



**Tribunal of Inquiry into Complaints Concerning
some
Gardaí of the Donegal Division**

Sole Member
The Honourable Mr. Justice Frederick Morris

THE MORRIS TRIBUNAL

**FURTHER OPENING STATEMENT OF COUNSEL
ON TERM OF REFERENCE (h) –
THE ANONYMOUS ALLEGATIONS MODULE**

FURTHER OPENING STATEMENT OF COUNSEL

Introduction

Sir,

You have already received a preliminary opening statement of counsel on this term of reference, which was delivered as far back as November 2002. It is not the purpose of this statement to go over any of the ground already covered in that earlier statement. However, a brief summary of the events prior to November 2002, might be of assistance. You will recall, Sir, that in June 2000, two members of Dáil Eireann received confidential information which they considered of sufficient importance that it should be brought to the attention of the Minister for Justice, Equality and Law Reform of the day, Mr. John O'Donoghue T.D.

In a statement made on the 30th of June 2000, Mr. Jim Higgins stated that on the 25th of June 2000 he had received a telephone call at his home from an individual who told him that he would shortly be receiving a document by fax, which had been drawn up by a former Garda and which contained very serious allegations concerning the Carty investigation and the Gardaí investigating that matter. He stated that both the person who phoned him and the retired former Garda were known to him. However, he was not at liberty to disclose their identity at that time. He went on in the course of that statement to outline how some short time later he received a document on his fax machine from the person who had telephoned him. On the following day, Mr. Higgins photocopied the original fax having first deleted the details from the top of the document which indicated from what fax machine the document had been sent. He then instructed his secretary to transcribe the document subject to the exclusion of the line which read "for the information of Mr. Jim Higgins T.D.". Mr. Higgins made contact with Deputy Brendan Howlin T.D. who was the Justice spokesman for the Labour Party at that time. He also made contact with the Minister for Justice, Equality and Law Reform of the day, Mr. John O'Donoghue T.D. A meeting was arranged for the 27th of June 2000.

On the 1st of July 2000, Mr. Brendan Howlin indicated in a meeting with Assistant Commissioner Fachtna Murphy and Detective Superintendent Pat Brehony that on the evening of the 25th of June 2000 he had received a call from a parliamentary colleague who gave him a telephone number at which he could make contact with a person who had been a source of information to him in relation to the McBrearty affair. Mr. Howlin telephoned the person, who informed him of a number of matters concerning the investigation into the circumstances surrounding the death of Mr. Richard Barron and also of matters concerning the Carty investigation which was then under way. Mr. Howlin made notes of this telephone conversation. Mr. Howlin was not prepared to divulge the identity of the person to whom he had spoken on the telephone when interviewed by the two officers at his home on the 1st of July 2000. However, he did undertake to return to his source to see if he would be

willing to be identified to the Gardaí. In his statement made on the 4th of July 2000 Mr. Howlin stated that having returned to his source, that person was not willing to allow himself to be identified by Mr. Howlin to the Gardaí. Mr. Howlin handed over copies of notes of his discussions with his informant which were held on the 25th of June 2000 and the 1st of July 2000.

Sir, you will recall that the document which had been received by Mr. Higgins by fax on the evening of the 25th of June 2000 in broad terms indicated the following:

- That information had come from a serving Detective Inspector in the Dublin Metropolitan area concerning the Garda investigation in the Donegal Division.
- That the investigation into the conduct of Detective Sergeant John White being conducted by the Carty team was not being conducted in accordance with the instructions given by the Commissioner of An Garda Síochána.
- That the reason for this was that Detective Sergeant White had worked with two named Assistant Commissioners for whom he had produced evidence by unlawful means when required.
- That a large number of convictions, which had been achieved by the two Assistant Commissioners, had been obtained by means of planting evidence on suspects and that Detective Sergeant White was the source of this evidence. That payment for such services was paid to Detective Sergeant White in the form of allowing him unmerited expenses or allowances.
- There was a fear among members of the Carty investigation team that if Detective Sergeant White was fully investigated, he would use knowledge of this wrongdoing in his defence of any allegations leading to catastrophic consequences for An Garda Síochána.
- There was an allegation that Detective Sergeant White was involved in planting stolen property on people and to this end had a huge amount of stolen property at his disposal. It was alleged that he had moved his stock of stolen property to Donegal when he transferred to that Division.
- As a result of these matters it was felt that the Carty investigation would be unsuccessful in establishing the true facts of the illegal activities on the part of Detective Sergeant White and the document stated that the only other alternative was a full an open public enquiry.
- The document also stated that Detective Sergeant White was in regular contact with Assistant Commissioner Hickey and had an eighteen page document concerning activities which had been carried on in Dublin

and that this was effectively his passport to avoid the rigours of the law and frustrate the ongoing investigation.

The information which had been received by Mr. Brendan Howlin T.D., was along broadly similar lines. On the 27th of June 2000 a meeting was held between Mr. Higgins, Mr. Howlin, Mr. John O'Donoghue T.D., who was the Minister for Justice, Equality and Law Reform at the time and his private secretary, Ms. Una McPhilips. A copy of the document was handed to Mr. O'Donoghue at the meeting. He immediately brought the matter to the attention of the Garda Commissioner, who appointed Assistant Commissioner Fachtna Murphy to investigate both the provenance of the document and the allegations contained therein. Mr. Higgins and Mr. Howlin assisted that investigation by indicating how the information came into their respective possessions. However, they refused to reveal the identities of their respective sources of information. The Murphy investigation team has produced a number of reports which are included in the books of evidence for this module. It would appear that no evidence has been found by the Murphy investigation team which would indicate that the allegations contained in the faxed document have any substance. That was essentially the position when the matter was opened to you in the Preliminary Opening Statement of counsel delivered in November 2002. This statement will deal with developments which have occurred since that time which are germane to this term of reference.

Interviews Conducted by Mr. Brian Garvie

On the 10th of December 2002, Mr. Brendan Howlin, along with his solicitor, met with Mr. Brian Garvie, one of the Tribunal's investigators. In the course of that interview, he refused to name his informant, or to voluntarily provide his telephone records for the relevant period.

On the 9th of January 2003, Mr. Jim Higgins, along with his solicitor, met with Mr. Garvie. The memorandum of this interview appears in the book of evidence at page 740. It should be noted that there is a typographical error therein wherein in the body of the document there are two references to Mr. Howlin being asked questions, this should of course read "Mr. Higgins", throughout. During the interview with Mr. Garvie, Mr. Higgins was asked as to whether he had carried out any investigation to ascertain the reliability of the informant's information on this occasion. Mr. Higgins replied, "no I didn't – no reason to based on the fact that previous information had been accurate". Mr. Garvie then asked Mr. Higgins the following question:

Q. Sir, Did you speak personally to the ex-Garda who authored the fax?

A. Yes, on previous occasions, but not about the contents of the fax. I had spoken to the conduit.

Mr. Higgins was asked whether he was prepared to reveal the name of his source or to voluntarily provide his telephone records for the relevant period. He declined to do either of these things.

At the end of the interview with Mr. Higgins there was a significant development. When asked as to whether there was any further information which he would like to provide to the Tribunal, he replied that he had received a second faxed document some short time later on the 15th of July 2000. It had the same typeset and was marked confidential. This document ran to three pages. However, at that time Mr. Higgins was only able to locate two of the pages. He subsequently located the third page and furnished this along with the other two pages to the Tribunal. The second faxed document is illegible in parts. The Tribunal has not been able to obtain a better copy of the document. Accordingly it is not possible to set out the document in its full terms, but rather to set out those parts which are legible as follows:

Confidential

***Mr. Jim Higgins T.D.
Dáil Eireann,***

Dear Jim,

From a serving member of An Garda Síochána in the Donegal Division.

A number of serious questions has arisen concerning the Garda investigation in Donegal under the appointed of Assistant Commissioner in charge of the North West region – Mr. Kevin Carty.

One of the matters that this investigation has failed to cover concerns the abuse of power by certain named Gardaí is causing [something concern] to both senior and junior member's of the Force.

As you are aware a Detective Sergeant [White] was arrested under the provision of Section 4 of the Criminal Justice Act, 1984 and subsequently questioned. During his interrogation he threatened to expose alleged wrongdoing by very senior members of the Garda Force. He was suspended from duty but, within 48 hours he was mysteriously, reinstated and given his choice of a station in the Dublin Metropolitan area.

It has now come to notice that this was done over the head of, and against the express wishes of the Officer in charge of the investigation, Mr. Kevin Carty. Mr. Carty was in a helpless situation to prevent his reinstatement as the Commissioner, Mr. Byrne would have signed both forms, (i). Revoking suspension and (2). agreeing his requested transfer, at public expense.

The D/Sgt. Having been suspended, made telephone contact with a senior officer in Garda Headquarters and for some unknown reason it was decided at [illegible] to have him reinstated and given a [illegible].

