THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 48 JR]

BETWEEN

MICHAEL LOWRY

APPLICANT

AND

MR. JUSTICE MORIARTY (The Sole Member of the Tribunal of Inquiry into Payments to Messrs. Charles Haughey and Michael Lowry)

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 27th of January 2016

Introduction

1.1. In these proceedings, the applicant seeks a range of reliefs in connection with a ruling and order made by the respondent in October 2013 in respect of an application by the applicant for the legal costs of appearing before the Tribunal. By that ruling and order, the respondent decided and ordered that the applicant should recover from the Minister for Finance one third of his costs of appearing by solicitor or counsel, such as were reasonably incurred and at a reasonable rate in respect of work undertaken within the Terms of Reference, such costs to be payable on a party and party basis when taxed and ascertained in default of agreement. By order of 27th January, 2014, Peart J. granted leave to the applicants to apply for judicial review for the following reliefs:

> "1) An Order of *Certiorari* quashing the Order of the Respondent of 31 October 2013 directing that the Applicant should recover from the Minister for Finance one third of his costs of appearing before the Tribunal by solicitor and counsel
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> 2) If necessary an Order of Certiorari of the Ruling of the Respondent in respect of an Application for Legal Costs by Michael Lowry
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> 3) A declaration that the Respondent has acted *ultra vires* and/or has acted unreasonably and/or disproportionately in withholding 2/3 of the applicants costs by order dated 31 October 2013 having regard to the Applicant's full cooperation in respect of the GSM module of the Tribunal of Inquiry
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> 4) A declaration that the Respondent has acted *ultra vires* and/or has acted unreasonably and/or disproportionately in withholding 2/3 of the applicants costs by order dated 31 October 2013 by failing to have adequate regard to the Applicant's undisputed cooperation in respect of substantial aspects of the "Money Trail" module of the Tribunal of Inquiry
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> 5) A declaration that the Order of 31 October 2013 was discriminatory in its terms having regard to previous costs Orders made by the Respondent including but not limited to that made in respect of Mr. Charles Haughey and Mr. Ben Dunne
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> 6) A declaration that the Respondent has acted *ultra vires* and unlawfully in failing to apply the conditions applicable to the withholding of costs in his General Ruling on Costs of October 2013
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> 7) A declaration that the Respondent has acted *ultra vires* and/or erred in law in making findings in respect of the Applicant's alleged failure to cooperate or provide assistance to the Tribunal or the giving of false or misleading information to the Tribunal without any or any adequate evidence to support the conclusions in this regard and without meeting the standard identified by him in the General Ruling
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> 8) A declaration that the Respondent has acted *ultra vires* and/or erred in law in making findings in respect of the Applicant's alleged failure to cooperate or provide assistance to the Tribunal or the giving of false or misleading information to the Tribunal without affording the Applicant a right to a fair hearing
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> 9) A declaration that the Order of 31 October 2013 is *ultra vires* being grounded upon substantive findings and/or considerations other than the Applicant's cooperation with the Tribunal
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> 10) A declaration that the findings in respect of the Irish Nationwide Account are *ultra vires* irrational and erroneous and in breach of the Applicant's fair procedures
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> 11) A declaration that the findings in respect of the Vaughan Files are *ultra vires* irrational and erroneous and in breach of the Applicant's fair procedures
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> 12) A declaration that the findings in respect of the Disputes and Settlements on UK Properties are *ultra vires* irrational and erroneous and in breach of the Applicant's fair procedures
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> 13) A declaration that the Respondent failed to have any or any adequate regard to the decision of the Supreme Court in Murphy v. Flood [2010] IR 136 in respect of the impermissibility of making findings of obstruction or hindering
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> 14) A declaration that the Applicant enjoyed a legitimate expectation that he would be the awarded his costs of the distinct investigations phases or modules of the Tribunal in respect of which no non-cooperation findings were made
>
> 15) A declaration that the manner of the application and construction by the Respondent of section 6(1)(a) of the

Tribunals of Inquiry (Evidence)(Amendment) Act, 1979 (as amended) is contrary to the provisions of Bunreacht na hÉireann and in particular Articles 34 and 40, thereof

16) A declaration that the withholding of 2/3 of the Applicant's costs constitutes *inter alia*, the imposition of a penalty and engages the Tribunal in the administration of justice

17) A declaration that the Respondent's findings on costs in respect of the Applicant have exceeded its Terms of Reference and are accordingly *ultra vires*

18) A declaration that the Respondent in withholding 2/3 of the Applicant's costs has failed to perform its functions in a manner compatible with the Applicant's rights under the European Convention on Human Rights

19) An order of *Mandamus* by way of application for judicial review directing the Respondent to make an Order that the Applicant should recover his full costs of appearing before the Tribunal by solicitor and council when taxed or ascertained

20) A declaration that there were insufficient reasons to render it equitable to deny the Applicant the entirety of his costs or in the alternative to award him 1/3 of his costs of representation before the Tribunal

21) An order if necessary remitting the Applicant's application for costs for reconsideration by the Respondent in accordance with law and/or the Order of this Court

22) An order if necessary directing the Respondent to have adequate regard to s.4A of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 as amended and the jurisdiction to apply for directions in relation to the Respondent's functions releasing the Applicant's costs

23) Damages

24) Such further or other order as this honourable court shall deem just to make

25) Costs"

The Parties
2.1. The applicant is a deputy to Dáil Éireann for the constituency of Tipperary North and was Minister for Transport, Energy and Communications from December 1994 to November 1996.

2.2. The respondent is the sole member of the Tribunal of Inquiry into Payments to Messrs. Charles Haughey and Michael Lowry.

The Factual Background
3.1. By a Resolution passed by Dáil Éireann on 11th September, 1997, and a Resolution passed by Seanad Éireann on 18th September, 1997, the Houses of the Oireachtas

(i) noted the "serious public concern arising from the Report of the Tribunal of Inquiry (Dunnes Payments) published on 25 August, 1997, which established that irregular payments were made to and benefits conferred on certain persons who were members of the Houses of the Oireachtas between 1 January, 1986, and 31 December, 1996"; and,

(ii) resolved that it was expedient that "a Tribunal be established under the Tribunals of Inquiry (Evidence) Act, 1921, as adapted by or under subsequent enactments and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, to inquire urgently into and report to the Clerk of the Dáil and make such findings and recommendations as it sees fit, in relation to the following definite matters of urgent public importance:

…

e. Whether any substantial payments were made directly or indirectly to Mr Michael Lowry (whether or not used to discharge monies or debts due by Mr Michael Lowry or due by any company with which he was associated or due by any connected person to Mr Michael Lowry within the meaning of the Ethics in Public Office Act, 1995 or discharged at his direction), during any period when he held public office in circumstances giving rise to a reasonable inference that the motive for making the payment was connected with any public office held by him or had the potential to influence the discharge of such office.

