

1 THE PROCEEDINGS COMMENCED ON THE 17TH MAY, 2011, AS
2 FOLLOWS:

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4 CHAIRMAN: Before we begin I'd like to thank everybody who
5 has taken the trouble to come here today and in particular
6 I want to thank those who have travelled from Northern
7 Ireland.

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9 It's as well that we should remember that certain central
10 to the events that occurred on the 20th March 1989 were the
11 personal tragedies of two families, the Breens and the
12 Buchanans, and I want again to extend to those families my
13 own sympathy on their loss and the sympathies of everyone
14 here present.

15
16 As you'll hear in the opening statement to be delivered in
17 the next public sitting, Tribunal's counsel have delved
18 very deeply into the issue into which I am task to inquire,
19 namely, the suggestion that there was collusion by a member
20 of An Garda Síochána or other state agency in the killings
21 of Chief Superintendent Breen and Superintendent Buchanan
22 on the 20th March 1989, after they had been in Dundalk
23 Garda Station that day for a short meeting. Such matters
24 are not for today's sitting.

25
26 What I am concerned about today is to deal with any
27 procedural matter that may, in the view of one or other
28 party, need clarification. For my own part I've suggested
29 we consider sitting days as I'm anxious insofar as it may
30 be practical to see whether it would be possible to sit

1 during the law vacations, particularly during the beginning
2 and the end of the upcoming Whit vacation.

3

4 You will see that today's list is divided into public and
5 private sessions, this is because there are matters the
6 Tribunal will have to consider from time to time in private
7 sitting in interest of maintaining a necessary confidence.
8 I hope that such occasions will be kept to a minimum as
9 this inquiry is mandated to be a public one. I have
10 provide for a private sitting today as there may be
11 procedural issues relating to matters of the nature I've
12 just described which one or other party may wish to raise.

13

14 I now call on Mr. Mills the Registrar to start today's
15 list.

16

17 REGISTRAR: Before we begin could you please make sure your
18 mobile phones are switched off.

19

20 Applications for representation. Application of MacGuill &
21 Company.

22

23 MR. MacGUILL: Yes, Chairman, I appear on behalf of Finbarr
24 Hickey who has been notified by the Tribunal, a request for
25 his assistance, and as I understand it he's not viewed by
26 the Tribunal at this juncture as a person against whom
27 there is an allegation of wrongdoing within the terms of
28 reference, but he is a witness whose co-operation has been
29 required and therefore I apply for representation. I have
30 previously indicated this in correspondence.

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CHAIRMAN: You have indeed, thank you very much,

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Mr. MacGuill.

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By application date 30th June 2009 representation is sought

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on behalf of Finbarr Hickey. Mr. Hickey is no longer a

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member of An Garda Síochána, but during his time as a

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Sergeant at Hackballscross Garda Station he countersigned

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false applications by members of Provisional IRA for Irish

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passports. He was convicted on his plea and sentenced to a

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term of imprisonment. The Tribunal has been investigations

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allegations against now former members of the force of

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dealings with the IRA and Finbarr Hickey is one such

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person. He has been interviewed in this context by the

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Tribunal and he will be called to give evidence.

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Having regard to these matters I'm satisfied that it is

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appropriate that he be granted representation for the

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entire of the Tribunal hearings. Such representation shall

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be limited to solicitor and one counsel.

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MR. MacGUILL: May it please you, Chairman.

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REGISTRAR: Application on behalf of Richard Ferguson.

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MR. ROBINSON: May it please you, Mr. Chairman, I appear on

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behalf of the Police Service of Northern Ireland. Richard

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Ferguson is one of my instructing solicitors. I believe,

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Mr. Chairman, you have an application for representation

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before you and I don't intend to go into the detail, but I

1 wish to formally move the application.

2 CHAIRMAN: Thank you very much.

3 By application dated the 9th June 2009 Richard Ferguson
4 solicitor for the Police Service Northern Ireland sought
5 representation on behalf of that organisation. The
6 application speaks of being granted the status of an
7 interested party. This is a concept unknown in this
8 jurisdiction. I make this comment not only because it is
9 correct, but also as a only warning to parties coming from
10 the jurisdiction of Northern Ireland not to assume that
11 matters are dealt with the same way in this jurisdiction.
12 It is necessary for such parties to acquaint themselves
13 with the provisions of Irish law starting with the
14 Constitution and the provisions of the Constitution which
15 deal with personal rights as interpreted by our courts. In
16 particular Section 2(b) of the Tribunals of Inquiry
17 Evidence Act 1921 speaks of authorising the representation
18 of any person appearing to be interested. This has be
19 taken to mean any person affected by the work of a
20 tribunal.

21

22 I accept that the PSNI as a successor to Royal Ulster
23 Constabulary has an interest in a general sense in the work
24 of tribunal. Indeed it has provided valuable assistance to
25 the Tribunal in many ways during the course of our
26 investigations. The PSNI seeks leave to make oral and
27 written submissions to the Tribunal. The PSNI may make
28 written submission to the Tribunal at any stage of the
29 proceedings. The Tribunal is a fact finding exercise and
30 no more. Oral submissions do not arise. The PSNI seek

1 standing to introduce evidence. Any evidence will be
2 adduced by the Tribunal's counsel. If the PSNI has
3 evidence it wishes to put before the Tribunal it should
4 provide same to the Tribunal's counsel who will decide
5 whether it should be submitted. The reason for this
6 procedure is that the Inquiry is not adversarial but
7 inquisitorial and all evidence is to be put before me by my
8 counsel.

9
10 There remains the issue under Section 2(b) of the Act of
11 1921 of whether the PSNI as a successor to the RUC is a
12 person appearing to them to have an interest in the sense
13 that I have referred to. I accept that this is the case,
14 as I also accept the entitlement of the PSNI as successor
15 to the RUC to cross-examine witnesses should the need
16 arise. I grant representation to the Police Service of
17 Northern Ireland limited to solicitor and one counsel.

18
19 MR. ROBINSON: Obligated, Mr. Chairman, there are some other
20 house-keeping matters which I'll reserve my position on and
21 will discuss with the members of the Tribunal privately.

22
23 CHAIRMAN: Very good, thank you very much.

24
25 REGISTRAR: Application of Michael Flanigan & Company.

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27 MR. MOONEY: Good morning, Mr. Chairman, I appeared
28 instructed by Michael Flanigan on foot of a written
29 application that was forwarded to the Tribunal 6th May and
30 I'm formally moving that application at this point.

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2 CHAIRMAN: Thank you very much. By submission dated the
3 6th May 2001 Michael Flanigan Solicitors sought
4 representation for Freddie Scapaticci. It should be noted
5 that such an application was previously considered and
6 refused by me on the grounds that at that time no matter
7 had emerged in relation to Mr. Scapaticci suggesting he was
8 a person who appeared to be affected by the Tribunal's
9 terms of reference. The situation has altered since then
10 and I accept, to use the language of Chief Justice in *Re*
11 *Haughey 1971, Irish Reports 217*, Mr. Scapaticci has become
12 a person who is of risk of having good name or his personal
13 property jeopardized and therefore he is entitled to the
14 protection set out at page 263 of the judgment. That being
15 the case he is entitled to representation, but this
16 entitlement will be limited to those occasions when he may
17 be mentioned in evidence. Representation is to be by
18 solicitor and one counsel.

