

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY, 5TH JULY,

2001 AT 10:30AM:

CONTINUATION OF EXAMINATION OF BARRY MALONEY BY MR.

McGONIGAL:

Q. MR. MCGONIGAL: Mr. Maloney, I gather, and the solicitors furnished a copy both to us and to the

Tribunal, that you managed to extract the legend of your electronic diary and you've had an opportunity of checking the position in relation to August of '97.

And I understand the position is that you are able to confirm that you were away for the period that I was talking to you about yesterday?

A. That's correct. I was away from the 4th to the 24th of August.

Q. In terms of consecutive meetings, that would appear, on the face of it, to put the meetings that you were talking about where these conversations were alleged to have taken place, into July, at the earliest?

A. I would say July or September.

Q. Why do you say September?

A. Because I also checked - the other thing you asked me to do yesterday was to check the first time I contacted Fergus Armstrong and he has confirmed the first time I went to see him was September 30th.

Q. Of September?

A. Of September.

Q. But wasn't Mr. O'Brien away on his honeymoon for most of September until I think roughly around the 22nd?

A. That's correct.

Q. So it's more likely to have been in July than September?

A. The dates that we met - we met on the 25th of - if I can just refer to my diary, I can give you the dates, I believe. We met on the 25th of August after I returned from my own vacation. We then met on the 22nd of September and we met on the 29th of September.

Q. I see. So you think now that - well, what do you think now?

A. Well, as I said yesterday, Mr. McGonigal, what I believe the most likely situation was the consecutive meetings were in September, but I wouldn't discount a reminder happening at the meeting on August 25th as well. I think I may have referred to twice, potentially a third time.

Q. You don't think it was July?

A. I am satisfied it's not July.

Q. That would mean that it happened at the same time as the Board Meeting of ESAT Digifone on the 24th of September?

A. That's correct.

Q. Now, just in relation to the Board Meeting of the 24th of September, as we discussed yesterday, that was the moment in time when the IPO documents were before the

board?

A. I have checked the minutes, Mr. McGonigal, of that meeting. It's not clear to me that there was IPO documents in front of the Board, although I can't specifically recall. But I do recall, and what's noted in the minutes, is that there was a request for information. As I recall, it was similar to the request that we gave in January of that year, which was the normal disclaimer and the normal sets of numbers that we released at a Board Meeting in January of '97.

Q. I see. But - and I am totally out of sequence, my recollection is that we have the Prospectus pages appearing in your documentation?

A. If you recall the discussion we had yesterday, that I have two sheets which are dated the same date of the Prospectus, but appear to be faxed to me; one page on each side of the Board Meeting.

Q. But what I am actually at, Mr. Maloney, is that I am trying to understand in my own mind the factors which came into your mind as you went to see Mr. Armstrong in or about - talked to Mr. Armstrong, you identified as being the IPO, the Tribunal, and the conversations?

A. And the reminders, that's correct.

Q. Now, so far as the Tribunals are concerned, I assume, and I may be wrong on this, what we were talking about was the reference in the Prospectus to the plan of the Irish government to establish a Tribunal of Inquiry, is

that right?

A. Yes. The establishment of the Tribunal.

Q. So that so far as at that stage, the company or the company's lawyers had prepared the Prospectus on the basis that the Irish government intended to establish a Tribunal of Inquiry and the probability, so far as they were concerned at that time, was that one of the matters that might be investigated by the Tribunal was the granting of the GSM licence, isn't that right?

A. I believe that was the case, yes.

Q. And part of the reason for that was that in the media after the granting of the licence, there had been a huge amount of discussion as to how ESAT Telecom had managed to get the licence?

A. That's correct.

Q. So both the company and the lawyers, for better or for worse, had correctly put into the Prospectus the fact that the government intended to establish a Tribunal of Inquiry, and one of the matters that potential investors should be aware of was that there was a probability that the GSM licence would be enquired into?

A. That's as I understand it.

Q. Yes. And the other aspect of that was that on the basis of the probability that the licence was going to be looked at, both you and Mr. O'Brien would have been conscious of the fact that the conversation, whether

jocose or serious, would probably become an issue

within the Tribunal, isn't that right?

A. That's correct.

Q. And that was something which you realised effectively as soon as you saw the documentation?

A. Documentation?

Q. Being the Prospectus document.

A. I would have been aware of that when I saw that comment.

Q. Now, that was the matter then, the context in which you spoke to Mr. Armstrong on the 30th of September?

A. On the 30th of September.

Q. And arising from that discussion, whatever it was, and following your own thoughts, whatever they may have been, you saw the course of action to be adopted by you to be one of trying to persuade the Chairman to delay the IPO, isn't that right?

A. That's correct.

Q. And your focus of attention for the next week or so was trying to persuade the Chairman to do that?

A. That's correct.

Q. Why was that?

A. The first time I went - after I spoke to Fergus Armstrong, I spent a bit of time thinking about what the approach to the conversation should be and that's when this concept of when I went to see him on the 8th to try and get a feeling of how critical the timing of

the IPO was to him at that time, to try to get a sense of that, to see what latitude he had in terms of timing.

Q. I understand your - I understand what your evidence is in relation to this area around the 8th of October, Mr. Maloney. What I am trying to understand is why you thought it necessary to seek to try and persuade the Chairman to delay the IPO.

A. Because I thought that if we could get the IPO - if he had any leeway to delay the IPO until the Tribunal had sat and done whatever investigations that it had done, that there would be less of a hazard following the Tribunal, if you want to do an IPO then.

Q. But is it not right to understand from the documentation that you had, that whatever the hazard to the company, it appeared to be of the view that putting the warning in the document about the Tribunal of Inquiry was considered sufficient?

A. I understood that to be ESAT Telecom's view, yes.

Q. See, in one sense, Mr. Maloney, is it not arguable that if you interpret your discussion with Mr. Fortune, which seems to have taken place around this time, as indicating a seeking of knowledge, if you like, in respect of the nature of IPOs and how long they might take; that part of the reason for you seeking to delay the IPO was to enable ESAT Digifone to be in a position to do its own IPO.

A. I would not agree with that, no.

Q. And in time constraints, on the basis that a Tribunal can take a minimum of three months to any length of time, but take it that there was a possibility of it taking a year, that would have enabled ESAT Digifone to develop itself more forcefully in the market and be a better numbers proposition for the people who invest in these things. Do you agree with that?

A. What was the question, Mr. McGonigal?

Q. I am suggesting to you that if the 12 month period had elapsed between September, '97 and, say, September, '98, when hopefully the Tribunal would have finished, that ESAT Digifone would have been in a much better position to do its own IPO at that stage.

A. What I would agree with is that in July or, sorry, in October of '97, an IPO for ESAT Digifone would have been far too early.

Q. But July of '98, September of '98, might not have been too early?

A. It would have been later. Whether it was too early or not, I wouldn't comment, because at that stage -

Q. Can I put it this way, Mr. Maloney, you probably agree with me, that the longer you had in time to develop the company, the better the prospects of doing your own IPO.

A. The longer any company's track record is, the better chance of a public offering.

Q. So from your point of view, the worst scenario, in a sense, was for ESAT Telecom to do an IPO at this time or indeed in advance of ESAT Digifone?

A. It's not clear to me why an IPO of ESAT Telecom would be a worse case for ESAT Digifone.

Q. Well, I understand the answer to that, and you may know this better than I, is that because once ESAT Telecom had done an IPO, since they were a 45 per cent shareholder of ESAT Digifone, that the market would not - the same investors who had invested in ESAT Telecom would not have been interested in taking up more shares in ESAT Digifone, since they already had an interest in the 45 per cent?

A. I believe that to be an opinion; whether it's a fact or not, I think, could be debated.

Q. But it would be debated by the financiers and investors who buy the shares?

A. It would be debated by a broker, I guess, or an analyst, if you went and had that discussion with them.

Q. And it would be part of the discussion which they would have with the company and its executives, which would have included you, when that time arose?

A. That would be correct.

Q. So that at this time, so far as an IPO was concerned, certainly ESAT Telecom doing an IPO was not in your best interests or in the best interests of ESAT Digifone necessarily?

A. I would not agree with that.

Q. Certainly, so far as reward is concerned, your interest in ESAT Telecom was substantially less than the reward which you might have obtained through an IPO in ESAT Digifone?

A. You mean me personally?

Q. Yes.

A. That's correct.

Q. And that, to some extent, is measured by the fact that in respect of your shareholding in ESAT Telecom, I think you disposed of that for \$60,000 or \$70,000, whereas your shareholding in ESAT Digifone, when it was disposed of, was in or around 40 million?

A. That's correct, in the year 2000.

Q. And that gives us some idea of the difference, in a sense, to you of an IPO in ESAT Telecom and an IPO in ESAT Digifone?

A. It reflects a lot of things, including what would have happened in the market in the intervening period.

Q. So that if we go back to September/October of 1997, when the Tribunal was mooted and set up, the appreciation which you had was, I suggest, an opportunity to have the IPO in ESAT Telecom delayed to enable the Tribunal to carry out its inquiries?

A. I believe I've given my evidence as to why I tried to get the IPO of ESAT Telecom delayed. It didn't include that particular item.

Q. The other aspect, of course, of this scenario is that the only persons at this time who knew about the conversation were yourself and Mr. O'Brien?

A. At which point in time, Mr. McGonigal?

Q. August/September of 1997.

A. That would be correct.

Q. And that was - apart from what you may or may not have said to Mr. Armstrong, that was the position as you moved towards the 7th/8th of October of 1997?

A. That's correct.

Q. Now, as I understand it, and we discussed yesterday, you had your regular meeting with Mr. O'Brien on the 6th - you may have had your regular meeting on the 6th of October of 1997.

A. That's correct. There was a meeting scheduled for that day, yes.

Q. But that wasn't the day upon which this matter came up for discussion?

A. No, it was not. Sorry, when you say this matter, which matter?

Q. The matters that were discussed on the 8th of October.

A. No, that's correct.

Q. And in respect of the 8th of October, I understood you to say yesterday that prior to that meeting you had a meeting with Mr. Armstrong?

A. That's correct.

Q. And I think, as we can now see from your diary, there

appears to be an entry on the morning of the 8th of

October with Mr. Armstrong?

A. That's correct.

Q. And is that the meeting to which you refer? Was that actually a meeting?

A. Yes, it was.

Q. Now, the record of that meeting that you have produced in relation to that are the three pages which appear as 4 of 4 continued and 5 of the second book of documents?

A. Just bear with me for a moment.

Q. Those three pages, isn't that right?

A. I think, yeah. It's only two sheets because there is some notes on the back of them. There would be three sheets on the copies you have.

Q. Now, those notes are in fact undated?

A. That's correct.

Q. And the - just as a matter of information, is the sequence of these pages - page 2 would be the first page; page 3 would be the second page?

A. I believe the first page would be the one headed 'Discussion with DOB' in a box. And I believe the second page to be the one headed "1. Push by U.S. investors." And then on the back of that sheet I have some other notes which I don't believe apply to this matter.

