

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 3RD JULY,
2001 AT 10.30AM.

CONTINUATION OF EXAMINATION OF BARRY MALONEY BY MR.
HEALY AS FOLLOWS:

Q. MR. HEALY: Mr. Maloney, I understand you might like to
take your jacket off, feel free to do so. It's
extremely hot in here.

Yesterday, Mr. Maloney, we were looking at your first
set of documents, if I can put it that way, the
documents that are in book 29 A in the first schedule
of documents and we had come on to the document in leaf
number 10. I think this is described as a
"Handwritten note of Barry Maloney on conversation with
Dermot Desmond in Spain. I think it says on the top
right-hand corner "Dermot Desmond"?"

A. At the top of the sheet, yeah, "Dermot Desmond call".

Q. It says "fax", I don't know why it says fax?

A. I am not clear. All I'd say is the notes were actually
taken on the back of what I think was an FCC press, it
was just the nearest piece of paper to me when he rang.

Q. And I think this refers to some of your earlier notes
concerning some of the same issues;

1. McCanns poor advice.
2. No officer past or present has any facts. No
evidence or facts relating to anything that definitely

happened.

3. Taking action may cause a liability.

4. No evidence or proof."

I think you mentioned yesterday that in the course of your conversations with Mr. Desmond, you may have said also with Mr. Walsh, the focus was on what facts were there, what proof was there, what evidence was there that Denis O'Brien had actually done anything, is that right?

A. That's correct.

Q. And I think you were saying that you may have agreed at a meeting with Mr. Walsh that there were no facts other than, of course, what had been said to you, isn't that right?

A. That's correct.

Q. Which was obviously a fairly important fact, the fact that you had been told what you had been told in 1996 and the fact that you had been told sometime shortly before this call on the 8th October that the money had gone to an intermediary but got stuck and had never gone through beyond that?

A. I would agree with that.

Q. And just while we are on that point, the mere fact, if you take all of that at face value, that money had never gone through, that it had got as far as an intermediary, was in itself an extremely serious matter, wasn't it, you'd agree?

A. Yes, it was.

Q. You go on here again, I think this is reflecting another memorandum of yours and other evidence of yours. "Letter saying disclaimer, where did it come from? ESAT Digifone acted properly. Taking action can cause a bigger liability against the interests of the company."

A. 'A bigger problem'.

Q. "A bigger problem against the interests of the company." Again we have a repetition of the proof point. "No evidence of a problem and not" and that tails off then with the emphasis on the bottom again on a disclaimer.

Just in relation to the one point. Point number 3 of the numbered points at the top of the call, "Taking action may cause a liability." Can you explain what was on your mind when you made that note?

A. Well, what I was recording there was what Dermot was saying to me on the phone. So those points should be looked at as me receiving the message that I was getting from Dermot. I believe his concern was that by us even investigating this or taking it any further, that, you know, could be causing ourselves a liability.

Q. I may have to come back to that later. In other words, that if you were to take any steps to look in this more deeply would you, in a sense, be putting your

head, and the company would be putting its head, above the parapet, more and more people would become aware of that; depending on how far you took it, you might be exposed to liability for not taking it further or you may be exposed to liability for not having looked into it at an earlier stage or there could be other liabilities that might arise in connection with the IPO?

A. My recollection of this was he was just saying to me that, you know, we could cause a bigger problem by looking

Q. how would you cause a bigger problem then if it wasn't going to be caused in the way I have outlined it?

A. I presume, I mean, and again I was trying to interpret what he was saying, but the sense I got was that if we weren't careful about how this was handled, we could cause ourselves a bigger problem. I am trying to interpret what Dermot Desmond was saying to me on a phone call four years ago. But that was my sense.

Q. Yes. If none of what Mr. O'Brien said to you had actually happened, then to be ventilating this in public could cause a serious problem, isn't that right?

A. I agree with that, yes.

Q. If all of what Mr. O'Brien said to you had happened, then it would be a serious problem anyway, whether it was ventilated or not if it was ever found out, isn't

that right?

A. Well, I think it would have been a problem whether it was found out or not.

Q. Well, surely it was only going to be a problem if somebody decided to take some action on foot of it, if somebody found out about it and did something about it?

A. I think that's fair, yeah.

Q. And I suppose in the nature of things, you were talking about outsiders who might wish to take advantage of these facts. I am not saying improperly, but if other people, if the public became aware of it, if government agencies became aware of it, if competitors became aware of these facts, then they could result in very serious problems for the company if the facts were true?

A. Well, again, as I understand it, it's in reference to what Dermot was saying to me. All I can do is give you what my sense was of the message he was giving me on the phone. I wouldn't have developed my thoughts the way you are now articulating them at that point in time.

Q. Was the sense then of what Mr. Desmond was saying to you that he wanted protection for the company on the basis of the worst possible scenario but he didn't want to go digging too deeply into this for fear that to do so could cause a problem or a liability?

A. I believe Dermot's sense was, as I think he described

it, in a worst case scenario, that there was still no evidence that had anything to do with ESAT Digifone, and he was kind of alerting me as CEO to make sure that my primary responsibility was that make sure that ESAT Digifone was protected.

Q. On the facts as they stood, provided you didn't go any further, provided you didn't dig any more deeply and you took a very strict literal view of the facts, you might be entitled to conclude, 'Look, if all of this is true, Dermot Desmond' sorry, I beg your pardon, 'Denis O'Brien paid money. He paid money to a politician. He paid it himself. We have no direct statement or evidence that he paid it on behalf of ESAT Digifone or that he paid it in connection with any of ESAT Digifone's business. It may have been to do with other business altogether. As long as we do not try to uncover any more of the facts, we needn't concern ourselves that those facts are going to affect us'. Is that a fair way of putting the view that you might have been having of it?

A. I think, Mr. Healy, that would be a question for Mr. Desmond as to what he meant.

Q. I am just asking you for your view?

A. That's a very expansive interpretation. As I said, what I was doing here is was jotting down the points as he was making them to me on a telephone call.

Q. Fair enough. The next document is one that we have

already dealt with. It's the note of your visit to

Mr. Denis O'Brien's home on the 14th October.

A. Document number?

Q. That was document number 11. We have already dealt

with it so we needn't go into it again. The next

document, document number 12 is an extract from the

ESAT Telecom Group Plc Prospectus. This is dated 14th

October of 1997. It's not clear when you got a copy

of it. Have you I suppose you don't recall when

you got a copy of it, do you?

A. I am afraid I don't.

Q. In any case, one thing that is of interest in the

context of the discussions you were having with Mr.

O'Brien around this time is that if you look at the

page 5, its numbered page 5, which is, in fact, the

second page of the pages that you provided to the

Tribunal or that came from your file, you see the

first heading is "Presentation of Certain Financial

Information." The next heading is "Certain Terms and

Industry Data. And the next heading is "Approval by

the Belgian Banking and Finance Commission." And then

you put square brackets around a section of the second

paragraph which reads "Neither ESAT Digifone or any of

its officers, directors or employees in their

respective capacity as officers" and so on and so on,

"... makes any representation whatsoever as to the

accuracy of the information contained in the Prospectus

or as to the opinions given in it." Isn't there a reference in the course of your discussions with Mr. O'Brien to changing the disclaimer, beefing it up or altering its position or giving it greater emphasis in the Prospectus?

A. I believe there is. I am trying to think, though, which meeting that was in. Perhaps it came from the 20th or maybe that was the meeting of the 13th.

Q. I don't think a lot turns on it.

A. Okay. It was referred to in one of the meetings, yes.

Q. You may recall that yesterday I mentioned to you that the disclaimer contained in the actual Prospectus is, in fact, in bold type and in a more prominent position.

A. I see.

Q. And contains for starters, it's on the same page, page 5. It's under "Presentation of certain financial information" but it's not part of another paragraph, "Certain terms industry data" and, in fact, it's a paragraph of its own with its own heading "Disclaimer" and it's in bold type, I don't know if that will become obvious on the monitor. I think it is obvious from the monitor, do you see that?

A. Yes.

Q. That's what I was referring to yesterday?

A. Okay.

Q. And there is a difference. So there must have been, as a result of some representations, or at least some

of the views being expressed by you or other people, there must have been a claim to put the disclaimer in those 'more prominent terms', can I put it that way?

A. Certainly seeing that highlighted there, that appears to be the case.

Q. And there may be some connection with the highlighting of that and the discussions you had had with Mr. Dermot Desmond where he was anxious you should assume the worst case scenario, put in the best possible disclaimer you could, or protection for your company and its employees and directors?

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

Q. I think the other documents in that section again seem to be other loose pages of the Prospectus. They don't seem to me to throw any light on what we are looking at. Is there any point you'd wish to make in relation to it?

A. None that I can think of no.

Q. We then pass over a few privileged documents to document number 14, which is a fax from Brian Harmon of FCC Financial and Corporate Communications, a PR company. We referred to it yesterday. It's dated 17th October and contains the Tribunal's advertisements of its Terms of Reference?

A. Yes.

Q. I don't know what the reference to the Cork Examiner

A. sorry, where is the reference?

Q. The next document. I am passing over the last document.

A. It's just another bill for a mast that we had difficulties with.

Q. Mr. Coughlan corrects me. It's not the Cork Examiner any more, it's the Examiner. I wouldn't know that.

The next document is document number 16 and we have referred to this document on an earlier occasion. It contains a list of the various attempts you made to get Mr. O'Brien to postpone the IPO between the 8th and the 4th October and I don't think we need to revisit it at this point.

The next document, document number 17, it's described as "Undated handwritten notes of Barry Maloney."

Entitled "Questions for Michael Walsh" and a note on the back which, as I say, has been partly obscured, because it contains privileged legal advice. In my copy, in fact, I can't read any part of the back of it.

So I may have to ask Ms. Finlay I think there may be some poor photocopying maybe Mr. Clarke can look into it.

MS. FINLAY: The position is there are three lines at the top only written which are excluded on the basis of legal privilege and the remainder is simply bad photostating that the print has, ink has come out.

MR. HEALY: It's another document altogether. That in some way

CHAIRMAN: in other words, it's a nullity on foot of your claim of privilege. There is nothing in there if the protected portion is deleted.

MS. FINLAY: That's correct, Sir. I think, in fact, it seems to be the ink of the front page which has come through in some respects onto the back. When you look at it it's the mirror image.

Q. MR. HEALY: Yes, it seems to be.

It seems to have been put together in your usual format of what looks like the agenda items and some answers or responses that you noted in the course the meeting?

A. I believe that's right.

Q. Number 1, it says "Meeting going ahead." Do you know what that's a reference to?

A. I believe at this stage it was in terms of getting all the directors together. I believe that's what the note referred to.

Q. All the directors of ESAT Digifone?

A. Correct.

Q. For the purpose of letting them in to the full picture and providing them with all the information that you and the others had?

A. That's correct. At that point, I believe, when this was written, it was in the context of, at this stage,

Dermot, Michael Walsh and myself.

Q. Well, we'll take the questions and the answers together. The answer to that is "Yes, going ahead, 10 a.m. confirmed".

Next question is "Have you been able to get in touch?

And you have "Conference call, Arve not sure about Rolf Busch."

A. I think that was saying that Arve would be coming in by conference call as opposed to being physically there, not sure about Rolf Busch, whether he'd be on the conference call or physically there. I believe that was the case.

Q. Third question "Have they got the advice? Do I need to get it to them?" And the answer is "Copies of it for anybody that needs it.

A. I think what Michael Walsh was saying to me was that they had copies there for anybody that needs it.

Q. Does that mean that they weren't being given it in advance?

A. I think that would be a reasonable assumption from that note, yes.

Q. "4. Wouldn't it make sense to have Fergus Armstrong attend?" And the answer is "Keep him available between 10 and 1:00 p.m."

A. That's correct.

Q. Then we come on to the next document which is, in fact,

the meeting, isn't that right?

A. I believe so, yes.

Q. Document number 18.

"Notes of meeting held in IIU offices on Monday 20th October 1997. Attendees: Michael Walsh, Dermot Desmond, Leslie Buckley, John Callaghan, Barry Maloney.

Conference call: Arve Johansen, Rolf Busch and Denis O'Brien." So you have a full muster of the directors, did you?

A. Yes, it looked that way.

Q. Then next document says " or the next note says "Meeting type: Informal among representatives of the shareholders and Barry Maloney as an invited guest."

So do I take it then that what was being constituted here was a meeting of the shareholders of the company i.e. of the representatives of the shareholders, to which and not of the directors not a formal meeting of the directors?

A. That's my understanding from that note, yes.

Q. To which you were an invited guest. You were simply an option holder at that stage, is that right, or did you have shares?

A. No, I didn't have shares. Just for clarification, in case there is any confusion, my option agreement didn't entitle me to any shares until 1999.

Q. I appreciate that, yes. Who described the meeting in this I'd have to say for me somewhat unusual way?

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

Q. Did it strike you as an unusual way to describe a meeting?

A. A little bit, yes.

Q. You were then and you are now an experienced businessman. Companies conduct their business through meetings of the directors or perhaps subcommittees of the board of directors and annually they have a meeting of the shareholders; smaller companies may have more regular meetings of the shareholders, but these meetings are usually minuted, isn't that right, in a formal way by the company secretary or by whoever is charged with the responsibility for minuting a directors meeting, wouldn't that be right?

A. I believe that's so, yes.

Q. This was, in one sense, a formal meeting but one which is described as being neither a directors' meeting nor a formal shareholders meeting?

A. From what my note says, I certainly took the meeting as a shareholders' meeting and I was there as a guest.

That's what I read from my note.

Q. There were no minutes of this meeting, were there?

A. Not no, I do not believe there was.

Q. So if anybody was to examine the record of the company's activities, there would be no formal company record of this meeting?

A. I think

Q. that seems reasonable?

A. I think that's right, yeah.

Q. In any case, we'll move on.

"Advice to the company had not been circulated." That is a reference presumably to the point that we mentioned a moment ago in relation to your earlier memorandum?

A. I believe so.

Q. That the advice was simply available for whoever wanted it at the meeting?

A. That's correct.

Q. "Conference call chaired by Dermot Desmond. Asked Denis O'Brien to explain the conversation he had with me back in October/November of 1996. What was said and what was meant." Then you have, I think, another note referring to Mr. O'Brien. "DOB said he'd like to take the opportunity to apologise to me because he understands the difficult position it put me in. He said he'd like to clarify that what he said was said while we were out for a run and that it was just a bit of bravado on his part."

Now, you refer firstly to Mr. Denis - or to Mr. Dermot Desmond's - request for an explanation of the conversation. Is the next note you have got the full extent of what Mr. O'Brien said or was it simply something Mr. O'Brien referred to before he went in to

describe what had happened in the course of the conversation?

A. I can't be sure. I believe, it's likely it's what he would have said before he described it but I can't be sure on that, Mr. Healy.

Q. "He said he'd like to clarify that what he said" presumably in 1996 "Was said while we were out for a run and that it was just a bit of bravado on his part." At that point had you ever heard Mr. O'Brien say that what you had discussed with him had occurred while you were out for a run?

A. I believe this was the first time that I heard it described as this. I also believe it was the first time the word 'bravado' was used but I couldn't be sure but I believe that was when, the first time 'bravado' was used.

Q. Did you make any effort to correct the impression that Mr. O'Brien gave that the remarks he had made to you had been made while you were out for a run?

A. I believe that I would have, yes.

Q. You didn't keep any note of that in your own note of the meeting?

A. No, I didn't but just in terms of the development of the issue as it was moving along, it would have been very unlikely had I not, but again I don't have a note so I can't be sure.

Q. Apart from saying that this was just a bit of bravado

on his part, we know from other notes that Mr. O'Brien expanded on that explanation for his conversation with you in other statements, isn't that right, and in that he said that he normally would go for a run on Sundays, that you'd shoot the breeze, that there was nothing sacred between you, that you'd ball-hop one another, that he'd tell you things that weren't true just to get you to do things and so on and so on. We'll be coming to it later on. But at this meeting did he give that more extensive, if you like, account of the jocular, jovial nature, according to him, of your discussions in October, 1996 or did he merely use the word 'bravado'?

A. My recollection is it was just the word 'bravado' and he might have said it was not a serious comment, something of that nature. But certainly my recollection is that he wouldn't have articulated, certainly the way he did when he was giving, as I understand he did when he gave testimony here.

Q. Or when he gave, I think, other explanations which we'll come to in the records later on, to Mr. Kealey or to, I think, Mr. Armstrong in response to Mr. Armstrong's questions?

A. That's correct.

Q. In the course of your meetings with him in August, did he ever say to you, 'Look, this was only a bit of bravado'?

A. No, he did not.

Q. Or anything that could be treated as being to the same effect, it was only a bit of a joke?

A. I'd have to say all of the conversations until the 20th were all deadly serious conversations where he sought to reassure me that there was no payment, no final payment, intermediary, got stuck, nothing to worry about.

Q. He then go on to say "I referred to the existence of advice the company had received." Was this a reference to Mr. Armstrong's advice?

A. Yes, it was.

Q. "Dermot Desmond got a bit aggressive, stating that if we" is that right?

A. that's correct.

Q. "If we wanted to get legal he would ask me why I had not brought the initial statement that was made to me back in October/November '96 to the attention of the board. I did not get an opportunity to respond to this point until after the conference call broke up with the Norwegians and Denis O'Brien.

I did take the opportunity to then emphasise, to DD in particular, that the statement in and of itself as made to me at that point had no implications that I could see for our company in that Denis O'Brien never said he had done anything for and on behalf of the company.

The actions taken from the meeting were that Michael

Walsh and myself would get McCanns to draft a letter."