19
20 MR. MOONEY: I'm obliged.

21
22 CHAIRMAN: Thank you.

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24 REGISTRAR: Application of the Attorney General.

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26 MS. BUTLER: Morning, sir, I appear with Mr. Douglas Clarke
27 instructed by the Chief State Solicitor to make an
28 application for a limited representation on behalf of the
29 public interest instructed by the Attorney General. A
30 written submission has been furnished. I apologise for the

1 lateness of that submission, it only reached you yesterday.

2

3 CHAIRMAN: That's perfectly all right, thank you very much.

4 By submission dated the 16th May 2011 the Attorney General

5 sought representation on behalf of the public interest. It

6 is clear that there is a public interest in the question of

7 whether there was collusion by a member of An Garda

8 Síochána or other state agency in the murders of Chief

9 Superintendent Harry Breen and Superintendent Bob Buchanan

10 on the 20th March 1989. While it is clear the Tribunal in

11 fulfilling its remit will have to have regard to the public

12 interest, the Attorney General is tasked with the wider

13 duty of protecting and vindicating the public interest

14 pursuant to her constitutional role as guardian of the

15 public interest. While a tribunal is to a large extent

16 master of its own procedures I am happy to follow the

17 authority of *TDI Metro Limited -v- Fingal County Council*

18 2004, *Irish Reports* 337, referred to in the Attorney

19 General's submissions.

20

21 One point I wish to make in relation to the Attorney

22 General's submissions is the reference to making

23 submissions to the Tribunal. The Tribunal is a fact

24 finding exercise. If the Attorney General wishes to make

25 submissions on behalf of the public interest same may be

26 made in writing.

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28 I grant the Attorney General representation on behalf of

29 the public interest limited to one solicitor and two

30 counsel.

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REGISTRAR: Application of Kevin R. Winters & Company.

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REGISTRAR: Application of Dermot Lavery & Co.

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MR. LAVERY: Mr. Chairman, I make an application for full representation on behalf of our client Mr. Neil Copeland. We may not have made a formal application to you in

1 writing. We only received documents ten days ago. We've
2 received documents and it's clear our client would seek to
3 adduce evidence that our client was involved with two
4 members of the Provisional IRA. In addition two
5 publications namely *Bandit Country* and an *An Irishman's*
6 *Diary* there are allusions to our clients, again in the
7 documents supplied there is allegations of a very serious
8 nature relating to our client of an incident which we would
9 say would have no probative value, but which is an incident
10 of a very serious nature and an attack on our client's
11 character. Most importantly the Tribunal stated in a
12 letter of the 4th February 2011 our client is somebody who
13 is an individual whose conduct is under investigation by
14 this tribunal and as such we apply for full representation,
15 that is senior counsel, we have been granted junior counsel
16 to date.

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18 CHAIRMAN: Thank you.

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20 MR. DILLON: Chairman, may I suggest that you reserve your
21 position on this matter and that you might give a decision
22 closer to the opening.

23
24 CHAIRMAN: Yes, I think that might be desirable.

25 Mr. Lavery I appreciate what you've said. I think it is
26 better that there should be some further discussions
27 between your firm and the solicitor and counsel for the
28 Tribunal and I can deal with the matter at a later date
29 before the opening statement if that's all right with you.

1 MR. LAVERY: Obligated. I have one further submission to
2 make, I might make that in private.

3

4 CHAIRMAN: Certainly, in the private sitting of the
5 tribunal?

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7 MR. LAVERY: Yes, Mr. Chairman.

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9 CHAIRMAN: It is of a confidential nature?

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11 MR. LAVERY: It is.

12

13 CHAIRMAN: Very good, well I can take that immediately
14 afterwards. Perhaps I can retire now until the hearing
15 room, people have left so that Mr. Lavery's application can
16 be taken in private.

17

18 MR. DILLON: I wonder if you might consider the next item
19 on the agenda before you rise which is the fixing of
20 sitting days.

21

22 CHAIRMAN: Yes.

23

24 MR. DILLON: As you mentioned in your opening comments
25 we're due to begin on the 7th June and by way of opening
26 statement to be followed on the 9th June at the beginning
27 of the taking of evidence. This does overlap with the Whit
28 break and I think it might be helpful if we could know
29 today if at all possible whether parties or their legal
30 representatives will be available on the 9th and 10th June

1 which is the Thursday and Friday of that week and then the
2 Monday and Tuesday not the following week but the week
3 after that which is the conclusion of the Whit break and
4 then the question of whether it will be possible to have
5 sittings during the course of the month of September might
6 also be considered. Maybe the parties might be in a
7 position to advise you of their availability during those
8 periods.

9
10 CHAIRMAN: Perhaps counsel would like to express a view on
11 that.

12
13 MR. DURACK: Certainly counsel on behalf of the Garda
14 Commissioner have no difficulty with that.

15
16 CHAIRMAN: Has anyone else any difficulty?

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18 MR. MacGUILL: I suppose it fits in with the submission I
19 was going to make you briefly in any event. I certainly
20 don't think in principle there will be difficulty with
21 those dates, but it would be immensely in ease of the
22 parties if the transcript could be made available as an
23 e-transcript on an overnight basis because that would for
24 instance facilitate parties monitoring proceedings because
25 perhaps we won't all be concerned with every aspect of all
26 the evidence. I know your colleague Lord Saville adopted
27 exactly that course and that was greatly in ease of the
28 parties in his inquiry. Also in terms of the flexibility
29 of September dates and the vacation dates if the
30 transcripts were available it would be obviously easier for

1 people to arrange for stand in representations to ensure
2 fluidity of the proceedings and I would be most anxious
3 that that would be available, but in principle we've
4 certainly no difficulty with the dates that have been
5 canvassed.

6
7 MR. DILLON: Chairman, in regard to the availability of
8 transcripts I think the view has been taken that
9 transcripts will not be put on the internet, they'll not be
10 available in that sense, nor are they going to be made
11 available to the parties. I think while this is not a
12 trial I think the best analogy might be that of a criminal
13 trial where there is a transcript that is taken but it's
14 not available to the parties. That's the also allusion to
15 a trial I wish to make because clearly this is not a trial,
16 this is not an adversarial process. I think the view has
17 been taken that transcripts are for the use of the Tribunal
18 and will not be made available to the parties, but subject
19 to that I have nothing further to say.

