THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 66

[2016 No. 128]

The President
Finlay Geoghegan J.
Edwards J.

BETWEEN

MICHAEL LOWRY

PLAINTIFF/RESPONDENT

AND

MR. JUSTICE MORIARTY

DEFENDANT/APPLICANT

JUDGMENT of the President delivered on 15th March 2018

Introduction, Context and Summary

1. This is an appeal by Mr. Michael Lowry from the judgment of Hedigan J. in the High Court on 27th January 2016 refusing his application for judicial review. Mr. Lowry sought to challenge a decision made by Moriarty J. as the sole member whereby the Tribunal reduced by two-thirds the costs recoverable by Mr. Lowry in respect of participation in its work. The respondent ordered that the appellant 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 by party basis when taxed and ascertained in default of agreement. The Tribunal withheld the major part of the costs because of non-cooperation, on the part of Mr. Lowry and knowingly providing the Tribunal with false information with a view to misleading it. The Tribunal made its Specific Costs Ruling in relation to Mr. Lowry on 31st October 2013.

2. Mr. Lowry's case is, first, that there is no factual evidence linking him to falsification or suppression of evidence. He claims that the decision is disproportionate: the phases of the inquiry in respect of which the Tribunal found non-cooperation were only a small part of the overall investigation, as to which there is no complaint. He says it is inconsistent when compared with the awarding of full costs to Mr. Charles J. Haughey and Mr. Ben Dunne, other persons who were investigated by the Tribunal, notwithstanding what he characterises as their failure to cooperate or concealment or withholding of information. Mr. Lowry maintains that his case was no worse than theirs, assuming that there is actual proof sufficient to make the standard for non-cooperation. He also claims that there was no objective re-examination of the evidence when the decision on costs came to be made and that was a necessary process because it was no longer a question of a Tribunal that was sterile of legal effect, but now it had actual teeth because it was imposing a severe penalty in financial terms on Mr. Lowry. He suggests that the Tribunal conflated the costs issue and the substantive findings that it made. He alleges breaches of fair procedures in and about the consideration of the issue by the Tribunal.

3. The severity of the impact of the decision to withhold two-thirds of his costs is obvious when the duration of the Tribunal's investigations and the extent of Mr. Lowry's participation are considered. His written submissions summarised the position as follows:

> "The Applicant was represented by Kelly Noone Solicitors throughout the duration of the Tribunal. (Both Mr. Michael Kelly and Mr. Ray Noone are sadly now deceased). The Applicant was represented by a variety of counsel during the course of the Tribunal's inquiries. The cooperation of his representatives has never been doubted. Most of these representatives have been paid only a tiny, tiny fraction of the fees which they incurred well over a decade ago. Kelly Noone alone (without taking into account counsels' time) expended in excess of 9000 hours in representing him before the Tribunal. Separately, his accountant, Mr. O'Connor, has brought a claim for circa €1.7 million, the majority of which relates to Tribunal work. The Applicant simply does not have the means to discharge such a liability. Neither would any ordinary individual." [Para 2.04]

4. The Moriarty Tribunal's work extended over an extraordinary 15 years in its investigative phase and then there was a further substantial time in dealing with costs. It is now more than 20 years since the appellant first faced into the work of the Tribunal. For this appeal he sought leave for the submissions to exceed the limit specified by the practice direction of the Court and in the result they came in at three times the normal limit. What was permitted to the appellant had to be allowed to the respondent. The brief summary above gives some indication of the range of the legal debate the case generated. In the result, however, it seems to me that the case falls to be determined in a settled legal context according to well-established principles. The issue with this Court as it so often is with appeals is the application of the principles to the facts, bearing in mind that in judicial review the applicant has to satisfy one or more of tests including rationality and reasonableness and fairness of procedures.

Background Facts

5. The background to the costs issue that is the subject of the judicial review and now this appeal may be sketched in the briefest terms as follows. The Moriarty Tribunal into Payments to Politicians and Related Matters was established in September 1997. Part I of the report of the Tribunal concerning Mr. Haughey was published in December 2006. Following completion of the major part of its enquiry hearings into payments to Mr Lowry and the second mobile telephone licence competition, the Tribunal gave notice to affected persons including Mr. Lowry of provisional findings in November 2008 to give them an opportunity of responding, whether by argument or submission or request for further evidence. Mr. Lowry's solicitors expressed particular concern about the proposed conclusions in a letter of 27th November 2008 in which they said that "some of the language used in the Provisional Findings (however they are to be described) raises very clearly the real possibility that the costs of Mr. Lowry and Mr. O'Connor's representation may not be awarded to them." The Tribunal relies on this statement to show that Mr. Lowry's solicitors were aware of the significance of

those findings in regard to costs.

6. On 30th April 2010 the Tribunal gave notice of new, revised Provisional Findings which reflected additional evidence that had been heard since November 2008 and which also took account of the Supreme Court decision of 21st April 2010 in the case of Murphy v. Flood [2010] 3 IR 136. Part II of the report was published in three volumes in March 2011 in which there were critical findings concerning Mr. Lowry that included findings of non-cooperation on his part. They are the basis of the decision in question and will be set out presently. The Tribunal notes in replying affidavits and submissions that Mr. Lowry did not seek to challenge the findings made in the report on publication, which it would have been open to him to do within a maximum period of 6 months.

7. The Tribunal then proceeded to invite applications for costs and Mr. Lowry duly did so by letter from his solicitors dated 27th July 2011 containing his application and submissions. In a letter of 1st March 2012 to Mr. Lowry's solicitors, the Tribunal gave notice of 15 matters which it considered might constitute or evidence a failure by Mr Lowry to cooperate with or provide assistance to the Tribunal or knowingly give false or misleading information to the Tribunal set out, in a schedule to the letter,. They were matters already contained in the report and are as follows: –

