

1 THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 26TH FEBRUARY 2003  
2 AS FOLLOWS:

3

4 CHAIRMAN: Good morning everyone.

5

6 MR. GALLAGHER: Good morning.

7

8 CHAIRMAN: When you are ready.

9

10 MR. REDMOND: Good morning, Chairman, Mr. Redmond on behalf of Mr. Dunlop.  
11 Before the cross-examination of Mr. Dunlop resumes I have a brief submission to  
12 make that transpired yesterday in the course of cross-examination of Mr.  
13 Dunlop.

14

15 It arises in the following circumstances: When Mr. O'Higgins made his  
16 submission to the Tribunal castigating the Tribunal for the manner in which it  
17 was conducting itself, he said inter alia at page 11 on Day 350: "Mr. Cosgrave  
18 contends this Tribunal has material which effects the credibility of Mr.  
19 Dunlop. He contends he is entitled to this material and its retention is  
20 unlawful. Now, to some extent, Mr. Chairman, this is the reverse side of the  
21 coin, because we are saying, in essence, if the Tribunal will not use the  
22 material, would you at least give it to us so that we can use it because it is  
23 abundantly clear to us that this Tribunal does have information which adversely  
24 affects Mr. Dunlop's credibility or is capable of it, or certainly raises  
25 questions about it."

26

27 The manner in which the cross-examination was conducted yesterday was that with  
28 no advance notice to the Tribunal, with no submission of the relevant cheque,  
29 Mr. O'Higgins plucked a cheque for 2,500 pounds payable from Frank Dunlop &  
30 Associates to Liam Cosgrave literally like a dead rabbit out of a hat. It had

1 not been disclosed in advance. So, the very castigation of the Tribunal which  
2 material affected the rights of Mr. Cosgrave appears to be something which  
3 Mr. Cosgrave's legal team are quite willing to do against Mr. Dunlop without  
4 giving him any advance notice in relation to this particular situation.

5  
6 The second aspect of my submission relates to the suggestion by Mr. O'Higgins  
7 and the demand for an apology in circumstances where it had been suggested by  
8 Mr. Dunlop that a cheque had been made payable to Messrs. Egan Cosgrave &  
9 Muldowney. Last late night the Tribunal circulated a cheque in the sum of  
10 1,815 pounds, which was made payable to Messrs. Egan Cosgrave & Muldowney.  
11 This was never acknowledged by the legal team for Mr. Cosgrave. It was never  
12 put to Mr. Dunlop. It was put in bald terms that there was never any cheque in  
13 any amount made to Egan Cosgrave & Muldowney and an apology was demanded. My  
14 respectful submission, Mr. Chairman, is that it appears whilst on the one hand  
15 Mr. Cosgrave demands fair procedures there is clearly no intention that the  
16 same privilege will be extended to Mr. Dunlop.

17  
18 I am further informed by Mr. Gallagher that there may be further documentation  
19 in relation to the cheque for 1,815pounds, which is due to be circulated later  
20 this morning. I would submit, Mr. Chairman, that it really would be  
21 appropriate for Mr. Dunlop and his advisors to have sight of such documentation  
22 before the cross-examination continues.

23  
24 That is the end of my submission, Mr. Chairman.

25  
26 CHAIRMAN: Mr. Gallagher.

27  
28 MR. GALLAGHER: The Tribunal will be aware that yesterday evening after the  
29 close of business, after the close of business in this room the Tribunal  
30 considered certain documents and directed that they should be circulated.

1 The -- one such document was circulated and the remaining documents which the  
2 Tribunal directed should be circulated will be circulated this morning. They  
3 were not circulated, I think, because I -- well, I think it was my  
4 responsibility for seeing that they were circulated and I didn't do so.

5  
6 In any event the remaining documents are being circulated this morning. I  
7 think they will be down here within the next ten or 15 minutes. I had thought  
8 that they had been circulated and discovered just before I came here that they  
9 had not and I'm arranging to have them circulated now as the Tribunal directed.  
10 It is a matter entirely for the Tribunal what it wishes to do in the  
11 circumstances and whether it wishes to make any comment or observation on what  
12 my friend Mr. Redmond has said or whether it wishes to hear Mr. O'Higgins --

13  
14 MR. O'HIGGINS: I would wish to be heard in due course.

15  
16 CHAIRMAN: Just a minute, not two together, please. Sorry, my colleague was  
17 talking.

18  
19 MR. GALLAGHER: Yes, I said that it is a matter entirely for the Tribunal  
20 whether it wishes to make any comment or observation on what Mr. Redmond has  
21 said or whether it wishes to hear Mr. O'Higgins on the matter.

22  
23 CHAIRMAN: Mr. O'Higgins must be heard before anything is said by anybody  
24 with due respect. Now, secondly, how long approximately do you think it would  
25 take to have the circulation complete?

26  
27 MR. GALLAGHER: I think ten or 15 minutes.

28  
29 CHAIRMAN: Now, Mr. O'Higgins, first of all, we are going to rise to enable  
30 the circulation to be carried out.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

MR. O'HIGGINS: Yes, Mr. Chairman, certainly.

CHAIRMAN: In the interim, I don't want in any way to appear to reduce your capacity to respond. Do you wish to respond now?

MR. O'HIGGINS: There were certain observations --

CHAIRMAN: We don't want to get this into a dog fight. I don't want any dog fights now.

