THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2022] IECA 260

Court of Appeal Record Nos 2021/14 & 2021/109

Ní Raifeartaigh J.

Collins J.

Binchy J.

BETWEEN

KEITH HARRISON

Appellant/Applicant

AND

PETER CHARLETON

Respondent/Respondent

JUDGMENT of the Court delivered on 11th November 2022

BACKGROUND

The Disclosures Tribunal and term of reference (n)

1. In these proceedings the Appellant seeks to quash a costs order dated 4 December 2109 ("*the Costs Decision*") made by the Respondent in his capacity as sole member of a tribunal of inquiry established by the Tribunals of Inquiry (Evidence) Act 1921 (Appointment of Tribunal) Instrument 2017 for the purpose of inquiring into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters (referred to hereafter as "*the Disclosures Tribunal"* or *"the Tribunal*").

2. One of the "*definite matters of urgent public importance*" identified in the resolutions passed by the Dáil and Seanad that led to the establishment of the Disclosures Tribunal was *"(n) To investigate contacts between members of An Garda Síochána and TUSLA in relation to Garda Keith Harrison*." That aspect of the Tribunal's terms of reference arose from complaints made by the Appellant and his partner Marisa Simms to the effect that TUSLA[1] had intervened inappropriately in their family life and that such intervention had been improperly manipulated by members of An Garda Síochána alleged to bear ill-will towards the Appellant and Ms Simms.

3. The Tribunal conducted hearings into term of reference (n) over 19 hearing days between 18 September 2017 and 24 October 2017. The Appellant was granted representation by the Tribunal and he and his legal team participated fully in the hearing, with the Appellant being one of a number of persons called to give evidence by the Tribunal.

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[1] TUSLA is the self-adopted title of the Child and Family Agency, an agency established by the Child and Family Agency Act 2013 to carry out the functions set out in section 8 of that Act.

4. The Tribunal issued its *Second Interim Report* on 30 November 2017 (hereafter *"the Report*"). While the Report states that it relates to Garda Harrison pursuant to terms of reference (n) and (o), as a matter of fact only term of reference (n) was the subject of substantive consideration in it.[2] That is not in controversy. It will be necessary to refer in more detail to the precise terms of the Report below. At this point, it is sufficient to note that the Tribunal was very critical of the Appellant (and of Ms Simms) and of the evidence given by him and rejected in emphatic terms the "*very serious allegations"* that the Appellant had made regarding the intervention of TUSLA and the role of An Garda Síochána in it.

5. The Appellant then sought to quash the Report (and portions of the Tribunal's *Third Interim Report* which repeated the conclusions that it had reached regarding the allegations made by the Appellant) on grounds of bias. Those proceedings were dismissed by the High Court (Donnelly J) ([2019] IEHC 626) and by this Court on appeal ([2020] IECA 168). The findings expressed by the Tribunal in the Report are now beyond challenge.

The Appellant's Application for Costs

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[2] Term of reference (o) referred to the investigation of any pattern of the creation, distribution and use by TUSLA of files containing allegations of criminal misconduct against members of An Garda Síochána who had made allegations of wrongdoing within An Garda Síochána and the use of such files by senior members of An Garda Síochána to discredit members who made such allegations. In light of the findings made in relation to term of reference (n), no issue of any "*pattern*" arose such as to require separate inquiry by the Tribunal.

6. On 4 December 2017, the Appellant's solicitors wrote to the Tribunal making a formal application for his costs. In response the Tribunal invited the Appellant to make a submission setting out the basis for that application and such a submission was provided on 21 December 2017. The submission made reference to section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 (as amended) ("*Section 6*") and to the decisions of the Supreme Court in *Goodman International v Hamilton* [1992] 2 IR 542 and *Murphy v Flood* [2010] IESC 21, [2010] 3 IR 136. While it was acknowledged that the Tribunal had rejected assertions made by the Appellant and had found them to be "*entirely without validity*", it was said that the Tribunal's findings *"fail to reach the threshold to warrant an adverse costs Order as against him*" and that any such order "*would be manifestly unjust and inequitable*" . As regards the Appellant's own costs, it was said that there were "*insufficient reasons and/or findings*" to refuse to grant him his costs of appearing before the Tribunal.

7. After some intervening correspondence which it is unnecessary to discuss, the Tribunal wrote to the Appellant's solicitors on 22 October 2018. The letter referred to Section 6 and to *Murphy v Flood* and suggested that, having regard to what had been stated by Denham J in *Murphy v Flood*, the giving of "*untruthful evidence*" to the Tribunal was something to which it could have regard in making any order as to costs. The letter went on to refer to certain aspects of the Report where the Appellant's evidence was variously described as "*false*", "*evasive and at times senseless",* "*nonsense*" and "*ridiculous*", and at one point referred to the determination of the Appellant and Ms Simms "*to persist in damaging and hurtful allegations notwithstanding the fact that they knew they were untrue.*" It concluded by indicating that the Tribunal was considering "*what, if any, portion of costs should be*

paid to you" and in that context invited the Appellant to make oral submissions at a hearing to be held on 1 November 2019.

8. Mr Harty SC appeared for the Appellant at that hearing, as he had at the hearings on term of reference (n). He submitted that his client had co-operated fully with the Tribunal and had assisted it in its work. That was so notwithstanding the fact that the Tribunal had not accepted his evidence. The fact that The Tribunal preferred the evidence of other witnesses to the Appellant's evidence did not provide a basis for imposing any form of costs "*penalty*" on him. Such a penalty would be justified only if the Tribunal concluded that the Appellant had been deliberately untruthful in evidence "*central to the terms of reference*" (as opposed to evidence relating to "*peripheral matters*") and where that evidence had delayed and/or impeded the work of the Tribunal. That was not the case here, according to Mr Harty. The issues in respect of which the Tribunal had been critical of the Appellant's evidence were not core to the terms of reference and there was no basis for characterising his evidence as deliberately or knowingly untruthful. It was no part of the Tribunal's functions to punish the Appellant for making allegations that had not been accepted by the Tribunal, even where those allegations may have caused hurt to other persons. Other persons represented before the Tribunal during the module had given false evidence and/or failed to assist the Tribunal without (so it was suggested) any costs penalty, such that it would be inequitable to impose any penalty on the Appellant.

9. Mr Harty relied on the decision of this Court in *Lowry v Moriarty* [2018] IECA 66 as authority for the proposition that, in the event that the Tribunal was minded to give his client anything less than 100% of his costs, it was obliged to set out its methodology and

the reasoning underpinning it. While Mr Harty declined to express a view as to what specific methodology might be adopted by the Tribunal in that context, he submitted that any order would have to relate to the evidence given and whether or not the evidence impeded the work of the Tribunal. Finally, Mr Harty emphasised that the origins of the Tribunal, as far as term of reference (n) was concerned, lay in a protected disclosure made by the Appellant and, having regard to the provisions of the Protected Disclosures Act 2014, it was said that "*exceptional circumstances"* were required to justify the imposition of any form of costs penalty on the Appellant.

The Tribunal's Costs Decision

10. The Tribunal issued its decision on the Appellant's application for costs on 4 December 2019. It began by setting out the law as to costs at a tribunal. In the course of its analysis, the Tribunal observed that tribunal costs are not dependant on whether a person did anything wrong "*but rather on co-operation, central to which is telling the truth"*. Having cited a well-known passage from the judgment of McCarthy J in *Goodman v Hamilton* as to the proper interpretation of the phrase *"the findings of the tribunal*" in section 6 of the 1979 Act, the Tribunal stated that "*as tribunals are set up in the public interest by the Oireachtas, the public should bear the costs of same subject to what findings the tribunal makes about the conduct of a particular party before it*." That was, the Tribunal continued, consistent with what had been said by Denham J in *Murphy v Flood*, citing a passage in which Denham J had stated that *"[o]rdinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to co-operate with the tribunal."* The ruling went on to refer to the judgment of

Fennelly J in *Murphy v Flood* in which he rejected the suggestion that the subsequent amendment of section 6 meant that the substantive findings of the tribunal on the subject matter of its terms of reference could be taken into account in the context of deciding whether or not to award costs.

11. The Tribunal explained that it was accepted by all parties that deceit before a tribunal could entitle the tribunal to discount an award of costs or to refuse costs to a party. The report of a tribunal should not "*be parsed or analysed to seek gradations of acceptance or rejection of a witness's evidence*". If evidence was described as mistaken or a result of a failure of recollection, then the threshold test for departing from the ordinary order for costs was not met. Where, however, evidence was stated to have been rejected or not accepted, that indicated that the threshold test was met. In looking at a tribunal report, the entire report had to be considered to give the necessary context.

12. The ruling then refers to the submissions filed on behalf of the Appellant, the Tribunal's letter of 22 October 2018 giving notice of its concerns as to why it might consider not awarding the Appellant costs/full costs (which is set out in full) and to the subsequent hearing on 1 November 2019. Re-iterating that the ruling had to be read in the context of the entirety of the Report, the Tribunal referred to the fact that "*the most damaging allegations*" had been made by the Appellant against the Garda Síochána generally, against the social work system and against individual Gardaí and social workers. Those allegations had made it necessary to prepare for and undertake public hearings over four weeks, at the conclusion of which the Tribunal "*could not find any basis for finding that those allegations were true"*. A myriad of people "*were blamed in the wrong"*. A *"staggering allegation*"

of social workers being manipulated by sinister forces had been made which had been *"stressful and deeply hurtful for all of those wrongly accused." "In substance*", the Tribunal went on, "*all of the allegations with which the terms of reference, (n) and (o). were substantially concerned were unfounded. These should simply never have been made"*. "*Dreadful allegations*" had been made which *"had no substance whatever to them*". Allegations had been made "*without basis"* and were elsewhere in the ruling characterised as "*baseless*" and "*scandalous*".

13. However, "*with considerable doubt*", the Tribunal considered it appropriate to award the Appellant costs up and including the first day of hearing, at which point, in the view of the Tribunal, the Appellant should not have persisted further in the allegations made by him and should have withdrawn them.

14. In its ruling, the Tribunal rejected the suggestion that there was any "*mathematical formula*" for reducing the costs payable to the Appellant or only awarding a portion of his costs. This was not an instance of where the approach of a party showed some substantial benefit in terms of revealing where the facts lay as "*in substance all of the allegations ... were unfounded*" and "*should simply never have been made".* Thus, it was not appropriate to make an order for costs on the basis of a fraction or percentage of the Appellant's costs.

THESE PROCEEDINGS

15. The Appellant then sought judicial review of the Tribunal's Costs Decision and the consequential order made by it. As well as an order of *certiorari*, the Appellant sought a

number of declarations, including declarations to the effect that the refusal to grant the Appellant the full costs of his representation amounted to "*an impermissible legal effect and is a penalty by imposing financial liabilities on the Applicant*" and also amounted to impermissible penalisation as defined by the Protected Disclosures Act 2014. The Appellant also sought a declaration that the Costs Decision was *ultra vires*, in breach of the principles of natural and constitutional justice and in breach of the Appellant's rights under Articles 6 and/or 10 ECHR.

16. The Statement of Grounds contains a large number of grounds. It asserts that at no point did the Tribunal state that the Appellant had failed to provide assistance or knowingly gave false or misleading information (e(20)) or invite the Appellant or his advisors to address the approach it intended to take in relation to costs (e(21)). At no point prior to the public hearings did the Tribunal invite the Appellant to withdraw any part of his allegations or statements (e(22)) or indicate that the allegations should be withdrawn (e(23)). It is also said that the Tribunal did not seek to interview the Appellant prior to the public hearings (e(24)). The "*Legal grounds*" set out include a complaint that the Tribunal wrongly applied principles of costs in litigation to the proceedings before it (e(31) and that the Tribunal erred in finding that *"allegations are the same as evidence of fact*" (e(32)). It is said that the Tribunal failed to have regard to the fact that that the Appellant had at all times assisted the Tribunal (e(33)) and the fact that no finding had been made by the Tribunal that the Appellant knowingly gave false or misleading information (e(34)). Reliance is placed on the Protected Disclosures Act 2014, it being said that in refusing the Appellant some of his costs, the Tribunal had failed to have regard to the fact that his evidence emanated from a protected disclosure within the meaning of that Act and had imposed a form of penalisation

as defined by the Act (e(35)). It is said that, in requiring the Appellant to pay for his own representation in respect of 19 days of hearing, the Tribunal had imposed an impermissible legal burden and financial penalty on him (e(36)) and that, in holding that costs are to be awarded to persons whose allegations are true, but not otherwise, the Tribunal had acted *ultra vires* (e(37). Finally, it is said that the failure to award the Appellant the entirety of his costs was in breach of Article 6 and/or 10 ECHR.

17. The Appellant's verifying affidavit (sworn on 2 March 2020) is largely formal but it concludes by stating that he has suffered prejudice and unfairness as a result of being refused all the costs of his representation, in breach of the principles of natural and constitutional justice and his rights under Articles 6 and/or 10 ECHR and that a great deal of time and expense had arisen by reason of the Appellant being a witness before the Tribunal. The Appellant says that at no stage did he frustrate, delay and/or mislead the Tribunal and that he sought at all times to ensure that all relevant evidence was brought before the Tribunal.

18. The High Court (Meenan J) directed that the application for leave should be made on notice to the Tribunal and the President of the High Court subsequently directed that the application for leave should be treated as the hearing of the substantive application for judicial review.

19. Opposition papers were then filed on behalf of the Tribunal. Its Statement of Opposition does not take issue with many of the factual assertions made by the Appellant, such as the

fact that the Tribunal had not sought to interview him (because – it is said – the statements provided to the Tribunal by the Appellant and Ms Simms were so comprehensive that no interview was necessary) and the fact that the Tribunal had not invited the Appellant to withdraw any part of his statements or allegations (it being said that the Tribunal was under no duty to do so and that it was a matter for the Appellant to withdraw untrue allegations that he had made of his own accord). It pleads that the Tribunal had correctly applied the law in relation to tribunals and exercised its discretion in accordance with law. It takes issue with the assertion that the Appellant assisted the Tribunal; it had concluded "*the reverse*". As regards the assertion that the Tribunal had not made a finding that the Appellant knowingly gave false or misleading evidence, the Tribunal pleads that it *"clearly found that the [Appellant's] evidence to the Tribunal was false and misleading. It is denied that the [Tribunal] was obliged to use a specific formulation of words to describe the non-cooperation of the Applicant and determining that the Applicant had not told the truth to the Tribunal and had not cooperated with the Tribunal"*. The Statement of Opposition denies that the Tribunal held that costs are to be awarded only to persons whose allegations are found to be true and pleads that the Appellant and his lawyers had been given very proper and adequate opportunity to address the costs issue. The alleged breaches of Articles 6 and/or 10 ECHR are also denied.

