
11 cooperated with the Tribunal.

12
13 The consultation paper of the Law Reform Commission on Public Inquiries,
14 including Tribunals of Inquiry was published in March 2003 and in this the Law
15 Reform Commission expressly rejected the Beef Tribunal's interpretation when
16 analysing the changes to the 1979 Act. It stated that the changes effected by
17 the 1997 Act to the 1979 act were as follows: "(iii) The major changes
18 directed at the main point under consideration here, namely whether in deciding
19 award costs, a Tribunal may take into account its findings on the substantive
20 issue or whether it is confined to the party's behaviour before the Tribunal.
21 The following points are relevant, first the fact that the Tribunal is enjoined
22 to pay regard to the fact that a person has "failed to cooperate with or
23 knowingly given false information to the Tribunal" is now in contrast to the
24 original 1979 Act wording, stated explicitly.

25
26 It is critical that there can therefore be no room for the suggestion that the
27 phrase "the findings of the Tribunal" should be taken to mean a finding as to
28 whether a person has failed to cooperate with the Tribunal. Instead this key
29 phrase must bear its natural meaning, that is the findings of the Tribunal as
30 to the substantive issue. The second point tending the same direction concerns

1 the phrase "including the terms of the resolution relating to the establishment
2 of the Tribunal." These words too make it clear that in awarding costs, the
3 Tribunal must take into account the facts found in relation to the subject
4 matter, which it was mandated by its Terms of Reference to explore.

5
6 In short, mention of the Terms of Reference points the Tribunal in the
7 direction of its findings on the substantive issue as a relevant factor to be
8 taken into account in deciding costs. This confirms the first point."

9
10 Now, notwithstanding this analysis contained in this section, the Law Reform
11 Commission concluded that it was just possible that the present drafting in
12 relation to this element could be misinterpreted and accordingly it suggested a
13 redraft. Whilst this extract seems to suggest that the amendment was a major
14 change introduced by the 1997 Act, it seems clear from the subsequent content
15 of the Law Reform Commission Report, in particular the references at paragraph
16 12.45 of its report at page 293, that it considered that the original wording
17 in 1979 had been judicially misinterpreted by the interpolation of a
18 significant qualification, namely that the only basis upon which a non-state
19 party might be required even to pay their own costs is that they have
20 obstructed the Tribunal in its inquiry.

21
22 However in arguing that the original intention of the legislation is carried
23 through, it surely must follow that the 1997 Act did not change the intention
24 of the 1979 legislation as is suggested earlier in the report and that, in
25 fact, there were only two changes to the legislation effected by the 1997 Act
26 and they are those identified in the report.

27 The first is that it grants the Tribunal the power to award costs and this is
28 extended to cover the costs incurred by the Tribunal itself and the second,
29 giving the Tribunal itself, and parties appearing before it, the right to apply
30 to the Tribunal to have an order for costs made, which would involve the

1 payment of costs by one party -- of one party by another.

2

3 Now, notwithstanding the manner in which the legislative changed was effected
4 through the modification of the existing section by interposing the phrases I
5 have already referred to in the body of the original legislation, it is, in
6 effect, new legislation and the brief traditional interpretation of the
7 original cannot bind subsequent interpretations of this new legislation.

8

9 It is undoubtedly the case that the Law Reform Commission's paper must be
10 considered persuasive in its rejection of the principle enunciated in the Beef
11 Tribunal report, namely that all parties are entitled to their costs from the
12 state unless they have been found to be non-cooperative and in this regard, I
13 think it's noteworthy that Mr. Justice Morris, the Sole Member of the Morris
14 Tribunal, expressly the adopted views of Mr. Justice Costello in the Whiddy
15 Inquiry and the views of Mr. Justice Keane as expressed in the Stardust
16 Tribunal in his interpretation of his Terms of Reference, both of which
17 expressly rejected the proposition that all parties appearing before a Tribunal
18 of Inquiry are entitled to costs and the state is obliged, except in the event
19 of the non-cooperation.

