

1 THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY,  
2 1ST DECEMBER 2004 AT 10:30 A.M.:

3  
4 CHAIRMAN: Good morning, Mr. Gallagher, and good morning, Mr. McCullough.

5  
6 MR. GALLAGHER: Good morning. I wonder would the Registrar please call the  
7 following summoned witnesses before the Tribunal today. Mr. Barry O' Kelly,  
8 Mr. Anthony Dinan and Mr. Richard Martin.

9  
10 REGISTRAR: Is there any appearance on behalf of Barry O'Kelly, Anthony  
11 William Dinan, Richard Martin?

12  
13 MR. MCCULLOUGH: Yes, Chairman, I appear for each of those three persons who  
14 have been called with Mr. John Lucey instructed by Ronan Daly Jermyn.

15  
16 Before the Tribunal calls those witnesses, there are just two very short  
17 preliminary points that I want to make at a point that's convenient to the  
18 Tribunal but before they give evidence.

19  
20 CHAIRMAN: All right. Well I think it's preferable that Mr. Gallagher would  
21 open the issue and then you can certainly.

22  
23 MR. MCCULLOUGH: Certainly.

24  
25 MR. GALLAGHER: Thank you, Chairman. This hearing follows the publication in  
26 the Sunday Business Post newspaper on the 17th and 24th of October 2004, of a  
27 number of articles written by Mr. O'Kelly, which appear and indeed claim to be  
28 have based on confidential documents circulated by the Tribunal to a limited  
29 number of parties, in circumstances which I shall outline later.

1 It goes without saying that the parties to whom the documents were circulated  
2 do not include any of the three witnesses or any person acting on their behalf.

3  
4 Before the witnesses are called, I propose to open to the Tribunal some  
5 correspondence earlier rulings of the Tribunal and other documents.

6  
7 I also intend to open some relevant statutory provisions and to refer the  
8 Tribunal to some case law which I consider relevant. I do this so that the  
9 Tribunal will have a background and will have an awareness of correspondence  
10 and other rulings which it may consider relevant to the matters to be dealt  
11 with today. And it's because that in some circumstances at least the rulings  
12 were delivered by the former Sole Member of the Tribunal.

13  
14 I do not open this correspondence, these earlier rulings other than by way of  
15 background and historical, history of the dealings the Tribunal has had with  
16 the media and indeed with the Sunday Business Post over a period.

17  
18 This Tribunal, as you will be aware, was established pursuant to resolutions  
19 passed by Dail Eireann, Seanad Eireann in October 1997 by the Tribunal's of  
20 Inquiries Evidence Act 1921 and 1979, No. 3 order of 1997. That instrument  
21 provided that the Tribunals of Inquiries Evidence Act 1921 as adapted by or  
22 under subsequent enactments and the Tribunals of Inquiry Evidence Amendment Act  
23 1979 shall apply to the Tribunal.

24  
25 By virtue of that instrument and the provisions of Section 1 of the 1921 Act,  
26 this Tribunal has all such powers, rights and privileges as are vested in the  
27 High Court or a judge of that court on the occasion of an action in respect of  
28 the following matters:

29 A. The enforcing of the attendance of witnesses and examining them on oath,  
30 affirmation or otherwise.

1 B. The compelling of production of documents.

2

3 I now propose to outline the background, historical background, as it were, to  
4 the events that bring us here today.

5

6 The Tribunal was set up at the end of 1997. And on Wednesday the 14th of  
7 January 1998, the Sole Member outlined to the protocol which the Tribunal would  
8 follow in relation to documents and he did so in the following terms. I fully  
9 appreciate, this is page 629.

10

11 "I fully appreciate the concerns which persons wishing to assist the Tribunal  
12 may have in relation to issues of personal and commercial confidentiality. In  
13 order to protect these legitimate concerns I propose to adopt the following  
14 protocol in regard to documents.

15 1. all original documents will be returned to their owner after the Tribunal  
16 has concluded its work.

17 2. All copies of documents with confidential commercially sensitive or personal  
18 information will be destroyed after the conclusion of the inquiry. 3. All  
19 documents will be stored in a secure location.

20 4. Confidential information not relevant to the inquiry will not be disclosed  
21 to any outside party. The only parties who will have access to such documents  
22 will be the Chairman and the legal team to the Tribunal. Documents which  
23 contain confidential, personal or commercially sensitive information not  
24 relevant to the inquiry and other information which is relevant will have the  
25 irrelevant information blanked out.

26 5. Counsel for the Tribunal will be willing at all times to discuss any  
27 concerns any person may have concerning confidential, personal or commercially  
28 sensitive information".

29

30 Unfortunately, the Tribunal experienced considerable problems arising from the

1 unauthorised publication of material which was confidential to the Tribunal and  
2 the Tribunal was significantly delayed and hindered indeed in the carrying out  
3 of its work. "Hindered" and that is my personal view.

4  
5 The unauthorised publication of confidential information provided to and  
6 circulated by the Tribunal resulted in the Sole Member writing on 10th December  
7 1998, page 91, please.

8  
9 To the editors of certain national newspapers including the Sunday Business  
10 Post to inform them and I quote "of his concerns following the continuing  
11 publication in the print media of confidential material provided to the  
12 Tribunal and circularised by the Tribunal on a strictly confidential basis.  
13 It is apparent that past publication of material has taken place,  
14 notwithstanding that the publishers were or ought to have been aware of the  
15 strictly confidential nature of the documentation which has published without  
16 the authority of the Tribunal.

17  
18 The Sole Member has received a volume of complaints from parties whose rights  
19 have claimed to have been infringed by such unauthorised publications. He has  
20 been informed by others that they are to participate fully in the work of the  
21 Tribunal or to comply with the requests made of them by the Tribunal has been  
22 limited by their fears, that any confidential information disclosed by them to  
23 the Tribunal and in turn circulated to named parties by the Tribunal will be  
24 published in the newspapers.

25  
26 The Sole Member is currently enquiring into the sources of the past  
27 unauthorised disclosures and the level of concern expressed to him to date by  
28 others has led him to conclude that the unauthorised publication of  
29 confidential material in the media may and/or may be understood to constitute  
30 an obstruction or hindrance of the Tribunal in the performance of its

1 functions. Accordingly, I am directed by the Sole Member to require you, not  
2 later than 12 noon on Friday, 11th December 1998 to undertake in writing to the  
3 Tribunal, that you will not publish in any form any confidential information  
4 which has been provided to the Tribunal or which has been circulated to others  
5 in confidence by the Tribunal.

6  
7 In the event that your undertaking is not received by this office by 12 noon  
8 the Sole Member will consider making an order pursuant of Section 4 of the  
9 Tribunals of Inquiry Act 1921, 1998, restraining you from publishing, in any  
10 form, confidential material provided to the Tribunal or circulated by the  
11 Tribunal on a confidential basis. Your attention is drawn to the provisions  
12 of Sections 1, 2 D and E of the afore mentioned Acts, which provide as follows;  
13 If any person -- D -- by act or omission obstructs or hinders the Tribunal the  
14 performance of its functions or E, fails, neglects or refuses to comply with  
15 the provisions of an Order made by the Tribunal, the person shall be guilty of  
16 an offence, the punishment for which, following conviction upon Indictment, is  
17 a fine not exceeding 10,000 pounds or at the discretion of the court  
18 imprisonment for a term not exceeding two years or to both, such fine or  
19 imprisonment".

20  
21 The letter in question then went on to invite the then editor of the Sunday  
22 Business Post to make submissions in relation to the proposed Order.

23  
24 A letter, page 94, please. In similar terms was written on the 10th of  
25 December 1998 to the editor of the Examiner newspaper, 96 Lower Baggot Street,  
26 Dublin 2. I mention the Examiner because the Tribunal will be aware that both  
27 the Examiner and the Sunday Business Post are published by Crosby Holdings  
28 Limited. And by an associated company Post Publications Limited respectively,  
29 both of which have their registered office at 97 South Mall, Cork and both have  
30 as their secretary Mr. William Anthony Dinan, who has been summoned here today

1 to give evidence to the Tribunal.

2

3 Following the leaking of further information which resulted in a newspaper  
4 article on the 23rd of November 1998, the Sole Member felt obliged to issue a  
5 public statement, page 121, please, which was in the following terms.

6

7 "The Tribunal of Inquiry is engaged in a confidential preliminary investigation  
8 in private into very serious matters of public interest. The purpose of the  
9 investigation is to ascertain the nature and extent of the evidence available  
10 in relation to the definite matters of urgent public importance identified by  
11 the Oireachtas in the Terms of Reference of this Tribunal.

12

13 An important characteristic of the preliminary investigation procedure is the  
14 need to avoid the disclosure of confidential information prior to a public  
15 sitting when such evidence as may be relevant will be adduced.

16

17 3. Since the establishment of this Tribunal there have been a number of  
18 public statements which have been reported in the print and broadcast media  
19 concerning confidential aspects of the work".

20

21 4. Such statements may have created the impression that confidential  
22 information furnished to the Tribunal has been disclosed by the Tribunal to the  
23 media. This is not the case and the Tribunal is aware that certain parties who  
24 have provided information to the Tribunal or maybe the focus of certain aspects  
25 of the Tribunal's investigations have made direct disclosure to the media.

26

27 5. The Tribunal wishes to make it clear that it does not welcome these  
28 statements or disclosures, which do not assist it in its work, and are not in  
29 the public interest.

30

1 6. Whilst there is a public duty upon any person who has any information or  
2 evidence in relation to any inappropriate disclosure of information by the  
3 Tribunal concerning its work to come forward, no person has done so.  
4

5 7. The Sole Member is satisfied that no documentation or information  
6 furnished by the Tribunal in confidence has been disclosed to any third party  
7 by the Tribunal.  
8

9 8. Numerous complaints were received by the Tribunal from persons who were at  
10 that time in communication with it. One solicitor wrote to the Tribunal  
11 demanding that a complaint be filed with the Garda Commissioner concerning the  
12 leaking of information and further requiring that undertakings be sought from  
13 national daily newspapers and Sunday newspapers, that they would not publish  
14 any information relating to confidential workings of the Tribunal and in the  
15 event that such undertakings were not forthcoming that the Tribunal should seek  
16 from the High Court interlocutory restraining orders from the press."  
17

18 That party complained that the leaks and I quote "have caused and continue to  
19 cause enormous damage to our client. It was submitted to you that our clients  
20 cannot have any confidence in the Tribunal's confidential workings for so long  
21 as they read about them in the Sunday newspapers. That position has  
22 crystallised even further by reason of" and a recent newspaper report was  
23 referred to. The letter went on "In the circumstances and without prejudice  
24 to our submissions in relation to jurisdiction, our clients until such time as  
25 the press have undertaken or been ordered by the court to desist from any  
26 further publication in relation to the confidential workings of the Tribunal we  
27 also insist that effective prosecutions be taken."  
28

29 That is arising from the unauthorised publication of confidential material.  
30

1 On the 11th of December 1998, the Tribunal sat to consider whether making an  
2 Order, whether to make an Order, pursuant to the provisions of Section 4 of the  
3 1979 Act in the Irish Times. In the course of his opening on that occasion, my  
4 colleague Mr. O'Neill, Senior Counsel, among other things, summed up the  
5 serious complaints that has been received from persons who at that time had  
6 confidential dealings with the Tribunal.

7  
8 If I may have page 126. He says as follows. One individual writes "our  
9 clients have another very serious concern in relation to any statement that may  
10 be furnished to the Tribunal. It would appear to be the case that almost any  
11 significant piece of information furnished to the Tribunal is shortly  
12 thereafter circulate to the media. The most recent examples of this leaking  
13 of information to the media involves an affidavit and a statement of two Garda  
14 witnesses. It is presumed that this leaking of information has been effected  
15 by persons having an interest to do so and is designed to serve their own  
16 interests.

17  
18 We well appreciate that any statements furnished by my clients to the Tribunal  
19 must be circulated to the persons affected by such statements. That being so,  
20 it seems to us to be highly likely that the content of those statements are at  
21 least selected portions of the contents will find their way into the media. We  
22 are concerned that the person who leaked such information will do so to serve  
23 their own ends and damage our clients. In the light of what has transpired  
24 today the Tribunal must accept that this is a very real apprehension on the  
25 part of our clients. Having regard to the foregoing our clients have decided  
26 on the advice of counsel, to furnish the Tribunal with statements dealing with  
27 the essential issues arising in the affidavit insofar as they relate to our  
28 clients. These statements will not be as detailed as the statements which we  
29 first envisaged furnishing to the Tribunal. But they only deal with crucial  
30 issues involving Mr. Gogarty."

1  
2 That is one example. Another party wrote, "this is the third occasion on which  
3 we have had to write regarding leakages to the press. Once again information  
4 concerning the inquiry has been made by the Tribunal which may impact on our  
5 clients affairs, have appeared in the Sunday Independent on the 18th of  
6 October. Indeed, over the last few weekends it has been possible to glean  
7 from the newspapers, Sunday newspapers the state of the Tribunal's inquiries  
8 and the nature of some of its evidence both before and after statements may  
9 have been signed by persons who may or may not be subsequent witnesses to the  
10 Tribunal.

11  
12 Apart from the Tribunal, it is difficult to see who else could have the  
13 information that appeared in the newspapers. One thing is clear, there is a  
14 duty on the Tribunal to investigate where these leaks are coming from and if  
15 necessary this investigation was to include an inquiry into its own staff. We  
16 are only satisfied that the Sole Member did not leak to the press."

17  
18 And then he went on to detail a further complaint or complaints which I don't  
19 propose to open. But the Tribunal can take it that the Tribunal has over the  
20 years and indeed in the very recent past, subsequent to the publication of the  
21 two articles in the Sunday Business Post on the 17th and 24th of October last,  
22 received complaints by parties who have dealings with the Tribunal. I will  
23 open those in some detail later.

24  
25 Following the hearing of evidence by the Sole Member. He delivered a decision  
26 which is described as a media decision on Friday 18th of December 1998. This  
27 is at page 287, please.

28  
29 In the first instance, he outlined the establishment of the Tribunal of  
30 Inquiry, and he went on to say, in the second paragraph "the decision to

1 establish a Tribunal of Inquiry is an exceptional matter, and is made usually  
2 where there is national crisis of confidence in relation to an important matter  
3 of public interest. The purpose of the inquiry is to make such findings or  
4 recommendations as it sees fit. In relation to definite matters of urgent  
5 public importance. Tribunals of Inquiry have a significant range of statutory  
6 powers and it is the established practice in the common law world for the  
7 government of the day to appoint a High Court judge as Sole Member of such  
8 Tribunal".

9  
10 Page 288, he continued in relation to confidential information as follows "it  
11 is essential to the proper functioning of this phase of the inquiry that, where  
12 appropriate the confidential nature of inquiries being made and the  
13 confidential nature of information and documentation coming into the possession  
14 of the Tribunal be represented. The Tribunal in common with past Tribunals of  
15 Inquiry took the step of publishing at a public sitting, a protocol detailing  
16 the manner in which the Tribunal would treat confidential information and  
17 documentation. The Tribunal considers all documentation and information  
18 concerning its inquiry work, whether emanating from or received by the Tribunal  
19 as confidential information. The Tribunal also considers that any such  
20 documentation or information is generally confidential in nature, as well as  
21 having been communicated in circumstances importing an obligation of  
22 confidence.

23  
24 Unauthorised disclosure of confidential information, the Tribunal is seriously  
25 concerned that confidential information connected with the Tribunal has been  
26 deliberately and systematically drip fed through elements of the media. The  
27 course of its inquiry work circulated to a limited category of persons,  
28 confidential information in which they have appropriate legal interest. It is  
29 of fact that in particular circumstances subsequent to a circulation, this  
30 information has been published in whole or in part by the media". And later

1 in that paragraph he says under that heading as follows:

2

3 "The Tribunal suspects that the systematic nature of these unauthorised  
4 disclosures is a conscious and deliberate attempt to damage in advance of any  
5 public hearing, the reputation of particular individuals and also to undermine  
6 the work of this Tribunal. The Tribunal has already made a formal complaint  
7 to An Garda Siochana in relation to specific unauthorised disclosures of  
8 information confidential to the Tribunal. An Garda Siochana has assured the  
9 Tribunal that a criminal investigation under the leadership of senior members  
10 of that force is being urgently undertaken.

11

12 The Tribunal has received complaints from certain persons who have an  
13 appropriate legal interest in the confidential information circulated to them  
14 by the Tribunal in relation to the unauthorised disclosure of that information  
15 by the media. In other instances persons from whom documentation or  
16 information has been sought have attempted to use the fact of these media  
17 disclosures as a reason to decline to cooperate with this inquiry".

18

19 Then he goes on to talk about the steps taken. Page 290, "The Tribunal is not  
20 only concerned to identify the persons or entities responsible for the past  
21 unauthorised disclosure of information confidential to the Tribunal. The  
22 Tribunal intends to take effective steps to prevent future unauthorised  
23 disclosures. To that intent and end, the Tribunal wrote to individual members  
24 of the print and broadcast media seeking their voluntary assistance and  
25 cooperation, to the effect that they would not allow themselves to be used as  
26 potential instruments of harm to the constitutional rights of others and to the  
27 effective working of the Tribunal. In each instance, although for different  
28 reasons in certain cases, no member of the media is willing to voluntarily  
29 assist the Tribunal in the manner requested.

30

1 The Tribunal subsequently wrote to particular members of the media and  
2 indicated that the Tribunal in view of their negative response was required to  
3 consider taking compulsory steps in relation to preventing further unauthorised  
4 disclosures."

5  
6 And he goes on later in that page "The Tribunal in consequence published a  
7 public notice advertising the fact of a public sitting to consider making an  
8 order restraining this disclosure of publication of documentation or  
9 information confidential to the Tribunal".

10  
11 He continues "role of the media. The Tribunal readily accepts both the  
12 importance and the role of the media in educating and influencing public  
13 opinion. This role is specifically acknowledged in the language of Article  
14 40.6.1 of the Constitution. The media enjoys a continuing right to freedom of  
15 expression. That to be in any way meaningful must include a right to report,  
16 comment and criticise.

17 The Tribunal in common with any other public entity in this State can  
18 legitimately be the subject of adverse comment. The Tribunal does not make  
19 any case that it is immune from the ordinary course of media reporting, comment  
20 and criticism. The media in common with every other person or entity in the  
21 State is not above the law. The media cannot suggest that because of the  
22 important nature of their journalistic work that are in some way less  
23 accountable in a constitutional democracy than any other citizen".

24  
25 At page 293 then Mr. Justice Flood gave the decision of the Tribunal. And the  
26 decision was in the following terms:

27  
28 "The principal duty of this Tribunal is to discharge it's mandate in as an  
29 effective manner as is reasonably practicable. The fact or threat of  
30 inappropriate disclosure or publication of confidential Tribunal information is

1 potentially damaging to this inquiry and to the rights of the persons affected.  
2 The Tribunal seeks to take steps to prevent any disclosure of publication of  
3 confidential Tribunal information. The media as a group interest, will not  
4 voluntarily agree to refrain from publishing confidential Tribunal information.  
5 The legal duty of a Tribunal of Inquiry in these circumstances, clearly set out  
6 in the judgement of Mr. Justice Blaney in Kilberd and Carey Mr. Justice  
7 Hamilton 1992, Irish Reports 257 where he states "it is perfectly  
8 understandable that some people would be reluctant to make material available  
9 to the Tribunal if they thought there was a risk that it could appear in the  
10 public press before being put in evidence at a hearing of a Tribunal. And if  
11 witnesses were dissuaded from coming forward with material relevant to the  
12 inquiry, then clearly the Tribunal would be hampered in carrying out its  
13 functions in that it would be deprived of the opportunity of hearing witnesses  
14 and considering material which might be of assistance to it. Apart from this,  
15 it seems to me that the Tribunal had to take steps to ensure that no further  
16 articles would be published based on materials submitted in confidence to the  
17 Tribunal. If it did nothing about the articles which had appeared in the  
18 Sunday Business Post there would be a risk of recurrence".

19  
20 The decision continued as followings: "the media have declined the request to  
21 voluntary refrain from publishing in the future, materials submit in the  
22 confidence to this Tribunal. If the Tribunal makes an Order under Section 4  
23 of the 1979 Act and it is disregarded the Tribunal must apply to the High Court  
24 to seek to enforce that Order. The media on the other hand, have properly  
25 indicated their view, that if such an order is made they will themselves seek  
26 to squash the order in the High Court. One way or the other the jurisdiction  
27 of the superior courts is necessary to effectively resolve this matter. In  
28 these circumstances the Tribunal has decided to take three distinct steps.

29  
30 First, the Tribunal wishes to use this public hearing to clearly reiterate its

1 view that all documentation and information concerning the inquiry work of the  
2 Tribunal, whether emanating from or received by the Tribunal is to be treated  
3 as confidential information, save to the extent that any documentation or  
4 information is disclosed in a public hearing of the Tribunal.

5  
6 Second. The Tribunal intends to consider making an order against the Tribunal  
7 under the Tribunal of Inquiry (Evidence) Acts 1921 to 1998 against Independent  
8 Newspapers, its servants or agents. Directing the production to the Tribunal  
9 of all copies of a documents said to be an affidavit sworn by James Gogarty and  
10 all copies of documentation said to be statements of persons made to the  
11 Tribunal in the course of its work. The Tribunal will hear submissions from  
12 Independent Newspapers on Monday next.

13  
14 The third. The Tribunal intends constituting proceedings in the High Court in  
15 an effort to prevent any further unauthorised disclosure of confidential  
16 Tribunal information".

17  
18 I should say by way of clarification, that in fact the Tribunal did not make  
19 the Order that it indicated there having heard evidence from and on behalf of  
20 Independent Newspapers and having heard submissions. But as I will indicate  
21 subsequently, the Tribunal did refer the matter to the Gardai.

22  
23 The further public hearing of the Tribunal was held on Monday the 21st of  
24 December 1998. And on that occasion Mr. Jody Corcoran, a well known  
25 journalist employed by Independent Newspapers, was asked to produce a document.  
26 He declined to do so. And having heard further evidence and submissions, the  
27 Chairman, at page 314 said as follows:

28  
29 "There is already a comprehensive Garda investigation underway at the request  
30 of the Tribunal. In my view, this matter should be referred to the Gardai

1       forthwith in order not to prejudice any investigation. I do not propose to  
2       comment other than to say, that the refusal to comply with the order of the  
3       Tribunal and its relevant circumstances are proper matters to ground a further  
4       criminal complaint".

5  
6       That refusal was in fact the subject of a further complaint to the Gardai.  
7       And a Garda investigation into alleged breaches of sections 1, 2D of the  
8       Tribunals of Inquiries (Evidence) Act 1921 as amended commenced on the 3rd of  
9       December 1998. The investigation lasted for nearly four months and initially  
10       concerned a total of six unauthorised disclosures. During the course of the  
11       investigation, which was carried out by one detective Superintendent, one  
12       D/Inspector, four detective Sergeants and eight detective Gardai. A total of  
13       98 people were interviewed including five journalists.

14  
15       89 of those interviewed co-operated with the Gardai. According to the officer  
16       in charge of the investigation, four of the journalists interviewed declined to  
17       answer questions, save to identify themselves and to confirm that they had  
18       written the articles complained of.

19  
20       The Officer in charge of that investigation, Detective Superintendent Patrick  
21       Brehony, gave evidence to the Tribunal on day 168, that's on the 14th of July  
22       2000.

23  
24       In January 2001, the Sunday Business Post and other newspapers again published  
25       confidential Tribunal material. These publications were viewed with such  
26       gravity that the Sole Member on the 24th of January 2001 made a public  
27       statement in the following terms.

28  
29       Page 336. I am not going to quote it in its entirety. Before I deal with the  
30       matters listed for today, I want to express my concern about the contents of

1 some recently published newspaper articles. He says "in particular --" this  
2 article I should say related to an inquiry which it was claimed the Tribunal  
3 were making or was making with a financial institution at that time and he  
4 continued. "In particular, no conclusion or finding will be made solely on  
5 the basis that I have sought or obtained information from financial  
6 institutions in respect of any individual or group of individuals. I am  
7 satisfied that it would be improper for me to do so. Consequently, I am  
8 satisfied that it is improper and unhelpful in the extreme for any newspaper or  
9 publication to publish the names of persons whose bank accounts are alleged to  
10 be the subject of inquiries in private by the Tribunal.

11  
12 Correspondence between the Tribunal and financial institutions is confidential  
13 to the Tribunal and is invariably headed "strictly and confidential" to be  
14 opened by addressee only. Any media publication of material contained in such  
15 correspondence, has the potential to hinder or obstruct the Tribunal in the  
16 performance of its functions and should it do so, would thereby constitute the  
17 commission of a criminal offence, punishable on conviction by a fine of 10,000  
18 pounds or two years imprisonment or both."

