

THE TRIBUNAL RESUMED AS FOLLOWS ON MONDAY, 25TH JUNE

2001 AT 11AM:

MR. COUGHLAN: Mr. O'Brien.

CONTINUATION OF EXAMINATION OF MR. O'BRIEN BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. O'Brien, I think when you were giving evidence on the last occasion, we were dealing with what has been described here in the Tribunal as the ESAT/Telnor donation to Fine Gael?

A. That's correct.

Q. And I think on that occasion reference was made to the fact that some other issues arose in the context of the IPO of ESAT Telecom, but because notes were not available at that stage, it was decided by the Tribunal that you would come back to deal with those issues along with the ESAT/Telenor donation in due course, isn't that correct?

A. That's correct, yes.

Q. And I think that's what we wish to deal with now today.

Now, I think the other issue, or issues which arose at the time related to a conversation which you had with Mr. Barry Maloney, who was the then Chief Executive Officer of ESAT Digifone, isn't that correct?

A. That's right.

Q. And I think that the conversation which you had with

Mr. Maloney centred around some remarks which were made by you to him, isn't that correct?

A. Yes.

Q. And I think, whilst nobody can give a verbatim account of what exactly was said, either you or Mr. Maloney, the general nature of the conversation took place in the context of Mr. Maloney, in your mind, being slow about paying success fees to various consultants and advisers who had been involved in the bid for the licence which was taken by ESAT Digifone, isn't that correct?

A. That's true. I have a clear recollection of the conversation.

Q. Now, first of all, if we could just try and identify when the conversation took place.

A. I believe it was on the 17th November.

Q. Of 1996?

A. 1996. The afternoon.

Q. Of the 17th November?

A. That's what I have in my diary entry.

Q. That was a Sunday?

A. It was a Sunday.

Q. And I think also it's your understanding that the conversation took place when you were having a run with Mr. Maloney, isn't that correct?

A. That's my clear recollection.

Q. You know Mr. Maloney believes that it occurred in the

office, but I just want to get your version of events for the moment, and maybe nothing much turns on where the conversation took place.

A. I don't agree with Mr. Maloney's recollection where the conversation took place. I distinctly remember where it was.

Q. Now, I think there is no dispute between you and Mr. Maloney that the conversation took place in the context of success fees for consultants and advisers on the bid, isn't that correct?

A. Yes, these were contract people, and they were owed their bonuses because we won the licence, and it was the year after that.

Q. And it was your belief that Mr. Maloney was slow in making these payments, and again I don't think there is any dispute between you, is there, that Mr. Maloney indicated that he wanted some sort of documentary basis for paying the payments, invoices, or whatever?

A. They were already supplied to Mr. Maloney.

Q. Now, can you tell us exactly or sorry. To the best of your recollection, obviously people can't remember exactly what was said, but to the best of your recollection, what you said to Mr. Maloney?

A. Well, we were running along, and I had a serious situation where people were not being paid, and I decided I'd tackle him on it. And knowing the psychology of the man, I said to him, "If you think you

have got problems paying these people, I have paid  
i;½200,000," or words to that effect. As I thought that  
if I was suffering pain, that that may force him into  
action, which he was stalling on.

Q. And just again to get your account of the event. Do  
you remember Mr. Maloney saying he didn't want to know?

A. No.

Q. Or words to that effect?

A. No.

Q. In any event, you do recollect using the expression in  
general terms, that you had to pay i;½200,000 yourself?

A. Falsely, yes.

Q. But I am just we can deal with that in a moment. I  
just want to try and identify exactly the sequence of  
events and what transpired.

A. Yes.

Q. Did you mention the name Mr. Michael Lowry at that  
time?

A. Absolutely not.

Q. Absolutely not. You know Mr. Maloney has furnished a  
statement to the Tribunal, and which you have seen, and  
it's also a matter which occurred at the time of the  
IPO, that the name "Michael Lowry" was mentioned in the  
context of one of these i;½100,000 payments.

A. He may have, but that's his statement.

Q. I see. And it's his recollection. In any event,  
things rested there, isn't that correct? There was no

further discussion between yourself and Mr. Maloney at that time?

A. It was a one-and-a-half hour run, but on that matter

Q. That seemed to be the end of the issue?

A. Yeah.

Q. And in the course of ESAT Digifone's business, in due course, I think Mr. Maloney authorised payments to certain consultants and advisers, isn't that correct, as far as you know?

A. Within a short period all of them were paid eventually, but at the time I thought I would have to pay them.

Q. Now, you believe that that was on the 17th November of 1996?

A. Yes. Mr. Coughlan, I wrote these notes in my statement when I was in the United States. I didn't have my diary. It's only subsequent that I checked my diary when I returned.

Q. Now, I'll come to the notes in due course, Mr. O'Brien. I am just trying to be as clear as I possibly can on your understanding of the events.

A. Right.

Q. Now, I think in the summer of 1997, Mr. Lowry had been through a Tribunal of Inquiry the McCracken Tribunal, and that Tribunal reported, isn't that correct?

A. I know there was a McCracken Tribunal, but I am not sure I take it that it was in the summer of '97.

Q. You can take it from me, the report was, I think, sometime in August or thereabouts, of 1997. And the Dail reconvened in September, I think, of 1997, and the Terms of Reference for this Tribunal were passed unanimously by both Houses of the Oireachtas.

A. Okay.

Q. Now, do you remember having any discussion with Mr. Maloney around that time?

A. I think I recollect having a conversation in July/August. We used to have weekly meetings, and he raised the issue, I think, of the Tribunal, and I think he asked me whether any money had been paid to Michael Lowry, and I told him categorically, the answer was no. He never raised the run at the time.

Q. Now, I know it's hard to remember the sequence of events exactly, but are you sure that Mr. Maloney raised the issue with you, or did you raise the issue with him and say, "Do you remember that conversation we had? I want to tell you that there is nothing in it."

A. I would have no reason to raise it with him, because I knew the previous conversation was in jest, and it's only he reminded me of that conversation some months after July/August 1997.

Q. Now, I'll come back to it in a moment again, the conversation, that is; but I think the matter again arose prior to the IPO of ESAT Telecom, isn't that correct?

A. I believe it was raised on the 8th October.

Q. And how do you remember it being raised?

A. I think it was a Monday morning meeting again, and Barry raised whether there was any problem whether money had been given to Michael Lowry, and I again told him absolutely not.

Q. And I think there was further discussion, I think on the that was the 8th October

A. 8th, yeah.

Q. The 8th October of 1997, isn't that right?

A. Correct. We were doing the IPO then. The process started.

Q. And just so that the public have an understanding, the involvement of ESAT Digifone ESAT Digifone was not being floated, isn't that correct? It was ESAT Telecom?

A. ESAT Digifone had only been trading since March 1997, so six months trading, whereas ESAT Telecom, which owned 40 or 45%, had been trading since 1993. And we had always told our investors, because we did an offering in June '96 when we raised 27 million, these were institutions from the US that we would be doing an IPO sometime in the last quarter of 1997.

Q. But, for the purpose of the IPO, ESAT Telecom needed, to some extent, the cooperation of the board of ESAT Digifone, isn't that correct?

A. There were two views on that, Mr. Coughlan. A legal

view, I recall being given, that we didn't need consent of ESAT Digifone. But a more practical view was that we would need certain financial information and description of the business, as it was, an affiliate of ours, and that information had to go into a Prospectus, and that had to be released by the company.

Q. Of course the practical and business view, you need this information from ESAT Digifone for the purpose of the IPO of ESAT Telecom, and that was the reason why ESAT Digifone had any involvement, isn't that correct?

A. Yeah. The information as per the Shareholders' Agreement had to be cleared. In other words, every line that was written in the Prospectus which would have ultimately found its way out to buyers of the shares, had to be checked and verified that it was correct. We wanted that in ESAT Telecom, but also ESAT Digifone wanted to do it to check the right information found its way into the market.

Q. Now, after the 8th October, I think the matter arose again on the 13th October, isn't that correct?

A. It's my understanding there was two meetings on the 13th October, one in the morning, and then one at lunch time. And Michael Walsh, I invited Michael Walsh of IIU to that meeting at lunch time.

Q. That was the second meeting?

A. Yeah, in the one day. Yeah.

Q. The first meeting was between yourself and Mr. Maloney



again?

A. Nine o'clock.

Q. And the issue arose again?

A. The issue arose again, and I had I was questioning why this was being raised by Mr. Maloney.

Q. And then it was it was agreed between you, I think, that you would involve Mr. Walsh?

A. My recollection is that I left Michael or sorry, Barry Maloney's office, and I had an uneasy feeling about what was going on, and what the agenda was

Q. The agenda?

A. Yeah. And then I rang Michael Walsh, this is the best of my memory, okay, and I said to Michael, I explained just briefly to Michael Walsh, and I asked him, would he be free at lunch time. And Michael Walsh and Barry Maloney I rang Barry Maloney back, and the three of us sat down for probably a half an hour. Michael Walsh informs a hurry, and had a conversation.

Q. And we'll be going through the notes of this meeting, but I just want to get the sequence of events now.

And there was a discussion, there was a three-way discussion, then, at the second meeting between Mr. Maloney, yourself, and Mr. Walsh, isn't that correct?

A. Yes.

Q. Where the matter was explained by Mr. Maloney and by you to Mr. Walsh?

A. I didn't keep notes of the conversation, but there was I know there was a conversation. Precisely what was said, I don't know.

Q. We'll go through the notes in due course. I just want to make sure we have the correct sequence.

Now, as a result of that meeting, did any further meetings take place, to the best of your knowledge?

A. Yes. The following evening

Q. That was on the 14th November?

A. The 14th

Q. October.

A. I had been out to dinner with my wife. I arrived home at about a quarter to eleven/eleven o'clock, and Barry Maloney knocked on the door. He wanted to talk to me, and so I brought him in to my living room and we had a conversation.

Q. And what was the nature of the conversation, in general terms?

A. My recollection is I gave him fairly short shrift.

First of all, I was a bit annoyed that eleven o'clock at night he was calling around to my home. Secondly, I wanted us to delay the IPO, and maybe fourthly, and I can't fully recollect this, but he could have said something about giving greater disclosure in the red herring

Q. The red herring Prospectus?

A. Yes. Normally what happens, as you are in the middle of a roadshow which lasts three weeks, a Prospectus is produced and it has got a red top on it, and you do the roadshow. And if there are any minor changes in that three-week period when you actually, the underwriters place the shares, you change it, and then it becomes the black. So we were at the red herring stage, and he wanted to put in he was concerned about disclosures.

Q. So I think Mr. Maloney wanted you to delay the IPO, isn't that correct, on that occasion, and I think that that was also his view on the first meeting you had with him, I think on the 13th October, isn't that correct?

A. I don't have notes of the 13th, but if he has notes, I'll go through them with you and see.

Q. I think that was the general nature of his conversation around this time anyway, that you should delay the Prospectus and/or, make greater disclosure in the Prospectus. These were two issues, would that be fair?

A. They could have been issues that we discussed at the time.

Q. And did he express any concern to you about the Terms of Reference of this Tribunal?

A. Much later people started talking about the Tribunal.

Q. Very good.

A. But

Q. I am just trying to identify when matters arose.

Now, whatever was in your mind at the time the conversation took place with Mr. Maloney, I take it that it must have been it must have been becoming obvious to you that Mr. Maloney hadn't viewed it as a joke?

A. I didn't understand Mr. Maloney.

Q. You didn't understand him?

A. Yeah.

Q. Well, perhaps we'll go back and try and fathom what you did not understand.

A. Well, in the context that I knew immediately he was going to try and cause trouble, because he didn't want the IPO to take place. The second, probably most important thing, is within seven or eight weeks of the conversation taking place in November 1996, we did a bond offering, a public bond offering for \$110 million. There was a Prospectus produced, and it was registered at the Securities and Exchange Commission, so Mr. Maloney had a concern seven or eight weeks later, and he would have expressed a concern.

And then the second matter was that we did a further bond issue in July, I think it was July 1997, for either 37 or \$40-million. That again had a Prospectus and again was registered in the Security and Exchange

Commission, and also in the meantime we did an ABN, an AIB facility for a substantial amount of money. That was a private transaction. There were two public transactions. So I was puzzled at the time that if he had a concern, why didn't he say it seven weeks later, instead of when we were going for an IPO.

Q. So I just want to go back. So, I take it, at the time of the conversation, whatever was said, I take it that you did not say to Mr. Maloney, "I am only joking."

A. We were friends for 22 years. We used to go running nearly every week. And he knew and I knew I knew when he was joking and he knew when I was joking. You don't have a friendship for 22 years without people knowing when you are pulling the person's leg or you are in jest.

Q. But, might I take it that you know we can all ball hop, but that if somebody, who you would expect to understand that you were hopping the ball at them, was taking a completely different view of it, that one might say, "Look, take it easy. I was only joking."

A. I would have thought the reverse. He would have said to me, "Are you serious?" He never said that.

Q. Well, he will give evidence to the effect that he said to you, "I don't want to know about it. I don't want to hear about it," which would be the same sort of thing, wouldn't it?

A. Well, I don't remember him precisely saying that. But

if he thinks he said it, and he has notes to that effect, or a recollection, I don't remember him saying it.

Q. Well, if we just try and stick to the facts. So you did not say to Mr. Maloney at the time of the conversation, wherever it took place, you did not say to him, "I am only joking"?

A. No, I didn't, but I think he would have known the tone of my voice.

Q. You did not say to Mr. Maloney, whoever initiated the conversation at the time that the Terms of Reference of this Tribunal was published, that you were only joking when you spoke to him?

A. No. Because he didn't recount the conversation. He asked me in July/August, 1997 whether I had made any payments to Michael Lowry, and I confirmed that I had not, categorically.

Q. Did you not say to Mr. Maloney, on the 4th October 1997, when the issue was raised again between you and him

A. That was the 8th.

Q. Sorry. I beg your pardon. On the 8th October, did you not say to him on that occasion that you were joking?

A. Because he didn't bring the conversation up. He asked a question of me, you know, "Did you ever pay money to Michael Lowry?" And I said I didn't.

Q. And can I ask you this: When was the first time you

remember giving the explanation that it was a joke or bravado?

A. I started the roadshow on the 15th October. I was back in Dublin on the 22nd, and then I wasn't back until the 8th November, 8/9th November, sometime around then. So it's when I sat down to write my because I was asked by McCann Fitzgerald, who were counsel to ESAT Digifone, to pose six questions to me. When I sat down and wrote out on a plane one day, when I was in the middle of the roadshow, what my recollection was, you know, I then remembered the run, remembered the conversation, and I gave an account of that in, as best I could in my statement.

Q. Now, apart from giving the explanation that this constituted bravado or jocular behaviour on your behalf, I think as matters unfolded, you also gave an explanation that the reason you would have said anything like that, even jokingly, was that at some stage you had formed the view that you were going to look after Mr. Lowry and pay him  $\frac{1}{2}$ 100,000, isn't that correct?

A. No. The context of the conversation was Mr. Maloney had not paid people for a year, even though he had the documentary evidence that they were owed the money, and these were all agreed two years ago before that, that as consultants to the bid, they would then get a bonus, if we won the licence. And it was in the context of a

lot of frustration, where they were not being paid, and they were phoning me and saying "Why are we not getting paid?" that I had made a decision in my own mind to pay them the bonuses, if he wasn't going to pay them.

And I then it was my last throw, really, to get him to pay, was to say, "If you think you have got problems, I had to pay \$200,000," because the psychology of Barry Maloney is that unless you are suffering, well, then he maybe he then would look more favourably on paying bonuses that were legitimately due.

Q. If I could just isolate that issue, and again, whether it occurred in the context of a run, which was a social occasion, or it occurred in the context of the office, which might be a more formal occasion. I am not quibbling at this stage.

A. My recollection, it was social and it was on a run.

Q. It was a social and it was on a run?

A. Yes.

Q. But nevertheless, it was a serious business matter which was weighing on your mind, the fact that the bonuses had not the success bonuses had not been paid; it wasn't in the context of any chit-chat or shooting the breeze, anything like that?

A. Well, in a formal sense, I had raised the matter of the bonuses with Mr. Maloney repeatedly at my Monday morning meetings, and he would write a note down in his



book about paying them. And then I'd get calls, you know, another ten days later, and people still hadn't been paid. So it was in the context of the run in a social context that I would raise it to him again, to see if I could get him to pay these people.

Q. But it was a serious business matter?

A. That was just the only piece of business.

Q. Yes, but it was a serious issue. You wanted these bonuses paid to these people, there can be no doubt about that, and I am not saying that you weren't right about that. That's not the issue?

A. All of them were paid.

Q. It was a serious business issue?

A. Mm-hmm.

Q. So as to where it took place may well be irrelevant, may well be, but I am just asking you, it was a serious business matter, as far as you were concerned?