20

21 The issue which faces this Tribunal this time is whether you, as Chairman of
22 the Tribunal, are restricted in your ability to make interim orders for costs
23 in respect of aspects of the Tribunal's work which have been completed on the
24 grounds that the issues involved do not involve the Tribunal reporting upon the
25 substantive issues which the Tribunal is mandated by its Terms of Reference to
26 report on. In other words, are you denied the opportunity of making a finding
27 on the costs which follow upon a determination of a peripheral issue. A
28 careful analysis of the words used therefore in the legislation must be carried
29 out by you in determining what exactly your powers are, though it must be borne
30 in mind in doing so, you are not acting judicially but merely as the Chairman

1 of a Tribunal of Inquiry.

2

3 It is clear from the ruling which was delivered by you, that is the ruling of
4 the Tribunal on the 24th September of this year, that the Tribunal has made
5 findings in relation to Mr. Lawlor. These findings were made in respect of a
6 specific aspect of the Tribunal's work, namely the compliance or otherwise with
7 the discovery and production of documentation in the possession of a person who
8 is subject to inquiry by a Tribunal. This aspect of the Tribunal's work has
9 been completed by the delivery of the ruling of the Tribunal of the 24th
10 September containing these findings.

11

12 It seems to me to be the case that in respect of Mr. Lawlor's future compliance
13 or otherwise with the Tribunal, the findings made in the ruling of the 24th
14 September 2003 will stand and are to that extent self-contained. The costs
15 which were incurred in respect of this aspect of the Tribunal's work are
16 capable of identification and distinction from other work of the Tribunal and,
17 in principle, there would appear to be no reason why the Tribunal should have
18 to await its further determination on other issues before embarking on the
19 consideration of the costs issues which arise from this specific issue.

20

21 It's noteworthy that the section as drafted does not require the Chairman to
22 await the conclusion of the inquiry before embarking upon the issue of costs,
23 nor does it expressly require the Chairman to wait until all the findings of
24 the Tribunal have been reached before doing so.

25

26 It cannot of course be said that the interpretation in this connection is clear
27 cut in view of the manner in which similar sections have been interpreted by
28 Tribunals of Inquiry since 1979. In the absence however of the word
29 "substantive" before the words "findings of the Tribunal" the section is open
30 to the interpretation, I submit, that the Tribunal can pronounce upon costs

1 issues, peripheral matters without having to await a determination to embark
2 upon a consideration of the substantive issues which are given it to consider.

3
4 The Tribunal is enjoined in the section however to have regard in the exercise
5 of its discretion for all relevant matters and clearly if there was any
6 indication that future events could have a bearing on a person's liability to
7 pay the costs in respect of modules or aspects of the Tribunal's work which
8 have already been completed, it might prove to be the case that the Tribunal
9 will consider it in equity, in the interests of the parties, that the matter
10 would be deferred but I do not say that that necessarily follows. It is a
11 matter, I respectfully submit, for the Chairman of the Tribunal to determine
12 whether or not, in the circumstances presented to him, it is appropriate for
13 him, having regard to all the matters and all relevant matters which include
14 but are not limited to those specified in the section itself, to exercise that
15 decision. Those are my submissions.

16
17 CHAIRMAN: Thanks, Mr. O'Neill. Now, Mr. Collins.

18
19 MR. COLLINS: Thanks. As had been made clear in the earlier extensive
20 submissions on costs which have been made on behalf of the Minister, it is the
21 view of the Minister for Finance that as a general principle, persons who have
22 been found by the Tribunal to have hindered or obstructed it or failed to
23 cooperate with it should not have an order for costs made in their favour.
24 Equally as general principle, it's appropriate in the Minister's view that such
25 person should have to bear the additional costs incurred by any other persons
26 appearing before the Tribunal and by the Tribunal itself arising from such
27 obstruction or non-cooperation.