MR. O'HIGGINS: No, certainly not, I will not be fighting dogs with anyone. At the same time he is under a misconception there are parties at hearing here but yet as some of his some of his observations are directed at legal teams we should set the record straight on that.

CHAIRMAN: I accept that.

MR. O'HIGGINS: I will deal with it when I have seen all the documentation and I won't be long.

CHAIRMAN: I think the better thing to do is we will rise to enable the documentation to be circulated so we have this on an even pitch. The decision to circulate is the decision of the Tribunal, not of any persons or body.

MR. O'HIGGINS: Yes, Mr. Chairman.

1 THE TRIBUNAL RESUMED AFTER THE SHORT ADJOURNMENT AS FOLLOWS:

2

3 CHAIRMAN: Now, Mr. O'Higgins, before we go any further do you wish to make  
4 any submissions?

5

6 MR. O'HIGGINS: I do.

7

8 CHAIRMAN: Then I think they had better be completed before we decide and  
9 adjudicate upon the entire matter.

10

11 MR. O'HIGGINS: I am sorry.

12

13 CHAIRMAN: Your submissions should be concluded and considered in the  
14 adjudication, we will deal with after.

15

16 MR. O'HIGGINS: Very good Mr. Chairman. Do you want me to make the  
17 submission now?

18

19 CHAIRMAN: Yes.

20

21 MR. O'HIGGINS: Very good. I am making a submission as I understand it  
22 really on two things. Prior to the commencement this morning Mr. Redmond  
23 raised certain matters and I think it would be appropriate that I would reply  
24 to that, but subsequent to Mr. Redmond making various observations to the  
25 Tribunal the Tribunal indicated that it would be appropriate that it would rise  
26 and certain documentation would be circulated to the parties, and we have had  
27 an opportunity of seeing that documentation and I would have some observations  
28 to make in respect of that, and subject to the Tribunal saying otherwise that  
29 is -- that is what I am going to make my submission upon.

30

1 CHAIRMAN: Certainly.

2

3 MR. O'HIGGINS: Very good. Mr. Chairman, I have to say quite frankly --

4

5 CHAIRMAN: I beg your pardon.

6

7 MR. O'HIGGINS: I have to say quite frankly on behalf of my client that we  
8 are terribly taken aback that material is being disclosed to us in the fashion  
9 that it is, and let me put that into context. We made an application on the  
10 very first day this module opened looking for disclosure of certain material.  
11 Subsequent to that we wrote many many letters which were all opened and read  
12 onto the record in respect of an application we made for a number of reliefs,  
13 including a renewed application in terms of particular disclosure that ran for  
14 a day and a half and we got a ruling from the Tribunal the following Tuesday in  
15 respect of that.

16

17 Now, the law on this is terribly well settled it has been opened by  
18 Mr. Gallagher, it was -- it has been relied upon by all parties making  
19 submissions and replies, as to what the duty of the Tribunal is to disclose.  
20 In essence, one could pair it down to this: It is Mr. Justice Costelloe's  
21 statement in respect of Goodman International that when you are accused of  
22 something, and my client is in here accused of the most serious conduct  
23 possible in terms of his professional and personal reputation, that you are  
24 entitled to be put in the same position as a person accused of a criminal  
25 offence.

26

27 Now, that is the law, in my submission, but one poses the question as to why  
28 that is the law and it is the law for a very good reason, it is to enable a  
29 person, a party, appearing at this Tribunal to be put into a position where  
30 they can instruct legal advisors, their legal advisors can take stock of the

1 situation, the legal advisors can prepare a case, a solicitor can prepare a  
2 brief, counsel can consider it, and the most important input which the legal  
3 team has into the whole process is probably the cross-examination of the person  
4 levelling the accusations. Of course it is absolutely, in my respectful  
5 submission, essential that counsel be put in a position to properly  
6 cross-examine the antagonist, the person making the allegations. I would have  
7 thought that that is a very basic situation and a very very basic submission.  
8 There is nothing novel in it. It is there. And it is there for a reason; to  
9 ensure fairness. To ensure that there is fairness in the system. And again  
10 without offer stating the obvious the reason why it has to be fair is because  
11 whether you are a party, whether you are representing the Tribunal, whether you  
12 are a member of the Tribunal, everybody must strive to do justice.

13  
14 I am making a submission on behalf of my client, Mr. Cosgrave, that he is not  
15 receiving justice. Let me illustrate it, this morning we came in here and a  
16 matter was raised by Mr. Redmond, which I will address the Tribunal on briefly,  
17 the Tribunal ruled that certain documentation should be made available to us  
18 and of course everybody thought that the documentation that would be disclosed  
19 to us would be in some way or another related to the matter that Mr. Redmond  
20 had raised. Was that the case? No, it wasn't. Because included in that  
21 documentation were certain bank records completely unrelated to the matter  
22 which has arisen this morning.

23  
24 Now, let me just set out on the transcript how it has come about that those  
25 bank records were made available to us this morning. It comes about in the  
26 following circumstances: On the opening day we made a submission, on a  
27 subsequent occasion we made a lengthy submission, in the intervening period we  
28 wrote a number of letters. We canvassed for bank records, the reply we got  
29 from the Tribunal was: That we have done a bank reconciliation vis-a-vis Mr.  
30 Dunlop's bank records and his allegations and no connection is established

1 between your client and Mr. Dunlop's allegations. That was the information  
2 that we got, that was the justification for withholding the material sought.

