

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 14TH JUNE

2001 AT 12PM:

MR. COUGHLAN: There will just be one witness before lunch, Sir. Mr. Frank Conroy, and we will be proceeding after lunch to deal with other matters, including a brief outline statement before we take up further witnesses.

CHAIRMAN: Very good, Mr. Coughlan.

MR. ALLEN: I wonder if I might indicate, I appear on behalf of Mr. Conroy, instructed by Messrs. JA Shaw & Company. I make an application for limited representation on the usual terms.

CHAIRMAN: I suppose, Mr. Allen, whilst I certainly understand that your client should not be at a loss in perhaps having to get legal advice for meeting with the Tribunal lawyers and preparing a statement, I might have some concerns as to whether an actual limited representation order is necessary, given his very limited role

MR. ALLEN: I am entirely in your hands.

CHAIRMAN: I'll give you leave to take part if anything arises, and you can renew the application at a later stage.

MR. ALLEN: I am obliged to you, Chairman.

FRANK CONROY, HAVING BEEN SWORN, WAS EXAMINED AS
FOLLOWS BY MR. COUGHLAN:

Q. MR. COUGHLAN: Now, Mr. Conroy, I think you furnished
a statement or a memorandum of your proposed evidence
for the assistance of the Tribunal, isn't that correct?

A. That's right, Sir.

Q. And I think you have it with you in the witness-box?

A. I have, yeah.

Q. And what I propose doing is to take you through it and
then, perhaps, just asking one or two questions to
clarify matters arising from it. I think you said that
you were a businessman and you reside at Killiney Hill
Apartments, Killiney, County Dublin. I have been
asked by the solicitor to the Sole Member to furnish a
statement covering details of your dealings with the
late Mr. David Austin in connection with a cheque for
€33,000 which was drawn on Mr. Austin's account at Bank
of Ireland, Baggot Street, in May, 1997, and made
payable to you, isn't that correct?

A. Correct.

Q. I think you say that, by way of background, you should
say that the late David Austin was a friend of yours
for a period in excess of 30 years, is that correct?

A. Correct.

Q. During that time, he and you would have had frequent

contact and would have holidayed together, both abroad and at home here in Ireland, is that correct?

A. Correct.

Q. I think you had a number of shared interests, including horse racing, is that correct?

A. That's correct.

Q. In particular, he and you were life-long supporters of the Fine Gael Party?

A. That's correct.

Q. Put simply, notwithstanding what now appears to be the case, your involvement in relation to this matter was as follows: The late David Austin would have telephoned you and told you that he was sending you monies for passage on to the Fine Gael Party, is that correct?

A. That's correct.

Q. It also seems clear that the Party in the person of Jim Miley, the then General Secretary, was aware of and expecting the money?

A. Correct.

Q. I think you have informed the Tribunal that, to the best of your recollection, it was represented to you that the monies would have been sourced from a dinner organised by the late Mr. Austin in New York in 1995, which was a fundraiser which was attended by the then Taoiseach, Mr. John Bruton, TD, as guest of honour, is that correct?

A. That's correct.

Q. I think you have informed the Tribunal that you think it right to point out that within the past eighteen months you have had major heart surgery with ensuing complications, and your ability to recall matters of detail with certainty is not as you believe to have been as you would now wish it to be, is that correct?

A. That's correct.

Q. This notwithstanding, however, you can say absolutely categorically that no mention was ever made to you by any person of Telenor, ESAT Digifone, or any other body, nor indeed had Telenor been mentioned at the time nor indeed if Telenor had been mentioned at the time, would it have meant anything to you?

A. That is correct.

Q. I think you have informed the Tribunal that when this matter entered the public domain in March of this year, you received telephone call at your home from Tom Curran, the present Secretary General of the Fine Gael Party, is that correct?

A. That's correct.

Q. You wish to emphasise that this was the first contact which had been made with you concerning the transfer on by you of the funds received from Mr. Austin since the task was carried out by you, is that correct?

A. That's correct.

Q. You were at all times a complete stranger to the

controversy which were clearly raging amongst various different parties over a period of time, and indeed would express some surprise that the facts of that controversy were not brought to your attention?

A. That's correct.

Q. I think you have informed the Tribunal that on the evening that Mr. Curran contacted you and during the course of your telephone conversation, he indicated to you that you had endorsed a cheque drawn on Mr. Austin's account in Baggot Street and transmitted it to the Party, is that correct?

A. (Nods head.)

Q. Your immediate reaction was that this was not correct, as you had no recollection of so doing at that time, isn't that correct?

A. That's correct.

Q. You asked Mr. Curran, did he have a copy of the cheque, to which he replied in the affirmative. Mr. Curran then, at your request, faxed to your home a copy of the front and the back of the cheque. And once you had received these, you recognised your own signature and immediately confirmed to Mr. Curran that it was yours, and that in the circumstances it was clear that, notwithstanding your lack of memory, Mr. Austin had made the cheque payable to you, and you had immediately passed it on to the party, is that correct?

A. That is correct.

Q. You wish to emphasise that that was the end of your involvement in the matter, until contacted by Mr. Curran and subsequently by the solicitor to this Tribunal, is that correct?

A. That's correct.

Q. In summary, in relation to the monies themselves, you did nothing more than pass on monies received by you to the institution identified by Mr. Austin as the appropriate recipient of those monies, is that correct?

A. That's right.

Q. You say that you are comforted by the fact that there is independent verification, and immediately you received the cheque, you endorsed it and passed it over, is that correct? I think you have informed the Tribunal that when forced to attempt to recall the circumstances in which you received the monies, your recollection was as you have already said, these monies represented the tail end of funds from the New York function, is that correct?

A. Correct.

Q. For the sake of completeness, you should say that you attended this function at your own expense?

A. That's correct.

Q. Just to be clear there, you were not a target for that function?

A. No.

Q. And you didn't pay for a plate, as others did, in the

fundraiser?

A. No, I didn't.

Q. You were just a party supporter. You had reason to go to New York, in fact?

A. That's right.

Q. And you went to the dinner, isn't that right?

A. Yes.

Q. Now, I think you have informed the Tribunal that you have known Mr. Michael Lowry for a considerable number of years. You would have met him, you believe, through your mutual involvement in the Fine Gael Party, although this, of course, was at a completely different level. Is that correct?

A. (Nods head.)

Q. Sorry, that Mr. Lowry's involvement was at a completely different level, isn't that correct?

A. Yeah.

Q. Now, I think you have informed the Tribunal that you do recall Mr. Michael Lowry introducing you to Mr. Denis O'Brien at some point?

A. At some stage.

Q. I think you say that you would describe your relationship with Mr. O'Brien as one of passing acquaintanceship, would that be correct?

A. That would be correct, yeah.

Q. You believe you did on one occasion ask him to attend a Fine Gael fundraising lunch, which he very kindly did?

A. That is correct, yeah.

Q. The subscription for that lunch, I believe, is 1/2 100 per person?

A. Yeah.

Q. I think you have informed the Tribunal that at the weekend following the breaking of the story by the media, you received a telephone call at your home on your unlisted telephone number from Mr. O'Brien. You did not know nor did you ask Mr. O'Brien where he obtained the number, but certainly would not have been from you. You had never before received a telephone call from Mr. O'Brien, either at home or you believe anywhere else. The telephone conversation was brief. Mr. O'Brien expressed regret that you had become involved in what you think he referred to as "this mess about the cheque," and "gave me his mobile phone number, lest I wish to contact him." I think you have informed the Tribunal that not wishing to pursue the matter, you believe that you indicated to Mr. O'Brien in a very general way that you were not in any way concerned, thanked him for his call, and there the matter rested. For the avoidance of doubt, within moments of terminating the telephone call, you tore up the piece of paper on which you wrote Mr. O'Brien's mobile number?

A. That's right.

Q. You made mention of this matter only because you had

been asked by the Tribunal to furnish it with all details you might have had with Mr. O'Brien. And I think you say that you are happy to supplement this statement with such oral evidence as may be required, is that right?

A. That's correct.

Q. Now, Mr. Conroy, I think you were a member of what is known as the Capital Branch of Fine Gael for many years

A. Just before I go ahead with that, could I just add something to that last statement?

Q. Of course.

A. In view of the evidence I heard that Mr. O'Brien gave in the last day or so, I did have a communication with Mr. O'Brien, I don't know when, whether it was before I got sick or after I got sick, when he was setting up the

Q. A mast?

A. The mast in the barracks. I heard that he may have had trouble getting permission for the mast in Cabinteely. At that particular time I was after completing an office block in Cabinteely, and I approached Mr. O'Brien to know if the office block might be a suitable situation for the site. I can't recall very much what took place, but nothing came of the conversation.

The reason, Sir, I am telling you that is that I may at

that stage, in fairness to Mr. O'Brien, have given him my phone number.

Q. I was going to deal with that because I think you had that brought to the attention of the Tribunal through your lawyers already, and I was going to raise that.

But you just want to clarify that, that you may have given Mr. O'Brien your telephone number at that time.

A. That's correct, yeah.

Q. Now, I think you had for many years been a member of what was called the Capital Branch

A. The Capital Branch of Fine Gael.

Q. Capital means Dublin, is that correct?

A. Yeah.

Q. And I think as a member of the Capital Branch of Fine Gael, you were involved in fundraising over the years on behalf of Fine Gael?

A. Correct. Over 20 years, yeah.

Q. As were the other members of Capital Branch?

A. That's right. I would be one of the longest serving members.

Q. And I think the late Mr. Sean Murray, who was

A. He was Chairman of the Capital Branch.

Q. And he was an accountant, isn't that correct?

A. That's correct.

Q. And when the need for funds arose at election time or other times, when Capital Branch were involved in fundraising, am I correct in understanding that you

would be given a number of people or entities to approach, but that you would not know who other members of Capital Branch were approaching?

A. Yeah. It was a kind of a very, very secretive organisation. We all had our lists of contacts which we made at every election to seek funds to fight the election. Now, nobody, other than those involved with that list and the Chairman and the General Secretary of the company, ever knew how much was collected by anyone from anyone.

Q. So Mr. Murray knew

A. Mr. Murray knew, and Mr. Miley knew.

Q. And whoever the General Secretary at any given time would know

A. That's right.

Q. the overall picture?

A. That's right.

Q. You would only know

A. I'd only know what I collected. I wouldn't know what any other person collected.

Q. And I think that's the way it always operated.

A. That's the way confidentiality, always, yeah.

Q. And just to be clear about this: You were a close personal friend of Mr. David Austin over a 30 year period?

A. Over 30 years, yeah.

Q. And he was a supporter of Fine Gael, isn't that right?

A. He was a supporter of Fine Gael. He wouldn't be the biggest supporter of Fine Gael as I was myself.

Q. I just want to be clear about this. Mr. Austin was never a member of Capital Branch?

A. He was for a very short time back in the eighties, but he gave it up after six months.

Q. After six months?

A. Yeah.

Q. So in terms of the serious fundraising side of the Party, Mr. Austin did not have a significant role over the years, would you say?

