

1 THE PROCEEDINGS RESUMED ON THE 27TH OF JANUARY, 1999, AS
2 FOLLOWS:

3 .

4 CHAIRMAN: Good morning everyone.

5 .

6 MR. GALLAGHER: Mr. Gogarty please.

7

8 MR. JIM GOGARTY RETURNS TO THE WITNESS-BOX AND CONTINUES TO
9 BE EXAMINED BY MR. GALLAGHER AS FOLLOWS:

10 .

11 Q. MR. GALLAGHER: Good morning, Mr. Gogarty. Yesterday we

12 had reached a stage in the correspondence, we had reached
13 up to November of 1989. I want to put to you a letter of
14 the 9th of November, of 1989, which is on page 1119 of Book
15 4. Perhaps before I read that I might just put it in
16 context. There was a request on the 23rd of October, of
17 1989, on page 1086, from Mr. Sheedy; where he asked for
18 confirmation that Lajos Holdings would now invest the sum
19 of £300,000 in the purchase affidavit pension, whether or
20 not Mr. Murphy's approval had been obtained, and he asked
21 for a reply on the 20th of October; and a reply comes on
22 the 9th of October, at page 1119, and it is in the
23 following terms:

24 .

25 "I confirm that Mr. Murphy has approved the payment of the
26 sum £300,000 pension for Mr. Gogarty and his wife. That
27 term of the agreement between Mr. Gogarty and Lajos
28 Holdings has not yet been implemented. The sum will,
29 however, be paid immediately out of funds due to JMSE in
30 respect of the settlement with the ESB.

31 .

32 In this respect I believe that Chris Oakley has already

1 been in contact with you by fax. Yours sincerely R J

2 Copsey. "

3 .

4 The next letter, Mr. Gogarty, I want to put to you is a

5 letter from Mr. Copsey, sorry a letter from Mr. Sheedy to

6 Mr. Copsey dated the 10th of November, and it is 1121.

7 .

8 "Dear Mr. Copsey, thank you for your letter of the 9th of

9 November. Of the sum of £560,000 which has been paid by

10 the ESB (excluding VAT), a sum of £215,000 is due to Mr.

11 Gogarty by way of commission. In addition, a payment of

12 £300,000 is to be made by JMSE in respect of the pension

13 for Mr. and Mrs. Gogarty. Please let me have:

14 .

15 (1) Your calculation of the amounts to be deducted from

16 the sum of £215,000 arising from the letter from the

17 Inspector of Taxes to you on the 26th October.

18 .

19 2. Your instructions to remit £300,000 to Pension and

20 Investment Consultants Limited, which firm, I believe, is

21 arranging the pension for Mr. and Mrs. Gogarty arranged in

22 a pension for Mr. and Mrs. Gogarty.

23 .

24 When I have received your instructions and remitted the

25 appropriate sum to PIC and having remitted to Mr. Gogarty

26 the sum due to him in respect of his net commission, I will

27 let you have a cheque for the balance of the funds together

28 which we hold for JMSE, together with interest.

29 .

30 With regard to the second sentence in your letter, I would

31 point out that none of the terms of the agreement between

32 Mr. Gogarty and Lajos Holdings have been implemented by the

1 company to date. On the other hand, Mr. Gogarty continues
2 to work for the benefit of the Group and has fulfilled all
3 of his obligations under the agreement".

4 .

5 That letter was replied to on the 10th of October, 1123.

6 It is a letter from Joseph Murphy Structural Engineers

7 Limited. It bears the reference RJC/CL/J5. It is

8 addressed to Mr. Gerry Sheedy. It appears to have been

9 faxed from Copsey and Murray. It is a fax of the 10th of

10 the 11th, 1989. It says:-

11 .

12 "Dear Mr. Sheedy, the Board of this company have been

13 passed various faxes between yourself, Pickering and

14 Company and RJ Copsey. We are amazed at the contents of

15 those faxes and especially yours dated 10th of November,

16 addressed to Mr. Copsey.

17 .

18 We have received legal opinion in the matter and are quite

19 certain that your firm, or your client is at fault in

20 misappropriating the sum of £700,000 properly due to this

21 company. We are advised that none of the terms of the

22 agreement between James Gogarty and Lajos Holdings Limited

23 give you or your client the authority to either

24 misappropriate the said funds or to operate or right of

25 offset.

26 .

27 This letter is a formal demand for you to immediately

28 remit the sum of £700,000 by way of bank draft to this

29 company together with interest accrued thereon from the

30 date of the cheque at the Double A overdraft rate which

31 represents the loss suffered by this company.

32 .

1 Unless the sums are received by noon on Monday, at Santry,
2 a copy of this letter and the relevant correspondence will
3 be delivered to the Law Society as part of a formal
4 complaint".

5 .

6 And it is signed by Mr. TJ Parker, Chief Executive. When
7 had Mr. Parker become Chief Executive do you know
8 approximately?

9 A. Sometime earlier in the year.

10 2 Q. I see. Now, the reply to that letter was a letter of the
11 13th of November, of 1989, from McCann Fitzgerald to Mr.
12 Parker. Re Mr. Jim Gogarty.

13 .

14 "Dear Mr. Parker, we are in receipt of your letter of the
15 10th of November addressed to Mr. Sheedy.

16 .

17 Mr. Gogarty resigned as a director and an employee of
18 Joseph Murphy Structural Engineers Limited in consideration
19 of the purchase of a pension for Mr. Gogarty and his
20 surviving spouse. The continuing failure on the part of
21 JMSE to invest the agreed sum of £300,000 in the purchase
22 of that pension gives our client reasonable grounds to for
23 being concerned that it is not the intention of JMSE to
24 honour its obligations to Mr. Gogarty or that it is not in
25 a position to do so.

26 .

27 Mr. and Mrs. Gogarty's position continues to be prejudiced
28 by the failure of JMSE to invest the sum of £300,000 in the
29 purchase of a pension for them.

30 .

31 Mr. Gogarty acted as act of JMSE in the final negotiations
32 that took place between him and the ESB. Accordingly Mr.

1 Gogarty is exercising his right or lien in respect of the
2 funds due to him in that capacity from the payment which
3 has been made by the ESB.

4 We enclose our cheque payable to JMSE in the sum of
5 £185,000, being the amount received from the ESB, less the
6 sum to be invested by JMSE in the purchase of a pension for
7 Mr. and Mrs. Gogarty and the commission of £215,000 due to
8 Mr. Gogarty.

9 .

10 We have previously requested Mr. Copsey to let us have the
11 appropriate calculations of the amounts to be deducted from
12 the commission due to Mr. Gogarty, but we have not yet
13 received these.

14 .

15 In relation to the affairs of Mr. Gogarty and JMSE and
16 Lajos Holdings Limited this firm has been acting on the
17 instructions of Mr. Gogarty. The issues between Mr.
18 Gogarty and JMSE and Lajos Holdings Limited are substantive
19 and we are now satisfied that they will have to be resolved
20 by the court. We are endeavoring to arrange a meeting with
21 our client at the earliest possible date so that we can
22 advise or client firstly to lodge the net sum which we have
23 on hands into court, and secondly to have all of the
24 relevant issues to be brought before the court for
25 adjudication by it. Please let me know the name of your
26 company solicitor and if they have your authority to accept
27 service of legal proceedings on behalf of the company.

28 .

29 We trust that the court will consider carefully many
30 actions taken and statements made by the officers of JMSE
31 to Mr. Gogarty and others in recent years, in particular an
32 explanation of why, when the funds are clearly available to

1 it JMSE did not give the necessary instructions for the
2 purchase of the pension for Mr. and Mrs. Gogarty, and for
3 the payment to him of the commission due in respect of the
4 ESB contract?

5 .

6 Finally, we have not overlooked and will deal separately
7 with the libelous reference in your letter to the
8 misappropriation by this firm in the sum of £700,000".

9 That is a letter from Mr. Sheedy of McCann Fitzgerald.

10 .

11 And then Mr. Sheedy, perhaps, may be the witness to deal

12 with this, but I understand that in fact the sum of

13 £185,000 was transmitted to Joseph Murphy Structural

14 Engineers on the 13th of the 11th, 1989. Do you know that?

15 A. Well, I believe it was.

16 3 Q. Yes?

17 A. I believe it was.

18 4 Q. Now, were you in constant contact with Mr. Sheedy at about

19 this time?

20 A. Fairly constant yes, fairly constant.

21 5 Q. And did he give you information of developments and did he

22 furnish you with copies of the letter, et cetera?

23 A. Yes.

24 6 Q. The next attendance is an attendance of the 17th of

25 November, 1989, it is an attendance by Mr. Sheedy Re: Jim

26 Gogarty. It reads as follows:-

27 .

28 "I telephoned Mr. Oakley in London but he was not

29 available. I telephoned Mr. Copsy at home to inform him

30 that I had been endeavoring to contact Mr. Oakley and that

31 Mr. Gogarty had instructed us to institute legal

32 proceedings. He inquired, proceedings for what? I told him

1 that the proceedings would be for specific enforcements of
2 the agreement between Mr. Gogarty and Lajos Holdings. And
3 also to determine to whom we should pay the money which we
4 are now holding.

5 .

6 I asked him if he would like to have the proceedings served
7 on the company solicitors, and he said that the proceedings
8 should be served on the registered office of the companies,
9 being his office at Charter House, 5 Pembroke Row.

10 .

11 Mr. Oakley subsequently telephoned and I explained why I
12 had been phoning him. He said that the funds which we are
13 holding belonged to JMSE Limited and that we have no right
14 to hold them and that he is proceeding to make a complaint
15 to the Law Society.

16 .

17 I told him that in our view Mr. Gogarty has a lien in
18 respect of the commission due to him, and also that he has
19 a claim against the remainder of the funds which we are
20 holding. Therefore, we are instituting proceedings for
21 specific performance and to request the court to determine
22 to whom the monies which we hold should be paid.

23 .

24 Mr. Oakley said that we have no right to retain those
25 monies, that they belong to JMSE Limited and that they
26 should be paid over to the company without delay.

27 .

28 I asked Mr. Oakley why his clients were not implementing
29 the terms of the agreement with Mr. Gogarty. He said that
30 they have been endeavoring for some weeks now to contact
31 Eamon Heffernan, of Pension and Investment Consultants, but
32 without success. They wish to see the draft policy on which

1 Mr. and Mrs. Gogarty's pension will be based to ensure that
2 it is tax effective. On receipt of the draft policy and
3 the proposal form they are prepared to complete the life
4 assurance company's requirements and to issue a cheque for
5 £300,000. He says that he has advised his clients that as
6 PIC are not performing they should now request their own
7 broker to arrange the pension for Mr. Gogarty. I told him
8 that, to my knowledge, PIC had been doing everything they
9 possibly could to have the policy implemented by JMSE
10 Limited.

11

12 I said that our duty is to protect the interests of our
13 client and to act on his instructions. I said that I would
14 be prepared to hand over the balance of the funds which we
15 hold in exchange for two cheques from JMSE, being:
16 1. A cheque for £300,000 payable to the life assurance
17 company to which Mr. Gogarty's pension was to be effected;
18 and
19 (2) A cheque for the net sum due to Mr. Gogarty by way of
20 commission.

21 .

22 Mr. Oakley mentioned that Mr. Gogarty's commission is
23 subject to PAYE and other deductions. I told him that I
24 had written two letters requesting Mr. Copsey to make the
25 calculations in respect of the deductions from Mr.
26 Gogarty's commission so that I could
27 send the net cheque to the company.

28 .

29 To date I have not received those calculations.

30 .

31 Mr. Oakley said that the funds which are to be used to buy
32 Mr. Gogarty's pension have to go through the companies'

1 books. His clients had also investigated whether the
2 pension should be provided by another company in the Group
3 rather than JMSE. I repeated that in order to facilitate
4 this I was quite prepared to hand over the funds which I
5 hold in return for the two cheques which I had previously
6 mentioned.

7 .

8 By this stage Mr. Oakley had become annoyed and I told him
9 that there was little point in our continuing the
10 conversation. He reiterated that his clients had been
11 implementing the agreement with Mr. Gogarty. I pointed out
12 that none of the terms of the agreement had been
13 implemented by his clients to date, not even the transfer
14 of the car to Mr. Gogarty which should have been a
15 relatively simple matter.

16 .

17 The conversation concluded with Mr. Oakley inviting us to
18 institute proceedings and stating that he would
19 counterclaim against Mr. Gogarty and his firm".

20 .

21 Now, the next document in the book is a copy affidavit
22 letter from Quinn Auctioneers to Jim Gogarty or Frank
23 Reynolds. This is in connection with the Abbeycarton
24 lands. They had been sold at that stage to Mr. Frank
25 Gearty in trust, that document is already, I think has been
26 referred to in the course of evidence.

27 .

28 I simply mention it as part of the sequence.

29 .

30 The next attendance, Mr. Gogarty, is an attendance of the
31 17th of November, of 1989, from Mr. Sheedy.

32 .

1 "I telephoned Eamon Heffernan of Pension and Investment
2 Consultants, PIC, and asked him if a request had been
3 received by him from Roger Copsey or JMSE to draft of the
4 policy to be used in connection with Mr. Gogarty's
5 pension. He said that he was not familiar with the case
6 and would look into it.

7 .

8 Subsequently at Seamus Howley's request I telephoned Pat
9 Bourke of PIC who said that he had sent everything which
10 JMSE requires, including draft directors resolutions to
11 have the policy implemented and requested the cheque to be
12 returned to him with the completed proposal forms.

13 .

14 He has not heard anything from JMSE or Mr. Copsey since
15 sending all the documentation to Mr. Copsey. I asked him
16 to let me have copies of the relevant correspondence on his
17 file".

18 .

19 The next attendance of the 20th of the 11th, 1989. Pat
20 Bourke -- an attendance by Mr. Sheedy Re: Jim Gogarty.

21 .

22 "Pat Bourke of PIC telephoned. Roger Copsey was in touch
23 with him on Friday afternoon. Roger Copsey is endeavoring
24 to have the pension purchased for Mr. and Mrs. Gogarty by a
25 company other than JMSE. The Corporation Tax rate being
26 paid by JMSE is much lower than some of the other companies
27 in the Group. Pat sent Roger Copsey a copy of the Revenue
28 practice note dealing with "Hancock policies" and which
29 clearly state that the pension has to be purchased by a
30 trading company. None of the other companies in the Lajos
31 Group are trading companies".

32 .

1 Can you tell the Tribunal, Mr. Gogarty, so far as you are
2 concerned, were there any trading companies in the Lajos
3 Group and if so the identity of that company?

4 A. I beg your pardon?

5 7 Q. What company, if any, in the Lajos Group was a trading
6 company?

7 A. Well, the main trading company in Ireland was JMSE.

8 8 Q. Was that the company that employed you?

9 A. That's the company that employed me at all times for the 20
10 years or whatever it was.

11 9 Q. Did any other company pay you any salary or commission or
12 anything of that nature?

13 A. Never. Never. But you can read between the lines.

14 10 Q. The next letter is from Copsey Murray of the 22nd of

15 November, of 1989. It is 1140, it is to the Inspector of

16 Taxes. It is Re: Grafton Construction Company Limited.

17 .

18 "We refer to our telephone conversation with Miss Eileen

19 Ryan of your office of the 21st of November, of 1989.

20 .

21 We would advise that Mr. James Gogarty is a director and
22 employee of Grafton Construction Company Limited, a company
23 within the Lajos Group of companies". Were you a director
24 at that time, Mr. Gogarty, on the 22nd of November of 1989?

25 A. No, sure I had resigned in June.

26 11 Q. Were you an employee of the company as of the 22nd of
27 November, of 1989?

28 A. Of Grafton? No, not at all, not at all. Sure there is
29 evidence of that.

30 12 Q. Sorry, would you speak into the microphone please?

31 A. Sure there is evidence that will come to show that. It is
32 all a ruse for - I don't want to say.

113 Q. Sorry, don't say anything, if you would just answer the
2 question. Are you saying that you were not a director of
3 Grafton and you were not an employee?

4 A. At that date.

514 Q. On that date?

6 A. Or I was never an employee of Grafton on any date.

715 Q. The letter continues: "Grafton Construction Company Limited

8 hold several properties for development and its trading
9 profits are liable to Corporation Tax under Schedule D,
10 case one.

11 .

12 The company wishes to purchase a Hancock annuity for Mr.
13 Gogarty in connection with Mr. Gogarty's retirement. The
14 sum of money to be invested in an annuity is £300,000.