Q. Well, I'll come to that in a second. But just in relation to these notes, these are the notes which

appeared recently and which you say you found in the office in a binder?

A. That's correct.

Q. Now, just looking at the pages, were they actually in a binder in your office or were they in a notebook in your office? Were they part of a notebook?

A. Terminology: you know the things you rip the sheets out of; it was in one of those.

Q. So that in fact in your office they were in a wire notebook and you pull the sheets out?

A. Correct. I tore them out.

Q. And you can see that quite clearly from looking at the originals, isn't that right?

A. I believe that's the case, yes.

Q. Now, when they were torn out, were they torn out in your office as you faxed them, as they were faxed?

A. No, I was going through a lot of papers and a lot of background and as I found pages that I thought might be relevant to the Tribunal, I tore them out and left them in a pile which I then asked my daughter, who was with me, to photocopy around the corner and bring back into me. So the pages would have been photocopied altogether at the end of my search process.

Q. You see, we are trying to date these documents ourselves, Mr. Maloney, to see if we could put something on them. And if you go to the third page, which is the back of the second page, and you see 1.01

"Declan Drummond Cavan gang meeting with Bertie."

A. I do, yes.

Q. And that appears now to be "Cavan gang meeting with Bertie."

A. Yes, I believe that's what it is.

Q. And "Cavan gang" refers, I understand, to a particular group in Cavan who were particularly concerned about sites, I think, or masts or something.

A. We had a particularly difficult experience with them, a mast location up there.

Q. And as of this morning, Mr. Maloney, and in fact I noticed it from your electronic diary, there appears to have been a meeting on the 3rd of October?

A. Yes, there was.

Q. And we think, and I am not asking you to comment one way or the other if you are not in a position to, that that entry, therefore, was probably made on the 3rd of October?

A. I don't know, Mr. McGonigal, when that was made.

Q. Be that as it may, going back to the documents, the other two documents which certainly didn't come into existence until - at the earliest, the morning of the 8th, isn't that right?

A. That's what I believed to be the case, yes.

Q. And as I understand it, whatever discussion you had with Mr. Armstrong on the morning of the 8th is reflected in the first page of that document?

A. That would certainly be me preparing myself for my meeting with Denis O'Brien. Whether they were notes I took while I was talking to Fergus or whether it was after Fergus left and I sat down and just framed the meeting for myself, I cannot recall.

Q. Yes. The way you put - the way you put it in evidence, Mr. Maloney, was that Fergus Armstrong would have a very detailed note of what your objectives for the 8th of October were. And that's at transcript 125, page 97. And at Day 125, 102, there is a similar entry at question 434 you said: "Also if I could just offer, because it might be relevant, the reason I am able to tie the document with a DOB document is because it ties almost 100 per cent with the document that Fergus Armstrong would have prepared "

A. Following my meeting with Mr. O'Brien, Fergus would have done a note of what I was trying to achieve and what happened at the meeting. And I think it was in that context I was referring when I was asked to see if I could date these two sheets of paper.

Q. I see. So am I to understand from that - I had read this differently, and I may well have been wrong, Mr. Maloney. I had read this, that on page 96 at question 424, what you said was: "The reason that I believe the first sheet would have been framed in the meeting of the October 8th was that Fergus Armstrong of McCanns had a very detailed note of what my objectives for that

meeting were which would tie, I think, with a document headed 'Discussion with DOB'."

I had read that answer and the following answer as meaning that as the meeting which you had with Mr. Armstrong on the morning of the 8th, that you had talked through with him the strategy for the meeting at four o'clock, and that whatever notes or memoranda he had, would coincide with the notes which you made either at the time of that meeting or subsequently, but you think I am wrong about that?

A. Yes, I do think you are wrong.

Q. So these notes do not correspond with any notes of Mr. Armstrong made at your meeting on the morning of the 8th?

A. Mr. Armstrong's note is a note of the strategy of what I tried to put to Mr. O'Brien. I think in my testimony yesterday, I believe it was, I mentioned that as part of this we put other issues that perhaps we thought might have been useful to Mr. O'Brien that he could have used vis-a-vis delaying of the IPO. I believe I referred to the issue of the routers and a contract with CIE that he is still trying to tie down. Those elements would have been discussions that Fergus and I would have discussed that morning as part of what we could put to Mr. O'Brien as very good, sensible business reasons why this may not be the ideal time, in

addition to the Tribunal.

Q. That's what I had understood, Mr. Maloney. Maybe we are at cross purposes. I had understood that when you saw Fergus Armstrong on the morning of the 8th, that you and he discussed a strategy. Following that meeting you then prepared notes or, sorry, either at the meeting or following the meeting, and before you saw Mr. O'Brien, you prepared notes of the way you were going to deal with the meeting?

A. What I cannot tell you, Mr. McGonigal, is whether I prepared discussions with DOB while Fergus Armstrong was sitting across the table from me or whether I wrote them after he left my office. That's the bit I am not - unsure about.

Q. I understand that. We are not apart then. It would either have been at the meeting with Mr. Armstrong or before the meeting with Mr. O'Brien?

A. Correct.

Q. But whatever time it was, you are saying that those notes would correspond with notes which Mr. Armstrong has which he made at the time of the morning of the 8th of October?

A. Mr. Armstrong made a note on the 9th of October describing the events in terms of the - what I was trying to do with the pre-meeting, and then what I reported to him occurred at my meeting with Denis O'Brien.

Q. I see. So far as the second page is concerned, when would you have made those notes?

A. I believed these notes would have been made following my meeting with Denis and I believe prior to me debriefing Fergus Armstrong.

Q. So that was some time after whatever time the meeting ended and whatever time you met Mr. Armstrong the next morning, the next day?

A. That's correct. It was the 9th or perhaps the 10th.

Q. Now, in relation to these notes, Mr. Maloney, I just want to ask you about number 3 on them, where you have recorded, "Told me the monies did go to a middle man but never got to Lowry or his account." Do you see that?

A. I do, yes.

Q. Now, as I understand your evidence over the last two days, Mr. O'Brien never said that to you?

A. I think what I described was that after we'd had the meeting in his office where he spent a lot of time trying to emphasise to me that he would never be going ahead with an IPO at this point in time if he believed there was any issue or doubt or potential hazard. As we left his office and went down the stairs, he said to me, "You are not buying it" or words to that effect, to which I asked him how then he could have reconciled the conversations that I've already given evidence of. And he then told me, "Well, what I haven't told you is that

it went to this 'intermediary' or 'middleman'."

CHAIRMAN: Well, I think you did say, Mr. Maloney, that the actual word 'middle man' could have been a synonym or a word meaning the same thing, a word that you used and may not have exactly reflected Mr. O'Brien's words, but you were adamant that 'intermediary' was used. Do I correctly recall your evidence?

A. That's correct.

Q. MR. MCGONIGAL: What you actually said, Mr. Maloney, is - what Mr. O'Brien said, and it's recorded at 125, page 90, at the top of the page, "Well what I didn't tell you was that I was going to make the payment but it got stuck with an intermediary." That's what you said in evidence the other day.

A. I accept that.

Q. And am I right in understanding that you are saying that that is your recollection of what was actually said?

A. To the best that I can recollect, yes.

Q. So when you recorded on your document, "told me the monies did go to a middle man but never got to Lowry or to his account," that was not an accurate, in any way accurate recording of what had been said?

A. Well, other than the qualification of the 'middleman' and 'intermediary', those, as I - I think I said that could have been a term I used to substitute one for the

other. But I would say that that note, handwritten note that was taken was more immediate in terms of timing than my recollection yesterday.

Q. That's why I am puzzled, Mr. Maloney, as to why you put that down at all, bearing in mind that what Mr. O'Brien has alleged or what you say Mr. O'Brien said to you was "stuck with an intermediary," he doesn't appear to have mentioned either the name, either the word 'middleman' nor Mr. Lowry, nor Mr. Lowry's account?

A. I can tell you that my recollection of the meeting of October the 8th was that he definitely did mention Mr. Lowry and he did mention getting stuck and he did mention intermediary. I accept that the term 'middleman' might have been used by me to mean intermediary. I think I stated that yesterday.

Q. But I think it's equally clear from your evidence, Mr. Maloney, that from your evidence, that whatever discussion took place in the office, the word 'intermediary' was not used?

A. As I recall, the word 'intermediary' first came up on the stairs on the way down from the office and then in a laneway at the side of the building of the Malt House.

Q. Yes. So that so far as Mr. O'Brien was concerned, on your version of events, what he said on the stairs was "stuck with an intermediary" which you translated on this document into 'middleman' "but never got to Lowry

or his account."

A. The way I recall this happened was, as we were going down the stairs, Denis - again, we had known each other for a long time - looked at me and said, "You don't believe me, do you?" And I said to Denis, "I am having trouble reconciling all the comfort you are trying to give me in the office around the IPO with the statements that you made." Denis never denied the statements. Then I believe it was an attempt to reassure me that no payment had been made, which was why he felt the Tribunal would not be a problem with the timing of his IPO. He then said to me, "What I didn't tell you was that it got stuck with an intermediary."

Q. I understand what you are saying as to say this alleged conversation came into existence, but I am a bit puzzled, and we'll come to it in a moment. You went to this meeting, as I understand it, for the express purpose of trying to persuade Mr. O'Brien to delay the IPO for whatever reason?

A. That's what I was trying to do, yes.

Q. And in the course of the discussion, as you've recounted it, you covered a wide range of matters as to why you thought the IPO should not go ahead at that time, which included not only matters pertaining to the Tribunal, but also, apparently, matters pertaining to CIE contracts and routers, I think was the other one?

A. That's correct. I tried to offer those to him as other reasons that could be used for a deferral of an IPO. I was trying to be helpful at the time.

Q. But what was clear, Mr. Maloney, was when that meeting came to an end in the office, you had not achieved your purpose?

A. That was definitely the impression I had got, yes.

Q. And as you and Mr. O'Brien were leaving the office, the position, from your point of view, was the IPO was going ahead?

A. That would have been my impression, yes.

Q. So you had failed to persuade the Chairman that there were any good grounds for delaying the process?

A. Denis spent a lot of time at that meeting in his office of the 8th telling me all the reasons why he did not believe that the Tribunal would be a problem for his IPO.

Q. I understand what you are saying about that, Mr. Maloney, but I am just trying to understand what was going on at the time between the two of you in this sense, that the objective that you had set out to achieve had not been achieved?

A. As we left his office I was under the distinct impression he was still going to go ahead with his IPO.

Q. And as you left the office, the other fact was that it was still - apart from Mr. Armstrong, the only two people who had knowledge of the conversation were

yourself and Mr. O'Brien?

A. That's correct.

Q. But by the time you left the pavement, so to speak, or the laneway, a third alternative or person or intermediary had come into being?