19  
20 Page 337 he says" unfortunately the unauthorised disclosure of the memorandum  
21 was not confined to that of one newspaper, as it appears to have been furnished  
22 to a number of journalists leading to unauthorised publication of confidential  
23 material in at least two separate journals. I believe that such unauthorised  
24 publication of confidential material may hinder or obstruct the Tribunal's work  
25 and may prove to be a disincentive to persons who would otherwise readily  
26 cooperate with the Tribunal's investigations. I also believe that the  
27 unauthorised publication of this confidential information has understandably  
28 caused significant distress to persons named in the articles. I assure those  
29 persons and the public in general that the information did not come from any  
30 Tribunal source or any Tribunal document but was extracted from the banks

1 internal memorandum as has been confirmed by one of the publications in  
2 question."

3  
4 Later he said "it is my intention to hear evidence in due course from senior  
5 official in the bank in question as to the outcome of the bank's  
6 investigations. In the meantime, I emphasise to that institution, to the  
7 media in general and to all others the serious view I take in relation to  
8 unauthorised disclosure and information confidential to the Tribunal. I  
9 earnestly ask the media not to publish or disseminate information which is  
10 confidential will to the Tribunal. And I want to make it clear to all  
11 concerned that I will not hesitate to use such options as are available to me  
12 whether by way of application to the High Court, by way of complaint to the  
13 D.P.P. or otherwise, to restrain any improper disclosure of information  
14 confidential to the Tribunal. I sincerely hope it will not be necessary for  
15 me to revisit this issue in the future."

16  
17 On the 26th of January 2001, page 85, please. The Tribunal wrote to the then  
18 solicitors for the Sunday Business Post. The solicitors were acting for Post  
19 Publications Limited and Mr. Frank Connolly who is a journalist, employed by  
20 that newspaper at the time and it referred to a newspaper article that had been  
21 published by the newspaper.

22  
23 And the letter read as follows, third paragraph: "also enclosed is a public  
24 statement made by the Sole Member concerning this matter at the public hearing  
25 on Wednesday 24th of January 2001.

26  
27 The Sole Member has asked me to inform you by way of explanation and on a  
28 strictly confidential basis, that your client's article appears to have been  
29 based on a document or documents compiled from a series of letters written to a  
30 financial institution by the Tribunal. These letters were written by the

1 Tribunal as part of its preliminary confidential investigations in private  
2 (which are not yet completed) and were expressed to be so in the body of the  
3 letters. Each of the letters was headed "Strictly private and confidential -  
4 to be opened by addressee only". The information contained in the letters  
5 remains confidential to the Tribunal, whether contained in the letters  
6 themselves or in a document compiled from the letters. This would undoubtedly  
7 have been readily apparent to your client. Your clients are undoubtedly aware  
8 of the importance of the confidentiality of the Tribunal's preliminary  
9 investigation are private. Your clients publication constitutes a very serious  
10 infringement of the confidentiality of the Tribunal. It could seriously damage  
11 the work of the Tribunal and could cause damage to the reputation of persons  
12 whose interest may be affected by the work of the Tribunal.

13  
14 The Sole Member would expect that persons who come into possession of  
15 confidential information of the Tribunal would seek to uphold the  
16 confidentiality thereof, rather than to expand the breach of confidence.

17  
18 The Sole Member requires that in future your clients' maintain the  
19 confidentiality to the Tribunal. Meanwhile, the Sole Member will take such  
20 steps as he considers appropriate to protect the work of the Tribunal. This  
21 letter and its contents are confidential to the Tribunal and may not be  
22 disclosed by you or your clients without the prior consent of the Tribunal."

23  
24 No reply was received to that letter.

25  
26 On the 14th of January 2004, the Tribunal received in confidence a statement  
27 from Mr. Jude Champion. May I just have the top, 2125, please. May I just  
28 have the -- just may I have the top first paragraph please of page 2125.  
29 Sorry. I'm told it's different. All right. May I have page 15, please.  
30 I will come to this document later. This is a copy of one of the articles

1 which gave rise to this hearing today and you will see that there is a document  
2 described as "confidential in the matters of the Tribunal of Inquiry into  
3 Certain Planning Matters. Statement of Jude Campion. It is date stamped the  
4 14th of January 2004, it bears the date stamp of the Tribunal. And I can tell  
5 the Tribunal that that photocopy, which I presume it is a copy, is in fact a  
6 copy of the statement which was furnished to the Tribunal by Mr. Campion on the  
7 14th of January 2004.

8  
9 On the 15th of January 2004 the Tribunal circulated the statement to a limited  
10 number of persons under cover of letter which was headed "strictly private and  
11 confidential to be opened by addressee only".

12  
13 May I have page 67, please. This is but a sample of the letters that went out,  
14 a covering letter with that statement. And I have redacted from that letter  
15 the name and address of the addressee and the parties to whom it is addressed.  
16 But you will see it's dated the 15th of January 2004. It's headed "strictly  
17 and private confidential to be opened by addressee only". Re: public hearings  
18 commencing on or about 20th of January 2004. Carrickmines 11 and related  
19 Issues, first phase Jackson Way lands.

20  
21 I refer to the above enclosed page numbers 2125 to 2140 of the Carrickmines 11  
22 brief. 2125 and 2130 relate to the narrative statement of Mr. Jude Campion  
23 and should be inserted at tab 2. Then it goes on at the bottom of the page

24  
25 "The enclosed documents remain the property of the Tribunal and the information  
26 therein contained is confidential to the Tribunal and may not be disclosed to  
27 any person other than your legal advisor, who is likewise restrained from  
28 disclosing the contents thereof.

29  
30 Your must retain the enclosed documents in your possession. If it is your

1 intention to copy any of the documents enclosed you must seek the consent of  
2 the Tribunal prior to doing so. Copies may be made for your legal advisor  
3 without first seeking the tribunal's consent to the making of such copies, but  
4 these should be clearly marked by you so as to ensure their security ".

5  
6 I should say. This warning is included by the Tribunal in all documents that  
7 is circulated or briefs that it circulates. It has become necessary to  
8 include that warning because of the constant deliberate leaking to the media of  
9 information that is confidential to the Tribunal and the unwillingness of the  
10 media to refrain from publishing that material, although they know, it is my  
11 respectful submission, and must know, in the light of what has transpired in  
12 the past. That the Tribunal regards these documents as confidential and that  
13 they should not be published.

14  
15 On the 6th of October 2004, a brief of documents containing approximately 2001  
16 pages in five lever arch folders was circulated by the Tribunal to a limited  
17 number of parties or their solicitors. The brief was sent under cover of a  
18 letter dated the 6th of October 2004.

19  
20 Page 69, please. Which again was headed "strictly private and confidential to  
21 be opened by addressee only" and contained a warning that the documents and  
22 information contained therein remained confidential to the Tribunal. The  
23 warning was essentially in the same terms as the warning I've just read which  
24 was set out in the letter of the 15th of January 2004.

25  
26 On the 15th of October 2004 a folder containing narrative statements of  
27 witnesses who will be called to give evidence in relation to lands at Coolamber  
28 County Dublin, was circulate to the same parties to whom the brief had been  
29 circulated on the 6th of October 2004. The narrative statements were sent to  
30 undercover of a letter, which again was headed "strictly private and

1 confidential to be opened by addressee" and contained the following.

2

3 Page 70, please.

4

5 "I refer to my letter of the 6th of October enclose a folder containing  
6 narrative statements of the witnesses who will give evidence in the Coolamber  
7 Lands Inquiry. The enclosed documents remain the property of the Tribunal and  
8 the information contained therein is confidential to the Tribunal and may not  
9 be disclosed to any person other than your client and counsel, who are likewise  
10 restrained from disclosing the confidential information.

11

12 You must retain the enclosed document in your possession. If it is your  
13 intention to copy any of the enclosed documents, you must seek the consent in  
14 writing of the Tribunal prior to doing so. Copies may be made for counsel  
15 without first seek the Tribunal's consent to the making of such copies, but  
16 these should be clearly marked by you so as to ensure their security ".

17

18 I should say that the parties to whom the various documents and folders that I  
19 have referred to, that is the parties who received the documents on the 15th of  
20 January 2004, on the 6th of October 2004 and the 15th of October 2004, do not  
21 include Mr. O'Kelly, Mr. Dinan, the Sunday Business Post or any party which  
22 they are associated.

23

24 On the 17th of October 2004, the Sunday Business Post published an article by  
25 Mr. O'Kelly entitled "Jim Kennedy's Pipe Dream." May I have page 11, please.  
26 We perhaps may have a clearer copy of that on page 635. I would ask Miss  
27 Griffin to hand in a copy of the Sunday Business Post of the 17th and of the  
28 24th of October 2004, and I will be referring the Tribunal to both of those  
29 later.

30

1 As the Tribunal will see, there is a copy of the article headed "Jim Kennedy's  
2 pipe dream" on screen with the photographs of four individuals. If we look at  
3 page No. 12. Sorry, that sub-heading which is on screen reads as follows:

4  
5 "Former Fianna Fail politician Liam Lawlor, arcade owner Jim Kennedy and meat  
6 baron Larry Goodman were involved in the Dublin land deal that is now being  
7 scrutinised by the Planning Tribunal. The Sunday Business Post reveals the  
8 details of the deal in previously undisclosed documents".

9  
10 The Tribunal will also have before it the article in the inside pages, page  
11 9 -- page No. 12, written by Mr. O'Kelly. I should explain to the Tribunal,  
12 to others who are present, that there is a reference to the Coolamber story and  
13 lands at Coolamber. No public hearing has yet taken place in relation to the  
14 lands at Coolamber. The public hearings in relation to the lands at Coolamber  
15 are fixed to commence on Tuesday next. It is only on that day and on  
16 subsequent days that the documents which are referred to here will be opened  
17 and that evidence will be given in relation to them. So it was the Tribunal's  
18 intention that none of these documents would be opened or referred to or quoted  
19 from prior to the opening of the Coolamber portion of the current module on  
20 Tuesday next, that's this day week.

21  
22 The article of the 17th of October 2004 reads as follows:

23  
24 "In early 1986 Liam Lawlor and his friend Jim Kennedy were sitting on a gold  
25 mine in the form of an obscure wayleave Dublin County Council. This granted a  
26 Kennedy Company exclusive rights over the waste pipe network in the soon to be  
27 exploited hinterland at Coolamber, in Lucan. But the pair had two problems;  
28 money and credibility.

29 Even in the hard boiled world of the building game, Kennedy and Lawlor were  
30 viewed with a certain suspicion, it would not be easy to persuade landowners or

1       councillors that their a plans for the land were above board. And in the  
2       recession hit 1980s, they also had trouble getting any money from the banks."

3  
4       I'm going to skip down to the next paragraph but one which reads as follows:  
5       "The Coolamber story revealed in documents obtained by the Sunday Business Post  
6       is under ongoing scrutiny in the Mahon Planning Tribunal at Dublin Castle.  
7       One document outlined the early part Goodman into the deal, offers an insight  
8       into the attitudes of the banks in the 1980s to property developers." It then  
9       goes on to quote a memorandum --

10  
11       CHAIRMAN:    Sorry.    Mr. Gallagher, is there any need to, given that this  
12       document or this article had been published.    Is there any need to revisit the  
13       detail of the article?  It's there for anyone to read in and we ourselves --

14  
15       MR. GALLAGHER:    Yes, I'm quite happy to pass that.    Simply to highlight the  
16       fact that there's a confirmation that the documents had been obtained by the  
17       Sunday Business Post.    And the documents in question would appear to be the  
18       documents referred to in the Coolamber, what's described as the Coolamber brief  
19       circulated by the Tribunal.

20  
21       On the 17th of October 2004, may I have page 633.    There was a further article  
22       by Mr. O'Kelly in which he refers to a statement, which he says was furnished  
23       to the Tribunal and was seen by the Sunday Business Post.    This is a statement  
24       of a Mr. Lynn.    And he quoted from that statement.    And I don't propose to  
25       quote anything further from it.

26  
27       On the 21st of October 2004, page 50, please, the Tribunal wrote to Mr.  
28       O'Kelly, at the Sunday Business Post arising from his article of the 17th of  
29       October 2004 in the following terms:

30

1 "Dear Mr. O'Kelly. I refer to your article in the Sunday Business Post dated  
2 17th of October 2004 entitled "Jim Kennedy's pipe dream".

3  
4 I am directed that you furnish to the Tribunal;

5 1. The identity of the source or sources of the information contained in your  
6 article.

7 2. Any document or other material furnished to new relation to article.

8  
9 Please reply within four working days from the date hereof ".  
10

11 On the same day, I should say, that the Tribunal wrote to parties to whom the  
12 various documents had been circulated with a view to establishing whether any  
13 of them were willing to confirm that they had released any of the confidential  
14 information to Mr. O'Kelly. And of course not surprisingly none of them  
15 admitted to so doing. In fact, a number of people complained rather bitterly  
16 about the publication in question. For example, one letter was received from  
17 a solicitor acting for one of the parties in will the following terms:

18  
19 "I refer to the article entitled "Jim Kennedy's pipe dream" contained in the  
20 edition of the Sunday Business Post on October 17th 2004. It is very clear  
21 that Mr. O'Kelly, the journalist had access to a considerable amount of  
22 information which would, it would appear, can only have emanated originally  
23 from the Tribunal. The article contains material inaccuracies insofar as  
24 their client was concerned. We appreciate that leaking of information such as  
25 this is extremely difficult for any Tribunal to control. And we trust that  
26 appropriate measures will be taken to investigate its provenience and steps  
27 will be taken to reprimand the perpetrators".

28  
29 One other party, the solicitor for one other party wrote in the following terms  
30 to the Tribunal in connection with that particular article.

1 "It is a matter of serious concern to my client as it is to members of the  
2 Tribunal that, that confidential documentation should be made public in this  
3 most public of ways. We have had correspondence in relation to issues such as  
4 this before and the views expressed at that time apply equally to this  
5 situation. With the greatest of respect, the exercise upon which you are  
6 embarked seems to me to be futile. If somebody is in breach in relation to  
7 the Tribunal's injunction to maintain confidentiality, it is unlikely that they  
8 will own up to this. If a stop is to be put to this type of behaviour, the  
9 journalist who is responsible for the article should, in my view be brought  
10 before a public sitting of the Tribunal and asked to give sworn evidence as to  
11 the source of his/her information. If he/she refuses for any reason  
12 whatsoever to disclose his or her source, contempt to proceedings in the High  
13 Court should be initiated against the journalist. I have suggested this  
14 course of action in the past but it has not been pursued. I strongly suggest  
15 that you adopt this course of action on this occasion".

16  
17 And in response to a further letter written on the 1st of November by the  
18 Tribunal, the same solicitor replied and in the course of his letter said as  
19 follows:

20  
21 "Your letter comes hard on the heels of a similar letter which you wrote me on  
22 the 21st in relation to another leak of confidential information. The  
23 newspaper article in each case was published by the Sunday Business Post and  
24 apparently written by the same journalist, namely, Mr. Barry O'Kelly. I  
25 repeat the suggestion made in my letter to you of 22nd in relation to the leak.  
26 If a stop is to be put to this type of behaviour the journalist who is  
27 responsible for the articles should be brought before a public sitting of the  
28 Tribunal and asked to give sworn evidence as to the source of his/her  
29 information.

30 If the Tribunal does not propose to adopt this course of action I will be

1 obliged if you would be kind enough to explain it me why not".

2

3 One further letter of complaint received by the Tribunal in relation to the  
4 publication was your letter dated the 27th of October 2004, which indicated  
5 that the solicitors client was very concerned about the furnishing of a  
6 document to the media and continued:

7

8 "I would be obliged for your comments in this regard and as to any steps which  
9 the Tribunal might take to prevent a recurrence of the event".

10

11 As I indicated earlier, the Tribunal wrote to Mr. O'Kelly, page 50, on the 21st  
12 of October asking him to identify the source or sources of the information  
13 contained in his article and to furnish to the Tribunal any documentation or  
14 other material furnished to him in relation to the article.

15 No reply was received from Mr. O'Kelly until he telephoned the offices of the  
16 Tribunal on Tuesday the 26th of 2004. He spoke to Miss Howard, solicitor to  
17 the Tribunal on that occasion, and verbally informed her that he was not able  
18 to identify to the Tribunal the source or sources of the information contained  
19 in his article of the 17th of October or to furnish the documentation or other  
20 material. He said to her that he considered his sources to be sacrosanct.  
21 He confirmed that he was in receipt of the letter of the 21st of October.

22

23 On the 24th, Sunday 24th of October, that's some days before I he spoke with  
24 Miss Howard, the Sunday Business Post published a further article written by  
25 Mr. O'Kelly. May I have page 15, please.

26

27 The article was entitled "Flynn, Lenihan Flynn in new payments revelations".  
28 It's on screen and it's also, I don't know whether it's easier to read. It's  
29 a better copy perhaps on page 637.

30

1 CHAIRMAN: It needn't be opened I think.

2  
3 MR. GALLAGHER: As the Tribunal will see, there is, there are a number of  
4 photographs, including a photograph of Mr. Campion. I should say also that on  
5 the same day another article, in the Sunday Business Post, the front page of  
6 the Sunday Business Post I think, was headed "Former Tanaiste caught up in  
7 Tribunal's allegations". That article was continued on page five.

8  
9 I should point out to the Tribunal that Mr. Campion had given evidence to the  
10 Tribunal on the 14th of October 2004, that's day 527. May I have page No. 1,  
11 please.

12  
13 Mr. Campion's statement had been circulated in its entirety to the parties who  
14 were involved with the Tribunal at that time. The affected parties. And  
15 when Mr. Campion was giving evidence, he was asked not to identify by name  
16 three individuals whom he had named in his statement, in the statement which  
17 had been circulated.

18  
19 And in the course of the cross-examination of Mr. Campion, Mr. Finlay sought  
20 guidance as to how to deal with the fact that three parties who had been named  
21 by Mr. Campion in his statement, but whose names had not been disclosed in  
22 public at the hearing of the Tribunal were to be identified. And on that  
23 occasion you, Chairman, said as follows. You will see on page No. 1, which I  
24 understand is coming up shortly. You said "we would prefer if names of  
25 persons who have no notice of the likelihood that they might be mentioned  
26 should be revealed in public. They can be referred to. You can certainly  
27 deal with the evidence but the names and Mr. Campion should be asked if he is  
28 being asked about that not to mention specific names.

29  
30 MR. FINLAY: Very good I can certainly deal with it in the way you have

1 described.

2

3 CHAIRMAN: He can write down the names if he wishes.

4

5 MR. O'NEILL: I think it follows from that ruling, sir, that the document  
6 itself shouldn't be put on screen because obviously it will".

7

8 Mr. Finlay indicated that he had no wish that it should be put on screen.

9

10 On day 528 you, sir, that's on the following day, page No. 4. You said as  
11 follows "Chairman, Mr. Redmond, you will be cross examining Mr. Campion now.  
12 Just before you start may I remind you that insofar as you can do so, you would  
13 not mention the names of individuals other than those who are mentioned in the  
14 course of evidence yesterday. If you wish to name somebody who hasn't been  
15 named you might seek the direction of the Tribunal before you do so. All  
16 right."

17

18 Subsequently on day 529. Page 21. You, Chairman, reiterated that there was  
19 no need to name the individuals in question.

20

21 And I should say that that decision was made by the Tribunal at the time  
22 because the Tribunal felt that the individuals should not be identified in  
23 public at that time, although their names could be written down and handed to  
24 the Tribunal if the witness wished.

25

26 In the course of his article, that's on page 5 of the newspaper, which was up  
27 on screen just in a few moments ago, Mr. O'Kelly said and I quote "During last  
28 weeks hearings he referred that, Mr. Campion, he referred to three TDs by the  
29 letters A, B, and C to whom he claimed to have paid money. He was seeking  
30 their support in his efforts to lobby the council to sell them a commercial

1 site in Coolmine west Dublin at the time. The names of the TD's and the story  
2 about the Gardai were left unsaid at the request of the Tribunal".

3  
4 It appears, therefore, to me, that Mr. O'Kelly was aware of the evidence that  
5 had been given by Mr. Campion and the request of the Tribunal that the parties  
6 should not be named. Notwithstanding which he proceeded to name the  
7 individuals whose names were contain in the Mr. Campion's statement.

8  
9 On the 28th of October 2004 the Tribunal sent a letter by courier to  
10 Mr. Campion (sic) and a copy was sent by fax to the managing director of Thomas  
11 Crosby Holdings, 97 South Mall, Cork. I should say that normally such a copy  
12 would have been sent to the editor of the Sunday Business Post but at that time  
13 the editor of the Sunday Business Post had vacated his position and it appeared  
14 that the post was, the editor's post was vacant.

15  
16 CHAIRMAN: You said Mr. Gallagher, that a letter had been sent to Mr. Campion.

17  
18 MR. GALLAGHER: Sorry. I should have said to Mr. O'Kelly. I beg your  
19 pardon. This is on page 45, please.

20  
21 It's dated the 28th of October, 2004. It's addressed to Mr. Barry O'Kelly.  
22 And it's re: Sunday Business Post 17th October 2004 and 24th October 2004 "Dear  
23 Mr. O'Kelly, I am directed by the Tribunal to refer to my letter of the 21st  
24 and your telephone call in reply of the 26th inst. In the course of your call  
25 you informed me that you are not able to provide to the Tribunal the identity  
26 of the source or sources of the information contained in your article of the  
27 17th of October or any documentation or any other material furnished to you in  
28 relation to the article. You did so on the basis that your journalistic  
29 sources are sacrosanct.

30

1 In the Sunday Business Post of 24th October 2004 in an article entitled "former  
2 Tanaiste caught up in Tribunal allegations" written by you, you referred to a  
3 statement made in confidence to the Tribunal by Mr. Jude Campion and quoted  
4 material contained in that statement. You also referred to evidence that had  
5 been given by Mr. Campion to the Tribunal in public in the recent past and  
6 identified by name, three individuals who were named by Mr. Campion in his  
7 statement and whose identities had not been disclosed in public at the request  
8 of and for the purposes of the Tribunal.

9  
10 In evidence the three individuals were referred to by the letters, A, B and C  
11 but you, notwithstanding the direction of the Tribunal, in relation to  
12 non-disclosure, knowingly disclosed the names of the individuals concerned.

13 In your article of the on the 24th of October you also said "the names of the  
14 TDs and the story about the Gardai were left unsaid at request of the  
15 Tribunal".

16  
17 As part of your article of the 24th of October, you also reproduced part of a  
18 photocopy of a statement of Mr. Campion furnished in confidence to the Tribunal  
19 which was the property of the Tribunal and bears the stamp of the Tribunal as  
20 having been received here on 14th January 2004.

21  
22 The Tribunal will, in due course, decide whether, in its view, your actions and  
23 or the editor of the Sunday Business Post in publishing material that is  
24 confidential to the Tribunal amounts to the hindering or obstructing of the  
25 Tribunal. The Tribunal requests that you immediately return to it a copy of  
26 Mr. Campion's statement which was furnished in confidence to the Tribunal. A  
27 photocopy of which appears in the Sunday Business Post on 24th of October last.

28  
29 If you decline to comply with the Tribunal's request the Tribunal will take  
30 such steps as it should take to seek your compliance.

1  
2  
3  
4  
5  
6  
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29  
30

You should note that it is not accepted that you are entitled to refuse to disclose the source/source of the information and document referred to above.

On the instructions of the Tribunal I forward a copy of this letter and my earlier letter to the editor of the Sunday Business Post".

As I said, the position of editor of the Sunday Business Post was vacant at that time. And it was in those circumstances forwarded to Mr. Dinan who is the secretary both of Thomas Crosby Holdings and of Post Publications Limited.

On the 3rd November 2004, a letter send sent by Ronan Daly Jermyn acting on behalf of Post Publications Limited trading as Sunday Business Post. That letter was not received by the Tribunal until Friday the 5th of November 2004.

The letter read as follows "We confirm that we act on behalf of the Sunday Business Post and Mr. Barry O'Kelly who has passed to us, your letters of the 21st and 28th October 2004. We also reply on behalf of Thomas Crosby Holdings to whom you have copied the letter of the 28th of October. We understand that following the issue of your letter of the 21st of October Mr. O'Kelly contacted you directly on the 26th of October and advised you that he was not in a position to provide to the Tribunal the identity of the source of the information contained in the article of 17th of October or any documentation or other material that might have been furnished to him in relation to the article.

We wish to confirm that regrettably neither the Sunday Business Post nor Mr. O'Kelly is in a position to divulge to the Tribunal the source or sources of either information contained in the article of the 17th of October or the 24th of October, or any documentation or other material that may have been furnished

1 to him in relation to those articles.

2

3 In relation to any documentation which may be in our clients' possession and  
4 which you assert in your letter of 28th of October 2004 to be confidential to  
5 the Tribunal. Our client is concerned that the return of this documentation  
6 to the Tribunal may possibly identify the source of that documentation. In  
7 the circumstances our clients undertake to destroy any such document as  
8 identified in your letter as may be in their possession. We await hearing."

