

A P P E A R A N C E S

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FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, BL

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FOR THE DEPARTMENT OF

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Mr. John O'Donnell, SC

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I N D E X

Witness: Examination: Question No.:

Owen O'Connell Mr. Coughlan 1 - 447

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 23RD

OCTOBER, 2003, AT 11AM:

CHAIRMAN: Ms. O'Brien, just before proceeding to evidence, there is some matter of a transcript amendment in relation to Mr. Towey's evidence, that it might be apposite to deal with it now. In fact I have the details of it here. And I think one of the solicitors had written in to the Tribunal pointing out that this was a clear-cut error, that everyone was agreed on, because it was a matter of a positive being placed instead of a negative. It was agreed this would be rectified. And I think it relates to a portion of Mr. Fintan Towey's evidence on Day 214, page 115, which incorrectly recorded: "Michael Lowry was the type of Minister that would talk to people typically at my level." And I think everyone was agreed that what, in fact, had been said was that "Mr. Lowry wasn't the type of Minister," etc.. So I think it's appropriate in accordance with, I think everyone's views, that I amend the transcript to record that.

MS. O'BRIEN: Very good. May it please you, Sir.

CHAIRMAN: Mr. Coughlan. Mr. O'Connell please.

MR. MCGONIGAL: As Mr. O'Connell is going up, just another housekeeping matter, Mr. Chairman, in relation

to my application, which is still very much alive, in the sense that I understand from speaking to your counsel, that the position in relation to Mr. Andersen is moving along but has not been clarified, and I am anxious to keep the application alive when, or until the matter is clarified itself when a decision can be made one way or the other.

CHAIRMAN: I agree, Mr. McGonigal, but we don't want to proceed on the basis of a moot, so I'll leave your options open. And I think Mr. Healy has made you aware of the progress that has been made, the somewhat changed situation that obtains, and we will monitor events in the context of that over the next week or so.

MR. MCGONIGAL: May it please you, Chairman.

CHAIRMAN: Thank you very much for attending again, Mr. O'Connell. Of course, you are already sworn from an earlier visit to the Tribunal.

OWEN O'CONNELL, PREVIOUSLY SWORN, WAS EXAMINED BY MR.

COUGHLAN AS FOLLOWS:

Q. MR. COUGHLAN: Mr. O'Connell, I think you furnished a number of Memoranda of Intended Evidence to the Tribunal, and enclosed documentation, documentation, where relevant and necessary, with those memoranda, isn't that correct?

A. Yes, I did.

Q. I take it you have those with you in the witness-box?

A. Yes.

Q. And I think you understand the procedure; that I will take you through the memoranda and the documents as presented by you in the first instance, and when we come back to discuss matters further, I will indicate to you other documents in good time so that you are well prepared to deal with other documents.

A. Yes.

Q. Now, I think what I intend dealing with in the first instance is the Memorandum of Intended Evidence furnished by you dated the 15th March, 2002. And I think in that memorandum, you inform the Tribunal that this memorandum is made at the request of the Moriarty Tribunal contained in Mr. John Davis's letter of the 14th February, 2002. And addresses your involvement in the association of Allied Irish Banks, (AIB), Investment Bank of Ireland, (IBI), Standard Life of Ireland, (Standard) and Advent International (Advent,) with the Esat Digifone Consortium (the Consortium), their subsequent disassociation from the Consortium, and the entry by IIU Nominees Limited (IIU), and Mr. Dermot Desmond (Mr. Desmond) in the Consortium. You have little direct recollection of the matters to which this memorandum relates, and it is accordingly based on a review of William Fry's files, from which you have assembled documentation which appears to be relevant.

You understand that all of this documentation has already been furnished to the Tribunal through McCann Fitzgerald, solicitors to Esat Group, to whom you furnished the documentation in the first instance. It is not the case that there is a single file dealing with the matters to which the memorandum pertains, and it has been necessary to assemble documentation from diverse sources. Accordingly, it is possible there is gaps in the narrative, and at the date of this memorandum you were continuing to review the files. Now, I understand that and we can, if anything else arises, we can deal with it.

A. Yes, thank you.

Q. I think in the first instance, inquiry was made of you of your knowledge, direct or indirect, of the association of Allied Irish Bank, Investment Bank of Ireland, Standard Life of Ireland, and Advent International, with the bid and/or the Consortium and the subsequent disassociation of them from the bid or the Consortium.

And you have informed the Tribunal, that you were aware in mid-1995 that Esat Group was preparing a bid for the pending second GSM mobile telephony licence in Ireland. You had previously been engaged as Esat's solicitor in discussions with Southwest Bell and Deutsche Telecom, aimed at creating a consortium led by Esat to make such a bid, but the negotiations had

broken down. You were not engaged in the preparation of drafting of the bid itself.

You have informed the Tribunal, that you were aware in mid-1995 that Esat required a financially-sound partner to support and lend credibility to its bid.

You may have had minor involvements in reviewing letters procured by Davys Stockbrokers from AIB, IBI, and/or Standard, containing non-binding expressions of intent as to their future participation in the

Consortium, but you do not recall being engaged in any discussions with either Davys or those parties. Is

that correct?

A. Yes.

Q. You were engaged in correspondence with lawyers for Advent concerning the terms upon which Advent would support Esat's bid. The terms were onerous. And you were aware that Esat did not wish to rely entirely, or perhaps at all, upon Advent for financial support for this reason.

I think you were then asked for your knowledge, direct or indirect, of the association of Mr. Desmond/IIU

with the bid and/or the Consortium, and their

subsequent disassociation from the Consortium. And

you were also asked for your knowledge, direct or

indirect, of the negotiations of Mr. Desmond/IIU from

August 1995 to May of 1996. I think you were also

asked for your knowledge, direct or indirect, of each

of the agreements or arrangements with Mr.

Desmond/IIU, whether concluded or otherwise, in the period from August, 1995, to May, 1996. And I think you were also asked for details of all of your involvement in any aspect of the negotiations with IIU,

Mr. Desmond, or with the agreements or arrangements reached with Mr. Desmond/IIU, whether concluded, or otherwise, in the period from August 1995 to May 1996.

I think you have informed the Tribunal that on the 18th September, 1995, you were informed by Mr. O'Brien and Mr. Buckley I take it that's Mr. Leslie Buckley?

A. Yes.

Q. That Mr. Desmond would participate in a financing transaction in support of Esat, notably by providing an underwriting letter for the Department of Transport, Energy and Communications, but that he wanted 30% of the Consortium in return. This would mean that there would be insufficient participation available for AIB, Standard and IBI. You were not involved in any previous discussions with Mr. Desmond in this respect.

And I think at this stage, you refer to a document, and it is it would be easier if we just opened some of these documents as you went along. It's your attendance, isn't it, on Mr. O'Brien and Mr. Leslie

Buckley, dated the 18th September, 1995. It's also been reconstituted, and I think you have that as well?

A. Yes.

Q. You can correct if any of the reconstitution is at variance with the handwritten note. But it's a memo, and it's to file and it's from you, and the client is Esat, and the subject matter is the GSM. And the date is the 18th of September, 1995. And you note: "Denis O'Brien and Leslie Buckley:"

Those were the people whom you were attending on.

"Dermot Desmond going ahead with financing

transaction.

Need 'Underwriting' letter for Department because

finances are seen as the weakness.

DD wants 30% of GSM. AIB, Standard, + IBI to be excluded."

Then under that:

"30 - DD.

5 - Advent,

32.5 - Esat,

32.5 - Telenor."

So, that was the first occasion on which you were informed that Mr. Desmond was potentially having an involvement in the bid or consortium, is that correct?

A. I believe so, yes.

Q. Now, if I continue with your memo then.

You have informed the Tribunal that arising from your

meeting with Mr. O'Brien and Mr. Buckley on the 18th September, 1995, you spoke by telephone to Mr. Michael Walsh of IIU, and sent him a standard draft underwriting agreement. You then received copies of draft letters, probably on or about the 19th September, 1995, in which Mr. Walsh confirmed the basis of IIU's agreement with the consortium, proposed the form of an underwriting letter to be written by IIU to the Department, and proposed a draft letter in which Mr. O'Brien would notify Davys and the Consortium would not be proceeding with AIB, IBI and Standard. These draft letters are at document number 2. The handwritten amendments to them are not mine. If we just briefly look at those documents which were furnished to you in this form by Mr. Michael Walsh, is that correct?

A. Yes.

Q. The first is a draft to be addressed to Mr. Kyran McLaughlin in Davys, and it reads:-

"Dear Mr. McLaughlin,

"I refer to our previous discussions in relation to the funding of the above. Unfortunately, the letters provided by the institutions did not provide the certainty necessary on the availability of sufficient equity finance to the Consortium.

"Accordingly, I have arranged firm underwriting through IIU Limited for  $\text{€}1\frac{1}{2}$ 30 million of equity finance,

being the 60% of the Consortium not held by Telenor.

"I want to thank you for your help in this matter.

"Yours sincerely." And it's prepared to be signed by

Mr. Denis O'Brien.

Then a handwritten note: "Accordingly, we will not be

taking up the conditional proposals from the

institutions AIB, IBI and Standard Life."

Then it came to you, was the handwritten note on it?

A. I can't recall, but I imagine it could well have been.

Q. I suppose we could approach it this way: Do you recognise the handwriting as being it's not yours?

A. It's not mine.

Q. Do you recognise it as being anyone in your office?

A. I don't recognise it.

Q. You don't recognise it?

A. No.

Q. Now, again, the next document, which was furnished to you by Mr. Walsh, is a draft of a letter to be sent to the Department, isn't that correct?

A. Yes.

Q. And again, there are some handwritten notes. It looks as if it's the same handwriting?

A. I should say, the word "Digifone" written into the heading where "GSM Holdings" is crossed out, that word is in my handwriting.

Q. Very good. The substantive note appears to be similar to the writing on the other?

A. Yes.

Q. And you don't know whose writing that is?

A. No.

Q. But again, it's addressed to the Department for the attention of Mr. Brennan. And it reads:

"Dear Sirs,

"We refer to our recent discussions with Mr. Denis

O'Brien on behalf of the Consortium in relation to

their proposal for the second cellular mobile

telephone licence (the licence).

"We have reviewed" and I'll read the typewritten

version "We have reviewed the information

memorandum, the memorandum prepared by the Consortium.

We confirm that we have agreed with Mr. O'Brien, on

behalf of the Consortium, to place the 60% of the

equity in the Consortium not held by Telenor with

Irish investors. Our commitment under this facility

will be for  $\text{€}1231$  million of equity finance, giving the

Consortium total committed equity finance in excess of

$\text{€}1250$  million.

"We do not foresee any additional need for equity.

However, we are confident that if such equity is

required, we will not have a difficulty in arranging

it."

And now, I'm just trying to just look at some of

the handwritten note. Could I just you received

this document in this form with handwritten notes on

it?

A. No, I am not sure whether I did or not.

Q. That's what I want to be clear about, and I want to be fair to you, Mr. O'Connell, because we, I think, got these particular documents from the IIU files?

A. Right. What could have happened is that the documents came in from Michael Walsh to my office, and someone in my office, either a member of staff in my firm or at a meeting in my office to look at the documents, somebody marked them up with suggested amendments before sending them back, or with the intention of sending them back to Michael Walsh. The amendments made, look to me, the sort of amendments that might have been made from a Communicorp perspective. So I am speculating now but that could be Gerry Halpenny, it could be Denis O'Brien, it could be I don't know.

Q. I just want to be and from your point of view, the documents, in the form that we have them here, were taken from IIU files?

A. Right.

Q. You don't believe that you would have received them in the form we have them here, with handwritten notes on them?

A. I can't be certain, but I think it's unlikely.

Q. We'll just deal with that. It's unlikely?

A. Yes.

Q. And it's possible, it's just possible that somebody in your office made certain amendments, or Mr. O'Brien made certain amendments, and they were sent back to Michael Walsh?

A. Yes. And certainly I made one of the amendments, which is the word

Q. I can see that. That's just a purely formal type of alteration there, isn't it? Because just looking at the handwritten note, particularly if you go to the bottom of the page, where it says: "We refer to the presentation made by the company to the Department by the Consortium to the Department last week. During the course of the presentation there was detailed discussion in relation to the availability of equity in relation to their proposal of equity finance from Communicorp and a number of" I can't make out the other words?

A. "Institutions".

Q. "Institutions". Now, you weren't present at the presentation?

A. No.

Q. And nobody from your office was present at the presentation?

A. Correct.

Q. So nobody from your office. So, if such an amendment was made by somebody in your office, it would have to be as a result of receiving instructions or

information about what occurred at the bid?

A. Yes.

Q. Sorry, at the presentation. Now, the other document which you refer to at this stage is a letter which is a draft proposed to be signed by Mr. Michael Walsh on behalf of IIU, addressed to Mr. O'Brien of Esat in his capacity as Chairman of Esat Digifone, or whatever particular role he had in Esat Digifone. And again, I think can we take it that the amendments in handwriting of "Digifone" were made by you; they seem to be in your handwriting?

A. I think the second one was, but the first one wasn't.

Q. I see, fair enough. And it reads:

"Dear Denis,

"I am writing to confirm the basis of our agreement with the Consortium as consideration for us issuing the attached letter to the Department of Transport, Energy and Communications.

"1. The total maximum commitment under the underwriting and placing will be  $\text{€}1\frac{1}{2}$ 32 million, and will be for the 60% of the equity not held by Telenor in the Consortium.

"2. The Consortium will pay a fee of 1% of the commitment to IIU Limited.

"3. All shares will be subscribed for on the same basis by all members of the Consortium.

"4. IIU Limited or its nominees will retain 30% of

the equity of the Consortium.

"5. IIU Limited will have security over the 30% intended to be placed with Communicorp Group Limited. In the event that Communicorp Group Limited does not subscribe to the 30%, then IIU Limited will be entitled to place these shares with any other party.

"Please sign the enclosed copy of this letter in confirmation of your acceptance of the terms of this placing and the underwriting agreement, and in confirmation of the Consortium's undertaking to use IIU as its underwriting agent."

There are a there are three asterisks, and there is a circle around the 30%, and then there is a tick crossed and appears to be scribbled out. I know it's very hard when you are looking at those.

A. I can see them.

Q. Can you assist the Tribunal as to whose notes these are?

A. I am afraid I have no idea.

Q. Now, if I might continue with your memorandum, so, for a moment.

It says, that it is your belief from the documents available to you, and already furnished to the Tribunal, rather than direct recollection; that discussions between Mr. O'Brien and Mr. Walsh continued on and after the 20th September, 1995,

concerning the terms on which IIU would participate in the Consortium, as to the percentage fee and other matters. The percentage of the Consortium which IIU would acquire appeared to be falling from 30%, originally proposed, to 20% or 25%. You believe that at some point in this period IIU introduced Bottin International Investment Limited as the company which would hold its interest in the Consortium, although as matters transpired, this did not occur.

Again, just to be clear here; you were not involved in these negotiations between Mr. O'Brien and IIU?

A. To the best of my recollection. I had some involvement, in the sense that I would receive calls from one or other of them, and I think I was involved in preparing some documents or reviewing documents prepared by Gerry Halpenny through that period. It was a nine-day period. So I had some involvement.

Q. But can I take it, that your involvement was to give effect to what was being agreed or had been agreed between IIU, through Mr. Walsh, it would appear, and Mr. O'Brien on behalf of the Consortium, or whatever that situation

A. Yes, I wasn't a principal.

Q. Now, you have informed the Tribunal that discussions reflected in drafts and redrafts of a letter agreement between IIU and Esat Digifone, the company which would acquire the licence, continued for a number of days,

until, on the 28th September, 1995, a draft agreement settled with IIU was sent by Mr. Gerry Halpenny of William Fry's to Mr. Simonsen of Telenor for his approval.

On the 2nd October, 1995, Telenor accepted IIU's participation on the basis stated in the draft agreement. It is your general recollection that Telenor had been unhappy at the perceived financial instability of Esat Group, and wished to have a binding commitment of support from a substantial third party. Telenor wrote a letter to IIU on the 12th October welcoming IIU to the Consortium and inquiring about Bottin International Investment Limited. And that is Document No. 3.

A. Yes.

Q. If we just look at that document for a moment. And it's addressed to Mr. O'Brien. And it reads: "Dear Denis,  
"Referring to our meeting on Friday last, and our following phone conversations and my conversation with John Callaghan, I will take this opportunity to elaborate on Telenor's view on our equity participation in Esat Digifone Limited.

"Telenor was invited to participate on an equal term basis (as stated in our joint venture agreement), and all work has been carried out on this basis. Our draft Shareholders' Agreement clearly lines out how a

pro rata reduction of ownership will take place down to 34% ownership each.

"Telenor has put substantial financial and human resources, including some of our best mobile expertise, in preparing the bid, as well as conducting the necessary follow-up work. Site work has explicitly been kept apart from our cooperation, as stated in the said JV agreement. All other bid costs were to be split on an equal basis (including a possible trade-off between advertising costs and Telenor Mobil staff costs).

"At an early stage of our collaboration, we made our concern clear regarding Communicorp's ability to fund Esat Digifone. After considerable pressure, Advent's comfort letter and your own acceptance letter was presented to us and the Ministry. Even though the contents of these letters were not very satisfactory, we decided to submit the bid due to the time constraints.

"It was quite clear from our meeting with the Ministry, that both the lack of commitment from the institutions, as well as the uncertainty in the Advent/Communicorp relationship, created a lack of confidence in the Irish side, of the Consortium's capacity to raise the necessary funding.

"In order to reassure the Ministry and give an even stronger signal to the Irish community in general, we

are pleased with the plan to have another solid Irish underwriter.

