

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

MARTIN BRENNAN Mr. Healy 1 - 276

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY,

29TH JANUARY, 2003 AT 11AM.:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: At the end of the day yesterday, Mr. Brennan, we were looking at the differences between the evaluation reports, and I was focusing in particular on the last portion of the report, the last part where the question of sensitivities, risks and credibility was dealt with, and specifically I was dealing with the changes made which ultimately resulted in page 44 of the final report. Have you got that?

A. I think I was dealing with a book that I had got from somewhere else at that point.

Q. If you have it's in the the easiest place to find these documents is in Book 46, because they are all put together in Book 46. You will find them at various other parts of the documents, but if you have Book 46, it makes it easier to refer to the valuation documents.

As we said yesterday, this page 44 is different, and I suppose you think it's fair to say significantly different from the equivalent page; it's not the same number in the first version of the report produced on the 3rd October and in the second version produced on the 18th. I think it's also fair to say that the difference between the version of the 3rd and the

version of the 18th was that a lot more tables had been completed by the 18th. The report was much closer in form to the form it ultimately took on the 25th, but mainly by the reason of tidying up, adding information in the form of tables and appendices.

There wasn't a lot of other work done. The form of the report in the October 3rd version is the basic form, and that is the form in which it always stayed, am I not right, until the 25th version?

A. More or less, yeah.

Q. Now, this change, however, as I said yesterday, when we were comparing any of the other two versions with it, contains a fairly significant alteration.

In the first two versions of the report, the section dealing with sensitivities, risks and credibility, Section 5, as I said yesterday, began more or less with the paragraph contained at paragraph 5 on page 44 of the draft of the 25th.

A. Yeah.

Q. The final report, in fact. And the portion of the report that is above that was the new portion. Now, if you go back to the earlier page 44, it actually has the same number in the draft of the 18th. What it contains is a description of the problems associated with A5 and A3. In A5's case, this problem is, you know, articulated in the second paragraph in, I won't say the starkest terms, but in fairly clear terms

which one would have to I think agree are relatively negative, though not as negative as in the supplemental analysis; would you agree with that?

A. I haven't looked now as closely as you have to come to that conclusion.

Q. Well, if you consider it this way: It points out the fact that A5 has got there is a weakness in A5?

A. Mm-hmm.

Q. Secondly, it points out that that weakness is related to one of the consortium members, namely Communicorp?

A. Mm-hmm.

Q. This it says is due to the fact that Communicorp has a negative equity. Earlier in the report, this is referred to in other parts of the report in which Communicorp is described as being below the required solvency levels for three years of its projected operations in the first four years. Do you recall that? And it goes on to say "Should the consortium meet with temporary or permanent opposition, this could in a worst-case situation turn out to be critical, in particular in matters relating to solvency."

I suggest that that is an analysis of a negative aspect of that application.

A. Okay.

Q. In the final version, before any reference is made to this negative aspect, there is a passage which

describes one of the purposes or one of the factors taken into account in an assessment of credibility or risk factors.

It says "A critical factor in any consideration of the credibility or risk analysis of the applications is the capability of the principals to finance the project, including ability to meet any shortfall in funding requirement due, for example, to unforeseen capital expenditure."

It's describing one of the worst case scenarios in a sense that you might consider when carrying out a sensitivity analysis. What if you need more money? Do you have the money to carry out the project along the lines you said you would if there is a requirement for greater capital?

And it says "In general terms, the applicants have provided comfort that appropriate funding arrangements are in place." It then goes on to say what conclusions the evaluators have reached, having regard to the comfort provided by the applicants. And it says that they have concluded that having regard to the high level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally throughout Europe, the project is fundamentally robust, and after a licence has been awarded, an attractive opportunity for corporate debt financiers. The evaluators have

therefore formed the view that subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial weakness of one consortia member should not have a negative impact on the ranking of the applications."

Now, could I suggest that this is anticipating the negative criticism of Esat Digifone that was contained in the report before this passage was put in?

A. I'd look at it a little differently. I'd say that either it reflects discussion that went on previously or it doesn't, and I'd be fairly confident that it does reflect the approach taken.

Now, we have discussed previously that the financial evaluation was carried out by a sub-group of which I was not a member. But and they will come here.

Now, if this text is representing a discussion that took place at that level, then it's right that this should be here; but there seems to be an underlying suggestion that this text was conjured up at this point to strengthen the case for the result rather than that somebody took a view, "If that's the discussion we had, then we should put it on the record". I strongly suspect it's the latter.

Q. You may

A. In the sense, by the way

Q. Can we discuss the meaning of the text first? I take

the point you are making, and I am exploring the proposition that the text was put in, if you like, to plug a gap to make the report, justify the conclusion that was reached. That is a suggestion I am trying to explore.

A. I can see that. But there were three different strands to what was going on in the Project Group. One was typos; another was Danish English; and a third very definitely discussed in the group was how to articulate in the report the case that was considered by the Project Group and how to improve the way that the report was presented, given that the group was at this stage very close to finally agreeing the result. And I think that the audit trail is reasonably good in relation to the various versions of the report, but I am not sure of that.

And the question is: Is this an isolated incident where such kind of change was made, or not? And I suspect it's not an isolated incident.

Q. My impression, Mr. Brennan, is that it is probably the most significant amount of text inserted between the October 3rd version and the October 25th.

A. I think that's probably a fair statement.

Q. The other changes are I think along the lines you described.

A. Yeah. I don't have recall of them, but I would expect that there are some which are significantly nuancing

the report.

Q. Yes. I mean, you could go through them and you could say that I think it would be fair to say you could find changes made to support more strongly one aspect of the ranking, but you could also find changes made that support more strongly other aspects of the ranking; i.e., some of the changes support more strongly the ranking of somebody in position 2, position 3 or position 4. Some of them negatively impact on the ranking of the entities in positions 2, 3 and 4. I think that's fair to say.

A. Yes, but all in the context of a mindset in the group of ending up with a report that reflected fairly what went on in the group in a manner that properly supported the result.

Q. I understand that. And I still want to explore the point I am making, but I mean, I am taking on board what you are saying. But I am asking you just to look at the text for a moment.

A. Sure.

Q. And in particular the part of the text that I read out just before I asked you a question about that. "The evaluators have therefore formed the view that subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial weakness of one consortium member should not have a negative impact on

the ranking of applications."

The point I am making is that at no point up to then in that passage is any reference made to a potential financial weakness of any consortium member in any consortium; that is something that follows later on in the text. Isn't that right?

A. Yes, but I think it's fair to say that it's clear from earlier evidence that this was the approach of the consultants which was articulated much earlier in the process.

Q. I understand that. This is what you call the deep pockets?

A. Yes, which was Andersens, who were the consultants we engaged, one of their ways of looking at competitions of this kind.

Q. Do you remember we looked yesterday at the lengthy handwritten verbatim note of the October 9th meeting which considered the October 3rd draft version of the report?

A. I remember that.

Q. In that, there were references to Annex 10, which contains the supplementary analysis dealing with financial weakness in the case of and other risks in the case of the various consortia; and it was suggested that the financial aspects would have to be looked at and that there would have to be a discussion on Annex 10?

A. Yeah, that sounds accurate enough, yeah.

Q. Subsequently a document was produced, a very lengthy document. I don't want to go into all of it. It seems to have been produced by or at least collated or assembled by Mr. Fintan Towey, in which, page by page, paragraph by paragraph, he goes through the report making the suggested changes of the various types you mentioned a moment ago?

A. Yes, I am not sure whether he did that once or twice. Whether he did it in relation to the 3rd October version and probably also in relation to the next version.

Q. Yes. Ultimately he faxed to Mr. Andersen all of the changes that on his side, and it was felt ought to be made to the report to the 18th October version so that they would appear in the final version, isn't that right, or what he hoped would be the final version?

A. You said on his part. I think he was collating on the part of various people, but yes.

Q. And that long document containing suggested amendments of the three classes you mentioned earlier in its final form contained this passage?

A. Yeah.

Q. And that passage was not contained in the October 18th version, so we may take it that the section of the amendments in which that passage is contained only went to Mr. Andersen to enable him to make a change in

the final report?

A. Yeah, I think Mr. Andersen wasn't at the relevant meeting; isn't that right?

Q. Yes.

CHAIRMAN: Whilst we have that passage on the screen, just the paragraph that was added for the final report, would you agree with my impression, Mr. Brennan, that this passage reads consistently enough as an exposition or development of the concept of bankability?

A. I think the concept of deep pockets allied with bankability, yes.

Q. MR. HEALY: Could we just for a moment now go on with the narrative or on with the chronological sequence of the documents, Mr. Brennan, and if you go to Book 43, sorry, Tab 132.

I don't want to I am going to cause you trouble now, Mr. Brennan, because I realise I should have mentioned a document, so we don't lose the chronological sequence, which is in Book 42. I'll try to rather than you have to turn it up, I'll try to deal with it by giving you a hard text copy which I will probably need in any case, because the copy in your book, if it's as illegible as mine, won't be of much assistance to you. This is in Leaf 49 of Book 42. Sorry, I beg your pardon, it's not. It's in Leaf 49 at Book 46. I am going to give you a hard text

copy so you don't have to

(Documents handed to witness.)

What you have is a bad photocopy of a page of the, I think, October 9th draft, or of the October 18th draft of the evaluation report. It came to the Tribunal from the files of the Department of Finance, I suppose clearly the draft that they were working on in reviewing the report. And I think the writing on it is Mr. Billy Riordan's writing, the handwriting. Do you see that?

A. Yes.

Q. And it's in two different inks. And if you go through the page, and if you go through the entire document, which I am not asking to you do now, you will find that there are comments in two different inks suggesting that some of the comments were made at one point in one ink, and the other comments were made at a later point in a different ink. And they seem to relate to one another in the sense they seem to be queries and answers, if you like.

A. Mm-hmm.

Q. Now, the first set of comments to which I want to direct your attention are in the first, it looks like a less dark ink, on the right-hand margin. Opposite the reference to "A5's maybe weakest point is not related to the application as such but to the applicant behind the application, or more specifically

to one of the consortium members, namely Communicorp, which has a negative equity."

And opposite that, and I am trying to I have seen the original note or a better copy than this. I think what's written opposite that is "How does". I think what it reads is "How does this stand up against a B for financial strength". I think you can take it that that's what it means. If it doesn't read precisely that, that's what it means.

A. Yeah.

Q. And I think that what Mr. Riordan is saying there is if the consortium has a weak point in relation to one of its members, how can you give it a B for financial strength? And we know from other documents that Mr. Riordan and, it would appear, Mr. Buggy, had reservations about giving a B for financial strength to Esat Digifone's consortium?

A. Yeah.

Q. And I think we'll look at the documents in due course.

But he was suggesting, I think, that they would get a C for financial strength. We have just got the exact wording now. "How does this stand up against a B for financial strength." As I said, Mr. Riordan and/or Mr. Buggy were suggesting that Esat Digifone should only have a C for financial strength, but one way or another, they seem to have been persuaded or at least their views don't seem to have been taken on

board, because right up to the final evaluation report, Esat Digifone got a B for financial strength. Now, underneath that you see firstly in a box you see the word "Change" after the paragraph "Although being assessed the most credible application, it is suggested to demand increased degree of liability and self-financing from backers if the Minister intends to enter into negotiations with A5."

Underneath that you have the word "bankability"; do you see that?

A. Mm-hmm.

Q. Now, we know that bankability is a way of describing the significant additional passage added to this portion of the report in the final draft. And it seems to me that bankability was what would justify leaving the scoring for financial strength of Esat Digifone consortium at a B instead of the C that Mr. Riordan and Mr. Buggy were contemplating.

A. Yeah.

Q. Now, financial strength had a weighting of 10 in the final evaluation. It was part of an overall criterion which had a weighting of 30, but broken down it had a weighting of 10.

A. Mm-hmm.

Q. In the final evaluation, the one where you converted the grades into what we in Ireland would call marks, numbers, if you like, a change from a B to a C would

have meant that Esat Digifone's Mark would have dropped by 10?

A. Mm-hmm.

Q. Which would have meant that instead of being 22 points or approximately .4 percent ahead of Persona, they would only have been 12 points

A. You said .4 percent.

Q. I beg your pardon, 4 percent, you are absolutely correct. Instead of being 4 percent ahead, they would have been down to a 12-point gap which is, out of 500, much, much less, obviously?

A. Yeah.

Q. Something in the order of 2.2 percent or something like that. 2.4 percent maybe.

Let's go back to Book 43 to where I referred you a moment ago, and to Leaf 132, which is the 23rd October meeting of the Project Group. You had a more or less full house. Mr. Andersen, I gather, was not present in person. I think what's on the left-hand side is by fax?

A. I suspect it's by speaker phone.

Q. By speaker phone; I see.

A. We have a conference room with voice-activated microphones and high tech for them, and I am fairly certain that's the manner in which he participated.

Q. I see.

It starts off with a core addendum, "Mr. Billy Riordan

noted for the record that Jon Bruel of AMI had stated at the previous meeting that he was sufficiently satisfied that the financial tables as evaluated were adequate and true. Reference to this statement had been omitted from the minutes of the previous meeting in error.

It then goes on to a discussion of the draft report.

"The meeting then proceeded with a discussion of the draft AMI evaluation report. Views from Regulatory, Technology, and Department of Finance all indicated that while there was general satisfaction with the detailed analysis and the final result, the presentation in the draft report of that analysis was not acceptable.

"Hence the discussion focused on the detail of the report. A re-ordering of certain sections of the report, together with some textual and typographical amendments, was agreed.

"Future work plan.

