

Mr. Justice Frank Clarke  
Chief Justice of Ireland  
Supreme Court of Ireland  
The Four Courts  
Inns Quay  
Dublin 7

**By email: xxxxx**

**cc: xxxxx**

9<sup>th</sup> November 2020.

**Re: Informal Resolution Process**

Dear Chief Justice,

I refer to your draft letter of the 5<sup>th</sup> inst. which was sent to me shortly after our brief meeting that afternoon.

First of all, I would like to apologise again for accepting the invitation to and attending the Oireachtas Golf Society dinner in Clifden on the 19<sup>th</sup> August 2020 and I fully accept the opinions, reasons and recommendations set out in the report prepared by Ms. Justice Denham, at your request.

As a newly appointed Judge of the Supreme Court, my ill-judged acceptance of the invitation, and subsequent attendance at the dinner, occasioned offence and hurt to the public and damage to the Court and this is a cause of profound regret to me.

Notwithstanding the fact that I had checked that the event was compliant with all relevant Covid Regulations and Guidelines, my attendance at the dinner raised an (incorrect) perception that I, as a Judge, had deliberately flouted the Covid Regulations and Guidelines and that I had no regard for them, which was of course not the case. However unintended, that perception has adversely affected the Judiciary in general and the Supreme Court in particular. I am truly sorry for that and for my misjudgment as identified by Ms. Justice Denham.

My determination now is to work to help and cooperate with the Supreme Court in every way I can to remedy this matter insofar as possible.

In your letter, you identify three matters which you say you would have required for the purpose of resolving this matter.

The first is that you have reprimanded me in relation to my attendance at the dinner. While I believe it is based on a misunderstanding to which I will refer further below, I would accept the reprimand if that would ensure resolution of this matter.

The second matter is that you have informed me that I will not be assigned to sit to hear any cases in the Supreme Court until February 2021. I would be willing to accept that also to again ensure resolution of this matter.

The third matter is that you refer to the offer I previously made to volunteer a month's salary to charity and, while acknowledging that you do not have any power to impose a financial sanction on me, you strongly suggest that I should waive or repay my salary for the three month period in which you will not be listing me to hear cases. I would be willing to forego my salary for not only one month but for the full three month period if that would ensure resolution of this matter, and if so I would propose to volunteer to transmit my salary for those three months to a nominated charity already identified to you. I believe that to be unprecedented for any Judge or, acknowledging the distinction, for any public servant in the history of the State.

Further to the above, I would be willing to sit as a High Court Judge during this three month period in order to assist with any shortage of Judges and any delays for litigants in certain lists in that Court.

Were it not for the fact that you said to me at the meeting on Friday that you propose to publish your letter of 5<sup>th</sup> inst., I would leave the matter as outlined above, and hope it would enable us shortly to treat it as closed and work to restore the very good relations which have previously existed between us and with the Court generally and which I trust will resume as soon as we can hopefully put this matter behind us.

However, if you propose to publish your letter (and I note that you suggested that you might also publish all of the correspondence which has occurred between us since the commencement of this affair) you will appreciate that I cannot leave some of the remarks in your letter stand without comment. Furthermore, your expression of your personal view that I should resign is also something upon which I must comment where I indicated to you at our meeting that I did not propose to resign. I intensely dislike having to comment further on these matters in this way as my objective is to avoid or minimise issues of disagreement, and I cannot see that this already protracted correspondence can be good for either of us or for the Court or the public interest, let alone its publication.

Before commenting on the issues raised by your letter, I would like to explain why I do not think it would be appropriate or helpful for you to publish our correspondence. First, our correspondence is part of the internal process within the Court for the purpose of achieving the informal resolution recommended by Ms. Justice Denham. This is a point you made to me in your letter of 2<sup>nd</sup> October when I had suggested bringing my counsel to the proposed meeting with three members of the Court, not as an advocate, but as somebody whose experience might have been helpful in assisting the resolution of the process. You explained that this would be inappropriate given that this was a matter internal to the Court but that I could be accompanied by a fellow Judge. I have corresponded with you since on that basis and would therefore be surprised if you should choose to publish our correspondence. Our correspondence has been part of the informal resolution process and as in any process such as mediation or resolution, with respect it appears almost never appropriate to publish the internal private workings of such process.