f. The source of any money held in the Bank of Ireland, Thurles branch, Thurles, Co. Tipperary, the Allied Irish Bank in the Channel Islands, the Allied Irish Banks, Dame Street, Dublin, the Bank of Ireland (I.O.M.) Limited in the Isle of Man, the Irish Permanent Building Society, Patrick Street branch, Cork or Rea Brothers (Isle of Man) Limited, in accounts for the benefit or in the name of Mr Lowry or any other person who holds or has held Ministerial office or in any other bank accounts discovered by the Tribunal to be for the benefit or in the name of Mr Lowry or for the benefit or in the name of a connected person within the meaning of the Ethics in Public Office Act, 1995, or for the benefit or in the name of any company owned or controlled by Mr Lowry.

g. Whether Mr Lowry did any act or made any decision in the course of any Ministerial office held by him to confer any benefit on any person making a payment referred to in paragraph (e) or any person who was the source of any money referred to in paragraph (f) or on any other person in return for such payments being made or procured or directed any other person to do such act or make such decision.

h. Whether any payment was made from money held in any of the bank accounts referred to at (f) to any person who holds or has held public office.

i. Whether any holder of public office for whose benefit money was held in any of the accounts referred to at (b) or (f) did any act, in the course of his or her public office, to confer any benefit on any person who was the source of that money, or directed any person to do such an act.

> j. Whether the Revenue Commissioners availed fully, properly and in a timely manner in exercising the powers available to them in collecting or seeking to collect the taxation due by Mr Michael Lowry and Mr Charles Haughey of the funds paid to Michael Lowry and/or Garuda Limited trading as Streamline Enterprises identified in Chapter 5 of the Dunnes Payments Tribunal Report and any other relevant payments or gifts identified at paragraph (e) above and the gifts received by Mr Charles Haughey identified in Chapter 7 of the Dunnes Payments Tribunal Report and any other relevant payments or gifts identified at paragraph (a) above."

The Resolution also provided:

> "the person or persons selected to conduct the Inquiry should be informed that it is the desire of the House that -
>
> a. the Inquiry be completed in as economical a manner as possible and at the earliest date consistent with a fair examination of the matters referred to it, and
>
> b. all costs incurred by reason of the failure of individuals to co-operate fully and expeditiously with the Inquiry should, so far as is consistent with the interests of justice, be borne by those individuals."

3.2. By an Order of the Taoiseach dated 26th September, 1997, a Tribunal was appointed to enquire urgently into and report and make such findings and recommendations as it saw fit to the Clerk of the Dáil on the definite matters of urgent public importance set out in the said Resolutions and nominating the respondent to be the sole member of the Tribunal.

3.3. By letter dated 13th May, 1999 from Kelly Noone & Co Solicitors, solicitors for Mr. Lowry, to the Tribunal, the applicant authorised

> "all Banks, Building Societies and Financial Institutions outside the Republic of Ireland to furnish the Tribunal of Inquiry appointed by the above Order of the Oireachtas, with details of all accounts, sums of money, funds, deposits, securities or assets of whatsoever nature held in the name of our Client, Mr Michael Lowry, with the above address [The Green, Holycross, Co. Tipperary] or any of the following addresses:-
>
> 1. Glengreigh, Holycross, Co Tipperary
>
> 2. Apartment No 9 Baroma, 298/300 Lower Kimmage Road, Dublin 6
>
> 3. 46 Finsbury House, Ballsbridge, Dublin 4
>
> …
>
> We hereby further authorise the production of all documents pertaining to such accounts, sums of money, funds, deposits, securities or assets (if any) to the Tribunal of Inquiry."

The Tribunal subsequently determined that the applicant knowingly concealed from the Tribunal throughout the period of his initial engagement with the Tribunal up to and including his evidence in 1999 the details relating to the Irish Nationwide (IOM) account opened in his name on 21st October, 1996, and the details surrounding the provision of £147,000.00 to him by Mr. David Austin which was lodged to that account. The address under which this account was maintained was not referred to in the letter of disclosure and was that of the applicant's accountant at "Brophy Thornton, The Gables, Foxrock, Co. Dublin".

3.4. Following extensive private and public hearings, the respondent furnished Provisional Findings to affected persons in 2008 in order to afford such persons an opportunity to consider them and to make any final submissions before any final findings were made.

3.5. In April and June 2009, Mr. Christopher Vaughan, an English solicitor retained by Mr. Lowry for both the Mansfield and Cheadle transactions, testified at the public sittings in relation to the falsification of letters in Mr. Vaughan's file regarding Mr. Lowry's involvement in those transactions.

3.6. There was an exchange of correspondence between the applicant and the Tribunal's solicitor to the effect that the respondent would have allowed the applicant to give any evidence he so wished if he could show that he had further information which it was appropriate to obtain by way of such evidence. By letter to the applicant dated 23rd December, 2009, the respondent stated *inter alia*:

> "The Tribunal however will of course consider any further information your client may wish to put before it with a view to considering whether it would be appropriate to lead it in evidence. In those circumstances, the Tribunal would be grateful if you could please let it have details of any such information together with an indication as to why such information has not been brought to the attention of the Tribunal to date."

The applicant did not bring to the attention of the Tribunal the existence of any new or additional information that he wished to provide by way of evidence.

3.7. On 21st April, 2010, the Supreme Court delivered its decision in *Murphy v. Flood* [2010] IESC 21, [2010] 3 I.R. 136. In light of that decision, the respondent withdrew any of its provisional findings which had been notified to the applicant to the extent that they indicated that the matters to which they were related constituted a hindering or obstruction of the work of the Tribunal. The solicitors for the Applicant were notified of the foregoing by letter dated 30th April, 2010, and were furnished with revised Provisional Findings under cover of that letter.

3.8. Part II of the Final Report of the respondent, which concerned the applicant's affairs, was published in March 2011. That Report contained, *inter alia*, substantive findings pursuant to its terms of reference and also various stand-alone findings of non-cooperation on the part of the Applicant.

3.9. The respondent subsequently invited applications for the costs of appearing before the Tribunal from various persons. By letter dated 29th June, 2011 to his solicitors, the applicant was notified, *inter alia*, that the respondent, having delivered the second and final part of his Report, would shortly consider applications from persons who appeared before the Tribunal by solicitor or counsel for Orders in respect of their costs of so appearing. The applicant was further notified that if he intended to make such an application, it should be made in writing by 27th July, 2011, and contain the basis upon which he believed he was entitled to such an Order, whether in whole or in part, together with any written submissions he may wish to make on the matter. On 27th July, 2011, an

application and submissions were made on behalf of the applicant in respect of his costs.