"Amendments to certain sections remained to be finally agreed. These were to be agreed within the Irish members of the group on the following day and Mr. Brennan was then to be deputed to come to final agreement with AMI in respect of the final text of the report."

The next document is a note which comes from Mr. McMahan's files. It's partly printed and partly

manuscript. In the top it says "Mr. McMahon, for GSM
file apropos our conversation on the 23rd.

Telecommunications and radio (Regulatory Division).

"GSM.

"Views of the Regulatory Division 23 October 1995.

"On the basis of our readings of the applications on
our hearing of the presentation by the applicants, and
on the logic of the AMI report, insofar as we follow
it.

"(i) we agree with the finding that A3 and A5 are
front runners.

"(ii). We also agree that A3 and A5 are very close.

"(iii). By reference to the report alone we are
unable to come to the conclusion as to which (A3 or
A5) is in fact ahead.

"(v), we feel strongly that the qualitative assessment
of the top two applicants should now be revisited.

"To be signed if PTGSM insisted on a finalisation of
the existing draft."

I want to pass on I may come back to that but
pass on to the next document, which is an extract from
Mr. McMahon's journal with reference to the GSM group
meeting of the 23rd October of 1995. It begins off:

"MB a reference" a reference to you "Notes that
we have only just seen final draft report.

that Minister wants a result today

that he hasn't been promised one.

"Michael Andersen admits that award of marks could be different

discussion quite clear that people here are still at odds about quantitative versus qualitative evaluation, weighting, ranking, grading, points etc.

"Me" a reference to Mr. McMahon "We (T&RR) can't justify the conclusion by reference to the draft that we have seen (i.e. the last one). It's too close and the report is not clear enough.

"More text needed to explain basis of Table

1 agreed. I made the point that bottom lines of tables doesn't explain the weighting."

He then refers to another portion of the report: "I raised the EU procurement point. Much discussion of Appendix 11. I am not happy that we are using this in a relevant way."

"Much discussion about my point as to how to explain result in?

agreed that text will have to explain it.

note that it was conceded by Martin Brennan and Michael Andersen that different types of weightings were used, sometimes none, sometimes "feel" to arrive at bottom line.

"Much discussion about bottom of summary "4 different methods" my point.

"We didn't use 4 different methods, only one. The grading (simply regrouped).

"Me Martin Brennan, Sean Fitzgerald, John McQuaid went to see Secretary at 3.30. Agreed that report not clear enough to support decision. QED!"

I don't know, I can't follow the first portion of the note here, but if you go on to the second portion, which seems to refer to a time after you had been to see the Secretary: "Agreed final decision should not be on table 16 this resulting from both our meeting with Secretary and independently by group in our absence.

It should be table 17 and 18. They can't agree on whether same weights went (it seems Martin Brennan dreamt them up during qualitative evaluation.)"

A. If I could help you with the bit you can't read. I think it's "Add L lines", which means "leased lines."

The second one looks like "End of voice telephony", which probably refers to the voice telephony reservation for Telecom Eireann.

The third one seems to be enforcement of licences. Then you have the word "decisions" written in each case.

Q. I am grateful for that, because I think I know what it relates to. We can jump ahead and get it out of the way immediately.

In the ultimate decision made by Government, apart from approving the opening of negotiations with Esat

Digifone as the winner of the competition, the decision also went on to say that other steps would be taken in relation to strict enforcement of the law on leased lines and so forth; would that be probably what it's referring to?

A. It looks like it could easily be, yeah.

Q. Just pause on to the next document for a minute, Document 135. This is from the Department of Finance files, a note to the Minister from Jimmy McMeel on the 24/10.

It says "Subject, competition for the award of the second mobile telephone licence. David Doyle mentioned to you last week that the result of this was imminent. Minister for Transport, Energy and Communications had intended to bring the matter to Government today but will not now do so. The reason is that the project team, of which I am a member, has not finalised its work with respect to the consultant's report."

The next document is a briefing note for the Minister.

I don't want there is no date on it, but obviously it must have come after the final report?

A. Okay.

Q. Or around the same time as it, but I don't think it adds anything to the chronology that we are dealing with at this moment.

A. There is just one minor point I'd like to bring to

your attention. In Mr. McMahon's journal, in the very first line, what you read out was "MB notes that we have only just seen"; I think that's "I have only just seen", referring to himself.

Q. Yes, I agree with you, looking at the manuscript.

If you go on to Mr. O'Callaghan's note which we read out yesterday. I am going to go to the sixth point, where he says "Informed at meeting of 23/10 that Minister wanted to go to Government 24/10 and get clearance for winner. Sean McMahon and I said we couldn't sign off on it as the report was deficient and had not been fully read. Martin Brennan and Sean McMahon and John McQuaid met Secretary and a further week was agreed to consider report. Meeting went on until 7.30pm."

A. I think it went on a lot later than that, by the way.

Q. I think he left at that time.

If you go on to the eight point. It says "Minister met Sean McMahon and Martin Brennan and Secretary and Sean Fitzgerald. He was to meet party leaders re winner. Heard at 4.45 that Minister was holding press conference to announce winner. We did no signing off on report. We had no final report, no consensus asked for. No vote effectively no decision taken by project team."

I think if he is referring to the day that all those events happened, the press conference, that has to be

the 26th, doesn't it?

A. I think that's right, yes.

Q. The 25th, I think, sorry, the 25th?

A. I am not clear in my head, one or other.

Q. I think the press conference was the 25th.

A. Okay.

Q. The next document is Leaf 138. It's another memorandum from Mr. Jimmy McMeel to his Minister, the Minister for Finance. It's the same subject, award of second mobile telephony licence. He says "It is understood that Ministers are meeting at 4pm today to discuss the above matter. The project team, which included the Danish consultants Andersen Management who drew up the report, will be recommending to Minister for Transport, Energy and Communications that he open licence negotiations with the top rated applicant, which is the Esat Digifone consortium.

"I was a member of the team and endorse the recommendation.

"The marks achieved by the six applicant consortia in the competition were as follows".

Then he goes through them. Then he lists the composition. Then he refers to the composition of the various consortia which he says are attached and then he gives a list

MR. FITZSIMONS: Just on that last document, Mr. Chairman, it's just a small point, but it's important

to be accurate. In relation to the paragraph 8, Mr. Healy read out "We did no signing off on the report". The typewritten text reads "He did no signing off on the report". I know that yesterday it was suggested that the manuscript version said "we". But a reading of the manuscript version and a comparison with the word "h", as used elsewhere by Mr. O'Callaghan indicates that the correct version is "He did no signing off on the report."

Just for accuracy's sake, Mr. Chairman.

CHAIRMAN: I recall checking that at a much earlier stage, Mr. Fitzsimons; I think you are probably right.

MR. FITZSIMONS: Thank you.

Q. MR. HEALY: Mr. McMeel, in any case, Mr. McMeel in his memorandum lists the criteria and says that "These criteria were part of the aide-memoire approved by a cabinet subcommittee on the 16th February, Government decision S22048E of the 2nd March refers."

At the bottom of the note he has an asterisk referring to the word "understood" at the top, indicating, I think, that he understood from you that the Ministers were meeting at 4pm on that day.

A. Yeah.

Q. The next document is 41 sorry, Leaf 140, sorry I have skipped a document, sorry. It's 139.

This is a fax from Mr. Towey to Mr. Andersen. It says "Michael, detailed comments as promised. Generally

speaking we would prefer if the references to marks were changed to grades. Also the suggested versions will necessitate revision of the table numbers and of the table of contents."

That's dated 25th and contains eleven pages of changes; do you see that? The copy that you have here doesn't have a fax banner on it. But from the documents which the Tribunal have referred to which are probably contained somewhere else in the books of documents, but we can if necessary turn them up that fax was sent at five past ten in the morning of the 25th.

The next document is Leaf 140. It's from Michael Andersen to Fintan Towey. And from the fax banner on that document, it would appear that that fax from Mr. Andersen to Mr. Towey commenced at seven minutes past two on you have flown to Copenhagen a bit, would that mean seven minutes past one our time, or seven minutes past three our time?

A. They would be ahead of us.

Q. So...

A. So one o'clock here is two o'clock there.

Q. Do you make a time change when you go to Copenhagen?

A. Yeah, I am nearly certain that you do.

Q. And that contains Mr. Andersen's comments to Mr. Towey's various amendments or suggested amendments.

Mr. Andersen says: "Dear Martin and Fintan,

"Attached you will find my handwritten comments to your fax received earlier today. I suggest that we discuss them one by one over the phone ASAP.

"In addition, changes are necessary in Appendix 2, but I assume that they will be covered by the comments on the appendices, which you will forward to me later today."

Do you remember actually going through these with Mr. Andersen?

A. I can't say that I have a specific recollection of it, but it could easily have happened.

Q. That process, I presume, whether it was conducted by Mr. Towey and Mr. Andersen alone or by the three of you, yourself, Mr. Towey and Mr. Andersen, presumably must have taken some time, and then there was the later there was the issue of the appendices. Can you remember if that was covered that day? Because I can find no documents suggesting that it had been covered that day.

A. I can't remember.

Q. At some point in that afternoon, to judge from Mr. Jimmy McMeel's note, Mr. Lowry must have got enough information to enable him to go to the meeting at four o'clock?

A. That sounds reasonable, yeah.

Q. Judging from those faxes, he wouldn't have had a printed copy, definitely, of the final report, sure he

wouldn't?

A. I think we have always acknowledged that.

Q. He wouldn't even have had physically the final report, as far as I can see, including all the appendices?

A. Probably not, but that wouldn't be particularly unusual it wouldn't be unusual at all, in fact.

Q. When you say it wouldn't be unusual at all, what exactly do you mean by that?

A. Most Ministers wouldn't look for or read a document of that size.

Q. I can really well understand that. The Minister is going to have the document summarised for him by his civil servants, and he is going to read a short summary he may want to read it?

A. Some Ministers would, but not sort of as quickly as that. I mean, it wouldn't be that unusual for a Minister to say "I'll take it home at the weekend and look at it", whatever. In this case, I suspect he was talked through the substance, but there is no record of that.

Q. But it doesn't look like there was enough time to talk the Minister through anything, judging by the faxes frenetically going back and forth at this stage, with hours to go?

A. I suppose it depends on the depth with which he wanted to be

Q. If he needed the report if he was going to have an

evaluation physically in his hand, he needed to have it by four o'clock. That was never achievable, looking at the time tabling?

A. That's fair comment, yeah.

Q. The best he could hope to have was confirmation from you that everything had been agreed and it would all be put together eventually in the form of a document that would reflect what had been agreed?

A. I think certainly by four o'clock I was in a position to say that everything was agreed but it had to be printed and delivered.

Q. This was not like any other report that the Department might have prepared for a Minister on some issue to enable him to bring him up to speed on it, like some of the reports we saw at the very early stages of your evidence, when we were going through the chronological survey of the documents, you know, the early documents, the position papers and so on prepared from time to time to bring a Minister up to speed to enable him to speak to somebody or speak in the Dail or anywhere. That kind of report is something that would have been prepared to enlighten a Minister to ease his passage through a process of consultation with outside interests or whatever, but this document was part of a formal adjudication process; isn't that right?

A. Yeah.

Q. A formal independent adjudication process?

A. Yes.

Q. Where you had introduced from the very beginning not just well, where you had introduced at the very beginning, where you have emphasised, I suppose, you can't say you've introduced a rule of secrecy for civil servants, they are all bound by the Official Secrets Act. But you introduced or you emphasised that you were going to overlay it with a very high emphasis on confidentiality and security and formality; isn't that right?

A. Yeah, that's reasonable.

Q. When you were conducting the presentations, you were anxious to stick with a very strict format?

A. Mm-hmm.

Q. A very strict timetable, so there were degrees of formality which were quite marked all along the way?

A. Mm-hmm.

Q. And yet I can't understand why, when you came to producing the final report, the culmination of all of this work and this formal process, the Minister would have wanted to rush off to a meeting without physically having it in his hand, even.

A. I wouldn't see it as being as unusual as you would; I'll put it like that.

Q. But you haven't been engaged, presumably, in formal adjudicative processes like this before, but I presume you'd be aware of them?

A. Before and since, I have been involved in a lot of processes, but none as quite as formal as this.

Q. Let's say I don't know whether you ever had any involvement with the Department of the Environment; from time to time inspectors would be appointed to carry out inquiries in relation to CPOs, bridges versus tunnels, tunnels versus bridges, that sort of thing, all over the country. And these issues generate a lot of heat, a lot of controversy, and inspectors are appointed to conduct hearings, to prepare reports. That's the type of adjudicative process civil servants frequently find themselves involved in; isn't that right?

A. That's true, yeah.

Q. And those are formal processes?

A. Yeah.

Q. Could I suggest that in those cases, again, a Minister involved, at the apex of such a process, would want a physical formal document to record or to, as it were, demonstrate that the formal processes had been carried through, the adjudication is over, this is the report, I am not going to ask you to read it but I have it in my hand, and this is what it recommends. Would you not agree that that would be a natural impulse on the part of anybody involved in a process as formal as this?

A. Not really, is the answer to that. And I am not

trying to be defensive of myself or of the Minister,

but

Q. I am not criticising

A. But Ministers generally don't tend to want to get into or to even physically have complex documents of this kind.

Q. I quite I can quite understand that. I am not talking about the content of the document, but the fact that the document is a demonstration of the fact that formal work is finished and it's recorded and represented in a formal way in a document. What I am trying to get at is: Why the rush? Why the hurry? Why not wait till the day after, when you might have the formal document? What was the great hurry?