- (1) [The transfer[?]] was done against the authority and express wishes of Assistant Commissioner Carty.*
- (2) [Illegible] the records from the phones in the D/Sgt's [illegible] in Letterkenny and Raphoe Garda Stations [illegible portion] were made and to whom?*
- (3) [illegible] did the Garda Commissioner, Mr. Byrne, take [illegible] whom he appointed to investigate Garda corruption in the [illegible].*
- (4) Was it as a result of the D/Sgt's threat to expose wrongdoings [illegible] within the Force that Commissioner now [illegible] be transferred.*
- (5) If it is the case, or indeed if the Assistant Commissioner [illegible] serving Gardaí now believe that this investigation is [illegible] similar incidents, that it is wholly flawed [illegible] by the members under investigation [illegible] that the full facts will not come out. They [illegible] comprehensive sworn public enquiry is the only way [illegible].*

[illegible] grave concern is the fact that certain [illegible] in the instructed harassment and abuse of [illegible] not coming within the scope of the investigation, namely Gardaí Sean Barrett, Noel Keaveny and Sergeant Sarah Hardigan. Those members were at the forefront of this alleged and instructed conspiracy, i.e. using public money allocated to BSE duties to harass and intimidate Mr. McBrearty and his family, giving evidence in open court under oath as instructed by Garda Superintendent, thereby committing allegedly barefaced perjury??

If those person are not part of the overall investigation then it [illegible] fails in what it set out to achieve.???

Finally, the Minister of Justice cannot say that the investigation was successfully establishing the facts when after the final report is delivered further serious matters come to light, and I can assure you Mr. Higgins that this is the way the matter will drag on and on and without the granting of a full sworn public enquiry, the Minister will get "egg on his face".

This whole affair can be summed up by the very old saying ... "Old sins cast long shadows".

It was never more true than in this case.

Yours faithfully,

A serving member of An Garda Síochana.

During the interview held on the 9th of January 2003, Mr. Higgins was asked as to why he had not provided this second fax at an earlier time. He responded as follows:

The reason that I kept it and didn't bring it to the attention of Assistant Commissioner Fachna Murphy was that I was of opinion that the information contained in the document would, in any event, be discovered or come to light in the course of the investigation by Fachna Murphy. The document was originally a three page document, but I have been unable to locate page 2. I have not given the document to anyone else other than my legal representatives. I am not in a position to stand over the contents. I have not done anything to determine the veracity of the allegations contained therein.

By letter dated the 18th February 2003, the solicitor acting for this Tribunal forwarded a copy of the three pages comprising the second faxed document to the Garda Liaison Officer with the Tribunal, who at that time was Superintendent Terry McGinn. This was done so that the second faxed document might be included in the investigation then being carried out by Assistant Commissioner Murphy.

In order to progress the matter further, the Tribunal, having heard all relevant parties, made an order for discovery against Mr. Higgins and Mr. Howlin directing them to make discovery on oath on all relevant documentation, including their telephone records for the relevant period. A similar order of third party discovery was made in respect of Eircom Plc. Mr. Higgins and Mr. Howlin instituted separate Judicial Review proceedings seeking to have the order for discovery made by the Tribunal set aside. On the 24th of March 2003 they obtained the leave of the High Court to institute proceedings seeking the quashing of the order for discovery. That matter would come on for hearing before the High Court in June 2003. However, before that hearing commenced there was a significant development.

Statement of Mr. Frank McBrearty Senior

On the 29th of May 2003, Mr. Frank McBrearty Senior, attended an interview with the Tribunal investigator, Mr. Brian Garvie. His solicitor, Mr. David Walley, was also present for that interview. In the course of that interview Mr. McBrearty Senior agreed that he would submit a statement concerning the two faxes which had been received by Mr. Jim Higgins. On the 19th of June 2003, the Tribunal received from Mr. McBrearty Senior's solicitor a statement which had been made by Mr. Frank McBrearty on the 11th of June 2003. In that statement, Mr. McBrearty Senior admitted that it was he who had sent the

two documents by fax to Mr. Jim Higgins. In the course of that statement he outlined how he had received the first document in the post and how he had forwarded it to Mr. Higgins:

The events of Donegal surrounding my family became almost weekly comment in the national media, and from an early time, I began to receive letters unsolicited from members of the public who had their own gripes against An Garda Síochána.

Many of these letters I ignored, and many more I destroyed. Some letters I received caused me great concern, as I had at that time, received little or no response of a supportive nature from any of the senior Gardaí with whom I made contact, or any assistance from the Government politicians. The Garda Síochána Complaints Board, did not progress their investigations in the manner which gave me confidence that they would get to the bottom of my complaints against the Gardaí. I believe that there was internal politics at play within An Garda Síochána, which would never allow me peace in my life in Raphoe or in the carrying on of my business.

I received in the post a certain letter (FMcB fig.1), in or about the month of June 2000 and I faxed a copy of it to Mr. Jim Higgins TD. I received a similar letter (FMcB fig.2) in or about the same time, and I also faxed a copy of this letter to Mr. Higgins. I do not remember the detail of the conversation I had with Mr. Higgins at the time I faxed the letters to him, but I was aware that Mr. Higgins was intending to bring the document referred to as FMcB fig.1 to the notice of the Minister for Justice, Mr. John O'Donoghue.

I recall talking with certain retired Gardaí at the time about these anonymous letters I had received and from their reaction, I felt that there could be some truth in the documents. I do not know who wrote the particular letters or indeed why the letters were sent to me, when they had already been addressed to Mr. Jim Higgins TD. I did not make contact with Mr. Brendan Howlin TD in connection with these documents.

I am not aware as to whether the contents of the letters have any truth and I did not personally have any evidence to show that the allegations made against Detective Sergeant White and Assistant Commissioners Kevin Carty and Anthony Hickey had any truth in them. It must however be understood at this time, I had no faith in the Garda authorities and I had no faith in the investigations, which had been undertaken by the Garda authorities.

In addition to faxing the document to Mr. Jim Higgins TD, I also sent a copy of the documents to my lawyers acting for me at that time.

Mr. McBrearty Senior went on in the course of that statement to describe the meeting which had been held in William Flynn's house on the night of the 7th of March 2000. He stated that Mr. PJ Togher did not speak at any time during the course of that meeting about Sergeant White or Assistant Commissioner Carty. He said there was no reference made to the allegations which were subsequently contained in the document which he had labelled FMcB fig. 1, being the first fax. Mr. McBrearty Senior went on to say that a few months prior to the date of his statement, which was made in June 2000, he had had a telephone conversation with Mr. William Flynn where Mr. Flynn had allegedly told him that his reason for making the allegations to the Murphy investigation team to the effect that Mr. Togher had spoken at the meeting on the 7th of March 2000 about the same matters which had been alleged in the first faxed document, was due to the fact that Mr. McBrearty had praised Mr. Jim Higgins and Mr. PJ Togher at that meeting rather than praising Mr. Flynn. He stated that Mr. Flynn believed that he had done an extraordinary amount of work on behalf of Frank McBrearty Senior and that he had not got the thanks and appreciation that he deserved for this work. Mr. McBrearty Senior continued in his statement:

I had the distinct impression from Mr. Flynn that he was in some way peeved and it was for this reason that he alleged [that] Mr. Togher made these comments at the meeting on the 7th of March 2000.

In the course of his statement, Mr. McBrearty Senior dealt with the question as to what had become of the originals of the documents which he stated he had received:

I have searched my papers and I cannot now find the document I referred to as FMcB1. It appears that I did not keep a photocopy of this document. I have a copy of the document I referred to as FMcB2, but I am not aware whether the document I have is the original document I received or a photocopy of same. I believe that part of the document FMcB2 which I have in my possession may be an original and the other part being a photocopy.

The receipt of this statement by the Tribunal on the 19th of June 2003, had a significant effect on the hearing of the Judicial Review proceedings which were due to start on the 24th of June 2003. Early on in the hearing of those proceedings, it was agreed that a short adjournment would be given so that the respective applicants, Mr. Jim Higgins and Mr. Brendan Howlin TD could be contacted to see whether their position as to guarding the confidentiality of their source had changed in the light of the statement which had been furnished by Mr. Frank McBrearty Senior. Having taken instructions from his client, it was indicated to the Learned High Court Judge by counsel acting on behalf of Mr. Higgins, that he had been relieved from the obligation of confidentiality and that he could confirm that he had in fact received the documents from Mr. Frank McBrearty Senior by fax. However, his counsel made it very clear that his client, Mr. Higgins, was still claiming privilege vis-à-vis the ultimate source of the document. Insofar as the discovery order was

concerned, he was in a position to withdraw his objection to that given the stance of Mr. Frank McBrearty Senior. At the conclusion of the day's hearing on the 25th of June 2003, counsel for Mr. Howlin was asked to check with his client as to whether his position had in any way changed in relation to the discovery order in the light of Mr. McBrearty Senior's recent statement. There had been some difficulty making contact with Mr. Howlin due to the fact that he was in Strasburg at that time. On the following morning, it was indicated by his counsel that contact had been made with him, but that his position was different to that of Mr. Higgins and that in effect he was still claiming privilege in relation to the identification of the source of his information and accordingly his objection to the discovery order stood. Judgment in the Judicial Review proceedings was reserved until the 13th of October 2003. The Learned High Court Judge held that Mr. Howlin was entitled to rely on parliamentary privilege to prevent disclosure of his telephone records. Accordingly, the discovery order made against him was quashed. This judgment was appealed by the Tribunal to the Supreme Court.

