

A P P E A R A N C E S

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FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, SC

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I N D E X

Witness: Examination: Question No.:

Denis O'Brien Mr. Coughlan 1 - 478

THE TRIBUNAL RESUMED AS FOLLOWS ON THE 26TH OF

NOVEMBER, 2003, AT 11 A.M.:

CONTINUATION OF EXAMINATION OF MR. DENIS O'BRIEN BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. O'Brien, I wonder if you have Book  
48.

I think we discussed yesterday your visit to

Mr. Johansen in Oslo on the 22nd of September, 1995.

I think at the same time, that is from the 18th on,

there were matters proceeding between Mr. O'Connell

and Mr. Michael Walsh on the hammering out the details

of the agreement, which resulted in the arrangement

agreement being consummated on the 29th of September,

isn't that right?

A. And Peter O'Donoghue may have been involved as well.

Q. And Peter O'Donoghue may have been involved, yes.

I just want to bring a few matters to your attention

just

Yes, if you go to Tab 58, please. Now, I am not going

to open this letter at all, but this is a letter

Michael Walsh sent you, and where he set out what he

understood to be terms agreed and was asking you to

sign them confirming that, isn't that right? I am not

interested in the content of the letter for the moment

at all.

A. Yes, it is from me from him to me, yes.

Q. From him to you. Matters proceeded further in any event, ultimately resulting in the signed Arrangement Agreement of the 29th of September, but I just want to he sent this to you outlining certain matters.

There were some changes, you can take it?

A. I don't believe that this is the same as the executed copy.

Q. You are right, there were some changes. I just want you to go to Tab No. 59, because you can see that this is a fax cover sheet from Per Simonsen to Pal Espen.

Do you see that?

A. Yes.

Q. Do you know if you can help us who Pal Espen it doesn't matter, he was somebody in Telenor?

A. I have never heard of him before.

Q. We can take it that it was somebody in Telenor anyway.

He sent to or enclosed with that fax cover sheet were four pages, and if you go over the page, you will see a copy of that letter Michael Walsh sent to you on the 24th of September, 1995. Do you see that?

A. Yes, it was handwritten.

Q. And there are handwritten notations. Now, can you say whether they are yours or not?

A. It is not my writing anyway.

Q. It is not your writing. I don't think it is. I think that these are notes that were made by Mr. Simonsen or by somebody on his side. That is what I think, but I could be wrong about that. The only reason I am bringing these to your attention is that you must have given these documents, or somebody on your behalf must have given these documents, to Mr. Simonsen to enable him to fax them to whoever Pal Espen was.

A. Yeah, they would there would have been an open exchange of documents and they would have been up to speed with what was going on.

Q. Well, in the first place, it looks, on the face of it at least anyway, that Mr. Simonsen had whatever correspondence or had some correspondence, definitely the correspondence dated the 24th of September, 1995, from Michael Walsh to you?

A. It looks

Q. Do you remember giving them to Mr. Simonsen or asking, say, Peter O'Donoghue to give them to Mr. Simonsen?

A. I don't remember specifically asking anybody to give it though them, but I know that we did give Telenor documentation surrounding the IIU agreements.

Q. Now, of course, it would seem reasonable and logical, you had gone to Mr. Johansen on the 22nd, and you had discussed the question of IIU's participation with him on the 22nd?

A. That's correct.

Q. We know you don't agree with it, but Mr. Johansen says in the first paragraph of his memo dated the 4th of May, 1996, that when you came to see him that what you first of all stated to him, indicated to him, was that IIU were coming in in place of the neutral banks, and that underwriting wasn't indicated at that time. I know you don't agree with that.

A. Well, I think it is further than that. Mr. Johansen doesn't remember the meeting of the 22nd.

Q. Mr. Johansen, I think, does. Mr. Johansen's memorandum of the 4th of May, you know the long memorandum?

A. Mmm.

Q. You remember in the first paragraph of that, he said you came over to see him

A. He wasn't sure what date it was, but

Q. Yes, it must be the 22nd, it was the only time that you would probably have met at that time, in fairness to both of you.

He said, in that memo, that the first on that day what you told him was that they were coming in to replace the neutral banks. I won't go into all of the rest that is contained in that paragraph. That they were coming in for that purpose, that underwriting wasn't an explanation on that day?

A. I differ.

Q. I know you do.

He said in the second paragraph then, that a short time later the true nature of the agreement or the involvement of IUU came into place and it was to strengthen the financial position of Communicorp. You can take it nothing turns on this for the moment. I am just pointing these documents to you as an example of something being given to Communicorp whereby Mr. Johansen might have to Telenor, whereby Mr. Johansen may have been left to form the view that a few days later, or sometime later, the true nature of the agreement comes into focus. That is all.

A. Yeah, I think my evidence is different to Mr. Johansen's, but

Q. I understand that.

A. but the correspondence that came in the period after the 22nd was, obviously, would have been as a result of parts of my meeting with Mr. Johansen.

Q. Yes. Now, if you then would look at a document and I wonder is this document at the back of your Book 48?

It is a

A. It is Amund Bugge.

Q. It is Amund Bugge's memorandum, yes?

A. Yes, 80 something A?

Q. Correct.

A. 80A.

Q. It might be just a good time to look at that.

Now, Mr. Bugge has informed the Tribunal that he was

away on holidays until the 27th up to and including the 27th of September. He came into the office on the, sorry, on the 28th. That was the first time that he had site of the Arrangement Agreement?

A. Did he backdate this, because this says the 27th of October "place and date".

Q. This memo

A. Yeah.

Q. is after the announcement of the licence competition. He made

A. If he came back from holidays on the 28th how would he

Q. He came back from holidays on the 27th of September, the Arrangement Agreement was signed on the 29th?

A. Okay.

Q. He saw the Arrangement Agreement, I think, on the 28th. He was a young

A. A young guy, a good fella.

Q. He was a bright but in-experienced young lawyer.

Now, on the 27th of October then he prepared a memorandum and he was sending it to Mr. Rolf Busch who was a senior lawyer, in-house lawyer in Telenor, is that right?

A. He was more he was actually more than that.

Q. Yes.

A. He was he ended up going on the Board of Esat Digifone. He was the head legal guy as far as we were

concerned.

Q. Yes. He is sending it also to Per Simonsen and Knut Digerud?

A. Yes.

Q. And it is about the Irish situation?

A. The status, yes.

Q. And the Ireland project as per the 27th of October, 1995.

"My heartfelt congratulations to Invest and Per Simonsen on the award from the Irish authorities.

"I have felt a need to go through the latest development in the case on the legal side and have summed up the situation as follows:

"1. The licence.

"The bid for the GSM II licence was delivered on 4th August 1995 in the name of the newly incorporated company Esat Digifone Limited. At that time Telenor Invest and Communicorp Group Limited each held 50% of the shares in Esat Digifone.

"On 25 October 1995, the Irish authorities announced that the licence would be awarded to Esat. Before the licence formally can be awarded the authorities will complete a round of negotiations with Esat to clarify the conditions related to the licence in detail.

"2. The Shareholders Agreement:

"The Shareholders Agreement was almost finished before delivery of the bid, but disagreement on two or three

issues prevented signature. The agreement has not been negotiated since and the relationship between the parties is formally governed by the Joint Venture Agreement between Communicorp Group Limited and Telenor Invest of 3rd June 1995 with the modifications described below.

"3. Financial security for Communicorp's obligation to capitalise Esat.

"A. The problem.

"Communicorp has limited capital resources. At the time of the delivery of the bid a crucial point for Invest was to make sure that Communicorp will manage its obligation to capitalise Esat. The capital need of Esat is calculated to be a total of 124 million Irish pounds, of which the equity shall represent i£½58.33 million." Then he gives the Norwegian equivalent.

"Considering that Communicorp's original owner share was 50%, the company would have to raise approximately IRi£½29 million. It was a presumption that Communicorp's ownership should be reduced to 40% and then to approximately 34%. Communicorp's financial contribution would still be significant in relation to the company's resources.

"B. The offer to Communicorp from Advent International Plc.

"Invest principally wanted a bank guarantee for

Communicorp's financial obligations but had to accept a security of a lower degree. Communicorp received an offer for financing from the fund Advent International Plc which owns 34% of the shares in Communicorp. Communicorp considered the offer to be unfavourable. The offer was not accepted by Communicorp, but Communicorp committed itself towards Telenor to accept it if financing on more favourable terms could not be achieved. We do not know whether the offer from Advent is enforce today.

"C: The agreement between International Investment and Underwriters Limited and Esat.

"After delivery of the bid Communicorp has achieved financing from International Investment Underwriting of all together 25% of the shares and the share capital. The financing obligation is, in this case, not towards Communicorp but directly towards Esat.

The Arrangement Agreement between Esat and IIU, seems to give Telenor significantly better security for the capitalising of Esat than the above offer from Advent and is as such relatively assuring. The agreement was signed by Denis O'Brien (CEO of Communicorp and Chairman of Esat) on behalf of Esat, but Invest has accepted the agreement orally. IIU guarantees in the Arrangement Agreement to get hold of up to four shareholders who shall subscribe for 25%. If IIU does not manage to find such subscribers, IIU will have to

purchase/subscribe for the shares itself.

"As a consequence of IIU's underwriting for 25% of the shares and the share capital, each of Invest and Communicorp have agreed to reduce its shareholding to 37.5%.

"Under the Arrangement Agreement IIU also guarantees for the 37.5% of the share capital which Communicorp shall raise. IIU's guarantee is limited to a total equity need in Esat of IRi½58.33 million. Under the Arrangement Agreement IIU thus guarantees for 25% plus 37.5% equal to 62.5% of the capital need in Esat limited to an accumulated capital need of IRi½36.5 million. Invest has, as mentioned above, accepted this agreement.

"Is Communicorp obliged towards Invest to ensure financing of the same quality as the financing offer from Advent represented?

"D. Two points of unsecurity.

"Unsecurity relates to particularly two circumstances.

"First, we have not obtained very much knowledge of the guaranteeing party, IIU. The company was incorporated in 1995, and its credibility rests completely on its owner Dermot Desmond. He is a financier and has made his fortune on stockbroking and has, broadly speaking, been behaving well. He is said to have acted illegally vis-a-vis the Irish authorities once before. This supposedly happened

relatively long ago, so the authorities' confidence in him is now presumed to be relatively good.

"Second, insecurity has arisen with regard to the guarantee from IIU because of a so-called side letter to the Arrangement Agreement. This was an amendment agreement between Esat and IIU. The side letter was signed on behalf of Esat by Denis O'Brien. Under the side letter IIU assigns its position under the Arrangement Agreement to Bottin Investments.

According to O'Brien, Bottin is a wholly-owned subsidiary of IIU. Bottin is, however, not registered and it has proven difficult to find reliable information about this company.

"E. Investigation from Invest about information.

"On 6 October this year Invest sent a letter to Denis O'Brien in which it asked for information of when Bottin was registered, the company's owners, the composition of the board, the balance of 30 June 1995, and the annual report for the previous three years.

In a letter from Invest to IIU on the 12th October, IIU was asked to present the same information. In addition, Invest asked O'Brien in a letter of the 12th of October of a confirmation in writing that there was no agreement between Communicorp or O'Brien, on the one hand, and any company controlled by IIU, or Dermot Desmond or Michael Walsh on the other.

"Up until now Invest has not had an answer to any of

these letters. The representatives of Invest are not convinced that they will receive any of this information before they sit down to negotiate with IIU/Bottin and Communicorp.

"F. Further actions.

"If the assign of IIU's contractual position to Bottin means that Invest in reality has no guarantee for the 62.5% of the capital of Esat, this will constitute a clear breach of Invest's premise for entering into the Arrangement Agreement.

"The worse scenario is that the guarantees are now without content. In such case, Invest may claim that Denis O'Brien was not entitled, on behalf of Esat, to assign Esat's contractual position (the Articles of Incorporation, Article 23 'borrowing powers'). Invest might, therefore, claim that Esat is not bound by the side letter.

"In addition, IIU has sent a letter to the Irish authorities in which IIU verifies the guarantees related to Esat. The transfer of the contractual position must at least constitute breach of such confirmation. According to the Irish lawyers engaged by Invest, the assignment may be considered as a breach of so-called good faith towards the authorities, but not a legal breach.

"The question is how strongly we shall react. Neither Invest nor Telenor wants to withdraw from the Ireland

project now. If Invest does not soon receive acceptable answers from IIU or O'Brien, it seems correct at least to supplement the letters sent by Invest to IIU and O'Brien with stronger demands for information. As the licence has now been awarded to Esat we must trust that it will show possible to obtain information from IIU and O'Brien by entering into direct negotiations with them.

"Invest is also under strong pressure from Communicorp and Denis O'Brien. He wants Invest to reduce its ownership share in Esat. Invest refuses to do so, in part to keep its influence, and in part to keep its part of the potential profit related to the shares in Esat as large as possible.

"The relationship between Telenor on the one hand and Communicorp and IIU on the other, may end in a deadlock situation either because of the discussion regarding the ownership shares or because of IIU's assignment of its contractual position to Bottin.

"It is of great importance that we now also obtain full clarity with regard to all financial obligations and guarantees.

"4. Financing negotiations of the Shareholders Agreement.

"Invest has asked us when the Shareholders Agreement should be finally negotiated. In light of the licence now having been awarded to Esat Digifone, I presume

that the answer to this question must now be clear.

The agreement must be negotiated and finalised as soon as possible. The task consists of clarifying the points which remain after the negotiations in August, and to adjust the agreement to a three-party agreement following IIU's entry to the consortium.

"Invests' Irish lawyers shall adjust the draft Shareholders Agreement to Irish law. It is also our intention that they shall join the financial negotiations of the agreement.

"5. Practical development of the project.

"I have understood that Invest received a number of"  
I don't think there is anything much in relation to that.

A. I think that is quite an important

Q. Is it okay?

A. If you don't mind.

Q. Yes, indeed.

"I have understood that Invest received a number of offers for deliveries of technical equipment within the deadline of Monday the 23rd October. Considering Esat's obligation to reach 80% GSM coverage in Ireland within one year, I assume the company should enter into the necessary and relevant agreements as soon as it has had an overview of the bids.

"Best regards. Amund Bugge."

Now, I am not going to go over in any great detail

again, but it appears from that particular memorandum there, that once the bid went in, that Telenor appeared to have accepted a lesser position to satisfy them than the Letter of Guarantee they were looking for under the Joint Venture Agreement, but we have been over that for days and I am not going to go into it again in great detail.

A. Well, I wouldn't agree with that.

Q. I know you don't agree with it.

What I do want to ask you about is this: The Arrangement Agreement signed on the 29th of September, of 1995, was signed by Michael Walsh on behalf of IIU, is that correct?

A. Correct.

Q. And it was signed by you both in your capacity as, I think, Chairman of Communicorp and

A. Well, that was one part of it.

Q. That was one part of it?

A. For Communicorp and then and then I signed

Q. And you signed on behalf of Esat Digifone?

A. The consortium, yeah.

Q. But there was also a side letter on that day, isn't that right?

A. Yes. Just what tab is that?

Q. And the I will just get it now.

The effect of the side letter was to assign all of the obligations and rights which IIU had under the

Arrangement Agreement to a company called Bottin,  
isn't that right?