A. Well, Mr. Coughlan, if I could answer this in this way:

Mr. Maloney, I found him to be difficult to deal with.

When we went running together, sometimes I could get

him to do things, and I found, in the running context,

it was easier for him to do things and, you know, agree

to do things that would be helpful, than going into his

office, and in an environment where it was much more

heated and pressurised to get him to do things. So

this was what the run was all about, really.

Q. About business?

A. Well, no, it wasn't. I'd say it was 99 percent social.

Because we had a laugh about everything, and if at any time that I wanted to get him to do something, I might raise it with him in a very light-hearted manner,

"Listen, will you pay these people," Blah Blah, "if you think you have got problems," Blah Blah

Q. I understand that, Mr. O'Brien, but it was a serious business matter which was exercising your mind when you raised the issue with him. You wanted these bonuses paid.

A. It was one of many issues.

Q. Sorry. If I could just it may have been the only business matter you discussed, but in your mind it was a serious business matter that you wanted these bonuses paid, isn't that right?

A. Yeah, we wanted them paid. Yeah. Absolutely.

Q. And I think you yourself, in using the expression you used to Mr. Maloney, said, "If you think you have problems, I have problems. I myself had to pay  $\$200,000$ , two  $\$100,000$  payments"?

A. I have already paid  $\$200,000$ , yes, to other people.

Q. So if that was the only business issue discussed, it was nevertheless a serious matter exercising your mind?

A. Because it was a false statement

Q. Sorry, I'll come back to the statement in a moment. I just want to identify your state of mind at that stage.

This was a serious business issue for you?

A. It was a kind of last throw of the dice to get him to pay it. To be honest with you

Q. Even more serious if it was the last throw of the dice, would you agree?

A. I had reached the end of the road, where I was going to have to go around him and bring it to the board to get them paid. So it was light-hearted, it was serious, and I was trying to get him to pay.

Q. Now, apart from the way you approached it, and you would have known Mr. Maloney better than I would, and you'd know how to approach him in a business context, and you felt that this was the best time and the best way to approach him, as the last throw of the dice in a serious business matter, isn't that right?

A. Well, we'd been on other runs and other matters had been dealt with in the same way.

Q. It would not have been unusual for you to discuss business matters on the runs?

A. The odd time, yeah.

Q. I take it, Mr. Maloney didn't laugh at the time?

A. Did he laugh? He didn't get serious, anyway.

Q. You wanted Mr. Maloney to respond in a certain way as a result of making your remarks, isn't that right? You wanted him to pay the bonuses?

A. That's right, yeah.

Q. You wanted him to take you seriously, to ensure that he did pay the bonuses, isn't that correct?

A. I needed to relax him a bit and then get him to make a decision in his own mind to pay the bonuses.

Q. Well, you are a serious businessman yourself. You were Chairman of the company of which Mr. Maloney was the Chief Executive Officer.

A. That's right.

Q. You were two very significant figures in that company.

A. That's right.

Q. In the corporate sense. And if you had thought that Mr. Maloney would have viewed your comments as just a joke, he'd hardly have acted in the way you wished him to act, on a bit of a joke. Would you agree?

A. Well, first of all, he paid up the people.

Q. Yes, exactly.

A. Secondly, he would have raised it with me the following morning, because I had a Monday morning meeting with him, and he never did. And then the examples of the other public offerings we did with bonds, he would have probably raised it at that stage, and he never did.

Q. No, I'll come to that in due course. But I am just asking you to contemplate this situation: If you cracked a joke, it was hardly going to cause Mr. Maloney to act in the if he believed it was a joke, to act in the way you wished him to act, and that was to pay the bonuses?

A. The psychology was that if he saw that I was suffering, then he might see fit to pay bonuses.

Q. Exactly. Exactly. So the effect you desired. So applying your psychology to the situation, was that if Mr. Maloney believed that you were suffering, that you'd had to pay out  $\frac{1}{2}$ 200,000, that he, in those circumstances, would do what you wanted him to do, which was to pay the bonuses, otherwise you were going to pay them yourself, isn't that correct?

A. Yes.

Q. And, I take it, that as Chairman of the company, you would not have wished to deceive the Chief Executive Officer, would you?

A. Absolutely not.

Q. And can I also take it that Mr. Maloney had been a friend of yours for, as you say, some 20 years previously; that you would not have wished to deceive a friend either?

A. Well, you have got to put it in the context, Mr. Coughlan. I am sorry to bring you back. I am trying to be helpful here, but you have got two friends running in the mountain. One is not paying people, the other friend says, "Look, if you think you have got problems, I have had to pay  $\frac{1}{2}$ 200,000." I never said to who or anything like that, but he felt but we had such a relationship, as friends, that I knew when he was spoofing, and he knew when I was spoofing.

Q. Yes, Mr. O'Brien, but you see

A. It wasn't a normal, I hate the use the term, business

relationship. This was friendship with a mix of business.

Q. Yes, I can understand that. But what I am asking to address is this: It was your belief that if Mr. Maloney believed that you were suffering, that you had had to pay out  $\frac{1}{2}$ 200,000, that he might act in the way you wished him to act. That

A. He would ask me he would have said to me well, if he felt that I was not spoofing to him or spoofing, he would ask me, "Who did you pay the 200 grand to?"

Q. We'll come to Mr. Maloney's version of events, which you know is that the name Michael Lowry was mentioned.

You disagree with that, but you know that Mr. Maloney will give evidence to that effect. If, as you say,

Mr. Maloney would or should have known that you were spoofing, that would have defeated your purpose

A. The opposite.

Q. The opposite?

A. So that

Q. So that is because he would not have believed that you were hurting, and therefore that there was no pressure on him to make these bonus payments?

A. He ultimately agreed to pay the people. All right?

And he made that decision. And he did pay them. So my run in the mountain worked in that context.

Q. Because you believe that Mr. Maloney understood that you were spoofing?

A. I think he well, first of all, would it not be true that he would ask me the following Monday, or at the time, like, "Who did you pay the money to?" Or whatever.

Q. Well, you know Mr. Maloney's explanation in relation to that, that you said you had to do it yourself, and that Mr. Lowry was one of the names was the name mentioned in respect

A. Can you just bring me through Mr. Maloney's notes and show me

Q. I'll come to the notes in due course. I am just trying to get your recollection of events for the moment. I will then come to the notes.

CHAIRMAN: Mr. O'Brien, had things soured a little bit between the two of you as partners by the time of this run on the strength of the success payments issue?

A. That, and other issues, Chairman. That the relationship changed the day he took over as Chief Executive of ESAT Digifone. Where people that were associated with me, professional advisers, all got fired. People, if they were seen as friends of mine, they were sidelined, and things became quite difficult. And I tried to keep the relationship going by continuing to run with the guy to see if we can sort things out. And one of these issues was these people who were owed their bonuses, they were contractors, consultants that had worked extremely hard on the

licence, and then weren't paid for twelve months.

Q. MR. COUGHLAN: Now, you believe this was in November of 1996, the run, when the conversation took place?

A. Yes.

Q. Was Mr. Maloney the sole Chief Executive Officer at the time, or was he joint? Can you remember? It's something we can check out.

A. Did he I think he probably became Chief Executive in, sole Chief Executive in July 1997, if I remember rightly. I had it somewhere here. Will I look for it, Mr. Coughlan?

Q. I think it was in I think he became sole Chief Executive Officer, I think, in 1997. He may have been joint Chief Executive Officer with Mr.

A. Mr. Knut Digerund

Q. Mr. Digerund at the time.

A. Yeah.

Q. Well, we'll check that in a moment, but I'll just come back to it. I will check when he became sole Chief Executive Officer, and I'll come back and ask you the question. I won't ask you for the moment.

Now, if I can again just get the sequence of events, as you understand them. After the meetings of the 13th of November, 1997, with Mr. Maloney, another meeting with Mr. Maloney on the morning of the 14th November, 1997, a meeting then



A. Evening.

Q. Sorry, evening. I am talking about October, I beg your pardon, I should be saying. The 8th October, the 13th October, the 14th October, and then you had a joint meeting with Mr. Walsh of IIU on the afternoon of the 14th, is that correct?

A. I thought it was the 13th, but whatever it's either the 13th or the 14th.

Q. I think the 13th. I beg your pardon, it was the 13th. And then there was a meeting, I think, on the 23rd October, isn't that correct?

A. That's right. The roadshow had started, and we were in Dublin that day.

Q. Sorry, on the 22nd, first of all, there was a meeting, I think, is that correct? It's not all that significant. I am just trying to get the exact dates as you remember them.

A. You are absolutely right. I went to a meeting with Owen O'Connell, who was the solicitor to the company, and explained to him the situation.

Q. Now, if I could just go to Mr. O'Connell's note, because that was the beginning of the documentary evidence as it came to us. We'll go back over other notes in due course.

A. Yes. I have it here. Yeah. I think it's Tab 1.

Q. Now, I think you attended Mr. O'Connell's office on the 22nd October, 1997, isn't that correct?

A. That's right.

Q. And you were accompanied by Mr. Aidan Phelan, is that right?

A. That's correct.

Q. Who is Mr. Aidan Phelan?

A. He was my accountant, but he was also working as a consultant on the IPO.

Q. And Mr. O'Connell's note is that there was a discussion re Barry Maloney's allegations. And then there is a hyphen, "Michael ML" means Michael Lowry?

A. That's right.

Q. "Per run". You were explaining matters to Mr. O'Connell?

A. Yeah.

Q. "Payment. Digifone board discussions. Pending meeting. Likelihood of Barry Maloney being called and repeating allegations." Then there was an assessment of that, whether 50/50 or 90/10. Then this is Mr. O'Connell making that note, "Possible consequences, Denis O'Brien to refute etc." Then there is some legal advice which the present solicitors for ESAT Digifone have claimed legal professional privilege in relation to. And then, "Denis O'Brien not relevant, nothing in allegation, no payment to Michael Lowry, allegation very destructive. Spreading it damaging to all, specially company. Starting fire in cinema. Not responsible to inform board. Nor

necessary. No board meeting of ESAT Telecom imminent.

Calling one would create crisis there. Red herring.

Statement not with misleading. Denis O'Brien can  
refute Barry Maloney in box. No payment made."

Then there is more legal advice and privilege has been  
claimed. Then, "Denis O'Brien, no need for concern,  
assurance nothing in it," and Mr. O'Connell initials  
his note, the attendance at the meeting.

A. Just for clarity, Mr. Coughlan, I am not seeking  
privilege on I am precluded from giving you or  
giving the Tribunal excerpts.

Q. The legal advice, yes, I think we explained that. I  
think we should explain it again that you are here in  
your personal capacity. You have no relationship with  
ESAT Digifone or ESAT Telecom now; that those two  
companies are owned by British Telecom now, and it is  
the present solicitors who have claimed legal  
professional privilege in relation to any  
advices sorry, the clients have claimed, that is the  
clients of the present solicitors have claimed legal  
professional privilege in relation to these matters.

A. Yes. Thank you.

Q. Was Mr. Phelan briefed by you of what had occurred  
before you went to see Mr. O'Connell?

A. Probably he was, yes.

Q. By you?

A. Yeah. My recollection, that I arrived back in Dublin, having started the investor presentations, the roadshow, I was in Dublin, I think, for two days for the presentations, and we went to see Owen O'Connell.

Q. Who was the solicitor to ESAT Telecom?

A. To explain to him what might be unfolding in regard to the allegations.

Q. Was there, apart from Mr. O'Connell who was solicitor apart from Mr. O'Connell, who was the solicitor to ESAT Telecom in advising in a corporate capacity, I think ESAT Digifone also had its own solicitors, isn't that correct?

A. There were

Q. Messrs. McCann Fitzgerald?

A. And then there were another four or five firms.

Q. Yes. And these were all solicitors advising in a corporate capacity in each situation, isn't that right?

A. Yeah. Do you want me to explain it?

Q. I just want to get this understanding. Was there a counsel involved in any of the companies in a regulatory capacity?

A. There would have been a head of regulatory affairs in ESAT Telecom, there would have been a head of regulatory affairs in ESAT Digifone as well, and they would have been dealing with licence matters, interconnection arrangements with Telecom Eireann at the time, regulatory

Q. Dealing with appropriate regulatory or State authorities, would that be correct?

A. This was pre the ODTR, so they would have been dealing with the Department of Communications.

Q. Were these matters brought to the attention of the regulatory counsel?

A. In the companies?

Q. Yes.

A. I don't believe so.

Q. Therefore, to the best of your knowledge, no view was sought of anybody who had responsibility in a regulatory capacity in the companies for a consideration of these remarks in the context of the Terms of Reference of this Tribunal?

A. It was all the matter was discussed, this matter and the Telenor matter, was discussed and/or handled by the legal counsel for ESAT Telecom, which is Fry's, IIU, which was Fry's; McCann Fitzgerald for ESAT Digifone; Layton Watkins for the underwriters; Davis Pope, which was or north American counsel for ESAT Telecom; Kilroy's for Telenor; and then McCanns also acted for one of the underwriters. I mean, there were, I think, six or seven legal firms all looking at this all at the time, all at the same time.

Q. But the regulatory counsel in the companies was not asked for his view or her view in relation to these comments in the context of the Terms of Reference of

this Tribunal, were they?

A. I don't believe he was asked an opinion, because he would deal with Telecom Eireann, and this was not in his space, as such. It was more a board corporate issue, and that's why the companies' solicitors were involved.

Q. I understand that aspect of it, but in the Terms of Reference of this Tribunal, the view of the regulatory counsel was not sought, am I correct?

A. I don't think it was.

Q. Getting back to the conversation and the first time that the issue of it being a joke or bravado arose.

That was after the matter had been raised by Mr. Maloney in October of 1997, isn't that correct?

A. I don't quite understand your question. Sorry.

Q. You had a discussion with Mr. Maloney on the 4th October. You may have had a discussion or a number of discussions with Mr. Maloney, perhaps in the previous month, around the time of this term, the Terms of Reference of this Tribunal being published, but the first time reference was made to the conversation being said jocosely, or as an act of bravado, was after the 4th October sorry, 8th October 1997.

A. Yeah.

Q. When was the first time, as far as you can recollect, that reference was made to you having a view that you would look after Mr. Lowry, or intended to make a

payment to Mr. Lowry, but thought better of it and didn't do it?

A. I think that probably would have been discussed, I can't be entirely sure, but sometime around the 23rd.

Q. Of October?

A. Of October.

Q. 1997?

A. 1997.

Q. Can you remember the expression "an intermediary" being used?

A. I think that was raised in a conversation it was part of a conversation on the 13th October during our brief meeting, Barry Maloney, Michael Walsh, and myself, in my office, when Barry came out, I have seen his statement, he has one view, Michael Walsh, I think he has a statement, or in his statement. I don't have any notes of that conversation.

Q. But do you remember using the expression "intermediary"?

A. Not precisely, but I know what I probably meant.

Q. Well, tell us.

A. And that was a financial intermediary, a banking institution, which was Woodchester. That's where my deposits were.

Q. So was it on the 13th October, you believe that there would have been a brief discussion, at the brief discussion between yourself, Barry Maloney, and Michael

Walsh, that you offered as an explanation, that you had it in your mind to make a payment to Mr. Lowry, but thought better of it?

A. I was trying to explain to Michael Walsh the context.

Q. Of what you had said to Barry Maloney on the run, is that right?

A. Well, when I was questioned about, "Do you think you have got problems? I paid  $\frac{1}{2}$ 200,000," obviously Michael Walsh was interested to know what was it all about. I was trying to explain to him that I had a thought, for less than a minute at some stage, that I would try and help Michael Lowry. And ultimately I didn't, when I considered it, and thought about it, I said, no, I am not going to do that.

Q. And why did you say that to Michael Walsh?

A. Because he was asking I think it arose at the meeting. Now, I don't have notes of the meeting, but

Q. No, we can go from your memory. We can go to the notes, and you can come back to the matter again. I just want to try and get your recollection at the moment. You

A. I can read you the answer to the question that was posed to me by the independent counsel that interviewed me, if that's helpful.

Q. I'll come to that in due course.

A. Okay.



Q. I just want to get your recollection of events first, if I may. The meeting with Michael Walsh, Barry Maloney, recounted the conversation, is that correct?

A. Barry Maloney, I believe, has notes of the 13th October.

Q. But what's your memory? Did Barry Maloney tell Michael Walsh, or did both of you tell Michael Walsh what had been said, whether it was on the run or whether it was in an office, I am not that concerned at the moment.

A. I briefly explained to Michael Walsh what it was all about. And soon afterwards, it's my recollection we got talking about a letter because

Q. How did the question of you thinking about making a payment to Michael Lowry arise? That's what I am trying to find out.

