

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

Instructed by: John Davis

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES: Mr. Richard Law-Nesbitt, SC

Mr. John O'Donnell, BL

Mr. Conleth Bradley, BL

Mr. Diarmuid Rossa Phelan, BL

Instructed by Matthew Shaw

Chief State Solicitors Office

FOR DENIS O'BRIEN: Mr. Gerry Kelly, SC

Instructed by: Eoin O'Connell

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

FOR MICHAEL LOWRY: Mr. Rossa Fanning, BL

Instructed by: Michael Kelly

Kelly Noone & Co.

OFFICIAL REPORTER: Mary McKeon SCOPIST: Ralph Sproxton

I N D E X

WITNESS: EXAMINATION:Q. NO:

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY,  
5TH FEBRUARY, 2003 AT 11AM.:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY  
MR. HEALY:

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

Could I ask you whether you have got Book 50,  
Mr. Brennan?

A. No, the only book I have today is 44.

Q. Have you got 49?

A. No.

(Book handed to witness.)

Q. If you look at Leaf 126 of Book 49. I just want to  
come back to a document that we passed over yesterday;  
we described it without actually devoting any  
attention to it. Do you remember I described the  
correspondence between Mr. Arthur Moran of Messrs.  
Matheson Ormsby Prentice and I think Messrs. Fry's,  
and in particular Mr. Neville O'Byrne in Fry's,  
concerning the arrangements that would apply as  
regards shares held by IIU Nominees and the impact of  
the ordinary pre-emption provisions in the case of  
articles of association of private companies which  
would normally affect transfers of shares to third  
parties?

A. I certainly remember you dealing with that yesterday.

Q. Remember I drew your attention to the fact that there

was some correspondence between Mr. Moran and Mr. O'Byrne in which this question of IIU's right, IIU Nominees' right to transfer to obviously the individuals for whom they were nominees and the fact that they didn't want this to trigger the pre-emption provisions, which seems like a reasonable provision.

A. Yes.

Q. I just want to draw your attention to one aspect of that debate which was touched on in this letter from Mr. Arthur Moran to Arve Johansen on the 25th April 1996. Most of the letter is of little consequence, but I'll as it's short, I'll go through it.

"Dear Arve

"Further to our telephone conversation yesterday I attach further draft of the Shareholders Agreement.

As you will see, the principal amendments are a new clause, 17.11, to deal with the IIU position which was previously in Recital D.

"I have amended clause 14 at the request of Gerry Halpenny to make it clear that the remedy periods apply even if call option agreements have not been entered into. I feel that this was already implicit in the wording of 14.2, and I have therefore also added the provision that no remedy period applies once a party has defaulted on three occasions".

This is with reference to a default by any member of the consortium or the company in the case, I think, of

a capital call.

"I have provided that 75% of the votes of the non-defaulting parties may decide the mix of capital.

"At clause 7.4, I have provided that defaulting party shall retain the right to appoint one director so long as it holds 10% of the capital.

"As you will be aware, I have made no amendment to the provision for five directors in relation to which we discussed Denis O'Brien's suggestion yesterday. I have today discussed with Gerry Halpenny, who has again requested that eight directors be provided, and I have confirmed that this is not agreed. I suspect that O'Brien will wish to discuss this issue with you again, and I have left it on that basis with Gerry Halpenny.

"I have received from Neville O'Byrne, acting for IIU, a draft letter in relation to the possible transfer of shares by IIU to its investor where they effectively seek consent in advance to a once-off transfer from IIU to its investors without sparking the pre-emption provisions contained in the articles of association.

I believe this concept is agreed and that with some tidying up, the draft letter is acceptable".

Now, recollect, I think it was envisaged that this, if you like, relaxation of the perception provisions would be contained in a side letter and not in the main articles. In the course of subsequent dealings,

I think following the issue of the licence, it was referred to from time to time as the one free transfer right that IIU had.

I just want to clarify whether you were aware that such a provision was being negotiated and was in fact ultimately agreed between the consortium members.

A. I don't believe I was so aware. I am recalling that some weeks later that there was a discussion in the Department about a side letter, and right now, without the document open, I don't know whether it's bearing on the same issue or not.

Q. Can you ever remember a discussion on the one free transfer right that IIU had?

A. I can't, no.

Q. I think, when we come to look later on at the steps taken by the Department to evaluate the introduction of IIU, I am right in thinking that that one free transfer element in the constitution of the company was not brought to your attention.

A. I don't recall it being brought to my attention.

Q. I am sure you can well understand that that gave a very significant right and a very powerful tool to IIU in the course of any interpartner debates in the consortium?

A. I haven't given it any consideration.

Q. Yes, but you'd recognise that it's something that would give a partner in a company, or a consortium

which is effectively a partnership, a very significant right?

A. It's not something that I would volunteer a comment on, because I don't fully understand it.

Q. Do you know what having a right of one free transfer means without the need to secure the consent of your co-partners?

A. I understand the word you are using, but I've never engaged in sort of high finance.

CHAIRMAN: I think that's fair enough, Mr. Healy.

It's not everyone's a company lawyer.

MR. HEALY: I wasn't looking at it from a company law point of view, Sir.

Q. What I am concerned is, do you understand its value from a financial point of view?

A. Not particularly.

Q. You don't?

A. No.

Q. If you have to get the consent of your partners to transfer your shares, that obviously puts you, to some extent, in the same boat as they are; isn't that right?

A. Yeah, I mean

Q. But if you don't have to get the consent of your partners for one transfer, then you have the edge on them; isn't that right?

A. You are asking me to comment on something about which

I know very little.

Q. I am giving you an opportunity of commenting on it,

Mr. Brennan.

A. Well I'll pass, thanks.

Q. Pardon?

A. I'll pass, thank you.

Q. I see. That's your answer.

CHAIRMAN: Well, I think we'll move on.

Q. MR. HEALY: Now, yesterday we were dealing with a

document concerning a meeting that took place in the

Department on the 3rd May and of which there is no

note in the Department, and I referred you to an

account of that meeting contained in Mr. Arve

Johansen's memorandum of the 4th May. And I think you

said I don't think you could remember the meeting

to begin with; isn't that right?

A. I don't have any particular recollection of it, no. I

said a number of times that while I was present for

some of these discussions, that I wasn't I wasn't

the primary mover in the sense that I was, say, during

the evaluation process.

Q. It's just that who asked you to be present, by the

way?

A. I don't know.

Q. Clearly Mr. Johansen's note suggests that you were a

primary mover; his note suggests that. You may not

agree with

A. It's just I participated in the meeting. That may be a personality thing. I would hardly ever sit at a meeting and not participate, but I think I did explain that I came back from Brussels late the previous evening and arrived in the Department I don't know what time of the day the meeting took place. Somebody obviously briefed me as to what was going on, and I participated in the meeting on that basis.

Q. I think, when I was asking you about Mr. Johansen's note, you said "This note is clearly written by Mr. Johansen for some purpose", and it's laced with irony, and so on. You said "I don't think I used any language, I don't know, but I don't think I would have used any language which could be recorded as 'appealed off the record'. That's very strong language, which I doubt."

I want to say two things about that. You don't remember the meeting at all?

A. I have no particular recollection of that meeting; that's right.

Q. So you are not in a strong position, I suppose, to dispute what Mr. Johansen has written. But can I go further and ask you what you mean by saying "This clearly was written by Mr. Johansen for some particular purpose"? What purpose did you have in mind?

A. As you read it out to me, it just came across as a



somewhat peculiar draft. I don't know what the purpose was, but it didn't seem like an ordinary record of ordinary events; I'll put it like that.

Q. Well, the events weren't ordinary. What Mr. Johansen was recording was the fact that after all that he had been through in this process, you were now asking him to support the whole project, off the record. My impression is that the document was prepared by Mr. Johansen as a memorandum for himself. I can't imagine, I don't know, but I can't imagine it was ever envisaged that this document would see the light of day. It's not a letter written to anybody. So I am wondering what you mean by saying that it was clearly written for some purpose.

A. That's just an impression I formed as you were going through the letter. I mean, I hadn't seen the document before.

Q. Well, I think you have had it for the last two and a half months.

A. I think it's fair to remind you that before Christmas, you directed me towards three actually particular books, and I did a considerable amount of work on those. I myself identified that Book 44 was likely to be raised, and I did some work on that too, but at no time did I set about reading the 40 or 50 or whatever number of books of evidence that you furnished us with. I think that would be an unreasonable

requirement, actually.

Q. Mr. Brennan, just to clarify one matter. I think the Department have made it clear from the outset that they were anxious that this matter would be inquired into as deeply as was practicable. All of the documentation the Tribunal has, the vast amount of it came from the Department. That's all your documents.

As far as I am aware, the Department you have a team of lawyers acting for you; they have been brought they have been made available, or copies of these documents have been made available to them for some considerable time.

MR. NESBITT: Mr. Chairman, that is an appalling thing to say to this witness. This witness is here as a witness of fact. He is now being examined on matters that he had nothing to do with at all, and he is being sought to comment, form opinions, talk about commercial deals he wasn't party to. I think it's unfair that he should be put in that light. And I think he should be asked to deal with issues that he can deal with of his own knowledge and leave the question of opinion-forming to the Tribunal on the basis of the evidence that's available.

I am sorry to have to get to my feet in these circumstances, Mr. Chairman. It was not called for to say that, what was said to this witness.

CHAIRMAN: Well, I don't feel it's necessary to make a

ruling on the matter, Mr. Nesbitt. I think that in the course of the lengthy examination of Mr. Brennan, it has been viewed as necessary for Mr. Healy to allude to certain of the dealings that were taking place between what may loosely be termed the protagonists, and it is accepted that Mr. Brennan was not privy to that, and I have already indicated that I would take the view that Mr. Brennan should not have difficult notions of corporate law put to him. But I think it's reasonably practicable that we seek to embark on perhaps putting the substance of matters that may have been comprised in correspondence between the lawyers acting for the various members of the consortium, perhaps without the necessity of going into inordinate detail or the legal minutiae.

MR. NESBITT: Thank you very much, Mr. Chairman.

CHAIRMAN: We'll proceed.

Q. MR. HEALY: Mr. Brennan, we'll pass on that debate and go back to the meeting that, according to two notes, you were at.

Now, there is no departmental note, I have asked you about that before, nor any reference in any departmental document to that meeting, and I now want to come on to another meeting, and again I can refer to you this meeting in two books. It's in Book 44 and in Book 49. I am working from Book 49, but I can refer to you Book 44. This is a note of Mr.

O'Connell's of a meeting of the 7th May of 1996, of a telephone call, in fact. It's 209 of Book 44.

It says "Fintan Towey"; seems to suggest there was a contact between Mr. Towey and Mr. O'Connell.

It says:

"Minister v. strong preference for 40:40:20 at time of licence. But" and "strongly" crossed out

"understands need for flexibility afterwards. Will take Esat Holdings subject to no substantive difference and outline in writing."

Mr. O'Connell has confirmed that this is a note of a phone conversation that he had with Mr. Towey. Did you know anything about the Minister having a very strong preference for 40:40:20 in terms of the share configuration of Esat Digifone?

A. What I would say is we all had a preference for 40:40:20 because that was the basis on which the application was made.

Q. It says "Minister very strong preference of 40:40:20".

Were you aware that the Minister had that strong preference?

A. I don't have a strong recall of who was saying what to whom. But I reiterate that there was a very strong preference among us, our legal advisers, and I presume the Minister was in on the conversation, whether directly with me or via Mr. Loughrey, I don't know.

Q. Can you remember a discussion with the Minister or a

discussion with Mr. Loughrey or Mr. Fitzgerald in which this issue was canvassed?

A. I can't remember a specific discussion, but I am fairly certain that there was discussion going on in the Department to which I was sometimes a party to where we were constant in our view that 40:40:20 was the basis of the application and that that was the basis on which the licence should be issued.

Q. Do you remember the letter, or the meeting of the 3rd May that we discussed well, you may not remember the meeting, but do you remember the note of the meeting of the 3rd May that we discussed I think yesterday?

A. Owen O'Connell's.

Q. In which Mr. O'Connell recorded the use of the expression "Clear a political football". Do you remember that meeting?

A. I do, yeah.

Q. And after that meeting Mr. O'Connell made a note of the jobs he had to do.

A. Yeah.

Q. And there is no reference there to any requirement on the part of the Department or the Minister that there be a 40:40:20 configuration, and I am suggesting that if that was something that was a high priority, it might have been mentioned at that meeting.

A. I mean, based on the limited notes of the meeting,

it's hard to know whether it was or not. But I am certain that the Department was always of the view that when an application was based on 40:40:20, the licence should be based on 40:40:20.

Q. Yes, I can understand that. It was mentioned in by Mr. O'Connell in his list of tasks, but he is mentioning it, if you look at Document 129 of Book 49; I read out this list of tasks yesterday. And one of the tasks he mentions was "Digifone/IIU agreement re 5% (if 20 percent)". That was an issue we know that was in the forefront of the minds of the consortium, because they discussed time and again, going right back to November of 1995, but there is no suggestion at that point that there is any requirement from the Department. What I am suggesting is that if it had been a Department requirement, it might have been mentioned at that meeting.

A. In the absence of a record of a departmental record of the meeting, all we have to go on is Mr. O'Connell's note, and it is a very skimpy note.

Q. Your view as you have expressed it now is that the application was 40:40:20, and

A. Sorry, the application was actually 50:50 with 20 to be placed, and 20 to be placed coming up to the licence; so then it was to become 40:40:20, rather than that the application itself was 40:40:20.

Q. Can we put it this way: To be consistent with the

application, 40:40:20 was consistent with the application?

A. Yes.

Q. And being consistent with the application was an important consideration from the Department's point of view, obviously?

A. Yes.

Q. And what was communicated to Mr. O'Connell was that the Minister had a strong preference for this; that it wasn't just a case even of Mr. Towey's own view?

A. Yeah.

Q. We know that ultimately the consortium had to re-jig their share configuration; isn't that right?

A. Yeah.

Q. Would you agree with me that it's surprising that there is no document, no letter from the Department to the consortium saying "We are not prepared to accept 37.5:37.5:25 as per your letter of the 16th April 1996, and your application will not be or the licence will not be granted unless you restore the share configuration to one which is consistent with your application"?

A. Would I agree with you

Q. That it's surprising that there is no letter to that effect.

A. You see, I was only one party to this. I don't know if there was conversations. If there was no letter,

there is no letter. That's not to say there was no contact, no communication; I just don't know. And I don't like keeping repeating this mantra, but there will be other witnesses who will be able to give some evidence on this too.

Q. Well, I am only asking you whether you agree with me or do not agree with me that it's surprising, when the Department was conducting extremely important public business, parts of an independent evaluation exercise, that there is no record, no written record that the Department had asserted the view that it would have to be 40:40:20?

A. I don't find it particularly surprising.

Q. I see. If you looked at the Department documents concerning this matter as of the date of the grant of the licence, the 16th May, there was no way of knowing whether this issue had ever been canvassed in the Department; isn't that right?

A. Whether which

Q. It had ever been canvassed.

A. What exactly had ever been canvassed?

Q. The 40:40:20 issue.

A. I think there was a fair amount of discussion within the Department about restoring 40:40:20.

Q. The actual application said that it would be, as you say, 50:50 with 20% going to institutional, blue-chip institutional investors. That was the application



that went through the evaluation process. Only one of those institutional investors warranted any scrutiny on the part of the Department. I am not criticising them for that. It's clear the Department were able to form their own view as to who IBI were, AIB were, Standard Life were. Advent was a new name, and some inquiries were made with a view to ascertaining who Advent were; isn't that right?

A. That's right, yeah.

Q. At one of the meetings that we referred to yesterday, or one of the notes of the meeting, I think it was the 3rd May, reference is made to the need for an explanation for why Advent, IBI, Standard Life and AIB were no longer being proceeded with. Can I ask you, why did the Department place so much importance on the 40:40:20 configuration and seem to ignore the identity of the blue-chip institutional investors who were part of the application?

A. I don't believe the Department ignored the identity. I think the Department made significant inquiries, and including taking legal advice.