A. I can't explain that. I mean, as I said a long time ago here, my personal disposition was the show is over, let's get on with it. So I wouldn't be of a mindset to say, what's the rush? Let's slow everything down.

I wanted to get shut of it, if you like. I don't know what was motivating the Minister, or for that matter if Mr. Loughrey was involved, but I presume he was.

Why were they focusing on this particular meeting?

Maybe because it was on, I don't know. Maybe because some of the key players were going to be out of the country. I just have no idea as to why it was done so quickly.

Q. We have agreed that an extra week was originally supposed to have been made available to complete this process.

A. Yeah.

Q. And judging from Mr. McMeel's note, he seems to be certain that an extra week had been allowed and that an earlier appointment for this meeting was now going to be put off?

A. Yeah.

Q. And then we have a second memorandum where he says, "No, no, no, all the lights are green, now we are going today".

A. Yeah.

Q. I take it that, although you may have thought that the or had the impression that the game was over, the result is known?

A. Yeah.

Q. Judging from the way you handled the presentations, you'd have been as sensitive or as anxious as anyone else to ensure that the thing was wrapped up properly from a formal point of view?

A. Yeah, and what I have been saying consistently is we had a near final version of the report, and we had agreed the amendments to be made to it, and we had that agreement recorded in the document back from Mr. Andersen, and so on. So as far as I was concerned, we knew then what the content of the report was, and we

knew we would have a copy the next day.

Q. Could I put it this way: If somebody had asked the Minister for Transport, Energy and Communications at the meeting, at the meet, "Could I have a copy of the report, I'd just like to read it, I know what you are saying, but I just have one or two concerns", he couldn't have produced it?

A. Oh, he couldn't.

Q. And if he had been asked at the press conference, "Well, let's see the report, Minister", he couldn't have produced it that night, the press conference that night?

A. Yes, he couldn't have produced it then.

Q. The best he could have done was to have got a copy of the version of the 18th, a copy of Fintan Towey's 11-page fax, a copy of Mr. Andersen's fax back, and you and/or Mr. Towey or somebody else to sit in front of him and to explain to him what had been agreed by Mr. Andersen and what had not been agreed and what other steps were going to be taken to put the appendix in place.

Now, isn't that wasn't the Minister or weren't you exposing yourself, if nothing else, to being accused of finishing this up in a sloppy way?

A. I suppose, looking back from here with a starting point which is different from our starting point, I am not surprised that you would be putting it that way.

Q. But you had put a lot of work into this?

A. Yes.

Q. A year and a half's work, perhaps even more. The Department had put in more you'd put in a lot of work, and certainly you had put in a very intensive six months into it?

A. Yeah.

Q. But I take it that the pressure which resulted in this fairly frenetic activity on the 23rd, 24th and 25th wasn't coming from you?

A. No. The pressure as such wasn't coming from me. I think what I said in evidence before Christmas was that when we were given a further week to complete the task and we came back into the group, and I said it was a rationalisation rather than a recollection, was that I then said "Well, we are at serious risk of being in the same position this day week unless we talk about this some more"; and out of that conversation, which went on for a long time, it became possible to finalise the report.

Q. You presumably it may have become possible to finalise it, but the pressure to engage the pressure to push it together in that sort of itsy-bitsy way on the following day didn't come from you?

A. I didn't fully articulate what I intended to say. Even though we had another week, we still found it

possible to finalise the report, is what I am saying.

Now, were there additional pressures at that stage?

What was driving the agenda? I don't know, but I know

that you will be seeing other witnesses who may be

able to give you more help.

Q. You did have a Minister who had from the 3rd October

been trying to put you under some pressure?

A. He certainly was trying to finalise the process, yeah.

Q. We'll come back to the milestones in a minute.

If we just go to the next document, which is an

extract from Mr. John Bruton's journals

A. What page are we at now?

Q. We are at Leaf 142.

A. Because there is a 141 that you

Q. I should have referred to Mr. Loughrey's note to the

Minister where he says the process has been completed

and that the selection of Esat Digifone, A5, was

unanimous.

The first page of the next set of documents is a

transcription from John Bruton's journal for

October/November 1995. This transcription was not

done by the Tribunal but by Mr. Bruton himself.

It's done by taking an A4 page and replicating on the

A4 page the contents of the two pages of Mr. Bruton's

journal.

The note begins, on the left-hand side: "Spring 27

million added to ODA by June"; that looks like

"overseas development" or something. Mr. Spring was Minister for Foreign Affairs; probably something to do with that?

A. Probably Overseas Development Assistance, yeah.

Q. Underneath that, it says "Mr. Michael D. Higgins".

That note appears to relate to some discussion between the Ministers either concerning expenditure or estimates or something like that. It's not clear.

A. Yeah, I suspect when you say "by June" it's a matter of no significance it may be "by Joan", Joan, rather than June.

CHAIRMAN: Anyway, it's absolutely nothing to do with mobile licences.

A. That's right.

Q. MR. HEALY: Then the next item on the left-hand side is "Albert had promised it to Motorola.

"ML (Michael Lowry) stayed out of the process leased line issue Telecom's account system can cost inadequately".

Then on the right-hand side: "Minister of Communications

"It can't be given before it goes to Cabinet GSM.

Quinn should not be involved.

Lochlann is a participant in another one.

"It is a major decision.

"In Italy the Government did not accept the Government report and there was consequential challenge.

European Commission took them to court because this change of policy.

2 (of the) project team are of Department of Finance".

That's the end of the note. Just to put that in context, I'll read out Mr. Bruton's statement, or the portion of it which deals with this meeting. It's in Book 38, Leaf 6, Divider A. I'll read it out; I don't think I'll need to refer to it.

"My recollection is a meeting took place around 4pm on 26th October in Government Buildings. There was a discussion between the Tanaiste, the Minister for Social Welfare, the Minister for Finance, and myself at that time about public expenditure. I believe that we met in my office in Government Buildings. While it would seem that the meeting was convened for the purpose of public expenditure, it would appear that Michael Lowry communicated with me to the effect that he needed to speak to the Tanaiste, the Minister for Social Welfare, and myself about the GSM licence, so we availed of that opportunity. The Minister for Finance was not present for the discussions. I have no detailed recollection of the information provided by Mr. Lowry on the result of the competition other than the information I have already supplied informally to the Tribunal, and my notebook entry is available for scrutiny by the Tribunal should that prove helpful. The notebook entry is mere jottings

that I wrote down in my notebook at the time and not attributed to any particular individual. But I assume that most of them are things that were said by Michael Lowry. I do not recall Michael Lowry informing the meeting that a qualification or rider had been placed on the competition result or that a reservation or concern had been raised by the evaluators regarding any aspect of the competition winner. I assume, however, that the reference to "the European Commission taking the Italians to court" would have been a reference by him about the dangers to the Government of not accepting the recommendation of independent consultants. The discussion that took place between Michael Lowry, the Tanaiste, the Minister for Social Welfare, and myself centred, to the best of my recollection, around when an announcement should be made. It was accepted by all that a clear recommendation had been made by the independent evaluation process and that neither we nor the Cabinet was going to second-guess the independent evaluation process. The choice was therefore between waiting to make the announcement after a formal Cabinet meeting or making the announcement straight away. The decision was made to make the announcement straight away rather than wait to consider it further because it was a decision that was, in effect, already taken once we had accepted the logic that we must go

along with the result of the independent evaluation process.

It was felt that delaying the matter over a weekend would have led to considerable pressure from disappointed bidders on politicians and others and that this would be unhealthy and unproductive. Thus Michael Lowry was then authorised to make the announcement.

I should say that this meeting was immediately followed by the plan discussions on the estimates to which I have made reference earlier and which involve the Minister for Finance, the Tanaiste, and the Minister for Social Welfare. That meeting was followed almost immediately after that by meeting a Cabinet Committee on Northern Ireland which had been scheduled for 5pm, the estimates meeting having been scheduled for 4pm. I have no recollection or record of other discussions with Michael Lowry in regard to this matter either proximate to the meeting in question or at the meeting."

Now, Mr. Brennan is of the impression that the remarks Mr. Bruton is of the impression that the remarks, most of the remarks here that he has noted, are remarks made by the Minister, Mr. Michael Lowry.

If you go to the right-hand side of the page, the first point made is "It can't be given before it goes to Cabinet. GSM." That's a reference to the formal

decision that was presumably made originally, that it was the Cabinet that would ultimately accept or reject this recommendation?

A. It could easily be, yeah.

Q. It goes on "Quinn should not be involved. Lochlann is a participant in another one." That's presumably a reference to Mobicall, in which Mr. Lochlann Quinn, a brother of the then Minister for Finance, was a participant.

A. Yes.

Q. Then "It's a major decision." That goes without saying. Then there is the reference to the Italian Government. Do you know what that is about?

A. I can't say here that I do. It may well be that we had some information about it, or it may well be that Mr. Loughrey had some information about it. Obviously it's not something the Minister would have known independently without having been told by somebody on our side.

Q. I don't think it actually happened, did it?

A. I don't know. That's why I was a bit guarded in the first part of my response.

Q. Well, the impression that the Tribunal has is that it did not happen. By that I mean that the Italian Government did not in fact reject a Government report.

A. I really don't know.

Q. And nor is the Tribunal aware of any consequential

challenge as a result by the European Commission. Are you aware of any? You are aware of trouble between Italy and the Commission in relation to conducting auctions.

A. Yes, but I don't have any more specific knowledge, no.

Q. And there were disputes between the Commission and the Italian Government concerning the way in which the competition was run and the fact that an auction payment was extracted from the winner; isn't that right?

A. I wouldn't have a good recall of the different things that were going on between the Commission and different member states, but there certainly was a row with the Italians, and they were certainly forced to institute some kind of a compensation mechanism, but I have forgotten the details of that.

Q. My impression is that the Italians extracted a substantial auction payment from the winner; subsequently they were obliged to put in place equivalent measures, if you like, to discriminate in favour of the new operator against the incumbent to make up for the

A. In the round, that sounds accurate, yeah.

Q. But I am not aware of any challenge to the Government arising out of a failure to accept a report.

A. Yeah, I don't recall ever being aware of such a challenge, but...

Q. What I am trying to get at, you I appreciate you'll want to check this, but you wouldn't have any recollection, presumably, now of telling the Minister anything like that?

A. No, I don't think so. I mean, my recollection of what happened with Italy is much as you have said.

Q. And the Department's own state of knowledge insofar as it's reflected in the documentation I think coincides with what I am saying.

A. I think that's probably true.

Q. Can I go back for a minute to the briefing note for the Minister which is contained in Leaf 136. When I was dealing with that last document, I forgot to mention the left-hand side of the page and the references to "Albert had promised it to Motorola".

Now, in the Opening Statement, this was mentioned by Mr. Coughlan, and the suggestion that Motorola or any other major competitor for the licence had been promised the licence, and there was a reference in a Dail statement by the Minister to the effect that the licence had been promised by the previous Government.

As Mr. Coughlan pointed out in the Opening Statement, when Mr. Lowry was asked about this, he indicated that there was no basis for it.

So far as the suggestion that Mr. Albert Reynolds had promised it to Motorola is concerned, do you know anything?

A. I know a couple of things. I know that there was a different reference in the Opening Statement in the evidence of somebody else, maybe Mark FitzGerald or somebody, of a meeting with Denis O'Brien, which I think happened earlier in the sequence than this, and where Denis O'Brien may have said something about Albert Reynolds. That I know from here, right.

I have a recollection which I can't document of something that happened in 1994 which doesn't come anywhere near as expressed here, "Albert had promised it to Motorola". But I saw a letter it was a very routine letter, of no more than six or seven lines, from I believe it was from the president of Motorola to Albert Reynolds shortly after the traditional Patrick's Day visit to Washington wherein the president of Motorola was more or less you know, "Lovely to meet you again, enjoyed the chat," and finished up by saying "Don't forget our discussion about the GSM licence".

That's the only connection that I can place between Albert Reynolds and Motorola, which I would probably have connected in my own mind with a general dialogue about jobs in Ireland or something of that sort.

Now, it is possible it is probable that I mentioned that recollection to Mr. Loughrey at some stage, and to Mr. Lowry or to Mr. Lowry; sorry. But I would have thought that may have been later than this. It

may have been in the context of trying to rationalise why the American Embassy at the time was taking such a high profile in public, which is not the way diplomacy normally works, etc.

But I do, in fairness to everybody concerned, want you to know that I have that recollection. I have since looked for copies of the documents. The reason that I have that recollection is the letter in question was copied from the Taoiseach's Office to whoever was our Minister, Mr. Cowen at the time, and copied also to the Minister for whatever was then Industry and Commerce, Enterprise, Employment or whatever, it was copied to both of those offices.

And I just feel, you know, once the subject came up, and I recall this, listening to Mr. Coughlan in the Opening Statement, and I have tried to see at least our people have tried to see if we can get copies, and so far we haven't succeeded.

Q. But would this be like some of the other expressions of interest that we saw in the early documentation here, where you were meeting you were meeting Mr. O'Brien, you were meeting Sigma, if not Mr. Boyle, people connected with him?

A. Certainly Mr. Boyle.

Q. This was way back in '93/'94?

A. What I am talking about is a specific recollection of a specific incidence of Motorola, the president of

Motorola being on record as raising the matter with the then Taoiseach. I attach no particular significance to it. But when you asked me the question the way you asked it, I thought in fairness to both parties I should say so.

Q. But your discussion with Mr. Lowry about it you say was prompted by the diplomatic the public diplomatic overtures that were made after

A. I think I can't be certain. I can't even be certain I mentioned it to Mr. Lowry, but I'd be fairly certain I mentioned it at some stage to Mr. Loughrey.

