THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 113
[2020 180 JR]

BETWEEN

KEITH HARRISON

APPLICANT

AND
PETER CHARLETON

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 18th day of February, 2021

Introduction

1. The applicant is a member of An Garda Síochána. The respondent is the former chairman of the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 (hereinafter "the Tribunal"). Certain allegations made by the applicant were investigated by the Tribunal. The applicant attended the Tribunal for nineteen days in respect of the Tribunal's terms of reference "N", which hearings concluded on 24 October 2017. The applicant gave evidence to the Tribunal over three days. The applicant also submitted a statement to the Tribunal together with copies of the applicant's allegations. The respondent's Second Interim Report in respect of modules "N" and "O" was published on 03 November 2017. It was highly critical of the applicant. Further criticism of the applicant is contained in the Third Interim Report which was published on 11 October 2018.

2. On 04 December 2017, following the publication of the Second Interim Report, the applicant applied to the respondent for his costs. The Tribunal's solicitor wrote to the applicant's solicitors, Messrs. Kilfeather & Company, on 12 December 2017 inviting submissions which would set out the basis and all relevant matters upon which the applicant was relying in making the application for costs. On 21 December 2017, the applicant's solicitors furnished legal submissions on behalf of the applicant. The Tribunal acknowledged receipt of same by letter of 28 December 2017. By letter of 22 May 2018, the applicant's solicitors enquired as to when they could expect the respondent to adjudicate on the issue of the applicant's costs and expenses. This correspondence was acknowledged by the Tribunal in a letter sent on 18 June 2018 which confirmed that the respondent had not fixed a date to deal with costs applications and that as soon as a date had been arranged, the Tribunal would be in contact.

3. Following the publication of the Third Interim Report, the Tribunal's solicitor wrote to the applicant by letter dated 19 October 2018 stating that the Tribunal was in a position to deal with costs. The Tribunal noted the applicant's submission dated 21 December 2017, referred to the Tribunal's report published on 11 October 2018 and invited the applicant to indicate their position regarding costs and to furnish submissions in that context. On 22 October 2019 the Tribunal again wrote to the applicant's solicitors detailing its proposed approach with regard to costs referring, inter alia, to the issue of whether or not the applicant cooperated with the Tribunal by telling the truth and certain extracts from the Tribunal's report were cited in the said letter. The penultimate paragraph of the 22

October 2019 letter stated that the Tribunal was then considering what, if any, portion of costs should be ordered to be paid to the applicant and the Tribunal invited the applicant to make oral submissions prior to the Tribunal making any decision on the matter. An oral hearing tool place on 01 November 2019, during which the applicant was represented by senior counsel and it was submitted on his behalf that the applicant was entitled to the entire of his costs.

4. On 04 December 2019, the respondent issued a ruling in relation to the costs application made by the applicant (hereinafter "the Costs Decision"). This comprised a 15–page written decision by the respondent on the application to discharge the applicant's costs from public funds. In the Costs Decision, the respondent ruled that the applicant was entitled to his costs of representation up to and including the opening day of the Tribunal's substantive hearings but was not entitled to any costs beyond that point. The Costs Decision granted costs to the applicant including all preparation up to and including the first day of the Tribunal's public hearings on the relevant module, on a party and party basis, to include counsel's brief fee and such solicitor's fees as that entailed, to be taxed in default of agreement.

5. In the present proceedings, the applicant seeks to quash the respondent's Costs Decision of 04 December 2019 and the applicant seeks, inter alia, a declaration that he is entitled to his full costs of appearance and representation before the Tribunal.

The pleadings

6. On 02 March 2020, an ex parte docket was issued on behalf of the applicant grounded on the statement of grounds of the same date and the applicant's verifying affidavit, with the applicant's solicitor also swearing an affidavit of verification on 02 March 2020. On that date, Meenan J. ordered that the respondent be put on notice and, by order made by the President on 08 May 2020, the application for leave was to be treated as the hearing of the substantive application for judicial review. The respondent's statement of opposition was delivered on 12 June 2020, accompanied by an affidavit verifying the contents of same sworn by Mr. Peter Kavanagh, Registrar to the Tribunal. A replying affidavit was sworn by the applicant on 15 July 2020 and, on 24 November 2020, the applicant's solicitors delivered a document entitled "Further Particulars of paragraph 26 of the Statement of Grounds", being a document to which the respondent objects. I have carefully considered the contents of all the foregoing as well as all the exhibits referred to in the various affidavits and I will comment on the contents of the foregoing during the course of this decision.

The relief sought by the applicant

7. The relief sought by the applicant, as is clear from the ex parte docket, the order made on 02 March 2020 and the contents of paragraph D of the applicant's statement of grounds, is as follows: -

> *"(i) An order of certiorari quashing the costs order of the 4th of December 2019 made in respect of the Applicant's costs before the Tribunal of Inquiry into protected*

disclosures made under the Protected Disclosures Act 2014 and certain other matters.

(ii) An order of mandamus requiring the respondent to make such orders as are necessary to provide for Applicant's costs of appearance and representation before the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters.

(iii) A declaration that the Applicant is entitled to his costs of appearance and representation before the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters.

(iv) A declaration that the refusal to grant to Applicant the costs of representation in respect of the public hearings of the Tribunal amounted to an impermissible legal effect and is a penalty by imposing financial liabilities on the Applicant.

(v) A declaration that the refusal to grant to the applicant the costs of representation in respect of the public hearings of the Tribunal amounted to penalisation as defined by the Protected Disclosures Act 2014 and is impermissible.

(vi) A declaration that the respondent's ruling in respect of costs was ultra vires and/or in breach of the principles of natural and constitutional justice and/or in breach of the Applicant's rights pursuant to Article(s) 6 and/or 10 of the European Convention on Human Rights.

(vii) An order if necessary extending the time within which to seek the reliefs sought herein.

(viii) Such further or other relief.

(ix) Liberty to apply.

(x) Costs of and incidental to these proceedings".

8. The foregoing relief, which is detailed in para. D of the applicant's statement of grounds dated 02 March 2020, is sought on the basis of the grounds set out at para. E thereof.

The Tribunal's Terms of Reference "N" and "O"

9. The applicant's statement of grounds refers to the Tribunal's terms of reference, including "N" and "O" thereof, which comprise the following:-

"[N] To investigate contacts between members of An Garda Síochána and TUSLA in relation to Garda Keith Harrison.

[O] To investigate any pattern of the creation, distribution, and use by TUSLA of files containing allegations of criminal misconduct against members of An Garda Síochána who had made allegations of wrongdoing within An Garda Síochána and

the use knowingly by senior members of the Garda Síochána of these files to discredit members who had made such allegations".

10. It is common case that the applicant was granted representation in respect of term "N" of the Tribunal's terms of reference. It is not in dispute that the applicant provided a statement to the Tribunal on 13 March 2017 and, on 20 April 2017, provided the Tribunal with a copy of what has been described as a disclosure. It is not in dispute that the applicant's statement and disclosure comprised approximately 40 pages of text containing significant detail of serious allegations. It is not disputed that the applicant was called to give evidence before the Tribunal.

The applicant's statement of grounds dated 02 March 2020

11. Later in this decision I will look in detail at each paragraph in the applicant's statement of grounds. For present purposes it is appropriate to point out that it contains certain matters which are not in dispute, including the Terms of Reference of the Tribunal, module "N" being of particular relevance. The following is a summary of what the Statement of Grounds contains.

12. In para. 9 of the statement of grounds it is pleaded that, in contradistinction to two other members of An Garda Síochána who had made protected disclosures, the respondent never sought to have the applicant interviewed by investigators for the Tribunal or by the Tribunal's legal team prior to the applicant being called to give evidence at the public hearing. In para. 10, reference is made to the applicant being furnished by the Tribunal, on 08 August 2017, with statements and arguments received from other witnesses totalling 1,602 documents. It is pleaded that the Tribunal did not seek clarification in respect of any particular issue from the applicant and that the applicant's statement was furnished to other witnesses at a much earlier stage and they were invited to comment in respect of particular issues. Paras. 11 and 12 refer to public hearings in respect of Module "N" which commenced on 18 September 2017 and which took place over 19 days, concluding on 24 October 2017 and reference is made to the Second Interim Report of 30 November 2017 which report was highly critical of the applicant. From paras. 13 onwards, reference is made to the applicant's application to the respondent in respect of costs and to the sequence of events thereafter, leading up to the oral hearing which took place on 01 November 2019 and the Costs Decision which is challenged in the present proceedings.

13. With regard to the oral hearing which took place on 01 November 2019, in para. 18 of the statement of grounds, it is stated, inter alia, that: "*Counsel for the Applicant indicated that to refuse the Applicant's costs on the basis set out in the letter of the 19th of October 2019 would be unlawful and inequitable"*. In para. 19 of the statement of grounds, reference is made to the 04 December 2019 Costs Decision and the applicant makes certain pleas in relation to what the applicant says was the basis upon which the Costs Decision was made. From paras. 20 to 25, it is pleaded that at no point did the Respondent:-

- state that the Applicant had failed to provide assistance or knowingly gave false or misleading information;

- invite the Applicant or his legal advisors to address the approach he intended to take in relation to costs;

- invite the Applicant to withdraw any part of his statements or allegations;

- indicate that the allegations should be withdrawn prior to the public hearings;

- seek to interview the Applicant prior to the public hearings;

- state the Applicant did not make a protected disclosure as defined by the Protected Disclosures Act, 2014 that was the subject of the Tribunal of Inquiry.

14. Paras. 1 – 25 of the Applicant's statement of grounds appear under the heading "FACTUAL BACKGROUND", whereas paras. 26 to 40 comprise what are said to be the "LEGAL GROUNDS" on foot of which the applicant seeks relief. These Legal Grounds include, inter alia, pleas that the respondent acted *ultra vires* and in breach of the principles of natural and constitutional justice in failing to award the applicant his costs in respect of the entirety of the proceedings before the Tribunal. It is also pleaded that the respondent failed to have any or any adequate regard for the law in respect of the entitlement to legal representation before a Tribunal of Inquiry and that the respondent erred in applying principles of costs in litigation to the proceedings before a Tribunal. The applicant claims, inter alia, that the respondent erred in finding that allegations are the same as evidence of fact and that the respondent failed to have regard to the fact that the applicant at all times assisted the Tribunal. The applicant claims inter alia that the respondent failed to have regard to the fact that there was no finding made by the Tribunal that the applicant "*knowingly gave false or misleading information*". It is also claimed that refusing the applicant some of his costs constituted a form of penalisation as defined by the Protected Disclosures Act 2014 and that the respondent imposed on the applicant a legal burden and financial penalty impermissible at law. Among other things, it is claimed that the respondent acted *ultra vires* and in breach of the principles of natural and constitutional justice in holding that costs in a Tribunal are to be awarded to persons whose allegations were found to be true but not otherwise. It is claimed inter alia that the respondent acted *ultra vires* in finding that the matters which the Oireachtas had required him to enquire on his appointment into, ought not have to been inquired into. It is also claimed that the respondent acted *ultra vires* in failing to have any or any adequate regard to the fact that it was the respondent as inquisitor and adjudicator in full control of the Tribunal who determined what evidence if any ought to be called before the public hearings. It is also claimed that the respondent failed to give the applicant any or any adequate opportunity to address the basis or methodology which he intended to use to restrict or limit the applicant's entitlement to costs. It is also claimed inter alia that the respondent acted in breach of the applicant's rights under Articles 6 and/or 10 of the European Convention on Human Rights in failing to award the applicant his costs in respect of the entirety of the proceedings before the Tribunal. Later in this judgment, I

will look more closely at each one of the "LEGAL GROUNDS" relied upon by the Applicant as well as the "FACTUAL BACKGROUND" pleaded. Issue is taken with the foregoing in the respondent's Statement of Opposition dated 12 June 2020 in which it is pleaded, inter alia, that the respondent did not act *ultra vires* or in breach of the principles of natural or constitutional justice and that nothing relied upon by the applicant affects the lawfulness of the Costs Decision. There is, however, considerable agreement as regards the relevant statutory provision and certain principles which emerge from the authorities and it is appropriate to refer to these, as follows.

Section 6 of the 1979 Act

15. It is not in dispute that the making of a ruling in respect of costs by a Tribunal is specifically provided for in Section 6 (1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended by s. 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 (hereinafter "s. 6 of the 1979 Act"). This provides as follows:-

> *"(1) Where a Tribunal, or, if the Tribunal consists of more than one member, the chairman of the Tribunal, is of opinion that, having regard to the findings of the Tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the Tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the Tribunal), there are sufficient reasons rendering it equitable to do so, the Tribunal or the chairperson, as the case may be, may, either of the Tribunal's the chairperson's own motion, as the case may be, or on application by any person appearing before the Tribunal, order that the whole or part of the costs-*
>
> *a) of any person appearing before the Tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;*
>
> *b) incurred by the Tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order."*
>
> *(emphasis added)*

Certain relevant legal principles

16. It is settled law that, in deciding on questions of costs, a Tribunal cannot have regard to the substantive findings and this principle is not in dispute between the parties. As McCarthy J. made clear in *Goodman International v. Hamilton* [1992] 2 I.R. 542 (at p. 605):

> *"Section 6: The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. … The expression 'the findings of the Tribunal' should be read as the findings as to the conduct of the parties at the Tribunal. In all other cases the allowance of costs at public expense lies within the discretion of the Tribunal, or, where appropriate, its chairman".*

17. The foregoing was endorsed by Denham J. (as she then was) in the Supreme Court's decision in *Murphy & Ors. v. Mr. Justice Flood & Ors* [2010] 3 IR 136 (at p. 164) which decision also emphasised that non-cooperation with a Tribunal may result in costs being lost and that non-cooperation includes knowingly giving false information:

> *"[79] In applying these principles to the construction of s.6(1) of the Act of 1997, I am of the opinion that the issue for a chairman is whether a party has co-operated with a Tribunal.*
>
> *[80] Ordinarily any party permitted to be represented at a Tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to co-operate with the Tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a Tribunal. The power to award costs is affected by a lack of co-operation, by non-co-operation, with a Tribunal. Non-co-operation could include failing to provide assistance or knowingly giving false or misleading information.*
>
> *[81] Fundamentally the issue is whether a party has co-operated with a Tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully co-operated with a Tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a Tribunal.*
>
> *[82] The distinction between the administration of justice and the authority of a Tribunal has to be drawn clearly. A Tribunal is not administering justice, it is a fact finding inquiry, reporting to the legislature. A decision on costs grounded on a substantive finding of a Tribunal would import a liability for a party. I am of the opinion that s.6(1) of the Act of 1997 should be construed in light of the well-established case law, and that consequently a chairman may not have regard to the substantive findings of a Tribunal when determining the issue of costs."*

18. In *Lowry v. Mr. Justice Moriarty* [2018] IECA 66 (at para. 58) Ryan P. endorsed the distinction between substantive findings, pursuant to a Tribunal's terms of reference, as opposed to findings regarding the conduct of the parties before the Tribunal, the latter, not the former, being relevant to determinations regarding costs:

> *"It is important, however, to recognise the distinction between the contents of the report insofar as they reflect the determinations of the Tribunal on the matters that are the subject of its terms of reference, the substantive findings, and the adjectival matters that arise subsequently in relation to costs. Therefore, we have two separate processes that should not be either conflicted or confused. In actual fact, I think that the Tribunal operated in a manner that respected this distinction by extracting its findings and serving them on Mr. Lowry with specific reference to the question of costs. The same findings had previously been notified to him prior to finalisation and publication of the report so that he would have an opportunity of*

responding. Now they were furnished to him for the different purpose of addressing costs."

19. It is common case between the parties that a Tribunal is entitled to refuse costs on the basis of non-cooperation. At the heart of the present case is the applicant's contention that the findings made against him do not extend to a finding of non-cooperation on the part of the applicant during the course of his engagement with and evidence to the Tribunal. Counsel for the applicant described the findings reached by the Tribunal in respect of his client, in particular in the Second Interim Report, as being *"not complimentary".* For the respondent it is argued that, not only are they adverse to the applicant, they extend to a finding of non-cooperation on the part of the applicant. The foregoing issue is central to the present case, but there is no material dispute as to the applicable legal principles, to which I have referred above.

20. In Fox v. Mr. *Justice Mahon & Ors* [2014] IEHC 397, Baker J. stated that a finding of false evidence is not, of itself, a sufficient basis for a Tribunal to refuse a party's costs. Her decision makes clear that the Tribunal must address itself to the question of whether the false evidence was given knowingly and, again, there is no dispute between the parties as to this principle which was explained by Ms. Justice Baker, (at para. 11) as follows:-

> *"The law is clear and does not confine the consideration to false evidence, and the Tribunal may not refuse the whole or part of an applicant's costs merely on account of the fact that the applicant has given false evidence or information to the Tribunal. The Tribunal must address itself to the question of whether the false or misleading evidence was given knowing it to be false or misleading. The Tribunal accordingly must take a view as to the truth of the evidence and the intention or knowledge of the person giving that evidence."*

21. It is not in dispute between the parties that a Tribunal's decision regarding costs must be made in accordance with fair procedures. In a judgment delivered by Fennelly J. on 21st April, 2010 in *Murphy v. Flood*, [2010] 3 IR 136, the learned judge stated, (p. 226, para. 343):

> *"[343] In applying the rules of natural justice to these procedures, it must be borne in mind, as is acknowledged by the applicants, that the requirements of natural justice vary according to the character of the proceedings and the gravity of findings. The fact that the Tribunal is entitled to have regard, inter alia, to its view as to whether a person has failed to cooperate with it does not necessarily mean that there has to be a separate hearing on that issue, so long as persons potentially affected have reasonable notice of the possibility of such findings. It might well, nonetheless, be good practice for a Tribunal to give some advance notice of the relationship between cooperation with the Tribunal and any decision regarding costs, which it might later make.*
>
> *[344] …The Tribunal made considered findings that the two personal appellants had hindered and obstructed its work. It is not contested that the appellants had no*

notice of the possibility that such a finding might be made. It requires no expansion of the rules of natural justice to state that anyone exposed to the risk of adverse findings of that character, amounting to an accusation of criminal conduct, should receive reasonable advance notice."

22. There is a clear distinction between the authority of a Tribunal and the administration of justice and this has been made clear in the relevant jurisprudence. In *Goodman International v. Mr. Justice Hamilton* [1992] 2 I.R. 542, Finlay C.J. (at p. 589) stated the following with regard to Article 34 of the Constitution:

> *"The meaning of the constitutional concept of the administration of justice involved in this Article was identified in the tests set out in the judgment of Kenny J. in the High Court in McDonald v. Bord na gCon [1965] I.R. 217 in a passage which was later accepted by the decision of the Supreme Court in the judgment of Walsh J. like Costello J. in the course of his judgment in this case, would adopt them as being appropriate tests. The passage is as follows:*
>
> > *'It seems to me that the administration of justice has these characteristic features:*
> >
> > 1. *A dispute or controversy as to the existence of legal rights or a violation of the law;*
> > 2. *The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;*
> > 3. *The final determination (subject to appeal) of legal rights and liabilities or the imposition of penalties;*
> > 4. *The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;*
> > 5. *The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country.'*
>
> *I am satisfied that with the possible exception of the first clause in this statement of the characteristics of the administration of justice, where it speaks of a controversy as to the existence of a violation of the law, the activities of this Tribunal of Inquiry fulfils none of the other fundamental conditions or characteristics of the administration of justice as laid down in this case."*

23. With regard to the distinction between the administration of justice and the authority of a Tribunal, Denham J. (as she then was) cited the foregoing dicta by Finlay C.J. from *Goodman v. Hamilton* before going on to state inter alia at para. 82 of her judgment in *Murphy v. Flood*, that: "*The distinction between the administration of justice and the authority of a Tribunal has to be drawn clearly. A Tribunal is not administering justice, it is a fact finding inquiry, reporting to the legislature*."

24. Having referred to the relevant statutory provision and to certain legal principles, which are not in dispute between the parties, it is now appropriate to turn to the Costs Decision which is challenged in the present proceedings.

