

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 27TH JUNE

2001 AT 11AM.

CONTINUATION OF EXAMINATION OF MR. DENIS O'BRIEN BY

MR. COUGHLAN:

MR. COUGHLAN: Before I continue with Mr. O'Brien,

Sir, Mr. O'Connell, from Messrs. William Fry, wrote to

the Tribunal by letter dated 27th June and asked me to

read this letter out. It's in the context of a line

of questioning which was being pursued with Mr. O'Brien

yesterday.

And the letter reads:

"Dear Mr. Davis.

I refer to the examination by Mr. John Coughlan, SC of

Mr. O' Brien during the morning of the 26th June. I

would like to make it clear for the record that Mr.

O'Brien delegated the assembly of material, the

preparation of responses to queries raised by you and

the drafting of correspondence to this firm and to a

number of individuals within his business organisation.

It is also the case, as we understand it, that Mr.

O'Brien personally holds few, if any, records

pertaining to the Tribunal's inquiries.

It has consistently been the case that we and/or

members of Mr. O'Brien's staff have had to approach

others, either within or outside Ireland for their

records and then await their responses.

Mr. O'Brien reviews letters sent by us to you before their issue but is not responsible for the decision as to when or whether sufficient information has been assembled in relation to any individual query to justify a response being made thereto.

I am informed by Mr. Owen O'Sullivan, with whom much of your correspondence has been conducted, that he informed you early on that it was our intention to seek to respond to questions in full rather than piecemeal and this we have done. Accordingly, regardless of when any individual piece of information or document, including, for example, the Investec statement referred to in evidence was obtained, it is entirely possible that it would be retained by us or by individuals within Mr. O'Brien's business organisation until further information and documentation came to hand, sufficient to allow the question to which it related to be answered comprehensively.

Mr. O'Brien would not necessarily know in relation to such a document either that it had been received or that it was proposed to send it to you until it had been sent to us by the person responsible for producing or obtaining it and we had prepared a draft letter to you enclosing it with our material relevant to the

appropriate question. The Investec statement dated 23rd May was handed to Mr. O' Sullivan at one of numerous meetings he had and is continuing to have with Mr. O'Brien's staff on the subject of your queries.

He can not recall precisely the date on which he received the statement but it is clear that he sent it to you as soon as he had sufficient information including, but not limited to the statement to respond properly to the relevant question.

If you would like to us to change our practice and to send documents and items of information to you individually upon receipt, please let us know.

However, given the large number of questions being raised by you, we believe that such a change will result in the process quickly becoming disorganized.

Yours sincerely, Owen O'Connell."

CHAIRMAN: I will have regard to the content of that letter, Mr. Coughlan.

MR. COUGHLAN: Now, Mr. O'Brien, I think you had been provided yesterday evening with the notes which were made by solicitors for Telenor concerning the meetings on the 4th and 5th November, 1997, is that right.

A. That's correct, yes. These here.

Q. Yes. And I think I should just explain, they are in typed form, is that correct?

A. That's right, yes.

Q. And I understand from My Friend Mr. Fitzsimons that these were dictated by Mr. Anthony Lang, one of the solicitors in the firm of Kilroy's, from handwritten notes he made at the meeting and that his method of working is that once he dictates the notes he destroys the handwritten notes. So just to explain the circumstances of these being typewritten notes.

Now, it is headed "Attendance, 4th November, 1997, re meeting of directors of ESAT Digifone Limited, not a formal board meeting, at the offices of IIU, 4th block, Irish Financial Services Centre, Dublin.

Present: Directors, Dermot Desmond, DD for shorthand; Michael Walsh, MW; Leslie Buckley, LB; Knut Digerud, KD; John Fortune, JF; John Callaghan, JC; by phone, Denis O'Brien, DOB; Arve Johansen, AJ. Lawyers: Fergus Armstrong, FA, of McCann Fitzgerald; Michael Kealey, MK, of McCann Fitzgerald; Kevin O'Brien, KOB, of Kilroy's, Anthony Lang, AL, of Kilroy's; Gerry Halpenny, GH, of William Frys; and the meeting commenced at 2.15 precisely?

A. I think Mr. O'Connell

Q. was also present by phone?

A. I think so.

Q. I think the note, I think, subsequently makes that clear. The purpose of the meeting: "Michael Walsh

asked what the purpose of the meeting was. Fergus Armstrong replied that it was not proposed that this would be a board meeting. The position was that a number of directors desire a meeting to take place for a better understanding of the facts of the matters and to establish the facts surrounding the question of alleged payments or alleged conversations in relation to payments. Fergus Armstrong pointed out that he was proposing that there would be a question and answer session, as suggested by the lawyers, concerning

1. The question of the conversation between Denis O'Brien and Barry Moloney.
2. The contribution transaction.

It was repeated that this was not a board meeting.

It was agreed that the position was to look at the last board meeting and to decide whether it would be appropriate to look further into these matters. It was pointed out by Fergus Armstrong that these matters had a relevance to matters outside the room to which we were not privy.

Fergus Armstrong explained that he was dealing with the corporate side and that Michael Kealey of his firm was fresh to the situation with a fresh perspective and that he was also with establishing and gathering evidence."

Then, there is a piece of legal advice on which privilege has been claimed by the clients of the current clients of Mr. Armstrong, that is the British Telecom, if I might use it in that broadest sense.

"John Callaghan replied that we must keep going along the route of investigation so as to get to the bottom of it. John Callaghan expressed the view that there was an obligation on the directors to satisfy themselves individually as to the position. They had to establish whether or not there was anything to the allegation or that there was nothing they were not comfortable with in the Prospectus or registration. .

John Callaghan therefore suggested that he, as a director, was anxious to get to the bottom of it and this was a process, once commenced, 'which you cannot stop'."

Then another piece of legal advice.

" Knut Digerud asked what had happened since Thursday's meeting. The meeting was informed that there had been a meeting with Frys. Leslie Buckley and Fergus Armstrong had gone to Owen O'Connell of William Frys. Gerry Halpenny of William Frys attending the meeting confirmed that he was handling the IPO for William Frys.

Arve Johansen had asked for a note of the documents

given to Owen O'Connell. It was explained that William Frys as agent with responsibility to deal with the matter immediately and pass on all documentation.

As a result of this meeting, Owen O'Connell went to Boston, USA to discuss the matter personally with Denis O'Brien. This had taken place on Saturday. There was a quizzing process with Owen O'Connell attempting to get to the bottom of it. A letter had gone to the board of ESAT Telecom summarising the matters and opening the issue up. A letter from William Frys had gone to each member of the board of ESAT Telecom. This letter was going out this afternoon and would be awaiting the directors. Leslie Buckley confirmed this.

It was pointed out that Owen O'Connell could be relied upon to make a full disclosure and that he and his firm would not take the responsibility of not would not take the responsibility of not doing so.

It was pointed out at the meeting that there were two issues to be dealt with.

1. A matter immediately and pass on all documentation.

As a result of this meeting" it seems to be a repeat it is a repeat, yes, Sir. If we go to the next page so.

"1. The evidence relevant to the Woodchester Bank and movements in and out of the account of Denis O'Brien.

2. Examination of the payment which had actually been made amounting to \$50,000. On this issue, it is known that a payment was made and that there are documents in existence and it was necessary to establish the existence of these documents. Kevin O'Brien was in possession of faxed copies of these documents received by fax from Telenor and indicated his possession of these documents.

Leslie Buckley and John Callaghan advised the meeting that the Chairman was getting documents and evidence in relation to the account in Woodchester Bank.

Fergus Armstrong then referred to McCann Fitzgerald being collaboratively involved with William Frys in the investigation and the establishment of the facts surrounding these matters.

Fergus Armstrong pointed out that there was a question as to who goes first and whether there was anything to be said re ESAT Telecom.

Kevin O'Brien inquired as to whether any changes had been made to the IPO document to reflect any proposed changes. It was pointed out that the draft in process was proceeding but Gary Halpenny of William Frys"



and then there is legal advice given over the next number of pages from Mr. Halpenny and Mr. Armstrong.

"John Fortune commented that you can't price, if you are going to make material changes." Then there is further advice given.

"John Callaghan pointed out at this point that it would be unusual to make any changes. Any change now made would focus attention on these changes. It would be unusual to have any event or circumstance come in now. It is not usual to have an unanticipated event requiring amendment."

Then there is further advice from Mr. Armstrong.

"2. Knut Digerud pointed out that there was an interconnect agreement and issues raised by this.

3. Knut Digerud pointed out that there was the issue of the next mobile telephone licence and the capital requirement of ESAT Digifone if it was to get that licence."

Then there is more advice.

"Shareholders' Agreement provided for a clause providing consent for information going out."

Over the page, following further advice -

"Barry Moloney raised the issue as to how long the

company would be subject to a penalty. In that context we refer to his meeting with the regulator tomorrow. Barry Moloney said it was the position of the company that we have all the sites and the problem it due to the inability of the Regulator to give us frequency space in a timely way. We have given the Regulator eight months notice of needing frequency so therefore the coverage problem is due to the inability of the Regulator to give us the frequencies, even though we have given prior notice of needing these frequencies. Barry Maloney confirmed that he had stated this position to the Regulator so that the Regulator had merely acknowledged receipt of these letters but had not agreed to see ESAT Digifone Limited."

Then there is further advice. "had now agreed" sorry "to see ESAT Digifone".

Then further advice.

"John Callaghan then pointed out all of this shadow boxing. It is of so little import compared to the real issues which concern Barry's alleged conversation with Denis O'Brien and the payments by Telenor."

Then further advice.

"Knut Digerud had replied that he was uncomfortable

with that position. He was opposing ESAT Digifone Limited being supposed to approve of things when the board of ESAT Digifone Limited has not made this decision.

John Callaghan replied that ESAT Digifone Limited had gone along with the IPO document. ESAT Telecom had, along with the document, gone through a number of changes and at the last minute, we, ESAT Digifone, are now agonising over it.

Knut Digerud replied that there was a big difference in that the position now was that the board of ESAT Digifone had a completely different understanding as to its responsibility and its liability for the Prospectus. The issue of the disclaimer had been identified and the issue was now whether the board of ESAT Digifone wanted to withdraw any clearance.

Leslie Buckley pointed out that with time difference, it was important that the two people, AJ and DOB, would come on line at this stage.

There was further discussion in relation to the amendments of the IPO document in relation to three issues already mentioned and John Callaghan submitted that there were far greater issues and that these three issues were far easier to deal with than the main points. He contended that the three other amendments

could be incorporated seamlessly into the document and there was no problem in relation to these."

There then follows further advice.

"John Fortune pointed out that in this context there were steps which had to be taken by ESAT Telecom board, steps which had to be taken over the next 48 hours and that the board of ESAT Telecom would have to obtain advices.

In reply, it was pointed out that the following steps had been taken in relation to the ESAT Telecom board.

1. Owen O'Connell had spoken to Denis O'Brien and had quizzed him for almost a full day."

Then the other steps are outlined which pertain to legal advice.

"John Fortune pointed out that there were two issues.

1. The alleged payments by Denis O'Brien.
2. The payment of \$50,000 to an account in the Bank of Ireland in Jersey.

John Fortune pointed out that this payment looks fishy, that it could implicate Esat Digifone, as a company, and Denis O'Brien and Telenor, as shareholders.

John Fortune then raised the issue of the Telenor payment. It was pointed out that this payment did not

take place until after the licence had been awarded, more properly, after the announcement of the decision to award the licence had been published.

John Fortune replied that in relation to conversations or alleged conversations between Barry Moloney and Denis O'Brien, there may or may not have been a payment. In relation to Telenor, the issue was whether it was a legitimate for Telenor in supporting a democratic system to make a foreign donation.

John Callaghan pointed out that in relation to this payment, the present position, as we don't know how it was spent, all we know is the first stage, that is the mechanism of the payment being made to David FT Austin. We do not know what the application of the money was.

Then there is advice from Mr. O'Brien.

"Leslie Buckley pointed out that since ESAT Digifone reimbursed Telenor, this posed a serious problem for the company, that is, for ESAT Digifone Limited.

In relation to Denis O'Brien, it was pointed out by Leslie Buckley that the payment had gone into the bank, that is Woodchester Bank, but no payment had gone out.

There was speculation in relation to the impact of the disclosure of the Telenor payment. There was a strong possibility that if it came into public knowledge, that

a Fianna Fail led government might consider it very unusual for a foreign company to make a political donation, for it to have been paid in Jersey, and would love to use the opportunity to embarrass Fine Gael and that this might have potential impact on the continuance of the licence.

John Fortune pointed out that the issue had implications for ESAT Telecom. What would the reaction in the US be to this disclosure where an asset such as the licence was placed in doubt? Although the company would fight in relation to this issue, any doubt concerning the licence would have a negative impact on the share value. Investors were likely to litigate if they found their share value decrease by the raising of any issue of the casting of any doubt concerning the ESAT Digifone licence.

John Fortune raised the issue as to whether the Tribunal's inquiries might raise these issues and to the potential impact of the share value, if any issue arose concerning the licence of ESAT Digifone Limited.

Barry Moloney referred to the problems of ESAT Digifone not knowing that this payment was part of the start-up costs. Barry Moloney pointed out that if the licence was got by improper means, it could be a problem.

Reference was made to the fact that four investigations

so far had confirmed the fairness of the process.

John Fortune referred to a period of uncertainty arising in relation to the licence being tainted.

John Callaghan referred jokingly to the possibility of ESAT Telecom suing Telenor for tainting the licence.

And Kevin O'Brien made some response, as did Fergus Armstrong.

John Callaghan pointed out that this matter was presently with the ESAT Telecom board. He pointed out that as a director of the ESAT Telecom board the directors were being informed of the issue and that at the same time, the IPO was very well subscribed. That it is heading on to Thursday for closure next Monday, and that the present position is that the IPO is on track."

Then Fergus Armstrong makes a comment.

"In relation to the disclaimer, John Callaghan commented, the issues are so amorphous that there is difficulty in establishing the position.

Fergus Armstrong made some interjection.

"At the request of Fergus Armstrong, Michael Kealey from McCann Fitzgerald, by telephone conference with Denis O'Brien in the presence of all other parties, then raised a number of questions from pre-prepared

questions.

A number of the questions were of a routine nature and were not recorded.

Denis O'Brien, in response to a question concerning Woodchester, pointed out that a search was being done by him with regard to payments into Woodchester Bank and that he was happy to open up all of his accounts.

Denis O'Brien confirmed that he had seven or eight accounts in Woodchester. He pointed out Woodchester is his main bank, his lead bank. He pointed out that the bank is the intermediary. All his payments came out of Woodchester Bank. He pointed out that all his personal bank accounts were with Woodchester. Denis O'Brien confirmed that there had been a conversation between Barry Moloney and himself. Denis O'Brien said that in his mind there was no dispute as to when the agreement took place. Denis O'Brien explained that the occasion in question was the reference to Barry Moloney "We were running in Wicklow near Roundwood. I remember the occasion because I twisted my ankle, and I have looked at my diary, I keep a very detailed diary. It was most likely Sunday, 17th November, 1995."

That should be 1996 I think Mr. O'Brien, I think there is no doubt about that

A. I think so, yeah.



Q. "But it could have been the 3rd November or the 20th October. It was most likely Sunday 17th November. The reference was Barry raising with me the issue of consultancy fees. About 40 people had worked with us on the bid. Many of these were contractors. These were to have bonuses paid to them. The bonuses were small to large. The largest was about  $\frac{1}{2}$ 50,000 in total. I had asked Barry to pay out the success fees. I wrote a memo. These would have been to parties such as PJ Mara, Dan Egan etc.. I kept on meeting these people and they were reminding me that they had not been paid. I thought Barry was dragging it out. I explained to him my embarrassment over meeting these people. I would meet these people in social circumstances outside work.

My conversation with Barry was very light-hearted. We were two people who had known each other for 22 years.

I had raised the issue of payments to certain people, including the possibility of Edward or some other party receiving cash or stock options in ESAT Digifone.

This was a jocular remark. In response to Michael Kealey's question, "What precisely did you say?"

Denis O'Brien explained that it was really the fact that he was trying to get Barry Moloney to pay these people. "I was persuading Barry, while making the payments. Michael Lowry was not mentioned by name but it may have been assumed that  $\frac{1}{2}$ 100,000 was to Michael

Lowry. I did not make this payment. This was an exaggeration." Barry Moloney replied, "I don't want to know. It has nothing to do with the company." I referred to two payments. I did so in the context of paying these people because I had to pay two amounts of  $\frac{1}{2}$ 100,000 each to other people. In response to the question as to how Barry would have known that it was Michael Lowry who was being referred to, "We may have understood that we were talking about Michael Lowry and that  $\frac{1}{2}$ 100,000 was payable to him. The second  $\frac{1}{2}$ 100,000 was by way of exaggeration. There was no first payment or second payment. My reference to having paid two x  $\frac{1}{2}$ 100,000 was bravado. No one got a payment of that scale. There was no assumption re the second payment but the assumption on the first payment may have been that it was to Michael Lowry.