Secondly, our correspondence, including your letter of the 5<sup>th</sup> inst. and this letter, reflect different points of view on the consequences of my attendance at the dinner and Ms. Justice

Denham's report. Each of us hold such differing views in an entirely legitimate, bona fide manner and I respect your point of view. Nonetheless, I cannot see how the publication of such internal differences, culminating in a difference of view as to whether or not I should resign from the Court, can be helpful to the Court itself or to the public interest, particularly where, for the reasons I explain below, I do not consider it in any way appropriate that I should resign.

I have indicated my willingness to accept the three points which you would have required of me in order to resolve this matter. In my view, could I suggest that the appropriate way to now conclude the process would be that I would issue the apology which I made at the beginning of this letter in public and you would issue a statement outlining the fact that you have reprimanded me, that I will not sit in the Court until February, that I have volunteered to transmit my salary for this period to a nominated charity and that I am prepared to work unpaid as a High Court judge for that period. I believe that the issue of such statements by both of us (without publication of our private correspondence) would be the appropriate way to now conclude this matter.

However, and on the assumption that you still propose to publish your letter of the 5<sup>th</sup> inst. (and perhaps all of our correspondence), I turn now to some of the remarks made in your letter.

#### **Your comments on my attendance at the dinner**

I accept that it was inappropriate for me, as a Judge, to have attended the dinner for the reasons outlined by Ms. Justice Denham. However, you assert that the organisation of the dinner *“did not comply with the objective of the regulations, which was to prevent large numbers of people from mingling together at social events”* and you refer to *“a perception that legal technicalities outweigh public health”*.

With the greatest of respect, this does not correctly describe the event or the Government objectives at the time. In July and August, it appeared that the Covid pandemic was coming under control in Ireland and, with a view to re-opening the economy, the Government accelerated the planned phased relaxation of the Covid restrictions. As was explained on my behalf to Ms. Justice Denham, the public policy statements from the Government at the time were to encourage people to resume attendance at social events within the limits laid down in both the Regulations and the Guidelines.

The Guidelines for the Hotel Industry were agreed and published by the Government of Ireland, Failte Ireland and the Irish Hotels Federation. Ms Justice Denham quotes the relevant part of those Guidelines in her report on page 13 as follows:

*“There is a limit on the number of people gathering in a venue at one time in line with NPHEAT guidance on indoor gatherings. The limit includes workers. **Multiple gatherings are allowed in venue facilities provided they are in separate defined spaces and there are systems to prevent intermingling in common spaces (e.g. entrances, exits and toilet facilities).**”*

This was, of course, subject to the requirement under the Regulations that the number in any given room or defined space should be limited to 50 people.

Accordingly, the objective of the Regulations and the Guidelines was to strike the appropriate balance between (a) physical health concerns and (b) other public policy concerns such as mental health concerns, economic concerns and so forth. The event in the hotel was not merely lawful as you say, although it was, of course, exactly that. It also complied with the objectives of the Regulations and the Guidelines where two dinners were held in two separate rooms with only 45 people in the room that I was in. There was compliance with both the letter and the spirit of the Government Guidelines.

This is not a matter of being legalistic or technical about the issue. The Guidelines were in place to facilitate the practical real-life balance which had to be struck between the various legitimate public policy concerns. Therefore, to the extent to which you consider that I attended an event which did not comply with the objectives of the Regulations and the Guidelines or somehow did not respect the spirit of the Government policy, I respectfully differ.