The Costs Decision of 04 December 2019

25. Exhibit "KH 16" includes a complete copy of the 15 – page Costs Decision which the applicant seeks to have set aside. Given its importance, it is appropriate to set it out, verbatim, which I now do, as follows:-

> **"T*ribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters***
>
> *Established by the Minister for Justice and Equality under the Tribunals of Inquiry (Evidence) Act 1921, on 17th February 2017 by instrument*
>
> ***The Hon Mr Justice Peter Charleton***
>
> *…*
>
> **R*uling as to costs application of Garda Keith Harrison***
>
> *The Tribunal sat on Friday the 1st of November 2019 to hear an application for the Tribunal to discharge the costs of Garda Keith Harrison from public funds. This is the Tribunal's ruling on that application.*
>
> ***Law as to costs at a Tribunal***
>
> *Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 gives a Tribunal express power to make an order for costs (either in favour of or against a party to the Tribunal) when the Tribunal is "of opinion that, having regard to the findings of the Tribunal and all other relevant matters there are sufficient reasons rendering it equitable to do so." Section 6 of the 1979 Act was considered in Goodman International v Hamilton. Hederman J in his judgment said it was clear that the various amendments contained in the 1979 legislation were made "to give Tribunals set up under the relevant legislation further efficacy." McCarthy J, in his judgment, said that the 1979 Act as a whole "must be construed as subject to the constitutional framework and, in particular, involving fair procedures." A Tribunal is not a contest between parties. It is a public inquiry that is called by the Oireachtas into matters of public moment. A person represented before a Tribunal is there because he or she has something to answer to, or is a witness to a public issue, or is an expert. If a person claims that some dreadful wrong has been committed by a public institution, the Oireachtas is the party setting up the inquiry. If a person sues the public institution, that individual is a litigant. Costs are awarded at the discretion of the court depending on the outcome. If the person is a witness at a Tribunal, he or she is there because of what he or she said. That person is obliged to tell the truth, in accordance with an oath or affirmation. To fail to tell the complete truth is to put the public inquiry nature of the Tribunal in jeopardy of not finding where the truth lies. Tribunal costs are not dependent on whether a person did something wrong but rather on cooperation, central to which is telling the truth. As McCarthy J said:*

The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression "the findings of the Tribunal" should be read as the findings as to the conduct of the parties at the Tribunal. In all other cases the allowance of costs at public expense lies within the discretion of the Tribunal.

The above fits in with the rationale behind costs orders in the first place. In litigation, for the reasons set out above, costs orders follow the event, that is the finding of criminal or civil responsibility. But as Tribunals are set up in the public interest by the Oireachtas, the public should bear the costs of same subject to what findings the Tribunal makes about the conduct of a particular party before it. Such reasoning is consistent with what Denham J said in Murphy and Others v Mahon and Others as follows:

> *Ordinarily any party permitted to be represented at a Tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to cooperate with the Tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a Tribunal. The power to award costs is affected by a lack of cooperation, by non-cooperation with a Tribunal. Non-cooperation could include failing to provide assistance or knowingly giving false or misleading information.*
>
> *Fundamentally the issue is whether a party has cooperated with a Tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a Tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a Tribunal.*

A subsequent amendment was made to section 6 of the 1979 Act by the Tribunals of Inquiry (Evidence) (Amendment) Act 1997. This added to section 6 of the 1979 Act by providing what "relevant matters" a Tribunal could have regard to when making orders for costs. The relevant matters include the terms of reference of the Tribunal, failing to co-operate with or provide assistance to the Tribunal, or knowingly giving false or misleading information to the Tribunal. Section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 which deals with costs now reads as follows:

> *"Where a Tribunal, or, if the Tribunal consists of more than one member, the chairperson of the Tribunal, is of opinion that, having regard to the findings of the Tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the Tribunal or failing to co-operate with or provide*

assistance to, or knowingly giving false or misleading information to, the Tribunal), there are sufficient reasons rendering it equitable to do so, the Tribunal or the chairperson, as the case may be, may, either of the Tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the Tribunal, order that the whole or part of the costs

(a) of any person appearing before the Tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order:

(b) incurred by the Tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order."

The effect of the above amendment was considered by the Supreme Court in Murphy and Others v Mahon and Others. Here an order for costs was quashed on the basis that the Tribunal made findings of obstruction, hindering and substantive findings of corruption which are criminal offences and used same to ground a costs order. As to whether the 1997 amendment changed the view held up to then that the phrase the "findings of the Tribunal" did not mean the findings of the Tribunal relating to the subject matter of the inquiry, but rather the conduct of the parties before the Tribunal, the court was of the view that it did not. In this regard Fennelly J said at paragraphs 125 to 127 as follows:

If it be the case that the amendment to s. 6(1) has the effect of investing in the Tribunal the power to refuse to award costs by reason of the substantive findings it has made, it is difficult to see how its findings could any longer be described as being devoid of legal consequence, made in vacuo or sterile. I cannot accept the submission made on behalf of the respondents that the necessary intervention of the Taxing Master or of processes of execution alters that fundamental fact. It is incumbent on this Court to address, only in the last resort, a question as to the constitutional validity of a statute. To that end, the Court must, so far as the words used by the legislature so permit, interpret those words so that they do not conflict with the Constitution. In the present case, that task is simplified by the availability of the judgments in Goodman v. Hamilton. The link created by s. 6(1) of the Act of 1979, as interpreted by the Tribunal and as upheld by Smyth J., appears to empower the Tribunal to penalise a witness before it in respect of costs by reason of its substantive findings. Clearly, this Court, when delivering judgment in that case did not contemplate any such possibility. The dictum of McCarthy J. avoids conferring that power on the Tribunal. If this Court had thought otherwise, the result of Goodman v. Hamilton might well have been otherwise. At the very least, the reasons given by Finlay C.J. would of necessity have had to be different.

The Oireachtas can be taken to have been aware in 1997 of the decision in Goodman v. Hamilton . If the legislature had intended to negative the effect

> *of the judgment of McCarthy J., it could have adopted clear wording to that effect. In fact, it has left intact the words which were interpreted by McCarthy J. I agree that if the section, in its present form, were the only matter to be interpreted, it is at least open to the meaning that the Tribunal may have regard to its substantive findings when deciding on costs. The matter is not, however, res in tegra. This Court has said, per McCarthy J., that a Tribunal may not have regard to its substantive findings when deciding on costs. The words which he interpreted are still in this section. The additional words interpolated in 1997 do not inevitably reverse the principle enunciated by the court in 1992. It is possible, without doing violence to language, to interpret the words in parentheses as qualifying both "the findings of the Tribunal" and "all other relevant matters". In the light of the decision in Goodman v. Hamilton and the obligation to interpret in conformity with the Constitution, I think that is the correct interpretation.*
>
> *I am satisfied, therefore, that the Tribunal, in making a decision as to whether to award costs is not entitled to have regard to its substantive findings on the subject matter of its terms of reference.*

It is accepted by all the parties making submissions that deceit before a Tribunal can entitle it to discount an award of costs or to refuse costs to a party. In that regard, a Tribunal report should not be parsed or analysed to seek gradations of acceptance or rejection of a witness's evidence. If evidence is rejected but not described specifically as mistaken, it comes within the comment of Geoghegan J in Haughey v Moriarty as follows:

> *As the question of costs does not really arise yet, I am reluctant to make any comments on it but as it has featured so prominently in the arguments I think I should say this. In my opinion, power to award costs under the Act of 1997 is confined to instances of non-co-operation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory provision specifically requires regard to be had to the findings of the Tribunal as well as all other relevant matters. However, I merely express that view by way of obiter dicta…*

It is part of the exercise of judicial restraint not to take the character of a witness beyond what is necessary to the decision. Instead a clear choice as between evidence is to be made, or in accepting as true or rejecting evidence. For a judge, and Tribunal chair-people are judges or retired judges in modern times, to say that evidence is rejected or not accepted is to indicate that that test is met. If testimony is described as mistaken or as a failure of recollection, then the test is not met. In construing a Tribunal report, the entire report needs to be considered to give the necessary context.

Tribunal letter of 19th October 2018

On the 19th October 2018, the Tribunal wrote to the solicitors representing Keith Harrison as follows:

Dear Sirs,

We refer to previous correspondence and to your representation before the Tribunal. We also refer to correspondence concerning costs in the above terms of reference. The Tribunal notes your submissions received in this connection dated 21 December 2017.

However, in light of the report of the Tribunal published on 11th October 2018 which is available on www.disclosuresTribunal.ie and has been since publication the Chairman has directed me to write to you in the following terms.

The Tribunal intends dealing with any issue as to legal costs arising from representation before the Tribunal at the earliest possible time. Accordingly, the Tribunal would be obliged if you would indicate the following:

1. *Whether your client seeks an order for costs from the Tribunal;*
2. *Whether your client intend seeking an order for costs against any other party or parties to the Tribunal - in which case please identify that party or those parties;*
3. *Whether your client intends making submissions that any other party or parties should not receive costs or that such costs ought to be reduced to a stated percentage of costs;*
4. *In the case of paragraphs 1 and 2 above, please furnish brief submissions setting out the basis upon which your client argues that there is an entitlement to such orders;*
5. *In the case of paragraph 3 above, please furnish brief submissions as to why such other party or parties should not receive costs or should only receive a stated percentage of their full costs.*
6. *In all such submissions, please state clearly the facts, circumstances and principles of law upon which you propose to rely.*

The Tribunal now regards it as essential that all orders related to its work should be finalized. The Tribunal would therefore be much obliged to receive submissions within 21 days from the date of this letter.

Yours truly,

Elizabeth Mullan

Solicitor to the Tribunal

Submissions as to costs

By letter dated the 4th December 2017 the solicitors on behalf of Keith Harrison sought costs in these terms:

Dear Madam,

Further to the publication of the Chairman's Second Interim Report on the 30th of November las, on behalf of our client, we formally apply to the Chairman for our costs.

Yours sincerely,

Trevor Collins

Kilfeather & Company

At the request of the Tribunal the following outline legal submissions were made on behalf of Garda Harrison:

1. *These submissions are filed on behalf of Keith Harrison in support of his application for his legal costs and expenses arising from his evidence to the Disclosures Tribunal of Inquiry. These submissions can be supplemented by oral submission if necessary at any oral hearing on costs.*

2. *The basis upon which Keith Harrison apples for his costs is premised on the following matters.*

    (i) *Keith Harrison submitted a statement of evidence to the Tribunal on the 13th of March 2017 to assist the Tribunal in its inquiry in respect of terms of reference (N)*
    (ii) *Keith Harrison attended before the Tribunal on all days relevant to eth terms of reference (N)*
    (iii) *Keith Harrison co-operated with the Tribunal at every stage and did not obstruct and/or seek to unnecessarily prolong the inquiry*
    (iv) *Keith Harrison did not knowingly give false evidence or misleading information to the Tribunal*

3. *Relevant Law*

    Section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended by s.3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 provides:-

> *Where a Tribunal, or, if the Tribunal consists of more than one member, the chairman of the Tribunal, is of the opinion that, having regard to the findings of the Tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the Tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the Tribunal), there are sufficient reasons rendering it equitable to do so, the Tribunal or the chairman, as the case may be, may by order direct that the whole or part of the costs*

a) *of any person appearing before the Tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order:*

b) *incurred by the Tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.*

Section 1(2) of the Tribunals of Inquiry (Evidence) Act 1921, as amended by s.3 of the act of 1979 provides, inter alia:-

If a person –

c) *wilfully gives evidence to a Tribunal which is material to the inquiry to which the Tribunal relates and which he knows to be false or does not believe to be true,*

or

d) *by act or omission obstructs or hinders the Tribunal in the performance of its functions…the person shall be guilty of an offence.*

Submissions

4. *It is submitted that the Tribunal ought to exercise its discretion in favour of Keith Harrison and grant him his costs appearing before the Tribunal to date.*

5. *It is submitted that any findings of the Tribunal, which reflect negatively on Keith Harrison in the field under investigation are not matters which should form the basis upon which the Tribunal should decide his entitlement to costs.*

6. *In Goodman International v. Mr. Justice Hamilton [1992] 2 IR 542 McCarthy J. notes at p. 605 in respect of section 6 Tribunals of Inquiry [Evidence] Amendment Act 1979, as amended:*

> *The liability of pay cost cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression " the findings of the Tribunal" should be read as the findings as to the conduct of the parties at the Tribunal. In all other cases the allowance of costs at the public expense lies within the discretion of the Tribunal, or where appropriate, its chairman"*

7. *The Supreme Court in Murphy v Flood [2010] 3 IR 136, at 164 Denham J. held that in applying the principles of constitutional justice to the construction of s. 6(1) of the Act of 1997:*

I am of the opinion that the issue for a chairman is whether a party has cooperated with a Tribunal. Ordinarily any party permitted to be represented at a Tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to cooperate with the Tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a Tribunal. The power to award costs is affected by a lack of cooperation, by non-cooperation with a Tribunal. Non-cooperation could include failing to provide assistance or knowingly giving false or misleading information.

Fundamentally the issue is whether a party has cooperated with a Tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a Tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a Tribunal. The distinction between the administration of justice and the authority of a Tribunal has to be drawn clearly. A Tribunal is not administering justice, it is a fact finding inquiry, reporting to the legislature. A decision on costs grounded on a substantive finding of a Tribunal would import liability for a party. I am of the opinion that s.6(1) of the Act of 1997 should be construed in light of the well-established case law, and that consequently a chairman may not have regard to the substantive findings of a Tribunal when determining the issue of costs.

8. *While, the Tribunal has rejected assertions may by Keith Harrison's and has found same to be "entirely without any validity", it is submitted that the findings of the Tribunal, which may be adverse of Keith Harrison, fail to reach the threshold to warrant an adverse costs Order against him. Moreover, it is submitted that it would be manifestly unjust and inequitable to make such a costs order in favour of any other party appearing before the Tribunal and/or the Tribunal itself against Keith Harrison.*

9. *It is submitted that there are insufficient reasons and/or findings to refuse to grant Keith Harrison his costs of appearing before the Tribunal.*

10. *It is submitted that the Tribunal's comment that this part of the Tribunal started in good faith extends to Keith Harrison's motive in making his disclosures.*

11. *It is submitted that there was no mala fides on the part of Keith Harrison and/or that he acted with reckless disregard in making his disclosures.*

12. *For the reasons as set out above, Keith Harrison hereby seeks his costs for appearing before the Tribunal to date, as against the Minister for Finance.*

Tribunal gives notice as to concerns

In accordance with the requirements of natural justice, the Tribunal gave notice of its concerns as to why it might consider not awarding Garda Keith Harrison costs or only a percentage of his costs. That was done by letter dated 22nd of October 2019 and was in the following terms:

> *Dears Sirs,*
>
> *Thank you for your submissions in respect of your application for costs dated the 21st of December 2017 and 7th November 2018 respectively.*
>
> *As you are aware Section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 provides as follows:*
>
> *"(1) Section 6 of the Tribunals of Inquiry (Evidence) Amendment Act 1979, is hereby amended by the substitution for subsection (1) of the following subsection:*
> *"(1) Where a Tribunal or, if the Tribunal consists of more than one member, the chairperson of the Tribunal, is of opinion that, having regard to the findings of the Tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the Tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the Tribunal), there are sufficient reasons rendering it equitable to do so, the Tribunal, or the chairperson, as the case may be, may, either of the Tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the Tribunal, order that the whole or part of the costs -*
> *(a) of any person appearing before the Tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;*
>
> *The Supreme Court (Denham J.) in Murphy –v- Flood [2010] 3 IR 136 and others has held as follows;*
>
> *"30. Further, section 6 of the act of 1979, as inserted by section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, gives to the statutory power in relation to costs. This includes a specific reference enabling regard to be had to a failure to co-operate with the Tribunal…*
> *37. The power and authority of the Tribunal is limited to that given to it by the terms of reference and the law, and so the Tribunal may make findings of a lack of co-operation, from minor to major. I would not attempt a list of activities or omissions which may be deemed to be a lack of co-operation…"*
>
> *Later in that judgement Ms. Justice Denham endorsed the following paragraph of Geoghegan J"s judgement in Haughty v Mr. Justice Moriarty and Others [1999] 3 I.R. 1 (at page 14);*

> *"As the question of costs does not really arise yet, I am reluctant to make any comments on it but as it has features so prominently in the arguments I think I should say this. In my opinion, power to award costs under the Act of 1997 is confined to instances of non-co-operation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory provision specifically requires regard to be had to the findings of the Tribunal as well as other relevant matters";*

Furthermore, commencing at paragraph 63 of the judgement, Ms. Justice Denham said as follows:

> *"…I am of the opinion that the issue for a chairman is whether a party has co-operated with a Tribunal.*
> *Ordinarily any party permitted to be represented at a Tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to co-operate with the Tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a Tribunal. The power to award costs is affected by lack of co-operation, by non-cooperation, with a Tribunal. Non-co-operation could include failing to provide assistance or knowingly giving false or misleading information. Fundamentally the issue is whether a party has co-operated with a Tribunal so as to be entitled to his or her costs."*

In view of the above, the position would appear to be that the duty to co-operate with a Tribunal includes the duty to give truthful evidence to the Tribunal and that the giving of untruthful evidence to the Tribunal is something the Tribunal can have regard to in making any order as to costs.

As you are aware the third interim report of the Tribunal was published in October 2018. We draw your attention to the following paragraphs contained in pages 6 to 7 of same which are set out hereunder:

> *"The Tribunal is exercising the High Court discretion in relation to costs, as limited by that principle and informed by the relevant legislation.*
> *Truth in that regard remains paramount. Even though a person is required in the public interest to appear and testify as to matters of public importance before a Tribunal of inquiry, those giving evidence are still obliged to be witnesses of truth. If a person has engineered a situation unfairly or deceitfully which results in public expense of a Tribunal of inquiry, that fact should be capable of being reflected in a costs order. Where a person makes serious and unjustifiable allegations against another party to the Tribunal, an order as between those parties may be made, allowing also for an order, if appropriate, in a proportionate way against the Minister for Finance."*

You will no doubt be familiar with the Second Interim Report of the Tribunal. What follows should be read in the context of the entire report. In relation as to whether or not your client co-operated with the Tribunal by telling the truth the following is a concise indication as what would appear to be relevant matters:

- *Garda Harrison maintained to the Tribunal that TUSLA intervened in his family life as the Gardai had manipulated social services to that end. Furthermore, Garda Harrison accused TUSLA of going along with this Garda manipulation. These allegations were completely rejected by the Tribunal as false. The following is the relevant extract from the Tribunal report:*

  > *"In particular, it was alleged that Donna McTeague had apologised on the telephone for having to do a home visit. It was claimed that in the aftermath of the meeting Donna McTeague apologised to Marisa Simms, claiming that "she didn't have any choice in the matter that her team leader had been in contact with the Guards and as a result had to do the visit". It was further claimed that after the visit "before leaving" Donna McTeague was "again apologising but guaranteeing this was the end of it….*
  >
  > *There is no mistaking any of these matters. The fact that at the hearing they were reduced by Marissa Simms to some kind of feeling which she had in consequence of the meeting when the allegations as made were specific and the fact that Garda Keith Harrison, notwithstanding this reduction, claimed he had been told in the immediate conversations surrounding the alleged events by Marisa Simms that social services has admitted to acting discreditably demonstrate their determination to persist in damaging and hurtful allegations notwithstanding the fact that they knew that they were untrue.*

  (Tribunal report page 18, 19, page 90 ,91)
- *The Tribunal found that answers given by Garda Harrison to the Tribunal in relation to PULSE checks on Marissa Simms were 'evasive and at time senseless". Furthermore, the Tribunal did not accept the evidence of Garda Harrison that no meeting over the PULSE system checks on Ms. Simms ever took place. The Tribunal was of the view that it was an example of Garda Harrison "tailoring his evidence to what suits his purpose at the time" [Tribunal report page 28, 29]*
- *The Tribunal categorised Garda Harrison' s evidence in relation to facing a hostile reception and being discriminated against in Donegal town garda station as "nonsense". When dealing with same, the Tribunal noted as follows: "As the Tribunal proceeded with its hearings, his position would shift in accordance with what was perceived to be*

the drift in the evidence and the clear allegations which he was making would be unmentioned if these did not apparently suit. (Tribunal report, page 30)

- *The Tribunal rejected Garda Harrison evidence in connection with texts on the phone of Marissa Simms as "ridiculous" and "nonsense". (Tribunal report, page 57).*

In light of all of the above, the Tribunal is presently considering what, if any, portion of costs should be ordered should be paid to you and in that regard, is inviting you to make oral submissions prior to making any decision on the matter.

To that end a hearing has been convened for the 1st of November 2019 next at 9.30 am at High Court No. 10, at the Four Courts, Dublin 7.

Yours faithfully,

Elizabeth Mullan,

Solicitor to the Tribunal

Hearing of 1st November 2019

The Tribunal held an oral hearing on the issue of costs and heard representations on behalf of Keith Harrison. The transcript of the hearing is on the Tribunal's website at www.disclosuresTribunal.ie and should be considered in full as to the ruling in this case together with the foregoing correspondence and the entirety of the Tribunal report.

Decision

This ruling should be read in its entirety and should also be read in the context of the report of the Tribunal published on 30 November 2017. While there follows a summary of the argument presented at the oral hearing on costs on 1 November, all of what was said on behalf of Garda Keith Harrison has been considered. The full transcript is posted on www.disclosuresTribunal.ie which is the Tribunal's website.

