

THE TRIBUNAL RESUMES AS FOLLOWS ON MONDAY, THE 2ND OF JULY, 2001 AS FOLLOWS:

MR. HEALY: Mr. Maloney, please.

MS. FINLAY: Before Mr. Maloney commences evidence, I would like to seek limited representation on behalf of ESAT Group Limited and its subsidiary companies, all the ESAT Group companies. I appear here instructed by McCann Fitzgerald, solicitors.

CHAIRMAN: Very good, Ms. Finlay. Is it that you also appear for Mr. Maloney.

MS. FINLAY: Yes, Mr. Maloney is currently the Chairman of ESAT Digifone and at the time of the matters that you are inquiring into was the chief executive of that company.

CHAIRMAN: Yes. I am just wondering as to the form of certification of representation. Please sit down for a moment, Mr. Maloney. The immediate contingency is Mr. Maloney and, obviously, he has an interest in the matters that have arisen in recent weeks. Would it be the most more convenient course if I perhaps were to accede to limited representation for Mr. Maloney and if matters need to be taken further in relation to British Telecom, as the parties now having acquired the entity, of course that can be dealt with.

MS. FINLAY: I see no objection to that. Obviously, the ESAT Group Limited and its subsidiary companies have an interest in the matters which you are now inquiring into and therefore they are also seeking limited representation, limited to this issue.

CHAIRMAN: Well, then I think on behalf of both the ESAT Group and Mr. Maloney it's clear that you would have an entitlement to limited representation and I'll accede to that application on the usual basis, as applied for everyone else, Ms. Finlay, that obviously I am not holding out any guarantees or warranties of any eventual costs, which will be another day's work.

MS. FINLAY: Very good. I am obliged.

CHAIRMAN: Yes. Very good.

BARRY MALONEY, HAVING BEING SWORN, WAS EXAMINED AS FOLLOWS BY Mr. HEALEY:

CHAIRMAN: Thank you for your attendance, Mr. Maloney. Please sit down.

MR. HEALY:

Q. Thank you, Mr. Maloney. You've provided the Tribunal with a statement or a memorandum of your evidence headed "Statement of Barry Maloney, British Telecom and Moriarty Tribunal" what I proposed to do Mr. Maloney is to take you through your statement. I'll

try to clarify one or two things as I go along. It may be necessary to come back after the statement and clarify other matters and then I'll go through the documentation that you've provided to the Tribunal, I think in two bundles, if I can put it that way. Then I'll have to take you through other documentation containing references to meetings that you attended; and at the end of all of that there may be further matters to be clarified. And in addition to all of that, I have to take you through some references in the evidence of, mainly, Denis O'Brien to your involvement in and ESAT Digifone. So you understand where we are going?

A. Thank you.

Q. I take it that you have a copy of that - your own memorandum and a copy of the relevant - or copies of the relevant documents?

A. Yes, I believe I do.

Q. You say that you were appointed as Chief Executive Officer of ESAT Digifone with effect from the 30th of July 1996. Your Co-Chief Executive Officer was Knut Digerund of Telenor. You say that upon his resignation you became sole Chief Executive Officer with effect from the 1st of July of 1997.

If I could just clarify the various roles you played in ESAT Digifone.

You became sole Chief Executive Officer with effect from the 1st of July of 1997. You are not now sole Chief Executive Officer, is that right?

A. That's correct.

Q. And when did you cease to be sole Chief Executive Officer?

A. I believe it was either the end of May, early June. I am not sure of the exact date.

Q. Of this year?

A. Of this year.

Q. What's your role in the company now?

A. I am now the Non-executive Chairman of ESAT Digifone now.

Q. Do you have any other ESAT-related roles at the moment?

A. No, I do not.

Q. No other directorships and affiliated companies within the new umbrella, if you like, of British Telecom's ownership of ESAT Telecom and ESAT Digifone and the other related companies?

A. No, I do not.

Q. You say you were appointed as Joint Chief Executive on the 30th of July of, 1996 and that your co-CEO was Knut Digerund. The Tribunal has heard evidence that you were in Oslo in December of 1995 in connection with what would appear to have been negotiations connected with your terms of employment. Is that right?

A. That's correct.

Q. Was there, in fact, a gap of six months between that date and when you actually started working for the company?

A. Yes, there was.

Q. I think prior to that you had some very limited involvement in the competition, in that you may have been introduced as part of a presentation to the, if you like, adjudicating civil servants and their advisers as an intended Joint Chief Executive Officer, or as an intended executive of the company. Would that be right?

A. That's correct.

Q. Did you do any other work in connection with the competition?

A. Yes. I worked on parts of the licence submission itself. I think the executive summary and maybe the distribution strategy.

Q. Prior to working with ESAT Digifone you were an executive of the Xerox Corporation in the States, is that correct?

A. That's correct.

Q. I think from documentation that has been made available and to which reference has been made by Mr. O'Brien, ESAT Telecom, or if you like, Mr. O'Brien's side of the ESAT Digifone equation, had the power and the right to appoint the Chairman of ESAT Digifone and Telenor had the right, or at least some veto, in connection with

the appointment of Chief Executive Officer, is that right?

A. That's my understanding.

Q. Were you appointed, as it were, or were you recruited by Telenor or were you recruited by Mr. O'Brien or was there a combination of both of them involved in the recruiting?

A. I believe it was both.

Q. Well, who approached you? Were you headhunted or was there an advertisement in the newspapers?

A. No, originally the first discussion I would have had, would have been with Denis O'Brien, but also with Arve Johansen at the time that we made the submission to the department, and Arve indicated at that time that he was keen that I would take up an executive role with the company at the time. It may well have been Chief Operating Officer, described something like that in the bid.

Q. I see. But the initial approach to you was from Denis O'Brien?

A. Yes, it was.

Q. Up until then you had no - you took no initiative to interest yourself in ESAT Digifone?

A. No, I did not.

Q. You had an association with Mr. O'Brien, I think, through a shareholding you had in ESAT Telecom, is that right?

A. That's correct. I was a founding shareholder in ESAT Telecom.

Q. Had you ever worked in ESAT Telecom?

A. No, I had not.

Q. You had merely put in some money at the outset of the company's life?

A. Correct. When it was first set up.

Q. And just to clarify this, I think that was a fairly small shareholding, is that right?

A. At the time when it started off it was one per cent.

Q. Right.

A. But over time, as increased funding requirements for the company, my stake reduced over time.

Q. It reduced?

A. Reduced.

Q. Because you did not invest in or you did not take up the further offers, or presumably needs, the company had for more capital?

A. Correct.

Q. And I think you've disposed of that shareholding, have you?

A. I disposed of that shareholding in, I think it was June or July 1999.

Q. And at that stage what per cent was it?

A. I can't remember.

Q. It must have been fairly tiny?

A. It was 15 - I believe the number to be 15,000 ADS's,

which realised for me at the time about 650,000

dollars.

Q. I see. You go on to say that Digifone was at that time a joint venture company in which ESAT Telecom and Telenor owned stakes of 40,000 each - 40% cent each, sorry - and IIU owned a stake of 20%. I think you are talking about the time of your appointment, I think, 30th of July 1996?

A. Yes, I believe that was the time.

Q. I understand that a separate document tracing the corporate structure of ESAT group has been or will be provided to the Tribunal. It was, in fact, provided to the Tribunal but I think since then, as a result of all the evidence, I think we've learnt a little more, and perhaps as much as we need to know at this stage, about the somewhat tangled corporate structure. In any case, the up-to-date position is that all of the various entities are now owned by British Telecom, ESAT Telecom, ESAT Digifone, and so forth, isn't that right?

A. ESAT Telecom and ESAT Digifone, yes.

Q. Yes. But at the time that we are talking about, ESAT Telecom and ESAT Digifone were two separate, although related, entities, is that right?

A. I think probably the most accurate way to describe the relationship was ESAT Telecom were shareholders in ESAT Digifone and we shared a joint Chairman.

Q. Yes. And maybe a couple of common directors as well?



A. Yes, we had.

Q. You say the managements of each company were independent of one another and each had independent legal and financial advisers. The name 'ESAT' was used, however, by both companies and both shared a common Chairman, Mr. Denis O'Brien. Under the shareholder agreement, Telecom were entitled to nominate the Chairman of Digifone, Mr. Denis O'Brien, and Telenor the CEO, which, as described above, became yourself.

When you joined the company, were the two managements of the two separate companies independent of one another?

A. At the time I joined the company there was only maybe 40 or 50 people in it and at that time part of my task was to come in and hire a management team for ESAT Digifone. At that time we basically would have had just site-finders look for sites for the base station.

So one of my first tasks was to go and hire a management team for the company.

Q. At that time, did the company have independent legal and financial advisers?

A. No, it did not.

Q. Did ESAT Digifone have the same legal and financial advisers as ESAT Telecom?

A. Yes, we did.

Q. And you set about hiring, as no doubt was quite proper, separate solicitors and accountants and other financial advisers for ESAT Digifone?

A. Yes, but that didn't occur until about a year afterwards.

Q. I see. You didn't do that right away?

A. No, did I not.

Q. So, for the first year you didn't have separate legal and financial advisers?

A. That's correct.

Q. You have been asked by the Tribunal's legal team to comment upon two specific issues, that was at the time of your statement. I think things have expanded since then. But in any case, you say: "The first is my own or Digifone's view of the circumstances in which a donation of 50,000 U.S. dollars was made to the Fine Gael party, initially by Telenor and subsequently charged in the accounts of Digifone. Following my appointment as joint CEO I became aware of the donation having been made. I believe that I was also aware that an invoice had been received in respect of it. The donation was not at that time a matter of any particular concern to me or, I believe, to any of Digifone's management.

Shortly before the initial public offering of shares in Telecom which took place on the 7th of November 1997, I was told by Arve Johansen of Telenor some of the

complicated history of the donation and I was given a copy of the series of invoices and credit notes that related to it. At a meeting on the 4th of November, 1997 at which a number of directors of Digifone were present and to which Mr. Denis O'Brien was linked by telephone, Mr. Arve Johansen of Telenor explained the background to the donation in some detail and expressed a concern to establish that Fine Gael, as such, had actually received the donation.

I regarded the issues raised by Telenor as substantially ones between the shareholders, that is between Telenor and Mr. O'Brien of Telecom. I had not previously had any question in my own mind but that the donation had been made to the Fine Gael Party, and despite the complex history of the payment described by Mr. Johansen, I do not think that I or Digifone at any stage believed that the money had not been received by Fine Gael.

The history which was described by Mr. Johansen was subsequently investigated but it was not, so far as I recall, regarded as particularly important in the context of the arrangements of the IPO.

The Tribunal has summarised to the solicitors for ESAT Group what it and Telenor understand to have occurred, and that accords with my understanding of what was

described by Telenor and was subsequently found on investigation, save for the qualifications expressed by our solicitors in their letter of the 16th of May. I do not know who, if anyone, in ESAT Telecom or ESAT Digifone directed changes to the Telenor invoices."

Before passing on to the second matter, and I have to come back to this issue of the Telenor donation, or the Telenor ESAT donation, at least more than once again, but can I just clarify one or two points in your statement at this stage.

You say in the third paragraph on the first page of your statement, "I have been asked by the Tribunal's legal team to comment upon two specific issues. The first is as to my own or Digifone's view of the commencement of the circumstances in which a donation of 50,000 was made to the Fine Gael Party, initially by Telenor and subsequently charged in the accounts of Digifone. Following my appointment as Joint CEO I became aware of the donation having been made."

Can you tell me how did you become aware of the donation having been made?

A. I believe Knut Digerund would have told me about it - my Co - CEO at the time.

Q. What did he tell you at the time?

A. Just that there had been a political donation made to Fine Gael and the company had paid Telenor back.

Q. Well, presumably, that must have been after the donation was made, after an invoice of some kind was raised by Telenor and after ESAT Digifone had paid for that?

A. Yes, I believe so.

Q. And I gather that was some time in the first half or after - I think after May of 1996?

A. As far as I know the repayment back to Telenor was in, perhaps, in a payment that was made in June. At that time we would have had a lot of costs between Telenor and ourselves from the start-up of the company.

Q. Yes. I think there was some large payments made by ESAT Digifone to Telenor and included in those was a sum to repay this, I think it was  $\text{€}31,600$ , which was the Irish equivalent of whatever number of Kronor were used to pay for the \$50,000, if you could follow those currency changes.

So, therefore, it must have been post-June or post- May or June of '96 that you were told about it?

A. I believe that to be the case, yes.

Q. And in what context would you have been told about this?

A. Just casual statements. It was no big deal.

Q. Right?

A. Just a political donation had been made.

Q. But of all of the payments that were made by Digifone

at that stage, I think they came, I'm sure someone would correct me if I'm wrong, to in or around 1/2600,000. I don't know what the Kronor-punt exchange is. It may have been much, much more.

Some time, it would appear, in or around the 30th of June, which was before you took up your appointment, some 6 million Kronor were paid by the Digifone to Telenor. I don't know what that translates to.

CHAIRMAN: It's sufficient, isn't it, that it was part of a much bigger sum?

A. I believe the rate was about ten, so about 600,000.

MR. HEALY:

Q. So I am probably right in thinking somebody must have told me somewhere that it came to about 600,000? And of all the payments that that must have embraced, why do you think Mr. Digerund would have mentioned the political donation?

A. I don't believe he mentioned it to me in the context of that payment.

Q. I understand. It was something else?

A. He just mentioned that a political donation had been made that had been paid back through the company. I don't believe it was specific to that payment of 600,000.

Q. You say that you were also aware that an invoice had been received in respect of it. How did you become

aware of that?

A. That we received an invoice. I mean, that's how we paid it. One of the - if we didn't have an invoice, we would not make a payment.

Q. But how did you become aware of that?

A. Because I was told that, you know, we had -

Q. - can you understand why I would ask why somebody would mention to you, firstly, that there had been a 50,000 donation to Fine Gael before you became involved in the company, and that an invoice had been raised in relation to it?

A. Just to clarify - it was after I joined the company.

Q. Yes, I know, but the payment was made before you joined?

A. Absolutely.

Q. You became aware of it after you joined?

A. Yes, that's correct.

Q. And I am just wondering why, in those particular circumstances, that you weren't around at the time, somebody would have said to you, 'there is a 50,000 donation - there is a \$50,000 donation to Fine Gael and there is an invoice in relation to it'.

A. I can't - I mean, Mr. Digerund is the person who I believe told me about it. As I say, at the time it had no particular significance to me whatsoever.

Q. Can you remember the context in which it came up?

A. I can't, I'm afraid.

Q. Would you agree with me that there must have been some particular context to cause Mr. Digerund to mention a political contribution?

A. I can't recall a particular context that caused him to raise it.

Q. You would be aware from the evidence that's been given to this Tribunal that the knowledge that there was in ESAT Digifone in Dublin of this payment having been made by Digifone has become somewhat an issue or a controversial matter. You are aware of that?

A. I am not sure to what extent you mean.

Q. Well, it has also become a matter of some controversy that invoices were raised in relation to it, and indeed that there may have been alterations made in invoices in connection with it?

A. Yes, that became clear to us much later when Mr. Johansen gave us copies of all of the documentation.

Q. Yes.

A. I think from ESAT Digifone's perspective, the only document that we had was one invoice on the file of the company, which related to consulting charges for the mentioned sum.

Q. Are you referring to when you became aware of the discrepancies between the two sets of invoices in 1997 or are you referring to some other period?

A. I believe that was always the case, that the only



document we had in the files of ESAT Digifone was the one the -

Q. - would I not be right in thinking that the only time you could have become aware of the differences between the two files was in 1997?

A. That's correct.

Q. So prior to that you were aware that there had been a donation and you were aware that an invoice had been raised in relation to it. Now, at the time that you were made aware of that, we do know that the only invoice that seems to have been kept by ESAT Digifone was an invoice relating to a management charge - a consultancy charge for which Telenor had picked up the tab, isn't that right?

A. That's correct.

Q. There was no reference to a political donation?

A. No, there was not. In fact, I think it says it was for consulting services.

Q. Yes. But did you think, before any of this matter arose in 1997, that there was, in fact, an invoice in relation to a political contribution?

A. I can't even say that I was particularly aware there was an invoice. I just knew a political donation had been made and it had been paid back to Telenor.

Q. It's just your use of the expression "I was aware that an invoice had been raised" is what has attracted my attention?

A. I see. There was no particular significance to that choice of words.

Q. Because you couldn't, in fact, have an invoice for a political donation, could you? I think you were one of the people, at the end of the day, who suggested that the payment be reclassified. It wasn't, in fact, an expense - well, at least it shouldn't have been an expense of the business, isn't that right?

A. That's correct.

Q. We may come back to it again. Part of your statement involves a reference to a letter of the 16th of May from McCann Fitzgerald solicitors to Mr. John Davis, solicitor for the Tribunal. You say "The Tribunal has summarised to the solicitors for ESAT Group what it and Telenor understand to have occurred and that accords with our understanding of what was described by Telenor and was subsequently found on investigation, save for the qualifications expressed by our solicitors in their letter of the 16th of May."

I'll just read out what that letter says, or what I believe the relevant parts of the letter contain, "We act for BT in relation to its Irish interests as well as for the company and ESAT Digifone Limited. When the political donation to Fine Gael was disclosed in the media in early March 2001 our clients decided to investigate the matter insofar as they could and, in particular, to carry out an examination of the

accounting records of ESAT Digifone Limited to establish whether or not that company had reimbursed Telenor for the payment made by Telenor to Fine Gael. Based on that examination and our own review of the facts on behalf of our clients, we can say that we have no reason to disagree with the summary of facts set out in your letter of the 27th of April, subject to clarifying two points."

