



The Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR
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PREFACE

This is my Second Interim Report to the Oireachtas. I have since my last report, conducted what were in effect three separate Public Inquiries. They are referred to in this Report as the Brennan & McGowan Module, the Century Radio Module, and the Gogarty Module. Public hearings on these issues took place between January 1999 and December 2001 and lasted 313 days, in the course of which 170 witnesses were heard. Where it has been possible, and is appropriate for me to do so, I now report my interim conclusions arising therefrom.

The subject matter of these inquiries extended to cover a period of more than 30 years and ranged over a number of topics, as diverse as:-

- Land Rezoning;
- Radio broadcasting, and
- Offshore trusts and corporations.

The extent of the inquiries was dictated by the Terms of Reference which obliged me to investigate substantial payments made to Mr Burke in the course of his long political career.

In reaching my conclusions in this Report, I have carefully considered the *viva voce* evidence of the witnesses who gave evidence on oath before me. I have considered the transcripts, which recorded their testimony and which extended to over 35,000 pages, and the exhibits referred to therein.

I have given full consideration to the points ably made by the legal representatives of the parties who appeared before me, and I have read and carefully considered the submissions, both oral and written, made by them at the conclusion of the public hearings of the issues in which they were involved. I reached the findings in this Report after much careful deliberation. I have sought in my Report to address the issues as I found them, so as to give a comprehensive and comprehensible report on the matters of concern to the Oireachtas which are encapsulated in my *Terms of Reference*.

In preparing this Interim Report, I was mindful of the vast volume of material which was considered by me in reaching my decisions, and the range of issues and arguments which were raised by the parties in their evidence and by their legal representatives in their submissions. I am conscious that a recital of each of the issues raised, and the evidence/lack of evidence relating to them, would render this Report so voluminous and complex as to make it incomprehensible to its readers.

The absence, therefore, of specific references to the evidence given, or to each individual point raised, or to each argument advanced, is not to be taken as meaning that I have not given full and careful consideration to such evidence and/or submissions. I have fully considered all relevant matters on the issues, and I am satisfied that the conclusions reached by me in reporting my findings are fully borne out by the evidence heard.

All citizens have a duty to co-operate and assist a Tribunal and to tell the truth when summoned to appear at a public hearing. It is with considerable regret that I have concluded that I must report, as one of my findings, that certain parties who appeared before me chose not co-operate with the Tribunal in its task.

The extent to which their actions may have involved them in breaches of the criminal law is a matter upon which the Director of Public Prosecutions has absolute and exclusive jurisdiction. I have decided to forward a copy of my Report to him to take such steps, and to do with it, what he, in his absolute discretion, considers appropriate.

I am very mindful of the significant costs which have been incurred in conducting the Inquiry to date. I have endeavoured to conduct the Inquiry in as economical a fashion as possible, having regard to the rights of those persons appearing before the Tribunal and my obligation to the Oireachtas.

In response to my request for information, the Revenue Commissioners and the Criminal Assets Bureau have informed me that, to date, in excess of €34,500,000 has been paid to these bodies in connection with inquiries into Revenue compliance issues arising directly or indirectly from this Tribunal. I believe that this is a significant consequence of the work of the Tribunal to date.

As this is an Interim Report only, I am not at this time making any specific recommendations in relation to amendments to existing legislation in the areas of planning, local government, ethics in public office or otherwise

The Honourable Mr. Justice Feergus M. Flood.
September 2002.

Introduction to the Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments

This Tribunal was established by Ministerial Order, on the 4th November 1997, to inquire urgently into the matters of urgent public importance set forth in its original Terms of Reference (see **Appendix A**) and to report to the Clerk of the Dáil upon its findings.

The Tribunal is mindful of the desire of the House that the Inquiry be completed in as economical a manner as possible and at the earliest date consistent with a fair examination of the matters referred to it.

The original Terms of Reference enabled the Tribunal to report, on an interim basis, on any matters which the Tribunal believed should be drawn to the attention of the Clerk of the Dáil including any matter relating to the Terms of Reference. On the 26th February 1998, the Tribunal availed of this provision so as to request the Oireachtas to amend the original Terms of Reference by the deletion of the words, “committed on or after 20th June, 1985” from paragraph A. (5) of the original Terms of Reference. The proposed amended paragraph would have then read;

“In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process which may in its opinion amount to corruption, or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties, it shall report on such acts and should in particular make recommendations as to the effectiveness and improvement of existing legislation governing corruption in the light of its inquiries.”

Following upon this request, and in view of other significant developments which had taken place since the setting up of the Tribunal, the Oireachtas amended the Terms of Reference of the Tribunal by Instrument of the Minister for the Environment and Local Government dated the 15th July 1998. The full text of the amended Terms of Reference is appended to this Interim Report (**Appendix B**).

The amended Terms of Reference incorporated not only the original amendment sought by the Tribunal but also amendments which specifically required the Tribunal to inquire into the public life of a named former member of the House, Mr. Raphael Burke.

These amendments, provided for at paragraphs E1 and E2, were to greatly expand the Tribunal’s task. In effect the Tribunal was obliged to investigate the entire public life of Mr. Burke from 1967 to 1997 to see whether any substantial payments were made or benefits provided to him which, in the opinion of the Tribunal, amounted to corruption, or involved attempts to influence or compromise the disinterested performance of public duties, or were made or provided in circumstances which may give rise to the reasonable inference that the motive for making or receiving such payments was improperly connected with any public office or position held by him, whether as Minister, Minister of State, or elected representative.

The amended Terms of Reference permit the Tribunal to report on an interim basis on any matters which the Tribunal believes should be drawn to the attention of the Clerk of the Dáil at that stage and to furnish such further interim reports as the Tribunal may consider necessary.

This Interim Report is provided at this time as the Tribunal considers it necessary to do so for the following reasons: -

1. The Tribunal has heard sufficient evidence in public to enable it to pronounce with finality upon certain payments made to Mr. Burke.
2. The likely duration of the public hearings of the matters which are the subject of current private inquiries being conducted by the Tribunal is such that a final report on these matters could not be delivered for at least two years from the present date.

3. In addition to those matters upon which decisions to go to public hearing have been taken, there are a number of additional matters currently under investigation by the Tribunal in its private investigative phase. It is not possible to forecast the likely duration of the public hearings on such matters should it be determined that they merit public hearings, and, consequently, the likely date for publication of a final report on all issues covered in the present Terms of Reference cannot be accurately forecast.
4. The Tribunal considers that the withholding of a report upon those matters which are capable of being determined at this time until the publication of the final report would be inconsistent with the Tribunal's obligation to report as soon as possible, consistent with fairness.
5. The Tribunal is being enlarged by the addition of two further members and, accordingly, it is considered appropriate that those matters upon which evidence was heard by the Sole Member Tribunal should, where possible, be the subject of a report which is independent of the reconstituted and enlarged Tribunal.

The Tribunal is in a position to report its conclusions in respect of the following matters:

- The payment of specific sums of money to Mr. Burke by Mr. Tom Brennan, Mr. Joseph McGowan, Mr. John Finnegan and/or their related companies.

The references to "payment" in this introduction extend to cover not only admitted payments but also alleged payments.

In addition to reporting upon the specific issues set out above this Interim Report contains a summary of the work carried out by the Tribunal to date in relation to:

1. Inquiries carried out into matters in respect of which it was determined that insufficient evidence existed to merit proceeding to public hearing.
2. Inquiries into complaints which, upon examination, were established not to fall within the Tribunal's Terms of Reference.
3. Inquiries into matters upon which, it was concluded by the Tribunal, there was no evidence to support the complaint.

The Report commences with a general background history of Mr. Burke's personal and professional details, in so far as they are relevant to the Tribunal's findings, and with a history of the events which culminated in his resignation from public life in October 1997.

The Report follows the chronological sequence of the events which are the subject of the report, rather than the sequence in which the Tribunal heard the evidence at public sessions.

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Chapter 1

Background to the Establishment of the Tribunal of Inquiry into Certain Planning Matters and Payments

BACKGROUND HISTORY OF MR. RAY BURKE OTHERWISE RAPHAEL P. BURKE

1-01 Mr. Burke was born on the 30th September 1943 in Donabate, Co. Dublin, the son of Patrick Joseph Burke and Catherine Mary Burke. His birth certificate records his full name as Raphael Patrick Burke. Prior to his marriage in November 1972, Mr. Burke resided at 251 Swords Road, Dublin 9, and subsequent to his marriage, he lived at Briargate, Malahide Road, Swords, Co. Dublin.

Political career details

1-02 Mr. Burke's father, Mr. P.J. Burke, was elected a member of Dáil Éireann in 1944, and served continuously until 1973 when he retired from active politics. Mr. Ray Burke entered public life as a Fianna Fáil councillor on Dublin County Council in 1967. He served as a member of the Council from 1967 until 1978. Between 1985 and 1987 he was Chairman of Dublin County Council. Mr. Burke was first elected to Dáil Éireann in 1973 upon the retirement of his father. He was a member of Dáil Éireann for the constituency of Dublin North from 1973 until his retirement on the 7th October 1997. Mr. Burke held the following ministerial offices during the course of his career:

- From January 1978 until October 1980, he was Minister of State at the Department of Industry, Commerce and Energy.
- From October 1980 until June 1981, he was Minister for the Environment.
- From March 1982 until December 1982, he was Minister for the Environment.
- From March 1987 until November 1988, he was Minister for Energy, and Minister for Communications.
- From November 1988 until July 1989, he was Minister for Communications and Minister for Industry and Commerce.
- From July 1989 to November 1991, he was Minister for Communications.
- From July 1989 until February 1992, he was Minister for Justice.
- From the 26th June 1997 to the 7th October 1997, he was Minister for Foreign Affairs.

On the 7th October 1997, Mr Burke retired both as Minister for Foreign Affairs and as a member of Dáil Éireann.

Professional career details

1-03 On the 4th October 1968, P.J. Burke (Sales) Limited was incorporated. Mr. Burke was a director of this company, which carried on the business of auctioneers and estate agents at Swords, Co. Dublin. The company made its last annual return on the 31st December 1980 and was dissolved on the 9th May 1989. On the 20th July 1984, Ray Burke & Associates Life & Pensions Limited was incorporated. Mr. Burke was a director and the secretary of the company. This company changed its name to Crown Insurance Brokers Limited with effect from the 27th July 1987. Mr. Burke had resigned as a director and as the secretary of the company with effect from the 14th October 1986. Crown Insurance Brokers Limited filed its last annual return on the 31st December 1989, and was dissolved on the 26th September 1995.

BACKGROUND HISTORY OF EVENTS, WHICH PRE-DATED THE APPOINTMENT AND OF EVENTS WHICH PRE-DATED THE SUBSEQUENT RESIGNATION OF MR. RAY BURKE AS MINISTER FOR FOREIGN AFFAIRS AND AS A MEMBER OF DÁIL ÉIREANN

Publications in the print media

1-04 The following material was published in the print media and pre-dated Mr. Burke's appointment as Minister for Foreign Affairs in June 1997: -

- On the 3rd July 1995, a notice appeared in two Irish daily newspapers offering a £10,000 reward to persons providing information leading to the conviction of persons involved in corruption in connection with the planning process. Donnelly Neary Donnelly, Solicitors of Newry, Co. Down, placed this notice on behalf of unnamed clients. This notice was the subject of much public comment at the time of its insertion, and subsequently, both in the print media and in Dáil Éireann.

1-05 The following publications in the print media took place following the appointment of Mr. Burke as Minister for Foreign Affairs on the 26th June 1997 and prior to his resignation on the 7th of October 1997: -

- On the 20th July 1997, an article, in the Sunday Tribune newspaper by Mr. Matt Cooper, named Mr. Ray Burke T.D. as the person who had received £30,000 in electoral contributions from a property company called Bovale Developments in 1989. This article stated that the claimed payment of £30,000 to Mr. Burke was separate from the allegation of payment from other sources, which had been made by a former executive in a major property company.
- On the 27th July 1997, the Sunday Business Post published an article, written by Mr. Frank Connolly, headed "Burke Political Funds' Confusion Continues" in which he stated that confusion surrounded the amounts and nature of the monies given to the Minister for Foreign Affairs, Ray Burke, during the 1989 election campaign. It stated that Mr. Michael Bailey of Bovale Developments Limited had denied a report in the previous week's Sunday Tribune that he had handed Mr. Burke £30,000 before the election in 1989. The Tribune story had quoted unnamed Fianna Fáil sources as confirming Bovale had made such a contribution to Mr. Burke. The article stated that Mr. Bailey had insisted that the most he ever gave Mr. Burke in one electoral campaign was £1,000 and that he also assisted other parties.

1-06 The following publication took place following Mr Burke's personal statement to the House on the 10th September 1997: -

- On the 25th September 1997, Magill Magazine published an article written by Mr. John Ryan which quoted part of the contents of a letter which had been written by Mr. Michael Bailey to Mr. James Gogarty on the 8th June 1989, in which Mr. Bailey stated that he would have to be offered a 50% stake in the Murphy lands in exchange for the procurement of planning permission and Building Bye-Law approval. It was stated that this would involve the procurement of a majority vote of a full Council meeting.

PARLIAMENTARY QUESTIONS RAISED CONCERNING ALLEGATIONS MADE BY MR. JAMES GOGARTY

1-07 Deputy Thomas P. Broughan tabled the following parliamentary questions directed to the Minister for Justice on behalf of his constituent, Mr. James Gogarty between June 1995 and June 1996.

"Chun an tAire Dlí agus Cirt; to the Minister for Justice

Question: * To ask the Minister for Justice the action, if any, which will be taken by the Gardaí regarding the attacks and intimidation of a person (details supplied) in Dublin 13 between the years 1991 and 1994; and if so, when.

Thomas P. Broughan ”

To which the following written answer was given on the 28th June 1995:

“Answer: I have requested a detailed report from the Garda Authorities in this matter and I will communicate with the Deputy once the Report is to hand.”

“Chun an tAire Dlí agus Cirt; to the Minister for Justice

Question: * To ask the Minister for Justice the reason a file was not sent to the DPP in respect of the person (details supplied) in Dublin 13 following attacks on a home and cars, verbal phone threats and intimidation to which a Garda was a witness.

Thomas P. Broughan ”

To which a written answer was given on the 2nd May 1996 as follows:

“Answer: I am informed by the Garda Authorities that having investigated this matter, they have found no basis for criminal prosecution.”

“Chun an tAire Dlí agus Cirt; to the Minister for Justice

Question: To ask the Minister for Justice the allegations and background surrounding threats to and intimidation of a person (details supplied) in Dublin 13 in each of the years from 1989 to 1994; and the reason the investigation carried out by Gardaí have not been referred to the Fraud Squad in Harcourt Street, Dublin 2 in order to prepare a file for the Director of Public Prosecution, in view of the serious allegations of fraud made against a leading Dublin company (details supplied) in Dublin 9 in the Circuit Court on 8th March, 1994.

Thomas P. Broughan ”

To which an oral answer was given on the 19th June 1996 as follows:

“Answer: I dealt with the allegation of intimidation in my response of 2nd May, 1996 to a previous parliamentary question tabled by the Deputy in this matter. As regards the allegations of fraud I am informed by the Garda Authorities that no such complaint has been received from the person in question.”

PUBLIC STATEMENTS BY MR. RAY BURKE T.D. ON THE 7TH AUGUST 1997 AND THE 10TH SEPTEMBER 1997

1-08 On the 7th August 1997, Mr. Ray Burke T.D., Minister for Foreign Affairs, issued a public statement in which he stated that he had been a target of a vicious campaign of rumour and innuendo during the previous two years. He stated that since his appointment as Minister for Foreign Affairs the campaign had intensified. He stated that the stories, which had appeared in the media in preceding weeks, were the culmination of a lengthy series of smears about him. He stated that the story kept resurfacing in different shapes and forms and that the repeated articles and comments of previous weeks had placed an unacceptable burden on his family and himself. While he resented having to dignify these allegations by responding to them at all, he believed that he was obliged to do so then.

1-09 In his public statement Mr. Burke stated:

- (1) Mr. Michael Bailey of Bovale Developments Limited visited his home with a Mr. James Gogarty during the 1989 Election campaign;
- (2) Mr. Bailey was well known to him, as he was a resident of North County Dublin and a long-term supporter of Fianna Fáil;
- (3) He had not met Mr. Gogarty previously but that he was introduced by Mr. Bailey as an executive of Joseph Murphy Structural Engineers, (JMSE). Mr. Gogarty told him that JMSE wished to make a political donation to him and he received from him in good faith a

sum of £30,000 as a totally unsolicited contribution;

- (4) At no time during their meeting were any favours sought or given;
- (5) He did not do any favours for or make any representation to anyone on behalf of JMSE, Mr. Michael Bailey, Bovale Developments Limited or Mr. James Gogarty either before or since 1989;
- (6) He believed that Mr. James Gogarty might be the source of the allegations being made against him;
- (7) He did not know of any motive which Mr. Gogarty would have in pursuing a vendetta against him. However, he believed that he had parted from his former employers, JMSE, in acrimonious circumstances. If Mr. Gogarty was the source of the allegations he was the author of a campaign of lies against Mr. Burke;
- (8) He acknowledged that he had received a political contribution of £30,000 and not £80,000 as reported;
- (9) He stated that the allegation that he had received £40,000 from Mr. Bailey or Bovale Developments Limited on that or any previous occasion was false;
- (10) He stated that there were three persons present when he received the contribution from Mr. Gogarty, namely Mr. Gogarty, Mr. Bailey and himself and not five as reported;
- (11) He stated that there was one JMSE executive present, Mr. Gogarty, and not two or three as variously reported;
- (12) He stated that he was taking the opportunity to state unequivocally that he had done nothing illegal, unethical or improper. He found himself the victim of a campaign of calumny and abuse. He stated that it was totally unacceptable that the matter should be allowed to continue to fulfil an agenda which has nothing to do with election contributions or any other aspect of reasonable or reasoned political debate in public life;
- (13) He stated that if any further untruths were published about him he would take all necessary steps to vindicate his good name and reputation.

1-10 On the 10th September 1997, Mr. Ray Burke T.D. availed of the opportunity of making a personal statement to Dáil Éireann. He indicated that he had come to the House to defend his personal integrity, the integrity of his party, of the Government and of the honour of the Dáil and to reassure the public, and in particular his constituents, that he had done nothing wrong. Mr. Burke reiterated the public statement, which he had made on the 7th August 1997, and elaborated upon it. He subjected himself to questions from members of the House.

1-11 Mr. Burke's statement to the Dáil revealed the following information in addition to that which had been contained in his public statement of the 7th August 1997;

- (1) He said that the contribution was entirely in cash.
- (2) He confirmed that he contributed £10,000 to the Fianna Fáil National Organisation during that election campaign. In addition, he handed over monies totalling approximately £7,000 to his local constituency organisation during the general election campaign in 1989. The remainder of the political contributions received by him, including the contribution Mr. Gogarty gave him during the meeting at his home was used to cover personal election campaign and subsequent political expenses.
- (3) He said that as regards the contribution, £30,000 was the largest contribution he had received during any election campaign either before or since 1989.

1-12 In answer to questions put to him by members of the House, Mr. Burke provided the following information in relation to the payment referred in his statement: -

- (1) He stated that in attempting to “recall and collect” details of particular allocations of funds, cheques or otherwise, during recent months in respect of the controversy he had no recollection of the denominations of the monies he received.
- (2) He produced a letter dated the 8th September 1989, from Ulster Bank, Dublin Airport Branch, Swords Road, Cloghran, Co. Dublin from Mr. W. J. Moody, Senior Manager, Business Banking confirming that a bank draft No. 340804 in favour of Fianna Fáil in the sum of £10,000 was issued and duly lodged and paid by the bank on the 16th June 1989.
- (3) He stated the sum given to his constituency organisation was confirmed as having been received in two drafts amounting to £2,000 and £5,000.
- (4) He stated that the money given to him by Mr. James Gogarty was lodged to his personal account.
- (5) He stated that his solicitors had received a letter from the solicitors acting for Joseph Murphy Structural Engineers Limited and Mr. Joseph Murphy Junior, stating that on the 8th June 1989, two consecutive cheques were drawn on the JMSE account in the AIB, Talbot Street Branch, one cheque for £20,000 and the second for £10,000. The cheque stubs in relation to both cheques said ‘cash’, they presumed that these cheques related to the £30,000 at issue, however, following inquiries with the AIB they had been unable to provide any details in relation to same and did have not have a record of paid cheques.
- (6) He stated that in relation to records other than those relating to the £10,000 bank draft that went to Fianna Fáil headquarters, he had discovered something of which he was not aware, namely that banks did not keep records dating back eight or nine years. All records were stopped and it was practically impossible to find records. He had found as much as he possibly could and was trying to be as frank as possible.
- (7) He stated that his recollection was that the money given to him was in two envelopes and that it was only after the people had left that the money was counted. He was not aware at the time of the sum he was receiving.
- (8) He referred to a letter, of the 4th August 1989, from Ulster Bank, Dublin Airport Branch, Swords Road, Cloghran, Co. Dublin as evidence of an overdraft of £35,000, which he required at that time and as evidence of the financial straits in which he found himself after the campaign.
- (9) He stated that because the money was given in cash, some of it would have been lodged and more of it would have been used on the ongoing daily expenses of the election campaign.
- (10) He referred to alleged impropriety in relation to the acquisition of his home at Briargate, Swords and said that the land upon which his house was built was not purchased by his father from an inmate of the Mental Hospital in Portrane, Co. Dublin as alleged, but was bought by him in a normal commercial transaction from Oldpark(*sic*) Developments Limited. He said the house was built in the normal commercial manner when he was doing business with that company and that that transaction along with others was the subject of a Garda investigation in 1974.

1-13 The full text of Mr. Burke’s statement and the questions and answers following upon his statement, are contained in the Dáil Report of the 10th September 1997 from paragraphs 616 to 638 inclusive and appears as **Appendix C** to this Report.

OCTOBER 1997 AND THE APPOINTMENT OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS

1-14 Following Mr. Ray Burke T.D's statement to the members of Dáil Éireann on 10th September 1997, the following significant events occurred.

1-15 On the 11th September 1997, Mr. Pat Rabbitte T.D moved amendment No. 27 to the Report of Tribunal of Inquiry (Dunnes Payments) and Establishment of Tribunal of Inquiry: Motion (the Moriarty Tribunal Terms of Reference Debate) to provide for an amendment of the Motion so as to insert the following new subparagraph after sub paragraph (1):

“(II) To carry out such investigation as it thinks fit, using all the powers conferred on it under the Acts, into the amount, source and circumstances of the financial donation received in 1989 by the Minister for Foreign Affairs, Mr. Ray Burke, which was the subject of a personal statement by him in Dáil Éireann on September 10th, 1997 in order to determine whether sufficient evidence exists to warrant proceedings to a full public inquiry into this matter.”

1-16 This amendment, if passed, would have included the preliminary investigation into the payment of JMSE's money to Mr. Burke in the Terms of Reference of the Moriarty Tribunal. The amendment was rejected by 76 votes to 69.

1-17 On the 25th September 1997, Magill Magazine published excerpts from Michael Bailey's letter of 8th June 1989 to James Gogarty seeking a 50% interest in the Murphy lands in return for procuring planning permission and building bye-law approval for the development of the lands.

1-18 On the 1st October, 1997, in answer to Question 13 put to an Taoiseach by Mr. Pat Rabbitte T.D, an Taoiseach Mr. Bertie Ahern T.D. informed the House that the Government had decided that a new Tribunal would be established to investigate all matters relating to the parcels of land referred to in Mr. Bailey's letter and any related matters. He informed the House that the *Terms of Reference* had been the subject of discussion between the Whips and that the formal Motion would be put down for debate when those discussions were completed.

1-19 On the 7th October 1997, an Taoiseach advised the House that he had accepted, on behalf of the Government, the resignation of the former Minister for Foreign Affairs, Raphael P. Burke and had also accepted his decision to resign his seat as a member of Dáil Éireann.

1-20 On the 7th October 1997, Mr. Noel Dempsey T.D, Minister for the Environment and Local Government moved the Motion to set up this Tribunal which following debate was carried with agreed amendments. The full text of the debate is annexed to this Report and appears as **Appendix D**.

1-21 On the 4th November 1997, by Instrument of the Minister for the Environment and Local Government this Tribunal was established. The full text of the original Terms of Reference of the Tribunal appears as **Appendix A** to this Report.

Brennan & McGowan Module

Chapter 2

Mr. Ray Burke's involvement with Mr. Tom Brennan, Mr. Joseph McGowan and their related Companies and Associates

2-01 Mr. Tom Brennan and Mr. Joseph McGowan were both born in County Mayo in 1936 and 1944 respectively and were known to Mr. Ray Burke from the 1960's onward. Mr. Brennan and Mr. McGowan were friends of Mr. Burke's father, Mr. P.J. Burke, T.D. who had also been born and raised in Co. Mayo.

2-02 The Brennan & McGowan business relationship commenced as a partnership in 1965 when they started house building on a small scale in the Dublin area. They went on to form limited liability companies as their business increased and prospered. By the late 1970s they were amongst the largest house building companies in Ireland and both Mr. Brennan and Mr. McGowan were wealthy men.

2-03 The companies controlled by them included Grange Developments Limited, incorporated in May 1970, and Kilnamanagh Estates Limited incorporated in August 1972. In addition to the companies in which they had joint interests, Mr. Brennan also had building companies in which Mr. McGowan had no identifiable beneficial interest including a company called Oakpark Developments Limited, (Oakpark) which was incorporated in April 1970.

2-04 Oakpark's core business was the development of high-density housing estates in the Swords area. It did not build individual houses with one notable exception, a substantial detached house standing on one acre at Malahide Road, Swords, Co. Dublin which was built in 1972 and which was subsequently named "Briargate" by its first owner, Mr. Ray Burke.

2-05 From 1968 onwards, Mr. Burke was conducting an auctioneering and estate agency business in the Swords area through a company called P.J. Burke (Sales) Limited. This company acted as the sales agent for houses, which were being built by Brennan & McGowan connected companies.

2-06 In 1974, Mr. Burke's relationship with Messrs. Brennan and McGowan was the subject of a newspaper article written by Mr. Joe McAnthony, a journalist then with the *Sunday Independent*. In the course of the article, reference was made to a document, which had been sent to the Companies Office with the returns for Dublin Airport Industrial Estates Limited, a company connected with Messrs. Brennan and McGowan. The document contained a reference which stated "Ray Burke – planning - £15,000". As Mr. Burke was at that time both a County Councillor and a newly elected member of the Dáil, this article attracted widespread attention. A Garda investigation followed and at its conclusion did not recommend prosecution of any individual.

THE INVOLVEMENT OF MR. TOM BRENNAN AND MR. JOSEPH MCGOWAN WITH THE TRIBUNAL

2-07 In the course of his oral testimony before the Tribunal in July 1999, Mr. Burke gave evidence about the source of funds, which had been lodged to a bank account in Jersey, held in the name of a Jersey registered company called Caviar Limited. Mr. Burke had earlier disclosed the existence of this account in his affidavit of discovery provided to the Tribunal on foot of an order for discovery and production made by the Tribunal. He acknowledged that the Caviar account was his. Mr. Burke's evidence at that time was to the effect that there had been two lodgments to the account. Both lodgments were made in 1984. The first was a lodgment of stg.£35,000 made in April 1984, and the second a lodgment of stg.£60,000 made in October 1984. He gave evidence that these lodgments were the proceeds of political fundraising activities carried out in the UK by his political supporters previously identified to the Tribunal as Mr. Brennan and Mr. McGowan. He did not know the identity of the individual subscribers to these fundraising activities.

2-08 In correspondence with Messrs. Brennan and McGowan, the Tribunal sought to establish the full circumstances relating to all payments made by them to Mr. Burke. However, this correspondence did not produce the necessary information. The Tribunal invited Messrs. Brennan and McGowan to provide a written narrative account of their dealings with Mr. Burke but this invitation was declined. Accordingly, the Tribunal decided to call both Mr. Brennan and Mr. McGowan to give evidence at the public sessions of the Tribunal in April 2000.

2-09 The Tribunal's decision to do so was reached, having regard to the provisions of paragraphs E1 and E2 of the Tribunal's *Terms of Reference* and to the substantial payments received by Caviar with which Mr. Burke said that Messrs. Brennan and McGowan were associated.

2-10 The evidence provided by Mr. McGowan, in which he was supported by Mr. Brennan, in relation to the offshore fundraising activities conducted on Mr. Burke's behalf, was that fundraising events had taken place to coincide generally with horseracing events in the UK at which contributions were raised for Ray Burke/Fianna Fáil. This fundraising activity commenced in the 1970s. The funds estimated to have been raised during that period were in the region of stg.£110,000 to stg.£130,000. That was calculated on the basis of an average contribution of stg.£10,000 per annum and stg.£20,000 in one particular year. The evidence was that this fundraising activity ceased in or around 1984. The fundraising was on an informal basis and Mr. Ernest Ottiwell was said to have been the *de facto* treasurer of this fundraising group. Having received the evidence of Mr. Brennan and Mr. McGowan on the question of payment of monies to Mr. Burke, the Tribunal conducted further inquiries.

2-11 On the 28th June 2000, Mr. Burke revealed in correspondence that he had received a sum of stg.£50,000 in December 1982 from a company called Kalabraki. Mr. Burke, in later evidence, said that this payment was part of the offshore fundraising activities of Mr. McGowan/Mr. Ottiwell. Whereas his original testimony was that there were only two lodgments of stg.£35,000 and stg.£60,000 in April and November, 1984 attributable to this offshore fundraising, he now maintained that there were two payments, the first of which was for stg.£50,000 in December, 1982 and the second in November, 1984 for stg.£60,000. The lodgment of stg.£35,000 in April 1984 was now recategorised as part of the original stg.£50,000 donation made in December 1982.

2-12 The Tribunal made further inquiries of Messrs. Brennan and McGowan. The Tribunal identified to them the two payments that were now the focus of the Tribunal's investigation, namely:

1. A payment of stg.£50,000 from Kalabraki in December, 1982, and
2. A payment of stg.£60,000 to Caviar Limited in November 1984.