> (i) Mr. Lowry 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) Mr. Lowry 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.
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> (iii) Mr. Lowry 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) Mr. Lowry 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) Mr. Lowry 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 Mr. Lowry in connection with those transactions. In consequence of that involvement, a false and deliberately misleading account of Mr. Lowry'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.
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> (vi) Mr. Lowry'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 Mr. Lowry's knowledge of and participation in the falsification of those files.
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> (vii) The purpose of the falsification and suppression of these documents was to mislead the Tribunal as to the true nature and extent of Mr. Lowry's involvement in the transactions under inquiry, and thereby to undermine its investigations.
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> (viii) The effect, in fact, of Mr. Lowry'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.
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> (ix) Mr. Lowry, 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.
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> (x) Mr. Lowry 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 Mr. Lowry 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.
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> (xi) Mr. O'Connor, as an agent of Mr. Lowry, negotiated and arranged a further payment of Stg. £150,000 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 Mr. Lowry'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.
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> (xii) Mr. Lowry 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 the material and documentation that came to light in the course of those disputes and settlements.
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> (xiii) Mr. Lowry knowingly concealed Mr. O'Connor's extensive role on Mr Lowry's behalf in negotiating and executing agreements and settlements, and in acting 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.
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> (xiv) The sole intention of the false stratagems and deliberate untruths aforesaid, in which Mr. Lowry was fully implicated, was to frustrate and impede the work of the Tribunal.

(xv) The effect of Mr. Lowry'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.

8. The respondent invited Mr. Lowry to make submissions on those matters. He did so in a number of letters in March and April 2012, while protesting that the Tribunal had not given sufficient time particularly in circumstances where at this point he was not legally represented. In the result, however, nothing turns on this point.

Statutory Jurisdiction and the Resolutions

9. The jurisdiction in respect of costs that the Tribunal exercised is contained in section 6 (1) of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, as amended, which 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—
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> (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;
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> (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.

10. It is also relevant to note that the Resolutions establishing the Tribunal stated the desire of the Oireachtas 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
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> (b) all cost incurred by reason of the failure of individuals to co-operate fully and expeditiously with the inquiry should, so far as consistent with the interests of justice, be borne by those individuals."

General Ruling on Costs and the Specific Ruling

11. On 31st October 2013, the Tribunal issued both its General Ruling on Costs and the Specific Ruling in respect Mr. Lowry's application for costs. The Tribunal provided in the General Ruling an analysis of the authorities on the issue of costs in Tribunals of inquiry including the famous judgment of McCarthy J. in *Goodman International v. Mr Justice Hamilton* [1992] 2 IR 542, which declared that the award of costs could not depend on the findings about the matter under investigation and that the statutory reference to the findings had to be read as referring to the conduct of parties at the Tribunal. The Tribunal set out its approach at para 21 of the General Ruling as follows:

> "[i]n essence, the starting point is that every person appearing before a Tribunal of Inquiry by solicitor or counsel has an entitlement to be reimbursed by the State his or her costs of so appearing. When a person applies to the Tribunal for a costs order, the Tribunal should grant that order unless satisfied that the applicant in the course of his or her dealings with the Tribunal failed to cooperate with or provide assistance to, or knowingly gave false and misleading information to the Tribunal, in which case all or part of the costs sought by the applicant may be refused. The Tribunal may only have regard to the conduct of, or on behalf of, that person at, during or in connection with the inquiry in determining whether to disallow any portion of his or her costs. The Tribunal may not have any regard to its substantive findings as to the subject matter of the inquiry so as to disallow all or any part of an applicant's costs."

12. The Tribunal emphasised the importance of distinguishing accordingly between substantive findings and findings in regard to cooperation. It said that in regard to the latter it had "confined its consideration solely to the clearest findings of deliberate concealment, falsification or untruth, where the Tribunal is satisfied that the evidence supporting the findings is beyond any doubt, and where that concealment, falsification or untruth has subsequently been laid bare. Regrettably, the Tribunal encountered many instances of such conduct in the course of its inquiries".

13. The Tribunal acknowledged that any decision to disallow costs had to comply with the principles of justice and fairness which it endeavoured to ensure by giving parties an opportunity to make submissions in advance. It cited the principle of proportionality as being applicable.

14. The General Ruling said that determining what portion, if any, of costs should be disallowed for non-cooperation was:

> "a question of not insignificant complexity. In certain cases, the lack of cooperation may have been so comprehensive or may have coloured so much of a person's involvement with the Tribunal, that he or she might lose all entitlement to costs. In other situations, a person's conduct may be such as to warrant disallowing only a portion of the total costs, where for example the person was cooperative in response to certain of the Tribunal's inquiries but did not cooperate in response to others. The task of separating the various interlocking strands and aspects of the inquiry so as to distinguish between cooperative and non-cooperative conduct is no easy one, particularly when so much of the Tribunal's work involved overlapping inquiries into different but related matters."

15. The ruling then set out at para 29 a non-exhaustive list of the matters to which the respondent had 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 as follows:

> "(i) 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;
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> (ii) 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;

(iii) The duration of the Tribunal's private work referable to the inquiries in respect of which the person failed to cooperate;

(iv) The duration of the Tribunal's public hearings referable to the inquiries in respect of which the person failed to cooperate;

(v) The amount of correspondence referable to the relevant inquiries;

(vi) 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 or falsified;

(vii) The extent to which evidence given by a person at public hearings was incomplete or false;

(viii) The amount of time expended by the Tribunal in pursuing inquiries based on false or incomplete information;

(ix) The period of time between the initial provision of false or incomplete information and the eventual provision of correct information, if any;

(x) The seriousness and materiality of the failure to cooperate or the provision of false or incomplete information;

(xi) The relative centrality of a person's involvement in inquiries 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;

(xii) 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."

16. The respondent then 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. By way of illustration, if a person has 100 documents in his or her possession, 99 of which are relatively innocuous and one of which contains highly relevant information that is potentially adverse to the person's interests, and that person makes discovery of the 99 documents while concealing the one, then it can hardly be seriously argues that the person should be entitled to 99% of his or her costs. All the Tribunal can do is to make an assessment, having regard to all relevant factors, which as fairly as possible reflects the extent to which a person cooperated with the Tribunal and which reflects the real effect of any failure in that regard."

17. It is relevant to the issues arising on the appeal to emphasise that Mr. Lowry had no notice of the matters set out by the Tribunal at para. 29 of the General Ruling and to which it states it had regard in determining the portion of Mr Lowry's costs to be disallowed prior to the Specific Ruling.

