

A P P E A R A N C E S

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FOR TRIBUNAL: Mr. John Coughlan SC

Mr. Jerry Healy SC

Ms. Jacqueline O'Brien BL

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I N D E X

WITNESS: EXAMINATION:Q. NO:

JOHN LOUGHREY Mr. Coughlan 1 - 343

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY 25TH
FEBRUARY, 2003, AT 11 A.M.:

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY
MR. COUGHLAN:

CHAIRMAN: Morning Mr. Loughrey, thank you.

A. Good morning Chairman.

Q. MR. COUGHLAN: Morning, Mr. Loughrey. Mr. Loughrey, I

think we were just coming to the, I think the 3rd of

May, 1996 on Friday afternoon when we adjourned to

today. Well, could I just ask you about one document

just prior to that, because I tell you, it's in

Book 44, it is at Divider 212. And I will it is

headed "Informal Government Decision GSM licence." And

it is signed by, per Sheila de Burca, Government

Secretariat.

A. Yes, I have that now.

Q. Do you see that?

A. Yes.

Q. "The Minister for Transport Energy and Communications

referred to the official press conference arranged by

his Department on Friday the 19th of April, which had

gone very well. In terms of the proposed contract had

been agreed with Esat Digifone legal clearance was

awaited from the Attorney General's office.

to the unsuccessful bidders, the Attorney General's advice had been sought as to what might be disclosed without breaching confidentiality undertakings. The Minister indicated that he was fully satisfied that the competition which had taken place would withstand any scrutiny whether in court or elsewhere."

We've been advised by Ms. De Burca of the Government Secretariat that that informal Government decision was made at a meeting of the Government on the 23rd of April

A. Mm-hmm.

Q. of 1996. First of all, could I just ask you, we have searched all the documents in the Department around this period and we can't see any note going to Government. We can't see a speaking note for the Minister either?

A. Yes, Mr. Coughlan. I am rather puzzled. The Government Secretariat is invariably correct in these things, I am almost puzzled by Government decision because it is clearly no decision there.

Q. Perhaps you could assist us, it doesn't even look like a decision?

A. This is something which I believe that Mr. Lowry, and he was quite entitled to do so, would have raised himself under AOB effectively, under any other business. I certainly wouldn't have briefed him, particularly the first paragraph, because first of

all, I wouldn't have wanted him to utter those words.

There is a touch of self congratulatory dimension to them which certainly I wouldn't have wanted to get across. I had even some mixed feelings even at the time of the particular press conference, so certainly the first paragraph.

The second paragraph was one where I suppose he was informing his Cabinet colleagues actually that following, for instance, obviously press reports and the Dail debate, I think it was just on a debate on the adjournment on the 16th of April, so it was topical and he was giving comfort or reassurance, presumably to his colleagues, that it is under control, "It is all right, I have it under control", but this is a note that I think would be quintessential Mr. Lowry. I don't think there is anything of the Department, and certainly I wouldn't have briefed him on that basis.

Q. Well, would you agree the impression we have, just looking at the documents, it doesn't seem to have been a promotion of the Department at least anyway, we can't see any document either a speaking note or briefing note or

A. Certainly not. There again, as I said at the outset, all Ministers actually have an absolute right to brief their colleagues as they see fit.

Q. Of course. I suppose, just bear with me for a moment.

Just looking at it, as you say in the first paragraph "the terms of the proposed contract had been agreed with Esat Digifone." Of course you wouldn't have briefed the Minister along those lines at all?

A. No.

Q. Yes.

A. There may have been an element of wishful thinking in Mr. Lowry's mind at the time, because clearly we were far from that at the time.

Q. I know, and you have explained because as at this time you certainly had definite views yourself.

Now, I think if we it seems to have been copied to you, Mr. Fitzgerald, Mr. McCrea and Mr. Brennan. Do you have any memory or recollection of receiving it?

A. No, I don't, Mr. Coughlan, I am sorry.

Q. Right.

A. Again, I assure you my reaction would probably have been much the same as the reaction I have give this morning.

Q. Yes.

A. It was a tad self congratulatory and that certainly wasn't the intention.

Q. Yes, of course. Now, I think we were approaching the, about the 3rd of May of 1996. And I think earlier on Friday morning or maybe the previous day I had opened to you Mr. Arve Johansen's memorandum of the 4th of May, 1996, and I think you wished to make certain

comments on Mr. Johansen's memorandum in the first instance, is that correct?

A. Well, I know the Chairman actually noted that at the time, as you yourself Mr. Coughlan, actually, I am not sure I think it was in the white heat of your examination.