You then refer to the fact that the night before the golf event, the Cabinet announced its intention to adopt a new rule or guidance reducing the numbers permitted at an indoor social event to six persons. I agree entirely with you when you say that even if such an announcement did not have the force of law (which it did not until approximately two weeks later), Judges should nonetheless exercise a reasonable level of vigilance to comply with such an announcement. I also agree with you that a failure by a judge to observe those principles could lead to serious damage to public trust in, and respect for, the judiciary. However, the fact of the matter is, as accepted by Ms. Justice Denham, I was not aware that the Cabinet had made such an announcement the previous night and I was totally unaware of any proposed “rule of six” when I attended the dinner. Thus, when you say that I failed to observe the principle that Judges should comply with such Government Guidelines, even if not a matter of law, I do not think it is fair to criticise me by saying I did not respect such Guidelines in circumstances where I was simply not aware of the “rule about six persons” in question. The primary point I have always made about the rule of six issue is not some technical argument that it was not law, but the much more simple argument that, regrettably, I was not in fact aware of it. If I had been, I would not have attended the dinner.

You have reprimanded me on the basis that I failed to observe the principle that Judges should obey even non-binding government guidelines. I agree with that principle. But since my non-observance of those guidelines was wholly unintentional because I was not aware of those guidelines (i.e. the proposed “rule about six persons”) (as accepted by Ms. Justice Denham), I am surprised that you have considered this an appropriate basis on which to reprimand me (equivalent to the most serious of the range of sanctions contemplated by the Judicial Council Act). That is particularly so in circumstances where the issue of whether Ms Justice Denham would recommend that you should issue a reprimand or admonishment to me was one of the questions addressed at some length on my behalf before Ms Justice Denham on the occasion of the second meeting with her, and where she ultimately decided against recommending any such admonishment or reprimand.

For the avoidance of doubt, may I make clear that I fully accept that members of the public would not have known that I was unaware of the Cabinet announcement of the previous night, that it would therefore have appeared to them that I had attended the dinner with some kind of disregard for the Government announcement and that such a perception would be damaging to the trust and respect which the public must hold for the Judiciary. It was for that

reason that I issued the apology which I did, which was for any inadvertent breach of these principles on my part. That apology was absolutely sincere and that remains the case.

### **Your personal view that I should resign**

The fact that the President of a Court to which I belong and a man for whom I have the utmost personal and professional respect, and whom I regard as a friend, should express even a personal view that I should resign, is something of the utmost seriousness which I have to consider and reflect upon, not only from my own perspective, but from the perspective of the institution of the Judiciary and the importance of the independence of each individual member of the Judiciary. I have, in particular, to consider whether I should resign to avoid damage or further damage to the Judiciary which I regard as a matter of the utmost importance. Equally, I have to consider the circumstances under which a Judge should resign under pressure from a fellow Judge or Judges, and the implications of a resignation in such circumstances for the independence of individual Judges. I have, as you can imagine, thought very deeply about this and have taken extensive advice from a number of people.

I have come to the conclusion that I should not resign, and I will try to explain my thinking in the balance of this letter.

As a preliminary matter, I note that the basis upon which you consider that I should resign does not relate to my attendance at the dinner but rather relates to some remarks I made in the course of my interview with Ms Justice Denham and to a reference I made in correspondence to my meeting with my three colleagues on the 2<sup>nd</sup> October. This is therefore a different basis to that previously proffered by others for my suggested resignation.

In your letter, before you deal with those matters, you make a general observation that in defending myself in this matter, I have concentrated on narrow and technical issues rather than recognising the serious public concern arising from my attendance at the dinner and you remind me of one of the only two conversations we have had about this matter prior to our meeting on the 5<sup>th</sup> inst., namely, our second telephone conversation on the 21<sup>st</sup> August in which you informed me that you had received a variety of messages expressing concern about my attendance at the dinner.

