

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 25TH FEBRUARY,
1999 AT 10:00AM:

CHAIRMAN: Good morning, everyone.

Arising out of the events of yesterday, I wish to say the following:

Background.

This Tribunal is presently hearing evidence in public from Mr. James Gogarty, a person specifically named in the terms of reference of this Tribunal.

Mr. Gogarty has, in the course of giving evidence to the Tribunal, made various statements that materially affect the interests of Joseph Murphy Structural Engineers Limited and its related companies and persons (whom I shall refer to collectively as JMSE).

At an early stage of this Tribunal JMSE sought, and were granted, an order for limited representation before the Tribunal in relation to their interests.

JMSE and related companies and persons or properly interested persons to be represented before the Tribunal in relation to the evidence being presently adduced by Mr. James Gogarty.

The Tribunal has been, and continues to be, conscious of its duty to ensure fair procedures in respect for the constitutional rights of JMSE in common with all other interested persons before the Tribunal.

1
2 This does not mean that the Tribunal is required to take
3 the "side" of any person in these proceedings. In fact,
4 having regard to the inquisitorial nature of a tribunal,
5 there are no "sides" to an inquiry. The sole function of a
6 tribunal is simply to inquire into existence, or otherwise,
7 of the facts relevant to its terms of reference and where
8 appropriate to make any recommendations thereon. The only
9 facts upon which a tribunal is entitled to rely are those
10 which are established in evidence at a public sitting.

11
12 **The Facts**

13 In the course of yesterday's hearing before the Tribunal, I
14 rose following an exchange with Mr. Garrett Cooney, Senior
15 Counsel, so as to afford him the opportunity to apologise
16 to the Tribunal.

17
18 At the relevant time Mr. Cooney was cross-examining
19 Mr. Gogarty on the content of a document described as a
20 draft affidavit or draft statement. It transpired that
21 this document was prepared by Mr. Gogarty's then
22 solicitors, Messrs. Donnelly Neary Donnelly in August,
23 1997. The document was not signed by Mr. Gogarty and he
24 has stated in evidence that he never swore or signed it.
25 Mr. Cooney wished to put to the witness an extract from
26 this document apparently to illustrate an apparent
27 inconsistency between this document and the affidavit sworn
28 by the witness on 12th October, 1998.

29
30 I made a ruling that this document should be put by
31 Mr. Cooney to the witness in its correct context.
32 Counsel for Mr. Gogarty having stated that it was quite

1 clearly a draft not signed by the witness.

2 .
3 Mr. Cooney maintained his entitlement to put the document
4 to the witness on the basis, and I quote, "... this
5 affidavit is in the first person singular, this document is
6 in the first person singular, it's 'I', he refers to 'I'."
7 Mr. Cooney went on to state, and I quote: "... somebody
8 may have actually typed it out for him, but it's plainly in
9 his words , plainly in his words."

10 .
11 Following upon an intervention by counsel for the Tribunal
12 to clarify that the document was not a draft affidavit but
13 rather a draft of a statement, Mr. Cooney accused counsel
14 to the Tribunal of attempting to sabotage that part of his
15 cross-examination. I ruled that no person was seeking to
16 sabotage the cross-examination by Mr. Cooney. In reply
17 Mr. Cooney stated, "It seems likely, Mr. Chairman."

18 .
19 The Tribunal then invited Mr. Cooney to put to the witness
20 the document concerned in its proper context. In reply
21 Mr. Cooney stated: "Please, Mr. Chairman, Mr. Gallagher
22 interrupts me, Mr. Callanan interrupts me." The Tribunal
23 again invited Mr. Cooney to put the document concerned to
24 the witness in the proper context. Mr. Cooney then, in
25 strident tones, addressed the Tribunal as follows:

26 .
27 "Mr. Chairman, what is going on here? Are you going to
28 give us a chance to defend ourselves in this Tribunal?"

29 .
30 The clear inference from these remarks is that the Tribunal
31 itself had wrongfully sought to interfere with the
32 constitutionally protected right of JMSE to defend their

1 interest before the Tribunal. This is not the case.

2 .
3 The Tribunal stated to Mr. Cooney that the content and
4 manner of his remark to the Tribunal were both insulting
5 and insolent. In response, Mr. Cooney stated: "It's well
6 justified, Mr. Chairman by the...." Mr. Cooney did not
7 complete his remark as the Tribunal forthwith adjourned so
8 as to allow time to Mr. Cooney to apologise.

9 .
10 These are the material facts in relation to the request
11 made by the Tribunal to Mr. Cooney for an apology for his
12 remarks concerning this Tribunal.

13 . 14 **Consequences**

15 The remarks made by Mr. Cooney in their effect constitute a
16 serious and direct challenge to the integrity of this
17 Tribunal and, in consequence, if left unchallenged, may
18 hinder the proper functioning and effectiveness of the
19 Tribunal.

20 .
21 A tribunal is not a court of law. This does not mean,
22 however, that there is not a requirement for decorum and an
23 appropriate respect for the procedures applicable in the
24 Tribunal.

25 .
26 It is a regrettable fact that in advance of these remarks,
27 Mr. Cooney yet again saw fit to announce to the Tribunal an
28 intention to apply to the High Court to judicially review
29 this Tribunal. The Tribunal has already publicly indicated
30 that in terrorum threats of High Court intervention would
31 not be allowed to impede its work.