Messrs. Brennan and McGowan did not provide any additional information to advance the Tribunal's knowledge of either of these transactions.

2-13 On the 28th February and 1st March, 2001 Mr. Burke gave evidence to the Tribunal confirming that there had been only two payments attributable to the offshore fundraising activities conducted by Mr. McGowan/Mr. Ottiwell, namely the stg.£50,000 and stg.£60,000 payments already referred to above. He specifically rejected a suggestion that a lodgment of stg.£15,000 to the Caviar account on the 19th April 1985 represented a separate payment from the stg.£50,000 and the stg.£60,000. Mr. Burke's explanation for this lodgment of stg.£15,000 was that it was a relodgment of the same sum, which had been taken from the same account on the 9th April 1985.

2-14 The Tribunal's further inquiries established that this account of events could not be true. Mr. Burke's Jersey company, Caviar Limited, was administered through Bedell & Cristin, a firm of Advocates in Jersey. The Tribunal obtained their Caviar file which bore the reference C992. The Tribunal noted that this file also contained references to dealings involving file reference C758, a company subsequently identified as Canio Limited. The Tribunal provided this information to the Irish solicitors currently acting on Mr. Burke's behalf in his dealings with the Tribunal.

2-15 Although all correspondence was being conducted through our respective solicitors, on the 12th March 2001, Mr. Burke wrote a personal letter to me, in which he effectively retracted substantial parts of the evidence, which he had given to the Tribunal to date, concerning the source of the funds lodged to his offshore account.

2-16 On the 13th March, 2001 the Tribunal informed Messrs. Brennan and McGowan's Irish solicitors, Messrs. Miley & Miley, of its knowledge of the existence of Bedell & Cristin file reference C758, and its apparent connection with payments made by Messrs. Brennan & McGowan to Mr. Burke. On the following day, Miley & Miley contacted Bedell & Cristin in Jersey and were informed by them that, whilst the identity of the corporate entity behind file reference C758 was not known to the Tribunal, the Tribunal was now aware of the connection between that entity and Mr. Burke's account. They also advised that compulsory disclosure procedures existed in Jersey which they expected would be availed of by the Tribunal if the information sought was not provided voluntarily.

2-17 It transpired that file reference C758 was the Bedell & Cristin file of Canio Limited, a Jersey company that was two-thirds owned by Mr. Brennan and Mr. McGowan, the existence of which had not been disclosed to the Tribunal. Messrs. Brennan and McGowan now retracted a substantial portion of their evidence in relation to the payment to Mr. Burke. In particular, it was now acknowledged that:

1. Kalabraki was a company wholly owned by Mr. Tom Brennan and that its funds were paid to Mr. Burke in December 1982.
2. The payment of £60,000 to Caviar was made by Canio Limited, a Jersey registered company, which had funded the payment from borrowings raised on the security of lands at Sandyford, Co. Dublin, and
3. That the payment of £15,000 to Mr. Burke in April 1985 was a separate payment made by Canio. Messrs. Brennan and McGowan now maintained that these payments were political donations made to Mr. Burke, in addition to the fundraising efforts of Mr. McGowan/Mr. Ottiwell, which had previously been referred to in their evidence to the Tribunal.

In view of the contradictory evidence given by both Mr. Burke and Messrs. Brennan and McGowan, the Tribunal concluded that it was necessary to fully investigate the financial relationship of those parties from the commencement of their relationship.

2-18 The Tribunal is in a position to reach conclusions in relation to the activities of Mr. Burke, Messrs. Brennan and McGowan, their related companies and associates on the following matters:

1. The circumstances in which Mr. Burke came to open and operate offshore bank accounts between 1971 and 1994.
2. The sources of the funds lodged to Mr. Burke's offshore accounts in the Isle of Man and Jersey.

COMMERCIAL DEALINGS BETWEEN MR. BURKE AND MESSRS. BRENNAN & MCGOWAN AND THEIR RELATED COMPANIES AND ASSOCIATES

Payments within the jurisdiction

2-19 While Mr. Burke was a member of Dublin County Council from 1967 onwards and an elected member of Dáil Éireann from 1973 onwards, he continued to conduct his auctioneering and estate agency business, P.J. Burke (Sales) Limited. The major clients of this company were companies in which Mr. Tom Brennan or Messrs. Brennan and McGowan had an interest. These companies were building houses in County Dublin which were being sold by Mr. Burke. Mr. Burke ceased his auctioneering business in 1982. Evidence established that between April 1975 and August 1982, the current account of P.J. Burke (Sales) Limited, at Bank of Ireland, Whitehall, was in receipt of a payment of £1,000 per month from Kilnarnagh Estates Limited, a Brennan & McGowan company.

2-20 Mr. Burke stated that these funds were probably lodged to the account on foot of an agreement, which he had reached with Mr. Tom Brennan regarding payment to P.J. Burke (Sales) Limited, for services rendered. Mr. Burke said that this arrangement provided for payment against the gross fees due to his company. There was no evidence of a formal balancing exercise ever having been carried out to establish whether or not these payments reflected the actual indebtedness of the Brennan & McGowan companies to his firm. There was no variation in the amount, paid monthly over a period of almost seven years, save for the final payment made in August 1982, which was for £2,000. The Tribunal considers this to be unusual, given that estate agents' fees are normally paid on a commission basis related to the value of the properties sold.

2-21 The Tribunal's consideration of the bank accounts of P.J. Burke (Sales) Limited, at Bank of Ireland, indicated that the vast majority of the sums lodged to this account were transferred on to the personal account of Mr. Burke. It is not clear how these transfers were treated in the books of account of P.J. Burke (Sales) Limited. However, it is apparent from the evidence of Mr. Burke that no reconciliation ever took place as between the work done by P.J. Burke (Sales) Limited and the amount due to P.J. Burke (Sales) Limited by Brennan & McGowan companies.

2-22 Accordingly the Tribunal concludes on the balance of probabilities that the £1,000 per month payment to the account of P.J. Burke Sales Limited was a retainer paid by the Brennan & McGowan companies and that Mr. Burke was the recipient of the majority of these funds.

2-23 The Tribunal concludes that whilst these were effectively substantial payments made to Mr. Burke by Brennan & McGowan companies through P.J. Burke (Sales) Limited, there is no evidence to establish that they were made for a corrupt purpose.

Chapter 3

Payments made outside the Jurisdiction

OFFSHORE BANK ACCOUNTS OPENED AND OPERATED BY MR. BURKE

3-01 Although Mr. Burke was at all times a resident of the Irish Republic, he opened and operated a number of bank accounts outside this jurisdiction from 1971 onwards. Between 1954 and 1992, Exchange Control legislation prohibited residents of the Republic of Ireland from opening or operating foreign currency accounts outside the State, save in limited circumstances that did not apply to Mr. Burke. Mr. Burke was aware of the Exchange Control regulations, both in his personal capacity as a citizen as he had sought Exchange Control permission to take limited funds out of the jurisdiction at the time of his marriage in 1972, and also as Minister for Justice, a position that he held from July 1989 until February 1992.

3-02 Mr. Burke, in his evidence, acknowledged that he had maintained accounts abroad which were in breach of the Exchange Control Regulations, but he offered as an explanation that these were matters of a “fairly technical application.”

3-03 The Tribunal sought to establish how and why Mr. Burke had chosen to open and operate bank accounts in breach of the then current legislation. The Tribunal established in evidence the circumstances surrounding the opening and operation of a number of offshore bank accounts. The Tribunal endeavoured to trace the source of lodgments made to these accounts and the disbursements made from these accounts, in order to establish whether or not the monies lodged to the accounts amounted to corrupt payments.

3-04 The evidence heard before the Tribunal established that the following accounts were opened and operated by Mr. Burke in jurisdictions outside the Republic of Ireland from 1971 onwards: -

1. *Foster Finance (NI) Limited*

This account was opened on the 18th August 1971 in Belfast, and was operated until the 29th November 1972.

2. *Bank of Ireland, Manchester*

This account was opened on the 6th December 1974 in Manchester, and operated until the 28th December 1977.

3. *AIB Bank (Isle of Man) Limited*

This account was opened on 21st December 1982 in Douglas, and was operated until the 17th April 1984.

4. *Allied Irish Bank, Bruton Street, London*

This account was opened on the 30th November 1983 in London, and closed on the 5th December 1983.

5. *Hill Samuel & Company (Jersey) Limited*

This account was opened on the 19th April 1984 in St. Helier, and was operated until the 19th July 1994.

3-05 All of the above named accounts were sterling accounts. In addition to the above listed accounts, Mr. Burke indicated that he had operated an account at Allied Irish Bank, Bruton Street, London for a number of years. The evidence from Allied Irish Bank Bruton Street witnesses did not support Mr. Burke’s evidence in this regard. The only recorded account, which existed at that branch, is that set out above as having operated between the 30th November 1983 and 5th December 1983.

MR. BURKE'S EXPLANATION FOR OPENING OFFSHORE ACCOUNTS

Foster Finance (NI) Limited

3-06 This account was opened through Bank of Ireland, Whitehall, where Mr. Burke had his account at the time. The account was opened in Mr. Burke's own name. Mr. Burke did not disclose the existence of this account to the Tribunal in his response to the written inquiries made of him by the Tribunal. His subsequent explanation to the Tribunal, for not doing so, was that he had forgotten about it. Mr. Burke was questioned as to the source of the sum lodged to this account, but was unable to give any evidence as to the source of the lodgment to this account. He assumed that the source of the lodgment was funds paid to P.J. Burke (Sales) Limited, the auctioneering company which had been founded by him. He had no adequate explanation as to why monies due to this company were lodged to his personal bank account maintained outside the State. The books of account of P.J. Burke (Sales) Limited were not available to the Tribunal, and it was not possible to establish if such sums were drawings from the company, or how such drawings by Mr. Burke had been treated in the books of account of the company. Mr. Burke stated that he believed that they would have been treated as directors' loans. The funds, standing to this account in Northern Ireland, were repatriated on the 29th November 1972, but Mr. Burke was not in a position to give evidence as to how the specific sum was expended. The Tribunal has concluded that Mr. Burke has not provided any reasonably comprehensible explanation for his having opened this account in Northern Ireland.

Bank of Ireland, Manchester

3-07 This account was opened in Manchester through Bank of Ireland, Whitehall, in Mr. Burke's own name. Lodgments to this account were made between December 1974 and February 1976. The existence of this account was not disclosed by Mr. Burke to the Tribunal, in response to the written requests made of him, to disclose all bank accounts both within and outside the jurisdiction. The funds lodged to this account remained offshore until the 28th December 1977, when £14,584.49 was repatriated to his personal account at Bank of Ireland, Whitehall. In correspondence, Mr. Burke was asked to account for the source of the lodgment of £14,584.49 to his personal account. In response to specific queries regarding the lodgment of this sum to his account, Mr. Burke was unable to identify the source of these funds.

3-08 The existence of the Manchester account was subsequently established by the Tribunal, as a result of documents produced by the Bank of Ireland. The Tribunal has not received any satisfactory explanation from Mr. Burke as to why monies, the property of P.J. Burke (Sales) Limited, were on deposit in accounts in his name in Manchester.

AIB Bank (Isle of Man) Limited

3-09 On the 21st December 1982, the sum of stg.£50,000 was lodged to Account No. 06472/00 at this bank. The documentary evidence established that the account was opened in the Isle of Man through the offices of Allied Irish Bank at Bruton Street, London. The account holder is named as Mr. Patrick D. Burke with an address at Bethany, 43 Church Lane, Holybourne, Nr Alton, Hampshire. Whereas there is no apparent connection between Mr. Raphael P. Burke of Briargate, Swords, County Dublin and Mr. Patrick D. Burke, of Hampshire, Mr. Ray Burke acknowledged in evidence that he is the account holder. The address, given at the time of opening the account, was an address occupied by his sister-in-law. The evidence established that A.I.B. Bank (Isle of Man) Limited was directed to communicate with Mr. Burke at the Hampshire address. Mr. Burke put in place a system whereby any such correspondence would be redirected by the occupant to him in Swords.

3-10 In his initial dealings with the Tribunal, Mr. Burke failed to disclose the existence of his account at AIB Bank (Isle of Man) Limited. Mr. Burke subsequently stated that the account was opened on his instructions with the intention of receiving a lodgment from Messrs. Brennan & McGowan, and that he gave Mr. McGowan and Mr. Ottiwell details which would allow them to lodge the funds into this account. No contemporaneous documentation created by the donor exists which identifies the lodgment as being one which was made as a result of a direction given by Mr. Burke.

3-11 No documentation exists to establish that a payment was made by Messrs. Ottiwell & McGowan as stated by Mr. Burke. In fact, the Tribunal established that the payment was made by a company called Kalabraki, a company which was wholly owned by Mr. Brennan and in which Mr. McGowan had no beneficial interest. No Kalabraki documentation identifying the nature of the payment to Mr. Burke has been made available to the Tribunal. No receipt or acknowledgement of payment was issued by Mr. Burke following the receipt of these funds to his account. No covering letter or confirmation of payment having

been made was written by Mr. Brennan.

3-12 There were four withdrawals from the account during the currency of its operation, none of which coincide with the date of elections in which Mr. Burke was a candidate. Mr. Burke's explanation for opening this account was that it was for reasons of confidentiality and to receive political donations, which had been raised abroad. Apart from the opening lodgment of £50,000, the only other lodgment, interest apart, was a sum of £10,000, which was lodged to the fixed version of this account on the 9th December 1983. Mr. Burke claimed that this was a partial redodgment of a sum of £15,000, withdrawn by him on the 29th November 1983, from this account.

Allied Irish Bank, Bruton Street, London

3-13 The account opened by Mr. Burke at the Allied Irish Bank, Bruton Street, London was opened in the name of P.D. Burke, with the same address in Hampshire as had been given in respect of the Isle of Man account. Mr. Burke's claim that he had operated an account at this branch for years has not been substantiated. As with other accounts held abroad, Mr. Burke maintains that the account held at Allied Irish Bank, Bruton Street was held for purposes of confidentiality and also, in this instance, for convenience.

Hill Samuel and Company, Jersey

3-14 The bank account at Hill Samuel & Company, Jersey differed from the accounts held at Allied Irish Bank in London and the Isle of Man, insofar as the account was not opened in the name of Burke. The evidence established that this account was opened in the following circumstances:

3-15 In early 1984, Mr. Burke instructed Mr. Oliver Conlon, his Dublin solicitor, to arrange for the setting up of a Jersey registered company. The curiously named Caviar Limited (Caviar) was incorporated in Jersey on the 10th April 1984 by a local firm, Bedell & Cristin, Advocates of Normandy House, Grenville Street, St. Helier, Jersey, on Mr. Conlon's instructions. The registered office of the new company was the same address as the offices of Bedell & Cristin. By the 19th April 1984, a bank account was opened at Hill Samuel and Company (Jersey) Limited, in the name of Canio.

3-16 Bedell & Cristin were furnished with an instruction that all correspondence in connection with Caviar (which would automatically include bank statements) was to be placed in a sealed envelope and sent to Mr. A. Burke, c/o Mr. Oliver Conlon, solicitor in Dublin. Mr. Burke gave this instruction to Bedell & Cristin directly. Mr. Conlon stated that he forwarded some correspondence to Mr. Burke under this system. Mr. Burke confirmed that he received some correspondence under this system. There was, therefore, no direct communication between Hill Samuel and Company (Jersey) Limited and Mr. Burke in connection with the account of Caviar.

3-17 The Tribunal is satisfied that Mr. Burke gave this instruction to Bedell & Cristin for the purpose of ensuring that there would be no obvious direct or discernible connection between this company, Caviar, and its bank account and himself.

3-18 The Jersey Companies Office details record that the shareholders in Caviar were Laurence Anthony Wheeler, Alisdair Fraser McDonald and Howard Oke Dart, all of whom were members of the firm of Bedell & Cristin. Each one of these individuals, however, executed a Declaration of Trust in respect of the shares they held in Caviar, in which they declared, in private, that they held the issued shares as a nominee of, and trustees for, Mr. and Mrs. P.D. Burke of Church Lane, Holybourne, Nr Alton, Hampshire. This information was not publicly available. The directors of the company were Mrs. H. L.G. Gibson and Mr. Gerard King both of Sark, Channel Islands, and Mr. Laurence Wheeler of Bedell & Cristin.

3-19 It is noteworthy that the same firm of Advocates acted in a similar fashion in setting up companies which were either individually or jointly owned by Messrs. Brennan and McGowan or by Messrs Brennan and McGowan and Mr. John Finnegan. The beneficial owners of these latter companies were similarly protected from public scrutiny by the device of registering the members of the firm of Bedell & Cristin as shareholders, whilst they held their shares as nominees for the true owners.

3-20 Caviar was opened for the sole purpose of receiving funds for and on behalf of Mr. Burke. The company carried out no activity other than to be the account holder of a bank account at Hill Samuel to which funds were lodged including those which are the subject of detailed examination hereafter, namely stg.£35,000 in April 1984, stg.£60,000 in November 1984 and stg.£15,000 in April 1985, a total of stg.£110,000. By holding a bank account in the name of a company, in which he was not registered as either a director or a shareholder, Mr. Burke imposed an additional layer of secrecy over his offshore financial affairs.

3-21 The Tribunal concludes that the history of Mr. Burke's offshore financial dealings illustrates an increasing level of sophistication in the concealment of the existence of these accounts, proceeding from his holding accounts in his own name abroad, through holding accounts in false names with addresses other than his own address, and culminating in his holding an account through a corporate structure which could not be identified with him.

3-22 The Tribunal believes that Mr. Burke's accounts in the Isle of Man and in Jersey were not opened solely for the purpose of maintaining the confidentiality of Mr. Burke's affairs. Mr. Burke stated that the monies lodged to these accounts were the proceeds of political fundraising events conducted for his benefit abroad. The Tribunal is satisfied that, even if this were the true source of the funds, it would not afford an explanation for these monies being lodged and maintained in offshore accounts. Legitimate political donations, received by a politician, were not taxable in the hands of the recipient. If the funds were required for political purposes, it would have been reasonable to expect that regular withdrawals for that purpose would be shown in the accounts, whereas the operation of the Caviar account is consistent with the monies being maintained on long term interest bearing deposits.

THE EXTENT OF MR. BURKE'S OFFSHORE FINANCIAL ACTIVITY AS ESTABLISHED BY THE TRIBUNAL

3-23 The documentation considered by the Tribunal established that withdrawals totalling stg.£265,400.90 were made from Mr. Burke's offshore accounts, between November 1983 and July 1994. Mr. Burke claims that this figure includes a number of re-lodgments. In particular, he claimed that the stg.£15,000 deposited in his account at Allied Irish Bank in Bruton Street on the 30th November 1983 was one and the same as the stg.£15,000 withdrawn from AIB Bank (Isle of Man) Limited on the 29th November 1983. Of this stg.£15,000 withdrawn from the Isle of Man on the 29th November 1983, he claimed that stg.£10,000 was re-lodged. Of the stg.£39,948.03 withdrawn from the Isle of Man account on the 17th April 1984, he claimed that stg.£35,000 was lodged to the Caviar account in Jersey. Based on acceptance of Mr. Burke's own figures, withdrawals from his offshore account amounted to stg.£205,400.90. In seeking to explain how these sums were expended, Mr. Burke indicated that all of the monies were brought back to Ireland in cash. The money was in sterling and he said that it was either kept in his safe or converted into Irish currency and spent for political purposes. Alternatively, it was lodged to Irish bank accounts and any withdrawals were subsequently spent on political purposes. Some of these monies remain in his accounts to this day.

3-24 On Mr. Burke's own figures, stg.£122,862.27 was lodged to bank accounts in Ireland and stg.£82,538.63 was dispersed in cash. Mr. Burke has not produced a single vouching document or established that any part of the stg.£82,538.63 was in fact expended for political purposes, nor has Mr. Burke produced any adequate documentation to establish, that any withdrawals from the accounts in which he says he lodged stg.£122,862.27 were expended for political purposes.

3-25 The Tribunal is not satisfied that Mr. Burke's evidence as to the amount of monies lodged to his accounts or the purpose for which he expended the monies is correct. The Tribunal does not accept that the monies gathered by Mr. Burke abroad, constituted a political fund. Mr. Burke did not reveal the existence of these monies to any member of his constituency organisation, nor did he inform his political party that he was maintaining such a fund at any time prior to his retirement from politics. Mr. Burke was asked in the Dáil on 10th September 1997 whether he held an offshore account, and he responded in the negative. Whereas his response may have been correct that day, insofar as the Caviar account had closed in 1994 and therefore he did not have an offshore account at that particular time, it did present an opportunity to Mr. Burke to reveal that he had maintained offshore accounts between 1982 and 1994 in which allegedly political funds were held. He chose not to do so. The Tribunal believes that in giving the response that he did, Mr. Burke seriously misrepresented the true position in relation to the subject matter of the questioning. Mr. Burke has laterally claimed that the proceeds of his offshore bank accounts constitute a political fund, which will be used for political purposes notwithstanding that he has retired from active politics.

3-26 The trustees of the shareholding in Caviar did not hold their shareholding in trust for any political party, political organisation or grouping, but declared they held their shareholding for the benefit of Mr. and Mrs. P. D. Burke.

3-27 The Tribunal considers it improbable that Mr. Burke would have established a political fund through a corporation the shareholding in which was secretly held by trustees for him and using a name and address which was not his own. Furthermore, if the fund was a political fund as claimed, it would be reasonable to assume that the trustees of the shares would have held their shares either for the local constituency organisation or the Fianna Fáil party.

3-28 In the course of his evidence, Mr. Burke offered as an explanation for his presence in Jersey in April 1985, the fact that he wished to ensure that his wife, Mrs. Ann Burke would have access to the Caviar account in the event of his death, as he described it "in the event of me being hit by the mythical bus". The Tribunal is satisfied that this explanation is untrue as the correspondence from Hill Samuel & Company dated 4th June 1985, addressed to Bedell & Cristin, informed them that the account was to be operated on the sole signature of Mr. P.D. Burke. It is clear therefore that no instruction was given to the bank in April 1985 by Mr. Burke to allow for access to the account by Mrs. Burke. However, the significance of this evidence is that Mr. Burke considered in his mind that the person who should have access to the account after his death was his wife, although it is clear that she did not have any role to play in the operation, or management of a political fund.

3-29 The Tribunal believes that Mr. Burke, at all times, treated the monies held in offshore accounts as his own funds to be expended as he wished, and that there is no question of these funds representing a political fund to be passed on to others engaged in politics upon his demise or retirement.

3-30 The Tribunal is satisfied that the monies lodged to Mr. Burke's offshore accounts were not the proceeds of political fundraising events as claimed. Insofar as the Tribunal has identified the source of monies paid to these accounts, such source was one of the following: Messrs. Brennan and McGowan, a company controlled by Mr. Tom Brennan solely or a company controlled by Mr. Brennan, Mr. McGowan and Mr. John Finnegan. The role of Mr. Brennan, Mr. McGowan and Mr. Finnegan in the context of their dealings with Mr. Burke is set out in detail hereafter.

Chapter 4

Payments made to Mr. Burke's Offshore Accounts Attributed to Messrs. Brennan & McGowan, their related Companies and Associates

4-01 The Tribunal examined the circumstances surrounding four particular lodgments to Mr. Burke's offshore accounts, the first of which was made to his account at AIB Bank (Isle of Man) Limited and the remainder to the account of Caviar at Hill Samuel and Company (Jersey) Limited.

THE LODGMENT OF STG £50,000 TO AIB BANK (ISLE OF MAN) LIMITED ON THE 21ST DECEMBER 1982

4-02 While Mr. Burke had disclosed the existence of an offshore bank account held by him in Jersey, in the name of Caviar Limited, and gave evidence that the monies lodged to this account were the proceeds of political fundraising activities (earlier identified by him as simply having been carried out in the UK, and later identified by him to have been carried out by Mr. Joseph McGowan and Mr. Ernest Ottiwell) he did not reveal the existence of his Isle of Man bank account to the Tribunal until the 28th June 2000. Having done so, he revised the amount which he said was lodged to the Jersey account by stating that the stg.£35,000 lodgment made to that account in April 1984 was, sourced by way of a withdrawal of stg.£39,948.03, being the balance of the stg.£50,000 which had been lodged to the Isle of Man account in December 1982. The total of the payments from fundraising activities now admitted to by Mr. Burke, was stg.£110,000 and not stg.£95,000 as formerly stated on his behalf. Mr. Burke adopted Mr. McGowan's evidence, given in April 2000, as to how the UK fundraising activities were conducted, and he now attributed, albeit belatedly, the stg.£50,000 payment in December 1982 to such activities.

4-03 In the course of giving their evidence in April 2000, Mr. McGowan, in the presence of Mr. Brennan, denied operating offshore accounts in the Channel Islands or elsewhere. Mr. Brennan denied making any personal payment to Mr. Burke. He failed to disclose that his offshore company, Kalabraki, had paid stg.£50,000 to Mr. Burke in December 1982. Mr. McGowan claimed that the proceeds of their fundraising activities were dealt with by Mr. Ernest Ottiwell, a self appointed treasurer of the proceeds of these fundraising activities. It was said that Mr. Ottiwell handled the payment of the monies to Mr. Burke.

4-04 The Tribunal has established in evidence the following to be the true facts: -

1. Mr. Tom Brennan did operate offshore accounts in the Channel Islands.
2. Mr. Brennan was the sole beneficial owner of a company called Kalabraki Limited.
3. Kalabraki paid the stg.£50,000 to the account of Mr. Burke in the Isle of Man in December 1982.
4. Neither Mr. Joseph McGowan nor Mr. Ernest Ottiwell had any interest in Kalabraki.
5. The transfer to Mr. Burke's account was not effected through either Mr. McGowan or Mr. Ottiwell, but was made as a result of a direction given by Mr. Laurence Wheeler, Advocate, of Bedell & Cristin, Advocates, in Jersey to Jersey International Bank of Commerce Limited, which resulted in the funds being taken from the account of Kalabraki and paid to the account of Mr. P.D. Burke in the Isle of Man.

4-05 The Tribunal is satisfied that these facts establish that the sum of stg.£50,000, lodged to Mr. Burke's account in the Isle of Man in December 1982, was not the proceeds of any fundraising activity conducted by Mr. McGowan or Mr. Ottiwell, and that it represented a single payment of stg.£50,000 from Mr. Tom Brennan to Mr. Burke and was not an accumulated fund raised from individual subscribers in the UK.

4-06 The Tribunal is satisfied that Mr. Brennan was at all times aware that he had made such a payment to Mr. Burke, and that he knowingly misled the Tribunal in giving evidence on the 10th April 2000 to the Tribunal that he had not made any payment to Mr. Burke. The Tribunal rejects Mr. Burke's evidence that he first learned of the fact that Mr. Brennan was the payer of these monies in the year 2001. The money could not have been lodged into the account of Mr. Burke by Mr. Brennan through Mr. Wheeler, unless Mr. Burke had informed Mr. Brennan of the account into which it should be lodged. Mr. Brennan had no legitimate reason to conceal the fact that he had paid Mr. Burke stg.£50,000 in 1982. They were then, and have remained close friends. The information, provided by Mr. Burke, to enable the payment to be lodged to this account was in turn transmitted to Mr. Wheeler, who transmitted it to the bank official at Jersey International Bank of Commerce Limited who effected the actual transfer. This information was that the money should be credited to the account of Mr. Patrick D. Burke at Allied Irish Bank (Isle of Man) Limited.

4-07 The Tribunal believes that Mr. Burke and Mr. Wheeler were not known to each other at this time, and accordingly, the instruction to transfer the stg.£50,000 did not come directly from Mr. Burke. Mr. Wheeler would only have acted in relation to Kalabraki's affairs on the instructions of its owner, Mr. Brennan, and would only have disposed of that company's assets on the instructions of Mr. Brennan. The Tribunal is satisfied that the transfer was not made as a result of any instructions given by Mr. McGowan or Mr. Ottiwell. Mr. Brennan now maintains that the payment, which was made by Kalabraki to Mr. Burke, was a political donation to "Ray Burke/Fianna Fáil". The Tribunal rejects this evidence. As the identity of the recipient of the funds can only have been given to Mr. Wheeler by Mr. Brennan, it follows that Mr. Brennan knew that his stg.£50,000 payment was not being paid to "Ray Burke/Fianna Fáil", but was being paid to an account held in the name of Patrick D. Burke.

4-08 At the time of the payment in 1982, stg.£50,000 was an enormous sum. It represented three times the gross annual income of Mr. Burke. It was being paid offshore to an account, which Mr. Brennan, knew was not held in the true name of the intended recipient, Mr. Ray Burke. The active concealment of the existence of this payment, and the failure of Mr. Brennan to give an explanation for such payment when asked to do so by the Tribunal, are indicative of Mr. Brennan's wish to conceal this transaction from the Tribunal, which he knew was investigating Mr. Burke's offshore accounts.

4-09 The Tribunal concludes, on the balance of probabilities, that Mr. Brennan did not make the payment of stg.£50,000 in 1982 in the belief that he was making a legitimate political donation as claimed by him to "Ray Burke/Fianna Fáil", but made it in the knowledge that it was a payment to Mr. Burke which would not withstand public scrutiny because, in the opinion of the Tribunal, it was a corrupt payment.

MR. BURKE'S EVIDENCE IN RELATION TO THE STG.£50,000 PAYMENT TO HIS AIB BANK (ISLE OF MAN) LIMITED ACCOUNT

4-10 Mr. Burke acknowledged that he opened this account to receive the payment. He said that the reason he used the name Patrick D. Burke was for confidentiality. The Tribunal is satisfied that Mr. Burke had not been given any reason to believe that the confidentiality of his Irish banking affairs was, at any time breached, and concludes that there was no valid reason for his using a name, other than his real name, to open an account if he intended to conduct his legitimate affairs through this account.