I regret if it appears that I have concentrated on what you describe as narrow and technical issues. I have not sought to do so. In the aftermath of the dinner, virtually all of the public commentary on the matter focused on two issues and it was those two issues which formed the subject of my discussion with Ms Justice Denham and formed the subject matter of her report. The first issue was the widespread perception that I had sat down to dinner in a room with 80 people, knowingly in breach of the relevant Regulations and Guidelines. I fully recognised the serious public concern that this would give rise to, if this were true. The primary and simple point I tried to make was that it was not true. That was not being narrow, technical or legalistic. It was simply a matter of fact. I attended a dinner in a room with 45 people, not 80 people. When it was suggested that in some way the room was not a separate room and that the wall of the room was not a wall but merely some flimsy partition, I had to deal with that and point out, with the benefit of an engineer's report, that the wall was, in fact, a retractable wall which was fully in place save it appears for the removal of one panel at the very end of the evening and that the separate room was, in fact, a separate room. The primary public concern, as is evident from a perusal of the media articles at the time (which my counsel furnished to Ms. Justice Denham to illustrate the points of public concern), was

premised on the narrative that I had sat in a room with 80 people for dinner. I sought to demonstrate that this was not so and Ms Justice Denham accepted that this was not so. I note that the Court says it has accepted Ms. Justice Denham's report. Accordingly, I do not think it fair to characterise my establishment of the true facts of the matter, which was necessary to defend myself, as being a "*concentration on narrow and technical issues*".

The second point of public concern which was voiced in the media, although with somewhat less emphasis, was the question of whether, from a separation of powers perspective, it was appropriate for a Judge to attend an Oireachtas golf society event at all. Ms Justice Denham formed the view that attendance at an event such as the one in question did not give rise to any such concerns. It seems apparent to me that this was your view also, since you sanctioned my attendance at the golf event (but, to be fair to you, not at the dinner since that was not an issue in either of our minds when we discussed the golf event). Again, I do not understand how my addressing the separation of powers issue can be construed as concentrating on some narrow or technical issue, when that was one of the fundamental issues raised.

For the avoidance of doubt, I fully accept the criticism that Ms Justice Denham did make, which is that apart from these issues, I should have been more alert and vigilant to the fact that attendance at such a social event, even if compliant with Covid Regulations/Guidelines, at a time of a pandemic crisis was inappropriate. I have accepted that criticism and I have apologised for it. Insofar as is necessary, I repeat that apology.

You set out three reasons as to why you have formed the view that I should resign.

The first is that in the course of my evidence before Ms Justice Denham, I did not seem to appreciate the genuine public concern and attributed the whole matter to a media frenzy. If that is the impression I have given, I am sorry for that and that is certainly not the impression I intended to create. I, of course, fully appreciated the public concern and said so to Ms. Justice Denham (see, for example, the transcript at page 131). My point was that the entirely understandable public concern and, indeed, outrage, was based on the assumption that I had attended a dinner in a room with 80 people and that I did so knowing that it was, or must have been, in breach of the relevant Covid Regulations and Guidelines. That was, in fact, not the case. Nonetheless, I issued the apology which I did (following my first telephone discussion with you on the 21<sup>st</sup> August) because, as I have explained above, it appeared that I had inadvertently acted in breach of the new "rule about six persons", announced the previous night by the Government, of which I had been unaware. That apology was and is genuine and I repeat it. I cannot see how any of this is a basis upon which I should resign.

The second ground you advance is that in the course of my interview with Ms Justice Denham, I made remarks critical of members of the Government and that part of the reciprocal respect due by the various branches of Government to each other is that Judges do not engage in controversy with regard to the other branches. Of course, I accept that principle entirely. However it must be recalled that when setting out the basis upon which her review would be conducted, Ms Justice Denham confirmed to me in her letter of 28<sup>th</sup> August 2020 that the meeting would be held in private and that a stenographer would be present to ensure an accurate record. That was the basis upon which I spoke with Ms Justice Denham and I believed that our discussion would remain private, other than the possibility, of which I was aware, that in sending her report to you, she might (as she did) attach the transcripts of our meetings. However, I did not make any public criticism of the

Government. Insofar as any concern arose publicly about the remarks I made, such public controversy arose from the fact that you, in your role as Chairman of the Judicial Council along with your judicial colleagues on the Council, decided to publish the transcript of the first meeting.