9

10 This letter was written under the reference DMG/GN/17090. What's the date of  
11 that letter?

12

13 MR. GALLAGHER: The date of that letter Sir is the 28th of October. It's on  
14 page 45: Sorry. The 3rd of November letter. It's on page 42. The letter  
15 I've just read is the 3rd of November.

16

17 It's on page 42 and page 43. On receipt of that letter, the Tribunal, Miss  
18 Howard, immediately replied by fax. The letter was not brought to her  
19 attention until after the public hearing was finished at four o'clock or  
20 thereabouts on the Friday evening. And immediately thereafter she, a short  
21 time thereafter she was furnished with the letter and made contact with Ronan  
22 Daly Jermyn, their reference DMG. And at page 37, you will see the letter she  
23 wrote on that occasion.

24

25 "Dear Mr. Broderick" that's the person she was told used the reference DMG, "I  
26 tried unsuccessfully to contact you by telephone this afternoon having received  
27 your letter dated 3rd of November 2004, after the conclusion of the public  
28 hearings today.

29

30 The Tribunal has not had an opportunity to consider your letter fully and

1 directs that your clients should not destroy any documentation whatsoever  
2 concerning this matter pending further direction of the Tribunal".

3  
4 I should say, sir, that by way of background to that, Miss Howard telephoned  
5 the offices of Ronan Daly Jermyn on two occasions on that afternoon and asked  
6 to speak to Mr. Broderick. She left a voice mail message for him to say that  
7 to say that the letter of the 3rd had been received. That it hadn't been  
8 considered fully as the members had been at hearing all day. She was to  
9 relate to him urgently that there should be no destruction of any documents  
10 pending a further decision of the Tribunal. She also informed a member of the  
11 staff, a telephonist or secretary that she would be sending a fax and that it  
12 was important that it should be brought to Mr. Broderick's attention that  
13 afternoon.

14  
15 On the -- no reply, I should say, was received to that letter. But on the  
16 10th of November 2004, the Tribunal wrote again to Mr. Broderick. Page 33.

17  
18 Wrote in the following terms: "Dear Mr. Broderick. I refer to previous  
19 correspondence resting with mine of the 5th instant. I have been directed to  
20 inform you that while the Tribunal is extremely reluctant to make any order or  
21 orders under the Tribunals of Inquiry (Evidence) Acts 1921 - 2004 and/or to  
22 seek the assistance of the High Court in relation to the matters at issue, it  
23 will have no choice but to do so unless:

24  
25 1. The copy of Mr. Campion's statement is returned to the Tribunal by 1 p.m.  
26 on Friday next, 12th November 2004 and;

27  
28 2. An understanding is given by your clients that any document, or any of the  
29 contents thereof, issued or circulated in confidence by the Tribunal will not  
30 hence forth be published by your clients or either of them, unless such

1 document or its contents has been disclosed at a public sitting of the  
2 Tribunal.

3  
4 The Tribunal is not at present insisting that your clients identify the person  
5 or persons who provided your clients with the said documents and the  
6 information contained in your recent newspaper articles, but reserves the right  
7 to do so if your clients fail to comply with the Tribunal's request herein.  
8 Please let me hear from you by 1.00 p.m on Friday next." That was sent by fax  
9 on the 10th to Mr. Broderick.

10  
11 And on Friday the 12th of November 2004 Ronan Daly Jermyn, page 32, please,  
12 wrote to the Tribunal that was faxed, I believe. Sorry. It was received by  
13 the Tribunal on the 15th of November 2004. And the letter reads as follows:

14  
15 "Dear madam. We refer to your letter of the 10th of November.  
16 Our clients have noted, with particular concern, the absence of any comment or  
17 denial in the Tribunal's response to ours of the 3rd of November, as to the  
18 issue of the possibility of identifications of sources from Tribunal  
19 documentation itself.

20  
21 As you will have seen from our letter of the 3rd of November, the only stated  
22 basis for our clients offer to destroy any documentation that may have been in  
23 their possession, rather than forward it to the Tribunal, was their concern  
24 that the dispatch of any such documentation would identify their source. Our  
25 clients did note your confirmation that the Tribunal was not, for the present,  
26 insisting that our clients disclose the identity of any source or sources of  
27 any such documentation. However, such a position, and confirmation of it,  
28 would be entirely meaningless were any such documents to identify the source  
29 from which they came.

30

1 In the circumstances, our clients have destroyed the documentation concerned.  
2 Our clients should like to advise the Tribunal that they intend no disrespect  
3 whatever to them in having adopted this course. They are, however, very  
4 concerned as to the issue of protection from disclosure of sources and to  
5 protect any sources that they may have. They have grave difficulties with any  
6 action which may be required of them which would lead to the identification of  
7 any such sources."

8  
9 It seems from a reading of that letter, particularly the final paragraph, where  
10 one looks at "in the circumstances -- it follows that in the circumstances that  
11 is having considered the Tribunal's letter of the 10th instant, our clients  
12 destroyed the documentation" but that is a matter for the Tribunal to  
13 determine. I would however, draw the Tribunal's attention that there is no  
14 reference in that letter of the 12th of November 2004, to the Tribunal's letter  
15 of the 5th of November or indeed the telephone calls which were made by Miss  
16 Howard on the 5th of November, when the Tribunal directed that their clients,  
17 that's the clients of the solicitors concerned, should not destroy any  
18 documentation whatsoever pending the direction of the Tribunal ".

19  
20 On the 15th of November, the day of which the letter of the 12th was received,  
21 the Tribunal replied as follows by fax and by post:

22  
23 "Dear Mr. Broderick. I refer to your letter of the 12th instant received this  
24 morning by ordinary post. The Tribunal had understood from your letter  
25 received here on the 5th inst that your clients had of their own volition  
26 undertaken to destroy the copy of Mr. Champion's statement, but not until they  
27 had heard the Tribunal's views on your proposal". This is page 38. "You your  
28 said letter of the 3rd instant concluded with the words "we await hearing".  
29 Clearly indicating that the status quo would be maintained until the Tribunal  
30 made its views known to you. In the light of the foregoing and the Tribunal's

1 direction of the 5th instant in reply, that your clients should not destroy any  
2 documentation whatsoever concerning the matter pending further direction of the  
3 Tribunal. I have been instructed to write to you to express astonishment at  
4 the news that your clients have since destroyed the copy statement.

5  
6 It appears from your letter under reply that the copy of Mr. Campion's  
7 statement was destroyed after your firm had received the Tribunal's most recent  
8 letter of the 10th. The entire matter will be considered in early course by  
9 the Tribunal and I would communicate further with you thereafter. The failure  
10 of clients to give an undertaking along the lines sought in paragraph 2 of the  
11 Tribunal's letter of 10th of November 2004 is also noted".

12  
13 On the 16th of November, the Tribunal decided to issue summonses requiring the  
14 attendance of Mr. Broderick, Mr. William Dinan and Mr. Barry O'Kelly. And  
15 perhaps I can open those in due course.

16  
17 I should say, however, that subsequent to the service of those documents on  
18 their solicitors, Mr. Richard Martin contacted the Tribunal and indicated that  
19 he was the solicitor who had been dealing with the matter on behalf of his  
20 clients Thomas Crosby Holdings Limited and Post Publications Limited and in  
21 those circumstances the Tribunal acceded to his request that the, that he  
22 should in fact be called to give evidence rather than Mr. Broderick and that  
23 the matter should be adjourned for some time. And it was adjourned to today  
24 to their request.

25  
26 I don't know whether the Tribunal wishes me to open any of the provisions of  
27 the Tribunals of Inquiry Evidence Acts 1921 as amended including the provisions  
28 of the 1997 Act, setting out the powers of the Tribunal Section 4. And the  
29 provisions of Section 4 of the --

1 CHAIRMAN: Well I think you should, if you can, summarise the paragraphs.

2

3 MR. GALLAGHER: Well I'll --

4

5 CHAIRMAN: We know them.

6

7 MR. GALLAGHER: Well I'll go through them as quickly as I can.

8

9 Section 1.2 which is amendment of the 1921 Act, it was amended by Section 3 of  
10 the 1979 Act, provides that "if any person being duly summoned by a witness  
11 before a Tribunal without just cause or excuse, that summons or being in  
12 attendance --

13

14 MR. MCCULLOUGH: The Chairman has said that the Members of the Tribunal know  
15 them. Of course that's correct, Mr. Gallagher knows them. I'm familiar with  
16 them as well.

17

18 CHAIRMAN: Yes, but this is a public Inquiry so it's important.

19

20 MR. MCCULLOUGH: I'm only trying to save time.

21

22 CHAIRMAN: If they could be summarised.

23

24 MR. GALLAGHER: I will summarise them. Paragraph E of Section 3 of the 1979  
25 Act provides that "if any person being in attendance as a witness refuse to  
26 take an oath or make an affirmation when legally required by the Tribunal or to  
27 produce any documents in its power or control legally required by the Tribunal  
28 to be produced to him, or to answer any question to which the Tribunal may  
29 legally require an answer or willfully gives evidence to the Tribunal which is  
30 material to the inquiry which he knows to be false or he does not believe to be

1 true or by act or omission obstructs or hinders the Tribunal in the performance  
2 of its functions or fails or neglects or fail to comply with the provisions of  
3 an order made the Tribunal or does or omits to do any other thing and is such  
4 and if such doing or omission would, if the Tribunal had been in the High Court  
5 have been in contempt of that court, that person shall be guilty of an offence.  
6 The penalty is a fine not exceeding 300,000 Euro and/or term of imprisonment  
7 not exceeding two years or both fine or imprisonment and there is provision for  
8 summary disposal of any such charge".

9  
10 Section 1.3 provides that -- of the 1921 Act, provides that a witness before  
11 any such Tribunal shall be entitled as to the same immunities and privileges  
12 has if he were a witness before the High Court.

13  
14 Section 4 as inserted by the 1979 Act, Section 4 of the 1979 Act provides as  
15 follows, a Tribunal may make such orders as it considers necessary for the  
16 purpose of its functions and it be shall have in relation to their making all  
17 such powers, rights and privileges as vested in the High Court or a Judge of  
18 that court in respect of the making of the orders.

19  
20 The 1977 Act inserted a new Section 4 which provides that where a person fails  
21 or refuses to comply with or disobeys an order of the Tribunal the High Court  
22 may on application to in a summary manner in that behalf by the Tribunal order  
23 the person to comply with the order and make such other order as it considers  
24 necessary and just to enable the order to have full effect ".

25  
26 I don't know that there is any other statutory provision that I need to draw  
27 the attention of the Tribunal to.

28  
29 I would say that in the course of his judgement. If I may have -- in the  
30 course of the judgement of the Supreme Court in Lawlor versus Flood 1999 (3

1 Irish Reports 107 at 122 ) Mr. Justice Hamilton said as follows in relation to  
2 the provisions of Section 4 of the 1979 Act.

3  
4 "If any person summoned as a witness fails to attend or if he does attend  
5 refuses to answer any question to which the Tribunal may legally require an  
6 answer or fails to produce any document in its powers or control which the  
7 Tribunal legally requires him to produce or does anything which would  
8 constitute contempt of court in a court of law, then the Chairman may certify  
9 the offence to the High Court, which may inquire into the facts and hear  
10 evidence including statements that may be offer offered in defence. If the  
11 witness is found guilty he may be punished to the same manner as if he had  
12 committed a contempt of court. A witness before the Tribunal has the same  
13 privileges and immunities as in a court of law".

14  
15 I should say that the page reference there is page 437. Later on in that  
16 judgement, at page 441, Mr. Justice Hamilton said:

17  
18 "In addition, the respondent, that was Mr. Justice Flood, would be entitled  
19 pursuant to provisions of Section 4 of 1977 Act, to apply in a summary manner  
20 to the High Court for an order directing the applicant to comply with the said  
21 order, that's the Applicant. That is the person, in this case it was  
22 Mr. Lawlor. To comply with the said order. The applicant would be subject  
23 to such orders as the High Court considered necessary and necessary and just to  
24 enable the order to have full effect".

25  
26 I mentioned briefly a decision of the High Court in the case of Kiberd and  
27 Mr. Justice Hamilton, which is at page 495. It's reported at 1992, 2 Irish  
28 Reports at 257. And that was a case were the Sunday Business Post, Mr. Kiberd  
29 was the editor of the Sunday Business Post. And the Sunday Business Post in  
30 the context of The Beef Tribunal were requested to detail the origin of

1 information contained in articles published by that newspaper and the persons  
2 or persons from whom it had obtained the information. It appeared to the  
3 Tribunal that the information contained in the article was not based on any  
4 evidence which had up to that time been given to the Tribunal but appeared to  
5 be based on information pulled from books and statements recently served on a  
6 number of persons prior to the giving of evidence to the Tribunal.

7 I suppose in that respect it is similar to the situation that appears today.  
8

9 The Tribunal wrote to Mr. Kiberd and asked him to attend to give evidence. He  
10 objected. And on that occasion his counsel contended that the Tribunal were  
11 not entitled to direct him to appear before the Tribunal or to divulge the  
12 information which had been sought. Mr. Justice Hamilton took the view that he  
13 had the power under Section 4 of the 1979 Act and made an order that's on, if I  
14 can refer the Tribunal to page 497 -- which Mr. Kiberd sought to quash in  
15 judicial review proceedings. In the course of his judgement, at 499 of the  
16 judgement itself. The internal pagination is page 262.

17  
18 Mr. Justice Blaney said the Section gives the Tribunal power to make a certain  
19 category of orders. The nature of the order being such as it considers  
20 necessary for the purposes of its functions. So for an order to come within  
21 the power given by the Section, it must be one which the Tribunal considers  
22 necessary for the purpose of its functions or to express it in a different way.  
23 Whenever the Tribunal considers which is the equivalent of saying is of the  
24 opinion that it is necessary for the purpose of its function to make an order  
25 it has power to do so under this Section ".

26  
27 I should perhaps briefly refer the Tribunal to what appears to me to be the law  
28 in this country relating to what is described as journalistic privilege. May I  
29 have page 622, please.  
30

1 The law in relation to what is sometimes described as journalistic privilege  
2 has been set out by the Court of Criminal Appeal in the case of Kevin O'Kelly.  
3 This case is reported in 1974, 108 ILTR page 97.

4  
5 In that case, Mr. O'Kelly, who is a very well known journalist, was called to  
6 give evidence in the Special Criminal Court in a prosecution of an individual  
7 who is alleged to be a member of the IRA. Mr. O'Kelly refused to answer  
8 questions which were put to him by the Tribunal. He was called as a witness  
9 by the prosecution and he refused to identify the man he had interviewed. He  
10 did so on the grounds that he had a problem with his conscience and while  
11 recognising his duty as a citizen to cooperate with the court on the furthering  
12 of justice he stated:

13  
14 "I also appear here as a journalist and as a journalist I do in conscience feel  
15 bound to respect the confidence given to me in that capacity".

16  
17 He was found to be in contempt of the Special Criminal Court. He was  
18 sentenced to three months imprisonment for contempt of court for refusing to  
19 answer a question put to him by the court. He appealed his -- the severity of  
20 sentence to the Court of Criminal Appeal. And I suppose perhaps it is note  
21 worthy that did he not appeal the fact that he had been found to be in contempt  
22 of the court by refusing to answer a question put to him by the court. He did  
23 appeal, as you say against the severity of sentence and in the course of his  
24 judgement the late Mr. Justice Walsh said as follows:

25  
26 "The court is quite satisfied that Mr. O'Kelly genuinely believed that he would  
27 be acting in breach of his journalistic ethics if he were to answer the  
28 question. But the court is not satisfied that he was entitled to refuse to  
29 answer it".

1 Mr. Justice Walsh went on to say as follows at page 101 of the report he says  
2 "journalists or reporters are not any more constitutionally or legally immune  
3 than other citizens from disclosing information received in confidence. The  
4 fact that communication was made under terms of expressed confidence or implied  
5 confidence does not create a privilege against disclosure. In so far as the  
6 administration of justice is concerned, the public has a right to every man's  
7 evidence, except for those protected by the Constitution or other an he is or  
8 other established and recognised privilege".

9  
10 So the court varied the penalty that had been imposed and proposed fine of 250  
11 pounds for contempt. That decision was recently referred to in the case of  
12 the D.P.P, the people at the suit of the Director of Public Prosecutions would  
13 be Catherine Nevin, which is reported at 3 Irish Reports, page 331. In the  
14 course of that judgement the Court of Criminal Appeal, Mr. Justice Geoghegan  
15 said it follows;

16  
17 "Counsel for the Applicant has submitted to the trial judge that she should  
18 order the journalists to disclose their sources as he pointed out, there is no  
19 doubt that on the law as it stands, there is no such thing as journalistic  
20 privilege and this was confirmed by a judgement of this court in re; O'Kelly  
21 1974" that's the case that I have just opened.

22  
23 I should say that there have been a number of pronouncement in other  
24 jurisdictions in relation to the alleged privileges including the decision of  
25 Attorney General and Mulholland, a decision of Mr. Justice Denning which is, I  
26 think reported 1963, 1 All England Reports 767 at page 771, this has been  
27 described as a classic statement of the law:

28  
29 "Then it is said that however relevant these questions were and however proper  
30 to be answered for the purpose of the inquiry, a journalist has a privilege by

1 law entitling him to refuse to give his sources of information. It seems to me  
2 that the journalists put the matters much too high. The only profession that  
3 I know which is given privilege from disclosing information to a court of law  
4 is the legal profession. And then it is not the privilege of the lawyer but  
5 of his client. Take the clergyman, the banker or the medical man. None of  
6 these is entitled to refuse to answer when directed by a judge. Let me not be  
7 mistaken, the judge respects the confidences which each member of these  
8 honourable professions receives in the course of it and will not direct him to  
9 answer unless not only is it relevant, but also proper and indeed necessary  
10 question in the course of justice to be put and answered. If the judge  
11 determines that the journalist must answer then no privilege will avail him to  
12 refuse".

13  
14 And just briefly an Australian case, a short passage was reported in 1943, 63  
15 Commonwealth Law Report 73 at 102 and 103, it's McGuinness and the Attorney  
16 General of Victoria and Sir Owen Dixon said on page 515, "no one doubts that  
17 editors and journalists are at times made repositories of special confidences  
18 which form an interest as well as honour those who would preserve from public  
19 disclosure if it is possible. But the law was faced at a comparatively early  
20 stage of the growth of the rules of evidence with the question how to resolve  
21 the inevitable conflict between the necessity of discovering the truth in the  
22 interests of justice on the one hand, and on the other hand the secrecy or  
23 confidence which an individual called upon to testify may in good faith have  
24 undertaken to a party or person. Except in a few relations where paramount  
25 considerations of general policy appear to require that there should be special  
26 privilege such as husband and wife, attorney and client, and a flexible rule  
27 was established that no obligation of honour, no duties of self disclosure  
28 arising from the nature of a pursuit of a calling could stand in the way of an  
29 imperative necessary of revealing the truth in the witness box".

1 I don't propose to quote any further authorities to the court at this time.

2  
3 If my friend wishes to refer to anything that I haven't opened or dealt with, I  
4 would hope that I would be permitted to deal with it in reply.

5  
6 Mr. Martin, please.

7  
8 CHAIRMAN: Just before you call the witness. Mr. McCullough indicated that  
9 he had some preliminary issue that he wanted to deal with. Or you can reserve  
10 your position if you like.

11  
12 MR. MCCULLOUGH: No, thank you, Chairman. There were two preliminary points  
13 that I wanted to deal with. And there are other legal considerations relating  
14 to the rights of journalists to answer questions. And I can deal with those  
15 as and when the questions are asked or I can deal with them now, which ever  
16 the Tribunal wishes.

17  
18 CHAIRMAN: No. Just deal with any preliminary issue that you want to raise  
19 and you can deal with others then as they arise.

20  
21 Mr. MCCULLOUGH. Of the two preliminary points that I intended to raise in any  
22 event, Chairman were firstly, I wanted to emphasise the point that was made in  
23 the letter of the 12th of November 2004 from Ronan Daly Jermyn to the Tribunal,  
24 which is that what has occurred is not intended to convey any disrespect on the  
25 part of the Sunday Business Post to the Tribunal. The newspaper greatly  
26 represents the work of the Tribunal. What has occurred has occurred because  
27 of the concerns that are expressed in that letter. The newspaper takes the  
28 view, and as the Tribunal's journalists also strongly take the view that they  
29 must protect their sources. If they fail to do so that has ramifications not  
30 only in the given case but also for the work of journalists in general.

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And it's only in pursuit of what they regard as a very important principle from their point of view, that the action was taken which has led to our presence here today. And I hope that the Tribunal would at least accept the good faith of the newspaper and its journalists in that regard.

The second point that I think I need to make before any evidence is given relates to the jurisdiction being exercised by the Tribunal today. It has perhaps tried to say that the Tribunal has power to inquire into matters only insofar as they are covered by its Terms of Reference. I have looked closely at the Tribunal's Terms of Reference. And I can't, with respect, see what it is that the Tribunal is enquiring into today that relates to its Terms of Reference. And I respectfully submit that the Tribunal doesn't, in those circumstances have jurisdiction to embark upon the questioning of the witnesses whom it has called today, because the questions asset out in the summonses don't relate to any issue that falls within the Terms of Reference of the Tribunal.

The only authority that might impinge upon that, that has been relied upon by Mr. Gallagher, is the Kiberd and Hamilton case, which Mr. Gallagher opened. The Tribunal will remember that's a case in which an order was made by the Tribunal under Section 4 of the 1979 Act, directing Mr. Kiberd to attend and produce material upon which the articles were based.

That Order, having been made, there was a judicial review of the Order, which failed in the High Court. And the judgement of Mr. Justice Blaney has been opened and I don't know if the Tribunal has copies of the report. I have only the one copy. If needs be I'm sure that we can get other copies made.

MR. GALLAGHER: The Tribunal has copies of the report.

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MR. MCCULLOUGH: It's evident from the report, even from the headnote I think, that Mr. Justice Blaney determined that the reason for which the Tribunal was entitled to make the order that it had made under the 1979 Act was because of a series of issues for consideration. The first was the Tribunal's opinion of the making of the order was necessary for its functions whether that was a bona fide view. Secondly, whether that opinion was supported by the facts. And thirdly, whether it could be said that the opinion was not unreasonable.

And Mr. Justice Blaney looked at those three issues and held that because each of those three tests was satisfied the Tribunal had the power that it had made under the 1979 Act.

There are two things however that I need to say about that. The first is that Kiberd and Hamilton needs to be seen in the context of Lawlor and Flood. When the Supreme Court made it very clear that the powers that the Tribunal has under Section 4 of the 1979 Act, are limited largely to powers to do with the ordering of events, if I can put it that way. Powers to do with the securing the attendance of witnesses. The production of documents and so on. And made it clear in that case that Kiberd and Hamilton, if it intended to suggest the Tribunal any greater powers other than that Sunday Section 4 was not to be read as so suggesting.

What Kiberd and Hamilton therefore has nothing to do with is therefore the question of whether the questions to be put to Mr. Kiberd related to any term of reference of the Tribunal. It simply wasn't an issue that arose in Kiberd and Hamilton at all, as far as I can ascertain from the report. It's a new point that I'm raising now and not one that's covered by Kiberd and Hamilton at all.

1 In my respectful submission to the Tribunal. The Tribunal is limited to  
2 calling witnesses to investigate issues covered by its Terms of Reference.  
3 And the question of what journalists did with documentation that came into  
4 their possession is not something that's covered by an issue under the Terms of  
5 Reference.

6  
7 That's a submission obviously that I needed to make in advance of any witnesses  
8 giving evidence.

9  
10 CHAIRMAN: Well is it your case that a Tribunal could never inquire into  
11 circumstances where documentation was being leaked or information which was  
12 covered by a Tribunal confidentiality was being published and that it is  
13 therefore powerless to deal with any such issue?

14  
15 MR. MCCULLOUGH: Well obviously I would have no objection to the Tribunal  
16 pursuing that matter by means that didn't involve calling persons whom I  
17 represent.

18 What I particularly say is when the Tribunal refers itself to the summonses the  
19 Tribunal will see the issues to which it's suggested questions will be put to  
20 the witnesses whom it is proposed to call.

21  
22 And I say the questions that are intended to put don't fall within the Terms of  
23 Reference. Without avoiding the question. No, it's not precisely my case.  
24 My case is that this particular matter doesn't fall within the Terms of  
25 Reference.

26  
27 CHAIRMAN: And you say that that, unless it falls within the Terms of  
28 Reference, unless a particular matter falls within the Terms of Reference, it  
29 can never be inquired into by the Tribunal even if the Tribunal deems it  
30 necessary to conduct such an inquiry in order to enable it fulfil its mandate

1 as directed by the Terms of Reference?