A. Well, I don't believe I said I can't remember anything that I said at the meeting of the 13th, which would lead to a conclusion that there was an intermediary other than Woodchester Bank.

Q. I'll come to the intermediary in a moment. Let's go back to the question of why did you say at that meeting, if you did say it, that you thought about making a payment to Michael Lowry?

A. Because Michael Walsh asked what, you know, "What is the  $\frac{1}{2}$ 200,000?" you know, that I allegedly paid, which I hadn't, and what it was it all about, and I am

trying to recollect exactly what I said. But I could have said that I had thought about giving Michael Lowry  $\text{\$}100,000$ , but it was only for literally a minute it was in my own mind. I never told anybody else. And I didn't. And I was happy that I didn't.

Q. And was that to explain to Michael Walsh why you had used the expression, when you spoke to Barry Maloney, "You think you have problems, I had to pay two  $\text{\$}100,000$ "?

A. I think I gave Michael Walsh verbatim the statement that I made on the mountain side, those three or four lines. Then he started to ask me about the  $\text{\$}200,000$ . Then I said to him, explained to him what the position was.

Q. So can I take it that at the time that you had the conversation with Barry Maloney back in 1996, you had, at sometime prior to that, considered making a payment of  $\text{\$}100,000$  to Michael Lowry, and that that was in your mind when you spoke to Barry Maloney?

A. It could have been on my mind, but, Mr. Coughlan, like, you know, it was literally for one minute.

Q. I'll come to that. I am just trying to understand the sequence of events, if I may, Mr. O'Brien. On the 13th October 1997, you had a meeting with Barry Maloney and Michael Walsh?

A. Yeah.

Q. The conversation is recounted to Michael Walsh?

A. Yeah, not in precise form.

Q. Yes. Michael Walsh wants to know what was it all about?

A. Yeah.

Q. You say to Michael Walsh words to the effect that you thought about making a payment of  $\frac{1}{2}$ 100,000 to Michael Lowry, you thought better of it, and you didn't do it.

Is that in broad terms?

A. Probably in broad terms, there or thereabouts.

Q. I am not holding you to those exact words.

A. Okay. Right.

Q. And was that being offered to Michael Walsh as an explanation of why you said to Barry Maloney "I made two  $\frac{1}{2}$ 100,000 payments"?

A. Yeah. I mean, I think I told him the second 100, that it was, you know, that that there was never any payment to anybody, and nor was the first one.

Q. But that in relation to the first one, that you had thought about making a  $\frac{1}{2}$ 100,000 payment to Michael Lowry, and that was in your mind when you spoke to Barry Maloney?

A. You see, it could have been on my mind at the time.

Q. That you spoke to Barry Maloney?

A. On the mountain side.

Q. Right. You think it could have been or it was on your mind?

A. Well, I didn't write a note when I got into my car

after the mountain, so it could have been on my mind or it could not I don't know, to be honest with you.

Q. But you are offering it as an explanation to Michael Walsh of why you said something which might have sounded to Michael Walsh worthy of investigation.

Obviously, he asked about it.

A. Yeah.

Q. And you are offering as an explanation as to why you would have said that, that it was on your mind that you had thought about making a payment to Michael Lowry, you had thought better of it, and you didn't do it.

That is why you said that to Barry Maloney, or it was on your mind when you said it to Barry Maloney, is that correct?

A. That's correct. That's right. We then continued the conversation.

Q. Very good. Now, if I can take you back to the conversation with Barry Maloney. You believe that that occurred on the 17th November of 1996?

A. Yes.

Q. When did you think about making a payment to Michael Lowry and thought better of it?

A. Precisely, I don't know, Mr. Coughlan, but

Q. It must have been before that date, would you agree?

A. It could have been, because I read something in the paper on that Sunday morning.

Q. I just want to ask you when, first of all. It must

have been before that date, mustn't it?

A. No, not necessarily.

Q. It wasn't before that date?

A. You see, I don't recall precisely when I had the thought.

Q. But, Mr. O'Brien, you were offering this to Michael Walsh as some type of an explanation as to why you would have said something to Barry Maloney, isn't that right?

A. Yeah.

Q. So if you are offering it as an explanation to Michael Walsh, can I take it you were doing your best to give Michael Walsh your best recollection of events, and you weren't in any way trying to mislead Michael Walsh?

A. No, my best recollection of events. So it could have been in or around the time of the run.

Q. If it was on your mind the day of the run, it had to have been before the run. Would you agree?

A. Or that instantaneously, but probably more likely on the day.

Q. Now, that was on the 17th November, 1996, isn't that right, according to your recollection of events?

A. To my diary, yeah.

Q. Had you taken any steps to identify or earmark money which you intended for Mr. Lowry?

A. No. All I had thought about was that, and it was only an initial brief thought, it went in and out of my

head, that I would help Mr. Lowry with  $\frac{1}{2}$ 100,000, and I didn't do it.

Q. Did you offer as an explanation at any stage that Woodchester Bank was an intermediary; that you were flush with funds as a result of the successful property deal in the Irish Financial Services Centre and some share matters, and that you had earmarked or identified in that sum of money  $\frac{1}{2}$ 100,000 for Michael Lowry?

A. In question 5, when I was interviewed, that contains the answer on that issue.

Q. I'll come to all these. I just want to at the moment did you offer that as an explanation?

A. Yes, I believe I did.

Q. And you offered that as an explanation to your own solicitor, to the solicitors for ESAT Digifone, and to the members of the board of ESAT Digifone, and perhaps to the members of the board of ESAT Telecom also, isn't that correct?

A. I was asked six questions, and I answered the six questions to the best of my recollection.

Q. You were doing this in a fairly serious context now. Lawyers were seeking answers to these questions, isn't that correct?

A. It got more serious over time.

Q. And you offered it as an explanation to the lawyers and to your fellow board members, both of ESAT Digifone and of ESAT Telecom, isn't that correct, that you were

flush with money, and that you had identified or earmarked  $\text{€}100,000$  in that sum of money in Woodchester Bank for Michael Lowry, but you then thought better of it. Didn't you offer that as an explanation?

A. What I'd like to do is read you what I said, because I was asked the question. I'll read it. "In October, 1996, I had a couple of million pounds of cash from property and share deals and things were going well for me, while ML was under attack politically in the media and someone told me that his company was in trouble. I felt, and still feel, that Michael Lowry had always been above board and fair with ESAT, both as regards the licence and our disputes with Telecom Eireann. I decided that I would help him out with his company by giving him  $\text{€}100,000$ . I earmarked  $\text{€}100,000$  of deposits with Woodchester for that purpose. All of this was on my mind at the time of my conversation with Barry in the mountain side. I pretended that I had already made the payment, and I doubled it for effect. However, shortly afterwards, I realised that the payment, if I made it, would be misunderstood. Thank God I saw sense and did nothing about it. Whether I used the phrase 'stuck with the intermediary', I meant that the earmarked amount was left in Woodchester. For the record, I regularly had discussions with Michael Lowry concerning ESAT Telecom warfare with Telecom Eireann, and wouldn't deny that I would discuss

the auto dialer issue. However, no promises or understanding of any kind were ever sought or given by the minister in relation to the licence."

Q. So you did earmark  $\text{€}100,000$  in Woodchester?

A. As per these notes, yes.

Q. You see, you can forget about the note for a moment, Mr. O'Brien. You told a lot of people, who were conducting a serious inquiry in relation to this matter, that you earmarked  $\text{€}100,000$  in Woodchester for Michael Lowry. Is that correct?

A. It depends how you describe earmark. In the context of this, I had a lot of money on deposit, and I had not moved  $\text{€}100,000$  into a special account or moved money around specifically, but I knew I had  $\text{€}100,000$ , if not more, on deposit; and at the time when I had this thought of giving Michael Lowry, I had the money there to make it, but I ultimately didn't. I thought better of it.

Q. Mr. O'Brien, you were informing people who took this seriously

A. Mmm.

Q. that you had earmarked  $\text{€}100,000$ . Now, I am not suggesting that you would necessarily have had to put  $\text{€}100,000$  into a separate account, on deposit or on call, but who looked after your personal financial affairs?

A. Two people.



Q. Who were they?

A. A woman called Ann Foley and Aidan Phelan.

Q. Did you inform just to clarify matters, Ms. Foley was a bookkeeper, effectively, in relation to your affairs, isn't that correct?

A. Yes, with maybe a wider role than that.

Q. Mr. Phelan was your accountant and, effectively, was your treasury manager, if I could describe him as that, would you agree?

A. I have one of them now, but he was my accountant.

Q. And looked after your personal financial affairs?

A. Yes.

Q. Carried out a large number of personal transactions on your behalf, isn't that correct?

A. Yes, at various times.

Q. Now, you had this money in Woodchester. Did you inform Mr. Phelan that you wished to earmark  $\frac{1}{2}$ 100,000 of that for Mr. Lowry?

A. Absolutely not.

Q. Or earmark that sum of money for sum or sums of money for anyone else?

A. No.

Q. Or identify that you wished  $\frac{1}{2}$ 100,000 kept for some special purpose?

A. No.

Q. So how would anyone dealing with your affairs know that money was earmarked, if you didn't inform them?

A. It was in my own mind. I never discussed it with anybody else. I was asked a question by legal counsel, and I answered the question.

Q. So you informed solicitors, your fellow board members, that you had earmarked money for Michael Lowry, isn't that correct?

A. In the context of a thought.

Q. First of all, did you inform them that?

A. It was in my answers back to McCanns, so they would have copied them.

Q. Did you offer any explanation to the solicitors or to your fellow board members that this was just a fleeting thought for one minute, that you earmarked it in your mind for one minute and that was all it was?

A. Yes.

Q. Where is that written down?

A. Well, basically, it was on my mind at the time of the conversation with Barry, but it was only on my mind for a short period of time.

Q. You are having a conversation with Mr. Maloney. It's immaterial to me whether that occurred in the context of a run or in an office, Mr. O'Brien. Certain words were used. We know where there is a disagreement between yourself and Mr. Maloney as to whether the name Michael Lowry was used.

A. Yes.

Q. You offer an explanation, almost twelve months later in

the first instance, that this was a joke, you were only spoofing. You then offer us an explanation, when Michael Walsh makes inquiries of you, that, "Well, I had it on my mind at the time"

A. Mm-hmm.

Q. "that I had thought about making a payment to Michael Lowry but thought better of it and didn't do it." You then, when the matter is taken up by lawyers on behalf of the various corporate entities, offer as an explanation that you had money at the time in Woodchester, and that you had earmarked  $\frac{1}{2}$ 100,000 for Michael Lowry, but thank God you thought better of it and you didn't go ahead with it. And you are now saying that this was a matter in your mind for about one minute, is that correct?

A. It was I don't know how long I thought about it, but I had a brief thought about it. And I decided against doing it.

Q. Now, if I just deal with the note, which is the answer you were giving to the question which was posed by Messrs. McCann Fitzgerald, I think, question number 5, and your reply. You are answering like this: "All of this info was on my mind at the time of my conversation with Barry on the mountain side. I pretended that I had already made the payment, and I doubled it for effect. However, shortly afterwards, I realised that the payment, if I made, would be misconstrued. Thank

God I saw the sense and did nothing about it. Whether or not I used the phrase 'stuck with an intermediary', I meant that the earmarked amount was left in Woodchester."

Now, can I take it that you thought about this seriously before you wrote down this reply?

A. Without my diary, yes. The dates may be

Q. I am not too concerned about the dates. You say that "All of this information was on my mind at the time of my conversation with Barry Maloney on the mountain side" that is that you had earmarked  $\frac{1}{2}$ 100,000 in Woodchester Bank for Michael Lowry, isn't that correct?

A. The word "information" wasn't used, but all was on my mind, that would be right.

Q. So at that time you had earmarked  $\frac{1}{2}$ 100,000 for Michael Lowry, is that correct?

A. Notionally in my own mind.

Q. You had earmarked it?

A. Yeah, in my mind. Yeah.

Q. You had earmarked it in monies which were in Woodchester Bank?

A. Yes.

Q. Now, what you say is that money was left in Woodchester Bank, that it was there, it wasn't moved out?

A. I didn't touch it.

Q. And can I take it that at this time there would have been other financial transactions of a personal nature,

or perhaps of a corporate nature, taking place on your accounts in Woodchester Bank?

A. Yeah. I mean, they were my main bankers.

Q. So you would have had to have had some general idea in your mind of what was taking place on your accounts in Woodchester Bank to ensure that  $\text{€}100,000$  was left there at this time?

A. I would look at my bank accounts maybe every couple of months. I knew that I had funds, though, on deposit.

Q. So at the time that you were talking to Barry Maloney, and I'll take it on your account at the moment, that this happened while you were on a run. You intended making a payment of  $\text{€}100,000$  to Michael Lowry?

A. I had a thought about making a payment.

Q. Now, you say that all if we go back to the first portion of this particular response you say that "I felt, and still feel, that Michael Lowry had always been above board and fair with ESAT, both as regards the licence and on disputes with Telecom Eireann. I decided that I would help him out with his company by giving him  $\text{€}100,000$ . I earmarked  $\text{€}100,000$  of deposits with Woodchester for that purpose."

So you had decided to give it, isn't that right, prior to the run?

A. It says here I decided that I would help him, yes.

Q. And you had taken a step, you had even in your own

mind, you had earmarked i;½100,000 in Woodchester Bank, isn't that correct?

A. The "earmark" remark is I knew that I had money on deposit, so I didn't move

Q. Mr. O'Brien, this is a serious response you were giving now, when the matter was being taken very seriously.

There were solicitors being involved in that matter, other board members were going to be brought into this matter, isn't that correct? If this was something you just thought about for a minute, and thought better of and didn't do it, why was there any need to go into any detail about it?

A. Because I was asked in detail to give a response.

Q. But you had volunteered this to Michael Walsh on the 13th October in the first instance, when he asked you why the phrase, phrase or phrases, had been used in the course of your conversation with Barry Maloney. You were the one who raised the matter.

A. Can we go to Michael Walsh's notes, because that would help me because that's his recollection of the meeting.

I don't have notes of the meeting, so

Q. I am asking you for your recollection. You were the one just identify this, if you could for me: The question of Michael Lowry was introduced by you, isn't that correct?

A. Yeah well, as per what I am saying here, yeah.

Q. Yes.

A. Yeah.

Q. And people are going into it now in more detail because they want to have a look at this closely, isn't that right?

A. And at the time, yes.

Q. And people are going to be looking going to have to make corporate decisions, and people are going to be seeking legal advice in relation to matters, isn't that correct?

A. Yes.

Q. And this was an extremely significant matter that would have affected the IPO, isn't that correct?

A. Yes.

Q. And can I take it that you were extremely careful in the language you used in responding to the queries raised by the solicitors?

A. I gave an honest account of the questions I did them on my own. I did it on a plane. I didn't spend much time on it, because I couldn't because I was in middle of investor presentations, and I wrote it to the best of my ability, my recollection of all the conversations. It's quite a difficult thing to do when you don't normally spend a day on something like this. I had a matter of hours.

Q. But you again drew my attention to this a few moments ago as being the best account of the matter that you could give, isn't that right?

A. Yes. But I think, Mr. Coughlan, at the bottom of the page I then go on to say and for me that's the most important thing

Q. I'll come to the bottom of the page in a moment. But if I could deal with this portion of the page. You say in this that you had decided that you would help Michael Lowry with his company, and that you earmarked  $\frac{1}{2}$ 100,000 on deposit in Woodchester for that purpose?

A. That's exactly what I said.

Q. So you had decided to do it, isn't that right?

A. I decided, but then I reconsidered, yes.

Q. When did you reconsider?

A. Pretty quickly.

Q. All of this took about a minute, was it, "in my mind"?

A. Well, it was in my mind. I don't know whether it was one minute, two minutes, or ten minutes, but ...

Q. Very good. You say that, "All of this info was on my mind at the time of my conversation with Barry Maloney on the mountain side." So this was on your mind that you decided to do this, and you had earmarked  $\frac{1}{2}$ 100,000 for Michael Lowry. That was on your mind at the time of the run?

A. Yes.

Q. And then you say, "I pretended that I had already made the payment, and I doubled it for effect." That was to get Barry Maloney to make the other payments?

A. That's correct.



Q. Now, I think you said, "I pretended that I had already made the payment ..."

A. "... And I doubled it for effect."

Q. So it was still in your mind to make this payment at that time, isn't that correct, when you were on the mountain?

A. Yeah, and then shortly afterwards.

Q. Is that right? Isn't that right? It was still on your mind at the time of the run, that you were going to make this payment to Michael Lowry, isn't that correct?