As to the second  $\frac{1}{2}$ 100,000, nobody received payment. These were throwaway remarks to get Barry to pay these people. I saw this as part of a delaying process by Barry. I don't disagree with Barry Moloney's reply that "I don't want to know".

Look, it was a joke, I was only bullshitting. I was together with Barry. We were close friends. We would outdo each other with more outrageous remarks. We were also talking about women."

Michael Kealey asked when the reference had arisen in relation to the context of controversy surrounding Michael Lowry concerning Michael Lowry." I will read that again "Michael Kealey asked when the reference had arisen in relation to the context of controversy concerning Michael Lowry. Denis O'Brien replied, "Everyone knew we had done an extraordinary amount of work on the tender. At the time the controversy was due to the fact that people were whinging that they had not done all this work.

Although it was not in the public domain concerning Michael Lowry, I knew that his business, Streamline, was in major difficulty.

On the basis that I was talking to Barry Malone, even on the 17th November, I knew at this point that Michael Lowry's business was starting to collapse and that this was coming up to the end of November. Everybody knew that Michael Lowry's business was in difficulties. I would not have known Michael Lowry well enough for him to have shared his problems with me but I was aware of it. When I referred to helping Michael Lowry, this was just a throwaway remark.

In relation to the subsequent conversation, I had a subsequent conversation, I believe, in the summer, in July, in relation to Monday 25th August, I was married on the 29th August.

In relation to Wednesday 8th October at the meeting at the Malt House and the reference to the statement "I did not do it, thank God." I admit that I did have a thought about doing it.

In October/November" again I presume that should be '96.

A. yes.

Q. "I was flush with cash. I sold property and had received cash and things were going very well for me. At the time Lowry was under attack. There were rumours that Streamline, Michael Lowry's company, was bolloxed. I felt that Michael Lowry had been above board in relation to our dispute with Telecom Eireann. I thought I would help. I could provide  $\frac{1}{2}$ 100,000 out of the deposits with Woodchester for that purpose. In relation to my remarks with Barry, I had pretended that I had made the payment and I had doubled it for effect. I was exaggerating. At the time I was thinking of making this payment I realised that it would be misinterpreted because of the publicity and other controversies. I never told Michael Lowry about giving him money and, in this case, I didn't. I have nothing to hide. I did not pay him. When I say the monies were stuck with an intermediary, I mean that the monies had been earmarked out of Woodchester.

I had frequent discussions with Michael Lowry on the DVI and auto dialler. These discussions with Michael Lowry were quite frequent but I had no understandings with him and no favours were asked for or given."

Michael Kealey then summarised what Denis O'Brien had said, that he had a meeting on the 17th November, that he had wanted to help Michael Lowry, that Michael Lowry had been of assistance, that Michael Lowry had received no credit for this in the public domain, that Streamline was in difficulty, that you, Denis O'Brien, you might help him out with  $\frac{1}{2}$ 100,000.

Denis O'Brien replied as follows: "I have all this money, I am a generous person when people are in difficulty. I thought that  $\frac{1}{2}$ 100,000 could be transferred from Woodchester. All of my deposits are in Woodchester. I had earmarked the money in my own mind. In my conversation with Barry Moloney I had doubled it for effect. I always have a funds flow in mind, knowing what is coming in and what is going out. I would know what is coming up and what would be going out. I decided to double the amount for effect and I decided to say two payments had been made, that is, to two people.

I changed my mind over making this payment and there is no way that I would have made the payment subsequent to the 29th November. People have thoughts to do things

but don't actually do them. I thought about a personal payment to the minister involved and I thought "I am mad". I don't know if this was before 29th November. I don't know what precise date. It would have been a harebrained scheme. I would not be the first person to think about something like this. I accept that if there are events on the 29th November, 1995"

that should be 1996 again

"In the paper about Michael Lowry that, there was only a twelve day interval between that and my conversation with Barry Moloney on the 17th November.

Then Michael Kealey asked whether he was considering to make a payment at a time on which date there would be an ongoing relationship with Michael Lowry in view of the fact that nobody knew it was going to happen to Michael Lowry in November/December, 1996. .

Denis O'Brien replied, "Lowry was always fair with us.

He could have said that the auto diallers were illegal and this would have shut us down. I realised that a payment to Michael Lowry would be misconstrued. My waters knew it was not the thing to do. It would have been a stupid thing to do and no payment was made.

This is a very serious issue for me. I did not pay the minister anything. This is the context.

Then Dermot Desmond. "At this stage Dermot Desmond, who the joined the meeting slightly earlier, said he had heard what Denis O'Brien had said and that he had two points.

1. I am not interested in what was said. If it comes out it could cause an investigation, inspection into the licence procedure.

Had Lowry any say? Could you have bribed Lowry? The methodology in relation to the licence, while it was awarded by an independent firm to the Department and then the decision by the cabinet, the only right of Lowry would have been a veto, isn't that right?

Anything with Lowry was not of consequence. Your intention to make a payment was not a Digifone problem.

The question is; did you take any action that could have influenced the licence?

Denis O'Brien replied "No."

Dermot Desmond stated "People should leave personal agendas behind. There is a lot of emotional history which should be left behind and which people seem to be unable to leave behind.

Dermot Desmond then referred to cross indemnities from ESAT Telecom affecting the licence, isn't that the issue? Dermot Desmond asked rhetorically that the

issue was, could something have happened? Dermot Desmond left the meeting at this point, having invited a response from Fergus Armstrong.

Denis O'Brien continued after Dermot Desmond's departure that minister Lowry had been business-like and commercial. "I thought to give him  $\frac{1}{2}$ 100,000 from an account in Woodchester. The payment was not specifically earmarked. I did not take any action to make the payment. I only had a funds flow idea in mind, but I took no action. When I say that the money was stuck with an intermediary, I mean that it was stuck with the bank. I don't recollect the word "Intermediary". I don't remember someone other than a bank. Woodchester are my lead bank. They have been bankers to me for seven/eight years. Woodchester saved my from bankruptcy three or four years ago. I pay everything through Woodchester. In relation to 'intermediary', you either use a bank or a cheque-book. In response to Michael Kealey's question as to why he used the reference to intermediary, Denis O'Brien replied "The money never left the bank." Michael Kealey again questioned the use of the expression 'intermediary', saying that this suggested a third party between Denis O'Brien and the recipient. Denis O'Brien pointed out that it was quite obvious who the intermediary was and that you use either a cheque-book



or the bank.

In relation to Michael Kealey's point as to why he would not use the simple reference to a bank Denis O'Brien replied, "You don't always say the obvious thing."

Michael Kealey stated that 'intermediary' would not mean 'bank' and Denis O'Brien replied that 'intermediary' obviously means a bank. Eventually he stated "I agree to differ."

Michael Kealey then pursued a different line of questioning.

Michael Kealey put it to Denis O'Brien that there were two possible ways in which a payment to the minister would have been misconstrued.

1. The minister was in financial difficulties and, in return for payment, the licence might have been influenced.
2. That Denis O'Brien would continue to have further future dealings with the minister.

Denis O'Brien said that he felt that it could be construed in both ways.

Denis O'Brien then said "I thought about paying the minister but I wised up saying to myself "This is all

wrong." "

At this stage Michael Kealey's questions concluded.

Fergus Armstrong asked were there any other persons at the meeting wished to ask questions.

Kilroy's:

Anthony Lang asked a number of questions in connection with the payment made by Telenor to David FT Austin.

Denis O'Brien in response confirmed the following details.

1. He, Denis O'Brien, had introduced David FT Austin to Arve Johansen.

2. It was Denis O'Brien who suggested to Telenor/Arve Johansen, that a payment would be made to David FT Austin for the Fine Gael Party.

3. The Fine Gael Party was in financial difficulty and needed payments.

4. He was aware of an intended dinner in New York.

He, Denis O'Brien did not go, but apparently it was \$25,000 a plate.

5: In response to Anthony Lang, Denis O'Brien confirmed that he had some idea that there had been a limit of 5,000 in relation to contributions."

I think that is again a reference we saw in a note

yesterday that, related to some statutory

A. I think it's the same thing.

Q. intervention in relation to contributions.

"Kevin O'Brien then pursued the following additional questions, to which Denis O'Brien replied as follows:

1. There was a dinner in New York at which John Bruton was to attend.

2. About 10 to 15 people went.

3. I thought about going but I did not.

4. I spoke to Arve Johansen and asked him whether he would be prepared to make a contribution, paying per plate.

5. Arve Johansen had asked me how I would go about making the payment.

6. I do not remember a reference to ESAT Digifone reimbursing the payment. Kevin O'Brien asked whether the payment was to be made by Telenor, by himself - Denis O'Brien - or by Digifone. Denis O'Brien acknowledged that he wanted payment to be made "Outside the country". Denis O'Brien replied, "I am not sure who ended up paying for it. They, Telenor, paid David Austin. I did not know whether Telenor making payment to David Austin were taking it that they were paying on

their own behalf or on someone else's behalf.

It was Peter O'Donoghue who had dealt with the pre-trading expenses. It was he would have dealt with the issue as to ESAT Digifone paying money to Telenor.

Denis O'Brien stated "I asked Arve Johansen whether he would be prepared to make a donation to Fine Gael?"

I had been invited to a Fine Gael fundraising dinner in New York. It was \$25,000 a plate. I proposed to pay for two plates. About 10 to 15 people went. I thought about going.

"I spoke to Arve. I asked whether he would be prepared to make a contribution paying per plate." He asked me how he would make the payment? It was agreed that ESAT Digifone was to reimburse for this payment.

Kevin O'Brien asked whether the payment was to be paid by Telenor, by yourself - Denis O'Brien - or Digifone.

Denis O'Brien explained that the payment was to be made outside the country. He replied to Kevin O'Brien "I am not sure who ended up paying for it. I know they, Telenor, paid David Austin".

There was a discussion in relation to how it was costed.

Kevin O'Brien questioned Denis O'Brien and put to him

that Telenor was paying David Austin "On your behalf".

Denis O'Brien replied, "I am not sure."

The meeting then discussed the situation and it was pointed out that Peter O'Donoghue was the person who had been dealing with pre-trading expenses. The money back would have been dealt by him.

Denis O'Brien said it was a reasonable assumption that ESAT Digifone paid back Telenor.

In response to Kevin O'Brien Denis O'Brien said, "I asked Arve whether he would be prepared to make a contribution to Fine Gael."

Michael Walsh questioned Denis O'Brien in relation to the position concerning the payment by ESAT Digifone. Michael Walsh asked whether the documents showed that there had been a repayment by ESAT Digifone. Denis O'Brien replied, "I would not be in the loop on that."

It was at this point that Denis O'Brien said that people were shouting at him to go and the issue of raising an explanation on the accounts in relation to the payment was then discussed.

Michael Walsh then asked whether in terms of documents it was now established that these monies had been repaid by ESAT Digifone and Denis O'Brien said he would

not be in the loop on that.

Denis O'Brien stated "They are shouting at me to go."

And at this point the questioning by Kevin O'Brien of Denis O'Brien concluded."

Arve Johansen remained on the telephone line throughout and then the questioning of Arve Johansen commenced.

"John Callaghan queried as to what the invoice was for and it was clarified by Kevin O'Brien on behalf of Arve Johansen that the invoice was for consultancy services by David Austin paid into the Bank of Ireland in Jersey. Kevin O'Brien confirmed that there was no VAT raised.

Arve Johansen replied to questions and confirmed as follows: "It was intended as a political contribution. My recollection was that this happened during a time when Barry Moloney was over in Oslo in connection with his contract of employment.

It was before Christmas, 1995. I might be able to find out the precise date. Barry Moloney had come over. Barry Moloney's employment contract was the main issue. It had been a hectic time with Barry Moloney coming over to Stockholm."

A. I came from Stockholm.

Q. I beg your pardon, he came from Stockholm?

A. I think it's wrong. I was coming from Stockholm. He

was coming from the States.

Q. "There were elements with the employment contract that Barry Moloney was not comfortable with. There had been discussion with him briefly before he rushed to the airport. Denis O'Brien took me aside. Knut may have been there. Knut Digerud confirmed I was partly there. I remember there was a mention of a dinner."

This is Arve Johansen continuing. "The feeling was that as good corporate citizens, some kind of appreciation signal that we were satisfied with the performance was appropriate. The idea was that it would be paid as a gratuity. There was no promises. There was no concrete thing. There was no buying of services or favours. It was regarded as a simple, good thing to do. At the time we were informed that the Fine Gael Party needed money and it was  $\frac{1}{2}$ 25,000 per plate.

The idea we had at the time was that ESAT and Telenor were working together. Our idea was that Denis O'Brien, you handle the Irish side if you believe it is the right thing to do, then we will take this at face value.

Telenor thought as good citizens an appreciation or acknowledgment was appropriate. On Digifone, there was a good decision by the politicians and after the

announcement of the award we were showing that we were happy. We were sharing the happiness with people.

It was an ESAT show of gratitude. ESAT could not make the contribution. Denis O'Brien told us "Don't make it visible in Ireland." The fundraising was in the US and yes, it was in that context that it came up.

David Austin's name was mentioned to me. Denis O'Brien gave me a phone number to phone David Austin about it. I have a yellow post-it with David Austin's name on it from my secretary. I telephoned David Austin at his telephone number in Dublin. I was travelling to Budapest that day. I think it was a Monday, sometime between 3 o'clock and 4 o'clock. I remember that I went to Budapest. I was in Budapest and at 4.25 p.m. Dublin time I spoke to David Austin. It was later in time in Budapest. David Austin was very open. I did not have any feeling that there was any sensitive thing at all. It is difficult to make me understand. This is very hard to find words for in English, but I got comfort and relief that there was nothing wrong at all and this was just party appreciation.

After a few hesitant attempts from Arve Johansen to explain the position Kevin O'Brien asked whether Arve Johansen meant that he understood the arrangements with Denis O'Brien were pretty standard? Arve Johansen replied, "Yes, that is what I mean. It seemed very



normal to me and very ordinary. I was told that there was an event in the US that I cannot recollect, but that is my understanding. I had that picture in my mind. It was explained to me by David Austin that the payment would be recognised as a general contribution, general fund and that the account number was in the name of David FT Austin. I remember that there was reference to John Bruton. Michael Lowry's name may have been mentioned. I explained to David Austin, we, Telenor, have a problem in making a payment without a contract or invoice. I may have said payment was impossible. I said "Can you send me an invoice?" And basically he suggested a consultancy fee. I said okay. He said this was fairly standard in connection with various people making contributions. I was happy with this.

I was not quite certain how these sort of things, contributions, are handled. I got clear indications from him, Denis O'Brien.

Maybe I did not ask a sufficient number of questions.

I now see that the payment was channelled into the account through a private person. Maybe I could have asked more questions than I asked. It sounded straightforward to me. He, David Austin, was relaxed and he said that he could write anything on the invoice.

It came up about getting a receipt for the payment and he, David Austin, said he could arrange a meeting with John Bruton. I think this was Friday, 8th December, 1997 when the suggestion was made. How the money was to go into the Party, I was a bit woolly, but he said he could arrange a meeting with John Bruton for John Bruton to thank me.

I recall that there were several requests for expedited payment. David Austin chased it many times. The chasing came from Denis O'Brien. David Austin complained to Denis O'Brien. Afterwards there was a letter from David. He excused himself for this.

I was told that Telenor would be reimbursed by ESAT Digifone."

At this point, Barry Moloney interrupted. He said he was dealing with a contract of employment issue with Telenor. He wanted it to be cleared up that he, Barry Moloney, was not involved in the payment and that he was out of the room when any discussion of this issue occurred. This was acknowledged by Arve Johansen.

The way which the contribution was discussed was that ESAT Telecom and Telenor, as the principals, were to make a contribution of  $\frac{1}{2}$ 25,000 each. ESAT Telecom asked us to pay out both. Then the idea was ESAT

Digifone would pay back Telenor.

Piers Simmonson had the day to day contact with Denis O'Brien.

At this point Knut Digerud interrupted. He pointed out that the arrangements for repayment was processed by Peter O'Donoghue and that Peter O'Donoghue was involved by Denis O'Brien "In that loop."

Knut Digerud said it was his understanding that the sum of \$50,000 was put in as part of the lump sum for the start-up costs and that the entire amount was paid back by ESAT Digifone Limited to Telenor.

There was a request for clarification as to whether there was an acknowledgment or invoice and it was cleared up that Telenor had furnished an invoice to ESAT Digifone. In that way ESAT Digifone paid the invoice for consultancy to Telenor.

John Fortune questioned the position in relation to the letter from David Austin. This was shortly after the payment had been made.

John Fortune then questioned as to whether a letter would come from Fine Gael. He referred to the letter being from David FT Austin.

There was a question as to whether the invoice from Telenor to ESAT Digifone was on the files of ESAT

Digifone Limited.

It was clarified by Barry Moloney and others that there was no reference to Fine Gael in any of the documents.

It was also pointed out that there had been care to avoid any mention of Fine Gael.

Barry Moloney therefore asked how would he know what was the relevant documentation? This happened before he joined ESAT Digifone Limited.

