

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 4TH JULY,
2001 AT 10.30AM.

CONTINUATION OF EXAMINATION OF BARRY MALONEY BY
MR. HEALY:

CHAIRMAN: I think the time was being used, Mr. Healy.

MR. HEALY: Yes, Sir. Two there have been two
developments. You will recall yesterday that there
was some delay while a question of documents was being
discussed between myself and some of the other parties'
legal representatives. That issue has now been
resolved.

You will recall that the Tribunal was anxious to try to
get Mr. Armstrong's solicitor's note of the meeting of
the 23rd October, and it has now been agreed by ESAT
Digifone/BT that this document will be provided. ESAT
Digifone/BT, in providing the document, however, have
indicated that they wish it to be made clear that while
they are waiving privilege in relation to the document,
they do not want that waiver of privilege to be used
against them in any argument or claim by the Tribunal
for access to all of the other documents over which
they claim privilege. And as a practical expedient, I
am certainly recommending that course be adopted.

In addition, of course, the Tribunal would reserve its

position to argue that any other document which it required was not in fact privileged if the Tribunal so believed. So it's on that, if you like, practical basis or on the basis of that practical expedient that the document is being provided, because as has become clear from the evidence, the Tribunal already has a reasonably satisfactory note of the meeting of the 20th. It has two notes, Mr. Halpenny's and Mr. Lang's notes three notes, Mr. O'Connell's, Mr. Lang's and Mr. Halpenny's of the 4th, all solicitors' note, and a solicitor note of the 23rd meeting, which seems to have been an important meeting, would be extremely useful to the Tribunal, rather than rely on doodles or scraps of paper upon which participants in the meetings may have noted parts of conversations or bits of expressions used by various people.

So it's on that limited basis that it's being provided to the Tribunal, and it's a basis upon which I suggest the Tribunal should accept the document at this stage in order to avoid any lengthy legal disputes concerning the matter.

CHAIRMAN: Well, I had indicated my preliminary view in the course of yesterday afternoon, Mr. Healy, and my primary concern is that the Tribunal should have the best possible quality of record of these important discussions and meetings, and I have already indicated

that it does seem to me, having seen the extent of Mr. Lang's note last week, which was accepted by Mr. O'Brien as being very helpful, it seems on the same basis that the note that has now arisen should be made available to the Tribunal as part of the fact-finding task. And I am happy to abide by what I accept to be a reasonably pragmatic step to procure that.

MR. HEALY: Thank you, Sir.

MR. McGONIGAL: I just wanted to indicate, Mr. Chairman, that while Mr. Healy and Ms. Finlay may have agreed this, it is not something which we have consented to. As the Tribunal will be aware, we wrote to them last night seeking asking the Tribunal to lift privilege in relation to all of the redacted notes of Fergus Armstrong which appears in the documents which have been led before the Tribunal, and insofar as there appears to be a waiver of privilege in relation to one document, we would see that as being a possible waiver in relation to all documents. And we are not, therefore, part of this agreement. And I want to make that absolutely clear, because on the basis of the evidence which has been given by the witness to date, he has, in respect of certain documents, relied to a large extent on what Mr. Armstrong may or may not have in some of his notes. And in respect of those documents which he seeks to rely on as being

complementary to his notes, it seems to me that that of itself may also be a waiver of privilege by the reasons of the documents.

So that our letter last night was on the basis that the Tribunal should be seeking all of these documents in the initial stage, and then the Tribunal should be seeking to determine whether or not they are material to the issues which they wish to inquire into. And for my part, I don't want to be taken as accepting the position which Mr. Healy has just outlined, that he is taking the the Tribunal is taking these documents on the basis that there is no waiver of privilege.

In my respectful submission, the Tribunal cannot adopt that position. It either gets the documents on foot of an order, if necessary, if they feel they are material to their inquiries, or they don't, and they cannot make a deal with one party to the exclusion of other parties, particularly where one of those other parties is seeking a waiver of privilege in relation to all of the documents.

CHAIRMAN: I'll note your remarks, Mr. McGonigal, but for present purposes, it seems to me the document that most immediately arises as being potentially helpful to the Tribunal is the memorandum that has been referred to and has been discussed between Mr. Healy and Ms. Finlay. And I am not making any ruling, save to

note that that document has been available and that both parties are effectively reserving their rights to argue any possible issues of privilege that may arise in relation to any matters.

I indicated yesterday I am certainly of the view that legal professional privilege must have its role in the inquisitorial model of tribunals as well as in the adversarial model of court litigation, and indeed recent case law has tended to confirm that view. And on foot of what has been discussed between counsel, I am, for the moment, and for immediate purposes only, satisfied that it is proper that that document should be made available. It is not, as I understand it, constituting an estoppel against any interested person, including the Tribunal's legal advisers, arguing any further matters that may transpire, and it is done, as I understand it, with a view to making that document available.

It has been the experience of the Tribunal that, in general terms, it seeks to devise realistic methods of procedure that will result in evidence being made available, rather than lightly courting the possibility of lengthy court applications or matters that will perhaps considerably delay the further investigations of Tribunal.

I see you, Ms. Finlay, expressing some concern and

MS. FINLAY: Yes, Chairman. I wonder, could this be left until after lunch, because I regret that, first of all, I haven't seen Mr. McGonigal's letter that he wrote to the Tribunal last night, but he is clearly making the point that concerns my clients.

First of all, I should say he refers to a waiver by this witness. The privilege that is being claimed is a privilege on behalf of ESAT Digifone Limited which was the company which was the client of McCann Fitzgerald and who Mr. Armstrong was advising at the time. It's not Mr. Maloney's personal privilege in any sense.

I haven't seen Mr. McGonigal's letter, but Mr. McGonigal has said to you this morning that he is going to make the precise argument which is of concern to my clients, namely, that by agreeing to facilitate the Tribunal by making available this record of the meeting of the 23rd, that it is going to be argued to you, Sir, that by doing that, my clients are deemed to have waived their claim to legal professional privilege over the remainder of the legal documents which they have claimed privilege around that period. And my understanding of the arrangement that had been reached was that we would make my instructions from my clients permit me to make this record available to the Tribunal now, provided the Tribunal indicate that the

Tribunal do not consider my clients to have waived their right to assert their claim to legal professional privilege over the remainder of the documents.

We understand very well that there may be a dispute as to whether we are entitled to maintain the claim in respect of other documents, as to whether it properly attaches, and Mr. Healy has fairly indicated that there may be some of the documents that the Tribunal will be saying that, looking at that document independently, you are not entitled to maintain a claim of legal professional privilege. But the point that I understood would not be taken against us and the Tribunal would not hold, that by having released this one, or it's in fact two notes, because there is a handwritten and a typewritten note of the meeting prepared by Mr. Armstrong, that ESAT would be deemed to have waived its entitlement to maintain its claim to legal professional privilege over remaining documents.

CHAIRMAN: I think that's clear, Ms. Finlay, and I don't think anything in either Mr. Healy's remarks or in my couple of brief observations is to any contrary effect. As I understand it, this document is being made available for immediate purposes without any question of concession or estoppel on anybody's part in relation to what may transpire in relation to other documents. I have already indicated that it was

helpful to the Tribunal that a general waiver of any aspects of privilege was made by Mr. McGonigal on behalf of Mr. O'Brien and by Mr. Fitzsimons on behalf of Telenor and for present purposes. I am merely happy to note that what seems a useful and potentially helpful document in the ongoing fact-finding task has been made available. Should it transpire that it is necessary to argue the position in relation to any other documentation, that in relation to which Ms. Finlay's solicitor has had custody, then as I understand it, the position of the legal representatives remains that they will be in a position to argue those on the particular merits as they transpire from time to time.

MS. FINLAY: Chairman, on that basis, can I just indicate what we are making available because there is a manuscript note which was taken by Mr. Armstrong while the meeting of the 23rd was in progress. And you will see that it is in short point form. And there is then a typescript note which was prepared within a day or so of the meeting by Mr. Armstrong, both from the manuscript and from his recollection insofar as it is, in some instances, slightly expands the handwritten note of what had been said. The typescript was, however, never brought to a final state and there are certain there are some, I should say, uncertainties

which are indicated by square brackets. And on a review of them, there are quite clearly a couple of errors in transcription, from one to the other, and it's with those caveats that we make these contemporaneous documents available to the Tribunal. And we haven't sought in any way to correct the typewritten note on review.

CHAIRMAN: All right. We will proceed on that basis. Sorry, Mr. Maloney you were held up in that discussion.

MR. HEALY: There was also some further delay, Sir, occasioned by the fact that additional documents were made available late yesterday afternoon by Mr. Maloney concerning his resignation and re-engagement in 1996 and this morning. Mr. O'Brien, through his solicitors has provided further documentation to the Tribunal concerning the same matter, and one or two other additional matters, and hopefully the Tribunal will be able to deal with those documents as we proceed today, though Mr. Maloney will obviously be looking for some opportunity to examine the documents he has just been provided with.

Q. MR. HEALY: Now, Mr. Maloney, yesterday I think I had got as far as the meeting of the 4th November?

A. That's correct.

Q. And the meeting which involved the directors of Digifone and their solicitors, and in particular which

involved Mr. Michael Kealey in carrying out the examination of Mr. O'Brien with a view to eliciting some of the facts surrounding two matters, what has been called the Telenor \$50,000 payment, and the 2 x 1/2 100,000 payments. I just want to get this meeting into some context, and specifically the role of the various people involved in it.

There had been a meeting of the 20th, which was attended by a number of by the representatives of by in fact a number of directors I think, is that right, of

A. Perhaps I can shed a little bit of light on your question yesterday about the headings for these meetings. It just reminded us last night of one of the issues we had, is that the company had an obligation to make all of the board minutes available to the company's bankers, so part of the reason I know you were a bit puzzled yesterday about the description of these meetings. Part of the purpose of that was to make sure we didn't have to provide these to the banks.

Q. The same thing occurred to me while I was reading the documents you gave to me yesterday.

A. Just to help with the clarification of that.

Q. You obviously did not, or it was decided that the company wished to avoid having to create minutes of meetings which would have to be given to the bankers,

and which would then entail the disclosure of some of this information to third parties, other third parties, is that right?

A. That's correct. While we were investigating the matters.

Q. I'll come back to that later. What I am trying to get at is how the meeting developed. At the meeting of the 20th, I think you said you thought the main purpose was to hear Mr. Denis O'Brien's side of things, is that right? That's your impression?

A. That's my recollection, yes.

Q. By the time of the meeting of the 23rd, there was an engagement between both sides of the story. There was your side, Mr. O'Brien's side, and hopefully the note that has been produced now will provide us with a clearer picture of that meeting. As I understand it, there was a more comprehensive discussion of that meeting?

A. At the meeting of the 23rd, practically everybody that was at it was actively involved.

Q. Then you come to the meeting of the 4th, which was again one of these meetings it was provided with a label which was at least thought the meeting would not have to be minuted and these sent to the bankers. This was the crunch meeting, if you like.

A. This was the meeting at which we agreed that we'd get somebody who was completely new and fresh to the whole

process to ask Mr. O'Brien the questions.

Q. Now, I don't want to go into what legal advice you got, but would I be right in saying that it was as a result of the legal advice that you got that you decided in, certainly in the meeting of the 24th, to conduct the sort of query that was being conducted to see, could you get as much information as possible concerning these matters, isn't that right?

A. I think that would be fair.

Q. Sprinkled throughout the papers we see references to what you felt was your obligation to satisfy yourselves as to what had or had not happened, or at least that you would take reasonable steps to satisfy yourselves as to what had or had not happened, is that right?

A. I would describe it a little bit differently. To investigate as far as we could, to see what we could find out.

Q. I see.

A. I wouldn't use the words "to satisfy ourselves," but that we did everything that would be required of us.

Q. I think the way I put it, you would take reasonable steps to satisfy yourselves. If you want to, I don't mind putting it the way you put it.

Now, I think you also said to me yesterday that having taken those steps, it was your intention by that I mean ESAT Digifone's intention, that the common directors would be armed with that information, and

that it would be up to them what they should do with it as or in their role or roles as directors of ESAT Telecom, is that right?

A. That's correct.

Q. So ESAT Digifone was not itself going to make any decision on foot of what transpired at the meeting of the 4th. It was going to be an information gathering or assembling exercise essentially for the common directors?

A. That's my recollection, yes.

Q. Now, one of the issues that I think did arise at that meeting was the fact that ESAT Digifone had already provided information, as you call it, mainly the numbers to ESAT Telecom for the purpose of its IPO, isn't that right?

A. The original the first time we provided numbers for any fundraising exercise, I believe was in January of '97, and at that meeting, there was an agreement as to what numbers could be released for each and every fundraising that ESAT Telecom did. So as I understand it, the format was agreed once, but each time that ESAT Telecom wanted, they had to come back for separate permissions, as I recall.

Q. I understand. But as things developed, and in particular, as the issues concerning the Tribunal and the conversations you had had with Mr. O'Brien evolved, the question which arose was whether, in giving this

information, or in providing this information, you were in some way endorsing the Prospectus and perhaps exposing yourselves to liability for not providing other information, specifically the information about your discussions with Mr. O'Brien in the Prospectus, isn't that right?

A. That would have been a concern held by the directors, yes.

Q. And I think that in the course of the meeting of the 4th November, one of the issues which arose was, I think Mr. Callaghan may have raised it, I think I'll refer you to the record in a minute, was, "Haven't we already given a clearance, in a sense, for the provision of information to ESAT Telecom?" And I think it was Mr. Knut Digerud who said "Yes, but we gave that clearance before this additional information came to hand, and therefore, we would be at liberty to review the situation." Would that be a fair summary of one of the debates that took place?

A. It may well have been. I wouldn't have a completely clear recollection of that.

Q. Now, do you have a copy of the I am not going to go through every word of it, but just the main parts of the Kilroy's, Mr. Tony Lang's note of the meeting of the 4th. Flag 2, book 29A.

A. Is it the one headed "Attendance notes of the 4th and 5th November"?

Q. Yes.

A. Yes, I do have a copy of that.

Q. If you go to the second page, you will see that, second paragraph "FA pointed out that he was proposing that there would be a question and answer session as suggested by the lawyers concerning the question of the conversations between Denis O'Brien and Barry Maloney.

Secondly, the contribution transaction." That was

the these were the two items that were to be

examined. And the strategy that was used that a new

lawyer, fresh to the situation, would conduct an

examination of Mr. Denis O'Brien for that purpose?

A. That's correct.

Q. If you go on to the next page, you see that I beg your pardon. The bottom of the next page, I think, you

will see a reference to a quizzing process that

Mr. O'Connell had conducted in the United States.

Then if you go on to page 5, you see the two items are

examined. This is effectively a refinement of the two

issues. Instead of talking about the two issues in

terms of the conversation you had had with Mr. O'Brien

and the Telenor contribution in simple terms, the

issues are refined a little more, and one of them is

described as "the evidence relevant to the Woodchester

Bank and movements in and out of the accounts of Denis

O'Brien"; and secondly, "examination of the payment

which had actually been made amounting to \$50,000. On

this issue it is known that a payment was made, and there are documents in existence, and it was necessary to establish the existence of these documents."

Now, I think what is being referred to there is the references by Mr. O'Brien to Woodchester Bank, which we'll come to at a later point as being a feature of the discussions that you had had with him, and in particular, his statement that the payment had not gone through, that it had got stuck with an intermediary, and that the intermediary was Woodchester Bank, isn't that right?

A. That's correct.

Q. If you go to page 16, you will see that there is a note that "DOB, in response to a question concerning Woodchester, pointed out that a search was being done by him with regard to payments into Woodchester Bank, and he was happy to open up all of his accounts. Denis O'Brien confirmed that he had 7 or 8 accounts in Woodchester. He pointed out that Woodchester is his main bank, his lead bank. He pointed out that the bank is the intermediary. All his payments came out of Woodchester Bank, and he pointed out that all his personal bank accounts were with Woodchester."

Now, at that point, were you aware before that meeting that Mr. O'Brien was proposing or was in the process of having an examination carried out of his Woodchester

bank accounts?

A. I don't believe I was aware of that before the meeting.

Q. Were you aware that this was a proposal that somebody, that anybody had suggested that this would be done as a way of getting to the bottom of the issue?

A. I am just having a little bit of trouble recollecting that. I can't remember whether it came up at the meeting of the 23rd or not.

Q. I see. In any case, at the meeting of the 4th, Mr. O'Brien was saying that all his accounts were in the Woodchester Bank, and that if that bank's records were examined, it would go some of the way toward throwing light on the situation?

A. That's correct.

Q. And was that something, as I think it was, that the meeting were relatively happy about, that this query was going to be conducted in Woodchester?

A. Yes, I believe they were.

Q. Now, I want to go to a passage at the end of that page, and you'll have to we are going to have to jump around a little here, rather than go through every word in the record. If you look at the bottom of that page, Mr. O'Brien is giving an account, his account of the discussion you had, and he deals with he says that it occurred in Wicklow. And he says that it occurred most likely on Sunday, 17th November, and he indicates how it is that he was able to arrive at that

conclusion. You have given your evidence in relation to that. But then he goes on to say "I had asked " and I think both you and he, or at least he agreed to differ with you on it. He then goes on to say, "The bonuses were small to large. The largest was about 50,000 in total. I had asked Barry to pay out these success fees. I wrote a memo. These would have been to parties such as P J Mara, Dan Egan etc. I kept on meeting these people and they were reminding me that they had not been paid. I thought Barry was dragging it out. I explained to him my embarrassment over meeting these people. I would meet these people in social circumstances outside work."

I just want to clarify the reference by Mr. O'Brien to a memo. Did you mention yourself receiving a memo from Mr. O'Brien, is that right?

A. Yeah, the sequence of events, as I recall it, and in terms of what I have on my files with regard to this matter, is that I believe I received a letter, first of all, from PJ Mara prior to the 24th February. On receipt of that letter from PJ Mara, I then wrote to Denis on the 24th February asking him about the letter I had received from PJ Mara. And as I recall, I got a letter back, a memo back from Denis dated 25th February, explaining to me the PJ Mara payment and the Stephen Cloonan one.

Q. And what year was this?

A. 1997.

Q. So this was long after your discussion in 1996, October/November?

A. That's correct. If that's the same memo he is talking about, yes.

Q. It's just that if you my reading of it, looking at this page, is that the memo predated the discussion you had, whether it was on the run or whether it was in your office, but you are telling me, and I think your evidence was yesterday that the memo did not arrive until much, much later, and when you got that memo, you had felt you had sufficient paperwork to pay the success fees, is that right?

A. That's correct.

Q. But do you agree with me that it appears here that the memo had been written before the discussion?

A. Certainly from what's written, that appears to be the case.

Q. Now, you told me yesterday, I think, that there was no examination or inquiries conducted of you by Mr. Michael Kealey such as were conducted by him in the case of Denis O'Brien?

A. That's correct.

Q. And do you remember making any contribution as Mr. O'Brien was giving his answers, to correct or qualify or add to anything he said?

A. No, I don't believe I did. I should just explain, Mr. Healy, that by the meeting of the 4th November, I was, if I use can the word, destressing, in that I felt I had got the thing to that point, and now everybody was in the room with all of the legal advisers and we were doing so I was very passive in that meeting, as I recall.

Q. I am not suggesting that you should have been interjecting yourself. I am simply suggesting or I am simply inquiring whether anybody took up with you any of the points being made by Mr. O'Brien, in the same way that they were taken up with him by Mr. Kealey, and as I understand it, that did not happen.