18. The Specific Ruling is essentially in two parts dealing with distinct although related issues. It first made its findings on non-cooperation and then considered and made its decision on the portion of Mr. Lowry's costs to be disallowed or perhaps more technically allowed. In the first part, it set out the matters relating to non-cooperation referred to in the Report which were notified to Mr. Lowry in the letter of 1st March 2012. It then recorded submissions received from Mr Lowry; set out its responses relying extensively upon what was in the Report and stating that it was satisfied that in one instance "it is clear beyond doubt" and in another that the "evidence heard by the Tribunal overwhelmingly supports the findings it has reached. . ." . it then stated that having regard to those matters the Tribunal 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".

19. Accordingly, the Tribunal was satisfied that Mr. Lowry should not be awarded all of his legal costs. The Tribunal then turned to the second question and observed that the question thus arose whether Mr. Lowry was entitled to any portion of those costs. In that regard, the Tribunal referred to its General Ruling and stated that 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 Tribunal 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.
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> 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 costs incurred by him during periods when his own conduct significantly contributed to the inquiries being unnecessarily prolonged."

20. The Tribunal concluded and ruled that Mr. Lowry should be entitled to recover one third of his costs. It is useful to pause here to notice some of the features of the second part of the ruling. The first point is that the General Ruling and the Specific Ruling were issued on the same day so there was no question of notification to Mr. Lowry in advance of the decision on his case of the matters set out in the General Ruling to which the Tribunal would have regard in deciding the portion of Mr Lowry's costs to be disallowed by reason of the findings of non cooperation. The Tribunal accepted that the question was a difficult one and that there was no precise mathematical calculation for deciding on the amount of any reduction. The Tribunal considered whether there should be any award of costs made to Mr. Lowry. The Tribunal acknowledged that it had made no findings of non-cooperation in connection with its investigation of the awarding of the second GSM licence which occupied "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." Since that was an area of the Tribunal's investigations in which Mr. Lowry was entitled to be represented and there was no question of non-cooperation on his part, it might be thought that his costs in respect of that part of the enquiry were safe. That does not appear, however, to be the approach that the Tribunal adopted because it went on to say by way of immediate qualification that the information resulting from those inquiries came from government departments and civil servants and Mr. Lowry's involvement was accordingly less central. It is not actually clear just what the Tribunal meant by these reservations as it accepted that Mr Lowry was entitled to "be legally represented in respect of those hearing". The paragraph concerning the GSM inquiries concludes by declaring that Mr. Lowry was entitled "to an order in respect of a portion of his costs to reflect the absence of findings of non-co-operation in connection with that aspect of the Tribunal's inquiries.

21. The Tribunal then said that it "must also have regard to the seriousness of the findings it has made in relation to non-co-operation and the extent to which the concealment and falsification went to the very core of its inquiries." It was difficult it said "to imagine more reprehensible conduct". "Nor can the Tribunal ignore the real effect of such conduct and non-co-operation on its inquiries and their length." The ruling then proceeds to explain how Mr. Lowry's reprehensible behaviour caused the enquiry to be more protracted than it needed to be and might have caused other delays. The ruling concludes with what seems to be an expression of exasperation and Mr. Lowry's continued denial of wrongdoing.

22. It seems therefore that the Tribunal's decision on the reduction of costs is not predicated on the time element only or in any specific manner. It is not the case or may not be the case as it appears from the terms of the ruling that Mr. Lowry was held to be entitled to his full costs of those zones of investigation in which there was no question of non-cooperation. The Tribunal attached significance to its own assessment of the moral turpitude of the activities that it condemned as non-co-operation, which implies that this unacceptable behaviour in respect of one part of the Tribunal's inquiries was reflected in some diminution of the costs that would otherwise have been Mr. Lowry's entitlement in respect of representation in other parts. This point of disproportionate reduction is a prominent part of the submissions by Mr. Lowry, who points to the fact that the GSM investigation occupied a greater part of the Tribunal's time than the money trail. By way of illustration of the proportions, it is argued on his behalf that Part II of the Report which concerns Mr. Lowry appears in three volumes, two of which deal with the GSM licence controversy and one only with the money trail investigation. Moreover, he submits that even in this area of the work, only a part is affected by the adverse findings in respect of cooperation, leaving a substantial proportion uninfected.

The High Court

23. Mr. Lowry obtained leave and then sought judicial review in the High Court, claiming *certiorari, mandamus* and a series of declarations on grounds broadly along the following lines. He claimed that the decision was *ultra vires*, unreasonable and disproportionate in circumstances in which he had fully cooperated in the great bulk of the Tribunal's work. The decision was discriminatory as he alleged when contrasted with the awards of costs by the Tribunal to other persons investigated. He claimed that the Tribunal did not observe its own precepts in the General Ruling as to the standard of proof to be applied. He alleged breaches of fair procedures. He had a legitimate expectation that he would be awarded his costs of the phases or modules of investigation in respect of which he cooperated and was not found by the Tribunal to be culpable of non-cooperation. And he claimed that the decision on costs represented the imposition of a penalty, which was legally impermissible.

24. Hedigan J. rejected the application, holding first that Mr. Lowry was out of time to challenge the findings of non-cooperation made by the Tribunal and published in its report and that he could not revisit them.

25. The Court held that the decision was not unreasonable, bearing in mind the range of orders on costs that the Tribunal might have made, stretching from full costs at one end of the scale – which Hedigan J. accepted was the default option – to fixing a party with the Tribunal's costs at the other. While the judge noted that no findings of non-cooperation were made in respect of the GSM module, he took the point made by the Tribunal that Mr. Lowry's role in that phase was less central to that in the money trail. He also agreed that the falsification of a solicitor's files "was conduct of the most reprehensible nature". In addition, he recorded that the Tribunal's work was "greatly delayed" by reason of actions of Mr. Lowry. In light of those findings of the Tribunal, Hedigan J. said that "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." One might perhaps doubt whether the Tribunal found that its work was greatly delayed and it did not hold that Mr. Lowry himself had actually falsified the solicitor's files. This is not to say that Hedigan J. was of the view that the Tribunal had so found.