Can I just go back to where you referred to Mr. Desmond getting aggressive and stating that "If we wanted to" and you have it in quotation marks "Get legal" he would ask you why you had not brought the initial statement that was made to you back in October 1996 to the attention of the board. Who is the "We" that you are referring to there? "If we wanted to get legal"?

A. I was just quoting what I believe he said.

Q. Mm-hmm?

A. So I believe Dermot said "If we wanted to get legal".

Q. Can you understand, Dermot wouldn't have said "If we want to get legal". Surely he would have said 'If you want to get legal'?

A. My note says 'we', Mr. Healy. My whole focus in this meeting was to try and get the people present at it to have a look at the advice. That's what I was trying to do and in offering to Dermot or making him aware of its existence this was the way he responded to it. I think

Q. He was using it in the casual way, meaning 'If the meeting wants to get legal'?

A. That's correct.

Q. "Then what about the fact that you didn't tell us all about this in 1996 when it happened?"

A. That's my understanding.

Q. I see.

A. I use the word here 'aggressive' because he was quite animated and aggressive at the time.

Q. You were obviously anxious to try to get people to act then on the legal advice that you had received from Mr. Armstrong?

A. No. I was conscious that they still hadn't seen it and it was important that they did see it.

Q. But had they not seen it at that stage?

A. Well, I suppose it depends the one that Fergus Armstrong would have prepared for us is dated the 16th. I can't be sure but I can't be sure whether they had seen that or not.

Q. What I want to what I am trying to get at is this: You were anxious to try to ensure that everybody at the meeting knew what the issues were from the point of view of the facts as they were known and what the legal implications were on the basis of the legal advice you had been given?

A. That's correct.

Q. Now, was Mr. Desmond getting aggressive about the contents of the legal advice or was he getting aggressive about the making available of the legal advice to the people at the meeting?

A. I can't recall.

Q. But his response to your efforts, whether it was in relation to the contents or simply handing over the legal opinion, was that 'If we were going to go down

the legal route here, well then we should start looking at Barry Maloney's liability for not telling us about this in 1996'.

A. I believe that was the message he was giving me, yes.

Q. That was a message directed to you, isn't that right?

A. Yes, it was.

Q. Did you feel intimidated by it?

A. I acknowledged what it was.

Q. It wasn't a very friendly message, let's put it that way.

A. No, not particularly.

Q. You say that after the meeting you made the point that, to Mr. Desmond I take it, that you didn't see what Mr. O'Brien said to you as having any implications for the company and here you are referring once again to some of the points I think we have discussed in the course of your evidence, that is to say that Denis O'Brien referred to his, himself having paid a $\frac{1}{2}$ 200,000 payment and as the information everybody had understood, it couldn't be said that he was acting on behalf of or in connection with Digifone or something else, would that be fair?

A. That's correct. I think also if you were to check on the notes of my telephone conversation with Dermot on the 14th, the way that conversation had went, so I was a bit taken aback when this came up in this context at this meeting, given that we had already had the

discussion where he had said to me, 'How do you know it had to do with ESAT Digifone? I told him I didn't.

In the context of having that conversation

Q. You had gone over the same ground in the course of the telephone conversation?

A. Correct. But not the quorum that was present at the meeting.

Q. Now, as I said, I think, to you yesterday, it wouldn't be unreasonable to take the view that that was a very literal interpretation of what Denis O'Brien said to you?

A. Sorry, Mr. Healy, that what was?

Q. Your interpretation that it had nothing, on the face of it, to do with, or you had no proof that it had anything to do with ESAT Digifone or the second GSM licence. Your interpretation of what was said to you was a very literal one.

A. It was it would, I believe, have been a literal one in the context of a discussion on the 14th October. I don't believe it would have been as literal in the context of when the statement was first made without the repetition of the two statements that were made to me in August or the circumstances the company found itself in.

Q. Because there can be no doubt that the statement was made originally in a, what I'll call, 'ESAT Digifone context' and repeated in an ESAT Digifone context

because it was the context of ESAT Digifone success fees that first brought up the statement, wasn't that right?

A. It was in the context of the success fees when he first made the statement to me.

Q. For the licence, the success fees for the licence?

A. That's correct.

Q. Now, I think you know that I will be coming back to this in the context of notes that Mr. Michael Walsh made of these meetings and just for the sake of the record at this point, Mr. Walsh did say that you never contradicted Mr. Denis O'Brien's version of what had happened in October/November of 1996.

A. At which meeting, Mr. Healy?

Q. At this meeting, as far as I can see. I'll come back to the detail of it, but can you recall whether you contradicted Denis O'Brien's version?

A. I can't recall because I don't have a note here. Let me put it this way; if I didn't, I certainly did on the 23rd when there was a much longer meeting of a wider group.

Q. I think we'll get through your own documents first and we'll come back

A. maybe if I also add to that Mr. Walsh was present with me at the meeting on the 13th also so he would have known very well what the contradictions were.

Q. And what your version was?

A. Correct.

Q. The next leaf contains, it's leaf number 19, contains your handwritten notes with flight details and notes on a call with Fergus Armstrong. Does the first page of that document throw any light it may help you with dates, but does it throw any lights on any of the issues that we have to deal with?

A. Just family vacation, I believe.

Q. That's what I thought. On the second page the document or the page is divided in what looks like three sections. The first section doesn't seem to be of any particular relevance. The second section seems to be relevant and it refers to Mr. Fergus Armstrong and you have a number of phone calls for him. Then a reference to 'page 6', which is presumably page 6 of the IPO Prospectus. "Certain terms and industry"

A. "Certain terms and industry data", I believe it is.

Q. "... In any respect or omissions. Then you have a note "Is it in the right place? Don't want to block" something

A. I believe that's "Don't want to block them."

Q. "Don't want to consent."

A. I believe that's correct.

Q. "Should it be in bold? Make additions or omissions." I think we can dispose of the last point fairly quickly.

Is this a discussion you are having with Fergus

Armstrong?

A. Yes, it is.

Q. And you are wondering, or both of you are canvassing, the proposition whether the disclaimer or health warning should be in bold, and clearly that was obviously done eventually, as we saw from the final form of the Prospectus.

A. I believe that to be the case.

Q. Your note "Don't want to block them, don't want to consent" seems to reflect some other discussion you were having about your overall attitude to this, is that right?

A. I think that's fair.

Q. And is it the same point again, you didn't want to stop the IPO but you didn't want to give a formal consent for fear that you might be liable or might have some liability yourself or the company might have some liability in case any material statements were omitted from the Prospectus?

A. I think all of that is true in the context that it wasn't clear to us that even if we wanted to stop it, there was anything we could actually do. If you think of the sequence of events it was, the withholding consent was the only role we had ever played in any previous fundraising. And I believe that was the only, if you like, 'authorisation', if you use that word, that ESAT Digifone would have had.

Q. You had no right to block or veto the IPO in a formal sense. You couldn't say, 'We are exercising a veto to stop this'?

A. It's in a different company's IPO so there was no question of us being able to veto it or block it. I think the only issue is whether or not we would withhold consent for use of the financial data but I think in minutes of meetings that come up afterwards, there was a view expressed that, you know, perhaps consent wasn't even required. I don't know whether that was true or not.

Q. I do recall that that is debated somewhere somewhere else in the documents?

A. Yes.

Q. And there was also a question of about 'Had you not already consented and given information'?

A. Yes, because when the first bond, I think January '97, was the first time, if you like, that John Callaghan on behalf of Digifone wrote to ESAT Telecom describing what information, in which format we were consenting for release and, as far as I know, that same content then passed through all the various stages. I can't be sure about that but that's my recollection.

Q. But in any case, the concern that you had was not in relation simply to the provision of numbers. You didn't mind providing financial information to ESAT Telecom for the purposes of their IPO. Your concern

was that by consenting to the provision of some information, you might be liable for not providing other information or you might be seen to be standing over other statements in the IPO, would that be fair?

A. That certainly would have been a concern, yes.

Q. And that have the critical concern from your point of view, isn't that right?

A. Yes, it was.

Q. And if we could just digress for a moment. Probably everybody here who is familiar with these documents is operating on the basis that of a degree of familiarity with the documents. What was at issue here was an obligation anybody issuing an IPO had to make sure that the Prospectus issued in respect of the IPO did not contain any or was not in any way open to criticism because material statements were omitted from it or because statements were included in it which misrepresented the true position. Would that be right?

A. I believe that to be the case.

Q. And that's a fairly serious and onerous obligation people involved in public flotations have, such as directors or officers of companies?

A. Yes, I believe what the concern would be is that if anything happened at a later point in time you could be sued by investors, I believe was the concern.

Q. The third section of your note contains four numbered

items. I can only read the first one and maybe the first two. I can read a little of number 4. The first one is "Spend money defending yourself!".

2. Insurance." I can't quite decipher the last bit.

A. I believe the third one reads "Role for the board with all the advice it could get. Issue for common directors. Courage might desert them." Is what I believe it reads.

Q. The common directors were in a particularly difficult position because as directors of ESAT Digifone they were now privy to a lot of information which was relevant to the role they had to discharge as directors of ESAT Telecom, isn't that right?

A. That's correct. It's probably also fair to say that we were relying on those three common directors to carry the issue to the board of ESAT Telecom and advise their advisers and their underwriters. We did not see that as being a role for us as directors of ESAT Digifone.

Q. Then point number 4. "No consent". If you have original maybe you could decipher?

A. The note I have says "No consent equals no indemnity."

Q. In other words, if you didn't consent to any information going forward, you wouldn't need an indemnity, would that be

A. I believe that was the

Q. that seems a reasonable conclusion. Again, that

was simply another way of looking at the dilemma that you found yourselves in?

A. That's correct.

Q. What did "Spend money defending yourself" mean?

A. I think that was there was this was a very stressful time but we did manage to run a little bit of humour through it and I believe that was the context that it was said in. I was speaking to Fergus Armstrong at the time.

Q. Do you want to spend money defending yourself? Do you mean 'After all this is over', is it?

A. I am not sure exactly what he meant.

Q. Before I move onto the next document I want to discuss a meeting that was held on the 23rd October in the offices of IIU. This meeting is referred to in document number 25 and I don't want to pass on to document number 25 at this point. Now, there was a meeting on the 23rd October in the offices of IIU, isn't that right?

A. Yes, there was.

Q. How did that meeting come to be held?

A. I believe it was as a result of the meeting that we had had on the 20th.

Q. Who was at that meeting, can you recall?

A. As I recall, I think everybody was there.

Q. Meaning the same people as were at the last meeting?

A. Maybe more. I think maybe all of the board. I know

Johnny Fortune was there. Dermot Desmond, I believe, was on a conference call from Madrid, he wasn't physically there, but he was on a conference call.

The three Telenor directors would have been there.

John Callaghan, Michael Walsh and myself. I am not sure if Leslie Buckley was there or not.

Q. The Tribunal has a note of that meeting prepared by Mr. Denis O'Brien and I think you may have been furnished with copies of that note. I think it might be a useful time if we were to refer to Mr. O'Brien's note at this stage. It's that note [indicating]. Does that ring a bell with you.

A. Do you know what section it is in the book?

Q. It's in section 1 of the book 29 A.

A. Sorry, Mr. Healy, is that included in my papers?

Q. It's certainly maybe Mr. Clarke can tell you where it is in your papers. It's in a different place.

I'll identify it for Ms. Finlay has identified it now in any case. Do you recognise the document?

A. I recognise the handwriting as being Denis's.

Q. I am just wondering have you had an opportunity of examining the document before now?

A. Yes, I believe I did read it.

Q. You'll see that on the top of the document at page 1, the notes are written sideways on some of the pages and lengthways on some of the other pages but on what's described as page number 1, it says "23rd October" if

looks like 'ten past something', I am not sure what.

Can you identify that?

A. Yes.

Q. It's 'Fergus Armstrong' is the first name on the left-hand side. It's some protected piece of privileged information. Then again we have this reference to the characterisation of the meeting.

It's described as "Not a board meeting" and again can you recall who described the meeting in this way?

A. I believe at the time I don't think there was anything to it other than to, that if the company wanted to maintain legal advice in the future, that that's certainly at that meeting where Fergus Armstrong was present, that would definitely have been the case.

Q. But at the previous similar meeting Mr. Armstrong was not present, he was simply on call, isn't that right?

A. That's correct.

Q. And there would have been no note of that previous meeting, no minutes rather. It's possible that individuals at the meetings kept their own notes but there were no formal notes or minutes of either of these meetings, isn't that right?

A. That's correct.

Q. "Preliminary legal advice has been circulated. Specifically covering pending IPO and how it affects ESAT Digifone." That's not new at this point. Then

you come to page 2. Dermot Desmond is quoted as saying "Is dilemma re conversation that CEO thinks are not relevant to the company." This is a note that Mr. O'Brien took. And then your response to that is described as "Yes." Mr. O'Brien was described as saying Dermot Desmond is described as saying "Conversation DOB and BM at a meeting discussed Tribunal. DOB told BM they were absolutely no payments. First conversation October/November. Had been an intent there but there was no payment." Maybe we should go through it all first.

Page 3

A. Can I just clarify? Are you going to ask me is this an accurate

Q. I am going to ask you that, yes, and I am also going to ask you about some of the issues identified there.

This is not your note. This is Mr. O'Brien's note of the meeting.

A. Right, okay.

Q. And I am also going to ask you, before I ask you any questions about it, about what I am told are your own notes that you may have prepared for this meeting.

A. Yeah, I should put that in context. At this particular meeting, what I was very focused on was a handwritten statement, if you like, that I read out to the meeting. So as I went into that meeting I had 10

points in handwritten which I believe has now been provided to the Tribunal.

Q. I am trying to do two things here. Firstly, I am trying to find out as much as I can about the meeting but I am also try to put to you what Mr. O'Brien says occurred at the meeting. I think what we'll do is we'll go through what Mr. O'Brien says occurred. Then we'll go back to your notes and you can deal with what Mr. O'Brien said?

A. If I can just make the point. Because of the nature of what I had to do at that meeting I was very focused on my own documents. I didn't take notes myself. However, Fergus Armstrong, who attended the meeting, took extensive notes which I saw after the meeting a few times and which I have looked at, obviously, in the context of my evidence here now as well.

Q. Have you a good recollection then of what happened at the meeting?

A. A fairly good recollection of it, yes.

Q. Then we'll go through it the way I suggested a moment ago. We'll deal with these notes first, your own preparatory notes, and then we'll come back to discuss any responses you want to make to these notes.

A. Fine.

Q. "Rolf Busch" - in quotation marks - "Postpone IPO".

Then "If not" if you don't postpone the IPO I think he seems to be saying "Reflect the facts and give

facts to people involved in IPO." Is that right?

A. That seems to be what's said.

Q. If you disagree with any of my readings of it, tell me.

Dermot Desmond is noted as having said "We undermine the shareholders or stakeholders in the company if the IPO is postponed. I am happy to accept a letter from the Chairman and his company's auditors." Then some legal advice, which is protected. Dermot Desmond "There is a lust to overthrow success.

Denis O'Brien said 'bravado' on three occasions.

Denis O'Brien has told Barry, and he accepted."

The next section has what seems to be a reference to some issues - "Contemplated or acted upon. Barry said 'I don't want to know'."

Then we go on to what I think is page 4. "BM issue of success fee - was the context. Was getting invoices were owed for arose in bid. Consultants advisers, BM was expressing concern. Denis said 'Relax, there are two other payments of $\frac{1}{2}$ 100,000 I had to make, one to ML'. 'I don't want to know about it' - end of conversation." I simply can't decipher the next bit, I don't know whether you can?

A. I am afraid I can't.

Q. "Denis never said he wanted money/refund. DOB assured no. DOB said 'If you think, Barry, you have problems'." Then there is a reference to 'PJ',

which must be mean PJ Mara, and then 'Jim Mitchell'.

On page 5 what seems to be attributed to you, 'BM' "DOB has said payment was stuck with a third party. DOB said if I was paying anybody, I would go to AIB and pay."

Barry Maloney says, "Share understanding of events"

October/November '96.

A third party has knowledge so company is at risk.

Denis O'Brien to BM concern conversation

October/November '96 in the context around issue of success fees - Mitchell, Stephen C, PJ.

BM was expressing frustration. 'You think you have problems, I have had to make two payments of 100K each.'

25th October, Denis O'Brien reminded Barry Maloney of statement. 'I did not actually do it'."

On the sixth numbered page, which I think in fact is the fourth leaf, "Next week the statement was made" can you follow that? "Two consecutive Mondays, I know you must be concerned."

New heading 'The IPO'.

"8th/9th October sought advice" it looks to me like 'some advice'.

"Sought some advice. Conversation on the 8th. I had

intended to make a payment."

"Four separate attempts" can you read the next word after 'four separate attempts'?

A. I am sorry, I couldn't even hazard a guess.

Q. Maybe it's 'made' "Potential position re impact on IPO.

October 13th gave draft preliminary advices

sandwich" reference to lunch, I think

"No payment had gone, prepared to give letter"

The next line is in quotation marks, attributed to

Barry Maloney: "No material damage to licence." Then

there is a line and a heading "Final outcome" and there are four or five numbered points.

"1. Letter to underwriter making a clear statement re degree of involvement/responsibility/disclaimer.

2. Re Prospectus." Then there is a line under disclaimer, "expressing no view on licence. Denis letter.

3. KPMG letter no payment.

4. To company's lawyer William Fry." "Most likely" I don't know what any of this meeting or another alternative number 4 it seems "Statement from BM, statement from Denis O'Brien to be done and sent to William Fry as solicitor for issuer."