A. That's correct.

Q. Now, if you go to page 20.

A. I am sorry, the numbering on the document I have is a bit hit and miss.

Q. You will find one or two numbered pages. Then if you can work backwards or forwards from that page. I agree that the photocopying is a little unsatisfactory. It starts with the top left-hand corner in italics.

"I have all this money ..." If you look at the middle paragraph, which is also in italics, I think indicating that Mr. O'Brien was replying to a question. He said "I changed my mind over making this payment and there is no way that I would have made the payment subsequent to the 29th November. People have thoughts to do

things but don't actually do them. I thought about a personal payment to the minister involved and I thought I am mad. I don't know if this was before the 29th November. I don't know what precise date. It would have been a harebrained scheme. I would not be the first person to think about something like this. I accept that if there are events on the 29th November 1995 in the paper " that should be 1996 obviously " in the paper about Michael Lowry, that there was only a 12 day interval between that and my conversation with Barry Maloney on the 17th November."

Now, do you remember that I think you mentioned to me, I forget which day now, that do you remember that you told me that Mr. O'Brien mentioned to you that the payment didn't go through, and he referred to when it all blew up. Do you remember that discussion

A. I do, yes.

Q. we had the other day? And I was asking you whether you had any idea what was being referred to, and I may have mentioned to you at that point that it all did blow up toward the end of November.

A. Yes, I do recall that.

Q. Now, I think at that stage I told you that we'd come back to this. And do you recall this portion of the meeting of the 14th of the 4th November when Mr. O'Brien was referring to the fact that he wouldn't have made the payment, that he changed his mind, and he

would not have made it subsequent to the 29th November?

A. Right, yes.

Q. Do you recall whether at the meeting Mr. O'Brien was saying that he had made up his mind to make a payment, and that this determination was something that remained with him until a particular time, until it all blew up, as you say he put it to you?

A. I can't recall that coming up on the meeting of the 4th. It might have, but I cannot recall that.

Q. And when this statement was made by Mr. O'Brien, no one said to you, "What do you say about that, Barry? Do you have any comment to make on it?"

A. That's correct, nobody did. Could I also note, Mr. Healy, that the 17th November, as the date when the conversation occurred, is not something that I am fixed on. I mean, in my mind it was always October/November, I am not quite sure when.

Q. I understand. If it occurred sometime in October, then it was a determination which was in Mr. O'Brien's mind for longer than the twelve day period that he has mentioned in his evidence.

A. Just to say from my perspective, that I can't completely tie in to the 17th November and say that was the day. I just cannot recollect and couldn't recollect back in '97.

Q. Now, there were other things dealt with at that meeting, which I don't want to deal with at the moment,

but I just want to go back to one where he Mark that was made at the beginning of the meeting. It's on page three, on the top of the page.

"John Callaghan replied " this was in response to something Fergus Armstrong had said "that we must keep going along the route of investigation so as to get to the bottom of it. John Callaghan expressed the view that there was an obligation on the directors to satisfy themselves individually as to the position.

They had to establish whether or not there was anything to the allegation or that there was nothing they were not comfortable with in the Prospectus or registration."

Do you remember a remark like that being made at the beginning of the meeting or close to the beginning of the meeting?

A. Is that the first remark, Mr. Healy, or the second one?

Q. One of the first remarks certainly. It's

A. I see the two remarks. But there was if I could just clarify, the question applies to which remark?

He made two: One, that there was an obligation to satisfy themselves individually, and the second one, to establish whether or not ...

Q. Well, he is saying there were two. As I see it, he is saying two things: Firstly, there is an obligation on the directors to satisfy themselves individually as to

the position, and secondly, they had to establish whether or not there was anything to the allegations or that there was nothing they were not comfortable with in the Prospectus. So you had to either, as I see it, get to the bottom of it or else you had to change something in the Prospectus if you weren't satisfied.

Would that seem fair?

A. Yes.

Q. So what was envisaged was what one would have thought was envisaged was a rigorous investigation, with a view to trying, in the time available, to get to the bottom of this. If you go to the next line, Mr. Callaghan says, "JC therefore suggested that he as a director was anxious to get to the bottom of it and that this was a process once commenced, you cannot stop." Now, do you recall him saying that?

A. I can't specifically recall him saying that, but he may well have.

Q. As an opening remark, it would seem to indicate that the meeting was determined to, as you put it, take all the steps that were reasonably open to the people at the meeting to try to get to the bottom of this, and that once they started digging, there was no way they could stop until they got to the bottom of it.

A. That's correct. The meeting of the 4th was to try and

Q. What concerns me is that although that seems a very

laudable objective, nobody actually examined you at the meeting. You weren't subjected to any examination by Mr. Kealey of the kind that Mr. O'Brien was subjected to, is that right?

A. That's correct.

Q. I think you were asked at the very end to make a contribution, and I think that you gave a summary of the sort of evidence that you have given to this Tribunal and some of the things which you have said in other documents, is that right?

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

Q. But you were not examined by Mr. Kealey on the line by line in the line by line way that Mr. O'Brien was examined?

A. That's correct. As far as I recall, I wasn't examined by Mr. Kealey at all.

Q. And before the meeting you didn't have any of the documents that I referred to yesterday, the question the written questionnaire prepared, it would appear, by Mr. Armstrong and to which Mr. O'Brien had added his written responses?

A. No, I hadn't. And just to clarify that, both myself and McCanns had never seen those documents.

Q. You have never seen them?

A. Before until the last couple of weeks, when the investigation with the Tribunal began.

Q. By that you mean you had never seen the documents

containing the questions and the answers, and you never saw the long statement that I read out?

A. That's correct. Other than it was in one of the files in the last few weeks. I believe what happened is it was material provided to McCanns by Frys from Denis O'Brien's files. I believe that to be the case.

Q. And do you know whether any of the other directors at the meeting had any of those documents with them at the time?

A. I do not know that.

Q. Certainly to your knowledge, would I be right in saying that nobody referred to them in the course of the meeting?

A. Not that I can recollect.

Q. At the end of that meeting, and just staying for a moment with the two $\frac{1}{2}$ 100,000 payment issue. Do you know whether any decisions were made or any whether it was decided what steps ought to be taken?

A. The end of the meeting of November 4th?

Q. Yes.

A. I just need to refer to the sheet to remind myself, Mr. Healy. Which page is it?

Q. Well, I have seen the various documents referring to the meeting, and there seems to be suggestions that there were further steps to be taken, but can you recall, yourself, can you just remember whether after that meeting you had any impression that things had

advanced in any way or that the directors were in a better position to form an opinion as to what had or had not happened?

A. The impression I would have had is that the joint directors of the company now had all of the information I suppose I saw the 4th November as a way as a step that ESAT Digifone had got to in doing everything that could have been reasonably expected of us to open up the issues. My expectation was that after the 4th, it was then up to the joint directors of the company to take that information and bring it to the advisers and the underwriters of the company that was doing the flotation.

Q. There was, as I understand it, no change in the Prospectus between the 4th and the 7th, isn't that right?

A. I believe that I believe that's the case, but we didn't, and I certainly wasn't aware of that at the time. I remember there was talk about, if there was change in the Prospectus at this late stage, I remember that piece of the discussion, that it might draw that it might cause them a problem.

Q. There is no doubt but that the date continued to be used and formed part of the Prospectus as it was eventually published. The disclaimer was roughly the same as had originally been agreed, with the exception that it was now given more prominence, isn't that

right?

A. I think that's correct.

Q. But it must follow from the fact that no other changes were made, and that the Prospectus and the IPO went ahead, that ESAT Digifone took no step on foot of that meeting to, either to withdraw their concerns or to insist on any changes in the Prospectus.

A. As I recall it, Mr. Healy, the only thing that I believe we had the power to do was to withhold consent for the release of the information. That's the only thing we could have done. But I also recall that during the meeting of the 23rd October, I think Denis mentioned once or twice that we had the option to be completely, what he called, hands off and take no you know, even the consent may not have been something that we had to do. So it wasn't clear to me at the meeting of the 4th November what leverage we had to influence it one way or the other, other than to make sure that we had done what we had been told we had to do as reasonable directors to investigate the matters.

Q. To lay the facts out?

A. Correct.

Q. And you believed then, and I think we were aware of this from some other documents, that these facts were then laid before the directors of ESAT Telecom formally, I think, by Mr. O'Connell?

A. That's what we understood, yes.

Q. And we know that they did go ahead with the IPO?

A. That's correct.

Q. Were you ever provided with the result of the inquiries carried out in Woodchester Bank in connection with Mr. O'Brien's bank account?

A. Not that I can recollect.

Q. Nobody ever formally or informally told you what those inquiries had produced?

A. No, sorry. I was definitely told that there was no payments of 100,000 or some you know, that the accounts had been investigated and no sum of 100,000 or two payments of 100,000 had been found.

Q. And can you remember if there was before the IPO?

A. It may have been, Mr. Healy. I can't remember.

Q. Am I right in saying that even if the examination of the Woodchester accounts showed no movements of the kind that were, that you have described and that we know were being examined, even if that were the case, that there was still the outstanding issue that you had identified and that other people had identified, that if what you said was correct, there seemed to have been at least an intent, as Mr. O'Brien agreed and has agreed in the witness-box, to make a payment and a period of some time during which that Mr. O'Brien continued to have that intention to benefit Mr. Lowry, until something blew up, however long or short that

period was, isn't that right?

A. Sorry, Mr. Healy, what was the question?

Q. What I am trying to say is this: Let's assume for the moment that you were satisfied before the IPO, and that the directors of ESAT Digifone were satisfied that the Woodchester inquiries had produced nothing by way of a payment of the kind that you described a moment ago, 100,000 or 50,000 or whatever. Wasn't there still the outstanding problem that does not seem to have been resolved, that Mr. Denis O'Brien appears to have had an intention to make a payment and that he had that intention for some time?

A. The question of how long he had that intention for, I cannot recall as being prominent in the discussions in October or November, although I have seen it in the testimony that's since been given, but at that time I can't recall that as being a particular feature.

Q. Well, would you agree with me now that it is an important feature; it was one of the features that exercised your mind, wasn't it, at various times?

A. I was still concerned, after the meeting of the 4th November, about the intermediary. I was concerned because of the way that Woodchester became the intermediary at a later stage of the conversations that I had been having with him. So that remained a concern.

Q. Did anyone ask you, or ask any other director on the

ESAT Digifone board, at the end of the meeting of the 4th, whether you had any continuing concerns?

A. I am sorry, I can't recall. I don't believe so, Mr. Healy, but I can't recall. I think it's important that you see this in the context within this was a highly pressurised situation and we were running against a time clock. Just to make those comments to you.

Q. Wouldn't there be a further worrying factor that if there was an intention to pay the $\frac{1}{2}$ 100,000 to Michael Lowry, which didn't go through, wasn't there also a concern that the other $\frac{1}{2}$ 100,000 was something about which there might have been an intention which didn't go through?

A. That was not an issue that we spent most of our time on, the 100,000 to Michael Lowry.

Q. No time appears to have been devoted to it at all.

A. That's correct.

Q. Even after the IPO, do you recall whether any further steps were taken to investigate this matter?

A. Not that I can recall.

Q. The time pressure was now off, wasn't it?

A. In a sense that the IPO was done, the company had been IPOed, I think that would be fair.

Q. The time pressure was off, but surely all the concerns were to some extent still there?

A. Again, it goes back to what we were trying to do on the

4th November, Mr. Healy, which was to open the issue up, investigate it to the best of our abilities, and then hand over, if you like, or pass over those findings to the joint directors and their advisers.

Q. Were you also, and I could see this might be understandable, trying to pass the buck or wash your hands of the problem; let it be somebody else's problem?

A. I wouldn't necessarily say it that way. I would say it this way: That as a board, I don't believe there was anything ESAT Digifone could have done to stop the IPO if

Q. Leave the IPO out of it. The IPO is now gone. The time pressures are off. You had concerns at least you had concerns. Was there any attempt made by the board of Digifone to pursue those concerns after the time pressure of the IPO was over?

A. Not that I can recall Mr. Healy.

Q. The company continued on with its operations with more or less the same directors, isn't that right?

A. That's correct.

Q. All having more or less the same knowledge that they had on the 4th November?

A. That's correct.

Q. And probably all having either the same or similar concerns to the concerns, whatever they were that they had, on that date?

A. I think that's correct.

Q. So you still had the difficulty that if any of these things were true, and the further difficulty, if a third party knew about them, that they could crop up at any time in the future and seriously undermine the company, isn't that right?

A. I think that's correct.

Q. And was there an extent to which, perhaps understandable from a human point of view, to which you or anybody else that you spoke to simply wanted to get on with running the company and put this behind you, forget about it, and try to get the head down and keep working?

A. I wouldn't say that it was as deliberate as you would suggest. I would say there was a lot of, you know, "Let's get on with the company." I would say that the process that we went through in October/November was a very difficult process, and that after that process, the strains among the shareholders and the strains between myself and my Chairman, Mr. O'Brien, would have been heightened and a lot more strained than they ever were prior to the process. So it wasn't, in the sense of the question you asked, it was back to business as usual. There was, I would say, increased stresses as a result of the process we had been through.

Q. It was undoubtedly a painful process, effectively almost an issue of credibility between a Chairman and a

Chief Executive. I don't doubt it wasn't a painful process. What I am suggesting is that the evidence we have heard from you, from Mr. O'Brien and from the documents that we have seen, didn't suggest that, for whatever reason - there may be time constraints - the process of inquiry was a very rigorous one. It wasn't a very rigorous one is what I am saying.

A. I mean

Q. I am taking an example

A. The question, Mr. Healy, is what

Q. I am suggesting that it wasn't a very rigorous inquiry that was conducted, for whatever reason, maybe time constraints.

A. Are you asking me, do I agree with that?

Q. Mm-hmm.

A. It was given the time that we had. It was as rigorous as we felt we could do.

Q. All right. I accept that time was a big problem.

But I gave the example of the fact that Mr. O'Brien was examined, but you were not examined in the same way.

And you mentioned to me that the second $\frac{1}{2}$ 100,000 was not a feature, a major feature of the meeting, and as you say, there were time constraints. And I agree, you had a guillotine coming down on you on the 7th November, but after the 27th of November all those pressures were gone, but what I am suggesting is that the problem remained. If you look at it from two

points of view, there was really an unanswered question, and the answer to that question could have been a time bomb ticking away, couldn't it?

A. I suppose the view we took, Mr. Healy, that as of the 4th we had the sworn affidavit from Mr. O'Brien saying it hadn't happened. We had the investigation of his Woodchester accounts. We had opened up the issues and had them examined by somebody external to the process, making all the information and data that we believed relevant available to the joint directors and the underwriters. And having done all of those things, we felt we had done what was expected of us.

Q. But can I suggest to you that you say that you had conducted an investigation, you had done everything you could. But don't you now know, from the evidence that has been made available at this Tribunal, that you didn't have, for instance, the statements made by Mr. O'Brien; you didn't have his responses to the queries posed by Mr. Armstrong? That's two examples, isn't that right, of documents you didn't have?

A. That's correct.

Q. And I am also saying that while Mr. O'Brien was examined by Mr. Kealey, you were never examined by Mr. Kealey. And the troubling responses that you continue to have to this day to the points made by Mr. O'Brien were still there, weren't they?

A. With regard to the intermediary, yes, that's correct.

Q. And they are still there up to today?

A. That's correct.

Q. And what I am saying is that, for whatever reason, the board of ESAT Digifone, and I am asking you as a member of the board now, not just as an individual, the board of ESAT Digifone never took up this issue again, either at a formal board meeting or at one of these meetings without minutes, isn't that right?

A. As far as I am aware, Mr. Healy, that's correct.

Q. You indeed, I think, said at one of these meetings that if, for instance, you were asked at a Tribunal questions the right questions concerning these matters, you'd have to give answers outlining your concerns?

A. That's correct.

Q. And could I suggest to you that there was no appetite in ESAT Digifone to pry any more or to dig any more into this matter after the 4th November?

A. I can only speak on behalf of myself Mr. Healy. What I can tell you is that we had a set of circumstances that we had taken to a certain stage. The question that was continually asked of me was "Do you have any proof that a final payment was made to the minister?" So that question and my answer has always and consistently been "No." So against that I had to balance, as CEO of the company, the commercial reality of 5 or 600 people, a company with several hundred

million pounds worth of revenue, and I had to take a view, a balance between the uncomfortableness that I felt in not being able to close it off completely, and to balance that against the reality and responsibilities I had to ESAT Digifone as a company, the employees, the customers and shareholders, and that was a balance that I had to reach.

Q. I think that's a fair answer. But am I right in saying that whatever views you had about it, nobody else raised it at any Digifone meeting?

A. To the best of my recollection, nobody else raised it at any Digifone meeting. I am just speaking on behalf of myself, Mr. Healy.

Q. Mm-hmm. Although during all of the period, from then until now, there's been a Tribunal sitting in which issues like this, or to which issues like this would be relevant. Nobody at the board of Digifone said "Let's examine this matter and try to see whether we have anything to inform a Tribunal about"?

A. Sorry, Mr. Healy, what's the question?

Q. Am I right in saying that nobody at the board ever suggested "Look, we better get to the bottom of this. There is a Tribunal sitting. These matters are relevant to what the Tribunal is looking into. We better see if we have information which we should give to them"? That decision was never taken?

A. That's correct.

Q. And was the board, in fact, since then not going forward with its eyes wide shut to this issue?

A. I don't know if I'd describe it wide shut to the issue.

I think it's very difficult to speak on behalf of my fellow directors, Mr. Healy. I can only speak on behalf of myself. The issue I had was I was always uncomfortable with the issue of the intermediary and the final payment going through, but when I was asked the question by the other directors, which I was, did I have any facts, had I any knowledge that any final payment had been made to the minister, the answer to that question was "No."

Q. I suppose you had one of the most important facts of all, and we'll leave this topic now. Mr. O'Brien had said all these things to you?

A. That's correct. Sorry, just to be clear. What he had said to me was that he had intention to pay and it got stuck with an intermediary.

Q. One of the other issues discussed at this meeting was the Telenor payment, and I just want to clarify one or two aspects of it.

If you go to page I think it's page 14, top right-hand words are "Government might consider it very unusual."

CHAIRMAN: Just before you get to that. Mr. Maloney, just on the line that Mr. Healy was pursuing with you.

And I realise hypothetical questions are difficult and that the equation is getting more and more complex, the more facts that are uncovered. But suppose we strip matters back solely to your conversation at the meeting, as you recall it, with Mr. O'Brien. I think you did say that you regarded it as a deadly serious meeting, and you took very seriously what he said.

A. Which meeting?

CHAIRMAN: The initial meeting when he talked about the two 100,000 payments.

A. That's correct.

CHAIRMAN: You regarded this content as being deadly serious, and you indeed, on your own evidence, accepted that it arose in the context of concerns about payment of success payments?

A. That's correct.

CHAIRMAN: Suppose there had been no disclosures involving Mr. Lowry and Mr. Dunne, no Tribunals under Judge McCracken or here, and matters had proceeded without further ado until the IPO. Does it seem that you would not have felt constrained to have raised the conversation in those circumstances?

A. That's a very difficult question, Sir. One of the things that alerted me to the difficulty that it could pose for our company was the reminders during the month

of August. I have often asked myself the question, had the reminders not happened in August, would I have been as concerned about all of this?

CHAIRMAN: Now, I am not putting an equation towards which my mind is working. I am just trying to put everything that occurs to me, including having regard to fairness to Mr. O'Brien, and I am just asking you, if you had had matters from the conversation that raised a possible tainting of the licence, that was the essential commodity that was being floated, albeit in the Telecom IPO, do you feel you would have felt constrained to raise it before the IPO went ahead?