20
21 MR. MacGUILL: I wouldn't wish to disagree with my
22 colleague, but of course transcripts are available in the
23 course of criminal trials on application and routinely are
24 provided, for instance, in the special criminal court, so
25 there should be no reason in principle, as I say it's
26 directed to economy of time and fluidity of the proceedings
27 and there would appear to be no good reason why parties
28 granted representation ought not to have the facility of a
29 transcript, of material that they have heard in the course
30 of that day but may need to explain to a colleague to

1 ensure continuity and a minimum of delay and a minimum of
2 expense in the operation of the Tribunal.

3

4 MS. LAFFERTY: If I might add to that, Chairman, parties
5 have been granted representation for the sole purpose of
6 appearing before this tribunal, appearing before you,
7 Chairman, for the purpose of taking notes and participating
8 in the proceedings, and I think if a decision has been made
9 by you sir there will not be a transcript handed out I
10 think it's perfectly in order due to the sensitivity of the
11 matters being discussed in this tribunal. I don't see any
12 necessity when the parties are represented that they have
13 to have the additional assistance of a transcript on a
14 daily basis.

15

16 MR. DURACK: If I may, sir, on behalf of the Garda
17 Commissioner we would be very anxious that there be a daily
18 transcript. It is essential. There has been a very wide
19 disclosure by the Gardaí of a very large amount of
20 information to the Tribunal. There has been total
21 co-operation with that. Our concern is we should be in a
22 position to react immediately to anything that is said in
23 evidence and appropriate instructions can be obtained.
24 We'd be very anxious there would be daily transcripts.

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26 MR. LEHANE: Sir, on behalf of Mr. Corrigan although the
27 matter was previously discussed with counsel for the
28 Tribunal we'd be very anxious a transcript be provided of
29 the public sittings, obviously not the private sittings
30 which go on in private, but in circumstances where this is

1 a public tribunal and the public are entitled to attend I
2 can't see how a transcript wouldn't be provided on the
3 basis that the matters being discussed would be sensitive
4 and I would also refer you Chair, to the precedents of
5 other tribunals, the Moriarty Tribunal, the Mahon Tribunal
6 and indeed the Commission to Inquire into Child Abuse in
7 which hearings were held in private but transcripts were
8 made available to affected parties.

9
10 MR. LAVERY: Mr. Chairman, I also support the application
11 for transcripts. We wouldn't propose to be here on every
12 single day so where a transcript is available it would be a
13 great assistance to us to keep us up-to-date on what is
14 going on. Just to say as well we've no difficulty with the
15 dates that are proposed.

16
17 MR. ROBINSON: Mr. Chairman, in relation to the dates I
18 have no difficulties with the dates that have been
19 proposed. In relation to the transcript given that the
20 representation of the PSNI and the distance one would have
21 to travel to attend the PSNI would be in favour of daily
22 transcripts so we can review the evidence and make any
23 written submissions and indeed attend on the next occasion.
24 It would be of great assistance in that regard to minimise
25 costs to the public purse. In addition to that I would
26 suggest, Mr. Chairman, if you are minded to make that order
27 that there is some form of filtering exercise undertaken
28 prior to transcripts being disseminated simply on the basis
29 that if there are sensitive matters contained within that
30 evidence that they are spotted at their earliest

1 opportunity before publication.

2 CHAIRMAN: Thank you very much.

3

4 MR. MOONEY: Mr. Chairman, in respect of the dates again on
5 behalf of Mr. Scapaticci I don't we've no difficulty in
6 terms of the dates. I would like also to support the
7 application for a daily transcript particularly in our
8 circumstances where the form of representation we've been
9 granted to days at which we're directly involved as it were
10 in what's at issue on that date. The nature of the
11 Tribunal it's my respectful submission it's very difficult
12 for the Tribunal to control what could happen in the public
13 sessions on the other days and we would need to keep an eye
14 on what's happening and a transcript in my respectful
15 submission would be critical to that and I'd support that
16 application.

17

18 CHAIRMAN: I think I should reserve my decision of this
19 matter and I'll give it whenever the next public sitting
20 will be when I'm dealing with other matters. Meanwhile if
21 you wish to have any further discussions with the solicitor
22 for the Tribunal please feel free to do so.

23

24 I should emphasize by the way I would welcome any use of
25 any available date whether in term or outside term for the
26 hearing of evidence because I think it's important that we
27 should proceed with all speed, possible speed that we can
28 without of course depriving the Tribunal of its
29 effectiveness, nevertheless we should move as quickly as
30 possible to a conclusion. I think that would be the wish

1 of everybody.

2 Any other applications?

3

4 MR. DURACK: Might I raise a number of issues, Judge, which
5 I raise in the interest of speed and efficiency of the
6 Tribunal. You indicated back on the 3rd March 2006 that
7 having completed your investigative stage you would then
8 re-interpret your terms of reference, and you said:

9 *"I will at a later stage and having reviewed such evidence*
10 *as may have become available by then, set out*
11 *interpretation of terms of reference thereby establishing*
12 *the parameters of the Inquiry to be conducted."*

13 I was wondering, sir, whether that was intended to form
14 part of the opening statement or whether you intended to do
15 that separately?

16

17 CHAIRMAN: I think that will be dealt with in conjunction
18 with the opening statement and I can make a pronouncement
19 on that at that stage clarifying the issue that remains to
20 be dealt with.

21

22 MR. DURACK: Clearly as I say there is a vast amount of
23 documents and information that tribunal of investigation
24 may not have considered relevant.

25

26 CHAIRMAN: Yes, naturally. Thank you.

27

28 MR. DURACK: The other matter I thought I should raise with
29 the Tribunal is we would seek an indication of how it
30 intends to proceed, whether it intends to investigate

1 individual issues in a sort of module form as has been done
2 with other tribunals and how long it anticipates any such
3 module will take, and the witnesses that would be relevant
4 to that module. Equally, sir, in your Rules of Procedure
5 which you published you indicated that, I think it was the
6 general rules 29 - 31, which you intended to serve a list
7 of witnesses and the proposed evidence on all the
8 interested relevant parties, and you indicated at that
9 stage that you intended to give notice of at least eight
10 weeks prior to the hearing of the said evidence. Now I
11 understand and can appreciate it will be necessary to
12 abridge that time and insofar as we can we should deal with
13 things as efficiently as possible, but I wonder when we can
14 we expect to receive the list of witnesses and the notice
15 of their proposed evidence.

16
17 I'd also raise an issue, just to highlight it, while
18 clearly there would be a statement of evidence, the
19 intended evidence of the witness, that also there should be
20 disclosed any other statements made by the witness which
21 may have any effect on the credibility of what becomes the
22 ultimate evidence and that would, you will be aware that
23 that was dealt with in relation to another tribunal where
24 there was requirement of disclosure of all other interviews
25 et cetera with the witness.

26
27 I think they're the only matters I wish to raise with you
28 in public and I perhaps will have something to say in
29 private if I may.
30

1 MR. DILLON: May I suggest that you reserve your position
2 on these matters and revert to them on a later date.

3

4 CHAIRMAN: I think so and certainly not later than the
5 opening statement day. Thank you.

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7 Any other application?