4-11 Mr. Burke said that the information necessary to allow Messrs. McGowan and Ottiwell to make the lodgment to this account was given by him to them. The Tribunal is satisfied that it is unlikely that this occurred in the manner described by Mr. Burke, as the donation was made by Mr. Brennan solely, and not by Messrs. McGowan and Ottiwell. For Mr. Burke's account of events to be true, it would have involved Mr. Brennan, Mr. Ottiwell and Mr. McGowan concealing from Mr. Burke the fact that the payment was made solely by Mr. Brennan. The Tribunal rejects this as implausible. The Tribunal is satisfied that Mr. Burke opened the account in a name other than his own and with an address other than his real address so as to ensure that the transactions which were conducted through this account remained secret. Mr. Burke had concealed the existence of this account from the Tribunal until the 28th June 2000. The Tribunal is satisfied that Mr. Burke made arrangements in 1982 with Mr. Brennan to lodge stg.£50,000 to the account and that at the time of receipt of this money, neither of them believed that the payment was a political donation.

THE LODGMENT OF STG.£35,000 TO THE ACCOUNT OF CAVIAR ON THE
19TH APRIL 1984

4-12 When giving evidence to the Tribunal for the first time in July 1999, Mr. Burke disclosed an offshore account, which was maintained in Jersey, and into which lodgments were made of monies allegedly raised in political fundraising activities held in the UK, earlier identified to the Tribunal as having been conducted by Messrs. Brennan and McGowan. It had been put to Mr. McGowan, on Mr. Burke's behalf, that there were two payments only to this account, stg.£35,000 and stg.£60,000 respectively in April and November 1984. Once Mr. Burke revealed the existence of his second offshore account in the Isle of Man, he changed the explanation for this stg.£35,000 lodgment, saying that it represented part of the proceeds of the earlier deposit by Kalabraki of stg.£50,000 to the Isle of Man account. He still maintained, however, that this sum of stg.£35,000 represented the proceeds of the fundraising activities, involving Mr. McGowan and Mr. Ottiwell.

4-13 The Tribunal has established that the stg.£50,000 in question was not the result of political fundraising activities in the UK but rather was sourced from the resources of Mr. Brennan solely. Mr. Burke is incorrect in his evidence that this sum represented the proceeds of UK fundraising activities. In addition the Tribunal sought to establish whether, in fact the stg.£35,000 lodged to the Jersey account represents a withdrawal of the Kalabraki funds, or whether it represents a separate, distinct payment to Mr. Burke.

4-14 The bank records of A.I.B. Bank (Isle of Man) Limited established that a sum of stg.£39,948.03 was withdrawn in London from the account of Mr. P.D. Burke in the Isle of Man on the 17th April 1984. The withdrawal took place as a result of a written request for the debit of that sum which was lodged with Allied Irish Bank, Bruton Street, London, signed by Mr. Burke as Patk. Burke on the 17th April 1984. This written document was forwarded to AIB Bank (Isle of Man) Limited. The evidence established the transfer as being one involving "same day value", which means that Allied Irish Bank, Bruton Street received value on the same date as the actual debit, that is the 17th April 1984. Mr. Burke maintains that this stg.£39,948.03 was lodged to his account held at Allied Irish Bank, Bruton Street at that time. He said that stg.£35,000 was then transferred from this account at Bruton Street to the account of Caviar at Hill Samuel in Jersey on the 19th April 1984. He stated that the balance of stg.£4,948.03 would have been used by him for ongoing political expenses. This balance was probably taken in cash and there were no vouchers available.

4-15 Evidence was given to the Tribunal by the bank officials at Allied Irish Bank, that the normal procedure would have been for a transfer from an account in the Isle of Man to an existing account holder in Bruton Street, London would be by way of a credit transfer identifying the account in Bruton Street to which the funds were to be lodged. This was not the procedure adopted in respect of the withdrawal from Mr. Burke's account on the 17th April 1984, which was by way of a direct payment. Allied Irish Bank, Bruton Street had no record of Mr. Burke having held an account at that bank, but the records of that bank were incomplete, and they subsequently revised their position by stating that there had been an account opened for Mr. Burke, which was in operation for a one-week period between the 30th November 1983 and the 5th December 1983. Mr. Burke maintained that he had had a bank account at Bruton Street for some years.

4-16 The Caviar account at Hill Samuel Jersey branch bank records that on the 19th April 1984 a lodgment of stg.£35,000 was made to the account noting that it was made "per Allied Irish Banks". There was no further identification to indicate the name of an account holder in Allied Irish Bank from whose account this sum had been paid.

4-17 On Mr. Burke's account of events therefore, the monies, which were on deposit in the Isle of Man, were withdrawn in London and were dispatched by Allied Irish Bank, London to Hill Samuel in Jersey. If that were so, the Tribunal can see no reason why Mr. Burke would not have informed the Tribunal in the course of his evidence in July 1999 that the Hill Samuel account was opened with the proceeds of his Isle of Man account. The Tribunal would have expected that, if he was intending to transfer funds from an existing account in the Isle of Man to an ultimate destination in Jersey, the most direct route would have been to advise the bank in the Isle of Man to transfer that sum from the account to Hill Samuel in Jersey.

4-18 The Tribunal believes that the available documentation from AIB Bank (IOM) Limited indicates that the money was withdrawn in London from the Isle of Man bank account on the 17th April 1984 and that value was given for it that day. This suggests that the withdrawal did not go into a bank account in Allied Irish Bank, Bruton Street and could not have accounted for the reference “per Allied Irish Banks” in the Hill Samuel account statement unless Mr. Burke had first withdrawn and then re-lodged the money in Allied Irish Bank, Bruton Street for onward transmission to Jersey. The Tribunal rejects this scenario as improbable, because it would involve an unnecessary step, in what would otherwise have been a direct transfer of these funds to Jersey.

THE OPENING OF THE CAVIAR ACCOUNT

4-19 The evidence established that this account was opened as a matter of urgency. Mr. Burke’s solicitor Mr. Oliver Conlon instructed Bedell & Cristin, Advocates, to form a company and, immediately following upon incorporation, to furnish documentation to Hill Samuel to facilitate the opening of a bank account in the name of the company. He stated that there was “considerable urgency” about this. The Tribunal fails to understand how there could have been considerable urgency, in the circumstances as described by Mr. Burke, as the effect of a re-lodgment of the monies withdrawn from the Isle of Man would have been merely to move monies which had been on deposit at one location for a period of a year and a half, to another location, where the evidence established the money also remained on deposit.

4-20 The Tribunal is satisfied that urgency could arise if fresh monies were being paid to Mr. Burke from sources other than his existing funds, and if Mr. Burke wished to place them in an account other than an account which he had used for other donations previously. Mr. Burke could not give any direct evidence as to the actual circumstances leading to the withdrawal of funds from his Isle of Man account, but did recollect, he said, that the source of the stg.£35,000 lodgment to his Caviar account was the withdrawal from his Isle of Man account. He offered to the Tribunal, as a process of deduction based on the available records, the fact that the stg.£35,000 in his Jersey account must have been part of the proceeds of the withdrawal of stg.£39,948.03, because of the proximity in the timing of the transactions, and because there was no other source of these funds. Insofar as this evidence is based on deductions, the Tribunal is not happy to accept Mr. Burke’s deductions as sufficient evidence to establish the facts. Insofar as this evidence is based on Mr. Burke’s claimed recollection, the Tribunal rejects the evidence as not being credible in view of his inability to recall the actual circumstances of the withdrawal.

4-21 The Tribunal considers that Mr. Burke ought to have been in a position to give positive and precise evidence as to the actual circumstances surrounding the stg.£35,000 lodgment to the Jersey account, since it was the opening balance in a new account which was being held in a different jurisdiction and through a different corporate structure than any previous accounts held by him to that date. The Tribunal does not accept that Mr. Burke could have been unclear as to the circumstances relating to the manner in which he had operated an Isle of Man bank account, prior to the operation of his Jersey account in the name of Caviar, and is satisfied that his failure to disclose the existence of the Isle of Man account, at the time of his evidence in July 1999, was a deliberate attempt to conceal the existence of the stg.£50,000 deposit of which he was aware at that time. The Tribunal is satisfied that Mr. Burke is seeking to utilise the proximity of dates between the withdrawal from the Isle of Man account and the lodgment in Jersey to make a connection between these funds, which does not in fact exist. The Tribunal is satisfied that the source of this lodgment of stg.£35,000 to Mr. Burke’s Caviar account was not the withdrawal from the Kalabradi funds in the Isle of Man as claimed. The source of the lodgment remains unidentified in that the Tribunal cannot identify the bank account from which this sum was paid but the Tribunal is satisfied, on the balance of probabilities, that this payment was made by Mr. Tom Brennan and his associates.

PAYMENT OF STG.£60,000 TO THE ACCOUNT OF CAVIAR ON THE 21ST
NOVEMBER 1984

4-22 As with the stg.£50,000 payment in December 1982, Mr. Burke maintained that the stg.£60,000 payment in November 1984 was a payment which had been made by Mr. McGowan/Mr.Ottiwell as a result of their fundraising activities in the UK, as previously described by Mr. McGowan and Mr. Brennan to the Tribunal. He stated that it comprised an accumulation of individual donations made for political purposes which he chose to keep offshore. However as events transpired this explanation for the payment of stg.£60,000 to Caviar was totally false. The Tribunal's inquiries established that the stg.£60,000 paid to Mr. Burke's Caviar account, was not the result of individual political donations accumulated by Mr. McGowan and Mr. Ottiwell and lodged to Mr. Burke's Caviar account. It was a single payment made by a Jersey company called Canio Limited to Mr. Burke's Caviar account which had been sourced from funds borrowed from Lombard & Ulster Banking Ireland Limited. This borrowing was secured upon the interests of Canio in certain lands at Sandford, County Dublin. These facts are now accepted by Mr. McGowan, Mr. Brennan and Mr. Burke, yet all three maintain that the payment of stg.£60,000 to Mr. Burke's Caviar account in November 1984 was a political donation.

4-23 Mr. McGowan now maintains that, whilst he was in error in significant portions of his earlier evidence given on the 10th April 2000, there had, in fact, been fundraising by Mr. Ottiwell which did raise funds of the order of stg.£120,000 over a ten year period, but that this fundraising was in addition to the separate and singular payments which were made to the Caviar account by Canio. If this evidence is correct it follows that Mr. Burke must have maintained other accounts either offshore or elsewhere, as the total of sums alleged to have been paid between Mr. McGowan/Mr.Ottiwell's fundraising activities and Canio's payments far exceeds the total of the amounts which can be identified as lodgments in the Isle of Man and Jersey accounts disclosed to date. Mr. Burke denies having any accounts other than those now disclosed to the Tribunal. If this is true, Mr. McGowan's account of the Ottiwell fundraising must be false.

4-24 The Tribunal is satisfied that Mr. Burke, on returning to give further evidence to the Tribunal in relation to the Canio payments, sought to distance himself from his earlier evidence, and to reduce the significance of the role previously attributed by him to Mr. Ottiwell. He stated, on this occasion, that Mr. Ottiwell's involvement was peripheral, and that he dealt in the main with Mr. McGowan. He now maintained that he only ever had two conversations with Mr. McGowan in connection with these monies, the first in connection with the stg.£50,000 Kalabraki payment in December 1982 and the other in connection with the stg.£60,000 Canio payment in November 1984. He continued to maintain, however, that he had given the account details for both the Kalabraki payment in December 1982 and the Canio payment in November 1984 to Mr. McGowan when Mr. Ottiwell was in his company. He also continued to maintain that it was his understanding at all times, based upon what Mr. McGowan had told the Tribunal and what he himself had known through the years, that these funds were sourced through the fundraising activities conducted by Mr. McGowan in England.

4-25 The Tribunal concludes that there was no reason for Mr. McGowan, Mr. Brennan or Mr. Ottiwell to have misled Mr. Burke as to the true source of the funds when the payments were being made to him in 1982 and 1984. If Mr. Burke's evidence is correct, it follows that Mr. McGowan lied to him as to the true source of the stg.£50,000 payment in 1982 and the stg.£60,000 payment in 1984. As is manifestly clear, the stg.£50,000 Kalabraki payment and the stg.£60,000 Canio payment were not accumulated funds sourced from individual donors but were payments from the accounts of companies controlled by either Mr. Tom Brennan solely or Mr. Brennan, Mr. McGowan and Mr. Finnegan.

4-26 The Tribunal can find no reason why Mr. McGowan would have given an explanation to Mr. Burke for such payments which was false. The Tribunal concludes that Mr. Burke was never informed by Mr. McGowan or Mr. Ottiwell that fundraising activities conducted by them had raised the stg.£50,000 or the stg.£60,000 for him as he claimed. The Tribunal is satisfied that the explanation given by Mr. Burke to the Tribunal for his receipt of these funds is false.

**PAYMENT OF STG.£15,000 TO THE ACCOUNT OF CAVIAR ON THE
19TH APRIL 1985**

4-27 The bank records established that on the 9th April 1985, the account of Caviar at Hill Samuel was in credit to the amount of stg.£89,448.32. On that date, stg.£15,000 was withdrawn by Mr. Burke, and collected in cash in Wood Street, London on the same date. On the 19th April 1985, a sum of stg.£15,000 was lodged to the Hill Samuel Caviar account by means of a cheque from Chase Bank and Trust Company (Channel Islands) Limited. Mr. Burke's evidence was this was a "contra", that it was a re-lodgment of the stg.£15,000 funds which had previously been withdrawn on the 9th April 1985, from the same account. Mr. Burke's evidence as to the sequence of events was as follows: -

1. On the 9th April 1985, he travelled to London and collected stg.£15,000 in cash from Hill Samuel at Wood Street London.
2. The stg.£15,000 collected at Wood Street, London was debited to the Caviar Hill Samuel account in Jersey on the same day.
3. He returned to Dublin with sterling cash of £15,000.
4. He placed the money in a safe in his house.
5. At some unidentified time later, he concluded that he did not require it and decided to re-lodge it.
6. On the 19th April he returned to London with £15,000 sterling in cash and on the same day he travelled from London to Jersey with this money.
7. In Jersey, he handed stg£15,000 to an employee of Bedell & Cristin, Advocates, who lodged the money to the account of Caviar at Hill Samuel, Jersey.
8. He recollected these events, because he had to go to Jersey to change the mandate on the account, so as to provide for his wife being able to draw from the account in the event of his untimely demise.

4-28 Neither Mr. Brennan nor Mr. McGowan had revealed in their earlier evidence to the Tribunal the existence of a payment of stg.£15,000 to Mr. Burke's Caviar account in April 1985.

4-29 The Tribunal's inquiries into this sequence of events established that the scenario so graphically described by Mr. Burke in his evidence could not have taken place.

4-30 The Bedell & Cristin files considered by the Tribunal confirmed that no member of staff of Bedell & Cristin had received stg.£15,000 in cash from Mr. Burke, as claimed by him, and that the stg.£15,000 lodgment did not come from cash provided by Mr. Burke, but came from the account of Canio.

4-31 Documents from the Bedell & Cristin Caviar file were furnished to Mr. Burke by the Tribunal following which Mr. Burke wrote a personal letter to me in the course of which he stated that he was incorrect in his recollection when he gave his earlier evidence in connection with the stg.£15,000 lodgment. He now accepted that the stg.£15,000 was in fact a separate payment made directly to Caviar, and that it was probably from the same source, as the stg.£60,000, which he identified as Messrs. Brennan and McGowan. He did not identify Mr. John Finnegan as the contributor of stg.£10,000 of that sum at that time nor did he do so subsequently.

4-32 When recalled to give evidence on this issue, Mr. Burke was unable to offer any satisfactory explanation to the Tribunal as to how he could recall events, which had not, in fact, ever occurred. The Tribunal is satisfied that Mr. Burke's response to the initial queries put to him regarding the stg.£15,000 clearly illustrate his ability to tailor his evidence to the documentation available, and to utilise this documentation as corroboration of an account of events, which was false. The Tribunal is satisfied that Mr. Burke's earlier evidence regarding the re-lodgment of the stg.£15,000 cannot be explained as an error of recollection on his part and that it was a deliberate invention. The Tribunal is satisfied that Mr. Burke deliberately misled the Tribunal as to the true circumstances surrounding this lodgment and that he did so with the assistance of Mr. Brennan and Mr. McGowan, so as to prevent the true nature and source of this payment being revealed.

CANIO LIMITED

4-33 Given that Canio Limited was the payer of stg.£60,000 to Mr. Burke in November 1984, and the apparent payer of stg.£15,000 in April 1985, it was necessary for the Tribunal to establish the identity of the beneficial ownership of Canio and the reasons for its payments to Mr. Burke.

4-34 The Bedell & Cristin file provided to the Tribunal established that the company had been incorporated in Jersey on the 1st December 1980. Bedell & Cristin recorded that its beneficial owners were Kalabradi Limited (beneficially owned by Mr. Tom Brennan), Gasche Investments Limited (beneficially owned by Mr. Joseph McGowan), and Foxtown Investments Limited (beneficially owned by Mr. John Finnegan). The information as to beneficial ownership was not publicly available through the Companies Office records. The records showed Canio was a company owned in turn by Ardcarne Limited, another Jersey registered company. Ardcarne's beneficial owners were privately stated in 1979 to be Mr. Tom Brennan, Mr. Joseph McGowan and Mr. John Finnegan, but by 1984 the beneficial owners were recorded as being the three corporate structures, namely Foxtown Investments Limited, Kalabradi Limited and Gasche Investments Limited.

FOXTOWN INVESTMENTS LIMITED

4-35 Foxtown Investments Limited (Foxtown) was a Jersey company incorporated on the 20th September 1972. It was a trust company established for Mr. John Finnegan by Mr. Des Traynor. Foxtown was wholly owned, through nominees, by College Trustees Limited, who were the trustees of the Amber Trust. The Amber Trust was a discretionary trust, whose named beneficiaries included the World Wildlife Fund, but whose trustees had the power to add or to delete beneficiaries at their sole discretion. College Trustees Limited was a subsidiary of Guinness Mahon Channel Islands Limited which was owned by Guinness & Mahon (Ireland) Limited. Management services for Foxtown were carried out by Sovereign Management Limited, which later changed its name to Credit Suisse Trust Limited.

4-36 The Tribunal is satisfied that Mr. Finnegan was the settlor of the Amber Trust, and sought documentation from Mr. Finnegan regarding the dealings of the trust and Foxtown. Mr. Finnegan claimed to be unable to obtain the documentation required of him from Credit Suisse. Mr. Finnegan is currently engaged in litigation in Guernsey (the trust having been moved to there) for recovery of documentation from Credit Suisse.

KALABRAKI LIMITED

4-37 Kalabradi Limited (Kalabradi) was a Jersey company incorporated through Bedell & Cristin for Mr. Tom Brennan. The Tribunal is satisfied that Mr. Brennan was the beneficial owner of the entire shareholding in Kalabradi.

GASCHE INVESTMENTS LIMITED

4-38 Gasche Investments Limited (Gasche) was a similar Jersey company incorporated through Bedell & Cristin for Mr. Joseph McGowan. The Tribunal is satisfied that Mr. McGowan was the beneficial owner of the entire shareholding in Gasche.

THE CONTRIBUTORS TO THE PAYMENT OF STG.£60,000 TO MR. BURKE'S COMPANY CAVIAR.

4-39 None of the three individuals involved with the three corporate structures which held one-third interests in Canio was able to provide any comprehensible and detailed explanation as to why Canio was established to acquire the Sandyford lands, and as to what their individual input into the company was other than an equal provision of funds to acquire these lands.

4-40 The Tribunal established that of the stg.£60,000 paid by Canio to Mr. Burke in November 1984, stg.£25,000 was paid by Kalabraki, stg.£25,000 was paid by Gasche and stg.£10,000 was paid by Foxtown. The proportions of their contribution to Mr. Burke did not match the proportions in which the individual contributors held their interests in Canio, one-third each.

4-41 The Tribunal established that the initial intention of Messrs. Brennan & McGowan was that each of the contributors would contribute stg.£20,000, but that Mr. Finnegan was prepared to pay only stg.£10,000, whereupon the shortfall of stg.£10,000 in his contribution was funded equally by Mr. Brennan and Mr. McGowan's companies. To the point in time at which the existence of Canio was discovered by the Tribunal, Mr. Burke, Mr. Brennan and Mr. McGowan had not made any reference to the fact that stg.£10,000 of the money paid to Mr. Burke in November 1984 came from Mr. John Finnegan through Foxtown or that stg.£25,000 each came from Messrs. Brennan and McGowan through their corporate structures.

MR. JOHN FINNEGAN

4-42 Mr. John Finnegan is a well known Dublin auctioneer and estate agent who has been involved with the Dublin property market since the 1950s. In his evidence he claimed that he had never made a payment to Mr. Burke at any time. Mr. Burke confirmed that he had never received a payment attributable to Mr. Finnegan or Foxtown. Mr. Finnegan's explanation for the stg.£10,000 payment by Foxtown in November 1984 was that it had been a contribution towards a retention fund of stg.£30,000 which was set up by Canio to meet future expenses, including architects fees, in relation to its lands at Sandyford, Dublin. He understood that three contributions of stg.£10,000 each were made to this fund, one from each of the three beneficial owners.

4-43 Mr. McGowan said that the stg.£10,000 paid by Mr. Finnegan was in response to a request made by him of Mr. Finnegan for stg.£20,000 for a political donation to Fianna Fáil. He said that Mr. Finnegan was unwilling to pay stg.£20,000, but paid stg.£10,000 instead. He said that Mr. Brennan and himself made up the stg.£10,000 shortfall in Mr. Finnegan's contribution by additional payments of stg.£5,000 each so as to bring their individual contributions to stg.£25,000 each and Mr. Finnegan's to stg.£10,000.

4-44 Mr. Finnegan in his evidence denied that he had ever been approached for a political donation by Mr. McGowan or that he had ever made any payment through Canio as a political donation to Mr. Burke or otherwise. Mr. Finnegan claimed to be totally unaware of the fact that Mr. Burke's company, Caviar, was paid stg.£60,000 from the funds of Canio in 1984. If Mr. Finnegan's evidence is correct, it follows that Mr. McGowan had obtained stg.£10,000 from him by false pretences and that stg.£10,000 intended by Mr. Finnegan to meet future expenses of the company, had been misappropriated and given to Mr. Burke without his knowledge.

4-45 The Tribunal considers that it is inherently implausible that Mr. Brennan or Mr. McGowan would have defrauded Mr. Finnegan of this relatively small sum. The Tribunal's inquiries established that these three parties had been connected financially to a series of land transactions, which had resulted in stg.£2,661,875.96 being transferred to Jersey and of that a sum of stg.£1,989,831.23 being distributed between the three participants. Mr. Finnegan's share of these monies was some stg.£633,994.85. To the date that the Tribunal commenced its inquiries into Mr. Finnegan's affairs, he had never alleged that any funds of his had been misappropriated by his former associates, Mr. Brennan and Mr. McGowan.

THE SOURCE OF THE STG£60,000 PAYMENT MADE BY CANIO TO CAVIAR IN NOVEMBER 1984

4-46 The Tribunal is satisfied that the evidence establishes that the ultimate source of the stg.£60,000 which was paid to Mr. Burke was a loan made by Lombard & Ulster Banking Ireland Limited to Canio in Jersey in November 1984. This loan facility was extended by Lombard & Ulster on foot of the security of land holdings, said to be unencumbered, belonging to Canio at Sandyford, Dublin. These lands were development lands through which it was intended that a motorway would, in time, be built.

4-47 The funds drawn down from Lombard & Ulster were not used to acquire these lands, which had already been acquired on foot of a contract entered into with the MacAogáin family in 1979 by a Mr. James J. Gleeson (in trust) the purchase monies for which had been provided equally from the resources of Messrs. Brennan, McGowan and Finnegan. The monies, subsequently borrowed from Lombard & Ulster in 1984, were borrowed with the intention that each of the three beneficial owners of Canio would receive an equal share of these funds.

4-48 The funds were received by Mr. Laurence Wheeler of Bedell & Cristin from Lombard & Ulster and with the consent of the Canio he deducted the professional fees due to his firm by Canio and by Ardcar. From the balance of the funds he deducted sums of stg.£25,000 each from the interests of Kalabraki and Gasche, and stg.£10,000 from the interest of Foxtown, whereupon the sum of stg.£60,000 was sent by cheque to the account of Caviar. The distribution document prepared by Mr. Wheeler is at (**Appendix E**). The Tribunal is satisfied, on the balance of probabilities, that Mr. Wheeler would not have made such deduction or payment without the express authority of Canio and its owners.

THE ROLE PLAYED BY MR. DAVID BARRY OF COLLEGE TRUSTEES LIMITED

4-49 Mr. Finnegan appointed Mr. David Barry of College Trustees Limited to protect his interests (held through Foxtown) in Canio. Mr. Barry liaised directly with Mr. Laurence Wheeler who was administering the affairs of Canio in Jersey. Mr. Wheeler took the necessary legal steps to ensure that the paperwork in connection with Canio and its associated company Ardcar reflected that Canio was owned by Ardcar, that Ardcar was owned one third each by Kalabraki, Gasche and Foxtown. By the 18th April 1984, Bedell & Cristin had dealt with the ownership of Canio and Ardcar and had arranged for the issue of the necessary new blank share certificates and declarations of trust to be executed to reflect the above. Mr. Barry thereafter monitored the activities of Bedell & Cristin, and the Tribunal is satisfied that his client's interests were suitably protected by him.

4-50 The Tribunal is satisfied that Mr. Barry was aware that funds would be raised from Lombard & Ulster and that they would be distributed in equal proportions to the three owners of Canio. Accordingly, the Tribunal believes that any unexplained inequality in the amounts which the three individual owners received, would have been subject to comment by him in his dealings with Mr. Wheeler. The dealings of Canio clearly reflect that there was a disparity between the sums distributed to Mr. Brennan and Mr. McGowan through their corporate structures, and the sum paid to Mr. Finnegan through his corporate structure, and this reflected the fact that stg.£25,000 each had been deducted from their share, whereas only stg.£10,000 had been deducted from Mr. Finnegan's share.

4-51 The Tribunal is satisfied that at the time of the deduction of the stg.£10,000 from Mr. Finnegan's share held through Foxtown, Mr. Barry was in a position to know that this sum had been combined with the stg.£50,000 from Kalabraki and Gasche and sent to Caviar as a single payment of stg.£60,000.

4-52 The Tribunal is satisfied that Mr. Wheeler would not have withheld information from Mr. Barry about any transaction, which he, as a member of a firm of Jersey Advocates, had carried out on behalf of the company whose interests were represented by Mr. Barry. Mr. Barry had become a director of Canio by the 4th July 1984 and had full access to its documents. In these circumstances, the Tribunal does not believe that Mr. Wheeler would have been a party to diverting funds intended to be lodged to a retention fund for Canio, into the account of a company in which Canio had no beneficial interest, namely Caviar.

THE ORIGINS OF THE CLAIM THAT THE STG.£10,000 DEDUCTED FROM THE FOXTOWN SHARE BY MR. WHEELER WAS DEDUCTED FOR THE PURPOSE OF A RETENTION FUND FOR FUTURE EXPENSES SUCH AS ARCHITECT'S FEES

4-53 The Bedell & Cristin file recorded that, on the 14th November 1984, Mr. Wheeler sent a telex to Mr. Hugh Owens, a chartered accountant in Dublin, who was the financial adviser to two of the individuals who were Canio's beneficial owners, namely Messrs. Brennan and McGowan, which stated as follows: -

"I briefly saw Mr. McGowan yesterday and he raised with me his wish and that of Mr. Brennan that each of the parties should reserve pounds 20,000 for possible future expenses (such as architect's fees) should the present negotiations not succeed. I put this to Barry of College Trustees Limited who said that this was not agreed. By the time I learned this I was not able to recontact Mr. McGowan but perhaps you would inform him and hopefully the three parties can agree in Ireland. In the meantime I am writing to Mr. Barry along the lines discussed with Mr. McGowan with the one proviso relating to the three pounds 20,000 retentions".

4-54 Mr. McGowan in his evidence agreed that he had had a meeting with Mr. Wheeler at which he had discussed the retention of stg£20,000 from each of the three parties, but says that he told him that this fund was for the purpose of making a political donation to Mr. Burke. Obviously, the telex to Mr. Owens does not reflect this fact and, on its face, the document supports Mr. Finnegan's subsequent claim to the Tribunal that his contribution was for future expenses such as architects' fees, and not as a political donation.

4-55 The Tribunal notes, however, that there was an element of urgency in the communication which passed between Mr. Wheeler and Mr. Owens, and it may be the case that Mr. Wheeler did not want to put in open correspondence that there was a dispute as to whether each of the three parties should pay stg.£20,000 to Mr. Burke. It is probable that each of the three parties, Messrs. Brennan McGowan and Finnegan, knew exactly what was in dispute between them and that the real purpose of the telex was to point out that the resolution of that dispute was a matter for the three participants in Dublin, without identifying what the dispute was.

4-56 The Tribunal is satisfied, on the balance of probabilities, that the factual position was that the decision-making power for Foxtown's decisions rested with Mr. Finnegan in Dublin, and not with his trustees in Guernsey, and that the decisions of Kalabraki and Gasche were effectively made by Mr. Brennan and Mr. McGowan and not by the directors of those companies in Jersey. No retention fund such as was envisaged in Mr. Wheeler's telex to Mr. Owens was ever set up by Canio, notwithstanding that there had been a deduction of stg.£10,000 from Foxtown's share of the Lombard & Ulster loan and deductions of stg£25,000 from the shares of Kalabraki and Gasche.

4-57 The Tribunal believes that Mr. Barry was vigilant in protecting Mr. Finnegan's interests, and that he must have been given an explanation for the deduction of this sum which met with the approval of Mr. Finnegan.