A. I feel I would have had to raise it. When you say "constrained to raise it," do you mean was there anything stopping me from raising it?

CHAIRMAN: That you wouldn't have slept happily in ensuing years if the IPO went forward on the basis a licence was being duly granted.

A. I believe I would have had to raise it.

Q. MR. HEALY: If you could just clarify one or two matters. We may unfortunately have to come back to this issue because more documents have become available. This is the Telenor payment, Mr. Maloney. If you go to page 14, the second last paragraph. "Barry Maloney referred to the problem of ESAT Digifone not knowing that this payment was part of the start-up

costs. Barry Maloney pointed out that if the licence

was got by improper means, it could be a problem.

Reference was made to the fact that four investigations

so far had confirmed the fairness of the process.

Johnny Fortune referred to a period of uncertainty

arising in relation to the licence being tainted."

Now, can you just explain to me what you mean by "The problem of ESAT Digifone not knowing that this payment was part of the start-up costs"?

A. I think what I was reflecting there was because I hadn't been around at the time, the start-up costs had been put together prior to the formal establishment of the company, if you like.

Q. Were you saying "I don't know whether it was part of the start-up costs"?

A. Correct. Because I believe in this conversation it was pointed out that it was part of the start-up costs somewhere along the lines, I can't recall by who.

Q. But do you remember, you told me that you knew soon after you joined the company, as a result of something Knut Digerud had said to you, that there had been a payment a political payment to Fine Gael?

A. Correct, but it wasn't clear to me at the time that it was part of what's referred to as the start-up costs, which as I remember was an expense of about $\text{€}1\frac{1}{2}$ million, which involved all of the costs of putting the licence

application together, finding sites, all that type of thing, and then when the company was formally set up, each shareholder took their percentage of that cost.

I think what I was reflecting there was that I hadn't realised that this item was one of the items in that cost. I believe that to be the case.

Q. I follow. I just want to ask you, do you know anything about a newspaper report which was brought to the attention of the Tribunal by Mr. O'Brien's lawyers? I think you have a copy of it. I gather this may be the only copy. You see it says on the top right-hand corner, "Sunday Business Post, 18th March 2001.

Reference Denis O'Brien, Telenor donation.

ESAT Digifone has flatly contradicted a claim by its former Chairman Denis O'Brien that the company reimbursed the Norwegian telecommunications company Telenor for the $\text{€}1/250,000$ donation it paid to Fine Gael in 1996. In its first public statement on the controversy, a spokesman for ESAT Digifone told the Sunday Business Post that a detailed trawl of all the company's records during the past two weeks has revealed 'No evidence that a reimbursement of a political donation of $\text{€}1/250,000$ has ever been made to Telenor by ESAT Digifone in respect of the payment to Fine Gael.'

Firstly, I want to ask you, can you recall a statement

to this effect being issued in March, 2001, when I think you were were you still Chief Executive at the time?

A. Yes, I was. There is a little bit of semantics here. I think the point that's referred to there is the invoice that was paid by ESAT Digifone said "consulting fees" on it, which was the only document the company had any records of. We didn't release a press release around the subject. Apparently, what happened was a statement had been prepared that would be used to answer media queries, and as I understand it, the Business Post in particular were chasing this hard, and this statement was released, I believe in around the 16th March.

I, at the time, had been in the US, and I was returning home. Our PR people were trying to get hold of me. They did not manage to do so. But this statement was made to the Business Post at that time.

Q. I think I now have a copy of the statement. Do you know if it was issued in the form of a press release, or whether you simply answered questions from the press statement?

A. We did not issue it as a press release. It was a prepared statement, if we had to say anything on the subject. I should point out, Mr. Healy, that at the time one of the actions that we took was to get Price Waterhouse Coopers to come in and do an analysis of all

of the paperwork and paper trail around this whole issue. As I recall, PWC were just finalising their trawl through the company's accounts in around this time, and I would have not seen that report yet.

Q. I understand that. But am I not correct in thinking that at the meeting in 1997, November, 1997, wasn't all this issue canvassed?

A. The issue that came up, as I recall, in 1997 was to make sure that the issue had been accounted for properly in the books of the company, as I recall.

Q. But wasn't it also clear at that meeting that there had been a reimbursement of Telenor by ESAT Digifone?

A. That's correct.

Q. So from 1997, the Digifone directors knew that there had been a reimbursement of Telenor? They knew what they say here was not true?

A. I believe what this was trying to do, in a not very clever way was, to differentiate between a political I think the point that was trying to be made, Mr. Healy, was that there wasn't an invoice on the company's accounts saying "political donation". There was an invoice in the company's accounts saying "for consultants fees".

Q. But did I not do I not have a correct recollection, correct me if I am wrong, that during the 1997 discussions, I think it was you who in fact said, you can correct me if I am wrong about this, you said that

the \$50,000 payment to Telenor which was for consultancy fees, and therefore would be in the books of the company as an expense, would have to be reclassified, isn't that right?

A. What we were asked to do was to check that the matter had been dealt with properly from an accounting perspective. When we investigated the matter, the finance department, as I recall, saw that it had been that the only invoice we had was as a consulting charge, and that that was the way it had been accounted for.

Q. Yes, but what that meant was that it had been written off against the profits, such as they were.

A. Well, I mean, the only financial liability that we had was around a tax issue, which only came up, as I understand it, if we had any profits.

Q. I appreciate that.

A. And then the start-up nature of the operation we had

Q. But you presumably carried your losses forward?

A. Well, maybe till now, yeah.

Q. It doesn't matter when you were claiming it as an expense. The fact is it was being claimed as an expense of the business, and had it not been reclassified, I think it was you am I right in thinking that there is a note in the evidence or in the documentation that it was you who said "We better get this reclassified"?

A. It was an action that I took to investigate that we dealt with it properly from an accounting point of view.

Q. Am I right that there is a note somewhere in the documents which says that it was you, in fact, who wanted it reclassified? I think the word is "reclassified"?

A. That could well be so, yes.

Q. And wouldn't that mean that it would be taken out of the expenses of the business and reclassified as a political donation, and therefore it would not be an expense of the business, and effectively would ultimately have to be it would mean that you wouldn't be able to claim the amount as a loss?

A. I think the issue we had, Mr. Healy, which went on until just recently in our exchange of correspondence with Telenor about this payment, we ended up getting a credit note as part of the process, and that has been now dealt with properly in the company's books.

Q. What I am concerned about, Mr. Maloney, is this statement. So that there will be no dispute about it, I'll put up your own statement, because there can be, I suppose, slight errors of communications sometimes, even sometimes between PR people and journalists. So if we just put up this press statement which you prepared. You take the hard copy and I'll read it off the printout. (Document handed to witness.)

Do you see where it says "ESAT Digifone would like to state we have no record in the company of ever reimbursing to Telenor an amount of i;½50,000 in respect of a contribution to the Fine Gael Party."

Let's just the statements as they are. There was a reimbursement to Telenor, isn't that right?

A. That's correct.

Q. We know that for a fact. We know that it was in respect of the Norwegian equivalent of \$50,000?

A. That's correct.

Q. We know that it was in fact in respect of the payment Telenor made to David Austin, isn't that right?

A. That's correct.

Q. And we know that these issues were canvassed in November of 1997?

A. That's correct.

Q. And we know that Telenor conducted their own further queries in 1998?

A. That's correct.

Q. And the matter came up again. Now, how could anyone in ESAT Digifone have been able to make that statement in 2001, when the issue of who was responsible for what or who was liable for having made the payment had already been canvassed on at least two occasions? How could anyone have made that statement in ESAT Digifone?

A. As I said, Mr. Healy, what I believe this was, was what

I'd call splitting hairs about what documentation was inside ESAT Digifone. The only document that was inside Digifone was this one that referred to consulting fees. I agree it's splitting hairs, so I am not arguing that point with you at all. I am just trying to explain that at the time that this sentence was agreed that you are asking me about, it had been a kind of a holding statement that they were given while we conducted the investigation inside ESAT Digifone, so that we had a full file on everything available to us about this payment.

Q. I accept that, Mr. Maloney, but wouldn't it have been far better to have said, "We are looking into the matter"? This, in fact, is not an accurate statement, in terms of the true picture or in terms of the true facts of what had happened in 1996, January, or what had been discovered in 1997, or what had been further discovered in 1998.

A. What I am trying to explain to you, Mr. Healy, is I am not disputing that. All I am saying to you is at the date, 16th March, there was attempts by our PR people to try and get hold of me to see how we should respond to this query, because this particular lady was following it up very aggressively. I was travelling back from San Francisco, they were not able to get hold of me, and this is what was released.

Q. Are you saying that you personally did not okay this

statement?

A. What I am saying is that I was coming back from San Francisco to Ireland while they were under pressure to make a statement.

Q. Are you saying that you personally did not okay it, or that you did personally okay it?

A. I did not personally okay it.

Q. Who personally or what member of the staff of ESAT Digifone, to your knowledge, okayed that statement?

A. As I recall, there was a discussion going on between our finance director, who was, if you like, the person who was working with PWC on the search of the company's documentation that was being done. And I believe it was between him and our PR people that this was that this statement was made.

Q. You see, Mr. Maloney, it seems to me, if you look at what happened in 1997, and you look at what happened in 1998 in Telenor, in ESAT Digifone, in Fine Gael, there seems to have been a determination right up to this press statement that the full facts of this should have, if at all possible, not come out.

A. From our perspective, Mr. Healy, I think you are reading too much into that.

Q. Well, isn't it true that none of the full facts of what happened in 1997 were circulated, outside of a very small and narrow group of people involved in the discussions between the end of October and the first

week of November?

A. Do you mean the documents, the invoices?

Q. All the discussions we have been examining over the past few days, all of that information, the documentation and the contents of that documentation was kept within a very small group of people.

A. That's correct.

Q. And, in fact, in the conduct of the various meetings, as you mentioned a moment ago, you or the company went to the trouble of ensuring, as you saw it, a formal meeting which had to be minuted would not be held, so that the minutes of those meetings would not get into the hands of the bankers, who under finance agreements, were entitled to them. Again, an attempt to keep this information, perhaps legitimately, but nevertheless, within as tight a group of people as possible?

A. We were investigating, Mr. Healy, some very sensitive issues, and we did not think it was prudent to share those investigations with the company's bankers at the time.

Q. And what you did was you came up with what you believed was an appropriate strategy which would entitle you, as you saw it, not to make the minutes or not to make the contents of the meetings available to the bankers, isn't that right?

A. I think "strategy" is too strong a word.

Q. I suggest that's not too strong a word. That's what

you did. You said "We'll have meetings, we'll call them meetings of shareholders but not formal shareholders meetings; we'll call them meetings of directors but not formal directors meetings; we'll have a solicitor present which means it's a privileged meeting; in that way we will not disgorge that information to anybody. I am suggesting that's a strategy. Whether it was a legitimate one or not, it was certainly a thought out strategy?"

A. I can't recall a time where as directors we sat around the room and said this is what we are going to have to do. I do recall at the start of each meeting the meetings being described as you said.

Q. In fact, what you had around this time were meetings of directors and meetings of shareholders of certainly ESAT Digifone, maybe also ESAT Telecom, and perhaps the most significant or most important issues those companies would ever have to deal with, ever have to deal with, and there isn't a single board minute of them, isn't that right?

A. That's correct.

Q. Now, I suggest to you that that was because of anxiety to keep all this information as tight as possible, and I am suggesting that the anxiety to keep that information as tight as possible was what was behind this very Jesuitical statement, even if it could be described as that?

A. I would disagree with the last part of what you said.

I would agree with the first part of what you said. I

think, Mr. Healy, you are reading far too much into

this. If I could just point out to finish on this

point. There was no reason why anybody in ESAT

Digifone would have any reason to cover or to hide any

of this with regard to the Telenor payment.

Q. Well, you may very well say that, Mr. Maloney, but it

doesn't seem to me to be reflected in what the PR

people or your finance director put out on the 16th

March 2001.

A. I fully accept that that statement is, as you describe,

Jesuitical and splitting hairs on terminology. I fully

accept that.

Q. In relation to what happened in 1997, if we could just

go back now for a minute now, and I am not going to go

into too much of the detail because you were not around

at the time of the $\frac{1}{2}$ 50,000 payment to Fine Gael to

David Austin rather. But \$50,000 payment, sorry.

Am I right in saying that you were only aware of that

as a result of information brought to your attention by

Telenor towards the end of October, is that right? It

may have been later than October.

A. Sorry, Mr. Healy, which year now?

Q. 1997.

A. As I said in my evidence yesterday, I was made aware of

a political contribution having been paid

Q. You are right. What I am referring to, I suppose, and I should have been more careful about it, was that difficulties that Telenor were identifying toward the end of October, beginning of November about this payment, the fact that the payment had not gone to Fine Gael directly, or if at all, as far as they were concerned, but that it had gone to David Austin and that it had gone into an offshore bank?

A. That's correct. My recollection is that sometime towards the end of October '97, Arve Johansen would have shared with me the copy of the invoices and the reinvoices. That would have been the first time I had seen that documentation.

Q. Did the invoices that you were shown, were they the same invoices that have been referred to in evidence here, as you call them the invoices and the reinvoices?

A. I believe so, yes.

Q. Now, it's not unusual in any business for somebody to ask for somebody to be invoiced in a different way or in a different currency or whatever. But I think you'll agree with me here that these invoices were, or the reinvoices were issued in somewhat troubling terms, isn't that right? They didn't reflect the reality of the underlying transaction?

A. I think that's fair, yes.

Q. And the problem, as Telenor saw it, and I think as a number of other people saw it at the meeting, was that

there was some whiff of an odour off this, and that the thing to do was to find out, did the money definitely go to Fine Gael, isn't that right?

A. In the context of the discussions that were happening in October/November, I believe the consciousness wasn't so much that, but if it had gone to if it had gone to David Austin, did Fine Gael get it, I think was the context within which those discussions were happening.

Q. Well, wasn't the ultimate question, did it go directly or did it go, whether directly or indirectly, to Fine Gael and not to Michael Lowry?

Wasn't that the real nub of the issue

A. I think there was a fear that because it had gone to David Austin, and may not have gone to Fine Gael, and had it gone to Michael Lowry? That was probably a fear that some people had in their minds, or a doubt.

Q. And do you remember a discussion as to whether you'd go to Fine Gael or whether you'd go to David Austin to try to get to the bottom of this?

A. I remember the discussion about getting a letter from David Austin to say he received the monies, and possibly that the letter said that he passed it on to Fine Gael, but I can't recall that specifically.

Q. Wasn't there also a discussion as to whether Fine Gael themselves would provide a receipt or some other evidence that they had got the money?

A. There might have been some vague discussion at the

time. I should say, Mr. Healy, that as an issue, this was seen by me and by the management team as a shareholder issue that happened. It wasn't something that particularly, you know, taxed us or we focused on, because none of us were there at the time.

Q. Well, except that if it was in any way related to the granting of the licence, you knew that it was improper or would be regarded as improper?

A. That's correct.

Q. I think you did say that at the meeting?

A. That it could be interpreted as being

Q. Yes.

A. Absolutely.

Q. That it would be improper if it was connected with the licence.

A. Well, Mr. Healy, at the time it was a political donation, and in and of themselves, you know, political donations are not necessarily a problem, as far as I am aware.

Q. Not at all. I quite agree. But this was a political donation which seems to have been well and truly hidden?

A. Certainly when you saw the paperwork and the route that it went through, I'd agree with that.

Q. I think that if you look at, I think it's page 32.

A. Of which document?

Q. Of Mr. Lang's notes. You see the middle of the page

"It was clarified by Barry Maloney"? Do you see that?

A. Yeah.

Q. "It was clarified by Barry Maloney and others that there was no reference to Fine Gael in any of the documents. It is also pointed out that there had been care to avoid any mention of Fine Gael."

So although there had been a political donation, there was even at that time, whoever was behind it, I am not going to say anything about that, a desire not to identify Fine Gael as the beneficiary of this particular political donation?

A. That appears to be correct.

Q. And I think it was, if you go up three paragraphs, "Johnny Fortune then questioned as to whether a letter would come from Fine Gael. He referred to the letter as being from David Austin." Do you see where that question

A. Yes, I do.

Q. Would you agree with me, as I think has been suggested to other witnesses here, that the obvious place to go to get information on about whether there was a payment to Fine Gael was Fine Gael itself?

A. I would agree with that.

Q. And can you give any explanation as to why somebody went and disturbed a sick man to get him to sign a letter saying that he sent this money to Fine Gael?

A. No, I cannot.

Q. I'll just go back now to finish some of the other documents quickly.

Now the next document, document number 28 in your first list of documents, is a letter to Mr. Denis O'Brien from Mr. Michael Walsh. We have referred to this letter already. It's a letter from Mr. Walsh. It's a similar letter to you, so I'll read this one, and we won't need to read the details of the letter to you.

"Dear Denis, following on the conversations which have arisen in the context of the IPO in the past few weeks, I want to confirm in writing to you that we have done nothing which could in any way jeopardise the ESAT Digifone mobile licence.

While we accept that the department set up a competition which was designed to be free from political influence and that the final decision was taken by cabinet rather than by the minister, we want to clearly put on record that if any actions were taken by yourself, either personally or corporately which damaged the licence, we will hold you liable. We are progressing with our investment on the basis that no such action was taken and I would like you to confirm this to me in writing as I have confirmed to you."

My question to you is how did that come to be on your

files?

A. I can't recall.

Q. In any case, you also received a similar letter, isn't that right, document number 30 in your book of documents?

A. Yes, I did.

Q. As I understand it, letters like this were sent by IIU to the shareholders in ESAT Digifone, Telenor, and ESAT Telecom, isn't that right?

A. That's correct.

Q. But individual letters were sent to you personally and to Mr. Denis O'Brien?

A. Sorry, I wasn't aware of that distinction. I received a letter dated 6th November, which was the day after the other letter seems to have been sent.

Q. What I am trying to get at is: Had there been any suggestion, in the course of any of the discussions that had taken place up to the 6th November, that you had done anything that would damage the licence?

A. No, there had not.

Q. Why do you think you received a letter like that, then?

A. I have no idea.

Q. Did it trouble you that you had received a letter like that?

A. Well, it did, and I sent a very terse two-liner response to it the same day.

Q. Your response, which is document number 31, was:

"Dear Michael,

I refer to your letter of the 6th November 1997. I respond in the capacity of Chief Executive and director of ESAT Digifone. You may be assured that all actions taken by me, whether individually or on behalf of the company, have been in all respects lawful, correct and in accordance with the highest standards of propriety and integrity."

The discussions that you had been having over the previous few days concerned things that had occurred or might have occurred in connection with the granting of the licence, isn't that right?

A. That's correct.

Q. You hadn't been involved in that except very peripherally?

A. No, I had not.

Q. And you don't think there was any suggestion, or could there have been any suggestion that what was being referred to was your bringing these matters up in 1997?

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

Q. Very briefly, I'll come to your last document in your first set of documents, which is number 32. It's a note of a meeting of the 6th November, 1997. Can you tell me what that meeting was about, because I am slightly confused by the reference to "Leslie Buckley, ET board meeting" at the top of it?

A. I believe it was Leslie Buckley giving us a synopsis of what had happened at the ESAT Telecom board meeting.

I believe that to be the case, but I couldn't be a hundred percent sure.

Q. "ESAT Telecom board meeting, William Fry and D Poke present" who would be an American lawyer, is that right?

A. So I understand.

Q. "- sworn affidavit from Denis O'Brien. - wording change on page 16." Now, did you know what that wording change was on page 16?

