

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

MARTIN BRENNAN Mr. Healy 1 - 359

THE TRIBUNAL RESUMED AS FOLLOWS ON THURSDAY,
6TH FEBRUARY, 2003 AT 11AM:

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY
MR. HEALY:

Q. MR. HEALY: We are waiting for one of our research assistants, Mr. Brennan, so that we will have all the documents we are talking about on the overhead projector.

What I plan to do is to go over something we looked at yesterday. I think at the end of the day, it may have been I was tired, maybe both of us were tired, I don't know, but I am not sure I got my I am not sure I fully dealt with the precise circumstances, so far as we know them, of Mr. Buggy's involvement in the analysis of financial matters.

I want you to look at the documents in Leaf 221, Book 44, please. If we go to the verbatim typed transcript for the moment. The first document is dated 13th May of 1996. And due to the fact that Mr. Buggy doesn't seem to be able to remember everything about his involvement in this part of the process or this series of meetings, I want to try to put these in context and in the context of the other events that were occurring around the same time.

You recall you were at a meeting on the 13th where you

were handed a number of documents by Mr. O'Connell by Mr. Digerud, I think, in fact. It doesn't really matter. Mr. O'Connell was in any case, as it were, the main representative on the Digifone side of the meeting, and it was from him that you obtained a number of documents, including a letter from Farrell Grant Sparks, a letter from Mr. Connolly, letters from Telenor, and so on, confirming or at least representing to you the state of their finances and their capacity to fund the project.

You had a quick look at these documents. Even at that stage, according to Mr. O'Connell's note on the 13th, you were able to say that you'd certainly need more information about IIU; isn't that right?

A. Yeah.

Q. To judge from Mr. Buggy's note, from the date of his note, he seems to have been involved in the project from that from the time you finished that meeting or sometime after you finished that meeting?

A. Yeah, okay.

Q. Now, would I be right in thinking that you presumably brought to him those letters and explained to him where you were at in terms of the licence negotiations?

A. He certainly got the letters. Whether I gave them to him directly or whether I discussed them with Mr. Loughrey who in turn gave them to him, I couldn't say.

Q. I see.

A. I think Mr. Loughrey was involved in the loop at that point.

Q. Well, assuming it's possible that you brought the documents or you went to Mr. Loughrey with the issues, as it were, that you were already identifying as flowing from these documents or arising from these documents, is it likely then that you had a discussion and decided "We need to get some more expertise"?

A. I think it's more likely that Mr. Loughrey decided that it would be a good idea to get Mr. Buggy to have a look at these.

Q. Do you recall a three-way meeting between yourself Mr. Buggy and Mr. Loughrey, or do you think you were then deputed to go and get Mr. Buggy involved in this?

A. It was either a three-way meeting or Mr. Loughrey dealt directly with Mr. Buggy.

Q. I see. Judging from Mr. Buggy's note of the 13th, he had certain information concerning the share configuration and the share capital of the company as of that date?

A. Mm-hmm.

Q. I don't know whether he was asked to look at the file or whether, at that late date, somebody simply told him what the figures were, but it looks to me like somebody simply told him what the figures were.

A. It could be. I don't know.

Q. Well, he was told, for instance, for certain, that it was a 40:40:20 configuration at that stage?

A. Mm-hmm.

Q. He described Telenor. He says that they are very big financially, and then he referred to their profits, their turnover. He says he has no balance sheet, but goes on to say that they had a very good credit rating from both Moody's and Standard & Poor, suggesting that he may have taken the trouble to find out what credit ratings they had.

A. Yeah.

Q. Then he refers to Arthur Andersen, which is presumably a reference to the letter he had given him from Arthur Andersen concerning Telenor's financial capacity?

A. It probably was, yeah.

Q. If we just jump down to Communicorp for a moment. He notes the ownership, and he notes that Communicorp owns 100 percent of Esat Telecom Holdings, which by that time had become the identified or nominal holder, if you like, of what we'll call the O'Brien side of the project. He then says that financing commitments are underwritten by or through IIU. That suggests, I suppose, some degree of uncertainty on his part as to whether the underwriting was coming from IIU or coming from somebody else through IIU.

And then he says, "Appointed CS First Boston for private placement in Esat Telecom Holdings, expected

to raise at least 22 million, not yet completed".

So at that point IIU didn't have or at that point Communicorp didn't have its 22 million, and I suppose that, if nothing else, was going to focus his attention on IIU's commitment to underwrite.

If you look at his notes on IIU, he says it's 100% owned by Dermot Desmond. He then has a reference to Farrell Grant Sparks, "invest and/or underwrite up to 40 million. Confirm in a position to do this." That's a reference to the first Farrell Grant Sparks letter, which said in simple terms "They can do this". I think it was on looking at that letter that you said "It's not enough to say they have the money; we want it know a bit more than that".

A. Yeah.

Q. Then he says "Not stated what they are underwriting."

It specifically doesn't state they are underwriting Communicorp. Then reflecting your own observation as recorded by Mr. O'Connell, he notes "Very little information on which to assess financial strength."

Now, then, at the bottom of the page, he canvasses a number of solutions as to how you'd deal with this.

Can you remember discussing any of these solutions with him?

A. I can't really, no.

Q. Would you have left it to him, or would you have left it to him and Mr. Loughrey?

A. I have a feeling that it was him and Mr. Loughrey were calling the shots at this point.

Q. Now, that document is dated the 13/5. If we go on two pages for a moment to the note of the meeting with Pearse Farrell on the 14/5/1996 at 10.30am.

A. Is that a separate leaf number?

Q. It's the it's not a separate leaf number. It's the first document is Esat Digifone, 13th 5/96. The second is 8.30am, Wednesday, 15/5/96; the third is 8.30am meeting with Michael Walsh 15/5 and the next is meeting with Pearse Farrell, 14/5/96, 10.30am.

Mr. Buggy has informed the Tribunal that any meetings he had with any outsiders, that at such meeting he was accompanied by you.

A. Okay.

Q. I think that may have been because he himself felt that not being a civil servant, he should be accompanied by one when, I think, engaging with the public, as it were.

A. Yeah, okay.

Q. Or a third party, in any case. My impression of the notes made of that meeting is that it contains information obtained from Mr. Pearse Farrell.

It says "Resident abroad", a reference to the fact that Mr. Desmond appeared to be resident abroad.

It says "The assets are spread out worldwide." That looks like information that has been obtained.

"Logistically difficult before you get to confidentiality." I think, as I was saying yesterday, that suggests to me that somebody was explaining that as Mr. Desmond's assets were spread out worldwide, you had a logistical difficulty in assessing or evaluating them; would that seem reasonable?

A. It's hard to interpret, really. I mean, what's the significance of confidentiality, that it couldn't be done until there was a confidentiality agreement or something?

Q. It says "logistically difficult before you get to confidentiality." In other words, the first thing you have to do is to identify and endeavour to evaluate assets spread out worldwide. And then, as I see it, what is being recorded is the fact that it's not simply that it's logistically difficult, but you then have, after that, the problem of confidentiality, getting information. That's what I believe the note to record.

A. You are sort of asking me to interpret somebody else's notes, which is a difficult thing in any event.

Q. Because you were at the meeting, and I think you had the impression yourself that it was not going to be easy to get information about Mr. Desmond?

A. I certainly recall that there was resistance to giving us information.

Q. Well, I am suggesting that the resistance was

presented firstly on the basis that it was going to be logistically difficult, but that apart from that, there was going to be confidentiality, in other words a desire not to disclose information.

A. Yeah, okay.

Q. Then there is a reference to "track record over the years, NCB, etc." That may be a suggestion, or this may be a note of a representation made by Mr. Farrell on Mr. Desmond's behalf.

The next is a statement that there is 20 million in a bank, followed by a note that leaving it there for up to 12 months would be costly. In other words, it would be lying idle and nothing would be being done with it. That may have something to do with Mr. Buggy's note that one way of dealing with this might be to put money in escrow; remember that?

A. Yeah.

Q. Then the note is "Imagine that IIU is highly capitalised, but can't comment on it definitively."

Again I have the impression, I think a reasonable one, that this is Mr. Farrell saying he can't comment definitively on the extent to which IIU was capitalised. Would you agree with that?

A. Well, it can only mean either that or Donal Buggy is recording his own thoughts on it.

Q. Then it says, "Need to clarify that IIU are underwriting Communicorp as per agreement 29/9/95".

Now, after that meeting it seems that there was a meeting with Michael Walsh. And we have two notes which may refer either to the meeting, to something before the meeting, or to something that was recorded after the meeting. But do you recall having meetings with Michael Walsh to deal with Mr. Desmond's finances?

A. I think I said consistently that I was in contact with Michael Walsh about the need to give us hard information. I wouldn't have recalled whether it was face to face or telephone, but if the evidence is it was face to face, I have no problem with that.

Q. Is it likely that it was following the meeting with Mr. Farrell and the fact that there was a resistance to providing information that Mr. Walsh came into the picture to satisfy the Department?

A. I would think so, yeah.

Q. Now, if you look at the second of the two pages of typed transcript of the handwritten notes. As you pointed out yesterday, they are both dated 8.30am, and one refers to a meeting with Mr. Walsh. The second half of the other one also refers to a meeting with Mr. Walsh.

If you look at the note of the 8.30 meeting with Mr. Walsh on the 15/5, it records the letter from Telenor underwriting up to 66 2/3 percent of, as we know, Communicorp, and a letter ultimately, and an

undertaking ultimately to underwrite up to 100%.

Now, then it records a letter from IIU or the need for a letter from IIU underwriting a third of Communicorp.

This seems to be a deviation from what was originally envisaged, isn't it, in that here you have not IIU underwriting Communicorp, but somebody else, and IIU's commitment to underwrite being diluted.

A. Yeah.

Q. So that while Mr. Connolly, in his letter, which was given to you on the 13th of May, had asserted that IIU were going to underwrite them, two-thirds of that underwriting was now being taken away?

A. Mm-hmm.

Q. Although there seems to be no documentation or no letter to Communicorp asking you to explain this, as far as I can see.

A. Okay.

Q. It then goes on "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 DOB comes up with the funds?"

I think that's a request for bank confirmation. I'll tell you why I think it's a request. I think it's a request for a letter confirming, a) that there is money available, and b) a letter from a bank certifying that fact. Because we know that a letter was produced; we know that a letter was produced later

on that day from Anglo Irish Bank.

A. Okay.

Q. It goes on, "Letter outlining in general terms the assets supporting DD's financial position.

also confirmation of revised capital requirement

from Esat Digifone no.

Shareholders agreement"

That seems to be a note of the result of a meeting, if

you like, with Mr. Michael Walsh indicating that

certain things would be provided. A letter, which as

we know was ultimately provided by Mr. Pearse Farrell

of Farrell Grant Sparks, supported by a letter from

Anglo Irish Bank?

A. Yeah.

Q. And ultimately letters from Telenor and IIU with the underwriting arrangements?

A. Mm-hmm.

Q. Now, if we go back for a moment to Leaf 220. We have

the letter from Farrell Grant Sparks of the 15th May,

1996. 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 has undertaken

to invest and/or underwrite an equity investment of up

to 40 million in Esat Digifone Limited. We confirm Mr. Desmond/IIU is in a position to make this investment and to make the underwriting commitment."

If you read that letter, I think the plain words of the letter do not indicate whether Mr. Desmond is going to invest or whether Mr. Desmond is going to underwrite, whether IIU is going to invest or whether IIU is going to underwrite. It's somewhat unclear, isn't it?

A. It seems to be one or other, yeah.

Q. Then it says that they are going to underwrite an investment of up to $\frac{1}{2}$ 40 million. So we are back to the old figure again of underwriting the total of Communicorp's investment.

A. Yeah.

Q. "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 market securities valued in excess of 10 million.

"Principal unquoted investments at cost IIU 13 million,

London City Airport, 25

44 percent of Pembroke Capital, 9 million.

Cash at bank 15 million, William Fry client account re

investment in Esat Digifone, 5 million.

Total 77 million.

"We assume this is the information you require.

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

Apart from the problem I have with the fact that this letter doesn't indicate who is underwriting who or who is investing, if at all, in who, if IIU are going to underwrite 40 million, this letter seems to suggest that IIU is only worth 13 million. And there is no reference to their liabilities at all, but if you look at the letter

A. Yeah.

Q. So that if you were hoping to rely on IIU to underwrite anybody, you were relying on a $\frac{1}{2}$ 13 million pot at the most; isn't that right?

A. Yes.

Q. If you look at the cash at the bank and the William Fry client account re investment in Esat Digifone, if the 5 million in Esat Digifone or the 5 million to go into Esat Digifone was going to be in Esat Digifone, and that was presumably not going to be available for underwriting, or even if it was, it wasn't going to it was going to be very unconfident underwriting, wasn't it?

A. I don't know what would be the relationship between the requirement for underwriting and the fact that some of the money was paid.

Q. Well, I am just saying that of the money here that's supposed to be available to underwrite someone's obligation to pay, to invest in a company, some of it is money that is already invested in that company.

And of that cash at the bank

A. But the only point I am making is that further up to that, we are talking about "Mr. Desmond and IIU have undertaken to invest and/or underwrite", and if they invest 5 million, then that's 5 million less that needs to be underwritten, I think. But I am sort of confident that Mr. Buggy will be able to give you better answers.

Q. That's their own investment. Maybe you are right. Maybe it's not their own investment. But it seems to me that that must mean their own investment.

A. It could be, yeah.

Q. But it mightn't be, as you say.

A. What I am really saying is that Mr. Buggy is an accountant and an experienced consultant, and I presume he will give you more complete, more satisfactory answers.

Q. I am not an accountant and you are not an accountant.

A. That's right, yeah.

Q. And looking at this letter, we don't have to be accountants to know that it doesn't tell you very much. It doesn't tell you whether Mr. Desmond or IIU is investing, and it doesn't tell you whether Mr.

Desmond or IIU is doing the underwriting. Which of them is doing it?

A. The letter doesn't tell you.

Q. Yeah. And it doesn't tell you whose assets are available.

If you go to the memorandum that was given to

Loughrey, the Secretary, dated 15th May, 1996.

It says "Mr. 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's financial strength.

"These discussions have been with a number of parties

but principally Mr. Michael Walsh, a director of

International Investment and Underwriting Limited."

Now, as I understand it, there is no letter from Mr.

Walsh supporting or certifying or confirming anything;

isn't that right? The only letters, the only

documentary support you had for anything was from Mr.

Farrell; isn't that right?

A. That's what it looks like from these documents.

Q. If you go to the last bullet point on the first page,

"The underwriting agreements have been revised in the

shareholders agreement so that in the event that any

one party default, the other two parties will

underwrite the defaulting investment in their agreed

share proportions. This means that if Esat Telecom Holdings defaults, Telenor and IIU will provide the funds in the ratio two-thirds:one-third. In the event that both ETH and IIU default, then the shareholders agreement provides for Telenor taking on 100% of the financial commitment."

Then he gives a breakdown of what that would entail in terms of commitment.

He says that Telenor are a very strong company. He says that "ETH are currently in the process of arranging a private placement. This is expected to raise 22 million. The process is at an advanced stage but not yet finalised, therefore we cannot yet rely on it at this particular time. He says as a result we must ensure that the parties underwriting ETH's share are financially strong enough to support their portion of ETH's share along with their own investment. We have already seen above that Telenor are strong enough, and IIU is discussed below."

Then he says that IIU are 100% owned by Dermot Desmond. Points out there are no financial statements available for the company.