26. Neither was proportionality offended. The High Court here, however, appears to have made a factual error. The court was under the impression that the Tribunal had found that Mr. Lowry failed to cooperate in two-thirds of its work in which he was involved and had decreed accordingly "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." On this point, it is clear that the High Court judge made an error in regard to the facts. It is actually Mr. Lowry's own contention that the GSM investigation can properly be regarded as occupying some two-thirds of the work and time of the Tribunal, whereas the money trail was something less than one-third. His argument is that at worst the Tribunal's findings of non-cooperation relate to the non-GSM part and then only to a subsection of that enquiry. He invites the Court to find that an application of proportionality on that basis could be justified is reasonable, whereas the approach adopted by the Tribunal is the opposite. Insofar as the judge of the High Court endorsed the approach that he erroneously ascribed to the Tribunal, it is of some assistance to Mr. Lowry's cause.

27. Hedigan J. rejected the claim of discrimination in respect of the contrast in the Tribunal's decisions in the cases of Mr. Haughey and Mr. Dunne, holding that the three parties' cases might be lawfully differentiated.

28. The court turned to the issue of procedural fairness. Since Mr. Lowry was given the opportunity of making submissions in response to the proposed findings, the Court held that there was no basis for a claim of lack of procedural fairness.

29. Finally, in regard to legitimate expectation, the High Court rejected this ground. Mr. Lowry was aware that failure to cooperate exposed him to a finding such as was made by the Tribunal in regard to costs. The Tribunal had a discretion and the Court would not interfere with it because to do so would amount to usurping to discretion.

The Appeal

Grounds of Appeal
30. On Mr. Lowry's behalf, the notice of appeal contains 18 grounds some of which involve a degree of repetition. Ground 1 relates to the decision by Hedigan J. that the failure to challenge the findings of the Tribunal as to non-cooperation on publication of the report excluded the possibility of raising the issue again at the costs stage. The Tribunal's answer to that in its notice is that the Moriarty Tribunal Report Part II was published in March 2011 and made findings, including non-cooperation against Mr. Lowry and he did not challenge within the time provided by O. 84, r. 21 or at all. Therefore, no issue arises on those findings. Neither can anything prior to the Specific Ruling in respect of Mr. Lowry and costs on 31st October 2013 be raised, by the same logic. The Tribunal says that the decision of the High Court was correct on that.

31. Ground 2: Section 6 of the Tribunal of Inquiry (Evidence) (Amendment) Act 1979 refers to the issue of costs and cooperation. This ground deals with the standard of proof and is elaborated in written submissions. The Tribunal's response is denial. Ground 3 raises particular issues as to the findings of fact, as to logic and proof concerning the Vaughan files and Kevin Phelan, including that Kevin Phelan did not testify, alleging lack of specificity in regard to falsification of records and ctiticising the logic and the inferences drawn by the Tribunal. The argument raised here is that the Tribunal did not have any sufficient basis of evidence to show Michael Lowry actually doing or causing the wrongful deeds *i.e.* acts re the Vaughan files. See the costs ruling reasons (iii) to (vii) and High Court judgment. The response here is also a denial. In fact, the response to all the grounds of appeal is a traverse/denial except for numbers 10 and 17 and furter, additional material responses. Ground 4 relates these criticisms to the findings concerning Vineacre, Denis O'Connor, Kevin Phelan and Aidan Phelan.

32. Ground 5 argues that the Irish Nationwide IOM account ruling is wrong because of waivers.

33. Ground 6 alleges that the Tribunal conflated substantive and cooperation findings as to the Money Trail.

34. Grounds 7 to 11 argue discrimination compared with the Haughey and Dunne rulings and decisions; invidious discrimination; requirement of similarity of treatment; inconsistent exercise of discretion; unreasonableness; distinction without a difference as between Michael Lowry, Charles Haughey and Ben Dunne. It is alleged that the trial judge was wrong when he held that the discrimination issue was subject to only limited review on the ground of rationality. Mr. Lowry maintains it is subject to a wider basis of review.

35. Ground 12 claims that the decision was disproportionate because:

> (i) It offended the the Tribunal's own criteria in the General Ruling.
>
> (ii) The GSM module took up two-thirds of the time but there was no finding of non-cooperation by Mr. Lowry in respect of that module. Mr. Lowry did in fact cooperate on GSM and on Money Trail.
>
> (iii) Mr. Lowry's position at the Tribunal and the severe financial consequences for him of the withholding of the major part of his legal costs.
>
> (iv) The duration of Tribunal and impact on Mr. Lowry.
>
> (vi) It represented invidious discrimination against him.

36. Ground 13: The High Court misunderstood and therefore erroneously endorsed the Tribunal's reasoning in that the judge thought that the Tribunal said that Michael Lowry failed to cooperate in two-thirds of its work and Hedigan J. held accordingly that that was proportionate. However, the Tribunal's reasoning was different.

37. Ground 14: The High Court made the point that the Tribunal was a body that had a particular function and special expertise and the Courts should give it deference and the appellant challenges that position.

38. Ground 15: This ground alleges that the decision was irrational or unreasonable. There is some repetition here of earlier grounds. The appellant also claims that the High Court was wrong to consider only whether the decision was within the bounds of reasonable decisions. The Court should have examined and enquired whether the specific reasons were well-founded and did the decision flow from those reasons.

39. Ground 16 alleges breach of the requirement for Fair Procedures, protesting that the Tribunal did not recall the appellant to testify on the question of costs.

40. Ground 17: The High Court judge mischaracterised the Tribunal's findings as involving perjury and criminal conduct against Michael Lowry when the Tribunal did not that and could not lawfully have done so. The respondent's notice acknowledges that the Tribunal did not make findings of criminal misconduct against Mr. Lowry.

41. Ground 18 is a repeat of previous ground.

Respondent's Notice
42. The respondent traverses the appellant's grounds and proceeds to set out a series of points and arguments including the following:

> (i) Oireachtas resolution especially at (iii)(b)

(ii) Section 6(1) of the Tribunal of Enquiry Evidence Amendment Act 1979, as amended.

(iii) On 27 November 2008, Mr Lowry solicitor's letter to the Tribunal responding to the draft proposed findings referred to costs.

(iv) On 23 December 2009, The Tribunal's letter to Mr Lowry's solicitors referred to "any further information".

(v) *Murphy v. Flood* [2010] 3 I.R. 136, Supreme Court.

(vi) The letter of 1 March 2012 from the Tribunal with "matters which may be material" to costs and 15 items as listed above.

