

A P P E A R A N C E S

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I N D E X

Witness:	Examination:	Question No.:
Owen O'Connell	Mr. Coughlan	1 - 422
Mr. Fitzsimons	423 - 600	

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY 31ST

NOVEMBER, 2003, AT 11 A.M.:

CONTINUATION OF EXAMINATION OF MR. OWEN O'CONNELL BY

MR. COUGHLAN:

CHAIRMAN: Thank you, Mr. O'Connell.

Q. MR. COUGHLAN: Mr. O'Connell, I think we were at Book 50 yesterday, and we were at Tab 143, which is your minute of the meeting of the 13th May, 1996, at the Department.

Now, I'll just bring one small matter to your attention, perhaps.

I think you brought to the Tribunal's attention, at Tab 144 this is, I think, Mr. Moran's note of a meeting, and you pointed to the fact that "Owen O'Connell to minute draft" sorry, "Owen O'Connell to minute."

A. Yes.

Q. And I think you expressed the view that that might indicate or probably indicated that it was Mr. Digerud perhaps who had requested the minuting?

A. No, I am just saying I think that it was someone at that meeting who

Q. Perhaps a letter has just been brought to my

attention. It is a letter of yours dated the 20th

A. I see.

Q. Who was the chief or the senior legal person, isn't that right

A. Yes.

Q. in Telenor. And just it might clear up, if I just read it to you.

"Dear Ralph,

"When I reviewed my file on this matter last weekend, I determined that you did not receive the minute of the meeting which Knut and I had with Martin Brennan on the 13th May, and which had been requested specifically by you."

A. I see.

Q. So perhaps that might clear matters up?

A. Yes, okay.

Q. That it was Mr. Busch

A. Clearly, yes.

Q. Now, if you again, if I could just return briefly to the third paragraph on the second page of the minute, and a matter that you clarified yesterday, or clarified the record of the Tribunal in relation to yesterday.

And the second sentence: "He queried IIU's attention in regard to placing 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 some time."

Again you stressed in the minute that this comment was, you were attributing to Mr. Michael Walsh, or sorry, that had been given to you by Michael Walsh and you stressed it at the meeting also, isn't that right?

A. Yes.

Q. Could I just ask you, what discussion did you have with Michael Walsh whereby he imparted that particular statement to you?

A. I can't recall, I am afraid, Mr. Coughlan. I would infer from the note that I had raised the matter with Michael Walsh sometime previously and he had made this comment to me which I relied at the meeting but I don't have a recall of the conversation with Mr. Michael Walsh.

Q. You don't have a recall or who else might have been present?

A. I did have conversations with Mr. Michael Walsh at this time; he was a director of Esat Digifone, I think, among other things.

Q. Yes. Very good. Just one other matter I would like to get out of the way by way of a type of housekeeping matter. When we looked at the minute or the note

prepared by Mr. Bugge, the memorandum of Mr. Bugge which related to the agreement of the 29th September?

A. Yes.

Q. I think you expressed the view, and I am not stopping you from having the view or expressing the view about Telenor?

A. Yes.

Q. And you have expressed that. And you pointed this as one example, perhaps?

A. Yes.

Q. I just want to now you hold that view in relation to other matters as well, I think, isn't that correct?

A. Yes.

Q. I just wanted to be fair to you and to Telenor about that, that in the first instance that had been provided to the Tribunal in Norwegian and then it was provided to the Tribunal after that in English, and at a meeting with lawyers for Telenor and the Tribunal would, as you might be aware, would conduct a number of meetings with lawyers from various parties to sort out outstanding correspondence or queries going either way; that it was the significance of it was brought to the attention of the Tribunal in response to a query as to whether Telenor had a draft of the agreement of the 29th September, and this was pointed out to the Tribunal as being an example or an indication that they did, so it was brought to the

attention of the Tribunal, in fact, in an inculpatory way rather than an exculpatory way, if I could just describe that, just to be fair to everybody.

A. I understand. Thank you for that, Mr. Coughlan.

Q. I think the next document at Tab 145, I think is one that we have already opened and you have expressed a view about it, isn't that correct?

A. Yes.

Q. This is your note

A. Yes

Q. of Mr. O'Brien informing you of Mr. Lowry's call "getting there slowly but surely"?

A. Yes.

Q. Sorry, if I just go back to Tab 144, this is Mr. Moran's note.

Now, the note reads: "Report by Knut Digerud on meeting with Department.

Martin Brennan and Towey" I think?

A. Yes.

Q. "...brief"

A. Review, I think.

Q. "...review by Department officials.

Will want more re IIU.

Owen O'Connell to minute."

That is the minute the meeting?

A. I think so, yes.

Q. "Draft licence paragraph 8.

Any transfer" is it?

A. "Any transfer or allotment."

Q. "...or allotment needs consent of Minister.

Joint press conference date.

When would IIU discuss" sorry, "When would IIU discuss with the..."

A. "With the press," I think.

Q. "...with the press.

Key questions to be available and answer and reasons.

Thursday hand over licence subordinated loans.

IIU - what money is being used? Department wants to know."

Do you remember this particular meeting or can you throw any light on what was under discussion there?

A. I think this is the author's, who I presume was Mr. Moran, note of what Knut Digerud was saying about the meeting he and I had just had with Martin Brennan and Fintan Towey.

Q. Yes?

A. Most of what he says here seems broadly consistent with my note and minute, I think. Is there

Q. Sorry, I beg your pardon?

A. I was just going to say, is there a particular issue

Q. No. Can you just throw any further light on it at the moment? I know it is Mr. Moran's note.

A. Not really. He is more or less saying the same or

he is recording Knut saying the same things I think, that I had said, approximately. I mean, no two accounts of a meeting will ever be the same.

Q. Yes, of course. Now, do you see that reference there, and again I know it is Mr. Moran's note, "When would IIU discuss with the press"?

A. Yes.

Q. Is that a reference to when did IIU become involved, do you think?

A. No. I think he is recording a question, probably by the Department, as to when IIU would be available to discuss their involvement in the project with the press, in the context of the joint press conference which was to be held between the Minister and Esat Digifone. That would be my understanding of it.

Q. Very good.

A. Because the next line also concerns the press conference.

Q. It does. Would it be would it be that there was a discussion as to when would IIU's involvement be disclosed to the press, perhaps?

A. No, I don't think so. I suspect what this was about was somebody saying, look, the press are going to want to talk to IIU about their involvement in the project generally, perhaps when they came in could be one issue. What they are doing there, what their intentions are with regard to the shareholding and so

forth, and as a matter of practicality or logistics,

when are IIU going to be available to do that?

Q. Yes.

A. I suspect that was what it was about.

Q. Very good. Well, it is not your note anyway?

A. No.

Q. Now, at Tab 146, I think this was a note of yours on the 14th May, 1996, isn't that correct?

A. Yes.

Q. And it is Mr. Neville O'Byrne and Michael Walsh.

These are the IIU people?

A. Yes.

Q. And I think we have been through this before, and you understand this to mean the Minister's consent necessary under Article 8, isn't that right? And indicating all the difficulties that that presents?

A. Yes, I think pretty much the whole meeting concerns the Article 8 issue.

Q. Yes. Again, just reference to Bottin International there?

A. Yes.

Q. Was that being discussed in the context of Article 8, do you think?

A. Obviously it was, since I noted it here.

Q. Right.

A. But in what context, I don't know.

Q. All right.

A. It could have been me asking whether Bottin was still around. It could have been them asking me whether a transfer to Bottin would create a problem. It could have been any one of a number of questions.

Q. Very good. So there was still some form of discussion, at least, taking place about Bottin as of the 14th May, 1996?

A. Clearly it came up here it, may just have been housekeeping on my part.

Q. Yes.

A. To put it to bed, as it were.

Q. Yes. But you have never seen any indication of the assignment to Bottin having been revoked?

A. No.

Q. Very good. Now, at Tab 147, I think this is your file note on a telephone conversation you had with Mr. O'Brien, isn't that correct?

A. Yes.

Q. Regarding his meeting with Mr. Lowry and Mr. John Loughrey?

A. Yes.

Q. Now, it notes: "Minister" this seems to be something attributed to the Minister, isn't that right?

A. Yes, I think so.

Q. "...haven't got information. Wants"

A. Then there are two things he wants, which are

indicated by the strokes.

Q. Yes. "Financial info IIU (Michael Walsh to go to Department/private meeting." Is that right?

A. Yes.

Q. And then: "Letter that finance is in place from the underwriters.

"Denis O'Brien underwriters are Telenor plus IIU;

will satisfy tomorrow.

A lot of frustration/pressure.

"All by 11 o'clock tomorrow. Lowry will clear"

A. "Check", I think.

Q. "With Sec."

A. I think meaning Mr. Loughrey.

Q. Yes. Would that seem to indicate that, at least for some of the meeting, that Mr. Loughrey may not have been present?

A. No, I don't think so. I think he is saying, look, you have got to provide this by tomorrow and I am going to check with Mr. Loughrey that you have done so.

Q. I see, I see.

A. But obviously I am recounting this at secondhand.

Q. No, I appreciate that.

And then, "Will hold Denis O'Brien and Leslie Buckley responsible" that is to get that, is it, to get it done?

A. Hold them responsible for doing it, for providing it.

Q. Yes.

"Has to be 40:40:20 on day.

And then: "Denis O'Brien/Article 8 very tough. Can do nothing.

Shares"

A. "Shares amongst parties."

Q. "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 - let ink dry."

That seems to be a reference, is it, to Article 8?

A. Yes, I think so.

Q. There wouldn't be a difficulty going to 45:45:10 once things had settled down "let ink dry"?

A. Yes, and I think there is another similar reference to reaching cruising altitude somewhere else.

Q. And reaching cruising altitude and things of that nature.

Then: "Public announcement - Lowry wanted last week.

Do everything in one go.

Deflect attention away from ownership."

What was being recounted to you there, do you think?

A. The last sentence clearly is that because of the, well I think because the press coverage and public discussion about the ownership issue was causing difficulties, the Minister wanted to deflect attention

away from it by the more positive aspects of the announcement on public service, consumer interests and so forth. The earlier part is clearly that Minister Lowry wanted to, had wanted to make the announcement of the licence signing the previous week.

"Doing everything in one go," I am not sure. It may mean pay the fee and sign the licence and have the press release all at the same time, I think, but I am not sure.

Q. Yes. Was there any discussion around this time that this was such a matter of low importance that why deflect attention away from the question of ownership?

A. Oh, there was no question of ownership being of low importance now. If you remember, I had said that from about the time of the 3rd May meeting, ownership had become a matter of major importance, and I said, I think in my evidence yesterday, that notwithstanding one's objective view of the actual importance of ownership by virtue of, I suppose, the Persona report, or complaint rather, the press coverage of the issue, the general discussion which had begun to occur, the whole political football point, it had become a matter of political importance irrespective of its legal or commercial or any other category of importance.

Q. Had anyone explained to you, at least anyway, what this political problem we know there can be political problems that one mightn't like something

being said but what political problem was identified

or was

A. The political problem of was the press say. Politics usually comes down to what the press say.

Q. Right.

A. In my experience, both politicians and civil servants are intensely sensitive to press coverage of issues for which they are responsible. As soon as the press start to cover them, their relative importance in the scheme of things, whether good or bad, increases dramatically, and I think that is what had occurred here.

Q. I think there had been, since 1995, since November of 1995, Mr. Lowry had made a number of statements in the Dail and had answered a number of questions, isn't that right? I am not asking you to remember it all now, but at the time I suppose it is something that Esat Digifone would have been keeping an eye on?

A. Probably, yes. Esat Digifone were quite sensitive to press, not as much as the politicians would be, but somewhat.

Q. Yes. And can I take it that you would have been aware that on each occasion Mr. Lowry dealt with this matter in the House the question of ownership came up?

A. Yes.

Q. And Mr. Lowry always indicated that he was not in a position to respond to queries regarding institutional

investors, isn't that right? He relied on

confidentiality, in other words?

A. Yes, I think we would also have regarded it as being down to the fact that ownership was on the agenda to be dealt with and hadn't yet been.

Q. I think he went further and he said, I think, in the House on perhaps more than one occasion, but certainly one occasion, that ownership had been declared or had been notified?

A. I don't remember reading the statement but obviously I take your word for that.

Q. And he had in fact issued a press release, I think the day bids came in, to the effect that he described the various consortia who had applied, and in relation to this particular bid, he had stated that there were four institutions but he was precluded from publicising who they were because of confidentiality that had been requested?

A. I see.

Q. Were you aware of that?

A. No, I wasn't, no. Actually, Mr. Coughlan, you have just reminded me of something that I promised yesterday I would check overnight. I made reference in my evidence yesterday to another of the consortia having a trust arrangement with unnamed parties.

Q. Yes.

A. The consortium was Eurofone, and it has reference to

40% being held by an independently administered trust in the summary. I just checked that overnight.

Q. But that had been the position, the stated position by Mr. Lowry from the 4th August, that there were named institutions there were institutions named in the bid but he couldn't say who they were because there was a confidentiality agreement in

A. I see.

Q. And he relied on that, or appears to have relied on that every time he dealt with the matter in the House. And he was being pressed and pressed quite hard in the House, on a number of occasions, to say who they were. I think you would have been aware of that?

A. I may well have been. I confess that I wouldn't have paid that much attention myself at the time to press coverage. I regarded that as the job of somebody else in the consortium and I had other things to do.

Q. That is a fair point. Whilst you might have a view that political problems might be just something that you believed, whether you were right or wrong, had been stirred up by disgruntled losing consortia, and/or newspapers

A. I think it wasn't just that, in fairness. I am not suggesting that it was the disgruntled loser or losers who were at the back of it. I said that I thought, without having any direct knowledge, that may have been part of that; but certainly the grant of the

licence in itself was a newsworthy event, the fact that Mr. Desmond was involved was a newsworthy event.

That seemed to have come as a kind of a slow burn, because obviously there had been references back the previous Autumn at least to their involvement in an advisory or underwriting role. Again, much more specifically in February, but nobody seems to have paid much attention to it. The February story was written, quite a lot of detail, and then it just died, and now in May, in late April, early May it had all suddenly come to the boil, as these things occasionally do for, I suppose, different reasons, and I was aware that it was very much an issue and it had, at this stage, intruded into my part of the transaction, if you like, in that it was now causing issues for me, so I would have been much more aware of it, although when I was reading the media books that I referred to earlier in my evidence, I noticed that there was actually more volume in the story around end April, early May

Q. I see.

A. than there had been on the 25th October when the announcement was made. So certainly it was a very hot issue.

Q. Right. When you say that the announcement, or sorry, the signing of the licence was a newsworthy event, you said that Mr. Desmond's involvement was also a

newsworthy event?

A. Yes.

Q. What do you mean by that?

A. Well, I mean, again as I have said before, that clearly at this time Mr. Desmond was a newsworthy figure in his own right; he had been involved in controversy and he was, he was and I suppose to some extent remains a fairly flamboyant figure as well, and the press have always been interested in him. I think they are possibly more interested then than now.

Things have quietened down, I suppose, for him.

Q. But perhaps you weren't fully aware of what the Minister had said in the House about this matter at the time? You might have been generally aware?

A. I would have been generally aware. I don't think I was specifically aware.

Q. Wasn't that perhaps the real problem that had to be faced here, that it was known by everybody at this time that Mr. Desmond was in, I mean everybody involved on the Department side and on the Esat Digifone side?

A. Yes.

Q. That Mr. Desmond was in?

A. Yes.

Q. And that he hadn't been in the original bid, isn't that wasn't that the real problem?

A. It may well have been, yes. I don't know, but it may

well have been.

Q. And that is why there was need to try and deflect attention away from ownership?

A. Possibly. I should say, Mr. Coughlan, there is a note which I didn't remember having seen before, at I think it is Tab 56 I don't know whose note it is which also seems to refer to this meeting. I would just mention that I didn't recall seeing this before I was doing my research for my testimony this time around.

Q. Sorry, which tab is it at?

A. I seem to be getting into difficulties about tab numberings, but it follows Tab 55.

Q. Could you just

A. It begins: "M Walsh talked to J Loughrey."

Q. Yes, I have that; that is at Tab 155.

A. That seems to be referring to the same it seemed to me it may have been referring to the same discussion.

When I read it I made a note to myself that this seemed to refer back to the meeting or the discussion I was making a note of.

Q. Well...

A. But I don't even know whose note this is, I should say.

Q. Yes, is that could that be referring to you see there on the first part of that note, that Mr. Walsh was to have a private meeting with the Department?

A. Yes, I thought that that might cross-refer to the bit of the top of the other note, and then under that there is talk about a letter from the underwriter and if you remember in my note there was a thing about the underwriters, Denis was to get material from the underwriters the next day.