A. Not specifically, no.

Q. Do you know what discussion there was about it?

A. No.

Q. "KPMG commentary re audits. - reclassification of \$50,000 for tax purposes. - "innuendo and rumours relating to the granting of the licence has been investigated by the directors to be added into the section"."

Do you know what that was about?

A. I can't specifically recall, because it's in inverted commas. It looks as if maybe there was a suggestion that that would be added into the text, perhaps.

Q. Maybe I am wrong in my reading of the documents, but I couldn't see anywhere on page 16 a reference to those words "innuendo and rumours relating to the granting of the licence has been investigated by the directors."

Did you think at this meeting that that had been added in at page 16 of the Prospectus?

A. I am not clear, Mr. Healy, it's not clear to me.

Q. What kind of a meeting was this that you were noting or recording in your memorandum?

A. As I recall, it was Leslie Buckley giving us an update of what had happened

Q. Giving us? Who is "us"?

A. I believe the directors of ESAT Digifone. Again, unfortunately my note doesn't say who else was at the meeting, so I can't be sure.

Q. Next it says "Assumed letter from David Austin." In other words, it was assumed that a letter would be provided by David Austin in the terms of the letter that we have now seen in evidence a few times.

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

Q. Then you have "No discussion on getting a letter from FG." I presume what that means is that Leslie Buckley was saying there was no discussion at the ESAT Telecom meeting of getting a letter from FG?

A. I believe that to be right, yes.

Q. Why would you have noted that?

A. I can't specifically say. I can't recall.

Q. Would I be right in thinking that you have noted it because you felt that getting a letter from FG might have been the proper way to solve once and for all the query surrounding the Telenor \$50,000 payment?

A. Perhaps, yes.

Q. "Letter from ESAT Digifone accepted would be changes in the document." You then seem to have a number of bullet points which would appear to record what you regarded as the result of that meeting.

"A letter from David Austin.

Letter from shareholders saying no impropriety took place."

Is that the reference to the letters that I mentioned a moment ago

A. I believe so.

Q. from IIU to you?

"3. Need comfort around "no insurance" personal indemnity.

4. Denis's affidavit general statement."

Can you remember at this time whether, in writing down those four needs, you assumed not only that you'd get a letter from David Austin, but that the wording change referred to in Mr. well, by Mr. Leslie Buckley would be added in the Prospectus?

A. Which wording? The one starting "innuendo"?

Q. "Innuendo and rumours in relation to the granting of the licence have been investigated by the directors."

A. I can't recall that as being something that was stated was going to happen, no.

Q. Were you in any way concerned about the use of the expression or the word "innuendo"?

A. I can't recall, Mr. Healy. I do remember having seen this type of statement somewhere else back through the process, I can't remember where.

Q. I see. Do you think that it was your concerns that were being referred to as innuendo or something else?

A. I don't believe they were my concerns, but I could not be sure.

Q. Can you tell me what the next page is, because I don't know how it fits into

A. The next page I have I have notes on the back of the same sheet. That's probably represented as a different page in your book, given that I have the original.

Q. Again, I only want to draw your attention to the last item, because it's the point we were making a moment ago.

"Need to treat the \$50,000 as a political contribution properly in the books of the company."

Do you see that?

A. Yes, I do.

Q. That's what I was referring to, I think, when I said that you may have noted it.

A. Okay.

Q. The next document the next set of documents, then,

are the documents that you say that you put together as a result of a search, I think, by yourself and your daughter, is that right?

A. That's correct.

Q. I think some of these, in the light of your evidence, now speak for themselves. The first document is described as a handwritten note of Barry Maloney relative to the IPO headed "Johnny Fortune". Then there is a reference to, "US securities lawyer; an associate, not subsidiary.

Took 2 years in CBJ. JF full time on it.

Effectively take Digifone public." I am not sure what that's about, but the reference to "an associate not a subsidiary" is presumably a reference to the relationship between ET and Digifone, is it, probably?

A. Correct.

Q. I think the next document we have already referred to, am I right?

A. The next document

Q. Number 2, "What exactly are the plans for an IPO by ET group"?

A. Yes, we have.

Q. I think I have dealt with that. And the next document. If I could just go to the last two documents, numbers 8 and 13. I think I have dealt with all the others. Can you throw any light on what number 8 is about ?

A. It's the handwritten note saying "I am not working on an expectation that I will be called." No, I can't.

Q. "I am not working on an expectation that I will be called. Don't have any particular info to give them."

What do you think that refers to?

A. I think somebody must have said it to me, but I don't know who.

Q. And does the name 'Mary' at the top of the document throw any light on it?

A. No.

Q. If you pulled this document out of your files, what criterion did you use for including it with the documents that were given to the Tribunal?

A. Just "I am not working on an expectation that I will be called," I presume when I saw that it would be reference to something about the Tribunal, that is why I included it.

Q. The next document is one which reflects some of the evidence you have already given and I think it seems to me that the middle section is the only relevant section, is that right?

A. Which document are you on now?

Q. This is 13. You may have them in a different order.

A. Yes, that's correct.

Q. Item A, is that "Concerns re success "fees."

A. Yes.

Q. "Memo from Denis re who was due." Then you have "Check

timing of this memo in terms of when it was received."

Can you tell me was that ever actually done? Did you ever turn up that memo or find it?

A. I found it in the context of the current dealings with the Tribunal. I think I don't recall having gone and checked it at the time.

Q. Obviously that would have dated in some way

A. Yes.

Q. to the dealings you were having with Mr. O'Brien?

A. Yes.

Q. Well, as far as I recall, the Tribunal hasn't got the memo, but if you can identify it, maybe you might try to make it available?

A. Sorry, I provided it the memo plus there is my memo, the letter from PJ Mara

Q. Well, you may have provided it well it shouldn't be a difficult matter to find it then if you think you have provided it, I am sure we can find it.

A. Otherwise I can provide it to you again.

Q. I just want to deal with one or two general matters.

Do you recall that

CHAIRMAN: It's ten to one, unless you feel

MR. HEALY: I don't think there is any point, we can get rid of the other matters more quickly in the afternoon if we can organise.

CHAIRMAN: Two o'clock. Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AT 2:00 P.M.:

Q. MR. HEALY: Mr. Maloney, I just want to clear up a few small matters and references in various parts of the transcript to dealings Mr. O'Brien had with you and I also want to deal with the additional documents that you've provided to the Tribunal.

I just want to remind you of one aspect of the evidence that has been given and of the documentation that has been produced. You will recall in your various efforts to endeavour to persuade Mr. O'Brien to delay the IPO, you were dealing not only with - you were trying to persuade him to delay the IPO and you were relying on what you felt were a number of good grounds he might give to U.S. investors to delay it?

A. That's correct.

Q. And you made this request to him on a number of occasions. But specifically you said, wait until after the Tribunal. Can you tell me what was behind the thinking you had in wishing to delay the IPO until after the Tribunal?

A. I think what was on my mind at the time was that if the IPO didn't occur before the Tribunal and the Tribunal sat and did whatever investigations it was going to do and found that there was nothing, that no payment had

been made, well then, the hazard, if you like, was gone, and that would have been a better time for the IPO to go ahead. I believe that's what was in my mind at the time.

Q. And did you envisage, therefore, that if the IPO was delayed, that you would be making available, or that Digifone would be making available to the Tribunal the information that had been garnered in the course of the investigations leading up to the 7th of November, '97?

A. I think that would be difficult to say, because the first time I put to Denis, you know, the potential for him to look at delaying the IPO, was, I believe, on the meeting of the 8th of October.

Q. Mm-hmm.

A. At that stage, of course, we hadn't done any of the investigations that was subsequently done.

Q. Yes?

A. So I think it would be too far for me to be able to connect it in the way you have described.

Q. I understand that. Did you think, therefore, that if you were delayed until after the Tribunal, that you would bring your concerns to the Tribunal and that it would be left to the Tribunal to investigate those concerns?

A. I certainly, in my meetings with Denis on the 8th, the 13th, two meetings on the 13th and the one meeting on the 14th, I would never have said to Denis, "If you

don't do this I'll go to the Tribunal."

Q. I am not suggesting that that would have been a threat.

But was it envisaged by you that if the IPO was delayed until after the Tribunal, did you envisage that the Tribunal would have the opportunity of examining your concerns and the information you had, or did you envisage that the Tribunal would simply report, without the benefit of knowing about your concerns, and if a clean bill of health was given, as it were, then there would be no need to refer in the Prospectus to the Tribunal and no need for you to worry about any material in the statement?

A. That's a very long question.

Q. I'll break it up, again, if you like, into the two parts.

A. Okay. I'd just like to understand what the question was.

Q. I'll just take it in its two parts. Did you envisage that if the IPO was delayed until after the Tribunal, that the Tribunal would have an opportunity of examining your concerns?

A. I assumed that they would have had an opportunity to examine whatever actions were being taken by Mr. Lowry at the time and that if any of those were shown to be connected with our company, that they would have been thoroughly investigated.

Q. Do I understand you there to say that you assumed that

if the Tribunal was going to examine Mr. Lowry's actions, that it would examine the bid process, the competition and so forth, is that right?

A. I would have had an assumption at the time that would have been one of the matters that they would have looked at, yes.

Q. And what you say is that if any of the actions taken by Mr. Lowry were shown to be connected with the company, then you assumed that they would be thoroughly investigated?

A. That's what I would have assumed back then, yes.

Q. But there are two sides to any issue like this. There are actions on the part of Mr. Lowry, and actions on the part of anyone who might seek to influence him, isn't that right - improperly?

A. That's correct.

Q. And what you had was information from Mr. Denis O'Brien concerning one half or one dimension of that, isn't that right? You had information from Mr. O'Brien that suggested that he had had dealings with Mr. Lowry which might be connected with the GSM licence?

A. That's correct.

Q. And the other directors also had that information after the - well, Mr. Walsh had it by the 13th, isn't that right?

A. That's correct.

Q. Mr. O'Brien himself had it; Mr. Desmond had it by the

14th, is that right?

A. That's correct.

Q. And by certainly the 20th the other directors had it?

A. That's correct.

Q. Now, that was before, if you like, any of the October, or any of the November, the 4th, 5th or 6th

investigations. Did the directors envisage that it was the Tribunal who would come to them or did they see themselves as having any role in going to the Tribunal?

A. I can't recall any discussions by them in the sense of them going to the Tribunal. I do recall that at the meeting of the 23rd of October, when I read out my ten point memo, that I believe I made a statement there saying that this - if there ever was an investigation that I was involved in, that these were the ten points that summarise the sequence of the issues that I was concerned about.

Q. And I think you may have said it on another occasion that if questions were raised with you by the Tribunal, the answers to which involved disclosing your concern, that you would have to provide those answers?

A. That's correct.

Q. And, in fact, I should say that you were the person who brought these matters to the attention of the Tribunal after its last Opening Statement.

A. I was asked the question by yourself, I believe, did I know of any reason why the health warning appeared in

the Prospectus? And I think what I said was I didn't - wasn't aware specifically if that was the reason, but that there had been a discussion about the two payments for 100,000.

Q. If the Tribunal had reported without the benefit of knowing about the concerns you had or the conversation that you had with Mr. - any of the conversations, all of which were very important, with Mr. O'Brien, do you think you would have felt an obligation to come to the Tribunal to correct the record?

A. It's a very difficult hypothetical question.

Q. It's a difficult question.

A. It's also hypothetical.

Q. Well, we know that

MS. FINLAY: Chairman, I wonder, with respect to - is it wise to go down the hypothetical route? It seems to me, in fairness to the witness, that perhaps one should stick to either what were his - what was his mindset in the given set of circumstances.

CHAIRMAN: In general, Ms. Finlay, but I think this one is a fairly straight and uncomplicated scenario. I'll limit it to this.

Q. MR. HEALY: To be fair, Mr. Maloney, what I am trying to do is finish up the discussion we were having this morning about perhaps an understanding, but not one I

would agree with, desire on the part of the directors not to raise this issue again: the eyes wide shut point, in other words.

A. I have difficulty, if you like, speaking on behalf of all the directors. I'm sure you can understand. I can only give you what my own state of mind was at the time, which was balancing what I knew to be fact.

Q. I understand that.

A. Which was basically conversations that Denis O'Brien had had with me, no more than that, against the responsibility I felt as CEO of the company.

Q. Can I put it this way then: that you - did you envisage that if the Tribunal were going to investigate this matter, and if nothing - if the Tribunal were going to investigate this matter, that unless somebody came to you from the Tribunal to ask you about your concerns, you didn't envisage bringing your concerns to the attention of the Tribunal?

A. I can answer that by saying, if there was any investigation into the company, I saw it as highly unlikely that I would not be invited to talk to the Tribunal, given that I was the CEO the last six years.

Q. You do agree that the concerns you had and which you shared with the directors in 1997 did not cease to have a relevance to the Tribunal's investigations up to today's date at any time between '97 and today?

A. Yes, I do agree with that.

Q. And I won't go any further on that point.

I want to go back and refer to one or two matters in the context of evidence that was given by Mr. O'Brien in the context of evidence you have given, and in particular with reference to the additional documentation you've provided to the Tribunal.

I think you are aware that Mr. O'Brien has already said that you were causing trouble to stop the IPO; that you had caused trouble in 1996 in connection with this previous bond issue. You are aware of that evidence?

A. Yes, I am.

Q. Mr. O'Brien also made the point, I think elsewhere, that you could have raised the concerns you had in connection with the 1996/1997 January bond issue and in connection with the 1997 July bond issue. Do you remember those two points being raised by him during the course of his evidence?

A. I do, yes.

Q. They are in some way connected, but maybe if we just deal with them separately for the moment. Firstly, in relation to 1996, December, 1995/January 1996, you have already indicated that you resigned for the reasons that you described; you didn't think that you - that you preferred to preserve your friendship rather than preserve your position and destroy your friendship with Mr. O'Brien?

A. That's correct.

Q. I think Mr. Coughlan corrects me. It's December, '96.

And you've provided further documentation to the Tribunal in connection with that period. I call this the documentation that's been provided in the green book. And that documentation deals with material which you feel is relevant to the issues that arose and the troubles that you had at that time, isn't that right?

A. That's correct.

Q. I think you have been given a copy of that book.

Now, the documentation you provided the Tribunal contains your resignation letter, certain correspondence between Telenor and one of the directors of ESAT Digifone, John Callaghan, concerning relations between the shareholders, on the one hand, and relations between the company and you and the interaction between the two of them with respect to your share options, is that right?

A. That's correct.

Q. Now, I don't think that the dealings between the shareholders threw a huge amount of light and maybe that have you provided these documents to show the whole course of dealings that occurred at the time, but if you think they throw some particular light on the action you took or the action the company took with respect to you at this time, you might tell me what light they throw on it, in general terms.

A. No, only to say that it was the environment; that that was the environment at the time.

Q. Could I summarise it in this way, then: that you had the Share Option Agreement that you described yesterday in the witness box; there were what I will call some strains or tensions arising because of an interpretation, rightly or wrongly, Telenor took as to how that Share Option Scheme should be implemented.

Would that be a fair way -

A. That's correct.

Q. And these tensions, which are ultimately resolved in the way that didn't in fact impact on you, but during the time when these tensions existed, there was a certain amount of uncertainty surrounding your position, or at least your position seemed to be in some way uncomfortable, would that be right?

A. That's correct.

Q. Because you didn't have the confidence that what you believed to be your share options were going to be implemented in the manner you had originally understood they would be implemented?

A. That's correct.

Q. So that was a background, but it's not actually - it's simply part of the tensions or part of the background against which you had other concerns which ultimately prompted you to resign, is that right?

A. That's correct.

Q. Okay, then. You resigned, you said yesterday, for the reasons you described. And your letter of resignation is, I think, dated - it's item number 5 - 9, sorry - dated the 9th of December. It's not on headed note paper, addressed to the directors of ESAT Digifone. It says:

"Effective immediately I would like to tender my resignation as joint CEO/CEO designate of ESAT Digifone.

When I joined the company I made an absolute commitment to John Callaghan on behalf of the board of directors to help manage the company as an independent stand-alone business. Unfortunately, the required climate to allow me to meet this commitment is absent.

I wish the company every success in tackling the many challenges ahead."

Now, yesterday you described what you meant by "an independent stand-alone business", isn't that right?

A. That's correct.

Q. As a result of your resignation, you received letters from Arve Johansen seeking in some way to put your mind at rest concerning the differences that Telenor had with ESAT Telecom regarding your share options, is that right?

A. That's correct.

Q. That's document number 10. I don't think we need to go into the details of it. That simply describes it.

Document number 11 refers to details that the company, or refers to arrangements the company had with its banks at the time, and I think it's in that document that, in fact, I saw the reference to the obligation the company had, am I right, it's in that document I saw it? Or in a related document? It's, in fact, in the appendix to that letter that I saw a reference to an obligation that the company had to furnish the bankers with copies of all board minutes on an on-going basis, is that right?

A. That's correct.

Q. Now, I then think that there is, with that bundle of documents, a letter from Mr. Callaghan to the company secretary setting out, or enclosing, rather, a paper he had prepared at the request of the board concerning relationships between shareholders and relationships between directors, relationships between management and each of the other two organs of the company, is that right?

A. That's correct.

Q. I don't think we need to go into it. I think what it was was an attempt to set down in black and white the boundaries over which the directors shouldn't trespass in dealing with management and vice versa.

A. Correct.

Q. The next document, document 13, seems to be a typed version of the type of document we've seen in handwritten form from you setting out what you described yesterday, I think, are the terms under which you would agree to resume your position as Chief Executive Officer?

A. If I can just make it clear that I returned to the company within three or four days

Q. Yes.

A. of my resignation on the commitment from Dermot Desmond on behalf of the board that these issues would be worked on, but in order to assist Denis at the time, it was very important that I came back to work very quickly. So I believe the day I resigned might have been on the Wednesday or the Thursday and I believe I returned the following week.

Q. Did you withdraw your resignation or did you return simply to assist with keeping the show on the road during the time that Mr. O'Brien was trying to raise money on his bond issue?

A. I didn't formally withdraw my resignation until I believe sometime in February, after all of these issues had been agreed by everybody.

Q. So you returned while efforts were being made by negotiation and otherwise to deal with the concerns that you had raised?

A. Correct. I accept that at the time it was going to

take some time to get everything bedded down but I accepted Dermot's word on behalf of the board that it would be done.

Q. If we can go through these points quickly. And you'll correct me if I'm wrong.

Firstly, you wanted a different PR company to ESAT Telecom and ESAT Telecom Holdings PR company to be involved with the PR of ESAT Digifone?

A. Correct.

Q. Secondly, you wanted different solicitors. And thirdly, you wanted the implementation of a new methodology of running the company as agreed with the banks. That, I think, is a reference to the document I mentioned a moment ago and the bank would have wanted fairly formal standard corporate structures and corporate government structures to be reflected in the way the company operated?

A. Correct. As I recall it, John Callaghan's document became part of the way we agreed the company would be run.

Q. I see. Next thing you talk about staying with ESAT Digifone. You wanted to be a stand-alone CEO. Did you mean you wanted to be the only CEO, or was that a reference to your stand-alone point that you'd been making earlier about the way the company should be run?

A. The point of concern I had at the time was that I was

concerned that Telenor, because of the shareholder issues that were going on, that they may not have seen me as the CEO designate at the time. When I took up my position with Digifone, it was as joint CEO, CEO designate, but because Telenor had the right to nominate the CEO for the first few years, I wanted to know that Telenor were happy that I would be the stand-alone CEO at the appropriate time.