8 Very well, I'll rise for a few minutes until the room is
9 cleared.

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11 **THE PROCEEDINGS THEN ADJOURNED.**

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1	afterwards [1] - 10:14 agency [2] - 1:20, 7:8 agenda [1] - 10:19 ago [1] - 9:1 allegation [1] - 2:27 allegations [2] - 3:12, 9:7 allusion [1] - 12:14 allusions [1] - 9:6 altered [1] - 6:9 amount [2] - 13:19, 16:22 amplified [1] - 8:8 analogy [1] - 12:12 anticipates [1] - 17:2 anxious [5] - 1:29, 12:2, 13:17, 13:24, 13:28 apologise [1] - 6:30 appear [4] - 2:23, 3:26, 6:26, 12:27 appearance [1] - 8:4 appeared [2] - 5:27, 6:8 appearing [4] - 4:18, 5:12, 13:6 application [21] - 3:5, 3:29, 4:1, 4:3, 4:6, 5:29, 5:30, 6:5, 6:28, 8:6, 8:8, 8:10, 8:17, 8:28, 8:30, 10:15, 12:23, 14:10, 15:7, 15:16, 18:7 Application [6] - 2:20, 3:24, 5:25, 6:24, 8:2, 8:26 applications [2] - 3:9, 16:2 Applications [1] - 2:20 apply [2] - 2:29, 9:14 appreciate [2] - 9:25, 17:11 appropriate [2] - 3:18, 13:23 arise [2] - 4:30, 5:16 arrange [1] - 12:1 aspect [1] - 11:25 assistance [5] - 2:25, 4:24, 13:13, 14:13, 14:24 assisting [1] - 8:16 assume [1] - 4:10 attack [1] - 9:10 attend [4] - 8:19, 14:1, 14:21, 14:23 Attorney [8] - 6:24, 6:29, 7:4, 7:12, 7:18, 7:21, 7:24, 7:28 authorising [1] - 4:17 authorities [1] - 8:14 authority [1] - 7:17 availability [2] - 11:7, 12:7 available [14] - 8:21, 10:30, 11:22, 11:30, 12:3, 12:10, 12:11, 12:14, 12:18, 12:22, 14:8, 14:12, 15:25, 16:10 aware [1] - 17:22	B	Bandit [1] - 9:5 basis [4] - 11:23, 13:14, 14:3, 14:28 become [2] - 6:11, 16:10 becomes [1] - 17:21 begin [3] - 1:4, 2:17, 10:25 beginning [2] - 2:1, 10:26 behalf [17] - 2:23, 3:6, 3:24, 3:27, 4:5, 6:28, 7:5, 7:25, 7:28, 8:5, 8:7, 8:10, 8:29, 11:13, 13:16, 13:26, 15:5 best [1] - 12:12 better [1] - 9:26 between [1] - 9:27 Bob [1] - 7:9 break [2] - 10:28, 11:3 Breen [2] - 1:21, 7:9 Breens [1] - 1:11 brief [2] - 8:7, 8:18 briefly [1] - 11:19 Buchanan [2] - 1:21, 7:9 Buchanans [1] - 1:12 Butler [1] - 6:26	client's [1] - 9:10 clients [1] - 9:6 closer [1] - 9:22 co [2] - 2:28, 13:21 Co [1] - 8:26 co-operation [2] - 2:28, 13:21 colleague [3] - 11:26, 12:22, 12:30 collusion [2] - 1:19, 7:7 coming [1] - 4:9 Commenced [1] - 1:1 comment [1] - 4:8 comments [1] - 10:24 Commission [1] - 14:6 Commissioner [2] - 11:14, 13:17 Company [5] - 2:21, 5:25, 8:2, 8:5, 8:18 completed [1] - 16:7 concept [1] - 4:7 concern [1] - 13:21 concerned [2] - 1:26, 11:25 conclusion [2] - 11:3, 15:30 conduct [1] - 9:13 conducted [1] - 16:12 confidence [1] - 2:7 confidential [1] - 10:9 conjunction [1] - 16:17 consider [3] - 1:29, 2:6, 10:18 considered [3] - 6:5, 11:6, 16:24 Constabulary [1] - 4:23 Constitution [2] - 4:14 constitutional [1] - 7:14 contained [1] - 14:29 context [1] - 3:14 continuity [1] - 13:1 control [1] - 15:12 convicted [1] - 3:10 Copeland [1] - 8:29 correct [1] - 4:9 correspondence [2] - 2:30, 8:11 Corrigan [1] - 13:26 costs [1] - 14:25 Council [1] - 7:17 counsel [14] - 1:17, 3:20, 5:2, 5:4, 5:8, 5:17, 6:18, 7:30, 9:15, 9:27, 11:10, 11:13, 13:27 countersigned [1] - 3:8 Country [1] - 9:5 County [1] - 7:17 course [7] - 4:25, 11:5, 11:27, 12:22, 12:23, 12:29, 15:28 court [1] - 12:24 courtesy [1] - 8:20 courts [1] - 4:15 credibility [1] - 17:21 criminal [3] - 12:12, 12:23, 12:24 critical [1] - 15:15	cross [1] - 5:15 cross-examine [1] - 5:15
2	2(b) [2] - 4:16, 5:10 2001 [1] - 6:3 2004 [1] - 7:18 2006 [1] - 16:6 2009 [2] - 3:5, 4:3 2011 [5] - 1:1, 7:4, 8:7, 8:9, 9:12 20th [3] - 1:10, 1:22, 7:10 217 [1] - 6:11 263 [1] - 6:14 29 [1] - 17:6	C		D	
3	30th [1] - 3:5 31 [1] - 17:6 337 [1] - 7:18 3rd [1] - 16:6			daily [5] - 13:14, 13:17, 13:24, 14:21, 15:7 damages [1] - 8:13 date [7] - 3:5, 9:16, 9:28, 14:13, 15:10, 15:25, 18:2 dated [5] - 4:3, 6:2, 7:4, 8:7, 8:9 dates [9] - 11:21, 11:29, 12:4, 14:15, 14:17, 14:18, 15:4, 15:6 days [5] - 1:29, 9:1, 10:20, 15:9, 15:13 deal [5] - 1:26, 4:15, 8:6, 9:28, 17:12 dealing [1] - 15:20 dealings [1] - 3:13 dealt [4] - 4:11, 16:17, 16:20, 17:23 decide [1] - 5:4 decision [3] - 9:21, 13:8, 15:18 deeply [1] - 1:18 delay [1] - 13:1 delivered [1] - 1:16 delved [1] - 1:17 depriving [1] - 15:28 Dermot [1] - 8:26 described [1] - 2:12 desirable [1] - 9:24 detail [1] - 3:30 Diary [1] - 9:6 difficult [1] - 15:11 difficulties [1] - 14:18 difficulty [6] - 11:14, 11:16, 11:20, 12:4, 14:14, 15:5 Dillon [5] - 9:20, 10:18, 10:24, 12:7, 18:1 directed [1] - 12:26 directly [1] - 15:9 disagree [1] - 12:21 disclosed [1] - 17:20 disclosure [2] - 13:19, 17:24 discuss [1] - 5:21 discussed [3] - 13:11, 13:27, 14:3 discussions [2] - 9:26, 15:21 disseminated [1] - 14:28 distance [1] - 14:20 divided [1] - 2:4 documentation [1] - 8:24 documents [4] - 9:1, 9:2, 9:7, 16:23 done [1] - 17:1 Douglas [1] - 6:26 due [2] - 10:25, 13:10 Dundalk [1] - 1:22 Durack [5] - 11:13, 13:16, 16:4, 16:22, 16:28	
4	4th [1] - 9:12				
6	6th [3] - 5:29, 6:3, 8:7				
7	7th [1] - 10:25				
9	9th [3] - 4:3, 10:26, 10:30				
A	abridge [1] - 17:12 Abuse [1] - 14:6 accept [4] - 4:22, 5:13, 5:14, 6:10 accommodate [1] - 8:22 acquaint [1] - 4:12 Act [2] - 4:17, 5:10 add [1] - 13:4 addition [2] - 9:4, 14:25 additional [1] - 13:13 adduce [1] - 9:3 adduced [1] - 5:2 Adjourned [1] - 18:11 adopted [1] - 11:26 adversarial [2] - 5:6, 12:16 advise [1] - 11:7 affected [3] - 4:19, 6:8, 14:8				