20. A lengthy replying affidavit was delivered by the Appellant (sworn on 15 July 2020).

21. The Appellant then brought an application for discovery and for leave to deliver interrogatories. Three categories of discovery were sought, as follows:

"A. All correspondence, notes, records or memoranda concerning the furnishing of the statement of the Applicant and/or Marisa Simms to third parties before the 8th August 2017;

B. All documents, notes, records and/or memoranda created prior to the 18th September 2017 concerning the decision not to interview the Applicant prior to the public hearings in respect of Module N;

C. All correspondence from or to the Tribunal concerning the application for costs and/or grant or refusal of costs in respect of Module N or O in the Terms of Reference."

22. The interrogatories which it was sought to deliver are lengthy and raised multiple questions, including questions regarding the Tribunal's approach to its terms of reference, its approach to the calling of witnesses in module (n) and the circulation of witness statements, whether the Tribunal had called on the Appellant to withdraw his allegations, whether applications for costs had been made by certain specified persons and the manner in which the Tribunal had exercised its Section 6 powers in relation to certain persons. For completeness, the interrogatories are set out in full in the Appendix to this judgment.

23. The Appellant's application was opposed by the Tribunal and an affidavit was sworn by the Tribunal's Registrar, Peter Kavanagh, for that purpose. That affidavit included a chronology setting out the flow of witness statements to the Tribunal. The application was heard by the High Court (Hyland J) on 6 November 2020 and on 18 November 2020 she

delivered a comprehensive judgment setting out in detail her reasons for refusing the application.

24. In relation to *Category A*, Hyland J noted that the sequence in which the Tribunal had received statements and the steps taken by it to obtain observations on those statements were not the subject of any dispute and that no challenge had been brought to the procedures which the Tribunal had adopted. In those circumstances, she had no hesitation in concluding that category A was neither relevant nor necessary for the determination of the proceedings.

25. As regards *Category B*, the High Court judge noted that there was no dispute as to the fact that the Tribunal had not interviewed the Appellant prior to the public hearings (whereas it had interviewed other potential witnesses) and the Appellant was free to make whatever legal argument he wished as to the consequences of the Tribunal's decision not to interview him. In its Statement of Opposition, the Tribunal had pleaded that the reason for not interviewing the Appellant was that he had provided such a detailed statement that it considered that no interview was necessary. While the Appellant argued that he should be provided with discovery of Category B in order to test the accuracy of that plea, Hyland J was of the view that that would amount to a fishing expedition in the absence of any challenge to the Tribunal's stated position. In the circumstances, she concluded that category B was neither relevant nor necessary for the determination of the proceedings.

26. Finally, as regards *Category C*, the High Court judge noted that the basis advanced for seeking discovery of that category was that the Tribunal had acted in a discriminatory

manner in the way that it had dealt with the Appellant's costs on the one hand and the costs of other parties on the other. She accepted that, in principle, a failure to treat persons equally in respect of costs could potentially be a ground for challenging a costs decision (referring to the decision of this Court in *Lowry v Moriarty* [2018] IECA 66 and to the earlier decision of the High Court in those proceedings ([2015] IEHC 39) directing discovery of material identifying how two other persons participating in the Moriarty Tribunal had been treated in respect of costs). In her view, however, no issue of unlawful discrimination was in the case. The *"very bald and boilerplate type plea"* at paragraph 26 of the Statement of Grounds – where it was said that the Tribunal had acted *ultra vires* and in breach of the principles of natural and constitutional justice in failing to award the Appellant the entirety of his costs – was not a sufficient specification of a plea of discrimination in her view. Category C was therefore refused.

27. As regards the intended Interrogatories, Hyland J considered interrogatories 1-7 together, concluding that none were in any way relevant to the matters pleaded in the Statement of Grounds. Interrogatory 8 was refused on the same basis as Category B of the discovery sought was refused and Interrogatory 9 was refused on the basis that, insofar as it related to terms of reference (n) and (o), Mr Kavanagh's affidavit had identified the four persons who had been asked to meet with the Tribunal's investigators. The information sought in interrogatories 10 and 14 had also been provided by Mr Kavanagh. Interrogatories 11 and 15 were of no possible relevance. Interrogatories 12 and 13 related to the Appellant's contention that the Tribunal ought to have called on the Appellant to withdraw his allegations and were not permitted on the basis that the fact that the Tribunal had not invited the Appellant to withdraw any allegations was not in dispute and the reasons for adopting

that position were not relevant to any issue in the proceedings. Interrogatories 16 and 20-28 related to the treatment of costs applications made by other parties and were not relevant for the same reasons as had led the Judge to refuse category C of the discovery sought. Finally, interrogatories 17-19 were refused on the basis that the information sought could be obtained by considering the transcript of the hearings of the Tribunal

28. The decision of the High Court on the Appellant's application for discovery/delivery of interrogatories is the subject of the first appeal before this Court (which, for convenience, we shall refer to as the "*Discovery Appeal").*

29. The substantive judicial review proceedings then proceeded to hearing before the High Court (Heslin J, hereafter "*the Judge*") on 12, 13 and 14 January 2021. No application was made by the Appellant to postpone the hearing pending the determination of the Discovery Appeal. On 18 February 2021, the Judge delivered a detailed judgment in which he concluded that the Costs Decision *"was plainly one taken in accordance with the [Tribunal's] powers under s.6 of the 1979 Act and was a decision taken intra vires, in accordance with the principles derived from relevant authorities."* (at para 142). He therefore dismissed the application for judicial review. That decision is the subject of the second appeal (appeal 2021/109) that is before the Court (which, for convenience, we shall refer to as the "*Main Appeal*").

30. It will be necessary in due course to refer to specific aspects of the Judgment of 18 February 2021. By way of summary, the Judge undertook a detailed analysis of section 6 of the Tribunals of Inquiry (Amendment) Act 1979 (as amended) ("*Section 6*") and of the

authorities which have considered that section. He noted that it was settled law that, in deciding issues of costs, a tribunal cannot have regard to its substantive findings and noted also that this was not in dispute between the parties (para 16). He then stated (at para 19) that:

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

31. The Judge then set out the main points of the Costs Decision, summarised the submissions of the parties and referred to what was said in the Tribunal's Second Interim Report regarding the allegations made by the Appellant. He stressed that the only decision at issue was the Costs Decision and that the findings made by the Tribunal in its Second and Third Interim Reports were not at issue. As regards the challenge to the Costs Decision, the Judge reminded himself that the proceedings were not an appeal on the merits from that Decision. It was not for the High Court to substitute its view for that of the decision-maker. The Court

was concerned only with the lawfulness of the Costs Decision and was confined "*to an examination as to whether the [Tribunal] had the power to make the decision, whether the decision was made in accordance with such power and whether fair procedures were adopted in respect of the decision made*." (para 31).

32. In the Judge's view, a reading of the Second Interim Report demonstrated that the Tribunal had not simply preferred the evidence given by others to the evidence of the Appellant or had found that he was sincere, even if sincerely wrong. Rather, the Tribunal's findings related to "*active, conscious and knowing <u>conduct</u> on the part of the applicant, insofar as his engagement with the Tribunal was concerned*" (para 46; emphasis in the original). Those findings constituted findings to the effect that the applicant knowingly gave false or misleading information to the Tribunal – "*no other outcome*" was available (para 47) – and that this was done deliberately (para 48). The Judge rejected the Appellant's contention that the Tribunal had wrongly approached the issue of costs as if it was governed by the principles governing costs in civil litigation in the High Court (paras 55-57, 59-60 and 61-63) and also rejected the argument that the Tribunal had applied a test to the effect that the Appellant would have been entitled to costs only if he was proved to be right (para 58). The findings of the Tribunal did not require to be in any particular form to trigger the powers of the Tribunal under Section 6 (paras 64-65). The Judge then examined and rejected the Appellant's assertions that he had at all times assisted the Tribunal. Those assertions were, in the Judge's view, *"wholly undermined by the various findings in the Second Interim Report."* (para 67). He also rejected the argument that the Costs Decision, if allowed to stand, would silence public debate and undermine the purpose of tribunals of inquiry by deterring persons from engaging with tribunals for fear that they could be penalised in costs

unless they are in a position to prove everything 100%. The Judge considered that this argument *"fundamentally mischaracterise[d] the Costs Decision and the reasons for it*" (para 69). The Tribunal had made findings specifically related to the Appellant's conduct before the Tribunal which demonstrated that he had knowingly given false or misleading information to the Tribunal and failed to cooperate with it and that had entitled the Tribunal to make the Costs Decision it did (*ibid*). As for the argument that the Costs Decision involved a usurpation of the judicial power, that was premised on an assertion that the Decision was based on the substantive findings of the Tribunal, which was not the case (para 71 and also at para 78).

33. The Judge then went on to address *seriatim* all of the material grounds in the Statement of Grounds (paras 80-131). In the course of that analysis, the Judge addressed the issue of whether the Appellant had pleaded that he had suffered inequitable treatment or that other witnesses had their costs applications treated differently to the way that his application had been treated. The Judge concluded that the Statement of Grounds did not make such a case (paras 111-113) and held that *"Further Particulars of paragraph 26 of the Statement of Grounds*" which had been delivered in November 2020, and which asserted that the Tribunal had treated the costs applications of other witnesses differently to the Appellant's application went beyond the permissible scope of particulars and amounted to a new ground, which could not be relied on in circumstances where no application had been made to amend the Statement of Grounds (paras 114-118). In any event, even if it had been open to the Appellant to advance such a ground, the evidence would not have sustained it (paras 120-121). The Judge then helpfully summarised his decision, before reaching the final conclusion already set out above.

THE APPEALS

34. The Discovery Appeal was lodged in January 2021. The Appellant did not seek priority. The appeal was listed for hearing on 19 July 2021. At that stage, the Judge had given judgment dismissing the judicial review proceedings and the Main Appeal had already been given a hearing date. The Panel assigned to hear the Discovery Appeal took the view that it was appropriate that it and the Main Appeal should be heard at the same time by the same Panel and the Discovery Appeal was adjourned to enable that to be arranged.

(1) THE DISCOVERY APPEAL

35. The decisions of the Supreme Court in *Tobin v Minister for Defence* [2019] IESC 57, [2020] 1 IR 211 and *Waterford Credit Union v J & E Davy* [2020] IESC 9, [2020] 2 ILRM 344 make it clear that decisions of the High Court relating to discovery should not be interfered with on appeal unless shown to fall outside the range of decisions reasonably open to the High Court in the circumstances.

36. In *Tobin*, Clarke CJ observed that *"issues as to relevance, necessity and proportionality involve an adjudication based on a detailed understanding of the case*" and stated that *"in general, decisions as to discovery should involve a significant measure of appreciation by any appellate court reviewing a decision at first instance*" (at para 59). The former Chief Justice returned to the issue in *Waterford Credit Union v J & E Davy,* as follows:

"6.1 It is appropriate to start with a consideration of the point made by Waterford as to the proper approach which should be adopted by an appellate court where there is an appeal in respect of an application for discovery in which questions of necessity and/or relevance arise. It should first be said that many of the issues which potentially arise on a discovery application involve questions of degree. While there may well be categories of documents where the court is satisfied that the documents in question could not be relevant or, at the other end of the scale, would be manifestly relevant, nonetheless there are many points in between those two extremes. All judges have experience of the fact that, of the documents discovered, many are not actually deployed at the trial because they turn out to be of little value to the resolution of the issues. However, the problem is that, without sight of the documents in advance, it can be very hard to tell exactly how relevant a document is likely to be. In such cases a first instance court must exercise a degree of judgment as to the likelihood of any document or documents being relevant, and must factor that into its overall conclusion.

6.2. Likewise, a court considering whether the disclosure of relevant documents may nonetheless not be necessary having regard to the principle of proportionality, may also have to make a judgment call, on the basis of whatever materials may be before the court, both as to the degree of relevance of the documents in question and the burden which their disclosure might be likely to place on the requested party. Many other examples could be given.

> *6.3. In my view, when a first instance court exercises a judgment of that type, it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court. Clearly, if the appellate court takes the view that documents whose discovery had been ordered were not relevant at all, then it should have little difficulty in overturning an order which directed that they be discovered. A similar approach should be adopted where clearly relevant and necessary documents were refused. However, the fact that the appellate court takes a somewhat different view from the trial court as to the degree of relevance should not lead to the overturning of the decision of the trial court unless the appellate court considers that the trial judge's assessment of the weight to be attached to relevance was clearly wrong and, as a result, he or she made an order which was outside the range of any order which could reasonably have been made."*

37. The above observations, which apply in every appeal in respect of a discovery motion, demonstrate that a margin of appreciation is afforded to the trial judge who made the decision at first instance. Decisions on discovery made by the High Court ought not to be disturbed on appeal unless they fall outside the range of decisions reasonably open to the High Court: *AB v Children's Health Ireland (CHI) at Crumlin* [2022] IECA 211, at para 30. However, the present case presents an additional feature which creates a further significant obstacle to success in this appeal in respect of the discovery motion. This is the fact that the substantive issues have now been determined by the High Court in circumstances where the Appellant did not take any formal steps to ensure that the

discovery appeal would be heard before the determination of the substantive issues. The fact that the substantive hearing was allowed to proceed without any attempt by the Appellant to ensure the prior hearing of the discovery appeal appears to significantly undermine the contention that the material sought was necessary for the proper disposal of the proceedings.

38. At the hearing of the appeal, counsel on behalf of the Appellant frankly acknowledged that his position on the discovery appeal was a difficult one, and he sought to concentrate primarily on one specific point; namely, the conclusion of the High Court judge (Hyland J.) that the Statement of Grounds did not disclose a plea of discrimination or unequal treatment of the Appellant when compared with other persons involved in the same module. This argument was advanced with respect to two matters; (a) alleged unequal treatment in the matter of costs and (b) alleged unequal treatment in the matter of procedures before the Tribunal more generally (for example, the matter of interviewing the Appellant prior to oral hearing, a failure to ask him to clarify any particular issue, and the timing of the circulation of statements to him as compared with the circulation of his statement to others).

39. It may be noted that the relevant ground in the Notice of Appeal in this regard was that the High Court judge "*erred in fact in determining that the Applicant failed to plead inequality of treatment in his statement as between the Applicant and other witnesses in circumstances where the Applicant advanced a plea of unlawfulness and inequitable treatment at paragraph 18 of the statement of grounds together with other pleas of fact set out in the statement of opposition (sic) indicating said inequality of treatment including the failure of the respondent to interview the applicant and the failure of the respondent to*

permit the applicant to consider the statements of witnesses making allegations against him at an early stage".

