

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 13TH JULY,  
2001 AT 11 A.M.

MR. COUGHLAN: Mr. Owen O'Connell.

MR. COLLINS: If I might apply for representation on  
behalf of Mr. Owen O'Connell and the firm of William  
Fry on the usual basis.

CHAIRMAN: A limited order for representation on that  
basis, Mr. Collins.

OWEN O'CONNELL, HAVING BEEN SWORN, WAS EXAMINED AS  
FOLLOWS BY MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. O'Connell, I think you are a  
solicitor in the firm of William Fry solicitors, isn't  
that correct?

A. Yes, I am.

Q. And at the period that is being looked at by the  
Tribunal I think you were the solicitor in that firm  
who was dealing with the affairs of ESAT Telecom, isn't  
that correct?

A. Myself and Gerry Halpenny, yes.

Q. Now, I think from apart from being a solicitor, could I  
just ask you did you have any other interest in ESAT  
Telecom at the time?

A. Yes, I had a small number of shares and I had some  
options.

Q. Now, I think you, at the request of the Tribunal, furnished to the Tribunal documents, primarily notes which were made by you at the time as matters unfolded, isn't that correct?

A. Yes.

Q. I think your firm is no longer the firm acting for the company and that Messrs. McCann Fitzgerald are the solicitors for the company now?

A. Yes, some of my colleagues are doing some work, primarily in a property area, but McCann Fitzgerald are representing the company in this matter and many others.

Q. And in many other matters?

A. Yes.

Q. The company, along with other ESAT interests having been taken over by British Telecom, isn't that correct?

A. Yes.

Q. Now, I think you furnished a Memorandum of Proposed Evidence - and you say that "The memorandum was made at the request of the Tribunal to the best of your recollection, based primarily on documents reviewed by you and which, subject to privilege claims, are enclosed herewith."

Now, those privilege claims, I hasten to add, are claims which were made by the current client of McCann Fitzgerald, isn't that correct?

A. That's correct.

Q. You say that it is not the case that you have reviewed all documents in existence relevant to the matters dealt with herein and your recall of certain events and circumstances may accordingly be open to correction, is that correct?

A. Yes.

Q. I think you have informed the Tribunal that you first acted as solicitor to ESAT Telecom Communications Limited, now a subsidiary of ESAT Group Limited, in or about 1991 and you continued to represent ESAT Telecom Communications?

A. ESAT Telecom Group.

Q. And companies within it until its acquisition by British Telecommunications Plc in the year 2000?

A. Yes.

Q. William Fry continued to provide legal services to ESAT Telecom Group Limited in certain respects but you are not directly involved in these matters and the firm is not representing the group in matters pertaining to the Tribunal, is that correct?

A. Yes.

Q. Now, I think you have informed the Tribunal that ESAT Digifone won a competition for the grant of a second mobile phone licence in the State on the 25th October, 1995 and embarked on a roll-out process whereby it created a mobile phone network, marketed it and operated it and the launch occurred in March of 1997,

is that correct?

A. Yes, that is correct.

Q. Now, I think you have informed the Tribunal that sometime after the launch Denis O'Brien confirmed his intention of proceeding with an IPO of ESAT Telecom Group and set autumn 1997 as the time at which it would occur, is that correct?

A. Yes.

Q. Could you just assist the Tribunal there, Mr. O'Connell, as to when you think that Mr. O'Brien informed you of his intention to float ESAT Telecom?

A. I can't recall exactly. As a rule of thumb one would expect the flotation process, from determination by the company to begin it until actual flotation, to take approximately six months and it can be quite difficult to do it in less. But I think it had been Mr.

O'Brien's intention for more than a year to float, without specifying the date, but he probably would have set the date within his immediate managers and advisers group about six months before the flotation actually occurred.

Q. That would be roughly about six months before November of 1997?

A. I would place it at April or May at a guess, yeah.

Q. Now, I think for the purpose of that flotation some degree of cooperation from ESAT Digifone was required for the ESAT Telecom flotation, is that correct?

A. Yes.

Q. This was mainly because certain data concerning ESAT Digifone would have to be included in the ESAT Telecom's Prospectus due to its shareholding in ESAT Digifone forming a large proportion of ESAT Telecom's overall value?

A. Yes, and I would add that there were probably two other reasons, one of which was the clause in the Shareholders' Agreement which actually required ESAT Digifone's consent to financial data being revealed and the other, that if the ESAT Digifone shareholders had violently opposed it, that opposition would have to have been negotiated and dealt with because it could have disrupted the process in practical ways.

Q. There were two issues, and I think we have heard before, that because ESAT Digifone was a major asset of ESAT Telecom's that you needed or sorry that the company needed release of financial data for inclusion in the Prospectus, and the other was the attitude that the other shareholders might take might require negotiation to enable the IPO to go ahead?

A. Yes.

Q. Now, I think you have informed the Tribunal that on the 22nd October, 1997 Denis O'Brien and Aidan Phelan called to see you. They told you that Barry Maloney had made an allegation as to a statement made to him by Denis O'Brien to the effect that he had made payments

to two individuals, one of whom was Michael Lowry, in respect of the licence. You took notes of the meeting and I think that's document number 1, isn't that correct?

A. Yes.

Q. I think you have informed the Tribunal that you discussed the implications of the allegation for the IPO. Denis O'Brien insisted there was nothing of substance to the matter, that he had made no payment to Michael Lowry, that the allegation would be destructive and would damage ESAT Telecom group. It was your understanding that the matter was still regarded as an internal ESAT Digifone matter being discussed at ESAT Digifone board level and that advice was being taken from Mr. Fergus Armstrong of McCann Fitzgerald, is that correct?

A. Yes.

Q. Now, I think this note has been opened already, so I don't intend opening each and every document other than ones that we haven't opened previously.

A. Okay.

Q. Could I just ask you; Mr. O'Brien was coming to you as Chairman and Chief Executive, I suppose of ESAT Telecom, because you were the solicitor for that company, isn't that correct?

A. Yes.

Q. Of course he was also Chairman of ESAT Digifone so he

was in a position to inform you that this was still

being viewed as an ESAT Digifone matter

A. yes.

Q. at that stage. In what capacity was Mr. Phelan?

A. I understood Mr. well Mr. Phelan, in my understanding, had really two roles at this point. One in which I would say he was probably not acting was Mr. O'Brien's personal accountant and he did, as I understood it, both accounting and company secretarial-related work for Mr. O'Brien. The other, in which I did regard him as acting at this point, was as a consultant to the IPO.

Q. Now, I think we saw reference in that note of the meeting of the 22nd and I think you were present when I asked Mr. O'Brien about the question of informing the board and Mr. O'Brien's view, that's of course, informing the board of ESAT Telecom?

A. Yes.

Q. Isn't that correct? And at this time it was still being viewed as a Digifone matter and the board of ESAT Telecom were not being informed at that time, of course, other than the common directors would have some knowledge of it, isn't that correct?

A. Yes.

Q. Now, I think you have informed the Tribunal that on the 27th or the 28th October you received a copy of a letter from Telenor to ESAT Digifone expressing concern

regarding the potential liability of ESAT Digifone

board members in relation to the IPO.

A. Yes.

Q. And that's document number 2.

A. Yes.

Q. I don't think this particular document has been opened, so it's addressed to ESAT Digifone and it's 'Board Members Insurance'.

"With reference to ESAT Telecom's Holdings coming IPO in the United States of America and in several other countries, I would be grateful if you could provide a legal opinion regarding the ESAT Digifone board members' potential liability in relation to the said IPO and to what extent such liabilities will be covered under any applicable insurances, the details of which I would also appreciate to be informed of.

The opinion should be available to the forthcoming board meeting on the Thursday, 30th October, 1997."

And I think that was then copied to all of the directors of ESAT Digifone?

A. Yes.

Q. And would you have received that particular letter from one of the common directors?

A. Yes, looking at the faxed data at the top of the letter it appears to have come to me from Communicorp fax on the 28th.



Q. Now, I think there has been a fair amount of evidence given at the Tribunal about various meetings which occurred in October of 1997, that is, meetings between Mr. O'Brien and Mr. Maloney on the 8th October, meetings between the two of them and Mr. Walsh on the 13th October. You were not in any way involved in any of those?

A. No. I have since seen Mr. Walsh's note of a call from me on the 21st October, which is the earlier reference to me in any of the documentation so far. I can't recall making that call. I don't dispute Mr. Walsh's record of it but the first matter of which I have a record is this 22nd.

Q. You were being briefed for the first time, you believe, on the 22nd?

A. Yes. And I suspect the call the previous day would have been something very general. I am speculating now, but I would suspect that Denis may have made a very general call to me saying 'Look, there is a problem, would you ring Michael Walsh and talk it over with him'. But I wouldn't have known very much about what was going on until the next day, the 22nd.

Q. Now, I think you had no role to play, or did you, in the meeting of the ESAT Digifone shareholders on the 23rd?

A. No, none at all.

Q. Sorry the 20th - the 20th was the ESAT Digifone

shareholders meeting, if I could describe it that way,  
and the 23rd was a board meeting which wasn't a board  
meeting?

A. I didn't have a role in either of those meetings  
although I think I probably I would have been aware,  
looking at my notes of the 20th sorry of the  
22nd I think I would have been aware that there was  
going to be a board meeting of ESAT Digifone the next  
day, but I didn't have any other role in it.

Q. Now, I think on the 30th October, which is your next  
note, at about 5.30 p.m. Mr. John Callaghan, Mr. Leslie  
Buckley and Mr. Aidan Phelan called to see you and  
inform you of the allegations made by Barry Maloney,  
isn't that correct?

A. Yes.

Q. And I think you have informed the Tribunal that a  
discussion ensued as to the consequences of allegations  
and what might be done regarding them. You were given  
copies of McCann Fitzgerald's memorandum of the 16th  
October, their letter to the board of ESAT Digifone on  
the 29th October and of handwritten statements by Barry  
Maloney and Denis O'Brien. Your note of the meeting,  
together with these documents, are all at document 3.

The handwritten notes on the copy of McCann  
Fitzgerald's letter are yours, probably added at or  
immediately after the meeting?

A. Yes.

Q. Of course we don't have McCann Fitzgerald's letter?

A. No.

Q. Am I correct, just in understanding what was happening here, and this appears to be so from the evidence of Mr. Callaghan and Mr. Buckley, that they, as common directors, were coming from ESAT Digifone to inform you, as solicitor for ESAT Telecom, of what had transpired at the directors meeting on the 23rd or

A. yes. It was very much a formal and on-the-record act by which ESAT Digifone was sharing the problem, or perhaps passing the problem, to ESAT Telecom through me.

Q. Through you. And just quickly going through the note, because I think the first note is that at number 1:

"Asking questions (possibly before communicating formally to ESAT Telecom board and underwriters).  
Next Tuesday - Dublin - Denis O'Brien by video conference. Inquisitor from McCann Fitzgerald - no comment, opinion or judgement (not Fergus Armstrong himself)."

I think the decision must have been made to have this inquisition or question and answer session and that you were being informed of this, is that correct?

A. I think so. Actually when I went back to that note I thought it was me saying that was what I thought should happen. But, in fact, having seen other documentation

it appears that decision had already been taken, yes.

Q. Now, the second one:

"KD consumed with rage - pull IPO over and over."

Can you remember what that was about?

A. It was either John Callaghan or Leslie Buckley telling me that at the board meeting, presumably that day, Knut Digerud had been very angry, that he, and presumably Telenor and ESAT Digifone, had been put in that position and was insistent that preventing the IPO, pulling it or stopping it, was the course that should be taken.