Submissions Briefly Noted

Mr. Lowry
43. Mr. Lowry's challenge to the findings in relation to costs was not time-barred. The decision on costs was a separate discrete matter and moreover it represented something quite different from the legally sterile conclusions of the report. The deprivation of most of his costs deprived Mr. Lowry of a legal benefit to which he was entitled. It necessarily also left him exposed to claims from his legal representatives and advisers. In a word, the exercise of the jurisdiction over costs was different in kind from the substantive conclusions contained in the report.

44. The findings on non-cooperation were arrived at in breach of fair procedures and without adequate material to substantiate them. The principal basis of the finding of non-cooperation and the matter that received the most trenchant condemnation was that the Tribunal found that the solicitor Mr. Vaughan's file was deliberately falsified and that Mr. Lowry was involved in the falsification. Information from a man named Kevin Phelan was crucial to this finding but he did not attend the Tribunal. He could not be compelled to do so because he lives in Northern Ireland. Mr. Lowry was therefore in the position of not having an opportunity to cross-examine the person who was critical to the provision of material to the Tribunal that satisfied it of the falsification of Mr. Vaughan's file. The Tribunal's own conclusions as to the credibility of Mr. Phelan and indeed of Mr. Vaughan and the lack of transparency in the discovery of this material are also relevant. These features meant that the Tribunal could not reasonably have come to a conclusion that was beyond doubt, the standard that it had set for itself in respect of the relevant findings on costs. For these and other reasons that were advanced in the written and oral submissions, the appellant argued that these findings of non-cooperation were necessarily unsound. The finding that Mr. Lowry had been part of a conspiracy to falsify the file went beyond any legitimate inference that could be drawn from the evidence. A *fortiori*, such a determination could not be made on a higher standard than the balance of probabilities.

45. The decision represented invidious discrimination made by the Inquiry.

46. The Tribunal held that Mr. Haughey had deliberately withheld information and made professions of ignorance that were not credible but nevertheless awarded him full costs, a decision that was wholly inconsistent with the instant case.

47. The reduction in costs of two-thirds was wholly disproportionate given Mr. Lowry's acknowledged cooperation with the majority of the workings of the Tribunal, in particular in relation to the award of the East mobile phone licence, which took up at least two thirds of the Tribunal's time.

48. The trial judge made an error of fact in concluding that the Tribunal had made "findings of perjury and bribery of a potential witness." A Tribunal of Inquiry could not lawfully have made findings of criminal conduct, a fact which the Tribunal acknowledges.

The Tribunal
49. Delay: the application for leave was made some two years and five months after the expiration of the prescribed period (O. 84, r. 21 of the Rules of the Superior Courts).

50. In regard to the factual findings grounding the costs decision, there is detailed evidence assembled and laid out in the report which forms the basis of the conclusions.

51. Mr. Lowry was given the opportunity to adduce further evidence in response to the provisional findings so there was not any breach of fair procedures in that regard:

> "The Appellant was afforded an opportunity to comment on other evidence heard by way of written submission. Moreover, it is clear from the judgment of Fennelly J. in *Murphy v. Flood* [2010] 3 IR 136 at 226. That the principles of natural justice/fair procedures did not require a hearing on whether a person had failed to cooperate. Rather, the Appellant was entitled to "*have reasonable notice of the possibility of such findings*" and it is clear from the evidence that he had, inter alia, such notice. The Appellant was afforded multiple opportunities to make submissions in relation to the Provisional Findings and to inform the Respondent of additional or new information which he wished to provide by way of evidence. The Appellant was also afforded the opportunity to make submissions in relation to the matters which it was indicated could constitute or evidence a failure on the part of the Appellant to cooperate with or provide assistance to the Tribunal or his knowingly giving false or misleading information to the Tribunal within the meaning of section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979, as amended,"

52. As regards the assertions of discriminatory/inconsistent treatment by reference to the costs orders made in favour of Mr. Haughey and Mr. Dunne, those assertions are equally without substance. As Mr. Brady explains in his first affidavit "[t]here are clear differences between the nature of the findings made in relation to the latter two witnesses and the findings made in relation to Mr. Lowry". In contradistinction to Mr. Lowry, the respondent did not find that they deliberately misled the Tribunal. Moreover, the primary ground which it appears the appellant seeks to pursue in connection with alleged discrimination (that a "different process" was applied to the assessment of the costs applications of Mr. Lowry and other persons) is not within the ambit of any of the grounds upon which leave to apply for judicial review was granted and, thus, does not arise herein.

53. There is no basis for concluding by reference to the principle of proportionality or otherwise that the Specific Ruling was unreasonable or irrational but even if the ruling could be challenged on the basis of the principle of proportionality, it is clear from the justified conclusions on non-cooperation that the Tribunal reached and "the range of orders on costs that might have been made by

the Tribunal" that the ruling and its effect were proportionate and the principle would not provide any basis for granting any of the reliefs sought. The High Court correctly concluded that "the manner in which the Tribunal came to its decision on costs was the very essence of proportionality".

Discussion

The Decision Revisited

54. The General Ruling and the Specific Ruling were issued at the same time so it is not the case that Mr. Lowry was given the overall basis of approach in advance of the Tribunal's decision on his case. The latter ruling, as already stated first considers the question of non-cooperation and sets out the particular matters to which the Tribunal had regard and concludes at paragraph 16 that Mr. Lowry failed to cooperate with the Tribunal in the course of its inquiries and knowingly provided the Tribunal with false information with the view to misleading the Tribunal, which in turn had the effect of delaying the Tribunal's work: "Accordingly, the Tribunal is satisfied that Mr. Lowry should not be awarded all of his legal costs". The Tribunal then in the second part went on to consider whether Mr. Lowry was entitled to any costs which, having regard to the general principles set out in its other document, it said 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".

55. Was this decision *ultra vires* the Tribunal, irrational, erroneous in fact, unreasonable, discriminatory, disproportionate, contrary to Mr. Lowry's legitimate expectations or in breach of fair procedures? This is an impressive catalogue of criticisms spanning more or less the full gamut of challenge to a decision the subject of judicial review.

