

MORIARTY TRIBUNAL - DAY 146

THE TRIBUNAL RESUMED AS FOLLOWS ON MONDAY, 22ND  
OCTOBER, 2001 AT 11 AM:

MS. O'BRIEN: Mr. Noel Walshe, please.

MR. McSHANE: Peter McShane solicitor, I am for Mr.  
Walshe, I'll be making the usual application in  
relation to representation.

CHAIRMAN: Limited representation on the usual terms,  
Mr. McShane.

NOEL WALSH, HAVING BEEN SWORN, WAS EXAMINED AS FOLLOWS

BY MS. O'BRIEN:

Q. MS. O'BRIEN: Thank you, Mr. Walshe. I wonder, can you  
hear me clearly?

A. Yes, I can hear you now, yes.

Q. Thank you. Just to put Mr. Walshe's evidence in  
context, Sir. Mr. Walshe has been asked to give  
evidence in relation to shares which were transferred  
to an account which he held with Donaldson Lufkin &  
Jenrette, and these were transferred to his account on  
the 16th November of 1998. And the Tribunal has heard  
evidence that these shares were initially purchased by  
Mr. Denis O'Brien and placed on an account of the late  
Mr. David Austin. And it's in those circumstances that  
Mr. Walshe has been asked to give evidence regarding  
his knowledge of this matter.

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Now, Mr. Walshe, I think you furnished the Tribunal with a document headed "Memorandum of Evidence", isn't that correct?

A. That's correct.

Q. I wonder, do you have a copy of that in the witness-box?

A. I have, yes.

Q. And just to let you know what I propose doing, Mr. Walshe, and we'll take it slowly. I am going to take you through that memorandum to enable you to confirm the contents of the memorandum, and there may be one or two matters that I might wish to raise with you briefly, and there may be just one or two documents that we look at on the overhead screen.

Now, in your memorandum you state that you did not know David Austin, and you have no knowledge of the purchase of 12,000 ESAT shares for the account of the late David Austin in September of 1998. Is that correct?

A. That is correct.

Q. You state that you opened an account with Donaldson Lufkin & Jenrette at the time of the ESAT Telecom IPO in November 1997 when you bought ESAT shares through the Friends and Family Scheme.

A. That is correct.

Q. You state that the purchase of these shares was funded by Denis O'Brien, your son-in-law?

A. Yes.

Q. You say that you subsequently repaid Mr. O'Brien by way of a transfer of the ESAT shares whose value had risen

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in the interim?

A. Yes, yes.

Q. You state that you subsequently sold all, bar one, of your ESAT shares, and you were left with this single share in February of 1998, is that correct?

A. That's right, yes.

Q. You state that you continued to deal with DLJ, and in particular, Mr. Peter Muldowney. You subsequently bought other shares through DLJ, and you would have received monthly statements, is that correct?

A. Yes.

Q. You say that in or about August of 1998, you believe that you would have had a general discussion with Denis O'Brien in which you would have expressed the desire to acquire some ESAT shares?

A. That is correct, yes.

Q. You state that at this time, you did not have the ready means to pay for the shares, is that correct?

A. Yes.

Q. You state that you cannot be specific as to when you

found out about the purchase of the ESAT shares, but would probably have received a statement of account in early 1998 which would have shown sorry, I apologise, December 1998, which would have shown a total of 22,000 shares in your name, is that correct?

A. That's right, yes.

Q. You state that these 22,000 shares had been organised by Mr. Denis O'Brien, 12,000 being funded by Mr. O'Brien and the remaining 10,000 being secured on Mr. Walshe's margin account, a credit facility provided by

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DLJ for its account holders, is that correct?

A. That's right, yes.

Q. You say that you knew nothing about the shares being purchased in September, 1998, but going into the wrong account, is that correct?

A. No, I knew nothing about that.

Q. Nor did you know the source of the 12,000 shares which were noted in your account with DLJ as of the 16th November of 1998, is that correct?

A. Yeah, can you just give me that again, please?

Q. You state in your memorandum, nor did you know the source of the 12,000 shares which were noted

A. That's correct, yes.

Q. in your account with DLJ.

A. Yes.

Q. You state that in April 1999, you transferred the sum of \$260,000 from your DLJ account to Mr. Denis O'Brien by way of repayment in respect of the financing by Mr. O'Brien of the acquisition of the 12,000 shares, is that correct?

A. Yes, that's right, yes.

Q. And that, I think, completes your memorandum?

A. Yes.

Q. Now, Mr. Walshe, you state that you opened this account with Donaldson Lufkin & Jenrette, which I think is a branch of Credit Suisse First Boston, in November of 1997, when you acquired ESAT shares on the IPO?

A. Yes, yes.

Q. Now, when you opened that account, Mr. Walshe, did you complete account-opening forms at the time?

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A. I can't remember that, but I can't remember that.

Q. You can't recall completing any account-opening forms?

A. Yes, yes, well, I am sure if there were forms that had to be done, I would have filled them in.

Q. You would have filled them in?

A. Yeah.

Q. At that time I think you acquired shares within the Friends and Family Scheme as operated?

A. That's right.

Q. That's perfectly understandable, and I think they were

funded by Mr. O'Brien?

A. They were, yes.

Q. Again, that's perfectly understandable. Can I ask you this, Mr. Walshe: At the time when the account was opened, did you give a power of attorney or did you give an authority to anybody else to act on your behalf in relation to this account?

A. I certainly did not, no, no.

Q. I see. Now, I think in your statement you said that in February of 1998, you then sold those shares that you acquired the previous November, and you were left with one share, isn't that correct?

A. Yes, yes.

Q. And I think you also say in your statement that you repaid Mr. O'Brien his funds by transferring shares, the ESAT shares to him, is that correct?

A. Yes, yes.

Q. So you would have transferred those by, I presume, instructing, was it Mr. Muldowney that you were dealing with?

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A. Yes, it would have been, yes.

Q. You'd have instructed him to transfer those shares from your account with DLJ to Mr. O'Brien's account?

A. Yes, yes.

Q. And did you have considerable dealings with Mr.

Muldowney at that time?

A. Well, I got quite friendly with him, and I he would have been talking to me about shares, and I would have been ringing him, and I mean, initially, you know, I got a considerable number of shares, and naturally I wanted to find out how they were doing.

Q. Yes, of course. So you'd have talked to him quite frequently about the shares?

A. I wouldn't say quite frequently, but I did speak to him, yes, on and off.

Q. Can you tell me this, was he an American, or was he an Irishman? With a name like "Muldowney", you might wonder if he was Irish.

A. Well, he is an Irishman with an American accent.

Q. I see. Is that on the basis that he spent some time living in the States? Do you know, was he born in Ireland and then went to the States, or would he be first- or second-generation American?

A. Well, I remember making some statement to him, and he said to me, "Well," he said, "I am from Ireland."

Q. I see. I think after that, and we don't need to go into this in any detail, but there was some profit on the sale of the ESAT shares, and I think you invested those in some other shares in about May of 1998?

A. Yes.

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Q. And in fact, I don't think those shares fared very well, isn't that correct?

A. These were the Smurfit shares?

Q. Yes.

A. Yes, yes.

Q. I think you say in your statement that in August of 1998, you were talking to Mr. O'Brien, and you indicated that you were anxious to buy some more ESAT shares?

A. Yes.

Q. And just so that we can confirm it, I think as of that date, you held just one ESAT share, isn't that correct?

A. One ESAT share and the Smurfit shares. If I remember, it was about 2,900 Smurfit shares as well.

Q. And do you recall you say that this discussion was around August of 1998?

A. Yes.

Q. And can you tell, me at the time, what was it that prompted you to decide that you wanted to acquire more ESAT shares in August of '98?

A. Well, the Smurfit shares were doing rather badly, and to the point in fact that I couldn't afford to sell them because they had dropped down to about 50% of the price that I had originally bought them. And naturally I would have mentioned this to Denis, yeah.

Q. And was it you who said that you wanted to buy ESAT shares?



A. I would have initiated it, yes.

Q. You would have initiated it?

A. Yes.

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Q. And did you have in mind at the time what number of shares you wanted to acquire?

A. No, I didn't. No, I didn't, but I mean, I was conscious of the number of shares which I got originally, you know, and I certainly didn't put any numbers on it.

Q. I suppose, would it be fair to say that you would have had in mind something around the same shareholding as the shareholding you acquired in the Friends and Family Scheme?

A. Well, I suppose that's how it would have been, yes.

Q. I see. And I think, in fairness to yourself, and it's perfectly understandable, we would have been all been in the position we would have found it difficult to fund an acquisition, a large acquisition of shares that were worth about \$37 each at that time, but did you have any discussion with Mr. O'Brien or did you address yourself to how you would fund this share acquisition?

A. Well, at the time, the Smurfit shares and cash that I had, I had probably about \$100,000, and in my personal account I probably had about £32,000, and I have a limited company and I would have had money in that as

well. And I did speak to my wife about the cost of the shares, and I made her conscious of it. And I did have a house that was quite valuable, so if it went completely the shareholding became a nil value, I still would more or less be able to cover myself.

Q. So you did address your mind to that at the time. What I was trying to, I suppose, discuss with you was in August, when you had this conversation with Mr.

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O'Brien, we know that ultimately when you acquired these shares, part of them were funded by Mr. O'Brien and part of them were on your margin account?

A. That's right, yes.

Q. And did you have any discussions with him in August of 1998 as to how you would split the liability between funding for from Mr. O'Brien

A. I didn't, and from memory, it would have been a very brief conversation. I mean, Denis would call to the house with Catherine, my daughter

Q. Yes, of course

A. I mean, time was quite precious. He was a very busy man, and he would only call infrequently. And I mean, the last thing I would ever do is to take up a conversation about money in the presence of my wife and daughter, because that's the last thing they would have wanted to hear about. And when Denis would be walking

out, I would have you know, had a few words with him.

Q. And you'd have mentioned it quite casually?

A. Very casually, yes, yes.

Q. You say then in your memorandum that you cannot be specific as to when you found out about the purchase of the ESAT shares but would probably have received a statement of account in early December, 1998, which would have shown a total of 22,000 shares in your name?

A. Yes.

Q. Can we just can I just refer you, Mr. Walshe, to that statement of account for I'll just put it on the overhead screen, if we could have it up, and I /RS

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think you may have a hard copy of it as well, and it's for the period, 31st October, 1998, through 27th November of 1998.

And I wonder, do you have a hard copy of that with you in the witness-box? Because I can hand one up to you if you don't.

A. Yes, I think I have a copy of it, yes.

Q. It's quite a complex document, I think, by anybody's standards, but we'll just go through it slowly, Mr. Walshe, if that's all right.

A. Yes, I think I have it here, yes.

Q. Now, you can see there that on the left it shows the

statement period. Below that it shows your account number, 22Y197498.

A. Yes.

Q. Then just to the right of that is your name, Charles Walshe, and your address?

A. Yes.

Q. Now, just below that is a table headed "Asset Valuation". And if we just look briefly on the left-hand column of it, I think it shows there a cash balance of \$322,529.22, with a minus sign?

A. Yes.

Q. And am I correct in thinking that that signifies that you had a liability on what we know is your margin account of \$322,529.22?

A. Yes, that would be my margin account. That is my credit which I would have had with DLJ.

Q. That was the credit facility which you operated on that /RS

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account?

A. Yes.

Q. And then money market funds is zero. Then below that, stocks, rights, and warranties. I think that's the value of the stocks that you held, which is shown at \$861,368.50.

A. Yes.

Q. Then the total brokerage account assets, which

presumably is the value of the stocks less your liability on the cash balance, and that's \$538,839.28?

A. Yes.

Q. Now, just below that table, there is a second table which goes on to a second page, "Transactions in date sequence"?

A. Yes.

Q. And I think the first of these on the left-hand side shows a settlement date which is shown as 11/16/98, and I think that's the American way of showing the date. I think it signifies that it was the 16th November, 1998?

A. Yes.

Q. And the activity type is shown as "Customer authorised transfer". Isn't that correct?

A. Yes.

Q. And then the description shows ESAT Telecom Group plc. I think the next entries refer to the type of shares. Below that, ordinary shares transferred from, and then it shows 22Y208238.

A. Yes.

Q. And then the quantity is shown as 12,000?

A. Yes.

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Q. And I think we now know that the account referred to there, 22Y208238 was the late Mr. Austin's account. But you didn't know that at the time, and I think your

position is that you weren't aware and didn't know at all, until this was brought to your attention, that these shares had come from Mr. Austin's account?

A. No, I didn't, no.

Q. Can I just ask you one thing, Mr. Walshe: I think you said in your statement, your memorandum, that this document would have come through your letter box sometime in early December of 1998?

A. Yes.

Q. And I presume that you are relatively familiar with these brokerage account statements, because they are complicated documents, but you would have been receiving them?

A. They are complicated, yes.

Q. And I presume that you would have noticed there the entry for "Customer authorised transfer," 12,000 shares?

A. Yes, yes.

Q. Did that strike you as being unusual at the time?

A. The 12,000 shares getting the 12,000 shares?

Q. No. The fact that it was referred to, the activity type was "Customer authorised transfer". Did that strike you as being in any way unusual?

A. Yeah, well, I didn't I mean, I presume that had been Denis's Mr. O'Brien's account number.

Q. I see. And would you not I think you said earlier in evidence that you had transferred well, what I

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suppose I am getting at is this: Would you have raised any query with Mr. O'Brien as to the source of these shares?

A. No. I mean, I didn't. I didn't, and I would have had no reason to. I mean, when people buy shares, they buy shares and

Q. But you'll accept that there is no indication of any purchase of shares on that entry?

A. There is no indication

Q. There is no indication, on that entry for the 12,000 shares, that any shares were actually purchased at that time; it was shown as "Customer authorised transfer"?

A. Yeah.

Q. But you assume do I take it your evidence

A. As far as I was concerned, 12,000 shares had been purchased for me.

Q. I see

A. By Denis.

Q. I see. If I can just ask you to look over the page to the second page, and I'll just take you to the third entry on the second page on that table. And the date there, 11/20/98, is the settlement date. The transaction date is shown as 17th November, 1998

A. I don't have this page.

Q. We can hand you up a page of that, Mr. Walshe.

A. Here we are, okay, I have it.

Q. It's just the third transaction recorded on that table on the second page.

You see the first entry on it is the 20th November,

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1998. The trade transaction date is the 17th November,

1998. The activity type is "Purchased", presumably

referring to a share purchase. And then details of

ESAT Telecom Group shares purchased at \$37 per share;

quantity 10,000; price \$37.4 per share. And the total

amount, \$374,000, with a minus?

A. Yes, that's right.

Q. And I presume it was those the purchase of those

shares that gave rise to the liability on your margin

account?

A. Yes, that's right.

Q. And I think we saw from the first page of that account

statement that your total liability on that margin

account was \$322,529?

A. Yes.

Q. Can I ask you this, Mr. Walshe: You were just saying,

when you opened your account, that you didn't give

anybody a power of attorney or an agency to act on your

behalf. Did you have discussions with DLJ, or did you

in some way formalise the terms on which that credit



facility was provided to you by DLJ?