Q. I will check whose note that is.

A. I am not sure whose note it is. It struck a cord with me when I read it.

Q. That is Mr. O'Brien's note.

A. Is it?

Q. Concerning final points prior to the grant, is how we have described it. I think it is from Thursday the 16th, I think?

A. Okay, that could well be so. It just struck me as very similar to what I was saying in my note on the 14th.

Q. And just, I think

A. Sorry, I see the Thursday on the screen. That isn't in my copy.

Q. Ms. O'Brien just reminded me that Mr. Loughrey gave evidence that he did have, I think, a meeting on the morning of the 16th?

A. I see. Okay.

Q. Then your note of what Mr. O'Brien was relaying to you then continued: "It must be phenomenally well briefed on bid document and tender.

Owen O'Connell to be present to answer questions."

That, again, must relate to what was in the bid?

A. Yes.

Q. And what the position was now, isn't that right?

A. Yes.

Q. Do you remember having to consider this particular matter, study the bid document?

A. I never had time to do it. I suspect that would have concerned me at the time because while I certainly would have had access to the bid document, I hadn't been involved in its preparation or I had never really gone into it in huge detail or done my homework on it, as it were. Certainly by this time, the 14th, I wouldn't remotely have had time to do that.

Q. Yes. And it goes on: "Legal ownership issue expressly important"

A. I think "extremely important".

Q. "Extremely important," is that right?

A. Yes.

Q. "All reporters focused on this." That, again, seems to relate back to the bid document, doesn't it, or what had been declared and what the position is now?

A. Yes, the ownership of the company.

Q. So it seems clear that it was certainly a very live and very important issue at this time?

A. Yes, but I think what is notable in a lot of this is the constant references to the press and to rehearsing

the press conference and to the press release. It seems to be almost entirely driven by concerns about press reaction.

Q. What or do you remember what was discussed as to what the press reaction might be?

A. No, I don't remember. I doubt there was any great I doubt anyone expected the press to be laudatory of anything at this time.

Q. Like, one can understand, yes, signing of the second GSM Licence in Ireland to be a fairly big press issue perhaps?

A. Yes.

Q. And you have identified yourself Mr. Desmond's involvement would be, perhaps, a big press issue?

A. Yes.

Q. Wouldn't the really big issue, if there had been any deviation from the bid document?

A. I would say not.

Q. Right. And that's the one that would cause political difficulty and press difficulty, I suggest?

A. I wouldn't agree.

Q. Right.

A. But I think it is hypothetical.

Q. Well then, why not just state it?

A. Oh, because there was a lot of frustration at this time. The people were, whose views we're recounting here, regarded all of this as a tremendous good news

story as part of the development of Ireland, as the whole infrastructure thing, the beginning of it here; there was a lot of public frustration around this time at the poor quality of the Eircell network, GSM was a better technology, this was going to put mobile phones cheaply in everybody's pocket, as indeed it did. And there was frustration that all the press could talk about was Dermot Desmond's ownership and so forth, and there was a desire to try to re-focus, pretty futile I imagine, try to re-focus the press on the good news elements of the story rather than the Dermot Desmond issue.

Q. I take your point when you say that there was a lot of excitement and happiness surrounding the people involved in the project. They had just gone through a fairly difficult and sometimes tense negotiations, wouldn't that be fair to say, the people involved?

A. Over the previous week, yes.

Q. Yes.

A. But it would be a mistake to think that what's shown in these documents is everything that was going on, it is only a tiny fraction of what was going on.

Q. I take that point.

A. Because there is nothing in here about the planning issues, there is nothing in here about mast issues, about site licences, about marketing plans, about the Christmas, about employees. There are a myriad of

issues going on at the same time. Legal or licence and the related legal issues are one among many. Now, the one I was involved in, and that is why all my notes relate to it. But the people at these meetings, the Denis O'Briens, the Knut Digeruds, the Peter O'Donoghues, and so on, were giving their half hour or their hour in the day to this and they were going off and dealing with other things as well.

Q. With the actual business?

A. Yes.

Q. I think at 148, that is just I don't think we need to refer to it?

A. I think it relates to my negotiations on

Q. On Article 8?

A. on the licence or Article 14. No, sorry, that seems to be that is on the Shareholders Agreement.

Q. Shareholders Agreement. It is technical stuff, I think?

A. Yes.

Q. There is nothing that we need look at.

A. But the two pages there, I think, are from different discussions.

Q. I see.

A. The first one with the reference to Recital D and headed "1421 B" is one thing; it concerns the Shareholders Agreement.

The next page, "MB needs sight at document re most

circumstances. Voting control to stay with DOB." That is Martin Brennan wanting sorry, that doesn't relate to Esat Digifone actually. That is

Q. That relates to Mr. O'Brien having control of Esat Telecom and retaining voting

A. And the American flotation and all of that.

Q. Yes.

A. I think they are two different things. They are put together here, but I don't think they actually belong together.

Q. Yes. Now, Tab 149. This is where we get the reference to the cruising altitude. This was at the Department of Communications, is that right?

A. Yes, it seems to be, yes.

Q. And this is the one where you are unsure whether you were correct in noting Mr. Buggy as being present?

A. I only said that because I couldn't remember the meeting, as I can most I don't think I would have put three people down on the page if there weren't three people there, so....

Q. Yes, yes. And what is being discussed here is matters that would need to be presented, isn't that right, at a press conference?

A. Yes. I suspect there may have been a bit more to this meeting. My note isn't remotely comprehensive, but I am not sure. There seems to be very little here for us to have gone down to the Department for, so I

suspect there may have been more to it. Or maybe only for me to go down I think, I don't note any else from our side.

Q. I think is that the one that you may have gone to?

A. Yes, I think so.

Q. On your own?

A. Yes.

Q. This is the "some Minister", and we looked at that.

Perhaps we will just look at that because you just touched on it briefly when you dealt with it in your statement.

A. Yes.

Q. You record who is there. Forget about Telecom Eireann.

"World Communications Day 17th May.

Bill O'Herlihy per Minister."

Sorry, if I could for a moment, and I shouldn't pass off the Telecom Eireann thing. Who told you that?

A. I don't know, one of the three.

Q. Yes. It was going it wasn't overly sensitive information; it was going to be announced anyway that day I think, is that right?

A. I think people knew there was a Telecom Eireann announcement coming because I have a vague recollection of people saying they are obviously timing this as a spoiling move or something like that.

Q. Yes. And then the question, "When did Telenor" and

I presume when did Telenor and Esat get together would be the question there?

A. Yes. I think there was something in the Persona complaint about that.

Q. Right. And then there is a discussion:

"Late April/early May."

Then it continues: "Parties talking second half of April."

Forget about the double dealing re Southwestern Bell.

The "pain in the ass" comment.

"Co-owned 50:50.

Intention to place/float 20%.

Strong supporting letters were available from a lot of blue-chip investments.

In normal course when project became real, negotiated but deal available"

A. "Best deal available", I think.

Q. "...best deal available which we now have.

IIU not in original.

"Comfort Minister favourably disposed re letter."

That must have been what letter is that, the underwriting letter?

A. I suspect that is no, more likely the side letter about the Clause 8.

Q. Clause 8, right.

A. I suspect.

Q. Yes, I think that is probably

A. Or sorry, when we discussed this before you thought, and I think I agreed with you, that it may well have been the Telenor letter saying that they will stand by Esat Digifone. I think we decided it may have been that one.

Q. Yes.

A. Yes.

Q. Then: "Dress rehearsal with Minister sometime after 1."

A. Yes.

Q. Sorry, Mr. Healy reminds me it is "Comfort Minister.

Or "Comfort. Minister favourably disposed"?

A. I am afraid I don't see the fullstop, Mr. Coughlan.

Q. I think that it was your view that it may have been Article 8 being referred to there, that seems to be correct?

A. It could be, yes.

Q. It is comfort for the consortium?

A. Yes, it could be that, yes.

Q. Then: "45:45:10. Cruising altitude.

In normal trading circumstances debt equity around 50% in start-up phase.

More fluctuations because of capital spend.

Will tend a little more towards equity, especially in early phase. Martin Brennan" and we discussed this?

A. Yes.

Q. And "Some Minister needs our help." And I think your understanding of that is Minister needs some help, is that right?

A. No, I think it means that in relation to the issues we are dealing with, the Minister has material, has some material to deal with them but needs our help to provide more material.

Q. Needs help to provide more material?

A. Yes.

Q. "Whether same project has won competition." So, that was a live issue at the meeting?

A. Yes.

Q. "Martin Brennan not keen on Denis as a speaker."

A. "Not attribution."

Q. "Not attribution"

A. Meaning he didn't want me to tell Denis that he had said that.

Q. Fair enough. Mr. Brennan was entitled to have his view?

A. Absolutely.

Q. "First conference: Denis O'Brien 'We'll be lowering' this was something that Mr. O'Brien was to deal with?

A. To say, yes.

Q. "We'll be lowering prices 25% in three years.

Focus of attack.

Couldn't have won competition on this basis."

So there is obviously some discussion taking place there or you are being informed by the Department that the competition couldn't be won on that basis because there might have been somebody else better placed on tariffs or pricing?

A. I think they were saying that they wouldn't have or couldn't have given the award of the licence simply on price.

Q. On price?

A. There had to be quality and certainly at the time, I mean people have forgotten now because mobile phones are generally very reliable. At that time there was a lot of dissatisfaction with the Eircell network and a lot of dropped calls and things like that, so quality was much more an issue.

Q. "Application was stronger than that" this was something that has been...

A. Yes.

Q. Can I just go back for a moment. Do you know Mr. Brennan's indication that he didn't want Mr. O'Brien as the speaker?

A. Yes.

Q. That seems to be on the question of whether same project as won competition?

A. No, I think it was more general. I think

Q. They were agreeing that Mr. O'Brien would give some sort of a

A. I think I was saying he wanted to say that.

Q. I see.

A. I think what was happening here is Martin Brennan is saying, look, I don't really want Denis to talk.

Q. Yes?

A. Implicitly that he was something of a loose cannon and he never knew what he would say and I was saying, well Denis wants to say that we will be lowering prices in three years.

Q. Well...

A. I think. I am not sure.

Q. Yes, I know. Could it have been the situation that this question of was this the same project that won the competition, this was a sensitive issue and it is one that Mr. O'Brien could mess up?

A. Yes, it certainly could have been that, yes, possible.

Q. Yes, because it was good news, I suppose, one could allow somebody a little bit more leeway?

A. Yes, he could have been referring back to that, yes.

Q. And then on the question of tariffs, "Prepare better answer.

Get correction in launch commitment" sorry,

"Application was stronger than that.

"Prepare better answer.

Get correction in launch commitment per bid."

A. "Launch commitment" seems to be a new sentence. I am pretty sure there is a fullstop there after "in". I

am not sure what we are correcting though.

Q. Yes. Sorry, there were various commitments in the bid in relation to the launch; that may be referring to something like that?

A. Yes, in fact

Q. The amount, the roll-out, perhaps?

A. Yes. And in fact, Esat Digifone was fined a million later on for being a month late in the launch.

Q. Yes. "Get presentation in price area." Again, that seems to be a reference back to the bid, doesn't it?

A. Yes.

Q. "Consider, although not in application, ten second billing units." That is per the oral presentation.

This is something that wouldn't be found in the document but was dealt with at the presentation, I think?

A. Right.

Q. "Denis O'Brien - one second billing by end year."

This was something Mr. O'Brien was to say, is it?

A. I think I may be saying that it is something he will say or something like that.

Q. "Different packages, different consumers.

25% a simplistic more complex exciting thing to shake up market. For example, per second billing early on (if Esat Telecom)"

A. I think it is "(NB: Esat Telecom.)"

Q. Right.

A. I think that may be something to do with the fact that Esat Telecom on its fixed line business was going to per second billing, and they were going to extend it into Esat Digifone; it may have been that.

Q. Yes. "Attempt to correct complaint.

Innuendo - 25% in three years."

Do you know what that is about?

A. No. It may be a reference to the Persona complaint, perhaps, I don't know.

Q. "Couldn't have won competition on the basis, not enough.

Another consortia reducing 30 to 35% within a year of launch."

A. Yes.

Q. This must have been information that was coming from the Department?

A. I think they are telling I think we are having a dialogue and I am saying what I expect to be said and they are telling me they like it or they don't or it has got to get better or you couldn't have done it on that basis alone and so forth.

Q. And then the question is being addressed, "'Why only being signed now?'

'Was licence delayed to put money in place?'

Leslie" Mr. Buckley was to speak about this I think, is that right?

A. Perhaps, yes.

Q. "Department delay all on our side."

A. I am not sure that was them saying that or me trying to get them to say that. It could have been either.

I doubt they would have volunteered that anyway.

Q. Yes. Certainly not in light of the letter that Mr. Brennan had written in response?

A. No, I suspect that was more me flying a kite.

Q. Yes. "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 for that.

Question, 16 June deferment.

23 June originally closing, with no deferment. Could we have"

A. "...bid."

Q. Oh, sorry. That would be a reference back to intervention of the Commission?

A. In June '95, yes.

Q. "Comfort now as to how Minister will act in given circumstances in the future." That seems to be a reference that you are receiving comfort?

A. I think that is back to the Article 8 again.

Q. Or you are looking for comfort?

A. I think that is back to Article 8. Article 8 was a big issue for me at this time.

Q. Yes.

Now, I think if you go I just want to skip for a moment over Ms. Gleeson's document to go to Tab 153, because this, I think, may be you reporting back on that meeting, is that correct?

A. Yes, it looks like it.

Q. And it looks like Mr. Halpenny, Mr. Neville O'Byrne

A. Michael Walsh.

Q. Michael Walsh, Owen O'Connell, Barry Maloney, Knut Digerud, Peter O'Donoghue and Arthur Moran?

A. Yes.

Q. "Owen O'Connell report re Department meeting.

Windfall gains.

Take out reference to €15 million."

A. "Minister must wave the 15 million."

Q. "Indemnity in accordance" is that "must wave", or what does that mean?

A. Meaning hold up the cheque.

Q. And then what is that, "identity" is it?

A. I think it is "identity".

Q. "Identity in accordance with the bid."

A. Yes. I think that is a reference back to what I said, if I may?

Q. Is it "indemnity"? Maybe it is "indemnity"?

A. It could be "indemnity".

Q. Couldn't it?

A. You see, it is not my writing.

Q. Yes, I know. I agree.

A. That looks more like an "I-N-D" all right.

Q. It may be "indemnity". That may be a reference to the fact that the shareholders, the parent company, the shareholders were to sorry, it is "the indemnity."

A. I remember what this is. That phrase does occur in the letter which Telenor and IIU wrote to the Minister on the 16th and, which I drafted I think, and it has the phrase that they will give the coverage "in accordance with the bid", or words to that effect.

Q. Right.

A. I am nearly sure it is in there. I think we will come to that letter.

Q. All right. Then there is a reference to Persona. "Lost 4/5 points re technology." Is that right?

A. Yes.

Q. "And re performance." That must be performance guarantee, is it?

A. I don't know what the word after performance is, it is missing on my copy. The next line is "Projected market not agreed by Department." I suspect this is something I didn't record in my note, which is the Department may be telling me about why Persona lost .

Q. Yes?

A. I don't recall that.

Q. Well, it looks like that at least, doesn't it?

A. Yes, it does.

Q. It is something we can take up with the Department.

A. Then there is, "No happier but dearer", I don't know what that is about.

Q. "No happier but clearer" perhaps?

A. Maybe "clearer", yes.

Q. I don't know.

A. Yes, perhaps.

Q. Now, this was all on the 15th before there had been, before Mr. Walsh's, I think, final meeting on the morning of the 16th, there was a meeting on the 16th with Mr. Loughrey, yes?

A. I think there was. I think this is pretty obviously, I think this is me having been down to the Department to the meeting we have just looked at and I have come back and the Digifone people have assembled in committee and I am reporting on the meeting I have had. Now, clearly Arthur Moran took things from my report which I hadn't noted.

Q. Yes. And I can understand you could have been just recounting, I can understand

A. Yes.

Q. what had been said.

Now, continue down: "Article 8." And then,

"Mr. O'Brien, Mr. Buckley met Lowry and Loughrey.

Sort all today. One person to settle everything today." That was you?

A. Yes, that refers back to the conversation between Mr. O'Brien and Mr. Buckley on the one side, and

Mr. O'Brien and the Minister on the other, and the

outcome of that.

Q. What is the next thing then? Is that, that looks like

"Identity to be clarified"?