2

3 MR. MCCULLOUGH: The Tribunal must have a power to which it can point to do  
4 anything in particular. It's clear that Section 4 of the 1979 Act, which was  
5 the power previously relied upon, in terms only gives a power to call witnesses  
6 and to ask that witness to produce documents. It doesn't in itself confer a  
7 power to require those documents to be produced in relation to a particular  
8 question. And the question to be investigated, in my respectful submission,  
9 must be one that falls within the Terms of Reference.

10

11 CHAIRMAN: It's nearly five to one. So I think in order -- we will certainly  
12 want to consider that particular issue and so we will sit at two o'clock.

13

14 MR. MCCULLOUGH: Thank you, Chairman. As I say, I have some submissions to  
15 make on the journalistic issue. But I might make those when the questions are  
16 asked.

17

18 CHAIRMAN: Well this last point that you have made is a preliminary obviously  
19 if we took a certain view there wouldn't be evidence called at all.

20

21 MR. MCCULLOUGH: Thanks.

22

23 CHAIRMAN: Two o'clock.

24

25 THE TRIBUNAL THEN ADJOURNED FOR LUNCH

26

27

28

29

30

1 THE TRIBUNAL RESUMED AS FOLLOWS AT 2:00 P.M.:

2

3 CHAIRMAN: Mr. McCullough has by way of submission argued that the Tribunal  
4 does not have jurisdiction to summon and question those persons who have been  
5 summoned today, because the subject matter of today's proceedings are not  
6 matters expressly within the Tribunal's Terms of Reference as amended.

7

8 The Tribunal fundamentally disagrees with this submission. While the Terms of  
9 Reference dictate the substantive matters, which are to be investigated by this  
10 Tribunal they do not provide the manner in which the Tribunal is required to  
11 conduct the necessary inquiries, other than by reference to the legislation  
12 governing the Tribunals of inquiry in general.

13

14 Section 4 of the 1921 Act as inserted by Section 4 of the 1979 Act provides as  
15 follows "a Tribunal may make such orders as it considers necessary for the  
16 purpose of its functions and it shall have in relation to their making all such  
17 powers, rights and privileges as are vested in the High Court or a judge of  
18 that court in respect of the making of orders".

19

20 If a Tribunal was restricted by its Terms of Reference as to what it can  
21 inquire into, as suggested by Mr. McCullough, it would effectively follow that  
22 the Tribunal could not conduct a variety of investigations such as compliance  
23 hearings, investigations relating to actual or potential obstruction or  
24 hindrance of its work or breaches of the confidentiality of documentation and  
25 information imposed by it.

26

27 The Tribunal must, of necessity, be in a position within the parameters of its  
28 legislative powers to manage and conduct its inquiries in order to fulfill its  
29 mandate as dictated by its Terms of Reference.

30

1 It is matter ultimately for the courts to impose sanctions or penalties on  
2 persons who are found to have failed to comply with orders of the Tribunal or  
3 who have obstructed or hindered its work. And this Tribunal does not purport  
4 to impose any such sanctions or penalties.

5  
6 Furthermore, we are satisfied that the judicial pronouncements of Mr. Justice  
7 Blaney in the case of Kiberd and Carney against Hamilton 1992, in fact  
8 provides know authority which absolutely supports this ruling.

9  
10 MR. GALLAGHER: Thank you. Mr. Martin, please.

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1 MR. RICHARD MARTIN HAVING BEEN SWORN, WAS EXAMINED BY

2 MR. GALLAGHER AS FOLLOWS:

3

4 Q.1 MR. GALLAGHER: Good afternoon, Mr. Martin. You are a solicitor, the partner  
5 in the firm of Ronan Daly Jermyn in Cork; is that correct?

6 A. That's correct.

7 Q.2 And your firm are the firm who act for Post Publications Limited for Mr.  
8 O'Kelly and for Thomas Crosby Holdings Limited, who are the owners of the  
9 Examiner Newspaper; is that correct?

10 A. That's correct.

11 Q.3 You are here on foot of a summons which was addressed to Mr. Daryl Broderick of  
12 your firm, which is at page 22. And this requires you to attend on the 23rd  
13 of November of this year to give evidence to the Tribunal. That date was  
14 changed at your request and by consent of the Tribunal to today; isn't that  
15 correct?

16 A. That's correct.

17 Q.4 And you in fact asked that Mr. Daryl Broderick should not be called to give  
18 evidence but you should in his stead be called to give evidence?

19 A. That's correct.

20 Q.5 And effectively you are you are here to answer the summons that was addressed  
21 to Mr. Daryl Broderick?

22 A. That's correct.

23 Q.6 And I take it you accept the jurisdiction and the validity of the summons that  
24 has been served on, although you are not served as the person in the summons?

25 A. That's correct.

26 Q.7 As you will see on the summons before you, you are required to give evidence to  
27 the Tribunal relating to and arising from correspondence between the Tribunal  
28 and Barry O'Kelly of Post Publications trading as Thomas Crosby Holdings  
29 Limited and 2, correspondence between the Tribunal and Ronan Daly Jermyn acting  
30 on behalf of parties referred to in paragraph 1 above and 3 your knowledge of

1 the alleged destruction by your clients copy of a confidential statement and  
2 other documents furnished to and circulated by the Tribunal which the Tribunal  
3 had directed should not be destroyed?

4 A. That's correct.

5 Q.8 Now, will you clear up for the Tribunal the uncertainty that seems to have  
6 given rise to the fact that Mr. Broderick was summoned and that his reference  
7 appears on the correspondence from your firm?

8 A. Mr. Broderick works with me at my office.

9 Q.9 Is he a solicitor?

10 A. Yes, he is. I, given the fact that I represent and have represented other  
11 parties in the past at this Tribunal, I indicated when this issue arose a  
12 preference to put some distance between myself on the face of the  
13 correspondence and this issue. It was in those circumstances that Daryl  
14 Broderick's reference was put initially on the correspondence. But at all  
15 times I dealt with the matter, other than I understand Mr. Broderick on one  
16 occasion made a call to the Tribunal. We might get into that in a minute.

17 Q.10 But insofar as the correspondence is concerned, can the Tribunal take it that  
18 you personally received the correspondence from the Tribunal in relation to the  
19 articles in the Sunday Business Post on the 17th and the 24th of October and  
20 that you wrote the letters from your firm which contained Mr. Broderick's  
21 reference?

22 A. That's correct.

23 Q.11 May I have page 50 please.

24

25 The letter which you see on screen is one from the Tribunal to your firm,  
26 sorry, to Mr. O'Kelly of the 21st of October 2004. It refers to the article  
27 in the Sunday Business Post dated the 17th of October 2004 entitled "Jim  
28 Kennedy's pipe dream" and continues "I am directed to request that you furnish  
29 to the Tribunal the identity of the source or sources of the information  
30 contained in your article.

1           2.    Any documentation or other material furnished to you in relation to the  
2           article, please reply within four working days from the date hereof."

3           Were you furnished with a copy of that letter?

4   A.    Yes, I was.

5   Q.12  When were you furnished with it?

6   A.    On the 28th of October.

7   Q.13  28th?

8   A.    Yes.

9   Q.14  Can I ask you -- I don't want you to tell the Tribunal of any advice that you  
10           may have given.   Were you made aware of the existence of that letter before  
11           the 28th?

12  A.    No, I was not made aware.

13  Q.15  Did you become aware that Mr. O'Kelly had been in touch with the Tribunal by  
14           telephone on the 26th?

15  A.    Yes, I did.

16  Q.16  And when did you become aware of that?

17  A.    I think on either the 28th or 29th of October.

18  Q.17  May I have page 45, please.

19           Mr. Martin, this is a letter which I opened earlier which is addressed to your  
20           firm, to Mr. Barry O'Kelly, I beg your pardon.   You've seen this letter and  
21           you've heard me read it, it's on page 45?

22  A.    Yes.

23  Q.18  Did you receive a copy of that letter at any stage?

24  A.    Yes.

25  Q.19  When did you receive it?

26  A.    On the 28th of October.

27  Q.20  And again I don't want you to say to the Tribunal anything that might have  
28           transpired between yourself and Mr. O'Kelly or indeed between Post Publications  
29           or any employee of that firm and yourself.   But were legal advices sought or  
30           were legal advices given in relation to that letter?

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MR. MCCULLOUGH: I'm not sure, Chairman, that the question was asked --

CHAIRMAN: Well I think this may. Mr. Martin doesn't have to give evidence as to any advice given by him or about any information furnished to him for the purposes of obtaining advice. That's the basis on which his evidence would be privileged. So -- now, the question you asked, Mr. Gallagher, was; was advice given.

MR. GALLAGHER: Yes. Did you give any legal advice in connection with the letter.

MR. MCCULLOUGH: I do maintain my objection to that question.

MR. GALLAGHER: I am not looking for the details of the advice, I just want as a fact, either yes or no or there were or there weren't.

CHAIRMAN: There's nothing wrong with that so long as he's not asked to disclose what the advice, what information was given to him in order to obtain that advice or what advice was given. But the factual question or answer to the question was advice sought from him, did he give advice does not in any way disclose or seeks to disclose the -- what in fact advice was given.

MR. MCCULLOUGH: Yes, I suppose on the face of it that's entirely correct, Chairman. My objection is this. If the Tribunal hear that is advice was given on a particular date to a particular person. Well then it follows from that, that that person had legal advice. And that is a matter that, in my respectful submission, is privileged as between a solicitor and the client.

CHAIRMAN: Well it's the advice surely that's privileged, not the question as

1 to whether somebody sought legal advice. There's nothing wrong that I can  
2 comprehend with somebody being asked did you go to a solicitor, did you receive  
3 advice. So long as you stop short then of saying what advice you were given.

4  
5 MR. MCCULLOUGH: Yes. If that's the ruling of the Tribunal, then, I stop at  
6 that.

7 Q.21 MR. GALLAGHER: Mr. Martin, was advice sought from you in relation to that  
8 letter? And in relation to the earlier letter?

9 A. Yes.

10 Q.22 And did you give advice in relation to that letter and to the earlier letter of  
11 the 21st of October?

12 A. Yes.

13 Q.23 Can you recall the date or the approximate date on which you gave such advice?

14

15 MR. MCCULLOUGH: Chairman, again, I don't want to interrupt unnecessarily. I  
16 have an objection to all of these questions. They, with respect, Chairman.

17

18 CHAIRMAN: On what grounds?

19

20 MR. MCCULLOUGH: There's a privilege, Chairman, for professional advice. And  
21 I think what the Chairman is saying is that that privilege extends only to the  
22 precise nature of the advice. I respectfully submit that's incorrect,  
23 Chairman. That the privilege extends to the solicitors telling anybody else  
24 that on a particular day I gave somebody advice. On a particular day somebody  
25 asked me for advice. On a it particular day I didn't give advice as the case  
26 may be. It's part of the relationship between the solicitor and client that  
27 is necessarily confidential for the solicitor to refuse to answer a question  
28 when he is asked did you give advice.

29

30 CHAIRMAN: Well then it must follow that the witness can't be asked did you go

1 to a solicitor.

2

3 MR. MCCULLOUGH: No. I don't think -- there may be a a very small difference  
4 between asking somebody did you go to a solicitor and did you get advice from a  
5 solicitor.

6

7 CHAIRMAN: Yes. But obviously a solicitor can't be asked -- or a particular  
8 witness can't be asked what advice he was given. Nor can he be asked about  
9 the information disclosed in order to get that advice. But we see nothing  
10 wrong with a solicitor being asked did somebody approach you for advice and did  
11 you give advice, so long as he's not asked to disclose what that advice is.

12

13 It may be relevant in this way. If one of the subsequent witnesses was to say  
14 I didn't get advice, for whatever reason. That might suggest to the Tribunal  
15 that a certain view should be taken of actions that followed or the way matters  
16 were dealt with subsequently.

17

18 MR. MCCULLOUGH: Yes. Well with respect, Chairman, I respectfully submit  
19 that part of what is confidential as between a solicitor and client is the fact  
20 that advice was offered on a particular day. It may test it in this way,  
21 Chairman. If your solicitor was to say that he had casually informed a person  
22 that he met on the street that he had offered legal advice on a particular day,  
23 I think you or anybody else would find that to be a shocking revelation and  
24 clearly, I would submit, a breach of the privilege as between solicitor and  
25 client.

26

27

28

29 CHAIRMAN: The only concern I think I might have would be that by asking a  
30 solicitor did he give advice and then looking at the subsequent actions of the

1 individual, one might be able to deduce from those actions as to what advice  
2 had been given. But that's a ground for objection.

3  
4 I don't see any difficulty. We don't see any difficulty or any difficulty  
5 with the solicitor being asked did you give advice to somebody. Did somebody  
6 come to you as a solicitor. So long as he's not asked questions which might  
7 in some way disclose the advice that was given.

8  
9 MR. GALLAGHER: I have no intention of asking him the advice that was given or  
10 not given or the questions that were put.

11  
12 CHAIRMAN: It's only for the purposes of giving background or giving some of  
13 the background. It's not of huge importance. I mean, it's clear that  
14 Mr. Martin was involved in the relationship of solicitor/client with his  
15 clients.

16  
17 Q.24 MR. GALLAGHER: The question, Mr. Martin, I asked was the approximate date on  
18 which you gave advices?

19 A. I think the day upon which I received the correspondence, being the 28th of  
20 October and from that day, from that day.

21 Q.25 Well it was faxed to the manager director of Thomas Crosby Holdings on the  
22 28th. It was sent by courier to the Sunday Business Post at 3:05 on that  
23 date. Would it be reasonable for the Tribunal to take it that you would have  
24 given advices on the 28th or the 29th approximately, I'm not going to tie you  
25 into any --

26 A. Yes.

27 Q.26 And can the Tribunal take it that you gave advice to both your clients, to Mr.  
28 O'Kelly and Thomas Crosby Holdings, whether it was Mr. Dinan or somebody else?

29 A. Yes, I think that's correct.

30 Q.27 Thank you. Now, subsequent to the Tribunal writing on the 21st and the 28th

1 of October, you replied to the Tribunal on the 3rd of November 2004. That's  
2 on page 42.

3 A. Yes, that's correct.

4 Q.28 And you in that letter suggested that any documentation in your client's  
5 possession would be destroyed; isn't that right?

6 A. Yes.

7 Q.29 And you end it by saying "we await hearing"

8 A. Yes.

9 Q.30 Now, that letter as we see --

10 A. Can I see the second page of the letter?

11 Q.31 Sorry?

12 A. Can I see the second page of the letter.

13 Q.32 It's on screen now. It ends with the paragraph or with the sentence "we await  
14 hearing"

15 A. Uh-uh.

16 Q.33 Now, on the 5th of November 2004 that was received by the Tribunal, page 37,  
17 please. When did you first become aware of the fact that the Tribunal had  
18 sent this letter by fax to your offices?

19 A. I personally became aware on Monday the 8th of November. However, if I can  
20 explain, that is because I was away from the office at a meeting on the  
21 afternoon of the 5th of November by virtue of the fact that the letter was  
22 addressed to Mr. Broderick. Mr. Broderick received the letter I know on the  
23 afternoon of Friday the 5th of November.

24 Q.34 Right. And I take it he was made aware of the telephone call which Miss  
25 Howard, telephone calls which Miss Howard had made on that afternoon and which  
26 conveyed that the Tribunal had directed that none of the documentation should  
27 be destroyed?

28 A. Yes. And in fact Mr. Broderick who had been engaged at a meeting for part of  
29 that afternoon made a call to the Tribunal offices at 25 minutes past 5 on  
30 Friday the 5th of November, with a view to responding to those messages and was

1 advised that Miss Howard had left for the day.

2 Q.35 I see. Can you say whether the instruction contained in that letter, that the  
3 direction that your clients should not destroy any documentation whatsoever  
4 concerning this matter pending further direction of the Tribunal was conveyed  
5 to your clients?

6 A. Yes, I'm aware that it was.

7 Q.36 When was it conveyed to your clients?

8 A. On the 5th of November.

9 Q.37 And by whom was it conveyed?

10 A. Mr. Broderick.

11 Q.38 Do you know when the documentation was -- was the documentation in the  
12 possession of one or other of your clients at that stage?

13 A. I know nothing of my own knowledge I know nothing about the documentation.

14 Q.39 Do you know from Mr. Broderick whether he was told anything about the  
15 documentation at that stage?

16 A. I believe he was not.

17 Q.40 Do you know when Mr. Broderick was first told that the documentation was  
18 destroyed?

19

20 MR. MCCULLOUGH: Surely, Chairman, that has to be a privilege issue.

21

22 MR. GALLAGHER: No --

23

24 MR. MCCULLOUGH: Part of what is privileged and is classically privileged is  
25 information furnished by a client to a solicitor for the purpose of obtaining  
26 advice. It must be self evident in the course of this documentation that what  
27 passed between the solicitor and the client here, insofar as it touched upon  
28 that area at all, must of necessity for the purpose of obtaining advice.

29

30 CHAIRMAN: I think that's correct. I think all that Mr. Martin can be asked

1 is did you or Mr. Broderick to his knowledge convey the content of that letter  
2 to his clients. And as I understand it, that was so conveyed. As to what  
3 transpired then between Mr. Martin and his client, presumably, took place in  
4 circumstances where either evidence or advice was being given or was being  
5 sought. So I think it is privileged on that basis.

6 Q.41 MR. GALLAGHER: Do you say that the contents of the Tribunal's letter of the  
7 5th of November 2004 was conveyed to your clients on that date or that  
8 afternoon or evening?

9 A. Yes.

10 Q.42 Can you say whether a copy of the letter was furnished to your clients, or  
11 either of them on that occasion?

12 A. I don't think a copy was sent on that occasion. It was the content of the  
13 documentation, the content of the letter was advised on the phone on that day.

14 Q.43 Do you know why the Tribunal's letter of the 5th of November, which was  
15 received by your firm on the 5th, was not replied to promptly. Just in case.  
16 It was replied to on the -- sorry. The letter of the 5th wasn't replied to  
17 and hasn't been referred to in any correspondence, I think you'll accept that?

18 A. Yes.

19 Q.44 And the next letter that passed between the Tribunal and your firm was a letter  
20 of the 10th of November 2004, page 33, please. Which the Tribunal's  
21 solicitor, Miss Howard referred to previous correspondence resting with the  
22 Tribunal's letter of the 5th, pointing out that the Tribunal was extremely  
23 reluctant to take any steps but it had no choice to do so unless a copy of  
24 Mr. Champion's statement is returned to the Tribunal by 1 p.m. on Friday the  
25 12th of November. A letter of undertaking was given by your clients that any  
26 document or the contents thereof, issued or circulated by the Tribunal will not  
27 hence forth be published by our clients or either of them until such time as  
28 the documents or it's contents have been disclosed at a public sitting of the  
29 Tribunal". Did you receive that letter?

30 A. Yes.

1 Q.45 Can you say when you received it? It was sent by fax. For assistance you may  
2 not have seen it. It was sent by fax according to the Tribunal's records  
3 shortly after twelve o'clock, twelve thirty perhaps?

4 A. Yes, the letter was received in my office. On that day I just don't recall what  
5 time.

6 Q.46 That's all right. Did you bring the contents of that letter to your client's  
7 attention, that's the attention of Mr. Kelly to Post Publications Limited and  
8 to Thomas Crosby Holdings Limited?

9 A. I brought that letter to the attention of my client, yes.

10 Q.47 All three?

11 A. No. I think I faxed the letter.

12 Q.48 To.

13 A. To the C.E.O of the Business Post, Mr. O'Riordan.

14 Q.49 The C.E.O of the Business Post?

15 A. Of Post Publications.

16 Q.50 And what's his name?

17 A. Fiacra O'Riordan.

18 Q.51 I see. Is he based in Dublin.

19 A. Yes.

20 Q.52 And did you do it in order that he would pass it on to Mr. O'Kelly?

21

22 MR. MCCULLOUGH: Again, Chairman, I'm not sure if I can be --

23

24 MR. GALLAGHER: In my respectful submission it's important to know whether  
25 he -- .

26

27 MR. MCCULLOUGH: It is my respectful submission, whether Mr. Gallagher wants  
28 to know it or not. It clearly asks this witness for what advice he gave about

29 --

30

1 MR. GALLAGHER: No.

2

3 MR. McCULLOUGH: -- for what advice he gave.

4

5 CHAIRMAN: All right. He can be asked what his intention in furnishing it to  
6 the Chief Executive Officer. Was it his intention that it go to him or that it  
7 go to his other clients.

8

9 MR. McCULLOUGH: Is that, with respect, Chairman, not simply another way of  
10 asking what his advice was.

11

12 CHAIRMAN: Well, I mean.

13

14 JUDGE FAHERTY: Well, Mr. McCullough --

15

16 CHAIRMAN: Advice as to something that should be given to him. I can't see  
17 how that falls into the category of privileged information. Mr. Martin's  
18 evidence is that he fax it had to Mr. O'Riordan. Who isn't one of the parties  
19 that have been summoned. So it's important that the Tribunal should know  
20 whether in so doing, was it the intention of Mr. Martin that it would be copied  
21 to whoever Mr. O'Riordan believed it should be copied.

22

23 If, for example, it was copied to Mr. O'Riordan in Dublin so as to prevent it  
24 or to ensure that it wasn't given to Mr. O'Kelly. That would be a matter of  
25 interest to the Tribunal.

26

27 MR. McCULLOUGH: Chairman, without in a sense I'm just repeating myself. Of  
28 course there are many issues that might be of interest would nevertheless be  
29 covered by privilege. I am not saying this is a central point. I am anxious  
30 to protest on any occasion that I --

1

2 CHAIRMAN: It can be dealt with I think in this way. Mr. Martin can be asked  
3 did, with the letter did advice go to Mr. O'Riordan. I'm not asking you what  
4 the advice was. But were advices given when sending it to Mr. O'Riordan?

5

6 MR. McCULLOUGH: And subject to my objection and a similar occasion on the  
7 last occasion, Chairman, that's the ruling of the Tribunal.

8

9 CHAIRMAN: And put it another way. If Mr. O'Riordan, whom we haven't heard  
10 about to date. If he had received that would he have known what it was in  
11 connection with?

12 A. Yes, he would.

13

14 CHAIRMAN: Well that seems to answer that.

15

16 Q.53 MR. GALLAGHER: The question I asked you was, was it your intention in sending  
17 the letter to Mr. O'Riordan. I don't want to know what you said to him. Was  
18 it your intention that he would convey the contents of that letter to Mr.  
19 O'Kelly, who was your client also, according to the correspondence?

20 A. Yes, I think that it was.

21

22 CHAIRMAN: Well it was assumed, I take it, by you that it would reach?

23 A. Yes, I think that's correct, yes.

24

25 Q.54 MR. GALLAGHER: Now, on the 12th of February, may I have page 32, please.

26 You wrote to the Tribunal and in the course of that letter you referred to the  
27 Tribunal's letter of the 10th of October -- sorry, the 10th of November. And  
28 you informed the Tribunal that your clients, "our clients have destroyed the  
29 documentation concerned. Our clients should like to advise the Tribunal that  
30 they intend no disrespect whatever to them having adopted this course. They

1 are, however, very concerned as to the issue of protection from the disclosure  
2 of sources and to protect any sources that they may have. They have grave  
3 difficulties with any action which may be required of them which would lead to  
4 the identification of such sources "; isn't that right?

5 A. Yes.

6 Q.55 You did not refer to the Tribunal's letter of the 5th of November in that  
7 reply?

8 A. No, I didn't.

9 Q.56 Why not?

10 A. I don't know that I had any particular reason for not referring it but I didn't  
11 refer to it.

12 Q.57 Did you not consider that the specific direction from the Tribunal that no  
13 documents should be destroyed was of considerable significance in the light of  
14 the fact that you were now reporting back to the Tribunal that your clients had  
15 in fact destroyed those documents?

16 A. I have a difficulty in answering this question because I think it encroaches  
17 upon the issue of the privilege that exists, solicitor/client privilege that  
18 exists.

19 Q.58 I'm not asking you about any solicitor/client privilege. I'm simply asking  
20 you which you, as the author of this letter, which I have referred to did not  
21 address the direction that was contained in the Tribunal's letter which was  
22 received at your office on the 5th of November 2004?

23 A. I suppose there was an implicit reference to it in the paragraph in relation to  
24 the issue -- where I say they intend to disrespect on having adopted this  
25 course. There was an implicit reference in that to the correspondence of the  
26 5th of November. I did not expressly refer to that letter.

27 Q.59 When did you learn that the documentation had been destroyed.

28

29 MR. McCULLOUGH: Chairman, I think it's the same issue.

30

1 MR. GALLAGHER: That, I suggest, is extremely relevant.

2

3 CHAIRMAN: Well if he was furnished with the information as to when it was  
4 destroyed for the purposes of obtaining advice it would be privileged.