A. Yes.

Q. And it was after you had spoken to Barry Maloney, you decided that you wouldn't pay it, isn't that right?

A. Shortly afterwards, yes.

Q. How shortly afterwards?

A. You see, it could have been that day, it could have been the next day. I don't know.

Q. So can we now try and establish exactly the length of time this matter was in your mind. It certainly wasn't only in your mind for a minute and dismissed, isn't that correct?

A. I actually don't remember.

Q. Now, Mr. O'Brien, you have informed us that this is your best account of matters. You have told us here in evidence this morning that something entered your mind for about a minute and you dismissed it. But

here, in your best account, you are informing your solicitors, ESAT Digifone solicitors, your fellow board members of ESAT Digifone, your fellow board members of ESAT Telecom, that you had decided to do this, that this acted on your mind when you were speaking to Barry Maloney, and it was after that conversation with Mr. Maloney that you took the view that you should not make the payment.

A. Shortly afterwards was the term I used.

Q. Shortly afterwards. For how many days was this on your mind?

A. I don't recall.

Q. You do accept that it wasn't just in your mind just for a minute?

A. Well, it says here in my statement, "Shortly afterwards," so I could have had it one minute and then afterwards said no.

Q. If you were offering now, Mr. O'Brien, and I'd ask you to be fairly thoughtful about this, if you could, please. You were furnishing this information for the consideration of people who had to make very, very big decisions, decisions which had legal implications, and decisions which involved consideration of millions of pounds, isn't that correct?

A. Yes.

Q. And you were furnishing them with this explanation.

Now, you did not say to them, "I had a momentary

thought, but I dismissed it out-of-hand." Isn't that correct?

A. I have to this is three or four years ago. I have to go with what I wrote at the time to my board.

Q. Yes. And what I am asking you is this: On any reasonable consideration of this particular written explanation by you, would you not agree that it must have been in your mind for some time?

A. I don't know.

Q. Hmm.

A. I actually don't know.

Q. You don't know. Nevertheless, you were going to ask other people to form a view on a serious matter, and you yourself didn't know, is that correct?

A. I knew there was nothing in the allegations. I knew that I had made no payment, so I was comfortable that the issue was being dealt with properly by the representatives of the board.

Q. Now, I'll have to ask you about this, Mr. O'Brien.

When did you change your mind about making a payment to Mr. Michael Lowry?

A. I don't remember.

Q. You certainly intended to make a payment to Mr. Lowry, on your own account of events, when you spoke to Mr. Maloney on the run or in the office, isn't that correct? Isn't that correct?

A. Well, as per the statement here.

Q. Mr. O'Brien, this is your statement, isn't that correct?

A. That's what

Q. You intended to make a payment to Mr. Lowry when you spoke to Mr. Maloney, isn't that right?

A. That's right, yes.

Q. Can you remember how long before that conversation you had that intention?

A. I don't I actually don't remember.

Q. You don't remember. So, therefore, can we take it, Mr. O'Brien, that if you had that intention at the time, that you were not spoofing Mr. Maloney when you spoke about payment of  $\frac{1}{2}$ 100,000 to Michael Lowry, whatever whether the name was used or not, you were not spoofing?

A. I was spoofing about  $\frac{1}{2}$ 200,000, if you recall.

Q. So can we take it so that it is the doubling it for effect was the spoof?

Sorry, Sir, this is a serious matter, and I am inquiring into

CHAIRMAN: I will certainly intervene if it's necessary.

A. Sorry, could you give me the question.

Q. MR. COUGHLAN: I find it disconcerting, people making noise behind me.

This is a serious matter I am inquiring into,

Mr. O'Brien. It was the second  $\frac{1}{2}$ 100,000, it was the doubling of it for effect that you were spoofing about, is that right?

A. Well, the first  $\frac{1}{2}$ 100,000, as per my statement, was on my mind. The second one didn't exist. So you could deduce that the second hundred was spoof.

Q. So, therefore, whether you use the name Michael Lowry or not, and if Mr. Lowry understood that the reference was to Michael Lowry, there was no spoof about that?

A. I have a different recollection on whether Mr. Lowry was mentioned. He was never mentioned.

Q. Very good. We'll take it on the basis of Mr. Maloney's intended evidence that Mr. Michael Lowry was mentioned. I know you don't accept that. I am just inquiring into that aspect of it now. If it was mentioned, there certainly wasn't a spoof about that, because that was your intention and that was on your mind, isn't that correct?

A. And then shortly thereafter.

Q. I'll come to that in a moment. I just want to get to the nitty-gritty of the conversation, if I can,

Mr. O'Brien.

A. Yeah.

Q. So, therefore, if the name Michael Lowry was mentioned, there certainly was not spoof about it. If the name Michael Lowry wasn't mentioned, and Mr. Maloney understood it to be Michael Lowry, there still was no

spoof about it, because that was your clear intention at the time?

A. My words were that I actually had paid  $\text{€}200,000$ . That was a spoof in the totality, because I never paid it.

Q. But when you break it up into its individual constituent parts, there was not a spoof about a payment of  $\text{€}100,000$  to Michael Lowry, because you had every intention at that time of doing it, and you had earmarked money for that purpose, isn't that right?

A. If you go back to my statement, I will read you the words, "If you think you have got problems, I have already paid 200 grand to other people." So I didn't make any payment.

Q. No, but you had, in your own mind, earmarked  $\text{€}100,000$  for Michael Lowry out of your own deposits, isn't that right?

A. Briefly, and then shortly afterwards I thought the better of it. Thankfully.

Q. But at the time. I am just dealing with the concept of Mr. Maloney being spun a yarn or you spoofing to him. That's the issue I am inquiring into at the moment, Mr. O'Brien. I am not dealing at all with whether money moved or not. I am trying to understand the various explanations you gave and what was acting on Mr. Maloney's mind at the time. Do you understand me?

A. I am trying to, yeah.

Q. That's what I am trying to zone in on.

A. Okay.

Q. Now, I think what you said in this particular statement was that you had pretended you had already made the payment, isn't that right?

A. Where does it say that now?

Q. You say, "All of this info was on my mind at the time of my conversation with Barry on the mountain side. I pretended that I had already made the payment."

A. "And I doubled it for effect."

Q. And you had doubled it for effect. So you are saying that you had doubled something for effect was a spoof, and saying that you had already made the payment was a spoof, notwithstanding that it was your intention to make the payment, isn't that right?

A. Well, the end game was to get him to pay the four people or five people. I can't remember.

Q. I know what you wanted. I just want to deal with this question of something being said out of bravado, jocosely, and that Mr. Maloney should have understood that this was a spoof. In your mind, you intended to make a payment to Michael Lowry. You had pretended that you had already done it. Isn't that right?

A. No yes, I had pretended that I had made the payment, and I doubled it for effect.

Q. That you had made the payment.

A. And then shortly there afterwards.

Q. Then you say, "However, shortly afterwards, I realised that the payment, if I made it, would be misunderstood. Thank God I saw sense and did nothing about it." So when you came off that mountain or you left the office, wherever the conversation took place, you still had the intention of making the payment, isn't that right?

A. No. Because

Q. When did you change your mind?

A. I could have changed my mind later on in the run, when I thought about it, but it was shortly there afterwards. I don't know precisely.

Q. Well, I think earlier you said it was probably it could have been the next day. Another time you said you don't remember. When was it, Mr. O'Brien?

A. It was shortly thereafter.

Q. When?

A. I can't remember.

Q. Did you inform Mr. Aidan Phelan, or did you brief him about this matter?

A. I already said I didn't.

Q. At the time that you were giving this particular explanation?

A. Absolutely not.

Q. Was Mr. Aidan Phelan with you or in your vicinity when you were giving this particular explanation?

A. I don't know where he was. He wasn't running with us.

Q. He wasn't running with you. Sorry, I beg your pardon.



We are at cross-purposes. He wasn't on the run with you?

A. No.

Q. When you were furnishing this particular explanation in reply to the questions raised by McCann Fitzgerald, did you brief Mr. Phelan about this?

A. No, I didn't. I mean, this was produced on my own, the six answers, but he did go on the 22nd, as I explained to you

Q. With you to Mr. O'Connell?

A. Absolutely, yes.

Q. And was Mr. Phelan not privy to this particular matter prior to you furnishing this particular written explanation, which I think would have been around the weekend of the 4th November of 1997, isn't that correct, or thereabouts?

A. I thought I gave it sometime around the 1st

Q. That was in November, anyway?

A. It was before the end of October, anyway, I think.

Before I was interviewed.

Q. Because, on the 30th October 1997, I think Mr. O'Connell has an attendance of a meeting involving JC, which is John Callaghan, is that correct?

A. Can you just show me where you are talking about.

Q. It's at Tab 3.

A. Yeah. "JCL"

Q. J Callaghan, who I think was a director of ESAT

Telecom, isn't that correct?

A. I wasn't at that meeting. I was actually in Milwaukee.

Q. John Callaghan was a director of ESAT Telecom?

A. Mm-hmm.

Q. "LB" is Leslie Buckley, a director?

A. And "AP", Aidan Phelan, and Owen O'Connell.

Q. Do you know why Mr. Phelan was at a meeting with the ESAT Telecom solicitor on that day?

A. Well, we would have had two or three people working on the IPO as consultants, and he was one of them.

Q. Right.

A. So this was an IPO issue, and that's why he was there.

Q. This matter was an IPO issue, wasn't it, the conversation?

A. Yeah, it became an IPO issue.

Q. Now, if you go to item number 3. You can see, "Payments - DOB/Barry Maloney discussion and FG. Intermediary - Woodchester? Other 100K? 'Payment stuck etc., per F. A. letter." That's Mr. Fergus Armstrong of McCann Fitzgerald, isn't that right?

A. Mm-hmm. That's right.

Q. Was Mr. Phelan there on your behalf?

A. No. He was there on behalf of the IPO process, which he was actively involved in.

Q. Did he have any discussions with you about the conversation with Barry Maloney and these other matters

of an intermediary and Woodchester and the other 100K?

A. He would have been there for the initial meeting on the 22nd October, when we briefed our solicitor for the company about the allegations. And then I see he is at this meeting.

Q. Well, you can see that there is reference at that meeting that a statement from Woodchester would be necessary. Do you see that?

A. Yes.

Q. "Statement from Woodchester definitely needed." Can I take it that Mr. Phelan would have been aware

A. He would you have been

Q. He would have been aware of your banking dealings with Woodchester?

A. Of course he would, yeah.

Q. And he would have handled many of those on your behalf, would that be correct to say?

A. Yes.

Q. So he was aware of Woodchester and any other banking arrangements which you had?

A. Yeah, he would have. Yes.

Q. And you can see that, item number 1, you see "Asking questions (possibly before communicating formally to ET Telecom board and underwriters) next Tuesday - Dublin - DOB by videoconference. Inquisitor from McCanns Fitzgerald - no comment, opinion or judgement, (not FA himself)"

So what was being discussed here was that there was going to be questions put by a lawyer to you and some other people, isn't that correct?

A. The lawyer had no association with work, so he was somebody independent. He was a fellow called Michael Kealey, I never met him, and he was the inquisitor.

Q. But it was for the purpose of putting questions to you?

A. Yes.

Q. Barry Maloney, and then because the other issue arose of the political donation, Mr. Johansen or somebody from the Telenor side, isn't that correct?

A. Yeah, that came up when I was away, yes.

Q. And this was to be done by videoconference with you in the United States, is that correct?

A. It didn't happen by videoconference, but it did happen.

Q. It was just a video conversation?

A. Teleconference with everybody on the call.

Q. Now, that was on the 30th October of 1997, and am I correct in thinking that you were visited by

Mr. O'Connell, who was solicitor to ESAT Telecom, on the

A. 1st.

Q. 1st November.

A. On behalf of the board.

Q. On behalf of the board. That meeting took place in Boston, is it?

A. Yes, it did.

Q. Mr. Aidan Phelan was also there, was he?

A. He was in Boston, but he wasn't really part of the meeting.

Q. But he was in Boston.

A. Yes.

Q. And I think, when Mr. O'Connell went to Boston, he went as the solicitor to ESAT Telecom board, is that correct?

A. Yes.

Q. And he had sight of a letter from McCann Fitzgerald, which was raising certain queries, isn't that correct, that needed to be addressed?

A. Yes. He was asked by the board to report on this whole matter, and part of his work was to come and interview me in quite some detail and then report back to the board, and take an account of all the other evidence as well.

Q. And why did Mr. Aidan Phelan go to Boston? He had been in Dublin, I think, on the 30th October, 1997, and he was in Boston on the 1st November.

A. He was coming over for the second part of the US roadshow.

Q. And what was his particular role in the US roadshow?

A. Because he was an adviser to the company.

Q. Doing what? What was his role in the roadshow?

A. Well, advising us well, I mean, it was four to five

of us at any one time on the roadshow, and he would come in and out of the roadshow. I was there all the time with Paul Connolly, and then other people would join and leave the roadshow.

Q. And when did Mr. Phelan come back to Ireland?

A. He would have come back at the same time as Mr. Connolly, myself, and Mr. Parkinson.

Q. When was that?

A. The 8th/9th certainly the next day after the IPO. The IPO was the 7th, I believe, of November '97, and so we had a bit of a celebration, and then we went home then a day later.

CHAIRMAN: Mr. Coughlan, I think it's probably a suitable time, it's just after ten to one, to adjourn for lunch. May I just say this briefly, ladies and gentlemen, that people attending Tribunal sittings have invariably been courteous and attentive, and I have no wish to appear in even the slightest degree school master-ish, but we are on a particularly important piece of evidence in the course of these sittings, and it is very important that Mr. O'Brien, along with every other witness, be enabled to put forward the best possible account of himself. So I would ask in the afternoon that even the mild amount of audience reaction that once or twice was evident please be curtailed. We will resume at five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH:

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

Q. MR. COUGHLAN: Mr. O'Brien, before lunch when we were exploring the circumstances surrounding this conversation with Mr. Maloney, I think first of all you were of the - or you gave an explanation for it in October of 1997, that it was bravado or a joke?

A. In jest, yes.

Q. In jest. And then you gave a further explanation that what was on your mind was this intent to make a payment to Mr. Michael Lowry, I think that was when Mr. Walsh, from IIU, became involved in the discussions on the afternoon of the 13th of October 1997, isn't that correct?

A. Yes.

Q. And I think here this morning you have informed the Tribunal that this was something which you thought of momentarily and decided that's wrong, isn't that correct?

A. Yes.

Q. Which one of those explanations do you say is correct?

A. Well, if I could deal with the last one, because that's the one I just remember now you asking.

Q. Yes.

A. I think could you start again. Sorry, I lost my concentration for a minute. If you could break it up in three parts.

Q. Indeed. A conversation took place, leave aside where  
ann at what place?

A. Okay.

Q. In October of 1997, on the - in October of 1997, the  
first explanation is that this was bravado, jocose, in  
jest?

A. Mm-hmm.

Q. Or words to that effect. Mr. Walsh becomes involved in  
your discussions on the afternoon of the 133th of  
October 1997, and the question of an intention to make  
a payment to Mr. Lowry enters the equation, isn't that  
correct?

A. Yes, I described what was on my mind.

Q. Yes. Then today in the witness box you have said that  
this intention entered your mind momentarily and then  
you thought better of it?

A. Yeah, it was a fleeting thought.

Q. Which - now, I think you also in the witness box, but  
you may wish to deal with this also, said that it was  
probably the day after the wrong, if it was a wrong,  
that you put it out of your mind, is that correct?

A. I said, to be precise, I believe I said anyway, that it  
was at the time or in or around that time. It could  
have been that day, it could have been the next day,  
but certainly within a very short period of time of the  
run.

Q. And I think you also agreed that if the intent was in



your mind, at the time you had, or if you had the intention at the time you had the discussion with Mr. Maloney in relation to Michael Lowry, that is a repayment to Michael Lowry, that there was no evidence of bravado or jest about that, at that time?

A. I only had a brief intention.

Q. I see. So which explanation for the conversation is correct? The Tribunal needs to establish that.

A. Well, what I've described of my conversation with Michael Lowry, or, sorry, Michael Walsh, excuse me, I was trying to explain to him the context of the conversation.

Q. Yes. But the Tribunal - there are a number of explanations. It was just pure jest. That does not seem to stand out, would you agree?

A. No, I understand by my original statement when I said that basically the remark was false, that it was done in jest, and that was, "if you think you've got problems, I've got to pay 200,000".

Q. But I am asking you to reflect on the conversation, your state of mind at the time. You have an intention to make this payment to Michael Lowry in your own mind, you had earmarked the money, in your own mind?

A. Well, that's the answer I gave on the question 5, yes.

Q. Yes. So can we, for the purpose of the Tribunal attempting to understand and clarify this matter, this wasn't just a joke?