3.10. By letter dated 1st March, 2012, the Tribunal notified the solicitors for the applicant that, in the course of his consideration of the application of Mr. Lowry for costs, the respondent intended, as part of that consideration to have regard to the question of whether the applicant had failed to cooperate with, or provide assistance to, the Tribunal at any stage of its inquiries. The Tribunal explained that the purpose of the letter was to give notification of matters which may be material to the consideration of the application for costs of the applicant, being matters which could constitute or evidence a failure on the part of the applicant to cooperate with or provide assistance to the Tribunal or his knowingly giving false or misleading information to the Tribunal within the meaning of s. 6 of the Tribunals of Inquiry (Evidence)(Amendment) Act 1979, as amended. Those matters were set out in the schedule to the letter and reflected the findings of non-cooperation contained in the Report published in March 2011. The matters were as follows:

> (i) the applicant knowingly concealed from the Tribunal throughout the period of his initial engagement with the Tribunal up to and including his evidence in 1999 the details relating to the Irish Nationwide (IOM) account opened in his name on 21st October, 1996, and the details surrounding the provision of £147,000.00 to him by Mr. David Austin which was lodged to that account;
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> (ii) the applicant thereafter failed to notify those matters to the Tribunal until his belated disclosure in 2001, at a time when it was very likely that the Tribunal would independently and imminently discover those matters;
>
> (iii) the applicant was centrally involved in the falsification and suppression of documentation with the intention of misleading and frustrating the work of the Tribunal, and his conduct in this regard misled and frustrated the Tribunal in fact;
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> (iv) the applicant together with others set about and implemented a course of furnishing to the Tribunal a materially false documentary record of the Mansfield and Cheadle property transactions;
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> (v) the applicant was involved in, and had knowledge of the creation of, the falsified versions of Mr. Christopher Vaughan's files concerning the Mansfield and Cheadle property transactions, with the intent and for the purpose of producing those falsified versions of the files to the Tribunal, and of concealing references to the applicant in connection with those transactions. In consequence of that involvement, a false and deliberately misleading account of the applicant's connection to the Mansfield and Cheadle property transactions was provided to the Tribunal, first in the course of the Tribunal's private inquiries and, later, in the course of evidence given at public hearings;
>
> (vi) the applicant's sworn evidence to the Tribunal in relation to his connection to the Mansfield and Cheadle property transactions, and in relation to Mr. Christopher Vaughan's files concerning those transactions, was knowingly false and misleading, and consistent only with the falsified version of Mr. Vaughan's files, and with the applicant's knowledge of and participation in the falsified version of Mr. Vaughan's files, and with the applicant's knowledge of and participation in the falsification of those files;
>
> (vii) the purpose of the falsification and suppression of those documents was to mislead the Tribunal as to the true nature and extent of the applicant's involvement in the transactions under inquiry, and thereby to undermine its investigations;
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> (viii) The effect, in fact, of the applicant's conduct and evidence in relation to the Cheadle and Mansfield property transactions was to mislead the Tribunal and to frustrate and protract significantly the work of the Tribunal over a period of years;
>
> (ix) The applicant, at a time when he had purported to provide full cooperation to the Tribunal, knowingly concealed from the Tribunal dealings between Mr. Denis O'Connor, his accountant acting on his behalf, and Mr. Kevin Phelan and Mr. Aidan Phelan concerning the settlement of disputes relating to property transactions then being examined by the Tribunal;
>
> (x) The applicant together with Mr. Denis O'Connor orchestrated the negotiation and conclusion of agreements with Mr. Christopher Vaughan and Mr. Kevin Phelan in April 2002, whereby Mr. Phelan was paid a total of Stg.£65,000.00 in relation to the Vineacre property project, in which the applicant had an interest. The predominant purpose of these agreements was to ensure Mr. Phelan's participation in a choreographed exchange of untruthful correspondence, for submission to the Tribunal, for the sole purpose of misleading and concealing from the Tribunal the true facts concerning the long-form/short-form correspondence of Mr. Vaughan then being inquired into by the Tribunal;
>
> (xi) Mr. O'Connor, as an agent of the applicant, negotiated and arranged a further payment of Stg.£150,000.00 by Mr. Denis O'Brien/Westferry Limited, which, in combination with the Stg.£65,000 already paid in respect of the Vineacre project, comprised a global settlement with Mr. Kevin Phelan, the predominant purpose and intention of which was to ensure that Mr. Kevin Phelan would not undermine the false version of the applicant's involvement in the UK properties already tendered to the Tribunal. This latter settlement was executed in the knowledge that Mr. Kevin Phelan had in his possession information and material which contradicted the false version of the property transactions, and was executed for the purpose of ensuring that Mr. Kevin Phelan would not, as he had threatened to do, draw the existence of that information and material to the attention of the Tribunal;
>
> (xii) The applicant knowingly concealed from the Tribunal the nature and extent of Mr. Denis O'Connor's involvement in settling disputes with Mr. Kevin Phelan, relating to the Doncaster Rovers, Cheadle and Mansfield property transactions, as well as material and documentation that came to light in the course of those disputes and settlements;
>
> (xiii) The applicant knowingly concealed Mr. O'Connor's extensive role on Mr. Lowry's behalf in negotiating and executing agreements and settlements, and in acing as an intermediary in relation thereto, and he further concealed from the Tribunal the matters to which Mr. O'Connor's role related, with the intention of misleading the Tribunal and of frustrating its inquiries;
>
> (xiv) The sole intention of the false stratagems and deliberate untruths aforsesaid, in which the applicant was fully implicated, was to frustrate and impede the work of the Tribunal; and
>
> (xv) The effect of the appellant's conduct and his evidence in relation to the Doncaster Rovers, Cheadle and Mansfield property transactions was to mislead the Tribunal and to frustrate and protract significantly the work of the Tribunal over

a period of years.

3.11. The respondent extended an opportunity to Mr. Lowry to make submissions addressed to those matters by 30th March, 2012. The respondent indicated that he was cognisant of the judgments and decision in *Murphy v. Flood* and other recent pronouncements on the principles to be applied in this context and that submissions should be directed to the specific issues relevant to the dealings of Mr. Lowry with the Tribunal. In response to a letter from the applicant dated 20th March, 2012, to the effect that he would not be in a position to furnish submissions to the Tribunal by the end of the month and his expectation that the Tribunal would not refuse to sanction the necessary time he required to provide detailed submissions, the respondent stated that an extension of the time for receipt of submissions would not be provided but that the Sole Member would endeavour to consider the applicant's submissions received on or before 16th April, 2012.

3.12. On 28th March, 2012, the applicant sought clarification on paragraph 3 of the findings of non-cooperation. The applicant provided preliminary submissions regarding his costs' application to the respondent on 29th March, 2012. On 30th March, 2012, the applicant made submissions regarding paras. 1 and 2. On 3rd April, 2012, the applicant provided submissions to the respondent regarding paras. 4 to 8, inclusive. By letter dated 4th April, 2012, the respondent addressed the applicant's query in relation to para. 3 stating that "…while paragraph 3 is couched in general terms, the matters to which it relates are identified more specifically in the paragraphs which immediately follow it in the Schedule." On 4th and 6th April, 2012, the respondent made submissions regarding para. 9 and sought clarification on the allegations being made in para. 9. By letter dated 9th April, 2012, the applicant responded to the respondent's position on paragraph 3, as set out by letter dated 4th April, 2012. On 12th April, 2012, the applicant made submissions regarding paras. 10, 11, 14 and 15. By letter dated 12th April, 2012, the respondent addressed the queries of the applicant in relation to para. 9.