5

6 MR. GALLAGHER: Well if he was told that the documentation. All I'm asking  
7 is that. Not whether it was for the purposes of obtaining advice or anything  
8 else. I simply asked when were you told that documentation was destroyed.  
9 Because it is extremely relevant. It is relevant in the context of the  
10 correspondence that was written. If he was told that after the contents of  
11 the letter of the Tribunal of the 5th of November had been conveyed to his  
12 clients, then it is extremely serious. It is much more serious, conceivably.  
13 And the Tribunal might take a much more serious view of it, than if it had been  
14 destroyed before the letter and before the direction had been sent out and  
15 conveyed to any clients.

16

17 MR. McCULLOUGH: Sorry, Chairman. There is a witness who the Tribunal has  
18 called, whom the Tribunal can ask about the destruction of the documents. I  
19 don't think it be privileged in a sense.

20

21 CHAIRMAN: This particular witness. Mr. Martin has been called really to  
22 deal with the sequence of correspondence.

23

24 MR. GALLAGHER: Indeed.

25

26 CHAIRMAN: And obviously what happens in between correspondence insofar as it  
27 involved contact or discussion with his client. I think that does come within  
28 the ambit of privilege. He could only have learned, presumably, precisely  
29 when the document was destroyed as a result of communication with his client.

30 MR. GALLAGHER: The fact that he may have had communication from his client

1 does not attract privilege, in my respectful submission. If I asked him to  
2 tell the Tribunal about the advice that was sought from him or the advices that  
3 he give. Then he would rightly refuse to answer that and the Tribunal would  
4 rightly disallow that question. I am not asking that question. I'm simply  
5 asking when did you become aware that the documents had been destroyed. And I  
6 asked that in the context of a letter that he wrote on the 12th of November  
7 stating that the documents had been destroyed.

8

9 CHAIRMAN: All right. Well that doesn't seem to breach privilege,  
10 Mr. McCullough.

11

12 MR. McCULLOUGH: I submit it does, Chairman. It is certainly correct --

13

14 CHAIRMAN: But he is writing a letter. We are here dealing with a series of  
15 correspondence. A letter was written from the Tribunal on the 5th of  
16 November. It's being replied to on the 12th of November. And obviously  
17 crucial to this correspondence is the destruction of this particular document.

18

19 MR. McCULLOUGH: Yes.

20

21 CHAIRMAN: And I don't understand how asking the solicitor when you became  
22 aware of when the document. He's not being asked the circumstances in which  
23 he became aware or who gave him the information.

24

25 MR. McCULLOUGH: But he is being asked whether he became aware. And it is of  
26 the, it's fundamental --

27

28 CHAIRMAN: He is being asked in effect when were you instructed that the  
29 document had been destroyed, which isn't necessarily information conveyed.  
30 It's information conveyed to Mr. Martin to enable him respond to a request for

1 information from the Tribunal.

2

3 JUDGE FAHERTY: Mr. McCullough, just in relation to that. I just want to add  
4 to what the Tribunal is saying. It also has to be looked at in the context of  
5 Mr. Martin's own letter of the 3rd of November, which was already at that point  
6 communicated to the Tribunal. Where there is a reference to his clients  
7 undertaking to destroy any such documentation. I mean, that was communicated  
8 on the 3rd. Obviously, and I don't want to trespass on the client/solicitor  
9 privilege issue. That's what Mr. Martin conveyed to the Tribunal on the 3rd  
10 to which was response the letter of the 5th.

11

12 CHAIRMAN: It's in the context of the undertaking.

13

14 MR. McCULLOUGH: Of course I agree that was conveyed in the letter of the 3rd.  
15 The point I'm making is a slightly different one is this. The Tribunal is in  
16 effect suggesting that a solicitor can be asked when you became aware --  
17 firstly, did you become aware of a particular matter upon which your client  
18 required advice. And then secondly, when you became aware of that.

19

20 And the question that it's being asked is a composite of the two. When did  
21 you become aware of a particular fact. That involves an assumption that the  
22 solicitor has been told of a particular fact. Now, in the context of this  
23 particular correspondence --

24

25 CHAIRMAN: But an instruction to a solicitor isn't necessarily information  
26 being given to the solicitor for the purposes of advice. Where you go to a  
27 solicitor and say I'm thinking, for example, I'm thinking of destroying the  
28 document.

29

30 MR. McCULLOUGH: Yes.

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CHAIRMAN: Can you advise me or I have destroyed the document can you advise me as to what I should do. That type of information may be. This is, as Judge Faherty has suggested, this has to be read in the context or viewed in the context of the earlier correspondence where an undertaking was being given to the Tribunal that it would or wouldn't be destroyed in particular circumstances.

MR. McCULLOUGH: Well I don't think any such undertaking was ever given Chairman. With respect, that's an issue of fact. There is an undertaking to destroy it as opposed to an undertaking to maintain it.

CHAIRMAN: Sorry, an undertaking to destroyed it. That was presumably based on instructions received from his clients.

MR. McCULLOUGH: But that's not a matter about which a solicitor can be asked. That's really a the point that I make.

CHAIRMAN: The solicitor is conveying this to the Tribunal. It's assumed that the solicitor is conveying that information having been so instructed by his client and possibly having given advice and so on. This is now some days later, the 12th of November.

MR. McCULLOUGH: Yes.

CHAIRMAN: And the documentation has been destroyed.

MR. McCULLOUGH: Yes.

CHAIRMAN: And I don't see how a solicitor being asked as to when

1 approximately he became aware. He may be asked of the circumstances of which  
2 he became aware. He's being asked when approximately he had become aware that  
3 the document had been destroyed.

4

5 MR. McCULLOUGH: Yes. Well in my respectful submission to the Tribunal is  
6 this. Information passed by a client to a solicitor for the purpose of  
7 obtaining legal advice is privileged. And I think that's fundamental.

8

9 CHAIRMAN: Then it must follow that Mr. Martin is in breach of that privilege  
10 when he says our clients have destroyed the documentation.

11

12 MR. McCULLOUGH: I don't understand why that should be, with respect, Judge.

13

14 CHAIRMAN: Well I mean, if your argument is correct. If your client had said  
15 to Mr. Martin we destroyed the documentation on the 8th of November.

16

17 MR. McCULLOUGH: Yes.

18

19 CHAIRMAN: And then Mr. Martin writes to the Tribunal saying we have destroyed  
20 the documentation but not stating the date on which. I can't see how  
21 divulging the fact that it has been destroyed, which is based on an instruction  
22 from a client is any different to saying when did you become aware it was  
23 destroyed.

24

25 MR. McCULLOUGH: Because the client through a solicitor is entitled to divulge  
26 any privileged information that he wants. It's entirely a matter for the  
27 client. He instructs that solicitor, the solicitor says I now have  
28 privileged information and the client says use it, release it. That's  
29 entirely the right of the client. I don't think with respect the Tribunal can  
30 look at this letter and say that it amounts to a breach of privilege because it

1       couldn't.    It's a letter written openly containing such information as  
2       Mr. Martin had instructions to convey.

3  
4       What I am objecting to, with respect is, the Tribunal asking questions about  
5       what passed between the solicitor.    Between the client and solicitor with a  
6       view to obtaining advice on it.

7  
8       MR. GALLAGHER:    Sir.    Can I say that I am not seeking to find out what passed  
9       between the client and the solicitor or vice versa in the context of seeking  
10      legal advice.    Everything that my friend has submitted to you seems to be  
11      predicated and he has used the words on which your client requires legal  
12      advice.

13     I am not asking anything in the context of which legal advice might have been  
14     sought and given.    I am simply asking for the date on which Mr. Martin became  
15     aware that the documents had been destroyed.    It is akin, I respectfully  
16     suggest, to asking a solicitor when did your client first tell you that his leg  
17     had been broken in the accident.    That is not a privileged statement.    It  
18     doesn't relate to any legal advice sought or given.    It is not a privileged  
19     statement.    It is not privileged information, it is a statement of fact which  
20     the court or indeed the Tribunal is entitled to have.

21  
22     CHAIRMAN:    I think, Mr. McCullough, I'm inclined to agree with Mr. Gallagher.  
23     I think -- I mean, in the last paragraph of that letter the solicitor is  
24     stating a fact based presumably on instructions that his clients had destroyed  
25     the documentation.    I see no reason why he can't be asked when did you  
26     discover this information.

27  
28     Q.60 MR. GALLAGHER:    Mr. Martin, when did you become aware of the date on which  
29     documents were destroyed?

30     A.    May I make one comment, Judge, except that if the communication, hypothetically

1 to me was for the purposes of seeking legal advice and information was conveyed  
2 to me for the purposes of seeking legal advice, that would be a matter over  
3 which I assert that I have privilege.

4  
5 CHAIRMAN: That would be only in relation to the actual date of which you had  
6 been informed. I'm not sure if Mr. Gallagher exactly framed it like this.  
7 But the question we feel is appropriate is, when is did you become aware that  
8 the documentation had been destroyed? That's nothing to do with client  
9 privilege. We're not asking you the circumstances in which you became aware  
10 or how you became aware or whether or not it was as a result of information  
11 volunteered to you or extracted by you from your clients. We are simply  
12 asking you say here in the letter to the Tribunal when -- you say in the letter  
13 the documentation has been destroyed. You are being asked when did you learn  
14 the documentation had been destroyed. And I don't see -- we certainly don't  
15 agree that that is privileged.

16  
17 It's not asking you when you were told or what you were told. When did you  
18 discover. When were you told that it had been destroyed. And it is relevant  
19 as to whether you were told five days before or three days before or two days  
20 before, or whatever; given that there was earlier correspondence and given the  
21 gap in time between the earlier letter from the Tribunal and this reply.

22 A. All I can say is I was instructed to write that letter on the evening of the  
23 11th of November.

24  
25 CHAIRMAN: All right.

26 Q.61 MR. GALLAGHER: Does it follow that you were told on the evening of the 11th of  
27 November, and I don't want to know what your instructions were, that you were  
28 told on the evening of the 11th of November that the documentation had been  
29 destroyed.

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MR. McCULLOUGH: I may be repeating myself. I don't think you can say I don't want to know what your instructions were, tell me what your instructions were. That is exactly what he has just said.

MR. GALLAGHER: No I'm not.

CHAIRMAN: Mr. Gallagher, Mr. Martin could have been, and this is all conjecture. But Mr. Martin could have been informed, I assume this didn't happen and I'm not suggesting it happened but he could have been informed five days before. We're instructing you that the document is destroyed but you're to wait for five days to respond to it.

MR. GALLAGHER: The question is a very simple question --

CHAIRMAN: Mr. Martin has said on the previous evening.

MR. GALLAGHER: I didn't ask him when he received instructions to write the letter. I'm asking him and I repeat the question and I suggest it's a question that he will have to answer to this Tribunal. This Tribunal should compel an answer.

When did you become aware. And by that I mean what date did you become aware, of the date on which the documents had been destroyed. It's a simple straight forward question. Put it another way, did you become aware on the 11th of November 2004 for the first time, that the documents had been destroyed?

A. I have no knowledge other than the instruction to send that letter on the evening of the 11th of November. I have no other knowledge.

Q.62 Can the Tribunal take it that you were not aware until the 11th of November that the documents had been destroyed?

1 A. I can only repeat that I have no knowledge, other than the issue of instruction  
2 to write that letter.

3

4 CHAIRMAN: Well then, Mr. Martin is clearly saying that he was not aware.  
5 Because if he was aware he would have had knowledge and he says he didn't have  
6 knowledge.

7 A. That's correct.

8

9 Q.63 MR. GALLAGHER: And to the best of your knowledge, did any member of your  
10 firm, for example, Mr. Broderick, have any knowledge prior to that?

11 A. I think Mr. Broderick's only involvement was on the afternoon of the 5th of  
12 November. He had no other involvement in this at all.

13 Q.64 For the purposes of this exercise, the Tribunal can take it that you were the  
14 individual, the solicitor and the partner in Ronan Daly Jermyn who was dealing  
15 with the matter and in contact with your clients about communications from the  
16 Tribunal and vice versa?

17 A. Yes, that's correct.

18 Q.65 Given that you received instructions on the 11th of November to write the  
19 letter which is dated the 12th of November 2004, which is on page 32, which is  
20 on screen. I again ask you if you can offer the Tribunal any explanation as  
21 to why having learnt that the documents had been destroyed, as you have  
22 conveyed in your letter of the 12th of November, the final paragraph. You  
23 didn't think it desirable or prudent or courteous to the Tribunal to address  
24 the direction that they had given to your clients on the 5th of November that  
25 no documentation whatsoever should be destroyed?

26 A. I think perhaps the final paragraph of that letter where I expressed on my  
27 clients behalf that they intended no disrespect what ever to the Tribunal in  
28 having adopted this course was --

29 Q.66 You see, I know that you have expressed regret on your clients behalf in the  
30 final paragraph. That is -- one might, I'm not saying the Tribunal. But one

1 might. I might consider that was fairly hollow gesture in the light of an  
2 express instruction that had been conveyed, that had been understood and had  
3 been ignored. Would you accept that?

4 A. I don't accept that. Can I make one point in relation to the issue just in  
5 relation to the issue of timing?

6 Q.67 Certainly, yeah?

7 A. It is asserted that that letter was sent only by post and received at the  
8 Tribunal offices on the 15th of November. The letter was in fact faxed. And  
9 my faxed transmission report on the morning of the 12th of November confirmed  
10 that it was faxed and that the transmission was okay on the morning of the 12th  
11 of November.

12 Q.68 Well I'm not in a position to deal with that one way or the other. You will  
13 see that on the correspondence and indeed from the reply of the 15th of  
14 November on page 30 from Miss Gilvarry, she refers to your letter of the 12th  
15 inst received this morning by ordinary post?

16 A. Yes.

17 Q.69 That was indeed your letter of the 12th of November which is on page 32, is  
18 date stamped as having been received by the Tribunal on the 15th of November.  
19 I don't think much turns on it in any event. I'm not saying you didn't send  
20 it by fax.

21  
22 Now, I asked you earlier the date on which you became aware that the  
23 documentation had been destroyed. Would you tell the Tribunal, please, who  
24 conveyed that information to you? And I'm not looking for any details of any  
25 advice that was sought by that individual or any advices that you may have  
26 given that individual, I just want to know the name of that individual who  
27 conveyed that information to you?

28 A. Mr. O'Riordan asked me to write the letter.

29 Q.70 Did he convey the information to you that the documentation had been destroyed?

30 A. Mr. O'Riordan asked me to write the letter.

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MR. McCULLOUGH: We're back to exactly the same issue.

CHAIRMAN: But thank can't be privileged. He's being asked who informed him that the document had been destroyed.

MR. McCULLOUGH: Yes. Chairman, let's just take a hypothetical example and try and separate it from this.

If I have done something I have run over somebody in the street and I go to a solicitor and I say I want to do something about this and the solicitor writes a letter on the basis of what I have told him. The solicitor cannot tell anybody else that I came to him and said that I ran over somebody on the street. Because I went to him looking for advice in relation to a particular matter and that's the context in which the advice was given. Mr. Gallagher keeps coming back to what seems to me, with respect to be the same point. He is now making an assumption that Mr. Martin was told that the documents had been destroyed. He's asking Mr. Martin to say who told you that, when was it said. Those all, in my respectful submission, fall into the same category of material that must necessarily have been given to a solicitor in the context of his giving advice.

Q.71 MR. GALLAGHER: With respect, it is not necessarily the case that it was given in the context of giving or seeking legal advice. It may very well be that an individual on receipt of this letter from the Tribunal or indeed in receipt of the letters from Mr. Martin might very well have phoned up and said goodness gracious me, guess what has happened, we've destroyed the documentation. That's not looking for or giving legal advice. It is simply conveying information. I'm in the looking for any advice that Mr. Martin gave or any advices --

1

2 CHAIRMAN: I think the point being made by Mr. McCullough. If the  
3 information is being conveyed for the purposes of obtaining advice. So if  
4 somebody says to Mr. Martin I have destroyed the document in question, can you  
5 tell me what my legal position is. That's part and parcel of information  
6 conveyed to a solicitor for the purposes of --

7

8 MR. GALLAGHER: Again. Yes, it may well be in certain circumstances. But  
9 if somebody comes into a solicitor and says I was in an accident and I  
10 sustained serious injuries. I was knocked down by a car driven by Joe Bloggs  
11 and I have a broken arm. And then subsequently he complains that he had a  
12 broken leg also. It would be perfectly legitimate for the solicitor to be  
13 asked when did your client tell you for the first time that he had sustained a  
14 broken leg. I don't want you to tell me of any advices he sought or gave or  
15 anything else. You are looking for a question of fact. When, what was the  
16 date on which he first made that complaint. Nothing more nothing less.  
17 That's all I seek from Mr. Martin on this occasion, nothing more nothing less.

18

19 CHAIRMAN: It could be information given to Mr. Martin in circumstances where  
20 the advice being sought had a lot to do with the name of the individual or the  
21 identity of the individual who actually he is being informed destroyed the  
22 documentation.

23

24 MR. GALLAGHER: I'm not asking him who destroyed the documents. I'm asking  
25 him who conveyed to him that the documents had been destroyed. That's not the  
26 same thing.

27

28 CHAIRMAN: He said he got his instructions from Mr. O'Riordan. And based on  
29 those he wrote the letter. That's it as I understood it. Is that correct?

30 A. Yes, I was instructed to write the letter. And that was what it said by

1 Mr. O'Riordan. That was the extent.

2

3 MR. GALLAGHER: And it and does it follow. And I don't want to push this for  
4 too long. Does it follow that Mr. O'Riordan was the individual who conveyed  
5 to you that the documents had been destroyed?

6 A. I can't answer that question.

7 Q.72 You won't answer it; isn't that what you mean, Mr. Martin? Isn't that what you  
8 mean Mr. Martin?

9 A. I have already said that I was instructed to write that letter.

10 Q.73 And you were instructed by Mr. O'Riordan?

11 A. Can I finish? I was instructed to write that letter on the evening of the 11th  
12 of November by Mr. O'Riordan. I have no further knowledge other than that.

13

14 CHAIRMAN: Mr. Martin, can we take it that that is the date on which you  
15 believe you were told or you were -- it came of your knowledge that the  
16 document had been destroyed. That's as I understand your evidence. That you  
17 were informed, we can go back and find out what you said. That you had said  
18 that you had no other knowledge prior to the 11th of November.

19 A. That's correct.

20

21 CHAIRMAN: And that you, based on the instruction that you, from  
22 Mr. O'Riordan.

23 A. Yes.

24

25 CHAIRMAN: You wrote the letter and that is the basis of your knowledge?

26 A. Yes.

27 Q.74 MR. GALLAGHER: To the best of your knowledge and belief was Mr. O'Riordan  
28 aware of the contents, at that time, that's on the 11th, aware of the contents  
29 of the Tribunal's letter of the 5th of November and the 10th of November?

30 A. Yes.

1 Q.75 And had Mr. O'Riordan been told, prior to the 10th of November, of the contents  
2 of the Tribunal's letter of the 5th of November?

3 A. Yes, you just asked me in relation to the 5th and the 10th.

4 Q.76 Had he been told prior to the 10th of the contents of the Tribunal's letter of  
5 the 5th? Sorry. I don't want to cause confusion. My understanding of your  
6 evidence is that the letter of the 5th was received by your office.

7 Mr. Broderick telephoned the Tribunal's office and the contents of that letter  
8 were conveyed to your clients, who on the penning of your notepaper, Post  
9 Publications Limited trading as Sunday Business Post, Barry O'Kelly and Thomas  
10 Crosby Holdings Limited and that was done on the 5th? Isn't that right?

11 A. Yes, Mr. O'Riordan was aware.

12 Q.77 And he would have been aware from the 5th?

13 A. I think probably not from the 5th but on one of those intervening days.

14 Q.78 I see.

15

16 JUDGE FAHERTY: You specifically wrote the letter of the 10th of November to  
17 the attention of Mr. O'Riordan, the C.E.O?

18 A. Yes.

19

20 JUDGE FAHERTY: Did you specifically bring to Mr. O'Riordan's attention the  
21 letter of the 5th of November in the same manner as you did on the 10th?

22 A. Not on that day, not on the 5th, no.

23 Q.79 MR. GALLAGHER: Could I just ask you in relation to Mr. O'Riordan, whose  
24 identity I was not aware of. Is he the Chief Executive did you say of Post  
25 Publications Limited?

26 A. Yes.

27 Q.80 Is he a journalist?

28 A. No.

29 Q.81 I see. Was he in day-to-day control of the publication of the Sunday Business  
30 Post? Insofar as you're aware. If you don't know Mr. Dinan will be able to

1 answer it I'm sure?

2 A. He is the Chief Executive of the company he is not the editor of the newspaper.

3 Q.82 MR. GALLAGHER: Yes, I understand that. My understanding is that there  
4 hasn't been an editor of the Sunday Business Post for some weeks; is that  
5 correct?

6 A. Yes, that's correct.

7 Q.83 All right. Thank you, Mr. Martin.

8

9 CHAIRMAN: Mr. McCullough, do you want to ask any questions?

10

11 MR. McCULLOUGH: Just one question, Mr. Martin.

12

13 THE WITNESS WAS QUESTIONED AS FOLLOWS BY MR. McCULLOUGH:

14 Q.84 The letter of the 5th from the Tribunal. I think Mr. Gallagher was unfairly  
15 criticising the failure to respond to that. If you look at it yourself.  
16 Does it require a reply?

17 A. No, it doesn't.

18 Q.85 Very well. Thank you.

19

20 CHAIRMAN: Thank you very much, Mr. Martin.

21

22 THE WITNESS THEN WITHDREW.

23

24 MR. GALLAGHER: Mr. Dinan, please.

25

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1 MR. ANTHONY DINAN HAVING BEEN SWORN, WAS EXAMINED

2 BY MR. GALLAGHER AS FOLLOWS:

3

4 MR. McCULLOUGH: There is one thing I should say that I have only recently  
5 made clear to Mr. Gallagher. It appears to me that we may have been working  
6 on a misapprehension. Mr. Dinan is not the secretary of Post Publications  
7 Limited, although I accept that he may be so named in the companies office.  
8 However, he resigned in the 2002. I'm not sure if the returns are up it date  
9 or not. I just want to tell the Tribunal I made that clear to Mr. Gallagher  
10 in advance.

11

12 MR. GALLAGHER: I, of course, accept that.

13

14 I should say that the returns in the Companies Office show that Mr. Dinan,  
15 these are the latest returns of September 2004, show Mr. Dinan is Secretary of  
16 the Post Publications Limited. I understand that that is in fact incorrect;  
17 is that right, Mr. Dinan?

18 A. That's correct, yes. The annual returns clearly show that Karen Maloney is  
19 Secretary.

20 Q.86 I see. You were Secretary?

21 A. I was, yes.

22 Q.87 And I think are you a Director of Post Publications?

23 A. I am, yes.

24 Q.88 And you are a Director of Thomas Crosby Holdings Limited?

25 A. Yes.

26 Q.89 And Thomas Crosby Holdings Limited is the holding company, is the parent  
27 company, is that correct?

28 A. It's the parent company of the Group.

29 Q.90 And can the Tribunal take it that the Chief Executive, Mr. O'Riordan, would  
30 have been effectively appointed or approved by Thomas Crosby Holdings Limited?

1 A. That's correct.

2 Q.91 Would you tell the Tribunal the role Mr. O'Riordan plays in the Post  
3 Publications Limited company and in particular in the publication of the Sunday  
4 Business Post?

5 A. Fiacra is the Chief Executive of the company and he is responsible for the  
6 day-to-day operations of the company.

7 Q.92 I see. What role does he play in relation to the articles that are about to  
8 be published by the Sunday Business Post?

9 A. Well it's the editors decision as regards whether an article is published or  
10 not in the Post and for obviously with the editor resigning at the end of  
11 October, it would be the responsibility of the assistant editors.

12 Q.93 I see. And I think Mr. Ted Harding was the editor of the Sunday Business  
13 Post?

14 A. That's right.

15 Q.94 Up to a date towards the end of October?

16 A. The end of October.

17 Q.95 Can you say what date he ceased to?

18 A. The 31st of October.

19 Q.96 Was that the day of his effective resignation or the date of his resignation?

20 A. The date of his effective resignation.

21 Q.97 When did he hand in his he resignation?

22 A. Oh, approximately two weeks before that approximately.

23 Q.98 He ceased to have any editorial responsibility about two weeks before the end  
24 of October?

25 A. That's correct.

26 Q.99 Did he have any editorial responsibility on the 17th of October?

27 A. As I recall it, he was editor then, yes.

28 Q.100 Right. Who do you say took over editorial responsibility after Mr. Harding  
29 left the Sunday Business Post sometime presumably in or about the 20th or  
30 thereabouts of October?

1 A. It would have been on a rota basis between the various assistant editors.

2 Q.101 Who was responsible for the publication of the Sunday Business Post on the 24th  
3 of October?

4 A. It would have been whatever assistant editors were on duty.

5 Q.102 Have you not made any attempt to find out who the assistant editor was at that  
6 time?

7 A. No, I haven't.

8 Q.103 Have you spoken to Mr. O'Riordan arising from the correspondence and the  
9 concerns that are expressed by the Tribunal in correspondence that confidential  
10 information had been published by the Sunday Business Post notwithstanding  
11 directions to the contrary?

