

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 11TH JULY

2001 AT 11AM:

MR. COUGHLAN: Mr. Michael Walsh.

MR. HOGAN: Just before Mr. Walsh takes the stand. I appear with Mr. Robert Baron, instructed by Michael Houlihan and Partners, for Mr. Walsh in his capacity as director of IIU and I'd respectfully ask you, Sir, for a grant of limited representation in respect of this witness.

CHAIRMAN: I have some reservations, Mr. Hogan, about the actual need for representation in the context of the centrality of your client's role but I note that your client has, in fact, cooperated already through your solicitor in the furnishing of a statement, in dealings privately with the Tribunal to date, and on that basis, that it is subject to the usual caveat that I have expressed on previous orders, I will make an order of limited representation in those circumstances.

MICHAEL WALSH, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS BY MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. Walsh, I think you have furnished a memorandum of proposed evidence for the assistance of the Tribunal, isn't that correct?

A. That's correct.

Q. Do you have that with you in the witness-box? And I intend to take you through it and also to cover I think you furnished extensive handwritten notes which were then typed up and I think you have a typed copy with you?

A. That's right, I've typed copy here as well.

Q. Now, I think you have informed the Tribunal that you are a director of International Investment and Underwriting Limited and of IIU Nominees Limited and that you were appointed a director of ESAT Digifone Limited as a representative of IIU Nominees Limited on foot of a Shareholders' Agreement between Telenor Invest AS, ESAT Telecom Holdings Limited, IIU Nominees Limited and ESAT Digifone Limited, dated 16th May, 1996, is that correct?

A. That's correct.

Q. I think you have informed the Tribunal that IIU Nominees initially became involved with ESAT Digifone Limited when it entered into an agreement with ESAT Digifone Limited on the 29th September, 1995, is that correct?

A. That's correct.

Q. Under this agreement IIU committed to paying its pro rata share of the bid costs and to underwrite the Communicorp obligations to ESAT Digifone, is that correct?

A. That's correct.

Q. In return, ESAT Digifone Limited undertook to place 25% of its equity with IIU, is that correct?

A. That's correct.

Q. You had no knowledge of the events set out below prior to them being disclosed on the dates noted and the event as described are based on notes of meetings, phone calls made at the time?

A. That's correct.

Q. And I think the events we are going to discuss are primarily the question of a conversation between Mr. Maloney and Mr. Denis O'Brien in 1996 and what transpired in October/November of 1997 and also, to a lesser extent as regards your involvement, the question of a political donation made through Telenor, is that correct?

A. That's correct.

Q. Now, I think that you have informed the Tribunal that on the 13th October, 1997 you attended a meeting at the Malt House with Denis O'Brien and Barry Maloney, is that right?

A. Yeah.

Q. I think that was a lunch time meeting?

A. That's right.

Q. And would you agree with the evidence which has already been given by Mr. O'Brien and Mr. Maloney, that it was over a sandwich in the Malt House?

A. I would.

Q. That was the first meeting. And I think it was Mr. O'Brien asked you to come to a meeting, was it, at that time?

A. That's my recollection, yeah.

Q. Can you remember exactly what he said to you at the time?

A. No, I can't really. I mean, I am kind of half guessing that he must have given me some indication on what the topic was but I really can't remember.

Q. He must have given you a phone call because he had been speaking to Barry Maloney earlier that morning?

A. He must have phoned but I have no recollection of the phone call or contact.

Q. You have informed the Tribunal that "at the meeting Denis O'Brien stated that he had had a conversation ^ two years ago with Barry Maloney" - I think that was probably a year ago?

A. it probably should be yeah

Q. with Barry Maloney where he stated that he was going to look after Michael Lowry. Denis O'Brien stated that no payment had ever been made to Michael Lowry and Barry Maloney accepted that. I think you have informed the Tribunal that you said the issue was serious and demanded a letter confirming that Michael Lowry received nothing from Denis O'Brien. The letter was to be agreed between Barry Maloney and Denis O'Brien, is that right?

A. That's correct.

Q. Now, I think you informed Dermot Desmond of the being the shareholder effectively, isn't that right?

A. that's right.

Q. - of the content of the meeting. You told Dermot Desmond that you were comfortable that the civil servants would have assured that there was no room for political interference in the licence process. Dermot Desmond was very upset that Barry Maloney had not informed you that is the directors at the time the issue arose. Dermot Desmond undertook to contact Barry Maloney to ensure that Digifone got proper protection and advice, is that correct?

A. That's correct.

Q. Now, I think you made a note of a meeting, isn't that correct?

A. That's right.

Q. And if we just turn and deal with that at the moment.

And I think the note is dated 13/10/1997. It reads

"Michael Walsh met with Barry Maloney/Denis O'Brien at the Malt House. Denis O'Brien informed Michael Walsh that he had a conversation with Barry Maloney approximately one year previously when Denis O'Brien stated he was going to look after Michael Lowry.

Denis O'Brien stated he had confirmed to Barry Maloney on a number of times since that he had not made any

payment. Barry Maloney confirmed that he accepted Denis O'Brien's assurances that no payment had been made to Michael Lowry. Michael Walsh said it was a serious issue and that he wanted a letter from Denis O'Brien to the company confirming that absolutely no payment or inducement had been made or proffered to Michael Lowry. Michael Walsh was under time pressure and it was left to Denis O'Brien and Barry Maloney to draft and sign the letter."

Now, is that your note of the meeting?

A. That's my note of the meeting.

Q. Now, I think your note goes on that on the 13th Barry Maloney phoned you in your car later in the afternoon to confirm that he had received the letter from Denis O'Brien, isn't that correct?

A. That's correct.

Q. And then your note goes on that you phoned Dermot Desmond to tell him about the meeting and to express concern. You told him that based on the quality of the civil servants involved you did not believe that there was room for political interference in the award of the licence. Dermot Desmond was concerned and annoyed that Barry Maloney had waited for a year to inform the board of the conversation." And "Dermot Desmond undertook to contact Barry Maloney to ensure that ESAT Digifone got proper protection and advice.

Barry Maloney contacted Michael Walsh to say he had talked to Denis O'Brien and was going to see McCanns.

Michael Walsh agreed to see Barry Maloney after McCanns."

Now, there is no date on the commencement of that portion of the note. Was that on the 13th or the 14th, to the best of your knowledge?

A. To the best of my knowledge the contact from Barry to myself saying that he was going to see McCanns was actually on the 14th and then Barry came to see me on the 14th.

Q. And if we continue, so, with your statement which reads that "On October 11th, 1997 Barry Maloney came to see me after he had been to see ESAT's legal advisers, McCann Fitzgerald. Barry Maloney said McCanns were very concerned but wanted to think about the issues further. Barry Maloney had told McCanns that he did not believe any money had been paid to Michael Lowry. McCanns felt that the initial claim by Denis O'Brien, even though subsequently denied, gave grounds for concern. Barry Maloney was concerned because he believed an intermediary was involved and that money intended for Michael Lowry got stuck for some unexplained reason. Barry Maloney said he had completely forgotten about the original conversation with Denis O'Brien until Denis O'Brien had raised it with him two months previously.

Barry Maloney and I discussed the licence process in detail and whether Denis O'Brien could have hoped to influence it. Barry Maloney and I both had a lot of professional exposure to the civil servants involved in the licence award and were convinced that all aspects of the licence award had been professionally handled and could not have been open to influence. However it was critical that ESAT Digifone and its directors be fully protected from any responsibility for the ESAT Telecom Group Plc IPO document. Barry Maloney undertook to further review this with McCanns."

I think your note for the 14th, which we have been through already in evidence, confirms that Barry Maloney was expressing the concerns you have indicated here in your statement and that the question of an intermediary was discussed and that Barry Maloney was concerned that some third party may have been involved in the matter, isn't that correct?

A. My note reflects the fact that an intermediary was discussed at the meeting between Barry and myself, yes.

Q. Can you remember if "intermediary" was discussed on the 13th?

A. The quick answer is 'I can't'. And obviously it's something I have actually looked at. I think in your discussion with Mr. Maloney, was it last week or the week before, you reviewed a letter that I had sent to

Barry on the 14th which had been prior to that meeting, and, you know, I think there is no mention of an intermediary within that note and, you know, given, I think, probably the amount of time I had actually spent looking at that kind of issue and preparing that note for Barry, it would be, you know, a bit implausible that if an intermediary had been discussed the previous day that it wouldn't have actually been reflected in that note. So, you know, my note doesn't reflect any suggestion of an intermediary on the 13th and, you know, my letter to Barry doesn't reflect any, you know, intermediary on the 13th. Now, I think the other kind of mention obviously Fergus Armstrong has provided, of a note of a meeting on the 23rd and at that meeting as Fergus's notes recorded, I was specifically asked, you know, and I think probably by Barry but I couldn't tell you for certain by who, whether or not the intermediary had been raised on the 13th? And I think Fergus's response to that is actually incomplete, from memory, having read his note. I said something like 'I came cold to the meeting, I couldn't really be certain'. But certainly by the 23rd I was fully aware of the intermediary but at the time, I couldn't have told you whether it was the 13th or the 14th or exactly when.

Q. In fact, I'll come to Mr. Armstrong's note in due course and we can take that issue up in the context of what he has actually written down and you can comment

on it.

A. Great.

Q. Now, whether it be the 13th or the 14th, there was no doubt but that the issue of an intermediary had been raised with you, isn't that correct?

A. Absolutely.

Q. And the document which you are referring to, being the note you prepared for Mr. Maloney, was prepared on the 14th October, 1997 and that's a memorandum from you to Barry Maloney, isn't that correct?

A. That's correct.

Q. And we'll just have a look at that for a moment.

(Document handed to witness.)

It reads - Was this before or after Mr. Maloney came to see you having spoken to Mr. Armstrong in McCanns?

A. My recollection is that this would have been a letter that I would have sent to Barry, you know, kind of earlier in the day and that, you know, he came along to talk to me kind of later that evening, you know.

Q. And I think it reads "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, 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 confirmation 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 be 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, 1996. Obviously, in this context, it is difficult to see what, if anything,

ESAT Digifone could have hoped to achieve by making a political payment in October 1996. There may have been decisions relating to ESAT Telecom which could be politically influenced but, if that were the case, it had 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 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 on, in any fashion, on ESAT Digifone making any decision on whether or not to invest. In my view, the 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 no payment directly or indirectly was made."

Now, can you remember what Mr. O'Brien said to indicate that no payment had been made directly or indirectly?

A. I mean, not precisely. At this stage my recollections are really formed from my own notes rather than anything else and really, in the context, I suppose, shall we say, my feeling coming out of the meeting on the 13th was, you know, Denis was basically saying that, you know, shall we say, he had thought about

making a payment or intended to make payment, I couldn't tell you precisely what words. Him saying he never actually made the payment and Barry equally well saying he accepted that Denis never made any payment. I suppose at the time I felt that was a fairly kind of closed point. I mean, it wasn't something that anybody liked but, you know, I had one party who was, shall we say, the party directly involved saying, you know, 'I said this but I never did anything' and the other party to whom it was said saying, you know, he accepted that nothing had actually been done. So, you know, I mean he was then sort of saying 'how do we deal with this?' and suggested that, you know, a letter from Denis to the company should be given, you know, confirming that nothing had actually happened and, you know, seeing as, kind of, Denis and Barry were the two people, shall we say, directly involved, seemed appropriate that Barry would actually agree the wording of the letter with Denis because in some senses, you know, they were the best adjudicators of each other in their own way.

Q. Well, as of the meeting of the 13th you were in no doubt that a conversation had taken place between Denis O'Brien and Barry Maloney a year previously or thereabouts?

A. No doubt. I mean, Denis was saying the conversation took place. Barry, you know, was also obviously saying

the conversation had taken place.

Q. And you were in no doubt that Denis O'Brien had indicated to Barry Maloney that he had made a payment to Michael Lowry?

A. I was in no doubt of that. I mean, I understand there's been debate as to whether Michael Lowry was mentioned or not. My notes reflect that he was, but all that I can rely on is my notes.

Q. You have no doubt that that was who was being mentioned as the recipient

A. I mean certainly at an absolute minimum it was completely implied. I mean, I don't think anybody thought it was anybody else.

Q. You also had no doubt that Denis O'Brien had indicated that he had intended to do it but didn't do it, isn't that correct?

A. Absolutely, no doubt.

Q. You had absolutely no doubt that that was, of itself, totally unacceptable behaviour?

A. Absolutely.

Q. And you characterised it as, you say yourself, 'evil thoughts'?

A. Evil thoughts, absolutely, yeah.

Q. And you had absolutely no doubt that if such a payment had been made, that this was an extremely serious matter?

A. Absolutely.

Q. Now, do you remember Mr. Maloney indicating when he said that he believed no payment had been made, he amplified that by indicating that no payment had gone through?

A. No.

Q. You don't remember that?

A. No.

Q. Now, in any event, you have no doubt but that by the 14th you were definitely aware of the question of an intermediary, isn't that correct?

A. I am.

Q. And is that reflected in your note of the telephone conversation sorry Barry Maloney came to visit you at around six o'clock that evening, isn't that correct?

A. That's right, yeah. And within that conversation, within that meeting, you know, Barry certainly raised the issue of an intermediary.

Q. He was particularly concerned because he believed an intermediary was involved and that the intermediary was aware of Denis's intent to give the money to Michael Lowry, isn't that correct?

A. That's correct.

Q. Now, do you believe that this was new information which was being brought to your attention at this stage?

A. I do, yes.

Q. And had you already sent the note to Barry Maloney

prior to that information coming to your attention?

A. I would be pretty certain sorry you know, I think, as we told the Tribunal, we don't have a faxed receipt, so you know, to be honest, until Barry actually confirmed last week that he had received that I am not sure whether I actually sent it out. So I couldn't actually confirm for you what time that went out at.

Q. I do understand that but do you have any recollection of what time of the day? Was it before the meeting at six o'clock, do you think, you would have sent it?

A. If it went out on the 14th I certainly I wouldn't have written it, shall we say, late in the evening after the meeting. I mean, it would have been written during the day and sent to Barry, I would have thought, during the day.

Q. It was a fairly critical document, wasn't it? You were assessing the whole situation, you formed a view about it, you expressed that to Barry?

A. As you can imagine these were pretty serious issues that were actually being raised. We were very concerned about what may have happened or what may not have happened and we were concerned about, you know, shall we say, liability and exposure in terms of the company and the IPO, etc. So it was quite important that I sort of sit back a bit and think about what happened.