Q. Very good.

A. I am not sure how wise they would be, but for what they are worth actually is, we had at the time, I think in terms of your questions focusing on the self-evident weakness of Communicorp's finances actually

Q. Yes.

A. and all of the discussion was focused on this, and I myself, having read that particular memo, and seeing the documentation at the time, saw of course there was an underlying financial problem there at all stages, this was even flagged quite clearly in the Evaluation Report, so there was no mystery about this.

Q. Yes.

A. But it appeared to me that perhaps there was an overlay that while it boiled down to a perceived financial weakness, was that perhaps one of the parties was positioning themselves as much about control as about finance. And in other words, now, can I couch my words very carefully, and I am saying this gratuitously, anything I say does not apply to

Mr. O'Brien or any of the players, but it does, from my own experience actually, and I have no identical experience, but from my own broad experience is, the very characteristics that makes for an entrepreneur, these are, and much valued in every modern economy and we need them badly, they are not necessarily the characteristics actually that are always comfortable, or they may not have the skill-set for a joint venture. In other words is, if an entrepreneur has a vision and has the drive to follow that vision, they may not those very characteristics may not be comfortable to a consolidation phase where moments of risk or aversion have to come into play. All I am saying in reading this and in reading some of the other documentation, and I stress I have no knowledge that this would apply to Mr. O'Brien, but for an entrepreneur to guard his or her vision in terms of control, is not an ignoble thing in itself actually, and while reading so much of this actually, and that note in particular, that did occur to me.

Q. I see. That is, it is 130, Book 49. I think as we proceed from here to the signing off of the licence the actual issue of the licence on the 16th, I should just explain to you, Mr. Loughrey, this period is a period which is causing the Tribunal great concern, and I should explain why.

The Tribunal knew nothing about the various meetings

we are going to come to in a moment. And the first time the Tribunal became aware that there was a meeting on the 3rd of May of 1996 was when this particular memorandum of Mr. Johansen became available to the Tribunal. When the matter was taken up with officials in the Department, following receipt of Mr. Johansen's memorandum, nobody in the Department seemed to have a recollection of this particular meeting, and there were no documentary records of the meeting.

When the matter was then taken up with the solicitors for Esat Digifone, through their now parent company, Mr. Owen O'Connell's notes became available because a solicitor would keep a note of meetings. And these confirmed that these meetings had occurred and what had transpired at them, and there was no record in the Department, and officials seemed to have no particular recollection of them. Now, you can see how that is of concern to the Tribunal?

A. Oh, I can readily understand that concern.

Q. And the Tribunal is looking for an explanation from officials as to why there were no records and why nobody seemed to have a recollection of certain meetings. Now, you weren't at the meeting of the 3rd?

A. But I was ultimately responsible for the Department.

Q. But you were ultimately responsible. Can you assist the Tribunal, first of all, on that broader question of no record in the Department?

A. Yes, I can actually, because I knew I haven't managed to read all the transcripts of the past but I knew this was a concern and a legitimate concern of the Tribunal.

First of all, perhaps I could make the contrast and this only once again, I haven't discussed this with anybody, drawing from personal observation, by definition I imagine that all good solicitor companies, but in terms of recall and record would actually have that discipline to record notes by definition. Also, to some extent, presumably underpinned by the fact that they presumably charge their clients on an hourly basis or whatever the basis of charge and that in itself is a further discipline. Now, this is not in any way to say that somehow the Department should have acted differently, I don't believe they should have acted differently. But what I would say is, that if in fact is, our recording procedures were not adequate, this is something clearly that the Tribunal rightly should have a concern about, and no doubt you have noted it already, but having said that, Mr. Coughlan, I don't think there is any question that somehow this lack of record that there is somehow anything more sinister behind it, because I don't believe that for one moment.

The general explanation I give, and once again my career almost spanned 40 years, the general is, that

the Civil Service that I entered, I recorded everything as a junior at meetings, in fact most meetings were recorded several times by the participants. We had the luxury and the time to do it. By the time Government had reached the '80s and '90s, the machinery of Government was to deliver more and more with, I won't say less and less, but productivity demands were enormous and, in fact, is with change of governments, Stakanivite output was required of civil servants, now this is not I am not saying it in any sense of excuse but there is little doubt about it, given the gravity or the seriousness of the, let's say the negotiations at the time, I would be as disappointed as you would be, Mr. Coughlan, that they weren't recorded. There is nothing critical or trying to pinpoint any of my colleagues actually, but it is due we are talking about the adequacy of the administrative background or the administrative procedures, I don't believe that there is any question whatsoever of anything untoward in failing to record the meetings.