Interview with Detective Sergeant White

In the interim Detective Sergeant John White had been interviewed by Mr. Garvie on the 24th of June 2003. In the course of that interview he stated that in or about November 2001, he had received a letter from Mr. William Flynn requesting that he would meet Mr. Flynn at his home. He stated that at one of the meetings Mr. Flynn informed him that between himself and Frank McBrearty Senior, they had four informants within An Garda Síochána, two serving and two retired members. Sergeant White stated that Mr. Flynn had told him that Mr. Jim Madigan was a source of information for Frank McBrearty Senior. Some time later he told him that the other retired member was Mr. PJ Togher. Sergeant White stated that he was very surprised when he was told that PJ Togher was part of a conspiracy to have a letter sent by fax to Mr. Higgins in June of 2000. This was due to the fact that he had served as a Garda with Garda Togher many years previously. Detective Sergeant White stated that Mr. Flynn sent him a copy of the memorandum of that meeting which he had drawn up and furnished to the Murphy investigation team. He said that Mr. Flynn assured him that Mr. Togher had said the things that were outlined in that memorandum in the course of the meeting held at his house on the 7th of March 2000. Detective Sergeant White went on to state that in the course of his discussion with William Flynn, Mr. Flynn had told him that he did not believe that PJ Togher was the sole author of the faxed document, but that there had been others involved. When pressed on that aspect by Detective Sergeant White, Mr. Flynn apparently wrote down a name on a piece of paper and showed it to Detective Sergeant White. This was the name of a journalist. According to Detective Sergeant White, Mr. Flynn then went over to the fireplace and burnt the piece of paper on which the journalist's name had been written. According to Detective Sergeant White this exercise of writing down the name of the journalist on a piece of paper, also occurred at subsequent meetings. Detective Sergeant White stated that Mr. Flynn was not in a position to give any concrete evidence that the journalist had been involved in the creation of the fax.

Subsequent to the meetings that Sergeant White had with William Flynn, he met Mr. PJ Togher. He gave a detailed description of these meetings and stated that Mr. Togher categorically denied that he was involved in the creation or distribution of the faxed documents. Detective Sergeant White stated that he had pressed Mr. Togher over a number of meetings to tell him who had been responsible for sending the first fax to Mr. Jim Higgins. He gave the following account as to what was allegedly said to him by Mr. Togher at one of these meetings:

... I told Mr. Togher that before our conversation continued, I needed to know who sent the fax to Mr. Higgins and I felt that he was aware of the identity of the person. He gave it some thought and he says "right, I'll tell you that the fax that was sent to Mr. Higgins arrived in a brown envelope anonymously in the post at Mr. McBrearty Senior's door. It was in a brown envelope and Mr. McBrearty's name [was] on it. I believe it was posted. I can't be sure about that, or whether it was just dropped in the doorway. I just can't remember" and I asked him what happened to it after that. He said that it was immediately put into the fax machine by Frank McBrearty Senior and faxed to Jim Higgins. I thought that the fax arrived on a Sunday and I discussed this with him and he said that it may have come a day or two before, but it certainly was his view that Frank McBrearty had only just read it and paid very little attention to it and I expressed my disbelief at this that such a document would be scrutinised by Mr. McBrearty and discussed in great detail. I asked Mr. Togher had he read it. He said he hadn't read the document, but that Frank McBrearty had told him this, that he had faxed it on to Jim Higgins and I brought it to Mr. Togher's attention that the contents of the fax that Jim Higgins received was very similar to the memo of interview that Mr. Flynn made with Pat Brehony, the Detective Superintendent and that Mr. Togher is alleged to have said certain things in his house, which seems to have been included in the fax to Jim Higgins and, therefore, I felt that Togher had an involvement. He was quite adamant that Billy Flynn was a liar and that he had no such involvement and he didn't say those things in Mr. Flynn's house.

Detective Sergeant White went on in the course of that interview to vehemently deny that he ever planted anything on anybody in the course of his career in An Garda Síochána. He denied ever having any stolen property in a shed, or anywhere else for that matter. He said that he had no knowledge of any wrong-doing on the part of Assistant Commissioner Tony Hickey. He stated that he had never been involved in any of the wrong-doing alleged in the faxed documents with Assistant Commissioner Kevin Carty. He went on to state that he did have knowledge of wrong-doing on the part of Assistant Commissioner Carty, but this related to other matters in respect of which he had made statements to agencies outside the State.

In the course of the interview he was asked about his suspension from duty following his arrest in March 2000 and his subsequent application for a transfer to Dublin, the granting of that application and the lifting of his suspension. Detective Sergeant White outlined that on the evening of the 23rd of March 2000 he had met Assistant Commissioner Dermot Jennings in the "Hole in the Wall" pub. He said that in the course of that conversation, Assistant Commissioner Jennings suggested to him that he had three problems. Firstly, that he should drop any concerns that he had in relation to the statement of Frank McBrearty Junior which had been allegedly made on the 4th of December 1996 at Letterkenny Garda Station. He stated that he was told to forget about that altogether. Secondly, he was told that he should change his solicitor, because the solicitor was allegedly annoying the hierarchy in An Garda Síochána. Thirdly, it was suggested that he should apply for a transfer to Dublin immediately and that Assistant Commissioner Jennings would ensure that he would get into the Special Detective Unit based at Harcourt Square, Dublin. He stated that Assistant Commissioner Jennings told him that his suspension would not be lifted unless he applied for the transfer. Detective Sergeant White maintained that he was not entirely happy with this suggestion, however, he agreed that he would telephone Assistant Commissioner Jennings on the following day from a coin box. He said that he was told not to use his personal telephone. He said that when he asked Assistant Commissioner Jennings whether his telephone was tapped, the Assistant Commissioner merely replied that he would not ring Detective Sergeant White on his mobile, or on his landline and he could take whatever meaning from that that he wished. Sergeant White said that it was agreed that he would ring the Assistant Commissioner on the following day from a coin box. However, on the following day he phoned the Assistant Commissioner from his mobile phone to the Assistant Commissioner's mobile phone. He said that he gave the Assistant Commissioner the telephone number of a coin box in Stranolar and that approximately fifteen minutes later Assistant Commissioner Jennings rang him at that coin box. He said that they had a discussion about his future career and the Assistant Commissioner suggested that he would do everything he could to have Sergeant White's suspension lifted. He went on to state that on returning to his home he found Superintendent Jim Gallagher and Detective Superintendent Joe McGarty waiting to speak to him. They had a conversation and took a statement from him over a period of approximately three hours. He said that this was an eighteen page handwritten statement concerning an alleged break-in to his locker in Letterkenny Garda Station. Detective Sergeant White did not deal further in that interview with his application for a transfer to the Dublin Metropolitan Region. He finished the interview by giving his belief that it was Mr. Frank McBrearty Senior who was behind the malicious allegations which were made against him:

I believe that Mr. Frank McBrearty Senior was deeply involved in compiling these malicious allegations against me for the purpose of having my background investigated in Dublin in the hope that they would find something of some wrong-doing of some kind, that he had nothing to lose by doing this and that that was the main focus of these allegations. I believe that Assistant

Commissioner Carty has stated that the sole purpose of the allegations were to destroy his character. I don't agree with him. I think these allegations were directed towards me mainly ... Well, he [Frank McBrearty Senior] has expressed his hatred openly for me throughout 1997, 1998 and I believe that he holds a very serious grudge against me in relation to my duties that I carried out in 1997, 1998, particularly 1997 in relation to his liquor licensing premises, Frankie's Nightclub.

A Senior Counsel Contacts the Tribunal

On the 24th of October 2003 the Tribunal received a letter dated the 23rd of October 2003 from Mr. Martin Giblin SC. He is a senior counsel practising at the Bar of Ireland for a long number of years. He has represented members of the extended McBrearty, McConnell and Quinn families since in or about 1997. His letter was addressed to the solicitor to the Tribunal and was in the following terms:

Dear Ms. Crombie,

I would be obliged if you would draw to the attention of the Tribunal the fact that I spoke to Mr. Brendan Howlin TD by telephone on the 25th June 2000 having received from Mr. Frank McBrearty Senior, per facsimile, a copy of the document the subject matter at paragraph (h) of the Terms of Reference.