Q. Would that be before the date of this document which is the 25th October?

A. I would have thought later, but I don't know.

CHAIRMAN: However, I think I am right in saying, Mr.

Healy, it's right to say that although the Tribunal has felt it necessary to ventilate these matters as part of the entire process, it remains the Tribunal's position that there is no suggestion whatsoever of any element of impropriety whatsoever on the part of Mr. Reynolds as the previous Taoiseach.

MR. HEALY: No.

Q. So, if we could go now to Leaf 136. This is headed "Briefing note for the Minister, recommendation regarding the best application in the GSM competition."

The Tribunal has not been able to date this document,

but it seems reasonable that it must have been prepared by the Minister as a way of prepared for the Minister as a way of informing him, arming him with the relevant information to enable him to go to the meeting with his other Ministerial colleagues on the 25th October; and therefore one assumes that although there may have been no physical report available or no physical completed evaluation, it was based on what you believed would be the final evaluation as of that day, "you" meaning the Department.

A. That's a reasonable hypothesis, yeah.

Q. It says "Evaluation the applications: initial evaluation showed that A5 and A3 stood head and shoulders above the rest detailed examination has shown that A5 is clearly the best allocation.

"Evaluation of the top two applications in light of paragraph 19 of the tender document:

"1. Credibility of the business plan and the applicant's approach to market development.

A5 is better because it has detailed well advanced plans for brand development and market expansion is consistent as between projected tariffs/usage levels and revenue streams demonstrates high degree of preparedness.

"This lends considerable credibility to its business plan.

for its part, A3 is:

less ambitious for growing the market

its distribution plan is weaker

its marketing budget is far smaller

it does not display full consistency between

projected tariffs/usage and revenue

seems generally less "ready to go"

"2. Quality and viability of technical approach

proposed and its compliance with the requirements set out therein.

critical issue is radio signal availability and

strength, so technical approach is evaluated by

comparing radio network architecture and network capacity.

technical experts agree A5 is better because it

has

a more attractive radio network design

more antenna sites and more cells

it surpasses A3 in respect of the capacity of its proposed network.

"3. The approach to tariffing proposed by the applicant, which must be competitive.

both A5 and A3 offer tariffs which are highly competitive when compared to Eircell.

A3 has lower tariffs than A5 for its domestic

calls, i.e. A3's airtime charge for consumers is 99p per minute, 20.8 percent cheaper than A5's charge of 12.5p.

however, A5 has firstly cheaper international tariffs.

offers volume related discounts of 5 to 15 percent.

plans metering and billing methods which could cause a difference of up to 10 percent in the price of an effective call minute.

actual A5 customer bills might well turn out to be broadly equivalent to A3's or at any rate only a fraction higher.

therefore, while A3 has lower domestic tariffs at launch, A5 is only marginally inferior in respect of its overall approach to competitive tariffing.

"Next criterion number 4.

"The amount in excess of the minimal initial licence fee which the applicant is prepared to pay for the licence.

all applicants offer the maximum fee of 15 million.

consequently this criterion has become irrelevant in the evaluation.

"5. Timetable for achieving minimum coverage requirements and the extent to which they may be exceeded.

both A5 and A3 fulfil the minimum requirement of serving more than 90% of the population within four years.

A5 is better because it offers a remarkably high degree of coverage at launch.

secondly this will be significant in building up customer confidence and growing the market

A3 plans to launch with only 40% coverage, which is poor in terms of providing an acceptable level of service

"6. The extent of the applicant's international roaming plan.

impossible for an organisation with no GSM licence to enter negotiations to establish roaming agreements.

therefore, none of the applications contained hard facts on this criterion.

it was agreed to focus on

the understanding of roaming issues displayed

the commitment expressed to developing roaming agreements within Europe.

both A5 and A3 proved to be equally satisfactory in both these respects.

"7. The performance guarantees proposed by the applicant.

A5 is better because it

has proposed milestones by which its performance can be measured

these have been substantiated with specific penalty clauses should A5 not deliver on its promises on time.

A3, for its part, has only suggested a number of "Technical" action plans in cases of proven non-compliance with service level commitments.

"8. Efficiency of proposed use of frequency spectrum resources.

both A5 and A3 intend to question the same amount of frequency.

however, expert examination has shown that A5 displays much better economy since it has conducted effective traffic and network planning in order to avoid wasteful use of spectrum therefore, A5 is better than A3 in this regard.

"Conclusion:

"Disregarding the criteria where both score the same, A5 is superior to A3 in five out of six cases, including in respect of the two most important criteria, i.e. market development/credibility of business plan and technical approach.

"Where A3 is judged to be better than 5 as regards tariffing, it is noted that A5 scores a very close second.

"Hence it is clear that, evaluating in accordance with

the criteria set out in paragraph 19 of the tender document, A5 has the best application.

"Recommendation:

"The GSM Project Group is therefore unanimous in its recommendation that the Minister should enter into licence negotiations with the A5 consortium.

"Should negotiations with A5 fail, the Minister should enter into licence negotiations with the applicant ranked second, namely A3."

Do you know how that document was produced?

A. I don't know how or by whom.

Q. Would I be right in saying that Mr. Loughrey couldn't have produced it?

A. Mr. Loughrey wouldn't have enough knowledge to produce it, but he may have influenced it, because there is some of his style in it.

Q. Is it likely, therefore, that it was produced when I say "produced", drafted by either yourself or Mr. Towey or somebody else in the Project Group?

A. Yeah, the three most likely people to have drafted it would be myself, Mr. Towey, or Ms. Nic Lochlainn. I don't know I don't see much of my own style in it, but that's not to say I didn't do it or have a hand in it.

Q. It's, I suppose, a very trenchant exposition of what the result is and that there is a clear result where A5 is superior to A3 in five out of six cases

including in respect of the two most important criteria, market development, credibility of business plan and technical approach, pointing out where they lose out to A5, they score a very close second?

A. Mm-hmm.

Q. And it goes on to say that the Project Group is therefore unanimous in its recommendation. Does that suggest that the Project Group as a whole were aware of that document and of the

A. Of this particular document?

Q. Yes.

A. No.

Q. It suggests to me it does, but I could find no evidence that the Project Group had any hand, act, or part in endorsing this document.

A. The Project Group didn't endorse this document, as far as I know. No, nor I can't imagine the Project Group would have met to endorse the document, because it's a briefing note recording, in a fairly positive way, the state of the evaluation, you know, the result of the evaluation and the support for it.

Q. In what way, as a matter of interest, do you recognise Mr. Loughrey's hand in it?

A. Not his hand so much as his approach. Kind of the bullet-point approach, emphasise the positive ahead of negative, that kind of thing. I mean, I could be wronging the man. He may not have had hand, act or

part in it, but he may have said to somebody, I don't think it was me, but I am not sure, prepare a short note, prepare it obviously in a great hurry, and you know, set it out in a convincing sort of way. And this is what I might suggest.

Q. That seems fair enough. That's what you'd have to do anyway?

A. If he was the one who called for the document in the first place.

Q. I just want to examine one or two parts of it. If you look at the first criterion, the first reference to paragraph 19. "1, credibility of business plan and applicant's approach to market development."

It says "A5 is better", and it gives three reasons.

It then says that this lends credibility to its business plan, and then refers to A3, and if you like, emphasizes the negativity of A3 or the reasons why they are not in number 1 position and the reasons why A5 are in number 1 position.

Just one small point here. If you look at the fourth bullet point under A3, where it says "For its part A3 does not display full consistency between projected tariff/usage and revenue." You haven't had an opportunity of looking at this in detail, but I am fairly certain that what the report says "is might not display". I suggest that's a little bit of poetic licence, converting "might not display" into "does not

display".

The top criterion, "Credibility of business plan and the applicant's approach to market development" in the final evaluation is not in fact assessed in the way it's described here, because if you look at the top criterion in Table 16 I'll put on the overhead projector so that you can see it. That's the final report.

You will see that A3 gets two Bs and an A, and A5 gets two Bs and an A. So if you were to analyse the first criterion, and if each of the indicators here had the same weighting, you find that both A3 and A5 are equal. I'd suggest to you that's a little disconcerting when you have regard to the wording used in the briefing note.

If you go to the next item, "Quality and viability of technical approach proposed and its compliance with the requirements set out therein", you find that the briefing note is accurate. Perhaps expressing the result in a convincing way, but nevertheless a fairly balanced account.

If you go to the next element, which is the approach to tariffing, in which A3 were better than A5. Again the approach is perhaps, as I said, somewhat trenchant but accurate.

The next one is the amount in excess of the minimum initial licence fee. That speaks for itself; they

both have to get the same on that, so it became neutral.

The next item is "Timetable for achieving minimum coverage requirements and the extent to which they may be exercised". This says "Both A3 and A5 fulfil the requirement of serving more than 90% of the population within 4 years."

It says "A5 is better because it offers a remarkably high coverage at launch.

"This will be significant in building up customer confidence and growing the market.

"A3 plans to launch with only 40% coverage, which is poor in terms of providing an acceptable level of service."

But in fact, if you look at the evaluation on Table 16, aren't I right in saying that on coverage, they both get an A? Do you see that?

A. Yes.

Q. Whereas the briefing note clearly says that A5 is better and gives us the reason that A5 offers a remarkably high degree of coverage at launch. And I think we both know that to be correct.

A. Mm-hmm.

Q. They do offer 80% coverage at launch, and A3 only offer 40%; but what it doesn't say is that A3 offered to start six months earlier. Of course you may say it's better to start with 80% six months later. But

the overall grading was an A and an A.

If you go on to the next item, which is the extent of the applicant's international roaming plan, I think the briefing note seems fair.

Likewise if you go onto the reference to performance guarantees, where A5 was clearly ahead.

If you go on to the next item, "Efficiency of proposed use of frequency spectrum resources", it says "Both A5 and A3 intend to request the same amount of frequency.

"However, expert examination has shown that A5 displays much better economy since it has conducted effective traffic and network planning in order to avoid wasteful use of spectrum.

"Therefore, A5 is better than A3 in this regard."

Now, again, if you look at the evaluation, you see that on frequency efficiency, they both get equal marks.

A. Yeah.

Q. I'd suggest to you that the briefing document is somewhat unbalanced again.

If you go to the conclusion, then, it says

"Disregarding the criteria where both score the same, A5 is superior to A3 in five out of six cases, including in respect of the two most important criteria, i.e. market development/credibility of business plan and technical approach."

Now, in reality, if you look at Table 16, of the eight

criteria set out in paragraph 19, the final report shows that A5 Esat and Persona receive the same grades in respect of five, and that Esat Digifone or A5 receives a higher grade in respect of two, while Persona, A3, receives a higher grade in respect of one. That seems to me to be quite a distortion of the evaluation report result. Would you not agree?

A. I would

Q. Or can you give some explanation for it?

A. I can't explain it now. I would certainly need time to consider it in more detail. I don't think it has ever been examined as forensically as that in the past by anybody, and I'd be interested in taking time to read the transcript of what you have been saying and compare it with this and perhaps with other parts of the evaluation report.

As I said at the beginning, I don't know who wrote it for what purpose and under what time pressure.

Q. I accept all of those points, and I want to make it clear, because I'd like to try and do this if I can today. So we'll try and stop now.

I am not suggesting to you that you or any civil servants were involved in deliberately massaging a process in favour of A3 or A5. What I am saying is that if you look at this document, notwithstanding the pressures under which, and perhaps because of the pressures under which it was being put together, that

the Minister was being provided with a version of the process and a version of the report which he wanted.

He wanted a quick result. And he wanted a result where financial issues could be disposed of by the bankability proposition, and he wanted that result, if you like, on the 24th, today. And he wanted to be able to bring that result to his colleagues in such a way that it left no doubt but that the recommendation was so clear-cut, it had to be accepted. Because I'll just ask you to ponder one other thing about it.

If you look at that document, do you notice it makes no reference at all to the fact that there was a weakness in relation to the most important criterion, financial capability, in the case of A3 and A5? And that's not mentioned at all, although the evaluators went to trouble to deal with it in the final draft of the report.

A. Yeah, I mean, at some stage, it should be possible to identify who wrote this and under what terms of reference, if you like.

Q. I'd be anxious to try to deal with it today. I appreciate I am not going to put you under pressure to do it quickly. But if you can do something over the lunch time adjournment, perhaps you can talk to us through your lawyers at maybe five to two or something like that and see if any progress has been made in trying to

A. What progress are you expecting?

Q. You may be able to discuss the matter with whatever members of your team are here. If we can get even some information today. I don't want to be coming back to too much.

CHAIRMAN: All right. Two o'clock.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

MR. NESBITT: Before the Tribunal starts, Chairman, I'd just like to mention one thing. It may be a small thing, but I think it's a matter of concern for me in relation to bringing witnesses to the Tribunal to assist.

Mr. Brennan has been under examination for some considerable period of time, and in the latter part of the morning, he has been asked to contrast the document that appears as the briefing note at 136 and then get into some quite detailed analysis of how what appears in that document may relate to a more substantial document.

And I'd have to say, with respect, Mr. Chairman, I think the way in which it's been done has been unfair to the witness. It's not that he can't deal with the questions if he was given the appropriate time. I am a little bit concerned that by being put in a position where he is trying to deal with quite a complicated question which is coming reasonably unexpected to him

because he wasn't told "Tomorrow we will wish you to make this detailed comparison", or whatever, it sometimes may leave him looking as though he is searching for an answer, and I am concerned that that should happen to him, and I'd just like to mark my concern.