A. I believe so. Just, can you help me with where that  
letter is?

Q. Yes.

A. I understand it is somewhere back here, isn't it?

Q. Yes.

A. I have Tab 65, but I don't know whether that covers  
the

Q. I will just look at that now, yes. It may be in  
different positions. Do you have the letter?

A. Is this the one re Esat Digifone, "Dear Denis"?

Q. It is the second document in Tab 65.

A. Could you just read the first two lines of the letter,  
if you wouldn't mind?

Q. "Dear Denis,

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

"Our agreement is based on the attached Arrangement  
Agreement" that is the full document "document  
prepared by William Fry Solicitors, but is subject to  
this side letter.

"1. In the event that the consortium is awarded the  
second GSM Licence, and the consortium undertakes to  
place 25% of the equity in the consortium with IIU or

its nominees together with the placees, IIU Limited,  
the arranger, will arrange underwriting."

Do you have that, do you?

A. Yes.

Q. That is the first paragraph.

The second paragraph then.

"The arranger has assigned the agreement in its  
entirety both benefits and obligations to Bottin  
International Investments Limited."

This was a side letter which was signed by you as  
Chairman of Communicorp and Esat Digifone, we take it  
in your capacity as

A. That's right.

Q. Now, we now from Mr. Bugge's memorandum, and I think  
we know from certain documentation, I just refer you  
briefly to them

A. There is a couple of, you know, in a general sense,  
Mr. Bugge's memorandum, it is his view of the world.

Q. Yes.

A. And certainly, I don't recall him being involved in  
the IIU situation.

Q. Mr. Bugge?

A. Yeah.

Q. No, he only saw the Arrangement Agreement the day  
before it was signed, at the earliest?

A. Yeah.

Q. And?

A. And it is his view of the world and there are certain inaccuracies.

Q. All right. I will come back and deal with those and you can clarify where you consider him to be inaccurate.

A. Also, it is Telenor to Telenor, so again, it is most most of the evidence really has to come from them on the memorandum.

Q. Yes. If you go to Tab 72 for a moment.

A. Okay.

Q. This is referred to Mr. Bugge's memorandum. He wrote or Mr. Haga wrote

A. To me.

Q. Wrote to you on the 6th of October, 1995.

"We refer to the letter dated the 29th of September, 1995 from IIU. Based on the contents of this letter I would kindly ask you to provide Telenor with the following information on Bottin:

"Date of foundation,

"Owners, Board of Directors, balance sheet as of 30/6/1995. Annual report of the last three years."

And he asked you to send him a fax copy of that.

You see that Mr. Bugge, in his memorandum, Tab 80, is it?

A. 80A is it?

Q. Just Tab 80.

A. Okay. I send it on to

Q. You sent it to Michael Walsh, you can see that, do you?

A. I said I will give you a buzz on this.

Q. "I will give you a buzz on this, Denis."

And you sent on Mr. Haga's letter looking for information about Bottin?

A. Yeah. It was an issue that he could answer.

Q. Yes. Well, Mr. Bugge, in his memorandum

A. Of the 27th?

Q. Yes.

A. We call this the treason memo.

Q. Why is it called the treason memo?

A. He is said to have acted illoyally vis-a-vis the Irish authorities.

Q. I see.

A. Nothing hangs on it, I can tell you.

Q. Yes. Just on to that particular paragraph, where he refers to the illoyally

A. And broadly behaving well.

Q. Yeah. Do you have anything to say about that?

A. No. I mean, we were amused when we read that, this is all, because we didn't see what context

Q. Yes. I will come back to that. But if you go to the next paragraph, what he describes as:

"Second, insecurity has arisen with regard to the guarantee from IIU, because it was because of a

so-called side letter to the Arrangement Agreement.

This is an Amendment Agreement between Esat and IIU.

The side letter was signed on behalf of Esat by Denis O'Brien. Under the side letter IIU assigns its position under the Arrangement Agreement to Bottin.

According to O'Brien, Bottin is a wholly-owned subsidiary of IIU. Bottin" then it goes on it is not registered.

Now, when you were negotiating this side letter assigning the rights and obligations of IIU under the Arrangement Agreement to Bottin International, can you help the Tribunal what discussion took place between yourself, Michael Walsh or Dermot Desmond about that?

A. I can't remember any real detailed discussions about this at all. I am sure I asked who is Bottin.

Q. Yes. What did they tell you?

A. The assurance that I got at the time was that it was a company within Dermot's group that he was involved in it, like he was involved with IIU, that it was we always viewed IIU and Bottin as all the one.

Q. Yeah.

A. I mean, the big thing that I was taking out of IIU or Bottin is that it had the full commitment of Dermot on the underwriting of Communicorp but also to fund irrevocably the 20%. So, you know, once I was happy about that, I didn't have any problem at all about this. I didn't even it didn't even cause any concern.

Q. Did you have any discussion about Bottin?

A. I would have asked, I am sure I would have asked just who is Bottin? And the answer I would

Q. What were you told?

A. The answer I would have got is that it is Dermot Desmond's part of the sort of IIU group.

Q. I see.

A. And Dermot's investment companies, that is all.

Q. And who would have told you that?

A. I don't know. I am not sure whether it was a lawyer or it was Dermot or Michael Walsh. I actually don't know. I don't remember. It is a long time ago.

Q. Now, you received a letter from Telenor about it, they wanted to know, I suppose not unreasonably, who is Bottin. And you sent it on to Michael Walsh and said that you would give him a ring about it?

A. Yeah.

Q. Do you remember having a discussion with Michael Walsh about it?

A. I actually do. I remember following up and just ringing Michael and I said, Michael, can you reply to that letter, because this is, the information I really sent the information to IIU not to me. I mean, I was passing the letter on to be replied.

Q. Yes, I understand that. But you had entered the side letter agreement on behalf of Communicorp and on behalf of Digifone?

A. That's correct.

Q. And what that side letter did was it assigned all of the rights and obligations of IIU under the Arrangement Agreement to this company called Bottin, isn't that right?

A. That's correct.

Q. And you didn't make any detailed inquiries to satisfy yourself as to who Bottin were?

A. I was satisfied on my preliminary inquiry that Bottin was Dermot Desmond.

Q. Right. Right.

A. So, I mean, once I had that

Q. That is fair enough.

A. Bottin, IIU, Dermot we all saw them as together.

Q. Yes?

A. The same thing.

Q. All right. That is fair enough. You satisfied yourself that Bottin was Dermot Desmond, that satisfied you.

But, by reason of the side letter, IIU were out and Bottin were now in. All the obligations and rights of IIU had been assigned under the side letter to Bottin, even though it was just Dermot Desmond in your mind at least anyway, isn't that right?

A. We viewed IIU and Bottin as the same. If they had a number of companies that they owned and they were moving things around, we did not have a concern

because ultimately Dermot was there.

Q. Well, you didn't have a concern, and I can understand that because Dermot Desmond was there.

A. Well, dealing with Dermot, you know, he could have it could have been any company he could have assigned this to. I was happy that once Dermot owned the company that this agreement was being assigned to, that it was the same thing. IIU was owned by him, Bottin was owned by him. So nothing really was there of concern to us.

Q. I can see from your point of view, the request to assign it to Bottin didn't come from you obviously, it wasn't of any particular interest to you?

A. No, we didn't really have a concern about it.

Q. So the idea to assign it came from the IIU side, would that be fair?

A. It was done in the drafting of the documentation.

Q. The letter of the 29th of September to the Department, the underwriting letter, is sent by IIU, is that right?

A. Mm-hmm.

Q. And it informs the Department of the position of IIU, is that right?

A. Yes. Let's look at that letter again.

Q. Tab 61.

A. No, it is not 61 in my book.

Q. Pardon?

A. 60, is it?

Q. 60.

A. Yes. I have got the

Q. Sorry?

A. The 25th of September, is that that's not the right one?

Q. I beg your pardon, 64.

A. 64.

Q. It is on IIU headed notepaper. And it reads:

"Dear sirs,

"We refer to the recent oral presentation made by the consortium to the Department in relation to their proposal for the second GSM cellular mobile telephone licence. During the course of the presentation there was a detailed discussion in relation to the availability of equity finance, to the consortium from, Communicorp and a number of institutions.

"We confirm that we have arranged underwriting on behalf of consortium for all of the equity (circa 60%) not intended to be subscribed for by Telenor. In aggregate the consortium now has available equity finance in excess of  $\text{£}1\frac{1}{2}$ 48 million.

"We do not foresee any additional need for equity.

However, we are confident that if such equity is required we will not have any difficulty in arranging it.

"Yours faithfully, Michael Walsh."

Now, the position of IIU had, at this stage, been assigned to Bottin, isn't that right on the 29th, the side letter had assigned it?

A. Yes.

Q. So why was the Department not told that it is Bottin who are underwriting circa 60% of the equity into the to be subscribed for by Telenor?

A. I actually don't know.

Q. You don't know?

A. I think we we always viewed IIU and Bottin as the one thing. I mean, it is very similar to Communicorp became Esat Holdings, we de-merged. All the same people were involved, it is just a different label, same ownership.

Q. Yes. So you really don't know why the Department was not informed that it was Bottin?

A. Certainly in a cursory look at this I didn't believe that it was relevant to put into that letter.

Q. To your knowledge were Bottin carrying on any business in the nature of a financial institution in this country or underwriting in this country or matters of that nature?

A. I can't answer that question, I don't know.

Q. To your knowledge, did Bottin have a licence from the Central Bank to carry on any type of activity?

A. It wasn't my company, so I don't know.

Q. All right. Now, I think, perhaps, we should go back,

so, to Mr. Bugge's statement.

Do you remember giving any sort of explanation, even an off-the-cuff explanation, to anyone in Telenor, because Mr. Bugge seems to be we don't see any formal reply to the letter for request, you know

A. From them direct to themselves?

Q. No, you know, the letter that Mr. Haga sent to you and that you sent we don't I haven't seen it anyway, a reply to that. There doesn't appear to be a reply in the documents?

A. Certainly I haven't seen anything in the files.

Q. I don't think there was.

A. It was a matter for IIU to handle.

Q. Right. But Mr. Bugge in his memorandum, which he made on the 27th of October, 1995, I am just wondering do you remember saying anything to somebody like Mr. Haga or Mr. Simonsen or somebody like that, that Bottin is a wholly-owned subsidiary of IIU? Do you remember that?

A. I can't remember. We may have had a conversation about it, but I don't know.

Q. All right. Did you take any steps at the time of the Arrangement Agreement and the side letter to even ascertain if Bottin was an Irish registered company?

A. No.

Q. Did you know that it wasn't?

A. I don't believe I did.

Q. You don't believe you did.

Now, according to Mr. Bugge's memorandum, whatever about the Department were informed of, somebody does seem to have said something to Telenor, that IIU was if you go to that paragraph at the top of the third page, the two issues of unsecurity.

"First, we have obtained very much" "we have not obtained very much knowledge of the guaranteeing party, IIU. The company was incorporated in 1995 and its credibility rests completely on its owner Dermot Desmond. He is a financier and has made his fortune on stockbroking." I will just halt there for a moment.

Do you remember telling IIU about this, I take it that they wouldn't have known about an Irish company necessarily? Telenor, I beg your pardon.

A. Certainly that wouldn't have been my description of Dermot.

Q. That wouldn't have been your description?

A. I mean, certainly I would have, you know if they asked their solicitor, MOPs to do something up on Dermot

Q. All right. And the rest of it: "He is a financier, has made his fortune on stockbroking and has, broadly speaking, been behaving well."

Did you have any discussion with them about that?

A. Absolutely none. I mean, I don't know how anybody can

say, "broadly speaking, being behaving well." Unless it is lost in translation. I don't know.

Q. All right. Did you convey any of the other information

A. Quite definitely not.

Q. recorded there?

A. Definitely not. In fact, I had nothing to do with that paragraph.

Q. You had nothing to do with that paragraph. Very good.

A. And certainly, Mr. Bugge didn't consult with me on this memorandum.

Q. No, I don't think he did. I think Mr. Bugge has told the Tribunal that he would have been dependant on receiving information from the likes of Mr. Simonsen and Mr. Haga. Would that be fair?

A. Or Mr. Johansen. It depends he doesn't seem to have too much of a concern, if he said at the end of it: "I assume the company should enter into the necessary and relevant agreements as soon as possible in regard to the equipment"

So I don't think we can make too much out of this memorandum.

Q. Yes. Well, you were the one that introduced IIU to Telenor, isn't that right?

A. That's correct, yes.

Q. On the 22nd of September, 1995?

A. I know we had a meeting on the 22nd, but I may have

discussed it beforehand and I don't know

Q. All right.

A. for sure.

Q. What did you tell them about IIU?

A. I told them that IIU were prepared to underwrite the 20%. They were prepared to underwrite us, which hopefully would satisfy Telenor; and broadly Telenor, if I remember correctly, were happy with having an underwriter involved.

Q. But did you tell them what IIU was, not what they were prepared to do?

A. Well, I would have more focused on Mr. Desmond.

Q. Well, what did you tell them?

A. I can't remember precisely what I told them, but I would have broadly painted his career.

Q. And tell us what you told tell us what you told them.

A. That he was a financier, he had made significant amounts of money, he is Irish, he had started the IFC, brought that project to the attention of the Government of the day and he was an investor in a number of different companies. And I probably would have mentioned one or two companies that I knew publicly that he was involved in, for example, London City Airport, Sandy Lane.

Q. And that was it?

A. That was it, yeah.

Q. Was he involved in Sandy Lane at that time?

A. I don't know, he could have been. I must have mentioned some of the projects that he was involved in. I don't know if he was in Sandy Lane or out of Sandy Lane at the time.

Q. Did you tell them that IIU was a new company?

A. You see, I always viewed dealing with Dermot was dealing with Dermot. And if it was IIU or anybody else it didn't really matter because Dermot was the person. Once I had his commitment

Q. As far as you were concerned the other was a vehicle?

A. Totally fine. I mean, everybody has a vehicle that they put their investments through.

Q. Well, then and I take your point on that. As far as you were concerned, the position as of the 29th of September, was that it was Dermot Desmond was underwriting your position and Dermot Desmond was taking the position of the institutions, as far as you were concerned in your mind?

A. Well, ultimately Dermot stood behind the vehicles that he used.

Q. Oh no, I understand that. But in your mind, you were dealing with Dermot Desmond, in your mind?

A. Yeah, because he was the principal behind IIU and then Bottin as well.

Q. Yes.

A. And that gave me a lot of security and comfort.

Q. Now, coming back to the letter you received from Martin Brennan on the 2nd of October, of 1995, which enclosed Michael Walsh's letter of the 29th of September, the underwriting letter, and informed you that it wasn't being taken into account?

A. Which tab is that now?

Q. 69.

A. 69, thank you.

Q. Now, you have told us that you believe that you would have sent that to Telenor and to IIU, is that what you believe you did?