Yours sincerely,

Martin Giblin

The Senior Counsel's Anonymous Informant

Upon receipt of this letter, the Tribunal Solicitor requested Mr. Giblin to furnish a detailed statement in the matter. This he did on the 27th of November 2003. In the course of that statement Mr. Giblin outlined how he had been retained to represent members of the McBrearty and McConnell families since the early part of 1997. He was first instructed in connection with an application to the High Court for an injunction to prevent what his clients regarded as excessive Garda harassment of their licensed premises. He then came to act on behalf of the licence holders, the McBreartys, in relation to a series of District Court prosecutions which had been brought against them. He stated that at this time a large number of summonses had been issued against members of the McBrearty and McConnell families in respect of liquor licensing offences and public order offences. From an early stage, Detective Sergeant John White became a major player in the unfolding drama. He said that several of his clients were terrified of the Sergeant. He was told by Frank McBrearty Senior, that when he had first met Sergeant White early in 1997 he was told by Sergeant White in no uncertain terms that the McBrearty "empire" was going to be brought down. Mr. Giblin said that over time he came to the view that Detective Sergeant White was exercising an authority that far

exceeded anything that he had ever seen a Garda Sergeant exercise within his own district. Mr. Giblin described how, during the latter part of 1997, he was contacted by telephone in the Law Library by a man who became his anonymous informant concerning matters relating to the McBreartys:

During the Michaelmas Term in 1997, I was contacted in the Law Library by a man who identified himself on the telephone as a Garda based in Donegal who wanted to talk to me about the "Richie Barron case". I was very taken aback by this approach, as from my experience, it was highly unusual. This man asked me if I was prepared to talk to him on a confidential basis. I indicated willingness to discuss the matter with him on this basis, but when I asked him who he was, he declined to identify himself and stated that this was necessary. He went on to say that "your clients are innocent. They had nothing to do with the death of Richie Barron". He said that a lot of "guards" in Donegal were worried about what was going on in Raphoe and feared that some damage could be done to the Garda force, if it continued. He also stated that every Garda involved in the investigation into Mr. Barron's death believed that Frank McBrearty Junior had not made any confession. Sergeant White's name was on the man's lips, as well, but the conversation was somewhat awkward and disjointed.

Mr. Giblin went on to outline how his next contact with his informant was in early 1998. On this occasion the informant told him that Detective Sergeant White had been given authority to close down the McBrearty family business. The informant alleged that Sergeant White had been given authority to recruit members of the Garda force "as he saw fit" and that those persons who were involved in the inspections of the McBrearty licensed premises were being paid special allowances. Mr. Giblin did not understand that reference, but later came to believe that the informant was referring to the fact that certain people, who were assigned to BSE duties, were recruited to participate in the inspections of the McBrearty licensed premises in Raphoe. Sir, you will be aware that this forms part of the allegations contained in the second faxed document.

Mr. Giblin also stated that his informant told him that Detective Sergeant White was not part of the normal chain of command and that he had a lot of experience in carrying out "dirty tricks". He was told that the operation against the McBreartys was a "dirty tricks" operation and that the rank and file Gardaí in Donegal did not like what was happening. Mr. Giblin stated that some time later he had contact with retired Garda officers in Donegal who had dealt with the McBreartys over the years. They confirmed that it was not the Garda force in Donegal as a whole which was picking on his clients, but a small group of the Gardaí. Mr. Giblin outlined that he had two further contacts with this informant by telephone in 1998. The informant told him that some Gardaí in Donegal were happy that the McBreartys were taking a stand in the District Court in relation to the liquor licensing and public order prosecutions. The informant also told him that he had been talking to a senior officer in Dublin and that there was a lot of trouble in Garda Headquarters over the use of

Detective Sergeant White against the McBreartys and the use of criminal elements in the District Court prosecutions.

Mr. Giblin went on to outline how his final contact with the informant was in the summer of 1998 when he was again contacted in the Law Library. His informant told him that a witness was being brought in from outside Donegal to give evidence which would allegedly destroy the McBreartys in court. He mentioned that the object was to close down the licensed premises and made reference to doing a "Frank Short job" on the McBreartys. Mr. Giblin stated that by this time he considered his informant to be an extremely important witness. He asked whether he would be prepared to make a statement to the McBreartys' solicitor, but his informant refused. The informant told him that there were "dirty documents" circulating concerning his clients and that these were official Garda documents. His informant asked whether Mr. Giblin would be interested in seeing some of these documents. The informant told him that he would probably not make contact with Mr. Giblin again by telephone, but that if he could, he would send documents. Mr. Giblin went on to state that he regarded the information which he obtained about a witness from outside Donegal as being crucial information. He stated that it was due to this information that he insisted on having Mr. Bernard Conlon called to the witness box for the purpose of cross-examination in the course of the District Court prosecutions. He stated that much of the cross-examination which he carried out on this and other witnesses was based on information which he had received from his informant. He regarded the information concerning Mr. Bernard Conlon as being particularly relevant and helpful to the McBrearty case. He came to the belief that Detective Sergeant White was not operating on his own, but had received some form of authority from senior Garda management at the highest level.

Mr. Giblin described how he received documents from his anonymous informant:

When my informant indicated that he would send me documents he asked that I should always dispose of the envelopes in which they arrived. He told me first to examine carefully the envelopes. In a bizarre twist he informed me that he believed I was interested in five-a-side soccer and he asked me if I liked Nike gear. This conversation struck me as very odd, but by the time he said it I was satisfied that he was not up to mischief as I originally feared he might. When the first set of documents arrived I examined the envelope and discovered the "Nike" symbol on the inside of the envelope. On approximately six or seven occasions I received documents from this man and, on each occasion, the same symbol was placed on the envelope.

When the anonymous circular came in on my fax, from Mr. Frank McBrearty Senior, on the 25th of June 2000 I was intrigued by the contents as it touched on major themes which I had proposed to explore in court, but could not now pursue. Furthermore, whilst John White was a topic of conversation on many occasions

between my clients and their advisors, allegations were being made which were entirely new insofar as it was stated that Sergeant White had, on a systematic basis, planted evidence on suspects to the knowledge of the two named Assistant Commissioners, and that he had a stash of stolen property at his disposal for this purpose. I have never heard this suggestion made before, although I had heard many allegations made against John White.

I spoke to Mr. McBrearty on the telephone and he told me the document was anonymous. I asked him if "his friends" had seen the document. The reference to "friends" was a reference to the retired members of An Garda Síochána who were sympathetic to Mr. McBrearty and his family and who felt that an injustice was being done to them. From time to time Mr. McBrearty Senior received unsolicited material in the post, most of it completely irrelevant. In the early stages, he sent us much of this, but I asked him to stop, as I did not have the time to deal with such material. I asked him not to send material unless it was important and relevant. If his "friends" had seen it and he still sent it on, this would be an indication that material was worth reading. On this occasion, the document had its own intrinsic merit. We were very careful not to discuss sensitive matters on the telephone in those days and we would certainly never mention names.

I felt I recognised the author of the document as my anonymous informant from whom I have not heard for a considerable period. I had informed none of my clients, including Mr. McBrearty Senior, of contact from my anonymous informant.

I was not privy to the conversation between Mr. Jim Higgins TD and Mr. McBrearty on the 25th June 2000, nor to the conversation in Billy Flynn's house some time earlier.

By June of 2000 I was very unhappy with the conduct of the investigation into events in Donegal insofar as the Raphoe case was concerned. I was of the opinion that the "Carty investigation" was bogged down and not going anywhere, insofar as my clients were concerned. Furthermore, extremely distressing information was coming in. My anonymous informant sent me a copy of Garda Tina Fowley's "report" that she had seen Detective Inspector McGinley practising the signature of Frank McBrearty Junior on the 4th of December 1996 in Letterkenny Garda Station. This report, assuming it to be true, had a damaging effect on my confidence in the Carty investigation.

My informant also sent two sections of the Carty investigation statements, one of which dealt with the "interrogation" of the four Dublin based detectives who had an involvement in the "confession" of Frank McBrearty Junior. These documents, again

assuming them to be true, told me much about the much heralded objectivity, independence and open mindedness (in which I had originally advised my clients to share my trust) of the Carty investigation.

My informant also sent me some documents relating to a round table conference between Professor Harbison and members of the Carty team in the course of which the State Pathologist seemed to be inclined to the view that Mr. Barron probably died as a result of a road traffic incident.