The question was then raised, how would it be known that the donation was passed on by David FT Austin to Fine Gael? Arve Johansen admitted that he only had David FT Austin's word for it. He had no proof. He said it could have gone to Michael Lowry. He referred in reference to Telenor "We had been the intermediary."

John Callaghan queried how it would look if, when discussing the explanation that the donation had been made to support the Irish democratic system, that the payment had been made to Jersey and Telenor had then charged the contribution to ESAT Digifone.

Barry Moloney then stated that he understood that David FT Austin was a close personal friend of Michael Lowry.

Arve Johansen stated that the payment could be put in a very bad light and that these were bad cards.

Owen O'Connell, who was present by telephone, then asked the following question "Was there any further contact with David FT Austin or Fine Gael after the letter?" Arve Johansen confirmed that he had no further contact.

It was clarified that David Austin was a director in one of the Smurfit Group of companies. Arve Johansen confirmed that when he had telephoned David Austin it was at an office in Jefferson Smurfit. John Callaghan and Leslie Buckley, who appear familiar with David Austin, confirm that David Austin had not been well recently.

4.28pm:

The position concerning Arve Johansen was that information and the documentation generated in connection with the Telenor donation to David Austin was then reviewed and discussed.

It was generally agreed at the meeting that:

1. The circumstances surrounding the donation in terms of the documentation and the payment in Jersey and the circumstances were capable of a very negative interpretation.
2. There was a general agreement that the circumstances in relation to this donation would be known sooner rather than later.

3. There was possibility that these circumstances might not be uncovered unless the payment ended up with Lowry and was traced.

In response to this John Fortune pointed out that if any one of us, that is the directors, was asked a question at the Tribunal whether they are aware of any payments, then this issue could arise because it would be revealed.

There was reference to the Terms of Reference of the latest Tribunal, the Moriarty Tribunal. There was no reference to a specific transaction in the Terms of Reference.

It did not appear that any payment had been made by David FT Austin to Michael Lowry and therefore, if the money trails are followed, these will show no payment, no connection between this payment and Michael Lowry.

A question as to what would arise and how these issues might be brought up at the Tribunal were discussed.

The question could be asked if the directors had "Any other dealings". It could also arise in the context of a request to produce material and written statements.

Michael Kealey of McCann Fitzgerald and there is legal advice.

"In relation to whether there are any documents in existence within ESAT Digifone, it was acknowledged that no one had gone looking for these documents but that, in any event, the invoice referred to, since it did not refer to Fine Gael or to David FT Austin, would not have arisen or come to notice in the course of inquiries within ESAT Digifone Limited.

It was then clarified that the announcement, that is public press announcement of the award of the licence, had been made on the 25th October, 1995 and that the payment to David FT Austin had been made on the 12th December, 1995 after the announcement.

It was noted that the payment by Telenor to David FT Austin had been agreed and suggested by Denis O'Brien.

It was agreed that a political contribution paid into a bank account for Fine Gael into a Jersey bank account for Fine Gael could cause difficulties.

The problems about obtaining an acknowledgment of receipt from the Fine Gael Party or the acknowledgment of the receipt of the monies was referred to.

It was pointed out that for a general payment to Fine Gael into Fine Gael's general coffers, this was not a very elegant way of doing it, that is, making the donation.

There was discussion as to the importance of obtaining from David FT Austin, written confirmation that was a payment to Fine Gael. Leslie Buckley and others referred to the fact that it had been opened to have a letter of confirmation from David FT Austin confirming that the payment had been passed to Fine Gael by 4am when the meeting was to start but it had not been received.

Then Fergus Armstrong.

"The point was made that Telenor had sent the contribution after the announcement of the award of the licence.

The question was asked as to whether anybody had attended the US dinner in respect of which \$50,000 had been paid and it was confirmed that nobody had been able to attend.

Knut Digerud then said that the main question is "Can we let the IPO go ahead?" The point was made that making a payment in this way to Fine Gael does not look good for Fine Gael and the problems about getting an acknowledgement from Fine Gael as to the payment were noted.

The obtaining of a letter from David FT Austin was agreed to be essential.



It was agreed that the directors would have to consider the timing and the method of payment. The payment was made within six weeks of the announcement of the award of the licence. It was pointed out that the perception might be the major problem here.

The question was asked by a director 'are we satisfied that the payment was made to Fine Gael and that we can accept David FT Austin's assurance that it was transferred?'

The position was reviewed and it was pointed out that there was two aspects. The first part was the alleged conversation between Denis O'Brien and Barry Moloney and what is alleged to have been said during these conversations. The second issue was the political payment.

Fergus Armstrong then asked whether any of the directors any other questions and there were no such questions.

Fergus Armstrong then asked Barry Maloney whether he wanted to add anything now that he had heard what had been said by Denis O'Brien.

Barry Moloney said that in relation to the date of one of the meetings and the reference to Denis O'Brien being on honeymoon, that he would have to look at his

diary, that he had not checked his diaries but that he thought the discussion had taken place between October 8th and October 23rd. He said there had been five separate sessions. He referred to the fact that it was his understanding that Denis O'Brien had referred to a third party intermediary, not to a bank, that it was only on the 23rd October that there was the first mention of Woodchester Bank.

Barry Moloney stated that he stood by his reference to the place of the meetings and that these discussions did not take place whilst they were jogging.

In relation to the discussions, Barry Moloney confirmed that he had not been prepared to pay success fees to individuals without verification. He had caused frustration on Denis O'Brien's part by seeking to have something in writing to authorise it. A lot of frustration came up. John Callaghan confirmed that Barry Moloney had spoken to him about his frustration.

Barry Moloney confirmed that he and Denis O'Brien ran most Sundays and that they would shoot the breeze. He pointed out that his reference to the payment was not one of these discussions when they were running. The discussion had taken place in the Malt House. Barry Moloney said he would not have spoken to Denis O'Brien about two  $\frac{1}{2}$ 100,000 payments whilst running.

He understood that the two x i½100,000 payments were reference to i½100,000 payment to Michael Lowry and that by 'intermediary' he had understood that this meant one individual.

Telenor:

It was agreed that it would be important to establish what was happening on the ESAT Telecom Group side and how they were proposing to deal with what had arisen during the discussions.

More advice from Mr. Armstrong.

"The history in relation to previous cooperation and letters from John O'Rourke was discussed but it was pointed out that John O'Rourke's clearance of previous 6documents was prior to anybody being aware of these allegations.

There then followed a number of pages, or the next page, where advice and questions are being asked to obtain advice of Mr. Armstrong.

Over the page: "At this point, Leslie Buckley and Fergus Armstrong had left the meeting separately. .

There was then further discussion in relation to the political donation. Owen O'Connell asked a number of questions. Knut Digerud and Arve Johansen pointed out that they had made the documents available to Kilroy's

and it was acknowledged that all the directors had seen the documents.

The question of a solution being to inform the underwriters of the position as to whether a message could be sent to the underwriters was discussed.

The position of the Irish correspondence to the underwriters was discussed.

Leslie Buckley raised the issue as to how to deal with David Austin.

The question whether this should be dealt with by ESAT Telecom, ESAT Digifone or Telenor was discussed.

The question of whether ESAT Telecom group should share the information which it had received through its common directors with the underwriters was discussed and the potential impact upon the share price.

Leslie Buckley was asked whether or not any of this information had been shared with the underwriters and Leslie Buckley confirmed that there had been no opportunity to do it."

Sorry, if I just go back the page where the matters are excluded, which are advices from Mr. Armstrong. I didn't read out one piece which was making reference to the other three issues which had been discussed at the

beginning of the meeting, and it was recognised that these three points were not deal-breakers, I think.

"Owen O'Connell asked whether disclosure to the underwriters was enough and whether it would have to be disclosed to the market generally.

Then there follows some matters relating to advice.

"Michael Walsh referred to the keeping open of channels of communications so that ESAT Digifone Limited and its directors would know about when the IPO was going live, so that they would know what date they had to do something, if anything.

Fergus Armstrong referred to the meeting permitting Owen O'Connell of William Frys to cooperate with McCann Fitzgerald, to cooperate with investigations in both jurisdictions and that this cooperation had already taken place.

It was then necessary for the directors to meet, perhaps consult with each other and then to come to a decision.

Michael Walsh asked the Telenor directors for their decision on the matter. Anthony Lang gave some advice. The imminence of the pricing conference was discussed.

It was pointed out that the pricing conference cannot take place without there being disclosure. Therefore,

the issue was how to ensure that these disclosures were made.

It was pointed out that in the first instance, the decision as to whether disclosure should be made had to be for the ESAT Telecom board. They in turn had to communicate their decision to the directors of ESAT Digifone.

Fergus Armstrong referred to the collaborative investigation. At this point, it was concluded that the board was not able to make the decision on the basis of the information then available to it.

It was agreed that it was necessary to make contact as soon as possible with David Austin to ascertain whether or not the monies had been paid to Fine Gael and, hopefully, for David Austin to produce some evidence of payment to Fine Gael.

It was pointed out by Owen O'Connell that Haughton Fry is the partner that had dealt with David Austin, who was a director in charge of one of the Jefferson Smurfit operations, but Haughton Fry was very protective in relation to his clients.

Owen O'Connell confirmed that he was willing to try but that Haughton Fry would not communicate lightly with David Austin.

Michael Walsh was irritated by this and stated that there was documents in existence with David Austin's name on them and there was at least a moral obligation to deal with this issue.

Then more advice from Mr. Armstrong.

"In relation to the mechanics of the IPO it was pointed out that the pricing conference was for Thursday. Effectively once the IPO is priced, the documents are closed.

Owen O'Connell asked that if for the sake of argument it was decided that the Telecom board felt that the matter raised required no disclosure or no further disclosure and that they were going to go ahead with the IPO with no amendment and price on Thursday releasing to the market, what would the position of ESAT Digifone be?

It was explained that ESAT Digifone would have to await the response of David Austin. Owen O'Connell asked what would the board of ESAT Digifone do if they get such confirmation.

The question as to whether any action was required was discussed. The issue of clause 19 and consent under the Shareholders Agreement of 16th May, 1996 was discussed.

John Fortune discussed the issue generally with Owen

O'Connell. Then Owen O'Connell asked "What can, should, will the individual directors do?"

It was pointed out by the time the directors reassembled again they might be in a position to decide what to do. In the circumstances, it was necessary to reassemble before the launch of the IPO on Thursday.

Then some advice from Mr. O'Connell.

"There was then discussion as to the holding of a meeting tomorrow and after the discussion it was agreed that this meeting would be at 4pm and that Arve Johansen would be available by telephone and

The meeting concluded at 6.40pm.

I think the rest of the note is then, this is Telenor information or matters for Telenor but I'll just deal with it.

Knut Digerud, Kevin O'Brien, John Fortune and Anthony Lang returned to 69 Upper Leeson Street that's the offices of Kilroy's and had a meeting to review what had transpired at the meeting and to decide on action for the meeting the following day at 4pm. Then Kevin O'Brien noted a number of points as follows:

And he sets out matters which are excluded.

John Fortune and Knut Digerud left the meeting at this



point and Kevin O'Brien and Anthony Lang met to discuss how the meeting of the following day at 4pm would be dealt with. Kevin O'Brien agreed that EJ would attend in Kevin O'Brien's absence and Kevin O'Brien outlined the approach that might be taken at the meeting the following day."

CHAIRMAN: We are getting a bit distant from what Mr. O'Brien was privy to.

MR. COUGHLAN: Yes.

Now, Mr. O'Brien, it would appear first of all, do you accept that as being an accurate note of the meeting.

A. I wouldn't agree with everything in the notes but I think these are very helpful, Mr. Coughlan. Just one question: When I know Mr. O'Connell was asked about Mr. Haughton Fry, whether he had approached Mr. Austin, and I am just wondering whether the timing, when these were available for everybody to look at, because they are helpful, you know, in the context of the investigation.

Q. These notes became available yesterday.

A. Okay.

Q. Now, first of all, in relation to your involvement with Mr. Kealey.

A. That's page 13, yes.

Q. I think it seems clear that, if these notes are accurate, that it wasn't anything in the media which brought it to your attention that there is any particular difficulty with Mr. Michael Lowry's company, Streamline Enterprises, would you agree?

A. Could you just show me where

Q. Page 19 18.

A. 18.

Q. "Although this was not in the public domain concerning Michael Lowry, I knew that his business, Streamline, was in major difficulty."?

A. I think that could be a recollection of what obviously was said on the day.

Q. And doesn't it seem to fit in, with the known facts at least, that it wasn't until sometime subsequently, around 29th November, that matters entered the public domain about Mr. Lowry's political and personal difficulties?

A. It would seem so. I haven't done a check of the press on this but, as I explained yesterday, it was either it was in the media or in the business community at the time.

Q. That's what I am interested in because I think if we exclude it being in the media

A. okay.

Q. and you seem to have excluded it there when you were discussing it

A. At that time, yeah.

Q. So you believe that it was in the business community, is that correct?

A. Yeah, it could have been, yes, yeah.

Q. Well, was it, Mr. O'Brien, is what I am trying to clarify?

A. Mr. Kealey has me quoted here saying that, that everybody knew that Michael Lowry's business was in difficulties. So...

Q. Well, is that your understanding that it was known in the business community in Dublin?

A. yeah.

Q. as of that time that Mr. Michael Lowry's company, Streamline Enterprises, was in difficulty?

A. I think 'there were rumours' is probably the best way to describe it.

Q. Now, I think, and we can come back to it but I think sometime around October of 1996 there is a reference in one of your diaries at the time that you may have had lunch with Mr. Lowry, is that correct?

A. In 1996?

Q. In 1996?

A. Whereabouts is that?

Q. I'll get the diary for you again. But do you remember having a lunch with Mr. Lowry around that time?

A. I think that would be a reference to me going to a lunch that would have been a fundraiser for Fine Gael.

That's

Q. That may be the reference, that may be the reference.

But do you remember what I am really trying to

ascertain is this: Did you have any discussion with

Mr. Lowry prior to your conversation with Mr. Barry

Moloney?

A. Absolutely not.

Q. Now, so we can take it so that Mr. Lowry was not the

source of information to you that there was difficulty

with his company Streamline Enterprises?

A. As I confirmed, I think, yesterday, yes. Will we go

through the diary or

Q. No, you needn't go through the diary, Mr. O'Brien.

Who could have discussed this matter with you? Who

could have?

A. It could have been I mean it could have been pub

talk. I mean, you always hear different rumours about

different people at different times. Some of them are

true. Sometimes in business, though, rumours become

fact.

Q. But this was something that, I take it, even if you

only thought for it momentarily

A. that's right.

Q. was something you took to be coming from a

responsible source?

A. I don't know who the source was. I mean, it was

just it was rumour or somebody had said to me, and I

don't know who the person was, so...

Q. I understand that, but you believed it?

A. Yeah, I did believe it at that time and that's why in my own mind I sort of, kind of had that thought at the time.

Q. And it wasn't Mr. Austin, it wasn't Aidan Phelan and it wasn't anyone in Woodchester Bank?

A. Well, Woodchester wouldn't have known, Aidan Phelan wouldn't have known and certainly David Austin never mentioned it to me.

Q. Mm-hmm.

Now, did you ever mention it to Mr. Austin yourself?

A. No, I'd have no reason to, really.

Q. Well, I think you knew that Mr. Austin was a friend of Mr. Lowry's, didn't you?

A. I knew that he had a friend. I don't think he was a close friend.

Q. Well, we'll hear Mr. Lowry on that. But I think Mr. Lowry will say that Mr. Austin was a close friend of his, do you know that?

A. I didn't know that at the time.

Q. You didn't know?

A. No.

Q. Because if we look at the situation which had transpired by the time you had had this conversation with Mr. Barry Moloney, and I am accepting at the

moment and you can take it that for the purpose of my questioning of you - we'll take the date as being the 17th November of 1996 for the purpose of this.

A. Yes, sure.

Q. You had already authorised Mr. Phelan to make arrangements to transfer two payments to Mr. David Austin, isn't that correct, in respect of a house in Marbella, in the Marbella region?

A. This was the agreement to buy a house. I think the agreement was in May and executed in June/July.

Q. That's just what I wanted to ask you about: What was executed in June or July?

A. Well, I bought I agreed with I had a meeting or I think it was a dinner with David Austin. As far as I can remember, it was in May, 1996 and this is when he raised issue about his properties and I agreed, sort of informally, to buy his house, and obviously we had subsequent discussions to the May conversation and then we actually did the deal, as such. Now, I don't know what date that was but I remember meeting with him. He went through the he showed me the deeds of the property and then I agreed to buy the property from him when we struck the price.

Q. So you believe that in May you had first of all, it arose in the context of a social situation, I take it?

A. Yeah, it could have been earlier than May but it's somewhere around that time.

Q. And you think that he showed you the deeds of the property and you struck on a price, is that right?

A. At some stage he did. He took out a big folder and showed me the original deeds, and that, of the house.

Q. And was this in a big folder?

A. Yes.

Q. And did that folder pertain to that particular property or were there other properties?

A. Yeah, he described that he owned the company that owned the property.

Q. And that was the deed he showed you, was it?

A. Well, now he, he showed me well I can't remember precisely what he showed me but he explained to me that the house was owned by a company called Tokey Investments and that there was a deed of trust there, and I now know that, obviously this is a regular occurrence now, when people buy overseas properties they don't buy a house with deeds well, they do ultimately, but they normally buy a company which owns the property. So that's done for tax purposes and for planning.