"Apparently this requires us to accept a dilution of about 5% in total. For Telenor, it is definitely very hard to give up ownership stake at all on the basis of supporting Communicorp's and the Irish institutions' capability to raise the necessary funding. But on the basis of the JV, and draft Shareholders' Agreement, we feel obliged and accept a pro rata dilution to 37.5%.

Any further dilution would be in conflict with the principles of our participation and the Board resolution of Telenor AS.

"Having said this, we still believe in the compatibility in our partnership. We sincerely appreciate the efforts you have put in, both on actual groundwork on sites, distribution and bid work, as well as your tremendous efforts in PR and lobbying.

However, we believe that Telenor's substantial efforts, mobile operation experience and reputation is equally vital for both winning of the licence and establishing the network within the promised time-frame.

"You have indicated to me that bid costs are running much higher than anticipated when entering into the JV agreement. We believe that Telenor, based on the agreement, will absorb its equitable share of these costs. If, however, you feel that Communicorp, for

some reason, is not fully compensated, we are willing to discuss this problem in further detail.

"I, once again, want to thank you personally for the tremendous effort you and Communicorp have put in place to help Esat Digifone win the license. I will also assure you that the whole Telenor team has enjoyed working with you all and promise support in any way that we can as the race moves into the finals.

"Looking forward to our common success.

"I remain yours sincerely

Arve Johansen, chairman of Telenor Investment AS"?

A. I should say, there is an error in my memo. That document is a letter of the 2nd October, 1995, referred to in the beginning of the paragraph, not the letter of 12 October referred at the end, although there was such a letter of 12 October.

Q. Now, I think your memorandum then continues: From early November 1995 to mid-May 1996 detailed negotiations involving Telenor, IIU and Esat were conducted with a view to settling a Shareholders' Agreement and Articles of Association governing Esat Digifone Limited. These negotiations were mainly conducted for Esat by Mr. Gerry Halpenny of William Frys. It is your understanding that Mr. Halpenny has submitted a narrative to the Tribunal based on his recollection of these matters and a review by him of your files. You understand it also to be the case

that relevant extracts from your files have been furnished to the Tribunal through Messrs. McCann Fitzgerald, solicitors.

You are aware that one of the issues in the Shareholders' Agreement negotiations was whether IIU would hold 25% or 20% of Esat Digifone, and one of the issues relevant to this matter was the statement made at the time of Esat Digifone's bid for the licence, that each of Esat and Telenor would hold 40% of the Consortium. You became involved in January 1996 in this issue, among a number of other key points which had arisen from the Shareholders' Agreement discussions.

Another possibility raised in the Shareholders' Agreement discussion was that IIU might place all of its interest in Esat Digifone with Esat and Telenor, either equally or with Esat having a slight majority, rather than with institutional and private investors, as originally intended by IIU. You believe this arose because Esat was, at that time, seeking to raise funds in the US market. It had been advised by Credit Suisse First Boston that its task in raising the funds would be easier if Esat could consolidate the accounts of Esat Digifone with its own. It was initially thought that this would require Esat to have more than 50% of Esat Digifone, but it was subsequently determined that it could be done with the holding of

exactly 50%. However, IIU were reluctant to sell all of their shares in Esat Digifone, and Telenor were reluctant to allow Esat acquire a greater shareholding than Telenor. These issues remained under discussion, but unresolved, through March and April into May 1996.

They were among many other issues being negotiated among Mr. Halpenny, Mr. Moran of Matheson Ormsby Prentice representing Telenor, and Mr. O'Byrne of William Frys representing IIU.

On the 17th April, 1996, you wrote to Ms. Regina Finn at the Department, setting out the ownership of Esat Digifone. And this is Document No. 4. And you say in your memorandum, before we open the document, that at this time it was still the case that IIU were expected to have 25% of Esat Digifone, and that IIU would sell on most of its shares to private and institutional investors.

We'll just look at the letter of the 17th April from you to Ms. Finn. And it reads: "Dear Regina, "I refer to our telephone conversation of yesterday regarding the ownership of Esat Digifone Limited and of Esat Telecommunications Holdings Limited. The position is as follows:

"Esat Digifone Limited:

"There are 3 million ordinary shares of £1 each in issue in this company. They are held as to 1,125,000 shares by each of Esat Telecommunications Holdings

Limited and Telenor Invest AS, and as to 75,000 (sic)

shares by IIU Nominees Limited.

"It is intended"

A. That's 750,000.

Q. I beg your pardon, you are right, 750,000.

"It is intended that by the time notification is received from you that the second GSM licence is available for issue, the issued share capital will have increased by 15 million to i.e. 18 million."

This, of course, is to take into account the licence fee itself?

A. Yes.

Q. "All comprising shares of i.e. 1 each held as to 6,750,000 by each of Esat Telecommunications Holdings Limited and Telenor Invest AS, and as to 4,500,000 by IIU Nominees Limited.

"The 25% of Esat Digifone Limited held by IIU Nominees Limited effectively represents the institutional and investor shareholding referred to in Esat Digifone's bid for the licence. You will recall that this referred to an immediate institutional/investor holding of 20%, with a further 12% in short and medium-term stages. Of the anticipated 12%, 5% has been pre-placed with IIU Nominees Limited. It is understood that most or all of the shares held by IIU Nominees Limited will in due course be disposed of by it, probably to private and institutional investors.

"Esat Telecommunications Limited:

"This company is owned (either directly or indirectly) as to approximately 57% of its issued share capital by Denis O'Brien, and as to approximately 31% thereof by a group of investment funds managed and controlled by Advent International. The remaining 12% is owned (again directly or indirectly) by a number of individuals (including Denis O'Brien) who are primarily present or former directors, employees, advisers or shareholders in Esat Telecom Limited.

(These percentages assume the full conversion of all existing issued convertible debentures in the company, i.e. they are expressed on a fully diluted basis).

"A placing of shares is near to completion in the United States, whereby the effective ownership of Esat Telecommunications Holdings Limited will be altered by the subscription for a substantial number of shares by a number of US financial institutions. The US institutions are likely to hold approximately one-third of Esat Telecommunications Holdings Limited after the placing (although Mr. O'Brien will retain a majority of voting shares). In addition, Advent International may increase its holding somewhat by participating in the placing.

"Other Group Companies:

"You asked me about a number of other companies of which you were aware, including Esat GSM Holdings

Limited and Communicorp Group Limited. While these companies remain in being and are within the overall group structure, they will not have a direct role in the licence.

"I believe that the foregoing accurately summarises the effective and beneficial shareholdings of the parties concerned, although the full shareholding structure is somewhat more complex than outlined and, as I told you on the telephone, many of the effective shareholdings are held indirectly through other companies. If you wish, a full briefing can be given as to the exact shareholdings of all parties in and through all companies, but I am not sure that this will serve any productive purpose. Please contact me if you would like such a briefing.

"At the risk of labouring the point, I must reiterate the anxiety of Esat Digifone to procure a grant of the second GSM licence as soon as possible, since significant damage to its plans and prospects is already being incurred and could largely be avoided by grant of the licence.

"I look forward to hearing from you."

Now, I think you then continue in your memorandum, that at the end of April 1996 you learned from Knut Digerud, of Telenor, and the Department, that a problem reconciling the original bid that the Department had a problem reconciling the original bid

with the actual position today, and wished to have a full understanding of Esat Digifone's ownership, and to be sure that financing was in place.

It is your recollection that this caused the shareholders to concentrate on the issue of IIU's shareholding. On the 1st May, 1996, Martin Brennan of the Department wrote to you seeking confirmation of Esat Digifone's ownership and financing. And that's Document No. 5.

"Dear Mr. O'Connell,

"I refer to your letter dated 17 April, 1996, concerning the restructuring of certain ownership interests in Esat Digifone.

"In accordance with the requirements of the GSM competition documentation, Esat Digifone provided ownership details which indicated that at licence award the ownership would be as follows:

Communicorp Group Limited - 40%; Telenor Invest AS - 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. In the case of Communicorp, it was indicated that it was 66% owned by an Irish investor (Mr. Denis O'Brien) and 34% by Advent International.

"In view of the information contained in your letter of the 17 April, 1996, it would be appreciated if the following could be clarified:

The nature of any difference between Communicorp Limited and Esat Telecommunications Holdings Limited in relation, in particular, to expertise or asset strength and

Full details of the ownership and categories of all shares of Esat Telecommunications Holdings Limited, including, in particular, by persons other than the owners of Communicorp.

"It is essential that the Department can identify precisely any change in the effective ownership (both direct and indirect) of Esat Digifone since the time of submission of the application.

"Finally, it would be appreciated if you could confirm that full certification of the following matters will be provided before the award of the licence:

" The precise equity ownership of Esat Digifone, including the identity of all institutional investors.

" The identity and financial commitments of providers 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 am available for any discussion you may require of

the foregoing."

And it is signed Martin Brennan.

In response to the financing query, a letter was provided on the 2nd May, 1996, by ABN-AMRO Bank and AIB plc confirming their willingness to provide finance.

And that's Document No. 6.

And that deals with the question of corporate debt financing, isn't that correct?

A. Yes. To Esat Digifone.

Q. To Esat Digifone. For the moment I don't think we need to open that letter.

You say that on the 3rd May you attended a meeting with Mr. Digerud, Mr. O'Donoghue, Mr. Johansen, Mr. Walsh and Mr. Connolly, at which the Department's requirements as to ownership and financing were spelled out in detail. And you refer to Document No. 7.

Now, this document is reconstituted, Mr. O'Connell.

Again, if there is any inaccuracies in the reconstitution, please feel free...

Again, it's an attendance of yours. And it relates to Esat Digifone, and the licence negotiations. And you noted that: "KD, DOB, Arve Johansen, Michael Walsh, Paul Connolly, Owen O'Connell at Department of Commerce. Martin Brennan, Fintan Towey, Regina Finn" and then there is some unknown word, I don't think

anything

A. I think there is two corrections there, Mr. Coughlan.

I think the second initials are POD, for "Peter" or

"Donoghue", rather than DOB. And the unknown word is

"Eanna", E-A-N-N-A, for Eanna O'Conghaile of the

Department.

Q. That's correct. Eanna O'Conghaile, that's grand.

Then there is a note: "Clear a political football."

"Identity of each shareholder's legal + beneficial  
ownership.

Esat Digifone changes relative to bid.

Change in institutional investment replacement of

Advent + Davys by IIU.

Need detailed information/quality/about IIU.

Confirmation that Telenor is same as of" and

there's an unknown word

A. That's "bid date."

Q. Very good. Thank you.

"Difference (in detail) as to expertise plus asset

strength between Communicorp and Esat

Telecommunications Holdings.

Numbers re IIU.

Telenor 'Backdrop' statement is as operator" "as

last resort.

AJ" I presume that's a reference to, you are noting

something Mr. Johansen said?

A. Arve Johansen, that's correct.

Q. "That's the way we see it anyway. We'll never abandon this one.'

Not requesting statement, but would be helpful per Martin Brennan."

I think you are there recording something Mr. Brennan is saying, would that be correct?

A. Yes.

Q. "Project finance POD" it's obviously giving information there, would that be correct? "Bank 60%/equity 40." So it's debt equity 60/40 ratio?

A. I think I noted that the wrong way around, in fact.

Q. I think you are right.

A. Throughout all other documents it was 40/60. I think just as I was making the note I put

Q. I don't think anything much turns on it. It's in accordance with what is being presented at the presentation and in the documents.

"ABN + AIB appointed co-providers." That's of the debt financing?

A. Yes.

Q. "25 million bridging committed." That was already committed.

"Thought to presentation. More the better, provided agreed in advance."

A. I am saying the more information there is, the better, provided the information has been agreed in advance.

Q. Is that your own note would that be a note of your

own thoughts or your own views do you think?

A. No, that

Q. Or was somebody saying something?

A. Probably Martin Brennan.

Q. Right. "Donal Buggy plus Billy Riordan, maybe

Andersen." This looks as if it's going to be some

sort of looking at finances, the personnel involved

there?

A. Yes.

Q. Again, would that be somebody indicating to you who

might be looking at it?

A. Yes, I think so.

Q. Probably Martin Brennan or

A. Probably Martin Brennan or Fintan Towey or Regina

Finn.

Q. "Better than 50% chance that Commission will send us

Persona complaint; Department would already have

replied, plus would like us to coordinate response.

When Telenor and Esat began to talk?"

Again, are you recording something being imparted to

you? It looks like that?

A. I am in the penultimate paragraph, but in the final

paragraph I think I am recording a question to us as

to when Telenor and Esat first began to talk. And

that has some relevance to the Persona complaint.

They are asking me because it has relevance to the

Persona complaint.

Q. When did Esat and Telenor start talking?

A. Yes.

Q. But again, what you are recording is a request for information?

A. Yes.

Q. Now, I will be coming back in due course, Mr. O'Connell, to this meeting of the 3rd, and just off the top of my head at the moment but I'll just let you know any other documents which I'd like you to consider but just off the top of my head I think there is a memorandum of Mr. Arve Johansen which relates to that particular meeting?

A. All right.

Q. I won't ask you about it today or anything like that, if you just bear that in mind.

A. Okay.

Q. Now, I think you say that on the 7th May, 1996, IIU confirms that it was 100% beneficially owned by Mr. Dermot Desmond. And that's Document No. 8. And that's just a short document stating that. So I don't think we need to spend too much time. In fact, it's certification from the company secretary of IIU I think, isn't that correct?

A. Yes. And it gives directors.

Q. It gives directors. Yes, just on that point, because it will arise at some stage. It is on IIU headed notepaper. And it gives the name of the

directors/partners at the bottom, is that correct,

of

A. Yes.

Q. Now, I think you then inform the Tribunal that on the

7th May, 1996, you received a telephone call from

Mr. Fintan Towey of the Department saying that his

Minister had a very strong preference that Esat

Digifone would be owned in the proportions 40:40:20 by

Esat, Telenor and IIU at the time the licence was

granted, but that he understood the need for

flexibility afterwards. And I think you made a note

of that telephone conversation, is that correct?

A. Yes.

Q. And that's Document No. 9. You record that it's a

phone call you received from Mr. Fintan Towey, and

your note says: "Minister very strong preference for

40:40:20 at time of licence, but understands need for

flexibility afterwards. Will take Esat Holdings

subject to no substantive difference, but (sic)

outline in writing."

A. I think that's " and outline in writing."

Q. Sorry, "and outline in writing."

Now, can I take it, as far as you were concerned, this

was the first notification or indication to you that

the Minister wanted the split to be 40:40:20?

A. Yes. In fact, approximately a week earlier, I think

it was on the 29th, I had met 29th April I had

met Fintan Towey, and he had told me that, what he referred to as his "legal people", whom I now understand to have been the Attorney General's Office, had some concerns about ownership issues and the percentage shareholdings. He told me, I think, that he didn't know whether there was any difficulty or problem or whether there was anything that he would want done differently, but he would let me know. And I think this was him letting me know that he did want something done.

Q. I think Mr. Towey gave that evidence, of having such a conversation?

A. Yes, and a note of it as well.

CHAIRMAN: I think in your own evidence, Mr. O'Connell, you'd internally noted it as a potentially problem, because the bid had referred to 40:40:20?

A. Yes, Chairman.

CHAIRMAN: And the initial negotiations had focused on Mr. Desmond seeking 30% ?

A. Yes, Chairman, that's correct.

Q. MR. COUGHLAN: But this was the first, what we call, notification/indication of the requirement of the Minister at this stage?

A. It was certainly the notification. Whether it was the first indication, I think we'd have had straws in the wind. There was a very heavy degree of press comment

at this time as well.

Q. I think your memorandum then continues: Although you have no specific recollection of the point at which it was accepted or agreed that IIU's shareholding would reduce to 20% by the 12th May, 1996, you were engaged in a meeting at which terms and mechanisms for the reduction were being discussed. Is that correct?

A. Yes.

Q. Again, can I take it that you were not a participant in that particular discussion which was taking place between Esat, IIU and Telenor, or were you?

A. I think I was present. On the day I am referring to there, I think I was present for a lot of it; I took notes.

Q. What was your purpose of being present? Was it to give effect to any agreement?

A. Probably, yes, yeah.

Q. And you refer to Document No. 10, which is your attendance at that meeting, is that correct?

A. Yes.

Q. And I think it was at your offices, isn't that correct?

A. Yes.

Q. And present were Neville O'Byrne, is that right?

A. Yes.

Q. Michael Walsh, that would have been on behalf of IIU. Arve Johansen, was that Rolf Busch who was

A. Rolf Busch, I think, yes.

Q. And

A. Arthur Moran.

Q. Arthur Moran on behalf of Telenor, I presume. And then there is you?

A. Yes.

Q. And Gerry Halpenny, is that correct?

A. Yes, although, in fact, others show up later in the memo. I may not have got everyone.

Q. At the beginning, anyway, that's whom you noted as being present?

A. Yes.

Q. And you note: "Need to increase authorised capital; to verify issued capital.

"Transfer of capital for 15 million

joint statement.

"Check Board minutes re 3 million.

Increase authorised capital and bonus share premium

account.

"Execute 2 and transfer IIU." That's the 2, 2 and a

half percent you are talking about?

A. Yes.

Q. "To Telenor and IIU to Esat Telecom Holdings.

"Ensure Communicorp Esat Telecom Holdings, Esat Digifone.

Communicorp security to IIU re 2 and a half percent purchase price.

Documentation re Communicorp's obligation to IIU or Telenor regarding the 6 million depending on underwriting or bridge." So that's to "Shareholders' Agreement - placement memorandum."

If I just go back over that for a moment.

The meeting seemed to be concerned, first of all, with the 1/215 million for the licence, isn't that correct?