A. No. It was in the latter years he had a fairly major role in organising golf classics.

Q. I think Mr. Bruton told us yesterday, or Mr. Miley, that there was a significant golf classic arranged in the K-Club, and that was to do with Mr. Austin's employment, obviously, with the Smurfit organisation?

A. That's right.

Q. And Mr. Austin was the prime mover in relation to the organisation of the fundraiser in New York, if I could describe it like that?

A. He was indeed.

Q. And that was done with the sanction of the president of the organisation, and we have seen here, by Mr. Michael Lowry, who was Chairman of the Trustees of the Party, and it was done in conjunction with his own committee and staff at Fine Gael headquarters. Would that be

your understanding?

A. Correct.

Q. Now, I think you attended the dinner in New York

A. I did, yes.

Q. And as far as you knew, that was the end of the affair?

A. That was the end of the affair, except towards the very end there were a few outstanding accounts that hadn't come in. One of them was in Ireland, the other two were abroad somewhere, and I didn't know where. But I happened to know the people in Ireland, so I took it upon myself to go and see them, and I went and saw the man here in Ireland, it was an American company, and I spoke to him. I told him what my mission was, and to say the least, he was horrified. It was a complete oversight on their behalf, and they immediately paid the cheque.

Q. And the company you approached had been initially a company which had been on a list targeted, made a commitment

A. Their president, who lives in New York, was president at the time.

Q. They made a commitment, and it was an oversight on their part?

A. Correct.

Q. And that was completely transparent and available through the records of the Party to be identified?

A. That's correct, yeah. Yeah.

Q. Now, I think, coming up to the General Election of 1997, I think you received a phone call from Mr. David Austin, is that correct?

A. Yeah.

Q. This is before the cheque was received?

A. Yes.

Q. And I think he informed you that he had some money or monies he wished to pass on he wished you to pass on to Fine Gael, is that correct?

A. Yes, that's correct.

Q. And did you have any further discussion with him at that time, do you remember?

A. No. I was amazed when I got the cheque made out to myself, and to be quite honest with you, I felt that David might have thought there was a little bit of rivalry in Capital Branch as to who would collect most money, and I thought that was maybe one of the reasons he made the cheque payable to me rather than making it payable to Fine Gael. It was on the Bank of Ireland in Baggot Street in his own account and made out to me, and I brought it into

Q. You immediately endorsed it and you brought it in to Jim Miley, isn't that correct?

A. Yeah.

Q. Now, when you were engaged in fundraising, as you had been over many years, would it be usual for the cheque that you would get from a contributor to be made out to

you?

A. Never before.

Q. Never before?

A. No.

Q. It would be more usual to be made out to Fine Gael, would it?

A. Fine Gael.

Q. And just to explore that a little: As a fundraiser, I presume fundraisers always feel a little bit vulnerable, they are collecting money, they are accountable both to the donor and to the Party?

A. And to the Party, yeah.

Q. And you want to be fairly sure that if anything goes wrong or goes missing, that you are not the person whose identified as having caused it to go missing or go wrong, is that correct?

A. That's correct. I always made sure they got a receipt.

Q. You always made sure they got a receipt.

A. Yeah.

Q. And whilst you had some surprise that this cheque was made out to you, from your own point of view you had no difficulty, because you just endorsed it over and gave it to Fine Gael. You knew where it was going?

A. I knew where it was going. I knew that Mr. Austin had been in touch with Jim Miley.

Q. Did you find that out from Mr. Austin or Jim Miley when you brought the cheque in to it, do you think? I think

Jim Miley was expecting something?

A. I think he was. Because I think Jim Miley did say he had three phone calls, as far as I can recall, with Mr. Austin before the cheque came in.

Q. Well, having given it to Jim Miley, can I take it that it was your understanding that if any receipts were going to be issued, they'd be issued by Jim Miley for the cheque?

A. I would imagine so, yeah.

Q. I take it, you didn't have much conversation with Jim Miley when you gave him the cheque?

A. I am not sure whether I gave the cheque to Jim Miley or whether I just left it in to the office.

Q. I see. Now, I think in recent times when this matter entered the public domain, you were contacted by Mr. Curran, the present General Secretary?

A. Correct.

Q. And at first you couldn't remember this, but when he sent you the cheque, a copy of the cheque and the back of it, you were able to identify your own signature?

A. I was, yeah.

Q. And you remembered that this was the cheque that David Austin had sent you

A. Yeah.

Q. And you had given to Jim Miley?

A. Yeah, that's correct.

Q. Now, I know you have difficulty with remembering things

because of your illness, Mr. Conroy, but Mr. Miley seems to remember that in 1998 he may have rung you and asked you, did you receive a cheque from David Austin which you passed on to the party. Do you remember that?

A. No, I don't. I also never heard that there was any controversy about the cheque from Fine Gael.

Q. I understand that you never heard that there was any controversy. I think Mr. Miley's evidence was that he just wanted to ascertain that you had received a cheque from David Austin and passed it on to him or the Party?

A. Yeah, it was inside in the office.

Q. But you had never heard about any controversy until this matter entered the public domain?

A. Until I heard from Tom Curran.

Q. Until you heard from Tom Curran this time?

A. Yeah.

Q. I think you were a bit surprised that

A. I was, yeah. Sure, I denied it.

Q. Until you got the cheque?

A. Until I got the photostat.

Q. Now, I think, apart from being a friend of Mr. Austin's over a long period of time, I think you did in fact have a certain degree of friendship with Mr. Michael Louis from the time you got to know him in the Party, would that be fair to say?

A. That's correct.

Q. I think yourself and Mr. Austin and Mr. Lowry would have

A. We would have met at race meetings, we would have met at well, I was on the committee that organised the function with Mr. Austin and Mr. Lowry in the Burlington Hotel.

Q. Where?

A. In the Burlington Hotel in Dublin.

Q. That was a different function to the New York one?

A. Absolutely, yes.

Q. And that was a function which was organised by Mr. Lowry there was a committee obviously Mr. Lowry, Mr. Austin, and yourself were on the committee?

A. Yeah, and I don't know who else.

Q. And when you say that you were introduced to Mr. Denis O'Brien by Mr. Michael Lowry, can you remember when?

A. I can't remember where, whether it was I know that I did meet him at a few race meetings.

Q. And apart from having a passing acquaintanceship with Mr. O'Brien, one of which was to get him to attend a $\frac{1}{2}$ 100 a plate lunch which was a fundraiser, you also had a contact with him over this question of a mast in Cabinteely?

A. When I read about it, I remembered it quite well. I certainly did. And whatever he says there is correct.

Q. Now, I know at the time when you received the cheque

from Mr. Austin, you were surprised that it was made out to you to begin with?

A. I was, yes.

Q. And the best interpretation you can put on why it was paid through you was because of this question of a little bit of rivalry within Capital Branch, understandably, which was bringing in most funds to the Party, would that be that was your view?

A. That was the only view, but I'll have to say here and now, that since I discovered recent events, I feel very annoyed, to say the least of it, that my, what I call a good name in the Capital Branch, had been used to get a cheque into the Party completely without my permission

Q. Or knowledge?

A. Yeah. Despite the fact David Austin was a personal friend of mine for over 30 years, he never once mentioned to me why he was doing it, why he made the cheque out to me or anything.

Q. I think you have expressed that annoyance, and you wish to express you wish in public to express your annoyance about that?

A. I do, yeah.

Q. I think you are also annoyed that you only learned about this controversy of recent times. Now, you think that somebody may have said to you that this money represented the proceeds of or a balance of proceeds

for the New York fundraiser. Do you actually remember somebody saying that to you?

A. There was talk of it. There was talk of it.

Otherwise it wouldn't have been in my mind.

Q. Was that at the time you received the cheque or is it since the controversy has arisen?

A. Before I knew there was all the money out there somewhere and there was one in Ireland, which I looked after myself.

Q. I understand that, but this is after the fundraiser, I think there were perhaps two or three outside Ireland; there was one company, an American company in Ireland?

A. That's right.

Q. And you looked after the company here in Ireland?

A. Yes.

Q. But those were all companies who had been targeted, made a commitment, and some of them had attended the dinner, wouldn't that be correct?

A. The one I contacted wasn't targeted by me. I had nothing to do with it, but I happened to know the executive who runs the operation here from racing, and I went to see him.

Q. I understand he hadn't been targeted by you, but had been targeted and made a commitment to the Party?

A. That's correct, yes.

MR. COUGHLAN: Thank you, Mr. Conroy.

CHAIRMAN: Mr. Fitzsimons? Mr. Allen?

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. ALLEN:

MR. ALLEN: Just very briefly, if I may, Mr. Chairman.

Q. MR. ALLEN: Mr. Conroy, you have told the Chairman and you said in your statement you knew Mr. Austin for a very long period of time, isn't that correct?

A. Correct.

Q. Mr. Austin, I think, never, correct me if I am wrong, never suggested to you at any time that the funds which he, for which you became a conduit, were personal funds from him or represented a personal donation from him to the Fine Gael Party, isn't that correct?

A. That is absolutely correct.

Q. So far as you were concerned, you were passing on monies which

A. That he had collected.

Q. To Fine Gael?

A. Yeah.

Q. Which you did as soon as you received them?

A. That's correct.

Q. Thank you.

CHAIRMAN: Thank you very much indeed for your attendance, Mr. Conroy.

A. Thank you, Chairman.

THE WITNESS THEN WITHDREW.

CHAIRMAN: That's the only evidence this morning,

Mr. Coughlan. Should I say ten past two?

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AT 2:10PM:

MR. HEALY: You will recall, Sir, that you mentioned, I think yesterday, that the Tribunal would make a further Opening Statement today in connection with some of the material which has come to hand over the past few days, and which may to some extent alter or at least expand the focus of the Tribunal's work over the next remaining part of these sittings.

You will recall that the last Opening Statement was mainly in two parts. The first part dealt with the Terms of Reference which concerned Mr. Charles Haughey. The second part concerned Mr. Michael Lowry. This additional Opening Statement is effectively supplemental to the second part of the last Opening Statement which concerned Mr. Michael Lowry almost exclusively.