The issues relevant to Garda Keith Harrison are those stated in the Tribunal's letter of the 22nd of October 2019, identified as part of the overall context of the Tribunal's report, but should again be repeated:

- *Garda Harrison maintained to the Tribunal that TUSLA intervened in his family life as the gardaí had manipulated social services to that end. Furthermore, Garda Harrison accused TUSLA of going along with this Garda manipulation. These allegations were completely rejected by the Tribunal as false. The following is the relevant extract from the Tribunal report:*

    In particular, it was alleged that Donna McTeague had apologised on the telephone for having to do a home visit. It was claimed that in the aftermath of the meeting Donna McTeague apologised to Marisa

Simms, claiming that "she didn't have any choice in the matter that her team leader had been in contact with the Guards and as a result had to do the visit". It was further claimed that after the visit "before leaving" Donna McTeague was "again apologising but guaranteeing this was the end of it…."

There is no mistaking any of these matters. The fact that at the hearing they were reduced by Marissa Simms to some kind of feeling which she had in consequence of the meeting when the allegations as made were specific and the fact that Garda Keith Harrison, notwithstanding this reduction, claimed he had been told in the immediate conversations surrounding the alleged events by Marisa Simms that social services has admitted to acting discreditably demonstrate their determination to persist in damaging and hurtful allegations notwithstanding the fact that they knew that they were untrue.

(Tribunal report page 18, 19, page 90 ,91)

- *The Tribunal found that answers given by Garda Harrison to the Tribunal in relation to PULSE checks on Marissa Simms were 'evasive and at time senseless". Furthermore, the Tribunal did not accept the evidence of Garda Harrison that no meeting over the PULSE system checks on Ms Simms ever took place. The Tribunal was of the view that it was an example of Garda Harrison "tailoring his evidence to what suits his purpose at the time" [Tribunal report page 28, 29]*

- *The Tribunal categorised Garda Harrison's evidence in relation to facing a hostile reception and being discriminated against in Donegal town garda station as "nonsense". When dealing with same, the Tribunal noted as follows: "As the Tribunal proceeded with its hearings, his position would shift in accordance with what was perceived to be the drift in the evidence and the clear allegations which he was making would be unmentioned if these did not apparently suit. (Tribunal report, page 30)*

- *The Tribunal rejected Garda Harrison evidence in connection with texts on the phone of Marissa Simms as "ridiculous" and "nonsense". (Tribunal report, page 57).*

In terms of substance, the most damaging allegations were made by Garda Keith Harrison against the gardaí generally, against the social work system and against individual members of An Garda Síochána and individual social workers and, on an overall basis, he claimed a conspiracy against him orchestrated through Garda Headquarters, or said that the evidence should lead to that inference. It is unnecessary to repeat the entirety of the Tribunal report since that document speaks for itself. It was necessary for the Tribunal over several weeks of preparation, the distribution of and analysis of thousands of pages of documents, and over about four weeks of hearing to consider all of the allegations of Garda

Keith Harrison. The Tribunal could not find any basis for finding that these allegations were true. Were there any truth to those allegations, it would be a national scandal of resounding proportions. Garda Headquarters did not cause collusion between social work services and the Donegal Division, nor any individual member of our police force, and did not bring about a situation where attention by social workers was directed to the home of Garda Keith Harrison and his domestic partner Marisa Simms causing a brief home visit. Nor was that home visit as described initially by Marisa Simms and nor was there any damage to their family circumstances. Rather, as the Tribunal report indicates, the nature of what was being told to the gardaí by social services was understated. Had it been forwarded in full, social services would have done much more than the minimal intervention which was in fact made. That intervention was made for good reason and was not in consequence of any deceit, conspiracy, exaggeration or any irresponsible or wrong behaviour by anyone. Nonetheless, a myriad of people were blamed in the wrong. In terms of national import, the wider claim that social workers would be manipulated by sinister forces and would not, instead and as professional people, simply do what was right, was a staggering allegation. It was clear to the Tribunal, sitting throughout the entirety of the hearings, that it was stressful and deeply hurtful for all of those wrongly accused.

The Tribunal accepts, and the case law indicates, that if a person makes an allegation in public and the Oireachtas decides to set up a public inquiry, the person making the allegation in coming to the Tribunal is entitled to costs provided he or she cooperates. In that respect cooperation must involve telling the truth as an objective reality. Any other interpretation, to the effect that turning up and repeating whatever wrong allegations led to the formation of the Tribunal in the first place amounts to cooperation, is contrary to any reasoned interpretation of the law and of the administration of justice. Let it be clear: justice is based on first of all finding out the truth. Awards of damages, or judicial review remedies, or declarations of wrongdoing, the latter only being relevant to a Tribunal, are as random as a lottery result unless the justice system first searches for the truth as diligently as possible.

As was said in Ó Gríofáin v Éire [2009] IEHC 188 at paragraph 10: "Is é an ceartas an aidhm atá le gach imeacht dlíthiúil. Is í an fhírinne an cuspóir atá ag gach cleachtas breithiúnach." Or as translated: "Justice is the aim of every legal proceeding. Truth is the objective of every judicial exercise." If a person makes an allegation and a Tribunal of inquiry is set up in consequence and if the individual tells the Tribunal that the allegation was wrong, or based merely on what they thought, or that they made it up, or that they were badly mistaken, a Tribunal can still conclude for their being awarded costs. Furthermore, the Tribunal could very quickly report and many months or years of public time would be saved and the expenditure of public funds would be minimised. It is a very different situation indeed for a person to make a series of allegations and to persist in the allegations where these have no foundation in reality and take serious work and costs to

analyse and to find as being baseless. The example given at the costs hearing was of a person proclaiming on the media airwaves that public representatives had taken bribes to vote on legislation in Dáil Éireann. That person, wrongly persisting in such an allegation, may give the appearance of cooperating by turning up over months to a Tribunal of inquiry and of giving wrong evidence. If the evidence is rejected where the person could have cooperated with the Tribunal by withdrawing baseless allegations and perhaps saying what motivated the allegations, the Tribunal work is required to continue over months and those at the receiving end of the allegations would be required to contest testimony and documents and to be represented. That is not cooperation. On the other hand, where the person, as Denham J states, says that the allegations are false and perhaps says what brought about his or her conduct in the first place, that is cooperation. What is involved here is not that situation. Clearly, there is also the situation where a person has serious allegations to make and while others contest his or her testimony, it turns out that the person should be vindicated. In that case, costs go to the person the truth of whose allegations is vindicated.

Counsel for Garda Keith Harrison argued that the Tribunal rejected his evidence because the Tribunal "did not like" it. That submission should not have been made. Nothing could be more incorrect: this was a scrupulously conducted judicial exercise. It is also asserted on behalf of Garda Keith Harrison that because some allegation causes hurt that wronging other people or hurting their feelings is neither here nor there. That is completely wrong. Once an allegation of fact is made, it is up to a Tribunal to find facts, it is claimed on behalf of Garda Keith Harrison, and just because facts are not accepted as true, testimony still involves cooperation. That is not backed up by the case decisions. Equity of award of costs is the test, it was said on behalf of Garda Keith Harrison, and taking a merciful view has nothing to do with anything. To not award costs, the submission went, there must be a situation of knowing lies which are made for the purpose of undermining the work of the Tribunal. What was involved here, it was claimed, was a protected disclosure. The Tribunal's procedures were said on behalf of Garda Keith Harrison to be unfair since a mechanism for reducing costs should have been notified in advance of the hearing on costs so that it would have been analysed by counsel for Garda Keith Harrison and criticised. Despite invitation, no alternative means of analysing costs was put forward during the course of this submission. This could have been addressed in the light of the recent decision in Lowry v Mr Justice Moriarty [2018] IECA 66, but was not. Costs, were a matter of all or nothing, according to the argument put forward by counsel for Garda Keith Harrison. Garda Keith Harrison had a view of facts found by the Tribunal to be wrong but that was no different to many situations; a person can be wrong but yet be subjectively right. This, according to his counsel, was exemplified by the film Rashōmon, the 1950 masterpiece by Akira Kurosawa starring Toshiro Mifune cited by counsel for Keith Harrison, not by the Tribunal, where a crime takes place but in telling it through the lens of several of the actors in the drama a different pattern of fact emerges. The

Tribunal report needs to be read in full for any reasonable person to realise that this submission is not relevant to this extraordinary matrix of hard fact.

In contrast to the submissions made on behalf of Garda Keith Harrison, counsel for Marisa Simms accepts that there is no such thing as a mathematical formula for going about reducing costs, or only awarding a portion of costs. That is correct. These are decision, it must be remembered, that the courts are called upon to make every day and in the interests of justice. These decisions are taken, as this decision is taken, by taking all relevant factors into consideration and doing the best that is possible in all the circumstances. A mathematical model would not assist that process since what is required is a common sense view of what the overall fairness of the situation requires on a shrewd appraisal of where and what the end result is. But, this is not an instance of where the approach of a party shows some substantial benefit in terms of the revelation of where the facts actually lay. It is thus not a case where a fractional, half or three-quarters, or as expressed in percentages 30% or 70% or whatever, is appropriate. In substance all of the allegations with which the terms of reference, (n) and (o), were substantially concerned were unfounded. These should simply never have been made. In so far as they were initiated outside the Tribunal, the reality remains that the Tribunal was nonetheless set up and the Tribunal must search to consider if there is some basis for awarding costs up to and including the brief fee on the first day of the Tribunal when at that point the allegations should have clearly been not persisted in after legal advice.

The Tribunal cannot find any basis for the award of costs based on cooperation within the meaning of the decisions which are outlined above. This was an instance where dreadful allegations were made against multiple individuals and as against the social work structures of the State and as against the integrity and direction of the national police force. In reality, the situation of turmoil that then existed in Garda Keith Harrison's domestic circumstances, about which the relations of his domestic partner Marisa Simms complained and with good reason, as did she, caused completely proper and moderate interventions by gardaí and social services. The evidence of Garda Keith Harrison exhibited almost no sense of the harm that was being done by his allegations but what is important is not that the allegations hurt, because the truth can hurt but telling the truth can be justified, but that he had the means to back away from them, which was done to a minimal extent by Marisa Simms, but that he persisted fully in them when they were wrong. The Tribunal does not ascribe any motivation to him as the Tribunal's only task is to find facts and to report on what was a series of allegations of public moment but which had no substance whatsoever to them.

The submission made on behalf of Garda Keith Harrison that the award of costs by the Tribunal is a matter of all or nothing, yes or no, is incorrect. This was a dreadful circumstance of allegations being made without basis. But it remains the duty of the Tribunal, despite the wrong done by Garda Keith Harrison in making these

allegations, and the obvious hurt and stress this caused to many individuals, to search for a basis on which some humane and lawful award of costs can be made. To return to the example of Denham J, quoted above, this was a case where incorrect allegations of a most hurtful kind were made against multiple parties and against the State apparatus of social work and policing. It was the Oireachtas which initiated the public Tribunal. There could have been a scoping exercise. If, during that exercise, the astonishing texts exchanged between Marisa Simms and Garda Keith Harrison had come out, any basis for holding an inquiry might have dissipated. But the Oireachtas, having set up the Tribunal, notwithstanding the baseless nature of the allegations, it might be argued that Garda Keith Harrison was entitled to consult solicitors, that solicitors would instruct counsel and that the very extensive disclosure made by the Tribunal would have to by analysed and that the opening speech of counsel for the Tribunal, factual and analytical in its objective nature, would have had to be considered. Hence, it is possible, though the Tribunal has serious doubts which are not resolved fully on the case law, that in the particular circumstances of national scandal that this series of allegations involved, that an award of costs should be made on a limited basis to the person making these scandalous allegations.

The Tribunal, with considerable doubt, therefore rules that Garda Keith Harrison is entitled to representation up to and including the opening day of the Tribunal substantive hearings but not any further costs beyond that point. All legal practitioners and judges will be familiar with situations where sense is achieved on the steps of the court. All will be familiar with situations where allegations can be withdrawn in a brief court hearing on the basis of a serious consideration of where the facts are. This helps if backed by legal advice. That should have happened here: but did not. But, that is not at all to suggest that there was anything wrong in any legal advice given. The opposite is assumed. Normally, in a civil case the party withdrawing an allegation will have to pay his or her own costs and that of the opposing party, but on occasion that can be compromised. Here, the Oireachtas set up the Tribunal, so it is arguable that such a principle does not fully apply. The Tribunal cannot make any award beyond that first day of the Tribunal substantive hearing and it is for the taxing master, in default of agreement, to sort out the costs measure that the Tribunal ruling entails on a party and party, and no other, basis. Therefore the award of costs is limited to all preparation and up to and including the first day of the Tribunal's substantive hearings, but only that. For the avoidance of doubt, that includes counsel's brief fee and such solicitor's fees as that entails. As of day 2 on; no costs.

All of the costs rulings of the Tribunal are on a party and party basis: no other. Any default of agreement as to the measure of costs will be referred to taxation".

26. Having set out the Costs Decision in full, it is appropriate to look at the various ways in which the applicant submits that same is legally infirm and contends that it should be struck down as well as what is argued on behalf of the respondent.

A summary of the Applicant's legal submissions

27. Both parties provided detailed written submissions which were supplemented by skilled oral submissions at the trial. These were of great assistance to the court and I want to express my thanks to both counsel and their respective instructing solicitors. I have had very careful regard to all submissions made by both sides and, during the course of this decision, I will refer to the key submissions made in greater detail. For present purposes it is appropriate to say that the thrust of the submissions made on behalf of the applicant was to assert that the Costs Decision falls to be struck down on a variety of grounds. It was submitted that the Costs Decision was flawed on procedural grounds, with particular emphasis being placed on the Court of Appeal's decision in *Lowry v Mr. Justice Moriarty* [2018] IECA 66. It was submitted that there was a lack of equitable treatment as between witnesses insofar as different costs applications were concerned. It was submitted that the Costs Decision was flawed in circumstances where the respondent fixed the applicant with costs in respect of a Tribunal during which the respondent determined what evidence should be called, and when, and it was submitted that there was a lack of opportunity afforded to the applicant to change his statement. It was submitted that incidents of untruth did not go to the heart of the matter, the submission being that reliance was placed, for the purposes of the Costs Decision, on peripheral or irrelevant matters. It was submitted that the applicant assisted the Tribunal in every way and that the applicant was required to be present before the Tribunal. It was submitted that the Tribunal was, in fact, a trial of the applicant and it was the applicant who was the person in most need of legal representation and, it was submitted, entitled to all costs associated with same. It was submitted that the single ratio of the Costs Decision is that it is only if you prove the allegation in full and only if you are found to be right, and not otherwise, that you will receive costs from the Tribunal. It is submitted that the respondent departed from established legal principles and impermissibly created a new test. It was submitted that the applicant made allegations which he believed to be true and it was submitted that the applicant never changed his belief. Relying on *Fox v Mahon* [2014] IEHC 397, it was submitted that it is not sufficient for the applicant to have given false or misleading evidence, but it is necessary that the Tribunal establish that the individual knew it was false or misleading. It was submitted that this had not been established and it was also submitted that an "allegation" is not "information" for the purposes of s. 6 of the 1979 Act. It was submitted that, never before, has it been suggested that an organ of the Irish State can punish someone – in this case, as regards costs – for what they believed. It was submitted that the effect of the Costs Decision, if it is allowed to stand, would be to silence public debate and to undermine the purpose of Tribunals. It was submitted that the Costs Decision was utterly inconsistent with the relevant legal principles and was made *ultra vires*, in breach of fair procedures, natural and constitutional justice and in breach of the applicant's rights under the European Convention on Human Rights. It was also submitted on behalf of the applicant that, in refusing the applicant a portion of costs, the respondent purported to exercise a judicial function. It was submitted that the refusal of the respondent to award the applicant all his costs was founded upon considerations as to the substantive findings of the Tribunal and that this represented a departure from the principles derived from *Goodman*

International v. Mr. Justice Hamilton [1992] 2 IR 542. It was also submitted that the respondent's costs order was in contravention of provisions in the Disclosures Act, 2014.

The Respondent's legal submissions summarised

28. For the respondent it was submitted, *inter alia* that it is clear on the face of the Costs Decision that it was based on the basic absence of cooperation by the applicant before the Tribunal, having regard to findings made by the Tribunal, in particular in its Second Interim Report. It was submitted that the Costs Decision was entirely consistent with the Tribunal's powers pursuant to s. 6 of the 1979 Act and the legal principles derived from relevant authorities including the Supreme Court's decision (Denham J.) in *Murphy v. Flood* [2010] 3 IR 136 wherein the court endorsed the views expressed by Geoghegan J. in *Haughey v. Mr. Justice Moriarty & Ors* [1999] 3 IR 1. It was submitted on behalf of the respondent that the Costs Decision was not based on the substantive findings of the Tribunal. It was submitted that this assertion on behalf of the applicant was an attempt to muddy the waters and blur the clear finding of non-cooperation on the part of the applicant by reason of his failure to tell the truth. Insofar as the applicant relied on *Fox v. Mahon*, it was submitted that the relevant standard of proof was met. For the respondent, it was also submitted that the Costs Decision does not plainly and unambiguously fly in the face of fundamental reason and common sense so as to trigger the irrationality ground for a review and it was submitted that no such allegation was made. It was submitted that the Costs Decision was made within jurisdiction and that the respondent's approach more than satisfies the relevant standards in respect of fair procedures, including having regard to the decision in *Lowry*. It was submitted that the Protected Disclosures Act of 2014 and the European Convention on Human Rights were not relevant and it was submitted that certain submissions on behalf of the applicant did not arise from the pleaded case, in particular, concerning any alleged lack of equality between different parties before the Tribunal. Submissions were made in respect of the appropriate approach to judicial review, having regard to the well-known authorities in *State (Keegan & Lysaght) v. Stardust Victims Compensation Tribunals* [1986] 1 IR 642 and *Meadows v. Minister for Justice* [2010] 2 IR 701. Reference was also made to *Murphy v. Flood* [2010] 3 IR 136 where Mr. Justice Fennelly held (at p. 226) "*the Tribunal is entitled to have regard inter alia, to its view as to whether a person has failed to cooperate with it*". It was submitted that, when reviewing a decision by a Tribunal in respect of costs, the court should be cognisant that the respondent had a far greater exposure to the evidence and that, in the present case, the respondent had the benefit of viva voce evidence over 19 days. It was emphasised that the proper function of the court, in the present case is the examination of procedure and *vires*, rather than substance.

The Tribunal's Second Interim Report

29. As the Costs Decision makes clear, it is to be read in conjunction with, inter alia, the Tribunal's Second Interim Report. The said report was issued by the respondent on 30 November 2017. The "*Introduction*" section to the Second Interim Report makes specific reference to the applicant in the context of module (N) and begins as follows: -

"This Tribunal was established under the Tribunals of Inquiry (Evidence) Act 1921 on 17 February 2017 by Instrument made under the hand of the Minister for Justice and Equality. While most of the terms of reference concern Sgt. Maurice McCabe, paragraph (b) asks the Tribunal to enquire into the general treatment of particular Gardaí who made a protected disclosure prior to 16 February 2017, a matter that the Tribunal in its current form is not enquiring into, paragraph (o) requires the investigation of any pattern of the creation, distribution and wrongful use by TUSLA of files containing allegations of criminal misconduct against Gardaí who made allegations of wrongdoing, and paragraph (n) requires the Tribunal to investigate contacts between the Gardaí and TUSLA in relation to Garda Keith Harrison. TUSLA is also known as the Child and Family Agency. This is the social work body with statutory responsibility for the protection of children and the support of families. Following an oral hearing lasting 19 days, this is the report of the Tribunal on this latter term of reference.

The precise form of the terms of reference is thus: -

(n) To investigate contacts between members of An Garda Síochána and TUSLA in relation to Garda Keith Harrison.