Q. Yes. Because isn't that the natural question which arises from a member of the public when matters as delicate as this are being negotiated and discussed; that the absence of a record or a recollection of such meetings could lead a member of the public to the view that what was going on here was concealment or

suppression?

A. I believe they could draw that inference. Quite incorrectly by the way, but it is open to an interpretation which is less innocent than the one I have given.

Q. Yes. Now, dealing with the matters which occurred on the 3rd of May of 1996, if we take Mr. Johansen's note first. And I don't think I need to open the first page of it for the moment. I won't open it. If you want me to come back to anything specific in it, but you can see what he is saying, that what happened from the previous September, how Denis O'Brien had approached him and how things had changed?

A. It is written with remarkable candour, yes.

Q. Yes. And coming then, to paragraph number 5, and he sets out that "In hindsight it is quite clear who benefited from this arrangement."

Now, I would suggest, but Mr. Johansen will come and speak for himself and this particular note isn't a self-serving note, because it is, warts and all, Mr. Johansen is laying it out for his own, his own employers or

A. There is almost a subtext that I was appointed on occasions, yes, and it is remarkable.

Q. There is no doubt about it?

A. It is refreshing, it is written with refreshing candour.

Q. Yes. He sets out, "In hindsight it is quite clear who benefited from this agreement." And then he says, "I have good reason to believe that the terms put forward by Advent" he deals with his understanding of the situation. We don't know because that whole thing never amounted to anything as far as the documents show, but that he is forming his own view about it and he is expressing his own opinion about it.

Then he goes along to 6: "As we go along we learn more, but it all serves to disclose more details which again more and more prove the above scenario.

"In the meeting with the Department of Communications Friday May 3rd, it became evidently clear that IIU was not a favourable name from an 'Irish public' point of view. On the contrary, the Minister basically asked for help for how to explain why we had substituted Advent, Davy Stockbrokers, and the other recognised named institutional investors in the bid (AIB, Investment Bank of Ireland, Standard Life Ireland)."

Now, just dealing with that. First of all you can see there that here is Mr. Johansen saying, you know, the bid as understood by the Department was certainly them, Telenor, Communicorp, these institutions and Davys which would act at the stockbrokers and here on the 3rd of May the Department is asking the specific question, doesn't that seem quite clear from that particular note, you know?

A. There is no doubt about it, that speaks for itself.

Q. And that the institutions were gone, the institutions, as the Department understood had been in the bid, were gone?

A. Correct.

Q. Yes. And there isn't any qualification here of potential institutional investors or indicative letters of commitment?

A. There isn't, Mr. Coughlan, but it is written by Mr. Arve Johansen. For whatever reason he may well explain himself.

Q. Oh, yes, but this is a frank exchange going on. Mr. Johansen is feeling under pressure here, he is going to be asked something now, he is going to have to take certain steps. The Department are under pressure as well, there is no doubt about that.

A. Yes.

Q. Like, it seems obvious, doesn't it?

A. Undoubtedly, undoubtedly. The licence was a long time cooking. It was coming to a head. The tempo was quickening and both sides would have been under pressure. I mean, the consortium can speak for themselves, but the precious Christmas market was beginning to disappear before their eyes, Christmas '96. The Department wanted action in this area sooner rather than later, must have felt even self-imposed pressure at this stage. So clearly there was

pressure. But I wouldn't and even though it was a frank exchange, that does seem like, what I would call an unguarded moment, if I may put it that way, but having said that, that is not to infer from that that a substitution could not be made among the third party investors. There is nothing in that to say that. It is just that people were surprised that the predicate what the comfort factor that was got from the well-known names was no longer there.

Q. I am going to go through what actually happened on each day, Mr. Loughrey.

A. Fine.

Q. And what you knew at each stage. Can we be quite clear; at the commencement of this particular inquiry of you

A. Sure.

Q. that what had happened here was that when you received the information from Mr. Owen O'Connell, either through Miss Regina Finn or in the letter from Mr. O'Connell, you looked at this and this is the first time you were

A. Absolutely.

Q. made aware that something was happening?

A. Yes.

Q. You certainly set your face against anyone thinking that they could come in here and divvy-up this licence on the 37.5:37.5:25 basis, you set your face against

that instantly?