Mr. Giblin went on to state that as a result of receiving the confidential information from his informant, the copy of the faxed documents which he had received from Frank McBrearty Senior and the other documents sent to him by his informant, he came to the conclusion that he was mistaken to have advised his clients to co-operate with the Carty investigation. He came to hold the view that the Carty investigation was not evidence-led, but was agenda-driven. He went on to outline how he had discussed the Raphoe case with several colleagues over the years and how he had expressed dissatisfaction with the Garda efforts to enquire into the whole affair. One of the colleagues with whom he spoke was Mr. William Penrose BL, TD. He stated that as a result of discussing the Donegal case with Mr. Penrose, he came to establish contact with Mr. Brendan Howlin TD, who was the Labour Party spokesman on justice and a former Minister for Justice. Mr. Giblin supplied him with information on the shortcomings which he had identified with the Carty investigation, in particular what he regarded as the unjustified delay and the Garda approach to dealing with the matter.

Mr. Giblin stated that by June of 2000 he was of the opinion that the system of justice had completely failed his clients. He stated that when the anonymous document came in on the 25th of June 2000 he contacted Mr. Penrose and asked him could Mr. Howlin telephone him. He believed that the contents of the anonymous document were credible because he felt that he recognised the author and the allegations against Sergeant White in the document were similar to the instructions received from his Donegal clients and his own observations of Sergeant White's activities. Mr. Giblin stated that by June 2000 he felt that there was something deeply unwholesome about Sergeant White's relationship with senior Garda management. He also felt that Sergeant White could not have carried out his campaign, as he saw it, against his clients over such a lengthy period of time, without permission from highly placed officers within An Garda Síochána. He stated that he felt that the allegations contained in the first faxed document might well have been simply correct in relation to the reasons for the Garda failure to declaim his client's innocence of involvement in the death of Richard Barron and to stop the District Court prosecutions and other forms of harassment which were then still allegedly continuing. He stated that the reason that he felt justified in bringing the Raphoe case into the political domain was because he was convinced that the Carty investigation was going nowhere as far as his clients were concerned. He felt that there was a real risk that Assistant Commissioner Carty was compromised and that the anonymous document

provided a possible answer as to how, why and by whom such compromise arose.

Mr. Giblin went on to state that on speaking to Mr. Howlin after the 25th of June 2000, he was disgusted to learn that the Minister for Justice had put the matter of the investigation of the document into the hands of An Garda Síochána. He stated that this was yet another completely useless investigation which had been commenced by yet another senior Garda officer. He said that at that stage he disengaged from the matter of the anonymous faxed document even though he felt that there were issues raised which were worthy of a bone fide investigation. Finally, he came to deal with the reason as to why he had stayed quiet for so long in relation to the fact that he was the source of the information provided to Mr. Howlin on the evening of the 25th of June 2000:

My clients have been of the opinion that paragraph (h) is of much less significance than other modules. For my own part, I felt that this module would be dealt with much later on than the other modules. I had a very busy Michaelmas Term 2002 and was surprised to read in the newspapers that Mr. Howlin and Mr. Higgins had been called before the Tribunal at such an early stage in the sequence of modules. I was completely confident that the Tribunal would not make orders for discovery against the TD's and that I could, then, have approached the Tribunal.

Once orders for discovery were made against Mr. Howlin. I felt that I was put in an impossible situation as, an approach by me to the Tribunal would have the effect of undermining any effort by Mr. Howlin to assert an important constitutional privilege. I felt that it would be wrong for me to take any action which would have such an effect.

Issues of privilege also arose. If a TD has a privilege in receiving information from a citizen, that citizen might also enjoy a corresponding privilege. Besides, Mr. McBrearty's fax to me was, arguably, covered by strict legal professional privilege. Mr. McBrearty has released me from this privilege to enable me to furnish this statement.

Interview with Mr. PJ Togher

On the 9th of September 2003 retired Garda PJ Togher was interviewed by Mr. Brian Garvie. He emphatically denied that he had played any part in the creation or distribution of the faxed documents. Mr. Togher also furnished to the Tribunal a very detailed affidavit which had been sworn by him on the 10th of April 2003. In that affidavit he categorically denied that he was the author of the anonymous allegations documents, or that he had played any part in the disseminating of any such information to any party whatsoever. He stated that he had never been and was not at the time of swearing that affidavit a "source of information regarding any activities by members of An Garda

Síochána in Donegal or elsewhere". He denied that he ever made any allegations of misconduct against Assistant Commissioner Hickey, or Assistant Commissioner Carty. He accepted that he had been present at the meeting in William Flynn's house on the 7th of March 2000. He denied that he had made any significant input to that meeting and in particular he denied that he had said the things which were alleged by Mr. Flynn in his memorandum of that meeting drawn up approximately one year later. He stated that in the course of that meeting Mr. Flynn had walked about the room engaging in a long monologue about a number of matters connected to the McBrearty affair. He alleged that the so-called memo of that meeting as furnished by Mr. Flynn to the Murphy investigation team, was untruthful and had been put together by Mr. Flynn so as to incriminate Mr. Togher and at the same time to ingratiate Mr. Flynn to the Murphy investigation team because he was anxious to enlist the help of senior Gardaí to overturn earlier convictions which had been made against him in relation to telephone calls which he had made to Mrs. Rosaleen White, the wife of Detective Sergeant John White. He stated that the memo drawn up by William Flynn was false, malicious and libellous. Mr. Togher accepted that he had met Mr. Higgins on a number of occasions and had been instrumental in introducing Mr. McBrearty to Mr. Higgins. In relation to the actual faxed documents, he was asked the following:

Q. Do you have any knowledge as to where those faxes originated?

A. Absolutely not. I don't know whether they were faxes or letters. Absolutely not.

Q. Did you see these faxes at any time prior to them being sent to Mr. Higgins?

A. The documentation that was shown to me on the 15/1/2002 I had not seen before, but I saw a similar typed documentation at some stage which bore Mr. Higgins name at some stage. I mentioned it briefly to Mr. McBrearty and I can't recall what he said. Whether he said he sent it to Mr. Higgins or Mr. Higgins sent it to me or whatever. But, at the time, I thought his answer did not correspond with the front page of what he was looking at. Bear in mind, I told, as my first statement to the Tribunal, my verbal statement this morning, I advised Mr. McBrearty not to be dealing in anonymous rubbish and for the most part, he heeded my telling him.

Q. Did he tell you that he had forwarded correspondence to Mr. Higgins?

A. No. The Dear, I call it the Dear Jim one, since this came into the domain, this Tribunal business, I refer to it as the Dear, there is Dear Jim on it. I am not sure who he said he forwarded it to. But I thought he said he forwarded it to

somebody, but whoever he said he forwarded it to, as he walked out of the office, it didn't really make sense with me and I discarded it and I think, I'm not sure, if that was part of ones I burned, but I'm [not] sure. I think I threw it into the bundle. It didn't matter to me. I saw so many anonymous letters, some coming from allegedly sources with Garda stamps, some coming from cranks. I never, during my service, dealt much with anonymous letters, but you have to deal with some of them you know.

Mr. Togher outlined how in February or March 2000 he had been shown a somewhat similar document by Mr. Frank McBrearty Senior:

A. *Yes. He didn't show it ... I think I found it in the vicinity of the office. I don't think he specifically showed it. He may have. He may have said what do you think of that? That was usually what he said when he got an anonymous letter. What do you think of that? he may have said and my comment would usually be, it could be rubbish and maybe it's not. I would say it is probably rubbish, ninety percent rubbish. A person who writes anonymous letters always has a reason for doing so.*

Q. *Was this letter in a similar format of a dot-matrix printer?*

A. *It was similar. I discovered later on the 21st, on the ... when the Garda came, I must get a date for it. On the 15/1/2002, it then reminded me on the 15/1/2002 while I was having a perusal of the letter, which was handed to me by Mr. Behony, that I had seen a similar letter, similar in writing, similar not in content perhaps, but similar in writing of the type. It was an unfamiliar type. It was large. Technically I didn't know a name for the type, but it didn't seem like anything I have seen for quite some time before. I cannot recall seeing that type of type. It then dawned on me that I had seen a letter similar and I think it was afterwards it dawned on me and I didn't give it much thought, but I remember at the time, that either Mr. McBrearty said what do you think of that, or that I saw it. I think to be honest, I am not a hundred percent sure. I think he said I sent that to Mr. Higgins. It came in the post and he either went to answer the telephone outside or he went to do something and suddenly it dawned on me that that comment did not appear right because I thought that he had received it from Mr. Higgins by post. Do you understand me? That Mr. Higgins had got this letter from a person allegedly someone within the Garda Síochána and that he had sent a copy of it to Mr. McBrearty in the post, but I didn't go into detail about that.*

Mr. Togher ventured the opinion that the faxed document looked like something that would be produced by Mr. William Flynn. However, he had no evidence to back up this belief.

Matters essentially rested there until the judgment of the Supreme Court was handed down in the Judicial Review proceedings on the 20th of December 2005. The judgment of the High Court was reversed and the order for discovery made on the 28th of February 2003 was reinstated.