12 A. No, I haven't.

13 Q.104 Have you spoken to anybody since the summons came about the witness summons on  
14 foot of which you are here, about the articles that were published in the  
15 Sunday Business Post?

16 A. My solicitor.

17 Q.105 Pardon?

18 A. Our solicitor.

19 Q.106 I see. And can the Tribunal take it that you only spoke about those matters  
20 after you received the witness summons?

21 A. That's correct.

22 Q.107 Does it follow that you were not consulted and were not aware of any of the  
23 matters which give rise to the hearing here today before you received the  
24 witness summons on the 16th of November?

25 A. That's correct.

26 Q.108 Having received the witness summons did you endeavour to find out from anybody  
27 in Post Publications Limited what had happened, why it had happened and what  
28 explanation they had for the publication of the material in question?

29 A. No, I spoke to my solicitor about it.

30 Q.109 Only to your solicitor?

1 A. To a solicitor, yes.

2 Q.110 Who did you leave it to make inquiries or to deal with this query in Post  
3 Publications?

4 A. The Chief Executive's job to liaise with the solicitor.

5 Q.111 Mr. O'Riordan?

6 A. That's correct.

7 Q.112 Did you speak to him about it?

8 A. No, I left it between the solicitor and Mr. O'Riordan.

9 Q.113 I see. And did you have any conversation with Mr. O'Kelly, for example,  
10 about it?

11 A. No.

12 Q.114 I see. Does it follow therefore that you had had no hands on role in  
13 connection with the Sunday Business Post for the last six weeks or so?

14 A. In that connection, that's correct. There would have been other matters I  
15 would have had a role in.

16 Q.115 And are you telling the Tribunal that you didn't discuss with Mr. O'Riordan or  
17 Mr. Kelly or anybody else in the Sunday Business Post or indeed Post  
18 Publications Limited, that you were called here to give evidence on foot of a  
19 summons and that you would be likely to be asked questions as set out in the  
20 summons?

21 A. I spoke to my solicitor about it. I didn't discuss it with anybody in the  
22 Sunday Business Post.

23 Q.116 Well, now, the summons required you -- first of all. I take it that you  
24 acknowledge that you received correspondence from the Tribunal; did you?

25 A. Yes, I did.

26 Q.117 Did you receive a copy of the letter of the 24th -- sorry, the 28th of October?

27 A. Can I see that letter, please?

28 Q.118 Yes. I'll put that up on screen for you. Page 45.

29 A. Can I see the second page, please?

30 Q.119 Sorry?

1 A. Can I see the second page of that, please.

2 Q.120The second page.

3 A. Yes, I saw that letter, yes.

4 Q.121Sorry?

5 A. I saw that letter.

6 Q.122Did you receive a copy of?

7 A. It yes, I did.

8 Q.123And when you received a copy of it what did you do?

9 A. I gave it to my solicitor.

10 Q.124Is that Mr. Martin?

11 A. That's correct.

12 Q.125And did you -- did you make any contact with any of the journalists or indeed

13 any of the executives of post publications?

14 A. No, I didn't.

15 Q.126Did you give any -- well, sorry. I better just check the letter. You were

16 aware that the Tribunal requested the immediate return of Mr. Campion's

17 statement in that letter?

18 A. Yes, that's correct, I read the letter.

19 Q.127I take it that you were anxious to cooperate with and assist the Tribunal in

20 any way that could in that regard?

21 A. I passed the letter to our solicitor to deal with it.

22 Q.128That wasn't the question. I asked you were you anxious to cooperate with and

23 assist the Tribunal?

24 A. Insofar as that was possible, yes.

25 Q.129And what did you do to assist the Tribunal in relation to its request that the

26 document be handed over?

27 A. I passed the correspondence to our solicitor to deal with.

28 Q.130And you didn't contact anybody in the Sunday Business Post?

29 A. No, I didn't.

30 Q.131Were you aware of a previous correspondence from the Tribunal to the Sunday

1 Business Post. You've heard the correspondence that I opened here today,  
2 Mr. Dinan, were you aware of that correspondence to you and to the Sunday  
3 Business Post and to the Examiner and to other newspapers over the years?

4 A. When I handed the letter to our solicitor. I knew there was correspondence.  
5 I haven't seen that correspondence until it was up here today.

6 Q.132 You are aware of the correspondence, or were you, that I opened that had been  
7 written to for example the Examiner and to other newspapers in 1998, concerning  
8 leaks to the media of confidential Tribunal information?

9 A. I wouldn't recall that correspondence. I doubt very much if I dealt with it  
10 at that stage.

11 Q.133 I see. And is it your evidence to the Tribunal that Mr. O'Riordan didn't  
12 convey to you or to anybody else in Thomas Crosby Holdings Limited that the  
13 documentation had been destroyed?

14 A. Mr. O'Riordan dealt with our solicitor on this matter. I did not deal with  
15 him in any way on this matter.

16 Q.134 I'm asking you, did he convey to you or to anybody else in Thomas Crosby  
17 Holdings Limited that the documentation had been destroyed?

18 A. He didn't convey to me. I can't answer for anybody else. I very much doubt  
19 if he would have contacted anybody else.

20 Q.135 Right. Now, the summons that was served on you and required you to do the  
21 following. May I have page 24, please.

22  
23 "To produce and hand over to the Tribunal a copy of the statement of Mr. Jude  
24 Campion which it reproduced in part and referred to in an article, written by  
25 Mr. Barry O'Kelly which was published in the Sunday Business Post on the 24th  
26 of October 2004."

27

28 Do you have a copy of that to hand over?

29 A. I have never seen that.

30 Q.136 Does it follow that you don't have a copy to produce or hand over?

1 A. That's correct.

2 Q.137The summons further requires you "to produce and hand over to the Tribunal the  
3 "documents obtained by the Sunday Business Post" and referred to by an article  
4 17th of October 2004".

5 A. I don't have a copy of those documents and I've never seen them.

6 Q.138It required you to answer all questions to which the Tribunal may require  
7 answers in relation to the source and present whereabouts of the document  
8 referred to and circulated in confidence by the Tribunal?

9 A. That's correct.

10 Q.139Now, what inquiries did you make as secretary of Thomas Crosby Holdings Limited  
11 and a director of Post Publications Limited to enable you to answer all  
12 questions which the Tribunal may require answers in relation to the source and  
13 present whereabouts of the documents?

14 A. I discussed the matter with our solicitor.

15 Q.140But what inquiries did you make and what answers are you in a position to give  
16 to the Tribunal about the source and present whereabouts of the documents?

17 A. None whatsoever. I don't know where they are and I don't know what happened  
18 to them.

19 Q.141Is that because you chose not to make inquiries as to when they were destroyed,  
20 by whom they were destroyed and where they were destroyed?

21 A. No, that is because the matter is being dealt with by the Chief Executive of  
22 the Sunday Business Post.

23 Q.142Sorry?

24 A. In conjunction our solicitor.

25 Q.143Can you give any explanation as to why the Tribunal wasn't told, if only as a  
26 matter of courtesy, that you were not in a position to answer any of those  
27 questions and that the appropriate witness to deal with these matters would be  
28 Mr. O'Riordan, the Chief Executive of the Sunday Business Post?

29 A. No, I'm afraid I can't. I was asked to come along here today and I came along  
30 to give evidence of what --

1 Q.144You are giving evidence to the effect that you know nothing?

2 A. That's right.

3 Q.145And you knew that from day one?

4 A. That's correct.

5 Q.146And you sought an adjournment on that basis that you weren't available to come  
6 along to give evidence that you know nothing?

7 A. I sought an adjournment because I wasn't available on the days in question and  
8 I appreciated the fact that the hearing was put back until day.

9 Q.147Why did you not say to the Tribunal or ask your solicitor to say to the  
10 Tribunal, Mr. Dinan doesn't know, hasn't had any dealings with this matter,  
11 Mr. O'Riordan is the man you need and he'll answer the questions?

12 A. Well really I took my solicitor's advice in coming here today. And in  
13 addition to that it says answer any questions the Tribunal may require answers  
14 to, meant that I could be asked anything today in relation to our organisation.

15 Q.148And you knew at all times that your answer would be I know nothing?

16 A. In relation to the documentation, that's correct.

17 Q.149You were asked "to answer any further or other questions to which the Tribunal  
18 may require answers relating to arising from articles written by Mr. Barry  
19 O'Kelly and published in the Sunday Business Post on the 17th and 24th of  
20 October 2002 and the recent correspondence to and from the Tribunal in relation  
21 it thereto".

22 A. That's correct.

23 Q.150Did you read the correspondence from the Tribunal?

24 A. No, I didn't.

25 Q.151So you came here, on foot of a summons, to assist the Tribunal, to give  
26 evidence to the Tribunal, knowing that you were going to be asked about recent  
27 correspondence and you failed to read the correspondence about which you were  
28 going to be questioned; is 245 what you're telling the Tribunal?

29 A. With respect what I see here is five points and the last one says "answer any  
30 further or other questions to which the Tribunal may require answers". That

1 to me is a very general remit and a very general reason to be here.

2 Q.152 I don't want to get involved in a lengthy debate about it but you are "to  
3 answer all further or other questions to which the Tribunal may require answers  
4 relating to or arising from the articles written by Mr. O'Kelly and the recent  
5 correspondence to and from the Tribunal in relation thereto".

6 A. No. 5 doesn't state that.

7 Q.153 No. 4?

8 A. I have referred to No. 5 in my answer.

9

10 MR. McCULLOUGH: I wonder what this is all leading to. I mean, Mr. Gallagher

11 --

12

13 CHAIRMAN: It's frustrating for us, Mr. McCullough. That Mr. Dinan, and I'm  
14 not blaming him. Knew from day one that he wouldn't have anything of  
15 relevance to say and that Mr. O'Riordan is the person perhaps who should be  
16 here in his place. The Tribunal accepted Mr. Martin's suggestion that he  
17 should come here in place of Mr. Broderick, which was a perfectly reasonable  
18 suggestion. And we're just somewhat frustrated and puzzled as to why the same  
19 suggestion wasn't made and save Mr. Dinan the trouble.

20

21

22 MR. McCULLOUGH: Perhaps that's a criticism more justly made of the lawyers  
23 than Mr. Dinan. If I can just add one thing. I'm not sure that it is a  
24 justifiable criticism at all until the committee hears Mr. O'Kelly and sees  
25 what it is that might ever have been offered by anybody else that ever would  
26 have been of any assistance.

27

28 CHAIRMAN: All right. Mr. Gallagher, I think there is nothing really more  
29 that --

30

1 MR. GALLAGHER: Thank you, Mr. Dinan

2

3 CHAIRMAN: Thank you.

4

5 THE WITNESS THEN WITHDREW.

6

7 MR. GALLAGHER: Mr. O'Kelly, please.

8

9 MR. BARRY O'KELLY HAVING BEEN SWORN, WAS EXAMINED BY

10 MR. GALLAGHER AS FOLLOWS:

11 Q.154MR. GALLAGHER: Good afternoon, Mr. O'Kelly. You are Mr. Barry O'Kelly.

12 you are a journalist and you have been employed by the Sunday Business Post for

13 a number of years?

14 A. Yes.

15 Q.155How long have you been employed by the Sunday Business Post?

16 A. Since January 2000.

17 Q.156Where did you work before that?

18 A. I worked in the Star Newspaper and before in a the Irish Press Group.

19 Q.157Are you the author of the articles which appeared in the Sunday Business Post

20 on the 17th and on the 24th of October of this year?

21 A. Yes.

22 Q.158The articles which I have referred to the Tribunal to earlier today?

23 A. Yes, I was.

24 Q.159Now, you are here on foot of a summons, Mr. O'Kelly, which is dated the 16th of

25 November 2004. And for the record I will just read the summons.

26

27 "You are required to attend at the Tribunal and to:

28

29 1. Produce and hand over -- page 26, please. Produce and hand over to the

30 Tribunal a copy of the statement of Mr. Jude Campion which was reproduced in

1 part and referred to in an article written by you, which was published in the  
2 Sunday Business Post on the 24th of October and

3  
4 2. Produce and hand over to the Tribunal the documents obtained by the Sunday  
5 Business Post and referred to in an article written by you which was published  
6 in the Sunday Business Post on the 17th of October 2004.

7  
8 3. To answer all questions to which the Tribunal may require answers in  
9 relation to the source of and present whereabouts of the documents above  
10 referred to and any other documents which were circulated in confidence by the  
11 Tribunal.

12  
13 4. Answer all further or other questions to which the Tribunal may require  
14 answers relating to or arising from the articles written by you and published  
15 in the Sunday Business Post on the 17th and 24th of October 2004 and the recent  
16 correspondence to and from the Tribunal in relation thereto.

17  
18 5. Answer any further or other questions to which the Tribunal may require  
19 answers ".

20  
21 That is a summons to which you received and which causes you to be here today;  
22 isn't that right?

23 A. Yes, it is.

24 Q.160 May I have page 15, please.

25 This is a photocopy of the article written by you in the Sunday Business Post  
26 on the 24th of October 2004; isn't that right?

27 A. Yes, it is.

28 Q.161 And you see that --

29  
30 CHAIRMAN: Sorry, Mr. O'Kelly. There is a screen there in front of you.

1 A. Yeah I Know, I looked.

2 Q.162MR. GALLAGHER: And you see that it shows in part the first, the top of and  
3 the first paragraph of a statement of Mr. Jude Campion made to the Tribunal;  
4 isn't that right?

5 A. It does, yes.

6 Q.163And it shows that it was received by the Tribunal. It bears the date stamp of  
7 the Tribunal, of the 14th of January 2004; isn't that right?

8 A. It does, yes.

9 Q.164And it is headed confidential?

10 A. Yes.

11 Q.165Now, do you produce and hand over to the Tribunal the copy of that statement of  
12 Mr. Jude Campion which you are required to hand over on foot of the summons I  
13 have referred to.

14

15 MR. McCULLOUGH: Chairman, I'm afraid I'm going to have to intervene to have  
16 the discussion about journalistic privilege that I think is inevitably going to  
17 have to be had in this case.

18

19 MR. GALLAGHER: With respect, sir, I think the question to the answer should  
20 be answered first.

21

22 CHAIRMAN: If we receive answers we which assume, we expect to receive. We  
23 can deal with it then at the end of the matter. We would prefer --

24

25 MR. McCULLOUGH: I'm not anxious to create any difficulty. I don't want  
26 equally my client being put in the position of having to refuse to answer a  
27 question, which I expect might be his attitude if in truth he doesn't have to  
28 answer it at all. Maybe that's more of politeness to the Tribunal than  
29 anything else. If he is asked a question to which, in my respectful  
30 submission, he doesn't have to give an answer. It does occur to me that that

1 might be the appropriate time to make such arguments I wish to make to the  
2 Tribunal. I'm in the Tribunal's hands about that.

3  
4 CHAIRMAN: All right. We can do it that way. He hasn't declined to  
5 anything at this stage. He has simply been. As far as I'm aware --

6  
7 MR. McCULLOUGH: He didn't give an answer, Chairman.

8  
9 Q.166MR. GALLAGHER: Mr. O'Kelly, will you hand over, produce and now hand over to  
10 the Tribunal a copy of the statement of Mr. Jude Campion which was reproduced  
11 in part in the article written by you on the 24th of October 2004?

12 A. I didn't hear your question because the helicopter overhead. Did you ask me  
13 will I now do it?

14 Q.167Will you now hand over -- will you now produce and hand over to the Tribunal a  
15 copy of the statement of Mr. Jude Campion which was reproduced in part in the  
16 article written by you on the 24th of October in the Sunday Business Post?

17 A. I wish no disrespect to the Tribunal but I can't do that.

18 Q.168You can't or you won't.

19  
20 CHAIRMAN: Well he says he can't. Can you explain, Mr. O'Kelly, why you  
21 can't?

22 A. I destroyed the document.

23  
24 CHAIRMAN: All right. So it's you don't have the document any more?

25  
26 MR. GALLAGHER: You were also required to hand over documents obtained by the  
27 Sunday Business Post and referred to in an article written by you published in  
28 the Sunday Business Post on the 17th of October 2004.

29  
30 Now, before I ask you any questions in relation to the production of those

1 documents. Can I hand you a folder of documents just for your perusal and ask  
2 you to identify them if you would, please.

3  
4 In your article. May I have page 12, please. Of the 17th of October 2004  
5 you quoted from a number of documents. I am only handing out those documents  
6 for the purpose of identifying them. It's not intended that they would be  
7 given out generally speaking. And I would ask at the end of this hearing that  
8 if they have been handed to My Friends, that they would return them because I  
9 simply put them for identification. I'm not going to open any of the  
10 documents.

11  
12 CHAIRMAN: All right.

13  
14 (Documents provided to all relevant parties)

15  
16 Q.169MR. GALLAGHER: The first document there is, has a heading Coolamber brief  
17 212. It's a memorandum dated the 29th of July 1987; is that correct?

18 A. Yes, that's the date on it.

19 Q.170Is that the document to which you referred in your article of the 17th of  
20 October last?

21 A. I cannot -- I can't see the article in question. It's too small.

22 Q.171I'll read it for you. If we can highlight the bottom of the first column on  
23 the screen, please.

24  
25 CHAIRMAN: Well have we a hard copy of the document?

26  
27 Q.172MR. GALLAGHER: In an internal memo by bank manager you said in the memo dated  
28 the 29th of July 1987 etc.. Is that the document?

29 A. That appears to be the document.

30 Q.173Have you seen a copy of that document before?

1 A. Yeah. That appears to be the document.

2 Q.174And I take it that that is the document that you refer to. There's a  
3 reference to 230,000 pounds and 4,181 pounds net etc.?

4 A. Yeah, it appears to be the exact same --

5 Q.175There's no trick question on it?

6 A. I can confirm what's in, what appeared in the paper. We referred to various  
7 documents and we clearly had those documents.

8 Q.176Well can I take it that you received copies of those documents that you  
9 referred to in that article and that you quoted from in part from in that  
10 article?

11 A. Yes.

12 Q.177And you had those in your possession?

13 A. Yes.

14 Q.178Will you tell the Tribunal who gave them to you --

15

16 MR. McCULLOUGH: That is.

17

18 CHAIRMAN: Well he has to revoke it to the Tribunal.

19 A. Wishing no disrespect to the Tribunal whatsoever, I really can't answer this  
20 question.

21

22 CHAIRMAN: And is that on the basis that you feel you have a journalistic  
23 privilege not to furnish?

24 A. There's a whole host of reasons. And there's nothing new in this.

25

26 CHAIRMAN: No, I accept that. But obviously you have the information but  
27 you're not prepared disclose it.

28 A. I actually put the Tribunal on notice about this in my first communication to  
29 the Tribunal over the phone. I pointed out that I was unable to do this. I  
30 pointed out that I had been down, I had been in the courts before on this very

1 issue. I referred the solicitor to the case in question. I pointed out that  
2 it would be very easy to he is establish the facts of that case. So it  
3 shouldn't come as any surprise to you that I'm not able to answer the question.  
4

5 CHAIRMAN: We just want to be clear for the record. You are being asked to  
6 name the source or identify the source of a particular document or a piece of  
7 information. That's the question you were asked?

8 A. Yes.

9

10 CHAIRMAN: Your response is in a you were not prepared to do so, for your own  
11 professional reasons?

12 A. Yes.

13

14 CHAIRMAN: It's not that you don't know the identity. It's that you,  
15 although you know it, you're not prepared disclose it to the Tribunal. That's  
16 it as we understand your evidence.

17 A. I can't answer the question because I want to protect my sources.

18

19 CHAIRMAN: All right. Well then perhaps Mr.--

20 Q.179MR. GALLAGHER: Can I just ask you some more questions if I may. Can the  
21 Tribunal take it that you know the identity of your source?

22 A. You can, yes, yes, because if it was an anonymous source I would have no need  
23 to protect it.

24 Q.180So you know the identity of your source or sources. You're not willing to  
25 identify the source or sources because you want to protect your sources or  
26 source; is that correct?

27 A. That's correct.

28 Q.181I just don't know Mr. O'Kelly, I'm sure your lawyers have explained to you what  
29 the Tribunal's of Inquiries (Evidence) Acts say in relation to witnesses and  
30 the obligation to answer questions and to cooperate with the Tribunals etc.

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CHAIRMAN: Mr. Gallagher. Mr. McCullough raised the point. I think it's sensible to do it. Mr. O'Kelly has elected not to provide the information, for his own professional reasons on the basis, presumably, that he's entitled not to give that information. Mr. McCullough has indicated when that evidence had been made clear when Mr. O'Kelly's position had been made clear, he wished us to deal with the issue of journalistic privilege insofar as it might affect his client. I think it's appropriate that we would do it now.

MR. GALLAGHER: I have no difficulty about that. I want to try and establish if Mr. O'Kelly is aware of the consequences for him if the Tribunal, if he should be wrong in his view about journalistic privilege. And if the Tribunal took the view that he is refusing to answer questions which are lawfully legitimately put to him by the Tribunal. I just want to establish that. I understand that Mr. O'Kelly has a view. He has expressed that view and I understand it. I may not agree with it as a proposition of law.

CHAIRMAN: But he has made it quite clear, Mr. Gallagher, that he's taking this position on the basis that he believes himself to be legally entitled to refuse to disclose. We have to establish, first of all, insofar as we can, whether or not he has that entitlement.

MR. GALLAGHER: All right.

CHAIRMAN: Obviously, if we decided that he does not have that entitlement. Then it would be appropriate to ask him is he aware of the consequences. But if he has that entitlement, that obviously wouldn't arise. I think at this stage it might be appropriate if we heard what Mr. McCullough had to say.

MR. GALLAGHER: There are a number of questions I had intended to ask this

1 witness.

2

3 CHAIRMAN: Irrespective of the outcome, obviously, we would be -- Mr. O'Kelly  
4 would be recalled.

5

6 MR. GALLAGHER: Very well

7

8 CHAIRMAN: Presumably there are other questions which don't relate necessarily  
9 to identifying the source. But this is the -- identifying the source issue is  
10 of paramount importance, so I think it's useful that we would. Because it  
11 looks like we're not probably going to finish this afternoon. It might be  
12 useful if we had submissions so that we could deal with them.

13

14 MR. GALLAGHER: All right.

15

16 CHAIRMAN: Overnight. Rather than drag the matter out until half four or  
17 five and then find that we would have to go back.

18

19 Q.182MR. GALLAGHER: Indeed. I have no difficulty with that. For the purpose of  
20 clarification and so that we are absolutely clear about the position.

21 My understanding, Mr. O'Kelly, of what you've said is that you are not and  
22 cannot produce the documents which are referred in your various articles  
23 because they have been destroyed; is that correct?

24 A. That's correct.

25 Q.183And you are --

26

27 CHAIRMAN: Sorry, Mr. O'Kelly, is that all the documentation, including the  
28 ones that you've looked at more recently?

29 A. All of the documents in relation to the ones that have been -- to the two  
30 pieces that were complained of.

1

2 CHAIRMAN: They have been destroyed?

3 A. Yes.

4

5 CHAIRMAN: All right.

6 Q.184MR. GALLAGHER: What about the other documents, Mr. O'Kelly, that were  
7 referred to in your article of the 17th of the 10th, one of which or two of  
8 which I referred you to? Have they been destroyed?

9 A. All of the documents have been destroyed.

10 Q.185You say all the documents including all of the documents which were quoted from  
11 and which, from which you gleaned or culled information which gave rise to the  
12 articles on the 17th and the 24th of October, all that documentation has been  
13 destroyed?

14 A. Yes.

15 Q.186And by whom was the documentation destroyed, Mr. O'Kelly?

16 A. By myself.

17 Q.187When did you destroy the documentation?

18 A. On Thursday, November the 11th.

19 Q.188Were you aware at that stage that the Tribunal had directed that the  
20 documentation should not be destroyed?

21 A. Yeah.

22 Q.189And in those circumstances, given that you knew that the Tribunal had directed  
23 that the documentation should not be destroyed can you offer an explanation as  
24 to why you destroyed it?

25 A. I did so for the purpose of ensuring the protection of the identity of my  
26 sources.

27 Q.190I have no further questions at this time.

28

29 JUDGE FAHERTY: I have one question. Mr. O'Kelly. You just said there that  
30 you mentioned sources in the plural. Do you have more than one source?

1 A. Um, I've chosen to use the word "sources". I don't want to be of -- I don't  
2 want to cause any difficulty for you whatsoever. I want to try and assist you  
3 in any way, but I want to ensure that I don't assist you in the identification  
4 of my sources. There may be one, there may be more than one. I am simply  
5 intent on making sure that my sources of information are protected. I'm sorry  
6 that I'm causing that difficulty.

7  
8 JUDGE KEYS: Mr. O'Kelly. You mentioned that the reason why, you were asked  
9 why you destroyed the documentation. And correct me if I'm wrong, but I  
10 understand you to say that you did so, to protect revealing your source or  
11 sources; would that be correct?