A. I believe so, yes.

Q. I am just wondering about that because if you go to, I suppose, first of all, the letter from Mr. Haga to you at Tab 72 of the 6th of October, 1995, he is continuing to request information about the Arrangement Agreement and there is no suggestion there that they had been informed that the government had effectively informed have informed you that it wouldn't be taken into account, isn't that right?

A. No, I think this is a completely different letter. He is inquiring, it is re Bottin.

Q. I know that.

A. "We refer to the 29th from IIU."

Q. That all, from Telenor's understanding of things, that all flowed out of what was agreed on the 29th of September?

A. But why would he refer to the letter from the Department of Communications?

Q. If he was now if he was now at this time aware that all that had been gone through, the hard work, the sharing of the pain by Telenor in accepting a dilution, had all, in effect, amounted to nothing, because this was a letter which was not being taken into account by the Department?

A. But our agreement still stood, Mr. Coughlan.

Q. Mm-hmm.

A. I don't see any reason why he would start talking about the Department letter when he was inquiring about Bottin. Maybe he can help you, but I can't see any linkage.

Q. Right. And if you go to Tab 73 then, a note on Matheson Ormsby Prentice paper. They were, by this time, Telenor's solicitors. And you can see there:

"Shareholders Agreement. IIU, arrow, Dermot Desmond."

Then the break up. "IIU have written letter to the Department."

You can see that there, this is information being given to the solicitors, obviously, by somebody in IIU or in Telenor.

If you go to the next tab again, it may be a note of somebody else of the same meeting. Tab 74. And it looks as if that is a reference to Per Simonsen and Michael Irvine informing, I think, at this time, this

would be Mr. Arthur Moran. You can see: "Per Simonsen Esat Digifone Limited. Bid to Department in writing. And verbal proposal."

Then "Communicorp" on the right-hand side.

"Michael Walsh, Dermot Desmond, International Investment and Underwriters Limited will indemnify underwrite the Irish part of the bid."

Then under that: "Political contacts."

Then under that: "Motorola less jobs."

Under that: "Shareholders Agreement. Telenor drafted William Fry Gerry Halpenny." Then the break up again.

Then: "IIU letter to Department and undertaking between Telenor and IIU. Complete negotiate the agreement. Contact between three lawyers.

"Schedule: Finalise agreement within two weeks.

"Decision end November 1995 in fact, decision 2/3 weeks."

Do you see that?

A. Yes.

Q. And the date of this is the 10th of October of 1995.

Now, again, just in this chain, if we might look at

Tab 77. This is a letter from Knut Digerud to you on the 12th of October, 1995:

"Dear Denis,

"Thank you for joining us at Telecom '95 in Geneva.

As you would have noticed there is a great deal of attention and enthusiasm at all levels in Telenor

regarding our joint GSM project in Ireland. We sincerely hope that the IIU underwriting will strengthen the financial credibility of the bid.

However, we were surprised by the side letter" this is the Bottin matter again.

Now, all of this and, sorry, there is one final matter. There is a letter from Mr. Johansen, I think.

A. Where is that?

Q. I will just sorry, I beg your pardon. That's I will get it now.

It is a letter from Mr. Johansen to Mr. Michael Walsh welcoming him on board.

A. Yeah.

Q. In effect. I don't need to open it for the moment.

A. I know the letter you mean, it is a very warm letter.

Q. Yes. All of that seems to convey the impression that at this time that Telenor were not aware that the letter had been sent to you by Martin Brennan, that is Michael Walsh's letter to the Department?

A. Well, I certainly believe that it was an important letter to get and I would have shared it with the people concerned.

Q. Well, I understand that point. And what is of interest to me now to pursue with you, you believe that you would have told people that the letter to strengthen the bid, not to strengthen the financial position, but to strengthen the bid

A. And the financial position.

Q. To send it to the Department it was to strengthen the bid?

A. Yes, but it was implied that we were getting strengthened along the way.

Q. Oh, yes, I take that point.

A. Okay.

Q. But that the bid hadn't been strengthened, did you tell people that, that it wasn't it wasn't being taken into account?

A. No, I would have told I believe I would have taken that letter and I would have either read it to people or else told them about it or faxed it to them.

Q. Mm-hmm.

A. I don't know which one. It is eight years later and I haven't I don't see any other correspondence, but more likely it was probably done on a verbal basis.

Q. Now, if you go to Mr. Moran's attendance at Tab 74.

A. Have you identified who the first one was?

Q. I haven't at the moment. I think it is somebody else in Matheson Ormsby Prentice attending it seems to be the same meeting that is being there covered.

A. Okay.

Q. But if you go down, do you see where it says: "Decision end November 1995." That was the publicly stated position.

Then it goes on: "In fact, decision 2/3 weeks."

Do you see that?

A. Yeah. I am just comparing them, yeah.

Q. That was fairly spot on, what happened, isn't that right, two weeks, two and a half weeks?

A. Well, the decision was out on the 25th.

Q. Yes. Do you know how Mr. Simonsen or Mr. Irvine could have been privy to that type of information?

A. I have no idea where they got that from. I mean, there is no communication with the assessors or the Department or the Minister.

Q. That is what I am just wondering about Mr. O'Brien, because there was tremendous activity to get IIU's position tied down from the time of the presentation, after the presentation up to the letter of the 29th going in. There was a lot of activity, isn't that right?

A. Well, we moved forward. As I explained in my evidence, we moved forward after the oral hearing. We were all as one in saying we should try and strengthen our financial standing.

Q. Oh, yes. But there was a lot of activity?

A. There sure was, yeah.

Q. Yes. And the result of that activity in relation to the bid was that it was not being taken into account, you were informed of that in Mr. Martin Brennan's letter, isn't that right?

A. Yes, they said they weren't accepting it, yes.

Q. And there appears to be tremendous calmness now in this period, looking at the documents and from what you tell us, there wasn't any major meeting

A. Everybody was waiting for it was like waiting around for your Leaving Cert result, but certainly my world wasn't calm. I mean, the rest of them were

Q. Telenor's solicitors were being informed that the result was to be at the end of November, but in fact two to three weeks, doesn't that seem to indicate, Mr. O'Brien, that there was some contact or some information being obtained about what was happening inside in the Department?

A. Quite definitely not, no.

Q. All right.

A. But maybe I can help you on this. Everybody was speculating when there would be a result. I mean, it was a running dialogue between everybody. People were saying, well, you know, if you have the oral hearing, how many weeks would it take them to reach a decision. You know, what happens, we probably would have asked the PA people how long does it take. I mean, there would have been a lot of speculation amongst the whole group of people working on the bid as to when we might

Q. You knew the result had to be or was going to be by the end of November, isn't that right? That was the stated position, isn't that right?

A. Yes, yeah.

Q. Now

A. It was it was the deadline.

Q. Reading this particular note, it doesn't appear to be that what is being conveyed to Mr. Moran is speculation, it is not saying decision end of November 1995, that's the deadline. Speculation could take the form, could be in two/three weeks. What it says here is, in fact, "Decision 2/3 weeks."

Now, what I am asking you here about, Mr. O'Brien, is doesn't that seem to indicate that there has been information, contact or communication with people in the Department on the Esat Digifone side?

A. Well, certainly I was not aware of any and I believe that there was none, and I think you are asking me to comment on somebody else's meeting. And I think you have to direct the questions to the people who were at the the three or four people who were at that meeting.

Q. I am giving you an opportunity to comment on it.

A. Well, that is my comment.

Q. Now, I just ask you for your comment on Mr. Haga's letter at Tab No. 77, where he said that:

"We sincerely hope that the IIU underwriting will strengthen the position credibility of the bid."

Doesn't it seem virtually impossible that he could state something like that if he had been made aware by

you

A. Well, this is Mr. Digerud.

Q. Mr. Digerud, if Telenor had been made aware by you that this letter was not to be taken into account?

A. Again, you will have to direct the question to me.

But in just reading this, we know that our financial credibility was strengthened by being underwritten, so this is it could be one interpretation of this letter.

Q. Oh, but I take your point

A. You would need to ask him, I don't know.

Q. The credibility of the bid, the bid?

A. You would have to ask him, I don't know.

Q. On the face of it, it seems to mean the bid, not anything to satisfy Telenor?

A. Ask him, it is his letter. I think so.

Q. Now, yes, sorry. Tab No. 75. I said Mr. Arve Johansen's letter to Mr. Michael Walsh, it is Knut Digerud's letter to Michael Walsh. It is Tab 75.

"Although we have not had the chance to meet, let me take this opportunity to welcome you on board as a stakeholder in Esat Digifone Limited. We appreciate your underwriting of the Irish side of the bid and sincerely hope that this step will remove any doubt within the Ministry about our consortium's financial capabilities and commitment in the race for the second GSM Licence."

Then he goes on to deal with the Bottin matter that is dated the 12th of October, 1995. Again, if at this time Telenor were aware that the letter was not being taken into account and had been sent back to you, it would seem unlikely, wouldn't it, that Mr. Digerud would write a letter of this nature to Mr. Michael Walsh?

A. Again, I don't know. I actually don't know.

Q. You don't know why he would write such a letter, is that it?

A. Oh no, I don't know where he was coming from. He would have been informed by me that the letter was sent back or that it was refused or they weren't going to take it into account.

Q. That it wasn't going to be taken into account?

A. So, it is a question that you would have to ask Knut Digerud.

Q. Mm-hmm. Now, if you go to Book 49, if you wouldn't mind, please.

A. Fine.

Q. And Tab 84. This is an attendance of Owen O'Connell's made on the 3rd of November, 1995. And present were you, Leslie Buckley, Paul Connolly, I think, and John Callaghan. And then: "IIU issue: Bullet point for press release. Problem re material change in shareholder against bid."

Now

A. Can I just mention to you, Mr. Coughlan, that once we had gone through the 25th of October, I was less concerned with what was going on in regard to the licence meetings with the Department, even internal meetings, and my agenda had moved on and that was to complete the financing with Credit Suisse First Boston so that I would be in a position then not to call upon the underwriting agreement. So in reading all of this stuff prior to coming here

Q. Yes.

A. a lot of it I wasn't involved in, and a lot of it was being handled by other people. And to me, this was not a priority in my world. I was trying to run my business, increase our revenues, sort out some problems, particularly with one business, and get our funding in place. So it involved an awful lot of travelling backwards and forwards to the US.

Presenting to institutions. So, I want to help you through this, but if I say to you I don't remember or I wasn't involved, please accept that.

Q. All right. Well, you were present at this meeting?

A. Yes.

Q. And issue re "IIU issue. Bullet point for press release. Problem re material change in shareholders versus bid."

"Group of constitutional and other investors to be"

I think it is "located"?

A. "By underwriters IIU."

Q. "By underwriters IIU."

"Had to upgrade financing arrangement from comfort to underwriting. IIU willing to give underwriting"

A. "Co-investors".

Q. "Co -investors. And did so, clearly gave control of 20% to underwriters.

"Understanding is that the investors will be"

A. "Underwritings will be."

Q. "That underwriters will be placing shares with other institution other investors, including institutions. Michael Walsh call" I can't see the next word.

A. "Financing options."

Q. "Financing options confidential"

A. "At present."

Q. "T present will be revealed in due course."

A. "When finalised."

Q. "When finalised" "In due course when finalised."

Now, what was this problem re the material change in the shareholders versus the bid?

A. I don't believe there was a material change.

Q. Sorry, just look at the words there now.

A. Well, that is his this is Owen. He is just putting points down, discussion, and he says: "Problem re material change in shareholders versus the bid."

Q. Yes.

A. I think, again, you will have to ask him.

Q. I did.

A. What was his evidence?

Q. He says that what he is doing is that he is receiving information from people when he notes things down and things to do.

A. Yes.

Q. Now, Mr. O'Connell came in here and much of his evidence took the form of, as he was entitled to do, speculate and rationalise on positions because he wasn't the primary

A. One of many players.

Q. No, he was the solicitor. He was doing things. And on that basis he was quite entitled to express the view

A. Was one of four solicitors.

Q. Yes. Now, I am asking you as a primary player in this, to tell me what that is about.

A. I don't know.

Q. So you don't know, so you can't help us there?

A. No. I don't even remember the meeting.

Q. Now, all of that note at this stage: "Group of institutions and other investors to be located by underwriters, IIU. Had to upgrade financing arrangements from comfort to underwriting. IIU willing to give underwriting. IIU willing to give underwriting commitment and did so. Clearly gave

control of 20% to underwriter. Understanding is that underwriter will be placing shares with investor and institutions."

Now, that is a discussion, it appears to be centred around preparing a press release, isn't that right?

A. Again, I don't know.

Q. If you look at the top of it: "Bullet points for press release."

MR. MCGONIGAL: There is a typed form, apparently, Mr. Chairman. It might be in ease of Mr. Coughlan and Mr. O'Brien.

A. I don't have that so...

Q. MR. COUGHLAN: Is it behind in yours?

A. Is it?

Q. But the discussion seems to be about IIU and the institutions and the letters of comfort needed to be needing to be firmed up to commitment, isn't that right, that is what that whole discussion has noted there, or the bullet points being put down for press release?

A. Everybody would have known that.

Q. There is no discussion there about underwriting Communicorp's position, is there?

A. I can't put this into any context, I don't know. I mean, I don't even remember the meeting.

Q. You don't you can't put it in any context, and you don't remember it?

A. Unfortunately, I can't, now.

"Problem re material change in shareholders bid."

Q. Now, if you go to Tab No. 86.

A. I am sorry, I can't help you on that, but I just

Q. All right. All right.

This is the first time we see any information, and it is about Telenor having any knowledge of the letter coming from the Department to you, Michael Walsh's letter. I refrain all the time from saying sending it back because it was sent from Michael Walsh to Martin Brennan and Martin Brennan sent it to you?

A. That's right, yeah. It was a very important letter to get, even though the contents weren't going to make us happy, but

Q. Why do you think that? Why do you think it was important?

A. Well, it was rejecting or they wouldn't take account of the IIU underwriting. But, you know, I have no doubt that I would have told people

Q. Right. Well, if you just look at this, this is

A. of the letter.

Q. Have you got this note here now?

A. I have. Yes, it is 86, is it?

Q. Yes, this is Arthur Moran again, who is Telenor's solicitor and Mr. Haga, sorry, Mr. Haga, Mr. Simonsen?

A. Knut Digerud.

Q. Knut Digerud?

A. We think, yeah.

Q. We have a typed version of that as well.

A. That would be handy, yes, thanks.

Are they they are 4.2, are they? When I was reading it I was trying to understand the 4.2. Is this back to the Advent or is that a different agreement?

Q. I think this is the Shareholders Agreement.

A. Is it, okay?

Q. I think this is the Shareholders Agreement.

"Case matter Telenor."

Then: "Knut Haga, Per Simonsen, Knut Digerud.

Votes when transfer notice issued or deemed issued.

"Share subscriptions when/how funded?

Breach, what penalty applies?"

It seems to be discussing the Shareholders Agreement.

"Peter O'Donoghue." Then it has, "Peter O'Donoghue, Richard O'Toole and Gerry Halpenny.

"Communicorp/or Esat Telecom requested, not conceded.