He says "In order to finance its own investment and underwrite its portion of ETH's investment, IIU/DD must have finances of 17.5 million (that is, a third of 52 million). While DD is known to be a very wealthy person, this alone is not considered enough

information on which to proceed.

to ascertain if DD has sufficient finances to support this project ,we discussed the matter with Mr. Michael Walsh. He informed us that DD had already put .75 million into the company and has put another 5 million this evening in advance of signing the licence.

"In order to satisfy us on the remaining 11.5, we received the following

a letter from Anglo Irish Bank confirming that DD has 10 million available to invest in Esat Digifone (including the 5 million put in this evening) and that this will remain available for the whole of 1996.

an updated letter from Farrell Grant Sparks which confirms that DD is worth at least 40 million and which outlines in general terms some of the unencumbered assets, totalling 77 million, which DD owns and which supports their opinion that he is capable of financing up to 40 million of this project".

Now, I am right in thinking, aren't I, that there is no reference to any unencumbered assets in that letter?

A. There is no specific reference to it, but it's really a question that you should address to Mr. Buggy.

Q. From the letter, there is no way you could say those

assets were unencumbered; isn't that right?

A. I think that's true, yes.

Q. It goes on to refer to letters from Telenor and IIU, saying that they are underwriting ETH's investment in the project in the ratio of two-thirds:one-third. A final version of the shareholders agreement was also included.

Then he goes on to conclude that, at the conclusion at the bottom that the "shareholders appear to have sufficient financial strength to ensure that Esat Digifone is financed in line with the expectations under the business plan, and required debt financing appears to be available to the company."

I think, when Mr. Buggy referred to a final version of the shareholders agreement, he was referring to a draft copy but not a finally executed copy.

A. I'll take your word for that; I don't know.

Q. I think you will find that the executed copy or the executed agreement wasn't in fact perfected until the following day, shortly before the licence is granted.

Now, the conclusion in the document dealing with Mr. Dermot Desmond is the second bullet point on the last page. And he says, "On this basis I consider that the final strength of DD has been confirmed to the extent that it can be relied upon to finance its own investment in Esat Digifone and underwrite its agreed portion of ETH's investment."

But as I understand it, there is no underwriting obligation from Mr. Desmond with respect to ETH; isn't that right?

A. I don't know whether it's right or not. I keep saying, and maybe it's becoming boring, but Mr. Buggy dealt with this, the detail of this.

Q. Leave Mr. Buggy out of this now. You were the person with Mr. Loughrey responsible for bringing this project home. One of the key elements of this project was to make sure that you got the finances in order. Here you were with hours to go. Are you telling me that you didn't know who was underwriting who?

MR. O'DONNELL: Sorry, this is a memorandum prepared by Mr. Buggy, and in fact the very paragraph that My Friend refers to says "On this basis I consider..."

And it seems to me if Mr. Brennan says that it is this is a matter more appropriately put to Mr.

Buggy, then that is the way it should be left. It

says he has said it again and again. This

is and I accept that Mr. Brennan says he was at the

meetings, although his recall of them isn't so good.

And he says he has made that clear, but certainly the

person keeping the notes of the meetings was Mr.

Buggy.

But this is a memorandum prepared by Mr. Buggy. It's

not a joint memorandum. It's prepared by Mr. Buggy.

Mr. Buggy assumes the responsibility for it. And in

those circumstances, it seems unfair to continually put to this witness the contents of this memorandum, ask him to comment on the various matters referred to in it, and in particular, ask him to consider on something that Mr. Buggy himself says "I consider that the financial strength of Mr. Desmond has been confirmed."

And in those circumstances it seems to me that Mr. Brennan's answer is completely reasonable.

CHAIRMAN: I am prepared to accept that on particular specifics of financial expertise that Mr. Buggy was the expert, but it's nonetheless the fact of things that Mr. Brennan was the person who had been heading the entire project ab initio, and that whilst he indicates that his role had become more peripheral at stages of the licence negotiations, nevertheless, he was present at all these meetings. And I think it is understandable that Mr. Healy wishes to ascertain, as far as Mr. Brennan can assist us, to what extent Mr. Brennan himself entered into and considered the financial sufficiency of the information forthcoming with regard, in particular, to Mr. Desmond and IIU. I will accept, if it gets to a particular point, that it would be preferable that matters move on.

Q. MR. HEALY: I don't think you need to be an accountant to wonder whether an underwriting commitment given by A was of any value if A didn't have any underwriting

obligation towards somebody; isn't that right?

A. My position in relation to this is that Mr. Buggy was asked by Mr. Loughrey to consider these matters. I was in attendance at the meetings because Mr. Buggy, as you said yourself, wasn't a civil servant. But with Mr. Buggy, an experienced accountant and business consultant advising Mr. Loughrey as to the state of the consortium at this point in terms of the intention to issue a licence.

Q. Leave aside, then, the reliance that you put on Mr. Buggy. Will you agree with me, now, that you don't have to be an accountant to at least ask yourself what use is it if Mr. Desmond has a lot of money to support a particular project or a particular obligation if he doesn't actually have that obligation legally?

A. I can see why you are raising this issue now, but at the time I was relying on Mr. Buggy's expertise and experience.

Q. I am moving on from that; I accept that. You were saying you were relying on Mr. Buggy. But I am asking you now with the benefit of the information you have now, and I am asking to you look at it now. And maybe you didn't look at it at the time because maybe you felt you could rely on Mr. Buggy, but I am asking you to look at it in the same way I have looked at it.

And I am not an accountant. What point is there, or what value is there in Mr. Desmond's obligation or

Mr. Desmond's wealth, what value is Mr. Desmond's wealth to an obligation IIU has to underwrite Esat Digifone or to underwrite Communicorp?

MR. O'DONNELL: Again, Chairman, isn't this a matter that should be put to Mr. Buggy? Isn't he the financial expert who was retained to deal with the specific issue? Mr. Brennan was there, I suppose, to represent the Department, but not to have the kind of input that is now being suggested Mr. Brennan should have had or to inform Mr. Buggy's thoughts. Mr. Buggy was retained as a specific expert on a specific topic, and to ask Mr. Brennan now to ignore Mr. Buggy, which he wasn't asked to do then, and to ignore his advice, and to say "What do you think about it now", seems somewhat unreal. It does seem to me

CHAIRMAN: Mr. O'Donnell, I have effectively indicated a disposition to rule in your favour as regards questions that pertain to technical matters of accounting. What I understand is what Mr. Healy is asking Mr. Brennan, as the person in charge of the project and who had resumed a leading role at this stage in appraising the end game of the financial capacity of the partners in the consortium, what view did he take. This particular question doesn't require accountancy expertise. Now, I think we should move on.

Q. MR. HEALY: I think you see the question I am asking,

Mr. Brennan. I am not suggesting for one moment that I am not asking you now about the fact that you placed reliance, which you did at the time, on Mr. Buggy or on the fact that Mr. Buggy and Mr. Loughrey were looking after this. I am simply asking you for your view, looking at the facts now. You can use all the 20:20 hindsight you like, or you can look at them in the way I am looking at them, which is in a common-sense way.

A. What I think you are really asking me is to retrospectively pass judgement on Mr. Buggy's work when you can ask Mr. Buggy about it.

Q. No, no, Mr. Brennan, I am not.

A. That's what it seems to me.

Q. I am trying to find out what the facts are. I am trying to ask myself I am a layman, and I am saying to myself, what use is it if Mr. Desmond has a lot of money? What use is it if Mr. Walsh has told Mr. Buggy that Mr. Desmond has a lot of money, and that this money is useful as a guide to how IIU's underwriting obligations will be performed? Mr. Desmond didn't have any legal underwriting obligations; isn't that right?

A. That seems to be the case, yeah.

Q. So legally, his wealth was irrelevant, wasn't it? You can see that without being a lawyer.

A. I can see the point you are making, but I still don't

see that it's appropriate for me to now pass judgement on Mr. Buggy's work of seven years ago when Mr. Buggy can come here himself.

Q. You can see the point I am making?

A. I can see the point you are making.

Q. We'll leave it at that. And you can see that anybody who wasn't an accountant would probably also see the same point?

A. I think that's a fair comment.

Q. The purpose of this exercise was to, if you like, I suppose, vet Mr. Desmond's or IIU's involvement in the project; is that right?

A. I think it was a little wider than that. I think it was to consider the overall financial standing of the project.

Q. But they were it was to look at the continuing problems with Communicorp and how they were going to be sorted out. Sorting out those problems and I am abstracting from Mr. Buggy's memorandum involved assessing Mr. Desmond's role; isn't that right?

A. Yes, that's correct.

Q. And assessing IIU's role?

A. Yes.

Q. And in assessing IIU's role, what Mr. Buggy said is, "Look, I have to rely on what I am told, because I can't get enough information"?

A. Sorry

Q. What Mr. Buggy is saying is "I have to rely on what I am told by Mr. Desmond", or "I have to rely on what Mr. Walsh tells me about Mr. Desmond"?

A. On the face of these documents, that's true. But again, I have to say that Mr. Buggy is in a better position to answer these questions.

CHAIRMAN: I suppose the particular point Mr. Healy is making is a fairly obvious one; you know, if you or I had booked a holiday and we thought if the holiday turned sour we would have a large individual to sue successfully, and it turned out that that individual had perhaps set up a company that maybe wasn't worth putting good money after I mean, it's obviously a situation that every individual has occasion to deal with from time to time.

Q. MR. HEALY: And if we move on to the next stage, Mr. Buggy was reporting to Mr. Loughrey, so Mr. Loughrey was the person who was going to make a judgement on this document; isn't that right?

A. I think that's true, yeah.

Q. So we can take it that until Mr. Loughrey had made that judgement, Mr. Dermot Desmond or IIU's involvement or the financial capacity of the various consortia members hadn't finally been, as it were, okayed or signed off on?

A. I'd say that's fair comment, yeah.

Q. And that wasn't done until, as far as I can see, a few

hours before the licence was issued; is that right?

A. I don't know exactly when, but close enough to the issue of the licence, yeah.

Q. Well, the document, the memorandum is dated 15th May.

And Mr. Loughrey notes, there is a tick at the top opposite, under the word "secretary", "noted, thank you"; I think that's Mr. Loughrey's writing?

A. It is, yeah.

Q. I don't recognise the signature, but I do recognise the writing. "16/5/96". So some time on the following day, the day of the actual grant this was done.

Now, yesterday I was asking you whether and to what extent you could rely on the letters from the accountants. And I drew to your attention the, as I saw it, somewhat tight language of aspects of the letters from Farrell Grant Sparks. And I think your response to me was well, you just accepted what the letters said or appeared to say, and this was pre Enron days, I think was the way you put it. We don't want to take Mr. Pearse Farrell's character I think accountants have been very quick to point out that Enron involved American standards of accounting and not European or Irish or British standards.

But I asked you to look at the context in which that document was produced, and in particular the fact that ultimately the document and the information contained

in it and the other information upon which Mr. Buggy's memorandum was based all came from Mr. Desmond. And I think I was making those points in the context of the fact that this wasn't post Enron, but it was post Glacken.

A. Yes.

Q. And I suggested that you ought to have been on your guard post Glacken, having regard to the very negative findings of a Government report concerning Mr. Desmond's activities and the information he had provided a Government inspector in relation to them.

A. Yeah.

Q. And I suggested to you that if you read those findings, or if anybody read those findings, they might have taken a little more time to scrutinise what he was proposing to do for this company, or scrutinise his involvement in it. And I think you said that you hadn't read it and you weren't aware of it having been mentioned in the course of your dealings with anybody else involved in the process at that time.

A. I did indeed say that, yeah.

Q. You say that subsequently, I think Mr. Jimmy McMeel told you that he didn't feel that this report was in any way relevant?

A. That was a casual conversation very recently.

Q. I appreciate that. And I think

A. Sorry, I didn't say that he didn't say it wasn't

relevant. I think what I said was that I think what he indicated to me was that it didn't make any findings or recommendations adverse to the person you are talking about.

Q. I see.

A. I think that's what he said.

Q. I see. And if it had done, would you have regarded it as relevant?

A. I didn't regard it at all at the time.

Q. No, no, if it had done; I am asking you with the benefit of hindsight. I am not trying to make a case against you or anyone else, Mr. Brennan. I am only trying to find out and look at the things with the benefit of 20:20 hindsight. If it had contained negative findings, would that have been a factor to be taken into account, and if you had been aware of it?

A. If I was aware that it had made negative findings which bore on the decision being taken, then of course I would have to take it into account.

Q. The Glacken Report, as it's been called, was a report prepared by Mr. John Glacken following his appointment by the Minister for Industry and Commerce, O'Malley, in 1991, to investigate and report on the membership of two companies, Chestvale Properties Limited and Hoddle Investment Limited, and specifically what he was asked to do was to investigate the true persons who were financially interested in the success or

failure of these companies, or those persons who were able to control or materially influence the policy of these companies.

In other words, what the Minister wanted examined was, apart from who may appear to be on the record in the Companies Office in whatever jurisdiction concerning the ownership or control of these companies, who was really financially interested in them or who was really and/or who was really able to control them?

You are familiar with that formula for investigating companies?

A. Yeah.

Q. This inquiry was prompted by a certain amount of, I think, public and ultimately Government unease arising from the manner in which the Johnson Mooney and O'Brien site was, I think, sold to Telecom Eireann. I think the report was ultimately delivered to the Minister sometime in the early nineties; I haven't the precise date. I think it was July '93, but I'll correct that. 2nd July, 1993 7th July, 1993.

In the report, Mr. Glacken, in general, concluded that "Mr. Desmond was at all times both financially interested in the success or failure of Chestvale and Hoddle, and that at all material times he was in sole control of those companies."

Now, that finding led to a number of conclusions with respect to Mr. Desmond's credibility. I am not going

to go through them all. I am not going to go through all of the summary of the findings of the report.

That was the main finding. And that was a finding which was in the teeth of what was being asserted to Mr. Glacken by Mr. Desmond.

Mr. Glacken made a number of other subsidiary findings concerning Mr. Desmond, and they are contained at pages 56 to 61 of the report.

He says "As set out in Sections 4 and 6 post, I have found that Mr. Desmond was also financially interested in the success or failure of the companies by virtue of being the true beneficial owner of Freezone and the person who controlled the account at UBS, Geneva, through which the advance of $\text{US} \frac{1}{2}$ million was made to Chestvale on the 9th August 1989.

"In making the determinations that Mr. Desmond was a person financially interested in the success or failure of the companies and that he controlled them, there are a number of other aspects of Mr. Desmond's evidence on which I've had to make findings of fact.

These findings are as follows:

"(i) that while acting as an agent and conducting the negotiations with interested third parties on behalf of UPH to dispose of its contractual interest in the JMOB site, between April and July of 1989, Mr. Desmond purchased the said interest from UPH without disclosing to UPH that he was doing so and without

disclosing to UPH what he knew about Telecom's interest.

"(ii) that whereas the possible involvement of Sportsfield with the JMOB site, by transferring the property into that company in consideration of the issue of shares, in conjunction with a proposed reverse takeover involving Mr. Smyth and others, may have been mooted among a limited number of persons; the advisers to Sportsfield, Mr. Desmond's colleagues in NCB, were not aware of this. It was not part of the formal proposal put by Mr. Smyth to Sportsfield and its advisers on the 26th July 1989, and there was never any serious intent that Sportsfield would acquire the property at the end of July or even at the beginning of August 1989, and in fact it could not have done so at best for many months after that.

"(iii) that Mr. Desmond misrepresented to certain banks and to Mr. Smyth, knowing that Mr. Smyth would make similar representations to banks, about the involvement of Mr. Goodman, Mr. Magnier and Dr. Smurfit in UPH and in the companies, even though he knew that Mr. Goodman was involved in neither and that Messrs. Magnier and Smurfit were not involved in the companies.