<p>during [6] - 2:1, 3:7, 4:25, 11:5, 11:7</p> <p>duty [1] - 7:13</p>	<p>3:13</p> <p>Fingal [1] - 7:17</p> <p>firm [2] - 8:22, 9:27</p> <p>fits [1] - 11:18</p> <p>fixing [1] - 10:19</p> <p>Flanigan [3] - 5:25, 5:28, 6:3</p> <p>flexibility [1] - 11:28</p> <p>fluidity [2] - 12:2, 12:26</p> <p>follow [1] - 7:16</p> <p>followed [1] - 10:26</p> <p>following [1] - 11:2</p> <p>Follows [1] - 1:2</p> <p>foot [1] - 5:28</p> <p>force [1] - 3:12</p> <p>form [5] - 8:12, 14:27, 15:8, 16:13, 17:1</p> <p>formal [2] - 8:17, 8:30</p> <p>formally [2] - 4:1, 5:30</p> <p>former [1] - 3:12</p> <p>forwarded [1] - 5:29</p> <p>Freddie [1] - 6:4</p> <p>free [1] - 15:22</p> <p>Friday [1] - 11:1</p> <p>fulfilling [1] - 7:11</p> <p>full [2] - 8:28, 9:14</p> <p>furnished [1] - 6:30</p> <p>furtherance [1] - 8:13</p>	<p>house-keeping [1] - 5:20</p>	<p>item [1] - 10:18</p>	<p>15:20, 17:27, 18:2</p> <p>mean [1] - 4:19</p> <p>Meanwhile [1] - 15:20</p> <p>meeting [1] - 1:23</p> <p>member [4] - 1:19, 3:7, 7:7, 8:19</p> <p>members [4] - 3:9, 3:12, 5:21, 9:4</p> <p>mentioned [2] - 6:17, 10:24</p> <p>Metro [1] - 7:17</p> <p>Michael [3] - 5:25, 5:28, 6:3</p> <p>Might [1] - 16:4</p> <p>might [9] - 9:21, 9:24, 10:2, 10:18, 10:28, 11:5, 11:6, 12:12, 13:4</p> <p>Mills [1] - 2:14</p> <p>minded [1] - 14:26</p> <p>minimise [1] - 14:24</p> <p>minimum [3] - 2:8, 13:1</p> <p>minutes [1] - 18:8</p> <p>mobile [1] - 2:18</p> <p>module [3] - 17:1, 17:3, 17:4</p> <p>Monday [1] - 11:2</p> <p>monitoring [1] - 11:24</p> <p>month [1] - 11:5</p> <p>Mooney [3] - 5:27, 6:20, 15:4</p> <p>Moriarty [1] - 14:5</p> <p>Morley [1] - 8:8</p> <p>Morning [1] - 6:26</p> <p>morning [1] - 5:27</p> <p>most [1] - 12:2</p> <p>Most [1] - 9:11</p> <p>move [2] - 4:1, 15:29</p> <p>moving [1] - 5:30</p> <p>murders [1] - 7:8</p>
<p>E</p>	<p>G</p>	<p>I</p>	<p>J</p>	<p>K</p>
<p>e-transcript [1] - 11:23</p> <p>earliest [1] - 14:30</p> <p>ease [2] - 11:21, 11:27</p> <p>easier [1] - 11:30</p> <p>economy [1] - 12:26</p> <p>effect [1] - 17:21</p> <p>effectiveness [1] - 15:29</p> <p>efficiency [1] - 16:5</p> <p>efficiently [1] - 17:13</p> <p>eight [1] - 17:9</p> <p>Eilish [1] - 8:8</p> <p>emerged [1] - 6:7</p> <p>emphasize [1] - 15:24</p> <p>end [1] - 2:2</p> <p>ensure [3] - 8:21, 12:1, 13:1</p> <p>entire [1] - 3:19</p> <p>entitled [4] - 6:13, 6:15, 8:23, 14:1</p> <p>entitlement [2] - 5:14, 6:16</p> <p>Equally [1] - 17:4</p> <p>essential [1] - 13:18</p> <p>established [1] - 8:15</p> <p>establishing [1] - 16:11</p> <p>et [1] - 17:25</p> <p>event [1] - 11:19</p> <p>events [1] - 1:10</p> <p>Evidence [1] - 4:17</p> <p>evidence [20] - 3:15, 5:1, 5:3, 5:7, 6:17, 9:3, 10:27, 11:26, 13:23, 14:22, 14:30, 15:26, 16:9, 17:7, 17:10, 17:15, 17:18, 17:19, 17:22</p> <p>exactly [1] - 11:27</p> <p>examine [1] - 5:15</p> <p>exercise [3] - 4:29, 7:24, 14:27</p> <p>expect [1] - 17:14</p> <p>expense [1] - 13:2</p> <p>explain [1] - 12:30</p> <p>express [1] - 11:10</p> <p>extend [1] - 1:12</p> <p>extent [1] - 7:15</p> <p>eye [1] - 15:13</p>	<p>Garda [7] - 1:20, 1:23, 3:7, 3:8, 7:7, 11:13, 13:16</p> <p>Gardaí [1] - 13:19</p> <p>General [6] - 6:24, 6:29, 7:4, 7:12, 7:24, 7:28</p> <p>general [2] - 4:23, 17:6</p> <p>Generals [2] - 7:19, 7:22</p> <p>given [1] - 14:19</p> <p>grant [2] - 5:16, 7:28</p> <p>granted [6] - 3:18, 4:6, 9:15, 12:28, 13:5, 15:9</p> <p>great [2] - 14:13, 14:24</p> <p>greatly [1] - 11:27</p> <p>grounds [1] - 6:6</p> <p>guardian [1] - 7:14</p>	<p>immediately [2] - 10:13, 13:22</p> <p>immensely [1] - 11:21</p> <p>important [1] - 15:26</p> <p>importantly [1] - 9:11</p> <p>imprisonment [1] - 3:11</p> <p>incident [2] - 9:8, 9:9</p> <p>indeed [3] - 3:2, 14:6, 14:23</p> <p>Indeed [1] - 4:24</p> <p>indicated [4] - 2:30, 16:6, 17:5, 17:8</p> <p>indication [1] - 16:29</p> <p>individual [2] - 9:13, 17:1</p> <p>information [2] - 13:20, 16:23</p> <p>inquire [1] - 1:18</p> <p>Inquire [1] - 14:6</p> <p>inquiry [2] - 2:9, 11:28</p> <p>Inquiry [3] - 4:16, 5:6, 16:12</p> <p>inquisitorial [1] - 5:7</p> <p>insofar [2] - 1:29, 17:12</p> <p>instance [2] - 11:24, 12:24</p> <p>instructed [3] - 5:28, 6:27, 6:29</p> <p>instructing [1] - 3:28</p> <p>instructions [1] - 13:23</p> <p>intend [1] - 3:30</p> <p>intended [5] - 16:13, 