15 While Mr. Gogarty has carried out services for the company
16 as the only executive employee for some 20 years he has not
17 received any remuneration from the company for those
18 services.

19 .

20 Mr. Gogarty does not hold any shares in Grafton
21 Construction Company Limited. The company will continue to
22 trade after the purchase of the annuity.

23 .

24 We enclose herewith a copy of the proposed from Grafton
25 Construction Limited to Mr. Gogarty for your attention. The
26 annuity has not yet been purchased, however we would expect
27 this to take place within the next month. We would confirm
28 that Mr. Gogarty is 72 years of age.

29 .

30 We shall be obliged if you would confirm that the full
31 amount of £300,000 may be set out against the companies
32 profits in the year of the purchase under the ordinary

1 rules of Schedule D.

2 .

3 In addition, we shall be obliged if you would advise us of
4 the tax position of Mr. Gogarty with respect to the annuity
5 arising from the £300,000".

6 .

7 Were you consulted by Mr. Copsey in relation to that letter
8 or in relation to any tax liability that might arise in the
9 event that Grafton Construction Company Limited were to
10 purchase a Hancock annuity for you?

11 A. No, no.

12 .

13 MR. COONEY: I think Mr. Chairman, could I at this stage
14 point out in one of the retirement agreements with Mr.
15 Gogarty and Lajos Holdings -- this might shorten this one.
16 It says; "The company", that is Lajos Holdings, "will make
17 available and will guarantee the sum of £300,000 to be
18 provided through JMSE Limited or any other Group company
19 for the purchase, for the purposes of purchasing a pension,
20 if in Ireland, for the Director and his wife".

2116 Q. MR. GALLAGHER: I now turn to page 1143. It is an
22 acknowledgement from the Revenue commissioners bearing the
23 reference "ER" in it's reference to the letter in
24 question. And it says:-

25 .

26 "Dear sir, I refer to your letter dated the 22nd inst. And
27 telephone call to this office today.

28 .

29 On the basis of the information outlined in your letter it
30 would not be possible to --

31 A. To approve.

3217 Q. "To approve a pension arrangement for Mr. Gogarty based on

1 non-remunerated service. "

2 .

3 The next letter is --.

4 A. I beg your pardon, I didn't see that letter at that time.

518 Q. Pardon?

6 A. I didn't see that letter at that time. That letter only

7 surfaced later on when we sought a discovery of documents.

819 Q. Was that in the context of subsequent proceedings?

9 A. Yeah, where Copsey was negotiating without my knowledge

10 with the Revenue.

1120 Q. The next document is a document to Mr. Sheedy, it is a

12 faxed document from Copsey and Murray. And it is a

13 correspondence regarding your retirement. And it appears

14 to include five copies of five sheets with it. Including

15 on page 1145 a copy of the letter I have just read, which

16 is on 1140. And the following document is on page 1147.

17 It is headed "Grafton Construction Company", and it is a

18 draft from Grafton Construction Company Limited, Charter

19 House, 5 Pembroke Road, Dublin 2. Addressed to you. And it

20 says:-

21 .

22 "Dear Mr. Gogarty, at a Board meeting held on (future

23 date) it was resolved that in consideration of your service

24 to the company an amount of £300,000 be set aside for the

25 purchase of a pension annuity to be paid to you for the

26 rest of your life.

27 .

28 The pension will be paid by one instalment of £300,000

29 being due at (future date to be decided within one month).

30 You will understand that the pension is non-commutable and

31 non-assignable.

32 .

1 This decision by the directors is one which they can not
2 revoke. For your greater security they wish to arrange for
3 Irish Life Assurance Company to take over the liability for
4 providing the pension payments and your agreement to this
5 course is requested.

6 .

7 To avoid delay in making the first payment will you please
8 let us have your acknowledgment of this letter as soon as
9 possible together with your agreement to your liability for
10 your pension being taken over by Irish Life Assurance
11 Limited.

12 .

13 I hereby certify the above to be a true copy of the
14 original letter sent to Mr. Gogarty". Signed -- and there
15 is no name, it is a Secretary, Grafton Construction Limited
16 and on the bottom is the following:-

17 .

18 "Directors: J Gogarty or J Copsey, J Murphy, JG Murphy, U
19 Murphy, P. Garner. Registered in the Republic of Ireland.
20 24323".

21 .

22 And that on the top of it bears a date indicating that it
23 was sent by fax from Copsey and Murray on the 27th of the
24 11th, 1989. Was the original of that letter ever furnished
25 to you for signature?

26 A. Not at that time, not at all, never.

2721 Q. Did you know that it was being written or did you have any
28 intimation of the circumstances in which the letter came
29 into being?

30 A. It was later on a discovery of documents that I --

3122 Q. But at that time on the 27th of November, of 1989, you knew
32 nothing about it?

- 1 A. I knew nothing about it, not at all. You see you are
2 talking about a Board meeting at a future date.
- 323 Q. Yes.
- 4 A. A future date.
- 524 Q. Now, the next letter I want to put to you Mr. Gogarty, is?
- 6 A. Sorry; there is no date on that letter is there, the 1147?
- 725 Q. Sorry, it is a letter, there is a date on the very top, it
8 was faxed on the 27th of November, of 1989?
- 9 A. Oh, that is a fax.
- 1026 Q. From Copsey and Murray?
- 11 A. To who?
- 1227 Q. Well, that is another question. There is nothing there to
13 indicate?
- 14 A. I had no fax at that time. Yes, anyway.
- 1528 Q. In any event it wasn't faxed to you and you didn't receive
16 it at that time. The next letter I want to refer you to is
17 a letter of the 28th of November, of 1989?
- 18 A. Sorry, did we read the one on the 22nd? Did we? To the
19 Inspector of Taxes, was it?
- 2029 Q. Yes?
- 21 A. Oh sorry, we read that, yes.
- 2230 Q. That had been read earlier. It was a copy of another
23 document. The next document I want to refer you to is
24 document 1154. It is a letter of the 28th of November, of
25 1989, from Copsey and Murray. It is for the attention of
26 Victor Mullen, the Inspector of Taxes, in O'Connell
27 Street. It is Re: James Gogarty/Joseph Murphy Structural
28 Engineers Limited.
29 .
- 30 "We refer to our telephone conversation today with your
31 Mr. Victor Mullen regarding the above. We have set out
32 hereunder the facts relating to the query.

1 .
2 Mr. James Gogarty has been an employee and director of JMSE
3 for the last 20 years. He has recently resigned as a
4 director of the company.

5 .
6 JMSE had a claim in respect of a contract and Mr. Gogarty
7 was the employee responsible for the negotiation of that
8 claim.

9 .
10 A written agreement between Mr. Gogarty and JMSE provided
11 that a substantial bonus would be paid to Mr. Gogarty on
12 the successful negotiation by Mr. Gogarty of the claim for
13 the company.

14 .
15 Recently the claim was successful and a substantial amount
16 paid to JMSE. An agreement has now been reached between
17 Mr. Gogarty and JMSE that Mr. Gogarty should waive the
18 bonus. To date the bonus has not been paid, nor put at the
19 disposal of the employee".

20 .
21 I just want you to look at that last paragraph Mr. Gogarty,
22 that I have just read, Mr. Gogarty.

23 A. The last paragraph.

2431 Q. Yes. "Recently the claim was successful and a substantial
25 amount paid to JMSE. An agreement has now been reached
26 between Mr. Gogarty and JMSE that Mr. Gogarty should waive
27 the bonus"?

28 A. Oh Jesus that was about bloody -- sorry.

2932 Q. Did you at any time agree to waive the bonus?

30 A. Never. Sorry, you see here - sorry you see -- there is a
31 letter, the 22nd of November, where Re Grafton Construction
32 Company -- and he says "we would advise that Jim Gogarty is

1 the Director, employee of Grafton Construction Company

2 within the Lajos Holdings Group". An employee.

333 Q. Yes?

4 A. An employee. You see he is covering his ground.

534 Q. Sorry?

6 A. But you see according to that I was 40 years with them

7 which was between two companies.

835 Q. Mr. Gogarty, I have read that letter to you, the letter of

9 the 22nd of November and you have confirmed that you were

10 never an employee of Grafton?

11 A. Never.

1236 Q. And that you had resigned as a director of Grafton the

13 previous July?

14 A. Yes.

1537 Q. Some five months earlier?

16 A. That's right.

1738 Q. I want you to just concentrate on this letter of the 28th

18 of November which I have referred to you, Mr. Copsy is

19 here saying "An agreement has now been reached between Mr.

20 Gogarty and JMSE that Mr. Gogarty should waive the bonus".

21 A. I am sorry because I tell you --

2239 Q. Did you ever; did you ever reach such an agreement?

23 A. Never.

2440 Q. Was there any such discussion about you waiving such an

25 agreement?

26 A. Never.

2741 Q. Were you aware of the contents of that letter at the time

28 it was written?

29 A. No, never, at that time it was on the discovery of

30 documents. I have been called a liar and everything by

31 that crowd over there.

3242 Q. Please now, Mr. Gogarty.

1 A. You know I don't want to go too far at the moment.

243 Q. Now, Mr. Gogarty, the next document is a document which is

3 numbered 1156. It is a letter from Mr. Copsey to Mr.

4 Sheedy. And he says:-

5 .

6 "I refer to previous telephone conversations and my fax of

7 the 27th of November, 1989, concerning the payment of

8 commission to Jim Gogarty.

9 .

10 I enclose copy correspondence between myself and the

11 Revenue which I think should be self-explanatory.

12 .

13 On the basis of this correspondence, can you please let me

14 have your agreement that your client would agree to waive

15 the commission due to him in respect of the ESB contract"?

16 A. Yes.

1744 Q. "A sum of £215,000 will be paid to him with deduction of

18 PAYE and the youth employment levy from Grafton/Reliable.

19 .

20 The mechanics of handing over the drafts and the agreement

21 of the wording of the waiver, etc, can be sorted out

22 immediately I have your agreement. RJ Copsey".

23 .

24 There is a copy to Seamus Howley and a copy to Chris

25 Oakley. Had you ever been employed as an employee by the

26 Reliable Construction Company Limited?

27 A. No, no, I wasn't. No, no.

2845 Q. And --

29 .

30 MR. COONEY: I refer again Mr. Chairman, to the term I

31 have just read out in the retirement agreement. Why is Mr.

32 Gallagher pursuing this when he knows very well the term of

1 the agreement? And also, it is quite clear the letter from
2 Mr. Copsey, was part of an agreement he was trying to enter
3 into with the tax authorities.

4 A. Behind me --

546 Q. MR. GALLAGHER: This can be dealt with by Mr. Cooney in
6 cross-examination if he wishes to do so. It is the time to
7 establish the circumstances in which all of this happened.
8 He was anxious to have the matter dealt with.

9 .

10 CHAIRMAN: Mr. Gallagher, proceed as you are proceeding.

11 .

1247 Q. MR. GALLAGHER: Thank you. And the next document on page

13 1158. It is dated the 28th of November, of 1989. It is to
14 the Inspector of Taxes, for the attention of Mr. Victor
15 Mullen and it is from Copsey Murray & Company. It is
16 signed by Mr. Copsey or at least Mr. Copsey's reference.

17 It is in the following terms.

18 .

19 "Re: James Gogarty/ Lajos Holdings Limited.

20 .

21 Dear Sirs, we refer to our correspondence on the 28th of
22 November, 1989, and our subsequent conversation with Mr.
23 Victor Mullen regarding the matters.

24 .

25 We set out below the terms of the agreement relating to the
26 claim against the ESB:

27 .

28 The Director shall act as a consultant to JSME Limited and
29 will negotiate on behalf of JMSE Limited with the ESB for
30 the payment by the ESB of monies due to JMSE Limited in
31 connection with goods and services supplied in relation to
32 the Moneypoint Generating Station Project. The director

1 shall have the sole rights of negotiation in this respect
2 but shall be subject to direction by the Board of Directors
3 from time to time. The company shall be responsible for
4 all reasonable day-to-day expenses incurred in connection
5 with the negotiation of the settlement of the claim.

6 .

7 The company shall pay to the director a commission
8 equivalent to the sum of 50 percent of the net sum received
9 by way of settlement of the claim, but only in respect of
10 such sum as is over and above the current offer in
11 settlement made by the ESB".

12 .

13 MR. COONEY: That is dated the 3rd --

14

1548 Q. That is dated to the 28th of October, 1989. That is

16 clearly relating to the agreement of the 3rd of October, of
17 1989, and -- "the proposed waiver would be in the following
18 format", sorry I am continuing to read the letter.

19 .

20 "The proposed waiver would be in the following format:

21 .

22 Under an agreement with Lajos Holdings Limited, dated the
23 3rd of October, of 1989, it was agreed that I should act as
24 a consultant to JMSE in connection with monies due from the
25 ESB.

26 .

27 Under that agreement I am entitled to a commission
28 equivalent to the sum of 50 percent of the net sum received
29 by way of settlement of the claim but only in respect of
30 such sum as is over and above the current offer in
31 settlement made by ESB. The current offer and settlement
32 is £130,000.

1 .

2 I hereby waive any entitlement to any commission resulting

3 from the claim by JMSE against ESB in respect of the

4 Moneypoint Generating Project".

5 .

6 It bears the name in print JG Gogarty. The letter

7 continues:

8 .

9 "So that you are in possession of all of the facts

10 relating to this matter we would advise you that the reason

11 Mr. Gogarty has agreed to waive the commission due is

12 because he is to receive an exactly similar sum from

13 another Group company. Mr. Gogarty has acted as an

14 Executive Director and employee of that other Group company

15 in which capacity he negotiated a most profitable deal.

16 The exactly similar sum will be paid from this other Group

17 company with deduction of PAYE.

18 .

19 It seems clear that on a genuine waiver of a commission

20 due, no PAYE will be payable by JMSE nor will the Revenue

21 seek to tax Mr. Gogarty individually on the amount waived.

22 However, Mr. Gogarty has received advice to the contrary.

23 The point made is that Mr. Gogarty has an entitlement to

24 the commission and it is possible that the Revenue could

25 seek to tax the remuneration waived and in addition the

26 actual remuneration paid by that other Group company. The

27 point does not to this firm appear valid, but we would seek

28 your advice in this matter".

29 .

30 Were you consulted about that proposed waiver or about the

31 terms of the waiver as it appears in that letter?

32 A. No.

1 .

2 MR. COONEY: Again Mr. Chairman, may I point out that some
3 of these letters were copied to Mr. Seamus Howley who is
4 Mr. Gogarty's accountant.

5 .

6 MR. GALLAGHER: Of course they were, I am not suggesting
7 anything otherwise. Any place there is Mr. Howley's name or
8 anybody else's name appears I will certainly draw the
9 Tribunal's attention to that.

10 .

11 The next letter is a letter of 1160. It is from the
12 Revenue Commissioners to Mr. Copey Murray. The reference
13 is V Mullen. It is a handwritten letter, referring
14 Re: James Gogarty. Reference Brian Law.

15

16 "Dear sir, I refer to your letter dated the 28th of the
17 11th, '89. Please note the commission that your client has
18 waived will not be chargeable to the tax providing it is
19 not charged in the company accounts and the waiver is
20 binding on your client. Yours faithfully G O'Morain".

21 .

22 The next letter is a letter from Mr. Sheedy to Mr. Copey.

23 It is dated the 28th of November, 1989. It refers to Mr.

24 Copey's letter of the 28th. It is in the following

25 terms:-

26 .

27 "Thank you for your letter of the 28th of November.

28 .

29 The funds to which you refer are properly retained by this
30 firm.

31 In view of the contents of the second paragraph of your

32 letter the resolution of the issues between Mr. Gogarty and

1 Lajos Holdings Limited and Joseph Murphy Structural
2 Engineers Limited will necessarily include confirmation by
3 your company that those funds have been properly held by
4 this firm on the date on which they were received".

5 .

6 On the same date there is a letter from Mr. Copsey as a
7 director of Joseph Murphy Structural Engineers Limited. It
8 is dated the 28th of November, of 1989. It is addressed to
9 Mr. Sheedy and it was faxed from the office much from
10 Copsey and Murray. It says:-

11 .

12 "Dear Mr. Sheedy, please accept this letter as your
13 authority to hold the balance of the ESB monies in your
14 client account for the period Monday to Friday, 1st of
15 December.

16 .

17 We all hope that this matter will be resolved without
18 recourse to litigation, but in view of that possibility I
19 must point out that this authority does not validate your
20 holding the said funds prior to Monday, 27th of November".

21 .