Q. Now, passing over item number 2, that's a technical matter which was unrelated, I think. Item number 3:

"Payments" Denis O'Brien/BM discussion and Fine Gael. Intermediary Woodchester? Other 100K? "Payments stuck" etc. per Fergus Armstrong letter.

Arve checking re Fine Gael money. Inquiry of DFTA?

John Callaghan - Telenor insisted and John

Callaghan/Leslie Buckley agreed to consult William Fry.

Per Fergus Armstrong - "common" directors.

Statement from Woodchester definitely needed.

Payment made and getting stuck.

Denis reference in board meeting to Woodchester as intermediary. Had thought about making payment but chose not to do it - this per John Callaghan.

Michael Lowry no expectation of payment - never any discussion.

Second 100K.

Process of further investigation.

Prospectus being issued Tuesday week.

Printed Monday week. Owen O'Connell letter held to Monday.

Owen O'Connell consider matter Friday, consult Chairman Saturday. Write board on Monday.

John Callaghan notifications quote from 2 x statements."

Then some numbers.

Now, I don't want to get into Mr. Armstrong's letter because it hasn't been furnished to us but can I take it that from the information you were able to glean from Mr. Armstrong's letter and from what was being told to you by the common directors, that you now had to give consideration to two issues, I suppose; one was the political donation and David Austin's position in that and what was to be done about it and the other was the conversation which took place between Barry Maloney and Denis O'Brien, what had transpired at the directors meeting on the 23rd, the references to 'getting stuck with an intermediary' and 'Woodchester'.

A. Yes.

Q. These were all matters you now had to take on board and consider, isn't that correct?

A. Yes, although I would have regarded myself as rather

less responsible for the Fine Gael matter and rather more for the other.

Q. Yes. But whether you liked it or not, you had been given the information as solicitor to the company, isn't that right?

A. Yes, I was, and expected to pass it on to those who didn't know it.

Q. Of course. As solicitor to the IPO company, just as some of the directors of ESAT Digifone seemed to have a concern about their own personal liability, both collectively and individually, the directors of ESAT Telecom would have found themselves in the same position, perhaps, depending on what information was available to them?

A. Yes.

Q. At any given time.

A. Yes, and what they did with it.

Q. Now, can you tell me why was Aidan Phelan at that meeting with Mr. Callaghan and Leslie Buckley?

A. Again, I have no specific recollection. I would, I think, have regarded him as being there as an adviser or consultant to the IPO. Neither Leslie Buckley nor John Callaghan were intimately or significantly engaged in the IPO and clearly this information had a potentially major impact on the IPO. So it would have made sense to have someone there. I think it was also known that Aidan Phelan perhaps had been, and certainly

was going to, had been in and certainly was going to the United States and therefore would have been a contact point with the people there.

Q. I think that is correct. He did go to the United States, isn't that correct?

A. Yes.

Q. And I am not in any way trying to inquire or criticise as to why he should have been there, but I just want to ascertain from the Tribunal's point of view would it have been the case that Mr. Phelan, because of his attendance at this meeting, was reasonably up to speed with what was happening in ESAT Digifone, the matters which were being reported to you?

A. He would probably have had as much information as I did except that he may not have read the McCann Fitzgerald letter, which was quite long and technical.

Q. Now, of course, the significance of the Woodchester reference, I think from your note, wasn't lost on you, and you took a view that or was it you who took the view that a statement from Woodchester would be necessary?

A. I can't recall. I wouldn't have been in any doubt but that one was necessary. So even if someone else had said it I would have formed the view anyway.

Q. Now, you believe that it was on the 30th October you were first of all informed of the political donation, although you may have heard about it previously, but

you think it was on the 30th?

A. Yes, I did make an effort to recall and I also checked my notes. I could find no earlier reference and I couldn't recall being told earlier but it's possible I was. It may have been that at the 22nd meeting. It would have been mentioned. But, as I said a few moments ago, it was always a secondary matter for me and I would have ascribed that importance to it.

Q. Now, I think there is a note at tab 4 of your documents, Mr. O'Connell, with the heading "MW" I presume Michael Walsh?

A. Yes.

Q. It's undated. Can you be of any assistance to the Tribunal as to when that note was made?

A. I believe it was made before I went to the United States on Saturday 1st November and it was definitely made, for an obvious reason, after the 23rd October, because it refers to the 23rd October meeting.

Q. I think you started preparation for going to the United States

A. on the 31st.

Q. on the 31st.

A. And I suspect it was made then.

Q. I think you contacted you believe you contacted Mr. O'Brien's bookkeeper at that stage. I presume that was to get information from Woodchester, is that correct?

A. Yes. Ms. Foley.



Q. And I think you believe that you interviewed Michael Walsh and that this may be the note of that, is that correct?

A. Yes, by telephone I think.

Q. And you had a preliminary conversation with Denis O'Brien and you made travel arrangements, is that correct?

A. Yeah. I think actually the conversation with Denis O'Brien was probably just to make practical arrangements as to where we'd meet and when and how I was flying and how he was getting there and so forth. I don't think there was any great substance to it.

Q. I think Mr. O'Brien was on the west coast when you contacted him, is that correct?

A. I believe so, yes.

Q. And you agreed to meet in Boston, half-way?

A. Yes.

Q. And I think you believe that in regard to the political donation, you requested documents from Kilroy's, is that correct?

A. Yes, from Kevin O'Brien.

Q. From Mr. Kevin O'Brien. Now, your note of your interview with Mr. Michael Walsh by telephone records

"No denial of existence of intermediary and suggestion it was Wood" I presume that's Woodchester?

A. Yes.

Q. "- jarred a bit but people prepared to accept it." Can I take it that's something Mr. Walsh would have said to you and you noted it?

A. Probably, yes, and possibly from the 23rd October meeting, I don't know.

Q. You weren't making judgments in relation to this at this stage?

A. No, no, I was trying to gather information.

Q. "Barry Maloney - didn't Denis say money had been moved to an intermediary and got stuck.

Michael Walsh responded no recollection.

Intermediary statements coming from Barry Maloney.

Denis O'Brien talking about Woodchester - didn't deny existence of intermediary.

No real discussion of second 100K.

Monday 13th October - Barry Maloney/Michael Walsh/Denis

O'Brien first meeting. Fergus Armstrong not present.

Malt House, 30 minutes, sandwiches, vague discussion.

On 23rd October Barry Maloney referring impression money had gone to third person, out of Denis O'Brien's control. Michael Walsh did not support this. Barry Maloney expressing an interpretation of what Denis O'Brien had said.

John Callaghan" is this a reference to Mr. Callaghan telling you something or was it a reference to something Michael Walsh was telling you about John

Callaghan?

A. I can't be certain, I suspect it's Michael Walsh

quoting John Callaghan but it's possible I spoke to

John that day but I don't think so.

Q. "Barry Maloney had said in his document re stuck in

intermediary. Denis O'Brien was asked who intermediary

was and said Wood."

Now, that was information you gleaned from Michael

Walsh. Did Michael Walsh I think you now know there

are notes of Mr. Walsh's in existence, and we have been

through them, that he had a fairly regular contact with

Barry Maloney around the period of the 13th and the

14th and that Barry Maloney had, at least by the latest

on the 14th, informed him of this whole question of an

intermediary, isn't that correct?

A. Yes.

Q. Did you know that at the time you were talking to

Michael Walsh if it was on the 31st October, 1997?

A. Well, Michael was certainly talking about the

intermediary so I knew he knew. I don't think he told

me when he told me or how he found out. I don't have a

recollection of him doing so.

Q. I see.

Now, there is another note at tab 4 and this relates to

the Fine Gael contribution.

A. Yes.

Q. Do you know again this note is undated do you know when that note was made?

A. Yeah well, when I prepared my memorandum I put it together with the Michael Walsh note and subsequent to writing my memorandum I received Michael Walsh's notes and I went through them and it seemed to me that the language Michael uses in his description of the 23rd October meeting is very similar to the language in this note. A couple of phrases recur. Partly for that reason I believe this is probably a conversation with Michael Walsh, probably on the same day. The other point which occurred to me is that I talk in, or I write in, the fourth last line of the note that no one attended the meeting from Telenor or ESAT Digifone. It occurred to me afterwards that Michael Walsh could have referred to a meeting but anybody else who was more familiar with it would probably have referred to a dinner. That's the New York event. So I suspect that that's probably Michael Walsh talking to me probably on the same day.

Q. So the note read "Denis O'Brien call from" whoever is talking to you and you think it's Michael Walsh, is telling you of what he had heard the version

A. The account of the thing, yes.

Q. And it reads "Re Fine Gael contribution December '95. Denis O'Brien call from David Austin re two plates at  $\frac{1}{2}$ 25,000" it's \$25,000 "Initially agreed but

thought better. Rang Arve, asked him whether he would do it and get back (either directly or through company) half. Did this, Arve paid 50K.

No one attended the meeting from Telenor or ESAT Digifone. Subsequently Telenor half reimbursed, can't remember how - check this. Jersey account."

So, the note there to check this Jersey account, is that a note to yourself or do you think it was something that was being

A. no, I don't think the 'check this' refers to the Jersey account. I think it refers to the reimbursement.

There is a dash after 'Can't remember how'. Then '- check this'.

Q. Sorry, that is 'check what happened there'?

A. In the reimbursement.

Q. And 'Jersey account' is another piece of information which was imparted to you?

A. Yes, I believe so.

Q. There is a third note, I think is it of the same date, do you believe?

A. I now believe it's not the same date. The reason I do is the phrase in the fourth line "Catherine not related" 'not' underlined, in the notes I made on the 1st November on the aeroplane travelling to the United States

Q. that was one of the queries you raised?

A. Somebody had said to me, I can't now recall who, that Denis O'Brien's wife Catherine was related to Michael Lowry and, of course, that was an important point to check. I was still I still thought that might be the case on the 1st November and I am here recording a statement that she isn't. So I think I must have made this note after the 1st November, perhaps on Monday the 3rd when I came back from the United States, or even sometime during the 1st or 2nd. I was in Boston on the 2nd waiting for the flight. I could have written it then. The 'DOB re 5', I believe to be a reference Denis O'Brien talking about the fifth question in the McCann Fitzgerald letter.

Q. And the note reads "Was intent to pay..."

A. Yes.

Q. "... Michael Lowry on uppers re Streamline. Denis O'Brien flush per IFSC and institutional sale of shares, wanted to give Michael Lowry a hand up. Catherine not related.

Payment not "stuck" - just left. No other intermediary or "theft"." In fact that is a question that you address as well on your way out?

A. Yes, it is, yes.

Q. Was it stolen?

A. Yes.

Q. "Hold and transmit would have been Woodchester not really an intermediary. Funds earmarked. Address

issue re Woodchester letter.

Saw sense - speculation about licence, also Ben Dunne."

What's that reference, do you think?

A. He is saying, I think, that he had intended to make the payment but he saw sense and the reason he did so was because in the period immediately after the licence competition had been won in October, 1995 there was a lot of controversy, a lot of press comment, the American embassy became involved, made representations to the government on behalf of some unsuccessful bidders. Also around this time I think the controversy surrounding Mr. Ben Dunne's alleged payments to Mr. Haughey was in the air and obviously payments to politicians was very much a controversial or difficult subject.

Q. Well, is that mixing two things there I wonder, Mr. O'Connell? Maybe I am wrong?

A. I think he is saying the two reasons he saw sense, the two reasons he didn't make the payment to Michael Lowry were (1) that there had been speculation about the propriety of the licence award and that would have fuelled it and secondly, the whole issue of political donations or donations to individual politicians, perhaps was then a difficult one.