40. It will be recalled that the High Court judge, when dealing with Category C of the discovery motion, said that she fully accepted that a failure to treat persons equally in relation to costs could potentially be a legitimate ground for seeking to quash a costs decision, referring in that context to *Lowry v Moriarty* [2015] IEHC 39; [2018] IECA 66. However, she distinguished that case from the one before her on the basis that the Statement of Grounds here did not include any complaint of inconsistent treatment or lack of equality of the applicant, either as compared to others appearing in the hearings on terms of reference (n) and (o), or more generally. She said that there was no identification of any persons said to have been differently treated nor any identification of the alleged differential treatment. There was no affidavit evidence on behalf of the Appellant identifying any of those matters and no exhibits relevant to same. The claim of unlawful discrimination was, in her view, simply not in the case. It will be recalled that she described the plea at paragraph 26, upon which the Appellant had relied, as a *"very bald and boilerplate type plea"* which did not specifically identify any plea of discrimination.

41. As regards the discrimination argument insofar as it concerned procedures before the Tribunal, it will be recalled that the High Court judge, when dealing with Category A of the discovery motion, said that while the statements of the Appellant and Ms. Simms were indeed sent out earlier than the statements subsequently received from third parties, that was unsurprising, given that it was the Appellant's allegations that were being investigated. She said it was therefore logical that the Tribunal would take a statement from the Appellant

and Ms. Simms first and then seek statements from the persons mentioned by him and Ms. Simms in their statements. She added that, in any event, the manner in which the Tribunal proceeded in this respect was not the subject of challenge in these proceedings. More generally, she also said that that on the pleadings, there was no plea of inequality of treatment as between the Appellant and other witnesses in how the hearings were managed or an assertion that they ought all have been treated in the same way in respect of the provision of statements or withdrawal of allegations.

42. Counsel for the Appellant contended on appeal that the High Court judge was in error on this point. He relied on the paragraphs 9, 10, 18, 21, 22, 23, 24, and 26 in the Statement of Grounds: as supporting his argument that a discrimination/inequality argument was within the parameters of the case, both in respect of costs and in respect of procedures more generally. In the course of argument, he sought to suggest that Chief Superintendent McGinn had made false allegations in respect of his client and had been treated differentially, but he accepted that this did not feature in the pleadings or on affidavit.

43. Counsel on behalf of the Respondent submitted that the pleadings simply did not contain any discrimination/inequality plea. He submitted that for such an argument to be advanced, the Appellant would, among other things, have had to identify an appropriate comparator. This would have to be not merely a witness whose evidence was not preferred by the Tribunal in the ordinary way, but rather another witness who was also found to have given evidence with knowledge of its falsity, and there was in fact no such comparator.

44. We turn now to the paragraphs in the Statement of Grounds identified by counsel for the Appellant in the course of oral argument on appeal. Paragraph 8 of the Statement of Grounds recites the fact that the Appellant was never interviewed by the Tribunal before he gave evidence, and the words *"in contradistinction to the two other members of the force who had made protected disclosures"* are used. Paragraph 10 refers to the documentation served by the Tribunal upon the Appellant, the invitation to furnish an additional statement if he wished to do so, and the fact that he was not asked for clarification of any particular issue. It also refers to the fact that other witnesses were furnished with the Appellant's statement at a much earlier stage and asked for clarification on particular issues. These are essentially factual narratives as distinct from allegations of discrimination.

45. As regards the costs issue, paragraph 18 of the Statement of Grounds refers to the oral hearing on the 1 November 2019 where counsel submitted to the Respondent that to award costs on the basis identified in the letter of 19 October 2019 would be "*unlawful and inequitable*". It also refers to his request to be given reasons as to why any reduction might be applied together with notice as to any methodology to be applied. Paragraph 21 pleads that at no point did the Respondent invite the Appellant or his legal advisers to address the approach he intended to take towards costs.

46. Paragraph 22 pleads that at no point prior to public hearing did the Respondent invite the Appellant to withdraw any part of his statement or allegations. Paragraph 23 pleads that at no point did the Respondent indicate that the allegations should be withdrawn prior to the public hearings. Paragraph 24 pleads that at no point did the Respondent seek to interview the Appellant prior to public hearing.

47. As we have already seen, paragraph 26 pleads that the Respondent acted *ultra vires* and in breach of natural and constitutional justice in failing to award the Appellant his costs in respect of the entirety of the proceedings of the Tribunal.

48. In our view, nowhere in any of the above-enumerated paragraphs of the Statement of Grounds is there any identifiable plea that the treatment by the Respondent of the Appellant was discriminatory or in breach of the principle of equality, whether in the matter of procedures (timing of statement-circulation, interviewing prior to public hearing and so on) or with regard to costs specifically. At most, there is perhaps an implicit hint that the Appellant felt that he was unfairly treated as compared to others; but this is very far from what is required to bring a discrimination claim into a judicial review case. While there was a factual narrative in relation to the procedure the tone of which was somewhat aggrieved, this did not culminate in any clear plea challenging the procedures actually employed; as the High Court judge correctly said, there was no plea that the procedures employed were illegal. It is not enough to present a factual narrative with a hint of a sense of grievance; it must culminate in an actual and specific plea that the procedures were illegal for the issue to be properly introduced into a case.

49. As to costs, there was simply no reference at all to inequality of treatment on this front in the Statement of Grounds. The phrase used by counsel (*"unlawful and inequitable"*) at the hearing of 1 November 2019 and as referred to in paragraph 18 is far too vague to be regarded as a claim of discrimination, and indeed the bulk of the complaints apparently identified by counsel at that hearing appear to have concerned matters such as the giving

of reasons and being given notice of what methodology would be used for the costs. No reference is made in paragraphs 18 or 19 to any other person being treated differently in the matter of costs. We also agree entirely with the High Court judge who described paragraph 26 as a boilerplate pleading, employing the general language of "*ultra vires and in breach of natural and constitutional rights*". It cannot be reverse-engineered into a plea of inequality of treatment as between the Appellant and other persons appearing before the Tribunal. No comparator was identified in the pleadings.

50. The affidavit of Trevor Collins grounding the discovery motion makes two references to inequality of treatment. Concerning the documents sought at Category A, he says that they are required because they are relevant to (*inter alia*) *"the fairness or manifest unfairness in treating the applicant differently to other witnesses to the Tribunal"*. No other witness is mentioned by way of comparator. Concerning the issue of costs, there is a reference to requiring the information sought at Category C because (*inter alia*) it was relevant to the respondent's exercise of discretion and *"whether he applied the same approach to all parties"*. Again, no other party is mentioned. The silence of the affidavit in this respect mirrors the silence of the Statement of Grounds and verifying affidavits.

51. The requirement for clear pleading in judicial review proceedings is emphasised in the authorities – see for example the decision of the Supreme Court in *AP v Director pf Public Prosecutions* [2011] IESC 2, [2011] 1 IR 729 - and reflected in the express terms of Order 84, Rule 20(3) RSC. There simply is no clear pleading of discrimination or unequal treatment here.

52. Finally, it is notable that, notwithstanding the High Court judge's conclusion that inequality was not within the case, the Appellant made no attempt to amend the pleadings prior to the substantive hearing in the High Court. This would not have been without its own difficulties, and a question might be raised as to whether it could be done in such a way as to be without prejudice to the maintenance of the discovery appeal; but it is nonetheless of some significance that there was no step taken of any kind by the Appellant after the High Court judgment and prior to the substantive hearing to ensure that the discrimination/inequality issue was squarely identified as falling within the parameters of the case.

53. Having regard to the foregoing, we are of the view that the High Court judge was correct in her conclusion that the pleadings did not disclose any plea of discrimination, whether in the matter of costs, or in the matter of unfairly discriminatory procedures being applied to the Appellant.

54. Counsel did not address the Court in relation to the interrogatories appeal, and it was not clear to us whether and to what extent the appeal was being pursued. In any event, we would observe that many of the interrogatories seek to ascertain whether certain third persons sought costs from the Tribunal and/or whether the Tribunal granted costs to them. Those interrogatories were clearly directed to the suggestion that the Tribunal had discriminated against the Appellant and/or treated him unequally in relation to his costs. For the reasons just explained, that issue was not in the case and, accordingly, those

interrogatories were not relevant or necessary. For completeness, we will briefly address the remaining interrogatories below.

55. For the avoidance of doubt, we are also of the view that the High Court judge's analysis was correct in respect of the other arguments advanced in support of the discovery and interrogatories sought. We agree with her analysis that what was sought by the Appellant fell into one or more of the following categories; (a) material or information that was already in the possession of the Appellant from other sources; (b) material relating to facts that were not in dispute (at least once the affidavits on behalf of the respondent had been sworn in the motion); (c) a pure fishing expedition and/or (d) irrelevant to the issues actually pleaded (although they might have been relevant if a plea of discrimination had actually been set forth).

56. We would therefore uphold the High Court's decision in respect of the discovery and interrogatories as falling squarely within the range of her discretion.

(2) THE MAIN APPEAL

Section 6

57. The impugned Costs Decision here was made in exercise of the powers conferred on the Tribunal by Section 6. It appears appropriate therefore to set out the provisions of Section 6 at this point and to survey the significant body of authority in which those provisions have been considered.

58. The Tribunals of Inquiry (Evidence) Act 1921 did not contain any provision empowering a tribunal of inquiry to make orders for costs. That omission was addressed by section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, subsection (1) of which provided:

> *"(1) Where a tribunal, or, if the tribunal consists of more than one member, the chairman of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters, there are sufficient reasons rendering it equitable to do so, the tribunal or the chairman, as the case may be, may by order direct that the whole or part of the costs 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."*

59. Section 6 was considered by the Supreme Court in *Goodman v Hamilton*. It involved a broad attack on the lawfulness of what became known as the Beef Tribunal. A major ground of challenge was that the Beef Tribunal constituted an invasion of the judicial domain and, in that context, it was argued that the applicants could be penalised by an order for costs made against them under section 6. That argument was addressed by McCarthy J (with whose judgment on this issue Finlay CJ and O' Flaherty and Egan JJ agreed). While noting that no constitutional challenge had been brought against the 1979 Act, he observed that its provisions must be construed as subject to the constitutional framework and, in particular, as involving fair procedures and then continued:

> *"c) Section 6: The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression "the findings of the tribunal" should be read as the findings as to the conduct of the parties at the tribunal. In all other cases the allowance of costs at public expense lies within the discretion of the Tribunal, or, where appropriate, its chairman"* (at page 605)

60. As the Law Reform Commission noted in its *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (LRC CP 22-2003) (March 2003), this approach to Section 6 (which the Commission considered to be *obiter dictum*) was very different to that taken by Costello J and Keane J as chairpersons of the tribunals into the Whiddy Disaster and the Stardust Fire respectively (paras 12.11-12.16). Each of those tribunals involved a "*single disaster*". As the Law Reform Commission also noted, the Beef Tribunal was not a "*single disaster*" tribunal. Nevertheless, the Beef Tribunal made orders for costs in favour of virtually all represented parties, apparently on the basis that *Goodman* required that parties permitted to be represented at the inquiry should have their costs paid out of public funds unless their conduct before the tribunal justified a departure from that default rule. Thus the distinction evidently drawn by McCarthy J as between the approach to be taken to costs

in respect of "*single-disaster*" tribunals on the one hand and other tribunals on the other appears to have been immediately elided.

61. In 1997 the Oireachtas revisited Section 6. Section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 substituted a new sub-section 6(1) as follows:

> *"(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 cooperate 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 named as aforesaid, shall be paid to the Minister for Finance by any other person named in the order."*

62. Apart from permitting orders for costs to be made in respect of the costs incurred by the tribunal itself, the major change effected by this amendment was the addition of the words "*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 cooperate with or provide assistance to, or knowingly giving false or misleading information to the tribunal)".

63. In its *Consultation Paper* and subsequent *Report on Public Inquiries Including Tribunals of Inquiry* (LRC 73-2005), the Law Reform Commission expressed the view that this amendment of section 6(1), and in particular the insertion into it of an express reference to "*failing to cooperate with ... or knowingly giving false or misleading information to the tribunal",* left no room for any suggestion that the reference to *"the findings of the tribunal"* in section 6(1) should be taken as meaning a finding as to whether the person had co-operated with the tribunal and that the expression "*must bear its natural meaning, that is, the findings of the tribunal as to the substantive issue"* (Consultation Paper, para 12.25(iii); Report, para 7.10). The Commission nonetheless considered that the language of section 6(1) was open to misinterpretation and so recommended that the sub-section be redrafted as so to make it clear that a tribunal could have regard to *"the findings of the tribunal in relation to its subject-matter"* when deciding the issue of costs. However, that recommendation has not been implemented.

64. Section 6(1) in its amended form was briefly considered by the High Court (Geoghegan J) in *Haughey v Moriarty* [1999] 3 IR 1. While Geoghegan J's observations were avowedly *obiter dicta*, they are nonetheless of significance, for reasons which will become apparent. In Geoghegan J's opinion:

> *"power to award costs under the Act of 1997 is confined to instances of non-cooperation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory provision specifically requires regard to be had to the findings of the Tribunal as well as all other relevant matters."* (at page 14)

65. The subsection was then the subject of close analysis by the Supreme Court in *Murphy v Flood* [2010] IESC 21, [2010] 3 IR 136. The plaintiffs had been allowed representation before the Planning Tribunal and had participated in approximately 163 days of public hearing, as well as providing extensive discovery and statements. They applied for their costs but were refused on the basis of (a) findings made by the tribunal to the effect that they had obstructed and hindered the work of the tribunal and (b) the substantive findings that the tribunal had made to the effect that the plaintiffs had acted corruptly. In addition to being refused their own costs, the plaintiffs were at risk of an order being made against them in respect of some or all of the costs of the tribunal.

66. The proceedings in *Murphy v Flood* squarely raised the issue of the scope and effect of the expression "*the findings of the tribunal"* in section 6(1) and, in particular, whether it comprehended the substantive findings made by a tribunal in relation to the subject-matter of its inquiry. The High Court (Smyth J) took the view that it did, though expressing the view that the liability to pay costs could not exclusively depend on such findings. In reaching that view, Smyth J relied very significantly on the terms of the amendment to section 6(1) effected in 1997. That amendment had been *"directed towards the difficulties imposed by perhaps a perceived narrow interpretation of the Act of 1979 in*

the Goodman decision" (at para 160) and, in his view, *"there was no limitation on the expression "findings of the Tribunal" in the amending legislation*" (at para 166).