And the two points.

"First, it is apparent from media coverage and in particular from statements issued by the parties involved, that Telenor and Mr. Denis O'Brien disagree upon the question of on whose behalf the donation was made. Our clients do not have any knowledge or evidence which confirms one deal over the other, and obviously such conflict can only be resolved by evaluating the evidence of Telenor and Mr. O'Brien respectively.

Secondly, the third invoice is the only invoice from Telenor appearing on the books of ESAT Digifone Limited. Our clients do not have any knowledge of, or evidence, to demonstrate whether or not any individual in ESAT Digifone Limited or the company indicated to Telenor that the various invoices required amendment or, if such an instruction was given, the identity of

the individual in question."

Your knowledge, after you became an employee of, and indeed a director of, ESAT Digifone was based on what Mr. Digerund had told you. And he told you that a donation had been made by Telenor and had been charged to ESAT Digifone?

A. Correct.

Q. And from that, do I take it that it would be reasonable to assume that the payment was Digifone's payment but that it had been made by Telenor because of funding difficulties?

A. The issue of the funding difficulties was not raised to me at any time.

Q. Why would you think that Telenor would make a payment of a donation and why do you think ESAT Digifone subsequently would have repaid Telenor?

A. My presumption was that it had been agreed among the shareholders, but I don't know.

Q. Because if Digifone was going to reimburse anyone, it had to be on the basis that the shareholders in Digifone agree that there should be a reimbursement, is that right?

A. Correct, particularly when you look at the time the event happened.

Q. Why does that ?

A. well, at that time it was very early stages. The company hadn't really started yet.

Q. Do you mean it didn't have money or it didn't have, if you like, a secretariat or -

A. it just wasn't functional yet.

Q. You go on in your statement, "The second matter on which I have been asked to comment is the form of the clause on page 16 in the prospectus for the telecom IPO in November of 1997. Telecom and its advisers were the people responsible for deciding to include such a provision and for drafting it so I cannot give you any comprehensive explanation as to the thinking behind it or the words used in it. Digifone would have seen some drafts of the prospectus, however, and I believe the existence of the statement, the publication of the Terms of Reference of the Moriarty Tribunal, and the fact that Mr. O'Brien reverted a couple of times to the conversation we had had about a year previously, alerted me again as to the possible significance of what Mr. O'Brien had said."

Now, what you are referring to here is the reference on page 16 of the prospectus to the ESAT Digifone licence.

It's the paragraph headed: "Importance of ESAT Digifone licence" that you are referring to, is that right?

A. I believe -

Q. you see it on the monitor in front of you?

A. Yes, that was it. If I just point out, I don't believe

that the draft I was referring to was not exactly

the same as -

Q. I see. It's just that I'm referring to - in your statement you are referring to the comments you were asked to make on the form of the clause on page 16 of the prospectus. Just to get this into some sort of chronological order, then. The document referred to or the document on the overhead projector is a part of the ESAT Telecom prospectus of November the 7th, 1997, in other words, the final form of the prospectus.

I am looking at the actual prospectus and Mr. O'Connell corrects me that what's on the overhead projector is not the actual prospectus. There has been some confusion. I think what I'll do, so as to avoid any confusion, is I'll put my copy, which is the actual prospectus, on the overhead projector and we'll make sure we are all talking about the same document. There are slight differences. If you look, before that document is taken away, I will just draw your attention to the second paragraph: "The government plans to establish a Tribunal of inquiry." Do you see that? The second line of the paragraph headed "Importance of ESAT Digifone licence."

A. Yes, I do.

Q. Right. If you just look at the paragraph that appeared in the final form of the prospectus. This was dated November the 7th. You see where it says: "The Irish

government has established a Tribunal of inquiry."

A. Yes, I do.

Q. Right. So now the queries that were being raised with you at this early stage were with regard to that form of the clause, the final form?

A. I believe the form that I was - that I referred to in my statement was the form in my book, which has got some handwritten notes -

Q. Yes. Which is not the final form?

A. Which I now understand is not the final form, yes.

Q. Yes. So when the Tribunal asked you to comment, you thought that, in referring to the prospectus, you were referring to the document that you had, is that right?

A. I don't believe - I can't remember, and I don't believe - it was to the statement. I wasn't conscious of which form it was.

Q. I see. Well, we know that there were slight variations in the statement from time to time, and I think you may have made some handwritten notes, which we'll come to in your documents later, indicating changes you thought ought to be made, or at least which contained references to changes somebody thought ought to be made to the wording of that clause.

You say that Telecom and its advisers were the people responsible for deciding to include such a provision.

You had no role in the inclusion of a clause in that

form in the prospectus?

A. That's correct.

Q. You didn't suggest it?

A. No, I did not.

Q. You were aware of the fact that a clause in this form was going to be put into the prospectus before it was issued and you were aware that there were some discussion concerning the wording of the clause, isn't that right?

A. I believe the first I would have been aware was a draft document that I have here, which is dated the 23rd of September, '97.

Q. Yes. And you had no role in inserting any document containing a clause to that effect, or any paragraph to that effect, in any of the earlier drafts of the prospectus?

A. I don't believe I did, no.

Q. Now, then you refer to three factors which you think alerted you to a conversation you'd had about a year previously with Mr. Denis O'Brien. And as we'll be coming back to that conversation in detail, I don't want to go into the detail at this stage.

You go on to say: "In these circumstances" meaning in the circumstances in which you were alerted to the possible significance of the conversation you'd had with Mr. O'Brien, you said, "I sought advice from Digifone's lawyers and thereafter I told the board



that, based on the advises received, I believed that in the context of the IPO, they should make inquiries of Mr. O'Brien, which were made at the meeting on the 4th of November of 1997." To which you say you've already referred.

"Questions were then put to Mr. O'Brien, who was in contact at the meeting by telephone, as to whether or not he had made any payment to Michael Lowry, the minister responsible for the granting of the licence in connection with the - in connection with the grant.

Mr. O'Brien said that he had not made any such payment. He said he had, in fact, wanted to make a payment to Mr. Lowry because he knew that Streamline, Mr. Lowry's company, was in financial difficulties, that he felt sorry for him and that he regarded Mr. Lowry as worthy of support.

He said that he had in some sense earmarked money for that purpose in Woodchester Bank, who he said were his bankers. Mr. O'Brien said, however, that he changed his mind and the money had not been paid. He said that he had never agreed with Mr. Lowry that he would ever make such a payment. Mr. O'Brien, I believe, acknowledged that he had said to me about a year previously that had he paid  $\frac{1}{2}$ 100,000 to Mr. Lowry but he explained that he had said this and had referred to

another payment of i;½100,000 to a person he did not identify, in jest, and as a piece of bravado in order to persuade me to pay a number of success fees which had been claimed by advisers following the award of the licence."

You go on "In the latter part of the meeting" referring to, I presume, the meeting of the 4th of November "Mr. Johansen described the circumstances surrounding the political donation to Fine Gael, and I have described this earlier also. During the period when arrangements were being made to hold the meeting of the 4th of November, 1997, I had a number of conversations with Mr. O'Brien where he assured me that what he had said to me had been mere bravado on his part, designed to persuade me to pay the success fees which were being claimed. He said that he had made no payment. He also said that some steps had been made or had been taken in this respect, but that no such payment had actually been made because of a difficulty or a hitch with a third party intermediary.

At a meeting on the 23rd of October of 1997, Denis informed us that the intermediary he referred to was Woodchester Bank. He said that he was glad that the payment had not been made because such a payment could now be misconstrued."

You go on to say, "I hope it is clear, and I should

stress, that I have no knowledge of any payment having been made by Mr. O'Brien to Mr. Lowry and the only reason which I, or I believe the Digifone board, has ever had for questioning whether or not such a payment was made, were words said by Mr. O'Brien which I have tried to describe."

Now, I want to go over a number of documents, but before I do so, I want to try to go back to some of the hard facts of this situation.

All of the documents I want to refer to relate to conversations at various times between you and Mr. Denis O'Brien, but most importantly a conversation that occurred in September of - in September, October, November, I am not sure, and there may be some dispute about it, of 1996, is that right?

A. I believe it was October, November '96.

Q. I see. Can you for a moment, ignoring all of the subsequent conversations, inquisitions and investigations, tell me where that conversation took place?

A. To the best of my recollection, it occurred down in the Malt House, which was Denis's office.

Q. Not the office you would normally work in?

A. No, it wasn't, to the best of my recollection.

Q. And what occasion did you have to be in Mr. O'Brien's office?

A. As I recall it, it was a meeting that we would have between the two of us. Most of the time it was held up in ESAT Digifone, but occasionally it was held down in the Malt House.

Q. When you say 'a meeting between the two of you' do you mean some sort of regular information-gathering meeting between the Chief Executive and the Chairman, or what type of meeting was it?

A. It would typically be an update, I would be giving an update on progress in the company and the issues -

Q. At the time you were the Joint-CEO, is that right?

A. That's correct.

Q. Why would you have been doing that, and not both of the co-CEOs?

A. I think, practically, the relationships between Knut Digerund and Denis O'Brien would have been fraught, right from the early stages. So in practice, once I was in the company for two or three months, I tended to take the lead on most issues. It's probably fair to say that for the last six months, when Knut was with the company, he was not really - we weren't really performing as Joint-CEOs.

Q. Do you mean that you divided your functions up in some way?

A. Yes.

Q. And what functions did you tend to concentrate on, and what functions did he tend to concentrate on?

A. Maybe if I described it the other way; to say that Knut tended to worry about matters that were technical in nature.

Q. Mm-hmm. And you tended to deal with the purely business side of the administration, the marketing?

A. And the people, yes.

Q. And - I see. So you were having one of these meetings with Mr. O'Brien, and this, you think, to the best of your recollection, was in his office?

A. Yes.

Q. And tell me what happened at the meeting.

A. I believe, from what I can recollect, Denis raised with me the issue of success payments that were due to various consultants who had worked on the bid. Some of those people had not yet been paid and I tried to explain to Denis I couldn't pay for success fees without any supporting documentation, from the company's perspective.

Q. Had you paid any success fees up to that point?

A. I believe we did, yes. One of them was what, what had been vouched and we had full supporting paperwork, so that was paid straight away.

Q. When you say 'paid straight away' do you recall when it was paid?

A. I can't remember, but I know there was no delay.

Q. Between when you received the bill, as it were, and when you made the payment?

A. There was no delay such that there was no paperwork to substantiate the payment, and therefore it was authorised. How long between it was authorised and when it was paid, I can't recall.

Q. And was there only one such payment or do you remember if there were more than one?

A. there were a number of these payments.

Q. where you had the relevant paperwork?

A. There was one that I remember clearly that we had the relevant paperwork, and that was paid. There was two - there was two that we didn't have any paperwork or backup for at that point in time.

Q. Had you paid them or were they two that were causing a problem?

A. No, those had not been paid because they were causing a problem.

Q. Was it you who drew this up with Mr. O'Brien or did he draw it up with you?

A. He raised it with me.

Q. Was it on the agenda for the meeting or was there a preset or planned agenda for these meetings?

A. No, usually there was not.

Q. So before you went to the meeting, were you aware that this was going to be a topic for discussion at the meeting?

A. I can't recall.

Q. In any case, at the meeting this was drawn up by

Mr. O'Brien?

A. As I remember it.

Q. Tell me what happened after it was drawn up. You explained that there was lack of paperwork?

A. He expressed frustration they hadn't been paid. I explained we couldn't pay it until I had supporting backup.

Q. And what happened then? You said what, and he said what?

A. I just explained I could not authorise any payments until I had the supporting backup.

Q. And did you expect him to say - did you - if I can just go back. Did you write to any of these people to whom success payments were apparently due and say, 'Look, there is no problem paying your success payment provided I have the relevant paperwork.'?

A. I don't believe I did.

Q. Why didn't you do that, as a matter of interest?

A. I just wasn't sure as to the nature or background of them.

Q. If somebody writes to you and says, 'You owe me  $\frac{1}{2}$ 30,000 by way of a success payment', wouldn't it be normal for you to say, 'Well, send in the documentation, show me your invoice or show me the request the company sent you to do this work', or what?

A. I don't believe I was in receipt of any documentation like that in October/November '96 when the conversation

occurred.

Q. So were you receiving any complaints or any requests for payment or was it Mr. O'Brien who was receiving the requests?

A. As I recall it, it was Mr. O'Brien - I think what he said, he was meeting - 'meeting these people socially', I think was the term he used and he was embarrassed they hadn't been yet.

Q. he was embarrassed they hadn't been paid. It must have been because something was said to him about non-payment. How could there have been an issue of non-payment unless the people involved had been on to ESAT Digifone looking for money and unless they had been told that 'We won't pay you' how could they have drawn it up with anybody?

A. I can't answer that.

Q. But are you saying that, in other words, you had no recollection at all of any requests for payment from any of these people?

A. Not at the time of October/November '96 that I can recall.

Q. I think Mr. PJ Mara, Mr. Kelly, Mr. Cloonan were mentioned, is that right?

A. Mr. Kelly was - that was one I referred to. That was clean and had supporting background and we just paid it. There was no issue with that. The one with Mr. Cloonan, Denis O'Brien informed me that the nature



of that one was that he had been for his services he had been given an option to subscribe for some shares in the company.

Q. Mm-hmm.

A. So that was a fairly difficult one, given that the structure of the company had changed between when the bid went in. And I had to negotiate to see if I could negotiate that one down to a financial sum.

Q. So, in fact, in Mr. Cloonan's case there was no straightforward way in which it could have been resolved, even by you?

A. That's correct.

Q. In his case it wasn't simply a matter of saying, 'I am owed  $\frac{1}{2}$ 40,000' I think it was something like that he was eventually paid, is that right?

A. that's correct.

Q. 'and here is my invoice, here is my other supporting documentation'. There was more to it than that?

A. That's correct.

Q. How could there have been any frustration with you then, since there was no basis upon which you could have dealt with that without some authority to negotiate?

A. I wasn't particularly frustrated by it.

Q. What about the other ones, then, was Mr. Cloonan, Mr. Kelly and Mr. PJ Mara

A. For Mr. Mara, at that time we had nothing. We had - I

had certainly no paperwork that could have allowed me to pay anything.

Q. Up to the time of that meeting are you saying you had no idea that PJ Mara claimed he was owed money by the company?

A. I can't say I had no idea but I certainly didn't have any documentation that would have allowed me to pay it and I don't recall Mr. Mara raising it directly with me.

Q. Do you recall having - it having been raised by Denis O'Brien prior to that date?

A. I believe Denis may well have mentioned it, yes, that PJ was owed money.

Q. And at that meeting Mr. O'Brien says that he wanted to persuade you to make these payments and that in order to do so he made what he claims is a false statement to you. What did he say to you at the meeting about other payments that he made?

A. What he said to me at the meeting, I expressed some - my - Denis was saying, 'Look, these people have got to be paid. They are owed the money.' I said, 'I can't pay them until I get all of the backup for it.' I was a bit exasperated and frustrated because I felt caught between the two issues. Then he said, 'Well, you think you've got problems. I've had to make two payments of  $\frac{1}{2}$ 100,000 each', one of which was to Michael Lowry, the other one, the identity of the individual was not

mentioned.

Q. And after he said that, what did you say?

A. I was a bit taken back. I told him that I didn't want to know. As far as I was concerned it was nothing to do with us and ESAT Digifone.

Q. When you say you were 'a bit taken aback' and you said 'you didn't want to know', do I understand that you would have adopted an attitude or a tone which would have indicated that you didn't want to hear any more about this, you didn't want to be burdened with any more information about this?

A. That's correct. I pushed back fairly strongly on him at the time.

Q. 'I don't want to know' is an expression that can have lots of different meanings; but when used in a certain way, at least in Ireland, idiomatically it means, 'Do not tell me any more about this for fear I learn too much about things I shouldn't know about.'?

A. Is that a question?

Q. Is that right? Would you agree with that?

A. I don't know what 'idiomatic' means.

Q. It's an expression that is used to mean, not in every case, but in many cases, people would use it to mean, 'I do not want to be told any more about this for fear I will learn about something improper or wrong.'?

A. No. I mean, this happened in a fairly - in a quick conversation. My expression was 'I didn't want to

know'. As far as I was concerned it had nothing to do

with our meetings at Digifone -

Q. Why do you mean you didn't want to know about it?

A. I didn't want to know.

Q. Why didn't you want to know?

A. It was just an expression.

Q. What do you mean by that expression?

A. What I said.

Q. Do you mean, 'I don't want to know about your own troubles'?

A. No. I just didn't want to know.

Q. What did you understand him to mean by saying he had to pay £100,000 to Michael Lowry?

A. I didn't interpret it in any way other than what he said.

Q. Mr. Maloney, you knew that Mr. Lowry was the minister responsible for the government's granting of the second GSM licence?

A. That's correct.

Q. The licence had been, I think, formally granted or perfected a few months previously, isn't that right?

A. Yes.

Q. Some time in the middle of May of 1996. And here you have the Chairman at your company telling you that he had paid £100,000 to Michael Lowry. Did that statement not surprise you in any way or worry you or make you uneasy?

A. As I said, I was taken aback. And my response to it was that I didn't want to know. As far as I was concerned it was nothing to do with ESAT Digifone.

