

A P P E A R A N C E S

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THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 15TH JULY,  
2003 AT 11AM:

MS. O'BRIEN: Mr. Joe Jennings, please.

CHAIRMAN: Thanks, Mr. Jennings. Sorry you have been  
troubled briefly again. Please sit down. You are  
already sworn.

JOE JENNINGS, ALREADY SWORN, WAS EXAMINED AS FOLLOWS  
BY MS. O'BRIEN:

MS. O'BRIEN: Good morning, Mr. Jennings. Thank you  
for coming back. You won't be detained for long.  
There is just one matter the Tribunal is anxious to  
clarify with you that arose in your evidence last

Friday and, in fact, it arises from paragraph 9 of your memorandum of intended evidence. And I'll just read you paragraph 9, and then I'll indicate to you what your evidence was on Friday last.

Paragraph 9 you stated that you recall meeting Mr. Lowry shortly after the conclusion of what you believe was the Cabinet subcommittee meeting on the 25th November, 1995. You corrected that to read October, 1995. You said that you were in the habit of meeting Mr. Lowry after Cabinet meetings. At this meeting on the 25th October, 1995, Mr. Lowry informed you that he had a winner of the competition. You advised Mr. Lowry that he and the Department should go public with this as soon as possible so as to avoid a leak. He agreed. He also agreed that following consultation with the Department officers, arrangements be made to hold a news conference as soon as possible to announce the winner of the competition.

And when I asked you about this last Friday, you stated that Mr. Lowry informed you after the Cabinet meeting that he had a winner, that you advised him that he should announce this as soon as possible because of your apprehension that once the matter had reached Cabinet that it could give rise to leaks; that he agreed, that you went around to each of the civil servants involved to get their okay and their imprimatur and that you then arranged the press

conference for the following day. And you recall that you had difficulties in reconciling the evidence that the Tribunal had and the records available to the Tribunal which showed that the meeting of the Party leaders had taken place early in the afternoon or in the afternoon of the 25th, and that the press conference had then been arranged for later in the afternoon of the 25th, bearing in mind your clear recollection that you had organised it had overnight. And I am just going to refer you to the transcript of that portion of your evidence, if you don't mind, so there can be no confusion. That was on page 101. We can actually put it on the monitor and I'll also read it out to you.

And at question 164, I asked you: "Now, in paragraph 9 you stated that you recall meeting Mr. Lowry shortly after the conclusion of the Cabinet Subcommittee meeting on the 25th November, and that you were in the habit of meeting him after Cabinet meetings. At the meeting of the 25th October, Mr. Lowry informed that you had a winner of the competition and you advised him that the Department should go public with it.

"So am I correct in thinking, therefore, that your usual pattern and the usual arrangement was that you met with Mr. Lowry after Cabinet meetings?"

And you answered "yes."

"Question: And that would be arranged from meeting to

meeting or would that arrangement be in place and established on a continual basis?

"Answer: Well, he normally returned to his Department after meetings in the Cabinet. It was only across the road in Government Buildings, and when he returned, I usually had early access to him, so that if there had been anything at the Cabinet by way of relating to the Department of which I worked, he would discuss it and I would make whatever arrangements to brief somebody or to prepare an announcement or to have an announcement prepared. And I would normally meet him, as I did on this occasion, and he said: 'We have a winner.' And I said to him immediately, I said, 'Now, I don't need to know the winner at this stage, but I advise you to call a news conference and make the announcement as soon as possible.' And he agreed. And we discussed around it. And I did mention that there was a danger or a risk of a leak, and my advice to him is like an old gaelic football advice, if you are in possession of the ball, don't let anybody dispossess you, because if you do, you lose the run of the game. And I said I would need to check with the Secretary General and Martin Brennan and those, if it's all right to go ahead tomorrow. And if they agreed I came back to him and said: 'Yes, we have agreement.' And we called the news conference for, I think, it was two o'clock the next day.

"Question: Are you certain about that in terms of your timing, Mr. Jennings, because certainly on the basis of the evidence that we have, the meeting that the Minister had with the Party leaders was on the 25th and the actual news conference was later in the evening on the 25th, perhaps five o'clock in the afternoon?

"Answer: No. My recollection is that we had it the following morning.

"Question: I think you, perhaps, could be wrong in that recollection.

"Answer: Perhaps. It may be that I might be confused in my memory with when the actual cheque was handed over, that was at two o'clock in the afternoon.

"Question: I think you might possibly be slightly confused on that, because certainly on the basis of the evidence which we have, and the documents available to us, the actual press conference to announce the winner of the competition was later in the afternoon of the 25th, and that was the same day as the meeting which Mr. Lowry had with the Party leaders.

"Answer: I have difficulty in reconciling what happened. My impression was that when he told me, we agreed to announce it, but before we would agree to announce it I had to clear with Martin and the Secretary General.

"Question: Do you recall how you went about clearing it with Martin Brennan and the Secretary General?

"Answer: What I did was, I did the rounds and said that the Minister had come back to say that we have a winner. And that would be it be okay to announce it the following day? Now, going on my memory, and the reason being that I didn't want any delays in case it might have been leaked.

"Question: When you say you did the rounds, would you have how would you have gone about doing the rounds?

"Answer: I went to the Secretary General's office, I went to Martin's office, I went to John Fitzgerald and Fintan Towey, mainly to check with them that they would have that they were clear to run with the announcement.

"Question. So you would have physically gone from office to office?

"Answer: Yes. I can't recall in which order I actually met them, but I do recall doing the rounds.

"Question: And I take it that there would have been they wouldn't have been surprised at you calling in and saying that the Minister had told you there was a winner?

"Answer: Pardon?

"Question: Would they have been surprised, do you recall did they know there was a winner when you

went to discuss it with them?

"Answer: Well, I imagine they would have known as quickly as I would have known.

"Question: Can I just ask you about that when you had the meeting with the Minister after he met with the Party leaders. I think we know from the evidence that that wasn't, if you like, a scheduled Cabinet meeting; it was a meeting that the Party leaders were having between themselves.

"Answer: Subcommittee

"Question: And Mr. Lowry went to attend it. Do you recall whether he contacted you after the meeting or before the meeting to ask you come to talk to him, because as I said, it wasn't a scheduled meeting of the Cabinet?

"Answer: I can't recall on whose initiative it was. I just know that I would normally meet him and I presume that I had gone in to talk to him after the meeting, but I don't know whether he sent for me or I sent for him, but normally I wouldn't barge in on him. I would check through his private secretary if he was free to drop in to see him.

"Question: Can you recall how would you have known that there was a meeting which Mr. Lowry attended with the Party leaders on that occasion?

"Answer: Well, he told me of the meeting. He told me of the result.

"Question: Right.

"Answer: That came to me as first news. I didn't know of it until he told me.

"Question: That came to you directly from Michael Lowry?

"Answer: Directly from him, yes.

"Question: Did he telephone you with the news or did he ask you to come and see him in his office?

"Answer: No. It was an oral exchange between the two of us when I went in to see him.

"Question: When you went in to see him?

"Answer: Yes.

"Question: What I am trying to get at this: Did he contact you for you to come and see him?

"Answer: I can't honestly recall which it was.

"Question: But if it wasn't a scheduled meeting of the Cabinet, it's unlikely that you would have known about the meeting, isn't that right?

"Answer: Well, he would have there were lots of meetings that he attended, not necessarily the Cabinet meetings but lots of meetings. Then after these meetings I would go to discuss it with him.

"Question: But if these weren't scheduled meetings what I am trying to get at is: You couldn't have known that the meeting took place and you couldn't have known that it was appropriate for you to go and discuss it with him.

"Answer: I didn't know the decision had been made until he told me himself.

"Question: And that was in his office?

"Answer: That was it. I didn't necessarily need to know or to be told if he was coming up.

"Question: You say it was your advice to him that he should announce it publically straight away?

"Answer: As soon as possible."

Then we went on to discuss your apprehensions that the matter might leak once the news was with the Cabinet.

Now, we know, Mr. Jennings, from the records available

to us and from the evidence available to us, that the press conference to announce the result was at around

5:00pm on Wednesday, the 25th October, and we also

know that there was, in fact, a scheduled meeting of

the Cabinet on Tuesday, the 24th October, the usual

Cabinet meeting, and what I am wondering is, given

your clear recollection that you organised this press

conference overnight, is it more likely that your

meeting with Michael Lowry in which he told you that

there was a winner took place after the Cabinet

meeting on the 24th, rather than after the meeting of

the Party leaders which was earlier in the afternoon

of Wednesday the 25th?

A. I cannot recall which. What I can recall, and I just

had to go back and try and verify I went to the

National Library yesterday and I took out the copies

of the Independent and the Times for the 26th and one of the reporters described a hastily summoned press conference. My recollection is that I called the press conference on the Wednesday morning, not on the Tuesday night, because I was again, my recollection is that I was trying to avoid any undue speculation, because at that time, a lot of speculation was quite rife in the media about the potential outcome. So my recollection is that I called it on Tuesday morning or on Wednesday morning for that afternoon and hence, the news stories appeared on the following day, Thursday.

Q. You see, that would mean, therefore, that your discussion which you related with Mr. Lowry was a discussion which must have occurred after the Cabinet meeting, the morning before, the 24th?

A. Yes.

Q. Can I just ask you also, you said in your evidence, and I read it out last week, that after your discussion with Mr. Lowry, that you did the rounds of the civil servants to get their imprimatur and get their confirmation that it was all right to go ahead and organise the press conference. Would you have done that on the Tuesday afternoon, do you think?

A. I would have done it immediately after I left Mr. Lowry's office.

Q. And that, we now know, was on the Tuesday?

A. That's my recollection of it. And I could stand corrected on that, but it's my recollection.

Q. Thank you very much, Mr. Jennings, and thank you for coming back again.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. O'DONNELL:

Q. MR. O'DONNELL: Just one question, you have no records that can support you in relation to your memory of when this meeting with Mr. Lowry took place?

A. No. Unfortunately, I went back to the Department after I had been summoned to the Tribunal, and there are no records in the press office. They would have been in the normal sense, maybe, disposed of at the end of a year, thrown out

Q. You have no record of when you met with Mr. Lowry or when the actual press conference was called. Were you shown documents you are relying then on your own personal memory?

A. I am relying on my personal memory, yes.

Q. Eight years later?

A. Eight years later.

Q. You would have accepted that there are other documents that appear to indicate a record of the decision to announce the result on the 25th October?

A. Yes, correct. And the difficulty is that it's very hard to make one's recollection reconcile it with the written records. And so, therefore, my recollection is purely my recollection. I have no other evidence.

Q. And you don't put it further than it is simply your recollection and if there is written documentary evidence which nobody has any reason to believe that is in any way improbable arrived at, you don't put it any further than that's the best you can do?

A. It's the best I can do, because I just going backwards from when the story appeared. It would have appeared on the electronic media on the previous night, naturally enough.

Q. That's how you were doing it, was it, that you were doing it working backwards, rather than looking at particular records?

A. Well, it would be it jogs my memory when I see them.

Q. Well, you're aware that there is a record of a discussion in relation to the announcement of the and the calling of a press conference and the announcement of the result which takes place sometime on the 25th October?

A. Yes, I am aware of yes, I am aware of that.

Q. It's a note compiled by Mr. Loughrey?

A. Yes.

Q. And you have seen that note?

A. I have seen that note.

Q. And all you say is that your recollection is this is the best you can do?

A. And with respect to the note which may be correct, but

I am just going on my memory, I just follow the sequence of the stories is that that would have dictated to me exactly the sequence of events.

Q. So, the note may be correct but your recollection is your recollection?

A. My memory is my memory.

Q. Thank you.

CHAIRMAN: Insofar as your recollection does point you towards what you have described, Mr. Jennings, I think at different times in your evidence, there was reference to a Cabinet meeting in the ordinary plenary sense, and also to a Cabinet Subcommittee meeting?

A. Yes.

CHAIRMAN: Can you recall which this was, in fact, insofar as there is any doubt?

A. Chairman, I can't recall. I can't swear to whether it was subcommittee or the Cabinet. I presume that Mr. Lowry would have taken, or understood me to have known what he had what meeting he had been attending to and I knew from his information that it had come from some Cabinet source.

By the way, I must apologise in my evidence on Friday, I mentioned that subsequent to the award of the winner, the announcement of the winner, that I would check queries that came in subsequently with I left out Fintan Towey, but he would have been included as one of the people that I would have normally referred

to as well.

CHAIRMAN: Very good. Nothing you want to raise, Ms. O'Brien? Thank you very much for coming back and for your assistance over these last few days.

MR. COUGHLAN: Mr. Loughrey.

JOHN LOUGHREY, PREVIOUSLY SWORN, WAS EXAMINED AS FOLLOWS BY MR. COUGHLAN:

CHAIRMAN: Thanks, Mr. Loughrey, good morning again.

Q. MR. COUGHLAN: I suppose Mr. Loughrey, if we just deal with that last issue first. I think you gave evidence about this particular matter on day 187, and it's to be found at page 86 of the transcript on that day, and that's the document which Mr. O'Donnell just referred to. This is the document which you found in your private no, in the book it's actually 141 A in Book 43.

I think you told us that you found this particular document in your private papers when you were doing a final trawl before you came to give evidence, isn't that correct?

A. Yes, and I believe I was quite correctly apologetic because it was misfiled, but I didn't know where the original had gone, this is clearly a copy.

Q. We had discussed we had been through the provenance and as to where the original might be.

But the sequence of events, as you gave evidence of on the previous occasion, was that Martin Brennan came to

you on the 25th with the result, if I can use a

shorthand to describe it?

A. Correct.

Q. You prepared a small briefing note for the Minister in

relation to that, and you and perhaps Martin Brennan

went to see the Minister about the result?

A. Correct again, yes.

Q. You had a discussion with the Minister?

A. Yes.

Q. And as a result of that discussion, you said that you

left the Minister's office, you perhaps had a further

discussion or thought about it, and you prepared this

particular document about how to position it, the

result, now for the Minister, isn't that correct?

A. Correct, that's absolutely right.

Q. That's the

A. That's the sequence, yes.

Q. And prior to the 25th, whilst you had some indication,

you believe, for perhaps from about the perhaps the

23rd, arising from the visit of the three Principal

Officers to you which

A. Which I didn't recall.

Q. Which you didn't recall, of how things were shaping

up. As far as you were concerned, you did not know

the result until the 25th, isn't that correct when you

were formally informed?

A. I had no definitive result until the morning, and

perhaps it was late morning, of the 25th.

Q. Now, if Mr. Jennings' recollection of the sequence of events is correct, that he had a discussion with the Minister after a Cabinet meeting, and that would have taken place on the 24th, the scheduled Cabinet meeting, that may well have happened, you don't know, you weren't present?

A. I don't know at all.

Q. So you're not privy to any discussion which may have taken place between Mr. Jennings and the Minister on that occasion or what information the Minister had on that occasion?

A. Absolutely not. And I have no memory of either Mr. Jennings or indeed the Minister, and it is there being anything in advance of my informing the Minister.

Q. Do you have any recollection of Mr. Jennings contacting you, as I presume would be the normal practice, that he had engaged in about arranging a press conference for a significant matter?

A. Mr. Jennings was a highly respected and very valued colleague. He would have come to me many, many times over the years about press matters and I couldn't possibly recall, you know, whether he came to me on this occasion, but if he says he did, and has a memory of it, of course I accept that. But I have no memory of it myself.

Q. Because, if that be the case, it would appear that things were happening on the 24th, if Mr. Jennings' recollection is correct, which are at variance with the note of the 25th, that, and I say at variance in this context of this being the first occasion on which the Minister would have known about how things were shaping up?

A. Prima facie, Mr. Coughlan, that would be the case.

There were things that Mr. Jennings mentioned in his evidence and I have just obviously been privy to it now, is that I feel absolutely certain that there was certainly no documentation and I can't be certain there was no Cabinet discussion of an informal kind on the scheduled ordinary Tuesday Cabinet meeting, but it certainly wasn't listed, nor could have been because we didn't have a result, and but my very clear recollection of the Minister effectively taking on board what he would want to say with conviction to the Party leaders and the Minister for Finance when they were meeting on the afternoon of the 25th, in the context of Cabinet Committee on aviation matters, so it would be at variance with my clear recollection of that, if in fact, there had been a discussion at the previous day's plenary session of the Cabinet; I would find that, as I say, it's certainly not my recollection.

Q. Yes, I understand. But you have a clear recollection

of receiving information from Martin Brennan on the 25th, is that right?

A. Absolutely, yes.

Q. You have a clear recollection of going to the Minister with that?

A. Yes.

Q. And it was your clear impression that this was the first time that the Minister was aware of the situation regarding the outcome of the competition; that that was your impression?

A. Of course that is my impression, and that's how we acted on the day.

Q. Yes, and as far as you were concerned, you were the person who advised the Minister on how to position it in terms of seeking clearance from the Party leaders in the first instance?

A. Yeah.

Q. And running with it quickly then in terms of announcing it publicly?

A. That wouldn't have precluded Mr. Jennings having exactly the same advice.

Q. I understand that.

A. Perhaps it might be helpful, you have opened this. Particular note for me actually, and if we look at it, it's redolent of that there was a previous note, I had spoken to him and that note is redolent of something that I wanted to get across that we must act, and I

put "today" in brackets and I put "immediately today," which seems tautologist almost, but I wanted to get across to the Minister is, this is breaking news on the day and if it, in fact, went into the system without a determination, there was always a risk that for something to arise which wouldn't which mightn't have been foreseen. So in other words, just taking the spirit of that note and linking it with the previous note

Q. Well, pause there for a moment. When you say the previous note, was this the formal minute you were giving the Minister about the outcome of the competition?

A. The formal the decision, they were obviously both same-day notes.

Q. Yes.

A. It is, I'd say, it's not an explicit paper trail but it's at least an implicit paper trail that this was all happening on the one day, that there had been no for instance, there'd be no sort of early warning the previous day for instance. Equally, for instance, had it been discussed at a Plenary session of the Government, very often you would see in the formal memorandum to Government, a note of previous discussion or an earlier mention, but the memorandum that went, dated 26th, for the formal copper-fastening by full formal Government decision actually, has no

such suggestion.

Now, all of that doesn't add to clear proof, but implicit in all of that is this all happened on the 25th. A de facto, what I call political realpolitik seen off by the leaders of the Government and the Minister for Finance same day, copper-fastened by a Government decision the following day. So that's not to say that I disagree with anything Mr. Jennings said. But that's my recollection.

Q. Well, if I might come at it this way for a moment, Mr. Loughrey: There is undoubtedly a paper trail in relation to you and your state of knowledge and what you were advising the Minister, isn't that correct?

A. That's correct.

Q. On that day?

A. That's correct.

Q. You do not know what conversations or what the Minister's state of knowledge was on the previous day or whom

A. Or any other day.

Q. Or whom he might have been in contact with?

A. Absolutely, no, correct.

Q. Now, just again, if I might clear up, because it is a matter of substance, I suppose. Mr. Jennings, in his evidence on Friday, and I am dealing now with the series of newspaper articles. The articles which appeared in November which gave some indication of

IIIU/Dermot Desmond effectively becoming the placers?

A. Taking over the Davy role.

Q. Taking over the Davy role?

A. Yeah, sure.

Q. That Mr. Jennings would have been satisfied that he would have read those articles, that would have been part of his job in any event?

A. Yes, of course.

Q. And when we come on to the McManus article in February, which is the more significant article, if I might describe it as that, in that it there is more meat in it about what was happening at the time in

A. It was a very considered article.

Q. A considered article. And there is a reference in it to a query being raised with the Department. Now, the query which appears to have been raised of the Department was, I think, something along the lines of what the state of play was in the licence negotiations perhaps, because the response is along the lines, I don't want to go through it now at the moment along the lines

A. Any good journalist would have done that.

Q. Along the lines that the Department expects to licence in the near future or words to that effect?

A. I recall, yes.

Q. And Mr. Jennings has told the Tribunal, and it seems perfectly reasonable to accept that, when a query

would be raised or made through him, he would go to the people dealing with the matter in this instance he believes it would have been to you, Mr. Fitzgerald, Mr. Brennan, I think Mr. Towey was out of the office at the time and he didn't mention Mr. Towey in his evidence, and Mr. Towey's evidence is he wasn't in the office at the time he was away on leave at the time of the McManus article.