Q. And that, I think, if I am correct, occurred, the whole question of Mr. Dunne and Mr. Haughey and Mr. Lowry blew up around the end of November of 1996. I think it

was the the 29th November, 1996, I think was the occasion when Mr. Sam Smyth published his article which appeared to start the whole thing off, in the public domain at least?

A. I think the 29th November '96 article was the one which started the speculation about Michael Lowry's relationship with Ben Dunne.

Q. I think Mr. Haughey's was subsequent to that?

A. It was? Okay.

Q. Maybe I am I think that is the situation. But in any event, just to be clear

A. didn't Mr. Dunne have earlier difficulties?

Q. There were other matters, I think unrelated to political payments, but there were two matters anyway which you are recording here. First of all, at the time of the licence, there was speculation anyway?

A. Yes, yes, in October.

Q. And as you say, the American embassy may have got involved in matters or there was

A. there were press reports at the time that the American embassy had made representations to the government on behalf of some of the unsuccessful bidders to re-examine the licence process, as a result of which the Minister, or senior civil servants, invited all the unsuccessful consortia in to have explained to them the scoring which had been made on their applications.



Q. Now, that was one issue and that was there all the time, I think, from the time of the announcement of the winning of the beauty contest?

A. Yes.

Q. These were the explanations that Mr. O'Brien were giving to you for seeing sense, and the other one was the Ben Dunne issue which occurred after the conversation with Mr. Maloney, isn't that right?

A. Okay. I can't really explain that any further.

Q. Now, I think you have informed the Tribunal that on the 1st November, 1997 you travelled to Boston for the purpose of meeting with Denis O'Brien and during the journey you prepared notes as to the issues to be raised, the questions asked and other matters, including some advice to be given as to certain legal issues raised by the allegations?

A. Yes.

Q. I think this document has already been opened to the Tribunal and what it is is your jotting down all of the matters which you think are of relevance. You are asking questions about them and attempting to get to the bottom of matters, isn't that correct?

A. Yes, it is. I should explain that, as is obvious from the original, I had never intended these to go to anybody else. They were very much my own notes. They came in part from the McCann Fitzgerald letter. I don't want to stray into an area I shouldn't, but certainly

the McCann Fitzgerald letter had an influence on those notes, and indeed the investigation then beginning was intended to be collaborative with Fergus Armstrong, and also my own thoughts and speculations and some preliminary research I had been able to do the day before into statutory provisions relevant to the matter. I then used them as an effective, I suppose, agenda or questionnaire for Mr. O'Brien when I arrived.

Q. And I think the documents have been up on the screen a number of times and you can see opposite the queries being raised by you little notes and are these responses you think you would have received from Mr. O'Brien?

A. Yes, I think they are. Generally I had to decide, beginning the process, whether I would make comprehensive notes of what was said and I decided, since I was unaccompanied, that if I sought to do that, I would lose a lot of the value of the interview process, of being able to observe a person and being able to achieve a flow of discussion and questioning. So I took the decision not to try to take comprehensive notes but just to get a general impression and I knew there'd be a further discussion the following week, or questioning the following week anyway the one by Michael Kealey so I only occasionally jotted down answers and I didn't try to keep a comprehensive record of his replies.

Q. I suppose you anticipate the question I am going to ask, Mr. O'Connell, and it's really this: As a solicitor, it would be your training and your obligation to keep a detailed attendance of events, isn't that correct?

A. Yes, it would.

Q. And they don't necessarily have to be very lengthy, that you would have sufficient training as a solicitor to be able to note what is important?

A. Yes.

Q. And you can see, even in your notes of the 4th November the questions and answers whilst Telenor's or Kilroy's notes are longer than yours, it seems to be the same matters which are covered, isn't that correct?

A. Yes.

Q. But you spoke to Mr. O'Brien or quizzed him for about six hours on this occasion?

A. On and off, yeah.

Q. But you didn't keep an attendance?

A. No, I didn't.

Q. And what was the purpose so of the quizzing or of the meeting?

A. I was going to have to write a letter to the board, which I did on the 4th, and I was also, inevitably, as a result of that letter, going to have to report to the board. The purpose of the questioning was to enable me to express a view to the board as to the existence or

otherwise of inconsistencies or contradictions or errors in Mr. O'Brien's account and I felt that if Mr. O'Brien was examined fairly thoroughly on his account of events more than once, at a remove of some days, then to the extent that he was telling any untruth or to the extent that his account was inconsistent, that it would be much more likely to show up than in a single account. So I had wished to have this first discussion with him and then to listen to the second questioning by Michael Kealey the following week and to try to identify any inconsistencies.

Q. That, of course, and I appreciate that your interest in law is as a corporate lawyer and not as a court lawyer?

A. Yes.

Q. That really gives rise to a question of you attempting to have some understanding from the point of view of assessing Mr. O'Brien's credibility, isn't that correct?

A. Yes.

Q. But you kept no record against which you could check his subsequent responses, isn't that right?

A. Except insofar as I knew what questions I had asked, because I asked everything on the sheet.

Q. But surely the purpose of a solicitor keeping an attendance is that the attendance is there, that there can be no controversy subsequently, that the solicitor says 'I was told something by the client' and the

client says 'No, I didn't tell him that'. Isn't that the purpose of an attendance?

A. It is, and I don't deny that it would have been desirable for me to have done such a thing.

Q. I suppose I have to ask you these questions on behalf of the public that, in effect, you minimised the effect of carrying through on what you intended to carry through, that is to assess Mr. O'Brien's credibility, by not keeping a record of what transpired at that meeting?

A. It may have been less but I wouldn't accept that it was minimised. I did have a reasonably good recollection of the thread, and really of the detail, of the content of what he had to say and the 4th November discussion was very shortly thereafter it. This was a Saturday, it was the following Tuesday. And I did feel that I was able sufficiently to recall what had been said to form a view as to the consistency and veracity of points.

Q. And to afford you an opportunity of dealing with another matter which I have an obligation to put to you on behalf of the public, and I hasten to add this is not any suggestion being made by the Tribunal, it is to afford you an opportunity to deal with a suggestion that a member of the public might make that this process was, in fact, a rehearsal for Mr. O'Brien's inquisition on the 4th November?

A. It certainly wasn't from my point of view. It may well have served as such from his point of view in that inevitably many of the questions I asked, Michael Kealey also asked, but I would make the point that it is by repeated questioning on the same subject at intervals that one can identify inconsistencies and if that enables the person questioned to rehearse himself, that's a necessary product of the process. It certainly wasn't intended as such by me. I also felt that insofar as the questioning the following week was going to be by Michael Kealey, I had an obligation to the ESAT Telecom board, as my clients, to conduct my own questioning and to be able to say to them

Q. I can understand that, of course, I can understand that, but I think it had been agreed at some stage, had it, that the process was going to be effectively a joint process between yourselves and McCann Fitzgerald?

A. No, it was going to be collaborative in that we would not treat both processes as either independent or as to be kept confidential one from the other, but we didn't plan our act jointly.

Q. Perhaps I use my language incorrectly there 'collaborative' perhaps it means the same thing to me?

A. Perhaps.

Q. But you were to conduct this process and neither of you were to keep any information you had exclusively to

yourselves, is that correct?

A. Yes, that's correct.

Q. Did you write to Mr. Kealey informing him of what had transpired at this six hour meeting with Mr. O'Brien?

A. No, I didn't. I had a conversation with Fergus Armstrong on the 6th November at which we exchanged notes and views as to both the 1st and 4th November discussions.

Q. Could you, if you can remember, can you remember how long the question and answer session took on the 4th November?

A. I can't, no. I think I was off-line for part of it. I seem to recall the conference facility not working the whole time or my dropping the call at one point. I think it was reasonably long. Well, I can't remember exactly. It would have been in or about an hour, I think.

Q. In or about an hour?

A. But I am not entirely sure.

Q. Right. Now, I think on the 1st November when you met with Mr. O'Brien in Boston, I think he furnished you with the handwritten documents which we have dealt with in evidence, is that correct?

A. I think I probably got his short, handwritten statement on the 30th and I think he gave me the draft answers to the questions on the 1st.

Q. Now, we have dealt with these?

A. Yes.

Q. The short document, being his draft statement, is the one that includes the apology to Mr. Maloney?

A. Yes.

Q. And the other documents are the are headed with the questions raised by Mr. Armstrong and Mr. O'Brien's responses?

A. They are not actually headed with the questions. They are headed with his understanding and summary of what the questions were.

Q. Of what the question was, yes. Now, I think you returned to Dublin overnight on the 2nd or 3rd November. On Tuesday, 4th November you sent a letter to all the directors of ESAT Telecom Group Limited, is that correct?

A. Yes.

Q. Of course we don't have that?

A. No, for the same reason.

Q. This claim of privilege?

A. Yes, by ESAT.

Q. Now, I think on the afternoon of the 4th November you received from Ms. Ann Foley, a letter from Woodchester Bank concerning Denis O'Brien's bank accounts and withdrawals therefrom, together with the list of all withdrawals in excess of  $\text{€}1/25,000$  during the previous two years. And then there are handwritten notes, which I think are in your handwriting, and these are



explanations which are being given by Ms. Foley, who was doing the bookkeeping service for Mr. O'Brien, is that correct?

A. Yes, but I think the explanations were added on the 6th or 7th, not on the 4th.

Q. I see, very good. So on the 4th you received the Woodchester statements from Ms. Foley, is that correct?

A. Yes.

Q. And was it you who had taken the view that you'd look for  $\frac{1}{2}$ 25,000 and  $\frac{1}{2}$ 25,000 plus for the purpose of carrying out as reasonable an examination of the accounts as was feasible in the circumstances?

A. As best I can recall, it was. Clearly it wouldn't have been enough just to look for payments of  $\frac{1}{2}$ 100,000. But equally there had to be some filter.

Q. Of course. Now, at this stage, I think you received from Mr. O'Brien and Telenor copies of the invoices and letters relating to the political donation, isn't that correct?

A. Yes.

Q. And those were Telenor's copies of the invoices from Norway, isn't that correct?

A. Yes, I understand Mr. O'Brien that is Kevin O'Brien had sourced them from Norway.

Q. I am not going to ask you anything about those. We have been through these particular documents and we'll have to return to them again?

A. Yes.

Q. On the 4th November also I think you were contacted by Paul Connolly to say that David Austin had been contacted by Aidan Phelan and would confirm in writing that he had received the \$50,000 contribution from Telenor, had held it for some weeks and then paid it with interest to Fine Gael, is that correct?

A. Yes.

Q. Now, this particular document, it's headed "Paul Connolly" and it's dated the 4th.

A. Mm-hmm.

Q. And it reads "David FT Austin contacted by Aidan Phelan, will confirm in writing that payment received, held some weeks then paid with interest to Fine Gael." Then in quotation marks "If push comes to shove" ?

A. Yeah.

Q. What's the reference "If push comes to shove"? That is obviously something Mr. Connolly is telling you, is that correct?

A. I assume so, yes.

Q. Do you have any understanding of what it means or what was being conveyed to you at the time?

A. My belief now, but not based on a specific statement that I can recall, is that the political fundraising process, which I was not engaged with in any way, tends to be conducted in a confidential way and David Austin may have been reluctant to give direct confirmation of

something which he would have preferred to keep confidential. But I have to add that's speculation now rather than anything I can specifically recall of that time.

Q. Where have you come to that view or when did you come to that view, that making a political contribution would not enable somebody to receive a receipt of confirmation of it?

A. I have always, I suppose, as a matter of generic knowledge, had the view that people often make political contributions without wanting them to be disclosed.