A. That credit facility is open to anybody who has an account in DLJ, and I think it means that if you have some shares, I think you can actually borrow I think the same amount to buy other shares. And that is readily available.

Q. I see. And apart was that facility then secured on the existing shares on your account?

A. The 10,000 would have been secured on the 12,000 shares.

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Q. I see. So the 10,000

A. Plus whatever I had there with the Smurfit shares.

Q. I see. So the 10,000 shares that were purchased on the margin account would have been secured on the 12,000 shares transferred into your account?

A. They would have been, yes, that is correct.

Q. I see. And also the other shares that were held on your account?

A. Yes, yes.

Q. And can I ask you, was there any formality as regards the interest rate that was charged by DLJ, or the repayment terms, and so forth?

A. Yes, there was an interest rate. I think it may have been 8 percent, but it may have been lower than that, but it was a very reasonable rate at which they were

charging.

Q. And

A. And that charge was actually I was charged that on a monthly basis.

Q. Yes, I have seen that on your account statements. Was there any limitation on the length of time for which you could operate the credit facility given to you by DLJ?

A. Well, if there was, I didn't know about it. My primary concern was watching the shares, because there was a lot of money involved, and I was watching that if they were going to move down, I was going to get out of them quite fast. So to answer your question, I don't know if there was a limit on the time.

Q. I see. Ultimately after you acquired these shares /RS

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then, you had 22,000, in total, 22,000 ESAT shares?

A. Yes.

Q. And you would have known from this account statement that these were funded partially by the operation of your margin account?

A. Yes.

Q. And you assumed, I think, that the other 12,000 shares which hadn't been purchased had been funded by Mr. O'Brien, is that fair to say?

A. Yes, yes, yes.

Q. And did you have any discussions with him about this between, I think, December or November of 1998 and April of 1999, when you ultimately sold some shares and repaid Mr. O'Brien?

A. Yeah. Well, taking up from where you left off when I said I had discussed the matter with my wife. And I did actually discuss it with Denis about the amount of money that was involved, and he just said, "Look, don't worry about it," or words to that effect.

Q. I see. And can you place in time when that discussion would have taken place between yourself and Mr. O'Brien?

A. I wouldn't, but I mean, I am sure that it was shortly after that I discovered about the 22,000 shares.

Q. So it would have been sometime after early December of 1998?

A. Yes, yeah, and I mean, Denis was probably around quite a bit then, and I would have spoken to him about it.

Q. I see. And did you indicate to him or did you and he address in any way when you might repay him the funds

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that he had provided to partly acquire or partly fund this acquisition?

A. No, I didn't.

Q. You didn't?

A. No, no.

Q. Now, I think you said in your memorandum, and we can in fact see it on the account statement, that you sold shares, sold some of these ESAT shares in April of 1999, and that you repaid Mr. O'Brien out of the proceeds of that sale?

A. Yes, that's right.

Q. And I think if we just can put on the overhead projector a copy of your account statement, your brokerage account statement for the period 27th March, 1999, through to the 30th April, 1999.

A. Yes.

Q. We can see the date there. And I think we can move directly to the table headed "Transactions in date sequence". And we see there that the first entry records the sale of 6,500 ESAT Telecom Group shares, and they had increased in value, because the price had gone up to just over \$40 per share?

A. Yes.

Q. And that realised \$261,210.04?

A. Yes.

Q. And I think the next entry is shown for the 14th April, 1999 money fund purchase, daily dollar, and that's \$261,210.04?

A. Yes.

Q. Then the next entry shows "Customer authorised

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transfer," on the 15th April, transfer to 22Y008562,  
and it shows an amount of \$260,000 with a minus sign?

A. Yes.

Q. I think recording the transfer of that \$260,000 to Mr.  
O'Brien's account?

A. Yes.

Q. At the time, Mr. Walshe, did you discuss with Mr.  
O'Brien or indicate to him that you now wanted to sell  
part of these shares to repay him the funding that he  
had made available to you?

A. No, I didn't.

Q. You didn't?

A. No.

Q. How did you arrive, then, at a figure of \$260,000 as  
the monies which you owed him for the funding which he  
had provided?

A. I contacted Peter Muldowney, and I had asked him, you  
know, what value was on this, what price Denis had on  
it. And that's the figure which I got from him, and  
that was the figure I had transferred.

Q. That you transferred?

A. Yes.

Q. And you got it from Mr. Muldowney?

A. I would say I got yes, yes.

Q. You see, from the evidence that the Tribunal has heard,  
Mr. Walshe, and you probably I am sure you knew  
nothing about this at all, but when these shares, these

12,000 shares were purchased by Mr. O'Brien in September of 1998, the evidence which has been heard is that he actually paid \$294,000 for these shares; so

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it's just in those circumstances, we were wondering how you arrived at a figure of \$260,000.

A. Well, that is how I arrived at them.

Q. I see.

A. I got a figure from Peter Muldowney. In fact, I noticed in fact on the accounts that there wasn't a value on them when they were bought. I didn't have a value on them.

Q. Yes, I can see that.

A. And I mean, you might say, well, why didn't I ask about it? Honestly I didn't, and

Q. It was Mr. Muldowney gave you the figure of \$260,000?

A. Yes.

Q. And did you tell Mr. O'Brien that you were repaying him this sum of money?

A. No, I didn't. But you know, I am sure I didn't, no.

Q. You didn't?

A. No.

Q. And after it had been repaid, did he say to you something along the lines of, "Thanks, I got that money back", or "We are all square," or acknowledge it in any way to you?

A. I probably and I am sure I thanked him for what he had done for me, but

Q. Well, that would be perfectly natural.

A. But I didn't go into the cost of the shares or anything with him or what I transferred. I mean, as far as I was concerned, I had transferred the money, and it was I was now out of financial problems.

Q. Can I just ask you to refer to one final document, Mr.

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Walshe, which is a document you wouldn't have seen, I think, before it was brought to your attention by the Tribunal. And there is just one aspect of it that I want to ask you about. It's a copy of a letter of the 13th October of 1998.

I wonder, do you have a hard copy of that with you in the witness-box? It's sometimes difficult to see it on the screen.

A. Yes.

Q. And that's a letter from the late Mr. Austin to Mr. Aidan Phelan dated 13th October, 1998, re ESAT Telecom Group.

"Dear Aidan:

"Further to our recent correspondence, I would be obliged if you would request DLJ in New York to transfer my holding of 12,000 ADRs in the above company

to Mr. Noel Walshe, who I understand has an existing account, account number 22Y197498, with DLJ.

"Thank you for your assistance. Yours sincerely,  
David Austin."

Now, the only thing I want to ask you about that letter, Mr. Walshe, is this: You'll see that Mr. Austin, who you didn't know at all, clearly had information about your account number.

A. Yes.

Q. Because he was able to quote your account number in the /RS

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instructions which he gave to Mr. Aidan Phelan as of the 13th October. And I was just wondering, apart from yourself and DLJ, who else would have had knowledge of your account number with DLJ?

A. Well, the only person who I mean, I didn't give my account number to anybody. And I mean, it would be my my account number would have been with DLJ.

Q. Yes, well, you would have known about it, obviously, because it was your account number.

A. Yes. I mean, I was getting statements, so I mean

Q. There is no issue on that, Mr. Walshe. And DLJ themselves Mr. Muldowney would have known your account number?

A. Oh he would, yes, yes.



Q. And I take it as well, Mr. O'Brien would have known your account number?

A. Well, he probably yes, yeah, I am sure he would have, yes. You know, I mean, if I mean, it's probable that he would have known it. I mean, yes.

Q. Well, certainly if he was transferring the shares to your account, and if he was buying them on your account

A. Then he would have known them.

Q. I take it he must have known your account number?

A. Then he would have known it, yes, yes.

Q. Do you remember, Mr. Walshe, you said to me that when you opened your account, that you didn't give anybody a power of attorney or an agency with regard to your account?

A. Yes.

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Q. Can you tell me when you furnished Mr. O'Brien with your account number?

A. I can't remember giving him my account number.

Q. So you can't remember giving him your account number?

A. No, I can't remember giving him my account number, but I mean, he probably could have established that elsewhere.

Q. I presume he could have just asked Mr. Muldowney, could he?

A. Well, I am a bit hesitant about it, because I can't say where he got my number.

Q. But you don't recall being asked for it?

A. And I don't recall giving him my number.

Q. Okay. And you were you ever asked to or did you give Mr. Muldowney authority to give your account number to any other person?

A. No, I didn't.

Q. Can I just ask you finally, Mr. Walshe, I take it that you would have no objection to Mr. Muldowney attending to give evidence to the Tribunal regarding any of these matters?

A. Absolutely not, no, no.

Q. Or for that matter, answering questions that the Tribunal might wish to put to him?

A. No, I would have no difficulty whatsoever.

Q. Thanks, Mr. Walshe.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL:

Q. MR. MCGONIGAL: Mr. Walshe, just in relation to the /RS

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subsequent disposal of those shares, I think when the shares were ultimately disposed of, you obtained a profit in relation to them?

A. Yes, that's right.

Q. And I think you also paid the Capital Gains Tax on that

profit?

A. Yes, I did.

Q. Thanks very much.

CHAIRMAN: Mr. Walshe, I am sorry it's been necessary to trouble you, but thank you very much for your prompt cooperation with the Tribunal.

THE WITNESS THEN WITHDREW.

MR. COUGHLAN: Mr. O'Brien.

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DENIS O'BRIEN, PREVIOUSLY SWORN, WAS EXAMINED AS FOLLOWS BY MR. COUGHLAN:

CHAIRMAN: Thank you for further attendance, Mr. O'Brien. You are already sworn.

Q. MR. COUGHLAN: Mr. O'Brien, I would like to deal with a number of matters with you, and I would suggest that the first item that I would take up is the question of the dealings with DLJ in relation to the share transfer from Mr. Austin's account to your father-in-law's account and the surrounding matters. We'll deal with that first, if that's all right with you.

A. Fine.

Q. I think you have furnished the Tribunal with a memorandum of proposed evidence in relation to this

matter, and it follows in sequence matters which were raised with you by the Tribunal in a letter from the Tribunal dated 2nd October, 2001, I think, isn't that correct?

A. That's correct, yes.

Q. And I think you have informed the Tribunal that you believe that you gave verbal instructions to Mr. Peter Muldowney of Donaldson Lufkin & Jenrette, DLJ, to purchase roughly \$300,000 worth of ESAT shares in September, 1998, is that correct?

A. That's correct, yes.

Q. I think you have informed the Tribunal that you wished to acquire the shares for the account of your father-in-law, Mr. Noel Walshe, is that correct?

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A. Yes, that's right.

Q. You have informed the Tribunal that you do not recollect the exact date upon which you gave the instructions to Mr. Muldowney, but you are sure that it must have been on or just before the 3rd September, 1998, when the shares were bought?

A. That's right.

Q. Now, I think you have seen the letter of the 7th September from Mr. Muldowney in which he refers to your instructions as to the late Mr. David Austin's name being mentioned and in which he confirms the error made

as a result. I think you have informed the Tribunal that you do not recall details of the conversations or the conversation in which you ordered the shares, and you do not recall mentioning Mr. Austin's name or the context in which it might have arisen, is that correct?

A. That's right, yes.

Q. I'll come back and deal with the letter. I'll just go through the statement first of all.

I think you have informed the Tribunal that you confirm that you gave instructions to Mr. Aidan Phelan to pay DLJ for the shares. You believe that it was when he asked, that's Mr. Phelan asked, for your approval for the payment, that you discovered the error which had been made, is that correct?

A. Yes.

Q. You nevertheless approved the payment because you still wanted the shares for Mr. Walshe. They had been bought and still had to be paid for; therefore, it was merely

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a matter of correcting the error, is that correct?

A. That's right.

Q. Now, I think you have informed the Tribunal that as stated already, you believe that you became aware of the error in the account for which the shares had been bought at the time. You were asked by Mr. Phelan to approve payment for them, is that correct, when he

asked for the money, or for authority to transfer?

A. That's right, to it ever, yes.

Q. You believe this to have been in mid-/late September 1998; that was when payment was due at the end of settlement period. Payment was requested by DLJ on the 18th September and made on the 22nd September, 1998.

You also believe that you previously ascribed the error to Mr. Phelan because you discovered it in a conversation with him. I'll come back to that; that's when you gave evidence previously. You were unsure as to whether the mistake was in DLJ or Mr. Phelan's, isn't that right?

A. Yes.

Q. The only person with whom you can recall having dealings in relation to the error, apart from Mr. Phelan, to the extent described above, is Peter Muldowney. You believe that you telephoned him and asked him to correct the error after the conversation with Mr. Phelan from which you discovered it, is that correct?

A. Yes.

Q. You can recall no dealings with the late Mr. Austin or /RS

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any other person in connection with the procurement, preparation or signing of a letter dated 13th October,

1998. That is the letter from Mr. Austin addressed to

Mr. Phelan, isn't that correct?

A. Yes, that's right.

Q. You say that you have nothing to add to what you have said about the queries other than those that are mentioned in paragraphs 1 to 6 of your memorandum of proposed evidence, is that right?

A. That's correct, yes.

Q. Now, I think Mr. Walshe has given evidence of having some type of general conversation with you, he believes around August of 1998, probably a brief conversation when he indicated that he might be interested in some more ESAT shares. He believed they would be somewhere in the range or region of the number of shares he got originally on the Friends and Family allocation?

A. I haven't heard his evidence, but if that's what he is saying, it's probably true.

Q. Would that seem right?

A. Yeah.

Q. It was a very general conversation; there was no great discussion about it?

A. Yeah. It was in I think it was in his home.

Q. Yes, I think he indicated it was when you came to his home.

A. Yes.

Q. You believe that in around the beginning of September, probably prior to the 3rd September 1998, that you

would have given instructions to Peter Muldowney of DLJ

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to purchase some shares, is that correct?

A. This is following my conversation, I think it was over a weekend, I think the following week I did

Q. The weekend you spoke to your father-in-law and you think sometime in the following week

A. Yes.

Q. that you would have spoken to Mr. Muldowney?

A. Yeah.

Q. And can I take it if we could just clarify a few matters, if you can assist the Tribunal, Mr. O'Brien.

Donaldson Lufkin & Jenrette Securities Corporation is an affiliate of Credit Suisse First Boston Corporation, isn't that correct?

A. It is now, but at the time it wasn't. It was an independent company.

Q. It was an independent company at the time?

A. Yeah.

Q. And what was it? It was a brokerage firm?

A. It was known as DLJ.

Q. DLJ. And Mr. Muldowney, can I take it you had dealings with Mr. Muldowney?

A. Yeah, he would have worked on the IPO of ESAT Telecom.

Q. In 1997?

A. And managed the Friends and Family that I think we went



into before in evidence.