(o) To investigate any pattern of the creation, distribution and use by TUSLA of files containing allegations of criminal misconduct against members of An Garda Síochána who have made allegations of wrongdoing within An Garda Síochána and of the use knowingly by senior members of the Garda Síochána of these files to discredit members who have made such allegations.
A pattern only emerges when primary facts have been found. Was it, for instance, to be found that TUSLA had undermined the family life of a particular Garda through the abuse of power, that would be a fact. Where such an abuse was repeated in another case, then a pattern might emerge. Even if there were only two such cases, the methodology of the abuse of power might establish a pattern. Before, however, one can think of uncovering a pattern, one must first of all find primary facts" (emphasis added)

Allegations made by the applicant

30. Page 12 of the Second Interim Report contains inter alia a heading entitled "*The allegations of Garda Keith Harrison and Marisa Simms",* and that section begins in the following terms: -

"In a letter dated 10 February 2017 to Dr. Katherine Zappone, the Minister for Children and Youth Affairs, Garda Keith Harrison and Marisa Simms made extremely serious allegations about social workers and Gardai. When they later made statements to the Tribunal, these were affirmed and elaborated on. That letter complained about lack of political action and blamed it on 'a systemic approach' by social workers and Gardai, referred to as 'State Agencies', to 'undermine the credibility, good standing and reputations' of Garda Keith Harrison

and Marisa Simms. In the letter it was complained that a series of illegal and corrupt events had occurred because Garda Keith Harrison 'has been publicly identified as a whistleblower'. In fact, he complained about alleged corruption only when the events dealt with in this report were substantially completed. It was complained by them that TUSLA had engaged in 'an inexcusable abuse of their position', which had caused Garda Keith Harrison and Marisa Simms 'untold distress, stress and anguish'. The letter implied a pattern of events occurring to Garda Keith Harrison and his domestic partner which were on a par with the treatment of Sgt. Maurice McCabe, thus making the case that the events were neither isolated nor un – designed. Indeed, in his statement to the Tribunal, Garda Keith Harrison made the claim that the way in which he was treated evokes comparison with Sgt. Maurice McCabe. This, he said, led him to the view that 'the similarities are so alike it couldn't be coincidence and considering the geographical locations of us such treatment had to come on orders from the highest level."

On p. 17 of the report it is stated inter alia that: -

"If these allegations made in the most explicit terms by Garda Keith Harrison and by Marisa Simms were true, it would mean that vulnerable victims of domestic abuse could be coerced into making false statements in order to destroy a garda officer and that TUSLA could be coerced into abusing their power to enquire into the welfare of children through pressure in order to further that end. These are allegations of corruption and of abuse of a most shocking kind".

On P. 74 of the Second Interim Report, the Tribunal stated, inter alia, that: -

"All of the allegations of Garda Keith Harrison and Marisa Simms examined by the Tribunal are entirely without any validity".

Discussion and decision

31. At the outset, it is important to state that the present proceedings do not constitute an application to disturb any findings in any of the reports produced by the Tribunal. Nor is this case an appeal on the merits of the Costs Decision. It is not for this Court to substitute its own view for that of the decision-maker. This court is concerned only with the lawfulness of the Costs Decision made. As such, the court is confined to an examination as to whether the respondent had the power to make the decision, whether the decision was made in accordance with such power and whether fair procedures were adopted in respect of the decision made.

32. It appears that, in separate proceedings, the applicant attempted, unsuccessfully, to challenge certain findings of the Tribunal. On 12 November 2018, the applicant was granted leave to seek to quash the findings of the Tribunal in respect of the applicant. The judicial review application was heard by Donnelly J. on 28 and 29 May 2019. On 23 August 2019, Donnelly J. gave judgment, refusing the reliefs sought. On 08 October 2019, final orders were made by Donnelly J. refusing the reliefs and awarding costs to the respondent. The said decision by Donnelly J. was appealed and the Court of Appeal

rejected the appeal, awarding costs in favour of the respondent. Leave to appeal to the Supreme Court, against the decision of the Court of Appeal, was refused. The foregoing is of significance because the case before this court is not an application to quash any of the findings of the Tribunal concerning the applicant. It is important to emphasise that the only decision at issue in the present proceedings is the Costs Decision and its lawfulness. The present proceedings are not and cannot be a challenge to any findings made by the Tribunal.

Certain findings in the Tribunal's Second Interim Report

33. It is also perfectly clear from their contents that findings in the Tribunal's Reports do not merely address the *substantive* issues. Rather, in its Reports, particularly the Second Interim Report, the Tribunal made findings in relation to the *conduct* of the applicant, insofar as information, answers and evidence provided by the applicant to the Tribunal was concerned. These findings are not challenged in the present proceedings and it is to certain of the findings in the Tribunal's Second Interim Report which I now turn.

"evasive"

34. Page 23 of the Second Interim Report contains, inter alia, the following with regard to answers given to the Tribunal by the applicant in the present proceedings: -

> *". . . the answers of Garda Keith Harrison were evasive and at times senseless".*

"deceit"

35. With regard to the applicant, p. 23 of the said Report also referred to:-

> *". . . the deceit involved in the evasive answers before the Tribunal . . ."*

"tailoring his evidence to what suits his purpose"

36. The first paragraph on p. 24 of the Tribunal's Second Interim Report concludes as follows in relation to evidence given by the applicant: -

> *"The Tribunal does not accept the evidence of Garda Keith Harrison that no meeting over the PULSE system abuse ever took place. It is yet another example of Garda Keith Harrison tailoring his evidence to what suits his purpose at the time".*

"nonsense"

37. The second paragraph on p. 25 of the Tribunal's Second Interim Report begins as follows:-

> *"Garda Keith Harrison claims that he was unhappy in Donegal town. He ascribes this to the oversight of Sgt. Durcan, saying that he would treat other Gardai differently to him and that as 'the months went on there was always a hostile reception' where he was discriminated against by not being offered overtime. The Tribunal is satisfied that this is nonsense".*

"his position would shift"; "allegations which he was making would be left unmentioned if these did not apparently suit"

38. Page 25 of the said Report also includes, inter alia, the following: -

> *"Garda Keith Harrison shows no insight into how hurtful the allegations that he has made are. As the Tribunal proceeded with its hearings, his position would shift in accordance with what was perceived to be the drift in the evidence and the clear allegations which he was making would be left unmentioned if these did not apparently suit".*

"nonsense"

39. On p. 40 of the Tribunal's Second Interim Report, the Tribunal described the claims made by Ms. Simms and by the applicant regarding a decision allegedly made by An Garda Síochána to treat them unfairly as being "*nonsense*".

"ridiculous allegation"

40. On p. 45 of the same Report, the Tribunal referred to the applicant's evidence given concerning certain text messages, stating: -

> *"Garda Keith Harrison's answer to these texts was to make the ridiculous allegation that Marisa Simms had made these up to hurt him; that she was lying".*

"utter nonsense"

41. Later in the same paragraph on p. 45, the Tribunal described the applicant's allegation as "*utter nonsense*".

"changed the nature of…testimony"

42. Page 50 of the Tribunal's Second Interim Report contains, inter alia the, following: -

> *"Marisa Simms several times changed the nature of her testimony from that which appeared in her statement to the Tribunal. Garda Keith Harrison is in the same position".*

"nonsense"

43. In the first paragraph on p. 51 of the Tribunal's Second Interim Report, allegations made by the applicant to the effect that he was subjected to some form of harassment or intimidation are described as "*nonsense*".

"persist in …allegations notwithstanding the fact that they knew that they were untrue"

44. With regard to the applicant and Ms. Simms, p. 68 of the Second Interim Report refers, inter alia, to:-

> *". . . their determination to persist in damaging and hurtful allegations notwithstanding the fact that they knew that they were untrue".*

Findings regarding the applicant's conduct

45. The foregoing does not constitute findings of the Tribunal in relation to the substantive matters it was established to inquire into. Rather, these findings refer to the conduct of the applicant before the Tribunal regarding the information and evidence provided by the applicant to the Tribunal.

46. A reading of the Tribunal's Second Interim Report demonstrates that the respondent did not simply prefer evidence given by others to that which was given by the applicant. It

was not a situation where the applicant was found to be sincere, even if sincerely wrong. There was no question of, for instance, a failure of recollection explaining the findings of the Tribunal as regards the evidence given by the applicant. Rather, the findings of the Tribunal - including of deceit, evasion, a tailoring of evidence and a shifting of position to suit the applicant's purposes - are findings which relate to active, conscious and knowing *conduct* on the part of the applicant, insofar as his engagement with the Tribunal was concerned.

Findings that the applicant knowingly gave false or misleading information

47. Findings which include that (a) there was "*deceit*" involved in "*evasive answers*" given by the applicant; (b) the applicant gave "*evasive and at times senseless*" answers; (c) there were multiple examples of the applicant "*tailoring his evidence to what suits his purpose at the time"*; (d) the applicant's "*position would shift*" in accordance with what was perceived to be the drift in the evidence; (e) the applicant would leave things "*unmentioned if these did not apparently suit*"; (f) the applicant gave answers which were "*utter nonsense*"; (g) the applicant persisted in allegations "*notwithstanding the fact that they knew that they were untrue"* and (g) the applicant was found to "*change the nature of"* his testimony from that which appeared in his statement, constitute findings to the effect that the applicant knowingly gave false or misleading information to the Tribunal. A reasonable consideration of the findings of the Tribunal can produce no other outcome.

48. The applicant places reliance on *Fox v Mahon* [2014] IEHC 397, submitting that it is not sufficient for the applicant to have given false or misleading evidence, but it is necessary that the Tribunal establish that the individual knew it was false or misleading. There is no dispute regarding the foregoing principle. In my view, however, the findings of the Tribunal as to the applicant's conduct, in particular those in the Second Interim Report, undoubtedly are findings to the effect that the applicant knew that he was giving false or misleading information to the Tribunal and findings to the effect that he deliberately adduced false evidence. To knowingly give false or misleading information is not to co-operate. The findings in the Tribunal's Second Interim Report clearly establishes non – cooperation on the part of the applicant.

Deliberate non – co-operation

49. Not only is there a wholesale rejection of the applicant's evidence, the findings made by the Tribunal are plainly to the effect that the applicant knowingly gave false or misleading information and failed to co-operate with the Tribunal. Nor can the applicant claim that the contents of the Second or Third Interim Reports of the Tribunal contained findings establishing that co-operation occurred as between the applicant and the Tribunal in respect of any area. The contrary is true. To give answers which were found to be "*evasive*"; to give answers involving "*deceit*"; to "*shift*" one's position in accordance with what was perceived to be the drift in the evidence; to leave clear allegations "*unmentioned if these did not apparently suit*"; to "*change the nature of*" one's testimony and to persist in allegations notwithstanding the fact that one knows "*that they were untrue*" is not accidental behaviour or behaviour which could fairly be considered to involving a passive or unconscious act. Doing so, on any reasonable analysis, amounts to an active and deliberate failure to co-operate with the Tribunal.

50. The Costs Decision is explicit about the fact that it should be read in the context of the Tribunal's "entire report". This is clear from internal p. 10 which states, inter alia, that: *"You will no doubt be familiar with the Second Interim Report of the Tribunal. What follows should be read in the context of the entire report. In relation as to whether or not your client cooperated with the Tribunal by telling the truth, the following is a concise indication as what would appear to be relevant matters . . ."*.

51. As to the reasoning underpinning the Costs Decision, it is made clear at the very outset that: *"Tribunal costs are not dependent on whether a person did something wrong but rather on cooperation, central to which is telling the truth"*. The foregoing appears on the very first page of the decision under the heading *"Law as to costs as a Tribunal"*. There is no question of the relevant law being misquoted or misunderstood. The law as to costs, specific to Tribunals, is accurately set out, including s. 6(1) of the 1979 Act, as well as relevant authorities.

52. Page 4 of the Costs Decision includes inter alia the following: -

> *"It is accepted by all the parties making submissions that deceit before a Tribunal can entitle it to discount an award of costs or to refuse costs to a party. In that regard, a Tribunal report should not be parsed or analysed to seek gradations of acceptance or rejection of a witnesses' evidence. If evidence is rejected but not described specifically as mistaken, it comes within the comment of Geoghegan J. in Haughey v. Moriarty, as follows:-*
>
> > *'As the question of costs does not really arise yet, I am reluctant to make any comments on it, but it has featured so prominently in the arguments I think I should say this. In my opinion, power to award costs under the Act of 1997 is confined to instances of non – cooperation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory provision specifically requires regard to be had to the findings of the Tribunal as well as all other relevant matters. However, I merely express that view by way of obiter dicta . . .'".*

53. Counsel for the applicants at the trial of this matter said that it was never accepted that deceit, simpliciter, entitles a Tribunal to discount an award of costs and went on to submit that the test, as Denham J. said in *Murphy v. Flood*, was whether false or misleading information was knowingly given. It is unnecessary to repeat all of the relevant findings with regard to the applicant's answers and evidence as they appear in the Second Interim Report of the Tribunal. It is, however, indisputable that they included, inter alia, findings of *deceit* involved in evasive answers given by the applicant to the Tribunal, multiple examples of the *tailoring* of evidence to what suited the applicant's purpose at the time, and changing the *nature* of the applicant's testimony from that which appeared in his statement to the Tribunal, as well as a determination on the part of the applicant to persist in allegations despite the fact that he knew *that they were untrue*. The foregoing findings are, in substance, that the applicant knowingly gave false or misleading information to the Tribunal. A finding that there was *deceit* involved in the evasive

answers given by the applicant to the Tribunal is a finding that there was a conscious act of concealing or misrepresenting information which, on any reasonable analysis, amounts to the adducing of deliberately false evidence, as understood by Geoghegan J. in *Haughey v. Moriarty* and by Denham J in *Murphy v Flood*.

54. Among other things, the Costs Decision sets out, *verbatim*, the Tribunal's 19 October 2018 letter to the applicant's solicitors and the legal submissions made on behalf of the applicant are summarised. Internal p. 10 of the Costs Decision includes a quote from the Tribunal's 22 October 2019 letter which was sent to the applicant's solicitors. That quote referred to the Tribunal's Third Interim Report published in October 2018 and two paragraphs contained in pp. 6 to 7 of same. Those paragraphs included the following quotation:-

> *"The Tribunal is exercising the High Court discretion in relation to costs, as limited by that principle and informed by the relevant legislation. Truth in that regard remains paramount. Even though a person is required in the public interest to appear and testify as to matters of public importance before a Tribunal of inquiry, those giving evidence are still obliged to be witnesses of truth. If a person has engineered a situation unfairly or deceitfully which results in public expense of a Tribunal of inquiry, that fact should be capable of being reflected in a costs order. Where a person makes serious and unjustifiable allegations against another party to the Tribunal, an order as between those parties may be made, allowing also for an order, if appropriate, in a proportionate way against the Minister for Finance".*

"High Court discretion"

55. In submissions on behalf of the applicant, emphasis was laid on the words "*the High Court discretion*". It is, however, entirely clear from the Costs Decision that the respondent did not exercise or purport to exercise the High Court's discretion in relation to costs. The Costs Decision must be read in full and it is perfectly clear, when one considers the entirety of the said decision, that the law was correctly cited and properly applied within the respondent's jurisdiction. It was submitted on behalf of the applicant that the approach taken by the respondent was entirely new and was *ultra vires*, having regard to the statutory position as interpreted by the relevant authorities. To my mind, the evidence does not support that submission which is, in my view, fatally and wholly undermined by virtue of the reasoning on the face of the Costs Decision and which, at its heart, is based on findings to the effect that the applicant knowingly gave false or misleading information to the Tribunal, thus failing to co-operate with it, being findings which are clear from the Tribunal's Second Interim Report and which constitute findings which are not challenged in the present proceedings.

56. In the Costs Decision, the Tribunal noted that if a person makes an allegation in public and the Oireachtas decides to set up a public inquiry, the person making the allegation in coming to the Tribunal is entitled to costs provided he or she cooperates, but that cooperation must involve telling the truth as an objective reality. Furthermore, the Tribunal said that if baseless allegations are made and persisted with throughout the hearings of the Tribunal, where the person turns up and repeats baseless allegations in

evidence, that may give the appearance of cooperation, but it is not cooperation. On the other hand, if a person makes an allegation and a Tribunal is set up and the individual tells the Tribunal that the allegation was wrong, or that they made it up, or were mistaken, that is cooperation. In submissions, counsel for the applicant took issue with the sentence on internal p. 13 of the Costs Decision to the effect that "*cooperation must involve telling the truth as an objective reality*". It was suggested that the foregoing represented a new departure imposing an extraordinary burden on the applicant. The submission was made on behalf of the applicant that the test imposed by the respondent was to require the applicant to prove each and every element of his allegations in order to obtain costs.

57. Despite the skill and conviction with which these submissions are made, I am bound to reject them and I do so for several reasons. Firstly, it is not permissible for this Court, in the context of judicial review, to take a single sentence from a comprehensive decision and to examine it out of context, divorced from what came before and after. Fairly examined, the Costs Decision is entirely consistent with the established legal principles. A submission to the effect that, in order to obtain costs, the respondent effectively required the applicant to prove every element of his allegations, is unsupported and wholly undermined by the reasons for the Costs Decision which are clear from its face. There is no question of the applicant having been refused costs because he did not prove his allegations. Explicit statements in the Costs Decision wholly undermine that submission. It might also be observed that the applicant was awarded some of his costs, namely up to the first day of public hearings. This, too, is utterly inconsistent with the respondent having taken the approach which the applicant submits, without evidence, that he took. At the heart of the Costs Decision is the findings of the Tribunal in relation to the applicant's *conduct* as regards providing answers and giving evidence and information to the Tribunal. Taken together, those findings are plainly to the effect that the applicant knowingly gave false or misleading information to the Tribunal. This is not cooperation. This is the opposite of co-operation. It is to hinder the work of a Tribunal.

"telling the truth as an objective reality"

58. By coming to the decision, the respondent plainly did not impose or purport to apply a new test to the effect that the applicant could only obtain costs if he was proved to be right. It is in the context of the Tribunal's findings (in particular in the Tribunal's Second Interim Report which must be read alongside the Costs Decisions) that the Costs Decision states, inter alia, that cooperation must involve *telling the truth as an objective reality*. Having regard to the findings in the Tribunal's Second Interim Report, the applicant plainly did not tell the truth as an objective reality. Rather, he failed to tell the truth, knowing this was so. No other interpretation of the relevant findings in the Tribunal's Second Interim Report is reasonable. It is to wholly mischaracterise the Costs Decision to suggest that the respondent adopted an approach to the effect that the applicant could only obtain costs if he was found to be 100% right, and not otherwise. That is not the approach which was taken in the Costs Decision and that is clear from the face of the decision itself, including from the following passage which appears on internal p. 13:-

"If a person makes an allegation and a Tribunal of inquiry is set up in consequence and if the individual tells the Tribunal that the allegation was wrong, or based merely on what they thought, or that they made it up, or that they were badly mistaken, a Tribunal can still conclude for their being awarded costs. Furthermore, the Tribunal could very quickly report and many years of public time would be saved and the expenditure of public funds would be minimised. It is a very different situation indeed for a person to make a series of allegations and to persist in the allegations where these have no foundation in reality and take serious work and costs to analyse and to find as being baseless. The example given at the costs hearing was of a person proclaiming on the media airwaves that public representatives had taken bribes to vote on legislation in Dáil Éireann. That person, wrongly persisting in such an allegation, may give the appearance of cooperating by turning up over months to a Tribunal of inquiry and of giving wrong evidence. If the evidence is rejected where the person could have cooperated with the Tribunal by withdrawing baseless allegations and perhaps saying what motivated the allegations, the Tribunal work is required to continue over months and those at the receiving end of the allegations would be required to contest testimony and documents and to be represented. That is not cooperation. On the other hand, where the person, as Denham J. states, says that the allegations are false and perhaps says what brought about his or her conduct in the first place, that is cooperation. What is involved here is not that situation. Clearly, there is also the situation where a person has serious allegations to make and while others contest his or her testimony, it turns out that the person should be vindicated. In that case, costs go to the person the truth of whose allegations is vindicated".

"judicial exercise"

59. The extract which I have just quoted was preceded by a quote, both in Irish and in the English translation from *Ó Gríofáin v. Éire* [2009] IEHC 188, namely: "*Justice is the aim of every legal proceeding. Truth is the objective of every judicial exercise*". The phrase "*judicial exercise*" also appears in the second paragraph on p. 14 of the Costs Decision. On behalf of the applicant, it was submitted that this reference was inappropriate, the suggestion being that the respondent acted *ultra vires* and rejected the applicant's allegations in a "*judicial exercise*". Such a submission is entirely unsupported by any evidence and I am bound to reject it. The allegations which were made by the applicant were dealt with by the Tribunal, whose findings are detailed, including in the Second Interim Report. The contents of same are not the subject of any challenge. Furthermore, it is plain from the contents of the Costs Decision that there was no approach taken to the question of costs other than one which was consistent with s. 6 (1) and the relevant authorities.

60. The following is stated on internal p. 15 of the Costs Decision:-

"The evidence of Garda Keith Harrison exhibited almost no sense of the harm that was being done by his allegations but what is important is not that the allegations hurt, because the truth can hurt, but telling the truth can be justified, but that he

had the means to back away from them, which was done to a minimal extent by Marisa Simms but that he persisted fully in them when they were wrong. The Tribunal does not ascribe any motivation to him as the Tribunal's only task is to find facts and to report on what was a series of allegations of public moment but which had no substance whatsoever to them".