Q. I don't think the legal advice on the change in the share configuration was ever pursued; at least we have not been able to see any legal advice dealing with it.

A. I can't comment without researching the documents on that.

Q. In the discussions that you had in the Department, and

you say there were many discussions on the issue, can you tell me what consideration was given to insisting that the consortium stick not only with the share configuration, which was part of the evaluation, but also the shareholders or intended shareholders who were part of the evaluation?

A. I think there was a close examination of the application itself, leading to the conclusion that there was some flexibility around the placement.

Q. What flexibility?

A. In the sense that the application talked about to be placed and talked about with institutional investors, of which certain ones were identified as being in a position to commit. But I think what we were looking at was, was this an exclusive list or not? And we came to the conclusion that it wasn't.

Q. So do I understand you to say, then, that you concluded that it wasn't an exclusive list, although I think the application made it clear it was exclusive, but you concluded it wasn't. But did you decide that although it wasn't an exclusive list, any other institution, any other financial institution which satisfied you would be acceptable?

A. It wasn't a question of satisfying me. It was a question of satisfying the legal requirements, if you like, to comply with the application.

Q. What did you understand those legal requirements to

be?

A. I believe that we looked closely at the application at that time to see what exactly was it saying, and then we looked closely at what was happening to see were the two consistent.

Q. Well, the application, we'll leave aside the issue that we have a difference on, and that I canvassed a minute ago. But the application said that you were going to have 40:40:20 or 50:50 with ultimately a 40:40:20 configuration, 20% to be placed with I suggest it was identified, but leave that aside financial institutions, blue-chip financial institutions. Is that what you were were you trying to see whether that was consistent with what happened?

A. "Blue-chip" was a word used later. It wasn't in the application, in any event.

Q. I see.

A. The question being looked at was, was there consistency between what we were now presented with as the party to be licensed with the application? And the conclusion seems to have been reached that there was.

Q. Did the Department form the view that the way to describe the institutions who were mentioned in the application was "blue-chip"?

A. I don't know whether that was a conscious forming of a

view in that sense. It was words used possibly first by Mr. Loughrey, I am not sure, but by somebody.

Q. It was used in the Dail debates. It was used, I think, in the public statements, wasn't it?

A. It probably was, yeah.

Q. I suggest it's a fair way of describing the type of institutions involved. They were blue-chip institutions, so therefore you were able to form a view as to whether this consortium had the financial capacity to do the work. It had Telenor, it had Mr. O'Brien's vehicle, and it had blue-chip institutions, or, if you like, it had financial institutions. Well, was there a correspondence between that configuration Mr. O'Brien, Telenor, and financial institutions and what you were being presented with on the 16th April?

A. It seems to me that after a lot of consideration involving a number of people, that view was formed.

Q. And was the Minister involved in that discussion?

A. I can't say that he wasn't, but equally I can't say that he was. I think these are questions that you may have to put to Mr. Loughrey in the first instance as to what was going on at that level.

Q. I am sure you won't disagree with me when I say that it's my impression that if you were to reach a decision like that, it's a decision that would have to go all the way up to the political head of the

Department, isn't it?

A. That sounds reasonable, yeah.

Q. If you go on to Document 132 in that book, I think in

Book 49. Now, I am not sure you'll find this in Book

44. I'll get you a copy if I can. I think you have

49.

A. Yeah.

Q. This is a note of Mr. Arthur Moran of Matheson Ormsby

Prentice, an attendance on Telenor, it looks like, Mr.

Knut Digerud. It's dated 8th May of 1996, the day

after the phone call we discussed a moment ago.

It says

"Licence likely to be ready Friday. EU has considered

Persona appeal and indicated Department can go

what Esat shareholdings?

Can we unravel the IIU involvement?

How we attack the arrangement agreement?

" KD

Minister and Department seeking the support of

Telenor by way of letter of comfort?"

This is Mr. Knut Digerud telling his own solicitor

that this was a request from the Department. And you

recall that Mr. Digerud was also at the meeting of the

3rd May. And could I suggest to you that this doesn't

appear to be consistent with Telenor offering or

volunteering to provide a letter of support?

A. I can see where you are coming from.

Q. And that therefore it's only consistent with Telenor being asked for this letter of support, if not by you, by somebody in the Department, and this was this included the Minister.

Next line: "Tie down the shareholdings and provide for Telenor to increase shareholding in the event of default by Esat/Communicorp/IIU", a reference to the need to have a default provision in the Shareholders Agreement.

The next line is Arve Johansen. It's not clear to me that he was I think he may have been present, in fact, because I for the first time I notice, on the top right-hand side of this, he may have been present by phone, of this memorandum; it looks like the word "Arve" is written.

"Arve Johansen

40:40:20."

Then it gives "Communicorp" on the right-hand side there is "? 43.5". Underneath that, Owen O'Connell, telephone number.

The next note you see is 9/5/96

Owen O'Connell to call back

Arve Johansen convertible note to give IIU 5%."

This is a proposal that was being canvassed at the time whereby IIU would cede 5% of their shareholding but would in return receive a note effectively entitling them to convert it back at some later point.

Underneath that, "Owen O'Connell indicated Telenor position that the shareholders structure" sorry, "Owen O'Connell", then "Indicated" this would appear that Mr. Moran indicated this "Indicated Telenor position that the shareholders structure revert to that agreed at the time of signing the licence."

That can only make sense if it refers to the time of the competition.

"OO'C pointed out that we are not party to the 40:40:20 arrangement and that they have been given 25% by virtue of" I think that must refer to the arrangement agreement, although it's impossible to decipher it, because Telenor were not a party to the 40:40:20 agreement. It was Esat Digifone who appear to have been a party to that agreement. This is a very, I suppose, narrow technical point.

A. There is obviously something cut from the edge, the right edge of that note, in the sense you said

"Pointed out that we are not party"; I think it's that somebody else were not party.

Q. It may be that I see your point; it may be that Telenor were not a party.

A. We can speculate who it might be; I don't know. I just drew to your attention that that's the way I was reading it.

Q. Well, if you look at the exchange, Telenor are

insisting that the share configuration of Esat Digifone revert to 40:40:20, and Mr. O'Connell's response was that the 40:40:20 arrangement was not one to which, I suppose IIU, you'd have to say, were not a party?

A. Yes.

Q. And that they were given 25% by virtue of the arrangement agreement.

A. Yeah.

Q. This is on the 8th May, this is in fact the 9th May, less than a week before, as we know, the licence was ultimately signed; and can I suggest that it reflects a considerable amount of dissension in the consortium as between the various members at that point; do you agree with that?

A. There seems to be some differences flowing around, yeah.

Q. The next document

A. By the way, you were suggesting that the note at the top suggested Arve Johansen was present. That looks more like a secretary's name, like "Aine", to me.

Q. That was my original impression.

A. If it's the same handwriting. The "Arve" further down is nothing like it.

Q. Yes. I agree with you I initially took it to be Aine as well, but because of when I was looking at Mr. Johansen's name a moment ago on the document, it



occurred to me that he may have been present. I don't think very much turns on it.

CHAIRMAN: It is a bit like deciphering the Dead Sea Scrolls; I think it probably suffices to make clear that there was a considerable dissent between the members of the consortium at that stage.

A. And it's clear that along the whole length of this document there is a word or probably a word missing on lots of lines. When you were reading it out and this is just a comment. At the beginning, you said "EU has considered Persona appeal and indicated that Department can go"; there is something missing there. Then you said "What Esat shareholding"; I think that's "what about shareholdings", plural.

Q. MR. HEALY: Same meaning, I suppose.

A. I don't know.

Q. Well, "what about shareholdings"?

A. You said "what Esat shareholdings".

Q. I agree with you, but I suppose it can only "be Esat shareholdings". I'm sure you are absolutely right.

What about shareholdings?

A. That's in the context of the consortium, I guess.

Q. In the context of the consortium, yes. And by Esat I meant Esat Digifone as opposed to Esat Telecom.

The next document is a fax to Arthur Moran in Matheson Ormsby Prentice from Arve Johansen on the 10th May enclosing firstly a memorandum of a proposal from

Neville O'Byrne of IIU of the previous day. This is dealing with proposals to resolve difficulties which had arisen regarding the shareholdings in Esat Digifone.

If you look at the first page of the memorandum, it says "This memorandum contains proposals by IIU to help to resolve the difficulties which have arisen regarding the various shareholdings in Digifone, both from the point of view of the shareholders and to ensure that the licence is granted with the minimum delay. The proposals in this memorandum are subject to detailed discussions by the parties, and when agreed in principle, subject to detailed drafting. It would be intended that the proposals, subject to their being agreed, would be incorporated into the existing draft shareholders agreement and that such agreement would be appropriately amended to take account of them. For the avoidance of doubt, this memorandum is for discussion purposes only and is without prejudice to the parties' existing situation.

"The existing shareholdings are described at 37.5, 37.5, and 25%.

It says "The IIU shares are ultimately beneficially owned by Dermot F. Desmond. The following are the proposals referred to above.

"1. Sufficient ordinary shares at par will be issued to each of Telenor and Esat to ensure the following

percentage shareholdings in Digifone as of 13 May

1996: Telenor 40, Esat Telecom 40, and IIU 20.

"2. Both Telenor and Esat will grant an option to IIU over 2.5% of the share capital of Digifone for i<sub>0</sub><sup>1</sup>/<sub>2</sub>1, or alternative, IIU will be given the right at any time after the licence issues to subscribe for such amount of ordinary shares as will give it a total of 25% of the entire issued share capital.

"3. IIU will contribute capital to Digifone in relation to the said option shares as if IIU were the owners of the same, i.e., IIU will act as if they owned 25% of the issued share capital subject to the exercise of the options described later.

"4. Telenor will have a right (the Telenor right) to acquire from IIU the option IIU has over 2.5% of the capital of Digifone (assuming IIU has such option) together with half of IIU's shareholding as of the 13th May (i.e. a further 10% or 12.5% of Digifone), as the case may be.

"The Telenor right will be exercisable at fair market value (to be defined) at any stage between the third and fifth anniversary of the execution of the shareholders agreement.

"Esat will have a right (the Esat right) to acquire from IIU the option IIU has over 2.5 percent of the capital of Digifone, assuming IIU holds the same, together with half of IIU's shareholdings as of 13 May

1996 (i.e. a further 10% or 12.5% of Digifone), as the case may be.

"The Esat right will be exercisable for one month from the date of execution of this agreement at a price of IRi;½6.5 million together with an amount equal to 50% of all capital subscribed by IIU to Digifone together with interest on such capital at 2% over DIBOR. Prior to the granting of the Esat right and entry into formal documentation, IIU must receive all the following in a form satisfactory to it:

"(A) CSFB confirm that all of the necessary funding for the Esat/Communicorp will be in place prior to 31 May 1996;

"(B) confirmation being received that IIU has been released from its underwriting obligations by all relevant parties;

"(C) confirmation being received from the Department of Transport, Energy and Communications that the revised shareholding structure will have no adverse implications for the GSM licence;

"(D) the completion of the shareholders agreement substantially in its current form incorporating the proposals set out herein;

"(E) the provisions of clause 14 of the existing draft shareholders agreement to be amended so as to provide that grade periods for any defaulting shareholder are deleted and the remedy rights for defaulting

shareholders are deleted;

"(F) an undertaking being given that irrespective of percentage shareholding controlled by Esat, Esat will have no right to vote a greater percentage of shares than that held by Telenor or alternatively, voting rights would be varied to give the same effect.

"8. The parties agree that the final documentation will contain covenants by the parties to float 20% of their shares on a recognised stock exchange no later than the fifth anniversary of this agreement. This flotation is to be arranged by IIU on normal commercial terms.

"9. The parties agree that the final documentation will contain covenants by the parties to place a minimum of 20% of the shares in Digifone at the time of flotation, such placing to be arranged by IIU, said 20% to be placed by each party pro rata to its holding.

"The foregoing proposals are to be treated as heads of terms only and non-legally binding until agreed and incorporated into formal documentation."

Now, the next document is one that we have already mentioned, and I don't want to go through it again.

It's an earlier proposal from I think it's an earlier it's a document containing a consideration by IIU of proposals by Communicorp/Mr. O'Brien to acquire part of IIU's shareholding.

In relation to the memorandum, you will see that what even if you haven't grasped all the detail of it, you will see that what the shareholders, one of the shareholders was proposing was that the configuration would go to 40:40:20 with 2.5% of IIU's 5% going to Telenor and 2.5% going to Communicorp, with IIU for a period of time, subject to other terms being agreed, having the right to vote 25% of the shares in the company, although they held only 20%, and subject to the other shareholders having a right within a short period of time to acquire larger portions of IIU's shareholding; but the whole thing was to be subject to financing being confirmed by CSFB and confirmation being received from the Department of Transport, Energy and Communications that the revised shareholding structure would have no adverse implications for the GSM licence.

I am drawing this to your attention because it was the subject of some discussion between the consortia members as to how they deal with what they saw as the Department requirement that, and the Minister's requirement, that they restore the 40:40:20 configuration.

I just want to ask you whether that particular proposal is one that you recall being brought to the Department.

A. I don't know.

Q. The next document, in Leaf 134, is November file note of Mr. O'Connell. This is an attendance by Mr. O'Connell on Mr. Digerud, Mr. Peter O'Donoghue, in connection with the licence negotiations. I think it says "Sequence information to F. Towey ASAP tomorrow"

CHAIRMAN: It's the 9th of the month, just for the record.

MR. HEALY: Yes, 9th May, which was Thursday, I think.

"They review; meet" something "shareholders. Agree joint statement. Possibly new draft tomorrow."

Mr. O'Connell has said this was his note of his meeting with Mr. Digerud and Mr. O'Donoghue to arrange to provide information required by the Department.

The next document is a note of Mr. Gerry Halpenny's of Messrs. William Fry Solicitors, again dated the 9th May 1996, in which Mr. Halpenny recalls meeting with Mr. Paul Connolly, Mr. Leslie Buckley and Mr. Owen O'Connell, in which they seem to be discussing what Mr. O'Connell in his statement calls outstanding issues in relation to the licence and associated matters such as the Esat Digifone shareholders agreement and the shareholding of Esat Digifone.

This was also on the Thursday, which was I think a week, approximately, before the issue of the licence.

It says "TN bridge dependent on the 12.5%. Knut

Digerud called to the Department to say that no cash available immediately."

Next a reference to "Denis O'Brien phone call".

"Minister of the opinion" or "impression" it's not

clear to me "that cash not available

call by KD to M. Brennan

DOB to call KD"

Bottom of the page: "Sequence of events

IIU

TN possibly sell 50% of the 40% to somebody. Tele

Danmark?"

Next line: "Cap at 40% arrow to Norway not EU

State

Irish partner

letter to sell shares Telenor said that not

prepared to sell

CSFB call by KD re the 12.5%

call to the Department re the 12.5%.

One free transfer"

That's a reference to the point I made earlier.

"Waive 12.5% pre-emption if IIU wish to sell

TN no placing to date

if public offer Esat Telecom Holdings" something

"level" I can't understand the rest of it "Offer

something at the subsidiary level"; that may be a

reference to Esat Telecom Holdings having plans to

make a public offering of its shares, which would



include, of course, its interest in Esat Digifone?

A. It looks like "offer some liquidity that a subsidiary"

Q. Yes, "offer some liquidity".

It looks like D-I-T-Y, in any case, yes.

"If there was a public offering of Holdings, something level"

This might result in money coming into the subsidiary, which would be the way it held its shares in Esat Digifone.

The next page says "Real value is at the market take out part of Holdings on flotation"?

A. I'll just offer a comment; if it was "Holdings", rather than "holding", it would probably have a capital H, if it was referring to the company as distinct from somebody's share in the company.

Q. Yes.

"Ability subject to licence to sell up to 50% of then holding without pre-emption

exclude somebody with substantial interest in telecoms in Ireland.

State that 50% only for technical reasons reaffirm the commercial basis of the deal as equal partners recognised in the shareholders agreement licence windfall provision difficult to resolve highly emotive profits over a certain level."

Now, while there were a number of matters being discussed there, including, it looks like, exit routes for the various shareholders, at this point I just want to draw your attention to where Mr. Digerud says, or where the note records "Mr. Knut Digerud called to the Department to say no cash available immediately."