1 **Courses of action.**

2 There are two possible avenues open to the Tribunal.

3 .
4 Firstly, it may attempt to ignore the import of the conduct
5 and the remarks of Mr. Cooney. In my view, this is not
6 appropriate, having regard to the necessity to preserve the
7 integrity of the Tribunal and respect for its procedures.
8 The only other option available to the Tribunal, which in
9 the circumstances would be effective, is to indicate to
10 Mr. Cooney that while the order for representation in
11 relation to his clients is not being varied or discharged,
12 the Tribunal in the absence of the appropriate apology from
13 him, will withdraw his personal right of audience before
14 the Tribunal. This, of course, would not affect the right
15 of audience or the two remaining senior counsel and legal
16 team appearing on behalf of JMSE.

17 .
18 This is not a decision the Tribunal would wish to make nor,
19 indeed, is it one that would be made lightly, but
20 nevertheless, it is a regrettable fact that the Tribunal
21 considers it necessary to consider whether or not
22 Mr. Cooney's continued right of audience in this Tribunal
23 should be withdrawn.

24 .
25 I'll now rise for ten minutes to allow you to consider the
26 matter.

27 .
28 MR. COONEY: Chairman, with respect, it is unnecessary to
29 rise and I know precisely what I want to say because I've
30 considered the matter overnight and in particular your
31 request for an apology, and having considered the matter
32 very carefully overnight, I remain convinced that I neither

1 said nor did anything yesterday which warrants an apology,
2 and in those circumstances, it would be both hypocritical
3 and insincere on my part to offer the apology which you
4 demand, and I do not propose to make such an apology.

5 However, I want to add two other things, Mr. Chairman.

6
7 There may be, just may be an element of subjectivity in my
8 response to your demand for an apology, and in order to
9 meet that, Mr. Chairman, I propose that this matter be
10 referred to the Professional Practices Committee of the Bar
11 Council to await its adjudication. And if that
12 adjudication results in any finding which is critical of
13 me, then I can assure you that I'll respond adequately and
14 fully to such a finding. That's the first thing I want to
15 say, Mr. Chairman.

16
17 The second thing I want to say is this, yesterday you
18 referred to the length of time in which I have been at the
19 bar, nearly 40 years, Mr. Chairman, and during that time I
20 have known you as a colleague and I've also known you as a
21 judge, I've appeared before you, and during those years,
22 Mr. Chairman, I have learned to respect you very much
23 indeed. Now, any impression of this respect which you may
24 have gained during the course of this Tribunal,
25 Mr. Chairman, is not intentional, but based on a very firm
26 conviction that almost from the date of its establishment,
27 this Tribunal has not given a fair crack of the whip to my
28 clients, Mr. Chairman. That is -- that is all I want to
29 say, Mr. Chairman.

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31 CHAIRMAN: Well, I'll rise for ten minutes to consider
32 your proposition before going any further.

THE HEARING THEN ADJOURNED FOR A SHORT BREAK AND RESUMED AS
FOLLOWS:

CHAIRMAN: I have noted Mr. Cooney's response to my most recent request with some regret. Mr. Cooney has had the opportunity since 12.45pm yesterday to tender an apology to the Tribunal in response to the requests made of him. In the absence of any response yesterday, the Tribunal was adjourned and the evidence of Mr. Gogarty postponed until today.

I have listened with care to what Mr. Cooney has said and I fully take into account the significance of the matters he has mentioned. I want to reject most emphatically that this Tribunal is in any way biased. I nevertheless have come to the conclusion that in order to maintain the integrity of the Tribunal, I must order that Mr. Cooney's entitlement to address the Tribunal on behalf of his clients is hereby withdrawn.

Mr. Herbert, do you wish to carry on with the cross-examination?

MR. HERBERT: Sir, while I wish to emphasise my long-held respect to you personally and say I hold you in the highest distinguishment, I regretfully must decline to go on and I support what Mr. Cooney has said fully and I thank you very much.

CHAIRMAN: Well, in that case, Mr. Cush?

1 MR. CUSH: Sir, my position is the same as Mr. Herbert's.

2 .
3 CHAIRMAN: Mr. Allen, in those circumstances, you must
4 begin to cross-examine the witness.

5 .
6 MR. ALLEN: Yes, Chairman, my position is quite simple. A
7 situation has arisen which poses very considerable
8 difficulties for me of a professional nature, and I would
9 ask that I be given 24 hours in which to consult with my
10 professional body in relation to the matter. I want to
11 make it absolutely clear that I am not in any way -- I have
12 obviously no input into your ruling, Chairman. That is a
13 matter entirely for yourself. I'm simply signalling to you
14 that I believe a situation has arisen which requires that I
15 take advice from my professional body, that is a view which
16 is shared by the other members of my team. And all I would
17 do, Sir, is that I ask that I be given that time and I
18 would limit that to a period of 24 hours. I want to make
19 it quite clear that I'm not refusing to cross-examine, and
20 that there is no question whatever of my withdrawing from
21 these proceedings. But I do feel, having consulted with my
22 colleagues, the need to address that matter.

23 .
24 CHAIRMAN: Well, the matter does not affect you, nor your
25 clients. However, I suppose you're entitled, as any other
26 professional man, to take counsel from his professional
27 association. I'll sit again tomorrow morning at 10 o'clock
28 and under those circumstances the case goes on.

29 .
30 MR. ALLEN: I'm obliged to Your Lordship.

31 .
32 CHAIRMAN: I'll adjourn, in those circumstances until, 10

1 o'clock tomorrow morning.

2 .
3 THE TRIBUNAL THEN ADJOURNED TO THE FOLLOWING DAY, FRIDAY,
4 26TH FEBRUARY 1999 AT 10:00AM.