12 A. Yes, I did.

13  
14 JUDGE KEYS: Why didn't you just retain the documentation and claim the  
15 privilege and use that as a method of protecting your sources?

16 A. I felt that I needed to take that precaution. I didn't want to take, if you  
17 just bear with me a second. I didn't want to take the risk. There might  
18 well have been no means of identifying the source through the documents but I  
19 didn't want to take that risk.

20  
21 JUDGE KEYS: Well is it because you felt that the arguments you might put up  
22 in court, whether to the Tribunal or to another court, might be that you don't  
23 have this privilege. And because of that then the document would then have to  
24 be produced. Was that the reason why you destroyed it?

25 A. I didn't engage in that thought process.

26  
27 JUDGE KEYS: You must have. Surely. If you were so confident that you had  
28 the protection of legal privilege. You didn't have to destroy the document or  
29 documents. You could have retained them, awaited a ruling on it. If the  
30 ruling was in your favour you had done everything you could possibly do to

1 protect your source. And if that revealed your source then nobody could  
2 criticise you for that.

3 A. Um, all I can say is that I -- my sole concern was to ensure the protection of  
4 my sources.

5

6 JUDGE KEYS: I accept that.

7 A. And with that in mind, I felt necessary to destroy the documentation. I  
8 wasn't thinking in terms of cases down the line. I simply wanted to ensure  
9 the protection of my sources.

10

11 JUDGE KEYS: Yes. But I've already suggested to you there was one method of  
12 doing that, by using the argument that it's privilege by virtue of journalistic  
13 privilege. That's a protection, you are saying. You're standing by it today.  
14 Your lawyers are going to put that submission to this Tribunal.

15 A. I can't talk to you about what conversations I might have had with my lawyers  
16 but there is no lawyer that would tell you that you have 100% chance of  
17 success.

18

19 JUDGE KEYS: That's true. So it's one way to be absolutely sure of  
20 protecting your source was to destroy the document, despite the direction from  
21 the Tribunal not to do so. Isn't this correct?

22 A. I did it for the purpose of protecting my source.

23

24 JUDGE KEYS: Despite the direction from the Tribunal you destroyed the  
25 document; isn't that correct?

26 A. That's absolutely correct.

27

28 JUDGE KEYS: You've come to court today. Via your solicitor you've indicated  
29 to this Tribunal that they don't want to show any disrespect to the Tribunal by  
30 virtue of what they've done yet, knowingly and blatantly in breach of an order

1 from the Tribunal or a direction I should say, you destroyed the document;  
2 isn't that correct?

3 A. Um, all I can do is answer from my own perspective.

4  
5 JUDGE KEYS: Yes.

6 A. I didn't see it in quite those terms. I didn't see it in terms of defiance.  
7 I wish no disrespect to the Tribunal.

8  
9 JUDGE KEYS: Well how else could it be possibly interpreted where an order or  
10 a direction was given by the Chairman of the Tribunal that you would blatantly  
11 destroyed the document. How but can it be but interpreted in that way?

12 A. It is regrettable that that is the interpretation that you're placing on it.

13  
14 MR. GALLAGHER: I wonder. Just something occurs to me. Mr. O'Kelly could  
15 stand down. I wonder could I have a word with My Friend, Mr. McCullough, for  
16 a moment before you rise, because it may save doing something tomorrow that  
17 might not otherwise be necessary. Can Mr. O'Kelly stand down?

18  
19 CHAIRMAN: Yes. Do you want to step down, Mr. O'Kelly.

20 A. Do you want these?

21  
22 (Documents Returned)

23  
24 CHAIRMAN: Just leave them there.

25  
26 THE WITNESS THEN STOOD DOWN.

27  
28 MR. GALLAGHER: Mr. McCullough needs to take instructions.

29  
30 MR. McCULLOUGH: It's an issue that I have already discussed with my client.

1 I just want to inform.

2

3 MR. GALLAGHER: It occurred to me, Chairman, that the, as Mr. Dinan is here  
4 and in order to obviate the necessity of his having to return tomorrow. The  
5 Tribunal might consider asking him whether he is in a position to give an  
6 undertaking that no further documentation or information circulated by the  
7 Tribunal will be published in any of the newspapers in question. I don't know  
8 whether the Tribunal wishes to do that. To ask for such an undertaking. You  
9 will recall that it was asked for in earlier correspondence. And it wasn't  
10 replied to. There was no indication of whether or not such a --

11

12 CHAIRMAN: Well he can be asked.

13

14 MR. GALLAGHER: Perhaps I can ask him to return to the box?

15

16 CHAIRMAN: Certainly. Yes.

17

18 MR. GALLAGHER: Mr. Dinan, would you mind.

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1 MR. DINAN, HAVING ALREADY BEEN SWORN, WAS QUESTIONED

2 AS FOLLOWS BY MR. GALLAGHER:

3

4 Q.191MR. GALLAGHER: Mr. Dinan, in the course of correspondence with your  
5 solicitors, the Tribunal wrote on the 10th of November last. And said that  
6 whilst the Tribunal was extremely reluctant to make any order or orders under  
7 the acts or to seek the assistance of the High Court, it would have no choice  
8 to do so unless a copy of Mr. Campion's statement is returned to the Tribunal.  
9 This is page 32, please.

10

11 "An undertaking is given by your clients -- that's Post Publications Limited,  
12 Mr. O'Kelly, and Thomas Crosby Holdings Limited -- that any documents or any of  
13 contents thereof issued or circulated in confidence by the Tribunal will not  
14 henceforth be published by your clients or either of them unless such documents  
15 or its contents have been disclosed at a public sitting of the Tribunal."

16

17 Now, your solicitors did not respond to that request for an undertaking. And  
18 no such undertaking has been given so far. I don't know what view the  
19 Tribunal would take if such an undertaking were to be given at this stage.  
20 And I wonder, I'm just drawing the Tribunal's attention to it, to see if they  
21 want to request an undertaking or not request an undertaking, as the case may  
22 be?

23

24 CHAIRMAN: Mr. Dinan, are you in a position to give an undertaking first of  
25 all?

26 A. I'm afraid not, Chairman.

27

28 CHAIRMAN: Does that mean, you don't have the capacity to give an undertaking  
29 or you do but you refuse to do so?

30 A. I would refuse to do so, Chairman.

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CHAIRMAN: On what basis?

A. We would have to establish on each document as it arose the rights and wrongs of publishing or not publishing and that has to be prerogative of the editor at all times in any of our publications.

CHAIRMAN: But you are being asked specifically not just in relation to any document, but documents which have been circulated in confidence by the Tribunal. You are being asked to -- are you in a position, on behalf of your company, to give an undertaking that those documents will not be published by you?

A. I'm not, Chairman.

CHAIRMAN: So that's another way, I have to suggest to you, of saying that irrespective of orders made by the Tribunal as to confidentiality of documents. Your business, your company will not respect those Orders or will not obey them. That's the affect of the undertaking?

A. Well, Chairman, each one of those orders will be studied in conjunction with our solicitors when they arose.

CHAIRMAN: Well can I ask you this. Are you prepared give an undertaking not to publish documents which, of which you are aware or your company is aware are covered by an Order of confidentiality by the Tribunal?

A. I would have to discuss that issue with our solicitors and with my shareholders.

CHAIRMAN: Well does that mean that you don't have the capacity to give an undertaking or? It's a straight forward issue. It doesn't require, I suggest to you, legal advice. If the Tribunal issues or makes an order or gives a direction that a particular document or documents or particular information is

1 to be retained in confidence and is not to be published, the question is; is  
2 your company prepared give an undertaking to comply with that Order or with  
3 that direction?

4 A. I would have to discuss that with my company.

5

6 CHAIRMAN: For what reason?

7 A. To see what their view is on it.

8

9 MR. McCULLOUGH: The witness should also be entitled to take legal advice.  
10 Certainly if he says that he wants to talk to his shareholders, his board of  
11 directors. I think it's reasonable to allow him that opportunity rather than  
12 --

13

14 CHAIRMAN: He can check the position overnight and take advice on it and we'll  
15 deal with it tomorrow. All right. Thank you, Mr. Dinan.

16

17 THE WITNESS THEN WITHDREW

18

19 CHAIRMAN: Now, Mr. McCullough, do you want to address the Tribunal on the  
20 question of journalistic privilege?

21

22 MR. McCULLOUGH: Yes, Chairman. If the Tribunal is contemplating that it  
23 might insist on Mr. O'Kelly answering the questions put by Mr. Gallagher, then  
24 I do. Of course if the Tribunal takes the view without any submissions on my  
25 part that it's not going to insist, well then I don't.

26

27 I'm assuming, perhaps incorrectly, that the Tribunal will insist on an answer  
28 being given. As opposed to simply allowing the matter to stand as it is.

29 I have into desire to the waste the Tribunal's time if the Tribunal's mind is  
30 working otherwise.

1

2 CHAIRMAN: My understanding of your suggestion that you make submissions would  
3 be on the basis that we would be insisting that the questions be asked and that  
4 they would be put and I assume Mr. O'Kelly will for the reasons stated by him  
5 decline to answer them.

6

7 MR. McCULLOUGH: So I understand that he will. I understand from what he has  
8 said that he has an ethical view of the matter and he takes the view that he is  
9 supported by the law in that regard.

10

11 Can I start off by making the first point that I would make is this, Chairman.  
12 What Mr. Gallagher described as the legal position, can perhaps roughly be  
13 summarised as follows. He said that there was a limited entitlement  
14 previously for a journalist to refuse to answer a question which might reveal  
15 his source. And he referred to certain authorities that indicated that the  
16 question shouldn't be persisted with unless the court or Tribunal, as the case  
17 may be, took the view that the answer was necessary.

18

19 That I think was said by Miss Justice Carroll in the Nevin case and it's what I  
20 think emerges from the authorities as well. And I agree that was, at least  
21 until relatively recently in this country, the law.

22

23 I just pause there for a moment and say that in my respectful submission, it  
24 isn't, even assuming for a moment, that remains the law. It isn't necessary  
25 for the Tribunal to insist on an answer to this question. Because the  
26 Tribunal is embarking, it seems to me, upon an examination of whether Mr.  
27 O'Kelly would be suggested to have committed an offence under the Tribunals  
28 Inquiries (Evidence) Act. It's not a matter for the Tribunal, it's a matter  
29 to be addressed somewhere else.

30

1 With respect, I can't see that it's necessary for any part of the Tribunal's  
2 work. Even accepting it's earlier ruling today that that question should be  
3 asked and answered.

4  
5 However, if the Tribunal differs from my submission in that regard. Well then  
6 I go on secondly to submit that the law is no longer as stated by  
7 Mr. Gallagher. That arises largely from the passage of the European  
8 Convention on Human Rights Act 2003.

9 I have some folders of authorities that I will hold out now but I hope not to  
10 have to go through every part of them.

11  
12 The Tribunal will no doubt be aware that the Act came into effect as of the  
13 beginning of January of 2004.

14  
15 Divider 1 of this folder contains a copy of the Act. And there are four  
16 sections that are of some relevance. In the first instance Section 2 provides  
17 as follows "in interpreting or implying any statutory provision or rule of law  
18 insofar as possible subject to the rules of law relating such interpretation  
19 and application do so in a manner compatible with the State's obligations under  
20 the convention provisions".

21  
22 In essence what, Section 2 means. When one is interpreting a rule of law at  
23 any stage after January 2004, one must attempt to do so in a manner that's  
24 consistent with convention principles.

25  
26 And part of the law that applies here is the law of privilege and the law of  
27 evidence. And that means that the Tribunal must do its best to interpret that  
28 rule. To interpret the rules of evidence and the rules of privilege in  
29 accordance with convention principles.

30

1 Section 3 is perhaps of even more direct relevance to the Tribunal. Because  
2 it imposes an even stronger obligation upon bodies such as the Tribunal to  
3 apply convention principles. "Subject to any statutory provision other than  
4 this act or rule of law, every organ of the State shall perform its functions  
5 in a manner compatible with the State's obligations under the convention  
6 provisions".

7 And subsection 2 goes on to set out that a person who suffers damage as a  
8 result of that not having occurred has a cause of action in damages.

9  
10 If the Tribunal turns back to the definitions Section, which is Section 1, on  
11 page 4. The Tribunal will see a provision of some importance for the present  
12 purposes. "Under the definition "organ of the State" includes a Tribunal or  
13 any body other than the present of the Oireachtas of or either house of the  
14 Oireachtas or a committee of either such house or a joint committee of both  
15 such houses are a court which is established by law or through which any of the  
16 legislative executive of judicial powers of the State are exercised ".

17  
18 So it's perfectly clear that a Tribunal being a body that's established by law  
19 is an organ of the State for the purpose of Section 3. And that means that  
20 the Tribunal pursuant to Section 3 is under a particular duty to perform its  
21 functions in a manner compatible with the State's obligations under the  
22 Convention.

23  
24 Then Section 4 provides "that judicial notice shall be taken of the convention  
25 provisions and of;

26 A. Any declaration decision, advisory or opinion or judgement in the European  
27 Court of Human Rights establish under the convention on any question in respect  
28 of which that court has jurisdiction" and goes on at the foot of the Section "a  
29 court shall when interpreting and applying the convention provisions take due  
30 account of the principles laid down by those declarations, decisions, advisors

1 or opinions and judgements".

2

3 The reason I place emphasis on that is that there is a judgement of the  
4 European Court of Human Rights that is directly relevant to this issue and it  
5 follows from Section 4 that then the Tribunal must take account of that when  
6 applying and interpreting convention provisions.

7

8 Section 5 is the final section of relevance, Section 5 provides that "In any  
9 proceedings the High Court or the Supreme Court in exercising its appellate  
10 jurisdiction may having regard to the provisions of Section 2 an application to  
11 it and that be had by a party or of its own motion or no legal remedy is  
12 adequate and available make a declaration referred in this Act, referred to in  
13 this Act, as incompatibility that a statutory provision or rule of law is  
14 incompatible with the State's obligations under the convention provisions".

15

16 Section 5 in effect means this. When it is simply impossible to interpret a  
17 rule of law in a manner that's compatible with convention provisions. Well  
18 then a person who is damaged by that, still has the right to apply for a  
19 declaration of incompatibility of the existing law with the convention.

20

21 But before you arrive at the possibility of a declaration of incompatibility  
22 under Section 5 every conceivable effort must be made to interpret any rule of  
23 law or statute in a manner that's constant with the provisions of the  
24 convention.

25

26 So my respectful submission. There are three principles of importance that  
27 emerge from the Act for the Tribunal's present consideration.

28

29 The first is that the Tribunal must interpret the rules relating to evidence  
30 and privilege in a manner that's compatible with the State's obligations under

1 the convention.

2

3 The second is that there's a particular obligation on the Tribunal as an organ  
4 of the State to perform its functions in a manner compatible with the State's  
5 obligations under the convention.

6

7 And the third principle is that in doing so, account must be taken of decisions  
8 of the European Court of Human Rights.

9

10 If I may turn then to the next divider. Divider 2. All of that raises the  
11 obvious question. What are the obligations under the State, of the State  
12 under the European Convention of Human Rights and they are examined in some  
13 detail in a case called Goodwin and the United Kingdom.

14

15 I will just explain the background to Goodwin. Goodwin was a case in which a  
16 journalist got hold of material that was private to a company called Tetra.  
17 In fact it was part of Tetra's business plan and was highly confidential. And  
18 the journalist proposed to publish it. And in due course, after a series of  
19 cases throughout the English courts, all of the way up to the House of Lords,  
20 three different Orders were made against the journalist, who is Mr. Goodwin.  
21 The first was an injunction restraining publication of the confidential  
22 material. The second was an Order requiring disclosure. That's an Order  
23 directing the journalist to hand the material back. And the third was a fine  
24 for his refusal to comply with the Order to hand the material back. A fine  
25 imposed on account of contempt of court in effect.

26

27 Those issues came before the European Court of Human Rights. The journalist  
28 was left with an order that he should disclose the material and he was fined  
29 for not having done so and those matters came before the court.

30

1 The court held that the Order requiring disclosure and the fine were a breach  
2 of article 10 of the convention. Which is the provision of the convention  
3 that deals with the freedom of speech.

4  
5 And like all decisions of the European Court of Human Rights it's difficult to  
6 follow. I will just point to what I think are the relevant points of it.

7  
8 At paragraph 27, article 10 is set out. And the court can see it there.

9 "Everybody has the right to freedom of expression, this right should include  
10 freedom to hold opinions and to receive and impart information and indeed --

11  
12 CHAIRMAN: Sorry, Mr. McCullough, what are you reading from?

13  
14 MR. McCULLOUGH: Paragraph 27. It's page 11 of the 23. Divider 2.  
15 Paragraph 27.

16  
17 At the foot of the page article 10 is set out. Which provides in terms for  
18 the right to freedom of expression. And I won't open all of article 10 but  
19 it's set out there.

20  
21 And then paragraph 28. Says "it was undisputed that the measures constitute  
22 an interference with the applicants right to freedom of expression is  
23 guaranteed by paragraph 1 of article 10 and the court sees no reason to hold  
24 otherwise. Must therefore examine whether the interference was justified  
25 under paragraph 2 of article 10."

26  
27 And the same thing follows here. That if the Tribunal makes an order  
28 directing Mr. O'Kelly to disclose his sources. That will prima facie be an  
29 interference with his rights under article 10.

1 And must therefore be capable of justification under the provisions of the  
2 convention. And the way in which it must be justified is then set out in the  
3 paragraphs that follow. And there are three tests that have to be met. The  
4 first is whether the interference is prescribed by law. That's addressed in  
5 paragraphs 29 to 34.

6  
7 The second is that the interference must pursue a legitimate aim. That's  
8 addressed at paragraph 35 and 36. And the third is that the interference must  
9 be "necessary in a democratic society" and that's addressed in paragraph 37.  
10 And the following paragraphs all of the way up to 46.

11  
12 And just to look at the first of those. Was the interference prescribed by  
13 law.

14  
15 In the Goodwin case the Court of Human Rights held that it was. And they held  
16 that there was a rule of law in England that set out for a journalist what  
17 would happen to him if he refused to answer a question.

18  
19 If you look at paragraph 31 you will see that there is such a requirement.  
20 "The court reiterates that according to its case law the relevant national must  
21 be formulated with sufficient precision to enable the persons concerned. If  
22 need be with appropriate legal advice to foresee to a degree that is reasonable  
23 in the circumstances, the consequences which a given action may entail. A law  
24 that confers a discretion is not in itself inconsistent with this requirement,  
25 provided that the scope of the discretion, the manner of its exercise are  
26 indicated with sufficient clarity, having regard to the legitimate aim in  
27 question to give the individual adequate protection against arbitrary  
28 interference".

29  
30 So, for something to be prescribed by law, a person must be able to foresee

1 roughly speaking in advance what will happen to him if he refuse to comply with  
2 the direction.

3  
4 And in England it was possible for the Court of Human Rights to hold that that  
5 test was satisfied, although others weren't, as I will demonstrate in due  
6 course.

7  
8 And the reason that was possible in England is because the Contempt of Court  
9 Act in 1981 in that jurisdiction provides for a protection for journalists and  
10 provides for the circumstances under which that protection would be set aside.

11  
12 The court looks at the top of the -- sorry if the Tribunal looks at the top of  
13 the following page, page 13 of the 23. The Tribunal will see reference to  
14 that. The first full paragraph reads as follows "Contrary to what's suggested  
15 by the Applicant the relevant law did not confer an unlimited discretion on the  
16 English courts in determining whether an order for disclosures should be made  
17 in the interests of justice. Important limitations followed in the first  
18 place the terms of Section 10 of the 1981 Act, according to which an order for  
19 disclosure could be made if it was "established to the satisfaction of the  
20 court disclosure was necessary in the interests of justice". And the text of  
21 Section 10 is set out at Section 20 of the judgement.

22  
23 The Tribunal can see that Section 10 is set out at paragraph 20 provides that a  
24 court isn't to require a journalist to disclose, nor is a journalist to be  
25 guilty of contempt of court for refusing to disclose unless its established to  
26 the satisfaction of the court that disclosure is necessary in the interests of  
27 justice or national security or for the prevention of disorder or crime.

28  
29 The Contempt of Court Act 1981, in England appears to have been introduced many  
30 years prior to the implementation of the convention in England as a means of

1 foreshadowing its provisions. It's not far off as it happens, what article 10  
2 provides.

3  
4 The point I'm making here is that, there isn't any such provision here. And  
5 it follows from that, that Mr. O'Kelly is in quite a different position even  
6 from Mr. Goodwin and a worse position. Because it is impossible to tell what  
7 the consequences for him are of refusing to comply with the disclosure order.  
8 Indeed, Mr. Gallagher was just about to go on to outline for Mr. O'Kelly the  
9 various things that might happen to him. But the truth is that nobody knows.  
10 He could be guilty of an offence, for which the sanctions are very significant.  
11 He could be guilty of contempt of court if the High Court agreed to make an  
12 order. Nobody knows what the position is.

13  
14 It follows therefor that in my respectful submission, this is not an order  
15 directing Mr. O'Kelly to answer this question. Is not one that would be  
16 prescribe by law in the sense that the court of European Court of Human Rights  
17 has looked at that phrase.

18  
19 At paragraph 35 and 36 the question of whether the interference pursued a  
20 legitimate aim as set out. I don't think that arises in this case.  
21 While my clients don't necessarily accept that the material published by them  
22 was confidential in the strict legal sense, I accept that there might be  
23 legitimate aim to be pursued by making an order directing Mr. O'Kelly to answer  
24 the questions. So I don't lay any emphasis on that.

25  
26 The third issue addressed at paragraph 37 and the following paragraphs is  
27 whether the interference was necessary in a democratic society.

28  
29 And Mr. Goodwin succeeded on this point. Even in a case in which he had  
30 already had the benefit of Section 10 of the Contempt of Court Act. And it

1 was found that the disclosure order against him and the fine imposed upon him  
2 on account of his failure to meet it were not necessary in a democratic  
3 society, and therefore were prohibited under Article 10.

4  
5 And the most relevant parts of that are set out in paragraphs 39 onwards.

6  
7 Paragraph 39 the Court said "The Court recalls a freedom of expression  
8 constitutes one of the essential foundations in a democratic society and the  
9 safeguards to be afforded to the press or a particular importance - see as a  
10 recent authority *Jerseal* against Denmark. Protection of journalistic sources  
11 is one of the basic conditions for press freedom, as it is reflected in the  
12 laws of the professional codes of conduct in a number of contracting States and  
13 is affirmed in several international instruments on journalistic freedom" and  
14 then it sets out what those source are. It goes on "Without such protection  
15 sources may be deterred from assisting the press and in informing the public on  
16 matters of public interest as a result the vital public watchdog role of the  
17 press may be undermined and the ability of the press to provide accurate and  
18 reliable information may be adversely affected. Having regard to the  
19 importance of the protection of the journalistic source for press freedom and  
20 democratic society and potentially chilling affect, an order of source  
21 disclosure has in the exercise of that freedom such a measure cannot be  
22 compatible with Article 10 of the Convention unless it's justified by an  
23 overriding requirement in the public interest". That's a very strong phrase.  
24 "There must be an overriding requirement in the public interest before an order  
25 can be made requiring a journalist to disclose his sources".

26  
27 These considerations have been taken into account in applying to the facts of  
28 the present case the test of necessity in a democratic society under paragraph  
29 2 of article 10. It goes on to say at paragraph 40 "as a matter of general  
30 principle the necessity for any restriction of freedom of expression must be

1 convincingly established" and then at the foot of page 40 it says, which I  
2 think is also important in the present context is; In some limitations on the  
3 confidentiality of journalistic sources call for the most careful scrutiny by  
4 the court".

5  
6 At paragraph 44 to 46, which I don't think I need to open now. The Court of  
7 Human Rights found that Tetra's very legitimate interest in seeking to prevent  
8 further publication of confidential material and its very legitimate interest  
9 in unmasking the identity of the person who had given the information to the  
10 journalist were not sufficient to override the entitlement of the journalist to  
11 protect his sources. Those were obviously very strong arguments on Tetra's  
12 side but nevertheless didn't meet the test.

13  
14 The paragraphs 44. "The judges say in this respect, it is true as Lord  
15 Donaldson put it -- that's in the House of Lords case -- that the injunction  
16 would not effectively prevent publication to Tetra's customers or competitors  
17 directed by the applicant journalist sources unless aware of the identity of  
18 the source, Tetra would not be in a position to stop such further dissemination  
19 of the contents for the plan, notably will bring proceedings against him or her  
20 for recovery of the missing document for an injunction against further  
21 disclosure by him or her or for compensation for damage. It also had a  
22 legitimate reason as a commercial enterprise in unmasking a disloyal employer  
23 collaborator might have continuing access to its premises in order to terminate  
24 his or other association with the company. These are undoubtedly relevant  
25 reasons however, it is also recognised by the national courts it would not be  
26 sufficient per se for a party seeking disclosure of a source to say merely that  
27 he or she would be unable to disclose to exercise the legal right or revert the  
28 threatened legal wrong on which he or she bases his or her claim in order to  
29 establish the necessity of disclosure."