Q. Of course. Well, by six o'clock or sometime after six o'clock that evening of the 14th that was the first time that you heard the mention of an intermediary, that was another significant piece of information coming to your attention, wasn't it?

A. Absolutely.

Q. And I would suggest probably made you more alert to the potential dangers for the company?

A. Very definitely so.

Q. And what was your view as of the 14th so when you were now in possession of this piece of information that

A. Well, I mean, I suppose really I continued to be worried and it obviously didn't alleviate the worry in any fashion. It probably enhanced the worry. But, you know, to a certain extent one also had to balance it with the fact that at the meeting the previous day Barry seemed to be very relaxed that nothing had actually happened. Then my feeling is that he came to me the next day and then gave to me what was effectively a new piece of information. So, I mean, certainly it would have, you know, enhanced the concern from my point of view and, I think, as is fairly clear from my notes. I spent a lot of time talking to Barry over, you know, the period because, you know, in some senses he was, shall we say, the closest independent source of information, if you'd like to put it that way.

Q. And what was your view as to what should be done when this piece of information came to your attention?

A. I mean, I am not really sure that I had any clear view as to precisely what should be done. You know, as I think is probably clear from, you know, both the notes and my conversation with Dermot on the 13th and, you know, shall we say, the earlier conversations that we really needed to kind of get a lot of advice from, you know, McCanns, or more precisely from Fergus, as to what was, you know, to be done and to, effectively, kind of review or protect the situation.

Q. Now, I think your note your notes record that on the 15th October, 1997 Barry Maloney phoned. He had met with Denis O'Brien. Denis O'Brien's main concern was that if the conversation ever came into the public domain, even though nothing had happened, it would do significant damage to the company. Denis O'Brien was particularly concerned that if the Telenor personnel were made aware of the conversation that it would head into the public domain. An article which appeared in the Sunday Times on the 12th October showed how leaking and uncautious some of the Telenor personnel were. Denis O'Brien felt that the ESAT Digifone directors were properly protected in the IPO document and as the letter of consent from ESAT Digifone and the disclaimer statement had been prepared by William Frys to ensure that protection. Denis O'Brien wanted to deal with

the situation on the basis that Barry Maloney and Denis O'Brien and Michael Walsh had agreed on the 13th October." That was the furnishing of the letter by Mr. O'Brien, I think, isn't that correct?

A. That's right.

Q. "Michael Walsh confirmed that this was his preference also. As Barry Maloney was satisfied nothing had happened and Denis O'Brien had assured us that nothing had happened, by taking it further we were simply trying to avoid taking a decision and implying that we weren't sufficiently satisfied when the only two people involved, directly or otherwise, were assuring us there was not an issue. Michael Walsh said Barry Maloney should focus with McCanns on ensuring the wording was correct to protect the ESAT Digifone directors and that the disclaimer was appropriately positioned and that the consent letter be re-examined in the light of the discussions.

Michael Walsh phoned Neville O'Byrne to ask him to review the ESAT IPO document in the context of possible exposure to ESAT Digifone directors. No background information was provided to Neville O'Byrne. Neville O'Byrne, having reviewed the document, felt that there was no major difficulty. However, in particular from page 28 on, there were a large number of statements which needed to be checked. Page 44 there was a description of ESAT Digifone service and page 88 there

were experts' views. There was no statement that ESAT Digifone had given its consent to the issue of the documents. Overall, Neville O'Byrne felt that the disclaimers would not fully protect one from being sued but the wording was as good as it can get. Neville O'Byrne felt that ESAT Digifone should be particularly careful on the wording of any consent.

Barry Maloney phoned Michael Walsh at 19.12. Barry Maloney had talked at length with Fergus Armstrong, who was of the view that no matter what disclaimers were in the document, we should take it as a working assumption that we will be sued. Michael Walsh said to Barry Maloney that, by definition, if someone is suing, then they would sue everyone. However, the question is whether there is any risk. In Michael Walsh's view, if people buy shares and there is a very clear disclaimer saying that the ESAT Digifone directors had nothing to do with the IPO document and took no responsibility for it, then people were being put on notice. Particularly in a situation where we had no reason to believe anything untoward had happened, I could not see how any investor who bought on the basis of the IPO document could hope to successfully sue us. Given the timing of the conversation in 1996, Barry Maloney/Michael Walsh both noted that Denis O'Brien had no connection with the Department of

Transport Enterprise and Communications with the mobile business during 1996 and anyway the Department had set up a very independent process."

Now, that was on the day after

A. the intermediary

Q. the intermediary was brought to your attention. I take it you had no reason to disbelieve Barry Maloney in relation to that. It was something you took on board as being a very serious matter?

A. I had absolutely no reason to, you know, disbelieve it. You know, I mean, you have to understand Barry and I would have had a reasonably good relationship so it would have been fairly open conversations so, you know, at the meeting on the 14th he told me that he believed that an intermediary was involved and, you know, I mean I had no reason to disbelieve that. I mean, I don't remember asking him why he believed there was an intermediary involved or otherwise but certainly, I mean, I just accepted his view that there was.

Q. And were you of the view at this stage that he was behaving in a responsible manner as Chief Executive Officer of the company, bringing the matter to the attention of at least some board members at that stage?

A. I think the reality is it was a very serious issue. If somebody believes that something had actually happened, you know, if anything our annoyance was the fact that he hadn't brought it to our attention when

the conversation began.

Q. I know that's an issue that he has had to deal with in the witness-box as well, why he didn't bring it to the attention of the directors or members of the board at an earlier stage. Now, at this stage, as of the 15th, I think it was Denis O'Brien's preference that the issue be dealt with by way of the letter he had prepared on the 13th, isn't that correct, indicating that he had made no payment directly or indirectly to Michael Lowry or any officials in the Department in respect of the award of the second mobile phone licence?

A. Well,

Q. or words to that effect?

A. Yeah. I mean, I can't remember any discussion about officials. I think the focus was entirely on Michael Lowry.

Q. I may be incorrect in that but we'll get it's a handwritten note and it's my recollection and it was also your preference as of the 15th, is that correct?

A. That was my preference that there would be, you know, kind of a formal letter to the company. Now, sorry, when I say that was my preference, I mean, equally well it was clear that we wanted Barry to talk to, you know, McCanns to make sure the company was properly protected. So, I mean, we would have expected that Barry would discuss, you know, all the matters with

McCanns as part of that.

Q. And the initial view which was being expressed to you by Neville O'Byrne, and it looks as if it was also being expressed to Barry Maloney by Mr. Armstrong in McCanns, that all the disclaimers in the world may not be sufficient to protect the directors. Perhaps they'd have to do something else?

A. Yeah.

Q. Was that the view that was emerging?

A. That was absolutely the view that emerges, and very clearly from Fergus's letter subsequently, you know, he says that, kind of, the statements of themselves would never be sufficient, that you have to go through, you know a more rigorous, you know, shall we say, review process.

Q. I think according to your note on the 16th of October, 1997 Barry Maloney phoned you at around 19.00 hours to say that McCanns had prepared a draft opinion which he had not yet formally received. He said that he had been through the background in detail with McCanns and despite the fact that Barry Maloney believed nothing had happened, they felt there were a number serious issues facing Digifone. You suggested to Barry Maloney that Denis O'Brien should see McCanns as he was the only one with direct knowledge, if there was any. Barry Maloney said that Fergus Armstrong was not happy to meet Denis O'Brien before his opinion had been

sent out and you told Barry Maloney that it was absurd.

There was no duty on the company there was a duty to

the company in giving the advice to be as fully

informed of the facts as possible in giving the advice.

Barry Maloney undertook to take the matter up with

Fergus Armstrong.

That was the only contact you had on the 16th with

Barry Maloney?

A. On the 16th that's the only one I have note of, yeah.

Q. Now, I think, according to your memorandum of proposed

evidence on the 17th October, you received a copy of

McCanns advices and sent it to Mr. Desmond, is that

correct?

A. That's correct.

Q. You were concerned by the divergence between the tenor

of the memorandum of advice from McCann Fitzgerald and

the view that Barry Maloney was expressing to you that

no money was paid by Denis O'Brien to Michael Lowry.

McCanns appear to have provided their advice on the

assumption that Barry Maloney had reasonable grounds

for believing something untoward may have happened.

Dermot Desmond asked to you organise a conference call

with the shareholders to enable a full discussion.

You talked to Arve Johansen. Arve Johansen was firmly

of the view that the licence competition had been run

on an arm's length basis and that the quality of the

submission had reflected the merit of the Digifone bid. Arve Johansen expressed concern that he had not been told of the conversation when it initially happened and to what extent was this part of the Barry Maloney/Denis O'Brien battle. A conference call was arranged for the 20th October."

Now, what was your understanding of Arve Johansen's query as to whether this issue was part of the Barry Maloney/Denis O'Brien battle?

A. I mean, there had been quite an amount of friction at different stages between Denis and Barry. I mean, going back for quite a long period of time and, you know, I suppose the reality was we weren't sure. And when I say we weren't sure, Arve wasn't sure, we weren't sure was this, shall we say, kind of really being aggravated by, you know, that battle as opposed to because of, you know, genuine concerns as to whether something happened or didn't happen. I think the difficulty from our point of view was, you know, trying to reconcile the situation where, if a conversation was very serious, you know, why it took effectively a year to surface and was that to do with, you know, it not being very serious at the original time, you know, and then effectively the relationship deteriorating and being part of that. But you know, I mean

Q. I think you were perhaps in a position to, if I understand your evidence so far, to perhaps assure Mr.

Johansen that this was a serious matter, isn't that right? Because as of the 13th, you were informed by Denis O'Brien that he had had formed this intention, that he had the conversation and that he had formed the intention. There was no question of that being frivolous?

A. No. I mean, certainly we were taking a very serious view of the thing. You know, I mean there was no question the conversation, you know, had taken place between the two of them, you know, and, you know, the only difference really was sorry I couldn't tell you when it came up as to where the conversation actually took place but certainly from our point of view it was a serious issue from day one.

Q. That's my understanding of your evidence so far because even as early as on the day of the 14th, you had taken a very serious view of that matter?

A. That's right.

Q. Even if no money had moved you still considered the whole thing very serious?

A. Totally wrong.

Q. And not frivolous?

A. Not frivolous, no.

Q. And nobody was suggesting to you, neither Barry Maloney nor Denis O'Brien, that this was a prank or a joke or anything at this stage?

A. No. I mean, we certainly weren't looking at it as a

joke in any sense, you know.

Q. And it wasn't your understanding of your dealings with the Chairman of ESAT Digifone, on the one hand, and its Chief Executive Officer, that it was being discussed in the context of a joke?

A. No. I mean, I am not sure that there was much discussion of what context it arose in at that stage.

It certainly arose later on.

Q. I know it arose later on but nobody had indicated to you and your view of the situation wasn't one that this was a joke?

A. No, we certainly didn't view it as a joke either before or after we heard various stories as to how it arose.

Q. Well, I just want to be clear about your understanding of this matter. As to whether it should have been reported by the Chief Executive Officer on a previous occasion at the time the conversation took place or soon thereafter, that was one issue; would I be correct?

A. I mean, very definitely we thought that it should have been reported at the time it happened, yeah.

Q. But notwithstanding that, by the time the 13th October, 1997 came around and you were involved, this was a serious matter?

A. Absolutely.

Q. The issue itself, the conversation and the intention?

A. Yeah.

Q. Now, perhaps if I just cover your note for the 17th October. Did you make these notes as you were going along, do you think, or

A. pretty much, in the sense I put them all together, you know, kind of, I think at the end of the process.

But, you know, sort of, I have gone through them it's actually hard to work out which ones were done absolutely contemporaneously and which ones were done the evening after the meeting or within, kind of, a few days.

Q. You appear to have kept them all together at the same time?

A. I mean, this was a very serious issue, you know, from our point of view, shall we say, there was a flotation going on of a company, there was an IPO being done and, you know, recollect we were very anxious to make sure we kept as detailed records as possible of all the events, I mean, purely for self-protection.

Q. Of course. Did you make contemporaneous notes from which you made these notes or are some of these notes contemporaneous and some of them written up on the same pages after meetings?

A. I mean sorry, there would have been a mixture, to be simple. I mean, my kind of guess is, having read them that, you know, things like phone calls, you know, I probably would have made a note while I was on the phone calls because I noticed in one of them I have,

kind of, the length of the phone call down and, I mean, I suspect as much as anything, it was, kind of, easy to write it down while it was actually going on. In terms of the meetings, I would have just taken rough notes at the meetings and then put them in, you know, kind of, manuscript later.

Q. Can I take it the meeting of the 13th, where you were first involved, the note that we have is not a contemporaneous note but one that you made subsequently?

A. I probably put it on the file the next day or something, you know.

Q. Now, just on the 17th October, your note reads "Michael Walsh received a faxed copy of Fergus Armstrong's memorandum of advice. Michael Walsh sent a copy to Dermot Desmond. Michael Walsh explained to Dermot Desmond that he was concerned by the divergence between the tenor of the memorandum of advice from McCanns and the statements and views that Barry Maloney was expressing to Michael Walsh. In speaking to Michael Walsh, Barry Maloney was convinced that no money was paid by Denis O'Brien to Michael Lowry and that if anything was contemplated it was in the context of other ESAT Telecom activities and not relevant to the mobile. Equally, the conversation between Barry Maloney and Denis O'Brien had been so inconsequential that it had been forgotten about for a year. This

contrasted markedly with the tenor of McCann's advices which, while carefully drafted, were based on the assumption that Barry Maloney had reasonable grounds for believing something untoward may have happened.

Dermot Desmond believed there needed to be a full discussion of the matters between all shareholders and asked Michael Walsh to set up a conference call for the 16th October at IIU. "

That was the one that ultimately took place, I think on the 20th, is that right?