Now, prior to that meeting, you had some notes, made some notes of your own, is that right?

A. Prior to the meeting, yes, I had a prepared 10 well, actually what I had was I had a prepared note out of which I took the ten key points that I wanted to try and focus the minds of the directors on in terms of the sequence of events that occurred so that they had all the facts, as I understood them, in front of them.

Q. Now, this is the second meeting at which all of these matters were being canvassed, isn't that right? The second if you like, big meeting. We had the meeting with which was not attended by Fergus Armstrong, which was not attended by Johnny Fortune, I think. This was the second big meeting to discuss this issue, isn't that right?

A. Other than to say the first meeting was very much characterised to me as a 'shareholders' meeting' to which I was invited as a guest. This meeting was described, as I recall, as a 'meeting of the directors', 'an informal meeting of the directors of the company'. I don't know if there is any particular significance of terminology but that was the terminology used.

Q. I find it hard to see any distinction, Mr. Maloney, but I won't trouble you with whatever legal distinctions there are between these gatherings of people. But it was the second big meeting at which this issue was discussed amongst all or most of the interested parties. You had the 20th, most of them were there.

Whether you called it an 'informal meeting of the shareholders' as opposed to a 'shareholders meeting' or not, the fact is most of the interested parties were there.

You were there, although you were not a shareholder.

The next meeting is a meeting of the directors, not a formal directors meeting, but you were there and you were a director, in fact, in any case, isn't that right?

A. That's correct.

Q. But it was this this was the second big meeting at which an attempt was being made to thrash this out?

A. That's correct.

Q. Prior to that meeting you had prior to that meeting you had committed to paper ten points that you felt ought to be addressed or discussed at the meeting?

A. That's correct.

Q. Now, you were telling me how you put those ten points together and where you drew the material for those ten points from. Maybe you'd just go over that again for me?

A. I have a longer essay-type document which runs to eight or nine pages of longhand, if you like, which kind of mapped out all of the events in terms of my understanding of the history of what had occurred. I then worked, together with Fergus Armstrong, to try and be more precise in terms of bringing it down to ten points which I could articulate more easily but

nevertheless get the directors to understand why I was concerned.

Q. And is that long document a document in respect of which privilege is being claimed?

A. I believe so, yes.

Q. Was that document prepared by you for your own personal benefit or prepared for the benefit of your lawyers?

A. Well, I prepared it for the purposes of making sure that when I related to Fergus what was happening, that he had the facts as I understood them.

Q. But did you prepare it at the request of your lawyers or did you prepare it yourself?

A. Well, when this process started, Fergus advised me to keep as copious notes as I could of what was occurring.

I think what I was trying to do was, while I kept individual notes of incidents, what I tried to do was kind of write an essay of what I understood the position to be prior to the 23rd.

Q. I see. We may have to come back, but in any case the information which was contained here was mined from that document.

A. Correct.

Q. Am I right in thinking that yesterday you told me you got advice before the 8th October, is that right, or perhaps after the 8th October?

A. What I believe I said to you yesterday is that I had been talking to Fergus on the phone.

Q. Before and after?

A. Before October, just sharing with him what was happening and, you know, was there any reason for me to be concerned, what was his view, as opposed to saying, 'I need some legal advice'. A sounding board, somebody I could trust and confide in, I think would be the accurate description of what I was doing.

Q. If we just go back to your note then. Now, we have been provided with both the original, a photocopy of the original and a typewritten version of this note.

I have got the manuscript version in front of me. The first numbered item is "October /November discussion" That's a reference to October/November, 1996, I take it?

A. That's correct.

Q. "Success fees for work on bid. Statement made re two x 100K payments that DOB had made. One of these to Michael Lowry.

2. Told him I did not want to know. As far as I was concerned it was nothing to do with our company, ESAT Digifone.

3. Statement was never referred to again until the 25th October 1997. At a regular update meeting I was reminded of DOB's statement the previous October/November with a comment "I didn't actually do it, thank God. I know you must be concerned." The

same statement was repeated to me at a meeting the following week, September 1st."

A. Could I just make a comment on that, Mr. Healy?

Q. In relation to the dates, is it?

A. Correct. The date of that was obviously incorrect, because Mr. O'Brien went on his honeymoon got married on the 29th. When I read this out that point was made and I conceded that the discussions were in August.

Q. And they must have been in the first, I think, three weeks - the discussions, both the discussions must have been in the first three weeks in August?

A. I was checking my August. We had meetings on the four Mondays in August.

Q. Fourth point: "The IPO document in the first week of October and the reference to the Tribunal contained in it brought the matter into focus for me vis-a-vis potential impact on our company.

5. On October 8/9 I sought and received advice from McCann Fitzgerald that there could be potentially serious consequences for the company with respect to the statement in the IPO.

6. In a discussion with Denis O'Brien on October 8th, when I inquired as to why he was now telling me that the payment never went through, he told me that he had intended to make the payment but that it had got stuck with a third party intermediary.

7. I made four separate attempts between October 8th and October 14th to try to convince Denis O'Brien of the potential position the directors of ESAT Digifone could be put in with respect to the statement in the IPO and asked him to delay the IPO until after the Tribunal.

8. On October 13th, I also shared with him an initial document headed "Draft preliminary advices" from McCann Fitzgerald which I believed I would need to share with the other directors of the company if the IPO was still going ahead. I did this so that Denis O'Brien could consider the type of scenario the directors of ESAT Digifone could be facing.

In my handling of this matter I had two overriding concerns which stated to Denis. 1. Not to be seen to be re-igniting any animosity amongst the shareholders and 2. If at all possible, to avoid enlarging the circle of individuals that needed to address this.

9. On the same day, October 13th, DOB then brought Michael Walsh into the loop on what had occurred. He again assured us that no payment had gone through and that he was prepared to give the company a letter to that effect.

10. The company then sought and received official

advices of potential impacts on the directors of ESAT Digifone which have now been shared with all of the directors."

Now, can I just get one thing in context in the light of the analysis, which I think is what it really is, that is contained in this document. There was no discussion of this matter between you and Denis O'Brien between 19916 and August of 1997?

A. That's correct.

Q. It was drawn up once, and then twice, a second time in August of 1997?

A. That's my recollection.

Q. After it had been drawn up for the second time by Mr. O'Brien did you seek legal advice, can you recall? In other words, did you think you definitely had advice before your meeting of the 28th? When I say 'advice', had you bounced something off your legal adviser before October 8th?

A. My recollection is that towards the end of September I would have been having telephone conversations with Fergus Armstrong. I would characterise them, as I said, more along the lines of a bouncing board, 'What do you think of this, is it potentially a problem for?'. That's how I would characterise them as opposed to saying to Fergus, 'I need some legal advice to the company.' I was trying to get his assessment of the potential hazard that was in front of us.

Q. I am trying to understand the development of things from the two conversations you had in August of '97 up to what was now happening in October of '97 and, in particular, what I want to ask you about again is your meeting of October 8th. That was not a meeting at which you had arranged or appointed an agenda with Denis O'Brien which included this, the 1996 statements, isn't that right?

A. I had a meeting with him.

Q. Yes. But there was no agenda for that meeting, or at least there was no agenda of that meeting which included the October 1996 statement?

A. That's right. There was no agenda for the meeting at all. As I recall it was one of our regular meetings.

Q. You didn't bring up either the 1996 statements or the 1997 August statements at that October the 8th meeting?

A. I definitely did.

Q. Brought them up?

A. Most definitely. That was the context if you go back to the evidence I gave yesterday, my efforts on October 8th, twice on October 13th and once on October 14th, was to try and see if there was any way I could find to help Denis to find a way that the IPO could be delayed in some fashion so that things wouldn't, you know, so that the issue that we saw for the directors of ESAT Digifone wouldn't occur.

Q. What I want to get at is did Denis O'Brien know before

that meeting that that is what you were going to try to do?

A. Before the meeting of the 8th?

Q. Yes.

A. I don't believe so, because I wouldn't have discussed it with him. I would have turned up for our normal meeting or he would have turned up. I can't remember where the meeting was but this was what I wanted to discuss. In fact, as I recall it, it was I think the morning, I think the 8th was down in the Malt House as I recall it.

Q. Do you recall how long that meeting of the 8th took?

A. It was a long meeting.

Q. And was the entire meeting, or most of it, devoted to the question of the impact of these statements in the context of the IPO?

A. As I recall, it would be exclusively so.

Q. Exclusively?

A. Yes. Sorry when I say that, I don't recall any other conversation other than that topic.

Q. So that you weren't having, or at least when Denis O'Brien came to meet you, you were just going to have your normal Monday morning or one of your normal regular meetings?

A. As I recall, Denis had been away on honeymoon following his wedding. I am not sure about when he came back, but as I recall it, this would have been our next

scheduled meeting.

Q. Yes. And as far as he was concerned it was going to be one of your normal liaison or touch-base type meetings?

A. I am sorry, Mr. Healy, I don't know what was on his mind but he would have definitely been aware of the discussions we had right up to him going on his honeymoon about the well actually when I think of it, maybe he wouldn't. Again the sequence of events

Q. That's what I am trying to get at.

A. No, I think that's right.

Q. So when he came into that meeting or when you came into it, I can't remember which of you went to visit who?

That was the meeting in the Malt House and the lane beside it so you went to him, isn't that right?

A. Yeah, I just need to check now. There is so many meetings with different locations. If you wouldn't mind me just refreshing my mind of October 8th.

Q. Take your time?

A. As I recall, the meeting of October 8th, was 4 p.m. in the Malt House. That was the meeting we discussed at some length yesterday, I believe.

Q. What I just want to clarify, if you like, the characterisation of that meeting. When you went to that meeting presumably you must have said to Denis O'Brien from the outset, 'I want to discuss this whole question of these two statements' or 'The statement

that you made to me and the impact it could have on the IPO and I want to you postpone the IPO' and you took a very long time discussing it.

A. We took a very long time discussing it. I would have opened the meeting of the 8th saying I didn't want to have any increased animosity amongst shareholders. I didn't want to cause his IPO a problem. I wanted him to understand the potential problem.

Q. So now we come back to this meeting of the 20th October. Who ran the meeting 23rd October?

A. My recollection of that meeting is that Dermot Desmond again, although he was on a speaker phone, he introduced the meeting and started the discussion around the subject.

Q. Was there a deputy chairman of this company or?

A. no.

Q. Well, he simply took the role of the Chairman at the meeting because obviously the Chairman was going to be involved in the issues that were under discussion, would that be right?

A. I am not I can't recall it would be even that formal. I think perhaps because he was away, he spoke first, I don't know.

Q. Now, can we come back to the detail of Mr. O'Brien's note. The first thing he records is Mr. Desmond saying that this is about "the dilemma re the conversation that the CEO thinks are not relevant to

the company." Can you recall whether that's how the meeting started?

A. Yes, I believe that is accurate.

Q. And you said yes. Did you say 'Yes, that's correct'?

A. I said 'Yes', that I didn't have any reason to believe that it was in the context of ESAT Digifone at the time the statement was made.

Q. Denis O'Brien, Mr. Desmond went on to say, "Told Barry Maloney there were absolutely no payments" and then there is, in quotation marks, "Had been an intent but there was no payment." Now, who said that, do you recall, or can you recall who said that?

A. I mean, I can't recall. That was definitely part of the discussion that I would have been adding to the conversation, saying that my understanding was that there had been an intent. Dermot's line of questioning, as I recall it, was along the lines of "Did anything actually take place? Do you have proof that anything actually happened?" I think he might have made a reference to "Show me the money" as a what Dermot was really focused on was 'Are there facts that anybody had' and specifically I had 'That tied any payment by Denis O'Brien to the licence that would have impacted ESAT Digifone'. And to those questions, as they came up from Dermot on the speaker phone, I responded in the negative because I didn't have the facts. I still don't.

Q. Well, you say then you may have said "There had been an intent but no payment" as far as you knew?

A. That's correct.

Q. If there was an intent, then that raised a number of issues, didn't it?

A. Yes, it did.

Q. Was it based on a promise or was it based on something else? Would that be a fair

A. I don't know what basis it was, but yes, I think Dermot also referred to, you know, 'Are we setting up our own Tribunal here?' That he didn't want what he described as a 'kangaroo court' and that as far as he was concerned, he was willing to accept the word of the Chairman and a statement from him.

Q. I think you were saying that Dermot Desmond said that he was he didn't want to be or he didn't think that you should be setting up your own Tribunal, but that

A. and that we shouldn't

Q. you shouldn't have a kangaroo court but that you should accept the word of your Chairman if he said that there had been no payments.

A. That's correct. He also used the term during the meeting that he was aware of, I think what he described as either 'personal animosity' or 'personal agendas' and that they should be left behind, which struck me at the time because I believed from that that he was referring to myself and yet he hadn't raised that issue

with me at any time prior to the meeting or even at the time of my resignation. That was never an issue that he raised with me.

Q. Did the meeting devote any time to the conversation that you had on the 8th October where there was a reference to an intermediary or a third party?

A. Yes, it did. But I am trying to get the sequence of events clear in my head because Dermot was on the conference call at the start of the meeting and would have played the role of chairing it for a large part of it. When I got the opportunity then to read out my ten point statement he had to leave the conference call and hung up and asked for somebody to ring him when the meeting was over. I believe it was Michael Walsh.

So it's not clear what I can't put into sequence for you was whether or not the words 'intermediary' were used they were definitely used obviously when I read out my ten points. I just can't recall I believe, though, that I would have used it prior to that.

Q. It seems from Mr. O'Brien's notes that at some point one of the issues being discussed was whether a payment was contemplated or acted upon. What discussion was there at the meeting which might have led to that or to those two points being noted by Mr. O'Brien?

A. There was a discussion around it. Fergus Armstrong was present at the meeting and he might have been putting those out as things the directors of the

company had to consider. I think I don't know, because they are Mr. O'Brien's notes but I presume it was in that context that he made the note.

Q. In relation to the question of the involvement of an intermediary. Mr. O'Brien seems to have a point or seems to have recorded that you said that the payment was stuck with an intermediary and that he said "If I was paying anybody, I would go to AIB and pay." Do you recall that exchange?

A. I cannot say I recall 'AIB' as a reference but what I do recall is John Callaghan asking Denis a question about the intermediary, to which Denis responded, saying it was Woodchester Bank and that was the first time that I had heard the intermediary described as Woodchester Bank, or any bank for that matter. But he may have mentioned AIB, I just can't recall it.

Q. What discussion was there at the meeting of Mr. O'Brien's response that the intermediary was Woodchester Bank?

A. There was a discussion as to whether or not you would describe, and I think it was an issue that I raised, that it didn't sit very well that an intermediary would be described as a bank. I thought that just sounded a bit difficult.

Q. It's not a way you'd describe a bank that you might use to pay something, as an intermediary?

A. I believe that would have been my view on it.

Q. Did Mr. O'Brien, in the course of the discussion, as you can recall, ever deny that he had used the word 'intermediary' in the course of your conversation on the 8th October.

A. You mean during the meeting of the 23rd?

Q. Yes.

A. Well, I think there was a bit of confusing statements there, because I think on the one hand he did say that he didn't use the word 'intermediary'. On the other hand, he presented Woodchester Bank as the intermediary. So I was a bit confused as to what exactly the point was.

Q. We know the discussion that seems to be referred to in the note "Contemplated or acted upon" that seems to envisage that there must have been some questioning or discussion concerning whether Mr. O'Brien ever thought or had an intent to pay something to Mr. Michael Lowry, which is obviously one issue. And the other issue is if you did have, or if Mr. O'Brien had, that intent or had that thought, did he act on it? Up until the time that you had your meeting of the 8th October, you knew nothing about any other people being involved in this payment, isn't that right?

A. Sorry, Mr. Healy, you say 'Any other people being involved'

Q. any other third party being involved in the payment. You knew nothing about any other third party being

involved in any payment?

A. October 8th was the first time that an intermediary was used to me and it was in the context of me trying to reconcile after I had had the discussion with Denis where he was trying to reassure me as I recall, I think, yesterday as we were going down the stairs he said to me, 'You don't believe me, do you?' And I said to him, 'Well how can you reconcile the statements?' He then said, 'Well what I didn't tell you was that there was an intermediary and the payment never went through'. That's what I meant when I said the payment never went through.

Q. The discussion that is again, to come back to it, referred to in the part of the note which distinguishes between a contemplated payment and an acted upon payment, is relevant to what was said on the 8th, isn't that right, because what was said to you on the 8th suggests that, to some degree, the contemplation or the thought of making a payment was acted upon, isn't that right?

A. I think that's correct.

Q. If you go to page number 6 which is, in fact, the second last leaf or sheaf of papers that I have given you containing Mr. O'Brien's note of the meeting.

If you go to the bottom page the bottom of the page, sorry do you see that? "October 13th gave draft preliminary advices. Sandwiches. No payment

had gone." Do you see that. Do you know who made those remarks or

A. Well, just to go back. I gave Denis, for the first time, the preliminary legal advices on the morning of October 8th, 13th. I presume that's what that note relates to. I don't know, they are not my notes.

During the sandwich that we had with Michael Walsh, I believe that statement was made, "No payment had gone through".

Q. By Denis O'Brien?

A. I believe so but I am not sure if these notes are Denis recording what I said or Denis's notes to himself, I just don't know.

Q. I don't know either, that's what I am trying to work out.

A. I see. Okay. Sorry.

Q. Do you recall

A. but my recollection was that while we were having the sandwich on the 13th Denis was seeking to assure the two of us that payment hadn't gone through. But as far as I can recall, he did not deny the existence of an intermediary at that meeting, as far as I can recall.