Mr. Howlin's Account

On the 22nd of March 2006, Mr. Brendan Howlin TD swore an affidavit giving a detailed account of his dealings with the allegations which were reported to him on the evening of the 25th of June 2000 by Mr. Martin Giblin SC:

On the 25th of June 2000, late in the evening on my return to my Wexford home, I received a telephone call from a parliamentary colleague, Deputy Willie Penrose, who said that Mr. Giblin was most anxious to speak to me about a matter of some importance. Mr. Giblin did not have my home telephone number and contacted Deputy Penrose whom he knew from legal practice.

I telephoned Mr. Giblin. He informed me that serious information had been brought to his attention regarding Detective Sergeant White. This information suggested that criminals were used by Sergeant White to give perjured evidence against Frank McBrearty, that Sergeant White planted evidence on a McBrearty associate, that Sergeant White planted stolen property on a youth in Lifford, County Donegal, and that this action was common for Sergeant White.

The critical issue, Mr. Giblin believed in all of this, was that, according to this evidence, Sergeant White was in a position to blackmail two Assistant Commissioners of An Garda Síochána who he named as Assistant Commissioner Kevin Carty and Assistant Commissioner Tony Hickey.

Mr. Giblin told me that the evidence was coming from a Garda based in Donegal who had previously provided Mr. Giblin with most reliable information.

Mr. Giblin told me that the Donegal-based Garda had been approached by a senior Detective from Dublin who said to him that Sergeant White was being looked after.

Mr. Giblin suggested to me that Sergeant White's expenses could make interesting reading. Mr. Giblin also suggested to me that his information indicated that Sergeant White had access to a stash of stolen property to plant on people. He further suggested

to me that every case involving Sergeant White would need to be re-examined.

Mr. Giblin said that his real concern was that the Carty investigation is compromised. He further told me that a case “with a Ballymun connection” would cause difficulty for Assistant Commissioner Carty. Sergeant White, his information suggested, did “dirty work” for Assistant Commissioner Carty.

The following day, Monday, the 26th of June, I received a telephone call from the then Fine Gael Justice Spokesperson, Deputy Jim Higgins. He told me that he had received information similar to my own. Deputy Higgins told me that he was in the process of making arrangements to meet with Mr. John O’Donoghue, the then Minister for Justice, Equality and Law Reform. We agreed that we should jointly meet with the Minister and make him aware of the allegations which we had received.

A meeting was arranged for the following day, Tuesday, the 27th of June 2000 in the Minister’s Dáil office in Leinster House. Attending the meeting were Minister O’Donoghue; the Minister’s private secretary, Ms. Una McPhillips; Deputy Jim Higgins and myself.

I brought with me my handwritten note of my conversation with Mr. Giblin of Sunday, the 25th of June. Deputy Higgins had a copy of a fax which he had received. Deputy Higgins gave a copy of his fax to the Minister and to me. During the meeting I recounted to the Minister the details of my conversation with Mr. Giblin. I did not identify my informant by name. I simply referred to him as a “legal non-Garda source”. I made it clear to the Minister that while I had complete trust in the integrity of my source, I had no proof whatsoever of the veracity or otherwise of these serious allegations. I believed that it was my duty to bring them to the notice of the Minister and for him to take whatever action thereafter that was appropriate.

As is now known, the Minister made contact with the Garda Commissioner. The Commissioner appointed Assistant Commissioner Murphy to investigate these matters.

The following Saturday, July 1st 2000, Assistant Commissioner Murphy and Detective Superintendent P Brehony called by arrangement to my home in Wexford. I confirmed to them the contents of my discussions with my source. I told them that I was not free to identify the source, but at their request I undertook to make fresh contact with him to establish if he was willing to speak to the investigating Gardaí.

After the departure of Assistant Commissioner Murphy and Detective Superintendent Brehony, I made contact again with Mr. Giblin. He told me that he was not willing to have his identity disclosed to the Gardaí. He further suggested to me that the investigation should interview the following members of An Garda Síochána – Sergeant John White; Garda John O’Dowd; Superintendent Kevin Lennon; Superintendent McGinley; and Chief Superintendent Denis Fitzpatrick.

Mr. Giblin told me that the Donegal based Garda would give evidence in court in the High Court action Mr. McBrearty was taking against Ireland and the Attorney General. He told me that Sergeant White had informed the Carty investigation that he, Sergeant White, had evidence on Assistant Commissioner Kevin Carty and Assistant Commissioner Hickey that “would bring them down”.

I asked Mr. Giblin if this could be bluster from Sergeant White. He responded that that might be the case.

By arrangement I met again with Assistant Commissioner Murphy and Detective Superintendent Brehony in my Dáil office the following Tuesday, the 4th of July 2000. During that discussion I made a signed statement to Detective Superintendent Brehony and gave him a note of my discussion of the 1st of July with my source and confirmed to the investigating Gardaí that he was unwilling to be identified.

On the 27th of April 2006 Mr. Howlin furnished his affidavit of discovery, including copies of his notes of his telephone conversations with Mr. Giblin.

A Further Statement from Mr. Giblin S.C.

Mr. Martin Giblin S.C. was furnished with a copy of Mr. Howlin’s affidavit and was asked to make any comments that he wished in relation to the content of that affidavit. In his statement made on the 28th of April 2006, Mr. Giblin stated that he had told Mr. Howlin that local criminals had been recruited to make false statements against the McBreartys in the context of the prosecutions in the District Court. He stated that in June of 2000 he had seen a statement made by Robert Noel McBride to the bar manager employed by the McBreartys, Mr. John Mitchell, on the 13th of December 1998. He said that he believed that statement. He indicated that the reference to evidence being planted on “a McBrearty associate” related to an allegation made by Mr. Paul Quinn that a controlled substance had been planted on him by Detective Sergeant John White. He also believed that Sergeant White and his colleagues had given evidence in the District Court of comments allegedly made by his clients in the licensed premises and elsewhere in Raphoe in circumstances in which he believed that it was clearly impossible for any such comments to have been heard by the Gardaí. Mr. Giblin stated that the reference to a “youth” in Lifford was a conflation of two alleged incidents. The

first being in relation to the planting of a shotgun by Detective Sergeant White and the second being that Mr. Giblin heard that there was a later incident where goods had allegedly been planted on a youth in Lifford, but he had no detailed knowledge of that incident.

Later in the statement, Mr. Giblin gave a further account of dealings that he had with his anonymous informant:

During the course of my telephone contact with my anonymous source, I tried to encourage him to come forward and give evidence in the District Court prosecutions against my clients. He was unwilling to make a statement to my solicitor on a confidential basis, or otherwise. It is difficult to convey in words how desperate the plight of my clients was during that time. I frequently discussed with colleagues the likely prospect that some of our clients would be sent to prison on the spurious charges upon which they were being tried; we were not optimistic. Notwithstanding the concerns of my anonymous contact, he was unwilling to come forward at that time. He did, however, give a firm undertaking that he would give evidence in the High Court when I gave him an assurance that those proceedings would not come on for hearing for at least two years; we were too optimistic. He undertook to disclose himself, when the dust had settled, as he expressed confidence that Frank McBrearty Junior and Mark McConnell would not be charged with murder. He told me that he was confident that colleagues would give evidence in the High Court and would tell the truth provided they were served with subpoenas. When I spoke to Mr. Howlin on the second occasion, I was, by that stage, extremely confident that my anonymous source, at least, would come forward and give evidence in the up coming High Court actions.

A Statement from Mr. Higgins

A final significant development on this aspect occurred on the 20th of October 2006 when the Tribunal received an affidavit of discovery from Mr. Jim Higgins which was sworn on the 19th of October 2006. Included with that affidavit was a statement from Mr. Higgins which was made on the same date. In that statement he outlined how he had first met Mr. McBrearty Senior when he called to his constituency office at Clare Street, Ballyhaunis, County Mayo in March 1999. He said that Mr. McBrearty was most upset and aggrieved by the treatment which he perceived he was receiving from members of An Garda Síochána. Mr. Higgins requested Mr. McBrearty to furnish a statement of his complaints. Subsequently he received a typed statement from Mr. McBrearty Senior. Some weeks later in April 1999, he received a visit from Mr. McBrearty Senior by appointment at Leinster House. Mr. McBrearty Senior brought with him a gentleman whom he introduced as a retired member of An Garda Síochána by the name of Mr. P J Togher. Mr. Higgins stated that Mr. Togher expressed the view that the McBrearty family were a family of good standing in the community and totally innocent of any

involvement in the death of the Late Mr. Barron. Mr. Togher also pointed out what he perceived as serious flaws in the so-called “confession” of Mr. McBrearty’s son, Frank McBrearty Junior. Mr. Higgins stated that that meeting ended with an assurance from him that he would vigorously follow up Mr. McBrearty’s grievances with the Minister for Justice, Equality and Law Reform. Mr. Higgins stated that he raised these concerns initially by way of correspondence with the Minister. However, as he was not satisfied with the pace at which the Minister’s office was dealing with his queries he commenced tabling a series of written and oral questions to the Minister in Dáil Eireann. He stated that he raised a number of parliamentary questions in the following months. He went on to deal with his contact with Mr. Frank McBrearty Senior on the 25th of June 2000:

Late in the afternoon of Sunday, the 25th of June 2000 I received a telephone call on my home telephone from Mr. Frank McBrearty Senior. He told me that I would shortly be receiving a facsimile message from him which was drawn up by a Garda source. It contained very serious allegations concerning senior Garda officers and further, it demonstrated how the Garda investigation into the wrongful arrest of members of the immediate and extended McBrearty family were seriously compromised. The fax arrived shortly after the phone call. It was marked for my attention and headed “confidential”. It ran to two pages. We spoke again by phone. I asked Mr. McBrearty who gave him the document and he indicated that it came from “my friend”. Often in our previous conversations, Mr. McBrearty had used the phrase “my friend” when speaking of Mr. PJ Togher. On this occasion I understood his use of the term “my friend” to mean Mr. Togher. Mr. McBrearty stated to me that he had forwarded the document to me in confidence.