It is clear from the face of the Costs Decision, including from the foregoing extract, that, notwithstanding submissions on behalf of the applicant to the contrary, the 04 December 2019 Costs Decision was not based on any moral judgment or concept of retributive justice, or for that matter, on any substantive findings by the Tribunal insofar as its terms of reference were concerned, despite the applicant's submissions to that effect. Rather, it was a decision which was based on findings, which are not challenged in the present proceedings, to the effect that the applicant knowingly gave false or misleading information and, thus, failed to cooperate with the Tribunal.

"civil case"

61. In the penultimate paragraph on internal p. 15 of the Costs Decision, the following is, inter alia, stated:-

"All legal practitioners and judges will be familiar with situations where allegations can be withdrawn in a brief court hearing on the basis of a serious consideration of where the facts are. This helps if backed by legal advice. That should have happened here, but did not. But, that is not at all to suggest that there was anything wrong in any legal advice given. The opposite is assumed. Normally, in a civil case the party withdrawing an allegation will have to pay his or her own costs and that of the opposing party, but on occasion that can be compromised. Here, the Oireachtas set up the Tribunal, so it is arguable that such a principle does not fully apply. The Tribunal cannot make any award beyond that first day of the Tribunal substantive hearing…".

It is clear that the foregoing analogy, made with a reference to allegations being withdrawn in civil proceedings, is simply that, namely, an analogy to illustrate the point made. Despite the submission made on behalf of the applicant, it is not evidence that the respondent believed himself to be exercising a High Court discretion in respect of costs or that he purported to approach the question of costs as if this was a civil case, thereby acting *ultra vires*. For this Court to agree with such a submission would be to do violence to what is said in the Costs Decision and to draw an improper inference which the contents of the Costs Decision – read, as it explicitly says it must be, in conjunction with, inter alia, the Tribunal's Second Interim Report - do not support or allow.

62. It is clear from the contents of the Costs Decision that the arguments raised on behalf of the applicant were dealt with, including the issue relating to awarding a portion of costs only. In the manner explained on the face of the said decision, the Tribunal found that this was not a situation where awarding a percentage of costs was appropriate. The Tribunal could not find any basis for an award of costs based on cooperation within the meaning of the case law. It is no function of this Court to second guess a decision which

was made *intra vires* by a Tribunal. It might be said, however, that in light of the statutory position and the principles which emerge from the authorities, it was open to the Tribunal not to award any costs in favour of the applicant. The Tribunal did not decide to award no costs to the applicant. Rather, the Tribunal went on to consider whether there was a basis upon which a "*humane and lawful award of costs*" could be made. The respondent noted that it was the Oireachtas which initiated the public Tribunal and noted that there could have been a scoping exercise and "*If during that exercise, the astonishing texts exchanged between Marissa Simms and Garda Keith Harrison had come out, any basis for holding an inquiry might have dissipated."* The respondent went on to observe that the Tribunal, having been set up by the Oireachtas, notwithstanding the baseless nature of the allegations "*it might be argued that Garda Keith Harrison was entitled to consult solicitors, that solicitors would instruct counsel and that the very extensive disclosure made by the Tribunal would have to be analysed and that the opening speech of counsel for the Tribunal, factual and analytical in its objective nature, would have had to be considered.*" It was on this basis that the Tribunal ruled that the applicant was entitled to representation up to and including the opening day of the Tribunal's substantive hearings but that no order was to be made in respect of costs for the remainder of the days of the hearing.

63. On any analysis the Costs Decision is clear, rational and based on stated reasons. It is worth observing that it is not pleaded that the Costs Decision plainly and unambiguously flies in the face of fundamental reason and common sense so as to trigger the irrationality ground for review. It is not in dispute that the power to make orders of costs is provided for in s. 6 of the 1979 Act which has been quoted, verbatim, elsewhere in this judgment. It is not in dispute that the respondent was entitled to refuse costs on the basis of non-cooperation. Indeed, the applicant confirms, in submissions, that this is so. Thus, central to the case before this court is whether, for the purposes of the Costs Decision, the respondent was entitled to regard the applicant as having failed to cooperate with the Tribunal and as having knowingly given false or misleading information to the Tribunal, having regard to the findings made by the Tribunal as to the conduct of the applicant insofar as information, answers and evidence provided to the former by the latter was concerned. In my view the answer is plainly in the affirmative having regard to the findings in the Second Interim Report which I have referred to earlier in this judgment.

A particular form of words

64. In my view, the respondent was not obliged to use, in the Second Interim Report, any particular form of words when describing findings in relation to the applicant's conduct before the Tribunal with regard to the giving of evidence and information or as regards the applicant's cooperation or lack thereof. The fact that the Second Interim Report does not contain the words "*Garda Keith Harrison knowingly gave false or misleading information to the Tribuna*l" or "*Garda Keith Harrison failed to cooperate with the Tribunal"* does not deprive the Tribunal of the powers conferred on it by virtue of s. 6 of the 1979 Act. Taken together, the findings by the Tribunal in relation to the applicant's answers and evidence undoubtedly constitute findings that the applicant knowingly gave

false or misleading information to the Tribunal and that he failed to cooperate with the Tribunal, or necessarily give rise to such inferences.

65. The giving of false or misleading information by the applicant, as found in the Tribunal's Second Interim Report, is not "cured" by the absence of any particular form of words or the absence of a specific formula by which the Tribunal expressed its findings or to the applicant's conduct. Similar comments apply in relation to the applicant's failure to cooperate when, as the authorities make perfectly clear, non-cooperation can include failure to provide assistance or knowingly giving false or misleading information or adducing deliberately false evidence.

The proposition that the applicant assisted the Tribunal

66. It is pleaded, *inter alia*, that the applicant at all times assisted the Tribunal. That plea is wholly undermined by the evidence, in particular, the contents of the Tribunal's Second Interim Report, certain findings of which have been set out earlier in this judgment. Similar comments apply in relation to certain assertions made in the replying affidavit of the applicant which was sworn on 15 July 2020. In it, the applicant makes averments to the effect that his beliefs were honestly held, that he gave a truthful account of matters throughout the Tribunal to the best of his recollection and that he assisted and cooperated with the Tribunal. The applicant also avers that there was no finding made by the Tribunal that his belief was not honestly held or that his evidence was false or misleading. At the hearing, counsel for the applicant also submitted that, in circumstances where no replying affidavit was delivered on behalf of the respondent and where no notice to cross-examine the applicant was served, all averments in the applicant's 15 July 2020 affidavit constitute uncontroverted averments which, in essence, this court cannot look behind or discount.

67. Despite the skill and conviction with which it is made, the foregoing is not a submission which avails the applicant. I say this for several reasons. As I have stated more than once in this judgment, these proceedings are not a challenge to the findings in the Tribunal's reports, nor can they be. Thus, regardless of what the applicant avers in July 2020, the Costs Decision which is challenged is one based squarely on the findings set out by the Tribunal, in particular in its Second Interim Report of 30 November 2017. Averments by the applicant over two and a half years later cannot negate the findings in the Tribunal's Second Interim Report, yet that is precisely what the applicant's 15 July 2020 affidavit and his counsel's submission seek, skilfully but impermissibly, to do. The assertions as to assistance cooperation and the giving of a truthful account of matters made in the applicant's 15 July 2020 affidavit are wholly undermined by the various findings in the Second Interim Report, to which I have already referred.

68. As I have stated more than once, the present proceedings are not, and cannot be, a challenge to the findings of the Tribunal in its reports but it could not be said that those findings were other than made following a reasoned analysis of the evidence given by the applicant in the context of the other evidence before the Tribunal. It is clear from the contents of the Second Interim Report that the Tribunal, in reaching findings with regard

to the applicant's answers and evidence, did so in the context of considering and weighing and balancing the totality of the evidence before it in respect of particular issues.

To silence public debate

69. On behalf of the applicant it is also submitted that the effect of the Costs Decision, if allowed to stand, would be to silence public debate and undermine the purpose of Tribunals by telling a concerned party, in effect, that if they "raise their head above the parapet" and say something, they could find themselves penalised for costs unless they are in a position to prove everything, 100%. It is submitted that this Costs Decision defeats the very purpose of Tribunals by imposing a rule that allegations honestly made and honestly held will result in a liability for the party who makes those allegations unless they turn out to be entirely correct in the allegations raised. The foregoing submission, regardless of the skill with which it is made, fundamentally mischaracterises the Costs Decision and the reasons for it. It is clear from the face of the decision that it is based on findings particular to the respondent's conduct before the Tribunal, specifically relating to his answers in evidence. The Costs Decision is clear that the fact that it must be read in conjunction with*, inter alia*, the entirety of the Second Interim Report. The findings in the Second Interim Report undoubtedly constitute findings which specifically relate to the applicant's conduct before the Tribunal. Taken together, those findings demonstrate that the applicant knowingly gave false or misleading information to the Tribunal. That is not cooperation. This entitled the Tribunal to make the Costs Decision it made.

70. There is no question of the Costs Decision being one which abandons or departs from the statutory position as interpreted by the authorities. The respondent did not impose a test of the type which counsel for the applicant suggests. The respondent did not apply a test to the effect that the applicant would only receive costs if he was proved right, but not otherwise. Such an impermissible test would, of course, speak to the findings of the Tribunal as regards the subject matter of the inquiry. That is not the test which the respondent applied. Rather, the gravamen of the Costs Decision related to the Tribunal's findings as to the conduct of the applicant. Far from "telling the truth as an objective reality" (to quote from p. 13 of the Costs Decision), the findings in the Tribunal's Second Interim Report demonstrate that the applicant knowingly gave false or misleading information to the Tribunal (to quote from s. 6(1) of the 1979 Act) and adduced deliberately false evidence (to quote Geoghegan J. in *Haughey v Moriarty*). The foregoing constituted non-cooperation, entitling the respondent to make the Costs Decision. The Costs Decision which so plainly was based on findings regarding the applicant's conduct, namely that he deliberately furnished false or misleading information to the Tribunal and did not cooperate with it, is not a decision which can fairly be characterised as likely to stifle public debate or to silence members of the public. Rather, it is a decision which flowed from very particular findings in relation to a participant before the Tribunal and his conscious decision not to cooperate with the Tribunal by knowingly adducing false evidence.

Substantive findings – usurpation of judicial powers

71. It is not in dispute between the parties that, because of the distinction between the administration of justice and the authority of a Tribunal, findings by the latter have been

described in the authorities as "*sterile of legal effect*" (per Costello J. in *Goodman International v. Hamilton*). Referring to Mr. Justice Costello's decision, Hardiman J., in *Murphy v. Flood*, stated as follows: *"The phrase referred to above is 'sterile of legal effect' or 'legally sterile' as it is sometimes rendered, used as a description of the quality of a Tribunal which prevents it from being an unconstitutional usurpation of judicial functions and powers."* On behalf of the applicant it is submitted that the respondent's refusal to award the applicant the entire of his costs was based on the substantive findings of the Tribunal and that the Costs Decision is not legally sterile. Neither is the case. The Costs Decision was based on findings in the Second Interim Report of the Tribunal which evidence non-cooperation on the part of the applicant. It is said on behalf of the applicant that the respondent departed from the principles identified in *McDonald v. Bord na gCon*, and endorsed by the Supreme Court in *Goodman v. Hamilton*, the submission being that the respondent made findings which were not legally sterile but which amounted to an unconstitutional usurpation of judicial functions and powers. This is not so. The findings in the Second Interim Report demonstrated non-cooperation on the part of the applicant, as regards his conduct before the Tribunal and the answers and evidence provided by him. Those findings as to the applicant's conduct have been set out earlier in this decision and have not been successfully challenged. Nor can the applicant seek to challenge those findings in the present proceedings. Those findings of non-cooperation by the applicant entitled the respondent, in exercise of the statutory power conferred by s.6 of the 1979 Act, to make the Costs Decision. There was no question of the respondent exceeding the authority enjoyed by the Tribunal with respect to costs and the Costs Decision did not involve the respondent straying impermissibly into the administration of justice, as opposed to properly exercising the statutory power conferred on a Tribunal regarding the issue of costs.

Submissions made with reference to "Day 31" of the Tribunal's hearings, 08 Oct 2013

72. Exhibit "KH 1" to the applicant's affidavit sworn 15 July 2020 comprised a total of four lever-arch folders containing transcripts in respects of days 19 to 37, inclusive, of the Disclosures Tribunal. During the hearing, senior counsel for the applicant opened pp. 149 to 164, inclusive, from the transcript regarding day 31, being 04 October 2017. This was the document exhibited behind Tab 13 in Book 3 of exhibit KH 1. This was the only extract from the transcripts which was referred to during the trial, and counsel for the applicant helpfully made it clear that the court was not being invited to read the entire of the transcripts. Counsel for the respondent confirmed likewise. The aforementioned extract from Day 31 concerned, inter alia, an 8 October 2013 meeting and a particular document which apparently comprised a note by a Chief Superintendent McGinn of the said meeting, which senior counsel for the applicant had just been furnished with on day 31. The transcript confirms that the respondent, as Tribunal chairman, adjourned matters overnight in order that certain inquiries could be made in relation to the document and required, inter alia, that a statement from Assistant Commissioner Kenny and a further statement from Chief Supt. McGinn be provided to the Tribunal. Furthermore, although interrupting the evidence of Supt. McGovern, the respondent decided to ask him if he had a recollection and to make an additional statement. Having opened the aforesaid extract from day 31, counsel for the applicant made a submission to

in the present proceedings to the effect that the documentation then available did not allow the respondent to take the view, at that stage, that the applicant's allegations should have been withdrawn.

73. Regardless of the skill with which the foregoing submission is made, it does not in my view evidence any legal infirmity in the Costs Decision or the reasoning underpinning it. In my view, nothing turns, for the purposes of the decision which this Court must make, on what information or documentation was before the Tribunal on 04 October 2017 or on the fact that the Tribunal did not, on 04 October 2017, express the view that the applicant should withdraw all his allegations. What is of relevance is the findings of the Tribunal, in particular in its Second Interim Report, being findings which are not the subject of challenge. But even taking the submission at its height, any view which the respondent may or may not have held, as of 04 October 2017, in no way prevented the applicant from withdrawing allegations which were ultimately found to be "*entirely without any validity*", as stated in the first paragraph of p. 73 of the Second Interim Report which issued on 30 November 2017.

74. Furthermore, and while stressing that it is no function of this Court in the present proceedings to look behind the Tribunal's findings, it is appropriate to observe that the extract from the transcript opened by counsel for the applicant contained, inter alia, the following statement by the respondent (which can be found on internal pp. 159 – 160 of the relevant transcript): -

> *". . . I asked for people who actually knew things relevant to the terms of reference to write to the Tribunal and tell us what they knew. Now, some people did. Appreciating as well that as time goes on, certain issues crystallise as being of importance, if you like, a pivot in a case, it has been pretty clear, it seems to me, for the last couple of weeks, that one of the important pivots in this case from which something perhaps might be made in terms of the book being thrown at Garda Harrison in consequence of the statement made on 6th October, was the 8th October 2013 meeting. Now, I of course have no idea as to whether there was a decision to throw the book at Garda Keith Harrison or if that happened, whether it was unjustifiable in the context. Just as, at this stage, having heard some of the evidence, I have absolutely no idea until we come to the end of matters and the matter has been considered as to how the statement on 6th October 2013 was taken, or indeed as to the veracity or otherwise of that statement in the context of the events that stretched back at that point about three years but focusing in particular on events which occurred in April, August and on the 28th September and on other dates . . .."*

75. With regard to the submission made on behalf of the applicant to the effect that, as of day 31, (i.e. on 4th October 2017), the respondent did not take the view that the applicant's allegations should have been withdrawn, it is plain that, at that point in time, the respondent had not made findings and was not in a position to make findings. This was for the very obvious reason that the respondent had heard only some of the evidence

– something the respondent commented on explicitly, as is clear from the extract which I have quoted above. Thus, it seems to me entirely unfair for the applicant to seek to rely on the proposition that, because the respondent did not express the view on 04 October 2017 that the applicant should have withdrawn all his allegations, it somehow entitles the applicant to costs at least up to that point and/or somehow undermines the findings of the respondent, reached after he had considered all evidence, including findings as to the applicant's conduct insofar as providing evidence to the Tribunal and the view, also expressed in the Costs Decision, that the allegations should not have been persisted with.

76. It seems to me that this submission on behalf of the applicant, which focuses on events of 04 October 2017, ignores the reality that no view taken, or not, by the Tribunal on that date, can in any way account for the conduct of the applicant insofar as deliberately providing false evidence to the Tribunal is concerned. It cannot be disputed that, in its findings concerning the answers given by the applicant to the Tribunal, the following were terms used: "*evasive and at times senseless"; "deceit involved in the evasive answers"; "tailoring his evidence to what suits his purpose at the time"; "his position would shift in accordance with what was perceived to be the drift in the evidence"; "the clear allegations which he was making would be left unmentioned if these did not apparently suit*"; with the Tribunal also finding that the applicant made up what it described as a "*ridiculous allegation*" and finding inter alia that the applicant had given evidence which was "*nonsense*" and "*utter nonsense*". Other findings included that the applicant changed "*the nature of*" his testimony from that which appeared in his statement to the Tribunal and that he had persisted in allegations "*knowing them to be untrue*". The submission on behalf of the applicant made with reference to the extract from the transcript of Day 31 fails to engage, at all, with the fact that the foregoing is how the applicant chose to provide answers and evidence to the Tribunal, as is clear from the findings in the Tribunal's Second Interim Report. In other words, the applicant knew at all material times that the evidence he was giving to the Tribunal was false or misleading. The respondent could not know this until all evidence had been given and considered, sufficient for the Tribunal to make relevant findings. Thus, to criticise the respondent for not, on 04 October 2017, calling upon the applicant to withdraw his allegations, is wholly unfair and is a submission which cannot avail the applicant in the present challenge.

To fall on one's sword

77. To fall on one's sword is a metaphor which appears more than once in relevant authorities. In the decision of Denham J. (as she then was) in *Murphy v. Flood* [2010] IESC 21, the learned Judge stated that: "*Fundamentally the issue is whether a party has co-operated with a Tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully co-operated with a Tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a Tribunal*". At this juncture, it is appropriate to observe that a reading of the Tribunal's Second Interim Report in the present case demonstrates that the applicant never fell on his sword. In other words, the applicant never withdrew baseless allegations which he knew to be untrue but, instead, gave answers which involved deceit, gave evasive answers, tailored his evidence to what suited his purpose at the time, left

allegations or mentioned if these did not apparently suit, gave information to the Tribunal described variously as ridiculous and utterly nonsensical, changed the nature of his testimony from that which appeared in his statement to the Tribunal and the applicant was found to have demonstrated a determination to persist with damaging and hurtful allegations knowing these to be untrue. In the manner explained in *Murphy v. Flood*, a person who fell on their sword, thereby fully co-operating with a Tribunal, could have an expectation that they would obtain their costs. The applicant did not fall on his sword and did not co-operate with the Tribunal.

78. The same phrase also appears in *Fox v. Mahon* [2014] IEHC 397 where, at para. 19 of her decision, Baker J. stated the following: "*Mr. Fox did not fall on his sword. He continued, despite being pressed and tested, to emphatically and absolutely deny the receipt of corrupt payments. It was the emphatic and absolute nature of his evidence that gave rise primarily to the Tribunal's finding that Mr. Fox knew his evidence to be untrue*." In the present case, it is beyond doubt that it was in the Tribunal's Second Interim Report demonstrate that, far from falling on his sword, the applicant gave untrue evidence to the Tribunal which the applicant knew to be untrue. Despite the relevant findings as regards his conduct, the applicant continues to assert to this day, in the teeth of findings to the contrary, that he gave a truthful account of matters throughout the Tribunal. This is clear from averments made by the applicant in his 15th July, 2020 affidavit, including in para. 26 thereof, wherein the applicant avers, inter alia, that he "*assisted the Tribunal at every request"* and that he "*gave a truthful account of matters throughout the Tribunal*…" In short, not only did the applicant not fall on his sword and fully co-operate with the Tribunal, the applicant continues, despite findings in the Tribunal's Second Interim Report to the effect that he deliberately gave false or misleading information to the Tribunal, to claim that he was truthful and co-operative. Based on the findings in the November 2017 Second Interim Report as to the applicant's conduct before the Tribunal, these assertions by the applicant in July 2020 are plainly incorrect. Nor is it the case that the Tribunal's findings as to the conduct of the applicant were based on any substantive findings pursuant to the Tribunal's terms of reference. Rather, it is clear that they relate to the information, answers and evidence given by the applicant to the Tribunal and are findings which resulted from a consideration of the evidence given by the applicant to the Tribunal in the context of other evidence adduced.