Q. And is he Irish or American? Can you assist?

A. He is Irish, but he has been living in America for a long time.

Q. Now, when matters were taken up with Mr. Muldowney through Mr. Water Beatty, who is the solicitor for the /RS

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late Mr. Austin, he was also Mr. Austin's close friend, but he was Mr. Austin's solicitor, his solicitor for the Estate and Mrs. Austin's solicitor as well; and through his offices the Tribunal made inquiries of Mr. Muldowney about this matter, and I think you have seen a letter which was sent to Mr. Walter Beatty, is that right?

A. I have a copy.

Q. If we just go through that for a moment. It's dated 7th September, 2001. And it reads:

"Dear Mr. Beatty, we refer to your letter of the 28th June and the 21st August.

"1. The holding of 12,000 ESAT shares remained in David Austin's account until November 16th, 1998, when we received a letter of authorisation (copy enclosed dated 13th October 1998) from David Austin to transfer the shares to the account for which they were originally intended.

"2. The documents we sent are the records of all

transactions on Mr. Austin's account, including share dealings, share transfers and receipt disbursements of funds, and do not show supporting documentation authorising transfer on the account. When an error is discovered in an account, and particularly if some period of time has elapsed, we request a letter of authorisation from the account holder" that's the copy he has enclosed "to permit us to rectify the error by transferring the shares to the proper account.

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"3. As requested, we enclose copies of all documentation held by DLJ in relation to the late Mr. Austin's account, including all share dealings on the account, including the transfer of any shares into or out of the account, the receipt of funds on the account, and the receipt of any instructions by or on behalf of Mr. Austin in relation to all share dealings.

"4. We enclose a copy of the trade confirmation for the purchase of 12,000 ESAT shares in Mr. Austin's account and letter of authorisation subsequently received from Mr. Austin to transfer the shares to the account for which they were originally intended. The error arose from a misunderstanding in verbal instructions given by Mr. Denis O'Brien to DLJ to purchase 12,000 ESAT shares for his father-in-law,

Charles Walshe."

That's the same person as Mr. Noel Walshe; I don't think there is any difficulty about that?

A. That's correct, yes.

Q. "During the conversation, both Mr. Austin's and Mr. Walshe's name were mentioned, and in error DLJ bought the stock in the wrong account.

"5. The 12,000 shares were transferred out of Mr. Austin's account on Mr. Austin's authority on the 16th November 1998. We requested and received a letter of authorisation from Mr. Austin (copy enclosed) dated /RS

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13th October, 1998, on the 16th November, 1998, to transfer the shares to the party for whom they were originally intended.

"Yours sincerely.

"Peter Muldowney."

Now, I think you have informed the Tribunal that you do not recall any details of the conversation you had with Mr. Muldowney when you issued the instruction around the beginning of September to purchase the shares, isn't that correct?

A. Sometime around the 3rd, yeah.

Q. Sometime around that time. Now, can I take it that the

only dealings that you had with Mr. Muldowney which related to Mr. Austin where Mr. Austin's name might have been mentioned appropriately was in the purchase of the shares under the Friends and Family allocation?

A. Yes, that would be true, yes.

Q. And that would have been the only time, to the best of your knowledge, that you would have mentioned Mr.

Austin's name?

A. Unless he asked me about Mr. Austin.

Q. Did Mr. Muldowney know Mr. Austin?

A. Yes, he would have known him, yes.

Q. He knew him?

A. Yeah.

Q. How did he know him?

A. From when he originally opened his account with DLJ. I introduced David Austin to Peter Muldowney.

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Q. Personally?

A. Personally well, we weren't there in person, but I put the two of them in touch with each other.

Q. Yes, and would that have been over the telephone, to the best of your or in correspondence?

A. I believe so. I think it probably would have been over the telephone.

Q. And to the best of your knowledge, the only involvement Mr. Muldowney would have had with Mr. Austin now,

this is to your knowledge would have been for the

allocation under the Friends and Families?

A. Yes, in terms of a transaction.

Q. In terms of a transaction, yes?

A. Correct.

Q. And is there any particular reason that you can recollect why you would have mentioned Mr. Austin's name in the course of giving instructions for the purchase of shares on behalf of your father-in-law, Mr. Walshe?

A. You know, I didn't mention his name, but maybe he may have raised Mr. Austin with me in some context.

Q. You have no recollection of that?

A. No.

Q. But as far as you were concerned, there certainly couldn't have been any doubt in your mind as to the instructions you were giving Mr. Muldowney in relation to the purchase of shares at that time?

A. I mean, the call to Mr. Muldowney was initiated by me for one purpose, and that was to buy shares for Noel Walshe.

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Q. Now, at that time, Mr. Walshe himself, according to his evidence this morning, was unaware that any transaction was taking place for and on his behalf at that particular time.

A. Well, he would have known that I was going to get him some shares.

Q. I understand that, but as of that date, he was unaware.

I'll just tell you what he said in the witness-box.

A. Fine.

Q. And the first time that he became aware that the 12,000 shares, and a further 10,000 shares which were purchased on the margin, were in his account was when he received his statement, he thinks in early December of 1998?

A. That's

Q. That's when he became aware that he had 22,000-odd shares.

A. That's right.

Q. 10,000 on the margin and 12,000 which are accompanied by the legend "Transfer from customer" I don't know the exact words, but they don't show a purchase; there is a transfer. He didn't pay much attention to that, and that's perfectly understandable. He wasn't a broker or he was just a client. He didn't pay much attention to that. But the first time that he became aware that there were shares in his account was early December of 1998; would you accept that as being

A. That looks as if that is so, yes.

Q. Did you give instructions to Mr. Muldowney to purchase the 10,000 shares on the margin for Mr. Walshe?

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A. I probably would have, yes.

Q. Do you remember that?

A. Because well, yes, I would have ordered the 10,000 shares on the margin, definitely.

Q. And would that have been around the time that they were purchased, which appears to have been around the 17th November of 1998?

A. Yes.

Q. Around that date?

A. It was a two-step process. One is the purchase of 12,000 shares, which created the security to have a margin to buy more shares. So it was a two-to-one or virtually two-to-one security for DLJ. But they had to have the 12,000 shares in order to margin

Q. To allow a similar credit facility?

A. Yeah.

Q. So, did you receive sorry, I'll take it step by step, if I may. As far as you were concerned, as of the 3rd September or thereabouts, you'd given instructions to Mr. Muldowney to purchase shares for Mr. Walshe, isn't that right?

A. Yes.

Q. And I take it that there is a settlement period then?

A. I am not sure what the precise period is, but it's normally two to three weeks, I believe.

Q. The evidence we have from Mr. Aidan Phelan is that he

receives a request from DLJ to pay for the shares;

would that seem to

A. That's true, yes.

Q. accord with your recollection of things?

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A. Yeah.

Q. And that would have been around 21st, 22nd there is

a facsimile from Mr. Phelan giving instructions on the

22nd September 1998, so we can take it that it was

sometime around that time that he would have been

requested by DLJ to pay for the shares?

A. In that time-frame, yes.

Q. Do you remember having a discussion with Mr. Phelan

about the money, which was 294 close to \$300,000

294,038, something like that?

A. He sought my approval to pay DLJ, and he mentioned I

think he mentioned that basically had to be paid that

day, and it was, probably a number of things that he

was talking to me about in that conversation.

Q. And he then sent a fax to Mr. John De Girolamo, to make

the necessary transfer. You can see you have seen

the fax, I think?

A. Yes, I have.

Q. That's the fax, and

A. This would have been a wiring, would it?

Q. Yes. Then there is the DLJ wiring instructions then



which is to pay the money, the money is paid in, and it's in the account of David Austin, and that would have been sent by Mr. Phelan as well, I think?

A. That's right.

Q. And Mr. Phelan has told us that yes, that was for Mr. Austin's account, and those were the wiring instructions that he sent. Now, I think you have informed us in your evidence this morning that it was in the course of this conversation with Mr. Phelan

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around the we'll take it the 22nd; it doesn't matter whether it was the 21st or the 22nd, around that time that you realised that a mistake had been made, is that correct?

A. Yeah, when he asked me to approve a payment for shares for David Austin, I immediately knew that that was an error.

Q. Now, you did not inform Mr. Phelan of that, isn't that correct?

A. I may have made some remark, I am not sure about that. But I knew that there was an error and that the error was the purchase of the shares for David Austin was an error.

Q. I'll just yes, I understand what you are saying. I just want to try and get the sequence, because Mr. Phelan has given evidence that he did not know that

there was any error until matters were under investigation by the Tribunal. So his evidence was that at the time that he sought your authorisation to transfer the funds to pay DLJ for the shares, they were in the account of David Austin, and he did not know at that time that there was an error; would you accept that?

A. I don't know whether I actually said to him, "Look, this is a mistake," or "This is an error on the part of DLJ." All I knew was that this was an error, and that's when I obviously went to DLJ to get them to rectify it, but I told him to pay the money.

Q. Yes, there is no doubt, and that happened?

A. Given that DLJ had bought the stock, but they had /RS

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bought it for the wrong account.

Q. The shares were bought and they had to be paid for, there is no doubt?

A. One way or the other, they had to be paid for.

Q. There is no doubt about that. But I am just trying to if you can remember whether you did say it to Mr. Phelan, because it is his evidence that it wasn't said.

A. I don't recall telling him that you know, "This is all a mistake." All I remember is that I told him to pay the money.

Q. Now, the next thing that happened, in any event, was

the money was wired, or the instructions and the money was transferred to the appropriate account for the purchase of the shares, isn't that right?

A. Yes.

Q. And the shares were in the account of Mr. Austin then, or they had been from the beginning, but they were paid for now in that account?

A. They would have been bought in his name. Whether they had landed in his account, I don't know. I don't know yet.

Q. I think they probably were, but that's

A. Were they? Okay.

Q. But that's an internal DLJ matter. If you didn't Mr. Phelan has also given evidence that he didn't take any steps to rectify any matter

A. That's correct.

Q. after that. So can I ask you, did you take steps?

A. I phoned DLJ. I spoke to Peter Muldowney and said,

"Look, there is a mistake here on this trade; it was

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not the shares were not for David Austin. They were for Noel Walshe. That was the original instruction."

And he said that he would correct the error and make sure the shares would get transferred into Noel's account.

Q. And did you speak to Mr. Austin about this matter at

all yourself?

A. No, I didn't. No. I mean, the way I looked at it was, it was Peter had made the error. It was up to him to go off and do whatever to correct it.

Q. So you didn't speak to Mr. Austin about this matter?

A. No.

Q. At all?

A. No, no.

Q. Did you have further or subsequent discussions with Mr. Muldowney after you rang him to tell him that there was a mistake on the account? Did he ever tell you that things had been rectified?

A. I think I only had one conversation on the error, and he said, "Look, I'll go and sort this out." So I originally thought that he might go and buy the same number of shares in Noel's name, sell the shares out of Austin, but obviously there was something that he didn't do. He decided he'd rectify it by going through to Mr. Austin.

Q. Did you know whether he did speak to Mr. Austin?

A. I wasn't all I said, "Look, this is a huge mistake, will you fix it?" He said, "Look, I am sorry, I will fix it." I don't know what steps he then took to fix it, but I assume that he would have contacted

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Mr. Austin.

Q. Well, the one thing is certain: You are certain that you did not speak to Mr. Austin about it?

A. No. I mean, it wasn't my error. It was a DLJ error. It wasn't up for me to fix it.

Q. And whether you did or did not know your father-in-law's account number which you probably wouldn't have known off the top of your head, anyway, or at any stage?

A. I would not know his account number.

Q. You certainly didn't give his account number to Mr. Austin?

A. No, definitely not.

Q. Did you see Mr. Austin around this time yourself? It was coming close to the time that he died.

A. Mr. Austin died on

Q. 1st November.

A. 1st November. I would have seen him the week he died and on the night he died.

Q. So the last week in October, you'd have seen him?

A. Yes.

Q. Sadly, I think he had an unpleasant end, isn't that right? He was quite ill?

A. He had a painful end.

Q. Did he say anything to you in that time that he had been in contact with DLJ?

A. Well, no. I mean, when I went to see him the week he died, he was coming in and out of consciousness. And

then the night he died, I was on my way to South Africa, and I went through London, and I went in to see /RS

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him. And you know, he just said a couple of words, and that was it. And then when I arrived in South Africa, I got a message that he had passed away at two or three in the morning. But it wasn't a time to talk to him about shares.

Q. Yes.

When you instructed Mr. Muldowney to buy the 10,000 shares on the margin for Mr. Walshe, can I take it you must have known at that time that there was sufficient in the account to allow for credit on the margin?

A. Yes. Because it couldn't have happened otherwise, yes.

Q. So can we take it that you must have had a conversation with Mr. Muldowney the 10,000 shares on the margin appeared to have been purchased on the 17th November, so it was either that day or the previous day?

A. It was sometime around then I would have had asked him to that Noel wanted to get more shares to margin, to make up to 22,000.

Q. Can you remember whether he told you that 16,000 shares or sorry, I beg your pardon, 12,000 shares had gone into Mr. Walshe's account on the 16th and that they had come from Mr. Austin's account?

A. No, he didn't go into that detail. I assumed that if he could margin, he had the shares; so I am not sure when the shares were had actually made their way to his account.

Q. Had the shares increased in value over the period from, say, early September to mid-November?

A. I actually don't know, but I can look at that.

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Q. It's probably not important.

A. They may have moved a little bit. It was not until the following year that things really took off.

Q. And can I ask you this: Was it always your intention to, on behalf of Mr. Walshe, to ask or instruct DLJ to purchase some shares on the margin for him?

A. It was, but he had to have shares to margin.

Q. Yes, I understand that, I understand that. And he has told us this morning that his interest in a share purchase was to be somewhere in the region of the number of shares he got on the Friends and Family allocation, and I think he got about 20,000 shares on that. So we are now talking about 22,000 shares, somewhere in the same region?

A. Somewhere in the ballpark.

Q. So can I take it that it was your intention so if there were 10,000 or 12,000 shares bought, there would be sufficient credit there to allow a similar number to

be bought again to build it up within the settlement period?

A. Yeah.

Q. Why was it not until the 17th November, or perhaps the 16th November, that you would have instructed Mr. Muldowney to purchase shares on the margin, when you had given original instructions to purchase that number of shares or thereabouts back in early September with the intention that the same number would be purchased on the margin?

A. I am not quite sure, because it would obviously I had to find out that shares were in his account to

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margin it.

Q. Mm-hmm.

A. I suppose Peter may have rung up and said, you know, "There are 12,000 shares; we are now in a position to margin." It could have been part of the original instruction where I said "Look, buy shares and then margin them."

And because the shares had, in error, gone into somebody else's account instead of Noel Walshe's account, well, then he wasn't in a position to margin.

Q. Could I just be clear about this. You can't remember the specific instructions you gave to Mr. Muldowney around the 3rd September?