A. Yes.

Q. Transfer of capital for 1/215 million, that had to be put

A. That was the gathering in

Q. That had to be gathered in. "Joint statement", I don't know what

A. I am not sure, possibly some form of agreed press release to go out at the time the licence was signed, but I couldn't be sure.

Q. And then you had to check the Board minutes about the first 3 million, is that correct?

A. Yes, to be sure that it was properly recorded.

Q. "Increase the authorised capital and bonus share premium," very good. And then execute the transfer of the 2 and a half percent each to Telenor and Esat from IIU, isn't that correct?

A. Yes. This is a list of things that had to be done with the licence grant imminent, practical matters mainly.

Q. Yes. "Ensure Communicorp, Esat Telecom Holdings, Esat

Digifone" I don't know particularly

A. This was a point, that the Department, as well as being concerned about IIU's 25%, had a concern that the, call it the Esat party wasn't Communicorp as it had been in the bid, but was to be Esat Telecom Holdings, and I think we saw in the previous document Fintan Towey saying that they would accept that the Department, that is, would accept Esat Holdings being the shareholder rather than Communicorp, and this is just me ensuring that whatever shareholding Communicorp might still have had in Esat Digifone, had gone into Esat Telecom Holdings at the time of the licence.

Q. It was a tidying up operation?

A. Yes, housekeeping.

Q. Then, "Communicorp security to IIU re 2 and a half percent purchase price." I presume it's 2 and a half percent?

A. Yes.

Q. That's a note of that. Can I take it that that was Communicorp weren't in a position to pay for the 2 and a half percent at that stage and had to provide some form of security, is that correct?

A. That's correct, yes.

Q. "Documentation re Communicorp's obligation IIU or Telenor regarding the 6 million." That is again Communicorp didn't have the money to pay for the

licence at that time and money was a scheme was going to be worked out whereby both IIU and Telenor were going to advance monies, isn't that correct?

A. Yes. And that did occur.

Q. That did occur?

A. Yes.

Q. And that was a question of securing that in some way?

A. And I think the reference to "depending on underwriting or bridge" meant that, I guess, there was a possibility that the 6 million would be borrowed from a bank and guaranteed by Telenor and/or IIU, or instead would be provided on a bridging basis directly by them.

Q. And we continue over. "Subordinated loans by Telenor 40%, plus IIU 60%, with conversion after 4 months to an instrument carrying effective value of shares but not votes or 50/50 per Neville O'Byrne on behalf of IIU." I don't know what that particularly another way of funding perhaps?

A. I think that's the 6 million, as to how it would be done.

Q. Just because you're, perhaps, in a better position to assist the Tribunal on some of these technical matters, having been present at it, that what was the what does it mean?

A. I think it means that Telenor and IIU were going to advance the 6 million to, whether it was Communicorp

or Esat Telecom Holdings, one of the Esat companies, as subordinated loans, so that the ordinary and secured creditors of the Esat company wouldn't be affected by them as to the quality of their security; that if the Esat company hadn't paid back the money within the four months, then an arrangement would be put in place whereby the debt instrument would effectively carry in favour of the holder the value which would be attributable to that proportion, or certain proportion of Esat Digifone shareholdings. Effectively, they could convert the debt.

Q. They will get the shares, but not the votes?

A. They will get the value of the shares.

Q. The value of the shares, but not the votes?

A. I think that's what that meant. I think the 30/50 is Neville O'Byrne querying on behalf of IIU whether it would be 40/60 or 50/50.

Q. I understand. The next matter then is the 2 by 2, that's the 2 by 2 and a half percent which in effect should be sold, "to be paid end of month, Neville O'Byrne agreement.

"Dermot Desmond/ will consider placing a further" something

A. That should have been 10.

Q. "10% after licence, offering equally to Communicorp and Telenor." That would bring it to 45:45:10. "But no formal agreement to do this."

A. Yes.

Q. Then, "DOB." Is that DOB or NOB?

A. That's DOB, Denis O'Brien. He has clearly arrived.

Q. He must have arrived at the meeting?

A. Yes.

Q. "2 and a half, also wants 4 months"?

A. Meaning that instead of paying at the end of the month he wanted four months to pay.

Q. "Funding of 15 million, okay, want to see specific terms. Should be per underwriting, i.e. 60:40."

Since he is happy with the discussion that's taking place on the arrangement for the repayment of the money being advanced for the purchase of the licence?

A. Yes, and he wanted IIU to provide 60% of the 6 million, and Telenor 40%.

Q. Yes, he wanted per the underwriting, as opposed to their proportionate shareholding in the company?

A. Yes, or 50/50 or the other proportion.

Q. Just on that, I think it ultimately was done in a different way, but it was done in terms of their proportionate shareholding, isn't that right?

A. There is an agreement later on, I can't remember offhand, but there certainly is a document.

Q. We'll come to it.

"Still wants 50% + commitment from DD 2 all of 10%."

This is where he wanted all of the 10%, where that

Dermot Desmond had indicated he might be prepared to

dispose of after the issue of the licence?

A. Yes, this is where he is saying he wants to go to 50% of Esat Digifone so as to consolidate its results for the CSFB financing.

Q. "If all of this not agreed, could not go forward on licence, Monday, Tuesday, Wednesday. Would wish to await funding (due 20 May)."

That is that the funding being raised in the United States wouldn't be due until the 20th May, is that correct?

A. Yes.

Q. Or thereabouts?

A. Yes, that was probably that was optimistic.

Q. So the position, just to try and understand what was happening here; Mr. O'Brien wanted the he wanted four months to pay back the 2 and a half percent, the cost of the 2 and a half percent of the shares?

A. Yes.

Q. He was happy enough with the  $\frac{1}{2}$ 15 million in relation to the licence, but had indicated it should be per the underwriting; that is IIU should be taking up 60% rather than Telenor?

A. Yes.

Q. And he still wanted to have 50% of the shareholding in Esat Digifone?

A. I think by his reference to a commitment from Dermot Desmond, what he is getting at here is he wants a

commitment from Dermot that he can go to 50%. I don't think he is saying that he wants it right then and there pre licence.

Q. I think it would be in the context of the disposal of 10% after the licence would be issued, but he wanted 50%. And I think you are recording there, or are you, something Mr. O'Brien is saying, that if all of this not agreed, could not go forward on licence?

A. Yes.

Q. Right. And he is still then you are recording him as indicating, they still wished the matter to hold off until his fundraising in the United States efforts in the United States bore fruit"?

A. Yes.

Q. Then we continue over the note, "Michael Walsh discussion Denis O'Brien." Is that correct?

A. Yes, that probably means there was some kind of a separate meeting between the two of them outside the room.

Q. "Telenor not willing re 50 unless they also 50. IIU not willing to release this."

So Telenor was saying if Mr. O'Brien's side are getting 50, we want 50. We won't agree to anything unless we are the same?

A. Yes.

Q. And what does the note, "IIU not willing to release this"

A. It means they weren't willing, effectively, to sell all their shares, which is what they would have had to do to give both Telenor and Esat 50%.

Q. Then it seems that you are recording that the terms of above were repeated again, that is that, is it, that Mr. Desmond might be willing to dispose of 10%?

A. As is indicated

Q. As indicated previously?

A. Yes, I think so.

Q. "IIU will definitely not go below 10%. Will allow DOB until 30 May to pay for 2 and a half percent." Would that be correct?

A. Yes.

Q. "Money will have to go in from Telenor and IIU. "DOB no longer trusts" there is a word crossed out "trusts Dermot Desmond or Michael Walsh. Will seek injunction block signing of licence." Is this something you are recording Mr. O'Brien saying?

A. Yes, it is. In fact, in the typed version of this the amount is obscured, it's 20 something, it's actually 2 and a half.

Q. I think you are right, it's 2 and a half. Then you record: "DOB response:

"2 and a half/40 straightforward, needs 4 months."

That's 2 and a half percent to bring it up to 40%?

A. Yes, to go from 37 and a half, which he was.

Q. "Next 5% need 4 months to pay"?

A. Yes, I think so.

Q. "Next 5% in writing 45% (also Telenor okay)." So things seem to be easing a little, is that correct?

A. I think he is saying 'All right, if IIU won't go below 10%, we'll leave them at 10%. That still leaves us 10% to deal on and we will deal with that by Esat taking 5% and Telenor taking 5%. And then they will both be on 45

Q. Rather than it being something that Mr. Desmond indicated he'd be prepared to do it, he seemed to be looking for some sort of statement in writing to that effect?

A. Yes. I mean, this is a bargaining process, and he is now modifying his earlier position.

Q. "Option for 5% at fair value within 2 years; can have same to Telenor (like Telenor offer 3 to 5 years, except 2 years.)"

A. I honestly can't remember what the bit in brackets is about.

Q. All right. "All subject to confirmation by CSFB by 3 p.m. tomorrow."

That is the discussions he was having with CSFB about the shareholding which Esat Telecom Holdings had in Digifone, whereby they could incorporate it into their own structure?

A. Yes. CSFB were driving the desire for 50%, and I think he is saying here that, okay, he won't get the

50%, but he will get 2 and a half now, a commitment for another 5, and then an option within a period for the final 5, but he needs to be sure that that's acceptable to CSFB.

Q. Yes. "Replacing requirements by demonstrating potential 5%. IIU to finance 40%"?

A. Sorry, it's all subject to confirmation by CSFB replacing requirements by demonstrating potential to go to 50%.

Q. I understand. Then, "Michael Walsh, will discuss with Dermot Desmond"?

A. Yes.

Q. "4 months will not be acceptable." He is signalling that there immediately, that's Michael Walsh?

A. Yes.

Q. "Did deal, Dermot Desmond last night and"

A. It's "reserve" something, I think. I may have a better copy of this on my file. I am afraid I don't have it here.

Q. All right. Okay.

A. Then it's "DD" something.

Q. Yeah.

A. I suspect it's, Dermot Desmond doesn't deal with people who renege. I think Michael has gone off and spoken to Dermot and he is coming back with Dermot's response and Dermot is saying, 'look, I did a deal with you and I don't do a deal with people who

renege.'

Q. "Is absolutely entrenched. All to be cleared up May, mortgage over shares, right to take them back and sell them." Is that "possibly not sell"?

A. Yes, "possibly not sell shares now, but let Denis come up with money at any time in the next 4 months." This is really, in effect, this is a threat by Dermot, because what he is saying is he wants the whole thing sorted out in May, he is not willing to talk about four months. He wants a mortgage on the shares so that if they are not paid for by the end of May, he can take them and sell them. And then he is saying, if you don't like that, forget about the sale, buy them when you have the money. But he knew perfectly well that Esat had to buy the shares by the time the licence came in. In effect, this is Dermot really being forceful.

Q. Playing hard ball?

A. Yes.

Q. "If Denis wants something in writing he doesn't trust me." What he is saying there is, 'I am giving my word on it'?

A. Yes.

Q. He is not getting anything in writing, and if he doesn't trust me, that's his

A. Yes.

Q. And then there is, "No." I don't know what that or

is that N-O?

A. I am speculating, but I suspect that's Denis replying 'No, it's not good enough. This doesn't do it for me.'

Q. All right. "2 and a half percent both sides on terms agreed last night. Even Denis O'Brien does not trust him"

A. No, "given Denis O'Brien does"

Q. Sorry. " given Denis O'Brien does not trust him, will not undertake to offer 10%. Once Shareholders' Agreement signed will consider 7 and a half percent originally intended offered equally to both sides. No option agreement re any future sale of shares."

This, again, seems to be recording something coming back?

A. I think it's coming back again, yeah.

Q. Is that correct?

A. Yes, I think so.

Q. And then: "Denis O'Brien, Dermot Desmond, following conversation.

"2 and a half percent each re licence.

"31 May, but a request for 14 day grace period."

That is, I take it, a reference to

A. I think your pages are a bit out of sequence.

Q. I beg your pardon?

A. Yes, I think that page is out of sequence. I think if you go onto the next page...

Q. "Overall tone 'incredibly negative'"

A. I think that logically, I couldn't be absolutely certain, but I think that's right.

Q. You are right. "Overall tone "'incredibly negative'.

Reduced 12 and a half percent to 10% to accommodate

people. Offered to get out 3 to 5 years out charging.

Everything offered being used against him." Is that

something that

A. This is still Dermot.

Q. Mr. Dermot Desmond is saying

A. He is complaining that he has facilitated people and

they are just taking it and not giving him credit for

it, they are still looking for more. And I think when

he talks about people he really means Denis.

Q. And what he is talking about here is that he has

already agreed to reduce his 25%, that's 12 and a half

to 10 in each?

A. Yes.

Q. And that he has offered to get out in three to five

years without charging. Would that be to get out of

the company?

A. To sell his shares.

Q. To sell his shares in the company. And he is saying

that everything he has offered is now being used

against him to try and force the pace?

A. Yes.

Q. Then: "Denis O'Brien enormous bridges to rebuild if

he wants to get anything from Dermot Desmond." Is this a note, do you think?

A. This is probably I think most of this is Michael Dermot Desmond certainly wasn't at this meeting. Michael Walsh was. And I think most of what we are reading now is my account of Michael Walsh coming back probably from more than one conversation with Dermot Desmond saying this is what he says.

Q. Yes. And this paragraph here is you recording something, or is it, perhaps, Michael Walsh saying something?

A. It's Michael Walsh saying

Q. "Denis O'Brien enormous bridges to rebuild if he wants to get anything from DD. And Dermot Desmond contactible 15 to 20 minutes. If Denis O'Brien any sense will ring and apologise profusely. Tell DD what he needs and why. Very fast." And he gives the number. We'll take the number down.

And then it would appear that Mr. O'Brien took Mr. Walsh's advice?

A. Yes.

Q. And, "Denis O'Brien to DD following conversation. 2 and a half each re licence." And it seems to be he is looking for 31 May, but a request for 14 days grace period. That's to pay for the 2 and a half?

A. I think it means that Denis has agreed that he will pay by the 31st May, but he has asked for a grace

period.

Q. "Between issue and ten days later, further 10% equally, payment terms to be agreed." That, I take it, is 10% between them?

A. Esat and Telenor, 5 each, which would leave IIU at 10.

Q. Or Mr. Desmond. "Gentleman's agreement. IIU dispose market value." So what they are talking about would be the market value at the time this was being conducted?

A. Yes.

Q. And that should be defined anyway?

A. Yes.

Q. "Sometime after 3 year preemption to apply. No Board meeting."

A. I think that's "NB" it's remember there is a Board meeting tomorrow.

Q. Just on that page, the question of 10 days sorry, between issue and 10 days later, the further 10%, that's, that would mean that both Telenor and Mr. O'Brien's company would be back up to 45%, would it?

A. I think it meant he was willing to offer the, another 10% if they could agree terms.

Q. If they could pay for it?

Yes, but also, it would have been subject to the Department, who obviously

Q. Yes, but this is after issue of licence, of course?

A. Yes. And there was a general assumption that the Department would have no objection to an increase in Esat and Telenor's shareholdings, as opposed to a decrease.

Q. And then I think, "NB: Board meeting tomorrow"?

A. It could be "no Board meeting", I am not certain. It could be either. My writing, I am afraid, isn't clear there.

Q. And then, the note continues: "If DD agrees, so will DOB."

Then, "Telenor what about funding 40%." There was still this problem about Mr. O'Brien's company not having the money to fund the

A. No, I think what that's about is, if you remember early on, Denis O'Brien was trying to have the funding provided 60% by Telenor sorry, 60% by IIU and 40% by Telenor. Not to put too fine a point on it, that's because Denis regarded Dermot as a more friendly lender than Telenor. He wanted to minimise his exposure to Telenor. Telenor personally, I suspect for the same reasons, wanted to have more lent to Denis, partly to give them more leverage over him, I believe, and partly so that any shares which, in the event of default, any shares coming back, a greater number would come back to them as security for the defaulted loan. There is a degree of extrapolation by me in there, but I believe that's the case.

Q. Fair enough. Just you are the one who was there and made this note.

And then there is a note, "DOB will not press point."

Do you know what that's about?

A. It's Telenor saying, how about this disagreement we have on the proportions on which the money will be lent? And Denis is saying he won't press his point in regard to a greater amount being lent by IIU.

Q. Right. Okay. I'll return to your memo now, Mr. O'Connell. And I think you have informed the Tribunal that on the following day, the day after this meeting, on the 13th May, 1996, you met Martin Brennan and Fintan Towey, of the Department with Knut Digerud. The purpose of the meeting appears to have been to clarify the Department's final understanding final outstanding requirements concerning shareholding and financing, as well as documents relative to them. And you, in fact, prepared a minute of that particular meeting, isn't that correct?

A. Yes. I should add, Mr. Coughlan, that I did contemporaneous handwritten notes of the meeting too, which I also have, but didn't enclose with this memorandum. I think you have them, but I can give you further copies.

Q. Now, I take it you prepared this minute when you went back to the office or

A. Yes, the time and date up on the top left-hand corner

would indicate that. That would have been the time it was typed, so it would have been dictated even earlier.

Q. And you say that this minute records a meeting held at 12.30pm on Monday 13th May, 1996, between Knut Digerud, you, Martin Brennan and Fintan Towey, isn't that correct?

A. Yes.

Q. "The meeting was held in Martin Brennan's office at the Department of Transport, Energy and Communications, 44 Kildare Street, Dublin 2. And the subject under discussion was the imminent grant to Esat Digifone Limited of the second GSM licence.

"After an exchange of courtesies, the meeting began with Knut Digerud handing a number of letters to Martin Brennan with copies thereof to Fintan Towey (Copies of the letters in question are enclosed.)"

We'll be coming to that particular letter in due course, because you have furnished a further memorandum.