Submissions based on the contents of the Third Interim Report

79. Exhibit "KH 11" to the applicant's affidavit sworn 02 March 2020 comprises extracts from the third interim report published by the Tribunal on 11 October 2018. In submissions on behalf of the applicant, reference is made to the following which appears at p. 15 of the third interim report: *"The default position for costs is that as a Tribunal of inquiry is set up in the public interest, the Minister for Finance, in other words the taxpayers of Ireland, should ordinarily pay the legal costs of all of the parties granted representation. Truth, in that regard, remains paramount. Even though a person is required in the public interest to appear and testify as to matters of public moment before a Tribunal of inquiry, those giving evidence are still obliged to be witnesses of truth. If a person has engineered a situation unfairly or deceitfully which results in the public expense of a Tribunal of inquiry,*

that fact should be capable of being reflected in a costs order. Where a person makes serious and unjustifiable allegations against another party to the Tribunal an order as between those parties may be made, allowing also for an order, if appropriate, in a proportionate way against the Minister for Finance." During submissions on behalf of the applicant, counsel made it clear that he agrees entirely with the proposition in the first sentence. However, serious issue was taken on behalf of the applicant with the statement that "*If a person has engineered a situation unfairly or deceitfully which results in the public expense of a Tribunal of Inquiry, that fact should be capable of being reflected in a costs order"*. The foregoing was described by the applicant's counsel as "wishful thinking" and the submission was made that the foregoing does not represent what the law says even if it represents what the respondent believes the law should be. This is a submission with which I cannot agree. It is uncontroversial to say that an element of *deceit* is to deliberately mislead and to act *deceitfully* is to knowingly conceal or misrepresent the truth. In other words, to act deceitfully in respect of a Tribunal is to knowingly give false or misleading information to the Tribunal. To my mind, it is not for this court to parse and analyse the words and sentences used by the respondent in the Tribunal's reports. Nonetheless, it is plain that there is an equivalence between giving answers involving *deceit* (as found in the Second Interim Report) or acting *deceitfully* (the word used in the Third Interim Report) and knowingly giving false or misleading information (the wording which appears in s. 6 of the 1979 Act). It is not in dispute that the latter constitutes non-cooperation, entitling a Tribunal to reflect this in a costs order. Far from being "wishful thinking" on the part of the respondent, it seems to me that the aforesaid passage from the Third Interim Report simply reflects the current legal position and, for the reasons set out in this decision, I am satisfied that, in the Costs Decision which the applicant challenges, the respondent does not purport to depart from the established legal position.

The "LEGAL GROUNDS" pleaded in the Applicant's Statement of Grounds

80. It is now appropriate in my view to look closely at each and every one of the legal grounds advanced by the applicant in respect of the relief sought and I propose to do so, as follows.

Para. 26 of the statement of grounds

81. At paragraph 26 of the statement of grounds, it is pleaded that the respondent acted *ultra vires* and in breach of the principles of natural and constitutional justice in failing to award the applicant his costs in respect of the entirety of the proceedings before the Tribunal. To understand the basis for this plea it is necessary to consider the totality of the pleas made in the statement of grounds, each of which I examine in this decision. For the reasons set out in this judgment, I am satisfied that the evidence does not support this plea.

Para. 27 of the statement of grounds

82. In paragraph 27 of the applicant's statement of grounds it is pleaded that the law provides that a person who is called to give evidence before a Tribunal is entitled to legal representation in that regard. There is, however, no automatic entitlement, in that the legislation provides for a Tribunal to grant, or refuse, representation in respect of an

interested party before a Tribunal. Furthermore, the entitlement to legal representation does not, of itself, confer any entitlement to costs.

Para. 28 of the statement of grounds

83. In para. 28 of the statement of grounds, it is pleaded that, because the applicant's allegations were rejected in a "*judicial exercise*", the respondent has acted unconstitutionally and *ultra vires*. In the manner examined in this decision, the evidence before this court simply does not allow for any finding that there was any, or any purported, administration of justice outside the judicial system. It also seems to me to be a plea which is directed towards the work and findings of the Tribunal itself. The present proceedings are not, and cannot be, a challenge to the work of the Tribunal, the procedures adopted by the Tribunal, the evidence given to the Tribunal or the findings made by the Tribunal. To the extent that the plea at para. 28 constitutes a claim that the respondent impermissibly exercised High Court discretion to determine the issue of costs, the evidence before the court wholly undermines that proposition. The Costs Decision was made in accordance with the respondent's powers pursuant to s. 6 of the 1979 Act and consistent with the principles which emerged from the relevant authorities referred to earlier in this decision.

Para. 29 of the statement of grounds

84. In paragraph 29 of the statement of grounds it is pleaded that the respondent acted *ultra vires* and unconstitutionally in failing to have any or any adequate regard to the fact that it was the respondent who determined what evidence, if any, ought to be called. Again, it needs to be emphasised that the present proceedings do not, and cannot, constitute a challenge to decisions taken by the respondent with regard to what witnesses would be called, the sequencing of same and the manner in which the Tribunal conducted its business. Furthermore, this plea does not appear to me to bear upon the fundamentally important issue which is at the heart of this case, namely, *co-operation* and the undoubted entitlement on the part of the respondent to make a costs order which reflected findings to the effect that the applicant did not co-operate with the Tribunal. Such findings are undoubtedly there in the Second Interim Report of the Tribunal and those findings are undoubtedly at the heart of the Costs Decision made and triggered the respondent's powers under s. 6 (1) of the 1979 Act. Regardless of when the applicant was called to give evidence and regardless of what other witnesses were or were not called (none of the foregoing being matters challenged in the present proceedings), it was open to the applicant at all material times *not* to give answers involving deceit, *not* to give evasive answers, *not* to shift his position , *not* to tailor his evidence to what suited his purpose at the time, *not* to leave allegations unmentioned if these did not apparently suit, *not* to make ridiculous allegations, *not* to give evidence which was nonsense, *not* to persist in damaging and hurtful allegations knowing these to be untrue and *not* to change the nature of his testimony from that which appeared in his statement to the Tribunal. Yet, the foregoing is the manner in which the applicant chose to conduct himself before the Tribunal, as emerges from a consideration of the findings in the Second Interim Report. It also must be said that the fact that the respondent was in control of the business of the Tribunal is utterly irrelevant to the manner in which the applicant chose to

conduct himself when giving evidence to the Tribunal. The respondent's control of the Tribunal's business cannot excuse, explain or render void, the applicant's conduct before the Tribunal, as found.

Para. 30 of the statement of grounds

85. In paragraph 30 of the statement of grounds, it is pleaded that the respondent failed to have any or any adequate regard for the law in respect of the entitlement to legal representation before a Tribunal. It has to be said that there is no law identified to which the respondent is said to have failed to have had regard. Furthermore, the fact that legal representation before a Tribunal may be granted, does not, of necessity, mean that the represented party is entitled to their costs. The question of costs is governed by s. 6(1) of the 1979 Act and by the relevant legal principles and, in the manner analysed in this judgment, I am satisfied that the Costs Decision was one made in accordance with the powers conferred on the respondent by s. 6(1).

Para. 31 of the statement of grounds

86. In paragraph 31 of the statement of grounds, it is pleaded that the respondent erred in applying principles of costs in litigation to the proceedings before a Tribunal. In the manner examined in this judgment, the evidence before this court does not support such a plea. Briefly put, the respondent identified, correctly, the legislative provision and set out, correctly, relevant case law. He applied relevant legal principles to the facts and plainly invoked the jurisdiction enjoyed by the Tribunal. It is the case that, on internal page 10 of the Costs Decision, reference is made in relation to the Tribunal exercising the High Court discretion in relation to costs. That, however, is a setting out of an earlier quote and any fair reading of the Costs Decision as a whole reveals that the respondent correctly applied the relevant principles derived from s. 6(1) of the 1979 Act as interpreted by the authorities and did not purport to exercise the High Court's discretion regarding costs. Very specific mention is made in the Costs Decision of both the legislative power and principles identified in relevant authorities concerning the Tribunal's powers on the issue of costs. There is no confusion on the issue. There is not, for example, any reference in the Costs Decision to s. 169 of the Legal Services Regulation Act, 2015 or to O. 99 of the Rules of the Superior Courts, both of which are fundamental to any determination of costs issues by the High Court in accordance with principles in civil litigation. It is clear that the respondent did not purport to apply High Court discretion or principles as regards costs.

Para. 32 of the statement of grounds

87. At paragraph 32 of the statement of grounds it is pleaded that the respondent erred in finding that allegations are the same as evidence of fact. Despite the sophistication with which this submission is made, I am satisfied that the applicant seeks to draw artificial distinction between allegations, information and evidence. It is beyond doubt that the applicant gave information to the Tribunal, including written information and answers in the course of his evidence. The evidence he gave is analysed carefully, in particular in the Second Interim Report of the Tribunal. The same report contains numerous adverse findings in respect of the answers and evidence given by the applicant and, taken together, they constitute findings that the applicant knowingly gave false or misleading

information to the Tribunal and deliberately adduced false evidence, thereby not cooperating with the Tribunal. No other conclusion is reasonable if one reads the Tribunal's findings as to the applicant's conduct. In short, the applicant undoubtedly gave information to the Tribunal by way of the evidence he gave, as opposed to only making allegations. This information was found to have been false or misleading and knowingly given by the applicant. Nor can I accept the applicant's submission that an "allegation" is not "information" for the purpose of s. 6 of the 1979 Act. Nowhere in the 1979 Act is it stated that an allegation is not or cannot constitute information. To make an allegation is to represent that something is factually so and the applicant knowingly provided information to the Tribunal in support of allegations which he knew to be incorrect. In my view, the concept of "information" must include the concept of an "allegation". The foregoing is, however, something of a sterile debate, because it cannot be disputed that the applicant provided information to the Tribunal, not only in written form but by way of answers given in his evidence as a witness. This is perfectly clear from a reading of the Tribunal's Second Interim Report which contains, inter alia, the various findings I have referred to in this decision regarding the applicant's conduct when providing answers – answers which plainly contained or comprised information.

Para. 33 of the statement of grounds

88. At paragraph 33 of the applicant's statement of grounds it is pleaded that, in refusing the applicant some of his costs, the respondent failed to have regard to *"the fact that the Applicant at all times assisted the Tribunal"*. The evidence before this court wholly undermines that plea. It is not a "fact" that the applicant at all times assisted the Tribunal. A reading of the Second Interim Report and the findings in respect of the applicant's conduct before the Tribunal confirms the contrary. For the applicant to have sworn an affidavit over two and a half years after the publication of the Tribunal's Second Interim Report in which he avers that he assisted the Tribunal does not make it so. Pleas in the statement of grounds and averments by the applicant in the context of the present proceedings does not "unseat" or render ineffective for the purposes of the Costs Decision, the findings made by the Tribunal in the Second Interim Report to which I am bound to have regard, those findings not being the subject of any challenge. The contents of the Tribunal's Second Interim Report wholly undermine the proposition that the applicant at all times assisted or cooperated with the Tribunal. The Second Interim Report does not need to include a phrase which states "*Garda Keith Harrison did not assist the Tribunal*" for this to be so. Taken together, the various findings adverse to the applicant in respect of his conduct before the Tribunal comprehensively demonstrate that he did not at all times assist the Tribunal. This is because those findings demonstrate that the applicant knowingly gave false or misleading information to the Tribunal. That is the opposite of cooperation and the contents of the Second Interim Report of the Tribunal provide the basis for the approach which was taken in the Costs Decision, a decision which was lawfully taken in light of the relevant legal principles concerning the Tribunal's power as regards costs.

Para. 34 of the statement of grounds

89. In paragraph 34 of the statement of grounds it is pleaded that, in refusing the applicant some of his costs, the respondent failed to have regard to the fact that there was no finding made by the Tribunal that the applicant *"knowingly gave false or misleading information".* This has already been addressed earlier in this judgment, but two comments arise in relation to this plea. Firstly, the respondent was not obliged to use any particular form of wording or formula in respect of the findings made by the Tribunal and, regardless of the manner in which the Tribunal expressed itself, the Tribunal's powers, conferred by s. 6(1) of the 1979 Act were available to the Tribunal in light of the relevant findings as to the applicant's conduct. Secondly, I am entirely satisfied that, taken together, the various findings in the Second Interim Report regarding the applicant's conduct before the Tribunal constitute findings that the applicant knowingly gave false or misleading information and, thus, failed to cooperate and failed to provide assistance to the Tribunal. The fact that the Tribunal's report does not use the phrase "knowingly gave false or misleading information" does not, despite the applicant's claims, set at naught the numerous adverse findings made by the Tribunal in relation to the manner in which the applicant gave information to the Tribunal. As stated previously in this judgment, but appropriate to repeat in light of para. 34, answers involving *deceit* and *evasive* answers are answers which are false or misleading. For the Tribunal to find examples of the applicant *tailoring* his evidence to suit his purpose at the time is a finding that the applicant knowingly gave false or misleading information. For the applicant to have been found to *shift* his position in accordance with what was perceived to be the drift in the evidence is a finding that the applicant knowingly gave false or misleading information. For the applicant to have been found to leave allegations *unmentioned* if these did not apparently *suit* is a finding that the applicant knowingly gave false or misleading information. For the applicant to have been found to have changed the *nature* of his testimony from that which appeared in his statement to the Tribunal is a finding that he knowingly gave false or misleading information to the Tribunal. For the Tribunal to have found that the applicant persisted in damaging and hurtful allegations despite the fact that he *knew they were untrue* is a finding that the applicant knowingly gave false or misleading information. To have done all the foregoing is to have impeded, not assisted or co-operated with, the Tribunal.

Para. 35 of the statement of grounds

90. In paragraph 35 of the statement of grounds, it is pleaded that, in refusing the applicant some of his costs, the respondent failed to have regard to the fact that the applicant's evidence before the Tribunal emanated from a protected disclosure within the meaning of the Protected Disclosures Act, 2014, ("the 2014 Act"), and is a form of penalisation as defined by the said Act. Part 1 of the 2014 Act contains the "interpretation" section, from which the following is clear:

> *"Interpretation 3. …*
>
> *(2) For the purposes of this Act –*
>
> *(a) an individual who is or was –*

(i) a member of the Garda Síochána …

(c) 'employer' –

(i) in relation to a member of the Garda Síochána (other than the Commissioner of the Garda Síochána), means the Commissioner of the Garda Síochána;"

In submissions, counsel for the applicant argued that, for the purposes of the 2014 Act, the applicant was employed by the State. This is plainly not so, having regard to the foregoing statutory provision. Furthermore, if one looks at s. 12(1) of the same Act, it states that: "*An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for having made a protected disclosure*." It is beyond doubt that the "employer" for the purposes of s. 12 of the 2014 Act is as defined in s. 3. (2) (a) and (c), namely the Garda Commissioner. The provisions of the 2014 Act are of no relevance to the present proceedings. The respondent is plainly not the plaintiff's employer and the 2014 Act has no application. In short, I am satisfied that the 2014 Act was not a relevant consideration for the respondent to have had regard to when making the Costs Decision, nor is the Costs Decision a penalisation as defined in the 2014 Protected Disclosures Act.

Para. 36 of the statement of grounds

91. In paragraph 36 of the statement of grounds it is pleaded that requiring the applicant to pay for his own representation in respect of 19 days of hearing was imposing on the applicant a legal burden and financial penalty which is impermissible at law. It is a matter for the applicant what arrangements were, or are, made as regards his legal representation and there is no evidence of those arrangements before this Court, nor would one expect there to be. More fundamentally, to suggest that it was *impermissible* for the respondent not to award the applicant some of his costs because the effect of such a decision is that the applicant will face a financial obligation, ignores the Tribunal's statutory powers under s. 6 of the 1979 Act. The logic of the submission is to rob a Tribunal of its statutory power in respect of costs, given that any party who is not awarded all of their costs by a Tribunal may well be likely to face a financial burden or penalty. The fact that a party who is not awarded all of their costs in respect of appearing before a Tribunal may very well face a financial obligation does not, in any way, demonstrate that an *impermissible* legal burden or financial penalty was imposed. Rather, the question is whether the Tribunal acted within jurisdiction in dealing with the applicant's costs and whether fair procedures were adopted. For the reasons given in this judgment I am satisfied that the answer to both questions is in the affirmative. It can also be said that the reason why the applicant was present at the Tribunal's public hearings is because the applicant made very serious allegations in respect of which he gave evidence. It is not necessary to repeat, here, yet again, the various findings in the Second Interim Report with regard to the answers given by the applicant but, taken together, they undoubtedly amount to a finding that the applicant knowingly gave false or misleading information and adduced deliberately false evidence. It also seems uncontroversial to say that, had the applicant told the truth instead of knowingly giving false or misleading information, significantly less time would have been taken up, any

potential financial liability for costs facing the applicant would be substantially smaller and, indeed, the applicant could legitimately claim to have cooperated and could reasonably have sought costs on that basis as, indeed, the Costs Decision makes clear. In the present case there was nothing impermissible about the decision made, even if the consequence is that the applicant faces a financial burden.

Para. 37 of the statement of grounds

92. At paragraph 37 of the statement of grounds it is pleaded that, in holding that costs in a Tribunal are to be awarded to persons whose allegations were found to be true, but not otherwise, the respondent was acting *ultra vires* and in breach of the principles of natural and constitutional justice. This is an approach which the applicant submits the respondent took, but that submission is simply not borne out by the evidence. I have already examined this issue earlier in this judgment. In short, the respondent did not decide to refuse the applicant some of his costs because the applicant's allegations were not found to be true. The foregoing is neither a fair nor an accurate interpretation of the Costs Decision. It is clear from the terms of the Costs Decision that the respondent was very well aware that the truth, or otherwise, of allegations is not determinative of the issue of costs. The applicant was not refused part of his costs because allegations made by him were not proved. Contrary to the applicant's submissions, the respondent did not impermissibly determine the question of the applicant's costs with reference to the substantive findings of the Tribunal. Rather, as is clear from the Costs Decision itself, the respondent refused the applicant some of his costs because the Tribunal found that the applicant had not cooperated. The form of the applicant's non-cooperation was that he had been found to have knowingly given false or misleading information to the Tribunal. It was entirely reasonable to take that view, having regard to the various findings in the Tribunal's Second Interim Report, including as regards the answers given by the applicant in his evidence to the Tribunal.

Para. 38 of the statement of grounds

93. At paragraph 38 of the statement of grounds it is pleaded that the respondent acted *ultra vires* in finding that the matters which the Oireachtas had required him to enquire on his appointment into ought not to have been inquired into. I am entirely satisfied that the respondent did not so find and the evidence before this court offers no support for that plea. The grounds pleaded in para. 38 do not provide any basis for the relief sought.

Para. 39 of the statement of grounds

94. In para. 39 of the applicant's statement of grounds it is pleaded that the respondent failed to give the applicant an or any adequate opportunity to address the basis or methodology which he intended to use to restrict or limit the applicant's entitlement to costs. This plea is undermined by the evidence. The respondent afforded the applicant every opportunity to make submissions, both in writing and orally, as to why the applicant should be awarded costs. Written legal submissions were made on behalf of the applicant and these are set out in the Costs Decision itself, from internal pp. 6 to 12, inclusive. The Tribunal also gave advance notice to the applicant of its concerns as to why it might consider not awarding the applicant costs and this was done by means of the Tribunal's letter dated 22 October 2019. Again, the text of that letter appears in the Costs

Decision itself, between pp. 8 – 11, inclusive. An oral hearing subsequently took place on 01 November 2019 and a transcript of that hearing comprised Exhibit "KH 15" to the applicant's affidavit sworn 02 March 2020. During the hearing before this court, counsel for the applicant opened, in full, pages. 20 – 71 of the transcript in relation to the oral costs hearing which took place on 01 November 2019. It is clear that the applicant was afforded every opportunity to make such submissions, both written and oral, as the applicant wished to make. It is equally clear that the applicant availed of the opportunity and made submissions to the effect that he was entitled to the *entire* of his costs and to no less. It is also clear that, in his decision, the respondent took account of all submissions, written and oral, made on behalf of the applicant. The Costs Decision is explicit that it should be read in its entirety together with *inter alia* the transcript of the oral hearing in respect of the costs issue, and the entirety of the Tribunal's report. The penultimate paragraph on internal p. 11 states: *"The Tribunal held an oral hearing on the issue of costs and heard representations on behalf of Keith Harrison. The transcript of the hearing is on the Tribunal's website at www.disclosuresTribunal.ie and should be considered in full as to the ruling in this case together with the foregoing correspondence and the entirety of the Tribunal report".*

95. Insofar as the applicant submits that the respondent failed to provide any mode of calculation with respect to the reduction of the applicant's entitlement to costs, I am satisfied that this is not correct and I take this view for the following reasons. The Costs Decision is clear as to the finding of non-cooperation on the part of the applicant and that finding is soundly based, having regard to the contents of the Tribunal's Second Interim Report as regards the applicant's conduct before the Tribunal. Non-cooperation entitles a Tribunal to decide against awarding costs. The Costs Decision is clear as to the rationale for granting the applicant costs up to and including the first day of the Tribunal's substantive hearings. It is equally clear as to the rationale for not granting costs thereafter. In submissions on behalf of the applicant, emphasis was laid *inter alia*, on the Court of Appeal's decision in *Lowry v Mr. Justice Moriarty* [2018] IECA 66. In particular, the applicant relies on the following passages from the *Lowry* judgment:

> *"81. I am also of the view that there had to be some process of evaluation of the legal costs incurred in the different parts of the inquiry in order for it to be rational, reasonable, proportionate and just in circumstances of a drastic reduction. I think that the Tribunal should have had a basis of calculation that went beyond general assertions, however justifiable those precepts might be in law as affording a rational basis or justification in general terms. That was not in doubt as I see it. For me, everything comes down to the reasons for that specific amount of deprivation of costs. The Tribunal said it was a difficult question and few would quarrel with that. The fact that the Tribunal did not give the mode of calculation of the reduction is I think a failure to give reasons and a failure to provide a basis for evaluating the reasonableness and proportionality of what was a radical decision with far-reaching ramifications not just for Mr Lowry but also for his professional advisers.*

82. There is in addition a substantial question of fair procedures in regard to the reasoning of the Tribunal and the notice that should have been given to Mr. Lowry prior to the making the decision to disallow two thirds of his costs. This point is perhaps ancillary to the other issues that are raised so it may not actually be a wholly separate question. It is of course no more than one element of the historic rules of natural justice, namely audi alteram partem. I think that there are some uncontroversial legal precepts that give me reason for more than unease about the process of decision-making revealed in these paragraphs of the Specific Ruling. My concerns relate to the reasons given and the corresponding issue of the opportunity that the person affected was given to influence the outcome of the consideration."