"(iv) that Mr. Desmond told Trinity Bank and Lombard and Ulster Bank about the possibility of a sale to Telecom in July 1989.

"(v) that Mr. Desmond induced the editor of the Irish Independent to publish an apology in February 1990 in relation to an article published by them on the previous day alleging his involvement in the JMOB site, when he knew that the original article was substantially correct and that he was not entitled to an apology.

"(vi) that Mr. Desmond misrepresented to Mr. Smyth in September 1989 the proposed role of Mr. Bourke, who was then a financial adviser to the Magnier family trusts. He informed Mr. Smyth that Mr. Bourke would be involved in refinancing the purchase of the JMOB site while knowing that that was not the true role of Mr. Bourke and that Mr. Bourke was asked to consider only the tax aspects of the transactions on behalf of UPH.

"Incidentally Mr. Bourke was described at the introduction to the Interim Report as an a employee of John Magnier Coolmore Stud. He should have been described as a former financial adviser to the Magnier trusts.

"(vii) that having become aware of Dr. Smurfit's interest in acquiring a site for a corporate headquarters for Telecom he, Mr. Desmond, discussed the JMOB site with Dr. Smurfit and by letter of the 1st December 1989 informed Dr. Smurfit that he could not advise Telecom on the transaction. He added that

"We disposed of the property to Chestvale, and if I can influence the Chestvale people in any way, I would be delighted to do so." However, he misrepresented his status by not telling Dr. Smurfit that he, Mr. Desmond, was financially interested in success or failure of Chestvale, that he effectively controlled it. He accordingly assumed a position of influence with Dr. Smurfit, knowing that Dr. Smurfit relying on his, Mr. Desmond's, apparent and declared independence would be likely to rely on him, which he did.

"(viii) that Mr. Desmond informed Mr. McGovern, the Chief Executive of Telecom, at a meeting on the 20th December 1989 convened to discuss the JMOB site, that he, Mr. Desmond, was an intermediary and thereby induced Mr. McGovern to deal with him as a bona fide intermediary. However, he deliberately failed to disclose to Mr. McGovern his personal financial interest in the success or failure of the company that owned the site, the fact that he effectively controlled the company, and the fact that only a few weeks earlier he tried to sell the same property for 6.3 million. These omissions put Mr. Desmond in a position where a conflict of interest was inevitable, whether or not he subsequently acted bona fide.

"(ix) that in his letter of the 20th February 1990 to Mr. McGovern, described at paragraph 10.14.18 of the Interim Report, Mr. Desmond deliberately misled Mr.

McGovern by stating that "I am not sure how far negotiations have gone..." when he was fully aware through briefings from Mr. Smyth.

"(x) that on 28th June 1990, Mr. Desmond executed a personal indemnity in favour of Mr. Smyth, as Mr.

Smyth had to assume personal liability to Telecom on foot of warrants and indemnities. Mr. Smyth had been required by Telecom to give these warrants at the closing of the sale on behalf of the three companies, Chestvale, Hoddle and Dellion, but he refused to do so without having a counter indemnity from the person whom he considered as his principal. Mr. Desmond did not seek a counter indemnity from any other party and remained ultimately liable personally on foot of various warrants given to Telecom.

"(xi) on 26th July 1990, Mr. Desmond telephoned Mr. Moloney, managing director of Ansbacher, and instructed him to make three payments from the Dellion accounts. Mr. Desmond promised Mr. Moloney to get written authority for those payments from the person who held the bank mandate, but he did not do so, and Ansbacher did not get written confirmation until the Dellion accounts were closed in October of 1991."

Now, I think those findings themselves should give you an indication of the scale of public controversy that had arisen around that time and that arose subsequent, I think, to the delivery of this report, and that

involved also the, I think, fairly high-profile defamation proceedings instituted by Mr. Desmond. Now, you say you weren't aware of those things because you were out of the country. But I am sure you will agree with me that anybody in the country at the time could not but have been aware of them.

A. I think that's probably true. I mean, you said the report was dated July of 1993. In July of '93 I was trying to organise to extricate my family from Brussels and come back to Ireland, which I did at the end of August. So even the extent to which I would have read such Irish newspapers as was available to me, it would be questionable, so I mean, I am just stating as a fact that I wasn't acutely aware of these events.

Q. But I think it's clear that anyone who was aware of them, and who had any idea of the flavour of them, would have had reason to, I suggest, ensure a very deep scrutiny of Mr. Desmond's involvement and of what was being represented on his behalf at this time.

A. I think that's fair comment.

Q. All of this, these activities involving the examination of the financial capacity of the consortium members, and indeed of the consortium itself, were not just common-sense steps that you were bound to take in handing out a licence like this, but were also taken on foot of the conclusions that the

project team and Andersen had reached in the

evaluation report; isn't that right?

A. Yes, that's true.

Q. But most of the final work in relation to it seems to

have been done in approximately the two days before

the licence was issued.

A. Mm-hmm.

Q. And the work seems to me to have been done up against

a very tight deadline, because that date of the 16th

was fixed in advance, wasn't it?

A. I think it was, yeah.

Q. And it was fixed even before the work was done?

A. I think that's probably true.

Q. And this, I think to me, and I am sure anybody else

following this evidence will see echoes in this of the

way there seemed to have been a frenetic activity in

the Department in October of 1995 coming up to the

conclusion of the evaluation report.

Now, on this occasion, I am not suggesting that civil

servants or advisers were themselves responsible for

applying these pressures of time, but what I can't

understand is why these fairly fundamental activities

examining the financial wherewithal of the consortia

members were being carried out or conducted under such

time pressure. Why somebody didn't say, "Listen, we

can't do this. We have got to do this properly. It

can't be done in two days. We have got to take our

time".

A. In transactions generally there is usually frenetic activity at the tail end anyway.

Q. There are usually frenetic activities at the tail end, usually to do with getting all your procedural ducks in a row, as it were; but here you were dealing with what Mr. Andersen and what the evaluation team, what the Minister in the Dail, what the RFP had all identified as the primary, the overriding consideration in granting the licence, ensuring that the people to whom it was granted had not just the technical but also the financial capability, and it was being done within two days, really, within two days. And I am suggesting to you that if you try to do work like that in two days, you are not it stands to reason you are not going to be able to engage in any in-depth scrutiny.

A. I don't really know whether to accept that or not.

Q. Well, as a general proposition for the moment, I am not going to ask you to answer these questions one by one; I'll put them all to you. I'd suggest that as a general proposition, if you are going to do work of this kind under time pressure, then you are not going to be able to scrutinise documents you are asked to look at or scrutinise representations that are made to you under very tight time deadlines.

In this case I am suggesting that the tight time

deadlines are reflected in the way the work was done; that Mr. Billy Riordan had to rely on Mr. Donal Buggy had to rely on a conversation or two with Mr. Walsh, a conversation with Mr. Farrell in which it was clear he was getting very little information and in which he was being told "You are going to have to trust me", or something to that effect, and I am suggesting to you that again, as a general principle, if you rush something, you are not going to be able to scrutinise a situation properly, and in this case, the documents we have suggest that there was a rush.

A. And I think you will inevitably have to canvass with Mr. Buggy the extent to which he felt either under pressure of time or that the quality of what he was doing was affected by any pressure that was around.

Q. Could I just ask you once again to go to the last of the typescript pages in Leaf 221. This is the note of the GSM II meeting with Pearse Farrell, 14/5/1996, 10.30am. Do you see that?

A. Mm-hmm.

Q. I just want to come back to one bullet point, the last bullet point on that page: "Need to clarify that IIU are underwriting Communicorp as per agreement of 29/9/95."

I think that's the first reference, maybe the only reference, or one of only two references, in Department documents to the underwriting agreement of

the 29th September 1995. Do you know what agreement is being referred to?

A. I think it may have been mentioned here in the Tribunal. I can't say that I have a recall of seeing it at the time, but that's not to say it wasn't around; it probably was.

Q. Well, this is the agreement that was the subject of the letter dated 29th September 1995 that Mr. Towey felt it would be advisable not to disclose to you. He disclosed the fact of the document but not the contents. Did you not have any curiosity at this time, if this agreement was mentioned, to see it?

A. There is no evidence one way or other whether we saw it at this point or whether Mr. Buggy saw it.

Q. There isn't. You see, if you were asked to examine an underwriting obligation, it seems only reasonable that you'd look at the origin of or the what was stated to you to be or represented to you to be the origin of that obligation. And that seems to be what Mr. Buggy is suggesting": We need to look at this. We need to clarify this."

A. It does.

Q. If he did get it, it's not on his files. It's not in the Department files.

A. Yeah, okay. But that wouldn't rule out that he had sight of it.

Q. That's as may be.

Now, Mr. Buggy was not involved, of course, to the same extent in the whole of the process, isn't that right, as you were?

A. He came late to the process. He was there in I think September '95, but he was on holidays for some of September '95.

Q. He was involved in some of the evaluation work, but he didn't have a continuous involvement with the process, a continuous intense involvement like he certainly had at the end, in any case?

A. That's correct, yeah.

Q. But if you looked at that agreement, you'd see, or you will have seen that IIU/Dermot Desmond were involved in this process from September of 1995.

A. Yeah.

Q. And that they were involved and that their involvement went beyond what was in fact contained in the letter underwriting the circa 60% Irish element of the bid?

A. Mm-hmm.

Q. And if it had become clear to you on the 15th, or even the 14th May of 1996, that Mr. Dermot Desmond/IIU were involved and were a member of the consortium as of September of 1995, wouldn't you have had to review an awful lot of the information that had been given to you up to that time?

A. I think if it had struck me at the time, that's fair

comment, yeah.

Q. And you'd have had to look at not just what had been represented to you by IIU in May, in April, in March, in January of 1996, but what had been represented in the course of the evaluation process; isn't that right?

A. I'd say yeah.

Q. And that might also have tempered the view you'd have taken of the information that you were being given at this time?

A. It may have done, yeah.

Q. Now, I can understand why somebody mightn't have looked at it at this moment, because ultimately the underwriting obligation was going to be superseded by the shareholders agreement?

A. Yeah.

Q. Because we know that you had the two-thirds:one-third mechanism, if you like, that was incorporated in the shareholders agreement; and I suppose, if you didn't have a lot of time, if you were under time pressure, you might not look at a document which you were told was going to be superseded by another document.

A. That's possible.

Q. You can see why the Tribunal therefore is interested to know where was the pressure coming from to get this process over quickly? It's understandable that people will, if they are in a hurry to meet a deadline, try

to achieve what is practicably achievable before that deadline?

A. Yeah.

Q. And will ignore, perhaps, things that they might, or I won't say turn a blind eye, and I am not suggesting that; you can only turn a blind eye to something that you can fully appreciate. But you might say "Just get on with it; we have an underwriting agreement; we have a two-thirds:one-third agreement. That will sort out the problem without looking, without looking into corners which, if you were aware of the full facts, you might be very tempted to look at?

A. You are making a reasonable case there.

Q. Now, if we go on to the next document, I am not sure it's hugely important, in Leaf 222.

Before going on to it and in the light of some of the things that I have just said, I just want to mention one point.

Mr. Johansen, in his memorandum and in the portion of it in which he deals with the meeting of the 3rd May of 1996, says that the Department sought an explanation for the exit of Davys, AIB, IBI, Advent and Standard Life and the subsequent involvement of IIU/Dermot Desmond, and I think that might have also been mentioned by Mr. O'Connell in one of his memos.

A. Okay.

Q. I am right in thinking that that explanation was never certainly never documented; it was never produced in writing?

A. I don't believe it was, no.

Q. And there is no note either on the consortium side or on the Department side of anyone having given that explanation?

A. Okay.

Q. If you go to the Document 222, I am not sure there is much in it, but I just draw one thing to your attention. It's on the second page of Mr. McMahon's note. The note itself deals with the meetings with the disappointed competitors. The first one is A3, the second one is A4; I think there are other ones elsewhere. I am not actually interested in that aspect of it but in the fact that on the second page, above the wavy line clearly it must have been in some interval between two meetings there was a general discussion about the way the GSM project was going.

And it says: "Owen O'Connell note 40:40:20 Esat Holdings, Telenor, IIU/Dermot Desmond". Then the note or bracket is closed.

"This is latest shareholding in Esat Digifone."

Then above that, "In about Article 8 licence". I think, to put that in context, Mr. O'Connell was in about Article 8 in the licence, which is the future

ownership provisions or future changes of ownership.

A. Okay.

Q. And then Mr. O'Connell appeared to give a breakdown of the shareholdings, and Mr. McMahon notes this is the latest shareholding in Esat Digifone.

Can you recall if you had any discussion in the course of the at the time of the meetings with the disappointed applicants about the shareholdings, about the shareholdings and whether they were still, as it were, up for grabs?

A. No, I don't have any recall of that.

Q. The next document is a William Fry memorandum of the 15th May, 1996. Again it's a note of Mr. Owen

O'Connell's, of a meeting in the Department with you, Mr. Towey and Mr. Buggy. If you go to the typed transcript, it says "Department of Communications

M. Brennan, F Towey, Donal Buggy

"Friday if necessary; 3.30 Thursday.

"Telecom Eireann big price decreases tomorrow (off record)

World Communications Day 17 May

Bill O'Herlihy per Minister

"MB

"When did Telenor late April/early May

KD phone calls late April, meeting Oslo early May.

"Parties talking second half of April. Double dealing re SW Bell."

Now, everything was still going ahead as of that stage, to judge from your meeting with Mr. O'Connell.

A. Yeah.

Q. And Mr. O'Connell you had given Mr. O'Connell no reason to believe, to judge from this note, that Mr.

Desmond's or IIU's involvement was in any way still under consideration or not finalised.

A. Okay.

Q. It looks like the meeting took place in the Department of Communications, doesn't it?

A. It does, yeah.

Q. The reference to late April/early May seems to refer to a point that you drew to the Tribunal's attention earlier in the week, and this concerned controversy connected with the postponement of the process and the suggestion that this was done to facilitate one of the contestants.

A. Yeah.

Q. And you were trying to establish when Communicorp/Denis O'Brien and Telenor got together?

A. Mm-hmm.

Q. And what you are being told here is that it was late April or early May. Isn't that right?

A. Yeah.

Q. And it says "Parties talking second half of April.

Double dealing re SW Bell

pain in the ass comment."

I suppose that may have been a reference to the fact that if somebody suggested if it was in the second half of April, SW Bell was still on board with Mr. O'Brien.

Then it goes on to describe the company.

"Company owned 50/50 intention to place/float 20 percent, strong supporting letters were available from a lot of blue-chip investors".

As a description of what the consortium actually envisaged, that's extremely fluid, isn't it?

A. How do you mean, "extremely fluent"(sic)?

Q. Well, to say that there was an intention to place/float 20 percent is not what was contained in the application.

A. To place 20 percent.

Q. What the application said was that there were four banks who were prepared to take specific amounts of money and had given a commitment falling short of a legal commitment to take up that; wouldn't that be right?

A. We have had this discussion over whether that was an exclusive list or not, and I believe that it wasn't exclusive.

Q. The amounts each of the banks were taking were stipulated, weren't they?

A. They were, yeah.

Q. And they came to 20%?

A. That's correct.

Q. And there was no suggestion of floating it?

A. I don't think floating in the context of 20% was ever part of it, no.

Q. "Strong supporting letters were available from a lot of blue-chip investors." What you had was letters from four financial institutions; isn't that right?

A. Yes.

Q. What this statement does, to my mind, is it's part of a process which you see to some extent in the Dail exchanges as well, and in public statements, to dilute or to soften the true nature of the original configuration of the consortium; and this was going to culminate in what was being planned for a press conference on the day of the granting of the licence, where an attempt was going to be made to soften it even further?