56. The first question is whether the appellant is out of time to make his objection, as found by the trial judge. The matter, it is said, should have been raised in March 2011 when the three volumes of Part II of the report were published. The time for making a challenge was a maximum of 6 months. When he was notified of the provisional findings, Mr. Lowry's solicitors wrote to the Tribunal on 27th November 2008 a letter that included the following: "some of the language used in the Provisional Findings (however they are to be described) raises very clearly the real possibility that the costs of Mr. Lowry and Mr. O'Connor's representation may not be awarded to them". It follows as the tribunal argues that Mr Lowry was aware at that stage of the implications that the proposed findings might have in regard to costs.

57. Mr. Lowry's argument is that the report did not deal with costs and any application that was made within the relevant period and which addressed the question of costs would have been premature. Moreover, the Tribunal itself embarked on a discrete process following publication of the report and directed to the question of costs.

58. Insofar as the report itself contains findings in relation to non-cooperation, it could be argued that they are more appropriate to a later stage when that issue is to the fore. However, there is no complaint on this basis and it does seem to me overall that it would be a point of excessive technicality without any real significance. 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 conflated 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.

59. Another point is made on Mr. Lowry's behalf that the Tribunal adopted a specific and high standard of proof which it described in the General Ruling and it was therefore open to him to say that this level of proof was not achieved.

60. It seems to me on this first question of time that the argument put forward by Mr. Lowry is correct. The process dealing with costs is a separate matter that was initiated following the publication of this part of the report. It began with an invitation by the Tribunal to relevant parties to make their applications. In Mr. Lowry's case, is application was the subject of a response from the Tribunal setting out matters that it considered relevant to the issue of costs. He made submissions which had to be considered by the Tribunal. The sole member might have accepted those submissions in whole or in part. The Tribunal might have considered it appropriate to entertain further debate on the question of costs; that was an option open to it. I do not of course suggest that the Tribunal was obliged to do so but merely to describe one possible course of action that it might have adopted. There was a clear line of distinction and point of distinction in time and purpose between the substantive material of the report and the later embarkation on the costs issue. It is a matter of enormous importance to a participant in an enquiry because of the gravity of the finding and in the circumstances of this case, having regard to the extent of the participation of Mr Lowry in the protracted investigations, there is the very practical consideration that he is left with an enormous liability in costs for his own advisers. It is also relevant that the tribunal set itself a particularly high standard of proof on the issue of costs which represents in effect the criminal standard beyond reasonable doubt. These points of principle, practicality and legal proof confirm the difference between the contents of the report and the decision on costs. It would therefore not be reasonable or legally permissible to hold that failure to challenge the report necessarily shut the appellant out from challenging the costs order. In those circumstances, I am satisfied that the processes are quite separate and the matter of costs is not time-barred as a result.

61. The appellant's challenge to the findings relating to non- cooperation falls into two broad categories, one concerning fact and the other concerning procedure. As mentioned above, Grounds 3 and 4 raising issues as to findings of fact in connection with the costs decision and going to logic, proof and including allegations of lack of specificity. They particularly refer to the Vaughan files concerning the Mansfield and Cheadle property transactions and to the issues concerning Vineacre and Doncaster. These are some of the specific matters that are the basis of the Specific Ruling. The second category concerns the process by which the findings and decision were made.

62. Mr. Lowry argues that the reasons for the decision to withhold two thirds of his costs were not soundly based on evidence heard at the Tribunal hearings and, insofar as they consist of inferences drawn from the facts, again there is inadequate evidential basis and there are deficiencies in logic as he contends. The matters that are listed in the letter of March 2012 to Mr. Lowry, as quoted above, include two important findings to which he pursued challenges. They are first the Mansfield and Cheadle transactions and the alterations in the files of Mr. Christopher Vaughan, the English solicitor who dealt with those matters. Secondly, he complains about conclusions concerning dealings involving Mr. O'Connor held to have been acting on behalf of Mr. Lowry in negotiations with Messrs Aidan and Kevin Phelan. It is submitted on Mr. Lowry's behalf that there was a fundamental flaw in regard to the evidence accepted by the Tribunal and on which it based serious adverse findings against him. That factual evidential flaw alleged is that Mr. Kevin Phelan did not give evidence to the Tribunal, having refused its invitation to do so and not being compellable because he resides in Northern Ireland. He did, however, communicate with the inquiry and he is the source of the long form letters that the Tribunal contrasted with what it was supplied with previously as purporting to be the copy letters on Mr, Vaughan's file. So the first point is

the absence of the critical witness Mr, Kevin Phelan who was essentially the source of the material that was used to discredit Mr, Lowry in this respect.

63. The appellant engages in his written submissions in a detailed analysis of the findings in the report to the effect that Mr. Lowry was involved in or concerned with the falsification of records in the sense that he was at least aware that falsification of records was taking place. The Tribunal is also challenged in respect of its conclusion that Mr. Lowry's evidence was consistent with knowledge of the fraudulent records. Again, the submissions engage in a detailed critical analysis endeavouring to establish point by point deficiencies of proof, errors in reasoning and departures from fair procedures in reaching the conclusions recorded in the report.

64. There can be little doubt about the significance that the tribunal attached to these particular matters in that its Specific Ruling expressly records its view of the gravity of the conduct in question.

65. It has to be said at the outset that an applicant faces a formidable obstacle in seeking to attack the findings of a Tribunal in the manner essayed by Mr. Lowry in this case. The Tribunal in its submissions draws attention to the jurisprudence on judicial review. Clearly, it is not a question of an appeal from the findings made by the Tribunal. Even if that approach were to be adopted, findings of fact and inferences are entitled to respect in accordance with settled case law: see *Hay v. O'Grady* [1992] 1 IR 210. That is not the situation here and neither is it the test. The court cannot impose its own view in preference to the deciding body. The test of unreasonableness in *State (Keegan) v. Stardust* and in *O'Keeffe v. An Bord Pleanala* sets the bar very high for such a challenge in respect of factual findings.

66. The appellant cites *Mahon v. Air New Zealand* [1984] A.C. 808 per Lord Diplock at 820 regarding the observance of natural justice in the discharge of an investigative jurisdiction:

> "The rules of natural justice can, in their Lordships' view, be reduced to those two [in an investigative context]… The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
>
> . . .
>
> What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.
>
> The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."