A. Mmm.

Q. "Dermot Desmond was very concerned to meet with Barry Maloney as he was unsure whether Barry Maloney's recollection of events and in particular Barry Maloney's desire to postpone the IPO until post the Tribunal was motivated by a genuine desire to protect ESAT Digifone or was part of the ongoing personal battle between Denis O'Brien and Barry Maloney. It was very disturbing to Michael Walsh/Dermot Desmond that Barry Maloney had managed to forget the conversation for a year and then a) only surface it when the Tribunal was announced and b) only focus on it in the context of the IPO. Michael Walsh/Dermot Desmond were convinced that if anything untoward was done it would surface as part of the Tribunal and we needed to satisfy ourselves insofar as was possible that nothing had been done. It was however, a very difficult

situation. A year after the first conversation there were subsequent conversations denying that anything had taken place. It might be possible to prove something had happened but by definition it was impossible to prove that nothing had happened. E.g., it might be possible to get the same assurances from Michael Lowry as had already been received from Denis O'Brien but could one rely on either or both assurances if they were seeking to mislead? In practical terms, one had to accept the word of the person involved unless there was some evidence to the contrary, which there was not. Dermot Desmond felt if we were certain something had happened we should make a disclosure to the Tribunal. However, Barry Maloney believed nothing had happened. Denis O'Brien had stated (in writing also) that nothing had happened and in such circumstances there was nothing to say to anyone. Saying something implied that we believed both Barry Maloney and Denis O'Brien were wrong.

Michael Walsh phoned Rolf and Arve. Rolf had left and Arve was out of the office. Arve phoned Michael Walsh back (15.00 hours in the car in Galway) and briefed Arve on the events of the week. Arve was very concerned, as he was firmly of the view that the licence competition had been run on an arm's length basis and the equality of what had been delivered had

reflected the merit of the ESAT Digifone bid. Arve was concerned that he had not been made aware of the conversation when it initially happened and to what extent this was part of the Barry Maloney/Denis O'Brien battle. Michael Walsh said that Michael Walsh and Dermot Desmond viewed it as a very critical issue, that it needed to be discussed in full. A conference call was agreed for Monday 20th October at IIU.

Michael Walsh phoned Barry Maloney and Denis O'Brien to organise the conference call."

Now

A. Obviously, a mistake in my notes in a sense that, you know, that actually took place on the 17th so I couldn't have or sorry Dermot couldn't have suggested a conference call for the 16th.

Q. I don't think there is any difficulty about that.

Now, the view seems to have been emerging, amongst a number of the directors at least, yourself, Mr. Desmond and when Mr. Johansen was informed of the matter, that there was something serious here at least that needed to be looked at, isn't that correct?

A. Absolutely, yeah.

Q. And that it was so serious that Mr. Desmond went so far as to say that - to you - that if one was certain that something had happened, we should make a disclosure to the Tribunal?

A. That's correct.

Q. And was that also your view?

A. Absolutely.

Q. Now, what was your understanding perhaps I'll just ask you what your understanding was if something had happened, if you were satisfied that something had happened. What was your understanding of that. I'm not asking you look into Mr. Desmond's mind.

A. I think, you know sorry this would have been a conversation between Dermot and myself and, you know, it would have been one where we were both really agreeing what should be done or, you know, what was appropriate. So very clearly if there was any evidence of a payment actually going to Michael Lowry, then it would have been something that we would have felt we had to disclose, you know, and I suppose, you know, what we have tried to do through the process is to find out whether or not there was any evidence to effectively contradict, you know, what we were being told by Denis.

CHAIRMAN: Well it seems, Mr. Walsh, by this stage you

hadn't taken much comfort from the reference Mr.

Maloney had made to 'if anything untoward had happened,

it mightn't have related directly to ESAT Digifone, it

might have been Telecom matters'.

A. Well, I suppose from the very beginning I was actually

pretty comfortable myself that the Department had actually run, you know, a very kind of, let's call it, 'political-free' sort of process, you know? I mean, you know, John Loughrey, the Secretary of the Department, would have been somebody I had worked with occasionally over the years and, you know, I would have had a very high degree of confidence in his professionalism and the way he would have run things. So I was pretty certain the Department themselves, you know, had ensured that, you know, there wasn't room for anything to actually go wrong. But nonetheless, you know, while we were kind of while I personally was confident that nothing could have been done, you know, this was a pretty serious allegation that had to be reviewed.

CHAIRMAN: But the obvious potential focus was on the licence to ESAT rather than on more generalised ESAT Telecom matters.

A. Absolutely. Because that was the only bit that really related to us. But as I say, from day one I was pretty happy, based on, you know, kind of knowing John Loughrey and the way he would have acted and conducted things, that there wasn't going to be any room for, shall we say, interference.

Q. MR. COUGHLAN: You yourself hadn't participated in the bid process?

A. No. We got involved really, I suppose, at the end of September of '95, you know, after, you know, all the original submissions etc. had been made.

Q. And was your understanding of how the bid process was conducted received as a second-hand information from other people involved in the process, was that it?

A. It was, yeah.

Q. in discussing with people like Barry Maloney and

A. I mean, my recollection is that Barry had been involved really with the presentation in helping to work on some aspects of the bid. But, I mean, that really kind of predated, I suppose, you know, our involvement so you know...

Q. now, I think on the 20th October there was a conference call there was a conference meeting, isn't that correct?

A. That's correct.

Q. I think Denis O'Brien and Arve Johansen attended by phone. John Callaghan, Leslie Buckley, I think they were two ESAT Telecom directors on the board of ESAT Digifone, is that correct?

A. That's correct.

Q. Barry Maloney, Chief Executive, Dermot Desmond and you attended in person, is that correct?

A. That's right.

Q. And Denis O'Brien said that nothing had actually happened. We'll go through the notes in a moment. If

I just take you quickly through your statement first.

He explained the initial conversation with Barry Maloney as part of a wind-up because he was getting a lot of grief from Barry about paying expenses which arose as part the bid process. The directors were all of the view that we should take all reasonable steps to ensure that nothing untoward had happened. Having taken these steps, unless there was evidence to the contrary, we should ensure that protection was maximized in the context of the IPO by ensuring that ESAT Digifone and its directors had no responsibility to potential investors for the IPO document. There was a substantial discussion on what steps could be taken and it was agreed that Denis O'Brien would provide a letter as previously agreed. John Callaghan would approach KPMG and get confirmation from them that they found no questionable transactions in the books of ESAT holdings. That was Mr. O'Brien's group of companies?

A. That's right.

Q. And Barry Maloney would confirm that there was nothing untoward in ESAT's books. In addition, Barry Maloney and you were to meet with McCann Fitzgerald ensure that Digifone was fully protected. At the meeting with McCann Fitzgerald Fergus Armstrong also raised the issue of the \$50,000 payment by Telenor to Fine Gael that Barry Maloney had previously brought to his

attention. Fergus Armstrong understood that the payment was billed from Oslo as part the start-up cost following a conversation between Arve Johansen and Denis O'Brien."

Can I take it this was the first time - or around this time you became aware of the political donation?

A. My recollection is that's the first time I had heard about it from any source.

Q. Now, just going to the notes of the conference on the 20th October. I think you list who attended and then you say, you summarised the position and "Denis O'Brien described in detail what had happened, the context in which it had happened and the fact that nothing had actually transpired. He explained the initial conversation with Barry Maloney as being part of a wind-up because he was getting a lot of grief from Barry Maloney about paying expenses which arose as part the bid process. Given Denis O'Brien's personality and focus on money the wind-up appeared plausible to the board. At no stage did Barry Maloney contradict any description of events described by Denis O'Brien."

What was your own personal view about the explanation that this was a wind-up at the meeting on the 20th October?

A. Well, it's always a bit hard to tell at this sort of late stage, you know. I mean, I think the reality is

that, I mean, I don't think I had heard about the wind-up sort of topic before the wind-up discussion, you know, and I think the fact that it was a wind-up or otherwise didn't actually make people terribly comfortable, you know, because you know, irrespective of whether it was a wind-up or otherwise, you know, it was clear the conversation had actually taken place.

I think people felt it was plausible, you know, including myself, it was plausible that, you know, shall we say, the nature of Denis is that he would cajole people into kind of doing whatever he wanted them to do. So you could actually see him, all right, saying 'well, I did X', sort of, you know, 'you think you have trouble, I have had twice that amount of trouble in some ways'. So it was actually plausible but it didn't, shall we say, remove the concerns in a sense that you know

Q. you continued to have concerns?

A. Well, everybody continued to have concerns because, you know, they felt they had to be satisfied as far as possible that nothing had actually happened.

Q. Did anyone raise the issue at that stage that this gave cause for additional concern that an explanation was now being offered to the directors present which had not been offered to you on the 13th or in any subsequent dealings with Mr. O'Brien?

A. Not that I can recall, no.

Q. That didn't give rise to additional concern?

A. No. I mean, in some sense, as I say, you know, this was like kind of peeling away layers, in some sense. The more time you spent at this, the more, shall we say, the additional colour of information one actually received. So in some senses it was just, kind of, extra facts coming out, you know.

Q. Now, I think your note continues "The directors were all of the opinion that we should take all reasonable steps to ensure that nothing untoward had happened and having taken such steps, unless there was evidence to the contrary, should ensure that protection was maximised in the context of the IPO, by ensuring that ESAT Digifone was not responsible to potential investors for the document. A substantial discussion took place as to what could be done to generate some comfort that nothing untoward had happened. It was recognised it was impossible to prove if people were intent on being dishonest, it would be difficult to find where, and consequently proving something did not happen was an impossibility. After discussion it was agreed that 1) Denis O'Brien would provide a letter as previously agreed. John Callaghan would approach KPMG and get the confirmation about the ESAT holding company and Barry Maloney would confirm there was nothing untoward in Digifone. In addition, Michael Walsh and Barry Maloney would meet with McCanns to tell McCanns

what had been decided and to instruct McCanns to ensure that ESAT Digifone was fully protected." And then the note continues, "Dermot Desmond informed Denis O'Brien that he was very upset by the events. While he accepted Denis O'Brien's assurance if it turned out that Denis O'Brien was misleading him, Dermot Desmond would be suing Denis O'Brien for any damage. This went for anyone else who had done anything which might undermine the company in any way. Dermot Desmond wanted written assurances from each of the shareholders that nothing had been done which would in any way impact on the mobile licence. Barry Maloney, Michael Walsh met with Fergus Armstrong to update him on the discussion between the shareholders group and ^ Barry Maloney. Michael Walsh told Fergus Armstrong that the shareholders wanted to do what was right for the company. The shareholders had been placed in a difficult position. They had been told about a conversation where both parties to the conversation believed nothing had transpired. And the one party, Denis O'Brien, who would have been aware of anything, was adamant that nothing had happened. Given that no one believed anything had happened we were in danger of damaging the company by effectively creating sufficient waves that everyone was unsure. In the view of those involved, they were prepared to rely on Barry Maloney/Denis O'Brien and they wished to make

reasonable inquiries and bring the matter to a close.

At the other extreme, the shareholders could refuse to exercise judgement, relate the story in full in the IPO document and by implication say to potential investors that the shareholders who know the individuals concerned, were sufficiently uncertain that they could not be satisfied with the Barry Maloney/Denis O'Brien view that nothing had happened and ask potential investors to make their own judgement. This would be a total avoidance of responsibility towards the company, albeit an easy way out and, accordingly, the shareholders, having given due consideration to the issue, had decided to

- (1) require a statement from Denis O'Brien,
- (2) get a letter from KPMG.
- (3) a letter from Barry Maloney re ESAT Digifone payments.

McCanns were to look at the document to maximise protection for the ESAT Digifone board and to consider the wording and location of the disclaimer statement.

Fergus Armstrong was concerned that the company had not circulated their opinion to all the directors. Equally, Fergus Armstrong felt that alternate directors, that is, John Fortune, should also be included in any future meetings as alternate directors had" I presume 'responsibility', is it?

A. 'Equal responsibility', yeah.

Q. "- Fergus Armstrong also raised an issue which Barry Maloney had previously brought to his attention" and the Telenor matter came up at that meeting with Fergus Armstrong, as far as you were concerned, the first time for you?

A. That's right.

Q. Now, at that meeting I think the view was being taken that the representatives of the shareholders in the form of directors of the company wanted to take all reasonable steps to get to the end of the matter to clarify the matter, isn't that right?

A. That's right.

Q. Were the representatives of the shareholders told at that meeting that this was the first time that the explanation of this being a wind-up was being proffered by Denis O'Brien?

A. I mean, a quick answer is 'I couldn't recall' but, you know, I would imagine that there would have been a very full discussion.

Q. Well, you were the one who knew that this was the first time it was being mentioned. Did you inform those present?

A. I mean, I just can't remember. But, you know, my note simply says that I updated everybody on what had actually happened so, I mean, I would find it surprising, you know, if I hadn't told people, you

know, pretty much what had happened over the various days.

Q. Do you think you may have summarised the position before Denis O'Brien gave the explanation of it being a wind-up?

A. I would imagine I mean, normally the way most of these meetings would have been conducted would have been, you know, in some sense a review of how we got to where we were that day. So I would be surprised if I didn't but I just can't recall.

Q. But in any event the upshot of that meeting of the 20th was people were still very concerned, weren't they?

A. Still concerned, yes, absolutely.

Q. Now, I think on the 21st you again met with Barry Maloney and it related to matters of legal advice, isn't that correct?

A. That's right. On the 21st I met with Fergus and Barry, really a continuation of the previous evening, yeah.

Q. I think in the context of what is protected the note is difficult to read, isn't it?

A. Yeah. I mean, from our point of view, obviously we are happy that, you know, shall we say, you can have the full version of the thing, but that's a decision for yourselves.

MR. HOGAN: Mr. Chairman, just to make our position absolutely clear. We have no personal difficulty in having the full version of these notes made available.

But we were conscious that this is a matter which was at least debatable as to the extent of the privilege and we didn't want in any sense to preempt any rights or concerns that other parties might have had who were parties to this meeting. That's entirely our position.

CHAIRMAN: I think we have got a reasonably clear picture aided by some of Mr. Walsh's testimony already this morning.

Q. MR. COUGHLAN: Yes. Now, I think on the 21st October, 1997 you record that Owen O'Connell called at the request of Denis O'Brien and he agreed that McCann's views needed to be circulated to the board and that if Barry Maloney felt, as now appeared to be the case, he needed an opportunity to brief the board of his concerns then he should again get the opportunity.

Owen O'Connell believed that the matter should be kept to a subset of the board because of personality issues and felt it was likely that Barry Maloney would be called on as a witness by the Tribunal." Isn't that correct?

A. That's correct.

Q. Now, I think Mr. Maloney was still concerned, wasn't he?

A. I mean, Mr. Maloney was still concerned and we were still very concerned.

Q. He continued to be concerned and it was a matter he did wish to bring to the board or to share the burden of it, at least, with the board?