Then underneath that, "Minister" I don't know whether it's "opinion" or "impression" "that cash not available. Call by Knut Digerud to Martin Brennan."

Do you recall receiving phone calls at or about this time from Mr. Digerud in which he was discussing the availability of cash?

A. I don't have any specific recall. I mean, are we am I to take it that this is talking about cash to pay the licence fee or something?

Q. Well, I am wondering.

A. I don't know.

Q. Do you recall receiving any telephone calls from Mr. Digerud at this stage in which he might have intimated to you that there were financial problems either on the company side or on the part of any member of the consortium?

A. I have no specific recall of any particular conversation, but it would not be unusual if Mr. Digerud spoke to me once or twice around that time.

Q. If you look at the next page, there is a note "Call to

the Department (re the 12.5%"); that may be a reference to the proposals that we looked at a minute ago from IIU.

A. It could be, yeah.

Q. Do you think that's the type of thing that would have been recorded in Department at the time?

A. It's very hard to know. I mean, in an ideal world, everything gets recorded in a bureaucracy, but the practice has changed over the years. Looking at it from where you are looking, the paper trail, it would be better if it were, but there is no evidence that it was.

Q. The issues being canvassed were nevertheless, I am sure you'll agree, very important ones at this stage if you were hoping to get a licence out

A. Yes.

Q. and to get the system up and running?

A. Yes.

Q. Not only was it important from that point of view, but wasn't it also important from the point of view of the IIU matters you were considering?

A. I mean, as regards 25 or 20, I think we were always clear in our own minds that it could only be 20 on the day the licence was issued; so whether we had an approach as to how they might resolve that dilemma within the consortium, I don't have any particular recall.

Q. But weren't you also being well, if the 12.5 percent being discussed here is a reference to perhaps IIU disposing of, you know, a much larger proportion of its holding or giving a right to Telenor and/or an equivalent right to Communicorp

A. I don't recall us being aware

Q. that might have an impact on how you might view, wouldn't it, IIU's role in the consortium?

A. I don't recall us being aware of anything like that.

Q. The next document is a letter from Telenor to Mr. Denis O'Brien, with a copy to Mr. Dermot Desmond, on the 10th May of 1996. It's in Leaf 136, signed by Arve Johansen. This is the 10th May, that's presumably a Friday, and therefore just six days before the licence.

"Dear Denis

"I refer to the meeting held today at which I attended together with Rolf Busch, general counsel of Telenor, Arthur Moran of Matheson Ormsby Prentice, our solicitors, and Leslie Buckley and Paul Connolly and your solicitor, Gerry Halpenny, and Knut Digerud and Owen O'Connell representing Esat Digifone. I would like to clarify our position following that meeting.

"The joint venture entered into between Communicorp and Telenor last year in order to bid for and be awarded the licence for the second GSM network in Ireland was originally based on a 50:50 participation

of Communicorp and Telenor. It was subsequently agreed that 20% would be made available to institutional investors, probably at a premium, and that accordingly, Communicorp and Telenor would each hold 40%. It has subsequently been stressed by Telenor on several occasions that the equal participation of Communicorp and Telenor is a basic condition for Telenor's involvement in the company.

"At today's meeting, Communicorp's representatives confirmed that Communicorp would adhere to such equal participation principle with respect to the control of the company, but that their presently contemplated financing arrangement necessitated a deviation from that principle with respect to the two parties' economic interest in the company.

"The bid submitted by Communicorp and Telenor was based on commitments from the Allied Irish Banks and some other parties to be the institutional investors and Advent's commitment to invest  $\frac{1}{2}$ 30,000 in Communicorp".

I don't know whether that's dollars or pounds, in fact.

A. It looks like dollars.

Q. I think in fact it was pounds, wasn't it?

A. I don't know.

Q. In fact the bid, in any case, isn't that a succinct description of the bid?

A. Yeah.

Q. "In 1995, on an unspecified date, an arrangement agreement was negotiated and signed by you alone on behalf of the company, the effect of which was to dilute Communicorp and Telenor's interest in the company from 40% each to 27.5% each and making available to the counter party to the arrangement agreement, International Underwriting and Investment Limited (IIU), 25% of the company. The purpose of the arrangement agreement was to strengthen Communicorp's ability to finance its obligations in respect of the capital required by the company. The signing of the arrangement agreement was not authorised by any resolution of the joint venture partners.

"Now we understand that Communicorp has established a further form of financing for its participation in the company which it is suggested is conditional upon Communicorp obtaining 50% of the shares of the company, leaving Telenor with 37.5% and the financing company, IIU, with 12.5%. This arrangement is conditional upon Telenor's consent to the increase in Communicorp ownership of the company from 37.5% to 50%.

As thoroughly explained to your representatives during today's meeting, Telenor cannot accept that Communicorp increases its shareholding from 37.5% to 50% without Telenor having the opportunity equally and

on the same terms and conditions to increase to a 50% ownership and maintain equal participation in the company with Communicorp. Telenor considers that this proposed arrangement as a whole jeopardizes fundamentally the basis for the joint venture between Communicorp and Telenor.

At today's meeting, Communicorp's representatives stated, however, that other sources of financing could be available to Communicorp on the basis of 27.5% ownership and without the requirement to breach the equal participation.

"Telenor would be willing to discuss a bridging arrangement giving Communicorp some time to put together financing of a 37.5% shareholding. As I hope you will understand, such a bridging arrangement would necessitate firm commitments in relation to the equal participation principle between Communicorp and Telenor and appropriate undertakings in that regard.

"If it would be convenient to you, I can make myself available in Dublin during the weekend of May 11/12 in order to discuss the above arrangements, but I will need to hear from you before 10am tomorrow as I shall otherwise depart to Oslo."

To judge from this letter, which is, as I said, dated six days before the licence, it would appear there were doubts concerning Communicorp's ability to keep up its end; isn't that right?

A. Yeah.

Q. Doubts on the part of Telenor, the partner it was with, although as I recall, I think the Minister said in the Dail that there was no doubt about the funding; isn't that right?

A. At which stage?

Q. On the 30th April.

A. Okay.

Q. I think, in fairness, the Department, through Mr. McMahan, had been told by Mr. O'Brien that it was no question but that he was able to write the cheque for the 15 million. Not Mr. O'Brien for 15 million; Esat Digifone for 15 million.

A. Yes, okay.

Q. The next document is a letter of Mr. Arve Johansen's, again on Saturday, 11th May, with five days to go, I think, in Leaf 137. It's addressed to Mr. Michael Walsh, his other partner, and he says:

"Dear Michael

"I refer to your letter of 11 May 1996 where you

"1. Enclose your letter to Communicorp of 1 May 1996

outlining the terms and conditions subject to which

IIU would be willing to sell 12.5 percent of its

shareholding in Esat Digifone Limited to Communicorp,

bringing Communicorp's shareholding in Digifone up to

50 percent, and ask Telenor Invest (Telenor) to

confirm that it would continue to support the Digifone



project in such a case, and

"2. Enclose two draft share transfer agreements

subject to which IIU would transfer 2.5 percent of its shares in Digifone each to Communicorp and to Telenor.

"The first of these points relates to the increasing of Communicorp's shareholding, and the second one relates to the 40:40:20 issue.

"First we will comment on the arrangement outlined in your letter of 1 May 1996, and then comment on the draft share transfer agreements.

"Communicorp and Telenor last year entered into a joint venture to bid for the second GSM licence in Ireland. Telenor believed that a joint venture between Communicorp and Telenor would be a strong contender for the second GSM licence in Ireland, Telenor being an experienced and successful mobile operator and having sufficient financial strength to commit to such a project and Communicorp representing first of all the Irish participation in the project.

"Although Telenor would have preferred to have a majority participating interest, Telenor accepted that the joint venture with Communicorp was established on a 50:50 basis. This was accepted despite the fact that Communicorp did not have the financial strength to carry half of the financial commitment that was necessary to support the joint venture if it was awarded the licence.

"As a consequence of Communicorp's lack of financial strength, Communicorp subsequently has invited institutional investors to participate in the project, necessitating a dilution of the existing shareholders. Communicorp has strongly argued that Telenor under the circumstances must accept a dilution of its participation, despite the fact that the dilution was caused by Communicorp's lack of financial strength. Telenor has opposed the reduction of its participating interests below that of Communicorp. On two occasions, therefore, Communicorp's and Telenor's participating interests in Digifone has thus been reduced first to 40% and then to 37.5 percent.

"The reduction of Telenor's and Communicorp's participating interests from 50 percent to 40% each followed a commitment from the Allied Irish Bank and some other institutional investors to take a 20 percent stake in Digifone, and Advent's commitment to invest \$30 million in Communicorp. The reduction from 40% to 37.5 percent followed as you will know from the arrangement agreement entered into some time in 1995 between IIU and Denis O'Brien."

That was in fact on the 29th September 1995.

"Subject to this agreement, IIU also undertook to underwrite Communicorp's financial obligations with respect to the funding of Digifone.

"Communicorp now has established yet another way of

financing its share of the funding of Digifone. This financial arrangement is organised by Credit Suisse First Boston and would, as we understand from your letter 1 May 1996, ideally require Communicorp to have 50 percent in Digifone. In your letter of 1 May 1996, you state that you would be willing to sell a 12.5 percent share in Digifone to Communicorp, bringing Communicorp's share in Digifone up to 50 percent. In return, Communicorp would pay to IIU its historical costs related to the said 12.5 percent share plus an amount equal to the subscriptions due on IIU's remaining 12.5 percent.

"First, Telenor wish to state that the transfer of 12.5 percent of the shares in Digifone from IIU to Communicorp would require Communicorp's (sic) express consent, which, as you will know from the copy you have received of our letter to Denis O'Brien of 10 May 1996, Telenor is not prepared to give.

"Second"

CHAIRMAN: Sorry to be pedantic; it was "Telenor's express consent".

MR. HEALY: Sorry, Sir; I'll read it again.

Q. "First, Telenor wish to state that the transfer of 12.5% of the shares in Digifone from IIU to Communicorp would require Telenor's express consent, which, as you will know from the copy you have received of our letter to Denis O'Brien of the 10 May

1996, Telenor is not prepared to give.

"Second, Telenor cannot confirm that it would continue to support the Digifone project if as a result of the events and arrangement described above Telenor would end up with a lower participating interest in Digifone than Communicorp.

"However, as you will know from the copy you received of our letter to Communicorp of 10 May 1996, we have offered to Communicorp to enter into a "bridging agreement" subject to which Telenor would carry Communicorp's financial obligations vis-a-vis Digifone during a limited time period, allowing Communicorp even more time to arrange its financing.

"With respect to your proposal concerning the transfer of 2.5 percent of the shares in Digifone to both Communicorp and Telenor, we consider that your handwritten points on the front page of the draft agreement need to be inserted, and in particular the mechanism for the transfer of legal title to the shares with immediate effect from the signing of the agreements. We agree that Recital A should be expanded to refer to the exact present shareholding of IIU. The two agreements require to be made interdependent on one another and should contain the usual warrant as to title to the shares being sold.

We also require that an undertaking be provided in the Telenor agreement that no further shares or interest

in shares shall be offered for sale or otherwise dealt with by IIIU without those shares or interests being first offered to Telenor. Specifically no shares or interest in shares should be offered to Communicorp or any person or entity acting in concert with Communicorp without the prior written consent of Telenor.

"Finally, we take this opportunity to stress that it is necessary for the parties to sign the shareholders agreement as soon as possible, and at latest prior to the award of the licence."

If you accept the facts and the account of the relationship between Telenor and Communicorp contained in that letter, I think you couldn't escape drawing the conclusion but that Communicorp's financial weakness had had and from the outset, had had from the outset, and if it's continuing to have destabilising effects on the constitution of the consortium, wasn't it?

A. I keep coming back to the idea that the Department dealt with the information given to the Department.

And to be asking me to comment on the wider problems or relationship issues within the consortium is it's just something I have difficulty with. I mean

Q. If what Andersen said was correct in the documentation, in the information he gave to the Tribunal, that it was his desire to get to the bottom

of Communicorp's financial problems, he might have tumbled to a lot of this, isn't that right, and you'd have been aware of it then?

A. In the plain words, I suppose, yes. But I mean, we have a dispute about or not a dispute, a difference as to whether Mr. Andersen spoke plainly about his concerns in realtime.

Q. The next document, in Leaf 138, is a note of or a memorandum of Mr. Denis O'Brien. Now, if you go to the second part of the leaf, you will see that it's been reconstituted, and it's easier to read. This was a document which Mr. O'Brien, if you turn to the last page of the memorandum for a moment, seems to have thought significant enough to require it to be witnessed, because I think it's the second page, sorry, the second page it says "Witnessed by Paul Connolly on the 11th May 1996 at 7.30pm."

Do you see that?

A. Yeah.

Q. This was Saturday, the Saturday before the licence was issued?

A. Mm-hmm.

Q. It starts off "Note to file.

"M. Walsh came to Paul Connolly office at 7pm on Sat 11 May. He had just been to a meeting with Arve Johansen, the Telenor lawyer, Rolf" that's a reference to the Rolf Busch we have just mentioned in

the meeting that was just mentioned by Mr.

Johansen "and Arthur Moran at Esat Digifone's offices.

"MW gave me a copy of a letter from Telenor addressed to IIU.

"He said Arve was getting more 'entrenched'

"I told Michael Walsh that I had been to a meeting with Dermot Desmond at 6 o'clock and Dermot Desmond had proposed the following.

"1. We would agree to buy 2.5% to add to our 37.5%."

That "we" has to be Denis O'Brien.

"2. Tell Arve that if he was not going to take up IIU's offer of the 2.5 percent, we would be happy to.

"3. We would be agreeable to sign the shareholders agreement on the 40:40:20 basis.

"4. IIU or Dermot Desmond would give CGL a loan of the cash required (or Esat Holdings)".

Essentially, that means the Denis O'Brien side of the transaction. And presumably it's a reference to the need Mr. O'Brien had to get cash to buy the 2.5 percent.

A. Yes. It comes up on the next line.

Q. Sorry; I am anticipating something else down the road.

If I read it again, it will make more sense.

"IIU or Dermot Desmond would give CGL a loan of the cash required to fund our 40% or 6 million."

That's a reference to IIU giving Mr. O'Brien a loan to

pay for the licence. Do you see that?

A. Yeah.

Q. If the licence was going to cost 50%. Then each of the 40% holders would put up 6, and the 20% holder would put up 3.

"5. Dermot Desmond said once we had the licence we were 'all in the one boat'.

"6. Dermot Desmond said he would in one transaction

(?) All together do the following:

"A, sell 5% each to Telenor and Communicorp so that we would increase to 45% each.

"B. Insist on CGL be granted an option for a further 5% of Esat Digifone, which would bring CGL's holding to 50%. DD thought that this option would be exercisable 12 months later. This was CGL to consolidate its 50 percent holding as per request from CSFB in Year 2, i.e. 1997.

"7. Dermot Desmond said he would be in a position to force through the above by the fact that Telenor would know that IIU had the right to issue the once to any one"; that's the free transfer I mentioned earlier.

If you had a right, without seeking your partner's consent, as I said, to transfer on one occasion some of your holding or all of your holdings, then you had a right, as Mr. Dermot Desmond is saying here, to force something through in the teeth of opposition from any one other partner.



It goes on, then, "Note to file:

"At 8:00pm Michael Walsh phoned DOB to say he had spoken to DD

"1. He did not want any pieces of paper around reflecting what was discussed" sorry, "He did want any pieces of paper around reflecting" I am not sure that's right, but in any case "He did want", yes, "He did want any pieces of paper around reflecting what was discussed.

"2. That 'we would have to trust DD'".

I think that would have to mean, to my mind, that in paragraph 1, it should read "He did not want".

"3. DOB said he wanted to record his understanding of what was said, as DD sometimes speaks very fast, and I wanted to make sure I full understand Dermot Desmond's proposal re: Now and the 45:45:10 proposal with 5% option for CGL.

"4. DOB asked MW to confirm that IIU would sell their 10% to Telenor, i.e., so Telenor would go from 45 to 55. He said that whatever assurance Telenor would have, we should have the same."