67. The Supreme Court took a rather different view on appeal. Giving the principal judgment (with which Geoghegan and Finnegan JJ agreed), Denham J cited the passage from Geoghegan J's judgment in *Haughey v Moriarty* which we have set out above and expressed her agreement "*with the analysis that power to award costs under the Act of 1997 is confined to instances of non-cooperation with the Tribunal*" (at para 72). Section 6(1) had to be construed in a constitutional context. A tribunal of inquiry was not administering justice. A decision on costs grounded on a substantive finding of a tribunal would import a liability for a party (para 82). Denham J clearly considered that such an order would impermissibly involve a tribunal in the administration of justice.

68. In Denham J's view, "*the issue for a [tribunal] chairman is whether a party has cooperated with a tribunal*." (para 79). She continued:

> *"[80] Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to cooperate with the tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a tribunal. The power to award costs is affected by a lack of cooperation, by non-cooperation, with a tribunal. Non-cooperation could include failing to provide assistance or knowingly giving false or misleading information.*

[81] Fundamentally the issue is whether a party has cooperated with a tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a tribunal."

69. While Hardiman J and Fennelly gave separate judgments, they were in agreement as to the scope and effect of section 6(1). Much of Hardiman J's judgment is concerned with the validity of the tribunal's findings of obstruction and hindrance. No such findings were made here and this aspect of *Murphy v Flood* is not of direct relevance to this appeal. Hardiman J referred extensively to *Goodman v Hamilton.* In his view, it was only by characterising the report of a tribunal as an "*opinion .. devoid of legal consequences*" and "*sterile of legal effect*" that its constitutionality had been preserved in *Goodman v Hamilton* (para 178). McCarthy J had been conscious of the "*very acute difficulty*" that the tribunal's costs jurisdiction under section 6 (which, Hardiman J stated, "*emphatically imposes liabilities")* presented for that analysis and that explained what he said about the exercise of that jurisdiction (*ibid*). Hardiman J rejected the contention that McCarthy J's observations were the views of a single judge only or that they were merely *obiter dictum* (paras 180-183). In his view, they continued to represent the law (para 221) and on the basis of *Goodman v Hamilton*, *"the order refusing costs in this case must fall since, apart from anything else, it is plainly based on the substantive findings of the tribunal"* (para 222). Hardiman J did not consider the plaintiff's constitutional challenge to section 6 but did express the view that, insofar as the amended section gave a power to consider the substantive findings of a

tribunal in the context of costs, it was "*manifestly doubtful*" that it was consistent with the constitutional status of tribunals of inquiry (para 238).

70. In his judgment, Fennelly J also rejected the argument that McCarthy J's observations about Section 6 in *Goodman v Hamilton* were merely *obiter*. McCarthy J had been addressing the plaintiff's argument that the tribunal had power to impose a liability for costs on it and therefore that the tribunal was exercising a judicial function (para 357). While he had spoken about a "*single disaster*" tribunal, Fennelly J saw no reason to restrict the principle that a party should normally be represented at public cost in that way. In his view, a tribunal of inquiry is established to serve the public interest and it is in the public interest that every person with relevant information should cooperate with the inquiry. It was "*beyond question*" that such cooperation could expose individuals to very substantial legal expense, which had to be incurred without any advance assistance or reimbursement. In those circumstances, Fennelly J thought "*that the ordinary presumption should be in favour of reimbursement. Otherwise, the obligation to cooperate with Tribunals would impose loss without compensation on individuals*" (para 358). He noted that Geoghegan J had expressed similar sentiments in *Haughey v Moriarty*. Fennelly J then addressed the argument that the position set out in *Goodman v Hamilton* had been altered by reason of the amendment of Section 6 in 1997. He accepted that, as a "*pure matter of construction*", there was some force in that contention and noted that it had found favour with the Law Reform Commission (para 360). However, if it was the case that the 1997 amendment to Section 6(1) had the effect of investing in a tribunal the power to refuse to award costs by reason of its substantive findings, it was difficult to see how its findings could any longer be described as being "*devoid of legal consequences, made in vacuo or sterile*." The court was

obliged to interpret Section 6(1) so that it did not conflict with the Constitution, so far as the words used by the Oireachtas permitted. He went on:

> *"[364] ... In the present case, that task is simplified by the availability of the judgments in Goodman International v. Mr. Justice Hamilton [1992] 2 I.R. 542. The link created by s. 6(1) of the Act of 1979, as interpreted by the Tribunal and as upheld by Smyth J., appears to empower the Tribunal to penalise a witness before it in respect of costs by reason of its substantive findings. Clearly, this court, when delivering judgment in that case did not contemplate any such possibility. The dictum of McCarthy J. avoids conferring that power on the Tribunal. If this court had thought otherwise, the result of Goodman International v. Mr. Justice Hamilton might well have been otherwise. At the very least, the reasons given by Finlay C.J. would of necessity have had to be different.*
>
> *[365] The Oireachtas can be taken to have been aware in 1997 of the decision in Goodman International v. Mr. Justice Hamilton [1992] 2 I.R. 542. If the legislature had intended to negative the effect of the judgment of McCarthy J., it could have adopted clear wording to that effect. In fact, it has left intact the words which were interpreted by McCarthy J. I agree that if the section, in its present form, were the only matter to be interpreted, it is at least open to the meaning that the Tribunal may have regard to its substantive findings when deciding on costs. The matter is not, however, res integra. This court has*

said, per McCarthy J., that a tribunal may not have regard to its substantive findings when deciding on costs. The words which he interpreted are still in this section. The additional words interpolated in 1997 do not inevitably reverse the principle enunciated by the court in 1992. It is possible, without doing violence to language, to interpret the words in parentheses as qualifying both "the findings of the Tribunal" and "all other relevant matters". In the light of the decision in Goodman International v. Mr. Justice Hamilton and the obligation to interpret in conformity with the Constitution, I think that is the correct interpretation."

71. One other aspect of Fennelly J's judgment warrants attention here. One of the complaints made by the plaintiffs in *Murphy v Flood* was that they had not been put on notice that the tribunal was contemplating making findings in relation to obstruction and hindering. Fennelly J had no difficulty in concluding that "*anyone exposed to the risk of adverse findings of that character, amounting to an accusation of criminal conduct, should receive reasonable advance notice"* (para 344).[3] Denham and Hardiman JJ reached the same conclusion regarding those findings. However, as regards to findings of non-cooperation, the fact that the tribunal was entitled to have regard to such findings *"does not necessarily mean that there has to be a separate hearing on that issue, so long as the persons potentially affected have reasonable notice of the possibility of such findings."* Even so, "*it might .. be*

[3] Section 1(2)(d) of the Tribunals of Inquiry (Evidence) Act 1921 (as amended by section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 makes it an offence to hinder or obstruct a tribunal in the performance of its functions.

good practice for a Tribunal to give some advance notice of the relationship between cooperation with the Tribunal and any decision regarding costs, which it might later make." (para 343)

72. *Murphy v Flood* settles the proper construction of Section 6(1) as amended in 1997 and, in particular, the issue whether *"the findings of the tribunal"* is to be construed as including or excluding the substantive findings of a tribunal in relation to its subject-matter. A tribunal *cannot* have regard to such findings in making decisions about costs under Section 6(1). So much is clear. Where a person is granted representation before a tribunal, then "*ordinarily*" their costs should be paid out of public funds, by means of an order for costs made in their favour pursuant to Section 6(1). That is the default rule. However, the entitlement to costs is presumptive and not absolute and may be lost by non-cooperation with the tribunal, including (but not limited to) knowingly giving false or misleading information to the tribunal.

73. Whether there are any other factors or circumstances that may, in principle, justify a departure from that default rule is somewhat less certain. In her judgment in *Murphy v Flood*, Denham J seems to leave open the possibility that there might be "*other relevant factors*" that could justify denying someone who had fully cooperated with the tribunal some or all of their costs. But that question does not arise here and it is not necessary or appropriate to consider it further.

74. However, while the construction of Section 6(1) may have been settled by *Murphy v Flood*, its application is not without difficulty, as the post-*Murphy v Flood* jurisprudence demonstrates.

75. In *Fox v Mahon* [2014] IEHC 397, a decision of Baker J in the High Court, the applicant challenged a decision by the Planning Tribunal to the effect that that he had failed to co-operate with it and/or had given false and/or misleading evidence to it. That finding was made subsequent to the publication of the tribunal's substantive report (in which findings were made that corrupt payments had been made to the applicant in relation to the re-zoning of land in Dublin) and after the tribunal had received submissions from the applicant on the issue of costs. The applicant contended that the findings of non-cooperation were inherently linked to the tribunal's substantive findings which, he submitted, was in breach of the principles established in *Goodman v Hamilton* and *Murphy v Flood.* In response, the tribunal said that its findings were based on its assessment that the applicant had knowingly given false evidence, motivated by a desire to frustrate the tribunal's inquiries and argued that such was a valid and lawful basis for those findings which was consistent with *Goodman* and *Murphy*. Baker J accepted that argument, as appears from the following passage from her judgment:

> *"22. This Tribunal in its final Report did make it possible to sever its substantive findings from those that made an actual finding that Mr. Fox had failed to co-operate. It made certain findings with regard to the credibility of his evidence and that of other witnesses, and fully explained its analysis and the elements that led to this conclusion. My view is that the approach of the Tribunal was*

quite different from that in Murphy v. Flood and the Tribunal did make it clear that it came to its conclusion not based on its the substantive finding of corruption but on its actual finding that Mr. Fox had not been truthful and the reasons it came to that conclusion. The Tribunal had weighed the evidence, balanced different versions of events and the responses of Mr Fox to these different versions, and adjudicated on the weight and credibility of other contrary witnesses. It held following a well reasoned analysis that Mr Fox's evidence was in parts " incredible" and "unlikely".

23. One might rationally ask what elements of a hearing could lead a Tribunal to a finding of knowing untruth if the elements did not include, or possibly even substantially be composed of, the findings and analysis with regard to the credibility of witnesses. Indeed, the dicta of Geoghegan J. in Haughey v. Moriarty clearly suggests that lack of cooperation could include the adducing of deliberately false evidence. The Tribunal did not, in my view, make the finding of non-cooperation based in any way on the finding that Mr. Fox had been in receipt of corrupt payments, but on its finding as to the veracity of the evidence and the balance of that evidence against other evidence adduced to it. The substantive finding of the Tribunal was that Mr Fox received corrupt payments. The decision challenged before me was not based on findings on the substantive matter of the Tribunal but on findings of conduct, intention or the reason why evidence was given.

> *24. For that reason it seems to me the Tribunal did not fall into error and while it did come to its conclusion on non-cooperation from certain findings of credibility contained in the substantive Report, its conclusion was not based on its substantive findings on the subject matter of the Tribunal, the corrupt payments found to have been received by Mr Fox, but its actual and analysed findings that Mr. Fox evidence was to be disbelieved."*

76. Earlier in her judgment, in a passage relied on by the Appellant here, Baker J explained that, for the purposes of section 6(1), it was not sufficient that the person seeking costs had given false or misleading evidence; the tribunal had to address itself to the question of whether such evidence was given in the knowledge that it was false or misleading and thus had to form a view both as to the truth of the evidence and as to the intention or knowledge of the person giving that evidence (para 11). Arguably, the expression "*false or misleading evidence*" in this context necessarily connotes evidence known to be false or misleading. In any event, it seems clear that the giving of evidence that is sincere but mistaken would not constitute non-cooperation for the purposes of section 6(1).

77. *Chawke v Mahon* [2014] IEHC 398, [2014] 1 IR 788 involved another challenge to a costs decision made by the Planning Tribunal, which was also heard by Baker J and in which judgment was given by her on the same day as *Fox*. The applicant had given evidence before the tribunal in one of its modules which the tribunal had rejected in its substantive report. Subsequently, the tribunal notified the applicant that it was minded to make a finding of non-cooperation on the basis that he had knowingly given untrue evidence to it and invited submissions. Submissions were made but the tribunal proceeded to make a

finding in the terms proposed and notified the applicant that it proposed to make an order giving him only 30% of his costs, essentially on the basis that the evidence given by him must have been given in the knowledge that it was false and for the purpose of misleading the tribunal and that his cooperation with the tribunal was limited to his engagement with it in correspondence prior to his oral evidence. The applicant then moved to quash that proposed costs decision.

78. In Baker J's view, the applicant was entitled to fair procedures following the publication of the tribunal's report and when it came to consider the issue of cooperation and costs (para 32). Having reviewed the transcripts of the applicant's evidence, Baker J considered that nothing had been said to him to alert him to the possibility that the tribunal might disbelieve him entirely. No contrary evidence had been given. As a result, the applicant had to be afforded a fair process after the hearing if a finding that he knowingly gave untrue evidence was to be properly made (para 36). In her view, the process engaged in by the tribunal did not achieve fairness because it "*had no real choice in the conclusion to which it came, once it had already decided in its primary findings that it disbelieved the applicant*" (para 40). A second hearing for the purposes of coming to a determination of non-cooperation was not always, or perhaps never, necessary (at para 42, citing *inter alia* the observations of Fennelly J in *Murphy v Flood*). However, the difficulty for the tribunal in *Chawke* was that it had failed to give notice to the applicant that it was minded to make a finding that certain payments had not been made (the applicant having given evidence of having made such a payment) at a time which would have permitted the applicant to engage. That, in Baker J's view, involved an absence of fairness (para 45). She expressed her conclusions as follows:

"[46] Accordingly, I am of the view that the process which led to the decision that the applicant was not a cooperating witness was not arrived at following the affording to the applicant of fair procedures. Because the applicant had no inkling from anything that had occurred in his engagement with the Tribunal before the final report was published in March,2012 that his version of events was likely to be disbelieved in substance, he had no opportunity to advance evidence or test the evidence that led the Tribunal to its findings of fact. The Tribunal finding that he was not a cooperating witness was arrived at by a process of deductive reasoning from the premise that his evidence was not truthful, as there was not present any of the vitiating factors, such as frailty of memory, that might have allowed it to conclude that he had not knowingly been untruthful. Arguments by the applicant after the final report issued could not have changed the finding of untruth, nor how it was subsequently characterised. The application in the adjudicative process of the rules of fair procedures cannot be achieved by a process of mere deductive reasoning, as were it such, the results of the reasoning process would be inevitable or would flow inexorably from a first premise, such that the fairness would be illusory. I am of the view that the process of adjudication by the Tribunal which resulted in the finding challenged in these proceedings was deductive in that sense and must fail for breach of fairness."