Q. Well, let's just take it step by step. You said you were taken aback. What do you mean by that?

A. I was surprised.

Q. What were you surprised at?

A. That he was telling me he had made a payment to Michael Lowry.

Q. Would you have regarded, at that time, a payment of that kind as in any way improper?

A. Yes, I would.

Q. Wouldn't it, in fact, have been a completely corrupt payment if it had been made?

A. It could possibly have been, yes.

Q. When you said, 'I don't want to know any more about this' did you mean that you didn't want to learn any more about it, or become involved in it in any way?

A. Both.

Q. Both. In saying that you didn't want to know in that way, I take it that what you meant was you hoped this had nothing to do with you, that it was Denis O'Brien's affair and the less said about it the better?

A. I believe that to be the case, yes. Which is why I qualified the statement about ESAT Digifone.

Q. Well, we may come back to it again when we look at the actual documents. You didn't ask him who the other

Q. 100,000 payment was made to?

A. No, I did not.

Q. What happened after that meeting?

A. I recall that was at the end of the meeting and it broke up and I left.

Q. Do you recall when you eventually paid Mr. Cloonan and Mr. Mara?

A. I believe it was in, I think one in March of the following year, '97 and the other one, perhaps, in May, maybe even June.

Q. Let me just get those dates again. You say one was in March of the following year and the other was in May or June of the following year?

A. I believe that to be the case.

Q. Do you remember making the payments or sanctioning the payments?

A. Yes, I did.

Q. And at that time was the paperwork in order?

A. Yes, at that stage I had a memo from Denis to me saying that these payments had been agreed with these individuals and I was also in receipt of an invoice and a letter, maybe two letters, from PJ Mara; and in Stephen Cloonan's case I had been negotiating with him to come up with a financial value that he was happy with, in exchange for the -

Q. the promised share option?

A. Yes, which we were not able to honour.

Q. After you said to Denis O'Brien at the meeting 'I don't want to know about this' what did he say to you?

A. He didn't say anything.

Q. He stopped talking about it?

A. It was the end of it.

Q. Now, Mr. O'Brien says that he did have a conversation with you similar to, but not precisely the same as, the one you've just described, but that he says that it took place while you were running on - up near Enniskerry, I think, or Roundwood Roundwood, County Wicklow?

A. So I understand, yes.

Q. Did you have a habit of going running with Mr. O'Brien?

A. Yes, I did.

Q. How frequently would you go running?

A. Depending on the period of time. Sometimes it was every week, every second week. We would also be joined by other people. It wasn't just the two of us all the time.

Q. I see. And do you ever recall having a discussion like this discussion in the course of one of those runs?

A. Not of this nature, no.

Q. If I could just go back to one other point for a moment. Mr. O'Brien has told the Tribunal that at this time relations between you and him were fairly strained, not just between Mr. Digerund and Mr. O'Brien, but also between you and Mr. O'Brien.

A. In October/November? In October/November I wouldn't be that - I mean, in October I wouldn't have been that conscious that relations were strained. In November there was some tensions starting to build. It really depends on the period in time.

Q. He says, in fact, that the relationship was one which didn't get off to a good start from the very beginning.

A. Sorry, what's the question?

Q. From when you became Chief Executive?

A. I wouldn't agree with that. In the first couple of months the relationship was fine.

CHAIRMAN: I don't want to interrupt you, Mr. Healey, but since we did hear from Mr. O'Brien that there had been a quite longstanding friendship as well a business association, maybe this is as good a time as any to tell us, perhaps, Mr. Maloney, just how did the two of you come to meet and what had been your association, both in a business sense and recreationally, over the years.

A. Yes, sir. We would have met after we both finished our secondary school education, in a place called the Pre-University Centre on Merrion Square. It was a repeat for those who didn't get enough points. I think in both of our cases, neither of us got any more points after the PUC.

Q. You made up for it since?



A. That's how we originally met. And we developed a strong relationship then and had been good friends for many years after that. It was a little bit interrupted, in that I travelled overseas as part of my career development. I went to Switzerland, where I spent six years in Geneva, and then I went from there to San Francisco for two years. I was out, in effect, for eight, eight and a half years. However, during that time we would have kept in regular contact, either by telephone or during vacation time, or attending sporting fixtures, like the World Cup, together. So I would describe him as a close personal friend during that time.

My commercial involvement with him at the time would have been much more passive. I was a founding shareholder of 98 FM, where I still am I own 1% of the company and a founding shareholder of ESAT Telecom Group, where I initially had 1%, and then that was diluted down over time as the various fund-raising came in.

Q. Just in relation to those involvements, were you working outside of Ireland at the time that you were prompted, or at the time that Mr. O'Brien, or whoever it was, prompted you to invest in those companies?

A. I believe - definitely not for 98 FM. I believe ESAT Telecom, also. I need to check on when it was founded, in '98, something like that, or '88.

Q. But you were - were you asked to make an investment by Mr. O'Brien himself?

A. Well, he afforded me the opportunity.

Q. Yes. You had no executive involvement, as you said, in ESAT Telecom at that time, nor in 98 FM?

A. No, I had not.

Q. By the time of this meeting, you had been in office for about three months, is that right?

A. I started in May - five months.

Q. I think Mr. O'Brien has said in evidence, that from the time that you took up your position, your relationship was strained or got off to a bad start. I am not sure of the precise words he used but he instanced your dismissing people, or at least changing personalities, holding various positions within the company. Can you recall if that had happened by the time of your meeting in October/November?

A. As far as I can - I cannot recollect any examples of that during that period of time.

Q. So the company still had, what we know at that stage did it still have the same executive staff?

A. You have to understand that the time I came into the company we didn't have an executive staff. It was a typical start-up. I mean, everybody was doing everything, we were rushing around, trying to get the launch, trying to get the company built. So at that time we didn't have efficient structures, as we would

have now, for example, in the company.

Q. So you weren't firing people, you were hiring them at this stage?

A. Absolutely.

Q. And you wouldn't describe your relationship, therefore, as strained by the time you had this meeting?

A. No, I would not.

Q. Did you ever discuss business matters with Mr. O'Brien in the course of your runs, whether in Roundwood or wherever else you went running?

A. We discussed maybe business ideas or - but not formal serious business discussions. To be honest, we were both gasping for breath.

Q. Yes. Well, before or after the runs, are you saying that your discussions would be of a more wide-ranging variety, but not dealing with down-to-earth details such as this?

A. Generally, as I said, on a lot of occasions there was other people with us running. It wasn't just the two of us, although we did run on our own sometimes. But I would say that was probably, maybe 50/50, we ran on our own or had other people with us.

Q. After the discussion you had with Mr. O'Brien, whether it was in his office or whether it was on the run or whatever, you didn't have any further - you didn't take that matter up with him again for a long time, is that right?

A. No, I did not.

Q. I think you say in the statement, which we'll come to in due course, or in a note which we'll come to, that you put it out of your mind, that you forget about it.

A. More or less, yes, I had forgotten about it.

Q. Would I be more right in thinking it was something you put out of your mind. It's not something you would want to carry around with you?

A. I am not sure about the subtleties between the two sentences.

Q. I don't think it would be easy to forget that somebody had told you that he had given the government minister  $\text{€}100,000$  which might be connected with the grant of a licence which was the heart throb of your company, isn't that right?

A. That's correct.

Q. Am I right in thinking that you put it out of your mind?

A. I think when I didn't get a response or anything to do with us, I put it out of my mind.

Q. Just explain that again. When you didn't get a response to -

A. when I made the statement, 'As far as I was concerned, it was nothing to do with ESAT Digifone'.

Q. Yes?

A. Denis did not respond to that statement.

Q. At all?

A. No.

Q. And you took it to mean that that was something to do with something else?

A. I don't know. I didn't pursue it.

Q. Again, could I suggest you didn't pursue it because, perhaps quite naturally, you didn't want to be pursuing it, you didn't want to be digging too deep?

A. Yeah. Just, I didn't pursue the matter.

Q. I want to look at some of your documents. Now, you've provided the Tribunal with documents, as I said, mainly in two bundles. The first group of documents were provided to the Tribunal shortly, I think, before the Tribunal's last supplemental opening statement. Can you just tell me where those documents came from. These are the documents that go from number 1 in your book to number 20 in the first set, or number - sorry, I could be wrong about that number. Number 32 in the first set. I could put the list on the overhead projector so that you might recognise it. Do you recognize that list?

A. Yes, I do.

Q. That's the first 6 list of documents. Where did those documents come from?

A. They came from my office.

Q. From your own files or -

A. From my own files.

Q. The first document is described as a "Faxed draft page

of Telecom prospectus with Digifone health warning,  
with handwritten note by Barry Maloney."

Now, this is similar to the document we had on the  
overhead projector a moment ago. The heading is  
"Importance of ESAT Digifone licence." This document  
is dated, I think, the 23rd of September of 1997, is  
that right?

A. Yes, it is.

Q. And can you remember where you got it from or does  
anything on the document assist you in recalling where  
you got it?

A. I am afraid it doesn't. I mean, there is a fax, the  
top of it, but I can't recall where it came from.

Q. Yes. Down at the bottom left-hand side in brackets,  
there is "NW". It says New York, and on the top and  
the middle it says "DPW". Do you see that?

A. Yes.

Q. Is "DPW" a set of initials that rings any bells with  
you?

A. I don't believe it is.

Q. Have you heard of Davis Pope and Wardel?

A. Yes, I have.

Q. Are they not lawyers associated with the prospectus?

A. I believe they were.

Q. So is it possible that you got it from them?

A. I can't think of any reason we would have got it

directly from them -

Q. Somebody may have gotten it from them and then gave it to you?

A. Correct.

Q. The document, in any case, judging from the format, seems to have been generated in the U.S., this month/day/year. Do you see that?

A. Yes, I do.

Q. Would you agree with that?

A. Yes, I agree with the dating format.

Q. You agree that it's the U.S. dating format?

A. Yes. Yes.

Q. It says: "The Irish government plans to establish a Tribunal of inquiry to investigate certain decisions made under the auspices of certain government ministers, one of whom is the former Minister for Transport Energy and Telecommunications, Michael Lowry. The decisions to be investigated will include the award by Mr. Lowry of the GSM licence to ESAT Digifone. Any such investigation would be the fifth investigation into the award of the GSM licence. The four previous investigations did not discover any impropriety in the award of the licence."

It goes on, "The company does not expect that the Tribunal will recommend that the award of the GSM licence should be revoked. However, there can be no assurance that the GSM licence will not be revoked or

that there will not be further investigations concerning the GSM licence."

Now there are some handwritten changes or handwritten indentations. On the right-hand side can you see the word, it looks to me like "delete"?

A. Yes.

Q. And that seems to refer to the portion of the second paragraph in brackets?

A. I believe what the word says is "deleted".

Q. "Deleted". I see. My copy doesn't go to the edge of the writing. Was it you who wrote that? Is that your writing?

A. Yes, it was.

Q. If you wrote 'deleted' does that mean someone told you it was deleted?

A. That's to the best of my recollection.

Q. Did you discuss this with somebody who was able to tell you that?

A. I didn't discuss it. I was being told by way of information exchange that that was going to be deleted.

Q. Who do you recall told you that?

A. I honestly can't recall.

Q. I see. Who would you normally have received information from in connection with matters like this?

A. It would normally come through our finance group.

Q. ESAT Digifone's finance group?



A. Yes.

Q. Your finance department or outside?

A. Our finance department, inside the company.

Q. Do you recall, did you have any line of communication to people in ESAT Telecom, apart from Mr. Denis O'Brien and the directors of that company?

A. No, I did not.

Q. Did you have any discussions with any of them at this stage, September of 1997, concerning the prospectus?

A. With any staff in ESAT Telecom?

Q. Staff or directors.

A. Not that I can recall at this point in time.

Q. It goes on to say, "While there can be no assurance" again a handwritten addition. Do you see that on the next paragraph?

A. Yes, I do.

Q. Now, do you know, is that your writing again?

A. Yes, it is.

Q. And again, I take it, that's because somebody told you that?

A. That's correct.

Q. You didn't make these suggestions?

A. No, I did not.

Q. Were you told why these additions were made?

A. No, I was not.

Q. Do you recall whether ESAT Digifone had any role in suggesting additions or deletions of this kind?

A. To the best of our knowledge, we did not have any role.

Q. The words "While there can be no assurance" is simply, as far as I can see, a change in the format of the last paragraph, isn't that right?

A. I believe -

Q. of the last - if you look at the last sentence it says: "However, there can be no assurance."

A. What I believe happened was that was going to be inserted, as a head of the company.

Q. Yes. It was simply - the last paragraph is simply changing things around a little bit, there is no actual change, but the deleted portion does not appear in the - in the final draft at all, as far as can be seen, isn't that right?

A. From what I can recall, yes.

Q. What the final draft says is, after the sentence, "The decisions to be investigated would include the award by Mr. Lowry of the GSM licence to ESAT Digifone", the following sentence appears "Allegations have been made of improprieties of the award of the GSM licence.

Revocation or modification of the GSM licence would have a material, adverse effect on the company."

Do you recall having any role in the addition of that passage to that paragraph of the prospectus?

A. No, I do not.

Q. Now, this document, you say, was one of the things that prompted you to recall the conversation that you'd had

with Mr. O'Brien, approximately a year earlier,  
according to your own evidence, is that right?

A. That's correct.

Q. You say that it was one of a number of factors: "The  
publication of this document, or the existence of a  
statement like this, the publication of the Terms of  
Reference at the Moriarty Tribunal and the fact that  
Mr. O'Brien reverted a couple of times to the  
conversation we'd had about a year previously".

So you are saying there is three items which alerted  
you to the possible significance of the discussion  
you'd had a year earlier, is that right?

A. I would say there was three elements coming together in  
the same period of time.

Q. Yes. Well, let's try and get the timing of this right  
in some way. This document that you've produced to the  
Tribunal is a page from some earlier draft of the  
prospectus, a draft as early as the 9th of the 23rd  
of September. I don't know if there were earlier  
drafts or not. Why did you keep this document?

A. I really cannot say. This was the only document, when  
I went to look into my files, as to what I had, that I  
found.

Q. Can you recall the time that you alerted yourself once  
again to the conversations that you'd had with  
Mr. O'Brien about a year earlier?

A. I was alerted when he raised the issues with me, reminding me of the conversation.

Q. When did that happen, do you think?

A. That was in August of that year.

Q. Why do you remember that it was in August?

A. Because I remember it was just prior to his wedding, his departure after he got married.

Q. And how did it come up?

A. I believe it came up at the end of our regular meeting, right at the end of it. He reminded me of the conversation and used words along the lines of, 'Thank God I didn't do it. It never went through', I think was the term - the words used.

Q. Let me just try to tease that out a little bit. It was at the end of one of your regular conversations, is that one of your - what I suppose I could call your 'liaison meetings' with him?

A. Yes.

Q. The kind that you described a moment ago having in either your own office or in the Malt House?

A. That's correct.

Q. Fairly regularly?

A. That's correct.

Q. In the course of one of those meetings, this came up at the end of the meeting?

A. My recollection is it was right at the end of the meeting, as he was literally picking up his papers and

leaving the office.

Q. And what did he say to you, if you can recall?

A. As far as I can recollect, he said to me that he just wanted to reassure me that - reminded me of the conversation, 'Do you remember I told you about the payment to Lowry. Well, I just want to let you know I didn't do it. Thank God I didn't do it.' or words to that effect. The absolute words I can't remember.

Q. You said a moment ago that you think he may also have said, "It didn't go through."?

A. I think - there was a sequence of these reminders. I believe it was either the following Monday or maybe one Monday in between, I've checked my diary and we had regular meetings scheduled for each of the Mondays in August, but I can't remember exactly which Monday it was.

Q. Now, you know from the evidence that Mr. O'Brien says that it was you who brought this matter up with him and not that he brought it up with you?

A. Sorry, your question?

Q. From the evidence, Mr. O'Brien says that it was - sorry - that it was you who brought this matter up with him, and not that he brought it up with you?

A. That's what I understand his evidence is.

Q. Yes. Have you any comment to make on that?

A. It's not my evidence.

Q. Yes. Can you remember what your own reaction was when

he brought it up with you in August of 1997?

A. I was taken aback.

Q. Maybe you can just expand a little bit on that expression?

A. Well, I was wondering why he was reminding me of it at that particular point in time. I was trying to put it into context why he was reminding me of it.

Q. He was dragging up something from the past which would not have been a terribly welcome thing to be, thinking about it, wouldn't that be right?

A. Yes.

Q. Did you say anything to him, when he said to you, 'Thank God' - or words to that effect - 'I didn't do it.'?

A. As I said, it was at the end of the meeting. I recall him heading towards the door as he said it and that kind of given me reassurance, kind of, the context in which he said it. Then he left. We didn't discuss it or debate it.

Q. You didn't say anything like, 'I'm glad you said that to me.' ?

A. No, I did not.

Q. 'That's a relief to me.'?

A. No, I did not.

Q. When you didn't say something like that to him, do you recall what his reaction was?

A. As I say, he left right after the conversation, he left

my office.

Q. You mentioned other conversations. Can you recall whether you had this document or a document like it before you had your next conversation with him about it?

A. 'This document' being the prospectus on the 23rd of September?

Q. Mm-hmm?

A. No, I did not - I do not believe I had seen this document or a previous version of it at that time.

Q. So you had another conversation with Mr. O'Brien where the same topic was being discussed, and at that stage you still did not have this or a similar document?

A. I believe that to be the case because I believe the two meetings, the two statements he made to me at the end of our meetings, were in month of August and this document was dated the 23rd of September.

Q. When you say the first time he mentioned it in 1997 was in August, before he went on his honeymoon, is that right, or before he got married?