Q. And this was, you believe, sometime around May, that he showed you these documents?

A. In around May

Q. Of 199

A. 6.

Q. 1996. And where was this?

A. This was in London.

Q. In London?

A. Yeah.

Q. And you believe then that the deal was completed or, to use your own expression, 'executed' sometime in the summer. I am not fixing you to a particular time, June, July, August of 1996 or thereabouts?

A. It went through a number of iterations. I remember paying the money, paying a deposit and the deposit got delayed and then I paid him the 100 and then, as part of the deal, he was allowed to keep the house until after the Ryder Cup, and then we took, obviously, possession of the house post the Ryder Cup, I think around October. And then there was a matter of I mean, I wasn't involved in this, but he had lost parts of the documentation surrounding the deed of trust of the house. So all this was not handled by me, so I am looking back

Q. I understand and I appreciate that. Because I'll just take you through the documentation if you want to make any comment on it but who was it handled by?

A. It was handled by David and it was also handled by David Phelan and Helen Malone.

Q. Ms. Malone being a partner of Mr. Phelan's, is that correct?

A. Yeah.

Q. Now, you believe that in London Mr. Austin had a file



which contained a lot of documents and among those documents was something he showed you concerning the deeds, and I know you are not a lawyer so I am not using it in a technical term, but showed you something about the property in Spain, is that right?

A. No, no, he was just describing to me how the property was held by him.

Q. But he had a document?

A. All he had was he showed me the original deed, some old document that he had when he bought the house originally.

Q. Very good. Now, I think as a result of the inquiries made through you by the Tribunal your solicitors have obtained certain documents pertaining to this particular transaction, isn't that right?

A. Yeah. There was a file that we had sought.

Q. And I think that was a file, and I'll just go through the important documents, as we see it at the moment, in relation to the transaction. If there is anything else you wish to refer to, please do. But the file had to be obtained from a number of sources, isn't that correct? From a Mr. Perera in Gibraltar and then some information had to be obtained from the Isle of Man, isn't that correct?

A. Yeah. I mean, he is the fellow who is managing Finnsbury nominees.

Q. Now, I think that the first document that I'd like to

bring to your attention, and I'll put it up, I have just extracted them for the moment, but it is a file note dated 3rd July, 1996. Do you have that?

A. I have that in front of me, yeah.

Q. And it reads. "File note re Tokey Investments Limited, dated 3rd July, 1996 prepared by Mr. MA Perera.

Telephone conversation with David Austin, who explained that due to ill health he was considering selling the property in Spain owned by Tokey by way of transfer of beneficial ownership in Tokey.

At present he was still unsure as to the vehicle to be used for the ownership but he said he would keep me informed with developments.

He said the purchaser was a friend of his and he would be staying on in the house a while longer. He asked for details of the procedure to be followed. I explained that he would have to return the declaration of trust which had been issued to him originally and that these would be cancelled and new ones issue to the new owners. A deed of transfer of beneficial ownership would have to be executed.

Mr. Austin said he could not remember where the declarations of trust were but would try and locate them and would revert to me."

Now, you believe that sometime around May of 1996

Mr. Austin had a file in London and he was able to show you something?

A. He had a plastic, if I remember, some sort of a plastic folder and he showed me the original deeds when he bought the house in 1988. I think it was 1988. And that's basically what he had.

Q. And you believe that that was around May of 1996?

A. Yeah, because I was buying a company he wanted to show that what was in the company, in other words, the house, was an asset of the company, and I took it on face value.

Q. And was this in his house in London?

A. I can't remember precisely where it was. It could have been over dinner or something that he just pulled it out and showed it to me.

Q. A file?

A. Well, it was a folder.

Q. Now, I think as we saw yesterday on the bank statements of Mr. Austin, the money arriving into Mr. Austin's bank account in Jersey in the summer of 1996, isn't that correct?

A. It was July or August, yeah.

Q. The 100,000 and the

A. And the 50, yeah.

Q. And the 50,000.

Now, the next document on the file which has been

furnished to us is another file note, and this is dated 11th June, 1997, and again it's prepared by Mr. Perera.

And it reads:

"Telephone conversation with David Austin who informed me that his health had deteriorated and he was now seriously ill.

He confirmed that he had looked for the declarations of trust everywhere in his various residences but could not find them.

I said I would need a letter of indemnity for lost certificate. He suggested that he would ask the purchaser's accountant in Dublin to deal with me and to get the necessary paperwork sorted out.

Mr. Austin said I would hear from the accountant in due course."

Now, did you know anything about that at the time?

A. I actually I knew that we were trying to get information from David but I wasn't really following it. The matter wasn't being handled by me. I mean, this file, I would have looked at when it was received there just recently.

Q. Now, the next document then is a letter from Valmet, this is Mr. Perera's he is the corporate the service company, isn't that correct?

A. Mm-hmm.

Q. And it's dated 10th December of 1997?

A. I see that, yeah.

Q. And it's to Mr. Phelan, who was your accountant in Dublin, isn't that right?

A. That's correct.

Q. And it reads "Dear Mr. Phelan.

Further to our telephone conversation of yesterday, I now attach a draft of a letter of instructions to be signed by Mr. David Austin.

I also require a letter of reference on yourself from either a bank, lawyer or chartered accountant as per terms of the attached draft.

I also enclose receipt of the letter of indemnity of lost certificate."

Sorry "I also await receipt of the letter of indemnity of lost certificate." And that's from Mr. Perera, isn't that correct?

A. Yeah.

Q. And then in response to that I think your accountants respond "Dear Mr. Perera, by letter dated 7th January, 1998 I refer to previous correspondence concerning the transfer of the above company from Mr. David Austin.

I now enclose the following documents duly signed as requested:

1. Letter of indemnity.

2. Deed of transfer.
3. Letter of instruction.

The beneficial owner is a trust registered in the Isle of Man and administered by Walbrook Trustees, Isle of Man Limited. The contact is Chris Tushingham and the phone number is given "if you require any references or further information please contact me if you require any further information on same."

That comes from Ms. Malone, who is Mr. Mr. Phelan's partner.

A. Is now.

Q. I think at the time she ran the secretarial

A. of Brian Phelan's company.

Q. The secretarial services of Brian Phelan's company?

A. Yeah.

Q. And then included with that is a registered letter signed by Mr. Austin and there is no date on it but it

is enclosed with that letter from Brian Phelan &

Company of the 7th January, 1998, do you see that?

A. Mm-hmm.

Q. And Mr. Austin is saying, "Please accept this letter as your instructions to transfer the beneficial ownership

in the above company to Walbrook Trustees, Isle of Man

Limited, whose full name and address appear at the

bottom of this letter.

Unfortunately the declaration of trust issued by you in my favour has been misplaced and I enclose a letter of indemnity of loss of certificate and deed of transfer of beneficial ownership, duly signed." Do you see that?

A. Yes, I do, yeah.

Q. And also included is a letter of indemnity signed by Mr. Austin, dated 7th January, 1998 and witnessed by Ms. Helen Malone at the offices of Brian Phelan's in Clonskeagh, isn't that correct?

A. Yes.

Q. And also included as an enclosure in the letter of Brian Phelan & Company of the 7th January to Mr. Perera is a deed of transfer whereby "Mr. David Austin hereby transfers and assigns the beneficial interests in the shares specified in the schedule hereto which I hold by virtue of the declaration of trust dated 19th January, 1998 which is duly attached for the ... to Walbrook Trustees IOM Limited, Grovener House, 66/67 Athol Street, Douglas, Isle of Man, to hold the same until the said transfer."

Then the schedule is referred to and it is executed by Mr. Austin on the 7th January, 1998 and it witnessed by Ms. Malone at the offices of Brian Phelan & Company in Clonskeagh, isn't that correct?

A. That's right.

Q. So those documents were sent off to Mr. Perera by letter dated 7th January.

And then there is a letter dated 9th January, 1998 back to your accountants from Mr. Perera in Gibraltar and it reads "Dear Ms. Malone, thank you for your letter of the 7th January with enclosures.

I will now list what we need to do.

1. Revoke power of attorney issued on the 19th January, 1988 to Mr. David Austin.
2. Issue new deeds of trust in favour of Walbrook Trustees IOM limited. I understand from my conversations with Mr. Phelan that our nominee shareholders would continue as registered shareholders. Should I send the new deeds to you or to Mr. Chris Tushingam at Walbrook Trustees?
3. Should I invoice your firm for our fees or should I invoice Walbrook Trustees?

Please note that at present there is an amount outstanding of €514.35 as per the attached copy printout. I look forward to hearing from you." I think that is just a reference to some management fees.

Nothing turns on it.

A. Mm-hmm.

Q. Now, the next document in the series is a letter dated 21st January, 1998 from Helen Malone, Corporate Services, and the address is given at Clonskeagh. And



it's addressed to Mr. Perera - the address of Brian Phelan & Company. I just point that out. It's to Mr. Perera in Gibraltar. It's dated 21st January, 1998. It reads:

"Dear Mr. Perera. I refer to your fax of the 9th January concerning the above company.

I confirm that you should send the new deeds to Mr. Chris Tushingham and an invoice of any outstanding fees.

Your nominee shareholders will continue as registered shareholders as per your fax.

Aidan Phelan will contact you to discuss the date of the trust deed as Mr. Austin was actually paid for the property in July, 1996.

Thank you for your prompt attention."

There then is a letter dated the 4th February, 1998, from Valmet, Mr. Perera, to Mr. Tushingham in Walbrook in the Isle of Man.

"Dear Mr. Tushingham.

I refer to the above mentioned and herewith enclose the original declarations of trust issued in favour of Walbrook Trustees, Isle of Man Limited, as requested.

Should you require anything further, please do not

hesitate to contact us."

And there is a letter dated 19th March, 1999 from Mr. Perera or sorry, from his company Valmet, to Ms. Helen Malone.

"Dear Helen.

Further to your telephone call of this afternoon regarding the above company, please find attached certified copies of the following documents.

Declaration of trust for 99 shares in favour of Walbrook Trustees, Isle of Man Limited.

Declaration of trust for one share in favour of Walbrook Trustees, Isle of Man Limited.

Share certificate number 3.

Share certificate number 4.

I also as requested attach a statement of account.

Please contact me should you require any further details."

And then the I then want to turn to the actual declarations of trust, all of which appear to have been executed subsequent to Mr. Phelan making contact with Mr. Perera following Ms. Malone's letter of the 21st January, 1998, informing Mr. Perera that

Mr. Phelan would be in contact to discuss the date of the trust deed, as Mr. Austin was actually paid for the property in July of 1996. Do you see that letter?

A. What date is that letter?

Q. That letter is dated 21 January, 1998. Now, I appreciate it was Mr. Phelan dealing with the matter, so I am just opening it for your consideration. If you don't wish to comment, that's fine, in relation to these matters, we can deal with Ms. Malone and Mr. Phelan.

A. I don't know a lot about them.

Q. You don't know a lot about them. But there are two sets of declarations of trust. And one is a declaration of trust executed by Finnsbury Secretaries Limited on behalf of Finnsbury Holdings Limited and the other on behalf of Finnsbury Nominees Limited. These were the two companies, the Finnsbury companies in Gibraltar, who held the company on behalf of Mr. Austin originally.

A. Is that the one?

Q. Yes, there are two sets of documents. I just want to know, do you know anything about when these documents were executed?

A. I knew there was problems I mean, vaguely, that there was problems getting David to give us his declarations of trust and I can see now from the correspondence that he gave them after he vacated the

property after the Ryder Cup. And it was sometime after that.

Q. Well, perhaps you can't deal with this and I should take the matter up with Mr. Phelan and Ms. Malone, but I take it you do accept that all of these declarations of trust postdate January of 1998.

A. I think there is a obviously there is a reason for that, because of Mr. Austin's delay in getting his declarations and so I am satisfied.

Q. If I just could go back, so, to your understanding of the actual deal which occurred between yourself and Mr. Austin. In May of 1996, I am not holding you to a specific date or even to that month specifically, Mr. O'Brien.

A. Okay.

Q. You had some discussion with Mr. Austin whereby it was informally agreed about you purchasing the property.

A. Yes, I mean there was maybe three/four conversations.

Q. And on your side you took the step of paying  $\$150,000$  into an account for Mr. Austin, Mr. Austin specifying that he wished it to come from an offshore source?

A. That's right. Because this was an offshore property owned through a Gibraltar company and he wanted it offshore because he was offshore.

Q. And Mr. Austin was unwell at the time also, wasn't he?

A. I think that's part of the problem, Mr. Coughlan, is that the file looks as if there was a lot of gaps and

delays and I think it was because of David's illness

and I think there was a view not to hound him or hassle him.

Q. I don't think that - and I can understand that, that one would not want to put pressure on a sick man but all that was required here was, what was ultimately required was for Mr. Austin to sign a few documents, have them witnessed and send them off to this company, Valmet, down in Gibraltar, isn't that right? That was all that was required for the transaction to be completed?

A. That would not be my understanding, having asked some questions about this file in the last few days, because I don't know a lot of, about this, but he lost his declarations of trust, so without them, he couldn't do anything.

Q. But all that he did to rectify the situation was to sign certain documents and send them to Valmet. That's what actually happened, as you can see, in 1997 and 1998?

A. It could be, and I am only guessing, it could be that he said, 'look, I am going to find them'. He'd say this every time somebody would raise the matter with him. Ultimately he didn't find them and it looks as if he had to indemnify somebody that he had lost them.

Q. Well, if Mr. Perera's note is correct of Mr. Austin's conversation with him on the 3rd July of 1996, he had

asked for the procedures to be followed for this particular operation, isn't that correct?

A. Yeah.

Q. And it was a fairly simple procedure?

A. Again, I am not totally familiar what steps had to be taken.

Q. But perhaps it's a matter we can take up with Mr. Phelan and Ms. Malone in relation to this matter at the moment. But could I just ask you: Do you accept that until these declarations of trust were executed, that you had no legal entitlement to the property in Spain?

A. I wouldn't agree with that at all.

Q. You wouldn't accept that you had no legal entitlement?

A. Absolutely I knew I owned the property.

Q. And that there was no documentation in position which would have enabled anyone to say that Mr. Austin had, in effect, completed this transaction with you?

A. Well, I am not a lawyer but the little bit I know about law, all I know, obviously my knowledge is improving as days go by, but if you pay somebody you have a contract. And I shook hands with Mr. Austin in May, whenever it was, and then I paid him the money, so there was a consideration for a contract. So I was very happy that I owned the property.

Q. Did you take any steps to use the property or have anyone use the property over the period?

A. Yeah, people used it. But then we rented it. We rented it intermittent. It's now in rent for the last two years.

Q. Did you use it after the money of paid?

A. Yes.

Q. When?

A. Not personally. But I gave it to a friend.

Q. When was that?

A. I don't know precisely, but somebody could find out.

I don't know when.

Q. Well, was it between

A. It was after no, it was after the Ryder Cup.

Q. It was after the Ryder Cup?

A. Yeah.

Q. So can we take it that Mr. Austin did not vacate the property until after the Ryder Cup?

A. That was part of the deal with him, is that he would have the use of the property up until the Ryder Cup.

Q. So he didn't vacate the property until after the Ryder Cup, is that correct?

A. I think that would be a fair assumption, yes.

Q. And was that in September or October of 1997?

A. You know, I think there was a period after the Ryder Cup. Ultimately he didn't even use it because he was too ill. I don't think he went to the Ryder Cup.

Q. I see. He may have, so

A. Well, he may have, but he was very ill at the time.

Q. Did any member of your family use it between the time the money was paid and the Ryder Cup, for example?

A. Well, there was obviously you will have seen from my bank accounts, but you know, I bought a place in Portugal, then I invested in a place called Quinta do Lago. So my family is now there, plus my father has a house as well, is building a house. So ultimately, my father didn't use the house because we decided to go to Quinta instead.

Q. And I think, am I correct in thinking that there is a reference in your bank account which was furnished to the Tribunal showing a payment going out in respect of property in Portugal?

A. That's right.

Q. And is that a reference to purchasing some house down in Portugal?

A. Ultimately it was a site and then it became a house.

Q. And that was at the same time or around the same time as this particular transaction with Mr. David Austin was going on?

A. It was post the event. Basically I heard about a site down there. I had been down there, my holidays in 1985, '86, and then I bought a site.

Q. But your understanding, or what you have informed the Tribunal when you made this payment to Mr. Austin, it was your intention to purchase the property for your father?



A. Well, for my parents.

Q. They never used it?

A. They ultimately didn't use it. Well, because David was in it and then when I moved to Portugal then they started going to Portugal.