Q. Yes, they may wish to keep them confidential?

A. And then those who obtain the contributions would then tend to adopt a frame of mind in which they keep the contributions confidential as a matter of natural course.

Q. Yes, confidential from the world at large but not necessarily from the person not from the contributor?

A. But if I would assume that if David Austin was being asked for a confirmation of this kind in the context of an ESAT IPO, he would assume, right or wrong, that it had at least a prospect of becoming public because the IPO is, by definition, a public process and he was being asked for the confirmation in that context .

Q. You think so that Mr. Austin may have been of the view

that if he gave confirmation that that would be published in the Prospectus?

A. Conceivably it would end up in some way in the Prospectus or on display. He was being asked for it in the context of the IPO.

Q. Is it your understanding, I am not saying whether it's right or wrong, but is it your understanding that notwithstanding that a contributor may wish to have his contribution acknowledged, and even declared publicly, that the political party receiving the contribution would not wish this to happen? Is that your understanding?

A. No, no, not at all. I think I am speculating that David Austin in his role as a political fundraiser would have a natural instinct to confidentiality and would be naturally reluctant to have contributions or contributors revealed publicly. But I stress that I am speculating.

Q. You are just speculating?

A. Yes.

Q. Did you know he was very sick at this time?

A. I probably did, yes. I think I probably would have known.

Q. Did you know him?

A. I did know him. My firm has represented the Smurfit Group for a number of years and I had, quite a number of years prior to this, been involved in some work in

which Mr. Austin was also engaged, although I hadn't had contact with him for a number of years at that point. He had moved on from the division I was working in.

Q. But in any event, whether it's right or wrong, that's your speculation in relation to the phrase?

A. That's all it is.

Q. It was used to refer to Mr. Connolly, obviously?

A. Yes, I imagine so.

Q. Or Mr. Phelan, one or the other?

A. Well, I think the what this says is that 'David was contacted by Aidan Phelan'. So I imagine Paul was quoting something that Aidan had said to him as having been said

Q. Perhaps it's more appropriate to take it up with Mr. Phelan.

A. Yes.

Q. Now, the you had, of course, written previously to the board members of ESAT Telecom, isn't that correct?

A. That day.

Q. That day?

A. Yeah.

Q. And you then started receiving responses from them, isn't that correct?

A. Pretty quickly, yes.

Q. And that's at document number 11 this hasn't been opened. I just wonder could you run through it because

I don't have a typed

A. by all means. The first note is a note to file from me, dated 4th November, '97 and it's headed 'ESAT IPO'.

"Following dispatch of letters directors' calls.

(1) Mark Roden."

There is a redacted privileged piece then.

"Donal Roche will talk to Leslie first instance and likely to take lead from him."

Donal Roche is a partner in Matheson Ormsby Prentice solicitors, who I know has represented Mr. Roden in the past. I think he was saying that he would perhaps talk to Donal Roche, who would then talk to Leslie Buckley, would probably take his lead from Leslie Buckley.

"(2) Brendan O'Kelly" another director "Cautious over phone. Visited DOB? - questions. Comes down to whether DOB believed. BOK believes DOB.

Where to go from here."

Then another piece of advice from me that's deleted.

"Intent versus attempt. Affidavit?

(3) Tom Keaveney" Mr. Keaveney is from an American Bank (CSFB) who is also a director of ESAT Telecom and phone number "out for 10 minutes." That would imply I was ringing him rather than him ringing me. I did get him a few minutes later. There is another note.

Q. Time was moving on so you had to move quickly?

A. "Mike Kedar" - another director, he is Canadian. "On call" - I was trying to call him. I did get him eventually.

Then "Paul Connolly.

General discussion. That Telenor knew about 50K matter through last three Registration Statements."

I would pause here to say there is a little bit of confusion. A registration statement is an American Prospectus.

"Offer to buy out Telenor. OOC draft letter re entry into discussion. John Bateson of IIU acting on ESAT Telecom behalf. To Telenor Invest AI."

I don't think that's relevant. That looks like 'BOD'.

I am trying to remember who BOD was - or BOB.

"Paper trail? No." Another of the directors, but I can't remember who.

"Mike Kedar.

Received letter. Doesn't understand purpose or why in writing, why in letter. As board" there is a piece missing something about "feeling something and responsible."

I do remember Mr. Kedar was annoyed. He didn't like the idea of it. He had a personal responsibility for these matters.

"Two days before pricing. Suggestion, (Tom and Massimo) must act as board. Propose conference call

board meeting - have investigated statements DOB and BM. Minute review and satisfaction."

Massimo would be Massimo Prance, another director.

Then there is a piece deleted for privilege.

"Stuck with intermediary/attempt issue, DOB explanation.

Power of Attorney to someone in ESAT. No say re Prospectus." Then another privileged piece.

"Definitely doesn't want to be personally involved.

Disagree with board and resign?" And another privileged piece.

Then "Tom Keaveney.

Surprised at letter. Conversations with John, did not think as big a deal as has become. Wants to know OOC involvement.

OOO description of position especially "stuck with knowledge".

Tom Keaveney need to investigate - by board, not just through OOC. Have to get affidavits, Denis O'Brien and Barry Maloney. Substantiate statements.

Unfair not to have talked to underwriters "Crazy".

They then to come to conclusion on advice of counsel (Latham and Watkins.)

Payment to Fine Gael bad, takes it to a different level. Would not necessarily result in loss of licence - payment small etc.

Need to have board record. Make underwriters aware."



And then a privileged piece.

"Recounted M Kedar conversation.

Someone has to talk to Denis about the seriousness of this. Big problem re liability; "if it costs the IPO that's tragic and we all get hurt but you have got to do it right and there is no way you can force the issue. The ultimate is that something comes out after the IPO and we all get sued by public stockholders... truly believes nothing here ... but surprised at revelation of Fine Gael payment". (Re John Callaghan conversation)

"All very ugly and timing couldn't be worse... could all be plot to embarrass Denis by Norwegians and Barry. No choice but to act" I am afraid there is another line I can't quite read.

Then next page "Else you can do" experience of Latham - will want recirculation of Prospectus."

I may have another copy of this note. If you wish I could try and get the missing pieces.

Q. My only interest is because we don't have McCann Fitzgerald's letter which there seems to be some claim of privilege in relation, or your letter, but from the responses you are getting here from the directors, it would appear that the directors knew about what was being said in relation to the conversations between Denis O'Brien and Barry Maloney, questions of intermediaries, getting stuck and the political

donation, would that be a fair

A. Yes, that's a fair assumption.

Q. And you were noting here the responses of various board members to the issues. They were coming to it new?

A. Yes.

Q. These particular board members?

A. I remember Mr. Callaghan's evidence yesterday, I think, or it may have been Mr. Buckley's, one of them had said that he had had informal notification

Q. Mr. Callaghan started a process of informal?

A. I wasn't aware of that. I was assuming these people were coming to it new.

Q. From your letter?

A. Yes.

CHAIRMAN: Mr. Coughlan, one procedural matter occurs to me - excuse me, Mr. O'Connell - it seems unlikely we will conclude Mr. O'Connell before lunch. I note Mr. Holly and Mr. Ward have been in attendance all morning for what I believe is a short piece of evidence. Perhaps consideration, since that evidence doesn't relate to any degree to what Mr. O'Connell is dealing with, might be interposed at twenty five to one if we are not concluded.

Q. MR. COUGHLAN: Yes. So, I think, maybe I am incorrect, I think either Mr. Buckley it was probably Mr. Buckley said that all the directors got a pack

of your briefing notes. Would this be a letter you wrote?

A. I think that is what he meant, yes.

Q. Now, I don't intend going through your notes of the meeting of the 4th November, the question and answer session. I think we have been through those notes and we have been through Mr. Lang's notes?

A. yes.

Q. of the particular meeting and, in fact, Mr. Halpenny's notes. Now, on the 5th November you received comments and reactions to the matters from Mr. Keaveney, who was at that time, being a director of ESAT Telecom Group was a senior executive of Credit Suisse First Boston, is that correct?

A. Yes.

Q. And Mr. O'Callaghan, an executive with Credit Suisse First Boston responsible for the IPO as well as Mr. Belinkoff, senior executive with Donaldson Lufkin Jenrette, and Mr. McCarthy of DPW, who are they?

A. Davis Polk Wardwell, American lawyers to the company.

Q. During 5th November reactions continued to be received from the directors of ESAT Telecom Group and those are at tab 13, I think, is that correct?

A. Yes.

Q. Now, it's not my intention to go through these particular documents at the moment. This was the process continuing of the directors of ESAT Telecom

responding to you, isn't that correct?

A. Yes.

Q. And you dealing with them?

A. Yes.

Q. Now, I think on the 5th November there was also a meeting with Aidan Phelan or a conversation with Aidan Phelan it's at the back of the documents on tab 13?

A. Yes, I have that.

Q. Where was Mr. Phelan at this stage, do you know?

A. I can't remember but I think he would have been in the States still.

Q. Well, that perhaps is correct because some of your memos or attendances would describe here, indicating that you were meeting somebody at the office, I presume, is it?

A. Generally if I am physically meeting someone at the office I would put the word "Here" to indicate that.

Q. But in any event you were talking to Mr. Phelan. Do you know for what purpose?

A. No, except just looking at the top line about the board meeting, I think he was probably checking in with me or I was checking in with him as to where we were, generally, and confirming the board meeting and so forth. But I don't think it would have been more than a general call.

Q. Well, it reads "Aidan Phelan. Board meeting being

convened. Denis O'Brien spoke to TK several times."

Who is 'TK'?

A. Tom Keaveney.

Q. One of the other directors.

"He is supportive. Disclose McCarthy; all a matter

for the board (and Jack but lawyers to take

instructions)." Who is 'Jack'?

A. That's Jack McCarthy, the partner in Davis Polk

Wardwell, who was responsible

Q. the American?

A. Yes.

Q. "Denis O'Brien spoke, Barry O'Callaghan" that's of

the Credit Suisse First Boston "will speak to Tony

Belinkoff. O'Callaghan no major problem ("precis

version").

Denis O'Brien seeking Jack McCarthy." What was

happening here? Was Mr. O'Brien briefing directors in

the United States or members of the underwriters?

A. This is mainly about the underwriters. Obviously,

whatever the directors decided on the matter, if the

underwriters were not happy then the IPO could not

proceed or would have to be altered or delayed as they

wished, or the Prospectus would have to be amended as

they wished. The underwriters really had a great

degree of control of the process and the content of the

process. And Barry O'Callaghan although there were

a number of joint underwriters, the two lead

underwriters were Credit Suisse First Boston and Donaldson Lufkin Jenrette. Barry O'Callaghan, who was Irish but worked in America for CSFB, and Tony Belinkoff in DLJ, were the two lead executives on the flotation, on the IPO and clearly their attitude to the revelations and what their view of what needed to be done, what the consequence of the revelations was key, and had the power to override the board because if they decided that it wasn't going to happen or if changes were going to have to be made they were going to have taken account of Denis was talking to them and getting their reactions.

Q. So can I take it that the key executives in the two major underwriters were being informed of exactly what was happening back in Ireland?

A. My recollection is that they were given copies of my letter.

Q. Of your letter?

A. Yes.

Q. That's your letter to the directors of the board of ESAT Telecom?

A. That's my recollection, yes, and also had conversations with Denis, with Denis O'Brien, this is what Aidan is telling me here. I subsequently also spoke to Mr.Coviello, who was a senior lawyer, and still is a senior lawyer, with Latham & Watkins, the underwriters' lawyers and sought to bring him up to date on the

matter.