4-58 The Tribunal is satisfied, on the balance of probabilities, that Mr. Wheeler would not have told either Mr. Barry or Mr. Finnegan that the stg.£10,000 which he had deducted from the Lombard & Ulster funds and sent to Caviar, was a payment to a retention fund of Canio's since this was not the case, and could readily be demonstrated not to be the case. It follows, on the balance of probabilities, that Mr. Barry was aware that the stg.£10,000 was paid to Caviar and if so, the Tribunal believes that Mr. Finnegan was also aware of this fact.

4-59 The Tribunal believes that the fact that Canio did not have a retention fund with stg.£30,000 to its credit was obvious to Mr. Finnegan, and that, if he had had any genuine belief that his stg.£10,000 had been deducted for such a fund, he or Mr. Barry would have sought details of the fund. Any such request would have obliged Mr. Wheeler to respond, and the only information he could have given in response to such a request would have been that he had transferred the funds to Caviar. If Mr. Finnegan's account is true, this would involve an admission by Mr. Wheeler that he had transferred the funds without proper authority. Such a scenario is highly improbable. Mr. Wheeler was an experienced Jersey advocate administering funds for a company, in which members of his firm were nominees, and of which he was a director. The Tribunal is satisfied that he would have ensured that he had the consent of all the beneficial owners of Canio before paying out their funds to another company, Caviar.

4-60 Confirmation of the fact that no Canio retention fund existed can be reasonably inferred from the events which took place prior to the 28th September 1989. In that month, almost five years after the stg.£60,000 payment to Mr. Burke, and the alleged setting up of a retention fund for Canio according to Mr. Finnegan, a meeting took place in Mr. Finnegan's offices in Dublin. The meeting was attended by Mr. Brennan, Mr. McGowan and Mr. Finnegan, who was accompanied by his solicitor, Mr. Michael O'Shea. Mr. O'Shea took a note of what had transpired at this meeting in the course of which there was a discussion about what was noted to be possible planning costs and by-law application costs in respect of the Canio lands. To that point in time no development costs had been incurred by Canio which have been disclosed to the Tribunal. Mr. O'Shea's note further recorded that: -

“The representatives agreed that the shareholders would have to make equal contributions to fund an application for the development of the lands”.

4-61 This is precisely the type of expenditure which would have been funded from the type of retention fund referred to in Mr. Wheeler’s telex, and which Mr. Finnegan says he believes had been created by his payment of the stg.£10,000 in November 1984. Since no such expenses had been incurred to that date, there ought to have been a fund available to the parties at the meeting in September 1989 of stg.£30,000 together with such interest as would have accrued on that retention fund from November 1984 to September 1989. None of the three parties present at this meeting, at which the creation of a retention fund was specifically discussed, made any reference to the fact that there had already been a retention fund created in 1984 for the purpose of meeting future expenses including architects’ fees.

4-62 The Tribunal believes that this could not have been an oversight on the part of each one of the parties who were supposed to have contributed stg.£10,000 to such a fund. The Tribunal believes that if Mr. Finnegan had a genuine belief that his stg.£10,000 had been lodged to such a fund, he would have raised that matter at the meeting and that he would have instructed his solicitor as to its existence.

4-63 The question of making a contribution to a fund to pay for the development costs raised at the September 1989 meeting did not progress further in 1989. In 1990 negotiations took place as between Mr. Tom Brennan and Mr. Finnegan with a view to Mr. Finnegan’s Canio interests being sold to Rushcliffe Limited (a company in which Mr. Tom Brennan had an interest). In order for this to take place, it was necessary to carry out a reconciliation or balancing exercise between the three parties involved in Canio.

4-64 The Tribunal is satisfied that if Mr. Finnegan had paid stg.£10,000 into a retention fund he would have sought credit for such payment or for a one-third share of the funds remaining in the account, in the balancing exercise which was undertaken. Mr. O’Shea, his solicitor, was carrying out this exercise on behalf of Mr. Finnegan, but he was never informed by Mr. Finnegan that he had made a payment to such a fund, and accordingly, Mr. O’Shea never sought a credit from Messrs. Brennan and McGowan for Mr. Finnegan in respect of that payment. Mr. O’Shea’s evidence was that he was never informed by Mr. Finnegan that a retention fund had been created in Canio, with an initial payment by him of stg.£10,000. The Tribunal is satisfied, that if such a retention fund had been created, Mr. Finnegan would have so informed Mr. O’Shea.

4-65 The Tribunal is satisfied that the explanation for Mr. Finnegan’s failure to refer to the existence of such a fund is accounted for by the fact that he was aware that no such fund was ever created, and that his stg.£10,000 was paid to Mr. Burke with his knowledge on foot of an instruction given by him to Mr. Barry or to Mr. Wheeler that such sum could be paid to Caviar. The Tribunal is satisfied that Mr. Finnegan gave a false and misleading account of the true circumstances in which his funds came to be paid to Mr. Burke through Caviar.

WHY WAS STG.£60,000 OF CANIO’S MONEY PAID TO MR. BURKE IN NOVEMBER 1984 AND A FURTHER STG.£15,000 PAID IN APRIL 1985?

4-66 In order to establish why Mr. Burke was paid these sums, the Tribunal sought to establish from Messrs. Brennan and McGowan, and Mr. Finnegan, why Canio was established, and what their individual input into the company was. Until such time as the existence of Canio was established by the Tribunal, Mr. Brennan and Mr. McGowan had been falsely maintaining that the only payments (apart from some small payments from the Brennan and McGowan companies at election time) to Mr. Burke were from the accumulated fund being handled by Mr. Ernest Ottiwell, and Mr. Burke had supported this account of events.

4-67 Once Canio was revealed Mr. Burke claimed ignorance of any role that it may have had, and reasserted that his understanding had always been that these were funds raised through Mr. McGowan and Mr. Ottiwell’s fundraising efforts. If true, this meant that Mr. Brennan and Mr. McGowan had for some unexplained reason borrowed stg.£60,000, paid it to Mr. Burke, and falsely represented to him that it was the proceeds of political fundraising activities. The Tribunal considers this to be utterly implausible, and rejects Mr. Burke’s evidence that the Canio payments were ever attributed by Messrs. Brennan and McGowan to fundraising activities.

4-68 The Tribunal believes that the stg.£60,000 payment made to Mr. Burke in November 1984 was made on foot of an agreement reached with Mr. Burke whereby he was to receive that exact sum. The Tribunal does not know why Mr. Finnegan refused to pay more than stg.£10,000, or why Messrs. Brennan and McGowan conceded that this payment of stg.£10,000 was sufficient in circumstances where it appeared that each of the three of them ought to have paid stg.£20,000 so as to reflect their equal shareholding in Canio. This inability on the part of the Tribunal, to conclude what the true circumstances were in relation to this payment, stems from the fact that none of the principals involved namely Mr. Brennan, Mr. McGowan or Mr. Finnegan, has given any comprehensible account as to what their relationship was at that time.

4-69 The Tribunal's investigations established that the relationship of Mr. Finnegan with Messrs. Brennan and McGowan was not limited to the Canio transaction, but extended to cover a range of commercial transactions in Ireland which over time resulted in the transfer of stg.£2,661,875.96 to Jersey. Each of the parties shared substantially in these funds, yet each claimed to have an almost total ignorance of the circumstances which led to these funds being generated, or the role which each of them played in the transactions which led to them being so enriched.

4-70 It appears to the Tribunal that the corporate entities set up in Jersey were set up with the assistance of the lawyers, tax advisers and accountants to the parties to serve specific and identifiable functions which are capable of detailed explanation. The evidence adduced before the Tribunal established that the corporate structures involved were a labyrinth which stretched from Jersey and Guernsey to Tortola and the only common features were the involvement of Messrs. Brennan and McGowan and Irish land transactions which resulted in large sums of money being distributed between Messrs. Brennan, McGowan and Finnegan in Jersey.

4-71 The Tribunal does not accept that those who profess to be ignorant of these transactions were as ignorant as they claimed. The Tribunal finds that the claimed ignorance of the events in which these parties had participated and had profited so, is not credible. The level at which Mr. Finnegan was prepared to cooperate with the Tribunal's inquiries into the affairs with which he was so closely linked, can be measured from the submissions made on his behalf for the first time on the 21st September 2001, some four months after the Tribunal had commenced public hearings into the matters with which he was involved. On that day, it was first suggested to the Tribunal that Mr. Finnegan had made financial contributions in connection with the "Jersey part" of these transactions, but not in connection with the actual purchase of the lands involved. It was submitted by Counsel on his behalf as follows: -

"He has given as much information as he possibly can, from his recollection of events. I explained, I think, yesterday that Mr. Finnegan, up until yesterday, was unable to instruct me in anyway in relation to these transactions, outside the bounds of the documents which had been furnished from this Tribunal to Messrs. Kennedy McGonagle Ballagh.* I have explained this. I have been at pains to explain this. I think I introduced this when I was cross-examining Mr. Brennan, that I had no further information than the Tribunal had in respect of these transactions"

* Messrs. Kennedy McGonagle Ballagh were Mr. Finnegan's solicitors.

And later: -

"He has been unable to assist me or instruct me in respect of these transactions. Therefore I was unable until now to suggest that Mr. Brennan's testimony was untrue. I felt it was my professional standing not to contradict the witness who had given sworn testimony, unless I had a firm basis to do that"

4-72 The Tribunal is satisfied that Messrs. Brennan and McGowan deliberately withheld from the Tribunal, any information which would allow the Tribunal to establish what the true relationship was between them and Mr. Finnegan in relation to Canio, and that they failed to give a truthful account of the circumstances which led to Mr. Burke receiving funds from Canio.

CONCLUSIONS AS TO WHY MESSRS. BRENNAN, MCGOWAN, FINNEGAN AND RELATED COMPANIES PAID MONEY TO MR. BURKE'S OFFSHORE ACCOUNTS

4-73 The Tribunal is satisfied that the funds lodged to the offshore accounts of Mr. Burke which have been disclosed to the Tribunal, were not the proceeds of any fundraising or other activities conducted by Mr. Ottiwell, and that the fact that they were so attributed by Messrs. Brennan and McGowan, and by Mr. Burke, is indicative of collusion between Mr. Burke and Messrs. Brennan and McGowan to present an account of events to the Tribunal which they knew to be false.

4-74 The Tribunal is satisfied that each one of the Canio payments to Mr. Burke was made by the payers, whether Messrs. Brennan and McGowan in respect of the stg.£15,000 payment or Messrs. Brennan, McGowan and Finnegan in respect of the stg.£60,000 payment, for purposes other than as political donations to either Mr. Burke or to Fianna Fáil.

4-75 The Tribunal concludes that, in the absence of any legitimate commercial or other disclosed relationship existing between the payers and Mr. Burke, there was no legitimate explanation for the payment of such substantial sums to Mr. Burke.

4-76 The Tribunal concludes that the payments to Mr. Burke's offshore accounts in the Isle of Man and Jersey were made by the payers with the intention of securing some, as yet unidentified, benefit for them. These payments were substantial payments within the meaning of Clause E. 1 of the Tribunal's Amended Terms of Reference. As no legitimate explanation has been provided for these substantial payments, it is the opinion of the Tribunal and the Tribunal concludes that these payments were made in circumstances which give rise to a reasonable inference that the motives for making and receiving these payments were improper and that such payments were connected with the public office held by Mr. Burke. The Tribunal is satisfied, in all the circumstances, that these payments to the offshore accounts of Mr. Burke were corrupt payments.

Century Module

Chapter 5

Introduction to Century

INTRODUCTION

5-01 In the course of the Tribunal's inquiries carried out under the original *Terms of Reference*, it emerged that a lodgment of £39,500 had been made to one of Mr. Burke's bank accounts on the 31st May 1989.

5-02 Upon inquiry, Mr. Burke informed the Tribunal that the payment was an amalgam of political donations received by him, one of which was a donation in the sum of £35,000 from Mr. Oliver Barry, a businessman, who was involved in the entertainment business. At the date of payment Mr. Barry was centrally involved with a company called Century Communications Limited (Century), which in January 1989, had been awarded the first independent National Sound Broadcasting Contract in the State.

5-03 As the Minister for Communications at the date of payment, Mr. Burke was responsible for matters relating to the granting of broadcasting licences, although the power to award sound broadcasting contracts was not within his remit but rested with the Independent Radio and Television Commission (IRTC), an independent statutory authority.

5-04 In March 1989, some months prior to the payment in question, Mr. Burke, in his capacity as Minister for Communications, had issued a Directive which fixed the level of transmission fees payable by Century to Radio Telefís Éireann (RTÉ), the national broadcaster. Mr. Burke's Directive resulted in Century paying RTÉ considerably less than RTÉ had sought for the use of its facilities. In 1990, the year following the payment, Mr. Burke promoted legislation which, inter alia, restricted RTÉ's income from advertising in anticipation that independent broadcasters would benefit.

5-05 Clauses E1 and E2 of the *Amended Terms of Reference* provide, that:

"The Tribunal shall ... inquire urgently into ...

1. Whether any substantial payments were made or benefits provided, directly or indirectly to Mr. Raphael Burke which may, in the opinion of the Sole Member of the Tribunal, amount to corruption or involve attempts to influence or compromise the disinterested performance of public duties or were made or provided in circumstances which may give rise to a reasonable inference that the motive for making or receiving such payments was improperly connected with any public office or position held by Mr. Raphael Burke, whether as Minister, Minister of State or elected representative.

2. Whether, in return for or in connection with such payments or benefits, Mr. Raphael Burke did any act or made any decision while holding any such public office or position which was intended to confer any benefit on any other person or entity making a payment or providing a benefit referred to in paragraph 1 above, or any other person or entity, or procured or directed any other person to do such an act or make such a decision."

5-06 Having regard to the foregoing and to the relationship between the promoters of Century and Mr. Burke, the apparent benefits which accrued to Century from his actions and the magnitude of the payment involved, the Tribunal was obliged to inquire into the circumstances surrounding the payment of £35,000 to Mr. Burke. Ultimately, it sought to determine at whose behest, and on whose behalf, this payment was made, whether it represented a political donation or an improper payment as defined by the *Amended Terms of Reference* above, and, if satisfied it constituted the latter, what benefit, if any, was procured by such inducement.

5-07 The following three substantive areas became the focus of inquiry, namely:

1. The circumstances surrounding the payment itself;
2. The issuing of a Directive by Mr. Burke as Minister for Communications under Section 16 of the Radio and Television Act 1988, which prescribed a series of tasks for performance by RTÉ in return for certain payments by Century at an amount fixed by him;
3. The circumstances surrounding Mr. Burke's relationship with Century's promoters in 1989 and 1990 when it was in serious financial difficulty and in particular
 - (a) The promotion and ultimate enactment of the Broadcasting Act 1990, which restricted RTÉ's advertising revenue;
 - (b) Attempts to divert part of RTÉ's licence fee income to the IRTC for onward transmission to independent broadcasters; and
 - (c) The proposal to change the role of 2FM programming, announced by him in the Dáil on the 29th May 1990.

BACKGROUND

Legislative history leading to the passing of the Radio and Television Act 1988

5-08 The radio frequency spectrum is a natural resource used for a number of functions, including broadcasting. It is allocated internationally by the International Telecommunications Union. Until the late 1980s the Wireless and Telegraphy Act 1926 governed the national grant of licences in respect of the radio frequency spectrum, including broadcast licences. In 1988 RTÉ, the national broadcaster, was the sole public radio broadcaster in the State.

5-09 During the 1970s a number of unlicensed broadcasters, commonly known as "pirates", came into existence. These unlicensed broadcasters were considered a danger as their existence could have led to an interference with emergency services which also used the spectrum. Attempts were made from the late 1970s to introduce legislation to shut down unlicensed broadcasters and from the early 1980s to provide for a licensing system for local independent broadcasters, but legislation was not enacted until 1988 in the form of the Broadcasting and Wireless Telegraphy Act 1988, and, later, the Radio and Television Act in 1988.

5-10 In September 1987, Mr. Burke, as Minister for Communications, sought Government approval for the introduction of new legislation to provide for the licensing of local and community sound broadcasting services together with the re-introduction of the Broadcasting and Wireless Telegraphy Bill 1985 (Broadcasting and Wireless Telegraphy Bill 1987). The Bills proposed to strengthen the Minister's powers to deal with illegal broadcasting and other illegal uses of wireless telegraphy. Since 1979 three Bills, one in 1981 and two in 1983, had been introduced in an effort to establish a statutory regime for local radio, but none of these had been promulgated into law.

5-11 By November 1987, in accordance with Government approval received earlier that year, the text of the Sound Broadcasting Bill 1987 was in place. In the Memorandum to Government seeking approval for the text of the Bill, Mr. Burke reminded the other Ministers that, when the scheme of the Bill was being considered in October, he had drawn their attention to the fact that the Bill had been constructed in a sufficiently flexible manner so as to accommodate the licensing of an independent national radio service. It was suggested that, from a technical point of view, the frequencies for such a service were immediately available on VHF and there was a favourable prospect that a medium wave frequency would be available within nine months. The Minister considered that this development was timely and accorded with the general thrust of broadcasting policy, both in Ireland and internationally, to provide diversity and choice of service to the public, relaxing the state monopolies which existed in the broadcasting sector, and allowing greater competition. The Minister held strong views that it was important that there should be an alternative to RTÉ services in the areas of news, information, current affairs and public interest programming, given that for many people the broadcasting services were the main, if not the only, source of such information.

5-12 These Bills were duly introduced into Dáil Éireann on the 8th December 1987, and the second stage was passed on the 10th February 1988. The initial approach of the Government, as evidenced by the Sound Broadcasting Bill, was that the selection of licensees and the granting of licences would be made by the Minister on the basis of stated criteria and having regard to advice from a proposed Advisory Committee. In the course of the second stage debate, however, the opposition strongly objected to the proposed ministerial power to grant licences in view of the possible abuse of such a power.

5-13 A Memorandum for Government, on the 12th May 1988, sought Government approval for a number of amendments to the Bill, including the establishment of a new regulatory body to be entitled the Independent Radio and Television Commission. The amendments, in effect, led to the creation of a new Bill, known as the Radio and Television Bill 1988, which became the Radio and Television Act, 1988 (the 1988 Act).

CENTURY COMMUNICATIONS LIMITED

The origins of Century

5-14 Century Communications Limited (Century) was incorporated in Ireland on the 30th November 1988. The company was established to apply for and operate an independent commercial sound broadcasting service licence as provided for by the Radio and Television Act 1988.

5-15 The evidence in relation to the origins of Century was broadly consistent. It appears that, some time in mid to late 1987, Mr. Oliver Barry approached the broadcaster, Mr. Gay Byrne, telling him of his idea to set up an independent radio station and asking Mr. Byrne if he would be interested in the project. In late 1987 Mr. Barry met an acquaintance of his, Mr. John Mulhern, while travelling to Cork on a train and a discussion ensued concerning a newspaper article referring to a proposal to issue broadcasting licences. Mr. Barry mentioned that he had had discussions with Mr. Byrne on the subject and that they were considering getting involved in independent broadcasting. Mr. Barry asked Mr. Mulhern if he would be interested in getting involved in the project and Mr. Mulhern confirmed that he would. Subsequently Mr. Mulhern introduced Mr. James Stafford to Mr. Barry. Ultimately, Messrs. Stafford, Barry and Mulhern became the promoters of Century.

5-16 Although the promoters of Century were focused on the establishment of a national radio service, Mr. Byrne advocated the establishment of a local station, as he believed this latter option would involve less investment. However, he told the Tribunal that the other promoters dismissed this idea out of hand as they were “imbued with a fervour for a national licence” rather than a local one.

5-17 Various figures and projections were presented at meetings in late 1987 and early 1988. Mr. Byrne said it appeared that the promoters strongly felt that if the venture were successful there would be considerable profits to be made, but even in the worst case scenario, “if all the wheels came off and the audience was not as great as expected and the advertising revenue was not as great as expected,” there was still a profit to be made and a large profit would perhaps just take a little longer.

5-18 It was not envisaged that Mr. Byrne would become an investor in the project, but there was a suggestion that he would be given a small shareholding. Although he had not entirely dismissed an involvement with the venture, as time progressed Mr. Byrne’s confidence in the project declined and he ceased attending meetings.

5-19 At some stage, probably towards the end of 1988, Mr. Barry called to Mr. Byrne’s home with an envelope, which, Mr. Barry said, contained a bank draft. Mr. Byrne assumed that the draft was for an amount that had been discussed between the two of them in respect of his taking up a three-year contract with Century. Mr. Barry confirmed that the draft was for the sum of £1million. Mr. Barry sought an answer from Mr. Byrne as to whether or not he was going to join Century. Having considered the matter Mr. Byrne decided not to take up the Century offer and renewed his contract with his then employer, RTÉ, on the 16th January 1989.

THE PERSONALITIES BEHIND CENTURY

Mr. Oliver Barry

5-20 In 1988 Mr. Oliver Barry was involved in the entertainment business. He had been a promoter of musical events and manager of artistes for some twenty-five years. Prior to the inception of Century, Mr. Barry had been a member of the RTÉ Authority for approximately three years.

Mr. John Mulhern

5-21 In 1988 Mr. Mulhern was a successful businessman and the son-in-law of the then Taoiseach, Mr. Charles J. Haughey. Mr. Mulhern was a director and a major shareholder of Clayton Love Distribution Limited, from which Mr. Mulhern withdrew funds for investment in Century. It would appear that Mr. Mulhern did not take an active role in the day-to-day running of Century.

Mr. James Stafford

5-22 Mr. Stafford was approached by Mr. Mulhern, in late 1987 or early 1988, who asked him if he would be interested in becoming involved with the venture. At that time Mr. Stafford and Mr. Mulhern were friends and had had dinner together once a month for the previous twenty-five years. Mr. Stafford was also a friend of the then Taoiseach, Mr. Haughey, and was best-man at the wedding of Mr. Mulhern to Mr. Haughey's daughter.

Mr. Laurence Crowley

5-23 In or about September 1988, Mr. Stafford asked Mr. Crowley to become Chairman of what was to be Century. Mr. Crowley was an accountant with KPMG Chartered Accountants and had specialised in insolvency work with that firm. He was co-opted as Chairman of the Board of Century in 1989. Mr. Crowley informed the Tribunal that he was a non-executive Chairman. Although not an investor in the company, Mr. Crowley was given share options that he did not ultimately exercise.

Chapter 6

The Ministerial Directive

6-01 The Broadcasting and Wireless Telegraphy Act 1988 envisaged that the illegal operators would be closed down and the Radio and Television Act 1988 provided that the Independent Radio and Television Commission (IRTC) would award a number of sound broadcasting contracts including one for an independent national sound broadcasting service.

6-02 It was determined that it was appropriate to grant the franchise for the national radio licence in advance of the local radio licences. The IRTC fixed the 16th December 1988 as the last date for acceptance of written submissions by interested parties for the national licence, and conducted oral hearings in January 1989 where potential franchisees were given the opportunity of making their submissions to the Commission in public. Having considered the submissions made, on the 12th January 1989, the IRTC decided to grant the franchise for the independent national radio service to Century on the 18th January 1989. The successful franchisee was entitled to enter into a seven-year renewable sound-broadcasting contract for the provision of a national independent commercial radio broadcasting service. As appears from the history of events set out in this Report, the contract to deliver this service was not signed until the 21st July 1989 notwithstanding that Century was declared the successful applicant on the 18th January 1989.

6-03 The capital costs involved in setting up a separate transmission service to broadcast independent commercial radio envisaged by the Act would have been prohibitively expensive, and it would have taken an inordinately long period of time to construct and to commission such a service. It was anticipated that the franchisee who would provide the independent national radio broadcasting service might seek to use the existing transmission network, which was at that time vested in RTÉ as the national broadcaster, to transmit its signal.

RTÉ TRANSMISSION CHARGES

6-04 RTÉ was aware that the successful franchisee for the new service would, in all probability, utilise its facilities. The evidence adduced before the Tribunal established that it was RTÉ policy to share its facilities with the successful independent broadcasting applicants, including the national broadcasting applicant, where requested to do so and that it was its policy to co-operate with each of the applicants to that end. As early as the 16th March 1988, Mr. Robert K. Gahan, Assistant Director General of RTÉ, had written to the Department of Communications confirming that RTÉ had no objection in principle to giving access to its sites to the independent broadcasters, or to the installation of separate facilities at a reasonable rent, provided all regulations were met and all extra costs incurred by RTÉ, including extra security costs, were reimbursed to it. Not unreasonably, RTÉ anticipated that a benefit would ensue to it from such an arrangement. RTÉ understood and believed that it would receive a commercial return on such activity, as it was always understood that any co-operation would be rendered on a commercial basis.

6-05 Mr. Burke, as Minister for Communications, had expressed the same view. In reply to a question put in the Seanad concerning the operation of Section 16 of the 1988 Act, he acknowledged that RTÉ's co-operation would necessarily be rendered on a commercial basis. On the 1st June 1988 in the Dáil, he had stated that the thrust of Section 16 of the 1988 Act was that there should be "this type of co-operation, any such co-operation should be rendered on a commercial basis." The Tribunal is satisfied that it was Government policy that the independent radio broadcasters would not receive a subsidy, directly or indirectly, from RTÉ in providing its service.

6-06 Section 16 of the 1988 Act provides as follows: -

"(1) The Minister may, at the request of the Commission and after consultation with Radio Telefís Éireann, require the latter to co-operate with sound broadcasting contractors in the use of any mast, tower, site or other installation or facility needed in connection with the provision of transmission facilities for sound broadcasting services to be established under this Act.

(2) A sound broadcasting contractor shall make to Radio Telefís Éireann such periodical or other payments in respect of any facilities provided in pursuance of sub-section (1) as the Minister, after consultation with Radio Telefís Éireann and the Commission, directs."

6-07 The effect of this section was to confer upon the Minister the power to order RTÉ to make its transmission facilities available to the independent national broadcaster and the power to fix the payments which the independent national broadcaster would pay to RTÉ for such facility. The 1988 Act envisaged that the Minister's power was to be exercised at the request of the IRTC and after consultation with RTÉ.

6-08 As events transpired, on the 14th March 1989 the Minister exercised his power under Section 16 of the 1988 Act to fix the level of charges which were to be paid by Century to RTÉ for the use of the RTÉ transmission facilities, and to direct RTÉ to acquire the necessary equipment to enable Century to broadcast its signal. The Directive of the Minister effected a considerable saving to Century over the amounts that were being sought by RTÉ for the provision of its services.

6-09 The Tribunal has sought to establish the circumstances leading to the making of this Directive and Mr. Burke's motive in so doing.

THE POSITION OF RTÉ

6-10 In 1988 RTÉ sought to establish the cost of the provision of transmission network facilities and services to third party broadcasters. In doing so it sought to: (a) ascertain the overall cost of the operation of the network, and (b) devise a formula for the apportionment of the network's operation costs as between the various services using it, and applying that formula to work out the appropriate charge for a third party wishing to use the network for a new radio service. RTÉ provided not only radio services but also television services within the State and, consequently, it was necessary for the purpose of its accounting exercise to apportion the cost of services as between these different media. As the names of some of those services changed, they shall, for ease of reference, be described hereinafter as Radio 1, 2FM, Raidió na Gaeltachta, RTÉ 1 and Network 2.

6-11 Initially, RTÉ's Finance Department apportioned 4/7 ths of costs to television and 3/7 ths of costs to radio on the basis that two television services equated with four radio services. Accordingly RTÉ's two television services, that is RTÉ 1 and Network 2, equated to four services and Radio 1, 2FM and Raidió na Gaeltachta brought the total complement of services up to an equivalent of seven radio services.

6-12 The cost associated with the provision of a single service could be calculated by dividing the relevant total cost of the provision of facilities and services by seven. This formed the basis of RTÉ's method for calculating the appropriate transmission charges to independent third parties. RTÉ, in evidence, maintained that this method of calculating the appropriate charges was transparent. It was designed, they maintained, to be fair and reasonable although the calculations, of necessity, contained subjective elements such as, for example, equating one television service with two radio services. RTÉ told the Tribunal that this apportionment allowed for some "headroom" in anticipation of future negotiations. Later, further analyses of the apportionment of costs resulted in a decision to abandon the subjective 4/7:3/7 ratio and to divide all costs evenly among television and radio services. Costs were thus to be divided among six services, i.e. the five RTÉ services and the new national independent radio service. These costs would be divided further as more new local licensees would seek to use RTÉ facilities.

6-13 RTÉ's calculations were made in advance of the anticipated negotiations with any of the national/local-broadcasting applicants and were not produced solely with Century in mind.

6-14 The Tribunal has concluded that RTÉ's method of arriving at its charge for its services was reasonable. The Tribunal further concludes that RTÉ would have been in breach of its statutory duty to maximise its revenues were it, for any reason, to decide unilaterally to undercharge for the use of its facilities or for the provision of its services. The figures identified by RTÉ as the cost of staff, power, spares, insurance, etc., were, in the opinion of the Tribunal, all derived from the actual budget of RTÉ. No additional costs were added on in any way to these figures. The Tribunal is equally satisfied that any surplus which existed in RTÉ's figures, arrived at from the apportionment formula referred to above between radio and television, would inevitably be identified by the negotiating independent broadcasters who would seek to have any surplus removed and would, accordingly, form the basis of any negotiations on these proposed charges.

CENTURY'S POSITION REGARDING RTÉ'S TRANSMISSION CHARGES

6-15 Once Century was awarded the franchise on the 18th January 1989, the Tribunal considers that it would have been reasonable to have expected its promoters to have immediately commenced negotiations with RTÉ with a view to reaching a mutually acceptable level of charge for the transmission services which they, at all times, recognised would have to be availed of in order to broadcast the Century signal.

6-16 The Tribunal is satisfied from the history of events recounted at the Tribunal that Century never negotiated or attempted to negotiate with RTÉ over the level of transmission charges which it would have to pay.