3  
4 We went as far, to be so bold, if I might use that description, in the course  
5 of making the submission seeking those bank records, to say if they were  
6 refused we would demonstrate in cross-examination, because we wish to hold it  
7 for cross-examination, why in our respectful submission it was in error to  
8 withhold those records. We gave full advance notice. That was totally flagged  
9 to this Tribunal.

10  
11 Now, to come back to the point that I made. The Supreme Court has indicated in  
12 the Abbeylara case, and in other cases, the critical importance of  
13 cross-examination. And cross-examination is reduced, in my respectful  
14 submission, to zero, to nil if a person is not in a position to properly  
15 prepare for the cross-examination. Now, as a result of reading widely around  
16 this case for preparing our client's case for cross-examination, we were in a  
17 position vis-a-vis Mr. Hanratty's examination of Mr. Dunlop two years ago to  
18 demonstrate on the transcript that monies of 55 and 10,000 pounds were drawn on  
19 12th November. That was regarded by us as critical, because Mr. Dunlop had  
20 said he had met our client on the 11th and if he didn't have money until the  
21 12th that was obviously something in his favour. And as counsel tasked with  
22 preparing our client's case we entered upon the cross-examination for the  
23 purpose of highlighting that point. When we came to it, we put it to him that  
24 we had established from a particular source he had not got the money until the  
25 12th and Mr. Dunlop seemed to agree in broad terms that that was so. We  
26 caveated by saying we did not have the bank records but we had constructed that  
27 from another source. Over the luncheon interval for the purpose of being  
28 responsible we sought clarification from counsel from the Tribunal that that  
29 assertion was correct. That clarification was forthcoming and we put it on the  
30 record in the afternoon that we had received the clarification and our

1 information appeared to be correct.

2

3 Now, subsequent to that, i.e. over the week when Mr. Dunlop was not available  
4 to give evidence, we wrote a letter to this Tribunal and in the letter we  
5 reiterated our case as to why we now were entitled to see the said bank  
6 records. We spelt it out in detail. We indicated that if the records would  
7 not be forthcoming we would make an application to the Tribunal.

8

9 We were going to make that application yesterday, however, it was indicated to  
10 us that the Tribunal was going to write back, so as a matter of courtesy we  
11 withheld our application and we come in here this morning and we see appended  
12 on to this issue about this cheque, which I am going to deal with in a moment,  
13 we get the bank records staple it on. No letter, no nothing, no explanation.  
14 And when we go to read the records we in fact see, yes, certainly the bank  
15 statement says what we said it said, but the withdrawal slips are actually  
16 dated 10th November. In other words, the money was apparently inferentially  
17 withdrawn on 10th but not recorded on the statement until the 12th. Now, what  
18 does that mean? Well, it means a number of things. On the lowest scale it  
19 means we wasted a lot of time on that point with Mr. Dunlop. But much more  
20 seriously our cross-examination was compromised, and in our respectful  
21 submission unfairly compromised, because the information that we sought,  
22 information that was clearly relevant, information that by its disclosure  
23 indicating its relevance this morning was not disclosed to us and the effect of  
24 its non-disclosure was to send us off on a bung steer.

25

26 Now, I am reiterating this for the third or fourth time and I apologise for the  
27 repetition. Cross-examination is essential, and it is not possible to  
28 cross-examine without proper preparation. I say respectfully the failure to  
29 make that material available to us when it was clearly relevant, in my  
30 respectful submission, was not justified. I am pointing up on the record that

1 it has damaged the case that we are bringing on behalf of our client and I lay  
2 firmly and squarely that damage at the door of this Tribunal, because it has  
3 not, in my respectful submission, treated us fairly. That is the first point.  
4

5 Now, the second point I want to make is this: The relevance or otherwise, the  
6 potential relevance or otherwise, of this cheque arises from the fact that 15  
7 days ago, years after the event, we were furnished with the statement from Mr.  
8 Dunlop in respect of which he alleged that he had made an election contribution  
9 through the firm of solicitors as a cover, Seanad Election contribution and  
10 there had been -- 1,000 cash had been given, that was the allegation. The  
11 letter to which I referred earlier when the Tribunal said we have examined all  
12 records and no link is established, indicates, in my respectful submission,  
13 that the Tribunal quite properly was posing a question as to whether there was  
14 any confirmation of any allegation of payment and that was a proper question to  
15 address and it is a proper issue to identify. So, there can be no debate in my  
16 respectful submission that the Tribunal has to properly consider that.  
17

18 So, the position is, Chairman, once that statement was in the hands of this  
19 Tribunal, and it contained a very serious allegation in it, it was purporting  
20 to say that a payment had effectively been run through a firm of solicitors as  
21 some part of a cover, if the Tribunal was in possession of any information, and  
22 for reasons which I will make clear on submission, but more properly in  
23 evidence, because that is where it ought to be done, not through counsel, this  
24 cheque does not in fact support that allegation at all. Leaving that aside, if  
25 it even has the potential for supporting the allegation it ought to have been  
26 disclosed, the fact that it was disclosed this morning simply closes off any  
27 debate about that. And the Tribunal has all of this information on hard disc.  
28 This is not a case of going into a back room and saying is it in box 10 or box  
29 80. That information can be accessed on the Tribunal's hard disc by simply  
30 typing in the search phrase Egan Muldowney, or cheque, or something of that

1 sort, that material can be called up in an instant. In my submission was  
2 called up in an instant and was done so before close of business here  
3 yesterday.