Q. So just to I am just trying to understand this letter, if I may for a moment. This was a letter to give information to the directors of ESAT Telecom, is that correct?

A. And advice.

Q. And was that the purpose for which it was created? Or was it also created for the underwriters? The underwriters didn't need your advice, isn't that correct?

A. That's correct. It was created for the directors. It was addressed to the directors and sent to them.

Q. And who decided I am just trying to understand who decided that it should go to the underwriters, the directors?

A. I can't remember but it would not it would have been a matter of fairly natural course on a matter such as this to tell the underwriters.

Q. I am not disputing that for a moment. In any event Mr. Phelan you must have had some discussion about the political donation as well, isn't that correct?

A. Yes.

Q. And I want to make it very clear that your note is recording what Aidan Phelan said to you?

A. Yes, very much so.

Q. It's not your view in relation to anything?

A. No, it is not.

Q. Or it's not anything that you had any knowledge of?

A. No, it is not.

Q. And it reads "Letter from Fine Gael. DFTA has done this for years. Ugly bits never talked about - money to DFTA. Then "Invitation. DFTA collect money. Always an offshore account. DFTA's offshore lives in France."

That's what Mr. Phelan told you?

A. Yes, it is, that's my record of it.

Q. You made a note?

A. Yes, I did.

Q. We can take it that it is Mr. Phelan can comment on it but as a solicitor you are used to taking notes of what people are telling you?

A. Yes.

Q. Now, I think your colleague Mr. Halpenny attended a meeting of the directors of ESAT Digifone, together with Mr. Fergus Armstrong and Mr. Kealey and a representative of Messrs. Kilroy's; that was Mr. Lang, perhaps?

A. Yes.

Q. On the 5th November of 1997, isn't that correct?

A. Yes.

Q. And I think he prepared notes of that?

A. Yes.

Q. And this was a meeting which was convened before a meeting of the board of ESAT Telecom which was to be later that day, isn't that right?



A. I think that's right, yes.

Q. Am I correct in understanding that ESAT Telecom were awaiting some view of ESAT Digifone?

A. Yes, I am not sure it was terribly formalised but there would have been an awareness that the ESAT Digifone directors or advisers were meeting and that their view of matters and the actions they decided to take or not to take would have potentially significant effect on what the ESAT Telecom directors would or could decide to do.

Q. Now, unless you think there is need to refer to anything in these notes, I don't intend opening them is there anything specific?

A. No, I don't think anything no. I should add perhaps that I reviewed Mr. Lang's notes of this meeting.

There has been a certain amount of discussion in recent days as to when my own decision not to approach Fine Gael was made and I believe Mr. Lang's notes disclose it being taken at this meeting.

Q. At this particular meeting?

A. Yes.

Q. Can you assist the Tribunal as to

A. I'll have to get Mr. Lang's notes. It's in Mr. Lang's notes of the meeting of the 5th November, near the end.

My pages are not numbered. It's a page headed "MW queried" and that's followed by a redacted piece.

It's about eight pages from the end and in the middle

of the page, "KD raised the issue concerning the reputation of Telenor and had the Telenor directors done enough and specifically whether they should go for a receipt from the Fine Gael Party." Then it continues "It was agreed because of the sensitivity of the matter and the problems raised that it would be preferable not to proceed with obtaining this letter."

Q. Now, I think after this meeting of the I am loth to call it a meeting of the board of ESAT Digifone but the board of ESAT Digifone anyway, there was a meeting of the board of ESAT Telecom, wasn't there?

A. Yes, that evening.

Q. That evening. And I think your notes of that are at divider 15?

A. These are actually notes that I made before the meeting and they are a list of items which I proposed to raise at the meeting.

Q. This effectively is a speaking note?

A. Yes, it is, and I should also add that the meeting was actually in two parts. The first part was attended by myself and Gerry Halpenny and, I think, other advisers and I delivered this report and there was a certain amount of discussion of it, and then everybody except directors left the meeting. To the extent that people were physically present, it was held in my office but there were a number of others present by phone and it went into a very formal board meeting at that point and

all non-directors left, either dropped off the call or left the room and the directors conducted their deliberations among themselves, with nobody else present. So this would relate to the first part of the meeting, as would Gerry Halpenny's notes, not to the second part.

Q. Right. So you prepared these notes to go to the meeting and I think they read

"For meeting (conference call with directors.

1. Owen O'Connell etc. consent to attend."

That's the other lawyers, the other advisers.

"2. Not yet a board meeting which will follow - privilege, bankers, however, a confidential and privileged discussion.

3. Having assumed authority and worked on investigation.

Propose to report on progress to date, and after questions, invite instructions on further work, if any felt necessary, appointment of supervising member etc..

4. Report

a) Have had long discussion with Denis O'Brien, exhaustive analysis of his version of events.

b) Have listed to McCanns version of Denis O'Brien (by Tribunal specialist).

c) Have heard Barry Maloney's response to Denis O'Brien

but have not examined Barry Maloney directly.

d) Have received reports of discussion with David

Austin but have not spoken to him directly.

e) Have seen Woodchester letter useful but limited.

f) Await Fine Gael letter.

g) Have seen Telenor/David Austin invoices etc..

Absence of corroborative and documentary evidence especially re transaction 1, but this to be expected in investigating a transaction which either did not occur (proving a negative) or would have occurred in secrecy.

Received explanation of Denis O'Brien's version of events.

Examined him on it, as did McCanns. Have not had McCanns report but own view is that account is internally coherent and consistent and consistent as between two examinations. Only point of concern is 'stuck with intermediary' issue. Does not necessarily go to heart of matter (since would still not imply payment made) but if literal or common meaning of words taken, implies movement of funds intended for Michael Lowry to third party. If so, then attempt (could constitute offence) and DOB untruth, casting doubt, possibly on rest of account. Denis O'Brien's explanation 'intermediary = bank, stuck = left.

Consistent in other respects, e.g., had money in bank, known source, no apparent payment out attributable to "intermediary" payment.

All other respects, account appears consistent.

Barry Maloney minor inconsistency re one of the five alleged meetings, (Denis O'Brien's honeymoon).

Barry Maloney that all five meetings reference to intermediary as third party not Woodchester, partially contradicted by Michael Walsh re 13th October.

Barry Maloney's response re Denis O'Brien.

- discussion 8th to 23rd \*(5) always third party intermediary; 23rd October first mention of Woodchester. BM still uneasy as a result.

- location of meeting. Not on run but regular business time meeting. Would not have discussed this on run"

Sorry - I beg your pardon, there is an asterisk

"Discussion on October 8th to the 23rd. 'I didn't actually do it, thank God; I know you must be concerned'." That's a reference to something Mr. Maloney had conveyed?

A. Yes, at one of the discussions.

Q. "- agree regular runs (and other meetings).

"Shot the breeze". Agrees reference to 2 x 100K was in context of complaints re non-payment of other invoices. Michael Lowry mentioned, never second payee.

Report re Fine Gael.

Heard Arve Johansen examined by Kilroy's and others.

Relate events per 4/11/97 note.

Apparent Fine Gael confirmation. Sight of invoice,

(Norwegian translations). No further contact by Arve Johansen with Michael Lowry (so no favours, presumably).

Reimbursement by Digifone also vouched.

Denis O'Brien request and agent in collection discussions.

NB. David Austin non-resident - relevant re use of offshore account.

Note little or no dispute or doubt about his issue generally (assuming Fine Gael letter). Therefore merely matter of perception, PR, politics etc..

"Contribution not illegal, subject

- possible tax consequence (unlikely, DA non-resident).

- unless reward for performance public service.

Note recent 30K Ray Burke payment - resignation and Tribunal re planning decision."

I think that was occurring and that time?

A. Yes, what I was getting at was that my reference to perception and PR and politics was informed by what had happened in relation to Mr. Burke.

Q. And then you list other matters which you consider for investigation, is that correct?

A. Yes.

Q. " examination of Barry Maloney comparison with McCanns outcome.

get Fine Gael letter.

translation of Norwegian remarks on letters,

invoices.

Telenor any other correspondence.

confirmation/explanation re Woodchester

disbursements.

affidavits.

Timing consequence of above.

Open discussion.

Stress personal liabilities of signatories to

Prospectus.

Refer Tribunal. Refer to possibility of overblowing

matters. Need sense of proportion. Ultimately

judgement call each director having regard to beliefs,

opinions. All should act."

Now, you prepared that and I think that is the essence

of what you conveyed to the directors before they went

into a meeting of the board?

A. Yes.

Q. Can I take it what you were doing was you were laying

before them the results of your investigations and

suggesting some other matters which might still have to

be done, is that correct?

A. Yes.

Q. But that it was a matter for them, each had to be

satisfied individually and then collectively, is that

correct?

A. Yes, and the purpose of this note was to make sure I

didn't leave anything out, that I got all of the points

across that I needed to.

Q. And you were not offering yourself to the directors as the person who could inform them of what they should or could do, is that correct?

A. Absolutely not.

Q. Now, in relation to other matters for investigation, can I take it the directors of ESAT Telecom dispensed, perhaps because of time constraints, with an examination of Mr. Maloney?

A. I am not sure they would have done so formally. In a sense we simply ran out of time and instead of that, I had a conversation the next day with Fergus Armstrong who had had I didn't realise how many meetings he had with Barry Maloney but I knew had had a number of meetings with Barry Maloney and I asked him whether anything had come up in his various meetings or discussions with Mr. Maloney which was inconsistent or contradictory of what Mr. O'Brien had said and Mr. Armstrong said no, there hadn't, apart from four items which he listed but which are a subject of claim for privilege. I think it is fair for me to say in relation to those four items that none of them were either new or fundamental to the matter.

Q. So the directors of ESAT Telecom were faced with a situation, they knew exactly where the position lay between Mr. Maloney and Mr. O'Brien, isn't that correct?



A. That was my intent, yes.

Q. And you had also brought quite a significant matter to their attention, would you agree, that it was an attempt to constitute an offence and was a very serious matter, isn't that right?

A. Yes.

Q. And apart from not examining Mr. Maloney, only the common directors were present for the examination of Mr. O'Brien on the 4th November, isn't that correct?

A. Yes.

Q. And that was intended, if I understand your notes correctly, to have been a video conference, isn't that correct?

A. The original idea, I think, on the 30th October was that it would be helpful if it had been a video conference, but even today, videoconferences can be difficult to arrange. It was then in its infancy and I think it wasn't possible. I think some inquiries were made, as far as I can recall, and I don't think it was possible from the Dublin end.

Q. But what I am just trying to understand at this stage is that Mr. O'Brien stayed on the phone and was questioned by Mr. Kealey, isn't that correct, and perhaps by questions being asked by other directors as well?

A. Yes.

Q. Nobody had an opportunity to observe his demeanour when

he was answering any of these questions, is that

correct?

A. No, no, they wouldn't have, although I think a number of directors, perhaps all, perhaps less than all, did have conversations with Mr. O'Brien at or around this time. Some of them would have been by phone and - I am speculating now - but some of them would certainly have had an opportunity, Tom Keaveney would be an example, perhaps Mike Kedar would be another, would have had an opportunity to meet him, but I don't know whether they did.

Q. Now, the second matter which you suggested or advised should be done was comparison with McCanns of outcome.

Was that what happened when you spoke to Mr. Kealey the next day?

A. To Mr. Armstrong.

Q. I beg your pardon to Mr. Armstrong?

A. Yes.

Q. Getting the Fine Gael letter was that the David Austin letter?

A. It's what

Q. what became the David Austin letter?

A. What became the David Austin letter? From this note I would conclude that at this point I still had it in mind to seek a Fine Gael letter but I didn't do it.