Q. And it was in the summer of 1996 that you made a payment on a property in Portugal, isn't that correct, as well?

A. It would be. I think I paid a deposit on a site, yeah.

Q. That was in July of 1996?

A. That was in July and then ultimately we bought the resort.

CHAIRMAN: It's just five to one Mr. Coughlan. We'll adjourn until five past two. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AT 2.10 PM:

CONTINUATION OF EXAMINATION OF MR. O'BRIEN BY MR.

COUGHLAN: I think, Mr. O'Brien, before lunch, you were correct in saying that, I think it was on the 11th July, there is a debit from the your Woodchester account. I'll just use it that way.

A. What tab are we on now?

Q. Sorry, it's on to be this is in Mr. O'Connell's book of documents. Tab 9. It's the Woodchester account.

The second page of that, you can see, there is no need to put it up at the moment. I just want to you confirm something. The 11th July, 'Portugal site' is in the Woodchester legend, do you see that?

A. Yeah.

Q. Opposite that the sum, 214.844 and then there is a handwritten note. This is obviously Mr. O'Connell's note of information he is getting from Ms. Foley, I think.

A. Yeah.

Q. Portugal house. Do you see that?

A. Well, I think it was a mistake. It's 'Portugal site'.

Q. But that's what you were talking about before lunch, isn't that correct

A. In Quinta do Lago. That's when I bought a site, yes.

Q. You bought a site there in July of or you commenced it, at least, in July of 1996, or you bought a site there in 1996 in the first instance, is that correct?

A. Yes.

Q. And I think you built a house on that site?

A. Ultimately, yes.

Q. When was that?

A. (Check)oh, oh I think it took about eighteen months/two years early 1998 to sometime around then. You don't build them too fast down there, but it normally takes eighteen months to two years.

Q. Now, if you go down the page, I am not sure whether

this is 1996 as well, you can see 'Xerox holdings, settlement/October', do you see that? And there seems to be, maybe it's 1997, there seems to be reference to 'Portuguese site' and 'building costs', do you see those two?

A. It could be, yeah. I don't quite see it now.

Q. The page we were on.

A. Yeah.

Q. If you go down, finish 1996, then you have 1997. Then there is another account, that's a second account.

It's 1991/1996 as well. 17th September, Xerox holdings, and there is a note of Mr. O'Connell's, 'Portuguese site, 43 odd thousand pounds', 1st October, building costs, i.e. 1/244,609. Building costs' - 'monthly payment', perhaps. Again, this information wasn't being given by you, it was being given by Ms. Foley I think to

A. It says

Q. - 1996, do you see that, September and October? I am just wondering about that. Because we have account number 01 D -02/48785/02. Then you have 1996.

Then we have 1997. Then under that we seem to have a new account number which is from November account.

This begins 1996. Do you see that?

A. Yeah. And it says 'something - Europa' and then it goes on to 'holdings', 'holdings' and then 'Doyle'.

Q. Yes, you see that. Is that 1997?

A. Mr. Coughlan, obviously I want to help you, but I am

not that happy that, you know, that my private home would be dealt in this way in a sense that the cost of building it and the cost of buying the site, so I am going to try and help you, but maybe if this could be handled in private rather than public.

Q. All I am trying to establish is this related to 1996 and 1997.

A. 1997, it says in my copy. I'll show it to you.

Q. Perhaps Mr. O'Connell would just - sorry, I beg your pardon, 1997, yes, you are correct. 1997, I see 1997 now?

A. That would have been the commencement of the building.

Q. And I think, as you have informed us already, neither you nor any member of your family, I mean by that your parents, used the house in Marbella at all, is that correct?

A. Well, the house wasn't available until October 1997, and then I think I gave it to some friends.

Q. But it was never used for any purpose for your parents.

It was never used by your parents?

A. No, and I explained to you, we bought Quinta do Lago, which was where that site was. Then my parents decided to go there on their holidays instead.

Q. Now, I think you also informed us before lunch that perhaps the reason why the documentation for the transfer of the shares wasn't completed, or declarations of trust were not executed, until 1998 was

that Mr. Austin had mislaid his original documents and that it was felt that perhaps it wasn't appropriate to chase him up because he was a sick man?

A. Well, I think people would have approached him but they weren't you know, they weren't putting a great amount of pressure on him at the moment.

Q. Who do you believe would have approached him, Mr. Phelan?

A. Or Ms. Malone.

Q. Those are the two people you believe would have been involved in that?

A. As far as I am aware.

Q. On your behalf. Did you approach him yourself?

A. I don't remember, no.

Q. And there can be little doubt that in late 1997, Mr. Austin was very sick. He had fairly serious chemotherapy in the south of France, isn't that right?

A. He had multiple treatments from, I think '96, '97, '98 and then he passed away in November 1998.

Q. I am just saying that, or asking you, can you remember in late 1997 he was particularly ill around that time. He had had fairly heavy treatment?

A. He was every couple of weeks he would go off and get very, very severe treatment, I think against the wishes of a lot of people. He was hopeful of getting through his illness and he never did.

Q. And you feel that that was it was out of a feeling

of sensitivity to him that matters were not pushed in relation to completing the documentation for the transfer of the shares?

A. Probably, yes.

Q. And I should say, not to complete the documentation, but to put in place any documentation?

A. Well, I think the process had been started. He was going off looking for his documentation.

Q. Would you agree that the same sensitivity to Mr. Austin's condition did not apply at the time of the IPO when it was thought necessary that he should be approached to furnish a letter in relation to the political donation?

A. My understanding, and I am relying on notes already given in evidence, is that, not to push too hard, that if he was willing to give the letter, but if he was not well enough, you know, to leave it. But ultimately he wrote a letter on his bedside and it was sent to whoever it was sent. I think it was sent to William Fry.

Q. But there wasn't there was an easier route, wasn't there, to go to Fine Gael, but it was decided to approach Mr. Austin, although he was a very sick man?

A. Obviously, the benefit of hindsight, but it was just interesting reading all the notes of the lawyers well, the three sets of lawyers and all the conversation which I was not part of, about Fine Gael,

all the directors were saying 'go to David Austin'.

Q. Did you at any time suggest that this was a sick man, not bringing up any personal relationship or dealings you had with him in relation to the house at that stage, but just to point out to them this was a sick man, 'look, just go to Fine Gael and get this sorted out'. That didn't occur to you?

A. I think the board would have known he wasn't very well and the instruction, and I have no reason to know whether this instruction would have been given or not, but I think it would have been handled very sensitively.

Q. But it didn't occur to you I am just asking you, it did not occur to you at the time, 'there is a simpler solution to this than bothering a sick man'?

A. I wasn't there for that part of the conversation for all these meetings of directors. Maybe if I had been there I probably said 'go to Fine Gael' but I don't know. I think the most obvious person at the time was David.

Q. Now, Mr. O'Brien, I want to put something to you and I don't want you to view it as being in any way adversarial but I have a duty conducting this questioning on behalf of the public to ask you to comment on this suggestion, that it would be it would not be unreasonable to take the view that there was no reality in the suggestion that this property was

being purchased from Mr. Austin for your parents; and the reason I ask you to comment on it is in the light of the fact that there was no documentation put in place until 1998. Your parents, nor you, ever used this property and at the time that this transaction was taking place you were in the process of providing holiday accommodation in Portugal; what would you say to that?

A. I would say I think you are completely, categorically wrong, Mr. Coughlan.

Q. Now, at the time of the IPO and at the time running up to the IPO, I take it that, as you have informed us, Mr. Austin was unwell for long periods of time, receiving treatment, recovering, receiving more treatment?

A. He was on a cycle of treatment.

Q. He was on a cycle of treatment. Now, was Mr. Austin in contact with you at a time coming up to the IPO in the weeks and months beforehand?

A. I would have consistently stayed in touch with Mr. Austin.

Q. And what sort of thing did you discuss?

A. Well, invariably he was in hospital or recuperating and he would ring his pals, ring them and talk to them and even though, you know, I might have been busy, I would us always step out of the meeting or wherever I was and have a good chat with him.



Q. And was this because of a longstanding family relationship with Mr. Austin?

A. When people are ill you can't say 'Look, I am busy'.

Q. I understand that.

A. The normal thing well I don't know what's normal here but you talk to the person and encourage them.

Q. And when Mr. Austin would ring you up and he probably rang many other people as well was it to discuss matters in general?

A. He was great company and he'd always have a laugh. He would mimic people that I would know and he would just chat about everything. He'd chat about his investments, he'd chat about the Smurfit Group. He just was a nice person to talk to.

Q. But from your conversations with him, can I take it that you didn't think it appropriate to raise business matters, for example, putting in place the documentation for the house in Spain?

A. Well, I knew and he knew that basically it was somebody else was handling that. Now, I could have said to him, 'Look, you know, can you see if you can find the declarations' or whatever was missing. But I don't actually have a firm recollection of saying that to him.

Q. Right. Well, can I take it that the conversations were not business-related conversations?

A. No. We'd talk about anything and everything. You

know, I might mention something about the Smurfit Group

but wouldn't go into any

Q. No, it was just general chit-chat?

A. Yeah, he'd talk about horses.

Q. A bit of gossip or whatever the situation may be?

A. Yeah.

Q. I take it that he was aware that in general terms, at

least, that there was going to be an IPO

A. Oh, yeah. I mean I would have told him well, he was on the board of a public company so he would know the process of becoming a public company and all the different things, and regularly I'd talk to him about, you know, how the IPO was going, etc., etc.

Q. And I suppose as you, being the son of a close friend of his, he'd have an interest in your affairs?

A. And you know, he might give me the odd tip or something.

Q. As a senior businessman himself?

A. Yeah.

Q. You have informed the Tribunal, I think, that in the run up to the IPO in ESAT Telecom in November of 1997, Mr. Austin asked you on a number of occasions to obtain shares for him in the flotation through the friends and family allocation, is that right?

A. Yeah, that's right, yeah.

Q. How did that arise? Did Mr. Austin actually say to you 'Will you get me some shares in the friends and

family allocation'?

A. What normally happens is you are besieged by people, particularly if there is if a company is doing a flotation and people in the media or people in general think that the flotation is going to go very, very well, that will create demand and then if there is demand, well then the shares will rise.

Q. Yes, I can understand.

A. So in that context what normally happens if you are a the Chief Executive of a company that's about to be floated you have people ringing up saying, 'listen, can I buy some shares?' and, like, obviously as Chief Executive, I wouldn't be dishing out share certificates.

Q. Of course not.

A. What normally happens is one of the investment banks which would be the lead in this case, that will run the books, in other words, they would be monitoring the demand as the orders came in after the roadshow, like every night they would look at the book. They then would have a scheme or they would have what's known as a 'friends and family' and normally 5% of an offering. So if you are raising \$100 million in the flotation, about 5 million of that would go in shares to friends and family, presuming they wanted to buy it. So I had like loads of people ringing me at the time saying 'can you get me shares, can you get me shares?' and

ultimately it was 5 or 6 times oversubscribed. So if they were selling \$100 million worth of shares we'd 600 million or 700 million worth of demand. So there would be an awful amount of pressure put on, both institutionally and individually, 'get us shares, get us shares'. So David had a couple of times said, 'look, will you get me shares?' I said, how much do you want to buy? He said '\$100,000 worth' and I said 'okay, leave it with me, I'll get them for you'. And ultimately, I, with all the other things going on, between what was going on back in Dublin, as we have been discussing here, and the pressure of the roadshow, I actually forgot to get him his shares. And I didn't feel very happy about that.

Q. I'll come to that in a moment. I am just wondering, I don't know, I am trying to understand Mr. Austin, because Mr. Austin is dead and can't speak for himself?

A. Unfortunately.

Q. Unfortunately. Was Mr. Austin the sort of man who would have been asking you for something like that or, as one could readily understand, you, as the son of a close friend of his might say, 'I'll get you some shares' that Mr. Austin was the one who instigated the conversation?

A. He said, 'listen, when you are going public, I'd love to buy some shares'.

Q. I can understand something like that being said?

A. That was it.

Q. That was it?

A. Yeah. I said 'how many shares do you want to buy?', because you don't want to embarrass the person and, you know, get an allocation that's too much for them. So in that case you'd say to the person, 'well, how much do you want to buy?' He said 'will you buy me \$100,000 worth.'

Q. How is that or what are the actual mechanics of it then in the friends and family allocation?

A. There would be one person in one of the investment we had four investment banks. So the lead investment bank would say to one of their people, and they may have two or three people working with them so, to run the friends and family list

Q. would it be an actual list or would it be a nominee matter?

A. No, it would be a list of people. And then the firm will come under a huge amount of pressure as well because, you know, directors of the firm or the CEO of the investment bank would get phone calls from all his friends saying, 'I hear this is going to be great, can you get me shares?' So they may end up on the list as well. So normally there is a scramble for the, hypothetically it's 5%.

Q. Well, if I take it that, as a situation like this, where it was oversubscribed anyway

A. Yeah.

Q. Would it mean that everybody on the list wouldn't get an allocation or the allocation they were hoping for?

A. What happened is that they wouldn't some people would be chopped off the list.

Q. And how was that determined, do you know?

A. It was well, you know the, the people who didn't merit getting shares or they didn't know anybody or it was tenuous, a friend of a friend of a friend or something like that.

Q. And who would decide on that?

A. The underwriters had a major role in that, as far as I can recall, plus the people running the advisers on behalf of the company.

Q. And such a list exists so?

A. It's in an archive somewhere in New York but, as you know, we have sought it.

Q. How, as you say, I can understand you get phone calls, you could get a pain in your ear from getting phone calls, I suppose, from people saying, 'can I get some shares here' or would you take a note and refer that to the person in the bank who was handling the friends and families allocations?

A. Yeah, if somebody phoned me, yeah.

Q. And when do you believe that Mr. Austin made inquiries of you as to whether he could get some shares?

A. Some weeks before the 15th October when we started the

roadshow.

Q. Sometime before the 15th October?

A. Yes.

Q. And you believe that you forgot to pass this onto the bank?

A. I actually did, yeah. And ultimately that was a bit of an embarrassment.

Q. When did it become apparent that Mr. Austin had not been included in the friends and families allocation?

A. He rang me a week after the IPO and said, 'Jesus, the shares will going great' and then I realised that I

hadn't put him down on the list and it was my error.

It was a mistake.

Q. So that was sometime after the 7th or 8th November I think the IPO was on the 7th November

A. It would have been the middle of November. I can't remember precisely, but sometime.

Q. I think what you have informed the Tribunal is that:

"On the 18th February, 1998, Mr. Austin paid \$100,000

into an account with Donson Luckin and Jennerett (DLJ)

in New York. The stock had appreciated by 50% since

flotation in November and therefore also on the 18th

February 1998 you transferred \$50,000 out of an RINV

account with Woodchester into Chase Bank New York for

DLJ's" that's the brokers" David Austin account.

Shares were then bought in the market for Mr. Austin by

DLJ and Mr. Austin thereby acquired the uplift he

believed had accrued through the IPO allocation he had sought from our client. There was no agreement between our client and Mr. Austin under which our client was either to provide or make up the share price differential between the stocks flotation price and its value in February 1998. We think that Mr. Austin was never aware that our client had in fact funded that differential."

A. I believe that is true.

Q. And I think you then furnished the extract from the RINV account in Woodchester Bank showing that particular transfer, isn't that right?

A. I believe we did, I think that's it, yes.

Q. And that was on the 18th February, transfer to Chase New York account, DLJ, Pershing account, David Austin and debit 50,000 and the value date 18th February, is that right?

CHAIRMAN: So ultimately, Mr. O'Brien, you tried to put Mr. Austin into the position he would have been in as far as possible if you had recalled his request to get \$100,000 worth and not to let him know it had been done afterwards by adjustment.

A. Yeah. I mean, I was in a bit of a quandary because he was ringing me saying 'congratulations, the shares are going great and I made X thousand dollars'. And I didn't have the heart to tell him 'Look, I never got



you the allocation' and ultimately I said to myself 'I am going to make this up because I promised him that I would get him the shares and I didn't'. So I suffered financially.

Q. MR. COUGHLAN: In the purchase of shares at the time of the IPO was there an account period?

A. An account period

Q. For example, if one was purchasing the shares, when did one have to provide the money for purchase of the shares?

A. I could be wrong about this but I think I am right when I say that in a 'friends and family' people have to lodge the money before the due date.

Q. I don't know. I am just wondering if you can help?

A. I think that's the way 'friends and families' work.

Q. And Mr. Austin wasn't providing \$100,000 until February of 1998, isn't that correct?

A. That's right, yes.

Q. Did Mr. Austin know that he was purchasing the shares at the price that they were then being quoted?

A. I think I said to him, 'look, I'll cover you and then you cover me'. I couldn't be absolutely sure about that.

Q. Sorry, pardon me if I don't understand that, Mr. O'Brien?

A. What I mean is he would have said, he would have put in his order with me and asked

Q. When?

A. Weeks before the IPO. And he said 'where will I send the money to?' I said, 'look, don't worry about it and I'll cover it until then I'll ring you and tell you to send the money'. So when he sent the money in February. I believe it was his assumption that I had covered it 'till then.