Funding house secured."

Then, "88% Communicorp, 12% executive. C Esat."

Then this is the note I want to bring to your attention.

"IIU, are Department aware?

"Yes. 29/9/95 letter to Department. Department replied that letter had not taken into account copy

to be supplied to us."

Now, that is a copy, I take it, to be supplied to

Matheson Ormsby Prentice?

A. Yes.

Q. Then the rest of it is all to do with matters to be

taken up in the Shareholders Agreement. But that is

the first time we see any information or record of

Telenor having a knowledge of the letter of the 29th

of September being sent to you by the Department?

A. Who was at that meeting?

Q. Mr. Haga, Mr. Simonsen and Mr. Digerud, according to

the note anyway.

A. Yeah, but there was a second meeting.

Q. Well, at that if there was a second meeting

A. It says O'Donoghue, O'Toole and Halpenny.

Q. Yes.

A. I don't know, it says Davenport 126, so whether that

was a second meeting or it is all the one meeting...

Q. Mm-hmm. Well,

A. I definitely informed them.

Q. I take your point about that, could it be that it was

Mr. O'Donoghue or Mr. O'Toole or Mr. Halpenny

informing Mr. Moran at that time rather than Mr.

A. It could be maybe Mr. Moran didn't have a copy of the

letter, I don't know. It looks as if they are

offering to give Arthur Moran a copy of the letter.

Q. Yes. You don't know whether that is on the Telenor

side or on Peter O'Donoghue, Richard O'Toole, Gerry

Halpenny, on the Communicorp side?

A. I am sure Peter would have known. I am sure Richard would have known and Gerry, that there was a letter back from the Department on the 20th or the 2nd or the 2nd of October I think the letter was dated, I don't know when we received it.

Q. I would say there was a good chance you might have got it that day, I would say there is a good chance you might have got it that day.

A. Yeah.

Q. As things stood, so, on the 25th October, when the competition result was announced, as far as you were concerned, the Department, the assessors, the Department, had not taken into account the strengthening of your financial position for the purpose of the bid, isn't that right?

A. Correct.

Q. And as far as you were concerned, the position in the Department was that as they understood it, that the financial position and ownership details were as contained in the bid documentation and as had been represented at the presentation, isn't that right?

A. Yeah

Q. Nothing else had been taken into account?

A. They were looking at a 50:50 joint venture plus third-party investors or institutions.

Q. Yes. And the agreement with Advent that you had indicated?

A. Yes.

Q. And matters of that nature. So that was how you believed things stood in the Department of the 25th of October?

A. And the two core partners were intact.

Q. And once you were informed of the result of the competition, in fact, as and from the 29th of September, but as and from the 25th of October, also, the position was that Dermot Desmond, through one or other of his vehicles, IIU, or Bottin, had 25%, isn't that right? Communicorp or Esat Telecom Holdings, I am not getting into any debate about that.

A. It is the same yeah.

Q. 37.5%?

A. Yes.

Q. And Telenor 37.5%?

A. That's right.

Q. That was the actual position?

A. That's right.

Q. Now, you didn't inform the Department on the 25th of October of that, did you?

A. Oh, when the decision was announced?

Q. Yes.

A. No, because we knew when this we would be given a right to negotiate

Q. Why not, why wouldn't you tell them?

A. Well, I mean, once we it was hats off when we won the licence and we had a celebration the next night because we were waiting for Telenor to come over and then we didn't get into the Department until sometime in November.

Q. Yes. So you thought that might be the appropriate time to deal with it?

A. Well, we knew we would be going through a number of checklist items, including ownership, funding, I think we were more concerned what was going to be in the licence.

Q. Yes, I know that.

A. For example

Q. I know. I can understand the night the competition was announced you had a party.

A. Correct.

Q. You knew you were going to have a meeting with the Department?

A. Sometime.

Q. Sometime, and sometime probably soon?

A. Yes, it took a couple of weeks.

Q. It was on the 9th of November, is that right?

A. I believe if that is the date in the memo, there is a memo there.

Q. Yes, the 9th.

Now, on that day when you went to the Department,

there was present, on your side, I mean, the Digifone

side

A. There was a posse. I mean, there could be 20 people at that meeting.

Q. And there were people there from the Department and Mr. Andersen was there; isn't that right?

A. Mr. Andersen was definitely there, yes. Can we open that just

Q. Yes, indeed.

A. What tab is that, sorry?

Q. It is Tab 87 A. These are Owen O'Connell's notes. I think we have a typed version of those as well.

A. Could I trouble you for them, sorry?

Q. Yes, I will get those for you.

(Documents handed to witness.)

A. Thank you very much. Eight of us and eight of the Department.

Q. And we know from the Department memo as well who was present. We have the full record of who was present.

Now, if you go to, I think, about the sixth page of the typed note, you can see halfway down the heading

"Michael Andersen." Do you see that?

A. Yeah.

Q. This is obviously a contribution Michael Andersen was making, that Mr. O'Connell is noting here.

"Board want corporation licence from our application.

Minor issues re date, applicant description.

Financial liability/equity requirement.

Formulation not decided, at least 40% cash requirements to be equity "

Then bullet point: "Financial strength of

Communicorp. We want to go into control of

Communicorp. Also financial strength.

Maybe not be licence itself, but merely greater clarity.

Further documents to be forwarded by us."

That is by the

Now, you didn't tell the people at this meeting what the correct position was about Esat Digifone, did you?

A. I think somebody raised the issue of change of ownership and that was going to be dealt with sometime in the future.

Q. No, not at this meeting.

A. It says "change of ownership" here.

Q. Change of ownership was in the context of Article 8.

A. How do you know that?

Q. I do know. There wasn't a question of change of ownership as you are talking about here now.

A. Well, it is my I don't know where the Article 8 is coming from but there would be no draft yet.

Q. Mr. O'Connell has given evidence about this.

A. What

Q. There was no evidence

A. He has one view. I might have a different view, with

respect.

Q. He was at the meeting.

A. So was I.

Q. Yes. Did you tell the Department, did you tell the Department at this meeting, so, that?

A. I don't believe it arose, Mr. Coughlan.

Q. Well, it arose in the context of Mr. Andersen raising a context for it to be told to the Department?

A. And that was change of ownership.

Q. No, financial strength of Communicorp.

A. That has nothing to do with it.

Q. Very good.

A. How could it?

Q. Fine, that is your answer.

CHAIRMAN: Well, just in ease of you, Mr. O'Brien, I suppose if Mr. Andersen did raise the question of financial strength, I mean, the two aspects were connected, were they not? You had gone to enormous trouble in your dealings with Mr. Desmond and Mr. Walsh to put together the firmer financial package.

A. Yes. I suppose, Chairman, in reality we sent in the letter about the underwriting, the letter wasn't accepted, but the Department would have known that we had entered into those agreements. So, you know, if it was going to be a big issue they would have probably at one at this meeting anyway, said,

listen, you know, tell us about the stuff that we couldn't review or we refused to take into account when we were assessing the licence.

CHAIRMAN: Yes.

A. So, I mean, that's how I would have viewed it, but this was a long meeting. It was a pretty boring meeting and there was a whole pile of things discussed and people were finding their way on, you know, people were trying to they were trying to lay out sort of a whole pile of things that would be included in the licence and then there was a long hiatus before we got a draft of the licence. You know, I can see what Mr. Coughlan is saying, but I didn't find it that unusual, the whole thing about IIU didn't come up at the time.

CHAIRMAN: Yes.

Q. MR. COUGHLAN: Well, are you saying that as far as you were concerned it didn't occur to you at that time?

A. No, I mean I can't remember every detail, but I am sure these minutes or these notes reflect what was discussed at the meeting.

Q. Well, would you go to Tab No. 88A. I just want to ask you about something.

A. Yeah, I saw this, yes.

Q. I want to put this in context because Mr. O'Connell has given evidence that there may have been either a radio programme or a television programme or you

had

A. There was a news

Q. Or you had been approached or

A. comment.

Q. Eileen Gleeson had been approached for comment or

something of that nature. So, that seems to be the

context.

A. Something, yeah.

Q. Do you remember that being the case? Do you

remember

A. I only really remember this when I went through the

documentation, so there was, I think, an inquiry from

somebody because, you know, there was some information

out in the public domain that IIU were involved with

us in some way with the consortium and this letter

I don't know anything really about the letter.

Q. Can we just look at it. It is a draft. I want to

know was it sent. If you read the draft anyway.

"Dear Martin,

"I am writing to confirm our conversation of today

concerning shareholdings in Esat Digifone."

Did you inform Mr. O'Connell that you had spoken to

Martin Brennan concerning your concerning your

shareholding in Esat Digifone?

A. I was looking at this last night and all I can say is

like, I don't remember having a conversation with

Martin Brennan. I will speculate only on this because

I am trying to be helpful but think I was supposed to ring him and then send this letter, but ultimately I don't remember this letter.

Q. Did you discuss this with Mr. O'Connell because Mr. O'Connell gave exactly the same answer in the form of speculation as well? I am just trying to separate the speculation from memory, if I can.

A. Well, I can only help you what I think it is.

Q. Well, lets go on anyway.

"Esat Digifone is and will continue to be owned and controlled by Esat and Telenor. Esat is, in turn, owned mainly by myself and Advent International. It is likely that in the course of the funding, the GSM project, we will introduce new constitutional finance, and indeed, we are already negotiating this with CS First Boston. Telenor is, of course, the Norwegian National Telecom operator.

"Our bid made it clear that Esat Digifone would also seek minority finance by public and institutional investors. In preparing for this financing, we have been advised by International Investment and Underwriters Limited, who have also agreed to underwrite the finance, i.e., to locate investors on behalf of Esat Digifone and itself to take up any shortfall.

"(Given the fact that IIU is publicly identified with Dermot Desmond, some publicity may ensue. I thought

it important that the facts of the matter should be made clear, of which the most important seem to me to be, firstly, that Esat Digifone comprises and is rolled by Esat and Telenor, and secondly, that IIU are its advisers and underwriters.)

"If you would like any further details please let me know in any event. Our on-going licence discussions, will, as you have made clear, cover the question of present and future control of Esat Digifone.

"Yours sincerely."

Now, had you had a discussion with Martin Brennan on the 17th of November of 1995 in which you discussed the present and future control of Esat Digifone?

A. I haven't had a conversation at all, I believe, with Mr. Brennan.

Q. Now, going through this draft, it does not state that Dermot Desmond, through one of his vehicles, held 25% in Esat Digifone, did it, as far as you were concerned?

A. Just hold on now, sorry.

Well, it says: "Locate investment on behalf of Esat and itself to take up any shortfall."

Q. Wasn't the position, I think we have been through this, what you described as a swap had taken place.

Dermot Desmond had 25%, you had 37.5%, and Telenor had 37.5%, wasn't that the correct position?

A. Well, it was IIU, Bottin, Dermot seen as one.

Q. You, Communicorp, Advent, Esat Telecom Holding, two.

Telenor, Telenor Invest or whatever, three.

A. But you have got to look at the rights of the underwriting agreement, that was that Mr. Desmond could sell shares. He could sell

Q. Yes, I agree.

A. The 2 or 25%, 20, what he had and he could sell it to anybody with providing they weren't a Telecom's partner.

Q. It was never 20%; 25, no doubt about that?

A. Well, it came to 20, it came to 20.

Q. We know that.

A. So what we didn't know at that stage, if I remember rightly and I am trying to be helpful, he we didn't know whether Dermot was going to hold on to some shares, keep half or keep all at that stage.

Q. That was immaterial, Mr. O'Brien, surely. If you were going to say something to Martin Brennan, what the position was

A. But we didn't like, let's be clear. This letter was not sent

Q. How do you know?

A. And I didn't have a conversation with him.

Q. How do you know it wasn't sent?

A. Because I don't see a signed copy and this is a draft letter. Where is the original?

Q. Yes.

A. If the original is there I stand to be corrected.

Q. Maybe you can tell us, so, where the original is, can you?

A. Well, I have given all my files, Mr. Coughlan. Above all else, I have given all my files.

Q. This doesn't come from your files, this draft, this comes from Fry's files?

A. Well, I have handed all my I haven't done any, said to you that anything is privileged. Like I have handed over what I have, so if there is another letter I

Q. You handed over everything you have, is that what you are saying?

A. Well, my lawyers would have handed over the information that was requested.

Q. I won't take it up with you, Mr. O'Brien. But what I want you to do now, is to go to Tab No. 90. Before I do that, however, there were two newspaper articles, I am just going to bring them to your attention. And just for everybody's reference, they are in Book 58B, 5 and 6. I will just read them. They are just newspaper articles. One is by Tom McEnaney.

A. I read these some weeks ago, but I know what you are talking about, yeah.

Q. I think there is an article by Mr. McEnaney.

"Mr. Dermot Desmond's financial services company has been appointed to handle the self 20% stake in Esat

Digifone the company which won the second mobile phone licence.

"The Chairman of Esat, Mr. Denis O'Brien, last night confirmed that Mr. Desmond's company, International Investments and Underwriting, has been appointed as advisor for the sale of the stake."

Did you say that to Mr. McEnaney, do you remember?

A. No. Hold on a second.

Q. "Chairman of Esat, Mr. Denis O'Brien, last night confirmed that Mr. Desmond's company, International Investment and Underwriters Limited, had been appointed advisers for the sale of the stake."

A. I don't know whether that is a direct quote, whether he got it right or not.

Q. All right. "However, he would not comment on industry sources' belief that Mr. Desmond or one of his companies has purchased a portion of those shares."

Do you remember that?

A. Just I am just trying to find out where the first quote is. I have a very dark copy of it here.

Q. Yes. All right.

A. Mr. Brian Gibbons is this "Decision on the phone lines may ultimately rest on politics," no?

Q. "Desmond's company to handle Esat sale."

A. Sorry, I have got it now, my apologies. I was looking at the wrong one.

Q. The 18th of November is the date of it. It is a

Saturday paper. It is the day after the draft letter.

I will continue on.

"When the 20% stake is placed, Mr. Dermot Desmond  
Mr. Denis O'Brien's holding company, Communicorp, will  
have a 40% stake in the company. The remainder will  
be held by the Norwegian telecommunications company,  
Telenor.

"Esat Digifone is estimated to be valued at  $i\frac{1}{2}$ 100  
million.

"Last month Mr. Desmond paid 14.5 million for London  
City Airport. Given that the airport was originally  
on the company for 30 million, Mr. Desmond is seen to  
have driven a hard bargain in the deal.

"Mr. Desmond is perhaps best known as the man behind  
NCB stockbrokers. He sold his stake last year. He  
has since invested in Glasgow Celtic.

"Esat expects to begin providing a nationwide mobile  
phone service by the end of next year."

Do you know whether you spoke to Mr. McEnaney or  
anyone on his behalf?

A. He probably would have telephoned me and I would have  
taken his call.

Q. Would he be correct, so, in reporting that you  
confirmed that Mr. Dermot Desmond's company,  
International Investment and Underwriters Limited, had  
been appointed as advisers of the sale for the 20%  
stake?