16:14, 17:6, 17:9, 17:19</p> <p>intends [2] - 16:30</p> <p>interest [12] - 2:7, 4:23, 5:12, 6:29, 7:5, 7:6, 7:12, 7:13, 7:15, 7:25, 7:29, 16:5</p> <p>interested [3] - 4:7, 4:18, 17:8</p> <p>internet [1] - 12:9</p> <p>interpret [1] - 16:8</p> <p>interpretation [1] - 16:11</p> <p>interpreted [1] - 4:15</p> <p>interviewed [1] - 3:14</p> <p>interviews [1] - 17:24</p> <p>introduce [1] - 5:1</p> <p>investigate [1] - 16:30</p> <p>investigation [2] - 9:13, 16:23</p> <p>investigations [2] - 3:11, 4:26</p> <p>investigative [1] - 16:7</p> <p>involved [2] - 9:3, 15:9</p> <p>Ira [3] - 3:9, 3:13, 9:4</p> <p>Ireland [6] - 1:7, 3:27, 4:4, 4:10, 5:17, 8:14</p> <p>Irish [4] - 3:9, 4:13, 6:11, 7:18</p> <p>Irishman's [1] - 9:5</p> <p>issue [5] - 1:18, 5:10, 15:10, 16:19, 17:17</p> <p>issues [3] - 2:11, 16:4, 17:1</p>	<p>jeopardized [1] - 6:13</p> <p>Judge [1] - 16:4</p> <p>judgment [1] - 6:14</p> <p>juncture [1] - 2:26</p> <p>June [5] - 3:5, 4:3, 10:25, 10:26, 10:30</p> <p>junior [1] - 9:15</p> <p>jurisdiction [3] - 4:8, 4:10, 4:11</p> <p>Justice [1] - 6:10</p>	<p>keep [2] - 14:13, 15:13</p> <p>keeping [1] - 5:20</p> <p>kept [1] - 2:8</p> <p>Kevin [3] - 8:2, 8:5, 8:18</p> <p>killings [1] - 1:20</p>
<p>F</p>	<p>H</p>	<p>L</p>	<p>M</p>	<p>N</p>
<p>facilitate [1] - 11:24</p> <p>facility [1] - 12:28</p> <p>fact [2] - 4:29, 7:23</p> <p>false [1] - 3:9</p> <p>families [2] - 1:11, 1:12</p> <p>favour [1] - 14:21</p> <p>February [1] - 9:12</p> <p>Ferguson [3] - 3:24, 3:28, 4:3</p> <p>few [1] - 18:8</p> <p>filtering [1] - 14:27</p> <p>Finbarr [3] - 2:23, 3:6,</p>	<p>Hackballscross [1] - 3:8</p> <p>handed [1] - 13:9</p> <p>happy [1] - 7:16</p> <p>Harry [1] - 7:9</p> <p>Haughey [1] - 6:11</p> <p>Healy [1] - 8:11</p> <p>hear [1] - 1:16</p> <p>heard [1] - 12:29</p> <p>hearing [4] - 8:21, 10:14, 15:26, 17:10</p> <p>hearings [3] - 3:19, 8:24, 14:7</p> <p>held [1] - 14:7</p> <p>helpful [1] - 10:28</p> <p>Hickey [4] - 2:24, 3:6, 3:13</p> <p>highlight [1] - 17:17</p> <p>hope [1] - 2:8</p> <p>house [1] - 5:20</p>	<p>inquisitorial [1] - 5:7</p> <p>insofar [2] - 1:29, 17:12</p> <p>instance [2] - 11:24, 12:24</p> <p>instructed [3] - 5:28, 6:27, 6:29</p> <p>instructing [1] - 3:28</p> <p>instructions [1] - 13:23</p> <p>intend [1] - 3:30</p> <p>intended [5] - 16:13, 16:14, 17:6, 17:9, 17:19</p> <p>intends [2] - 16:30</p> <p>interest [12] - 2:7, 4:23, 5:12, 6:29, 7:5, 7:6, 7:12, 7:13, 7:15, 7:25, 7:29, 16:5</p> <p>interested [3] - 4:7, 4:18, 17:8</p> <p>internet [1] - 12:9</p> <p>interpret [1] - 16:8</p> <p>interpretation [1] - 16:11</p> <p>interpreted [1] - 4:15</p> <p>interviewed [1] - 3:14</p> <p>interviews [1] - 17:24</p> <p>introduce [1] - 5:1</p> <p>investigate [1] - 16:30</p> <p>investigation [2] - 9:13, 16:23</p> <p>investigations [2] - 3:11, 4:26</p> <p>investigative [1] - 16:7</p> <p>involved [2] - 9:3, 15:9</p> <p>Ira [3] - 3:9, 3:13, 9:4</p> <p>Ireland [6] - 1:7, 3:27, 4:4, 4:10, 5:17, 8:14</p> <p>Irish [4] - 3:9, 4:13, 6:11, 7:18</p> <p>Irishman's [1] - 9:5</p> <p>issue [5] - 1:18, 5:10, 15:10, 16:19, 17:17</p> <p>issues [3] - 2:11, 16:4, 17:1</p>	<p>language [1] - 6:10</p> <p>large [2] - 7:15, 13:19</p> <p>lateness [1] - 7:1</p> <p>Lavery [7] - 8:26, 8:28, 9:25, 10:1, 10:7, 10:11, 14:10</p> <p>Laverys [1] - 10:15</p> <p>law [2] - 2:1, 4:13</p> <p>least [1] - 17:9</p> <p>leave [1] - 4:26</p> <p>left [1] - 10:15</p> <p>legal [1] - 10:29</p> <p>Lehane [1] - 13:26</p> <p>letter [3] - 8:7, 8:8, 9:12</p> <p>Limited [1] - 7:17</p> <p>limited [5] - 3:20, 5:17, 6:16, 6:28, 7:29</p> <p>list [4] - 2:4, 2:15, 17:6, 17:14</p> <p>locus [1] - 8:12</p> <p>Lord [1] - 11:26</p> <p>loss [1] - 1:13</p>	<p>name [1] - 6:12</p> <p>namely [2] - 1:19, 9:5</p> <p>naturally [1] - 16:26</p> <p>nature [5] - 2:11, 9:8, 9:10, 10:9, 15:10</p> <p>necessary [3] - 2:7, 4:12, 17:11</p> <p>necessity [1] - 13:12</p> <p>need [5] - 1:28, 5:15, 8:17, 12:30, 15:13</p> <p>Neil [1] - 8:29</p> <p>nevertheless [1] - 15:29</p> <p>next [4] - 1:17, 10:18, 14:23, 15:19</p> <p>Northern [6] - 1:6, 3:27, 4:4, 4:10, 5:17, 8:14</p> <p>noted [2] - 6:4, 8:14</p> <p>notes [1] - 13:7</p> <p>nothing [1] - 12:19</p> <p>notice [2] - 17:9, 17:14</p> <p>notified [1] - 2:24</p> <p>number [1] - 16:4</p>