Q. I see. Secondly then, you refer to your Share Option Agreement which you wished to be - which you wished to be rewritten in the way you described yesterday, and which I think, unless someone corrects me, is more or less reflected in what is stated here?

A. That's right, Mr. Healy. If I could just add that these changes were, such as they were, were requested by me in the context of Dermot Desmond having offered me $\frac{1}{2}$ 250,000 to come back to work for what was effectively 90 days.

Q. Yes.

A. Back in 1997, and still is today, back in 1997 that was a hell of a lot of cash.

Q. Yes.

A. And -

Q. 60 days work?

A. For 60 days work. I explained to Dermot that the cash compensation was not the issue and I didn't have the interest in that. What would be useful for me,

however, is to get my Option Agreement finally tied down and agreed by everybody to reflect the changing circumstances the company had found itself in.

Q. The next document, document number 13, I think you already covered in the evidence you gave, and I think it's related to some of the points that you in fact just mentioned a minute ago?

A. That's right.

Q. Again, we needn't go through it.

The next document is a meeting held in the Chairman's - a note of a meeting held in the Chairman's office, ESAT Digifone, on the 31st January 1997. And this is where it would appear Mr. John Callaghan made a note of the discussion concerning what you wanted and what ESAT Digifone were prepared to do for you, is that right?

A. That's correct.

Q. And reference is made to the point concerning the $\frac{1}{2}$ 250,000 inducement. You preferred an inducement in the form of a reconfiguration of your Share Option Scheme to reflect what you believed to be the achievable goals in terms of performance, is that right?

A. Correct. Part of my Option Agreement was performance related.

Q. Yes.

A. And those goals had changed because of the change in the characteristics of the company.

Q. And I'll just read the headings.

"Different PR company from ESAT Telecom.

Different legal firm from ESAT Telecom.

Implementation of new methodology for running ESAT

Digifone.

Stand-alone CEO.

Change in the Share Option Agreement".

CHAIRMAN: Synonymous with the last one, Mr. Healy,
isn't it?

MR. HEALY: I don't think it is, Sir. I think it's a
note of a meeting.

CHAIRMAN: It's exactly the same content as the
previous document.

MR. HEALY: I think it was. In fact, the only two
changes are the ones I am about to come to.

Q. "Shares in first charge of option to be available to
buy and sell unrestricted and an agreement from all
current and future shareholders to buy whenever Barry
wants to sell."

These were the terms that proved, in fact, to be the
sticking points, isn't that right?

A. What I was effectively looking for at the time was a
put option, which meant that at the time the shares

were available for sale, that the existing shareholders in the company would buy them from me.

Q. But you didn't succeed in that?

A. I didn't succeed in that and accepted that as part of my return. I might just mention I was concerned at the time that IIU would exit the company and leave ESAT Telecom and Telenor to have the company between them which would have been a very, I believed, would have been destructive on the future value of the company.

Q. I see. You say that - you go on to deal with the exercise of options. As a reference to performance goals which was put back for further discussion along with the share option issues we've described a moment ago, the other share option issues we described a moment ago. And then there was a question about mitigating taxation.

The next document, document 15, is simply a correction of one point in that memorandum.

I think there was some other toing and froing until ultimately you received a letter from Denis O'Brien as Chairman on the 12th of February, 1997 in which the company set out the agreed terms under which you would continue to act as CEO and withdraw your resignation formally, is that right?

A. That's correct.

Q. And you accepted those terms?

A. Yes, I did.

Q. What light does your handwritten document at the end of leaf number 19, what light does that throw on the issue?

A. Really, only - I think really all it does is just some notes that I made in consultation with John Callaghan after I received Denis's letter, because between the time that I had agreed to come back and the time of this letter, there was continuing to be some issues going on which were affecting the independence of Esat to continue on. John Callaghan helped me draft a letter back to Denis O'Brien to close the issue then finally.

Q. And is that the final letter of the 18th of February, 1997?

A. That's correct. So my handwritten notes were provided to John Callaghan as my input into the draft of that letter, which he helped me with, back to Denis O'Brien, dated the 18th.

Q. And the end of that letter was that you formally withdrew your resignation?

A. That's correct.

Q. Now, in addition to the point that Mr. O'Brien made concerning your resignation, which we dealt with yesterday, I think mainly he also made the point that you had an opportunity of raising your concerns in January of '96 and in July of '97 when there were two

other capital raising efforts on his part, I think there were two bond issues. He says that you could have raised the concerns you had with him during that period, that you didn't do so, and that you raised them at the time of the IPO solely in order to cause trouble.

A. I am aware that's what he said.

Q. Yes. Well, why didn't you raise them with him in January of '97 or in July of '97?

A. To the best I can recollect, the only time - if you just take the documentation point, in terms of the prospectuses, or whatever the equivalent document for a bond issue would be, I never saw any of those until the one at the time of the IPO. I would say that those fundraisings that were being done in the context - the context of it was a shareholder fundraising, we wouldn't have been that closely involved that I can recall.

Q. Well -

A. Other than

Q. Information was being provided?

A. Other than the release of the financial information from the company that they used.

Q. Do you know if the - either of the prospectuses issued at that time or the equivalent documents contained any disclaimers such as the kind that ultimately appeared in the IPO Prospectus?

A. I didn't know that. I have been told subsequently, in the last couple of days perhaps, that there were similar disclaimers made in the prospectuses for the bond offerings.

Q. I just want to get it clear what you are saying there when you say there were no disclaimers or health warnings. I want to be clear that I understand your evidence. There were, I think, disclaimers in the earlier documentation?

A. As I recall, on - at some point in January of '97 there was a memo that went from ESAT Digifone to ESAT Telecom outlining what was required by ESAT Digifone to allow them to release information. I believe that included a disclaimer statement plus the release of the numbers that we were authorising could be used as part of their fundraising. As I gave evidence earlier on, it's my understanding that the format of that was consistent through each of their fundraisings, but they had to come back for permission each time, as I recall the situation to be. I might be wrong, but that's what I recall the situation to be.

Q. What I am talking about, in relation to the context of the Prospectus, is the reference on page 16 to the importance of the ESAT Digifone licence and the reference to inquiries being conducted into the licence. Do you recall any such similar references being drawn to your attention in relation to any other

capital raising activity?

A. No, I do not.

Q. The Tribunal has also been provided with further documentation this morning by Mr. O'Brien which appear to be related to the events of December 1996. Do you have a copy of that documentation?

A. I do, yes.

Q. This documentation has been provided to enable you to comment on it, and the Tribunal has been told that it is documentation prepared by Mr. Denis O'Brien and filed under your name in his office. If you look at the opening page, that is how the documentation is described. Have you got a copy?

A. Mr. Healy, if you wouldn't mind if I just get - I believed I did have but I must have left it behind me.

Sorry, Mr. Healy, I have it now.

Q. Thank you. The first page is a list of bullet points. It seems to have had some kind of a post-it or sticky note put on the top right-hand corner. The Tribunal hasn't yet had an opportunity of examining the originals but in order to save time and in view of your own time constraints, we are going to try to go through them as expeditiously as possible at this time. If there is a need to come back to them, you can make contact with the Tribunal if you feel there is anything you want to add.

A. Okay.

Q. I think it says, the first bullet point, I'll read them out and I'll ask you to comment on them as I go through them, unless I ask you some additional question.

"He holds the last piece of jigsaw.

Assumption is that we have no choice.

This is blackmail."

The next one:

"Picked this time when the company is at its most vulnerable.

Sue him for breach of" something.

"His judgment is wrong.

Get Kane Gustad.

Trust factor.

Can we ever trust this guy again?

He knows he's between the company and the drawing of the project finance.

He should have told the bank he was staying and then come to us in three or four weeks time and ask the Board to change the contract.

He should withdraw the letter.

He could take up options and leave in six months (i.e.

wants it up front) gone on merit.

Company cannot operate this way."

I don't know what the last line - something about the position of the banks. I don't know if you can decipher it; "pivotal position of the banks."

Firstly, can I just ask you, unless have you some comment to make on those, can I ask you, were you accused of blackmailing the company at the time?

A. No, I was not. Sorry, no I was not, that I can recall.

I can't recall it.

Q. Yes. You did say that it was a vulnerable time for the company, is that right? You did say that to me yesterday?

A. I understood, after I resigned, Denis explained to me how vulnerable it was for his company, ESAT Telecom, because what he told me was that if I didn't come back, he would not be able to raise the money and by not being able to raise the money, the way the Shareholders Agreement worked in ESAT Digifone, he believed he would lose his parity with Telenor.

Q. Can you tell me how long after you resigned did he come to you and say that?

A. The day after.

Q. And what was your response?

A. Well, it was on the basis of the discussions with

Dermot Desmond and the personal visit that Denis made to my home the next day that I then came back to work on the following Monday morning.

Q. So Mr. Desmond - Mr. O'Brien came to your house the day after you wrote your letter of resignation; Mr. Desmond made contact with you on the same time?

A. I believe Mr. Desmond's call came first.

Q. I see.

A. I believe that was on the same day, perhaps in the afternoon. And I believe Mr. O'Brien came the next day, the best I can recollect.

Q. You came back to work on the following Monday?

A. That's correct.

Q. To see could you negotiate some solution, but you did not formally withdraw your letter of resignation?

A. If I put it another way: I agreed to come back on Dermot Desmond's word that the Board would take on board the issues I had given and make sure that they all got resolved.

Q. Was Dermot Desmond effectively saying to you that he believed that you - your concerns, both in relation to independence and in relation to your options, could be satisfied, if you like?

A. He led me to believe that, yes.

Q. Were the banks aware that you had resigned?

A. I don't know the answer to that question.

Q. Did you tell any of the banks that you had resigned?

A. No, I did not.

Q. Is there a suggestion here that the banks may have been aware that you had resigned?

A. In these notes?

Q. Yes.

A. Well, because he is referencing it to the banks, there is that suggestion, yes.

Q. Yes. But are you sure that you did not inform the banks or direct anyone else to inform the banks?

A. I am certain I did not.

Q. In any case, of course, you would have been dealing only with ESAT Digifone's bankers, I presume?

A. That's correct.

Q. Next page is a reference to the 3rd of January, 1997. There is a note: "One of the banks mentioned that Barry Maloney was trying to wangle a deal."

Do you have any comment to make?

A. No comment to make.

Q. Back to December, '96, "Spoke to DOB: DD offered 250,000 back [sic] plus 60 days."

A. I believe that's "launch plus 60 days."

Q. What does that mean?

A. The launch of the network, which eventually occurred in March '96.

Q. "Hadn't left over compensation." I don't know what that means. Do you know what it means?

A. In my discussion with Dermot I made it very clear I

hadn't resigned because of any issue of compensation, either stock option related or any other element of compensation.

Q. "Money not issue." That seems to be consistent with what you were saying.

"It was more how company was run." Again consistent with what you were saying to Dermot Desmond.

"Mentioned to get options sorted," is that right, share options sorted?

"DD said he would that maybe with Arve).

DD spoke to Barry Maloney today."

It seems to be a record of a conversation Mr. O'Brien may have had with Dermot Desmond?

A. That appears to be so, yes.

Q. The next page is undated, it says: "Barry Maloney in light of new way of running company" - maybe the word 'way' should be inserted " - and PR and legal common companies find it difficult to serve both companies.

PR company decides legal adviser.

Reference to "Board would decide legal advisers."

This seems to be a reference to the issues that you were raising.

The next page is a reference to the issue that you had

raised concerning stand-alone CEO.

Unless you think there is something on this page which marketedly suggests that other issues were involved, I don't propose to go into it in detail.

A. That's fine.

Q. The same in relation to the Share Option Scheme.

And I think there are a number of pages dealing then with the breakdown of the Share Option Scheme, the 1 per cent and the two .5 per cents.

I can see nothing on the rest of the document that throws any particular light on it, or that in any way suggested that there were issues other than the ones you were raising, that being were discussed or canvassed by anyone at the relevant time, would that be right?

A. Not that can I see.

Q. The last - the next separate document, not the last document, the next separate document is a fax from ESAT Telecom from a Rachel Howard to you. Do you know who Rachel Howard is?

A. I can't say I do, no.

Q. "Find attached information for you for your attention from Denis" - presumably Denis O'Brien, and this is a reference to a transcript of a Morning Ireland program in relation to the mobile, second mobile phone licence.

It's dated the 10th of July 1997. And it refers to Michael Lowry's role as minister. It's an interview between - or it's a Mr. Richard Crowley, I think, is interviewing Mr. Sam Smyth. He says:

"Sam Smyth, in a way, your story on Michael Lowry began all of this, are you in some way concerned that the emphasis is now switched in a completely different direction, and that the affairs of Michael Lowry, particularly during his time as minister, won't be looked at closely? Or do you accept what Dick Spring says, which is that the present Tribunal is well equipped to do that?"

Sam Smyth: No. Mr. Spring was in government with Mr. Lowry and did stand over him, for a long time so one can understand why he said that. Now I think we should say this point, that I presume that Charles Haughey hasn't, didn't have the sole franchise on corruption in this country, or, indeed, badness.

And one of the things is of course, there are a number of controversial contracts that Mr. Lowry was involved in handing out, or his department did. Now there is one in particular which caused the American embassy in this country to intervene. I had never heard of that happening before when they did. This was over the mobile phone licence or the second mobile phone licence was handed out. Now there are lots of things there

that caused grave disquiet and I suppose when I hear Fintan talking about that, the way to look at these things for Charles Haughey, and indeed, Michael Lowry, is to see who benefited along the way. Look at the points that were made, look at the contracts that were given out during those times, and usually when you find out who benefits, that is very often an indication of where there is at least potential for corruption."

Do you remember getting that?

A. I can't honestly say I can remember it.

Q. Did you have any discussion - do you remember having any discussion about this document, even if you didn't get it, about the radio program?

A. No, I do not.

Q. Do you remember the issue arising at this time which would have been sometime in the first week of July of 1997?

A. No, I do not.

Q. Obviously, I think what Mr. O'Brien wishes to bring to the attention of the Tribunal is that around this time he was drawing to your attention issues that might arise concerning the second GSM licence?

A. As I said, I cannot remember seeing this fax before. I can't be categorical about it, but I do not recall having seen this before.

Q. Did you have any discussions with Mr. O'Brien about Mr. Lowry during 1997 and at the time that his affairs

were being scrutinised in the McCracken Tribunal?

A. No, I do not believe so. The question was, Mr. Healy, with regard to Michael Lowry's affairs?

Q. Yes.

A. No, I don't believe so.

Q. Well, with regard to Michael Lowry in any way -

A. Well, only - I am just trying to get the sequence of all of this. I think I explained to you yesterday that I had - I met with him regarding the status of the launch and the network. I am trying to get all these sequences of dates correctly.

Q. Yes.

A. I believe that was in a different period of time to the period of time you are asking me about.

Q. Well, by the launch of the network, you mean literally getting the phone system up and running?

A. March, '97.

Q. March, '97. Do you mean that the minister might have been there at some ceremonial launch or whatever?

A. Yes, but prior to that, I think I explained to you I met with him, which I think was either very early in '97 or at the end of '96 when we were seeking - we were trying to get the government to understand the issues we were having, the planning difficulties and the fact that Eircell, our competitor, had been given a derogation from planning laws to get their network up. I think I explained the circumstances of that to you

yesterday.

Q. I just want to get that clear. The meetings you must have had with Mr. Lowry were meetings with him as minister?

A. Correct.

Q. So they must have been prior to the - well, to some time in the end of October, November of 1996?

A. That's correct.

Q. But in 1997, when I suppose you could say the controversy was becoming quite heated concerning Mr. Lowry's affairs, during that time did you have any discussions with Mr. O'Brien concerning Mr. Lowry's affairs or any dealings he may have had in connection with the second GSM licence?

A. None that I could recall.

Q. I could see nothing that the last two memoranda in any way - I can't see how they add to the sum of information we have concerning these matters, can you?

A. No.

Q. Now I come to the document that was made available by ESAT this morning, the note of the meeting of the 23rd of October.

This was a note prepared by Mr. Fergus Armstrong. I think it's on the overhead projector. I'll read it as quickly as can I. We'll make a copy available for the stenographer. This is a note of a meeting which took

place at the offices

CHAIRMAN: Do we need to go through the note,
Mr. Healy? I am concerned about the time.

MR. HEALY: I am concerned with time as well, Sir. I
have never read this document. I am relying
exclusively on the highlighted portions of it. I don't
mind doing it that way.

Q. If you look at the first page of the document, there is
a reference to an intervention you make on the sixth
paragraph: "At this point Barry Maloney said that he
had understood from the second discussion that there
had been at least an intent to make a payment and that
Denis O'Brien had said something to the effect that
"thank God it hadn't gone through."

Dermot Desmond said he thought the questions were "did
any action take place?" And that the answer to this
was "no."

If you go down further, it seems that Mr. Rolf Busch
intervened saying, "What facts are before us?" "He
referred to McCann Fitzgerald summary note and in
particular paragraph 3 in which it was stated that "the
chief executive had reasonable grounds for considering
that actions may have taken place which would or which
could plausibly be alleged by third parties to put into
question the legitimacy of the process whereby the

company was awarded its licence to do business."

On the next page, in the second last paragraph,

Mr. Armstrong is querying you, and the note goes:

"Fergus Armstrong queried Barry Maloney with regard to his comment as to whether the first conversation referred to had been thought by him as "not relevant to Digifone". Barry Maloney then described the context in which that discussion had come up. That being one in which various payments of a consultancy nature were being requisitioned and in which DOB said something to the effect, 'you think you've got problems' and then referred to two payments of 100,000 he had made, to which BM replied, 'this has nothing to do with our company.'

Fergus Armstrong asked whether there had been a request to reimburse these sums."

And I think we dealt with that issue in a different context in the course of your evidence?

A. Yes, we did.

Q. If you go to the next page, the fourth last paragraph:

"Barry Maloney commented that Denis O'Brien had said the payments never went through and had said this to him a number of times and he saw no reason why this should be repeated but it made him quite anxious in the context of the IPO and the forthcoming Tribunal. He felt obliged to speak to the company solicitor and

following that he asked whether the IPO could be deferred."

Go to the second last paragraph, a reference to the introduction of the word "intermediary".

"Rolf Busch referred back to the conversation of October/November 1996 and to the assurances in August. He asked if Barry had accepted those assurances and noted that he still went to Fergus Armstrong. Were there worries? Was he taking Denis O'Brien's word that there had been no payment to the persons mentioned? To this Barry replied that he believed from what had been said that there had been an intention to make a payment since he had been told that a payment had gone to an intermediary. Rolf Busch said his bottom line was that the assurance given did not solve the problem, that the answers were not in the clear."

And I think we discussed that point this morning, that that was the continuing concern, even after all of the inquiries or discussions in November, up to November the 7th?

A. That's correct.

Q. "Barry Maloney said that what he had been given to understand was that there had been an intent and that the payment had got stuck.

DOB had interjected here saying "I actually didn't."

"Dermot Desmond intervened again speaking for IIIU, he said, "unless somebody shows me evidence, unless somebody shows me, I am happy that there was no action taken and I am prepared to sign off on the IPO. 'show me the money'."

I think you mentioned that point yourself yesterday?

A. Yes.

Q. If you go to the third or fourth last paragraph on page 4:

"Barry Maloney said that his concern was that the payment had been made to an intermediary, not simply to a bank. He invited Walsh to state what he understood from the meeting that had taken place between the three on" - I presume that has to be the 13th of October now?

A. Correct.

Q. from the evidence we've heard. "Michael Walsh responded by saying "to be clear, I came cold to the subject, there was talk of an intermediary."