6-17 Whilst RTÉ could not know the exact requirements of the incoming broadcaster until such time as the details of the service required were agreed between them, it had, nonetheless, carried out certain projections which it incorporated in a document, headed ‘National FM Radio Coverage – Outline Proposals and Costs’, which was sent to Mr. Barry with a covering letter on the 2nd November 1988 (**Appendix F**). Included in this document was a calculation for the provision of an “all-in” service for FM signal distribution, which was referred to in the evidence as a “turn key” operation. This was costed at £1.14 million and included the acquisition by the commercial operator of the necessary capital equipment over a five-year primary leasing period. This scheme envisaged the operator using the FM service and having 98.5% national coverage from the end of the third year. From their meeting on the 2nd November 1988 with RTÉ, Mr. Barry and Mr. Stafford were aware of RTÉ’s estimated cost of the service on this basis.

6-18 In making their written submission to the IRTC in December 1988, Century included a figure of £375,000 for its transmission costs. The origin of this figure is unclear, and although Century subsequently sought to attribute it to a costing exercise of its consultants, the Independent Broadcasting Authority (IBA), the Tribunal is satisfied that it did not originate from any scientific costing exercise and that it had its origin in the financial costings considered in progressing a business plan for Century. It was, at its highest point, a figure which the promoters felt should be paid to RTÉ, as it was within Century’s financial projections and was a figure their experts would not dispute having regard to the brief they had been given by Century. This figure was never put to RTÉ’s representatives by Century prior to the award of the licence.

6-19 Meetings had taken place between Century and RTÉ, on the 2nd November 1988, the 8th November 1988, and the 18th November 1988, at which RTÉ’s costs were discussed. In the course of those meetings, RTÉ’s figures had been revised downward to £914,000, but Century had not responded with any alternative figures. As of the 8th December 1988, Mr. Stafford was preparing a document headed ‘Brief to the Minister’ in which it set forth Century’s figure of £375,000 as against a claimed £1.25 million from RTÉ. It is not clear from the evidence whether this brief was actually provided to Mr. Burke as no copy of it appears on any of the Department files. However, the Tribunal is satisfied that Mr. Burke and Mr. Barry were in regular contact at that time and concludes that it is probable that Mr. Burke was made aware by Mr. Barry of Century’s disquiet at the level of transmission charges being sought by RTÉ, and that he was also made aware of Century’s figures.

6-20 The IRTC was aware of the concern about RTÉ’s proposed level of transmission charges that had been expressed by each of the three applicants for the national broadcasting licence intending to use terrestrial based systems. Whilst all considered RTÉ’s charges to be excessive, Century’s estimate for the charges was half that which the other applicants were prepared to pay.

6-21 The IRTC did not consider that it was its function to establish what the appropriate rate of charge for access to the RTÉ transmission service should be. It was aware, before the award of the licence to Century, that the Department of Communications and RTÉ had agreed, on the 10th January 1989, that a sum of £692,000 per annum was the appropriate charge for provision of the FM service.

6-22 On the 13th January 1989, the day after Century’s oral presentation to the IRTC, the Chairman and Secretary of the IRTC met with Mr. Stafford. According to a fax sent by Mr. Stafford later that day to Professor Hills, one of Century’s specialist consultants, Mr. Stafford claimed that the Chairman and Secretary required as much information as possible to challenge the RTÉ figures and justify £300,000 as the correct charge. Century endeavoured to provide this information as a matter of urgency, but in fact provided little significant independent support for their figure despite the best efforts of Professor Hills to obtain a report from the IBA. Professor Hills noted with disappointment the response that had been provided by his former colleague in the Independent Broadcasting Authority Consultancy Service (IBACS). The IRTC however concluded that the resolution of the transmission charges issue was one for Century and RTÉ to resolve in negotiation.

6-23 In fact Century never embarked upon the process of negotiation with RTÉ at any time prior to the award of the licence but instead directed considerable energy towards ensuring that the Minister, Mr. Burke, would make the ultimate decision as to the cost of the provision of services by RTÉ.

6-24 Mr. Stafford acknowledged that, at a meeting with Mr. Burke, he had been informed by Mr. Burke that he did not have the power to fix the level of transmission charges unless the matter was referred to him by the IRTC. In its efforts to have the matter referred by the IRTC to the Minister, Century had engaged in correspondence with the Chairman and Secretary of the IRTC expressing dissatisfaction with the level of charge being sought by RTÉ and seeking to create the impression that negotiations with RTÉ were log-jammed.

6-25 Mr. Connolly, the Secretary to the IRTC was apparently impressed with Century's arguments and wrote to the Department of Communications on the 6th February 1989, endorsing their views (**Appendix G**). The Department had independently been endeavouring to impress on RTÉ the need to reduce its level of charges. The variation in the charges proposed by RTÉ was as follows:

On the 2nd November 1988, an all-in annual rental figure for FM services of £1.14m was proposed in the document headed "*National FM Radio Coverage-Outline Proposals and Costs.*" (**Appendix F**). This figure was to be payable once 98.5% coverage was achieved in the 3rd year of operation. In year 1, the initial rent was to commence at £600,000 per annum and progress to £840,000 per annum as coverage increased.

On the 18th November 1988, a figure of £914,000 for an annual charge for the all-in service was proposed (**Appendix H**).

By the 10th January 1989, an annual charge of £692,000 for the provision of an FM service and a figure of £112,000 for AM services (Dublin and Cork) together with figures for FM and AM project management and installation of £230,000 were agreed between RTÉ and the Department of Communications and the Minister, Mr. Burke (**Appendix I**).

On the 14th February 1989, following a further meeting between the Minister and the Director General of RTÉ, RTÉ was prepared to accept an annual sum of £614,000 for the FM service charge previously agreed at £692,000 (**Appendix J**).

6-26 This final figure was at that time acceptable to the Minister and the IRTC was so informed on the 16th February 1989, by letter, wherein the Minister stated that a sum of £614,000 was not unreasonable in Irish circumstances (**Appendix K**).

6-27 The response of Century to this information was to write to the IRTC on the 17th February 1989 and on the 20th February 1989. The first of these letters (**Appendix L**) was signed by Mr. Barry and Mr. Stafford, the second by the Chairman of the company, Mr. Laurence Crowley (**Appendix M**). In the first letter, Messrs. Barry and Stafford stated: -

"The Board meeting reviewed the question of transmission charges. They were of the unanimous opinion that the £375,000 offered to RTÉ for a full transmission service was, given the advice they had from the IBA, fair and reasonable. Furthermore they were of the unanimous view that they were not prepared to negotiate or to increase that offer as it would effect the viability of the service."

6-28 Their letter of the 17th February 1989 was accompanied by a schedule setting out the headings under which they calculated the £375,000 charge. The letters written by Century on the 17th and 20th February 1989 to the IRTC seriously misrepresented the factual position pertaining at that time. The Tribunal is satisfied that there had never been an offer by Century to RTÉ of £375,000 or any other sum. The Tribunal is satisfied that the IBA never costed the provision of eight transmitters and six boosters over four years to provide a national coverage of 98.5% at £300,000. The Tribunal is satisfied that RTÉ never quoted Century a rate of 7% on the combined investment over a twenty-year plan as claimed. The Tribunal is satisfied that there was never a Board meeting at which Century resolved that the £375,000 was the figure above which their plan was not viable. The Tribunal is satisfied that the notes taken at the Century meeting of the 14th February 1989 accurately reflect the true position; namely that Century considered transmission charges at a cost of £375,000 would represent 'a steal' and that the company was prepared to pay £520,000. The Tribunal is satisfied that these letters were written and the meeting with the Chairman of the IRTC arranged so as to convince the IRTC that the only possible resolution of the matter lay in the hands of the Minister, in circumstances where an impasse had arisen as between negotiating parties, whereas the true position was that no negotiation at all had taken place.

6-29 The Tribunal is satisfied, on the balance of probabilities, that Century would not have insisted on the matter being referred to the Minister unless its promoters believed that he would resolve the matter in their favour.

MR. BURKE'S CONSIDERATION OF THE IRTC LETTER OF THE 20TH FEBRUARY 1989 AND ITS ENCLOSURES

6-30 The Chairman of the IRTC wrote to Mr. Burke on the 20th February 1989 in the following terms:

“Re: Transmission Charges for National Independent Radio.

Dear Minister,

Please see the enclosed copy of a letter received today from Century Communications concerning the charges being sought by RTÉ for the provision of transmission facilities for the new independent national radio station.

Please note that Century Communications are seeking a Ministerial Directive under Section 16 of the Radio and Television Act 1988.

It would appear that a contract with Century Communications cannot be entered into until this matter is cleared up.

I look forward to hearing from you at your convenience.
Yours sincerely.”

Mr. Burke chose to treat this letter as a reference under Section 16 of the 1988 Act by the IRTC, although the letter itself expressly noted that Century was seeking the Ministerial Directive.

6-31 Although there had not been a formal Board decision of the IRTC to refer the matter to the Minister for a Directive under Section 16 of the 1988 Act, the Chairman stated in evidence that he was quite sure, with the benefit of hindsight, that the Commission was in agreement with the request. He also stated that he never heard it said that the Commission did not make a request for a Directive under Section 16 of the Act. The Tribunal accordingly finds that Mr. Burke was entitled to treat the Chairman's letter as a request by the IRTC to him for a Directive under Section 16 of the 1988 Act.

6-32 The section provides that, after consultation with RTÉ, the Minister may require it to act. Mr. Burke agreed that there had been no communication with RTÉ between the date of receipt of the IRTC's letter on the 20th February 1989 and the date upon which he issued his Ministerial Directive, the 14th March 1989. In evidence Mr. Burke stated that he considered that he had already carried out the consultation process which was envisaged in the section, insofar as he had considered RTÉ's position, both in consultation with RTÉ and with his own departmental advisors, on a number of occasions from January onwards.

6-33 It is true to say that Mr. Burke had considered RTÉ's figures on a number of occasions but it is also the case that in so doing he had considered the Century figures and their arguments, and rejected them in favour of RTÉ's figures. In reaching his decision that £614,000 was a reasonable annual charge to make for the FM transmission services, Mr. Burke had considered the Century figure of £375,000 and had rejected it in holding that £614,000 was the appropriate figure. He must also, of necessity, have rejected the arguments in favour of Century's £375,000 figure which were advanced by the Secretary to the IRTC in his letter to the Minister of the 6th February 1989 which, in turn, enclosed the only independent documentation which had been proffered to support Century's figures; namely the fax prepared by the IBACS the contents which had been found wanting by Professor Hills.

6-34 In his direct dealings with the Director General of RTÉ, Mr. Burke advanced to him the arguments that were contained in Mr. Connolly's letter of the 6th February 1989 for his response. Since he went on to hold in favour of the RTÉ figures over the Century figures, it follows that he must have preferred RTÉ's argument at that time.

6-35 Notwithstanding the letter and enclosure received from the Chairman of the IRTC on the 20th February 1989 it is difficult to conclude that there was sufficient additional information which would have allowed for the Minister to reach a conclusion as to the appropriate transmission charge other than that which he had expressed four days earlier, namely that £614,000 was the appropriate charge for use of the RTÉ transmission facilities for the FM service.

6-36 The IRTC's letter and its enclosure were considered in the Department of Communications, and, on the 23rd February 1989, an Aide-Memoire (**Appendix N**) was prepared for the Minister by his department and provided to him by the then Secretary of the Department, Mr. McDonagh. This document reviewed the issues surrounding the application for the Directive and analysed the main arguments advanced by Century and by RTÉ in relation to their respective positions. It concluded that Century had seriously underestimated the costs involved in matching RTÉ's FM service.

6-37 It stated that the IBA service in the United Kingdom and in Northern Ireland was not comparable with the RTÉ service and that the UK charges, quoted by Century and used as the basis for the provision of services in Ireland, were not supported by any examination. It stated that Century in its submissions to the IRTC had ignored the project management and installation costs totalling £375,000.

6-38 On the issue of the purchase of capital equipment, it highlighted Century's claim that RTÉ had quoted an interest rate of 7% per annum and that the equipment had a life expectancy of twenty years and that Century claimed that the costs should be written off over twenty years at an interest rate of 7% per annum. The document noted, however, the RTÉ response that there was no possibility of being able to borrow money at a fixed rate of 7% over 20 years and that RTÉ's own Exchequer Borrowings were costing an average of 12% per annum.

6-39 The Aide-Memoire drew attention to the fact that Century had ignored the costs of the AM service completely and had assumed that they were included in the FM charges.

6-40 Appended to the Aide-Memoire was a memorandum that recorded a discussion which had taken place between Mr. Michael Grant of the Department and Mr. Ivan Tinman, Managing Director of Downtown Radio, in which it was stated that Mr. Tinman had expressed the view that a charge of stg.£800,000 would not be unreasonable for a fourteen station national FM network, covering the twenty-six counties. The Tribunal is satisfied that Mr. Grant's contact with Downtown Radio was prompted by Century's letter of the 17th January 1989 to Mr. Connolly stating that the figures paid by Downtown Radio to the IBA in the North of Ireland were supportive of the figures which it was prepared to pay to RTÉ.

6-41 A further memorandum was attached to the Aide-Memoire, which recorded the contact by the department with a representative of the IBA in which it was stated that this representative had said that the IBA's costing methodology would be of little help in determining the appropriate way of apportioning costs in Ireland for the reasons set out therein.

6-42 The Minister's Directive of 14th March 1989 (**Appendix O**) required RTÉ to provide its facilities to Century on the following basis:

1. RTÉ was to provide access to its 14 FM sites and two AM sites (Dublin and Cork) at an annual cost of £35,000.
2. Maintenance charges in relation to Century's equipment was to be levied at: £30,000 per annum to cover the first thirty visits, £1,000 per visit for each of the next 40 visits; and additional visits to be charged at actual cost plus 25%.
3. Power and spares to be charged on an actual cost basis.
4. RTÉ would acquire the necessary transmitting and associated equipment and the cost would be financed at the best available terms over 14 years. The capital cost and interest charges would be paid by Century over the 14 year period and the residual value of the equipment at the end of the period would accrue to Century.
5. Annual charges would be increased in line with the Consumer Price Index and 5% for overheads would be paid
6. A once-off installation and project management fee of £250,000 would be paid by Century to RTÉ for the AM and FM facilities.

6-43 These figures were radically different from what had been agreed with RTÉ by the Minister in February 1989, when £252,000 *per.annum* was agreed as the appropriate figure for access, whereas Mr. Burke had now directed that access be provided for £35,000 per annum. £355,000 had been agreed as the appropriate figure for maintenance, whereas Mr. Burke was now directing that RTÉ provide this service for £30,000 on the basis of 30 visits, with £1,000 for each subsequent visit (up to 40), and additional visits to be charged at actual cost plus 25%.

MR. BURKE'S JUSTIFICATION FOR HIS DECISION

6-44 Mr. Burke sought to justify his decision on the following grounds: -

- The transmission charges as fixed by him, although lower than those sought by RTÉ, were what he considered to be 'fair and reasonable'.
- The charges as fixed by him did not involve a subsidy to anybody as was confirmed at his meeting with RTÉ on the 31st March 1989. He had agreed with RTÉ that maintenance charges would be reviewed after 18 months so as to ensure that there was no question of subsidy.
- The amount being asked by RTÉ was not an amount which was going to be paid by Century and accordingly, if the station was to be got up and running, he was obliged to take the course of action which he did.
- He had no option but to issue a Directive since he had been requested to do so by the IRTC in their letter of the 20th February 1989.

6-45 The Tribunal does not accept Mr. Burke's explanation for his decision and is satisfied that: -

- He could not have believed that the figures set by him did not amount to a subsidy to Century given that he had earlier agreed that a figure of £614,000 per annum was a reasonable figure to pay in the circumstances.
- RTÉ never accepted that the charges fixed by the Minister did not subsidise the independent broadcaster, as was stated by Mr. Burke.
- Mr. Burke had no reasonable grounds for believing that Century would not enter into a contract with RTÉ other than on the terms which he fixed in his Directive.
- The fact that he was requested to give a Directive by the IRTC did not mean that he necessarily had to direct that the service would be provided at a rate lower than that already found by him to be appropriate.

Chapter 7

Payment of £35,000 to Mr. Ray Burke by Mr. Oliver Barry on the 26th May 1989

7-01 On the 26th May 1989, £35,000 in cash was handed to Mr. Burke by Mr. Barry in the Minister's office in Kildare Street, Dublin 2. In March 1989, Century Radio had been the beneficiary of a Ministerial Directive under Section 16 of the Radio and Television Act 1988, which obliged RTÉ to provide equipment and transmission facilities to Century at a figure which was considerably lower than that which RTÉ considered appropriate and also considerably lower than that which had been previously agreed by the Minister. Century had yet to sign the broadcasting contract with the IRTC and, as of May 1989, was in dispute with RTÉ as to the extent of the obligations which were imposed upon RTÉ by the Ministerial Directive.

7-02 Century had yet to go on air and would not do so for a further four months. Mr. Barry and Mr. Burke met regularly and discussed Century's progress and its difficulties. The circumstances in which the admitted payment of £35,000 came to be made are disputed in the accounts of events given to the Tribunal by the donor, Mr. Barry, and by the recipient, Mr. Burke.

7-03 Mr. Burke said that Mr. Barry had, of his own volition, proffered the sum of £35,000 in cash by way of an unsolicited political donation. He said that they had been discussing the political campaign that would precede the General Election, which was to take place on the 15th June 1989, and that Mr. Barry had volunteered the payment with the object of assisting in the retention of the second seat in Mr. Burke's constituency of Dublin North. Mr. Barry, he said, was a personal friend and a constituent who had helped him in past election campaigns.

7-04 If this was the true sequence of events leading to the payment, the Tribunal considers that it was, at a minimum, imprudent of Mr. Burke to have accepted the money proffered by Mr. Barry, given the ongoing relationship between Century, the Minister and his Department. The Tribunal considers that the payment of such a substantial sum of money to a Minister was such as to bring into question any subsequent decision which might be taken by him in the course of those of his public duties that involved the donor or his company. In these circumstances, the Tribunal considers that any such donation ought to have been refused by Mr. Burke.

7-05 Despite being a personal friend of Mr. Burke's and a long time supporter of the Fianna Fáil party, Mr. Barry had never before made a payment approaching £35,000 to either. In the course of the political campaign in which Mr. Burke received his payment, Mr. Barry made payments of £5,000 to the Fianna Fáil party and a similar sum to Mr. Charles J. Haughey, then An Taoiseach.

CONCLUSIONS ON MR. BURKE'S TESTIMONY CONCERNING THE £35,000

7-06 Mr. Burke has given evidence to the Tribunal that the £35,000 received from Mr. Barry formed part of a £39,500 lodgment made to one of his accounts on the 31st May 1989, five days after its receipt. Mr. Burke was not in a position to identify the source of the remaining £4,500. Mr. Burke's evidence on this issue cannot be verified at this time. No contemporaneous documentation was produced to the Tribunal to prove that the monies lodged to this account on the 31st May 1989 comprised any part of the £35,000 received from Mr. Barry five days earlier. Mr. Burke was not in a position to produce any adequate documentation to vouch the expenditure of this sum on political expenses, either in the 1989 election or otherwise.

7-07 If it was the intention of Mr. Burke to apply these funds towards the campaign so as to ensure the re-election of a second candidate for Fianna Fáil in his constituency, as claimed, the Tribunal would have expected that the existence of this donation would have been made known to Mr. Burke's constituency organisation at the time, and that there would be evidence of expenditure of that sum, or a substantial part thereof, during the campaign. Mr. Burke accepts, however, that he did not inform any person in Fianna Fáil of the fact that he had received this sum from Mr. Barry.

MR. BARRY'S MOTIVE IN MAKING THE PAYMENT TO MR. BURKE

7-08 Mr. Barry's evidence was that he made the payment to Mr. Burke on behalf of Century because he felt that it was in the company's best interests so to do. Mr. Burke had been Minister for Communications in the outgoing Government and he had introduced commercial broadcasting in the State. Mr. Barry felt that it would have been disadvantageous to his investment in Century if Fianna Fáil did not get back into power.

THE TREATMENT OF THE £35,000 PAYMENT TO MR. BURKE IN THE BOOKS OF ACCOUNT OF MR. BARRY, QUALITY ARTISTES MANAGEMENT LIMITED AND CENTURY COMMUNICATIONS LIMITED.

7-09 Since Mr. Barry stated that the payment to Mr. Burke was a legitimate political donation made by him on behalf of Century, the Tribunal would have expected that this payment would be so reflected in the books of account of Century, and of any other company involved in the payment. However, this is not the case. The payment can be identified in the financial memoranda of Mr. Barry as 'deposit' and as 'donation' and as 'cash payment' but nowhere is there an unequivocal statement that it was a political donation much less that it was a payment made to Mr. Ray Burke, T.D.

7-10 Mr. Barry gave no explanation to the Tribunal as to why details of the admitted £35,000 payment made by him to Mr. Burke were not provided by him to the relevant accountants in order to allow for the payment to be recorded in any one of the accounts of QAM, or the accounts of Century, or his own personal records.

7-11 The evidence established that the cash handed to Mr. Burke, on the 26th May 1989, was sourced from an account called the '*Oliver Barry/Frank Sinatra savings account*' at the Bank of Ireland at 28 Lower O'Connell Street, Dublin 2. Century had no connection with this account, which was the account of a company solely owned by Mr. Barry. Mr. Barry sought to have his expenditure reimbursed by Century. His first attempt to do so was by reducing the amount he was obliged to pay to the Century's share capital account, thus giving himself a credit for the payment. In July 1989, Mr. Barry made a payment of £148,334 to the share capital account. This payment brought his contributions to that date to £215,000, which was £35,000 short of the £250,000 which had been paid by that date by Mr. Stafford. Mr. Stafford's area of expertise lay in the field of corporate finance and the Tribunal is satisfied that, as of July 1989, Mr. Stafford must have been aware that Mr. Barry had given himself credit for £35,000, in his dealings with Century, by paying a reduced contribution to the share capital account.

7-12 Ms. Noreen Hynes, a Chartered Accountant, was the Head of Administration and Finance in Century from June 1989 until August 1990. She was never made aware by Mr. Barry or Mr. Stafford of the fact that Mr. John Mulhern was entitled to any shareholding in the company. She understood the payments into the company's share capital account to come from Mr. Barry and Mr. Stafford, although she was not able to distinguish which of them made any particular payment, as the monies were merely lodged to the account without any indication to her as to identity of the contributor.

7-13 While Mr. Barry sought to give himself credit for the £35,000 payment to Mr. Burke, by withholding an equivalent amount from the share capital account, he provided no documentation to support this expenditure, nor did he inform Ms. Hynes that he was adopting that course. When the first annual audit of the company was performed in March and April 1990, Ms. Hynes recorded in a memorandum addressed to Mr. Stafford and Mr. Barry, that there was a shortfall in the share capital account of £122,695. These figures were calculated without reference to any credit being given to Mr. Barry for a £35,000 payment. Mr. Stafford, at this time, informed her that there were expenses of the company which had been met by the directors personally for which credit should be given to them in this account and for which invoices would be produced. By the 31st of December 1989, the end of the financial period for Century, the shortfall in the share capital account was £120,225 despite the efforts of Ms. Hynes to have the directors vouch the claimed credits at the time of the signing off of the accounts.

7-14 Ms. Hynes prepared a memorandum to that effect and circulated it to Mr. Barry and Mr. Stafford. It ought to have been clear to Mr. Barry from that memorandum that he was not being allowed to take credit for the £35,000 shortfall. The reason why Mr. Barry was not allowed credit for that sum was because it had not been vouched. Had Mr. Barry produced a receipt from Mr. Burke for the £35,000 which was paid to him in May 1989, Mr. Barry would have been allowed full credit for this expenditure. The Tribunal is satisfied that, instead of obtaining such a receipt from Mr. Burke, Mr. Barry set about trying to seek reimbursement of this expenditure from the company through other means.

7-15 Having failed in his attempt to recover the expenditure via a credit in the share capital account, he then tried to recover it on the basis of it having been a loan to the company from him. By mid-1990, Century was in serious financial difficulties and the directors of the company were themselves funding the company's expenditure, including its wage bill.

7-16 A financial restructuring of the company took place, which involved the acquisition of a substantial shareholding by the United Kingdom based company, Capital Radio Plc, and the injection of additional finance by the original promoters. It was agreed that the directors were to be allowed credit for the loans they had provided to the company.

7-17 In the course of the due diligence exercise carried out prior to the completion of the agreement with Capital Radio, Mr. Barry and Mr. Stafford advanced a claim to offset the sum of £302,094.16 on the basis of loans made to Century by them. Of this sum, £260,853.63 could be vouched as expenses incurred in funding the wages account of Century and in lodgments to Century's bank account. The unvouched element of the claim amounted to £40,686.04, of which the Tribunal is satisfied £35,000 was represented by the payment which had been made by Mr. Barry to Mr. Burke. Given the absence of vouching documentation for this expenditure, Capital was unwilling to give credit to the directors for this sum, with the result that the agreement closed on the basis of the directors' loans being quantified at £260,853.63. The second attempt to have Mr. Barry's £35,000 payment to Mr. Burke paid back to him thus failed.

7-18 Having failed to recover the £35,000 through the directors' loan stratagem, Mr. Barry sought to have the money paid out on the basis that his company QAM, had provided services to Century between January 1990 and July 1990 at a rate of £1,600 per week. No such claim had been made by QAM to that point.

7-19 Ms. Noreen Hynes confirmed in her evidence that she had made all of the directors, including Mr. Barry, aware of their responsibility to ensure that all known liabilities of Century were fully disclosed to Capital Radio as part of the due diligence exercise. Yet Mr. Barry never indicated to her that he or QAM were owed any money for services rendered. Had he done so, she would have entered QAM as a creditor in the accounts that were prepared prior to closing the agreement with Capital Radio Plc.

7-20 The Tribunal is satisfied that there was no such liability on Century to pay £40,000 to QAM and this was merely a device contrived to ensure that the monies paid to Mr. Burke by Mr. Barry were reimbursed by Century. Mr. Taylor, Financial Director of Capital Radio and a director of Century, was not prepared to sanction this payment, but Mr. Stafford was insistent that the matter be referred to the Board for discussion and, at a Board Meeting on the 10th January 1991 it was resolved "that the matter be agreed between Mr. Barry and the company." Subsequently a cheque dated 19th February 1991, for £40,000 was issued by Century to QAM. The Tribunal is satisfied that, of this sum, £35,000 was to recompense Mr. Barry for the expenditure of £35,000 incurred in paying Mr. Burke in May 1989. The balance represented monies that Mr. Barry claimed to have paid on behalf of Century by way of bonus payments to RTÉ staff for their work in enabling Century to get on air in September 1989.

7-21 The extraordinary lengths which were gone to in order to achieve this repayment, were necessitated by the fact that there was no supporting documentation to record that Mr. Burke had been paid £35,000 by Mr. Barry. Had such documentation been available, Mr. Barry would have been reimbursed without further ado. The accountants for Century properly insisted upon vouchers being produced for any expenditure sought to be attributed to expenses paid by the directors on behalf of the Century.

Chapter 8

Mr. Burke's Relationship with Century's Promoters in 1989

8-01 On the 15th September 1989, at the instigation of the IRTC, a lunch meeting with Century management personnel was held at the Grey Door Restaurant. The objective was to improve relations between the parties. A note of the meeting was taken by Mr. Laffan of Century and the content of the comments attributed to Mr. Connolly, the Secretary of the IRTC, were confirmed subsequently by Mr. Connolly who informed the Tribunal that the views expressed were those of the Commission.

8-02 The document noted Mr. Connolly's comment that the promoters of Century Radio were "too highly politicised" and that they felt "empowered to enlist the help of Ministers wherever and whenever they chose." The Ministerial Directive of the 14th March 1989 was highlighted as an example of this claim. Mr. Connolly had also referred to "the almost daily consultation with the Minister on matters which properly belonged to discussion and negotiations between Century, the IRTC and RTÉ." The Tribunal believes that the views expressed by Mr. Connolly at that time were an accurate summation of the relationship which existed between Century and the Minister.

STEPS TAKEN BY MR. BURKE TO ASSIST CENTURY FROM DECEMBER 1989

The Broadcasting Act 1990

8-03 The Tribunal inquired into the circumstances surrounding the origin, preparation and ultimate enactment of the Broadcasting Act 1990. This Act restricted the sale of advertising time by RTÉ, which in turn led to the substantial reduction in its overall income. Mr. Burke, as Minister for Communications, was centrally involved in promoting this legislation.

8-04 The Tribunal also inquired into a proposed amendment to the Broadcasting Bill, as it made its way through the Oireachtas. The suggested amendment was announced by Mr. Burke in the Dáil on 29th May 1990 and, if enacted, would have diverted a portion of RTÉ's licence fee income to the IRTC for onward distribution to the independent broadcasting sector. By the 7th June 1990 however, Mr. Burke informed the Dáil of the Government's intention not to proceed with this proposal.

8-05 The Tribunal was also concerned to inquire into the contents of a speech made by Mr. Burke to the Dáil, on 29th May 1990 where, having set out the original rationale for the development of 2FM, he queried whether in its then format (music based) it represented the best use of a "scarce and valuable natural resource." He there stated that the Government's intention was to ask the RTÉ Authority, as a matter of priority, to develop plans for an alternative use of 2FM which would be more in keeping with the public service mandate of RTÉ.

8-06 The effect of this latter proposal, if implemented, would have been to change the focus of programming within 2FM, thereby making it a less attractive medium for advertising. This could have had a significant adverse effect on RTÉ's advertising income and could have had a major benefit to Century, since 2FM was in direct competition with Century for advertising.

THE PERCEIVED CAUSES OF CENTURY'S FINANCIAL DIFFICULTIES

8-07 Mr. Barry and Mr. Stafford accepted in evidence that, by the end of 1989, after approximately three months on air, the Company was in serious financial crisis and was facing liquidation. Both Mr. Barry and Mr. Stafford diverged, to some extent, in their evidence as to the cause of Century's malaise. The Tribunal's assessment of the various reasons offered for Century's failure by the main participants is as follows:

Mr. Stafford's perception of the cause of Century's difficulties

8-08 Mr. Stafford blamed RTÉ for Century's difficulties. He criticised the lack of transmission coverage afforded to Century by RTÉ, and claimed that it was in breach of its contractual obligations to Century. He also criticised the manner in which RTÉ restructured its own advertising strategy both prior to and after the launch of Century.