As regards the substance of what I said at the meeting, at the very end of a very stressful three hour meeting (conducted with the utmost courtesy and consideration by Ms. Justice Denham who did everything possible to minimise my stress), I made a reference to the fact that I had been told that Minister Calleary had not been asked by the Taoiseach for his account of the facts and that there appeared to be some confusion in Government on the status of the various rules and Regulations. Albeit that this was said in private without any intent that it would be made public, and was said when I was trying to put into context the status of the “rule about six persons” announcement, I nonetheless regret having expressed myself as I did. I would ask you to consider, however, that my meeting with Ms Justice Denham was the first time in over four weeks after the dinner, during which period I was subjected to intense criticism on what I believed to be a mistaken premise, that I had an opportunity to explain myself to anybody. I was under the most intense pressure, personally, physically and emotionally, and the transcript, like all transcripts, does not adequately communicate those sensations. My remarks about the Government come at virtually the very end of the meeting and if I expressed myself poorly or inappropriately, then I apologise for it.. However, I do not believe any reasonable person would consider it a ground upon which I should resign as a Judge, particularly considering that I understood we were speaking in private and I was, in effect, fighting for my professional life and reputation and was speaking the truth as I understood it.

The third and last point you make in support of your view that I should resign is that in the course of my interview with Ms Justice Denham, I raised the question as to whether some of my colleagues might have pre-judged me and you connect this with what I said in a letter to you about my meeting with our three colleagues on the 2<sup>nd</sup> October.

As regards what I said about possible pre-judgement, the points I have made above about the circumstances of the interview with Ms Justice Denham equally apply. The only information you or the other members of the Court had in relation to the matter was the commonly accepted narrative that I had attended a dinner in a room with 80 people in knowing breach of the relevant Regulations and Guidelines. It would have been difficult for anybody to avoid the conclusion that I had made a serious error of judgement, if those were the facts. What I was concerned about was that, bar the two telephone conversations I had with you on the 21<sup>st</sup> August (when I telephoned you in response to the text you had sent me about responsible people being understandably concerned given the accepted narrative), and bar one sympathetic WhatsApp exchange from one member of the Court very early on, not a single member of the Court made any effort to contact me during this period or to find out my point of view in relation to the matter or to enquire if what was widely reported was in fact true. I think it is understandable that I considered that there was at least a possibility that some of my colleagues might have formed the view that I had been guilty of some serious misjudgement and I expressed that concern to Ms. Justice Denham. So my expression of concern about pre-judgment to Ms. Justice Denham in our private meeting, which again I did not believe would be made public, is not a reasonable ground for resignation. I would not have made such a comment about any of my fellow Judges had I known that the transcript of this meeting would be made public.

As regards what I said in reaction to the meeting of 2<sup>nd</sup> October, I think it worthwhile to note in the first instance the terms of the letter I wrote to you that morning which was the day after the Judicial Council had published the Denham Report and where you had asked me to meet, not with you but with three of our colleagues. I fully accepted the Denham Report and I said in my letter to you of the 2<sup>nd</sup> October:

*“I am very conscious that my attendance at the dinner has, unfortunately, occasioned damage to the Court in terms of public perception and I see the force of Judge Denham’s point that, even though I reasonably considered the event was “Covid compliant”, I did not adequately consider that attendance at a dinner, which would be uncontroversial for a layman, might not be so for a judge. I am immeasurably upset and equally apologetic that my decision to attend the dinner should have subsequently been perceived as something damaging to the Court. That such damage was, of course, wholly unintended, does not detract from my profound regret that I have been the cause of it and I would like to do anything I can to repair such damage. I will be glad to discuss whatever I can do with you and our colleagues”.*

However, at the meeting with my three colleagues that afternoon, no such discussion took place. I was presented with what I was told were the Court’s demands which I was told, in unequivocal and uncompromising terms, were non-negotiable, that there would have to be “serious consequences” for me, and that there would be no question of me emerging “unscathed” (language which you repeated in your letter to me of 5<sup>th</sup> October), although the Judge who took the lead at the meeting said he did not consider the matter required resignation. (In the same letter you maintained that this was the personal view of the Judge in question rather than the collective view of the three or the Court). I felt that I was not afforded any realistic opportunity to explain myself, even though I understood this was partly the purpose of the meeting.