67. The Tribunal made findings against Mr. Lowry in respect of an Irish Nationwide Account in the Isle of Man, as to which no challenge was directed at the hearing of the appeal. In respect of the Vaughan files, to use that general expression to cover the Tribunal's findings, the Tribunal had undisputed evidence of Mr. Lowry's presence at the meeting of 15 March 2001 in respect of which the determination records specific conclusions. It cannot be said that they do not have evidential foundation. In regard to the matters at IX to XII concerning the UK settlements, Vineacre and Doncaster, the challenge here is not to the finding of Mr. Lowry's failure to provide information about the involvement of Mr O'Connor but rather to the detail of the determinations. It is impossible I think to dismiss the detailed factual analysis put forward on Mr. Lowry's behalf as being unfounded. It is clearly a careful and detailed response to the evidence and the conclusions and inferences that were drawn by the Tribunal. But the height of the challenge is in respect of a relatively narrow area and then with particular reference to matters of detail. It seems to me taking account of all the points for and against that the high threshold required for a successful challenge to a Tribunal's findings and conclusion of non-cooperation has not been reached.

68. Neither do I consider that the Tribunal was in breach of the obligations of fair procedures in relation to that part of the Specific Ruling which made findings of non- cooperation. It gave Mr. Lowry notice of the relevant matters in the letter of 1st March 2012, an opportunity of making submissions in relation thereto, considered same and albeit in broad terms gave reasons for the findings made and conclusion of non-cooperation.

69. I turn then to the challenges to the decision to disallow two thirds of Mr. Lowry's costs by reason of the findings made in the first part of the Specific Ruling including the alleged invidious discrimination, proportionality and rationality, penalty and fair procedures.

70. Amongst the matters to be considered was the fact that all of the findings of non-cooperation related to various aspects of the money trail inquiries and none to the enquiries into the GSM licence. The latter comprised a considerable portion of the Tribunal's work and a significant number of days of public hearings and Mr. Lowry was entitled to be legally represented at those hearings. Clearly, those matters weighed in favour of Mr. Lowry being awarded all of the costs of the GSM inquiry. However, the Tribunal went on at paragraph 17 of its Special Ruling to enter some qualifications. In the first place, the bulk of the evidence in those enquiries was provided by Government Departments and civil servants and Mr. Lowry's involvement was less central than in the money trail investigation. Also, he had less control over the provision of information and material to the Tribunal in the GSM investigation. Secondly, the Tribunal notes that there was a significant degree of overlap and interconnection between the two areas of investigation. This paragraph concludes: "[n]onetheless, 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."

71. The Tribunal then proceeds to another consideration. Paragraph 18 of the Special Ruling is as follows:

> "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 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 un-falsified 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 costs incurred by him during periods when his own conduct significantly contributed to the enquiries being unnecessarily prolonged."

72. My reading of the ruling is that the Tribunal began by appearing to acknowledge that Mr. Lowry was *prima facie* entitled to his costs in respect of the GSM inquiries but that account fell to be taken first of the relative non-centrality of his role in that part of the Tribunal's work and his limited function in regard to the supply of information and material in respect thereof. A second relevant feature was the interconnection and overlapping of the zones of investigation in which there was no suggestion of non-cooperation on his part and the one in which the Tribunal had made such findings. Thirdly, the Tribunal held that Mr. Lowry's role in regard to the Vaughan files was quite exceptionally reprehensible. Fourthly, his non-cooperation in regard to those files and in other respects resulted in delay in the work of the Tribunal. All of these matters taken together led the Tribunal to make its decision to award Mr. Lowry only one third of his costs. I note also that the Tribunal gave consideration to whether Mr. Lowry should be given any of his costs before ultimately concluding as it did.

73. In regard to the claim made by Mr. Lowry that the way he was treated by the Tribunal was discriminatory when compared with Mr. Haughey and Mr. Ben Dunne and the way they were treated, the Tribunal responds to this in the proceedings by making distinctions that I think are less than convincing. This is an administrative matter and a party is entitled to look for consistency in the exercise of an administrative decision-making power, including a discretion. The administrative process should be fair and reasonable and it should broadly be consistent. One problem but not the only one is that Mr. Lowry did not have an opportunity of putting his case for similar treatment with other persons. While there may be legitimate distinctions to account for full costs being awarded in the cases of those other persons as compared with Mr Lowry, if he had known about the Tribunal's intentions he could have argued the position. Obviously I am not saying that the Tribunal had to find in favour of Mr. Lowry on costs in the same way that it did in the cases of Messrs Haughey and Dunne, but this is a reason why I conclude below that fair procedures required notice sufficient to enable Mr. Lowry to address the real issues. The tribunal had made it clear in its General Ruling that it had encountered many instances of grave failure to cooperate. It said that it had "confined its consideration solely to the clearest findings of deliberate concealment, falsification or untruth, where the Tribunal is satisfied that the evidence supporting the findings is beyond any doubt, and where that concealment, falsification or untruth has subsequently been laid bare. Regrettably, the Tribunal encountered many instances of such conduct in the course of its inquiries."

74. On the question of proportionality and rationality, it seems to me that the reasoning of the Tribunal gives rise to real concern under this heading. In my view, the Tribunal fell into error in failing to identify some rational mode of calculation and in apparently taking into account irrelevant matters or alternatively things of which no notice had been given.

75. There is no doubt that Mr. Lowry's rights and interests were in issue. The seriousness of the impact of the ruling by the Tribunal on Mr. Lowry and his professional advisers is obvious. The submissions on his behalf furnish some of the detail of which it is only necessary to mention a couple to indicate the scale of the reduction and its impact. It is said that the solicitors who were then acting for Mr. Lowry recorded some 9,000 hours of work in connection with the Tribunal. His accountant, Mr. O'Connor, has issued proceedings against Mr, Lowry claiming payment of fees in the amount of €1.7 m, a sum that remains outstanding and unpaid. The issue fundamentally affected his financial standing not just in the present but for the future also. He had been professionally represented at this Tribunal for more than 15 years and had incurred an enormous liability for costs which it would be beyond the capacity of all except the super-rich to be able to discharge from their own resources. Beyond Mr. Lowry and his obligations, there was the position of the advisers themselves whose interests did not fall to be considered independently but it is at least arguable that in considering Mr. Lowry's position and the rights and wrongs of reducing his costs, the fact that his advisers would very likely go unpaid for many years' work does not seem wholly irrelevant, if only as something that would haunt him long into the future.