I think it's unfair to Mr. Brennan that he should be put in that position. He is a person who has come here and has helped, to the best of his ability, with some very complicated and detailed issues and I'm a little bit concerned that this sort of treatment of him shouldn't no doubt quite unintentionally occur.

I'm not suggesting there is any intention to do this.

I am concerned it does show him in a poor light if one doesn't understand the circumstance of his position.

It's unfair and it's difficult for somebody and other witnesses if they think that's what's going to happen to them, however unintentionally.

I just wanted to make that point, Mr. Chairman.

CHAIRMAN: I am fully aware, Mr. Nesbitt, of the difficult task that Mr. Brennan has in dealing with a very considerable range of matters throughout the vast preponderance of the period of the licence competition. And whilst it may be implicit in your remarks that there has been some degree of unfairness towards Mr. Brennan, I have to take the view, having carefully listened to all that has transpired both

this morning and on previous days, that Mr. Healy has been courteous, has not sought to spring any ambushes on Mr. Brennan, and insofar as there may on occasions have been some variation in sequence of documents put, this reflects the very considerable difficulties Mr.

Healy, in his own turn, has in examining over a very wide range of issues.

As regards the matter of the particular briefing document, I fully accept if Mr. Brennan cannot answer beyond the response he gave shortly before lunch to the effect that he may, perhaps in conjunction with Mr. Loughrey or Mr. Towey or Ms. Nic Lochlainn, have had some communication with Mr. Lowry or that he may have been privy to its preparation, I will fully accept that he should not be pressed on that matter and that it may be something to take up with other witnesses.

But I do not uphold any suggestion that the line of examination has been oppressive or unfair to Mr. Brennan in any way. I am conscious his task is not an easy one, as indeed Mr. Healy's isn't. And in my view, it is being pertinently, courteously and properly explored, particularly in respect of the last two to three days when we are embarking on matters that are very particularly privy to the terms of reference.

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY MR.

HEALY:

Q. MR. HEALY: Thank you, Mr. Brennan.

I gather from your counsel that it hasn't been possible over lunch to try to identify precisely the authors of the document, so we are going to leave it over until you have had an opportunity or your team has had an opportunity to look into the matter further. I should say

A. There are two separate issues, as I see it. One is, who wrote the document? The other is, are the inferences you were drawing as between the document and the consultant's report the appropriate ones, or appropriate ones, and that's a more difficult exercise that would have to be done in due course.

Q. I fully understand that. I just wanted to say two things about that, just so you'll understand what I want you to look at.

What I was suggesting is that when you looked at the document and the statements that were contained in the document concerning the differences between the top two contestants, if you like, that those statements were inaccurate compared to what was contained in the evaluation report and that by presenting them in that way, they were being presented in an unbalanced way. And that is the inference I am drawing, that it's an unbalanced presentation.

A. I am

Q. My question is grounded in the factual points that I have made to you. And I appreciate you may want to have time to look at it.

A. Yes. I am aware that those are the inferences that you are drawing. I have some reservations, on my feet, as to whether they are correctly drawn or not, but that is something that would require a significant amount of research.

Q. Yes.

Now, just in relation to two aspects of the way that we are seeking to deal with these matters. I fully appreciate that you are being asked to deal with a vast range of material, where you were involved centrally, peripherally, or sometimes even more remotely than that. I am taking you through them because you were the chairman, you were the linchpin, the person through whom information came from the bottom up and through whom it came from the top down.

And I know, and I am much obliged for your attention to the matter over the last considerable length of time, but if the Tribunal doesn't go through the vast bulk of the important documents with you, you will be in and out of the witness-box, as every other witness would be, time and again, and the whole process would be impossible to conduct. But as you have indeed taken the opportunity from time to time, you of course are at liberty to indicate that you can only answer

something up to a certain point because of your own direct connection with whatever matter is under discussion.

A. I am not complaining severely about what's going on here. But I am conscious of, for example, at one time last Friday, there were five different extracts from presentations open across here at the same time, and linkages being made across them, and I found that difficult enough to deal with.

Q. And one last point: I think we have made it clear since you came into the witness-box that there are a number of matters upon which the Tribunal hoped you'd be able to come back with further information. And I think the Tribunal has gone further, in fact, than even relying on you to collate them. It has provided with you a collation of the matters which arose before Christmas; isn't that right?

A. Yes.

Q. And hopefully you will be able to provide responses to those?

A. I have done a significant amount of work on those, but they are just not finalised.

Q. Yes.

I am trying to find, Mr. Brennan, just very briefly, so that I can be sure that it's been mentioned as part of the record, is the Mr. Billy Riordan or Mr. John Buggy and/or Mr. John Buggy produced a document

concerning the financial issues and the suggestion that the suggestion made by them that the grading be changed. Do you remember, I drew your attention

A. There was a manuscript note on the edge of a page of a document.

Q. Yes, but in referring you to that manuscript note I referred you, without going into detail, to some actual calculations that Mr. Riordan and Mr. Buggy did in which they changed or suggested changes to the evaluation of financial strengths, and I then invited you to go with me and change to make those changes in the final report; do you remember that? I just want to refer you to the document so that if you want, you can look at it yourself. It's Book 42, Leaf 125.

A. You want me to open that now?

Q. I am only going to refer you to it, point you I can do it on the overhead projector, because I'll be going back to Book 42. I have already made the point, but I just want to refer to you what I am referring to in case you want to look at it yourself if there is any other point.

You see where it says, starting at the top, "Executive summary up front." That's clearly a suggestion they're making. I think this is all in Mr. Billy Riordan's hand, but I am linking Mr. Mr. Donal Buggy's hand. I am linking Mr. Riordan with it because of the other documents and because they seem

to do a bit of work together.

A. Yeah.

Q. See 36, 37, then page 37, then page 37 a second time, then page 38; do you see that?

A. Yeah.

Q. That's a reference to a table contained on page 38.

And do you see where under "Financial strength", A5 had been given a B, and that was marked down to a C.

Do you see that?

A. I do, yeah.

Q. And the original grading at the bottom was a C; do you see that?

A. I do, yeah.

Q. Elevated to a B. And as I was saying, if you transposed those marks onto the final table of numerical marks that you had generated, that would have reduced the gap between the two top contestants to about 2.4 percent.

A. Yeah.

Q. I am reminded by Mr. Coughlan about one other entry on that document. And I am drawing it to your attention for the purpose of flagging it because, strictly speaking, I suppose it's a matter I am going to have to take up with Mr. Buggy or Mr. Riordan. But do you see "deep pockets"?

A. Yeah.

Q. And then you have "Backers have sufficient financial

strength in their own right"?

A. Yeah.

Q. I understand that to mean that each of the individual backers must have financial strength in their own right, irrespective of whatever money the consortium as a whole might be able to raise. Do you understand me?

A. I understand that's the construction you are putting on it. That doesn't fit with my understanding of the AMI view of deep pockets.

Q. The AMI view being that if you had one deep pocket, that deep pocket could take up the slack?

A. Yes.

Q. Well, we can dispose of that document now. We are going to have to come back to that proposition on a number of future occasions, but just to deal with one aspect of it.

If a deep pocket is to take up the slack, and I can understand the proposition, then there must be a mechanism in place for that, mustn't there, within a consortium?

A. There were various mechanisms in various consortia. I can't recall the details, but they were on the record.

Q. Sorry

A. They are on the record.

Q. Yes. During the presentation, we heard that both the Persona consortium and the Mobicall consortium had

mechanisms in place. Now, I think in the Mobicall case you had the document, and in the Persona case you had a document, an actual signed-up joint venture agreement which contained a provision whereby if a weaker consortium member didn't have the money to make, say, to respond to a capital call, the deep pocket could make that response, could provide that equity; but that effectively, as a result, the weaker consortium member would find his equity diluted?

A. Yes, I am familiar with the concept.

Q. And that is the kind of mechanism that you'd want to see in place to ensure that could you rely on a deep pocket. Otherwise you'd just have a row, wouldn't you?

A. Well, I didn't import the concept of deep pockets into the process. We had engaged consultants, at significant cost, and that was one of the things they brought around the table. And I mean, I was taking a more simple view that if the deep pockets exist in their own right, that that was but that's my interpretation of the AMI position, but I don't know exactly.

Q. My impression, from reading the evaluation report and from noting the way that Mr. Andersen distinguished it in the supplementary analysis, I think he did refer to the mechanisms that were in place in some consortia to bring a deep pocket into play, if you like?

A. Yeah, I think he may have done. And the other thing I'd say about this document on the screen, before you take it down, and it's not I am not either attacking it or defending it, but I don't know its context. Is it something that they brought into a meeting to promote discussion and then during the discussion, a different view was maybe suggested by the consultants or something? I really don't understand. Or is it the outcome, their view of the outcome of a discussion? I think, if it was their view of the outcome of discussion, then it raises serious issues; if this was their position going into a discussion, it would have a different status. But no doubt that's something you can canvass with them in due course.

Q. That was something that was exercising the Tribunal's mind as well.

MR. McGONIGAL: Mr. Chairman, just in relation to that, I don't know whether it's appropriate to ask, I notice at 124, that booklet, there seems to be another document of Mr. Buggy's and Mr. Riordan's of 9th October 1995, and there seems to be some similarity between that and the handwritten document, and the typewritten document seems to follow a conversation. And I don't know whether the Tribunal has taken the view that those two documents are connected or not.

CHAIRMAN: With Mr. Healy?

MR. HEALY: Yes, there is, I think, a connection between them. I wasn't going to burden Mr. Brennan with references to the differences between them, but I think that there is undoubtedly a connection, in that some of the issues identified in the handwritten document that's on the the handwritten document that was on the overhead projector are reflected in the memorandum. The memorandum seems to be part of a dialogue between Mr. Buggy and Mr. Riordan, on the one hand, and Mr. Andersen and Jon Bruel, on the other hand. If we could just have that other document on the overhead projector.

Does that document ring a bell with you, Mr. Brennan, and would you agree with my description of what seems to be involved?

A. Yeah, it's clearly information going from Mr. Buggy and Mr. Riordan to Mr. Andersen and Mr. Bruel. And Mr. Bruel was the guy in AMI looking after that end of the business, as far as I know.

I suppose what I am trying to say is: If this is an ongoing dialogue between the people who were concerning the financial aspects, it's the result of the dialogue that I'd be more interested in pinning down, and at this stage I don't know which document contains that result.

Q. Maybe we can just explore it a little more, in that we see some of the ideas reflected in these documents

coming up in discussions; but if you look at the handwritten document for a moment again, the first asterisk deals with page 38, and then we have the table, and we have the change in the grading of A5 from a B to a C.

And underneath that, then you see a manuscript note, second paragraph, page 38, "RTE, English?" Presumably a reference to the English used. Underneath that, "Telenor and Communicorp, C from B". That seems to be a reference "C from B", that seems to be a reference from their proposed regrading of A5 in the table above from a B down to a C. And then after this, they say "As Communicorp doesn't have sufficient strength for a 50% share." Do you see that?

A. I do, yeah.

Q. Now, I am suggesting that that seems to be linked, I was suggesting this morning it seems to be linked to references on germane on matters germane to that in Mr. Billy Riordan's annotations to what looks like the penultimate version of the report, and the answer he seemed to put in to deal with this type of issue was bankability.

A. Okay.

Q. That's why I am drawing your attention to it. I can't be more precise than that from the documents I have got, but if you look at that handwritten manuscript, he does refer, looking at the other side of the coin,

to he does refer to Esat Digifone, and if I can find it, I think and to the statement in the draft that there was a weakness in the Esat Digifone consortium related to the financial strength of the one of the members.

And he said "How could that be if they got a B for financial strength?" Do you see that?

A. Mm-hmm.

Q. I'll be coming to another document in a moment which may help us to date this to sometime after the 18th October version came to hand.

If you go back to 124 for a moment on the overhead projector, which is the typewritten document, I'd suggest to you that that typewritten document was generated before the handwritten document that we are referring to. It says "Need to replace 'deep pockets' with an alternative phrase throughout the document." Then there is a note, "replaced". And I think that's a reference to a telephone conversation in which Mr. Buggy and Mr. Riordan were informed that it had been replaced.

"Paragraph 38, page 38, paragraph 2 doesn't refer to Sigma's financial concerns", i.e. balancing out the reference to Digifone's financial concerns with Sigma's financial concerns. And it says "For consistency with Communicorp, should they not be mentioned?"

And the answer seems to be "Not included, not material given the size of other consortia members." Do you see that?

A. Yeah.

Q. But all of that debate ultimately seems to have been resolved in favour of inserting a passage in the report which we'll call, if you like, the bankability passage, in which issues of financial strength were deemed to have been capable of being resolved by reason of the bankability of the project.

I just want to help you with this question of how this notion of bankability came to prominence in the final draft. The Tribunal queried the matter with Mr. Fintan Towey and asked him, at page 40, query number 67 of his questionnaire, which is in Book 33, Tab 3A. It's a short response, so you won't need to turn it up yourself.

"Please provide details of the knowledge, direct or indirect, of the departmental officials of all consideration given by the Project Group or by any member of the Project Group or by any other person, whether in conjunction with Andersen Management or otherwise, to the qualifications placed by Andersen on the financial capability of Esat Digifone and Persona as set out in the evaluation report and appendices, and in particular, page 44 of the report and Appendices 9 and 10."

Mr. Towey's response is as follows: "The Project Group was aware of a potential financial weakness of one of the parties in Esat Digifone. However, this awareness was balanced by the Project Group's belief that the business opportunity was excellent. The concerns reflected on page 44 of the report were followed up by the certification in relation to financing received at the time of the licence award."

I now want to go back over the way in which some of these and related issues were dealt with or treated by the evaluation team from the time that the applications were first made.