28
29 The Tribunal under the relevant provisions of the Tribunals of Inquiry Evidence
30 Acts has the competence and power to direct costs orders against those who have

1 been uncooperative. At this stage however, the Minister's submission is
2 confined to a single legal point, that relates to an issue of time. The
3 question is whether Section 6 of the Tribunals of Inquiry Evidence Act 1979 as
4 amended by Section 3 of the 1997 Act contemplates a cost orders being made only
5 after a report containing findings on substantive issues within the terms of
6 the reference of this Tribunal or whether a costs order can be made against
7 uncooperative persons or undertaking in the absence of such a report.

8
9 Mr. O'Neill has set out the terms of Section 6 of the 1979 Act as amended. The
10 jurisdiction vested in the Tribunal to make costs orders against uncooperative
11 persons is straightforward and readily exercisable. There can be no doubt
12 about the power of the Tribunal to award costs in the circumstances referred to
13 in Section 6. The only issue is when it is appropriate to determine whether
14 such an order should be made.

15
16 In his earlier submissions of May 2003, the Minister submitted that having
17 regard to the wording of Section 6.1 of the 1979 Act, as amended, the phrase
18 "the findings of the Tribunal" should be interpreted as meaning substantive
19 findings on the issues, the subject of the Tribunal's inquiry, as opposed to
20 other relevant matters such as its findings relating to a person's conduct
21 vis-a-vis the Tribunal, including, of course, the failure of any person to
22 cooperate with the Tribunal or comply with its orders. In making any order
23 under Section 6, the Tribunal must have regard to its findings as well as to
24 all other relevant matters.

25
26 In such circumstances, while there is nothing in Section 6 which would preclude
27 the Tribunal from addressing the issue of costs from time to time during its
28 investigation, the Minister is obvious that having regard to the wording of
29 Section 6.1, it would not be appropriate to adjudicate separately on the costs
30 involved in a phase of the Tribunal which was concerned solely with the issues

1 of compliance rather than with the investigation of substantive matters within
2 the Terms of Reference the Tribunal resulting in the preparation of a report
3 containing the findings of the Tribunal in respect of those matters. and the
4 furnishing of such report to the Clerk of the Dail.

5
6 Accordingly, it would be the Minister's submission the appropriate course is
7 for the Tribunal to defer its course of the costs associated with the
8 compliance module until such time as the Tribunal's work reaches the point
9 where the Tribunal has prepared a report in the sense already indicated on its
10 current phase of the inquiry. At that point, when the findings of the Tribunal
11 are known, there will of course be no impediment to all issues of costs
12 associated with the compliance module being determined in accordance with the
13 provision of Section 6.

14
15 Thank you, Sir.

16
17 CHAIRMAN: Thank you very much.

18
19 MR. O'REILLY: May it please you, Sir. On behalf of the Attorney General
20 acting in the public interests, I adopt the submissions made by Counsel for the
21 Minister for Finance and I have nothing further to add. Thank you, Sir.

22
23 CHAIRMAN: Thank you. Now, Mr. Lawlor, do you want to make submissions?

24
25 MR. LAWLOR: Firstly, could I -- the only correspondence I got from the
26 Tribunal regarding this cost issue and my reply, if it could be read in the
27 record regarding Tony Seddon's appearance, I don't have the two letters but if
28 Mr. O'Neill could read them into the record, they dealt with the only interface
29 I had and I will make a submission.

1 MR. O'NEILL: That is not a matter which is currently before the Tribunal, Sir,
2 as you will appreciate, the direction which you have given is that the issue to
3 be determined today is one and one only and that is whether your consideration
4 of the costs issue should be deferred in the light of an interpretation which
5 might be placed upon the section or whether the hearing should proceed. The
6 issue I think which Mr. Lawlor is endeavouring to raise at this point will
7 concern the merit or otherwise of a particular party's entitlement to recover a
8 particular sum in respect of costs but that is a matter which will only arise
9 when the substantive issue as to the amount of costs and the parties who should
10 pay those costs is determined. That isn't a matter which is set down for
11 determination today. It's not one upon which submissions were invited from the
12 parties, it was made clear to Mr. Lawlor on the 15th October that the only
13 issue that will be determined today is the question of a deferment or otherwise
14 as was requested by him in his letter of the 10th and not the merits of
15 individual applications for costs.