A. I'm sorry, could you repeat the question?

Q. Did you just say to me a moment ago that you dated the first time he mentioned it to you by reference to something?

A. By reference to a Monday in August.

Q. Yes?

A. Prior to him going on his honeymoon.

Q. Yes?

A. Which he went on at the end of August.

Q. Right. So presumably he was gone for a week or two?

A. I believe so.

Q. When did he mention it to you again?

A. Well, he mentioned it to me, I believe, on consecutive Mondays prior to his departure during the month of August.

Q. I see. So he mentioned it to you at one point in August and then again before, on each occasion before he went away on his honeymoon?

A. I believe so.

Q. All right. And the second mention was again in his or in your office, one or the other?

A. Yes, it was. It was in my office.

Q. In the course of another such liaison meeting or -

A. yes, also at the end of the meeting. The second time, I believe, he used words like, 'I know you must be worried and I just want to reassure you it didn't happen'.

Q. Had you said anything to him or done anything that would have prompted him to say, 'I know you must be worried.' ?

A. No, I did not.

Q. When he said to you, 'I know you must be worried' did you say, 'I am not worried' or 'I am worried.'?

A. I didn't respond.



Q. What else did he say?

A. Again, when he made the second statement, it was right at the end of the meeting. Again, as I recall, as he was leaving the office. It was, like, the last thing we discussed before he left.

Q. And just go through it for me again. He said, 'I know you must be worried.'?

A. 'I know you must be worried. I did not make the payment. It didn't go through.'

Q. And what was your response to that?

A. Well, after he left I was a bit taken aback and I started to wonder why he was reminding me of the conversation and why he had felt necessary to say it, not once, twice.

Q. He wasn't just reminding you of the conversation at this point, he had reminded you of the conversation the first time. He was now saying to you twice, in a space of a few weeks, 'I didn't do it', isn't that right?

A. Yeah, he was reassuring me.

Q. But on the first occasion you hadn't said, 'I am delighted you have told me that.' You hadn't said, 'I am relieved.' And he mentioned it again. When he mentioned it a second time, again you didn't say you were relieved or you were delighted he told you this?

A. Correct.

Q. Of the items that you mentioned which prompted you to recall your conversation, you've mentioned those two

dealings you had with Mr. O'Brien and then you mention also the publication of the Terms of Reference of the Moriarty Tribunal. Now, can you recall when the publication of the terms of the Moriarty Tribunal prompted you to consider these matters?

A. I can't recall absolutely. I do know that at some point or - our company at the time sent me a fax of what they were. Perhaps they were appearing in the national newspapers at the time but I can't be sure.

Q. I think the terms were not published until the 21st of September and the fax that you refer to, the - is that the one that's in your book of documents?

A. Yes, I believe it's headed the 'Irish Independent, 17th of October'.

Q. But it seems to have been sent to you around that date, as far as I can see, 17th of October 1997?

A. From what I can see in my file.

Q. That's in the advertisement the Tribunal would have put in the newspapers some time after the Tribunal had been established.

A. My recollection was the Tribunal had been established in August/September. I can't be sure.

Q. Well, it certainly was - the resolutions were passed on the 11th of September of 1997. There may have been some discussion prior to that. I don't know if the Dail was recalled after the McCracken Tribunal was published. Mr. Coughlan reminds me it was recalled.

Presumably there must have been some discussion in the newspapers of the matter toward the end of August, the beginning of September?

A. I remember at the time it was some speculation as to whether ESAT Digifone would be included in its Terms of Reference or not.

Q. As a specific issue, you mean?

A. Yeah, just in terms of - what you would have picked up in the media.

Q. I was going to say, was that newspaper speculation or speculation amongst your contacts?

A. No, no, media.

Q. After Mr. O'Brien had these two discussions with you, and I should say that Mr. O'Brien again says that it was you who brought these up with him and not - it was you who brought this matter up with him and not the other way around.

A. I understand that's his evidence.

Q. But you disagree with that?

A. I do, yes.

Q. On each occasion?

A. On each occasion.

Q. Would you agree that it wouldn't be surprising if after Mr. O'Brien had mentioned it on the first occasion, it wouldn't be surprising that you would come back to him on the second occasion and say, "That matter you mentioned to me last week, would you go over that

again?' ?

A. Sorry?

Q. It wouldn't be surprising if you were to draw it up with him a second time after he had mentioned it to you the first time?

A. No, I don't believe it would have been surprising.

Q. But are you saying that you certainly didn't bring it up the second time?

A. I definitely did not bring it up the second time.

Q. Between the first time and the second time, do you recall drawing this to anyone else's attention?

A. No, I did not.

Q. After the second time, did you bring it to anyone else's attention?

A. I believe during the month of September I would have started to get concerned about the confluence of the three items coming together and I would have discussed it with Fergus Armstrong and McCanns as a kind of a sounding board as to whether or not I had any reason to be worried or concerned. But I wouldn't have discussed it with anybody else.

Q. Anyone else in ESAT Digifone or any other -

A. anyone else anywhere.

Q. I see. It was a very alarming thing to have to consider again, isn't that right?

A. Yes, it was.

Q. I want to go to your next document. Document number 1

is the fax copy of an earlier draft of the prospectus.

There are then a number of excluded, privileged documents. And the next included document is document number 4.

CHAIRMAN: Five.

MR. HEALY: It seems to be number four on mine. I have a document number 4, "Handwritten note of Barry Maloney on call question with Fergus Armstrong." It does say 'not included' but I do actually have a note. I'll put it on the projector and see if you have the same document as I have.

Can you look at the monitor and see if you have that document?

A. Yes, I do.

Q. If you can just make sure that you've got your own hard copy so we are talking about the same document. It says: "Fergus Armstrong" and then five numbered points. Is this all in your handwriting?

A. Yes, it is.

Q. It says, "U.S. advise impact reference" is it "discussions" is that right?

A. Yes, it is.

Q. Just correct me if I'm wrong, if I am wrong anywhere. "J" for Johansen?

A. JF would be Johnny Fortune.

Q. Have you JF? I only have 'J' on mine. "Reference

discussions Johnny Fortune and DOB" Denis O'Brien

"probably need to do anyway." Do you know what that's about or what that refers to?

A. I am just trying to recall because this one was marked "privileged" in mine. So I didn't specifically spend any time looking at it.

Q. Doesn't worry about it. Unfortunately it's been opened on several occasions. Now, we'll go through it quickly. Then, maybe over the lunch break, you might have a look at it?

A. Okay.

Q. Obviously, the fact there is a reference to discussions with Johnny Fortune and DOB may help you to identify what it's about?

A. Sure.

Q. Then "Wording changes on Tribunal." Some reference to the Tribunal. "Timing, Davy's next week participate in road shows." Some suggestion of you participating in ESAT Digifone road shows. And then there is some sub-issues. ESAT Telecom road shows, sorry.

A. That's correct.

Q. "Company liability." And then you have "endorsement of info." In other words, if you were to participate in the roadshow, you would be, as it were, seen to be endorsing on behalf of ESAT Digifone the information concerning ESAT Digifone in the ESAT Telecom

prospectus, is that what you were probably thinking about?

A. Probably, yes.

Q. Next you have the red herring version of the Terms of Reference of the prospectus, sorry "Board opposed to change before" is that 'finalising'?

A. I believe what I would have been saying there is "Board opportunity to change before final." I believe that to be the case.

Q. I see. Then you have "Board approval probably not required." We'll try to come back to that document after lunch when you might have a clearer idea. And the next document, document number 5, is a "handwritten note of Barry Maloney and Gerry McQuaid and Paul Connolly in the U.S.A."

I am going to go through this document quickly. I am not sure what light it throws on the situation. It's dated the 10th of October of 1997. Is that a contemporaneous note of the date?

A. I believe it to be, yes.

Q. The first part. Gerry McQuaid prepaid solution in Aldiscon". Does that have anything to do with the issues we are discussing?

A. No

Q. The first reference is "Telenor next week for consent - Tuesday at the earliest, SAS 71." What does the

reference to Telenor indicate? Does it bring anything to your mind?

A. It doesn't have any significance other than SAS 71 is an accounting standard which I believe was used in the US.

Q. I see.

A. "Tuesday at the earliest". Maybe it was in terms of some discussion with them. "Next week for consent." I believe the consent referred to information, consent for the release of information by either the board of ESAT Digifone to be used by ESAT Telecom.

Q. In the prospectus, yes. I presume that it was consent for the release of, primarily, financial information?

A. Yes, it was. We had a limited set of numbers that had been approved, I believe, as early as January.

Q. You mean approved by the board?

A. By - of ESAT Digifone to allow ESAT Telecom to use in its various documents.

Q. Next is a reference to the roadshow, presumably the ESAT Telecom roadshow. Am I right in thinking that doesn't throw any particular light on -

A. I presume that to be the case.

Q. Again, there is a reference to "Earliest Tuesday. Johnny Fortune, no issues, timetable moved up." And something about 'market'. Does that throw any particular light on the issues we are looking at here?

A. The difficulty I have is the points 1, 2 and 3 are not



- there is no context within which it was happening,

who I was talking to or -

Q. I see. Then point 4 refers to - it's under a note you have "Paul Connolly from U.S.A. by phone."

A. That's correct.

Q. "Looking to get legal advice on U.S.A. impact because it's an IPO." Can you recall what that telephone conversation was about?

A. I do remember receiving a call from Paul Connolly, who, at the time, I believe was in the States.

Q. Do you know what the call was about?

A. I think - I think he was calling me, as I recall it, to give me some kind of assurance that what was required from Digifone was not going to be that materially different to what had been provided in terms of information in the past. That's the best of my recollection.

Q. Is that a reference to the previous bond issue or the two previous bond issues?

A. Well, without being specific to the bond issues, in January of that year the board released a set of - gave - the board gave its consent to the re the release of particular sets of numbers in a particular format to ESAT Telecom.

Q. To be used by ESAT Telecom for whatever purpose, to raise money, however they wished to do it?

A. Correct. But specific to each fund-raising, as I

recall.

CHAIRMAN: Just remind me of Paul Connolly's position in the company?

A. I believe, Sir, he was a corporate finance adviser to ESAT Telecom group.

MR. HEALY:

Q. Then you have "PLC bonds not traded; already traded."

Does this have any relevance?

A. I think those were notes I would have made of what Paul was telling me. Basically the bonds were already traded, the documentation, the SEC, reference to a F1 form. By implications, same as in August." I presume there was a bond issue in August, but I am not sure.

Q. Underneath that?

A. "Partner is involved on behalf of one of the underwriters" and a reference to William Earley. I believe at this stage William Earley was acting for one of the underwriters, but I am not sure.

Q. Then on the next page, something which may be of interest. You have two points. Can you put them in context?

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

Q. Pardon?

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

Q. The first point is "Not enough to eliminate the risk. Probably need to have." I don't know if that's an

unfinished sentence "Not enough to eliminate the risk"  
seems to be related to points related in other  
documents considering the risk to you and directors of  
ESAT Digifone and the company itself concerning the use  
of information or references to the Tribunal in the  
prospectus. Would that be right?

A. I think that's probably right. The difficulty is that  
my - I have used a pencil on the first sheet dated  
10/97, which is the Gerry McQuaid headed one, whereas  
these two bullets are on the back of that sheet and I  
have used what looks like a black biro. I would have  
been fairly haphazard in my keeping of notes, where I  
wouldn't necessarily trap everything sequentially.

CHAIRMAN: It's as good a time as any to adjourn. Five  
past two. Thank you, Mr. Maloney.

THE TRIBUNAL THEN ADJOURNED TO 2.05. P.M.

THE TRIBUNAL RESUMED AS FOLLOWS AT 2.05 P.M.

CHAIRMAN: Good afternoon.

MS. FINLAY: Just before Mr. Healey starts, I just want  
to say on instructions that the document number 4 which  
was referred to this morning, which in the schedule to  
Mr. Maloney's statement is marked as being a privileged  
document was, in fact, sent to the Tribunal in error.  
But we don't believe anything turns on it and we are  
not making any point about it now. I simply want it

recorded, it was sent in error, though it is a document over which privilege had been claimed. But it's in the public domain now. We are not making any further point in relation to it.

CHAIRMAN: It's perhaps one of the more marginal ones, in any event, and for what limited probative value it may have, it's of little fact. Thank you.

BARRY MALONEY CONTINUED TO BE EXAMINED AS FOLLOWS BY

MR. HEALY:

Q. Thank you, Mr. Maloney. Do you remember before lunch we were discussing this document and you had had an opportunity of considering it. It was the document headed "Fergus Armstrong, Johnny Fortune" 'JF' for 'Johnny Fortune', document number 4, I think.

I think before you - before we broke at lunch time we had just gone on to the next document.

Very briefly, if we can just go through this document.

It says - is there anything in it that you think that throws particular light on the issues?

A. I think the only thing that might be helpful is point number 4 "Participation in roadshow - BM." In my conversation with Denis O'Brien on the 8th of October, he had raised with me the possibility of me participating in the roadshow and I told him that that would depend on getting - I had no problem with that as

long as the board, you know, agreed it. And I believe the two bullets underneath it, 'company viability, endorsement of information' and or only to say in terms of timing it would have to be after October 8th, in a discussion with Fergus somewhere along the lines.

Q. I follow?

A. Sorry I can't be any more helpful than that.

Q. Don't worry. By this stage, you'd had - by the time that this document was written, which must have been presumably after October the 8th, Denis O'Brien had asked you to participate in the roadshow and by that time he had also had the two discussions with you in August, isn't that right, that we were -

A. that's correct.

Q. - canvassing just before lunch. Now, between the time of the conversations in October/November, whenever, of 1996, and the time of this memorandum we are looking at now, which is about a year in the difference, there had been no discussion of those October/November 1996 conversations until August, isn't that right?

Notwithstanding the discussions, Denis O'Brien still wanted you to go on the roadshow?

A. During my - one of my subsequent meetings with Denis O'Brien, after his return from his honeymoon, I went down to see him down in the Malt House. At that time, if you like, I had framed a discussion that I wanted to have with him about the three issues, the reminders,

and that I now believed that I was being put in a difficult position as CEO and Director of Esat Digifone. So it was in that context that I remember the reference because at the end of that meeting that I had had with Denis, we were leaving, he had raised this issue of whether or not I would participate in the -

Q. Can I just go back for one moment to 1996 and to the discussions that you had with Denis O'Brien. You recall that I mentioned to you that Mr. O'Brien said that he was frustrated, and indeed embarrassed, because people who were owed money were not being paid money?

A. Yes.

Q. And you, at the meeting, were saying, 'Look, we need some invoices, we need some paperwork for this', right?

A. That's correct.

Q. Up to that time you had had, am I right in summarizing your evidence, you had had no request from PJ Mara to pay money that was due to him?

A. To the best of my knowledge, I haven't.

Q. Do you recall - you recall that you'd had some dealings with Mr. Kelly's claim for success fees, isn't that right?

A. Yes.

Q. And that had been paid?

A. No. That wasn't -

Q. subsequently paid?

A. yes.

Q. And the appropriate paperwork was produced?

A. I believe there might be a helpful memo included in my packet to help with this, because I received a memo from Denis, then.

Q. Yes. I am only interested - well, you can tell me about it if you like. What I am trying to get at is this: Mr. O'Brien says that you were delaying making payments.

A. Denis had asked me to pay these people, in which I responded I couldn't pay until I had documentation that I could authorise within the company to have the fees paid.

Q. But you weren't delaying paying, in the sense that you weren't aware of claims for payments being with you on your desk?

A. that's correct.

Q. - for some period of time?

A. That's correct.

Q. The issue between you and Denis O'Brien is, 'Will you pay - won't you pay?' and you were saying, 'I will pay if I get the paperwork.' ?

A. Correct.

Q. So it wasn't a delay issue, it was a 'will I or won't I pay' issue?

A. Well, the delay issue had only - would only arise if I had the paperwork and had I sat on it for a period of time. The point the discussions were happening, I

hadn't received any paperwork, nor had I received any authorisation from him as Chairman to allow me to pay it, as CEO, given that I wasn't around at the time of the bid

Q. I am simply trying to put Denis O'Brien's remarks, whether on your version or his version, in context.

And if it wasn't in the context of delay, on your evidence, it must have been in the context of, 'Look, will you please pay these two or three people, I've had to pay Michael Lowry and one other person'.

A. I think the way the discussion occurred was, 'What are you so upset about?'. That was the gist of the discussion, 'What are you - why are you so upset about this? I have had to pay, I have had to make two payments of  $\frac{1}{2}$ 100,000.' .

Q. Yes.

A. But it wasn't a question, from my point of view that the company couldn't pay, in the sense we didn't we just didn't have anything that we could authorise payment.

Q. I understand. Now, you may recall that before lunch I was also - I referred you also to the evidence of Mr. O'Brien, that at the time of the remarks in October/November of 1996 he indicated that the relationship between you and him had become strained, and in fact, that, as he put it, going for a run with you, he was simply, you know, trying to keep the



relationship going, to try to trying to mend fences, trying to ensure that he continued to get on well with you. You've told me before lunch that in fact you don't recall there being any strain in your relationship at that time.

A. No, I think, Mr. Healey, what I said was that when I started, and for the period from, let's say, May, the start of the company, up until about September, maybe into October, there was no particular strain, because we were just trying to get the company started, get the rollout done. Whether it was in October or the start of November, strains did start to appear, principally around strategic issues in terms of the company strategy for launch. And also I was finding it more and more difficult, because his reaction to what was right for Esat Digifone to do was starting to cause our relationship to come under a lot of strain in the end November/early December time period.