In that earlier Opening Statement the Tribunal focused on four items. Firstly, the \$50,000 US Telenor/ESAT payment. Secondly, the £147,000 payment into an Isle of Man account in the name of Michael Lowry, which was described in that Opening Statement as the Carysfort

Avenue/David Austin payment. Thirdly, the Mansfield transaction. And fourthly, the Cheadle transaction.

Each of those two transactions were property transactions.

In that Opening Statement, Mr. Coughlan set out the information then available in something approximating to historical chronological order concerning those four matters, that is to say, concerning the circumstances in which payments were made in each of those four cases. The Tribunal indicated that it was its intention to examine both the circumstances surrounding each of these items individually and the various overlapping relationships between the persons who appear to have been involved in them, namely, Mr. Lowry, Mr. O'Brien, the late Mr. Austin, and Mr. Aidan Phelan who then appeared to play a subsidiary role in relation to some, but a more central role in relation to others, of those matters.

Since that Opening Statement was made, a significant amount of further material has become available to the Tribunal. There were two things which prompted the Tribunal to seek access to this additional material.

Firstly, there was the Tribunal's continuing examination of the Telenor/ESAT \$50,000 payment. This payment was, as it now seems, the subject of much discussion at the time of the Initial Public Offering

of shares in ESAT Telecom, a company which controlled nearly 50% of ESAT Digifone. This Initial Public Offering was made in November of 1997. In the preparation of the Prospectus, a significant degree of attention was paid to the circumstances surrounding the \$50,000 payment. There were extensive discussions between the various individuals and different entities involved in the IPO concerning this payment, and those discussions generated an amount of paperwork. The Tribunal has been seeking access to this paperwork and has now managed to overcome a number of legal difficulties, with the result that some, though as yet not all, of this material is now available. As of this moment, the Tribunal believes that it has probably accumulated sufficient material to enable it to provide a reasonably accurate outline picture of what occurred.

I hasten to add that these difficulties arose due to a number of technical points relied on by some of the entities holding these documents. It is important to bear in mind that these technical arguments would, if accepted, be perfectly valid and the Tribunal is not anxious to become embroiled in technical arguments where privilege or confidentiality attaches to documents where it believes it can otherwise gain access to the relevant material. At the same time, I think it's important to bear in mind that in the case of both the Fine Gael Party and Mr. Denis O'Brien, the

Tribunal has now been afforded access to all material of any kind, whether covered by any claim to confidentiality, privilege or otherwise.

In addition to the work the Tribunal has been doing in seeking to gain access to this material, the Tribunal acquired further information concerning another matter which exercised the minds of the various entities involved in the IPO in 1997. This additional matter concerned events which occurred in 1996. These events, effectively one event, were brought to the attention of the Tribunal by Mr. Barry Maloney, the former joint Chief Executive Officer of ESAT Digifone, and latterly the sole Chief Executive Officer of ESAT Digifone. I think Mr. Maloney has now moved on to a non-executive position with the company. Mr. Maloney was recruited to a senior executive position with ESAT Digifone some time after the announcement of the decision to grant the second GSM licence to that company. It appears that he had done some limited work in connection with the competition, but did not become really active with the company until around 1996. Mr. Maloney informed the Tribunal that sometime in or around September or October of 1996 he had a discussion with Mr. Denis O'Brien concerning payments which, as Chief Executive Officer, he was obliged to sanction in connection with the work done in the

competition for the second GSM licence. These payments were mainly in the nature of what has been called or what have been called success payments, that is payments due to consultants and others engaged by ESAT Digifone solely for the purpose of promoting its competition bid, and which payments were contingent or presumably partly contingent on the success of that bid.

Mr. Maloney wished to clarify the obligations of the company with regard to those payments and had complained to Mr. O'Brien about the lack of invoices to vouch the claims of the various consultants or others to whom success payments appeared to be due.

Mr. Denis O'Brien was anxious that Mr. Maloney should sanction the payments so to ensure the people entitled to them were paid and to avoid delay in meeting these obligations. I think the way Mr. Maloney understood it, Mr. O'Brien wanted Mr. Maloney to get on with making the payments.

In response to Mr. Maloney's complaints concerning the lack of paperwork to enable him to process these payments, Mr. O'Brien remarked that he himself had had to make two payments of $i_{\frac{1}{2}}100,000$, one of which was to Michael Lowry. Mr. Maloney has informed the Tribunal that this discussion took place in the offices of ESAT Digifone. Mr. Maloney's response to these remarks of

Mr. O'Brien was to say that he didn't want to know any more about them, that they concerned a period when he wasn't an executive of the company, and as far as he was concerned, that was the end of the discussion at that time about them.

This discussion, together with further related discussions, became the focus of attention at the time of the Initial Public Offering and the preparation of the Prospectus in relation to the Offering in 1997. In fact, it was only after the matter of these two payments was raised in the context of the preparation for the IPO, that the further matter of the US \$50,000 ESAT/Telenor payment arose. Having acquired this additional information from Mr. Maloney, the Tribunal recognised that the requirement to examine the documentation generated in the course of various discussions concerning the Prospectus in 1997 had become more urgent. It was for this reason that, in the course of examination of Mr. Arve Johansen to date, and the examination to date of Mr. O'Brien, that certain matters could not be scrutinised in detail or could not be scrutinised as completely as it will now be necessary to examine them.

It is clear from the documentation which has now been made available that the Tribunal will have to make a much more wide-ranging inquiry into the events

surrounding the preparation with the Initial Public Offering in November of 1997.

To the four items warranting inquiry and which were mentioned at the Tribunal's last Opening Statement will now have to be added a fifth item as well, namely, whether there was in fact a payment by Mr. O'Brien to Mr. Lowry at some time prior to September or October of 1996. In addition, in the examination of the overlapping relationships between the various individuals in connection with the four items mentioned at the Tribunal's last Opening Statement, this further matter will assume considerable significance.

From the information which has now been made available to the Tribunal, it would appear that there are a number of different versions of what transpired between Mr. Maloney and Mr. O'Brien in 1996. There are also a number of different versions as to what transpired in the course of the IPO discussions in 1997 which concerned that 1996 conversation and other related conversations between Mr. O'Brien and Mr. Maloney.

Most of the documentary material concerning the matters to which I now intend to refer has been made available to the Tribunal by ESAT Digifone, ESAT Telecom, by Mr. Barry Maloney, and by Mr. Denis O'Brien. The Tribunal is in the process of endeavouring to obtain further documentation from Telenor and IIU, and it

anticipates that this further documentation will be to hand within the next few days.

I think at this point it might be useful if I were to say a word or two about the relationship between ESAT Digifone and the other ESAT affiliates or ESAT associated entities.

The second GSM licence was awarded to ESAT Digifone Limited. That was the vehicle used by the successful consortium for the award of the licence. As of the date of the award of the licence, that is to say the 16th May, 1996, and not the date of the announcement of the winner of the competition, the shares in ESAT Digifone appear to have been held as to 40% by ESAT Telecom, which was Mr. Denis O'Brien's corporate vehicle; as to 40% by Telenor; and as to 20% by IIU Nominees Limited. It would appear that the shares in IIU Nominees were beneficially held for Mr. Dermot Desmond.

As of November of 1997, that is at the time of the ESAT Telecom Initial Public Offering, ESAT Telecom and Telenor had each acquired a further 5% interest from IIU Nominees, so that at that time the shares in ESAT Digifone were held as to 45% by ESAT Telecom, if you like, Mr. O'Brien's vehicle; as to 45% by Telenor; and as to 10% by IIU Nominees Limited.

Subsequent to the ESAT Telecom IPO, both ESAT Telecom and Telenor again increased their respective shareholdings by each acquiring a further 4.5% interest from IIU Nominees, so that the shareholding in ESAT Digifone was by then held as to 49.5% by ESAT Telecom; 49.5% by Telenor; and 1% by IIU Nominees Limited.

As at this time, the shares in ESAT Telecom and in ESAT Digifone have been acquired by British Telecom, so that BT, as it is known, now owns both ESAT Telecom and ESAT Digifone in their entirety.

From the information recently provided to the Tribunal and from the documentation to which I have just referred, it would appear that in late 1997 there were a number of discussions between Mr. Barry Maloney and Mr. O'Brien concerning the remarks which had been made by Mr. O'Brien earlier, that is to say in 1996.

Mr. O'Brien, as I will indicate, denies that he ever paid $\text{€}100,000$ to Michael Lowry, or a second $\text{€}100,000$ success fee to another party. Mr. Michael Lowry, denies that he ever received $\text{€}100,000$ from Mr. Denis O'Brien. However, Mr. O'Brien has not denied either to Mr. Barry Maloney or to any other of the individuals involved in the IPO that he made these remarks, although he does deny that he ever stated that he ever made a payment to Michael Lowry. In other words, he does not deny that he made a reference to two payments

of $\text{€}100,000$ in connection with the granting of the licence.

At the time of the IPO, the questions which were exercising the mind of Mr. Maloney and the minds of a number of other individuals were as follows. This is a summary of a much wider canvass in which these questions were being considered: whether these statements of Mr. O'Brien had in fact been made.

Secondly, whether, if made, these statements were true, whether, in other words, Mr. O'Brien had in fact made two payments of $\text{€}100,000$ to two different individuals, one of whom was Mr. Michael Lowry. If true, obviously there were huge implications for the IPO, in particular if there were a connection or an apparent connection between a payment of $\text{€}100,000$ to Mr. Michael Lowry and the granting of the second GSM licence. It was also a question whether the remarks were true or not, and whether or not the truth or falsity of the remarks could be established in advance of the issue of the Prospectus. In addition, it was a question as to what extent these remarks ought to be disclosed, either in the Prospectus or to other interested parties involved in the IPO.

There was also, of course, the question around this time, and as we know, for some time afterwards, whether these statements, true or not, or whether the truth or

not of them could be established, should be disclosed to the Moriarty Tribunal which had been set up in the course of the preparation of the IPO.

The vast bulk of the material to which I have now referred, or to which I will now refer, was provided by ESAT Digifone and came from the custody of Messrs. William Fry solicitors. The documentation was generated mainly by Mr. Owen O'Connell and Mr. Gerard Halpenny, then both partners in William Fry solicitors in connection with the dealings between the various interested parties in the IPO in 1997. Mr. O'Connell, who is now the managing partner of William Fry solicitors, has provided the Tribunal with an account of the circumstances in which this documentation came into being. He has informed the Tribunal that he acted as solicitor to ESAT Telecom at or around the time of and for some years prior to the time of the IPO. As Mr. O'Connell has informed the Tribunal, as is now fairly well-known, Digifone had won the competition for the granting of the licence on the 25th October, 1995, and thereafter embarked on the process of rolling out or creating the mobile phone licence network. The launching of this mobile phone network occurred in March of 1997. Sometime after the launch, Mr. O'Connell was informed by Mr. O'Brien of Mr. O'Brien's intention of proceeding with a public

offering of shares in ESAT Telecom, and he set the Autumn of 1997 as the time at which this would occur.