There seems to be a signature after that.

What this memo shows is that with five days to go, the degree of instability of being well and truly crystallised, I think, between these partners?

A. Yeah.

Q. Would you agree with that?

A. It looks like that, yeah.

Q. If you go to the next document, 139, and it's also been reconstituted. And it also appears, as I said, to suggest that contrary to what had been stated to Mr. McMahon, Communicorp did not have the 6 million to write the cheque for the licence.

The next document is a memorandum of William Fry Solicitors prepared by Mr. Owen O'Connell. It's dated 12th May, 1996, which was the Sunday before the licence was issued. The client is Esat Digifone, the matter is licence negotiations.

It says "Attendance at Fitzwilliam House. NOB, Neville O'Byrne; MW, Michael Walsh; AJ, Arve Johansen; RB, Rolf Busch; AM, Arthur Moran; OO'C, Owen O'Connell; and GFH, Gerry Halpenny", representing I think the different interests, firstly IIU, secondly Telenor, thirdly Esat Digifone, fourthly Communicorp.

The first item is "Need to increase authorised capital; to verify issued capital.

"Transfers of capital for  $\frac{1}{2}$ 15 million."

That's obviously why the capital has to be increased.

"Joint statement.

"Check board minutes re 3 million.

Increase authorised capital and bonus share premium account.

Exclude 2 by transfers, IIU to Telenor.

IIU to Esat Holdings."

This is presumably a reference to the 2.5%.

"Ensure Communicorp to Esat Telecom Holdings to Esat Digifone." I think that must be a reference to the way in which the Communicorp shareholding in Esat Digifone was going to be held.

"Communicorp security to IIU re 2.5 purchase price."

I think that's a reference to something I mentioned earlier, and I think which we'll come to again, where in order to get the money to buy the 2.5 percent of the company, Communicorp had to effectively give IIU a charge over the shares until it paid up the money. It didn't have the money to pay for the 2.5 percent, so it had to provide some security to IIU for the payment of money due on the shares.

"Telenor re 6 million (depending on underwriting or fudge)

shareholders agreement, placement memorandum."

Go to the next line: "Subordinated loans by Telenor (40%) plus IIU (60%) with conversion after 4 months to an instrument carrying effective value of shares but not votes".

Then on the left-hand side you have "Or 50/50 per Neville O'Byrne."

Next section, "2 by 2.5 to be sold to be paid end of month. Neville agreement.

"Dermot Desmond will consider 'placing' a further percentage after licence, offering equally to

Communicorp and Telenor (45:45:10). But no formal agreement to do this."

I think what this suggests is that while some agreement was evolving with regard to how the parties would take the licence, in that it looked like it looks from this that they were going to take it on a 40:40:20 basis. It also would appear that IIU were going to be left with 20% of the shares but with a security over 2.5 percent, and what was to happen after that was still somewhat unclear, but there was a possibility that it could go to a 45:45:10 configuration within a short while.

The next page is a reference to Denis O'Brien. Now, Mr. O'Brien doesn't seem to be at the doesn't seem to have been at the meeting at the outset, so it's not clear to me whether he joined the meeting or whether this is simply a reference to what he what his requirements were.

It says:

"DOB, 2.5 percent, also wants 4 months.

Funding 15 million okay, want to see specific terms.

Should be per underwriting, i.e. 60:40.

"Still want 50% and commitment from DD

2 all of 10%.

"If all of this not agreed, could not go forward on licence. Monday/Tuesday/Wednesday, would wish to await funding (due 20 May)".

You may find that of interest in light of some of the correspondence you received insisting that you produce the licence or suffer the consequences.

The next page records:

"Michael Walsh discussion, DOB".

It says:

"Telenor not willing re 50 unless they also 50.

IIU not willing to release this. Repeated terms above.

IIU will definitely not go below 10%.

Will allow Denis O'Brien until 30 May to pay for 2.5% (amount obscured but twenty something is not correct).

"Money will have to go in from Telenor and IIU.

"DOB no longer trusts DD or MW;

will seek injunction to block signing of licence."

I think that this suggests that there was something verging on a complete breakdown of stability within the consortium at this point, all due to Mr. O'Brien's financial problems.

The next document notes Denis O'Brien's response.

"2.5, two 40, straightforward, need 4 months.

"5% in writing. 45% also Telenor okay."

Suggests maybe that Mr. O'Brien was happy with the 45:45 outcome, or might be.

"Option for 5 percent at fair value within two years.

Can have same for Telenor.

Like Telenor offer 3 to 5 years, except 2 years.

All subject to confirmation by CSFB by 3pm tomorrow.

Replacing requirements by demonstrating

potential 5%

IJU to finance 40% by Communicorp.

"MW

"Will discuss DD"; presumably "will discuss with DD".

"4 months will not be acceptable. Did deal DD last night".

And I don't think the rest of that can be deciphered.

The next page:

"Deal people who renege?" something unclear "is absolutely entrenched. 'All to be cleared up by May' mortgage over shares. Right to take them back and sell them.

"Possibly not sell shares now but let DOB come up with money at any time in next 4 months.

"If Denis wants something in writing, he doesn't trust me and he can f.o."

"NO" possibly is Neville O'Byrne; I'll just check that. Unless it means "no", meaning in the negative

"2.5 percent on both sides on terms agreed last night.

Even DOB does not trust him, will not undertake to offer 10%. Unless shareholders agreement signed, will" then some unknown word "7.5% originally intended offered equally to both sides. No option agreement re any future sale of shares."

Next page, "Overall tone 'incredibly negative'.

Reduced 12.5 10 to accommodate people.

Offered to get out 3 to 5 years without charging.

Everything offered being used against him.

"DOB enormous bridges to rebuild if he wants to get anything from DD. DD contactable 15 to 20 minutes.

If DOB any sense will ring apologise profusely

tell DD what he needs and why very fast."

And then it gives an English phone number which I think we should obscure.

The next note seems to refer to what happened following a conversation between Mr. O'Brien and Mr. Desmond.

"DOB DD (following conversation)

"2.5 each re licence. 21 May but a request 14-day grace period.

"Between issue and ten days later, further 10% equally, payment terms to be agreed.

"Gentleman's agreement IIU dispose market value (Neville to define) sometime after three years, pre-emption to apply.

No board meeting tomorrow."

Next line, the end of the meeting:

"If DD agrees, so will DOB"; then a line.

Then "Telenor what about funding 40%

DOB will not press the point."

I'd just only make one point on this and ask your

observation on it, Mr. Brennan. Do you recall in the course of carrying out the evaluation and in the evaluation report; I can't identify the precise place now but Mr. Andersen, and effectively I suppose the project team, identified financial problems as things that could lead to this sort of internecine strife and jockeying for power, something that could ultimately damage a consortium?

A. Yeah, I think that is there somewhere, yeah.

Q. And that that was

A. Whether it's there in relation to this consortium or another consortium or several consortia, I don't know, but

Q. Oh, several consortia?

A. Yes, the thought is there somewhere.

Q. And he identified it as a problem that stemmed from financial weakness?

A. Yeah.

Q. Now, I hasten to add that on the basis of the information he had, he was going so far with that analysis, and we have heard the presentations, at which none of this was alluded to; I am not making the point that he had the information.

A. Okay.

Q. The next document is a note, I think to Dermot Desmond from Denis O'Brien, on William Fry notepaper, dated 12th May 1996, which was the same day as the long memo



that we have just discussed.

"Re proposal to resolve current difficulties.

"1. 2.5% to Esat Holdings. 2.5% to Telenor. That's described as to obtain licence", I think reflecting the fact that the consortium members felt they had to revert to 40:40:20 if they were to get the licence.

Would you agree with that?

A. Yeah.

Q. "Consideration to be payable by Telenor upon transfer.

Consideration by Esat Digifone to be paid by 30 May but there would be a request for a 14-day grace period from Dermot Desmond.

"2. Sometime between the issuing of the licence and 10 days later, IIU would sell a further 5% to Esat and Telenor. This leaving the parties at 45:45:10.

Payment terms to be agreed.

"3. IIU remaining 10%.

There will be a gentleman's agreement that IIU would dispose its holding at fair market value (needs the description Neville O'Byrne to define) sometime after three years. Pre-emption would apply and also offer round provision.

"I hope the foregoing reflects our telephone conversation this evening. As discussed, I will call you early tomorrow morning. In" something

"there will be no benefit in having a board meeting."

Signed Denis O'Brien.

Just briefly go to Book 150. I am not asking you to pull it out, because I don't sorry, Book 50, I beg your pardon. I am going to refer to Tab 142, Book 50, which contains Mr. O'Brien's response to the long letter that Mr. Arve Johansen said to him sent to him on the 10th May, and of which you can recall a copy was sent to Mr. Walsh, together with another letter from Mr. Arve Johansen on the 11th May. I think it's only fair that we put Mr. O'Brien's side. This is the 12th May of 1996 from CGL, Communicorp Group Limited, to Mr. Arve Johansen, managing director of Telenor International AS, 12th May 1996.

"Dear Arve

"I refer to your letter dated Friday 10 May and your letter dated 11 May to Michael Walsh.

"I am disturbed by the contents and inaccuracy of both these letters. Furthermore, your continuous personal comments throughout the meeting to my colleagues on Friday at the office of Matheson Ormsby Prentice when you questioned the integrity of Dermot Desmond IIU and myself was outrageous and totally unacceptable.

"Just to remind you of some of the things that you said were noted and minuted at the meeting.

the IIU agreement prior to the awarding of the licence 'was a method for Denis O'Brien to get back-door control of the business'.

the IIU agreement was entered into without the

knowledge of Telenor.

on a number of occasions you clearly cast  
dispersions" I suppose that means "aspersions"

"on my character. Having repeated these  
aspersions, both Leslie Buckley and Paul Connolly  
stated that they were not prepared to accept the  
personal nature and basis of your allegations.

"This kind of behaviour is not acceptable to us as  
partners and prevents reasonable discussion and debate  
taking place.

"May I now remind you of the sequence of events.

"IIU conspiracy theory"

"1. On Friday, 22 September 1995, I travelled to Oslo  
to meet with Sjern Malm and yourself to discuss the  
GSM bid and the participation of IIU in the  
consortium. Per Simonsen also joined us later on in  
the meeting. I had received a letter dated 15  
September (copy attached) from Knut Haga Saturday that  
Advent's letter of financial support was not  
acceptable. IIU participation for 25% of the equity  
in Esat Digifone was brought about for two reasons.  
Firstly, it was viewed that the consortium needed more  
firmly committed Irish investment content as the other  
institutional letters from IBI, AIB, Standard Life  
were letters of intent and not legally binding; the  
other reason being that Telenor had rejected Advent's  
letter of financial support.

"In your letter dated 2 October 1995, which I enclose, you state 'in order to reassure the Ministry and to give an even stronger signal to the Irish community in general, we are pleased with the plan to have another solid Irish underwriter". It was also viewed that by having 62.5% Irish content, the bid would be greatly enhanced.

"Later in the same letter you state "But on the basis of the joint venture and shareholders agreement, we feel obliged and accept a pro rata dilution to 37.5%. Any further dilution would be in conflict with the principles of our participation and the board resolution of Telenor AS". The Norwegian content (non-EU) was deemed to be high at 40%, particularly since Sjern Malm and Per Simonsen told me on the 27 April 1995 that Telenor would be selling off half its interest within 12 months to Tele Danmark (from an EU member).

"At our meeting on 22 September 1995 in Oslo I made two requests

"1. Communicorp Group did not want to reduce its holding to 37.5% as we were the lead consortium member, having spent two years on the bid, thus we wanted to maintain our 40% interest and asked for Telenor to reduce to 25% with IIU at 25%. Despite reasoned and rational arguments on our side, you rejected this request.

"2. Telenor had refused to go pari passu on the bid costs, which at the time were running at 1.5 to 1.6 million. I had asked you to go pari passu, and you refused, despite reasoned argument by me on behalf of Communicorp. However, your letter of 2 October 1995 did state that 'Telenor, based on the agreement, will absorb its equitable share of these costs. If, however, you feel that Communicorp for some reason is not fully compensated, we are willing to discuss this problem in further detail'. Both myself and my colleagues did raise this matter with yourself and Knut Haga, but we were told that Telenor was not prepared to go pari passu. In essence Communicorp risked 1.1 million on the licence while Telenor were only prepared to risk .5 million. This was not the behaviour of a partner.

"To finish on this point, I feel it is incomprehensible that you are still arguing that IIU have a 20% holding and that you want Communicorp to cede 5% to IIU. You also claim that Telenor never approved IIU participation in our consortium. This is in direct contradiction to your letter of October. In fact you told the meeting on Friday last, minutes of which have been passed to me, that 'I do not accept the arrangement with IIU'. All documentation between IIU and Esat Digifone was reviewed and cleared in advance of signing by Telenor executives.

"Clearly you have now arrived at a situation, despite your letter of 2 October, that you disagree with both partners, Communicorp and IIU.

12.5% shareholding issue:

"IIU hosted an Esat Digifone shareholders breakfast meeting on 9 February. At this meeting I formally asked both Telenor and IIU whether they would be interested in selling Communicorp 12.5% as our investment advisers in New York, Credit Suisse First Boston, had advised us that US investors would want us to consolidate our holding in Esat Digifone.

Initially we thought it would need 12.6% in order to consolidate our holding, for accounting reasons, but subsequently we were informed by KPMG that only 50% was required. We informed IIU of this. Subsequently Telenor wrote to us to say they were not interested in selling any shares. On the 27 February we wrote to Knut Digerud to say that we were pursuing a deal with IIU to purchase 12.5% interest from them.

At all stages we were frank about our pressing need to purchase 12.5% in order to complete our US placing.

Richard O'Toole, representing Communicorp, had also been open with Knut Haga during the detailed shareholder agreement negotiations.

"In fact we did not ask for any changes in the shareholders agreement to reflect a 5% shareholding.

We negotiated in good faith on the basis of equality

with no one partner dominating another. We wanted the shareholders agreement to reflect this basic principle and pushed for this outcome.

"Since the 27 February you knew we were going ahead with the purchase of 12.5% from IIU and with the placing in US with CSFB to finance 5% economic interest in Esat Digifone. At our meeting on 2 May I updated you on the CSFB placing and drew out a financing chart. You expressed some concern about Communicorp increasing to 50%, but I again explained the rationale for this, as we needed this economic interest to close the placing. You also told me before you left my offices to Canadian Ambassador's residence to sign the Nortel contract that 'there would not have been a licence without Denis O'Brien'.

"At 7.30 p.m. I received a conference call from Scott Seaton, managing director of CSFB, and his colleague, who was in charge of our placing, shown to me. They told me that you had contacted them to ask about the Communicorp placing and whether we needed to consolidate our 50% shareholding in Esat Digifone.

They asked whether I had given you permission to talk to them directly about the placing. I told them absolutely no. Arve, you interfered without any permission by calling my company's investment bank, CSFB, to seek information regarding our forthcoming placement. You had absolutely no right nor did you

receive any consent to do this.

"Appointment of Barry Maloney and Knut Digerud.

"Barry Maloney helped write the bid and led as Deputy CEO in the oral hearing to the Department on the 12th of September 1995. It was clearly stated in the bid document that he was taking up the position of Deputy CEO if we were successful with the bid.

When we won the licence you questioned the validity of his appointment, saying he was too expensive, despite the fact that Telenor representatives in June 1995 said he had all the necessary qualifications for the job. His CV was given to executives at that stage.

"This is another example of you trying to break an agreement that was clearly in place. Three months later, in February 1996, you eventually confirmed that the original appointment of Barry Maloney was the right decision. You personally delayed the appointment of Barry Maloney and caused unnecessary delay in progressing the project before Knut Digerud joined the company.

"What we found extraordinary as a partner was that you sent over Jan Edvard Thygesen in November 1995 knowing he was not going to stay as CEO because of his family commitments. In February 1996 you met me in the Davenport Hotel and went through a short list of five potential replacements for Jan Edvard Thygesen. Knut Digerud was on this list. You told me that you would



go and talk to each of them and come back to me with a recommendation before progressing with an appointment.