Q. I think a moment ago when I mentioned this meeting of the 20th and the fact that of the 23rd and the fact that Mr. O'Brien had a note of it, you said you wanted to say something about the accuracy of the

record kept by Mr. O'Brien of what had transpired at that meeting.

A. I am sorry, I can't really recall that.

Q. So that there can be no doubt about it.

A. I think it may well have been around this point at the bottom of page 6. I think what I was going to clarify with you was whether or not this was a record of something I had said at the meeting or whether it was a record of Denis's notes of what he had said. I believe that was the clarification I was going to seek.

Q. Have you any other comment to make on any other part of these notes?

A. Well, other than to say it was a long meeting, a lot of people spoke. Certainly following my having read out the ten points, there was a general discussion about what all this meant and people were asking questions about the underwriter and underwriters and which obligations, you know, what obligations individuals had. And I recall a point being put to Denis, 'How would the underwriters respond if we had made this information available to them?' and I believe he said that they would pull the IPO.

Q. If you go to the final page which is, I don't know whether it's an account of what happened at the meeting, as the result of the meeting or whether it's Mr. O'Brien's own notes made after the meeting, but if you look at the note which says "Final outcome" do you

see that, the very last page?

A. Yes.

Q. Was there an outcome of the meeting or a decision at the meeting as to what you would or would not do?

A. The only concrete decision that I recall from that meeting was that we gave Fergus Armstrong the authority on behalf of ourselves as directors to go to the US and just to seek the US legal advice part to this because that was something we hadn't done up until that point.

The other things that are listed here are things that we had talked about, if you like, prior to this or during this meeting.

Q. In fairness to Mr. O'Brien, you said a moment ago that Mr. O'Brien wasn't anxious that or at least Mr. O'Brien indicated that if the US underwriters were informed of, effectively, the contents of the meeting or the contents of your discussions with Mr. O'Brien, they would pull the IPO or that the IPO would be pulled. If you look at the final outcome, there is a reference to a letter to the underwriters 'making a clear statement'. Do you see that?

A. Yes, I do. It's marked 'number 1' on the sheet.

Q. Yes. Does that suggest that it was a decision of the meeting that the underwriters would be provided with a clear statement?

A. As I recall, one of the outputs of the meeting was that all the details that we had would be provided to

William Fry as the advisers to the IPO. That's my recollection.

Q. Well, it is true that there is a suggestion in the, I think the fourth or the alternative fourth item, that statements would be sent to William Fry from you and from Denis O'Brien. But do you recall any discussion that a letter would be sent to the underwriters making a clear statement?

A. No, I cannot recall that.

Q. Well, you do recall that the underwriters were discussed, the US underwriters, and giving information to them was discussed?

A. Yes, it was.

Q. When

A. Sorry, maybe I something that might help. I do recall a letter to the underwriters being discussed within the context of what responsibilities we as ESAT Digifone directors were taking. In other words, in the same context, I believe, as the disclaimer.

Q. In other words, would it be enough to protect you that a letter would be written to the underwriters making a clear statement of what had happened, is that right?

A. I don't know if I could characterise it like that. It was more of a making to make it clear to the extent to which our company was taking ownership for any information or any facts that would be in the Prospectus. I believe that properly traps it.

Q. That's just another type of disclaimer, isn't it?

A. That's correct.

Q. It wasn't, in other words, a letter to the underwriters providing them with more information?

A. Not that I can recall.

Q. Mr. Armstrong's visit to the States, was it envisaged that he would go to the States or that he would simply inform the US lawyers?

A. The board requested that he would go to the States and meet another law firm just to understand the potential exactly what the potential liabilities under US law were for directors of an affiliate company which is the way we were described.

Q. This was not going to lawyers who were advising the underwriters. This was going to completely independent US lawyers to get a feeling for the US legal aspects of this?

A. That's correct.

Q. Do you know and this is a question, of course, that concerns, obviously, the ESAT Telecom directors but do you know whether a statement was sent to the underwriters or a letter was sent to the underwriters containing a clear statement of all that had happened?

A. I do not know.

Q. You weren't asked to contribute to any such letter?

A. No, I was not. I do remember a conversation at that meeting however, where there was that all the

information should go to William Frys as the advisers to ESAT Telecom.

Q. After that meeting were you any wiser as to what had or had not happened?

A. When you say 'wiser', Mr. Healy?

Q. Well, did you have any you had Mr. O'Brien's statement that he made to you on October 8th that the payment had not gone through, that it had got stuck with an intermediary. At this meeting of the 23rd October you were told that the intermediary was Woodchester Bank.

A. That's correct.

Q. So you had one more additional piece of information.

It may have been difficult to accept it, it may have been difficult for you to accept that 'intermediary' meant Woodchester Bank. But you now had a piece of information, didn't you?

A. That's correct.

Q. That Mr. O'Brien was saying that the payment was in Woodchester Bank. At that meeting

A. may I describe it differently? He described the intermediary as Woodchester Bank.

Q. I see.

A. To the best of my recollections.

Q. But if you bear in mind that he had said to you that the payment had got stuck with an intermediary, that must have meant that the payment had got stuck in

Woodchester Bank?

A. That's correct, because I remember that when the discussion about Woodchester Bank came up, one of the issues that we talked about was whether or not in Woodchester Bank there would be a payment or a sum of money for $\frac{1}{2}$ 100,000 and whether or not that existed in one of his bank accounts and, I believe as a result of that discussion, there was a check done subsequently to the accounts.

Q. Had there been any reference at that meeting to the question of earmarking a sum of money for Mr. Lowry in Woodchester Bank?

A. It would have been characterised as the intent more the intent than he had actually done it would be the way, as I recall the way Denis presented it.

Q. I know there were a lot of meetings happening at this time. But you will be, I presume, aware from the documentation that the word "Earmarking" was used by Mr. O'Brien, at least recorded as having been used by Mr. O'Brien at one of these meetings, I think on the 4th November, with reference to what had happened in Woodchester.

A. Yeah, but that was after this meeting. This is the 23rd October. So I can't recall the term "Earmarking" being used prior to this meeting. I am not saying it wasn't. I just can't recall it.

Q. I think Sir, it's half past twelve, unless you want to

go on?

CHAIRMAN: Are you moving on to a different topic now, Mr. Healy?

MR. HEALY: Yes. I want to go on to Mr. Michael Walsh's note now.

CHAIRMAN: It's probably appropriate then and we'll consider perhaps a similar procedural approach to that adopted last Friday, in the afternoon, depending on what progress we are making. We will resume at a quarter to two. Thank you very much.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AT 1.45 P.M:

CONTINUATION OF EXAMINATION OF BARRY MALONEY BY MR.

HEALY AS FOLLOWS:

MR. HEALY: Sorry, Sir, for the delay.

CHAIRMAN: Just for the point of view of members of public, not for me, Mr. Healy; I understand that you led me to believe that you were pursuing some discussions with other legal advisers to see if some possible evidence that may be of assistance to the Tribunal in resolving the important controversies that we are dealing with this week could be made consensually available.

MR. HEALY: Essentially what it means, Sir, is that we may be able to dispose of a possible argument, that's all I am saying, about privilege in relation to certain documents which would mean that the Tribunal would be able to rely on more extensive and accurate notes of meetings and, in particular, the meeting of the 23rd October, which would save a lot of time and make the work of the Tribunal a lot easier to dispose of at the very end of the day.

CHAIRMAN: I won't preempt any discussions, Mr. Healy, and of course I am conscious of the need and importance of legal professional privilege but, by the same token, I think it can be readily understood that, if possible, the Tribunal should be facilitated with the best memoranda of meetings and if it is the case that persons who, by professional aptitude and detachment, may be more distanced from the controversy discussed at meetings, are in a position to furnish memoranda, these can be more helpful than perhaps the more sketchy or subjective recall of actual protagonists.

Q. MR. HEALY: One last thing in relation to that meeting of the 23rd October, 1997, Mr. Maloney, I think I may have asked you already but I am not sure that I did, just, one of my colleagues asked me to go over this ground again. Can you recall who called that meeting?

A. The meeting of the 23rd?

Q. Yes. You said that you were anxious at all times to ensure that members of the board and the directors had access to the legal advice and that in going to the meeting your ambition, if you like, was to try to deal with the implications for the board of the information that you had been burdened with and to share the legal advice so that they could understand what those implications were. But do you recall who instituted the meeting?

A. I believe it I believe we got the legal advice maybe dated the 19th. I just need to check that. But I believe that was I can't recall who actually called the meeting itself but I know I believe it was decided at the meeting of the 20th that this would need to that we would need to deal with the advice as a group but I can't recall who specifically asked for it.

Q. I understand. I want now to come to document number 25?

A. Excuse me, Mr. Healy. If I could ask, Sir, is there any chance I could take the jacket off?

CHAIRMAN: Of course.

Q. MR. HEALY: This is a document which was dated which you have noted as having been prepared prior to a meeting in IIU of the 4th of the 11th?

A. That's correct.

Q. 1997. Am I right in thinking that there was no other major meeting between the 23rd and that meeting at which you were in attendance, is that right, apart from meetings with your lawyers?

A. Not that I was in attendance, no.

Q. It's headed "BM concerns." This is what you prepared before you went to the meeting of the 4th?

A. That's correct.

Q. You said you have three points under the heading "Third party". So you were making, as it were, an issue or you were identifying a reference to a third party as something of major importance or significance?

A. I was just trying to prepare in my own head what were the key issues for me in the meeting of the 4th, which I hoped at the meeting of the 4th would shed light on.

Q. And for you, this was an item of major significance third party?

A. Item 1, yes.

Q. And we discussed this before lunch, how significant you thought it was.

A. That's correct.

Q. What is written on the top right-hand corner?

A. Would you like me to read it?

Q. Yes, please.

A. "In four separate attempts between October 2th and October 14th while trying convince DOB to delay the IPO, never once referred to the third party

intermediary as a Woodchester Bank account."

Q. You say "October 8th discussion of third party intermediary, clear impression it was an individual no mention of Woodchester." Your reference to Woodchester is, I presume, a reference to what had transpired at the meeting of the 23rd, is that right?

A. The best I can recollect, yes.

Q. "B, October 13th discussion including Michael Walsh, no reference to Woodchester." That was the meeting you had at lunch?

A. That's correct.

Q. "October 23rd meeting in IIU first reference ever that third party was not an individual but was a bank account in Woodchester."

A. That's what the note says, yeah.

Q. So you have identified some of the issues that we canvassed this morning when we were discussing what happened at the meeting of the 23rd and what was important.

A. That's correct.

Q. Your next issue you identify is the second $\frac{1}{2}$ 100,000.

What was the importance of that?

A. Well, I just felt in terms of going into the meeting of the 4th November, that that was still an outstanding issue in my mind with regard to the second payment that was part of the statement that was made.

Q. In what way was it an outstanding issue?

A. I was just conscious that in all of this there hadn't been much discussion about the second $\frac{1}{2}$ 100,000 payment.

Q. Obviously I think Mr. O'Brien said somewhere there was no first $\frac{1}{2}$ 100,000 and, therefore, there was no second $\frac{1}{2}$ 100,000 and I suppose the way you might look at it, or am I right that you would be looking at it this way, is if there was the first $\frac{1}{2}$ 100,000, well then there probably was the second $\frac{1}{2}$ 100,000?

A. Yeah, to me it was always the statement that was made about two $\frac{1}{2}$ 100,000 payments.

Q. I don't think Mr. O'Brien has ever denied that he referred to two separate $\frac{1}{2}$ 100,000 payments. You are aware of that. He has never denied it in any of the meetings you had and he has never in any way resiled from that proposition in the evidence given to this Tribunal?

A. The only thing where I would diverge in terms of seeing the evidence he gave was the statement that he rolled it up or doubled it for effect. That was something I was not conscious of at all in this process.

Q. He had never said that to you before?

A. Correct.

Q. I do think in fairness to Mr. O'Brien that he has mentioned somewhere that he exaggerated the position, is that right?

A. Sorry, is it right that that's what he said?

Q. Yes.

A. From what I have read, that is what he said.

Q. I think he, I suppose there isn't a huge difference between exaggerating and doubling up for effect?

A. I think that's true.

Q. You also recall that Mr. O'Brien has said, I think in a document which we will come to in due course, that there was no first $\text{€}100,000$ payment and there, therefore, was no second $\text{€}100,000$ payment. Do you recall that? If you don't you needn't worry because we'll be coming to it?

A. I think I do recall it, yes. But just to make the point; these are my thoughts, the issues that were concerning me prior to the 4th November meeting.

Q. What I am trying to identify is what issues were raised in your mind by the second $\text{€}100,000$ reference? The issue that would be raised in my mind was this: If you had information that a payment of $\text{€}100,000$ had been made to Michael Lowry and that it had got stuck with an intermediary, wouldn't that lead you to think that there must definitely been another $\text{€}100,000$ payment, whoever it went to?

A. I am not sure how I'd connect the two, Mr. Healy.

Q. Well, if one if the first payment was a payment which had actually happened up to the point where it finally didn't go through, if you understand me?

A. Yes, I accept that.

Q. Then the same at least must be true of the second payment, that it actually happened up to some point, maybe it went through completely?

A. But to the best I can recall there was never any discussion about the second payment being held up with an intermediary or anything. It was always with reference to the Michael Lowry discussion. The words 'intermediary' and 'stuck' were always in the context of the Michael Lowry discussion.

Q. Does that mean that, or are you suggesting that, the \$100,000 payment, the second one to the unidentified person, must have gone through completely?

A. I don't know that, Mr. Healy.

Q. What's your own view? What impression did you form?

A. I didn't form any one other than to say that when he made the first statement about the payment to Michael Lowry to me it was in the context of two \$100,000 payments, one of which went to Michael Lowry.

Q. And you were never told that the second payment got stuck with an intermediary?

A. That's correct. Nor did he ever make any suggestion or any clue as to who the second payment may have gone to. It was in that context that I related the doubling up point.

Q. Well, we'll come back to where he actually mentions the doubling up point when we get to the notes.

Next you identify the Telenor payment. You say "What

was it for? What did Telenor think it was for? What was on the invoice? Who did the money end up with?"

which are all fairly pertinent questions in relation to that payment. Lastly, you identify the second last point is, the "Bravado issue, which is one we mentioned this morning, was one that had been made for the first time only very recently at that date.

"Statement made on October 23rd was the first characterisation of the conversation I heard being described in that way."

A. I'd just like to add to that, Mr. Healy, that I believe that that should have been October 20th, not October 23rd. Because in my notes of October 20th I think there is reference to the word 'bravado'.

Q. Yes, you correct me on that. Fifth, you say "Where the conversation took place? I have a clear recollection of it happening in Denis O'Brien's office in the context of success fees for work on the bid."

Now, these notes were made by you in preparation for the meeting of the 4th. There is no indication on this document as to when you made them. Can you recall when you made them?

A. I am sorry, I can't.

Q. Do you recall who called or arranged the meeting of the 4th?

A. To the best of my recollection Fergus Armstrong returned from his trip to the US with the independent

legal advice from the US lawyers' side and I believe then gave us an opinion which included the US angle, which was the first time we had that. I would just need to check the date of that. I believe it was dated 29th October.

Q. So what you are saying is that you got legal advice that is privileged and you don't want to refer to, on the 29th October, resulting from Mr. Armstrong's trip to the United States to canvas the position with American lawyers. After you got that advice somebody arranged this meeting and that you think the arranging of this meeting had something to do with that advice?

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

Q. Now, this was a meeting of the this was a Digifone meeting, is that right?

A. Yeah. If I could just note, the legal advised date, the 29th October, was addressed to all of the directors of ESAT Digifone Limited, so in this case I believe all of the directors would have received it individually.

Q. I'll come to that meeting in a moment but could I just go on to the next document, document number 26, and ask you to identify that document for me.

A. It's headed "Michael Walsh 5.55 p.m."

Q. What is it? It has no date on it, do you notice that?

A. Yes.

Q. Can you do anything to put a date on it?

A. Other than to say I believe it would be at around the

same time as part of this preparation for the November 4th meeting. That's the best I can do with it, I am afraid.

Q. Could I suggest to you that it may have been before that because it says "USA advice on a no-name basis."

Did that refer to getting USA advice or having obtained US advice?

A. Well, because of the delicacy of what we were trying to do, as I understood it, when Fergus Armstrong went to the States, but I stand to be corrected on this, but as I recall, he didn't specifically refer to which companies were going to be doing the IPO. So we talked about 'Company A, who has an affiliate company B, what would the implications be under US law?'. That's the best that I can recollect, but I stand to be corrected on that.

Q. We might usefully go through the note. The first point is this is in your handwriting, is that right?

A. Yes, it is.

Q. And is it presumably the result of a meeting or a phone call from Mr. Walsh?

A. Hard for me to say, reading the note.

Q. Well, some contact, in any case, between you and Michael Walsh?

A. That's correct.

Q. "Under Irish law what is it we would need to do as directors to show that we have done everything

reasonably expected of us, given the advice we have been given? Get advice from Fergus Armstrong as to what exactly we should be saying tonight to the group in terms of detail of information to ensure I am not making matters worse with regard to sharing of information.

3. IPO cannot be delayed without catastrophic impact on ESAT Telecom and ESAT Digifone." Was it you said that or somebody else?

A. Somebody else. That's why it would be

Q. presumably Mr. Walsh, if he was the only person you were speaking to?

A. That's my assumption. There may be a clue, Mr. Healy, in point number 2. "What exactly I should be saying tonight?" My recollection is that the meeting we had, which was a night meeting, was the meeting of the 23rd, whereas the meeting on the 4th I believe to have been a day meeting. So it may well be that this was part of my preparation for the meeting of the 23rd. The other clue that suggests that to me in here is it says, "Reference in terms of detail information to ensure I am not making matters worse in regard to sharing matters of information".