16
17 CHAIRMAN: Do you understand what Mr. O'Neill has said? The only issue --

18
19 MR. LAWLOR: I fully understand and I just comment as follows. I received a
20 letter from this Tribunal demanding that I discharge costs. That's the letter
21 I received from this Tribunal and I want it read into the record and I want my
22 reply and then we got this letter on the 15th rolling back whatever you had
23 intended in a letter that could extract it from the Fianna Fail manifesto in
24 what it said, pointing in two different directions at the one time, I have
25 received this letter and I want it read into the record and I want my reply
26 read also.

27
28 CHAIRMAN: Mr. Lawlor, the only issue I'm concerned with today is the issue as
29 to whether I am empowered to consider whether costs should be paid in relation
30 to the non-compliance issue. If I was to decide that I was so empowered, I

1 wouldn't be making any orders today, that would be done at a subsequent date so
2 I want to confine the issues and the submissions today to those relating to
3 that particular matter. So I am not going to permit any reading of any
4 additional material into the record at this stage. I just want to know if you
5 have submissions -- wait -- wait.

6

7 MR. LAWLOR: This was your correspondence to me demanding that I pay costs.

8

9 CHAIRMAN: Mr. Lawlor --

10

11 MR. LAWLOR: You had decided -- now it's relevant to this hearing. Your letter
12 of the 15th then superseded what you had already demanded of me and it's
13 relevant to this hearing.

14

15 CHAIRMAN: Mr. Lawlor, do you wish to make any additional submissions over and
16 above those which have been made in correspondence in relation to the issue
17 with which we are concerned or do you wish to add anything to the or deal with
18 any of the submissions that have been made by the other parties? That's all I
19 am concerned with.

20

21 MR. LAWLOR: That's fine, well are you then, Chairman, withdrawing your letter
22 and superseding it with your letter of the 15th which you are dealing with here
23 this morning, is that what the Tribunal is doing?

24

25 CHAIRMAN: I am not withdrawing any letter, I am simply asking you if you want
26 to make submissions in relation to the issue which you know to be the issue
27 today and which has been made clear to you and which you say you understand as
28 being the issue.

29

30 MR. LAWLOR: I do. The submission is I want to make, I just quote from the

1 Tribunal's letter of the 26th September to the Secretary General in the
2 Department of Finance and on the last page on the first paragraph of that page.

3
4 CHAIRMAN: What's the -- sorry, what's the date?

5
6 MR. LAWLOR: 26th September 2003, from the solicitor for the Tribunal and you
7 are stating in that letter to the Minister for Finance, the Secretary General
8 of the Department, "In view of the role envisaged by further minister in this
9 section, the Chairman anticipates that the Minister for Finance will consider
10 making applications to the Tribunal for orders in respect of the costs incurred
11 by the Tribunal itself and by parties appearing before the Tribunal" and I now
12 interpret that that is what the Minister is intending to do as requested by the
13 Tribunal based on the contributions I have heard. What I wanted to say,
14 Chairman, and I had requested that I make this submission which is relative to
15 the totality of the workings of the Tribunal and the cost issue and that is
16 that I have to, having heard what you have said about the costs issue, the rush
17 to want to issue costings in this matter to me is pretty obscene. There's
18 people that have been before this Tribunal for a number of years that haven't
19 had the opportunity and the Tribunal's decision in this matter and the way that
20 it has rushed now, tripped up by the Minister for Finance and the Attorney
21 General, appears to me cannot proceed to deal with this cost matter and that
22 the Tribunal has to now get on with the substantive business of coming to
23 findings and issuing a report and in two hours here, I have been dealing with
24 planning issues in County Dublin after about two or three years and when I came
25 back the following morning, Mr. O'Neill decided that he had no further
26 questions so what I want to say on costs and the rush to try and fix costs and
27 very obviously under Section 6 of the Tribunals Act or under whatever the
28 appropriate legislation is, that the Tribunal was quite out of order in its
29 efforts.