A. Absolutely, yeah. I mean, which I think was right and proper.

Q. Now, I think on the 22nd October, 1997 McCanns advice had been circulated and following discussions between you and Mr. Desmond and you and Arve Johansen, it was agreed that there was need for a board meeting to fully review the position and it appeared that the only feasible time was on the 23rd October, 1997 at 21:00 hours in IIU. Again, you say, "Denis O'Brien would be under pressure because he was going to Milan for an investors presentation first thing on the 24th."

So I think that's how the meeting of the 23rd came about, is it?

A. That's right.

Q. Yourself Mr. Desmond and Mr. Johansen having had a discussion.

A. Yeah.

Q. I think Barry Maloney phoned you to discuss the issue. Barry Maloney felt that if one stood back the fundamental issue was what should be done about the IPO? Barry Maloney didn't believe any transaction went through. However, he believed that there was a third party involved, although he had no idea who that

was. Barry Maloney felt that ESAT would be in trouble because of the intention. ESAT Digifone had been incorporated in May '95 and, in Barry Maloney's view, Denis O'Brien was CEO from May '95 to May '96. Michael Walsh pointed out that Telenor had appointed a CEO (Jan Edward Thygesen). Barry Maloney agreed that maybe Denis O'Brien had not been in control of ESAT Digifone. Barry Maloney was continuing to examine and think about how the selection process could have been corrupted. Barry Maloney was also worried as to why Denis O'Brien made a statement two Mondays in a row that nothing had happened. Barry Maloney was questioning why Denis O'Brien should have given him this assurance." Fergus Armstrong gave advice which is protected "Barry Maloney was very exercised, saying he was not going to be the bad guy, that everything he had done had been above board. Denis O'Brien/Michael Lowry were very close, (per Barry Maloney) and all sorts of things were going on. He had asked Denis O'Brien when he came back from his honeymoon about the conversation.

At the end of the call, which lasted for one hour 23.49, Michael Walsh agreed that Barry Maloney should again talk to Fergus Armstrong on what the board would need to do to act reasonably in the circumstances."

So, this was a lengthy conversation with you, isn't

that correct?

A. Very lengthy.

Q. And were you as concerned as you note Mr. Maloney being concerned about issues such as third party intermediaries, the intent, and matters of that nature?

A. I mean, my guess is, I mean, you know, obviously I made a fairly short note despite the fact that the call was about an hour and a half or thereabouts. So my guess is that, I mean, you know, it was obviously fairly interactive. It couldn't have been a completely one-sided conversation. So, you know, I mean, I would have certainly been sharing Barry's concerns in relation to the issues. But, I mean, I think, as is clear from the note, Barry was also very concerned about his own position, obviously. So, you know, I mean, I would have been trying to help to assuage his concerns.

Q. That is because the matter hadn't been brought to the attention of the board earlier, is that right?

A. Yeah. I mean, Barry, I think, felt, you know, in some sense that he should have brought it to the board at an earlier stage at this point in time, but he hadn't.

Q. I take it you would have agreed that, at every stage, that this was a matter which should have been brought to the attention of the board?

A. Absolutely. I mean, it should have been brought to the board's attention when the conversation took place.

Q. And it should have been brought to the board's attention when the matter was brought to your attention, as it was when the process had evolved from the 13th October, 1997, isn't that correct?

A. Absolutely. It was, you know, once there was a letter from, shall we say, kind of, Denis to the company, it was inevitably going to come to the board's attention.

Q. Well, was that so? I think the letter went to Fergus Armstrong.

A. Well, yeah, but the actual note and sorry I mean I am not sure that I ever received a copy of that particular draft letter. But, I mean, the note of the conversation was that, you know, Denis was to draft a letter to the company to be agreed with Barry.

Q. That particular draft, of course, which we have seen and we'll discuss later, makes no reference to the conversation which took place between Denis O'Brien and Barry Maloney in October/November of 1996 or of any subsequent conversations where Denis O'Brien assured Barry Maloney that he hadn't done anything, no matter who initiated those conversations.

A. I mean, as I say, I am not sure that I ever actually saw the letter because in some senses it was overtaken, you know, by events. Because I think, you know, at a later stage I drafted a letter which I gave to Fergus for, you know, his consideration.

Q. In fact, I think the letter, and perhaps it would be no

harm if we just look at it now, we'll give you a hard copy, and I appreciate it was overtaken by events, but the letter is addressed to Barry.

A. All right, okay. (Document handed to witness.)

Q. That particular letter didn't form part of the consideration of the board, did it? It never went that far because events overtook it?

A. It never, you know, came to the board because, you know, effectively the board, kind of, really, I suppose, continued to kind of go through the process and I think on file there was another draft letter, you know, by myself at a later stage and then, you know, ultimately we got as far as as having the sworn affidavit from Denis.

Q. Yes. Now, I think on the 23rd October, 1997, the meeting of the directors which didn't constitute a board meeting, took place at 21:00 hours but before that, I think Barry Maloney had contacted you at about ten past three, he had talked to Arve Johansen in relation to the Telenor payment and the amount involved was \$50,000 and it was paid into an account in Jersey. Arve Johansen said that this was a political contribution to Fine Gael. He had received a bank account number and an invoice. The name of the person on the account of David Austin and this had occurred in December, 1995. Per Barry Maloney there was a close personal relationship between Michael Lowry and David

Austin. Barry Maloney queried whether David Austin was in charge of official fundraising for Fine Gael at that stage. Michael Walsh said he had no idea.

Barry Maloney said that the money paid out would have been re-invoiced back to expenses at ESAT Digifone."

Now, did you know who David Austin was when Barry Maloney gave you that piece of information at ten past three on the afternoon of the 23rd October, 1997?

A. I mean, I knew who David Austin was. I mean, a well-known business figure.

Q. As a businessman?

A. Yeah, absolutely. I mean he was a director of Smurfits

Q. Did you know that he had any association or friendship with Michael Lowry?

A. No, not at all.

Q. Did you know whether he had friendly with Denis O'Brien or his family?

A. Not that I am aware of, no.

Q. Did you know whether he had any association with the Fine Gael Party?

A. The quick answer is 'I couldn't tell you' because, you know, in some sense it's a bit of a blur at this stage whether I associated him with Fine Gael or I associated him with Fine Gael at the time.

Q. Nevertheless, this was a new piece of information coming to you, isn't that correct?

A. I mean, I certainly wouldn't have been aware, you know, that David Austin was, shall we say, the fundraiser for Fine Gael or anything like that, you know.

Q. Did this cause any concern for you in the context of even the previous matter which was under consideration?

A. In the context of the 100?

Q. Yes.

A. No. I mean, David Austin had never surfaced in the context of that at all.

Q. At the time?

A. Well, I mean, I think, actually, until really the Tribunal here. You know, at the time there was no mention of David Austin other than in connection with the, you know, Telenor, you know, 50,000 Fine Gael payment.

Q. Now, I think at a quarter to four on the 23rd Barry Maloney rang you again in relation to the board meeting and you had a discussion with him on whether Fergus Armstrong should attend. "Fergus Armstrong felt that if he was present that part of the discussion would, at least, be privileged. If part of the purpose was to hear both sides then we were increasing the hazards to the company and to the individuals if no legal advisers were present. Per Barry Maloney, Fergus Armstrong felt we should also be deciding on what strategy we should use in relation to the Tribunal both on behalf of the company and the individual. Everyone who heard

the information can be questioned. By having Fergus Armstrong present, Fergus Armstrong felt that he could guide the position. Fergus Armstrong was of the view in and of itself the payment ex Oslo should be giving people something to consider. Barry Maloney raised the question of what we need to do to protect for the Tribunal ignoring the IPO. Michael Walsh felt that was the wrong question. Barry Maloney and Michael Walsh both agreed that nothing had been done which could have influenced the mobile licence and that from a Digifone perspective the issue we were meeting on this evening was clearly focused on the IPO and what was necessary to enable that to happen. It was agreed that Fergus Armstrong should attend the meeting."

I think he rang again at six and he had been talking to Fergus Armstrong further and "Fergus Armstrong felt he needed to get US input to understand fully the responsibilities" that's in relation to the IPO?

A. That's right.

Q. "Fergus Armstrong also felt we should not get into all the nits and grits as this would only confuse things.

Michael Walsh contacted Dermot Desmond to update him and Dermot Desmond (in Spain) agreed to join the meeting by conference call."

Now, at a quarter to four a discussion took place between yourself and Barry Maloney concerning what

strategy should be adapted in relation to the Tribunal,
isn't that correct?

A. Well, I think probably not so much strategy in relation to the Tribunal but, you know, whether or not we should be discussing, you know, this in the context of the Tribunal or in the context of the IPO and, I mean, I would have felt very strongly at the time that, you know, the Tribunal was an element in the background but, you know, the primary concern of the board was, you know, what was its exposure in the context of the IPO. If it was something to do with the Tribunal, that was in some sense a separate matter, but when I say 'separate', it was obviously something that would have formed one's decision in relation to the IPO.

Q. Well, a view had been taken by yourself and Mr. Desmond a few days previously that the Tribunal would have to be informed if there was

A. evidence of wrongdoing, absolutely.

Q. If you came across anything that you were of the view constituted a wrongdoing I use that word perhaps loosely?

A. Well, I mean, let's take the word as being fair for a second. I mean, the practical reality is if we had found something that was, you know, wrong, you know, in that sort of, you know, sense, I mean the reality is (a) we couldn't have gone ahead with the IPO because we wouldn't have been in a position to sanction or release

it and (b) we would have felt obliged to inform the Tribunal. So in some senses, you know, the two things are you know related or interrelated.

Q. Now, I think the main meeting anyway took place at 21:00 hours and Arve Johansen, Rolf Busch, Knut Digerud, John Fortune on behalf of Telenor; Denis O'Brien, Leslie Buckley, John Callaghan on behalf of ESAT Telecom; Barry Maloney, Michael Walsh - and Dermot Desmond by phone - on behalf of Digifone. I think "Michael Walsh opened the meeting saying that Fergus Armstrong was present as legal adviser to the board to enable the board to consider the advices by Fergus Armstrong and make the conversation privileged. The focus of the meeting was purely on Digifone and, as a board, we need to come to a decision on whether or not to approve the IPO which was underway. Fergus Armstrong said the meeting should not be deemed a formal board meeting and that his advice was being put forward in the context of the IPO." Our note contains a protected view of Fergus Armstrong.

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

Maloney said that there were various conversations and that Denis O'Brien had explained to him that there was an intent to make a payment but it had not happened.

Dermot Desmond queried whether any actions had taken place, whether there was anything through a third party directly or indirectly and whether any actions were intended for the benefit of ESAT Digifone as opposed to ESAT Telecom. If they related to ESAT Digifone they were not done with either board or shareholder approval.

Fergus Armstrong said there was a need to understand precisely the action and how they are explained.

Dermot Desmond queried the obligations of the directors - was it carry out a Tribunal or to take" that's illegible.

A. "to take someone's word."

Q. "to take someone's word." Fergus Armstrong then said something over which protection is claimed.

Rolf Busch said that based on Fergus Armstrong's memorandum of advice, particularly par 3 and 8, the inevitable conclusion was that the IPO should be postponed. Michael Walsh responded that Fergus Armstrong's memo was based on the belief that there was reasonable grounds. Fergus Armstrong had not heard the views from Denis O'Brien. Fergus Armstrong agreed with Michael Walsh. Dermot Desmond said the issue needed to be discussed in the context of

responsibilities to the company and the damage that would be done with all of the ESAT companies. Fergus Armstrong said it was open to the directors to accept the written letter of Denis O'Brien and the auditors. Dermot Desmond said the CEO did not believe there was an issue. Fergus Armstrong's understanding was that there was an explicit request to Barry Maloney for refund of part payment.

Barry Maloney said the context of the discussion was success fees. Barry Maloney was receiving invoices covering consultants and advisers. Denis O'Brien told Barry Maloney to relax, that Denis O'Brien had made 2 x $\frac{1}{2}$ 100,000 payments. Barry Maloney told Denis O'Brien he did not want to know about it, that it had nothing to do with Digifone.

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

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

Arve Johansen said his concern was the IPO. Barry Maloney said the issue was weighing on his mind.

Barry Maloney had no reason to disbelieve Denis O'Brien

but Barry Maloney felt uneasy. Dermot Desmond said the board should have been advised.

Rolf Busch said he had difficulty with the discussion.

The initial discussion was in October 1996 and confirmed in July this year. Barry Maloney said he accepted the assurances, but if he did, why did he then seek legal advice? Barry Maloney responded that he was worried because of the sequence of events. While he accepted Denis O'Brien's word, he believed a third party had knowledge.

John Fortune queried whether there had been an intent to make a payment. Barry Maloney responded he believed that no payment had been made to Michael Lowry but believed the company is at risk because a third party is aware. Denis O'Brien said there had been no intent to make a payment and no payment had been made."

Could I just pause there, do you think that that is your note of what Denis O'Brien said, 'that there had been no intent to make a payment'?

A. I mean, that is my note

Q. You believe that to be an accurate note of what he said at that meeting?

A. I mean, I find it hard to believe it's an accurate note in the context of what I have had read but, I mean, that is my note of the meeting.

Q. That is your note of the meeting?

A. That is my note of the meeting.

Q. "Barry Maloney recounted the history of events. Some of the details were wrong. Denis O'Brien/Barry

Maloney had been having a discussion on success fees.

Jim Mitchell, Stephen Cloonan, PJ Mara. Knut Digerud

had been aware of the conversation as Barry Maloney had

been expressing his frustration. Denis O'Brien said

he had had to make two payments. In a conversation on

the 25th October 1997 (dates wrong) Denis O'Brien

reminded Barry Maloney of the discussion - Denis

O'Brien had said he didn't actually do it - 'You must

be relieved.' The comment was repeated to Barry Maloney

on the following Monday. The IPO document was

published on the 8/9 October and Barry Maloney sought

advice from Fergus Armstrong. In discussion with Denis

O'Brien, Denis O'Brien said payment was intended to go

through but didn't. In total, there were four

separate discussions. Barry Maloney told Denis

O'Brien that he would have to share the opinion with

the directors of the IPO was not postponed. On the 13th

October a meeting was arranged for Denis O'Brien, Barry

Maloney and Michael Walsh at which it was agreed that

Barry Maloney would get a letter from Denis O'Brien

confirming that nothing had happened. Barry Maloney

had sought official advice on behalf of the company.