CHAIRMAN: I think there was a mention of Mr. Towey in Mr. Jennings' evidence this morning. I was going to mention that the recall of Mr. Towey

Q. MR. COUGHLAN: In fairness to Mr. Towey, I think he was aware on annual leave at the time.

A. Sure.

Q. And that it would be his job and he would then read articles which affected the Department, and with particular reference to make sure that anything that was being attributed to the Department conformed with what he had given the journalist, and he'd check it off to make sure he'd keep a note of the query he'd keep a note of his response and he'd check those off?

A. That was his professional style and I wouldn't disagree with anything you said, yeah.

Q. Now, he says that he has no doubt but that he would have read the McManus article, and I think he expressed the view that he would be surprised if other

people in the Department wouldn't have read the article?

A. Quite understandable. I mean to say, this is, as I say, we have been over this ground and indeed Chairman, you, you believe, you expressed surprise yourself. All I can say in returning to this is that, I can't speak for anybody else other than myself, but I am baffled and disappointed I missed this article, because this wasn't, and all journalists are good but this wasn't a tabloid speculation. This was a very measured article which, if I had taken it on board, I would have reacted exactly the same way as I reacted on perhaps the 18th April when Regina Finn's letter from Owen O'Connell came my way. The minute I took on board, and let's say it was the 18th April, I think it was dated received the 18th, I may have got it on the 18th or the morning of the 19th, but it doesn't really matter, as I started to pull lever straight away because I saw the significance of it. I believe I would have reacted in exactly the same way had I taken that article on board on the 28th. This was not an article somehow to be filed under 'F' for forget. It wasn't an article to be ignored. It was I regarded it as extraordinarily informed and in particular it was an intention by the consortium with which I had not agreed and did not agree subsequently. It was so significant I presume I was abroad and that's why I

didn't see it. I managed to get access to the diary which was in the hard drive in the Department and it showed I was indeed in the office on that day, so I am not hiding behind that as an excuse. All I am saying on the day all days was busy and this was extraordinarily busy. There were back-to-back meetings from early morning right to 5:00 or 5:30 when the Director General of telecommunications, Robert Veru, was coming to see me in my office and almost certainly that continued over dinner. And the following day we had Neill Kinnock in the office and from memory it was the start of the 'Open Skies' debate.

Now, all days are busy. I should have seen it. I may have seen it, and somehow in some aberration didn't take it on board. I am not hiding behind a busy diary. As I say I am baffled and disappointed, Chairman. I believe I would have reacted on the 29th February, because it was a leap year, in exactly the same way as I reacted in mid-April when it was brought to my attention.

Q. Well, just to ask you about one further matter pertaining to that particular article. It was found in the files of the Department and immediately behind or in front of it was an analysis carried out by Mr. Donal Buggy, a good analysis of the information contained in the article.

Now, Mr. Buggy said that, and would you agree, that when he carried out work in the Department, he was a specific task he'd be asked to do a specific piece of work. He wasn't a civil servant in the general sense of that, who would have ongoing work. He'd be asked for advice by civil servants on some financial matter or accounting matter?

A. That's perfectly correct. I personally would have commissioned him as an in-house consultant for a specific task. That's quite right, Mr. Coughlan, yes.

Q. Now, he says that he doesn't have a recollection of actually carrying out the analysis, or when he did it, if he did it. But that he would have been asked to do it by, I think he said, either you or Martin Brennan.

Now, Mr. Brennan has given evidence that he didn't ask him to carry out an analysis of the particular article. Do you remember asking him to carry out an analysis?

A. Absolutely not. Because I would have been horrified then as I am now had I such awareness of having missed that article. No, I have no such recollection.

Q. I have imposed 18th/19th April, you didn't ask him to carry out such an analysis?

A. Absolutely not.

CHAIRMAN: I suppose what concerns me, Mr. Loughrey, is that it's actually not even reciting some farfetched rumour. It purports to be a statement of

fact that the consortium, in fact, had Mr. Desmond or his new company as a 25% shareholder, so if this was some outrageous speculation or poppycock, it would have been incumbent on the Department to quickly address a false publication, would it not?

A. You are absolutely right, Mr. Chairman. And as I say, it makes it all, as I say, the more disappointing.

The only thing I would say, and it's not by way of excuse, is that: Ultimately on May 16th, I don't believe the outcome ultimately of the grant of the licence would have been any different had we had this earlier had we picked it up as early as we should have.

Q. MR. COUGHLAN: Now, if I could then finally get back to where we left off the last day, Mr. Loughrey. And this was on the question, because I wanted to have a look at the report again, because you, quite correctly, said that the report made a suggestion in how to deal with what was identified as a problem, isn't that correct?

A. That's right.

Q. And I think, perhaps, we'll go to the final report, and it's at Divider 50 of Book 46. Page 44. It's the heading: "Sensitivities, risks and credibility factors."

A. Yes, I have it now.

Q. And if you see at the commencement of the second

paragraph it says: "A critical factor in any consideration of the credibility or risk analysis of the applications is the capability of the principals to finance the project including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure." So that's what's being identified?

A. That's clearly identified, yes.

Q. Then if you go down the penultimate paragraph on that page, then you see: "Although being assessed as the most credible application, it is suggested to demand an increased degree of liability on self-financing from the backers, if the Minister intends to enter licence negotiations with A5."

Isn't that right?

A. Yes, I see that.

Q. So what is being identified here is the problem, the financial frailty of one backer in particular?

A. Mm-hmm.

Q. There is a recommendation that Esat Digifone should get exclusive negotiation rights if they could cover the risks, isn't that right, that were identified?

A. It's not put as conditional as that, Mr. Coughlan.

Q. I see. And does it not further go on to say that failing that, that the Minister should go onto the next ranked, which, was A3, and they identified, in this report, similar risk and failing that, that they

should go on to Mobicall

A. A1, yes, you are quite right, you are quite right, yeah.

Q. But if you go to page 52 this is the conclusion under the heading "Conclusion and recommendations"?

A. I have that now.

Q. The recommendation: "The results of the evaluation as reflected in Table 16 and confirmed in Table 17 means that the evaluators have concluded the following ranking of the three best applicants.

"It is therefore proposed to advise the Minister to enter into licence negotiations with the consortium behind the A5 application with the prior consent of the applicant that if the negotiations fail or are impossible to conclude successfully, that licence negotiations will be commenced with the next nominated candidate. If the consortium behind A5 cannot satisfactorily cover the risks identified (but not scored), it is recommended to consider entering into licence negotiations with A3. Similarly, if the consortium behind A3 cannot satisfactorily cover the risk identified (but not scored) and abandon the strong reservations concerning the draft licence, it is recommended to consider entering into licence negotiations with A1."

You say that you don't consider that the

recommendation was that strong; that the suggested solution now, no other solution was ever put into place?

A. I am not saying that at all, Mr. Coughlan. Quite clearly from the report and I read the report at the time, probably on the 27th or thereabouts at the time, I think I believe, you know, I was struck by the fact, particularly in Appendix 10, they didn't pull their punches at all and it links in with this recommendation. They said, you know, A5 and A3 have a member that don't have the money. I can't quote it exactly, but, in fact, they don't have the money. And obviously this is something that has to be addressed. Now, nothing could go clearer than that. They stated it actually in the opening sentence and they stated both in respect of, both in terms clearly what we're interested here in terms of Communicorp and they uttered the same remarks in terms of Sigma and we don't have to go down that particular road. But what I am saying is that no punches were pulled in the terms of their assessment.

Now, clearly that's the last thing I would ignore, and I don't believe I ignored it. I was conscious of that and when we went into this this wasn't this was an input, a recommendation into negotiations, but the report people who made up the report as a team, as a Project Team, and particularly Andersens, they were

not the negotiators of the licence. The Department took on its normal corporate role in negotiating the licence on behalf of the Minister. And we retained our discretion. But I believe ultimately in the testing of the, what I call practical robustness of the consortium, to finance this, I believe we met the spirit of what was recommended here.

Q. Well, we know that Mr. McMahon was a member of the negotiating team.

A. Correct, there was an overlap of course.

Q. He was the de facto Regulator, I suppose, at the time?

A. You're right.

Q. He never had a copy of this report?

A. Pardon?

Q. He never had a copy of this report until the Tribunal commenced its business. He never had a copy of the final report?

A. I am surprised. I know he was a busy man, but it wasn't withheld from him, let me put it that way. But ultimately, Mr. Coughlan, the decision rested with me.

The decision rested with me, and I had to satisfy myself as I saw it. The practical and immediate robustness of the consortium to meet the capital calls. I believe I was so satisfied.

Q. But that was in May of 1996?

A. Correct.

Q. Not something before the Minister entered into

negotiations with A5. It wasn't tied nothing was tied down. In other words, the suggestion, as you say here, in the recommendation wasn't taken up?

A. No, because if they were to increase their degree of self-financing for instance, and that is the recommendation, this means a project of this magnitude and of an attractiveness should have a debt/equity ratio different from the 60:40. That's nonsense, Mr. Coughlan. I believe they were wrong in their recommendation. It was my experience that they were wrong. And not only that, take a look at the documentary evidence. See the letter from ABN-AMRO. See what it says. It almost says is we were knocked down in the rush and we were very happy to get this non-recourse project finance job. Is that the sort of sign that the debt/equity ratio is wrong? Certainly not, Mr. Coughlan.

Q. All right. But the one thing we do know for certain is this, Mr. Loughrey, isn't it: That the Taoiseach didn't know about this, the Tanaiste didn't know about it, the Minister for Social Welfare, as leader of the Democratic Left Party in that coalition Government didn't know about it, and the Cabinet didn't know about this recommendation and suggestion, isn't that right, when they were informed of the decision and had to take the formal decision, isn't that right?

A. If you are inferring that there was some sort of the

discriminatory bias brought into a report into the Cabinet. Equally, if there was a point made there is a weakness in 2 and a weakness in 3, an exasperated Taoiseach, an exasperated Government could say "for God's sake, you civil servants, give us a decision that we can be clear on; not beset us with problems." We didn't beset with them with problems. In other words, we solved the problems and they were solved satisfactorily.

Q. Do you agree with me they did not know about it?

A. I don't believe they had to know.

Q. Do you agree with me they did not know?

A. Of course I agree with you they did not know.

Q. Thank you, Mr. Loughrey.

MR. FITZSIMONS: Just one question.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FITZSIMONS:

Q. MR. FITZSIMONS: I think, Mr. Loughrey, it's not in issue that Mr. McMahon was a very competent Regulator?

A. Indeed he was, yes.

Q. I think you would agree with me if I were to suggest that it is absolutely inconceivable that a competent Regulator who had concerns about the outcome of this competition would not pick up the phone and ask for a copy of the final report?

A. Mr. Fitzsimons, I did say in my interchange with Mr. Coughlan a moment ago, that I was surprised because perhaps I put it indirectly is, Mr. McMahon is

extraordinarily competent and prodigiously hard-worked Regulator. Perhaps that's a reason, but if he didn't seek a copy of the evaluation report, that's a decision he took himself. But, you believe in negotiating the licence, he himself was focused on the legal dimension and the financial dimension was left to Mr. Brennan on recall, but particularly Mr. Buggy and myself.

Q. Yes, but there is no question about the fact that he could have had a copy of this report by walking down a corridor and asking for it or picking up the phone and asking for a photocopy to be sent across to him?

A. Yes, I believe so.

Q. And isn't it reasonable to say that the only inference that can be drawn from the fact that he didn't look for a copy of the report is that he was perfectly happy with the result to which, of course, he was a party?

A. Not only that, Mr. Fitzsimons, but I think more than anything I think the evidence that the Tribunal have unearthed and we have heard that Mr. McMahon, perhaps more than anybody else, not to infer that anybody else took less, but was so meticulous in the wording of the report from start to finish, that I think he had an inbuilt familiarity with the report and perhaps he didn't have to go back and reread it, let me put it that way.

Q. Thank you, Mr. Loughrey.

MR. McGONIGAL: Just one question, Mr. Loughrey.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. McGONIGAL:

Q. MR. McGONIGAL: Apart altogether from the examinations

which you yourself or others may have done in relation

to the granting of the licence, is it, in fact, correct

to say that the acid test prior to the licence being

given to Esat Digifone was that they had to pay the

€15 million?

A. Yes, correct.

Q. That had to be produced before any licence issued?

A. I think Mr. Brennan put it very succinctly, no licence

fee, no licence.

Q. Thanks, Mr. Loughrey.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. O'DONNELL:

Q. MR. O'DONNELL: Mr. Loughrey, just to take you back

to some of the evidence you gave on the last occasion.

Firstly, IF I could deal with the meeting that you had

with the three heads of the various sections within

your Department on the 23rd October when, in the

middle of the consideration of the final report, they

came to you to discuss certain concerns they had in

relation to the wording of the report.

I think you indicated that your management style was

not to pass judgement and say, well, you're right and

you're wrong. Your style was rather to facilitate

consensus amongst people where there was a problem

that seemed to be brewing?

A. It wouldn't have been my style I mean to say, if something is going wrong, I would always bring somebody in on a one-to-one basis because anybody would have to be allowed both dignity and to exit with honour from anything that might smack of a negative judgement or even a reprimand. So in a meeting which would involve more people, my style would have to either seek consensus but certainly not to score a victory for an alleged victory for one side or the other.

Q. And this was, I suppose, a situation where these, the three men who had come to see you were in the middle of a busy and challenging process and you were in the middle of what I assume was a busy day for yourself?

A. That would be correct.

Q. In that context the suggestion by somebody that it could have been up to two hours as a length of a meeting, does that strike you as being likely?

A. No. I believe myself is clearly I have stated on more than one occasion, I don't have a personally, I don't recollect this meeting, but clearly with so much evidence, it, of course, took place, but I would be astounded, because my day tended to be pre-booked, so to speak, that somehow an unforeseen meeting could last for two hours. I feel instinctively that that couldn't be correct. That's not to say, I am not

criticising anybody who may have said that, but I tended to clear the room quite quickly, and I had, at the time, I had a first-class private secretary who would not have allowed any meeting to last, I imagine, ever more than one hour, if they were unscheduled, and she would signal that I had, and whether it was a matter of convenience or fact, that I had to be elsewhere, so I can't imagine for one moment it could have lasted two hours.

Q. And you say that, therefore, the likelihood is that the most it could have lasted was an hour and it may even have been less?

A. You are asking me to almost speculate on a meeting for which

Q. That you can't remember?

A. I can't recall. But I know one thing: I'd be astounded if any such meeting lasted certainly more than one hour and one hour at the maximum.

Q. Now, having given having indicated to the personnel in question that there was going to be time available for them to repair the wording of the report and to improve the presentation of the report, that was, in a sense, I suppose it took any pressure they may have felt, rightly or wrongly, it took any such pressure off them at that stage?

A. It did. If you're looking at it from their perspective, it would have done so. And I think I

expressed the view, when speaking to Mr. Coughlan, I think I expressed the view that that might have been I can only speculate it might have been given the makeup and the people that made up the team with whom I was familiar with them all to a greater or lesser extent some collective indigenous feeling that we brought it so far, let's get it over the line.

Q. But that that was a group feeling, or a group ethic, it wasn't a pressure being exerted from the outside by you?

A. Certainly not, there was no reason for me at the time to exercise such pressure.

Q. So nobody intervened to ask you to start putting pressure back on this team?

A. Oh, absolutely not.

Q. And you didn't put it on, pressure again, of your own volition?

A. Certainly not.

Q. And you are not aware of anybody else coming to the Project Team and saying, sorry, forget about what Mr. Loughrey has said, you must finish it within a particular period of time?

A. I am not so aware and being without conscious of hierarchial pecking order, nobody in the Department could have done that other than the Minister and there is no there is no belief or record that the Minister would have done so, and had he done so, they

would have immediately come back to me to act as that sort of lightning conductor role that I spoke of in the past.

Q. Yes, so there is no source from which pressure could have come on the Project Team again after the meeting with you?

A. I believe

Q. That you would not have known about?

A. I believe you are correct there, Mr. O'Donnell, yes.

Q. That also applies you are not aware of anybody putting pressure on Mr. Brennan or Mr. Towey or any individual member of the team?

A. Absolutely not. And I think it's evident that none of the team were shrinking violets and wouldn't have taken such pressure or had such pressure been attempted they would have come back to me for support.

Q. Now, the you said, I think you said that you felt that, therefore, if the pressure didn't come from outside, there may have been kind of a collective will to try and get the matter over the line. Can you explain how you understand the dynamic of that to work?

A. I have often been involved in this myself perhaps and perhaps all night negotiations that I had been involved in, where a sort of a collective sense of can do evolves out of long hours and being cooped up together, sometimes it's out of frustration, sometimes

it's out of a form of elation if you work long hours,  
to get a transaction of one kind or another effected.  
I am only speculating. But in the absence of any  
evidence of pressure I can only assume that it was  
something along those lines.

Q. Now, if we come then to the 24th and the 25th, and  
perhaps going back again to Mr. Jennings' evidence.  
Firstly, I think Mr. Jennings' evidence, on Friday,  
was that he would be anxious that a decision like this  
would be announced immediately, that there would be no  
delay, no hiatus, no intervening period allowed to,  
for speculation or unhappy developments of that sort  
to take place, and was that your knowledge of him as a  
person; that he would be direct in a situation like  
that?

A. Well, I can't recall this particular incident, but I  
knew that Mr. Jennings actually was a very wise,  
streetwise and experienced information officer, and I  
would have listened very carefully at any stage to  
advice he would have offered me.

Q. And would he have come to you before and I think he  
says he would have, but that's your experience always  
that he would have come to you before making a press  
announcement of this sort?

A. Not necessarily. In listening very carefully to  
Mr. Jennings this morning, one thing slightly puzzled  
me and that was, it's not to doubt anything he said

for one iota, was that he would have gone sort of from room to room, but I am puzzled because if I authorised a press conference, I don't think he would have gone to somebody else to second-guess that, to be honest.

So I am perhaps

Q. He'd have to go below you so to speak?

A. And I don't say that in any sense of self-importance, but equally Sean Fitzgerald, or Martin Brennan, I am not sure he would have, but it's up to Mr. Jennings as I say, I respect everything he said, but I am not sure it's necessary to check with, you know, four people in a management line to see if something is on or not on actually. Normally, one would suffice if they were of sufficient stature, and I don't mean stature in a phony way. Martin Brennan as Principal Officer certainly would have had that in spades.

Q. If we look at the rationale behind announcing decisions of this sort speedily, there seemed to be a fear that once a matter got to Cabinet, particularly to a coalition Cabinet, that there was a serious risk of the matter being leaked to the public domain, there was also a serious risk in relation to lobbying.

That's what Mr. Jennings says in his statement.

A. I wouldn't put it that way myself actually. I think in all the partners in that particular tripartite Government or in any Government where they had a legitimate interest in terms of their political

discretion or in terms of their constituency - with a small 'C' - take voter constituency, I don't mean directorate constituency, they would have had a right, and they would have had to let me put it this way, is to take time-out, if they so wished, to consider something. Now, I know this is something Mr. Coughlan had put to me sort of earlier in February, and of course I respected that, but I equally knew the realpolitik of this major decision was that if it became known in public without a final Government determination, there would have been a risk there certainly would have been the certainty of lobbying because there was so much at stake and there would have been a risk that different interest groups would have taken a position. I think I had mentioned I had seen this when it first happened in this area when the communications workers union quite legitimately had an interest. This was when cable and wireless were mooted in 1993/4 as the first possibility for a strategic alliance. They immediately went into overdrive, as is their right, and they influenced part of Government to make sure that that didn't happen in that particular way. Now, there is nothing, nothing ignoble about that whatsoever. It's part of the way our democracy works, but equally if, in fact, the Party leaders and the Minister for Finance were to buy into a quick determination, I believe that that was

the best way forward to avoid mischief and difficulty for my Minister. I was looking after the Department of Transport, Energy and Communications; that was my particular responsibility.

Now, I knew, personally and otherwise, the makeup of the quartet that I have just mentioned which would be: Mr. Bruton, Mr. Spring, Mr. De Rossa and Mr. Quinn; not for one second would any of that quarter of heavyweights been over-bowled by anything suggested by a civil servant. So in doing so, they got the option on the 25th to see what the decision was, to review what they would do, and in the event, they bought into that what was, in effect, a de facto Government political decision.