A. Sorry. The comment that I made to Barry Maloney was a joke.

Q. That was a joke?

A. Yes.

Q. So that's the explanation: it was a joke?

A. I said in my statement, I said -

Q. Sorry. It was just a joke?

A. I've said that it was - I described it as bravado, and that it was a false remark.

Q. So it was just, as far as you were concerned, a joke?

A. Sorry, I described it as bravado on my part. I didn't say it was a joke.

Q. Sorry. Said in jest?

A. In jest.

Q. Now, is bravado not something different? And I am not holding you to this. Is bravado not something different to something said in jest?

A. It depends what context you use the word.

Q. I am not trying to hold you.

A. I would have to go and look up a dictionary but bravado was a word I used in my draft statement. Probably if I spent more time on my statement I may have changed that word.

Q. Well, can I take it so, if we go back to the initial conversation with Barry Maloney, was everything you said to Barry Maloney false?

A. What I said to Barry as that I'd paid 200,000. That

was false.

Q. And in relation to the explanations which you then furnished, is there any aspect of those explanations which is false?

A. No. I stand by what I answered in question 5, which I read earlier when you were examining me on it. And I believe the most important thing is that I said all of this was on my mind at the time of the conversation

Q. Yes.

A. with Barry on the mountain side. "I pretended that I already made the payment and I doubled it for effect.

However, shortly afterwards I realised that the payment, if I made it, would be misunderstood."

Q. So you intended to make a payment?

A. Briefly.

Q. We'll deal with that one. You intended to make a payment, Mr. O'Brien?

A. In my own mind, yes.

Q. And you identified the amount?

A. Then I considered it though.

Q. But you identified the amount in your own mind,  $\frac{1}{2}$ 100,000?

A. It was a figure in my mind, yes.

Q. And you identified out of which account the money would come?

A. No. But I knew that I had money on deposit in only one bank, so it wasn't any specific bank, it was just the

bank that had money in it.

Q. Now, I'll come to deal in due course with Mr. Maloney's notes of various meetings and Mr. Walsh's notes of various meetings, but for the moment I just want to refer to some of the notes which Mr. O'Connell drew and which started off the documentary aspect of this evidence.

A. Sure.

Q. If you go to Tab number 4. And that is a note made by Mr. O'Connell of an attendance on Mr. Walsh. Do you see that?

A. Yes. We were trying to figure out what this was, but I think certainly Michael Walsh is giving - making some commentary to Owen O'Connell.

Q. Yes.

A. But it's undated so we don't know where it really fits it in the evidence.

Q. Yes. But what Mr. O'Connell is recording is that it's some attendance on Mr. Walsh, probably by telephone, that Michael Walsh and "no denial of existence of intermediary and suggestion was it was Wood," meaning the Woodchester, I presume, "jarred a bit, but people prepared to accept it."

And then Barry Maloney: "Didn't Denis say money had been moved to an intermediary and got stuck.

Michael Walsh responded, no recollection.

Intermediary statements coming from Barry Maloney.

DOB talking about Woodchester - didn't deny existence of intermediary.

No real discussion of second 100K." And then, "Monday, the 13th October," refers back to a meeting of Monday the 13th of October, "Barry Maloney, Michael Walsh, Denis O'Brien, first meeting, Fergus Armstrong not present, Malt House 30 mins. On the 23rd of October Barry Maloney referring and ^pressure money had gone to a third person out of O'Brien control. Michael Walsh did not support this. Barry Maloney expressing an interpretation of what Denis O'Brien said. JC," that's John Callaghan, I presume, "Barry Maloney had said in the document his stuck in intermediary. DOP was asked who intermediary was and said Woodchester."

So I take it that you have no difficulty in accepting that you did mention an intermediary?

A. Well, first of all, I wasn't part of this conversation.

Q. Mm-hmm.

A. Secondly -

Q. I am referring back to conversations that you had with Mr. Walsh and Mr. Maloney. That seems - it seems to be some sort of a record of that being imparted to Mr. O'Connell?

A. I think Mr. Maloney had one view. Michael Walsh had a different view.

Q. Yes. That is the question of whether it went to a

third party, but you remember the word "intermediary" being used and you offering as an explanation that it was Woodchester?

A. Woodchester, yes.

Q. But the word "intermediary" was used?

A. Yes. It seems that way from the notes, but again I don't have - I was in New York at the time so I wasn't in on the conversation.

Q. Yes. Now, I think what is being, perhaps, being reported to Mr. O'Connell is the views of you being present at conversations, perhaps, on the 13th and the 23rd of October. Would that be correct?

A. I have my own notes for the 23rd.

Q. I know you have your own notes for the 23rd.

A. So I could take more heed from them, from my personal evidence.

Q. Very good. We'll come to those in a moment.

Now, there can be little doubt, I take it, that you used the expression "intermediary" and you used the expression "Woodchester"?

A. I'm not sure who mentioned the word "intermediary" first, but when the word was put out, my assumption always was that it was Woodchester.

Q. Woodchester. Now, did you use the name Woodchester, do you believe?

A. Well, in my answer to question 5, certainly I used the

word "Woodchester."

Q. Yes.

A. And whether or not I used the phrase "stuck with an intermediary", the earmarking that was left for Woodchester, I am paraphrasing what I said in my questions.

Q. Yes.

A. Reply to the questions. But basically I don't remember using the word "intermediary" on the 13th.

Q. Well, if you look at Mr. O'Connell's note, and this is something being attributed to Mr. Walsh, the note begins, "No denial of existence of intermediary" and suggestion that it was Woodchester "but people prepared to accept it." Do you see that?

A. I can see the note here, but I wasn't present for this conversation, so I am taking it -

Q. You weren't present when Mr. Walsh informed Mr. O'Connell in it?

A. No. I mean, this is a conversation, I think; we don't know.

Q. Yes.

A. Between Michael Walsh and Owen O'Connell.

Q. That would essentially be correct. But it seems to be Mr. Walsh informing Mr. O'Connell of meetings which had taken place with you and Mr. Maloney, to some extent?

A. That's what we think.

Q. That seems to be, and that seems to be the only sense

one could make of it.

A. I mean, I am trying to be helpful, Mr. Coughlan.

Q. Yes, indeed.

A. I wasn't there for the conversation. I think we need to direct that to the other participants in the conversation.

Q. You mean, the conversation with Mr. O'Connell?

A. Yeah.

Q. Very good. Now, I think the next thing that happened was Mr. O'Connell came to see you in the United States, I think in Boston, on the 1st of November. Is that correct?

A. Saturday the 1st.

Q. And it was at that meeting that you gave Mr. O'Connell your handwritten responses to the queries which had been raised by McCann Fitzgerald, solicitors, isn't that correct?

A. I think I either gave them before or after. I either sent them to him on the Friday or I gave them to him on the Monday. I can't precisely remember.

Q. It was around the same time?

A. Yes.

Q. And Mr. O'Connell had prepared a number of queries himself, isn't that correct?

A. From his notes, you can see that he had - he had worked on them over in the plane.

Q. Yes. And I think he went through these matters with



you, isn't that right?

A. I better explain the circumstances. I remember being in a hotel, Owen O'Connell would be there asking some questions. To say precisely what questions he asked me, I don't remember. At the time I was absolutely exhausted, and I wasn't that happy about having to spend four or five, six hours in a room answering all these questions, but I knew it was a necessity.

Q. Yes. Mr. O'Connell had flown out from Ireland for the purposes. It was certainly serious stuff, wasn't it?

A. It was certainly serious stuff, but I think, having been on a roadshow meeting, you know, 30, 40 people a week, making presentations, different presentations, ten a day, you need a break. I wasn't getting a break. So a detail of these notes, I didn't keep any notes. So I am relying on these notes, as such, for my records.

Q. Oh, yes. Of course. And one would expect that Mr. O'Connell, as a solicitor, will be keeping a reasonably accurate note. The notes, as we've seen, seem to reasonably cover various matters which occurred around that time, don't they?

A. Well, thankfully, he did keep notes of everything.

Q. Yes.

A. In this process.

Q. Yes. And I think that Mr. O'Connell was identifying the various issues when he was going out on the plane,

and he has informed the Tribunal that some of the writing - you have them at Tab 5.

A. Yes. They are typed, if you want them, no, it's the handwritten ones. I don't have the typewritten ones, but it's

Q. In fact, we'll see how he brings it up. He wants to know what was said, where in the context, how the subject arose. And then you see that writing to the right?

A. Yes.

Q. I think he's informed us that these would perhaps have been responses which you made to questions he put to you. And that seems to refer to how the subject arose, outstanding invoices.

A. It could be, but I don't have - I don't actually but it looks as if these little notes were done when he went through these questions. It could be.

Q. And one expects that Mr. O'Connell will be keeping a reasonable note of the responses you gave?

A. He certainly did.

Q. Yes. So it arose in the context of outstanding invoices, isn't that right?

A. Yeah, the four people, or five people.

Q. He goes on, "Who said what? Conclusion. Further references since." And then he has an arrow to "Moriarty". So that seems to corroborate the view that something arose after the terms of reference of this

Tribunal were published and that some discussion must have taken place between yourself and Mr. Maloney?

A. Yeah, as I said this morning, July/August was when Mr. Maloney questioned me.

Q. He goes on then, "What is Barry Maloney's version?

agree/disagree

explain disagreement

collaborating evidence, (otherwise)" and then a note, "only circumstantial." Do you know what that refers to?

A. No, I actually don't.

Q. Then you go over the page: "Why reasonable for DOB to

accept comments of such a potentially serious nature if made jocose; bravado." Do you remember being asked about that?

A. See, I know he asked me a rake of questions that day, and it looks as if these are the notes of the questions that he was going to pose. Now, on many of them he hit me with, I don't know. So precisely I can't say what answers I gave to these questions at that time.

Q. Do you have any recollection of this meeting with Mr. O'Connell?

A. Oh, absolutely I do.

Q. He came - it came up because this was a very serious matter.

A. Yes.

Q. I think, he was, at the time, continuing with his note,

"context, social sporting, old friendship, unpaid invoices." Do you remember you discussing that with him?

A. Not precisely, but he probably would have asked me about those things.

Q. And he goes on to the area 3 where there are disagreements between your account of events and Mr. Maloney's account of events: "Where does Barry Maloney allege? Denis O'Brien's office." He is questioning then whether the rooms regular? Purpose - business/social?

Any trigger event causing remembrance - ankle sprain."

And then go on to the diary to query dates.

A. Mm-hmm.

Q. And then it goes on down: "Barry Maloney says October/November against Denis O'Brien, October 4-6 weekends versus 11. (One either end of the month.)"

And then just the question of check with your personal assistant re your diary.

A. We did that subsequently, the 17th of November was, we believed, the day.

Q. Then if you go to 4, there is a second payment reference, "relevance of question if first denied? no obvious suspect.

who would come to mind, Denis O'Brien?

"Mitchell no, consultant." I think that was a reference to Mr. Jim Mitchell, who was in fact your

consultant?

A. I think he may have put that there. I would never have said that.

Q. You didn't say that?

A. No, I have no recollection of saying - anyway, it would be incorrect.

Q. There is a correction, do you not see the way the note is written, "Mitchell" and then, "no, consultant." Do you see that?

A. Maybe he had written Mitchell on the plane and then when he was asking the question, I said, no, and he was only a consultant.

Q. Mm-hmm. Then what's the next word?

A. "Exaggeration".

Q. "Exaggeration re invoices?

ML mentioned?" And your response to Mr. O'Connell, according to this note is, you can't recall.

A. Well, I can't recall ever mentioning.

Q. You can't recall mentioning?

A. Absolutely.

Q. I just want to be clear about this. You are saying you can't recall, you are not saying you did not mention

Michael Lowry. Is that right?

A. He says here "ML mentioned."

Q. Yes.

A. And I don't know whether he wrote "can't recall" on the plane or he probably - it could have been the other

way, that was an answer that I made -

Q. Mr. O'Connell's - if I am correct in my understanding about what Mr. O'Connell has informed us, these notes, is that those comments are your comments. He has "Michael Lowry mentioned?" He is querying it.

A. Mm-hmm.

Q. And your response, according to Mr. O'Connell's note anyway, "can't recall."

A. In the context of our mentioning.

Q. So can I take it that you just cannot recall mentioning Michael Lowry? You are not saying you did not mention the name Michael Lowry?

A. I can't recall ever mentioning.

Q. You can't recall ever mentioning that. You are not saying you did not mention the name Michael Lowry, is that correct?

A. It's my belief that he never mentioned his name.

Q. Then you go over to 5: "Denis O'Brien statement of the 23rd of October 1997." And we come to you have notes of that meeting. "Stuck with intermediary." Then: "Critical issue - attempt, conspiracy, etc.. Woodchester reference." And then there is, I think it's NB, JC call, confirmed Michael Walsh. Had thought about making a payment, but chose not to do it."

This seems to be Mr. O'Connell's note of matters which appeared in other documentation he saw, and was bringing to your attention. Do you remember having a

discussion about that with Mr. O'Connell in Boston?

A. I don't

Q. You don't. And then Mr. O'Connell goes on then

"Further/supplementary

intention

contacts with Michael Lowry," then a reference,

(Catherine related)?"

A. That's how -

Q. That doesn't arise.

" attempt (conspiracy issues)

acts designed to make or facilitate a payment

acts/discussions by" - I can't make out that word

"with others.

Identity of intermediary. Please phrase, 'stuck with

intermediary' quite specific. Quite specifically

striking. Address specifically." And then

Mr. O'Connell note goes on: " how "stuck" what

actually happened?" And then there seems to be a note

which is a reference to a response to you. "Stuck,

just left in bank." Do you remember telling

Mr. O'Connell that?

A. It looks the way he is writing the answers to all the

questions that small little writing with arrow out of

it or whatever, could mean that that was my question,

but - or my answer, but it's not so.

Q. I'll come back to that in a moment. "If statement

acknowledged and not adequately explained, serious

effect re Tribunal, press."

A. "Pols".

Q. "Pols."

A. " share values".

Q. "Desire/intent or attempt?" Now, do you remember having a discussion with Mr. O'Connell about the need to explain the statement "because there were serious effects re the Tribunal," this Tribunal, I presume, "press, pols and the share value." Do you remember having a discussion about that?

A. No, the only thing it was was that he told me that he was writing a report to the board about the whole issue, and that I would be interviewed by a specialist inquisitor within, you know, the following week. And that's what I believe - I mean, that was the teleconference on the 4th of November.

Q. Yes.

A. It's my own understanding, he wrote all these notes, he put everything down on paper on his flight over.

Q. Yes.

A. And whatever thought that came into his head, he just put it on the paper.

Q. Yes. That seems to be correct. And he's trying to identify all of the issues or as many as he possibly can do?

A. But then his report would probably - would lead you, probably, to the answers.



Q. But, Mr. O'Brien, I think Mr. O'Connell has told us that the answers are the ones that are written in the margins and were given by you. That's what I am interested in.

A. It seems that way, but I don't precisely recall how he took the answers back down. Did he write it on his existing notes? Because I only saw these notes when the Tribunal sent them to me.

Q. Yes. But you have no reason to doubt that Mr. O'Connell made these notes at the time?

A. I would take Mr. O'Connell's word.

Q. Yes.

A. But I can't remember - I remember going into a room and being barraged with questions for hours, but the precise questions, I just can't answer them.

Q. And I can understand. I wouldn't expect that you could remember the precise questions that were put to you over a period of time. But I take it that you have no difficulty in accepting that Mr. O'Connell, as a responsible solicitor who had a note and was keeping a note of certain responses, would do that accurately?

A. He probably would, yes.

Q. Definitely, it would be true?

A. Well, he - he kept accurate notes, so far as I am concerned. Because if you look at his other notes that he gave you.

Q. Yes.

A. I wouldn't doubt their accuracy.

Q. Now the note continues: "What was Lowry's situation at the time? How likely payment?

When, where, to whom was 23 of October '97 statement made? Any notes available? Negative not proven, though. Address exact circumstances in which statement made. Phrase "stuck with intermediary" has recurred often, very thorough explanation if statement made/not made.

If not made,

shall tell board. Underwriters? (Board obligation, so advise, if matter material, misleading, etc.."

A. And then "Halpenny".

Q. Mr. Jerry Halpenny, another solicitor in the firm at the time?

A. Yes.

Q. Then the note goes on "Telenor "ad in paper"?

Fergus Armstrong, communicate underwriters directly?

Has he done so?

If made,

indication of intent or attempt (critical difference)

whether other(s)involved?

Intermediary - Woodchester or another (with account in Woodchester)?