John Callaghan queried whether any third party had been

named. Rolf Busch queried whether Barry Maloney must still have doubts as despite assurance, he had felt it necessary to inform the board. Barry Maloney said the first time he had any reason to be concerned was when Denis O'Brien raised the issue and confirmed nothing had happened."

Then Fergus Armstrong gave advice.

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

Arve Johansen queried whether there was a way to slow down the IPO. Denis O'Brien said no. John Fortune queried what exposure the directors had, taking into account what we had done." Then there is another Fergus Armstrong intervention.

"Barry Maloney reiterated that his main concern was that there was a middleman/intermediary and not just a bank involved." You believe that those terms were used at the meeting, 'middleman', 'intermediary' 'involved'?

A. I mean, I do. I didn't I mean I have obviously reviewed Fergus Armstrong's note of the meeting as well and, you know, I would have said that, you know, I would have recognised, shall we say, Fergus's notes

from the same meeting. So...

Q. I think "Rolf Busch reiterated that Barry Maloney must be concerned otherwise he would not have informed the board. John Callaghan explained Barry Maloney's role as feeling he had to share the information. Barry Maloney confirmed John Callaghan's view. John Callaghan said that Barry Maloney had shared the information and it was now the responsibility of the board members to decide how to deal with it.

The discussion returned to the IPO and its timing relative to the Tribunal. John Callaghan said the IPO timing had nothing to do with the Tribunal. Rolf Busch said he would not expose himself to any liability to get the IPO to fly." Fergus Armstrong gave some suggestion then.

"John Callaghan said the directors were behaving responsibly. There had been a comprehensive discussion and people were reflecting on the issue. John Callaghan wondered whether it was a collective or individual decision. John Fortune said we were trying to deal with interpretations. There were conflicting recollections of conversations. There were no facts to sustain them and we were dealing with Barry Maloney's interpretation of the conversation. The discussion then turned to a matter where there were facts and these relevant to the \$25,000 a plate dinner

with Bruton in New York David Austin had organised and the money was paid into an account in Jersey. Telenor are to"

A. "check the paperwork."

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

"Rolf Busch suggested as a way of going forward, that Fergus Armstrong would get US advice. We would draft a letter to the underwriters clarifying the limits of ESAT Digifone's responsibilities in addition to Denis O'Brien, Barry Maloney and KPMG letters previously discussed. It was agreed to resume the discussions again on the 30th October."

Now, what was your understanding of matters as of the completion of that meeting on the 23rd October?

A. I mean, my understanding is that, you know, people were still uncomfortable because, you know, I suppose we wanted as a board to get a very clear view as to what we actually had to do to protect ourselves in the context of the IPO and, I mean, in fairness to Fergus, it was a very difficult thing to give, kind of, absolutely cast iron advice on because, you know, it was really a US issue, the IPO, whereas he was relying

very much on, kind of, Irish law. So, you know, there would have been a fairly lengthy debate about all of the events and, you know, equally, well, what could be done in terms of, you know, ensuring that, you know, we did whatever was right.

Q. But was any did you make any individual decision or come to any view yourself or was there any collective view about what was happening here?

A. Well, I think it's fair to say that there was, you know, a kind of, at all stages in this process, unease, you know, and I mean the nature of the thing was actually debate, really, in relation to, you know, what had actually happened in the circumstances, presumably the conflicting evidence between Denis and Barry so, you know, I mean, there would have been, I am sure, reasonably fraught conversation at different stages of the actual meeting.

Q. Where was the conflict between them as you understood it as of the 23rd?

A. I think the two elements of conflict, you know, from recollection it's not really reflected in my notes properly the two elements of conflict, you know, were probably where the conversation had taken place between Denis and Barry, i.e. was it the run in the mountain or was it in a more formal setting? And, you know, secondly, I think sorry there seemed to be an element of conflict about the intermediary. You

know, 'Was it, effectively, Woodchester Bank or was it an individual?'

Q. When was the first time you heard Woodchester Bank being mentioned?

A. I don't have it listed in my notes. I can't really be precise about that, you know, whether it was actually at that meeting or some earlier stage.

Q. Are you the author of the phrase "Woodchester as intermediary jarred"?

A. No.

Q. What was your view about that?

A. I mean, the conversations I had had with Barry were really about an intermediary and I suppose, you know, in terms of those conversations with Barry, you know, you tend to think of an intermediary as a person. You know, I mean, I suppose, you know, I suppose in a different sense I might use the term 'intermediary' as being a financial intermediary but I would have thought in the conversation with Barry it was more a person than an institution or an organisation.

Q. And we'll come to it. The explanation for intermediary was given by Mr. O'Brien, isn't that correct?

A. That's right.

Q. As being Woodchester Bank?

A. Yeah.

Q. How did that sit with you?

A. I mean, I don't really recall precisely how it sat with

me. I mean, I have to say that the conversations with Barry, as I say, I would have thought it was a person. But, you know, there was, you know, in some sense, Denis was the one who was actually talking about the intermediary being Woodchester. Barry had no idea who the intermediary might be. And, you know, I mean that is kind of documented there. So, you know, it sounded unusual that the intermediary would be, you know, a bank.

Q. Did that give rise did that cause you any concern that this explanation of being offered?

A. Well, I think, I don't remember, but I would have would be surprised and, I mean, it may or may not be reflected in Fergus's notes, I can't tell you. I would be surprised if there was no discussion as to whether there was a reasonable explanation.

Q. What was your own view? You were one of the people charged with the responsibility of forming a view?

A. I suppose the danger is that you make up a view now, you know, whether, you know I mean, at the time I didn't actually record what my view was of it, you know.

CHAIRMAN: It's probably a suitable time now, it's a little after a quarter to, to defer until two o'clock.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

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

MICHAEL WALSH CONTINUED TO BE EXAMINED AS FOLLOWS BY
MR. COUGHLAN:

Q. Now, Mr. Walsh, I think we had finished your notes on the meeting of the 23rd, isn't that correct, before lunch, and I think your next involvement in the matter, according to your notes, was on the 29th October, 1997, is that correct?

A. That is correct.

Q. I think you attended a meeting with John Callaghan, Leslie Buckley and Owen O'Connell at William Frys at 21:00 hours. I think the meeting discussed the IPO and the role of the ESAT Digifone board. In Owen O'Connell's view there was no need to have further approval from Digifone for the release of the IPO document. Owen O'Connell said we needed to be careful to maintain legal privilege in any information sent out.

Now, I think then on the 30th October, 1997 you had a conversation with Mr. Armstrong and privilege is claimed in respect of it. And then some points in the IPO were discussed which were really technical matters and not really relevant to the issues we are looking at, I think, isn't that correct?

A. That's correct.

Q. I think Mr. Johansen felt that the Prospectus could not

go out unless Frys were fully aware of all the facts.

John Callaghan said that the practice was - to get to the bottom of the issue is to ask the question and to get any corroborating evidence. Then Fergus Armstrong gave some advice. Then, after substantial discussion, it was agreed that the question/answer session should be held and be conducted by the lawyers and that equally William Fry should participate as they were lawyers to the company undertaking the IPO. John Callaghan noted to Arve Johansen that the sure way for Arve Johansen to avoid any liability was for Telenor to sell its shareholding - that's a different matter perhaps - but it was as a result of discussions you were holding up with Fergus Armstrong on the 30th of October, 1997 that the idea or the procedure adopted on the 4th November, 1997, that's the inquisition or question/answer session, it arose at that time, is that correct?

A. That's correct. My recollection is that Fergus had been to the US to take US legal advice, you know, as part of that. He felt that there had to be a question and answer session to, you know, make sure that we went through all elements of the stories that we had heard.

Q. And again I am not inquiring as to what advice Fergus Armstrong gave, but you had already been made aware that the disclaimers, perhaps of themselves, afforded no protection, isn't that right?

A. That's right.

Q. And now, as a result of advice you received, the directors were coming to the view that there would have to be some way of trying to get to the bottom of this and the questions and answers session was the way to do this?

A. That's right. I think probably in conjunction with the other things.

Q. In conjunction with the disclaimers, of course?

A. Sorry in conjunction with the disclaimers but also in conjunction with the other things that had actually been discussed i.e., shall I say, some kind of statement from Denis, the KPMG

Q. yes, the other issues which had been put in train, KPMG auditing, ESAT holdings, Barry Maloney looking at ESAT Digifone, some form of a statement or undertaking or letter from Denis O'Brien saying he hadn't done anything, isn't that right?

A. That's correct.

Q. Now, I think on the 4th November, and we have more detailed notes of that from other people, a meeting took place at IIU for the purpose of examining in detail the questions covered by Mr. Armstrong's opinion dated 29th October. And you give the people who attended and I think we know from previous evidence given to the Tribunal who attended that particular meeting.

A. That's right.

Q. And I think "Mr. Armstrong started the meeting by saying it was not a formal meeting. It was a question and answer meeting suggested by the US lawyers and the role of the legal adviser was to assist the shareholders. John Callaghan confirmed that he had given Fergus Armstrong's memorandum to William Frys as legal advisers to ESAT Holdings. Owen O'Connell had met with Denis O'Brien in the US to review the issues and a letter was now gone from William Frys to the board of ESAT holdings. Mr. Halpenny confirmed that William Frys would be making a full disclosure. They would be making all documents available to everyone. John Callaghan said he understood that evidence was being sought from Woodchester in relation to payments by Denis O'Brien and from Telenor on payments they had made.

Fergus Armstrong said that Digifone was only collaterally involved - they weren't part of the IPO directly. Kilroy's queried whether IPO document reflected recent discussions with Frys and confirmed it did not." Mr. Digerud went into some of the other technical matters relating to the IPO.

A. That's correct.

Q. "Fergus Armstrong felt that the penalty issue may not be that serious." That again related to this matter of delay and

A. delay in the roll out

Q. Yes. "Knut Digerud said he was in a difficult position having read Fergus Armstrong's memorandum. Fergus Armstrong said it was anybody's best guess that people would not get full comfort. There was a problem which can't be issued(sic) because it can't be disclosed."

A. Sorry, 'can't be insured'.

Q. "Can't be insured because it can't be disclosed. Gary Halpenny said Owen O'Connell went to the US and quizzed Denis O'Brien. Backup evidence will not contradict story of Denis O'Brien."

Now, at the meeting of the directors on the 4th November I think Mr. Kealey, who was a solicitor for McCann Fitzgerald and was not participating in any advice being given to the company, came to ask questions of Denis O'Brien, isn't that correct?

A. That's correct.

Q. And Mr. O'Brien was on conference call, I think from California?

A. He was certainly on conference call from the States.

Q. America, yes. Now, I think we have seen many notes taken, Mr. O'Connell's notes, the notes made by solicitors for Telenor, of the meeting, and I think you have had an opportunity perhaps of looking at those and reviewing the evidence yourself, have you?

A. Yes.

Q. And can I take it that you don't have any great disagreement with the notes as taken of the type of questions that were asked

A. No, I mean I think they are all fair recollections of the meeting.

Q. And I think at that meeting Mr. O'Brien in response to Mr. Kealey recounted that the conversation between himself and Barry Maloney took place on a run, that it was said in a jocose manner first of all it was said to try and get Barry Maloney to get the finger out and pay the consultants, isn't that correct?

A. That's correct.

Q. He informed the meeting that this was said by way of bravado or in a jocose way. And he informed the meeting that he had formed an intention but hadn't gone ahead with it, isn't that right?

A. I don't remember precisely from the notes but, I mean, all I can say is I read the other people's notes and 'nothing really jarred', is the best way I put it, to use the words from this morning.

Q. He explained about Woodchester being the intermediary?

A. That's right.

Q. That he had earmarked $\frac{1}{2}$ 100,000 in Woodchester in his own mind and that he had mentioned the second $\frac{1}{2}$ 100,000 for effect.

A. That's right.

Q. would that be a

A. yeah.

Q. reasonable summary

A. That would be a reasonable summary.

Q. And I think it was decided over and above the other matters which had been discussed, that is KPMG looking at the accounts of ESAT Holdings, Barry Maloney looking at the accounts of ESAT Digifone and some form of letter or, as it transpired subsequently, an affidavit being furnished by Denis O'Brien, it was also agreed that Mr. O'Brien's accounts in Woodchester be looked at, isn't that right?

A. That's right.

Q. And I think were you made aware of the result of the search in Woodchester in respect of Mr. O'Brien's accounts?

A. We were.

Q. And I think Mr. O'Brien then left the meeting. He had to go off. There were discussions taking place in relation to the political donation, isn't that correct?

A. That's correct.

Q. There was a broad discussion amongst the directors in general terms about matters. I think Mr. Maloney was asked by Mr. Armstrong if he wished to add anything to what Mr. O'Brien had said and he informed the meeting of matters which had been, the type of thing he had been telling you the whole way along, isn't that right?

A. That's correct.

Q. And what was your view at the end of that?

A. I think everybody's view was that, you know, we had a situation where we had to find out, as far as we could, from independent sources, as to whether or not there was, you know, an issue that we had to be, you know, worried about. When I say 'worried about', kind of an issue that we could actually demonstrate that, you know, something had actually happened and, you know, to the extent that we could - we had to make all reasonable inquiries, you know. This is obviously part of that actual process and, I think, as is probably clear, I mean I haven't read the various notes in the last few days so I am just going a bit from memory, but I think it's fairly clear from everybody that, you know, even at the end of the meeting on the 4th, having gone through the question and answer session, that people still felt that we had to continue, you know, our endeavours before coming to a final conclusion.

Q. Now, I think you may be aware from evidence given at this Tribunal that in the summer of 1996, i.e. 1/2 407,000, or something in that region, had been paid into an account in the name of Mr. Aidan Phelan in the Isle of Man out of a company of Mr. O'Brien's account in Woodchester. The meeting was not informed of that?

A. Certainly not that I recollect. I mean, my recollection in relation to the Woodchester was that, I

think it was that Woodchester supplied a list of all payments over 25,000 and, you know, we effectively went through, kind of, that list and there was an explanation in relation to them. I don't remember any mention of a payment of $\text{€}407,000$ into an account, you know, controlled by Aidan Phelan or otherwise.

Q. And I take it that you were not aware that out of the money paid into this account in Allied Irish Bank in the Isle of Man, that $\text{€}150,000$ was paid in two tranches, one of $\text{€}100,000$ and one of $\text{€}50,000$, to an account of Mr. David Austin's in the Bank of Ireland in Jersey?

A. We weren't aware and there was no mention of any payments to David Austin of any sort, I mean, other than in the context of the Fine Gael 50,000 contribution.