Q. And that occurred on the 25th?

A. Correct.

Q. And just to be clear about this, Mr. Jennings' memory, and he is fair enough to concede that it's only his memory and there is no record of this, that he may have called the press conference on the 24th for the 25th. Firstly, that would have allowed a day or 24 hours to have elapsed which would not necessarily be desirable either in his way of thinking, or in yours?

A. Correct.

Q. Secondly, it would not necessarily have been desirable from the point of view of AMI, whose advice was, once a decision is made it should be announced

quickly?

A. And Martin Brennan so advised me that that was their recommendation.

Q. And thirdly, it seems his recollection is that his discussion now is that his discussion with Mr. Lowry may have taken place after a Cabinet meeting where Mr. Lowry said "we have a winner". But there is no record of any Cabinet meeting on the 24th or the 23rd where this was discussed, where the GSM licence was discussed?

A. Well, I think Mr. Jennings' recollection is perfectly understandable because, to some extent, not on this issue, I have the same problem because typically after a Cabinet meeting, not all Ministers, but certainly Mr. Lowry, would have discussed matters that came up with me. So in other words, it would have been usual for me to talk to Mr. Lowry immediately, indeed immediately before and immediately after a Government meeting. So certainly in my mind, this allusion of meeting a Minister after a Cabinet meeting, it happened so often actually, that I myself would have difficulties in recalling where one, let's say, meeting stopped and another started, except in this case, because it was so significant for both myself and the Department, and there is a documentary trail for my relationship with Mr. Lowry. Mr. Coughlan is quite correct in pointing out Mr. Lowry may well have

spoken to others, I don't know that, but my own recollection is quite clear, prompted of course by the paper trail on the day; that's how it happened on the day is how I recall it.

Q. And if we just look at the paper trail, as you call it, just to identify the role of the Department in relation to this. It's I think we have opened document 141, and we might look 141 A which is Booklet 43.

A. Divider 43, is it?

Q. Book 43, Divider 141.

A. Yes, I have that.

Q. And that is the, I think, in response to Mr. Coughlan, you agreed that the sequence was, and I think it was a summary of your evidence that Mr. Coughlan put to you, that Mr. Brennan came to you on 25th with the result, you prepared a briefing note, and this is the briefing note that you prepared on the 25th October?

A. It is a briefing note, but it's more than that: it's the clear-cut summary for the Minister that the process was complete and that we had the nomination for exclusive negotiating rights.

Q. And this was a document that he would be able to bring with him when he was going to discuss the matter with Cabinet Ministers or at a full Cabinet meeting; this was a document he would have with him?

A. I believe so. Mr. Lowry didn't burden himself with

too much paper, but I suspect he either brought the content with him or he brought the note with him; one or the other, yes.

Q. But given that this document was only prepared on the 25th, he wouldn't have had the information he wouldn't have had this document or the information as put by you in this document earlier than the 25th?

A. Oh quite clearly that's the case.

Q. And, therefore, he has the document, and if we turn over, we see the next document, which is also prepared on the 25th October, and that's 141 A, and again this is a document that's prepared by you on the 25th October, and it relates to the announcement of the decision?

A. Not only the announcement, but to get to ensure that the Minister got the necessary, a political buy-in of the Party leaders and the Minister for Finance.

Q. Well, let's look at it. It says: "Minister, following our conversation a couple of minutes ago we have reflected on how best the GSM decision should be positioned immediately.

"There might well be considerable merit in getting the agreement of the Minister for Finance, and of course the Party leaders that you are announcing the decision immediately (today) following the meeting at 4 o'clock."

Now that seems to suggest the earlier document doesn't, but this document suggests an announcement of the decision so it's

A. Yes, it does.

Q. That's the first time that this is recorded.

"Clearly this has the certainty that the decision and the process stay under your control and cannot be hijacked in any way.

"If a news item is sufficiently interesting, a successful press conference can be arranged at half an hours notice."

That also indicated that at that stage it was your understanding that no press conference had been called of course?

A. Nor could it have been. Because it would have been, a) irresponsible in the extreme of a Minister of the Minister, without the imprimatur of the political leadership of the Government, to have gone ahead unless he had that okay from him.

Q. Can I put it to you like this: when you were discussing the positioning of the GSM decision and the announcement of the GSM decision and when you were discussing, in particular, the calling of a press conference, there was no suggestion to you by Mr. Lowry, "oh I have already organised a press conference yesterday with Mr. Jennings"?

A. Oh no. And I think the spirit of the second note you

have just opened is one where I am encouraging him to go ahead. If in fact if in fact he had taken that decision or a decision had been taken already, it would have made a nonsense of this particular note.

Q. It would have been pointless

A. Pointless.

Q. to be suggesting that a press conference be called?

A. Absolutely, yes.

Q. And Mr. Lowry never led you to believe that a press conference had already been called?

A. Oh certainly not. I was the person who was, let me put it this way, encouraging him to think of, to buy into a same day declaration.

Q. And no other member of the PTGSM ever suggested to you that a press conference had already been arranged prior to the 25th?

A. And certainly not; they wouldn't have the authority to do so.

Q. And then, so far as the discussion of the matter at Cabinet is concerned, the next leaf is the leaf which appeared to record discussions which took place at the Cabinet table. Now, again, it's undated. There are various fax headlines at the top which I think for once we can ignore the banner headline, but they appear to be discussions that took place at a meeting of the Cabinet, but they don't appear to have taken place prior to any they don't appear to have taken

place on the 24th. It seems more likely that they took place in a Cabinet meeting on the following day, the 26th. You may not be in a position to comment?

A. I am not in a position to comment actually on that.

I'd like to know again what the provenance of those particular notes are. There is nothing in them that causes me any trouble whatsoever, but the provenance of those particular notes.

Q. But we know there was a meeting

MR. COUGHLAN: I can help My Friend

MR. O'DONNELL: There was a meeting

MR. COUGHLAN: Those documents are from Mr. Bruton's own notebook of the discussion he had with Mr. Lowry prior to the meeting with the Ministers on the 25th.

A. Fine.

MR. O'DONNELL: That dates them in time; it confirms them as being the 25th rather than the 24th.

A. So I am to gather from Mr. Coughlan this was just before they got to the scheduled business of the Cabinet Committee on aviation matters, they had discussed this on a political basis. I have no problem with what's there. Just to make sure that we're talking, Mr. O'Donnell, about the right date.

Q. But it confirms that they did not take place. These aren't discussions that took place at any Cabinet meeting prior to the 25th. It's clear they took place

A. Certainly. We wouldn't have access to them if they were at a Cabinet meeting. Clearly we wouldn't have access to notes that were part of a plenary session.

Q. All right. Now, can I just take you to your analysis and the analysis carried out by Mr. Buggy in relation to the liquidity of the partners. Firstly, I think you were referred to the report, the final report and you said you read the final report. But it may be helpful to look at the appendices to the final report, and in particular, to Appendix 10; that's at Tab 51 of Book 46.

Now, I don't know if you have Appendix 10?

A. Yes, I have Appendix 10.

Q. Now, 10.1 is the introduction and it makes it clear that "the top two ranked consortia have members who presently do not have the capital required to finance the GSM2 network." So there is already a warning there that two of the top ranked consortia don't have the money, as Mr. Coughlan put it?

A. I think Mr. Coughlan, and I agreed, nothing could be starker than that introductory sentence.

Q. "This analysis discussing the risks due to lack of funding. And it further suggests means to close the uncertainty relating to finance."

A. Correct.

Q. Then it assesses briefly A2, A4 and A6. There is rather a lengthier assessment of A1. There is then an

assessment of A3, which was the second place, and it concludes then with an assessment of A5.

A. Correct, yes.

Q. And I think it's appropriate to point out that it sets out the existing corporation of Esat Digifone as being 50% Telenor and 50% Communicorp. While it makes it clear that Telenor has the financial strength to provide the necessary financial backing, it says at page 5 "Communicorp is a new company which has invested heavily in telecommunications infrastructure and has a very weak balance sheet which needs capital injection before it can support the shareholders equity commitments stated in the shareholders agreement."

A. Correct.

Q. Then an analysis of the shareholders agreement in a text box over the page, at page 6, and extracts from the shareholders agreement are then also analysed. But I think at the bottom of that page, it's made clear, on a worse case equity requirement it says "This equity commitment cannot be met by Communicorp today."

A. Christally clear, yes, quite.

Q. And so, the report itself made it clear that there was going to be a potential problem in relation to the funding of the 50% ?

A. Absolutely and it's one that would have to be

addressed.

Q. Mr. Buggy's own report then, I think the analysis which he carried out for you also makes it clear that while I don't know if you have a copy of that?

A. Yes, I have it now.

Q. I think he also examines the business plan, but the second page he says "ETH" that's Esat Telecom Holdings "are currently in the process of arranging a private placement in the US. This is expected to raise at least IRi½22 million. The process is at an advanced stage but not yet finalised. Therefore, we cannot rely on it at this particular time. As a result, we must ensure that the parties underwriting ETH's share are financially strong enough to support their portion of ETH's share along with their own investment."

So, also not simply the view of the Project Team, but it is the view of Mr. Buggy that there is also still an outstanding potential problem in relation to funding?

A. And I think it's important actually to look at the sentence of Mr. Buggy's note and really what is he doing? You can see quite clearly he is looking at an assessment of the consortium's financial strength. Now, clearly, that includes the three principals as they were then, but that's what the objective was; that we had to be satisfied that the consortium's

financial strength was such that a project so important wasn't jeopardised in any way. Now clearly this was going to be a cash only project up front. Clearly it had been well signalled that Communicorp were frail financially. So it was how that problem was going to be addressed.

Now, if Communicorp had to get more equity on their balance sheet, they had to go about getting it. Now the same would have applied I am just saying it this as an aside exactly the same trail would have been the same for, say, Sigma in the second Persona. But once again I am quite certain had it been A5, it would have been addressed, broadly speaking, in the same way I am not inferring for one moment that it couldn't have been in Sigma for the Persona consortium as well but basically you had young, frail, but ambitious Irish companies that needed to strengthen their balance sheet to keep up with the play for the roll-out of this project. Now, how would they set about doing this? Well, the capital markets are not into charity and are seldom into uncertainty, so either Communicorp or Sigma would have to await, for all sorts of practical reasons, until such time as the licence was granted, because if there was uncertainty about the grant of the licence, try putting that in a Prospectus to the capital markets and see how far you would get; in fact, the

discount would be so deep as to make it untenable. So in other words, I knew, in assessing this, that, and I mentioned this with Mr. Coughlan and I had this conversation, is that clearly Mr. Buggy, quite correctly, prudently, for the sake of this exercise, effectively put the Communicorp contribution to zero, and he was right to do it. A snapshot on the 15th May, he was absolutely right to do it. But it was I who was making the judgement call, and I knew perhaps the key phrase almost, whether he wrote it consciously or unconsciously is "We cannot rely on it at this time".

Now, quite clearly is, I might have seen only one or two percent of the documentation that the Tribunal has thrown up in terms of this, because clearly there is an enormous amount, and I haven't seen any of the principals' documentation of any kind, but I would be astounded if anybody, anybody at all would have demonstrated the slightest doubt that Communicorp, or Mr. O'Brien, if you want to put it personally, would not have been able to raise that money. And in fact it's not just and while I took the judgement on my own, some of the documentation, all of the documentation that I am aware of opened by the Tribunal, casts no such doubt and I am not talking about the sort of obvious things like KPMG's conditional letter; I am talking about perhaps

something that Mr. Arve Johansen's note for instance, where Telenor were quite happy to bridge, and let's just think about this for a moment: Telenor, Norwegian based, successful international telecommunications company actually, very street wise, so they were happy to effectively bridge Mr. O'Brien until such time as his funds were raised in the United States.

Q. And you say that's a vote of confidence by Telenor?

A. That's a vote of confidence. Any other reference is, it's not whether Mr. O'Brien was going to get his money; it was when he was going to get his money. So in other words, is, and I don't want to sort of delay you, Mr. O'Donnell or the Tribunal, but if we wanted to look at anything that I am aware of, I don't know of anybody who would have any of the slightest doubt that that money would have been successfully raised.

So that was my preoccupation. My preoccupation was on the front end liquidity, and I though I actually worked on conservative lines, I was certain that that money would come in. Look at the presumption that was made in Mr. Buggy's note, which I don't disagree, is that all the cash calls for the first year would be on equity. No debt whatsoever.

Now, we know that's not correct. I am not privy to the conditionality of ABN, AIB's bridging finance before the full known recourse finance kicked in, but

it was certainly there. The idea that you'd have a project of this nature, of course banks and notably project finance lenders who were relying not on the assets, not on the creditworthiness of the principals, but were relying on the cash flow of the particular project, of course they would be careful and they would want to see equity go up front, but not a hundred percent equity totally in the first year.

So, everything that was in Mr. Buggy's note, and I didn't disagree with it actually, was ultra conservative

Q. As you would expect?

A. As you would expect, and quite correctly, but my judgement call was based on the fact is, so long as I was convinced that Mr. Desmond/IIU had the up-front locked in liquidity to provide for the early financing, the early cash calls for this particular project, I was quite happy to inform the Minister that I was satisfied that on the basis of financing for the project was sound and that was my approach.

Q. And just finally in relation finally, and it is in relation to IIU, I think you have referred to it again as a judgement call that you make an assessment of the information that you'd been given by reputable accountants. You also look at the analysis carried out by Mr. Buggy in relation to how that information should be treated, and you then make a judgement call;

that's your responsibility is to make a decision?

A. The buck stopped with me. That's what I was paid to do. And in a sense is that I had set out, and I think the phrase I used off-the-cuff was, I wanted to climb that ladder of liquidity, and of course I could have relied on Mr. Pearse Farrell's opening letter where he gave a confirmation that Mr. Desmond/IIU was in a position to meet it, but if you look at the text of the second letter from Mr. Farrell, not only does it major on liquidity, but it also is a much more considered letter and it was a letter that I could rely on without looking at the background assets and perhaps while I am at it, is just to address this attitude of encumbered, unencumbered assets. I was not relying on assets whatsoever. Even in fact if there was no fixed or floating charge, any mortgage, on incumbrance or, for instance, London City Airport whatsoever is, that's not cash or near cash, it's not something that I would have been relying on because I think Mr. Coughlan, very tellingly, on many occasions used the phrase, if a member of the public were looking in, and I think it was a very valid and he made some very telling points on that basis, if I could sort of borrow from that for one instant and say is that, I think most people in Ireland, because we're the most owner/occupier in terms of housing that I know of in western Europe is, we are all conscious of

how you can be asset rich and cash poor. Nominally asset rich and even when there is equity in your own house, it's not easy to translate that into an immediate cash call. So the fact is, and I don't want to sound cavalier, but whether the assets were unencumbered, encumbered or partially encumbered, as far as my mindset was concerned, nothing much turned on that. I was looking for cash and near cash for the certainty that up front liquidity would give.

Q. And what Mr. Farrell confirmed in his letter was the ability of Mr. Desmond/IIU to make the investment?

A. Correct.

Q. In the amount sought?

A. Correct.

Q. And that was what you wanted?

A. Correct.

Q. And

A. Not only the investments, but that he could take up the commitments that self-evidently that Communicorp couldn't do until such time as their convertible loan note issue matured, came through in the United States.

Q. And that was a judgement call you made back in April or May of 1996, but looked at now, is it a judgement call you would stand over?

A. Oh absolutely.

Q. Thanks very much, Mr. Loughrey.

MR. COUGHLAN: If I might just take you up on that

last

CHAIRMAN: If I might just give Mr. Fanning, who has arrived in recent times, an opportunity

MR. FANNING: I beg your pardon, Chairman, I apologise if I am out of sequence. There is one matter I'd like to briefly canvass with this witness, if I may. I don't know if at any stage the letter of Mr. Brennan to Mr. Andersen of the 14th September, 1995, has been put to Mr. Loughrey.

CHAIRMAN: By all means raise it.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FANNING:

Q. MR. FANNING: I wonder could it be shown on the projector. I am not sure exactly what book it is in. It's the letter from Mr. Brennan to Mr. Andersen of the 14th September 1995. It was the letter which was the subject of extensive discussion on Day 229.

A. Mr. Fanning, we'll have to put it on the screen. I am not immediately familiar with it obviously.

Q. I appreciate that. I am hoping that you'll be assisted. It was a letter that was the subject of discussion in the Tribunal in very recent days.

(Document handed to witness.)

Now, I don't propose to bring you through the full letter. I am actually looking at the transcript version, a paragraph that begins, "The final evaluation report"

A. I have that.

Q. I am looking at a sentence at the end saying: "The final evaluation report, taking into account the views of the GSM Project Group, shall be submitted to the Department by AMI by 25th October 1995 until an alternative date is expressly approved by the Department prior to the said date." So that's a letter of Mr. Brennan's. He has given evidence, I think, that he wouldn't have been primarily responsible for the drafting of the letter; that it may have, in fact, been drafted by Mr. Towey, but it was a letter nonetheless sent under his name to Mr. Michael Andersen on 14th September 1995?

A. Mr. Fanning, this is the first time I have seen this letter, but I have noted that it was a matter of some press discussion it was in the precise in the last week or two.

Q. You have already answered my first question, you don't believe you saw the letter?

A. I don't believe I saw the letter at the time.

Q. Could I ask you then in circumstances where this letter appears to suggest a timetable that was, in fact, ultimately adhered to, and appears to be written earlier than any indication that Mr. Lowry may have had of the result of the process. Can I ask you if you agree with me that this letter discounts the possibility that the Minister, in fact, accelerated the decision of the Project Group?

A. Mr. Fanning, I don't think the letter itself, I could go so far as that, but I could offer the opinion that clearly from September '95, that, in fact, there was either an implicit agreement of this letter wasn't contested or if Andersens acknowledged this letter and agreed with this, an explicit commit to a critical path which would culminate on October the 25th. And if that work programme were adhered to, there would be little reason for the Minister to seek an acceleration, but I couldn't go so far as to agree with the fullness of your question, because I am not in a position to stand over it.

Q. Well, I think I can accept your answer insofar as it goes. Can I just ask you finally that, Mr. Jennings, who was the press officer in the Department at the time, gave evidence on Friday that it was his view, and he advised the Minister accordingly, that once the result came to hand it should have been announced immediately and that this was inadvisable to have any I think it was previously your evidence that you equally advised the Minister when the result came to hand that there should be no delay in that. Am I correct in that?

A. Not only are you correct in that and on top of that, Mr. Coughlan might find it in some way ironic that I am picking up on one recommendation, that AMI themselves had long practice in this area of being

involved in competitions for second or third licences, they equally advised that there should be no delay between the determination and formal announcement. So there would have been quite a consensus of one kind or another behind that recommendation to the Minister.

Q. Thank you very much.

THE WITNESS WAS EXAMINED FURTHER BY MR. COUGHLAN:

Q. MR. COUGHLAN: Just a few matters. I might take up that issue which you have dealt with just with Mr. Fanning there.

A. Sure.

Q. First of all, you were unaware, I take it, that what was presented on the 18th October of 1995 purported to be the final report?

A. I was unaware of that.

Q. I think you were unaware, or you appear to be unaware, that you did accede to a request for extra time on the 23rd?

A. It's quite clear from the very explicit and measured memory augmented by Mr. McMahon's and Mr. O'Callaghan's notes at the time that that happened. And I accept that totally.

Q. And something happened to change that and you don't know what caused that change?

A. No, I don't know. I did offer an opinion, but it is only an opinion and it doesn't count for anything because I don't know.

Q. I understand. Because and you were being kept aware of the the one thing you were being informed was in relation to the whole process was the critical path, that we are on time

A. Yes, that, I felt, was the only thing I should have had access to.

Q. Just it's something I forgot to ask you about and my apologies, but do you remember I mentioned one of the items I was going to I'll come back to deal with that issue, Mr. O'Donnell, raised with you on the question of Mr. Buggy's analysis and the judgement call you say you made.

A. Sure, of course.

Q. But the I think we gave you a tribute of the press conference this was the press conference on the 25th October, 1995. There is only a portion of it and it came from the Department files in any event. And I'll give you a hard copy.