A. Absolutely instantly, yes.

Q. Instantly?

A. Yes.

Q. And that wasn't going to happen, that was not going to happen?

A. To the extent that I had control or influence that wasn't going to happen.

Q. Yes, but you were going to block that, if you could, isn't that right?

A. Yes, that's correct.

Q. Now, you sought legal advice from the Attorney General's office on the question of ownership?

A. Yes, I was informed that we were seeking legal advice.

Q. Yes, I appreciate that, but the Department was?

A. Yes, the Department had sought legal advice.

Q. Such advice was not received?

A. I now know that.

Q. Yes?

A. Yes.

Q. And I know the Department proceeded then and you are going to say, you know, sort of bringing Mr. Desmond in was a substitution for the institutional investors, but can we just be aware at the moment that you had sought legal advice about this, you hadn't received the legal advice. I just ask you to bear that in mind?

A. That's correct.

Q. Now, Mr. Johansen has also recording here that "IIU does not seem a favourable name from an 'Irish public' point of view."

A. Once again, Mr. Coughlan, Mr. Johansen will have to, presumably he will explain, if he is called as a witness.

Q. Oh yes, he is coming all right.

A. Was that based on anything from an explicit statement to body language, and it could have been across a table, it could be a combination of both, if I may put it this way. But to the extent that people, perhaps, raised their eyebrows, it could be as something as simple I make the suggestion because I wasn't a participant at this meeting. In fact, I didn't know this meeting had taken place until the Tribunal unearthed it. Clearly I had no knowledge of it whatsoever. But having said that, I don't want in any sense to say this with any sense of denigrating financial institutions, but they would be perceived as being the colour of grey, they are grey and safe, that would be a popular and yes, I have to say that Mr. Desmond would not be regarded in colour terms as grey. So he could have caught that mood as much as anything else.

Q. Well, we will hear what Mr. Johansen will say. Mr. Johansen didn't have any much experience in Ireland,

you know. He was sort of in and out

A. True.

Q. Any one around Ireland at the time would have been very aware, involved in public administration or the law or business, would have been very aware of controversy surrounding Mr. Desmond, and Mr. Glacken's report in particular?

A. Absolutely.

Q. It may be that sort of body language that Mr. Johansen picked up in the Department?

A. It could well have been so, yes.

Q. Now, Mr. Johansen's note continues: "Eventually the project coordinator from the Ministry, Mr. Martin Brennan, actually appealed (off-the-record) to Telenor to write a letter of comfort that we would serve as last resort for the Digifone company for funds and operational support. My feeling was that if Telenor had owned it alone, he had been more comfortable than with the current shareholders."

Do you know anything about that sort of view?

A. No, I don't. But clearly, aren't there echoes there, Mr. Coughlan, of the "deep pockets" philosophy that the Project Team worked with so diligently for so many months? I would get echoes of "deep pockets" in that sort of response.

Q. I wasn't going to take that issue up with you of "deep pockets" because you weren't involved in that whole

process. The "deep pockets" concept is an interesting concept, I suppose. It doesn't seem to be that there are "deep pockets" seems to be a situation where, just looking at how the evaluation process, they talked about in the actual various stages they were going through, big pockets in members of the consortium. In other words, that the parent companies, those members of the consortium would be behind the actual project itself?

A. I would defer to that, Mr. Coughlan.

Q. That would

A. Sorry.

Q. That evolved in somebody's thinking, I don't know where it came from but it evolved in somebody's thinking?

A. Mr. Coughlan, to be honest, clearly you have a deeper knowledge than I would because I wasn't a member of this group, but my impression of the "deep pockets" always was the comfort that at least one member of a consortium would be the owner of the so-called "deep pockets" and that in other words is that, if you are looking, we are coming back to Clause 19 as we do all the time.

Q. Yes.

A. If in fact is, that the competition, the best application was run on the eight criteria, the "deep pockets", at least of one member of the consortium,

actually would bring comfort that it addressed Clause 9 and the prerequisite clause in Clause 19. I always that was my impression, but perhaps I am wrong.

Q. You could be, I understand it that all deep pockets in that context were Telenor undoubtedly had a deep pocket?

A. Clearly, indeed.

Q. But what that might give comfort to would be that the Project Group, that is the GSM project might well be safeguarded if Telenor were prepared to step in and take the whole thing over?

A. Once again, I hope this is not a gratuitous comment, but in practice, once the licence was granted, and it didn't matter who the recipients were, I don't say that in a cavalier way, is, if in fact it it would never have failed if at least one member of the consortium had a broad enough back, financially speaking, to carry the project. No given the growth prospects at the time, given in fact that the licence was being part of then perceived a seven-year duopoly is, in practice Telenor would have adopted that, and they can speak for themselves, but I reckon they would have adopted that if in the event it was required. Now, that I know that is a good way away from the comment and the question you put for me, but I just, but I would say is, that perhaps, Mr. Coughlan, I am straying too far from your question and

I am happy to defer to what you

Q. I see the point you make about that here was a situation where in fact the Department, if Mr. Johansen is correct about this, that the Department are asking him will Telenor, you know, sort of back this whole position? And that would give some comfort. That was not, and never going to be a solution to Communicorp's underlying financial problem of stumping up its end of the equity, isn't that and that is where the instability was going to arise?