Q. Then "Translation of Norwegian remarks on letters and invoices." Was that done?

A. I got some of them, I didn't get them all, I think, in the end.

Q. "Request Telenor if they had any other correspondence"

I presume that related to the invoices, did it?

A. There is a fax later, I think, from Mr. O'Brien or Mr. Lang to Gerry Halpenny saying, enclosing the David Austin letter of February 9th, I think, 1996 sorry,

I am losing my dates the letter in which David Austin thanks Mr. Johansen for the contribution

Q. Yes, the February letter of 1996?

A. There is a letter from Kilroy's enclosing that to Gerry Halpenny saying 'This is everything now' or words to that effect.

Q. Was that on the 6th, do you think?

A. I think so, yeah. I think it's here. Yes, it's at tab 19 near the back and it's a letter of the 6th November from Kevin O'Brien to Gerry Halpenny.

"I attach copy letter of acknowledgment dated 19th February 1996 from David FT Austin which completes the Telenor documentation on this matter."

Q. Right. What was done with that letter, do you know?

A. I don't think anything was done with it beyond my keeping it on file and probably telling directors that I had got it.

Q. I suppose of its own, it was hard to make sense of it took us a fairly lengthy time here to tease it out to try and make any sense of it?

A. I certainly took it as, I mean, having

Q. a receipt from Fine Gael or an acknowledgment from Fine Gael?

A. Kind of a back-handed one or one of limited clarity and worth, perhaps, but of some kind.

Q. But you understood it to be an acknowledgment from Fine Gael?

A. Yes, I did.

Q. That's what you understood it to be?

A. Yes, I did.

Q. Now, because you had informed the directors that you had seen the Woodchester letter, it was useful but limited, that's because you didn't have explanations, I suppose, in relation to the various sums which were drawn on the account, was that right?

A. That probably would have been part of it. I can't now remember exactly what my use of that phrase was meant to convey.

Q. I think in the context that you did get explanations, I think around the time of the board meeting, would that be right?

A. I think it was actually the 7th before I got the explanations.

Q. Very good. But anyway, one of the things that you advised to be Denis O'Brien was to get confirmation, explanation re Woodchester disbursements and you did do that?

A. Yes, I did.

Q. And you got the affidavits or an affidavit from Denis O'Brien?

A. An affidavit and a series of letters.

Q. And then it was a matter for the directors to make their mind up on the matter, isn't that correct?

A. Yes, and I record some advice there. I don't know why that wasn't the subject of a claim for privilege by McCanns, but that would have been broadly the advice.

I would certainly have also have given advice concerning directors' responsibility for Prospectus .

Q. Now, Mr. Halpenny's note, is that a note that he kept as you were speaking to the directors?

A. Yes. I was very conscious going into this meeting that it was important for the directors in making their decision, that they be fully informed, as far as we could, but also from the point of view of the firm, myself and Gerry Halpenny, that we could show that we had provided proper information and proper advice and since I would actually be giving the report and giving the advice, I was concerned that we should have a record on or file of it actually being given. So I asked Mr. Halpenny to attend the meeting. Generally we did go to meetings together because there was a resources issue, an IPO is enormously time-consuming. But at this meeting I ensured that he attended with me so that he could take a note of the meeting while I

delivered the report.

Q. Could I just pause there for a moment, Mr. O'Connell, and just try to understand this: The need for

Mr. Halpenny to be present was twofold; was to make sure that there was a report kept that the directors were getting the appropriate information and advice, isn't that correct?

A. Yes.

Q. And that was in the interest of the company?

A. Yes.

Q. And the second was to ensure that there was some degree of protection there for your firm also, to make sure that you had given all the information and the advice, isn't that correct?

A. That would have been a secondary motive but it would have been there. I suppose in fairness, also, Gerry Halpenny was a senior lawyer and there could well have been something that he could add if I had missed. It would have been back up.

Q. Of course. There is nothing sinister in a solicitor's firm ensuring that they want to have a record that they have given all the appropriate information and advice. That's one of the purposes of keeping a note as well, isn't it?

A. Yes.

Q. It does contrast, of course, with what you did when you went to see Mr. O'Brien in

A. I am aware of that.

Q. In Boston, isn't that right?

A. I didn't have Gerry Halpenny with me when I went to Boston.

Q. You didn't keep a note yourself?

A. I kept a minor note, but I didn't keep much of a note, yes

CHAIRMAN: We are just on a quarter to, Mr. Coughlan.

I am not sure if Mr. Healy and Ms. O'Brien have given consideration if it causes difficulty.

MR. COUGHLAN: I am not going to be much longer. I am not going to open Mr. Halpenny's note unless you think there is something specific. I think I might get finished.

CHAIRMAN: We will press on for the time being.

Q. MR. COUGHLAN: Yes. I think the next significant matter is that you had a conversation with Mr. Aidan Phelan, isn't that correct, on the 6th November of 1997 and that's at tab 19?

A. Yes.

Q. I think by at this time, whatever the conversation was about, it was probably by phone, would you agree?

A. Yes, I think so.

Q. And it's following a call from Latham and Watkins to Aidan Phelan and obviously you are making inquiries of

him about accounts?

A. Yes.

Q. Bank accounts. Because you wanted to be sure that you were bringing all appropriate matters to the attention of the board or doing your job correctly, isn't that correct?

A. Yes, I think also Latham and Watkins may have raised this point.

Q. And you are informed, according to your note, "No other significant accounts - house account (pays household expenses) UK account for salary, AIB (from Communicorp). Could get statements.  $\approx$ 11,000 per month, then transferred to Irish account; also runs credit cards.

No other accounts.

Per Woodchester statement.

4914 fee, stack B, sold March" that's information about a specific matter one of the specific payments on the Woodchester so it appears that what was being conveyed to you there was that you were on the right track in relation to looking at significant accounts, isn't that right?

A. Yes.

Q. And it was also being conveyed to you that there were other accounts, but really they amounted to about  $\approx$ 11,000 a month, there or thereabouts, and that they weren't in the significant category?



A. Yes, and I took the view that in order to assemble payments of the scale we were talking about out of that account, having regard to credit card payments being made, would have been

Q. that that's perfectly reasonable, yes, that seems perfectly reasonable. Now, Mr. O'Connell, you had no knowledge, I take it, that there had been drawings out of the company account of the company which Mr. O'Brien had a major shareholding in of  $\text{€}1/2407,000$  or thereabouts, had you?

A. I didn't, at that time, no.

Q. And you had no knowledge that out of the monies which were lodged to Mr. Phelan's account in the Isle of Man, that monies had been paid to Mr. David Austin at that time?

A. No, I didn't know that at that time.

Q. And can I take it that if that information had been brought to your attention, it's something you would have had to pause to consider and investigate or bring to the attention of the board of ESAT Telecom?

A. Yes, I think I would have had to examine where the money came from, and more importantly, where it went to, although I would add that I don't think necessarily it would have been fatal to the IPO once the purpose of the payment became clear.

Q. And, of course, you were professionally burdened with information that there was reference to an

intermediary, isn't that correct?

A. Yes.

Q. Your own report to the board indicated that in the ordinary use of words or language, that 'intermediary' would give some indication that a third party was involved, isn't that correct?

A. Yes, although I was interested in Mr. Callaghan's reference yesterday to 'financial intermediary'.

Q. And if you had carried out you also knew that reference had been made to "Got stuck with an intermediary", isn't that correct?

A. Yes.

Q. And if you had, considering that you were not prepared to give an opinion to the board as to what they should do, you were laying out the information you had, isn't that correct?

A. Yes, although my reluctance to give an opinion had less to do with my views of the veracity of what I had been told, the truthfulness of what I had been told. It wasn't my function; it was their function to make a decision on the basis of what I laid before them.

Q. Yes. But you would have brought to the attention of the board that an account out of which  $\frac{1}{2}$ 400,000 odd had been paid?

A. yes.

Q. not into an another account of Mr. O'Brien's but into an account in the Isle of Man in the name of

Mr. Phelan?

A. Yes.

Q. Out of that,  $\frac{1}{2}$ 100,000 and  $\frac{1}{2}$ 50,000 had been paid to Mr. David Austin. The name would have come up again, isn't that right?

A. It would. I would have listed all the payments.

Q. And if you had been able to pursue the matter further and found that this money had been used to make a loan to Mr. Michael Lowry on the face of it sorry, make a payment to Mr. Michael Lowry by Mr. Austin?

A. Mm-hmm.

Q. And that when the McCracken Tribunal was established, this money went back to Mr. David Austin, would you have brought all those matters to the attention of the board if they had been brought to your attention?

A. I would. I would have recounted to the board everything I had been told.

Q. They were all relevant matters, isn't that right?

A. Yes, but in fairness, I would add that the purchase of the house is one of the matters in that trail of events which would also have been brought to the attention of the board.

Q. Would you have brought it to the attention of the board that it was reported to you that this was for the purchase of a house but there was no documentation in existence at this time when the board was meeting in relation to that matter?

A. I'd have asked for documentation and if I had failed to get it, I would have mentioned that fact, yes.

Q. There was none in existence at that time, isn't that right?

A. I think there were memos from Mr. Perera.

Q. No, there was a memo, isn't that it? That's right?

A. I think there was more than one.

Q. Isn't that it?

A. I think

Q. Isn't that it, Mr. O'Connell?

A. Yes.

Q. Thank you.

THE WITNESS OF EXAMINED AS FOLLOWS BY MR. FITZSIMONS.

Q. MR. FITZSIMONS: The meeting of the 4th November, how long did that last, Mr. O'Connell? What time did it break up at?

A. I am afraid I can't remember, Mr. Fitzsimons, exactly.

It was quite a long sorry, this was I was on my call.

Q. It started at 2.15 according to Kilroy's note of it.

Did it last two hours, three hours, four hours?

A. I would say from recollection it probably would have been closer to two than three or four.

Q. Very well. Your memo of the document number 10 of your phone conversation with Mr. Paul Connolly, what time of the day on the 4th did you receive that phone call?

A. I am afraid I have no idea.

Q. I take it was it before the meeting?

A. I can't recall I am afraid.

Q. You can't recall?

A. No.

Q. What position did Mr. Connolly have in who was Mr. Connolly?

A. Mr. Connolly owns a company called Connolly Corporate Finance and he is a corporate finance adviser. At that time he was engaged by ESAT in connection with its IPO. He is particularly strong in connections to and dealings with US financial institutions.

Q. And was he in Dublin?

A. No, I think he was in the United States.

Q. Well, was he with the team in the United States then?

A. Yes, he was.

Q. Well, Mr. O'Brien apparently was in, I think he told us he was on the east coast at that time?

A. The west coast.

Q. Very well, so they are eight hours ahead?

A. Eight hours behind.

Q. Behind?

A. Yeah.

Q. I see. Who was in contact with Mr. Connolly to provoke him to phone you?

A. He says well, sorry, I don't know I presume Mr. Phelan because he tells me that David Austin had

been contacted by Aidan Phelan so I am assuming that

Aidan Phelan had told him, but I don't know.

Q. And who had contacted Aidan Phelan?

A. I don't know.

Q. Did you or your firm?

A. I don't think so, no.

Q. Just one other minor matter. You said you got some of the Norwegian notes translated.

A. Yeah.

Q. This is apropos discussion of document 15. Who translated them, what firm, what agency?

A. I think we got the translation from Arve actually. I don't think we engaged a firm.

Q. You said you got some translated?

A. We certainly got the first one where sorry, if I could just get the note out to refresh my memory. Can you remember what tab it's at?