A. No. I believe what happened was as we were going down the stairs he actually stopped, to the best that I can recollect this, we stopped on the floor down below, kind of a platform between the two floors and he looked at me straight in the eye and he said, "You are not buying this, are you?" And I said to him, "How can I reconcile the conversations, Denis, with what you've told me in your office?" He then said to me, "Come on downstairs." We went down to the reception area and then he asked me to go around the front of the building and into the laneway. That's where the rest of the conversation occurred. That's the best of my recollection as to what occurred.

Q. You remember so far as Mr. O'Brien is concerned, his understanding of the matter as he gave it in evidence?

A. I recall reading it, yes.

Q. And you don't agree with that?

A. I would like to see it again before I make any comment on that so I can be specific.

Q. Well, what he said in relation to the 8th of October, and it's at transcript 120, page 13 in answer to Mr. Coughlan, he said that you asked him a question,

did you ever pay money to Michael Lowry? And he said he didn't.

A. I need to see when the - the context within which he made that statement, because in his office

Q. Yes.

A. he definitely would have said to me that he had paid no money to Michael Lowry. And that was - he was using that as the reason why - to try and reassure me that the Tribunal would not be a hazard for him.

Q. And that would be consistent with what he had told you as he recalls it in July of 1997 as the meeting which you now say may have been in September of 1997, when he says that you asked him a question as to whether he had paid - "whether had you paid Mr. Lowry," and he said, "Absolutely not."

A. It appears we have different recollections of who brought the issue up, yes.

Q. So far as you are concerned at that stage, Mr. Maloney, an element had now come into the equation which had not been there before?

A. That's correct.

Q. Which was the idea of an intermediary, which you interpreted as another person, isn't that right?

A. I wouldn't put it that strongly. What I believe I said with regard to my note of the 'middleman', that I used that term perhaps to mean the same thing as the 'intermediary'. I believe in all my further notes and

discussions with the other directors, I would have used the term 'intermediary'.

Q. So that am I to take it from that, that insofar as there is evidence in relation to the explanation of the intermediary as being Woodchester Bank, am I right in understanding that you accept that that is a possibility?

A. What I would accept is that my note here under "3" of the 'middleman' should not be used as a reason to discount Mr. O'Brien's evidence about Woodchester Bank.

Q. Well, in fact, isn't the reality that that note shouldn't be used at all in the sense that it doesn't reflect the conversation as you remember it, and insofar as that is concerned, the evidence is contained in the area that I read out, which is, "I didn't tell you that I was going to make the payment but it got stuck with an intermediary," that is in fact your evidence of what the conversation -

A. That's correct. I think it's probably worth just noting that the meeting I had with Mr. O'Brien was over an hour long. These are five bullet points from that meeting so they shouldn't be read as being the absolute only things that were discussed or mentioned.

Q. I understand that. But equally do you agree with me, Mr. Maloney, that so far as your evidence in relation to whatever was said at the Malt House in the laneway, that we should now only have regard to your answer in

the Book of Evidence as opposed to that writing which you have on that document at number 3?

A. The writing - the five points on this document, I believe, were the five points that summarised my meeting with Denis. I would have included my meeting with Denis as being the discussion in his office, the discussion on the stairs and the discussion in the laneway.

Q. Yes.

A. I saw that as the one meeting.

Q. Now, following that, you then go back to Mr. Armstrong on the 9th of October, isn't that right?

A. I see there is two dates here; one on the 9th, one on the 10th.

Q. And following those two meetings - were they both meetings?

A. I believe they were.

Q. Draft preliminary advices were obtained by you from Mr. Armstrong?

A. That's correct, dated the 12th, I believe.

Q. And following the 8th, on the 13th and the 14th you had three further attempts at trying to persuade Mr. O'Brien to delay the IPO?

A. On the morning of the 13th when Denis came to my office, I gave him the draft - I asked him what the status was in terms of the IPO. He told me it's continuing to - he was continuing to proceed with it.

I then gave him the draft legal advice, just to give him some feel for the potential problem that the company could be put in.

Q. But in the context of what you were trying to achieve, Mr. Maloney, what you were trying to achieve was to stop or to delay the IPO?

A. I was trying to get him to delay it, yes.

Q. And the reality was that without even the IPO, whether it went ahead, once the Tribunal of Inquiry was established, if it determined to look into the licences, as was envisaged by the company, the matters which you were concerned about were going to become part of its inquiry?

A. Yes. At the meeting that we'd had in the Malt House Denis spent a lot of time explaining to me why he believed the matter would not be looked at by the Moriarty Tribunal.

Q. But insofar as whether it would be looked at or not, in a sense, so far as the company was concerned, it was taking the position that it would be looked at and therefore, the matters which you are concerned about would become the subject matter of it?

A. Which company, Mr. McGonigal?

Q. ESAT Telecom.

A. I believe that to be the case.

Q. And of course there was also - so that at the time that you finished the meeting, for whatever reason, the IPO

was not being delayed, the Tribunal was still going ahead and there was a probability or strong possibility that this matter might be enquired into?

A. Which meeting, Mr. McGonigal?

Q. Sorry, the 8th of October.

A. That's correct. The only thing I would add to that was Denis was adamant, during the meeting of October the 8th, this matter would not be looked into, that he had not made a payment and there was - you know, he was spending a lot of time trying to allay my fears and saying there is nothing to be concerned about.

Q. So moving on from there, you go to the two meetings of the 9th and 10th and then on the 13th you have your initial meeting with Mr. O'Brien in the morning and the - you give him the draft preliminary opinion of Mr. Armstrong's and then you have a second meeting at lunch time with Mr. Michael Walsh?

A. There was an intermediary - sorry, excuse the term. There was another step in the process. When Denis came to my office that morning, we talked a little bit about where he was on his thinking about the IPO. He told me it was still going ahead. I then again asked him, "Is there any way the thing could be delayed?" He told me, "Unfortunately, no," and that's when I gave him the preliminary advices. He picked up the preliminary advices. I recall him rolling them up in his hand and asking me would I go out with him to Paddy Kavanagh's,

which is a coffee shop behind our offices, to have a coffee, which I did.

Q. And I think following that, or at some stage that morning you had a meeting with Michael Walsh on the 13th?

A. That's correct. He asked me in the coffee shop who else was aware of these matters, or knew about this, and I told him Fergus Armstrong was the only person I had spoken about. So then he left. I believe what then happened is I got a phone call from him during the morning asking me would I meet him and Michael Walsh for a sandwich down the Malt House.

Q. Yes. And in that meeting, insofar as Michael Walsh's record of it is concerned, there was no discussion about an intermediary at that stage, although it was a short meeting?

A. That's not my recollection, Mr. McGonigal.

Q. You think there was but it's not recorded in his minutes?

A. I believe it's in his handwritten notes, but not in his memo, that he seems to have given to the Tribunal.

Q. You are not - when you say handwritten notes, I mean, are you referring to these?

A. Sorry, I might have a typed version of the handwritten note. I am not sure. I saw two separate documents, Mr. McGonigal. I saw one headed, 'Memo from Michael Walsh' and then I saw another one which I believe is a

Tribunal reference on it that perhaps was supplied by William Fry's of the translation or the typed version of what I believe were Michael Walsh's handwritten notes.

Q. Well, I was reading from his handwritten notes.

A. Okay.

Q. And the confusion may be, Mr. Maloney, and I am going to get them out and just explain it to you.

A. I think this could be in my bag.

Q. Have you got them?

A. I think they are just trying to find them.

Q. Do you have those, Mr. Maloney?

A. I have a document prepared by William Fry's solicitors, 'Handwritten Notes of Michael Walsh', but it's a typed version.

Q. You don't have the - well, it's a handwritten -

A. I presume they are the same, are they?

Q. Well, it's the handwritten one. I thought that you had said there was something in the handwritten ones which wasn't in the typewritten ones?

A. Sorry, I wasn't trying to suggest that.

Q. I just wanted to explain to you where the confusion might arise. You have them now. The first page, you'll see the 13/10/97.

A. Yes, I do.

Q. And that's apparently a record of the meeting which you and Denis O'Brien had with Michael Walsh at the Malt

House?

A. Yes, it appears to be.

Q. And I am just saying to you that insofar as that note is a record of what transpired, it doesn't appear to make any reference to 'intermediary', 'third party' or 'middleman'?

A. I see that.

Q. Now, the confusion may arise, in your mind, Mr. Maloney - the next matter that is referred to is a meeting between you and - a phone call between you and Michael Walsh in the car when you are telling him that you've got the letter from Denis O'Brien?

A. I see that note.

Q. And then the next one is reflecting a phone call which you had: "Michael Walsh phoned DFD to tell him about the meeting and expressed concern." Do you see that?

A. I see that, yes.

Q. And then if you go to the next page: "BM contacted MW to see if he talked to DFD."

A. I see that, yes.

Q. And your records would seem to indicate that you had a conversation with Dermot Desmond on the 14th of October?

A. That's correct.

Q. And I was suggesting that that reflected that conversation. And that you go to McCanns after the conversation, or sometime after the conversation, and

then you go and ring Michael Walsh at around - you visited Michael Walsh at around six o'clock on the 14th?

A. That would tie in. That seems to be Michael's notes.

Q. And it's in that meeting between yourself and Michael Walsh, about 7 lines down, that you say that "BM said he was particularly concerned because he believed that an intermediary was involved and the intermediary was aware of Denis's intent to give money to -"

A. That's correct.

Q. So that's the introduction, if you like, of the intermediary into the IIU/directors scene; from then on it begins to be taken over by Dermot Desmond and Michael Walsh and ultimately the directors of ESAT Digifone and also ESAT Telecom?

A. I believe in one document, Mr. McGonigal, I can't recall exactly which one, whether it was the 23rd of October or the one on the 4th of November, Michael Walsh, when asked that question in one of the meetings says, 'I came to the subject cold'. There was some suggestion of an intermediary, but I just can't remember which meeting that note was in.

Q. No, I understand what you are saying, Mr. Maloney. I think there are two entries, one suggesting that he came cold to it, there is that, and I think there is another suggestion somewhere that he - he says something else about an intermediary, but since he's

giving evidence, it's not a matter that I need to take up with you?

A. Okay.

Q. What I do want to ask you about is just going back to the 13th for a second, to your lunch time meeting with Michael Walsh, the result of that meeting was that Denis O'Brien was asked to do a letter, which he did, for you, absolutely confirming that no money was paid by or anyone acting on - "by me or anyone acting on my behalf to Michael Lowry or any of his officials regarding the granting of the GSM licence to the ESAT Digifone consortium."

A. That's correct.

Q. And insofar as that is relatable to anything, that would correspond with his conversation to you in the Malt House where he denied that he had paid anything to Michael Lowry and would correspond with the meeting in July which he records where he denied making any payment to Michael Lowry?

A. Just to be clear: in the Malt House meeting of October the 8th, I do not recall him at any stage denying that he made a payment to Michael Lowry. I do recall him saying to me this intermediary and it didn't get through, but at no stage up until then had he denied to me that had he made any payment.