A. Yeah.

Q. And did, as we know?

A. The Department, you are quite correct, from Owen O'Connell's letter of the 17th of April, there was a dilemma and the dilemma presumably took two forms; one was for whatever reason there was an agreement in place where the percentage division did not conform with the original bid. That was for me that was the central dilemma, but there was also an emerging dilemma. Now, I wasn't conscious of it, probably until the 13th of May or thereabouts, but there was this emerging dilemma that the there was positioning or apparent positioning among the members which would have been, I imagine, unsettling for the Departmental team that faced it

Q. Now, if we can continue. Mr. Johansen is then expressing his view that he thinks that "It would be a

very prudent thing for Telenor to do especially since we then effectively underwrite the whole project, both Communicorp and IIU having already having paid Communicorp's price for the first underwriting that now appears to be useless."

He is referring to the underwriting back in September for which cost them 25 percent or

A. 12 and-a-half.

Q. or 12 and-a-half, 12 and-a-half, or five it was going institutions anyway?

A. That's true.

Q. "But the story doesn't end there. Two days ago I was informed by Denis that he had entered into an agreement with IIU to buy back 12.5% of the shares now held by IIU. I found it absolutely unbelievable and made it quite clear that Telenor would not accept anything but equal partnership, either we buy 6.25% of the IIU held shares each or Telenor should take the other 12.5% of the IIU held shares.

"I have now also seen the letter of agreement between Communicorp and IIU which strongly supports the scenario outlined above.

"IIU apparently has no (or very little at least) money and cannot afford more than 12.5%. The price agreed is a little cryptic. But it looks as though any advances IIU has to make for the disposed 12.5% before the transactions effective date (31 May 1996) is seen

as cost (????) It will, if this is the case, serve as a moving target for IIU's eventual gain on the transaction, putting an immense pressure on Communicorp to delay capital calls in Digifone until the US placement is finalised."

You see the emerging identified problem by Mr. Johansen here; it relates to Communicorp's financial frailty, and he's anticipating them wishing to delay capital calls until the placement of the US placement is finalised, that is what we see as CS First Boston?

A. I see that as Mr. Johansen's then assessment, and it wasn't an unreasonable assessment from his point of view. I think, obviously, you could look at it from other angles as well, but this obviously from Mr. Johansen's point of view, that wasn't an unreasonable interpretation from him, from his point of view.

Q. Yes. Now, he was also viewing IIU as having financial frailty at that stage; that was his assessment?

A. I see that. I don't know what basis he had for assuming that. I have no idea nothing that I have seen, nothing that I knew of at the time, the knowledge of Mr. Desmond's assets were clearly picked up from newspaper comments, I have no view on them whatsoever. You know, Mr. Desmond's net worth at the time was an unknown factor to me, let me put that way.

Q. It was also an unknown factor

A. Sorry.

Q. It remained an unknown factor for you?

A. Can we return to that point, Mr. Coughlan, later?

Q. Yes.

A. Because this is something I think we touched on already.

Q. Yes.

A. But what I would say is, I would be surprised if Mr. Johansen somehow had an insight into IIU's finance, that is we are unaware of. That probably was an impression he got probably more than anything else.

Q. We will continue with his note then.

"The return favour from Communicorp is to release IIU from all its underwriting obligations in Digifone.

Does Digifone have an opinion on this and what about Telenor? This effectively gives Communicorp back its

12.5% of its shares at par (or close to), releases IIU

from all its underwriting liability (which Digifone

paid 25% for), and IIU ends up having delivered

absolutely nothing, having done nothing but

complicated the award of the licence (if we get it at

all) but with some cash and 12.5% of the shares of

Digifone which effectively have deprived from Telenor,

at the same time as the Department and our honoured

partners gently ask us to unwrite the whole project.

"Fortunately, IIU is at least realistic enough to see

that this cannot take place unless Telenor continues to support the project. This fact, the time limit and the cooperative spirit shown (by disclosing the letter) may signal a hope for a sensible solution to this mess.

Oslo, 4th of May."

Now, you were still, of course, unaware of how this whole 25 percent and IIU's involvement in Mr. Desmond's involvement had commenced?