30

1 Now in dealings with that matter, I just want to put it to this Tribunal and I
2 have to put it to you, Chairman, and I have to make this submission to you
3 because I have wish to do so at the commencement. I have to bring to your
4 attention an article that appeared last Sunday in the Ireland on Sunday
5 newspaper dated the 12th October, the heading and content in that article
6 was very prejudicial to my position vis-a-vis this Tribunal and in particular
7 in the role and status of the Chairman and I quote and the headline "Liam prime
8 suspect in Mahon tax set-up. Tribunal lawyers suspect that Lawlor had
9 carefully placed the story for publication this week and immediately sources
10 have confirmed to Ireland on Sunday that another publication had been tipped
11 off about the story in advance of Phoenix publishing it but was unable to
12 confirm its veracity."

13
14 On a previous occasion, your predecessor, the Sole Member in charge, Mr.
15 Justice Flood, saw fit to refer the leaking of Tribunal related matters carried
16 to the media to Garda authorities for investigation. This report suggests the
17 Tribunal lawyers suspect that I had some or was at the source of the story that
18 appeared regarding the Chairman and his personal tax affairs in the recent
19 publication of the Phoenix magazine. It's a matter of public record that I
20 have sought to protect the integrity of every citizen's right to privacy in
21 relation to their personal taxation positions with the Revenue Commissioners.
22 I have not been afforded such confidentiality at this Tribunal. However I take
23 this opportunity to put on record my opposition to the publication of any
24 citizen's personal tax dealings with the Revenue Commissioners other than what
25 is specified by statue. I would also like to indicate publicly that I was not
26 the source, either direct or indirect, of the article that appeared in the
27 Phoenix magazine concerning the Chairman and I trust you, Chairman, will accept
28 this clarification. However, the publication of this article suggesting that I
29 somehow was involved in undermining the position of the Chair of this Tribunal
30 and further, that lawyers employed by this Tribunal suspect that I was

1 involved, leads to a position that is highly prejudicial to my position in my
2 dealings with this Tribunal.

3
4 I suggest the existence of this suggestion publicly may affect the ability of
5 the Chairman to deal with my position in an independent and unbiased manner
6 given it is now a matter of public record that there's an accusation I somehow
7 sought to calculate a media like to undermine the Chairman's position, the net
8 result is that my position in appearing before the Chairman is now prejudiced
9 until such time as this matter is fully investigated and reported on and I am
10 afforded the opportunity to clear my name.

11
12 This is no reflection on the Chairman, as indeed he has been the victim of a
13 disclosure of his personal taxation affairs in a manner that could potentially
14 undermine your position as Chairman. However this is not my issue with the
15 Tribunal, rather it's the unsubstantiated suggestion that I was in some way
16 involved in the placing of this story. Therefore I am calling on you, the
17 Chairman, to refer the purported accusation by lawyers acting for this Tribunal
18 that I am in some way involved in the leaking of this story to refer to the
19 Garda authorities for investigation in line with the previous decisions of Mr.
20 Justice Flood regarding media leaks.

21
22 Secondly, I call on the Tribunal to make a statement clarifying the position of
23 both the Tribunal itself and the lawyers acting for and on its behalf in
24 relation to this story as to whether the story is unfounded or, in the
25 alternative, that there is a suspicion that I was the source and that any such
26 suspicion should be substantiated publicly in order to allow me to challenge
27 any question that hangs over me regarding this matter.

28
29 I have taken the liberty, Mr. Chairman, to write to the Commissioner of an
30 Garda Siochana, Mr. Noel Conroy, bringing to his notice the article in the

1 Ireland on Sunday newspaper and its serious implications suggesting that the
2 Tribunal lawyers had given an off-the-record briefing to Mr. Frank Connolly,
3 senior reporter with the Ireland on Sunday newspaper, and I have no doubt,
4 Chairman, that you will also call for the Gardai to investigate this matter. I
5 will make available to the Tribunal copies of my correspondence.