A. I don't know whether that is a true quote or not but it is certainly close to reality if you look at the underwriting agreement. I actually don't remember the conversation with this gentleman.

Q. What was close to reality, Mr. O'Brien, was this, that Mr. Desmond had 25% of Esat Digifone and you and Telenor had 37.5% each, that was reality?

A. Can I give you the real world though?

Q. Yes.

A. When you have a journalist ringing you and they have a story, you want to give as little information as possible, simple as that. And that is what this reflects.

Q. All right. Because he obviously asked the hard question there, one on which there was no comment?

A. I don't know what questions he did ask me. Imagine somebody ringing you up eight years ago and somebody asking you then what happened.

Q. Well, I will just continue.

"However, he would not comment on industry sources' belief that Mr. Desmond, or one of his companies, had purchased a portion of those shares."

Now, why wouldn't you comment on something like that?

What was the problem about commenting on it?

A. Can I just explain to you, I will just repeat when a journalist rings you, you give them the least amount of information as possible. Simple, plain and simple.

This is eight years ago. I mean, we need to be realistic, Mr. Coughlan.

Q. Yes.

A. How can I remember what questions this gentleman posed to me?

Q. I am not

A. And how can I even make a comment, what my comment was? I mean...

Q. If you go to the next article, so, the one: "Desmond firm advising Esat Digifone in share placing."

"A financial services company owned by financier

Dermot Desmond is advising Esat Digifone on the

placing of 20% of the consortium's shares with

institutions and other investors, it emerged

yesterday.

"A statement from Esat Digifone the winner of the

second GSM Licence said Dr. Michael Walsh of the

IFSC based International Investment and Underwriters

Limited has been appointed to advise the consortium on

this aspect of its financing.

"A spokeswoman said" I take it that is a reference

to Miss Gleeson?

A. Spokeswomen there must be two women.

Q. "A spokeswoman said IIU would arrange the placing of

20% of the group's shares but she declined to comment

on reports that Mr. Desmond's company would be

underwriting this sale.

"There was speculation last night that Mr. Desmond himself, or some of his companies, was likely to take up some of these shares.

"IIU was established by Mr. Desmond to deal with a limited number of clients in selected investments and probably trade its own capital. The spokeswoman said the identity of the investors would be revealed in a few weeks time.

"The day after winning the GSM Licence Esat Digifone Chairman Denis O'Brien said that the shareholding in Esat Digifone was

A. 40:40:20.

Q. "Would be 40:40:20." Sorry, it is over the page.

"The day after winning the GSM Licence, Esat Digifone Chairman Denis O'Brien said that the shareholding in Esat Digifone was 40:40:20 between Esat, the Norwegian State phone company Telenor and unnamed investors.

"He said the overall investment was underwritten by Esat and Telenor.

"Mr. O'Brien has consistently refused to be drawn on the identity of the other investors in Esat Digifone.

He said on winning the licence that the funding was there, but that 'institutional investors don't write cheques until they see the terms of the licence.'"

"It is not clear what the present market value of a 20% stake in consortium would be worth.

"Mr. O'Brien has said the group will invest around

€100 million in building a network.

"Given that also said the debt equity ratios in the business usually ranged between 50:50 and 40:60, a 20% stake holder might be expected to Invest a minimum of €10 million in the group. Any investor is likely to have to pay a premium to reflect the expected revenue generating potential of the licence.

"The consortium has also said it would consider floating 20% of its shareholding in about three years' time, depending on the state of the market, giving investors an opportunity to cash in their gains if the licence proves as successful as expected.

"The news that IIU will be advising Esat Digifone comes only a couple of weeks after the announcement that Mr. Desmond had purchased London airport and Celtic."

Do you remember such a statement being issued to the effect that

A. I actually don't.

Q. You don't?

A. I mean, I was looking for in the diary it is not there.

Q. Well, now that you have looked at it here, what comment, if any, do you make on this statement which was issued, if it was issued?

A. I would have to see the statement because if I saw the statement, well then, I would then compare it with the

newspaper article.

Q. Very good. The newspaper article, on the face of it, seems to convey something different than what the real position was at the time, doesn't it?

A. Well, he is making he is commenting about what I may or may not have said sometime at that time, so I had well, if I had the statement then could I look at the statement and say

Q. But the real position was at that time that Dermot Desmond, through IIU, in fact through Bottin

A. It is all the one, yeah.

Q. Had 25%, you had 37.5%?

A. They had the right

Q. And Telenor, everyone had the right, Mr. O'Brien?

A. They had the right but what actually happened, of course, was something different, 20.

Q. At this time, at this time?

A. Well, they had a right.

Q. And that wasn't being conveyed. Something else was being conveyed in this article, isn't that right?

A. What happens here, I mean, a journalist rings you or rings a spokesperson, they are trying to look for information. You either decide to give them information or you don't. In most cases you don't.

Q. Well, this article says there was a statement issued.

A. Well, if we had the statement, well then, I could comment on it.

Q. Well then, let's go to Tab 90, please.

And again, this is a Gerry Halpenny note. I think there may have you found it in your book, a typed version?

A. No. But fire away. We will dig it up.

Q. Present are Richard O'Toole, Peter O'Donoghue, Knut Haga, Per Simonsen, Arthur Moran and Gerry Halpenny.

It is dated the 21st of November, 1995. And it reads:

"Position re the Department IIU."

Sorry. "Position re the Department IIU."

"Not a problem for Martin Brennan and the Department.

"Main concern that Denis O'Brien and Telenor mainly involved on the operational side.

"Present the agreement to IIU ASAP."

Now, what is that about, that the position that IIU is not a problem for Martin Brennan in the Department?

A. I wasn't even at this meeting, okay, so I am being asked to comment about a meeting I wasn't at, and I had no feedback from this meeting, so I think you have to ask all those five people.

Q. Well, I am asking you because there was you were Chairman.

A. Not at the meeting.

Q. No, you were Chairman of the company, and I am also asking you because there was a draft prepared on the 17th, a draft of a letter prepared on the 17th of the same month, four days previously, where there was

reference being made in the first sentence to that of  
you having a telephone conversation that day with  
Martin Brennan?

A. And I have described to you, I don't remember ringing  
Mr. Brennan, I don't remember sending the letter.

Q. Yes, you have told us.

A. So, you are asking me to comment on somebody else's  
notes of a meeting. I mean, I don't have

Q. I am giving you an opportunity to meant?

A. Well, I don't have a comment really.

Q. All right. That is fine.

CHAIRMAN: It is five to one. I think we will resume  
at five past. Thanks, Mr. O'Brien.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AS FOLLOWS AT 2:05 P.M.:

CONTINUATION OF EXAMINATION OF MR. DENIS O'BRIEN BY

MR. COUGHLAN:

Q. MR. COUGHLAN: I wonder, Mr. O'Brien, would you just  
look for a moment at Tab 87 in Book 49. This is  
another handwritten note of Gerry Halpenny's, I think  
dated the 9th of November, '95.

CHAIRMAN: If this isn't stopped within five minutes,  
we'll adjourn until it stops.

A. Sorry, the tab again?

Q. MR. COUGHLAN: Tab 85 sorry, Tab 87, I beg your  
pardon.

And you can see there that present are Peter

O'Donoghue, Richard O'Toole, Knut Haga, Knut Digerud, Per Simonsen, Arthur Moran and Gerry Halpenny. And you can see "Esat Telecom rather than Communicorp," that must have been some discussion about that issue.

"Bottin, IIU, appearance. Telenor unhappy re Bottin.

Letter for the Department re IIU."

A. Can you help me with the date of this? Sorry?

CHAIRMAN: I think it's the 9th of November.

A. 9th of November. Thank you, Sir.

Q. MR. COUGHLAN: It's for the Department. I just want to ask you, do you know anything about that, whether there was any consideration given at that time for a letter for the Department?

A. No. I mean, I wasn't at that meeting.

Q. All right. Okay. Now, I want to go to Tab 91. And this is to deal with the Mr. Kyran McLaughlin and Davys?

A. Yeah.

Q. I think you received this letter from Mr. McLaughlin; isn't that right? The 22nd of November?

A. It's addressed to me. I'm sure I got it. I don't know. I don't remember getting it.

Q. And it reads:

"Dear Denis,

"Further to our telephone conversation last Friday, and the subsequent announcement in Saturday's newspaper concerning the involvement of Dermot

Desmond's company, International Investment Underwriters, (IIU) in the financing of Esat Digifone, I thought I would write to you setting out my understanding of some of the issues which have been raised.

"When John Callaghan and yourself asked me last April if Davys could get some institutional investment interest to support your application, I said it would be difficult, as the eventual financial terms of the licence were unknown, and it would be difficult to put a precise financial proposal to potential investors.

"However, Tom Byrne and Paul Connolly prepared an information memorandum and an investment proposal and we secured three institutional investors prepared to commit 8.5 million in support of your licence application early in June. The commitment was conditional on your consortium acquiring the licence on financial terms acceptable to the institutions, but this condition was not seen by yourself at the time as one which could make your application financially undebatable.

"As you are aware, a large number of financial issues were not finalised when the institutions made their commitment, in particular the size of the bid by your consortium and the consequent debt/equity ratio of the consortium. Therefore, it was difficult to get a firm unqualified commitment in early June from the

investing group.

"When John came to see me on Friday, 29th September, he told me that you had been advised that the financial element of your package was not sufficiently strong to allow Esat Digifone to be awarded the licence, and that you were negotiating with the financial party who could provide the stronger financial backing necessary to be awarded the contract. He did not tell me who had provided this advice, nor the identity of the stronger financial party. He asked me if I would ask the three institutions who had made the previous commitment if they would step aside so that the 20% to which they would have been entitled would be available to the investor who was prepared to provide firmer financial support.

"Even though we both recognised that this was embarrassing, I did notify each of the three parties that you were asking them to step aside to make way for a financial party which was prepared to put forward a stronger financial commitment. It has now emerged that this investor was IIU, which appears also to have been appointed to handle the sale of the 20% stake.

"A number of questions are likely to arise from the institutions who had made a commitment to Esat Digifone in June:

"(A) Why were the original investing group not asked to make a stronger financial commitment along the lines of that offered by IIU if that was necessary, given that by the 29th September a maximum price of £15 million had been established for the licence and discussion on the application had clearly taken place with the department and probably the assessors.

"(B) Was information available to IIU that was not available to the original investing group at the time they were asked to step aside?

"(C) At what stage were the Department of Communications and the assessors told of changes in the institutions providing finance to the consortium?

"In addition, the news media have asked us why Davy is not involved in raising funds, as it is common knowledge that Davy were involved in the original application. I do not discuss our clients with the media, but you will appreciate that the current media presentation may be damaging to our reputation.

"I believe it is important to reassure the financial institutions that made the original commitment that they were treated fairly. They will be particularly concerned if the 20% stake is resold to other investors at a significant profit over a short period of time. It would be helpful to me if you could let me know your response to the issues raised so I can provide them with reassurances."

Now, I take it that his description of what happened in relation to the financial institutions, Paul Connolly and Tom Byrne preparing a presentation and taking matters on, is all correct?

A. Will we do paragraph by paragraph on this?

Q. Yes. Yes, very good.

Now, he said: "Further to our telephone conversation last Friday and the subsequent announcement in Saturday's newspapers concerning the involvement of Dermot Desmond's company, International Investment Underwriters, IIU, in the financing of Esat Digifone, I thought that I would write you setting out my understanding of some of the issues that had been raised."

Did you have a telephone conversation with

A. I'm sure I did, if he refers to it. And this is, I think, an original letter.

Q. This is Mr. this is Mr. Kyran McLaughlin's

A. I know that, yeah.

Q. I haven't seen the original.

A. Either have I.

Q. Well, it was sent to you, so it must be with you somewhere.

A. It's probably with Esat BT. I didn't keep these files.

Q. No, it's not there with Esat BT, I can tell you that. Certainly not.

A. Well, I don't have it.

Q. Right.

A. Can I just clarify for you and for the Chairman. When I left Esat BT, I had limited files, Chairman. And any files that I had in my possession I've given them to the Tribunal. In this example, I didn't have a copy of this letter.

Q. All right. Let's go to the next paragraph, so:

"When John Callaghan and yourself asked me last April if Davys could get some institutional investment interest to support your application, I said it would be difficult, as the eventual financial terms of the licence were unknown, and it would be difficult to put a precise financial proposal to potential investors."

I take it you have no disagreement with that paragraph at all?

A. No. This arose out of the France Telecom

Q. Yes. "However, Tom Byrne and Paul Connolly prepared an information memorandum" that's correct; isn't that right?

A. They did.

Q. "...and an investment proposal, and we secured three institutional investors prepared to commit 8.5 million in support of your licence application in early June. The commitment was conditional on your consortium acquiring the licence on financial terms acceptable to the institutions." Is that correct?

A. Can I there was three letters and there were some differences in the letters.

Q. Yeah, I know that.

A. So I think what's important, you have to look at the letters and then look at this, because...

Q. But surely what's important is to look at the continuation of that sentence: "The commitment was conditional on your consortium acquiring the licence on financial terms acceptable to the institutions, but this condition was not seen by your" just listen to me now "this condition was not seen by yourselves at the time as one which could make your application financially unacceptable." Is that correct?

A. I don't fully agree with this. There were other conditions in the letter. You'd have to open it up, Mr. Coughlan, to see those conditions, because maybe he's just picking one or two of the conditions to discuss here.

Q. No. Would you just concentrate now, Mr. O'Brien.

A. I'm totally concentrating.

Q. "This condition was not seen by yourselves at the time as one which could make your application financially unacceptable." Do you agree with that?

A. Well, my point is there were other conditions, including just I'm going to give you the answer now.

Q. Yes.

A. Including they had to have Investment Committee approval. So you can't look at this in isolation.

And if you're looking at this in the context of why we swapped the institutions for something more solid by way of an underwriting agreement, you have to examine those letters in the context of this letter. That may not suit what you're trying to say to me here. But in fairness, if you want me to give evidence on this letter I need to have the letters beside me.

CHAIRMAN: That's fair enough.

A. So could I have the letters, please?

Q. MR. COUGHLAN: Yes. Just while they're being got and something you said, you did not swap the institutions for an underwriting letter, you swapped the institutions through Mr. Dermot Desmond's vehicle, Bottin

A. IIU effectively took over the institutional position. If I haven't explained that, maybe we need to come back to that. I want to have a very clear position on this.

Q. You have explained it. Book 48, 8, 9 and 10.

A. The point here, Chairman, is that there were this is just one of the conditions, but I think Mr. McLaughlin knows that there were other conditions in these letters.

Q. All right.

A. If you take Standard Life, there's A, B, C, D, so the

terms of our investment being approved by our Investment Committee, the fact and details being confidential, which was always going to be the case, and the expression of interest being subject to the licence being granted by the 15th of November. And A was the licence being prepared to the consortium on terms broadly in line with those set out in the memorandum. And AIB is just A and B, the licence being prepared on terms broadly set out in the memorandum, and then the term of our investment being approved by our committee or board. And point B in AIB's letter, point B in AIBI's letter and point D in Standard Life's letter, were very important conditions. So it just wasn't this the commitment wasn't just on financial terms. There were other conditions in each of these letters that had to be fulfilled. And the most important one being is, if your committee doesn't approve this, well, then we're left with no money. So the 8.5 is entirely at the whim of the Investment Committee. And that's why I wanted to open this up.