A. In fact, I have seen it, and I may comment on it, it's not a tribute that makes particularly pretty reading.

Q. It's incomplete in any

A. Yes.

Q. It's somebody obviously tried to make a quick note of things and typed it up. It appears to be something like that. There are just a few interventions by you, I just wanted to bring to your attention.

A. By all means.

Q. Not all your interventions. If you go to the third page, I suppose, isn't that the best place to go? And you see the first reference there is a reference to you at the top.

"It is a decision, a clear decision, that Esat would be the people with whom we will enter into exclusive negotiations with the intention of achieving the second mobile phone licence.

" Reporter: I am a little confused. Were Esat the only party recommended by the consultants? Was there a clear number 1 in favour of Esat by the consultants, because we understood there was going to be a short list from which the final decision would be made."

Then you respond: "Well, to be honest, I say this in the most friendly way, I don't know where that came from because there was just one clear-cut recommendation."

Now, of course, you hadn't seen the report at this time, isn't that correct?

A. No, but I had been briefed by Martin.

Q. But you hadn't seen the report?

A. I hadn't seen the report, but implicit in that question by the reporter, and it's a natural question to ask, but implicit in that is that somehow people other than the PTGSM would have discretion on who would be chosen among three. But that would absolutely throw the whole process into that would,

in fact, the RFP or the RFT, depending on what we want to use, didn't allow for such discretion. There was only discretion to nominate one person for exclusive negotiating. It wasn't going to be a shopping list to be put to some alternative or even, indeed, the Cabinet to choose among because that wasn't the way the competition was organised.

Q. Can I take it you were unaware of the debate and dispute which emerged during the course of the competition between Andersens and Mr. Brennan and Mr. Towey? And I think Maev Nic Lochlainn took a note of the meeting, where Andersen did express the view that what they should do is nominate three and there an argument took place?

A. Well, in my opinion, even reacting off-the-cuff, Andersens would have been quite incorrect in their interpretation of the document to do that.

Q. I take it you weren't aware

A. I was not so aware, no.

Q. Right. Now, again, the next reference, the Reporter:

"Was there a grading system employed?"

And you respond: "Well, there was clearly, which instigated that there was a very detailed evaluation process actually, and clearly that was a multi-faceted process, and all the applications would have been graded extremely carefully both quantitatively and qualitative." Then there is dot

dot and "the outcome was as stated."

Again, can I take it that you were unaware as of that particular press conference that the quantitative evaluation had

A. been subsumed by the qualitative?

Q. Well, had withered away, had been discarded, had been subsumed by the qualitative, whatever you wish to describe.

A. I couldn't choose any of those pejorative words, but I wasn't so aware I knew always that the qualitative would be the discretionary end of it, but I wasn't so aware that the quantitative had been set aside, let me put it that way.

Q. Very good. And then just the final reference then I'd like to bring you to is on the the fourth page, in the middle of the page. And again this is perhaps "When did Andersens come up with their response that they had evaluated all the...."

Mr. Loughrey: "As you know the final date was going to be along the critical path ..... The fact that it has been brought forward ahead of schedule means that this is, in fact, the work had been going on virtually to the last moment."

A. Not very elegant.

Q. You probably didn't say I'd accept

A. I was working the people in the room were the business journalists and the business editors and they

had been working off the 4th August press statement which said that it would be decided before the end of November. And I was, I think that was an attempt to say, we had brought it forth.

Q. The critical path had allowed until that

A. Exactly.

Q. I want to be careful about this here. That the decision was a decision for the Cabinet, isn't that right?

A. Absolutely, oh, yes.

Q. And whatever about delivering reports, you were also of the view that you had to allow time for Cabinet deliberation, if that was required, but you also had to build in time for what you described as, I think, slippage, as one expects to find in many processes?

A. Quite, yeah.

Q. And that was the view of the critical path here, isn't that right?

A. Slippage was, as you say, it's contingency planning, so we can discard that. The other was: Clearly it was the decision the Minister couldn't make alone. It had to be made by Government, yes.

Q. Now, if I can now come to the issue you were dealing with a moment ago with, Mr. O'Donnell. And that is the judgement you say that you exercised on, I think, the 15th May of 1996, and notwithstanding the very good work which Mr. Buggy did, it wasn't something

which affected your judgement. All you needed to know was the question of did IIU/Dermot Desmond have cash to see IIU and Communicorp over the first year, isn't that right, that's the judgement you made?

A. Correct, that was my judgement call, yes.

Q. Now, it's quite clear that the report, the recommendation and the suggestion in the report was to tie down the financial position of Communicorp, I would suggest, before exclusive negotiations were entered into, you wouldn't put it as highly as that?

A. Mr. Coughlan, I just didn't get the full drift of that question.

Q. I would suggest the report suggested that you tie down the Communicorp position.

A. So it did, yes.

Q. There is no doubt about that.

A. Yes.

Q. I suggested to you that the report recommended that this be done before the Minister enter into exclusive negotiations with them leading to the award of the licence. You didn't accept that position?

A. No. And you know, I am not sure whether it rationalises the time. But if we look at it: Pretty unrealistic if I may say so. I am not being unnecessarily critical of AMI, but pretty unrealistic, because if you think about it, they identified Communicorp as a recently established company involved

in a cash-hungry upfront fixed-line business that was part of this consortium, Esat Digifone consortium bidding for a licence. So they were either to up their self-financing for all practical purposes, in other words, they were to strengthen their balance sheet with equity. Now, if they had thought it through, that could only be done when they had the certainty of the licence and this is

Q. I wonder are you correct about that Mr. Loughrey, because the position as put forward by Mr. O'Brien to the evaluators was that this money was in position; it was in position through a firm called Advent and he informed the evaluators at the time that when this commitment was fulfilled that the money came available, that he had an agreement to the effect that Advent would have a certain shareholding in his company; he'd have a majority shareholding over them. But the real safeguard was that a control of the company, they had an agreement that he would have a 3-to-1 voting superiority over them in the country, and perhaps I am mistaken in understanding what was going on in this process, but doesn't it look like what was being suggested there was this be tied down, that let's see this, let's get this agreement tied down. We're told it's there. We're told this agreement is in existence already. Doesn't that solve or wouldn't that have solved the position of

the financial frailty of Communicorp?

A. You may well be right, if the event turned out on that basis, but I wasn't part of those discussions. I wasn't part of the PTGSM, and when I intervened myself from mid-April onwards, in that, if I may say, much quoted phrase, we are where we are, and I took up the running from that point there to ensure that the State's licence was given to the right consortium and in such a way that we could be confident it was delivered upon. Now, Mr. O'Brien's relationship with Advent wasn't one that occupied my mind.

Q. I understand that, but that was what the Evaluation Team had been presented with; they make their recommendation and suggestion on that basis. You say that Mr. McMahon's side of the house, the regulatory side dealt with the legal issues, the legal aspects of the licence, and that it was Martin Brennan, at a later stage, or the development side of the house dealt with the financial issues, would that be a fair way of putting it?

A. That's correct, yes.

Q. Now, all the mad flurry at the end, I would suggest, came because things weren't tied down initially as suggested in the report?

A. I'd rephrase that, Mr. Coughlan: all the very focused work in the last three days, rather than the mad flurry; it wasn't a mad flurry.

Q. Might I suggest to you a reason why, as you say, the focused work and I'll adopt that phrase for a moment was to give effect to defending the Minister's position. You say no?

A. No, of course anything we do impacts on the Minister's position. But it wasn't the Minister's position that was in my mind when I wanted to make sure that the robustness of the financing can I say so, Ministers come and go. I worked with seven different Ministers actually. I wanted to make sure that the Department didn't look amiss if something were to go wrong at a later stage actually. So I was looking, if there was any self-interest in it, it was a personal and institutional self-interest. I wasn't thinking of the Minister. I was thinking is, we want to make absolutely crystal sure that there is no hiccup in the financing of this particular consortium. Otherwise, the Department in general, and myself in particular, were going to look we would have been pilloried at the Public Accounts Committee if that were the case.

Q. Could I just ask you to look at the you know, the famous speech made by the Minister in the Dail on the 30th April of 1996, and then some exchanges between him and other deputies, and statements made by the Minister which are not contained in the drafts prepared by civil servants?

A. I recall that, yes. 44, Book 2 sorry, 44/02.

Q. Now, we can go, in fact

A. I have that now, Mr. Coughlan.

Q. Now, if we go to the second last page of the debate.

And you see in the centre of the page, a reference to Mrs. Geoghegan Quinn and then the Minister, Mr. Lowry says: "To look into the future and decide, as a result of a public placement, who, in fact, would win it. That is not my business. My business in the Department was to ensure that the winning consortium was capable of funding the project which it was undertaking on behalf of the State. I have satisfied myself as to that and I am confident, without contradiction, that Esat Digifone has the funding in place and will proceed on target to give us the roll-out and competition with Eircell before the end of the year."

Now, I have already dealt with down at the bottom of that where he makes reference to the fact that it is a matter for Esat Digifone and not the Department about Mr. Desmond. We dealt with that, therefore, and we have your response in relation to that. You don't agree with the Minister about that, I take it?

A. No, I don't.

Q. You see there the Minister has stated in the Dail that he has satisfied himself, and that he is confident without contradiction that Esat Digifone has the funding in place.

Now, that could not have been a correct statement of the situation.

A. I don't know the basis of Mr. Lowry's mindset in uttering those words in the Dail. I do not know the basis.

Q. It didn't come from that statement couldn't have come from you or any of the civil servants?

A. I believe so, because the term I used, and I am not sure whether you're happy with it or not, Mr. Coughlan, but I still believed that it was a work-in-progress at that stage.

Q. Now, that statement, to the best of my knowledge, has never been corrected in the record of the Dail.

A. I believe you are correct, yes.

Q. And what I am suggesting to you is that your very focused work, as you have stated, April, particularly into May, 13th, 14th, 15th May, could well be viewed as being directed towards defending that position as stated by the Minister in the Dail?

A. I can say with almost certainty, I didn't read the blacks which read the Dail reports subsequently because had I done so, I would have picked up Mr. Molloy's 25%. So I don't believe that has ever been brought to my attention, and thank you for bringing it to my attention. But as I say at the outset, I don't know what Mr. Lowry had in mind when he made that statement. Maybe it was said maybe he

had felt confident or maybe he believed that that was the case, but it wasn't the case at the time.

MR. FANNING: Chairman, with very great reluctance I

stand up at this stage to interrupt My Friend,

Mr. Coughlan. I must ask the question at this stage

that whilst on behalf of Mr. Lowry, we're perfectly

willing to cooperate with the investigation that the

Tribunal is engaged in and we understand that a very

full investigation is required in this module, it is

not at all clear to me what possible constitutional

purpose an investigation into the basis or beliefs

that a Minister made a statement in the Dail on can be

pursued by this Tribunal. The terms of the Supreme

Court's decision in Attorney General versus Hamilton

No. 2 are to my mind very clear: That in the absence

of a deliberate, conscious and voluntary repetition of

a statement outside the Dail, it is not competent

under, I believe, and I am making the submission

spontaneously, under, I believe, Article 13.10, it is

not competent for any other Tribunal or forum to

investigate the statement made in the Dail. And I

have certain concerns at this stage that

Mr. Coughlan's line of questioning is flying in the

face of the Constitution and is flying in the face of

the decision of the Supreme Court in Attorney General

and Hamilton No. 2. So

CHAIRMAN: I think

MR. FANNING: I am right at this stage to cautiously make that submission.

CHAIRMAN: Mr. Fanning, I am having regard to the proceedings that took place in the presence of your predecessor, Mr. Donal O'Donnell, and it might be helpful if you check the record in that regard.

MR. COUGHLAN: I think Mr. Lowry personally withdrew such an objection which was taken on a previous occasion, but it's a matter, if he wishes to rely on, we can deal with again in due course. You needn't be concerned about that, Mr. Loughrey.

MR. O'DONNELL: I think there was one issue that Mr. Coughlan came back on that he hasn't, in fact, dealt with initially, and that is the press conference. If I just briefly deal with that.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. O'DONNELL:

Q. MR. O'DONNELL: I think Mr. Coughlan suggested to you that the what was presented on the 18th October of 1995 purported to be the final report. I think we don't have to open it up, but I think it's clear from the front piece on the report itself, the document says "October 18, 1995, final draft version." It's not, in fact, the final report.

The second suggestion is that Mr. Coughlan put to you in was to open up the question asked by the reporter, he says:

"I am a little confused. Were Esat the only party

recommended by the consultants? Was there a clear number 1 in favour of Esat by the consultants, because we understood there was going to be a short list from which the final decision would be made?"

And you say: "Well, to be honest, and I say this in the most friendly way, I don't know where that came from because there was just one clear-cut recommendation."

Now, Mr. Coughlan made the point that you didn't see the final report at that stage. Firstly, if we look at the page 53 of the the second last report which is 46, tab 16, it's headed, paragraph 6.6, "The recommendation," and firstly it sets out the results of the evaluation, means that the evaluators has arrived at the following ranking of the three best applications, and then it sets out A5, A3, A1. It then says:

"It is therefore proposed to advise the Minister to enter into licence negotiations with the consortium behind the A5 application. And it then goes on to deal with if that fails, what will happen then. So there is one clear recommendation, and your statement to the press on that occasion is correct, that it wasn't simply a situation where they were going to give the Government a list. They, in fact, in the draft report and in the final report made a recommendation in relation to negotiations with one

consortium?

A. That's correct, yes.

Q. Now, the other issue that was raised in relation to the press conference was the timing of the announcement of the result. I think the reporter asked you a question:

"So they made you say in response when did Andersens come up with a sense that they evaluated all ...." You say "as we know, the final date was going to go further along the critical path.

Actually, we had until November to make the selection.

In fact, that it's being brought forward ahead of schedule means this is the work that's been going on virtually to the last moment.

"So they made their recommendation in the last few days.

"Mr. Loughrey: You can take it that their recommendation and announcement are side by side. You say I am not going to be thrown in to say when exactly. I am not going to be thrown into that actually. I think there was no question of concealing the fact that this announcement was being made immediately after the decision had been reached and that the result had been arrived at?

A. Not only that, but taking the atmosphere of the room at the time, it was even commented on in the press at the time, is that it was quite clear that, in fact,

the Government decision and the recommendation by definition were almost simultaneous. Because in a sense, this genuinely was the best kept secret in Government circles in Ireland for a major transaction.

More so than any one I remember.

Q. So you were quite happy that the press know that that announcement was coming out as soon as it reasonably could after the result was arrived at?

A. Absolutely. It wasn't something to hide.

Q. Thanks very much, Mr. Loughrey.

CHAIRMAN: Thank you for your attendance and assistance again, Mr. Loughrey. We will resume I take it that Mr. Brennan ten past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

MR. FANNING: I wonder, before Mr. Brennan takes up his evidence, could I briefly, for the record, revert to an issue that I raised in the course of Mr. Coughlan's examination of Mr. Loughrey this morning.

Very briefly, Mr. Healy has been very helpful and has allowed me to see a previous transcript, but if I could just say for the record, certainly no waiver has been made by Mr. Lowry over the particular Dail statements in April 1996 that governed the GSM process, and secondly, Sir, if I could say that any waiver would, if effective, only entitle the Tribunal

to examine the repetition which would forfeit the Article 15.13 cloak. And I am still standing in my objection that the Tribunal would not be constitutionally entitled to examine the ingredients that were in Mr. Lowry's mind when he made his Dail statement. Article 15.13 would retain a cloak over the Dail statement, but the waiver, if effective, and that's an issue which might be reconsidered in any event, but the waiver, if effective, would only forfeit the article 15.13 protection over the repetition that took place outside the House. That's as much as I think I need to say.

CHAIRMAN: I think, Mr. Fanning, it would have been helpful if these remarks had have been communicated at a stage earlier when they could have been evaluated and ruled and we need not perhaps embark on spending the considerable amount of time that was felt necessary to deal with utterances in the House in pursuance, as was understood at the time of Mr. Lowry's expressed anxiety, to have as full and thorough an inquiry as possible. If required, I'll revert to the issue, but we'll proceed with evidence for the time being. Thanks again, Mr. Brennan.

CHAIRMAN: Mr. Healy.

MR. HEALY: I think Mr. McGonigal proposed dealing with the evidence Mr. Brennan gave on the last occasion, and indeed maybe any other evidence he gave,

but he wished to defer it until after Mr. Ryan, I think, gave evidence.

MR. McGONIGAL: That's so. I actually deferred it because I wanted to hear Mr. Ryan's statement and also just to give consideration to some documents which had then become available. And we have just a few questions, Mr. Chairman, that I want to direct the witness to.

MR. BRENNAN, PREVIOUSLY SWORN, WAS EXAMINED AS FOLLOWS

BY MR. McGONIGAL:

Q. MR. McGONIGAL: Mr. Brennan, if I could start by asking you to look at the letter of the 14th September, of 1995.

A. Yeah.

Q. You'll recollect that this is the letter which came to light at a very late stage of the Tribunal's hearings, about a week or so ago, ten days or so ago?

A. Yeah.

Q. And at the time the letter was described as significant, and I think you yourself described it as being you considered it a significant letter?

A. Yeah.

Q. Can I ask you in the first instance, why you consider it a significant letter?

A. I hadn't previously adverted to it in the context of my attendance at the Tribunal either in public or in private, and had forgotten its existence, but when I

saw it, Ms. Nic Lochlainn discovered it when she was researching something else and she brought it to my attention. I thought it was setting the sort of time-frame in a clearer context and that it was something that we had clearly agreed as the outcome of a dispute we had with the consultants, and that it was, the particular thing I thought was important was that it made clear that the final report was in the time-frame of 24/25 October.

Q. The letter in the on the first page, refers to, in the second paragraph, refers to the disappointment that if events have unfolded in the manner now under discussion, and they refer to the legal contract of i½297,000-odd for colleagues of activities stipulated in the tender from Andersen Management International submitted on the 16th March. And you are aware that several of the items which you consider to be additional to the project would, in our view, be reasonably considered to be intrinsic to the evaluation process to which your tender relates."

I'll go back into some of the documentation preceding this letter, but it certainly appears very clearly here, that a dispute of some significance had arisen between yourselves and Andersen Management International in relation to the way in which the contract was being costed, and more particularly, as to whether certain items had been included in the

contract or were entitled to be charged at a separate rate.

A. That's correct, yeah.

Q. And this letter was, in effect, drawing a conclusion well, was hopefully drawing a conclusion to that dispute and setting out a programme and a price which the Department were prepared to pay to Andersens for the work involved?

A. That's right, and it followed two separate discussions with Michael Andersen, conducted by

Q. And I'll go back to one or two of those because I think they are useful to understand the argument.

The next paragraph is: "Nevertheless, our primary objective is to have the evaluation completed in a professional and timely manner, to receive a comprehensive evaluation report which fully satisfies the professional standards of Andersen Management International and to receive professional high quality advice on completing the licensing process. It now appears that this objective cannot be achieved without either incurring additional cost or undesirable departure from the prescribed time scale for completing the process. We are, therefore, willing to consider a compromise solution which will have the effect of achieving the required consultancy assistance at a fixed price."

So you seem to be there setting out the parameters in

relation to the way in which the resolution should come about?

A. Yeah.

Q. "It is, therefore, proposed that Andersen Management International shall:

" complete all the steps outlined in the AMI tender submitted on the 16th March 1995,

" carry out such supplementary analysis as are considered necessary by AMI along the lines identified in the minute from AMI dated 5th September 1995,

" submit, by a target date of the 3rd October, 1995, unless an alternative date is expressly approved

by the Department prior to the said date, a first draft of the evaluation report, along the lines set out at step 18 of the tender submitted on the 16th

March, 1995. The evaluation report shall contain a quantitative and a qualitative evaluation of all

applications and the results of any supplementary analyses undertaken. The report shall rank the top

three applications for the GSM licence in order of merit according to the criteria prescribed by the

Department, while detailing the differences between the applications which form the basis of this ranking.

The evaluation report shall also nominate a winner and shall explain why the three applications are ranked do not qualify for ranking.

"The final evaluation report shall take account of

comments provided by member of the GSM Project Group.