"Martin Brennan and Fintan Towey scanned the letters, with Martin Brennan noticeably pausing to read closely the letters concerning IIU. He noted that Farrell Grant Sparks were IIU's auditors, and commented that he would like to have known this fact earlier (this was generally taken to be a reference to Greg Sparks' position as Programme Manager to

An Tanaiste, Dick Spring). Martin Brennan then said that he would send the documents to the Department's in-house accountant, and also to an accountant in the Department of Finance, who was awaiting them. He said there may well be requests for further information and/or clarification of the letters, but it was quite likely that more information would be required in relation to IIU, specifically more than a statement that "they have money i.e. what money?"

"There was some general discussion about the purpose and manner of presentation of the letters, all of which was acknowledged by Martin Brennan and Fintan Towey.

"Fintan Towey made the point that the bid had referred to 20% of the company being placed with the "blue-chip institutions" (acknowledging that the institutions in question were not identified). He queried IIU's intentions in regard to placing of its holding. Owen O'Connell replied that IIU was a financial institution and qualified under the bid description, so the placing question should not arise; and that while it might place its shares in future, if queried now on the point by journalists, might reply that recent turmoil over the licence made such a placing unlikely for market reasons, for sometime (stressing that this was not Owen O'Connell's view, but was based on comments made by Michael Walsh)."

So, again, what you're recording here as you having stated, is the views expressed by Mr. Michael Walsh, and they are not your own views about this matter?

A. I am not saying they are or they aren't. I am just recording them as what Michael Walsh has suggested.

Q. Yes, but you are recording there that you are here as a solicitor for the company, isn't that correct?

A. Yes, for Esat Digifone.

Q. Expressing the views of one of the shareholders?

A. As relayed to me.

Q. As relayed to you?

A. Yes.

Q. And you stress that it's not for the note, you are stressing that what you are doing is recording the views of Michael Walsh, isn't that correct?

A. I am not just stressing it in the note. I am saying that at the meeting I said that.

Q. Sorry, yes. Both?

A. Yes.

Q. Both. Just to be clear.

"Fintan Towey said that a new draft of the licence was imminent, and especially that Article 8 thereof would be amended. He said that a new draft of Article 8 had been received late on Friday last, the 10 May, from counsel, and was now with the Parliamentary Draftsman, who wished to shorten it. Martin Brennan added the name of counsel. Martin Brennan said that the thrust

of the new Clause 8 was that all changes of ownership would be subject to Ministerial approval, but that the grounds for objection by the Minister were specified in the clause and had been taken largely from the recent EU directive on mobile personal telecommunications. After a brief discussion between Martin Brennan and Fintan Towey, Fintan Towey left the room to obtain a copy of the latest draft.

"Knut Digerud and Owen O'Connell were permitted to review the draft (which extended to two pages) but not to do so at length or in detail or to take copies.

After this review, Owen O'Connell raised the point that one of the paragraphs referred to Ministerial consent being required for a private placement of shares could be interpreted as requiring such consent for a routine issue of shares consequent on a financing round. The point was also made that the clause should distinguish between existing shareholders (who were presumably acceptable to the Minister, and thus not require comment on acquisition of shares by them), and new third party shareholders.

After some discussion, these points were acknowledged by Martin Brennan and Fintan Towey, who said they would look at the matter further. Apart from this, Knut Digerud and Owen O'Connell indicated that as a very preliminary view, and subject, obviously, to both detailed examination of the clause and discussion with

shareholders and colleagues, there did not seem to be any fundamental difficulty.

"Martin Brennan asked whether the banks named in one of the letters given to him (ABN-AMRO and AIB)" that related to corporate debt financing "would consent to their names being used in an announcement of the granting of the licence.

Having checked the matter with one of his colleagues, Owen O'Connell indicated that the banks would so agree, subject to no statement concerning them being made which was inconsistent with the letter of the 2 May given by them to Martin Brennan, and that any written press release or similar statement which referred to them should be subject to prior clearance with them.

"The meeting moved on to a discussion of events in the immediate future. It was indicated by Martin Brennan and Fintan Towey that they were about to engage in 'feedback meetings,' these being meetings with unsuccessful applicants for the second GSM licence (for the purpose of giving them reasons for their failure to obtain the licence). It was felt that it might be somewhat insensitive to grant the licence while these meetings were underway, and that accordingly the proposed date for grant of the licence was Thursday next, 16 May. Martin Brennan also said that the Department had written to solicitors for the

Persona Consortium informing them of their intention to grant the licence, and that if the Persona Consortium wished to challenge this, they should do so through the courts. However, no response had been received.

"Martin Brennan added the Department's view, that the licence had expired as a live issue for the press, and the Minister and the Department were very anxious not to revive it by injudicious statements being made by anyone at the press conference.

"Martin Brennan said that it was the Minister's wish to announce the grant of the licence at a press conference co-attended by Esat Digifone. Great stress was repeatedly laid on the need to prepare extensively and exhaustively for this press conference, and it was stressed that the journalists present would have been briefed in a hostile way by 'Others' (this clearly being a reference to unsuccessful consortia.)

"Martin Brennan said he wished to have Esat Digifone identify key questions likely to be asked at a press conference, to draft answers to them and to explain to the Department the reasons for those answers. He would also then wish to arrange a meeting between the Minister for Transport, Energy and Communications and Knut Digerud, together with 'one or two others,' at which the progress of the press conference would be discussed/rehearsed.

"Martin Brennan indicated that there had been discussions within the Department as to whether shareholders should participate in the press conference, and if so, to what extent and in what way. At this point, Knut Digerud made a strong point to the effect that Digifone saw itself as an entity independent of its shareholders, that it had premises, employees and funds and a viable business in its own right, and that there were issues likely to be raised at a press conference which would not necessarily be a matter for the company, but rather a matter for its shareholders. Fintan Towey conceded this as a 'fair point' and acknowledged that the company would be at liberty during a press conference to refer questions concerning its ownership to its shareholders. Martin Brennan interjected to say that in such case, the Minister would wish to know what response the shareholders would make when the questions were put to them. Martin Brennan stressed the need to have a number of 'definite, clear and acceptable statements for us at the press conference,' and he outlined a number of 'Obvious questions' as follows:

"A: Is this the same consortium as that which applied?

"B. Can the Denis O'Brien side of the Consortium stand up? (Adding that either Denis O'Brien or Knut

Digerud should answer this question).

"C. Will Telenor support the project to the end? (To this query Martin Brennan added that it was sensitive in nature and it would have to be answered in such a way as not to imply any doubt in the Department as to Communicorp's financial strength).

"Owen O'Connell made the point that within reason (and certainly short of telling any lies) Esat Digifone was willing to be guided by the Department as to the conduct of the press conference and would follow policy lines laid down by the Department; Esat Digifone also expected the Department to have some input as to the answers to the questions to be given by it, i.e. would coordinate such answers with the Department. This was acknowledged by Martin Brennan and Fintan Towey.

"The meeting ended with Martin Brennan reiterating that it was "virtually certain that we would have to get more information on IIU, some numbers."

"The meeting concluded at 1.10pm. Its tone throughout was cordial and it concluded amicably"

and we will come back to discuss this particular meeting, Mr. O'Connell, but just at this stage, if I could ask you about one matter, in fairness to Mr. Towey who has given evidence already about this, and that is where the note, your note, or your memorandum, if you go to the second page, and the third paragraph

"Fintan Towey made the point that the bid had referred to 20% of the company being placed with the "blue-chip institutions" (acknowledging that the institutions in question were not identified)."

Now, we know from the bid document and we know from what happened at presentations that they were identified.

A. Yes.

Q. Could your note of what Mr. Towey said at this meeting be inaccurate in that regard?

A. Obviously it could. I

Q. In fairness to Mr. Towey?

A. I don't claim to be a perfect keeper of records or notes.

Q. Could I approach it this way: you are recording in the first instance there that Mr. Towey referred to the bid, making reference to 20% being placed with blue-chip institutions, or

A. Yes.

Q. That seems to be something Mr. Towey said. Then you put in brackets but not in quotation marks

"acknowledging that the institutions in question were not identified." Could that be a recording of your interpretation rather than something that Mr. Towey said? Could that be

A. Well, if I were to reconstruct this and it is a reconstruction, it's not from direct memory, this

would be probably, and I'm putting a circle around with emphasis on the word "acknowledging" here, rather than saying I suspect what may have happened is that Fintan would have said to me, 'look, the bid, you said you were going to put 25% with blue-chip institutions', this obviously being a reference to IIU being a single institution and arguably not being blue-chip, at least at that stage. I may well have said, 'Well, Fintan, as far as I know, the bid didn't say who the institutions were'. Remember, I wasn't present

Q. You weren't a party to the bid.

A. And there had been a lot of press comment that the institutions hadn't been identified, that nobody knew who was taking this 20%, so I suspect at that time, I still believed that the institutions hadn't been identified in the bid. And Fintan may well have said, 'Yes, that's true.' And I would have recorded that as a point of minor importance to me or significance to me, so I would take the word, my use of the word here "acknowledging" as implying that I had said something with which he had then agreed, rather than he had come out with something of his own volition.

Q. The reason I ask you about it, in fairness to Mr. Towey who had participated in the whole process, had in fact been the secretariat, and he has given evidence about this and I suppose was surprised to see

such a note of something being attributed to him.

Perhaps we can come back, if we need to, about it, but

I just want to highlight it at this stage, in fairness

to Mr. Towey.

A. I understand.

Q. Now, I suppose at this stage you could perhaps assist

the Tribunal; it wouldn't be your normal work practice

when you make an attendance, to type it up, would it?

A. No, not at all. I wouldn't have time normally.

Q. You wouldn't have time. And we all know from seeing

solicitors' practise, they write out their attendance

at meetings, they put it on the file and when you look

at the solicitor's file that's where you find the

written attendance; there may be an occasion where

something is typed up just for clarification. This is

the only typed note in the whole process?

A. Yes.

Q. I mean typed note of a solicitor's attendance.

A. Yes.

Q. Was there a specific reason why you made this minute?

A. I don't know. I have thought about this myself

because I agree, the typed minute is anomalous. The

best explanation I have been able to come up with is

that I attended the meeting under the instructions of,

with and under the instructions of Knut Digerud who

was, or who is quite a punctilious man in my

experience and I suspect he may have asked me when we

left the meeting to provide a typed note.

Q. I see. I see.

Now, I think on the next day I'll just return to your memorandum on the 14th May, 1996, you attended a meeting with Mr. Michael Walsh of IIU and his solicitor Mr. O'Byrne of William Fry, and the meeting addressed a number of core concerns of IIU including its future intentions regarding its shareholding and it was apparently at this time that it was still IIU's desire to place or transfer many of its shares to third parties, and you refer to document number 12, which is another attendance of yours, isn't that correct?

A. Yes, and when I re-read this note I realised that it really all concerns Clause 8 of the licence.

Q. All it's all Clause 8.

A. It seems to me to be entirely IIU explaining and emphasising their problems with Clause 8 of the licence as it then existed.

Q. And just to be clear, Clause 8 of the licence is about the transfer or disposal of shares after licence issue when the company is up and running?

A. Yes.

Q. And if we just look at it just very briefly so. The note reads:

"Ability to block Communicorp's placing.

Ability to block IIU Nominees placing.

Ability to place consequence of IIU underwriting.

DOB commitment." Given that's all referable to Clause 8?

A. I think that's all IIU complaining that the Minister has power under Clause 8 to do all of those things.

Q. "Transfers and issues within group of existing shareholders." That again seems to be recording that the Minister, on one view, might have the power to do all of these things, isn't that correct?

A. Yes.

Q. "5(a) clarification re issues to existing shareholders.

Bottin International." What's that all about?

A. I am not entirely sure. Bottin was to me always something of a puzzle. I never liked Bottin. I always felt that insofar as IIU had given the commitments, one could take a view about IIU as to its creditworthiness and so forth, but it at least was a real entity; it had substance, premises, employees, it traded, dealt in shares, lent money. It was regulated by the Central Bank and so forth. And, therefore, I felt that while unquestionably the quality of its underwriting commitment could be and was questioned, there was equally an argument on the other side which could be made for it. None of those things were really true of Bottin, which was a company nobody knew anything about and was not, as far as I could recall,

an Irish company or as far as I can recall an Irish company.

Q. That's right, it was an offshore company.

A. And I don't think anyone on the Digifone side was very happy with Bottin. I think I had understood by this time that Bottin had gone away and we had had confirmation by now that IIU Nominees held its shares directly for Dermot Desmond.

Q. Right.

A. Now, why Bottin is noted here I think can only be either because I was seeking confirmation that it had gone away or because either Michael Walsh or Neville O'Byrne raised it for some purpose.

Q. Right. Now, we will be dealing with it when we come back to deal with the letter of 29th September and the side letters and Bottin's entry or entrance into the picture.

A. Yes.

Q. But just very briefly, am I correct in understanding that on the 29th September, the agreement that was entered into, that the IIU/Dermot Desmond interest both in terms of benefit and commitments had all been assigned to this company called Bottin?

A. Yes, there is a document.

Q. In broad terms?

A. There is a document you are quite right, there is a document effecting that assignment. I always had a

question in my mind certainly in as to its wisdom, but also as to its effectiveness because the commitments given to third parties were not expressed as having been so assigned.

Q. We'll come back and look at that, but that's how it came into the picture, isn't that right

A. Yes.

Q. back then and I'll deal with Bottin in due course, but here at the moment something is happening, or there is some discussion about Bottin anyway?

A. For some reason, yes.

Q. You don't have any recollection of what was happening here?

A. No.

Q. All right. Then, is that "possible broad problems re US shareholders ability to transfer the shares they acquire." This is again a complaint about the Minister's

A. The point here is that the clause at the time was so far reaching that it didn't just affect transfers of shares in Esat Digifone, it affected shares transfers of shares in any company which, through however many other companies, indirectly held those shares, and the point was being made, correctly I think at the time, and I believe I subsequently made it to the Department as well, that if Esat Telecom placed its shares through CSFB with institutions in

the US, financial institutions or whatever,  
technically the scope of Clause 8 of the licence was  
such that even transfers of shares in those  
institutions was affected. So, for instance, if

Q. It might need the consent of the Minister?

A. Yes, which was a ludicrous situation. So if, for  
instance, JP Morgan took up some shares in Esat, then  
somebody transferring shares in JP Morgan would  
technically need consent. It was ridiculously  
far-reaching.

Q. I understand. Then the note continues, "Pre consent  
letter," is it? "Raise 10% issue with  
Department? discuss Michael Walsh."

A. I am not sure

Q. Is this a reference to the gentleman's agreement about  
the 10%?

A. No, I think no, I think well, the first the  
consent letter I think concerns the letter which we  
did get two days later from the Minister, the side  
letter at the time of the licence being granted in  
which he effectively resolved most of the problems we  
had with Clause 8, and I think that's what the consent  
letter refers to.

The 10% issue with the Department may, yes, have been  
the proposal by IIU to sell 10% back to Esat and  
Telenor.

Q. And would the Minister block this or had he

A. It could be that. I think there was also a proposal floating around at this time that we were looking for an amendment to Clause 8 which could not apply to transfers of 10% or less, and it could be that.

Q. Yes, very good. Then again "Consent re mortgage on 2 1/2% of shares."

A. Same point, that the Minister would have had to consent to it.

Q. "Realisation of investment problems re general marketability."

A. Still the same point.

Q. "Really need: approval intermember transfers and issues as a fundamental; some recognition of basis of IIU's investment i.e. intention to place other shareholders and/or institution

"Recognition that certain direct and indirect shareholders (IIU and US) are different to operational investors and should be subject to a more relaxed regime re disposal to existing shareholders or to new investors of a similar character i.e. financial institutions. IIU will give letter re 10% for US investors. IIU will not offer 10% until Communicorp has money to pay, i.e. will not offer 5% to Telenor unless happy DOB can take up to 5%."

So that final note there is really dealing with

A. That's a different matter.

Q. It's a different matter. It's not Clause 8.

A. No, you are quite right.

Q. It's dealing with the position of this question of the potential sale of 10% after licence issue, 5 and 5, and what they are saying there is if Denis O'Brien can't take up his end of it they won't give it to Telenor either?

A. Yes, I think that's what's being said.

Q. All the rest of the attendance seems to be concerned with Clause 8 either in identifying potential problems and identifying perhaps an approach that might be taken in negotiations to see if Clause 8 could be redrafted in such a way that it meet these type of needs?

A. Yes.

Q. Less than 10% or matters of that nature. Now, just in that context, Mr. O'Connell, the reference to Bottin International is clear in that portion of the attendance, it deals with Clause 8 and the difficulty which might be presented by Clause 8 and the need for consent by the Minister?

A. Yes.

Q. Now, I think there is no doubt about it, Bottin International was not an Irish company, isn't that right; it was an offshore company?

A. I am not absolutely certain, but I think that's correct, yes. I don't recall ever specifically checking it but I always had the sense that it was

offshore.

Q. And of something being indicated to you here that Clause 8, or the Minister's consent, if I can use it, the necessity for the Minister's consent would present a difficulty to the assignment of IIU/Mr. Desmond's interests to Bottin?