A. I believe I was always of the view that it was 50/50, and it was 20 percent to be placed, and strong indication, that is there was an appetite for it backed up by letters of commitment for four particular institutions.

Q. "In normal course when project became real, negotiated but deal available, which we now have."

A. Probably "best deal available"

Q. "Best deal available, which we now have. IIU not in original."

Where did that statement come from?

A. When he talks about "which we now have", it sounds to me like it's an Owen O'Connell statement, but I don't know.

Q. It wasn't correct, sure it wasn't? IIU was in the original consortium?

A. Yes, that information had surfaced in the Tribunal, yes.

Q. Not only that, this was the 15th May, 1996. That information was at that moment either available to or accessible by the Department, but for the time pressure they were under, because if he had looked at the share if they had looked at the arrangement agreement of the 29th September, 1999, they would have either found that out, divined it there and then, or asked a question to which the answer would have had to be, if it was a truthful answer, that IIU were in from the beginning.

What does the next or can you say what the next portion of the record means? "Comfort Minister favourably disposed re letter"?

A. I think the letter must refer to an ongoing discussion about a side letter about ownership. Comfort

Q. That's the Article 8 issue?

A. I think, yeah. I mean, there is a full stop after "Minister" in the typescript. I don't know whether it's all one sentence. I can't particularly explain

it, except...

Q. Were you aware of comfort the Minister was looking for at this point?

A. I can't say that I have a specific recall of the Minister looking for comfort.

Q. Was the Minister looking for comfort that he would be able to put a complexion on this consortium which would be consistent with what he had said in the Dail?

A. I don't remember seeing it in those terms.

Q. Next item, we'll leave out the references to the shareholders agreement.

"Dress rehearsal with Minister. Sometime after 1.00, some our side"?

A. That's probably "same our side".

Q. "Same our side."

The next page, "45:45:10 "cruising altitude". Do you know what that is referring to?

A. I don't particularly know what it is referring to. It's a kind of a John Loughrey speak, if you like, the words "cruising altitude", and it may be to do with holding the 40:40:20 or not going below 45:45:10 until the business is up and running. That's the sense in which I'd interpret it.

Q. I think that's the sense in which I interpret it as well, that the Minister would countenance a 45:45:10 change in the configuration once the company had reached cruising altitude.

A. Something like that, yeah.

Q. And I think there is an echo of it in a document we saw yesterday, I think a note of Mr. O'Brien's, where he was discussing the problems he had with Article 8 with the Minister, and a suggestion that he'd need to be able to move the share configuration from 40:40:20 and that he needed Article 8 or an interpretation of Article 8 which would console him that he could do that; isn't that right?

A. Yeah.

Q. And then there is a reference to waiting until the ink was dry.

A. Yeah.

Q. Sort of Treaty of Limerick reference. In other words, the Minister was saying, "Well, I don't want you to do it right away", because if you did it right away it might give the lie to 40:40:20, but that you might do it later on; and that that's where we get the expression "cruising altitude"?

A. I really think "cruising altitude" is a John Loughrey expression rather than a Mr. Lowry expression in any event.

Q. Maybe?

A. For me, just thinking about it now, it's against the background that there was a clear indication given to all of the applicants back in '95 in the information memorandum that changes that didn't affect the I

have forgotten the details, but it was a clear indication that changes in ownership up to a very significant extent wouldn't require our consent in any event.

Q. I think earlier we discussed this. You couldn't have been there, and you couldn't have expected anyone to subscribe to a set of rules which meant you'd be on their shoulders for the rest of their commercial lives?

A. I don't remember that particular phrase being used, but maybe it was.

Q. Maybe you didn't use those terms, but my impression is what the Department wanted and what the competition was designed to achieve and what Mr. Andersen's analysis seemed to be driving at was you wanted to identify a consortium, you wanted to identify a share configuration that would get this network up and running. After that, once the network was there, once the infrastructure was there, ordinary commercial dynamics would take over, wouldn't they?

A. I think that's fair comment, yeah.

Q. So what you wanted to be sure about was that you were evaluating different competitors with a view to being sure you'd identify one who would get to the point where the network would be up and running and rolled out?

A. Yes.

Q. And that's why Mr. Andersen was concerned about instability in consortia arising from financial problems; isn't that right?

A. I think it probably is, yeah.

Q. It seems to me from the document you can agree with me or disagree with me that the impetus, or as you'd put it, the driver for this desire to change the share configuration was Mr. O'Brien's financial problems?

A. I think that's more obvious from what you call participants' documents than from the information available to the Department at the time.

Q. I fully accept that, yes. At least what was being said to you wouldn't have given you that understanding?

A. Yeah.

Q. Maybe what was being said to other people, maybe other people involved in the process were getting more information, I don't know; we'll have to wait until we talk to them.

A. I don't know either.

Q. But the Minister, notwithstanding what the process was designed to achieve, seemed to have given an indication that he was happy that changes could occur fairly quickly after the licence was granted, but perhaps not too quickly from the point of view of public perception. That's the sense of the note. I am not asking you whether you say that's what the

Minister says. That's the sense of Mr. O'Brien's note?

A. I think you'd have to ask Mr. Loughrey what his role was in this as well.

Q. Mr. O'Connell's note I am coming back to now, and it goes on: "In normal trading circumstances, debt equity around 50% in start-up phase more fluctuation because of capital spend will tend a little more towards equity, especially in early phases.

"MB (save Minister needs our help)".

A. I find that very strange, and the fact that it's in brackets strange as well. And I don't know whether it's "save", I mean, I am not disputing it, it could be "some", I don't know what it is. I can't make sense of it.

MR. O'DONNELL: Further down, Chairman, the word "have", h-a-v-e, is written a very different way to one would expect the word "save". The bracket, then, if it's what Mr. Brennan says, it reads "some", then it would be "some Minister needs our help."

MR. HEALY: Mr. O'Connell seems to be in no doubt it's "save", anyway. If you look at it, it's on his notepaper. It's William Fry memorandum. He did the transcription.

MR. O'DONNELL: I have no idea who did this.

MR. HEALY: If you look at it, it says "William Fry".

MR. O'DONNELL: I think it's "some".

MR. HEALY: We can ask.

MR. McGONIGAL: I don't think, Mr. Chairman, we did this, but I am not a hundred percent sure but I'll have it checked and I'll have Mr. O'Connell tell us what his writing says.

CHAIRMAN: All right, Mr. McGonigal, we'll revert to it if necessary. But let's proceed.

MR. HEALY: Leave the word "save" out of it, or "some", or whatever it is: "Minister needs our help." In other words, Minister needs help of Esat Digifone. Then it goes on

A. It could be that, yeah.

Q. Then it goes on "Whether same project as won competition." Do you see that?

A. Yeah.

Q. "MB not keen on Denis as speaker (not attribution)

"1st conference DOB will remember lowering prices 25% in three years

focus of attack, couldn't have won competition on this basis. Application was stronger than that."

"Prepare better answer, get correction in launch commitment per bid. Good presentation in price area.

Consider (although not in application) 10-second billing units, oral presentation DOB 1-second billing by end Year 1. Different packages, different consumers, 25 percent simplistic more complex exciting things to shake up market, e.g. per-second

billing early on (if Esat Telecom). Attempt to correct complaint/innuendo 25% in three years, he couldn't have won competition on the basis (not enough another consortia reducing 30 33% within a year of launch."

At this point, there seems to be some reference to what was planned for the press reference in terms of the way the activities or the operations of the new operator were being presented. Is that right?

A. It looks like that anyway, yeah.

Q. Leaving the technical references to billing packages and so forth out of it for the moment. After whatever it is, "Minister needs our help", the document goes on "Whether same project as won competition." We have seen that before identified as an issue that was going to have to be tackled?

A. Yeah.

Q. And is it in that context that the Minister needed help, in light of what he had been stating in the Dail and in public statements?

A. I don't know whether it was in that context or not.

Q. Isn't it clear that what the Minister had stated in the Dail on the 16th April, when he had an opportunity of dealing with this matter but didn't, isn't it clear that what he said in the Dail on the 30th April 1996 was going to be thrown in his face in light of the true facts?

A. I think there is an element of that, yeah.

Q. I'd suggest that there wasn't just an element of it, that it was a major sensitivity.

A. It gets back to the consideration which was going on in the Department as to the relationship or the consistency between the consortium being licensed and the consortium that had submitted the application and the discussion we had yesterday as to whether or not Dermot Desmond or IIU, to be more accurate was a financial institution or not and the representations accordingly from Owen O'Connell and so on. It's all in that context.

Q. You could say that at that time all these matters were being considered by the Minister, and that was the context in which to view these things; but when you say that the Minister needs the help of Digifone, and when you bear in mind that you were going to have a press conference for which you were already preparing the next day, couldn't you also conclude reasonably that Esat or that IIU and Dermot Desmond's involvement wasn't being involved; what was being done is it was being justified?

A. I am not sure whether

Q. Did the Minister ever say "This is a big problem; I want it looked into, and I want it looked into seriously, and I want to call off this press conference and get to the bottom of it"? That's not

the sense of the documents; am I right?

A. I don't think it is.

Q. And the Minister didn't need help, I'd suggest, to get to the bottom of these things. The help he wanted was to put a spin on a result that was going to happen, like it or not, on the 16th May 1996, and the result was going to be Communicorp, Telenor and IIU/Dermot Desmond?

A. I think I said yesterday that we were almost certainly assuming that the information would stack up and the licence would be granted, yes.

Q. Well, were you assuming that the Minister wanted the information to stack up and that an analysis which stacked it up was what was required, rather than an in-depth and proper scrutiny? Perhaps an understandable attitude with a time constraint.

A. I don't remember seeing it in those terms at that time.

Q. If we go on to the next

A. And I don't understand, by the way, the reference to "first conference". I don't understand that either.

Q. The reference to?

A. "First conference", at the end of whatever page we were on.

Q. I don't either. Unless there was a am I right in thinking that at one point, two press conferences were being planned, one Esat Digifone and one by the

Minister, but ultimately it was decided to do

everything in one go?

A. I don't recall the detail, but it would be relatively easy to check.

Q. Is there a reference that the Minister wanted to do it all in the one show or all in the one presentation?

A. I don't recall that right now, but it could well be.

Q. I see.

The next page, "Why only signed now? Was licence delayed to put money in place?"

I don't know who identified that issue, but you can see from the facts that we have seen that it's an issue that could have arisen; isn't that right?

A. Mm-hmm.

Q. It says "Leslie a speaker?" Was that Leslie Buckley?

A. Yes, it had to be, yeah.

Q. "Department delay all on our side." Is that a reference to the Department accepting that they would run with the proposition that the delay was all on their side?

A. I personally was of the view that the Department took far too long to produce the licence; I'll put it like that. So if I used those kind of words, it wouldn't be it wouldn't be unlikely that I used those kinds of words, let's say.

Q. How could there have been a delay on the Department side? Mr. Desmond/IIU wasn't even yet on board. You

didn't have a shareholders agreement. Every other consortium gave you one in the course of the evaluation. You still didn't have one, with a day to go. You didn't get one, in fact, until hours to go.

Mr. O'Brien, according to Mr. Buggy, didn't have his money. How could there have been any delay on the Department side?

A. In simple terms, my perception was that to take from October until May to produce a licence was a very long time. And I don't think that's the first time you are hearing that from me.

Q. What use was a licence to a consortium that wasn't even hadn't tied down its shareholders agreement?

What use is a licence to a consortium that couldn't pay for it?

A. This is getting back again to the idea of frenetic activity at the end of a transaction. Who is to say, if the licence was available two months earlier, that there wouldn't have been the same kind of frenetic activity?

Q. Well, it brings us back to the suggestion I made to you, a good few days ago now, that this whole issue of financial capacity was one that should have been tackled on the 26th October, at the latest on the 9th November, and that that was the sense of the evaluation. The first thing to do was to tie down the precondition. Do you not agree that that's borne out

by the facts as they unfolded?

A. I can understand why now, with all the information that you have, that that's the way you would look at it.

Q. Can you not also see that that's the way you'd look at it, or that's the way you might be persuaded to look at it, if one person carrying 40 or 50 percent of the project didn't have any money in November of 1995?

A. But what the report was saying was that this was a matter to be dealt with in the licence negotiations.

Q. Yes, yes. The weak point in this consortium, from the point of view of its finances, and as we now see, even possibly its credibility, was money; and if you had looked into that in November, you might have seen a lot of things in November that you couldn't see in two days in May because you were under so much pressure. Isn't that right?

A. Again, I'd repeat that with all of the knowledge that you now have, it's reasonable for you to see it in that way.

Q. Next entry: "What is impact of delay on launch? Will there be delay (especially if different).

Geographical and quality coverage stress this.

"Everyone knows Christmas market critical and intend to demonstrate seriousness for that.

"Question 16 June deferment: 23 June, original closing. If no deferment, could we have bid". A

reference to the issue of timing again.

The final entry: "Comfort now on how Minister will act in given circumstances in the future".

I think that's looking now for comfort from the Minister, isn't it, in relation to how he'd act in the context of Article 8 and requirements or restrictions on changes in future ownership?

A. I think that's right, yeah.

Q. The next, I think, two or three documents in Leaf 224 in fact contain a draft letter indicating how the Minister would act, and that letter was ultimately agreed by way of a side letter; isn't that right?

A. Yeah.

Q. I am not going to go into the details of it now. We are now going to go on to the 16th May, Sir, so it might be an appropriate time

CHAIRMAN: It's appropriate we resume at five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH:

MR. COUGHLAN: Sorry, Sir, perhaps it's a matter I should just bring to the attention of the Tribunal; I have discussed the matter with you, Sir.

It's a matter which was raised by My Friends Mr. Nesbitt and Mr. O'Donnell, that they have indicated to me that Mr. Brennan is tired or coming towards the end of his the examination by Mr. Healy at the moment.

And in the event that he finishes tomorrow, I think, My Friend Mr. Nesbitt has indicated that Mr. Brennan has requested that any further examination would be put off till next week because I understand he is tired, so the matter is obviously that the other people involved in the Tribunal should be aware of and make the appropriate arrangements, Sir.

MR. NESBITT: We'd be very grateful, Mr. Chairman, if you'd give him the weekend just to recuperate. He has been under constant examination for a very considerable period of time. I think it's fair to say it's probably impossible for him to remember what happened the day before, given the chronology and the amount of detail he's had to deal with. He feels he's not going to be able to do himself justice unless he has a chance just to recover. And you can probably understand that. Coming back each day requires him to keep his place in his mind and deal with issues, and he has asked for this time, and I'd ask the Tribunal to consider the request favourably.

CHAIRMAN: And this is something you do feel, and it's on that basis that you have conveyed it to your barristers, Mr. Brennan. Well, obviously I am anxious that we don't lose time on even the provisional schedule of dealing with this phase that has been embarked upon, but fairness to witnesses, particularly somebody who has, in the case of Mr. Brennan, has been

in the witness-box for the greater part of a calendar month, is a consideration that I obviously can't ignore.

In these circumstances, I am very reluctant to visit upon you the matter of perhaps four further counsel taking up matters with you tomorrow, and so I won't have that. We'll assess, from the standpoint of how far towards conclusion Mr. Healy gets today, whether the utility of listing tomorrow at all or not. In other words, Mr. Healy, if you have only 20 minutes left tomorrow, it would be a waste of State resources to simply list a sitting day tomorrow. But we'll go ahead as far as we can, to ten past, a quarter past four today, and we'll finalise the remaining arrangements. But in any event, I won't have the conclusion of Mr. Healy tomorrow followed by all the other barristers. So in substance, I am going to afford you that latitude. Thank you.