Q. But you were not aware of that?

A. Absolutely not, no.

Q. Now, did the fact that Mr. O'Brien mentioned that the intermediary was Woodchester, did that cause you any concern?

A. No. I mean, I think we discussed this before lunch. You know, my recollection is that the Woodchester name came up, effectively, earlier than that. It came up at one of the earlier meetings, and as I think I said to you earlier, you know, the context of an intermediary as discussed between Barry and myself, I

would have more taken it as being an individual rather than an institution. So, you know, the meeting on the 4th, you know, I am not sure there was any new information that came out of that at all in the sense that I think we had pretty much heard everything, you know.

Q. There was one further step, wasn't there, there was an query into the Mr. O'Brien's accounts in Woodchester looking for payments of - or payments out of $\frac{1}{2}$ 100,000 or payments over $\frac{1}{2}$ 25,000 to any one individual or entity?

A. That's right, looking for a list of all transactions, I think, in excess of $\frac{1}{2}$ 25,000.

Q. Can I take it that what you at least wanted to satisfy yourself was that you were getting the full picture in relation to all transactions of Mr. O'Brien's?

A. Absolutely.

Q. Do you have the typed version of Mr. Armstrong's notes of the meeting of the 23rd, by any chance?

A. I don't actually, no. (Document handed to witness.)

Q. If you go to the and these have sorry, I beg your pardon, these have not been opened fully. I just wonder, you have seen the notes, have you?

A. I have, yeah.

Q. They haven't been opened fully. And if I just, the first page of them just records who was present?

A. mm-hmm.

Q. at the meeting, isn't that correct?

A. That's correct.

Q. Mr. Desmond spoke. Mr. Armstrong interrupted to make

a number of introductory points and Mr. Desmond then

said that there had been a discussion on Monday 13th

October from which it appeared that nothing had been

done which was detrimental to the integrity of the

licence. However because Denis O'Brien had raised

some other matters. Barry Maloney had some concern.

At this point Barry Maloney said they had understood

from the second discussion that there had been at least

an intent to make a payment and that Denis O'Brien had

said something to the effect that 'thank God it hadn't

gone through'. Dermot Desmond said he thought the

question did any action take place and that the answer

to this was 'No'. The next was anything contemplated -

any deed, direct or indirect done that would undermine

the licence? And again the answer was 'No'. If there

were any acts, the questions would be - were these

intended for ESAT Digifone or ESAT Telecom? And then

Mr. Rolf Busch intervened and he asked what facts are

before us? He referred to the McCann Fitzgerald

summary note and in particular to paragraph 3 in which

it was stated that the Chief Executive had reasonable

grounds for consideration that actions may have taken

place that would, or could plausibly be alleged by

third parties, to put into question the legitimacy of

the process whereby the company was awarded its licence to do business. He also referred to paragraph 8 of the advice which there was reference made to assurances. He said that for his part, assurances from Denis O'Brien, whatever they might amount to, would be short of what was enough. Rolf Busch was asked what did he suggest? He replied he saw two possibilities. The first was that the IPO would be postponed until after the Tribunal had taken place. The other possibility was that we would reflect the facts before us to the appropriate addressees in relation to the IPO. Michael Walsh intervened at this point to note that Barry Maloney had gone to Fergus Armstrong and that when the note of advice had been prepared Fergus Armstrong had not heard the news from both sides and might not have concluded as he did at this or at some point in the meeting. I did make clear that when writing our note we had the benefit of the contents of the conversation which had taken place between Denis O'Brien at the Malt House on the 13th October. Michael Walsh continued that we as directors have to make our decision/judgement, etc.. Dermot Desmond said words to the effect that 'surely we are not setting our own Tribunal here looking for all proofs that a Tribunal would.' as far as he was concerned he accepted the Chairman's word on all these matters and did not need to do further analysing of the

situation."

Now, "He suggested that if the IPO were to be put off, that the public would come to the conclusion that presumptions would arise which could themselves undermine the licence. They were important economic interests here and the company had to be careful as to what action it took. Dermot Desmond said he was personally satisfied to take the written representation of the Chairman and did not require to have any further action beyond the proposed letter from the auditors."

What was your understanding at that time in the meeting as to what you were looking for as a director of the company?

A. I mean, it's a bit hard to tell in the sense if we go back to the meeting of the 13th, we had actually agreed a kind of a way forward. Subsequent to that then, you know, there is a kind of a lot of discussion and, shall we say, I think on the meeting of the 20th, you know, we had agreed a wider set of criteria effectively for taking the thing forward. So I think my view at that time would be that, you know, we were still looking for the wider set of criteria but, you know, the concern that I think, you know, certainly I would have had, I suspect Dermot would have had too, is that, you know, shall we say, kind of, people weren't focusing on what needed to be done to come to a conclusion because, you

know, I mean, things aren't, you know, necessarily completely black and White. I mean the easiest thing to do was throw up our hands and say 'Well, we can't make any decision.' so we were really trying to agonise all the way through and I think you will see the question repeated to Fergus a number of times in the various minutes of, you know, 'what do we need to do to actually protect ourselves appropriately?' and, you know, it was very difficult for Fergus to give a precise answer because I don't think Fergus was really absolutely certain as to what would give adequate protection.

Q. But you yourself as a director - well, this wasn't a meeting of the board - but you were a director of this company.

A. Sure.

Q. There was a potential liability for the company and there was a potential liability personally for each director. Was that a matter which was weighing on your mind?

A. I think it was a matter weighing on everybody's minds around the table, yes.

Q. And you, as of this stage, the 23rd, still wanted to take matters further to satisfy yourself, is that right?

A. In term of taking matters further, certainly we wanted the letters, you know, from Denis. We wanted the

letter from Barry in relation to nothing inappropriate there, you know. We wanted the, I can't remember exactly what else he had at that point in time sorry the KPMG letter I can't remember whether at that particular juncture there was any of the other issues in terms of examining the Woodchester accounts or whether that came up later.

Q. That came up later and that's what I mean, that notwithstanding the views that were being expressed at this meeting by people in discussion, I am just interested in your own view; you still wanted to take matters further to be satisfied?

A. Well, I think 'we had already agreed various things that we should do beyond just taking Denis's word for it' is the best way to put it. Certainly I don't think there was ever any suggestion that those things shouldn't actually be done. We were in receipt of Fergus's advice at that time and, you know, we were going through that and really trying to get down to the end point of what we really needed to do to take the thing forward.

Q. Now

A. I mean, I think a lot of the inference really when you actually go through it, you know, if you take kind of Rolf Busch's questions, he is sort of saying, you know, 'will I hear from Barry that he doesn't believe anything happened?' and yet despite that he actually

went to Fergus, you know, for advice and in that context, you know, he must still be worried. That was a fair sense, I think, of the meeting.

Q. That it was being taken seriously, that the Chief Executive of the company took it seriously and he was going to take legal advice about it?

A. It was being taken very seriously in a sense that, you know, first of all the Chief Executive was taking legal advice but I think, more importantly, while the Chief Executive was saying he didn't believe anything had actually happened

Q. the Chief Executive was taking advice for the company?

A. sorry absolutely. I mean, we had asked, I think really from the beginning, that he would get proper advice for ESAT Digifone, you know, and that had actually arisen before we, you know, even became aware of these actual facts.

Q. And I think again just to understand your own state of mind at the time, and I don't have any intention of reading out of all of Mr. Armstrong's notes here to you, but on page 9 of the typed notes, if you go I think it's the third reference to you "Michael

Walsh: But the fact that Barry Maloney went to Fergus Armstrong means that he wasn't comfortable. We have to accept that it wasn't a totally trivial conversation and make our own judgement on the matter." Would that

be a fair reflection of what you said in your state of mind at the time?

A. I mean, I have no reason to disagree with Fergus's note, yeah.

Q. Now, I think if you return to page 3 of the notes and you see, after Mr. Desmond's interventions you see "Barry Maloney commented that Denis O'Brien had said the payments never went through and had said this to him a number of times and he saw no reason why this should be repeated but it made him quite anxious in the context of the IPO and the forthcoming Tribunal. He felt obliged to speak to the company solicitor and following that he asked whether the IPO could be deferred. Dermot Desmond said that Barry Maloney should have gone to the directors before going to the solicitors. He noted that there had been a strong emotional conflict between Barry Maloney and Denis O'Brien. Addressing Barry Maloney he said 'if you feel something is wrong, say it now. If you don't trust Denis O'Brien, say it now'. Rolf Busch referred back to the conversation in October/November of 1996 and to the assurances in August. He asked if Barry had accepted those assurances and noted that he still went to Fergus Armstrong. Were there worries? Was he taking Denis O'Brien's word that there had been no payment to the persons mention? To this Barry replied that he believed from what had been said that there had

been an intention to make a payment, since he had been told that a payment had gone to an intermediary. Rolf Busch said the bottom line was that the assurances given did not solve the problem and that the answers were not in the clear. Barry Maloney said that he had been given to understand what he had been given to understand was that there had been an intent and that the payment got stuck. Denis O'Brien interjected here saying "I actually didn't." Dermot Desmond intervened again, speaking for IIU. He said 'Unless somebody shows me evidence, unless somebody shows me, I am happy that there was no action taken and I am prepared to sign off on the IPO. Show me the money.' At this point Barry Maloney offered, as he had done previously in the meeting, to take those present through the events which had occurred in sequence. He said that this would take a few minutes. At this point Dermot Desmond said that he proposed to go off line and that someone could call him back at the end of the meeting.

Barry Maloney then read from his handwritten memorandum which he had brought to the meeting that has been opened here at the Tribunal, the points he raised.

A. Right.

Q. "Rolf Busch intervened at this point to remark that in spite of all assurances between August 25th and recently, Barry Maloney still thought it necessary to inform the board and he concluded that if Barry Maloney

still felt that necessary, this must be because he had some doubts.

Barry Maloney said August 25th was the first time that there were two consecutive meetings and at that stage they were not talking about the Tribunal. Then the IPO document had arrived and he saw the statement in the IPO document concerning the Tribunal. He went directly to Denis O'Brien and it was he who brought Michael Walsh into the loop.

John Callaghan then put the question to Denis O'Brien. 'Did the money go to an intermediary?' The answer given was 'It got stuck with Woodchester.' Rolf Busch indicated at this point that he found it difficult to believe that was being said. Denis O'Brien said "I didn't pay or promise". Barry Maloney said that his concern was that the payment had been made to an intermediary, not simply to a bank. He invited Michael Walsh to state what he understood from the meeting that had taken place between the three on blank October. Michael Walsh responded by saying "To be clear I came cold to the subject. There was talk of an intermediary."

Rolf Busch said he could accept Denis O'Brien's statement that no payment had been paid but he was looking at a situation where someone comes and makes

statements before the Tribunal."

Now, do you remember that sequence of events unfolding at the meeting on the 23rd October?

A. Pretty well, yes. I think as I indicated earlier, you know, I disagree with Fergus's interpretation of the question about the intermediary.

Q. I'll come to that in a moment. I just want to ask you I am not asking you to answer for Mr. Dermot Desmond, your fellow director nominated by IIU, can you confirm the sequence of events, that he made his contributions as he did in general terms and that he went off line and asked for somebody to ring him back afterwards?

A. That's right. I mean my recollection is Dermot was in Spain so he was on the other end of a mobile phone.

Q. Then, do you remember Barry Maloney reading out his list of items?

A. I do, yeah.

Q. I think they amounted to ten in all.

A. That's right.

Q. And do you remember Denis O'Brien referring to Woodchester 'got stuck with Woodchester' or words to that effect?

A. Words to that effect, yeah.

Q. And what you disagree with is Fergus Armstrong's note recording you as responding by saying, and he has it in quotation marks "To be clear, I came cold to the

subject. There was talk of an intermediary."

A. Yeah. I mean, sorry - when I say I disagree with Fergus I think his statement is just incomplete because what I was saying at the time was that I was fully aware of the fact there was an intermediary by that stage but I couldn't actually recall at that point in time whether it was the 13th or some subsequent actual date.

Q. Because the letter you wrote on the 14th, or the memorandum you sent to Barry Maloney on the 14th where you summarise matters, you say "In summary, that Denis admits to having had evil thoughts but has confirmed these thoughts were never brought to fruition."

Now, I don't want to get into any great discussion with you about your use of language but might I suggest to you that by using the term "Brought to fruition" would seem to indicate that apart from having a thought, something may have been done to give effect to the thought but that it never came to fruition?

A. Yeah, I mean, I don't actually agree with that interpretation. I mean, my clear recollection, you know, well certainly my understanding from reading my own memo, is that there was no mention of an intermediary prior to me writing that memo.

Q. Do you have any reason to believe that the introduction of an intermediary into the equation was introduced

maliciously by Barry Maloney?

A. I have no reason to believe that, no.

Q. And, in fact, it's something that you and your fellow directors took seriously, isn't that correct?

A. Absolutely.

Q. Because if something like was that introduced maliciously somebody would not an appropriate person to continue as Chief Executive of the company after all this was over?

A. Sorry - I mean, that's unquestionably the case.

Q. I beg your pardon?

A. It's unquestionably the case that, you know, if somebody did something like that maliciously. But, I mean, really, I rely on my kind of note to Barry on the 14th where, you know, if there had been a discussion about an intermediary, you know, I mean, I think it's fair to assume that that would have been described, you know, as part of what Denis had described to us the previous day.

Q. Would there have been discussion of a payment not going through?

A. Certainly I have no recollection of that at all, you know, the way that's actually sort of written there, you know, and I suppose understanding the way my own mind works to some extent, you know, it was very much a matter of, you know, there was talk about making a payment but no payment was actually made and it wasn't

really a matter of it, you know, kind of not going through despite the intention to make it.

Q. If I could just take you to the first paragraph, and again, I am only trying to tease this out for the assistance of the Tribunal, but as you say, I take it you'd be fairly careful in your use of language?

A. I think at the time we thought it was a serious issue so I probably would have been, yes.

Q. And if you go to the first paragraph of your memorandum. "Having had a chance to reflect on the meeting with yourself and Denis at the Malt House, I do not believe ESAT Digifone or ourselves have any reason to be concerned. Denis has indicated that in or about October, 1996, he intended to give money to Michael Lowry, told you he had done so but is adamant, in fact, that Lowry never received any money directly or indirectly from him."