This did not happen. The first we knew about Knut Digerud's appointment was when he came to my office and told me that he was the new CEO and that his wife was going to be appointed to a position in the company and that he would be paid 180,000 per annum as a salary, i.e. the same salary as Barry Maloney, whose salary level you had previously questioned. In essence you made this appointment without consultation with myself or the board and without advance warning.

You subsequently wrote to me on 12 March 1996 informing me of his appointment. This is not the behaviour of a partner. Despite five requests for a copy of his CV, I am still waiting. Surely this is a reasonable request in the circumstances. I do not doubt Knut's ability, but he was seconded from Telenor to Esat Digifone. Consequently it is not acceptable for him to be given a 2 percent equity option in Esat Digifone as per your request at our recent meeting. I understand IIU also have the same view.

"Despite all the foregoing events, which are factual in content, and despite your behaviour throughout last Friday's meeting, and because of the critical importance of resolving the outstanding matters quickly, you must understand that we have had our problems in closing our CSFB placing on 20 May and

that the economic purchase of the 12.5% from IIU is of critical importance to complete this placing. There is no alternative financing package.

"My understanding of a partnership is that all parties are treated properly with respect and consideration and without rancour. Provided these principles are applied, I am happy to meet with representatives of Telenor."

Now, I have drawn that letter to your attention for two reasons. Firstly, because I think it's only fair to read it out, having read out Mr. Johansen's letter to Mr. O'Brien; secondly, to show that as of that moment there were, according to Mr. O'Brien, significant problems on his part financing his end of the project, so much so that he asserted that if Mr. Johansen couldn't agree to his proposal, there was no alternative financing arrangement available.

MR. HEALY: It's one o'clock, Sir; I think

CHAIRMAN: Yes, it's probably an appropriate time to rise.

I might mention one procedural matter, and in this regard I am primarily addressing Mr. Fitzgerald, Mr. Gerry Kelly, and Mr. Fanning. As we come relatively near to the conclusion of the principal evidence given by Mr. Brennan, the matter arises of the sequence in which other counsel may be enabled to examine Mr. Brennan. I have no doubt that Mr. Nesbitt or Mr.

O'Donnell, Mr. Brennan being their client, should be the final substantive persons to conduct an examination subject, as is usual, to Mr. Healy's final right of rejoinder or a sweeper, in effective terms, on behalf of the Tribunal, but the issue of the sequence as between Telenor, Mr. O'Brien and Mr. Lowry is one that perhaps counsel might consider in the first instance. I am anxious that the sequence be the one that is both the fairest and the most efficient and that will not give rise to needless situations of counsel having to feel that he or she must return to a particular witness, and in this regard, the degree to which witnesses on behalf of a particular entity may have made statements to the Tribunal may be of some relevance.

So I'd ask counsel perhaps to confer amongst themselves, and if needs be, with Tribunal counsel, overnight to see if a consensus can be reached. If not, I'll rule on the matter with a view to finalising Mr. Brennan's evidence, as we discussed.

A quarter past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: Thank you, Mr. Brennan. If you'd go to Book 44 now, please. If you go to Leaf 210.

This is a letter dated 7th May, 1996. Now, you will recall that on the 7th May, according to Mr. O'Connell, there had been a conversation between Mr. O'Connell and Mr. Towey in which Mr. Towey conveyed the Minister's preference for a 40:40:20 configuration. And you'll be aware from this morning of all of the, if you like, internecine feuding between the various members of the consortium around this time right up until the I think the 12th, it went to; in fact it goes right up to until slightly later. But I just want to put this letter and some other documents in that context.

This is a letter to the Minister on the 7th May.

"Dear Minister,

"We are writing on behalf of our clients Esat Digifone Limited in connection with the pending grant to our clients of the second GSM mobile telephone licence for Ireland.

As you know, our clients were informed on the 25 October last of the decision taken in principle to grant them the licence. Since that time, on the basis of the promised licence, they have incurred extensive commitments and expenditure including 120 full-time employees with more employees being taken on at present.

a 25-year lease on 24,000 sq. Feet premises in Dublin.

a contract in excess of 30 million with Northern Telecom for network construction multi million pound contracts for other elements of the network, including backbone with Siemens, software, billing systems, etc.

the arrangement of finance facilities in excess of IR£170 million.

"All of these things have been done in anticipation of the licence being granted early in 1996. This did not occur, and our clients are accordingly facing massive losses if the present delay continues. You will appreciate that the licence necessitates capital expenditure of over 100 million mostly in advance of any revenue being received. Our client cannot be expected to incur expenditure on such a scale unless the licence is granted.

"We understand your predicament, having regard especially to the voluminous adverse publicity stirred up by losing contenders for the licence and the complaint made to the European Commission by the Persona consortium. As you know, it is our view that there is no foundation whatever for either the publicity or the complaint and that the competition for this licence was won fairly by our clients on the basis of separate assessments made by your Department and independent consultants according to previously announced criteria.

Our clients' expenditure is predicated on the assumption that they will be in a position to achieve very large sales in the period before Christmas 1996. This in turn requires the establishment of a comprehensive and tested network in autumn of 1996. Delay in the pretrading period will cost our clients millions of pounds. If the licence is not granted within the next week, launch of the Esat Digifone service in October may have to be abandoned, with a huge impact on the project's finances which may never be recovered.

"In all the circumstances, we must appeal to you as a matter of the utmost urgency to grant our clients the licence promised them without any further delay. We would like to assure you that everything necessary to be done by us or our clients or their other advisers either has been or will be done forthwith on request".

Are you aware of or do you recall that letter coming into the Department around this time?

A. I don't have a specific recall of it. I think the date you said was the 7th. It was faxed in on the 7th. I know I wasn't there that day, but that's not to say I didn't see the letter the next day or something like that.

Q. The previous letter the Department received from Mr. Digerud, do you remember, suggesting that the consortium were losing vast sums of money because of

delay on the part of the Department in dealing with the licence, was responded to and became the subject of a meeting; isn't that right?

A. Yeah.

Q. And Mr. Digerud, I think, to coin a phrase, backed down, would be a fair way of putting it.

A. Yeah.

Q. This letter suggests that large expenses were being incurred by the consortium and that the consortium were ready to roll, as it were, of that date. And it went on to suggest, I think, that the Department were in a predicament that was delaying the licence in some way connected with the complaint to the European Commission. Would I be right in saying that wasn't a source of any significant delay?

A. I think we were reluctant to issue the licence until we saw where the complaint was going.

Q. I appreciate that, but was that the source of a significant delay?

A. I don't think it was a particularly prolonged delay.

Q. Am I right in thinking there are no documents where the Department has said "We can't issue the licence because we need to deal with the complaint"?

A. I don't know whether there are or not.

Q. I think at one point you did say you'd rather have meetings with the disappointed contestants before you issued the licence, but that was a matter of days;

isn't that right?

A. Mmm.

Q. You felt it would be discourteous to have a meeting with a disappointed contestant after you had actually issued the licence?

A. I think that's true, yeah.

Q. We're talking about days, or a week or so; nothing more than that?

A. I don't think we could have predicted how long it would have taken to get the Commission to accept our view of the Persona complaint. As it happened, it didn't take very long.

Q. Mm-hmm.

A. But we would have been hesitant about issuing a licence if there was still a serious threat of intervention by the Commission.

Q. There had been no suggestion, as far as I can judge from that letter, to Esat Digifone that you were not prepared to issue the licence to them until you had formally considered whether you'd accept or whether you'd run with the involvement of IIU in the consortium.

A. I am not sure whether there was or not. There may not have been.

Q. While it is true to say that at the meeting of the 3rd May, the records of that meeting suggest that you wanted explanations and you wanted information



regarding IIU, I think I am right in saying that there is nothing in the notes of the meetings nor anything in the documentation in the form of a formal letter from the Department saying "We are not prepared to accept this until we have looked into it"; isn't that right?

A. There was some evidence in documents you opened yesterday from Mr. Mr. McMahon's side that there was dialogue going on about the make-up of the consortium, but there are people better able to deal with that here than I am.

Q. What the documents suggest is that Mr. McMahon indicated that he was unhappy with the  
40:40:20 sorry, with the, I beg your pardon, he was unhappy with the absence of the 40:40:20, I beg your pardon but there was no formal requirement, as I see it, documented, either in the form of a letter or otherwise, to the effect that the Department had said, "Look, we are not prepared to run with IIU/Dermot Desmond at all until we have looked into this matter"?

A. There may well not have been such a letter, but it is still clear from what was going on that the Department was considering the matter.

Q. I appreciate that. And I know that's your evidence. If you go to the next document, Document 211, this follows Mr. Lowry's discussions with Mr. Van Miert in Brussels in which he I think received an intimation

from Mr. Van Miert that he could proceed notwithstanding the complaint. Isn't that right?

A. Yeah, I am just scanning it here.

Q. I am not interested in the Persona complaint side of it. So that's my general impression of what happened.

A. Okay.

Q. I am more interested in the opening portion of the statement, where it says "In line with my policy of maintaining an open and constructive relationship with the Commission, I met Commissioner van Miert to inform him of my intention to issue a second mobile phone licence in the very near future."

He goes on to say that he is satisfied that Commissioner van Miert indicated to him that there was no justification for acceding to Persona's request for interim measures.

A. Mm-hmm.

CHAIRMAN: Just to clarify for the public

Q. MR. HEALY: Interim measures being the form of an injunction to stop you issuing the licence. The Commission are saying we are not going to stop you

A. Such measures were requested in the complaint, is my recollection.

Q. The Minister nevertheless made a public statement here that he was going to that he intended to issue the licence. How could he have made that statement, in light of the fact that the Department hadn't completed

their consideration of the IIU issue?

A. I don't know. I am certain that I wasn't in Brussels.

And I think it's likely that whoever was with the Minister in Brussels was the one who drafted the press release.

Q. If you go to the next document, which I originally thought was subsequent in date to the Minister's statement, but in fact it's earlier. It's a record of an informal Government decision of the 23rd April.

It says: "The Minister for Transport, Energy and Communications referred to the official press conference arranged by his Department on Friday 19 April, which had gone very well. The terms of the proposed contract had been agreed with Esat Digifone. Legal clearance was awaited from the Attorney General's Office.

"As regards the question of disclosure of information to the unsuccessful bidders, the Attorney General's advice had been sought as to what might be disclosed without breaching the confidentiality undertakings.

The Minister indicated that he was fully satisfied that the competition which had taken place would withstand any scrutiny, whether in court or elsewhere."

Again, doesn't this document suggest that the Minister was proposing to go ahead to grant a licence to Esat Digifone?

A. On its face it does, yeah.

Q. And that effectively the Government was brought into the loop on making this decision?

A. That looks like that, yeah.

Q. Although, to judge from what you are telling me yesterday and I think what you have repeatedly informed the Tribunal, there had been no consideration, or if there had been some consideration given, it hadn't been completed by this time, in relation to whether 20 percent or 25 percent of the consortium as it then stood would be accepted or not?

A. Yes, my recollection is we were still taking advice and carrying out some scrutiny in relation to two aspects of this matter as of that time and for a little while afterwards. One was still seeking hard information on the wherewithal of IIU, and the other was the Attorney General's Office and legal advice about the application.

Now, in what circumstances the Minister had this discussion with the Government, or with Government, I don't know. I don't know whether Mr. Loughrey was involved in it or not. But as I have said before, you will have such witnesses in due course.

Q. I presume I'd be right in saying that if the Minister was going to Government, this is something that would have involved his civil servants, maybe not you?

A. Well, the absence in these papers of an aide-memoire

or a memorandum of any kind could mean there was something done orally between himself and Mr.

Loughrey. You know, if there is a Government today you might as well mention sort of thing.

Q. I follow.

A. And then, because there is no written word, you have no control over the words used.

Q. Yes, I understand that, and I accept that especially since it's such obviously something that you didn't take up much time in the Cabinet, but if you look at the date of it, the 23rd May, 23rd April, the fact as of that moment, from what you have told me, in the Department was that you were 25 percent short of a consortium if you like?

A. Mm-hmm.

Q. How could the Minister, if he had been fully briefed by his civil servants, have taken the view that everything was fine, everything is on track, everything is fine, we have no problems?

A. I don't know. You are mentioning a date of 23rd April for this note.

Q. Yes.

A. I can't see that date.

Q. It's not on it. I am sorry, I have had to find out.

A. I have no idea.

Q. And the same goes for the it was the Secretary to the Government informed the Tribunal of that date of

the 23rd May. But the same 23rd April, sorry. But the 8th May 1996 statement was one that was presumably issued in the Department; isn't that right?

A. Which one of the 8th May?

Q. Mr. Lowry's press statement.

A. Issued in Brussels, I think. Well, I don't know.

What I said earlier about this is that I clearly wasn't at the meeting in Brussels. And the statement couldn't have been drafted until after the meeting.

So whether the meeting whether the statement was drafted by whoever was accompanying the Minister and sent home for issue, I just don't know.

Q. If you look at the informal Government decision, that's copied to the Secretary, Mr. Loughrey; to Mr. Fitzgerald; Mr. Colin McCrea, the programme manager; and you?

A. Yeah.

Q. Wouldn't you have felt that that was significantly overstating the position in light of the facts as you knew them?

A. If I thought about it, yes.

Q. On the plain words of what both these documents contain, don't they suggest that the decision on the licence was wrapped up, and all that required to be done was to cross the Ts and dot a few Is and hand it out?

A. I don't think that's borne out by other documentation

which I presume I am fairly confident is in this folder.

Q. Yes, you are absolutely right about that.

A. Where we as civil servants were still examining the two aspects I referred to.

Q. I appreciate what you are saying, that civil servants had not concluded matters, and we know from the documents that we are going to examine in a moment that there was still a lot of work to be done. But how did the Minister or how could the Minister have formed the impression that the terms of the proposed contract had been agreed with Esat Digifone and legal clearance was the only thing that was awaited from the Attorney General's Office? How could he have formed that impression, knowing that in fact he had a huge problem?

A. Well, for me, legal clearance is more than legal clearance of the licence. I am sure that we were still examining the ownership issue with the Attorney General's Office. Now

Q. What use was legal clearance on that if the ownership issue it was one thing to have a different consortium; it was another thing to know whether that consortium would stand up. All you had was an indication that IUU were going to be involved.

A. Yeah, I mean, I am clear and I just keep repeating the same thing: The Department was still looking at

the financial issue and still looking at the legal issue at that point.

Q. As far as the Minister was concerned, doesn't it look like he was giving out this licence to Esat Digifone anyway? I understand your position.

A. I don't know the extent to which there is a tendency to personalise things in the Minister, in the following sense and only the following sense: This press release was drafted by somebody accompanying the Minister, since Ministers don't write press releases. Now, as of this moment, I don't know who accompanied him, but the Department's records should be able to show who accompanied him. Whoever that was clearly would have drafted the press release.

Now, whether the press officer was with him or whether Mr. McMahon or Mr. Loughrey was with him, I don't know who was with him. But the press release, I would say, was drafted by the civil servants. Now, which ones, you will have to find out. I don't know.

Q. Well, we'll look at the work that was being done before we come back to the press release.

I am just reminded about one aspect of it. The press release of course is drafted by whoever was with the Minister, but it was the Minister, presumably, who procured that informal decision that's recorded on the overhead projector?

A. Yes. No doubt about that.



Q. If the Minister had committed himself to a decision like that, it would put some pressure on the Department, wouldn't it?

A. Again, I raised some doubt about the sentence about awaiting legal clearance. That could be only the contract was awaiting legal clearance. I am satisfied in my own mind that the Department was awaiting a legal analysis on the ownership issue. Now, how that was conveyed and how was it interpreted by whoever wrote the minute of the Government discussion, I just can't account for.

Q. Well, as far as I can see, you never got clarification, or else you never pursued clarification on the ownership issue. The only ownership issue upon which you got clarification, to judge from communications the Tribunal has received from the Attorney General's Office this morning, is on the ownership issue post issue of the licence, Article 8 issues.

A. I can't respond to that on my feet without documentation.

Q. I have mentioned it to you yesterday.

A. Okay. It certainly is clear in my mind that we were seeking advice about the ownership issue. What I am less clear on is what advice we got.