A. It could be "identity" or it could be "indemnity" or

"indemnified", or "underwriting" yes,

"underwriting".

Q. Yes. "Underwriting to be clarified."

A. Yes, I think that could be right.

Q. And then sorry, that was one thing. Yes.

"IIU financial info. Press conference details.

Draft next letter" sorry?

A. "Draft" something "letter re-transfer."

Q. "Article 8"

A. "Consent letter re-transfer".

Q. "Consent letter re-transfer." Yes. Then, "Article 8"

A. "Amendments proposed by OO'C."

Q. Yes. "Letter for four shareholders re underwriting"?

A. That is "underwriting", I think, yes.

Q. And then a "to do" list?

A. Yes.

Q. Now, at this time, can I take it that it was your understanding that you were just, you were proceeding

on the basis that it was just sorting out the nuts and

bolts, that the licence was going to be

A. Yes, this is a classic push across the line really.

Nearly every transaction comes to a point where if you let it, new things will keep coming up and people will come in in the morning and say, I was thinking last night and could we have this and could we have that, and most transactions arrive at a point where you simply have to give it a lot of attention and push and be a bit abrupt with people sometimes and say, look, you can't have that or you have to give the other, and go away and sort that out and come back in half an hour. You try to draw lines and say, right, that is dealt with, forget about it, no more points to be raised. Inevitably the longer this process goes on, the more people do raise new points. I was engaged, I think, here in a fairly energetic process, of trying to get people across lines on various issues, whether it was the Department, Telenor, Esat, IIU, whoever it was.

Q. Yes.

A. And that would be very much part of my role in a matter such as this.

Q. And the to do list was the Shareholders Agreement, isn't that right?

A. Yes. And articles.

Q. And articles. The transfer of the 5% to 2.5 each to Esat and Telenor, isn't that right?

A. Yes.

Q. Then what is the third one?

A. "Terms of provision of monies to Esat Telecom Holdings by Telenor and IIIU." Something "cash".

Q. And "One year loan note. Not repaid"

A. "No conversion."

Q. "No conversion."

A. "Press conference rehearsal", then, is the next one.

Q. "Letter to Department. Reviewed per telephone"

A. "Review per telephone".

Q. "With Arve Johansen", yes, I presume?

A. Yes. The next bit is missing from mine and it is missing on the screen as well.

Q. What letter is that?

A. Probably the letter in which they said they will stand behind the project. I imagine that is the one that Mr. Moran would have had to discuss with Mr. Johansen.

Q. Yes. And going over the note, it is headed "Rolf Busch" this must have been some information he is not recorded as being at the meeting, is that right?

A. He has headed one sheet 'Telenor I', and the other is headed 'Telenor II'. It could be two separate meetings. I don't know, though.

Q. Right. Well you weren't at this meeting, were you?

A. It could be a continuation of the previous meeting or it could be a new meeting, I just don't know which.

Q. Okay. "Text shares/interest to be placed once only"

A. "Without" I think that word is.

Q. "Place once only" I can't "without acquisition of company and in which the shares.

Seek underwriting from ETH"

A. That is "undertaking".

Q. "Seek undertaking from ETH/Communicorp/O'Brien not to acquire..."

A. "...directly or indirectly..."

Q. "...directly or indirectly any interest of any shares in Esat Digifone."

A. Yes. This became the subject of a side letter on the 16th. There are letters on this point later on.

Q. "Sign all documents simultaneously."

A. This is arrangements I think for what occurred on the 16th. He is noting things that have to be done.

Q. Very good. I think then there is "Telenor", do you see the note, "Telenor III"? It seems to be again

A. Yes.

Q. It seems to be a phone call from you from the Department, would that seem

A. Possible, yeah. I could have gone back down again, I don't know. I was pretty much full time engaged by now on this.

Q. Yes. And it seems to be: "Split in two letter legally binding, that if shareholders in the company wish to transfer or have any wish to issue shares must apply." Is that right?

A. Yes. This is a description of how the side letter on

Article 8 turned out.

Q. Yes. "But the Minister is bound to issue consent re consent letter."

A. In other words, there were certain circumstances in which the Minister, we always had to apply that there were certain circumstances in which he would have to consent.

Q. Yes.

A. That is in fact how the letter was written in the end.

Q. Right.

A. And I think I am describing how it is evolving, because that letter went through innumerable drafts. They haven't come to light, they haven't been in the Tribunal documents but there were a lot of drafts, etc..

Q. Then, "8.6C: Letter to be ready when licence issued, but not before.

Telenor plus IIU capital call.

Communicorp", I presume, "faced to pay.

Telenor to transfer 11.375 million to William Fry."

That is 10 million.

"Esat Digifone 1.375 million IIU Nominees."

What is that about, do you know?

A. It is arrangement for all the monies. The 1.375 I think is the consideration, their share of the consideration for the 2.75. The 10 million, I would have to work it out. It would be it doesn't come

to quite an exact amount.

Q. It is their 6 plus the 4, which is their portion of money?

A. Of Esat's 6.

Q. Esat's to 37.5, whatever, 40%?

A. It is actually 66%.

Q. 60% of Esat's requirement?

A. Well it is not, it is 66.6%. I don't think that was the proportion in which they lent so I am not quite sure where they got the 10 million.

Q. Right. There was definitely, they had on the they had to provide 6 million themselves?

A. In their own right, yes.

Q. In their own right, isn't that right?

A. Yes. And then they were providing a portion of Esat's

Q. IIU had to provide 3 million?

A. No. More.

Q. Sorry?

A. Sorry.

Q. I beg your pardon, 15 million

A. 3 million, you are right, 3 million.

Q. Yes, they had to provide 6 million. Communicorp had to provide 6 million, and IIU 3 million?

A. 3 million, yes.

Q. They provided 6 million, their own 6 million in this 10 million, I presume?

A. Oh, yes, sorry I was getting confused about the 37.5.

Of course we are back to the 40 now.

Q. Yes, we are back to the 40. And the balance was their proportion that they were advancing in relation to

Esat

A. Which did come out proportionate rather than 50:50.

Yes, that explains it, yes, sorry.

Q. It came out at 4 million, I think?

A. Yes, two-thirds.

Q. Yes. So the total 15 million came this way: 10 million came from Telenor, isn't that right?

A. Yes.

Q. And 5 million from IIU?

A. Yes. And then IIU got 1.375 from

Q. They got 1.375 from Telenor?

A. And they were owed the same amount.

Q. And they were owed the same by?

A. By Esat.

Q. By Esat?

A. For payment two weeks later.

Q. Yes. And when we say "Esat" we mean Esat/Communicorp?

A. We actually mean Esat Telecom Holdings.

Q. Yes, I appreciate that. It is just that we use the term as distinct from Esat Digifone, yes, that is all

I want to do.

A. Yes.

Q. And was this all agreed on the 15th?

A. Yes, I think yes, I think we were dealing with the practicalities now. As I said, I was trying to I am not sure I was at this, oh, yes, there seems to be a call from me and I think I am ringing up to say this is how we have to do it, don't forget to get the money. Sometimes in transactions you get so tied up in the details of the contract that you actually forget to bring along the share transfer or the seal or the keys or the cheque, and I was making sure that that wouldn't happen.

Q. Yes. If we go over the page then.

"Outstanding matters:

"Bank supplemental agreement." Is that right? "Share Register/certificates"

A. Yes. The bank wanted a supplemental agreement to the Shareholders Agreement. I don't think anything turned on it relative to matters that you are interested in.

There was a supplemental Shareholders Agreement dated by the bank. I don't even remember what it provided.

It is in the 16th May documentation.

Q. What is that note then "Certificates over 3 million shares"?

A. I think Mr. Moran is probably noting that in relation to the 3 million no, that wouldn't be right because it was 4 million. He may, for some reason, have been harking back to the 3 million issue.

Q. Yes?

A. Perhaps "certificates" which I think is a month earlier at this stage, for which maybe certificates, share certificates hadn't yet issued or something, I don't know.

Q. All right. "Matheson Ormsby Prentice letter to Fry requiring money to be held for Telenor pending issue of the GSM Licence."

I think the rest of the note is just housekeeping matters, isn't that right?

A. Yes, I think so.

Q. Then on the 16th, your note at 154, I need to go back

A. Yes.

Q. first to 150. And I think we have been through Ms. Gleeson's letter to you and you are not in a position to assist us about who the Minister's adviser is or the Minister and his advisor referred to there?

You think it must be Mr. O'Herlihy or something; that is a matter for Ms. Gleeson, or have you clarified it?

A. No, I haven't. I was just going to say there is a reference to Mr. O'Herlihy in my other note.

Q. Yes. Perhaps if we go to 151, it is the questions and answers really. I think we have dealt with this reasonably fully so I don't think we need to go through it in any great detail other than I think I did raise with you the issue yesterday, you see the second one there, "Was IIU mentioned in the bid

document as one possible shareholder, i.e. were they one of those that gave letters of commitment?"

A. Yes.

Q. And I think your note is: "IIU to say no. Department have said already expressions of interest given. Bid was confidential in that respect. That is "backers" identities were not revealed."

That is when I asked you yesterday was that approached on the basis of the confidentiality which had been invoked by the Minister in the house?

A. I see. I think in fact when we went through this before I had concluded as a matter of probability that the darker notes on the right were my initial suggestions and the lighter in the middle and the left was what was actually to be said. So I think I may have thought to myself when I made the note that maybe we just said the bid was confidential, but somebody else probably came along and probably more wisely said no, we will get IIU to say no they weren't making the bid.

Q. Now, 154 I think we can go to then. This is your note of the 16th May, 1996?

A. I would just like to preface all of the 16th May material, Mr. Coughlan, by saying that I think it is out of sequence on the day and I am not absolutely sure what sequence it should be in. Some of the documents are timed and some aren't. And it is also

possible to work out, on the basis of logic, where certain ones fall. But I don't think the way they are here isn't necessarily in the correct sequence.

Q. I agree. And it is your note of the 16th May.

"Martin Brennan/Fintan Towey/Donal Buggy." That is timed?

A. Yes.

Q. It is timed at 11:55, that is five to twelve?

A. Yes.

Q. Was there do you recall if there were any earlier meetings in the morning?

A. I don't recall, I am afraid. It may become apparent as we go through.

Q. All right.

"Martin Brennan/Fintan Towey/Donal Buggy - 11:55.

"Knut has to be there. Michael Walsh ought to be there.

"Have told you a lot about this company more."

What is that a reference?

A. I don't know if I don't know, it seems to be somebody suggesting an answer to the press perhaps.

"This company" maybe being Esat Digifone, or obviously it could be IIU.

Q. That was what I was just wondering; were they looking for more information at that time, I think?

A. I don't think anybody would have been able to say, we told you a lot about IIU, but they could have said, we

told you a lot about Esat Digifone.

Q. Very good. Obviously the next answer is "Loves answer re 500K"; that is the extra costs occurred in the delay I think, is it?

A. Yes, I think so.

Q. Then there is a reference to "Mr. Brennan wants formal press release. Still looking at letter"?

A. That Mr. Brennan is obviously Mr. Seamus Brennan.

Q. Yes. It is, yes. I don't think "Minister to guarantee re coverage geographically plus quality.

Dail tonight.

Wants formal press release.

Still looking at letter" what's

A. It could be either the Article 8 letter or the Telenor letter, I don't know. They were the two letters I think the Minister was concerned with.

Q. "Very urgent re Shareholders Agreement.

Still on for 3:30.

Printing stage.

Minister's press release need now.

Account Department" that is the 15 million, where it was to go?

A. Yes.

Q. Coming back to that, you have it in quotation marks,

"I told you a lot about this company more." What more would you need to tell about Esat Digifone, do you think? I am just trying to figure out what

company we are referring to there?

A. Yes, I suppose you can always ask for more. I don't know, no.

Q. 155A is the press release, I think?

A. Yes, the draft.

Q. The draft, yes. And this would have been prepared by whom, do you believe?

A. Eileen Gleeson.

Q. By Ms. Gleeson.

A. She is referred to at the bottom of it as the content, or perhaps someone in her office, but by FCC.

Q. Well, the draft she sent you I think was at Divider just before the questions and answers.

A. 51.

Q. 51, yes. 150 in my book?

A. Yes, 50.

Q. We will just have a look at the differences.

A. I think they are doing different things.

Q. Are they?

A. The actually it has just become clear to me. When we looked at these before I said I thought that the reference in the covering letter to the good idea versus bad idea was about doing everything on the 15th or doing everything on the 16th. I think I was wrong. I think what this is if you look at the 15 May draft.

Q. Yes?

A. It is really just all about IIU and the shareholding.

Q. Yes?

A. And the one we have just been looking at a moment ago on the 16th is the actual announcement of the licence.

Q. Yes?

A. I have a suspicion that what the 15th one was about was trying to get, trying to defuse the IIU. Now, I should say I have only come to this conclusion now in looking at the documents. It is not any burst of recollection.

Q. Right.

A. But I think the one on the 15th may be that somebody, perhaps Eileen or somebody else had the idea that we will put out the IIU material first

Q. Yes?

A. on the 15th. And get it out of the way so that people would concentrate on the 16th, on what I referred to earlier as the good news story, the signing of the licence, because the 15th one is all about IIU. The 16th is all about the licence.

Q. That's right.

A. Now, I don't think that ever happened. And I think where there was a reference in the covering letter to the 'Minister's advisers thinking it a good idea but Loughrey not', may have been about the tactic of putting out a press release early about IIU.

Q. About IIU.

A. All of that is speculation, but I think that is what it is about.

Q. Yes.

A. I don't think it happened anyway.

Q. You don't think which happened?

A. I don't think that the IIU press release was sent out, the 15th.

Q. The 15th, yes. Then I think the dress rehearsal is a document is document 159 in our book, it may be 160 in your book.

A. Yes, I have got it.

Q. I think again we have been over this document, I think, isn't that correct?

A. Yes.

Q. I think unless you want to say something, I don't intend dealing with it again?

A. No, I have nothing else to say about that document.

Q. If we go back to Tab 155 now, I think in our book. It may be 156 in yours?

A. Yes. This is the one headed, "M Walsh talk to J Loughrey?"

Q. Yes.

A. The first recollection I have of seeing this document is in my research for this session, so I am not very familiar with it.

Q. It is Mr. O'Brien's note, I think, would you it looks like Mr. O'Brien's writing?

A. I would certainly accept it is. I don't know. It does look more or less like his writing, yes.

Q. Yes. And this is, this is timed 12 noon, isn't that right, on the left-hand corner?

A. Yes.

Q. And then "Thursday 11:30" on the right-hand side?

A. Most of that is missing from mine, I am afraid. Yes, I see it there, yes.

Q. "Michael Walsh talk to J Loughrey. Seen enough to satisfy.

Letter finance in place from underwriter.

40:40:20. Don't discuss 5, 5." That must be the 'cruising altitude' or 'let the ink dry' matter?

A. Maybe, yeah.

Q. Or is it just don't discuss 5%, I don't know?

A. I have no idea what it is, I am afraid, or what it refers to. There was so many 5% by now.

Q. It could well be the 'cruising altitude', 'let the ink dry', 10 percent?

A. It could be.

Q. "3: Worst probable

A. "Worst possible."

Q. "Worst possible"

"...questions:

"Number 37. Competition for GSM Licence.

William Fry to play devil's advocate.

Legal advisor will attach"?

A. "Attend", is that "attend"?

Q. Is that "attend"? It could be. Is it "attach"? I don't know.

A. It looks more like "attend".

Q. Or is it "attack"?

A. That fourth letter looks like an E. If you look it is also "Davys solicitor to attend" is the next bit.

Q. "Davys solicitor to attend"

A. I think that is "attend," "legal advisor will attend."

Q. What is that "Davys solicitor to attend"?

A. I don't know.

Q. It could

A. It could be "Will attack Davys."

Q. And then, "Solicitor to attend." Could that be you don't know?

A. I don't know, I am afraid, no.

Q. You don't know?

A. No. I haven't seen this note really before.

Q. "Solicitor to attend.

"1. Ownership.

"2. Deflect attention away more business info.

"Infrastructure. To give them.

Don't"

A. Something "before".

Q. "...before invested" these were the good news matters, I suppose

A. Probably.

Q. they wanted to emphasise. Then the next one is:

"DDI lines.

DDI/DDO"

A. This is all the fixed line.

Q. The technical fixed line.

"Matrix: Need them. Quality. Vows licence."

"Justify requests.

"Quality"

A. This is all DDI fixed line, I think.

Q. Yes. All right. Then there is, at Divider 158, and this is your note on the press conference, isn't that right, and we have been over that?