Why "stuck". How could a payment get stuck - modern banks can easily make payments. Did another intermediary keep (steal) the money? If so, why no

action taken?" That is if the money was stolen, why was no action taken? "Why made presumably after licence" and then there is legal advice. "Barry Maloney apparently accepts no payment made (worth of this belief? - irrelevant) NB paragraph 6 intend, not intent, conversation/contacts with minister, presumably lots per Telecom Eireann disputes - DDIs, audio dialers, etc., licence discussed? (NB independent procedure x 2 - AA" a reference to Andersons, the consultants, "And civil servants - ability of minister anyway).

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

Why were civil servants competent enough to break precedent and go to press conference if they felt minister could have influenced civil servants don't usually trust ministers."

And then in relation to question 6. "Reference to Woodchester as "intermediary" consistent with Barry Maloney account 13th October. If not, which to be preferred.

What is Barry Maloney's account of 13th October written down? Anywhere else there?

Implication that Woodchester as intermediary not consistent.

This the most puzzling question what lies behind it?

Is the suggestion that there is another intermediary -  
instead of or as well as Woodchester?

Does 13th of October mean 13th of October 1996? Hardly  
if Denis O'Brien and Barry Maloney statements  
inconsistent, how should resolve (written statements  
don't seem to be inconsistent).

7. Verification or documentary evidence re relevant  
accounts at Woodchester, payments to or from, account  
holder,

Catherine any accounts? Others, Aidan Phelan, PC  
O'Connell

ESAT Telecom Communicorp., etc. presumably audited.  
chester

accounts? Past (closed) accounts, track lodgements by  
Denis O'Brien to other accounts and get payments out of  
them. (Probably not possible if unconnected to him.)

Where was 100K supposed to have been paid? If any  
general view, maybe get all statements of period.

Maybe even get all payments out of Woodchester in  
period on all accounts, of 150K. Impractical."

And then we go on to the Telenor issue:

"Contribution transaction."

A. "DOB recommendation"? whether true".

Q. Yes. "Whether true. Other involvement. Reimbursement  
- how done - ESAT Digifone to ESAT Telecom.

Documents/receipts, e.g. Fine Gael - presumably not).

Bruton. What did he know? That Telenor had paid re launch (licence decision only couple of months back). Who attended launch? Not much to go on here even for drafting questions.

Miscellaneous,.

Denis O'Brien statement only "draft" - finalise.

Draft ESAT Telecom directors letter (conform McCann, letter if possible - "collaborative investigation, etc."

Barry Maloney statement does not describe conversation.

Board disclosure, underwriters disclosure," arrow, "prospectus, market" arrow?

The next one ESAT Digifone insistence to acquire personal and corporate protection?

Get 16th October letter Fergus Armstrong," arrow, "board".

Then there is: Legal advice," then at the end:

"Michael Lowry, Carysfort Avenue house - anything known re funding, any involvement?" That last reference there, Mr. O'Connell, I think, has informed the Tribunal, refers to something that he had seen in the newspaper around the time he was going to America.

Now, tell us what you actually remember of the meeting

with Mr. O'Connell.

A. As you can see, he was having a mini Tribunal, in other words, he had taken all the issues that were there and he created questions, statements, things to remind him of things to ask me. And that's what I believe he went through on the day.

Q. Mr. O'Connell was taking this very seriously.

A. Everybody was. At first we didn't, because we felt that it was just, you know, somebody causing trouble to stop the IPO, but then when we found that the person concerned was seriously trying to impact what was going on and changed the timing of the IPO, then everybody was on red alert to go through everything and make sure that the whole matter was investigated properly.

Q. So this was a very serious matter?

A. Quite definitely.

Q. Yes. And you were able to inform Mr. O'Connell that money had been left in Woodchester, isn't that correct?

A. Well, it goes back to my brief thought, and that, as I said in one of my statements, that I had earmarked money in my mind, that I had done nothing else about it.

Q. Because the next set of documents is, in fact, your own set of documents, and these are the answers which you were giving to questions which were raised by Messrs. McCann Fitzgerald?

A. I think the 29th October letter, yes.

Q. And question 1 - question 1: "Whether Denis O'Brien's explanation of the conversation, October/November is in accordance with Barry Maloney's impression." Isn't that right?

A. Yeah, that's the first question.

Q. And the note you make at the time is: "My recollection of the conversation that it was not serious..."

A. "Non-serious".

Q. "That it's too very old pals bullshitting about..."

A. "business".

Q. "... business, sport and women out on a ..."

A. "...Run."

Q. "... run one Sunday morning. What's crossed out?"

A. Crossed out, "that's but" -

Q. And then what's crossed out under that?

A. "This is a very serious subject," in other words, I thought that somebody would say to me, look, this is going to be serious. "It was not serious in the context, it was just craic".

Q. From the evidence you've given, that just isn't so. Would you agree?

A. I stand by the answer that I gave to this question.

Q. Which is what that it was crack?

A. No, you see, I crossed out that.

Q. Yes.

A. Okay.

Q. That's what I am saying: this was a serious matter.

A. Everything that's not crossed out is the answer to the question.

Q. Very good. Very good.

A. And all subsequent questions as well.

Q. Very good. Well, let's go to question 2: "Whether it's reasonable that comments of such a serious nature would have been made out of bravado?" And what was your answer to that?

A. "Yes, anybody who knows me knows that I will not - just don't take myself generally too seriously. I have known Barry Maloney for 22 years. We have had the most extraordinary experiences. Nothing was sacred between us and there was nothing that could not be joked about." That was my answer.

Q. Yes. Question 3: where the conversation took place.

A. Will I read the answer?

Q. Yes, please.

A. "I remember the conversation taking place while running in the Wicklow mountains near Roundwood in October last year. On the day in question I remember badly twisting my ankle. I checked my diary and I put a note to my personal assistant.

Q. Yes.

A. Okay.

Q. Question 4: "Significance of second 100,000".

A. I'll read the answer. "There was no first payment, nor any second payment. I said I paid out two amounts of



100,000 each out of bravado to persuade Barry to get the finger out and pay bonuses to PJ Mara, Eddie Kelly and Stephen Cloonan.

If payments had ever been made most people would assume one of them would have been to ML. But there is no one else who could be assured to reasonably have got payment of that scale.

There was nothing in the mind of either of us as to who was second 100,000 person might be. As I said, the whole thing was just bravado."

Q. Yes.

A. The next question doesn't have a number.

Q. Yes, that's right.

A. But is it 4?

Q. "Re conversation," I think is it headed?

A. It just goes on, I think.

Q. "My recollection is -"

A. "A conversation while I was running on the mountain.

However, it was over a year." Well then I've deleted because I wasn't sure.

Q. Yes, okay.

A. Then the characterisation/context, shall I read on?

Q. Yes, please.

A. "I repeatedly asked Barry Maloney to pay out the bonuses to all the people who had worked on the bid on a contract basis. These include PJ Mara, Stephen

Cloonan, Edward Kelly and Enda Hardiman. BM was dragging his feet, in particular with PJ Mara and Stephen Cloonan. Every time I would meet Barry Maloney I would again ask him to pay them. It was getting embarrassing for me and the people concerned. This was the context of my October conversation."

Q. Question 5, we've already read.

A. Yes.

Q. This morning, is that right?

A. You want it again?

Q. Unless you wish to read it again?

A. No.

Q. It's in evidence.

A. Yes.

Q. Question 6, then. "13th of October meeting versus 23rd of October meeting, account/intermediary," is that right?

A. Will I read it?

Q. Yes, please.

A. "I don't remember saying anything at the 13th of October meeting which was only for half an hour which would lead to conclusions that the so-called intermediary was anyone other than Woodchester.

Anyway, I don't see the importance of this since

Woodchester would only have been used to transfer money if I had made a payment - they would have been an intermediary only in the sense of making the payment.

I think there might have been a misunderstanding here between me and Barry." And then I recalled the my conversation - my conversation and I wanted to check with Michael, you were at the meeting, what do you think?" Michael Walsh, that is.

Q. Now, I'll go into the meeting of the 4th of November, but I just want you to describe to me, this is when the solicitor from the McCann Fitzgerald was acting as inquisitor, is that right?

A. Yeah, a fellow called Michael Kealey.

Q. Yes. Where were you?

A. I was in San Diego at 4:00 in the morning.

Q. Were you on the other end of a telephone?

A. Correct.

Q. It had been intended that there would be a video link-up, isn't that correct?

A. I can see that from somebody's notes, yes.

Q. Do you know if any arrangements were ever made for such a link-up?

A. They probably could have, but I don't think it was a video link-up in Dublin at the time.

Q. I see. Now, the purpose of the meeting was to allow this lawyer, who was not advising any of the companies involved, to ask questions of you and Barry Maloney, and as it transpired, some of the Telenor people because of the second issue of the contribution arising, isn't that correct?

A. To be honest with you, I was only concerned about myself at the time.

Q. Yes.

A. And all I wanted to do was answer the questions that this fellow was asking me.

Q. Yes, but am I correct in understanding that that was the purpose, to enable the - your fellow directors to satisfy themselves about certain matters?

A. Yes.

Q. Nobody had an opportunity of seeing you when you answered the questions, isn't that correct?

A. Well, I was at the end of a phone.

Q. I was just asking you, nobody actually saw you while you answered the questions?

A. I would have been happy with a video conference.

Q. I am just asking you the question. Isn't that right?

A. No.

Q. And I think would it be correct to say that you had a general understanding of the line of questioning that would take place?

A. Yes, I knew what were the most important issues.

Q. Now, I think arising out of that meeting or for that meeting, information was obtained from Woodchester bank, isn't that correct?

A. I didn't see the information, but, yes, it was. I never - didn't get a copy, but it was sent in.

Q. Yes.

A. Yes.

Q. And I think that has been furnished to the - this information was supplied, perhaps to Mr. O'Connell, the account or the statement or a letter was obtained from Woodchester and your bookkeeper provided explanations to Mr. O'Connell in respect to the various drawings, isn't that correct?

A. I told her to go through every payment and describe them in detail. I'm not sure whether it was Mr. O'Connell, I think it was Mr. O'Connell.

Q. Well, anyway, to one of the lawyers involved, but I think it was Mr. O'Connell?

A. Yes.

Q. And that was for the purpose of satisfying your fellow directors in relation to this question, isn't that

right, of i<sub>6</sub><sup>1/2</sup>10

12 A. Yes, it was by Telenor.

Q. And Mr. David Austin also entered the equation at this stage, isn't that right?

A. Well, I was around for the conversations dealing with the Fine Gael donation.

Q. Mm-hmm.

A. That on the conference call I dealt with my issues and then went and then there was, from what I can see in the notes, there was other things discussed, and then Barry was asked whether he was happy. And then Arve was asked questions by his own lawyers.

Q. But are you saying that you were unaware that there was an issue being dealt with, and that that issue was this contribution, this political contribution?

A. I remember somebody telling me in the middle of the roadshow that there was a demand for a letter from David Austin, and I asked why? And they said, "Oh, in regard to the donation." But all the - I mean, it's now, I can read all the stuff subsequent.

Q. Yes?

A. I was out of the country on the roadshow. I didn't realise that the Telenor issue had become a big issue.

Q. Who told you that there was a letter required from David Austin?

A. I think Paul Connolly, or Aidan Phelan, one or the other.

Q. And who got the letter from Mr. Austin?

A. As explained before, it was either of them. I think in my evidence some weeks ago I said that I don't know who precisely.

Q. Did they inform you that the letter had been obtained?

A. When they got it, I think so.

Q. Did Mr. Paul Connolly and/or Mr. Phelan know that discussions were taking place concerning this contribution?

A. My impression is that they weren't, because there was a lot of meetings happening in Dublin by teleconference.

Q. Mm-hmm.

A. They were with me on the sales calls, so it would be difficult for them to be participating, all the time, given that they were in anywhere from six to ten presentations per day with me, and then travel in the meantime. So they could have been - I'm not sure whether you have notes or something. Maybe you can help me, Mr. Coughlan.

Q. No -

A. - they were present.

Q. No, Mr. O'Brien, I am just asking you, somebody brought it to your attention, either Mr. Connolly or Mr. Phelan, that a letter was required from Mr. David Austin, isn't that correct?

A. That's right.

Q. And I think you had furnished an explanation, had you, about your role in the \$50,000 donation?

A. I may - no. I mean, - no, I didn't - nobody really examined me. You know, I wasn't examined about that.

And for me it was a non-issue at the time. I think it was more of an issue for Telenor. But from the evidence that I've seen, notes of people, I don't think I was asked about Telenor.

Q. You weren't asked about them at all?

A. I don't think so. Unless there are notes there to show that I did, but my recollection - but it could be wrong - is that I wasn't asked about the Telenor payment.

Q. Well, let's go to the notes of the meeting of the 4th

of November, 1997.

A. Mm-hmm.

Q. It's at Tab 12.

A. 12.

Q. And it's Mr. O'Connell's note of the meeting, I think Mr. O'Connell was attending this meeting by telephone conference as well?

A. Yeah, and Mr. Halpenny, I mean, I am relying on their notes to remind me of what was happening. I didn't keep the notes because I was the person.

Q. It has Michael Kealey/DOP in U.S. by phone. Also Esat Digifone directors."

A. "Kealey wasn't with me in the U.S.

Q. No. Mr. Kealey was the solicitor who was asking the questions. I think what it means was that you were in the US?

A. Yeah, I was on the phone. Yeah.

Q. Yes. "Also ESAT Digifone directors. AJ," that's Mr. Johansen, "KD," that's Mr. Knut Digerund, "Mr. Fortune, Mr. Callaghan and Leslie Buckley, also Fergus Armstrong, and Mr. Halpenny, Owen O'Connell on phone, Kevin O'Brien and another at Kilroy's meeting, nature of Denis O'Brien/Barry Maloney relationship." And then "longstanding, could joke about anything."

Michael Kealey asked: "What said precisely?"

"Denis O'Brien (hesitant): Trying to get Barry Maloney



to pay, trying to persuade.

"MK: "100K to Michael Lowry."

"Denis O'Brien: No didn't mention name."

Barry Maloney said, "Don't want to know. One payment or two."

Now, that answer you gave to Mr. Kealey sorry, that answer - sorry, I beg your pardon. If we go above that. "Denis O'Brien: No, didn't mention name."

A. "BM said don't want to know."

Q. "Barry Maloney said, "don't want to know."" The next is "Michael Kealey: One payment or two?"

Now, if I could go back to where you said, "No, didn't mention name." I might suggest to you that that was an inaccurate response. You have informed us a few moments ago in evidence that in response to Mr. O'Connell's query of you in the United States, that you couldn't recall.

A. No. What I said in my statement was that - and I said earlier in my evidence, Mr. Coughlan, was that I didn't mention Michael Lowry's name on the road.

Q. Well, correct me if I'm wrong, Mr. O'Brien, but a few moments ago when I was asking you to deal with the notes and the responses made by Mr. O'Connell when he attended on you in Boston on the 1st of November -

A. I think we should go back to them, if we can. That's Tab 4, is it?

Q. We will, Mr. O'Brien. Don't worry. And it is the fourth page, it's under query number 4, the bottom of the page. "Michael Lowry mentioned?" "Can't recall."

A. Yeah, then I said - I can't recall ever mentioning his name. So I'm not sure what that is.

Q. This is a solicitor taking a note of what is said to him. He is asking a question of you: "Is Michael Lowry mentioned?" And your response to him: "I can't recall."

A. Okay. I am giving you now the context of that, as I described 15/20 minutes ago. However, when we - whether it was this morning, I can't remember. Was it earlier today?

Q. You say that that response is consistent with your assertion that you didn't mention the name Michael Lowry.

A. What I said at the time is I can't recall ever mentioning his name.

Q. And I specifically asked you is that you don't have a recollection or are you saying that you didn't mention his name? And you said to me that you had no recollection. Now, I am putting it to you, Mr. O'Brien, that that is inconsistent with the response you gave to Mr. Kealey at this inquisition on the 4th of November, 1997.

A. You are better with the words than I am but I remember saying to you when you asked me about this some time

ago in the last hour, I said "I can't recall ever mentioning his name."

Q. Yes.

A. And I think we should look at the record if you don't believe me.

Q. You can't recall ever mentioning his name?

A. Because you said, "Are the questions posed by Mr. O'Connell as per his notes "is Michael Lowry mentioned, question mark -"

Q. Well, let's deal with it this way, Mr. O'Brien. You cannot recall ever mentioning his name, isn't that right? Is that right?

A. Yes, that's what I am saying. That's my evidence.

Q. What you told Mr. Kealey is that you didn't mention his name, which means that there is a recollection of events, and you are asserting to him that you did not mention his name.

A. Well, maybe you are better at English than I am, but I am saying here in my evidence to you I can't recall ever mentioning his name. And you go on to ask me: "Michael Kealey - or DOB, no, didn't mention name."