A. I would have had conversations with Mr. Muldowney, I'd say, nearly every day in that time, so

Q. I understand that

A. So they weren't infrequent, if you know what I mean.

Q. I understand that. But on the 3rd September, you believe it was your intention that there would be a number of shares purchased and an equal number or thereabouts

A. Margined.

Q. margined. That was your intention, to build up the shareholding to around 20-odd thousand?

A. Yeah. And I probably would have said that to him

Q. at the time.

A. Instructed him, yes.

Q. That would seem reasonable and logical, if it was your intention to get that number of shares, that you'd

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purchase half of them and then the rest to be margined.

But it wasn't until, you believe, you spoke to Mr.

Muldowney after the request for payment of the shares

was received around the 22nd September, that Mr.

Muldowney was in any way given the knowledge that a mistake had taken place, is that right?

A. Well, as soon as I saw that there was a payment to DLJ for shares in the name of Austin, I knew that that was totally wrong. That's when I contacted him and said

"Look, you have made a mistake, and can you go off and correct it?"

And I just left it at that. I mean, Peter Muldowney is a fairly efficient guy. If you said to do something, he would do it.

Q. That's what I am trying to understand, because you have no objection to Mr. Muldowney coming to give evidence to this Tribunal, and you have so informed us, Mr. O'Brien; I just want to make that clear.

A. Absolutely none.

Q. Mr. Walshe has no objection to Mr. Muldowney coming, and the Estate of the late Mr. Austin has certainly no objection to it, but unfortunately Mr. Muldowney will not come to give evidence and will not even give a telephone conference to the Tribunal, so I have to rely on you to try and tease out the conversation.

A. I am not aware of that.

Q. I just want to make it very clear, you have absolutely no objection to him coming?

A. None whatsoever. And I'd be very happy to write a /RS

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letter asking him to go.

Q. So I am trying to tease out the initial conversation you would have had around the 3rd September.

A. Mm-hmm.

Q. I take it that it would be usual in share transactions to purchase shares and to margin shares; that would be a fairly

A. Not always, but it was a bull market, and people did take advantage of margining shares.

Q. That's fair enough. That was happening at the time, and you would have known about this, as a businessman?

A. Absolutely.

Q. And you were attempting to get this benefit for Mr. Walshe as well, which is absolutely nothing wrong with that.

A. It's a family, yeah.

Q. If the instructions were to purchase shares and to purchase a similar number on the margin, there certainly were not a similar number of shares purchased on the margin on behalf of Mr. Austin, isn't that correct, even if Mr. Walshe understood for whom the shares were to be purchased?

A. That's correct.

Q. And on the other side, there were certainly no shares went into Mr. Walshe's account these shares, these 12,000 ESAT shares, I am talking about and there was certainly nothing purchased on the margin for Mr. Walshe either?

A. It would have been two steps. You buy the shares, you make sure the shares are in the account, and then

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within a period, you then margin it.

Q. You have a credit facility?

A. So when I you know, had the original conversation, and I am trying to recollect to the best of my ability, I would have said, "Buy the shares and margin." So when we settled for the shares, which was in around the 18th, 22nd September, immediately Muldowney was told, "There is a mistake here."

So he would not have margined any shares; otherwise he would have been doubling the mistake that he originally made.

Q. I understand that, but if your initial instructions, as you believe, were on around the 3rd September, were to buy shares and margin

A. Subsequently.

Q. Subsequently?

A. You wouldn't do it in a simultaneous way.

Q. I understand that. But one would expect or maybe I am wrong, and you can assist me on this that you would expect it within a reasonable period of time, and you'd hope to have the shares for around the same value, at least, wouldn't you?

A. It's normally slightly below. Maybe it's 80, 90 percent.

Q. And that's reflected here, because there were 12,000 shares and there were 10,000 purchased on the margin?

A. Yeah.

Q. Now, once the instruction was given to purchase the shares, one would expect them to hit the account within

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a few days, at least?

A. Well

Q. Would that be right?

A. My understanding is you pay for shares, and then you get the shares as you pay for them. In other words, it's like that, and you give the money in.

Q. Well, am I misunderstanding the situation, so that it wouldn't have been until the 22nd September when the shares were actually paid for that you'd have the shares in your account?

A. I don't know now, because I haven't been looking at Mr. Walshe's accounts. But it would seem that way, but I wouldn't be totally sure.

Q. Well, maybe we'll have a look at Mr. Austin's account at some stage to see when the shares actually hit his account originally. And I'll get that, I'll get that.

A. Okay.

Q. What I am trying, or what the Tribunal is trying to understand here is this mistake.

A. Yeah.

Q. And how it could have arisen, and how it was rectified. Because you had no role other than having a

conversation with Mr. Muldowney, as far as you were concerned, in relation to rectifying what you had believed to be a mistake on this, carrying out of this instruction?

A. That's correct.

Q. And something unusual appears to have happened in that regard as well, in that Mr. Phelan gave evidence he gave evidence previously that he didn't know anything

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about the rectification of a mistake. And when DLJ furnished the Tribunal with the letter dated 13th October, signed by Mr. Austin, giving instructions to transfer shares from his holding to the account of Mr. Walshe, and gave the account number, first of all, that information could not have been given to him by Mr. Phelan. And I think everyone accepts that, because Mr. Phelan didn't know about it and wouldn't have had Mr. Walshe's account number anyway.

A. I don't know.

Q. He has given that evidence. You didn't have Mr. Walshe's account number, and you didn't contact Mr. Austin?

A. I wouldn't even know my own account number.

Q. Yes, yes. And there is another unusual aspect of this as well, in that Mr. Phelan cannot understand, even if his office was used as an accommodation address just to

pass mail, why anyone would need to write to his office when a simple phone call to DLJ or a simple conversation between Mr. Muldowney and Mr. Austin could have sorted the whole matter out.

A. Well, if you look at the CSFB letter, did they not say they wanted something in writing, or something you know? They requested a letter.

Q. They requested a letter.

A. So I don't think if they needed a letter, a conversation obviously wasn't going to do it for them.

Q. Can I ask you this: Do you know if all telephone communications with DLJ are taped?

A. I actually don't know. I am sure they in certain

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circumstances they would, yeah.

Q. Maybe, just from reading newspapers, I seemed to pick up that brokerage firms, from the point of view of security in relation to customers and themselves particularly, tend to record all conversations, just to make sure there isn't anything like insider trading or matters of that kind. Is that your understanding of matters as well?

A. I have heard of it. I have never been told, talking to a broker, that my conversation is being taped.

Q. But in any event, we had a situation which emerged here that I think you have seen another letter signed by

Mr. Austin which was dated 8th October, 1998; or have you ever seen that letter? If not, I will put it up for you. It's a letter directly addressed to DLJ giving instructions have you ever seen that particular letter? I think we may have sent it to you.

A. It could have been in evidence.

Q. And it's addressed just generally to Donaldson Lufkin & Jenrette Security Corporation, the address, and "Dear Sir." It gives an account number and asks for a transfer of shares from his own account these are ESAT shares which the Friends and Family shares, to the account of his wife.

(Document handed to witness.)

That was on the 8th October 1998. Does it strike you as being in any way unusual that a letter would be addressed to Mr. Phelan, dated 13th, to carry out an /RS

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instruction which was just to rectify a mistake?

A. I wouldn't obviously I wasn't party to the conversations that Peter Muldowney may or may not have had with Mr. Austin at the time, so I don't know.

Q. When you spoke to Mr. Muldowney about purchasing the 10,000 shares for Mr. Walshe on the margin, did you have did he say anything to you?

A. I actually don't recall a conversation. I may have had



a conversation with him, or else he would have, from the original instruction, have done, purchased the shares on the margin.

Q. So you may not have spoken to him?

A. I may or may not have. I don't really recall a conversation. He was going off to rectify the problem.

I thought it had been rectified quickly.

Q. And it's your belief that as of the 3rd September, when you spoke to Mr. Muldowney, and if Mr. Austin's name came up at all, it would have been Mr. Muldowney who may have raised, if anyone raised Mr. Austin's name?

A. I don't believe it was me, anyway. There would have been no context for me to raise it.

Q. And what context do you believe there would have been for Mr. Muldowney to raise it?

A. I can only speculate.

Q. Well, I don't mind if you do. I am looking for every assistance I can.

A. He may have said, Mr. Coughlan, you know, "How is David?"

Q. Yes, I can understand that.

A. Or something to that effect.

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Q. That would be perfectly understandable.

A. Or "Have you seen him", or

Q. That he might have inquired after his health; everybody

knew he was unwell?

A. He also I think it would have been widely known that he went for a last heavy treatment in August/September of that year.

Q. Yes. So and I accept that that could have been the context, of course, that he would have been inquiring after Mr. Austin's health.

Had you ever in your dealings with Mr. Muldowney; I am not talking about DLJ or other brokerage firms had you ever had a mistake like this made, where somebody was inquiring of a man's health and ended up buying shares in his account when the instruction was given to buy for somebody else and to purchase further shares on the margin?

A. There may, but it was never brought to my attention. They probably would have found the error themselves. I don't know.

Q. When you originally gave evidence about this matter, which was earlier in the summer, at that time you were uncertain as to where the mistake had occurred. I just want to be clear, you have always given evidence

CHAIRMAN: There has just been one bit of a mistake in the realtime recording, which if it it's not put right now will cause chaos later on. I think there is a continuous question and answer from you in the last

/RS

response, whereas there should be a break from you to Mr. O'Brien, I think some four lines before the end.

"And to purchase further shares on the margin." There should be a full stop, a question mark and then a switch to Mr. O'Brien. "There may, but it was never brought to my attention." It might be as well to have that rectified now.

Q. MR. COUGHLAN: When you gave evidence earlier in the year, you were unsure as to where the mistake had occurred, isn't that correct?

A. When I I think in my evidence on the 27th June, I said I wasn't sure whether it was an Aidan Phelan error or a DLJ error.

Q. Yes. How could you have believed at that time that it could have been an Aidan Phelan error?

A. Well, it's only when you have the benefit of evidence of other people, and when you look into this at the time, I didn't really know that much about it. So

Q. I can understand that, that you might have to go and

A. And I hadn't spoken to Mr. Phelan, and in his subsequent evidence he had said it was my error. So when I spoke to him about it, he confirmed that it was not his error. And then

Q. Had you spoken to Mr. Muldowney?

A. Well, I phoned Mr. Muldowney to find out what

his how did he recall the whole thing.

Q. And what was his recall at that time?

A. And his situation this was post my evidence; he said

that he remembered that there was an error in where the

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shares whose account they were bought for.

Q. That was after you gave evidence?

A. Correct.

Q. And you had no recollection of events yourself as of

that time, other than that there had been error?

A. You were asking me a number of questions about a number

of matters that day, and this question of the 12,000

shares, and Mr. X was the person who we talked about.

Q. Yes. But at that time, you were unclear as to whether

the mistake was Mr. Phelan's or Mr. Muldowney's, isn't

that correct?

A. I knew that there was an error made at the time, and I

wasn't sure whose error it was. And when I spoke to

Mr. Phelan, he said, "It wasn't my error; it was DLJ's

error." And that's what

Q. The first time Mr. Phelan knew there was an error was

around the time the was looking into the matter, isn't

that correct?

A. I don't know that.

Q. He has given evidence to that effect.

A. Has he? Okay.

Q. So he said you never told him that there was a mistake the time you instructed him to pay it. You can't be of any further assistance to the Tribunal as to why you believed at that time that there was a possibility that it was Mr. Phelan's error?

A. Well, I hadn't researched it, so I didn't really have the benefit of preparing for the questions you were asking me that day. And to the best of my ability, I felt that it was either one or the other.

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Q. It seems like a strange coincidence, doesn't it, Mr. O'Brien I am asking this question on behalf of the public that an error like this would occur and that Mr. Austin would again be involved in what might be described as unusual circumstances, isn't that correct?

A. I wouldn't agree with you. This was a human error. There was no benefit to Mr. Austin. Clearly there was a benefit to my father-in-law, and he held onto the shares. So it was a human error.

Q. And your father-in-law sold the shares, isn't that correct, subsequently?

A. (Nods head.)

Q. And

A. Eventually, yes.

Q. And recouped you the 260 more or less the amount of the shares, isn't that correct?

A. Correct.

Q. Was that always your intention with your father-in-law?

A. Well, it's unfortunately my father-in-law has had to be involved in this matter, but

Q. Yes, I agree.

A. but I lent him money, he paid me the money back, and that was always what had happened.

Q. Was that your intention from the outset, that

A. He would pay me back, yes.

Q. That he'd pay you back?

A. Absolutely, yes.

Q. From an objective viewpoint, one could make the suggestion, Mr. O'Brien, that this was money that was being paid to Mr. Austin if you just listen to the

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question, and you can comment

A. I am listening.

Q. and that the monies were got back to you because of Mr. Austin's impending demise

A. Not back to me, though.

Q. Well, Mr. O'Brien, the money did come back to you. It all came back to you, more or less; short of \$30,000, it all came back to you, isn't that right?

A. Well, there was a profit.

Q. No. In fact, I think I may be incorrect on this, I'd have to do the figures. I think instructions were

given to pay \$294,000 and some few odd dollars. I think, when your father-in-law disposed of the shares subsequently, I think there was I may be wrong in this, but I'll come back to it there was about \$260,000 came back to you, if you understand me?

A. Well, there was a number of times I lent him money to buy shares, and each time he repaid me the money.

Q. There is nothing wrong with that.

A. Okay. Good, okay.

Q. Nothing wrong with that. But what I am saying here, the money came back to you?

A. The loan.

Q. I am saying, looking at it objectively, instructions were given to buy shares. The shares were purchased by DLJ in Mr. Austin's account. They were paid for by Mr. Phelan, knowing that they were in Mr. Austin's account, and with your consent to the transfer?

A. At the time, yes.

Q. And that money ultimately came back to you when Mr.

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Walshe disposed of his shares, they having gone through Mr. Walshe's account, the shares, isn't that right?

A. Eventually the error was corrected and the shares were transferred in to Mr. Walshe, yes.

Q. Could this have been a way that you were trying to get money to Mr. Austin, but because of his impending

demise, difficulties would have been obvious when the Inland Revenue affidavit was sworn, and the shares would have to be disclosed?

A. Mr. Austin didn't get any financial benefit out of this.

Q. I know that now. But I am asking you, was it the intention that Mr. Austin should get a financial benefit?

A. Absolutely never any intention.

Q. Can I take it that when the shares were purchased on the margin for Mr. Walshe on the 17th November of 1998, that you have no recollection of any communication with Mr. Muldowney on this particular issue, the purchase of the shares?

A. I don't remember any conversation.

Q. As you said yourself, you may have been talking to Mr. Muldowney a couple of times a day?

A. On this particular subject, but he would phone me at night, you know, after work, because the hours in New York are different, I would have had a whole series of conversations with him.

Q. So can I take it that you didn't know that the shares had gone into Mr. Walshe's account on the 16th November of 1998?

/RS

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A. No, I wouldn't have known that.