Q. I had understood, and I may be wrong, and it's in the transcript, Mr. Maloney, but I understood that you

agreed with me, and you may not have. I may have taken you up wrongly, that I said to you that Mr. O'Brien, in his evidence, it's on Day 120: "Did you ever pay money to Michael Lowry? And I said I didn't." I understood you are agreed that that had been said in the Malt House?

A. I'm sorry, in the Malt House.

Q. On the 8th of October?

A. In the meeting between myself and Denis in the Malt House on the 8th of October he did not say that to me.

I am sorry if I misled you or was ambiguous in any way.

Q. No. No. It's probably my misunderstanding, because that was his recollection of what - of the conversation in the Malt House. But you say that didn't happen?

A. I'd say my recollection is different, yes.

Q. But insofar as if his recollection is right in relation to that, his letter, which he was asked to give to you in relation to this matter, which he gave to you on the 13th of October, his conversation as he's identified it on the 8th of October in the Malt House, and his conversation as he identified it in July of '97, are all the same conversation denying that he gave anything to Michael Lowry, isn't that right?

A. All I can say is I was in receipt of the letter that you've just described which I then took to McCanns.

Q. Now, as a result of that, on the 14th, then, you had - or was it as a result of that? When did you see

McCanns after the 13th?

A. If you just bear with me. Let me just check my diary.

After the 14th, Mr. McGonigal, was it?

Q. The 13th.

A. After the 13th. I don't see anything in my diary after the 13th in terms of another meeting with McCanns.

Q. I think the next meeting, so far as we can identify it, appears to have been on the 22nd.

A. That appears to be the case, yes.

Q. So you get the letter from Mr. O'Brien on the 13th and there is a gap then to the 22nd before you go back to Mr. Armstrong. In the meantime -

A. Mr. McGonigal, I wouldn't say that. I believe I would have brought that letter straight to Fergus Armstrong, although it's not noted in my diary.

Q. So there may have been another meeting?

A. There may have been me giving Fergus Armstrong the letter, yes.

Q. Because, in fact, I think that the preliminary advices were firmed up into actual advices on the 16th, isn't that right?

A. I believe that's correct, yes. So he would have had the letter as part of that.

Q. And, in fact, in his legend there is no meeting referred to until the 19th of October between yourself and Mr. Armstrong. But be that as it may, Mr. Maloney, so far as the history of these events were concerned,

the matter then moves fairly swiftly from meetings between yourself and phone calls between yourself and Mr. Desmond and meetings between yourself and Mr. Michael Walsh over the 14th and the 15th, and there has been various evidence in relation to that, which there is no need to go back over. Path

The next significant thing, so far as you would be concerned, was the meeting of the 20th of October of 1997. And that was a meeting in IIU where Mr. Desmond had the conference call. Is that right?

A. Just bear with me.

Q. I think it's at Tab 18.

A. That's correct. I believe the people on the conference call were Arve Johansen, Rolf Busch and Denis O'Brien.

Q. Now, so far as that meeting was concerned, that appears to have been concerned, and I think the way you put it was - at least Mr. O'Brien gave an explanation, but you didn't offer anything to that meeting, as far as I can make out from your notes of it.

A. There is nothing in my notes.

Q. So that at that stage, for those that were at the meeting, you weren't offering any explanation in relation to the conversations, whatever they were, to the meeting at that time?

A. I believe what I said, Mr. McGonigal, was that my notes that I have don't record any significant contribution by myself. That's not to say that I didn't make any.

Q. And I think also Michael Walsh's don't record any significant contribution from you either on the 20th?

A. That could be the case.

Q. But at this stage it was still your ambition, so to speak, to get a postponement of the IPO?

A. Well, at this stage we were moving to a different phase of it. At this stage I had received the advices dated the 16th. Although they had not yet been put to the directors. So at that stage I wouldn't describe what I was trying to do to get it delayed - the delay period, I believe I described was between the 8th and the 14th, my attempts, at least, to have it delayed.

Q. And had you moved to a different - was there a different operation, in a sense, now the delay not having worked, what were you trying to achieve now?

A. Well, at this stage what we were trying to do is in the context of the IPO going ahead, what would this potentially mean? That's when I received the advice that is dated the 16th that you've already referred to.

Q. So were we focusing now on the Prospectuses?

A. I can't specifically answer that one way or the other. When you say focusing on the Prospectuses -

Q. As to whether or not they were appropriate for the IPO in the circumstances which you are now revealing to the - which are now becoming apparent to the Board?

A. My notes don't include any recording of that either. I can't say.

Q. Because it does appear throughout the notes of the meetings, that certainly up to the 4th of November, and including the 4th of November, there were discussions about as to whether or not the IPO could be postponed.

A. That was -

Q. Or delayed, rather.

A. That was certainly a discussion that was going on in the wider group of directors but I tried to characterise was that my personal efforts to see if it could be postponed was described by me as the period through 8th to the 14th of October.

Q. But at the same time the efforts to delay the IPO continued up to and including the 4th of November on a and in particular, Telenor seemed to be involved in suggesting that as a possibility?

A. I think other directors would have been looking at that as a possibility, yes.

Q. Now, so far as the meeting on the 23rd was concerned, that was a meeting which you prepared a document of bullet points, am I right in thinking that?

A. I believe it was for that meeting, yes.

Q. And the document which is now being produced is the document which you read to the meeting, but is a shortened version of an 8 to 9 page essay which you prepared prior to this meeting?

A. I just counted that - five and a half page essay.

Q. And you have that with you, do you?

A. Well, it's marked as a privileged document.

Q. But the document, whatever it is, is a historical analysis of what your recollection was at that time of the events from October/November of 1996 to the date of the 13th of October and maybe slightly beyond that?

A. I believe yesterday I described it as an essay type document to try and put all my beliefs and recollections together, out of which I came up with the ten point document that I put to the meeting.

Q. And at that time, the time that you prepared this document for the Board Meeting on the 23rd, did you have available to - what did you have available to you?

A. My own recollections and notes that I would have kept.

Q. And would that -

A. As far as I can remember, Mr. McGonigal.

Q. And would that have included the notes of the 8th of October?

A. Which notes of the 8th of October?

Q. The notes of the meeting of the 8th of October, of the four o'clock meeting of the 8th of October.

A. I believe so, but I cannot recall.

Q. And so far as it's material at that time when you were writing the ten point document, you record the conversation as being, "I didn't actually do it, thank God. I know you must be concerned" as being a statement made in August of '97, which I think is now either September or July of '97 - you think September?

A. Yes.

Q. And so far as the 8th - 9th is concerned, what you said was that, "It never went through. He told me he intended to make the payment but it got stuck with a third party intermediary."

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

Q. Now, am right in remembering was it at this meeting or was it the meeting of the 4th of November that you described it as a sort of de-stressing process?

A. No, that was the 4th of November.

Q. And that was, in essence, because at that stage the matter was now being considered by the Board fully?

A. I think what I described by the 4th, all of the shareholders were there and all of their advisers were there and the questioning - the independent questioning had begun.

Q. But the independent questioning, so far as was only of Mr. O'Brien, is that right?

A. That's correct.

Q. There was no questioning of you at that time?

A. That's correct.

Q. Although you were given an opportunity of responding?

A. Of responding to?

Q. To the - speaking to the meeting.

A. On the 4th of November?

Q. Yes.

A. I believe I did make contributions to that meeting,

yes.

Q. I think Mr. Armstrong, in fact, asked you specifically to comment in relation to what Mr. O'Brien had said?

A. He may well have.

Q. But following that meeting, the directors of ESAT Telecom determined that the IPO should go ahead and it did go ahead?

A. That's what I understood, yes.

Q. In a sense, Mr. Maloney, if you look at the entire process which you were engaged in at that time, from the 8th of October or from the 7th of October, if you like, for a period of time up to the 14th, what you were trying to achieve, in a sense, was to get the IPO delayed?

A. I was trying to put to Denis the potential problem that would be there and see if there was any way he could delay the IPO. That's correct.

Q. And I want to suggest to you that the only reason for you trying to get the IPO delayed was because you wanted the IPO of ESAT Digifone to take first place?

A. I think I've already said I do not accept that.

Q. You, as a businessman and a chairman and non-executive chairman of a significant company, would appreciate that the delaying or pulling of an IPO would have a seriously detrimental effect on a company?

A. Depending on when it was done, I would agree with that, yes.

Q. Well, when it happened immediately before the IPO was just about to take place, it would be catastrophic?

A. That term was definitely used in discussions with the directors, yes.

Q. And we had a good example of that, which was referred to by Mr. O'Brien in the GPA situation?

A. That's correct.

Q. So that from that point of view, what you were actually trying to achieve was something which was, if it took place, going to damage the company ESAT Telecom?

A. I believe it would have damaged both companies, ESAT Telecom and ESAT Digifone.

Q. Well, the damage to ESAT Digifone might not have been so severe or might have been capable of being dealt with if ESAT Digifone had separated itself from ESAT Telecom once the IPO had been pulled?

A. I don't believe in November, '97 there is any way that a damage such as that to ESAT Telecom would have not damaged ESAT Digifone.

Q. I accept that it would have damaged it, Mr. Maloney, but I am saying that the damage could have been contained and remedied by the separation of ESAT Digifone from ESAT Telecom.

A. It's not clear to me that would have been the case, Mr. McGonigal. I believe it would have been equally damaging for both companies.

Q. And equally the other events that would have intervened

would have been, of course, the Tribunal?

A. Sorry, what's the question?

Q. The reason for the delaying of the IPO, or the pulling of the IPO, if you like, would have been because of the Tribunal of Inquiry?

A. That was - I think that's correct, which was why, at the start of the process, we were trying to put forward some other reasons that we hoped, I hoped Denis might be able to use.

Q. But in reality, Mr. Maloney, based on what you are articulating to the Chairman of the company and indeed later on to the directors, am I not right to suggest that the only reason which was being advocated for the pulling or delaying of the IPO was, in effect, the Tribunal of Inquiry and your concern in relation to evidence which may be given at that inquiry?

A. Not just my concern. I'd say at that stage it was a concern of all of the directors of the company.

Q. Well, the directors were already concerned, Mr. Maloney, because they had put into the Prospectus the fact that the Tribunal of Inquiry would probably investigate the GSM licence.

A. I believe that was put in by the directors of ESAT Telecom.

Q. Yes.

A. Not the directors of ESAT Digifone.

Q. And - the directors of ESAT Digifone you are referring

to?

A. That's correct.

Q. But the two factors, in a sense, that would have been uppermost in your mind at the period, September '97 to October '97, were, first of all, the conversations between yourself and Mr. O'Brien and secondly, the Tribunal of Inquiry and how it would impact on the company?

A. That's correct.

Q. And it was armed with those two, if you like, arguments that you set about trying to delay the IPO?

A. I'd say those two plus the health warning that appeared in the document dated the 23rd of September, '97 that we already referred to.