22 I think that is all the documentation I want to refer to in
23 Book No. 4. I will be coming back to certain aspects of
24 it, but I want to deal with the sequence of events which
25 continued and to deal with the circumstances in which the
26 matter was finally resolved.

27 .

28 MR. COONEY: With respect, Mr. Chairman, Mr. Gallagher is
29 opening some correspondence and then has asked Mr. Gogarty
30 some questions. The intent of which is to suggest that Mr.
31 Copsey was some how behaving dishonorably or something like
32 that. There are subsequent letters which should be opened

1 to Mr. Gogarty which establish that Mr. Copsey kept Mr.
2 Sheedy and Mr. Gogarty's accountant fully informed of the
3 agreement he was trying to reach with the Revenue
4 Commissioners, which agreement was for both the benefit of
5 Mr. Gogarty and his employers, or his former employers. I
6 think those letters should be opened.

7 .

8 MR. GALLAGHER: If Mr. Cooney could refer me to any letter
9 that I haven't opened I would be delighted to do so. I had
10 thought that I had opened all relevant letters. If I
11 haven't done so I would be happy to do so. He refers me to
12 a letter on page 1171. He refers me to a letter on page
13 1171. Sorry, a letter 1171 is a letter from Copsey Murray
14 of the 30th of November. This is a letter which, it is a
15 copy of a letter in fact which was opened by me and is to
16 be found on; it is, it is to be found on I believe page
17 1168.

18 .

19 CHAIRMAN: I think it is the same letter.

20 .

21 MR. GALLAGHER: I quite accept that that letter was copied
22 to Mr. Seamus Howley and Mr. Chris Oakley.

23 .

24 MR. COONEY: It seems to me, Mr. Chairman, there is some
25 confusion here on this side of the house,, we believe it
26 wasn't opened by Mr. Gallagher, Mr. Gallagher says it was.
27 We aren't doubting his word. I think for the sake of
28 clarity perhaps he might open that letter.

29 .

30 MR. GALLAGHER: In fact 1156 was also, it is also to be
31 found on page 1156. I did refer to that and I did ask,
32 draw attention to the fact that it was sent to Mr. Howley

1 and Mr. Oakley.

2 .

3 MR. COONEY: Would you just open that one again?

4 .

5 MR. GALLAGHER: I will open that one again. This is on

6 page 1156. A copy of it is to be found on page 1171 in the

7 same body, the body of the letter is the same. I think

8 also on 1168.

9 .

10 "Dear Mr. Sheedy, I refer to previous telephone

11 conversations and my fax of the 27th of November, of 1989,

12 concerning the payment of commission to Jim Gogarty.

13 .

14 I enclose copy correspondence between myself and the

15 Revenue which I think should be self-explanatory.

16 .

17 On the basis of this correspondence can you please let me

18 have your agreement that your client would agree to waive

19 the commission due to him in respect of the ESB contract.

20 A sum of £215,000 will be paid to him with deduction of

21 PAYE and the youth employment from Grafton/Reliable.

22 .

23 The mechanics of handing over the drafts and the agreement

24 of the wording of the waiver, etc. can be sorted out

25 immediately I have your agreement. Yours sincerely R J

26 Copsey." And a copy to Mr. Seamus Howley and a copy to Mr.

27 Chris Oakley.

28 That, as I say is --

29 .

30 MR. COONEY: That is dated the 30th of November.

31 .

32 MR. GALLAGHER: That is a document which appears to have

1 been faxed to Mr. Sheedy on the 30th of November, of 1989,
2 as per page 1171 for the record.

3 .

4 I am going on to, I am now going on to Book 5.

5 .

6 MR. CALLANAN: Sorry Mr. Chairman, in relation to that
7 letter, that letter was replied to on the 30th of November,
8 of 1989, by Mr. Sheedy on behalf of McCann Fitzgerald,
9 making it clear Mr. Gogarty's wish that that agreement be
10 implemented with that variation. I haven't any
11 difficulties with Mr. Cooney's objections. That letter that
12 in turn was read or reread was, are replied to in
13 categorical terms by Mr. Sheedy on the 30th of November, of
14 1989, at page 1175, document 409 of Book 5.

15 .

16 MR. COONEY: If Mr. Callanan can't hear me from here, I
17 have already asked Mr. Gallagher that he should read that
18 letter. It is in Book 5.

19 .

20 MR. GALLAGHER: I will now turn to Book 5. I intend to
21 read all those letters sir.

22 .

23 The letter I am now referring to is on page 1172 of Book
24 5. This letter is also copied at page 1175. This is a
25 letter that both Mr. Cooney and Mr. Callanan are anxious
26 that I would read out and it would be my intention to read
27 it in any event. It is a letter from Mr. Sheedy of the
28 30th of November, of 1989, to Mr. Copsey as a director of
29 Joseph Murphy Structural Engineers, Shannowen Road, Dublin
30 9, Re: James Gogarty Lajos Holdings Limited:

31 .

32 "Dear Mr. Copsey, I am in receipt of your letter of the

1 30th of November.
2 .
3 At present there exists a complete form of agreement
4 between Lajos Holdings Limited and James Gogarty. In
5 correspondence and telephone conversations which have been
6 exchanged between us and between you and Seamus Howley of
7 Bates Butler & Company during the past week you have made
8 suggestions for variations to be made to that agreement and
9 which are entirely for the benefit of Lajos Holdings
10 Limited and Joseph Murphy Structural Engineers Limited.
11 Mr. Gogarty has received advice from Mr. Howley with regard
12 to the treatment for tax of the various payments to be made
13 both to him and on his behalf under the terms of that
14 agreement. It is Mr. Gogarty's wish that the agreement
15 should be implemented without variation.
16 .
17 Before Mr. Gogarty will agree to consider the variations
18 which you have proposed both in your correspondence and in
19 your telephone conversations with me and Mr. Howley it is
20 essential that we deal with the issue which you have raised
21 concerning the funds held by this firm. The advice which
22 we have received from senior counsel is that arising from
23 the allegations and assertions which you have made we
24 should make an immediate application to the court to remove
25 any uncertainty which may exist on the part of your company
26 concerning the entitlement of this firm to retain those
27 funds, pending the implementation of the agreement between
28 Mr. Gogarty and Lajos Holdings Limited.
29 .
30 The allegation which you have made concerning the
31 misappropriation by this firm of the funds that we hold for
32 JMSE and the assertion that these funds are improperly held

1 by this firm must be withdrawn immediately. Alternatively
2 as I have indicated to you, it is our intention to make an
3 application to the court at the earliest possible date to
4 resolve that issue. If you wish your proposals to be
5 considered by Mr. Gogarty, I must request you to let me
6 have a letter confirming firstly, that the funds have been
7 properly retained by this firm since the date on which they
8 were received; and secondly, that this firm may continue to
9 retain those funds pending the implementation of all the
10 terms of the agreement between Mr. Gogarty and Lajos
11 Holdings Limited".

12 .

13 The next document is a letter of the 4th of December, of
14 1989. It is on page 1184. It is a letter from Mr. Sheedy,
15 a further letter from Mr. Sheedy to Mr. Copsey. It is Re:
16 James Gogarty/Lajos Holdings/Joseph Murphy Structural
17 Engineers Limited.

18 .

19 "Dear Mr. Copsey, as we have not heard from you in
20 response to our letter of 30th November we are now issuing
21 proceedings in relation to the balance of the funds which
22 we hold."

23 .

24 The next letter is a letter 1186. It is a copy of a letter
25 from Copsey Murray & Company, a reference RJC/CL/J5 to the
26 Inspector of Taxes, the Retirement Benefits District,
27 Landsdown House, Landsdowne Road. Re: Grafton Construction
28 Limited.

29 .

30 "We refer to our letter of the 22nd November, 1989, and
31 your reply of 24th November, 1989..

32 As advised Mr. James Gogarty who is aged 72 is at present

1 an employee of Grafton Construction Limited and is about to
2 retire.

3 .

4 There is an obligation to give Mr. Gogarty a pension on his
5 retirement. An agreement has been made between Mr. Gogarty
6 and Lajos Holdings Limited which places an obligation to
7 ensure the purchase of an annuity to fund that pension.

8 .

9 Mr. Gogarty has worked for Grafton for 20 years and the
10 company is willing to grant an annual pension. After he
11 retires Grafton Construction Company Limited wishes to
12 purchase a Hancock annuity for Mr. Gogarty and his wife.

13 .

14 We understand that the following points apply:

15 .

16 (A) The amount of £300,000 used to purchase the annuity
17 will not be taxable under Schedule E as income of Mr.
18 Gogarty as he will not be an employee of the company at the
19 time of the purchase.

20 (B) As an individual Mr. Gogarty will be liable to income
21 tax on the annuity which he receives.

22 (C) Grafton Construction Company Limited is entitled to a
23 deduction of £300,000 representing the purchase price of
24 the Hancock annuity against the companies' profits in the
25 year of purchase on the basis that the company had an
26 obligation to Mr. Gogarty to pay a pension after his
27 retirement.

28 .

29 We would refer you to the case of Hancock -V- General
30 Revision Area Investment Company Limited. The case held
31 that where the company was under a liability to pay a
32 pension to a retired employee an agreement was made whereby

1 the company purchased an annuity for the employee which he
2 accepted in the place of his pension. The sum paid in
3 purchasing the annuity was allowed as a deduction in full
4 in the year of purchase for the purpose of computing the
5 companies' profits. The lump sum was paid in order to
6 compress into one year a recurrent Revenue charge.

7 .

8 We should be obliged if you would let us have your
9 confirmation of the points as set out above under A to C
10 inclusive".

11 .

12 Mr. Gogarty, were you on the 5th of December, 1989, an
13 employee of Grafton Construction Company Limited?

14 A. I never was an employee. The evidence will come up in the
15 course of the Tribunal to confirm this.

1649 Q. All right. So far as you are concerned, did Grafton
17 Construction Company Limited have an obligation to pay you
18 a pension after your retirement?

19 A. Not at all. Not at all.

20 .

21 MR. COONEY: Why does Mr. Gallagher keep ignoring the
22 clause in the retirement agreement which I have already
23 drawn to his intention.

24 .

25 MR. GALLAGHER: I have read that, it is already in on the
26 record.

27 .

28 MR. COONEY: If he has read it, why does he insist in
29 asking questions that are plainly misleading in terms of
30 that agreement?

31 .

32 CHAIRMAN: Are they misleading? Isn't that something that

1 I have got to determine?

2 .

3 MR. COONEY: We will come to litigation based on the terms
4 of this agreement. Now, he can't have it when it suits him
5 and not have it when it doesn't suit him. That condition
6 in the agreement refers to Lajos Holdings, JMSE or any
7 other company in the Group, Mr. Chairman. It is in
8 black-and-white.

9 .

10 MR. GALLAGHER: It is not a question of suiting. Let's be
11 clear about this, I am bringing to the Tribunal's attention
12 all documentation which appear to be relevant. If anybody
13 points out documents that I have failed to draw to your
14 attention I will be happy to do so. I am drawing them to
15 your attention to assist you so that you can eventually
16 make up your mind on what is or is not relevant and what
17 weight, if any, is to be attached to the matters that are
18 presented to you.

19 .

20 I am opening all documentation and it is only, it is for
21 the purpose of alerting you as to the background and to the
22 circumstances of what happened at that time.

23 .

24 I am now coming to the litigation that did in fact arise.

25 .

26 MR. COONEY: Mr. Chairman, my complaint is not about Mr.
27 Gallagher opening the documentation. My complaint relates
28 to questions which he asks of the witness after he has
29 opened the documentation which is plainly contrary to the
30 terms of the agreement, or the intention is to suggest
31 contrary to the expressed terms of the agreement. That is
32 my objection. I don't see why he should do that.

1 .

2 MR. GALLAGHER: I think that is a matter for argument. If
3 Mr. Cooney says that the agreement expressly provided that
4 Mr. Gogarty was an employee of Grafton Construction Company
5 Limited.

6 .

7 MR. COONEY: No, I didn't say that.

8 .

9 MR. GALLAGHER: Well, I think it is a matter that can be
10 submitted and argued in due course. Can I suggest, Sir,
11 that it might be an appropriate place to break at this
12 stage, for a few moments?

13 .

14 CHAIRMAN: We will break for a quarter of an hour.

15

16 THE HEARING WAS THEN ADJOURNED FOR A SHORT RECESS AND
17 CONTINUED AS FOLLOWS:

18 .

1950 Q. MR. GALLAGHER: Sorry, Sir, before I resume going through
20 the documentation, I should say that Miss Dillon has drawn
21 my attention to the fact that the transcript of yesterday's
22 proceedings incorrectly referred to correspondence which I
23 opened as being written in December of 1989, in fact the
24 correspondence I opened referred to September of 1989.

25 .

26 CHAIRMAN: Very good. Thank you very much.

27 .

2851 Q. MR. GALLAGHER: Now, the next letter I want to refer you to
29 is page 1188, the letter of Copsey Murray & Company and the
30 Inspector of Taxes.

31 .

32 "Dear Sirs, we would advise that Mr. James Gogarty who is

1 aged 72 and at present an employee of Grafton Construction
2 Company Limited is about to retire.
3 .
4 There is an obligation to give Mr. Gogarty a pension on his
5 retirement. An agreement has been made between Mr.
6 Gogarty and Lajos Holdings Limited which places an
7 obligation to ensure the purchase of an annuity to fund
8 that pension.
9 .
10 Mr. Gogarty has worked -- I think the balance of that
11 letter is, the entire of that letter is probably in
12 identical terms to the letter at 1186 which was written to
13 the Inspector of Taxes Requirement Benefits Direct,
14 Lansdowne House on the same date, 26th December, of 1989.
15 I therefore don't propose to read the balance of that
16 letter.
17 .
18 There is a third letter in similar terms to the Inspector
19 of Taxes, Dublin, No. 12 District, Lansdowne House,
20 Lansdowne Road, Dublin 4. I should say that the letter to
21 the Inspector of Taxes in O'Connell Street at 1188 seeks
22 confirmation of the points set out at (B) above, which is
23 in the following terms:-
24 .
25 "As an individual Mr. Gogarty will be liable to income tax
26 on the annuity which he receives", and the letter at 1190
27 addressed to the Inspector of Taxes, Dublin, No. 12
28 District seeks confirmation of the points as set out under
29 (C) above, which is in the following terms:-
30 .
31 "Grafton Construction Company Limited is entitled to a
32 deduction of £300,000 representing the purchase price of

1 the Hancock annuity against the companies' profits in the
2 year of purchase on the basis that the company had an
3 obligation to Mr. Gogarty to pay a pension after his
4 retirement" .
5 .
6 The next page then which I refer is a reply from the
7 Directors Division of the Revenue Commissioners to Mr. Law
8 of Copsy Murray.
9 .
10 "Dear sir, I refer to our telephone conversation of the
11 6/12/89. Please let me have details of your client's work
12 history with particular reference to the following point:
13 .
14 1. Who exactly was Mr. Gogarty employed by?
15 2. Who paid his salary?
16 3. State all members within the Group of companies held by
17 Lajos Holdings Limited.
18 4. State the name of all companies of which your client
19 was a Director.
20 5. State if he ever received emoluments or benefits in
21 kind from any company other than JMSE.
22 6. Let me have copies of all contracts of service which
23 your client holds or has held.
24 On receipt of the above information I will be in a position
25 to deal with your letter dated 5/12/1989". The page
26 reference of that is 1194.
27 .
28 The next letter is one from the Retirements Benefit
29 District of the office of the Inspector of Taxes on page
30 1199, Re: Grafton Construction Company Limited.
31 .
32 "Dear sir, Re: your letter of the 5th inst. and subsequent

1 phone conversation, I refer: .
2 .
3 Any scheme/arrangement or contract established for the
4 purposes of providing pension or other relevant benefits
5 must be approved or exempt approved under Section 15/16 FA
6 1972.
7 .
8 Failing this, the consequences of non-approval as outlined
9 in the Section 18 FA 1972 will apply.
10 .
11 The Revenue Commissioners will only approve schemes under
12 the above legislation where the benefits to be provided are
13 limited to a fraction or factor of final remuneration as
14 appropriate.
15 .
16 In addition, for the purposes of Revenue limits, only
17 service which is a remunerated service may be taken into
18 account in determining benefits.
19 .
20 In Mr. Gogarty's case, no approvable benefits can be
21 provided since he has no remunerated service and no final
22 remuneration.
23 .
24 The ruling in the Hancock case would only come into play
25 where the benefits to be provided under a scheme approved
26 under Section 15 were secured by the outright purchase of
27 an annuity. I attach copy of our practice notes for
28 reference".
29 .
30 I now turn, Sir, to the litigation which ensued, and I have
31 prepared a summary of the references which have been
32 circulated to My Friends for ease of reference.