You got the applications firstly in documentary form. The next stage, as far as you were concerned, was to have to evaluate them, look at them. You had this question of formal disqualification or not; we are into agreement in that. There was nobody formally disqualified, even if somebody hadn't got the correct number of pages, but it wasn't deemed to be very material.

Then you started examining the documentation in greater detail. Work began on the quantitative evaluation which entailed a lot of number crunching, and ultimately your aim was to get to the point where you could have a presentation. The presentation was preceded by written questions to applicants.

Following that, you developed a set of

applicant-specific oral questions to be posed to the applicants at the presentations. The applicants were not asked for answers to them in advance.

At the presentations, without advance notice, the applicants were asked these oral specific questions.

An amount of them had been prepared by Mr. Andersen, but the evaluation team detected there were certain matters not being dealt with. When I "said the evaluation team", the Department side of the evaluation team felt that there were a number of matters that mightn't have received the attention they deserved, and they were flagged as matters that were to be dealt with.

Now, in the case of a number of consortia, financial issues were identified as matters that required to be specifically dealt with at the presentations.

Let's take the Esat Digifone application for a moment.

That application was presented in documentary form on the basis that Communicorp and Telenor would take 50% each. And then we have discussed, time and again, how you would characterise the involvement of the institutions and to what extent there was an actual there was a statement in the application to the effect that there were four institutions who had made commitments, the bindingness of which is not absolutely clear from the written material.

At the presentations, I think, the at the

presentations, I think the various executives associated with the consortia in the Esat Digifone application asserted that the banks were on board; would that be right?

A. It sounds right, yeah.

Q. Mr. O'Brien I think went so far as to say that they were likely to form an Irish voting block; I think likely he might have gone further than that.

From the written documentation and from what you were told at the presentation, the impression that you were left with was Advent were going to provide the funding for Communicorp's equity. The documentation in relation to that consisted of a letter from Advent of the 10th July I can remember the date; you may not be able to remember it in which Advent offered to make available $\frac{1}{2}$ 30 million of funding to Communicorp for the purpose of enabling Communicorp to fund its share of the equity of Digifone.

At the presentation, though not in the written documentation, Mr. O'Brien said or described this as an irrevocable commitment from Advent; would that be right?

A. I think that's true, yeah.

Q. One of the things that you did not know from the application documents and was not made clear at the presentation, if it was in fact touched on at all, was that was the price for this involvement; they

didn't know what they were going to charge in terms of how much equity were they going to be looking for and on what terms, or what sort of money was involved.

At the presentation, Mr. McMahon asked was there an agreement in place supporting this assertion, and he was told there was. The application itself didn't contain the agreement.

In relation to other aspects of the Digifone application, I don't think an aspect that was dealt with explicitly at the presentation but certainly dealt with in their documentation, you were informed that it was proposed that there would be a joint venture or shareholders agreement between the various members of the consortium once Esat Digifone was formed; isn't that right?

A. That sounds reasonable. I don't recall it now.

Q. You were not given a copy of a shareholders agreement between the existing shareholders, if I am right in that; all you had was a draft indicative document?

A. I don't know for sure, but for the moment keep going.

Q. And as far as I know, it didn't contain you can check this if you like; as far as I know, I think I am right in saying it didn't contain an offer round provision which would have enabled the deep pocket, Telenor if you like, or anybody else who had a deep pocket to take up any slack in the event of Communicorp not being able to fund its share of the

equity.

Now, at the meeting, Mr. Billy Riordan, and it may have been somebody else as well, took up the question of negative solvency for three years; isn't that right?

A. Yeah.

Q. Mr. Andersen may have contributed as well to that discussion. Then I think Mr. Andersen and Mr. McMahon definitely contributed to the discussion on the extent of Communicorp's commitment.

A. Mm-hmm.

Q. The only people to, as far as I can see, mention the institutions at length in the presentation were Mr. O'Brien and Mr. Johansen.

A. Yeah, okay, I'll take that.

Q. Whereas the queries that were coming from your side related to Communicorp.

A. Yeah, okay.

Q. I think it's fair to say, correct me if I am wrong, that at the presentations, the evaluators identified financial issues upon which they wanted clarification, and they were going to have to decide how they dealt with that afterwards; isn't that right?

A. I think that's fair, yeah.

Q. From the documentation I referred to I think last Friday, it seems that on the other side on the Communicorp/Telenor side, the applicants identified

the sensitivity of the Department of financial issues?

A. Yeah.

Q. Although I don't think any big issue, if any issue at all, was made on the Department side of the involvement of the financial institutions?

A. Yeah, okay.

Q. You weren't asking for more rock-solid commitments or anything like that, I think I am right in that?

A. I don't believe we were. As you know, I didn't sit through the presentations. I did flick through relevant pages of them during those days, but I mean, I am taking you

Q. I think I am right, but if I am wrong I am quite happy to go back over it.

In other words, the applicants were right, at least in detecting a sensitivity, a legitimate one, on the part of the evaluators as regards the funding of Communicorp?

A. Okay, yeah.

Q. I am saying that to suggest there was any sensitivity regarding the involvement of the institutions, I think would be I couldn't see any basis for it, anyway. You'd agree with that, that there is no obvious sensitivity?

A. I don't think there is, no.

Q. Now, we were trying to discuss before putting a date on Mr. Fitzgerald's discussions we were trying to

put a date on discussions that Mr. Fitzgerald had with you.

A. Yes.

Q. Do you remember that?

A. Yeah.

Q. And although he said early September, I think you pointed out, and I think it must be correct, that in early September you wouldn't have been in a position to give him the information that he believes he obtained?

A. Yeah.

Q. Because he identified, in his discussion with you, in his recollection of it, Esat Digifone as a front runner?

A. Yeah.

Q. I am just trying to be clear about it here.

A. I can recall that discussion.

Q. Now, that discussion therefore must have taken place it could have, but I suppose unlikely to have taken place after the presentations. You wouldn't have had that degree of certitude?

A. I wouldn't be even close, no.

Q. I am suggesting another milestone after that was you went to Copenhagen for the first visit, 19th/20th September.

A. Yeah.

Q. It's possible that you had some you were evolving

towards something, but at that meeting I think it was flagged that it was hoped to have a first draft evaluation report ready by the 3rd, so you were working towards that. And you went to another meeting on the 28th/29th?

A. Mm-hmm.

Q. Now, following that meeting, I think I am right in saying you would have had a much clearer picture?

A. Absolutely, yes.

Q. So the meeting with Mr. Fitzgerald must have occurred, the absolute earliest would have been 18th/19th, well after the 18th/19th, the 20th/21st, that would be putting it at its absolutely earlier when you discussed the way things were panning out, if you like?

A. Okay.

Q. Probably more likely, correct me if I am wrong, after the 28th/29th. But it could have been around that time?

A. Yeah.

Q. In his discussion with you, he indicated that a result in favour of Esat Digifone was going to be controversial, because of his impression that they had financial problems. And I want to be fair to you about that; I am not sure he says that. In his note he says it was "it is going to be controversial and had better be well founded as it would be open to

attack. I asked if the Minister was aware of the situation and was told he was and had not expressed any views. I then raised the question of Communicorp's financial status discussed in the next question."

I presume, if there was a controversiality about it, it was linked to the financial status aspect?

A. I don't know. I'd say we were all conscious in one way or another that there would be, if what I might describe as a more media-friendly result possible, but we couldn't sort of produce a result to order. We had to deal with the application we were dealing with.

Q. I appreciate that.

At that point, Mr. Fitzgerald says that "At that point he asked if the Minister was aware, and he was told that he was", presumably told by you, and that the Minister had not expressed any view?

A. Yeah.

Q. At the meeting, the interdivisional meeting on the 3rd October, you referred to a meeting you had, or you referred to the fact that the Minister wanted to accelerate the process; and could I suggest that that stemmed from your meeting with the Minister?

A. Yes, it sounds reasonable, yeah.

Q. I don't know whether it was at that meeting or at another meeting that you would have discussed the shape of the report with the Minister.

A. The shape of the report?

Q. Yes, the shape of the evaluation, sorry.

A. I don't recall

Q. Do you remember, we referred to the notes of the 9th October meeting of the Project Group?

A. I remember, yeah.

Q. In which you are reported as having indicated that the Minister knew the ranking of the top two, knew the shape of the evaluation?

A. Yeah.

Q. And then you are reported as conveying to the meeting the Minister's observation that he didn't want a report that undermined itself?

A. Yes.

Q. That a project is either bankable as we know, we don't know what the rest of the words used were. And I am suggesting that this involves some appreciation on the Minister's part of the way the report was going and the fact that although it had identified a front runner, there were negative aspects concerning that front runner's front position?

A. I have some doubts in my mind or some reservations about the way you are shaping that, in the sense that I think it's eminently possible that because Mr. Fitzgerald was the first to raise this issue as a result was emerging, that he may well have been the one was, if you like, the germinator of that sort of

thought process. I don't know that for a fact, but it seems to me a most likely hypothesis.

Q. That he was the person who germinated the idea that there is a financial problem with

A. The idea that there is a financial problem, and he was the first to talk about the bankability of the project and stuff like that.

Q. Yes. I think, in fairness to him, he used bankability in a slightly different light, but if I could just stick with where we are for the moment. I am happy to look at the way he approached that, but it may be that the Minister got the idea from him, but in your report to the meeting of the 9th, you mentioned that the Minister didn't want the report to undermine itself; and I am suggesting that an inference from that is that you must have been discussing in some way the shape of the report and the fact that while it had a front runner, it had a question mark?

A. Yeah, I have no recollection of at any time discussing any aspect of the evaluation or the report at any level of detail with the Minister, because he wasn't really a Minister that focused on the detail in any event.

Q. You mightn't have a recollection of it, but would you agree, if there is a note of it, you must have had some contact with the Minister; not where you discussed it in detail, but where you may have

discussed the emerging nature of the final conclusion?

A. Yeah.

Q. After all, at this point, you had a ranking emerging.

You knew what it was. And at this point, at this early stage, you also knew that on the headline requirement of financial capability, you had, if you like, a reservation emerging; isn't that right?

A. Yeah, there were reservations about the financial capability of members of the two leading consortia.

There is no doubt about that.

Q. Following, if you like, on from that meeting, when

either as a result of the exhortations that were conveyed to the Minister didn't want a report that undermined itself and/or because members of the team were saying "Look, we must have a report that makes sense", the report evolved to the point where the negative aspects of the top two, maybe even there was some aspects of the top three consortia were, and I am borrowing, paraphrasing from Mr. Fintan Towey's response, balanced by what the team felt were was the bankability of the project?

A. Yeah.

Q. But all of that final resolution of that difficulty in

the report, whether you call it a difficulty of substance or a difficulty of form, was only resolved in the dying days?

A. Yeah. It depends on what you are describing as the

difficulty, number one; and number two, the

Q. I am leaving that open; I am saying it's either a difficulty of content or form, for the moment.

A. Okay. But I mean, I have been saying quite a lot over the time I have been here that the financial questions were in the main evaluated by a sub-group and the people who were members of a sub-group, and I was obviously taking advice from them as we went along.

Q. Yes. That's why I am saying I am not asking you about the contents of it.

A. It's a question about in their marking of those aspects or dimensions or whatever is the appropriate word at this stage, they came to certain conclusions, and the question is, those conclusions must have taken account of their state of knowledge.

Q. Yes.

A. So, I don't beyond that, I don't know where we are taking this.

Q. Well, I am saying that from the 9th onwards, we know that changes were made to that to the qualifications or reservations that were contained in the report?

A. Yes. And I was suggesting this morning that that was probably more influenced by properly recording the thought processes that went on during the evaluation.

It was more likely to have been that. Okay. Balanced by the need to make sure that the report was a robust

one, but I am assuming that that paragraph was a way of recording what actually happened when the evaluation was going on.

But I would prefer the other people involved to be questioned on it and give you their position on it. I mean, it's clear from the records that that text was settled in a group, on whatever date it was, and I think while what went was in Mr. Towey's name, it was Mr. Towey collating the inputs of several people. And I am assuming for now, until you hear evidence from others, that the substantial influence in that was from the people who were expert in that area.

Q. All I am seeking to obtain your observations on is, as I said, whether it was prompted solely by the Minister's exhortations as conveyed by you, or by that and the need expressed by many members of the team to make sure the report was a robustly articulated report, or by the latter only. The fact is the final work in relation to it, where page 44 was concerned, the critical page was only done in the dying days, the 24th or the 25th October.

A. Yes.

Q. And I take your point that you don't know what deliberations were going on in detail amongst the team, but what we do know is that there is no apart from the few documents I have seen and the reference by Mr. Billy Riordan to bankability, very little, by

way of any other evidence, of lengthy consideration of this.

A. I think, while you referred to the Minister not wanting a report to undermine itself, members of the Project Group wanting a report to properly articulate what had happened and support the result, I am nearly certain that we have already agreed that Mr.

Fitzgerald was feeding in a similar view.

Q. A report that was to be capable of standing up to scrutiny?

A. Yes, yeah.

Q. Toward the end of the process, you had the additional complicating factor that the Minister seems to be putting more pressure on. At one page I think Mr. McMahon recorded that he wanted a report today but hasn't been promised one?

A. Yeah.

Q. Then there were the tensions that developed over the extra time that was required. Extra time was to be provided, but subsequently it was withdrawn, if you like, or at least the process went ahead without the extra time being provided.

A. Yeah. I mean, the word "withdrawn" I think is, correctly, "withdrew".

Q. "Withdrew", all right.

Now, if I could ask you to look at page 44 again, this time to look at the actual wording used.