Q. I assume you have a documentary record of the translation. I mean, you wouldn't have retained the translation in your memory to pass on to the directors.

I assume you have a document?

A. Yes, I wrote it beside the I wrote it beside the Norwegian text in my copy or on my copy.

Q. In your copy of it?

A. Yeah, I think it may only have been the first one. It wasn't me who wrote it. It was somebody else who wrote it. It says "This must be paid by us and invoiced as

management costs to Digifone." That's to the left of

the text.

Q. That your writing?

A. No, it's not.

Q. Whose writing is that?

A. I don't know.

Q. Is that the translation that you

A. I think that's the only one we had.

Q. And you procured that translation?

A. No, I don't recall whether I did or not.

Q. You have told us that you got some of these documents

translated. Now

A. I think I said I got translations of some of them.

Q. Yes.

A. Sorry, if I misled you. I apologise. I didn't mean to

say that I had gone to an agency and got them

translated. I didn't do that. I got this piece of

paper which had a translation written on it.

Q. I see. So when you got the paper when you got the

invoice for the first time, the translations were on

them?

A. I don't recall, but I would assume so:

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL.

Q. MR. MCGONIGAL: Three small matters. Mr. O'Connell, in

relation to the Shareholders' Agreement, did that

shareholding agreement have any clauses in relation to

the IPO by ESAT Digifone? What was the situation in relation to that?

A. Yes, it had a clause saying that there was no agreement as to an IPO.

Q. And had there been a change in was that a change from a previous draft?

A. Yes. The previous draft had a clause, the same clause said that the parties intended that there would be an IPO, but that was two weeks previously, but by the time it was signed, the clause had reversed and said there was no agreement as to an IPO.

Q. The other matter that I want to ask you about was in relation to the Prospectus and the drafting of the final clauses. What was the position in relation to that?

A. It seemed to begin quite early on in the process at a meeting, a drafting meeting, probably in America.

Gerry Halpenny and the Davis Polk Wardwell people had discussed it and the lawyer in Davis Polk Wardwell sent Gerry Halpenny a draft text which he commented on and it went back and forth. I have provided this correspondence to McCann Fitzgerald, who I understand are going to, or may have already, provided this to the Tribunal. It went back a forth a number of times with minor changes to the text. Then it was discussed in moderate detail at the board meeting of the 5th November and some changes proposed and then on the



night of the 7th November, Jack McCarthy of Davis Polk Wardwell telephoned me and caused an amendment, a further amendment, a reduction in the statement made. He felt that parts of what we were saying was unnecessary. I should add that Davis Polk Wardwell very much had the drafting initiative on this document. There was no Irish flotation of the company at this stage. It was an American flotation under SEC rules and NASDAQ rules. Now, it had to be also classed as an Irish Prospectus under the Irish Companies Act because it was an Irish company issues shares but that's done by a wrapper called the 'A pages' which is between 4 and 8 pages of specific information relative to the company which is required under the Irish Companies Acts and not required under the US legislation. But the document is a US document prepared by the US lawyers.

Q. So that the final, the clause in the final draft was one which was actually arrived at or finally decided by Mr. McCarthy, the American firm?

A. 'Decided by' is a little strong but he certainly had the final say on it.

Q. So far as the first draft in relation to the Prospectus was concerned, can you give some idea as to the date when that may have been first created?

A. Yes, I have something here. There is a fax from Davis, Polk & Wardwell of the 16th September, 1997 at which

Sarah Geoffreys, a lawyer there, is saying to Gerry Halpenny that "At last week's drafting session" so presumably around the 9th "It was suggested that a risk factor be added describing the possible investigation into the award of the licence. Attached is a draft I have attempted." That is a Sarah Geoffreys, the American lawyer had attempted and she asks Gerry to revise the draft for this Thursday's drafting session "Since you are closer to the facts than I am".

Q. That would have come into being sometime shortly before that?

A. There would have been a discussion the previous week.

It would have been said that we need to have some form of words, she drafted it and sent it to Gerry Halpenny for comment.

Q. Now, the other matter that I just wanted to ask you about was there has been discussion in relation to the 1996 resignation of Mr. Maloney from ESAT Digifone.

You were, I think, involved in that?

A. Yes.

Q. And was that something one of the features of the negotiations related to the options?

A. Yes.

Q. And was that something which you had been involved in with Mr. Maloney prior to December?

A. Yes.

Q. When had the question of the options first arisen?

A. Subsequent to there being negotiated and signed in October 1996.

Q. And following discussions between yourself and Mr. Maloney at that time, he then resigned in December?

A. Yes.

Q. And there were then significant negotiations in relation to the options?

A. Yes, and changes.

Q. What was the significant change on the options, so far as Mr. Maloney was concerned?

A. The amount increased slightly, the conditionality was reduced and the period within which they could be exercised was slightly reduced so as to enable him to avail of a tax break which, in fact, he didn't achieve in the end.

Q. Now, that resignation or those negotiations took place at a time when there were negotiations going on with the banks in relation to a syndicated loan?

A. Yes, and also a bond issue by ESAT Telecom.

Q. Was there any other occasion when Mr. Maloney sought to avail of that kind of opportunity when the company was in discussion with its bankers?

A. Well, whether it was in his mind to avail of it, I don't know, but it certainly happened again in 1999.

Q. And what was that?

A. The company was ESAT Digifone was renegotiating and

increasing its project finance facilities with banks and Barry wrote asserting rights in relation amended rights in relation to his options and saying that representations had been made to him concerning them and that he was taking advice as to what remedies would be available to him in that respect. And the fact that he was making those threats became known to the banks and caused a problem in the financing, which was cleared up by the shareholders, I think, going to speak to the banks.

Q. Thanks, Mr. O'Connell.

THE WITNESS WAS FURTHER EXAMINED AS FOLLOWS BY MR.

COLLINS:

Q. MR. COLLINS: Just one matter Mr. O'Connell. Your meeting with Mr. O'Brien in New York

A. in Boston.

Q. in Boston I should say you took detailed notes on the plane of your agenda but you only took some brief notes, as we have heard, which you scribbled on that document, when you were interviewing Mr. O'Brien?

A. Yes.

Q. And am I right in thinking that you took a conscious decision that you would not take detailed notes because you wanted to observe and evaluate the veracity of Mr. O'Brien?

A. Yes, that's correct.

Q. This was a big issue, obviously, at the time, wasn't it?

A. Yes, it was.

Q. And you had the benefit of, a few days later, of the second examination by McCann Fitzgerald?

A. Yes, the view was that because we were trying to prove a negative, which was most unlikely that documentary evidence would come to light. I think I made the point elsewhere, if the transaction never occurred, clearly there would be no documentary evidence, and if it had occurred, presumably since it could have been done covertly, there would have been little or no documentary evidence available. Therefore the key was to assess the truthfulness or otherwise of the principal players, and obviously the principal player was Denis O'Brien. So I formed the view that it was a question of judging his truthfulness that lay at the heart of the matter, at the heart of the investigation.

Q. In your agenda note that you prepared on a plane I see, for example on page 3, one of your notes was "Where does BM allege?" meaning where did the conversation take place? You have scribbled in an answer "DOB office." Do I take it what's scribble there 'DOB office' is a note that you took at the meeting with Denis O'Brien?

A. Probably, yes.

Q. On page 6 of the questions you are posing is about the

money, "How stuck? What actually happened?" And there is a scribbled note, "Just left in bank." Was that Mr. O'Brien's explanation that he gave at that particular meeting?

A. Yes.

Q. You had the benefit then a few days later of the McCann Fitzgerald examination?

A. Yes.

Q. Were you satisfied that you were in a position to evaluate any inconsistencies between Mr. O'Brien's account in talking to you and in the McCann Fitzgerald account?

A. Well, that was my thought. I hoped I was, yes.

Q. And I see that in the document at tab 15 on the 5th November, your notes for the presentation to the directors, you deal with the question of the consistency between the two accounts on page 2 and you point out at the very bottom of page 2, "Our view is that account is internally coherent and consistent as between two examinations only point of concern is "Stuck with intermediary" issue." The point that you had taken a note about at the meeting in Boston?

A. Yes.

Q. Thank you Mr. O'Connell.

CHAIRMAN: Can I revert briefly, Mr. O'Connell, to the issue of whether or not it was to be Fine Gael or

Mr. Austin who was to furnish some verification or vouching of payment of the donation? You were, you are the, I think the first legally qualified person to testify in relation to this. Now, I accept that this was a corporate and not a litigation situation and I am not, I hasten to say, making any sinister suggestion, but am I right in thinking it wasn't an ordinary application of the law of evidence, if you are proving in court that a particular amount has been paid, you get the recipient to swear up or to furnish vouching documentation, rather than the person who actually made payment. For example, if you are proving money is paid in an infant settlement for approval and the like.

A. Yes, Sir, that would be a fair comment, although I would, with respect, add that at least in a limited sense, the recipient did confirm receipt, the recipient being Mr. Austin.

CHAIRMAN: Very, very good. Anything you wanted to raise? Thank you for your attendance, Mr. O'Connell.

THE WITNESS THEN WITHDREW.

CHAIRMAN: I suppose we should make the effort then, if the remaining witnesses are brief

MS. O'BRIEN: I think Mr. Holly will be a short witness. Mr. Eddie Holly, please.

EDDIE HOLLY, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS

BY MS. O'BRIEN:

Q. MS. O'BRIEN: Thank you, Mr. Holly. Mr. Holly, you have provided a Memorandum of Evidence to the Tribunal.

I just wondered if you have a copy of that in the witness-box with you?

A. I have.

Q. I intend just going through that with you and raising one or two questions by way of clarification. I think just dealing with a short number of documents that you have produced for the assistance of the Tribunal?

A. Mm-hmm.

Q. You have informed the Tribunal that you were a brother of the late Mr. Michael Holly and a director of Cedar Building Company Limited; that as of 1996 both you and your brother were directors of the company. That you ran the business of the company and your brother who was also involved in a number of other businesses.

Your late brother was managing director of the company, is that right?

A. That's correct.

Q. I think you stated that you only met Mr. Michael Lowry on one occasion many years ago at a race meeting at Gowran race course when you were simply introduced to Mr. Lowry. You had never the late Mr. Austin?

A. That's correct.

Q. That's Mr. David Austin?



A. That's correct.

Q. I think you stated that you recall that in mid-1996, Mr. Michael Lowry discussed with your late brother the possible purchase of a property in the Blackrock area of Dublin. You understand that your late brother became aware of the property at Carysfort Avenue coming up for auction that he told Mr. Lowry that he liked the property himself but that if Lowry, who was then out of the country on government business on his return was impressed with the property, that he would be given an option to purchase it?

A. That's correct.

Q. You state that you were aware that your late brother instructed solicitors to bid for the property and that the bid was successful.

A. That's correct.

Q. Now I think you informed the Tribunal that at the time the house was in a poor state of repair and required to be fully refurbished. Your brother agreed that the company, that's Cedar Building Company Limited, would undertake the work and architects were retained for the purposes of providing specifications.

A. That's correct.

Q. You state that a Bill of Quantities was drawn up and the tender documents were submitted directly to Mr. Lowry by letter of the 2nd September, 1996.

A. That's correct.

Q. I think you stated that the works were priced on the basis there would be a reasonable profit for the company?

A. Correct.

Q. You stated that the tender price was  $\text{€}90,725.45$  inclusive of VAT and it covered the works listed in the schedule. That's in the schedule to the estimate which we'll look at shortly?

A. That's correct.

Q. I think you said that the  $\text{€}90,725$  included VAT and covered those works, the works not forming part of the tender price were finishing works and included the fitting of kitchen and utility room units, wardrobes, tiling, carpeting, papering of walls and so forth.