1 .
2 It appears that on the 18th of December, of 1989, two
3 plenary summons were issued. The first is to be found on
4 Book 5 at page 1281. And it is a plenary summons in the
5 High Court registered in -- the record number is 1989 at
6 No. 1671. The summons was issued on the 18th of December,
7 1989, between Joseph Murphy Structural Engineers Limited
8 and Lajos Holdings Limited, and James Gogarty and McCann
9 Fitzgerald, Defendants, and the relief sought was for
10 payment of the sum of £515,000, being money had and
11 received by the Defendants or one or other there of on
12 behalf of the first named Defendant.

13 .
14 There was alternative relief claimed and it was contended
15 in the special endorsement of claim that the Defendants,
16 and I quote; "The Defendants that paid the first named
17 Defendant the sum of ... Leaving a balance of £515,000".
18 (Quoted)

19 .
20 Now, on the same day, the 18th of December, 1989, the
21 plenary summons was issued in the High Court bearing the
22 record number 1548 P, indeed it may be 15481 P but we can
23 check that. It was issued in any event on the 18th of
24 December, the Plaintiff was James Martin Gogarty and Lajos
25 Holdings Limited, and Joseph Murphy Structural Engineers
26 were Defendants, and the relief sought was as follows:-

27 .
28 "1. In an order ... Relief" (Quoted)

29 .
30 That summons was served on Lajos Holdings Limited on the
31 18th of December under cover of a letter of that date,
32 which is to be found on 1289, and that summons was

1 accompanied by a Notice of Motion and an affidavit of Mr.
2 Gogarty, which is to be found on the page 1200 of Book 5.

3 .

4 That affidavit is in the following terms:-

5 .

6 "I, James Martin Gogarty, of Renvyle, Sheilmartin Road,
7 Sutton, County Dublin, aged 18 years and upwards make oath
8 and say as follows:-

9 .

10 I am the Plaintiff in the above entitled proceedings and I
11 make this affidavit from facts within my own knowledge,
12 save where otherwise appears. Such statements herein as
13 relate to my own acts and deeds are true and those which
14 relate to the acts and deeds of any other person I believe
15 to be true.

16 .

17 I am a chartered civil engineer by profession and have been
18 engaged in the professional practice for approximately 33
19 years. For most of this time I have worked or been
20 associated with one Joseph Murphy, and for the past 20
21 years I have worked actively with Mr. Murphy's group of
22 companies. Mr. Murphy owns either directly or indirectly a
23 number of companies in the United kingdom and in Ireland.
24 The main business of these companies is construction and
25 civil and structural engineering and manufacturing.

26 .

27 Prior to 1968 I was employed by a firm of consulting
28 engineers known as Higginbothan and Stafford. While
29 employed by that firm a substantial amount of my time was
30 devoted to dealing with the requirements of Mr. Murphy's
31 companies. In 1968 I became a full time employee of a
32 number of Mr. Murphy's Irish companies, (including the

1 second named Defendant herein) and became Managing Director
2 and Executive Chairman of these companies.

3 .

4 In 1982 I reached the age of 65 and was contemplating
5 retirement. At the time I agreed with Mr. Murphy that I
6 would remain on as Executive Chairman of the various
7 companies, but I would retire as Managing Director of the
8 second named Defendant. The position of Managing Director
9 was then filled by one Marcus A Sweeney. At that time Mr.
10 Liam Conroy became Group Chief Executive of the first named
11 Defendant. The second named Defendant and other companies
12 being subsidiaries of the first named Defendant. Mr. Murphy
13 himself increasingly withdrew from the day to day
14 activities of these companies over the past number of
15 years.

16 .

17 By reason of my long service with Mr. Murphy's companies
18 and the vital role which I had played within the
19 development of Mr. Murphy's businesses Mr. Murphy promised
20 me that as part of my retirement I would receive a benefit
21 of approximately £1m. I knew this was a realistic figure
22 for Mr. Murphy to offer because Mr. Murphy as accumulated
23 very considerable funds in the Isle of Man and Switzerland
24 over the past number of years.

25 .

26 My negotiations with Mr. Murphy culminated in an agreement
27 made on 3 October, 1989, between myself and the holding
28 company of Mr. Murphy's group of companies. Namely the
29 first named Defendant herein. In this respect I beg to
30 refer to a copy of the said agreement upon which marked
31 with the letter "A" I have signed my name prior to the
32 swearing hereof.

1 .
2 Under the terms of the agreement the first named Defendant
3 said that it will make available and will guarantee the sum
4 of £300,000 to be provided through JMSE Limited, the second
5 named Defendant
6 and/or any other Group company for the purposes of the
7 purchasing of a pension in Ireland for the Director, i.e.
8 the Plaintiff and his wife. The company, i.e. the first
9 named Defendant shall use its best endeavours to give
10 effect to the policy preference of the Director, subject
11 always to the policy being approved for tax purposes in
12 Ireland.
13 .
14 The agreement went on to provide for my retirement as a
15 Director, that I would act as a consultant to the
16 Defendants AGSE Limited and any other Group company in
17 return for £23,500 per annum for a period of five years.
18 That my transferred to me and that the first named
19 Defendant would repay me all expenses properly incurred.
20 .
21 The agreement further provided that I was to negotiate on
22 behalf of the second named Defendant with the ESB for the
23 payment by the ESB of monies due to the second named
24 Defendant in connection with goods and services supplied in
25 relation to the Moneypoint Generation Station Project. I
26 was to have the sole rights of negotiation in that respect,
27 but was to be subject to direction from the Board of
28 Directors from time to time. Clause 3 (B) of the agreement
29 provides as follows:-
30 .
31 "The company shall pay to the Director a commission
32 equivalent to the sum of 50 percent of the net sum received

1 by way of settlement of the claim, i.e. the claim against
2 the ESB, but only in respect of such sum as is over and
3 above the current offer in settlement made by the ESB the
4 current offer in settlement is £130,000.

5 .

6 The clause also provided that certain expenses would not be
7 taken into account in arriving at the net sum received by
8 way of settlement.

9 .

10 A firm of solicitors in London, Pickering Kenyon, acted
11 for the Defendants in the negotiation of the agreement. By
12 letter of 3 October, 1989, they wrote to McCann Fitzgerald
13 who were acting for me in this matter and whom I had
14 instructed on many occasions previously on the affairs of
15 the Defendant and associated companies. In the letter from
16 Pickering Kenyon on 3 October, 1989, were set out further
17 terms in relation to the consultancy arrangement. In this
18 respect I beg to refer to a copy of the said letter upon
19 which marked with the letter "B" I have signed my name prior
20 to the swearing hereof..

21

22 The defendants' accounts in Dublin are a firm know as
23 Copsey Murray & Company of Charter House, 5 Pembroke Row,
24 Dublin 2. Mr. Copsey of that firm is a Director of the
25 Defendants herein and of various other companies within Mr.
26 Murphy's group of companies. By letter of 17 October, 1989,
27 Mr. Sheedy of McCann Fitzgerald wrote to Mr. Copsey
28 referring to their meeting to the 3rd of October with Mr.
29 Oakley, the Defendants' English solicitors, at which
30 meeting it had been confirmed that my pension would be
31 purchased within ten days. Mr. Sheedy sought confirmation
32 that those arrangements had now been made and that the

1 funds were available for the immediate purchase of the
2 pension.

3 .

4 Mr. Sheedy also wrote to Mr. Oakley in London by letter of
5 the 18th of October, of 1989, pointing out that in view of
6 the manner in which the financial markets were then
7 fluctuating it was vital that my pension be purchased at
8 the earliest possible date.

9 In this respect I beg to refer to copies of the said two
10 letters upon which pinned together and marked with the
11 letter "C" I have signed my name prior to the swearing
12 hereof.

13 .

14 Mr. Copsey replied by letter of 19th of October, of 1989,
15 pointing out that he had not yet received authority to pay
16 the said sum of £300,000. This was notwithstanding the
17 fact that Mr. Copsey had in his capacity as a director of
18 the first named Defendant signed the agreement of 3
19 October, 1989 on behalf of the first named Defendant. In
20 this respect I beg to refer to a copy of the said letter of
21 the 19th of October, of 1989, upon which marked with the
22 letter D I have signed my name prior to the swearing
23 hereof.

24 .

25 Mr. Sheedy wrote again to Mr. Copsey on the 20th of
26 October, of 1989, stating that he understood that
27 discussions between Mr. Copsey and Bates Butler and Company
28 who were dealing with the pension arrangements resulted in
29 an agreement being reached
30 with regard to Mr. Gogarty's final years salary and which
31 would enable £300,000 to be invested in the purchase of the
32 pension. Mr. Sheedy also sought confirmation that if any

1 restructuring of the Lajos Holdings Group my position
2 should not be adversely affected first named Defendant
3 would continue to be in a position obligations to me on
4 foot of the agreement of 3 October, 1989.

5 Mr. Sheedy wrote a further letter on the 23rd of October,
6 of 1989, to Mr. Copsey pointing out that the question of
7 getting authority from Mr. Murphy to purchase the pension
8 should not arise and referring to Mr. Copsey's previous
9 statement that the pension was being purchased within a
10 week or ten days. Mr. Sheedy further pointed out that the
11 agreement had now been reached on my final years salary, so
12 that there was no valid reason why the pension should not
13 be purchased. Mr. Sheedy also sought confirmation that
14 the first name defendant would now invest the sum of
15 £300,000 in the purchase of the pension obtained. In this
16 respect I beg to refer to a copy of the said letters upon
17 which pinned together and marked with the letter "E" I have
18 signed my name prior to the swearing hereof.

19 .

20 Mr. Copsey replied by letter of the 24th of October of
21 1989, to say that the payment needed the authority of more
22 than one director of the first name defendant and stated
23 that without Mr. Murphy's approval, the money would not be
24 paid. By a further letter of the same date Mr. Copsey
25 stated that he was not 'aware of any events which may have
26 happened or may be presently contemplated which would
27 prevent Lajos Holdings Limited from honouring their
28 obligations to Mr. Gogarty on foot of the agreement which
29 was signed on 3 October. In this respect I beg to refer to
30 copies of the said letters upon which pinned together and
31 marked with the letter "F" I have signed my name prior to
32 the swearing hereof.

1 .
2 Mr. Sheedy wrote again to Mr. Copsey by letter of the 25th
3 October 1989, expressing my increasing concern at the delay
4 in implementing the agreement and pointing out that if the
5 first named Defendant was not going to honour its
6 obligations I might have to take the initiative and secure
7 my position with the assistance of the court.

8 .
9 I had previously been engaged in negotiations with the ESB
10 concerning the money due from the ESB, and ultimately I
11 negotiated a settlement of £700,000 with the ESB. I
12 instructed Mr. Sheedy to seek payment of this amount from
13 the ESB, which Mr. Sheedy did by letter of 11th October
14 1989, which letter enclosed an invoice from the second
15 named Defendant in the sum of £700,000 (including vat).
16 In this respect I beg to refer to a copy of the said
17 letters upon which pinned together and marked with the
18 letter (G) I have signed my name prior to the swearing
19 hereof.

20 .
21 On the 23 October, 1989, the ESB sent McCann Fitzgerald a
22 cheque in the sum of £700,000, and on my instruction McCann
23 Fitzgerald placed the said sum on deposit with Banque
24 National de Paris in an account entitled "McCann
25 Fitzgerald-- Joseph Murphy Structural Engineers
26 Limited" .

27 .
28 Mr. Sheedy wrote to Mr. Oakley in London by fax letter of
29 31st October 1989, pointing out that the delay of four
30 weeks was unacceptable and that the £700,000 had been
31 placed on deposit. Mr. Oakley replied by letter of the
32 3rd November 1989, and stated I am led to believe that Mr.

1 Murphy has now approved the terms of the settlement so
2 there should be no further delay in implementing this
3 matter.

4

5 Mr. Oakley asked for the cheque to be transferred to Mr.
6 Copsey as soon as possible, stated that by his calculations
7 I was entitled to £215,000 under the terms of the
8 agreement, and that he had asked Mr. Copsey to make the
9 necessary arrangements for the sum of £300,000 to be
10 transferred to the pension fund of my choice without delay.

11 Mr. Oakley enclosed with his letter a copy of a letter
12 which Mr. Copsey received from the English Revenue
13 Commissioners who took the view that I was an employee of
14 the first name defendant under the terms of the agreement
15 of 3 October 1989 and that certain PAYE deductions fell to
16 be made from the sum of £215,000.

17 .

18 By letter of the 3rd November 1989, Mr. Copsey informed Mr.
19 Sheedy that he would make the arrangements to pick up the
20 cheque for £700,000 the following day and asked that the
21 cheque be made payable to either Mr. Copsey's client
22 account or to Joseph Murphy Structural Engineers Limited.

23 .

24 Mr. Sheedy sent a fax on the 8th of November 1989, to Mr.
25 Copsey pointing out that he had been informed that Mr.
26 Murphy had now approved the payment of the sum of £300,000
27 for the pension, and asked for the confirmation that this
28 term of the agreement had been implemented by fax of the
29 same date from Mr. Oakley in London addressed to Mr.
30 Sheedy. Mr. Oakley requested that the sum of £700,000 in
31 the client account of McCann Fitzgerald should be paid to
32 the second named Defendant and if this was not done before

1 close of business on that date "I am instructed to commence
2 proceedings against your firm for recovery of the same
3 without further warning" .

4 .

5 By fax letter dated 9th November 1989 to Mr. Sheedy, Mr.
6 Copsey confirmed that Mr. Murphy had approved the payment
7 of the sum of £300,000, but at this time had not been yet
8 implemented. He stated;

9 .

10 "The sum will, however, be paid immediately out of the
11 funds due to JMSE in respect of the settlement with the
12 ESB".

13 .

14 Mr. Sheedy responded to Mr. Oakley by fax of 9th November
15 1989, pointing out that the terms of the agreement had not
16 yet been implemented and that Mr. Sheedy had been waiting
17 for Mr. Copsey's calculations of the deductions which
18 should be made from the sum due to me by way of commission
19 in light of the views of the Inspector of Taxes. Mr.
20 Sheedy pointed out that the implementation of the agreement
21 was a matter entirely for the Defendants.

22 .

23 By fax of the 10th November, 1989, to Mr. Copsey, Mr.
24 Sheedy sought Mr. Copsey's calculation of the deductions
25 which fell to be made from the sum of £215,000 arising from
26 the letter from the Inspector of Taxes and also sought Mr.
27 Copsey's instructions to remit £300,000 to Pension and
28 investment Consultants Limited which firm was arranging the
29 pension for me. Mr. Sheedy said that on receipt of these
30 instructions Mr. Sheedy would give Mr. Copsey a cheque for
31 the balance of the funds then held.

32 .

1 By fax of 10 November 1989 from the second named defendant,
2 the second named defendant demanded that McCann Fitzgerald
3 should remit the sum of £700,000 to the second named
4 defendant.

5 .

6 Mr. Sheedy replied by letter of the 13th of November of
7 1989, enclosing a cheque payable to the second named
8 Defendant in the sum of £185,000, being the amount received
9 from the ESB less the sum to be invested in the purchase of
10 the pension and the commission of £215,000. Mr. Sheedy
11 pointed out that he had not yet received from Mr. Copsy
12 details of the deductions which were to be made from the
13 commission payment of £215,000. Mr. Sheedy's letter
14 further stated:

15 .

16 "In relation to the affairs of Mr. Gogarty, JMSE and Lajos
17 Holdings Limited this firm has been acting on the
18 instructions of Mr. Gogarty. The issues between Mr.
19 Gogarty and JMSE and Lajos Holdings Limited are substantive
20 and we are satisfied that they will have to be resolved by
21 the court" .

22 .

23 In this respect I beg to refer to the copies of the
24 foregoing correspondence which pinned together and marked
25 with the letter "H" I have signed my name prior to the
26 swearing hereof.

27 .

28 On 17th November, 1989, Mr. Sheedy telephoned Mr. Copsy
29 and told him that I was going to institute legal
30 proceedings for specific performance. Mr. Sheedy also
31 spoke on the telephone with Mr. Oakley and informed him
32 that I was exercising a lien over the funds in respect of

1 the sums due to me and that I was instituting proceedings
2 for specific performance. Mr. Sheedy offered to hand over
3 the balance of the funds in question in exchange for two
4 cheques from the second named Defendant, being the cheque
5 for £300,000 payable to the appropriate life assurance
6 company and a cheque for the next sum to me by way of
7 commission.