4  
5 Now, I am objecting in the strongest possible terms that I am expected to  
6 conduct a cross-examination in circumstances on material which has the  
7 potential to be relevant is not disclosed to us. In my respectful submission  
8 it is quite wrong. I actually agree with very many of the submissions made by  
9 Mr. Redmond, I am going to address that in due course, we are on the same side  
10 absolutely as far as that is concerned. But in my respectful submission it is  
11 absolutely wrong and, if I might also say, it is not the first time that we  
12 made this complaint that the Tribunal has dealt with us in a way which we say  
13 is not fair.

14  
15 This Tribunal asked, or directed rather, that people should make written  
16 submissions to the Tribunal. We did that in January, We wanted to ventilate a  
17 point and as it turned out on that occasion the point was strongly in  
18 Mr. Cosgrave's favour. We didn't get an opportunity to argue the point or make  
19 submissions on it, the Tribunal simply came out and ruled in Mr. Cosgrave's  
20 favour. We made no reference to it at the time. Subsequently we did make  
21 reference to it, because we had written in a letter we are on our guard about  
22 setting out our case quite fully and we had admit we had gone to the other  
23 extreme and confined our submissions to generalisations and in the course of  
24 the generalised submission the Tribunal purported to make, in effect, what were  
25 rulings and we objected at that juncture, we made reference to the fact that on  
26 a previous occasion we had written in the full version and we had not had an  
27 opportunity to argue it and we were disappointed that that had occurred and  
28 disappointed that we had to say on the record that the thing was being dealt  
29 with in that way.

1 But nothing has changed, in my submission, because we came in here yesterday to  
2 make a submission on the bank situation and we were told a letter was going out  
3 to us. We held firm, and what happens this morning? We find it simply thrown  
4 in, lumped in and appended in what might be perceived to be another matter  
5 which is occupying Mr. Cosgrave. In my submission, Chairman, I say this with  
6 the greatest of regret, we are not being taken seriously, the rules and  
7 procedures which apply, in my respectful submission, I say so with the greatest  
8 respect, are not being applied to Mr. Cosgrave. What has happened here this  
9 morning, in my respectful submission, is a very very strong indication that  
10 this Tribunal has to reassess how its business is being done with a view to  
11 reassessing, in fact, whether all the material which is capable of being  
12 relevant ought to have been disclosed, that our applications to see it are  
13 reasonable applications and that it is necessary for us to have it for the  
14 purpose of cross-examination.

15 Now, to reply briefly to the points made by Mr. Redmond. First of all, I am in  
16 agreement with 95 percent of what Mr. Redmond says. Mr. Redmond opened a  
17 particular quotation, submission, which is made by us. He went on to suggest  
18 that in some way or another we were selective and we only wanted that principle  
19 applied to us but not to anyone else. He is incorrect on that. Be that as it  
20 may, the submission which he opened to you, saying that if there was material  
21 that are capable of undermining credibility of anyone that should have been  
22 made available to us, it doesn't in the light of anything that has transpired  
23 remotely or in any way embarrass us because we are not arguing points in a  
24 case, we are arguing legal principles and the principles are much greater than  
25 any point that can be made by a litigant, witness, a counsel or anything else.  
26 The principles transcend that.

27  
28 Mr. Redmond is equally wrong in saying that there is any responsibility to be  
29 visited upon the legal team, we are not parties to this. We are here to  
30 represent a party to the best of our ability. It is wrong, in my submission,

1 to direct his attention onto the legal team. But there is this one great irony  
2 in what he says, he is absolutely right, in my submission, in adopting the  
3 submission we made to the Tribunal as saying that that is a correct statement  
4 of a party to the proceeding. He is ironically, in my respectful submission,  
5 quite wrong, although I fully accept unintentionally, to say that if because of  
6 non-disclosure all the questions are not asked in the order or the way they  
7 might be asked that in some way or another responsibility lies in the direction  
8 of a legal team, in this case this legal team. It doesn't in my respectful  
9 submission. The responsibility is directed at the Tribunal who have not made  
10 the material available.

11  
12 The only other observations I wish to make in respect of that are Mr. Redmond  
13 said the cheque which was produced yesterday was produced out of a hat, the  
14 cheque which was produced yesterday became relevant as a result of a statement  
15 which was made by his client 15 days ago. His client gave lengthy statements  
16 to this Tribunal in July and October of 2000. 15 days ago he elected to make a  
17 new allegation and that new allegation was that he had written a cheque for  
18 1,500 pounds at the time of the Seanad Election through the firm of solicitors.  
19 We were in a position to show that the only electoral contribution that was  
20 made at the time of the Seanad Election was in the sum of two and a half  
21 thousand made personally to Mr. Cosgrave.

22  
23 The presentation of this cheque, ultimately will be a matter for evidence and  
24 the Tribunal, does not in any way dilute that thesis. First of all, the cheque  
25 is not given during the Seanad campaign, we have produced that cheque. Mr.  
26 Dunlop has said, and I have no reason to doubt him on this because we had, all  
27 the time, the order, the time it was signed and everything else, the Seanad  
28 Election ran over a time span concluding 6th August. This cheque was dated  
29 19th September. It is a figure that includes that and we will be in a position  
30 to produce by evidence, and evidence is a proper way to do it, that services

1 were rendered.