Q. That's a fair point. But these conditions weren't ones that were exercising your mind?

A. They were totally exercising my mind.

Q. They were totally exercising your mind?

A. Quite definitely.

Q. Did you tell Mr. McLaughlin that?

A. We would have had a discussion at the time, when he was off trying to get these commitments, to try to get them as strong as possible. But all of them had the caveat that they had to go back to their Investment Committee. That to me was a very, very weak situation to be in, compared with having an underwriting agreement from IIU.

Q. Is Mr. McLaughlin incorrect, so, in his letter when he states that this condition was not seen by yourself at the time as one which would make your application financially unacceptable? Is he wrong in that statement?

A. It's by the way, we got the letters and we actually put them into the bid and then we evaluated the letters. We then saw that this was maybe going to be perceived as a weakness. So we got the three letters. We were reasonably happy at the time, but when we actually went back and revisited

Q. Can I take it, so, that when you spoke to Mr. McLaughlin, that you did not inform Mr. McLaughlin that you saw this as something which would make your application financially unacceptable?

A. I think he would have been aware of our concerns in this area.

Q. I'm trying to establish one thing.

A. I'm answering the question.

Q. I'm asking you, is Mr. McLaughlin wrong when he states

in his letter that at the time sorry, this was not seen at the time by yourselves as one which would make your application financially unacceptable? Is he wrong?

A. He's right in that, but he knows that we would have liked something firmer, but that was not achievable.

And do you know why it wasn't achievable? Because those investment institutions are not allowed to give a blank cheque.

Q. Mr. O'Brien, I have heard that theory and speculation

A. Sorry, it's not a theory.

Q. put forward in evidence.

A. Are you saying my evidence is speculation or theory?

Q. I'm saying I've heard it put forward by Mr. O'Connell.

I understand the point.

A. It's a critical point. If you're going to open up the letter, you have to give me an opportunity to explain to you.

Q. I'll ask you to explain it in the context of questions, specific questions.

Mr. McLaughlin then asked you:

"As you're aware, a large number of financial issues were not finalised when the institutions made their commitment, in particular the size of the bid by your consortium and the consequent debt equity ratio of the consortium. Therefore, it was difficult to get a firm

unqualified commitment in early June from the investing group." Is that correct?

A. It is correct.

Q. So, therefore, there doesn't appear to be any difficulty about the institutions being able to provide the finance if they had the full understanding of the financial consequences and the cost of the bid?

A. They could never have known that.

Q. All right.

A. And secondly, within their statutes or their articles of association or their governments, they would never have been able to give us underwriting.

Q. I know that. They would never have been able to give you underwriting.

A. Or a blank cheque.

Q. There was no question of a blank cheque here.

A. They couldn't have taken an open-ended commitment of this nature. It would never their Investment Committee would never do that. That's how institutions work. It's like going and saying, I want an unlimited overdraft. It doesn't happen.

Q. Every agreement you entered into, whether it be verbal or written, was subject to certain caveats and certain things happening, like getting the licence was one?

A. We have to go through them all again. Mr. Coughlan, surely now you're not suggesting that we didn't need a licence to get the money?

Q. Let's continue on.

"When John came to see me on Friday, the 29th of September, he told me that you had been advised that the financial element of your package was not sufficiently strong to allow Esat Digifone to be awarded the licence, and that you were negotiating with a financial party who could provide the stronger financial backing necessary to be awarded the contract."

Now, we've been over that before, the advice, is that correct, is that what Mr. Callaghan, to your knowledge, went to do?

A. Words to that effect.

Q. All right. Okay.

A. I don't know whether it was the precise words he used.

You have to ask him. You'd have to ask him.

Q. Fair point. Words to that effect.

You weren't at this meeting, I can take it.

"He did not tell me who had provided this advice, nor the identity of the stronger financial party." We have to ask Mr. Callaghan whether he agrees with that.

But you have no reason to disbelieve that, do you?

A. Well, I think Mr. McLaughlin would have known who some of our advisors were.

Q. "He asked me if I would ask the three institutions who had made the previous commitment if they would step aside so that the 20% to which they would have been

entitled would be available to the investor who was prepared to provide firmer financial support."

That's what Mr. Callaghan is asking them to do, to ask the financial institutions to step aside?

A. The three of them, yes.

Q. "Even though we both recognised that this was embarrassing" I suppose that's understandable "I did notify each of the three parties that you were asking them to step aside to make way for a financial party who was prepared to put forward a stronger financial commitment."

You have no reason to disbelieve that that's what he did?

"It has now emerged that this investor was IIU, which appears also to have been appointed to handle the sale of the 20% stake."

A number

A. Sorry, can I just

Q. Yes, indeed.

A. He may be jumping the gun a little bit there on the handle of sale he may have been taking that from the newspaper article.

Q. I think that's what he says, that it's arising from newspaper articles that he's writing this letter, and a conversation he had with you.

"A number of questions are likely to arise from the institutions who had made a commitment to Esat

Digifone in June:

"(A) Why were the original investing group not asked to make a stronger financial commitment along the lines of that offered by IIU, if that was necessary, given that by the 29th of September a maximum price of  $\text{£}15$  million had been established for the licence, and discussions on the application had clearly taken place with the Department and, possibly, the assessors."

Now, he asked that question.

A. Simple answer.

Q. Yes?

A. They were incapable. They couldn't do it.

Q. The question is why were they not asked?

A. Because we knew they couldn't.

Q. Well, this is Mr. McLaughlin now asking a question as

A. He didn't know the terms under which we had underwritten the Communicorp and the 20% equity in Esat Digifone, so he didn't have something to compare it.

Q. He didn't know about the underwriting of Communicorp, isn't that

A. I don't know how much information John Callaghan gave him, but these institutions couldn't have given us what Dermot Desmond gave us. That is as clear as black and white.

Q. Did you give Mr. McLaughlin that answer?

A. I wasn't at the meeting.

Q. Did you give in response to this letter, did you give that answer to Mr. Kyran McLaughlin?

A. I don't think we wrote an answer back. There was discussion of the letter, as far as I remember.

Q. What did you say to him at the discussion?

A. I explained to him the situation and he he obviously wanted to get a little bit more information, which is what this letter is doing. And ultimately, you know, there was no breaking down of relationship with Davy, far from it.

Q. I'm not talking about that. He has asked you a specific question here. You say you didn't write to him, is that correct?

A. Yeah.

Q. You said you had a discussion with him. Did you tell Mr. McLaughlin that it was impossible?

A. I actually don't remember what I said to Mr. McLaughlin. I know I might have had some sort of a conversation, could have met him socially, or Mr. Callaghan could have spoken to him.

Q. All right. Second question: "Was information available to IIU that was not available to the original investing group at the time they were asked to step aside?"

Did you say anything to Mr. McLaughlin about that?

A. I mean, IIU's information would have been limited, and

so would the information in fact, I don't believe

we gave IIU an information memorandum like we gave the three institutions.

Q. I think you may be incorrect on that, that there seems to be an information memorandum and it may be is it the same?

A. I don't know whether I could be wrong, I don't know whether Mr. Desmond got it, but certainly the institutions got it.

Q. I know the institutions got it. I think, I think Mr. Desmond may have got it, I think.

A. I don't remember. He could have.

Q. "(C) At what stage were the Department of Communications and the assessors told of the changes in the institutions providing finance to the consortium?"

A. We all know that date. 29th.

Q. Did you tell that to Mr. McLaughlin?

A. I don't I mean, we didn't take to we didn't have much concern about this letter because, No. 1, we had a very good relationship with Mr. McLaughlin. No. 2, Mr. Callaghan was talking to him, having a conversation with him, and I may have met him socially. I can't remember giving him any explanations as laid out in this letter. And ultimately, none of these institutions had any problem in buying shares when we floated our company. In

fact, all of them had a role in one shape or form in buying shares. IBI made a significant amount of capital out of their investment. Standard Life is the same. AIB made money as well. I can't remember what the quantity was. But certainly there's no hard feelings at the end of this process. And Davys also acted for us in our flotation. So I can see the way you may see this as an important letter. I don't see it as an important letter.

Q. Well, Mr. McLaughlin has furnished a memorandum to the Tribunal, just dealing with some portions of it. Much of it is in accordance with the letter.

A. I haven't read that now.

Q. I'll just read it out for the moment and you needn't deal with it fully at this stage.

Now, he said that he sent the letter, this letter of the 29th of November, and he outlines the three questions he asked. And he informed the Tribunal that he received no reply to this letter, that he met you casually before Christmas, 1995, and you indicated that you and John Callaghan would contact him in January in relation to the matter raised in this letter. Do you remember that?

A. I said that I met him socially. I can't remember agreeing to go and see him or anything.

Q. He said that you did not contact make contact with him, nor did any other person on behalf of Digifone.

And on the 4th of July, 1996, having heard nothing further from you, he wrote to you again, and indicated that it would be very helpful to Davys in dealing with the institutions in question to know Esat Digifone's response to the three questions he had raised in his letter of the 29th of or the 22nd of November, 1995. And he said that on the 8th of August you and Mr. Callaghan attended a meeting at his office, and you kept a note he kept a note of the meeting, and he indicated that's Mr. McLaughlin that in light of the fact that the institutions were asked to step aside in favour of another party, as they were told that their commitments would not be sufficient to win the award of the licence, they had concerns regarding the following matters:

(A) They had been replaced by IIU, who financially was not as strong as they were.

(B) They had been replaced after a limit of 15 million on the licence fee had been agreed by the Government.

(C) IIU may have had inside knowledge of Esat's probability of success when they made their investment.

(D) IIU was likely to sell its investments back to institutions at a premium.

And you said that your explanation with regard to these concerns was as follows: In respect of (A), that is that the institutions had been replaced by

IIU, who were financially not as strong. Your

response was that:

"The Esat Digifone Consortium had been told that they needed a firm financial commitment guaranteed by a bank, both for the 20% institutional placing and for their own 40%, and they knew no normal institution would give them that commitment, but that IIU was prepared to do so."

"(B) IIU had no inside information, as nobody had, although civil servants did tell Esat Digifone afterwards that their written submission was the best received.

"(C) IIU was likely to sell its investment back to the existing shareholders and not to the market."

Do you remember giving him those explanations?

A. I don't remember precisely, but broadly I wouldn't disagree with them.

Q. You wouldn't disagree?

A. No, except for the no, A, B, C, I would be happy with the replies that he gave.

Q. Now, if Mr. McLaughlin and he kept a note of the that meeting, I think you don't disagree in broad terms with it?

A. The A, B, C answers, no.

Q. Just looking at the A answer there, that "Esat Digifone Consortium had been told that they needed a firm financial commitment guaranteed by a bank both

for the 20% institutional placing and for their own 40%, and that they knew no normal institution would give them that commitment, but that IIU was prepared to do so."

Now, can I ask you this: Who told the Esat Digifone Consortium that they needed a firm financial commitment guaranteed by a bank for, first of all, the 20% institutional placing?

A. I think the answer to A is broadly right, right? The only thing I would nitpick with is a bank guarantee.

Q. Well

A. To answer your question, who told

Q. A commitment guaranteed by the bank first of all, the 20% institutional placing; now, who told the Esat Digifone Consortium that they needed that?

A. Well, what I agree with is the "firm financial commitment". You will now, again, having gone through this repeatedly say, Nicholas French, okay, we had PJ Mara, Pdraig O'hUiginn, we had our own impressions from the oral hearing of the 12th, so it was a collective thing where we all reached the same conclusion, get a greater commitment on that 20% and underwrite it.

Q. I understand all the evidence you gave about that and consulting with Mr. French, Pdraig O'hUiginn, Mr. Mara, and all that centered around strengthening the financial position of Communicorp. I understand

the point you make the whole time about Telenor and what was required under the joint venture. I understand all of that. But where was the consortium informed told by whom that they needed a financial a firm financial commitment guaranteed by a bank for that? Who told the consortium that?

A. The only thing I would sorry. I'm saying to you, and this is the first time I've read this statement, okay?

Q. You have had it, Mr. O'Brien. You have had it?

A. I may have had it, but I didn't think we would get this far today, rightly or wrongly. But we knew we had to get a firm financial commitment from our advisors. Those are the people who kept telling us, drilling it into us, look, you have a weakness, strengthen it, that's why

Q. All the evidence to date has been that you needed that in respect of Communicorp

A. No.

Q. And that's stated there as well, and I'm not taking issue with that. I'm asking you who told you

A. That is what you're saying is totally untrue because my evidence has not just been focused on Communicorp. I always said we needed the institutional side as well underwritten. Now, Mr. Coughlan, we'll have to go back into the transcript again because I'm very clear what I did

say. You may have said that in error, but it's not true. I've always said there's two parts to the underwriting, there's Communicorp, which is to satisfy Telenor, and there is the institutions, which was to strengthen what we perceive to be a weakness.

Q. Mr. O'Brien, I don't want to go over this over and over again. On the 29th of September, Dermot Desmond, through IIU or Bottin, had 25%. You had 37.5%, Telenor had 37.5%. The underwriting, insofar as it had any effect, related to your 37.5%?

A. Wrong. See, this is my point which we started six days ago. We really need somebody to advise the Tribunal from a financial point of view because I've been very clear on this and we still, after six days of evidence, we still there's still you don't understand what I'm saying to you.

Q. I think you've been very clear, and I agree with you, Mr. O'Brien, and you said it to me this morning and on previous occasions.

A. Why am I saying that?

Q. Mr. O'Brien, can I just tell you what you said, as I remember it. The swap; Dermot Desmond, IIU/Bottin was the swap for the institutions. There was no underwriting of these institutions, Mr.

A. I'm sorry

Q. Where was there an underwriting?

A. Let's go and look at the letters.

Q. Where was there an underwriting?

A. No, no, no

Q. Mr. O'Brien, the institutions were out

A. Chairman

CHAIRMAN: Well, let's try and keep it a little more temperate.

A. Between the two of us, I'll try to do that.

Mr. Chairman, can I just try to say something here.

It's very clear in the IIU letters and agreement that there's underwriting for Communicorp and for that 20% block. We swapped these institutions for them for that. Okay? Now, to say that there was no underwriting for the 20% is simply not true from the evidence that I've given.

Q. MR. COUGHLAN: I didn't say that, Mr. O'Brien.

A. You're saying nowhere have I said

Q. Mr. O'Brien, what you said was, and we know, that on the 29th of September these institutions were out.

A. Swapped.

Q. They were they were out, they were gone.

Mr. McLaughlin had been approached. They were gone.

There was no underwriting of the institutions.

A. The block, Mr. Coughlan, of shares that was filled by third party investors was underwritten by IIU. Now, how

Q. Mr. Desmond owned them or was entitled to them

A. He could if he wanted to.

Q. He was entitled to them.

A. He could place them

Q. And what he was doing was underwriting himself, is that what you're saying?

A. He had a number of different things he could do. He could place, sell or keep. And ultimately, at this stage, which is, I believe, in November, December of 1995, we did not know whether he was going to hold on to his equity or place the shares with other third parties.