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. My concern in this respect is firstly because of the requirement for reasons as a matter of administrative law and, secondly, on the related question of the failure to offer Mr. Lowry an opportunity of addressing the quantum of reduction and the methodology of measurement thereof that the Tribunal was proposing to adopt. It follows from this last point that I think that the Tribunal was obliged to formulate and more particularly to identify some method of calculation, allowing for the reasonable point that precision was not possible according to a mathematical formula. 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.

77. Did the Tribunal reduce the costs incurred in the GSM hearings because Mr. Lowry's role was less central than it was to the money trail inquiry? What was the reason for that? If that was not a reason for reduction, why is it mentioned in the ruling? In regard to the crossover element between the two areas of inquiry, did the Tribunal not have some even rough calculation of the amount? And independently, allowing for the possibility of interconnection between the two, why should it follow that Mr. Lowry should be deprived of the costs of the GSM inquiry? What was the Tribunal's approach to determining the proportion of non-GSM investigations that was affected by non-cooperation? And why and in what way did the moral judgment made by the Tribunal as to the falsification of the solicitor's correspondence affect the decision in respect of the areas not contaminated?

78. In my view, the ruling has to be interpreted as embodying some impermissible considerations. It is acknowledged that Mr Lowry did not fail to cooperate in regard to the GSM licence hearings. It is also accepted that his presence with legal representation at those hearings was proper and indeed required. The fact that his role may not have been central or that the principal evidence was given by others is not a basis for reducing his costs. They is no suggestion that they were not properly incurred. The introduction of qualifications on his entitlement to these costs seems to me to be unreasonable in the judicial review sense.

79. The moral turpitude that is expressed is also irrelevant in the determination of Mr. Lowry's entitlement to costs. The matter of sanction is not appropriate in the circumstances. The tribunal made it clear in its General Ruling how it interpreted s. 6(1) – see above at paragraph 11.

80. Insofar as the reduction decided upon by the Tribunal included a judgment of the moral quality of the non-cooperation, that is impermissible as a quasi-penalty or sanction and is not open to a Tribunal. Even if it were to be considered lawful such an evaluation of the quality on the scale of seriousness requires to be notified to give the party affected the opportunity of disputing it.

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. In my view, notwithstanding the wide-ranging challenge to the decision made by the Tribunal the appeal falls to be decided by reference to classical principles.

83. In *Re Haughey* [1971] IR 217 concerned a person whose presence before a Tribunal went further than that of merely being a witness and was closer to that of a party. Ó Dálaigh CJ made the most famous and earliest declaration of the constitutional rights of such a person when he said at p. 264 that:

> ". . . in proceedings before any Tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights."

84. Forty years later, Hardiman J, in his judgment in *Dellway Investments Ltd v. NAMA* [2011] 4 IR 1 said at p. 296:

> "[i]t is trite law to say that a right to a hearing carries with it a right to notification of the proposed decision and to sufficient detailed information, including criteria, as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears."

85. It is clear that the pillar of natural justice which is *audi alteram partem* includes first, the right to know the proposed decision that is going to affect a person's rights or interests and secondly, the opportunity to make his case against the proposal. In this case, I think that the reasons given by the Tribunal for its decision as to the amount of the reduction of costs awarded are at least unclear and unspecific and may well depending on the interpretation thereof be of dubious legality. There is an absence of transparency as to how the decision was reached. And on the other side of the rule of natural justice just cited I do not think that Mr. Lowry was given any or any adequate notice of the proposed reduction or the matters to which the Tribunal would have regard in determining the portion to be disallowed as set out at para. 29 of the General Ruling or an opportunity to dissuade the Tribunal from coming to that decision.

86. Another point is related to this. The Tribunal did not give Mr. Lowry specific notice that it was considering such a swingeing deduction from what it is accepted was his prima facie an entitlement.

87. As appears from para. 29 of the General Ruling that is quoted above at para.15, one of the elements to be taken into account and as to which an opportunity to respond would have been required was:

> (xi) The relative centrality of a person's involvement in inquiries 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** [emphasis added];

88. There is no universal rule about fair procedures. What is required depends on what is in issue and on the context. In this instance, there was Mr. Lowry's acknowledged *prima facie* an entitlement to recover his costs. As against that, there were reasons why the Tribunal was concerned whether there should be a reduction imposed. Indeed, the Tribunal has made clear in its Specific Ruling that it considered whether there should be any award at all of costs to Mr. Lowry. It does not follow that because a procedure is fair in one context it will also pass muster in another situation. So what may have been fair in respect of the factual assessments and conclusions of the Tribunal's report will not necessarily be appropriate in the context of applications for costs. In my judgment, this is a source of error in the Tribunal's approach.

89. The Tribunal gave parties including Mr. Lowry notice of draft conclusions which it was proposing to reach in light of the documentary and oral evidence that had been explored in the hearings and it invited responses. At this point, the parties including Mr. Lowry had before them the specific proposed conclusions and they could respond with general and particular objections and submissions. Clearly, the Tribunal was not bound to accept any responses. Mr. Lowry was in a position where he knew that if he did not make any response, or if his objections did not find favour with the Tribunal, this is what the report was going to contain. Not every Tribunal of Inquiry proceeded in this manner of giving affected parties notice of the contents proposed for the report. This process adopted by the Moriarty Tribunal represented a very high level of consultation in advance of publication of the report and cleared the threshold of fair procedures by a substantial margin.

90. I do not think the same can be said for the consultation in respect of costs insofar as it relates to a proposed disallowance. As set out above, 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.

91. For these reasons, I would dismiss the appeal of Mr. Lowry in relation to the challenge to the findings of non-cooperation in the Specific Ruling and allow the appeal in respect of the decision that Mr. Lowry only be allowed one-third of his costs and would remit the matter to the Tribunal for reconsideration of the costs to be granted to Mr. Lowry having regard to the findings of non-

cooperation made in accordance with the principles set out in the General Ruling and this judgment.

92. It also follows that Mr. Lowry is also entitled to an order of certiorari of the order of the Tribunal dated 31st October 2013.