CONTINUATION OF EXAMINATION OF MARTIN BRENNAN BY

MR. HEALY:

Q. MR. HEALY: Mr. Brennan, I think that before lunch I had referred you to the draft, what I'll call Article 8 letters that were being considered just before the licence was drafted. Or just before the licence was issued.

The next document is a Matheson Ormsby Prentice memorandum of the 15th May, 1996. It seems to be a

note of a meeting with Mr. Gerry Halpenny, Mr. Neville O'Byrne, Mr. Michael Walsh, Mr. Owen O'Connell, Mr. Barry Maloney, Mr. Knut Digerud and Mr. Peter O'Donoghue, and Mr. Arthur Moran was the solicitor taking the attendance.

Mr. O'Connell reported on a meeting with the Department and then referred to a number of items.

I just want to clarify something for a moment, Mr. Brennan. I was looking at the line under "Windfall gains", "take out reference to 15 million", and for a moment I was puzzled by the third next word, "Minister must", and for a second I thought that was "w-a-i-v-e". I think it's "w-a-v-e", from which it follows the next three words would be the "1/2 15 million cheque". That's what the delay was about; I am sorry.

A. Yeah, okay.

Q. The next second-next line is "Department wants shareholders agreement as signed". I just want to deal with that matter first. We referred to a draft version of the shareholders agreement already which may have come into the hands of Mr. Buggy, and the Department were at this stage clearly indicating, understandably, they wanted the actual signed shareholders agreement; they had to know that they were giving this to a concrete actually existing entity. And I think that was in fact done on the following day around 3 o'clock.

Underneath that there is "Indemnity in accordance with the bid". I am not quite sure what that refers to, but it clearly indicates again a sensitivity on the part of the Department to make sure that what was being put in place was in accordance with the bid; would I be right in that?

A. I think so, yeah.

Q. "Persona lost 4/5 points re technology and re performance bond projected market not agreed by Department" the next word I can't quite follow.

Then in quotation marks: "No happier but dearer".

I don't quite follow that portion, but in any case I would draw your attention to one thing: It does appear that at that point, "no happier but clearer", I think is what that means. Would you agree that that's what it probably means?

A. It's hard to know

Q. In any case, I am not sure, I can't form any impression of what that might mean or might refer to, but I would draw your attention to the fact that it seems that information concerning one of the other contestants was available at this point, including quite relatively detailed information concerning how they managed to score on two aspects of the evaluation criteria; do you notice that?

A. I do, yeah.

Q. I thought that the Department had set its face against

making available information at that level to anybody.

A. I think that's probably true, but by that stage, it had been given to the Persona people.

Q. I agree that you had given information to the disappointed contestants, but you drew the line at giving that level of detail; isn't that right?

A. I think we probably didn't give information about the number of points. We probably did point to the weaknesses in technology, whatever.

Q. I understand that.

A. And like yesterday, there is obviously a half-inch or so cut from the edge of this document.

Q. There appears to be.

A. Which would probably help if we had it.

Q. The next three pages the next four pages, sorry, the four pages in total of that memorandum seem to deal with getting the shareholders agreement in place, getting the $\frac{1}{2}$ 15 million together, arranging to ensure that the Article 8 side letter was put in place, and arranging also, from the Telenor and Communicorp point of view, to pay the extra money to IIU for IIU 5%?

A. Mm-hmm.

Q. If you go to the third page, you will see a reference above the note that says "10pm OO'C"; do you see that?

A. Yeah.

Q. It says "Telenor to transfer 11.375 million to William Fry. 10 million for Esat Digifone, 1.375 million for

IIU Nominees." Do you see that?

A. Mm-hmm.

Q. Now, there were two aspects to the money transaction

that was taking part or that were taking place at this

point. Firstly, IIU were being paid 2.75 million for

their 5 percent, which valued the licence at that time

at about 55 million Irish punts, about 80 million

euro. 1.375 million of that came from the Telenor

side and 1.375 million was to come from the

Communicorp side. Communicorp didn't have their

1.375, so instead an arrangement was put in place

whereby they'd have to pay it later on. Did you have

any idea that that was going on at that time?

A. I don't believe that I did.

Q. You knew that the shareholding was going from 25

percent back to 20?

A. Mm-hmm.

Q. Did you know at that point that that was changing

hands for a consideration of which put a full value

on the licence of 55 million Irish pounds?

A. I don't believe we did.

Q. And nor did you know that Communicorp were not able to

pay their 1.375 million, obviously, if you didn't know

the first part of that?

A. I think that's true, yeah.

Q. And that, I presume, would have affected your

impression of the financial capacity of Communicorp at

that moment?

A. Yeah, I suppose it would, yeah.

Q. You were concerned one of the issues that you and the Department, certainly the Minister, had to deal with in terms of public presentation was queries concerning Communicorp's financial capacity. If you had been told they can't pay 1.375 million, not to mention their share of the 15 million, it might have tempered the presentation that would be made in relation to financial capacity if you were going to allow it to go ahead at all?

A. Yeah, it might have done, but it would have to be taken with the totality of the information.

Q. But that's a fairly concrete piece of information

A. Yes.

Q. that they couldn't put up that much money. Did you know that they couldn't put up their share of the 15 million?

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

Q. Notwithstanding the fact that they hoped to have it all in due course, they didn't have it on that day, and that surely would have affected your view about whether the licence could really go ahead or not, wouldn't it?

A. It would certainly have had to be taken into consideration.

Q. Isn't there more than that? You couldn't possibly

have exposed yourself to a situation where, after a very lengthy evaluation process and a lengthy negotiation process, it might get into the public domain that the licence had been given to somebody whose financial capacity was supposed to have been checked out but who couldn't actually pay for it that day. That would have been unacceptable, wouldn't it?

A. I think we would have had to re-open the examination that Donal Buggy carried out for us.

Q. The point about the Donal Buggy examination is that Mr. Buggy was actually alerted to the fact that Communicorp didn't have all of its money. Now, he was not he freely accepted that there was no note or suggestion that he was alerted to the fact that Communicorp didn't have the money to pay up their share of the 15 million, but he was aware the money from CSFB was not in place; isn't that right?

A. That's right, yeah.

Q. But nobody at that stage seems to have been queried whether Communicorp actually had the funds to come up with their share of the 15 million.

A. I think the relevant question for us was, would Esat Digifone walk in with a cheque for 15 million?

Q. I think that what the Minister said on the 30th April is that a statement would be made concerning A, the ownership of Esat Digifone and the funding and the source of funds; isn't that right? That's what he

said in the Dail.

A. Okay, I'll take your word for that.

Q. And when we come to the presentation, I think we'll find that the source of funds, in particular the source of the 15 million, was never disclosed. And let's face it, politically, it was simply untenable to disclose it, wasn't it?

A. I don't know, really. I mean

Q. Mr. Brennan

A. It certainly would have been a difficulty if

Q. I think that would be the understatement of the year.

Are you saying you could have had a press conference and said "I have $\frac{1}{2}$ 15 million here", the Minister waving the cheque for $\frac{1}{2}$ 15 million, "I got a share of this from Mr. Desmond, another share of it from Telenor, Mr. O'Brien didn't have his, but the other two agreed to give him a loan of it for the time being"

A. I mean, we didn't address that question because it didn't arise.

Q. It couldn't have arisen isn't that right? It couldn't arise. I want to see what pressures were dictating why the true facts didn't come out. The Minister made a promise to the Dail that the true facts would come out. But these were two facts. The fact that the $\frac{1}{2}$ 15 million, the source of it was not disclosed, and the fact that 2.7-odd million was paid

to Mr. Desmond for his 5%. Those two facts didn't come out. They couldn't come out.

A. We weren't aware of them.

Q. You weren't aware of them. I am sure you weren't.

But if you had been aware of them, you simply could not have gone ahead?

A. There would have been difficulty, of course there would, yes.

Q. Did anyone ask in the Department about what was going to be done about the 5%? Was it simply going to be a reorganisation without any money changing hands?

A. I don't believe we addressed that question. We simply we took the simple view that the application was based on 50/50 with 20 to be placed. And that's what we wanted to be licencing, not 40:40:20.

Q. This licence was being traded therefore before it was even granted; isn't that right?

A. It looks like that.

Q. The next document is in Leaf 226, the next one I want to refer to you. We have already dealt with the Anglo Irish bank document.

This is a meeting, I think in Mr. O'Connell's office, on the 16th May of 1996, attended by you, by Fintan Towey, and by Donal Buggy. It would appear that the meeting was held at around 11.55?

A. Why do you say in Mr. O'Connell's office?

Q. I don't know. I am saying I think so because it

doesn't mention the Department.

A. I am not sure that I know where William Fry's offices are, to be honest with you.

Q. Maybe it's in your office. It's just that do you recall that in the other notes Mr. O'Connell kept of meetings, he referred to usually referred to where the meetings took place? You may very well be right.

A. If you are asking me now where is William Fry's office, I don't know.

Q. One thing is clear: There is no note in the Department of the meeting. Isn't that right?

A. I haven't checked that, but if you haven't got one, there mustn't be.

Q. It says "Knut has to be there", I presume a reference to Knut Digerud. "MW 'ought' to be there." Meaning a representative from the IIU side.

"Have told you a lot about this company more".

Can you imagine or think what's that referring to?

A. I can't, no.

Q. The next one is "Loves answer re 500 K". Do you think you know what that's about?

A. I can't think of any reason now, anyway.

Q. We'll come to that in a moment. There is "Seamus

Brennan Dail Minister to guarantee re coverage geographically and quality. Dail tonight.

Wants format press release (formal press release).

Still looking at letter" presumably means side

letter.

"Very urgent re shareholders agreement".

Now, over the page, "Still on for 3.30". That's 3.30

that afternoon, I take it?

A. I'd imagine so, yeah.

Q. "Printing stage

Minister's press release need now.

Accountant, Department of Finance, 15 million."

I presume that's the payee on the cheque?

A. I'd imagine so, yeah.

Q. If you go to Document 234 for a moment, I only want

you to look at it just for a moment. This is the

rehearsal for the press conference. I am not going to

go through all the participants' documents on this,

but if you look at the transcript, one of the issues

that had been flagged at the earlier meetings at which

you attended is whether Telenor and Esat Digifone get

together and re delay. Do you remember, it was late

April. It's now shifting back to second half of

April, and it's now being pushed back to April. All

Jesuitically correct, I suppose, but what was

originally late April/early May is now becoming April.

"Whether ready to put in bid.

Certain 9 May "April" is the answer.

"Were ready 23 June. Felt penalised, better prepared.

Team disappointed. Added 500 K to the cost. (Keep

team together) One new competitor."

Do you see that?

A. Yeah.

Q. I suspect that that's the 500,000 answer.

A. It could easily be, yeah.

Q. And I don't know whether you loved it, Mr. Towey or Mr. Buggy or the Minister, but can you recall?

A. I can't really, no.

Q. I don't suppose you are actually aware whether 500,000 was added to the cost or not?

A. No, I am not.

Q. It doesn't seem likely, does it?

A. I mean, I don't know what the costs were of putting the bid together or whether there was any costs, at the end of the day. I presume there was some salary cost.

Q. There must have been, of course, some costs. What was done was this: The delay may have added some cost because you had to keep your operation going for an extra month or so, but the 15 million definitely reduced the cost for everybody, didn't it?

A. Yes. I don't know what point you are making there.

Q. I am just saying that this seems to me to be a ludicrous proposition, that because of the delay 500 was added to the cost, when the bottom line is that you had a fixed cost for your licence of 15 million, which presumably must have saved a huge amount of money for anybody likely to bid, bearing in mind that

as of that moment the licence was being valued at 55 million.

A. Yeah, but if in this conversation we were speculating about questions that might arise, and they came out with you know, this is part of an answer, I could see why I might have said "Yeah, that sounds lovely".

Q. Lovely, but grossly inaccurate.

The next document, in Leaf 227. This is a handwritten note of Mr. Denis O'Brien dealing with a number of points to be tackled in the run-up to the press conference. See the first note, "Michael

Walsh 12.00 noon, Michael Walsh talk to J

Loughrey

seen enough to satisfy".

May be a reference to Mr. Loughrey conveying to Mr.

Walsh his view of the memorandum prepared by Mr.

Buggy?

A. It could easily be. I mean, Mr. Loughrey will come with evidence.

Q. Can I just make sorry, I beg your pardon

A. The only thing, "talked to" looks more like the future than the past.

Q. I agree. "Seen enough" refers to the past rather than the future. Maybe a combination of both?

A. Yeah.

Q. It may be "talk to Mr. Loughrey and ascertain whether he has seen enough to satisfy him"?

A. It could be that too.

Q. One way or another, if it's in the future, then Mr. Loughrey hadn't yet been satisfied.

A. This is Denis O'Brien's note.

Q. Yes?

A. Denis O'Brien didn't know if it's in the future, then Denis O'Brien didn't know whether Mr. Loughrey was satisfied or not.

Q. Yes. Do you remember, I think a few days before this, there is a reference in one of the memoranda or else you certainly mentioned it in evidence the other day that at one point, some consideration was given to involving Mr. Andersen in this whole question of looking at IIU/Dermot Desmond?

A. I seem to remember it. Like yourself, I have a hazy recollection of it being mentioned in passing. I don't think I mentioned it, but I could be wrong in that too.

Q. I am not sure you mentioned it. Maybe it's in a document, and I am not sure whether the document attributed it to you, but there is a reference to "Should we involve Mr. Andersen"?

A. I have a vague, a very vague recollection that I saw something like that in one of the days up here within the last week or so. But I wouldn't be it wouldn't be possible for me to trace it now.

Q. In the course of the evaluation process, the people

who dealt with the financial issues on the Irish side,
the in-house side, if you like, were Mr. Buggy and Mr.
Riordan; isn't that right?

A. Yeah.

Q. Mr. Riordan seemed to have devoted a lot of time and
to have been involved quite intensely; isn't that
right?

A. He seemed to do, yeah.

Q. Why was there no consideration given to trying to
involve the same people at this point in looking at
Mr. Desmond?

A. I really don't know. I don't know, for example, if
Mr. Riordan was still in the Department of Finance at
that point or not. That's something that could be
established relatively easily.

Q. Was anybody else was any consideration given to
involving anybody else from the Department of Finance?

A. I don't recall that being the case.

Q. I don't think the Department of Finance were kept in
the loop over these developments, were they?

A. They probably I don't know

Q. I could see no document suggesting that.

A. I don't know the extent to which they were or were
not. I mean, clearly there was some contact with
them. I mean, it's obvious that there was contact,
for example, as to who should the cheque be made out
to; so I don't know how much dialogue was going on.

Q. That's fair enough, I suppose. Any cheque that's paid in like that, you could I am sure there must be plenty of precedents for cheques like that, but

A. There was a history to cheques like that.

Q. I see. Well, there is no record, as far as I can see, of the Department of Finance being involved at all.

Mr. Curran or Mr. Doyle. Or Mr. McMeel.

A. I don't recall their being involved.

Q. Underneath that it says "Letter finance place from underwriter".

Underneath that, "40:40:20. Don't discuss 5%:5%."

Seems to refer to the 45:45:10 proposal that wasn't to get under the way until the ink was dry.

"Worst possible questions

number 37 competition for GSM licence".

I am not sure what that means.

"William Fry to play devil's advocate.

Legal adviser will attack Davy solicitor" or

"attach Davy"

"solicitor to attend."

Then there is two numbered items.