Q. What do you mean by his reaction to what was right for Esat Digifone to do?

A. Well, for example, at that stage we would have had a management team formed, we were putting together our plans for the launch of the service, we were putting together our own sales force, we were putting together our own marketing department. We were, you know, getting the building blocks required for the launch of the service in place. Denis would have had views as to

how our distribution strategy and sales strategy should have been executed. For example, one of the things he wanted was that effectively the salesforce of ESAT Telecom would sell the mobile service as part of the other things they sold, whereas we believed very strongly that we needed a dedicated-focus sales force that sold mobile only. That caused a lot of conflict between myself and Denis and a gentleman called Mark Roden at the time, who worked for Denis at the time.

So things like that were starting to create a lot of hassle. There was also questions about giving ESAT Telecom access to our infrastructure, where again we were reticent because we didn't believe we had enough capacity just to support the mobile business. So issues like that started to build.

I should also add that the relationship at the time among the shareholders was very fraught. In fact, it was fraught from the first board meeting I attended after I joined. And I reached the conclusion in early December that I didn't want to lose my relationship with Denis and I actually resigned. And my - at the time my resignation letter was because I did not feel this company was capable of being managed independently.

Q. If we could just get some chronology on this.

A. Yes.

Q. By the time of the discussions concerning the two  
\$100,000 payments?

A. Yes.

Q. There may have been tensions but there weren't strains,  
would that be a correct way of describing the evidence  
you've given?

A. Correct.

Q. But tensions were building up over what I - I think I  
could describe as Mr. O'Brien's view about how the  
company should be run or operated on a day-to-day  
basis, and your view as chief executive as to how it  
should be run; would that be fair?

A. That's correct.

Q. By December of 1996, those strains, which were much  
more than tensions, they were, I suppose, to do with  
interference and whatsoever and your discretion as to  
how you ran the company, had reached the point where  
you felt they would interfere with your relationship  
with Denis O'Brien, your personal relationship?

A. That's correct.

Q. And you decided that rather than have them interfere  
with your relationship, you would resign?

A. Correct.

Q. So I just want to deal with two things. As an aside I  
want to deal with something else in that context. You  
had a strong enough personal relationship at that time  
that you were prepared to put your personal

relationship ahead of your business relationship?

A. That's correct.

Q. And the discussion, therefore, that you had in 1996, October/November, was a discussion or was a conversation in which Mr. O'Brien was saying something to you as a very close friend of his?

A. In the context of the meeting -

Q. I accept that, yes.

A. yes.

Q. Would he have shared many confidences, business confidences, personal confidences?

A. Certainly on the personal side, yes. We'd been friends for, close friends for over 15 years and I had reached the point where in discussion with my wife I said, 'You know, if it means I resign from the job, at least I keep my relationship with Denis.' .

Q. But I am simply anxious to establish the, not just the importance of the relationship to you, but how close you were in terms of the type or nature of confidential information or confidences that you could exchange and if Denis O'Brien had had dealings with Mr. Lowry of the kind that he described to you, it wouldn't be unusual, would you think, for him to tell you about them, of all people?

A. Well, it was unusual because it was the first time we'd ever made reference to any matters such as that.

Q. I know. I understand that from your evidence. But you

were sufficiently close that if somebody was to tell you something as significant as that, it's something that he could have told you, you were sufficiently close to him for him to tell you something like that?

A. Yes.

Q. To go back to December, when you decided to resign.

Your resignation, therefore, was to do solely with the impact your business relationship was having on your personal friendship?

A. What I said in my letter of - when I was first offered the job, it was made very clear to me, John Callaghan was directed by the board to negotiate, if you like, my final terms and also what the job was, because one of the things I worked quite hard to clarify was 'What is the role of the CEO, what is the role of the Chairman?' in a situation where you are close personal friends. I wanted to make sure the roles were sufficiently well defined so that there wouldn't be any confusion about who was doing what.

And it was in that context that I had reached the conclusion in December that the company just could not be managed in the way I believed it needed to be managed for it to be successful in the marketplace.

Q. And what happened after you resigned? What happened between you and Mr. O'Brien personally after you resigned?

A. Well, I believe the date I resigned was the 9th of

December. What I did was I just sent my letter of resignation to the shareholders and I just left the office. I went home, we were staying in an apartment at Malahide at the time, and I believe it was either that evening or the next morning I received a call from Dermot Desmond, who basically wanted me to reconsider and to come back to the company.

I explained to Dermot that coming back to the company wasn't going to solve the issues that were there, that, you know, there were fundamental issues about strategy, and, in effect, who was managing it and that I didn't believe it would be the right thing to do.

Dermot at the time then offered me a payment of  $\frac{1}{2}$ 250,000 pounds to come back on what he saw as a temporary basis, at least until 30 days after the launch of the company. I told Dermot that I wasn't interested in a financial inducement at the time, but what I was interested in was, you know, the proper governance and management of the company.

So at the end of the telephone conversation, some time after it, I think it was that night or maybe the next morning, Denis O'Brien arrived on my doorstep and asked me to go for a coffee with him, to the coffee shop in Malahide, which we did. And during that conversation he explained to me that he was raising funds in the

U.S. at the time and that if I didn't rejoin the company as CEO, he would, in effect, not be able to finance the next part of our project and would lose his interests in the company.

I explained to Denis the difficulties that I'd been having and how difficult it was to try and balance my relationship with him with doing what was right in terms of running the company. But he pleaded with me pretty hard to come back on the basis that if I didn't he would lose his shareholding in Digifone, which was the value that he had worked all through the many years with ESAT Telecom to realise.

Q. Mm-hmm.

A. So I returned home that evening and discussed it with my wife and then decided, primarily because of the strength of my previous relationship with Denis, that I would go back and give it a go.

Q. Did you get a new contract?

A. No. What happened was Desmond did - he said, asked me then to put down on a sheet of paper what I believed to be needed to be done, which included separate legal advisers, separate financial advisers. Also, with respect to the financial piece, I said to Dermot, 'Look, rather than cash, which I am not interested in, would you please have a look at my option agreement and make sure that it reflects the reality of where the business is', because one of the -

Q. - would you translate that into the kind of language I can understand?

A. Certainly. My option agreement when I joined the company was one per cent for joining but it was just an option. I didn't get any - it wasn't until 1999, I believe, was the first time I had been able to take up the shares.

Q. Mm-hmm.

A. The other two pieces of it were related to performance. In other words, 'if you launch by a particular date, you get the other half per cent' -

Q. By 'launch', you mean launch the network?

A. Launch the network on a particular day. And then if you add 100,000 customers you got the last half per cent. That was the nature of the agreement between John Callaghan and myself.

At that time, in December, it was clear we were not going to be able to launch the network for the Christmas market. And the reason we weren't able to launch it was because we were having a lot of difficulties getting planning permission to get our masts up. And I felt that I had done everything that I could, including getting this agreement with the police force to use the masts, that we would get a good launch early in the new year. However, I was not going to hit that December 1 date. And really what I asked Dermot



was, on my behalf to consider that matter with the board in terms of making sure I wasn't penalized for that.

Q. And was that change made?

A. Yes, it was. I also mentioned to him at the time that I believed, because of the way the company was being - the pressure we were under from the ESAT Telecom side in terms of strategy, that I believed the value of what we would create would be lower than what we had expected. And I also said to him that at the time, I think my option agreement was going to start in three years after I joined, and would go on for another two, and I think I asked him to consider moving it closer because I believed that the value wouldn't come at that point in time, given the way things were.

Q. What do you mean by 'moving it closer'?

A. In other words, instead of having a five year horizon to cash everything, that I could have cashed at an earlier time. I think I suggested three years, something like that.

Q. Yes. And was that achieved? Did you reach an agreement on that?

A. What we reached agreement - we reached agreement subsequently that was that I would not be penalized for the launch delay, I would not be penalized for the increased capital requirements which the company had, compared to what was originally envisaged, because they

were issues that I'd control. But John Callaghan and the board decided that it would not be appropriate to shorten the time period and I subsequently accepted that.

Q. So you were left with the 1999/2001?

A. 2002.

Q. 2002?

A. '99 the first one per cent, the year after that, the next half and then the last year the last half. But what we did get agreement on is we would get separate advisers to the company.

Q. I want to go on to the rest of your - to the balance of 1997 and the way you related to Mr. O'Brien after you came back. But before I do that, because this might be an appropriate time to do it, I just want to mention to you what Mr. O'Brien said about that period in 1996, when you resigned. And I think what he said was, this is book 24, page 67, question 252. I'll read this slowly so that you can follow it. "Now, I think before lunch you wanted to make a point to the Tribunal as to your belief that Mr. Maloney did not wish the IPO of ESAT Telecom proceed, isn't that right?" And Mr. O'Brien answered: "I mentioned in the context of December 1996" it's on the screen if you want it as well "I mentioned in the context of 1996 where Mr. Maloney resigned at a very sensitive time. We were in the middle of a bond issue which was taking place,

planned for the first week of January 1997, and Mr. Maloney resigned at that time. And in the context of that, was that when Mr. Maloney joined the company as Chief Executive, he negotiated share options over close to 2 per cent, and they were non-voting shares. In 1996, he resigned in December, 1996 in the middle of the planning for the bond issue and the reasons he gave was management independence and some other areas as well and he made a number of demands of the board which covered, I think, three or four issues, but the main one being management independence and an increase in his options, relaxation of the terms under which those options would come into place, in other words, they were performance-related prior to this, and then dismissal of certain advisers. And the last one was a put - a demand from the board that the board or the shareholders would have to buy his shares at a certain period into the future.

Mr. Desmond and I then, and I think this is somewhere in the documentation in the evidence, had to obviously go to Mr. Maloney and meet all his demands, most of his demands, except for the put option because we knew that we couldn't do the bond issue without him being in his position because you couldn't do a bond issue if a major affiliate " and then the last part of his sentence is filled in by Mr. Coughlan "if you just lost your chief executive." . "Answer: Yes. So eventually

he returned in January and we conceded most of the points. But nevertheless Mr. Maloney - what Mr. Maloney did was he persisted with the shareholders about, you know, having them - that he had a right to get them to buy his shares and this was all in the context, I believe, that he was concerned that he owned 2% per cent of an affiliate company in Esat Digifone and that really there was no real market for his shares unless there were two things; one was a trade sale where somebody came in from somewhere and said 'Can we buy the whole of Esat Digifone?' or, secondly, if there was an IPO of Esat Digifone. And in the case of a trade sale Telenor weren't interested in selling because we were trying to buy them at the time, and certainly we were not interested in selling. So the other alternative was an IPO of Esat Digifone. So it was our view that when this whole issue of the IPO of ESAT Telecom arose he felt that basically his opportunity of floating, or the opportunity of floating Esat Digifone and ultimately getting liquidity that way for his shareholding, was completely closed off. So that was the background."

I just want to put all of that could that in context because we have to go back again. I am sorry we have to go back and forth, Mr. Maloney. But Mr. O'Brien was stating, and I think I am summarizing a huge chunk of

his evidence, that you caused trouble, I think as he put it, at the time of the IPO, because this was your last chance to achieve what you wanted to achieve to get value for your shares, and that you had caused trouble about your shareholding in 1996. And that it was because of your concern to 'get value for your shares', using that expression a very broad way, that you resigned in 1996.

Now, I am only concerned with 1996 at the moment. But you say that you resigned in 1996 because the pressure your relationship with Mr. O'Brien was coming under meant that had you to choose between business or friendship?

A. Correct. That was what was going on in my mind when I resigned.

Q. Did you make that clear to Mr. O'Brien at any time?

A. I did, yes.

Q. Did you say it to him?

A. Yes, I did.

Q. What did you say to him?

A. I told him that when he came out to see, as we were discussing the issues that had arisen, and the difficulty I was put in, I said that my relationship with him would, in effect, be gone. And that, you know, I had had a successful career abroad, and I could get another job without too much difficulty.

Q. Was that now before the resignation or just after it?

A. This was after the resignation.

Q. And after he had come out to talk to you about it?

A. That's correct.

Q. Otherwise, I don't think there is a huge difference between you as to what you were looking for and as to what you ultimately got from the board or from the company, is that right?

A. I'm sorry, you read out an awful lot there, Mr. Healey.

There are some things I would definitely disagree with.

There are others I would agree with.

Q. Okay. Well, you definitely got a change in, or an agreement at least, whether it was complied with is another thing, you got an agreement as to how your role would be performed from then on?

A. That's correct.

Q. You didn't get, or you didn't take, any inducement of  $\frac{1}{2}$ 250,000?

A. No, I did not.

Q. You got a relaxation of the terms under which, if you like, the performance-related terms under which your options would come into place?

A. I got acknowledgment that for the first half per cent, which was performance related, that I would not be penalized because of the delay in the launch of service, given the difficulties we had with the planning.

Q. Yes. So the point you would wish to make there is

that, whereas the way Mr. O'Brien has put it, it looks like you were looking for a change in your conditions to suit yourself, you are saying that you wanted an acknowledgment that what had happened up to that date was not your fault, but due to either lack of capital or operational difficulties in the company, is that right?

A. Yes. I qualify that by saying the other thing I did ask for was that instead of the option period running for five years, that it be made a total of three years because I was concerned about the value over time if we kept going the way we were going. So that I would describe as a change in the term, request for a change in the term.

Q. But you didn't, in fact, get that concession, did you?

A. No, I didn't and I accepted that I wouldn't get it when I came back.

Q. But am I right in summarizing that what - the gist of Mr. - the main issue, as far as Mr. O'Brien was concerned, was that you were causing trouble about your share options. You say that wasn't the point. Your big problem was governance and you were going to have to put your friendship over your business relationship or else opt for your friendship and leave your business relationship behind you?

A. That's correct. I believe my letter of resignation said that I made an absolute commitment on behalf of

John Callaghan on behalf of the board, that I would manage the company independent and equally of all three shareholders, but I found myself in a position that it was impossible to do so in the climate we were operating in. On that basis I couldn't add the value that I should have been able to add.

Q. You are clear that you did tell Mr. O'Brien that it was a choice for you between a personal friendship and a business relationship?

A. Absolutely.

Q. The wider issue is what I'll come back to and I'll give you an opportunity to deal with it at a later moment where Mr. O'Brien says in his evidence that this was but one example of your determination to cause trouble for his IPO. We'll come back to that at a later point?

A. Okay.

Q. During the rest of 1997, between -

A. just one other point relevant to that last conversation. You have to recall that at that time I was the joint CEO, so there was still another CEO.

Q. Yes.

A. Just to make that point.

Q. What point did you make in relation to that, because as I understand it, you were the person driving forward the business of the company, Mr. Digerund was handling strictly technical affairs?

A. That's correct. But the reference was made that it



would effect his bond issue if there was no CEO in Esat Digifone. There would have been a CEO but it wouldn't have been me because I would have resigned.

Q. I accept that, but your role in Digifone was an important enough role for you to have been part of a presentation to the, if you like, adjudicators, even before the announcement was made, isn't that right?

A. That's correct.

Q. And I presume that your name would have meant something to the investors in the states or wherever else capital was being raised?

A. I don't know that.

Q. Well, you don't have to be modest about that. Presumably it must have meant something, otherwise Mr. Desmond and Mr. O'Brien wouldn't have gone to so much trouble to keep you on board.

A. I certainly, based on the reaction from both of them, I got the message it was very important. But when I went back it was at the personal appeal of Denis O'Brien because he would lose control of Esat Digifone. That's the only reason I came back.

Q. Lose control of Esat Digifone?

A. Yes.

Q. Lose control of his own shareholding in Esat Digifone or lose control of Esat Digifone?

A. What he told me was if I didn't come back he would not be able to raise the money in the U.S. that he had been

promised, and if he couldn't raise the money there was a capital call on Digifone coming up which he wouldn't be able to fund. As I understand it, the shareholders agreement would then trigger that the other shareholders would take its shares -

Q. He mightn't necessarily have had control but he would have lost his opportunity in Esat Digifone because not having the money, somebody else could have taken over control, is that right?

A. Well, as I understand it, if he hadn't been able to fund his piece of the next investment phase of the company, it would have been a difficulty for him.

Q. Yes. So that when you came back in 1997, you had succeeded in getting certain changes in the operational structures in the company. You had succeeded, presumably, in getting some commitments from Mr. O'Brien and Mr. Desmond. How did you get on with Mr. O'Brien between 1997, January, and, say, August when these issues cropped up, the issues of the conversation cropped up again?

A. It was very difficult.

Q. What caused the difficulties?

A. There was a lot of tenseness, there was a lot of - I would come back, I thought, to help him based on what he had said to me, that the issues that we'd had up to December 9th he understood and wouldn't occur again and he was happy to support the place being run. He

explained to me the pressures he was under, and in fairness to him, he was under pressure from the ESAT Telecom side of the business as well. And he was the CEO of that business. So he was trying to match the role of CEO of ESAT Telecom with the - and I could tell you that was a very difficult task for anybody.

Q. Was there any particular event which would have characterised your difficulties between 1997, January, and 1997, August?

A. Well, one that came to mind, one of the agreements that I thought we had reached is that we would get new PR advisers. And although we got new legal advisers and a new firm of accountants, when it came to the PR advisers, that was blocked at the board. And the team of PR advisers I wanted to bring in was also blocked at the board. So it kind of left the company in a difficult situation. And I felt that was a reneging on the commitment that had been made by him.

Q. What problem did you have with the existing PR advisers? I am not saying they lacked competence, but why did you not want those PR advisers as opposed to the PR advisers had you in mind?

A. Because those PR advisers had said to me that their priorities were to Denis O'Brien first, ESAT Telecom second, and ESAT Digifone third. And I said, 'Well, on that basis, you can't continue to support the company'.