Q. Leaving aside the question of legal advice on the ownership issue, even assuming you got legal advice on

it, you were still faced with the question of would this new owner be acceptable? I think that's what you told me yesterday.

A. Acceptable from the point of view of and this is the heart of the legal advice that I believe the Department was looking for acceptable in the context of the application at one level and acceptable in the context of wherewithal at another level.

Q. All right. Well, before I go through the steps that were taken, I just want to make it clear so that you'll understand the documentary position.

As far as I can see, there is no letter or other communication from the Attorney General's Office, or from anybody else with legal expertise on the issue, of the change in the ownership of the consortium from the time of the application up to the time of the issue of the licence. Nor is there any legal advice from the Attorney General's Office as to what steps should be taken, or what evaluation should now be conducted, or what process should be gone through to evaluate this new information concerning the new consortium or the new member of the consortium.

Now, as far as I can see, there is no information concerning that. The issue, as far as I can see, was never addressed. I want to you understand there is no document, as far as I can see, to that effect, before I go through what actually did happen.

A. But you will be meeting other witnesses who were involved in various discussions and contacts. How much of it is on the record and how much of it is oral, I can't account for.

Q. The Tribunal has received a communication from the Attorney General himself who says that the examination of the records in his office shows that the only advice given was in connection with the ownership issue going forward.

Now, I am happy to look again at the documentation.

If we go on to Leaf 21,3 and we have a note of a printed or a typed minute of a meeting of the 13 May 1996 at your office in the Department of Transport, Energy and Communications, Kildare Street, attended by Mr. Knut Digerud, Mr. Owen O'Connell, yourself, and Mr. Fintan Towey. The meeting, as I think we may have discussed already, commenced at around 12.30pm and concluded at ten past one.

This is not a transcription by the Tribunal of what occurred at the meeting; this is in fact the document prepared by Mr. O'Connell immediately after the meeting. It seems to have been typed sometime around three o'clock on the day of the meeting.

"The meeting was held in Martin Brennan's office, etc." And the subject under discussion was the imminent grant to Esat Digifone Limited of the second GSM licence.

"After an exchange of courtesies the meeting began with KD handing a number of letters to MB with copies thereof to FT. Copies of the letter in question are enclosed." We can look at those later on.

"MB and FT scanned the letters, with MB noticeably pausing to read closely the letters concerning IIU.

He noted that Farrell Grant Sparks were IIU auditors and commented that he would like to have known this fact earlier (this was generally taken to be a reference to Greg Sparks' position as programme manager to An Tanaiste, Dick Spring). MB then said that he would send the documents to the Department's in-house accountant and also to an accountant in the Department of Finance who was awaiting them. He said there may well be requests for further information and/or clarification of the letters, but it was quite likely that more information would be required in relation to IIU, specifically, more than a statement that they have money i.e. what money?"

"There was some general discussion about the purpose and manner of presentation of the letters, all of which was acknowledged by MB and FT."

Now, I think I'll just mention this before we pass on to the next part of the memorandum. If you go to Leaf 214 for a moment, the first letter is a letter from Knut Digerud in which he encloses the documents and listed them: a letter from Telenor concerning support

for the project; a letter from Arthur Anderson concerning the ownership and finances of Telenor; a letter from IIU; a letter from Farrell Grant Sparks, advisers and auditors to Dermot Desmond, the beneficial owner of International Investment and Underwriting Limited; a letter from Paul Connolly of Communicorp Group; a letter from KPMG, auditors to Communicorp Group; a letter from ABN-AMRO Bank. And finally he says "Confirmation will be given on or before the grant of the licence that the company is owned as to 40% each by Telenor Invest, a wholly-owned subsidiary of Telenor AS, and Esat Telecommunications Holdings Limited, a wholly-owned subsidiary of Communicorp Group Limited, and as to 20% by IIU Nominees Limited holding on behalf of Mr. Dermot Desmond. IIU Nominees Limited is a wholly-owned subsidiary of International Investment and Underwriting Limited, which in turn is also wholly owned by Mr. Dermot Desmond."

The next document, then, is a letter of the same day, 13th May 1995, from Arve Johansen addressed to you. He refers to the meeting of the 3rd May 1996 and to your request with respect to confirmation of Telenor's commitment to supporting the Esat Digifone project. And again, you see that he refers to your request and doesn't suggest that he is volunteering it.

"Thus I can confirm the long-term commitment of

Telenor Invest AS as to this project and its determination that Ireland's second GSM network is successfully constructed, launched and operated.

"Telenor is, as you will see from the enclosed documentation, fully capable of financing its share of the necessary investments in order for Digifone to implement a GSM network in Ireland in compliance with the licensing terms. Furthermore, Telenor is both capable and willing to increase its financial commitment if necessary. Such increase in financial commitment would require that Telenor reach agreement with other interested parties as to its implications for Telenor's influence over Digifone and its operations.

"For your further reference, please also find attached some extra information related to Telenor and its international activities over the last months."

And there is a list of those, a couple of documents vouching Telenor's international involvements.

The next document is a letter from Arthur Anderson, certifying that as auditors of Telenor AS and Telenor Invest, they confirm the following:

"1. Telenor AS holds its investment in Esat Digifone through its wholly-owned subsidiary Telenor AS, and accordingly Telenor AS is the beneficial owner of this investment.

"We understand that under the business plan Telenor

Invest AS will be required to invest approximately  
IRi½20.8 million in Esat Digifone Limited, and we can  
confirm that our client Telenor AS is in a financial  
position to make these funds available to Telenor  
Invest AS and to meet its commitments under the  
business plan.

"Should you require any additional information, please  
contact Mr. Olve Gravrak of this office."

In any case, Telenor was effectively the Norwegian  
equivalent of Telecom Eireann, wasn't it? It was a  
wholly-owned State company?

A. I think that's right.

Q. The Norwegian Government were hardly going to fail to  
fund the project.

A. I wouldn't necessarily jump from one statement to the  
other there.

Q. Which one wouldn't you jump to?

A. The jump to the Norwegian Government was hardly going  
to fail to fulfil the project. There were a  
cases a recent case where ESB was going to do a  
project in Poland and our Government said "Too big a  
bite; no, thanks".

So I mean, you just went from the fact that they were  
a Norwegian State company to the Norwegian Government  
was hardly going to fail. State bodies don't operate  
in that close relationship with Government. Sometimes  
they are given a remit, and sometimes they require

specific approvals. In our own case, State bodies have to come back to Government for Telecom Eireann things and so on.

I am just saying I wouldn't make the leap in the way you make it.

Q. Well I just want to maybe you should just understand the leap I am making. I am not suggesting the Norwegian State Government were going to support this until Telenor had entered into the arrangements, but you are hardly suggesting that once the Norwegian Government allowed Telenor to enter into the commitment, they were going to pull back, no more than the Irish Government would allow ESB to break a contract if it entered into abroad?

A. Using staying with the ESB example, and it's not a great idea

Q. It was you introduced the ESB.

A. If the ESB went into a major contract abroad and got it approved on the basis that it would have a joint venture partner at 50 percent, and then came back to Government and said "We are taking a hundred percent of that project", it cannot be taken as read that the Government would automatically say yes. That's the only point I am making about it.

CHAIRMAN: I don't think we need I think the point that perhaps governments are a little bit less committed to away matches is one that might be



Q. MR. HEALY: I take it you were quite satisfied they were committed here to this?

A. I was quite satisfied that Telenor had given a letter of commitment.

Q. And I presume

A. Well, I would take it as read that they had the authority to do so.

Q. That's what I mean, yes. But they were what we'd call a semi-State company?

A. Yeah.

Q. The next document is a letter from IIU, from the secretary of the company.

"Dear Sirs,

"International Investment and Underwriting Limited is 100 percent beneficially owned by Dermot F. Desmond.

"The directors are:

"Dermot Desmond

Michael Walsh

Chris McHugh

Nigel McDermott"

The next document is a letter from Farrell Grant

Sparks, accountants. It says:

"Dear Sirs,

"We act as financial advisers and auditors to Dermot

F. Desmond. We confirm that Mr. Desmond is the

beneficial owner of 100 percent of International

Investment and Underwriting Limited. We are informed

that Mr. Desmond/IIU have undertaken to invest and/or underwrite an equity investment of up to 40 million in Esat Digifone Limited. We confirm that Mr. Desmond is in a position to make this investment and to make the underwriting commitment."

The next document is a letter from Communicorp, dated 13th May.

"Dear Mr. Brennan" it refers to the request for information and says, if you look at the listed points:

"1. I attach a chart which, together with the notes thereto, correctly states the current ownership of CGL.

"2. CGL owns 100 percent of the issued share capital of Esat Telecommunications Holdings Limited and confirmation will be given on or before grant of second GSM licence that ETH owns 40% of the issued share capital of Esat Digifone Limited.

"3. CGL is also the owner, through a number of other subsidiaries, of certain radio stations and interests.

With the exception of the disposal of the radio station in Stockholm for market value, neither of these interests nor the percentage ownerships of CGL therein have changed since submission of our bid for the second GSM licence in 1995.

"4. CGL's financing commitments to Esat Digifone Limited, as outlined in the 1995 bid, are underwritten

by or through International Investment and

Underwriting Limited.

"5. I wish to confirm the long-term commitment of ETH, of which I am also a director, to this project and its determination that Ireland's second GSM network is successfully constructed and launched and operated. Furthermore, CGL is both capable and willing to increase its financial commitment through Esat Telecom Holdings. If necessary, such increases in financial commitment would require that CGL/ETH reach agreement with other interested parties as to its implications for CGL/ETH's influence over Esat Digifone and its operations.

"Should you require further details and clarification, please let me know."

You also received a letter from ABN-AMRO, which I don't think we need to go into. That was referring to the project finance. And you received a letter from KPMG, chartered accountants, saying "Dear Sirs,

"With regard to Communicorp Group Limited, we act as auditors to Communicorp Group. We have been requested by the directors of the company to write to you to confirm the following matters in connection with their joint application through Esat Digifone for the second GSM cellular mobile licence.

"1. The company has appointed CS First Boston as exclusive agent for the purpose of a private placement

in its subsidiary Esat Telecommunications Holdings Limited. The placement is being offered in the USA to a limited number of institutional investors.

"The amount of funds expected to be raised in the placement is at least 22 million.

"The placement process is at an advanced stage and is expected to complete shortly.

"The company has in addition entered into an agreement with IIU dated 29 September 1995 under which IIU has undertaken to arrange underwriting for the company's proposed interest through its subsidiary, Esat Telecommunications Holdings Limited, in Esat Digifone Limited. IIU have confirmed that they have arranged underwriting."

Now, this was the first time you received, I think, documentation or certification post the announcement of the winner of the competition concerning the financial capacity of the members of the consortium; isn't that right?

A. I think so, yeah.

Q. And you were going to have to judge from the fact that you issued the licence on the 16th, two days in which to scrutinise it. The licence was issued on the 16th?

A. Yes, okay.

Q. If we go back to the memorandum.

You already, apparently, judging from the memorandum, drew attention to the fact that the information

required in relation to IIU would not be enough and that it wasn't enough to state that they had money. You wanted to know what money. At that stage you don't seem to have made any reference to the information provided by Communicorp, having regard to the terms of the evaluation report's recommendation that you obtain or write conditions into the licence to deal with Communicorp's financial status; isn't that right?

A. It looks to me, from the documentation we have here, that it was all being handled together at that point.

Q. It does, yes, but I am simply stating what I assume is a fact. You had a query even from your quick, cursory look at the documents, you had a query in relation to IIU. You don't seem to have raised any query at that point concerning Communicorp.

A. But isn't it true to say that some days back in evidence, it's clear that I made it clear to Denis O'Brien that we would have to be satisfied about all of these matters before we issue a licence?

Q. Correct.

A. So I mean, that's where we were at. We were still

Q. I am just trying to see what could be done in the available time. You had two days in which to do it.

It was going to be an awful lot to do in two days. I think I suggested earlier that you had left yourself with very little time.

A. You are saying I left myself very little time?

Q. Well, the Department left itself with very little time.

A. Okay. Again, it's another issue where there is no alternative to awaiting the evidence of other witnesses, of whom, I believe, Messrs. Buggy and Loughrey will be key.

Q. I understand that from the documents, yes.

"There was some general discussion about the purpose and manner of presentation of the letters, all of which was acknowledged by MB and FT. FT made the point that the bid had referred to 20% of the company being placed with the 'blue-chip institutions', acknowledging that the institutions in question were not identified."

Now, I am not sure whether you can draw that conclusion, that a reference to the blue-chip institutions was an acknowledgment that they were not identified. We all know that they were in fact identified; isn't that right?

A. Subject to conversations we have previously had about whether the list was exclusive or not, yes, but bearing in mind

Q. They were identified in the bid and they were identified in the presentation; absolutely no doubt about that. Isn't that right?

A. Okay.

Q. And not only were they identified, they were identified in a formal letter which accompanied the application, and you were told "We do not want their names to be mentioned".

A. Yes.

Q. And as I can recall, that was a fairly exclusive list, and I don't think there was room for any more; but we may have to differ on that.

"He queried IIU's intentions in regard to placing of its holding. Mr. O'Connell replied that IIU was a financial institution and qualified under the bid description, so the placing question should not arise;"

Can you recall that discussion taking place, the suggestion being made that what you had to have was a financial institution, and IIU was a financial institution?

A. I can't specifically recall it, but I think it's likely that it did take place.

Q. Did you accept then or would you accept now that at that point IIU was a financial institution?

A. That's a difficult question to take a flyer at. Bear in mind that the information has been conveyed to us by a solicitor; we couldn't take it lightly, let's say.

Q. All right, I'll accept that. You couldn't at the time simply reject that proposition. You mightn't know the

name of every financial institution in the country.

Don't we know now, or you must surely have found out

fairly soon afterwards, IIU didn't even have a set of

accounts?

A. I don't think I found that out.

Q. Well, Mr. Buggy and Mr. Riordan and Mr. Loughrey found

out they didn't even have a set of accounts.

A. Okay.

Q. I think we know now they were not a financial

institution, sure they weren't?

A. Okay.

Q. They were a vehicle for Mr. Dermot Desmond.

The note goes on:

"And while it might place its shares in future, if queried now on the point by journalists, might reply that recent turmoil over the licence made such a placing unlikely for market reasons for some time, stressing that this was not Owen O'Connell's view but was based on comments made by Michael Walsh."

Isn't that a somewhat extraordinary comment in light of the negotiations I opened to you this morning, isn't it, where there were suggestions that by way of a gentleman's agreement there will be a placing of 10 percent within a few days?

A. Certainly it's not consistent with it.

Q. And isn't it really simply a suggested way of presenting to the public, to journalists, the absence



of any intention on the part of IIU to involve other investors?

A. Well, I mean, that's what it says, if queried now on a point by journalists, yeah. And it's a statement of Owen O'Connell's, it looks like.

Q. Could I suggest that you were being drawn into, to judge from this, a suggestion that this consortium could be presented to the media in a way which did not reflect the true position, it did not accurately reflect the true position?

A. I don't recall seeing it in that light at the time.

Q. On the face of it, does the note not suggest you were being drawn into that? I am not saying you were drawn into it, but you were some attempt was being made to draw you into it?

A. Is it that, or is it just suggesting a way of handling the presentation? You know, a question was likely to be asked about shares being placed, and this is a good answer to it.

Q. An answer that could be given which would deflect attention from the truth; isn't that right?

A. But I mean, I didn't know the truth, it seems, from what you were presenting this morning.

Q. Mr. Brennan, do you not accept that even if you didn't know the whole truth at this point, you were being asked to sit there and acquiesce in a proposal that it would be sufficient to present IIU as a financial

institution, since a financial institution is something that would qualify under the bid as consistent with the bid, and that any reference to placing, perhaps as the bid might have suggested, any reference to placing shares could be deflected by saying that because of turmoil over the licence, this was now no longer likely?

A. I know the absence of a Department record is a difficulty for me and for the Tribunal, but please bear in mind that this was written by Owen O'Connell.

Q. I accept that. You could look at that from two points of view, that it's worrying that there is it's worrying, rather, that there is no Department record.