96. In my view the applicant was afforded adequate advance notice with respect to the possible approach to costs which might be taken by the respondent and an opportunity, which the applicant availed of, to make such submissions as the applicant wished to make and, in submissions, the applicant sought the entirety of his costs. In my view, nothing in the above dicta renders the Costs Decision unlawful on fairness grounds. The basis upon which the Tribunal decided to award costs up to the first day of public hearings is clear from the Costs Decision, as is the basis for the decision not to award costs thereafter. The applicant also relies on the following passages from *Lowry*:

"90. … he was alerted to potential findings of non-cooperation but not to the potential consequences in relation to the amount of any disallowance. The most important point I think is that Mr. Lowry was not alerted to the possibility that he would only get a fraction of his costs or, alternatively, that the possibility that he would get no costs was under consideration or, further, that the Tribunal was considering that his conduct in participation in the work of the Tribunal was such that it might merit condemnation in costs to the extent of withholding of two thirds thereof. Neither was he given an indication of the methodology of calculation of reduction or matters to which the Tribunal would have regard set out in the General Ruling so that he could address these in response with a view to averting that outcome."

97. In my view the applicant in the present proceedings was undoubtedly alerted, in advance, of the Tribunal's concerns and why it might consider not awarding any costs to the applicant, or part only. This is perfectly clear from a reading of the Tribunal's 22 October 2019 letter which, to my mind, more than adequately complies with the approach to fair procedures explained in the foregoing dicta from *Lowry*. It also has to be said that the factual situation in the *Lowry* case is materially different to the situation before this court. In *Lowry*, the appellant had his entitlement to costs reduced by two thirds by a Tribunal and President Ryan held that the Tribunal failed to identify some rational mode of calculation. By way of contrast, the present situation includes the following factors. Consistent with the dicta in *Lowry* and with the principles of natural justice, it was explained in advance of the costs hearing that the Tribunal had concerns as to why it might consider not awarding costs to the applicant or only a percentage of his costs. It was made clear that those concerns stemmed from the applicant's conduct before the Tribunal, reference being made*, inter alia*, to the applicant's determination to persist in

damaging and hurtful allegations notwithstanding the fact that he knew these to be untrue and specific reference being made, *inter alia*, to the applicant tailoring his evidence to what suits his purpose at the time and giving evidence which was found to be ridiculous and nonsense. Section 6 of the 1979 Act, and relevant authorities were quoted *verbatim*. Thus, the applicant was put squarely on notice of the Tribunal's entitlement not to award costs by reason of non-cooperation and that knowingly giving false or misleading information constitutes non-cooperation. The applicant's attention was drawn to the contents of the Second Interim Report of the Tribunal and it was made clear that the entire contents of that report were relevant and should be read in conjunction with the 22 October 2019 letter, which highlighted the Tribunal's concerns in advance of the costs hearing. The findings in the Second Interim Report, on any reasonable analysis, constitute non-cooperation with the Tribunal on the applicant's part, by giving false or misleading information to it. On the evidence before this court it seems clear that the Tribunal had the jurisdiction to award no costs in favour of the applicant but, following an oral hearing at which the applicant, through his senior counsel, made such submissions as he wished to make, which submissions were to the effect that applicant should be awarded his full costs, the Tribunal, having considered same, came to a decision in which, in the manner explained therein, the applicant's costs up to the first day of the public hearings were granted. For stated reasons no further costs were granted. Unlike *Lowry*, this was not a situation where the Tribunal dealt in fractions or percentage reductions without some means for the applicant to understand a specific fraction or percentage reduction and why, for example, a greater or lesser fraction or percentage was not applied insofar as the relevant reduction was concerned. None of the foregoing arose. In short, there is no question of a failure to identify a rational mode of calculation of the costs which were awarded and not awarded, as this is clear from the reasoning on the face of the Costs Decision itself.

98. Given the emphasis placed on the *Lowry* decision, it is also appropriate to quote the following: -

> *"76. While I am conscious of the Tribunal's observation that there is no mathematical formula that can be applied to determine this question of the appropriate and just deduction to be made in respect of costs to which a person would otherwise be entitled, it is not clear to me why the Tribunal fixed on such a very substantial reduction. On the face of it, it appears that the decision was made to deprive the appellant of part of the costs of representation at the phases or modules in which there is no allegation of non-cooperation but what the reason was or how the amount was determined is impossible to ascertain."*

99. There was no need for any "mathematical formula" to be proposed in advance of the Costs Decision, nor is any mathematical formula used in, or necessary to be employed in order to understand, the Costs Decision. In the present case, unlike the situation in *Lowry*, it is very clear why the Tribunal did not award the applicant any costs beyond the first day of the public hearings. This is because of the finding that the applicant knowingly gave false or misleading information to the Tribunal, thereby failing to co-

operate. Furthermore, and unlike the position in *Lowry*, the Tribunal did not make a decision to deprive the applicant of part of the costs of representation in respect of a module in which there is no allegation of non-cooperation. On the contrary, the Second Interim Report contains numerous findings, adverse to the applicant, with regard to the manner in which he conducted himself before the Tribunal insofar as the giving of information was concerned. As is clear from the Costs Decision, it was this non-cooperation upon which the respondent based the decision not to grant costs to the applicant beyond day one, for the reasons stated. Unlike the position in *Lowry*, there is no absence of a reason, nor is it impossible or in any way difficult to understand how the Tribunal determined the amount of costs granted to the applicant, as opposed to costs not granted. In my view, reliance on the decision in *Lowry* cannot avail the applicant in the present proceedings.

100. I am entirely satisfied that the approach taken by the respondent more than satisfies the standard in respect of fair procedures as explained in *Lowry*. As President Ryan also stated at para. 76 of his decision: "*Fairness does not require mathematical precision but in this situation it did demand that Mr. Lowry be given an opportunity of dissuading the Tribunal from making such a swingeing deduction from his costs*." In the present case the applicant was undoubtedly given an opportunity to dissuade the Tribunal from making no award of costs in his favour and/or from reducing any costs award in his favour and, as is clear from the submissions made on behalf of the applicant, he argued for his entire costs and he did so via written and oral submissions which were made with obvious skill and conviction by the applicant's counsel.

Para. 40 of the statement of grounds

101. In paragraph 40 of the statement of grounds it is pleaded that the respondent breached the applicant's rights pursuant to Articles 6 and/or 10 of the European Convention on Human Rights in failing to award the applicant his costs in respect of the entirety of the proceedings before the Tribunal. Although this is pleaded and counsel for the applicant made it clear that this was a claim maintained in the present proceedings, I am entirely satisfied that the evidence does not support any finding that there has been any breach of Convention rights. Although asserted, it is fair to say that there is no substantive submission made in respect of this plea and I am satisfied that, having regard to the evidence, the applicant has not made out a case on this ground.

Analysis of the "FACTUAL BACKGROUND" detailed in the statement of grounds

102. Having analysed each of the "LEGAL GROUNDS" detailed in the applicant's statement of grounds it is also appropriate to look closely at paras. 1-25 of the statement of grounds which appear under the heading "FACTUAL BACKGROUND".

Paras. 1 - 3 of the statement of grounds

103. Paragraphs 1-2 concern the applicant's training and where he is stationed and no comment is necessary in respect of same. At para. 3 it is pleaded *inter alia* that the applicant made a number of protected disclosures. Earlier in this decision I referred to the reliance which the applicant has sought to place on the Protected Disclosures Act of 2014 and, in the manner explained above, I am satisfied that the 2014 Act is of no

relevance. I am also satisfied that it is no function of this court to make a determination as to whether, or not, the applicant made protected disclosures within the meaning of the 2014 Act.

Paras. 4 - 8 of the statement of grounds

104. Paragraph 4 of the statement of grounds refers to the establishment of the Tribunal, whereas para. 5 sets out its terms of reference and para 6 refers to the modular approach adopted. Paragraph 7 refers *inter alia* to the giving of evidence and statements by the applicant, whereas para. 8 refers to the grant of representation in respect of module N of the terms of reference.

Para. 9 of the statement of grounds

105. In paragraph 9 it is pleaded that, in contra-distinction to the two other members of An Garda Síochána who made protected disclosures, the respondent never sought to have the applicant interviewed by investigators for the Tribunal or by the Tribunal's legal team prior to the applicant being called to give evidence at the public hearing. The following comments can be made in relation to the foregoing plea. Firstly, in para. 4 of the respondent's statement of opposition - the contents of which are verified by means of an affidavit sworn on 12 June 2020 by Mr. Peter Kavanagh, Registrar to the Tribunal - the following is stated with regard to the fact that the respondent did not seek to have the applicant interviewed prior to the applicant giving evidence at the public hearing: *"This occurred in circumstances where the applicant and his domestic partner had submitted comprehensive statements and material. The applicant's statement and alleged protected disclosure collectively amounted to approximately 40 pages of relatively dense text containing a significant level [of] detail of a large number of serious allegations. The length and detail of the statements provided to the Tribunal was such that the Tribunal determined that further interview prior to the public hearings was unnecessary*." Secondly, and even more important than the foregoing explanation averred to on behalf of the respondent, it seems to me that, insofar as the applicant has any complaint about the fact that he was not interviewed prior to giving his evidence, this is a complaint regarding the manner in which the Tribunal conducted its business. A complaint regarding the manner in which the Tribunal conducted its work is not a complaint which properly forms any part of the present proceedings or which provides any basis for the relief sought.

Para. 10 of the statement of grounds

106. Paragraph 10 of the statement of grounds refers to the applicant being furnished with statements and documents from other witnesses and it is pleaded that the applicant was invited to furnish an additional statement should he wish in response to material furnished. It is also pleaded that the Tribunal did not seek clarification in respect of any particular issue from the applicant and it is pleaded that the applicant's statement to the Tribunal was furnished to other witnesses at an earlier stage and they were invited to comment. I am satisfied that nothing turns on the foregoing, insofar as a challenge to the Costs Decision is concerned. Again, this case does not concern the procedure adopted prior to or during the public hearings and the what the applicant says at para.10 does not provide a basis for relief.

Paras. 11 - 12 of the statement of grounds

107. Paragraph 11 refers to the public hearings in respect of module N which commenced on 18 September 2017, taking place over 19 days and concluding on 24 October 2017, whereas para. 12 refers to the publication of the Second Interim Report on 30 November 2017. It is pleaded that the report was highly critical of the applicant and this is not in dispute.

Paras. 13 – 15 of the statement of grounds

108. Paragraph 13 refers to the application for costs and to the applicant's written submissions of 21 December 2017. Paragraph 14 refers to the respondent's Third Interim Report published on 11 October 2018. Paragraph 15 refers to the Tribunal's 19 October 2018 request for further submissions from the applicant in respect of costs.

Para. 16 of the statement of grounds

109. Paragraph 16 concerns correspondence of 19 October 2018 from the solicitors for the applicant who raised concerns regarding what it described as "*potential bias*" in relation to the hearing of module N. Paragraph 16 goes on to refer to leave granted on 12 November 2018 seeking to quash the respondent's findings in respect of the applicant and to the judicial review application heard by Donnelly J. on 28 and 29 May 2019 resulting in judgment delivered on 23 August 2019 refusing the reliefs sought and a final order made 8 October 2019 refusing the reliefs and awarding costs to the respondent. Paragraph 16 concludes by stating that the decision of Donnelly J. "*is under appeal to the Court of Appeal*" but at the hearing of the present matter, this court was informed that the Court of Appeal had rejected the appeal and had awarded costs to the respondent and that leave to appeal to the Supreme Court had been refused.

Para. 17 of the statement of grounds

110. Paragraph 17 refers to the 22 October 2019 letter from the Tribunal to the applicant's solicitors, where para. 18 refers to the oral hearing in respect of the costs issue which took place on 01 November 2019.

Para. 18 of the statement of grounds

111. It is appropriate to set out para. 18, verbatim, as follows: "*18. An oral hearing took place on the 1st November 2019 whereby Counsel for the applicant sought to deal with the matters set out in the letter of the 22nd October, 2019. Counsel for the applicant indicated that to refuse the applicant's costs on the basis set out in the letter of the 19th October 2019 would be unlawful and inequitable. Further, Counsel for the applicant set out that if the respondent intended to deny the applicant any part of his costs of attending the Tribunal, the respondent was obliged to place the applicant on notice of both the reasons for refusing any part of the costs and the methodology by which such a reduction was to be carried out.*" It is clear that paragraph 18, which appears under the heading "FACTUAL BACKGROUND" refers to submissions made on behalf of the applicant during the 01 November 2019 costs hearing. Insofar as anything stated in para. 18 is reflected in a plea which is made in the present case, the final sentence in para. 18 (concerning the argument made on 01 November 2019, regarding reasons for and methodology concerning any reduction of costs) is reflected in para. 39 of the statement of grounds which comprises one of the "LEGAL GROUNDS" in respect of which the relief at

section D is sought in the present proceedings. I have already addressed that issue in respect of which the applicant placed significant reliance on the decision in *Lowry*. It is not necessary to repeat the analysis which is contained earlier in this judgment. Suffice to say that this plea is not made out, having regard to the evidence.

112. If one looks at the second sentence in para. 18, it refers to an argument made on 01 November 2019 that to refuse the applicant's costs would be unlawful and "*inequitable*". It is fair to say, however, that the word "*inequitable*" does not appear anywhere in any of the "LEGAL GROUNDS" which are set out between paras. 26 and 40, inclusive, of the statement of grounds and which are advanced as the legal basis for the relief sought. It is also true to say that the word "*inequitable*" does not appear anywhere in the relief at s. D of the statement of grounds, being paras. (i)-(x) inclusive, in respect of which the applicant seeks judicial review. This is not a criticism of the manner in which the case has been pleaded. It is plain that it is a case pleaded with care and sophistication. It is, however, appropriate to point out that the term "*inequitable*", insofar as it appears in para. 18, is explicitly stated to be with reference to the oral hearing on 01 November 2019. Thus, taken on its face, it is not a plea that the Costs Decision which is the subject of the present proceedings is allegedly unlawful by reason of any alleged lack of equity or equality.

113. It must also be said that, nowhere in the statement of grounds, is any other person identified and said to have been treated differently to the applicant with regard to costs. In fact, no reference is made, anywhere in the statement of grounds, to the nature of the treatment of any other person or persons with respect to costs.

"Further Particulars of Paragraph 26 of the Statement of Grounds"

114. At this juncture, it is appropriate to make reference to a document which appeared behind tab 32 of the book of pleadings furnished to the Court, being a document entitled "*Further Particulars of Paragraph 26 of the Statement of Grounds"*. This is a document dated 24 November 2020. The Court was informed that it is a document to which the respondent has objected and that it was included in the book of pleadings without prejudice to that objection. The first paragraph of this document begins as follows:

> *"Without prejudice to all other matters pleaded expressly in the statement of grounds and for the avoidance of confusion the Applicant will rely on the following matters already pleaded in the statement of grounds to establish that the respondent acted* ultra vires *and in breach of the principles of natural and constitutional justice in failing to award the applicant his costs of representation in respect of the public hearings:*
>
> *(1) The respondent treated the costs applications of other witnesses differently to that of the Applicant…" (emphasis added).*

115. It will be recalled that para. 26 of the applicant's statement of grounds states that *"The respondent acted ultra vires and in breach of the principles of natural and constitutional justice in failing to award the applicant his costs in respect of the entirety of the*

proceedings before the Tribunal." Although doubtless an appropriate plea from the applicant's perspective and one which is plainly relied on by the applicant, it is fair to say that nowhere in this plea is it asserted that the Costs Decision is challenged on the basis that the respondent allegedly treated the costs of other witnesses differently. In other words, on its face, para. 26 of the statement of grounds is not one which pleads alleged inequality arising from allegedly different treatment.

116. Insofar as the first sentence of the document dated 24 November 2020 states that the matters set out in it are "*already pleaded*", I cannot share that view. Having carefully reviewed para 26 to which it refers and having carefully reviewed the entire content of the statement of grounds, I can find nothing which pleads that the Costs Decision is challenged on the basis of alleged *inequality* or alleged *different treatment* of other witnesses. In my view, the document of 24 November 2020, properly considered, is not a clarification of something already pleaded and in respect of which the applicant is entitled to seek judicial review. Rather, it seems to me to advance a new ground and to seek to introduce a new plea of allegedly different treatment as regards costs applications when compared to other witnesses before the Tribunal.

117. Counsel for the applicant fairly and properly accepts that a new claim cannot be introduced into judicial review proceedings by way of an updating of particulars. It is also important to point out that, during the hearing, no application was made for this 24 November 2020 document to be admitted or, perhaps more accurately, for any addition to or amendment of the relief for which the applicant seeks judicial review (para. D of the statement of grounds) or the grounds upon which judicial review is sought (para. E of the statement of grounds). No such application was made, in circumstances where counsel for the applicant made it clear that, from his client's perspective, no such application was necessary, because the applicant was satisfied that the question of different and unequal treatment with regard to the question of costs was "*already pleaded*" and was already in issue. This is not a proposition I agree with for the reasons stated in this judgment.

118. I would also add that, in respect of the 24 November 2020 document, no verifying affidavit accompanied it and, in my view, it would be to create a patent unfairness to treat it as a pleading in the case in the teeth of objections from the respondent and in circumstances where, not being pleaded in the statement of grounds, the issue of alleged inequality has not been addressed by the respondent in submissions. In deciding this case, I want to make it clear that, in light of the foregoing, my approach has been to confine a consideration of matters to the pleaded case, in particular the entirety of the statement of grounds delivered by the applicant, dated 02 March 2020. I satisfied that this ensures fairness to the parties and this is particularly so, given that it was made very clear during the trial that, from the applicant's perspective, anything contained in the 24 November 2020 document is already pleaded and no application to admit or amend any relief or grounds was necessary insofar as the applicant was concerned and no such application was made. I have already carefully examined each and every one of the "LEGAL GROUNDS" advanced in support of the claim for relief and such a plea is not made out there. Further comments should, however, be made as follows.

Pleading a case in judicial review

119. In the Supreme Court's decision in *A.P. v DPP* [2011] IESC 2, the then Chief Justice Murray made the following clear (at para. 21): "*When an applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required… The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to appeal has been granted the basis for the review by the Court is established."* In the present case, by order made on 08 May 2020 the High Court President determined that the application for leave be treated as the hearing of the substantive application for Judicial review. The relevant order which determines the basis for the review by this court is the order made on 02 March 2020 (Meenan J.). Thus, the applicant may seek the relief which is set out at paras. (i) to (x) of the 02 March 2020 Order. The foregoing mirrors the relief set out in para. D of the applicant's Statement, dated 02 March 2020, the grounds being those set forth in para. E of the said Statement of grounds of 02 March 2020. That is the case before this court and, no application having been brought in respect of the disputed document dated 24 November 2020, the proper parameters of the case before this court as set out in the applicant's statement of grounds dated 02 March 2020, which are examined in detail in this judgment.