Q. That you personally had covered it?

A. Yeah.

Q. But he didn't send the \$100,000 to you?

A. He didn't send it 'till February.

Q. Hmm?

A. He didn't send it 'till February.

Q. He didn't send it 'till February but he didn't send it to you in February?

A. He ultimately sent it into DLJ.

Q. How would he have known where to send it?

A. Because I would have told him. He knew that DLJ were doing the IPO.

Q. But somebody must have told him to pay it in there, isn't that right? You, or perhaps Mr. Phelan?

A. I think it could have been me. I am not sure. I don't know. So when he would ring me and say 'God, the shares are going great, where will I send the money to?' I was in the quandary whether I tell him that he has no shares or else that I cover the difference.

Q. Now, you think that Mr. Austin rang you a week or two

weeks, whatever, after the IPO?

A. Yeah.

Q. Why did you wait until February to carry out the transaction?

A. Normally, and this is not because I had any particular knowledge, but normally what happens on an IPO is that the share price moves forward and then over a period of time it tapers and then it recovers, if you look at graphs of IPOs. So I thought that in January it might be, you know, the stock might soften a bit and it would save my money buying his shares for him. But ultimately it didn't. It just kept going so I just said, 'I'd better do this transaction now.' .

Q. Now, the money which came out of Radio Investments account with Woodchester on the 18th February, did you give that instruction or was it Mr. Phelan?

A. I actually don't know now. The ultimate instruction would have come from me that to send \$50,000 across to DLJ.

Q. I understand that but would Mr. Phelan have executed that instruction on your behalf?

A. I actually don't know now. I wouldn't be sure.

Q. I think you also informed us about something else. I don't want to mention any names or any relationship at this stage, if that's all right with you.

A. That's fine, yes.

Q. But you have informed the Tribunal that in relation to

another person, that person has an account with DLJ in New York to which you occasionally lend money to enable that person to buy shares?

A. Yes.

Q. That person is unconnected with Mr. David Austin or anyone else?

A. Absolutely, yes.

Q. In September 1998, you directed Aidan Phelan to advance funds to buy 12,000 shares for the person who has that account, isn't that right?

A. Mm-hmm.

Q. In error Aidan Phelan arranged their purchase on the 3rd September 1998 in David Austin's account with DLJ.

A. That's correct.

Q. Accordingly, on the 18th September Aidan Phelan arranged for the transfer of \$294,000 US to David Austin's account to pay for the shares and the shares were subsequently transferred in correction of the error to the other person's account?

A. Yes.

Q. There was no financial benefit to David Austin, is that correct?

A. None whatsoever. This was a miscommunication between the brokers.

Q. At the time when Mr. Phelan conducted this particular transaction was he acting for Mr. Austin or for you?

A. He was acting for me.

Q. He was acting for you in the context of an instruction to buy shares for the unnamed person, is that correct?

A. Well, no. He was well, he was moving money on my behalf, yeah.

Q. But he was giving instructions in relation to a correction of what has been described as the error and he was giving instructions in relation to the account with the brokers in Mr. Austin's name, isn't that correct?

A. Well, what was happening was that DLJ realised the error that they made and they corrected it. That's as far as I know.

Q. Now, who do you think made the error? Was it Mr. Phelan who purchased them in David Austin's account with DLJ or was it the brokers?

A. I think the brokers made the mistake.

Q. You think the brokers made a mistake?

A. But I wouldn't be a hundred percent sure of that. It could have been Mr. Phelan but it looks to me as if the broker made a mistake, that he got confused with his Irish clients.

Q. So you think that when Mr. Phelan sent money to the brokers it would have gone without an instruction as to who the shares should be purchased on behalf of?

A. You see, we are operating I am looking at this letter here and we are trying to explain, my solicitor was trying to explain it. But I thought it was a DLJ

error. I mean, brokers make plenty of errors where they put shares into the wrong account or buy shares and put them into the wrong account. So

Q. Very good. So an instruction could have been given to buy shares and they went into Mr. Austin's account.

A. By mistake.

Q. By mistake. If we take that first. According to what you have informed us through your solicitor, on the 18th September Aidan Phelan arranged for the transfer of \$294,000, I take it from an account of yours?

A. Mm-hmm.

Q. To David Austin's account to pay for the shares, isn't that right?

A. Mm-hmm.

Q. So Mr. Phelan paid for the shares which were now in Mr. Austin account?

A. Just let me read.

Q. on the 18th September, Aidan Phelan if we start if we take it step by step instructions were given to purchase shares. The shares were put into Mr. Austin's account, it would appear, or they were held for Mr. Austin by the brokers. That would appear to be the situation, is that right?

A. Yeah. I mean, what it says here, that I directed Aidan Phelan to advance funds to buy 12,000 shares for

X. In error, Mr. Phelan arranged the purchase in

David Austin's account.

Q. So it would look that the error was Mr. Phelan's error, would it?

A. I actually don't know. I mean, I think you'd have to check with DLJ.

Q. Very good. In any event, and we can check this, but in any event

A. there was no benefit

Q. sorry, in any event, I just want to just go through this in some detail, if I may, just so that I can understand it, Mr. O'Brien.

A. Mmm.

Q. Whether the error was Mr. Phelan's or whether the error was the broker's, there was now 12,000 shares in Mr. Austin's account?

A. Then they were moved out.

Q. If we take it step by step. Leave aside whose error it was, there was 12,000 shares in Mr. Austin's account?

A. Yeah, briefly, yeah.

Q. And the brokers here the whole time were DLJ, were they?

A. Yes, Donson Lufkin Jennerett, yeah.

Q. That was on the 3rd September that happened, the instruction to purchase the shares occurred?

A. Yeah.

Q. It would appear from what we have been told. On the

18th September we are informed Aidan Phelan arranged for the transfer of \$294,000 US from David Austin's account to pay for those shares, is that right?

A. Yes.

Q. And that money was your money, isn't that right?

A. Yeah.

Q. The shares were subsequently transferred in correction of the error to X's account?

A. Yeah. I think when well, it's a cycle of buying shares and it's probably a two week cycle around then.

When you buy the share, you pay for the share. So obviously they realised the mistake when they came for payment and that's when

Q. who did?

A. the brokers did, or whoever did, and then they discovered, 'hey, these shares were not Mr. Austin's, they were somebody else's'.

Q. Now, Mr. Austin was alive at this time, isn't that correct?

A. This is September '98, yes.

Q. Do you know if anyone spoke to Mr. Austin about this?

A. I actually don't know whether even Mr. Austin, whether he knew or not about the whole thing, but I know Mr. Austin was in hospital in London at that time.

Q. And what if the brokers had sent him a statement of his account, he would see that he had a very large number of shares in the account, wouldn't he?



A. Knowing him, I'd say he would have been on the phone to see what was going on.

Q. In any event, we are looking for more documentation, isn't that correct, in relation to these matters?

A. Yeah, but Mr. Austin didn't make anything out of it.

It was a mistake, as brokers make mistakes or people make mistakes.

Q. But Mr. Phelan was carrying out the instructions on your behalf, is that correct?

A. On my behalf originally, yeah, with the transfer of the money.

Q. And the purchase of the shares?

A. No. The purchase of the shares was somebody else.

Q. Who was that?

A. Mr. X.

Q. I am sorry, we are at cross-purposes there. Do you know when the correction of the error occurred?

A. It would have been the 18th September then, wouldn't it? Yeah, I think it was the 18th.

Q. You think

A. Well, from this, the documentation looks as if the 18th. So they were there for two weeks.

Q. Well, the only reason I just wonder, and perhaps you can give me an explanation, there was the instruction from Aidan Phelan by fax

A. this is 22nd

Q. 22nd September, 1998 giving the instructions, "I

would be obliged if you would transfer \$294,000 from the Denis O'Brien facility as per attached wiring instructions. See DLJ wiring instructions.

Regards." And it's from Aidan Phelan, AP Consulting, Orchard House, Clonskeagh Square, Clonskeagh, Dublin 14, do you see that?

A. Yeah.

Q. And that was on the 22nd September, 1998. And then the wiring instructions to DLJ, which appears to be on the 18th of September, 1998

A. I'd say there is an explanation for that.

Q. Well, very good

A. It's simple. Maybe he verbally had told them and then they said 'will you write a note or something?'

Q. But in any event, in relation to shares which Mr. Austin had in ESAT Telecom, \$50,000 worth of those shares were attributable to you making up the difference between the value of the share at the time of the IPO and the value in February of 1998, is that correct?

A. Yes, and I think you would have seen why I did that and I was trying to be as honourable as possible, given that what he had asked me to do initially.

Q. And the other movement one might see on Mr. Austin's account showing a large number of shares

A. is an error.

Q. is an error?

A. Absolutely.

Q. And I think we are all waiting to get further documents in relation to that particular transaction.

A. Yes, Mr. Austin then held on to the shares, from what I understand, all the way.

Q. Do you think Mr. Austin was ever told that he had received any benefit from you in that regard I know just to make up your own mistake.

A. He would have been very embarrassed and I would not have told him.

Q. Do you know if you ever made any note to remind yourself to inform did you make any note when Mr. Austin spoke to you, to remind yourself to purchase the shares for him?

A. No, probably not, no. I don't think so.

Q. And do you believe did you ever make any note just even by way of jotting down on a piece of paper in front of you the name 'David Austin' for passing on to the bankers dealing with the family and friends facility?

A. I don't think so. I mean, it's hard to know whether I did or not.

MR. MCGONIGAL: There is just one small matter, Mr. Chairman. I don't want to interrupt and I know we are getting more documentation and we will get further documentation, but I note, just looking at the DLJ

wiring instructions which follows the letter from Aidan Phelan, that, in fact, on the top left-hand corner, that has a date of September 18, 1998.

MR. COUGHLAN: Yes, I bought that to Mr. O'Brien's attention.

MR. MCGONIGAL: I think that may be from New York to Ireland. I think there may be another DLJ instruction from Aidan Phelan backwards. I am not a hundred percent sure but I think that may be the sequence because the dates are so different.

Q. MR. COUGHLAN: I did bring that to Mr. O'Brien's attention. I think we are awaiting further documentation. I think it's what we were looking at was the date on top of the fax which was for the transfer of the funds dated 22nd September, isn't that right? And a the DLJ wiring instructions which seems to be a fax date of the 18th September.

A. Yeah.

Q. But that's a matter we can take up again.

Now, I know from the letter I read out this morning, Mr. O'Brien, that your legal advisers, your financial advisers and members of your staff assist in the gathering together of the documents for the purpose of furnishing them to the Tribunal?

A. You are keeping everybody busy.

Q. Can I ask you who got this particular document from Woodchester?

A. This one?

Q. Sorry, the document which shows the withdrawal or the transfer of the 50,000 from the Radio Investments account.

A. Who would have got this? Maybe Paddy Halpenny featured again.

Q. A member of your staff?

A. Yeah. I wouldn't be absolutely sure.

Q. And the fax dated 22nd September, 1998 where Mr. Phelan is giving instructions to transfer money from your facility, where did that come from, to the best of your knowledge?

A. It went to William Fry in June. I am not sure. It could have come from Mr. Phelan or else it would have been on a file.

Q. And the DLJ wiring instruction, where do you think that may have come from?

A. Probably similarly

Q. Perhaps from Mr. Phelan?

A. It could have been, I am not sure where it came from.

Q. So do you believe Mr. Phelan will have some documentation himself in relation to these matters?

A. I'd say what he has he has given to us at this stage.

But we can always ask again.

Q. Now, if I might return to matters which were occurring

around the time of these particular matters, that is the IPO and the discussions that were taking place and the questioning of yourself and Mr. Moloney and Mr. Johansen. I think you know that Mr. Moloney has furnished handwritten notes in relation to various conversations he had with you and with other people

A. The new ones or the

Q. No, new ones and the older ones. I think you have had an opportunity

A. To read them, yes.

Q. to read the notes. And I think Mr. Michael Walsh of IIU also furnished notes of conversations he had with you, Mr. Moloney and other people as well, isn't that correct?

A. Yes.

Q. And I think you yourself have notes of the meeting of the 23rd October 1997?

A. Yes.

Q. Is that right?

A. That's right.

Q. Now, before I go into the notes, I think it is correct to say that looking at the Telenor notes of the meeting of the 4th November, 1997, those typed notes we opened this morning

A. Will we go to them or will I leave the Moloney stuff?

Q. If you wish to go to those particular notes at the moment, fine, but it's just I think do you accept that

those notes are a reasonably accurate account of what took place at the meeting on the 4th November?

A. Yeah, it's a kind of a resume (Fr) but broadly, broadly.

Q. And I specifically want to ask you when Mr. Kealey was questioning you, you seemed to accept that you had used the expression which was attributed to Mr. Moloney, that Mr. Moloney had said "I don't want to know" or words to that effect. "I don't want to know, it's not my company."

A. I think I had seen his statement and there had been conversations with him and I had no reason to believe that he might not have said that, so I wasn't sure whether he had or not, but

Q. But you have no reason to doubt that he said that, have you?

A. I said I don't disagree with Barry Moloney's reply "I don't want to know".

Q. We are just trying to establish all the facts here, Mr. O'Brien. So can I take it that you don't disagree with Mr. Moloney that he used those words?

A. Probably on hindsight reflection, yeah.

Q. And I take it you then wouldn't have any great difficulty in accepting, so, that if Mr. Moloney used those words or similar words, that he wasn't viewing the conversation as being bravado or a joke?

A. I would have a different view. I would have said he

doesn't view the conversation as serious.

Q. I see. And can I take it that you accept, again just looking at those notes of what transpired on the 4th November, that whilst you said you didn't recollect using the term "Intermediary" that you went on to give an explanation that if you had used the term "intermediary" it meant a bank?

A. Yeah.

Q. A bank, or I think you said "a bank or a cheque-book" is that correct?

A. I don't know where I got the "Ocheque-book" from, but a bank, yeah.

Q. And that when Mr. Kealey put it to you that why didn't you use the word "Bank", that to any other person, an intermediary would mean another person

A. Where is that now?

Q. I'll get it for you exactly now. It's book 29 A

A. I have the I am looking at this. Is this the right one?

Q. Yes.

A. Yeah, page 15 I think it is, is it?

CHAIRMAN: Which page, Mr. Fitzsimons?

MR. FITZSIMONS: 23. It's, it starts off by saying

MR. COUGHLAN: "In relation to Michael Kealey's point as to why he would not use the simple reference to a bank, DOB replied, "You don't always say the obvious



thing." Michael Kealey stated that 'intermediary' would not mean 'bank' and Denis O'Brien replied that 'intermediary' obviously means 'a bank'. Eventually stated "I agree to differ."

Now, would you agree with the point Mr. Kealey was making that if you were making reference to a bank, you would simply make reference to a bank and your response was 'you don't always say the obvious thing.'?

A. I also said "I agree to differ".

Q. Yes, that is subsequently, you agreed Michael Kealey stated that 'intermediary' would not mean 'bank' and you say "I agree to differ with you on that."

MR. McGONIGAL: I think it first starts on the page before that.

MR. COUGHLAN: I'll take half the page before that.

"DOB continued after DD's departure that Minister Lowry had been business-like and commercial. "I thought to give him  $\frac{1}{2}$ 100,000 from an account in Woodchester. The payment was not specifically earmarked. I did not take any action to make the payment. I only had a funds flow idea in mind but I took no action. When I say that the money was 'stuck with an intermediary' I mean that it was stuck with the bank. I don't recollect the word 'intermediary'. I don't remember someone other than a bank. Woodchester are my lead

bank. They have been bankers to me for 7/8 years.

Woodchester saved me from bankruptcy three/four years

ago. I pay everything through Woodchester. In

relation to 'intermediary' you either use a bank or a

cheque-book." In response to MK's question as to why

he used the reference to 'intermediary', DOB replied

"the money never left the bank." Michael Kealey again

questioned the use of the expression 'intermediary'

saying this suggested a third party between Denis

O'Brien and the recipient. Denis O'Brien pointed out

that it was quite obvious who the intermediary was and

that you use either a cheque-book or the bank. In

relation to Michael Kealey's point as to why he would

not use the simple reference to a bank, Denis O'Brien

replied "You don't always say the obvious thing."

Michael Kealey stated that 'intermediary' would not

mean 'bank' and Denis O'Brien replied that

'intermediary' obviously means 'a bank'. Eventually

he stated "I agree to differ."

Now, is it your is that still your position, that

'an intermediary' obviously means 'a bank'.

A. Yeah. You see, I actually don't remember using the

word 'intermediary' and Barry Moloney raised this, I

think, on the 13th or the 14th October. But my

interpretation and the other person at the meeting was

that 'intermediary' was 'the bank'.

Q. But that's still your view, that 'intermediary'

obviously means 'a bank'?

A. Yes.

Q. And would it have been your normal use of language in relation to Woodchester, that they were the intermediary in any other business transaction?

A. In any other business transaction?

Q. In a business transaction?

A. A bank, in my view, is an intermediary, a financial intermediary bank.

Q. Now, you can see the way Mr. Kealey was putting the matter. Would you agree

A. he was doing his job.

Q. that that would be the more common and reasonable use of the expression "Intermediary"?

A. And that's why I said I agreed to differ with him. I wasn't picking a row with him, at whatever time of the morning it was, 4 or 5 in the morning.