I am asking you now whether you would accept that that record suggests that an attempt was being made to draw you into a proposition to present this in a way which deflected attention away from the true ownership of the company.

A. On the face of Owen O'Connell's words and in the light of the knowledge that you opened up this morning, it's clear that that's the construction that will be put on it.

Q. Even without the knowledge I opened up, even without knowing what was contained in the documents that I referred to this morning, isn't it clear on the face of that document, if you knew nothing more, that an attempt was being made to deflect attention away from

the true role of IIU?

A. I can't think of any other words to use responding to you, quite honestly. I mean, at one level it's a realistic proposition that even if you intended to place shares, that the time wasn't opportune, given what had been going on in the media.

Q. Didn't you have the letter of the 16th April on your file somewhere, didn't you 17th April?

A. The Department did, anyway.

Q. I mean, was this consistent with what was in that letter?

A. As I said, I don't recall the letter right now. I know we discussed the letter.

Q. Wasn't the whole point of the letter of the 16th 17th that Mr. Dermot Desmond was the beneficial owner of 25% of the shares?

A. Yeah.

Q. And now what was being proposed was "Sure, look, we'll run it as 40:40:20. We can say that the 20% which was to be held by a financial institution is being held by a financial institution because IIU is a financial institution, and we can deflect any attention away from the notion that IIU would be placing its shares with somebody else in the way that was originally envisaged by saying there is a problem with the market because of turmoil", when the truth was, as you knew, and as the people who were making that proposal knew,

that Dermot Desmond was the owner of the shares and he was bargaining and jockeying for position with other members of the consortia in relation to them. You knew that because the 5% was gone; isn't that right?

A. I'd have to see the transcript of that question, because there is a lot of folds in it.

Q. Let's go through it again. Wasn't this an attempt to say "Look, we have got to present the 40:40:20 configuration as consistent with the bid application?"

A. We always took the view that it had to be 40:40:20.

Q. I am going a step further. Wasn't what was being discussed here a way of presenting the 40:40:20 involving Mr. Desmond in a way which was consistent with the bid?

A. There is an element of that about it, yes.

Q. And what was being suggested was that the bid said you had to have a financial institution or that you would have a financial institution in fact, three or four of them involved?

A. Mm-hmm.

Q. And what was now being suggested is "Well, we can spin that on the basis that Mr. Dermot Desmond's outfit, IIU, is a financial institution"; isn't that right?

A. I think it certainly is clear that Owen O'Connell was representing to us that it was a financial institution, yes.

Q. And wasn't it also being suggested that "We could get

away from the proposition that there might have to be a placing of shares by saying, 'Well, this won't happen in the near future because there is a bit of turmoil about the licence and Mr. Desmond won't be placing for that reason IIIU won't be placing for that reason'?"

A. I don't know whether it's that he is not placing or that he had intended to but couldn't, because we didn't have the same knowledge then that you have now.

Q. Ignore that knowledge. Looking at the face of the document, isn't that what you were being told?

A. But I don't know whether I was being told at face value he would have placed only for the difficulty in the market or whether on the face of this, whether I was being told "The plan has changed; we are not floating any more, or placing any more".

Q. Look at the very careful language chosen by Mr. O'Connell. "So the placing question should not arise and that while it might place its shares in the future, if queried now on the point by journalists, might reply that recent turmoil over the licence made such a placing unlikely for market reasons, for some time (stressing that this was not Owen O'Connell's view, but was based on comments made by Michael Walsh.)"

That passage, I am suggesting to you, involves an attempt to draw you into a proposal to spin the facts.

A. I didn't see myself being drawn into a proposal to spin at the time.

Q. You weren't drawn in, but was this an attempt to draw you in?

A. I can see why you would present it as such.

Q. The next paragraph I think we have already read, and it doesn't add much. It does say that Mr. Fintan Towey said that a new draft of the licence was imminent and especially that Article 8 thereof would be amended. The advice of counsel had been taken and so on. In relation to Article 8, which I think is the ownership article, and that deals with ownership going forward.

The next portion deals with the new a copy of the latest draft of the licence in the light of the changed EU regulations.

If you go to the end of the third page:

"The meeting moved on to a discussion of the events in the immediate future. It was indicated by MB and FT that they were about to engage in feedback meetings, these being meetings with unsuccessful applicants for the second GSM licence for the purpose of giving them reasons for their failure to obtain the licence. It was felt that it might be somewhat insensitive to grant the licence while these meetings were underway, and that accordingly the proposed date for grant of the licence was Thursday next, 16th. MB also said

that the Department had written to solicitors for the Persona consortium informing them of their intention to grant the licence and that if Persona consortium wished to challenge this, they should do so through the courts. However, no response had been received.

MB added the Department's view that the licence had expired as a live issue for the press, and the Minister and the Department were very anxious not to revive it by injudicious statements being made by anyone at the press conference."

Does that suggest that at that point you referred to your reference to the Minister and the Department indicated that you'd had some discussion with the Minister, or you were conveying the fruits of somebody else's discussion with the Minister?

A. I suspect the latter, but I don't know.

Q. "MB said it was the Minister's wish to announce the grant of the licence at a press conference co-attended by Esat Digifone. Great stress was repeatedly laid on the need to prepare extensively and exhaustively for this press conference and it was stressed that the journalists present would have been briefed in a hostile way by others", this clearly being a reference to unsuccessful consortia.

"MB said he wished to have Esat Digifone identify key questions likely to be asked at a press conference, to draft answers to them, and to explain to the

Department the reasons for those answers. He would also then wish to arrange a meeting between the Minister for Transport, Energy and Communications and KD, together with one or two others, at which the progress of the press conference would be discussed/rehearsed.

"MB indicated that there had been discussions within the Department as to whether shareholders should participate in the press conference, and if so, to what extent and in what way. At this point KD made a strong point to the effect that Digifone saw itself as an entity independent of its shareholders; that it had premises, employees, funds and a viable business in its own right and that there were issues likely to be raised in a press conference which would not necessarily be a matter for the company, but rather matters for its shareholders. FT conceded this as a fair point and acknowledged that the company would be at liberty during the press conference to refer questions concerning its ownership to its shareholders. MB interjected to say that in such a case the Minister would wish to know what response the shareholders would make when the questions were put to them. MB stressed the need to have a number of definite clear and acceptable statements for use at the press conference".

And he outlined a number of "obvious questions" as



follows:

"A, is this the same consortium as that which applied?

"B, can the Denis O'Brien side of the consortium stand up? (Adding that either Denis O'Brien or KD should answer this question).

"C, will Telenor support the project to the end?"

"(To this query MB added that it was sensitive in nature as it would have to be answered in such a way as not to imply any doubt in the Department as to Communicorp's financial strength).

"OO'C made the point that within reason, and certainly short of telling any lies, Esat Digifone was willing to be guided by the Department as to the conduct of the press conference and would follow policy lines laid down by the Department; Esat Digifone also expected the Department to have some input as to the answers to questions to be given by it, i.e. would coordinate such answers with the Department. This was acknowledged by MB and FT.

"The meeting ended with MB reiterating that it was virtually certain that we would have to get more information on IIU, some numbers."

"The meeting concluded at 1.10pm. Its tone throughout was cordial, and it concluded amicably."

When you say that it was the Minister's wish to announce the grant of the licence at a press conference co-attended by Esat Digifone, again, can

you recall if you were if you had any meeting with the Minister concerning this matter?

A. I can't recall, but I wouldn't rule it out.

Q. Presumably, to judge from or based on what you have told the Tribunal earlier about the Minister's wish to be prepared for any public occasions on which he would be obliged to give an account of himself, there must have been discussion with the Minister about the presentation of these matters?

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

Q. And to judge from the issues which you described or which you are recorded as having described, "is this the same consortium as that which applied?" Doesn't that imply there must have been a discussion with the Minister about the international underwriting investment issue?

A. I think there probably was at this point, yeah.

Q. Do I take it from the answer you gave me yesterday that at no time in the course of any discussions concerning that aspect of the consortium or the presentation of that aspect of the consortium was any reference made to the Glacken Report?

A. I don't recall any reference to the Glacken Report being made.

Q. You identified the questions as follows, or the issues, according to this, as " Is this the same consortium as that which applied?" Would you agree

that that's an issue you had in your mind as one to be addressed?

A. Yes.

Q. "Can the Denis O'Brien side of the consortium stand up?"

A. Yes.

Q. And "Will Telenor support the project to the end?"

A. Yes.

Q. Specifically, do you see the coda that Mr. O'Connell added to the effect that you mention that it was this was a sensitive query and that it would have to be answered in such a way as not to imply any doubt in the Department as to Communicorp's financial strength?

A. Yeah.

Q. Wasn't this harking right back to the evaluation report?

A. I think at this stage I was expecting that on examination, that the documentation we were receiving would stack up as being reasonable.

Q. This was the now the Monday, the 13th May, almost a month since the Department had received concrete information concerning the change in the consortium. And while you were looking for information, doesn't this document and the meeting it records not imply that you had accepted the consortium in its new configuration and with its new shareholder?

A. Oh, I think that's slightly overstating it. I think

my expectation was that when the documentation we were in receipt of was checked out, that it would check out; but it still had to be checked out. And then it's clear from the very end of this note that I was still looking for hard information on IIU because it was clearly not there.

Q. That's correct. But you already had a fixture for the 16th.

A. I think that at this stage the Department's thinking was in favour of granting the licence, but subject to these things being checked out, and they still weren't checked out.

Q. But you had two days in which to do it, and you had put yourself you had put a guillotine on yourself?

A. Yeah, I don't

Q. At this stage the 16th had already been picked out, because hadn't the Minister felt it was an attractive date from the point of view of I think The World Telecommunications Day coming up on the 17th, or something like that?

A. I think I heard that being mentioned somewhere in the last month. I don't know whether it was picked for precisely that reason. There was certainly a lot of pressure from the consortium to get the licence issued. You saw the dialogue about getting it up and running for the Christmas trade and so on. I don't know which of the drivers were the principal cause of

fixing that particular date, but what I do know is that we still regarded ourselves as having to be satisfied on the two issues, and the dialogue was still going on internally.

Q. When you say you regarded yourself as having to be satisfied on the two issues, you mean what you call the legal issue and also what we'll call the financial issue; is that right?

A. Yeah. There was no point in us having information that IIU were taking 20% and were also underwriting Communicorp without us knowing that they had what was required to do that. And it's clear that we weren't prepared to accept alone letters from Farrell Grant Sparks or KPMG, that we wanted to see the colours of their eyes, if you like.

Q. Why hadn't any of that information been sought in the previous month so that you weren't driven up against this two-day deadline?

A. We had this discussion already, I think. I am not conceding that it hadn't been sought. It may not have been sought in writing, but I mean, it didn't arrive at this meeting unless somebody had asked for it somewhere along the way.

Q. But we know

A. I think it was always clear we wanted it.

Q. We know that you had asked for something, but notwithstanding the fact that you weren't getting

anything until this date, you went ahead and fixed a launch date, if you like, of the 16th May.

You see, you could form the impression, looking at these documents, that what the Department was seeking to do was to obtain some justification for a decision that had already been made and that they were going to run with, willy-nilly; would you agree with that?

A. What I think was happening was the Department had run a process to select a licensee. Then there had been an interval of I have forgotten now, seven months, to allow for licence negotiations and to check out the issues that had been raised about Communicorp's ability to finance. And with the arrival of a new partner, to check out the issues that surrounded the arrival of that new partner.

Q. In all that period of time, I think I am right in saying, unless there were oral discussions, there isn't a single document in the Department file in which the Department checked out the financial strength of Communicorp; and I think I am right in saying that it wasn't even done in those two days, although there were requests for guarantees.

A. I am not sure. I think it's another case where there were other people involved and that you have to wait for their evidence before you can form any conclusions.

Q. Let's just look at what happened in the following two

days.

Now, the next document is in Leaf 215. This is another file note of Mr. Owen O'Connell's, in which he says "Re licence negotiations.

"DOB/Lowry call yesterday. 'getting there slowly but surely'.

Called last night re auto dialers.

meeting today Loughrey and Lowry re this."

Mr. O'Connell has informed the Tribunal that this was his note of information conveyed to him by Mr. O'Brien concerning a phone conversation he had had on previous day between Mr. O'Brien and the Minister. He is not sure whether the quotation is a quotation of what Mr. O'Brien said or a quotation of what the Minister said. There is no note in the Department of any of these contacts. No note that Mr. Loughrey had any meeting with Mr. Lowry, with Mr. O'Brien, such as is referred to or anticipated in this document. Are you aware of any such meeting?

A. No, but I never had any dealings with the subject of auto dialers.

Q. I can't imagine that auto dialers were really top of the agenda, can you, at this moment, realistically?

A. Well, auto dialers were close enough to the top of the agenda to be mentioned in the Government decision, I think. But it's not a subject, as I said several times, that I have

Q. Well, it would appear that Mr. Lowry and Mr. Loughrey were involving themselves in auto dialers on this occasion, but not, as far as we can see, from any record that the Department have been able to produce in discussions with you or anyone else, any recorded discussions concerning the GSM project; isn't that right? I am simply commenting on the fact that they seem to have been involved with auto dialers with a day to go to issuing the licence.

A. Am I right in recalling somewhere in today's or yesterday's evidence a link between auto dialers and Credit Suisse First Boston?

Q. Yes.

A. So it could have been important, but I don't know.

Q. It could have been. It wasn't pursued by the Department, in any case; isn't that right?

A. I keep reiterating, that side of the Department's business, I have very little knowledge of.

Q. The next document is another memorandum of Mr. O'Connell's. It seems to be a note of a meeting attended by Mr. Neville O'Byrne and Mr. Michael Walsh.

It says:

"Ability to block Communicorp placing.

Ability to block IIU Nominees placing.

Ability to block consequences of IIU underwriting.

DOB commitment.

"Transfers and issues within group of existing



shareholders.

"5A clarification re issues to existing shareholders.

"Bottin International." That's one of Mr. Desmond's offshore vehicles, I think.

"Possible broad problem re US shareholders ability to transfer the shares they acquire.

"Pre consent letter.

Raise 10% issue with Department discuss MW."

And I think we can pass over the next page. Again, it's about rows between or at least discussions between the shareholders on issues that were still alive between them on the 14th.

The next document is in Leaf 217, and it seems to be a note of a meeting of the 14th May, 1996.

I think the next document is Mr. O'Connell's note of information conveyed to him by Mr. O'Brien concerning the meeting Mr. O'Brien had had, presumably the one that was mentioned in a previous note, concerning a meeting Mr. O'Brien had had with the Minister and Mr. John Loughrey.

I'll go through it slowly. It says "DOB re meeting Lowry/John Loughrey.

Minister said haven't got information. Wants

financial information, IIU (MW to go to Department/private meeting)

letter that finance is in place from the underwriters.

"DOB underwriters are Telenor and IIU; will satisfy tomorrow.

"Lot of frustration and pressure.

"All by 11 tomorrow; Lowry 'will check with secretary' and hold DOB/LB responsible.

"Has to be 40:40:20 on day.

"DOB Article 8 very tough, can do nothing. Shares amongst parties; will not allow Telecom parties to reduce shareholding.

"Loughrey to meet OO'C/Martin Brennan tomorrow A M.

"Minister informed of 45/45/10 very quickly Lowry 'let ink dry'

"Public announcement, Lowry wanted last week, do everything in one go. Deflect attention away from ownership. Discuss business, infrastructure, contracts, roll-out plan, employment, coverage something else, contracts, hold off buying phones too public etc.

Must be phenomenally well briefed on the bid document and tender. OO'C to be present and to answer questions.

Legal ownership issue extremely important, all reporters focused on this.

"All 3 shareholders to agree, OO'C answers questions.

Rehearsal.

"Persona have written another letter to ask licence not be granted.

"Just one person with one signal."

Can you recall, did you have a meeting with Mr.

Loughrey and Owen O'Connell on the 15th?

A. I am not sure.

Q. Can you recall contact between yourself and Mr.

Loughrey on a fairly regular basis around this time?