120. In the manner explained above, I am satisfied that the applicant has not pleaded, as part of a challenge to the Costs Decision, that he suffered inequitable treatment or that other witnesses had their costs applications treated differently to that of the applicant. Even if I am entirely wrong in that view, and even if this court could properly consider a challenge to the Costs Decision based on a plea that the respondent treated the costs applications of other witnesses differently to that of the applicant, I am also entirely satisfied that evidence has not been adduced by the applicant which supports any such finding. I say this in light of the following.

121. The replying affidavit of Keith Harrison, sworn on 15 July 2020 is before this court and, earlier in this decision, I made reference to its contents, satisfied that averments by the applicant to the effect that he gave a truthful account of matters and cooperated with the Tribunal does not negate or prevent this court from having regard to the findings in the Tribunal's Second Interim Report which, taken together, are entirely to the contrary. In his 15 July 2020 affidavit, the applicant also makes the following averment in paragraph 16: "*I say further that other witnesses made grave allegations against your deponent which allegations were also untrue; this included supplying the Tribunal with an anonymous letter, stating that I had breached the garda code in transferring to Buncrana and that I had taken a patrol car without permission. I say that no costs penalty was imposed on those parties."* Even if a plea of inequality or different treatment was made in the present case, the foregoing, in my view, falls well short of evidence which would entitle a court to reach a finding that any different treatment, much less unequal treatment, took place insofar as the making of costs orders by the respondent was concerned. The averment in para. 16 is no more than a bare assertion which, in my view,

is wholly devoid of necessary detail to amount to evidence of different or unequal treatment justifying such a finding by a court. In short, even if alleged inequitable treatment as regards Costs Decisions made in respect of others who appeared before the Tribunal was part of the pleaded case, (and I am satisfied that it is not), there is no evidence before this court which supports such a plea.

Para. 5 of the "Further Particulars of Paragraph 26 of the Statement of Grounds"

122. It is also appropriate to note that para. 5 of the disputed document dated 24 November 2020, entitled "Further Particulars of Paragraph 26 of the Statement of Grounds", comprises a plea that "*The Respondent has penalised the Applicant in regard to costs in respect of matters which were not referable to the terms of reference".* I am satisfied that the foregoing also constitutes a new plea which was not, and is not, before this court and is a plea in respect of which no leave was applied for when the case first came before Mr. Justice Meenan on 02 March 2020. The Supreme Court's comments in *A.P. v DPP* [2011] IESC 2 also apply to para. 5 of the 24 November 2020 document, given that it constitutes a plea which does not appear in para. 26, or elsewhere, in the applicant's Statement of Grounds of 02 March 2020. It is also appropriate to point out, once more, that no application was made in respect of the document of 24 November 2020. Thus, the case which this court has to decide is the one pleaded in the applicant's statement of grounds, dated 02 March 2020, which does not include the plea made in par. 5 of the 24 November 2020 document.

123. Furthermore, and even if I am entirely wrong in that view, it seems to me that the gravamen of such a plea is that there were findings made by the Tribunal, including in its Second Interim Report, which the respondent was not entitled to rely upon for the purposes of the Costs Decision. This is to invite this Court to take the view that certain findings reached by the Tribunal, but not others, should have been ignored by the respondent insofar as the Costs Decision was concerned and that this should be done because, the applicant contends, those findings were findings which were made other than with reference to the Terms of Reference of the Tribunal. Several observations can be made as regards the foregoing. At its heart, this is an argument canvassed on behalf of the applicant to the effect that this court cannot have regard to certain of the findings in the Tribunal's Second Interim Report. This is despite the fact that no successful challenge has been made in respect of any of the findings in the Second Interim Report. In essence, it asks this court to engage in an act of selective blindness to a range of findings in the Second Interim Report concerning the applicant's conduct because, it is submitted, these findings are allegedly peripheral to or outside the Tribunal's terms of reference.

124. There is neither evidence or authority advanced for the foregoing proposition. Nor does this submission appear to arise from the pleaded case in respect of which the applicant sought leave 02 March 2020. Nowhere in the applicant's Statement of Grounds dated 02 March 20202 is it asserted that the respondent relied, for the purposes of the Costs Decision, on any finding or matter which was not within the terms of reference of the Tribunal. Nor has the applicant in these proceedings identified with any particularity

those findings which he says fell outside the Tribunal's terms of reference, as opposed to those findings which he says did not. The applicant has not tendered any evidence which would justify any such conclusion even if it was an issue properly before this court, which it is not. In truth, this contention can fairly be characterised as a wholly impermissible attempt to mount an attack on the findings made by the Tribunal, which is not pleaded, which this court cannot entertain and which, in any event, is simply not supported by the evidence. Each of these are insurmountable problems from the applicant's perspective, in circumstances where this court cannot entertain what is, in reality, an attempt to make a wholly impermissible challenge to findings made by the Tribunal. It is the lawfulness of the Costs Decision, not the findings made by the Tribunal, with which this Court is concerned.

Para. 19 of the statement of grounds

125. Returning to the "FACTUAL BACKGROUND" as pleaded in the statement of grounds, para. 19 refers to the 04 December 2019 Costs Decision which is challenged in the present proceedings. It is unnecessary to comment at too much length on the manner in which the applicant characterises the Costs Decision in para. 19, in circumstances where I have set out in this judgment, *verbatim* and in full, the Costs Decision itself. I have also analysed each of the please raised in para. 19. A careful analysis of the Costs Decision in conjunction with, inter alia, the Second Interim Report, undermines the manner in which the applicant seeks to characterise the basis for the Costs Decision. The various pleas in para. 19 are not established on the evidence and do not assist the applicant. It is unnecessary to repeat here, the detailed analysis found elsewhere in this judgment. Suffice to say that the proposition, advanced in para. 19 (a), that the basis of the Costs Decision was that "*the Tribunal could not find any basis that the Applicant's allegations were true"* ignores the numerous findings as to the applicant's conduct which establish that the applicant knowingly gave false and misleading information to the Tribunal. The use in the Costs Decision of the phrase "*telling the truth as an objective reality*", referred to in para. 19 (b), has been looked at closely elsewhere in this judgment and cannot avail the applicant. Para. (c) concerns the assertion made by the applicant that the respondent imposed a rule to the effect that only a party who can prove their allegations is entitled to costs and, again, this assertion has been rejected for reasons explained elsewhere in this judgment. In para. 19(d), the applicant pleads that the basis upon which the Costs Decision was made was "*That the Tribunal was a judicial exercise*". Once more, the foregoing is not borne out by the evidence before this court. In short, the pleas made in para. 19 are not established on an analysis of the evidence.

Para. 20 of the statement of grounds

126. In para. 20 it is pleaded that at no point did the respondent state that the applicant had failed to provide assistance or knowingly gave false or misleading information. This assertion reflects the plea made in para. 34 of the applicant's statement of grounds under the heading "Legal Grounds" and I have already dealt with the matter. In short, this is an argument made by the applicant which addresses *form* and ignores *substance*. The Tribunal was not required, as a condition precedent to the proper exercise of its powers under s. 6(1) of the 1979 Act, to use any particular form of wording, be that in the

Second Interim Report or in the Costs Decision. The fact that the Tribunal did not state in a particular form of words that the applicant failed to provide assistance, knowingly gave false or misleading information, failed to cooperate and adduced deliberately false evidence, does not detract in any way from the respondent's findings which were to the foregoing effect. Those findings are clear from the contents of the Tribunal's Second Interim Report. Regardless of the *form* of word used, the substance of the findings in the Second Interim Report is that the applicant knowingly gave false or misleading information to the Tribunal, thereby failing to provide assistance and failing to cooperate with the Tribunal. Those are findings reached. They trigger the Tribunal's statutory power as regards costs. The said power in s. 6 of the 1979 Act is not set at naught because the Tribunal expressed itself in the way it did.

Para. 21 of the statement of grounds

127. At paragraph 21 of the statement of grounds it is pleaded that at no point did the respondent invite the applicant or his legal advisors to address the approach he intended to take in relation to costs. This reflects the plea made at para. 39 under the "Legal Grounds" heading and it is an issue I have already addressed in some detail. In the manner explained when I looked at the plea in para. 39, the evidence before the court paints an entirely different picture to that asserted at para. 21 and demonstrates that the respondent took an approach which ensured fair procedures and that the principles of natural and constitutional justice were applied. The Tribunal's 22 October 2019 letter to the applicant's solicitors letter explained, in advance of a costs hearing, the proposed approach of the Tribunal to the question of costs. As well as citing the relevant statutory provisions and the judgment of Denham J. in *Murphy v. Flood* as well as that of Geoghegan J. in *Haughey v. Moriarty*, it was made clear that the giving of truthful evidence was a consideration as to whether there was cooperation with the Tribunal. It will be recalled that the findings of the Tribunal insofar as the applicant's conduct was concerned, were already well known to the applicant by this point, in that the Tribunal's Second Interim Report was made available on 30 November 2017. These findings were clearly to the effect that the applicant had knowingly given false evidence to the Tribunal, as opposed to having been found to have told the truth. The concerns on the part of the respondent on the question of whether or not the applicant cooperated with the Tribunal are set out in detail in the 22 October 2019 letter. Having read the letter, the applicant and his legal advisors could have been in no doubt as to the proposed approach regarding costs, including the potential consequences of what Geoghegan J. referred to in *Haughey v. Moriarty* as ". . . *the adducing of deliberately false evidence*". As can be seen from its contents, the letter of 22 October 2019 referred to a number of issues and included a number of quotes from the Tribunal's Second Interim Report. This put the applicant squarely on notice of the issue of non – cooperation with the Tribunal as regards telling the truth and the applicant was afforded the opportunity to make submissions in relation to costs before any decision would be made by the respondent. The applicant was afforded, and availed of, the opportunity to make written and oral submissions. In advance of the costs hearing, the Tribunal gave notice to the applicant of its concerns as to why it might not consider awarding costs to the applicant. Armed with the concerns of the respondent, submissions were made on behalf of the applicant to the effect that the

applicant was entitled to his *entire* costs. It was never conceded on behalf of the applicant that he might due less than the entire of the costs. It was only after a consideration of the foregoing that the Costs Decision was made, being a decision taken on a basis which is clear from the face of the decision and being reasonable, explained, *intra vires* the respondent's powers and in compliance with fairness principles and natural justice provisions.

Paras. 22 – 23 of the statement of grounds

128. At paragraph 22 of the statement of grounds it is pleaded that at no point prior to the public hearings, did the respondent invite the applicant to withdraw any part of his statement or allegations. This is an issue which I addressed earlier in this decision in the context of the submission made by counsel for the applicant with reference to the transcript of day 31, being 4th October 2017. The essence of the plea is that a duty rested on the respondent to invite the applicant to withdraw his allegations. No such legal duty has been identified and I am satisfied that none exists. A Tribunal is a creature of Statute and comes into being to investigate matters in accordance with its terms of reference. It is uncontroversial to say that a Tribunal cannot properly make findings in respect of the substantive matters it has been set up to enquire into, until it has heard and considered all relevant evidence touching on those matters. Until all relevant evidence has been given and considered by the Tribunal and the latter is in a position to reach findings, a party who deliberately gives false or misleading information to the Tribunal has an "advantage" over it, in that they know, but the Tribunal does not yet know, that they are providing false or misleading information. The plea at para. 22 of the applicant's statement of grounds is fundamentally flawed both legally and temporally. Legally, it is not the respondent's responsibility to call upon a party who is knowingly giving evasive answers and answers involving deceit and tailoring their evidence and shifting their position and persisting with allegations which they know to be untrue, to withdraw the allegations which it is the role of the Tribunal to investigate. Furthermore, a Tribunal cannot be expected to know that allegations are untrue and cannot be in a position to find that a party has given answers involving evasion, deceit and a tailoring of evidence to suit their purpose, until the Tribunal is in a position to make findings, having heard and considered all relevant evidence. No act or omission on the part of the respondent constituted any bar to the applicant telling the truth, as opposed to knowingly giving false or misleading information to the Tribunal, or prevented the applicant from withdrawing, at any point, allegations which he knew to be untrue.

129. Similar observations are appropriate with regard to para. 23 of the statement of grounds in which it is pleaded that the respondent, at no point, indicated that the allegations should be withdrawn prior to the public hearings. The same legal and temporal flaws apply to this contention and this plea cannot under any circumstances avail the applicant in respect of a challenge to the Costs Decision. The applicant's failure to tell the truth, as opposed to knowingly giving false information to the Tribunal, and the applicant's failure to withdraw allegations he knew to be untrue, cannot be explained or excused by suggesting that it was the responsibility of the body established to find facts, to call for this. There was no such legal duty on the respondent and, in reality, it was the applicant

who at all material times knew that he was furnishing false or misleading information and that he was persisting with allegations he knew to be untrue, whereas the Tribunal could not reach findings until a much later point, namely until the Tribunal had received and considered all relevant evidence.

Para. 24 of the statement of grounds

130. At paragraph 24 it is pleaded that at no point did the respondent or the Tribunal team seek to interview the applicant prior to the public hearings. This repeats the contents of para. 9 and is something which has already been addressed in this decision. In short, the present proceedings are not a challenge to the work of the Tribunal or the manner in which the Tribunal organised its work.

Para. 25 of the statement of grounds

131. At para. 25 in the statement of grounds it is pleaded that at no point did the respondent state that the applicant did not make a protected disclosure as defined by the 2014 Act that was the subject of the Tribunal of Inquiry. I have already dealt with the 2014 Act and it is unnecessary to repeat that analysis. Suffice to say that the applicant's purported reliance on the 2014 Act provides no basis for challenging the Costs Decision.

This court's decision summarised

132. The case before this court is not a challenge to any findings by the Tribunal. Such a challenge was previously brought by the applicant, in separate legal proceedings, and was unsuccessful. The Costs Decision which is challenged in the present proceedings was explicit about the fact that it needed to be read in the context of, *inter alia*, the entire Second Interim Report of the Tribunal. In the Second Interim Report, numerous adverse findings were made concerning the applicant's conduct, to the effect that the applicant had not told the truth to the Tribunal and that the applicant did this knowingly.

133. When, on p. 13 of the Costs Decision, the respondent stated that "*cooperation must involve telling the truth as an objective reality*", this was to contrast the foregoing with what the applicant had done, being the polar opposite, including, as found in the Second Interim Report, giving evasive answers, answers involving deceit, tailoring evidence to suit the applicant's purpose, shifting his position in accordance with what was perceived to be the drift in the evidence, leaving allegations unmentioned if they did not apparently suit, making up a ridiculous allegation, saying things which were utter nonsense, changing the nature of his testimony from that which appeared in his statement to the Tribunal and persisting in allegations knowing that they were untrue.

134. The findings in the Tribunal's Second Interim Report utterly undermine the submission that the applicant gave evidence which, subjectively, he believed to be true or that he co-operated with the Tribunal. Taken together, the Tribunal's findings are plainly to the effect that the applicant gave evidence which he knew to be untrue, false and/or misleading. The findings in the Second Interim Report also fatally undermine the averments made in the applicant's 15 July 2020 affidavit, wherein he claims to have assisted the Tribunal and to have given a truthful account of matters throughout the Tribunal to the best of his knowledge and recollection. The Tribunal's findings in the

Second Interim Report are not only to the effect that the applicant gave false or misleading evidence, but that he did so knowingly.

135. The respondent did not reject the applicant's allegations in an impermissible judicial exercise. Furthermore, the Tribunal's findings regarding the applicant's conduct, and the Costs Decision which was based on those findings, did not involve any impermissible straying by the respondent into the realm of the administration of justice, as opposed to the lawful exercise by a Tribunal of statutory powers given by the Oireachtas to the Tribunal, with regard to costs issues. Nor did the respondent exercise the High Court's discretion when making the Costs Decision.

136. In making the Costs Decision, the respondent has not, as the applicant claims, attempted impermissibly to re-write the law or depart from established legal position. The respondent neither based the Costs Decision on *substantive* findings, nor did the respondent purport to impose a test to the effect that only those who prove their allegations 100% will be entitled to costs. Rather, findings concerning the applicant's *conduct* before the Tribunal were to the effect that applicant knowingly gave false or misleading information to the Tribunal, deliberately adduced false testimony and failed to cooperate with the Tribunal. By deliberately giving false evidence, the applicant failed to co-operate with or to provide assistance to the Tribunal.

137. The applicant could have, but never did "fall on his sword". On the contrary, to this day the applicant asserts that he assisted the Tribunal fully and that he gave truthful evidence at all times, being assertions which are wholly undermined by the findings of the Tribunal regarding the applicant's conduct.

138. There was no absence of fairness or fair procedures. The applicant was given every reasonable opportunity to make such submissions as he wished, both written and oral, in advance of the Costs Decision being made. The applicant, via his legal representatives, took that opportunity, arguing at all times that the applicant was entitled to his entire costs and making that argument squarely on notice of the Tribunal's findings regarding his conduct, the statutory position in light of s. 6 of the 1979 Act and the respondent's concerns as to why it might consider not awarding costs to the applicant. There was no failure to give the applicant an opportunity to address the basis or methodology underpinning the Costs Decision. The applicant was afforded the opportunity to try and dissuade the respondent from making any deduction in respect of costs but, at all times, it was contended that the applicant was entitled to the entire of his costs. The Costs Decision, which took account of all submissions made on behalf of the applicant, requires no mathematical formula to understand. For stated reasons which are clear, rational, readily comprehensible, consistent with the respondent's powers under s. 6 of the 1979 Act and the relevant authorities, the applicant was awarded costs up to the first day of the Tribunal's public hearings but no thereafter. The respondent did not act *ultra vires* in making this decision, nor did he breach any principle of natural or constitutional justice.

139. Inequitable or unequal treatment, as regards the costs applications of other witnesses, is not pleaded in the case before this court, nor is any evidence proffered which would

provide a basis for such a finding. The proposition that the Costs Decision relied on findings by the Tribunal which were not referable to its terms of reference or which were peripheral to same is neither pleaded, nor has the applicant proffered any evidence to support such a claim. This case is not and cannot be considered by this court to be, a challenge to the Tribunal's findings, be they findings as to the applicant's conduct or substantive findings. The case before this court concerns the lawfulness of the Costs Decision.

140. For the reasons set out in this decision I am satisfied that the respondent was undoubtedly entitled to exercise his discretion in relation to the applicant's costs in the manner which he did, having regard to the findings of the Tribunal as detailed in its Second Interim Report concerning the conduct of the applicant before the Tribunal. The respondent's powers under s. 6 of the 1979 Act did not depend on the use of any particular *form* of words and, in *substance*, the findings regarding the applicant's conduct were undoubtedly to the effect that the applicant knowingly gave false or misleading information, to, and failed to co-operate with, the Tribunal. This entitled the respondent, in exercise of his statutory power, to make the Costs Decision. The respondent undoubtedly acted within jurisdiction in dealing with the applicant's claim in respect of costs and I am entirely satisfied that the respondent adopted fair procedures consistent with the principles of natural and constitutional justice in reaching the Costs Decision.

141. The purpose of a Tribunal is to carry out an inquiry regarding matters of public concern which the Oireachtas has deemed worthy of investigation. The means by which a Tribunal carries out its work is to receive information and evidence from parties. It is plainly the case that to give evasive answers or answers involving deceit or to tailor one's evidence or to shift one's position or to give answers which are senseless or nonsense or to leave things unmentioned if they did not apparently suit or to answer a matter by making a ridiculous allegation or to change the nature of one's testimony from that which appeared in a statement given to the Tribunal or to persist in allegations despite the fact that one knows them to be untrue, is to knowingly give false or misleading information to the Tribunal. It is to deliberately adduce false evidence. It is to impede the work of the Tribunal. It is to fail to cooperate. It is to fail to assist. It is to undermine the Tribunal's efforts. It is to make a Tribunal's work more difficult and more time consuming and it is to create the very real potential that the essence of the Tribunal's task, as a finder of fact, may be frustrated. Despite the submissions made on behalf of the applicant, the Costs Decision is not one which re-writes the law or which, if allowed to stand, will stifle public debate and frustrate the aim of Tribunals. Rather, the Costs Decision is entirely consistent with the well - established legal position to the effect that someone who knowingly gave false information to a Tribunal may have to face the consequences of same in a decision regarding legal costs.

142. In short, the Costs Decision was plainly one taken in accordance with the respondent's powers under s.6 of the 1979 Act and was a decision taken *intra vires*, in accordance with the principles derived from relevant authorities. For the reasons set out in this judgment I am satisfied that the applicant is not entitled to any of the relief sought at section D on

the grounds set out at section E of the applicant's statement of grounds. Accordingly, I am obliged to dismiss the applicant's claim in its entirety.

143. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "*The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate*." Having regard to the foregoing, the parties should correspond with each other with regard to the appropriate order to be made. In default of agreement between the parties, short written submissions should be filed in the Central Office within 21 days. This will allow for time for the parties to engage and will give time for short submissions to be provided if such engagement does not produce consensus on the form of the Court's final order, including as to costs.