On the next page, clearly responding to this portion of the discussion, Mr. O'Brien said, "There was both no intermediary involved, no money paid". "Men say things to other men... you spoof... nothing ever happened."

If you go to the end of that page, the point is taken up by you:

"Barry Maloney said he was still concerned that there was a clear impression that there was a middle person

not a bank, a third party involved."

"You didn't mention that the intermediary was a bank".

Were you speaking to Denis O'Brien when you said that?

A. I believe I was, yes.

Q. "John Fortune said Michael Walsh had given a different answer on that to the meeting. He had said that he didn't get a clear impression that there was a person" and there's a quotation mark "intended to go on". It's unclear what he said after that.

If you go to page 8, then. And for a moment we'll change to the subject of the Telenor payment. The third last paragraph, the fourth last paragraph, rather, or fifth last paragraph:

"Arve Johansen said his impression was that this was a political contribution requested of them. Fergus Armstrong asked to where had the money been paid and he was told that this was paid to an account in the name of David Austin in Jersey. Arve Johansen said that he had learned afterwards that Mr. Austin was a close friend of Mr. Lowry.

Denis O'Brien described Mr. Austin as "a wealthy guy, a bagman for Fine Gael. He said he would get me in front of John Bruton.

Knut Digerud said Mr. Lowry also arranged for us to come here (that is to IIU)".

Do you remember that remark, or does it make any sense to you?

A. I can't say I specifically remember it.

Q. Do you know what Mr. Digerud was referring to?

A. I don't - I know Knut Digerud's English wouldn't have been great, it certainly wouldn't have been as good as Arve's.

Q. Is it possible, in fairness to Mr. Lowry, that what he was referring to were the arrangements or his understanding of the arrangements made at the time of the collection of the - the solicitation of the Telenor payment?

A. I am sorry, I don't know what Knut Digerud meant.

Q. We'd obviously have to take it up with Mr. Digerud, because it suggests that Mr. Lowry arranged for Telenor to come to IIU's offices, then it would seem that Mr. Lowry was involved with Telenor at the time of these discussions on the 23rd of October, isn't that right?

A. I would say that's highly unlikely, but I don't know.

Q. I think you may be right. It's something that can be sorted out in due course.

On to page 9, then, and to the fourth paragraph:

"Michael Walsh then asked Barry Maloney "did you believe that these payments referred to had anything to do with our company?" Barry Maloney said that at the

time he had no reason to believe that they were to do with ESAT Digifone. That was at the time. However, the later statements caused him to worry. Then I asked" - I presume that's Fergus Armstrong - "asked Denis to align," - whatever that means - "what had been said, and he said that he had had the intention to pay, and that the payment had got stuck with a third party. Denis has since assured me the final link third party and Lowry never happened."

A. I think what perhaps, Fergus was trying to trap there - I believe that was me speaking at the time, in the way that's written.

Q. I see.

A. I believe it was Fergus recording what I said.

Q. Can you just go through that - explain what was happening there at that point, then, to me. Was it you

-

A. As I understand he was trapped here. Michael Walsh asked me, "Did you believe that these payments referred to, had anything to do with our company?" And then I commented that at the time I "had no reason to believe that they were anything to do with ESAT Digifone. That was at the time. However, the later statements caused me to worry. Then I asked Denis to align what had been said and he said that he had had the intention to pay and that the payment had got stuck with a third party. Denis has since assured me that the final link - third

party and Lowry, never happened." I believe that's what was trapped there.

Q. You, Barry Maloney, was asking Denis that?

A. Yes.

Q. Did you ask Denis O'Brien at the meeting to align what had been said, or is there a reference to some dealing you had on a previous occasion?

A. This would have been the October meetings, the 8th through to the 14th, I believe.

Q. So you asked Denis O'Brien a question and his response was, "The payment got stuck with a third party."

A. I believe this was Fergus recording my response to Michael Walsh and Michael Walsh put to me the question, "Did you believe these payments referred to had anything to do with our company?" I believe what comes after is what I said in response to Mr. Walsh.

Q. So you are referring to a whole historical period, then

-

A. Remember this was the 23rd of October.

Q. Yes. Yes. If you go to the last three or four paragraphs then on page 10, which is in fact the end of the note, because the rest of it is simply your own notes:

"Michael Walsh, I have a responsibility to weigh this thing up. We have to have regard to the potential damage to the company. I have formed my own view and I believe we have a responsibility.

Rolf Busch: "Michael, do you want to push us as to who we believe?"

Arve Johansen: "The knowledge we have tonight could be used against us."

"It was agreed that the four lines of approach suggested above would be followed and it was suggested that Fergus Armstrong visit New York. The question of providing facts to a New York law firm was discussed and Fergus Armstrong was given liberty to use his discretion as to what he felt it necessary to say in order to get the required advice and as to what level of detail he needed to go into."

If you just go back to the four points that were agreed.

"McCann Fitzgerald to draft a letter to underwriters making clear what is the extent of the information that our company is conveying, our degree of responsibility and making a disclaimer relative to any further information.

Obtain assurance from Denis.

Opinion for auditors.

Letter to underwriter (subsequently revised to be company's solicitors - William Fry - explaining what

are the matters we have investigated and giving them the total package)".

Do you remember yesterday - yesterday we were looking at Mr. O'Brien's own notes, I think, of that meeting?

A. The 23rd of October, was it?

Q. I was wondering what - I think some of the notes Mr. O'Brien made about what he called the final outcome of the meeting meant?

A. Yes.

Q. And one of the notes he made was "write a letter to the underwriters making a clear statement of all the facts." Do you remember that?

A. Yes.

Q. That was one of the notes Mr. O'Brien -

A. Yes, I do.

Q. If you look at item 4 here, this seems to be related to that item, "Letter to underwriter (subsequently revised to be the company's solicitors explaining what are the matters we have investigated and giving them the total package)." Did that mean giving them all the facts that had come out from this meeting?

A. Correct.

Q. Do you know if such a letter was written?

A. I can't actually say because I don't believe I've seen that.

Q. Was it the conclusion of the meeting that the facts would be given to the underwriters, or if not, to the

solicitors for the issuer, who were William Fries?

A. That was what Rolf Busch's proposal was. It's not clear to me at the end of the meeting - the key thing for me at the end of the meeting was giving Fergus Armstrong the authority to go to the U.S. to get the U.S. legal advice. These points had been proposed by Rolf Busch -

Q. Well, if you look at the last line: "It was agreed that the four lines of approach suggested above will be followed and it was suggested that FA visit New York."

A. Okay. So it appears, yes.

Q. And do you know why the notion of sending a letter to the underwriters was revised to a letter to the company's solicitors?

A. To ESAT Telecom's solicitors?

Q. Yes.

A. No, I do not.

Q. But was it the intention that the underwriters, if necessary, through their solicitors, would be informed of the facts as they appeared from this meeting?

A. That's correct.

Q. And this was, then, the decision that ESAT Digifone's Board, if you like, was making as to how they would proceed in relation to this matter in light of the pending IPO, is that right?

A. I believe that to be right, yes.

Q. So there were - to get away from this somewhat

troubling reference to the meeting as a meeting of directors without calling it a formal board meeting, this was nevertheless a decision of the Board of the company as to how they would proceed, isn't that right?

A. These were the four agreed actions from the meeting.

Q. But it was - you would draft a letter to the underwriters dealing with the information, i.e. the numbers that would be provided, obtain an assurance from Denis O'Brien, get an opinion to the auditors and write a letter to the underwriters, subsequently revised to the company's solicitors, putting all the facts before them. These were decisions of ESAT Digifone on the basis of advice. And the other decision was to get further advice in America, is that right?

A. I can't see they are final decisions because at this point we still didn't have a clear picture on what the U.S. implications were. So there was still a piece of data at this point in time we didn't have, which was how did all this sit in the U.S. market between an affiliate company and a company that was about to IPO?

Q. I don't want to get too - you are not a lawyer, Mr. Maloney, and I don't want to get too involved with you in a discussion as to the legal niceties of this.

Aren't I right in thinking, if you leave the legal niceties out of it, that is - this is how the Board of ESAT Digifone was going to proceed in this matter? If

anyone had said the following day what right has Mr. Armstrong to do what he is doing? What right has he got to go to the United States? What right has he got to write a letter to the underwriters? What right has he got to obtain an assurance from Denis O'Brien? it would have been based on a decision of the Board, isn't that right?

A. Again, I am not familiar enough with the -

Q. Well, I am leaving the legal niceties out of it.

A. The directors present at that meeting authorised Mr. Armstrong to do those four things. I think that's the correct capture of it.

Q. Now, Mr. Maloney, you are anxious, and indeed I would be if I were in your position, to leave the witness box and get on with your business. I want you to realise that if anything else concerns you about any of the matters I have questioned you about, you should bring them to the attention of the Tribunal, no doubt through your own solicitors over the next few days or weeks or hopefully not months, as the case may be, though you may be needed to deal with other matters the Tribunal will be bringing to your attention at a later point.

A. I understand that.

Q. I don't know if anybody else has any other questions for you.

CHAIRMAN: We will observe the usual sequence.

Mr. Ftizsimons, anything you wish to raise?

Mr. McGonigal?

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL:

Q. MR. MCGONIGAL: Mr. Maloney, there are a few questions

I want to ask you on behalf of Mr. O'Brien and perhaps

the best way to start is in the similar way in which

Mr. Healy approached it and go back to the statement

which you made about joining ESAT Digifone.

Just to try and get a background, I think yourself and

Mr. O'Brien were very friendly for a very long time?

A. That's correct.

Q. And that friendship resulted in joining together, in a

business sense, in this company, ESAT Digifone, in

1996?

A. Certainly Denis was the guy who came to me and asked me

would I consider coming back to Ireland to join ESAT

Digifone.

Q. I think, as you indicated the other day, that at that

time you were employed by Rank Xerox in America.

A. That's correct.

Q. And in some way, when you got in contact, you came over

to assist ESAT Telecom in relation to some work in

1995, and as a result of that, were offered employment,

give or take

A. I believe I helped Denis with writing some sections of

the bid, which would have been in 1995. At that point

he asked - requested if my name could be put into the bid as a senior executive who could be available to join the company, but I told him at the time that that wasn't a commitment from me to join at that particular time in '95 when the bid went in.

Q. But it was something which you considered further and indeed you went to Oslo in December, '95, and there were discussions in relation to possible terms of employment?

A. That's correct.

Q. And am I right in understanding that when you went to Oslo in December of '95, that you flew there from the states?

A. That could be right, yes.

Q. Just in relation to evidence which you gave on the first occasion, Day 125, you recollect being asked some questions in relation to the invoices and a conversation which you had with Mr. Digerud?

A. The invoices as they related to the Telenor?

Q. The Telenor \$50,000 payment?

A. Yes, I do.

Q. Now, as I understand your evidence in relation to that, questions 52 and 53, page 14, you indicated that that conversation and that payment - first of all, the payment had been made before you joined the company, and the conversation took place after you joined the company.

A. The question -

Q. Is that right?

A. Is that what I said? I believe - I actually don't have the text that you are referring to. If I can maybe get a copy of that, it might help.

Q. Yes. Do you see there page 14, Mr. Maloney?

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

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

Question: But how did you become aware of that?

Answer: Because I was told that, you know, we had

Question: can you understand why I would aske would somebody would mention to you, firstly, that there had been a 50,000 donation to Fine Gale before you became involved in the company, and that an invoice had been raised in relation to it?

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

Question: Yes, I know, but the payment was made before you joined?

Answer: Absolutely.

Question: You became aware of it after you joined?

Answer: Yes, that's correct."

Do you recollect that evidence?

A. Yes, I do.

Q. Am I not right in thinking that you commenced working with the company on the 13th of May?

A. That is correct.

Q. So that this would have happened after that?

A. This being?

Q. The invoice was paid in June of 1996?

A. That's correct.

Q. And the conversation was after May of 1996?

A. That's correct.

Q. So am I not right in thinking that that was not a casual conversation between yourself and Mr. Digerud, but your co-chief executive informing you of a material fact in relation to the invoice?

A. That's correct.

Q. So that as of that date, that is June of 1996, you were fully aware of the circumstances in relation to the invoice of March, '96 and the purpose behind it?

A. I can't tell you when Mr. Digerud mentioned it to me. I couldn't say to you it was in June or July or August or September, but I know he did mention it to me during the period of me joining and December of that year.

Q. But, I suppose, the point is you were aware of the invoice, you were aware that it was paid and you became aware that there was - that it represented a political donation?

A. In the period between May '96 and December of that year, that's correct.

Q. And the person who made you aware of that was Mr. Knut Digerud?

A. That's correct.

Q. At no stage did you have any conversation with Mr. O'Brien in relation to that donation at that time?

A. Not that I can recall.

Q. Now, in October/November of 1996, you have described, and Mr. O'Brien has described, both your versions of what you said and where you believe it was said, isn't that right?

A. We both -

Q. In connection with the run?

A. We both had different versions of where the discussion occurred.

Q. Now, in your preparation, and indeed in relation to some of the documentation that you have provided, did you try and establish any date for the meeting that you say it took place?

A. The meeting in October/November?

Q. Yes.

A. No, I did not.

Q. And is that simply because you have no recollection or no record of it?

A. I think because it was so long ago. I mean, even in November - sorry, even in '97, when we were looking at

the issue, I could not recall when exactly or in which month, whether it was October or November that the conversation had occurred.

Q. So it could have been November?

A. It could have been November.

Q. And it could have been the 17th of November?

A. Yes, it could have been the 17th of November.

Q. Do you recollect the run that you went on that day?

A. No, I don't. We were running fairly regularly at the time.

Q. You also indicated yesterday, in the course of your evidence, that you wouldn't have been surprised if Mr. O'Brien had said to you in the course of a run at that time, in respect of the success fees, to get the finger out and go and pay them?

A. That's correct.

Q. Are you accepting that it's a possibility that the conversation to which Mr. O'Brien referred took place on the run?

A. The possibility around when he first -

Q. The 17th of November.

A. Sorry, Mr. McGonigal, I need just to understand the question.

Q. Are you accepting that it is a possibility that on the run on the 17th of November this conversation that Mr. O'Brien has described may have taken place?

A. I don't believe it is a possibility, no.

Q. And is that because of the seriousness that you attached to what he said?

A. It was because I recall the context being in an office environment and in a discussion about success fees in what was a, you know, formal, one-on-one between the two of us.

Q. But you are not able to identify a particular meeting at that time?

A. No, I am not.

Q. And I am sure you've gone through your diary to check?

A. For October/November, '96, I am not even sure that I have done that.

Q. And is that because you don't have the diaries, or because you wouldn't have made the entries?

A. I think I referred that it was possibly - probably down in the Malt House in a meeting down in the Malt House during either October/November, '96.

Q. Just in relation to your diaries, do you not have the diaries or have you not checked?

A. I have an electronic diary. I have not checked.

Q. And apart from the electronic diary, you have no desk diaries, as such?

A. No, I do not.

Q. So that there is, in your mind, this window of four or five weeks when this conversation could have taken place?

A. I'd say even a bigger window. It could have been the

eight weeks of both the month of October and November.

Q. At this particular time it was a significant time for the company, wasn't it?

A. Yes, it was.

Q. On the one hand, you had commenced correspondence in October of '96 concerning your options?

A. I am just trying to get the date in my head. October of '96. I just can't recall that time as being a period of -

Q. When was it that you resigned?

A. In December, '96, as I recall.

Q. And am I not right in thinking that the information in relation to the options which subsequently became the subject matter of discussions commenced in or about October of '96?

A. It did in the context of the concerns that Telenor had about the agreement.

Q. And at the same time the company was also involved in preparing for the launch of a bond issue in the States?

A. Which company?

Q. ESAT Telecom.

A. I was not - I don't believe I was aware in October that they were doing that.

Q. When did you become aware of that?

A. The first I can recollect is when the first request for the release of information came to the Board of Digifone in January, '97 to the best that I can

recollect.

Q. Am I right in understanding that since this was a public offering of bonds, that there would have been significant documentation to be lodged to the Stock Exchange in America?

A. I think you could assume that.

Q. I think, in fact, you may have identified it in one of your documents, when you talk about an F1 document in Tab No. 5 of your documents, at the bottom of that page you refer to "plc bonds are traded, already traded, document F1 to SEC did not review by implication, same as in August."

A. Can I just check the document, Mr. McGonigal?

Q. You can indeed, yes.

A. What's the document reference number? Number 5. Those notes relate to a phone call that I believe I took from Paul Connolly, who I believe was in the U.S. at the time.

Q. I appreciate that, but what - I am just trying to fill in information at the moment, Mr. Maloney. You see at the bottom of the page, third line up from the bottom, it says: "Document F1 to SEC did not review, by implication, same as in August."

A. That's correct.

Q. That relates to documentation which would have to be sent to the Securities Exchange Commission in America in respect of the public offering of bonds?

A. I was in receipt of this information from Paul Connolly, who I believe was in the U.S. at the time.

Q. And am I right in understanding that ESAT Digifone, as a company, at the time in January would have consented to the use of the information, its financial information, in any documentation which was lodged with the SEC?

A. I believe the disclosure that we - the disclosure that we approved was for certain information to be available to be used by ESAT Telecom in its disclosures.

Q. And that is something that ESAT Digifone consented to?

A. That's correct. I believe at the Board meeting in January, '97 was when the consent was given.

Q. So that at that time, so far as ESAT Digifone was concerned, you had no difficulty in allowing the company to involve itself in the bond offering in whatever capacity it was required to be done?

A. In the context of whatever our Board had approved, yes.

Q. And at that stage you felt no urge or necessity to inform the Board, prior to making that decision, of the conversation which you say took place in October/November of 1997?

A. '96.

Q. '96, I beg your pardon.

A. That's correct.

Q. And was that because you put it out of your mind and forgot about it?

A. I would describe it as - I would have put it out of my mind, yes.

Q. I just want to try and understand that, Mr. Maloney.

Are you actually saying to us here that this - these remarks which were made by you and Mr. O'Brien to each other and of which you took a very serious view of, that when you left the office in the Malt House, if that's where it took place, that you actually put it out of your mind and forgot about it as if it had never happened?

A. The context within which the discussion came up was when Denis made his statement, I said to him, "I don't want to know. As far as I am concerned, it's nothing to do with ESAT Digifone." I reacted quite strongly to Denis and he didn't follow it up with any kind of clarification. What I was probably saying or feeling was, because you didn't respond,^ if you did, it had nothing to do with the company.

Q. But am I right in understanding that when you walked out the door of the Malt House, that so far as you were concerned, that was a conversation that had never taken place?

A. No, I wouldn't agree with that.

Q. So that you did remember the conversation and it was of concern to you beyond that date?

A. I did remember the conversation.

Q. And you did consider it significant beyond the date of

whenever it happened?

A. Well, the conversation happened. It was a concern to me at the time, but I think I've also said that I'd almost forgotten about it prior to the following August.

Q. Well, what I am interested in, and to a certain extent it's a question which the Chairman asked you this morning I think: why did you not do anything about the conversation if you considered it so serious?

A. Because I didn't believe it had anything to do with - from Denis's reaction, when I pushed back on him, he gave me no reason to believe that it had anything to do with ESAT Digifone.

Q. As I understand it, there was no response from him. Your evidence is there was no response.

A. That's correct.

Q. And how could you say that it was nothing to do with ESAT Digifone, having regard to the context in which the conversation is alleged to have taken place?

A. This is a little bit tied to the question that Fergus Armstrong was raising in the meeting when he asked me could I say that it was being raised in the context of, perhaps, refunding Denis for the success fees? And I think I said at the time that that was - I couldn't go that far, I don't believe Denis did suggest that.