A. That's possibly so.

Q. I'll just deal with the final paragraph of this memorandum so, just before lunch, Mr. O'Connell. You say that on the 16th May, 1996, the shareholders agreement was signed. The Articles of Association of Esat Digifone were adopted and the licence was signed. On the same day IIU sold 5% of Esat Digifone to Telenor and Esat as to 2 1/2% each for a total consideration of  $\text{€}2,750,000$ . And you refer to document number 13 there, which is the shareholders agreement, which, at the moment, I won't go through with you unless you want me to open

A. I think it's the Share Purchase Agreement rather than the Shareholders Agreement.

Q. That's right, Share Purchase Agreement.

Perhaps it might be more appropriate to

CHAIRMAN: Well I thought that that's a sensible demarcation point having concluded Mr. O'Connell's long memo. We'll resume, if it's suitable to you, Mr. O'Connell, at five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE HEARING RESUMED AFTER LUNCH AS FOLLOWS:

Q. MR. COUGHLAN: Thank you, Mr. O'Connell. It is Document No. 13, Mr. O'Connell, the Share Purchase Agreement. This is the Share Purchase Agreement between IIU Nominees Limited and Esat Telecom Holdings Limited. I take it there was, probably not similar, but a Shareholders' Agreement, or a Share Purchase Agreement between IIU and Telenor as well?

A. I have a feeling there was.

Q. The difference probably being that Telenor paid for the shares there, and then I presume that particular

A. Yes.

Q. This particular agreement, anyway, was dated the 16th of May, and it is between IIU and Esat Telecom Holdings Limited. And it recites: "Whereas the vendor is the registered owner of a number of shares in the capital of Esat Digifone Limited, as set out in Part I of the first schedule hereto, and have agreed to sell to the Purchaser the shares specified in Part II of the first scheduled hereto (hereinafter referred to as 'the shares'). The Purchaser has agreed to the Vendor to purchase all the shares for the consideration and upon the terms and conditions hereunder set out, and accordingly it has been agreed that these presents shall be entered into:"

And it is agreed:

"1. Sale and purchase: The Vendor agrees as registered owner to sell and the Purchaser agrees to purchase the shares on the completion date (as hereinafter defined) hereof free from all liens, charges and encumbrances and with the benefit of all rights and advantages thereto belonging or accruing to the consideration hereinafter specified."

The consideration is set then at  $\frac{1}{2}$ 1,375,000.

"The completion: The completion of the sale and purchase of the shares should take place on the 16th of May, 1996, the completion date, at the office of the William Fry Solicitors, whereupon the Vendor shall hand to the Purchaser, or as it may direct, to the executed Stock Transfer Forms in respect of all the shares together with the relevant shares certificates."

Then is sets out "Payment of Consideration".

"The Purchaser shall deliver to the Vendor on the 30th May, 1996, a bank draft for the amount of the consideration heretofore specified in respect of the shares.

"Security:

"As security for the Purchaser's obligation to pay the consideration referred to in paragraph 4 above, the Purchaser shall enter into a Deed of Charge in terms agreed prior to the execution hereof between the Vendor and the Purchaser."

There are further assurances.

"The Vendor shall, and shall procure that all necessary third parties shall likewise do, execute and perform all such further deeds, documents and assurances, acts and things as the Purchaser to or after completion may reasonably require to give effect to the terms of this agreement."

And there is "Interest".

"In the event that any sums due by the Purchaser under the terms of this Agreement are not paid on the due date for payment, such sums shall carry interest from such date until actually paid at a rate of 10% per annum, such interest to accrue from day-to-day and to be payable as well after as before any judgement obtained hereunder.

"Captions:

The captions to the clauses of this agreement are inserted for convenience of reference only and shall not be construed as party to give effect to the construction of the agreement."

so, what appears to have occurred here was that an agreement was entered into by Mr. O'Brien's company to purchase two and a half percent of the shares of Esat Digifone from IIU for i;½1,375,000, the completion date was to be the 16th of May, 1996, and there was to be interest of 10% until payment was made. That

A. From the 30th May.

Q. From the 30th May. That's it. And the security yes, "For the purchase obligations to pay the consideration referred to in paragraph 4 above, the purchaser was to enter into a Deed of Charge in terms agreed prior to the execution." So there was, and I take it there was a Deed of Charge?

A. I presume so, yes.

Q. Now, we have heard evidence from witnesses from the Department, and they have stated that they were unaware of this particular transaction. Can you be of any assistance to the Tribunal in that regard or...

A. I don't think so. I wouldn't have any knowledge of the Department's knowledge, but it was certainly they who had instigated it by requiring that the

Q. 40:40:20?

A. the 40:40:20 be in place on the 16th, so I assume they would have I think I wrote to Martin Brennan later this day, I gave him a letter in which I confirmed the position. I would have to double-check that.

Q. I think we will be coming on to deal with that with you in the next memorandum because it deals with that whole period.

A. Yes.

Q. I think yes I think what and you do confirm the position is now 40:40:20, or words to that effect.

We will come to that in due course.

A. Yes.

Q. But to the best of your knowledge, do you know were the Department unaware that Mr. O'Brien, in effect, had to borrow for the purchase of these shares?

A. I don't think they would have been aware or would have asked. I think they wanted confirmation the position was as it was and they got it and that was all they were really interested in.

Q. All right. And to your knowledge, from the evidence we have from the Department, at this stage they were unaware that 2 point, whatever it was, 2.75 million had changed hands to bring the position to 40:40:20?

A. Again, I would accept that evidence. I have no reason to believe otherwise.

Q. Just with reference to this particular transaction and the position of IIU as of this time, I am not going to ask you about it now, but I would ask you to think about it because when I come back to deal with the 29th September of 1995, whether you could assist the Tribunal as to where Bottin was at this stage?

A. Mmm.

Q. I think we can now proceed to your second, not your second Memorandum of Intended Evidence, it is your Memorandum of Intended Evidence dated the 7th October of 2002.

A. Yes.

Q. And we will just deal with that and the documents.

Again, I think we can perhaps skip the first page, the introduction, because you are in fact saying that you are have no specific recollection in relation to all matters and that you are relying for the evidence you intend giving on a perusal of the files in the office?

A. Yes, it is essentially the same qualification as the last one.

Q. Now, then, if we go to the second page under the heading "Background", I think you inform the Tribunal that: "After Esat Digifone won the competition to become the preferred party for negotiating and grant of the licence, I was asked by Esat Digifone to become part of a team which would negotiate the licence. The team included commercial, technical and legal personnel. Mr. Jarlath Burke, the in-house counsel of the Esat Telecom Group, was also involved."

A review was conducted of the draft licence contained in the Department's invitation to participate in the competition, and a long list of proposed amendments was prepared. At a meeting in the Department in November, 1995, it was made clear to Esat Digifone, you think by Mr. Martin Brennan, who was the person in the Department with principal responsibility for the licence, that the licence to be granted would be based primarily on the draft included in the competition documentation. This would be amended to take account of elements of Esat Digifone's bid, which were

relevant thereto, and some statutory and EU provisions which either had come into being since its original publication or had not fully been taken into account in the preparation thereof.

The Department was also willing to entertain proposals from Esat Digifone, and to take them into account in its redrafting exercise if and to the extent that they were useful. However, it was made clear, in very direct terms, that the redrafting process would be conducted by the Department with the assistance of the Office of the Attorney General and would result in the offer in early course of a licence to Esat Digifone.

Esat Digifone would either accept or reject the licence after brief negotiation. In the latter case the Department already had authority to offer the licence to the bidder ranked second in the competition. The basis of the discussions and the Department's intentions with regard thereto were set out in a letter from Martin Brennan to Denis O'Brien on the 13th November, 1995 and that is Document No. 1.

A. Mr. Coughlan, if I might just make a point which has occurred to me in relation to the opening page of the memorandum?

Q. Yes.

A. It is, the letter which Mr. Davis wrote to me, in response to which I prepared this memorandum, only

asked me for an account of the period from the 1st May to the 16th May.

Q. Yes.

A. Now, I decided that I would set the scene by way of this section headed "Background", but I would just like to make the point, that because it wasn't the question I was asked, this part is not particularly comprehensive; whereas from the 1st May I sought to be as comprehensive as possible.

Q. That's fine. We will be coming back to deal with this in the light of other documents, in any event.

A. Fine.

Q. I think this letter from Mr. Brennan reads:

"Re discussion on GSM License.

"Dear Denis,

"As promised at our recent meeting, I wish to convey formally the Department's position in relation to discussions on the award of the licence for GSM mobile communications to Esat Digifone Limited. In this context, and in the paragraphs that follow, the word "licence" should be interpreted to mean all regulatory requirements to be imposed on Esat Digifone Limited by way of statutory instrument, licence or other instrument.

"You are aware that the Government has pronounced that the award of the GSM License is subject to agreement on appropriate terms. In the event that discussions

with Esat Digifone Limited fail to lead to a satisfactory conclusion, the Government has given a clear mandate to open discussions with another of the six applicants.

"I am therefore directed by the Minister to enter into exclusive dialogue with Esat Digifone Limited on a bona fide basis, with the intention of clarifying issues to facilitate speedy progress to formal licence award. I wish to make clear at the outset, however, that no liability shall attach to the Minister or to his agents for any expenses occurred by or on behalf of Esat Digifone Limited based on any assumption made by Esat Digifone Limited regarding the award of the licence or any terms of the licence that might ultimately be awarded.

"The Minister's primary objective for these discussions is to ensure that the licence provided for all the ordinary terms and conditions that are incidental to a mobile service of this kind, with particular regard to requirements of the GSM competition documentation and the commitments contained therein. The Minister also intends that the commitments made by Esat Digifone Limited in its application should similarly be converted into binding conditions. We would welcome any views you may wish to offer, verbally or in writing, but of course, without any commitment. The Minister is the licensor

and retains sole responsibility for the drafting of the licence.

"As I explained yesterday, the GSM licence documentation will necessarily contain specific conditions with regard to your financing arrangements for this project, and in relation to effective control of the future licensee, with particular reference to possible decision-making structures, voting rights etc.. Matters relating to security interception must also be satisfactorily resolved. Further issues, some of which were explored by our consultant, Mr. Michael Andersen, at yesterday's meeting, will also be included in the licence.

"The draft licence which I know is enclosed is essentially the same in content as that contained in the memorandum of the 12th of May, 1995, while representing a similar reorganisation format.

"Please note, that this text has not yet been cleared by our legal advisers, and must therefore be accepted in good faith subject to the caveat on the cover sheet.

"A list of the Ministerial orders, regulations and licences which will cover the operations of the second GSM Licensee is also attached. We will table a more complete draft in due course.

"Finally, I would like to thank you and your team for the initial open exchange of views at yesterday's

meeting and look forward to receiving your views on the enclosed in the near future.

"Yours sincerely" and it is Pped to Martin Brennan.

Now, I think your memorandum then continues, that shortly after this meeting, that was the meeting in November of 1995?

A. Yes.

Q. Esat Digifone submitted extensive proposed amendments to the existing draft licence, including the 25, approximately, legal/regulatory amendments set out in your draft memo on the 17th November, 1995. You have not been able to locate the final version of the memo but you believe the draft enclosed a Document No. 2 to be the final draft or close thereto.

I think the document follows the numbering of the draft licence, I presume, which was

A. Yes, I think so.

Q. which was furnished. I think the document states:

"This document is written in advance of the receipt by Esat Digifone of draft licence and associated statutory instruments and in response to the summary documents received by Esat Digifone from the Department of Transport, Energy and Communications.

"Esat Digifone reiterates its commitment to its application for the second GSM License."

Then it continues in that general form to begin with, isn't that correct?

A. Yes.

Q. Then at paragraph number 1 you indicate, "That for all practical purposes Esat Digifone constitutes Esat Group and Telenor Invest AS.

"It is submitted that the licence should provide that the licensee will continue to be owned as to a majority of its share capital by both of these parties, and that each of them will continue to have a substantial shareholding, defined as more than 10% therein, at least for a period ending no later than the third anniversary of its grant, and the substantial achievement of all coverage commitment in Esat Digifone's application. Therefore, the consent of the Minister should be required only to either party committing its shareholdings to fall below 10%, and the Minister should not be entitled within reason to withhold his consent."

This is a suggestion being put forward by Esat?

A. Yes. Yes. I think it seems very loose now, but it is in the context that the draft licence which was enclosed with the tender documentation had no reference whatever to an ownership condition; in other words, the licence of which the bid was submitted did not refer to ownership or control of ownership at all.

Q. Yes.

A. Indeed on the contrary, the only reference to ownership in that licence was that the licensee had to

operate independently of any parent organisation. So we were coming at the, coming at the concept of a condition as to ownership from a base on which there was to be no condition at all, so we were naturally proposing quite a modest condition.

Q. Yes. Yes. The next paragraph just deals with the question of renewal of the licence to provide an incentive in relation to investment in the high technology.

CHAIRMAN: A large amount of it is technical, that you propose to purport Mr. O'Connell

Q. MR. COUGHLAN: I will. In fact, if we can take it at the moment as being opened, that number 1 is something that I will return to in light of what transpired previously, particularly around the 29th of September of 1995. Very good.

I think your memorandum then continues: "There followed a hiatus in which very little occurred, despite the Department's statement that a draft licence would be available in early course. Esat Digifone was anxious to obtain the licence because without it, it would not be possible to finalise project finance for the construction of its network. Without committed finance, construction could not begin with the results, firstly, that the deadline for roll-out of the network in Esat Digifone's bid might not be met, as indeed turned out to be the case, and,

more critically, Esat Digifone might not be in a position to launch before Christmas 1996.

"The consequence of the latter failure could be serious because a large number of sales of new mobile licences or phones and subscriptions to the network was expected to occur in or about Christmas."

Following representations in early January, 1996, you learnt that the Department was finding the drafting of the licence more difficult than anticipated, and you were given to understand that there were particular delays in the Office of the Attorney General. These representations led to a meeting with the Department, at which verbal responses were given to the points raised in your memo of the 17th November, 1995. Your brief note of the responses are in handwriting in the margins of Document No. 2, and your notes of the meeting are set out in Document No. 3.

Now, we have Document No. 2, and we see your brief handwritten notes, so if we need to come back to any of those, we will in due course. Just Document No. 3, which is just your attendance.

I think you just set out there, "Finding the drafting of the licence more difficult." You then go into the licence; a lot of technical matters, the heads of articles of the licence. And then, Item No. 9 in your attendance, you just make a note: "Ownership - management and operation of service. Ownership not to

be diluted below base amount (not specified - ref  
schedule 1 re licensee) Our comments?" I say that  
your comments were being sought about that, is that  
right?

A. Yes.

Q. "Management and operation - to be managed and operated  
by Esat Digifone"?

A. The next three lines are on the same point,  
Mr. Coughlan.

Q. Yes. I think so, yes. I think, unless you want to  
specifically refer to something at this stage in  
relation to this, most of the rest of the, or all of  
the rest of the note seems to refer to technical  
matters, would I be correct?

A. Yes, I think that is true.

Q. There is just one matter which item number under  
Item No. 24. Do you see that?

A. "Cessation of licence operations."

Q. Yes. Underneath that: "Martin Brennan - exclusivity  
(?) query - not in licence - side letter."

What does "side letter", the reference to side letter  
there mean, Mr. O'Connell?

A. I am not sure, but I think what that was about was, we  
wanted it to be confirmed that there would be no other  
licensee, no other GSM licensee for a period, and  
Martin Brennan was telling us that there would be no  
such commitment in the licence, but there would be a

side letter. I think that is what it is about.

Q. Right.

A. Apart from Eircell, obviously.

Q. Yes. So at that stage, at least, it was your understanding that there was the potential for a commitment, but not in any published way; it wouldn't be in the licence, it wouldn't be in any public document, but it might be given in a side letter; there was nothing firm about this

A. I think the tender provided that there would be no other licensee for five years.

Q. That's correct.

A. Yes.

Q. For five years.

A. I think we were asking how that commitment would be expressed.

Q. Right.

A. So, yes, I think we would have been I don't think we would have been particularly concerned as to how or

Q. I am just trying to understand what was being said to you

A. I think we were

Q. that they weren't prepared to put it upfront, if I can put it that way

A. Yes, I think so.

Q. but were prepared to give it to you in a side

letter, although it had been signalled in the competition?

A. Yes, I suspect it may have been the case that such a commitment wouldn't have been appropriate for a licence which, after all, was a statutory instrument, and might have been more appropriate for a quasi-contractual document such as a side letter.

Q. Yes. Now, you say that on the 22nd March, 1996, a draft licence was sent by the Department to Knut Digerud, the Chief Executive of Esat Digifone.

However, it was expressed to be an indicative draft and had not been cleared by the Department's lawyers.

By this time Esat Digifone regarded itself as being in a position in which it would have to accept almost whatever licence was offered. In April, 1996, there was an exchange of correspondence in which Esat Digifone protested vigorously about the Department's delay in providing the licence and indicated that it regarded itself as being under duress with regard to the acceptance thereof. It was strongly rejected by the Department and led to some cooling of relations.

The draft of Esat Digifone's letter you don't have a final version and a copy of the Department's reply are at Document No. 4.

A. I have since seen the original of that letter and it is.

Q. And the original of this letter has, in fact, been

opened, and the response?

A. Yes.

Q. And, in fact, I think there is a note of a further communication or meeting between Mr. Digerud and but just very we will just very briefly run through it so.

It is addressed to Mr. McMahon who was the de facto Regulator, I think, at this stage.

"Thank you for your letter of the 22nd March with an indicative draft of this licence. I note and acknowledge the basis of its preparation.

"As has been said by us in meetings and letters since October, 1995, it is critically important that the licence is awarded forthwith. The prospect of our achieving a launch of the Esat Digifone service during the run up to Christmas, 1996, (which is essential if our business and service projections are to be met) is already under severe pressure. This is because we booked production capacity with equipment suppliers, and have been unable to take up that capacity due to the non-availability of the licence. This has resulted in the postponement of the production and delivery of critical elements of the network. Esat Digifone has put in place a facility of  $\text{€}25\text{m}$  with AIB bank and ABN-AMRO bank to part fund the cost of purchasing, constructing and launching the Esat Digifone service. The drawdown of these funds is

subject to the issue to us of the licence. Clearly, financial institutions will not advance funds to a company which (to quote your indicative draft) 'may ultimately be granted' the licence. The grant of the licence is one of the fundamental elements of our overall GSM project, the others being the provision of finance, the production of equipment, installation and commissioning of the network and the launch of the service. The delay which has occurred in respect of the licence has created a bottleneck behind which other fundamental elements have launched.