Mr. Higgins outlined how he had no means of verifying the contents of the substantive allegations contained in the document. However, he felt that the allegations did require investigation. Accordingly, he decided that his only option was not to go public with the information, but to bring the document to the attention for the Minister for Justice, Equality and Law Reform, Mr. John O’Donoghue. He outlined how, on the morning of the 26th of June 2000, he gave the fax which he had received to his secretary and asked her to transcribe same because of its partial illegibility. In order to protect the identity of the sender of the fax, he removed the telephone number from the top of the faxed document, prior to photocopying it. He stated that he then shredded the original of the fax. He made arrangements to meet with the Minister for Justice on the 27th of June 2000. That meeting took place in the afternoon and was attended by Mr. John O’Donoghue; Ms. Una McPhilips; Deputy Brendan Howlin and Mr. Higgins. He handed a copy of the transcribed document to the Minister. He also gave a copy to Mr. Brendan Howlin. Subsequently he made a statement to the Murphy investigation team. He refused to identify who had given him the document as he understood that he had a constitutional protection as well as a moral and civil obligation to protect the identity of those who had brought the information to his attention.

He went on then to deal with his interview with Mr. Brian Garvie in January 2003:

In January 2003 I met with Chief Superintendent Brian Garvie to answer queries which the Tribunal had in respect of the document I received. While preparing for that meeting I came across a second facsimile, which I received on the 15th of July 2000 also from Mr. McBrearty. It was a three page document, of which page two was missing. At the time that this Tribunal was established in April 2002 I had completely forgotten about the existence of this second fax and as I say above, only recalled it when I came across it while looking through my papers in preparation of the meeting with Mr. Garvie in January 2003.

After July 2000 I continued to vigorously pursue the McBrearty case in the Chamber of the Dáil, with the intention of pressing home the need for the Government to establish a Tribunal of Enquiry into all of these matters. I am sure that the record of the Dáil and Seanad will show that over the following period the pressure was mounting on both the Minister and the Government to accede to this demand. There were a number of debates in respect of the issues involved. In particular, I recall a debate in November 2001 on a private members' motion moved by my colleague, Deputy Alan Shatter, calling for the establishment of a Tribunal of Enquiry. This was an exceptionally fiery debate which ultimately resulted in the Government voting down the motion, but such was the clamour that the Minister agreed to appoint Mr. Shane Murphy SC to conduct an independent evaluation of the Garda files in relation to all of these matters. After the establishment of this Tribunal, as I have noted above, I met with Chief Superintendent Brian Garvie in January 2003. In the course of that meeting I again declined to reveal the name of the sender of the first facsimile. This position remained constant until June 2003, at which point Mr. McBrearty released me from my obligation to him.

In view of the fact that I was not in a position to stand over the veracity of the information contained in the facsimiles I received in June and July 2000, I refrained from bringing them into public focus as I had done previously in the case of other justice-related issues where I was in possession of substantial information. Indeed, having discussed the matter in detail, both Deputy Howlin and I felt that to avail of the protection of privilege provided to utterances by Members within the Chambers of Dáil and Seanad Éireann and to refer by name to the two senior Gardaí named in the facsimiles [forwarded to me] and telephone contacts [with Mr. Howlin] would constitute an abuse of that privilege. Hence our decision not to go public, but to place the matter confidentially in the hands of Minister O'Donoghue.

For the avoidance of all doubt, I received each of the two facsimiles from Frank McBrearty Senior. I do not know the author of either document, but understand that Mr. McBrearty received the documents from Mr. PJ Togher.

Mr. Higgins had an interview with the Tribunal investigators on 16th February 2007. At the time of dictation of this statement, there is only an unapproved version of the transcript available. In the course of that interview Mr. Higgins outlined four occasions on which he met with Mr. PJ Togher – at his offices in Dáil Éireann in April 1999, at his own house in the autumn of 1999, at his offices in Dáil Éireann in March 2000 and in the Sligo Park Hotel in January 2007. In relation to the last meeting, he stated that this had been arranged at the request of Frank McBrearty Senior prior to Christmas 2006. He stated that this meeting was the only time that he discussed the first faxed document with Mr. Togher:

...the only time I actually discussed it with PJ Togher was in the presence of Frank McBrearty at an arranged meeting in the Sligo Park Hotel in the first week of January this year and that was the only time that I actually discussed it with him. I told him that I would be telling the Tribunal that I understood from Frank McBrearty when the fax came on the 25th June 2000 that I understood it to come from PJ Togher as the person who actually gave it to Frank McBrearty and I told him that I would be referring to him as my friend and he said well if you have to say that, if that's what you believe, then you tell the Tribunal that and really we didn't have any further discussion about it after that.

In the course of that interview Mr. Higgins indicated how Frank McBrearty Senior had changed his stance on what in relation to authorship of the first anonymous document:

Mr. McBrearty sometime last year, or the year before, I can't say for definite, as the Tribunal was progressing I mentioned to Mr. McBrearty about the fax and basically put it to him "where had it come from?" and he said he basically rowed away from what he had told me on the 25th June 2000. He said I was getting a huge volume of information, documents etc. through the post, some of them I threw aside, some of them I dealt with; he said some of them were anonymous some of them signed and so on and this basically is how it had arrived at him. In other words he was saying that it was not PJ Togher, he was disclaiming any knowledge of P. J. Togher having anything to do with it, he was saying that it arrived in the post to him and he sent it down to me.

The transcript of this interview will be circulated as soon as Mr. Higgins has had the opportunity to approve it in the usual way.

An interview with Mr. Jim Madigan.

Mr. Jim Madigan was interviewed by the Tribunal investigators on 12th and 16th December 2006. He stated that he had never seen the faxed document until shown it by the Tribunal investigators. He denied that he had anything to do with it. He stated that he had been friendly with Mr. Frank McBrearty Senior for over thirty years. He had also done a very small amount of work for Mr. McBrearty. He stated that he met with Mr. Martin Giblin S.C. on four occasions – once in Frank McBrearty Senior's house, twice in hotels in Donegal and once in his daughter's house. They discussed Mr. Bernard Conlon and matters connected with the liquor licensing prosecutions in the District Court. He had a recollection of Mr. PJ Togher coming into the meeting at Frank McBrearty Senior's house. Mr. Madigan stated that he also visited PJ Togher on two or three occasions. Mr. Madigan denied sending any documents to Mr. Giblin. He stated that he may have spoken to him on the telephone one occasion from his home. He stated that Frank McBrearty Senior had also used the telephone in his home on a number of occasions.

Mr. Madigan stated that he had never seen the anonymous documents prior to his interview with the Tribunal investigators. He did recall mentioning the anonymous documents to Frank McBrearty Senior. He said that Mr. McBrearty was not inclined to speak very much about the topic, except to say that as far as he, Mr. McBrearty knew, they came from a retired Detective Inspector in Dublin. Mr. Madigan stated that Mr. McBrearty Senior did not seem to want to talk about the matter. He stated that Mr. McBrearty was very keen to have a Tribunal of Inquiry set up. He felt that this was the only way to get the matter sorted out. He stated that Mr. McBrearty Senior had called to his home on hundreds of occasions, but that these visits had ceased for no particular reason in 2003.

On 16th February 2007, Mr. Madigan submitted a statement to the Tribunal. This largely reiterated the information which he had previously provided to the Tribunal investigators. In relation to Mr. PJ Togher, he stated that Mr. Togher might have accompanied Mr. McBrearty Senior on one occasion on a visit to his house. He also recalled how he had visited Mr. Togher at his home to ascertain whether Mr. Togher was going to provide a character reference for Mr. Frank McBrearty Senior.