A. Is this in the final report?

Q. Yes, in the final report.

A. I don't have Book 46 up here at the moment.

Q. I'll try and get you the page. It might be much easier if I got you the actual page. I can look at it on the overhead projector, and I'll give you this copy.

(Document handed to witness.)

If you just go through the wording of this: "A critical factor in any consideration of the credibility or risk analysis of the applications is the capability of the principals to finance the project including ability to meet any shortfall in the funding requirement due, for example, to unforeseen capital expenditure. In general terms, the applicants have provided comfort that appropriate funding arrangements are in place. The evaluators have concluded having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally throughout Europe that the project is fundamentally robust, and after the licence has been awarded, an attractive opportunity for corporate debt financiers. The evaluators have therefore formed the view that subject to at least one of the principals having sufficient financial strength at this stage to ensure completion of the project, a potential financial

weakness of one consortia member should not have a negative impact on the ranking of applications. It is important, nevertheless, to draw attention to the need to deal with this factor where relevant in the context of licence negotiations. These aspects are subject to further elaboration in Appendices 9 and 10."

See the sentence that begins "The evaluators have concluded having regard to the level of interest in the Irish competition for the GSM licence and the high profitability of mobile communications generally throughout Europe, that the project is fundamentally robust and after a licence has been awarded, an attractive opportunity for corporate debt financiers"?

A. Yeah.

Q. What do you understand that to mean in the context of the requirements of individual consortia to raise money?

A. It's talking probably more about the consortium, the business, the business's ability to raise finance.

Q. This is corporate debt finance; isn't that right?

A. Yeah.

Q. In other words, this is a type of finance the consortia would be raising as a consortium?

A. Yes, as Esat Digifone as distinct from its component parts, yes.

Q. In all of the applications I think you were informed by I may be wrong in this by virtually all of

the applicants that they were going for a 60/40

debt/equity ratio?

A. They certainly all declared a debt/equity ratio.

Q. What we are talking about here is the debt element of the debt/equity ratio of the business as a whole?

A. Yes.

Q. That was never the subject of any significant discussion or controversial discussion at the presentations; am I right in that?

A. I don't recall that it was, in any event.

Q. I don't think anybody was asked a question along the lines of "Do you really think you are going to raise money here? Do you really think that you are going to get money from the banks to fund this project?"

A. I think it was probably taken as read.

Q. It was assumed as read, yes.

Now, banks were identified. Corporate debt financiers were identified as likely sources of corporate debt finance, I think, in a number of applications?

A. Yeah.

Q. But as I understand it, the problem that's identified on this page is not corporate debt finance but the individual financial strength of the individual consortia members and the capacity of those consortia members to come up with the funding for any capital calls in the event of you know, things not turning out as they might have been expected to turn out.

A. Yeah.

Q. So I am suggesting that it's not actually a deep-pockets answer to the solution at all, or answer to the problem. It's not a deep-pockets solution to the problem.

A. The next sentence is important in the concept of deep pockets, isn't it?

Q. Yes. I am saying you can't connect them. The reference to the high profitability of the business and the availability of corporate debt finance is one thing; that solves problems that consortia have as a whole. But the problem that was being identified in the case of Esat Digifone where Communicorp was concerned was that with 40 or 50% of the equity, they didn't have the money to run the project in certain circumstances; it was their individual capacity to raise finance that was at issue.

A. But you said you can't connect those two sentences. Do you have to connect them?

Q. I think they are intended to be connected.

A. The word "therefore" could connote that unless it's covering the all the preceding sentences, but

Q. The whole page makes you connect them because that's what the whole page is about.

A. I mean, I am not claiming parenthood of this draft. I was surrounded by financial experts who were all involved and whom you will all see in due course, or

all of whom you will see in due course.

I mean, I am recalling that in terms of, say, the Communicorp side of it, it was taken at face value that the Advent support for Communicorp was, except in the most extreme circumstances, what was taken into account by the financial evaluators. So it's against that background that I am trying to figure out the various bits in this text.

Q. That's why I am asking the questions about it, because the text doesn't, if you like, address that problem, although it purports to address it. And what I am wondering is, was this put together in a bit of a hurry?

A. Hold on a second. The second sentence, "In general terms the applicants have provided comfort that appropriate funding arrangements are in place". Does that not encompass the Advent support for Communicorp?

Q. It does.

A. So, I mean, I thought that was the issue you were probing a moment ago.

Q. But we know from the supplementary analysis to which you referred that the position is slightly more stark than that. In general they have provided comfort. I think, if you read the supplementary analysis, you are told at the outset that neither of them have the capital to fund the project. It goes on then to describe the scenarios that could arise in the event

of their being unable to raise the capital, and I am asking I am trying to inquire what consideration went into drafting this page, seeing as it was considered to be of some significance, some major significance, and I could find no evidence that Mr. Andersen was involved in forming any view as to whether this was the solution.

I know he signed it at the end. I agree with you that he has expressed some other views in the meantime to the effect that there was insufficient time to conduct supplementary analysis, which I'll come to later. But I can find no evidence of any significant consideration of the propositions contained in this passage and how they might be applied to solve the problems identified either in the report or in the supplementary analysis.

A. Well, I think I believe that there was oral discussion within the group and that this text is an outcome from such discussion.

Q. That discussion, whenever it occurred, resulted ultimately in something that was put together only at the last minute, isn't that right 24th/25th, last days, the dying days?

A. Okay, when an attempt was being made to ensure that the report properly reflected what went on throughout the process and properly supported the result.

Q. I just want to mention at this stage Mr. Fitzgerald's

view on this issue. In Book 35, Leaf 1A, page 16, in the answer to Question 25 and I think you'll be able to follow it on the projector; it's just one passage Mr. Fitzgerald was asked for "details of his concerns regarding the financial capability of the Esat Digifone consortium and in particular, the financial capability of Communicorp; the identity of all persons with whom Mr. Fitzgerald discussed his concerns, and details of the assurances given to him regarding his concerns, i.e. the provision of cross guarantees."

And what Mr. Fitzgerald says: "Once the possibility of the Esat Digifone bid becoming a possible winner emerged, I was concerned that their financial capability to implement the project should be clearly established before a recommendation was made. My concern related to the Communicorp partner which was also heavily involved in developing a wire-based service in competition with Telecom Eireann. This service was still unprofitable and was requiring ever-increasing amounts of capital, resulting in increasing investment by venture capital funds and a dilution of Mr. O'Brien's shareholding. Even though the award of a licence would result in a bankable project for establishing the mobile service, the telecom business could put a strain on Communicorp's ability to fund their large 50% stake. Mr. Brennan

said the group had been aware of the financial weakness of Communicorp and also that of some participants in other bids. They had required all bidding group members to cross-guarantee all other bid partners. This ensured that Telenor's financial strength would, if necessary, ensure the Esat Digifone group financial availability. It would not necessarily stabilise the shareholding, but neither would any other financial underpinning. I was satisfied at that stage that steps were taken, but see also my reply to Questions 26 to 28."

Could I suggest, Mr. Brennan, Mr. Fitzgerald is articulating there, if we leave the timing of this out for a moment, that all the bankability in the world isn't going to solve the potential instability that could arise from Communicorp being able to raise money on its side?

A. I'd have to think about that one.

Q. I think he is saying that the award of the licence would result in a bankable project. The telecom business could still put a strain on Communicorp's ability to fund their large project. Mr. Brennan said the group had been aware of the financial weakness of Communicorp and also that of some participants in other bids. They had required all bidding group members to cross-guarantee all other bid partners.

A. I think I told you before in private that I do not

accept that last statement. I don't think

Q. That's fair enough.

A. I don't think that ever happened or I ever said it.

It may be his understanding of what we meant when we used the phrase "deep pockets" or something, but the question of cross-guarantees I have never seen except in other people's evidence.

Q. Yes.

A. I have seen it in some of the consortia, I think.

Q. One thing is clear at this stage. There were no cross-guarantees in the Telenor/Communicorp application?

A. I never suggested there was I think I said it to you a long time ago that I didn't think there was, that I didn't think I used that expression or that there was cross-guarantees in that consortium.

Q. But you do see that Mr. Fitzgerald draws the same distinction that I am drawing, and I think you accepted a moment ago, between the bankability of a project and the bankability or the capacity of an individual consortium member to raise finance on his side?

A. Yeah.

Q. He suggests that he could never properly cure it. I suppose you could cure it by having a very small equity?

A. Yeah, okay.

Q. With 50% or 40% it was going to be difficult, wasn't it?

A. Yeah.

Q. On the basis of the information you had at that time?

A. Except the extent to which the Advent backing was there.

Q. Yes.

Now, as of that moment we'll eventually go through these documents in detail as of that moment, as I think I have said to you, Advent were being edged out of the Esat Digifone consortium

A. Were being or had been, but that's information you had that I didn't have.

Q. That's right.

The institutions were gone. And in fact, from being a two-man consortium with Irish institutions who might be likely to form a block, it had now become, if you like, a three-man consortium of Communicorp: Dermot Desmond's company, IIU; Dermot Desmond himself; and Telenor?

A. Mm-hmm.

Q. So that all of this consideration and this evaluation was being conducted in circumstances where the entity that you were considering was no longer in existence?

A. That certainly is obvious from Mr. Coughlan's Opening Statement.

Q. I mentioned yesterday that I was hoping to get

together an amount of documentation containing details of Mr. Andersen's meetings with members of the Tribunal legal team and I mentioned that as with the document that was read out by the Registrar, the weight to be attached to this may have to be considered in due course. There was a delay yesterday in giving you some of those documents because they contain, if you like, editorial comments by the Tribunal which it wouldn't be fair to Mr. Andersen to put up, and I think those documents have been made available. I want to just to refer to one or two passages in them in the context of the area that we are looking at at the moment.

MR. NESBITT: Mr. Chairman, I have to express some level of concern that the matter might proceed in this way, that we have indeed been given what My Friend has described as editorialised documents of meetings with Andersen

MR. HEALY: The editorialisation has been removed.

MR. NESBITT: Well, not in my copies.

And in those circumstances, Mr. Chairman, we are concerned to see the underlying documentation. I don't want to be obstructive. Obviously Mr. Brennan will answer any questions that might be put to him, but I do think it's fair that he should see what's there. We already have the Andersen 2002 memorandum, which I understand is a document not going to be

sustained by a witness giving evidence. It seems that we are going to now start examining what is prepared by the Tribunal. We should see the underlying documentation, if there is any, that went to make that up, because that's something that Mr. Brennan should have the chance to look at so he can give a complete answer if he can.

I just sound a note of caution. Obviously you decide what happens. But I am concerned that we might be coming at this on more than one occasion, unless it's done in a chronology that's sort of reasonable.

CHAIRMAN: Obviously

MR. HEALY: I think I can be of assistance, and I appreciate the point. The documents that have been made available are in fact, they are virtually the original documents. They are produced after meetings. I fully accept the logistical difficulties. This inquiry is an evolving one where Mr. Andersen's attendance is concerned. Though I should emphasise the Tribunal sought the assistance of the evaluation team and initially approached the Department to provide that assistance. The fact that Mr. Andersen has pursued his own course with the Tribunal was something that developed as the matter unfolded.

But what I perhaps could do, and it might be a way of speeding matters up, though it will involve to some extent truncating the day's hearing, is I can draw to

the attention of the witness the aspects and I do not want to refer to every aspect of these documents the aspects upon which I think his evidence would be of value, and I can leave it at that. It will take me about maybe ten minutes or fifteen minutes to do that.

CHAIRMAN: Well, I think there were hopes, I think, Mr. Healy, that we might conclude Mr. Brennan's evidence this week, and I am very anxious if we can, within the confines of the considerable job you have to undertake, do that. Should I perhaps defer for fifteen minutes but not abandon the day, that we then see if we can usefully deal with what you had stated were a relatively limited number of instances in these documents.

I accept Mr. Nesbitt's general concerns. Obviously, whilst Tribunals have more latitude than would have courts in dealing with hearsay matters, subject of course to the weight being put on these, it wouldn't of course be the Tribunal's preference that there be a proliferation of hearsay matters ventilated, but it's necessarily part of the process because of what has arisen.

MR. HEALY: Rather than slow matters down, if I could put these, as it were, to Mr. Brennan in the way that I think I'd want him to approach them. I could perhaps make another bit of progress getting on to the

next tranche of chronological documents which might fill out the time, rather than break at all, but I am just saying I won't be able to pursue queries on these if Mr. Brennan is going to require time to digest them.

CHAIRMAN: I think it's reasonable that he have a chance to review and consider matters with a little more knowledge of it. Perhaps, Mr. Healy, we might try and use the remaining time to go forward a bit and revert tomorrow to that.

MR. HEALY: I'll ventilate them, and I'll go forward on the chronology.

The documents that have been made available consist of a number of attendances and memos. I want to draw your attention firstly to attendance number 1, paragraph 12 in that attendance. I have highlighted it on the overhead projector. You'll have an opportunity of examining the entire attendance, but...

See where it says "Andersens would have wished to have conducted further financial sensitivity analysis on Communicorp, but it was clear that this could not be funded out of the existing budget."

I won't say any more than that, other than it has an echo in the document we read out yesterday.

A. It has indeed, and the only comment I would wish to make is that at no time did Andersens come to me with a proposal to do more work for more money after the

first hiatus we had with them.

Q. Right.

The next attendance I want to draw your attention to, it's the same attendance, paragraph 13. "Had there been time and resources available" it's the you see maybe the last full sentence on the screen: "Had there been time and resources available, Andersens might have queried whether the key financial figures should have been taken at face value or whether they should have considered whether the figures were realistic. Ideally Andersens would have revisited the financial figures."