"1 ownership

"2 deflect attention away more business info

infrastructure", and a number of other things that I

can't decipher. But the two numbered items are ones

that reflect earlier memoranda and earlier notes of

meetings where again these two approaches were

canvassed: firstly, that the ownership issue was a problem one; and secondly, that attention would be deflected away from it in favour of the more positive upbeat aspects of the project, i.e. infrastructure and so forth. Isn't that right?

A. That's what it looks like, yeah.

Q. The next page there are reference to direct dialer issues, which I don't think we need to dwell on.

The next document is a letter addressed to you from Owen O'Connell enclosing the shareholders agreement signed by Telenor, presumably IIU, and as I recall from seeing the draft, Mr. O'Brien's representative.

It says "I also enclose a letter in the agreed form signed by Telenor Invest AS and IIU concerning potential funding shortfalls."

I think we can pass over that shareholders agreement.

The next document is the actual form of the comfort letter on the issue of shares. What this letter does, a letter of the 16th May 1996, signed by you and addressed to Knut Digerud, is it indicates, if you like, a form of advance consent or gives an indication of the type of transaction to which the Minister would consent; is that right?

A. Yeah.

Q. In the next document you have the Telenor and IIU letters.

The next document is the press release signifying the

Minister's signing of the second mobile phone licence.

The next document is the actual press release, I think, issued by Esat Digifone. This press release was, I think, cleared by the Department; do you recall that taking place?

A. I don't specifically recall, but it's likely.

Q. I think I can refer you to other documentation, but I don't want to go through it, suggesting that this was cleared by the Department and why I think the next document if you go to the next document, in fact, 234, you see Mr. Owen O'Connell sending you a copy of a draft which is more or less as it was ultimately issued, subject to a few typos. I want to refer to a document in Book 38. I am not going to put you to the trouble of opening Book 38.

Book 38, Leaf 18; I'll put it on the overhead projector and we can all look at it. If you go to the top of the document, please. This is a it looks like a memorandum from FCC, I think Esat Digifone's communications company, of the 15th May 1996, to Owen O'Connell from public relations company, sorry dated 15th May 1996. To Owen O'Connell from Eileen Gleeson.

It says "Attached is a draft press release which would be sent out today if we get approval from the Department to do so (which is not at all definite; the Minister's advisers thought it a good idea but I think

that Loughrey does not). Anyway, regardless of whether it is today or tomorrow, we need to agree the details for publication on ownership and funding anyway.

"Could you look through the attached. I also prepared questions which might be asked on the issue.

"Denis asked me to go to your office at 1:00pm to discuss the release and the questions which will be asked of the Esat Digifone people at the press conference in the interests of everyone being 'on the same line', it is very important that this practice session is undertaken."

This document contained or this press release, which I won't go into in detail, contained some of the material which ultimately found its way into the final press release issued on the following day. What I want to ask for your observations on is the suggestion in the memorandum that "the Minister's advisers thought it a good idea, but I think that Loughrey does not".

Do you recall any discussion either with Mr. O'Connell, with Ms. Gleeson, or with Mr. Loughrey

A. I don't.

Q. about the timing of a press release?

A. I don't, no.

Q. If this is correct, it would appear that the Minister's advisers meaning, presumably, people

other than Mr. Loughrey; is that right?

A. Yeah.

Q. Thought it a good idea but that Mr. Loughrey did not.

A. Yeah, but I don't know what it is that they were commenting on, whether it was the issue of it today as distinct from tomorrow, or whether it's the question of its issuing at all.

Q. I think there was no doubt about its being issued. It seems to me to do with issuing it today, as you say.

A. Yeah.

Q. As opposed to the following day. What it says is, it says this is issued in advance of the I'll read out the first few lines to give you a flavour of it.

"In advance of the formal signing of licence to operate Ireland's second mobile telephone network tomorrow, Esat Digifone has confirmed details of its shareholding structure as follows."

And it confirms details of the 40:40:20 structure with Telenor, Esat Telecom and Dermot Desmond, and that ultimately found its way into the final press release that was issued on the day of the issue of the licence. I read the memorandum as canvassing the proposition that it should have been issued that day.

A. Yeah, okay.

Q. Can you recall whether there was any discussion about issuing this type of thing in advance?

A. I have no specific recall. There was certainly talk

about whether to have one press conference or two, but

I don't know whether it was in the context of different people's press releases or not.

Q. It does seem to deal with one of the issues, at least deal in part with the issue of ownership; it deals in part with the issue of the share configuration, doesn't it?

A. I haven't actually read it.

Q. Just the few lines I read out.

A. Okay.

Q. It contains the 40:40:20 breakdown and identifies each of the three shareholders. Maybe it's something better taken up with Mr. Loughrey, if you don't recall being involved in any debate on that.

A. I don't have a clear recall of being involved, so you are right, I think it's better to take it up with Mr. Loughrey.

Q. Or Ms. Gleeson, yes. If there was a distinct between the or a difference between the Department's advisers, between the Minister's advisers, i.e. the civil servants more directly involved than Mr.

Loughrey, can you remember any issue as between yourself, Mr. Towey and Mr. Buggy and whoever else was involved, Mr. McMahon, and Mr. Loughrey?

A. No, I think this is more likely to refer to the Minister's advisers, possibly Bill O'Herlihy, who was always around when there was press occasions.

Q. I see. It may refer to his non-political, or his political advisers, as it were?

A. Yes. I think Bill O'Herlihy was more a PR adviser than a political adviser.

Q. I understand. What I mean by "political", I suppose, is that

A. Non-civil service.

Q. He was non-civil service, yes.

The press release that actually did go out in any case is the one I think contained in Leaf 233, and as I said, it seems to have obtained your approval. So that there would be no doubt about it, I want to go on to the one that was actually sent to you, which is in the next leaf.

You see the cover sheet, and then the draft on the following two pages. You see that?

A. Mm-hmm.

Q. Obviously you corrected the headline, where it said "Esat Digifone signs GSM licence", which is of course may be correct, but the Minister, as the vendor, was the most important person to sign it, if you like?

A. The original person to sign it, I think.

Q. Is that right? Well

A. It's a unilateral document.

Q. Is it? I see.

A. I think.

Q. It says "The Minister for Transport, Energy and

Communications, Michael Lowry TD, and the Chairman of Esat Digifone, Denis O'Brien, have signed the licence giving Esat Digifone the go-ahead to operate Ireland's second mobile phone licence."

You changed that, I think, to say, respecting the view you have just expressed, the Minister signs; okay?

A. Yeah.

Q. "Esat Digifone announced that it is well on target to launch the new service in the last quarter of this year."

It goes on then "Esat Digifone also confirmed details of its shareholding structure. Esat Telecom Holdings Limited, a wholly owned subsidiary of Communicorp Group Limited, holds 40% of the shares. Telenor Invest AS, a wholly owned subsidiary of Telenor, the Norwegian telecommunications operator, owns 40% of the shares. And IIU Nominees Limited, a wholly owned subsidiary of International Investment and Underwriting Limited, hold the remaining 20% of the shares on behalf of Mr. Dermot Desmond.

"IIU has stated that this shareholding or part thereof may be placed with additional investors at some future time. This will be reviewed when Esat Digifone is operational towards the end of the year."

Now, that was removed from the final draft.

A. Yeah, okay.

Q. Can you recall whether you recommended the removal of

that paragraph?

A. I don't know. And I should say that the annotations on it are not in my handwriting. So there was more than one person involved in it.

Q. Yes. It was sent to you. Who do you think you would have involved in it?

A. I'd say Mr. Loughrey, Mr. Towey, Mr. Buggy perhaps, within that group, anyway.

Q. Do you recognise the handwriting on the amendments in the next paragraph?

A. I don't, no, I don't recognise the handwriting.

Q. Of course it could have been Mr. O'Herlihy as well, I suppose, possibly?

A. I suppose it could, yeah.

Q. But that paragraph in any case was one that was drawing attention to IIU; isn't that right?

A. Mm-hmm.

Q. But was removed.

"The shareholders listed above have each contributed to the investment made in the network to date and will each discharge its financial responsibilities to the entire investment required for the project, which is in the order of €120 million. This funding will be provided by equity from the shareholders and by debt financing, ABN-AMRO and AIB Bank have been appointed lead bankers to arrange the project financing."

Now, if you go to the draft that was actually issued,

it says "The shareholders listed above have each contributed to the investment made in the network to date." And then instead of "and will each discharge its financial responsibilities to the entire investment required for the project, which is in the order of 20 million", it says "The entire investment required for the project is in the order of 120 million, with total commitments to date exceeding 50 million."

And I suppose the express statement that each will discharge its financial responsibilities to the entire investment has been removed. Do you know why that statement was removed?

A. I don't know either why it was removed or by whom it was removed.

Q. It goes on "Esat Digifone has been proceeding with development of its network since October last year and is on target to launch the service to the public during the last quarter of this year. The service from day one will reach 80% population coverage, rising to 95% population coverage within a further nine months of launch. These levels will exceed the quality and population coverage requirements as stated within the tender".

Then there is an additional paragraph: "The physical construction of the network has already commenced with the building of the first base station in Cork.

Network roll-out continues on target."

The draft goes on: "There are nearly a hundred people already working on the launch programme, including network roll-out, establishment of the Customer Care Centre, sales and marketing plans and on service at product development. The company will employ over 300 people at launch date rising to over 500 at maturity.

About half of these jobs will be placed at the Esat Digifone National Customer Care Centre in Limerick, with the remainder at headquarters in Dublin and a small number in regional centres." And that again is as per the draft.

I think the rest of it is more or less as per the draft, dealing with who the joint chief executives are and ultimately what infrastructure and other equipment contracts have been issued.

In the next leaf you have a note of a rehearsal for a press conference. Were you present at any rehearsal for a press conference?

A. I don't think I was.

Q. Do you know if any Department officials were?

A. I don't know that.

Q. We have seen some of these issues referred to already.

I mentioned this document a while ago. It's dated 16th May, "Rehearsal for press conference".

"When did Telenor and Esat get together re delay?"

"Second half" crossed out, "April '95.

Whether ready to put in bid, certain 9th May

'April' is the answer." We discussed that already.

"Where ready 23 June. Felt penalised, better prepared. Team disappointed. Added 500,000 to cost.

Keeping team together. 1 new competitor.

Arve delay in licence Government State", obviously blaming the Government and the State for that.

"DOB contribution wish to scotch the persistent rumours on this. The licence fee has been paid.

Millions has been spent by the company to today.

Almost entirely out of shareholders fund.

Little or no bank funding to date.

All of Esat Telecom Holdings shares of the funds have been paid.

Arrangements among the shareholders have been concluded to everyone's satisfaction and are working."

And then the next question identified "Is this the same consortium as that which applied?"

Can you recall if questions like these did arise at the press conference?

A. I don't recall, no. I was at the press conference, I know that. When I say I was at it, I was at the back of the hall.

Q. If you go to the third-last entry on the first page of that transcription, it says "Team disappointed. Add 500 to cost (keeping team together) one new competitor."

Was there a new competitor?

A. We have no way of knowing how many people would have applied for the licence if the closing date had been deferred, because all we knew is who bought the documentation. Now, it may well be that the consortium had different information. As far as we were concerned, one potential competitor dropped out, and I mean, we know who they are. But I wouldn't I have no way of knowing whether there was one more competitor as a result of the delay.

Q. Well, maybe we could just break it down. Did anybody else, other than those who expressed an interest first day, become involved in the project? When I say that, you had expressed

A. There was no new requests for documentation after the early days of the launch of the project.

Q. And the only people who were formally notified of the change were those who had initially purchased the documentation; isn't that right?

A. That's correct, yeah.

Q. There was no readvertisements, notwithstanding the change

A. No.

Q. in the competition terms?

A. No.

Q. So the only people who would have formally become aware of the competition rules were those who had

purchased the original documentation?

A. Yeah.

Q. And are you aware of anyone who felt that the change enabled them to join the competition, to join a competition which they wouldn't have joined before?

A. No.

Q. The next item is "Delay in licence". Then underneath that, "Denis O'Brien contribution I wish to scotch the persistent rumours on this. The licence fee has been paid. Millions have been spent by the company." As of the 16th and as of the press conference, the licence fee had been paid. That was absolutely correct; isn't that right?

A. Mmm.

Q. "Millions have been spent by the company to date." That's true. "Almost entirely out of shareholders funds", presumably true. "Little or no bank funding to date."

I don't know if there were any rumours that the licence fee hadn't been or wouldn't have been paid. To judge from the Dail exchanges, the rumours concerned Mr. O'Brien's capacity to pay his end, isn't that right, to keep up his end?

A. I don't recall that right now, but if that's what you are saying in the Dail papers, that's fine.

Q. If a statement like that was made, it was, I suppose, accurate so far as it went. Insofar as it purported

to scotch any rumours concerning Mr. O'Brien's having made or his ability to pay, it would have been completely incorrect, wouldn't it?

A. According to the information that you have presented here, yes.

Q. The next document concerns the Persona complaint.

A. Are you assuming, by the way are you assuming that this was a joint rehearsal as distinct from

Q. No, I am not.

A. Because I don't know one way or the other.

Q. Where was the actual press conference held?

A. The press conference was held in the Department.

Q. No note was kept of it, was it?

A. I am not aware of any note being kept of it.

Q. I am just passing over the next document, unless you want to comment on it it's from Fintan Towey to Mr. McFadden in the Attorney General's Office enclosing documentation from the Commission regarding the Persona complaint. Do you see that?

A. Yeah.

Q. The next document I think is an extract from the proceedings of the European Parliament. It's an extract that appears to have been sent from Mr. Jarlath Burke, presumably to Mr. Denis O'Brien, in which he says "Question posed orally by Pat the Cope Gallagher, FF MEP (who else), Hocepied had to go to Strasbourg with van Miert to answer the question."

Then it says "File Department of Communications"; do you see that?

A. Yeah.

Q. Unless you want to comment on it, I propose to pass over it.

A. I am wondering what's the significance of the annotation "File Department of Communications". I don't suppose you got it from the Department files. But I don't know.

Q. I think so. But it's in the Department documents.

A. Okay. That's fine.

Q. The next document is a note of a meeting in August of 1996 concerning the project financing of Esat Digifone by ABN-AMRO and AIB. Unless you want to comment on it, I don't see any reason to draw your attention to it.

The next document seems to be a letter from Mr. Owen O'Connell to Fintan Towey following on the meeting and dealing with the same issue.

The next document is a letter on the 6th December 1996 to Mr. Robert Molloy, TD, from the then Minister for Transport, Energy and Communications, Mr. Alan Dukes, Mr. Lowry having resigned. You will recall that Mr. Molloy had been asking a lot of questions about the process in the course of 1995 and 1996.

It says:

"Dear Bobby,

"There appears to be considerable confusion abroad about the precise situation regarding ownership and investment in Esat Digifone. I hope the following information will clarify the matter for you.

"The Esat Digifone application was on behalf of a consortium owned as to 50% each by Telenor Invest AS and Communicorp Group Limited (the holding company of Esat Telecom.) The application disclosed that if it was successful, 20% would be placed with financial investors. A list of potential investors was submitted, all of whom are 'blue-chip' institutions.

The Minister and Department are specifically precluded from naming these, but there was no room for doubt as to either their bona fides or their financial capacity.

"I can, however, confirm that the names being speculated upon in the last few days were not on this list.

"At the licensing stage, several months later, Esat Digifone was in a position to announce that it had placed the 20% with IIU Nominees Limited, and it was certified to the Department at that time that Mr.

Dermot Desmond was the sole beneficial owner of the 20%. Adequate evidence of his capacity was disclosed.

Mr. Desmond is still the exclusive beneficiary of the IIU shareholding.