8 .

9 On 27th November 1989, Mr. Sheedy received a telephone call
10 from Mr. Copsy, in which Mr. Copsy suggested that the sum
11 of 300,000 to be invested in my pension under the original
12 agreement of 3rd October 1989 be paid by JMSE and in which
13 Mr. Copsy further suggested that the sum due to me by way
14 of commission in respect of the settlement affected with
15 the ESB be paid to me by way the Grafton Construction
16 Company Limited and by Reliable Construction Limited
17 another two companies in Mr. Murphy's group of companies
18 rather than by Lajos Holdings Limited as was originally
19 agreed.

20 Mr. Copsy also suggested I should act as a consultant to
21 Lajos Holdings Limited rather than to Lajos Holdings
22 Limited, JMSE Limited and AGSE Limited as heretofore
23 agreed.

24 .

25 The reason advanced for these suggested variations in the
26 terms of my agreement was that the resourcing payments as
27 outlined above would increase the tax benefit to JMSE.

28 Mr. Sheedy rejected these proposed variations.

29 .

30 On 28th November 1989, JMSE over the signature of its
31 Director, Mr. Copsy, to authorised McCann Fitzgerald to
32 continue:

1 .

2 "To hold the balance of the ESB monies in your client

3 account for the period Monday to Friday, 1st December".

4 .

5 I beg to refer to a copy of the said letter upon which

6 marked with the letter "I" I have signed my name prior to

7 the swearing hereof.

8 .

9 On 30th November 1989, Mr. Copsey wrote to Mr. Sheedy by

10 fax enclosing copies of various items of correspondence

11 between Copsey Murray & Company, and the Irish Revenue

12 Commissioners had stated that:

13 .

14 "A sum of £215,000 will be paid to him (i.e. to me) with

15 the deduction of PAYE and the youth employment being from

16 Grafton/Reliable" .

17 .

18 Mr. Sheedy replied by fax dated 30th November, 1989,

19 addressed to Mr. Copsey as a Director of JMSE stating that

20 it was my wish that the terms of the original agreement of

21 3rd October 1989, be implemented without variation. I beg

22 to refer to a true copy of the said letters upon which

23 pinned together and marked with the letter "J" I have

24 signed my name prior to the swearing hereof.

25 .

26 I say and believe that I am deeply disturbed in the manner

27 which the Defendants have refused to carry out their

28 obligations to me. No satisfactory or coherent reason has

29 been advance in the course of the correspondence which Mr.

30 Sheedy has had with Mr. Copsey and Mr. Oakley as to why the

31 defendants have not implemented the agreement.

32 . At no stage have they attempted to deny that I am

1 entitled to the pension payment of 300,000 or to the
2 commission payment of £215,000 (less the appropriate PAYE
3 deductions). Not with standing that I had procured the
4 necessary funds from the ESB for the defendants so that
5 such funds are ready and available for the discharge of the
6 defendants obligation to me, the defendants have still not
7 taken any steps to implement the agreement, this has made
8 me both suspicious and apprehensive that the defendants
9 have no intention of honouring the agreement. The
10 suspicion and apprehension is heightened by the fact that
11 the companies in the Lajos Holdings group are currently
12 engaged in selling their properties. The companies
13 involved, the respective directors of those companies, the
14 respective properties and the closing dates of the sales of
15 those properties are, as far as I'm aware as follows:

16 .

17 (A) Company: Gaiety Theatre, (Dublin) Limited.

18 Property: Gaiety Theatre.

19 Sale: Mid September 1989.

20 Value: 1.3 million.

21 (B) Company: The Grafton Construction Company Limited,

22 Reliable Construction (Dublin) Limited.

23 Property: Property at Swords.

24 Sale: February, 1989.

25 Value: 1.45 million.

26 (C) Company: Wexburn Limited.

27 Property: 23 Lower Baggot Street.

28 Sale: 12 December, 1989.

29 Value: £310,000.

30 (D) Company: The Grafton Construction Company limited.

31 Property: Longford, 9 acres.

32 Sale: 12 December 1989.

- 1 Value: £24,000.
- 2 (E) Company: Finglas Industrial Developments Limited.
- 3 Property: Finglas 83 acres.
- 4 (F) Company: Barrett Developments Limited.
- 5 Property: Finglas 39 acres.
- 6 (G) Company: The Grafton Construction Company.
- 7 Property: Ballymun 100 acres.
- 8 (H) Company: The Grafton Construction Company Limited.
- 9 Property: Balgriffin 255 acres.
- 10 (I) Company: The Grafton Construction Company Limited.
- 11 Property: Portmarnock 9 acres.
- 12 (J) Company: Turvey Estates Limited.
- 13 Property: Donabate 155 acres.
- 14 Sale: 19 December 1989.
- 15 Total value E to J above: 2.3 million.
- 16 .
- 17 Company Directors:
- 18 Lajos Holdings Limited: Joseph Murphy, Una Murphy, Joseph
- 19 Gerard Murphy, Roger Copsey.
- 20 Secretary: Copsey Murray Secretarial Services Limited.
- 21 Company: Joseph Murphy Structural Engineers Limited:
- 22 Directors: Joseph Murphy, Joseph Gerard Murphy, Una Murphy,
- 23 Roger Copsey.
- 24 Secretary: Copsey Murray Secretarial Services Limited.
- 25 .
- 26 Next company: Gaiety Theatre (Dublin) Limited.
- 27 Directors: Joseph Murphy, Joseph Gerard Murphy, Una
- 28 Murphy, Roger Copsey.
- 29 Secretary: Copsey Murray Secretarial Services Limited.
- 30 Company: The Grafton Construction Company Limited.
- 31 Directors: Joseph Murphy, Joseph Gerard Murphy, Una Murphy,
- 32 Roger Copsey.

1 Secretary: Copsey Murray Secretarial Services Limited.
2 .
3 Next company: Wexburn and Finglas -- They have the same
4 directors and same secretarial service.
5 .
6 Next company: Barrett Developments Limited. Same director
7 and same Secretary.
8 .
9 Next company: Turvey Estates Limited. Same Director and
10 same Secretary.
11 .
12 Next company: Reliable Construction (Dublin) Limited.
13 Same Directors and same Secretary.
14 .
15 Paragraph 30:
16 .
17 "By reason of the largely common directors between these
18 companies, it can be seen that all of these companies are
19 effectively under the control of Mr. Murphy and the
20 Directors of the Defendants herein. I say and believe
21 that from my life time experience with Mr. Murphy and his
22 various companies, all the companies in the Group are run
23 and operated for the benefit of the Group as a whole and
24 are run in light of common policies set by Mr. Murphy and
25 the directors of the Defendants herein, so that in
26 commercial and economic terms all of the Group companies
27 are effectively one unit. These companies represent Mr.
28 Murphy's extensive business interests in this jurisdiction
29 and the properties in question are the major assets of
30 those companies.
31 .
32 As previously referred to Mr. Murphy has extensive business

1 interests in the United Kingdom, the Isle of Man and
2 Jersey. I am very apprehensive that the process which is
3 now underway whereby all of the companies in the Group
4 appear to be attempting to liquidate their assets allied to
5 the Defendants refusal to implement the agreement and their
6 obvious concern to bring under their own control the fund
7 of £700,000 without making any provisions for the discharge
8 of their obligations to me is the process which will result
9 in the funds otherwise available for the satisfaction and
10 implementation of the agreement in this jurisdiction being
11 dissipated. In my view and from my knowledge of Mr. Murphy
12 and his business affairs it is much more likely, it is more
13 than likely that the net surplus of funds which arises from
14 the disposal of these properties will be remitted outside
15 the jurisdiction and in all probability to either Jersey or
16 the Isle of Man.

17 .

18 I am fortified in this apprehension by a conversation I had
19 with Mr. Murphy in or about April of this year in the
20 Bonnington Hotel in London in which he discussed with me
21 his future plans, and in the course of which he stated he
22 would be trying to remove as much of his money out of the
23 Ireland as he could because of his fear that certain legal
24 proceedings in which he was involved outside the
25 jurisdiction might go against him.

26 .

27 My suspicions were further confirmed when on Tuesday, 12th
28 December 1989, at about 5 p.m. I attended a meeting held in
29 the offices of McArdle & Company, solicitors, of 30 Upper
30 Fitzwilliam Street, Dublin 2. The purpose of the meeting
31 was to discuss the sale of various properties owned by
32 companies within the Lajos Holdings Group. The companies

1 and the properties involved in the sale are set forth at
2 paragraph 29, sub paragraph E to J of this affidavit.
3 .

4 During the course of the meeting, which was initially
5 attended by Mr. McArdle, as solicitor for the companies, by
6 Mr. Duffy as auctioneer for the companies, by Mr. Copsey as
7 Director of the companies and by myself. Mr. Copsey
8 averted to the certain "Monumental exposure" to tax which
9 the companies would suffer as a result of the proposed
10 sale. Mr. Copsey went on to outline a scheme which would
11 avoid exposure to these lax liabilities, and Mr. McArdle
12 expressed some doubt as to the ultimate effectiveness of
13 the scheme. Mr. Copsey in reply said that he had taken
14 the advice of senior council in relation to the scheme and
15 in any event thought that the Revenue Commissioners would
16 not be likely to examine the scheme too closely because of
17 their existing burden of work. Even if a detailed
18 examination of the scheme was undertaken by the Revenue
19 Commissioners the time which would be required to complete
20 the examination would be such as to allow for the removal
21 of the remaining assets of the companies from this
22 jurisdiction and for the appointment of a liquidator over
23 these companies. I understand that a liquidator had in
24 fact been appointed over three of these companies, namely
25 Finglas Industrial Developments Limited, Barrett
26 Developments Limited and Turvey Estates Limited, or if not
27 so appointed was in the course of being so appointed.
28 .

29 I further say and believe that by reason of the terms of
30 the agreement between myself and the first named Defendant
31 whereby I was to be entitled to 50 percent of any excess
32 over £130,000 which I might procure from the ESB in

1 settlement of the claim arising out of the Moneypoint
2 Generating Station, by reason of the fact that such
3 agreement was entered in with the full knowledge and
4 concurrence of the second named Defendant. I have a
5 propriety interest in the fund now held at Banque National
6 de Paris to the extent of £215,000 (less whatever may be
7 the appropriate PAYE deductions).

8 .

9 I further say and believe that I am entitled to a lien over
10 the funds in question, pending discharge of the Defendants'
11 obligation under the said agreement.

12 .

13 Accordingly, I have instructed McCann Fitzgerald to retain
14 said funds pending resolution of this matter and have
15 instructed them to commence proceedings with a view to
16 bringing this matter before this honourable court. I
17 therefore pray this honourable court for the relief sought
18 in the notice of motion herein, and for such further or
19 other relief or directions as this honourable court shall
20 seem fit" .

21 .

22 That affidavit was sworn by you, Mr. Gogarty, on --

23 A. That's right.

24 .

25 MR. ALLEN: I wonder if I could seek some clarification
26 from you, Sir? In relation to a matter which is causing me
27 concern and which I wish to communicate to you. I accept
28 that what, of course that what Mr. Gallagher is doing now
29 is that he is, he has just completed reading an affidavit
30 sworn some years ago by Mr. Gogarty in the litigation,
31 which we have been hearing about. My concern is this, Sir,
32 and I respectfully ask for your guidance and assistance in

1 relation to the matter.
2 .
3 We are now -- this is the tenth day, I am sure you don't
4 need to be reminded, Sir, of public sittings of these
5 proceedings. I have in front of me, as I am sure you have,
6 a copy of the Terms of Reference pursuant to which this
7 Tribunal was instituted, and I have also carefully looked
8 at the transcript of the entirety of the proceedings, and
9 thus far, Sir, insofar as those Terms of Reference are
10 concerned, and insofar as my clients in particular are
11 concerned; and I hold no brief for anybody else; we have
12 had exactly 45 minutes out of ten days of material and
13 relevant evidence.
14 .
15 Now, I am not seeking to create any difficulty, Sir, and I
16 want to emphasise that, but I want to ask, I seek your
17 guidance in this regard, Sir, because I have to answer to
18 my clients. I would ask you, Sir, if you would consider
19 so doing, to indicate to me, as the representative, as the
20 leader of the legal team for Messrs. Bailey and Bovale, as
21 to what precisely the purpose of what is now happening is?
22 .
23 Because if I could just amplify it a little bit, Sir, so
24 that what I am saying to you is I hope, fully clear. It
25 appears to me, and I say this with respect, Sir, that none
26 of this has anything what ever to do with the specific
27 Terms of Reference. We know that you are required to deal
28 under:
29 .
30 (1) With the identification of the lands.
31 .
32 Under (2) With the planning history of the lands.

1 .
2 Under (3) Whether the lands referred to in the letter dated
3 the 8th of June, 1989, were the subject of the following:
4 Rezoning applications, resolutions for material
5 contraventions of the relevant Development Plans.
6 Application for special tax designation status pursuant to
7 the Finance Acts.
8 Application for planning permission, changes made or
9 requested to be made with regard to the servicing of the
10 land for development. Applications for the granting of
11 building bye-law approval in respect of which buildings, in
12 respect of buildings constructed on the lands.
13 Application for Fire Safety Certificates -- and that is on
14 or after the 20th day of June, 1985.

15 .
16 We then come to your obligation to ascertain the identity
17 of any persons or companies, and in companies the identity
18 of the beneficial owners of such companies who had a
19 material interest in the said lands or had a material
20 involvement in the matter aforesaid, and obviously a matter
21 of considerable public concern, which is the need to
22 ascertain:

23 .
24 "The identity of any members of the Oireachtas, past or
25 present, and/or members of the relevant local authorities
26 who were involved directly or indirectly in any of the
27 foregoing matter whether by the making of representations
28 to the planning authority or to any person in the authority
29 in a position to make relevant decisions, or by the
30 proposing of, or by voting in favour or against, or by
31 abstaining from any such resolution, or by absenting
32 themselves when such votes were taken, or by attempts to

1 influence in any manner whatsoever the outcome of any such
2 application or who received payment from any persons or
3 companies referred to at (1) above.

4 .

5 3. Is to ascertain the identity of all public officials
6 who considered, made recommendations or decisions on any
7 such matters etc.

8 .

9 4. To identify all of the recipients of payments made to
10 political parties and members of either House of the
11 Oireachtas past or present etc. That's 4 (A).

12 .

13 4 (B) Whether any of the persons referred to at sub
14 paragraph 3 (2) and 3(3) above, were influenced directly or
15 indirectly by the offer or receipt of any such payments".

16 .

17 And A (5) then, Sir, is the, is what, I suppose, could be
18 referred to as the omnibus clause, depending on how one
19 interprets it, and I don't think that I need trouble you
20 with that. It is a matter which has already been
21 ventilated in the Supreme Court.

22 .

23 But my concern simply put, Sir, is this; if we are now at
24 the end of, coming towards the end of the tenth day of
25 these proceedings, what we appear to be caught up in is a
26 review ad nauseum, and I don't say that in any
27 disrespectful sense, but a review ad nauseum. It would be
28 wrong to describe it as a squabble, but of a bitter, a
29 bitter struggle and dispute between Mr. Gogarty and his
30 former employers, none of which has anything, in my
31 respectful submission, subject to correction by you, Sir,
32 none of which is in anyway relevant to the matters which

1 have to be determined by you.
2 .
3 I specifically say, Sir, subject to correction by you,
4 because I want to refer you back to what I said when I rose
5 to my feet, which was that what I am seeking is
6 clarification. You will, I am sure, Sir, be not unaware
7 that various people outside of these proceedings, including
8 politicians, have made not thinly veiled, but actual
9 attacks on those who represent my clients, which means
10 attacks on me, and those who represent Messrs. JMSE,
11 because we are in some way apparently, by lack of
12 co-operation, subverting the process of these
13 proceedings.
14 .
15 What I want to know, Sir, and that is one of the factors
16 which I bear in mind, what I want to know is what are we
17 doing here at this point in time? Are we, and I ask this
18 in all seriousness, or it may be that there is a complete
19 answer to it; is the purpose of this exercise to establish
20 or to -- is the purpose of the exercise to establish Mr.
21 Gogarty's credibility in some way, or is there some other
22 purpose?
23 .
24 Because I have said before and I won't weary you with it
25 again, that it is not the function, in my respectful
26 submission, of Mr. Gallagher or of anybody attached to the
27 Tribunal, to establish or vindicate the integrity of any
28 individual. The purpose is to put all relevant, and I
29 stress Sir, the word "relevant", information before you, so
30 that you may be in a position to decide. I accept that
31 fully, Sir, it is you who has to decide.
32 .