Q. Part of your concern in relation to the Prospectus, as I understand it, Mr. Maloney, related to you trying to seek indemnities for yourself in relation to any fallout that might arise following the IPO?

A. I believe that issue came up at the meeting of the 4th of November, or perhaps the 5th, I'm not sure, one of those days.

Q. Mr. Desmond had articulated a view on the 14th of October to you that he saw - he was concerned as to why you had not raised this issue back in October/November of '96.

A. I believe I covered that as part of my evidence at that meeting, yes.

Q. And clearly that would have been one of the matters that you would have discussed with Mr. Armstrong as to what, if any, concerns you should have by reason of that omission?

A. That's not correct. I don't recall ever having had that discussion with Fergus Armstrong.

Q. Well, if you go to Tab 20 - sorry, if you go to Tab 7 first.

A. Is this in my own -

Q. Sorry, in your original book of documents, Tab 7. Is that not reflected in the 3, 4 and 5 points that you make there:

"Directors insurance will be invalid.

My participation in the IPO endorses the statement.

My shareholding in ET could leave me open to actions."

A. The context within which that came up was a general point where - a point in this process, ESAT Telecom Board were offering - I believe ESAT Digifone directors requested an indemnity from ESAT Telecom as a general point for all of us.

Q. Well, I wonder if that's right, Mr. Maloney, because if you go to the bottom of that page, you then say, "If he refuses I want the monkey off my back and the Board to be part of the risk."

A. There is a note there that says that, yes.

Q. And does that not reflect your view at that time?

A. I think you are perhaps reading too much into the word "risk" there. What I was trying to articulate there is that I wanted this thing broadened so that I wasn't the only one running around with this knowledge, if you like. That was the context within which that was made.

Q. Yes. There was a concern on your part that because you were the person who had some knowledge and had knowledge since October/November of '96, that you hadn't shared that with the board at that time, it was articulated by Mr. Desmond into a concern, and it was a real concern on your part?

A. That's not my recollection, no.

Q. I see. And you then underneath that also say, "Either he calls a Board Meeting to get Board buy into the risk or I will share my concern with one of the other directors." You don't think that reflects a similar concern?

A. I think what that note says is that I was going to require a Board Meeting to make sure that everybody understood the situation that we were facing. The word "risk" there would have been used in that context as opposed to any kind of insurance risk, to the best that I can recollect.

Q. And if you go to Tab 8 then, you see there, "Do not want to take any responsibility for it."

A. That was me recording a comment that Michael Walsh made to me on a telephone call of that day.

Q. And then if you go to Tab 20 on mine, I think. It's Mr. Armstrong recording the top of the page 'Niall McCabe'?

A. Sorry, Mr. McGonigal, which sheet are you on?

Q. This one. Maybe it's 19.

A. Yes, I have that sheet.

Q. Do you see the bottom of it there "spent money defending yourself."

A. Yes, I do.

Q. Is that not reflecting then number 2 is insurance, no consent; no indemnity is number 4, and I am not sure what 3 is?

A. 3 says, "The role for the Board with all the advice it could get

- issue for common directors

- courage might desert them."

Q. So does that not again reflect what I am suggesting was one of the matters which was - concerned with your position in relation to the information which you had as of October/November '96?

A. No, it does not. I believe in my testimony I mentioned that "spend money defending yourself" as I recall it, was a jocose comment that Fergus made at the start of the conversation, was a joke.

Q. I see.

CHAIRMAN: On the face of matters then, Mr. Maloney,

and I am not indicating any view in this, when you say you first used Mr. Armstrong as a sounding board and you told him of this potentially fairly explosive conversation, he would obviously have asked you when the conversation took place.

A. That's correct.

CHAIRMAN: Well, without prying into what took place between you, it might be thought that it would likely have been discussed that there might be some concern that nothing had been done for the better part of a year. Are you saying that when Mr. Desmond made his rather robust observations that you could be in trouble yourself about not having raised it at the start, that that was the very first time your mind turned to that possible topic of delay?

A. That's correct, Mr. Chairman. I should also add that once I responded to Mr. Desmond and gave him, if you like, my rationale for that, he seemed to accept that.

Q. MR. MCGONIGAL: Now, just a few more things, Mr. Maloney, that I just want to ask you about. If you go to Tab 4. You see there in number 4, it's another reference to a meeting with Fergus Armstrong which, I understand, took place after the 8th of October. Do you have that?

A. Sorry, what I have in section 4 is a document headed 'Fergus Armstrong' marked 'privileged'.

Q. No. Well, if it is, mine isn't. And if it is, it's not any more. That one. [Indicating].

A. The first one is "U.S. advice impact reference discussions JF".

Q. It may have been privileged at some stage, Mr. Maloney, but it seems to have got involved in the Tribunal for whatever reason, for better or for worse, and there is just one matter I want to ask you about in relation to it. And that is, you see there where it says, "Participate in roadshows."

A. Yes.

Q. "Company liability.

Endorsement of information."

And as I understand it, correct me if I'm wrong, you suggested that in the course of the discussion in the Malt House on the 8th of October, that Mr. O'Brien invited you to participate in the IPO on the roadshow?

A. He asked me two things. One was would I be prepared to participate in the roadshow? And the second question he asked me is what did I plan to do with my own shares in ESAT Telecom Group? And to the first one I replied that, you know, that would need to be something agreed by the Board. And to the second one I said that I didn't really know and hadn't given it any thought at the time.

Q. See, my recollection is that in your evidence you said,

at question 303, on Day 125. I'll just check it now for you, in case my note is wrong. It's on the second page, 63. The question from Mr. Healy was - I think just before we move on to the next document, and this is the document that you had gone on to, and I think the only thing he says there - you say in answer:

"I think the only thing that might be helpful is point number 4 "participation in roadshow - BM." In my conversation Denis O'Brien on the 8th of October, he had raised with me the possibility of me participating in the roadshow and I told him that that would depend on getting - I had no problem with that as long as the Board, you know, agreed it. And I believe the two bullets underneath it ... "

So that seems to be in accordance with your answer just now. My note isn't quite - you see, what I am going to suggest to you, Mr. Maloney, is that in the context of what you were trying to achieve, it's difficult to understand how you could have even considered the possibility of going on a roadshow.

A. Well, I've given you the - I've given you my answer to that, Mr. McGonigal.

Q. I see. Now, just a few matters in relation to the resignation that I just want to try and understand, Mr. Maloney.

First of all, two things: At the time that you left

Rank Xerox and came to work in ESAT Digifone, you would have been non-resident in tax terms?

A. That's correct.

Q. And, in fact, the delay between the 13th of May, '96 and July of '96 was to enable a tax efficient scheme to be set up with an Isle of Man company for your benefit to employ you through - as a consultant to ESAT Digifone?

A. Yes, because I had been out of the state for eight years, there was what I believe was a three year window which would allow a structure like that to be put in place, which I availed of.

Q. And when it came to your resignation in December of '96, you have identified the reason for your resignation as being because you wanted to protect the personal friendship of - between you and Mr. O'Brien?

A. That's correct.

Q. So that you felt the best way to do this was to resign from the company?

A. That's correct.

Q. At a time when the company, ESAT Telecom, was in the process of raising money through a bond issue?

A. That's correct.

Q. And it's quite clear from the reaction of the directors, both Mr. Desmond and indeed Mr. O'Brien, that whatever about the reason for protecting a friendship, they certainly did not see any benefit or

good in you resigning at that time from the company's point of view, isn't that right?

A. Mr. Desmond never articulated anything of that like to me ever. And secondly, Mr. O'Brien at the time certainly did not articulate that either. I did see it on the notes that you handed me yesterday, but that's the first time I saw those notes and the first time he would have raised any of those issues with me, either one-to-one or among other directors with me present.

Q. So you don't think that the offer of 250,000 and come back until 60 days after a particular launch was indicative of a deep concern on their part as to the Chief Executive leaving at that particular time?

A. That was an offer put to me by Dermot Desmond, who I was told was acting on behalf of the Board.

Q. Do you not think that indicated a deep concern on the part of the Board that their Chief Executive should be leaving at that time?

A. Yes, but my understanding was what they wanted was for me to come back to get them through the launch period of the company.

Q. And to come back for that period?

A. That's correct.

Q. You don't seem to have, and I may be wrong about this, but you don't seem to have articulated to Mr. Desmond, anywhere that I can see, the reason that you resigned was because you wanted to protect the personal

friendship.

A. That's correct. But I - what I would have said to Mr. Desmond was that Denis and I were in constant conflict because what I saw as his interference in operational matters in Digifone, and that, you know, I just - I couldn't put up with it any more.

Q. And not only that, Mr. Maloney, but in relation to the subsequent negotiations which took place, they focused on a readjustment of your options, isn't that right?

A. I believe we covered that yesterday.

Q. And the purpose of the negotiations was to try and improve your position on your options from what it had been before you resigned?

A. I believe from the evidence I gave yesterday you saw the changes that were made, which were the agreement that I wouldn't be penalised for the delayed launch, the issue of the capital, but that it remained, in terms of the length of the deal, there was no change.

Q. Well, first of all, I think there was a change in the length of the deal.

A. Sorry, in the sense that it was still a five-year programme.

Q. Am I not right in thinking that the first half was reduced to enable you to take advantage of a tax break?

A. It might have been by a month, something like that.

Q. Well, it would be a pretty significant month, Mr. Maloney, if it allowed you to take advantage of a tax

break.

A. Well, that's correct, but if I put it this way to you:

one month certainly wasn't costing the shareholders -
wasn't going to cost the shareholders anything.

Q. No, but what you were in fact inter alia trying to also
obtain was effectively a put option in relation to your
shares?

A. Which I did not succeed in getting and I accepted that.

Q. That's one of the things that you were after?

A. That was one of the things I asked for in the context
of what I could see of the company breaking apart
because the tensions that were going on within it.

Q. You see, my understanding, and again I may be wrong in
this, Mr. Maloney, is that subsequent to this
agreement, you actually sought to have the shareholders
buy out your shares?

A. When you say "subsequent to that," Mr. McGonigal, could
you be more specific -

Q. I think it was 1998 or 1999.

A. Following - if you accept it was an option to buy, the
first time the option arose was in 1999. So at that
time I bought the first shares that I was entitled to.

Q. But I think that what you had tried to do was to get
them to buy them back at some stage in the future, I am
not 100 per cent sure on the date, I think it was 1999.

A. Sorry, I did not ask for that in 1999. I asked for
that as part of the agreement for me rejoining the

company, but the Board and the shareholders did not agree to that and I accepted it.

Q. You see, what I am actually suggesting, Mr. Maloney, is that far from being a reason to protect a friendship in 1996, that in fact you were resigning at an opportune time, as you felt, to improve your position in relation to a) the running of the company and b) your option position.

A. I would not agree with that.

Q. And in particular what you were, so far as the running of the company was concerned, you were seeking to be the sole Chief Executive instead of being a co-Chief Executive/CEO.