Q. And were they the same PR advisers that stayed with the

company, then, right through until the IPO?

A. That stayed with ESAT Telecom.

Q. ESAT Digifone?

A. No, they weren't.

Q. When were the PR advisers changed?

A. Well, I, based - based on the conversation about those priorities, I ended the agreement with the company that was advising us. But then when we went to - the following board meeting, then, I was asked about why I had done that, and I said because it was part of the agreement. And then there was a vote on the board, and the vote was, I think it was 8, 8 votes, and four on each side.

Q. The Chairman had the casting vote?

A. The Chairman had no casting vote.

Q. I see.

A. Then I had planned to issue a new contract to a new set of PR advisers and there was a vote taken on that at the board, and again it was four all. So we were left in a kind of limbo situation. But I had dismissed the PR company prior to the board meeting because I believed that it wasn't a board issue. It was an operational issue.

Q. But what was the upshot of it at the end of the day?

What PR company were you left with?

A. Well, we ended up - it's a very difficult situation because the PR aspects of what ESAT Telecom were trying

to do locally vis-a-vis the U.S. investors were very important to them. What we did was we kind of downgraded our own PR to a significant extent and just used somebody for, let's say, the consumer part of it. And not so much the PR, the corporate PR side of it. Because I was concerned about getting in continuing conflicts and also we had this vote at the board, you know, blocking, two sets of blocking votes.

Q. So did you continue to have a relationship with the old PR advisers?

A. No, we did not.

Q. None whatsoever?

A. No, we did not.

Q. You just had new advise PR advisers on an ad hoc basis, on what you call consumer issues?

A. When I say ad hoc we hired a company to do consumer PR for us. What I mean by that is the retailing and merchandising aspect of the business. We didn't do a lot of corporate PR because that was a very sensitive area to Denis and his American shareholders, which I understood.

Q. By the time of the two August 1997 conversations, how would you describe your relationship with Denis O'Brien?

A. It was very difficult.

Q. On a business basis?

A. On the business basis, and at that stage we didn't have

a personal relationship.

Q. When he made those two remarks to you, or had those two conversations, if you can call it that way, one-sided conversations with you where he simply made those remarks on each occasion about the 1996 conversation, was your non-response anything to do with the strained personal and business relationships or the strained business and non-existent personal relationship you had at that time?

A. No. I'd say it was more a factor of the fact it was the last thing he said as he left the office. There really wasn't an opportunity for me to respond.

Q. Did he say it as the last thing twice?

A. Correct.

Q. And on the second occasion you didn't even call him back and say, 'Look, you said this to me before, Denis'?

A. No, my recollection is I did not.

Q. I think the next document I want to look at is in leaf number 7, I think. It's described as "Handwritten preparatory notes of Barry Maloney from meeting with Denis O'Brien."

You've dated document number 7 as the 13th of October of 1997 and I think that date is very obscured on the top right-hand side, in fact it's better on the - can you see it on the monitor or on your copy, or do you

have an original?

A. I have the original here. It says "Change in wording of statements not enough."

Q. If you look at the top of the document it says "Preparatory notes for meeting with Denis O'Brien."

A. That's correct.

Q. Is that a contemporaneous note or was it added later on to show what the document was about?

A. No, it was a contemporaneous -

Q. And underneath that on the right-hand side is the date "13th October 1997" I think?

A. That's correct.

Q. Now, we've another document, which I don't want to open in detail at this stage because it's not a contemporaneous note, but it's a document, it's at leaf number 16, and if you like, it sort of catalogues various attempts that you say you made to get Denis O'Brien to postpone the IPO. And it refers to a meeting of the 8th of December of 1997 - 8th of October of 1997, 4 p.m. at the Malt House.

A. That's correct.

Q. And because that precedes this meeting, I just wonder, could you deal with it first?

A. Yeah. That was the first meeting, if you like, that Denis and I had had following the statements that he had made in August. And I set myself the objective of trying to put to Denis what my concerns were regarding

the three issues that were happening at the same time.

I went to some length to outline for Denis that the last thing I wanted to do was to antagonise any shareholder issues that were going on in the company, of which we had several at the time. Nor did I want to make my own difficulties with him any worse than they were, because they were fairly poor at the time. But I outlined to him the sequence of events and that I was concerned about the position I was being put in as the CEO and director of ESAT Digifone. And I was trying to get some sense for the timing and the criticality of him to do an IPO at that period of time.

What he told me at the time was that he had no particular desire to do an IPO at that period of time, that in fact it was the U.S. institutions who were on his board that were pushing it. He also said, I believe, that he had £60 million on - the company had £60 million in funding available to it which hadn't got to be repaid for four to five years and that if he had a preference, he would delay the IPO, because he felt he would get more if he waited. But he was being pressed and pressured by the Americans.

I then just went back to the issues that I was concerned about and I put to him that there were other reasons why an IPO at that time may not be the best in terms of timing. The other two issues I put to him



were issues that I had picked up around the issues of the ESAT routers, were there had been a decision made as to whether they could be used or not, which was an important part of his revenue plan for, as I understood it, at the time of the IPO.

Q. whether they could be used by Telecom?

A. by ESAT Telecom. And the other issue that was going on at the time was an agreement that he was trying to get finalised with the CIE for use of the rail tracks for his fiberoptic network. So I tried to put to him that there was other reasons why there would be - that would be explainable and understandable to the Americans - why this was not a good time to be doing an IPO. As I recall it, he acknowledged those factors, but said that, nevertheless, they were pushing him to go ahead and do the IPO.

Q. You say that you had that meeting in Denis O'Brien's office and in the lane at the side of the building.

What do you mean by you had it 'in the lane at the side of the building'?

A. While we were, if I could describe the meeting in his office as being one of trying to reassure me that there was no need for me to be concerned because had he done anything with Lowry, he would not have been going for an IPO at this time.

Q. Mm-hmm.

A. He reassured me that the company was not in the

Tribunal's Terms of Reference and that he didn't expect there would be any issue there. So he was trying to convince me. I was still concerned and, as we left the office and went down the stairs, he said to me, I think, words to the extent, 'Like, you are not buying it, are you? You don't believe me?' to which I said, you know, I continued to be concerned. And I said to him, 'How can you now tell me that there is nothing to be worried about, given the two statements you made to me in August and the discussion - the statement - you made to me back in October/November.' to which he replied, 'Well, what I didn't tell you was that I was going to make the payment but it got stuck with an intermediary'. So that would be the time where this concept of an intermediary was introduced to me.

He said, 'I thought about it but I didn't do it.' that's what I meant by it being stuck in one of the conversations that he made in August.

So that was - that discussion happened in the lane beside ESAT Telecom's building. So that was the reference to the lane.

Q. So you had a meeting in the office. As you were leaving the office you said he said words to you to the effect that you weren't too convinced?

A. Yes.

Q. Convinced that he had not made a payment?

A. Correct.

Q. So what he had said to you in September-October-November, whatever it was, '96, was that he had made a payment. You said you didn't want to know about it. He drew it up again in August on two occasions, in which you didn't respond, either because - as you say because there was no - you say you had no opportunity to respond, it was the last thing he said leaving a meeting on each of the two occasions it was mentioned but obviously he must have felt you weren't convinced because it was drawn up again at this meeting on the 8th. And you say that he went further, to tell you that the money - that money did not go to Michael Lowry because it got stuck, is that right, with an intermediary?

A. That's my recollection of what he said as we were going down the stairs and out into the laneway beside the office.

Q. And did that convince you of anything?

A. No, it probably heightened my worries.

Q. Did you ask him to amplify what he meant by - What do you mean by 'got stuck with an intermediary'?

A. He just said 'It didn't go through. Had it gone through, I couldn't be doing the IPO'. It was in that context. He said, 'No payment was made to Michael Lowry' is what he said.

Q. Right. You know that there will be - we'll have to

come to, at some point, to discuss the attention that was devoted to the expression 'stuck with an intermediary'. Do you think he used that expression on those steps or in that lane on that occasion or do you think he just said, 'It didn't go through'?

A. I believe he used the term 'intermediary' at the meeting of October the 8th in the laneway. He did not use that term in the office.

Q. Now, you'd had a meeting with him in which you had discussed at length the various reasons he might give to his American underwriters for not going ahead with the IPO, what we'll call 'substantive reasons' to do with corporate or investment or operational matters?

A. Correct.

Q. And from what you tell me, you seemed to have discussed it at some length?

A. Yes, it was a long meeting. As I recall, we could have been there an hour, maybe even an hour and a half.

Q. Who was present at that meeting?

A. It was just the two of us.

Q. And as you left the meeting he brought in this additional factor. Did you pursue that with him, or discuss that or devote any further time to discussing what that meant?

A. As we went down the stairs he proffered to me, he said, 'You don't believe me, do you? You are still worried, aren't you?' that type of a discussion. And I said,

'Well, I am, Denis, because if I connect the three conversations, and then the IPO statement, yes, I am worried.' When we came out of the front of the Malt House he then asked me to step into this lane down the side of the building and it's my recollection that at that time he said, 'What I didn't tell you at the time was that there was an intermediary and that the payment - that's what I meant when I said to you it never went through'.

Q. Right?

A. I think he might have made to some reference to, 'When all this thing blew up', that kind of a statement.

Q. Right. You know that we will be coming back to that again, the time when all of this blew up. I don't want to get bogged down into too many memos but it certainly blew up in a big way at the end of November '96, isn't that right - the end of November of '96, I think. You may not recall the precise date but you do recall that there were newspaper articles about Mr. Michael Lowry in the Irish Independent, I think. Do you recall those?

A. What was the timing?

Q. November - 29th November 1996, I think an article by Sam Smith?

A. I don't recall the specific article but I remember some media speculation at the time.

Q. Yes. And you know that subsequently Mr. Lowry resigned

and then made a statement in the Dail some time in late December?

A. Yes, I do.

Q. Can we just clarify one or two other aspects of the documents in relation to that meeting. I think, if you could - just for one moment, could you go to Folder B, which is - or part B of this folder - which contains the second set of documents you made available to the Tribunal, and just clarify one matter for me. Could you go to item number 4. Take your time.

A. Having some problems finding section B here.

Q. It may not be section B on yours. If you go to your second set of documents.

MS. FINLAY: It might be G in the book that Mr. Maloney has.

A. I did find G. Yes, I have section G.

MR. HEALY:

Q. If you look at the monitor just to make sure we are looking at the same document. You see "Discussion with DOB."

A. I see it on the monitor.

Q. Just try - take your time. You have plenty of time?

A. Yes, I have it here in front of me.

Q. Right. That's described as "Handwritten note of Barry Maloney". In any case, what I am trying to do is trying to - I am trying to put a date on this document.

I am just going to read out the index description of it. It's "Handwritten note of Barry Maloney outlining points for discussion with Denis O'Brien and a note following that discussion. Mr. Maloney believes this document was written sometime in October 1997, after Mr. O'Brien had first raised with him the conversation that they had had in October/November 1996, two pages."

Now, it was while you were describing the meeting that you had with Mr. O'Brien on the 8th of October of 1997, and the things that were said by him and by you, that it occurred to me that there may be some connection between that meeting and these notes.

Now, if we just go through it slowly, you can tell me whether you agree with it or not.

"Conversation is nothing to do with any issues between him and I." I think you mentioned that a moment ago?

A. Yes.

Q. "Do not want to cause any further relationship issues between him and Norwegians." Again you mentioned that was some point that you made.

A. Yes.

Q. "3. Do not want in any way to cause his IPO a problem." Then you have a note "Concerned about the reference to the Tribunal in the IPO document and issues arising from it vis-a-vis your request for consent from the board." Next point "Prefer if you

could delay IPO - your IPO until after the Tribunal, therefore removing the need to include it." You mean 'include the passage in the IPO document', is that what you mean?

A. Yes.

Q. Then you go to the next page "Pushed by U.S. investors. Doesn't want or need to do IPO now." That seems to tally with what you said to me a moment ago, Mr. O'Brien said to you at the meeting?

A. That's correct.

Q. You said, point number 2: "Willing to bring up any concerns I have at the board.

3. Told me the monies did not - told me the monies did go to a middleman but never got to Lowry or his account. Did not deny any of our conversations.

4. Saying would never allow IPO to go forward if any risk whatsoever.

5. Look to changing words in IPO document."

Now, do you think that that - from what you said to me, don't those notes appear to be related to that meeting?

A. Yeah, a particular style I would have is that prior to an important meeting I would write down for myself the key points that I want to make so that I hit them. So I believe what you see, in terms of "Discussion with DOB" was me setting out, prior to my meeting with him,



of October the 8th, what I was trying to do at that meeting.

When the meeting was over I would try and encapsulate how I got - how far I got against the objectives I had for the meeting. So I believe the second sheet is that summary of how I believed the conversation had gone.

Q. I understand. When those documents were made available to the Tribunal, it seems that neither you nor your solicitors were able to put a date on the meeting.

A. I believe that's correct.

Q. The reason I mention it to you now is that what the documents contain occur to me to be related to what you described as having happened at the meeting. Can you agree with that, that it's the 8th of October meeting as described by you, that is referred to in these documents?

A. I believe that to be the case.

Q. Is there any reason why you didn't recall that until now?

A. I don't recall being particularly asked. I think one of the issues around these other papers, if you like, that I came across is I started a new job in London, and I faxed the material from there to McCanns, saying 'I found these extra notes, are they of any significance?'.  
Q. You can understand that in fairness to Mr. O'Brien,

it's important that he, when he was giving evidence, should have had the best opportunity of giving an account of himself or a good account of himself. Now, he did not know at the time he was responding to these documents. While I've got to be careful about that, I don't know what he knew, but it certainly wasn't put to him that these documents refer to a meeting of the 8th of October of 1997, because the Tribunal hadn't been informed that it related to that?

A. I understand that. The reason that I believe that the first sheet would have been framing the meeting of October the 8th is that Fergus Armstrong in McCanns has a very detailed note of what my objectives for that meeting were, which would tie, I think, very well with the document headed "Discussion with DOB."

Q. Well, let me just mention one or two things from the evidence. When this matter, this document, it was not drawn up in the context of this meeting with Mr. O'Brien, but it was referred to in the course of his evidence. And he said "In relation to your point number 1 of the five response points, if I can call them that". Are you with me. It's on the second page?

A. Yes, I am.

Q. He said that he would - he said he would never have said that he was being pushed by U.S. investors and that he didn't want or need to do the IPO. I think he used words to the effect that Telecom had a truly

enormous appetite for cash at this stage.

What do you say to that? Do you think that - let's deal with it in reverse order, firstly. He says that he couldn't have said it because Telecom had a truly enormous appetite for cash?

A. All I can tell you, Mr. Healey, is he told me what he told me at the October 8th meeting. He referred specifically to having  $\frac{1}{2}$ 60 million available in cash, and he referred to a four to five year window before it was due for repayment. To be honest with you, I would have been very familiar with ESAT Digifone's requirements. What Mr. O'Brien's total requirements to ESAT Telecom group were, I wouldn't have had any particular insight. But I would accept that any telecommunications business would have a voracious appetite for continued funding. It's a very capital intensive business.

Q. Well, it may have had an appetite but it actually had the cash at the same time. It didn't need to go to the market for it?

A. In the discussion with me, what Denis explained to me was that he was getting pushed by his U.S. investors to do this, that they believed the timing in the market was right, that there have been a capacity issue earlier on but it was opening up and now was the time to do it, that he personally thought if they waited longer, they would get more for it.

Q. We'll just stay with this document, since on your evidence it now appears to relate to this meeting of the 8th of October. In relation to the third point you make, which is that Mr. O'Brien "Told me the monies did go to a middleman but never got to Lowry or his account'. Mr. O'Brien says that he never said that.

A. I would - as I look at this, the term 'Middleman' and 'intermediary' to mean - I accept he never used the word 'middleman', that could have just been my translation of the statement that was made to me. However, I have a very clear recollection of the term 'intermediary' being used.

Q. I see. Now, Mr. O'Brien went on to say in relation to that document, and maybe I should read from book 123, page 73, line 13. In fact, if I go to page 72, question 321. In fact, if I go to the top of that page, Mr. O'Brien says: "Well I have just told you, you know, from my point of view I cannot remember saying any of these things that he has written down on this piece of paper.

Question: Could you have said that to Mr. Maloney?

Answer: I think I've answered that question already.

Question: That you couldn't have -

Answer: I couldn't have said those things.

Question: You couldn't have said it? But I think you would agree with me that the note itself is significant, first of all, in that if it was said, it's

significant and, if it wasn't said, it's also

significant that such a note would be made, isn't it?

Answer: Well, you are saying either the notes are true or they are not true."

Do you follow that, Mr. Maloney?

A. Yes, I do.

Q. "Question: Yes.

Answer: So either way it's significant.

Question: It's significant. I take it you would take that as

Answer: I think it would be very serious.

Question: And you will appreciate that this is an issue which the Tribunal will have to grapple with now and you are firmly of the view that you could not have said this, is that right?

Answer: Well, here is what I think; after seven or eight days of evidence, and during that time new evidence comes into the domain suddenly out of nowhere, so when I received it this week, when I saw it undated, I just questioned where it was coming from and how it had been mislaid up until now or was it in response to any evidence? You know, you begin to ask yourself some questions

Question: Which you are perfectly entitled to do, Mr. O'Brien, and I will raise those questions on your behalf with Mr. Maloney.

Answer: Okay. I know you'll be fair to me so I am happy with that.

Question: I want you to have we all agree this is a significant document, one way or the other?

Answer: It's significant if it's incorrect.