"It will be apparent from all of the above, that we are in a situation, where, by reason of the commercial duress, we must accept whatever licence is offered, regardless of its terms. I am aware that your draft licence does not contain the security provisions intended to be inserted at Article 11. I assume that the preparation of detailed security requirements and their approval by the numerous departments and agencies involved will take a great deal of time.

Clearly, such time is not available to us."

Then there is a general obligation, etc..

"If it is desired at a later stage to insert more comprehensive provisions, this can of course be done by means of the amendment provisions in Article 4.

"Due to the extraordinary circumstances in which we have been placed, we propose, as already indicated, to

accept your draft licence in the terms offered, but wish to record prior to its grant, the following:

"The licence must comply with Irish and EU law and we have assumed that you and/or your advisers have taken and will continue to take steps to ensure that this is and will be the case.

"The principles of equivalent treatment and fair competition as between ourselves and both Eircell and Telecom Eireann should be preserved. Accordingly, cost restrictions and obligations imposed on Esat Digifone should be fairly applied on an equivalent basis to our competitors. We perceive the grant of the licence as at a stage in an ongoing process and will seek to settle amendments to the licence immediately after its grant. We would have preferred to do so prior to grant, but commercial duress applied to us has rendered this impossible.

"As you are aware from our bid, our network will be financed by a mixture of debt and equity. As indicated above, debt facilities are in place. These involve the grant of standard security over the company's assets, clearly nothing in the licence can inhibit the grant or enforcement of the security (and you might confirm accordingly for the benefit of our banks.)

"I will be obliged for the receipt of confirmation by return."

And it is signed by Mr. Digerud, or we know the original was signed by Mr. Digerud.

Can I take it this letter was prepared for

Mr. Digerud?

A. Yes.

Q. In your office?

A. Yes.

Q. And perhaps even by yourself, but certainly in your office?

A. I think by me, it has my initials on it.

Q. Well, who gave you the instructions? Was it Mr. Digerud gave you the instructions?

A. I think it was Mr. Digerud and Mr. O'Donoghue.

Q. And Mr. O'Donoghue?

A. I think probably the two of them, yes.

Q. Yes. Now, I think the Department responded to this letter. We know I will come to deal with it

Mr. Brennan's view about this, he considered it litigation planning, but anyway he replied to the letter?

A. It wasn't actually litigation planning; I know he thought it was.

Q. That was his view.

"Dear Mr. Digerud,

"I refer to your letter of the 3rd April in response to Mr. McMahon's letter of the 22nd March. At the outset I must make it quite clear that if Esat

Digifone has been put under any duress as stated in your letter, it is not due to any act or omission of this Department.

"I would refer you to the Department's letter of the 13th November to Mr. O'Brien, and in particular the third paragraph of the letter."

Then he recites that letter, in saying they wouldn't be responsible for any expenses that might be incurred by Esat Digifone.

"In relation to Esat Digifone's business and service projections I received with your letter of the 15th March, your company's 'critical path,' which had been requested by this Department at a meeting on the 26th of January. I note that the overall project time schedule was only approved by Esat Digifone's Board on the 14th March, at which stage the Board and the company would have been fully aware that your licence award 'target' of the 31st of January, 1996, had not been met.

"I cannot accept that Esat Digifone's ability to participate fully in reaching agreement on licence terms should be compromised by commercial circumstances. It is clear from previous discussions, that certain provisions in the present draft licence in respect of which you have voiced the concerns are consistent both with Irish and EU law and the original GSM competition documentation and are not negotiable.

Apart from provisions which will reflect these basic sources, the present draft licence is largely based on commitments given in your application. It has also been clear that such commitments would be incorporated in the licence and you have confirmed your acceptance of this.

"Secondly, with regard to Article 11 of the draft licence, the Department notes your suggested form of words, but a short text has already been prepared and will be included in the text in the next provision of the draft licence. On the basis of your suggested wording, it is not envisaged that there will be any major problem with the Department's draft.

"Thirdly, I would like to address the issues on which you base your proposed acceptance of the draft licence as set out on page 2 of your letter.

"As stated in Mr. McMahon's letter of the 22nd March, this indicative draft has not yet been cleared by the Department's legal advisers, but you can be assured that the clearance process will take account of Irish and EU law.

"I can state that the commitments given in the competition documentation relating to a level playing field between the second GSM operator and Eircell will, subject to the terms of the competition, be fully respected.

"I note your request that the grant of the licence be

treated as a 'stage in an on-going process' wherein you would seek to settle amendments immediately after its grant. I would refer you again to this

Department's letter of the 13th November, 1995, in which it was stated that the award of the GSM licence is subject to the agreement of appropriate terms.

Clearly, it is the intention that the terms will be discussed and agreed prior to the grant of the licence. There is, therefore, absolutely no question that the status of this licence is in any way provisional or there can be any significant renegotiation of terms and conditions after the licence date is granted.

"The matter for security for any debt into which your company might enter is, once again, a commercial matter for the company. However, I would draw your attention to the provisions in relation to change of ownership which are contained in Article 8 in the indicative draft licence.

"In conclusion, you may wish to reconsider your proposal to accept the draft licence in the form supplied to you on the 22nd March in the light of these points. I would suggest that your company table any queries about the licence now while it is in draft form and, as offered, an early meeting can be arranged to discuss these. I understand that a date of Wednesday the 17th April has been agreed for a meeting

and I would suggest that any matters you might wish to raise be discussed at that stage."

And it is signed by Martin Brennan.

Sorry, it is just when you keep reading these documents and things come up, the 17th of April becomes a significant date again

A. Yes.

Q. as we know, in due course. Now, on the 16th April, 1996, you say that you received a call from Ms. Regina Finn of the Department asking for particulars as to the ownership of Esat Telecommunications Holdings Limited and other companies within the Esat Telecom Group, and you provided the information on the 17th April, 1996.

I just want to be clear as to who initiated the contact here. It is your recollection, is it, that you were contacted by Ms. Finn?

A. I think I have a note of a her calling, I am not sure, I think so, yes.

Q. I just want

A. Yes.

CHAIRMAN: And you have the very detailed phone conversation on foot of which she made a memorandum, and then it was set out more fully by you by letter on the lines that were opened this morning?

A. Yes, Chairman.

Q. MR. COUGHLAN: Now, that proposed meeting, as

suggested by Mr. Martin Brennan in the letter of the 12th April, 1996, do you know if any such meeting took place?

A. I don't have a record I haven't come across a record of one, I don't

Q. We haven't come across a record of yours of one either.

A. And I don't recall a meeting. It wouldn't at all be uncommon for someone to say 'Why don't we meet on such a date' and for something to happen that you wouldn't

Q. I understand that entirely. And all you have for, you have for around this period, is Ms. Finn's communication on the 16th April and your letter of the 17th April?

A. Yes, I think so. I have very large books back in my office of chronological material, and I will double-check those this evening, but I don't think there is anything else.

Q. Right. Fine.

Now, we will be coming back anyway to deal with the letter to Ms. Finn in due course, but I will continue on with your memorandum.

You say that on the 29th April, 1996, you met Mr. Fintan Towey of the Department, in which he raised the question of the beneficial ownership of Esat Digifone and of the companies owning it. He told you

that this issue had been raised by his legal people, but made it clear that no decision had been made as to whether any difficulty arose from the issue. The next day Knut Digerud spoke to Martin Brennan and was told that the Department had a problem in reconciling the original position with the present position, and wished to have a full understanding of Esat Digifone's ownership. Mr. Brennan also sought assurances as to the availability of Esat Digifone's financial facilities.

Now, I think you referred to this particular meeting or conversation with Mr. Towey on the 29th April already this morning?

A. Yes.

Q. And I think here you are informing the Tribunal that the question of the beneficial ownership of Esat Digifone was a matter which was being looked at?

A. Fintan Towey was telling me that he was looking at it, yes.

Q. Yes. And it was there was some issue being raised by the "legal people"?

A. Yes. Up to this point we didn't regard early on ownership was a very peripheral issue. It certainly became gradually more important through the winter of '95/'96, but up until shortly after this point we regarded the ownership of anything over a controlling interest by Telenor and Esat together as relatively

immaterial, or that it should have been, and indeed was, relatively immaterial. In other words, we felt that as long as Esat, with what it brought to the licence process of a, or the roll-out process, and Telenor similarly, provided those two entities controlled the licensee, then who provided the finance and who had minority shares and whether that was 20 or 25 or 30, or perhaps even 40%, was of relatively little interest, quite properly, to the Department.

And, in fairness, I think the Department felt the same way too, that the in Knut Digerud's words earlier, the company which had applied for the licence was a legal entity in its own right, it had premises and staff, had assets, it had plans, to the extent that it needed to draw on Esat and Telenor because it was in its infancy; it was important that those companies have a very substantial commitment to it and should be able to provide and incentive-wise to provide whatever it required, but once those basic criteria which were fundamental to the successful roll-out of the service were met, then the ownership of the remainder and the providers of the funds and the sources of those funds were much less important.

Now, at this time, and particularly from the 1st May, there was a fantastic amount of media coverage of the licence. Persona, and to a lesser extent the US Embassy, were becoming very vocal because the grant of

the licence was known to be imminent and they began to put a lot of media pressure on the Minister as regards the licence in an attempt to delay it. That, indeed, is the genesis of the political football comment that will come up later on.

Q. But, now, apart from Mr. Towey having a conversation with you on the question of beneficial ownership, Mr. Digerud must have told that you he had a discussion with Mr. Martin Brennan, is that right?

A. Yes, and I have a note of that conversation.

Q. Yes. And that Mr. Brennan raised two issues: one was ownership and the other was the financial facility?

A. Yes.

Q. Okay. We'll come back to deal with all of those in due course, Mr. O'Connell.

A. Yes.

Q. Now, I might continue then, because we get into a fairly concentrated period of time and there is a fair amount of documents to be referred to.

You have informed the Tribunal that on the 1st May, 1996, Martin Brennan wrote to you concerning the direct and indirect ownership of Esat Digifone and ownership of Communicorp Limited and Esat Telecommunications Holdings Limited, and the availability of debt finance. And that's Document No. 5.

Now, this is apart from the conversation you had with

Mr. Towey on the 29th, which appears to have been fairly brief. Would that be fair to say?

A. Yes.

Q. And the conversation which you know about which Mr. Digerud reported to you, together with Mr. Brennan, which again appears to have been fairly brief; would that be a fair description?

A. Yes.

Q. This is the response of the Department to your letter of the 17th April, I think, isn't it, the letter of the 1st May, 1996?

A. Yes.

Q. And it reads:

"I refer to your letter of the 17 April, 1996, concerning the restructuring of certain ownership interests in Esat Digifone.

"In accordance with the requirements of GSM competition documentation, Esat Digifone provided ownership details which indicated that at licence award the ownership would be as follows: Communicorp Group Limited 40%; Telenor invest AS 40%; institutional investors 20%. The application also provides details of the ownership of the operational partners and identified the probable institutional investors and the brokers who would be responsible for placement of equity with institutional investors. In the case of Communicorp it was indicated that it was

66% owned by an Irish investor (Mr. Denis O'Brien) and 34% by Advent International.

"In view of the information contained in your letter of the 17th April, 1996 it would be appreciated if the following could be clarified:

"The nature of any differences between Communicorp Limited and Esat Telecommunications Holdings Limited in relation in particular to expertise or asset strength, and;

"Full details of the ownership and categories of all shares of Esat Telecommunications Holdings Limited, including in particular, by persons other than the owners of Communicorp.

"It is essential that the Department can identify precisely any changes in the effective ownership (both direct or indirect) of Esat Digifone since the time of submission of the application.

"Finally, it would be appreciated if you could confirm that full certification of the following matters will be provided before the award of the licence:

"The precise equity ownership of Esat Digifone, including the identity of all institutional investors.

The identity and financial commitments of providers of debt financing. It is essential that these matters be cleared up before the issue of the licence. We also need to discuss the public presentation of these matters.

"I am available for any discussions you may require of the foregoing."

Now, you received that letter probably on the 1st May, certainly on the 2nd of May, certainly I suppose, anyway, wouldn't it be fair to say?

A. Yes.

Q. And you say in your memorandum, that on the 3rd of May you attended a meeting at the Department with Knut Digerud, Denis O'Brien, Arve Johansen, Michael Walsh, Paul Connolly, Martin Brennan, Fintan Towey, and Regina Finn. A copy of the notes of the meeting is attached at Document No. 6 arising from the meeting.

You prepared a list of documents which were sought by the Department, which is attached at Document No. 7.

Who convened this meeting?

A. I can't remember, I am afraid.

Q. How it was convened, do you know? Was it convened by you see the reason I am asking you, you had to get Mr. Digerud, Mr. O'Brien, Mr. Johansen. Was Mr. Johansen even in Ireland at that time? Was he able to come over for it?

A. I don't know, I think he was spending quite a bit of time in Ireland at the time.

Q. I see. I see. But, you had to, first of all, on your side at least, get all these people together, I suppose?

A. Yes.

Q. Explain to them what was involved in the letter from the Department of the 1st May. Do you think that Esat would have requested the meeting or the Department requested the meeting, to the best of your recollection?

A. Yes, I am afraid I don't have any recollection at all.

Q. All right.

A. No, I can't recall.

Q. All right.

A. Logically we would have, because that is the non-Department side, because the Department had written to us, so it was either for us to write back or to ask for a meeting to discuss it. So, as a matter of simple logic it would have been we that asked for it.

Q. You think it is?

A. It is more likely than that.

Q. It is more likely, but it may not have been the case?

A. Yes.

Q. Now, we have already opened this particular document this morning; this is your note of the meeting on that day, isn't that correct?

A. Yes.

Q. This is the "clear the political football" matter?

A. Yes.

Q. Then there is a note of the housekeeping list as well, I think?

A. Yes, I am sorry, did we open this this morning?

Q. Perhaps we didn't.

A. I am not sure we did, Mr. Coughlan.

Q. We will run through it fairly quickly. I think I may have because I think I said I will be, we would be coming back to Mr. Johansen's memorandum, but just because you are dealing with it here, if you just want to read through it fairly quickly, Mr. O'Connell?

A. Yes, I remember it.

Q. I am not going to ask you anything specific about it.

A. Okay, now I remember it, I am sorry. Yes, this is where I corrected the bank 60, equity 40 as well.

Q. Now, the only thing I will ask you about, because it was something you brought up yourself a few moments ago, for the moment about this meeting, the "clear a political football".

A. I am nearly sure that was Martin Brennan.

Q. Right. Right.

MR. McGONIGAL: Just one matter, Mr. Chairman, I think I am right in saying that when Mr. O'Connell referred to this document earlier this morning, that he indicated that the second name in the document was Peter O'Donoghue?

A. That's right.

MR. McGONIGAL: And not Mr. O'Brien.

CHAIRMAN: And not Mr. O'Brien, that was clear, Mr. McGonigal.

MR. MCGONIGAL: But that may have a significance in relation to his paragraph 11 where he has "Denis O'Brien" in his document instead of "Peter O'Donoghue", for correctness.

A. I think that is an error, I think that is my error.

CHAIRMAN: Yes.

MR. COUGHLAN: In fact I think on this reconstitution we do have "POD", I think it is correct. Well, in any event...

CHAIRMAN: But this wasn't the meeting where you referred to Mr. O'Brien as having arrived during the currency of it and not accordingly having been noted?

A. No, Chairman, that was the negotiating; the effect of the negotiation with Dermot Desmond.

CHAIRMAN: So it was pretty sure that it was Mr. O'Donoghue as Chief Financial Officer?

A. I am sure it was Peter O'Donoghue. And in fact, on the second page of the note, his initials appear there.

Q. MR. COUGHLAN: I think that is correct. Sorry, I think I was asking you, you think that was something Martin Brennan would have said, "Clear a political football"?

A. Pretty sure, yes.

Q. Something had intervened between your meeting with Fintan Towey on the 29th April of 1995 and this meeting on the 3rd May, 1996, and that is that I think

the Minister had made a long speech in the Dail,

hadn't he?

A. Yes, he had.

Q. And were you aware of that?

A. I became aware of that this morning actually when I was reading some notes around this time. There was also a lot of press comment at this time.

Q. Were you aware at the time, would you think, that it had been

A. Probably, yes.

Q. And I think in the Dail there had been some questions raised about the ownership of the investors, or the ownership of the institutional investors?

A. Yes, I think so.

Q. Or the identity, I beg your pardon, the identity, and there was even reference made to Mr. Dermot Desmond, isn't that right?

A. I can't recall.

Q. You can take it from me there was.

A. Okay.

Q. And the Minister made some response. Does that assist you as to the context in which the statement or words to these, to the same effect were made by Mr. Brennan about "clearing a political football"?

A. I said I thought it was in more because it was the kind of thing Mr. Brennan would say and not the kind of thing we would have said.

Q. Yes?

A. It is possibly also an issue that he would have been naturally more aware of than we would have been.

Q. Yes. Was the company at that time, to your knowledge, receiving the assistance of any public relations firm, if I might use it in its broadest sense like that, to keep it abreast of comments that were being made in the media and what was being said in the Dail?