Q. Now, we might, at this stage, I think usefully, go to the notes provided by Mr. Michael Walsh in the first instance. Now, Mr. Michael Walsh was a director of ESAT Digifone. He was one of the IIU Nominees?

A. That's correct.

Q. And I think he was involved by yourself and Mr. Moloney in the first instance, I think, on the afternoon of the 13th October, 1997, would that be correct?

A. 13th, yes. What Mr. Moloney had said to me before that is, you know, you are forcing me not 'forcing',

it was something to the effect, 'look, the board needs to go or be informed, we should get another director involved', and I didn't wait for him to do it. I just immediately said to myself 'I am going to get Michael Walsh immediately involved in this'.

Q. Now, I think Michael Walsh, Mr. Michael Walsh kept fairly lengthy notes of various meetings he had, isn't that correct, and I think you have had an opportunity to examine those?

A. I think they are different to the other notes, that they are sort of a resume of what was said. So I don't think they are verbatim.

Q. No, I am not suggesting well we will hear Mr. Walsh on it

A. I am only guessing now.

Q. Well, we'll just put Mr. Walsh's notes before you for your consideration. You have had an opportunity of reading them but I'll open them to you, you needn't worry.

A. Do you have to read all these?

Q. I am going to read the portions to you, Mr. O'Brien, that I want to make reference to.

A. Okay.

Q. Now, the note, the first note of Mr. Walsh's is for the 13th October, 1997 and it reads "Michael Walsh met with Barry Moloney, Denis O'Brien at the Malt House. Denis O'Brien informed Michael Walsh that he had a

conversation with Barry Moloney approximately one year previously where Denis O'Brien stated he was going to look after Michael Lowry. Denis O'Brien stated he had confirmed to Barry Moloney on a number of times since that he had not made any payment. Barry Moloney confirmed that he had accepted Denis O'Brien's assurances that no payment had been made to Michael Lowry. Michael Walsh said it was a serious issue, that he wanted a letter from Denis O'Brien to the company confirming that absolutely no payment or inducement had been made or proffered to Michael Lowry. Michael Walsh was under time-pressure and it was left to Denis O'Brien and Barry Moloney to draft the letter."

Now, would that accord with your understanding of the meeting on the 13th October, 1997?

A. Not fully. And I think the one thing where he says 'DOB said he was going to look after Michael Lowry', I think I would have said at the time about the run, that 'if you think you have got problems, I have had to pay 200,000'. So the rest is the letter, that could be privileged, I don't know, but I don't have a copy of that, Mr. Coughlan.

Q. You accept that there is a significant difference between your understanding, so, of what occurred and Mr. Walsh's record of his understanding of what

occurred?

A. Yes, on the one issue.

Q. It's a significant issue, you will accept, in the context of what was going to be inquired into?

A. Yeah, definitely.

Q. Now, you can, I think, move along because I don't want to ask you to comment on matters you were not involved in. Mr. Walsh will be giving evidence of all his contacts with people like Mr. Desmond and Barry Moloney. You weren't present for those?

A. No, I wasn't, no. I hadn't realised there were so many conversations going on.

Q. Now, if you go to the next page, and I know you weren't present?

A. This is a conversation

Q. between Mr. Walsh and Mr. Barry Moloney. It seems to be sometime after 6 p.m. on the 13th October, 1997.

MR. McGONIGAL: I think this may be on the 14th, Mr. Chairman.

MR. COUGHLAN: I see.

MR. McGONIGAL: And it's by reason it's an analysis by me arising from the first paragraph, "Barry Moloney contacted MW to say he had talked to Dermot Desmond" and in one of Mr. Moloney's notes he appears to have contacted Mr. Desmond on the 14th, so I am assuming that this is a contact after that, which would place

this document as being the 14th.

Q. MR. COUGHLAN: Very good.

A. But it's labelled 13th, is it?

Q. It seems to be, and Mr. McGonigal may well be correct on the date of it. But you can see that it is a conversation between Mr. Walsh and Mr. Moloney.

A. Mm-hmm.

Q. And I know you weren't present but I just want to ask you for your comments, if any, in relation to what was said. Barry Moloney you see on the second page, the second line, it begins, "BM" - in bold capitals - "BM said he was particularly concerned because he believed that an intermediary was involved and that the intermediary was aware of Denis's intent to give money to Michael Lowry. Barry Moloney believed that money for Michael Lowry had been given to an intermediary by Denis O'Brien but had, for some unexplained reason, got stuck with the intermediary. BH said he had completely forgotten about the conversation with Denis O'Brien until Denis O'Brien raised it with him in the past two months. Denis O'Brien had raised the matter and assured Barry Moloney had nothing had happened."

Now, do you have any view to express in relation to that particular conversation which took place between Mr. Maloney and Mr. Walsh?

A. It's certainly not reflected from anything he had said

previously. You know, the intermediary was never mentioned on the 8th October.

Q. Or for some unexplained reason got stuck with the intermediary. I think this is Mr.

A. you have got to have the flavour of this, Mr. Coughlan, and I could be wrong. But when there was a couple of things going on at the same time is that there were people against the IPO and there were people for the IPO. When certain matters were raised, some people would have thought, 'well, this is a way of derailing the IPO' and then, when that didn't work, maybe other language then was brought into it, such as the word "Intermediary" and then obviously that had to be analysed in many different conversations. So I think that's the background.

Q. No, I understand. I am just I think there can be little doubt but that Mr. Walsh is recording something which was said to him by Mr. Moloney?

A. Yeah, well and I don't know whether Mr. Walsh agrees with him or not, but obviously we are looking

Q. This is Mr. Walsh's own note?

A. Yeah.

Q. This is Mr. Walsh's own note. Now, Mr. Moloney was the Chief Executive of ESAT Digifone and Mr. Walsh was a

A. non-executive director.

Q. A non-executive director there on behalf of IIU, isn't



at that right?

A. Yes.

Q. Now, these if we accept that the Chief Executive Officer, speaking to a director whom you wished to involve, on the previous day or days?

A. Well, I had asked

Q. in the matter?

A. Because I wanted to share the problem.

Q. We can take it that this was at least being taken seriously by Mr. Walsh.

A. And by me.

Q. And by you and by Mr. Maloney?

A. Yes.

Q. Now, as between Mr. Walsh and Mr. Moloney, and this conversation, and again I am trying to understand the flavour of the occasion or the time, who do you think was trying to derail the IPO?

A. Well, certainly not Mr. Walsh. So Mr. Moloney.

Q. You think Mr. Moloney was trying to derail the IPO?

A. Yes.

Q. And this was why he said this to Mr. Walsh?

A. I think there was a number of factors going on in his mind at the time.

Q. So is it your understanding that the first time that 'intermediary' was introduced was at this meeting between Mr. Maloney and Mr. Walsh, to the best of your knowledge?

A. I am not quite sure. It could have been at the lunch time meeting.

Q. That was the meeting on the 13th between yourself and Mr. Moloney, alone?

A. no, no.

Q. with Mr. Walsh?

A. I got a flavour at nine o'clock on the 13th from Mr. Moloney about just some of the things he was saying and I immediately, when I got back to my office, phoned Mr. Walsh. I said, "Will you meet me and I am going to ask Barry to come to the meeting as well to discuss some serious matters?"

Q. And when do you believe that the word 'intermediary' was introduced into the consideration?

A. I can't recollect precisely how it was introduced, who said it, but it was sometime, I think, around then.

Now, I could be wrong, but somewhere around then.

Q. Very good. But you think it was around the 13th/14th, that time?

A. Yes.

Q. Now, if we go to the note under the 15th October, 1997, Mr. Walsh receives a phone call from Mr. Moloney.

Barry Moloney phoned

A. This could be the report of his I was trying to work this out a report of his 11:00 p.m. knock on the door to my house.

Q. And Mr. Walsh records Mr. Moloney as informing him of

this. "He had met with Denis O'Brien. Denis O'Brien's main concern is that if the conversation ever came into the public domain, even though nothing had happened, they would do significant damage to the company. Denis O'Brien was particularly concerned that if the Telenor personnel were made aware of the conversation, then it would be headlines into the public domain. An article which appeared in the Irish Times on

A. It was Sunday Times.

Q. "Sunday Times, on the 12th October, showed how leaking and uncautious some of the Telenor personnel were.

DOB felt that the ESAT Digifone directors were properly protected in the IPO document, as the letter of consent from ESAT Digifone and the disclaimer statement had been prepared by William Frys to ensure that protection. Denis O'Brien wanted to deal with the situation on the basis that Barry Moloney, Denis O'Brien, Michael Walsh had agreed on the 13th October.

Michael Walsh confirmed that this was his preference also. Barry Moloney was satisfied nothing had happened and DOB had assured us that nothing had happened. By taking it further we were simply trying to avoid taking a decision and implying that we weren't sufficiently satisfied when the only two people involved directly or otherwise were assuring us that there was not an issue. Michael Walsh said Barry

Moloney should focus with McCanns on ensuring the wording was correct to protect the ESAT Digifone directors and that the disclaimer was appropriately positioned and that the consent letter be re-examined in the light of the discussions."

Now, do you agree or disagree with what has been conveyed to Mr. Walsh by Mr. Moloney during this telephone conversation?

A. If you break it into pieces?

Q. Very good.

A. About the public domain, I probably had a concern.

Q. Well, first of all, Mr. Moloney had met you, isn't that correct?

A. Oh, yes, he did, yes.

Q. Did you have concern about the matter getting into the public domain and you were concerned about leaks to newspapers, would that be

A. yeah, there had been a leak to the Sunday Times on the 12/10 and we were concerned, like any board would, that people would leak material.

Q. And that you had expressed the view to him that the disclaimer statement in the Prospectus was prepared by a competent firm of solicitors and that was sufficient to protect the directors of ESAT Digifone. Did you use words that

A. it may have been amended subsequently.

Q. But would you have expressed views like that?

A. I think I probably would have expressed a view, 'look, within reason, we will do everything to protect everybody'. The point that I made earlier about 'DOB wanted to deal with the situation on the basis that we had agreed on the 13th' this surprised me because at that lunch meeting with Michael Walsh, we agreed a course of action because Barry admitted that he understood that no money had been paid. And Michael Walsh heard my side of the story and we agreed that I would write a letter and that would be it. So I became a little bit suspicious when the word "Intermediary" suddenly popped out of nowhere, that this thing had now started off a life of its own.

Q. Now, I think from Mr. Walsh's note it would appear that Mr. Moloney had, after your meeting, I think on the 13th, taken the advice of Messrs. McCann Fitzgerald, who were the solicitors to ESAT Digifone, isn't that correct?

A. I think he had taken advice long before that.

Q. But it would appear that he had taken advice at this time as well?

A. Yes, and it would be interesting to get that advice if we somehow could get our hands on it.

Q. Now, if we continue through Mr. Walsh's note. Going to the next paragraph, "Michael Walsh phoned NOB". I don't think we need deal with that particular aspect?

A. It's Neville O'Byrne. Whatever you think.

Q. Then if we go to the next paragraph. "Barry Moloney phoned Michael Walsh at 19.12. Barry Moloney had talked at length with FA, who was of the view that no matter what disclaimers were in the document, we should take it as a working assumption that we will be sued.

Michael Walsh said to Barry Moloney that by definition if someone is suing, then you would sue everyone.

However, the question is whether there is any risk.

In Michael Walsh's view, if people buy shares and there is a very clear disclaimer saying that ESAT Digifone directors have nothing to do with the IPO document and took no responsibility for it, then people were being put on notice. Particularly in a situation where we had no reason to believe anything untoward had happened. I could not see how any investor who had bought on the basis of the IPO document could hope to successfully sue us. Given the timing of the conversation in 1996, Barry Moloney, Michael Walsh both noted that Denis O'Brien had had no connection with DTEC

A. That's the Department of Transport, Energy and Communications.

Q. "In the mobile business during 1996 and that always the Department that anyway the Department had set up a very independent process."

Now, on the I think it's also clear to distinguish

here, if we need to again, that these were the concerns by members of ESAT Digifone who were not part of the IPO, isn't that correct? The IPO was Telecom?

A. No. The IPO was ESAT Telecom, yeah.

Q. Now, I think on the 16th October, 1997, Barry Moloney phoned Mr. Walsh about opinions which were being prepared by the solicitors, isn't that correct?

A. Yeah, circa 19:00.

Q. Now, under the 20th October, 1997, there was a conference call from IIU attended by phone by Denis O'Brien, Arve on behalf of Telenor, John Callaghan, Leslie Buckley attended on behalf of ESAT Telecom, Barry Moloney on behalf of ESAT Digifone and Michael Walsh and Dermot Desmond on the behalf of IIU?

A. I was only partly on that call, Mr. Coughlan, because I was in Amsterdam and I was just about to get on a plane to London or Paris, so I remember this call, but I was only in and out of it for a short period.

Q. Very good. I think Mr. Walsh's note reads: "Michael Walsh summarised the position and DOB described in detail what had happened, the context in which it had happened and the fact that nothing had actually transpired. He explained the initial conversation with Barry Moloney as being part of a wind-up because he was getting a lot of grief from Barry Moloney about paying expenses which arose as part of the bid process. Given Denis O'Brien's personality and focus on money,

the wind-up appeared plausible to the board. At no stage did Barry Moloney contradict any of the descriptions of events described by Denis O'Brien.

The directors were all of the opinion that we should take all reasonable steps to ensure that nothing untoward had happened and, having taken such steps, unless there was evidence to the contrary, should ensure that protection was maximized in the context of the IPO by ensuring that ESAT Digifone was not responsible to potential investors for the document.

A substantial discussion took place as to what could be done to generate some comfort that nothing untoward had happened. It was recognised that it was impossible to prove as, if people were intent on being dishonest, it would be difficult to find where and, consequently, proving something did not happen was an impossibility.

After discussion, it was agreed that

1. DOB would provide a letter as previously agreed.
2. John Callaghan would approach KPMG to get confirmation from them that they had found no questionable transactions in the books of ESAT holdings and
3. Barry Maloney to confirm there was nothing untoward in Digifone.

In addition, Michael Walsh and Barry Moloney would meet with McCanns to tell McCanns what had been decided and



to instruct McCanns to

MR. McGONIGAL: It's not redacted, it's simply off the bottom of the page.

MR. COUGHLAN: "DFD informed Denis O'Brien that he was very upset by the comment. While he accepted Denis O'Brien' assurance if it turned out... Suing Denis O'Brien for any damage. This went for everyone else who had done anything which might undermine the company in any way. DFD wanted written assurances from each of the shareholders that nothing had been done that would in any way impact on the mobile licence."

Now, do you remember that meeting.

A. I remember the meeting taking place. Not exactly the content. But I wasn't I remember this much, it wasn't very I mean the board were going through it. There was no great concern by the board. I think it was the first I think the board were getting a bit unhappy.

Q. Were getting?

A. A little bit unhappy to be dragged into this.

Q. Now, did you ever inform the board or approach board members individually at the time to say that you believed that Mr. Maloney was trying to derail the IPO?

A. It would have been a general ESAT Telecom view.

Q. That was a general ESAT Telecom view?

A. Mm-hmm. I think also the two IIU directors, in some of the commentary that we have seen in the notes here, also had a view, maybe not to the same degree, but they were questioning of the motives.

Q. Now, if you go to the notes under the 22nd October, 1997.

A. Of Michael Walsh?

Q. Michael Walsh's notes, yes.

A. Yes. "No meetings, DFD, Madrid", is that it?

Q. Continue over. You can see "Barry Moloney phoned Michael Walsh to discuss, Barry Maloney felt if one stood back the fundamental issue was what should be done with the IPO. Barry Maloney didn't believe any transaction went through. However, he believed that there was a third party involved, though he had no idea who that was. Barry Moloney felt that ESAT could be in trouble because of the intention."

So the question of an intention had

A. this is Barry Moloney. "He then said I was Chief Executive" incorrectly.

Q. Mr. Walsh is recording that he said "Could be in trouble because of the intention."

A. I don't know where this came from.

Q. Well, it's Mr. Moloney saying something to Mr. Walsh and Mr. Walsh is recording it.

A. Then is said "BM said ESAT could be in trouble..."

There was never any, I mean

Q. You had the intention, isn't that correct?

A. But only briefly, as I explained, I think, yesterday around the 17th.

Q. All I am trying to ask you at the moment is where you agree and disagree with any of these particular recordings?

A. I disagree with I mean there is a couple of things I disagree with. He then goes on to say I was CEO from May 1995 to May '96, which I thought anybody to even come up with, that was and I think Mr. Walsh says that couldn't be true.

Q. Well, do you agree or disagree with the reference to intention? You must have conveyed this to people prior to this.

A. Only what I said in my statement. Like, I have no recollection of ever saying anything about an intermediary or a third party.