Mr. Barry's perception of the cause of Century's difficulties

8-09 Mr. Barry informed the Tribunal that he was of the view that Century's problems were attributed to a combination of internal factors including high start-up costs, salaries, and programming problems. He also identified difficulties with the transmission service provided by RTÉ as part of the problem claiming that there were large pockets of the country where Century did not have coverage. This complaint, however, must be viewed in the light of the fact that Mr. Barry was prepared to pay a sum, he said, of £5,000 in cash, by way of bonus payments to RTÉ staff for the work which they had carried out in enabling Century to get on air in September 1989.

RTÉ's perception of the cause of Century's difficulties

8-10 RTÉ disputed that it was in any way responsible for Century's financial difficulties. It pointed out that the transmission agreement, signed on the 28th July 1989, set out a time schedule for the installation of facilities for Century's FM transmission. It stated that under this contract the third quarter of 1990 was the earliest commencement date envisaged for the full transmission service. Century's financial woes were manifest in the first quarter of its operation, in December 1989. RTÉ was, in fact, ahead of schedule in the performance of its contractual obligations and had provided temporary installation for transmission facilities.

8-11 An RTÉ generated document, dated 29th September 1989, headed "*Temporary Installation, Primary and Fringe Coverage for FM only*" shows that, as of that date, RTÉ had provided Century with 45.6% coverage nationally. The memorandum went on to state that it was intended that, by the end of November, that figure would increase to 48.9%, reaching 68.3% by 15th December 1989.

8-12 In a memorandum to the staff of Century, dated 18th October 1989, Mr. Laffan noted that the level of developments in the transmission system was such that Century would have in excess of 70% coverage of the national population by the end of November 1989, and in excess of 75% by the end of that year. Furthermore, in an internal bank memorandum of 7th December 1989, Century's bankers recorded that Messrs. Stafford and Barry informed them that Century, at that date, had a broadcasting coverage of 70 – 75%.

Capital Radio's perception of the cause of Century's difficulties

8-13 Mr. Taylor of Capital Radio attributed Century's difficulties to two things. First, Century had made commitments to advertisers in relation to audience levels which had not been fulfilled, as a result of which the revenues generated did not match the cost of the station. And, second, the station was set up with a significant level of costs, particularly in respect of personnel. He believed that it was clear from the way in which the station was structured initially that it was non-viable in the medium term.

The view within the Department of Communications as to the cause of Century's difficulties

8-14 Mr. Grant of the Department said of Century that:

"My recollection is that there was a view that the station was unfocused in the audience it was intending to reach. There was a view, I think, that it had spent a lot of money on high profile presenters, and that high profile presenters did not necessarily bring in the audience and of course, the two issues that were crucial to the success of any National Radio Service was the extent of its coverage and the popularity of its programming, if we are not talking about pure public service programming. I don't know whether we coined the phrase, but certainly we wrote it a number of times, that advertising follows audience and until such time as Century Radio had developed a significant or relatively significant audience share, it was going to be difficult to persuade advertisers to spend a significant amount of money on the station. I do recollect that there was a view that the advertising sector was favourably disposed towards Century because they were naturally anxious, in the interest of bringing pressure, presumably on RTÉ to bring down their advertising rates, to a viable competitive alternative to RTÉ."

THE SEARCH FOR A SOLUTION TO CENTURY'S FINANCIAL DIFFICULTIES

8-15 Shortly after Century went on air it became apparent that it was not generating the projected income and that its costs were in excess of its revenue to the extent that, unless significant savings could be made in running costs and significantly increased advertising sold, it would be insolvent. Accordingly, Century explored all of the available options open to it to limit its costs and increase its revenue including limiting its public service content which was fixed at 20% of air time.

Legal advice

8-16 Mr. Eugene Fanning, solicitor of Arthur Cox & Co., faxed Mr. Michael Laffan, Chief Executive of Century, on the 30th November 1989, in connection with advertising on RTÉ radio and television. This fax followed a telephone conversation which had taken place the previous day between Mr. Laffan and Mr. Fanning, where advice was sought as to what leeway or freedom Century could obtain from the IRTC as regards the 20% public service content requirement imposed on them as a condition of its broadcasting licence. The advice given detailed the national and European legislation, as regards RTÉ and Century's advertising entitlements, and the Minister's power to regulate in that area. Prior to December 1989 there were no discussions or proposals within the Department of Communications which in any way suggested curtailing RTÉ's advertising time. Representations had been made over time to the Minister and to the Department by the print media and their lobbyists that such curbs be introduced. However, this was not in the context of independent radio broadcasting.

The involvement of the Minister, Mr. Burke

8-17 Mr. Burke was approached by Messrs. Barry and Stafford, in relation to the precarious financial situation, which had developed in Century by early December 1989. Two meetings took place on the 19th December 1989, involving these parties. On the 19th December a copy of the legal advices, which had been furnished by Mr. Fanning to Mr. Laffan on the 30th November, were faxed to Mr. Stafford at his request. The covering page of the fax transmission drew attention to Section 20(3) of the Broadcasting Act 1960 suggesting that this enabled the Minister for Communications to regulate advertisements in RTÉ and that the total daily time allocated to advertising and distribution of advertisements throughout the day was a matter which was subject to ministerial approval, thereby clearly suggesting that the Minister could unilaterally control RTÉ's advertising strategy.

8-18 In evidence Mr. Burke said that he could not recall being given these advices nor did he have any recollection of receiving the fax. However, a copy of the fax was found in the documentation discovered to the Tribunal by the Department of Communications. The Tribunal is satisfied that this document was probably given to Mr. Burke by Mr. Barry or Mr. Stafford at the time of their first meeting on 19th December 1989, and that it was considered by him at that time.

8-19 Of the two meetings attended by Mr. Burke, Mr. Barry, and Mr. Stafford, on the 19th December 1989, the first took place in the morning and the second later that afternoon. There was no civil servant present at the first meeting. The meeting was quite short and Messrs. Barry and Stafford were to return again that afternoon. In the course of the meeting, Mr. Burke was advised of Century's perilous financial position and of Mr. Stafford's view that this had been brought about by the abuse of a dominant position within the broadcasting industry by RTÉ. Mr. Barry and Mr. Stafford claimed that a levelling of the playing pitch in advertising was necessary, and they sought Mr. Burke's assistance in this regard. Mr. Burke informed the Tribunal that there was anecdotal evidence from local stations as well as a general perception that this was in fact the case. He acknowledged, however, that no evidence, documentary or otherwise, was introduced at this meeting to support this contention. As Century was broadcasting for no more than three months at this time, the Tribunal considers that its directors' capacity to pronounce with any certainty upon the cause of its financial ills being related to RTÉ's activities must, at a minimum, have been considered speculative.

8-20 The second meeting took place on the afternoon of the 19th December 1989 and, in addition to those who had attended the earlier meeting, the Minister was accompanied by Mr. Bernard McDonagh, Secretary General to the Department of Communications. The Tribunal sought to establish whether any minutes of this important meeting existed, but no departmental documentation recording what had transpired at that meeting was available to the Tribunal. From the evidence of those who attended the meeting, the Tribunal is satisfied that Mr. Barry and Mr. Stafford threatened to liquidate Century unless the Minister found a solution to their difficulties. Whilst Mr. Burke does not recollect the meeting, he does not dispute that such a meeting took place or that he was in attendance. He had a recollection of complaints being brought to his attention by Mr. Barry or Mr. Stafford about unfair competition and the treatment of Century at the hands of RTÉ.

8-21 The Tribunal accepts that, at the afternoon meeting, Mr. Burke gave a direction to Mr. McDonagh to take steps to cap the level of RTÉ's advertising time. The Tribunal accepts that Mr. Stafford's letter to Mr. Burke, of 26th February 1990, is confirmatory of this fact. There was subsequently a dispute as to whether Mr. Burke had given an assurance to Century's promoters that RTÉ's advertising time would be reduced by 50% or by a lesser proportion. Mr. Burke, however, denied that he had ever given any such assurance.

8-22 Further support for Messrs. Barry and Stafford's contention that assurances had been given to them at that meeting to curtail RTÉ's advertising revenue can be gleaned from a memorandum prepared within the Department of Communications, on the 3rd January 1990. Mr. McDonagh, Secretary General in the Department, had delegated to Mr. Ó Móráin, Principal Officer in the Department, the task of obtaining advices from the Office of the Attorney General as to how the Minister could reduce the total daily advertising time allowed to RTÉ. In the course of this memorandum Mr. Ó Móráin noted, "the more fundamental question of cutting back RTÉ's limit to 5% to help Century...." The Tribunal believes that it is clear from this memorandum that Mr. Ó Móráin had been instructed that the intended action was directed towards helping Century. As Mr. Ó Móráin had not himself attended this meeting, he could only have obtained this information from either Mr. McDonagh or from the Minister. The reference to cutting back RTÉ's limit to 5% refers to the percentage of advertising time per broadcasting hour that was allowed under the regulation. The result of reducing advertising time to 5% would effect a 50% cut in the total advertising time available to RTÉ.

8-23 Still further support for Messrs. Barry and Stafford's contention that the Minister had given an assurance that he would reduce RTÉ's advertising times, comes from a memorandum prepared by Mr. Paul McHale, a bank official, to whom Mr. Stafford and Mr. Barry had recounted details of their meeting with Mr. Burke on the day following the meeting. Mr. McHale's memorandum, of 20th December 1989, records as follows:

"The following information was advised in confidence by James Stafford and Oliver Barry at the Century meeting:

The Minister for Communications has confirmed to Oliver Barry and James Stafford that with almost immediate effect RTÉ will be required to operate on an equal basis in future. This stipulation will be issued by way of regulation, Directive or legislation if necessary. The major benefit to the independent sphere will be that advertising time available to RTÉ1 and 2 will in future be the same as that available to Century themselves. Century estimated that this will reduce RTÉ income by approximately 25%. Oliver Barry suggested that the decision may in effect bring about closure of RTÉ 2.

The decision has full Cabinet support, which is totally committed to the concept of independent radio and its success.

The decision it would appear has come about as a result of pressure from all of the independents whose viability is in question as a result of RTÉ's strength and its ability to cross fund Radio 2 from Radio 1.

Barry and Stafford advised that the Minister would be pleased to meet with a representative from the bank to offer reassurance on the above..."

MEETING BETWEEN CENTURY'S BANKERS AND MR. BURKE

8-24 The Bank took up the offer to meet the Minister. Mr. Burke met with Century's bankers on the 22nd December 1989. The meeting was attended by Messrs. Burke, Stafford, Barry and three senior officials from Bank of Ireland. No civil servants were present at this meeting, which took place in one of the Minister's offices, the exact location of which is not clear. One of the bank officials believed that it took place "just up from the corner of Earlsfort Terrace."

8-25 Other than a manuscript note prepared after the meeting by Mr. Michael Connolly, one of the bank officials, no other written record appears to have existed of what was discussed and agreed with the Minister at this meeting. Mr. Connolly's note gives further corroboration of the evidence of Messrs. Barry and Stafford regarding the assurances given to them at the second meeting of the 19th December 1989. The note records: "Minister confirmed:

1. Government's commitment to independent radio and intention to eliminate RTÉ 'excesses' in recent months. Will limit their advertising – either by way of Ministerial order (Attorney General examining this at the present) or

legislation. Legislation will be initiated immediately post-Christmas; will try to get it through by Easter but at worst by summer recess.

2. Talking to radio authority re sharing of news between independent stations. Aware of costs impact on Century of present “stand alone” system.
3. We asked Stafford/Barry to leave meeting for a few minutes. During this – Minister confirmed commitment to Century (rather than just all independent stations in general).”

8-26 Century was, at this time, considerably indebted to the Bank of Ireland and, whilst there was no offer of money made by Century to the bank at that time, the bank personnel gave evidence that they took some comfort from the fact that a Cabinet Minister was meeting with them on behalf of Century in Christmas week. The bankers maintained, however, that they were not influenced in the operation of the account as a result of whatever steps the Minister took. Mr. O’Donoghue, another of the bank’s officials, said that there so many strings attached to the Minister’s assurance that the meeting really did not have a major influence, and he would not comment as to whether or not the bank would have appointed a receiver in the absence of the Minister’s assurances.

Mr. Burke’s evidence in relation to the meeting with Century’s bankers

8-27 The Tribunal considers it important to note that Mr. Burke himself accepted in evidence that at this time, no issue relating to RTÉ’s claimed “excesses” in the advertising market had been brought to Government, nor had any decision been taken concerning a change in the then current legislation. Accordingly, contrary to what is recorded in the memoranda, the Government had not given any commitment to the course suggested by Mr. Burke. Although Mr. Burke denied that he had used the word “excesses” when referring to RTÉ as is recorded in the bank memorandum, he said that he did have a different view to his Department staff as to whether or not there were excesses on the part of RTÉ.

8-28 Mr. Burke maintained that he was not telling the bankers about the Government’s view regarding RTÉ, but was merely expressing his own view, as he was not in a position to express the Government’s view. He stated he would not have informed anybody of the Government’s intention, particularly at a time when he had not put anything before the Government. His explanation was that the bankers must have misinterpreted what he had said to them, and that they were obviously linking the Government’s commitment to independent radio to his personal intention to bring forward legislation to cap advertising. The Tribunal notes that Mr. Burke’s interpretation of what had taken place in this meeting is not supported by any other documentation discovered from Century, the Bank, or the Department.

Century’s credit status with its bankers prior to the meeting with the Minister of the 22nd December 1989

8-29 In October 1989, the Bank of Ireland offered facilities to Century which comprised an overdraft of £1 million, a term loan of £1 million, and letters of guarantee in favour of RTÉ in an amount of £282,000 and to Telecom Éireann in the sum of £20,000. The overdraft facility was repayable on demand and the term loan was repayable in four equal instalments, the first of which was to be paid on the 31st December 1992. These facilities were accepted by Century. By the 7th December 1989, it was apparent to the bankers that Century was in breach of its covenants undertaken at the time of taking out the loan. Instead of having a net worth of approximately £1.2 million in line with its original forecast, the net worth was £554,000 as of the 26th November 1989, and its net current liabilities were £883,000 as opposed to the £214,000 forecast.

8-30 The Tribunal is satisfied that this marked change in the financial situation prompted the bank to revise its approach to Century. Under the terms of its loan facility it would have been entitled to call in its loan to Century at that time. The Tribunal is satisfied that, on the 22nd December 1989, the bank verbally notified Mr. Barry and Mr. Stafford that it was altering the existing facility and offering in lieu an overdraft facility of £2 million, which was verbally accepted by Mr. Barry and Mr. Stafford. Whereas the parties subsequently disputed the precise conditions which should attach to this loan offer, the Tribunal is satisfied on the balance of probabilities that the bank’s decision to offer this new facility to Century was influenced by the assurances given by Mr. Burke that he would effect the regulatory or legislative change necessary to limit RTÉ’s advertising.

The Tribunal's conclusions from Mr. Burke's meetings with the Bankers

8-31 The Tribunal is satisfied that Century's bankers received an assurance from Mr. Burke, as Minister for Communications, that he would introduce the necessary regulation or legislation to curb RTÉ's revenue from advertising. The intended consequence of this action was clearly to improve Century's financial prospects. The Tribunal is satisfied that the fact of such assurance being given to the bank by a Cabinet Minister influenced the bank in their decision to continue providing finance to Century.

**PRESSURE EXERTED UPON MR. BURKE TO DELIVER UPON HIS
COMMITMENT TO CAP RTÉ'S REVENUE**

8-32 After the December meetings, Mr. Stafford wrote to Mr. Burke at his department, strongly urging him to implement the solution in accordance with his agreement at their meeting and the meeting with Century's bankers. None of this correspondence was found within the Department files, where it could be expected that such communication would be retained.

8-33 The first letter regarding this issue was dated the 26th February 1990. It advised that Century's losses for January and February 1990 were the greatest of any month to date. It further advised that Century's bankers were very concerned that the solution proposed had not been implemented, and that Century could not expect the bank to tolerate a further dilution of its security, unless the solution was implemented quickly. Mr. Stafford's letter set out the position thus:

"I refer you to our meeting held on the morning of the 19th December 1989 when both Oliver Barry and I advised you of the difficulties being encountered by Century and to our subsequent discussion that afternoon. On the basis of your assurance that you would cut approximately 50% of RTÉ's total advertising time and revenue to be spread equally across all its services, along with all the various safeguards discussed, both Oliver and I have continued to support Century. Both of us were greatly reassured by your instructing the Secretary of your Department in our presence that such measures be brought into effect immediately by direction or legislation if necessary. We were further reassured that if it were necessary to bring in legislation that the latest date of implementation of the solution would be the end of February."

8-34 Mr. Stafford again sent a letter on the 18th April 1990. This letter was sent following a meeting which had taken place between Mr. Stafford, Mr. Barry and Mr. Burke on that day. It was addressed to Mr. Burke at the Department of Communications, Scotch House, Hawkins Street, Dublin 2. This letter set out a number of Mr. Stafford's complaints with regard to what was being proposed at that time by Mr. Burke in the draft legislation, namely: -

- (a) He complained that what was being proposed by Mr. Burke at this point was not consistent with what had been sought and promised by Mr. Burke to Century and its bankers in December/January, in that the net effect of the proposed legislation was to reduce RTÉ's advertising time by 25% whereas Mr. Burke had earlier agreed to a reduction of 50%.
- (b) He complained that the proposed solution for capping RTÉ's revenue at 75% of its licence fee still allowed RTÉ to sell advertising at a significant discount to actual costs.
- (c) He proposed a solution which he felt was one which would have been acceptable to all parties, subject to certain safeguards, as follows: -

"To be constructive, I would suggest that an acceptable solution to all parties must be that RTÉ's total licence fee for the last year as a percentage of RTÉ's total running costs, both TV and radio, be deemed to be a purchase by the licence payers of a corresponding percentage of their total allowable advertising time of 6 minutes."

8-35 Mr. Burke accepted in evidence that both of these letters had been written to him. He insisted, however, that what Mr. Stafford was reminding him of was what he, Mr. Stafford, perceived to have been given by way of an assurance of the meeting in December 1989, whereas Mr. Stafford was in fact wrong in his perception. He endeavoured to explain Mr. Stafford's remarks on the basis that Mr. Stafford was under considerable pressure at the time. Mr. Burke stated that he had never contemplated cutting RTÉ's advertising by 50%, as stated by Mr. Stafford and that Mr. Stafford was, in effect, writing in hope rather than in expectation. He acknowledged that the letters were an attempt by Mr. Stafford to pressurise him into a course of action, but he was adamant that Mr. Stafford did not succeed in so doing.

8-36 The Tribunal believes that Mr. Burke received both letters, notwithstanding that no acknowledgement issued from his Department. The Tribunal concludes that these letters were retained by Mr. Burke because their contents confirmed that he had given assurances to Century's promoters which were improper in the circumstances and which would have been politically damaging to him had the contents of the letters been publicly aired.

THE STEPS TAKEN BY THE DEPARTMENT OF COMMUNICATIONS TO IMPLEMENT MR. BURKE'S WISH TO CONTROL RTÉ'S ADVERTISING

8-37 The advent of Independent Radio was a period of transition for the Department because, for 30 years or more, they had a relationship with only one broadcaster, but were now required to work with a number of broadcasters including RTÉ.

8-38 After Mr. Burke had given the commitment to Century to regulate RTÉ's advertising, the Department was faced with the problem of ensuring that the implementation of this wish by the Department did not infringe any legal entitlement of others. Some years beforehand, when RTÉ was the only national broadcaster, RTÉ's advertising limits were set at 10% of broadcasting time per day, subject to a maximum of 7.5 minutes in any one broadcasting hour.

8-39 Mr. Ó Móráin of the Department contacted the Attorney General's office by letter, on the 2nd January 1990, seeking advice as to whether the Minister could unilaterally withdraw his approval of the advertising limits which were in existence and seek to establish new and lower levels either directly or indirectly by refusing to approve anything other than the lower limits which he had in mind.

8-40 Mr. Ó Móráin's memorandum of the 3rd January 1990, directed to the Secretary of his Department, contains a contemporaneous record of what the Department believed the Minister had in mind at that time. The memorandum records the objective of the Department, as directed by Mr. Burke, was the "cutting back [of] RTÉ's limit to 5% to help Century." The memorandum envisaged, by reducing the level to 5%, approximately £7 million of advertising revenue would be displaced - although there was no evidence that this displaced advertising would go to Century. Whilst Mr. Ó Móráin understood the objective of the reduction in advertising time was to help Century, he was less than certain that the proposed course of action would achieve the desired outcome. He recorded: -

- "(b) In the IRTC's view the most of it will be picked up by local stations who, in comparison to Century, have been significantly exceeding revenue targets to date. Century's basic problem in the IRTC view is its lack of identity and programming appeal.
- (c) Advertising follows audience. Even with a 5% limit RTÉ will probably be able to retain a reasonable share of the 'displaced' advertising by simply increasing price."

8-41 Despite the view expressed by his civil servants, Mr. Burke was not to be deterred in the course of action which he had chosen, and the Department continued its liaison with the Attorney General's office on this complex issue. While Mr. Burke's department was considering actions which would radically affect RTÉ's operations, no official communication of the Minister's intentions was made known to RTÉ. The Department and RTÉ had, for years, conducted regular informal meetings to discuss and resolve, where possible, matters of mutual interest. The understanding was that these meetings took place under, what was described in evidence as, the '*Chatam House Rules*', which the Tribunal understood to mean that no note or memorandum of the contents of these meetings were to be prepared of the matters discussed at such meetings.

8-42 Despite this understanding a note was prepared within RTÉ, on the 6th February 1990, following one such meeting, from which it is apparent to the Tribunal that RTÉ became informally aware of moves afoot to assist Century. The memorandum in question records as follows: -

“Century Communications: Department officials advised that the political will was that Century had to succeed and therefore be given whatever support was necessary to achieve this. Consideration had already been given to a restriction on advertising time on RTÉ Radio but this was being ruled out as it would be of greater assistance to the other independent radio stations, as Century did not have the product at present to attract audience levels justifying increased advertising spend. The question of a subvention from the television licence fee had been raised but this would require legislation and would also lead to demands for equal treatment by the other independent radio stations and, in time, TV3.

RTÉ providing free transmission facilities would not be a great [*sic*] cash flow assistance due to low level of these charges already.

Department officials requested RTÉ to give the matter serious thought as it was probable that at short notice, RTÉ would be requested to assist Century – ideally whatever assistance being given, should be capable of being withdrawn if/when Century became financially viable.”

8-43 The issue of the diversion of RTÉ licence fee income and the subsidisation of Century by RTÉ was raised in the Dáil on 27th February 1990 by a number of deputies, following a press release issued by Mr. Jim Mitchell, T.D. on the 12th February 1990. In the course of debate on this issue, Mr. Burke replied as follows to the Dáil: -

“Neither I nor my Department have made any proposals, formal or informal, to RTÉ to divert income to any independent radio station.

...I take this opportunity to say again; in case there is any misunderstanding, that neither my Department nor I have made any proposals, formal or informal, to RTÉ to divert income to any independent radio station. Not only am I saying that but I note that the Director General of RTÉ has confirmed the situation.”

8-44 Whilst it is true to say that Mr. Burke had not formally approached RTÉ, it is also abundantly clear that he did have plans to curtail RTÉ’s revenue by capping its advertising revenue and also that he had considered the question of a subvention from the licence fee income which had been informally disclosed to RTÉ by his department on the 6th February 1990.

8-45 As late as March 1990, Mr. Burke had yet to consult with RTÉ. As of the 13th March 1990, Mr. Grant of the Department had prepared a document in which he indicated a method whereby RTÉ’s advertising time could be capped by linking the same to the licence fee of the previous year on a percentage basis. This formula ultimately found its way into the legislation. In his memorandum Mr. Grant said that this approach could go a long way to eliminating the possibility of endless and inconclusive rows with the independent broadcasting sector and the newspaper industry which could be expected if the restriction were to be expressed as a percentage of broadcasting time to be devoted to advertising. He suggested this approach would also enable RTÉ to promote its own activities including the sale of TV licences, the “*RTÉ Guide*”, etc.

8-46 No research had been done within the Department to ascertain whether there was a distorted media spend or whether RTÉ was abusing its dominant position. Yet the Department’s own rough calculations showed a possible reduction in RTÉ’s income as a result of these proposals to be in the order of £12-14 million per annum. The Department appreciated that the reduction in income would result in curtailment and reduction in programme quality, reduction in output and possible staff redundancies. This was of concern to the Department and the civil servants felt it necessary to formally record that the Department had not consulted RTÉ in regard to the consequences for programming or on the estimate of income diverted.

THE AIDE-MEMOIRE TO THE GOVERNMENT

8-47 An Aide-Memoire was circulated at the Government meeting of the 22nd March 1990 in which the Minister proposed an amendment to Section 20 of the Broadcasting Act 1960, so as to provide that the total daily time for broadcasting advertisements on RTÉ should not exceed 7.5% (as opposed to 10%) of broadcasting time per day. The maximum advertising in any one hour was to be limited to 4.5 minutes (as opposed to 7.5 minutes). The stated purpose of this measure was to provide “a fairer competitive environment for the independent broadcasting sector, and to address to some degree the concerns of the newspaper industry.” The proposed lower limit was the equivalent to half the time allowed to the independent sector.

8-48 Mr. Burke received Government authority to arrange for the drafting of legislation along the lines proposed by him in his Aide-Memoire and his department set about giving consideration to the details of the "Heads of Bill" likely to be required to give effect to the proposals in the original Aide-Memoire.

8-49 On the 29th March 1990, Mr. Burke spoke directly with the Attorney General concerning the urgent preparation of the legislation as authorised by Government. The telephone conversation with the Attorney General was followed up on the following day by a letter from Mr. O'Morain enclosing the Aide-Memoire sent to Government, together with draft legislation which he had been instructed to prepare by the Minister. The draft legislation, with the words "*final copy*" written thereon, was approved by the Minister and sent to the Attorney General's office.

8-50 A memorandum, prepared by Mr. Grant for discussion within the Department, was entitled "Comments and suggestions on the draft of Broadcasting and Wireless Telegraphy." In it, Mr. Grant had suggested that RTÉ be allowed a limited form of flexibility by inserting the words "on average" after "7.5%" in the proposed legislation. Mr. O'Morain noted the Minister's views concerning this proposal as follows: -

"Minister was adamant, definitely not."

8-51 Mr. Burke in evidence said he had no recollection as to what was meant by this note. He rejected the suggestion that this position had been adopted because Mr. Stafford had indicated that he did not want any flexibility given to RTÉ.

Chapter 9

The Extent to which the Proposed Legislative Changes were dictated by Century's Demands of the Minister for Communications

THE CAPPING OF RTÉ'S ADVERTISING

9-01 There were no plans in the Department of Communications in December 1989 to cap RTÉ's advertising. There was no evidence in the Department to indicate that independent broadcasters as a whole felt that RTÉ's advertising strategy was harming the industry. The complaints that there was not a level playing pitch and that there was an abuse of its dominant position by RTÉ, were developed by Mr. Stafford. Whilst Mr. Burke in evidence maintained that there was anecdotal evidence available to him that RTÉ was abusing its position, the Tribunal is satisfied that no such evidence was made available to the Department of Communications and that no investigation by the Minister was directed to establish whether or not there was, in fact, such abuse.

9-02 The Tribunal is satisfied that Mr. Stafford's complaints to Mr. Burke formed the basis of his direction to the Secretary-General of his department to proceed to reduce RTÉ's advertising capacity by 50%, either by Directive or by legislation.

9-03 The Tribunal is satisfied that Mr Burke adopted Mr Stafford's view without any proper analysis of the issue and without commissioning any study into the possible adverse consequences which would follow in the event that Mr. Stafford's suggestion was implemented.

9-04 The Tribunal is satisfied that the genesis of the legislation to curb RTÉ's advertising costs was Mr. Stafford's request of Mr. Burke that such curbs be imposed.

THE PROPOSAL TO RE-DIRECT A PROPORTION OF THE LICENCE FEE INCOME

9-05 Prior to January 1990 there were no proposals extant in the Department of Communications to redirect any portion of the licence fee income which had to that date been paid to RTÉ. Century, however, sought Counsel's opinion on the 19th January 1990 and amongst the issues addressed was the question of the discretionary nature of the licence fee payments to RTÉ. Following receipt of counsel's advice Arthur Cox & Co., solicitors to Century, wrote to Century stating that:

"Century could usefully consider approaching the Minister about the axing of some or all of the licence fee income received by RTÉ."

9-06 Counsel's view was that the Minister would be obliged to give RTÉ notice of his intention to axe some or all of the licence fee income, and that a 12 month period might be required. The solicitors offered the view that closer investigation of the deregulation situation could lead to the view that the period of notice could be considerably shorter than that. The Tribunal believes that it was only following these advices that consideration of the diversion of licence fee income to independent broadcasters was considered in the Department.

9-07 Some RTÉ personnel learned of a proposal in an informal way at the meeting which took place, on 6th February 1990, with the Department officials. On the 27th February 1990 the matter was raised specifically in the Dáil by Deputy Mitchell, and responded to by Mr. Burke in a manner which could only be interpreted as a denial that any such plans were afoot. A proposal to divert licence fee income was contained in proposed legislation which Mr. Burke laid before the Dáil on the 29th May 1990, (**Appendix P**). The criteria therein, to be applied in determining the entitlement of the independent broadcasters to share in the diverted licence fee, were such that Century was likely to be the main beneficiary of this legislation.

THE PROPOSAL TO ALTER THE STATUS OF 2FM

9-08 In his speech to the Dáil, on the 29th May 1990, Mr. Burke set out the main rationale for the development of 2FM, and queried whether in its then format, which was music based, it represented the best use of a “scarce and valuable national resource.” He stated that the Government’s intention was to ask the new RTÉ Authority, as a matter of priority, to develop plans for alternative uses of 2FM, which would be more in keeping with the public service mandate of RTÉ. This issue had not formed part of any recorded deliberations of the civil servants in the Department of Communications to that point in time.