A. We have.

Q. As you said, as things moved along you

A. I lost interest more or less. It didn't seem relevant to me, to the legal side.

Q. Yes. Was it your impression of the press conference that no hard questions came up?

A. I can't really remember, but probably yeah. I remember it as very much a celebrity affair. A lot of goodwill and I don't remember any jarring notes particularly.

Q. Yes. Well, can I take it that well we don't know. But you would have probably have noted something if something difficult had arisen?

A. Most likely, yes. Or I may have taken pretty much when a completion occurs, as this has, I largely

switch off. This is post completion. So even if somebody did ask an unwelcome question, I mightn't have been that bothered because I would have taken the view that it was done at this stage.

Q. Yes. Now, there is another, at 159 there is a note of I beg your pardon, we have been through that, I beg your pardon.

I think I stated to you before you gave evidence this morning there were a large number of side letters signed on this day also, isn't that correct?

A. Yes.

Q. And I was going to ask you if you could assist us in understanding

A. Yes, I will do my best.

Q. in understanding them.

A. Would you like me to go through them or do you want to take me through them?

Q. Yes, I better refer to them as well. It is in Book 47. Now, I know a lot happened on the day, and it may be hard for you to remember the actual sequence of events on the day, but the Shareholders Agreement was furnished to the Department, isn't that correct?

A. Yes, as signed.

Q. As signed. That was signed on the 16th, isn't that right?

A. Yes.

Q. The letter from the Department, the side letter

relating to, sorry the licence was issued and its side letter from the Department was issued, isn't that correct?

A. The licence and the side letter were signed in a room on an upper floor of the Department just before the press conference.

Q. Just before the press conference. And at Document No. 3 in Book 47, there is a side letter dated the 16th May, 1996, signed by Telenor Invest and by Mr. Johansen and by Mr. Walsh, isn't that correct?

A. Yes.

Q. And that went to the Department?

A. Yes.

Q. And that letter is the one where they undertook or to provide the underwriting agreement, in effect?

A. Yes. Well it was rather more than underwriting. This wasn't really underwriting, this was I mean, there have been a lot of references to underwriting and it has been used in quite a technical way so this wasn't really underwriting. This was more of a guarantee probably that the project would be carried through and the money provided irrespective of any failure to provide funds by Esat.

Q. Yes. Esat/Communicorp?

A. Esat/Communicorp, yes.

Q. Now, as of the signing of this particular letter, the underwriting which arose out of the Arrangement

Agreement, the 29th of September, ceased to exist, is that correct?

A. Yes, because the Shareholders Agreement contained very detailed provisions for what would happen on each issue of shares in the event of a default, so it was super well, it was both subsumed into and superseded by the Shareholders Agreement.

Q. Yes?

A. This letter wasn't really part of that. This was a separate assurance to the Department.

Q. A separate assurance to the Department?

A. In practice the mechanism of the Shareholders Agreement implemented this letter but this is very much shorthand for what the Shareholders Agreement did.

Q. Yes. But up to the Shareholders Agreement, the signing of the Shareholders Agreement IIU had an underwriting obligation in respect of Esat/Communicorp?

A. Yes.

Q. And Telenor didn't?

A. Yes.

Q. By the signing of the Shareholders Agreement, and we will include this letter as well, Telenor now assumed, and I take your point about using the term "underwriting" in its technical sense, assumed a position of guarantee which they did not have prior to

that?

A. They did, yes, they did. And also some quite significant rights corollary to that. I am not sure that the rights and obligations given and undertaken in the Shareholders Agreement are properly describable in any of the common forms such as "guarantee" or "underwriting". They are really sui generis, and they need to be looked at as a series of covenants or contractual rights and obligations in their own standing alone. They are not classically underwriting, classically guaranteeing or classically anything else.

Q. Right. Now, Divider No. 4 in Book 47, this is a letter which is signed on the 16th. I don't know if we need to go into it in detail. If you could just explain. It is a side letter in relation to the banks, is that right?

A. Yes. The banks were always concerned that elements of the licence could be used in such a way as to frustrate their ability to realise security or otherwise to enforce the terms of their loans. And for a long time they wanted the Minister to give some form of a letter, originally a binding letter, then they dropped their demands I think to a comfort letter, saying that he would do certain things and wouldn't do other things, which various things would have had the effect, would have had detrimental

effects to the banks.

Q. Yes?

A. And their solicitors we haven't seen in this Tribunal, I think, the very, very extensive correspondence which went on between the banks and Esat Digifone, mainly through other solicitors; that hasn't come up. My partner, Elaine Hanley, who I mentioned the other day, was one of them.

Occasionally that intruded into the Department's side when the bank looked for these letters and eventually in the, in the bitter end the banks failed to get anything from the Minister. It was put to Department officials once or twice that they might consider giving letters and they never really wanted to nor wanted to get involved with the banks and treated that as very much our affair. So this is the, this is the banks saying, look, this is our understanding of how things are going to go.

Q. Right?

A. But I don't think it had really much effect in reality. And they are saying that we expect all of these things to be in the licence or not to be in the licence.

Q. I see.

A. That is the basis I am going to let you take the finance. But in practice, once the licence was signed, everybody went off and started to build the

network and draw down the money; the ability of the banks to do anything with this letter or about it was to all intents and purposes nil. So I don't think the letter the letter is the longest side letter, I think, but possibly the one with least effect.

CHAIRMAN: Aspirational.

A. Yes, Chairman, I think so. They end up saying if their various concerns aren't adequately addressed they may not be in a position to address project finance. In reality a lot of the project finance had already been drawn down.

Q. MR. COUGHLAN: Were you aware at any time that the Minister had met with the banks or some of the banks to give comfort?

A. I don't think so. I think that very vaguely rings a bell with me that they asked to meet him, I think. I think A and L Goodbody asked to meet him or asked to have their clients meet him. I can't remember now whether I was aware whether there was such a meeting or not. I was quite divorced from all the banking stuff.

Q. That is fair enough.

A. It wouldn't surprise me but I think the Minister would have been cagey at such a meeting because I remember the Department officials being quite nervous with the banks and what they might try to draw the Department into. You will remember I described also the issue

about mortgage over the licence.

Q. I do. I do. I think Divider 8 is the next one. Now, can we take it that in relation to that side letter, the bank side letter, that the Department wouldn't have been necessarily aware of that?

A. I don't think so. They knew we had endless there would have been a huge amount of papers with the bank and they would generally have known that was going on, but I don't think so. This is the bridging of the, as you call it, Esat/Communicorp share of the 6 million.

Q. Yes. Perhaps we should just look at that so?

A. Yes.

Q. It is signed by Mr. Johansen on behalf of Telenor and Mr. Walsh on behalf of IIU. And there is a reference, the Shareholders Agreement between IIU Nominees Limited, Telenor Invest and Esat Telecom Limited and Esat Digifone dated the 16th May, 1996, the agreement.

"Dear sirs,

"A. We refer to the agreement and to terms thereof specifically relating to mechanisms for handling a default by any of the parties thereto in relation to the provision of capital (as defined in the agreement).

"B. At a Board meeting of the company held on 16 May 1996 the Board resolved to call for a capital contribution of $\frac{1}{2}$ 15 million in respect of the acquisition of the GSM Licence. Esat Telecom Holdings

Limited indicated that it would not be able to meet this capital call and accordingly under the provision of Clause 14 of the agreement a meeting was called to discuss alternative methods of providing the shortfall arising from this default amounting to IR£126 million.

"C. Pursuant to that meeting agreement has been reached between us in accordance with the terms of the agreement as to the provision of the shortfall of £126 million in accordance with the following terms:

"1. IIU will contribute £12 million of the shortfall.

(The IIU contribution).

"2. Telenor will contribute £4m of the shortfall (the Telenor contribution)" that is the 10 million I think, their own 6 and the 4 subsequently?

A. Yes.

Q. "3. The terms upon which the IIU contribution and the

Telenor consideration will be invested in the company

are that each of IIU and Telenor will be issued with a

loan note in respect of the said contribution in a

standard form confirming firstly, the principle

amount. Secondly, an interest rate of 2% over the

Dublin interbank offered rate to Allied Irish Banks

plc for funds of an amount equivalent to each of the

said contributions on a one month basis set on the

date of the said contributions and reset monthly

thereafter. Interest will be payable on the notes

monthly in arrears and if unpaid will be compounded

with the principal and will itself bear interest.

Interest will accrue interest day-to-day.

"4. The notes will have a repayment date on a date which is four months after the date of the contribution i.e. 16 September 1996.

"In the event that the company does not make the repayment on that date aforesaid we shall either have the option at our unanimous agreement to extend the repayment date or to procure the conversion of our contribution into ordinary $\frac{1}{2}$ shares in the company on $\frac{1}{2}$ for $\frac{1}{2}$ basis taking into account any unpaid capitalised interest which has accrued in respect of the contributions aforesaid. If IU and Telenor are unable to reach agreement in accordance with the terms of this clause by 16 September 1996 the contributions shall be converted into Ordinary Shares accordingly.

"6. In the event that the company is unable to repay and we are unable to convert the contributions as specified in paragraph 5, then we agree to negotiate together so as to convert our contributions into a quasi equity instrument on standard and usual terms which will effectively treat the contribution as an equity investment in the company and will carry the rights of an ordinary share save in respect of voting rights. The intention is to create an instrument which would have the same commercial value in all respects as an ordinary equity share carrying voting

rights.

"In the event that we are unable to agree on the format of the aforesaid instrument then we agree to refer the matter to an independent chartered accountant agreed between us or appointed by the President of the Institute of Chartered Accountants in default of agreement. The said chartered accountant so agreed or appointed, acting as an expert, will fix the terms of the instrument taking into account the provisions of the agreement and of this letter.

"The capital call made on IIU for $\text{N}1\frac{1}{2}$ million and Telenor for $\text{N}1\frac{1}{2}$ million at the Board meeting referred to in paragraph B have or will be contributed to the company on the same terms as the IIU contribution and the Telenor contribution herein set out. "

And it is signed by Mr. Walsh and Mr. Johansen, isn't that correct?

A. Yes.

Q. That provided the mechanics for the Esat/Communicorp contribution or

A. Yes. And the reason it was so complicated, as I recall, is the simple way to do this would have been for Telenor and IIU each to lend the money to Esat.

Q. Yes?

A. Esat to subscribe it to the company, get shares and then mortgage the shares to Telenor and IIU. Telenor couldn't make loans to Esat for some reason to do with

its own constitution or the form of its establishment or whatever. Anyway, we were told they couldn't make loans. So this more complex mechanism was constructed whereby they made loans instead.

Q. To Digifone?

A. To Digifone.

Q. Yes.

A. The loans were convertible to shares. Esat subscribed also for shares, but on a 1p paid basis, so it got its shares on the day. If Esat had the idea then was that when Esat raised its money from CSFB, it would pay up the 99p per share; that would put this amount of money into the company; the company would use this amount of money to repay Telenor and IIU and everything would be as it should have been and that indeed is the way it occurred and this instrument effectively washed out of the equation because of no effect. If Esat Esat/Communicorp, call it, had failed to raise its money in the US, the IIU and Telenor would have converted their debt to shares, provided the Minister consented. -

Q. Yes?

A. Then the company would have made a call on Esat's shares for the 99p. Esat wouldn't have been able to meet it and the company would have forfeited the shares. Thus you have the same effect as if a mortgage had been created ab initio. If the Minister

had withheld his consent, this is what paragraph 6 is about, if the Minister had withheld his consent to the conversion of the debt into shares, then the forfeiture would probably still have taken place, although in theory the forfeiture itself could also have been subject to ministerial consent and the company would have given to Telenor and IIU rights analogous to shares as close as could be within the constraints of the licence.

Q. Yes?

A. That is what this is all about.

Q. Do you know whether this side letter was given to the Department or disclosed to the Department?

A. I doubt it. I don't think there would have been any reason to give it to the Department because if it had no impact immediately on ownership. The ownership was as it was intended to be: 40:40:20. Any impact it could have had on ownership would have been subject to the ministerial consent provisions of the licence and the general anticipation, expectation that it wouldn't have any effect on ownership, as indeed it proved not to have because Esat did raise its money, did pay up its shares the company did repay the loans and so forth.

Q. I am just wondering it might have been of interest to the Department in the context of a concern as to whether Esat/Communicorp could raise the money

eventually?

A. My own understanding was that as long as the Department got the 15 million, they had no particular interest.

Q. Right. So as far as you were concerned, you are not stating necessarily that it was stated to you as a fact or anything, the Department were just concerned getting the 15 million on that day, and they didn't go into any detail as to the mechanics of how it arose?

A. There was quite a lot of press speculation that the Department wouldn't get its 15 million. Once they did they were happy. That was where the comment earlier the Minister wants to waive the cheque, waive the 15 million came from.

Q. Do you think the Department or do you think the Department were aware, to your knowledge, that Mr. O'Brien didn't have the wherewithal as of that day to pay for his portion of the licence?

A. I can't remember. I can't remember. It wouldn't have been unusual to bridge that sort of thing though. I mean, even if Telenor and IIU hadn't done it, what Mr. O'Brien would very likely have done was gone to a commercial source and sought to bridge the CSFB financing. In fact, I think he may have been in discussion with CSFB about they bridging, because remember, CSFB weren't, when we talk about the CSFB financing, it wasn't CSFB who were providing the

money; they were the people who were going out effectively promoting the sale of the shares. I think there probably was a discussion at the time, whereas CSFB might bridge the financing themselves as a bank.

Q. Yes. As a bank?

A. Yes. That would be quite common. That wouldn't at all have been unusual and they probably would have done it.

Q. This issue was, this issue of Esat/Communicorp's lack of finances was a matter of some consideration, isn't that right? Your minute of the 13th May, if we just go to it, Divider 143 of Book 50.

A. This is my typed minute.

Q. Your typed minute. On the fifth page you can see the "Martin Brennan stressed the need to have a number of definite clear and acceptable statements for use at the press conference and he outlined a number of obvious questions as follows:

"A. This is 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)."

That seems to relate to this issue, doesn't it, finances?

A. Oh it does. As I said a moment ago, the press were speculating at this time that the Government wouldn't

actually get its 15 million because Esat couldn't afford it.

Q. Yes.

A. So what Martin Brennan is saying here: Look this is in the press, they are going to ask it at the press conference. To which the answer was, the cheque.

Q. I see.

CHAIRMAN: Ten past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF OWEN O'CONNELL BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Just, if we might just briefly return to the side letter of the 16th May; this is the one at Tab 8. This was putting the mechanics of the funding for Esat Holdings of the licence, is that right?

A. Yes.

Q. I think I referred you to a document your own memorandum of the 13th, where that was an issue that was being highlighted at the meeting with Mr. Brennan, isn't that right?

A. Yes.

Q. And might I also just refer you to another note of yours, dated 16th May, 1996, which is behind your third statement at Divider No. 21, and it was I think your own rehearsal for the press conference?

A. I am sorry, my third memorandum

Q. Yes. And Tab 21.

A. This is a meeting of the 16th, or a rehearsal of the press conference?

Q. "Rehearsal for press conference", that document there.

A. Yes.

Q. And you can see at the bottom yes, what is being prepared there is a Denis O'Brien contribution, isn't that correct?

A. Yes.

Q. And what is proposed is: "I wish to scotch the persistent rumours on this. The licence fee has been paid. Millions have been spent by the company to date, almost entirely out of the shareholders' funds.

Little or no bank funding to date. All of Esat Telecom Holdings' share of the funds have been paid. Arrangements among the shareholders have been concluded to everyone's satisfaction and are working."

Now, that's fairly carefully put together, isn't it?

A. I suppose so, yes. There was care being put into the answers.

Q. Yes, because one might be confused there in thinking the reference to "All of Esat Telecom Holdings' share of the funds have been paid," that may well be read as a reference back to funds that were used to date and not necessarily the licence, isn't that correct?

A. I am sorry, I am not with you on that point. Yes

Q. "Millions have been spent by the company to date,

almost entirely out of shareholders' funds. Little or no bank funding to date. All of Esat Telecom Holdings' share of the funds have been paid." And then it continues: "Arrangements among the shareholders have been concluded to everyone's satisfaction and are working."

A. Yes.

Q. As to whether that is, in fact, the reference to this particular arrangement that was put in place?

A. It could be a reference to that, yes.

Q. So it certainly was a matter which was exercising people's minds, isn't that right?

A. Yes. The press had a lot of stories about Communicorp's, or Esat's inability or assumed inability to pay the, its share of the 15 million.

Q. Well, out of its own funds it was unable to do so, wasn't it, as of that time; an arrangement had to be made?

A. Yes.

Q. Number 9 now is, in Book 47 I am sorry, we are back now to Book 47. This is a letter from IIU Nominees, acknowledged by Mr. Johansen, is that right? And Mr. O'Brien, is that right?