Question: It's significant if it's incorrect, it's significant if "

"It's significant if it's correct, it's significant if it's incorrect. I think you'll accept that?

Answer: Well I don't believe it's correct.

Question: I know that but you accept that it is very significant?

Answer: I don't hold it in much credibility, but anyway, that's my view."

I think what Mr. O'Brien is saying there is that that document became available in very suspicious circumstances and I think he is suggesting that it became available after he had commenced his evidence in such a way as to cause him to be suspicious of how it came into existence. And I think finally he says, "I don't hold it in much credibility." He doesn't believe it's a genuine document?

A. Mr. Healey, if you are asking me is it a genuine document, I can tell you it is a genuine document.

Q. Yes. Can you think of any reason why Mr. O'Brien would say it doesn't - it didn't exist at the relevant time and that it was only brought into existence after he

gave his evidence?

A. I cannot think why he would say that. What I can tell you is that when I first met privately with yourselves and we were asked to submit our paperwork, there were two boxes of material in my office which went straight from my office down to McCann Fitzgeralds and they went through what was in them and compiled the evidence for the Tribunal attached to the statement I made.

After I met with the company barrister last week, she pressed upon me the importance of being very familiar with all of these materials, and over last weekend I went back into the office on a Saturday with my daughter, who is 11, and went through -

Q. you must mean the weekend before last?

A. The weekend before last. And went into the office and literally went through these pages are pulled out of ring binders, as you can probably see, and I went all the way back through every piece of every single ring binder I had in my office to see was there anything else anywhere that might be relevant here. I was also going back and checking board minutes, all types of materials such as that.

I found the sheets, I gave them to my daughter to photocopy for me, which she did on the Sunday, and then I faxed them to McCann Fitzgerald from Benchmark Capital, which is the new place I work, on the Monday

morning.

I can tell you those notes are my handwriting and I believe they happened before and after the meeting of October 8th.

Q. Do I have the actual original of the notes there?

A. For some reasons I have copies -

Q. sorry, Mr. Davis has them, I am told.

A. Also, if I could just offer, because it might be relevant, the reason I am able to tie the document with a DOB document is because it ties almost 100 per cent with the document that Fergus Armstrong would have prepared

Q. I am going to come to that.

A. Sorry.

Q. One last point or two last points in this document.

Mr. O'Brien is effectively saying that this document was either fabricated or else that it contains what is a completely inaccurate account of what happened between you. He does make one point. He says he couldn't have said that he told you that the monies did go to a middleman but never got to Lowry or his account, because he said there never was any middle man. So you are agreeing, I think, with him to some extent, that he certainly never used the word 'middleman' or you think he may not have used the word 'middleman'?



A. Yes, that - I mean, what I remember very clearly in the laneway beside his office, the word 'intermediary' used. I cannot recall that specifically if he also used the word 'middleman' in that conversation. I do know if my own mind I would have interposed those two terms as meaning one and the same thing.

Q. Is there any reason why you put down 'middleman' here if it wasn't used, however?

A. Not that I can recall. What I was tried to do was just capture what I understood to be an attempt to payment, because the context of the conversation was he wasn't denying any of the statements but he was trying to give me reassurance that the final payment hadn't happened.

Q. Yes?

A. Therefore, he could go ahead with the IPO, therefore there was no risk and I didn't have to be concerned.

Q. Now, I think - I'm sure you will agree with me that it is this reference to the money going to a middleman or an intermediary which is perhaps the most significant aspect of all the discussions that were - that you had with Mr. O'Brien and other people in October and November of 1997, isn't that right?

A. I accept it's a significant document.

Q. And when you were making that note did you realise how significant it was?

A. No, I didn't.

Q. I see.

A. I should point out that, until the meeting of, I think it was October 20th, up to that point that I can recall, Denis did not - I think it was the 20th, the next meeting - you have to understand at this stage there was, in our interaction there was no denial at all of any of the discussions that have occurred. What Denis was trying to do was to reassure me that because the final payment never went through, I did not need to be concerned.

Q. But as you said a moment ago, he then went on to say something which was even, perhaps, more alarming, by telling you that it hadn't gone through, that it had gone to an intermediary and got stuck and didn't go beyond the intermediary?

A. It had gone to an intermediary, was my recollection of what he said on October 8th.

Q. I may have to come back to this again. By that time, and I take it, and I don't know, did you know who Mr. David Austin was?

A. Very vaguely. I mean, I had heard the name in the context of an employee of Smurfit, but no other context that can I recall.

Q. You are aware of the evidence that has now been given to the Tribunal concerning payments to Mr. Austin at or around this time?

A. I mean, I read -

Q. - at around 1996 - I beg your pardon?

A. I read the reports.

Q. Well, I think you can understand, then, that in that context this note has enormous significance.

If you go right back, then, to Tab 7.

A. Is that in the first section?

Q. That's in the first section, yes. This was the document that contained the notes for a meeting with Denis O'Brien on the 13th of October 1997, and you will recall that before we went into that document in order to get the meetings in some sort of chronological order. I went back to the note you referred - in which you referred to the meeting of the 8th of October.

A. Yes, I do recall that.

Q. So are you on track again now?

A. Yes, I am.

Q. We are at the notes that you made for the meeting of the 13th.

How did this meeting come to be set up, or can you recall?

A. I cannot recall. It might be worth checking, if the 13th of October was a Monday. I think perhaps it might have been, but I am not sure.

Q. You had had the meeting of the 8th?

A. We had the meeting of the 8th.

Q. You clearly weren't satisfied as you were leaving that meeting, notwithstanding the additional further, and

perhaps even more alarming, information. There must have been some intervention to set up this meeting again, intervention by you or by Mr. O'Brien or somebody else?

A. Yeah. I may well have called him and asked to see him again but I can't specifically recall having done that.

I do know there was a meeting on the morning of the 13th October.

Q. On this day, I think you had two meetings, is that right, one with Michael Walsh?

A. We had a meeting in my office in Baggott Street, which is why I believe the 13th of October was a Monday. It would have been at one of our normal scheduled meetings. And then we had another meeting at lunch time in which Michael Walsh became involved.

CHAIRMAN: Mr. Healey, you have the unenviable task, indeed as has the witness, and I said to Mr. O'Brien last week, in darting between statements and affidavits and transcripts and memos, I don't want to complicate that. But one suggestion I might venture to make is with a little over half an hour to go, I would hope we might embark upon the, perhaps, more minor, but still very important scenario of the joke/bravado aspect. If we at least touch upon it.

MR. HEALY: I was trying to establish the date of meetings with Mr. Armstrong so that I don't have to go

back earlier than the 13th again.

Q. Do you think you had advice from Mr. Armstrong before you had the meeting on the 13th of October with Mr. O'Brien?

A. Yes, I did.

Q. And do you recall whether you'd been to Mr. Armstrong after your meeting of the 8th or before it?

A. I had been with - I had talked to Mr. Armstrong both before the meeting of the 8th.

Q. Yes.

A. And after the meeting of the 8th.

Q. And by the time you came to the meeting of the 13th, had you, I think what has been described as preliminary legal advice from Mr. Armstrong?

A. That's correct.

Q. At this stage, you've - you got four points, four - five numbered points. Maybe you would describe the document, the layout of the document.

A. Again, this would be typical of preparing myself for the meeting with him of the 13th. The first five points would have been trying to get Denis to understand the issues that we would be facing. My handwriting is much better in those five, as you can see. Obviously, it has been carefully written. The points underneath, which are hyphenated by the arrows, were basically the position I was taking, depending on his response or reaction, I believe.

Q. I understand. So the points were, firstly, change in the wording of the statement, meaning the statement in the IPO was not enough, not enough to protect you from liability or protect the company from liability?

A. That was the advice -

Q. And that was the statement about the importance of the ESAT Digifone licence?

A. That's correct.

Q. You say then, "Real problems for the company in Irish and U.S.A. law if anything comes up. Thirdly; directors insurance will be invalid." Does that mean the insurers had not been informed or weren't being informed?

A. As I recall, at the time there was some talk about the directors of ESAT Digifone being given some kind of insurance by ESAT Telecom that would protect them -

Q. I follow. "Fourthly, my participation in IPO endorses the statement." Is that a reference back to the suggestion that you get involved in the - in the roadshow or was it a reference to your participation simply as a member of the board of ESAT Digifone?

A. I believe it to be a reference to the requests that Denis made to me on the 8th, of our participation in the roadshow.

Q. I see. "My shareholding in ET could leave me open to actions." Do you mean that it could be suggested that because you had a shareholding in ESAT Telecom and you

weren't disclosing these facts, it was to protect your own shareholding?

A. That's correct.

Q. That you would have a conflict, in other words?

A. That's correct.

Q. - to benefit or profit from the IPO without disclosing this information?

A. That's what I was afraid of.

Q. And then at some stage in the course of the meeting you say you wrote "Appeal for him to delay the IPO until after the Tribunal.

If he refuses, I want the monkey off my back and the board to be part of the risk."

Next "Either he calls a board meeting and gets board to buy in to the risk or I share my concerns with one of the other directors." And I don't think the next page matters that much. Am I right?

A. No, I don't believe it does. It relates to an operational issue.

Q. So at this point Denis O'Brien knew about this conversation, you knew about it, but as far as you were aware the board did not know about it?

A. That's correct.

Q. And what you mean by "Get the monkey off my back" is you didn't want to be carrying the can for all of this as the person who had the information but didn't

disclose it to your board?

A. Correct. I felt the information I had put me in the difficult position as a director and the CEO of the company.

Q. Do you know what his response was to your threat, 'Either he calls a board meeting and gets the board involved by giving them the information, and, if you like, burdening them with the information, or you share your concerns with one of the other directors'?

A. I recall him being particularly sensitive to the Norwegians.

Q. Mm-hmm.

A. So I don't know if that was my answer to the question.

Q. Do you mean that when you said you wanted a board meeting, he didn't want the Norwegians to be involved in this?

A. Well, at the meeting on October the 8th, when I told him that the difficulty I believe would arise for him, that when it came to consent, which had to be done every time they did a fund-raising, that I believed he would have difficulty getting consent because I would, at that stage, have had to share the discussions with the board.

Q. Because they couldn't be giving that consent without knowing the materiality of -

A. correct, that I would have had to share the conversations prior to them giving their consent.



Q. But I know you say he was particularly sensitive to the Norwegians. Did he say - what did he say, nevertheless? Did he say he was prepared to call a board meeting?

A. Not that I can recall, on October the 13th. He did mention in the meeting of October 8th, early on in the conversation, that if I wanted to bring the issue to the board, he was happy for it to - but in the same conversation he also made reference that if the - if Telenor knew about it, he was afraid - he made some reference to an article in the Irish Times, something of that nature.

Q. That's right. After you had finished that meeting, things hadn't really advanced very much, had they?

A. Well, what actually happened in the meeting, I gave Denis, in that meeting - the way I was trying to run the meeting, to try to get him to understand the kind of difficulties we were going to have. I didn't feel I was getting very far, so I gave him the preliminary advises that Fergus Armstrong had prepared for us. What I wanted him to do was to understand the implications on the company. So it was another way of trying to get him to understand the potential problems. So I handed him the advises.

Q. Mm-hmm.

A. Which he then asked me if I would go across the road with him and have a cup of coffee in Paddy Kavanaghs,

which is just behind our office in Digifone House.

Which we did. And in the course of that conversation his interest was - his question was, 'Who else knows about this?' to which I said, 'Nobody other than Fergus Armstrong.' who had provided me with the preliminary advises.

Q. Had Fergus Armstrong provided that advice to you personally or as the Managing Director of ESAT Digifone?

A. As the Managing director of ESAT Digifone.

Q. Was it effectively Digifone advice, in other words?

A. Yes, it was.

Q. And it would have to eventually go to the board, wouldn't it?

A. Yes, it would. And I was trying to get Denis to understand that this is likely to be the kind of document the board would be receiving.

Q. The meeting with Mr. Walsh was held around lunch time, is that right?

A. As I recall, after Denis left me in Paddy Kavanaghs, I got a call, perhaps around mid-morning, I believe it was, it was from Denis, I'm not sure, - I think it was from Denis, asking would I meet him and Michael Walsh for a sandwich in the Malt House. I believe it was at lunch time that day.

Q. And you did do that and you met Michael Walsh?

A. Yes, I did.

Q. And the purpose of that meeting was?

A. My recollection is that Denis recounted to Michael the discussions that we had had and reassured Michael that no payment had been made.

Q. Mr. Walsh has provided a statement to the Tribunal in connection with this meeting. He's also provided a handwritten note he's made, which may be contemporaneous, but in any case it refers to that meeting. Firstly, could I refer you to his memorandum of intended evidence, which I think is in - divider 4.

MS. FINLAY: I don't know if the witness has this book.

CHAIRMAN: Incidentally, Ms. Finlay, while we are getting this document, having heard what we discussed at the outset today, that Mr. Maloney is still within the ESAT nexus, I think with a view to keeping representation orders as short and simple as possible, it would suffice if I simply make your representation as being on behalf of ESAT, and that of course will extend to Mr. Maloney.

MS. FINLAY: Very good, Sir.

MR. HEALY:

Q. Firstly if we look at the statement, you see the reference to the statement of 13th of October 1997?

A. Yes, I do.

Q. Just read out the relevant portion. It's at divider 4

- it's the first page. "On October the 13th, 1997, I attended a meeting at the Malt House with DOB and BM. At the meeting DOB stated he had a conversation two years ago with BM where he stated he was going to look after ML. DOB stated that no payment had ever been made to ML and BM accepted that. I said the issue was serious and demanded a letter confirming that ML received nothing from DOB. The letter was to be agreed between BM and DOB."

He goes on then to refer to a conversation he had with Dermot Desmond.

At the meeting, who introduced the subject of the discussions or the conversations that you'd had with Denis O'Brien?

A. Denis did.

Q. Do you see where Mr. Walsh says that "DOB stated he had had a conversation two years ago" and obviously that date is wrong "With BM where he stated he was going to look after ML." Do you recall was that expression used?

A. Not that I can specifically recall.

Q. "DOB stated that no payment had ever been made to ML and BM accepted that." Did you accept that?

A. What I - what Denis was telling me at the time was that no final payment had been made.

Q. No final payment?

A. Yeah. That was the context of the meetings up until this meeting. If you think about the sequence of events.

Q. When you say 'No final payment' is that the way you are putting it now or was the word 'final' used by Denis O'Brien?

A. I can't recall. I can't recall.

Q. Let me go back to what you said a moment ago, that Mr. O'Brien was endeavouring to assure you that the payment never went through, that it got as far as an intermediary and it got stuck there and never went any further because things blew up.

A. That's correct.

Q. Right. That is more consistent with what actually occurred between the two of you, yourself and Denis O'Brien?

A. That's correct.

Q. So you are saying - so are you saying that you did not accept that no payment had ever been made but that you did accept that a payment - or do you accept that a payment got stuck?

A. At the meeting of October 13th the question that I believe I was asked at some point in this, although Michael doesn't refer to this there, is 'Did I have any proof of any payment being made to Michael Lowry?' 'Did I have any proof?' I think was the word which was used, to which I said 'No'.

Q. Yes?

A. He said, 'Well, Denis is saying it didn't happen'.

Q. Mm-hmm.

A. So in that - in that sense, maybe that's what he means by 'accepted that'. I don't know.

Q. I understand. Do you recall whether at that meeting Mr. O'Brien gave the same explanation to Mr. Walsh that he had given to you in the Malt House and in the laneway at the side of it?

A. He wasn't anything as specific or detailed as the discussions that we had had in the Malt House or in the laneway.

Q. When Mr. Walsh said, "Do you have any evidence or any proof?" Did you at that point tell Mr. Walsh what Mr. O'Brien had said to you?

A. I can't recall whether I did in that meeting or not.

Q. Do you recall what the upshot of the meeting was, what happened at the end of it?

A. At the end of it there was an offer made somewhere in the conversation that Denis would give the company a letter to say he never made any payment. And as I recall then, Michael Walsh left while Denis went to draft this letter, which he then gave to me. I brought that letter to the company's lawyers so that they had it on record.

Q. Have you ever seen that letter since?

A. I think I did see it somewhere in this pack somewhere.

Q. I may be wrong on this, but - I don't think I've ever seen that letter. I have seen ...

A. I believe it was a handwritten note, is my recollection of it.

Q. Oh, I see. Well, I won't slow you down, Mr. Maloney. We'll try to find it if it's amongst your own papers.

Was that letter, do you recall, provided on that day, the 13th?

A. I believe it was, yes.

Q. And I won't hold you to it, but can you remember what did it say?

A. I can't remember.

Q. Presumably, it referred to dealings between Mr. O'Brien and Mr. Lowry?

A. Yes, it did.

Q. Do you remember whether it referred to 'middleman' or 'intermediaries'?

A. I can't recall.

Q. We can -

A. I don't - I can't recall.

Q. I want to go on to the next document, which is document number 8. It says "fax from Brian Harmon, FCC"?

A. I have a different document.

Q. I think I am looking at the wrong list of documents.

This is a document which is headed "Chamber of Commerce" it's a handwritten note - it's the second

part of the document we are interested in. We are just giving you the heading. It's "Chamber of Commerce", the top left-hand corner. What it is is a reference to a meeting had you with Michael Walsh on the 14th of October of 1997 at IIU. Have you got that document?

A. Yes.

Q. I am right in thinking the first half of the document doesn't seem to be of any importance, is that right?

A. That's correct.

Q. There is a reference to a disclaimer from advisers, which protects us in any way." And you have after that the word 'need.' Is that anything to do with the meeting you had with Mr. Walsh?