3.13. In October 2013, the respondent delivered a General Ruling on Costs. The respondent indicated in the General Ruling that the matters to which the respondent had regard in determining the portion of a person's costs to be disallowed by reason of that person's non-cooperation with the Tribunal's inquiries include but are not limited to the following:

> "The degree to which those aspects of the Tribunal's inquiries in connection with which a person failed to cooperate or provided false information can, if at all, be separated from other aspects of the Tribunal's inquiries which were not so affected;
>
> The overall extent and duration of the Tribunal's work, both in private and in public, in connection with inquiries in respect of which the person failed to cooperate or knowingly provided false information;
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> The duration of the Tribunal's private work referable to the inquiries in respect of which the person failed to cooperate;
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> The duration of the Tribunal's public hearings referable to the inquiries in respect of which the person failed to cooperate;
>
> The amount of correspondence referable to the relevant inquiries;
>
> The amount and extent of discovery or disclosure of documentation made by a person to the Tribunal and the extent to which any such discovery or disclosure was incomplete are falsified;
>
> The extent that evidence given by a person of public hearings was incomplete or false;
>
> The amount of time expended by the tribunal in pursuing inquiries based on false or incomplete information;
>
> The period of time between the initial provision of false or incomplete information and the eventual provision of correct information, if any;
>
> The seriousness and materiality of the failure to cooperate or the provision of false or incomplete information;
>
> The relative centrality of a person's involvement in the enquiries in respect of which he or she failed to cooperate as compared with those in respect of which cooperation was given and the likely relative extent of attributable legal costs;
>
> The extent, if any, to which a person accepted or admitted, even belatedly, that they had failed to cooperate or had provided false information and the extent, if any, to which that person voluntarily or unilaterally sought to correct or rectify that prior conduct."

3.14. The respondent observed:

> "In considering some or all of those interrelated matters, as well as any other particular considerations that may arise in connection with individual applicants, it is clear that the determination of the appropriate percentage portion of an applicant's costs to be allowed or disallowed by reason of non-cooperation is not susceptible to precise mathematical calculation and there is no simple equation that can be applied."

3.15. On the 31st of October 2013, the respondent made the costs ruling and order in respect of the application for legal costs by the applicant herein. In the course of that ruling, the respondent addressed the specified matters that were notified to the applicant in March 2012, which in turn reflected the findings of non-cooperation contained in the report published in March 2011, and the submissions of the applicant in connection therewith. Having regard to all the matters addressed, the respondent stated that he was

> "satisfied beyond any doubt that Mr. Lowry, in a number of significant respects, failed to co-operate with the Tribunal in the course of its inquiries and knowingly provided the Tribunal with false information with a view to misleading the Tribunal, which in turn had the effect of delaying the Tribunal's work."

Accordingly, the respondent was not satisfied that the applicant should be awarded all of his legal costs. The respondent observed that the question thus arose whether the applicant was entitled to any portion of those costs. In that regard, the respondent referred to his General Ruling and stated that this was "a question of not insignificant complexity and requires a consideration of a number of possible factors, including those listed by way of example in that Ruling." The respondent continued as follows:

> "In considering what portion, if any, of Mr. Lowry's costs should be allowed, amongst the matters to be considered is the fact that all of the findings of non-cooperation relate to various aspects of what has been referred to as the Tribunal's

money trail inquiries, and the Tribunal has made no findings of non-cooperation in connection with the Tribunal's inquiries into the awarding of the second mobile GSM licence. Those latter inquiries comprised a considerable portion of the Tribunal's work and took up a significant number of days of public hearings, and Mr. Lowry was entitled to be legally represented in respect of those hearings. That said, the bulk of the material, information and evidence that formed the basis of those inquiries was provided by the relevant government departments and the civil servants who had been involved in the licensing process. Mr. Lowry's involvement both in private and in public was accordingly less central than was his involvement in the money trail element of the Tribunal's inquiries, and, unlike in the case of the money trail, Mr. Lowry had a more limited involvement in and control over the provision of information and material to the Tribunal. It is also the case that there was a significant degree of overlap and interconnection between those two related aspects of the inquiries. Nonetheless, Mr. Lowry is entitled to an order in respect of a portion of his costs to reflect the absence of findings of non-cooperation in connection with that aspect of the Tribunal's inquiries.

The Tribunal must also have regard to the seriousness of the findings it has made in relation to non-cooperation and the extent to which the concealment and falsification went to the very core of its inquiries. It is difficult to imagine more reprehensible conduct than the calculated and concerted falsification of a solicitor's files prior to their provision to the Tribunal with a view to obscuring the truth. Nor can the Tribunal ignore the real effect of such conduct and non-cooperation on its inquiries and their length. The examination of the £147,000 deposit in Irish Nationwide (IOM) Ltd would have been completed in 1999, rather than two years later in 2001. Had unfalsified files and truthful information concerning the English property transactions been provided in early 2001, the Tribunal might have concluded its inquiries into those matters in a matter of days or weeks, rather than discovering for the first time new material, previously concealed, as late as 8 years later, in the course of its hearings in 2009. Nonetheless, in the teeth of overwhelming evidence to the contrary, Mr Lowry continues to this day, including in the submissions considered in the course of this Ruling, to deny any concealment or falsification, and seeks the reimbursement of his full legal costs including those legal costs incurred by him during periods when his own conduct significantly contributed to the inquiries being unnecessarily prolonged."

The respondent by order dated 31st October, 2013, ruled that the applicant should be entitled to recover just one third of his costs on the basis set out in the Ruling.

The Legal Framework

4.1. Section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended ("the 1979 Act"), provides:

> "(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;
> >
> > (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."

4.2. The Terms of Reference of the Tribunal also give the Tribunal an express jurisdiction and power to consider a failure to co-operate with the Tribunal as a factor in the issue of costs, providing that:

> "all costs incurred by reason of the failure of individuals to co-operate fully and expeditiously with the Inquiry should, so far as is consistent with the interests of justice, be borne by those individuals."

Submissions of the Applicant

Standard of Review

5.1. The applicant submitted that, at a minimum, the Tribunal is bound to act consistently with the legal principles set out in the General Ruling on Costs Any departure constitutes an error of law. The application of the principles set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 can no longer be appropriate as the Tribunal set itself a standard that the evidential findings must be "beyond any doubt". Further, the finding of the Tribunal must be squarely within the terms of s. 6 of the 1979 Act or otherwise it will be unlawful.

5.2. The applicant argues that this Court must consider whether the evidence put before this Court is sufficient to sustain the findings of the Tribunal. He asserts that there was a complete mismatch between the findings and the evidence as there was no factual evidence linking Mr. Lowry to falsification or suppression.