It is anticipated that comments from the GSM Project Group on the draft evaluation report shall be provided to AMI by 10, October 1995. Following consideration of such comments, AMI shall produce a further draft evaluation report in the format described above for the draft evaluation report by 17 October, 1995. This further draft evaluation report shall be discussed at a meeting of the GSM Project Group within six days. The final evaluation report taking into account the views of the GSM Project Group shall be submitted to the Department by AMI by 25 October, 1995, unless an alternative date is expressly approved by the Department prior to the said date.

" carry out such further work which is not expressly specified at this time but would generally be considered reasonable in order to ensure a fair and objective evaluation of the applications for the GSM licence.

" participate in the preparation of a draft licence and in the licence negotiation process as outlined in the tender of the 16 March, 1995.

"In consideration for this work, the Department shall pay to Andersen Management International a total sum of IRi½ 370,000."

So, as I understand it, what was there being set out was the nature of the work that the Department saw

that Andersen Management would be involved in during the time that had still to elapse, and that in consideration of doing the work referred to in those various paragraphs, that they would receive a sum of £370,000?

A. Yes.

Q. Now, insofar as those dates were concerned, was it the intention, so far as the Department was concerned, that Andersen Management should stick to those dates?

A. Yes. No question about that. And we were also binding ourselves to stick to certain narrow time frames for turning around reports.

Q. And did that include the 25th October?

A. Yes.

Q. So that as of this date, certainly between the Department and Andersens, is it right to say that the 25th October was envisaged as being the date upon which the final report would come to hand?

A. There is no doubt about that.

Q. And that, to get an extension of that date, would require express approval from the Department to Andersen Management?

A. Yes.

Q. And in the absence of that, Andersen Management weren't entitled to go beyond the 25th?

A. That's correct.

Q. And I just want to be clear on one thing, Mr. Brennan,

in relation to the 25th October, was that a date that

the PTGSM would have been aware of?

A. I can't say for certain that they were at this stage.

I mean, I said before that Fintan Towey and I conducted this negotiation with AMI because we didn't want the dispute to pollute the general working environment with the PTGSM. I'd be fairly certain, but couldn't confirm in evidence, that this letter may have been circulated because it wasn't a confidential letter or anything like that. It may well have been circulated to the group, but I can't say that for certain.

Q. But just one aspect of it that interests me is, that certainly I can take it that you were aware of the letter and Fintan Towey was aware of the letter.

A. Yeah.

Q. And your position is that maybe others within the PTGSM may have been aware of the letter?

A. I think on balance it's likely that they were.

Q. And certainly AMI were aware of the letter, particularly Michael Andersen?

A. No question about that.

Q. And is it right to say that on the 23rd October, that would have been the position, that on the 23rd October, both sides, the Department and AMI, would have been aware that the final report was due on the 25th?

A. Yes, we were definitely working towards that date. No question about that either.

Q. I'll come back to that in a moment, but before I go into that, can I just go back to the letter which based the reply of the 14th, which was the letter of the 5th September, which was written by Andersen Management to you setting out their side of the dispute?

A. I don't have a copy of that now, with me. I can deal with it on screen if needs be.

Q. It's on the screen. This is the letter, Mr. Chairman, which we wrote and asked for, arising from the letter of the 14th and it was certainly sent to us.

You may not have seen this letter recently, Mr. Brennan?

A. That's correct, yeah.

Q. So I'd better read it to you.

"With reference to our contractual meeting yesterday we hereby forward our comments to the situation with the agreed scarcity of resources on both sides."

What he appears to be referring to there, the meeting the day before was on the 4th September and you recollect after the meeting of the PTGSM on the 4th September, there was a subsequent meeting between yourselves and AMI in relation to the contract issue?

A. Yeah, between Fintan Towey, myself and AMI. There wasn't anybody else.

Q. That's right. And Ms. Nic Lochlainn was also there?

A. She may have been, yeah.

Q. "Our model is to proceed with the agreed ceiling under code 109 with no activities at all under code 139.

C.f. your letter of the 29 August. If you opt for this model, I expect that we will be out of budget soon and we should then jointly have to assess the remove activities of the Andersen team.

"The other model is to stick to the 139 arrangement and invoice all extra activities under this code. In addition to the work of Tage Iversen which has been informed to the Department, the Andersen team requests approval of the following:"

Now, just before I go on, can you help me in relation to code 109 and code 139?

A. Without studying it in detail, not specifically, but it may well be based in the original Andersen tender.

Q. I think they have to do in a way which things may have to be charged or not charged?

A. Yes.

Q. And also in relation to the third paragraph there, Tage Iversen, do you recollect who he was?

A. I think he may have been a radio frequency expert who was working for the Danish radio agency and came on loan to AMI. Now, that's sort of a vague recollection.

Q. He was a member of the national Telecom agency in

Denmark, who, I think, Andersen Management

International sought I am not clear as to what the position was, but in some way he became involved in the process?

A. Yeah, I think he was mentioned, actually, in the original tender as somebody who would be available in the radio frequency context, but who was not part of whatever was AMI, Andersen Management International, which was an association of, I think, relatively independent consultants under the AMI flag, but he wasn't an associate if you like. He was just somebody who was available subject to his other commitments with his day job, if you like.

Q. But he was used in the evaluation process but was being billed separately, as we'll see?

A. Yeah.

Q. "Activities already performed during August:

"The following is based on our registrations and exchange rate of 8.83.

" A5 recalculation removal of year 15. 5 hours performed by Jens Dohn," and gives an amount.

" extra conformance testing and extra work during the admittance procedure. 15 hours performed by Jens Dohn, equals 2,039.

" extra spreadsheet work due to virus, wrong date and incomparable data, validity checks, etc. performed by Jens Dohn."

Just before I leave that, in relation to "due to virus," did you ever get an explanation as to what that meant? It's not a huge amount, but I am just curious as to when or why it happened?

A. I mean, mention of a virus is something I would remember. But it doesn't seem to have struck any chord with me. Having said that, it's in the letter and I don't recall asking about it.

Q. And you were being billed for it as well.

"Michael Thrane (part of his work is in voiced under code 109) extra work performed compared with the approved work plan, 63.5 hours, equals within amount.

" extra work in relation to written applicant-specific questions, 108 hours in total.

" press release participation in the meeting equals 611.

"More details will appear in the specifications to our invoices. The total invoice excluding the work of Tage Iversen under the 139 is approximately 30,000."

Now, as I understand that that's an additional 30,000, to an amount within the contract?

A. Yeah.

Q. "Activities to be performed (budgetary projections)

"with the same exchange rate we estimate the following:

" supplementary analysis on interconnection and the

business case effects of interconnection since the applicant, somewhat in contradiction with the RFP document, have assumed widely different interconnections charges. To be performed primarily by Michael Thrane and MIV. 100 hours budget, 12,500, " tariffs, only part of this is extra, but an in-depth supplementary analysis is necessary due to widely different metering and billing principles. To be performed primarily by Michael Thrane, Michael Andersen, MIV and JD, 50 hours extra budget equals 7,900.

" conformance with EU requirements, the procurement rules, cross-subsidization, etc., to be performed by TMI, 25 hours extra budget.

" supplementary analyses on blocking and drop out, to be performed. And it gives the hours and the price.

" more hours than allocated are needed to the drafting of the report. Extra 100 hours equals approximately 17,000.

"Extra 50 hours should be reserved to the final meetings with the decision-makers into the licensee negotiations equals approximately 11,325."

And those extra activities would amount to  $i_{\frac{1}{2}}66,845$ .

"Andersen Management International has a preference for continuation with the agreed 139 code or similar arrangement. In order to optimize the resource

allocation, we need the Department's decision as soon as possible. A decision concerning the invoicing method for the activities already performed in August in agreement with the Department is requested Wednesday, 6th September, 1995, for administrative reasons.

"I would like to draw your attention to the fact that there are substantial synergical effects between the knowledge and experience of our advice in GSM2 tender, concerning tendering, tender specifications, comparison business case, fixed and mobile technologies and the competent profile of the consultancy firm to assist the Department in the strategic issue." Those activities to be performed, they were the items which were going to be an added burden in relation to the contract. In other words, they were going to be extra to the  $\text{€}1/2297,000$ ?

A. Yeah.

Q. And it was partly for those reasons that, in effect, the Department agreed the target of  $\text{€}1/2370,000$ , setting out, at the same time, the basis upon which or what work was to be done?

A. Yeah.

Q. Now, as I understand it, Mr. Brennan, the reason for the difficulties, and the importance in relation to the contract, arises out of the fact if you could go to Book 52, Tab 22 for a moment. Do you have that?

A. No, I am surrounded by books up here but none of them is 52.

Q. Tab 22. Now, this document, I am not sure of its origins or anything about it, except that it seems to be a Department document, and it's headed: "Journal of AMI contractual litany." And it's a meeting refers to the meeting on the 4th September 1995 as above, and then:

"Morning of Wednesday 6th September letter from MMA suggests that 100 K overrun without including:

"A) 20,000 already spent on the Commission letter

"B) the unknown Tage Iverson factor."

They then set out the original tender 297, plus extra 100, plus Commission letter 20, Iverson and unknown quantity. 417.

"Since EU procurement rules only allows 150 K over the original 300 K contract, this is staying very close to the wind."

Now, am I right in understanding that that is, in fact, pointing to the essence of the problem that was beginning to exercise everybody's mind?

A. Well, I think the essence of the problem was more than the issue of the EU procurement rules. I think Mr. Towey and I were concerned that we were dealing with somebody who had won this contract in a competitive tender situation, and who was now introducing material that he should have known would

arise in a competition of this type since he had done several of them before, and seeking to bill them by a device that was probably in the contract to deal with things that couldn't be anticipated. There was very little in the stuff you have adverted to that couldn't have been anticipated as likely to arise in a contest of this kind. So, while we were concerned about the EU procurement technical breach, we were more concerned, I think, with what was going on in the relationship.

Q. I actually, I think, probably put that badly in the sense that, the contract had been agreed at 297. And you were getting bills from AMI, which appear to be suggesting that there were items which hadn't been within the contract which they were now putting down?

A. I think there was a facility in the contract for issues that couldn't have been anticipated to be billed, but we couldn't agree that things like completing the tariff analysis, couldn't be anticipated as being a problem, so we were we weren't happy at the approach that was now being proposed by AMI.

Q. But, am I right in understanding that the more that the bills came in in relation to above the 297, the more concern there was because you only had a limited amount between the 297 and the 150,000 on top of that which the procurement rules allowed?

A. I think that we were having this discussion with AMI on an ongoing basis, why were these bills arising? So, the meeting wasn't something that happened in isolation. Now, the 150K possibility within the procurement rules was just a fact to be considered. I don't think it was particularly driving the discussion.

Q. But was it driving it to this extent: that it was important to get the nature of the work which Andersen had to do fixed so that there was an identifiable date you could say the work was finished was within the contract price and that was that?

A. Yes. And we also attached considerable importance to making sure that there could be no reservations on their part about the quality of the report due to us not giving them resources. So we wanted to come out with we wanted to get back to the concept of a fixed price but a fixed price that would get us a quality report.

Q. Absolutely. But equally the other side of that is if anything had to be extended by agreement or approval by the Department which involved Andersen, was going to cost extra money over and above the 370 in all probability?

A. Sorry, would you repeat that, I didn't

Q. That if the date of the 25th October had to be extended, for example, by agreement with the approval

of the Department, that that was probably going to cost the Department more money because it wouldn't have been within the 370?

A. Probably is the best answer to that.

Q. And just to be clear in my own mind, was the ceiling of 150 on top of the 290, an actual ceiling against which you had to work or not?

A. I think that under the procurement rules, you to go to tender if the contract is anticipated to be above a certain number. And then you only have flexibility extend up to 50% of the value of the original tender.

I think that's the way it's set up in law.

Q. So that there is and was some significance in relation to the 297, the 150 and the ceiling?

A. Yeah, that's where the 150 comes from. It's 50% of the original tender for all practical purposes.

Q. Your solution to this problem was, in effect, to set out the programme in the letter of the 14th?

A. Yes.

Q. That's why you attach some significance to it?

A. Yes.

Q. The other document that was produced the other day, and I just want to ask you about it, was a fax cover sheet dated 30th June of 1995, which has the Gantt chart. Now, as I understand this chart, Mr. Brennan, it seems to be a chart which is dated the 30th June, '95 which was setting out the nature of the work that

had to be done and the period during which aspects of the work would be done?

A. Mm-hmm.

Q. Is that right?

A. Yeah.

Q. And what particularly interests me, and I just want to ask you about it is, if you go to what is called step 13, which is called the quantitative evaluation and number CRU, which I presume is crunching, it appears to be the black line which is the summary which is dated from the 30th August to, give or take the week between the 20th and 27th August. Do you see that?

A. Yeah.

Q. And then down below could be the 30th July, Mr. Healy is quite correct. From the 30th July?

A. Yeah, okay.

Q. On the left-hand side at step 13 you will see, 10, 11, 12, 13, 14, 15, 16, and 17, and that is in relation to the quantitative evaluation and number-crunching.

Now, what it says there is:

"Check the excel sheets rectify non-comparable data.

"12, first assessment.

"13, discussion of disagreement.

"14, second assessment.

"15, formulate the report on the quantitative evaluation 1st draft.

"16 circulate draft, comment and return it.

"17, final version of the report."

Now, as I read that, and I don't know if you can help me in relation to it, but that seems to be suggesting that within those once those steps are taken within the period of time that they have allotted, that you end up with a final version of the quantitative analysis report?

A. I think that's certainly an interpretation of this chart that looks reasonable.

Q. Because it doesn't appear to go back to the quantitative analysis during the rest of the steps that I could find, and I may be wrong, but that seems to be the position?

A. I haven't examined it in that level of detail, but I'll take your word for it, I am sure you have.

Q. But is that your recollection of the way in which it happened?

A. Certainly the quantitative stuff was produced very early on.

Q. And then it was brought to the meeting of the 4th September and discussed and that was effectively was that, in effect, the end of it?

A. I think for all practical purposes, it was. Now, in terms of those steps between 10, 11, 12, 13, 14, I have a feeling that a lot of that was internal in the AMI team and not interacting with the Department, but I couldn't be because my recollection is that all

this quantitative stuff was done by them

independently.

Q. Well, in actual fact, Mr. Brennan, you did write and seek the working documents from AMI and we did ask whether they were available or not, but they don't seem to have come to light, which would have shown the actual work done during that period. You don't recollect those?

A. I don't, no.

Q. Now, the last thing that I just want to go back to for a second is the October 25th/October 23rd thing, and I just want to ask you in relation to that. When you go into the meeting on the 23rd October, both AMI, yourself and Mr. Towey all knew that the final report had to be available on the 25th.

A. Yeah.

Q. Now, as I understand it, there is evidence to suggest that Andersen were there certainly for the morning of the 23rd?

A. Yeah, I have seen that evidence.

Q. And that they then may have gone back to Copenhagen?

A. Mm-hmm.

Q. And they certainly seem to have gone back to Copenhagen before there was any meeting with Mr. Loughrey.

A. That's what I have seen in evidence.

Q. Now, whatever leave aside whatever took place in

the secretary's office for a moment. The date couldn't be put beyond the 25th without Andersens being involved, in the sense that they would have to be told of the express approval extending the date?

A. I'd be fairly certain that if he went to them with the idea of extending, the first question to surface would be resource of money. So I mean, I was confident myself that, you know, the show was over. We just had to tidy up the report.

Q. I appreciate that. I was just trying to understand something, Mr. Brennan, looking at it from a slightly different viewpoint, and I wonder if you could just have a look at Mr. McMahon's notes, which are of the 23rd, which are in Book 43, Tab 134, for a second. You see, what we can actually I think, are you able to help me in relation to this: Certainly when you come back whatever took place at the meeting with the secretary and whatever happened there, there was no suggestion of anyone contacting AMI and saying we are extending the date for the final report beyond the 25th, isn't that right?

A. That's I mean, I didn't recollect this meeting at all until it came up in evidence, and I have always said, the evidence is there, it's fine, you know. So I don't have a clear recollection of why the meeting took place, how long it took, or what the discussion was, but I do know that at this stage my frame of mind

was, let's get finished with this job and get on to something else.

Q. I understand that. And if you are not able to answer the question, so be it, Mr. Brennan. But it does seem to be the case that and there doesn't seem to be any evidence to suggest that after the meeting with Mr. Loughrey, that anyone made any attempt or made the point that AMI should be notified that the date had been extended beyond the 25th. In other words, the 25th was still fixed.

A. Well, I have no recollection of anybody suggesting the need to do that at that time.

Q. Mr. McMahon's note there says that:

"Notes that I have only just seen the final draft report

" that the Minister wants a result today

" that he hasn't been promised one."

I was just wondering, Mr. Brennan, whether, in fact, what was taking place was that confirmation that the report that the result wouldn't be moved to the 24th; that it would stay on the 25th. Not that there was to be an extension beyond the 25th, but that the discussion was whether the result was to be announced on the 24th as opposed to the 25th.

A. I really don't have enough recollection to comment on that.

Q. I see. Thanks, Mr. Brennan.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FANNING:

Q. MR. FANNING: In relation to the letter of the 14th September, 1995, that Mr. McGonigal has opened to you, can you tell me, Mr. Brennan, where Minister Lowry stood, from your perspective, in relation to that letter, completely in the dark, approving of its contents?

A. I don't believe he was involved at all.

Q. He wouldn't have had any involvement in the setting out of the timetable in that letter from your perspective?

A. I can't imagine how he would have.

Q. If I can ask you then, secondly, leaving aside the issue of Mr. McMahan and the meeting in the secretary's office, if I can just leave aside that issue which evidence has been heard on, in your knowledge, did the Minister do anything between the 23rd and 25th October to accelerate the ultimate recommendation of the Project Group that arrived on the 25th?

A. Well, Mr. McMahan's note records somebody, me conveying to the meeting that somebody said the Minister would like the result sooner rather than later. I can't connect that directly did the Minister tell me or did he tell Mr. Loughrey or whatever. At that stage, he probably was aware that, you know, the result was due the final report was due to be there

on the 25th. Was he saying, could we do it on the 24th? Could I get it into the Cabinet meeting because it happens to be Tuesday? Or something, I just don't know.

Q. As Chairman of the Project Group, are you saying that you don't, looking back at it now, detect any material interference by Mr. Lowry in the timing of the announcement?

A. I don't really, no.

Q. Thank you.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. NESBITT:

Q. MR. NESBITT: Mr. Brennan, do you have the document, I think the Gantt table, that it's called, that was handed in?

A. Yeah.

Q. Do you remember seeing that in the course of the process?

A. I saw a number of such documents. But I can't say whether I saw that particular one or not. I mean, there were a number of iterations going back to the very start.

Q. They would have followed the same sort of format I would assume?

A. Absolutely.

Q. They would have been trying to explain when various parts of the process were going to take place?

A. Yes.

Q. And just bringing you through the various numbered boxes down the left-hand side, we see phase C as executing evaluations, and step 9 is reception of tenders, check applications; that was a pretty mechanical task I assume. Is that right?

A. Yeah.

Q. And then: Check the substance of application is step 10. Step 11 is check for minimum performance. And then overview reading. And then finally, coming down, step 13, quantitative evaluation and number of CRU.

Do you know what CRU stands for?

A. I think it's number-crunching.

Q. Okay. So this appears to be the quantitative analysis of the applications that had been obtained and considered?

A. Yes.

Q. And this chart is describing the relevance of importance of that as of the 30th June of 1995?

A. Yeah.

Q. So, coming up to the end of June and before we went into the sub-groups of the qualitative analysis, this table would have represented the importance and the critical nature of the tasks that are listed down here, is that right?

A. Well, what I would say is, without being that definitive, that it's a fair interpretation of what it's saying.

Q. And after quantitative evaluation, it's pretty obvious but just to bring you down through it, step 14 we have presentations and then over the page we have step 15, the qualitative evaluation. So clearly by the 30th June, 1995, the importance of a qualitative evaluation was clearly being signalled by those who were receiving or making this chart and those who were receiving it?

A. Absolutely. And it's clear that it's a much longer time-frame envisaged for completing it.

Q. I was going to get on to that. The first thing we notice is qualitative evaluation occupies quite a small time-frame. If we come over to 15 rather quantitative represents quite a small time frame. If we come over to qualitative evaluation, it seems to be taking longer, is that right?

A. Yeah.

Q. Now, could you explain to me why the tasks that were identified here were defined as tasks on some occasions and critical tasks on other occasions. It's at the bottom of the page, you will see the shading depicts the importance of the task.