Q. Can you remember if Mr. Muldowney and yourself had any discussion about Mr. Austin and that you told him he was dead?

A. I was away; I was away for about twelve days when he died. So I wouldn't have had a conversation I was in South Africa, so I wouldn't

Q. You don't remember discussing Mr. Austin with Mr. Muldowney

A. No.

Q. after he died?

A. No, I was away on holidays.

Q. "Unfortunately, Mr. Austin is dead", or

A. No, I wouldn't have come back for ten or twelve days.

Q. Because something quite unusual actually happened here.

There is a letter dated the 13th October of 1998, addressed to Mr. Phelan and signed by David Austin, giving instructions for a transaction.

A. Yeah.

Q. But from the letter that we have received from Credit Suisse, it would appear that they received that on the 16th November, if my reading of their letter is correct. Would you agree with that interpretation of their letter yourself?

A. Which paragraph is it?

Q. I'll show it to you.

A. Yeah, the last paragraph. Yeah, I see that.

Q. That they seem to have received it on the 16th

November.

A. Yeah.

/RS

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Q. And of course Mr. Austin was dead for some sixteen days by then?

A. That's correct.

Q. And Mr. Phelan has told us he was not his agent, although he was one of the executors. None of the executors gave any instructions, and Mr. Walter Beatty gave no instructions, and DLJ and there may be a perfectly reasonable explanation for this transferred 12,000 shares out of the account of a dead man, when only executors would have the authority to do something of that nature.

So you can't remember any discussion with Mr. Muldowney about Mr. Austin?

A. I wasn't involved in getting the shares transferred or procuring letters or instructions or anything like that from Mr. Austin. It wasn't my mistake. It was a DLJ error.

Q. Well, can I take it that from your experience of dealing with DLJ, and they now being an affiliate of Credit Suisse First Boston, that this is a firm which has high standards and behaves in accordance with the law and in an ethical manner? That would be your experience of them, would it?

A. Absolutely, yes.

CHAIRMAN: We are just on ten to, now, Mr. Coughlan; is it perhaps an appropriate time to adjourn until two o'clock, if you please, Mr. O'Brien. Thank you.

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THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

/RS

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

CONTINUATION OF EXAMINATION OF MR. O'BRIEN BY

MR. COUGHLAN:

Q. MR. COUGHLAN: Mr. O'Brien, I intend now, for the moment, to deal with the Telenor/ESAT donation, but before I do, could I just go over something that I was asking you about before lunch, just to be clear in what I am asking you about and as to whether you understand exactly the point I was inquiring into.

You believe that you gave an instruction around the 3rd September of 1998 on behalf of your father-in-law, isn't that correct?

A. That's right, yes.

Q. To Mr. Muldowney?

A. Yes.

Q. And it was your intention, you believe, that there would be shares purchased for Mr. Walshe, and that there'd also be shares obtained on the margin for Mr. Walshe?

A. That was the general idea, yes.

Q. Now, from the letter we have received from Mr. Muldowney, where he says that he had a conversation with you and that Mr. Austin's name was probably mentioned and that that gave rise to the mistake in purchasing the shares in Mr. Austin's name

A. Mm-hmm.

Q. there is no evidence, and it seems clear that there  
/RS

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were no shares purchased on the margin that went into Mr. Austin's account, isn't that right, from what we have seen?

A. From what we have seen, yes, that would be true.

Q. So that if a mistake if Mr. Muldowney made a mistake, the mistake was a double mistake, isn't that correct? The shares were purchased in Mr. Austin's name, and no shares were obtained on the margin, from what we have seen?

A. No, it wouldn't be. It would be my understanding that you can only margin shares if you actually have the shares in your possession and you have paid for them, so it's a two-step process. The purchaser buys the

shares, waits for them to come, pays for the shares, takes the credit. And then there is a couple of days when the payment is made at the settlement period. The shares arrive into the account and thereafter, once they have been paid for, you margin the shares. That's my understanding of it now.

Q. That's your understanding?

A. Yeah.

Q. So therefore the shares being in the account are not your shares; is that what you are saying?

A. Well, you have to pay for them.

Q. I understand that. But does and you know more about share dealings than I do, but if the shares say when they were purchased at the beginning of September.

A. Mmm.

Q. And they appreciated in value?

A. Yes, yeah.

/RS

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Q. Even though the settlement period has not been completed that is, that they haven't been paid for yet the person whose account they are gets the benefit of the appreciation in value; would I be correct in that?

A. Yes, they would, they would have like a credit, or they would have credit terms. So if they are buying something, they are given 18 or 21 days, I am not sure

what the precise settlement period is, and then the they actually own the shares when they actually pay the broker for them, and then they have an asset which they can borrow money against under a margin, what they call a margin.

Q. Yes. So is it your understanding that Mr. Muldowney would have intended to have purchased shares on the margin for Mr. Austin once the shares were paid for, if matters were not brought to his attention? Is that what your belief is?

A. You see, before he had been paid, DLJ had been paid for the shares, they were made aware that they had made an error. So he would have then said, "Well, there is an error here." And this is a question you'd have to direct to him; I am trying to help you by what might have been going on, in other words, that there was an error, and then they didn't margin it because the error had arisen between the request for payment and the actual payment being received.

Q. But Mr. Muldowney or DLJ turned to Aidan Phelan to pay for the shares, isn't that right?

A. That's absolutely right, yes.

/RS

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Q. As of that time, it would appear that nobody in DLJ was aware the mistake had been made?

A. No. It was only when Mr. Phelan got the payment

sanctioned by me that I knew that there was an error,  
and I immediately brought it to the attention of DLJ.

Q. Right. But the shares had been paid for then, hadn't they?

A. No. They were when Aidan Phelan called me, and this is as best I can recollect.

Q. Yes, of course.

A. He said, "I am paying \$294,000 to DLJ for shares, David Austin shares." And I don't know whether I said there was an error or not, but I knew immediately there was an error. And I told Muldowney, being the person that I initially did the order with and the transaction with. So Muldowney and DLJ would have known there was a problem before they actually were in receipt of the funds. I am not sure well sometimes funds can be transferred in a day; I don't know what value day he had the funds.

Q. Yes. But it's your understanding that until the settlement takes place, shares cannot be obtained on the margin, is that right?

A. As far as I know, but that would be my understanding of it, anyway.

Q. Now, if I might turn for a moment, Mr. O'Brien, to the Telenor/ESAT donation; I think that's how we have described it all along in the course of the Tribunal's business.

A. I am just going to clear away this material, then.

/RS

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Q. Yes, of course.

A. Yes, sorry.

Q. Now, I think you have been aware of the fact that Mr. Peter O'Donoghue, Mr. Arve Johansen, Mr. Jan Edvard Thygesen, Mr. Knut Digerud, and Mr. Per Simonsen gave evidence about these matters last week?

A. I am aware they were appearing, yes.

Q. And you know that when Mr. Fitzsimons, on behalf of Telenor, questioned you in the summer, he prefaced his examination by informing you that this was a credibility issue between Telenor and yourself, isn't that right? Do you remember him saying that? I think it's one of the matters that this comes down to: Who is telling the truth? And in the evidence you have already given to the Tribunal on this particular matter, if I could just summarise it, and correct me if I am wrong, that you were requested to make a contribution or a donation by Mr. Austin. You didn't think it was appropriate for you or your associated companies to be involved in such a contribution or donation at that time, but you indicated to him that you would pass it on to Telenor to see if they were interested. Would that be a broad summary?

A. Roughly, yeah.

Q. And that when you met with Mr. Johansen in Oslo, I



think around the 8th December, for the purpose of discussions on Mr. Barry Maloney's employment as Chief Executive Officer, ultimately, of ESAT Digifone, you informed Mr. Johansen, in broad terms, of how I have summarised it, would that be correct?

/RS

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A. A conversation no, well, it would have there would have been one other thing that preceded all that, is that I would have in evidence, I believe I said that I contacted Mr. Johansen in November.

Q. Very good.

A. Soon after Mr. Austin had

Q. Mr. Austin spoke to you?

A. phoned me. So the steps are, phone call from Austin to me requesting; second item then is on the 8th December, I was in Oslo, and the question arose again, and I had a discussion with Mr. Johansen.

Q. So can I take it that when you spoke to Mr. Johansen on the 8th December, it was after the event anyway; it was after the function in New York?

A. Yeah. The original request came before the function. The function was on the 9th, and I tried to explain to the Tribunal that sometime the 2nd or 3rd November, Mr. Austin had approached me to see if I was going to if ESAT would make a donation or buy tables at the function.

Q. Now, again if I may just summarise, on the occasion of the 8th December, when you spoke to Mr. Johansen, you were leaving it, in effect, to Telenor to make a political contribution or donation?

A. Yes, it was a matter for them to decide on. And I think I made that quite clear in my evidence earlier in the summer.

Q. And then in the course of evidence at this Tribunal, the issue was effectively joined between yourself and Telenor on this whole question of the invoicing and /RS

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what happened subsequently, isn't that right?

A. Yes, the invoicing module took off on a life of its own.

Q. Now, there has been more evidence since then, so I am not necessarily going to hold you specifically to anything you may have said on that occasion if new information which has come to light is of any assistance to you. Do you understand me?

A. I know what you are saying, but I'd be happy with my evidence.

Q. Very good. I just

A. There may be small things

Q. I just want to make it clear that much more information has come to light which may be of assistance to people, and the Tribunal would not cut anyone off from using

that information for the purpose of either refreshing their memory or anything. But you are quite happy to deal with it in broad terms on the basis of the evidence you gave on a previous occasion?

A. Broadly, it would be my view that my position has not changed.

Q. Very good.

Now, from the evidence which was given by Mr. Thygesen and Mr. O'Donoghue, the situation appears to be that the new firm, the new company, ESAT Digifone, operated from a floor in the Malt House, is that correct? They had a floor in the Malt House?

A. Yes, for a temporary period.

Q. And there were no partitions, offices off? It was more /RS

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or less an open work area?

A. Probably three or four small offices, that's it, a meeting room.

Q. And everyone was working in that area?

A. Yeah.

Q. And am I correct in thinking that Mr. O'Donoghue, who had been the who was probably the Chief Financial Officer of ESAT Telecom or Communicorp

A. Communicorp.

Q. then acted as Chief Financial Officer for the new company, ESAT Digifone, would that be correct?

A. That's correct, although for an initial period, he may have kept a desk on the Communicorp floor and on the ESAT Digifone floor, for a very short period.

Q. For a very short period?

A. Maybe a couple of weeks.

Q. And after a short period of time, his work was ESAT Digifone work; he was Chief Financial Officer?

A. Yeah, there was a hand-over period where his deputy, Brendan O'Keefe, took over his work within Communicorp.

So particularly in the financial area, he just you just can't leave one job without handing over.

Q. Of course.

A. And that's exactly happened.

Q. And according to Mr. O'Donoghue, there was an accountant who was employed I don't know if it was on a contract on a short-term employment, a Mr.

A. Colm.

Q. Colm Maloney.

A. Yeah.

/RS

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Q. And it was one of his tasks, whilst there wasn't any cash in the kitty of ESAT Digifone, to in fact record the invoices that came into the company?

A. His job was in the management accounts area, but there was cash in the kitty because the shareholders were funding the business, so day-to-day expenses, there

would have been some money there, obviously, to meet it.

Q. But what they were doing, they were also recording matters where as between the shareholders or the partners in the arrangement, isn't that right?

A. Yes. It was complicated.

Q. And whilst things were being recorded, there wasn't necessarily any money changing hands at that time?

A. Well, to synthesise, to help you. Telenor came on board in May 1995. We had spent Communicorp had spent, through ESAT GSM Holdings, I think, a substantial amount of money on the bid. They were not prepared to pay the costs that had been incurred before their arrival in the consortium. So ESAT GSM Holdings, or whatever the vehicle was, was in credit when we won the licence. In other words, we had expended more money than Telenor, plus the added complication was that IIU also were contributing their money in as well, so we were plus for some period of time, and then Telenor were contributing capital and people to make up with that. And eventually there was a settlement done sometime in December on the bid costs, and then a new period of accounts began where there was a roll-out period.

/RS

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Q. Well, the famous handwritten document prepared by Mr.

Maloney, in fact, does record the bid cost rebill,

isn't that right?

A. I have seen it, yes.

Q. And that was the bid company, wasn't it? ESAT GSM Holdings?

A. Yes. Which ultimately became I have it, yeah.

Q. That seems to be the figure that was signed off on, isn't it, on the bid?

A. Yeah.

Q. 2.3 million, to include VAT or something. Very good.

Now, can you remember the was there any formal system in operation for the receipt of mail, faxes, and matters of that nature, into Communicorp and then into ESAT Digifone Limited, if you understand, the two floors?

A. Well, Communicorp obviously, having a different name, would get its mail; it also had its own separate communication system, it had its own fax numbers. It's my recollection that when ESAT Digifone was set up on the floor below, that they had their own telephone lines and they had their own fax facilities, photocopy, everything, and it was all done in a hurry.

Q. Now, correct me if I am wrong, but as I understand the evidence you gave on a previous occasion, you were unaware, in the first instance, of the letter and invoice for consultancy service which Mr. David Austin

sent to Mr. Johansen in Telenor?

A. That's correct, yes. Until much later did I find out.

/RS

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Q. Was that until the discussions around the IPO in 1997?

A. I believe that was the first we saw of it, yes.

Q. So if I could just deal with those first. I think you have seen the letter and the invoice from Mr. Austin previously?

A. Well, there is two there is letters with stamps all over it, and there is letters

Q. Well, there is this letter from Mr. Austin, where he informs him it's dated the 14th December of 1995, and it reads: "Dear Mr. Johansen.

"Please find invoice for consultancy work for the duration of 1995 as agreed with Mr. Denis O'Brien. I hope that you will find this in order.

"Yours sincerely, David Austin."

And then an invoice accompanied that from Mr. Austin, and it's for it's dated the same day. It's addressed to Telenor, and it's for consultancy work for 1995 as per the agreement.

And I think if we just run through it, the amount is for \$50,000?

A. Correct.

Q. Now, you say that you did not see those or become aware of the content of those until around the time of the discussions centred on the IPO, October/November of 1997, is that correct, around that time?

A. Yeah, there was two matters at the time.

/RS

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Q. When it became an issue?

A. Yes.

Q. I think you were aware of the fact that Mr. Arve Johansen and Mr. Knut Digerud gave evidence here last week about these two particular documents. Isn't that correct?

A. I haven't read their evidence, but I know they were here.

Q. And in the course I'll take Mr. Digerud's evidence, because it was as a result of him informing Mr. Johansen of certain matters that Mr. Johansen's memory was jogged in relation to the attending both of them attending the first board meeting of ESAT Digifone, which took place in Dublin at the Malt House on the 20th December of 1995.

Would that be first of all, was that the date of the first board meeting?

A. I know there was a board meeting on the 20th December.

Q. Yes, 20th December.

A. There is a quite a serious change, obviously, in



evidence between earlier in the summer and now.

Q. I will afford you every opportunity to comment on it, Mr. O'Brien, because this is a significant issue between Telenor and yourself. But in the first place, if we can just see where the agreement and disagreements occur.

There was a board meeting on the 20th December of 1995?

A. Yes, there was.

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Q. And it took place in Dublin?