You state that you had no direct dealings with Mr. Lowry in connection with the job?

A. That's correct.

Q. And that you recall that the work commenced around mid-September, 1996, shortly before the execution of the formal Articles of Agreement?

A. Correct.

Q. I think you stated that by late November 1996 a substantial portion of the works had been completed.

It was at that time that Mr. Lowry resigned his government position and the late Mr. Holly and you were apprehensive as to whether Mr. Lowry wished to proceed with the works at the costings as originally agreed.

You stated that in order to protect the interests of the company an evaluation was forwarded to Mr. Lowry on the 4th December, 1996 of the completed works in the sum of £32,446.80 inclusive of VAT?

A. That's correct.

Q. I think you have stated that you recall that no response was received to that letter of the 4th December and that your late brother endeavoured to contact Mr. Lowry directly. That shortly after that it was agreed that the company, that's Cedar Building Company Limited, would buy back the property from Mr. Lowry at a price which would reflect the costs incurred by him.

A. That's correct.

Q. I think you have stated that a figure of £237,875 was agreed to cover the initial purchase price of the house. The stamp duty was £13,380 paid by Mr. Lowry and the legal costs of £1,495, that would have been Mr. Lowry's legal costs in purchasing the property initially, would it?

A. Sorry?

Q. That would have been Mr. Lowry's legal costs in the purchase of the property when he initially acquired it?

A. Yes. The figure that was agreed was that Mr. Lowry would not have been out any monies on the actual purchase and the sale back.

Q. You would not have been left in a no gain no loss

situation?

A. Yes.

Q. You stated that from the records which were available to the company it appears that the deposit of £23,000 was paid by cheque dated 10th January, 1997 and the balance of the purchase price of £214,875 was paid by cheque dated 17th January, 1997?

A. That's correct.

Q. You stated that you were not informed at any time by your late brother that he was aware that there were funds available to Mr. Lowry to meet the refurbishment costs from the late Mr. David Austin?

A. That's correct.

Q. You stated that to your knowledge, there was never any discussion of the company carrying out the fit-out works such as those referred to in the last sentence of paragraph 4 of your memorandum, that's the finishing works I think that you referred to?

A. The finishing works, yeah.

Q. Nor was the company requested to quote or tender for those works?

A. Not that I am aware of, no.

Q. You say that you are not aware that the late Mr. Austin had any involvement in any aspect of the funding of the acquisition or refurbishment of the property?

A. I was never aware that Mr. Austin had any function in it.

Q. You say that since buying back the property the company completed the refurbishment works and the fit-out for letting purposes and the total sum expended by the company in finishing the property was €166,495.

A. That's correct.

Q. And just in relation to the documents which you have furnished, Mr. Holly, I think the first of those documents is the estimate that was furnished for the works which was on the 2nd September of 1996.

(Document handed to witness.) I think, in fact, that's a letter signed by you addressed to Mr. Lowry at his home address in County Tipperary?

A. That's correct.

Q. And it states that "Further to your recent inquiry, we have pleasure in submitting our estimate in the sum of €80,267, subject to VAT at the appropriate rates, for carrying out the above works in accordance with the architects drawings and specification.

We attach herewith a summary sheet showing the breakdown of our tender for your information."

A. That's correct, yeah.

Q. I think you indicated in your memorandum that, I think, architects were retained and they produced specifications for the refurbishment works and it was on foot of those specifications that the tender was prepared, is that correct?

A. That's correct.

Q. If you just look at the tender document then itself.

I think the document lists the various works that were included within the estimate. I think they are largely the refurbishment work to the fabric of the building, would that be fair to say?

A. The refurbishment, yeah, yes.

Q. I think the total of the tender works was i;½90,725.45?

A. That's correct, yes.

Q. That was the total inclusive of VAT?

A. Inclusive of VAT, yes.

Q. And professional fees?

A. Mm-hmm.

Q. I think the professional fees are provided as i;½5,000?

A. i;½5,000.

Q. If we just turn it over to the second page, we see the schedule attached to the tender. That lists the further works included in the tender as provisional sums and it also lists the works not forming part of the tender, which I think you'd agree are the finishing works to the interior of the house?

A. Yes.

Q. And in the ordinary course they'd be a matter for the owner of the house after the refurbishment works would be complete, would that be correct?

A. That would be correct, yes.

Q. Now, I think that was the 2nd September, 1996 that you furnished that letter and the estimate.

A. It was, yes.

Q. And, in fact, that appears to have been signed by you yourself, the letter of the 2nd September appears to have been signed by you?

A. It was, yes.

Q. Rather than your brother?

A. It was I signed that, yes.

Q. Were you the person that kind of went about organising the tendering for this refurbishment work?

A. Yes, I would, certainly after the initial contacts, I would have met the architect on-site but I would have had a quantity surveyor from our company with me on that occasion and we would have gone through with the architect on-site what was required etc.. The house was there, the house was substantial and it was a question of repairs, refurbishment and slight alterations. So there was a Bill of Quantities prepared for that and you have the summary there brought forward from the bill of quantities.

Q. And who would have given instructions to the architects as to what was required in terms of alterations?

A. It would have been agreed with the architect and ourselves in bringing back the house to what it was, there was damp problems some floors had, so a lot of it was self evident.

Q. I see. And did your brother, Mr. Michael Holly, have any input into this work, the preparation

specifications and the costings and furnishing?

A. No, he would not have an input we would have done that internally in the office. Once we got the drawings and the specification and there was obviously agreement on what had to be done, once we knew that, that would be prepared in-house.

Q. I see. And did Mr. Lowry have any input into any part of this, do you recall?

A. I don't know. As I said, that once we got the drawings and the specifications, that was produced in-house and we prepared the estimates based on that.

Q. I see. Now, in your memorandum, I think you state that the work commenced around mid-September, 1996 and this was shortly before the execution of the formal Articles of Agreement. I think you furnished the Tribunal with the Articles of Agreement. These are the Articles of Agreement between Mr. Lowry and between Cedar Building Company Limited and I take it there'd be nothing unusual about having Articles of Agreement of this type for a refurbishment job of the type that was contemplated for the house in Carysfort Avenue?

A. There would be nothing unusual in something like that, that would be dealt with people that knew each other and there is a formal document, that's in agreement, rather than having solicitors and that type of thing tie up documents, that certainly would not be unusual, no.



Q. And I think we can see that it's a standard form of document and it's dated the 20th September of 1996 and it sets out the contract price and on the second page of it, it's signed by Mr. Michael Lowry?

A. That's correct, yes.

Q. And I think in fact it's witnessed by Mr. Denis O'Connor as well. That would be Mr. Michael Lowry's signature presumably?

A. Yes, correct, yeah.

Q. I think on the appendix to it, there is a reference there to the date of possession as the 9th September, 1996 and the date for completion of the works on the 7th February, 1997?

A. That's correct.

Q. I think from what you have said, that the actual work commenced shortly after the possession date. Sometime around mid-September of 1996?

A. Around mid-September, yes.

Q. So, in fact, the work commenced prior to this document being signed?

A. Yes, it would.

Q. Now, I think in your memorandum you then refer to Mr. Lowry's resignation from his position as government minister and the matters which came into the public domain I suppose regarding Mr. Lowry's difficulties at the end of November of 1996. And then you indicate that you wanted to try and ascertain what the position

would be regarding the continuing refurbishment works and presumably also payment for the works which had been undertaken to date?

A. Payment for the works and how we stood in the contract.

Was Mr. Lowry intending to go ahead or what was the situation? There was a lot of publicity at the time.

So we were apprehensive as to, you know, what way it would go.

Q. As to whether he would want to continue?

A. Whether we were to continue, yes, yes.

Q. As to whether you would be paid for the work to date?

A. Yes.

Q. And I presume when you referred there in your answer to 'we', I take it when you refer to 'we' you are talking about the company?

A. The company.

Q. Yourself and your brother also?

A. Yes.

Q. As a result of that apprehension, I take it the letter of the 4th December of 1996 was sent to Mr. Lowry, was it?

A. Well, I think that would have gone as a matter of form anyway, that we were into the contract. We were probably 40 or 50% on the way through. So the valuation would have been prepared so that certainly focused the mind to speed it up and get it through.

Q. That concentrated your mind to get out the valuation?

A. It, did, yes.

Q. That's 4th November, 1996. It's signed a Paul Tiernan?

A. Yes, he was the quantity survey in the company.

Q. Working on that particular job?

A. Yes.

Q. It says, "Dear Mr. Lowry,

Please find our enclosed valuation number 1 for the sum of £32,446.80 in connection with the above project for your attention."

You enclose a detailed valuation which particularises all of the works which had been completed to that date and the total fees, the total sum due under that valuation was £32,446.80?

A. That's correct, yeah.

Q. And that included again a provision for professional fees and also the VAT that accrued on the works to date?

A. The works to date, that's correct.

Q. And that was sent on the 4th December of 1996?

A. That's right.

Q. I think in your memorandum you say that you received no response to that letter, is that correct?

A. That's correct, yes.

Q. And did you discuss that with your late brother at that stage?

A. We discussed it at that time and I know that Mick, my

brother, did try to contact Mr. Lowry after that had gone in and I think that he wasn't able to contact him for sometime, it might have been a matter of days or it might have been weeks etc. but eventually he did make contact with Mr. Lowry and as far as I am aware then, that the agreement was that Cedar building company would purchase the house back from Mr. Lowry.

Q. I see. And I take it therefore, were you aware at the time that your brother knew Mr. Lowry?

A. Sorry?

Q. You were aware that your brother was a friend of Mr. Lowry's or knew Mr. Lowry quite well?

A. Oh he did, yes, yeah.

Q. So he would have been the appropriate person as between the two of you to make the approach to Mr. Lowry?

A. He would, yeah.

Q. You say that was shortly after the letter of the 4th December?

A. Sometime afterwards, yes, yeah.

Q. Can you place in time at all when, to your knowledge, it was agreed between your brother and Mr. Lowry that the company would buy back the property?

A. I think it was sometime prior to Christmas.

Q. So you'd put it at prior to Christmas?

A. I would, yes, I'd put it prior to Christmas, yeah.

Q. Now, I think you say in your memorandum that the deposit was paid on the 10th January of 1997, is that

correct?

A. That's correct, yes.

Q. And the deposit was i;½23,000?

A. That's correct, yes.

Q. And then from your records also you have been able to ascertain that the balance was paid on the 17th January of 1997?

A. That's correct.

Q. So that the sale presumably completed on that date, 17th January, 1997?

A. That's right.

Q. Now you said in your memorandum that your brother never informed you that there were any funds available to Mr. Lowry to meet these refurbishment works or that Mr. Austin had provided any funds for that purpose.

A. That was certainly my understanding of it, that I was never aware that there was any funds available or as far as I understood, it was a straight contract and straight agreement. As I said, I wasn't aware that there was any funds available.

Q. Now, I suppose if your brother had been aware that there were funds available, he might have put your mind at rest around the 4th December when you were concerned as to whether you would be paid for the job or what the status of the refurbishment was?

A. He probably would have. He'd have probably said - yes, yeah I am sure.

Q. Thank you, Mr. Holly.

CHAIRMAN: Nothing anyone wishes to ask? Thank you very much for your attendance, Mr. Holly.

THE WITNESS THEN WITHDREW.

MR. COUGHLAN: Those are the available witness witnesses today, Sir. Tuesday at 11 o'clock.

CHAIRMAN: Tuesday at 11:00. Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 17TH JULY, 2001 AT 11AM.