Q. Because that what you were going to do, you were going to share information?

A. That's correct, I just offer that

Q. I suppose the other clue was the one at the outset.

"USA advice on a no-name basis". That was probably a reference to getting it as opposed to having obtained it already.

A. Correct.

Q. I want to go to the meeting of the 4th November.

Before I do so I want to dispose of the fairly lengthy notes prepared by Mr. Michael Walsh concerning various dealings he had with you and with Mr. Denis O'Brien over the period in the first in the second three weeks of October of 1997. Do you have a copy of those notes, of the printed version of those notes? It's headed "Handwritten notes of Michael Walsh prepared by William Fry solicitors from manuscript notes furnished by the Moriarty Tribunal but not reviewed by Mr. Walsh." Do you have that?

A. I don't believe I do in my document, no.

Q. It's certainly with the books provided by the Tribunal.

You'd have been provided with the handwritten note but I think we'll make much faster progress if we get the typed version?

A. Just to be clear, I believe I have seen Michael Walsh's handwritten notes and the typed version, I just don't have them

Q. That's just what I am getting for you now so that we can speed things up. If you examine the book of documents you got, you got a statement from Mr. Walsh and then copies of Mr. Walsh's handwritten notes.

What I am now giving you is a printed version of those handwritten notes. (Documents handed to witness.)

A. I see.

Q. We have looked at bits and pieces of this before so we'll try and go through the first bit fairly quickly.

The first reference is to dated 13/10/1997. Now, I

do not know whether these are contemporaneous notes,

Mr. Maloney. Mr. O'Brien says he didn't think they

were. That is Mr. Denis O'Brien. But what they do

contain is references to the various dealings both you

and he had around the relevant period. It starts off

"Michael Walsh met with Barry Maloney and DOB at the

Malt House. DOB informed Michael Walsh that he had a

conversation with BM approximately one year previously

where DOB stated he was going to look after Michael

Lowry. DOB stated he had confirmed to BM on a number

of times since, that he had not made any payment. BM

confirmed that he accepted DOB's assurances that no

payment had been made to Michael Lowry. MW said it

was a serious issue and that he wanted a letter from

DOB to the company confirming that absolutely no

payment or inducement had been made or proffered to

Michael Lowry. MW was under time-pressure and it was

left to DOB and BM to draft the letter."

We have already dealt with most of that passage, isn't

that right, in the course of, I think, your evidence

given yesterday?

"BM phoned MW in the car later in the afternoon to confirm that he had received the written letter from DOB."

Now, you and Mr. Walsh, or you and Mr. O'Brien drafted a letter, is that right?

A. As I recall it, Mr. Healy, but I stand to be corrected on this, is that Denis wrote the letter and gave it to me. I am not aware of my role in drafting what the letter should say.

Q. I am just going to put it on the monitor so you'll see

it. "Dear Barry,

I want to absolutely confirm that no money was paid by me or anyone acting on my behalf to Michael Lowry or any of his officials regarding the granting of the GSM licence to the ESAT Digifone consortium.

Yours sincerely" and there is a squiggle at the bottom.

That document was handed to you by Denis O'Brien, the original of that document?

A. That's correct.

Q. Did you bring that document to anyone else in ESAT Digifone to discuss it?

A. I brought it straight back and gave it to Fergus Armstrong, the company's solicitor.

Q. Was the document ever discussed by the directors at any

of the meetings, whether there were meetings of the directors which were not directors' meetings or meetings of the shareholders which were not shareholders' meetings?

A. I believe maybe at the meeting of the 23rd there was reference to getting a letter from Denis, his assurance was a letter.

Q. Well, you had got this letter by that date. This document was produced on the 13th.

A. Sorry, that's correct.

Q. Do you recall a reference then to getting another letter from Denis O'Brien?

A. I do recall it but I think it was in the context then of, as we get further into the process there was the question of getting the affidavit. So it went from the letter which was offered on the 23rd and then as we went closer to the timing of the 4th I think the feedback just in terms of the advice the feedback we got was that the letter wasn't much wasn't going to be of much value in assisting the directors with the issues that they were faced with.

Q. Well, it was only going to be an element of the things the directors might have to consider in facing those issues?

A. Correct.

Q. Would that be fair? We know that subsequently letters

were exchanged between IIU, Telenor and Denis O'Brien and also yourself in connection with the there were letters sent to you, I think, and to Mr. Denis O'Brien by Michael Walsh at a later point in connection with any potential liabilities that might arise from any actions taken by Mr. O'Brien or, it was suggested, you, in connection with the GSM licence, is that right?

A. I received a letter from Michael Walsh.

Q. Yes. I'll come back to that letter in a moment in the context of what's contained in this letter but what this letter simply says is that "Mr. O'Brien did not pay any money to Michael Lowry regarding the granting of the GSM licence to ESAT Digifone." So it dealt very specifically with one of the issues that I think Mr. Desmond was raising in his phone calls to you and at one of the meetings; 'Did Mr. O'Brien do anything to get the GSM licence for ESAT Digifone?'?

A. I believe this letter was a direct response to Michael Walsh's request that he wanted a letter from Denis, which he has got in his note there.

Q. I see. I'll just read through the rest of the note. I'll stop when I come to sections that concern you. If I don't read the other sections, we won't be able to put things in context. "MW phoned Dermot Desmond to tell him about the meeting and express concern. Michael Walsh told Dermot Desmond that based on the quality of civil servants involved he did not believe

there was room for political interference in the award of the licence. DD was concerned and annoyed that BM had waited a year to inform the board of the conversation. DD undertook to contact BM to ensure that ESAT Digifone got proper protection and advice."

We have dealt with those phone calls that you had.

"BM contacted Michael Walsh to say that he had talked to Denis O'Brien and was going to see McCanns.

Michael Walsh agreed to see Barry Maloney after McCanns. BM came to visit Michael Walsh at around 6 p.m." Now, that is probably the next day, I think.

Mr. McGonigal has certainly suggested it was the next day. It would seem to make sense. I think

Mr. McGonigal also corrects me, and I think he is right, that if you go to the sentence that begins "BM contacted Michael Walsh to say he had talked to DOB."

I think that should read "He had talked to DFD."

Dermot Desmond?

A. I am sorry, they are Michael Walsh's notes.

Q. The fact is you did talk to Dermot Desmond around this time, isn't that right, according to your own notes?

A. I think it was the 14th when Dermot called me. The other thing that ties in to the 14th is, if you see the last paragraph "BM came to visit Michael Walsh around 6 p.m." Before I went to Denis's house that evening I had spent time with Michael Walsh in IIU.

Q. "BM said that McCanns were concerned and wanted to

think about the issues further. BM had told McCanns that he did not believe any money had been paid to Michael Lowry."

A. Can I just make a comment on that. It's just this difference between my belief and what I accepted from Denis is that no final payment had gone through.

Maybe that's what Michael Walsh means when he says "He did not believe any money had been paid." Just a subtle difference.

Q. I understand. What you are saying is you think you would have said 'I don't believe the money ever got through to Michael Lowry', not that it hadn't been paid or gone some of the way and then got stuck with an intermediary?

A. What I always said that I accepted Denis's assurances that no final payment ever went through. Because the angle that Michael and Dermot were coming at was, 'Do you have any proof that any payment was made?' The answer to that was 'No'. But the difference between Michael, the way Michael notes it and the impression or belief that I had at that time are, you know, in my mind

Q. - -I understand the difference and I understand the point you are making. "McCanns nonetheless feel that the initial claim by Denis O'Brien, even though subsequently denied, gave grounds for concern. BM said he was particularly concerned because he believed

that an intermediary was involved and that the intermediary was aware of Denis's intent to give money to Michael Lowry. BM believed that money for Michael Lowry had been given to an intermediary by Denis O'Brien but had, for some unexplained reason, got stuck with the intermediary." I think that's a reasonable indication of your belief, isn't that right?

A. Yes, it is.

Q. "BM said he had completely forgotten about the conversation with Denis O'Brien until DOB raised it with him in the past two months. DOB had raised the matter and assured BM that nothing had happened. (During my meeting with BM)" he refers to another phone call.

"BM and Michael Walsh discussed the licence process in detail and whether DOB could have hoped to influence it. BM/Michael Walsh both had a lot of professional exposure to the civil servants involved in the licence award and were convinced that all the aspects of the licence award had been very professionally handled and could not have been open to influence. BM was convinced that if Denis O'Brien was doing anything with Michael Lowry that it was in relation to his other activities." Would that be right, to say that you were convinced?

A. What I do recall very clearly is the conversation that Michael and I had about the licensing process for the

second mobile phone licence. And we both kicked it around at that meeting, which I believe went on for two hours or more, how we believed the process had been run. Michael knew the officials inside. I hadn't met them until I had been involved as part of the process but I was certainly satisfied that the process itself was very rigorous and it would have been very difficult for anyone to impact it politically. The only thing I wouldn't necessarily go along completely with was this thing that it was Michael Walsh's statement that if he was doing anything with Michael Lowry that it was in relation to his other activities. I think the context I was having the discussion with Michael was that there were other matters going on in the ESAT Telecom side of the house that may have been the reason for the payment or attempted payment.

Q. I am just interested in Mr. Walsh's having recorded you as being convinced that if Denis O'Brien was doing anything at all, that it was in relation to his other activities. That suggests that you were satisfied that there was no connection between what Mr. O'Brien had told you, or there could be no connection, and the second GSM licence and that it must have been connected to other activities. All I am trying to find out is whether it's right to say you were convinced of that?

A. Mr. Healy, given the evidence I have given up to now, I can't say how I could have been convinced at that point

in time.

Q. That's precisely my own view.

A. But what I can say is that we did have the discussion that if Denis made a payment, it could have been with regard to other matters, because the context we were having the discussion in was the licences process and the handling of that process by the departmental officials.

Q. Maybe I'll just read on. "Denis O'Brien in and out of the minister's office all the time and each time he came out he had more" is that 'pointers' or should it be 'routers'?

CHAIRMAN: Let's press on, Mr. Healy. It's not going to be the end of the world, that word.

MR. HEALY: "Given that anything done even in relation to Denis O'Brien's other activities would have a potential impact on the IPO it was critical that ESAT Digifone and its directors be fully protected from any responsibility for ESAT Holdings IPO document. BM undertook to review this with McCanns.

The 15/10/1997" this is a phone call from you to Mr. Walsh. "BM phoned. He had met with DOB. DOB's main concern" this presumably is a reference to your meeting late on, or whatever time it was, on the night of the 14th, would I be right in that, Mr. Maloney?

A. I am just reading the statement so I can see if I can

help you with that, Mr. Healy. Yes, I believe that was following my meeting with Denis on the evening of the 14th because he specifically referred to both the Sunday Times and the Irish Times in the context of ^ Telenor at that meeting.

Q. "He had met with DOB. DOB's main concern was if the conversation ever came into the public domain, even though nothing had happened, they would do significant damage to the company. Denis O'Brien was particularly concerned if the Telenor personnel were made aware of the conversation then it would leak into the public domain. An article which appeared in the Sunday Times on the 12/10/97 showed how leaky and incautious some of the Telenor personnel were. Denis O'Brien felt that the ESAT Digifone directors were properly protected in the IPO document as the letter of consent from ESAT Digifone and the disclaimer statement had been prepared by William Frys to ensure that protection. Denis O'Brien wanted to deal with the situation on the basis that Barry Maloney, Denis O'Brien, Michael Walsh had agreed on the 13th of the 10th" that was to provide the letter, isn't that right?

A. That's correct.

Q. "Michael Walsh confirmed that this was his preference also. As Barry Maloney was satisfied nothing had happened and DOB had assured us that nothing had happened by taking it further we were simply trying to

avoid taking a decision and implying that we weren't sufficiently satisfied when the only two people involved, directly or otherwise, were assuring us that there was not an issue. Michael Walsh said Barry Maloney should focus with McCanns on ensuring the wording was correct to protect ESAT Digifone directors and that the disclaimer was appropriately positioned and that the consent letter be re-examined in the light of the discussions."

A. Sorry, Mr. Healy, if you went to the bottom of page 2, I just make the comment in terms of my satisfaction that nothing had happened in the same context as I mentioned earlier on.

Q. I can see your point. Nothing had happened other than the things you have described which caused alarm for you. You were told that a payment had got as far as being stuck, if I can put it that way?

A. Correct. I believe what Michael was referring to, he said nothing had happened, was that the assurances were given that no final payment had been made, because that's what the letter from Denis was part of.

Q. "Michael Walsh phoned NOB." That is Neville O'Byrne?

A. I don't know.

Q. You didn't write it, yes, of course. "... to ask him to review the ESAT IPO document in the context of possible exposure to ESAT Digifone directors. No background information was provided to NOB. NOB

having reviewed the document felt there was no major difficulty. However, in particular from page 28, there were a large number of statements which needed to be checked. Page 44, there was a description of ED services." And so on I think I can go down to the last, second last sentence. "Overall NOB felt that the disclaimers would not fully protect one from being sued but the wording was as good as it can get. NOB felt ESAT Digifone should be particularly careful on the wording of any consent."

Then we have a reference to you again. "Barry Maloney phoned Michael Walsh at 19.12. Barry Maloney had talked at length with Fergus Armstrong, who was of the view that no matter what disclaimers were in the document we should take it as a working assumption that we will be sued. Michael Walsh said to Barry Maloney that, by definition, if someone is suing, then they will sue everyone. However, the question is whether there was ^ any risk. In Michael Walsh's view if people buy shares and there is a very clear disclaimer saying ESAT Digifone directors had nothing to do with the IPO document and took no responsibility for it, then people were being put on notice. Particularly in a situation where we had no reason to believe that anything untoward had happened, I could not see how any investor who had bought on the basis of the IPO

document could hope to successfully sue us. Given the timing of the conversation in 1996, Barry Maloney/Michael Walsh both noted that Denis O'Brien had had no connection with the Department of Energy and Communications in the mobile business during 1996 and that, anyway, the Department of transport Enterprise and Communications had set up a very independent process."

A. Can I just clarify there, I joined the company in May '96 so I wouldn't have had any kind of opinion prior to that because I wasn't here. But from '96 on

Q. - from May '96?

A. From May '96 I think the point is that I was dealing with the Department

Q. You are aware that Mr. O'Brien would have been dealing with the Department in connection with the formalisation of the licence between October of '95 and May of '96?

A. That's correct.

Q. And that would have entailed quite an amount of contact, wouldn't it, maybe not personally between him, but between the company and the Department?

A. Yes, that's correct.

Q. "16th October '97, Barry Maloney phoned Michael Walsh at circa 19:00 to say that McCanns had prepared a draft opinion which he had not yet formally received. BM said he had been through the background in detail with

McCanns and that despite the fact that Barry Maloney believed that nothing had happened, they felt that there were a number of serious issues facing Digifone. I suggested to Barry Maloney that Denis O'Brien should see McCanns as he was the only one with direct knowledge, if there was any." There seems to be some break. 'Call resumed'. "Barry Maloney said that Fergus Armstrong was not happy to meet Denis O'Brien before his opinion had been sent out. I told Barry Maloney that that was absurd. There was a duty to the company in giving the advice to be as fully informed of the facts as possible in giving the advice. Barry Maloney undertook to take the matter up with Fergus Armstrong."

"17th October, 1997. Michael Walsh had received a faxed copy of the Fergus Armstrong memorandum of advice." So somebody had faxed it to Mr. Walsh, whatever about the other shareholders or directors. Do you know whether it was you did that or whether it came directly?

A. I can't recall, Mr. Healy. It could have been either.

Q. "Michael Walsh sent a copy of this to Dermot Desmond.

Michael Walsh explained to Dermot Desmond that he was concerned by the divergence between the tenor of memorandum of advice from McCanns and the statements and views that Barry Maloney was expressing to Michael Walsh. In speaking to Michael Walsh, Barry Maloney was convinced that no money was paid by Denis O'Brien

to Michael Lowry and that if anything was contemplated it was in the context of other ESAT Telecom activities and not relevant to the mobile." Well, I think that you have already referred to the fact that the word 'convinced' isn't entirely an accurate reflection of your view, is that right?

A. That's correct.

Q. "Equally

A. May I also add, Mr. Healy, that the wording of Denis' letter that he gave us was very specific in the context of ESAT Digifone Limited and the licences process.

Q. I see. "In speaking to Michael Walsh, Barry Maloney was "Equally the conversation between Barry Maloney, Denis O'Brien had been so inconsequential that it had been forgotten about for a year. This contrasted markedly with the tenor of McCanns advice which, while carefully drafted, were based on the assumption that Barry Maloney had reasonable ground for believing something untoward may have happened."

If I could just deal with that point, that the conversation had been so inconsequential that it had been forgotten about for a year. Am I right in thinking yesterday that you said to me the conversation was one which you wanted to forget about, which you wanted to put out of your mind. It wasn't one that was easy to forget.

A. That's what I said.

Q. So did you say anything to Mr. Walsh which could have led him to form the impression that you thought it was an inconsequential conversation?

A. I would have been very clear with Michael Walsh all through this process as to what my concerns were, that I was prepared to accept Denis's word, his statements and the letter saying that no final payment had gone through. But I was still concerned about this intermediary issue.