1 But I have a growing anxiety about the manner, from my
2 clients' point of view, about the manner in which matters
3 are proceeding. On the current basis we can expect to be
4 hearing about Mr. Gogarty's complaints, be they justified
5 or otherwise, frankly I don't think it is a matter
6 monumental in difference to anybody as to whether they are
7 justified or not, in the context of this Tribunal.

8 .

9 Of course Mr. Gogarty is entitled to feel that he was
10 hard-done-by, equally his former employers are entitled to
11 suggest that he was not hard-done-by, but with the greatest
12 of respect, Sir, it is clear even from the reading of this
13 affidavit, that these are matters which were ventilated,
14 going back to December of 1989 in the High Court of this
15 land. We are now, and I can see it, if this proceeds, we
16 will be into next week hearing about this squalid row
17 between individuals, one with Mr. Gogarty sounding off at
18 great length, although it has to be said not for yesterday
19 or today because it just appears to be an exercise where
20 Mr. Gallagher reads documentation.

21 .

22 I would ask you, Sir, with great respect, to consider this
23 point and to consider whether or not there is something to
24 be said for truncating this. What I, with the greatest
25 respect say is an entirely irrelevant exercise. It
26 certainly has nothing that I can see, which has any
27 relevance whatsoever to the Terms of Reference, and it in
28 no way, I say, again subject to correction by you, it in no
29 way assists, but by any conceivable stretch of the
30 imagination does it or can it or will it assist you in
31 reaching a conclusion on the matters which you have been
32 mandated by both Houses of the Oireachtas to consider?

1 .

2 And I thank you for listening to me on the points, Sir.

3 .

4 CHAIRMAN: Mr. Gallagher?

5 .

6 MR. GALLAGHER: I had at one stage thought of categorising

7 Mr. Allen's submission as a speech but I feel --

8 .

9 CHAIRMAN: Let's deal with it as a submission, please.

10 .

11 MR. GALLAGHER: The fact is that you, Sir, are charged

12 with endeavouring to reach a decision as to whether the

13 truth lies in this matter. We have here affidavits that

14 are sworn in the past by Mr. Gogarty. No doubt Mr.

15 Gogarty's evidence will be tested on cross-examination by

16 Mr. Allen and by others. It is, in my respectful

17 submission, relevant to understand the background and the

18 history of the events that gave rise to the events we now

19 find ourselves dealing with, the motives of those

20 concerned, the actions of those concerned and whether or

21 not those actions are consistent or inconsistent.

22 .

23 It is a matter for you to weigh up in due course, and

24 whilst I have no intention of prolonging this hearing, it

25 is, I think, in fairness to this witness and in fairness to

26 everybody else who will be following, appropriate that this

27 material should be put before the Tribunal so that you,

28 Sir, can evaluate what relevance, what weight, if any, you

29 will attach to it.

30 .

31 You said that you would hear evidence de bene esse. In my

32 respectful submission you are hearing and having opened to

1 you correspondence and documentation which relate to and
2 arise from the agreement of the 3rd of October, of 1989,
3 and documentation which has passed from one side to the
4 other, which includes documentation and memoranda which I
5 have opened at the request of Mr. Cooney and which I intend
6 to continue to open.

7 .

8 In my respectful submission this is material. It is
9 material that will and may assist you in arriving at the
10 difficult decisions that you have to arrive at, and in my
11 respectful submission it must continue.

12 .

13 MR. ALLEN: If I might briefly respond to that, Sir, for
14 the avoidance of doubt, if I may use that expression, I
15 wasn't and do not criticise Mr. Gallagher, I am querying
16 Mr. Gallagher and I was asking you for a direction.

17 .

18 It seems to me that the matter can no better be illustrated
19 than by reference to the fact that we are now at a period
20 in December, of December of 1989 where Mr. Gogarty is
21 litigating with JMSE and the various companies. Now,
22 December of '89 is a long time after June of 1989. It is
23 the position as of June of 1989 to which your Terms of
24 Reference refer, it is -- we still await hearing about the
25 identification of lands, I am not going to weary you with
26 repeating matters which I believe to be already on the
27 record.

28 .

29 But I do think that I would be properly open to criticism
30 if I didn't, I think point, tell you of my very real
31 concern about the manner in which Mr. Gallagher is dealing
32 with the matter. It is a query, not a criticism. And I

1 accept that it is for you to decide what is to be done, but
2 I do feel that, an obligation, not simply to sit silent and
3 allow, what I regard to be a profound waste of public funds
4 and public money to continue.

5 .

6 At what point in time, I ask rhetorically, are we going to
7 deal with the exception, the single exception of the 45
8 minutes of evidence tendered by Mr. Gogarty some five days
9 ago? At what time are we going to deal with the Terms of
10 Reference of this Tribunal?

11 .

12 You know, should we sort of, because as matters proceed we
13 will undoubtedly be here next year on this section.

14 .

15 MR. COONEY: Could I just say, Mr. Chairman, that I share
16 the apprehensions and concerns voiced by Mr. Allen. I
17 think I would like to point out to the Tribunal that the
18 genesis of this evidence lies in the very long affidavit of
19 evidence which was furnished by Mr. Gogarty to this
20 Tribunal and in which he devotes page after page to what he
21 describes as background and method and accounting and so
22 on. Also to the fact that he gave evidence over a period
23 of about six days initially, which really wasn't relevant
24 to the core issues you have to decide but was mainly based
25 in him venting his spleen in the most vicious way against
26 his former employers, particularly against Mr. Murphy
27 Senior, Junior and Mr. Roger Copey whom he has described
28 in very insulting terms continuously throughout his
29 evidence.

30 .

31 I do share Mr. Allen's concern, Mr. Chairman, and I wonder
32 about the relevance of it. Now, that the matters have

1 been introduced by the Tribunal team of course it is a
2 matter I will have to deal with when I come to the
3 cross-examination. It is something that has been imposed
4 upon me, it is not something I sought, Mr. Chairman.

5 .

6 MR. CALLANAN: I think I should reply to that point in as
7 far as Mr. Cooney launched a gratuitous attack on Mr.
8 Gogarty. The submission is a preposterous piece of
9 humbug. Everybody here has seen Mr. Cooney repeatedly
10 insisting on documents being put. We have had speeches
11 about the necessity incumbent on counsel for the Tribunal
12 to lay all matters open in the evidence-in-chief, and it is
13 preposterous for Mr. Cooney now to take exception to that
14 and seize the opportunity to launch another unwarranted
15 attack on my client.

16 .

17 MR. COONEY: It would help, Mr. Chairman, in these
18 proceedings if Mr. Callanan would reply to the point which
19 I actually make and not one which he finds suitable and is
20 largely imaginary.

21 .

22 MR. GALLAGHER: Can I say, Sir, that Mr. Allen protests
23 that he doesn't wish to criticise me, he does however
24 criticise the way in which I run and introduce evidence
25 into this matter. It seems to me that Mr. Allen is, in
26 fact, despite his protestations playing the man and not
27 playing the ball. I think I should proceed with this
28 matter and if we had fewer interruptions we would get
29 through this quicker.

30 .

31 MR. ALLEN: With respect, Sir, and this is my final word
32 on this matter. With respect, Sir, I think it is

1 profoundly unfair of Mr. Gallagher to talk about my
2 protestations.

3 .

4 CHAIRMAN: Enough, I am not going to have criticism of
5 counsel.

6 .

7 MR. ALLEN: I wasn't going to criticise Mr. Gallagher. He
8 was criticising me and most unfairly.

9 .

10 CHAIRMAN: The problems of this Tribunal flow entirely
11 from the failure of the parties to face up to the reality,
12 in that we have to look into and find the facts. I have
13 repeatedly said that if the parties -- Sorry, may I change
14 the word parties, participants, had said and given a
15 narrative account of what their situation was, what their
16 view was, none of this would arise, have arisen. There has
17 been a vicious attack, it may well be absolutely justified
18 for all I know, upon Mr. Gogarty, who has been described as
19 a audacious liar. If he is an audacious liar, and that's
20 the issue in this case, then we are going to have to look
21 into whether the circumstances which that, gave rise to
22 that comment. It is entirely the product of the manner in
23 which the case is being run.

24 .

25 If we were looking into what we should be looking into,
26 which is the facts, or the versions of the facts that the
27 participants allege, I don't know and I have no preference
28 for any particular participant, they are all entitled to
29 give their view of what the facts were or how the sequence
30 of events took place, I will sit down and look at all their
31 versions, choose what I believe to be the matter, as a
32 matter of probability what did occur.

1 .

2 But if there is going to be a challenge that once a person
3 gives evidence that they are accused of being an audacious
4 liar, then I think they are entitled to justify the
5 proposition that they are not an audacious liar and perhaps
6 those who are criticising them may not be altogether holy
7 and angelic.

8 .

9 Listening to the evidence here today one might perhaps take
10 a different view of the angelic nature of some of the
11 parties and some of the people who have been described, I
12 don't know, I have to look at the whole thing.

13 .

14 If you care to discuss the matter with Mr. Gallagher and
15 try to come to an agreed agenda of what is relevant and
16 what you are prepared to admit as to the situation and try
17 and get, as it were, an area of agreement and we look at
18 the area of disagreement, it would undoubtedly enhance and
19 undoubtedly speed things up.

20 .

21 But if everybody contends on the basis that one calls the
22 other an audacious liar, then I am going to have to select
23 just who is and who is not lying.

24 .

25 I am actually at the moment inquiring into a very simple
26 sector of this case; what were the circumstances under
27 which an admitted payment of £300,000, querying whether it
28 is more or less, was made to Mr. Burke? That's all I am
29 doing.

30 .

31 It may well be that Mr. Gogarty as a participant has, I am
32 going to use a neutral phrase, an inaccurate recollection,

1 and it would be of help had those who say they have an
2 accurate recollection, if they gave us their version, but
3 that has not been possible, I have asked for it in
4 correspondence, I have asked for it here, and it just is
5 not emerging, so there is nothing I can do except listen to
6 the circumstances in which Mr. Gogarty says he was not an
7 audacious liar and the points that establish that facts.

8 .

9 But whether I hear it now or hear it as a result of
10 cross-examination makes little difference, it is still
11 going to delay the proceedings, and it all flows from a
12 lack of common sense, lack of common purpose to look at the
13 reality of what this Tribunal is about.

14 .

15 Proceed, Mr. Gallagher, and please try to shorten things
16 up.

17 .

18 MR. GALLAGHER: Thank you, Sir.

19 .

20 The next document I propose to open is a draft of an
21 affidavit of Mr. Roger Copsey, to be found at page 3057 of
22 the book of extracts. It is a different book, my folder is
23 a blue folder. Mr. Copsey says:

24 .

25 "I, Roger Copsey, of 5 Pembroke Row, Dublin 2, Chartered
26 Accountant aged 21 years and upwards make oath and say as
27 follows.

28 .

29 I am a director of the first named Defendant and financial
30 director of the second named Defendant, and I make this
31 affidavit on behalf of the first and second named
32 Defendant, and with the consent of the first and second

1 named Defendant.
2 .
3 The second named Defendant is a wholly owned subsidiary of
4 the first named Defendant.
5 .
6 I make this affidavit from facts within my own knowledge,
7 save where otherwise appears on where so appearing I
8 believe the same to be true.
9 .
10 I beg to refer to the affidavit of the of the Plaintiff
11 together with the exhibits referred to herein when
12 produced.
13 .
14 I refer to paragraph two of the said affidavit of the
15 Plaintiff.
16 The beneficial ownership of the companies referred to does
17 not rest within Mr. Joseph Murphy referred to, due to the
18 creation of a trust in 1968 for the benefit of his children
19 and for a significant period of time Mr. Murphy has had no
20 active involvement in the management of the companies up to
21 a period of 18 months ago when following certain events
22 which are irrelevant to these proceedings the said Mr.
23 Murphy again began to take an active interest in the
24 management of the companies referred to".
25 .
26 Can I by way of an aside; beneficial ownership is a matter
27 you will in due course have to deal with, Sir, and it is
28 referred to here by Mr. Copsey.
29 .
30 "Paragraph 6. I beg to refer to the paragraph 4 of the
31 said affidavit, in that although the Plaintiff describes
32 himself as Executive Chairman of the companies referred to,

1 recently the Plaintiff took little active part in the
2 management of the companies due to the signature
3 personality clash between him and the then Group Chief
4 Executive of the companies.

5 .

6 I beg to refer to paragraph 5 of the said affidavit,
7 specifically in relation to the allegation that Mr. Murphy
8 had promised the Plaintiff payment of 1 million pounds and
9 while it does not appear relevant to these proceedings, I
10 wish to say that during the course of my negotiations with
11 Mr. Gogarty figures of that order were never in
12 contemplation. Futhermore I have been advised by Mr.
13 Murphy and verily believe that no pension for such an
14 amount was agreed to by Mr. Murphy.

15 .

16 I beg to refer to paragraph 11 of the affidavit, and for
17 the sake of clarity I wish to point out that the firm of
18 Copsy Murray & Company do not act as the Defendants'
19 accountants, however I this deponent do act as financial
20 advisor to the Defendant companies as required.

21 .

22 I refer also to the meeting which took place on the 3rd
23 October, 1989, and I wish to state that neither I nor Mr.
24 Oakley confirmed that the pension would be purchased within
25 a period of ten days. Although we did not then expect the
26 problems that arose subsequently. And I initially expected
27 it to be put into effect within a few weeks.

28 .

29 It was made clear at that meeting that Mr. Murphy's
30 authority to make the payment of £300,000 would be required
31 and that a Board meeting of the relevant company would have
32 to be held to approve the payment prior to purchasing the

1 pension, and furthermore the agreement entered into between
2 the Plaintiff and the Defendant companies, dated the 3rd
3 October, 1989, and which is referred to as Exhibit A in the
4 Plaintiff's affidavit provided at paragraph 1 thereof, that
5 the company would use its best endeavours to give effect to
6 the preferences of the Plaintiff, subject to approval being
7 obtained from the Revenue Commissioners. At the time of the
8 execution of the said agreement and at the time of the
9 meeting already referred to no information had been
10 provided by the Plaintiff's advisors as to the specific
11 pension which the Plaintiff wished to have purchased on his
12 behalf, but I was requested to deal both with Bates Butler
13 & Company and with Pension and Investment Consultants
14 Limited.

15 .

16 I beg to refer to paragraph 14 of the Plaintiff's
17 affidavit. Negotiations for the purchase of the pension
18 were conducted on the Plaintiffs behalf by Pension and
19 Investment Consultants Limited, and the tax implications of
20 the pension arrangements were dealt with on the Plaintiff's
21 behalf by Bates Butler & Company. Some days following the
22 execution of the agreement I wrote to Bates Butler &
23 Company requesting that they would contact me to discuss
24 the purchase of the pension. I was advised by them to
25 deal with Pension and Investment Consultants Limited who
26 advised that the Plaintiff wished to have purchased on his
27 behalf a Hancock annuity.

28 .

29 I beg to refer to a copy of a letter dated the 16th
30 October, 1989, from Pension and Investment Consultants
31 Limited upon which marked with the letter "B" I have signed
32 my name prior to the swearing hereof.

1 .

2 A Hancock annuity has different tax implications from the
3 normal statutorily approved pension scheme. This request
4 resulted in considerable difficulty and delay in seeking
5 Revenue approval the Plaintiff's advisors stated that it
6 was not necessary for the company paying the pension to
7 have remunerated the Plaintiff. However, the Revenue
8 Commissioners in a letter dated 24th November, 1989,
9 advised me that they would not approve any pension unless
10 it was provided by a company which did remunerate the
11 Plaintiff. Further doubts existed as to whether the Revenue
12 approval would be obtained due to the fact that the age of
13 a person in whose favour the pension is being purchased
14 should not be more than 70 years, the Plaintiff is in fact
15 72.

16 The relevant legislation provides for circumstances whereby
17 the Revenue Commissioners can vary this requirement but
18 this is a matter of concession rather than of right. In
19 addition a Hancock annuity may be purchased at the date of
20 retirement or in anticipation of retirement.

21 .

22 The said agreement provides that the Plaintiff will
23 continue to work as a consultant for the Defendants and
24 other companies within the Group. The Revenue
25 Commissioners have determined that the Plaintiff continues
26 to be an employee of the Defendant companies and thus
27 approval may not even now be forthcoming on this basis.

28 .