I wonder does that assist you in your memory of anything happening on the 13th because it is a fairly careful use of language and it seems to give the impression that what was being said was that Mr. Lowry didn't receive money, not that nothing was done to get money to Mr. Lowry or attempt to get money to Mr. Lowry, would you agree?

A. I wouldn't entirely agree with you. I think it's very clear from that that, you know, Denis told us he had the intention to give money but that he actually did

nothing about it, didn't make any payment. You know, if there had been any suggestion of an intermediary at that point in time that, you know, I would have said something to the effect that, you know, in or about October '96, you know, he intended to give money to Michael Lowry but gave it to an intermediary and it didn't go through, whatever. I think the phrasing would have been very different if there had been a discussion about an intermediary.

Q. Well, I know it's difficult. How do you think you might have worded it if you understood that to be the case? I am just trying to get as full a picture?

A. That's what I thought I had just given you. Something to the effect that Denis had indicated in or about October, 1996 he intended to give money to Michael Lowry. He transferred this money to an intermediary but it did not go to Michael Lowry, or well sorry - there would have been some statement about that but is adamant, in fact, that Lowry never received it, presumably with an explanation as to why, i.e., where it got stuck. The fact that I have absolutely no mention of intermediary, you know, in that first paragraph, or indeed anywhere in the memo, really leaves me strongly to believe that the first I heard about intermediary was from Barry you know kind of later on on the 14th.

Q. And the first time you heard the suggestion that

Woodchester was the intermediary was when Mr. O'Brien informed the representative of the shareholders or the directors, whatever guise the meeting was being conducted under, isn't that correct?

A. That's correct.

Q. Did Mr. O'Brien ever deny to the directors that he had indicated that an intermediary was involved?

A. I mean, I don't think he ever denied that there was an intermediary. I mean, certainly all of the directors were of the view that there was a statement made that, you know, an intermediary was involved and the money got stuck with an intermediary.

Q. I think the directors were satisfied that that was said, is that correct?

A. Absolutely, yeah.

Q. Now, perhaps nothing turns on it but on Mr. Armstrong's note when he records you as making those remarks and you think it may be incomplete?

A. Yes, I believe it is incomplete.

Q. What do you think you did say?

A. Well, I think what I actually said was that there had been talk of an intermediary or was talk of an intermediary but I couldn't be sure at which stage it arose.

Q. Well, I take it that you were conscious at that time that you had sent the memorandum to Mr. Maloney on the 14th October?

A. I mean, a quick answer is I had actually completely forgotten about that memorandum until we came across it in the files when we were actually kind of getting information ready for yourselves.

Q. I can understand, as of now, but at the time, this was within a short timeframe?

A. No. I know it sounds kind of improbable in some ways, but the fact of the matter is, you know, I didn't have any notes with me. It was just a straight meeting so the question was just posed and, you know, I was trying to actually kind of think back as to when I had actually first heard about it. So, you know, it was in that context. I think very clearly, you know, if I had actually had the benefit of my notes or of that letter, when I would have presumably been able to have a clearer view at the time.

Q. But in any event, it doesn't alter your view or your belief that it was the view of the other directors that that statement was made by Mr. O'Brien to Mr. Maloney about an intermediary being involved and it getting stuck?

A. everybody accepts

Q. that that is

A. that that statement was made, absolutely.

Q. And there was nothing said by Mr. O'Brien at any of the meetings which would have altered that view which the directors held?

A. No. I mean, I think, you know, when the issue was discussed, you know, Denis identifies the intermediary as being Woodchester.

Q. Now, after the meeting of the 4th November, the question and answers

A. mm-hmm.

Q. what was done? I think you had a meeting on the 5th November, is that correct?

A. Sorry, we had a meeting on the 5th November and a meeting on the 6th November, you know, with a view to trying to, I suppose, kind of take matters forward as far as we could.

Q. And what was the thinking of you as a board member?

A. I mean, I think probably two things had actually come out, shall we say, kind of in the latter part, without specifying what dates. One was the ESAT Telecom board had to be, you know, fully informed effectively of everything that was going on. And, you know, when I say the ESAT Telecom board, including their advisers in relation to the IPO, because I think one of the very strong views that, you know, Fergus would have expressed was that, you know, 'they are the people who are really in the front line in relation to any issues and, you know, they should be making the judgement on their own behalf as opposed to, you know, expecting us to make the judgement for them.' so there was a fair bit of discussion, you know, around that time about the

process of communication, you know, with the ESAT Telecom board and then, you know, actually having a meeting of the ESAT Telecom board and I think at the end of the meeting on the 4th it was probably indicated that there was going to be a meeting of the ESAT Telecom board the next day.

Q. And did the board of ESAT Digifone arrive at any determination of these matters or was it decided just to inform the board of ESAT Telecom?

A. Well, I mean, I think what actually happened was I couldn't be precise on dates but what actually happened was, you know, people were still feeling uncomfortable because, you know, events had actually kind of taken place, you know, whether kind of real or otherwise, you know, but certainly we had been made aware of situations which, you know, were not capable of being proved as being, shall we say, kind of, without basis or without foundation. And in that situation, you know, we weren't the people who were going to benefit from the IPO so we didn't want to be the people who were left entirely with the decision making criteria.

Q. What was done?

A. Well, my recollection is that everything was done to make sure that the ESAT Telecom board and their advisers were fully informed of

Q. fully informed of all the steps that had been taken

by the board of ESAT Digifone?

A. Well, of all the steps and presumably of the conditions that ESAT Digifone actually wanted in terms of, you know, the disclaimer and, you know, the KPMG letters, etc.

Q. So am I correct in thinking that the board of ESAT Digifone itself did not arrive at any conclusion in relation to this matter other than to inform the board of ESAT Telecom?

A. I mean, the board of ESAT Digifone didn't reach a final conclusion really until, you know, the morning of the 6th November.

Q. Right. And what was decided on the morning of the 6th November?

A. What was decided on the morning of the 6th, I think, is reflected in my notes, was that on the basis of, you know, the sworn affidavit from Denis confirming that he had made no payment to Michael Lowry. Secondly, on the basis of what the changes in wording were of the IPO document. Thirdly on the basis of the letter from KPMG confirming no evidence of payment. Fourthly on the reclassification of the \$50,000 political subscription for tax purposes and fifthly a letter from David Austin confirming that \$50,000 had gone to Fine Gael. On the basis of those things, together with, you know, kind of confirmation effectively from ESAT Telecom that they were aware of the issues from the

ESAT Digifone point of view, that provided we had confirmation from each of the shareholders in ESAT Digifone, that they had not done anything to jeopardize the licence and provided there was a repositioning and highlighting in the disclaimer, then we wouldn't raise any objection to the issues of the IPO document.

Q. I think what was required of you, was it not, was to consent to the release of financial numbers or numbers for the purpose of the IPO document, that was all that was necessary, was it?

A. I mean, if - I think we were formally opposed to, you know, the document going ahead. I mean, we could have presumably withdrawn our approvals in some senses.

But in that sense, I mean it was really an agreement not to raise an objection. I mean, I think it's fair to say that we would have been fairly carefully advised as to how to express, shall we say, our release of the documents so as not to give rise to legal obligations or well, to minimise the legal responsibilities in terms of something untoward happening.

Q. I think you have informed the Tribunal in your statement that at the end of the process, you formed the view that while you did not like what you had heard there was no reason to disbelieve Denis O'Brien's assurance that is no payment or inducement had been given to Michael Lowry in the context of the award of the second mobile licence. You formed this view in

light of the fact that (a) Denis O'Brien had provide a sworn affidavit to that effect; (b) the auditors of KPMG had not discovered any such payment; (c) the bank statements from Woodchester contained no evidence of any such payment; (d) Barry Maloney confirmed that he was happy that no payment had been made; (e) you were happy that the licensing process had been conducted by people with integrity and it was structured in such a way as to preclude political interference, is that correct?

A. That's correct.

Q. That would seem to confirm this is the reason why you arrived at your view that you had not been informed of payments into an account of Aidan Phelan's of €407,000, isn't that correct?

A. That's correct.

Q. Or payments out of that account to a man called David Austin?

A. That's correct. The only context that David Austin ever surfaced in terms of any of these discussions was in relation to the payment to Fine Gael.

Q. Now, if I may turn to that briefly; did that particular donation occupy much of your time or did you address your mind to it over any extended period of time while the other matter was being discussed?

A. I mean, the other matter really seemed like a much more serious matter in the sense that, you know, the payment

or donation or contribution to Fine Gael seemed like a thing that was very foolish to be done. I mean, it was foolish for Fine Gael to ask for it, it was foolish for, kind of, you know, ESAT Digifone, you know, Telenor or any of the people involved to actually give it. But, you know, we were satisfied at the time that it was a donation, you know, to Fine Gael as opposed to something that, you know, was directly to, you know, Michael Lowry or indeed to any other individual.

Q. Did anybody address their mind to the question of the timing of it as a donation to Fine Gael?

A. Not particularly, in the sense that it was tied in more to an event. I mean, as we heard it at the time, it related to an event you know, approximately a year previously, was it? Sorry - two years previously, you know. It was a particular dinner, you know, in New York with, you know, kind of John Bruton as the guest of honour, whatever. So the focus really was on that, you know. Equally, well, I think it was clear that it seemed to post date the actual announcement of, you know, who had won the licence competition, if I put it that way.

Q. I just want to ask you, you know, about that briefly.

But and just to be fair to Fine Gael in this respect as well, you said it was foolish of Fine Gael to ask for it. Fine Gael, of course, came and gave evidence to say they didn't ask for it. It was David Austin who

approached Mr. O'Brien. You may not have been following that evidence. But that's neither here nor there at the moment

A. I think in the context of what we actually heard, it was David Austin, you know, on behalf of Fine Gael.

Q. Do you ever remember anyone raising the question of Mr. Austin being unwell at that time?

A. Oh, I think it was fairly well-known that Mr. Austin was quite unwell at that stage.

Q. Did anyone come up with the idea, 'Couldn't we go down the road and ask Fine Gael quietly whether they got the money?'

A. I think as was actually reflected in my notes, at one point in time there was a statement saying that, you know, a letter might be available from Fine Gael.

Q. Yes

A. So I mean, there was discussion about it. I mean, I think it was, you know, people felt very relaxed about it, you know, in the sense that, you know, people were quite comfortable it had gone to Fine Gael. So, you know, it was almost a matter of kind of tidying up loose ends really as opposed to, shall we say, something like the $\frac{1}{2}$ 100,000 type payment which, you know, was somewhat more difficult, is the best way to put it.

Q. Well, of course if you had approached Fine Gael it would have created a terrible problem at that time,

wouldn't it?

A. Well, just on the basis of what I have read in the papers, you know, Fine Gael seem to not be aware of the fact they had the money even though it was actually in their bank accounts, is the best way to put it.

Q. They were aware they had money. They were aware they had a donation from Mr. David Austin. They were unaware that they had a donation from Telenor or ESAT Digifone or anyone else?

A. Sorry, that's obviously absolutely the case but, I mean, you know, I suppose our judgement at the time which, you know, even though Fine Gael may not have known it, was that the money had gone to Fine Gael and, you know, I think that's known to be correct.

Q. I just want to be clear about something else you were referring to a moment ago. The licence was not awarded in October of 1995, isn't that correct?

A. No. It was formally awarded in May of '96.

Q. After fairly extensive dealings with the Department, isn't that correct?

A. That's correct.

Q. What had happened in October was that it was announced that the winner of the beauty contest was the entity which became ESAT Digifone, isn't that correct?

A. That's correct.

Q. But there was no question of the licence having been awarded by, of course, a minister couldn't award it or

by a cabinet Sub-Committee or by the cabinet and it was not in fact awarded until the 16th May, 1996, isn't that correct?

A. That's correct.

Q. Which was some six months after this particular donation was made?

A. That's correct.

Q. Now, if I may turn to the other issue which Mr. O'Brien raised with Mr. Maloney and that was the second $\frac{1}{2}$ 100,000. Was there ever any inquiry into that?

A. No. There never was. You know, I mean, I think it's reflected in my notes on one occasion that Barry is speculating as to who the other 100,000 might have been for. But you know, I mean Barry was never able to identify anybody who it might have gone to.

Q. And there was no further inquiry made?

A. Well, there was no further inquiry because, you know, I mean Barry in some sense was the person closest to the whole process and he couldn't even think of a potential recipient.

Q. I just want to go through this again and this is not criticising you or any member of the board for the views they arrived at because the Tribunal will arrive at its own view on these matters, but the position having moved from being very serious when Mr. O'Brien and Mr. Maloney spoke to you on the 13th, and whether it was on the 13th or the 14th that Mr. Maloney told

you of the intermediary, it wasn't until about the 20th that the bravado or joke element entered into the explanation, am I correct?

A. That's correct.

Q. It wasn't perhaps until the 23rd that Woodchester entered the equation as being the intermediary, am I correct?

A. I think so, yes.

Q. Well, I won't hold you to that, don't hold me to it, but it was at a later time, isn't that correct?

A. Absolutely, yeah.

Q. And the question of the second $\frac{1}{2}$ 100,000 was then only referred to by Mr. O'Brien as being for effect, in that he was doubling up to try and get Barry Maloney to do something and in the light of all of these explanations unfolding as they did, was it the information you got from the Woodchester bank accounts of Mr. O'Brien's that gave you sufficient comfort I know you have always been unhappy about it but gave you sufficient comfort to proceed as you did on the 5th and 6th November?

A. I mean, it wasn't Woodchester on its own. It was actually, you know, kind of a combination of things.

Q. Yes, I know all the other matters, the affidavit but all of these were being put in position as you went along. It probably hadn't crystallised into an affidavit initially, it would be some sort of letter

from Denis O'Brien, isn't that correct?

A. That's correct.

Q. The inquiries being made by KPMG on their audits; the inquiry being made by Mr. Maloney into Digifone to see if any payments had been made. These were all evolving isn't that correct?

A. That's correct.

Q. What happened over and above these matters, even though people were still uncomfortable and wanted to pursue the matter further, was the information which was gleaned from the Woodchester Bank accounts, would you agree?

A. Yes, absolutely.

Q. And I am not suggesting that you were ever totally comfortable with the situation, but that you were sufficiently comfortable to proceed as you did, was that the information received from the Woodchester bank which brought you ultimately to the position you arrived at on the 6th November?