The tribunal's proposed order was quashed accordingly.

79. Finally, we come to the decision of this Court in *Lowry v Moriarty* [2018] IECA 66. The applicant challenged a decision by the Moriarty Tribunal to award him only one-third of

the costs incurred by him, on the basis of findings that he had not co-operated with it and had knowingly given false information with a view to misleading it (including by being involved in the falsification of documentary material provided to the tribunal).The applicant argued that there was no factual basis for those findings and also argued that the decision was disproportionate having regard to the level of costs that he had incurred in engaging with the tribunal over the many years of its operation and that the phases of the tribunal's inquiry to which the findings related were only a small part of the overall inquiry, about which no complaint of non-cooperation was made. He complained of a breach of fair procedures in the manner in which the costs decision had been made and also complained that the tribunal had been inconsistent in its approach to costs and had given full costs to Charles J Haughey and Ben Dunne notwithstanding what the applicant characterised as their failure to co-operate with the tribunal (para 2).

80. The application failed in the High Court but met with greater success on appeal. Ryan P (with whose judgment Finlay Geoghegan and Edwards JJ agreed) rejected the challenge to the findings of non-cooperation and the giving of false or misleading information. He also rejected the applicant's complaint of a lack of fair procedures in respect of this part of the tribunal's decision (i.e. the findings of non-cooperation), holding that the tribunal had given sufficient notice of the matters which ultimately led to its findings, had given him an opportunity to make submissions, had considered those submissions and had given reasons, albeit in broad terms, for the findings made and the conclusion of non-cooperation (para 68). However, the President had great difficulty in understanding the basis for the very substantial reduction in the costs allowed to the applicant, particularly as the level of reduction meant that the applicant was deprived of parts of the costs of representation at

phases/modules in respect of which there was no suggestion of non-cooperation and he was concerned that the applicant had not had an opportunity to address the quantum of the reduction or the methodology that the tribunal was proposing to adopt (para 76). While he accepted that there was no *"mathematical formula"* that could be applied in this context, the tribunal was obliged to formulate and identify some "*method of calculation*" in relation to the reduction in the applicant's costs (*ibid*).

81. In the President's view, the tribunal's costs ruling embodied impermissible considerations. It had not been suggested that the applicant had failed to co-operate during the GSM module (a major part of the tribunal's work) but the applicant was nonetheless not allowed all of his costs of his (permitted) representation during that module. The fact that his role was not central and that others were more centrally involved was not a basis for reducing his costs (para 78). Equally, such reduction could not be justified by the "*moral judgment*" that had been made by the tribunal as to the degree of "*moral turpitude*" involved in the acts of non-cooperation in other areas of the tribunal's investigations. Such an approach was impermissible as a *"quasi-penalty or sanction"* (para 80). In the President's view, 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 the circumstances of a drastic reduction*" (para 81). Everything came down to the reasons for the specific amount of deprivation of costs: no sufficient reasons had been given and the tribunal's decision failed to provide a basis for assessing the reasonableness and proportionality of what was "*a radical decision"* with far-reaching implications for the applicant and his professional advisers (*ibid*). There was, the President considered, a lack of transparency in the tribunal's decision on the reduction to be applied and the applicant

had not been given adequate notice of the tribunal's approach or any proper opportunity to make submissions on that issue (para 82-90). Accordingly, the tribunal's order was quashed.

82. In our view, the following principles are to be derived from the authorities just discussed:

(1) The discretion conferred on tribunals of inquiry by section 6(1) is significantly more constrained than a literal reading of its provisions might suggest.

(2) Subject to (5) below, the reference in section 6(1) to "*the findings of the tribunal*" does not permit a tribunal to have regard to its substantive findings on the subject-matter of its inquiry for the purposes of deciding questions of costs.

(3) For all tribunals of inquiry (and not just "*single-disaster*" tribunals), the correct starting point is that any person permitted to be represented at the tribunal should ordinarily have their costs paid out of public finds, i.e. an order for costs should ordinarily be made in their favour under section 6(1).

(4) However, that is a presumptive entitlement only and it may be lost where the person concerned has failed to cooperate with the tribunal (including, but not limited to, knowingly giving false or misleading information or evidence to the tribunal).

(5) A finding that a person has failed to cooperate with the tribunal may flow in part from the tribunal's substantive findings, to the extent (and only to the extent) that such

findings are relevant to the tribunal's assessment of whether the party cooperated with it. Thus, in determining whether a person gave false or misleading information or evidence to the tribunal (which is a form of non-cooperation), the tribunal may have regard to its substantive findings where they are relevant to that issue. By way of illustration, if a person called as a witness by the tribunal gives evidence that event X did not occur, and the tribunal finds that X *did* occur, that finding would clearly be relevant in assessing whether that witness gave false or misleading evidence (although the tribunal would of course have to go to consider whether the evidence was given in the knowledge that it was false).

(6) Any decision that a person has failed to cooperate must be arrived at fairly. However, that does not *necessarily* require a two-stage process before such a finding can be made.

(7) Any findings of non-cooperation should be made in clear terms and sufficiently reasoned.

(8) A finding(s) of non-cooperation does not leave the tribunal at large. Any decision to refuse or reduce the costs that would otherwise be payable to a person must be reached fairly and in accordance with fundamental principles of public law, including the right to be heard and the right to reasons.

(9) There must be (and the tribunal must identify) some rational relationship between the acts or omissions constituting non-cooperation on the one hand and the decision to

refuse or reduce the costs. That does not require use of any *"mathematical formula*" but the tribunal must explain how the refusal or reduction reasonably follows from the non-cooperation and is proportionate to it.

Grounds of Appeal

83. The Appellant sets out 34 grounds of appeal, together with an additional nine grounds in respect of which it is separately claimed the trial judge erred in his application of the law. In the Court's view, these grounds are unnecessarily prolix and repetitious. Parties and their legal advisors have an obligation to identify grounds of appeal clearly and concisely so that the real issues on appeal can be readily ascertained.. In any event, the grounds of appeal pursued at the hearing of this appeal may be summarised as follows:

1) The Judge erred in law and in fact in failing to have regard to the Costs Decision made by the respondent, and in failing to consider the Costs Decision on the basis of the reasoning set out therein. (Ground 1 and legal ground (e), of the notice of appeal).
2) The Judge erred in fact and in law in failing to find that the Costs Decision meant that co-operation with the Tribunal *required "telling the truth as an objective reality"*. (Grounds 3,28).
3) The Judge erred in fact and in law in failing to distinguish between evidence which was objectively untrue but honestly given and evidence which is dishonestly given. (Ground 6)
4) The Judge erred in fact in finding that Report found that the Appellant *"knowingly gave false or misleading information"* within the meaning of

s.6 of the Tribunals of Inquiry (Evidence)(Amendment) Act, 1979. (Grounds 22, 27 and 33)

5) The Judge erred in law in finding that the Appellant *"gave untrue evidence to the Tribunal which he knew to be untrue"*. (Ground 32)

6) The Judge erred in fact and in law in finding that the Respondent had made findings in his second interim report relating to *"active, conscious and knowing conduct on the part of the applicant insofar as his engagement with the Tribunal was concerned"*. (Grounds 4, 18 and 33)

7) The Judge erred in failing to apply the requirement that a finding of non-cooperation must be separate and distinct from the findings of the Tribunal in respect of its terms of reference, i.e. its substantive findings, (legal ground d).

8) The Judge erred in fact and in law in finding that a failure to cooperate does not require an express finding to that effect. (Ground 8)

9) The Judge erred in fact and in law in finding that the *ratio* of the Costs Decision did not involve the Appellant being disentitled to costs because he did not prove his allegations. (Ground 5)

10) The Judge erred in fact and in law in finding that the Costs Decision *"did not involve the respondent straying impermissibly into the administration of justice."* (Ground 9, legal ground (b))

11) The Judge erred in law in finding that the words *"the Tribunal is exercising the High Court discretion in relation to costs"* did not mean that the

Respondent was purporting to exercise the High Court discretion in relation to costs. (Ground 26)

12) The Judge erred in fact and in law in failing to consider the import of the terms of reference of the Tribunal when considering whether the alleged non-cooperation affected the work of the Tribunal. (Grounds 12, 14 and25, legal ground (c))

13) The Judge erred in fact and in law in failing to consider the obligation of the Respondent to provide notification of the proposed mode of calculation (of the reduction in the costs awarded to the Appellant) before reaching his decision on costs. In this regard, the Judge erred in law in distinguishing the decision of this Court in *Lowry v. Mahon.* (Grounds 13, 34, legal ground (g)).

14) The Judge erred in fact and in law in failing to have regard to the different approach taken by the respondent to different witnesses both in respect of their evidence and their costs applications. (Ground 15, legal ground f)

15) The Judge erred in finding that the question of different and unequal treatment was not pleaded. (Ground 23).

16) The Judge erred in fact and in law in failing to have any or any adequate regard to the fact that the Respondent had acted *ultra vires* or for the requirement of fairness in the procedure adopted by the Respondent. (Grounds 16, 17).

17) The Judge erred in finding that by not *"falling on his sword"* the Appellant did not cooperate with the Tribunal, and it was *ultra vires* the Respondent to decide that the Appellant should have withdrawn his allegations. (Ground 10, legal ground H)

84. References later in this judgment to ground of appeal numbers shall be to the numbers allocated above rather than those in the notice of appeal. In so far as specific corresponding grounds of appeal in the Appellant's notice are not referred to above, this is because they were not pursued at the hearing of this appeal.

Respondent's Notice

85. The Respondent denies, *seriatim*, each and every ground of appeal of the Appellant. He says that the Judge had appropriate regard to the many findings of the Tribunal contained in the Report and the third interim report of the Tribunal which clearly establish deliberate non-cooperation with the Tribunal on the part of the Appellant . The Respondent places specific reliance on paras. 48, 49 and 57 of the High Court Judgment, in which he concluded, *inter alia*, that the Tribunal had found that the Appellant had knowingly given false and misleading evidence to the Tribunal, and that these findings lay at the heart of the Costs Decision. The Respondent says that the Judge was correct to conclude that the procedures adopted by the respondent were fair, and that the Appellant was given advance notice of the Tribunal's concerns as to why it might not award the Appellant his costs and was afforded every reasonable opportunity to make such submissions as he wished to make to the Tribunal in that regard.

Submissions of the Appellant

86. The Appellant argues that the trial judge erred in failing to find that the Respondent had erred in the costs decision in stating that the latter was to be read in conjunction with the *"entire report"* of the Tribunal. This, the Appellant contends, is inconsistent with the jurisprudence on the interpretation of section 6 which makes it clear that it is the findings of a tribunal as regards the conduct of an applicant for costs that are relevant to the decision of the tribunal on that application, and the substantive findings of the tribunal are not relevant and should not be considered. The Appellant contends that the respondent impermissibly took into account the substantive findings of the Tribunal by incorporating the entire report into his consideration of the costs application, and the trial judge erred in failing to so conclude. It was also submitted that the trial judge impermissibly drew inferences from the Report regarding the conduct of the Appellant before the Tribunal.

87. The Appellant submits that the Tribunal may only refuse costs on the basis of non-cooperation, and that while the findings against the Appellant were not "*complimentary*", they did not amount to *"non-cooperation"* for the purposes of an application for costs under section 6. The Appellant submits that the respondent made no finding as to the state of knowledge of the Appellant or as to the veracity of his evidence. It is submitted that there was no finding on the part of the Tribunal that the Appellant had knowingly given false and misleading evidence to the Tribunal, and the trial judge was not entitled to draw an inference as to such a finding, on the part of the Tribunal, from the contents of the Report.

88. The Appellant further submits that, for the purposes of section 6, an *allegation* is not *information* and both the respondent and the trial judge fell into error in conflating the meaning of each.

89. The Appellant relies upon the decision of Fennelly J. *in Murphy v. Flood* in which he stated, *inter alia, "it requires no expansion of the rules of natural justice to state that anyone exposed to the risk of adverse findings .... should receive reasonable advance notice."* It is submitted that both the respondent and the trial judge erred in inferring, from the Report, findings adverse to the Appellant, in breach of the principles of natural justice and fair procedures.

90. The Appellant further argues that the respondent failed to afford him fair procedures insofar as he failed to provide the Appellant, in advance, with any information as to the basis upon which the award for costs would be reduced, contrary to the decision of this Court in *Lowry v. Moriarty.*

91. The Appellant contends that the Judge erred in failing to hold that, in making the costs decision, the Respondent had purported to exercise a judicial discretion in relation to costs, leading him to apply principles of costs in civil litigation to the Appellant's application for costs. These principles have no application to the award of costs to witnesses appearing before a tribunal of inquiry. That the Respondent did so, it is submitted, is apparent from the face of the Costs Decision itself, from which the Judge quoted at para. 54 of his judgment as follows: *"The Tribunal is exercising the High Court discretion in relation to costs, as limited by that principle and informed by the relevant legislation."* It is submitted

that a further indicator of this error is to be found in another statement made by the Respondent in the costs decision wherein the respondent referred to the work of the Tribunal as a *"judicial exercise"*. The use of such a phrase, so the Appellant contends, is an acknowledgment on the part of the Respondent that he was purporting to exercise a judicial function in making the costs decision, and in failing to so hold, the Judge was in error.

92. Relatedly, the Appellant submits that the Costs Decision was made on the basis that the Appellant had failed to prove all of his allegations, and in making the Costs Decision on this basis the Respondent was engaging in the administration of justice by imposing a costs penalty on the Appellant, contrary to *Goodman v Hamilton* and *Murphy v Flood*.

93. It is also the Appellant's case that the Respondent had an obligation to treat all witnesses before the Tribunal equally in relation to matters of costs. The Appellant contends that the Respondent failed to do so, and that the Judge erred in his determination that such a case was not pleaded.

94. The Appellant submits that the Tribunal was established pursuant to protected disclosures made by the Appellant within the meaning of the Protected Disclosures Act, 2014. As such, the Appellant argues that he is entitled to the protection of that Act in relation to protected disclosures, and specifically was entitled to be protected from the imposition of a penalty by reason of the disclosure, as provided in section 12 of the Protected Disclosures Act.

95. The Appellant submits that the Respondent erred in the Costs Decision in suggesting that the Appellant should have *"fallen on his sword"* and that he should have withdrawn his allegations no later than the first day of the Tribunal sittings, and the Judge erred in failing to so find.