29 I was advised by the Revenue Commissioners on the 15th
30 December, 1989, that they would not provide approval for
31 the type of pension scheme proposed on behalf of the
32 Plaintiff. I beg to refer to copies of all correspondence

1 with the Revenue Commissioners upon which pinned together
2 and marked with the letter "C" I have signed my name prior
3 to the swearing hereof.

4 .

5 I wrote to Pension and Investments Consultants Limited on
6 the 13th December, 1989, and advised them that on the basis
7 of verbal communication with the Revenue Commissioners
8 (later confirmed in writing by the letter of the 15th of
9 December, 1989, referred to above the Revenue approval would
10 not be forthcoming)". And he refers to letters exhibited
11 at "D". I had already placed a new proposal before the
12 Revenue Commissioners and I beg to refer to a copy of my
13 said letter dated the 4th day of January, 1990, upon which
14 marked with the letter "E" I have signed my name prior to
15 the swearing hereof and say that I will continue to
16 actively pursue such approval.

17 .

18 I beg to refer to paragraph 16 of the Plaintiff's
19 affidavit. It was a term of the said agreement that the
20 Plaintiff was to act as consultant for and on behalf of the
21 first named Defendant in the resolution of a dispute which
22 had arisen between that company and the Electricity Supply
23 Board, and negotiations in respect of which were on-going
24 at the completion of the said agreement. It was agreed
25 that the Plaintiff would have sole rights of negotiation in
26 this respect, but would be subject to the direction of the
27 Board of Directors of the first named Defendant from time
28 to time. It was agreed that the first named Defendant
29 would pay to the Plaintiff a commission equivalent to the
30 sum of 50 percent of the net sum received by way of
31 settlement --

32 .

1 CHAIRMAN: Just may I interrupt here please. Am I not
2 correct in the belief that the litigation was never
3 actually determined by the court, that it, in fact, was
4 compromised?

5 .

6 MR. GALLAGHER: That's so.

7 .

8 CHAIRMAN: Isn't the reality of that, that we have got to
9 get down to agree to disagree on specifics. The situation
10 as I, obviously I can't ask that the terms of compromise be
11 revealed to me, but clearly the terms of the compromise
12 will give a considerable implication for the realities of
13 who was right and who was wrong, another party likely to
14 give away anything they believe they would be entitled
15 to. This was a litigation that went on, was compromised.
16 It may well be that it will establish one way or the other
17 about one or both, we want to be absolutely in equilibrium
18 as far as I am concerned. I don't know at the moment, I
19 haven't sat down to consider it.

20 .

21 Surely it is possible to do some degree of getting together
22 and saying we accept these allegations, list them, we
23 accept they were denied and the denials are to be found in
24 such-and-such correspondence? This reading it into the
25 record is going to go on for years. Mr. Cooney, what do
26 you think?

27 .

28 MR. COONEY: I respectfully agree, Mr. Chairman, but you
29 will understand, Mr. Chairman, the language that has been
30 put by the manner this Tribunal has been run for the last
31 two and a half weeks, as I said earlier, we were faced with
32 an affidavit when the witness made the most scandalous

1 affidavits against my personal client.

2 .

3 CHAIRMAN: Mr. Cooney, we have heard this proposition from

4 you before, why not look at the affidavit, say this

5 statement is incorrect, my version of it is Y? Why not set

6 them out and let's get down to the core problem arising,

7 and not play, we are at the moment effectively playing

8 snakes and ladders, that's what we are doing.

9 .

10 MR. COONEY: Mr. Chairman, if the Tribunal had adopted the

11 highly practical course which you are now suggesting two

12 and a half weeks ago none of this would have arisen. May I

13 respectfully remind you, Mr. Chairman, that the Tribunal

14 has allowed this witness to indulge his venom towards my

15 clients in an unrestrained fashion for the last two and a

16 half weeks in the course of which, in the course of which

17 he has denigrated them in every possible way that could

18 occur to him. If you think back about the things he

19 uttered about Mr. Murphy Senior, Mr. Murphy Junior and Mr.

20 Copsey, in particular, you will recall, Mr. Chairman, that

21 they are defamatory in the greatest possible way.

22 .

23 Now, Mr. Chairman, my clients have a right to defend

24 themselves against these allegations, and bearing in mind

25 the latitude that you gave to this witness to make these

26 allegations, Mr. Chairman, I think that --

27 .

28 CHAIRMAN: All right, if you are not willing to assist

29 then you get the latitude in your cross-examination and in

30 giving your evidence in reply, and we will go into the

31 matter in detail and we will make an appropriate finding,

32 whatever that may be.

1 .

2 MR. COONEY: I respectfully agree, Mr. Chairman.

3 .

4 CHAIRMAN: I am trying to truncate this matter. You
5 appear to be resisting this, as you have resisted from day
6 one by failing to give any adequate responses as to what
7 your version of events were. That's where the thing lies
8 at the core of the matter.

9 .

10 MR. COONEY: Mr. Chairman, about five minutes ago you put
11 a proposition to me, when I endeavored to answer that you
12 interrupted me on two occasions, and in the course of these
13 interruptions you have misstated my position to a very
14 serious degree.

15 .

16 First of all, Mr. Chairman, I emphatically reject your
17 suggestion that the statements which we have made to this
18 Tribunal are inadequate, this is a matter which you and
19 your team have raised time and time again. You have not
20 furnished one concrete example in which any one of the six
21 statements that we furnished to you are inadequate. And I
22 respectfully ask you, Mr. Chairman, to cease making that
23 allegation against us, unless you can illustrate by example
24 anyway in which any one of these statements are
25 inadequate. Now, this is a side issue and I want to leave
26 that and return to my principle point.

27 .

28 I said, Mr. Chairman, that you have given this witness
29 latitude to expuriate my clients in public, in this
30 Tribunal and which has been very widely reported. Now,
31 this is a matter of credible, it is a matter of this
32 witness' credibility. It may turn out to be a matter of

1 credibility for my clients when it comes to giving their
2 evidence.
3 .
4 Credibility, Mr. Chairman, is frequently a matter of
5 detail, who is right, who is wrong, who is lying, who is
6 telling the truth. Mr. Cush said earlier this week, and I
7 support him wholeheartedly in what he said; he said Mr.
8 Gogarty is not an audacious liar, the phrase used by Mr.
9 Cush was that he was "a malicious and artful liar". We
10 believe he has constructed a house of lies in this Tribunal
11 made of interlocking blocks of lies relating to the manner
12 which we dealt with the accounts of the company, the
13 affidavit which we asked for him to make on procedures in
14 the Isle of Man and other matters. We believe he has
15 skillfully built a context of lies in which to tell his
16 central lie, that is the lie which he has told already,
17 relating to the events of the 8th of June and the days
18 immediately before and the days immediately after that
19 date. We would much prefer, my client would much prefer
20 if they could go back to their ordinary business and
21 operate that, instead of being dragged into the middle of
22 this Tribunal. They would much prefer if this Tribunal,
23 Mr. Chairman, dealt on the events just before and just
24 after the 8th of June.
25 .
26 Unfortunately due to the way the Tribunal is run they are
27 not restricted to those particular events because of the
28 circulation of this affidavit, the scurrilous affidavit
29 made by Mr. Gogarty to which we objected to when we were
30 first furnished, and the manner in which he is allowed to
31 expand upon the lies contained in the affidavit, we will
32 have no choice when the time comes but to challenge him on

1 its matter.
2 .
3 Whether or not the matter is currently opened to the
4 Tribunal or should be opened as a matter of direct evidence
5 is a matter for you, Mr. Chairman. We don't control the
6 running of the Tribunal, but you can take it, Mr. Chairman,
7 that some of these matters will certainly be raised by us
8 in cross-examination. For instance, Mr. Chairman, we will
9 be very interested in inquiring of this witness and Mr.
10 Sheedy how they came to sign an agreement which said on the
11 3rd of October, of 1989, the current offer of settlement of
12 the ESB was £130,000 when they both knew that the offer
13 then currently available was 560 K. These are critical
14 matters of credibility which we intend to raise.
15 .
16 If you want to stop the correspondence now, Mr. Chairman,
17 we have no objection, but I would have to put you on notice
18 that we intend to visit some of these matters in
19 cross-examination.
20 .
21 CHAIRMAN: If that's the situation then Mr. Gogarty's
22 counsel are going to have to, the Tribunal's counsel will
23 have to put the facts before --
24 .
25 MR. CALLANAN: I think it is worth saying that it appears
26 to mark a distinct resile from the position adopted by Mr.
27 Cush in relation to his submissions on the issue of the
28 cross-examination of Mr. Gogarty. Mr. Cush took quite an
29 expressed position, and Mr. Cooney has now sought to shift
30 that position on behalf of his clients in seeking latitude
31 of the Tribunal. I think it is necessary to point that out
32 to the Tribunal now.

1 .

2 MR. GALLAGHER: Sir, I ask that I be permitted to conclude
3 the reading of this affidavit and the replying affidavit of
4 Mr. Gogarty, and hopefully we can conclude matters for
5 today on that basis. These are affidavits, they may be
6 relevant, they are relevant; they raise matters that are
7 relevant to the agreement that Mr. Cooney has referred to.
8 They arise from that agreement and therefore they are
9 relevant, they are matters that have to be considered.

10 .

11 CHAIRMAN: Very good. Very well.

12 .

13 MR. GALLAGHER: "I beg to refer to paragraph 16 of the
14 Plaintiff's affidavit. It was a term of the said
15 agreement that the Plaintiff was to act as consultant for
16 and on behalf of the first named Defendant in the
17 resolution of a dispute which had arisen between that
18 company and the Electricity Supply Board and the
19 negotiations in respect of which were on-going at the
20 completion of the said agreement.

21 .

22 It was agreed that the Plaintiff would have sole rights of
23 negotiation in this respect but would be subject to the
24 direction of the Board of Directors of the first named
25 Defendants from time to time. It was agreed that the
26 first named Defendant would pay to the Plaintiff a
27 commission equivalent to the sum of 50 percent of the net
28 sum received by way of settlement from the Electricity
29 Supply Board, but only insofar as the sum exceeded the
30 amount which was then being offered in settlement by the
31 ESB. The amount disclosed by the Plaintiff in the said
32 agreement as having been offered by the ESB was £130,000.

1 .
2 On the 11th of October, some eight days following the
3 completion of the agreement entered into between the
4 Plaintiff and the first named Defendant an invoice was
5 issued on behalf of the second named Defendants by the
6 Plaintiff in relation to the settlement of the claim of the
7 ESB. This invoice showed the settlement of the claim in
8 the sum of £700,000. I beg to refer to a copy of the said
9 invoice, upon which marked with the letter "F" I have signed
10 my name prior to the swearing hereof. The said invoice
11 contains the following statement;"To agreed final account
12 as per your letter of the 29th September, 1989".

13 .
14 In fact the said letter of the 29th September, 1989, was
15 written on behalf of the second named Defendant by the
16 Plaintiff. The said letter confirms the second named
17 Defendants agreement to the account/figures as set out
18 there in resulting in a payment of the second named
19 Defendant of £700,000. It would appear from the contents
20 of this letter that the Plaintiff had, in fact, reached
21 settlement of the claim against the ESB in the sum of
22 £700,000 prior to the signing of the said agreement on the
23 3rd October. I beg to refer to a copy of the said letter
24 of the 29th September, 1989, upon which marked with the
25 letter "G" I have signed my name prior to the swearing
26 hereof.

27 .
28 By reason of the facts set out in paragraph 11 and 12
29 hereof I say and believe that the Plaintiff is not entitled
30 to any commission under paragraph 3(5) of the said
31 agreement. I say and believe that the Plaintiff has
32 wrongfully caused the sum of £515,000 the property of the

1 second named Defendant to be retained by his solicitors
2 because the sum of monies are the property of the second
3 named Defendant which has no liability of any nature to the
4 Plaintiff, and furthermore is not even a party to the said
5 agreement.

6 .
7 Furthermore the Plaintiff states in the said paragraph 16
8 of his affidavit that his solicitor wrote to me by letter
9 dated the 25th October, 1989, expressing concern at the
10 increasing delay in implementing the agreement and pointing
11 out that he may have to take the initiative to secure his
12 position with the assistance of the court. He further
13 states that he instructed his solicitor to seek payment of
14 the agreed settlement from the ESB. The settlement monies
15 were I believe made payable to the second named
16 Defendants. Notwithstanding this, the monies were sent by
17 the ESB either directly to the Plaintiff or to his
18 solicitors, and this cheque was deposited by the
19 Plaintiff's solicitors in an account in the joint names of
20 the second named Defendant and the Plaintiff's
21 solicitors. As can be seen from the dates referred to
22 above, the request for payment of the settlement of the
23 dispute with the ESB was made by the Plaintiff's solicitors
24 prior to any concern being expressed by them in relation to
25 delay in implementing the purchase of the pension.

26 .
27 The said sum of £700,000 is the property of the second
28 named Defendant. Both the Plaintiff and his solicitors
29 have refused and continue to refuse to pay over the said
30 sum to the second named Defendant and proceedings have been
31 instituted seeking the recovery of the said amount.
32 .

1 I beg to refer to the paragraph 29 of the Plaintiff's
2 affidavit in which he states that he is apprehensive
3 concerning the sale by the Defendants of certain of their
4 properties. He has chosen to disclose to the court
5 extensive confidential information regarding the affairs of
6 the said companies to which he had access by reason of his
7 special position in the companies. For the reasons already
8 stated I say and believe that the Plaintiff has no right to
9 receive any monies in relation to the resolution of the
10 dispute with ESB. And thus the first named Defendant
11 company is willing to deposit the sum of £300,000 with
12 their solicitor, Gerard Scallan and O'Brien and to
13 authorise those solicitors to give an undertaking to this
14 Honourable Court to hold that sum to the credit of this
15 action and subject to the directions of this Honourable
16 Court. The first named Defendants are under no obligation
17 to do this and this offer is made in order to refute the
18 suggestions made regarding the Defendants alleged intention
19 to dishonour the agreement, and on condition that the
20 Plaintiff's solicitors return to the second named Defendant
21 the monies which the second name Defendants have wrongfully
22 withheld.

23 .

24 It is entirely untrue for the Plaintiff to suggest that the
25 Defendants have no intention of honouring the terms of the
26 said agreement. Not only is the allegation without
27 foundation but it is also mischievous and designed to give
28 the Plaintiff an excuse to disclose in open court and quite
29 unnecessarily the confidential affairs of the Defendant
30 companies. There is no question, whatever, of there being
31 insufficient monies available to meet the Defendants'
32 obligations to fund the Plaintiff's pension and I believe

1 the Plaintiff knows this. I do not therefore think that it
2 is either necessary or appropriate to reply in detail to
3 the account of the Defendants' affairs given in paragraphs
4 29 to 32 to the Plaintiff's affidavit. I would comment only
5 on the fact that the Plaintiff has apparently worked
6 harmoniously and fruitfully with Mr. Murphy and his
7 companies for many years. He is being provided for
8 generously in his retirement. I have gone to considerable
9 lengths to deal with the Revenue Commissioners on the basis
10 of the Plaintiff's own proposal. I cannot therefore
11 understand the reason for the acrimony the Plaintiff is now
12 bringing to the relationship and I object strongly to the
13 wild accusations and allegations being made and the
14 draconian and unnecessary orders being sought."

15 .

16 The last affidavit is -- Mr. Cooney draws my attention to
17 document page 1306 on Book 5, a letter to McCann Fitzgerald
18 and copied to Gerard Scallan and O'Brien and from Pickering
19 Kenyon. It reads as follows:-

20 .

21 "Thank you for your letter of the 19th of December. We
22 acknowledge receipt of the documents enclosed therewith. We
23 have instructed Gerard Scallan & O'Brien to act on behalf
24 of our clients.

25 .

26 You should by now have received a copy of the writ issued
27 by our clients against Mr. Gogarty and yourselves in
28 respect of the sum received by you and held in your
29 clients' account for our client's JMSE. However, as a
30 courtesy we enclose a copy.

31 .

32 In the light of those proceedings we believe that you have

1 a conflict of interest in continuing to act for Mr. Gogarty
2 in proceedings where you yourselves are a party. In the
3 circumstances please confirm that you do not intend to act
4 for Mr. Gogarty in these proceedings.

5 .

6 We have read with interest the exhibit to the affidavit of
7 Mr. Gogarty lettered "G", and in particular the invoice
8 dated the 11th October submitted by you on the instructions
9 of Mr. Gogarty on behalf of our clients JMSE to the ESB.