A. When I joined the company, the job that I went into was joint CEO, CEO designate, so upon my return all I was looking for was a vote of confidence from Telenor who held the right on the CEO to say that that planned change was going to happen. That is what I saw and that is what I received.

Q. But what I am saying, amongst your demands and at the time what you were seeking was to become sole Chief Executive to enable you to run that company, ESAT Digifone, from that time forward?

A. I think I've just answered the question.

Q. Okay. Just a small matter, Mr. Maloney. On Day 126 you said that, in answer to a question from Mr. Healy, at page 23:

"You had no right to block or veto the IPO in a formal sense. You couldn't say, 'We are exercising a veto to stop this?'" And you said, "It's in a different company's IPO so there is no question of us being able to veto it or block it. I think the only issue is whether or not we would hold consent for use of the financial data but I think in minutes of meetings that come up afterwards, there was a view expressed that, you know, perhaps consent wasn't even required."

Now, as I understand it, do you not accept that if ESAT Digifone had withheld the financial information which ESAT Telecom were seeking, that that would have, in effect, been fatal to the IPO?

A. That certainly was our - was, I believed, the view of ESAT Digifone directors. Whether it was fatal or not, I only referred to that in the context of comments that were made in the meetings of the end of October and in November by the ESAT Telecom directors, I believe it might have been Denis himself, where he said it's open for us to be completely hands off, I believe is the term he used. And I think what he was referring to there is that they didn't really need our consent anyway. That's the only reason I mention that. I don't believe that was ever tested.

Q. No, but am I not also right in thinking that in the ESAT Digifone Shareholders Agreement, and in particular Clause 19 of it, it says that:-

"In the event that any of the parties require to disclose information about the company to possible investors in that party or the company, such party shall, before disclosing any information, seek and obtain the prior written approval of the board of the company of the contents of any disclosure."

A. That's correct.

Q. And that would seek to indicate that before the information was released, it would have to be done with the consent of the Board of ESAT Digifone?

A. I would agree with that.

Q. So that in that sense, if that consent was withheld, then the IPO could not go ahead, or would have difficulty in going ahead.

A. It's just the last piece I wouldn't be completely clear on in my own head, Mr. McGonigal, given the statements that were made by the Telecom directors at the time.

Q. I think the only other matter, Mr. Maloney, that I want to ask you about - well, there were two small matters. First of all, in the context of the Fine Gael donation, you say that you had a view that you didn't consider that particularly important in the context of the arrangements for the IPO. Do you remember that?

A. Yes, I do remember.

Q. Would you not agree with me that, in fact, if you look at the documentation, particularly coming up to November the 4th and 5th of November, that the Fine

Gael donation was in fact looming quite significantly within the considerations of the Board for the IPO?

A. I think what I was trying to reflect there was that the other issue was much more significant in my mind through that period.

Q. And the only other matter, Mr. Maloney, was in relation to recent times, have you been to Oslo?

A. How do you mean?

Q. Well, have you been to -

A. Have I travelled to Oslo? Yes, I have. I was there four weeks ago, I believe.

Q. And was that in connection with Tribunal business?

A. No, it was not.

Q. Thanks, Mr. Maloney.

CHAIRMAN: Ms. Finlay, I'll leave it to you whether you want to take ten minutes now or whether you prefer to launch straight into your examination of your client immediately after lunch.

MS. FINLAY: I have probably only one question. I don't know if Mr. Healy is going to take time after lunch in any event.

CHAIRMAN: The usual practice is that the counsel for the actual interested person goes last in the normal sequence, but there is the usual Tribunal rule that Tribunal counsel may, colloquially in the role of

sweeper, have some questions in the context of matters arising during previous examinations.

MS. FINLAY: The only point of my question is that if it was only me left, I would certainly do it now before lunch so that we could all be finished before lunch.

If there is anybody else who is going to ask questions of Mr. Maloney, well then I would leave it till after lunch, if we have to come back anyway after lunch. If I am the only person. I don't know whether Mr. Fitzsimons

CHAIRMAN: Well, Mr. Fitzsimons has already -

MS. FINLAY: Very good.

MR. HEALY: I think it would make more sense perhaps to do it at quarter to two.

CHAIRMAN: Ms. Finlay, you are aware of the constraints within -

MS. FINLAY: I am obliged, Chairman.

CHAIRMAN: Quarter to two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AT 1.45PM:

THE WITNESS WAS EXAMINED AS FOLLOWS BY MS. FINLAY.

MS. FINLAY: Just perhaps three matters.

Q. MS. FINLAY: Firstly, Mr. Maloney, arising out of perhaps a question which the Chairman asked you. In October/November of 1996, in your view, did you know Mr. O'Brien well enough to be able to detect when he was either joking or spoofing, on the one hand, or when he was not?

A. I would have known whether he was spoofing or not.

Q. And the next matter, then, I want to come to is just the question of the dates of the meetings that you had with Mr. O'Brien in the summer of 1997. I think you have given the Tribunal a copy of the extract from your electronic diary for that period, isn't that correct?

A. That's correct.

Q. And I think you have also indicated that just because Mr. O'Brien's name appears in the diary, it doesn't necessarily mean that you had a meeting with him on the day indicated, isn't that correct?

A. That's correct.

Q. I think the entries appear as repeat entries?

A. Yeah, they typically are put in at the start of the year.

Q. But as far as you can now recall, do you believe that you did have one or more meetings with Mr. O'Brien in the month of July?

A. Yes, I did have meetings during the month of July.

Q. And then in August, can you say with certainty whether

you had any meeting with Mr. O'Brien in August?

A. The only one I could say with certainty would be the 25th, which was the date we were both in Dublin, neither of us on holidays.

Q. And then in September, I think you have indicated that you believe you had meetings on the 22nd and 29th?

A. That's correct.

Q. And can you just perhaps in summary, because I think you have acknowledged that you must have been in error in your earlier evidence that Mr. O'Brien reminded you of the '96 conversation at two meetings in August. I think you have acknowledged that, isn't that correct?

A. Yes, I have.

Q. Can you now, just in summary, indicate to the Tribunal, to the best of your recollection, which of the summer meetings do you believe that Mr. O'Brien raised this matter with you at?

A. It was always a question on my mind whether there had been two or three reminders. I believed it was two, but it may well have been three. Also, in terms of looking at the dates, the one in August and the two in September, it could have been the three occasions that that occurred on. I should also just point out that when this matter came up in '97, when I read out my statement to the board, it was acknowledged then that at least one of the dates was wrong, which was the September 1st. But just to make the point that there

wasn't a lot of focus on what the dates of the meeting was at that time. It was the substance of what had happened that people's minds were focused on. Just to make the point that I knew the dates in the September or in the October 23rd memo that I read out were incorrect, but we just didn't correct them at the time because there was no alternative dates offered as to when the reminders occurred.

Q. Now, if I can just turn to one other matter. I think there is just perhaps one part of Mr. O'Brien's evidence that may not have been put to you in precise terms. I think on Day 124, at page 69, at question 254, in answer to Mr. Coughlan, who I think was attempting to summarise what Mr. O'Brien was saying, I think the burden of the evidence of Mr. O'Brien was the effect that he was suggesting to the Tribunal that you, in seeking to postpone the IPO in the autumn of 1997, were motivated by your own financial interests. Now, do you agree with that suggestion by Mr. O'Brien?

A. No, I do not.

Q. And I think the reasoning of Mr. O'Brien appears to be that by having an IPO in ESAT Telecom, that that fact was effectively preventing or making less likely a subsequent IPO in ESAT Digifone. Do you agree with that?

A. No

Q. Sorry, I should make it clear, my question. That's

Mr. O'Brien's suggestion. Do you agree that that as a fact is correct?

A. The background to all of this is that when the bid went in for the second mobile phone licence, as part of our bid submission was a plan to IPO ESAT Digifone within three years after launch. That was as part of the submission that we made to the government at the time. So in that sense, there was always an expectation that there would be an IPO of ESAT Digifone. We launched the network in March of '97, so three years after that would have been March, 2000.

In June of '97, I recall, and I think it's minuted in the board papers, that Arve Johansen asked the Chairman at one of our own board meetings, was there any actions that were being taken that would prevent ESAT Digifone reaching the commitment that it had made in the bid to an IPO; and Mr. O'Brien, as Chairman, responded to say that there had not been any actions taken that would stop that happening. So from Digifone's perspective, there was always going to be an IPO in that sense. In fact, I believe it wasn't until perhaps September of '99, when Mr. O'Brien made it clear to the board that ESAT Telecom would never support an IPO of ESAT Digifone, and that then, of course, as events transpired, British Telecom ended up buying the company in January of the year 2000, which, if you map it back to the issue of the timing of an IPO, was practically

bang on when the commitment would have been made, but instead of it being an IPO, it was a trade sale.

Q. Did the board of ESAT Digifone or you as the CEO ever take steps in ESAT Digifone, subsequent to the Telecom IPO in '97, to consider the pros and cons of an IPO in Digifone?

A. We hired NCB in, I believe it was April of 1998, to consider the issue from the company's perspective, and also on behalf of all of the shareholders. And John Conroy in NCB did that piece of work for us, which I then shared with some of the directors of the company, which basically showed that at that point in time there was going to be benefits to everybody if the board had made a decision to go ahead with a separate IPO for ESAT Digifone.

Q. And was it considered at that stage that the IPO in Telecom, which had then taken place, precluded the IPO which was under discussion in Digifone?

A. No. NCB fully took into account the fact that ESAT Telecom had already done an IPO as part of the work that they had done. So from our perspective, it was never an issue. In fact, from a staff perspective, once Eircom did their IPO, there was a lot of discussion about, well, you know, how are Digifone going to react? Because Eircell's employees got benefit from the Eircom one, so that was always part of an ongoing process that was going on inside the

company.

Q. And in your view, is there any material difference to the benefits which shareholders may have achieved through the purchase by British Telecom as compared with an IPO?

A. None. I mean, I believe BT paid market price at the time they bought the company, so it's a bit hypothetical in, had the company been launched, what the share price would have been. But I believe none, because they would have paid, you know, what the mobile value was when they did the deal with Telenor and myself and the other shareholders.

Q. Thank you Chairman. Thank you, Mr. Maloney.

THE WITNESS WAS FURTHER EXAMINED BY MR. HEALY:

MR. HEALY: Just a few small matters.

Q. MR. HEALY: I just want to clarify one or two things about dates, Mr. Maloney. If I could ask you to look at your diary for a minute and to take up with you some of the matters highlighted by Mr. McGonigal this morning so that they can be clarified for the Tribunal.

If you look at what is the, I think the day, or the page of the diary beginning the 3rd October. Do you see that?

A. Yes, I have it here.

Q. Now, you will recall that when you were being examined

on that page of the diary, if I can put it that way,

Mr. McGonigal was focusing on at least to some degree the memoranda which you had prepared and which are noted at or which are contained at fax pages 2 and 3 of your second batch of documents. Well, it's discussions with DOB, the document which you say contains the notes of the points you wish to raise with Denis O'Brien on the 8th October, and also contains the result of those discussions.