ESAT Telecom's shareholding in ESAT Digifone formed a large portion of ESAT Telecom's overall value and was probably the main attraction for investors in ESAT Telecom at that time. Mr. O'Connell has informed the Tribunal that for that reason some degree of cooperation from ESAT Digifone was required for the ESAT Telecom flotation.

The first document I want to refer to of the documents provided by Mr. O'Connell is a memorandum of a meeting on the 22nd October, 1997, at the offices of William Fry solicitors. Mr. Denis O'Brien and Mr. Aidan Phelan, an associate of Mr. O'Brien's, called to see Mr. O'Connell, and they told him that Mr. Barry Maloney had asserted that a statement had been made to him by Denis O'Brien to the effect that he, Denis O'Brien, had made payments to two individuals, one of whom was Mr. Michael Lowry, in connection with the ESAT Digifone bid for the second GSM licence. Mr. O'Brien insisted, in the course of the meeting, that there was nothing in the allegation; as he put it, it was destructive and that spreading it would be damaging to all, especially the company, that it was akin to starting a fire in a cinema, and that it was neither responsible nor necessary to inform the board of ESAT Telecom. In

particular, he stated, according to

Mr. O'Connell's note, that he had made no payment and that he could refute any assertion of Barry Maloney to that effect in the box, meaning, presumably, in the witness-box; that he could, in other words, swear to that effect.

Now, the Tribunal has been provided with photocopies of these memoranda, but has also very helpfully been provided with typewritten transcriptions, if you like, of these by Messrs. William Fry solicitors. It won't be necessary to go into the detail of all of these documents at this stage, but as this is the one in which it would appear this matter was first brought to Mr. O'Connell's attention, I should perhaps go through it.

It's a note to file dated 22nd October of 1997, the client is ESAT. And the matter is IPO. Underneath that you have the initials "DOB," Denis O'Brien, "A Phelan," meaning that Mr. O'Brien and Mr. Phelan were at a meeting in Mr. O'Connell's office. Next note is "Discussion re Barry Maloney allegations. ML" Michael Lowry "per run payment." The reference to the word "run" is a reference, as will appear later on, to Mr. O'Brien's account of where and how the discussions he had with Mr. Maloney arose.

Mr. O'Brien says that they arose not in the course of a

discussion in Mr. Maloney's office, but rather while they were having a run in the Wicklow mountains. "ML" refers to Michael Lowry. The note goes on: "Digifone board discussions and pending meeting. Likelihood of Barry Maloney being called and repeating allegation (50/50: 90/10)" in other words, this was an assessment of the likelihood of him being called to discuss those allegations and obviously of his repeating them.

Next note is "Possible consequences discussed," and then, "Denis O'Brien to refute etc." The next portion of the note has been deleted, I hasten to add not by Mr. O'Connell on behalf of Mr. O'Brien, but rather by ESAT Digifone, who technically have the dominion over these documents at this time. Messrs. McCann Fitzgerald, acting for ESAT Digifone, have directed that this portion of the document be obscured on the grounds that it contains information protected by legal professional privilege.

Next there is the initials "DOB," which is presumably a reference to Mr. O'Connell's note of what Mr. O'Brien was saying. "Not relevant." "Not" underlined.

"Nothing in allegation. No payment to Michael Lowry.

Allegation very destructive. Spreading it damaging to all, especially company. Starting fire in cinema.

Not responsible to inform board, nor necessary. No

board meeting with ESAT Telecom imminent. Calling one

would create crisis air. "Registration statement not misleading. Denis O'Brien can refute Barry Maloney in box. No payment made."

Next we have a privileged deletion again. Next a statement apparently attributed to Denis O'Brien.

"No need for concern, assurance nothing in it."

Signed at the bottom by Mr. Owen O'Connell.

Now, that meeting took place on the 22nd October of 1997. From other information made available to the Tribunal by ESAT Digifone, and in particular by Mr. Barry Maloney, the Tribunal has been provided with an amount of documentary material relating to the period from in or about the 8th October, 1997, onwards, but in particular material relating to the period prior to the meeting between Mr. O'Brien, Mr. Phelan, and Mr. O'Brien's adviser, Mr. O'Connell. From these documents provided by Mr. Barry Maloney, it would appear that Mr. Maloney had become concerned about the statements made by Mr. Denis O'Brien, and about the question as to whether they were true or false or otherwise needed to be resolved.

Over a period of time in early to mid-October, Mr. Maloney was concerned that he might have obligations to disclose this conversation he had had with Mr. O'Brien in the context of the IPO, and that in any case he had obligations to disclose it to his

directors and, perhaps, wider obligations of disclosure. He was also concerned that he might have, or that the company of which he was Chief Executive Officer, ESAT Digifone, might have a liability in the context of the IPO if the statements were not disclosed or if representations were made in the course of the IPO to which these statements might be relevant.

He had a number of meetings with Mr. Denis O'Brien with a view to seeking to persuade Mr. O'Brien to postpone the IPO. He has informed the Tribunal that in or around the 8th October, 1997, he had a meeting with Mr. O'Brien in Mr. O'Brien's office in the Malt House, and also, I think, in a street near the Malt House or at the side of the building, in which he pleaded with Mr. O'Brien to postpone the IPO until after the Moriarty Tribunal. He made a similar request on the 13th October, when they discussed the matter both in Mr. Maloney's office and over coffee in a nearby public house. He was unsuccessful in seeking to persuade Mr. O'Brien to postpone the IPO in both those meetings, and obviously, as we know, was unsuccessful in all his other efforts to persuade him to postpone it. But in any case, it would appear from the information provided by Mr. Maloney, that on the same day that he had a discussion with Mr. O'Brien over coffee in a public house near his office on the 13th October, he had a

further meeting attended by himself, Mr. O'Brien, and Mr. Michael Walsh of IIU, that is to say the company representing Mr. Dermot Desmond's shareholding in ESAT Digifone. The purpose of that meeting was to bring these matters to the attention of not only Mr. O'Brien, but also now another shareholder in IIU, with a view to seeing whether Mr. Maloney's concerns could be allayed.

It would appear also that by this time Mr. Maloney may have brought the matter to the attention of ESAT Digifone's legal advisers and that he was in receipt of advice from Messrs. McCann Fitzgerald, from Mr. Fergus Armstrong, solicitor of that firm, concerning the matter.

In any case, notwithstanding the intervention, if I can put it that way, of Mr. Michael Walsh of IIU, Mr. Maloney's concerns were not allayed, and what is more, he failed to persuade Mr. O'Brien to postpone the IPO. He had a further meeting with Mr. O'Brien on the 14th October, in which he again failed in his attempt to convince Mr. O'Brien to postpone the IPO. It would seem that in addition to Mr. Michael Walsh, Mr. Dermot Desmond also became involved in the matter at this time, and in the course of a telephone conversation between Mr. Dermot Desmond and Mr. Maloney on the 14th October, 1997, Mr. Maloney informed Mr. Desmond of what had transpired between himself and Mr. O'Brien.

Mr. Desmond informed Mr. Maloney that as far as he was

concerned, they, meaning ESAT Digifone, didn't know that anything had been done by Denis O'Brien, or that anything Denis O'Brien may have done had anything to do with ESAT Digifone and that it could have had to do with ESAT Telecom business. He directed Mr. Maloney that it was his job to make sure that ESAT Digifone was fully protected, that is to say, fully protected in the context of any statements made in the IPO documentation.

Around this time, and for sometime afterwards, Mr. Maloney was endeavouring to promote the drafting or crafting of a disclaimer to be inserted in the Prospectus in such a way as to protect ESAT Digifone, its employees, and directors from any liability which might ultimately follow in the event of the statements made by Mr. O'Brien proving to be true, or in the event of there being any liability for failing to disclose those statements, whether true or false, or in the event of there being any liability for failing to take any steps in relation to establishing the truth or falsity of those statements.

There was a lot of, if I can put it this way, to-ing and fro-ing between Mr. O'Brien and Mr. Maloney, all, it would appear, to no avail, for as Mr. O'Connell's file shows, by the time that Mr. O'Brien and Mr. Phelan went to discuss the matter in William Fry solicitors,

it had become clear that Mr. Maloney was still anxious to discharge what he believed to be his obligation to disclose these matters to the other directors of ESAT Digifone and to its other shareholder, that is to say, to the directors representing Telenor and to Telenor itself as the other shareholder. A question which was arising at that stage and which was no doubt exercising the minds of those directors of ESAT Telecom who were aware of this, was as to the extent to which the other directors of ESAT Telecom had a right to be fully informed of these matters.

It would appear that by the 30th October of 1997, the issue, together with other questions concerning the \$50,000 payment to Fine Gael, had become issues for ESAT Telecom and for its directors. In other words, these two matters had become issues for the company which was making the public offering.

On the 30th October of 1997, Mr. John Callaghan and Mr. Leslie Buckley, both directors of ESAT Telecom, and once again Mr. Aidan Phelan, called to see Mr. O'Connell concerning Mr. Maloney's statements regarding the remarks made by Mr. O'Brien.

Now, once again, we have Mr. O'Connell's note of that meeting and his very helpful transcription. The memorandum is headed "A note or a memo to file from

Mr. O'Connell," client is ESAT, and the matter is the IPO, and it's dated 30th October 1997. The attendance is "JC," meaning Mr. John Callaghan; "LB," meaning Mr. Leslie Buckley; "AP" meaning Mr. Aidan Phelan; and "OC" meaning Mr. Owen O'Connell at the offices of William Fry solicitors.

There was a discussion between the four people at the meeting, and it would seem that the items discussed were:

"1. Asking questions (possibly before communicating formally to ESAT Telecom Board and underwriters)" that is to say the underwriters connected with the Initial Public Offering.

"Next Tuesday, Dublin, Denis O'Brien by videoconference. Inquisitor from McCann Fitzgerald - no comment, opinion or judgement (not Fergus Armstrong himself)"

Next item says "KD," which I think is a reference to Knut Digerund, an executive of Telenor "consumed with rage, pull IPO over and over." As Mr. Digerund was not at the meeting, I presume this is a reference by somebody at the meeting to the views Mr. Digerund had been expressing in connection with the matter.

"2. Letter from ESAT Digifone Board to Chairman of ESAT Telecom re concerns on Prospectus."