Q. "Dermot Desmond believed that there needed to be a full discussion of the matter between all shareholders and asked Michael Walsh to set up a conference call for the 16th October at IIU. Dermot Desmond was very concerned to meet with Barry Maloney as he was unsure whether Barry Maloney's recollection of events and, in particular, Barry Maloney's desire to postpone the IPO until post the Tribunal, was motivated by a genuine desire to protect ESAT Digifone or was part of the ongoing personal battle between Denis O'Brien/Barry Maloney. It was very disturbing to Michael Walsh/Dermot Desmond that Barry Maloney had managed to forget the conversation for a year and then (a) only surface it when the Tribunal was announced and (b) only focus on it in the context of the IPO." You have already dealt with that in your own evidence, isn't that right? This, after all, is Mr. Walsh's own analysis of the situation. I am not suggesting that

you were part of any conversation which led Michael

Walsh to say this. Would I be right in that?

A. That's correct.

Q. "Michael Walsh/Dermot Desmond were convinced that if

anything untoward was done, it would surface as part of

the Tribunal and we needed to satisfy ourselves insofar

as was possible that nothing had been done. It was,

however, a very difficult situation. A year after a

first conversation there were subsequent conversations

denying anything had taken place. It might be

possible to prove something had happened but, by

definition, it was impossible to prove that nothing had

happened. For example, it might be possible to get

the same assurances from Michael Lowry as had already

been received from Denis O'Brien but could one rely on

either or both assurances if they were seeking to

mislead? In practical terms, one has to accept the

word of the person involved unless there was some

evidence to the contrary, which there was not. Dermot

Desmond felt that if we were certain that something had

happened we should make a disclosure to the Tribunal.

However, Barry Maloney believed nothing had happened.

Denis O'Brien had stated (in writing also) that nothing

had happened and, in such circumstances, there was

nothing to say to anyone. Saying something implied

that we believed both Barry Maloney and Denis O'Brien

were wrong.

Michael Walsh then refers to phoning Rolf Busch and Arve Johansen. Rolf had left and Arve was out of the office. Arve phoned Michael Walsh back, (15:00 in the car to Galway) and briefed Arve on the events of the week. Arve was very concerned as he was firmly of the view that the license competition had been run on an arms-length basis and the quality of what had been delivered had reflected the merit of the ESAT Digifone bid. Arve was concerned that he had not been made aware of the conversation when it initially happened and to what extent this was part of the Barry Maloney/Denis O'Brien battle. Michael Walsh said that Michael Walsh/Dermot Desmond viewed it as a very critical issue and it needed to be discussed in full.

A conference call was agreed for Monday 20th October at IIU."

Then he describes going on about organising the conference call and we have seen your ^ memoranda about that as well?

A. Can I just make one comment about that?

Q. Yes, do.

A. This reference to this BM/DOB personal battle. To the best of my recollection this was never raised by Dermot Desmond with me at any stage in the earlier conversations that I had had.

Q. Though you mentioned this morning that he had alluded

to it at a meeting?

A. Correct, when everybody was the shareholders or directors were around the table he did allude to it. But in the discussions with me on the 13th and the 14th when we talked, talked by phone, never once did he raise that in any size shape or context.

Q. Although he did say to you that he felt, he said to you, in what I feel from your note was a somewhat critical way, that you should have raised this matter with him in 1996 and that you could be exposed for raising it at a late point, at a late stage in 1997.

A. That's correct.

Q. And in the course of that conversation he never said to you that he thought you were raising this as part of an ongoing battle with Denis O'Brien?

A. Correct, he never made any reference to that.

Q. Did Mr. O'Brien ever say that to you in the course of any of these meetings?

A. Not that I can recollect, with the exception of the meeting in his home on the night of the 14th October where, I believe towards the end of the meeting, he was getting agitated and said that I was trying to make life difficult

Q. make trouble

A. make trouble for him or make life difficult for him.

I can't remember which words he used. But that was the only time where he at any stage suggested to me that I

was making life difficult as opposed to doing what I believe were my duties as a director and CEO.

Q. There is then a reference to the meeting of the 20th October. "There was a conference call from IIU attended by DOB/Arve on behalf of Telenor. John Callaghan/Leslie Buckley attended on behalf of ESAT Telecom; Barry Maloney on behalf of ESAT Digifone and Michael Walsh/Dermot Desmond on behalf of IIU."

I didn't understand your note of that meeting to suggest that Mr. Callaghan and Mr. Buckley were attending on behalf of ESAT Telecom. Am I right that they were there as directors of were they directors of ESAT Digifone?

A. Yes, they were the joint the three individuals who were joint directors were Leslie Buckley, John Callaghan and Denis O'Brien.

Q. But they were there as directors of Digifone, isn't that right?

A. That's correct.

Q. Yes, of course. This was one of the meetings which has been described as a meeting of the shareholders but not a shareholders meeting. I am sorry if I don't seem to take that distinction too seriously, Mr. Maloney, but I can see that if Mr. Callaghan and Mr. Buckley were there on behalf of a shareholder, then the shareholders on whose behalf they were there had to

be ESAT Telecom, isn't that right? If they were there representing a shareholder the only shareholders they could have been representing was ESAT Telecom?

A. Well, because they were joint directors, I don't know, but I suspect they could have been representing either.

'I don't know', Mr. Healy, is the answer.

Q. Maybe the less we try to confuse things with these strange descriptions of the meetings, the better.

"Michael Walsh summarised the position and Denis O'Brien described in detail what had happened, the context in which it had happened and the fact that nothing had actually transpired. He explained the initial conversation with Barry Maloney as being part of a wind-up because he was getting a lot of grief from Barry Maloney about paying expenses which arose as part of the bid process. Given Denis O'Brien's personality and focus on money, the "wind-up" appeared plausible to the Board. At no stage did Barry Maloney contradict any of the description of events described by Denis O'Brien. DFD informed DOB that he was very upset by the events. While he accepted DOB's assurance, if it turned out that DOB was misleading him DFD would be suing DOB for any damage. This went for anyone else who had done anything which might undermine the company in any way. DFD wanted written assurances from each of the shareholders that nothing had been done which would in any way impact on the mobile licence. The directors

were all of the opinion that we should take all reasonable steps to ensure that nothing untoward had happened and, having taken such steps, unless there was evidence to the contrary, should ensure that protection was maximised in the context of the IPO, by ensuring that ED was not responsible to potential investors for the document. A substantial discussion took place as to what could be done to generate some comfort that nothing untoward had happened. It was recognised that it was impossible to prove as if people were intent on being dishonest it could be difficult to find where and consequently proving something did not happen was an impossibility. After a discussion it was agreed that

(1) Denis O'Brien would provide a letter as previously agreed.

(2) JC would approach KPMG and get confirmation from them that they had found no questionable transactions in the books of ESAT Holdings" would that be a company with which Mr. O'Brien would be associated?

A. I believe that's right.

Q. "And Barry Maloney would confirm that there was nothing untoward in Digifone. In addition, Michael Walsh and Barry Maloney would meet with McCanns to tell McCanns what had been decided and to instruct McCanns to do something." I think the note isn't very clear after that.

Could I just go back to the previous page and I have

already drawn one of the passages in this note to your attention where Mr. Walsh says that he explained the initial conversation with Barry Maloney as being part of a wind-up because he was getting a lot of grief from Barry Maloney about paying expenses which arose as part of the big process." Do you recall Mr. Walsh actually using that express 'wind-up'?

A. I don't recall Mr. Walsh using that. As it's written here, my reading of it is perhaps that Mr. O'Brien might have used that term that Michael Walsh was referring to. He may well have at the meeting of the 20th, given that that was the meeting, I recall, where the word 'bravado' was used. Which means the two would have meant the same thing. So similar.

Q. If you go down a few lines where Mr. Walsh states, "At no stage did Barry Maloney contradict any of the description of events described by Denis O'Brien."

Have you any comment to make in relation to that note?

A. No. Other than that my recollection of the meeting on the 20th was to give Denis O'Brien an opportunity to explain, you know, what had been said and in what context.

Q. Do you not think it would have been appropriate if Denis O'Brien referred to 'bravado' or having made these remarks out of bravado, that it would have been appropriate for you to say that that was the first time that you'd ever heard that explanation for the remarks?

A. I am not sure that I didn't. I just don't have a record of it. I just cannot remember.

Q. You can remember that the word 'bravado' was first used at that meeting?

A. It was in the note that I used of the meeting of the 20th, in my handwritten notes, that he used the term 'bravado' to explain what had happened.

Q. Did it come as a surprise to you he was now using the term 'bravado' to explain what had happened?

A. It did, yes.

Q. This was a completely new explanation as far as you were concerned, wasn't it?

A. Yes, it was.

Q. I mean, was it consistent with the previous explanation he had given you on the 8th October?

A. No, it was not. Nor was it consistent with what he said to Michael Walsh and I on the 13th.

Q. In each of those explanations he had referred to a payment not going through, isn't that right?

A. That's correct. In all the meetings with me between the 8th and the 14th, what he was seeking to do was to reassure me that no final payment had been made, to the best that I can recollect.

Q. I don't think there is anything significant on the next page and unless you feel that unless you feel that there is something you want to draw my attention to, and if you don't get a chance to draw to my attention,

you can later on. I think we should pass on to page

8. Do you see where it says at the top of the page

"BM phoned MW to discuss the issue."

A. Yes.

Q. This was, I think, prior to the meeting of the 23rd October of 1997. "Barry Maloney felt that if one stood back the fundamental issues was what should be done about the IPO. Barry Maloney did not believe any transaction went through. However, he believed that there was a third party involved, though he had no idea who that was. Barry Maloney felt that ESAT would be in trouble because of the intention." That's a fair description of the some of the concerns you had,?

A. That's correct.

Q. "ESAT Digifone"

A. can I just say, Mr. Healy, with regard to the discussion of the 20th my recollection of that meeting was to give Denis an opportunity to tell people about his version of it. So I am just going back to the context when all this happened, because this is two days later where you now have this note from Michael.

Q. Yes, and what point are you making, because I don't quite follow?

A. The only point being that during the meeting of the 20th, it could well have been that this was Denis's opportunity to say his version of what had happened.

So it wouldn't surprise me at all that if at that

meeting on the 20th, I was wasn't very combative, if you like, of what had actually happened.

Q. As far as you were concerned?

A. As far as I was concerned, exactly. Just to put that in context.

Q. And you feel that this was an indication that you were on the phone to Mr. Walsh at this stage indicating your view of the matter, that regardless of whether anything had happened or not, there had been an intention to do something and that intention had got as far as a third party who was now involved?

A. No. My understanding and my fears would have been expressed to Michael Walsh going back to the 13th of October, which was a week before this. Around the 'intermediary' and the 'stuck' piece.

Q. But how did how does this note of the conversation that Mr. Walsh had with you before the meeting of the 24th, how does that how does anything in that cause you to refer back to the meeting of the 20th?

A. Sorry, only I was linking it back to the question you asked me about the meeting of the 20th when Denis decided it was bravado. Why I you know, why I wouldn't have been have said nothing which Michael wouldn't have noted, which I thought was your question.

Q. You, if you look at this note Mr. Walsh doesn't say, for instance, you said '^ all that reference to bravado was new to me. I never heard any of that', then go on

to say, you know, 'no transaction went through here, but I believe there was a third party involved', I don't know who that was. I felt that ESAT could be in trouble because of the intention.' I can understand that this is putting your side but at no point here do you say, 'Look, this bravado is complete news to me'?

A. No, that's true.

Q. Because if you had raised that issue of bravado, wouldn't you have been raising an issue as to the credibility of Denis O'Brien?

A. Which I believe at the meeting of the 23rd I did. The meeting of the 23rd, I believe I referred to the fact that this bravado statement on the 20th was the first that I had

Q. you certainly made a note in relation to the meeting of the 23rd that that was the first occasion on which the bravado explanation had been mentioned but do you recall whether you actually said it at the meeting?

A. Of the 23rd?

Q. Yes?

A. Yes, I believe I did.

Q. Well, we may be able to do something about the note of that meeting and rather than waste time on it now, if there is a note which will presumably clarify the position. "Michael Walsh pointed out that Telenor had appointed a CEO, (Jan Edward). Barry Maloney agreed that maybe Denis O'Brien had not been in control of

ESAT Digifone." This is a reference to some details at the meeting. "Barry Maloney was continuing to examine and think about how the selection process could have been corrupted. Barry Maloney was also worrying as to why Denis O'Brien made statement two Mondays in a row that nothing had happened. Barry Maloney was questioning why Denis O'Brien should have given him this assurance. Fergus Armstrong had advised" then that's protected "Barry Maloney was very exercised saying he was not going to be the bad guy, that everything he had done has been above-board. Denis O'Brien/Michael Lowry were very close, according to Barry Maloney and all sorts of things were going on. He had asked Denis O'Brien when he came back from his honeymoon about the conversation." What's that about, that last sentence, first? If we go backwards, who do you think is being referred to there? "He had asked Denis O'Brien when he came back from his honeymoon about the conversation"?

A. I presume that was in the context of the conversation I had with Denis on the 8th October following his return from holiday.

Q. I understand that. It says "Barry Maloney was very exercised, saying he was not going to be the bad guy, that everything he had done was above-board." This was in reference to what you felt you had a duty to do.

Denis O'Brien/Michael Lowry were very close, according

to you, and all sorts of things were going on. What was that a reference to or what knowledge did you have of how close Denis O'Brien and Barry Maloney were?

A. I just would have known that they knew each other well. He would have been talking to him regularly about issues with ESAT Telecom, about issues around deregulation issues, you know, things that were causing difficulties for the business.

Q. How did you think that Denis O'Brien was talking to Michael Lowry that frequently?

A. I don't know but I would have been I would have been generally aware of it.

Q. Were you at present at any of these meetings?

A. I would not.

Q. Would you have learned about them from Mr. O'Brien or from somebody else?

A. If I could just make sure I am very clear here: I would have had a meeting with the Minister myself at one stage when we were having difficulties with the roll out and planning regulations to do with the network, and that meeting was organised for me by Denis, so in that context I would have been aware that he had that direct contact with him because I wouldn't have been able to get a meeting.

Q. With the Minister?

A. That's correct.

Q. Had you met with the civil servants?

A. I had met with John Loughrey

Q. who was the Secretary?

A. who was the Secretary on a couple of occasions as well over similar matters.

Q. But in order to go higher than the Secretary, you had to get Mr. O'Brien to intervene?

A. Well, yeah, I think that would be correct. Maybe 'intervene' is the wrong word.

Q. 'Intercede' might be a better word. He had to go and arrange it for you, in any case?

A. Put it this way, I didn't know the Minister from Adam so to get an audience, Denis would have organised that for me.

Q. "Michael Walsh, at the end of call which lasted one hour," - nearly 24 minutes - "Michael Walsh agreed that Barry Maloney should again talk to Fergus Armstrong on what the board would need to do to act reasonably in the circumstances."

The next note is a note of the 23rd, it's not a note of the meeting but is a note of the conversations he had.

Now, there is a reference here to the Telenor payment which would crop up in the context of the meeting on the 23th, I think it might be no harm to mention it.

"Barry Maloney phoned. He had talked to Arve Johansen in relation to the Telenor payment. The amount involved was \$50,000 and it was paid into an account in

Jersey. Arve Johansen said that it was a political contribution to Fine Gael. He had received a bank account number and an invoice. The name of the person on the account was David Austin and this had occurred in December of 1995. According to Barry Maloney, there was a close personal relationship between Michael Lowry and David Austin. Barry Maloney queried whether David Austin was in charge of official fundraising for Fine Gael at that stage. Michael Walsh said he had no idea. Barry Maloney said the money paid out would have been invoiced back to expenses at ESAT Digifone."

How did you know that there was a close personal relationship between Michael Lowry and David Austin?

A. I am not sure. I was generally aware of it but I am not sure how I would have been aware of it.

Q. Had you ever met Mr. Austin?

A. No, I had never met Mr. Austin.

Q. You had only met Mr. Lowry in the context of the meeting you described a moment ago?

A. That's correct. I mean, other than when the licence was issued we would have been but in terms of a private meeting, that's true.

Q. From whom do you think you could have got the impression that there was a close personal relationship between Michael Lowry and David Austin?

A. I can't recall, Mr. Healy. I mean, it could be something as simple as horse-racing is something I like, it could have been as simple as that

Q. Nothing wrong with that?

A. Sorry?

Q. Nothing wrong with that. And you might have come across him in that context, do you think?

A. Or I might have heard it in racing circles.

Q. Mr. Walsh queries whether David Austin was in charge of official fundraising for Fine Gael at that stage. Why did you raise that query?

A. It just, Arve had told me that the meeting, that the payment had gone to David Austin, so I was asking Michael was David Austin the fundraiser because that, to me, would have been a logical reason why David Austin would have been involved. I know at a subsequent meeting Denis would have described David Austin as a 'bagman', similar to, I think, maybe Des Richardson in Fianna Fail, something like that. It was described as the equivalent to something like that.

Q. At a quarter to four there is another telephone call. "Barry Maloney telephoned Michael Walsh in relation to the board meeting to be held in the evening. We had a discussion on whether Fergus Armstrong should attend. FA felt that if he was present, a part of the discussion at least would be privileged. If part of the purpose is to hear both sides, then we are increasing

the hazard of the company and the individuals if no legal advisor present. According to Barry Maloney, Fergus Armstrong felt we should also be deciding on what strategy we should use in relation to the Tribunal, both on behalf of the company and the individual. Everyone who heard the information can be questioned. By having Fergus Armstrong present, Fergus Armstrong felt he could guide the position. Fergus Armstrong was of the view that in and of itself the payment from Oslo should be giving people something to consider. Barry Maloney raised the question of what we need to do to protect for the Tribunal ignoring the IPO. Michael Walsh felt that was the wrong question. Barry Maloney/Michael Walsh both agreed that nothing had been done which could have influenced the mobile licence and that from the Digifone prospective the issue that we were meeting on this evening was clearly focused on the IPO and what was necessary to enable that to happen. It was agreed that Fergus Armstrong should attend the meeting." So he had not attended the meeting of the 20th, is that right?