Mr. Madigan outlined how he became aware of the existence of the anonymous documents from articles he read in the newspapers. He recalled raising the matter with Mr. McBrearty:

I raised the matter with Frank McBrearty who was not keen to discuss it. He mentioned that he had received the document from a retired Detective Inspector in Dublin. He never gave me any name and was not inclined to talk about it. I never thought that Frank McBrearty might be behind it, although as time went on, it occurred to me that he might have had some involvement in it. From my knowledge of him, I do not think he would have been capable of drafting the contents of the fax. I cannot say for

certain whether he was maintaining the position that he did not know the name of the retired Detective Inspector in Dublin, or whether he was indicating that such a person wished to remain anonymous.

This statement will be circulated as part of the documents in the Book of Evidence.

An Interview with Mr. Ken Smyth

Mr. Ken Smyth had an interview with the Tribunal investigators, Mr. Patrick Cummins and Mr. Michael Finn on the 25th of January 2007. He confirmed that he had acted as solicitor for the extended McBrearty and McConnell families from in or about 1997 until approximately mid-April 2002. He stated that he had also done some personal work for retired Garda Mr. P J Togher at that time. He denied that he ever had possession of the first faxed document, or any knowledge of it, until it was forwarded to him by Frank McBrearty Senior. He emphatically denied that he had possession of that document prior to the time when it was furnished to the two members of Dáil Eireann. He stated that he had not heard of any of the material contained in the faxed document being discussed prior to his receipt of it. However, he did have some recollection of some mention being made about the diversion of BSE monies from their intended purpose to fund raids on the McBrearty premises. He outlined how Mr. Togher had given assistance to Mr. McBrearty in relation to various matters that were of concern to him. He stated that Mr. Jim Madigan also gave considerable assistance to Mr. McBrearty at that time. He stated that he did not know who the author of the document was. He denied that he had any part in drafting either of the documents.

The Substantive Allegations

A detailed investigation was carried out into the allegation that BSE funds had been misused, whereby members of An Garda Síochána had carried out inspections and raids on the McBrearty licensed premises, at a time when they ought to have been carrying out BSE duties. That allegation was contained in the second faxed document. The allegation was directed against Sergeant Sarah Hargadon and Gardaí Séan Barrett and Noel Keaveny. The investigation was carried out by Inspector J J Keane. He examined each of the members A.85 and A.13 forms for the relevant period and compared same with the BSE roster for that period. He interviewed each of the members concerned and also the two superintendents who had been in charge for the relevant period. He did not find any evidence to substantiate the allegation, nor did he find any evidence of criminality against any of the three named members. His report on the matter is included in the books of documentation prepared for this module.

The documentation examined by Inspector Keane has been reviewed by Mr. Pat Cummins, one of the Tribunal's investigators. He will give evidence as to the results of his review.

In relation to the allegation concerning the transfer application submitted by Detective Sergeant John White in March 2000, the manner of its granting and its subsequent withdrawal, the Tribunal has received an amount of documentation from the various members concerned setting out their position in relation to the entire transfer matter. Superintendent James P Gallagher was the superintendent who recommended that the applications submitted by Detective Sergeant John White should be granted. He gave an interview to Mr. Brian Garvie on the 2nd of September 2003. In the course of that interview he was asked as to why he had recommended that the transfer application should be granted.

Q. *Why did you support it?*

A. *Well, he was looking for it. He didn't tell me why he was looking for it.*

Q. *But, with all due respect, it is not a rubber stamp process. I am sure that everyone that walks into your office and requests a transfer, just because they are looking for it, does not automatically receive it?*

A. *He recommended to me that it be sent immediately to Dublin, that it had to go to Dublin immediately so I had no time to think about it. I automatically recommended it. I had no reason, I wasn't aware of any background to it or what had transpired.*

Q. *But again, with all due respect, are you suggesting that anybody who walks into your office in a hurry and requests a transfer, because you do not have time to think about it, you are going to recommend it?*

A. *Not necessarily, but I had been talking to him for I'd say three hours, taking a statement from him. He never mentioned a transfer to me. Yet an hour and a half later he comes in requesting a transfer. He seemed to be in a hurry to get it and I recommended it. Chief Superintendent Fitzpatrick and I were sitting there. Chief Superintendent Fitzpatrick made no comment on it.*

Q. *Be that as it may, why did you feel that it was appropriate to recommend it?*

A. *Because he was looking for it.*

Q. *And for that reason alone?*

A. *Yes. I wasn't aware of any contact that he might have had with anyone else.*

The Tribunal has an amount of documentation surrounding the application for transfer which was submitted by Detective Sergeant John White in March 2000. This documentation has been distributed in the Book of Evidence. One of those documents is a report dated the 23rd of March 2000 from Chief Superintendent Denis Fitzpatrick addressed to the Assistant Commissioner, Human Resource Management and Research. In that report Chief Superintendent Fitzpatrick gave the following recommendation:

The suspension of duty of D/Sergeant White expires at 7.00 p.m. on Friday, the 24th of March 2000. It is my recommendation that D/Sergeant White's suspension from duty should be continued for the following reasons:

- ***The nature and seriousness of the allegations contained in Mr. Conlon's statement***
- ***The supporting statements available in relation to the allegations contained in Mr. Conlon's statement.***
- ***The nature of the duties D/Sergeant White carries out in his current position, he is a member of the Detective Branch whose duties are operational, investigative, security, reporting and supervision.***

By letter dated the 24th of March 2000, Assistant Commissioner Fachtna Murphy, who was then the Assistant Commissioner in charge of Human Resource Management and Research at Garda Headquarters, wrote to the Chief Superintendent at Letterkenny in the following terms:

I refer to your report of 23rd instant wherein you recommend that the suspension of D/Sergeant John White, 19787D from duty be continued. I am also in receipt of your report of the 24th March 2000 wherein you recommended acceptance of his application for a transfer to the Dublin Metropolitan Region.

In light of the fact that I have agreed to the transfer as requested, I do not propose to continue the suspension of the member.

There is also a second letter of the same date from Assistant Commissioner Murphy to Chief Superintendent Fitzpatrick informing him that Detective Sergeant White will move on permanent transfer to the Special Detective Unit, Harcourt Square, with effect from that date – the 24th of March 2000. The Tribunal also has the letter dated the 20th of April 2000 wherein Detective Sergeant White asked to withdraw his application for a transfer on the basis that his application had been made under extreme duress and inducement and on the understanding that he would take a different stand or view in relation to allegations of harassment and improper procedure, by various members of the investigation teams and effectively allow his evidence to suit the wishes of his superior officers. Assistant Commissioner Murphy has made the case that he agreed to the transfer and reinstatement due to the

fact that at the time there was an agreement with the relevant representative bodies, that if a member who was facing disciplinary investigation could be transferred to another district, rather than be suspended, that this course of action would be taken. He stated that that was the reason why Detective Sergeant White's application was acceded to in this instance. In the circumstances, Sir, it will be necessary for you to hear all of the officers concerned in this transfer application to determine whether there is any truth to the allegation contained in the second faxed document.

In relation to the perjury allegation contained in the second faxed document, this is dealt with in a number of interviews which were held with Mr. Brian Garvie. The officers concerned denied any knowledge of any circular "targeting" the extended McBrearty family. A number of circulars have been produced, wherein members of An Garda Síochána based in Donegal were advised that if they were approached by any of the McBrearty family or persons working for them, that they should immediately report this to their superior officers and likewise if they received any correspondence from them.

As already outlined in the preliminary opening statement of counsel delivered in November 2002, the substantive allegations contained in the first faxed document were the subject of extensive enquiry by the Murphy investigation team. The reports issued by Assistant Commissioner Murphy form part of the documentation which has been distributed in advance of the hearing of this module. No evidence was unearthed in the course of those wide-ranging investigations which would lend any credence to the allegations contained in the first faxed document. Your current Tribunal investigators, Mr. Michael Finn and Mr. Pat Cummins, have reviewed the documentation which was examined in the course of the Murphy investigation. They have also reviewed the documentation which was examined as part of the investigation carried out by Inspector JJ Keane. The review of documentation to date by the Tribunal investigators has not found any evidence to support any of the allegations advanced in either of the faxed documents. A full report of the Tribunal investigators review will be included in the book of evidence as soon as possible.

The only other allegation of the planting of material by Detective Sergeant White is the allegation made by Mr. Paul Quinn that in or about February 1997, a controlled substance was planted into the pocket of his jacket by Detective Sergeant White so that he could be arrested and prosecuted under the relevant drugs legislation. Sir, you have already heard some evidence in relation to this allegation in the course of the Barron Investigation Module. You will recall that Detective Sergeant White gave evidence on the matter and was cross-examined by senior counsel on behalf of Mr. Paul Quinn. The remainder of the evidence on this aspect will be taken in the course of the Harassment Module.

That concludes the summary of the developments which have taken place in this module since the delivery of the Preliminary Opening Statement in November, 2002.

19th February 2007

**Paul McDermott SC
Anthony Barr SC
Kathleen Leader BL**