9-09 The Tribunal is satisfied that 2FM’s position as a competitor of Century was a concern which had been specifically addressed by Century’s public relations firm, Wilson Hartnell. The conclusions contained in a memorandum of a meeting on the 29th March 1990 between Century personnel and Mr. Frank Young of Wilson Hartnell included the following:

“The most practical and beneficial solution based on the information available to us is to convince the Minister that the transfer of 2FM to Century is both in the best interests of Radio 1 and Century. It allows Radio 1 to compete in the open market with Century.”

9-10 By 29th May 1990 Mr. Burke was in a position to make his Dáil speech concerning 2FM, and the possibility that its role would be altered. The Tribunal is satisfied that Mr. Burke had, by that time, discussed the matter both with Mr. Stafford, and with Mr. Barry, and that he had given them to understand that 2FM’s role would not continue as theretofore.

9-11 In the absence of any investigation being carried out within his own department to establish the viability and consequences of moves to alter 2FM’s programme content, the Tribunal is satisfied that the only factors which caused this matter to be raised in Dáil Éireann were the persistent attempts by Mr. Stafford and Mr. Barry to have the Minister alter the status of 2FM to their company’s advantage.

GOGARTY MODULE

Chapter 11

Payment of Money to Mr. Ray Burke T.D. at his Home at Briargate, Swords, Co. Dublin in June, 1989 at a Meeting Attended by Mr. James Gogarty

EVIDENCE OF MR. BURKE

11-01 Mr. Burke acknowledged in evidence that on a date unknown prior to 15th June, 1989, a meeting took place at his home at Briargate, Swords, Co. Dublin, which was attended by Mr. Michael Bailey and Mr. James Gogarty. He stated that the meeting had been arranged by Mr. Michael Bailey by telephone, the day before. Mr. Bailey had informed him on the telephone that he wished to assist him in regard to the forthcoming General Election and Mr. Burke interpreted this as being a desire on Mr. Bailey's part to make a financial contribution to him. He said that no mention was made of Mr. Gogarty, or of JMSE at the time the meeting was arranged. Mr. Burke said that he knew Mr. Michael Bailey, because he was engaged in house building in the locality of Mr. Burke's home in Swords at that time, and he knew him to be involved in Fianna Fáil affairs, to the extent that he had attended Fianna Fáil race nights in the constituency in 1988. Mr. Burke believed that he had received two envelopes from Mr. Gogarty.

11-02 Mr. Burke stated that he did not know Mr. Gogarty prior to this meeting and that he had never received a political donation prior to that date from JMSE, or from any other Murphy company. He had never met any member of the Murphy family, and he never received any donations from them. He was aware of the existence of JMSE, as its manufacturing premises was located in proximity to his former home at 251 Swords Road, Santry, and was on the boundaries of his constituency.

11-03 Mr. Burke stated that he had never made any representation on behalf of Mr. Bailey, or his Companies, to any person, nor had he done so in respect of the Murphy companies (**Appendix Q**). He stated that he actively opposed proposed rezonings in 1993 and had led a delegation to the then Minister for the Environment urging him to reject certain zoning applications, and to follow the Development Plan.

EVIDENCE OF MR. MICHAEL BAILEY

11-04 Mr. Michael Bailey stated that he had developed a relationship with Mr. Gogarty in the course of negotiating the acquisition of the Murphy company lands at Forrest Road, Swords in 1988. In April/May, 1989 he began to negotiate with Mr. Gogarty over the possible acquisition of the remainder of the Murphy's North Dublin land holdings. Mr. Bailey said that he recommended that the payment should be made to Mr. Ray Burke, then a Government Minister in his local constituency. He offered to set up a meeting with Mr. Burke, if Mr. Gogarty wished him to do so. He stated that Mr. Gogarty asked him to arrange for such a meeting, and accordingly he telephoned Mr. Burke, and made the appointment. He believed that he had made it clear to Mr. Burke that the meeting was one at which Mr. Gogarty was to make a contribution.

11-05 Mr. Michael Bailey stated that on the day of the meeting, Mr. Gogarty drove to the Bovale building site at Carlton Court, Swords, where they met and they then travelled a short distance from the building site to Mr. Burke's home. Mr. Tom Bailey stated that he was present at Carlton Court when Mr. Gogarty arrived, and he confirmed that Mr. Gogarty, and Mr. Michael Bailey, left for Mr. Burke's house from Carlton Court. Mr. Michael Bailey said that he was surprised by the amount of the donation. He said that he had not asked Mr. Gogarty, at any time, what the amount of the intended donation was, and after the donation was made he did not inquire from him as to why he had made such a large donation. At the conclusion of their brief meeting with Mr. Burke, Mr. Bailey said that he drove Mr. Gogarty back to Carlton Court.

THE INDIVIDUALS

11-06 The Tribunal examined the apparent relationship between the parties in June 1989 in an effort to establish what was the probable explanation for the payment of JMSE monies to Mr. Burke.

Mr. James Gogarty

11-07 Mr. Gogarty had no known political preferences. He was not a member of any political party. He was not resident in Mr. Burke's constituency, he had never made a political payment to Mr. Burke at any time prior to 1989.

Mr. Michael Bailey

11-08 Mr. Bailey's relationship with Mr. Gogarty was purely commercial. On his account of events they had never discussed politics, save on the occasion when he was asked to nominate a suitable recipient for a political donation by JMSE. He was a member of Fianna Fáil, and had made modest contributions to constituency events hosted in Mr. Burke's constituency, but he never made a personal donation to him. He was not a fundraiser for Mr. Burke in the 1989 General Election campaign.

Mr. Ray Burke

11-09 Mr. Burke was the outgoing Minister for Industry and Commerce, and also the Fianna Fáil T.D. for the Constituency of Dublin North, a position which he had held since 1973. He had no business dealings with JMSE, or the Murphy companies. He did not know Mr. Gogarty, he had limited knowledge only of Mr. Michael Bailey, which was based on the fact that Mr. Bailey was working in the Swords area at the time, and was known to have made some small contribution to Fianna Fáil fundraising events within the constituency.

The Murphy Interests¹

11-10 The Murphy family, and their Companies, had not been contributors of any significant amounts to any political party in Ireland at any time prior to June 1989. They had no business, or other relationship, with Mr. Burke. Their relationship with Mr. Bailey was limited to the fact that he was the purchaser of their Forrest Road lands in 1988, and was actively negotiating to purchase their North Dublin lands in 1989. Their relationship with Mr. Gogarty was that he was a long serving member of their staff, with whom an agreement in principal had been reached in May 1989 under which he was to retire from all positions within the company, and to provide his services as a consultant for 5 years thereafter, if so required.

The Tribunal considered that if the relationship between these parties was as set out above, it did not provide any apparent explanation as to why a substantial sum of Murphy company money should be paid to Mr. Burke.

**THE UNUSUAL FEATURES ATTACHING TO THE ACKNOWLEDGED RECEIPT BY
MR. BURKE OF JMSE FUNDS**

11-11 Irrespective of what the actual intention of the donor of the money was, the transaction in which Mr. Burke received these funds has the following unusual features:-

The amount of the donation.

11-12 In June 1989 £30,000 was an extraordinarily large donation for any individual or company to make to a politician. Mr. Burke acknowledged this fact.

The relationship between the donor and the recipient.

11-13 It was accepted by Mr. Burke, and by the Murphy interests, that no prior political donation was ever made to Mr. Burke by the Murphy companies or their directors, either on their own behalf, or on behalf of any of the Murphy companies. It was accepted by Mr. Burke that Mr. Gogarty had never made any prior political donation to him, and that he was unknown to him, prior to the payment in June 1989. The Tribunal considers it extraordinary that, despite the absence of any prior relationship whatsoever between the donor and the recipient, a very substantial sum in cash, was paid to Mr. Burke.

Response of the recipient.

11-14 It was agreed that the packaging in which the JMSE monies were contained was not opened by Mr. Burke at the meeting. The Tribunal has concluded that it was clear to all persons then present, that a substantial sum in cash was involved in the handover. Whether the JMSE money was contained in one or two envelopes, and whether it comprised £20,000 in cash, or £30,000 in cash, it must, of necessity, have been a bulky and obviously large donation. Mr. Michael Bailey, who was on his evidence a disinterested observer, noted the handover to Mr. Burke. He could conclude from the size of the packaging that a large donation in cash was being made to Mr. Burke. The Tribunal believes that the same conclusion was capable of being drawn by Mr. Burke at that time. While on his

¹ Appendix R.

account to the Tribunal he claimed that he was not to know of the exact amount of the donation until later that day, when he opened the envelope, the Tribunal has concluded that it must have been apparent to Mr. Burke at the time of the receipt of the package, or packages, that he was being given a substantial sum in cash. The Tribunal considers it extraordinary that, if his version of what took place is true, Mr. Burke did not take immediate steps to establish from the donor the amount of the donation, the reason for its being in cash, and the reason why he had been selected as the recipient for such a large sum at that time.

The absence of an appropriate acknowledgement by Mr. Burke for the payment of £30,000.

11-15 Mr. Burke states that he expressed thanks orally to the donor at the time of the receipt of the donation. He said he was unaware at the time of the enormity of the payment. A substantial payment of this nature ought to have earned an effusive expression of appreciation, and gratitude, from the recipient. None such was offered to Mr. Gogarty in the account of events given by Mr. Burke, or Mr. Bailey. The Tribunal believes that the reaction of any person, who had discovered to his surprise, that he was the recipient of a £30,000 donation in 1989, would have been to contact the donors to specifically thank them for this donation, particularly where only an oral acknowledgement of the donation had been made at the time of the handover. The Tribunal concludes that, it is unusual that, once Mr. Burke discovered the enormity of the donation, he did not contact either Mr. Gogarty, or JMSE, to express his gratitude for this generosity.

The failure to account for the payment.

11-16 Mr. Burke did not issue a receipt to the donor at the time of the handover, nor did he subsequently provide any written acknowledgement. He did not disclose the fact that he had received this substantial donation to any person in his political organisation at local constituency level, or at Party level. The tribunal considers it unusual that Mr. Burke failed to disclose the fact of the payment to any person connected with the finances of his political campaign if he believed that the payment had been made to him for political purposes.

The expenditure of the money.

11-17 Mr. Burke was not in a position to produce any evidence to the Tribunal to show that any portion of this particular donation was expended for a political purpose. He concluded from sight of the JMSE financial records provided to him by the Tribunal that the £10,000 cheque element of the payment had been lodged to an account of his. The account referred to by Mr. Burke was an account in the joint names of himself and his wife which was apparently opened by the lodgement of this cheque. There was no evidence that the sum from that account was spent in that election campaign, or at any later stage, for political purposes.

The absence of any subsequent request for funds by Mr. Burke.

11-18 Mr. Burke acknowledged that he never again made contact with either Mr. Gogarty or JMSE to seek their support in any of the election campaigns which followed the 1989 campaign. The Tribunal considers that Mr. Burke could hardly have forgotten the apparent generosity of JMSE in 1989, and that his failure to seek further donations from them was not satisfactorily explained.

Chapter 12

THE ACCOUNTING AND AUDITING PROCEDURES REGARDING THE JMSE FUNDS PAID TO MR. BURKE

MR. TIM O'KEEFFE'S INVOLVEMENT IN THE ASSEMBLY OF FUNDS PAID TO MR. BURKE

12-01 In 1988, Mr. O'Keeffe was a recently qualified Accountant in the firm of Copsey Murray & Co. He was appointed Financial Controller of JMSE and held that position until he was replaced by Mr. John Maher in September 1989. He recalls attending the AIB Branch at Talbot Street, Dublin, in June 1989 to collect a sum of £20,000 in cash. He believes that he was driven to the bank by Mr. Frank Reynolds, who waited in the car while the £20,000 was counted out to him by a bank official. He then returned with Mr. Reynolds to the JMSE offices, where he said he handed over the £20,000 cash to Mr. Gogarty.

MR. FRANK REYNOLD'S INVOLVEMENT IN THE ASSEMBLY OF FUNDS PAID TO MR. BURKE

12-02 Mr. Frank Reynolds was Managing Director of JMSE and had no particular recollection of driving Mr. O'Keeffe to the Bank in June 1989, but acknowledged that he did so from time to time. He was not aware that Mr. O'Keeffe had collected £20,000 in cash in the bank on the 8th June 1989, and says that no discussion between himself and Mr. O'Keeffe took place regarding any such sum. He had no special recollection of counter-signing a cheque for £10,000 at Mr. Gogarty's request.

THE ACCOUNTANCY TREATMENT OF THE TRANSACTIONS RELATED TO THE PAYMENT OF THE £30,000 OF JMSE FUNDS TO MR. RAY BURKE IN JUNE 1989

12-03 The Tribunal sought to establish how the payment had been accounted for, and found that none of the documents, prepared by the accountancy personnel, dealing with the funds used to pay Mr. Burke £30,000 record the fact that the money was paid to him. None of the documents prepared by the accountancy staff record that any political donation of £30,000 was made by any Murphy company in the year 1989. The fact that £30,000 was expended by JMSE in June 1989 is evidenced by the monthly bank statement on the JMSE Current Account at AIB, Talbot Street, Dublin.

12-04 The explanation offered to the Tribunal by the Murphy interests for the absence of any record of the monies being paid to Mr. Burke was that no-one, other than Mr. Gogarty, knew the identity of the recipient of the funds, and no one, other than Mr. Copsey, knew that any political donation was to be made by Mr. Gogarty. The Tribunal has reviewed all of the documents generated in the course of the recording of the transaction and the evidence of those who prepared the entries.

JMSE RECORDS

12-05 The documentary evidence available to the Tribunal commences with the cheque stubs for two cheques drawn sequentially on the JMSE account at AIB, Talbot Street, Dublin, both dated the 8th June 1989. These cheque stubs record the amounts of £20,000 and £10,000 respectively with the words, "re; Grafton cash" on each stub – thus indicating that these cheque payments by JMSE were made to, or on behalf of, Grafton². The JMSE cheque payment journal completed by the in-house accountancy staff in JMSE for the month of June 1989, records the two cheque payments as having been made on the 8th June 1989, and attributed them to "Grafton Construction". The AIB bank statement for the month of June 1989 records that the cheques for £20,000 and £10,000 had been debited to the company's account in June 1989. A nominal ledger entry was prepared by the accountants showing that the expenditure of £30,000 incurred by the cheques for £20,000 and £10,000 respectively in June 1989 was re-imbursed by a £30,000 payment from Grafton some days later.

² See Appendix Q

McARDLE AND CO. RECORDS

12-06 The apportionment account prepared by Mr. McArdle, solicitor, in relation to the proceeds of the sale of the Forrest Road lands, records that on the 13th June 1989 £30,000 was paid from the funds of Grafton to JMSE. The correspondence from Mr. McArdle to JMSE, in June 1989, indicates that a £30,000 cheque drawn on ICC Bank was being forwarded to “Jim” in response to Mr. Copsey’s telephone request for £30,000 made on the 8th June 1989 and that “Jim” (Mr. Gogarty) had responded that he did not need it. Thereupon Mr. McArdle sought further instructions from Mr. Copsey who then instructed Mr. McArdle to send it to Mr. O’Keeffe at JMSE.

GRAFTON RECORDS

12-07 Grafton did not write its own cheque to re-imburse JMSE. The payment was made from Mr. McArdle’s Solicitor/Client account at ICC Bank. Accordingly there was no independent Grafton-generated record of the transaction – it was recorded in Mr. McArdle’s Grafton file and his apportionment account was in turn enclosed in the Grafton financial file maintained at JMSE premises at Shanowen Road. Since the accounts of Grafton do not record the receipt by Grafton of the proceeds of either of the cheques for £20,000 or £10,000 drawn upon the JMSE account which are attributed in JMSE’s cheque journal to them, it is therefore apparent from the available records that JMSE paid some third party, or parties, the cheques or their proceeds on behalf of Grafton and that this expenditure was reimbursed within days to JMSE by Grafton through the cheque for £30,000 drawn on the Solicitor/Client Account of Mr. McArdle at ICC Bank.

THE ACCOUNTING REQUIREMENT CREATED BY THE EXPENDITURE OF JMSE FUNDS AND THE REIMBURSEMENT OF THE EXPENDITURE FROM THE FUNDS OF GRAFTON

12-08 In the accounts of JMSE, it was sufficient to record the mechanics of the transactions without necessarily recording the nature of the transactions as the role of JMSE was as facilitator only for Grafton, a sister company in the Lajos Holdings Limited group. Since the payment out by JMSE of cheques for £20,000 and £10,000 on the 8th June 1989 was reimbursed in full on the 13th June 1989, it did not involve any expenditure of JMSE funds which would have to be reflected in the company’s annual accounts. It was sufficient to prepare a nominal ledger for the JMSE monthly accounts, recording the expenditure and reimbursement of this sum. Such nominal ledger was prepared by the in-house JMSE accounting staff. (**Appendix S**)

12-09 The accounting requirement in relation to Grafton’s account was different, it had made a payment out of £30,000 to reimburse JMSE, which would have to be explained in its accounts. Unlike JMSE, it had not been reimbursed this sum from any other company within the Murphy Group. Grafton was a landowning company which was engaged in a limited number of financial transactions in any one year. The accountancy functions for Grafton were carried out by the same office staff who performed the accountancy functions for JMSE. Unlike JMSE’s accounts, it was sufficient for Grafton’s purposes to prepare annual accounts as opposed to the various weekly, monthly and quarterly accounting exercises involved in JMSE’s business activities. It was nonetheless important that all expenditure by the company would be properly vouched and accounted for.

12-10 In February 1989, Grafton, and its sister company Reliable, were paid the outstanding balance of the £1.45m sale price of the Forrest Road lands which had been sold to Mr. Michael Bailey. Much of Grafton’s actual expenditure for the years 1989 and 1990 was doubly accounted for because these cash assets of Grafton were held on deposit in the Solicitor/Client account of Mr. McArdle at ICC Bank. Any funds that were withdrawn from this account were recorded by McArdle & Co. independently of any internal accounting by JMSE/Grafton’s accountants. McArdle & Co. accounted to Grafton for the fund which had passed through its client account, and this included the £30,000 which had been paid by Grafton to JMSE on the 13th June 1989 by an ICC cheque requested by Mr. McArdle on the 8th June 1989.

THE GRAFTON ACCOUNTS FOR THE YEAR ENDED THE 31ST MAY 1990

12-11 The annual accounts of Grafton were prepared by Mr. Bates, the Auditor of the Irish Murphy companies, based upon the financial records and information provided to him by the JMSE accounting staff. The internal accountancy staff in JMSE retained the relevant financial information, and supporting documentation, which was generated in the course of the financial year in anticipation of the ultimate preparation of the annual accounts by Mr. Bates. Mr. Bates was familiar with the Grafton accounts, having prepared this company’s accounts for some years previously.

12-12 The various Murphy land-owning companies in Ireland had carried out limited financial activities in the course of the financial year ended the 31st May 1990. The extent of those activities was such that the financial records for three companies namely Grafton, Reliable and Wexburn, were contained within one lever arch file. This file was discovered to the Tribunal; it was internally divided so as to separate the documents between the three companies involved, and was further divided so as to separate the individual company's receipts from expenditure.

12-13 In the section of the file relating to Grafton, headed "General", there were a small number of original documents, which record or explain certain financial transactions engaged in by the Company during the financial year commencing the 1st June 1989 and ending the 31st May 1990. In this section of the file was to be found the apportionment account of McArdle & Co., (**Appendix T**) which confirms, inter alia, the payment of £30,000 from Grafton to JMSE on the 13th June 1989. Mr. McArdle's accounting obligation to his client ceased with the preparation of this apportionment account. He was not obliged to inquire as to whether this payment was ultimately utilised for any particular purpose, although he may have been aware of such purpose. Those preparing the annual accounts for Grafton had the obligation to account for this expenditure.

12-14 Until the 14th August 1990, Copsey Murray & Co. had been providing accountancy services to JMSE. In June 1989 Mr. O'Keeffe was the Financial Controller and in-house accountant having been seconded from Copsey Murray & Co. to work for the Murphy companies. He reported directly to Mr. Copsey, the Financial Director. The Tribunal is satisfied that it would have been Mr. O'Keeffe's responsibility to account for the Grafton expenditure of the £30,000 to JMSE in June 1989.

12-15 Mr. O'Keeffe's role as in-house accountant ceased with the appointment of Mr. John Maher in September 1989, but he continued to provide his accountancy services to the Murphy companies until the 14th August 1990. In 1990, at the request of Mr. Copsey, he prepared a document headed "Grafton/Reliable Cash Balance", in which he sought to establish the balance of the funds which would be available to Grafton from the proceeds of sale of the Forrest Road lands after deduction of all outlay and expenses. This document was contained within the general section of the Grafton file to year-ending 31st May 1990, prepared for the Auditor (**Appendix U**). This document set out the relevant figures, involving both accretions and deductions, under various headings, which were in turn subdivided into categories in which the individual items were separately listed. The accretions shown therein comprised; a deposit, the balance of the purchase money, and a draft received in respect of the sale of Forrest Road land. The deductions shown were in respect of the costs, disbursements, purchase of land and repayment of inter-company loans and tax.

12-16 Within the heading "Costs" there were two sub headings, "Planning Permission" and "Fees". Immediately above the category "Fees" there was one blank line effectively dividing these two categories from one another. There is only one recorded expenditure of £30,000 appearing on this document and it is entered in the section headed "Costs".

12-17 Mr. Copsey is an experienced accountant who has for many years dealt with financial documentation prepared by his colleague, Mr. O'Keeffe. Mr. Copsey confirmed in the course of his evidence that the £30,000 entry shown on the Grafton/Reliable Cash Balance document was a cost referable to planning permission. In the course of his being questioned on this document, he did not suggest that the £30,000 reference appearing therein was anything other than a reference attributing the £30,000 payment to planning permission.

12-18 The author of the document, Mr. O'Keeffe, when called to give evidence some days later disputed that the reference in the document attributed the expenditure to "planning permission". His evidence was that the planning permission entry referred solely to the figure appearing on the same line, that is £80,258.00 and did not apply to the £30,000 entry appearing on the line below. He maintained that he would have inserted letters "DO" (meaning Ditto), beneath the words "planning permission" referred to in the line above had he intended to record that both entries referred to expenditure in relation to planning permission. He sought to distinguish the "planning permission" reference on the first line from the entry on the immediately following line by pointing out that a colon does not follow the words "planning permission", and, therefore, the reference is to one item only – namely the £80,258.00 entry recorded on that same line.

MR. ROGER COPSEY'S CONSIDERATION OF THE GRAFTON/RELIABLE CASH BALANCE DOCUMENT

12-19 Mr. Copsey considered this document in his capacity as Mr. Murphy Snr.'s Financial Advisor. He did so in order to be in a position to advise Mr. Murphy Snr. as to the net balance of funds available to him from the proceeds of sale of the Forrest Road lands. It is inherently improbable that, in considering this document, Mr. Copsey would not have carefully considered the individual items which led to the bottom line figure. The Tribunal rejects Mr. Copsey's evidence that he was only interested in the bottom line figure, and that he was not concerned with the financial calculations which led to it.

12-20 When Mr. Copsy first considered this document a relatively short period of time had elapsed from the date of his involvement in seeking the £30,000 from Mr. McArdle as a claimed political donation. Mr. Copsy was therefore aware that a £30,000 payment had been made in June 1989, and that it had been funded from the Grafton/Reliable deposit at ICC Bank which was the subject of the analysis in the Cash Balance document. It should, therefore, have appeared as an item of expenditure in the document he was considering. In considering this document he only had to consider fourteen items of expenditure, of which only one referred to a sum of £30,000. The Grafton/Reliable Cash Balance document prepared by Mr. O’Keeffe contained no reference whatsoever to any expenditure on a political donation having been funded from the proceeds of the sale of the Forrest Road lands on deposit at ICC Bank. The correct designation of the £30,000 payment was necessary to ensure that the bottom line figure was correct. If an expenditure on a political donation were incorrectly entered as a tax deductible expense, the bottom line figure would be wrong.

12-21 If Mr. Copsy’s version of events were true it ought to have been readily apparent to him at that time that the bottom-line figure was incorrect, because Mr. O’Keeffe had wrongly attributed a payment which Mr. Copsy knew to be a £30,000 political donation as a payment for planning permission which was a tax deductible expense, whereas Mr. Copsy knew the payment was made for a non tax deductible expense. Even if Mr. Copsy did not check whether the correct tax status had been allowed for by Mr. O’Keeffe it was clear from the document that Mr. O’Keeffe had not made any reference to the expense being a political donation, but had apparently treated the payment as one related to planning permission. On his version Mr. Copsy knew that £30,000 had been expended as political donation, yet there was no record of any such expense in the Cash Balance document. It ought to have been apparent to him at that time that there was a manifest error in Mr. O’Keeffe’s document.

12-22 Although this document was not specifically prepared for the purpose of the annual audit, it was one which would find itself in the audit file of Grafton documents in the normal course. If there was any mistake, ambiguity, or lack of clarity in this document it was incumbent upon Mr. Copsy to correct the entry so as to reflect the true position. Mr. Copsy could not know, at the time of the consideration of the document in 1990, that Mr. O’Keeffe was subsequently to clarify the “planning permission” reference in 1999 so as to exclude the £30,000 entry from that category, and to claim that it stood alone as unattributed expenditure. Mr. Copsy made no attempt in 1989 or 1990 to remedy what to him must have been an obvious error in the face of this document (if such in fact was the case).

12-23 Mr. Copsy’s evidence on this issue was that he believed that he had instructed Mr. O’Keeffe to treat the matter as an inter-company loan between Grafton and JMSE. If that was the limit of his instructions it singularly failed to address the question of how the payment was to be accounted for. With that limited information Mr. O’Keeffe could not account for the expenditure, because he had not been given the necessary information to enable him to do so. The Tribunal believes that it is highly improbable that Mr. Copsy would have given such an ineffectual instruction to his subordinate, or that Mr. O’Keeffe would not have sought meaningful instructions from his superior if such a meaningless instruction was given. Upon ceasing to act for the Murphy companies in August 1990, Mr. Copsy must have been aware of the fact that the £30,000 political donation had not been recorded by him in any of the financial records of Grafton or JMSE. He must have known that he personally would have to advise Mr. O’Keeffe’s successor, the in-house accountant Mr. John Maher, of the nature and purpose of this expenditure so that it could be properly accounted for in the companies’ books of account. However, if Mr. Copsy’s evidence is to be accepted, it follows that he took no steps whatsoever to ensure that this substantial cash payment of £30,000 was accounted for in any way, either at the time of its making, or for the fourteen months thereafter, during which time he was Financial Director of the Company.

12-24 The Tribunal believes that this is improbable and concludes that it is likely that Mr. Copsy was, at all times, aware of how the expenditure had been treated in the books of account of the companies, JMSE and Grafton. The Tribunal is satisfied that he would not have left the sum of £30,000 unaccounted for without advising the directors of that fact.

THE INVOLVEMENT OF MR. O’KEEFFE IN ACCOUNTING FOR THE £30,000 EXPENDED IN JUNE AND REIMBURSED BY GRAFTON

12-25 In his evidence Mr. O’Keeffe said that he assumed that he was given instructions by Mr. Copsy as to how to account for the transaction. The Tribunal would have expected, given its unique nature, that Mr. O’Keeffe would have been in a position to give evidence as to exactly what he was told by Mr. Copsy at that time. However, he was not in a position to do so. On Mr. O’Keeffe’s recollection of events, he was not given any explanation from either the Managing Director, Mr. Frank Reynolds, or from the Chairman of the Company, Mr. James Gogarty, as to why the money was assembled. He merely collected £20,000 in cash at the bank as instructed, and handed it over to Mr. Gogarty on his return to the JMSE offices on the 8th June 1989. Mr. O’Keeffe was a trained Accountant, he was the Financial Controller of the company from whose bank account this money was being taken. He knew that this expenditure would have to be accounted for by him both in the books of JMSE and its sister company, Grafton..

12-26 The Tribunal does not consider it credible that Mr. O’Keeffe would have accepted an instruction from Mr. Copsey to treat the transaction as an inter-company loan in the books of JMSE as sufficient to account for this expenditure. The manner in which the payment was to be treated did not afford an explanation that was sufficient to identify the purpose for which the money was spent. Hence, it could not be accounted for. The Grafton financial file assembled over the course of the financial year from June 1989 to May 1990 would in all probability have been complete, or at least substantially complete, before Mr. O’Keeffe left the employment of JMSE on the 14th August 1990.

12-27 The Tribunal considers that it must have been obvious to Mr. O’Keeffe that there was a serious omission in the documentation available to the accountant/auditor for the preparation of the year-end accounts for the year ended the 31st May 1990, as a very large sum, including the £20,000 in cash which he said he handed to Mr. Gogarty, was unaccounted for. The Tribunal considers it highly improbable that Mr. O’Keeffe would have allowed this situation to continue, and that he would not have taken steps to address what were obvious omissions in the proper accounting for a substantial cash withdrawal, during his tenure as Financial Controller, with which he was clearly identified. If the account given by Mr. O’Keeffe was true this would have constituted an extraordinary omission on Mr. O’Keeffe’s part, for which there is no reasonable explanation.

THE AUDITORS’ TREATMENT OF THE £30,000 EXPENDITURE OF GRAFTON FUNDS IN THE ACCOUNTS OF GRAFTON FOR YEAR ENDED THE 31ST MAY 1990

12-28 In the latter part of 1990, it fell to Mr. John Bates, the Auditor, to prepare the annual accounts for the Murphy land-owning companies. Prior to so doing, he had the benefit of conducting an audit upon the more complex accounts of JMSE. He had noted that there was a nominal ledger prepared which showed an inter-company loan as between JMSE and Grafton in June 1989 and involving the expenditure of £20,000 and £10,000 by way of two cheques from JMSE, which sums were reimbursed by a £30,000 cheque payment from Grafton to JMSE on the 13th June 1989.