A. Yes.

Q. And this is another side letter, was it?

A. Yes.

Q. "Dear Sirs,

"We refer to the arrangement, and in particular, to the provision of Clause 12.2. In accordance with our discussions we are writing to you to confirm that the shareholding of 20% in Esat Digifone Limited, the company, held by us as registered owner is beneficially owned in the following manner:

"Name: Dermot F. Desmond - 100%.

"This letter is further to record our agreement that any transfer of the beneficial ownership listed above will be subject to the terms and conditions regarding transfer contained in the agreement and the Memorandum and Articles of the company, save and except that the shares beneficially owned by Mr. Dermot Desmond may be freely transferred on a once-off basis without the requirement to abide by the terms and conditions of the agreement or the company's Memorandum and Articles, provided that if we offer shares to either of you, we will make an offer of an equal amount on equal terms to the other party. If at the time of the share transfer, Esat Telecom Holdings Limited and Telenor Invest AS do not hold equal amount of shares in the company, the offer shall reflect the parties pro rata shareholding.

"Finally, you either alone or in concert with the other parties agree not directly or indirectly to purchase shares or interests in shares in Esat Digifone Limited from any party holding such shares or

interests from any placement exempted from the shareholders' preemption rights or to acquire shares or interests in any party directly or indirectly holding such shares or interests in Esat Digifone without offering to the other shareholders of Esat Digifone the opportunity to participate in the purchase on equal terms and pro rata to their shareholdings in the company.

"Each of us accept that each and every other shareholder in Esat Digifone is a beneficiary of the commitments we have undertaken in this letter and may take any action, including action before the courts, to claim right according to this letter.

And then to signify your confirmation and acceptance of this, and that's signed.

Now, what's that side letter about?

A. It's doing quite a lot of things. The first thing it's doing is confirming IIU's one free transfer right; the shareholders are agreeing that it will have that right without regard to the restrictions in the Shareholders Agreement or the Articles of Association.

It is also setting in stone, so far as it can be done legally, the principle that Esat Telecom and Telenor will maintain equality. There was a concern on the part of both of them, but I think it's fair to say more Telenor, that there were various ways in which the other could have got effective control of shares;

for example, if Mr. Desmond had transferred some shares to company X, then one of them might have bought company X, or indeed if company X was owned by company Y and company Y by company Z, then one could have bought company Z and perhaps the other would never even have known that control was exercised in that way.

Similarly, there would have been regard to the possibility in the future that Esat Digifone might issue either shares or convertible debt securities of some kind to raise funds which wouldn't be subject to preemption provisions, and one party or the other might directly or indirectly acquire those shares through a nominee, perhaps, or by in turn acquiring an allottee of those securities and so forth.

There are all sorts of ways in which one can get shares when once they are out in the world, as it were. And it's trying to put a very general rule in place around all those possibilities and to say, well whatever device is used to if shares are acquired by any such device, the principle is hereby set in stone that the other party will have the right to acquire a proportionate amount of the interest thus acquired.

Q. Right.

A. And it's the last substantive paragraph is extending the benefit of this to successors; the one beginning,

"Each of us accept..." Neville O'Byrne seems to have drafted this document; his initials are at the bottom.

Q. Right. Now, the next letter, I think, is at Tab 10, and it's from Esat Telecom Holdings and Telenor to IIU Nominees Limited.

"Dear Sirs,

"We refer to the agreement, and we write to acknowledge that you have entered the agreement in your own right, and that the contractual and other liabilities imposed on you under the agreement are liabilities on your own behalf and not on behalf of any third party.

"We also refer to the deed and equitable mortgage entered into between yourselves and Esat Telecom Holdings Limited on the 16 May 1996 in respect of 75,000 shares in Esat Digifone Limited.

"We hereby confirm that insofar as such mortgage is concerned, and insofar as the enforcement is concerned, the provisions of Clause 13 of the agreement are hereby waived, provided always that should you wish to dispose of the shares, the subject of the mortgage, any such disposal will be subject to the provisions of the agreement and the Memorandum and Articles of Association of Esat Digifone Limited, unless you exercise the right contained in the mortgage to take full beneficial ownership of the shares in satisfaction of the amounts owing to you."

Now, what was that sorry, first of all perhaps
before I ask you about that, do you know if the
Department were aware of the previous side letter?

A. I doubt it was brought to their attention. But for
much the same reasons as I gave in respect of the
previous one.

Q. And do you know if the Department were aware of the
one free placing?

A. I think they were, but I can't be certain, and I can't
establish that by reference to a document.

Q. Right.

A. This document I can't remember why the first
paragraph is there. The remainder of it Clause 13
of the agreement, I just checked it now, is a
provision prohibiting mortgage by the parties of their
shares. The purpose, or the reason being that by
virtue of a mortgage, one cannot be sure in whose
ownership the shares would end up. So this is
permitting the mortgage of the shares to IIU Nominees,
and it's then saying that if by way of realising its
security following a default, IIU disposes of them to
a third party, it will be subject to the preemption
provisions, but if it retains them itself, it will
not.

Q. Now, Tab 11 then, appears to be we'll just go
through it quickly.

"Dear Sirs,

"In consideration of your company signing the Shareholders Agreement in relation to the company, we hereby jointly and severally undertake that you and we shall not either alone or through any of our subsidiaries or in concert with any other party or parties:

"A. Purchase or otherwise obtain any shares or interest in shares of the company either directly or indirectly.

"B. Purchase or otherwise obtain any shares of or interest in any party directly or indirectly holding shares in the company

"without first offering to the other shareholders in the company the opportunity to purchase or otherwise obtain the shares or interest on equal terms and pro rata to their shareholding in the company."

And that's signed by Telenor, isn't that correct?

A. Yes, this is part of a round robin set of letters under which each of the shareholders undertook this to the others.

Q. We can pass over then, so, Tab 12. That's the one signed by Esat Telecommunications Holdings, isn't that right?

A. Yes.

Q. Now, I don't know if Tab 13 what's that? It's a short letter

A. This is the authority about the share certificate?

Q. Yes.

A. That's not really a side letter. That's simply because normally when shares are issued, one will issue a single share certificate, but because Esat's shares were being mortgaged part to Telenor and part to IIU, a split certificate, or split certificates had to be issued.

Q. Tab 14, then, I think, is that the

A. There was a certain chicken and egg sorry, do you want to read it before

Q. "Dear Sirs,

"We confirm that we shall sign the Shareholders Agreement and all other documents required in relation to the issue of the second GSM licence to Esat Digifone Limited, on the strict condition that a letter in the attached form will be issued by the Minister for Transport, Energy and Communications immediately after the issue of the licence. In the event that the said letter is not forthcoming, our signature shall be null and void and will have no effect."

It's signed by Mr. Johansen on behalf of Telenor.

Signed on behalf of Esat Digifone Limited by Mr. Moloney and Mr. Digerud. On behalf of IIU Nominees by Mr. Walsh. And on behalf of Esat Telecom Holdings Limited by, I don't know who?

A. Paul Connolly. I was beginning to say there was a

chicken and egg situation in which Telenor, particularly, were concerned that the Shareholders Agreement might be signed, the money paid, the licence granted everything be done and then for some reason there might be a hitch vis-a-vis the Clause 8 side letter by the Minister. And they really wanted it to be the case that the whole thing would only happen if the Minister gave the promised letter. So they sought this they imposed this condition on their signing the Shareholders Agreement, and the others acknowledged it.

Q. They imposed this condition on the signing of the Shareholders Agreement?

A. Yes.

Q. So that the Minister's letter had to precede the signing of the Shareholders Agreement?

A. No. You see, the Minister's letter succeeded the Shareholders Agreement because the Shareholders Agreement had to be given to the Department, so it was they are saying now: We are giving the Shareholders Agreement, but if the Minister doesn't give the side letter, then our signature of the Shareholders Agreement is null and void.

Q. And that's and that is an agreement amongst the parties?

A. Well, it was really it's really only Telenor's signature that's null and void. The other parties

didn't impose that condition, only Telenor did.

Q. Why I just wonder why, when we know that Telenor, from what you have said and from some of the documents we have seen, were always the ones who appeared to be concerned about the other shareholders doing something, isn't that right, in terms of Mr. O'Brien increasing his shareholding or

A. This wasn't concern about their co-shareholders or Mr. O'Brien. This was that the Minister mightn't play his part. The condition here relates to the Minister's act. Specifically why they imposed that condition, I don't know.

Q. You are unsure, or you don't know?

A. But they did. Quite late, if you look at the time of this letter, it's 1.30pm, they seem to have come up quite late with this condition. Exactly why, I can't recall.

Q. All right.

A. But it is only their signature which would have been null and void.

Q. Yes. Well, this wouldn't have been disclosed to the Department, would it?

A. No, I don't imagine so.

Q. So would it is it the position that if the Minister hadn't come up with the side letter, that the Minister was unaware that when he received the Shareholders Agreement, that one party was imposing this condition?

A. Well, I think he probably would have been unaware, but in fact in my view it was a wholly hypothetical situation, because I was already under instructions from Telenor, and in fact there is a record of them in an earlier meeting, that I wasn't to release their money unless I got the side letter. We came across that this morning, I think, in one of the meetings.

Q. Yes.

A. So it would never have got to this, because if the Minister hadn't signed the side letter, I couldn't have given him the money and he wouldn't have given me the licence, and so it would have unraveled. I think this was a belt and braces device, perhaps.

Q. I think those are the side letters, isn't that correct?

A. Yes, I think so.

Q. Now, there are just a few matters, it won't take long now.

If I could ask you to return to Book 50, and it's the at Tab 153 in ours, it may be 54 in yours.

This is the first Telenor memorandum of Arthur Moran of the 15th May, 1996.

A. Sorry, Mr. Coughlan, which tab number?

Q. It's tab well it's 153 in mine, it may be 154 in yours. It's Mr. Moran's Telenor I.

A. Yes, I have it.

Q. And under the note: "Indemnity in accordance with the

bid." Then, "The Department wants Shareholders

Agreement as signed." Then "Persona: Lost 4/5 points

re technology and re performance guarantee."

A. I don't see the "guarantee" word.

Q. "Of performance" something anyway. That seems to

indicate that you had been told by Mr. Brennan

something about the Persona bid and how it had been,

to some extent, scored, isn't that right?

A. It seems to.

Q. Can you remember if he told you about any other aspect

of the scores?

A. No, I don't remember that part at all, I am afraid.

It wasn't in my note.

Q. Or if he told you about any other bid?

A. No, I don't think so. I am not sure why that would be

there at all, why that would have come up at that

time.

Q. Well, you had been having some discussions with him

about the question of, as recorded in I think your own

note about some discussion at a press conference,

perhaps, about tariffs or pricing or matters of that

nature. Do you remember that note?

A. Yes, and the Persona complaint was also very much in

the air at this time. Perhaps that's why.

Q. Now, there was just one final matter, it's just a

matter that occurred to me and I'd be interested to

hear your views on it. When we spoke, I can't

remember whether it was yesterday or the day before, perhaps yesterday, about the question of institutional investors, and we discussed the matter about ability and willingness, do you remember

A. Yes, I do.

Q. that discussion? And I understand the point you make about IIU and Mr. Desmond and willingness in relation to it. Do you have a view as to why an institutional investor, the type of institution that we saw indicated in the bid, would have been unwilling to meet a capital call?

A. It wasn't so much I was saying they were unwilling. It's that they hadn't given a binding commitment to do so.

Q. I understand the point. You are not suggesting that there would have been an unwillingness in the event that they were in the scheme of things?

A. No, I wasn't. Although, I suppose at a subsidiary level I'd have been suggesting that at the time we're talking about and in the circumstances we were talking about, those institutions, with possibly one exception, would not have given a commitment at that time in those circumstances.

Q. And that's just something I just want to tease out with you there for a moment. You had indicated that once the competition result was announced that Mr. O'Brien had been inundated with phone calls, or

had received phone calls or

A. Yes, from bankers.

Q. From bankers. Did that relate to project financing or to equity financing for Mr. O'Brien, to the best of your knowledge?

A. I think it was project financing.

Q. Project financing?

A. Yes.

Q. Now, if the institutions sorry, first of all, it was well-known that obtaining the licence was a good thing and there was going to be good business done, isn't that right?

A. Yes, that was the general assumption.

Q. There was going to be duopoly. And if the institutions had still been there, was the circumstance which would have caused difficulty was the inability of Esat Telecom Holdings or Communicorp to meet its financial commitments at the time, at the time we're talking about in February of 1996; would that be a reason why financial institutions wouldn't be prepared at that time, and in those circumstances?

A. To give commitments?

Q. Sorry? If there had been a call at that time?

A. No, I think what I was saying was that I didn't believe that the, that three of the four financial institutions who were listed would have given

commitments, certainly in October, and I think probably still in February, of the kind that IIU gave.

Q. That's precisely that's what I was trying to tease out, of the kind IIU would give?

A. I am not sure they would have given any commitment at all at either of those points in time.

Q. Because they would have wanted to ensure that the other shareholders would be, would have been in a position to meet

A. No, not exactly.

Q. their requirements?

A. Not exactly. For reasons more to do with the nature of those institutions. I have said that I thought one was an exception; that was Advent. Advent are a venture capital company, or and were, a venture capital company with significant private company investments, indeed they had made one in Communicorp the previous year, and they might have been, as it turned out they weren't, but they might have been induced to up their letter of comfort to a commitment.

It was conceivable. Now, as it turned out, they wouldn't, but they were the kind of people who, in the autumn of '95, were worth approaching to see would they, because the nature of their business was such that it was conceivable they might. I don't believe in respect of the other three that was so. In other words, I think I think on my first day of evidence

I said we wouldn't have wasted our breath going to the other three looking for commitments, I mean

Q. That was in the pre-announcement of the competition results?

A. Whether it was pre-announcement or post-announcement.

And there are different reasons for that in respect of the three. If you'd like me to elaborate I'd be happy to?

Q. Yes.

A. In respect of Standard Life, they are a, obviously as is well-known, a very large pension and life assurance company. They invest almost exclusively in quoted securities and typically big quoted companies, not smaller cap markets, AIM or the like, and frankly the prospect of their investing in a private company of the kind and scale of Esat Digifone was almost inconceivable. It would have had to be quoted. In fact, I suspect in respect of most of their funds, if not all of their funds, their mandates require them to invest in quoted securities. Relatively few companies of the kind of Standard Life are permitted by their mandates, in fact, most of the funds managed by them to invest in unquoted securities because of the difficulty of realisation, and even when they are permitted, they usually won't do it for exactly the same reason, difficulty of realisation. Also, the amounts involved are usually too small. These are

companies that manage hundreds and hundreds of millions, billions of pounds, and the amount of effort involved in investing a few million in a private company is just vastly disproportionate. They could put a hundred million into a public company in 30 seconds.

Standard Life was managed in Ireland I think at that time by a man called Des Doran, and Des was well-known to be a very live wire, very interested in things, and I personally suspected, and still suspect, that he put in the letter of intent just out of interest to see what it was all about. I may be doing him wrong there, but...

IBI, Investment Bank of Ireland, don't, in my experience and knowledge, typically invest on their own account in companies. That isn't their mandate. They're a corporate finance house. They are primarily advisers, and I am quite certain that what they intended by their letter of intent was that they would go to their stable of contacts and investors, they do this all the time, and say, we have an interesting prospect, interesting company here, we have so many shares representing such a percentage in our allocation, and if you'd like to take it up, please let us know. IBI do that a lot. Probably in recent times more with property ventures than with equities, but with quite a lot of equities. Indeed, speaking

personally, I have bought into one or two companies like that myself from them. So what they need before they can actually first of all, they are not committing their own money. So they couldn't have given a letter of commitment saying we, IBI, will, as a legally binding obligation, put money in, because they never do, this isn't their own money. They would have had to go out to a mailing list of high net worth individuals, and before they could even do that, they would have to have a definite proposition. There'd have to be a company. There'd have to be a licence. There'd have to be a business plan. There'd have to be the whole nine yards of an investment proposition: cash flow forecasts, an exit strategy, how long are you going to be in here? The tax consequences worked out, nature of the securities, the rights under the Shareholders Agreement. Everything would have had to be totally clear, signed, set down. The business would have had to be there, the license granted and then their punters really were going to come. So IBI were never going to be able to give a commitment.

That leaves AIB. At the time we are talking about, late '95, AIB had just sold their venture capital subsidiary, which was a company called Act Venture Capital. Indeed, which is still in being today. And they really had got out of the venture capital

business. They weren't interested in it any more.