A. Yes.

Q. In the Malt House?

A. In the Malt House, yes.

Q. And I take it that Mr. Johansen and Mr. Digerud were present, and they were in fact, I think, nominated to the board on that day, isn't that correct, by Telenor?

A. Yes, and then I think some of the other people were nominated on the same day. So it was really the first official board meeting.

Q. And can I take it that Mr. Jan Edvard Thygesen was already in Dublin at that time?

A. Oh, he was in Dublin, I think, since three days after we won the licence, around the 27th or 28th November.

Q. And he was seeing as this was the first board meeting, he was either the acting or the Chief

Executive Officer of the company at that time, is that correct?

A. Yeah, he reported to the board as Chief Executive.

Q. And he has given evidence that he would have effectively drawn up the agenda for that particular board meeting, the various matters that were the subject matter for discussion and consideration by the board?

A. Well, I think he would be also the secretary, and also I would have had an input, but also Telenor as well.

Q. But it would have been his job

A. To get the papers together, yes.

Q. to get everything together for that particular board meeting.

/RS

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Now, evidence has been given that this was there was a large or a long agenda?

A. I have a different view on that now, because my recollection is that this was a short-ish meeting.

Normally our board meetings would go three to four hours when the business began to be more and more established. This was a short enough meeting, a couple of hours max.

Q. Well, would it have been normal to have a short break during a board meeting?

A. No.

Q. It would not be?

A. Not at that time, no.

Q. Do you remember if there was a break on this particular day?

A. I am nearly sure there was no break.

Q. Would there have been a break for a cup of coffee, or would that be served during the board meeting, or bottles of water?

A. Everything would have been just laid out, and people dig in, basically.

Q. Now and I'll deal with Mr. Digerud's evidence in the first instance, and then I'll come to Mr. Johansen.

Mr. Digerud has given evidence of something that happened when you were not present the previous day in Oslo. He said that Mr. Johansen showed him the letter and the invoice from David Austin and that he told him what it was about. I am just giving you the

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background. You were not present for that?

A. No, no.

Q. He said that he saw Mr. Johansen put these two documents into his briefcase and that they came to Dublin the next day for the board meeting. You weren't present for that?

A. No.

Q. He said at a break in the board meeting, he saw Mr. Johansen show you these documents. And he remembers them particularly because of their colour, which are a kind of a yellow-ish brown we have the originals but that he remembers and that he saw Mr. Johansen showing them to you and having some conversation with you.

A. Absolutely not. And I'll tell you

Q. Yes.

A. If I can help you.

Q. You can expand as much as you like.

A. I had a meeting with Mr. Johansen at 11:30 that morning.

Q. I beg your pardon?

A. Which was our custom.

Q. You had a

A. A meeting with Mr. Johansen before the board meeting.

Q. A private meeting?

A. Yes.

Q. The two of you?

A. And when the relationship with Telenor was going well, we would always have a meeting before the board meeting

to clear up if there was issues arising or matters that

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had to be resolved between the shareholders. And that

would have been the opportunity for Mr. Johansen to

raise the matter of a letter.

Q. Now, Mr. Digerud says that Mr. Johansen, having shown and had some conversation, obviously Mr. Digerud didn't hear the conversation, that Mr. Johansen came to him and handed him the two documents and instructed him to proceed with the payment. And then Mr. Digerud made the entry on the document itself, the handwritten note on the document. Did you see any of that?

A. No, I didn't, Mr. Coughlan.

Q. Now, in fairness to Mr. Johansen, I think his evidence on this occasion is in relation to showing you the documents and having a discussion with you. He says that it is based on, effectively, his memory being refreshed as a result of being recently reminded of matters by Mr. Knut Digerud. You understand the basis whereby he gave his evidence on last week?

A. I would have thought he would have had access to Mr. Digerud before he came to make his original evidence in Dublin, given that they were close friends.

Q. But what I want you to be clear now, to understand that this is what Mr. Johansen based his evidence on on this occasion, that he had discussed the matter with Mr. Digerud

A. Yes, fine

Q. and he was reminded of matters.

Now, he, in his evidence, again says that he received the letter and the invoice from Mr. Austin; that the

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day before the board meeting in Dublin on the 20th December, he showed them either in the afternoon or the evening to Mr. Digerud, they were preparing to come to Dublin for the meeting; that he put them in his briefcase and that he came to Dublin with Mr. Digerud. And he said at some point which was shortly before or during a break in the board meeting I am not just limiting it at this stage to a break in the board meeting, but it might have been do you remember anything happening either shortly before the board meeting or during a break in the board meeting? He says that he had a discussion with you in the room in which the board meeting was held. Knut Digerud was there, but he did not participate. And that during the discussion, he showed you the original letter and invoice that he had received from David Austin. Do you remember that happening?

A. He definitely did not.

Q. That definitely did not happen?

A. Yeah. I mean, the forum for this would have been my earlier meeting with Mr. Johansen.

Q. Very good. I just want to be very clear to see where there is disagreement and where there is agreement, Mr. O'Brien.

A. Yes.

Q. Now, Mr. Johansen, in his evidence, and again he said that he informed you that he would arrange for Telenor to facilitate the payment of \$50,000, as it transpired, as you had requested. Did that conversation take place?

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A. No. Because it was well back in the 8th or 11th December that Telenor had decided that they would make the donation.

Q. And according to his evidence, he said that Telenor would then invoice Digifone for an equivalent amount by way of reimbursement, or words to that effect; I am not holding anyone to the exact wording.

A. A conversation, Mr. Coughlan, didn't take place, so

MR. MCGONIGAL: I don't think that piece was in his evidence, but I am subject to correction.

MR. COUGHLAN: I think My Friend, Mr. Healy, led Mr. Johansen through all of his statement, and it will form part of the evidence. But

CHAIRMAN: We can clarify it in due course.

MR. COUGHLAN: But if there is any difficulty about it...

Q. I just want to be clear, because this is the first

series of documents that there is a dispute between you and Telenor, isn't that right?

A. Yeah, and there is two new players involved.

Q. Yes. And also the situation had changed between your conversation with Mr. Johansen in Oslo on the 8th December and the board meeting on the 20th December, and that was that Mr. Johansen now had in his possession Mr. Austin's letter and Mr. Austin's

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invoice, isn't that correct, dated the 14th?

A. We now know, yes, we now subsequently know.

Q. Wouldn't it seem reasonable, I am putting this to you for your comment, Mr. O'Brien, that if Mr. Johansen was in possession of something new, namely the letter and the invoice, that he would bring it to your attention, or bring those documents to your attention?

A. And furthermore give me a copy.

Q. First of all I am asking you, would you agree that it would be reasonable in the course of business and particularly your name is mentioned in the letter, of course?

A. Only in relation to the amount of money.

Q. Yes, but would it not seem reasonable that Mr. Johansen would bring these two documents to your attention?

A. No, definitely not.

Q. It wouldn't seem reasonable?



A. No.

Q. I am not questioning you now on the question of whether he did or he didn't.

A. I am well aware of that. I mean, no, to help you; the arrangement was between Mr. Johansen and Mr. Austin.

The invoice and the letter was something between them.

I don't know whether Mr. Austin said "I'll send you an

invoice" or Mr. Johansen requested an invoice, so it

was a matter up to them between Telenor and,

effectively, Mr. Austin as agent for Fine Gael.

Q. So as far as you were concerned, and on your evidence,

it was really none of your business, it was a matter

between Telenor, Fine Gael, David Austin. It only

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involved you insofar as you had effected an

introduction?

A. Correct.

Q. That is your clear position; that's all?

A. Yes, Mr. Coughlan.

Q. And on that basis, you say that whilst in the normal

course of business involving partners, effectively,

that it might be reasonable to bring matters to the

attention of one another in the specific context in

which this payment was being made and this invoice was

furnished, it would not be reasonable to bring it to

your attention because you had nothing to do with it?

A. Correct, yes.

Q. I am just trying to understand

A. And if Eddie would have brought it to me at our pre-board-meeting meeting.

Q. I just want to be clear, that's the position.

A. Sure.

Q. Now, Mr. Digerud is the person whose writing appears on the letter.

A. I believe that's his writing.

Q. He gave evidence to that effect, and it's signed by him, and it's dated the 20th December.

A. Yes.

Q. You see that?

A. Yeah.

Q. And Mr. Digerud said that he put that on the letter on the 20th December, and he was in Dublin on the 20th December.

A. The only thing I know is that he was in Dublin.

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Whether he did or not, but we'll take his word for it.

Q. Very good.

And what it is is it's an instruction to Per Simonsen, who was the project manager, isn't that correct, of the ESAT Digifone project?

A. Yes, yes.

Q. This is the evidence, that it was an instruction to him

to make the payment and to invoice this as a management cost to Digifone.

A. That's what the Norwegian

Q. That's what the translation is?

A. That's what the Norwegian translation is, yeah.

Q. And then if you go to the invoice, it's again Mr. Digerud, he writes "Okay", and he initials it, and that relates to the invoice itself: It's okay to pay this.

That's his writing?

A. And on the top

Q. On the top

A. It says "Copy to be invoiced further."

Q. That's made by the Swedish accountant, Irina, it would appear, and as I understand it, is "to be copied invoice on", or words to that effect.

A. On my copy it says, "Copy to be invoiced further."

Q. Then there is a reference number, you can see it on the side, and there is a date, 22nd December, 1995. You can't see "1995" on it, but it's 1995.

A. Yeah.

Q. And the reference appears to be and I'll come become to it in a moment appears to be a bank or a

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transaction reference number in the bank. It seems to be, when we look at the bank statement or the instruction to the bank?

A. It's on the Den Norske statement.

Q. We see that, and that may well be the transaction reference number.

Now, Mr. Simonsen was also in Dublin on the 20th December, isn't that correct?

A. I actually don't know whether he was or not.

Q. Well, he has given evidence, so

A. I was in and out of Dublin at the time.

Q. Yes. And he said that he went back to Oslo so if I can just clear up the Dublin end of things and the meeting of the 20th and/or the 21st, if you were in contact with anybody.

A. Yeah.

Q. You are adamant that nobody I am not just saying Mr. Johansen, but nobody from the Telenor side, including Mr. Johansen, showed you the David Austin letter or the David Austin invoice?

A. Categorically not. What surprises me is that these two new people, since June, now involved in this, the invoices.

Q. That's who? Mr. Simonsen and Mr. Digerud?

A. Mr. Simonsen is not a financial person, and when I was going through preparing for my evidence, the question I had was, what is he doing in the middle of a financial matter when he was a project guy?

Q. I might come to ask you and expand on the concept of a

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project guy in a moment, if you wouldn't mind.

A. Okay.

Q. But we'll leave Dublin. You say that you never saw or were never shown the letter and the invoice?

A. That's right.

Q. And

A. There was a photocopier right outside the door of the board meeting as well. If they wanted to give me a copy, they could have given me a copy.

Q. And am I correct in thinking that as of the 20th December, you didn't even know that David Austin had sent an invoice or a letter to Mr. Johansen in Oslo?

A. As far as I can remember, no.

Q. Or sent an invoice to him anywhere?

A. No.

Q. Mr. Simonsen said that he had returned to Oslo, having received the letter and the invoice with Mr. Digerud's instructions written on them, and that he went back to Oslo on the 21st December, he believed, the next day; and whilst he can't be definite, he may have gone into the office on the 21st, in the afternoon/evening of the 21st, but that he was certainly in the office the next day, on the 22nd, and it was coming towards the wind-up before the Christmas period. And he said that he wanted to get this particular piece of work off his

desk before Christmas, so the instructions were given to the accounts department, in effect, to process the matter. Do you understand me?

A. (Nods head.)

Q. Now, he says that he had a telephone conversation with /RS

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you. Now, I know you must have had many telephone conversations with Mr. Simonsen over the time.

A. Not in that period.

Q. Not in that period?

A. No, during the licence, when he was working on the bid.

Q. Yes, I just want to be clear, you would have been used to talking to Mr. Simonsen, particularly during the licensing period, would that be right?

A. Which ended in August, yes.

Q. Yes, and I think that there wouldn't be any great disagreement between you on that particular point, that that was a period

A. I wouldn't have thought so, no.

Q. But you knew him?

A. Yes, I did.

Q. And you'd know who you were talking to when you were on the telephone to him?

A. He had a distinct Norwegian voice, yes.

Q. Can I take it he'd have known if he was talking to you on the telephone?

A. Yes, he would, yeah.

Q. Now, he says that it must have been around this date, around the 22nd, that you spoke to him on the telephone to the effect that you did not want David Austin's identity to be disclosed on anything in Dublin, or words to that effect. Well, first of all, let's break it up.

Did you have a conversation with Mr. Simonsen around this time, after the first board meeting of ESAT

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Digifone?

A. Absolutely no.

Q. Definitely no?

A. Definitely not, no.

Q. I want to be clear about this because and this is not a criticism of anybody, but when Mr. McGonigal asked Mr. Simonsen questions, he said you had no recollection of having such a conversation or telephone conversation. Can we take it that you definitely did not have such a conversation, or first of all, you had no conversation at all?

A. I am not going to preface my remarks by a recollection.

I am saying I definitely did not, Mr. Coughlan.

Q. Definitely did not?

A. (Nods head.)

Q. Not only did you definitely not have a telephone

conversation with him, you had no conversation with him whereby you informed him that you didn't want Mr. Austin's name or identity appearing on anything in Dublin?

A. Absolutely not.

Q. Or words to that broad effect, even?

A. Absolutely not. Furthermore, I wasn't in my office. I was over in Mayo on the 21st, according to my diary; and secondly, I was not working on the 22nd.

Q. Now, Mr. Simonsen says he did not know where you were when you spoke to him, but I just want to capture this as broadly as I can. You didn't have any conversation with him; you didn't inform him that you didn't want Mr. Austin's name being mentioned on any document in /RS

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Dublin, or even any conversation that could have given that broad impression to anybody?

A. I have said from the very, you know you opened up by saying "Look, you know, maybe things have changed with the evidence." I am being quite firm in my evidence in that I had nothing to do with the invoices.

I mean, you are asking me now, quite rightly, after hearing Mr. Simonsen's evidence, you know, "Did you ask him to change a name, Mr. Austin's name?" And if I had been involved at that stage, I would have been



involved much, much earlier with the invoices which came in in the middle of December. But I want to assure you and the Chairman that I had nothing to do, and these conversations did not take place.

Q. Did not take place?

A. I was never shown things out of somebody's briefcase.

Q. I want to be there are no grey areas here?

A. No, no, it's black and white.

Q. There are no grey areas here?

Now, Mr. Simonsen I just want to complete in general terms the evidence which Mr. Simonsen gave in this regard he said in evidence that he had no difficulty in dealing with the matter as he says you suggested, because he had instructions from Mr. Digerud to invoice it as a management charge or service from Telenor to ESAT Digifone, and he didn't therefore refer back to Mr. Digerud on the matter. Do you have any comment to make on that?