A similar point.

If you go to attendance 2, paragraph 6: "What AMI would have liked to do was to sit down and score sensitivities and credibility, but by then they were out of time, out of budget, and were faced with a decision to close down the project."

Now, there was a query raised by them, remember, concerning whether you would score or wouldn't score sensitivities and credibilities. That was around the 21st, I think, of September?

A. Yeah.

Q. The next extract I want to refer you to is paragraph 9 of attendance 2. "In all other competitions, what Andersens did after preparing the initial evaluation report was to do paired comparisons between the

top-ranked and second-ranked applicants. This involved the same assessment but confined to the 2 top entrants."

In passing, I should say, to some extent the briefing note for the Minister was confined to the top two and to distinguishing between them, though what was obviously contemplated here was a more in-depth assessment of the difference between the top two.

The next extract is the same attendance, attendance 2, paragraph 10, next paragraph.

You see the last page the last sentence, sorry.

Maybe the last two sentences: "In relation to Fintan Towey's draft final evaluation document, a copy of which was supplied to us from Fintan Towey's hard disk, Michael Andersen recalls that Fintan Towey suggested some textual contributions to the report, and this was probably one of them. In particular, the reference" and this is the thing I want to draw your attention to "the reference in the draft to Andersen's view that no further analysis should be carried out would not accord with Michael Andersen's view, and he would not have agreed to the inclusion of that passage in the report."

In fairness, I think that's in direct contradiction to what is in the report.

A. Okay.

Q. Paragraph 8 of attendance 3 is the next one I want to

refer you to.

"Michael Andersen wanted to do extra work on the financial side. He wanted to examine the state of affairs in Communicorp to get to the bottom of the weakness and to determine whether it should or should not affect the ranking."

Those are the only passages there are a number of other things I want to draw your attention to, but I'll do that privately. There is no point in delaying the inquiry today.

A. I feel I should respond in the following way to those extracts: If AMI or Michael Andersen had come to me with a serious reservation or a serious problem about the quality of the report or the quality of the result which required further expenditure and further analysis, I could not and would not have ignored it. And I think I could say the same in respect of the group. So while Mr. Andersen may now be articulating those views to you in private, he did not articulate them to me in the manner he suggests there at the time.

Q. I appreciate you may want to make further comment on them, but for the moment, that's your comment?

A. Yes.

Q. Would you have accorded the same recognition to Mr. McMahan coming to you and saying that he wasn't happy with the way things were proceeding at that time?

A. Absolutely.

Q. Didn't he in fact express considerable concern at that stage about how things were evolving?

A. Mr. McMahon was expressing considerable concern about the content of the report rather than about the result of the competition.

Q. I think he was saying the content didn't support the conclusion; would that be a fair way of putting it?

A. If you accept the context that he accepted the conclusion, then yes.

Q. It's not clear from his notes that he accepted the conclusion; am I right in that?

A. It's clear from the note we were talking about this morning that he wrote that note with the intention of putting it into play if necessary and then at some time decided it was no longer necessary, because he then put it on his division's file for the record.

Q. I think he did say in his notes, in that note, that he agreed with the top two but that he felt that they still had to be separated?

A. Yes.

Q. Now, do you remember I drew your attention before to another note that he prepared, much, much later and after the events of 23rd, 24th, 25th October 1995, when he received a copy of the 9th October, I think it was, evaluation report minutes. On the 1st November, he made a note. It's Document 148, I think, in Book

43.

And the note, we have been over it before

A. Could I give you back the documents I am holding for you so that I can manage the two.

The page number again, please.

Q. Page number 148, Divider 148.

Just looking at another note made by Mr. McMahon, just to put in context what you were saying, although it is a matter ultimately that will have to be left for comment by him, where on the 1/11 he says, referring to the 9th October, "It's probably too late to change this record, but our intervention at subsequent meeting made clear that we did not subscribe to unanimity at this meeting. We expected the qualitative assessment to continue from that time.

The report, while it had probably highlighted the best 2 candidates, had a long way to go."

I appreciate that other events occurred after that, but he wrote this on the 1st November, and I'd suggest it signifies a degree of significant degree of concern on his part that the conclusions were not conclusions with which he would have agreed, in addition to not being in agreement with the actual form in which they were expressed?

A. Well, it's clear that he wrote this on the report of the meeting of the 9th October, and he wrote it on the 1/11, and he was careful to say "We did not subscribe

to unanimity at this meeting."

Now I am saying unequivocally that it is my view that he did subscribe to unanimity at a later meeting.

Q. Unanimity presumably not as to the final form of the report, because he couldn't have seen that?

A. As to the result. Now, you'll have to ask him, did he arrive at that position as a result of conviction or as a result of the fact that everybody else already had that view? That's something only he can answer.

But I am absolutely unequivocal that Mr. McMahon joined his division in the result of the competition.

Q. At the time that this final these final corrections were being made to the report in October, on the 24th, 25th 25th, in fact, of October 1995, Mr. Towey was the only person who knew the content of the letter from IIU of the 29th September 1995, according to your evidence?

A. Yes.

Q. And you and he were the only people who knew that a letter had been received from Esat Digifone?

A. I think that's probably true, yeah.

Q. Mr. Andersen did not know that Esat Digifone had endeavoured to introduce new information?

A. I think that's probably true.

Q. And Mr. Andersen drafted, presumably, and you and Mr. Towey agreed with the passage in this report which says, at the third paragraph from the bottom on page

44 I'll get it on the overhead projector; it's a very short passage. The hard text may make it easier for you.

Third-last paragraph, "In general the credibility of A5 has been assessed as extremely high, as A5 is the applicant with the highest degree of documentation behind the business case and with much information evidenced."

I read that as a reference by Mr. Andersen to the fact that where people made assertions in their applications or made assertions orally, these were regarded as having more credibility if they were backed up by actual documents.

A. That sounds a reasonable interpretation of those words, yeah.

Q. And all of the applications, I think I don't want to be unfair to all of them, but the ones we have looked at, in any case, in detail, have had areas where assertions were made either in the documentation or orally at the presentations where the documentation evidencing them either didn't exist or partly existed or was only produced, if at all, at the presentations?

A. Okay.

Q. I am not talking about the table that came in the next day; I am talking about more substantive things.

Now, it was known that Esat Digifone were relying on Advent, and it was known that they had relied on an

agreement which was not produced, but Mr. Andersen did not know that they had sought to write in on the 29th to suggest either a new substituted or an additional financial support; isn't that right?

A. Yeah, Mr. Andersen did not know.

You said they wrote in; I still make the distinction that Michael Walsh, IIU, wrote in, not the consortium.

Q. I fully accept that, but you couldn't have been under the impression at the time other than this was Messrs. Digifone wrote in?

A. But if I was considering it legally, I don't think I could say it came from the consortium.

Q. No, but the impression you had to have was it came from them. I know you were wrong, of course, but you must have been operating the only impression you could have had was that it came from Digifone. That's what you were told. That's what the letter said in sending it back.

A. I don't know precisely what I was told, and

Q. I think what you were told is "You don't want to see this", words to that effect?

A. I was told I wouldn't want to see it; I can't say I'd be as specific as to say a letter came in from the consortium or a letter came in from IIU or from Michael Walsh or whatever.

Q. I think we are absolutely clear from your earlier evidence, Mr. Brennan, that you never saw the letter.

A. That's right.

Q. You were told what had come in. Mr. Brennan or Mr. Towey sent it back to Mr. O'Brien himself and signed, and you signed the letter.

A. Yeah.

Q. I have no impression from anything you have said to date that you or Mr. Towey drew the distinction which I am drawing now between the document coming from IIU and the document coming from Digifone.

A. I have drawn the distinction here in this box once or twice before.

Q. But the impression

A. But not based on conviction. Based on, as I said, looking at its face, its plausible deniability, because it didn't come from the consortium itself.

Q. I just want to get clear my earlier impression about this. You had no impression, before you saw this document again in the course of the Tribunal work, that an additional submission had come in on IIU notepaper; am I right in that?

A. I actually don't believe I had seen IIU notepaper at that stage, for any purpose.

Q. If you look at the only documents to which you would have had access, which is your response, your response sent that document back to Mr. O'Brien?

A. Yeah.

Q. It was described as a letter from Mr. O'Brien?

A. Mmm.

Q. So Mr. Towey must have been operating under the impression, whether mistakenly or through oversight, that this had come directly from Mr. O'Brien, because that's where he sent it back to?

A. Okay.

Q. Unless somebody rang him up and told him. Unless Michael Walsh rang him up. Or did he ring you up and say 'I am sending something back on behalf of Denis O'Brien'?

A. I don't remember speaking to Michael Walsh at that time.

Q. But what I was suggesting that at that time if this matter had been looked into or if Mr. Andersen had been aware of this development, he might have been able to write this sentence without looking further into what prompted sending in that letter; isn't that right?

A. Yeah, I understand the point you are making.

Q. What I am trying to say is further scrutiny at that stage, the scrutiny which Mr. Andersen may be now for the first time, I don't know, is saying he would have wanted to conduct, would probably have led to the team finding out that what had in fact been stated at the presentation was not evidenced at all, and what had been stated in the application was not evidenced at all, and that the degree of evidencing was poor?

A. That's certainly a hypothesis that you can make based on what you now know.

Q. But again, I am not suggesting that A, you were aware of that, or that B, being aware of it you were seeking to drive this process in a particular way. But one thing is clear, I think, and it's this: If the process was being shut down at this point, there was going to be no further scrutiny of anything; isn't that right?

A. Well, the concept of the process being shut down is something

Q. The evaluation process?

A. That's something I am hearing for the first time based on the interaction between the Tribunal and Mr. Andersen. I wasn't conscious when the thing was going on that that was a factor in how it was being concluded.

Q. I think you have agreed with me this morning that there was pressure on, not from you, and we have I think agreed, had to have come from Mr. Lowry, unless it came from Mr. Loughrey, there was pressure on to get this matter finished?

A. Yes.

Q. That day, notwithstanding the what I suggested was the I would have thought was the desire one would have expected the civil servants to have to produce a proper report, there was pressure on. Leave the words

"shut down" out of it. There was pressure on to get this report finished and to get a result?

A. There certainly was a degree of pressure, but it's clear, too, that Mr. Loughrey afforded us another week should we need it.

Q. One thing is right, isn't it, I am sure you'd agree with me, if you knew that there were aspects of the Esat Digifone finances that were somewhat parlous, or at least I won't use that word aspects of the Digifone finances that were in a state of, say, significant change, you would have wanted the process stopped or brought to a conclusion as quickly as possible so that there wouldn't be any more scrutiny?

A. That wouldn't be my particular starting position.

Q. If you knew it. Not you if one knew it? If you wanted the result to stay as it was on the 23rd October?

A. If what you are asking me is

Q. You wouldn't have wanted any more scrutiny?

A. If you are asking me for support for the hypothesis that Mr. Lowry shut down the process because Mr. Lowry knew of difficulty with Esat Telecom or Communicorp's or Esat Digifone's state of finances, I am not in a position to assist you by giving you that support. Because I don't know.

Q. I am not asking about it in the context of Mr. Lowry for the moment. You can leave Mr. Lowry out of it.

Anyone who wanted that result to stay as it was, who was in possession of some of the true facts which had not been disclosed to you, would not have wanted any further scrutiny for fear those two facts could come to light? It's a hypothetical question. I am asking you with the benefit of hindsight.

A. It's extremely hypothetical.

Q. What is not hypothetical about it is the facts. The fact is you had a report concerning the financial status of Esat Digifone which bore no relation at all to the true fact. That is an absolute fact that will be shown to be, I think.

Now, that certain people were aware of that is clear, presumably the consortium themselves, from the documents that I have referred to on Mr. O'Brien's side referred to by Mr. Coughlan in his Opening Statement. From the documents referred to on the Telenor side, it seems that both of the main arms of that consortium when it was first put together were aware of this state of its finances, and presumably Mr. Desmond must have been aware because he had just come in. Now, those are facts.

A. Those are facts known to you now, and you are asking me to make judgements as to what I would have done if I was aware of them at the time. That presents me with a lot of difficulty.

Q. Let me put it this way: If we leave that degree of

speculation out of it, and I won't ask you any more than this, it was extremely fortunate there was no further scrutiny, wasn't it?

A. Extremely fortunate for whom?

Q. For Esat Digifone that you didn't have to go and look at the true state of affairs? You might have reached the same conclusion?

A. I don't know. I think we are at the outer edge of hypothesis at this stage, and it's getting more difficult by the minute.

Q. You, I think, took a very strong view in relation to the provision of further information. You felt that it was inappropriate to even know about it; isn't that right?

A. Yeah, that's consistent with what we say at each presentation at the beginning and at the end.

Q. At that particular point, the consortium that had made the application changed and was a new consortium, and those facts couldn't have been brought to your attention because you would have rejected them, but if you had known that it was no longer the same consortium to the one that was in the application, then you'd have had to take the view that you couldn't grant them the licence; isn't that right?

A. I'd have run for legal advice.

Q. You certainly have run for legal advice.

Thank you, Mr. Brennan.

MR. HEALY: I don't propose to take Mr. Brennan any further in relation to this aspect, and I am going to move on tomorrow, Sir, into the next stage in the process after October 1996.

CHAIRMAN: Very good.

If there are any further matters relating to the internal dealings between the Tribunal and AMI that might arise in dealings with Mr. Brennan tomorrow, obviously, as you intimated, it would be preferable he be told of anything else in the near future.

Thanks very much. Eleven o'clock.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
THURSDAY, 30TH JANUARY, 2003 AT 11AM.