A. Totally unaware.

Q. You were totally unaware as of this time. So you are not in a position to assist us as regards Mr.

Johansen's apparent thinking in looking at this particular

A. I thought, if you thought I could be of help, I would do so, but clearly that's for Mr. Johansen, it is not for me.

Q. Right. But the famous letter of the 29th of September was deprived in the Department. You can now see how significant that might have been if it had been handled in a different manner; it might have opened up lines of inquiry within the Project Team?

A. It is, as you say, it might well have done so.

Q. Yes.

A. In a sense and what the Project Team might have done with it, but it is one of these things we will never know. Mr. I maintain and it is obviously just a

personal opinion.

Q. Yes, of course.

A. That as I say, that Mr. Towey had no other option virtually but to send it back. I maintain that he did the correct thing but it could be open to other interpretations, of course.

Q. I think if we move to Book 44. That is I think the book

A. Sure.

Q. that contains most of the documents for the period.

Now, I think we have already referred to the document which is at Divider 203, Mr. Brennan wrote to Mr. O'Connell about the whole question of the ownership of Esat Digifone. And then I think if you go to

A. Yes, I have that now.

Q. We referred to that on Friday. And if you go to, I think it is Divider 206, and what it is, you will see the first two pages it says "Transcription of Mr. O'Connell's attendance."

A. This was the undocumented meeting.

Q. The undocumented meeting of the 3rd of the May, 1996.

A. Yes, I have that.

Q. And present were: "Mr. Digerud, Mr. O'Donoghue, Mr. Johansen, Mr. Michael Walsh, P. Connolly, Paul Connolly, Owen O'Connell. And Department Communications: Martin Brennan, Fintan Towey, Regina

Finn, Eanna" I think that is O'Conghaile.

A. Eanna O'Conghaile, it is yes.

Q. "Clear a political football.

"Identity of each shareholder legal and beneficial ownership. Esat Digifone changes relative to bid.

"Change in institutional investment replacement of Advent and Davys by IIU.

"Need detailed information quality about IIU.

"Confirmation that Telenor is same as bid date.

"Difference (in detail) as to expertise and asset strength between Communicorp and Esat Telecom Holdings.

"Numbers re IIU.

"Telenor backdrop statement as operator as last resort. Arve Johansen 'That's the way we see it anyway. We will never abandon this one.' Not requesting statement but would be helpful per Martin Brennan.

"Project finance PO" Peter O'Donoghue "Bank 60% Equity 40%. ABN-AMRO + AIB appointed co-providers. 25 million bridging committed. Thought to presentation. More the better provided agreed in advance.

"Donal Buggy + Billy Riordan. Maybe Andersen.

"Better than 50% chance that Commission will send us Persona complaint. Department would already have replied + would like us to coordinate response.

"When Telenor and Esat began to talk? (Ref. complaint)."

Now, again this seems to be again, Mr. O'Connell will come but the note seems to share Mr. Johansen's impression anyway about Telenor's backdrop position or final position or

A. Yes, that is apparent, yes.

Q. The matter had been, as we now know, before the Government unbeknownst to you on the 23rd of April?

A. By way of mention.

Q. By way of mention?

A. Yes.

Q. The Minister made a statement in the Dail on the 30th of April, again not instigated by the Department. And you see reference here to "clear a political football". Can you be of any assistance as to what may have been going on?

A. Clearly, and I am just reacting as I read it now actually, it could be anything from as anodyne, though I suspect it is not, as anodyne as, "Look, this has been hanging around for so long, here we are." It is something that was signalled by the previous Government, the previous administration, and here we are deep into the second year and, in fact, within 12 months of a General Election, actually, and we still have this hanging about. Now, it could be something as anodyne, but I suspect in all honesty it is because

the ownership issue had become topical, and I imagine, in all honesty, that it is likely to be that, but I can't guarantee that, obviously.

Q. Yes. Yes. That's fair enough.

And you can see there that there is reference on the second page, do you see that "Donal Buggy + Billy Riordan, maybe Andersen." Again I am not sure what that is about, but is it

A. It certainly is fascinating isn't it.

Q. It looks like some, these are financial fellows, anyway we know that, aren't they? So that somebody better be looking at something, I suppose, or it gives that impression, doesn't it

A. It does.

Q. of that side of the house?

A. It was never brought to my attention, but it was something I might have considered, in the sense is, while I had every confidence in the ability of the Department's, if I may say so, bought-in financial expertise in the form of Donal Buggy or his equivalent in the Department of Finance, it is an interesting concept that clearly somebody on the Departmental side raised Andersen, because it was hardly raised by

Q. By

A. By so, the only logic is that somebody had mentioned is, 'We are going to have to have a look at this, clearly we will be asking Mr. Buggy and Billy

Riordan and maybe we might ask Andersens'. Now, I don't believe that ever went up the line, so to speak, I don't know.