<p>O</p> <p>obliged [1] - 6:20 Obliged[2] - 5:19, 10:1 obtained [1] - 13:23 obviously [2] - 11:30, 13:29 occasion [1] - 14:23 occasions [2] - 2:8, 6:16 occurred [1] - 1:10 One[1] - 7:21 one [11] - 1:27, 2:9, 2:12, 3:13, 3:20, 3:28, 5:17, 6:18, 7:29, 10:1, 14:20 opening [8] - 1:16, 9:22, 9:29, 10:24, 10:25, 16:14, 16:18, 18:5 operation [3] - 2:28, 13:2, 13:21 opportunity [1] - 15:1 Oral[1] - 4:30 oral [1] - 4:26 order [2] - 13:10, 14:26 organisation [1] - 4:5 ought [1] - 12:28 outside [1] - 15:25 overlap [1] - 10:27 overnight [1] - 11:23 own [3] - 1:13, 1:28, 7:16</p>	<p>practical [1] - 1:30 precedents [1] - 14:4 present [1] - 1:14 previously [3] - 2:30, 6:5, 13:27 principle [3] - 11:20, 12:3, 12:25 private [10] - 2:5, 2:6, 2:10, 10:2, 10:4, 10:16, 13:29, 13:30, 14:7, 17:29 privately [1] - 5:21 probative [1] - 9:9 procedural [2] - 1:27, 2:11 procedure [1] - 5:6 Procedure[1] - 17:4 procedures [1] - 7:16 proceed [2] - 15:27, 16:30 Proceedings [2] - 1:1, 18:11 proceedings [5] - 4:29, 11:24, 12:2, 12:26, 13:8 process [1] - 12:16 pronouncement [1] - 16:18 property [1] - 6:13 propose [1] - 14:11 proposed [4] - 14:15, 14:19, 17:7, 17:15 protecting [1] - 7:13 protection [1] - 6:14 provide [2] - 2:10, 5:4 provided [4] - 4:24, 12:24, 13:28, 14:2 Provisional [2] - 3:9, 9:4 provisions [2] - 4:13, 4:14 Psni [9] - 4:22, 4:26, 4:27, 4:30, 5:2, 5:11, 5:14, 14:20, 14:21 public [20] - 1:17, 2:4, 2:9, 6:29, 7:5, 7:6, 7:11, 7:13, 7:15, 7:25, 7:29, 8:19, 13:29, 14:1, 14:25, 15:12, 15:19, 17:28 publication [1] - 15:1 publications [1] - 9:5 published [1] - 17:5 purpose [3] - 8:15, 13:5, 13:7 purse [1] - 14:25 pursuant [1] - 7:14 pursue [1] - 8:16 put [3] - 5:3, 5:7, 12:9</p>	<p>react [1] - 13:22 reason [3] - 5:5, 12:25, 12:27 receive [1] - 17:14 received [3] - 8:11, 9:1, 9:2 refer [1] - 14:4 reference [5] - 2:28, 6:9, 7:22, 16:8, 16:11 referred [2] - 5:13, 7:18 refused [1] - 6:6 regard [4] - 3:17, 7:11, 12:7, 14:24 Registrar[7] - 2:14, 2:17, 3:24, 5:25, 6:24, 8:2, 8:26 relating [2] - 2:11, 9:8 relation [5] - 6:7, 7:21, 14:17, 14:19, 17:23 relevant [3] - 16:24, 17:3, 17:8 remains [2] - 5:10, 16:19 remember [1] - 1:9 remit [1] - 7:11 Reports[2] - 6:11, 7:18 representation [20] - 2:20, 2:29, 3:5, 3:18, 3:19, 3:29, 4:5, 4:17, 5:16, 6:4, 6:15, 6:28, 7:5, 7:28, 8:29, 9:14, 12:28, 13:5, 14:20, 15:8 Representation[1] - 6:17 representations [1] - 12:1 representative [2] - 8:22, 8:23 representatives [1] - 10:30 represented [1] - 13:12 request [1] - 2:24 required [1] - 2:29 requirement [1] - 17:24 reserve [4] - 5:20, 9:20, 15:18, 18:1 respect [1] - 15:4 respectful [2] - 15:11, 15:14 retire [1] - 10:14 revert [1] - 18:2 review [1] - 14:22 reviewed [1] - 16:9 Richard[3] - 3:24, 3:27, 4:3 rights [1] - 4:15 rise [2] - 10:19, 18:8 risk [1] - 6:12 Robinson[3] - 3:26, 5:19, 14:17 role [1] - 7:14 room [3] - 8:21, 10:15, 18:8 routinely [1] - 12:23 Royal[1] - 4:22 Ruc[2] - 5:11, 5:15 Rules[1] - 17:4 rules [1] - 17:6</p>	<p>S</p> <p>satisfied [1] - 3:17 Saville[1] - 11:26 Scapaticci[4] - 6:4, 6:7, 6:11, 15:5 Section[2] - 4:16, 5:10 see [4] - 1:30, 2:4, 13:11, 14:2 seek [4] - 4:30, 8:12, 9:2, 16:29 seeks [1] - 4:26 senior [1] - 9:15 sense [3] - 4:23, 5:12, 12:10 sensitive [2] - 14:3, 14:29 sensitivity [1] - 13:10 sentenced [1] - 3:10 separately [1] - 16:15 September[2] - 11:5, 11:29 Sergeant[1] - 3:8 serious [2] - 9:7, 9:10 serve [1] - 17:6 Service[3] - 3:27, 4:4, 5:16 sessions [2] - 2:5, 15:13 set [2] - 6:14, 16:10 shall [1] - 3:19 short [1] - 1:23 simply [1] - 14:28 single [1] - 14:12 sit [1] - 1:30 sitting [8] - 1:17, 1:24, 1:29, 2:7, 2:10, 10:4, 10:20, 15:19 sittings [4] - 8:20, 11:5, 13:29 situation [1] - 6:9 sole [1] - 13:5 solicitor [7] - 3:20, 4:4, 5:17, 6:18, 7:29, 9:27, 15:21 Solicitor[1] - 6:27 solicitors [1] - 3:28 Solicitors[1] - 6:3 sort [1] - 17:1 sought [4] - 3:5, 4:4, 6:3, 7:5 speaks [2] - 4:6, 4:17 special [1] - 12:24 speed [3] - 15:27, 16:5 spotted [1] - 14:30 stage [5] - 4:28, 16:7, 16:9, 16:19, 17:9 stand [1] - 12:1 standi [1] - 8:12 standing [1] - 5:1 start [1] - 2:14 starting [1] - 4:13 state [2] - 1:20, 7:8 State[1] - 6:27 statement [7] - 1:16, 9:29, 10:26, 16:14, 16:18, 17:18, 18:5 statements [1] - 17:20 Station[2] - 1:23, 3:8</p>	<p>status [1] - 4:6 subject [1] - 12:18 submission [9] - 4:28, 6:2, 6:30, 7:1, 7:4, 10:1, 11:18, 15:11, 15:15 submissions [7] - 4:27, 4:30, 7:19, 7:22, 7:23, 7:25, 14:23 submitted [1] - 5:5 successor [3] - 4:22, 5:11, 5:14 suggest [3] - 9:20, 14:26, 18:1 suggested [1] - 1:28 suggesting [1] - 6:7 suggestion [1] - 1:19 Superintendent[4] - 1:21, 7:9 supplied [1] - 9:7 support [3] - 14:10, 15:6, 15:15 suppose [1] - 11:18 switched [1] - 2:18 sympathies [1] - 1:13 sympathy [1] - 1:13 Sióchána[3] - 1:20, 3:7, 7:8</p>
<p>P</p> <p>page [1] - 6:14 parameters [1] - 16:12 part [2] - 1:28, 16:14 participate [1] - 8:24 participating [1] - 13:7 particular [2] - 1:5, 4:16 particularly [2] - 2:1, 15:7 parties [16] - 4:9, 4:12, 8:12, 10:29, 11:6, 11:22, 11:24, 11:28, 12:11, 12:14, 12:18, 12:27, 13:4, 13:12, 14:8, 17:8 party [4] - 1:28, 2:12, 4:7, 8:16 passports [1] - 3:10 people [2] - 10:15, 12:1 perfectly [2] - 7:3, 13:10 perhaps [2] - 11:25, 17:28 Perhaps [2] - 10:14, 11:10 periods [1] - 11:8 person [7] - 2:26, 3:14, 4:18, 4:19, 5:12, 6:8, 6:12 personal [4] - 1:11, 4:15, 6:12, 8:4 phones [1] - 2:18 place [1] - 8:21 plea [1] - 3:10 point [2] - 5:30, 7:21 Police[3] - 3:27, 4:4, 5:16 position [5] - 5:20, 9:21, 11:7, 13:22, 18:1 possible [6] - 1:30, 10:29, 11:4, 15:27, 15:30, 17:13</p>	<p>Q</p>			<p>T</p> <p>task [1] - 1:18 tasked [1] - 7:12 Tdi[1] - 7:17 ten [1] - 9:1 term [3] - 3:11, 15:25 terms [6] - 2:27, 6:9, 11:28, 15:6, 16:8, 16:11 themselves [1] - 4:12 thereby [1] - 16:11 therefore [2] - 2:29, 6:13 third [1] - 8:16 Thursday[1] - 11:1 today [4] - 1:5, 1:26, 2:10, 10:29 today's [3] - 1:24, 2:4, 2:14 total [1] - 13:20 tragedies [1] - 1:11 transcript [13] - 11:22, 11:23, 12:13, 12:29, 13:9, 13:13, 13:18, 13:28, 14:2, 14:12, 14:19, 15:7, 15:14 transcripts [10] - 11:30, 12:8, 12:9, 12:17, 12:22, 13:24, 14:7, 14:11, 14:22, 14:28 travel [1] - 14:21 travelled [1] - 1:6 trial [4] - 12:12, 12:13, 12:15 trials [1] - 12:23 tribunal [11] - 4:20, 4:24, 7:15, 8:23, 9:14, 10:5, 13:6, 13:11, 14:1, 16:23, 17:23 Tribunal[32] - 2:6, 2:24,</p>