A. Although it's no longer possible to identify which is which in black and white version.

Q. I think we can identify for the purpose of what I am going to ask you very clearly which is which. Because I want you to deal with step 13 and step 15. I think

you'll agree with me that on this particular chart,

step 13 is just described as a task?

A. Yeah, I think that's the shading, yeah.

Q. And those shadings were pretty clear all the way down?

A. Yeah.

Q. Whereas you get to qualitative evaluation, the meeting

concluding the evaluation is the one part that's

described as critical, as is the qualitative report?

A. Yeah.

Q. Whereas, insofar as one can tell, in relation to

quantitative evaluation, none of them are described as

critical?

A. That's what it looks like on the face of it, yeah.

Q. Wouldn't that accord with what actually was the

reality of this whole process, that as early as that

point in time, it was crystal clear to the people

involved in the process that the quantitative marking

was not going to achieve a winner. You were going to

be dependent upon the qualitative analysis?

A. I think we were always clear on that. But what's

crystal clear here is that's the consultants' view.

Q. So that's your view, and assuming it's AMI's view,

that they were the people who were preparing this

chart, is that right?

A. Yeah.

Q. So there was unanimity with everybody involved that

this was the way it was going to be?

A. I think that's clear from this document.

Q. Now, when you get on to wondering how qualitative analysis is going to work, and how it's going to be done, we come to the end of June, July, and we have seen the Andersen draft evaluation models and I think at that point in time, you're aware that in big picture terms, the criteria that appear in the competition document, have been given weightings that are fixed in stone. 30 the first criteria; 20 the second criteria. But what wasn't at all clear at that point in time is how, in qualitative terms, there was going to be a weighting of dimensions or how indicators or sub-indicators might be dealt with, isn't that right?

A. Yeah, I think that's fair comment, again.

Q. But what was also becoming clear and what was the fact, that the marking of the qualitative issues went to sub-groups?

A. Yes.

Q. So at that point in time, the whole Project Group had handed over individual parts of qualitative marking to sub-groups?

A. Yes.

Q. And the first time that was going to come back was effectively when the first draft of the total report was to hand, isn't that right?

A. Yes. Although I do think that some of the sub-group

markings, the early ones, the technical ones, may have been presented to the Project Group earlier than that particular phase.

Q. Obviously, if they were brought to the Project Group, they would be looked at, but the first time you're going to see them all in the round was when Andersens would present the first draft evaluation report for discussion purposes?

A. Okay, yeah.

Q. And the point I want to make to you is this: That whatever is the answer to the issue of how a decision was made to weight dimensions for the purposes of hanging under criteria in qualitative terms, the first time a draft report that was available for everybody to look at that did the whole thing, it was crystal clear from that report exactly how the indicators had been weighted for the not the indicators, the dimensions had been weighted for the purposes of the qualitative report?

A. It certainly was included specifically in the document, yes.

THE WITNESS WAS EXAMINED FURTHER BY MR. HEALY:

Q. MR. HEALY: Mr. Brennan, just a few small matters.

Firstly, just to clarify my understanding from your evidence, I think, on the last occasion you were in the witness-box, the letter of the 14/9 stipulated a time-frame that had always been agreed, isn't that

right, that was always the understood time-frame?

A. I am not so sure whether I gave that evidence or not.

It certainly was the time-frame that was on the table at the conclusion of that dispute.

Q. It was I think it was if you look at the Gantt chart we were looking at a moment ago, it tallies with that, doesn't it?

A. It tallies approximately with that, yeah.

Q. October, the final week of October?

A. Well, it's talking about coming up to the 15th October for executing the evaluations.

Q. I think if you look at this document

A. The week beginning the 15th October sorry, I am looking yes, the week it looks like the middle of the week beginning the 15th October.

Q. I think the final report, if you look at it there, finishes up at the week of the see the 22nd October, do you see that?

A. Yeah.

Q. Isn't that what actually happened?

A. Yes, yes, okay.

Q. And I think that Mr. Loughrey was giving evidence as well of another document which has reference to a critical path, that was as I understand it, always the target date?

A. Yes.

Q. And there was always a period left for discussion,

slippage, call it what you will, we won't argue about it, but there was always a lee time on the far side?

A. Yeah.

Q. I am not sure that I quite understand some of the things you said about that letter. Now, I don't I suppose I am right in thinking that letter wasn't written in stone. I know you'd have had to agree to an extension of it, but there wasn't going to be a big hullabaloo in an extension of required of a few days?

A. It was a very carefully drafted letter after a dispute that spanned two meetings and probably a number of informal discussions, so it was recording the outcome

Q. I appreciate that, but if there had been, let me put it this way: there are other things in that letter that weren't complied with. You didn't get any quantitative report for instance. Just take that for a minute. You didn't get a quantitative report. That was promised in that letter, wasn't it?

A. That's right.

Q. You weren't complaining about that?

A. That's right.

Q. So what I am saying is the letter was an attempt by to you tie Andersen down?

A. Yes.

Q. You weren't going to be keeping him to every single syllable of that letter, as long as you were within

something close to your ultimate target date?

A. I don't know what point you're trying to make.

Q. I am just asking you. I had the impression that you are suggesting that the letter had a guillotine on 25th October?

A. I never put it as strongly as that.

Q. You wouldn't put it as strongly as that?

A. No. What I was saying when this letter resurfaced was that it clearly was a reminder to me, which I had forgotten, that there was a firm, a fairly firm commitment on both sides to finish this off by the 25th October.

Q. That doesn't mean that if the project work hadn't been completed within that date that you would have said we are going to finish on the 25th regardless of quality?

A. Absolutely not.

Q. Did I understand you to say that you had an apprehension on two fronts about timing: One related to the feeling you had, I think, that, if you mentioned to Mr. Andersen on the 25th that you thought a bit more time would be usefully spent on the report, you could be met with a request for more money, and on the other hand, an apprehension that you could fall foul of EU procurement rules, would that be right?

A. You are going back to what I think is a Maev Nic Lochlainn note that Mr. McGonigal opened. Clearly, we were conscious of the constraint of EU procurement,

and there was a little bit of headroom between the figure we agreed and the maximum allowed under that route. So some flexibility existed if needed.

Q. Did you have some flexibility?

A. There was, I think, about 40,000 headroom or something of that sort.

Q. Right. I think when you were asked about the Gannt chart, do I understand you to say that the Gannt chart, in some way, suggests that the quantitative report was going to disappear, or did I pick you up wrong?

A. No, I didn't say that. I was responding to Mr. Nesbitt, who was drawing to my attention and I hadn't adverted to, that there is different shading in different parts of the Gannt chart and if you are going by the shading, it was clearly in the minds of Andersens that while the quantitative evaluation was a task to be completed and was allocated two weeks in August, that when you come to the qualitative, it's described as a critical task and a longer period allowed. I was just responding to Mr. Nesbitt's surmise, if you like, that this was important, and I think it probably is.

Q. I see. Why did you put it in the letter of the 14th September that it was to be produced?

A. That what was to be produced?

Q. The quantitative report. I mean, those were your

thoughts at the time; not now. On the 14th September, you and Fintan Towey wanted a quantitative report in which you told me was a carefully framed letter.

A. Yes.

Q. So whatever this document contains, in a carefully framed letter at a time when these things were in your room, you wanted a quantitative report?

A. Yes.

Q. And is that the correct position then?

A. Well, the quantitative report was part of the approach, if you like, and we have been through, and you have been through it with several other witnesses, what became of it, and I suppose the expression of AMI is, it withered away, and there is evidence that, you know, it didn't wither away by mistake; that it seems to have been it's clear that it was discussed at various stages.

Q. Well, it's also clear, isn't it, that it was up for discussion as late as the 21st September?

A. Yeah.

Q. And that, in fact, it was being discussed on the 9th October?

A. Without looking at the documents, I think that's probably true, yeah.

Q. Now, I just wanted to finish up by drawing a whole load of documents to your attention and because I only want to draw to your attention one or two lines in

each one. We have been over them all. I don't want you rummaging through 40 books. I have got one book with all of the documents in it and I'll refer everybody else to the documents.

And what

MR. NESBITT: Mr. Chairman, it seems to be incredibly overreaching attempt to produce a leverarch file of the quality and thickness of the file that has now been produced in circumstances where My Friend sat down having finished his examination of this witness over probably the longest examination of any witness in this Tribunal, to now produce a booklet of that thickness arising out of no re-examination that he could have known about by Mr. McGonigal or anybody else. I just question

CHAIRMAN: This isn't, Mr. Nesbitt, as I understand it, this is not new material. It is very short references in what might colloquially be called a sweeping operation. It is not envisaged that it will go beyond the ordinary close of play today. And it's certainly helpful to me in trying to assess all this very large amount of information, that some effort is made to concentrate on certain of the main seminal matters. So I do think it's a fair procedure and I don't envisage it going beyond the conclusion of today's hearing.

MR. NESBITT: May it please you, Mr. Chairman, and

hopefully Mr. Brennan had been able to deal with it although he is only getting it for the first time.

Q. MR.HEALY: I think we have been over some of this ground, Mr. Brennan, but once or twice when we were dealing with it we had the unsatisfactory situation where I would refer you to a number of documents and you quite rightly would say, look, I can only give a sort of semi-speculative answer because I don't have them all in front of me. And I am only referring you to, if you like, a consequence of one aspect of document A added to another aspect of document B added to another aspect of document C and it's completely unsatisfactory unless you can actually pinpoint those aspects, and that's what I am trying to do and if you have any difficulty with them just stop me.

What I am trying to look at is the way, to some extent, some aspects of the ownership issue evolved over a long period of time. During some of which you were there all of the time. During some of which it seems to me you may not have been there. I want to be absolutely clear about that, there you were there or not there.

The first document is in is document 89 in Book 42, and I'll put them on over the head projector. Most people will be familiar with them. I am wrong to say there is no new document. There is, in fact, one document which from the Department files, but I

don't think it will come as a surprise to anyone.

The first document is a letter written by Fintan Towey to Enda Hardiman asking Mr. Hardiman on behalf of Esat Telecom to indicate whether he had any objection to certain information being published by the Department on foot of the applications that had been received by the closing date or that would be received by the closing date. And he wanted to know whether the name of the consortium could be mentioned. The names of the various parties and the fact that a tender for the GSM competition had been received and the response he got on the next page of the book you have, which is in document 90, Book 42, was: "I would like to confirm that we have no objection to the following information being released:

"The name of our consortium Esat Digifone

"The following names who go to make-up our consortium:

" Communicorp Group Limited Telenor institutional investors.

"We do not wish the names of the institutional investors to be released at any stage.

"The fact that we have submitted a tender for the GSM competition."

I think we have been over some of this before. Do you agree with me that at that point, Esat Digifone certainly represented themselves as a consortium consisting of Communicorp, Telenor and institutional

investors? We know the ramifications of the institutional investors are more particularly set out in their application.

A. Yeah.

Q. The next document is we have referred to it, I think, in evidence. I am not sure if it came up in a particular book. It's from the Esat Digifone application. It's supplied by Esat Digifone from their own application and the Department will have had their own copy of it. I think we mentioned it in the course of some of your evidence.

If you look at it, you'll probably recognise it as part of Esat Digifone application. There is a number of bullet points under a heading: "Introducing Esat Digifone."

A. Yeah.

Q. And it asserts that: "Esat Digifone would guarantee a certain service launch. Has the backing of highly qualified and compatible partners. Would be majority Irish owned and will remain so for the long term."

It goes on to say: "The ownership structure of Esat Digifone ensures that no one shareholder dominates.

The company plans a partial public offering within three years, thereby giving the Irish public an

opportunity to participate in the growth of

telecommunications in Ireland. Three of Ireland's

leading institutional investors, AIB, IBI and Standard

Life have already provided written investment commitments through Davy stockbrokers."

On the next page in that document under section 2, you have a heading, "A strong ownership structure," and that's divided into a number of subheadings, the first one is "Operating partners," and I think that's a distinction that is filtered through the whole of the dialogue between the Department and Esat throughout the process. And the operating partners are described, as you can see, as Communicorp and Telenor. Then underneath that you have the company's ownership structure in a little more detail.

"Esat Digifone is an Irish incorporated company, currently 50% of the shares are held by Communicorp and the other 50% by Telenor. On award of the licence 20% of the equity in the company, (10% each in Communicorp and Telenor) will be made available to third-party investors. This allocation has been placed by Davy Stockbrokers, Ireland's largest stockbroking firm, with

"AIB

"IBI

"Standard Life Ireland.

"Advent International.

"Confirmation letters are included."

On the next page then you have a graphic showing the ownership structure divided into Telenor, Communicorp

and institutional investors, and they are named.

Now, I think what you were being told, therefore, by Mr. Hardiman in his letter in response to Mr. Towey was that you could say who the operating partners were and that while the other owners were identified, they could not be named in public, or other I better be careful of the word I use other interested partners or parties could be referred to in generic terms, they couldn't be identified, would that be fair?

A. Yeah.

Q. The next document again comes from the application.

This is the first section was an extract from the executive summary. This is an extract from the management section, and again deepens the extent to which it goes into the detail of the application under the heading, "Ownership and equity holding."

It says that: "Esat Digifone is a limited liability company registered in Ireland, jointly owned by Communicorp and Telenor."

Then it goes on: "The terms of the shareholders agreement between the parties are presented in management appendix A."

The next page it states: "The shareholders agreement states that Communicorp Group and Telenor will each initially hold 50% of the equity of Esat Digifone. In the period leading up to the award of the licence, 20% of the equity (10% from each of the partners) will be

formally placed by Davy Stockbrokers, Ireland's largest stockbroker.

"As of submission of this application, Davy Stockbrokers has received written investment commitments from" the four institutions mentioned.

A. Could I just remind you, we were through all this in December or January. The difference between the executive summary and this, the executive summary talked, in two sentences succeeding, one said "has been placed." Now, this in a more detailed application is saying, "will be formally placed." That's a nuance that's important, I think, and we discussed it a long time ago.

Q. Yes. On the next page, it goes into a little more detail. Again, you have a diagram similar to the one we saw before in the executive summary. It goes on then to describe the principal roles of the shareholders.

Firstly, it says that: "Esat Telecom will have primary responsibility for provision of marketing and commercial skills." It goes on to give a short profile of the company and its expertise.

Then it says: "Telenor as a world leader in mobile communications and as an international GSM pioneer will have primary responsibility for provision of engineering and cellular marketing skills." Again, there is a short profile.

Then the next paragraph: "The institutional investors will provide funding which will complement the financial capability of Esat Telecom and Telenor. In addition to immediate benefits to the investors. Such investment will also have the effect of reinforcing interest on the part of Irish business communities in the economic potential of deregulated telecommunications and utility markets."

Then in a management- and decision-making structure it tells you that Esat will have a board consisting of two nominees from Communicorp, two from Telenor and the institutional investors will nominate one board member.

The next document which comes from the management appendices of the Esat Digifone application is the draft shareholders agreement between Telenor Invest AS and Communicorp Group Limited.

Now, this is a document which has never been referred to except by name. I don't think it has before been produced or opened, though it has been mentioned by name, I think, in the course of the presentations.

A. Okay.

Q. This is the only document, I think, subject to correction, containing the nature of the agreement between Telenor and Communicorp. Firstly, it's in draft form and I don't think there ever was a tied-down agreement presented to you.

If you look at the document, in fact, it appears to be in a form, or it appears to be in the form of such documents where they are still passing between solicitors, where one firm of solicitors will propose a certain amendment to a particular paragraph and put it in brackets and the other firm, in responding, will either leave the brackets on or put brackets around another code error a rejoinder.

I'll give you an example. If you look at the first page that I have referred you to, under the heading "Additional shareholders," at the bottom of the page you see "Draft"?

A. Yeah.

Q. Just above that you see a section in brackets, can you see that?

A. Yeah.

Q. In square brackets. I think that's clearly something that involved a feature of the agreement that hadn't been agreed but was in the process of being negotiated between the two sides to the proposed agreement?

A. I think you said earlier, it has the features of between solicitors, it could equally be between the parties.

Q. It could be between the parties, yes, I meant that between the parties, but that's usually a format that solicitors use in any case.

It says under 5.1: "Provided the company is awarded

the licence, it is the parties' intention at the time, of the award to introduce new shareholders in the company so that each of the party's shareholding in the company is successfully reduced to a minimum of 40% with a maximum 20% being held by three to five reputable financial institutions. A third party will be admitted as shareholder only if he agrees to be bound by the terms and conditions of this agreement, however, with the necessary formal modification to be agreed between the parties and the additional shareholder. The parties can reduce their shareholding either by transfer of shares or by issuing of additional shares."

Paragraph 5.2: "The parties agree that as new shareholders will be chosen two or more of the following four companies:

"AIB

"IBI

"Standard Life

"Advent International.

"These four companies have all submitted written investment commitments to Davy Stockbrokers.

"5.3. If for some reason the parties do not choose two or more of the four companies as above mentioned, the parties shall make their best efforts to reach consensus as to whom to admit as an additional shareholder and as to the conditions on which the

third party will be admitted.

Then in brackets:

"If the parties cannot reach such consensus the parties agree that Telenor, to ensure that the company is backed by shareholders that have the funding deemed necessary by Telenor, shall have in its rights solely to choose one or more third parties as an additional shareholder in the company.

"Any admission of additional shareholders shall be attained through a pro rata reduction of the parties' shareholdings in the company."

That seems to say that provided the company is awarded the licence, it intends to go 40:40:20, or 40:40 with a maximum of 20 being held by three to five reputable financial institutions.

It goes on perhaps it's not absolutely clear to say that the parties agree that as new shareholders that new shareholders will be chosen from the four listed ones, and it seems to suggest that two only of those would be chosen. I am not saying any of this makes sense. I am just saying that's what it seems to suggest.

It goes on in 5.3 to say that: "If the parties can't agree, ultimately Telenor is to have the whip hand"; do you see that?

A. As one alternative.

Q. That seems to be what it seems to say, firstly, is

that 20% up to a maximum is to be held by three to five reputable institutions. It then goes on to say that the new shareholders would be two or more of four financial institutions. I am not sure that those two paragraphs are wholly consistent. It then goes on to say that: "In any case, if the parties do not choose two or more of the four companies as above mentioned, they are to try to reach agreement as to whom to admit. And if they can't, I think at least Telenor seems to be proposing that if they can't, Telenor is ultimately to have the whip hand.

A. Yeah.

Q. The next section I want to refer you to is from the financial section of the Esat Digifone application. Under the heading, "Financing," at paragraph 8.4 it says:

"The shareholders agreement state that Communicorp and Telenor will each hold 50% of the equity of Esat Digifone. In the period leading up to award of the licence, 20% of the equity (10% from each of the partners) will be formally placed by Davy Stockbrokers, Ireland's largest stockbroker.

"As of submission of this application, Davy Stockbrokers has received written commitments for 21.35% of the equity from

" AIB,

" IBI,

" Standard Life

" and Advent International."

Now that seems to me to suggest that there was going to be some rateable reduction in that 21.35%, if each of those four companies was going to get a slice of the action?

A. Yeah, well the, previous document referred to possibly two or three or four. So in some circumstances, people would have to move up. In other circumstances move down a little, but it's not a big issue for me at least.

Q. It's not what it's suggesting here is that 20% would be placed by Davys, and that as of submission, they'd receive written Commission for 21.35% indicating some degree of appetite for this.

A. Yeah.

Q. You know then that letters of financial support, or commitment were received from the four major banks

A. Yeah.

Q. that are mentioned? And also from the three banks and from Advent International. Now that's what you had going into the presentations?

A. Yes.

Q. You had the fairly, I suppose, strong statement in the executive summary, followed by not entirely clear statements in the rest of the document, would that be a fair way of putting it?

A. It depends on what interpretation. I mean, you would say that the executive summary says "has been placed," and I would put more emphasis on the "will be placed" in the more detailed documents. So when you say a strong statement in one and not so strong in the other, I don't know what you exactly mean.

Q. Well, what I am saying is that in the executive summary it says: "The company will be majority Irish-owned and will remain so for the long term. Three of Ireland's leading institutional investors have already provided written investment commitments."

And the other statement: "This allocation of 20% has been placed by Davys with AIB, IBI, Standard Life, Advent International." Do you know which is the true position?