"On the 19 April, when the Department held a press

briefing, the fact that it was not in a position to give final definitive information on the placement of the 20% minority shareholding may have reduced the clarity of the exchanges. My information is that when the licence was issued shortly thereafter, the precise situation was clearly stated.

"If I can be of any further assistance to you within the constraints of the binding confidentiality arrangements, I would be delighted to do so."

Do you recall being involved in discussing any of these matters with the then Minister, Mr. Dukes?

A. I don't particularly recall a discussion. I guess it's likely that he got a letter from Deputy Molloy, and that the letter came down to the division for a draft response.

Now, whether there was an oral exchange between me or us and the Minister in considering the response, I don't precisely recall. But certainly the text of the letter rings familiar to me. I may well have written it myself; I am not sure.

Q. Mr. Dukes has informed the Tribunal that when these queries were addressed to him, he decided to conduct, as it were, his own inquiry, insofar as he could do it; that meant that he addressed the matter to you and to Mr. Loughrey.

A. Yeah, okay.

Q. Do you recall that?

A. Well, certainly if it was a letter from Deputy Molloy, it would have come to me for a draft response. I don't specifically recall there being a discussion, but I would not rule it out at all. I mean, this seems to have been within days of the new Minister arriving.

Q. And therefore within days of the old Minister resigning?

A. Yeah.

Q. And the old Minister, Mr. Lowry, resigned in hugely controversial circumstances, isn't that right, which ultimately led to the setting up of the McCracken Tribunal and this Tribunal?

A. Yes.

Q. Now, the new Minister knew nothing about this, other than what he would have heard in the corridors of the Dail or in the debates or in the press; isn't that right?

A. I think that's true.

Q. And I understand that is his position. And he was dependent on what he was being told by you, I think, and Mr. Loughrey?

A. Yeah.

Q. And I think he was anxious to try to put a stop to this controversy, inasmuch as he was a new Minister, he was a new broom; it had, on the face of it, nothing to do with him. Isn't that right?

A. Yeah.

Q. And he says "There appears to be considerable confusion abroad about the precise situation regarding ownership and investment in Esat Digifone". These again are the two issues that had been profiled time and again, more or less from the previous November; isn't that right?

A. Yeah.

Q. And then there is a description of the application as being on behalf of a consortium owned as to 50% Telenor, 50% Communicorp, with a disclosure that if it was successful, 20 percent would be placed with financial investors. Now, I am not sure it actually said that; I think it said 20% would be placed with financial institutions, and I think that has quite a different meaning; but to some extent you pick that up in the next sentence. "A list of potential investors was submitted, all of whom are 'blue-chip' institutions". There can be no doubt about that; isn't that right?

A. That's right, yeah.

Q. We have time and again, in the course of this portion of the Tribunal's proceedings, mentioned that there was no need for the evaluation group to have any doubt concerning the bona fides, as you put it, or financial capacity of these entities; isn't that right?

A. Yeah.

Q. If they said they were going to be involved, then short of being legally bound to do so, they were as committed as a bank would be in the ordinary way; isn't that right?

A. Mm-hmm.

Q. And I think, judging from the presentation we received, their involvement was trumpeted as a sign of confidence only; isn't that right?

A. Yeah.

Q. "I can, however, confirm that the names being speculated upon in the last few days were not on this list."

That was a reference to the confidentiality obligations subject to which this information was accepted first day; isn't that right?

A. That's the previous sentence is a reference to that?

Q. Yes, both sentences.

A. That sentence must be to do with media speculation around wrong names.

Q. Around wrong names. Can I just clarify one thing: Did you ever know whether any of these institutions were themselves or ever find out whether they themselves wanted their names kept private?

A. I didn't, no.

Q. Did anyone think, at this stage, of contacting them and saying "Have you got a problem with

confidentiality, or were we being coddled about this?"

A. I don't think anybody thought of that.

Q. It goes on to say "At the licensing stage, several months later, Esat Digifone was in a position to announce that it had placed the 20% with IIU Nominees Limited, and it was certified to the Department at that time that Mr. Dermot Desmond was the sole beneficial owner of the 20%".

It goes on, "Adequate evidence of his capacity was disclosed. Mr. Desmond is still the exclusive beneficiary. On April 19, when the Department held a press briefing, the fact that it was not in a position to give final definitive information on the placement of the 20% minority shareholding may have reduced the clarity of the exchanges".

At the very least, isn't that sentence and the previous paragraph disingenuous?

A. I am not so sure what you are getting at. I am not at all sure what you are getting at, in fact.

Q. There is no discussion from all the documentation we have been through, on the participants' side or on any side, that Esat Digifone was in a position to announce only at the licensing stage that it had placed 20% with IIU Nominees Limited and that Mr. Dermot Desmond was the sole beneficial owner of the 20%. At one stage, wasn't an attempt being made to induce you to buy into the suggestion that the public would be told

that IIU were going to take 20% but that because of the market conditions, they wouldn't be placing this with anybody else?

A. You certainly had documentation to that effect this morning.

Q. Didn't you know from the 19th April that the consortium was describing itself as a 25:37.5:37.5 consortium, wasn't it?

A. Yeah.

Q. You say that "On the 19th April, when the Department held a press briefing, the fact that it was not in a position to give final definitive information on the placement of the 20% minority shareholding may have reduced the clarity of the exchanges." There was no question on the 19th of any issue arising on the 20% minority shareholding. There was no such 20% minority shareholding. It was a 25% minority shareholding, wasn't it, and you had absolutely definitive information on it?

A. We had a letter saying 25%. We had an agenda to get it back to 20%. And we were taking we were examining both the legal and the financial aspects of that situation from then and for some time thereafter.

Q. I don't think Mr. Dukes was ever told that the Department were informed on the 19th that you were aware of a 25:37.5:37.5 configuration but that you had an agenda to get it back to 20:20:40. He was never

made aware of that.

A. That's quite possible.

Q. But wasn't that the key piece of information concerning the evolution of the ownership of Esat Digifone, wasn't it?

A. It was an important piece of information.

Q. And wasn't the new Minister, who should have been armed with the full facts if anybody was to be armed with them, been given the impression that there was a seamless evolution from 50/50 at the application stage to 40:40:20 at the licence stage; isn't that right?

A. Isn't what?

Q. Isn't it right that this letter gives the impression and the Minister was given the impression and was authorised or allowed to give the impression to Mr. Molloy and to the outside world, if you like, that there was a seamless transition, an evolution of the ownership from 50/50 with potential for 20% financial investors at application stage to 40:40:20 at licensing stage, and that there was a sort of a negotiation or an evolution during that period which ultimately led to the introduction of IIU Nominees and Dermot Desmond?

A. Maybe it's tiredness, I don't know what it is, but I am not following the line of argument for the moment. And I don't know, for example, whether the Minister got this letter in isolation or whether there was

support documents given to him.

Q. The Minister said he knew nothing about the 25% and it was a huge surprise to him.

A. Okay.

Q. Now, this letter does not mention the 25%, and by not mentioning it, it contains a complete distortion of what was happening.

A. And you are suggesting a deliberate complete distortion, obviously.

Q. Whether it's deliberate or not is another matter.

Hopefully that's not for me to decide. Thankfully

it's not for me to decide. I am not pursuing that.

I'm simply pursuing the plain words of the document.

The plain words of the document are a distortion of the true position, both as it was on the ground and as it was known to the Department). Would you accept that?

A. I accept that with all of the information that the Tribunal now has, and with a forensic review of the letter, that it could have been drafted better; and I believe I probably drafted it myself. I don't believe there was any deliberate attempt to confuse the Minister, mislead the Minister. It may be that I overlooked some details in drafting the letter.

Q. You see, I think what I could suggest and if I can put a number of suggestions to you, Mr. Brennan.

Well, firstly, I might establish, did Mr. Loughrey

approve of the letter, do you know?

A. It's such an important letter that it probably went up in the hierarchial fashion.

Q. As you described on an earlier occasion?

A. Yeah.

Q. Up the line, before it went out to the Minister?

A. Yeah. But there should be evidence of it should be traceable where it went in the Department.

Q. Mr. Dukes has informed the Tribunal that the letter, as I said, was the result of some inquiries he made to try to establish the position, and that he made those inquiries with you and Mr. Loughrey.

A. Okay.

Q. And the Tribunal understands that what's contained in the letter is what was relayed to him by you and Mr. Loughrey.

I'd suggest to you that if you'd look at the second-last paragraph, which begins "On the 19 April, when the Department held a press briefing, the fact that it was not in a position to give final definitive information on the placement of the 20% minority shareholding may have reduced the clarity of the exchanges", can only have been written by somebody who was alive to the fact that the 19 April press briefing avoided or evaded, whichever way you want to look at it the fact that the Department was now armed with some very troublesome information suggesting, or

indicating in the clearest terms, that 25% was owned

by Mr. Desmond?

A. Well, what I have said consistently is the Department had new information. It wasn't the Department wasn't happy with the 25% element. And the Department engaged in a process of examining both the legal and the financial aspects of that letter. And given that that was the situation, the Department obviously took a decision that it wasn't the appropriate time to start dealing with it in public.

Q. But why weren't those facts brought to Mr. Dukes' attention?

A. I don't know.

Q. Wasn't he being left hung out to dry on an issue which was red hot in the press and in the Dail at that time and for a whole year? Isn't that what was happening?

A. You are using very strong expressions there which

Q. I am using strong expressions, Mr. Brennan

A. which imply that this was a deliberate campaign to mislead the new Minister, and I am saying that we don't work like that.

Q. What I am trying to find out, Mr. Brennan, is why a new Minister, seeking to deal and trying to damp down a controversy, was not being provided with the true facts and was, as far as I can see, being allowed to stand over a letter which, once again, suppressed the true facts and endeavoured to give an impression which

was consistent with what had happened at the press conference some months earlier, where the ownership issue was one from which attention was being deflected, and that that's what was happening here again, a deflection of attention from the true facts.

And I want to know why.

A. And I can't help you beyond what I have said already.

Q. This was an approach to describing this company which was consistent with some, as I would see it, of the spins being developed on the participant's side in May of 1996; would you agree with that?

A. You are talking about spins on the participant's side; I think they are spins of which we had no knowledge.

Q. You didn't know all of the underlying facts, but you were aware of some of the overground facts, of which Mr. Desmond's involvement at 25% was a key one, one which led you to, as you say, progress your agenda to reduce it to 40%.

A. Reduce it to 20.

Q. To 20%.

A. Yes.

Q. What you suggest in the third of the indented paragraphs is that "Esat Digifone was only in a position to announce that it had placed 20% with IIU Nominees at the licensing stage".

What happened at the licensing stage, according to the evidence you have given to me today, is that you

the Department, that is had completed its consideration of the introduction of Mr. Dermot Desmond; isn't that right?

A. Yes.

Q. And why is there no reference here to the fact that the Department, having been told of Mr. Desmond's involvement, investigated it and needed time to investigate it, and that this is what delayed the announcement?

A. I don't know the answer to that question.

Q. It's a troubling question, isn't it?

A. I suppose I'd have to say a little troubling, yeah.

Q. The final sentence in the penultimate paragraph is:

"My information is that when the licence was issued shortly thereafter, the precise situation was clearly stated."

Don't we know, from what he have seen on the Department's side and on the participant document side, that the whole purpose of the press conference was not to state the precise position?

A. Which press conference are we talking about now?

Q. The one at which the licence was announced. The Minister and participants press conference.

A. I wasn't conscious of that being an objective of the press conference.

Q. To deflect attention from the ownership issue?

A. That was certainly in some of the rehearsal notes, in

Owen O'Connell's notes.

Q. There was no reference in any of the press releases to the 25% going back to 20%, was there?

A. No. I think what I meant in drafting the precise situation was that a clear statement was made as to what was the ownership at the licensing stage.

Q. The next document is a note for the Minister's information regarding the use of Garda masts. I don't want to dwell on that for the moment unless you have any comment to make on it.

A. No.

Q. The next document is a letter from Mr. Loughrey to the Registrar of the McCracken Tribunal. This is in Leaf 241. Do you recall being involved in the drafting of this document?

A. I don't recall being involved in it. I don't know, I can't clearly see what the date is. It's sometime in May of '97.

Q. It looks like the 2nd July, 1997.

A. Yeah, well, what I'd say about that is that in or about May of '97 I was promoted to a new grade in a different part of the Department. So the likelihood of me being brought back for a letter like this is very unlikely.

Q. Is it? Even though it involved reporting to a Tribunal on, if you like, historical facts with which you were involved, you think that you mightn't have

been involved in?

A. I have no recollection of being consulted on this draft.

Q. The next document is the minutes of evidence to the Public Accounts Committee on the 2nd April 1998. I only want to draw your attention to one aspect of it simply to clarify something for me. If you go to page 7.

This was about the hiring of Mr. Andersen, I think.

Do you recall an issue arising about monies paid to Mr. Andersen? You had to pay him more than you had originally estimated.

A. Yes.

Q. That's not an issue that I am interested in, but if you go to the Deputy Rabbitte's question, "What have you to say about protecting the integrity of the process and the eventual decision made on the job?"

Mr. Loughrey says "I do not mean this as a facetious answer. I should say absolutely the same. The competition was run on very strict professional lines.

The only people with access to the deciding criteria and the weightings were within the Department, the

Department of Finance, and the consultants on a

need-to-know basis. The need-to-know basis was even

very strict. Technical people working on the

assessment did not have the weightings on the

commercial or financial, for instance. It was only

brought together on a need-to-know basis. In fact there were only two sheets of paper that would have been helpful for anybody in this process. One was kept under lock and key in the Department of Finance, and only one copy in lock and key in the then Department of Transport, Energy and Communications. When it was all brought together and there was a clear winner, I informed the then Minister on the day, 25 October, and the then Minister got political clearance with the key players in Government at the time. It was eventually rubber-stamped I do not mean that in any pejorative way at a Cabinet meeting the following day. There was no delay. It was dealt with in a way like Calpurnia should be above suspicion. Why do we do this?" etc. etc.

I am just interested in this notion I want to see if you agree it was correct that there was a Chinese wall between the technical people and the financial people, and that one did their work behind one side of the wall and the other did their work behind the other side, and you all came together at the end. This doesn't seem to be consistent with what we have seen from the Department documents about how the competition was run; isn't that right?

A. Yeah. I think it's slightly overstated.

Q. I was just concerned that it might have been correct.

What I am trying to get, Mr. Brennan, is your response

to queries. You provided a written memorandum containing responses to queries. Are you happy to proceed with those now?

A. Yeah.

Q. The first query concerned the notion of having a preliminary threshold test not only for procedural conformance but also for compliance with headline conditions of financial and technical capability. And I don't think you have added anything to the evidence you already gave. You, I think, said to me correct me if I am wrong that you were under the impression that there had been a test, a threshold test for substantive technical and financial capability, and that you formed that impression from Andersens having stated that all of the applications should be admitted to the evaluation; isn't that right?

A. Yeah.

Q. Now, we discussed that, and I produced the documentation I think showing that Andersens were clearly referring to the procedural conformance, but I think you said in evidence that you still had the impression that somewhere he had said something else.

A. No, what I think I said in evidence or what I intended to say in evidence was that my recollection was of the matter being dealt with orally in the Project Group, and on the basis of whatever words were used, I formed certain conclusions. And that having read all the

applications and finding them, in layman's terms,
okay, I didn't see any reason to question that issue.

Q. Yes. You formed that impression there was no reason
to question it, but be that as it may, the
documentation, such as it was, produced by Mr.
Andersen referred only to procedural conformance;
isn't that right?

A. That's right, yes.

Q. And ultimately the issue, or the Achilles' heel of the
winning application, and to some degree other
applications as well, was financial capacity; isn't
that right?