2:26, 3:11, 3:15, 3:19, 4:25, 4:27, 4:28, 4:29, 5:3, 5:21, 5:29, 7:10, 7:23, 8:15, 8:20, 9:11, 9:28, 12:17, 13:2, 13:20, 13:28, 14:5, 15:11, 15:12, 15:22, 15:28, 16:6, 16:29 Tribunals ^[4] - 1:17, 5:2, 5:4, 6:8 tribunals ^[2] - 14:5, 17:2 Tribunals ^[1] - 4:16 trouble ^[1] - 1:5 try ^[1] - 8:20 Tuesday ^[1] - 11:2 two ^[4] - 1:11, 7:29, 9:3, 9:4	wrongdoing ^[1] - 2:27
	Y
	yesterday ^[1] - 7:1
U	
Ulster ^[1] - 4:22 ultimate ^[1] - 17:22 under ^[2] - 5:10, 9:13 undertaken ^[1] - 14:27 unknown ^[1] - 4:7 unrelated ^[1] - 8:16 up ^[1] - 14:13 up-to-date ^[1] - 14:13 upcoming ^[1] - 2:2	
V	
vacation ^[2] - 2:2, 11:29 vacations ^[1] - 2:1 valuable ^[1] - 4:24 value ^[1] - 9:9 vast ^[1] - 16:22 view ^[4] - 1:27, 11:10, 12:8, 12:16 viewed ^[1] - 2:25 vindicating ^[1] - 7:13	
W	
warning ^[1] - 4:9 watching ^[2] - 8:7, 8:18 ways ^[1] - 4:25 week ^[3] - 11:1, 11:2 weeks ^[1] - 17:10 welcome ^[1] - 15:24 Whit ^[3] - 2:2, 10:27, 11:3 wide ^[1] - 13:18 wider ^[1] - 7:12 Winters ^[3] - 8:2, 8:5, 8:18 wish ^[9] - 2:12, 4:1, 7:21, 8:19, 12:15, 12:21, 15:21, 15:30, 17:27 wishes ^[2] - 5:3, 7:24 witness ^[4] - 2:28, 17:19, 17:20, 17:25 witnesses ^[4] - 5:15, 17:3, 17:7, 17:14 wonder ^[2] - 10:18, 17:13 wondering ^[1] - 16:13 writing ^[2] - 7:26, 9:1 written ^[5] - 4:27, 4:28, 5:28, 6:30, 14:23	