A. That's correct.

Q. He was merely on call?

A. That's correct.

Q. Now, we go onto the meeting itself.

"Michael Walsh opened the meeting saying that Fergus

Armstrong was present as legal adviser to the board to enable the board to consider the advices provided by Fergus Armstrong and to make the conversation privileged. The focus of the meeting was purely on Digifone and as a board we needed to come to a decision on whether or not to approve the IPO which was underway. Fergus Armstrong said that the meeting should not be deemed a formal board meeting and his advice was being put forward in the context of the IPO." Then there is a reference to protected views of Fergus Armstrong.

A. Could I make a comment about that?

Q. Yes.

A. It wasn't clear to me that we were part of any process to approve the IPO as directors of ESAT Digifone.

Q. Yes.

A. So I just make that comment. It's just

Q. I understand the point

A. I have read Michael notes. "We needed to come to a decision whether or not to approve the IPO which was underway." .

Q. You did have a role in relation to the IPO in that you had information now by 'you' I mean Digifone and its directors had information which could be material to any decision a shareholder or a potential shareholder might make if he was going to buy shares in ESAT Telecom, isn't that right?

A. That's correct.

Q. And the question you had to decide was what duties did you have in relation to that information if the Prospectus was going to contain some endorsement from you?

A. I think that would be a correct yeah, it's a little bit different to approving it. The advice

Q. I agree with you but I just want to be clear that we are both ad idem. You were not approving the IPO; whether you approved or not was beside the point?

A. My point was even at the end of all of the process we felt we had to go through I am not conscious that we ever approved the IPO. What I was very conscious of was that we had a process, one which we felt we had to go through as directors of the company. Once we had completed that process, we handed over the results of the process to the advisers and directors of ESAT Telecom group for them to decide on what to do with the IPO. Just for the sake of clarity.

Q. "Dermot Desmond expressed the view that the CEO did not really believe the conversations were relevant to Digifone. If Barry Maloney believed they were relevant, then Barry Maloney would have informed the board immediately. Denis O'Brien said he had raised the issue and Barry Maloney was concerned. Barry Maloney said there were various conversations and that Denis O'Brien had explained to him that there was an

intent to make a payment but it had not happened.

Dermot Desmond queried whether any actions had taken place, whether there was anything through a third party directly or indirectly and whether any actions were intended for the benefit of ESAT Digifone as opposed to ESAT Telecom. If they related to ESAT Digifone, they were not done with either board or shareholder approval." I think you'd agree with me though, I assume, that you'd agree that if Dermot if Denis O'Brien did something which might have affected the licence or if he did something improper in connection with the application for or the granting of the licence, that could have an impact for ESAT Digifone as soon as ESAT Digifone became aware of it even if ESAT Digifone hadn't approved of it or authorised it?

A. I'd agree with that if they had.

Q. Yes. "Fergus Armstrong said that there was need to understand precisely the actions and how they have explained. Dermot Desmond queried the obligation of the directors - was it to carry out a Tribunal or to take someone's word? Rolf Busch said that based on Fergus Armstrong's memorandum of advice, particularly par 3 and 8, the inevitable conclusion was that the IPO should be postponed. Michael Walsh responded that Fergus Armstrong's memo was based on the belief that there were reasonable grounds. Fergus Armstrong had not heard the view from Denis O'Brien. Fergus

Armstrong agreed with Michael Walsh. Dermot Desmond said the issue needed to be discussed in the context of responsibilities to the company and the damage that could be done with all of the ESAT companies. Fergus Armstrong said it was open to the directors to accept the written letter of Denis O'Brien and the auditors.

Dermot Desmond said the CEO did not believe there was an issue. Fergus Armstrong's understanding was that there was an explicit request to Barry Maloney for refund of part payment."

Could you just deal with those two sentences for me.

In the first place, there is a record that Mr. Desmond said that 'the CEO', meaning you, 'did not believe there was an issue'. Is that consistent with everything you have told me or recorded up to now?

A. Only in the context again that in most of my discussions with both Michael Walsh and Dermot Desmond, they were focusing on the issue, as they described it, as proof of a final payment being made and I had no proof of a final payment being made then and I have no proof now.

Q. But what you did have was a statement of an intent to make a payment and a statement of bringing that payment as far as a third party?

A. Correct. And I believe that Dermot and Michael would have been well and fully aware of that all along the process.

Q. For you that was an issue but I don't think they saw it as an issue, or at least not as an important an issue as you did?

A. Perhaps. I think it's a question for them.

Q. "Fergus Armstrong's understanding was that there was an explicit request to Barry Maloney for refund of part payment." Do you know what that is a reference to?

A. The context of the original discussion that had occurred about the success fees was, you know, I was complaining about 'How many of these are there?', you know, 'is it four, is it 14?' you know? Part of what I was trying to get a handle on is 'What's the financial exposure to the company?' When Denis made the statement that he did, you know, 'What are you complaining about? I had to make two payments of $\frac{1}{2}$ 100,000'. That was my recollection of the discussion we had in October/November. One thing Fergus had asked me was did I believe that Denis was looking for some kind of refund of those payments? I never felt my recollection of what was said in '96 went that far, but Fergus had asked me two or three times, but I could never get enough clarity in my own mind to say, and I believe he was looking for me to refund, in some sense.

Q. "Barry Maloney said that the context of the discussion was success fees. Barry Maloney was receiving invoices covering consultants and advisors. Denis O'Brien told Barry Maloney to relax, that Denis O'Brien

had made 2 x 1/2100,000 payments. Barry Maloney told Denis O'Brien that he didn't want to know about it, that it had nothing to do with Digifone." I am not sure whether you agree, or do you agree, that Denis O'Brien said to you 'to relax'. This seems to be related to a later description of the events as being more sort of jovial or jocular than you have given evidence?

A. I believe that may have been in the context of me complaining about this list, 'How long was it, how short was it?' I think part of Denis's statement was you know, 'Relax, what are you upset about? I had to make two payments of 1/2100,000.' I believe that's the reference, Mr. Healy, but I couldn't be sure in terms of what Michael was noting.

Q. "Denis O'Brien said he wished to assure everybody that nothing had been done. He couldn't recall the detail of the conversation but it was a question about who was paying Jim Mitchell and PJ Mara. Five to six weeks ago Barry Maloney had raised the issue with him.

Dermot Desmond again tried to get an answer as to what the directors were required to do. Could they accept the word of the directors - what else was feasible?

Arve Johansen said his concern was the IPO. Barry Maloney said the issue was weighing on his mind. Barry Maloney had no reason to disbelieve Denis O'Brien but

Barry Maloney felt uneasy. Dermot Desmond said the board should have been advised" what does that mean?

Was that a reference to 1996?

A. I don't know Mr. Healy. Could I just add one comment to the earlier piece? There is reference here about 'Success fee for Jim Mitchell'. I wasn't aware of any success fee to Jim Mitchell. He was not one of the people

Q. the people that seem to have been mentioned, according to the other evidence, were, certainly, PJ Mara, Mr. Kelly and Mr. Cloonan, is that right?

A. Those three and I believe I also saw a reference in an earlier one, Enda Hardiman.

Q. I think you are right. Though Mr. Mitchell's name appears in a few places but then seems to be discounted on the basis that he was a more regular consultant, is that right?

A. Correct. Mr. Mitchell has provided consulting services to the company since I arrived in ESAT Digifone. He had been, prior to that I believe, maybe for Communicorp, or ESAT Telecom, I am not sure which.

Q. Since before you arrived?

A. Correct.

Q. "Rolf Busch said he had difficulty with a discussion. The initial discussion was in October '96 and confirmed in July this year." There must be some mistake in his reference to July because I don't think there is any

evidence to that effect from any witnesses. "Barry Maloney said he accepted the assurances but if he did, why did he then seek legal advice?" That must be Mr. Walsh's own note. "Barry Maloney responded that he was worried because of the sequence of events. While he accepted Denis O'Brien's word, he believed a third party had knowledge. John Fortune queried whether there had been an intent to make a payment. Barry Maloney responded that he believed no payment had been made to Michael Lowry but believed the company is at risk because a third party is aware. Denis O'Brien said there had been no intent to make a payment and no payment had been made.

Barry Maloney recounted the history of the events - some of the dates were wrong. Denis O'Brien/Barry Maloney had been having a discussion on success fees. Jim Mitchell, Stephen Cloonan, PJ Mara, Knut Digerud had been aware of the conversation and Barry Maloney had been expressing his frustration. Denis O'Brien said he had had to make two payments. In a conversation on 25/8/97 (dates wrong) Denis O'Brien reminded Barry Maloney of the discussion. Denis O'Brien said he didn't actually do it - you must be relieved. The comment was repeated to Barry Maloney on the following Monday. The IPO document was published on 8/9 October and BM sought advice from Fergus Armstrong. In discussion with Denis O'Brien, Denis O'Brien had said

payment was intended to go through but didn't. In total, there were four separate discussions. On October 13 BM shared with DOB the preliminary advices of McCanns. Barry Maloney told Denis O'Brien that he would have to share the opinion with the directors if the IPO was not postponed. On the 13th October, a meeting was arranged for Denis O'Brien/Barry Maloney/Michael Walsh at which it was agreed that Barry Maloney would get a letter from Denis O'Brien confirming that nothing had happened. Barry Maloney had sought official advice on behalf of the company."

Could I just go back to two points in relation to something that was mentioned by Mr. seemed to be mentioned by Mr. Desmond at this meeting and which he had mentioned to you, that you should have brought this matter to the attention the board when it first occurred? He was clear about that, that it should have been brought to the attention of the board, isn't that right, as a whole, the board?

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

Q. Although by the time he first learned of it he was being made aware of it along with Mr. Denis O'Brien, Mr. Michael Walsh and nobody else, isn't that right?

A. I think the sequence of events was that Denis asked Michael to join us for the meeting of the 13th.

Q. I know that. I am simply talk about the circle of

people who were made aware of it. Mr. Desmond was aware of it. As far as you know, did he go to the board with immediately?

A. No. As far as I understand after the meeting that Michael Walsh had with us, that he called Dermot and informed him. That's what I understand happened. But I could be wrong. Can I also just refer to the statement that said 'Four separate preliminary advices to McCanns'. I wouldn't agree with that. There was one set of preliminary advices - were the ones I gave to Denis on the 13th.

MS. FINLAY: I think there may be a line missing in the typewritten version, it would appear from the handwritten photostat. It's very indistinct but it looks to me as if there is a line missing before the word 'Preliminary advices' from McCanns. See the bottom line there, it's clearly missing

MR. HEALY: No, in total there were four separate

MS. FINLAY: Then there is a line missing before you come on to 'Preliminary advices'".

Q. MR. HEALY: I don't know what it is. I suppose we are just going to have to try to find out at some point.

"John Callaghan queried whether any third party had been named. Rolf Busch queried whether Barry Maloney must still have doubts as, despite assurances, he had felt it necessary to inform the board. Barry Maloney

said the first time he had any reason to be concerned was when Denis O'Brien raised the issue and confirmed nothing had happened." You are referring to August of 1997, is that right?

A. That's correct, I believe so.

Q. "Denis O'Brien said that he had raised the matter with Barry Maloney because he felt he had to reassure Barry Maloney that nothing had been done. Barry Maloney asked Denis O'Brien why he was saying nothing had happened and Denis O'Brien had said it got stuck.

Arve Johansen queried whether there was any way to slow down the IPO. Denis O'Brien Brian said no. Johnny Fortune queried what exposure the directors had, taking into account what we had done."

Then "Fergus maintained it was a middle man, intermediary and not just a bank involved. Rolf Busch reiterated that Barry Maloney must be concerned, otherwise he would not have informed the board. John Callaghan explained Barry Maloney role as feeling he had had to share the information. Barry Maloney confirmed John Callaghan's view. John Callaghan said that Barry Maloney had shared the information and it was now the responsibility of the board members to decide how to deal with it.

The discussion returned to the IPO and its timing

relative to the Tribunal. John Callaghan said that the IPO timing had nothing to do with the Tribunal.

Rolf Busch said he would not expose himself to any liability to get the IPO to fly. Fergus Armstrong suggested

John Callaghan said the directors were behaving responsibly. There had been a comprehensive discussion and people were reflecting on the issues.

John Callaghan wondered whether it was a collective or individual decision. Fergus Armstrong advised.

Johnny Fortune said we were trying to deal with interpretation. There were conflicting recollections of conversations. They were no facts to sustain them and we were dealing with Barry Maloney's interpretation of conversations.

The discussion then turned to the matter where there were" illegible "and those relevant to the 25,000 a plate dinner with Bruton. David Austin had organised and the money was paid into an account in Jersey. Telenor are to check the paperwork associated with the payment.

In conclusion, Fergus Armstrong reiterated the view that no US advice had been taken and Barry Maloney confirmed that if he was called to the Tribunal his statement would cover what he had said this evening.

Fergus Armstrong pointed out" then something is

protected by privilege "Rolf Busch suggested as a way of going forward that Fergus Armstrong would get US advice. We would draft a letter to the underwriters clarifying the limit of ESAT Digifone's responsibility in addition to the Denis O'Brien, Barry Maloney and KPMG letters previously discussed. It was agreed to resume the discussion next Thursday 30th at Baggot Street."

Then I think the meeting passes on to I don't think there is anything else significant in that note until you get to the meeting of the 4th and we have already got a very good record of that meeting from Mr.

O'Connell, Mr. Halpenny and Mr. Lang: .

I am just looking at the time, Sir, and I am wondering whether it might be appropriate if we were to break for a short while to continue for another bit so as to get to the meeting of the 4th, which is essentially the end of the main period, and I don't think there is much else, except perhaps some new documents that were made available today, that might be disposed of quickly tomorrow morning.

CHAIRMAN: Yes. Well, it doesn't seem feasible that we will conclude Mr. Maloney's evidence this evening, although that had been my hope. I think it can be undoubtedly held that it will conclude tomorrow.

MR. HEALY: Yes.

CHAIRMAN: Would you be of a like view, Ms. Finlay, if we took a fifteen minutes break - perhaps primarily for the stenographer- if we went on from five past four until shortly after half past. It would mean that the concluding portion tomorrow is abridged that much further?

MS. FINLAY: I think Mr. Maloney has made arrangements that he can remain tomorrow to assist the Tribunal but it would be very difficult after that.

CHAIRMAN: I am conscious I must try to facilitate all witnesses and I appreciate his difficulty. I think then we will take that course, of a fifteen minute break, going on for a further half hour and then it would ensure that the remaining portion tomorrow will enable him to adhere to his arrangements.

THE TRIBUNAL THEN ADJOURNED NOR A SHORT BREAK AND RESUMED AS FOLLOWS:

THE TRIBUNAL RESUMED AS FOLLOWS:

Q. MR. HEALY: I now come to the meeting of the 4th November of 1997. This was a meeting of the directors of ESAT Digifone in the offices of IIU, isn't that right?

A. That's correct.

Q. What did you understand the purpose of that meeting to

be?

A. That Michael Kealey would put to Denis, as an external person who hadn't been associated with the process that we had been through, a list of questions.

Q. That he would, if you like, examine him on the issues that had been raised by you at previous meetings?

A. That's correct.

Q. And were you to be examined at that meeting at all?

A. I don't recollect that I was, no.

Q. Were you in attendance at the meeting from the beginning?

A. Yes, I was.

Q. And was it the intention of the board, or of the company, I suppose, that the people present at the meeting would listen to the explanations that Denis O'Brien gave on being questioned by Mr. Kealey, a solicitor who had not had previously any contact with the issues, is that right?

A. That was my understanding, yes.

Q. And that two matters would be dealt with, the conversations that had occurred between you or taken place between you and Denis O'Brien and the Telenor payment?

A. That's as I recollect it, yes.

Q. Were you aware that prior to that meeting, I think it was prior to that meeting, Mr. O'Brien had provided a written response to five queries contained in a letter

from Mr. Fergus Armstrong, or at least five queries

identified by Mr. Armstrong?

A. I can't say I am specifically aware of that.

Q. Were you provided with any documentation before you went to that meeting?

A. Not that I can recall but I may have but not that I can recall.

Q. I think if I just very briefly go through the responses that Mr. O'Brien gave to those five queries and another piece of information contained in that draft statement that he seems to have made available at some point in the course of this process, sometime prior to the 30th October of 1997. Now, I just want to know firstly, whether you have those documents? They are contained in a separate book of documents provided by Frys on the instructions of McCann Fitzgerald but containing notes prepared by, in part, and in other places, assembled by Mr. Owen O'Connell at a time when he acted for ESAT Telecom.

A. I have a document attended notes on the 4th and 5th November, 1997.

Q. Do you have the attendance notes? I don't know if you have got them in the same leaf but I'll just check it with Ms. Finlay. This is a separate book of documents and if you go to leaf number 6?

A. I have one headed "Attendance 5th November."

Q. No. I'll try and put it on the projector and you can

identify it and see if you have a copy of it. Do you see that document. They are what have been called the 'Owen O'Connell documents'.

A. If you just bear with me one moment. Yes, I have them here.

Q. And the question is whether Denis O'Brien's explanations of the conversation in October/November is in accordance with Barry Maloney's impression. And Denis O'Brien's response is "My recollection of the conversation is that it was non-serious i.e. two very old pals bullshitting about business, sport and women out on a run one Sunday morning."