A. I don't, but I would tend to assume, and I haven't said it in quite these words before, we have had this discussion a lot before, that you write the executive summary when you have written all the other bits and I would be more inclined to describe the executive summary as loose drafting, because it's unlikely to have been done the other way around.

Q. But if you go to the, if you like, the section I think that's what I was suggesting a moment ago, that whether it's loose drafting or not, what's in the executive summary, maybe I am suggesting the opposite, is clear?

A. It's clear that the executive summary says: "Has been placed," and the other documents say: "Will be placed" but I don't know which is

Q. What does the rest of the document say? It says: "Will be placed." It also says that there is to be this placing is to take place on foot of or under a shareholders agreement. You don't have any shareholders agreement. You don't even have a draft. All you have is a draft that's in the process of negotiation. If you read the draft shareholders agreement, the situation becomes even slightly more confused.

A. Yeah.

Q. That's all I am saying. That the executive summary, rightly or wrongly, puts it in very specific terms. The rest of the document puts it in terms different from the executive summary, and terms that differ, depending on which part of the rest of the document you'd look at, would that be right?

A. Yeah.

Q. When you came to the presentation, I think, however before we even come to that, sorry, if you go to document the next document in your book, which is the document containing the Book 57, Leaf 3, which is the Minister's press announcement following the receipt of applications in which, on foot of the letter that we discussed a moment ago, he mentioned

the various applicants. He says: "Esat Digifone I can't read the name of the first consortium is that Cellstar

A. Cellstar, yeah.

Q. "Cellstar, a consortium consisting of Comcast, RTE, Bord na Mona and I can't identify the other party for the moment.

Then you have Esat Digifone, a consortium consisting of Communicorp Group Limited and Telenor, together with some institutional investors. I think we have been over that document. We agreed, I think, that it was drafted by the Department, presumably?

A. Yes, no question about that.

Q. On the basis that that was the Department's understanding, I admit in a very general way, of what the application contained, you weren't going to go into the detail, but it involved a three-part consortium, where the third part could be described generically but not specifically?

A. Yeah, okay.

Q. Then if you go onto the next document, which is contained in Book 42, document 91, and it seems to be a document generated in the Department based on the application of Esat Digifone, no doubt similar documents drafted based on the applications of other applicants.

And it says: "Commitments made Esat Digifone in their

application submitted on the 4 August 1995 and valid for a period of 180 days thereafter."

And it says: "This document has been prepared with a view to establishing a comprehensive set of commitments made by Esat Digifone in their application as a lead up to inclusion of those commitments as conditions in the GSM licence. The object of the exercise is to produce an exhaustive list of all commitments made regardless whether these have been qualified by Esat Digifone or not. This is in order to provide an optimum, if exaggeratedly strong, opening position for the Department in the licence discussions.

"This document proceeds through the Esat Digifone application volume by volume." And so on. At the very end it says: "Road map at the end of Esat Digifone's executive summary may also need to be re-examined once this search through the application has been completed."

On the second page then, you have a reference to, I think, the executive summary, and firstly, the statement I mentioned earlier has been highlighted here, that the company would be majority Irish-owned and would remain so for the long term.

It was an Irish incorporated company currently 50% owned by Communicorp, 50% by Telenor. It goes on: "On award of the licence 20% of the equity, (10% of

each partner's holding) will be made available to third-party investors. This allocation has been placed by Davy Stockbrokers with AIB, IBI, Standard Life and Advent International. More detail in the financial volume/appendix."

Then, it seems then that the next major contact you had with the applicants was the presentations. I am not going to turn to them just at this point. You did have an exchange, I think, of correspondence, you know that set of questions?

A. Yeah.

Q. To enable people to give as good an account of themselves as possible in their applications. You respond to that. But apart from that, the next major contact was the presentations themselves, isn't that right?

A. Well, before I answer that, could I ask you, have you evidence that this piece of document you have just been referring to, is chronologically in the right place, because I don't know. I suspect from looking at it, that it was prepared at a later time.

Q. It's not chronologically, it couldn't have been because I would have thought it had been prepared in fact after the

A. Prepared by somebody who was getting ready for the licence negotiations and not necessarily somebody who was involved in the evaluation. It could easily, for

example, have been Regina Finn who came new to the licensing phase. You know, I just don't know. But in the way you took me chronologically through it, I didn't want to let the point go.

Q. I think we can probably check that. Well, for the moment, if you ignore that, and just pass on to if you go on four leaves in your book for a moment, to a document that was made available to the Tribunal by Mr. Billy Riordan in the course of his giving evidence. Do you see it?

A. Are we talking about one headed oh, manuscript, yeah, okay.

Q. Do you see that?

A. Yeah.

Q. From Mr. Riordan's evidence, I think this document was prepared sometime in or around the presentations. And do you see how he describes Esat Digifone in his second bullet point as, "Communicorp 40%, Telenor 40%, unnamed institutions 20%"? Do you see that?

A. Yeah.

Q. Then they are listed, AIB, IBI, Standard Life and Advent. Although they are described as the unnamed institutions, they are, in fact, as you can see, all listed here. And that is consistent with, I think, the descriptions that we mentioned already; would you agree with that?

A. Yeah.

Q. The next document in the book you have is contained at Leaf 4 of Book 57. It came from the Department of Finance documents. It's a document generated in Mr. McMeel's under Mr. McMeel's reference, do you see that, on the top right-hand side "J McM, 141"?

A. Yeah.

Q. And it's headed, "Licensing process for the second mobile telephony GSM franchise, preliminary screening of applications". It seems to be based on the sort of initial reading in by the various members of the team reading themselves into the process.

A. Yeah.

Q. And under Esat Digifone the first note Mr. McMeel makes is as to his understanding of the composition of the consortium, and it's:

Esat, Telenor, 20% Esat, Telenor sorry then 20% to April, IBI, Standard Life, etc. Stock exchange launch in two to three years.

The next document came from Mr. Riordan's file, the precise provenance of it is not clear, the handwriting on it he thinks is his. It seems to be a list of questions, and if you look at the questions they seem to be related in some way to questions which we know were asked in the course of the presentation when financial issues were raised with the Esat Digifone people.

A. Mm-hmm.

Q. That's document 57/24, if I didn't already give the reference. And there are eight numbered points, and if you go to the sorry, there are nine numbered points and if you go to the 9th point it says,

"Presumably, the following structure will be in place for Esat Digifone:

"Communicorp 40%

"Telenor 40%

"Investors (AIB, IBI, SL) 15%

"Advent 5%

"Total 100."

Now, it seems to me that that document either came into being as a result of an analysis of the application, and in preparation for the presentations, would that seem right?

A. Yeah, there was some discussion around the preparation for the presentations as to who would ask what and some exchange of views as to, first of all, who would lead the questioning and this document would fit in, it looks like to that. Whether it was generated in the Department of Finance it's more likely to have been generated in the civil service than Andersens, because Andersens typeface seems to be of a different type. So I would take it at face value, probably generated in finance.

Q. If you look at the way the statement is made.

"Presumably the following structure will be in place

for Esat Digifone." And then if you can recall what happened at the presentation; it seems that at the presentation there was actual confirmation of that?

A. Yeah.

Q. Because I think I have already reminded you of the responses or the remarks made, I think both by Mr. O'Brien and by Mr. Johansen at the presentation these extracts are contained on pages 9, 10, 43, and 44 respectively, of the presentations, and are contained in Leaf 1 of Book 51. If you just go back a few pages, you'll find them in the book you have?

A. Yeah.

Q. Again, I'll just quickly draw your attention to the second paragraph, I think or the first paragraph in Mr. Johansen's remarks.

"Ladies and gentlemen, Esat Digifone has the right partnership in place to succeed, I will explain this to you this afternoon by highlighting five points.

Esat Digifone is an Irish company. We have sufficient financial capacity to meet and even exceed the funding requirements. The partners have complementary skills and experiences and we have a very high level of commitment and we have the freedom to choose the best quality infrastructure.

"Esat Digifone is an Irish company. It's evidenced, first of all, by the Communicorp Group holding 40% as

we get going and we have institutional investors holding 20% and they are: AIB, IBI, Standard Life and Advent. In addition, we have Telenor, through its subsidiary Telenor Invest and Telenor is the main telecommunications operating company in Norway, having last year an operating revenue of 1.8 billion and a profit of 190 million."

I am not going to go into the detail. But Mr. O'Brien, in summing up, makes a somewhat similar point, referring, I think, to what Mr. Johansen may have said if you look at page 43, he says, "The business if you go to the last seven or eight lines "The business plan is sound, no blue skies, no dreaming, it's a business plan that makes sense and as Arve has mentioned, both Communicorp and the financial institutions are going to share in this investment and I think this is important because it's the first time a utility will make available shares to financial institutions."

And Mr. O'Brien goes on to mention why that is important. And he describes the company as having, if you look at it on the next page, "So we have two operating partners and financial institutions. So that's done."

Now, I am not suggesting that Mr. O'Brien was saying that he had locked up and tied down every one of these people into this, but it seems to me that he was, to

some extent, confirming the impressions that had been formed in the documents I have mentioned already, that this was a consortium, a three-part consortium of Telenor, Communicorp and a number of specifically identified financial institutions.

Now, if you go onto the next document in your list of documents, in your bundle of documents, which I have is a press release, announcing the winner I don't think anything particular turns on it, except that it does describe the winner, Esat Digifone, as a consortium comprising Telenor of Norway and Communicorp. The owners of Esat Telecom, subject to can you see that on the first paragraph

A. Yeah.

Q. If we just jump on then two leaves to the next document we have already mentioned, it's the draft letter dated the 17th November, 1995 intended to be sent, or proposed, I can't say intended to be sent, by Mr. O'Brien to you and drafted by Mr. Owen O'Connell, which was never sent, refers to a telephone conversation, the contents of which you wouldn't agree with in any case, as having taken place. That telephone conversation suggests that, or contains a lot of detail about how the Esat Digifone, and in particular, the Esat Telecom consortium was going to fund itself. Now, as far as you were concerned, you could recall, I think, that you may have had

conversations with Mr. Denis O'Brien, and you think it's possible you may have learnt that IIU were taking over Davy's role, is that right?

A. Yeah.

Q. And the next document on the in the bundle you have, which is also contained at Leaf 90 of Book 49, is Mr. Gerry Halpenny's attendance of the 21st November of 1995, in which reference is made to the position re the Department, "IIU not a problem for Martin Brennan in Department." Do you remember that?

A. Yeah.

Q. Am I right in thinking, therefore, that it was your position, as of this date, that this consortium consisted of Telenor and Communicorp; that the 20% that Telenor and Communicorp were going to cede was going to be taken up by a number of financial institutions AIB, IBI, Standard Life and Advent; that this was going to be handled by Davys and you think I think I am right in saying that you are not absolutely sure of this, you think you may have learned that IIU were going to become involved but that information was confined to knowledge of IIU's involvement in the mechanics of the placement?

A. I think I said I may have been the idea of substituting IIU for Davys may have been canvassed with me.

Q. Would that be then a fair summary of your knowledge?

A. I think it probably is, yeah.

Q. Now, I now want you to come on to the speech made by the Minister on the 22nd November, 1995, and what I want to go to is the documents prepared by the civil servants. I am not going to mention the speech for the moment. The various drafts prepared by civil servants in responding to that in responding to the queries, or the questions put down in the House.

These are contained in Book 43, Leaf 156. Have you got them on your own bundle of documents?

A. I have a series of possible supplementaries, that document?

Q. Yes, I think the first document you have is headed "Reply," and it's a draft reply, starting off as follows: "Ceann Comhairle, I propose taking questions," and then there is a big list of them, indicating that they are all to be taken together.

Now, we have been over a lot of these questions, I think, in some detail in the past, in particular, some of Mr. O'Dea's, and I think Mr. O'Dea's questions and Mr. Molloy's questions. And also I think, Mr. Noel Treacy's question. I just want to focus for a moment on one question, question number 85, Mr. Molloy's question which asked the Minister if Article 3 of his Department's GSM competition licence documents were complied with in the awarding of the licence and the identity and ultimate beneficial ownership of the

institutional investors who will own 20 percent of the successful bidding company."

Then if you go to the response, there was this overall compendious response.

And then if you go to, I think, about halfway through the document there is a heading "Licence fee," in the top left-hand corner of the page?

A. Mm-hmm.

Q. And underneath that, financial, technical and ownership aspects. It says:

"None of the six applications submitted was rejected because of the absence of technical and financial ability to deliver the service. Examination of these aspects was an integral part of the evaluation."

Paragraph 3 of the bid document which relates to full disclosure of ownership was adequately dealt with in the evaluation of applications. In fact, the majority of the applications contained indications of probable changes in the ownership of minority interest by way of flotation, institutional investment, etc., after licence award and the level of such proposed changes was considered acceptable. The intentions of the winning applicant in this regard were fully disclosed."

In light of the knowledge that you had at that time, doesn't that seem like avoiding the question rather than answering it?

A. That's a I think that's not the first time you have asked me this avoiding is not a term that I would subscribe to. I think drafting answers to parliamentary questions is a kind of a black art of civil servants

Q. Well, I think I don't want to stop you. I think I know what you're driving at, but are you driving at, correct me if I'm wrong, the notion that civil servants are not going to show their hand or whatever in or show the Minister's hand in answering a question?

A. Show the Minister's hand I mean, in terms of the drafting of the answers, it was the civil service doing what the civil service does. The Minister wouldn't be consulted as the drafting went on, put it like that, so the civil service was trying to find a way of answering the question.

Q. But why not simply say, "We have been told who the institutions are and here is who they are"? Was there any reason why on earth in the world the confidentiality business presumably was all over. This team had won. Was there any reason why you couldn't say what you believed to be the position at that time?

A. Looking at it now, I don't know.

Q. Now, I am not going to dwell on it because I want to come to all of these and take them all together. The

next document I want to refer you to is the press statement that was issued by civil servants. I think it's contained in Book 44, Leaf 231 sorry, it's not, it's book, I beg your pardon, it's Book 43, Leaf 188.

CHAIRMAN: We have certainly had it. I think it will suffice that we take

MR. HEALY: Have you got that document? We have been through this before, and through what prompted civil servants to become involved in issuing press statements themselves. The final sentence in the first paragraph says: "The Department wishes to put the facts of the situation on the public record in order to provide a basis for informed comment." And am I correctly summarising your earlier evidence that there was a plethora of innuendo and what you believed to be uninformed comment out there and you wanted to put a stop to it by putting the facts on the record insofar as within the limits of confidentiality, and I think political considerations, you could do so?

A. Yeah.

Q. Now, that statement was issued on the 19th, isn't that right?

A. 19/4/96, yeah.

Q. And on that date, Mr. O'Connell, solicitor to Esat Digifone had written to you to tell you that the consortium consisted of 357.5% Mr. O'Brien's vehicle,

37.5% Telenor and 25% IIU/Dermot Desmond's vehicle?

A. Yeah. I mean, I don't recall the chronology at this stage.

Q. You remember the letter

A. I certainly remember the copy being canvassed here, yeah.

Q. The letter was written, was sent to you before this date?

A. Okay.

Q. And I think Mr. Loughrey, even in referring to it this morning, I think mentioned that he would have got it sometime around this time, and said that he was galvanised into action immediately?

A. Right.

Q. Am I not right in saying that, at this point, the institutions were out now, weren't they?

A. I think they probably were, yeah.

Q. And wouldn't that have been an appropriate time to say "the institutions are out"?

A. Certainly that would have been an option, I suppose, yeah.

Q. The next document in your bundle is simply Mr. Loughrey's own briefing. I don't think it adds anything to it.

And the second next document, I think, is again in civil service work, preparatory to the Minister's speech in the Dail on the 30th April, 1996, in which

the Minister's clearly conscious of mounting queries indicated that he wanted to use the occasion to say on the record all that could be said about the issue.

A. Mm-hmm.

Q. And the question of ownership is dealt with at page 14 of that statement, which is contained, I think, in Book 44, Leaf 201.

Now, it says: "I would like to dwell for a moment here on the requirement that applicants provide full ownership details. The ownership structure of all the applicant consortia was examined by the Project Team.

Four others along with Esat Digifone envisaged that the project would be financed, apart from debt financing, through equity participation going beyond the original consortia members. This wider equity participation involved unidentified stakeholders arising either through private placement or through stock market flotation.

"The consultants on the Project Team saw nothing exceptional in this for a project of this size.

Andersens had clearly been down this road before. It is impossible to expect that something envisaged by five of the six applications in some way damaged their applications.

"These equity arrangements were not considered and rightly so to be a negative factor in relation to any application. Indeed, if the evaluation process had

marked down any application on these grounds, it would be impossible to defend, and I have already made it clear that this process can be fully defended.

"In the case of Esat Digifone, the intention of the consortium partners to arrange a private placement with blue-chip institutional investors was disclosed.

Letters of commitment from the investors for specified amounts were submitted. In addition to this very strong expressions of interest in loan and equity participation in the consortium were available from other leading international institutions. Because of the confidentiality constraint, I cannot name any of the institutions concerned. The situation would be no different if any other consortium had won. The Project Team established that all the consortia were capable of funding the project."

At that time, the institutions were out, weren't they?

A. Yes.

Q. Why couldn't that point have been made so as to stop fuelling the degree of uncertainty?

A. I suppose, the option of making that point was there, but this text, as far as I can judge now, is talking about the application.

Q. Yes, but the questions that were being raised were who owns the 20%? At that stage, you had a firm description, you had a clear and express statement from Esat Digifone as to who owned it. You see, what

I am suggesting is was there some reticence on the part of civil servants, to setting out the true position about this 20% ?

A. I don't know how best to answer that. I mean, it's clear that there was a change in the makeup of the 20%, but it's clear that it was still not out of accord with the details of the application. Looking back from here, maybe it would have been better to have come out and said that in clear English, but it just wasn't done at the time. Whether it was reticence I don't know what caused it. That text there is talking about the application, I am certain of that.

Q. It's not setting out all that could be said about the process, is it?

A. About the process, it actually is.

Q. I think what it says is

A. I mean

Q. "I want to use this occasion to say on the record all that can be said about the issue."

A. Yeah.

Q. "This intention to place with blue-chip institutional investors was now history."

A. But it still is an accurate description of the application.

Q. It is, yeah.

A. That was considered.

Q. Yes. You could say, Jesuitically, it was an accurate description of the application, yes, or a relatively accurate one, but does it describe the situation and why doesn't it describe what was the true situation at that point?

A. I don't know.

Q. You had received no request for confidentiality on Mr. Desmond's part, sure you hadn't?

A. No, we didn't.

Q. I want to take you back to some of the course of the correspondence. You'll recall that you got the letter of the 17th April from Mr. O'Connell in William Fry Solicitors, which was addressed to Regina Finn, it followed on a telephone conversation she had the previous day with Mr. O'Connell. She made notes and then she received a letter from Mr. O'Connell setting out the position in detail in his letter, do you remember that?

A. Yeah.

Q. Then on the 1st May, a letter was sent out under your over your name, seeking more information; that was a letter of the 1st May 1996. I think you'll have to go on I don't have numbered leaves in my book. I may be able to refer you to a numbered Leaf. Have you got number leaves in the bundle of documents?

A. There may be numbers in the index.

Q. If you have 28 do you have number 28?

A. Is this the letter of Owen O'Connell, yeah.

Q. A letter to Owen O'Connell or from?

A. To.

Q. It's contained at Book 44, Leaf 203.

It says: "Dear Mr. O'Connell,

"I refer to your letter dated 17 April 1996 concerning restructuring of certain ownership interests in Esat Digifone.

"In accordance with the requirement of the GSM competition documentation, Esat Digifone provided ownership details which indicated that at licence award the ownership would be as follows: Communicorp 40%, Telenor 40%, institutional investors 20%. The application also provided details of the ownership of the operational partners and identified the probable institutional investors and the broker who would be responsible for placement of equity with institutional investors." So on.

If you go down to the second-last paragraph it says:

"It is essential that the Department can identify precisely any changes in the effective ownership both direct and indirect of Esat Digifone since the time of submission of the application."

It goes on:

"The precise equity ownership of Esat Digifone including the identity of all institutional investors, "the identity and financial commitments of debt

financing.

"It is essential that these matters be cleared up before issue of the licence. We also need to discuss the public presentation of these matters."