Q. You weren't aware of it?

A. I wasn't aware of it, but it is still interesting that people thought they were addressing something that, you know, required careful handling.

Q. Yes. Yes. And if you, I believe, correctly identify from the note of the meeting, the question of the identity of the shareholders was the big issue here?

A. Yes, yes. That, of course, as perceived from outside.

Q. Yes.

A. Our preoccupation or my own preoccupation, indeed I think departmentally, was to make sure is, was that for whatever reason, the 25 percent had emerged that was going to be shoehorned back into 20 percent.

Q. I understand that. No matter what happened, you weren't going to let anyone away of that if you had to lie down in front of the process. I understand that.

I understand that. That is how things got back, but obviously the question, the identity of the shareholders, conformity with the bid, this was all, this was all a huge issue, wasn't it

A. Absolutely.

Q. in the thinking of the Department.

Now, I think we can then go to Divider 209. And this is a note, again from Mr. Owen O'Connell. It is

obviously an attendance of a telephone conversation he has received from Mr. Fintan Towey on the 7th of May of 1996, I think. "Minister very strong preference for 40:40:20 at time of licence. But understands need for flexibility afterwards. Will take Esat holdings subject to no substantive difference + outline in writing."

Now, can I just ask you about that. This is fairly critical stuff that is going on at this time and one might have thought that if the Department was communicating with Esat Digifone's solicitor on this sort of issue, that it would be in writing. After all, the Department had received a letter from Mr. O'Connell saying 'Look, this is the position, it is 37.5:37.5:25 percent."

The response was the letter from Mr. Martin Brennan seeking full details or full particulars, and then all the other communications are either, you know, sort of at meetings or they appear to be by way of

A. It is true, from a documentary point of view the trail is pretty sparse, but I I wouldn't quite put it quite as sparsely as you infer, I think. Mr. O'Connell did indeed write in on the 17th, but I think Martin Brennan's letter of the 1st of May sets out the Department's inquiry trail very clearly.

Q. I agree with you, but

A. There is no seeming response in writing to that,

either in a sense, so it is a pity from a documentary evidence point of view, in trying to piece it together, that it might be preferable to have this by way of exchange of letters. But I think there is certainly, you know, almost a day-by-day trail here which is very telegraphic, but it does give some hint of what is happening.

Q. Which the Tribunal would never have discovered from the Department's papers.

A. Oh, I accept that.

Q. Yes.

A. I accept that.

Q. That is the concern, you can see that?

A. I have already readily, and admittedly readily understand that concern.

Q. Now, this was obviously the Ministers's view, it was your view, because you were not obviously you had spoken to the Minister you were not going to let them, as you saw it, away with the 25 percent, as you saw it?

A. Quite. And of course when civil servants, particularly middle management, Mr. Towey is strong middle management, but when middle management are meeting outsiders, very often they will cite always everything as a ministerial view, for the simple reason is, if it would certainly add weight rather than, say, a civil servant's point of view, that is

the way it should be because responsibility eventually lies with the Minister in any event, but so is, I am not sure Fintan Towey, I have no idea, at that stage, if he had a view of the Ministers's viewpoint or if he was representing the departmental viewpoint, but certainly to utter it as the ministerial viewpoint would certainly add to his hand as a middle manager in dealing with an outside senior lawyer.

Q. I understand that. I can understand that. It sounds more impressive anyway, but this was in the middle of fairly serious and delicate negotiation with a very experienced solicitor on the other side?

A. Absolutely, yes.

Q. What was said had to be very serious because the Department had taken a view that things were happening here that the Department were uncertain of, to say the least, and were trying to address a situation on the Department's terms. Would that be a fair way of putting it?

A. That would be a fair way of putting it. You know, those, whatever were 20 words, actually cover, in a sense, a multitude of sins, but as I just read them now, the two main themes were a reversion to 40:40:20, but also presumably Fintan Towey was in the middle of the detailed negotiations of the articles in the licence on ownership as well, and both concepts emerge from those short, whatever number of words, 20 words.

Q. I suppose you wouldn't be surprised if a member of the public said it is fairly surprising there isn't a formal letter in the formal process

A. Yes, I

Q. with regard to something

A. I think that certainly wouldn't be unreasonable for the ordinary

Q. You would accept that?

A. for the ordinary citizen. There are no ordinary citizens, for any citizen to say so. On the other hand, if it were explained to them that this was a sort of a moving kaleidoscope, detailed legal negotiations with a, with a subset of emerging uncertainty, just to use your own words, is actually sometimes people say 'Let's explore this further before we put it down on paper'. Now, I could make that explanation, but equally a citizen could say is 'why couldn't it have been documented more precisely?'