A. Yeah.

Q. Another of the questions raised, we'll take two of
them together, Questions 2 and 3. "In dealing with
Question 41 in Mr. Brennan's memorandum of intended
evidence, counsel for the Tribunal asked whether the
evaluation process prior to the 4th September 1995
proceeded on the basis of the old weightings in
respect of the licence fee being applied."

And you indicated that you wanted to check that.

Because, do you remember, we saw a query where a
quantitative evaluation was conducted, but somebody
wrote a note on it "Is this the old or the new
weightings?" And it seemed to be on the old
weightings. And I wanted to know, was there any
evidence ever of a fully completed quantitative

evaluation on the correct weightings? And I don't think you have been able to find that out.

A. I haven't been able to find that out.

Q. Question 4: "Counsel for the Tribunal stated as a proposition that the quantitative evaluation might have been reconstituted after 'dropping' the unquantifiable or incomparable items. Mr. Brennan indicated that he had not considered this, and counsel for the Tribunal asked whether he would give it some thought. Mr. Brennan did say that he felt that Mr. Andersen had made the point in one of his memos to the Tribunal that over 50% of the quantitative evaluation was unusable. Counsel for the Tribunal replied that he was aware of this contention by Andersen, but he did not understand it, as it seemed to the Tribunal that only a small number of criteria were troublesome".

You say "In relation to the 'withering away' of the quantitative evaluation, I think it is reasonable for me to suggest that Section 7.6 of the memorandum of January 2002 prepared by AMI for the Tribunal should speak for itself. The question as to whether it would be reasonable or fair or wise to reconstitute the quantitative evaluation after the dropping of the unquantitative or incomparable items is quite difficult to speculate upon retrospectively. This is a case where I cannot compensate for the fact that AMI

do not appear to be available to the Tribunal. It is self-evident that substituting different quantitative indicators would have had a serious risk of being subjective indeed and taking account only of those indicators about which there were no reservations could have raised serious questions about whether the quantitative evaluation had an appropriate balance to it. I find it impossible to take the matter further than my evidence so far. It may be that other members of the project team can throw further light on this matter in due course."

If I could just develop one aspect of that. I take your point that you couldn't be sure that if you dropped one or two elements, you mightn't have been fair to the people who put in their applications. But in putting in their applications and in receiving their applications, they were receiving them on the basis that you were going to conduct a quantitative evaluation; isn't that right?

A. Yeah.

Q. And ultimately, you didn't do it. One was, as far as we know, never included in the evaluation report.

A. That's right.

Q. Was that fair?

A. I think we didn't finalise a quantitative evaluation because it wasn't possible to do so, but that we took the relevant quantitative information fully in account

in the qualitative evaluation.

Q. But was the absence of quantitative of a completed and concrete quantitative evaluation something which undermined the entire process?

A. I wouldn't have thought so, in the sense that it clearly was the view by both certainly by the consultants, and I think probably by the project team as well, that the qualitative evaluation was the principal one.

Q. I understand that. I am not saying that these things can't happen or didn't happen. It's the absence of any attempt to address it in the report that I am trying to probe. As I understand it, what the report suggested was that you would have a quantitative evaluation

A. Yeah.

Q. followed by a qualitative or more subjective evaluation, and that using that qualitative or subjective evaluation, you would then revisit the quantitative evaluation; isn't that right?

A. Yeah.

Q. If the quantitative evaluation ceased to exist, then the framework of the overall evaluation was lost?

A. It certainly was impaired.

Q. Yes. It's the fact that this doesn't seem to have been addressed, apart from the expression "The withering away" of the quantitative evaluation in the

report that has puzzled me.

A. I don't know I don't understand your puzzlement, in the sense

Q. Why wasn't there why was there no explanation of how you were going to revamp the application? Why were no quantitative evaluation figures, such as they were, ever put into the evaluation report and an explanation given as to why they couldn't be used?

Now, they were used in individual portions, but not even there was no attempt to put together what quantitative information there was and to include then an explanation in an appendix describing how this couldn't be, if you like, formalised in the form of an evaluation quantitative report.

A. I mean, we have been around this a few times now. I can't give you any more information about it. I do appreciate the difficulty the Tribunal has by not having access to the consultants at this stage. But as I said once or twice before, I can't compensate for that.

Q. Would it make you wonder about using foreign consultants again?

A. That would be illegal, to rule them out.

Q. I wonder any more would it be. There is no European process, apparently, to enable us to compel attendance.

Mr. Andersen has in any case, I should say I had

intended to mention it to you earlier indicated that he is still not prepared to come, notwithstanding having received a waiver from the company that now owns Merkantil Data, and he has indicated that he may come after an arbitration but that he is not willing to come, notwithstanding the provision of a waiver.

A. I see.

Q. Question 5: "In dealing with the notion of other aspects, in particular the context of Question 47 in Mr. Brennan's memorandum of intended evidence, Mr. Brennan stated that his understanding that AMI analysed "the other aspects" and came back to the Project Group and said that that analysis did not alter the ranking of the applicants. Counsel for the Tribunal asked Mr. Brennan did he understand that to mean that they had scored/marked the other aspects, and Mr. Brennan replied that he would have to think about that."

What's puzzling about that in the report, just before I read your answer, is that you can amplify it is that what Mr. Andersen says is that "We had a ranking. We looked at the 'other aspects'. We didn't score them, and we didn't see that they would have any impact on the ranking because the ranking of the other aspects was the same".

That's what he is saying. I am not asking you to understand it. I don't understand it.

A. That's what he is saying. It's a case of, I suppose, Danish English. I think what we understood at the time was that the exact same factor was bearing on the two top applications. And he was recommending that the extent to which it was bearing did not give rise to a need to revisit.

Q. But did you agree with that?

A. I think the Project Group must have agreed with it.

Q. But how could that be the case, if the extent to which they were bearing was most definitely not the same?

The problem afflicted 50% of one consortium and 26% of the other, and in one case you had a remedy for it and in the other case you had none. And I am paraphrasing Appendix 10. How could that be the same?

A. I mean, this is back to the old discussion about the original Digifone application and the extent to which the financing of it was covered by Advent underwriting the Communicorp side and the financial institutions and so on.

Q. They weren't underwriting it. They were actually funding it directly.

A. Well...

I don't know what I can add on this.

Q. Well, can you see where I have a problem with it? How can you say that Consortium 5 and Consortium 3 were afflicted to the same extent by this problem when the problem in the case of Consortium 5 affected 50% of

the consortium, and that consortium had no provision
no shareholders agreement which could have dealt
with it, and the other consortium had a similar
problem, but it only affected roughly 26% of it, and
they had a shareholders agreement dealing with it?
Doesn't that suggest there is a difference, anyway?

A. We were reacting to the advice of consultants who were
experienced in this business.

CHAIRMAN: You did say you'd read the actual reply.

MR. HEALY: Yes.

Q. "This question was revisited in oral evidence on the
24th January 2003. I want to cite a number of
references in responding to the concerns evident in
the questioning by the Tribunal.

AMI tender document page 8, and you quote:

"Independent of which evaluation models at the end of
it the Department finally chooses, we recommend that
supplementary analysis be carried out where no
discrimination among applications is made. (Page 19
table "other risks
"Risks/effects on the Irish economy.

I believe it was always clear in the Project Group
that this question had no place in the selection
criteria in paragraph 19."

That's your answer. I understand that.

Also page 19: "Finally, a number of supplementary
analyses might be necessary to carry out sometimes in

order to document important differences or inconsistencies among the applications, other times in order to highlight important findings.

"The results of supplementary analyses will form the basis for the award of marks or the revision of marks preliminarily awarded."

Then the evaluation model itself.

Page 10, at 3.5: "Other aspects, such as risk and effect on the Irish economy, may also be included in the qualitative evaluation".

The next point you make is that "It is clear on the matrix on page 12 that the subtotals come above the material which they are totalling."

You go on to say "As stated earlier, effects on the Irish economy have no place in paragraph 19 of the RFP, and therefore risks is the only item still standing under "other aspects".

You say "I am in no doubt that the question of "other aspects" in the context of the foregoing was specifically considered, and this is evidenced in Book 42, Leaf 115, second page, and in the penultimate paragraph of chapter 4 of the draft evaluation report at Leaf 117. This did not amount to a scoring, as such, of what was clearly an optional extra to be included in certain circumstances, but it does amount to appropriate consideration of the matter."

I take your point about it being optional, but I

understand that it was optional in the sense that it was something that might require attention if it was necessary to attend to it. And whether it was necessary or not to attend to it was something, as I recall, that the evaluators left up to you on the 21st September or the 29th; I am not sure which day a question was posed for the Irish side by Mr. Andersen as to whether he should score other aspects, but I could find no consideration of that question, although we know the answer must have been no.

A. Yeah, I think we I suggested in earlier evidence and understood you to agree that you might get more information about this from Mr. Towey in due course.

Q. Maybe you're right.

Question 6 relates to a point on double jeopardy. I don't think you add anything to it unless you want me to read it out.

A. No, it's okay.

Q. The next question deals with "other aspects" again, and I don't think it adds anything. We are not going to learn anything more from going over it.

Question 3: "Counsel for the Tribunal put it to Mr. Brennan that Mr. Mark FitzGerald had indicated in a statement that he had discussions with Mr. Lowry in respect of certain details of the evaluation process.

Mr. Brennan indicated that he would like to have another look at Mr. Fitzgerald's statement, as that

was not the point which struck him on his first reading of it."

And you say "I have no particular comment to make about the statement by Mr. Mark FitzGerald. If Mr. Lowry got general information at or close to the date of the alleged conversation with Mark FitzGerald, i.e. the 16th October 1995, from someone in or close to the Project Group, this could not have made much, if any, difference at that stage. The suggestion that Mr. Lowry is alleged to have referred to the availability of a third licence seems curious, to say the least, especially if it is simultaneously thought by the Tribunal that Mr. Lowry definitively knew the result at that stage."

I am only going on your evidence that he knew the ranking at that stage.

A. Okay.

Q. I don't think or am I right in thinking that you are not suggesting that there was a class of general information which it would have been appropriate to give to Mr. Lowry or anyone else?

A. No, I am not saying that.

Q. I think the next question is one we have actually probably covered all day today, IIU and Mr. Desmond, and I am not going to trouble you with that again.

The next question refers to your doubts or doubts within the Department in or around May of 1996 in

relation to Communicorp's financial strength. I was asking you whether you had doubts or whether you were aware of doubts, and this was in the context, I think, of Mr. Fitzgerald's statement to you, is that right, Mr. Sean Fitzgerald's statement, The Assistant Secretary's statement to you?

A. I have forgotten the context now.

Q. You say "As I have stated previously in evidence, my involvement in the licence negotiations or the negotiations close to the issue date was sporadic because of my frequent absences abroad. It is clear that the documentation on this matter is extensive, and I would prefer to leave the matter to other witnesses", I think is what you are saying.

A. Yeah.

Q. I think the other things have already been dealt with, and I don't think I need to refer to them.

Now, there were a number of other matters that you said you'd look into since Christmas. Those are the matters before Christmas, and you indicated you might deal with them on the hoof. There are only a few matters; I am happy to leave them off.

CHAIRMAN: Well, I think it's probably preferable that we leave those over until what will obviously remain a substantive day of Mr. Brennan's evidence.

Mr. Nesbitt?

MR. NESBITT: If it was only a small amount left, we'd

be keen to finish rather than come back and then have to go into cross-examination. I don't know if Mr. Brennan

MR. HEALY: There is only a few matters. I understood that Mr. Brennan had already indicated a desire to deal with them, as it were, on the hoof with counsel for the Department, not Mr. Nesbitt, and I tried to put together one or two or three or four of the most important ones, but

CHAIRMAN: Well, we'll leave it to you, Mr. Brennan. If you are fairly tired at this stage and you'd just as soon defer

A. I don't recall the circumstances. I know there were several times when I said I would like an opportunity to have another think about that or have another look at the records. But I haven't had the time or even a list of those events to check them out, so I don't think I can add anything, particularly at this hour of the evening. I don't think I can add anything without considering the questions and maybe having a list of them or something.

CHAIRMAN: I think it's preferable, then, we defer until what would seem to be the last day of your evidence; and we'll come to arrangements for that in a moment.

MR. HEALY: I was going to say, Sir, if we could sit at half ten to get rid of them, they won't take that

long on Tuesday morning.

CHAIRMAN: The only consideration that had occurred to me is, is there anything to be said, if it means that we have no feasible sitting tomorrow, that we might try to aim for Monday to try and facilitate the other witnesses being told well, I notice Mr.

McGonigal Mr. Fitzsimons, is it a problem for you?

MR. FITZSIMONS: It would be a very serious problem for me.

CHAIRMAN: If people have made their plans, I think we may perhaps revert at least to half ten for the sitting days of next week to try and make up the little bit of time we have lost.

And then what will be involved seems to be then your last day, then, Mr. Brennan, subject to anything that the small amount that Mr. Healy may still have, you will then be questioned by a number of barristers, of whose presence you are probably well aware by now, and in addition by your own counsel.

Might I raise just one last matter. I don't think it's raising any particularly new thing at this stage, but again, if you want to think about it over the weekend, it can be deferred until next Tuesday.

And it was just the reference in the last of the AMI documents, the report that was submitted to the Tribunal last year in which you will recall there were some concerns expressed about security in the

Department, and there was a reference to a particular incident over which Mr. Andersen expressed some concern whereby somebody attached to the Esat Digifone consortium may have been in the actual departmental premises where the process was being conducted at a stage that Mr. Andersen disapproved of.

A. Yeah, there is two things I'd say about that, is the meetings were taking place in a conference room on the first floor; all relevant material to the competition was on the fifth floor. And I think the context in which this person was in was in terms of looking at the technology and so on. But Mr. Andersen specifically recommended that we write to the consortium about it and seek a reply, and we did write and we did get a reply. Now, I don't have them, but I know that that happened.

CHAIRMAN: Yes. Well, I surmise it was not felt to be a matter of enormous import or that it was felt that there was any significant risk of the process being compromised through that, and I take it you appear to be of that view.

A. I am indeed, Sir.

CHAIRMAN: Yes, very good, Mr. Brennan, and thank you for your attendance this week and on previous days. We'll take up the balance of your evidence, then, at 10.30 on Tuesday next. And thank you very much. Well, just as regards the sequence, then, has it been

the case that counsel have had an opportunity to discuss the matter? I had indicated, Mr. Nesbitt, you would be last, subject to Mr. Healy's.

MR. NESBITT: I will. I understand there is a discussion concerning the positions, but it's nothing to do with me. I will be at the end.

CHAIRMAN: Well, I mean, gentlemen, do you want me to give a ruling on it now so that you know where you stand? Has it not proved feasible to achieve consensus on this?

MR. FITZSIMONS: It hasn't, I am afraid, Sir, been possible to reach agreement with Mr. McGonigal on the order of cross-examination. So I'd appreciate if you could make a ruling on it, Sir.

CHAIRMAN: Well, I don't want to give the impression I had indicated that a possible criterion might be the degree to which persons had made statements; persons involved with the Tribunal are not obliged to make statements, and they should not be penalised for them. And my main concern was to preclude a situation in which perhaps, if it might be necessary for Mr. Fitzsimons to return, so to speak, on two occasions. I don't think that's an enormous likelihood, and I seem to recall from analogous situations in the past the situation was essentially a sequence of Mr. Fitzsimons, then Mr. McGonigal, then obviously Mr. Lowry, as the person who is specifically named in the

terms of reference, then counsel for the Department,

and then some residual entitlement to Mr. Healy.

So we'll act on that basis on Tuesday morning. Thank

you.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 11TH

FEBRUARY, 2003 AT 10.30AM.