A. I don't know. I know Eileen Gleeson became or was involved very shortly after this.

Q. Yes?

A. So I imagine she was probably retained at this time too, but I can't recall for certain.

Q. Right.

A. I would guess she was.

Q. I am just trying to ascertain the state of knowledge of the various players at this time as to what might have been happening?

A. Oh, I think I mean, there was so much press comment at this time that we would have been aware that it was very much in the phrasier "political football". It was a matter of great public debate and comment. Now, whether as a result of paranoia or otherwise, I think there was a view that a lot of this was being stirred up, and Persona, I think, had just complained to the European Commission, or was about to, I can't remember which, and there was an attempt, I believe, to delay

signing of the licence, which I suppose was seen to some extent as an irrevocable step. And we were trying to push it forward also because Christmas, although this was only May in the context of the timetable Christmas was looming, and we were looking likewards to Christmas, which we do.

Q. As of this time, around the 3rd May, there was no definite date, was there, indicated to you anyway, as to when the licence might have been

A. I think almost every day everybody wanted it the next day; it was regarded as constantly imminent.

Q. Right. Now, I think your memorandum continues that on the 7th May, 1996, you wrote on behalf of Esat Digifone to the Minister appealing urgently for the grant of the licence and assuring the Minister of Esat Digifone's willingness to do everything necessary to facilitate this. And that is just a document of yours at No. 8.

I don't think that there is need necessarily to open this, but what you are just indicating is what is involved, how much is being spent, the urgency of getting the licence?

A. Yes.

Q. Now, just in fairness to you and the point you were making there, you do say in the second paragraph on the second page that you understand: "We understand your predicament, having regard especially to the

voluminous adverse publicity stirred up by the losing contenders of the licence and the compliant made to the European Commission by the Persona Consortium."

Is that right?

A. Yes.

Q. Then you said, "As you know, we don't believe that there is any foundation in that"?

A. Yes.

Q. Now, on the same day, that is the 7th May, 1996, you received a telephone call from Fintan Towey, stating that the Minister had a very strong preference for a 40:40:20 ownership at the time of the licence, but understood the need for flexibility. Again, I think, we did open this document earlier this morning, but you do note that it is the Minister's very strong preference for 40:40:20 at time of licence.

"Understand need for flexibility afterwards.

Will take Esat Holdings subject to no substantive difference and outline in writing."

And as you say, this was the first notification, I suppose, or indication

A. Yes.

Q. The first notification, there may have been some indication that the ownership, the ownership issue, but not the share configuration, was a subject matter, that may be slightly

A. I am not sure, there is a strong line of demarcation

between ownership and configuration of the shares. I

agree, there is some distinction between them, yes.

Q. Yes. Also, with the memorandum or the attendance made

by you of the 7th May of 1996, it may be nothing to do

with this, recording a telephone conversation with

Mr. Towey, there is a further attendance, it seems to

be dealing a lot with Christmas business and matters

of that nature, is that correct, there is nothing

significant

A. I don't know what this is the one without anything

in the heading?

Q. Yes.

A. I am not sure what that is, I am afraid.

Q. I am not sure when it was made.

A. It may not even belong here.

Q. That is what I think. There is the odd, the 40:40:20

to be dealt with, it may be things to do or it may be

A. There is also "3 o'clock Friday for signature," which

would place it around this time because, in fact, it

was, in fact, on a Friday.

Q. It may be a list of things to do, I don't know.

A. And I am working out shareholdings there as well. I

think it belongs around this time.

Q. Yes. Now, on the 9th May, 1996, you met with Knut

Digerud and Peter O'Donoghue, who was the Chief

Financial Officer of Esat at the time, Esat Digifone?

A. Yes.

Q. To arrange for the provision of information required by the Department. And I think that document is there again and it is "Sequence - information to Fintan Towey ASAP tomorrow.

They review: Meet company's shareholders. Agree joint statement. Possibly new draft tomorrow."

A. Yes.

Q. And also on the 9th May, 1996, you met Paul Connolly, Leslie Buckley and Gerry Halpenny to discuss outstanding issues in relation to the licence and the associated matters such as the Esat Digifone Shareholders Agreement and the shareholding of Esat Digifone. And you have an attendance of that, and that is at Document No. 11, isn't that correct?

A. Yes, that is Mr. Halpenny's note.

Q. That is Mr. Halpenny's note, yes. Now, just looking at that note, if we may for a moment, you were at this meeting and Mr. Halpenny made the, or kept the attendance, is that correct?

A. Yes.

Q. "TN"; what is that?

A. Telenor, I think.

Q. "Telenor - bridge"

A. " dependant on the 12 and-a-half percent."

Q. I don't know if anything turns on that at the moment.

"Knut Digerud called to the Department to say that no

cash available immediately."

Do you know what that is about?

A. It may have been him saying we are not going to sign the licence today, but I don't really know.

Q. Right.

A. This is exactly a week before the licence was signed, so clearly it was imminent.

Q. Mm-hmm. And then there is an indication that "DOB phone call." That Mr. O'Brien must have rung into the meeting or to Mr. Halpenny, anyway?

A. Yes.

Q. And then it reads: "Minister of the opinion that cash not available.

Call by Knut Digerud to M Brennan.

DOB to call KD."

Do you know what that might be about?

A. Well, I am afraid I am guessing, but it may be that when Knut Digerud told the Department there was no cash available, it set off alarm bells and they rang somebody in the Department may have rung Denis and he may have come into the meeting and said 'What are you saying?'

Q. Right.

A. I really don't know, though, that is one interpretation.

Q. It is just that you were present, you were present and you may be one of the people in a position to help the

Tribunal.

A. I was clearly, but this was just seven years ago, seven and a half years ago.

Q. Yes. Can I just ask you there, if you can throw your mind back, what cash might have been referred to there? Obviously Telenor had money?

A. Probably the 15 million. But Telenor having the money didn't mean that Digifone had the money.

Q. No, I appreciate that, I appreciate that, but they were in a position to keep their end up of the 15 million?

A. Oh, my view would be that Telenor would only have put the money in if the other two put the money in.

Q. Right.

A. There was no point having six million in the company if you needed 15.

Q. I understand.

A. And I think what Knut was saying there was not as Telenor, he was saying that Digifone, of which he was Chief Executive, didn't have the money.

Q. Yes, yes. But, of course, as of that time, the deficiency possibly did not relate to Telenor, if there wasn't money available?

A. I think rather he means that because no Shareholders' Agreement had been signed because the shareholders hadn't sorted everything out, that the company didn't have the money to pay for the licence, but I am not

sure that that is the case. It is certainly true that

at this time the press was speculating that

Communicorp didn't have the money for its share.

Q. Just continuing over the page then, sorry under that sequence of events:

"IIU

Telenor - possibly sell 50% of the 40% to somebody,

TeleDenmark." I don't know what that is referring to,

do you?

A. I have no idea, no.

Q. "Cap at 40%. Norway not EU State.

Irish (?)

Letter to"

A. "Irish partner", I think.

Q. "Irish partner", yes.

"Letter to sell shares.

Telenor said that not prepared to sell.

"CSFB - call by Knut Digerud - re the 12 and-a-half

percent.

Call to the Department re the 12 and-a-half percent.

One free transfer."

Do you know what that is about?

A. The free transfer was, that always referred to the

right which IIU had negotiated in the context of its

intention to place the shares; that it had the ability

to transfer any share once without going through the

preemption process. In other words, without offering

it to Esat or Telenor if they wished to do so.

Q. Yes, I understand.

Then: "Waive 12 and-a-half percent - if IIU wish to sell.

"Telenor - no placing to date.

"If public offering at holding level, offer some liquidity at subsidiary level."

Do you know what any of this means, or refers to, I beg your pardon?

A. It more or less looks to me like people are talking fairly long-term about what might happen to Esat Digifone in the future. There was always something of an issue around Esat Digifone's future as to what would happen if either Telenor or, as occurred, Esat Telecom became publicly quoted, it could be something about that, although why that was being discussed at this point I don't understand; it wouldn't have been a logical time.

Q. All right.

Now, on the 13th May, 1996, you, together with Mr. Digerud, delivered a package of letters to Mr. Martin Brennan and Fintan Towey at the Department in fulfillment of their request for information and certification made on the 3rd May, 1996. And you refer to Document No. 12.

At the time the package of letters was delivered there was also a discussion between Martin Brennan, Fintan

Towey, Knut Digerud and yourself concerning progress on the licence. Your handwritten note of the meeting, and a more comprehensive typed minute thereof, prepared immediately afterwards, are attached at Documents Nos. 13A and B.

On the same day, Knut Digerud received a fax, a revised text of Article 8 of the proposed licence dealing with ownership. You believe that he forwarded the draft to you for review.

Now, this was on the 13th May, and it might be helpful at this stage the letter which you brought with you to the meeting on the 13th of May

A. Yes.

Q. is the housekeeping letter, isn't that right? It was all that had to be gathered together or assembled:

A letter from Telenor Invest; a copy of letter from Arthur Andersen; a letter from Chris McHugh, Secretary of International Investment and Underwriting. And we have had this letter opened on a number of occasions, isn't that right?

A. Yes.

Q. These were all housekeeping matters to be taken care of?

A. And it confirms the 40:40:20 would be in place.

Q. And it confirms the 40:40:20 split?

A. Which essentially had been agreed on the previous day at the meeting we spent time on this morning the

Sunday.

Q. Yes. Now, and this was the meeting which resulted in you preparing a minute from your attendance, from your handwritten note, the meeting that you attended where you handed this letter over

A. Yes, it is.

Q. with its attachment?

A. Yes.

Q. Now, just I would just ask you to bear in mind that, and I think you furnished a further memorandum just this week to the Tribunal about a draft which had been prepared of this letter around the 10th May of 1996, isn't that correct?

A. Yes, I did, yes.

Q. And it might be better to come back to that when we come to deal with the memorandum that you furnished in that regard, just for the moment to indicate that the draft which was prepared was more extensive than this particular letter, isn't that correct?

A. Yes.

Q. And the draft purported or set out whatever instructions may have been given to you about the ownership matter, isn't that correct?

A. Yes.

Q. And this was to enable you to not only to respond to what was requested at the meeting on the 3rd May, but to the letter from the Department of the 1st May which

required information about the ownership, isn't that right?

A. Yes.

Q. Now, this letter of the 13th May, which is, in effect, the response to the letter of the 1st May, together with the matters raised at the meeting of the 3rd May, does not deal with the question of ownership, isn't that right?

A. That's correct.

Q. And just for the moment, can you be of any assistance to the Tribunal as to how that occurred?

A. I think the only assistance I can give the Tribunal is as set out in my memorandum, No. 6, in which I concluded that as a matter of supposition based on circumstantial evidence, Martin Brennan or Fintan Towey had probably either asked for the removal of that material or had agreed to its removal.

Q. We will come to deal with it in due course; we might as well signal it here at this stage.

A. Yes.

Q. I don't intend at this stage re-opening the minute that we opened this morning. I think we can deal with it and the attachments, if necessary, to the letter of the 13th May in due course?

A. Yes.

Q. Now, you have informed the Tribunal that you have a recollection that at about this time you engaged in

extensive negotiations with the Department, and especially with counsel who had been retained by the Department to advise on the terms of the licence as to the outstanding amendments being sought by you, notably in relation to Article 8, that was the transfer following the issue of the licence, and Article 18 - windfall gains.

Your recollection of your that is Esat Digifone's principal concerns was that they were: In regard to Article 8, that it would prevent, or at least require Ministerial consent, in relation to transfer of shares between the shareholders. This was felt to be inappropriate because the identity of the shareholders had been approved Ministerially by the grant of the licence.

There was also concern that the Article could effect even changes in the ultimate ownership of the shareholders themselves. At this time Esat Telecom Group was engaged in an equity fee placement in the United States, which would eventually lead to institutional investment. It also had the desire to float on the Stock Exchange in the near term, and it was felt that Ministerial consent should not be required to such transactions. It was also the case that Telenor did not wish to be capable of being restricted as to its ownership by the Irish Minister, and indeed, in the years following, Telenor entered

into discussions for its merger with Telia, the Swedish Telecom company, although the discussions failed.

After negotiation, these concerns were resolved by settlement of a side letter to be signed by the Minister contemporaneously with the grant by him of the licence. The possibility that technical accounting treatment of capital and/or trading transactions in the future could result in a notional windfall gain in one accounting period of Esat Digifone, only to be reversed in a subsequent period when appropriate charges were taken into the accounts. This was resolved by providing for the calculation of windfall gains over two financial periods in each case.

I think you enclosed handwritten notes, Document No. 14, which you believe to be a rough record of discussions between yourself and Martin Brennan concerning the final aspects of the licence on or about the 13th or the 14th May, 1996.

CHAIRMAN: So effectively, Mr. O'Connell, your negotiations in this intense period yielded two side letters from the Minister as part of the eventual agreement but collateral to it; one dealing with an effective undertaking that the five-year period held out in the draft period, though not appropriate to be inserted in the second licence, would be honoured, and

in this instance, also responding to your concerns in the original, as you saw it, understandably restrictive format of the draft in Section 8 and possible repercussions in an American flotation?

A. Chairman, I am certain that we did get the letter concerning Article 8, that is here. But I, frankly, can't recall ever getting another side letter concerning the five-year period, and while I haven't carried out any real searches for it, it could well have been overlooked.

CHAIRMAN: It never became a matter of moment anyway?

A. No, it didn't.

Q. MR. COUGHLAN: I don't think we need to open the notes about

A. No, they are not very helpful.

Q. I don't think there is anything in it.

Now, I think you informed the Tribunal that on the 14th May, 1996, you were informed of a telephone conversation of the previous day between Denis O'Brien and the Minister. Your note contains the quotation, "Getting there slowly but surely." If we just look at the note first, I think it is at Document No. 15.

And it is an attendance of a telephone conversation, I presume, is it?

A. Yes.

Q. With Mr. O'Brien?

A. Yes.

Q. And the 14th, it is the 14th May, 1996, sorry. And it's: "DOB/Lowry call yesterday." Hat would have been on the 13th, I presume?

A. Yes.

Q. Then "'Getting there slowly but surely.'

Called last night re auto dialers.

Meeting today, Loughrey and Lowry re this."

So is that recording that there are two telephone calls from Mr. Lowry to Mr. O'Brien, or what are they?

A. It could be one or it could be two. The sense of the note is there were two.

Q. Yes.

A. But the second related to auto dialers, which is an Esat Telecom, as opposed to an Esat Digifone, issue.

Q. And can I take it that the sense of the note indicates that it is Mr. Lowry calling Mr. O'Brien?

A. No, I wouldn't have known.

Q. Oh, right.

A. It could have been he could have been saying "I called last night" or "he called last night".

Q. All right. Now, going back to your memorandum, you say your note contains the quotation "getting there slowly but surely". I don't know whether this is a summary of Mr. O'Brien's view of the overall position in regard to the licence or a statement made by Mr. Lowry (sic) to the Minister, or vice-versa. In any event, the conversation appears to have resulted

in a meeting being arranged for the 14th May between Mr. O'Brien and the Minister and Mr. John Loughrey, the Secretary of the Department.

I just wonder I just wonder could you help us really on your note, because you have it in quotation marks

A. Yes.

Q. "Getting there slowly but surely"; would you think that that seems to indicate that that is somebody telling you that somebody has said this?

A. I am afraid the fact that it is in quotation marks really only means that it was said in those words.

Q. I appreciate that. But you wouldn't normally record in quotation marks an attendance on a client, would you, what the client is telling you?

A. Quite often I do. Several of my notes if we I am sure I could search for it, but quite often I do put quotation marks around particular things that are said to me on the phone. Fintan Towey's I think, maybe not sometimes I do. So it could have been me quoting something he said to me, or it could have been him saying to me 'The Minister said this to me.' I just don't know which of those it was, I am afraid.

It could even have been something he, Mr. O'Brien, said to the Minister because it is, as we are about to see when we come to the next paragraph, the Minister by now is getting impatient at the lack of progress in

relation to the licence and was pressing for it to be finished, so it could have been Mr. O'Brien telling me that he told the Minister 'We are getting there slowly but surely' in regard to the ticking of the boxes required for the signature. I don't really know, though.

Q. I see. Now, I think you had a meeting with Mr. O'Brien on the 14th May, 1996, and you were briefed on the meeting he had with the Minister and with John Loughrey. The Minister was seeking information concerning IIU and the availability of finance. The Minister appears to have told Mr. O'Brien that the shareholding in Esat Digifone on the day that the licence was granted had to be 40:40:20, but there appears to have been discussion of a change in shareholding to 45:45:10 at a later date. There was also a discussion of the terms of Article 8 of the licence. There was discussion of a forthcoming press conference in which the grant of the licence would be announced and apparent agreement as to the need for a rehearsal.

Now, if we just look at your note on that. It is Document No. 16. I think it reads: "Denis O'Brien re meeting Lowry/John Loughrey.

"Minister - haven't got information wants.

"Financial information IIU (Michael Walsh to go to the Department private meeting)

" letter that finance is in place from the underwriters.

"Denis O'Brien underwriters are Telenor and IIU; will satisfy tomorrow.

"Lot of frustration/pressure.

"All by 11 tomorrow.

"Lowry 'will check with Sec' and hold DOB/LB " I presume Leslie Buckley?

A. Leslie Buckley.

Q. " responsible."

A. I think he would have been there because the meeting was convened to discuss auto dialers, which was his area.

Q. Yes. "Has to be 40:40:20 on the day.

DOB - Article 8 very tough - can do nothing. Shares amongst parties will not allow telecom parties to reduce shareholding.

Loughrey to meet Owen O'Connell, Martin Brennan tomorrow a.m..

Minister informed of 45:45:10 very quickly.