Q. Yes. You don't see any difference?

A. Can you help me with it, because -

Q. Do you see any difference?

A. Well, one is more precise. One says, and this is what I said, if these notes are right: "No, Denis O'Brien didn't - no, didn't mention name."

Q. Yes.

A. Then Owen O'Connell's notes of the 1st of November, he says: "ML mentioned another question," and my answer to that was: "Can't recall ever mentioning his name."

Q. It's the same person made these two notes, the same solicitor made these two notes. What I am asking about here, Mr. O'Brien, and what I am exploring, is this: if somebody doesn't have a recollection or can't recall something, that is one matter. You are here asserting something positive to Mr. Kealey that you did not mention his name. Do you see the difference?

A. Well, what I remember saying was I can't recall ever mentioning his name.

Q. To Mr. O'Connell?

A. Yeah. I meant -

Q. What did you say to Mr. Kealey?

A. I said, "No, I didn't mention his name."

Q. They mean two different things. Do you understand that?

A. I can't recall I can't remember ever mentioning his name. No, I didn't mention a name.

Q. Yes.

A. I think we could be splitting hairs.

Q. Oh, no, Mr. O'Brien. This was a very serious inquisition that could have the effect of putting the IPO - it involved a consideration by the directors and lawyers of a very serious matter involving millions and

millions of pounds.

A. Hundreds.

Q. Hundreds of millions of pounds here. And are you saying that all we are doing is splitting hairs here when the same solicitor made both notes?

A. I am trying to understand what you are getting at.

Q. I am not getting at anything, Mr. O'Brien. I am not getting at anything. I am asking you: the same solicitor made both notes, and you are saying that they mean the same thing. Is that what you are saying? If it is, fine.

A. What I am saying is that I am not sure what the precise difference is. That's really what I am saying. You are picking - you are going into one thing, then you are going back to another thing, and I am trying to say to you, as much as I can remember what was going on at the time, and I've already said to you, I don't have any notes of the 4th of November, I don't have any notes of the 1st of November. So I think you need to be fair to me, in the circumstances.

Q. Well, is it your evidence that there is no distinction between what is reported and in these two notes?

A. I am not saying that. I am just saying they were different contexts of different conversations with two different people inquiring.

Q. Absolutely.

A. One was Mr. Kealey, who was supposedly a Tribunal

specialist.

Q. Yes.

A. The other one is a lawyer for our company that was writing down hundreds of issues on a piece of paper, and conducting his own Tribunal in his own mind about the matters at hand. And I am not trying to water them down. This was deadly - this was catastrophic if we didn't make the IPO.

Q. Yes, absolutely.

A. I don't need to be reminded of that.

Q. And here you had two solicitors, Mr. O'Connell in the first instance, asks you if the name Michael Lowry was mentioned, and your response to him in Boston on the 1st of November is you can't recall. Mr. Kealey puts a specific question to you, a specific question, he's carrying out the inquisition and he puts a specific question to you and you say, "No, I didn't mention the name." Now, do you understand there is a huge difference?

A. Can I not have a reflection where I actually say at the time I can't recall ever mentioning his name, and then, thinking about it and saying, did I, did I, did I mention his name? And the answer is, no, I didn't mention his name to Mr. Kealey.

Q. That's what you said. So you reflected on your answer that you gave to Mr. O'Connell and you now realised, no, I did not mention his name. Is that what you are

saying now, Mr. O'Brien?

A. That's five years ago.

Q. Is that what you are saying? Mr. O'Brien, let's take it slowly. You have a meeting with Mr. O'Connell. You tell him you can't recall whether you mentioned the name. I can understand that somebody can then reflect on the matter and having reflected, they can have a memory of a situation and in response to the same question or a similar question being put subsequently answering, "no I didn't mention the name."

A. That could be the case.

Q. You understand they have two different meanings, don't you?

A. They probably do.

Q. Yes.

A. I don't know.

Q. Now, Mr. O'Brien, in the witness box here this afternoon I asked you about this matter and you informed us, on your sworn evidence today, that you can't recall mentioning the name.

A. I am relying on the notes that I have been given.

Q. But, Mr. O'Brien Mr. O'Brien -

A. I said at the outset.

Q. Would you just listen to me, please. You are relying on the notes; you have given a number of explanations now. I can understand Mr. O'Connell comes to you, he asks you was the name Michael Lowry mentioned? He

calls Maloney, the same name was mentioned and you say, I can't recall at that time. You then come to the inquisition being conducted by Mr. Kealey, and he asks you the same question, and you have said that in the context you probably reflected on the matter in the meantime, and did remember the situation and remembered that you did not mention the name. Is that right?

A. That seems to be the case.

Q. Very good. In the witness box here today when I asked you about this, you informed the Tribunal in sworn evidence that you cannot recall ever mentioning the name. That's the evidence, which is, I suggest to you, at variance with the response that you gave to Mr. Kealey and the explanation which you are now giving

-

A. What I would like, so that you can be helpful to me, Mr. Coughlan, is to see the transcript, I think, because you are jumping into one thing and then you are saying - you are asking me questions about the 1st of November, then you are going back to the 1st November - or the 4th of November. There was, coincidentally they are both notes written by the same solicitor. I haven't got my own notes, so I can only rely on the notes that I have been given here in evidence. So -

Q. Yes. As the Tribunal does.

A. Everybody is relying on these notes.

Q. Yes.



A. But I don't - you know, I didn't keep my own notes, which I would have thought would be more - would certainly give probably a better recollection of events.

Q. Well, what are you saying now, Mr. O'Brien? Are you saying that you cannot recall ever mentioning the name, or are you - I am asking, are you now saying that you did not mention the name?

A. I would like to see the transcript -

Q. I am just asking you now, Mr. O'Brien.

CHAIRMAN: For present purposes, Mr. O'Brien, which is the best assistance you can give the Tribunal as to what actually may have taken place, is it that you have a positive recollection that Mr. Barry wasn't mentioned, or is it that you simply can't recall that he may or may not have been?

A. Well, my - this note says, "no" that I didn't mention the name, so I don't know which one is right.

Q. MR. COUGHLAN: Very good. Now, there was a note which is attributed to you by Mr. O'Connell in response to questions put by Michael Kealey, "BM:" which means Barry Maloney, "said don't want to know."

Do you remember giving that response to Mr. Kealey?

A. That - Barry would have said that in one of his statements, and that's where I would have picked it up.

Q. But, Mr. O'Brien, Mr. Kealey is trying to get to the bottom of this. He is trying to assist the other directors who were present. He is asking questions to try and establish the facts.

Now, did you say to Mr. Kealey "Barry Maloney said don't want to know."? Are you responding to Mr. Kealey in that -

A. I don't precisely remember saying that to Mr. Kealey, but again I am relying on these notes, so -

Q. Mm-hmm. Now -

A. Mr. Halpenny's notes here.

Q. Now, whatever the situation, doesn't it seem clear from that, however you came to that information, that Barry Maloney did not consider this to be a joke?

A. Barry Maloney raised this issue for the purpose of creating a difficulty at the time of our planned IPO, otherwise he would have raised it at our bond issue, when we raised our 110 million, which was more than what we were raising in the IPO, and the subsequent bond issue in July of 1997. The first one was seven weeks after the run, both of them were publicly registered documents. So when this all arose in October, I certainly had a view, and I questioned what the motive was. That's my evidence.

Q. You questioned what the motive was?

A. Yes.

Q. And that is your evidence?

A. He knew there was no payment.

Q. I just want to be clear about this and I want to be very clear about this.

A. Yes.

Q. You are putting Mr. Maloney's character in issue, effectively, isn't that correct?

A. No, I am not. I am just having a different view of things.

Q. You are questioning his motive that it wasn't promoted by any duties he owed to his company to bring a serious matter like this to the attention of the directors. Is that what you are saying?

A. If you look at the notes -

Q. Is that what you are saying?

A. That was my own personal view.

Q. Is that what you are saying?

A. That is my own personal view.

Q. Is that what you are saying?

A. I am just replying to your question, that was my personal view.

Q. My question is: is that what you are saying, that Mr. Maloney was motivated by some other purpose other than his obligations and duty as a Chief Executive Officer to bring a serious matter to the attention of board members? Is that what you are saying?

A. He knew there was nothing in it and that was my personal view. That's my answer to the question.

Q. Just listen to the question again, Mr. O'Brien. Are you saying that Mr. Maloney was motivated by something other than his duty to the board of ESAT Digifone?

A. Correct.

Q. You are?

A. Yes.

Q. Now, we'll go back to the question.

A. Which one?

Q. That commenced this: if Mr. Maloney said that he didn't want to know any more about it, and you don't dispute that he said that, or words to that effect, do you?

A. I don't precisely recall saying that, but he could have used -

Q. You told Mr. Kealey.

A. Well, I - this is an answer to a question that he posed. I am looking at Mr. Halpenny's notes, and maybe, I think, he could have a different note of the same conversation, because there was two people writing notes. In fact, there were four, but we had been able to use ours.

Q. Yes, okay.

A. So -

Q. I can point to something in Mr. Halpenny's notes that would be assistance.

A. It says in the bottom. BM responds, "did not want to know." I don't know whether that's Barry saying this or me saying this in the context of the notes.

Q. Hold on a second, Mr. O'Brien. Mr. O'Connell, Mr. O'Connell is a senior and experienced solicitor, and he is taking a note of important matters which are occurring. Mr. Halpenny, perhaps not as experienced as Mr. O'Connell at the time, is at the meeting and he is also keeping a note. Mr. O'Connell has recorded in his note: BM said "don't want to know." And that's attributed to you. There is also, in Mr. Halpenny's note on page 2: "BM responds, "do not want to know.""

A. I just said that, yes.

Q. It is surely referring to the same remark that Mr. O'Connell is recording?

A. Could be the same question, yes.

Q. So you now have two solicitors from Messrs. William Fry recording your response that Barry Maloney said he didn't want to know.

A. That is right, yes. Two solicitors reporting it.

Q. And do you remember Mr. Maloney saying he didn't want to know when you made the comment?

A. What I remember is reading Mr. Maloney's statement. I probably took that from the statement and said, well, if he saying that he didn't want to know, that was his statement, well then I'll accept it.

Q. So you didn't accept it?

A. Pardon?

Q. Do you remember him saying it?

A. I don't remember him saying it, but I think he had it

in his statement. I'm not sure.

Q. Leave aside the statement for the moment. Going back to the conversation: do you remember him saying it?

A. On the mountain side?

Q. Yes.

A. No.

Q. You have no recollection?

A. No. I would have put that in my statement if I remembered at the time. But I probably accepted it on the 4th of November as being factual.

Q. Very good. So you accepted it on the 4th of November as being factual, so it seems very clear that if somebody used the expression, "I don't want to know," he wasn't considering the contents of the conversation as being a joke?

A. It depends how he said it.

Q. I see. Well, what intonation would you have expected in his voice if he was responding that this was just a joke, Mr. O'Brien?

A. Well, my remark to him was, "You think you've got problems, I've already paid 200 grand."

Q. Mm-hmm.

A. Now, if we accept what he said was true, and that is, "I don't want to know," it could mean a throwaway remark.

Q. And then, of course, you believed that he raised this issue subsequently for some vexatious purpose?

A. I never used the word "vexatious".

Q. Well, for other than his -

A. I never used the word "vexatious".

Q. What purpose other than his duty as Chief Executive Officer?

A. Putting it in the context, if you are the Chief Executive and Chairman of the company, and you have done two public issues of a bond, two bond issues in the public markets, registered with the Securities Exchange Commission, one of them for \$110 million after seven weeks after a run.

Q. Yes?

A. And then the person doesn't put their hand up and say, "Look, what about the run? Or what about the conversation?" And then we do a second bond offering in July of 1997 raising \$35 or \$40 million, and then he doesn't put his hand up and say, "What about the run?" And then we arrive up to the IPO.

Q. Yes.

A. With all the same amount of detail in a prospectus.

Q. Yes.

A. And the person doesn't then - then only at that stage puts their hand up and says, "Well what about the run? or the conversation?" but he says it's in an office, I say clearly it was on a mountain side. That's why I am trying to say to you I had an unease about it.

Q. Well, may I ask you this: are you now saying that

Mr. Maloney was right to raise the issue in the context

of this IPO?

A. I think he should have raised it much earlier.

Q. I see. Did any other prospectus contain a reference to

the -

A. To the run?

Q. No. To the risk of the licence?

A. I don't have the prospectus on me, but if you have them

there, I'll read them and go through. I know where

they would be. They would be under 'Risks'.

Q. Well, Mr. O'Brien, you have just informed the Tribunal

that it was the same type, not the same prospectus,

obviously, but the same type of prospectus which was

used in respect of these other raising of money. And I

am asking you - bonds - and I am asking you, did any

other prospectus make reference to a risk of the

licence?

A. I actually don't know, but - I don't have it as my

evidence, so -

Q. When were the bond issues?

A. January, 1997.

Q. Yes.

A. I think it was the first three weeks, I think, sometime

in the last third or fourth week we closed the deal.

Q. Yes.

A. And then the other one, I believe, was July or August,

but -



Q. Of 1997?

A. 1997.

Q. And isn't the specific reference to the licence in the IPO of ESAT Telecom in November of 1997, doesn't it contain a paragraph making reference to the establishment of this Tribunal and that no assurances could be given?

A. Yes.

Q. And that one of the named persons in the terms of reference of this Tribunal was the government minister who was the minister at the time of the award of the licence, and that the licence would be investigated by this Tribunal, but that it was believed that this Tribunal would not recommend revocation of the licence.

I am paraphrasing what's in the prospectus. But isn't there a specific reference in the prospectus of ESAT Telecom for the IPO of November, 1997 to that effect?

Isn't there a paragraph to that effect?

A. Yes, there was, definitely.

Q. And it wasn't until this Tribunal was established and the terms of reference were published in September of 1997 that that became an issue, isn't that right, a query into Mr. Michael Lowry?

A. Yes, there was a query - the inquiry started from what I understand, is August.

Q. Other than in the context of Dunnes Stores payments which have been the subject matter of the McCracken

Tribunal, isn't that right?

A. Well, I am not familiar with them.

Q. Very good.

A. What they were doing.

Q. So what Mr. Maloney saw was this particular reference in the red herring prospectus that there was this particular paragraph included in it, which had not been included, to the best of my knowledge, in either of the other prospectuses issued on the bond issues, so there would have been no basis for raising it in the context of those bond issues. Would you agree?

A. Let's be very clear, and this is - I would like to go into a little bit of detail with you here.

Q. Would you answer the question first of all?

A. Which question?

Q. Was there anything in the prospectus on the bond issues making reference to the licence and this Tribunal?

A. Mr. Coughlan, realistically, how could I remember a 200 page prospectus? Now, if you show it to me there, and if it is in or out, I don't know.

Q. Mr. O'Brien -

A. To be fair to me.

Q. Mr. O'Brien, you got into the witness box. Yes, I will. I'll give it to you. You got into the witness box and you just said that there were these two bond issues, that it was the same type of prospectus.

A. Mm-hmm.

Q. And that it was in the context of those two bond issues that Mr. Maloney should have brought the matter to the attention of the board, and that therefore you were - you had reasons to doubt his reasons for raising it in the context of the IPO?

A. But then I was about to explain to you.

Q. Oh, I see.

A. Like, this is a little bit more complicated, and it should be gone into some detail, as far as I am concerned.

Q. Okay.

A. First of all, when a prospectus is written, you have underwriters, lawyers, you have company lawyers, you have also advisers, and generally they throw everything into the prospectus under the 'Risks' section.

Q. Yes.

A. Now, I believe that there were certain discussions about - because the licence and the process had been investigated, we believe, by four or five people. The European Union, Richard Nesbitt on behalf of the Department, then, I think, the government had the Attorney General's office did an investigation, and then somebody else did an investigation. So we would have had some sort of risk factor in it just to have to put in. This is what the lawyers were insisting. When we went on to the IPO, this Tribunal had been set up.

Q. Yes.

A. And even though everybody, all the directors, by the 7th of November, knew that there was nothing untoward in what had happened in the granting of the licence, the licence was perfectly given by - assessed by independent consultants.

Q. Yes.

A. Somebody decided, it wasn't me, but some lawyer or a number of lawyers in a room or on a teleconference going through the risk factors decided to put it in as a risk factor.

Q. Mm-hmm.

A. Generally, it's known as throwing the kitchen sink in. And it's boiler plate legalese. So the reason why it wasn't put in before is because I think the Tribunal had not been set up, so the - as the two bond issues

Q. Yes.

A. But if the Tribunal had been set up at the same time as those, or before the two bond issues in January and July, they probably would have put that in as well.

Q. Mm-hmm. Yes. And what drew Mr. Maloney's attention to the matter again was the reference to this Tribunal in the red herring prospectus?