2

3 That is my submission, thank you Mr. Chairman.

4

5 JUDGE MAHON: Mr. O'Higgins, could I ask you to clarify or deal more  
6 extensively with one of the points you made? You complained that the cheque  
7 for 1,800 pounds odd, this is the cheque made payable to Mr. Cosgrave's  
8 company.

9

10 MR. O'HIGGINS: To the firm of solicitors.

11

12 JUDGE MAHON: To the firm of solicitors. You complained, as I understand it,  
13 that you were taken by surprise in the sense that that cheque was produced to  
14 you only this morning.

15

16 MR. O'HIGGINS: Yes, Judge.

17

18 JUDGE MAHON: Can I suggest to you that surely this is something that would  
19 have been known to Mr. Cosgrave, I am talking about the surprise element?

20

21 MR. O'HIGGINS: What I would say about that, Judge, is this is an enormous  
22 brief, we are spanning over a ten-year period and in terms of having every bit  
23 of paper and every transaction and having it to the forefront of your mind it  
24 is -- one might say there is a form of constructive notice in the sense that a  
25 transaction was there, one has to be aware somewhere deep in the recesses of  
26 one's memory.

27

28 JUDGE MAHON: I accept that as a general statement, but in this particular  
29 case as you approach that particular issue in cross-examination you would have  
30 been aware that there was this cheque for a sum of around 1,500 pounds --

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

MR. O'HIGGINS: I was not aware, Judge.

JUDGE MAHON: -- as a result of statements made by Mr. Dunlop and so on.

MR. O'HIGGINS: Sorry, Mr. Dunlop's statement was that he had given 1,500 pounds plus 1,000 during the Seanad Election campaign. That applied our minds to, well, what contribution had been made for the campaign, during the campaign? And that's what highlighted the cheque for 2,500.

JUDGE MAHON: Are you saying you were not aware?

MR. O'HIGGINS: I personally had no knowledge of it, none, or junior counsel.

JUDGE MAHON: Or your solicitor?

MR. O'HIGGINS: Or my solicitor.

CHAIRMAN: Mr. Gallagher, in the light of the submissions that you have just heard do you wish to add anything to anything you said already this morning?

MR. GALLAGHER: Yes, I do.

The Tribunal is master of its own procedures. The Tribunal decided at the outset in order to try to get through the enormous amount of work it has to get through in some sort of intelligible way that it would operate in a modular way and would deal with financial records effectively at the end or at the latter stage if not at the end.

And it was for that reason that the Tribunal did not circulate all documents

1 which are available to it in relation to financial matters, did not do so at  
2 this time. It did circulate a limited number of documents and one of them,  
3 documents which I was asked about in the course of hearing and in which  
4 Mr. O'Higgins has mentioned in his submission was a document in relation to the  
5 lodgement and withdrawal of monies from Mr. Dunlop's account. I was asked that  
6 information on a counsel to counsel basis. I provided it on that basis. I did  
7 so by looking at the statement from the bank that related to those  
8 transactions. I did so believing that the statement accurately reflected the  
9 date on which the lodgement and withdrawals took place.

10  
11 Subsequently I became aware that withdrawals appeared to have taken place  
12 before the date stated in the statement and that, the Tribunal is aware of,  
13 documentation which has been circulated today which shows that. So, any  
14 information that I can convey to Mr. O'Higgins was done in good faith, it was  
15 done in the belief that it was accurate, and it was done on a counsel to  
16 counsel basis. It was not intended and there was no suggestion that that  
17 document had to be further circulated or dealt with. Certainly not at that  
18 time.

19  
20 Yesterday Mr. O'Higgins produced a cheque, which he put to Mr. Dunlop. That  
21 cheque had not been discovered to the Tribunal by Mr. Cosgrave. Certainly  
22 there is no reference to it in any of the affidavits that he has sworn, and  
23 whilst I'm arranging to have all the documents he produced physically gone  
24 through to see if it is possible that there is a reference or copy of that  
25 cheque included with the documentation it is my belief at this stage that such  
26 a document was not discovered. If Mr. O'Higgins can tell me otherwise I will  
27 of course accept what he said and will apologise in that respect.

28  
29 It, therefore, came as a surprise to me yesterday when the cheque was produced.  
30 And the Tribunal will be aware that at the end of business yesterday the

1 Tribunal, and I stress the Tribunal, directed that the documents which had been  
2 circulated yesterday evening and this morning should be circulated. The  
3 Tribunal did so I think because an issue had arisen in the course of  
4 cross-examination relating to that cheque and the Tribunal decided that in  
5 those circumstances the additional documents which they now directed should be  
6 circulated should be circulated. As I indicated through an inadvertence on my  
7 part yesterday evening only one of the documents was circulated and we arranged  
8 for the balance to be circulated first thing this morning, and they were  
9 circulated and they were accompanied by a letter.

10  
11 The letter which is on plain paper because of the time constraints, but will be  
12 followed up on official Tribunal notepaper and it states as follows, it is  
13 dated 26th February 2003, and as I understand it will be given to each party  
14 here and will be circulated to any party who is not present here today in the  
15 normal way. The letter says: "I refer to the above and enclose for your  
16 attention additional documents page numbers 4414 to 4419. Please note that  
17 pages 4416 to 4419 relate to documents 4412 and 4413, which were furnished  
18 under cover of letter dated 25th February 2003. The Tribunal has directed that  
19 the enclosed documents be circulated at this stage because of specific matters  
20 that have arisen in the course of cross-examination."