96. Finally, the Appellant submits that the Judge failed to have regard to the import of the terms of reference of the Tribunal when considering whether the alleged non-cooperation or false or misleading information affected or related to the work of the Tribunal. The Appellant also submits that the Respondent erred in having regard to matters peripheral to the terms of reference, when making the costs decision, and the trial judge erred in failing to so find.

The Respondent's Submissions

97. The Respondent submits that the Appellant has made no allegation that the Costs Decision plainly and unambiguously flies in the face of fundamental reason and common sense, so as to trigger the irrationality ground for judicial review. The Respondent further submits that in reviewing the Costs Decision, the court should be cognisant that the Respondent had the benefit of hearing the evidence of the Appellant and other witnesses over the course of nineteen days and is in a better position than the court to assess the cooperation with the Tribunal of those giving evidence, including the Appellant.

98. The Respondent says that the Appellant relies in his submissions on selective extracts from the Report, the Costs Decision and the Judgment of the High Court. The Respondent

commends to the court the observation of the Judge that *"It is not permissible for this Court, in the context of judicial review, to take a single sentence from a comprehensive decision and then examine it out of context, divorced from what came before and after."*

99. The Respondent submits that there is no dispute between the parties as to the principles applicable to costs decisions of tribunals and so the question to be decided by the High Court was whether or not the Respondent was entitled to find that the Appellant had failed to cooperate by failing to tell the truth, as *"an objective reality"* (to quote from the Tribunal Report) and in persisting with false allegations knowing them to be untrue.

100. The Respondent submits that the fact that the Appellant did not give a truthful account to the Tribunal is not the subject of a challenge in these proceedings. While the Appellant could have, in the words of Denham J. in *Murphy v. Flood, "fallen on his sword"* at any time, he did not do so and the Judge was correct to so conclude. The Judge was entitled to and correct to rely upon the conclusions of the Respondent that the evidence of the Appellant had been evasive and deceitful, and that the Appellant had tailored his evidence to suit his own purposes. The Judge was also correct to find that these conclusions of the Tribunal did not *"constitute findings of the Tribunal in relation to the substantive matters it was established to enquire into. Rather these findings refer to the conduct of the applicant before the Tribunal regarding the information and evidence provided by the applicant to the Tribunal."* Furthermore, it is submitted, the Judge was correct to conclude that, for the purposes of section 6, *"information"* includes *"allegations"*, and so therefore when the Tribunal found that the Appellant made and persisted in making an allegation he knew to be untrue, he knowingly gave false information to the Tribunal.

101. The Respondent submits that the Appellant was afforded ample opportunity to make submissions on the issue of costs. By its letter of 22nd October 2019, the Respondent gave advance notice to the Appellant of reasons as to why he might not award the Appellant his costs. This letter was consistent with the principles enunciated by this Court in *Lowry v. Moriarty,* as well as, more generally, the requirements of natural justice. Furthermore, the appellant was afforded an oral hearing on 1st November, specifically so as to enable him to address the concerns flagged by the Tribunal in its letter of 22nd October, as well as to make any other submissions he wished to make regarding costs.

102. The Respondent submits that he adopted the most favourable approach to the Appellant in awarding him his costs leading up to and including the first day of the Tribunal on the basis that, regardless as to whether or not he cooperated, the Appellant would have incurred those costs at least.

103. The Respondent submits that the decision of the Tribunal not to award the Appellant his costs was one properly taken in exercise of the statutory power conferred by section 6, and consistent with the jurisprudence regarding the interpretation and application of that section There was therefore no question of the Tribunal exceeding its authority or straying into the area of the administration of justice as claimed by the Appellant.

104. The Respondent submits that the Protected Disclosures Act 2014 has no application because the Respondent is not the employer of the Appellant. The relevant provisions of

that Act (being those relied upon by the Appellant) prohibit the imposition of a penalty by an employer on an employee in respect of the making of a protected disclosure.

Discussion and decision

105. There is no material dispute between the parties as to the principles summarised at para.82 hereof. However, there is a significant conflict between the parties as to whether the Respondent made the Costs Decision on the basis of the findings of the Tribunal as to the conduct of the Appellant *vis a vis* the Tribunal, or on the basis of its findings on the substantive subject matter of the Tribunal's inquiries. It is, therefore, important to identify the findings of the Tribunal in each respect.

Substantive Findings of Tribunal

106. The findings of the Tribunal as regards the substantive subject matter of its inquiries may be succinctly stated: all of the allegations of the Appellant and Ms. Simms in relation to the contacts between An Garda Síochána and TUSLA concerning the Appellant were resoundingly rejected and condemned as being *"entirely without validity.*"

Findings of Tribunal as to Conduct of Appellant- *"knowing conduct"*

107. The findings of the Tribunal as regards the conduct of the Appellant which were relied upon in the Costs Decision included express findings that the Appellant and Ms. Simms

persisted in making damaging and hurtful allegations against individuals in both An Garda Síochána and TUSLA knowing *"that they were untrue"*. It is of some significance that this particular finding went right to the very core of the relevant terms of reference of the Tribunal, relating as it did directly to the allegation made by the Appellant (and Ms. Simms) in connection with the investigation by TUSLA into matters concerning the welfare of Ms. Simms's children, and specifically the allegation that that TUSLA were conducting that investigation under improper pressure from the Gardaí. These allegations were summarised in the Report as follows : *"They accuse the gardaí of having no cause to refer the issue of the well-being of the Simms children to the health service executive, later TUSLA. They accuse the gardai of having no faith in the statement of complaint made by Marisa Simms to Inspector Goretti Sheridan and Sergeant Bridgid McGowan on 6th October 2013. In consequence of that knowledge of the supposed lack of genuineness as to the complaints by Marisa Simms against Garda Keith Harrison, both claim that there was no basis for a social work referral. They alleged that Donna McTeague was manipulated into an abuse of her power: that she accepted a wrongful direction to invade a private home and interact with children knowing that this direction from her superior Bridgeen Smith was coerced by Sergeant Bridgid McGowan. They accuse the gardaí of putting such pressure on social services and social services of acting under that pressure. They accuse Donna McTeague of admitting to them that she was carrying out an unlawful invasion of their home in visiting and of being aware that she was manipulated through her superior Bridgeen Smith into that visit. They accuse Bridgeen Smith of passing on information to them of this manipulation and of accepting that she was going along with an abuse of power."*

108. Having regard to the arguments advanced by the Appellant, it bears repeating at this juncture that it was these allegations in particular that gave rise to term of reference (n), and it is clear that the Tribunal expressly and unambiguously found that the Appellant made these allegations, and persisted in them, *"knowing them to be untrue".* This finding cannot be said to relate to a matter peripheral to the terms of reference of the Tribunal. On the contrary, it goes right to the very heart of term of reference (n) and would, without more, justify a finding that the Appellant had failed to co-operate with the Tribunal in a material way by knowingly providing it with false and misleading information, and by persisting in doing so throughout the hearings of the Tribunal. But of course there was more.

109. Other findings of the Tribunal included findings that the answers given by the Appellant regarding PULSE checks that he had made on Ms. Simms were *"evasive and at times senseless"*, and in relation to the same issue, the respondent referred in the Report to the *"…. deceit involved in the evasive answer before the Tribunal"*. The Appellant submits that these conclusions relate to an issue that was peripheral to the work of the Tribunal, and should not therefore be taken into account when considering the Appellant's application for costs. However, we do not agree that the questions relating to PULSE were as peripheral as the Appellant contends. While it is true that this issue was not referred to in the terms of reference of the Tribunal, it arose in the course of the Tribunal's investigation into the circumstances whereby TUSLA received an anonymous letter expressing concern as to the welfare of Ms. Simms's children, by reason of her relationship with the Appellant. This letter led the relevant social worker in TUSLA to contact An Garda Síochána, and these

communications fell squarely within the remit of the Tribunal. As the evidence regarding these communications then unfolded, it transpired that the Appellant had, for no legitimate garda operational reasons, carried out no less than 17 PULSE checks on Ms. Simms, some of which had been carried out even before they were in a relationship. Unsurprisingly, this led to questioning of the Appellant about these inquiries, and it was his answers to these questions that the Tribunal found to be deceitful and evasive.

110. In relation to a third allegation of the Appellant, that he was being discriminated against by his superiors and colleagues in Donegal, the Respondent observed in the Report that the Appellant's *"position would shift in accordance with what was perceived to be the drift in the evidence and the clear allegations which he was making would be unmentioned if these did not apparently suit."*

111. Finally, as regards the content of text messages exchanged between the Appellant and Ms. Simms, the Tribunal found that the evidence of the Appellant was *"ridiculous"* and *"nonsense"*. These texts were very significant, because they pre-dated a statement of complaint that Ms. Simms had made to the Gardaí about allegedly threatening conduct of the Appellant towards her. It was alleged by Ms. Simms and the Appellant that Ms .Simms had been pressurised by Ms McTeague, a TUSLA employee, to make this statement. This was alleged to have occurred during the same TUSLA visit that the Appellant and Ms. Simms claimed had come about because of pressure from the Gardaí. However, the content of the texts was consistent with the statement made by Ms. Simms to the Gardaí and so it followed that the fact that the text messages pre-dated the statement allegedly procured

under pressure, seriously undermined that allegation in the eyes of the Tribunal. Indeed in the Costs Decision the Tribunal expressed the view that had these text messages come to light before the terms of reference of the Tribunal were finalised, these matters might not have been included in the terms of reference at all.

112. Finally, we would observe that it is manifest from the terms of the findings that it made, that the Tribunal did not consider that the Appellant gave his evidence on the basis of a sincere but mistaken view of the position (see para 76 above, referring to the observations of Baker J in *Fox v Mahon*).

Express findings – not inferences

113. As is apparent, each of the findings referred to above are express findings of the Tribunal relating to the conduct of the Appellant in his dealings with the Tribunal. They are not inferences drawn by the Judge from the Report. While it is correct to say that these findings, amongst others, led the Respondent to his conclusions on the substantive matters under investigation by the Tribunal, i.e. that the allegations of the Appellant under investigation were unfounded, this did not mean that they could not be taken into account, or were required to be ignored, by the Respondent in his consideration of the Appellant's application for costs: they were findings concerning the conduct of the Appellant before the Tribunal. Since it was the allegations that had been made by the Appellant that had given rise to the inclusion of term of reference (n) in the Tribunal's terms of reference, there was inevitably a close relationship between the substantive findings of the Tribunal

and its findings as to the conduct and credibility of the Appellant. But as long as the latter were clearly and separately identified and assessed by the Tribunal, as they were, then it was entitled to rely on those conclusions in arriving at the Costs Decision, and was correct to do so. Such an approach is consistent with that of Baker J. in *Fox v Mahon* (see para.23 and 24 of her judgment, quoted at para.75 above).

114. In light of the Tribunal's findings regarding the conduct of the Appellant, it is unsurprising that the Judge reached the conclusions he did at paras 48 and 49 of his Judgment:

> *" 48…In my view, however, the findings of the Tribunal as to the applicant's conduct, in particular those in the second interim report, undoubtedly are findings to the effect that the applicant knew that he was giving false or misleading information to the Tribunal and findings to the effect that he deliberately adduced false evidence. To knowingly give false and misleading information is not to cooperate. The findings in the Tribunal's second interim report clearly establishes non-cooperation on the part of the applicant.*
>
> *49. Not only is there a wholesale rejection of the applicant's evidence, the findings made by the Tribunal are plainly to the effect that the applicant knowingly give false and misleading information and failed to cooperate with the Tribunal. Nor can the applicant claim that the contents of the second or third interim reports of the Tribunal contained findings establishing that cooperation*

occurred as between the applicant and the Tribunal in respect of any area. The contrary is true. To give answers which were found to be "evasive"; to give answers involving "deceit"; to "shift" one's position in accordance with what was perceived to be the drift in the evidence; to leave clear allegations "unmentioned if these did not apparently suit"; to "change the nature of" one's testimony and persist in allegations notwithstanding the fact that one knows "that they were untrue" is not accidental behaviour or behaviour which could fairly be considered to involve a passive or unconscious act. Doing so on any reasonable analysis, amounts to an active and deliberate failure to cooperate with the Tribunal."

115. We agree with these conclusions. As in *Fox v Mahon*, the Tribunal in this case made findings regarding the conduct of the Appellant that were clearly identifiable. If anything, those findings were expressed more starkly and in clearer language than those relied upon by the tribunal in *Fox v Mahon* . We also agree with the conclusions of the Judge at para.46 of his Judgment where he stated:

"A reading of the Tribunal's Second Interim Report demonstrates that the respondent did not simply prefer evidence given by others to that which was given by the applicant. It was not a situation where the applicant was found to be sincere, even if sincerely wrong. There was no question of, for instance, a failure of recollection explaining the findings of the Tribunal as regards the evidence given by the applicant. Rather, the findings of the Tribunal - including of deceit, evasion, a tailoring of evidence and a shifting of position to suit the applicant's

purposes - are findings which relate to active, conscious and knowing conduct on the part of the applicant, insofar as his engagement with the Tribunal was concerned."

116. The findings of the Respondent referred to by the Judge, describing the conduct of the Appellant, are findings of deliberate and knowing non-cooperation. Those findings which are made in the Report are referred to in the Costs Decision and together constitute the reasons why the Respondent arrived at the decision that he did in relation to the Appellant's application for payment of his costs. Therefore the submission of the Appellant that the Judge fell into error by drawing inferences from the Report must be rejected, as must the submission that he fell into error by failing to have regard to the Costs Decision.

117. Furthermore, the Judge was correct in his observation that the Respondent was under no obligation to use any particular formula of words in reaching his conclusion that the Appellant had not cooperated with the Tribunal; what matters is that the conclusion itself is clear, as we consider it was.

"Entire Report"

118. The Appellant contends that the Respondent fell into error in having regard to the entirety of the Report in arriving at the costs decision, because this necessarily imported into the considerations of the respondent the substantive findings of the Tribunal, contrary to section 6, and the trial judge erred in failing so find.

119. At para. 50 of his Judgment the Judge stated that the *"costs decision is explicit about the fact that it should be read in the context of the Tribunal's "entire report"*. This is clear from internal page 10 which states, inter-alia, that *"you will no doubt be familiar with the second interim report of the Tribunal. What follows should be read in the context of the entire report."*

120. What follows thereafter is a summary of the four main points that troubled the Tribunal regarding the evidence of the Appellant. It will be recalled that the letter of 22 October 2019 was set out in full in the Costs Decision. Having quoted that letter, the Tribunal then refers to the hearing on 1 November 2019 and then, under the heading *"Decision"* states : *"This ruling should be read in its entirety and should also be read in the context of the report of the Tribunal published on 30th November 2017."*

121. This submission (that the Respondent erred in having regard to the entirety of the Report), while perhaps having some superficial force, does not withstand any real scrutiny. In arriving at the Costs Decision, it was necessary for the Respondent to cross refer to the Report, and to quote from extracts thereof and to summarise or paraphrase conclusions thereof. On any occasion when a person quotes from, paraphrases or summarises a larger document, there is a risk that the true meaning of the principal document may become distorted simply because the text being quoted or summarised is no longer within its original context. For this very reason, it is commonplace in such circumstances for an author to say, as the Respondent did in the Costs Decision, that the document under

consideration should be read in the context of the principal document. Otherwise, the principal document might have to be set out in full to avoid any risk of misinterpretation.