'Lowry'" in quotation marks.

Can I take it that seems to be you being told this is what Mr. Lowry said?

A. Yes.

Q. "Let ink dry."

A. Yes.

Q. "Public announcement Lowry wanted last week.

"Do everything in one go.

"Deflect attention away from ownership."

What is that? Is that Mr. O'Brien informing you of something Mr. Lowry has informed him? It is not in quotation marks. Or is it something that he is informing you of?

A. From the sense there, it is something that Mr. Lowry said to Mr. O'Brien.

Q. Right.

A. There was a lot of press speculation about ownership at this point.

Q. Yes. "Discuss business infrastructure, contracts, roll-out, plan, employment, new contracts "

A. That word is "Limerick".

Q. I thought it was "Limerick."

A. There was to be an operation in Limerick.

Q. Yes. That's right, yes. Mr. Egan's idea, I think he told us at one stage?

A. Yes.

Q. "New contracts. Hold off buying phones to public, etc..

"Must be phenomenally well briefed on bid document in tender.

Owen O'Connell to be present and to answer questions.

"Legal ownership issue extremely important.

"All reporters focused on this.

"All three shareholders to agree. Owen O'Connell

(OO'C) answers questions.

Rehearsal.

"Persona have written another letter to ask licence

not to be granted.

"Just want one person with one signal."

I will come back and deal with a few issues there in

due course, Mr. O'Connell.

A. Indeed.

Q. Now, on the 15th May, 1996, you met Martin Brennan,

Fintan Towey, and Donal Buggy of the Department. And

you made a note of that meeting, and it is Document

No. 17.

Just if I might pause there for a moment; there were a

fair number of meetings at the Department over this

period, weren't there?

A. Yes.

Q. And you kept an attendance of the meetings?

A. Not all of them. There was certainly more than I have

minuted.

Q. I beg your pardon?

A. There was certainly more than I have minuted.

Q. There were more meetings?

A. Yes.

Q. That you attended?

A. Yes. Mainly negotiating meetings.

Q. But you have no attendance of those?

A. Apart from the scrawled note we passed over earlier

which wasn't very helpful, but there were several such meetings.

Q. Several. I mean, this was when you were negotiating with counsel?

A. Yes, the Clause 8 stuff and all that.

Q. Yes. But I can understand that.

A. Yes.

Q. I am not talking about that but meetings with the officials, were there any other meetings

A. Generally they would be at those meetings too, but no, sorry, I didn't mean to cause confusion, I am sorry.

Q. I want to distinguish now.

A. Right.

Q. Where there was negotiating going on, were you were negotiating on Article 8 and on the windfall gain; they were the two main areas that you were concentrating on, isn't that right?

A. Yes, they were. And those meetings would have been with officials and with counsel.

Q. Yes. Officials and counsel?

A. Yes, usually, yes. In and out of meeting rooms and corridors and late nights and things like that, quite a lot of that.

Q. All right. Yes, and you have a note of one such meeting, and it may be a note to encompass

A. Yes, for some one of the puzzles to me is why I didn't keep better notes of that process, I just don't

understand it, normally I would have done. They may have been lost or something, I don't know.

Q. Right. I want to distinguish meetings where you were negotiating on primarily on Article 8 and windfall gains

A. Mmm.

Q. and other meetings with the officials; were there any other meetings that you can recollect you had with officials where there is no attendance kept?

A. I can't be certain that there isn't or there wasn't, Mr. Coughlan. Things were very intensive at this stage. I was up and down to Kildare Street morning, noon and night literally.

Q. I see.

A. There were a lot of phone calls. Fintan Towey would ring me or I would ring him, Regina Finn would ring or I would ring her. We were trying to sort out what was required. There were constant calls which aren't really referred to much here about timetable, will we get it away this week, will we not? The problem was once we set a date, a whole lot of people came into play: Department of Finance came into play, press officers, press conference facilities, the Minister's diary was relevant, you know.

Q. Yes.

A. So there was a great deal of contact. We were all in one another's pockets for roughly this week.

Q. Yes.

A. From, say, the previous Friday. The Saturday and Sunday we were working on the 40:40:20 trying to bring the

Q. Configuration?

A. the configuration, right. We settled that on the Sunday, then we had to implement it. There were issues about Clause 8. There were issues about the press conference. All of this was going on at the same time. Now and I remember it as quite a frantic time and I remember a lot of late nights and early mornings, and I can't be certain that I got notes of everything.

Q. Right.

A. I have given the Department, the Tribunal, I should say, all of the notes I have been able to find. But I am not in a position, I regret to say, that there weren't meetings, but I think likely there were certainly phone conversations and meetings that I don't have notes of.

Q. Fair enough. Can you recollect, the meetings where you did keep a note, whether anyone else kept a note of those meetings?

A. I don't recall. I wouldn't generally notice. Without wanting to spend too much time, or I suppose in a way to lecture; my habit of keeping notes is very much that it is in inverse proportion to the degree of my

involvement in the meeting. So when I am heavily involved in a meeting, when I am speaking a lot and I am discussing something or I am paying a lot of attention, I will keep very few notes and sometimes hardly any at all, and on the other side, where I am relatively quiet and maybe a big meeting with a lot of people, I will keep very detailed notes and even my writing will improve. An example will be the 9th November meeting in the Department, where I have extensive notes. I suppose a controversial example from the last module would be the meeting in Boston, where I had practically no notes, apart from some things scribbled in the margin. It is a question of how engaged I am in the meeting or not, and I will have notes or not, accordingly.

Q. The only reason I ask you is because I think you are aware now, from evidence given, the only records that we have at all of what occurred at these meetings are your notes, apart from Mr. Arve Johansen's memorandum of the meeting of the 3rd May of 1996, and there is no record at all of any document or any note of these meetings in the Department?

A. So I understand.

Q. And I am just wondering, did you notice if anyone else kept a note?

A. I really didn't, Mr. Coughlan. And, frankly, if I had noticed, I wouldn't recall at this remove.

Q. Right. Right. Sorry, I digressed there for a moment.

It was Document No. 17, it was the meeting you had with Martin Brennan, Fintan Towey, and Donal Buggy on the 15th of May of 1996?

A. Yes. And I should say, I have read Mr. Buggy's or the examination of Mr. Buggy, in which he says he can't remember being here. It is possible that I confused him with someone else or something, I don't know. I don't I didn't know Mr. Buggy particularly, and probably if I passed him on the street today I wouldn't recognise him, but I came to know Mr. Towey, Mr. Brennan, and Ms. Finn much better.

Q. Can I take it, that it would be your practice when you are keeping a note of a meeting, to record those in attendance? That would be the usual practice?

A. Yes, it would. But sometimes if I don't know a person, I won't embarrass everyone by asking who he is, I will just jot down the people that I know.

Q. Yes. Well, can I take it, that if you didn't know somebody he would probably be introduced to you? Like you didn't know Mr. Buggy before this?

A. Well, you see, he would have been at meetings that I was at, so they might have assumed that I knew him or something. I am speculating now, though.

Q. Well, perhaps we can look at that. Perhaps we can look at that. But nevertheless, you do note him as being present?

A. Yes, I do.

Q. And then: "Friday, if necessary. 3:30 Thursday."

That seems to be a reference as to when the licence will be signed off, isn't that right?

A. Yes.

Q. And the next matter: "Telecom Eireann - big price decrease tomorrow (off record)." That is just a little bit of information, I am not concerned about that.

"World Communication Day 17th of May." That seems to be the day that it was being targeted for the Minister, at least anyway, to sign off on the licence?

A. Yes.

Q. This comes from Bill O'Herlihy "per Minister". Was Mr. O'Herlihy there?

A. No, I don't think so. I don't remember ever meeting him.

Q. That is right. Then Martin Brennan, these seem to be a series of questions that he is putting or proposing.

"When did Telenor" that is when did Telenor become involved? You say late April/early May.

"Knut Digerud phone calls late April. Meeting also early May. Parties talking second half of April." I don't know, "Double dealing re Southwest Bell." I don't know what that is about.

A. I think that probably was a reference to some suggestion that Communicorp was talking to Telenor.

It was before its deal with Southwest Bell had split up.

Q. I see, before it finishes.

I don't know what the "pain in the ass" comment is about?

A. I think it is Persona, but I am not sure.

Q. I see. "Company owned 50:50.

Intention to place/float 20%.

Strong supporting letters were available from a lot of 'blue-chip' investors.

"In normal course, when project becomes renegotiated but deal available, which we now have.

IIU not in original."

Is that something you are saying or is it something

A. I am not sure. It seems to be someone rehearsing or describing what advancing a description of what had occurred or something that might be said at a press conference or similar.

Q. Yes. Of course, it is just a statement of fact, isn't it?

A. Is it?

Q. IIU were not in the original?

A. Oh, yes, absolutely, yes.

Q. "Comfort - Minister favourably disposed to letter." I don't know what that is, do you? I think it is

Article 8, I think it

A. Yes, probably.

Q. "Preference P1 Shareholder Agreement, recital reference for shareholder.

"Dress rehearsal with Minister sometime after 1.

Some" "

A. "Our side."

Q. Then: "45:45:10, cruising attitude." Could that be a reference to that being a dry sort of situation?

A. Yes, I think so. If everything is going all right and time has passed.

Q. "In normal trading circumstances, debt equity around 50%, and start-up phase more fluctuations because of capital spend, will tend a little more towards equity, especially in early phase.

Martin Brennan" I think we can take it or can you help us there, "Save Minister, needs our help"?

A. I think it is "some Minister." That is an "O". I think he means on what is coming up, the Minister can give some material, but he needs something from us.

Q. Could you just repeat that again, and just your reasoning there, Mr. O'Connell, sorry?

A. The second letter in the word is definitely an "O", as I would write it. I think it is, "Some Minister needs our help." I think what it means is that on the material that is coming up, the Minister has some ability to respond or has information, but he needs something from us.

Q. I see. So would that be the way you would write your note, rather than say, "Minister needs some help"? I am just trying to understand how the note is in that form?

A. No, I think what it means is that Martin Brennan is saying 'Look, the Minister has something on this, but he needs our help because he needs more material from us, or he needs backing content from us.' I mean, it could be the other way, but that is definitely an "O".

Q. Right, okay. And then, "Whether same project has won competition." Who is saying that or what

A. This is Martin describing a question that is going to be asked. This is what he needs us to give more material on. That is how I would read it.

Q. This is where the Minister needs the help?

A. Yes.

Q. Whether it is some more information or

A. Yes. Arguments for why sorry arguments for why it is essentially the same project or team that won the bid.

Q. Because the Department didn't have an answer to this, isn't that right?

A. The Department couldn't have had an answer to it because they weren't inside our team early on and they weren't inside our team when it changed.

Q. I see. I will come back to that. Okay, I suppose we have to read it:

"Martin Brennan not keen on Denis's speaker."

I think there has been a reference, they wanted you to answer some of the questions?

A. Yes. However, I didn't in the end.

Q. "First conference - Denis O'Brien, 'We will be lowering price'"

A. "Prices."

Q. "Prices 25%. Focus of attack. Couldn't have won competition on this basis."

This is a reference to low tariffs, isn't it?

A. Yes, I think so.

Q. Yes. And of course, they couldn't have won the competition on the basis of tariffs.

"Application was stronger than that. Prepare better answer.

Debt correction in launch commitment per bid."

A. I think there is a fullstop after "debt correction in."

Q. Pardon? "Debt correction in."

A. Yes, I think so.

Q. But

A. And then, "launch commitment per bid," meaning the what was the launch, what date did we commit to launch in the bid.

Q. I see, yes.

"Good presentation on price area.

Consider, although not in application, ten second

bidding units, oral presentation.

DOB - one second" this is all to do with the

A. This is the point. I don't know whether it is still the case, but at the time, when you were making a call on Eircell, if your call lasted five seconds you were still billed for a minute. And Esat Digifone had promised that, in its service, you would only be charged for ten seconds, and eventually you would be charged on a one-second basis, so whatever time your call actually lasted, that was what you were charged for.

Q. Yes. This is all to do with billing tariffs, trying to present that in a positive way, as a good foot forward?

A. Yes, as a good thing for consumers. As a good thing for consumers.

Q. Then the note continues: "Why only sign now?" That is, why is the licence only been signed now?

A. Yes.

Q. "Was licence delayed to put money in place?

Leslie" I think we have corrected that, I think?

A. Sorry, I am lost now, Mr. Coughlan.

Q. I beg your pardon.

A. "Different packages for different consumers." You are still in the same notes?

Q. Yes. Sorry, I beg your pardon?

A. "25% simplicity. More complex exciting things to

shake-up market." Have you moved on from that?

Q. I have moved on from that. That is all to deal with the same issue, is it?

A. Yes.

Q. More or less?

A. I see where you are, yes.

Q. "Why only signed now? Was licence delayed to put money in place." That is to do with why is the licence only being is it?

A. Yes.

Q. Then there is can you help us there, what somebody is the speaker?

A. Leslie, Leslie Buckley.

Q. "Department" then this response is sorry, the question was asked by Leslie Buckley, "Was delay to put money in?"

A. No, I think somebody is asking whether Leslie would be a speaker, whether Leslie Buckley would speak at the press conference.

Q. Sorry, I beg your pardon.

A. We are still discussing the press conference here.

Q. "Department" what is that, "Department delay all on our side"?

A. We are in the context of why the licence is only signed now.

Q. And the Department, was the Department offering that as an explanation?

A. I am not sure which way around it is.

Q. I see.

A. I am not sure who is saying who was in delay; each of us thought the other was.

Q. Yes, I know that. What is "Impact of delay on launch.

Will there be delay, especially if different geographical and quality coverage stress this?

Everyone knows Christmas market critical and intend to demonstrate seriousness of that.

Question 16th of June deferment.

23rd of June original closing, no deferment.

Could we have bid."

What is that?

A. This is about the delay in the submission of bids back in June '95 consequent on the European Commission intervention, and it is speculating that the press will ask

Q. About the cap?

A. There was speculation at the time that it had been deferred for the benefit of Esat.

Q. Yes.

A. And this question relates to that issue.

Q. Yes. The deferral and the cap, that relates to that issue?

A. Yes.

Q. Yes.

A. Yes.

Q. Then: "Comfort now as to how Minister will act in given circumstances in the future." Is that something that is being sought or being looked for or

A. I am not sure what that is about, I am afraid.

Q. Right. But again, I mean, we can come back to that.

It is your reading of this note in one area that the Department are looking for information from you to show, or an argument as to why this is the same project that won the competition?

A. Yes. We are talking about we are debating and agreeing how the obvious questions, which simultaneously outside the room are being debated in the press at this time, will be answered when they come to be asked at the press conference.

Q. Yes.

A. And essentially Martin Brennan, his colleagues are saying, 'Look, here are the questions. Here is what we think can be said, or here is the information we have to give an answer. What can you add to that?

What extra goodies, as it were, can you bring from a consumer point of view, or can you bring?' And he is saying in the, I think in the question you are referring to, he is saying, 'Look, we are going to be asked about whether this is the same consortium that bid. Here is the bit we have that we can give an answer for, but we need a bit more from you. What can you give us that is a reasonable, proper, correct,

obviously, explanation?'

Q. As the bid they had showed that the bid would I be correct in understanding that the bid they had received was Esat, Telenor and institutional investors, isn't that right?

A. Although to some extent we were still coming from behind the mark at this point because we were still trying to catch up with the notion that the minority shareholder mattered at all. To us this was Esat Digifone which had its critical shareholders, Telenor and Esat.

Q. Yes, I understand all of that. I am just concerned with what your understanding of the Department's position as regards the bid and what they were asking about the bid document. I am not concerned here at the moment about issues of the relative ways the bid document had indicated the proposed owners, or the proposed licensees, as the licensees being a consortium comprised of Telenor, Esat and four constitutional investors, isn't that right?

A. Yes, I would accept that that is partly right.

Q. Where is it wrong?

A. I think

Q. Or where is it

A. The bid document went further in one sense, and not as far in another, in that it did provide for institutional financial investment, otherwise than

from the four investors.

Q. I see. Okay, we will take it up then in due course.

A. And in a way it was that point that Martin Brennan may have been looking for.

Q. Sure, wasn't the issue again we will take it up again wasn't the real issue here was this; there was a problem, and the problem was this: That IIU were in and the institutional investors were gone?

Wasn't that the problem in a nutshell?

A. Yes.

Q. And how that was to be presented?

A. Yes.

Q. Yes.

A. And whether it was consistent with the bid.

Q. Yes.

MR. COUGHLAN: Sorry, it is after 4 o'clock now, Sir.

Mr. O'Connell

CHAIRMAN: It has been a long enough shift. Have you finished that particular note?

MR. COUGHLAN: I have. Yes, Sir.

CHAIRMAN: You might just do paragraph 20, then that just brings us to the last day which related to draft questions from Ms. Gleeson.

Q. MR. COUGHLAN: Yes, indeed.

If we just go to paragraph 20. On the 15th of May you received from Ms. Eileen Gleeson of SCC, public relation advisors I think Ms. Gleeson had been

retained by Esat Digifone?

A. I think so, yes.

Q. a draft and a series of questions which she had prepared. You wrote draft answers on the page bearing the questions, but cannot recall how or whether you communicated these draft answers, or to whom, although you may have done so at the rehearsal meeting on the 16th of May referred to below. And we will come to that meeting on the 16th of May. That is just

Document No. 18?

A. Yes.

CHAIRMAN: That should suffice for today. We will take up the course of your evidence at 11 tomorrow.

Thank you very much, Mr. O'Connell.

THE HEARING THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
FRIDAY, THE 24TH OF OCTOBER, 2003, AT 11 A.M..