They had decided as a strategic matter to concentrate on their core business, which was being a bank, which was lending. They do a bit of fund management through a company called AIBIM, Allied Irish Banks Investment Managers, but that was a similar operation, although smaller, to Standard Life, in other words, it managed pension funds and similar, and it invested in quoted companies. They had consciously got out of venture capital. They had sold, in an MBO, their venture capital subsidiary and my personal belief was they had given the letter because they wanted to get an entre to the project financing, which was their big interest in it, and they didn't want to annoy the promoters of the project with whom they had banking relationships and they wanted to preserve those relationships. So they gave the letter of intent knowing that was no more than it was. I also believe that had we got back to AIB and said: Look, can we make this a legally binding commitment, with no criticism intended of them, it would have been: we have to go back to the main board, we are not really in venture anymore and this and that.

In my experience, I must say, AIB have done one or two private company deals over the years, but literally only one or two that I am aware of over the last ten years, and generally they have done so very

reluctantly for very special reasons, and I don't

think they'd have done so here.

Q. And this is a position you were of the opinion would have prevailed in October

A. And still in February.

Q. And still in February. And probably a view that you would have held which would have prevailed prior to the bid going in even?

A. Oh, I think so. And even to say that in relation to Davys, I mean the question could be asked, well why didn't you go back to Davys and get someone else?

That Davys, as is well-known, are the largest stockbrokers in the State, and the people with whom they typically deal, the stratum of business in which they are engaged is typically companies of the kind I have described. They are large stockbrokers. They deal with pension fund managers and similar all the time.

So the kind of people to whom difficult Esat would typically have entre, would all be of the kind I have just described in one form or another.

Q. Now, you previously reviewed the letters, I think you have informed us, isn't that right?

A. I think I did after the event. I don't think I did beforehand.

Q. I beg your pardon?

A. I think I did after they were obtained.

Q. After they were obtained, yes. And that was before the bid went in?

A. Yes. Was it? I'm not sure.

Q. Right. And you must have had some discussion with Mr. O'Brien, so, about the quality of those particular letters?

A. I think I probably would have said something like, look, turning these into signatures on agreements and hard cash will be a major exercise, it will take a long time.

Q. Well, from the way you describe it, it was a virtual impossibility, with the exception of Advent perhaps?

A. Well, IBI eventually would have come through.

Q. IBI with a question-mark?

A. Yeah, the other two, in fairness, might have, but getting advance commitments from them I think would have been impossible. You might eventually have got the investment when you had the entity in being, but getting advance commitments, meaning binding commitments, I think would have been impossible.

Q. And you think you would have had a discussion along, generally along those lines?

A. Nothing like as specific as I have just outlined to you.

Q. I accept that. But generally?

A. Probably.

Q. Do you know if that view was conveyed to Telenor?

A. I don't know, no.

Q. Were you aware that, or were you informed, sorry, that at the presentation, Mr. O'Brien made great emphasis of the excitement of having these institutions potentially on board, and that this was going to be an opportunity for the first time for Irish pension funds to have an opportunity of investing in

A. I wasn't aware or informed. But in fairness, I would say that such excitement wouldn't have been entirely misplaced, because it was unusual, I think, for Standard Life, and to some degree, AIB as well, to give letters of that kind. I mean, I wouldn't rule out the possibility that they would have performed in the end. All I am saying is that I don't think they'd have given legally binding commitments before there was something solid there.

Q. You are saying they might have performed, there is a possibility?

A. In fairness to them, I shouldn't say that. If they gave the letters, they had at least in their minds, I believe, a means by which they could have performed.

Q. And would it also be fair to say that they are fairly serious businesses? They were providing these to Mr. O'Brien for a bid, isn't that right?

A. Yes. I mean

Q. And they must have expected that some use would have been made of them with the Government, and of course,

they are institutions that deal with governments all the time?

A. Yes, they are, and perhaps I have overstated the case.

I would certainly concede that insofar as they gave the letters, they had some means or method or structure or vehicle in mind by which they would perform them. The point I am making, and of which I am more clear, is that had they been approached before there was actually a business to invest in, before all the pieces were in place, for a legally binding commitment that they would perform when in the future all the pieces were in place, that commitment would have been practically impossible for them to give.

Q. I understand the point you are making perfectly. Of all the ducks were in a row, ready to be lined up

A. They probably would have come through.

Q. They probably would have then, but at the discussion stage of matters

A. Well, right up to the ducks-in-a-row stage.

Q. Right up to the ducks-in-a-row stage. But I think would you have a view about these institutions from your practice, that the one thing that was improbable was that they would have underwritten Communicorp's position?

A. AIB would be in the business sometimes of giving guarantees, but they'd want security for them.

Q. That's what I mean. In all the circumstances here,

that it is improbable that they would have provided

that particular function?

A. It's possible that Advent would. It's improbable that AIB would, but just about conceivable. And it's probably not conceivable that either Standard or IBI would have done.

Q. Now, Advent, of course

A. Just to protect myself and my reputation, I should perhaps say that I am speaking very, in very specific terms about what these companies would have done, and I have no right to do that, or authority to do that.

Q. It was just your view?

A. What I am speaking of is my own experience dealing with these companies over the years. I have dealt relatively little with Standard. I have dealt more with the others.

MR. COUGHLAN: Thank you very much, Mr. O'Connell.

A. Thank you, Mr. Coughlan.

CHAIRMAN: Just taking on board what you have said in your last exchange with Mr. Coughlan, it is, I suppose, the fact that Mr. McLaughlin did go to the trouble of writing a somewhat irate, in a gentile sort of way letter, and did intimate that he would have liked to have given a chance to see if his client's commitments could have been advanced?

A. Yes, Chairman, that's a fair point.

CHAIRMAN: I note what you say. Mr. Fitzsimons?

MR. FITZSIMONS: Thank you, Chairman.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FITZSIMONS:

Q. MR. FITZSIMONS: Just on that last point,

Mr. McLaughlin, of course, was able then to copy that letter to the various clients that he had to demonstrate that he had done what he could?

A. Presumably so.

Q. Mr. O'Connell, you have dealt with this matter in general terms, but I'd just like to be absolutely clear in terms of representation.

Now, could I ascertain exactly whom you were acting for during 1995/1996 and for when, and what period?

A. Yes. Initially I was acting for Communicorp.

Q. Now, we are talking from January, 1995, you were acting for Communicorp, is that right?

A. Yes.

Q. And you acted for Communicorp until when?

A. I can't, at this point, Mr. Fitzsimons, put an exact date on it. At some point after the joint venture between Telenor and Communicorp was formed, it was decided that I would work for Esat Digifone and my partner, Gerry Halpenny, would work for Communicorp.

Q. Very well. Would it be possible for you, then, to get that information by Tuesday, the date when you ceased to act for Communicorp?

A. No.

Q. Why not?

A. Because I'm not certain either whether I have a record of it or where it might be if I have.

Q. Did your firm bill Communicorp?

A. I am sure we did.

Q. And is partners' time itemised on the bills that are issued to clients?

A. If the clients ask for it, yes, but not then.

Q. Not then?

A. Not then.

Q. So you did not itemise your time when you billed Communicorp?

A. Not in 1995, no.

Q. Well, were there Communicorp files or are there Communicorp files in your firm's possession?

A. Yes, I believe so.

Q. And do those files show, via attendances and letters, when at least I assume that those files demonstrate, via the cessation of your attendances and letters, when you ceased to act for Communicorp?

A. No, I wouldn't think so. And I would also doubt that there was a specific date well, first of all I never ceased to act for Communicorp.

Q. Well, you see, I am trying to find out that's precisely the sort of information I am trying to find out. Did you or did you not cease to act for Communicorp? We know you were acting for them in January 1995 onwards. You have told us you ceased at

some stage. Now you are saying you didn't cease to act for them?

A. That's correct. Because you didn't let me finish. As I made clear to Mr. Coughlan during my examination, I continued to act for Communicorp in matters unrelated to Esat Digifone.

Q. Yes. Well now, let's come back again. On what date now, you are a top class commercial lawyer, second to none in your field. You are a managing partner of one of the leading London or Dublin firm of solicitors. This was a huge deal. Are you telling the Chairman that you cannot recall when you transferred responsibility for work done for Communicorp to other members of your firm?

A. Yes, I am. And if you wish, I'll elaborate?

Q. Well, elaborate or explain?

A. Whichever you'd prefer.

Q. Well, please explain why you, with all of your skills, your background and your knowledge of the importance of a solicitor knowing whether he is or is not acting for a particular client, cannot tell us when you ceased to act for Communicorp in connection with this matter?

A. The first reason is that it was approximately eight years ago, and my memory is not that good.

The second reason is that the entity which became Esat Digifone emerged as a separate entity sometime in the

middle of 1995. It is not possible to specify the exact point at which it did so. It was formed, I believe, as a wholly-owned subsidiary of one of the Communicorp companies, perhaps a direct subsidiary, I can't remember. And subsequently I think Telenor acquired a share in it. For a considerable time in the early days of the company, it had no meaningful separate existence. It had no premises, employees, notepaper even, records, telephone lines, furniture, anything of its own. It was entirely a creature partly owned by Esat, well call it Communicorp, and partly owned by Telenor. As the separate existence of that company began to emerge, which would have been in mid-1995, it was felt desirable that it would be separately represented by me, but as to what date exactly that occurred, if indeed there was an exact date, a crisp and clear-cut decision, I can't, at this remove, I can't recall.

Q. Who took over from you in advising and acting for Communicorp?

A. Gerry Halpenny.

Q. Mr. Halpenny. Well, can you tell us the date upon which Mr. Halpenny took over?

A. No.

Q. You can't? Well, is it possible that Mr. Halpenny knows the date upon which he took over?

A. Yes, it's possible, but you'd have to ask him.

Q. Well, have you not asked him?

A. No.

Q. And can you not ask him over the weekend?

A. Mr. Halpenny doesn't work in my firm any more.

Q. Where is Mr. Halpenny?

A. He works for LK Shields.

Q. Does he live in Dublin?

A. I believe so, yes.

Q. Does he have a telephone, do you think?

A. I don't have his phone number, but I am sure he does.

Q. I see. And you have no way of finding his telephone

number and telephoning him over the weekend to ask him

the simple question of when he took over acting for

Communicorp? Is that the position, Mr. O'Connell?

A. No.

Q. Well, are you going to contact him over the weekend to

see if he can tell us when or tell you the date upon

which he commenced acting for Communicorp?

A. Well, if the Chairman asks me to, I'll be happy to,

Mr. Fitzsimons.

Q. And you are not going to do it otherwise, is that the

position?

A. I do not regard myself as answerable to you,

Mr. Fitzsimons, in that respect.

Q. I see. Now, you spent three weeks, you told us,

reviewing and researching the files, isn't that right?

A. No.

Q. Oh no? Oh, I see, I thought you had told us earlier that you had spent the past three weeks doing research to enable yourself to give evidence here?

A. No, I didn't say that. I said that I had asked the Tribunal for three weeks. The purpose of that which I didn't go and sorry, that the Tribunal had not felt able to give me that period. I did not then go on, because it was unnecessary in the context of the question I was asked, to say that the purpose of the three weeks was partly to allow me to clear my diary, which was going to take a week to ten days, and as to the remainder of that period to review my files, but I didn't get that long.

Q. Although you were managing partner of Frys at this time?

A. Yes, I am.

Q. No, at that time, back in 1995?

A. No, I was not.

Q. Who was the managing partner then?

A. It was changing over I think from Neville O'Byrne to Brian O'Donnell.

Q. I see. And I take it the managing partner of a firm keeps an eye on who is acting for what client at any particular point in time?

A. No.

Q. No? I see. Well, what system does Frys have for recording who was acting for what client at any

particular point in time? What protocol or system?

A. Are you asking me about new clients or existing clients?

Q. I'm talking about 1995. How was a client to know who was acting for him or her or it?

A. When a client first comes to the firm as a client, it is assigned a partner responsible. That partner has overall responsibility for the firm's relations with the client. However, the client's work will be done by individual partners, associates or solicitors within the firm according to the nature of the specialist work required. It's frequently the case that a client has a number of files open at one time in different disciplines. In that situation, it will have a single partner responsible to whom it will refer perhaps billing queries or issues about the efficiency or timeliness of the work being done. But the individual specialists within the firm who are carrying out work for it at a point in time will report to their own partners, that is the partners within their own departments or work units.

Q. So can we take it, then, that you retained overall responsibility for Communicorp, but from a particular date, Mr. Halpenny was deputed to work for them and nobody else?

A. In relation to Esat Digifone, but certainly not no one else.

Q. But Esat Digifone and this entire transaction, we are talking about?

A. I think so, yes, yes.

Q. Well now, you think so?

A. Yes, I think so, because it was eight years ago.

Q. Well now, that's really not good enough, Mr. O'Connell. You know perfectly well that I'm talking about this entire transaction, and I'm asking you did you or did you not act for Communicorp for the period through '95 and '96?

A. I did act for Communicorp in 1995, I have already said that.

Q. In relation to this entire transaction?

A. I did in '95, yes.

Q. Through the entirety of '95?

A. No, I have told you that until a date, which I can't now recall, I did.

Q. Okay. And not in 1996? We'll go into '96 then.

A. Not that I can recall, no.

Q. Well now, why can you not recall?

A. Because it was seven and a half years ago.

Q. Sorry?

A. Because it was seven and a half years ago.

Q. Well now, we have evidence from the files that you, in a sense, certainly from the legal perspective, brought this deal home, and are you seriously this huge deal that was so greatly beneficial to your client as

a result of your expert work as a solicitor, are you seriously suggesting that you can't recall

A. Yes.

Q. whether you acted you are? That you didn't whether you acted for Communicorp in 1996; you can't remember

A. No, I have told you I didn't act for Communicorp in 1996.

Q. No, you haven't told me that.

A. Well I am telling you now, and I did tell you.

Q. I'm afraid you didn't. You are telling us now that you did not act for Communicorp in '96?

A. I'm prepared to say that, but I would wish to qualify it if you'll give me the opportunity to do so?

Q. Qualify away, please.

A. Thank you. It is the case that during the latter half of 1995 and the initial half of 1996, the lines between the parties in this transaction frequently blurred. It is also the case that there was a very great deal of work to be done. It is certainly possible that at specific times in respect of specific meetings, calls, or letters, whether because Mr. Halpenny was on holiday, because he was engaged in other work, because he was engaged in other work in this matter, I would have been called upon to do something and would have done it. The objective was always to achieve the licence. Sometimes that

included matters such as the financing of Communicorp, more often it included matters like dealing with the Department. I'm not prepared, seven and a half years on, to say that at no point in 1996 was I asked to do something for Communicorp and did it.

Q. Did it. And I take it that

A. Sorry, just to finish; but as a general rule, I regarded my primary obligation and duty as a solicitor to be to Esat Digifone, and I regarded Mr. Halpenny's to be to Communicorp, subsequently Esat Telecom Holdings, in relation to this matter.

Q. There is no issue over the fact that everything you did was to bring home the bid, and indeed, your trojan efforts are well evidenced by the documents. But can I take it from that, that in all likelihood you did do some work for Communicorp in 1996, for example, the occasions you have mentioned?

A. I would certainly accept that's possible, yes.

Q. And your time was billed accordingly to Communicorp in that regard?

A. I imagine so.

Q. Now, Mr. Halpenny, you say, acted for Esat Digifone, and we have to get the date of that

A. No, I said Mr. Halpenny acted for Communicorp. I acted for Esat Digifone.

Q. Of course, yes. And did anyone else act for Communicorp with Mr. Halpenny from the time he took

over?

A. Well, he would generally have had assistance. I can't remember, Mr. Fitzsimons, who was his assistant in 1995, and also, if issues arose requiring, say, property or banking or some other kind of expertise, he would have called that in from elsewhere in the firm.

Q. Now, Esat Digifone, you acted for them from the time we have to ascertain, and did you continue to act for them through '95 and through '96?

A. Yes.

Q. Until when? Did you ever cease to act for them?

A. Yes, Mr. Moloney made it a condition of his withdrawing a resignation that William Fry be removed as the company solicitors, and I think that at the end of '97, I believe, but I'm very focused on the time line we have been dealing with the last five or six days. I think it was December '97/January '98.

Q. Now, was Mr. Denis O'Brien a client of the office?

A. Yes.

Q. And who acted for him?

A. I did.

Q. You did. And did you act for him continuously through '95/'96?

A. Yes.

Q. And in relation to IIU, Mr. Neville O'Byrne is referred to as that firm, that company's solicitor?

A. Yes.

Q. Now, I think you can confirm, it's self evident, it doesn't apply to just commercial solicitors, but all solicitors, their duty to their client and to nobody else?