I never said that my colleagues had engaged in inappropriate or improper conduct. What I actually said, in my email to you of 4<sup>th</sup> October, was that *“the content and tone of what was laid out for me by my three colleagues with whom I met on Friday, and indeed their collective demeanour, was unexpected, upsetting and traumatic, and has added very significantly to an already stressful situation”*. You will be aware that I had by that time developed a serious medical condition in consequence of the stress, and I had to inform you that I now required medical assistance as a consequence and therefore was not in a fit position to meet with you the following day as had previously been set out by you.

I am sorry if any of my colleagues took offence at either the apprehension of pre-judgement that I expressed to Ms Justice Denham, or at the fact that I found my meeting with them to be upsetting and traumatic and said so. The fact of the matter is, however, that I did find the content and tone of the meeting both upsetting and traumatic. I think I was entitled to communicate that to you, and I do not consider that in doing so, it has given rise to any reason as to why I should resign. What I said to you was true.

Accordingly, I do not think that any of the three reasons you have proffered for my resignation, either individually or collectively, remotely constitute substantial reasons or grounds for my resignation, let alone amount to judicial misconduct (as defined in the Judicial Council Act).

One of the most curious and unfortunate features of all of this is that, despite Ms Justice Denham's recommendation of an informal resolution (being the least serious of the responses contemplated by the Judicial Conduct Act with an admonition at the most serious end of the scale) you have never discussed any of these matters with me, whether the matters relate to the dinner or the matters which you say now give rise to your view that I should resign. While I acknowledge that our planned meeting had to be postponed on a number of occasions, when we eventually did have that meeting last Thursday, it did not amount to a real discussion, but in effect a meeting where you read out to me a draft of the letter which you sent to me shortly thereafter and where I only had an opportunity to make a few very high level points. You had explained to me in writing in advance that the meeting was not for negotiation or extended debate and so it transpired.

I believed "informal resolution" meant that we would meet informally to discuss the issues. We have never met, formally or informally, to discuss the issues. Not only that, but you formed your personal view that I should resign without even discussing with me the shift in the goal posts when, faced with Ms. Justice Denham's unequivocal view that my attendance at the dinner did not warrant my resignation, you grounded your call for my resignation on how I had defended myself. It is, on any view, surprising that something so serious as a Chief Justice calling on a fellow member of the Supreme Court to resign (and, apparently, intending to do so publicly) should occur without the Chief Justice even discussing the matter in advance with the Judge in question or hearing what the Judge might have to say on a point of significant concern to his livelihood, his reputation and his mental health.

## **Conclusion**

As I said at the outset of this letter, I intensely dislike having to go through the foregoing points in such detail or at all and I equally dislike the fact that we are in disagreement on these issues. As I have explained, I have only set out my position in this detail because of your statement that you intend to publish your letter in which case it would be only fair that you publish my detailed response. As I have already said, I do not believe publication of this correspondence serves the interests of anybody or the Court.

You and I have been friends and professional colleagues in various capacities for many years, indeed decades. My respect for you is unquestioned and undiminished. I have no doubt that the various steps you have taken in this matter and the views you have formed, while I might disagree with some of them, have been taken and formed in your conscientious discharge of what you believe to be your duty as Chief Justice in relation to an undoubtedly difficult issue. I completely respect that and anticipate that you equally respect my response to these issues.

The question of resolving those points appears to devolve down to the fact that the Court has put three points of informal resolution or sanction to me and I have expressed a willingness to accept those points, if that would ensure resolution of this matter for all of our sakes and for the sake of the Court. I do not doubt that you share my aim of working together in a collegiate and friendly fashion, that we are capable of putting these difficult issues behind us and that we can and will work together in the future in a constructive, collegiate and amicable fashion, as we have always done previously.

Kind regards.

Yours sincerely,

Seamus