A. Where does he say that - in his notes? Can you -

Q. No, in his proposed evidence.

A. But where -

Q. That was the issue. Now, I want to ask you, this - no, I want to ask you, Mr. O'Brien, you have said that

there were four inquiries. You said the European Union carried out an inquiry?

A. Yes. This is what we had been told.

Q. You have said the European Union carried out an inquiry. Is that right?

A. Correct.

Q. You have said the Attorney General carried out an inquiry?

A. That's what we've been told.

Q. You said that -

A. Richard Nesbitt.

Q. Carried out an inquiry on behalf of -

A. Somebody.

Q. On behalf of somebody. And what was the fourth inquiry?

A. I don't know what the fourth one was, but we had been told that there had been a fourth one.

Q. I see. Were any of those inquiries informed of the \$50,000 donation, the \$50,000 donation?

A. Probably not, no.

Q. Definitely not, isn't that so?

A. The timing of them, probably no, definitely not.

Q. Did any of those inquiries, if they took place, have any information concerning this conversation between yourself and Mr. Maloney and all that transpired subsequently?

A. If every conversation where somebody in a jocose manner

was to say something and it wasn't to be true, this

Tribunal would be sitting here for 50 years.

Q. Mr. O'Brien, would you mind answering the question?

Were those inquiries informed of the conversation and

what transpired subsequently between yourself and

Mr. Maloney?

A. These investigations had taken place in 1995, in 1996.

Q. I see. Were they informed, is the question I asked?

A. Well, the run probably hadn't taken place and the

\$50,000, it depends - certainly nobody saw it as being

an issue to go into the Attorney General's Office about

it.

Q. Were any of these - sorry. This Tribunal was not

informed of these matters, isn't that correct?

A. That's right. We had legal advice to say that there

was no need to go to the Tribunal about it. And

different legal advice, not just one firm.

Q. There was no need to go to the Tribunal about it?

A. Yes.

Q. That this conversation was not a matter which might

have been relevant to the Terms of Reference of this

Tribunal. That is the legal advice you received, is

it?

A. Well, I don't have the legal advice in front of me, but

if they had given advice that we should go to the

Tribunal, we would have gone.

Q. If this matter had got out at the time of the IPO,

wouldn't it have been the end of the IPO, Mr. O'Brien?

A. It would have been a second GPA, Mr. Coughlan.

Q. It would have been calamitous, wouldn't it?

A. Absolutely, and that's why we were taking it so seriously.

Q. And it was the only reason that matters were being taken seriously, because it could have affected the IPO?

A. Well, it would affected not just the IPO; the staff, the company, the reputation, everybody.

Q. And the Terms of Reference of this Tribunal

A. We -

Q. were they weighing heavily on the mind?

A. No, they weren't, because we had advice that it wasn't part of the Terms of Reference.

Q. And when this process, and I will come back to all the notes of that meeting, was gone through, and a statement was obtained from Woodchester Bank about the state of your deposits there and the drawings on them?

A. Yes.

Q. That was done with your consent and with your knowledge, is that right?

A. Remotely, yes. I gave an instruction to tell -

Q. And when Mr. Aidan Phelan, who looked after your personal affairs, was contacted by Mr. Owen O'Connell on the 6th of November of 1997 -

A. What tab was that?

Q. I'll give it to you now. Tab 19.

A. I was in Stanford, yeah.

Q. It says: "Following Leyton & Watkins call, Aidan Phelan asked other significant accounts" and an explanation is given by Mr. Phelan, "House accounts pays households expenses, UK account for salary, AIB from Communicorp, could get statements." To cover all of these matters, perhaps, "11,000 per month, then Aidan to transfer to Irish account."

A. "Also owns credit card."

Q. "No other accounts." Do you see that?

A. Yes, I see that.

Q. Now, didn't you and Mr. Phelan know that in the summer of 1996, which pre-dated this, that a payment was made to Mr. David Austin of  $\frac{1}{2}$ 150,000?

A. For a house.

Q. For an apartment in Spain.

A. A house, a townhouse.

Q. A townhouse in Spain. And that that PD 150,000 was paid in the following manner: PD 50,000 bank draft drawn on Allied Irish Banks Isle of Man; isn't that right?

A. I don't have the notes. Go ahead. It sounds familiar.

Q. You were paying for it. Isn't that right?

A. I didn't make the banking instructions.

Q. Isn't that right?

A. 50,000, yes.



Q. From Allied Irish Banks - on a bank draft drawn on Allied Irish Banks, Isle of Man, is that right?

A. Correct.

Q. And that PD 100,000 entered Mr. Austin's account in Bank of Ireland Jersey by way of a swift transfer from Allied Irish Banks Jersey?

A. No.

Q. It didn't?

A. No.

Q. It didn't happen?

A. It came from Isle of Man, was cleared through Jersey.

Q. They both came from Isle of Man and was cleared through Jersey?

A. Absolutely.

Q. Right. Now, when was that account opened in the Isle of Man?

A. It was opened up to repay a shareholder's loan that I had made available to Radio Investments on foot of an investment that we made in Sweden. I think the loan was made in July 1996 and it was a director's loan repaid.

Q. Yes. When was it opened?

A. It was opened sometime around the time of buying the house.

Q. When was that, the summer of 1996?

A. It would have been the summer of 1996, in July, June/July, I'm not sure what the precise date was, and

a total of 407 or  $\frac{1}{2}$  415,000 of the loan account was repaid into an account in the Isle of Man in the AIB.

Q. Mm-hmm. And you knew that?

A. Did I know precisely? At that time, at the time of the IPO, no.

Q. You didn't know that there was an account - was it your account?

A. Well, I am trying to answer the question as best I can.

I knew I was owed money in July - June/July 1996 as a shareholder's loan, repayment of a loan that I had made to a company.

Q. Yes.

A. That money, I knew, I was getting back or I had gotten back at the time.

Q. Mm-hmm.

A. I definitely got it back.

Q. You got it back from this company?

A. Yeah.

Q. Right.

A. And then the money went to the account, then other people were paid money as well. This was the normal course of -

Q. Tell me about the account first, Mr. O'Brien.

A. It was opened - it was like a special purpose account: money in to receive and then paid out.

Q. Was the account in your name?

A. I don't know whether it was in my name or Aidan

Phelan's name but the account was only set up to clear the shareholder's loan, repayable to me, and then to pay - I bought a house, I paid other people some legal bills -

Q. Why was it opened in the Isle of Man?

A. Because Mr. Austin wanted his - the money for the house from an offshore account. So we had to open an account.

Q. So you knew that Mr. Austin wanted the money paid from an offshore account?

A. Correct.

Q. At the time, that was in the summer of 1996?

A. Yes. When I had done the deal, he then said to me, "You pay me from an offshore account" because he effectively was offshore. He was living offshore.

Q. Now, at the time of the IPO, when inquiries were being made of Woodchester, you knew that an account had been opened in the Isle of Man for the purpose of paying Mr. David Austin, isn't that correct?

A. If it had been explained to me, I would have known, but it wasn't on my mind at the time I mean, looking at these notes here, they are true, there are no other accounts. Yes, there was a shareholder's corporate loan repayable to me, but it didn't go into Woodchester. It went into the Isle of Man and then the money was disbursed.

Q. That's the whole point, Mr. O'Brien. Neither you nor

Mr. Phelan, whom you say knew about this, in - and was it Mr. Phelan arranged it?

A. I believe he opened the account, yes. I learned that subsequently.

Q. Did not inform Mr. O'Connell, who was making an appropriate inquiry, of the existence of an offshore account out of which  $\text{€}150,000$  had been paid to Mr. David Austin?

A. It was opened for probably a week to -

Q. I don't care if it was opened for ten minutes, Mr. O'Brien. Mr. O'Connell was making a serious inquiry; this was a very, very serious matter.

Mr. O'Connell wasn't off on some irrelevant inquiry.

He was making an inquiry as to whether there were any other accounts here, and this was for the purpose of laying matters before the board of ESAT Telecom who actually had to make a very big decision, isn't this right?

A. This was a conversation, a conversation between two people. I was not present at it so I am relying on these notes, and the detail is on this piece of paper. I wasn't part of the conversation.

Q. Right. Well, let's go back to it now.

You know that when Mr. O'Connell went to America on the 1st of November of 1997, one of the matters Mr. O'Connell identified when he was carrying out his

analysis on the way out was, we better start identifying bank accounts. I better start looking to see if there were any drawings of  $\frac{1}{2}$ 100,000 to anybody, or any drawings, say, over  $\frac{1}{2}$ 25,000 to any one person to see if there is any validity in this statement about  $\frac{1}{2}$ 100,000. That was the exercise Mr. O'Connell was setting about.

A. He definitely was doing that, yes.

Q. And he's informed that Woodchester is the only place to look, isn't that right?

A. Well, all my instruction was to Aidan Phelan and Ann Foley was get the accounts, give them -

Q. Hold on a second, Mr. O'Brien. You tell Mr. O'Connell - you are telling everybody that it wasn't anywhere; it was Woodchester?

A. Woodchester

Q. You are telling people that. Now, over and above that, you tell Ms. Foley and Mr. Phelan. Now, I take it, that Ms. Foley had no involvement in this account in the Isle of Man?

A. I can't say precisely, but probably not. I don't know. I actually don't know.

Q. And Mr. O'Connell, behaving cautiously, as you'd expect of a solicitor, when he carries out his inquiries in relation to Woodchester, makes the further inquiry, are there any other accounts? And he is told by Mr. Phelan, some accounts dealing with household

expense, credit cards, expenses, matters of no major significance. But he is not told about an offshore account in the Isle of Man which was used for the purpose of making a payment of 150,000 to Mr. David Austin. Why?

A. I can only deduce from this that there was working accounts, operating accounts, and I need to check on the detail, but the Isle of Man account was only opened up and closed in a short period of time. Now, it may have been that they - that the account was closed at that time and there could have been lots of other closed accounts around the place that, you know, previously I had used in other banks and whatever, but they were not significant. That's what I think what he is saying here, that there was no money on deposit of a significant nature.

Q. Mr. O'Connell was looking for sums of money of around  $\frac{1}{2}$ 100,000. That's what he was trying to identify, because that was what the conversation was about.

A. No, I said 50.

Q. But what he was trying to see, was there  $\frac{1}{2}$ 100,000 went to anyone? That's what he is looking for. That's the purpose of his inquiry.

A. Yes.

Q. And here is a situation where there were payments made to Mr. Austin, who became a significant person in the context of the 4th of November inquisition?

A. But I wasn't - you see, you are missing the point. I wasn't there for the inquisition on Telenor on the 4th of November. It's subsequently that I learned that it became a bigger issue. And when you read all the issues in the evidence, it became a big issue for people. It wasn't a big issue for me.

Q. When did you understand it to become a big issue, Mr. O'Brien?

A. After the event.

Q. When?

A. Well, when - well, first of all, when I read the notes here, I never knew that there was such a big issue at the time of the IPO. I knew there was a touch of it there, but then there was people questioned by lawyers about it. I wasn't there for those conversations.

Q. When did you inform this Tribunal of how the payment was made to Mr. David Austin?

A. Of which payment now? To buy the house?

Q. The £150,000.

A. After there was a press report that Michael Lowry had received a loan in October or November of 1997.

October '96, I don't know, '96, I think it was.

Q. You informed this Tribunal that money came out of the Isle of Man to pay Mr. David Austin -

A. No. Let's be very clear here. I read or listened to RTE, I think it was Charlie Bird who broke a story that David Austin had borrowed money or lent money to

Michael Lowry. I wrote in a letter to this Tribunal within a day or two to say, "I bought a house off David Austin."

Q. Yes?

A. Because I want to be totally upfront with that.

Q. Yes?

A. And I was up front.

Q. You told this Tribunal that you had bought a house from David Austin?

A. Yes.

Q. When did you inform this Tribunal that the source of the money to pay for this house came out of an offshore account in the Isle of Man?

A. I'd say it was the last few days.

Q. Yes. As a result of queries being raised with you by the Tribunal, isn't that right?

A. And we have been totally cooperative, and you know that.

Q. And you hadn't disclosed that to this Tribunal until the matter was -

A. I didn't know that myself until I made the investigation.

Q. I see. I see. So you did not know that  $\text{£}100,000$  and  $\text{£}50,000$  had been paid to Mr. Austin out of an account of the Isle of Man until a few days ago, is that right?

A. Well, I was running a public company. I could not tell you precisely all the banking arrangements that I had.



I was working 14 hours a day. When this conversation arose on the 6th of November 1997, I wasn't part of the conversation.

Q. I thought a few moments ago you told us that you knew that an account had been set up in the Isle of Man in the summer of 1996 because Mr. Austin wished to be paid from an offshore source. Is that right?

A. I said that, yes. But I didn't know where it was. I mean, I didn't know whether it was Jersey, Isle of Man, Guernsey.

Q. Fine. You didn't know whether it was the Isle of Man, Jersey, Guernsey. But you knew it was an offshore account?

A. I knew that David Austin wanted to be paid from an offshore account.

Q. In the summer of 1996?

A. In June, '96.

Q. Whatever. And you knew where the money came from to pay for that?

A. No, I didn't - I mean, I didn't until I looked at this in the last two or three weeks. I knew I bought the house, but where precisely the money came from, I don't know.

Q. Mr. O'Brien, you didn't know where the money came from.

A. Look, it's very easy. I - you know, that's why you have an accountant and you have a bookkeeper. They know what account pays what things. I didn't know

precisely. Like, I am trying to be honest with you.

And I am sure you don't know where your credit card bill is paid or which account it comes out of. People sometimes don't get into that detail. I didn't.

Q. I see. So you did know that in the summer of 1996 that Mr. Austin was paid  $\frac{1}{2}$ 150,000 from an offshore source?

A. Yes, that's what -

Q. From an account of yours or an account held for the benefit of you, if I can put it as broadly as that, is that right?

A. I didn't know the precise description of the account, but it was probably -

Q. But it was for your benefit, at least?

A. Yes.

Q. Nobody informed the directors of ESAT Telecom of that, isn't that right?

A. Not as far as I know, no.

Q. Nobody informed the directors of ESAT Digifone of that, isn't that right?

A. No.

Q. And it wasn't until this Tribunal asked questions in the last few weeks that the information about this offshore account has come to the attention of the Tribunal, isn't that correct?

A. You asked - you posed a question, how did you pay for the house? And basically somebody went through the records, went through the bank to find out where the

money came from, which account it came from, and how it paid for the house. But that's how it was done.

Q. Mm-hmm. Now, you knew that Mr. Austin wished to be paid from an offshore source; you knew in the autumn of 1997, that your own accounts were being examined in the context of looking for payments amounting to  $\frac{1}{2}$ 100,000, isn't that correct?

A. Yes.

Q. And

A. 50 to 100.

Q. And neither you nor Mr. Aidan Phelan made that information available in the first instance to Mr. O'Connell, is that right? That information is not made available to Mr. O'Connell?

A. You see, in November, 1997 I knew I bought a house. That's all I knew. That's all I could remember. Now from where? It could have come from Woodchester, could have come from an offshore account.

Q. Just listen to the question, please. Did you tell - did you or Mr. Phelan tell Mr. O'Connell that Mr. Austin had been paid from an offshore account?

A. I don't recall.

Q. Did you tell your fellow directors of either ESAT Digifone or ESAT Telecom of that?

A. No, I don't believe so, no.

Q. Or did you instruct Mr. Phelan to tell them?

A. I don't remember telling him anything.

Q. And it wasn't brought to the attention of this Tribunal either, until this Tribunal asked the question, isn't that right?

A. No. I brought it to the attention of the Tribunal.

Q. That Mr. Austin was paid from an offshore account. You brought that to the attention of the Tribunal?

A. I brought it to the attention that I bought a house.

Q. Oh, yes, that you bought a house. Yes.

A. Yes.

Q. But you never brought it to the attention of the Tribunal that the source of the money was from an offshore -

A. Then the Tribunal, to be precise, wrote a letter and said, "Please tell us where you paid - where the money came from to pay for the house." And you wanted proof of payment. And we then complied with that. We had to do a bit of digging, but then we came up with the account.

Q. Sorry, if I could just - at the time of the - just one final matter for today: At the time of the inquisition by Mr. Kealey, you were where?

A. Where?

Q. Yes.

A. I believe - I think I've given you this, but it's in this roadshow schedule, and I think it says the 4th of November, it says San Diego.

Q. Right. And on the 6th of November where were you ?

A. 6th of November I was in Connecticut, Stanford.

Q. Thank you.

CHAIRMAN: Thanks, Mr. O'Brien. 11.00 tomorrow morning. Thank you very much.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
TUESDAY, 26TH JUNE, 2001 AT 11:00AM.