I think you told me already that that letter went out with your signature but perhaps it may have been drafted by somebody else?

A. It looks it certainly has my signature. It looks as if it was more likely drafted by Regina Finn than anybody else. Regina Finn did not work for me at the time. She worked for Mr. McMahon. She was leading the licensing negotiations. Mr. Towey was keeping in touch with it on my behalf. So it looks, on the face of it, somebody came to me and said look it, we need you to sign this letter, and I signed it.

Q. The letter suggests that somebody decided that it was important to know, and to identify changes in the effective ownership, both direct and indirect, of Esat Digifone since the time of submission of the application.

Aren't I right in saying that you never got a comprehensive response to that query? I have to take your word for it. I mean, you have the 70,000 documents, and I don't. And you also have all the evidence?

Well, could I just refer to another document that we mentioned before? It's a memorandum of Messrs.

William Fry's. If you go to tab I want to refer you to a document we discussed the other day, and I think that was also discussed in the course of Mr. Towey's evidence. It's a memorandum by Mr. O'Connell of a meeting or of a telephone conversation with Towey on the 29th April of 1996. Do you see that, and it seems to have predated the letter that I just mentioned to you. And I think I may have used the word 'nailed down', but obviously I am mixing my metaphors. Mr. O'Connell records contact with Mr. Towey, then says:

"Trying to hammer down paper trail between beneficial ownership as in bid and as now proposed to determine whether there are any differences. Legal people involved." I think that would suggest that Mr. Towey was actively becoming involved in this issue. Maybe he had a role in the letter that was written the following day?

A. Quite possibly, yeah.

Q. There was then, if you just pass on from that for a moment, to Mr. O'Connell's memorandum, or attendance of the meeting he had on the 3rd May 1996, it's at tab 29 of your book, and at Book 44, Leaf 206 have you got that document?

A. Yeah.

Q. This was a meeting in the Department at which you were present. You were the most senior civil servant

present, I think. And Knut Digerud was present, Mr.

Peter O'Donoghue, Arve Johansen, Michael Walsh, Paul

Connolly, Mr. O'Connell, Mr. Towey, Ms. Finn and I

presume, "Eanna", means probably refers to Eanna

O'Conghaile, I suppose?

A. Yeah.

Q. It says: "Clear a political football.

"Identity of each shareholder legal and beneficial

ownership.

"Esat Digifone changes relative to bid.

"Change in institutional investment replacement of

Advent and Davys by IIU.

"Need detailed information/quality about IIU."

That seems to me to suggest that you were following up

on, firstly, Fintan Towey's telephone conversation;

secondly, the letter that was written either by Regina

Finn or you or Fintan Towey or all three of you

together; and now you had a meeting on the 3rd May in

which you were saying if this if this note is

correct, that you wanted to check changes in Esat

Digifone relative to the bid, isn't that right?

A. Yeah.

Q. And somebody recorded this as a political football?

A. Yeah, Owen O'Connell.

Q. We know that Mr. Arve Johansen also made a note of

that meeting, isn't that right, do you recall that?

A. There is so many documents open now, I don't recall

anything.

Q. Well, he made a memorandum on the 4th May of 1996.

I'll put it on the overhead projector. It's at Leaf

130, of Book 49. I am not sure if it's in your book,

but if you look at it on the overhead projector.

Mr. Johansen says: "I have below summarised a few points that has become clear to me over the last 24 hours as a consequence of the information acquired regarding Communicorp's attempt to buy back 12.5% of the IIU shares."

The first paragraph: "Denis O'Brien came personally over to see me in Oslo, probably sometime during September last year. He informed me that, based on information from various very important sources, it was necessary to strengthen the Irish profile of the bid and get on board people who would take a much more active role in fighting for Digifone than the 'Neutral' banks who basically would like to keep a good relation to all consortia.

"I accepted Denis' word for the necessity of this new move. Note: Underwriting was never used as an explanation.

"IIU should apparently be the ideal choice for this function, the only string attached being they demanded a 30% equity participation 'For the job.' Denis had managed to reduce this to 25% but it was absolutely impossible to move them further down. This was a

disappointment to us, since everything we had said and done up to then had been focused on at least 40% ownership for the principal shareholders at the time of the issuing of the licence. But not only that, Denis then pushed very hard for Telenor to swallow 15% of this and Communicorp only 10% to which I never agreed." And it goes on.

I don't want to go into too much of the Telenor/Denis O'Brien relationship because I'd have to open Mr. O'Brien's very, very strong response. But if you just go on a little, "As we go along, we learn more, but it all serves to disclose more details which again and more prove the above scenario. In the meeting with the Department of Communications Friday May 3rd it became evidently clear that IIU was not a favourable name from an "Irish public point of view." On the contrary the Ministry basically asked for help to explain why we had substituted Advent, Davys stockbrokers and the other recognised named institutional investors in the bid: AIB, Investment Bank of Ireland, Standard Life Ireland."

If that note is correct, it would suggest that, again, you were pressing the point originally made by Fintan Towey in his telephone call, "we need to hammer down the paper trail", mentioned again by Regina Finn, mentioned again at the meeting of the 3/5 to the point where it clearly seems to have made an impression on

Mr. Johansen. But I think as we agreed the last day you gave evidence, it was never followed up on after this?

A. Yeah, okay.

Q. Was there some reason for that?

A. I don't recollect a reason.

Q. For instance, if you look at that document, if those facts are accepted, isn't it clear that the entity with which you were conducting negotiating on an exclusive basis was not the entity that had won the competition, according to the application that you got, isn't that right?

A. Yeah, you have canvassed that one with me now, I'd say three or four times down the months.

Q. I think you agreed with me?

A. Well, I agreed, but only against the background that when it came to the changes, clearly we had to revisit the application to see exactly what it said. Then we had to take advice whether what was now there fitted with that, and the conclusion arrived at, that given it was an intention to place was clearly in the application, and we had to take account of our own rights and the rights of other parties, that it was reasonable to do what we did.

Q. But doesn't that suggest, or doesn't the documents I have given to you suggest that you were looking for rather more detail than that; you wanted a paper

trail. You see the point I am making to you is if you had pursued the paper trail, you might have found that the that Mr. Desmond was on board before you ever announced the result of the competition. And that his coming on board was not merely the result of an intention to place, but that he was already there. Do you see my point?

A. I do, but I think I have responded before and I'll respond again, that to a significant degree, I think you have to accept that we were dealing with the parties and the applicants on the basis of taking a lot at face value.

Q. Yes.

A. So, I mean, we weren't probing forensically from the point of view of, you know, suspicions that arose after the event and that caused the setting up of this module of this inquiry. That's not where we were starting from.

Q. That's a fair point.

A. So I don't I don't see the changes as being as significant as you see them in the sense that we did all we could to satisfy ourselves that there was a reasonable relationship between the licence entity and the application.

Q. You're making two points there. Can I just be clear about that. Firstly, I was asking you why you hadn't pursued the paper trail and that it might have showed

something; it might have showed that the entity that you were negotiating with was a different entity to the one that had been presented to you in the application, and your response to that was, well, we weren't looking at what was being said to us in that, as you put it, forensic way, we weren't probing that deeply, we were taking things at face value. That's point 1, isn't that the first thing you were saying to me?

A. Yeah.

Q. You also said that we didn't see the difference based on what was presented to us as being significant, based on what was presented to you?

A. On what we had before and after, there was a reasonable relationship between the entity that made the application and the entity that was going for the licence. And I suppose the unasked question is: Did somebody stop us from pursuing a paper trail? And the answer is nobody did. If we didn't do it to the degree that this, the mind set here would suggest we should have done, we just didn't.

Q. Where the involvement let's take the scenario as it was presented to you; what you were told was there was always an intention to place you looked at the application, and you see an intention to place with financial institutions. You are now faced with not a financial institution, but an entity, effectively,

representing Mr. Dermot Desmond's interests?

A. Yeah.

Q. And you were saying, is that the same as a financial institution, aren't those the questions you are asking yourselves?

A. I think so, yeah.

Q. And then there is another question: Is that entity Mr. Dermot Desmond/IIU capable of standing in and doing the work of a financial institution?

A. Yeah.

Q. Well, there are a number of questions there. We have been through, on the last day you were here, the work that was done to examine the financial side of that development. Mr. Loughrey has said that he took over that whole matter, and in evidence today, and I think the last day he gave evidence, indicated that, in fact, he wasn't impressed at all. He may have been impressed by the work and the quality of the work Mr. Buggy was doing, but that wasn't what impressed him at all. He was more interested in only one aspect of that: The availability of cash. Do you ever remember that analysis being propounded?

A. I don't have a recollection one way or the other.

Q. Was it something that you had did you have any role in saying, yes, we'll run with Mr. Desmond/IIU or we won't? Let me assist you I understood Mr. Loughrey to say that he did it all himself, but I could be

wrong in that?

A. I wasn't going to come in here and say, pass, it's nothing to do with me, it's Mr. Loughrey. I am sure that I was involved in some discussions around that time, but I don't think what Mr. Loughrey said is fair; that he was in the lead at that point.

CHAIRMAN: Mr. Healy, I am a bit concerned of us getting into substantive matters. I think we might just glide fairly quickly through the remaining matters because there is nothing completely new.

MR. HEALY: There isn't.

Q. Then you went on to finally you went on and I am putting a few of these documents together, to the preparation for the ultimate conclusion of the process, and at that point, you're raising, or recorded as having raised at a meeting with Mr. O'Connell some issues that had to be addressed, one of which was whether the consortium which applied was the consortium, or was the same as the consortium to which the licence was issuing. And whether Mr. O'Brien could keep up his side of the consortium in financial terms.

A. Mm-hmm.

Q. In relation to the question of finance, I didn't understand you to say to me when you were last giving evidence on this matter, that you were aware that Mr. O'Brien couldn't come up with his 6 million to pay

for the licence on the 16th May?

A. I can't I am aware that you had this discussion with Mr. Loughrey.

Q. I drew to your attention the fact that Mr. Buggy was able to record that Mr. Desmond was providing 5 million for the 16th, of which 3 was to be his own contribution and 2 to be part of his rateable contribution along with Telenor toward paying for Mr. O'Brien's share; do you remember that?

A. I remember we had a discussion. I don't remember being specifically aware that Mr. O'Brien had to fund his share of the licence fee in that manner. I just don't remember being specifically aware.

Q. If you were aware of it, I suppose it's something you'd have remembered, isn't it?

A. It probably is, yes.

Q. Wouldn't it have been something fairly serious, from your point of view, in light of everything that you said in evidence before, Mr. O'Brien you were aware from your discussion with Mr. O'Connell that issues could arise concerning Mr. O'Brien's capacity to fund his end of the project; you wanted those questions approached in such a way that, I think you said that no doubt should be implied as to the Department's belief in Communicorp's financial strength; do you remember that?

A. You're attributing all of that preparatory phase to me

in the way you are putting the questions. I suspect that there was a bit of brainstorming in the Department as to well I suppose, in the normal course, anybody facing an important press event that's not a gifted communicator, prepares in detail, and Mr. 4kLowry always sought assistance in preparing for any public speaking event. So a number of us, and I don't know who was involved, was probably involved in brainstorming, what are the issues we have to cover? And I may well be the one who led the discussion with the other side as to identifying the issues and so on.

Q. Well, there was a meeting between yourself, Mr. Towey, Knut Digerud and Mr. O'Connell, and Mr. O'Connell notes, you will recall this: "Martin Brennan stressed the need to have a number of definite, clear and acceptable statements for use at the press conference and he outlined a number of obvious questions."

A. What I am saying is coming to that meeting, it is quite likely that we already had some brainstorming between some of the leading players in the Department to see what were the issues that needed to be discussed in advance of the meeting.

Q. I follow. But if you knew that Mr. O'Brien didn't have the money to pay for his share of the licence, would you have been happy

A. Well, I would have talked here

Q. to go before the press or the public and say,

Mr. O'Brien has the money to pay for the licence?

A. If I knew he hadn't, I wouldn't be happy to say he had.

Q. If you knew he hadn't, would you be happy going into the press conference in any case?

A. Well, I have always viewed this business of the financing the project in terms of the consortium rather than its individual parts. So in that sense, yes.

Q. You would have been happy.

A. I'd have been happy enough that the consortium getting the licence could deliver the business.

Q. Well, I'll just quote you what Mr. O'Connell said.

You identified one of the questions as: "Will Telenor support the project to the end?"

And then the note goes on: "To this query MB added that it was sensitive in nature as it would have to be answered in such a way as not to imply any doubt in the Department as to Communicorp's financial strengths." Do you see that?

A. Yeah.

Q. Now, would you have been happy with that, if you knew that Communicorp was in some difficulty to the extent that on that day they couldn't come up with the 3 million?

A. I am struggling to find an answer to that one. The consortium was always going to come up with the money.

Q. If you had been asked that question, if the Minister had been asked it in the Dail and if you were drafting an answer or if he had been asked at a press conference, would you have been happy to say, well, Communicorp don't have the money today but we're giving them the licence anyway because Telenor will stand behind this?

A. I don't know.

Q. I think the answer is no, isn't it, realistically?

A. You are saying no. You have canvassed this with several of the parties involved at this stage.

Q. Am I right in thinking that if you had been aware of that as an issue, you would have it would have been one of the obvious matters listed here? If you had been aware specifically that Mr. O'Brien did not have the 3 million, it's one of the matters that would have been mentioned here as something to be addressed well in advance and to which a very clear and definite statement in response will have to be prepared?

A. Yeah, I think that's fair comment.

Q. Wouldn't I be right in thinking, therefore, that you weren't aware of that?

A. Well, that's what I said previously, I don't recall being so aware.

Q. Isn't it somewhat odd that at the end of the day, you'd been Chairman of the Project Team, you had driven the process, and yet at the last minute, one

vital aspect of the process had not been revealed to you?

A. I regarded myself, I suppose, really, as having done my job when the decision of the Project Team was settled in October. I went on to other business. We have been through all this before I went on to other business.

Q. I am aware of that.

A. I was kept in touch with the project and brought back into play, to a limited extent, close to the end game. So I am not so sure what the burden the import of what you're saying is, but I don't attach any great significance to it.

Q. But you were brought in to deal with specific issue at the end or at least you yourself would I be right in saying you rolled up your sleeves to deal with this matter?

A. I think that's fair comment, yeah.

Q. And yet a key element in all of this was not brought to your attention?

A. That's curious when you put it like that, yeah.

Q. Just one last matter, and this has been touched on, I think, with you and with Mr. Towey. I went through a whole list of documents there in which I suggested that there appeared to have been, or at least on one view, there might appear to have been a reticence to mention the true state of affairs regarding the

ownership of Esat Digifone. Could any of that reticence be put down to any embarrassment or any concern you had that the letter of the 29th September, 1995 could have shown the Department had been aware of all of this well in advance could have?

A. No. I am very confident that we were surprised when that I was certainly surprised when reference to that letter emerged in the media after the a long time after the event, and I only really became sort of conscious of it at that stage, which supports what I have been saying all along: That it's a letter that came in. Mr. Towey took a judgement, he discussed it with me and we sent it back. I didn't have any recall of it during this time, as far as I know.

Q. You know that Mr. Desmond says that it made absolutely clear his involvement?

A. I heard that here, yeah. But that was being made in the context of a certain line of questioning at a particular time, I don't deny it, I mean...

Q. I mean, did it, as far as you were concerned, make absolutely clear his involvement?

A. I don't know without going back to the text at twenty to five, I don't know whether that's helpful or not.

Q. Thank you.

MR. NESBITT: Very briefly, on re-examination,

Mr. Chairman.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. NESBITT:

Q. MR. NESBITT: At the very beginning of your examination by Mr. Healy today, Mr. Brennan, he asked you the following question: I think we have been over this before that was certainly true do you agree with me at this point that Esat Digifone certainly represented themselves as a consortium consisting of Communicorp, Telenor, institutional investors? And that question was asked at the stage of the application and your analysis of who'd be a winner. And your answer was yes.

Now, I have to suggest to you that the documentation that you received, on any analysis, makes your answer there an overreaching answer, because what we know in relation to the presentation of Esat Digifone before they were declared the person to have exclusive negotiating rights to win the licence, was that depending upon which analysis you choose to accept, they either said 20% of the equity will be made available to third-party investors, this allocation has been placed with Davys stockbrokers, Ireland's largest stockbroking firm with the name of four people, AIB, Investment Bank of Ireland, Standard Life and Advent International, or if you want to look at a different part of their application form, they said "The shareholder agreements states that Communicorp Group and Telenor will each individually hold 50% of the equity of Esat Digifone. In the period leading up

to award of the licence, 20% of the equity, (10% each from each of the partners) will be formally placed by Davys Stockbrokers, Ireland's largest stockbrokers.

"As of submission of this application, Davys stockbrokers have received written investment commitments from," and it names the same people.

I think the one thing we also know but wasn't put to you, that the nature and strength of the various commitments that had been received are to be seen in a series of letters, and I am not sure if you recollect the letters at this remove that were attached to the

A. They certainly weren't firm commitments.

Q. And at their best, they are an indication that they might, if their investment committees approve the investments, invest. And I have to suggest to you that even if you had no knowledge of obtaining finance, there is no way that that could be indicated as agreement to invest?

A. I have been clear throughout my evidence here that the significance of the difference between "has been placed" in the executive summary, and "will be placed" elsewhere in the licence, is very important, and its importance, if anything, grew with time.

Q. And in relation to the interest of Advent, the state of their letter, slightly different terminology, but in relation to the 20%, which is to be allocated to

institutional shareholders, they say:

"We are delighted to have the opportunity of investing directly in Esat Digifone as well as our indirect investment company, through Communicorp and Esat Telecom, and they indicate that they have offered the amount that Communicorp need to enable it to fund its obligation."

So again, although funding appears to have been on offer in that particular date, that was the state of the situation from their letter. They didn't say they would necessarily end up being the final person who funded the equity, isn't that right?

A. Yeah.

Q. And as I understand it, when you formed the view that there was a winner, you were satisfied that the appropriate winner was Esat, isn't that right?

A. Yes.

Q. And you weren't doing it to advantage any other third party?

A. Not at all, no.

Could I say too, by the way, in the long list of documents opened today by Mr. Healy, there is a series of documents all going in the same direction, relying on the words in the executive summary and they were all written by different people. I would say it was quite legitimate for Mr. McMeel who was writing a note to file or a note to inform his own superiors to rely

exclusively on the executive summary without going behind it, and the same may well be true of such a summary written by Donal Buggy I think it was maybe Billy Riordan.

Q. Now, in relation to who might or might not end up as the institutional investor, insofar as documentation came to hand indicating that there would be a 20% ownership or the involvement of Dermot Desmond, with the exception of one document which was returned, because it was viewed as inappropriate to allow it into the process because of the nature of the process, the other documents all find themselves in the record of the Department?

A. Yeah.

Q. So the suggestion that something's been hidden, that something that can be got away, that you can mislead people, all has to ignore the fact that if somebody chooses to look at the Department record, as any appropriately authorised person can, they will see what the true position is?

A. The material is there. The extent to which it was adverted to by individuals is in dispute, but it was there, yeah.

Q. So, with 20/20 vision, hindsight, having all the information and as much time as ever to be wished to pick over it, we can look at things and we can wonder why things hatched, but I have to suggest to you that

whatever did happen was straightforward and maybe it could be done a different way now, but that's the way you did it?

A. Yeah.

Q. And do you feel you have anything to answer for in that regard in relation to having disadvantaged one applicant or having intentionally advantaged another applicant to affect the outcome of the process?

A. No such thing occurred.

Q. Thank you very much.

CHAIRMAN: Thank you, Mr. Brennan. Sorry it was a long shift this afternoon. We'll take up a further witness at eleven o'clock tomorrow.

MR. McGONIGAL: Just one matter, Mr. Chairman, that I indicated to Mr. Coughlan that I intended to raise after Mr. Brennan had finished his evidence, you may prefer that I do it tomorrow rather than tonight, but

CHAIRMAN: It's probably preferable tomorrow, Mr. McGonigal, unless it's something of particular urgency overnight, in fairness to the stenographers, I think it may

MR. McGONIGAL: Not even for you or I

CHAIRMAN: it may survive thus far.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
WEDNESDAY, 16TH JULY, 2003 AT 11AM.