12-29 In preparing the accounts for Grafton, Mr. Bates sought to establish to what this £30,000 expenditure related. In his evidence he stated that, in performing the audit, he had been unable to identify the purpose for which the expenditure had been incurred as the expenditure was un-vouched in the company’s financial records considered by him. He stated that, in 1990, he made inquiries of the JMSE in-house accounting staff to establish what the £30,000 was expended for, but without success. He specifically recalled asking Mr. John Maher, the in-house accountant, and Mr. Frank Reynolds, the Managing Director, but neither could assist him.

12-30 Mr. Bates was aware that Copsey Murray & Co.’s involvement as accountants to the companies had ceased in August 1990, and that Mr. Copsey and Mr. O’Keeffe were no longer employed by the companies. He said he felt that there was a certain coolness in the relationship between JMSE and the members of Copsey Murray since their removal from office. Accordingly, he said he did not pursue the matter with them other than to make a telephone inquiry to the office of Copsey Murray. He was aware that Mr. O’Keeffe had been seconded from Copsey Murray to the accounts department of JMSE, and that he was JMSE’s in-house accountant in June 1989 – the relevant period in which the unaccounted for expenditure had been incurred. However, he claimed to be unable to make personal telephone contact with either Mr. Roger Copsey or Mr. Tim O’Keeffe when he was preparing the accounts in 1990. Mr. Bates believed that he did receive information by telephone from an unknown member of staff in Copsey Murray & Co. which suggested that the payments might have been a finder’s fee or auctioneers fee, but he said that he rejected this explanation in the absence of any supporting documentation.

12-31 Mr. Bates gave evidence that he concluded that the un-vouched £30,000 expenditure must have been expended for a purpose which had enhanced the value of the land owned by the company, and he so treated the expenditure in the financial accounts of Grafton which were presented by him to the company’s directors for approval and signature in February 1990. In those accounts he added the £30,000 to the expenditure of £65,273 involved in acquiring additional lands, at Poppintree, so as to record the enhancement expenditure as £95,273 (**Appendix V**). Mr. Bates said that he was at all times conscious of the fact that he had received no explanation for the £30,000 expenditure from the directors or staff in JMSE or Grafton. He had seen no vouching documentation to identify the recipient or recipients of those funds. Consequently he said that, at the time, he told both of the directors, Mr. Murphy Jnr. and Mr. Reynolds, and also the in-house accountant, Mr. John Maher, that his audit inquiries to that date had revealed that there was an un-vouched expenditure of £30,000 in the Grafton accounts. He said that, notwithstanding the absence of any explanation or supporting documentation for this expenditure, the directors signed off on the accounts for the year ended the 31st May 1990.

THE AUDIT TRAIL AVAILABLE TO MR. BATES TO FOLLOW

12-32 Despite the fact that Mr. Bates said that his audit queries left him unable to account for the expenditure of £30,000, the Tribunal believes that there was a readily apparent audit trail which would, in all probability, have allowed him to identify the recipient of the un-vouched £30,000, had he chosen to follow it. Mr. Bates had the Grafton accounting file before him which contained Mr. McArdle's apportionment account showing that the £30,000 of Grafton money expended on the 13th June 1989 was attributed to JMSE. He knew, or could ascertain from the JMSE nominal ledger account, that the £30,000 expenditure by Grafton on the 13th June 1989, was to reimburse JMSE for the two cheques for £20,000 and £10,000 respectively, written on the 8th June 1989. He knew therefore that the bank account maintained by JMSE, at AIB Talbot Street, funded the expenditure which was un-vouched in the accounts of Grafton. The cheque payments journal maintained by JMSE for the month of June 1989 showed Grafton as the payee of the £20,000 cheque, number 011546, and the £10,000 cheque, number 011547, thus confirming that this expenditure by JMSE was stated to be in relation to Grafton. This journal was available to Mr. Bates.

12-33 Armed with this knowledge Mr. Bates could have checked the two cheque stubs, which were in the possession of JMSE, and the relevant bank statement for the month of June 1989, from which he could have readily established the following relevant information:

1. The £30,000 expenditure was sourced from the JMSE account at AIB, Talbot Street, by means of two cheques, the stubs for which referred to "8th June 1989 ..re Grafton cash"
2. The £20,000 cheque, number 011546, was debited to the JMSE account at AIB, Talbot Street, on the 8th June 1989 – the date upon which it was written, and was therefore, in all probability, exchanged for cash at that branch on that date.
3. Mr. Tim O'Keeffe was the person who had written out the cheque stubs and was therefore, in all probability, the Person who had completed the cheques.

12-34 With this information, Mr. Bates could have sought details from the Manager of AIB, Talbot Street, as to the circumstances in which the £20,000 cheque was negotiated at his branch on the 8th June 1989. He could have sought the return of the original cheques or sight of copies of the cheques from the Bank, perusal of either would have allowed him to establish the identity of any payee shown on the cheque. He could have identified the cheque signatories to each cheque, the identity of any person who may have endorsed either of the cheques, and, possibly, the account into which the £10,000 cheque was lodged.

12-35 Copies of these cheques ought to have been readily available to Mr. Bates in 1991 as his inquiries were being made within two years of the date upon which the cheques had been written. The cheque stubs for these cheques were in the JMSE premises, where the Grafton documentation was also retained, pending audit. The cheque stubs ought to have been readily available to Mr. Bates in 1991, as they were relevant to the preparation of the financial year statements for JMSE for the same period. Had Mr. Bates viewed the cheques or copies, he would have been in a position to approach the payees if they were named thereon. Even if the cheques were made out to cash, he would have been in a position to approach the signatories to the cheques to obtain details from them of the purposes for which the cheques were written. Even if Mr. Gogarty were a signatory on both cheques, the cheques required two directors' signatures and, consequently, if he were reluctant to approach Mr. Gogarty directly he could have approached the other signatory. Even if the cheques showed the payees as "cash", it should have been possible for the bank to trace the account into which the £10,000 cheque was lodged.

12-36 Inquiries of the Manager of AIB, Talbot Street, would in all probability have confirmed that the £20,000 was negotiated for cash at that bank on the 8th June 1989. Given the relatively unusual nature of the transaction in the context of JMSE's accounts, it is probable that some member of staff would have recalled paying £20,000 in cash to Mr. O'Keeffe on that date. Even if such a staff member could not be identified, the bank would surely have been in a position to produce a receipt or acknowledgement signed by the recipient of these funds, had an inquiry been made of them in 1991. However, even if it were the case that the bank could not assist in identifying the recipient of the £20,000 in cash or of the £10,000 cheque, it ought to have been abundantly clear to Mr. Bates that Mr. Tim O'Keeffe could assist him in his quest for information. The events surrounding the writing of these cheques and their presentation ought to have been fresh in the mind of all parties who dealt with the cheques at the time when Mr. Bates was carrying out his audit at the end of 1990 and the beginning of 1991.

12-37 The Tribunal considers it extraordinary that Mr. Bates did not follow the obvious audit trail to its conclusion. The Tribunal considers it inconceivable that any auditor concerned with the tracking down of this un-vouched expenditure of £30,000 would not have followed the basic steps in endeavouring to pursue the money trail. The Tribunal considers it equally improbable that the auditor would have reported to the directors of the company that he had been unable to trace this cash expenditure when he had not, in fact, even sought the return of the paid cheques by which he knew the expenditure was incurred.

THE MATERIAL ACTUALLY AVAILABLE FOR CONSIDERATION BY THE AUDITOR IN THE GRAFTON FILE FOR YEAR ENDED THE 31ST MAY 1990

12-38 Mr. Bates had before him the file that contained all the financial records for Grafton to year ended the 31st May 1990. This file contained the apportionment account prepared by Mr. Denis McArdle, from which it was clear that the un-vouched £30,000 had passed through Mr. McArdle's account. Yet there was no evidence that Mr. Bates inquired of Mr. McArdle as to whether he knew what this expenditure related to. Had Mr. Bates made the inquiry in 1990/1991, Mr. McArdle would in all probability have been in a position to inform him that he had been asked by Mr. Copsey on the 8th June 1989 for £30,000 - £20,000 of which was to be in cash, and the balance a cheque, for the purpose of making a political donation. Mr. McArdle could have informed him that this £30,000 was sent by him to JMSE, on the 13th June 1989, and subsequently recorded in his apportionment account as a payment to JMSE. The Grafton/Reliable Cash Balance document in the handwriting of Mr. O'Keeffe which appeared on its face to attribute a £30,000 expenditure to "planning permission", was in the file. If this document was considered in conjunction with Mr. McArdle's apportionment account, it would be clear that the £30,000 expenditure which was incurred on the 13th June 1989 and shown on the apportionment account as "To JMSE" was probably the £30,000 shown as the cost incurred in relation to planning permission.

12-39 The Tribunal considers it inconceivable that, having considered Mr. O'Keeffe's Cash Balance document, Mr. Bates could have concluded that the reference to £30,000 in the Cash Balance document meant anything other than that the £30,000 expenditure for which he was seeking an explanation was attributed in this document as having been made in connection with planning permission. Whilst it is true that there was no back-up documentation in the Grafton file to vouch that the £30,000 had in fact been paid in respect of planning permission, there was no other documentation on file which suggested that the £30,000 had been expended for any purpose other than for planning permission.

12-40 In these circumstances the Tribunal considers it inconceivable that Mr. Bates would have chosen to reject or disregard the apparent attribution of £30,000 to "planning permission" and substitute his own surmise when preparing his final accounts. Whilst Mr. Bates in evidence initially stated that he believed that he had not considered the Grafton/Reliable Cash Balance document in preparing his accounts, he later conceded that he had in fact done so, and a copy of the document was found in his audit working papers which confirms this to be the case. At a minimum it must have been clear to Mr. Bates that Mr. O'Keeffe, the identifiable author of the Grafton/Reliable Cash Balance document, had information which had apparently caused him to conclude that the transaction giving rise to the £30,000 expenditure related to planning permission.

12-41 In these circumstances the Tribunal considers that it is improbable that Mr. Bates would have gone to the directors to say that he could not identify how this sum was expended. If Mr. Bates was genuinely seeking an explanation as to how the £30,000 was expended, the Tribunal considers that the minimum steps he would have taken would have been to send a copy of the Grafton/Reliable Cash Balance document to Mr. O'Keeffe to seek his explanation for his apparent attribution of the expenditure to planning permission. He did not do so.

12-42 In his working papers for the accounts for year ended the 31st May 1990, Mr. Bates dealt with the un-vouched expenditure of £30,000. He entered the expenditure under the journal heading "Audit Adjustments". It is there recorded by him as two separate payments, one of £20,000 and one of £10,000, identified as "enhancement expenditure". (**Appendix W**). Under the heading, "Development Property", he recorded two items of enhancement expenditure, one of £65,273 related to land at Poppintree, and one of £30,000 headed simply "Cash". (**Appendix X**). The only document in the Grafton file which would have allowed him to reach the conclusion that the £30,000 expenditure had been expended in enhancing the value of the land was the Grafton/Reliable Cash Balance document which had been prepared by Mr. O'Keeffe and which, on its face, showed a payment of £30,000 attributed to planning permission. (**Appendix U**).

12-43 Mr. Bates in his evidence denied that this was the basis for his attribution. His evidence was that he attributed the expenditure to “Land Enhancement” because the company was primarily a land-owning company and, consequently, the expenditure was probably incurred in enhancing the value of the company’s land holding. However, only these expenses incurred in the enhancement of the value of the company’s property portfolio could properly be so described. Other than the purchase of the Poppintree lands recorded in the Cash Balance document, there was no documentation in the file for the year ended the 31st May 1990 to suggest that any further lands had been acquired that year. It was clear from the accounts file that Grafton/Reliable had sold their major land holding at Forrest Road, Swords, so that there was a translation of the companies’ assets from land to cash, which in turn was placed on deposit with ICC bank from February 1989 onwards.

12-44 In making the attribution “cash-land enhancement”, on the basis upon which he claims to have done, Mr. Bates would have had to have ruled out the possibility that the un-vouched expenditure may have been incurred under any one of the other headings of expense under which the company had in fact incurred expenditure during that year. The other documents which he had on file showed that, notwithstanding that Grafton was a land-owning company, it had nonetheless expended over £100,000 that year on expenses which did not enhance the value of the company’s property portfolio. Having considered the documents in the Grafton file, Mr. Bates had prepared accounts which showed that the expenditure of over £100,000 had been incurred under such headings as legal fees, professional fees, directors fees, travelling expenses, etc. None of these enhanced the value of the land and, consequently, he had no valid basis for assuming that the un-vouched expenditure had to be reflected as an enhancement of the company’s land.

12-45 The only documents in the Grafton file which recorded the expenditure of a specific amount of £30,000 by Grafton were the apportionment of Mr. McArdle & Co. Solicitors, which showed that £30,000 was paid to JMSE, and the Grafton/Reliable Cash Balance document, which showed that £30,000 was attributed to planning permission. If Mr. Bates accepted these documents at face value, he could legitimately attribute the expenditure as “cash-land enhancement”, albeit that he would not be in a position to produce a voucher from the recipient of the money to prove that this expenditure was incurred for that purpose.

12-46 The Tribunal rejects Mr. Bates evidence that his attribution of the £30,000 expenditure to land enhancement was based upon a belief that expenditure incurred by a land-owning company, which could not be vouched otherwise, must have enhanced the value of the land.

Chapter 15

The Participation Proposal

THE PARTICIPATION PROPOSAL CONTAINED IN MR. MICHAEL BAILEY'S LETTER OF THE 8TH JUNE 1989

15-01 Mr. Michael Bailey's participation proposal involved Lots 1-5 inclusive of the 6 lots of land that were for sale by the Murphy companies at that time. Mr. Bailey calculated the acreage of the 5 lots at 717 acres, and proposed he would be given a 50% interest in these lands in return for his participation. The "participation" envisaged by him involved him expending up to £150,000 on professional fees etc, in respect of Lots 1,2 and 3 and a similar expenditure in respect of Lots 4 and 5. It envisaged that he would give exclusively of his time and efforts over the 2 years involved in Lots 1, 2 and 3 and the 3 years involved in Lots 4 and 5. In justifying his entitlement to share equally in this substantial land holding, Mr. Bailey's letter expressly referred to the fact that the steps to be taken on the way to procuring a buildable planning permission and Building Bye-Law approval are "notoriously difficult, time consuming and expensive".

15-02 On its face the reward which Mr. Michael Bailey expected to receive for his efforts, and correspondingly the cost to the Murphys of the services he would provide, would appear to constitute a disproportionate reward for the efforts which would be required to achieve that end. In principle the Murphy companies could themselves have engaged professional planning advisers and other experts to process any application to alter the planning status of the lands at a fraction of the cost, which would be involved in agreeing to Mr. Bailey's proposal. His proposal envisaged their ceding 50% of the value of their lands to him.

15-03 While Mr. Michael Bailey was reluctant to put any value on any particular parcel of the 5 lots of land involved in the proposal, the Tribunal is satisfied that at a minimum a tenfold increase in the value of the lands would result from their being altered from agricultural land to buildable development land. In the same letter Mr. Bailey stated that he was prepared to pay £30,000 per acre for the lands in lot 6 in the event that he obtained planning permission, and the Tribunal notes that he had paid almost £60,000 per acre for the Forrest Road lands which he had bought in 1988 from the Murphy interests. Even taking the lower of these valuations the potential value of the Murphy lands, in the event that Mr. Bailey was successful in his endeavours, was £21.5 million of which he would receive £10.25 million.

THE ABANDONMENT OF THE PARTICIPATION PROPOSAL

15-04 There was litigation in the Isle of Man, between Mr. Conroy³ and the Murphy trust, in the course of which Mr. Conroy made a series of allegations of Revenue wrongdoing on Mr. Murphy Snr.'s part. If these allegations were true, and if the Revenue authorities pursued Mr. Murphy Snr. and succeeded in establishing the truth of these matters, there could have been very significant financial consequences for Mr. Murphy Snr. and the Murphy companies, which had for many years enjoyed favourable tax treatment through the use of offshore trusts.

15-05 Whilst Mr. Murphy Snr. in his evidence dismissed Mr. Conroy's allegations as the baseless accusations of a fantasist and of no concern to him, the Tribunal is satisfied that the fact of such allegations being made against him was a matter of concern to him, as evidenced by the lengths to which he went to ensure that all records of these allegations were destroyed once he had reached a satisfactory financial settlement with Mr. Conroy.

15-06 The Tribunal is satisfied that since 1988 Mr. Murphy Snr. had been engaged in a radical review of his business interests and land holdings both in Ireland and in England. The removal of Mr. Liam Conroy from office was followed by the resignation and/or removal of a sizeable number of managers and directors in the Murphy group. With the advice of his strategy committee Mr. Murphy Snr. was considering selling off, not only his Irish landholdings, but also the Murphy core companies in the U.K. In the end he sold off only the land-owning companies assets.

15-07 The Tribunal is satisfied that Mr. Murphy Snr. had been sorely disappointed by the manner in which his trust in Mr. Conroy had been misplaced, and that he had a reluctance to enter into any further commercial transactions in which he would be dependent upon the activities of others for the success of the scheme.

³ Acting Chief Executive of the Murphy companies from 1982 - 1988

15-08 The Tribunal is satisfied that it was for this reason that he decided not to proceed with a participation proposal with Mr. Michael Bailey who was a relatively unknown quantity.

15-09 The Tribunal is satisfied that the disputes which arose at the JMSE board meeting of the 3rd July 1989 with Mr. Gogarty, served to further illustrate to Mr. Murphy Snr. the difficulties which can arise even between former close associates. Despite the advices of Mr. Roger Copey, and the request of Mr. Murphy Snr., Mr. Gogarty was refusing to sign off on the 1988 accounts of JMSE, and was creating difficulties between the Irish and English members of the board. The Tribunal is satisfied that the attraction of a straight sale of the lands, rather than involvement in a protracted scheme which was dependent on the activities of others, tilted the balance in favour of Mr. Murphy Snr. deciding to sell the lands outright, and not to proceed with the participation proposal advanced by Mr. Michael Bailey.

Chapter 17

Co-Operation with the Tribunal

17-01 All parties from whom the Tribunal legitimately sought information had an obligation to provide such information truthfully and expeditiously. The provision of misleading information or the withholding of relevant information has the capacity to hinder and obstruct the Tribunal, and inevitably leads to delay. The conduct of a statutory public inquiry is a complex and costly exercise, and this Tribunal has endeavoured to carry out its statutory functions with expedition and as economically as possible, so as to comply with the express wishes of the Oireachtas contained within its Terms of Reference.

17-02 This Tribunal continues its work more than four and a half years after its inception, not only because of the multiplicity and complexity of matters which it is obliged to investigate under its Terms of Reference, but also because of the failure of persons who have been required to provide information to the Tribunal, either documentary or otherwise, to provide such information expeditiously or, in some instances, at all.

17-03 Any person, duly summoned to do so, who gives evidence to the Tribunal which is material to its inquiry, which that person wilfully knows to be false or does not believe to be true or who by act or omission obstructs or hinders a Tribunal in the performance of its functions, commits a criminal offence.

THE BRENNAN AND MCGOWAN MODULE

Mr. John Caldwell

17-04 The Tribunal is satisfied that Mr. Caldwell, the legal adviser to Mr. Tom Brennan and to Brennan and McGowan related companies from the 1980's was in a position to provide information which could have assisted the Tribunal in establishing the nature and extent of Brennan and McGowan activities in the Channel Islands. The Tribunal is satisfied that Mr. Caldwell failed to co-operate with the Tribunal by:

- a) Failing to provide a proper Affidavit of Discovery in compliance with an Order for Discovery and Production made against him on the 4th April 2001.
- b) Failing to comply with an Order for Discovery made against him on the 10th August 2001.
- c) Failing to comply with a witness summons requiring his attendance at a public session of the Tribunal on the 27th September 2001.

Mr. Hugh Owens

17-05 Mr. Owens was an accountant and adviser to Messrs. Brennan and McGowan. The Tribunal is satisfied that he failed to co-operate with the Tribunal by failing to provide a full explanation of the schemes which he had devised for Messrs. Brennan and McGowan in relation to the land transactions with which they were involved with Mr. Finnegan and which resulted in funds being distributed in Jersey from which Mr. Burke received stg £60,000 in November 1984.

THE CENTURY MODULE

Mr. P. J. Mara

17-06 The Tribunal is satisfied that Mr. P.J. Mara failed to co-operate with the Tribunal by:

- a) Failing to provide the Tribunal with details of an account in the name of Pullman Limited, operated by him at Royal Bank of Scotland in the Isle of Man, when swearing his Affidavit of Discovery made pursuant to an Order of the Tribunal requiring him to discover, inter alia, any such account.

Chapter 18

Findings of the Tribunal in Relation to the Matters Raised in Clause A, Sub-Clauses 1, 2 And 3, of the Amended Terms of Reference of the Tribunal

18-01 Clause A of the amended Terms of Reference of the Tribunal relates to the six lots of land which were referred to in Mr. Michael Bailey's letter of the 8th June, 1989 to Mr. James Gogarty and which have been described earlier in this report as the "North Dublin lands".

18-02 The Tribunal has heard evidence in relation to the identification of the lands, the planning history of the lands and the identity of any member of the Oireachtas or Local Authorities involved with the lands. The details of the Tribunal's findings in relation thereto are set forth in the Appendix Y annexed to this report which is headed "Report into the matters covered by Clauses A1, A2 (a) to (c) inclusive, A3 (a) to (g) inclusive, and A3 (i), (ii) and (iv)".

18-03 Other than the members of Local Authorities and of the Oireachtas referred to in the report above (see Appendix Y), the Tribunal has not identified any other past or present member of either body who was involved in any of the matters set out in Clause A3 in respect of these lands.

18-04 The Tribunal's Report in this regard is an interim report and its pronouncements upon the matters referred to in Clauses A1 to 3 inclusive should not be regarded as either final or conclusive upon these issues. In relation to Clause A3 (iii) the Tribunal has deferred its report and may, in its reconstituted format, hear further evidence to complete this aspect of its report.

Chapter 19

Other Work of the Tribunal

19-01 At the outset, the Tribunal would like to take the earliest possible opportunity to express its gratitude to the members of the general public who provided much assistance to it both in providing documentation and in drawing matters to the attention of the Tribunal. The Tribunal is mandated under Clause A. 5 of its *Terms of Reference* as follows:

“In the event that the Tribunal in the course of its inquiries is made aware of any acts associated with the planning process which may in its opinion amount to corruption, or which involve attempts to influence by threats or deception or inducement or otherwise to compromise the disinterested performance of public duties, it shall report on such acts and should in particular make recommendations as to the effectiveness and improvement of existing legislation governing corruption in the light of its inquiries.”

19-02 In *Redmond v. Flood* [1999] 1 I.L.R.M. 241 at 255 Hamilton C.J. stated as follows:

“Its [*the Tribunal's*] powers are limited to the investigation of and reporting on acts associated with the planning process of which it becomes aware during the course of the inquiries authorised by paragraphs A1 to A4 of the terms of reference and which in its opinion amount to corruption or an attempt to compromise the disinterested performance of public duties.”

The Tribunal is also required to conduct its inquiries in accordance with Clause B. (I) of the Terms of Reference as amended. Clause B. (I) provides that the Tribunal is required to carry out such preliminary investigations in private as it thinks fit using all the powers conferred on it under the Acts, in order to determine whether sufficient evidence exists in relation to such matter to warrant proceeding to a full public inquiry.

19-03 In general the usual sequence of inquiry by the Tribunal is as follows:

1. Information is made available to the Tribunal.
2. The Tribunal determines whether the subject matter of the information falls within its Terms of Reference.
3. If the subject matter falls within its Terms of Reference the Tribunal, in the first instance, carries out inquiries in private to determine whether sufficient evidence exists to warrant proceeding to a full public inquiry.
4. At the conclusion of its inquiries in private the Tribunal makes its determination as to the sufficiency, or otherwise, of the evidence, and, depending on that determination, proceeds to a public inquiry or not as the case may be.

19-04 Following the establishment of the Tribunal, the Tribunal sought the assistance of the public who may have been in possession of information relevant to the work of the Tribunal. The Tribunal did so initially by placing advertisements in the national and local newspapers between the 15th and the 21st December 1997, requesting that “any person having information which may be relevant to the Terms of Reference should forward same in writing, in confidence, to the Registrar of the Tribunal.”

19-05 By Instrument dated the 15th July 1998, the Terms of Reference of the Tribunal were extended, following which a further advertisement was placed in the national, and a number of local newspapers, between the 26th and the 30th August 1998, again extending an invitation to the general body of the public to forward relevant information to the Tribunal.

19-06 Following the publication of these advertisements, the Tribunal received information in connection with one hundred and eighty-four matters. These matters were in the main, drawn to its attention by concerned members of the public. Where the Tribunal was furnished with a complaint it provided a copy of its Terms of Reference to the party who had drawn the matter to the attention of the Tribunal.

19-07 The submissions and complaints received by the Tribunal did not fall into any particular geographic pattern or location, emanating as they did from all parts of the country. Neither did these matters fall into any particular urban or rural divide, as complaints received concerned both urban, and rural matters. These matters were not confined to complaints in connection with commercial development, but included single dwelling units, and extensions. Some of these matters could not be categorized as complaints, as such, but rather appeared to the Tribunal to be general concerns which concerned citizens, whilst not fully appreciative of the remit of the Tribunal, felt should be drawn to the attention of the Tribunal.

19-08 The Tribunal was obliged in considering these matters to decide, in the first instance, whether the subject matter of the complaints appeared to come within the Tribunal's Terms of Reference so as to provide a legitimate basis for any further inquiry by the Tribunal. If the Tribunal determined that the subject matter of the complaint did not come within its Terms of Reference it so informed the complainant, and returned the documentation (if any) to the complainant, explaining the decision of the Tribunal, having already provided that party with a copy of its Terms of Reference.

19-09 If the subject matter of the complaint appeared to the Tribunal to come within its Terms of Reference, the Tribunal conducted further inquiries in private by obtaining the relevant planning files from the relevant local authority, interviewing the parties involved, and obtaining any other relevant information and/or documentation, so as to enable the Tribunal make a decision as to whether the subject matter of the inquiry was such as to warrant a public inquiry. Of necessity, this work was carried out in tandem with the other work of the Tribunal.

19-10 Broadly speaking, the one hundred and eighty-four matters that were drawn to the attention of the Tribunal in this fashion are capable of being divided into the following categories:

MATTERS OF GENERAL CONCERN

19-11 The Tribunal received twenty-seven submissions of a general nature. In general these were not complaints as such, but expressed concerns ranging from planning policy in its widest sense, to concerns about a perceived lack of communication, or consultation, between planning authorities and the community. These submissions, with two exceptions, did not make any allegations of corruption or wrong-doing against any identifiable person or party.

19-12 Of these twenty-five complaints that did not contain any allegation of corruption or wrong-doing many expressed similar concerns about development policy in the future, and highlighted a desire for the planning process to provide for a greater consultative process, particularly as between the relevant local authority and community, or local representative groups. The parties making these submissions appear to be genuinely public-minded citizens. The Tribunal is satisfied that the matters, the subject matter of these twenty-five complaints, do not fall within its Terms of Reference, but the views expressed therein shall be borne in mind when the Tribunal considers recommendations in its final Report to the Oireachtas.

19-13 In so far as the two complaints that did make allegations of corruption or wrong-doing, these are presently the subject matter of a private inquiry by the Tribunal so as to determine whether there is sufficient evidence to warrant proceeding to a full public inquiry in relation to these matters.

COMPLAINTS CONCERNING LARGE-SCALE DEVELOPMENTS

19-14 The Tribunal received fifty-nine complaints which fall into this general category. Many of the complaints in this category did not make any allegation of corruption or wrong-doing. A common identifiable feature of many such complaints was a concern that such large-scale development did or would seriously affect local amenities.

19-15 Broadly speaking, these complaints centered on concerns about the circumstances in which certain large-scale residential developments were granted planning permission or the circumstances in which re-zoning of certain lands to provide for large-scale development was obtained. These complaints were in the main from persons or parties affected directly by the development or the proposed development the subject matter of the complaint. Where it is clear to the Tribunal that the subject matter of the complaint was not within its Terms of Reference it so informed the complainant.

19-16 Where the Tribunal was satisfied, following a preliminary examination of the matter, that there appeared to be no evidence of wrong-doing, and that the matter did not warrant further investigation at that time, the Tribunal so informed the complainant. The Tribunal reserved the right to re-open the matter should further information become available. Thirty-two of the fifty-nine complaints were so decided by the Tribunal. Apart from the foregoing, and arising from the balance of these complaints to the Tribunal, there are twenty-seven of these matters currently the subject matter of private inquiry by the Tribunal so as to determine whether there is sufficient evidence to warrant proceeding to a full public inquiry in relation to such matters or any of them.

COMPLAINTS CONCERNING LOCAL OR DOMESTIC ISSUES

19-17 The Tribunal received eighty-one complaints in this broad category. In general these complaints centered on concerns of individuals in connection with the development of single private houses or extensions to private houses, and/or a perceived non-compliance with a condition or conditions attached to a planning permission for either of the foregoing. The complainants were, in the main, resident in close proximity to the subject property. The Tribunal is satisfied that, whilst the complainants, in the main, genuinely held their views, at least half of these matters did not come within the Terms of Reference and the Tribunal so informed the complainants. The Tribunal is satisfied that, within this category, forty-nine matters were not within its Terms of Reference.

19-18 In so far as the balance of the matters within this category are concerned, these continue to be the subject matter of private inquiry by the Tribunal so as to determine whether there is sufficient evidence to warrant proceeding to a full public inquiry in relation to such matters or any of them.

CONCLUSION

19-19 At present, therefore, sixty-one of these matters remain under active inquiry by the Tribunal. When the Tribunal forms a final view on these matters it will communicate with the affected parties. Each inquiry will be dealt with on its own merits, and this work must be carried out in conjunction with the other work of the Tribunal.