Disproportionality of Withholding Two Thirds of Costs

5.3. The applicant argued that withholding of two thirds of the applicant's costs of representation is grossly disproportionate having regard to his representation costs being incurred across the full span of its inquiries (more particularly between 31st October, 1997, and March 2007 and subsequently), the scale of his cooperation in relation to matters including his own bank accounts, his company bank accounts and his family's bank accounts, his own personal appearances and the appearance of his representatives his engagement and the specific nature of the three non-cooperation finding themes.

5.4. It was argued that the Tribunal failed to weigh the significance of the absence of any non-cooperation findings concerning other areas of its inquiries including, *inter alia*, the GSM licence inquiries, payments by several individuals to Mr. Lowry and the ESAT Telenor Donation to Fine Gael. The applicant also rejected the Tribunal's contention that no modular approach was adopted by it in relation to the Tribunal's inquiries. The applicant submitted that he required representation in respect of the GSM licence inquiries, even though he was not regarded as a primary witness.

5.5. The applicant contended that the Tribunal also grossly exaggerates the level of delay attributable to the applicant's alleged non-cooperation and fails to take adequate account of the impact of a series of third party challenges before the Courts to the workings

of the Tribunal and the belated availability to the Tribunal of certain witnesses. No credit was afforded to the applicant for not bringing a challenge to the Tribunal's investigative process.

Unreasonableness of Withholding Two Thirds of Costs
5.6. The applicant submitted that the ruling is unreasonable in the following respects: the ruling's coherency with its own set standards of proof and stated approach to treatment of evidence; the ruling's disproportionate effect having regard to the extensive demonstrable cooperation with the Tribunal's inquiries; the absence of properly adduced evidence to ground its key conclusions; the ruling's predication on substantive conclusions as to credibility and other findings, which prior findings were based on different applications of the burden of proof; it is discriminatory and oppressive treatment of the applicant vis-à-vis every other party before it to date, and in particular those from whom the First Part of its Report manifestly indicates it did not receive appropriate cooperation, such as Mr. Haughey and Mr. Dunne.

5.7. The applicant contended that the costs ruling is unreasonable as the decision is *ultra vires* the purpose for which the powers to determine the assessment of costs were granted. The applicant argued that the ruling exceeds the mere assessment of whether it would be equitable that he should recover his costs and reflects a clear intention to punish the applicant.

5.8. It was also asserted that the oppressive effect on the applicant as a result of only awarding 30% of his costs can be regarded as an unreasonable exercise of the Tribunal's powers.

Discriminatory/Inconsistent vis-à-vis Other Parties' Costs
5.9. The treatment of the applicant's costs vis-à-vis other individuals whose testimony was roundly rejected, such as Mr. Haughey and Mr. Dunne, is discriminatory and inconsistent. In respect of procedural inequality, the applicant submitted that the Tribunal did not formulate principles on costs in respect of Mr. Haughey and appeared to make a decision only by reference to whether or not it would be equitable to award Mr. Haughey his costs. In relation to Mr. Lowry, a general costs ruling was delivered which set out the approach that would be taken by the Tribunal and a very detailed decision was given in respect of Mr. Lowry. No attempt to explain this inconsistency is made in the ruling in circumstances where Mr. Haughey and Mr. Lowry were similarly situated being the only persons the subject of the Terms of Reference.

5.10. With regard to the alleged substantive inequality, the applicant submitted that the two subjects of the Terms of Reference ought to be treated substantially similarly from the point of view of costs given the findings made about the conduct of Mr. Haughey in the course of the Tribunal's activities. The applicant contended that Part I of the Report clearly demonstrates that the Tribunal consistently found that Mr. Haughey had deliberately withheld information and/or that his professions of ignorance were not credible. It is thus apparent that the Tribunal has not approached the applicant's costs in a manner consistent with that of Mr. Haughey who was awarded his full costs of representation. There was no explanation advanced for this different approach. In addition, no other party to date has had any of their costs withheld.

Lack of Procedural Fairness
5.11. The applicant submitted that the Tribunal failed to afford the applicant fair procedures in relation to its non-cooperation findings. First, the Tribunal offended against the principle of *nemo iudex in causa sua* as the Tribunal withheld costs on the basis of disputed findings of non-cooperation and rejected the contrary submissions of the applicant in relation to costs. The applicant contended that the respondent started from a fixed premise, in that the substantive report discredited the applicant, from which it never shifted and that there was no objective re-examination of the evidence for the decision on costs.

5.12. Secondly, the applicant did not adequately know the case against him. The applicant accepted that the Tribunal brought its statements of conclusion to his attention. However, the respondent failed to put its most contentious propositions to the applicant during the course of his oral evidence nor did it allow him to test by cross examination the allegations against him. The specific reasons for the respondent's conclusions and the basis of the evidence upon which it relied were not notified to the applicant.

5.13. Further, the applicant submitted that the Tribunal failed to have regard to the evidence led by other witnesses consistent with the applicant's account and erred in accepting the unsworn evidence provided by Mr. Kevin Phelan to the Tribunal.

5.14. It further denied him, when he requested it, that he be afforded the right to give further evidence in respect of contentious issues. The applicant maintained that the right to make written submissions fundamentally fell short of what was required where the findings were contentious, engaged credibility issues and the implications of an adverse costs finding were so profound for the applicant.

Costs Findings Exceed Non-Cooperation/Terms of Reference or Are Substantive in Nature
5.15. The applicant argued that the findings relied upon are conflated with the Tribunal's substantive findings or are otherwise *ultra vires* its costs jurisdiction. The costs findings are entirely predicated upon the correctness of the Tribunal's substantive findings and the credibility assessment upon which they rely, both of which the applicant contests. They purport to characterise relationships and conclude the applicant's involvement in a criminal conspiracy on 15th March, 2001, when no witness gave evidence which could support such a conclusion.

5.16. As the findings of non-cooperation derive from the substantive reports and were not looked at afresh and independently at the costs stage, they were arrived at when the relevant standard was "a reasoned and informed expression of opinion" and did not apply the standard stated by the Tribunal in its Ruling to be applicable at costs stage – the clearest findings of deliberate concealment, falsification or untruth, where the Tribunal is satisfied that the evidence supporting the findings is beyond any doubt.

5.17. The substantive findings were originally made by reference to the question whether they were "obstructing or hindering" the Tribunal. This wording was subsequently substituted with a reference to "attempt to mislead and undermined the work of the Tribunal" following the Supreme Court decision in *Murphy v. Flood* [2010] IESC 21, [2010] 3 I.R. 136. However the findings were never made by reference to the 1979 Act, i.e. "knowingly giving false or misleading information to the Tribunal". The test is precise and it is not met in respect of the three substantive instances of non-cooperation identified by the Tribunal.

Legitimate Expectation
5.18. The applicant asserted that he enjoyed a legitimate expectation that his costs would be discharged by the Minister for Finance.

Submissions of the Respondent
6.1. At the outset, the respondent submitted that these proceedings cannot and do not entail any challenge, or collateral challenge, to the Second Part of the Final report of the respondent which was published in March 2011 and/or any decisions, rulings, procedures, orders which predated the Specific Ruling dated 31st October, 2013, which is the subject of these proceedings.