A. I think at this time there probably was, yeah.

Q. Are you aware that he and Mr. Lowry had met Mr.

O'Brien and that Mr. Lowry was in contact with Mr.

O'Brien?

A. I don't have a specific recall that I was, but I mean,

it was a very active time, where there was contacts.

Q. You note where the document says "Lowry wanted public announcement last week"?

A. Yeah, I heard you reading that out.

Q. Does that suggest that the Minister was putting a lot of pressure on?

A. I don't know why that's there. I mean, Mr. Loughrey attended the meeting, and Mr. Loughrey may well have more information for the Tribunal than I have.

Q. This was the 14th, the Tuesday, and the Minister was indicating again to Mr. O'Brien that more information was needed concerning IIU. So clearly you haven't got the information you wanted or were in the process, I think, as we know from other documents, of only getting the information at that stage, although the Minister was sticking with his deadline of the 16th;

isn't that right?

A. My recollection is simply that there was a lot of resistance from Dermot Desmond's side to ever giving us the information. And I made it clear at around this time that the licence couldn't be granted on that basis.

Q. Do you know if that information was ever conveyed to the Minister?

A. The information that

Q. Sorry, I beg your pardon, the point of view was ever conveyed to the Minister?

A. I can't say specifically that it was, but it was very firmly my view and Mr. Loughrey's view, and I am sure the view of the people concerned, that we could not proceed with a blindfold in relation to the financing of IIU.

Q. If you go on Leaf 220, I'll just describe this document first, and the next document.

This is a letter of Farrell Grant Sparks to the Department marked for your attention concerning IIU.

The next document, in Leaf 221, is a memorandum to the secretary from Mr. Donal Buggy concerning the financial strength of the licensee. Do you see that?

A. Yeah.

Q. The letter from Farrell Grant Sparks is dated 15th. The memorandum is also dated the 15th. Do you see that?

A. Yeah.

Q. Following that is a set of notes, handwritten notes made by Mr. Buggy relating to meetings he had had from the 13th May onwards, presumably between the 13th and the 15th?

A. Yeah, the version I have is completely unreadable, so I don't know

Q. Yes, there should be a transcription as well, is there not?

A. I don't think so, unless it's mixed up somewhere. I have the memorandum from Donal Buggy and

Q. The next item?

A. What I seem to have then is an unreadable

Q. You don't have part of the memorandum after the third page, you don't have a verbatim typed transcript?

A. No, immediately after that is something that looks like somebody else's handwriting. And it looks like it's in the context of

Q. I'll get you a transcript of it.

(Document handed to witness.)

We'll look at the letter first. It says "Re Esat Digifone Limited.

"Dear Sirs,

"We act as financial advisers and auditors to Dermot

F. Desmond. We confirm that Mr. Desmond is the beneficial owner of 100 percent of International

Investment and Underwriting Limited.

"We are informed that Mr. Desmond/IIU have undertaken to invest and/or underwrite an equity investment of up to 40 million in Esat Digifone Limited. We confirm that Mr. Desmond/IIU is in a position to make this investment and to make the underwriting commitment.

"We are also authorised to confirm that Mr. Desmond is the beneficial owner of the following principal assets:

"Various marketable securities valued in excess of  $\frac{1}{2}$ 10 million".

Then there is a list of principal unquoted investments at cost,

International Investment and Underwriting Limited: 13 million.

London City Airport and associated companies: 25 million.

44% of Pembroke Capital Limited: 9 million.

Coming in total to 47.

Underneath that,

"Cash at bank, 15 million.

"William Fry client account re investment in Esat Digifone Limited, 5 million".

Coming to 20 million, making a grand total of 77 million.

"We trust that this is the information you require.

Should you have any queries, please revert to me."

Now, I think that letter was what followed a series of discussions between Mr. Pearse Farrell, of Farrell Grant Sparks, and the Department, and that that was the letter which the Department ultimately accepted?

A. Yeah, I don't remember dealing with Pearse Farrell over this. I think I had one intervention and it was with Michael Walsh.

Q. What this letter says is that Mr. Desmond/IIU have undertaken to invest and/or underwrite an equity investment of up to 40 million in Esat Digifone Limited".

Now, did you know at that stage who the actual nominal shareholder was going to be?

A. The nominal shareholder in IIU?

Q. Who was the named shareholder in Esat Digifone going to be? IIU Nominees, IIU Limited or Dermot Desmond?

A. I think we knew it was Dermot Desmond, anyway.

Q. Dermot Desmond was the man behind it. He was the investor, but it was going to be taken in the name of a company?

A. Yeah, I am not sure whether I differentiated between IIU Nominees or IIU.

Q. That's as may be, but in terms of what you were looking for by way of evidence of the financial capability of the consortium was information concerning the people who were actually named as shareholders, together of course with any other

information as well; isn't that right?

A. I think so, but I don't know what you are getting at.

Q. You had to know that Mr. Desmond was behind it, because his name was a name that was going to attract some attention?

A. Yeah.

Q. You also had to know that if he had a company that was going to take the shares, that that company had the money; and you also had to know that that company had the money to do whatever else it was supposed to do to support Communicorp's commitment. Isn't that right?

A. That sounds reasonable, yeah.

Q. The next document is a memorandum of Mr. Buggy, and after that is the working papers.

If you look at the memorandum for a moment, just the first line. It's from Mr. Buggy to the secretary.

It says "Mr. Martin Brennan and I have been involved in various discussions in respect of the financial strength of the members backing the Esat Digifone consortium over the last two days, and detailed below is my understanding of the current position and an assessment of the consortium financial strength."

If you go to the verbatim typed transcript now. The first note is: "Esat Digifone 13 May 1996". And it has the 40:40:20 share configuration with a total share capital of 52 million.

It says, it describes Telenor "Very big financially



successful.

"1995, profits before tax, 210 million.

turnover 2 billion.

No balance sheet.

Very good credit rating from both Moody's and Standard  
& Poor

"Arthur Andersen will be able to fund the 20.8 million  
required."

IIU 100% owned by Dermot Desmond.

Farrell Grant Sparks invest and/or underwrite  
up to 40 million.

confirm in a position to do this.

not stated what they are underwriting,  
specifically Communicorp.

very little information on which to assess  
financial strength".

I think what Mr. Buggy in that note may be referring  
to was the first letter that you received concerning  
this matter at the meeting with Mr. O'Connell on the  
13th May.

A. Mm-hmm. Given the date of this note, etc., probably  
true, yeah.

Q. It says "We confirm Mr. Desmond is in a position to  
make this investment and to make the underwriting  
commitment."

And what Mr. Buggy is presumably noting is he doesn't  
know specifically what they are underwriting. It's a

fairly general loose statement. He says "Very little information to assess financial strength." He goes on to refer to

"Communicorp: Owned by Denis O'Brien, 62.5 percent. 34.8 percent Advent International".

Then says that it "owns 100% Esat Telecom Holdings".

financial commitments underwritten by or through

IIU

appointed" and this is reference to a letter

from Mr. Paul Connolly obviously "Appointed CS

First Boston for private placement in ETH

expected to raise at least 22 million. not yet

completed".

Then he refers to the debt financing, which is from

ABN-AMRO Bank and AIB plc.

Then he listed at the bottom a number of possible

solutions to what he clearly sees as a problem facing

him. How to assess financial strength on the

information to hand.

"Due diligence of Dermot Desmond's personal wealth."

He could see he could examine carefully to see what

was Mr. Desmond actually worth; not what did he have,

but what did he own in net terms, what did he have net

of liabilities.

Next was "An escrow account, interest bearing"; simply

put money into an account and leave it there to

support the project.

Next, "Cash flow required per business plan is 108.4

by end of year 3.

share capital of 52 million and loans of 72

million by end Year 4. "

Now, the next note is timed can I just, before I

leave that, can you recall having discussions with Mr.

Buggy as to how he might approach this problem?

A. I think Mr. Buggy was operating under the broad

direction of Mr. Loughrey at this time. And to the

extent that I am mentioned in the earlier note of

having been involved in various discussions, I was

probably making the connections in the introductions.

Some of the conversations of outside parties may well

have taken place with a loudspeaker phone in my room,

or something like that.

Q. Presumably he must have got the documents from you, in

any case, to enable him to conduct his primary

analysis?

A. He certainly would have got the documents handed over

at the meeting the day previously, or whenever.

Q. I think the next meeting, at 8.30 on Wednesday, 15/15,

was a meeting that according to Mr. Buggy took place

in your office. Maybe it took place when you were

present.

A. It doesn't give any indication of who the meeting was

with sorry, I am looking at one page, 8.30 on

Wednesday, with no names, and then the next page,

8.30am, meeting with Michael Walsh.

Q. Mr. Buggy has informed the Tribunal that all the meetings he had with Mr. Farrell and Mr. Michael Walsh were meetings at which he was accompanied by you, and that each meeting took place in your office.

A. If I was involved and he was involved, it would be in my office, simply because there is more space.

Q. But he just says you accompanied him to each meeting.

A. Yeah, okay. I am just trying to look at the relationship between two separate notes, both of which talk about 8.30 Wednesday.

Q. Yes. You have no note yourself of these meetings; is that right?

A. I don't believe I have, no.

Q. The first meeting says or the first note says:

"No dilution below 80% stick to 40:40:20 note DTEC satisfied cruising altitude is reached.

IIU confirm underwriting Esat.

cash balance of DD, but what about liabilities

conditions under licence agreement roll-out

targets will require capital to remain in business

could 5 financial institutions stand behind DD

shouldn't be seen to be treating an individual

different from a company therefore need to fall

back on fact that we don't have a track record

is there joint and several liability no use

'big' brother.

escrow until money put into company by both

parties

can't withdrawn

no dividends

monitoring conditions quarterly accounts

(including cash flow) to Regulator."

It may be that those bullet points reflect issues that

he wanted to address. They don't seem to contain

answers as much as questions.

A. Yeah.

Q. Then he refers to meeting with Michael Walsh.

Telenor undoubted ability to bankroll the

project

need to ascertain ability of other parties to

bankroll their shares.

share capital going into as follows", and there is

a reference to that which we have already referred to.

Then there is another note.

"8.30am meeting with Michael Walsh.

Letter from Telenor underwriting up to 66 2/3% and

ultimately up to 100%".

I think this was a reference to the fact that he

wanted a letter from Telenor formally underwriting

initially a 66 2/3% of the company, and

ultimately let me just if I forget the

percentages for a moment and make more sense out of

this.

Telenor were into the company for 40% and IIU were in for 20%. There is a suggestion made, and I think ultimately run with, that Telenor would provide a letter supporting the project in the event of Communicorp not being able to do so and underwriting ultimately Communicorp's funding of the project to the tune of two-thirds. IIU were going to underwrite it to the tune of one-third.

A. Okay.

Q. This is in direct proportion to their respective shareholdings in the company.

A. Yeah, okay.

Q. But in addition to that, as a further fallback, Telenor were going to underwrite Communicorp's financing requirement to the extent of a 100%, in the event, in other words, of IIU not being able to do so.

And you'll see I mean, you saw already that that caused a degree of chagrin on the Telenor side, having regard to the fact that they were told that IIU were coming in to underwrite.

Next item is "Letter from IIU underwriting up to 33 1/3%.

bank confirmation on behalf of IIU stating 10 million available of all of 1996 includes 5 million to be paid over today

what about when Denis O'Brien comes up with the funds?"

I think that's a reference to a letter from Anglo Irish Bank that there was 10 million available to IIU for the year 1996, or from what was left of it, in any case. Were you aware of that?

A. I can't specifically now confirm that I was.

Q. The next document is the next point is: "Letter outlining in general the assets supporting DD's financial position.

also confirmation of revised capital requirement from Esat Digifone no. shareholders agreement."

The next note is a record of a meeting on the same date, I think sorry, the day before, at 10.30am, I should have probably mentioned that first, with Pearse Farrell, in which the first record is: "Resident abroad", a reference to Mr. Dermot Desmond, obviously.

"Assets spread out worldwide. Logistically difficult before you get to confidentiality.

track record over the years (NCB etc.)

"20 million in bank at present but leaving it there for up to 12 months is costly.

"Imagine that IIU is highly capitalised but can't comment on it definitively.

"Need to clarify that IIU are underwriting Communicorp as per agreement of 29/9/95."

You were presumably at that meeting?

A. If Mr. Buggy has told you I was at all the meetings, I

have to take his word for it. But I have to say I met Mr. Farrell of Farrell Grant Sparks years afterwards, and I didn't recognise him. So, with a lot of bodies moving around, that's quite possible.

Q. But at this meeting, Mr. Buggy was trying to get information about Mr. Desmond and seems to have been told by Mr. Desmond's accountant, that it was A, logistically difficult because you could run up against a confidentiality problem before you get to sorry, I should repeat that: logistically difficult, firstly because the assets were spread out worldwide, and then you have a confidentiality problem, obviously a desire on the part of Mr. Desmond not to disclose information.

A. Oh, it was clear to me at that time that Mr. Desmond didn't want anybody to have all of the facts in relation to his wealth.

Q. Why didn't you tell him to forget the licence, then, if he wasn't going to submit himself to scrutiny?

A. We effectively did insist that we got information, which is the information contained in the letter from Farrell Grant Sparks you were addressing a few moments ago.

Q. What information did you get in that letter that enabled you to make a decision? You were told what Mr. Desmond's assets were, you had no idea what his liabilities were, and you were told that a bank would



make 10 million available to him for six months. You were told nothing about his other assets all around the world. You were told nothing about bank accounts, the companies he operated through, or anything like that.

A. Well, in general, I would leave that aspect of it to Mr. Buggy to talk about because he was carrying out the analysis. But it is clear, from the Farrell Grant Sparks letter at least, that he had 15 million in cash, he had 5 million in a client account with Fry's, and he had 10 million in what I would regard as liquid assets, various marketable securities. So in terms of the business we were dealing with, that seems to create a reasonable match, but that's just off the top of the head. Mr. Buggy will no doubt explain what his assessment was.

Q. Let's look at the letter. You have made your own analysis of the letter?

A. I am just analysing it here.

Q. Yes. This is a letter you received one day before the licence, and it says "We are informed that Mr. Desmond (IIU) have undertaken to invest and/or underwrite an equity investment of up to £1/240 million. We confirm that Mr. Desmond is in position to make this investment and to make the underwriting commitment. We are also authorised to confirm that Mr. Desmond is the beneficial owner of the following principal

assets."

Nowhere do Messrs. Farrell Grant Sparks stand behind a line of this. They don't say "We certify that Mr.

Desmond has the following net assets; we certify that Mr. Desmond has the following unencumbered fixed assets worth so much". Where does this letter tell you anything that you can stand over?

A. In the pre Enron days, I think we were inclined to take the word of auditors and accountants, and I certainly wasn't trained to look for, you know, the weasel words. If I have a firm of auditors and accountants saying "We confirm that Mr. Desmond is in a position and we are authorised to confirm that Mr. Desmond is the beneficial owner", I would have thought that they wouldn't have used that language unless they had evidence.

Q. Yes. But that selfsame firm had told you that apart from the problem logistically of finding out what this man owned, you were going to have a confidentiality difficulty which you yourself were aware of, i.e. his reluctance to give information about his financial affairs; so what use was this document in the context of that knowledge which this firm of accountants had given you?

A. It's clear, when they indicated they couldn't give us information, that we wouldn't accept that position, and then this letter came as a consequence of that.

Q. If you had read the Glacken Report at this time you'd have learned that Mr. Glacken found it very difficult to accept many of the things that Mr. Desmond had told him in the course of his evidence specifically relating to his financial affairs.

A. You are telling me that now for the first time.

Q. I am telling you that you should have done it then.

And why wasn't it done then?

A. It didn't occur to me to do it.

Q. And you say there was no mention of it by any other person in the Department dealing with this matter as far as you were concerned?

A. What I said yesterday was I don't recall the Glacken Report being mentioned in my company in this context.

And I said further, if it had been, it is, on balance, likely that I would have taken a copy and read it on the train on the way home that evening.

CHAIRMAN: Mr. Healy, I think it's probably, unless there is any net point you wish to eleven o'clock tomorrow. Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,  
THURSDAY, 6TH FEBRUARY, 2003 AT 11AM.