122. It is of course correct to say that the Report also contains the substantive findings of the Tribunal. However, in saying that the Costs Decision should be read in the context of the Report, the Respondent was saying no more than that the findings as to the conduct of the Appellant were to be properly understood in the context of the Report as a whole. The Respondent was not, in our view, thereby placing reliance upon the substantive findings of the Tribunal, and to so construe that statement would in our view be unreasonable and would be wholly inconsistent with any fair reading of the Costs Decision as a whole, and the process which lead to it, from which is evident that the Tribunal clearly understood the proper approach to section 6 and clearly appreciated that its substantive findings were not relevant for the purposes of deciding the Appellant's costs application (save of course to the extent that such findings were relevant to the conduct of the Appellant before the Tribunal). We therefore reject this ground of appeal also.

Allegation or Information?

123. The Appellant argues that an allegation is not information for the purpose of section 6; and therefore, even if an allegation is false, it does not amount to the giving of false information to the Tribunal, for the purpose of section 6. This submission is a matter of semantics and may readily be rejected.

124. An allegation necessarily contains information presented by way of an assertion or accusation; or put another way, there must be information within an allegation relating to a state of affairs or the conduct of a party. Without information, there cannot be an allegation. The distinction sought to be drawn by the Appellant is, in our view, entirely illusory. The Appellant clearly provided information to the Tribunal. That the information was accusatory in character does not alter that fact. The Appellant provided a lengthy statement to the Tribunal. He also gave oral evidence to it. All of the material that the Appellant put before the Tribunal had to be investigated by it in discharge of its functions. Having carried out that investigation, the Tribunal concluded as it did about the (lack of) credibility of that material and reached the conclusions that it did about the Appellant's conduct. Those findings were clearly open to it.

125. In his treatment of this argument at para. 87 of his judgment, the Judge observed : *"It is beyond doubt that the applicant gave information to the Tribunal, including written information and answers in the course of his evidence…….In short, the applicant undoubtedly gave information to the Tribunal by way of the evidence he gave, as opposed to only making allegations. This information was found to have been false or misleading and knowingly given by the applicant……To make an allegation is to represent that something is factually so and the applicant knowingly provided information to the Tribunal in support of allegations which he knew to be incorrect. In my view, the concept of "information" must include the concept of an "allegation".*

126. We agree with the analysis and conclusion of the Judge in respect of this argument and accordingly this ground of appeal must also be dismissed.

127. To be clear, the conclusions reached above are determinative of all grounds of appeal related to the findings of the Tribunal regarding the conduct of the Appellant, the assertion that the Respondent impermissibly had regard to the substantive findings of the Tribunal, the claim that the Judge improperly drew inferences from either the Report or the Costs Decision, the claim that the Judge failed to interpret and apply section 6 correctly, the claim that the Judge failed to have regard to the costs decision and any remaining grounds of appeal related to the terms of reference of the Tribunal. All grounds of appeal arising under any of the foregoing headings are dismissed. These are the grounds set out in ground of appeal numbers 1, 3, 4, 5, 6, 7, 8 and 12: see para. 83 above).

Truth as an "Objective Reality"

128. Related to his argument that the Judge erred in failing to hold that the Respondent had refused the Appellant's application for costs in the absence of a finding by the respondent that the Appellant had *knowingly* failed to cooperate with the Tribunal, is his argument that the Respondent applied the wrong test to determine whether or not the Appellant had cooperated . It is submitted that the Respondent applied an objective test, asking whether the information provided by the Appellant to the Tribunal was objectively true, as distinct from whether or not the Appellant knew that his evidence to the Tribunal was untrue. This, it is said, is apparent from the passage in the Costs Decision where the Respondent states that *"…cooperation must involve telling the truth as an objective reality."*

129. While these words may, if looked at in isolation from the remainder of the Costs Decision, be capable of being construed in the manner contended for by the Appellant, that is not, in our view, the correct approach to adopt. The fact is that in the Costs Decision the Respondent considers in some detail the terms of section 6 as well as the seminal authorities on its interpretation and application (*Goodman v Hamilton*, *Murphy v Flood*), and then proceeds to refer to those parts of the evidence of the Appellant already considered above that led him to the conclusion that the Appellant had not cooperated with the Tribunal. As already discussed this conclusion was based on findings that the Appellant had, *inter alia*, been evasive in his evidence and had knowingly given evidence that was untrue. Thus the Respondent not only considered the relevant authorities, but that he correctly applied the principles derived from those authorities on the basis of the Appellant's subjective state of knowledge and intentions, and not simply on the basis of a conclusion reached as to the facts reached objectively. In stating that the truth must be determined as an '*objective reality'*, in our view the Respondent meant no more than that the determination as to whether or not a person is knowingly telling untruths must be anchored in the first instance in whether the person was telling untruths as a matter of objective reality; thereafter one looks to the question of whether he was *knowingly* telling untruths. Having regard to the entirety of the Tribunal's analysis, we are of the view that it was plainly aware of the requirement that the Appellant must have *known* of the untruthfulness of his evidence before it could reach the decision on costs that it did. In all of this, the Tribunal is entitled to form a view of and have regard to the credibility of the applicant for costs as a witness before it, as it did here.

130. There was no error on the part of the Judge regarding this issue. We would therefore also dismiss this ground of appeal. (Ground no. 2, para.80)

The Appellant did not "Fall on his sword"

131. In *Murphy v Flood*, Denham J stated :

> *"Fundamentally, the issue is whether a party has cooperated with a tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a tribunal."*

132. The Appellant contends that the Respondent erred in concluding that the Appellant should have *"fallen on his sword"* by withdrawing his allegations, and says he was never requested to do so. However, all the Respondent did was to adapt the dictum of Denham J in *Murphy v Flood* to the circumstances of this case. At page 13 of the Costs Decision the Respondent stated: *"If the evidence is rejected where the person could have cooperated with the Tribunal by withdrawing baseless allegations and perhaps saying what motivated the allegations, the Tribunal work is required to continue over months and those at the receiving end of the allegations would be required to contest testimony and documents and to be represented. That is not cooperation. On the other hand, where the person, as Denham J. states, says that the allegations are false and perhaps says what brought about his or her conduct in the first place, that is cooperation. What is involved here is not that situation."*

133. This issue is addressed by the Judge at paras.77-78 of his Judgment. At para. 77, he said:

> *"At this juncture, it is appropriate to observe that a reading of the Tribunal's second interim report in the present case demonstrates that the applicant never fell on his sword. In other words, the applicant never withdrew his baseless allegations which he knew to be untrue but, instead, gave answers which involved deceit, gave evasive answers, tailored his evidence to what suited his purpose at the time, left allegations unmentioned if these did not apparently suit, gave information to the Tribunal described variously as ridiculous and utterly nonsensical, changed the nature of his testimony from that which appeared in a statement to the Tribunal and the applicant was found to have demonstrated a determination to persist with damaging and hurtful allegations knowing these to be untrue. In the manner explained in Murphy v Flood, a person who fell on their sword, thereby cooperating with a tribunal, could have an expectation that they would obtain their costs. The applicant did not fall on his sword and did not cooperate with the Tribunal."*

134. We cannot identify any error in the Judge's conclusions on this issue. Once the Respondent had made the findings that he did as regards the conduct of the Appellant, it was obviously within the discretion of the Respondent, in making the Costs Decision, to take into account the fact that the Appellant had not withdrawn his allegations and had thereby significantly prolonged that part of the Tribunal's work. The Tribunal was not

under any obligation to ask the Appellant to withdraw his allegations. This was a matter entirely for the Appellant himself. He had the benefit of the witness statements and other material that the Tribunal had circulated in advance of the hearing. He was legally represented. He was in a position to make an informed decision as to whether or not it was appropriate to maintain the serious allegation that he made against An Garda Síochána and TUSLA. He elected to maintain those allegations and even now maintains that he was entitled to do so. In the circumstances, the implication that the Appellant would have "*fallen on his sword*" if only such a course of action had been suggested by the Tribunal is entirely fanciful.

135. We would therefore dismiss this ground of appeal. (Ground no.17, para. 83).

Fair procedures arguments

136. The Appellant's arguments under this heading are grounded upon the decision of this Court in *Lowry v. Moriarty.* The central complaints of the Appellant under this heading are, firstly that the methodology of the Respondent in arriving at the costs decision (specifically, in deciding to award the Appellant only the costs incurred up to and including the first day of the Tribunal's inquiry) was not disclosed to him in advance, so that he could make submissions in regard to it, and secondly that the Respondent failed to identify in the Costs Decision any mode of calculation in respect of the reduction of the costs that the Appellant was presumptively entitled to in accordance with the decision of this Court in *Lowry.*

137. While the Appellant places much reliance on *Lowry*, that case is materially distinguishable, in at least two respects, from these proceedings. Firstly, the Appellant was given an opportunity to make submissions to the Tribunal on the issue of costs and did so at the hearing on 1 November 2019, which hearing took place against the background where the Tribunal had identified its concerns in its letter to the Appellant's solicitors of 22 October 2019. This is an important point of difference with *Lowry* - Mr. Lowry was not afforded such a hearing. While it is clear that such a hearing is not necessarily required in all cases where a tribunal is contemplating a departure from the default position under section 6 (see para. 82 (3) above), nonetheless where it is offered and availed of, as it was here, it provides a significant extra procedural safeguard for the person concerned.

138. Secondly, in *Lowry* the impugned costs deduction was imposed on a percentage basis, without any identifiable rationale for the chosen percentage of two thirds. In these proceedings, the rationale for awarding the costs of the Appellant only up to and including the first day of the Tribunal hearings could not have been clearer, and it is clearly explained in the Costs Decision itself. In summary this is that since the Oireachtas had set up the Tribunal, the Appellant was entitled to instruct solicitors and counsel, and that he should therefore be entitled to recover his costs incurred in so doing at least up to and including the first day of the Tribunal, notwithstanding that his non-cooperation with the Tribunal (by persisting in his allegations) required the Tribunal thereafter to continue with its investigations into allegations that it concluded should never have been made in the first place.

139. While the Appellant has contended that the Respondent erred in this conclusion (and that the Judge erred in failing to so find), this was a logical conclusion flowing from the Tribunal's determination that the Appellant had knowingly made false allegations that led to the establishment of this part of the Tribunal's inquiry. It was in that context that the Respondent made the observation (in the Costs Decision) that the allegations should never have been made, and the Respondent clearly contemplated not awarding the Appellant *any* of his costs. However, instead, the Respondent made the award of costs that he did *"with considerable doubt"* because he considered he had a duty to *"search for a basis upon which some humane and lawful award of costs [could] be made"*.

140. This was, in our view, a rational and transparent conclusion. It is addressed as follows at para. 97 of the Judgment:

> *" ....On the evidence before this court it seems clear that the Tribunal had jurisdiction to award no costs in favour of the applicant but, following an oral hearing at which the applicant, through his senior counsel, made such submissions as he wished to make, which submissions were to the effect that the application should be awarded his full costs, the Tribunal, having considered same, came to a conclusion in which, in the manner explained therein, the applicant's costs up to the first day of the public hearings were granted. Unlike Lowry, this was not a situation where the Tribunal dealt in fractions or percentage reductions without some means for the applicant to understand a specific fraction or percentage reduction and why, for example, a greater or lesser fraction or percentage was not applied in so far as the relevant reduction*

was concerned. None of the foregoing arose. In short, there was no question of a failure to identify a rational mode of calculation of the costs which were awarded and not awarded, as this is clear from the reasoning on the face of the costs decision itself."

141. We agree with the Judge. There was no want of fair procedures on the part of the Respondent in the process leading to the Costs Decision. In his letter to the Appellant's solicitors of 22 October, 2019, the Respondent clearly identified areas of concern arising out of the Appellant's conduct before the Tribunal, and invited submissions thereon. It was clear that the Appellant was contemplating the possibility of a zero award of costs - this is apparent from the sentence in the letter in the concluding part thereof in which the respondent stated: *"In light of all of the above, the Tribunal is presently considering what, if any, portion of costs should be ordered should be paid to you….."* The Appellant was invited to a hearing to make such submissions as he wished to make, and he did so. He submitted that he was entitled to an order for all of his costs, and his counsel declined to make any submission as regards the basis upon which the Tribunal might award anything less than all of his costs, having regard to the matters identified in the letter of 22 October 2019.

142. Had the approach taken by the Tribunal been to reduce the costs awarded to the Appellant on the basis of a percentage of his total costs, the percentage reduction being related to the extent of his non-cooperation with the Tribunal, then he would have been entitled to know that in advance and to make submissions regarding the extent to which the identified non-cooperation had impacted adversely on the work of the Tribunal as a whole,

in percentage terms, and then to make submissions as to an alternative, more favourable , percentage reduction in costs. However in the Costs Decision the Respondent expressly concluded that such an approach would have been inappropriate and unhelpful in this case, for the reasons which he explained in some detail, and the Judge agreed. We also agree.

143. As we stated in paragraph 82 above, there must be (and the tribunal must identify) some rational relationship between the acts or omissions constituting non-cooperation on the one hand and the decision to refuse or reduce the costs. That does not require use of any *"mathematical formula*" but the tribunal must give some explanation as to how the refusal or reduction reasonably follows from the non-cooperation and is proportionate to it. In our view, the Costs Decision amply discharged the obligations on the Respondent in this regard.

144. We find no error in the analysis or conclusion of the Judge, and therefore this ground of appeal must be dismissed. (Ground nos. 13 and 16, para.83).

Judicial Discretion and Administration of Justice

145. The Appellant's arguments under this heading are grounded upon the reference in the Costs Decision to the Tribunal exercising the *"High Court discretion in relation to costs"* (which was, in turn , a quotation from the third interim report of the Tribunal) , as well as a description of the work of the Tribunal as being *"a scrupulously conducted Judicial Exercise"* . The Appellant also relies upon a reference, in the Costs Decision, (by way of analogy or comparison) to the treatment of costs in civil litigation, where allegations are withdrawn. All of this, it is submitted, demonstrate that the Tribunal erred by applying costs

principles applicable in civil litigation rather than the costs principles applicable to the work of tribunals.