Standard of Review
6.2. The respondent submitted that there are certain well-established principles in accordance with which the complaints in these proceedings must be determined: (i) Judicial review is not an appeal from an administrative decision but a review of the manner in which the decision was made; (ii) the Court cannot substitute its opinion for that of the decision-maker just because it would have reached a different conclusion to the decision-maker; (iii) there is limited scope to interfere with the exercise of discretion by an administrative body and, in particular, an administrative body with special technical or professional skill and/or making a decision with special competence in an area of special knowledge; (iv) there is very limited scope to interfere with a decision made by a Tribunal of Inquiry in the exercise of its discretion; (v) it is necessary to have regard to the Terms of Reference of a Tribunal of Inquiry.

Disproportionality of Withholding Two Thirds of Costs
6.3. The respondent argued that insofar as the principle of proportionality arises herein, it does so in the context of an assessment of the reasonableness of the ruling at issue and not as a discrete stand-alone ground of challenge (see *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701). There is no basis for concluding, whether by reference to the principle of proportionality or otherwise, that the ruling was unreasonable or irrational. In any event, the respondent argued that the ruling and its effect were proportionate.

Unreasonableness of Withholding Two Thirds of Costs
6.4. The respondent denied the contention by the applicant that the ruling in respect of the applicant's application for costs was unreasonable or irrational. It was submitted that the applicant's claims rest on the erroneous premise that the applicant is entitled to "a minimum of 70% of [his] costs", being those which he contends are applicable to GSM issues. The respondent contended that this figure is based on a misconceived mathematical tallying of hearing days and Report pages attributable to GSM which does not give an accurate picture of the correct apportionment of costs as between GSM and money trail matters as they related to the applicant. Further, the applicant failed to consider the spectrum of costs orders that could have been made by the respondent having regard to all relevant matters. In considering the ruling made by the respondent in light of that range of potential costs orders, the challenge to the validity of the ruling is without substance. The applicant is unable to establish that there were no reasonable grounds for the decision of the respondent, whether by reference to the principle of proportionality or otherwise.

6.5. The respondent disagreed with the contention by the applicant that he cooperated extensively with the Tribunal. Insofar as the applicant purported to provide waivers and access in relation to all of his bank account and those of his relatives, the Tribunal found nonetheless that he deliberately chose to conceal what was a highly significant deposit, having regard both to is size and that it was made into an offshore account specifically opened for the purpose of its receipt, and was also a highly relevant deposit, having regard to its stated connection with another transaction into which the Tribunal was inquiring, namely the purchase of Carysfort Avenue property. Moreover, the falsification of Christopher Vaughan's files in relation to the UK properties transactions, and the subsequent settlements and negotiations with Kevin Phelan for the purpose of concealing that falsification, as well as the concealment of those negotiations themselves, was non-cooperation of an extensive nature.

6.6. Thus taking all relevant factors into account as the respondent contended he did, the decision of the respondent in relation to the costs ruling was reasonable and proportionate.

Discriminatory/Inconsistent vis-à-vis Other Parties' Costs
6.7. The respondent submitted that the complaints of discriminatory treatment by reference to the costs orders made in favour of Mr. Haughey and Mr. Dunne are without substance as there are clear differences in the nature of the findings made in relation to Mr. Lowry and Mr. Haughey and Mr. Dunne. As averred by Mr. Brady, Solicitor to the respondent, the Tribunal made an observation that Mr. Haughey did not volunteer information in relation to payments. However, the Tribunal did not find that Mr. Haughey had deliberately misled it, as the Tribunal found in relation to Mr. Lowry. The Tribunal found that while Mr. Dunne failed to identify certain payments, this failure had no practical adverse effect, thus contrasting with the findings regarding Mr. Lowry.

Lack of Procedural Fairness
6.8. The respondent argued that the submissions by the applicant, described as the "three pillars" of the procedural fairness arguments, are not pleaded in the amended statement of grounds and thus do not properly arise.

6.9. The respondent submitted that there was no want of fair procedures in the Tribunal's dealings with Mr. Lowry. In relation to the provisional findings, the applicant was afforded the opportunity to adduce further evidence and invited to indicate the information he wished to adduce by way of further evidence. The applicant did not bring to the attention of the Tribunal the existence of any additional or new information that he wished to provide by way of evidence. Instead, the applicant sought the opportunity to comment on matters arising from further evidence adduced in relation to the "GSM", rather than the "money trail", element. The applicant was also afforded the opportunity to comment on other evidence heard by way of written submission.

6.10. The respondent also submitted that the opportunity was afforded to Mr. Lowry, who was legally represented at the time, to cross-examine Mr. Christopher Vaughan in 2009, but which he did not exercise.

6.11. The respondent also asserted that the applicant had reasonable notice of the possibility of findings in relation to non-disclosure and failure to cooperate with the Tribunal, with detailed questions being put to him in relation to the disclosure of the Isle of Man account and an opportunity for comment afforded to him during the hearings on Days 149-150.

Costs Findings Exceed Non-Cooperation/Terms of Reference or are Substantive in Nature
6.12. The respondent submitted that the costs findings were carefully framed to deal with the conduct of Mr. Lowry towards the Tribunal. The non-cooperation and concealment findings did not depend on the making of any substantive finding in order to stand. The costs findings are supported by evidence which is independent of any ultimate finding on substantive matters that the Tribunal made.

Legitimate Expectation
6.13. In relation to the applicant's assertion that he "enjoyed a legitimate expectation that his costs would be discharged from the public purse", the respondent submitted that the applicant did not, nor could he have, had such expectation having regard to matters including the nature and extent of his failures to cooperate with the Tribunal and the express language of s. 6(1) of the 1979 Act and the Terms of Reference. Moreover, the respondent contended that the applicant's claim rests on the erroneous premise that the Court can effectively ignore the fundamental limitation on the doctrine of legitimate expectations that it cannot override an express statutory discretion.

Decision

The Nature of Judicial Review, notably in relation to Tribunals of Inquiry
7.1. In any application for judicial review, the Court is not concerned with the merits of the recommendations made and the decisions taken by the respondent. It is not the function of the High Court in judicial review to decide whether the respondent has made a correct decision, whether a better decision might have been made or whether the decision is justified on the merits of the claim (see *McCarron v. Kearney* [2008] I.E.H.C. 195). The Court is concerned only with the legality of the decision and the lawfulness of the process by which it has been reached.

7.2. The Court must assess whether the material conclusions reached are tainted by any irrationality or unreasonableness having regard to the facts found or accepted and the evidence and information before it. (*See The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] I.R. 642.)

7.3. The precise role of the court in judicial review has been outlined most recently in the case of *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3.where Denham J. articulated the core principles as follows:-

> (i) In judicial review the decision-making process is reviewed;
>
> (ii) It is not an appeal on the merits;
>
> (iii) The onus of proof rests upon the applicant at all times;
>
> (iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense;
>
> (v) The nature of the decision and the decision maker being reviewed is relevant to the application of the test;
>
> (vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area;
>
> (vii) The Court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Victims Compensation Tribunal*, referred to as the "implied constitutional limitation of jurisdiction" in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision.