21  
22 This morning, Chairman, you made it clear just before you rose that the  
23 decision to circulate those documents was the Tribunal's decision.

24  
25 Mr. O'Higgins said, as I understood his submission, that a letter was written  
26 to the Tribunal yesterday morning, was faxed to the Tribunal yesterday morning,  
27 and that having been told by me that a reply was on its way from the Tribunal  
28 he desisted from making any application until that letter was received. I  
29 understand that that letter -- I am told, instructed that letter was sent  
30 yesterday, yesterday morning at quarter past 11 and was delivered to the legal

1 team in this room. That letter read as follows. "Dear Mr. Egan, the Tribunal  
2 has considered the letters -- the contents of your letter of 25th February 2003  
3 in relation to the above matter. The Tribunal rejects your request for the  
4 production of Mr. Dunlop's financial records at this time. The Tribunal  
5 believes that previous rulings of the Tribunal have dealt fully with similar  
6 applications on behalf of Mr. Cosgrave. If you wish to make a formal  
7 application and have a considered ruling on the issue you may make your  
8 application at 2 o'clock today." No application was made, but a cheque which  
9 had not been discovered by Mr. Cosgrave was produced and there was  
10 cross-examination on that cheque, and, as I say, the Tribunal considered that  
11 other cheques which might assist the Tribunal in arriving at a finding as to  
12 the truth, other documents were circulated as the Tribunal directed.

13  
14 I should say that in his affidavit of discovery Mr. Cosgrave said as follows in  
15 paragraph one: "I say that an order for discovery was made against me by the  
16 Chairman of the Tribunal of Inquiry (into Planning Matters and Payments) on the  
17 18th December 2000 to make discovery of all documents and records I have or  
18 have had in my power, possession or procurement which relate to any account  
19 held in my name or on my benefit or for my benefit or any account into which I  
20 have made lodgements of money whether held jointly or otherwise and whether  
21 held within or outside the State for the period 17th January 1980 to date. I  
22 make this affidavit from facts within my knowledge save where otherwise appears  
23 and where so appearing believe the same to be true."

24  
25 So, as I say, it is my belief that that affidavit of discovery or any other  
26 affidavit of discovery that was sworn by Mr. Cosgrave does not refer to that  
27 cheque and, as I say, and I repeat, I am arranging to have the documentation  
28 that was discovered by Mr. Cosgrave and the documents that were produced by him  
29 physically examined in case that cheque has before overlooked.

1 I should say also that I have not had an opportunity to consider the  
2 documentation and the correspondence that passed between the Tribunal and  
3 Mr. Cosgrave's solicitors, but I'm aware that following the writing of a letter  
4 by the Tribunal in the course of hearing Mr. Dunlop's evidence the Tribunal  
5 wrote on the 5th February 2003 to Egan Cosgrave and sought certain information  
6 from Mr. Dunlop, sorry from Mr. Cosgrave and that information to the best of my  
7 belief again, I say this without having gone through the file in detail, was  
8 not furnished. I should also say that the decision of the Tribunal to make --  
9 not to make documents available to Mr. Cosgrave and to anybody else at this  
10 time was taken for reasons of the orderly running of the affairs of the  
11 Tribunal, it was not intended and it has not been unfair to Mr. Cosgrave or  
12 anybody else, and indeed if the cheque in question had not been produced  
13 yesterday then the issue would not have arisen at this stage, although it would  
14 have, of course, arisen at the later stage, given part of the story and part of  
15 the documentation in relation to a particular matter that was produced without  
16 warning, without the Tribunal being aware of it, without the Tribunal having  
17 sight of the particular copy cheque and without having been alerted to the fact  
18 that this was going to arise the Tribunal decided that further documentation  
19 should be submitted in an effort to be fair to everybody and to assist it in  
20 the work it has to do.

21  
22 MR. O'HIGGINS: Mr. Chairman, would you let me reply briefly --

23  
24 CHAIRMAN: Just one moment. Are you finished?

25  
26 MR. GALLAGHER: Yes, thank you.

27  
28 JUDGE MAHON: Mr. O'Higgins what do you say to the point made by  
29 Mr. Gallagher that as far as he is aware this particular cheque was not  
30 discovered?

1

2 MR. O'HIGGINS: What I would say to you about that, Judge, the making of  
3 discovery orders, the terms of them, what was discovered and so forth, has long  
4 preceded my arrival in the case. I would not wish to at all talk off the cuff  
5 about it, I will take formal instructions about it. The Tribunal can rest  
6 assured we will give a very full response to anything outstanding so far as  
7 discovery is concerned. If it ought to have been discovered we will  
8 (inaudible) the sword on that and we will explain and apologise. If it ought  
9 not to have been discovered, and I am in possession of some information, that  
10 it may not be until I have full instructions I think it would be preferable for  
11 me not to say anything

12

13 CHAIRMAN: That is absolutely fair and proper in every sense of the word.

14

15 MR. O'HIGGINS: I would wish to say to Mr. Gallagher, however, Judge, in case  
16 there is any confusion about this the information Mr. Gallagher gave to us was  
17 100 percent accurate, and, of course, it was given in good faith and one is not  
18 suggesting anything to the contrary.