A. Yes.

Q. And they are not required, and indeed, must not advise other individuals or parties who become involved in transactions if they're not the client?

A. And if there is a conflict.

Q. Sorry?

A. And if there is a conflict.

Q. Obviously if there is a conflict. So at no time did you owe any duty to Telenor when Telenor was not in receipt of legal advice, isn't that so?

A. Telenor were never my client, no.

Q. No. And indeed, you didn't even owe them a duty to advise them to seek Irish legal advice, isn't that so?

A. I don't recall the question ever arising, but no, I didn't owe them any such duty.

Q. That is a fact. I mean, I am not trying to suggest otherwise.

A. That is a fact.

Q. And of course, you never at any stage did advise them to seek Irish legal advice, local legal advice, isn't that correct?

A. I can't recall

Q. As was your right?

A. I can't recall ever doing so.

Q. As was your right, isn't that so?

A. I can't recall ever doing so.

Q. And they never did seek Irish legal advice until late on in the beginning of October 1995, isn't that correct?

A. I'm not sure that is correct, no.

Q. They went to Mr. Moran?

A. They went to Mr. Moran well, they certainly had their in-house advice, but that wasn't Irish legal advice, of course.

Q. No.

A. I'd be I have a feeling they did get Irish legal advice early in '95, and I think I have already given evidence, for instance, that a lot of the Joint Venture Agreement shows signs of Irish legal input.

Q. Yeah. Well, my instructions are that's not accurate, I am afraid, but that can be asked of my clients.

A. I see. Well, your clients would know better than I would, obviously.

Q. And Amund Bugge, as we know, was fresh out of law school, he qualified a couple of months before when you met him in early August, '95, isn't that so?

A. Yes, but Rolf Busch wasn't.

Q. Mr. Busch was not in Ireland at that stage?

A. I met Mr. Busch in Ireland.

Q. Now, can I suggest to you, Mr. O'Connell, that the fact that Telenor did not seek Irish legal advice is a testament to their trust in the guidance that they were getting from those they met in Ireland?

A. Well, you can certainly suggest that, but I am afraid I don't have any opinion on it.

Q. It's just that you referred in your evidence to the fact that there was tension between Telenor and Communicorp during this early period, and I have to suggest to you that that is a misrepresentation of the actual facts; that in fact there was almost total trust between Telenor and Denis O'Brien and, above all, yourself during these early months, and whilst, of course there were odd issues that arose that everyone had to try to resolve, that was the situation and it is not correct to suggest that there was tension between the parties on a broad scale, as you have suggested in your evidence?

A. Again, I couldn't put an exact date on it, and it's certainly not the case that there was tension of the kind and scale which emerged later. Certainly when Communicorp failed to produce the guarantee, there was, I think, some, ill-will may be too strong, but some tension. There was always a level, I think, of misunderstanding because Mr. O'Brien and Telenor were constitutionally chalk and cheese. Mr. O'Brien is a classic entrepreneur, Telenor are a classic semi-state

company, and the approach of each of them to almost any given question, from the most trivial to the greatest, tended to start from different points and then diverge.

So frankly, I couldn't accept, as a general statement, that there was always great trust, at this early period there was great trust between them. Telenor came into the picture, after all, not as, I suppose, first choice for the consortium, that had been Southwest Bell and Detecon. They came in a little hurriedly and quite late in terms of competition process, and certainly by the time the first big row was the radio plan. Apart from the guarantee problem, the big operational row was the radio plan. In fairness, that probably would have been nearer the second half of '95 than the first.

Q. December '95, to be precise. So that was the first big row, December '95?

A. I said operational row. But, no, I think it came to a head in December, but it had been simmering for much longer, and there was also the I mean, there were lots of little things, Mr. Fitzsimons. There were Mr. O'Brien resented that the Telenor people mostly went home to Norway at weekends. They'd leave on Thursday night or early Friday and they wouldn't get back until Tuesday and they'd leave all their rucksacks under the stairs, and he didn't like that.

And there were there were endless cultural

differences between them, I am afraid.

Q. Well, Mr. O'Brien may have been irritated by these

habits, accepting those facts, but Telenor had the

opposite impression of Mr. O'Brien. At the beginning

they thought he was wonderful, isn't that so?

A. I am sure it is. He can be very charming.

Q. And they were equally, I suggest to you, very

satisfied to accept guidance on legal matters from

yourself?

A. I don't recall

Q. Even though you weren't acting for them?

A. I don't recall ever giving them guidance on legal

matters.

Q. But isn't that why they didn't think in terms of

seeking Irish legal advice until the stage I have

mentioned, when this issue about bringing in the other

party arose?

A. I am afraid I didn't know I don't know why they

didn't think that.

Q. Well, that's I see, very well.

But it is a fact that at no stage did you ever suggest

to them, as of course you were entitled to, that it

would be very wise and prudent if they sought local

Irish legal advice in connection with this very

serious venture?

A. I don't know whether that's the case or not. I

certainly have no letter or record on file of having done so. Indeed, if I do have it on file, I haven't looked it up, I haven't seen it. As to whether I certainly would have always preferred my, the opposite number in any joint venture arrangement in which I am involved, to have their own competent lawyers. It becomes very difficult if they don't. But as to whether I ever specifically advised them they should do so, at this remove I simply can't recall, and I don't have a record of doing so.

Q. But it certainly suited your client, Denis O'Brien, or sorry, Communicorp, that Telenor should not have local legal advice in view of the obligation to furnish a guarantee; that of course was never fulfilled, isn't that correct?

A. No, it's not. The obligation to furnish the guarantee, the legal obligation to furnish the guarantee in the Joint Venture Agreement is clear, is unequivocal. There was never, to my knowledge, an assertion or suggestion by Mr. O'Brien that there was anything defective in that obligation, or any assertion that it was unenforceable, ambiguous or otherwise. In other words, the legal obligation by Telenor imposed on Communicorp as to the guarantee was perfectly clear and did not suffer by the absence of legal advice, if indeed legal advice was absent. I find it hard, from the text of that agreement, to

believe that legal advice was absent.

Q. But of course, the question of enforcement is another matter, Mr. O'Connell. But the fact of the matter is, I suggest to you, that had Telenor been advised to seek local legal advice, that things might have proceeded quite differently?

A. I can't believe that Telenor didn't know that if they two things: Firstly, that if they chose to take legal action to enforce the guarantee right, they could practically have walked out onto the street and thrown a stone in certain parts of Dublin and hit a lawyer who could issue a writ for them for that purpose. Secondly, to do so would probably have been futile because, as I have given evidence already, Communicorp didn't have the money. It would have been blood from that stone. They couldn't have got the guarantee. But they had a legal right to it, and I made that point a number of times in evidence, and that legal right was never challenged by Mr. O'Brien.

Q. But a local lawyer might have been able to advise them that there was going to be no blood drawn from any stone, isn't that correct?

A. It isn't a lawyer's function to give advice as to the financial ability of a defendant to pay. It's his function, as I understand it, simply to get his judgement.

Q. You are suggesting are you seriously suggesting

that a lawyer acting for a client has no obligation, in a commercial transaction, to take a view or to guide the client as to what checks the client should take as to the financial position of the other contracting party?

A. No. I am suggesting, frankly, that as a major multinational company, which already at that time was in almost identical joint ventures, as I understand it, for example, in Greece, Telenor were perfectly capable of understanding the need to check out their partners and to take a view as to their ability to perform.

Q. As you have already stated, you were totally within your rights in not suggesting to Telenor that they should seek local legal advice, but just to finish with this matter; I suggest to you that of course it suited your client that you should not, if you like, allow your conscience to be pricked and give them this friendly advice that might have been beneficial to them?

A. I don't accept that for a moment, Mr. Fitzsimons. First of all, I have, on innumerable occasions, advised third parties in transactions in which I am advised to seek local advice. I think it's quite likely I did so in respect of Telenor, but I am not asserting as a matter of fact that I did because I have no record to prove it and I have no definitive

recall. I always prefer dealing with a competent Irish lawyer, particularly a corporate lawyer, to dealing with either foreign lawyers or with foreign executives. It is always easier for me. So I am not aware of any specific act, event, emission or instance during the period we are talking about by which Mr. O'Brien benefited and Telenor suffered as a result of their not having instructed Irish lawyers. I can't think of an event in which that occurred.

Q. But you can confirm that of course you had no problems with Telenor during this period, because of course they were perfectly happy with the assistance you were giving them?

A. I had one problem later on. I had a big problem around the turn of the year, but it doesn't relate to this matter.

Q. No, we are talking about '95, a critical period, summer/autumn of '95?

A. At that time I didn't have problems with Telenor, no.

Q. And they didn't have any problem with you, isn't that so?

A. None that they none that they notified me of, no.

I did have a problem, as I say, around the turn of the year, but not related to this. I can elaborate on that if you want?

Q. No, it's quite all right. We'll move on to another matter.

You have given very helpful evidence, I have no doubt, to the Tribunal, Mr. O'Connell, but you have openly, I am not suggesting anything underhand, you have engaged in a lot of speculation and you have been very frank to say that you were speculating and rationalising and giving your views. Now, I take it you, as a lawyer, know that speculation isn't evidence or admissible evidence in any forum or tribunal. Could I ask you why you have come here to present your speculation to the Tribunal as evidence of fact?

A. Because I felt in the first place because I felt it would be helpful to the Tribunal. In the second place, because in certain instances it seemed to me that the line of questioning by Mr. Coughlan was drawing such speculation from me or inviting it, and in the third place, because as I proceeded with it, I wasn't stopped.

Q. You told us you have told me a few minutes ago you have a very poor memory, and of course, we have heard many instances of it in response to Mr. Coughlan's questioning about you being unable to remember things. How can you suggest that any speculation by you can be valid in any way if you have such a poor memory?

A. Firstly, its validity is a matter, as far as I am concerned, for the Sole Member to determine, and he will presumably give whatever weight or lack thereof

he thinks appropriate to my evidence.

In the second place, I don't accept that my memory is very poor.

Q. Sorry, these are your words. It's on the transcript of a few minutes ago, "I have a poor memory."

A. I didn't say I have a poor memory. Could we get the transcript back? I may have said that in respect of a particular matter, I have a poor memory, but not that I have a poor memory generally. I wouldn't accept that.

Q. I see. Well then I am quite happy if you wish to tell us you don't have a poor memory generally.

A. Well, the way

Q. Could I say, you couldn't be a top class commercial lawyer if you had a poor memory, isn't that so?

A. The way my memory as a commercial lawyer of whatever class operates, and I have discussed this matter with other lawyers in the field, and they have reported the same to me, is that when I am instructed in a matter, I accumulate, within my memory, all of the facts and circumstances, the parties, their names, amounts of money, consideration, elements of the deal, the views of each party to the deal on every aspect, how all the various clauses operate, and I continually add to that memory, as the deal, or the transaction proceeds. So that by at any given point in it I can tell you in relation to almost any clause in the agreement or any

individual, what that individual's view of the matter is and how it will interact on others, and how a change in the clause will operate with regard to other clauses. And I have found over the years that when I complete a transaction, almost overnight and without any conscious effort on my part my memory disappears of all that. And I suppose, room is made for something else. And I have very often had clients astonished on ringing me a week or so after a completion meeting to find that I couldn't remember the name of a significant party or a major element of the consideration or some such matter. And that is quite simply how my memory works.

Now, in relation to my evidence given now, whether that's a good memory or a bad memory or some specialist kind of memory, it's for you to decide.

But in relation to my memory here, what I have sought to do is to recall to my memory as much as I can of the events of this period by exhaustively reading the material, both which I had on my files and which was provided to me by the Tribunal.

In a few instances I have had my memory jogged, I have, and I have gradually felt parts of it coming back to me, but mostly that hasn't been the case, and in most of my evidence I have relied both on my general understanding of the circumstances and on specific lines, sentences or words in the material.

In relation to a lot of speculation which I have laid out before the Tribunal, I have sought to analyse chronologically what occurred, looking at what each party wanted, what it was seeking, what it was doing at the point in time, and have tried to understand motivations and actions, and I have laid that out as lines of speculation to the Tribunal.

I hope that helps.

Q. Now, if could I move on to another matter.

The joint venture agreement, which is Document 48(7), you said in relation to that, that it was not your document, but was possibly sent to you for review.

Now

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

Q. Now, you say it's not your document. Who sent it to you for review?

A. I can't recall, but probably Mr. O'Brien. I think I said it may have been sent to me for review. If it was, it probably would have been Mr. O'Brien, or perhaps Mr. O'Donoghue.

Q. Mr. O'Brien or Mr. O'Donoghue. Well, who

A. Probably.

Q. Who prepared it?

A. I don't know.

Q. You are familiar, I take it, with Joint Venture Agreements?

A. Yes.

Q. And you are aware of the duty of good faith that is implicit and expressed, indeed, in any joint venture, isn't that correct?

A. Broadly, although the contract would govern.

Q. Sorry?

A. Broadly, although the contract would govern.

Q. The contract would govern. Well, are you suggesting that there was no duty of good faith owed by Telenor to Communicorp and vice versa?

A. No, I am not.

Q. You are not. And that means that at all times, Communicorp was obliged to act in good faith to its partner in terms of providing information, in taking decisions and in proceeding generally, isn't that so?

A. Yes, generally. But I wouldn't accept that in a technical sense the parties were partners. Not if you mean "partner" in the legal sense. There was never a partnership here, I think.

Q. And it also follows that the advisers to parties to a Joint Venture Agreement are obliged to similarly act with good faith?

A. Yes, they should do so.

Q. Now, I think when

A. But, there is obviously an overriding duty to one's own client.

Q. I beg your pardon?

A. There is obviously an overriding duty to one's own

client.

Q. Oh indeed. The client can instruct you not to act with good faith?

A. Well, I am not suggesting that ever happened. I am just saying that in any given situation one must have first regard to one's own client.

Q. You have to do what your client says, and if the client is acting in a particular way, that's not your responsibility; you have to take his instructions, isn't that so?

A. Well, within ethical limits.

Q. Yes. Well, if the client tells you, or told you in this instance, not to furnish information to Telenor, you would have to take those instructions?

A. While I was acting for Communicorp, yes.

Q. I think we see an example of the good faith working, principle working when IIU was insistent on Mr. O'Brien not gaining control of Esat without Telenor's consent?

A. Well, I don't know what IIU's motive was.

Q. Well, I think it's reasonable to suggest that they were they got legal advice from, presumably, Mr. O'Byrne, that they had this duty of good faith, and they prudently accepted it?

A. I don't know, I am afraid.

Q. And acted accordingly?

A. I don't know.

Q. Well, did you ever give Mr. O'Brien advice to the effect that he had a duty to act with good faith towards Telenor?

A. I'm before answering a question as to advice I did or didn't give, I think I would have to check with McCann Fitzgerald, Mr. Fitzsimons, because

Q. Well, could you explain that, please?

A. Because they have claimed privilege in respect of the, nearly all, I think nearly all of the advice I gave to the company, which was then Esat Telecom Holdings, which is now owned by their client.

Q. I see. I am afraid we weren't aware of that. We had assumed that all the advices had been furnished to the Tribunal. But that is not the case?

A. Much of the material, certainly from the last module, the written material was redacted to exclude privileged material. I mean, I am aware that generally McCann Fitzgerald, on behalf of the company which was then Esat Telecom Holdings, has claimed privilege. Perhaps the Tribunal could

Q. Does that mean that there are possibly in existence attendances with your advices that the Tribunal has never got?

A. I don't think that's the case in this module.

Q. It's not the case in this module. Well, we are talking about this module then. If it's not the case, then you can answer my question.

A. My memos or attendances don't generally record advice

I have given. I am sorry, Mr. Fitzsimons, I'm not trying to be unhelpful, but the I am being asked about advice I may or may not have given, and I don't act any more for this client. And they have claimed privilege in respect of advice I gave on other related matters. So I am reluctant to answer without clearing with them.

Q. I see. Well, perhaps you could check the position in that regard over the weekend and we can return to it.

A. Yes, if I could I am just I'll just make a note.

Your question is whether I gave advice on

Q. To Mr. O'Brien, that he had a duty to act with good faith towards Telenor at all material times because of the Joint Venture Agreement?

A. I think I wouldn't be breaching any privilege by simply saying I can't recall, and that is the fact of the matter. I just I made the point I did because you were asking me about advice, so I reacted immediately to that, but in fact I can't recall either way whether I gave that advice.

Q. You now find you can't recall, is that the position?

A. It's not that I now find. I am just telling you I can't recall. I am answering your question to the effect that I can't recall.