7.4. In order to challenge a decision made with special competence in an area of special knowledge an applicant must satisfy the court that the decision was irrational. The test for irrationality is set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 where Finlay C.J relied on the decision in *The State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 as follows:-

> "In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, Henchy J., in that judgment set out a number of such circumstances in different terms. They are: - 1. It is fundamentally at variance with reason and common sense. 2. It is indefensible for being in the teeth of plain reason and common sense. 3. Because the Court is satisfied that the decision maker has breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'....1 am satisfied that these three different methods of expressing the circumstances..... constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."

From the foregoing decisions it is evident that there is limited scope to interfere with the exercise of discretion by an administrative body. As judicial review is not an appeal from an administrative decision but a review of the manner in which the decision was made the court cannot substitute its opinion for that of the decision maker merely because it may have reached a different conclusion to the decision maker. The court must have regard to the implied constitutional limitation of jurisdiction in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate this justifies the court setting aside the decision.

7.5. Decisions and rulings of Tribunals of Inquiry in the exercise of their discretion and/or as part of the management and control of their procedures and proceedings are afforded a high level of deference in the context of judicial review applications. The Court should not intervene save where the decision is irrational, unreasonable or contrary to common sense (see *O'Brien v. Moriarty* (No. 2) [2006] 2 I.R. 415. It was observed by Keane C.J. *in Flood v. Lawlor* (*Ex tempore*, Supreme Court, 24th November, 2000) that "[i]t is not necessary to stress, because it has been repeatedly said in this court, that the courts in interpreting the relevant legislation, must afford a significant measure of discretion to the Tribunal as to the way in which it conducts these proceedings". The Supreme Court explained that "[t]he Tribunals must be afforded a significant measure of discretion as to the manner in which they carry out the important task which has been entrusted to them by the Oireachtas because if that principle is not borne in mind then the very important objectives which the establishment of the Tribunal of this nature was intended to achieve can only be frustrated". (See also the Supreme Court decision in *Bailey v. Flood* (Unreported, Supreme Court, 14th April, 2000); the decision of this Court in *O'Brien v. Moriarty* [2011] IEHC 30).

7.6. In relation to a challenge to a decision or ruling of a Tribunal of Inquiry, it is necessary to have regard to its Terms of Reference and the interpretation thereof (see *Murphy v. Flood* [2010] IESC 21, [2010] 3 I.R. 136). The Supreme Court has emphasised the power of a Tribunal to interpret its own terms of reference (see *O'Brien v. Moriarty* (No. 1) [2005] IESC 32, [2006] 2 I.R. 221). In this regard the tribunal was enjoined by the Oireachtas resolution cited above at 3.1 that it should, consistent with the interests of justice, ensure that all costs incurred by individuals who failed to cooperate fully and expeditiously with it in its inquiries be borne by them.

7.7. The issues arising in this case seem to be as follows;

> a. The nature and scope of this challenge
>
> b. Unreasonableness
>
> c. Proportionality

d. Discrimination

e. Procedural fairness

f. Whether the findings grounding the decision on costs are substantive in nature

g. Legitimate expectation

The Nature and Scope of this Challenge
7.8. This application is not and can not be a challenge to the respondent's findings made in his report published in March 2011. Those findings stand unchallenged and neither a direct nor a collateral challenge can be made herein. This applicant is limited to a challenge to the specific ruling on costs made in relation to himself herein on the 31st October, 2013. In the respondent's unchallenged report of March 2011 he made certain findings of non cooperation on the part of the applicant. Those findings are set out at para. 3.10 above. These unchallenged findings are a litany of falsification and deception by Mr. Lowry including the alteration and falsification of a solicitor's files in order to conceal certain of his dealings from the tribunal. They include findings of perjury and bribery of a potential witness to support Mr. Lowry's false evidence. All of this was with the intention of misleading and frustrating the tribunal. As a result of this conduct by Mr Lowry, the tribunal was frustrated and misled and its work was protracted significantly. I emphasise these findings are not challenged in these proceedings nor can they be because the time within which such a challenge could be brought is long expired.

Unreasonableness
7.9. The respondent in his general ruling on costs set out the approach the tribunal would take in determining its attitude to any parties' costs. An examination of that general ruling which is not challenged herein, reveals it to be a fair, balanced and logical approach. Moreover nothing in the specific ruling on costs seems to me to be at variance with the general ruling. Was the decision on Mr. Lowry's costs in any way unreasonable. The court must bear in mind the range of orders on costs that might have been made by the tribunal. These stretch from allowing full costs at one end of the scale, which I accept is the default option, to fixing a party with the tribunal's costs at the other end. In Mr. Lowry's case in the light of its findings on non cooperation the tribunal decided to allow him one third of his costs. The rationale for this was based upon the general rulings criteria of false and misleading information and the time lost thereby, upon the centrality of Mr. Lowry in the areas of investigation by the tribunal in respect of which he failed to cooperate and the fact that such measure of non cooperation could not be reduced to a mathematical formula. The respondent found that all the findings of non cooperation by Mr Lowry related to various aspects of the so called money trail. No findings of non cooperation were made in respect of the GSM module. However it considered Mr. Lowry's involvement in the GSM module was less central to that in the money trail. The respondent went on to consider the gravity of its findings of non cooperation and the extent to which the concealment and falsification went to the very core of its enquiries. It considered that the falsification of a solicitor's files prior to providing them to the tribunal was conduct of the most reprehensible nature. It also found that Mr. Lowry's conduct led to the tribunal's work being greatly delayed. In the light of these findings it seems to me that the tribunal might well have withheld all of Mr. Lowry's costs. It might even have had a sufficient basis for ordering him to pay at least a part of the tribunal's costs. It certainly was in my view well within the bounds of reasonableness in deciding to withhold just two thirds of his costs.

Proportionality
7.10. The applicant argues that the tribunal did not take into account that his representation costs were spread across the whole range of the tribunal's enquiries. Nor did it take into account the extent of his cooperation. He argues that he required representation at all stages of the enquiry. He claims that the tribunal grossly exaggerates the level of delay attributable to him. Finally he claims that he should have been given credit for not delaying the tribunal's work as other parties did by bringing legal challenges thereto. The respondent argues that there was nothing disproportionate in the decision on costs taken by it. It explained in its costs ruling why it adopted the two thirds disallowance of costs. This figure represented its assessment of the extent of delays caused by the non cooperation of Mr Lowry. It seems to me that the manner in which the tribunal came to its decision on costs was the very essence of proportionality. It attempted to ascertain as best it could the percentage or proportion of delay attributable to the applicant's non cooperation. I understand the argument that the disproportionality of which the applicant really complains is the enormity of the costs liability involved. But that high level was at the least in some measure caused by his non cooperation. In any event, it seems to me that the assessment of the level of delay caused to the tribunal is something that is classically within the expertise of the tribunal to assess. The court can only intervene on the limited basis open to it in judicial review if there were some manifest error in the tribunal's approach to assessing the level of responsibility for delay attributable to the applicant. The onus is on the applicant to satisfy the court in that regard. It is to the proportionality of this decision that the court must look in order to determine whether there was a disproportionate effect in its ruling. Looking to this, it seems clear that the tribunal considering Mr Lowry's involvement in both modules assessed that involvement as to 1/3 in the GSM module and 2/3 in the money trail module. The tribunal's decision as to this breakdown of his involvement meant that his failure to cooperate with the tribunal in 2/3 of its work in which Mr Lowry was involved decreed that he should be disallowed his costs in that same proportion. In my judgment this was a fair and proportionate way to dispose of the issue of his costs.