I'll give you an opportunity to comment on that now?

A. I don't have any comment on it.

Q. Do you agree with it?

A. No, I don't.

Q. It's clear from your evidence that the conversation you had, or the relevant conversations, occurred in Denis O'Brien's office?

A. That's correct.

Q. One thing that is significant about Mr. O'Brien's recollection of the events is this: Regardless of where they occurred, is that he says it was a non-serious conversation.

A. I would not agree with that.

Q. Question number 2. "Whether it's reasonable that the comments of such a serious nature would have been made

out of bravado?" You can see how that question would arise from the evidence given by Mr. O'Brien or not the evidence but the evidence we have heard, sorry, from Mr. O'Brien and others concerning what happened on the 20th October, where the bravado explanation was raised for the first time, according to you. And the question is whether it was reasonable that comments of such a serious nature would have been made out of bravado, to which the response is "Yes, anyone who knows me knows I will laugh about anything. I just do not take myself or life in general too seriously."

Firstly, would you agree with that?

A. Sorry, would I agree with what, Mr. Healy?

Q. Would you agree with Mr. O'Brien that anyone who knows him would know that he would laugh about anything?

A. Denis would have a very good sense of humour and would enjoy the craic and making jokes about lots of things.

Q. He says "I have known Barry for 22 years and we have a most extraordinary" "We have had the most extraordinary experiences. Nothing is sacred between us and there was nothing that could not be joked about." Well, you agree that you had known one another for a very long time and you clearly had had a very close friendship?

A. That's correct.

Q. The next query concerns where the conversation took place and I think you have already dealt with that in

asserting that it did not take place on a run, according to you, but Mr. O'Brien says he agrees to differ with you on it. Do you see that at the end of his note?

A. I do, yes.

Q. Now, we come to the point that I may have raised with you earlier on this afternoon. Question number 4.

"Significance of the second $\frac{1}{2}$ 100,000." And the response of Mr. O'Brien is "There was no first payment nor any second payment. I said I had paid two amounts of $\frac{1}{2}$ 100,000 each out of bravado to persuade Barry to get the finger out and the bonuses to PJ Mara, Eddie Kelly and Stephen Cloonan. If payments had ever been made, most people would assume one of them would have been to Michael Lowry. But there is no one else who could be assumed to have got a payment reasonably assumed to have got a payment of that scale. There was nothing in the mind of either of us as to who a second person might be. As I have said, the whole thing was just bravado."

Mr. O'Brien is saying that there was no first payment and no second payment. He is saying both payments were simply mentioned in order to persuade you to do something. Now, would you agree with me that you certainly believed what he was saying, whether it had any effect on you or not, you believed what he said at

the time?

A. I think that would be my evidence, yes.

Q. And you didn't think he was joking about it?

A. No, I did not.

Q. And the next note doesn't seem to be specifically related to any particular question. Then it says "My recollection is that the conversation took place while running out on a mountain near Roundwood. However, it is over a year ago and" I think part of the rest of it is crossed out. The context is characterised as follows: "I had repeatedly asked Barry Maloney to pay out bonuses to all the people who worked on the bid on a contract basis. These were PJ Mara, Stephen Cloonan, Eddy Kelly and Enda Hardiman. Barry Maloney was dragging his feet, particularly with PJ Mara.

Every time I would meet Barry Maloney I would again ask him to pay them. It was getting embarrassing for me and the people concerned. This was the context of our conversation." Do you remember we were discussing this yesterday and the suggestion that you were delaying in paying people. Mr. O'Brien says here he had repeatedly asked you to pay particularly PJ Mara and Stephen Cloonan. Do you recall repeated requests to pay those people?

A. Certainly I would have remembered repeated requests by Denis. I think what would typically happen is Denis might meet these people in social circles around town

or at particular functions. And he was definitely feeling embarrassed about the fact these people hadn't been paid. What I said to him was, 'I'll pay them as soon as I have the documentation or some kind of authorisation to pay them, because at the moment, in the company, we don't have anything that would allow me to pay'.

Q. What I am trying to get at is do you recall this matter coming up with Denis O'Brien on more than one occasion?

A. Yes.

Q. It did? Because I understood yesterday that you said that it hadn't arisen on more than one occasion, but I could be mistaken.

A. No. Denis would have mentioned to me several times about paying these people.

Q. But I think the point you must have been making to me yesterday then was that you had received no paperwork from these people so there was no delay on your part in paying them?

A. Correct. If you read Denis's note here, actually I think it's a fairly good summary where he says, in particular, PJ Mara and Stephen Cloonan. Eddie Kelly, we had the paperwork, it was paid straight away. So I don't ever believe being asked to pay that one, I could be wrong but I don't recall, because we had everything we needed in PJ Mara's case and Stephen Cloonan's case, we had nothing until I got the memo from Denis which we

provided to the Tribunal. That was the first piece of authorisation, if you like, that ESAT Digifone had to pay.

Q. But therefore I am correct in thinking that the point was and the point of your discussion in October/November, 1996 was that not you were delaying in paying people where you had paperwork from those people but that you wouldn't pay people without paperwork?

A. That's correct.

Q. Now, the next document is a note in response to what's described as query number 5. And query number 5 relates to the issue concerning the involvement of an intermediary. The heading is "Payment got stuck with an intermediary." Now, before I read this out, can I ask you had you ever seen this document before the Tribunal brought it to your attention?

A. I don't believe I had, no. I couldn't be certain, Mr. Healy, but I don't believe I have.

Q. And the purpose of the meeting to which you had been summoned on the 4th November was to enable you and the other directors to make decisions about this matter, is that right?

A. It was to have him interviewed by somebody external to the process.

Q. But to enable you to make decisions, the directors of ESAT Digifone?

A. Yes. There might be a question of what those decisions were but...

Q. Had you ever received any documents containing information similar to the information contained in these responses that I have been reading out to you, before they were brought to your attention by the Tribunal?

A. Unless it was enclosed with the advices from Fergus Armstrong, which I'd need to check, but other than that, I don't believe so.

Q. Maybe you can check that and you can you needn't check it now but you can check that after your evidence today.

A. Sorry, Mr. Healy, what exactly do you want me to check?

Q. Whether you had received this information from Mr. Armstrong prior to going to the meeting?

A. Oh, I see, okay.

Q. Because I am sure you can agree with me that it would be relevant to know what Mr. O'Brien was saying and if this information was available, then the people making judgments at the meeting were surely the people entitled to know about it to ensure that they were as fully advised as possible, isn't that right?

A. This document was available prior to the meeting of the 4th

Q. I don't know.

A. That's what you want us to check.

Q. Exactly.

A. Okay.

Q. Or the information contained in it, because it may have been provided to you in another form, I don't know.

"In October of 1969 I had a couple of million pounds in cash from property and share deals, IFSC and sale of shares to US investors and things were going very well for me. Meanwhile Michael Lowry was under attack politically and in the media and someone had told me his company was bolloxed. I felt and still feel that Michael Lowry had always been above board and fair with ESAT, both as regards the licence and our disputes with Telecom Eireann. I decided that I would help him out about his company by giving him $\text{€}100,000$. I earmarked $\text{€}100,000$ of deposits with Woodchester for that purpose.

All of this information was on my mind at the time of my conversation with Barry on the mountainside. I pretended that I had already made the payment and I doubled it for effect. However, shortly afterwards I realised that the payment, if made, would be misunderstood. Thank God I saw sense and did nothing about it. Whether or not I used the phrase "Stuck with an intermediary" I meant that the earmarked amount was left in Woodchester. For the record, I frequently had discussions with Michael Lowry concerning ESAT Telecom warfare with Telecom Eireann and wouldn't deny that I would discuss the auto dialer issue. However,

no promises or understandings of any kind were ever sought from or given by the Minister in relation to the licence." Had you ever heard that amplification of Mr. O'Brien's explanation for what he had done before the meeting of the 4th November?

A. I think other than what he would have said at the meeting of the 23rd where he described it as 'bravado in a non-serious meeting' and I think what would have happened at the meeting of the 23rd, because did you ask me a question earlier on about challenging it? I think what would have happened at that would have been Denis would have given his version and I would have given the issues that I was concerned about; for example, the intermediary, the fact that I believed a third party was aware and the fact that Woodchester was now being introduced as that third party. So in a question to the challenge, it was in that context as opposed to attacking the word 'bravado', if you like.

Q. Can I ask you about another aspect of that meeting or the meeting of the 20th or a meeting of the 8th or the meeting of the 13th. In any of the meetings prior to the meetings of the 4th, did Mr. Mr. O'Brien say to you, 'I decided that I'd help I'd help Michael Lowry out with his company by giving him $\frac{1}{2}$ 100,000 and that I earmarked $\frac{1}{2}$ 100,000 of deposits with Woodchester for that purpose'.

A. The only one I am not very clear on is whether or not

he would have said that on the 23rd or not.

Q. You are not clear. You think he may have said that?

A. I just can't remember.

Q. We may be able to find out if we can see a record of the 23rd.

A. What was clear to me on the 23rd, the mentioning of the Woodchester account was definitely made.

Q. Woodchester was mentioned at the meeting of the 23rd, but was it mentioned in this context: that $\frac{1}{2}$ 100,000 of deposits in Woodchester were earmarked for the purpose of giving them to Michael Lowry?

A. I don't believe so. But I stand to be corrected on that. I don't believe so.

Q. It's a fairly specific statement, isn't it? This is not a question of involving Woodchester as an intermediary but setting money aside in Woodchester for the purpose of paying it to Michael Lowry. Can you recall a reference to something like that at the meeting of the 23rd?

A. I remember a reference to the earmarking 100,000 on deposit because, as I recall, that's what prompted somebody to say, "Well, we should be able to find that amount of money in the Woodchester account if it was earmarked." I can't remember who, but...

Q. We'll come back to it when we get the note.

The next document refers to $\frac{1}{2}$ query number 6, 13th of October meeting, Barry Maloney versus 23rd October

meeting" and I think the reference to the intermediary is the issue that is being addressed in the response.

"I don't remember saying anything at 13th October meeting, which was only for half an hour, which would lead to the conclusion that so-called intermediary was anyone other than Woodchester. Anyway, I don't see the importance of this since Woodchester would only have been used to transfer money if I had made the payment. There would have been an intermediary only in the sense of making the payment. I think there might have been a misunderstanding here between me and Barry. Michael you were at the meeting, what do you think?"

I think we have gone over that ground already, haven't we?

A. I believe we have, yeah.

Q. There is one further document, it consists of a draft statement of Mr. Denis O'Brien to McCann Fitzgerald and I want to ask you one or two things about the contents of it. But I also want to ask you whether you were ever aware of it before. This is in book 29. Draft statement of Denis O'Brien to McCann Fitzgerald. On the overhead projector, if you want to see can you identify it there is a photocopy of the original. Do you recognise that document?

A. I couldn't be sure but I don't believe I do. Was this a statement that was made to McCanns by Denis?

Q. It seems to have it's described as a "Draft statement of Denis O'Brien to McCann Fitzgerald".

A. Okay.

Q. And you think this may be the first time you have seen it?

A. I am just looking I believe I believe it is but it might have been in something. I don't believe I have seen this before, Mr. Healy, to be clear.

Q. Well, that's something that you might as well try to check overnight. I'll go through the contents of it, which are very similar to some of the documents we have been looking at already, in case that jogs your memory.

Mr. O'Brien says "Early one Sunday morning in October '96 I was running in Roundwood in County Wicklow with Barry Maloney. Barry was complaining about the invoices received by ESAT Digifone from consultants and lobbyists in relation to the bid. I wanted him to pay them because they were from people I had recruited.

This was twelve months after the bid had been successful and many of them had still not been paid.

I indicated that if the company reneged, I was honour-bound to make the payments and I added, falsely, that 'If you think you have got problems, I have already paid 200 grand to other people.'

Now, if I could just go back to that for a minute and just mention two things to you. There is a slight difference between that statement and other statements

that have been made concerning the context in which these discussions were taking place. Maybe very little turns on it, but do you see where Mr. O'Brien says you had been complaining about the invoices received by ESAT Digifone from consultants and lobbyists. Do you follow?

A. Yes, I do.

Q. This is not a complaint that you were looking for invoices but a complaint that you were not paying invoices that you had actually received?

A. I think I have already covered that, Mr. Healy, a few times.

Q. And am I right in saying that your response to that is that it was the absence of invoices you were complaining about and the absence of paperwork in ESAT Digifone to justify the payments?

A. That's correct, to the best of my knowledge.

Q. If we just go on then. "These runs with Barry Maloney were almost weekly events. Frankly, we spoofed a lot. Barry and I had been friends for 20 years and often talked about sport, business, money-making schemes, women and other things with fantasy and reality equally mixed. At least half of what we said was bravado."

Now, again you have responded to me already in relation to where you say that meeting took place. Can I clarify one thing. If you were running on the

mountainside or wherever it was you ran fairly regularly with Mr. O'Brien, would that be a fair description of the things you talked about, either during, even if you found that difficult, or after the runs?

A. We wouldn't I don't recall us talking about serious business matters.

Q. Well, did you talk about did you spoof about money-making schemes, women, sport, or

A. I have already had a tough time with my wife over this one. I don't want to go there again.

Q. You can leave that out of it. Were these the kind of conversations that you might have with a longstanding friend on a jog on the mountain side that you'd be spoofing or ball-hopping or whatever?

A. We would laugh and joke a lot. We would tease each other. I remember times, particular parts in the run we had to cross a river we'd try and push each other in. That kind of joking around. That would be a regular intent.

Q. But there was no joking inside in your office, according to you, isn't that right?

A. I am sorry, Mr. Healy?

Q. According to you there was no joking when this matter was raised inside in your office?

A. I think that's my evidence.

Q. In Denis O'Brien's office, sorry?

A. That is my evidence.

CHAIRMAN: Could I just take up, one aspect of that, Mr. Maloney? I think you have already said a couple of times that Mr. O'Brien had a colourful and lively sense of humour.

A. Yes, he has.

CHAIRMAN: And we are not getting into comparative national styles of humour at this time of the day I think occasionally Americans and English people have trouble with types of Irish humour where people make extravagant or extremely wild statements that aren't meant to be taken seriously. Sometimes this can happen, particularly in an Irish scenario. I think I have even heard judges at it on occasion. But it seems to me, just looking at that possibility, that either the person who has a wildly extravagant remark made to him that's not meant to be taken seriously, could respond in kind by making a similar jocose remark or, if it seemed that the person might be taking it seriously, the first person would quickly correct matters.

A. That's correct.

CHAIRMAN: Now, did anything like that happen in what you say was in the office?

A. Not that I can remember, Sir.

CHAIRMAN: So you took it seriously and there was no, if you like, disclaimer by Mr. O'Brien that he wasn't serious.

A. Not that I can recall.

Q. MR. HEALY: Can I clarify one other matter? Mr. O'Brien says that the discussion took place in the course of a run. Did you ever have a discussion with Mr. O'Brien in the course of a run in which Mr. Mara's invoices or the payments due to Mr. Mara were mentioned? Leave aside any question of Michael Lowry?

A. I can't recall that but it is possible. He may well have said on one of the runs, 'Would you ever get the finger out and pay the lads?', that kind of a comment. I would not be surprised if he did say that as part of a run, but in a joking way.

Q. But you don't recall in any such conversation the reference to his having to pay two $\frac{1}{2}$ 100,000 payments, one to Michael Lowry?

A. No, definitely not.

Q. Just while we are on that topic, it's also the case that Mr. O'Brien says that he never mentioned Michael Lowry's name in the course of the discussion, wherever it took place.

A. I think I have already given my evidence on that, Mr. Healy.

Q. Yes, and you disagree with that?

A. I do disagree with it.

Q. Would I be right in thinking that if he had not mentioned Mr. Michael Lowry's name, there mightn't have been any reason to be concerned?

A. I'd agree with that. I mean, I do not think I would have gone through the process from the 8th October or the reminders in August had his name not been mentioned.

Q. I'll just go onto the rest of the statement. "I did not pay any money to Michael Lowry for ESAT Digifone's licence. When the Moriarty Tribunal was mooted in July '97 Barry sought and I gave reassurance that the company had nothing to worry about. Barry did not mention the October '96 comment at this time and it has only been raised by him in the last couple of weeks." You say it was Mr. O'Brien brought it up in August, not in July, and you say that it is true that you did not respond to him on either of the two occasions when he brought it up but that you did, in fact, respond in the course of a lengthy meeting on October 8th.

A. That's correct.

Q. He then goes on to say, "I deeply regret the anxiety caused to Barry and the trouble created for board members by this matter. However, I am concerned that a casual and untrue remark made in a social context should be blown into something which will have consequences out of all proportion to its significance. On the basis of this information and my assurances that

the payment was not made, I hope the issue will be concluded."

Now, just again for the sake of the record, you don't think you have ever seen that statement before or heard it in those terms?

A. I believe I have, Mr. Healy, but I will need to check and refresh my memory, because that's all I can say on it.

CHAIRMAN: I think it's probably desirable, Mr. Healy, that we leave it there. In fact, I think you have covered a fair amount of the content of the 4th November meeting in anticipation. Just to ensure that logistics can be complied with, is it preferable I say half ten in the morning?

MR. HEALY: Yes, I think so.

CHAIRMAN: Very good.

MR. McGONIGAL: Mr. Chairman, are we getting documents this evening?

CHAIRMAN: So I understand, Mr. McGonigal.

MR. McGONIGAL: May it please you Chairman.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY, 4TH JULY, 2001 AT 10.30 A.M.