A. I have those pages.

Q. Now, Mr. McGonigal then drew your attention to the next document which is called number 5, it's on page 4 of the fax. And you I think confirmed for Mr. McGonigal that this was on the reverse side of one of the page or the pages that contained your notes of the October 8th meeting, is that right?

A. That's correct.

Q. And Mr. McGonigal was seeking to date that meeting, having regard to the fact that your notes do not contain any date on them, is that right?

A. That's correct.

Q. Now, Mr. McGonigal drew your attention to an entry which I want to ask you about. Entry number 2 of the two numbered items on that page, it says "1:00pm, Declan Drummond, Cavan gang meeting with Bertie."

Now, there is a reference to Mr. Declan Drummond in the

notes, a reference to the 3rd October in the diary,

sorry, a reference to the 3rd October, 7.30 to 8am.

"Declan Drummond and Paul Craig, re Cavan."

A. That's correct.

Q. Is that a reference to the same Declan Drummond? It's the same person, anyway?

A. Yes, it is.

Q. Is he a member of your staff or a member of some outside agency working for you, or is he a third party altogether?

A. He was a member of our staff, as was Paul Craig.

Q. And is the reference to "Cavan" a reference to the problem with sites in Cavan that you referred to in responding to Mr. McGonigal this morning?

A. I believe so, yes.

Q. If we go down to 2.30 on the same day, you have a note "Committee meeting from Cavan." Is that a reference to the same people?

A. That's correct. What I believe happened was the group from Cavan were coming down for a meeting with myself in our boardroom, and I believe that was the day when I met with them. And what Declan Drummond and Paul Craig were doing were just giving me the briefing on where things were at prior to that meeting.

Q. I understand. Now, your note at 1.01 is not, I suggest, a reference to a time of a meeting, unless you were in habit of scheduling your meetings minute by

minute.

A. No. What I would do as a habit or mannerism, if you like, is when I switch back on my mobile phone I tend to get a lot of messages. As I download the message, it would start typically 1, and as the message says 12.49, I would write 12.49, and what the message is and so on. To the best of my recollection what would have been going on there is: 12.49pm message from Gerry McQuaid to book a slot in my diary. Next message, two minutes later, 1:01pm, Declan Drummond, where he seemed to be leaving me a message that the Cavan gang it was a bit of news, the Cavan gang were going to meet with Bertie Ahern.

Q. I am not sure what the correct grammatical term is, but "meeting" is being used there in the sense of a verb and not in the sense of a noun, is that right?

A. Yeah, I think what Declan Drummond would have been telling me is that they had managed to get an audience with Bertie Ahern. To the best that I can recollect.

Q. And are the references to Gerry McQuaid, are they linked to other references to Gerry McQuaid later on in your diary on February 10th?

A. Gerry McQuaid

Q. October 10th.

A. Gerry McQuaid is our sales director, so on October 10th in my diary there is a meeting scheduled between 11:30 and 12:30, where I was due to meet Gerry. There is a

subsequent reference on the 13th October, between 2:00 and 3:30, where it says "Gerry McQuaid re diary from last Friday, all issues." So what I assume happened is we had a meeting planned, after getting his voice mail for the 10th, which had to be rescheduled at some point to the 13th.

Q. Can I just try to put this note in some order chronologically. If you had two meetings scheduled with Mr. McQuaid for Friday, one of which of rediaried to the following Monday, is that right?

A. It would have been between a Friday and a Monday, that's correct.

Q. Well, if we go back to the Friday, somebody at some point at 12.49pm on some day requested or left a message seeking to book a slot for a meeting with Gerry McQuaid.

A. Sorry, that would have been Gerry McQuaid himself leaving me a message that he wanted a slot, is what I believe it would be.

Q. So that message was left with you sometime, presumably, prior to Friday, 10th October?

A. That's correct. You will see there is a diary entry on the 10th for 16.15 to 17.15, that says "Gerry McQuaid again."

Q. Also booked in for 11:30 to 12.30.

A. That's correct.

Q. So what I am suggesting is if the message which reads,

or the note which reads, "12.45pm, Gerry McQuaid book a slot" refers to a meeting on the 10th, it was presumably taken, or the message was taken by you or received by you some day prior to the 10th.

A. That would seem to be a reasonable assumption, yes.

Q. And if you mention those two items together as number 1 and number 2, can I take it they were both received on the same day?

A. Correct.

Q. So can you help me then in putting this whole page together. It would seem that you must have had a meeting on the 3rd October with Declan Drummond, firstly, to brief you, and secondly, a meeting with the Cavan committee or Cavan gang or whatever you want to call them, is that right?

A. They were a Cavan gang.

Q. You had a meeting with Fergus Armstrong on the 8th and you had a meeting with Denis O'Brien on the 8th?

A. That's correct.

Q. On the notes you took for that meeting, you must have written in the you must have written in the notes of what you took from your mobile telephone?

A. I am sorry, Mr. Healy, could you

Q. The notes you kept of the 8th October meeting were the notes on which you wrote in the two telephone messages?

A. I have it on the back of the same sheet of paper.

Q. Well, does that is that of any assistance to you in

saying when you made those two telephone notes, if I can call them that?

A. All I can say is that it's likely, given that it was the way my book works, is the sheet would open from right to left, so if this was a document after the meeting with Denis O'Brien of the 8th, then I would have been taking my messages at some point after I made those notes. That's as much as I can say.

Q. Would you make appointments with people such as Gerry McQuaid, would you normally make those appointments a day ahead, a week ahead, three days ahead or what?

A. As our sales director, he holds a very important position in the company, and typically it was a sales opportunity and I would tend to prioritise that. So for him to leave a message, for him to say he needs a slot, it's usually quite urgent, and I would usually do it very quickly.

Q. I see. In the course of opening Mr. Michael Walsh's documents yesterday, I referred to his notes, but I did not refer to a memorandum from him to you which is contained in his documents, which is dated 14th October. This, if you go to folder or leaf number 4 in book 29A, and if you go to the very last document in that book. (Document handed to witness.) Do you see it?

A. I do, yes.

Q. Do you recognise it?

A. I do, yes.

Q. Do you recall getting it at the time?

A. I do recall, yes.

Q. Just go through it, because I think it may throw some light on some of the issues that are being discussed concerning the meetings that you had with Mr. Walsh on the 13th October, or the contacts you had with him on the 13th, at least one of which was a meeting and the 14th indeed.

It says "Barry, having had a chance to reflect on the meeting with yourself and Denis yesterday at the Malt House, I do not believe ESAT Digifone Limited or ourselves have any reason to be concerned. Denis has indicated that in or about October of 1996, he intended to give money to Michael Lowry. Told you he had done so, but is adamant that, in fact, Lowry never received any money directly or indirectly from him. Denis readily agreed to confirm this in writing and has now done so. As you have said, Denis never gave any reason for why he was considering giving money to Lowry.

As I see it, in addition to Denis's confirming that no money was given to Lowry, we are both aware of the process that was gone through in 1995 in setting up the competition in relation to the second mobile licence. In particular, you were involved in the bid process

from an early stage, and I am aware of the quality of the civil servants charged with managing the bid process. We both agree that the process was very professionally run at all stages, which is exactly what one would expect given the quality of the civil servants responsible for the process.

In effect, the civil servants together with Andersen Consulting, set out to create a process which would stand up to all scrutiny, be seen to stand up to such scrutiny and be free from any potential political interference.

From memory, the announcement of the intent to grant the licence to ESAT Digifone was announced in October 1995, even though the detail of it was not completed with the department until May of 1996. Obviously in this context, it is difficult to see what if anything ESAT Digifone could have hoped to achieve from making a political payment in October of 1996. There may have been decisions relating to ESAT Telecom which may be politically influenced, but if that is the case, it has nothing to do with ESAT Digifone.

In summary, Denis admits to having had evil thoughts but has confirmed that these thoughts were never brought to fruition.

The department ran an open competition on the mobile

licence which was insulated from political influence.

Denis was not involved with the department in discussions in relation to the mobile business once you had joined ESAT Digifone.

Denis was in discussion with the department and politicians in relation to his other businesses.

On this basis I do not believe ESAT Digifone has any need for concern. I do not like what has happened and what was contemplated was totally unacceptable behaviour. However, Denis has confirmed that no money was actually paid. Even if a payment had been made it could not have influenced the decision on the mobile licence and must have been contemplated for other reasons.

As the board of ESAT Digifone have always affirmed before anyone was aware of your discussions with Denis, ESAT Digifone and its directors should not be liable in any fashion for the content of ESAT Telecom's Prospectus, and it must be made clear to any investor that this is the case and that they cannot rely in any fashion on ESAT Digifone in making any decision on whether or not to invest. In my view, a statement in the Prospectus as drafted makes it quite clear that neither ESAT Digifone Limited or its directors/officers accept any responsibility for the ESAT Telecom

Prospectus. It is up to ESAT Digifone's legal advisers to ensure that no one can successfully represent after the fact that they relied in any fashion on ESAT Digifone or its directors/officers in making any investment decision.

I would appreciate a copy of Denis's letter confirming that payment directly or indirectly was made."

Now, if I could just ask you about that letter which contains some reference to the facts and some reference to an argument being advanced or canvassed by Mr. Walsh. The first paragraph and the summary seem to me to relate to an account of the meeting.

In the first paragraph Mr. Walsh says "Denis has indicated that in or about 1996 he intended to give money to Michael Lowry. Told you he had done so but is adamant that in fact Lowry never received any money directly or indirectly from him."

I take it you agree that that is a reasonably correct account of the main things that happened in any case, that Mr. O'Brien had indicated that he intended to give money to Michael Lowry; that he told you that he had in fact already done so, but he was adamant that Lowry in fact never received any money directly or indirectly from him?

A. That's correct.

Q. That's a broad outline?

A. Yes.

Q. If you go on to the summary. It says "Denis admits to having had evil thoughts but has confirmed that these thoughts were never brought to fruition." What do you understand by that by reference to your meeting?

A. I believe what he was referring to there was this discussion about the intermediary that occurred in our discussions.

Q. Is it possible that he might be referring to an expression you used earlier, that it never went through?

A. It could be that.

Q. He doesn't in fact use the word "intermediary", though. He does use the words "never brought to fruition."

A. That's correct.

Q. There is no reference in this letter, of course, to any suggestion that what had been said to you was a joke or a bit of bravado?

A. No, there was not. I don't believe the bravado issue came until later.

Q. I think, just to clarify one thing, and it may be that Mr. McGonigal is the only person who can ultimately clarify this. Yesterday a document was produced by Mr. McGonigal, a copy of a fax from ESAT Telecom addressed to you. What Mr. McGonigal, or what Mr. O'Brien has provided, quite properly, is the

original of the fax cover sheet; it would appear to be the original from the fact that Ms. Rachel Howard's name is clearly written and is not actually photocopied on the front of it. Then with that cover sheet is a document which was, as far as I can see, in copy form when it was faxed, and that fax contains two pages of an extract from a discussion regarding different government - controversial topics involving government administration. I am reading directly from it.