A. Yes, I believe it was.

Q. Can you tell me what the rest of the document means in the context of the meeting you had with Mr. Walsh?

A. I believe the view that Michael was taking at the time is that we needed to make sure we were fully protected, that we had the disclaimer and that we, ESAT Digifone, did not want to take any responsibility whatsoever for the document or any liability that might arise in the future.

Q. And was this liability in the context of the conversations with Denis O'Brien?

A. I believe it was, yes. I believe it was following the meeting the two of us had had with him.

Q. You see the reference to "U.S.A. request for advice.



This company is 45% owned by a company seeking to raise money on a stock exchange. ESAT Digifone have no problems with this as long as we are not liable in any way for any info contained herein."

Is this a suggestion of some query that would be addressed to U.S. lawyers, or why is it in quotation marks?

A. I believe it was what Michael Walsh would have said to me about the level of security that he wanted to get vis-a-vis future liability.

Q. So this was effectively his views as a shareholder, which he was conveying to you as the managing director, as to what he believed you should be doing to protect the company's interests?

A. That's correct. I believe on the same day I would have had a call from Dermot Desmond as well.

Q. Yes. And I think that's referred to in your next document, document in divider number 9. Is that right?

A. Yes, I believe that is.

Q. It says "Telecom with DD on 14/10/97. Approximately 5 to 6 p.m. After my arrival back from Brussels had a message to call DD.

Michael Walsh had informed him of our meeting at Malt House on the 13th October. Asked me what had occurred between us and I told him.

DD told me I might be exposed for not bringing the

initial conversation with DOB to the board at that time. I told him that at that time the statements made to me had no particular relevance and that I just wanted to forget conversation."

Now, what did you understand Mr. Desmond to mean when he said to you that you 'Might be exposed for not bringing the initial conversation with DOB to the board'?

A. I am not clear. I think the point he was making was 'Why didn't you tell the board about this when the conversation first occurred?'

Q. In 1996?

A. In 1996.

Q. Do you think he was also suggesting to you that if you were now to bring it to the board's attention, then the fact that you had not brought it to their attention at the relevant time could leave you exposed to some kind of liability?

A. I don't know, Mr. Healey.

CHAIRMAN: It seems you put this paragraph in at the end of the memo, Mr. Maloney, because obviously DD's response follows on the more broadly-spaced writing in the second paragraph.

A. Absolutely.

CHAIRMAN: Yes.

MR. HEALY:

Q. Was Mr. Desmond suggesting that you bring it to the board or was he suggesting that you should consider whether you should bring it to the board, or be careful in bringing it to the board in case you exposed yourself?

A. I don't recollect any of those three messages. But what I do recollect him saying is the notes I made here regarding separation - this is a situation we need to separate Denis from the company. We don't know that anything he may have done had anything to do with ESAT Digifone. He was challenging me a little bit, that did I know? Had he done something? It was for ESAT Digifone. He was challenging that, did I know. And I didn't know, and I still don't know.

Q. Your response, you say, to the first point he made about the potential for exposure was that, at the time, the statements made to you had no particular relevance and you just wanted to forget the conversation. What do you mean by 'that the statements have no particular relevance'?

A. In the context of our company, ESAT Digifone, I believe that was what that meant.

Q. What do you mean by 'in the context of your company ESAT Digifone'? How did that change the impact or the relevance of the statements?

A. It just went back to the time that the first statement

was originally made to me, at which I said I didn't want to know. As far as I was concerned it had nothing to do with ESAT Digifone.

Q. I can accept that. Mr. O'Brien said that he had had to make the payments, not that ESAT Digifone had had to make the payments, isn't that right?

A. That's as I recall it, yes.

Q. But at the same time here was the person who had, effectively, driven ESAT Digifone through all the bid process telling you he had made a payment of  $\text{€}100,000$  to a government minister. Surely, that had relevance for ESAT Digifone, even if Mr. O'Brien didn't say expressly that he had made the payments on behalf of ESAT Digifone?

A. Yeah. As I said earlier on, the context within which it came up, I reacted strongly to it at the time and said I didn't want to know.

Q. But you didn't want to know because it did have a relevance, isn't that right, if you were to pursue it and in more - or digging in deeper, you might find that it did have a relevance?

A. That's correct. I believe my notes, as they pertain to the meeting with Dermot on the 14th, was to align a questioning from him about whether or not I knew for a fact he had anything to do with ESAT Digifone. I believe that was the context -

Q. That some very fine distinctions were being made,

perhaps legitimate distinctions, but very fine ones,

would that be right?

A. I accept that.

Q. We'll just go through them. Mr. Desmond's response

was: 'This was a situation where we had to separate

DOB from the company, ESAT Digifone'. The first point.

The second point 'We don't know that anything DOB may

have done had anything to do with ESAT Digifone. It

could have had to do with ESAT Telecom business, for

example, Reuters'. His point was that Denis O'Brien

had made a statement to you which, on the face of it,

meant that he had made a payment to Michael Lowry, and

I think what Mr. Desmond was saying, that taking the

statement at face value, it doesn't mean that he did

that on behalf of ESAT Digifone or that he did it - or

that what he did had anything to do with ESAT Digifone.

It could have had to do with some purely independent

ESAT Telecom business; is that right?

A. I believe that's the case.

Q. Now, that would seem to suggest that you should take

the statement at face value and not look into it, not

try to clarify whether it had anything to do with ESAT

Digifone?

A. Sorry, is that a question?

Q. Yes.

A. You could interpret it that way.

Q. In fairness to Mr. Desmond, he does go on to say

"Instructions to me were to make sure that ESAT Digifone was fully protected. To assume the worst and ensure that the board, management and employees of the company were fully protected vis-a-vis Denis O'Brien IPO document."

What does the expression 'to assume the worst' mean?

A. My reading of that was that perhaps a payment to - to assume a payment had been made and to make sure that we were completely protected in the case it had of been made was the way I interpreted that.

Q. So do I take it that what Desmond was saying to you at that point was 'Leave aside any duty or interest anyone might have had in getting to the bottom of the payment. Assume the payment had been made and ensure that you are not liable for any material omission or any material statement in the prospectus for which you might be seen to have some liability'.

A. I was reading what he was saying to me, is to make sure that as CEO I made sure that that was the case. He was putting - he was putting me on notice that the company better be fully protected through -

Q. I don't know what legal advice you got at the time but the Tribunal has been told, I think by a witness from Telenor, that the disclaimer in the prospectus was something which he felt didn't give very much protection to ESAT Digifone. I would assume that

that's the advice that you probably received as well, because it would seem to anyone looking at the situation, that the disclaimer couldn't give very much in the way of protection.

MS. FINLAY: I am sure Mr. Healey doesn't mean to ask the witness about the legal advice he was receiving at the time. It just sounded as if it might have been the question.

CHAIRMAN: You would undoubtedly be on saleable grounds on a - in an adversarial situation, Ms. Finlay. I doubt it's necessary to go quite into this, Mr. Healey, at this stage. It can perhaps be considered overnight.

Q. MR. HEALY: Yes, it can be. In any case, a disclaimer was put into the prospectus, and I am going to tell you, Mr. Maloney, that it is my opinion that it wasn't worth anything. Now, what that means is that you and anybody else were exposed for material omissions or statements in the prospectus. Wouldn't that be worrying to you, depending on - or bearing in mind what you knew at this time?

A. The way the situation was described to us, and again I need to be careful here on the advice issue, but what was made clear to us was that we needed to do everything we could, that the statement in and of itself would not be enough, and that it was incumbent upon us as directors to do everything that anyone could

ever claim at some point in the future could have been done in the circumstances we were in. And I believe that was the path we pursued.

Q. To take every reasonable step?

A. Correct.

Q. Well, I think that's mentioned, Sir, and we can come to it again.

Now, that was the end of that telephone call, and then you have a reference to - well, I think, in fact, before I go to the next telephone call - the next note on that document is dated the 17th. In fact, between the 14th and the 17th, didn't you have a further meeting with Mr. Denis O'Brien when you went to his house late on the night of the 14th?

A. That's correct.

Q. I think you have it - we'll have to jump back and forth between the documents at this point. I think it's at document number 11. Have you got that document?

A. Yes, I have.

Q. It says on the top right-hand side, there is a reference to 5:30 p.m., something to a delay - a reference to the 15th. Is that the following day?

A. I believe that is something to do with a flight or something like that. I don't think it is a particular reference to the -

Q. Underneath that is "Notes on meeting with Denis O'Brien



on the 14th of October at his home at 11 p.m." When did you make these notes?

A. It would have been after the meeting.

Q. It said "Tried to get him to delay IPO." This is something you've told us about before. "Informed him very unlikely that he would get the consent letter from the board in the same form as last time.

Worst case issues will arise for the board.

Irish level.

US level.

To assess Irish level will require board meeting. DOB does not want Telenor to be informed, afraid they will leak it to Sunday Times. Said he may as well do a press release to the Irish Times.

To assess U.S.A. exposure would need to involve USA lawyers. DOB does not want this. Would cause his IPO problems.

Told him board may not want to make changes to the document meaning the placement of the 'health warning'?

A. I think that was 'moving'.

Q. "Moving the place of the 'health warning' to a different place in the document and perhaps highlighting it in the same way" -

A. 'in some way', I believe.

Q. Or "In some way" - sorry. I think it was, in fact, bolded, was it, at the end of the day?

A. I believe so, but I never actually saw the last -

Q. "DOB said as a practical matter this may be a problem as if it was noticeably different from the earlier version there would be questions as to why.

DOB quite agitated, raised his voice several times and said, "I have not handled the situation very well. Trying to make life difficult for him."

Now, can you tell me, firstly, why you thought it sufficiently important to go to Mr. O'Brien's home late at night, 11.00 at night to be precise?

A. At this stage of the process, it was a - in my mind, a last gasp attempt to try and get him to change what I saw to be the sequence of events. And what I meant by that was that for him to hold off doing an IPO until the Tribunal had completed its work. At that time, of course, we didn't realise how long it was going to go. But I do remember Mr. O'Brien referring in the meeting of 8th of October that in his view the Tribunal was going to go on for a long time, and referred to some issue with Mr. Haughey objecting or - so it - certainly he had a perspective that it was going to take a very long time.

So what I was trying to do on the evening of the 14th,

going to his home that late at night, was following a meeting with Fergus Armstrong and a separate meeting with Michael Walsh, I agreed with both of them to go and give it one last go, to see if there was some way.

Maybe it's a point I should make, Mr. Healey. This was an extremely difficult time for me, where I was dealing with an issue of this sensitivity with my own Chairman, and also somebody who had been very close to me for a long time. So it was a very, particularly stressful time.

Q. It was an issue that could unravel the entire ESAT Digifone business, the whole prize that -

A. I believed it was an issue that could also unravel ESAT Telecom, because of its significance. So I was - this was a very stressful period within which I was trying to do this. So to go to his home at that hour of the night was not a step I made lightly in my mind. It was a last gasp attempt to try and see if there wasn't some way that he could use the other business issues to see if this thing could be deferred.

Q. When you say that you'd said this to Michael Walsh and Fergus Armstrong, do you mean that you'd had another meeting with Michael Walsh after your 14th of October - after your 14th of October afternoon meeting with him?

A. My recollection is that I was in McCanns.

Q. 13th of October with him. Sorry?

A. My recollection is that night I was in McCanns with

Fergus Armstrong, and then IIU's office is just across.

So I had been in contact with Michael and told him I would go across and talk to him as well. I believe that might have been something like 8:30 at night.

Q. After you spoke to Mr. Walsh and you said to him 'I am going to make one more effort and get Denis O'Brien to postpone' or at least 'I'm going to make another effort tonight to do it'?

A. I believe I did. I certainly said it to Fergus Armstrong. Whether I said it to Michael or not, I'm not completely clear.

Q. I see. So you went to his house?

A. I went to his house. He wasn't there. His wife let me in.

Q. Mm-hmm.

A. I spent some time in the kitchen with his wife and his sister having a few glasses of wine. I believe Denis came back at about 11.00 that night. I am aware, by the way, in his evidence that he said that when I got there there was nobody at home and I was sitting on the doorstep. That's not -

Q. he said he had been out to dinner with his wife?

A. I had a drink with his wife and his sister in the kitchen of their home.

Q. While you waited for Mr. O'Brien to come in?

A. Correct.

Q. And presumably then you went to another room or

whatever?

A. Correct. He took me into the sitting room.

Q. At that stage the issues you mentioned a moment ago arose, that Mr. O'Brien, according to you, did not want Telenor to be informed for the reasons you've stated?

A. That's correct.

Q. That was an enormous issue for you at this stage, wasn't it?

A. Absolutely.

Q. You were being told not to inform another shareholder?

A. Which I couldn't do. I was trying to make it clear to Denis that I couldn't do it.

Q. What was his response to that?

A. That I was making life difficult.

Q. You also indicated that you wanted to get U.S. lawyers or to involve U.S. lawyers to assess the U.S. exposure, and you say Mr. O'Brien did not want this. And I want to make it clear, he denies that he says he said that and he says that he, in fact, wanted U.S. lawyers on board.

A. On the 14th of October I am satisfied from my recollection, that at this stage he did not want U.S. lawyers concerned. In terms of my interaction with McCanns, we were very sensitive that we would need to get board direction before we could go and get U.S. legal advices.

Q. I know it's four o'clock, Sir, but I am just wondering.

I am just looking at the chronology to see if there is any point to dealing with one or two more matters?

CHAIRMAN: If you felt you could usefully deploy ten minutes, I am always reluctant from the point of view, from the point of the witness and the stenographer to -

Q. MR. HEALY: yes, I appreciate that. Mr. Coughlan reminds me of something that arose last week. I don't know if you recall from the evidence, Mr. Maloney, but in the course of evidence last week typewritten notes were on Friday typewritten notes were produced to the Tribunal headed "Notes for a meeting to consider legal advices." Do you have a copy of that?

Some confusion has arisen, Mr. Maloney, and I don't think we are going to resolve it in five minutes and there is no point in confusing what is already a fairly complex sequence of dates. So I think I'll just deal with one or two more minor matters. If you just get some

If you go on to the - I think the next document, in fact, means going backwards, because it's going back to document number 10 to deal with your 17th/10th/1997 telephone call from Mr. Desmond. Do you remember that?

A. Yes, Sir.

Q. On the same page as your 14th of the 10th conversation. That's on document number 9. You say you received a

call from DD from Spain. "Michael Walsh had sent him a copy of the advices from McCanns which I had sent to Michael that a.m."

Am I right in thinking this was the more comprehensive advices you got and not the preliminary advices?

A. That's correct.

Q. "DD said he thought that McCanns were giving us bad advice and that if we were to pursue the course of action we could end up causing damage to the company, its board and employees. I expressed my frustration at being the go-between between the company's legal advisers and the three directors who now knew the nature of the matter. DD said he would call Fergus Armstrong and give him his views."

Now, by the time you got those advices, you had - you were aware that your entreaty of the 14th of October 1997 to Mr. O'Brien had not worked. He was not prepared, I take it, at that point to cancel the IPO, or to delay it?

A. No.

Q. You had received, I suppose, advices or guidance from Mr. Desmond to seek to try to do the best deal you could for ESAT Digifone, to try to get the best protection, the best disclaimer, or the best, I suppose, take up the best position to protect you from liability, isn't that right?

A. That's correct.

Q. But even so, by the 17th no one else on the board knew about this except you, Mr. O'Brien, Mr. Walsh, and Mr. Desmond, isn't that right?

A. It's not clear to me at that stage whether I may have at that stage already been informing Telenor. But I just cannot - I don't have notes of that, but I actually believe somewhere in this process I would have.

Q. The reason I think that you may not have done that, and I am not criticising you, Mr. Maloney, is that if you look at the last part of your note, "I expressed my frustration at being the go-between within the between the company's legal advisers and the three directors who now knew the nature of the matter." Do you follow?

A. Yes, I do. And that's fair.

Q. And what I am suggesting is that you were under, it seems to me, under enormous pressure because only three directors knew about this?

A. That's correct.

Q. You were, effectively, being asked not to spread the word, even though you had an obligation, which I am sure you were aware of, to make this information and this advice available to everybody?

A. And just to be very clear, at no point did I ever give Denis any comfort that I wouldn't be making it



available to -

Q. I accept that. But by this point it hadn't gone to the board?

A. That's correct.

Q. He was, of course, the Chairman, I understand?

A. Yes, he was.

Q. But - so Mr. O'Brien and Mr. Desmond knew, but the other equal biggest shareholder, Telenor, knew nothing at this point?

A. I believe that to be the case.

CHAIRMAN: Mr. Healey, I should probably just establish this apropos of my observation to you. At this stage, we are just about the middle of the month now, Mr. Maloney, and as you are aware, in the inquisition involving Mr. Kealey from McCann Fitzgerald, the explanation that there were elements of joke or bravado in the critical conversation loomed quite large. Is it the case that at this point that we've got up to today, and I know Mr. Healey has been largely taking matters chronologically, that had not been raised or discussed between you or anyone else?

A. That's correct.

CHAIRMAN: Yes. Well, we'll come to deal with that in due course tomorrow.

What time do you think, then, Mr. Healey, in the

morning.

MR. HEALY: I suppose in the circumstances, Mr. Maloney has got some time constraints. Maybe if we start at half ten.

CHAIRMAN: It would be preferable to start a little earlier. Half ten if that suits you, Mr. Maloney, in the morning.

THE TRIBUNAL THEN ADJOURNED TO TUESDAY, JULY 3RD, 2001.