19

20 CHAIRMAN: I have no doubt that there is no mala fides on either side. I am  
21 quite clear about that. I want to solve the things in a proper, fair and  
22 appropriate manner. If there is any further information that can be  
23 forthcoming between now and ten past two, perhaps, you would be kind enough to  
24 get it to us as soon as possible. I do appreciate the problems involved in  
25 such a request. Likewise we will give this matter very careful attention  
26 between and now and ten past two. If there is any more information, perhaps,  
27 you would make it available through the appropriate sources.

28

29 MR. O'HIGGINS: Of course.

30

1 MR. GALLAGHER: Can I just say very briefly two things, Sir, the adequacy of  
2 the discovery has been the subject of on-going correspondence between the  
3 Tribunal and Mr. Cosgrave's solicitors, that is number one.

4  
5 The second is that it appears that there may be a document or a file rather in  
6 the offices of Egan Cosgrave, which may relate to the cheque for 18 hundred odd  
7 pounds that has been discovered. It may be there are ledger cards and other  
8 records in relation to that cheque and that apparent payment.

9  
10 Can I suggest to the Tribunal that it might invite Mr. O'Higgins or  
11 Mr. O'Higgins' client to arrange to have those documents made available to the  
12 Tribunal subject, of course, to Mr. Redmond and his client consenting to that  
13 course. If it doesn't then the Tribunal may wish to make an order for  
14 discovery, may be the Tribunal would wish to make an order in any event, there  
15 is no reason why the parties should not be invited in the first instance to  
16 furnish all those documents.

17  
18 MR. REDMOND: Mr. Chairman, just in response to Mr. Gallagher's request as to  
19 whether or not I would be consenting to that, I most assuredly would be  
20 consenting to that. I would, in fact, ask the Tribunal to go a little bit  
21 further though. I would also ask them in relation to any relevant file  
22 incorporated that there would be any appropriate ledger cards or VAT invoices,  
23 they should only refer to two singular documents in addition to those outlined  
24 by Mr. Gallagher but I think they would be significant and relevant

25  
26 MR. O'HIGGINS: We will see the file and I will advise my client, if an order  
27 is required the Tribunal can make one, it seems at this juncture to be  
28 premature.

29  
30 CHAIRMAN: I accept it would be premature at this stage, but I would

1 appreciate if you would expedite your consideration of the file and advise your  
2 colleagues, I will call it a voluntary compliance so the matter can be  
3 progressed. I want to make it quite clear that we are open to any attempt or  
4 any effort to bring this matter to a satisfactory conclusion. There is no  
5 doubt about that. I want to make that absolutely clear.

6

7 MR. O'HIGGINS: Very good, Chairman.

8

9 CHAIRMAN: We will rise until ten past two. We will rise now until ten past  
10 two.

11

12 THE LUNCHEON ADJOURNMENT

13

14

15

16

17

18

19

20

21

22 THE TRIBUNAL RESUMED AFTER THE LUNCHEON ADJOURNMENT

23 AS FOLLOWS:

24

25 CHAIRMAN: Mr. O'Higgins, before we deal with an interim ruling --

26

27 MR. O'HIGGINS: I can be of assistance.

28

29 CHAIRMAN: Have you progressed the question of --

30

1 MR. O'HIGGINS: I have, I have progressed it substantially, Mr. Chairman.  
2 First of all, on the issue of the file referred to, we have both of those  
3 files, we will make them available forthwith to the Tribunal and I confirm that  
4 the file as has been handed over are full and complete in their entirety, in  
5 the sense the file has been taken from the cabinet in the office, brought down  
6 here and has been transmitted without any redaction of any sort. In other  
7 words, whatever is in the office which is contained in two binders that will be  
8 made available to the Tribunal at four o'clock today.

9  
10 As far as the other issue of the cheque is concerned, Chairman, my instructions  
11 relating to that are as follows: Mr. Cosgrave swore two affidavits in June and  
12 July of last year. At the time those affidavits were sworn a copy of that  
13 cheque was not in his possession, I can confirm. And subsequently I believe  
14 the Tribunal did make an inquiry of Mr. Cosgrave, or may, in fact, even have  
15 preceded his filing an affidavit about whether he had a copy of cheques, and so  
16 forth, and my client replied on 17th December 2001, and indeed this letter was  
17 opened to the Tribunal in the opening statement, and the relevant paragraph is:  
18 "I am not aware whether any of the cheques were lodged to any bank account or  
19 whether they were cashed, but it is probable some were lodged and some cashed,  
20 these details would be available from Mr. Dunlop's bank." That was the  
21 position as of September 2001. And, of course, the position is, Mr. Chairman,  
22 that it is not a matter, (a) that was in my client's possession, or (b)  
23 ordinarily any way within his procurement, it is not his cheque, it is Mr.  
24 Dunlop's cheque. I don't think it would be unreasonable to say that he  
25 anticipated that when Mr. Dunlop disclosed a history of his cheque that any  
26 cheque made payable to him would have been made available to the Tribunal via  
27 that route.