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A. I wouldn't have any knowledge of what the reporting mechanism was. But I found it strange that he'd be handling invoicing, given my previous work with him in the summer of 1995.

Q. What was that? Perhaps this would be a good time to take it up, that you could tell us what the project manager did?

A. He represented Telenor in the bid team. They supplied a number of people to work on the bid. There was, at the peak, there was nearly 40 people, and there was a substantial number of people from Telenor working on the bid. In other words, generating the documentation to go into the bid box, and every page of the bid, and there was literally hundreds of pages, had to be approved by the two shareholders, so either myself or Lucy Gaffney or one of the other team members on our side would have approved a part of the bid, maybe a chapter of it, would then go to him. He would read it and mark it up and make some changes. If there was areas of disagreement, well ,then we would debate them and resolve them and then finish that chapter.

Q. Well, in the evidence he gave to the Tribunal, I think he was asked whether he was a technical person that is, from the engineering side and he said no, he was from the business side.

A. Yeah, that would be true.

Q. Would that be correct?

A. Yeah, we had technical people to write technical parts.

Q. He informed the Tribunal that he then gave the documentation, after he said that he spoke to you, to

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the accounts department, which was located close to his office. And he instructed the payment to be made to

Mr. Austin and informed him that it had been approved by Mr. Digerud. And he also instructed them to prepare and issue an invoice to Digifone in respect of the same sum of money. And he believes that the instruction he gave at the time was that it was to be invoiced as a Telenor consultancy fee. That was his belief of the instruction he gave to his accounts department before the Christmas holiday period.

Now, were you expecting any Telenor consultancy fee being invoiced to ESAT Digifone?

A. They would have well, they had quite a number of people on the ground working it for the company, so there would have been fees charged from Telenor by one of their companies, whether it was Invest or Telenor Mobil, I don't know, but they would have been billing us for people. And in some I think they bought a radio planning tool kit; they invoiced us for that as well. So there would be a number of invoices coming in at that time.

Q. Now, he said that from recollection, when he returned to work after Christmas on the 3rd January, 1996, that a person named Irina, in their accounts department, came to him and handed him a photocopy of the invoice from David FT Austin and the invoice being raised by Telenor to Digifone by way of reimbursement of the payment to David Austin. And he says that as he had

requested the issuing of the invoice, it was natural to

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provide him with a photocopy of the fax. When he looked at it, he saw on the text of the invoice "Consultant FT Austin", and I think we have all seen this particular invoice before. And he said that he went to the fax machine to see if it had been sent, and when he was told that it was, he immediately rang Dublin, and he spoke to a person at the Dublin end, and he says that he is certain that the person he spoke to at the Dublin end was not one of the Telenor people.

A. Well, can I make a comment on that?

Q. Yes, indeed.

A. Allegedly he phoned me on the 21st/22nd saying

Q. No, I think

A. Or I phoned him.

Q. It may be

A. It was I was supposed to have phoned him and said "Please remove the Austin name." Now, Per Simonsen is a very efficient guy. Now we now have a situation where an invoice has been done up by Irina, and it has David Austin's name. It's faxed to Dublin. She brings him a copy after sending the fax. And I am surmising

Q. Yes, that's the evidence he gave.

A. And then he rings somebody in Dublin that he recognises

but is unnamed. That he can't name the person

Q. Well, he doesn't say that it's recognised. He says it wasn't one of the Telenor people, but it was a range of people on, I would say, the Irish side, I suppose, yes.

Do you think that

/RS

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MR. McGONIGAL: I think the evidence went slightly further than that, Mr. Chairman.

A. Yeah, the sequence

Q. MR. COUGHLAN: The range of people, and a male

A. He asked him to shred it.

Now, if I was involved, surely he would have phoned me and asked me to shred it, or he would have informed me that there was a mistake; and no such call or you know, a fax or nothing came to me. And secondly, I couldn't have phoned him either, because I was in Mexico.

Q. Nothing turns on it, but you could ring somebody from Mexico

A. Sorry, I was staying in a hotel that had been hit by an earthquake, and there was no phone lines out of it. It wasn't in the brochure.

Q. There was no phone line in either, of course?

A. No.

Q. I don't know if there was mobile phone reception there?

A. This is in it's in a jungle on the west coast of

Mexico, a place called Careus.

Q. So you were completely incommunicado?

A. I was, unfortunately.

Q. In any event, Mr. Simonsen informed the Tribunal that

after the discussion with somebody on the Dublin end

and the request that the invoice be shredded, he issued

an instruction to his accounts department to prepare a

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second invoice, omitting the name David Austin from it,

for \$50,000, which was the currency he had requested

that the original invoice be prepared in, and again

this invoice was prepared by Irina in the accounts

department.

Now, we know from the evidence that has been given that

it has the first of all it was hand-generated, it

was manually generated on the word processor, this

particular invoice. You can see the word "Invoice" is

incorrectly spelt, but significantly, it's the same

invoice number as the computer-generated invoice, and

of course the computer couldn't generate two invoices

of 1000050. And that that was for consultancy fees for

Telenor Invest AS, and it was for \$50,000. And he says

that sometime after this, that he received another

telephone call from you, and that you informed him that

you didn't wish the currency on the invoice to be US

dollars, or words to that effect.

A. Categorically, I did not phone him.

Q. And he says that you also requested that the invoice be delayed for a period of four to six weeks.

A. Again, absolutely no.

Q. That didn't happen?

A. No.

Q. Now, he says that this particular second invoice, and we have been through the history of this, was cancelled by way of the issue of a credit note, and then

A. Would there not have been correspondence?

Q. These are the documents we have, Mr. O'Brien. We are

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trying to find out everything.

A. Nobody well, in business, Mr. Coughlan, nobody will

send an invoice like this over the fax without

something, with a cover sheet. It's most unusual. If

you can think to yourself, if you are sending an

invoice to somebody, you actually put something, a

piece of paper to say "Enclosed please find an invoice

relating to X; kind regards."

But what we have here is just an invoice. I think on

the credit note, there was a letter.

Q. Yes.

A. And then the other one, the

Q. The final the invoice that stood?

A. Yeah, the shredded invoice, if you want to call it that, that we seem not to have any header or top sheet for that either.

Q. Yes.

A. So we are missing vital pieces of information.

Q. Mm-hmm. And what you are saying is that if an invoice is being sent in the normal course of your business, it would have a quick covering note?

A. Yeah.

Q. Or a compliment slip, or something of that nature?

A. Something, from the person who is sending it.

Q. Yes.

A. And then there would be a statement at the end, you know, over a period of time, fifteen days later.

Q. Well, in this case, Mr. Simonsen this is the final invoice which went into position said that you had

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requested the removal of a reference to US dollars and that you wanted you would prefer it to be in Irish pounds, and you asked that it wouldn't be issued for a number of weeks hence.

A. I said that?

Q. That's what

A. No, it's from it's addressed to Irina from Per. And



it says "Dene Irina" (Phonetic) I don't understand

Norwegian, but I don't see my name on that.

Q. No, it's not on that note, but Mr. Simonsen in his evidence said this was done as a result of a request from you.

A. Okay. That's his evidence.

Q. Your answer is?

A. I never asked him to delay it or

Q. As far as you are concerned, you had no conversation with him about this at all?

A. At all. I mean, my name not even on these invoices.

Q. Mr. Simonsen had no further involvement in relation to these invoices or the matters they pertain to, and he subsequently had some involvement, it must have been, he believes, around the time of the IPO in 1979 sorry, I beg your pardon, 1997.

A. I don't remember him being involved.

Q. No, he is not saying that he was involved, but that

A. Maybe behind the scenes in Telenor.

Q. Yes.

A. Yeah, could be.

Q. Now, if we go to the working paper prepared by Mr. Colm Maloney, you know, the handwritten document?

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A. Yeah.

Q. We can take it Mr. Maloney hasn't given evidence

yet, but we can take it that this is in his handwriting, and he prepared this particular working document?

A. Fine.

Q. And you can see that it records an account, an intercompanies account, matters operating on it, and there are sums payable to various parties. There is one there recorded, ESAT Telecom 12,275; Communicorp, 5.139; 98FM as recorded there. I take it that this is indebtedness that ESAT Digifone has to these companies of one sort or another?

A. Yes, it looks like that, yes.

Q. And then there is "Telenor Mobil re David Austin, 31,600."

A. Yes.

Q. That is that's roughly the 316,000 kroner, I think?

A. By 10, yeah.

Q. By 10. And then there is Telenor Invest, 100,000, and I think Mr. O'Donoghue may have given evidence that this was actually payment received from Telenor, a cash payment. I am unsure, but it doesn't really matter that much.

A. Yeah.

Q. Now, he prepared this for the period for the accounting period ending 31st December, 1995; you can see that?

A. Mm-hmm.

Q. And he believes that he would have prepared it sometime

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early in January 1996?

A. Yes.

Q. And for the purpose of preparing it, it would appear that he contacted somebody in the accounts department of Telenor to find out what monies were owing, and that he received this particular information, and I am unsure at the moment whether it was in hard copy form or whether he received it over the phone.

A. It would be you'd assume, unless they spelt Mobil over the phone to him, otherwise he would have just put Telenor Mobile, so it could be a hard copy somewhere.

Q. Now, it may have been a fax?

A. Yeah.

Q. Now, from the information he supplied to the Tribunal, he believes that he may he may have brought it to the attention of Mr. Thygesen, and that he may have been informed by Mr. Thygesen because he was conscious of the fact that Mr. David Austin was a Smurfit executive, or had no involvement, anyway, with your company, and that Mr. Thygesen may have informed him that it was something to do with PR, that it may have been the situation.

A. Hard to believe, but maybe, yes.

Q. Mr. Thygesen, when he was asked about this, has no

recollection of this particular matter being brought to his attention, and he, in his evidence, said that he had not been informed about the transaction at all. Do you have a view about that?

A. I don't know.

Q. Now, the one area all witnesses who have given evidence /RS

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on the negotiations leading to the Shareholders' Agreement appear to be reasonably clear on is that this did not become an issue at the time of the negotiations of the Shareholders' Agreement.

A. Well, it was an issue for us. And because we queried it.

Q. And are you still saying that there was pressure brought to bear on your side to allow this payment to go through on the books of ESAT Digifone?

A. From what I can remember, and there were I think fourteen drafts, and there were six months of negotiations. It was one of maybe fifteen items, maybe twenty items, and we queried it, but we let the matter in other words, we let the company pay for it.

Q. Can you remember who specifically queried it now?

A. Well, I know I would have queried it.

Q. And whose job would it have been to agree this as an item?

A. Well, it would have been down to the negotiators. And there were different negotiators at different times because of the duration, the length of time it took to negotiate a Shareholders' Agreement. And ultimately, you know, it was a minor irritant from our point of view, on what really was a much bigger canvas, because we were going into a project with Telenor, and they were bridging us for approximately, I think, four weeks, for our equity, because we were in the middle of a placing in the US which didn't finish till June, and we had a gap.

/RS

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So on the one hand we were trying to finalise the Shareholders' Agreement, and on the other hand we were trying to borrow money off our partner. And in that circumstance, you try and cut down the number of things that there would be rows about. So ultimately we agreed that we would drop it.

Q. When you say "we", who, specifically?

A. Well, the ESAT side.

Q. I think even Mr. O'Connell gave evidence here, and I don't think anyone has any clear recollection of this ever being an issue.

A. Well, he was only one person involved. But there was four or five people for different parts of the agreement.

Q. So you are positive in your evidence that you were never shown the David Austin documents; you were never informed of their existence until it became an issue around the time of the IPO, is that correct?

A. Well, I would have known that Telenor were trying to much later in the day, sometime around May, that they were trying to recover 31,000.

Q. Trying to recover money. Did you see the David Austin documents then?

A. No, I just knew that this was a line item.

Q. And you were positive that you had no conversation with Mr. Arve Johansen around the time of the board meeting in Dublin on the 20th December about this particular item?

A. That's right.

/RS

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Q. You had no conversation with Mr. Per Simonsen about Mr. Austin's name appearing on any document coming to Dublin?

A. Absolutely.

Q. You had no conversation with Mr. Simonsen about the currency?

A. No.

Q. Well, the Tribunal has to face up to this now, Mr. O'Brien; if that is the case, this is a complete and utter fit-up by Telenor against you, isn't it?

A. I don't well, I am not sure what reasons they have.

It could be for reasons back home. But there certainly is a strong disagreement in evidence.

Q. No, it goes further than that, Mr. O'Brien, surely.

This isn't a type of a situation where you might have that something probably happened or probably didn't happen. We are not in that area here now. We are in an area here now, because the evidence which has been given by Telenor and the evidence which has been given by you, somebody is telling lies under oath.

A. Correct.

Q. There is no doubt about that.

A. Correct.

Q. And if you are correct in your evidence, this is an appalling fit-up of you by Telenor, isn't it, to come and give such false evidence

A. Well, Mr. Coughlan, I am being consistent

Q. Sorry, Mr. O'Brien, I am not saying you are not, I just want to be clear.

A. in every way. And if you look at the way I have  
/RS

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given evidence in this Tribunal, I have opened everything up, all right? And I know this is something that has been on the foremost of the mind of the Tribunal, I believe this is a small matter, but a very serious matter. But I have given evidence on some much

more serious issues and allegations against me in full detail, with full embarrassment in certain circumstances, and I am here today to tell you that my evidence stands.

Q. Yes, I understand that, Mr. O'Brien. But from the Tribunal's point of view, attempting to get to the motivation of people who would engage in such an activity, it's very important

A. It is.

Q. to understand your understanding of this matter, that you are in no doubt that you are of the view and giving the evidence that this is a lie being told about you?

A. And furthermore

Q. That these are lies being told about you?

A. And furthermore, certain parts of the press, Mr. Coughlan, have dealt with this matter pretty poorly, in my view, as far as my evidence is concerned.

Q. Right. There is no grey area here now. Mr. Digerud and Mr. Johansen and Mr. Simonsen, as far as you are concerned, have told lies about you in the witness-box?

A. No, Mr. Johansen has also given evidence as well.

Q. Sorry, I said

A. He is pulling the strings.

Q. I said Mr. Johansen, Mr. Digerud and Mr. Simonsen.

/RS



A. It starts with Mr. Johansen.

Q. It starts with Mr. Johansen. Then Mr. Digerud and Mr. Simonsen?

A. Correct. And if you look at the key pieces of evidence, they have only come out in the last two weeks. Not when we all looked at this in great detail in June, or May, or whenever it was.

Q. Now, is there or was there anything in the relationship between you and these three individuals which could assist the Tribunal in understanding why they would come and give false testimony against you?

A. I think probably two things.

Q. Yes?

A. And they are both are human nature. The first one is, Telenor didn't succeed in their bid for ESAT. And the second thing is that perhaps back home in Norway, they weren't full and frank as to the circumstances as to the donation that they made to Fine Gael.

Q. Can you assist the Tribunal on that latter one now? I can understand you say that Telenor wanted to purchase the whole of ESAT.