Now, that's if you read the documentation very carefully, but also I know because I was there. We didn't know what Dermot was going to do, whether he was going to keep half of them or a quarter of them, 75% of them. And ultimately, as he got more comfortable with the project and got into the numbers, because for the first time we could actually show him reasonable projections, reasonably accurate projections, he could see that if he held on to the shares it was going to be infinitely more profitable in the long-term.

Q. Now, Mr. O'Brien, we have been furnished by your solicitors with the review or the audit carried out on the bid by PA in the interim period when there was a postponement of the application. Do you remember that?

A. I do of course, yes.

Q. And having read that document, there doesn't seem to be any reference or advice from those particular advisors in that document

A. Well, let's can I sorry

Q. that they ever saw the need to guarantee the 20%.

A. Can I see the document?

Q. We just got it recently from your solicitors.

A. I'd like to see it, thank you.

MR. MCGONIGAL: Is this a document you're now producing in evidence?

CHAIRMAN: Well, it's received from you, Mr. McGonigal.

MR. COUGHLAN: These come from Mr. O'Brien's private papers, we've been informed.

MR. MCGONIGAL: If you're going to produce it, you're going to produce it.

MR. COUGHLAN: Mr. O'Brien has asked for the document.

A. Can I trouble you for it?

Q. MR. COUGHLAN: Yes. Mr. O'Sullivan has it there.

A. Okay. Thank you.

(Document handed to the witness.)

Q. Now, you have the document? I take it you're familiar with the document?

A. I've seen this document, yes.

Q. Do you agree with me, that nowhere in there are PA advising that there needed to be a guarantee obtained?

A. I'm definitely going to try to help you because this

is a technical plan, suggested improvements.

Q. Perhaps you don't want to deal with it now.

A. No, I'd be delighted to deal with it. But this is the technical plan, suggested improvements. This is one part of a larger document.

Q. Where's that, Mr. O'Brien?

A. I have no idea. I don't know where it is.

Q. We've asked for it, Mr. O'Brien.

A. Go and ask BT because I don't have a copy of it.

Q. No, no, Mr. O'Brien, they don't have it. We've asked you for it.

A. Do you understand the process

MR. MCGONIGAL: I mean, can we have a bit of sense

CHAIRMAN: Mr. McGonigal, it's not going to help.

MR. MCGONIGAL: No, it's not going to help.

CHAIRMAN: I'm going to insist that we do have a more it's not going to assist. People are quite tired after quite an exacting week. And Mr. O'Brien, if any of these documents you feel have been produced at a stage that you haven't had an opportunity to prepare and read them fully, of course I'll defer each aspect until the next day.

MR. MCGONIGAL: That's not the point. The point is Mr. Coughlan is producing a document which is not a full document.

MR. COUGHLAN: I didn't produce

MR. MCGONIGAL: Which is not a full document

CHAIRMAN: Ah, gentlemen, please, we must have some order in these proceedings.

MR. COUGHLAN: Mr. O'Brien asked for the document.

Mr. O'Brien has now informed me it's not a full document. We've asked Mr. O'Brien's solicitors for this document. That is the correct position.

MR. MCGONIGAL: We gave him what he had, and he's then trying to use it on this witness in some form or other. He says he has read it and he says there's not in it certain things. He has not acknowledged in his question that it's obviously not a full document. Can we have some order in relation to the way this examination proceeds?

A. Mr. Chairman, as well, there's an undercurrent here that that I'm not giving the documents. I left Esat Telecom's employment three and a half years ago, nearly four years ago. How can I have the files that were company files? Any files that I had I have given to my solicitors and they have freely made available documentation. But the suggestion here is, oh, this is something and I'm trying to be evasive about it. This deals with the technical plan. There's never ever going to be a discussion about the financial make-up of the consortium in a technical evaluation of the bid done by PA in July 1995. So maybe we're all at cross-purposes here.

Q. MR. COUGHLAN: Perhaps we are. Perhaps we are,

Mr. O'Brien. I just want to clarify.

A. I'll give it back to you.

Q. This document was made available to us on Monday morning. Sometime yesterday we were informed that it may not be the full document. You were asked you asked me for the document, Mr. O'Brien. You stated that it wasn't the full document. I asked you if you wanted to defer it until we consider the situation further?

A. I think you also said, "Where in the document does it say?"

Q. Yes.

A. And I said, "Let me see the document." And then you gave me the document and then I read the document, knowing full well we can all play games, but you know as well as I do that this doesn't talk it only talks about the technical plan.

Q. Mr. O'Brien, that's the only document I have. I will put it back.

A. Let's understand one thing; I have given all of my files. I haven't hidden behind privilege or anything like that, like other people. I have given my files to my solicitors and said any information the Tribunal wants, cooperate fully and give it to them. Now, if files from eight years ago have gone missing, or Esat doesn't have them, well then, I don't think people can be too hard on them.

Q. I'm not, Mr. O'Brien. I'm just you asked for the document. You then tell me it's not the full document. Fine.

A. But you knew it wasn't the full document.

Q. I didn't, Mr. O'Brien.

CHAIRMAN: Gentlemen, I'm afraid we're going to have to if we're going to make satisfactory progress for the remaining hour and a quarter, we're going to have to pursue a more temperate course. I'm faulting nobody on this. At the moment we're on Mr. McLaughlin's letter. I think, Mr. O'Brien, I have surmised your essential substantive response to that is to make certain corrections to indicate that in particular you, looking at the individual letters advanced by the three financial institutions, felt that there were varying aspects which made these unsatisfactorily tentative, and you have alerted me to that and to certain other matters that I've noted. Now, if it's necessary for us to return to the particular PA document, I think it probably preferable that we defer that until the next day.

Q. MR. COUGHLAN: Just to wind up on this particular matter now, Mr. O'Brien. You said that when you received the letters from Mr. McLaughlin they went in with the bid, but after that you assessed them, is that correct, I think, or words to that effect, and you formed the opinion or the view that you needed a

firmer financial commitment?

A. The advisors and the partners reviewed them, reviewed where we were in terms of the funding, looked at the weaknesses, and then we decided we needed something stronger, better, more firm, more irrevocable.

Q. All right. I'm just asking you, when was that?

A. That would have been well this, of course

Q. Was it after

A. This is all ignited and kept boiling by the fact that we had to satisfy Telenor as well, so that was another consideration that had to go into the mix.

Q. I just want to know, was it after the presentation?

A. It was before and after the presentation.

Q. When before the presentation?

A. When we were looking at what we were going to say in the presentation and putting the you know, telling the, giving the oral hearing, we look at where's the weaknesses, where's the strengths. Plus, in the background I had Telenor keep telling me that they still weren't financially happy. So there was a number of mixture of things all coming together at the same time.

Q. All right. I know the advisors you referred to after the presentation. Can you tell me the advisors who advised you along these lines prior to the presentation?

A. They would have been the same people.

Q. Same people. Now, at this stage, Mr. O'Brien, I want to deal with a discreet matter, and this relates to the evidence given by Mr. Mark FitzGerald.

Now, do you have the statements of Mr. FitzGerald, first of all?

A. I'm looking for my own statement first.

Q. Yes, all right.

A. I think I have it here.

Q. Do you have Mr. FitzGerald's statement, that's the one dated the 11th of November, 2002?

A. Yes, I do. His first statement?

Q. His first statement. Now, he gave his evidence in accordance with that. I don't want to read it out of the transcript. It's easier if we deal with it here out of this for the moment, if that's all right with you, is it?

A. That's fine.

Q. Now, he said that he was a member of the Organising Committee for the Fine Gael golf classic, which was to be held at the K Club on the 6th of November, 1995.

"At the time of these events Mr. Denis O'Brien and I knew one another, though we were not particularly friendly. I remember previously I had two earlier business contacts with him."

Is that broadly correct? You knew each other, but you weren't

A. Well, he did more than two pieces of business for me,

Mr. Coughlan, six, seven, maybe more. He did a substantial amount of my business.

Q. As of this time or subsequently?

A. They would they would have done a lot more than two transactions for me, quite definitely.

Q. Sherry FitzGerald?

A. They would have negotiated, exit out of leases, buying buildings, buying property. I think that doesn't do justice to the amount of business I did with

Mr. FitzGerald.

Q. All right. And he then said that: "Sometime in August, 1995, Mr. O'Brien telephoned me at my office at Merrion Row and asked me to meet him for a cup of coffee in the Shelbourne Hotel. I assumed that Mr. O'Brien wanted to discuss some business matter.

Mr. O'Brien told me that he was applying for the second mobile telephone licence, that he was facing an uphill struggle against Motorola, and it was rumored that Albert Reynolds was in line for a pay-off if Motorola was granted the licence. I should say, that there was no discussion as to whether this rumor was in any way creditworthy.

"Mr. O'Brien also told me that he, Mr. O'Brien, wanted to keep up his profile with Fine Gael, and that he had heard that Fine Gael was having a golf outing. I told Mr. O'Brien that I thought it might be unwise for him to be involved in the event in the circumstances in

which he was applying for the licence, but I said that Mr. David Austin was running the golf event if Mr. O'Brien really wanted to become involved."

I just want to get your statement out now.

A. What I have a letter more than a statement. Sorry, what index is it?

Q. It's

A. Is my statement the letter, is it?

Q. It's

A. Did you take the statement from a letter?

Q. Exactly.

A. Okay, fine.

Q. Let me just get that now for you. I think it may be in Book 14. I'm just checking that now for the moment. Book 40, Tab 1B. If we can't put our hands on it, I'll put it on the screen.

CHAIRMAN: Yes, we have it on the screen. It's pretty manageable.

A. It's very simple, anyway.

Q. MR. COUGHLAN: Now, I think you you responded, and it's been converted into a statement: "With reference to the information regarding meetings/conversations that allegedly took place with Mr. Mark FitzGerald, Mr. O'Brien acknowledges that Mr. FitzGerald is an acquaintance of his, and indeed, that his firm would have acted for Esat and Mr. O'Brien on a number of occasions in connection with property transactions in

his capacity as Chief Executive of the Sherry FitzGerald Group. However, although Mr. O'Brien may have spoken to Mr. FitzGerald on a number of occasions during 1995, Mr. O'Brien's recollections differ significantly to those of Mr. FitzGerald. In particular, Mr. O'Brien has no recollection of ever speaking to Mr. FitzGerald Mr. FitzGerald in relation to Mr. Albert Reynolds or the Motorola consortium " I'll just complete it.

"He also has no recollection of ever meeting Mr. FitzGerald in the company of Mr. Jim Mitchell or Mr. Phil Hogan, and having reviewed his diaries has found nothing to dispute this. In any event, Mr. O'Brien is at a loss as to a reason why any such meeting would have taken place.

"Mr. O'Brien would like the Tribunal to note that he was also approached on a number of occasions by various members of the Oireachtas requesting him to consider a member of their constituency for a position in Esat."

Now, is it the situation that you don't have a recollection of

A. I didn't meet him.

Q. You did not meet him?

A. I mean, in paragraph 3 I would take issue with other things that he said.

Q. All right. Please do.

A. First of all, I didn't meet him. He apparently said that I told him that he was applying we already had applied for it at that stage. And I never said anything about Mr. Reynolds. And I never said anything about keeping up a profile. I mean, I never had a conversation even to say that. And anyway, I would have gone to numerous political functions and I've given you a full schedule of them, starting the year before.

Q. I know that, yeah.

A. So this is all untrue. And he never advised me orally, on the phone, or in a meeting that it would be unwise to be involved in the event. I mean, if he was to advise me and I was only an acquaintance, he should have also told his other committee members, Mr. Dineen, Mr. O'hUiginn and Mr. Sean Murray. So as far as I'm concerned I didn't meet him in the Shelbourne, I didn't meet him when apparently Mr.

Q. That's the next one. I'll go on to that, paragraph number 5: "At a subsequent meeting" sorry, that's not correct.

Paragraph number 6: "I received a further telephone call from Mr. O'Brien around the middle of October 1995. My recollection is that this is after the Golf Classic, which was held on Monday, the 16th of October, 1995, but it must have been before the end of that week because during much of the following week I

was in the UK. Mr. O'Brien asked me to meet him for coffee at a restaurant close to my office. I assumed that this related to a business matter about which I had shortly before spoken to Mr. O'Brien. I was surprised when I arrived to find Mr. O'Brien sitting at a table with Mr. Phil Hogan and Mr. Jim Mitchell. As I sat down, Mr. O'Brien asked me if I heard any news on the licence. Mr. O'Brien had never previously asked me anything about the licence. I told him that I had bumped into Mr. Michael Lowry at the golf classic at the K Club, and Mr. Lowry had said to me that Denis O'Brien had made a good impression on the Department, that he had good sites and good marketing. I may have also said that Mr. Lowry said there would always be a third licence because I recall Mr. Lowry said this to me. I do not recall any other significant matter arising in the brief conversation with Mr. Lowry. I was annoyed at myself for having passed on the comments made to me by Mr. Lowry, even though they were gratuitous and I believed them unimportant."

That's the second meeting.

A. When I got this I read my solicitor sent it to me, I viewed this thing, this statement as coming left field and totally untrue, and for some reason he is trying to be a player in this whole situation about the licence, and clearly he's not.

Q. Just explain that to me, please.

A. Well, I don't understand I mean, I didn't meet him

Q. Sorry, perhaps I should say, could you explain to me what you mean about a "player" in the licence?

A. That somehow he was, you know, asking the Minister or conveying information from the Minister. I don't remember that.

Q. Well, I just want to be

A. He's not a player.

Q. Clear about this, because if you go to you don't have the transcript? Now, you have said that what Mr. FitzGerald has given evidence about is untrue, isn't that right?

A. I don't agree with what he's saying in his statement. In my statement I'm saying I'm really retorting, saying

Q. Well, you said in your own statement, first of all, that you had no recollection of any meetings with Mr. FitzGerald?

A. That's true, yes.

Q. That's the first position. You have said in your evidence that you did not meet him and you did not have this conversation or say anything to him about Albert Reynolds or Motorola?

A. That's correct.

Q. And you said that what's in the statement is untrue?

A. Yes. My evidence is contrary to that.

Q. Well, I just want to ask you because

A. And my statement.

Q. It's not just that, it's what was put to

Mr. FitzGerald in the witness box by Mr. McGonigal on your behalf in this regard is this:

Mr. McGonigal said, Day 235, page 97, he commences at question 231:

"Mr. FitzGerald, as you probably know, I appear for

Mr. Denis O'Brien in his personal capacity, and

there's a couple of things I'd like your assistance in

relation to. First of all, so as we know where we're

coming from in relation to paragraph 3 of your

statement of the 11th of November" that's the

meeting in the Shelbourne Hotel referred to there

"which I think you have in front of you?"

"I don't", Mr. FitzGerald said, "but read it out.

"Mr. McGonigal: No, no, I'll wait until you get it.

"The only statement I have here is mine, the statement

of the 11th of March."