10 We note with particular interest that Mr. Gogarty had, in
11 fact, concluded a settlement of the claim against the ESB
12 arising out of the Moneypoint Project and had received an
13 agreed final offer from them on the 29th September, 1989,
14 prior to the execution of the settlement agreement of the
15 3rd October, 1989. By reason of Mr. Gogarty's breach of
16 duty and/or misrepresentation and/or fraud in failing to
17 disclose prior to the execution of the agreement that he
18 had already concluded a settlement with the ESB, we have
19 instructed our clients Dublin lawyers to issue further
20 proceedings against Mr. Gogarty in this regard."

21 .

22 Mr. Gogarty, in relation to that letter, it is alleged that
23 you failed to disclose that an agreed final offer had been
24 received from the ESB on the 29th of September, 1989, prior
25 to the settlement of the 3rd of October. Have you anything
26 to say in relation to that?

27 A. I completely reject that, sure the other day you read out
28 letters, memos where I had been in touch with Mr. Murphy
29 prior to it. I agreed with and I asked him would I call a
30 Board meeting and he said "no, do-it-yourself with Frank
31 Reynolds". We have gone into that before I thought.

32 .

1 MR. COONEY: Sorry, just before Mr. Gallagher leaves it;
2 surely the question he asked is if that was true why was
3 that term included in the agreement?

4 .

5 CHAIRMAN: What term?

6 .

7 MR. COONEY: The term "The current offer of settlement is
8 £130,000".

9 .

10 CHAIRMAN: Just a moment, I may be wrong in my
11 recollection of the evidence, I usually pick these things
12 up as I go along, it is my recollection that Mr. Picker or
13 whatever his name, Oakley of Pickering Kenyon, and Messrs.
14 McCann Fitzgerald came to an agreement in terms of letters,
15 which is reflected in the agreement of the actual formal
16 agreement. That agreement, it is my recollection, was back
17 in August. Now, I may be wrong, I haven't got it in, I am
18 using a -- that's my recollection, and in fact the
19 agreement which is produced ultimately is the same. Now,
20 what occurred is simply this, that as I understand it that
21 you wish to vary one of the terms by moving it around for
22 taxation purposes, and the very last paragraph of your own
23 affidavit, it is that you say it is untrue that you were
24 not going to implement -- now maybe I have got it wrong --
25 .

26 MR. COONEY: Mr. Chairman, perhaps -- I must say, I repeat
27 it as simply as I can again, Mr. Chairman, in case I failed
28 to make the point as clear as I should. Mr. Gallagher has
29 written, has read out a letter to this witness from our
30 then solicitor in which our then solicitors make the point
31 that for the first time he learned following a reading of
32 Mr. Gogarty's affidavit, and particularly Exhibit G, for

1 the first time he learned that at the time Mr. Gogarty
2 signed this agreement and had a signature witnessed by his
3 solicitor, for the first time he learned that what had been
4 agreed with the ESB or was then currently agreed was not a
5 sum, not a sum of £130,000 but a sum of £560,000.

6 .

7 Now, just bear with me for a moment. Mr. Gogarty has
8 sought to meet an allegation of dishonesty there by saying
9 that he had informed Mr. Reynolds and Mr. Murphy about this
10 agreement, therefore he was not doing anything dishonest in
11 signing the agreement, which is the sum of £130,000. Mr.
12 Gallagher asked him a question specifically to establish
13 that point, the point which Mr. Gogarty already made in the
14 course of his evidence.

15 .

16 I am asking why isn't Mr. Gallagher asking this question:
17 Why did Mr. Gogarty sign this agreement and have his
18 signature witnessed by a solicitor when both he and the
19 solicitor knew that they were signing an agreement which
20 contained a false statement, namely that the offer then
21 currently available from the ESB was £130,000? It is a
22 simple straightforward question, which requires an answer
23 and with --

24 .

25 CHAIRMAN: Please sir, only one person at a time can
26 address this Tribunal.

27 .

28 MR. ALLEN: I want to bring something to your attention,
29 Mr. Sheedy is making hand signals to the gentleman in the
30 witness-box. I have observed him, he should not be doing
31 so.

32 .

1 CHAIRMAN: I very much doubt Mr. Sheedy, a member of
2 McCann Fitzgerald is making hand signals.

3 .

4 MR. ALLEN: He has, he has and I have watched him.

5 .

6 MR. COONEY: The question is --

7 .

8 MR. CALLANAN: Mr. Sheedy has a concern and I also have to
9 restrain Mr. Gogarty in the face of provocation. Mr.
10 Cooney will have his opportunity to cross-examine --

11 .

12 CHAIRMAN: First of all I don't think you can require
13 other counsel to ask specific questions. If and when you
14 come to examination you are perfectly entitled to do so,
15 but may I -- if I get involved in this I am obviously going
16 to indicate perhaps an improper preference which I don't
17 want to do.

18 .

19 MR. COONEY: I appreciate that.

20 .

21 CHAIRMAN: And also that I have taken up the evidence at
22 this moment in time erroneously and it is, remember this, I
23 am listening to evidence and it is on a transcript here and
24 I will check it, I have no wish to get involved in a debate
25 with you, but I merely point out, as I understood the
26 evidence going along the situation was that an agreement
27 was reached between Mr. Gogarty and his principal, put it
28 this way, that over and above a certain sum he would, the
29 original sum was £43,000 that was amended to £120,000 by
30 virtue of an offer canvassed, I think to one of the members
31 of the staff of -- after that point the two men agreed if
32 he got more than £120,000 he would get a percent. Now,

1 that's the state of the agreement as recorded in the letter
2 going back, I think it is August. Now, again I stand
3 subject to correction of my recollection.

4 .

5 Apparently further negotiations occurred, now apparently.
6 I don't know whether it did or not, apparently, from which
7 it emerged that a sum of £520,000 -- thousand

8 .

9 MR. COONEY: 560.

10 .

11 CHAIRMAN: I was talking about net not gross, was willing
12 to be paid by them. Now, the deal had been done between
13 the two men about the percentage that he would get over and
14 above 120, now where -- Sorry, I, shouldn't ask you this
15 question, but that is as I understand it. Now, where do
16 you want to go from there?

17 .

18 MR. COONEY: Where I want to go from there is why did Mr.
19 Gogarty, the question, the points I want to make is this;
20 repeatedly, Mr. Chairman, you have said that this is an
21 inquiry, it is not an adversarial proceedings, but what I
22 object to, Mr. Chairman, is that Mr. Gallagher intersperses
23 his reading of this correspondence with questions intended
24 to establish the credibility of Mr. Gogarty and nothing
25 else.

26 .

27 Now, he has in his last question to Mr. Gogarty, has
28 brought out a point that Mr. Gogarty was at great pains to
29 make earlier, in other words to establish his innocence of
30 any wrongdoing in relation to this. I believe there is a
31 contrary point to be made, Mr. Chairman, and the point is
32 simply this; if what he is saying is the truth why did he

1 sign an agreement and have the signature witnessed by a
2 solicitor which contained what he knew to be a false
3 statement, namely that the offer then available from the
4 ESB was £130,000?

5 .

6 CHAIRMAN: Mr. Cooney, I don't propose to debate that with
7 you, but to do so I would, might be prejudicial to some
8 party without having heard all of the evidence, so I am not
9 going to debate it with you, but I will leave it there.

10 .

11 MR. COONEY: All right, the point I want to make is Mr.
12 Gallagher should ask that question as well.

13 .

14 CHAIRMAN: It is a matter for Mr. Gallagher to decide what
15 questions he is going to ask and not for you, with due
16 respect, how to tell him to run his business. You will
17 have an opportunity in due course of cross-examination and
18 no doubt you will be brief, in the light of your, you know
19 your desire.

20 .

21 MR. COONEY: All right, Mr. Chairman, I won't bother you
22 any more with that.

23 .

24 CHAIRMAN: Thank you.

25 .

26 MR. GALLAGHER: With your permission, Sir, I will just
27 conclude with reading the second affidavit of Mr. Gogarty
28 which was sworn on the 19th of January, of 1990, in reply
29 to Mr. Copey's affidavit. It is at page 3146, and if I
30 may skip the first paragraph he says;

31 .

32 "I beg to refer to a draft affidavit of Roger J Copey

1 which I have been informed will be sworn by Mr. Copsey in
2 reply to my first affidavit. At the date of swearing of
3 this affidavit I have not seen the sworn version of Mr.
4 Copsey's affidavit.

5 . Mr. Copsey states at paragraph 8 of his affidavit that
6 it was clear that Mr. Murphy's authority to make the
7 pension payment of £300,000 would be required. I say and
8 believe that the agreement which we reached did not contain
9 any such condition and the written agreement exhibited in
10 my first affidavit speaks for itself in that regard.

11 .

12 The main point made by Mr. Copsey would suggest that I in
13 some way mislead the defendants as to the likely outcome of
14 the negotiations with the ESB, and that accordingly I
15 induced the defendants to agree to give me 50 percent of
16 any excess over £130,000 which might be received in
17 settlement from the ESB by means of a misrepresentation as
18 to the likely outcome with the ESB.

19 .

20 In fact I did no such thing. I and my solicitors have been
21 negotiating with the defendant since April 1989 in respect
22 of the terms which would govern my retirement. From an
23 early stage in the negotiations it was agreed that I would
24 receive of whatever amount might be recovered from the ESB.

25 For example, I beg to refer to a copy of a letter from my
26 solicitors dated 26 of May 1989 to defendants English
27 solicitor Mr. Oakley which letter sets out the basic points
28 of an agreement which had been reached between myself and
29 Mr. Murphy. In so far as the negotiations with the ESB
30 were concerned the said letter said that:

31 "By way of commission 50 percent of the amount recovered
32 from the ESB by Mr. Gogarty will be paid to him".

1 Mr. Sheedy of my solicitors informs me that after faxing
2 that letter to Mr. Oakley, Mr. Oakley telephoned him the
3 same day to say that he had been speaking with Mr. Murphy
4 who had given him instructions on my solicitors letter of
5 26 May 1989. As far as paragraph 3 was concerned ie (the
6 paragraph dealing with the ESB) this was agreed (although
7 paragraph 4 was not agreed).

8 .

9 Mr. Oakley subsequently responded to that letter in writing
10 by letter of the 29 of June 1989 and in so far as the ESB
11 negotiations were concerned his letter stated as
12 follows:"Mr. Gogarty will have sole rights in negotiations
13 on the claim in respect of the ESB contract. He will be
14 paid a commission of 50 percent of the net amount recovered
15 (after taking into account litigation or arbitration
16 costs). In respect of the claim his commission shall only
17 be payable in respect of any net offer in settlement made
18 in excess of that already offered by the ESB of £43,000.

19 .

20 The only point raised by my solicitors in their response to
21 29th June 1989 was to query the meaning of the words"net
22 amount recovered" and they pointed out that the amount
23 already offered by the ESB at that time was £40,000. Final
24 agreement was reached by an exchange of letters between
25 solicitors dated 5th and 6th July respectively. In this
26 respect I beg to refer to copies of the foregoing
27 correspondence upon which together are marked with the
28 letter "A" I have signed my name prior to the swearing
29 hereof.

30 . My solicitors wrote to Mr. Oakley on 2nd of August 1989
31 expressing concern that the draft documentation had not yet
32 been received notwithstanding that"almost four weeks has

1 now lapsed since your client's offer was accepted by us on
2 Mr. Gogarty's behalf". Mr. Oakley responded by sending the
3 draft settlement agreement under cover letter of 7 August
4 of 1989 in which letter he alleged that pursuant to further
5 negotiations the ESB had made a higher offer of £130,000
6 and the commission entitlements should be based on this
7 figure. My solicitors answered on 15 August 1989 stating
8 that the only offer which the ESB had made up at that point
9 was an offer of £43,000 although from contacts with other
10 employees of the second named Defendant had with the ESB
11 personnel there were some indications that a figure of
12 £130,000 might be arrived at. My solicitors stated
13 .
14 "Mr. Gogarty has been negotiating with the ESB since March
15 last and should any settlement figure in excess of £43,000
16 be agreed with the ESB this would arise solely from the
17 efforts of Mr. Gogarty. Accordingly, the terms of
18 agreement must remain as we have previously agreed in
19 writing, namely that Mr. Gogarty will receive 50 percent of
20 any sum recovered from the ESB in excess of £43,000 in
21 relation to this particular contract... It is not open to
22 either part to renegotiate any of those agreed terms".
23 .
24 There was a further exchange of correspondence between the
25 solicitors by letters of 7 September and 13 September 1989
26 and while my solicitors pointed out that I did not accept
27 that there was any question of non-disclosure on my part,
28 if the figure of £130,000 had been mentioned as between a
29 Mr. Sweeney (on behalf of the second name Defendant) and
30 the ESB, I was "prepared to accept that figure as the base
31 on which he will now negotiate and the inclusion of that
32 figure in agreement with Lajos Holdings Limited".

1 .
2 Mr. Oakley accordingly forwarded an engrossed copy of the
3 settlement agreement under cover of letter of 15 September
4 1989. This draft did not in fact reflect fully all the
5 points which had been already agreed between the parties
6 which was pointed out by my solicitor in their letter of 26
7 September 1989. However those particular points did not
8 relate to the question of the ESB and my commission
9 entitlement. My solicitors agreed the final point with Mr.
10 Oakley on the telephone on 29 September 1989.
11 . In the meantime in accordance with my instructions I had
12 been negotiating with Mr. Maurice O'Sullivan of the ESB in
13 an effort to increase the settlement figure, ultimately on
14 the 27 of September of 1989 Mr. Maurice O'Sullivan stated
15 that he would be prepared to recommend to his board of
16 directors that an offer of £560,000 plus VAT be made. He
17 indicated that he would be prepared to make such a
18 recommendation provided that I would indicate to him that
19 such an offer would be accepted by the second named
20 defendants.
21 .
22 On 28 September 1989 I telephoned Mr. Joseph Murphy and
23 informed him of my conversation with Mr. O'Sullivan. Mr.
24 Murphy instructed me to inform Mr. O'Sullivan that an offer
25 of £560,000 plus vat would be accepted. I inquired from
26 Mr. Murphy if I should obtain Mr. Roger Copey's written
27 instructions to this effect, but Mr. Murphy told me that it
28 was not necessary for me to seek Mr. Copey's approval or
29 instructions. I there upon informed Mr. Maurice
30 O'Sullivan that the second named Defendant would accept an
31 offer of £560,000 plus Vat from the ESB. On 29 September
32 1989 I wrote to Mr. Maurice O'Sullivan to confirm our

1 conversation. Subsequently on 11 October 1989 after
2 (hearing on 10 October 1989 that the board of the ESB were
3 prepared to offer £560,000 plus Vat in settlement of the
4 second named Defendant claim), the invoice referred to at
5 Exhibit F of the affidavit of Mr. Copsey was sent to the
6 ESB.

7 .

8 In this respect I beg to refer to the foregoing
9 correspondence upon which pinned together and marked with
10 the letter "B" I have signed my name prior to the swearing
11 hereof.

12 .

13 On 29 September 1989 I informed Mr. Frank Reynolds, a
14 Director of the second named Defendant, of my agreement
15 with Mr. Maurice O'Sullivan and that I expected an offer to
16 be received from the ESB when the terms of settlement had
17 been approved by its board of Directors.

18 .

19 For the avoidance of doubt the reference in the invoice
20 dated 11 October 1989 from the second named Defendant to
21 the ESB containing the words "Your letter of 29th September
22 1989" should have read "Our letter of 29 September of
23 1989", "your" appearing in error instead of "our".

24 .

25 The defendants are obliged to arrange or procure a pension
26 for me in the sum of £300,000 and to arrange or procure
27 that I be paid 50 percent of the excess over £130,000 of
28 the settlement agreed with the ESB ie, £215,000 giving a
29 total of £5 15,000. Accordingly I have instructed my
30 solicitors to deposit this amount from the monies received
31 from the ESB in the joint names of the second named
32 defendant and my solicitors. The balance of the monies

1 received has been remitted to the Defendant" . Sworn on
2 the 19th day of January 1990.

3 That's your signature Mr. Gogarty; is that right?

4 A. That's right, that's right.

552 Q. Thank you. That's the end of the affidavits, Sir, and
6 perhaps it is an appropriate time?

7

8 CHAIRMAN: Well, it is after one o'clock. So we will
9 resume, if I am still alive, tomorrow morning at 10
10 o'clock.

11 Thank you for your attendance.

12 .

13 THE HEARING THEN ADJOURNED UNTIL THE 28TH JANUARY, 1999 AT
14 10 AM.

15

16

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