Q. I see. Maybe we can approach it this way: I have to suggest to you that it's absolutely clear from the

events that happened that Mr. O'Brien never at any stage acted with good faith towards Telenor, and this is evidence of the fact that he either declined to accept advices re good faith given to him by you, or by perhaps Mr. Halpenny, or that he wasn't given those advices?

A. I don't think it's for me to comment on how Mr. O'Brien acted, and you should put that to him.

Q. Very well.

There is a letter 48(30) from Denis O'Brien to Amund Bugge of the 4th August, 1995. You say you can't recall if you prepared that letter?

A. Sorry, Mr. Fitzsimons, I'll just get the letter.

Q. 48(30).

A. 4th August sorry, Mr. Fitzsimons, 4th August, 1995?

Q. That's right, yes.

A. Yes, I see the letter.

Q. You say you cannot recall whether you prepared that letter, is that so?

A. Yes.

Q. You can't recall? You don't recognise it, is that the position?

A. I can't recall whether I drafted it. I think I was asked whether I drafted it or participated in drafting it, and I can't recall whether or not I did so.

Q. You say you recall being told of the offer?

A. Yes.

Q. And I think you said words to the effect, Advent terms were very expensive you elaborated on that and that they effectively wanted negative control?

A. No, no

Q. Maybe I took you up incorrectly.

A. Well, I think in the latter case I was speaking hypothetically. What I think I said was, I was told that Advent's terms would be very expensive, and that I was aware from my experience of dealing with them from a previous deal sorry, I didn't use them previously, I was aware of the previous deal, and I was aware from my experience generally with venture capitalists that typically they would extract terms such as 30% annual return, short exit terms, covenants which effectively amounted to negative control, and something else which I am afraid I forget now, but I am sure it's on the transcript.

Q. Yes. Could Mr. Halpenny have prepared that letter, 48(30)?

A. He could have done.

Q. He could have done. And

A. Or I could have done or Mr. O'Brien could have done or somebody else.

Q. You would have been fully aware, I take it, of the Advent situation at that time, though you were acting for Esat Digifone?

A. I was aware at this time that there was, what I'd

termed in my evidence, as a crisis, whereby the bid was due on this day. I think this was the deadline for the bid, and Telenor were threatening, well "threatening" is perhaps a pejorative word, were considering exercising their right to forbid the submission of the bid because of the absence of the guarantee. And I think I gave evidence as to attempts by Mr. O'Donoghue in particular, I think, to square the circle, that is to get Advent to give a letter which was sufficiently, which was actually binding or which was sufficiently close to the line of being binding to satisfy Telenor, but failed to do so.

Q. And were you involved in this process at the time directly in any way?

A. I don't think I was directly involved. I was certainly aware it was going on. I met Mr. Bugge, as I have given evidence, on the 4th I think, and he told me he was seeking from me a better understanding as to what the Advent commitment or not commitment was, and wanted an opinion from me. And I explained to him I hadn't seen the Advent commitment, or letter, whatever it was, and he said, as I recounted in a letter a week later to Mr. O'Brien, that on foot of that he would advise Telenor not to go ahead with the matter. So I was certainly involved to that degree.

Q. I want to show you a letter of the same date, it's a letter of the 4th August, 1995, from Mr. Halpenny

to sorry, this is it's in the book, 48(32). I

beg your pardon 48(32).

A. Right. Yes, I see it.

Q. And this is a letter of the same date, just if I could read it out. From Gerry Halpenny to Peter O'Donoghue.

"Dear Peter,

"I enclose for your attention copy of the letter handed over to Amund Bugge today in connection with the financing of the GSM bid."

Now, I take it that that is, in all likelihood, the letter there is the letter at 48(30), the one we have just been discussing? That's a reasonable inference?

A. Probably, although there were a lot of letters around this time, but yes, it's quite likely.

Q. "We also discussed at our meeting this morning what steps should be taken with Advent regarding the funding of the GSM company. As you will recall, Owen O'Connell is strongly of the view that the condition in Clause 4.2 of the agreement dated 12 July, 1995, has not in fact been satisfied, and that you should very strongly consider sending a letter along these lines to Advent stating as that agreement was not satisfied, the agreement 12 July, 1995, is of no further effect.

"I trust this is in order.

"Kind regards."

So you were of the view this letter indicates that

you were involved at this time, and you had this

strong view?

A. It records that I was consulted in relation to the agreement with Advent of 12 July, 1995, and gave a view in relation to it.

Q. Now, were you aware that Telenor was never given a copy of that agreement?

A. I have no idea whether they were or not.

Q. Well, how would that gel with the duty of good faith, if Telenor were not given a copy of that agreement?

A. The agreement was between Communicorp and Advent.

Q. Yes, but it related to the joint venture; it was a critical element in Communicorp's funding plans?

A. Well, as to whether they got a copy of the agreement, I can't say, but, and I take your word for it that

they didn't, but I think they were aware, were they

not, that the I think they were sorry, I am

slightly lost in the time line now. But I think they

were aware that Advent were to get 5% of yes, they

were aware, that Advent was to get 5% of Esat

Digifone; they were certainly made aware of that

because

Q. They were told of an agreement, but they were never given a copy of the actual document, the agreement itself?

A. Again, as I say, I take your word for that,

Mr. Fitzsimons.

Q. Well, that will be the evidence.

A. Yes, okay. Okay, I accept what you say.

Q. Now, you have referred, on a number of occasions, to Denis O'Brien having told you that he had communicated to Telenor an offer that had been made by Advent, and I am not correct me if I am doing him an injustice, but you to indicate that Telenor were told of an offer over and above whatever was in the agreement?

A. Yes. That is correct.

Q. Well, could you please tell me the terms of such offer that you were told had been communicated to Telenor, because Telenor have no recollection of hearing anything of the sort?

A. Could I tell you the terms of the offer?

Q. Yes, please?

A. No, I couldn't. I wasn't told the terms of the offer.

Q. Well, why not? Why didn't you find them out, if you were acting as the solicitor for Esat Digifone at the relevant time, or perhaps for Communicorp, if it occurred at an earlier point in time?

A. Because, as I understood it, the offer hadn't been accepted.

Q. I know, but you were the solicitor acting in the matter and you would need this information to assist you to advise your client.

A. I am sorry, I don't follow, Mr. Fitzsimons. I wasn't consulted as to the implementation of the offer,

because the offer wasn't accepted. Had the offer been accepted and gone for implementation, clearly either Gerry Halpenny or myself would have to have been told what the terms of the offer were, either in order to draft a formal agreement implementing it or to respond to such an agreement if drafted by Baker McKenzie.

But the matter never went to that point.

I was told there had been an offer, it hadn't been accepted. I'm afraid I don't regard it as the case that, where a client tells me he has received an offer but hasn't accepted it I should quiz him as to what his terms were. I wouldn't see my duty as a solicitor going remotely that far. It's my client's business.

If he wants to tell me, perhaps because he wants to accept and implement the offer, fine. But if he has already rejected it, why should he waste time telling me about it?

Q. Well, correct me if I am wrong, but I get the impression from your evidence and the correspondence, that you are suggesting that Telenor were somehow or another being unreasonable in seeking to obtain their contractual rights?

A. I must correct you on that. Absolutely, Mr. Fitzsimons, that is the exact opposite of my evidence.

Q. I see.

A. In fact, I gave that evidence, as I recall it, and I

would have to go back to the transcript, but as I recall it, to say that Telenor, not unreasonably, felt that Mr. O'Brien's failure to deliver the guarantee was perhaps a breach of faith and certainly a breach of contract, and not unreasonably were seeking to insist on their rights.

Q. I see. Well, maybe I took you up incorrectly. If so, I apologise.

Now, we'll move on to another matter, Document 48(54). This is a letter sorry, not that document, we'll pass from that.

I referred to, earlier in this cross-examination, to the speculation which you very fairly stated you were engaging in, speculation, reconstruction from the documents, and one of the results of one of these exercises was your statement to the effect that you think that Mr. Haga was wrong in saying that he wrote the letter of the 15th September?

A. No, I said that I thought

Q. At Denis O'Brien's request?

A. Yes. I thought he wrote the letter of the 19th September at Denis O'Brien's request, but of the 15th, on his own initiative.

Q. But this was a reconstruction or speculation on your part?

A. Yes, it was.

Q. Well, we've been able to contact Mr. Haga, and he

doesn't agree with that.

A. I see.

Q. So he can give his own evidence in due course.

Now, in your evidence, again correct me if I am wrong,

I took you as stating that Mr. Arve Johansen told

Denis O'Brien at some stage after the presentation

that the Department had expressed concerns in relation

to funding at the presentation. Now, I know Denis

O'Brien was at the presentation, but have I

A. Yes, I think he said it in his memo as well,

Mr. Johansen, I think he has a memo to that effect.

It's also in Mr. Haga's letter, I think.

Q. We know there were references at the presentation to funding.

A. Yes.

Q. And why do you say that Mr. Johansen told Denis of that? What is the relevance of that?

A. I'm not sure I said he told him. I think

Mr. Johansen had reference in one of his letters or

memos to there having been dissatisfaction on the part

of the State, the Project Team, that the consortium's

financing, or perhaps Communicorp's financing, I can't

remember I am not sure that I said he told

Mr. O'Brien, and certainly the letter of 15 September

talks about dissatisfaction at the 12 September oral

presentation.

Q. I'll move on from that.

Document 48(42), your attendance of the 8th September, 1995, Denis O'Brien and Leslie Buckley.

A. Yes. That's the 18th, I think.

Q. Now, you said in your evidence that you may have heard of it beforehand, this proposal?

A. Yes, and I took that from the phrase "going ahead" in the attendance.

Q. Well, tell us about your hearing it beforehand. When? Where? From whom?

A. I have no idea, Mr. Fitzsimons. What I said in my evidence was, Mr. Coughlan asked me whether I had, prior to this, heard of the possibility that Mr. Desmond or IUU might become involved in it, and I said I didn't think I had, but it was possible I had, and I took the inference that I might have done from the phrase "going ahead" as it appears in this attendance.

Q. You said you may have heard of it beforehand?

A. Yes, and I took that inference merely from the phrase "going ahead" in this attendance, but I also said I had no recollection of being told and I couldn't refer to any specific event, time, date or circumstance as a result of which or in which I was told.

Q. Yeah, I see. Now, at this time you were acting for Esat Digifone, isn't that correct?

A. I would have been, yes.

Q. And it's the 18th

A. September.

Q. Is it the 8th or the 18th? I can only see the 8

A. It's the 18th.

Q. Okay. We'll take it as the 18th. Did it occur to you to pick up the phone as soon as you got this news and telephone Telenor representatives, directors, shareholders, Mr. Johansen about this fairly important event that was taking place?

A. I can only presume it didn't, because as far as I recall, I didn't do that, but in my defence, I would make two points:

The first is that the individuals telling me about this are both co-directors with Telenor executives of Esat Digifone. So it is reasonable for me to assume that as fellow directors, they would do the informing. And in further support of that, I will say that they did inform Telenor within a couple of days after this, because there is correspondence I'll have to get the exact dates but it's certainly no later than the 23rd in which Telenor are being told of this and asked to approve it.

Q. Yes. Well, in what capacity did you see these two gentlemen on this day? I mean, were Mr. O'Brien was he there as a personal client? Was Mr. Buckley there I think he was a director of Esat Telecom

A. And Esat Digifone.

Q. No, he wasn't a director on that date, nor was

Mr. Denis O'Brien.

A. Was he not? I see, okay.

Q. Neither were directors on that date, so they didn't have a duty on that account.

A. I certainly thought they both were. Even today I thought they both were.

Q. But you were the solicitor to Esat Digifone. Are you saying that you didn't know who were the directors of the company for whom you were the legal adviser on a particular date?

A. I am saying that I think that at this date I thought they were directors. They were certainly Mr. O'Brien was the principal promoter, there can be no doubt about that.

Q. But you, as the company solicitor, owed a duty to all of the directors. Why didn't you phone up Telenor representatives on the board, who clearly would have had the greatest interest in receiving this information? Why did you not do that, Mr. O'Connell?

A. Mr. Fitzsimons, I have individual directors of companies coming in to me, with the exception of the past week, from once to half a dozen times a day telling me things about their companies and things they want done, and if I took the time to ring up every other director of those companies and tell them what their colleagues had told me, I would never get

anything done. If someone comes in to me on behalf of a client and says, I am instructing you in this, I take the instructions unless I have very strong reasons to believe otherwise, and I don't feel any obligation to call up the individuals, fellow directors and tell them what he said.

Q. Yes, that's fine. It's all very well, but this was a joint venture. This wasn't your ordinary company with a half dozen directors, all of whom are swimming in the same boat, so to speak.

A. Very well, Mr. Fitzsimons, but you didn't present the question to me as me taking instructions on behalf of one joint venture partner and ringing up the other. You presented the question to me as why didn't I call up these directors, fellow directors and tell them.

Q. Well then it's my error. Very well, let me present it in that way and please deal with it then.

A. Because I wasn't acting for Telenor as a joint venture partner.

Q. You weren't acting for Telenor as a joint venture partner. Well, did you advise your clients on that day that they had a duty and good faith to immediately, immediately inform Telenor of this dramatic development?

A. I can't recall whether or not I did. I may have done so. But, in any event, they did inform Telenor within a very short time, within that week.

Q. Why is there no reference to Telenor in this attendance?

A. I have already explained that the notes I tend to take of meetings are generally related to matters which I have to remind myself to do. They are not intended as minutes of the meeting.

Q. You see, I have to suggest to you that at this time, Telenor were proceeding along blithely trusting Denis, trusting your firm, maybe unwisely, not having taken their own local legal advice, and you were perfectly happy to proceed on that basis; that all you had to do was to contact Denis O'Brien, your real client, and keep him up to date with what was going on, but nobody else?

A. Mr. Fitzsimons, I think that's an improper suggestion.

In the first place, Telenor were not my clients. In the second place, a characterisation of Telenor as babes in the wood is not correct. Telenor were world wise. They were, as I say, a multinational telecoms company engaged in joint ventures elsewhere in Europe, possibly elsewhere in the world. I did not have the duty which you seem to suggest I had. I did not act improperly in this matter, as you are implicitly suggesting, and I must say I take exception to your question and its implicit criticism of me.

Q. I am not suggesting that you acted improperly at all, Mr. O'Connell.

A. Thank you.

Q. What I am saying is that at this particular point in time, it, because of the particular situation, never occurred to you to bother with Telenor; that your insofar as in your eyes, the real client here was Mr. O'Brien. They really didn't matter?

A. The real client was Esat Digifone. Of course Telenor mattered. You are telling me that I thought something eight years ago. With the greatest respect, Mr. Fitzsimons, I can't remember what I thought and you certainly don't know what I thought.

Q. We'll move on to another matter.

CHAIRMAN: Mr. Fitzsimons, I am just wondering about the logistics, if you are going to be more than a couple of more minutes. It's a long week for everything, but primarily Mr. O'Connell.

MR. FITZSIMONS: I could be another 20 minutes or half an hour.

CHAIRMAN: It's a bit oppressive in the light of a full day in the box already, and obviously some of your colleagues may have questions in addition. So whilst we are getting near the end of the road, I am afraid it will have to be next Tuesday then, Mr. O'Connell, and apropos your remarks that you would have welcomed a bit more notice, I regret that it wasn't possible.

A. That's understandable, Chairman.

CHAIRMAN: But having to get ahead with the business, I am afraid it did require perhaps to put you on stage a little bit more quickly than you might have.

MR. FITZSIMONS: I wonder, Chairman, just one matter that Mr. O'Connell has mentioned. He said that he would only accept a direction from you to contact Mr. Halpenny with a view to finding out the date upon which Mr. Halpenny commenced acting for Communicorp in 1995. Would it be possible

MR. COUGHLAN: Perhaps, Sir, I can diffuse that. We'll undertake to do that.

CHAIRMAN: I was going to say, Mr. Fitzsimons, I think I should be reticent about giving a direction of that nature, bearing in mind that Mr. Halpenny will be giving evidence, but I think it's sensible that the Tribunal legal team explore the position and that we'll address it on Tuesday morning at 11.

MR. MCGONIGAL: Just one other small housekeeping matter. I notice that Mr. Fitzsimons said that he had managed after seven years or six years or four years to be in touch with Mr. Haga. I was wondering if it would be possible to have all of Telenor's statements in relation to their evidence before Tuesday week?

MR. COUGHLAN: That's another Tribunal matter, and I'll deal with my colleagues in relation to that. I don't think it needs to be aired here at this moment, Sir. But we'll deal with that.

CHAIRMAN: All right. In anticipation of progress

then, on that front, and others, Tuesday at 11.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 4TH
NOVEMBER, 2003, AT 11AM