And then they go on: "Do you have the statement?"

"I do, Mr. McGonigal, yes.

"Question: It's paragraph 3, that's where you're

talking about the meeting in August 1995 that you say

Mr. O'Brien telephoned you at your office at Merrion

Row, and asked you to meet him for a cup of coffee in

the Shelbourne Hotel. How can I say to you that

Mr. O'Brien disagrees with this, that he did not phone you sorry. Now, can I say to you that Mr. O'Brien disagrees with this, that he did not phone you in your office at Merrion Row and did not ask you for a cup of coffee to the Shelbourne Hotel?

"Answer: You can say it, but obviously I have a different recollection, Mr. McGonigal.

"Question: In relation to the rest of the conversation, that clearly didn't take place either, if there was no meeting in the Shelbourne Hotel?

"Answer: As far as I'm concerned there was a meeting in the Shelbourne Hotel, and I was there.

"Question: And that there was particularly no discussion between you and Mr. O'Brien at any stage, either in the Shelbourne or any other place in relation to Albert Reynolds and Motorola and the granting of a licence?

"Answer: If that's Mr. O'Brien's position, that's Mr. O'Brien's position.

"Question: And that at no stage did you ever suggest to Mr. O'Brien that it would be unwise for him to be involved in a golf classic or other event in connection with Fine Gael?

"Answer: Well, again I have to reiterate that I did advise him and I advised him at the meeting.

"Question: Mr. O'Brien is saying, in effect, Mr. FitzGerald, that insofar as your recollection is

concerned, it is untrue, made up and lies?

"Answer: Well, if that's what he's saying, that's what he's saying, but I can assure you, Mr. McGonigal, I'm not sitting here in this witness-box likely, and what I'm saying is my clear recollection of what happened.

"Question: Going to paragraph 6, you say that Mr. O'Brien asked you to meet him for coffee at a restaurant close to his office. Do you have that?

"Answer: I do.

"Question: That never happened, and that equally, there was no meeting between himself, Mr. Mitchell, Mr. Hogan and yourself?

"Answer: Well, again, Mr. McGonigal, I gave my evidence already this afternoon to the Tribunal, where I quite clearly said that my recollection is that the meeting did take place. It took place in a restaurant in Lloyd's Brasserie in Upper Merrion Street, and those are the people that attended the meeting.

"Question: And again, in relation to this meeting, so that there is no doubt about it, this is made up by you, untrue and lies?

"Answer: Well, that is incorrect, Mr. McGonigal.

"Question: Are you surprised, Mr. FitzGerald that neither Mr. Hogan, nor Mr. Mitchell, the late Mr. Mitchell, when he was first asked, have you any recollection of this meeting in the restaurant?

"Answer: I don't stop to reflect on these things. I received a letter from the Tribunal. They asked me questions. I answered the questions truthfully, and that, as I see it, is my role. It's not for me to comment. It's for other people to comment on their evidence."

Now, what was being put to Mr. FitzGerald, on your behalf, was that the fact of the meeting in the Shelbourne Hotel, the conversation which Mr. FitzGerald said took place there, and the fact of the meeting in the Lloyd's Brasserie as described there, the second meeting referred to in his memorandum, that those are untrue, made up, and lies.

A. Correct.

Q. Is that your position?

A. Correct.

Q. Now, I think it is correct to say, as Mr. FitzGerald gave in his evidence, that the night of the announcement of the winner of the competition, I think Mr. FitzGerald was invited and did attend a party in Esat, isn't it?

A. That's correct.

Q. You knew Mr. FitzGerald

A. That's correct.

Q. as a person? His firm had conducted business with your firm, and perhaps there may have been personal involvement in relation to personal matters as well?

A. No.

Q. Only with the firm?

A. In a business context he was invited, as we did with all our other service providers, because at that time and still, Sherry FitzGerald acted for Esat Digifone.

They located the office in Jenkinson House. They helped on sites. And in that party in Baton Rouge, we invited everybody that helped us, right down to the printer, to help us celebrate winning that licence.

It was in that context that Sherry FitzGerald were invited, and Mr. FitzGerald was invited as well.

There was a sweep of calls to everybody, come down and have a drink to celebrate, and that's why he was there. And he was there, and Mr. O'Reilly was there as well, who worked for Mr. FitzGerald.

Q. Who worked for Mr. FitzGerald. Did you ever have any business falling out with Mr. FitzGerald?

A. Well, I wouldn't do business with him now. He's not an agent I'd recommend to a friend, after this.

Q. Up to this, Mr. O'Brien, had you ever done had any business falling out with Mr. FitzGerald?

A. Not that I'm aware of. He may have been unhappy that I wouldn't have done deals that he would have brought to me. But I can see no reason why he would be unhappy with me. But I think you'd have to direct that to him.

Q. I'm asking you, and I'll tell you why in a minute.

On a personal level had you had any falling out or difficulty with Mr. FitzGerald up to this?

A. Over this, definitely.

Q. Prior to this?

A. I have no idea.

Q. You had

A. I don't believe so.

Q. You hadn't had any falling out, you had no personal

A. He would have had I'm involved in an organisation called the YPO.

Q. Called what?

A. The YPO, the Young President Organisation. He would have known the difficulties for me of being involved in a Tribunal, the pressure, the amount of work that I would have to put in to give my evidence properly, to provide all the documentation, so he would have had a great insight, on a very confidential basis, the demands of being involved in a Tribunal were and how that was happening.

Q. Yes.

A. That's what he would have known.

Q. Might have known that. But I'm asking you, did you ever have any personal falling out with him?

A. Certainly not on my side.

Q. To the best of your knowledge, had any member of your family had any personal falling out with Mr. FitzGerald?

A. They don't do business with him and they probably never will.

Q. I'm asking you, to the best of your knowledge had any of your family had any personal falling out prior to this?

A. They haven't done business with him.

Q. Can you think of any reason as to why Mr. FitzGerald would, first of all, state an untruth, something made up and a lie in sworn evidence?

A. In being involved in this Tribunal, as I have been for two and a half years, this is probably one of two or three things that I found very strange. And when I read his statement, certainly I just couldn't believe it. And I I feel a great disappointment, in fact.

Q. But you have said that Mr. FitzGerald is lying when he says this?

A. Yes, that's my evidence.

Q. I'm asking you can you give me some reason why you believe that he would tell a lie about this?

A. I don't know. I just find the whole thing strange.

Q. You don't know why he would lie?

A. And I believe this thing is strange.

Q. Well, what do you mean by that?

A. I never had these meetings, and suddenly I have to start replying to things that didn't happen, were never said. That is wearing, Mr. Coughlan.

Q. Well, what I'm trying to ascertain here, because

Mr. FitzGerald has given evidence and you're giving evidence now, and he has given evidence of meetings taking place and what was discussed, isn't that right?

That's what's happened. You say this didn't happen and that he is lying when he said that these happened?

A. For the fourth time, I believe he's lying.

Q. But you don't know why? You hadn't fallen out with him, there had been no business difficulties? It's is it a mystery to you?

A. It is a mystery. I mean, I do business with another main agent in this city, property deals, maybe he's unhappy that I used them. But I can not see any

Q. It would be a fairly big step to take, would you agree, to give evidence of this nature

A. This is a very big step, Mr. Coughlan.

Q. This would be a huge step.

A. This is one of two or three things that have really troubled me since I came into this Tribunal.

Q. So do you think that that could be taking such a step and telling lies could be related to commercial jealousy?

A. I actually the world is a funny place. I just do not know. But it's of immense disappointment, I'm just telling you that. Completely let down by him.

Q. Let down because he's lied about you?

A. Correct.

Q. And lied in a very significant way, as far as you see

it?

A. Correct.

Q. And as your counsel said to Mr. FitzGerald on page 99

of Day 235, question 243: "Mr. FitzGerald" this is

in response to Mr. FitzGerald saying that he was

truthfully responding to questions put to him

"Mr. FitzGerald, that's a load of poppycock. Let's

get realistic here. This is a tribunal where your

credibility is at stake. Mr. O'Brien is putting in

it in issue." And then he goes on to say: "Mr. Hogan

is putting it in issue and the late Mr. Mitchell is

putting it in issue." That's what Mr. McGonigal said.

Mr. Hogan was here and gave evidence. I'm not going

to deal with that matter. And Mr. Mitchell, to my

recollection of events, it's not a matter for you, but

neither Mr. Hogan or Mr. Mitchell put Mr. FitzGerald's

credibility in issue. But you are putting it in

issue?

A. Totally.

Q. I just want to be very clear about this, because this

is a serious and significant matter for the Tribunal

and for you and for Mr. FitzGerald.

A. It's most serious.

Q. It's a very serious matter. I just want to be clear

about this. You are not contending for a position

that Mr. FitzGerald may be right, but that you have no

recollection of events? You are quite categorically

stating that Mr. FitzGerald that this did not happen and that Mr. FitzGerald is lying about it?

A. Correct.

Q. Now, I won't keep you much longer, I hope today, Mr. O'Brien, because I just want to...

Sorry, it's your statement of the 2nd of December, 2002, dealing with this matter. I just I have to ask you this because of what's involved, Mr. O'Brien.

Paragraph 8, this is the first time you responded to the Tribunal when this query was raised with you before you gave your evidence.

Sorry, you gave this response in December, 2002, of course.

"With reference to the information regarding meetings/conversations that allegedly took place with Mark FitzGerald, Mr. O'Brien acknowledges that Mr. FitzGerald is an acquaintance of his, and indeed, that his firm would have acted for Esat and Mr. O'Brien on a number of occasions in connection with property transactions in his capacity as Chief Executive of the Sherry FitzGerald Group. However, although Mr. O'Brien may have spoken to Mr. FitzGerald on a number of occasions during 1995, Mr. O'Brien's recollections differ significantly to those of Mr. FitzGerald. In particular, Mr. O'Brien has no recollection of ever speaking to Mr. FitzGerald in reference to Mr. Albert Reynolds or the Motorola

Consortium. He also has no recollection of ever meeting Mr. FitzGerald in the company of Mr. Jim Mitchell or Mr. Phil Hogan. And having reviewed his diaries, has found nothing to dispute this. In any event, Mr. O'Brien is at a loss as to a reason why any such meeting would have taken place."

Now, I just want to ask you, when you gave this response to the Tribunal, late November/December of 2002, you stated that your position was that you had no recollection of this meeting, the conversation concerning Motorola, Albert Reynolds, or a recollection of a meeting in the company of Jim Mitchell and Phil Hogan. Is that correct?

A. To be clear, we're talking about two meetings, one in the Shelbourne and one

Q. One in Lloyd's Brasserie.

A. Neither.

Q. No, but I just I just want your assistance here because I appreciate that witnesses preparing for a tribunal are assisted by their lawyers in preparing matters.

A. Absolutely, yeah.

Q. And it may be just a very lawyers' point, but the references there that "Mr. O'Brien has no" or "his recollections differ significantly and that he has no recollection of ever speaking to Mr. FitzGerald," you were not stating at that time, and I have to ask you

this

A. Sure.

Q. because you put Mr. FitzGerald's credibility at issue here.

A. Of course.

Q. You did not state at that time that Mr. FitzGerald was telling lies or making things up or stating untruths, why is that, Mr.

A. Because I was going to give my evidence, first of all. I don't know what other I mean, I think they're saying that I have no recollection.

Q. You see, and I understand that one would be assisted by lawyers in preparing a statement, and I just want to give you an opportunity in relation to that, because it is not stated there at that first opportunity that Mr. FitzGerald is lying, telling untruths or making things up, isn't that right?

A. Well, this probably was written by my solicitors, either after having a conversation with me and their asking me questions on the phone, or else a brief meeting with them, and I just said no, I didn't meet him, didn't happen, either meetings, so...  
But I did obviously speak to Mr. FitzGerald during 1995.

Q. Yes. Yes. Sorry, I just want to be clear. I'm asked to clarify one other matter.

You're saying that you didn't have the Motorola/Albert

Reynolds conversation, and you're saying that you did not meet him in the Shelbourne as well?

A. Correct. He's saying that there was a meeting in the Shelbourne at which there was some discussion about Motorola.

Q. Yes.

A. I'm saying the meeting didn't take place and the conversation didn't happen there or at another place or time.

Q. I understand. Did you ever meet Mr. FitzGerald in the Shelbourne at any other time, to the best of your knowledge?

A. I don't know. I mean, I can't remember.

Q. About the golf classic now I mean?

A. No.

Q. Did you meet him at all about the golf classic? Did you meet

A. I don't think so, no.

Q. Just, and I'm just referring to it as the Motorola conversation for a moment, does that when you received the Mr. FitzGerald's statement from the Tribunal and you were asked for your comments on it, was that did that come as a surprise to you, that anything of that nature was ever discussed?

A. I wouldn't have a context to discuss something like that with Mr.

Q. No, I'm asking you had you ever sorry. I want to

be careful about this because there's somebody else's reputation on the line here as well.

A. Of course.

Q. That's why I'm referring to it as the "Motorola conversation" as described by Mr. FitzGerald in his statement or something similar, that is a relationship of some sort or a promise of some sort?

A. Did I ever say that to

Q. No, between Motorola and another political figure?

A. No.

Q. I know you say you never said it to Mr. FitzGerald.

When you saw it being referred to in the statement, did even that as a story come as a surprise to you?

A. There have been many vicious rumors, allegations about people around this licence, it is far from me to say something like that. I didn't say it. I've had five years in the media of allegations that are totally untrue, and that's why I'm here today.

Q. I think, Mr. O'Brien, that I indicated to you through Mr. McGonigal that the areas we would be dealing with today, I think we've covered the areas I indicated we would deal with today, and in fairness to we've made good progress, in fact. And I don't think that you're in a position to move on to other matters into 1996 at this stage?

A. Probably not, we're a little bit ahead.

MR. COUGHLAN: I wonder in those circumstances, Sir

it's been a hard number of days for Mr. O'Brien.

CHAIRMAN: I understand that discussions have taken place between counsel, and obviously consulting your own commitments, Mr. O'Brien, which I'm anxious to honour, with a view to arranging a number of at least substantial part days in succession in such a manner as would give reasonable grounds for optimism that we may conclude your evidence, as I'm sure is your wish, as much as everybody connected with the Tribunal. So I'll provide for that.

The Tribunal also has other matters to attend to, not least an imminent Supreme Court hearing. There are other witnesses, and I think Mr. McGonigal has intimated, and I think you may confirm to me, Mr. O'Brien, you have no particular objection to speeding things along somewhat more than has been happening, if perhaps some of those other witnesses who are then connected with the Esat Digifone side might testify if they're available before you return.

A. No issue at all, Chairman.

CHAIRMAN: Very good. So I'll seek to make arrangements for that, with a view to a very prompt resumption, even apart from Mr. O'Brien's ongoing evidence, and I'll cause the usual communication on our website and notification to other people in the media to be promptly conveyed as soon as matters have been finalised, probably with a view to next week.

Thanks. Thank you, Mr. O'Brien.

THE TRIBUNAL THEN ADJOURNED TO A DATE TO BE NOTIFIED.