1 And that connection the court would recall that the considerations to be taken  
2 into account by the Conventions institutions, under review paragraph 2 of  
3 article 10, tip the balance of competing interests in favour of the interests  
4 of democratic society and security in securing a free press. On the facts of  
5 the present case, the court cannot find that Tetra's interests in eliminating  
6 their proceedings against the source, the residual threat of the damage through  
7 dissemination of the confidential information by the press in obtaining  
8 compensation and unmasking a disloyal employer/collaborator where even if  
9 considered cumulatively sufficient to outweigh the vital public interest in the  
10 protection of the Applicant journalists source. The court did not therefore  
11 consider the further purposes served with a disclosure order were measured  
12 against a stand as imposed by the convention amount to an overriding  
13 requirement in the public interest".

14  
15 And it goes on to say at paragraph 46 that in some there wasn't a sufficient  
16 degree of proportionality between the order made on the one hand and the  
17 legitimate aim pursued by the disclosure order on the other hand.

18  
19 I should say, there was some relevance in this case that the injunction had  
20 been made preventing further dissemination of information. And the Court of  
21 Human Rights took that into account in saying well at least the information  
22 can't be published any more. But the interests that Tetra had in finding out  
23 who had given the information and in preventing further disclosure. Even  
24 under those circumstances. Important that they be, don't outweigh the  
25 importance of protecting journalistic sources.

26  
27 And in my respectful submission, Goodwin is a case that is far stronger from  
28 Mr. O'Kelly's point of view when applied to the present case. Than the facts  
29 of Goodwin were itself even.

1 Here the relevant documents have been destroyed. They can't be used any more.  
2 ascertaining the identity of the person who gave the information to Mr. O'Kelly  
3 and restricting further publication are certainly legitimate interests for the  
4 Tribunal to pursue. But in this case the information is already in the public  
5 domain and no serious purpose is served in terms of preventing further  
6 publicity by any disclosure order.

7  
8 And the only real remaining interest that the Tribunal could have, I  
9 respectfully submit, is in trying to find out who gave the documents to  
10 Mr. O'Kelly. And it's clear when you look at Goodwin that that fact is simply  
11 not important enough to outweigh the significance of journalistic privilege, if  
12 I may call it that.

13  
14 So, when you put all of those facts together, I respectfully submit that on the  
15 basis even of Goodwin itself, this is a case in which the Tribunal should take  
16 the self denying step of not insisting on an answer to the question put by  
17 Mr. Gallagher to Mr. O'Kelly.

18  
19 All of that is backed up by a number of English cases and I won't open these in  
20 any extended detail. But there are a number of cases that follow. I will  
21 just mention three of them.

22  
23 One is at divider four. A case called Chief Constable of Leicestershire  
24 Constabulary and Another against Garavelly.

25 It's a case on Section 10, like many of the English cases but the English  
26 courts appear to take the view that Section 10 of their Contempt of Court Act  
27 and Article 10 of the Convention are roughly similar. It's more the facts of  
28 it that are relevant as they apply to the present case. That's a case in  
29 which the Chief Constable of Leicestershire was pursuing a disciplinary inquiry  
30 against a policeman of whom he suspected as having passed confidential police

1 material to a journalist, that's Miss Garavelly.

2  
3 Confidential crime figures. And both the Chief Constable of Leicestershire  
4 and the policeman against whom the allegation was made, agreed that no just  
5 inquiry into the conduct of the policeman could be carried out unless Miss  
6 Garavelly said who her sources were, for reasons that I don't need to go into  
7 in detail.

8  
9 That appears to have been agreed by the parties. And notwithstanding that  
10 fact, the court took the view that this with not a case in which it could order  
11 Miss Garavelly to make disclosure of her sources.

12  
13 It simply took the view that it wasn't necessary or sufficiently necessary to  
14 outweigh. Sorry that the interests that had been raised, important though they  
15 obviously were, were simply not sufficiently necessary to outweigh the  
16 requirement to protect journalistic sources.

17  
18 The next case is perhaps stronger again. It's a case called Saunders and  
19 Punch. It's at divider five. This is Mr. Earnest Saunders, and in this case  
20 material had come into the possession of Punch that was clearly privileged  
21 information. That's solicitor client privilege had come into the possession  
22 of Punch and they made use of it.

23  
24 And Mr. Saunders sought an injunction against further publication together with  
25 an order for disclosure of the magazine's source in respect of the confidential  
26 material. That's clear from the headnote. And again there's another I  
27 respectfully submit, is very strong example where Mr. Saunders clearly had an  
28 extremely strong interest in protecting the confidentiality of the solicitor  
29 client relationship. Specifically protected by privilege. But the court took  
30 the view that important though that might be, it was not sufficiently important

1 to make it necessary that Punch should be obliged to disclose its sources.  
2 That's set out by Mr. Justice Lindsay at the foot of page 1001 and page 1002.

3  
4 The foot of page 1001 says "while I am very conscious that to speak of a  
5 balancing exercise conjures up a rather spurious picture of an exercise a good  
6 deal more precise than scientific but can be the assessment of the fact of  
7 which I have described, was having mind the fundamental importance of the  
8 confidentiality of privileged communication between client and solicitor that  
9 interests of justice in the Plaintiff's favour is here made less weighty by way  
10 of the relative insubstantiality of foreseeable damage and the relative  
11 unlikelihood of repetition. What the European Court of Human Rights described  
12 in Goodwin in the UK is a residual threat of damage through dissemination is  
13 far less weighty than it was, for instance, in the X case".

14  
15 The X case was the case that led to Goodwin.

16  
17 "The great importance of the protection of sources has also to be recognised  
18 to be a very substantial counter weight. And doing as I understand the X case  
19 requires me to do, I do not in the overall balance, find myself satisfied that  
20 by way of relief on the injunction already granted disclosure is here in the  
21 interests of justice of such preponderating importance as to require the  
22 statutory privilege against disclosure".

23  
24 And then he compares two Judges who had previously considered the matter.

25  
26 "Rather than in the words of the statute, my being satisfied that the  
27 disclosure sought was necessary in the interest of justice I find even taking  
28 the view most favourable to Mr. Saunders that I'm left in doubt. The  
29 improbable but at least possible prospect that at a trial at which evidence is  
30 not available on affidavit may be available by way of subpoena. It could

1 transpire that his dealings with TK, the L Group or with the White Propaganda  
2 Group Unit or in general indiscretion, Mr. Saunders really lost the  
3 confidentiality which is here tried further to enforce would make me less  
4 satisfied about whether the disclosure is really needed for the interests of  
5 justice ".

6  
7 And there is one final authority that I want to open to the Tribunal. It's the  
8 next one John against Express Newspapers Limited and Others. This is Elton  
9 John, and he and a number of other people were suing their accountants, Price  
10 Waterhouse.

11  
12 And in this case, counsel was providing advice to Elton John and to his  
13 associates. Counsel's draft advice was stolen from his chambers and appears  
14 to have been passed on to Express Newspapers who took the view that it was  
15 interesting advice for reasons that don't matter very much but intended to  
16 publish it.

17  
18 And the Tribunal will see that notwithstanding. What is on any analysis the  
19 importance of preserving the confidentiality of that relationship in something  
20 that was self evidently confidential. The court took the view that for  
21 reasons that I'll explain in a moment, it wouldn't be appropriate to make an  
22 order for disclose of sources. And the central parts of all of this was set  
23 out in paragraphs 26 and 27. And I'll just say what I will respectfully  
24 submit it establishes, which is this that before any Tribunal or body or court  
25 makes an order it must be satisfied it's necessary to do so, and part of that  
26 is at all other avenues must be explored before you insist on an answer to the  
27 question. That's I think what emerges at paragraph 27.

28  
29 He contrasts the approach taken by two previous judges and said the Court of  
30 Appeal contrasts the approach taken by two previous judges and said "of the two

1 approaches Moorland J and Lindsay J it's the approach of Lindsay J which is to  
2 be preferred. Before the courts require journalistic break what a journalist  
3 regards as a most important professional obligation to protect a source a  
4 minimum requirement is that other avenues should be explored. It cannot be  
5 assumed that it would not be possible to find either the culprit or at least to  
6 narrow down the number of persons who could have been responsible. On  
7 weighing the conflicting public interest involved it is to be remembered that  
8 no certainty that ordering a journalist to reveal her sources would be any more  
9 successful. If it is not successful damage will be caused to the public  
10 interest and protecting confidential source in in compensating benefit to the  
11 competing public interest and protecting professional privilege ".

12  
13 Those are all of the authorities that I want to open to the Tribunal.

14  
15 If I may sum up the points that in my respectful submission mean that the  
16 Tribunal shouldn't in this case seek to direct Mr. O'Kelly to disclose his  
17 sources.

18  
19 They are as follows:

20 Firstly, there is the fact that it is impossible to tell what the consequences  
21 for Mr. O'Kelly of refusing to comply are. That's a point made in the Goodwin  
22 case. And unless Mr. O'Kelly can have a reasonable foreknowledge of what is  
23 likely to happen if he refuses. Well, then, the disclosure order isn't one  
24 that is in accordance with law as set out in article 10.

25  
26 Secondly. There's the fact that the confidentiality and the documents  
27 themselves can't be protected by disclosure order because for better or worse  
28 they've been disclosed. There's nothing to be gained by protecting the  
29 contents of these documents.

1 Thirdly. There's the fact that the Tribunal's only remaining legitimate  
2 interest is, I suggest, in seeking to find out who did give the documents to  
3 Mr. O'Kelly. That has to be less significant than a very similar interest  
4 that the Plaintiffs in Goodwin, Saunders, Garavelly and John had. In each of  
5 those cases there was, just thinking about the facts of the case. A far  
6 greater responsibility on the parts of the persons who must have disclosed the  
7 documents than there can have been in this case. And notwithstanding that the  
8 courts found that the interest in finding out who it was wasn't sufficiently  
9 great to merit a disclosure order being made.

10  
11 Fourthly. Then there's this point that. While I understand what the  
12 Tribunal says that the information that it circulates is confidential. And  
13 while I understand the sense in which the Tribunal is using that word. It's  
14 not confidential information, I respectfully submit in the classical sense of  
15 that word. It's not information that is for the most part intended forever to  
16 remain under wraps and never to be exposed to anybody. After all the tribunal  
17 considers the nature of the information, the documentation that was used here  
18 by Mr. O'Kelly. One part of it was a statement that was circulated with a  
19 view ultimately to being use in the evidence.

20  
21 The other part, as I end stand it consisted of documents that composed part of  
22 a brief for a forth coming hearing of the Tribunal, which of their nature  
23 again, are intended in due course to be used in the public.

24  
25 So there is a difference in quality between the sort of information that arises  
26 in many of these cases and that even then didn't justify a disclosure order and  
27 the sort of information that is available in this case.

28  
29 Then the fifth point that I make. While I heard Mr. Gallagher say that  
30 persons to whom the documentation has been sent have been written to and each

1 of them has protested their innocence. That I respectfully submit appears to  
2 be the extent of the investigative steps that the Tribunal has carried out.

3  
4 Certainly on the basis of the John case in particular. It would be  
5 inappropriate to ask anybody to reveal their sources until very extensive  
6 investigation has been carried out that wouldn't involve asking a journalist to  
7 reveal his or her sources and I'm sure the Tribunal can think of significant  
8 steps that might be carried out in that regard in this context.

9  
10 Lastly, there's a mentioned in the John case again. The reality here is that  
11 the Tribunal has been informed and certainly my instructions are that  
12 Mr. O'Kelly in any event doesn't intend to answer the question. So, an order  
13 directing him to disclose will not in any event obtain the information that  
14 Tribunal requires. In saying that. I don't mean to be in any way rude to  
15 the Tribunal but it's a fact of this case that come what may, the information  
16 isn't going to be disclosed by Mr. O'Kelly. So the consequences for him are  
17 simply negative ones for him without any compensating benefit coming to the  
18 Tribunal. And the Tribunal has heard Mr. O'Kelly's evidence and it may form  
19 its own judgement as to whether I am right in that. I respectfully submit  
20 that I almost certainly am that no good will come to the Tribunal of making  
21 that order.

22  
23 Those are my respectful submissions. Founded as they are largely as they are  
24 upon the 2003 Act in my submission, radically changes the way in which the  
25 Tribunal has to approach its interpretation of the law in relation to  
26 privileges.

27 Thank you, Chairman.

28  
29 CHAIRMAN: Thank you.

1 MR. GALLAGHER: I was going to suggest a very short break and I mean literally  
2 for two minutes perhaps.

3  
4 CHAIRMAN: All right.

5  
6 MR. GALLAGHER: Thanks.

7  
8 MR. McCULLOUGH: Could I ask the Tribunal to consider one thing.

9  
10 Mr. Dinan is in very serious difficulties tomorrow. He will of course consult  
11 with his lawyers and with the other people with whom he has to consult about  
12 the issue. Can I take it that his presence tomorrow isn't required to say  
13 what the attitude of the company is. It wouldn't seem to advance matters for  
14 him to be present to say that.

15  
16 CHAIRMAN: Well I just want to discuss about whether we will be sitting  
17 tomorrow. So if you just wait for a few minutes until we come back.

18  
19 MR. McCULLOUGH: Certainly.

20  
21 CHAIRMAN: I'll deal with that.

22  
23 THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND  
24 RESUMED AS FOLLOWS:

25  
26 CHAIRMAN: What we have decided to do, Mr. McCullough. Mr. Gallagher may  
27 want to reply for a short while. And then we won't sit tomorrow. It's not  
28 realistic. We are going to have to read a lot of what you've referred to.  
29 And so we're going to suggest that we would sit on Friday, if that suits, at,  
30 say, 10:45.

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Sorry. 11:00 I'm told if that suits. And Mr. Dinan and Mr. O'Kelly obviously wouldn't be required until then. And hopefully whichever way the matters going we would deal with it between 11:00 and lunchtime on Friday.

MR. McCULLOUGH: Thank you, Chairman. It's Mr. Dinan I'm thinking of. I'm just wondering how genuinely necessary his attendance is.

CHAIRMAN: We're keen to pursue the question of an undertaking because whatever about what may have happen in the past. We're concerned about the future. So we would be keen. Mr. Dinan has said that subject to legal advice. That he wished to take legal advice and also check with his shareholders. So presumably that can be done before Friday.

MR. McCULLOUGH: Oh absolutely. Even the gap until Friday would be useful about that. Let's say just for instance that Mr. Dinan and the company says we're not willing or we are willing to offer an undertaking, I'm not sure much is served by having him being here to say that as opposed to me being here.

CHAIRMAN: The alternative is Mr. O'Riordan. It's a matter for yourselves. We would be keen that whoever is, whoever either refuses or gives an undertaking has full authority to make that decision for the company.

MR. McCULLOUGH: Thank you, Chairman

CHAIRMAN: All right. Mr. Gallagher.

MR. GALLAGHER: Chairman, members of the Tribunal. I outlined earlier today the decisions of the Court of Criminal Appeal in the O'Kelly case and the

1 reiteration of the judgement of Mr. Justice Walsh in that case in the Catherine  
2 Nevin decision. I don't know propose to open them any further.

3  
4 In relation to the Goodwin case, and to the Act of 2003, to which My Friend has  
5 referred. I accept of course that this new legislation, this new Act has  
6 consequences for the interpretation of law in this jurisdiction. But I say  
7 that the Goodwin case is one that can and should be distinguished on its facts.

8  
9 I say that when one looks at the background to this case and to the three tests  
10 to be, the three pronged test which Goodwin suggested should be applied. That  
11 the Tribunal will be satisfied that because there have been flagrant and  
12 repeated disclosures of confidential information over a long number of years  
13 and that it is reasonable to believe that the disclosure of this information,  
14 this confidential information. Information which has stated and has been  
15 treated by the Tribunal as being confidential and which indeed in the case of  
16 Mr. Campion's statement bore the word confidential on its face. That the  
17 disclosure of this information to journalists is concerned not with assisting  
18 journalists in their investigative role or in their watchdog role but is  
19 intended to damage the work of the Tribunal, to hinder the Tribunal in its  
20 work, to prevent and discourage or at least discourage people from cooperating  
21 with the Tribunal. And it is the publication of such material and the  
22 publication of material in this case clearly is contrary to the public  
23 interest. And was done and I don't say this in any, inappropriate way, and I  
24 don't intend it, I recognise the excellent work that Mr. O'Kelly has done in  
25 other situations.

26 But Mr. O'Kelly here was simply replicating and producing material that had  
27 been obtained by the Tribunal in the course of its work. It was a form, in a  
28 sense, and again I don't mean any disrespect. It was a form of plagiarism of  
29 the work and investigative efforts of the Tribunal. And it was published in  
30 the newspaper I suggest, for the purpose of circulation. It is part of the

1 wall of circulation. And that is the reason there has been a reluctance by  
2 newspapers in this country to give any undertaking not to produce material that  
3 is generated by or secured by the Tribunal.

4  
5 This material would have become public in due course but the Sunday Business  
6 Post in this case was not prepared to wait until that happened. It had what  
7 it regarded as a scoop. And having obtained a scoop and having published the  
8 material, I would suggest, for commercial interests, it seeks to hide behind  
9 what is called and generally described as journalistic privilege.

10  
11 I say that there is no journalistic privilege in this case. And there is no  
12 provision similar to the provision of the Contempt of Court Act 1981 as there  
13 is in the UK.

14  
15 But there is certainty as to the law. And that certainty of the law is to be  
16 found in the pronouncements of the Court of Criminal Appeal.

17  
18 The legitimate aim that the Tribunal seeks to pursue is the aim of identifying  
19 those, that individual or those individuals who for years have been  
20 endeavouring to frustrate the work of this Tribunal. And whose efforts have,  
21 despite the best efforts of this Tribunal, continued up to the present day.  
22 These efforts have included the reporting of the leaking of confidential  
23 information to the Gardai and the carrying out of the investigation that I  
24 described earlier today over a period of four months involving many, many  
25 Gardai. And it is note worthy that the journalists concerned or the vast  
26 majority of them took the view that they weren't going to answer any questions  
27 put to them by the Gardai.

28  
29 It is suggested by My Friend that it is impossible for Mr. O'Kelly or indeed  
30 his other clients to tell the consequences of his failing to disclose the

1 source of his, of the documentation. I suggest that is incorrect. He knows  
2 that if he hinders or obstructs the Tribunal. And this has been pronounced on  
3 many occasions by the Tribunal. That it is an offence in law. And the  
4 maximum penalty can be imposed are set out in the legislation that I referred  
5 to earlier today.

6  
7 So anybody who hinders or obstructs the Tribunal or fails or refuses to answers  
8 questions legitimately put to them in accordance with the provisions of the  
9 acts, commits an offence in circumstances where they may be liable to the  
10 penalties imposed by the legislation as amended by Section 3 of the 1979 Act  
11 and Section 9 of the 2002 Act.

12  
13 Now, it is a matter for the Tribunal to consider whether one of the reasons  
14 perhaps Mr. O'Kelly destroying the documentation was that he would not be in a  
15 position to produce it. He deliberately put himself into a situation where he  
16 could not produce the material, that he was summoned to produce.

17  
18 The second point that I want to make in relation to the Goodwin case and the  
19 manner in which I say it can be distinguished. Arises because the fact that  
20 in the court in the Goodwin case was strongly influenced by the fact that there  
21 had been an effective injunction in place, that prevented the information  
22 coming into the public domain. I say that in the case of this Tribunal its  
23 attempts and its continuing attempt to prohibit the disclosure of names has not  
24 been effective. And therefore it is, in my respectful submission, necessary  
25 for the Tribunal to require the production of sources in the public interest,  
26 so that the individual or individuals who have released material which they  
27 knew to be confidential which they got in circumstances of confidence would be  
28 identified.

29  
30 I should say that for those reasons in summary I say that the Goodwin case can

1 and should be distinguished. I don't propose to go into it in any great  
2 length because I know that it is matter that the Tribunal will want to read and  
3 it is a very lengthy judgement and it would be inappropriate for me to start  
4 answering it in any great key detail at this stage.

5  
6 The second point that was made by My Friend was that the confidentiality cannot  
7 be preserved as the documents have been destroyed.

8  
9 Well that may be. It may be that certain material in, certain information has  
10 been disclosed. But confidentiality can be preserved insofar as other  
11 individuals are concerned, individuals who might be tempted to release  
12 confidential information to journalists.

13  
14 And again, I say that the material is confidential. It's stated to be such,  
15 it's treated to be such. And whilst I don't want to get into it, in any  
16 detail. I would prefer the Tribunal to the provisions of the Officials  
17 Secrets Act which provide that, defines official information as meaning any  
18 secret official code etc. or document or information which is secretive or  
19 confidential or is expressed to be either and which has been or which has been  
20 in the possession of the custody control or holder of a public office to which  
21 he has are had access. And public office would include a Tribunal set up by  
22 the Oireachtas. I would refer the Tribunal to Section 2 of that Act.

23  
24 Apart altogether from that Act. I say that the Tribunal is entitled to set up  
25 its own proceed procedures. It has decided. It set out its protocol. And  
26 I have taken the Tribunal to the various sittings that were held -- the various  
27 rulings and decisions that were made and the various attempts that the Tribunal  
28 made to identify persons who were hindering and obstructing the Tribunal by  
29 deliberately leaking material over the past number of years.

30

1 And finally, I should say that it is of considerable significance that the  
2 European court of first instance on the 15th of October 2004 in the case of  
3 Tillack in the Commission of the European Communities have delivered a  
4 preliminary ruling. The effect of which is to effectively set aside the  
5 Goodwin decision.

6  
7 I don't have details of that ruling in the first instance. But I can tell the  
8 court for example the EU Constitution of which we down loaded a portion of it  
9 describes it as follows. It's on page 598. "An EU court has rejected a case  
10 brought by a journalist concerning the protection of journalistic sources.  
11 The European Court on the 1st inst on Friday the 15th of October rejected an  
12 application for interim measures by Hans Martin Tillack which would have meant  
13 that possessions of his, seized earlier in the year by Belgian police would not  
14 be allowed to be inspected ny the EU's Anti Fraud Office. Mr. Tillack an  
15 investigative journalist working for the magazine brought the case against the  
16 European Commission on the grounds that if Olaf for which it is responsible is  
17 allowed to inspect the material seized by the police then his sources would be  
18 compromised."

19  
20 I don't wish to detain the Tribunal any more than that except to refer it to an  
21 article by Jeffrey Titford, a commentary on that. He's an MEP in the European  
22 Parliament. Normally, I wouldn't refer to or rely on this. In the  
23 circumstances I haven't had an opportunity of getting the ruling. I think  
24 it's of assistance to the Tribunal. And I'll read it very briefly just the  
25 first two paragraphs.

26  
27 "On the 15th of October the European Court of First Instance threw out a case  
28 brought by journalist Hans Martin Tillack in which he sought to prevent the  
29 European Commission from examining his records. In so doing, the Court has  
30 kicked aside 50 years of international case law. And it has shown that the

1 European Court is now perfectly willing to overrule the Court of Human Rights.  
2 This non-EU Court has until now, been seen as the final arbiter on human  
3 rights. The precedent that the ruling sets is astounding. It gives the  
4 commission the power to start investigating any of its myriads of abuses.  
5 Mr. Martin Tillack has written a series of heart hitting magazines etc. etc.".

6  
7 All I want to do is to draw the attention of the Tribunal to the fact that as  
8 recently as last month or the month before last, there has been a decision of  
9 the European Court of Justice which receive perceived to have the effect of  
10 overruling Goodwin. And of course in any event, we say that that Goodwin is  
11 distinguishable on the facts of this case.

12  
13 CHAIRMAN: Well, sorry, I didn't get that last ....

14  
15 MR. GALLAGHER: Sorry. I say that the facts here are distinguishable from  
16 Goodwin and that in any event, the Tillack case seems to have effectively  
17 overruled that or has the effect of over ruling. And if not overruling  
18 certainly a departure from. I regret that I don't have any more details of  
19 that decision but I'm sure they can be obtained. Mr. McCullough, asked what  
20 good would come to the Tribunal if the sources should be revealed. I think  
21 that that is self evident I would suggest.

22  
23 The Tribunal would then be able to deal with the persons who are hindering and  
24 obstructing the Tribunal and are endeavouring to undermine the work that the  
25 Tribunal is doing.

26  
27 I'm aware that the Tribunal is pressed for time and I don't wish to say  
28 anything further at this stage. Thank you.

29  
30 CHAIRMAN: All right. Friday at I think 11:00. Thank you.

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THE TRIBUNAL THEN ADJOURNED UNTIL FRIDAY THE 3RD OF  
DECEMBER 2004 AT 11:00 A.M..