A. Yes, at one stage well, they made a hostile bid against us for the company.

Q. Okay. That's one thing. And you say that there wasn't full and frank disclosure about this particular transaction back in Norway

A. I am trying to help you as to maybe a reason why there

is such a divergence here.

Q. Yes. And you understand the true nature of this transaction to be one of a political contribution being

/RS

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made by Telenor, is that correct?

A. That's correct.

Q. Which was a wholly-owned Norwegian government company at the time, and a donation was being made to a political party in government in another country.

A. That's right.

Q. And you think that that is a possible reason why they are prepared to come and give false testimony against you?

A. That could be one of the reasons.

Q. Now, you are perfectly correct in saying that some of the evidence which has been given on this particular issue arose when statements were furnished by various witnesses from Telenor over the summer break.

A. Correct.

Q. And just so that I can explain the procedures of a Tribunal, because you are not a lawyer, Mr. O'Brien:

It is not for anyone to make a case at a Tribunal. It

is for the Tribunal to attempt to get at the truth of

the situation itself, but if that is levelled as a

criticism at these particular witnesses, and you are

quite perfectly entitled to do it, might I take it up

on their behalf, as I am bound to do

A. Sure.

Q. that it was not put to any of these witnesses they were telling lies. It was not put on your behalf, and the Tribunal was not furnished with any statement by you to say that they were telling lies. I am trying to put the whole picture before the public, and that is correct, isn't it? It was not put to these people that

/RS

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they were telling lies, and the Tribunal was not furnished with any information from you to say, "Ask them this question, ask them are they telling lies". I just want to complete the whole picture.

A. That's a very fair summary.

Q. I appreciate that at the time of the IPO, this particular matter did not have the significance of the matter which arose between yourself and Mr. Barry Maloney?

A. No, it didn't. Not in our eyes, but maybe, I think Telenor were concerned.

Q. Well, Mr. Digerud, I think, it's recorded in some of the documentation, Mr. Digerud, even as far back as then, was concerned about the IPO and this particular issue. It's recorded.

A. He had much more personal motives.

Q. Well, I'll come back to that in a moment, because the

Tribunal has to test everything now because of this

issue which has to be decided.

A. Of course.

Q. And Mr. Digerud gave evidence here at the Tribunal the

other day about the time of the IPO and the view he had

that it shouldn't have gone ahead; he had heard about

the conversation issue between yourself and Mr.

Maloney, and he was concerned then about this

particular donation until the letter was received, the

handwritten letter from Mr. Austin. But you say that

Mr. Digerud had more personal motives as well. Could

you assist the Tribunal as to what they were, first,

and do they in any way

/RS

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A. Well, he was joint CEO of the company. He was CEO,

then joint CEO. And ultimately the company had to pay

him a sum of money to leave the company and also pay

compensation for his wife to leave the company as well.

So when it came down to getting a balanced view at the

stage of the IPO, I think Mr. Digerud could have been

coloured by those events previously.

Q. When you say that he had to leave the company, was that

because of a shove from your side of the company?

A. No. That's not my recollection of it. I think the

company was suffering from not having one Chief

Executive.

Q. I see.

A. That's one reason, but I think

Q. That was a management matter?

A. It was a management matter and also a matter of ability as well.

Q. So you think that that would have affected his view about the IPO of ESAT Telecom?

A. Well, if the IPO had failed, you have got to look at practically, who was going to pick up the pieces? Who was in a position to fund the company, fund ESAT Digifone?

Q. Telenor, would that be correct?

A. They were the prime partner, yes.

Q. Because I just want to be clear, these are significant matters for the Tribunal to consider. You think that the opposition he had to the IPO at that time was unrelated to this particular donation and was more to do with a personal view of things?

/RS

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A. That would be my understanding of it. That would be my personal view. I can't speak for the other board members at the time, but that would be my personal view.

Q. Yes. And can I take it that if he had such a personal view, that would not, or would it, have coloured the evidence he gave here last week about remembering the

board meeting in Dublin and you being shown documents?

A. I don't know, to be honest with you. I am not sure. I don't know.

Q. And you again I have to ask you about each individual who gave evidence what would the motivation of Mr. Simonsen be to come and give false testimony against you?

A. I can't figure that one out, but he is a reasonably junior executive in a large organisation, and in organisations, people who want to progress, they obviously take their instructions.

Q. Can I take it that you always enjoyed good personal relations with Mr. Simonsen when he was project manager?

A. Well, in fact in my testimony when you questioned me about this months ago, I said he was a very good guy. And he was a very competent fellow.

Q. On a personal level, you found

A. Excellent.

Q. you got on well with him?

A. Excellent fellow.

Q. Because his evidence is quite specific, isn't it?

A. Yes, it is, yeah, phone calls.

/RS

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Q. Phone calls. And you can't point to any personal animosity between you?

A. No, I don't believe we worked very closely together in the bid phase. He was a very, very professional fellow to work with.

Q. And is there anything specific about Mr. Johansen which you believe may have been a motivating factor in him giving false testimony against you?

A. Mr. Johansen is a complex character. He can be a fantastic guy, he can be a guy that's very stubborn, unchangeable, probably jumps the gun a bit, a competent executive. But I think the Norwegian way is different, their business is different. The way business is done here, people are much more give and take in this country, where in a debate people will say, "Okay, well, let's do it", and not necessarily push their point of view too hard. The Norwegian view is a lot more black and white. And I think he was more concerned at the IPO that we would turn around and sue Telenor for not allowing the IPO to go ahead. I think that's what his concern was.

Q. Now, I think when this particular donation became a matter for inquiry before the Tribunal, and when Mr. Johansen gave his evidence on the first occasion, it didn't necessarily reflect all that well on him and his company in this regard, in that if he had known about the routing of a payment to a political party to an offshore bank account and a false invoice being paid, or being furnished for the payment, if he had known

about those things beforehand, he said he would not

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have given permission for it to take place.

A. I think he then said in evidence that he wasn't surprised about people using offshore accounts.

Q. He did go on and said that in relation to Ireland, he saw offshore companies being used reasonably frequently.

A. I don't know how he would have said that, though, in December of 1995. He would have known that because...

Q. But he got into the witness-box, and even though it appeared to be slightly painful for him, he made that admission, that he wasn't necessarily all that proud of what had happened, but

A. None of us are

Q. But he felt committed, once he had agreed to make the payment. Now, I want to ask you, does that, in your mind, appear to be the type of evidence that somebody who has given perjured evidence would give?

A. I wasn't here for all his evidence, but I think I share with him the view that we should never have been asked for a donation in the first place. And that's why we are talking about this; this is why the Tribunal has dealt with this for many days.

Q. But it has now moved to a far more serious plateau, hasn't it, that there is a situation has arisen where,



as you said yourself, and as Mr. Fitzsimons, when he questioned you on behalf of Telenor before said, this is a credibility issue, and the positions are clearly drawn now; somebody is telling lies here?

A. I think it's up to you and the Chairman; it's up to the Sole Member to decide that.

/RS

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Q. I understand that. This is why we are looking for all the assistance we possibly can as to motivation.

Now, would you agree with me that if the individuals concerned, Mr. Johansen, Mr. Simonsen, who are still with the company, with Telenor

A. Two of them are.

Q. Mr. Johansen and Mr. Simonsen are.

A. Yeah.

Q. That if they came and gave false testimony, and it was to be so found, it wouldn't just be damaging to themselves, it would be extremely damaging to Telenor also, wouldn't it?

A. It would be, yes.

Q. I think it's a matter you just raised yourself, that it wasn't appropriate for you to be asked for the donation to begin with, that was your view is it your view now it was always your view that it wasn't appropriate for Digifone or any Digifone perhaps, ESAT

GSM Holdings, or any of these companies associated with the bid

A. Certainly not the ESAT combine.

Q. anything under the ESAT name, it wasn't appropriate to be asked for or to make a political donation to the main government party at that time?

A. Yes, I would agree with you.

Q. And it wasn't appropriate for Telenor either?

A. Probably not, in hindsight.

Q. That's why I am asking you.

A. Yes, purely in hindsight.

/RS

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Q. And that at the time you spoke to Mr. Johansen, even on your own version of events, that wasn't appropriate, to get them involved in a making I know you say it was a matter for themselves, but it wasn't appropriate to get them involved?

A. Well, it's become such a major issue, and maybe with a lot more thought about it the whole thing is regrettable, Mr. Coughlan.

Q. Yes. The whole thing is what?

A. The whole thing is regrettable.

Q. Is it regrettable that the matter has become public, or is it regrettable that it happened and shouldn't have happened, is what you are saying, as a moral issue?

A. I think in hindsight, looking at this years later, it

was unwise for to be asked for the donation; it was unwise to make a donation. As to whoever made it...

Q. Is there anything else in relation to this particular matter that you'd like to deal with at the moment, Mr. O'Brien, or

A. I don't think so, Mr. Coughlan. Thank you.

Q. I was going to turn for a moment would you like a few minutes to sort out some of your

A. No, I'll just tidy up my papers, that's all.

Q. I was going to turn for a moment to the whole question of the property in Spain, Mr. O'Brien.

A. Fine, okay.

Q. Can I ask you this: Did you ever see it?

A. I did, yeah.

Q. When?

A. It would have been in 1996, before I bought it.

/RS

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Q. Were you visiting Mr. Austin?

A. I was actually in Portugal. I believe I drove across.

Q. Did you ever see it since 1996?

A. I have, yeah. I have never stayed there.

Q. When did you see it?

A. It would have been a couple of years ago, I was over there.

Q. Am I correct in thinking that up to this summer, in the little nameplate outside the house, the name "Austin"

remained?

A. I don't know. It has been let for the last two/three years anyway.

Q. But you don't know that?

A. I wouldn't have a clue, sorry.

Q. And did you give it to a letting agent to let?

A. The manager who managed the house for David Austin continued when I bought it, and he found people to rent it. I think there is a couple in it at the moment.

Q. Was that after 1998, into 1999?

A. It would have been let pretty soon after Mr. Austin vacated, I think. It was sometime in 1998.

Q. The paperwork in relation to the property wasn't completed until May of 2001, isn't that correct, all of the paperwork?

A. Well, this is this concerned me a little bit because there is three layers here. There is the company that owns the property, which is a company called Tokey, which when I was buying the property from Mr. Austin, I was buying shares in a company, so I wouldn't need a solicitor, and particularly I knew the vendor very

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well. So

Q. I am not concerned about the question of a solicitor at all.

A. No, but I am trying to break it down into pieces. So

Tokey, and then above them there is a company called Finsbury Nominees, and the paperwork between Tokey and Finsbury Nominees was in place. The paperwork then between Finsbury and Walbrook, which is another nominee trustee company, was in place. But the last piece, and all of those pieces would have noted that I was involved, the last piece between Walbrook and myself was put in place in May 2001.

Now, there is correspondence from Deloitte & Touche to actually say that they had mislaid the documentation which was completed in May 2001, and there is a guy called Tushington or Tushington [sic] who has written this letter. Now, this only came in to show this.

Q. When did that letter come?

A. It would have come in late on Friday.

Q. I see. Perhaps we can deal with

A. We have it, yeah. So just to dispel that, I own the property since 1996. Mr. Austin had the right to use the property, but also he had lost his declarations of trust. And because he was ill at the time and had mislaid them, it took quite some time before it was not until 1998, when I had taken delivery of the property or taken over the property and started paying bills that we actually got Mr. Austin to give us the declarations or find them or create duplicates, I am

/RS

not sure which one.

Q. I wonder, are you correct about that, Mr. O'Brien? You only started bills only started to be paid

A. In the last quarter.

Q. By Ms. Malone, or Mr. Phelan and/or Ms. Malone, after Mr. Phelan signed certain documents?

A. No, what happened was Mr. Austin

Q. They covered a period prior to that, but they weren't paid until afterwards. I think I am correct in that?

A. Well, we paid invoices. Some of them in fact related to his use of the house, but they were small, inconsequential. But we paid for the costs relating to the house, I think, from October '97.

Q. Do you know how those were paid, those invoices?

A. I don't know. I mean, small money, I don't know.

Q. No, I understand they were small money. I kept asking Ms. Malone about them because she was dealing with them, and she had no idea where the money came from.

A. These would have been utility bills, yes. This could have been money Po had, the house man, on deposit, I don't know.

Q. Because Mr. Perera was always looking they were small amounts, two or three hundred pounds, that sort of thing.

A. Yeah.

Q. But you don't know how they were funded?

A. I actually don't, no.

Q. And did you have any discussion with Mr. Phelan about that, or Ms. Malone, or did you just leave it to them?

A. I actually left it to them. I mean, these were

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small these were hundreds of pounds bills, not big bills.

Q. And you believe now that Mr. Tushingham from Deloitte & Touche in or Walbrook, which is a Deloitte & Touche company in the Isle of Man, has furnished a letter which can be of some assistance to the Tribunal?

A. Well, it shows that the that basically, it was they had they knew that the property was owned by me, but there was all the other documentation to show the property was still owned by me, but that was the last piece in terms of as the final trustee, and that was Walbrook. And that is Deloitte & Touche, I think, own Walbrook now.

Q. Yes. And the initial declarations of trust, that is from and letters of indemnity from Mr. Austin to allow the property or the shares in the company to pass from him.

A. Mmm.

Q. They indicated that the transaction had occurred in 1996, isn't that right?

A. It's in this document, this

Q. You can take it that that is so.

A. Fine, okay.

Q. But that is only because Mr. Phelan spoke to Mr. Perera down in Gibraltar and told him that the money had passed over in 1996, isn't that correct? There was no documentary trail since 1996?

A. Well, I am looking at a file note here where it says 3rd July, 1996, Valmet. "Telephone conversation, David Austin explained that he was /RS

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considering selling the property."

Q. I saw that.

A. He goes on to say to a friend

Q. That he was considering selling a property. I saw that.

A. And he is trying to locate the declarations of trust.

Q. Yes.

A. That's what took the from what I understand, I wasn't intrinsically involved in this, but from what I am told, that's what

Q. Yes, but what I am saying is the paper documentation in relation to ownership of the property through the shares was put in place late 1998/early 1999?

A. No, I think it's the other way around, late '97/early '98.

Q. I beg your pardon, 1997/'98, and they indicate that the transaction is to be backdated to August of is to be



dated from August of 1996?

A. That's when I paid for the property, yes.

Q. And they were only enabled to come into existence because Mr. Phelan spoke to Mr. Perera to tell him that Mr. Austin had been paid the money in 1996, isn't that right?

A. Again, I don't know.

Q. You don't know?

A. I am sorry.

Q. Can I ask you this: In the course of your business, is it usual for you to try and get documentation right within a reasonable period of time, particularly when it relates to an asset?

/RS

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A. Yes, it would, of course, yeah.

MR. COUGHLAN: I was just going to deal with something else now, Sir. I wonder, would that be an appropriate time?

CHAIRMAN: It's five to four. We'll take matters up at eleven o'clock in the morning.

Thank you for your help, Mr. O'Brien.

The Tribunal then adjourned until the following day, Tuesday, 23rd October 2001 at 11 am.

/RS