146. It is further submitted that the foregoing had the effect of imposing a costs penalty upon the Appellant, on the basis that he had failed to prove all his allegations, and that this is contrary to the well-established principle that the work of tribunals forms no part of the administration of justice, and their conclusions must be must be legally sterile. The Respondent, it is said, strayed impermissibly into the administration of justice and the Judge erred in failing to so find.

147. As we have already observed it is apparent from the face of the Costs Decision that the Tribunal was fully aware of its statutory jurisdiction to award costs, and of the limitations on that jurisdiction as interpreted and applied by the Superior Courts. This is apparent, *inter alia*, from the statement in the Costs Decision that *"The Tribunal accepts, and the case law indicates, that if a person makes an allegation in public and the Oireachtas decides to set up a public enquiry, the person making the allegation in coming to the Tribunal is entitled to costs provided he or she cooperates. In that respect cooperation must involve telling the truth as an objective reality."*

148. This argument was addressed by the Judge at paras. 55-57 and 61-62 of his Judgment. At para 55 he stated that: *"To my mind, the evidence does not support that submission which is, in my view, fatally and wholly undermined by virtue of the reasoning on the face of the costs decision and which, at its heart, is based on findings to the effect that the applicant knowingly gave false or misleading information to the Tribunal, thus failing to*

cooperate with it, being findings which are clear from the Tribunal's second interim report and which constitute findings which are not challenged in the present proceedings" . At para. 57 , the Judge observed that : *" ...There it is no question of the applicant having been refused costs because he did not prove his allegations. Explicit statements in the costs decision wholly undermine that submission."*

149. In our view the conclusions of the Judge on this submission are correct. Once again, the Appellant's submission involves taking a single sentence (in fact, less than a sentence – as we note below, the Respondent goes on in the same sentence to refer to the limitations applicable to its discretion on costs) and looking at it in isolation, divorced from the Costs Decision as a whole. If looked at in that way the statement that the Tribunal was exercising the *"High Court discretion in relation to costs"* might call for explanation or clarification. However, it is readily apparent from the Costs Decision that the Tribunal was fully aware of and applied the particular legal principles applicable to awards of costs by tribunals of inquiry, and not the principles applicable to costs incurred by parties in civil litigation.

150. In advancing his submissions under this heading, counsel for the Appellant placed great emphasis on the nature and purpose of tribunals and their place within the constitutional framework. He submitted that the costs decision, if left stand, would have a chilling effect on those who may wish, in the future, to raise issues or participate in a tribunal. However, this submission is advanced on a false premise, i.e. that the Appellant is being deprived of a full costs indemnity because he failed to prove his allegations. It is important to stress that this is not so; we have already addressed the findings of the Respondent as regards the conduct of the Appellant, and will not repeat them here. Suffice to say we are satisfied, as

was the Judge , that the Costs Decision was based on particular and specific findings of the Respondent that the Appellant failed to cooperate with the Tribunal in the ways discussed above, and not because he failed to prove his allegations. We cannot readily see how the Costs Decision, based as it was on findings of non-cooperation with the Tribunal, might be said to operate as a disincentive to cooperation with future tribunals of inquiry.

151. Finally, we agree with the observation made by the Judge at para.57 of his Judgment, to the effect that in considering the rationale of the Costs Decision, it is an incorrect approach to emphasise phrases or sentences in isolation from their context , and without regard to the Costs Decision as a whole. This is particularly relevant to the reliance sought to be placed on the phrase *"High Court discretion in relation to costs"* when read in the context of entirety of the sentence in which it appears (in the third interim report of the Tribunal, which the Respondent identifies in the Costs Decision as being the source of the statement). That sentence reads: *"The Tribunal is exercising the High Court discretion in relation to costs, as limited by that principle and informed by the relevant legislation"* (our emphasis). The *"principle"* to which the Respondent expressly referred when first making this statement in his third interim report was the *"default position"* that a person who is required to appear before a Tribunal and to whom representation is granted, is entitled to have his or her costs paid by the Minister for Finance.

152. It follows from the foregoing that the grounds of appeal based on the claim that the Respondent erred in making the Costs Decision on the basis of "*High Court discretion*" or principles applicable to civil litigation, rather than on the basis of section 6 and the

authorities interpreting that section, and that the Judge erred in failing to so find, must be dismissed. (Ground no.11, para.83)

153. Likewise, the ground of appeal that the Respondent strayed impermissibly into the administration of justice and imposed a costs penalty on the Appellant because he failed to prove all his allegations, and that the Judge erred in failing to so find, has not been made out and accordingly must also be dismissed. (Ground nos. 9 and 10, para.83).

Unequal treatment

154. Although not expressly pleaded in the Statement of Grounds, the Appellant contended before the High Court, and again before this Court, that the Respondent acted *ultra vires* and in breach of the principles of natural and constitutional justice in failing to award the Appellant his costs of representation in circumstances where other witnesses whose evidence was not accepted by the Tribunal received orders for their costs from the Tribunal. The Appellant argued that this claim was embraced by the plea at para.26 of the statement of grounds, that *"The respondent acted ultra vires and in breach of the principles of natural and constitutional justice in failing to award the applicant his costs in respect of the entirety of the proceedings before the Tribunal".* The Appellant further argued that the claim was specifically made in a document delivered on behalf of the Appellant dated 24 November 2020, entitled *"Further particulars of paragraph 26 of the statement of grounds"*, wherein it was expressly pleaded that the Respondent treated the costs applications of other witnesses differently to that of the Appellant. The Respondent

objected to the delivery of those further particulars, which were delivered more than 9 months after the statement of grounds.

155. The Judge addressed this issue at paras 114-118 of his Judgment. He concluded, firstly, that the plea of unequal treatment is not made in paragraph 26 of the statement of grounds, nor in any other of the pleas advanced in the statement of grounds, and therefore that the *"further particulars"* delivered on 24 November 2020 did not constitute a clarification of a matter already pleaded, but rather amounted to an entirely new ground of judicial review. He noted that there was no application before him to amend the Statement of Grounds, and further that there was no affidavit of verifying the alleged unequal treatment. In those circumstances, and having regard to the objections of the Respondent, the Judge concluded that this claim did not form part of the pleaded case and did not therefore fall for adjudication.

156. The Judge added that even if there was a plea of inequality, there was no evidence to support it. At para. 121, he referred to the replying affidavit of the Appellant dated 15 July 2020 in which he averred: *"I say further that other witnesses made grave allegations against your deponent which allegations were also untrue; this included supplying the Tribunal with an anonymous letter, stating that I had breached the Garda code in transferring to Buncrana and that I had taken a patrol car without permission. I say that no costs penalty was imposed on those parties."* The Judge held that this was no more than a bare assertion devoid of the necessary detail to amount to evidence of unequal treatment justifying such a finding by a court.

157. At the hearing of this appeal, it was submitted on behalf of the Respondent that the claim of unequal treatment is not pleaded and is not therefore *"in the case"*. It was also submitted that there was no finding of untruths on the part of other witnesses.

158. We have addressed the issue of whether the Statement of Grounds properly makes allegations of discrimination and/or unequal treatment in the context of addressing the Discovery Appeal. Having regard to that analysis, we are in no doubt that the Judge was correct in holding that this issue is not pleaded in paragraph 26 of the Statement of Grounds.

159. Likewise, the Judge was correct in holding that there was no evidence of unequal treatment with other witnesses before the court, other than a bare assertion on the part of the Appellant. That this is inadequate to ground such a claim is apparent from the fact that, as was submitted by counsel for the Respondent, the Tribunal made no finding of untruthfulness or lack of cooperation on the part of other witnesses. In the absence of any concrete evidence, then the claim could not possibly have succeeded, even if it formed part of the pleaded case. Accordingly, this ground of appeal fails also. (Ground nos.14 and 15, para.83).

Protected Disclosures

160. Firstly, it should be observed that although this point was raised in the Appellant's written and oral submissions, and responded to by the Respondent in his submissions, it was not actually raised in the Appellant's notice of appeal, notwithstanding its prolixity

Nonetheless, since it was addressed by both parties in their submissions, we will address the point in the interests of completeness.

161. The Appellant submits that his allegations giving rise to terms of reference (n) and (0) of the Tribunal were protected disclosures within the meaning of the Protected Disclosures Act, 2014, (the *"PDA Act"*) and as such attract the protections afforded by that Act. Therefore, it is submitted that the costs order, in so far as it does not make provision for reimbursement of all of the Appellant's costs is a form of *"penalisation"* of the Appellant (as defined in the PDA Act) which is prohibited by section 12 of the PDA Act.

162. In the Appellant's written submissions on this issue, it is stated, at para. 65 that: *"The Disclosures Act precludes* <u>*any person*</u> *(our emphasis) from penalisation or threatening penalisation against an employee, at section 12, for having made a protected disclosure".* However, this is not correct . Section 12 actually provides : *"An* <u>*employer*</u> *(our emphasis) shall not penalise or threaten penalisation against an employee………..for having made a protected disclosure".* Section 3(2)(c)(1) of the PDA Act provides that, for the purposes of the Act, *" "employer", in relation to a member of the Garda Síochána ………means the Commissioner of the Garda Síochána".* It is therefore apparent that the prohibition provided for in section 12 of the PDA Act, so far as concerns the Appellant, is directed to the Commissioner of the Garda Síochána, as the Appellant's employer, and not to the Respondent , against whom the provision is sought to be invoked.

163. The Appellant submitted to the Judge that, for the purpose of the PDA Act, the Appellant is employed by the State, and since the Tribunal was established by the State

the Costs Decision was, in effect, one made by the State, as the Appellant's employer, and is prohibited by section 12 of the PDA Act. The Judge addressed this argument at para.90 of his judgment, dismissing it very simply in the following terms : *"The respondent is plainly not the plaintiff's employer and the 2014 Act has no application. In short I am satisfied that the 2014 Act was not a relevant consideration for the respondent to have regard to when making the costs decision, nor is the costs decision a penalisation as defined in the 2014 Protected Disclosures Act."*

164. In our view, there is no doubt that the Judge was correct in his determination of the issue. The definition of *"employer"* so far as concerns members of an Garda Síochána is clear and leaves no room for doubt. The argument of the Appellant on this point is fanciful, to put it at its mildest, and it is somewhat surprising that it was repeated on appeal. Neither the Tribunals of Inquiry Acts nor the PDA Act provide any basis on which the Tribunal here could properly be identified with the State or with the Commissioner of An Garda Síochána in the manner suggested. The Tribunal here was constituted by a Judge of the Supreme Court, exercising important public law functions in an independent manner. The Tribunal was not subject to the control of the State and was not in any relationship with the Appellant capable of being affected by the PDA Act. This ground of appeal is also dismissed.

CONCLUSION AND ORDER

165. All of the Appellant's grounds of appeal as pursued at the hearing of this appeal have failed. Accordingly, the Appellant's appeals are dismissed and the substantive orders made by the High Court are affirmed. As regards the issue of costs, as the Respondent has been entirely successful in both appeals, our provisional view is that he is entitled to his costs in this Court and in the High Court. If the Appellant wishes to contend for a different order, he will have liberty to seek a short supplemental hearing on the issue of costs by notifying the Office of the Court of Appeal accordingly within 14 days of the date of this judgment. If such hearing is requested and does not result in a different order, the Appellant may be additionally liable for the costs of the supplemental hearing.

APPENDIX – THE INTERROGATORIES SOUGHT TO BE DELIVERED BY THE APPELLANT

"1. *Did the respondent determine what matters were required to be inquired into in accordance with the terms of reference?*

2. *Did the respondent determine that Module N in the terms of reference meant that it was to investigate "all interaction between any member of the Gardaí and Tusla in relation to Garda Keith Harrison howsoever first initiated and any contacts thereafter"?*

3. *Did the respondent determine which parts of the applicant's protected disclosure fell to be considered within the terms of reference of modules N and O?*

4. *Did the respondent consider the necessity for public hearings in relation to the issues covered by modules N and O?*

5. *Did the respondent exclude consideration of significant portions of the applicant's protected disclosure and statement to the tribunal for the purposes of modules N and O?*

6. *Did the respondent consider matters and issues relating to the Applicants time in the Donegal Division which were not alleged by the applicant to be relevant to modules N and O?*

7. *Did the respondent call evidence which was not contained or referred to in the statement of the applicant or his partner?*

8. *Did the respondent consider the statements of other witnesses in determining whether or not to interview the applicant?*

9. *Did the respondent direct the interview of other witnesses for the purpose of modules A to O?*

10. *Did the respondent direct the interview of witnesses for the purpose of module N or O?*

11. *Did the respondent, his servants or agents, in interviewing witnesses, direct their attention to evidence contained in the statements of other witnesses?*

12. *Did the respondent consider calling on the applicant to withdraw his "allegations" prior to the public hearings?*

13. *Did the respondent form the view prior to the public hearings of module N that the applicant's "allegations" ought to be withdrawn by the applicant?*

14. *Did the respondent furnish copies of the applicant's statement to witnesses to any party prior to the 8th of August 2017?*

15. *Did the respondent direct the attention of any of those witnesses to particular parts of the applicant's statement for the purpose of specific comment?*

16. *Did the respondent grant full orders for cost in respect of all applications made to him regarding module (n) and/or (o), save for the applications made on behalf of the applicant and Marissa Simms?*

17. *Is the quote from page 23 of the report related to evidence concerning "interaction between any member of the Gardaí and Tusla".*

18. *Did Chief Superintendent Sheridan give evidence of any interaction on his part with TUSLA concerning the applicant?*

19. *Did the "allegations" referred to in page 45 of the report involve any person other than the Applicant or Marissa Simms?*

20. *Apart from the applications made by Keith Harrison did the respondent accede to all applications for costs made to him in respect of Module N and/or O?*

21. *Did the respondent accede to an application for costs on behalf of Ms Rita McDermott?*

22. *Did the respondent accede to an application for costs on behalf of Chief Superintendent McGinn?*

23. *Did the respondent accede to an application for costs on behalf of Inspector Sheridan?*

24. *Did the respondent accede to an application for costs on behalf of Inspector Durkin?*

25. *Did the respondent accede to an application for costs on behalf of behalf of Sergeant McGowan?*

26. *Did the respondent accede to an application for costs on behalf of Superintendent English?*

27. *Was an application for costs made on behalf of the Commissioner of An Garda Síochána?*

28. *Was an application for costs made on behalf of TUSLA?"*