6

7 CHAIRMAN: Mr. --

8

9 MR. LAWLOR: On the basis of the above submission, Chairman, I would now ask
10 that any adjudication today regarding costs would be adjourned pending the
11 outcome of the above investigation and until such time as this insinuation, the
12 subject matter of this newspaper report, has been either substantiated or
13 eliminated to the satisfaction of both myself, the Chair and the Tribunal.

14

15 Further, having considered my position in relation to the Tribunal in recent
16 days, I have taken steps to engage solicitors and counsel to act on my behalf.
17 Further, I will be asking my legal team, when appointed, to consider seeking
18 the protection of the High Court by way of a judicial review of the procedures
19 that have been followed by the Tribunal over its life, in particular in
20 relation to due process and fairness of procedures as carried out in the
21 Tribunal's dealing with my affairs.

22

23 The last straw came last week when Mr. Seamus Ross came before this Tribunal on
24 the 8th October --

25

26 CHAIRMAN: Mr. --

27

28 MR. LAWLOR: The first official notification --

29

30 CHAIRMAN: Mr. Lawlor --

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MR. LAWLOR: I received from the Tribunal --

CHAIRMAN: Mr. Lawlor --

MR. LAWLOR: Setting out the Tribunal's intentions, I'm going to put the submission on the record.

CHAIRMAN: Mr. Lawlor, I am not going to allow you continue. I have given you more than ample time to make, I am only concerned with dealing today with issues concerning, relating to the cost and have you any further submissions?

MR. LAWLOR: I am making the submission, Chairman, because I am putting the Tribunal on notice as to --

CHAIRMAN: Mr. Lawlor, do you want to make any further submissions in relation to the costs issue?

MR. LAWLOR: I do, I want to make in submission which is related to your adjudicating on the costs issue.

CHAIRMAN: Is this to do with Mr. Ross?

MR. LAWLOR: It's to do with this Tribunal picking and plucking and cherry picking a witness and putting him into the middle of the Carrickmines model to come in here and make unsubstantiated charges --

CHAIRMAN: Mr. Lawlor, is it --

MR. LAWLOR: Bordering on criminal behaviour and I'm not given an opportunity

1 to cross-examine him and put on public record my response.

2

3 CHAIRMAN: Mr --

4

5 MR. LAWLOR: I'm going to finish this whether you wish or not, Chairman,
6 because I am putting on record what I am contending to doing regarding the
7 workings of this Tribunal.

8

9 CHAIRMAN: Mr. Lawlor, do you want to make any further submissions in relation
10 to the costs?

11

12 MR. LAWLOR: I want to make the submission that I am proposing to seek a
13 judicial review because of a breach of my constitutional rights to defend my
14 good name in a matter and I seek directions from a higher court.

15

16 CHAIRMAN: All right. Mr. Lawlor --

17

18 MR. LAWLOR: The Tribunal may have an opportunity in the future.

19

20 CHAIRMAN: Mr. Lawlor --

21

22 MR. LAWLOR: Mr. Chairman, you, when I was in America, called a witness that
23 had nothing to do with the Carrickmines module.

24

25 CHAIRMAN: Mr. Lawlor --

26

27 MR. LAWLOR: And had him come in here in the witness-box and make
28 unsubstantiated allegations and I was not given the opportunity to redress
29 those matters.

30

1 THE TRIBUNAL THEN ADJOURNED AND RESUMED AS FOLLOWS:

2

3 CHAIRMAN: I note from the transcript that it didn't record the fact, due to
4 Mr. Lawlor's interruption, that I had in fact risen when I did rise a few
5 minutes ago.

6

7 In relation to the issues with which I am now concerned, I am satisfied that
8 Mr. Lawlor has abused the opportunity which the Tribunal has afforded him to
9 make submissions in relation to the issues with which I am concerned. And I
10 don't propose hearing anything more from him. I have his written submissions
11 and I believe I understand the case that that he wishes to make. I am now
12 going to adjourn and I will consider the matter and I will issue a ruling
13 hopefully in a few days and the parties concerned will be informed.

14

15 THE TRIBUNAL THEN ADJOURNED

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