Essentially what it refers to is the discussion between Richard Crowley and Sam Smyth on Morning Ireland in which references were made to Mr. Lowry and decisions made by Mr. Lowry. Do you recall that document?

A. I saw that yesterday, yes.

Q. The thing I notice about that document is that it doesn't contain any indication that it was actually faxed. Maybe Mr. McGonigal can help me with that. You may know far more about technology than I do, but can you tell whether that document should contain or would contain any indication that it had been faxed.

(Document handed to witness.)

A. The only comment I can make is if you look at the second sheet, it looks as if, on the top of the sheet, that's when it was faxed to Communicorp, which is dated 7/10/97, as it reads. But there is nothing on the cover sheet which suggests when the cover sheet was sent, but as I said in my testimony yesterday, I don't

believe I have ever seen this before.

Q. I see. But can we just clarify this: Are you saying that the cover sheet should contain some indication that it was sent, or are you not saying that?

A. All I am saying is I do not believe that I have seen that before.

Q. But there is nothing on the face of the document that would indicate to me or to the Tribunal whether it had been sent, and there couldn't be anything on the face of the document so to indicate?

A. No, typically you'd get a confirmation slip which would show

Q. Which is a separate document?

A. Absolutely. Sometimes it can be on the same sheet as the top sheet, depending on the technology being used, and typically at the end of the page you would get your message to say it had gone through to whatever number at whatever time. That doesn't appear to be on this sheet. That's all I can say about this.

Q. Maybe Mr. McGonigal can check whether at that time that was the type of technology they were using in ESAT Telecom.

The Tribunal has been told in a memorandum provided by Mr. O'Connell, and I think which was referred to maybe on the day the Opening Statement was made last Thursday week. "The Tribunal has been told that sometime after the launch of ESAT Digifone Denis O'Brien confirmed his

intention" that is to say confirmed it to his solicitor "of proceeding with an IPO of ESAT Telecom and set autumn 1997 as the time at which it would occur."

Can you tell me whether you were aware or can you recall the earliest time at which you were aware that ESAT Telecom intended to go public or to float?

A. To the best that I can recollect, the issue came up at a board meeting, I believe it was in August of '97, where Denis O'Brien told the board that it was being contemplated or considered, that an IPO for ESAT Telecom was being contemplated or considered. The following board meeting, which I believe was September, he informed the board that an IPO was proceeding in the short term, I believe was the reference in the board minutes.

Q. And are you saying that you never heard of an ESAT Telecom IPO prior to that date?

A. There is a memo, which I believe is dated September 12th between our finance director and Neil Parkinson, who was the finance director in ESAT Telecom, and the reference in the memo is to information requirements, and also the conversion between the US accounting standard and the European accounting standard. In that memo, John O'Rourke, our finance director, says to Neil Parkinson that the suggestion is that the

requirements for data were becoming more onerous, and that if there was a plan for ESAT Telecom to be quoted on NASDAQ, that he wanted to understand, or we wanted to understand what the implications would be for ESAT Digifone.

I believe that memo was dated September 12th, so that would have been twelve days before the board meeting when Mr. O'Brien told us that it was being planned in the short term.

Q. Do you recall, apart from the documents you have seen, whether Mr. O'Rourke or anyone else told you that he had the impression that there might be an ESAT Telecom flotation after that meeting with Mr. Parkinson?

A. I believe in and around September 12th would have been the first time. It was in and around board meetings .

Q. One last matter: This is perhaps one of the first matters I asked you about, and you have been asked about it since then by, I think, maybe Mr. McGonigal, I am not sure, but certainly the Sole Member has asked you.

The conversation that led to all of this occurred sometime in October/November of 1996, isn't that right?

A. That's correct.

Q. If you take that conversation at face value, what you were being told by Mr. O'Brien in the context of success fees was that he had made a payment of $\frac{1}{2}$ 100,000

to an unidentified person and a further payment of

100,000 to Michael Lowry. Isn't that right?

A. That's correct.

Q. Now, I want to leave out of the equation for the moment

the fact that on a literal interpretation of that

conversation, you might say, as Mr. Walsh is saying in

his letter there a moment ago, that this didn't

specifically refer to ESAT Digifone, but the fact is

that it was mentioned in the context of success

payments by ESAT Digifone connected with its second GSM

licence success, isn't that right?

A. That was the context, yes.

Q. Now, after that conversation which, if we can use a

neutral phrase, you put out of your mind, the only

impression with which you could have been left was that

Mr. O'Brien had actually made a payment to Mr. Lowry,

isn't that right?

A. I think that's fair, yes.

Q. And nothing more was done about that by anyone until

the two conversations, maybe three, in which, in the

course of which, on your evidence, Mr. O'Brien reminded

you of the 1996 conversation, and in which he said "I

never paid Michael Lowry," isn't that right?

A. Yes, as the evidence I have given was in the context of

saying "I never did it."

Q. So in 1996 he said "I did do it." After that

conversation was over, the only impression you could

have been left with was that he had done it, and it was now it was an accomplished fact. Then in 1997, whether it was in July, September or October. He came to you and on at least two occasions said "I never did it." Isn't that right?

A. Words to that effect. I think I have described the words.

Q. And then in the course of a conversation on the 8th, he said, "Look, I never did it, and then sensing, according to your evidence, that you weren't convinced, he said "I intended to do it, I got as far as taking some steps. The money never went through. It got stuck with an intermediary." Isn't that right?

A. That's correct.

Q. That left you with continuing concerns, as you confirmed to me yesterday, right up to today, isn't that right?

A. That's correct.

Q. Isn't it in fact the case, however, that after the November sorry, after the September/October '97 conversations, if you believed Mr. O'Brien, you were left with an impression that was less alarming than the one you had been left with after your November '96 conversation, isn't that right?

A. That's correct.

Q. Because between November '96 and September '97, you had the utterly alarming scenario of money having actually

been paid, isn't that right?

A. I am sorry, I don't follow.

Q. Between November of '96, and because there has been some dispute about the date of them, we'll call them the reminder conversations, and the 8th October conversation in 1997, in that interval you have the alarming scenario of money actually having been paid to Mr. Lowry, isn't that right?

A. I am sorry, Mr. Healy, I still don't understand. I think I said at the meeting of the 8th October, what Mr. O'Brien said to me is that he had intended to make the payment and it got stuck with an intermediary.

Q. But between those three conversations and the period a year beforehand, almost a year beforehand, you had or were carrying around with you, if you chose to think about it, the impression that Mr. O'Brien had actually paid Mr. Lowry, the money had gone through, isn't that right?

A. Based on the statement that was made to me in October/November '96?

Q. Mm-hmm?

A. The first time that Denis would have suggested to me that he hadn't paid was when, as I described, going down the stairs in the Malt House on the 8th, when he described to me or introduced to me the intermediary.

Q. After the three or however many conversations you had in 1997, and indeed in the course of those

conversations, I think on the evidence, you were so concerned that you went to Mr. Armstrong, isn't that right?

A. That's correct.

Q. And ultimately, as I said, you brought your concerns to the board, and even up to this day the concerns haven't been totally resolved. Isn't that all correct?

A. The concerns about the payment to the intermediary, that's correct.

Q. What I am trying to inquire into is this: The period between November of 1996 and the time the reminders arose in '97, you had the scenario or you must have had the scenario in your mind that money had actually gone to Mr. Lowry?

A. That's correct.

Q. Xxx it was a much more alarming scenario than the one you had after the 8th October, 1997 meeting, in one sense, isn't that right?

A. If you had accepted the discussion about the intermediary, that the money had not gotten through, then I would agree with that, yes, which was what Denis said from that day on.

Q. Well, that's what I am trying to get at. Am I right in thinking that you didn't well, did you have a concern that that explanation wasn't a satisfactory one? Did you have a concern that the money hadn't got stuck with an intermediary?

A. It was introduced to me, as I have testified, on the meeting of October I am getting mixed up now 13th.

Q. Refer to the nature of the meeting rather than the dates.

A. It was described to me sorry, the meeting of the 8th the nature of the meeting was in an effort to reassure me that the payment hadn't been made. After the initial discussion and the two or three reminders, the issue of the intermediary was brought up to try and reconcile for me the reminder conversations and the first conversation, but to say it didn't actually happen, the payment didn't actually go through, therefore, you have nothing to worry about.

Q. Well, if you believed Mr. O'Brien, that the money hadn't gone through, and that it hadn't gone to an intermediary or that it had got stuck with an intermediary, if you believed that, wasn't that a slightly better I don't say that it was hugely better, but wasn't it a slightly better situation than the situation that must have existed, according to your evidence, between November '96 and when the reminders arose?

A. Marginally better, yes.

Q. And yet, even though a marginally better situation, it was one that caused you to have concerns, concerns that have existed up to this day, isn't that right?

A. I accepted Denis's word in the period end of October/November that a final payment had not been made, based on his sworn affidavit and what he had told us and the investigation that we had done. I accepted that no final payment had been made.

Q. But in fairness to Mr. O'Brien, what I am trying to revisit, just this last time before you leave the witness-box, is why you did nothing between November '96 and the reminders, when the only impression you could have had was of a much more serious situation of a payment, that if it related to Digifone, was an utterly corrupt one had been made?

A. All I can say to you, in answer to that, there was nothing at the time to lead me to believe that it was related to ESAT Digifone, because when I put my response to Denis in terms of whether it had anything to do with ESAT Digifone, he did not make any comment.

Q. Wasn't there one obvious thing that connected it, the context?

A. The context was definitely there, yes.

Q. Was it because of your friendship that you didn't want to look into it any more or dig any deeper?

A. I just didn't want and I think this is what Fergus Armstrong was prodding me at the meeting, when he said to me, "Was there a suggestion that he wanted you in some way to pay any of the monies back?" And I think I have already said in evidence that I did not believe I

could have said that I could have gone that far. I think, had he said or had I believed that he wanted the monies to be paid back, then I would have definitely been even more concerned at the time because it he would have been telling me it was directly to do with ESAT Digifone.

Q. But isn't it also true that if you wanted to make a corrupt payment to somebody, it's hardly one that you'd be putting through the books of your company, isn't it?

A. That's correct.

Q. Thanks very much.

CHAIRMAN: Thanks for that lengthy shift, Mr. Maloney.

You are free to go now indeed.

THE WITNESS THEN WITHDREW.

MR. COUGHLAN: Those are the witnesses for today, Sir.

I think, as regards resumption, perhaps it would be better if we were to put it on the website. Mr. Davis is just

CHAIRMAN: I will not anticipate there will be any significant time-lag. There are investigations to be done. I think it will be next week. I think one witness, who was intended for tomorrow, was unavailable, so it will be the earliest possible date next week.

MR. COUGHLAN: That's correct, Sir.

THE TRIBUNAL THEN ADJOURNED UNTIL FURTHER NOTICE.