A. I mean, that's correct, but as part of a totality of others. So, yeah.

Q. Now, I think you wrote a number of letters then, didn't you, on behalf of IIU?

A. Sorry, the ones to the different shareholders?

Q. Yes.

A. Yeah.

Q. And we have had these opened. You wrote a letter to

Telenor inquiring of them if they had done anything which could have affected the licence. I think you wrote to Mr. O'Brien in the same vein. But curiously enough, you wrote to Mr. Maloney, why?

A. Well, I think what actually happened, you know, I mean, suffice to say, you know, Barry has actually asked me why did his letter come a day later? You know, my recollection is that I hadn't actually written to, you know, Barry. I had written to effectively, kind of, Denis and to Arve on behalf of Telenor and then, you know, in the sort of final meeting on the 6th, you know, I am reminded, in fact I think from my notes, by John Callaghan that we were supposed to get the letter from Digifone as well. And, you know, I hadn't actually done anything about getting that. So, you know, I simply issued the exact same letter to Barry that I had actually issued to the others.

Q. So, in fact, when you were writing to Barry Maloney, you were writing to him as Chief Executive officer of ESAT Digifone and not in a personal capacity?

A. You know, I suppose in his capacity as Chief Executive Officer, director of the company, yeah, absolutely.

Q. Because he hadn't been, other than for a short period, involved in the bid in relation to it - there was no suggestion that he had had any involvement in the licence process. He didn't become Chief Executive Officer until after the award of the licence, isn't

that correct?

A. None at all. This was simply and I mean I gave Barry - or sorry - I wrote to Barry in the exact same letter as I had written to the others. It wasn't intended to infer anything in terms of his involvement one way or the other. It was simply, you know, I had been reminded at the meeting that, you know, the confirmation was to come from ESAT Digifone as well and

Q. and it wasn't to be in any way interpreted as being a suggestion that he had done anything to affect the licence by bringing serious matters to the attention of board members?

A. Absolutely not at all. It was looking for the same confirmation from him as, you know, we were looking from everybody else and I think the wording of the letter basically gives an undertaking from us to them that we have done nothing. So it was intended to be, shall we say, a completely mutual undertaking, if you put it in that fashion.

Q. I suppose without the explanation and looking at it from the outside one could be forgiven for taking the view that it was firing a shot across his bows for having brought the troublesome matter to the attention of the board?

A. I don't think that would actually be fair, you know. Shall we say - I mean from a very early stage there

was to be confirmation from, you know, ESAT Digifone that, you know, there was nothing kind of untoward in their, you know, kind of operations and, you know, the simplest thing was to actually issue the same letter to everybody as opposed to doing a special letter.

Q. You have clarified the matter. I think you have informed the Tribunal, and this relates to Telenor approaching Fine Gael in 1998, isn't that correct, that you have noted the evidence of John Fortune that he contacted you on or about February 11th 1998, to discuss the possibility of Telenor going to see Fine Gael. While you have no reason to dispute this, you have no recollection or note of such a contact.

"As John Fortune has stated in his evidence, I would have had no reason to oppose such an action. However, I would have expected that before any meeting with Fine Gael took place it would have been discussed and agreed in advance between Arve Johansen, Denis O'Brien and myself. My recollection is that I first became aware that Telenor had met Fine Gael when I was given the cheque for i£1/233,000 made payable to Telenor from Fine Gael together with a letter from Arve Johansen dated 24th March 1998. I was very concerned as to what had happened and had resulted in Fine Gael deciding to send a cheque in the sum of i£1/233,000 to Telenor. In October/November 1997 the \$50,000 donation to Fine Gael

had been discussed at length and the board of Digifone were satisfied that it had been a political contribution. The fact that Fine Gael now wished to return the contribution raised concern as to whether there was other circumstances or actions that we were not aware of. This was compounded by the fact that Telenor were not prepared to disclose on the grounds of confidentiality what had actually happened between themselves and Fine Gael. I learned in June 1998 from Denis O'Brien that the cheque had been returned to Fine Gael."

Now, about this particular donation: What was your understanding from the moment you heard of it?

A. I mean, my understanding from the moment I heard it was that, you know, and you know, I'll use your words I suppose, that David Austin had actually looked for a contribution on behalf of Fine Gael and that, you know, we had agreed to actually make the payment and, you know, when I say 'we', you know, I mean Denis maintained it was a Telenor decision, Telenor maintained it was a Denis decision in some senses.

And from our point of view, it didn't seem to be terribly relevant whose decision it actually was. The fact was, you know, that a payment had been made or a donation had been made to Fine Gael and, you know, it had been done by, you know, one or other of the shareholders, collectively or individually and it had

been reimbursed by the company.

Q. Was it your view you accepted it was always a Digifone donation as you understood it?

A. Well, in the sense that, you know, we fully accepted that ESAT Digifone had actually paid the amount or reimbursed it to Fine Gael. Certainly the way it came out at some of the meetings, you know, suggested, I mean, some of discussions you have actually had in here where effectively Denis would have said 'it was actually kind of Telenor on their own' and, you know, Telenor would have said that they were facilitating Denis. But from our point of view, discussing the thing at the time, you know, kind of the argument in some sense between Telenor and Denis was absolutely irrelevant. The fact of the matter was that, you know, one way or the other, ESAT Digifone had, you know directly/indirectly made a contribution to, you know, Fine Gael via David Austin.

Q. Thanks.

CHAIRMAN: Anything Mr. Fitzsimons?

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FITZSIMONS:

Q. MR. FITZSIMONS: Just for the avoidance of doubt, Mr. Walsh, arising from something Mr. Coughlan put to you, you are aware now from the evidence that, in fact, Mr. Austin was fully authorised by Fine Gael to collect

monies in relation to the dinner in New York this is the evidence.

A. That's my understanding.

Q. You state in your evidence that Mr. Denis O'Brien could cajole people into doing things?

A. He is a very good motivator.

Q. And even on occasions, I am sure not all the time, people would find themselves doing things that they wouldn't do if they were left alone?

A. That's quite possible.

CHAIRMAN: Mr. McGonigal?

MR. MCGONIGAL. I am not clear, Mr. Chairman, we were furnished this afternoon with documents of April '98. I don't know whether it was an oversight or not. I am not sure that I even understand them. I take it Mr. Coughlan has decided to do them at some other stage. They seem to refer to the Telenor material.

MR. HOGAN: Mr. Chairman, perhaps I could endeavour to assist Mr. McGonigal in that regard. The position is that this - we were asked, Mr. Walsh was asked for notes in relation to the events of October/November '97 and of course we duly gave those notes to the Tribunal. I then, in consultation with Mr. Walsh this morning, Mr. Walsh drew to my attention the fact that he had four pages of notes or three and a half pages of notes in respect of the events of April '98 in respect

of his dealings with Arve Johansen and Telenor in relation to the \$50,000 payment. And I then informed Mr. Coughlan of that fact, and indeed my solicitor, Ms. Rackard, furnished Mr. Davis with copies of those particular notes. We had never been requested to furnish the Tribunal with those notes. We have done it as a matter of courtesy. I don't think there is anything in particular in those notes, but just to be clear on the position.

CHAIRMAN: Well, it doesn't seem anything has been raised in the course of this morning's examination in relation to them.

MR. COUGHLAN: I haven't had an opportunity to read them.

CHAIRMAN: I haven't myself. Well, we'll cross them if we come to them, Mr. McGonigal. It seems nothing that affects anybody has transpired on foot of them.

MR. MCGONIGAL: I haven't been able to read them myself. I just wondered what their status was. They were given to us. They haven't been dealt with. I presume they will be dealt with at some time if they are necessary to the inquiry.

A. If I might comment, Chairman? I mean, basically you know, they are just notes of a few telephone

conversations that I had with Kevin O'Brien of Kilroy's in relation to the kind of to-ing and fro-ing of, you know, 'what to do with the cheque?'. So, you know, they are just kind of contemporaneous notes of those conversations. You know, I am not sure that there is actually much turns on them but that's for other people to decide.

CHAIRMAN: I'd rather spare you having to come back again, Mr. Walsh, so perhaps the members of my legal team might just go through them briefly to see if anything does transpire. But for the moment, Mr. McGonigal, if matters arise on foot of the evidence that Mr. Walsh has been given, perhaps we might deal with that.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL:

Q. MR. MCGONIGAL: There is just one matter I want to ask you about, Mr. Walsh, and that is in relation to Mr. Maloney's resignation in 1996. Can you assist me in relation to that? He gave evidence to the Tribunal that he had resigned for personal reasons. First of all, do you recollect that period?

A. I mean, I recollect it reasonably well, you know, not in phenomenal precision, obviously. You know, the relationship between, I think, Barry and Denis had been deteriorating on a fairly, shall we say, significant level. There were lots of different arguments and

really at this stage I couldn't remember what all the arguments were actually about, but it really led up to a situation where, you know, in or about kind of December '96, Barry, you know, shall we say left the office and effectively resigned from the company.

Q. And when he gave evidence he said it was because he wanted to preserve his friendship with Denis O'Brien in the context of the timing of his resignation and what was happening to the company. Would that accord with your own view?

A. Well, I am not sure that anybody would have perceived it as, you know, a resignation to actually protect a friendship. You know, I mean, I think the friendship in some senses was already gone by that point in time. Certainly there was phenomenal tension between the two of them. It obviously was a very critical juncture in relation to the company itself because I think the company, from recollection, was going through a syndicated debt issue, you know, and it was obviously important that, you know, we have a proper management team in place.

Q. I think you said a syndicated bank loan was involved at that time?

A. That's my recollection, that there was a syndicated bank loan being organised by, I think AIB and ABN AMRO

Q. The timing of the resignation as such was a critical

period for the company?

A. It was a very critical period for the company. I mean, the company was still in a very early phase. Obviously it needed, you know, the sort of syndicated finance.

I mean, I can't remember how much it was for but I mean you are talking about, you know, raising maybe, kind of at least as much again as the equity component and probably larger amounts. So it was quite critical.

Q. I think, in fact, Mr. Desmond was instrumental in getting him back and we have notes in relation to that.

The other matter that I just wanted to ask you about; in relation to the IPO of ESAT Telecom, what was the position so far as a possible IPO of ESAT Digifone was concerned?

A. I suppose there are possibly two points to be made. You know, there always was some element of friction between, let's say, ESAT Telecom and ESAT Digifone as to who would do the IPO. You know, I think it's fair to say that kind of the, the management of ESAT Digifone would like ESAT Digifone to do the IPO and obviously Denis was very anxious that ESAT Telecom would do the IPO. In the context of, shall we say, the events of whatever it was, October/November of '97 I think it would have been very difficult for, you know, us as a board, certainly for me personally and I am sure equally for Dermot, to actually stand over an IPO of ESAT Digifone because, you know, if anything had

actually happened in relation to the licence, then you were going to be directly in the firing line.

Whereas, you know, the reality is that was less of an issue in the context of ESAT Telecom.

Q. So if an IPO of ESAT Telecom had been delayed it would have been affected a possible IPO of ESAT Digifone?

A. Well, I mean as a practical matter in the context of, you know, all the investigations that had gone on, you know, they were even more meaningful for ESAT Digifone directly, you know, in the context of ESAT Digifone floating than they would have been for, you know, kind of ESAT Telecom. So, you know, in that context, I think, you know, shall we say, everything was relative but you wouldn't have been rushing out to do an ESAT Digifone flotation at that stage.

Q. Just one other matter I should have asked you in relation to the resignation; am I right in understanding that as part of the negotiations that took place at that time that IIU was asked for a put option and refused it as part of the negotiations?

A. I think it wasn't just IIU. I think all the shareholders were asked for a put option.

Q. And was it refused?

A. It was refused, yeah.

Q. Thanks, Mr. Walsh.

MR. HOGAN: No questions.

MR. COUGHLAN: Just two matters, Sir.

THE WITNESS WAS FURTHER EXAMINED BY MR. COUGHLAN:

Q. MR. COUGHLAN: First of all in relation to the period of Mr. Maloney's resignation, he didn't threaten to resign, he actually resigned?

A. That's right.

Q. And with effect from the moment he wrote his letter?

A. Yeah. I can't

Q. And he came back as Chief Executive officer without any of the matters he wished to have dealt with being dealt with and they worked their way out subsequently in discussions with Mr. Callaghan as a director and with the board, isn't that correct?

A. I mean, I think that is correct. I think certainly the thing was, let's put it this way, 'it was calmed down' is the best way to put it and, you know, there were kind of, as I recall, reasonably lengthy discussions through, I think it was kind of the following month.

Q. And how was he viewed as the Chief Executive Officer?

A. Sorry?

Q. How was he viewed?

A. Oh, I think Barry was a very good Chief Executive. He was a good manager.

CHAIRMAN: Just on that, Mr. Coughlan: Do you agree with his evidence that in the course of the immediate

process of his resigning and the negotiations he did decline an offer of $\frac{1}{2}$ 250,000 from your colleague Mr. Desmond, although obviously other terms were eventually arrived at, but he came back without accepting that facility?

A. That's absolutely true.

MR. COUGHLAN:

Q. Just there - and just to deal with it: The suggestion that has been made is that Mr. Maloney was attempting to derail or scupper the IPO of ESAT Telecom. Now, in response to Mr. McGonigal asking you a question a moment ago when you were asked about the question of ESAT Digifone or ESAT Telecom being the first to IPO, your response was that for yourself and Mr. Desmond as directors the matters which had arisen made it far more difficult for an IPO of ESAT Digifone because of the information which was now available to the directors of ESAT Digifone, is that correct?

A. That's correct.

Q. And the necessity to make material disclosures, isn't that correct?

A. That's correct.

Q. And it was your view that the same was not necessarily the situation for ESAT Telecom because they had not conducted this process?

A. Well, more in a sense that, you know, looking at it purely from my personal point of view.

Q. yes, your personal point of view?

A. ESAT Telecom was one step removed and, you know, we had gone through a fairly rigorous process but

Q. which you felt, subject, of course, to any advice you received, but which you felt could amount to information which you would have had to disclose in an IPO of ESAT Digifone, or at least to people involved in the preparation of the Prospectus of an IPO for ESAT Digifone?

A. Certainly, I mean, you would have had to have, you know, a completely open discussion as part of any verification process. But, I mean, there was that tension, shall we say, as to, you know, who was going to do the IPO.

Q. Thank you.

CHAIRMAN: Thanks very much for your assistance, Mr.

Walsh. That concludes, I think, today's sitting and it is anticipated that some other witnesses will be available for eleven o'clock tomorrow as I understand.

Thanks very much.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
THURSDAY, 12TH JULY, 2001 AT 11 A.M.