This is a reference to a matter which is of purely

technical reference and needn't concern us at the moment.

"3. Payments, Denis O'Brien/Barry Maloney discussion and FG" in other words, that identifies the two items, the first set of payments relating to the Denis O'Brien/Barry Maloney discussion, and the second set concerned with the \$50,000 payment to Fine Gael.

The next word is "intermediary," and I'll come to the significance of that word in a moment.

The next word is "Woodchester?" Then you have "other $\frac{1}{2}$ 100,000?" - presumably a reference to the other $\frac{1}{2}$ 100,000 payment. Then "payments stuck," and I will come to the significance of highlighting those words in that way in a moment. "Etc. per FA," meaning the Fergus Armstrong letter.

It goes on then, "Arve checking re FG money," meaning Arve Johansen, presumably, checking re the Fine Gael payment.

Next, "Inquiry of DFTA," - David FT Austin? Next item "JC, Telenor insisted and John Callaghan/Leslie Buckley agreed to consult WF" William Fry.

Next it says, "per Fergus Armstrong, "common" directors." While this may require some clarification, I think it refers to the common

directors of ESAT Digifone and ESAT Telecom.

Then it goes on, "Statement from Woodchester definitely needed." Again I'll explain the significance of that in a moment.

"Payment made and getting stuck." Underneath that, "Denis reference in board meeting to Woodchester as intermediary." After that, "Had thought about making payment but chose not to make it. This per John Callaghan."

Next, "ML," meaning Michael Lowry "No expectation of payment. Never any discussion."

Underneath that, "second 100,000" with no further details. Underneath that "Process of further investigation."

Then underneath that, a note that the Prospectus was being issued on the following Tuesday week, printed on the following Monday week. "Owen O'Connell letter held till Monday. Owen O'Connell to consider the matter Friday. Consult Chairman Saturday. Write to the board Monday. JC notifications quote from two by statements," which I think is reference to statements, whether formal statements or not, from Barry Maloney and Denis O'Brien concerning these matters, and then there is two phone numbers.

Now, it would appear that at that meeting Mr. O'Connell had received a document described as "Draft Statement of Denis O'Brien to McCann Fitzgerald," and this was one statement made by Mr. O'Brien concerning these matters, and I think I should read it at this point so as to be able to make some sense of the references in the notes of Mr. O'Connell.

It says: "Early on Saturday morning (8am) in October '96, I was running up in Roundwood, County Wicklow, with Barry Maloney. Barry was complaining about the invoices received by ESAT Digifone from consultants and lobbyists in relation to the bid. I wanted him to pay them because they were from people I had recruited.

This was twelve months after the bid had succeeded and many of them had still not been paid. I indicated that if the company reneged, I was honour bound to make the payments, and I added (falsely) that, 'If you think you have got problems, I have already paid 200 grand to other people.'"

The second paragraph goes on: "These runs with Barry Maloney were almost weekly events. Frankly, we spoofed a lot. Barry and I had been friends for 20 years and often talked about sport, business, money-making schemes, women, and other things with fantasy and reality equally mixed. At least half of what we said was bravado."

Third paragraph: "I did not pay any money to Michael Lowry for ESAT Digifone's licence. When the Moriarty Tribunal was mooted in July, '97, Barry sought, and I gave reassurance, that the company had nothing to worry about. Barry did not mention the October '96 comment at this time, and it has only been raised by him in the last couple of weeks."

Fourth paragraph: "I deeply regret the anxiety caused to Barry and the trouble created for Board members by this matter. However, I am concerned that a casual and untrue remark made in a social context should not be blown into something which will have consequences out of all proportion to its significance. On the basis of this explanation, and my assurances that the payment was not made, I hope the issue will be concluded."

Now, it would appear that by that date the 30th October, 1997, Mr. O'Brien had made other statements concerning the $\frac{1}{2}$ 100,000 payment to Mr. Michael Lowry, and had, in particular, suggested that at one point he had an intention of making a payment of $\frac{1}{2}$ 100,000 to Mr. Lowry; that what had prompted him to do this was the fact that Mr. Lowry was being assailed in the press; that he also had some financial problems in connection with his company, Streamline; that he, Mr. O'Brien, had gone so far as to earmark funds, a sum of $\frac{1}{2}$ 100,000 for transmission to Mr. Lowry; that these

funds had been placed with an intermediary, or that they had in some way got stuck with an intermediary either before or at the time when Mr. O'Brien thought better of his intention to benefit Mr. Lowry in this way; that he did not go ahead with the transmission of any money to Mr. Lowry, and that he never paid Mr. Lowry the money in question either in that way or in any other way.

Apparently at one point he indicated that the funds had been earmarked in Woodchester Bank, and that this was the intermediary to which he had referred and with which the payments had got stuck.

Now, it's in the context, I think, of those other statements concerning this matter, that Mr. O'Connell noted the words "intermediary," "Woodchester," "Payment stuck," and so on in his note. And it is in the context, I think, of those notes, and presumably those other statements, that Mr. O'Connell noted a statement from Woodchester is definitely needed, and in the context of which he made the note roughly in the centre of the overhead projector, "Payment made and getting stuck."

Now, in addition, as the notes made by Mr. O'Connell made clear, one of the propositions being canvassed at that time, on the 30th October, 1997, was the conduct

of an inquisition by a member of the firm of McCann Fitzgerald with a view to endeavouring to elicit the facts from either Mr. O'Brien and/or Mr. Maloney. It was envisaged that this inquisition or examination would deal not only with the question of a $\frac{1}{2}$ 100,000 payment to Mr. Michael Lowry, any other $\frac{1}{2}$ 100,000 payment to a party, but also the payment of \$50,000 to Fine Gael. Mr. O'Connell made preparations in anticipation of being instructed to take part in such an investigation. He has produced a note of conversations he had with Mr. Michael Walsh of IIU and Mr. Denis O'Brien on the 31st October, in which, once again, some of the matters under review were being canvassed.

It may be that in this discussion Mr. O'Connell was recalling solely what transpired at a meeting or conversation between himself and Mr. Michael Walsh, although it would appear that Mr. Michael Walsh may have been relating to Mr. O'Connell details of what he had learned in the course of meetings with Mr. Barry Maloney and Mr. Denis O'Brien.

It's again a William Fry file note. It's not dated, with the result that Mr. O'Connell has had some difficulty in placing it precisely in terms of the latter end of October of 1997.

It says "MW," meaning Michael Walsh. "No denial of

existence of intermediary and suggestion it was Wood" short for Woodchester. "Jarred a bit, but people prepared to accept it. BM" which is presumably a reference to what was stated by Mr. Barry Maloney "Didn't Denis say money had been moved to an intermediary and got stuck." Michael Walsh responded to that, but apparently had no recollection of his response. It goes on to note: "Intermediary statements coming from Barry Maloney, Denis O'Brien talking about Woodchester - didn't deny existence of intermediary."

Next line: "No real discussion of second $\frac{1}{2}$ 100,000."

"Monday, 13th October 1997," - a reference to the first meeting between Barry Maloney, Michael Walsh, and Denis O'Brien. That was part of the series of meetings I referred to earlier in this Opening Statement.

The first meeting Fergus Armstrong not present, Malt House, 30 minutes, sandwiches, made discussion.

Another meeting on the 23rd October, Barry Maloney referring impression money had gone to third person, out of Denis O'Brien's control. Michael Walsh did not support this. Barry Maloney expressing an interpretation of what Denis O'Brien had said."

Underneath that there is a reference to John Callaghan.

Underneath that another reference to what had been said

by Mr. Maloney. "BM had said in his document stuck in intermediary. Denis O'Brien was asked who intermediary was and said Wood" meaning Woodchester.

On the 1st November of 1997, Mr. O'Connell travelled to Boston to meet with Mr. Denis O'Brien. Mr. O'Brien was, by this time, in the US promoting the public offering of shares in ESAT Telecom. He was working on the west coast, it would appear, and as Mr. O'Connell had to travel from Ireland, it was agreed that they would meet in Boston. In preparation for this meeting, Mr. O'Connell analysed the issues in the course of his plane journey. He reduced his analysis to a number of handwritten notes and in these notes raised a number of queries. It would appear that at sometime in the course of his discussions with Mr. O'Brien, he received responses which related to these queries, and these responses are noted on his handwritten notes. Because they raise many of the issues with which the Tribunal will be concerned, and because they identify many of the issues of fact which any lawyer will have identified as pertinent, they can be usefully referred to at this stage.

It's on William Fry notepaper. It says, "Plane, 1/11/1997." Underneath that a memorandum from Mr. O'Connell to himself to get a chronology. Then what follows appears to be a form of analysis.

"A) what was said," an obvious question.

"B) where/context."

I hope that Mr. O'Connell will correct me if I am wrong
in any of these as I go along.

Underneath that a number of sub headings.

"How subject arose.

Who said what.

The conclusion.

And further references since."

And in relation to those queries or that analysis of
the issue, Mr. O'Connell has noted that the subject
arose in the context of discussion about invoices, and
that presumably would appear to suggest that there is
some common ground between Mr. Maloney and Mr. O'Brien
as to what prompted the discussion.

In relation to further references, it would appear that
it was mentioned in the context of the establishment or
the Terms of Reference of this Tribunal.

Next, "QC, what is the BM version.

Agree this version or disagree it," as the case may be.

"Explain disagreements. Corroborating" I think
is what's intended "Corroborating evidence either
way." And to the right hand of that is a note which
says, "The only corroborating evidence either way is

purely circumstantial."

On the next page, "Why reasonable for directors to accept comments of such a potentially serious nature made in jocose," then quote "Bravado."

Presumably a reference to what the directors of ESAT Telecom should make of these comments. Was it reasonable for them to accept that comments of such a potentially serious nature would have been made in a jocose way or by way of bravado?

Then analysing that, Mr. O'Connell goes on: "He identifies issues relating to context, social and sporting" a reference to Mr. O'Brien's account. Underneath that, "old friendship," and underneath that, "unpaid invoices."

Next section of the analysis deals with "Where" where did the discussion take place? Where were the remarks made? And in brackets "disagreement" I think I'll have to go over that again, because I may have been right in my initial instinct. What this deals with is where the discussion took place, and is there a disagreement as to where the discussion took place, and there is an analysis of this disagreement. "Where does Barry Maloney allege?" And there is a note, "Denis O'Brien's office." Underneath that, "runs regular?" And then to the right-hand side, "Purpose of the runs: Business/social?" These appear to be responses of

some kind. Underneath that, "Any triggering event causing remembrance." Then there is a note, "ankle sprain," and as will appear in the course of the evidence, this was suggested as a potential triggering point of one or the other, Mr. Maloney or Mr. O'Brien, to date the discussion.