Q. But the point I am trying to understand, Mr. Maloney, is here you are sitting in the office apparently and

Mr. O'Brien then says to you, "If you think you have problems, I have just given 200 grand to two people."

You say he also said "one to Michael Lowry," your immediate reaction was, "I don't want to know and it has nothing to do with ESAT Digifone."

A. I don't want to know. As far as I am concerned, it has nothing to do with ESAT Digifone." That's what I responded.

Q. But this is in the context you had just been talking about success fees which related to the licence, the licence which had been granted to ESAT Digifone the previous year. The minister had assumed for a moment some involvement in that and you are saying that despite all those factors, you were able to just push it aside and say, "nothing to do with ESAT Digifone."

A. I would describe it a little bit differently. I believe I was inviting Denis to confirm to me that it had something to do with ESAT Digifone, given that the context was within a discussion about the success fees.

Q. But you got no reply?

A. I got no reply.

Q. So, in that sense, your question was never answered?

A. That's correct.

Q. So when you left the office, whatever was in your mind must have been of some concern?

A. I believe that's fair.

Q. See, it's difficult to understand, Mr. Maloney, having

regard to everything that you have done since October, to believe that such a person, on hearing that conversation for the first time, would actually do nothing and pretend as if it had never happened. Would you not agree with that?

A. Sorry, Mr. McGonigal, could you repeat the question for me, please?

Q. I am just trying to understand in the context of everything that you had done since October of '97 in relation to trying to get the IPO stopped, and at the same time going back to November - October/November of '96, when something very significant was said to you as CEO of ESAT Digifone, if it was that serious, why you did nothing about it at that time?

A. I think, Mr. McGonigal, I've already given as part of my evidence that the next event, if you like, that triggered this was the reminder of the conversations in August of '97 and that it was the combination of the reminders, the establishment of the Moriarty Tribunal, and the original statement and the health warning that caused me to investigate the matter further.

Q. But just take it in October/November '96, when the conversation first took place, did you not consider it serious then?

A. I considered it serious, but I did not have anything that would lead me to believe that it had a direct influence or was related to ESAT Digifone. I think

I've already made the point that I believed that Denis was quite close to the minister anyway, so I had no reason to believe, when I asked him, I put that - remember, it was in the context of the success fees.

Q. But, if I just move forward a wee bit, Mr. Maloney, the only added factor, surely, that has added to the information that you got in October/November of '96, was the possibility of an intermediary being involved. That's the only new factor that came out of any of the conversations that happened subsequently.

A. I don't agree. The next piece that was significant to me was being reminded of the conversations in August, '97, at the end of our normal weekly one-on-ones, just as Denis was going out the door on both occasions.

Q. So it was the repeating of the conversation on three occasions that made it that bit more serious that you felt that something might have to be done about it?

A. It was the repeating of the conversations and then Denis informing the Board in August of '97 of his intention to IPO ESAT Telecom and then -

Q. Sorry?

A. Sorry, and then the subsequent health warning that followed.

Q. So however serious you say you viewed it in October/November of '96, it wasn't so serious that you felt that something should be done about it at that time?

A. That would be fair.

Q. At the same time, when this remark was made to you by Mr. O'Brien in his office, were you and he still friendly?

A. In October/November, '96, I think I described yesterday that our relationship was still good enough for us to be running, at least in October, I'm not so clear in November, because during November there were definitely strains coming into the relationship.

Q. So that if the conversation, as you've described it, took place in October, you would have both been more friendly than you say you would have been in November?

A. I think that's right. Mr. McGonigal, it's very difficult to remember all these things back then.

Q. And at the same time you - when Mr. O'Brien made this remark to you, you didn't say, "Jesus, Denis, I hope that's not so" or "you must be joking" or something like that.

A. I told him I didn't want to know. That's exactly what I told him. And my reaction to it was strong. I mean, we had known each other a long time and I think he knew by my tone that I was taking it -

Q. I was wondering to myself, Mr. Maloney, whether two friends, if they were two friends at the time having a conversation, that you wouldn't be more likely to say something to the effect that, "I hope you didn't do that."

A. I cannot recall saying that to him, Mr. McGonigal. In fact, I'd say I did not say that to him.

Q. You see, there is one possibility, Mr. Maloney, and it is this: that one of the reasons, and the only reason indeed why you could have forgotten, or at least not felt the conversation serious in November '97, was because you realised at the time that he was not being serious about it.

A. Sorry, Mr. McGonigal, November '97?

Q. November '96.

A. Sorry, could you just repeat the question, please?

Q. I am suggesting to you that the - there is one possibility as to why you didn't act upon it or take it any further, was because at the time that it was said, you realised that he was in fact joking?

A. I did not think he was joking when he said it.

Q. If he said it on the run, am I right in understanding that in all probability you would have accepted that he was not being serious?

A. But he didn't say it on the run.

Q. If he did say it on the run - if, for the sake of argument, just this moment in time the Chairman took the view that it did happen on the run, would he be right in taking the view also that in all probability it wouldn't have been serious?

A. I'd say it would have depended how he said it.

Q. Regardless of the seriousness that you attached to it,

one thing is absolutely clear, Mr. Maloney, is that whatever Board meetings you attended beyond that date up until September of '97, you didn't think it worth mentioning to any of your fellow directors or members on the Board?

A. That's correct.

Q. And when the Prospectus came out shortly after the conversation is alleged to have taken place - that's the ESAT Telecom Prospectus - you took no action on foot of that either?

A. Which Prospectus, Mr. McGonigal?

Q. The one that came out in January of '97, which is seven weeks, approximately, later.

A. I think I've given evidence already that I don't recall having seen those prospectuses.

Q. But you would have been aware of them, wouldn't you?

A. I would have been aware of them from the disclaimer that we gave in January, that there was fundraising going on on behalf of ESAT Telecom.

Q. The second - the other thing, of course, is that there was a second bond issue in 1997, which was July of '97, or maybe it was August, July/August of '97. Do you remember that one?

A. I don't specifically remember it as an event, but I accept that there was another offering during that year.

Q. And that would have been a similar offering as to the

offering in January of '97?

A. If that's what you are telling me, Mr. McGonigal, I have no reason to deny it.

Q. And again, information from ESAT Digifone would have been required and would have been given with the consent of the board of ESAT Digifone and would have been used in the filing of documentation in the Securities Exchange Commission in New York?

A. That would be correct.

Q. And also, of course, with the Irish authorities, isn't that right?

A. I expect so, yes.

Q. But again, whatever you remembered about the conversation in October/November of '96, it wasn't anything that you thought should be brought to the attention of the Board at that time?

A. That's correct.

Q. The second trigger factor that you told us about was the discussions in August of 1997.

A. That's correct.

Q. And as I understand it, in your statement to the meeting on the 23rd of October, which you prepared for the meeting on the 23rd of October, you identified in that statement the two meetings as being the 25th, late August '97, and the 1st of September.

A. That's correct. But I also knew at the time that I was wrong on the date of the 1st of September, because

Denis, I believe, was on his honeymoon at the time.

And I think the point was raised at the time and I fully accepted that.

Q. And on further research and as you told the Tribunal in the last few days, you believe now that it happened on two of the regular meetings which you say took place in August of '97?

A. I believe the two discussions were in August of '97. There may have been a third one as well but I can't specifically recall that. Two in August.

Q. There may have been a third what?

A. I think I've already said that in terms of the reminders, there was at least two, I think, is the terminology that I've used.

Q. And you've put them in August?

A. I put two of them in August. To the best that I can recall, yes.

Q. And I think you told us the other day that had you gone and looked at your diary to check and see what days they might have been

A. The Saturday we provided some extra documentation to the Tribunal, I checked my electronic diary in the month of August and saw that we had four meetings scheduled for each Monday of that month. However, the fact that they were scheduled, in some cases Denis would be away and wouldn't show up, sometimes I wouldn't be around. So the fact that they were

scheduled would not necessarily have meant that the meetings actually went ahead.

Q. But if they didn't go ahead, then, Mr. Maloney, you wouldn't have had these two conversations in August?

A. That's what I am saying. I am happy that during the month of August two of those four meetings occurred.

Q. And the four Mondays which you identified in your diary were, presumably, the 4th, the 11th, 18th and the 25th?

A. If those are the Mondays.

Q. Well, didn't you check this yourself?

A. I checked that we had a meeting planned for each of the Mondays.

Q. Did you know or did you remember that the 4th of August, which was the first Monday, was a bank holiday?

A. No, I did not.

Q. So it certainly didn't take place on that day?

A. Most unlikely.

Q. On the 5th of August, or that day, it would appear that you went away. Did you remember that?

A. I can't recall that.

Q. Was it not in your diary?

A. I don't believe it was, but I am not sure.

Q. See, on the 5th of August, above the words "the 5th Tuesday" there are the words "Barry away." Which would seem to indicate that you had gone away. This is in Denis's diary.

Yes, the Tribunal have had this for a long time.

On the 11th of August, Mr. Maloney, which is the second Monday of the month, again above the words "August" and "Lunasa" are the words "Barry away" and it would appear as if also Mr. O'Brien is away.

On the third Monday, which is the 18th of August, again above the words "August/Lunasa, Barry away."

A. What does 'Lunasa' mean?

Q. August. It's the Irish for August, I understand.

And on the 25th of August, which was a Monday, "Barry back."

So it would appear from this diary that there weren't two consecutive Mondays in August?

A. I haven't seen that diary, Mr. McGonigal.

Q. But you've seen your own diary?

A. As I said to you, my own diary is an electronic one, and it has for that - for those dates, one-on-one meetings planned in for the four Mondays in August. If I could also make the point, Mr. McGonigal, to the best that I can recall, I never stated specific dates that it happened on. But I did say it was in consecutive meetings.

Q. You said consecutive Mondays, if I recollect the transcript?

A. Mondays.

Q. But what I am concerned with, Mr. Maloney, is that on

the basis of the evidence which you've so far given to the Tribunal, and people make mistakes, we needn't worry about it, there were no two Mondays in August which were consecutive at which these meetings could have taken place?

A. As I said, my evidence is that he made it - comments to me on two consecutive meetings during our normal one-to-ones, as I recall it.

Q. Well, if that is right, if I am right about this, then it would appear that you would have to go back to July, isn't that right, at the earliest, for two consecutive Mondays?

A. If that's correct, yes.

Q. You see, do you remember a document which you saw this afternoon which turned up in one - in your files, which is in the possession of Mr. O'Brien's people in Malt House, of an interview between Sam Smyth and Richard Crowley, which was apparently faxed to you on the 14th of July of '97?

A. I remember seeing that document in my earlier evidence.

Q. The probability is that when you received - if you received that document, it would have caused some spark of life to come to your mind about the conversation which had happened in October/November of '96?

A. I think I've already given evidence, I don't recall having seen that fax.

Q. If you did see it, do you think it might have triggered

a memory of the conversation in October/November, '96?

A. Repeat the question.

Q. If you saw the document, if it was faxed to you and you saw it, do you think now, looking at the document, that it might have triggered a recollection of the conversation in October/November of '96?

A. Not particularly, because from my recollection of what the interview was about, it was what I'd call speculative, of which there was lots of speculative material in the media before, after and during that time.

Q. But the fact that it mentioned Lowry might have been of particular significance, if your version of the conversation was correct?

A. I recall that there was lots of media comment and speculation around the same time.

Q. You see, you remember Mr. O'Brien's evidence in relation to this, that his recollection was that at some stage in July you asked him the question whether he had paid money to Lowry and he said, "No." You remember his evidence on that in the transcripts?

A. I remember his evidence, but I would not agree with what he said.

Q. Well, you see, what I am trying to suggest to you, Mr. Maloney, is that if you received this faxed document, there is a possibility that that would have caused you to ask Mr. O'Brien a question concerning Mr. Lowry,

isn't that right?

A. Not necessarily. Why was that - why would that be the case?

Q. Because apparently you say that the conversation which you heard in October/November was a serious conversation and because the document which, if you got it, refers to the possibility of corruption, refers to Lowry's name and you would have remembered the licence, the conversation, and might have thought that this required a question to your Chairman?

A. My evidence, Mr. McGonigal, is that Denis reminded me of the conversation.

Q. I understand that. I understand your evidence, Mr. Maloney. I am suggesting to you that in fact that the evidence which Mr. O'Brien gave is more likely to be correct, having regard to the material which is available to us?

A. What material is that?

Q. The absence of any consecutive meetings in August, the presence of the document which may have been - which was faxed to you on the 14th of July, and Mr. O'Brien's evidence concerning the conversation which he says you had with him in July of 1997.

A. My evidence is that he did not have - that I did not have that conversation with him that he reminded me of the discussions. I fully accept the issue around the dates in August. I never specifically claimed which

dates they were because I was unsure.

Q. Well, it's a matter for the transcript, Mr. Maloney, but my recollection is that yesterday, or the day before, you said that you had checked your diary and you were satisfied that it was two consecutive Mondays in August but you couldn't identify the two Mondays.

A. What I believe I said was that I was sure that the two conversations had occurred before Denis left for his honeymoon. If you were to say to me one of them was at the end of July and the other one in August, I wouldn't have been surprised by that.

Q. In transcript 126, page 37, question 145:

"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?"

Answer: I was checking my diary, we had meetings on the four Mondays in August."

A. As I said to you, my electronic diary for the month of August has a one-on-one with Denis O'Brien for each of those four Mondays in August.

Q. Am I right in thinking, Mr. Maloney, that at this stage, relations between you and Mr. O'Brien had soured completely on a personal basis?

A. At which stage?

Q. This stage, August of '97.

A. August of '97? Yes, that's correct.

Q. And that the - that that had, in effect, come about,

really, since December of '96, when you resigned. That was the beginning of the end, so to speak?

A. I'd say it was before that. There were tensions leading up to my resignation around the operational management of the company.

Q. There were tensions, it's certainly clear from Mr. O'Brien's note of December '96, which was handed in, which was referred to by Mr. Healy, that if one takes the literal use of the words in that document, that Mr. O'Brien's view of you had substantially changed?

A. Changed from what, Mr. McGonigal?

Q. From being friends to being, effectively, questioning whether he could - the trust factor had to be considered.

A. Well, there were many comments on that front page.

Q. And none of them complimentary?

A. I can't - I don't - I don't have the document in front of me. I wouldn't say any of them were particularly complimentary, no.

Q. So the relationship between yourself and Mr. O'Brien had completely broken down?

A. What's the question?

Q. On a personal basis, isn't that right?

A. We had strains developing since the end of October/November of '96.

Q. Now, following Mr. O'Brien's wedding and honeymoon, he

appears to have returned to the office in or about

September, the 22nd. Do you recollect that?

A. No, I do not. We were based in different offices, Mr. McGonigal, so I wouldn't necessarily know when he was coming and going.

Q. You see, if the - well, can I put it this way: in relation to the two conversations which had taken place, that is, firstly, the one in October/November of '96; secondly, your alleged conversations in August of '97, at that stage the discussions in the newspaper, and in fact, I think, the Order had been made for the setting up of the Tribunal of Inquiry had taken place, isn't right?

A. Sorry the question was?

Q. The Tribunal of Inquiry had been set up, I think, sometime around the 18th of September of 1997, this Tribunal of Inquiry?

A. That could be so. I'm not sure what the exact date was but I accept that was the date.

Q. But all during that period of August and early September, in fact since the McCracken Tribunal reported, there was constant discussion in the newspaper, in the media, concerning the setting up of a new tribunal?

A. That's correct.

Q. And at what stage was it that you felt that things had taken such a serious turn that you would have to bring

matters to the attention of your directors?

A. I think I've already given evidence that the first time

I believe I went to see Denis on this was on October

the 8th and then the 13th twice and then the 14th.

Q. So can I take it that it wasn't until the 8th of

October that you made a decision that you should do

something about it?

A. I think my evidence has already shown that I was

talking to Fergus Armstrong about the potential, and

trying to bounce off him whether or not I had any

reason to be concerned towards the end of September, as

I recall.

Q. Do you recollect when that was?

A. Not exactly, but towards the end of September.

Q. And was that a meeting which you had with

Mr. Armstrong?

A. I believe they would have been telephone conversations.

There may well have been a meeting as well.

Q. And how many telephone conversations?

A. I can't recall, Mr. McGonigal.

Q. Or how many meetings?

A. I can't recall that either.

Q. And were they in September?

A. I believe they would have been towards the end of

September.

Q. And these were conversations, telephone conversations

and a meeting where you were seeking advice, is that

right?

A. No, I wouldn't have been - I think - I already gave in evidence that what I was doing at that time was talking to Fergus Armstrong almost as a bouncing board, describing to him the events and discussions and trying to put that in context of 'do I have anything to be concerned about here?' as opposed to going to him and saying, 'I would like some legal advice on this'.

Q. So am I to understand, in a sense, that you went to Mr. Armstrong when you - well, put it another way: You didn't go to Mr. Armstrong until late September, is that right?

A. The best I can recollect, yes, the end of September.

Q. So that whatever happened in relation to the two conversations in August, they of themselves, plus the earlier conversation in October/November of '96, were not of themselves sufficient for you to take action, is that right?

A. No. I was very concerned at the reminders of the conversations from Denis.

Q. What I am interested in, Mr. Maloney, is that assuming, if you have to have two consecutive Mondays - if you had to have two consecutive Mondays for these two conversations, and you bring it back to July, which seems a possibility, why didn't you go and take steps on foot at that time?

A. Mr. McGonigal, if you were to challenge me on the issue

of two consecutive Mondays or two consecutive meetings,

I wouldn't fall out with you over that. So I am just -

all I am - what challenged me to it was the reminder

and the way the reminders were made at the end of the

meetings, in consecutive meetings.

Q. I am simply trying to learn, Mr. Maloney. I am not trying to challenge you.

A. I understand.

Q. I understand they are looking for a break, Mr. Chairman.

CHAIRMAN: Well, from the stenographers' point of view, yes. We can't realistically go beyond 5:00. We'll take ten minutes now.

THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED AS FOLLOWS:

MR. MCGONIGAL: Mr. Maloney, just before we broke, we were talking about September of 1997, and you indicated that you thought you had two conversations and one meeting with Mr. Armstrong in connection with these matters, is that right?

A. I can't recall how many conversations or how many meetings. What I can tell you is that there would have been discussion on the issues with him towards the end of September, early October '97.

Q. What I am just interested at the moment, Mr. Maloney,

is in relation to September. I had understood you to say before the break that there were, you thought, two telephone calls and one meeting. First of all, is that as you recollect it?

A. I can't recollect how many telephone calls. There could have been six telephone calls. I am just not sure.

Q. Am I right in understanding that you do recollect telephoning Mr. Armstrong in September?

A. Towards the end of September, yes.

Q. And am I right in understanding that you have a recollection that you may have had a meeting with Mr. Armstrong in September?

A. My recollections around this period are from review of Fergus Armstrong's files, where it's noted on the cover 'telephone conversations' at the end of September.

Q. So that, in fact, he has a record of whatever conversations, the dates of the conversations, whatever was said in the conversation?

A. He has a record that we were talking.

Q. Communication?

A. Yes.

Q. He doesn't have a record of what was said?

A. That's correct.

Q. But he can give us - I take it that we would be able to get those dates of those conversations?

A. I'm sure anything that he has he'll make available to

you.

Q. So far as a meeting in September was concerned, what is your recollection?

A. I don't believe we had a meeting in September, but I could be wrong.

Q. Okay. So you think there may have been a couple of phone calls and your recollection is that you may have discussed in those phone calls matters relating to the conversation of October/November, '96 and the two consecutive meetings in August of 1997?