Q. Now, on the 23rd October of 1997 you can see that Barry Maloney phoned Michael Walsh and he had talked to Arve Johansen in relation to the Telenor payment. The amount involved was \$50,000 and it was paid into an account in Jersey. Arve Johansen said that it was a political contribution to Fine Gael. He had received a bank account number and an invoice. The name of the person on the account was David Austin and this had occurred in December, 1995. Per Barry Moloney, there was a close personal relationship between Michael Lowry and

David Austin. Barry Moloney queried whether David Austin in charge of official fundraising for Fine Gael at that stage. Michael Walsh said he had no idea.

Barry Moloney said that the money paid out would have been invoiced back to expenses at ESAT Digifone.

Then, at 15.45 Barry Moloney phoned Mr. Walsh in relation to a board meeting to be held that evening?

A. That paragraph beforehand, certainly I would have some problems with it. But this is Barry talking. Like, for example, in Mr. Johansen's statement he said, I think that he told Barry for the first time, around the 30th, about the Fine Gael donation. And this is saying that Arve Johansen said this is a recounting of a conversation that Mr. Johansen had. So somebody has got their dates wrong.

Q. Well, this is Mr. Walsh's note so it must be Mr. Walsh who has his date wrong?

A. No, it could be the other way around. It could be the person who is reporting to Michael Walsh.

Q. No, sorry, which date do you say is wrong?

A. It's interesting. This is just an interesting observation, okay. Because what Barry is saying is that he had talked to Arve Johansen. And Arve Johansen had raised the whole Fine Gael donation.

Q. Yes.

A. Now, in another statement that I have, I don't know, it could be, I think I have four statements from Mr.

Johansen, but one of them, it says that Mr. Johansen for the first time raised the issue of the Fine Gael donation with Barry Moloney on the 30th, in or around the 30th, which would be

Q. the 30th October?

A. Yeah, which is certainly a different time. So that's why I thought that was an interesting

Q. Well, yes, we'll look at that. But this is Mr. Walsh's note of a conversation he is having with Mr. Maloney on the 23rd October and he is recording that Mr. Maloney is telling him about Mr. Johansen.

A. The error is not with Mr. Walsh.

Q. Now, just bear with me for a moment, Mr. O'Brien. The next note of 15.45 on the same day is Mr. Maloney contacting Mr. Walsh in relation to a board meeting to be held that evening and discussing certain matters which he had discussed with Mr. Fergus Armstrong, the solicitor to ESAT Digifone, isn't that correct?

A. Yeah. He had mentioned that, yes. Whether Fergus Armstrong should attend.

Q. I don't think we need to go into anything in relation to that unless you feel that we should at the moment. We'll be going through all of these notes eventually with Mr. Walsh when he gives his evidence, but I don't think you need to make any observations on it.

Now, I think on the 23rd October, 1997, the note, under

the time 21:00 hours. "Meeting at IIU with Arve

Johansen, RB

A. Rolf Busch. He was the lawyer for Telenor.

Q. "Knut Digerud, John Fortune on behalf of Telenor.

Denis O'Brien, Leslie Buckley, John Callaghan on behalf

of Telecom, Barry Moloney, Michael Walsh and Dermot

Desmond by phone. Michael Walsh opened the meeting

saying that Fergus Armstrong was present as legal

adviser to the board to enable the board to consider

the advices by Fergus Armstrong and make the

conversation privileged." I won't make any comment

about that. I'll just read it there for the moment.

"The focus of the meeting was purely on Digifone and,

as a board, we need to come to a decision on whether or

not to approve the IPO which was underway. Fergus

Armstrong said that the meeting should not be deemed to

be a formal board meeting and that his advices were

being put in the context of the IPO. Fergus

Armstrong's views" and then because people seem to

be of the view that having a solicitor present, that

you turn everything into a privileged occasion, legal

and professional privilege is recorded there then.

A. We were under privilege then.

Q. I know nothing for you, Mr. O'Brien

A. I am only pulling your leg.

Q. Nothing for you at all Mr. O'Brien?

A. Okay.

Q. "Dermot Desmond expressed the view that the Chief Executive Officer which was Mr. Maloney "Did not really believe the conversations were relevant to Digifone. If Barry Moloney believed they were relevant, then Barry Moloney would have informed the board immediately. Denis O'Brien said he had raised the issue and Barry Moloney was concerned."

Now, do you see that note there, "Denis O'Brien said he had raised the issue and Barry Moloney was concerned. Barry Moloney said that there were various conversations and that Denis O'Brien had explained to him that there was an intent to make a payment but it had not happened."

A. I think that goes back to what I said originally.

Q. What was that, Mr. O'Brien?

A. That I had an intent around the 17th November.

Q. Yes. Now, do you agree with that note that Denis O'Brien said that he had raised the issue and Barry Moloney was concerned."

A. I think I have a different recollection there. I think he raised it with me.

Q. Very good.

A. I couldn't be entirely sure but I think it was the other way around.

Q. Now, I'll continue with the next paragraph: "Dermot Desmond queried whether any action had taken place,

whether there was anything through third party actions were intended for the benefit of ESAT Digifone as opposed to ESAT Telecom. If they are related to ESAT Digifone, they were not done with either board or shareholder approval. Fergus Armstrong said there was a need to understand precisely the actions and how they are explained. Dermot Desmond queried the obligation of the directors, was it to carry out a Tribunal or to take" it's illegible " Fergus Armstrong said" again legal professional privilege is claimed "RB said that based on Fergus Armstrong's memorandum of advice, particularly paragraph 3 and 8, the inevitable conclusions was that the IPO should be postponed." Do you remember that?

A. I remember one of them saying that, and you have got to look at the sort of corporate machinations here. On the one hand Telenor were afraid that if the IPO didn't go ahead that they could be potentially sued. On the other hand, if the IPO failed, they could potentially I am not saying that they were intent on this, but you know, this is all hypothetical that they could take over, pick up the pieces. Because the IPO was a very important milestone because it was raising more money for the company that the company needed to meet its future commitments. So we'd be a little bit cynical of Mr. Busch if he said that.

Q. Well, if I just read it. What Mr. Rolf Busch is



saying here, and I am asking you is this your understanding of the advice which appeared in the memorandum of Mr. Armstrong which is mentioned here.

A. I actually don't remember the memorandum.

Q. "Rolf Busch said that based on Fergus Armstrong's memorandum of advice, particularly per 3 and 8, the inevitable conclusion was that the IPO should be postponed. Michael Walsh responded that Fergus Armstrong's memo was based on the belief that there was reasonable grounds. Fergus Armstrong had not heard the view from Denis O'Brien. Fergus Armstrong agreed with Michael Walsh. Dermot Desmond said the issue needed to be discussed in the context of responsibilities to the company and the damage that would be done to all of the ESAT companies. Fergus Armstrong said it was open to the directors to accept the written letter of Denis O'Brien and the auditors. Dermot Desmond said the CEO did not believe there was an issue. Fergus Armstrong's understanding was that there was an explicit request to Barry Moloney for refund of part payment." That must relate to the Telenor contribution.

A. There was no it says here, I have no

Q. Barry Moloney said that the context of the discussion was success fees. Barry Moloney was receiving invoices covering consultants and advisers. Denis O'Brien told Barry Moloney to relax, that Denis O'Brien

had made two x i;½100,000 payments. Barry Moloney told Denis O'Brien that he did not want to know about it, that it had nothing to do with Digifone. Denis O'Brien said he wished to assure everyone that nothing had been done. He couldn't recall the details of the conversation, but it was a question about who was paying Jim Mitchell and PJ Mara five six weeks ago. Barry Moloney had raised the issue with him."

Now Dermot Desmond again I just want to clarify there because of the reference to Mr. Mitchell. There is no question of success payments in the context of Mr. Mitchell?

A. No.

Q. That you know of?

A. That's what my understanding is. He was a consultant to the company.

Q. Well, perhaps that's something we can take up at some other stage, but I am not I just want to, for the purpose of reading this out for the moment, or was there a question of a success payment to Mr. Mitchell?

A. Well, you see, there was a multitude of consultants, so I actually would have to look and see. I don't think he was I know Mr. Cloonan was and Mr. Kelly were.

Q. Well, could I ask you this, did you mention Mr. Mitchell's name in that context as is recorded here by Mr. Walsh?

A. I actually don't remember.

Q. Now, Dermot Desmond again tried to get an answer as to what the directors were required to do, could they accept the words of the directors? What else was feasible? Arve Johansen said his concern was the IPO. Barry Moloney said the issue was weighing on his mind. Barry Moloney had no reason to disbelieve Denis O'Brien, but Barry Moloney felt uneasy. Dermot Desmond said the board should have been advised."

"Then the Norwegian lawyer said he had difficulty with the discussion. The initial discussion was in October 1996 and confirmed in July this year. Barry Moloney said he accepted the assurances but if he did, why did he then seek legal advice? Barry Moloney responded that he was worried because of the sequence of events. While he accepted Denis O'Brien's word he believed that a third party had knowledge."

"John Fortune inquired whether there had been an intent to make a payment. Barry Moloney responded that he believed no payment had been made to Michael Lowry but believed company is at risk because a third party is aware. Denis O'Brien said that there had been no intent to make a payment and no payment had been made."

Did you say that, that there was no intent at this meeting?

A. It wouldn't have tied in with what I said before at all. So

Q. I know that.

A. So, I don't know where that came from.

Q. "Barry Moloney recounted the history of events. Some of the details were wrong. Denis O'Brien, Barry

Moloney having a discussion on success fees. Jim

Mitchell, Stephen Cloonan, PJ Mara, Knut Digerud had

been aware of the conversation. Denis O'Brien said he

had to make two payments. In a conversation on the

25th August 1997, dates wrong, Denis O'Brien reminded

Barry Moloney of the discussion. Denis O'Brien had

said he didn't actually do it. You must be relieved.

The comment was repeated to Barry Moloney on the

following Monday. The IPO document was published on

the 8th/9th October and Barry Moloney sought advice

from Fergus Armstrong. In discussion with Denis

O'Brien, Denis O'Brien had said payment was intended to

go through, but it didn't. In total, there were four

separate preliminary advices of McCanns. Barry

Moloney told Denis O'Brien that he would have to share

the opinion with the directors of the IPO if it's not

postponed. On the 13th October, a meeting was

arranged for Denis O'Brien, Barry Moloney, Michael

Walsh at which it was agreed that Barry Moloney would

get a letter from Denis O'Brien confirming that nothing

had happened. Barry Moloney had sought official

advice on behalf of the company.

John Callaghan queried whether any third party had been named. Rolf Busch queried whether Barry Moloney would still have doubts as despite assurance he felt it necessary to inform the board. Barry Moloney said the first time he had any reason to be concerned was when Denis O'Brien raised the issue and confirmed nothing had happened."

Now, Mr. O'Brien, there was some lengthy conversation taking place at this meeting about the question of a third party intermediary having knowledge, isn't that correct?

A. Well, in some of the conversations, yes.

Q. And you were present at this meeting by phone, is that correct?

A. For part of it. It's interesting what Mr. Walsh says, some of the details were wrong. When he said that Barry Moloney recounted the history of events.

Q. but I want to ask you Mr. O'Brien, did you ever say at that meeting, or subsequently, that the reason why Mr. Maloney introduced the term 'intermediary', 'third party', or 'got stuck with an intermediary', was because he wanted to derail the IPO?

A. Not to the meeting but I probably would have shared it with some of my other directors.

Q. So therefore, it is it was your view that

Mr. Moloney had invented this?

A. I had a suspicion, yes.

Q. That he had invented it?

A. Not invented it but somehow, somebody raised that word and he latched onto it as if it was the word of the week.

Q. Let's be very clear about this now, because Mr. Moloney's reputation is at stake here as well?

A. And so is mine.

Q. But I want to be very clear what you are saying, to enable Mr. Moloney to deal with this. Are you saying that Mr. Moloney invented a conversation or the contents of a conversation with you?

A. No, I am not. Absolutely not.

Q. So do you accept that you used the expression would you just listen to the question first

A. I wasn't going to say anything

Q. That you had a conversation with Mr. Barry Moloney and that you told him that money had been paid to a third party or intermediary and it had got stuck?

A. I don't recall ever using the word 'intermediary' or 'a third party'.

Q. Or paying money to anyone and it had got stuck?

A. I actually don't remember saying that. It says here, "Barry Moloney asked why DOB was saying nothing had happened and DOB said it had got stuck." I don't remember saying that.

Q. A few moments ago you said Mr. Moloney introduced this into his conversations with Mr. Walsh?

A. No, I didn't say that. I said I don't know where the word intermediary came from and I also said an hour ago that Michael Walsh's understanding of that meeting was that 'intermediary' was 'a bank'.

Q. Mr. O'Brien, you told this Tribunal that Mr. Moloney raised this issue of intermediary or third party ?

A. It's all in the notes.

Q. And you said he raised it for the purpose of derailing the IPO, is that right?

A. It was my private view and some of other people's as well.

Q. So he raised something which had not occurred for the purpose of derailing the IPO, is that correct?

A. You see, nobody knows where the word came from, Mr. Coughlan.

Q. Well, I just want to be clear about this, Mr. O'Brien; either you had a conversation or a number of conversations with Mr. Moloney where the words were used?

A. I have no recollection of ever saying the word, anything about an 'intermediary' or a third party.

Q. Now, this was the main issue at this particular meeting on the 23rd October and you never, at that meeting, according to Mr. Walsh's notes and maybe you did inform the meeting you had no recollection of

this, it didn't happen and Barry is raising this for the purpose of attempting to derail the IPO?

A. It was a private view that I had and maybe some other people as well. We could have been wrong.

Q. You have given evidence here that now, I know it was you say it was your private view nevertheless, did you not, in the pursuance in pursuance of your own interest and on the basis of your private view, not object to the expressions being used, 'intermediary', 'third party', 'getting stuck'?

A. Well, there was a lot of heat at the time and I kept a lot of my views to myself.

Q. No, this was a serious issue this was a serious issue which was being discussed by the board here. It was the conversation and the contents of conversations which were being discussed by the board. Mr. Moloney raised this difficult issue with the board, that whilst he accepted assurances that nothing had been done, he was worried because he was bringing it to the attention of the board that a third party might know about this matter, that a third party had been involved, isn't that correct?

A. Yes, but I think you need to go and look at my evidence yesterday when, or the day before, when I said to you that Mr. Moloney really should have raised the issue of the run. Now, obviously he is saying it's not a run when we were doing a bond issue, when we raised \$110



million seven weeks after the run, or he should have gone to one of the directors, the senior directors, which is normally the case with a board, and said 'look, I have a bit of a problem'. He never did that and it was our view that, at the beginning we just thought this was amazing, and secondly, we thought it had been dealt with on the 13th, because he was happy, and then suddenly it started again. I am trying to give you a flavour of what our views were.

Q. If I can ask the question again, Mr. O'Brien. At this meeting on the 23rd October the significant issue was the question, because assurances were being accepted at that time that nothing untoward had been done, but the significant issue which was before the meeting was that Mr. Maloney was expressing a concern that a third party knew about the matter and he was bringing it to the attention of the board that that was the case.

A. There was a lot more discussed on the 23rd than that.

Q. I know that, but this was the significant issue Mr. O'Brien?

A. No, there was other very significant issues.

Q. Well, let's deal with that issue, Mr. O'Brien. I am going to ask you straight up: Did you object to the expression being used "intermediary", "third party", "getting stuck" at that meeting on the 23rd October of 1997?

A. I don't remember whether I did or not.

Q. Very good. We'll ask the other participants whether you did so, Mr. O'Brien?

A. That would be great.

Q. Can I ask you this: Did you ever say to anyone at that meeting or go to anyone after the meeting and say, "There is something afoot here. Barry Moloney is trying to derail the IPO and he has introduced this and it's not true"?

A. When you read the notes, when you read Mr. Johansen's comments, when you read Mr. Desmond's comments

Q. will you answer the question Mr. O'Brien please?

A. everybody had different views.

Q. Would you answer the question please, Mr. O'Brien: Did you say at that meeting that Barry Maloney has a motive here to derail the IPO and he has introduced this element about a third party into the equation and it's not true? Did you say that?

A. I would have discussed it with maybe one or two

Q. Did you say it at the meeting?

A. I don't remember whether I did or not. I think I answered that question already.

Q. Very good. Is that your answer so. That you don't remember?

A. I don't remember.

Q. Did you go to any other directors and say to them that 'this is not true, Barry Moloney is trying to derail the IPO'?

A. As I described earlier, the ESAT Telecom

Q. tell me the directors you went and told that to?

A. I would have said it certainly to Mr. Buckley.

Q. You told it to Mr. Buckley?

A. He would have the same view as me.

Q. You told it to Mr. Buckley?

A. Well, we discussed it.

Q. Did you say this to Mr. Buckley, 'this is not true, Barry Moloney is trying to derail the IPO'?

A. I don't recall having that precise conversation but we would have had conversations as to what was going on at that time.

Q. You say you went to Mr. Buckley?

A. Yes, I spoke to Mr. Buckley.

Q. Very good.

CHAIRMAN: I think I thought of seeking to conclude the meeting of the 23rd but both with regard to the witness and to the stenographers, it's preferable we adjourn now until the usual time tomorrow. Very good.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY, THURSDAY 28TH JUNE, 2001 AT 11:00AM.