Underneath that, "Diary. Weekends away. Sick, etc. Barry Maloney ditto." Underneath that, "Barry Maloney says October/November, versus Denis O'Brien says October. 4 to 6 weekends versus 11" being the range of weekends over which it could have occurred. "(One either end of month)" underneath that, "Check Sally Ann, re diary," a reference to Mr. O'Brien's personal assistant, I think.

Next item is item number 4, "Second payment reference." This is the reference to Mr. O'Brien having paid to or made two payments of $\frac{1}{2}$ 100,000. The subanalysis is "Relevance of question if the first denied?" Next point is, "No obvious suspect." Obviously that meant no obvious suspect for the second payment, or was there? Underneath that, "Who would come to mind," in Denis O'Brien's mind? There is an answer, "Mitchell" and then "no, consultant." And I think this is a reference to the fact that Mr. Jim Mitchell was, in fact, I think I can put it this way, an ordinary consultant and not a success fee paid consultant of

ESAT Digifone.

Underneath that, "Exaggeration," then "Re invoices?"

Underneath that, "ML" Michael Lowry "involved?"

And "Can't recall" is the answer, meaning, I presume, that Mr. O'Brien couldn't recall whether he definitely mentioned whether Michael Lowry was mentioned in the course of the discussion. Just to clarify that, the note reads "ML mentioned?" not "ML involved?"

Now, item number 5, "DOB statement of the 23rd October of 1997." This is a statement which the Tribunal does not have, but which from other documentation made available to the Tribunal appears to involve some of the explanations which I have already canvassed in this Opening Statement.

The first item mentioned is "Stuck with intermediary." That's the expression that has already been mentioned in other notes of Mr. O'Connell.

Underneath that, "Critical issue" is this "an attempt, conspiracy etc.?" Underneath that, an analysis of the Woodchester reference. "NB. John Callaghan call, confirmed Michael Walsh." This is presumably a reference to some differences between Mr. Callaghan, Mr. Walsh, Mr. O'Brien, and Mr. Maloney, as to whether or not there were references to Woodchester.

Underneath that is a reference to another expression which seems to have been used by Mr. O'Brien in describing his response or in responding to the discussion that he had made these statements, and he said, "Had thought about making a payment but chose not to do it." Then underneath that there is a heading, "Further/supplementary," matters requiring attention. Firstly, "Intention" was there an intention to make a payment.

Underneath that, "Contacts with Michael Lowry." Then in brackets "(Catherine related?)" I think there is a suggestion for which there is no foundation, or some relationship or some relation between Mr. O'Brien's wife and Mr. Lowry and there is no such relationship.

Underneath that, "Attempt/conspiracy issue."

This is revisiting some of the earlier ground, and that's subdivided into "Acts designed to make or facilitate a payment," which of course could constitute either an attempt or abandoned or failed conspiracy.

Underneath that, "Acts/discussions by/with others."

Underneath that, the other item which is cropping up again, "identity of intermediary," and related to that the phrase "stuck with intermediary" and "quite striking, addressed specifically."

And then we have some specific attention directed to

that expression, and the first issue which

Mr. O'Connell identified is what did stuck mean? And

his note is "How 'stuck'" and his question after

that he has, "What actually happened?" Then he has a

note just above that which seems to contain a response

to the effect that what this expression meant was that

the payment was "just left in bank."

Next part of the analysis is, "If statement

acknowledged and not adequately explained, serious

effects re Tribunal, price, politics, share values."

Underneath that, again a further analysis or revisiting

of the analysis of what prompted the payment, "desire,

intention, or attempt."

Then some further notes, "What was Michael Lowry's

situation at the time? How likely a payment?"

Underneath that, "When, where and to whom was 23rd

October, 1997, statement made?" It appears that this

may have been a verbal statement. "Any notes

available?" Then in brackets, "(Negative, not proven

though)."

Underneath that, a further memorandum or note, "Address

exact circumstances in which statement made," and then

it suggests special attention to the phrase "stuck with

intermediary." It says, "Phrase 'stuck with

intermediary' has recurred often. Very thorough

explanation."

Then Mr. O'Connell goes on to analyse the matter under two headings: "If the statement was made/not made."

If the statement is not made, he identifies an issue as to whether the board should still be told, "Still tell board, underwriters? (Board obligation, so advise, if matter material misleading etc. GFH)" Gerry Halpenny is an associate of Mr. O'Connell. Underneath that, then, "Telenor, ad in paper?" Which seems to be a reference to some proposed form of disclosure.

Underneath that, "FA" meaning Fergus Armstrong "Communicate underwriters directly? Has he done so?" That analysis is followed by an analysis on the assumption that if the statement was made, and it's broken down as follows:

"Indication of intent or attempt." Then in brackets, "(critical difference)." Underneath that, "Whether other(s) involved?" Underneath that, once again, "Intermediary Woodchester or another (with an account in Woodchester?)" in brackets.

On the next line, "Why 'Stuck'? How could a payment get stuck. Modern banks can easily make payments. Did another intermediary keep (steal) the money, if so, why no action taken?"

It seems to go on then to another section of the

analysis. "Why made?" Then hyphen " - presumably after the licence.

Then there is a section obscured. Again, as I hasten to add, not by Mr. O'Connell or Mr. O'Brien's instructions, but on the instructions of ESAT Digifone.

CHAIRMAN: I suppose, Mr. Healy, for non-lawyers present, it could be indicated that in general terms one must presume the deletions have taken place on a basis that the records purport to be legal advice to clients rather than recording what took place or what was said at specific occasions.

MR. HEALY: Yes, I think I said that at the outset, that the Tribunal doesn't necessarily agree that any of these exclusions or excisions are valid, but on the assumption that they do refer to real professional advice, then they would be valid. But hopefully they do not interfere with the Tribunal's analysis of these matters.

Then it continues - "BM apparently accepts no payment made. (Worth of this belief? -irrelevant)" Then there is a reference to "NB paragraph 6, intend not attempt." Underneath that, "Conversation/contacts with minister" presumably.

Then underneath that, "Lots per Telecom Eireann disputes." Then a reference to "DDI's auto diallers

etc." the type of disputes that ESAT Digifone would have had with Telecom Eireann following the launch or in the course of the launch of its cellphone network.

Then "Licence discussed? (NB" and this is presumably a reference to the licence "Independent procedure X 2. Firstly, Andersen" AA is a reference to Andersen Consultants - "AA and civil servants - ability of minister anyway."

Presumably a reference to what ability the minister anyway had to interfere in this two part independent procedure.

Underneath that, "Any commitments even understandings, even implicit? (This is a key issue)."

Underneath that a reference again to the involvement of the civil servants. "Why were civil servants confident enough to break precedent and go to press conference if they felt minister could have influenced - civil servants don't usually trust ministers."

Six is, I think, devoted mainly to the reference to Woodchester as an intermediary. "Reference to Woodchester as 'Intermediary.' Consistent with Barry Maloney account of the 13th October. If not, which to be preferred?"

On the next line, "What is Barry Maloney's account of 13th October written down? Anyone else there?"

Underneath that, "Implication that Wood" meaning

Woodchester "as intermediary not consistent.

Then the most puzzling question. What lies behind it?

Is the suggestion that there is another intermediary instead of or as well as Wood?" Meaning Woodchester.

"Does 13th October mean 13th October 1996?" Then after that, "Hardly." "If DOB and BM statements are inconsistent, how to resolve (written statements don't seem to be inconsistent)."

Item 7. "Verification or documentary evidence re relevant account at Woodchester, payments to or from account holder." This is a reference to a possible way of verifying movements on Woodchester accounts connected with Mr. Denis O'Brien.

Underneath that, "Catherine, any accounts? Others (AP, PC etc.)?" presumably others. Underneath that, "ESAT Telecom" Mr. O'Brien's own vehicle. "Communicorp," another company which he is associated. And beside that, "presumably audited."

Underneath that there seems to be some kind of a list of steps that might usefully be taken under the heading "DOB's accounts." Firstly, "List;" secondly "all withdrawals over (say) 50K on in '95, '96, '97;" thirdly "withdrawals under 50K, all to same payee/destination;" fourthly "offshore payment."

Mr. O'Connell then posing the question, "How to verify a negative? How to produce documents to prove the nonexistence of other documents. Denis O'Brien access and control of other Woodchester accounts.

Passed (accounts)."

It goes on, "Track lodgements by DOB to others accounts and get payments out of them (probably not possible if unconnected to him)." This was Mr. O'Connell presumably canvassing how far or how extensive his inquiries of Woodchester could be.

Next, "Where was 100K supposed to have been paid?

If any general view, maybe get all statements of period? Maybe even get all payments out of Woodchester in period on all accounts of 150K. Impractical."

Then there is an analysis which seems to be confined to what's called the "contribution transaction," meaning, presumably, the \$50,000 payment. Firstly, the first note is "Mainly for Telenor." Underneath that what should appear is "DOB 'Recommendation'? whether true? Any other involvement? Reimbursement how done ED, [ESAT Digifone], or ET? [ESAT Telecom]"

Then any "documents/receipts, (e.g., Fine Gael presumably not.)"

I think next it says, "Bruton. What did he know?

That Telenor had paid re lunch (licence decision only couple of months back) who attended lunch?

Not much to go on here even for drafting questions."

Then under the heading miscellaneous, "MISC":

"DOB statement only 'draft' Finalise

draft ET directors letter (conform McCann letter if possible, collaborative investigation etc.)

BM statement does not describe conversation.

Board disclosure - underwriter - Prospectus (market)?

ED insistence to acquire personal and corporate protection? Get 16th October letter Fergus Armstrong to board."

Then a privileged portion. And the same on most of the next page. And then at the end of the next page, "ML"

Michael Lowry "Carysfort Avenue house anything known?

Re funding, any involvement?"

I think Mr. O'Connell may have included that additional reference to Carysfort because he may have seen it or references to it in the newspaper at the time.

It would appear that around this time Mr. Fergus Armstrong, solicitor of McCann Fitzgerald, will also identify a number of issues which I believed required clarification. In addition to dealing with his own analysis of the situation, Mr. O'Connell, when he arrived in Boston, also dealt with Mr. O'Brien's responses to six questions raised by Mr. Fergus

Armstrong. These questions, having been posed by a lawyer, once again focus on some of the issues to which the Tribunal will be devoting a considerable amount of attention, and for that reason it may be useful once again if I refer to them at this point.

They are divided up into five or six questions, and they are relatively short.

Question 1 is: "Whether DOB explanation of the conversation in October/November is in accordance with Barry Maloney impression."