A. Yes.

Q. And this was because you had a concern, following the two conversations, as to - well, what was your concern?

A. My concern was, why was Denis reminding me of the conversations - of the conversation - the statement he had made to me back in '96 at a time when the Moriarty Tribunal was coming into focus?

Q. So it was a matter, whatever time the phone calls, it was a matter that you felt was now becoming more urgent?

A. You say "more urgent". It was a matter that concerned me that I was being reminded of the conversation we'd had in October/November, '96.

Q. Okay. Let's look at September, just as a matter of interest, Mr. Maloney, to understand what ESAT - what you, as well as ESAT Digifone - I think if you go to your exhibits attached to your statement and the first

tab -

A. What's the document number?

Q. Sorry?

A. The document number?

Q. Document number 1. Now, these are the documents which relate to the draft Prospectus, or the first Prospectus which was drawn up in relation to the IPO, isn't that right?

A. Dated 23rd of September, '97.

Q. And there are two documents, isn't that right?

A. Two pages.

Q. Yes. And one of the pages is dated the 23rd, and one of the pages is dated the 25th. Do you see that? On the top left.

A. Sorry, I see - the top left I see the 25th of the 9th, the first sheet in my book, and the second one is the 23rd of the 9th, being the dates of what I think the fax number were.

Q. So they seem to have come, if the faxes are correct, the first one came on the 23rd and the second came on the 25th and you got both of them in some way or other?

A. That appears to be right.

Q. Can you recollect anything about these documents?

A. When you say 'anything about these documents', what do you mean?

Q. What do you recollect about these documents?

A. I don't recollect very much, other than they were in my

file.

Q. You don't remember from whom you received them?

A. No, I don't recall from whom I received them.

Q. Do you remember when you first became aware of the existence of the Prospectus in relation to the IPO?

A. I don't recall, no.

Q. And your recollection in relation to the document upon which your handwriting appears, which is the second in time, that has the words "deleted" in the first - the end of the first - the second paragraph, within the paragraph detailing the importance of ESAT Digifone licence, is that right?

A. There is "deleted" around the last sentence which is included in brackets, yes, that's correct.

Q. Now, if you go to the second book of documents that you provided, and number 3 of those documents.

A. Is that in the second book, Mr. McGonigal?

Q. Yes, it is indeed, Mr. Maloney. Do you have that?

A. Just bear with me for a moment. Which section?

Q. I think it's the first section. It's the third document. It's got "3" on it.

A. Headed up 'John Fortune'.

Q. No, that's number 1. The next one. It's a Board Meeting.

A. The next one in my file is three points, 1, 2, 3.

Q. Well then, the next one it has a "3" on the top right-hand side. Do you see that? And it's on the

screen and it's called a "Board Meeting."

A. Yes, I do see that.

Q. And do you see that's dated the 24th of September?

A. Yes, I do.

Q. Which is the day in between the 23rd and the 25th, isn't that right?

A. That's correct.

Q. And the second last line says, "Documentation for IPO."

A. That's correct.

Q. Do you think that this documentation, which we had from your first bundle, is the documentation which the Board of ESAT Digifone was considering at the meeting of the 24th of September?

A. It's possible.

Q. So that there must have been a discussion at that Board Meeting, would you agree, about the importance of the ESAT Digifone licence?

A. I think I've already given evidence that my handwritten notes were notes I was making as somebody was telling me what was going to happen to the change in those statements.

Q. That wasn't really the question I was asking you, Mr. Maloney, but I'll repeat it for you, because sometimes it's difficult to follow. In relation to the Board Meeting on the 24th of September of '97, which we see there, do you think that you were at that Board Meeting?

A. I think I was at the Board Meeting, yes.

Q. Would those have been notes that you made at the Board Meeting?

A. Quite possibly.

Q. Would it be right to assume from that minute, that one of the matters discussed at the Board Meeting was the documentation for the IPO?

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

Q. And would the IPO that they were there talking about, would that be the ESAT Telecom IPO?

A. I would assume so, yes.

Q. Now, the other two documents, which are pages from the Prospectus, does it seem likely that they were probably part of the documentation which was before the Board of Directors at this meeting?

A. Quite possibly, yes.

Q. And the paragraph, one of the paragraphs which is underlined concerns the importance of the ESAT Digifone licence, isn't that right?

A. That's correct.

Q. And in the second paragraph it says:

"That the Irish government plans to establish a Tribunal of Inquiry to investigate certain decisions made under the auspices of certain government ministers, one of whom is the former Minister for Transport, Energy and Telecommunications, Michael Lowry. The decisions to be investigated will include

the award by Mr. Lowry of the GSM licence to ESAT Digifone. Any such investigation will be the fifth investigation into the award of the GSM licence. The four previous investigations did not discover any impropriety in the award of the GSM licence. The company does not expect that the Tribunal will recommend that the award of the GSM licence should be revoked. However, there can be no assurance that the GSM licence will not be revoked, or that there will not be further investigations concerning the GSM licence."

Do you think it's probable that that paragraph or that section was discussed by the Board at its meetings of the 24th of September?

A. It could well have, yes.

Q. At that Board Meeting did you give any indication to the Board of the conversations which Mr. O'Brien had with you in October/November of '96 and in August of '97?

A. No, I do not believe I did.

Q. Why?

A. I mean, I didn't - at that stage, I was still wondering whether or not I had any reason to be concerned.

Q. I see. So you were still wondering whether you had reason to be concerned, and despite the alleged three conversations and what was said and the fact that this paragraph was being drawn specifically to the Board's attention?

A. That's correct. I think I said in my evidence, I am not sure, when I first contacted Fergus Armstrong, it would have been the first time that I would have raised the issue.

Q. Is it possible that as a result of the discussions of the Board on the 24th, that the document which was created the next day arose from the deliberations of the Board?

A. From what I can see, the two sheets are both dated the 23rd of September in the IPO documents, so I think that would be unlikely.

Q. One is the 23rd and one is the 25th. What I am getting at -

A. Sorry, Mr. McGonigal, I think the 23rd and the 25th are the dates they were faxed. The two sheets are the same document.

Q. I see. What I am trying to get at, Mr. Maloney, is whether or not the Board of ESAT Digifone had a view as to that paragraph which may have resulted in you raising or the paragraphs appearing on the second page and the word "deleted" appearing?

A. As I've already given evidence, I was in receipt of information that allowed me to make those handwritten notes on that sheet. I can't recall whether that was at a Board Meeting, over a telephone conversation, nor have I checked the minutes of the Board Meeting of that date.

Q. At that time is it possible that you would have discussed this matter, that is the Prospectus in this paragraph, with Mr. Armstrong?

A. Is it possible that I would have?

Q. Discussed this -

A. It may well have been as a result of the Board Meeting that I discussed it with Mr. Armstrong.

Q. Bearing in mind that those Prospectus documents had been in existence before the Board Meeting of the 24th, could you in fact have got them from your solicitor?

A. Perhaps, but as you can see from the dates, I appear to have got one sheet on the 23rd and one on the 25th of the same document dated the 23rd.

Q. They seem to have come from American lawyers. That's the DPW is an American firm?

A. I see.

Q. And they would - I was assuming that they might have gone to lawyers rather than necessarily to you as a CEO, but maybe they went to you as the CEO. You have no recollection of receiving them?

A. I'm afraid I don't.

Q. If you didn't receive them, it's possible that the firm's lawyers may have given them to you?

A. That's right. At the time it was William Fry, so -

Q. So they may have given them to you?

A. Yes.

Q. So at the earliest, would it have been after that Board

Meeting before you talked to Mr. Armstrong?

A. I've already said, Mr. McGonigal, I cannot be absolutely sure the first date that I contacted

Mr. Armstrong was. But it wouldn't surprise me if it was around the times and the dates of these documents.

That would make logical sense to me.

Q. While we are on those documents, the first three documents in your second section, Mr. Maloney, the first document, which is headed 'John Fortune', in relation to that document in the legend which was given to us with the documents, that is identified as being a document which was - may have been created in September of 1997. Do you agree with that?

A. Sorry, the legend is the index?

Q. Yes.

A. It's document number 1?

Q. Yes.

A. It's down here as September '97, no date on it.

Q. And do you accept that that is probably correct?

A. It is a likely date, so I think it's probably correct.

Q. And it seems to reflect a conversation between you and Mr. Fortune?

A. That's correct.

Q. Where he was giving you information inter alia concerning the IPO of CBT?

A. That's correct. I think that - yes, that's correct.

Q. And part of that discussion seems to have been

concerned with the possibility of taking ESAT Digifone public. You see the words "effectively take Digifone public"?

A. I do see that, yes.

Q. What does that mean?

A. My recollection of this document was that it was a telephone call that I was having with John Fortune, a subcommittee of the Board was set up which was made up of John Fortune on behalf of Telenor, Michael Walsh on behalf of IIU and I believe John Callaghan - I forget who the third - possibly John Callaghan on behalf of ESAT Telecom, who were asked to liaise with the company on the planned IPO of ESAT Telecom if there was any issues regarding information or documentation, or implications. In other words, that this group of three would handle any issues that arose for ESAT Digifone in the context of ESAT Telecom IPO. And I believe this was a note of a conversation that I had when John Fortune called me.

Q. And what - how would that be relevant - how would "effectively take Digifone public" be relevant to that?

A. As I recall it, what John Fortune had done is he had talked to a U.S. securities lawyer about what was planned and he was telling me that our company would be described as an associate, not a subsidiary; that it took two years of a process in CBT, because the question at the time was what does this mean for us?

John Fortune, I believe, told me that he was practically full time on it and that effectively it meant that Digifone was going public. So that was me receiving that information from Johnny, to the best that I can recollect.

Q. You see, it could be interpreted, I may be misunderstanding this, Mr. Maloney, but it could be interpreted that that was a discussion whereby information was being given to you that to take Digifone public would take another two years?

A. Most definitely was not.

Q. So in relation to the third document which is there, which is also dated September, '97, and there are three questions. Do you have that?

A. Yes, I do.

Q. And the three questions that are asked there are:

"What are the plans for an IPO by ED Group?

How do these plans impact ED?

And what's the ED Board's position re the impact on the company?"

Now, I understand that the word 'September '97' was added at a later stage, but in relation to the two previous documents, can you assist me as to when that may have been created?

A. As I say, the earlier sheet headed 'John Fortune' is

written in a blue biro on the originals and this sheet with the three points is written in a pencil. I'm not sure if that helps you very much, but that's all I can say about it.

Q. But clearly what you and - certainly you and maybe Mr. Fortune and maybe others, I don't know, seem to have been discussing at this time, the IPO of ESAT Telecom, how it would impact on ESAT Digifone and the - you were understanding that by taking ESAT Telecom public, that that is effectively taking ESAT Digifone public. Is that right?

A. Well, there is two separate things. One is the discussion with John Fortune, which I think I just finished describing what I believed the nature of it to be. Then there is a separate document, which has three questions on it.

Q. Certainly as of this date and this time, there is no indication from you in relation to these matters of any concerns that you might have had arising from previous conversations?

A. That's correct, with respect to these two documents.

Q. In relation to these three documents?

A. The third one being?

Q. The Board Meeting.

A. That's correct.

Q. Now, just in relation to the end of September, Mr. Maloney, am I right in understanding that so far as

your electronic diary is concerned, that you have an entry in it for every Monday, or that in those days you had an entry in it for every Monday, regardless, with Denis O'Brien?

A. I believe the way we used to do it was we just plan it for every Monday, so there would be -

Q. That's what I mean.

A. Yes.

Q. That you -

A. Like a blanket.

Q. electronics -

A. Nine to ten o'clock.

Q. And put it in?

A. Correct.

Q. And that doesn't necessarily mean that the meeting took place?

A. That's correct.

Q. So that when we look at September, in Mr. O'Brien's diary and see an entry of Barry Maloney at nine o'clock, that doesn't necessarily mean that a meeting took place - the 22nd. I beg your pardon.

A. The 22nd of?

Q. September.

A. As I said, there was a blanket - typically there would be a blanket one hour on the Monday morning. But in my diary, to the best that I can recollect, in my diary there is no record of when the meetings actually

happened or not. I should say that as the relationship became more and more strained, that the meetings became less and less regular.

Q. On the 24th, as we've already identified, there is an entry in Mr. O'Brien's diary for the 24th of September of the ESAT Digifone Board Meeting, which was held, I think, 8 a.m.. Would he have been at that meeting?

A. I presume he would. He was the Chairman.

Q. And so far as ESAT Holdings Board would be concerned, would you have been at those?

A. No, I would not.

Q. On the following Monday, the 29th of September, again there is an entry for nine o'clock for Barry Maloney.

Again can you say whether that meeting may or may not have taken place?

A. I am afraid I can't.

Q. On Monday, the 6th of November, or sorry, on Monday, the 6th of October, at nine o'clock, there is an entry in Mr. O'Brien's diary of "(9:00 Barry - 9:15-ish to 9:30-ish", which would seem to indicate that a meeting may have taken place on that Monday. Can you assist me?

A. I can't, I'm afraid, no.

Q. Do you recollect having a meeting with Mr. O'Brien two days before you went to see him on the 8th?

A. No, I can't, or don't.

Q. Of the documents that we gave to the Tribunal this

morning, Mr. Maloney, the last three pages which

Mr. Healy drew attention to but didn't open, there is a

date of the 6th of October on the third last page.

A. Sorry, I am just going to find that document again now.

Q. Do you have that?

A. Headed '6th of October '97'.

Q. I understand that that represents the - may represent

the meeting which you had on the 6th of October, on

Monday, the 6th of October. Are you in a position to

assist me in relation to that?

A. As to?

Q. Whether it took place and whether that would be a

correct reflection of it, insofar as you can decipher

it.

A. It could, Mr. McGonigal, but I can't be sure.

Q. So there is a possibility, certainly, if the two of

were available on that Monday that you would have met,

and the fact that it's 9:15-ish-9:30-ish might indicate

that a meeting took place on the 6th?

A. Perhaps, yes.

Q. In relation to the next entry on the 8th of October,

that was a Wednesday?

A. I believe that's so, yes.

Q. And it, therefore, wasn't a regular Monday meeting?

A. That's correct.

Q. How was that meeting arranged?

A. I can't recall, but I could have called Denis and asked

to meet with him Monday.

Q. Before this meeting on the 8th, you had, of course, been to see Mr. Armstrong, isn't that right?

A. Yes, I had.

Q. Can you recollect when that was?

A. Not in terms of the exact date, but it would have been prior to the 8th of October.

Q. And would it have been - could you say at all, I mean, in preparation for giving evidence over the last few days, had you had an opportunity to check as to when that meeting may have taken place?

A. I can't recall the exact date, but it was sometime prior to the 8th. It could have been the 7th, it could have been the evening of the 6th, I'm just not sure.

Q. So that it wasn't until whatever date this meeting was with Mr. Armstrong that you decided to take whatever action you decided to take, isn't that right?

A. What I was trying to do at the time is to frame the conversation in my mind with Denis for October the 8th. That's what was focusing my attention at the time.

Q. I just want to try and get it in sequence, in a sense, Mr. Maloney. You had the first conversation in October/November of '96; the second and third conversations in August of '97 and the next significant step, despite all we've talked about, is the 7th/8th of October.

A. That's correct.

Q. At that stage, what was the position of the IPO?

A. I did not - I was not aware of what the position of the IPO was.

Q. You weren't aware?

A. No. What we were told at the August Board Meeting was that there was an intention by ESAT Telecom to do an IPO. I believe that's recorded in the minutes. At the September meeting the update was that ESAT Telecom intended to go ahead with the IPO in the short term, but we were not given, at least I was not given any other date or timing as to when that IPO would occur. I know there was some reference to market conditions, etc., at the time.

Q. But you knew that an IPO had been decided upon and you knew that certain steps had been taken towards the IPO, you had had a Board Meeting concerning the documentation of the IPO, so is it reasonable to assume that it was at a reasonably advanced stage?

A. I believe the September Board Meeting the Chairman notified us that the IPO would occur in the short term.

Q. So it was at an advanced stage?

A. Just that it was short term.

Q. And in that sense, it was reaching what you might describe as a crucial time for ESAT Telecom and its IPO?

A. That wasn't described to us that way.

Q. Would you describe it, looking back in that way now?

A. As I said, when we were told in September, we were not told whether it was going to be October, November, December or January. The comment that was used was that market conditions, you know, would decide that.

Q. At the Board Meeting on the 24th of September, did the board at that meeting, or had it previously, given its consent to the use of financial information in the IPO documents?

A. I don't believe that it had, no.

Q. So that that was an event still to happen?

A. I believe that's the case.

Q. Can you tell me now when that Board Meeting gave - when the Board gave its consent to the use of financial information in the documentation for the IPO?

A. I can't remember which Board Meeting that was. I would need to check the minutes of the Board Meetings.

Q. Mr. Chairman, I am moving on to a new matter which will take some time.

CHAIRMAN: I've given a commitment, Mr. McGonigal, to the witness. I sought to facilitate your client as best I could and I have indicated to him, and I think it's been made clear to me by my own counsel, in talking to Ms. Finlay, that he's going to be occasioned particular disruption if he doesn't depart to America tonight.

MR. MCGONIGAL: I am not complaining, Mr. Chairman, but

I am not anxious to put my client at a disadvantage by pursuing my cross-examination at this stage. I am quite happy that the matter be put back to a later stage -

CHAIRMAN: Well, insofar as it has been, I think, been made fairly clear that we will need to hear from Mr. Maloney again, just as we will from Mr. O'Brien at some later and hopefully not too distant stage, in those circumstances, Mr. McGonigal, it seems reasonable that I accede to you deferring some portions of your examination. And this, I appreciate, Ms. Finlay, may put you in a position of some difficulty as to how far you should go.

MS. FINLAY: I see Mr. Maloney looking somewhat anguished at the thought of this. I wonder, could I have just one moment to discuss -

CHAIRMAN: I won't even rise. Just take two minutes and I'll just sit here.

MS. FINLAY: Just to see what Mr. Maloney's -

CHAIRMAN: Well, go up with Mr. Clark and just discuss with him.

MS. FINLAY: Mr. Maloney is very anxious to finish this portion of his evidence and the cross-examination at this session. He says that he will - he has to make

arrangements, but that he will make the arrangements to come back here in the morning to finish it. That's his preference. He doesn't want to - his difficulty is that he is going to be away for the next two months and he is absolutely committed to being away for the next two months and he doesn't want to leave - in fairness to everybody, he is prepared for this evidence and this portion of it.

I understand there may be different issues which haven't been raised to date that he might at some future date have to come back and help the Tribunal with, but in terms of this portion of the evidence, he wants to complete it while having prepared himself to deal with it now.

CHAIRMAN: Well, in those circumstances, it's preferable then that we adjourn until tomorrow morning. The matter is too important and it's far too much a pressure on our sole stenographer to proceed at this juncture for a further time. And obviously since you have questions to ask and Mr. McGonigal has a certain amount of further matters to pursue, it's preferable we adjourn, should I say half ten or half eleven in the morning?

MS. FINLAY: I wonder, just so we don't have a repeat of this problem tomorrow evening, I wonder could Mr. McGonigal give you some indication as to how long

more he might be. Will he finish tomorrow for certain

with the witness?

MR. MCGONIGAL: I would anticipate finishing tomorrow,

Mr. Chairman.

CHAIRMAN: Yes.

THE HEARING THEN ADJOURNED TO THE FOLLOWING DAY,

THURSDAY 5TH JULY, 2001 AT 10:30 A.M.