Discrimination
7.11. The applicant compares his treatment by the tribunal in relation to costs with that of Mr. Haughey and Mr Dunne. He focussed primarily on the comparison with Mr Haughey. He was awarded his costs despite findings by the tribunal concerning his conduct before the tribunal that it described as being of a most reprehensible nature. This involved deliberate withholding of information and professions of ignorance that were not credible. Moreover the tribunal's decision on Mr. Haughey's costs was made without the formulation of any policy as was done with Mr. Lowry's costs by way of the general ruling. The applicant argues that Mr. Haughey's costs were awarded simply on the basis of what seemed equitable with no formulation as to how that could be determined. By contrast Mr. Lowry's costs decision was the subject of a very detailed decision on his costs. The applicant argues that because their conduct was found by the tribunal as essentially the same, the same decision on costs should have been made if the tribunal was to be consistent. Because it was not, the applicant argued the tribunal's decision was arbitrary and discriminatory. The tribunal argues that the two situations were not in fact the same. The tribunal rationalises its decision on the basis of significant difference between the findings against Mr. Haughey and those against the applicant. Mr. Haughey it noted did not volunteer information in relation to payments and he feigned ignorance of other matters. He did not however deliberately mislead the tribunal whereas Mr. Lowry did. While Mr. Dunne failed to identify certain payments, the tribunal found no real adverse effect thereby in terms of serious delay. The key difference apprehended by the tribunal is the active misleading of the tribunal by Mr Lowry. Full details of that misleading was furnished to Mr. Lowry as set out at para. 3.10 above. Do these findings justify a decision on costs different to that made in relation to Mr. Haughey and Mr. Dunne. There seems to me in the tribunal's ruling at the very least a reasonable basis upon which to differentiate the three cases. On the one hand it found a calculated and blatant programme of falsification and deception with the clear aim of actively misleading the tribunal and with the effect of initially doing so and in the end delaying its work. On the other

hand, it found that there was a sort of sitting on their hands by the other men, notably by Mr.Haughey. It found no deliberate attempt to mislead was made by Mr Haughey. On Mr. Dunne's side no actual delay was caused. Whether this Court agrees or disagrees with the tribunals finding that this constituted sufficient grounds to disallow two thirds of costs in Michael Lowry's case but not in the other two is not the question for this Court. The court must ask rather whether the tribunals approach constituted a reasonable rationale for the decision. In my view it does. Thus the three parties' cases may be lawfully differentiated. The tribunal was entitled to find that they were not in like situations.

Procedural Fairness
7.12. The applicant claims firstly that the tribunal moved from a fixed premise and did not re-examine the evidence objectively. Secondly he claims he did not know the case against him and did not have the chance to test by cross examination the allegations against him. Thirdly the tribunal did not notify him of the reasons for his conclusions. Fourthly the applicant challenges the tribunal's assessment of the evidence. Finally he claims he was not given the opportunity to make submissions and costs.

7.13. It seems to me that the tribunal did not base its decision on anything other than its findings in relation to Mr Lowry's conduct before the tribunal. These findings are not nor can be challenged in these proceedings. No second hearing was required by the tribunal in order to decide the issue of costs. Mr Lowry was afforded the opportunity to adduce further evidence. Although he was requested to, he failed to bring to the attention of the tribunal the existence of any additional evidence. He simply sought the opportunity to comment on evidence given after his own in respect of the GSM module rather that the money trail module. Any such commentary could have had no bearing on the decision as to costs because he was in fact awarded his costs in relation to the GSM module. He was furnished as set out above with all the findings the tribunal intended to consider in making its decision on costs. He was invited to make submissions in relation to these. He did so quite elaborately. It was upon those findings and its consideration of his submissions thereon that the tribunal made its decision. I can find no basis for the claim that Mr Lowry was not afforded fair procedures in the decision made by the tribunal on his costs.

The Findings are Substantive in Nature
7.14. It seems clear from the report that the findings on non cooperation are quite distinct from those of the findings on the substantive matters into which the tribunal was required to enquire. They deal with the manner in which Mr. Lowry conducted himself before the tribunal. As noted above they are a litany of falsification and deception by Mr. Lowry. As noted above, these findings were notified to Mr. Lowry prior to the decision made in relation to his costs. He was given the opportunity to respond to those specified findings and to comment thereon. He took that opportunity in full measure and commented upon each and every one of them to the tribunal. There can be no requirement upon the tribunal to conduct a second hearing in relation to findings that were at that stage i.e. 2013 already beyond challenge. References by the applicant to disputed findings of fact are incorrect. There are no disputed findings of fact. The findings of fact made by the tribunal in 2011 could have been challenged by Mr Lowry but were not. They cannot now be challenged because the time limited for such a challenge is long expired. It is upon those findings that the tribunal made a decision in relation to costs that was quite distinct from the substantive findings that it made in its report.

Legitimate Expectation
7.15. No party appearing before the tribunal can be taken to have been in ignorance of the provisions of the Oireachtas resolution dealing with non cooperation and the awarding of costs. All parties appearing before the tribunal must be taken to have been aware that if they did not cooperate with the tribunal as required they were liable to have a range of decisions on costs made against them. Moreover, where a body such as a tribunal is given a discretion or power to make decisions on matters such as costs herein, the court will not interfere with the exercise of such discretion as to do so would be tantamount to the court usurping that discretion. This principle has been taken as a limitation on the doctrine of legitimate expectation, see Abrahamson v Law Society [1996] 1 IR 403 McCracken J at p.423

Conclusion
7.16. Thus taking into account the nature and scope of the challenge brought herein, it is the courts judgment that the applicant has failed to demonstrate any unreasonableness or irrationality, disproportionality or discrimination in the decision that was made by the tribunal herein. It seems quite clear to this Court that Mr. Lowry in the costs decision made by the tribunal was advanced every element of procedural fairness in being furnished with the fullest details of what the tribunal intended to rely upon in coming to a decision on costs and was given the opportunity to respond. He took this opportunity in full and I cannot find any lack of fairness in the procedure that was followed. Finally, like any other party appearing in front of the tribunal, Mr. Lowry must be taken as aware of the fact that if he failed to cooperate with it he was liable to have orders made prejudicial to him in relation to costs. Thus the application fails on all the grounds raised.