Then what looks like, what I gather is Mr. O'Brien's response or draft response: "My recollection of the conversation is that it was non-serious, i.e. two very old pals bullshitting about business, sport and out on a run one Sunday morning."

Question 2: "Whether it's reasonable that comments of such a serious nature would have been made out of bravado?"

Answer: "Yes, anyone who knows me knows that I will laugh about anything. I just do not take myself or life in general too seriously. I have known Barry for 22 years, we had the most extraordinary experiences. Nothing is sacred between us and there was nothing that could not be joked about."

Question 3: "Where the conversation took place."

Response: "I remember the conversation taking place while running in the Wicklow mountains near Roundwood in October last year. On the day in question I remember badly twisting my ankle. I have checked my diary " and then it trails off. At the bottom it says, "We agree to differ on this point."

Query 4: "Significance of the second $\dot{i}_i^{1/2}100,000$."

"There was no first payment nor any second payment. I said I had paid out two amounts of $\dot{i}_i^{1/2}100,000$ each out of bravado to persuade Barry to get the finger out and the bonuses to PJ Mara, Eddie Kelly, and Stephen Cloonan. If payments had been made, most people would assume one of them would have been made to Michael Lowry, but there is no one else who could be assumed reasonably to have got a payment of that scale. There was nothing in the mind of either of us as to who a second ($\dot{i}_i^{1/2}100K$) person might be. As I've said, the whole thing was just bravado."

The next query in my set of notes, it's between 4 and 5, I don't have a number for it, and it's headed, "The conversation " In any case, it would seem to be in the same handwriting as the other documents, and presumably some of it was prepared by Mr. O'Brien. No doubt he will be able to be more specific about it.

It's headed "The conversation October/November."

"My recollection is that the conversation took place

while running out in a mountain near Roundwood.

However, it's over a year ago. I can't be absolutely sure," and so on.

Next heading "Characterisation/context," followed by a paragraph - "I had repeatedly asked Barry Maloney to pay out the bonuses to all the people who worked on the bid on a contract basis. These included PJ Mara, Stephen Cloonan, Eddie Kelly and Enda Hardiman. BM was dragging his feet in particular with PJ Mara and Stephen Cloonan. Every time I would meet Barry Maloney I would again ask him to pay them. It was getting embarrassing for me and the people concerned. This was the context of our conversation."

Query number 5 deals with the expression "Payment got stuck with an intermediary."

"In October of '96, I had a couple of million pounds in cash from property and share deals (IFSC and sale of shares to US investors) and things were going very well for me. Meanwhile, Michael Lowry was under attack politically and in the media and someone told me his company was" I am not sure what the next word means.

"I felt and still feel that Michael Lowry had always been above board and fair with ESAT both as regards the licence and our disputes with Telecom Eireann T E.

I decided that I would help him out with his company by giving him $\frac{1}{2}$ 100,000. I earmarked $\frac{1}{2}$ 100K of deposits

with Woodchester for that purpose. All of this was on my mind at the time of my conversation with Barry on the mountainside. I pretended that I had already made the payment and I doubled for effect. However, shortly afterwards I realised that the payment, if I made it, would be misunderstood. Thank God I saw sense and did nothing about it. Whether or not I used the phrase stuck with an intermediary, I meant that the earmarked amount was left in Woodchester. For the record, I frequently had discussions with Michael Lowry concerning ESAT Telecom's warfare with Telecom Eireann, and wouldn't deny that I would discuss the auto dialler issue. However, no promises or understanding of any kind were ever sought or given by the minister in relation to the licence."

The last question is question 6. "13th October, Barry Maloney versus 23rd October meeting re intermediary."

Mr. O'Brien's response, "I don't remember saying anything at the 13th October meeting which was only for half an hour which would lead to a conclusion that the so-called intermediary was anyone other than Woodchester. Anyway, I don't see the importance of this since Woodchester would only have been used to transfer money if I had made the payment. They would have been an intermediary only in the sense of making the payment. I think there might have been a

misunderstanding here between me and Barry [Michael you were at the meeting, what do you think]"

Mr. O'Connell had his meeting in the States, and at that stage the clock was ticking away towards the planned publication date for the Prospectus. The various steps which ought to be taken or which it was felt ought to be taken to clarify these various issues were beginning to crystallise in the first few days of November, 1997. It had become clear that in order to satisfy, even to a reasonable degree, anyone with a proper interest in these matters that such payments had not been made, it would be necessary to examine Mr. O'Brien's bank accounts. It was also becoming clear that in order to establish that a \$50,000 payment had actually gone to Fine Gael, some attempt would have to be made to track the payment from the time it left Telenor. Mr. O'Connell, I think as his analysis indicates, he intended to put in train inquiries with Woodchester Bank with a view to establishing what accounts were held by Mr. O'Brien in that bank in the previous two years, that is to say between November of '95 and November of 1997. It was not envisaged that every transaction on those accounts would be examined, but only substantial transactions, i.e. those in excess of $\frac{1}{2}$ 25,000, or any transactions involving payments of smaller amounts to one single person where in the

aggregate those smaller amounts came to $\text{€}25,000$. So that between the time of his note on the plane and actually taking these steps, Mr. O'Connell had lowered the threshold for this examination.

An examination of the Woodchester accounts showed that there were no such payments. In order to extend this inquiry, it would appear that Mr. O'Connell, following some discussions with American lawyers involved in the Prospectus, and in addition, having regard to some of the analysis we know he made in the course of his plane journey, made contact with Mr. Aidan Phelan to inquire, were there any other significant accounts operated by Mr. O'Brien? Mr. Phelan's response was that there were no such accounts. In fact, as I think would now appear from other information made available to the Tribunal, Mr. Phelan appears to have been involved in July of 1996 in arranging for two substantial transfers of $\text{€}100,000$ and $\text{€}50,000$ respectively on Mr. O'Brien's behalf from offshore accounts in the Channel Islands and the Isle of Man. These payments of $\text{€}100,000$ and $\text{€}50,000$ were made to David Austin and appear, as the Tribunal has already indicated in an earlier Opening Statement, to be connected with a subsequent payment by Mr. Austin to an account in the Isle of Man in the name of Mr. Michael Lowry in the sum of $\text{€}147,000$.

Now I come to the inquisition or questioning of the

various individuals involved in these payments. This occurred on the 4th November of 1997 in the offices of IIU in the Financial Services Centre. Mr. O'Connell was present by phone. Also present were Mr. Fergus Armstrong and Mr. Michael Kealey of McCann Fitzgerald solicitors. Mr. Arve Johansen, it appears by conference call, and Mr. Knut Digerund of Telenor, who were also directors of ESAT Digifone. Mr. Barry Maloney, Mr. John Fortune, Mr. John Callaghan and Mr. Leslie Buckley, all directors of ESAT Digifone. Mr. Callaghan, Mr. Buckley were also directors of ESAT Telecom. Mr. Gerry Halpenny, solicitor of William Fry, was also present, as was Mr. Kevin O'Brien, solicitor of Kilroy solicitors. Mr. Denis O'Brien was present by phone from the United States. Both Mr. O'Connell and Mr. Halpenny took notes of a discussion, and these notes had been provided to the Tribunal.

Mr. O'Brien was examined by Mr. Michael Kealey of McCann Fitzgerald, and it would appear that Mr. Kealey had had no previous and indeed no subsequent involvement with any of the matters under discussion.

For the same reasons as I have mentioned before, and because these discussions sought in a forensic way to identify some of the issues involved, it might be useful if I refer to parts of them, or at least the

part which contained the main examination.

Once again, as is the case of some of the earlier notes, I think, Sir, you should have

Mr. O'Connell's typescript transcription of what transpired.

William Fry file note dated 4th November of 1997. A note from Mr. O'Connell to his file. Client is ESAT and the matter is the IPO.

It starts off with the names of those present, "Michael Kealey, Denis O'Brien, Arve Johansen, Knut Digerund, John Fortune, John Callaghan, Leslie Buckley, also Fergus Armstrong, Gerry Halpenny, Owen O'Connell, Ken O'Brien.

It starts off, and these seem to be Mr. Kealey questioning and Mr. O'Brien answering. And what you have is Mr. O'Connell's notes of the questioning by Mr. Kealey and of the answers by Mr. O'Brien. And this was to enable Mr. O'Connell to provide himself or arm himself with further information in relation to some of the issues he had identified on the plane, and so that he could take the matter further in advice he gave or any steps he advised the directors of ESAT Telecom to take in connection with this matter.

"Nature of DOB/BM relationship. Long-standing, could joke about anything. MK - "what said precisely," DOB (hesitant) trying to get BM to pay, trying to

persuade."

"MK 100,000 to Michael Lowry. "DOB no, didn't mention name. BM said don't want to know. One payment or two?"

DOB: Believes two. 100K to you know who. 100K to two people. How would BM have known one was to ML?

Maybe assumption easy to make but second totally exaggeration. A throw away remark to get BM to pay the other people.

What was BM response? DOB: Don't want to know.

MK: Why didn't you say it's only a joke?"

Obviously a reference to the fact that subsequently Mr. O'Brien had stated that these remarks on his part were merely bravado. So Mr. Kealey is asking him, why didn't he say at the relevant time it's only a joke?

"DOB, not a serious conversation. Social context.

One trying to outdo the other.

Michael Kealey: Public controversy at the time of the licence. Was that the reason for assumption?

Michael Lowry house of cards started to collapse 29th November. DOB: Everybody knew Michael Lowry business in difficulty. Close in time to discussion, did 29th November information give pause for thought. I had no idea of problems. Don't know Michael Lowry well enough for him to share a problem with me."

Then, "Barry Maloney error 1st September '97

conversation. (DOB married 29th August)" In quotation marks, "I didn't actually do it, thank God. I know you must be concerned." Then what looks like Mr. O'Brien, "Gave answer re helping out Michael Lowry. Deciding to make payment but never did so. 'Saw sense.' frequent conversations with Michael Lowry but no promise or understanding re licence. Michael Kealey - in mind." I am not sure what that means.

Then "Michael Kealey, summary." Presumably Michael Kealey attempted to summarise the course of the questioning of Mr. O'Brien.

Then Mr. Johansen deals with what appears to be some questions concerning his role in the \$50,000 payment. "Denis O'Brien and Barry Maloney came to Oslo before Christmas '95. Topic Barry Maloney contract. Hectic morning. Came from Stockholm, leave early pm. Denis O'Brien took Arve Johansen and (maybe Knut Digerund too) Knut was there partly involved. Mentioned a dinner, just that the feeling was as good corporate citizens, should show appreciation. Give signal were satisfied with performance. Only as a gratuity. No promises or buying favours. Just good thing to do. Fundraising for party. 25K per company - ESAT and Telenor. AJ said okay if DOB thinks right thing to do, will take at face value. KOB" a reference to Mr. O'Brien, meaning ESAT Digifone, "good corporate

citizens." When I say "KOB," meaning

Mr. O'Brien, I mean Kevin O'Brien, solicitor of
Kilroy's.