28  
29 I would also point out that the bank account in respect of which it would  
30 appear part of this cheque was lodged was fully disclosed to the Tribunal in

1 his affidavit of discovery. The cheque came into his possession, I understand,  
2 some time in mid or late December and it arose in circumstances where  
3 Mr. Cosgrave was being pushed for more specific information and to make  
4 inquiries, and he made inquiries with his own bank as to whether they could  
5 assist him or not and in due course the bank produced the check. It was made  
6 available physically to us only very recently because we became interested in  
7 it in the light of the statement that was made 15 days ago, because at that  
8 stage it would appear to us to be fairly critical as to what was being alleged  
9 as being -- what was alleged occurred vis-a-vis the Senate elections of 1997  
10 that hitherto had not been an important part of our case or the case we had to  
11 meet.

12  
13 Notwithstanding all of that I accept that when the cheque came into our  
14 possession last December it ought to have been disclosed, because I think it is  
15 referable to the terms of the order of discovery, but I would just simply wish  
16 to say that that wasn't uppermost in our mind and it became uppermost in our  
17 mind only when the statement was made available to us 15 days ago. I would say  
18 as evidence to support any proposition that it was not being concealed or held  
19 back, in fact, we freely put it into the proceedings, but I do accept that it  
20 ought to have been disclosed and I apologise for that.

21  
22 CHAIRMAN: Do I understand correctly, and this is not a pejorative comment,  
23 that he did not include the cheque in documents which he had, but no longer has  
24 in his --

25  
26 MR. O'HIGGINS: I don't think that is right. When he swore the affidavit in  
27 June or July not only did he not have the cheque -- sorry, I take your point.  
28 He must have had it at some stage before he --

29  
30 CHAIRMAN: I just want to clarify.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

MR. O'HIGGINS: Before he lodged it. Again I would draw your attention to what he said on 17th September: "I am not aware whether any of the cheques were lodged to any bank account or whether they were cashed, it is probable some were and some weren't." He has been characterised as an individual who is a bit disorganised, unfocused and scattered and that is what we have been dealing with in attempting to get instructions on the matter. He is not a man who has photographic recall of instances, cheques or particularly amounts that were on cheques. And it was only after consultation among some of the lawyers here that pressure was put on him to try and find out more specific information and that is how the cheque came into his possession.

MR. GALLAGHER: Sir, I don't know whether you wish to hear me in relation to that, if I may?

CHAIRMAN: Certainly.

MR. GALLAGHER: Mr. Cosgrave swore affidavits on 12th July 2001 and on 25th January 2002 and nowhere in those affidavits do I see any reference to this cheque, or the fact that this cheque had been in his possession and had been dealt with, negotiated or otherwise dealt with in any way. This cheque clearly was within his procurement because he subsequently procured it and it is in my respect -- there was and continues to be an obligation on Mr. Cosgrave to rectify the discovery he has made, which is clearly inadequate and is not in accordance with the order and that is something that the Tribunal may wish to consider.

I note what my friend says in relation to the availability of the cheque, that it was physically made available to Members of the Tribunal -- or his legal team in the recent past, but it appears that Mr. Cosgrave had it since December

1 last and whether he made the fact that he had that copy cheque available known  
2 to his legal team is perhaps something you may wish to consider or not as you  
3 consider appropriate.  
4

5 I should say that the form of discovery that is required is a form that has  
6 been considered by the High Court and Supreme Court. And the requirement to  
7 specify documents that have been in the possession of a deponent but are no  
8 longer in his possession has been endorsed by both courts in the case of  
9 Mr. Liam Lawlor.  
10

11 CHAIRMAN: Well, we will take those into consideration overnight. To enable  
12 the Tribunal to consider the issues and submissions raised this morning we  
13 propose adjourning until 10.30 tomorrow when we hope to give a comprehensive  
14 ruling. Secondly, subject to some good reason for not doing so, we will  
15 consider making an order for discovery against Egan Cosgrave & Associate  
16 solicitors tomorrow morning.  
17

18 Mr. O'Higgins may address us either now or tomorrow morning on this issue if he  
19 wishes. And we will deal with the whole element, aspects of matters tomorrow  
20 morning.  
21

22 MR. O'HIGGINS: The files will be given now to the solicitor for the Tribunal  
23 who can copy them and give us a copy back in the morning. I would have thought  
24 that meets the situation adequately.  
25

26 CHAIRMAN: We will deal with that tomorrow morning and overnight.  
27

28 MR. GALLAGHER: I don't know whether the ledger cards and financial records  
29 which relate to the cheque for 1,815 pounds which is 1,500 plus VAT they should  
30 be encompassed in any order that this Tribunal should make.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

CHAIRMAN: Subject to anything you say, Mr. O'Higgins, I would think that is true

MR. O'HIGGINS: The way I would approach it is as follows: Every scrap of paper that is available on file, all of it, nothing should be removed, should be given to the Tribunal and every scrap of paper that is on file will be given to the Tribunal and after that it is a question if there is a document there that questions arise that can be asked in cross-examination. If there isn't a document there and that gives rise to a concern that can be addressed in cross-examination, but all my client can physically do is say, here is every bit of paper. So, making orders directed to specific documents isn't going to assist, we will give you everything.

CHAIRMAN: When Mr. Gallagher has had an opportunity of perusing the files, which you are tendering at the moment, he is open to make submissions in the morning so far as they may be relevant.

MR. O'HIGGINS: Indeed, Mr. Chairman.

CHAIRMAN: On that note we will adjourn until 10.30 tomorrow morning.

THE HEARING ADJOURNED UNTIL THURSDAY, 27TH FEBRUARY 2003

AT 10.30 A.M.