Mr. Johansen went on: "That was context, our only
involvement in Ireland associated with Digifone. In
business because of good decision by politicians. No
connection to licence - after award (good while).

Atmosphere, we are very happy and should share it.

Kevin O'Brien: If essentially ESAT gratitude, why
didn't they do it?

Arve Johansen: Because ESAT had made contributions,
5,000 here and there, and there had been a big fuss,
better to come Norway. Gave DFTA name and phone
number. 11th December, Denis O'Brien called and asked
him to call DFTA that day. Phone number in Dublin.

Arve Johansen going to Budapest. (Called Monday 3-4
(on post-it) or 4.25. Thrust was very open. Not any
feeling of sensitive or difficult matter. Very
straightforward. DFTA - good thing to do.

Appreciated by party. Fairly standard. Can't recall
reference to discussion, was general understanding.

Mechanisms of payment then discussed. On AJ note that
reference to conversation J Bruton, Denis O'Brien
(Michael Lowry name mentioned) by way of explanation,
recognised a general contribution (i.e. into Party
fund). DFTA gave account number. Arve Johansen
problems paying out without invoice. DFTA offered

invoice for 'Consultancy fees'. Arve Johansen - okay.

DFTA gave impression this very standard. Meeting Barry and Denis Friday, 8th December. Arve Johansen found entry. Knut" this seems to be an interjection by Knut Digerund "Suggestion could arrange meeting John Bruton.

Arve Johansen: Yes, by way of being clear that money went to party."

"Then invoice arrived, handled normally in Telenor system. Several attempts to expedite payment - (Telenor late) and was chased through Denis. Bank of Ireland Jersey Limited. DFTA complained to Denis O'Brien, who rang Telenor. Letter then after payment from DFTA apologising for chasing. Per Denis O'Brien and Barry Maloney conversation 8th December, no discussion re reimbursement." Then it says, "Barry Maloney" - I am not sure if he was present at the meeting. This is an interjection by him, "I there re employment - no discussion.

Arve Johansen: Yes."

"Re reimbursement, still 8th December. DOB offered it as 'right' for Telenor and ESAT to bear payment equally. No discussion of Digifone involvement. Per Simonsen involved in the mechanisms. Seems agreement to settle a startup cost for Digifone. Knut Denis arranged Peter O'Donoghue to reimburse. Arve Johansen understands put into lump sum for start-up. Entire

amount reimbursed as "consultancy fees."

All letterheads were DFTA, not Fine Gael.

No reference to Fine Gael. Letter should be on Knut file. If not, doesn't know where to look, but will try.

Fine Gael not mentioned in correspondence."

Interjection: "John Callaghan: Money could have gone to Michael Lowry."

Arve Johansen: "We didn't think too much about this.

Recent concern that we were the 'intermediary.'

Barry Maloney: DFTA and Michael Lowry are close personal friends.

Arve Johansen: Yes, this could be put in a bad light.

Owen O'Connell: Any contact with DFTA after letter acknowledging payment?

Johansen: No.

Then continuing with Arve Johansen: "Number on Arve Johansen note is Jefferson Smurfit Group.

Agreement in subsequent discussion that any participant in meeting who was questioned in a general way at the Tribunal would have to reveal a 1/250,000 contribution.

DFTA letter refers invoice for consultancy work in 1995 'As agreed with Denis O'Brien.' Account number 66064, Bank of Ireland Jersey, NB, 1995 year which licence was awarded."

John Fortune interjecting. "As political contribution, it doesn't look right even if it flowed back into Fine Gael.

Seek evidence from DFTA of payment to FG.

Knut Digerund concerned to see 'The Americans' have full information." This is actually an interjection by Knut Digerund when he says, "Concerned to see that the Americans have full information."

Then Mr. Johansen again: "Seeking payment by Telenor to possible promise of payment by DOB, i.e. if money went to Michael Lowry. John Callaghan reminder that DOB gave assurance no promise made but remarked that appearance would be very damaging."

Mr. John Fortune interjecting: "Situation needs further investigation including direct contact with DFTA. How likely before Thursday?"

Response by Knut Digerund: "Yes, then assurances by FG. Even then might not be satisfied.

Michael Kealey interjects, "Whether Barry Maloney wants to add anything to Denis O'Brien responses."

Barry Maloney: "Re date of meeting on honeymoon.

Meetings were two months before he went away.

Discussions beginning October 8 to October 23 (five separate discussions). Always third party

intermediary, 23rd October was first mention of

Woodchester. Barry Maloney still uneasy as a result."

Michael Walsh interjecting, "No recollection of intermediary reference on 13th October."

Barry Maloney: "Location of meeting, DOB was frustrated with me for not paying money. BM seeking invoices etc."

He continues, "Did run most Sundays and shot the breeze, but very clear this was not one of those discussions. Had regular meetings. First reference to two by 100K payments was in context of complaints about payments per bid. Would not have occurred in context of run."

Clear two by 100K payments mentioned, one to ML, other never mentioned.

'Third party intermediary' consistently used.

Woodchester, first referred to 23rd October.

Knut Digerund: "What happened re ESAT?"

John Callaghan and Leslie Buckley interjecting: "All go ahead, letter has gone to Denis."

John Fortune interjecting, "Won't have concluded investigations by Thursday, e.g. DFTA, he needing to retrieve records etc. Will take time. Telenor directors won't have concluded before next week."

Michael Walsh interjects: "Telenor directors unlikely ever to finalise position re Barry Maloney G to, B contribution."

Kevin O'Brien interjecting: "Yes, but will decide on"

other situations (next week)

First matter is for directors generally.

Second is for Telenor."

Michael Walsh interjection: No, second matter is for full board. Michael Walsh nervous about Telenor talking alone to DFTA as DOB talked to collectively so should DFTA."

Then there is a privileged deletion and a new line, "Apparently Arve Johansen and Knut Digerund have made documents available to Kilroy's re 50,000. Owen O'Connell - should make available to board as well."

Then there is a privileged deletion.

Now, by this time there were discussions between various individuals involved in the IPO with a view to endeavouring to decide how matters should be resolved, whether the IPO should be abandoned, should be postponed, or whether statements should be inserted in the Prospectus to take account of the concerns of Mr. Maloney and a number of other individuals, as Mr. O'Connell's notes of that examination shows.

By the 5th November of 1997, a board meeting of ESAT Telecom was convened for the purpose of resolving how the company should proceed. That meeting was addressed by Mr. O'Connell, who endeavoured to identify the various issues which had to be considered by the

directors. It would appear that following that meeting and subject to certain steps being taken, the board decided that they would proceed with the IPO. It would appear that it was resolved that in relation to the Fine Gael contribution, a letter would be obtained initially, it would seem, from Fine Gael, but subsequently from David Austin confirming the transmission of the payment to Fine Gael. In relation to the other issues, the two payments of $\text{€}100,000$, the Board had a decision to make as to whether they would accept Mr. O'Brien's version, and this, it appears, they did subject to the provision by Mr. O'Brien of an affidavit, the affidavit, which has already been referred to in these sittings, in which Mr. O'Brien confirmed that he had never made the payment for the purpose of securing the licence.

Part of the information made available to the directors appears to have included the confirmation from Mr. Aidan Phelan that apart from the Woodchester accounts, and one or two other accounts which were satisfactorily explained, there were no other significant relevant accounts.

The further dealings of the directors of ESAT Telecom between themselves and the dealings between the various shareholders in ESAT Digifone concerning the resolutions of these issues may be of some assistance

to the Tribunal, but I do not intend to refer to them in any detail at this point.

The fact that these issues were resolved or partly resolved by the directors of ESAT Telecom, and the way in which they did so is not of course conclusive where the resolution of these issues in the context of the work of this Tribunal is concerned. What this Tribunal has to determine is whether there were any payments to Michael Lowry and whether those payments were made in circumstances of the kind referred to in the Tribunal's Terms of Reference, whether, in other words, those sums of money were paid in circumstances giving rise to a reasonable inference that the motive for making the payment or payments was connected with any public office held by Mr. Lowry, or had the potential to influence the discharge of such office, or whether, in more concrete terms, Mr. Lowry made any decision, in this case a decision connected with the granting of the second GSM licence, or any other decision, in return for or otherwise in connection with any such payment.

Now, obviously there won't be any witnesses today, Sir.

MR. COUGHLAN: It was the intention to call Mr. O'Brien at this stage, Sir, but taking the time of day that's in it, it seems that we wouldn't get through any useful business

CHAIRMAN: I see no particularly useful purpose in embarking for five or ten minutes. I think we should perhaps sit a little early tomorrow, perhaps at half past ten, and we'll take up Mr. O'Brien's evidence then.

MR. COUGHLAN: And may I just say, Sir, that again, as you indicated on the last occasion when an Opening Statement was made in respect of these matters, and I would draw to the attention of the public and ask you to say so again, Sir, that this is an Opening Statement made by the Tribunal. It affects an awful lot of people. Those people must have an opportunity of giving evidence and being heard in relation to these matters, and it would be wrong for anyone to speculate or to draw any conclusions in relation to the matters referred to by My Friend Mr. Healy in the Opening Statement.

CHAIRMAN: I emphasise that my earlier remarks in relation to that apply to this further phase of these sittings. The reports and conclusions of the Tribunal can of course only be made on foot of appropriate oral testimony, and it would be premature and wrong to seek to draw any conclusions on a basis of an Opening Statement which is meant merely to indicate the facts and potential issues that may be canvassed in the course of forthcoming evidence.

MR. McGONIGAL: The matter, Mr. Chairman, which I would have some concern in relation to your last remarks, is not so much the public as the press, because on the previous occasion when this matter was opened it was reported by the press inaccurately in places, and certain steps had to be taken by our client in relation to that.

CHAIRMAN: I am aware that a correction was obtained in relation to that, Mr. McGonigal.

MR. McGONIGAL: And I am anxious to avoid headlines which are not justified from the Opening, which would tend to lift the temperature or exaggerate matters which have not yet been dealt with in evidence.

CHAIRMAN: It is obviously important that coverage of this afternoon's sitting, like any sitting, be careful and dispassionate, particularly in the present circumstances. Half ten tomorrow.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
FRIDAY, 15TH JUNE 2001 AT 10.30AM.