Q. Yes. Sorry, I beg your pardon.

If you go to Divider 211, please.

A. Yes, I have that, yes.

Q. There is a statement issued by the Government Information Service, you see that?

A. Yes.

Q. And on behalf of your Department.

"Lowry to issue second GSM licence following a meeting

in Brussels with Commissioner van Miert."

There had been a meeting with Commissioner van Miert and we know Mr. Lowry had gone over to personally make a submission to the Commissioner?

A. Yes.

Q. That related to the Persona

A. As I recall I was with him at the time, that is my recall.

Q. And it goes: "In line with my policy of maintaining an open and constructive relationship with the Commission, I met Commissioner van Miert to inform him of my intention to issue a second mobile phone licence in the very near future' says Mr. Michael Lowry, TD, Minister for Transport Energy and Communications issued in a statement issued in Brussels today, Wednesday the May 8th.

"Minister Lowry added, 'I also made a presentation to Commissioner van Miert on the background to the GSM competition. I briefed him on the procedures observed and on the methods pursued and the basis for arriving at a decision in favour of Esat Digifone. I referred to the recent complaint to the Commission on the award of the licence.

"In concluding Minister Lowry said, 'I also indicated that should Commissioner van Miert require any further clarification or information in the course of his review of the matter, I would be pleased to cooperate

fully.'

"In his response Commissioner van Miert indicated that he was obliged to consider all complaints to him.

However, as a result of certain clarifications, the Commissioner indicated that he would be notifying Persona that he saw no justification for acceding to their request for any interim measures of an injunctive character."

And the statement ends and that was dated the 8th of May, 1996.

You can see there that the, I suppose two things that perhaps arise out of it: the Minister is indicating he is going to award the licence soon?

A. Yes, he is, yes.

Q. That he intends to do that in the near future, and he is also, as is his right and his duty, making certain representations or submissions to Commissioner van Miert about a complaint which has been received. Of course there will be no question of him alerting Commissioner van Miert in the course of his, Commissioner van Miert's, consideration of the complaint that things were hotting up in Mr. Lowry's own Department about this whole ownership issue and whether the people who were now positioning themselves to receive the licence had been the people who in fact had bid for it. That wasn't explained to the Commissioner?

A. Even though I don't have a detailed recall of the meeting, if my memory serves me correctly, I was at the meeting, but the focus was on, is the specific Persona complaint at the time.

Q. Yes.

A. And not to such issue as the ones you have described were, arose or were brought up

Q. Yes

A. by either side, clearly.

Q. Now, of course as we know from the evidence you are giving at the moment and from the documentation and from Mr. Brennan's evidence, that the issue, the issue of ownership and the financial capacity issues hadn't been tied down, isn't that right, as far as the Department was concerned?

A. I hadn't, at that stage, involved myself personally. Either Sean Fitzgerald or Martin Brennan would have kept me in the picture, that's probable to the extent of certain. So I knew, broadly speaking, what was happening and would have briefed the Minister accordingly. It is inconceivable that I wouldn't have so briefed the Minister. But once again, could I Mr. Lowry would forgive me if I were to say, he was a minister always looking for results sooner rather than later, so that if I were involved in the I wouldn't have drafted this, but if I were involved in the approval or the vetting of this press release, it

might have only, we are talking about perhaps a 30 second or a one minute vetting of it.

Q. Yes.

A. It is possible that in the very near future with a compromise by my saying 'Minister, don't give any hostages to fortune' and he saying 'look, we have to get this licence out one way or the other'. And I it is possible. I am just giving that interpretation.

Q. That's that's helpful, Mr. Loughrey. That is helpful.

Now, if we go to Divider 213. Just very briefly just to outline to you; Mr. O'Connell, when he furnished us the documents, very helpfully furnished us with a second Memorandum of Intended Evidence and it is very helpful, in fact, in following the documents and what was going on from

A. And, Mr. Coughlan

Q. his understanding.

A. would legal team have had sight of that document?

Q. I will get it for you now. It is in Book 38, Divider 1B, it is Mr. O'Connell's second, it is the Memorandum of Intended Evidence of Mr. O'Connell dated the 7th of October, 2002. If you can get page 4.

(Document handed to witness.)

A. And it is it is at Tab 4, is it?

Q. Tab 1B.

A. Tab 1B.

Q. Page 4 of the Memorandum?

A. Mr. Coughlan, if you could help me, I am usually I hope some way adept by now but I am having difficulty on this occasion.

Q. I will get you one. You see that there heading, "Board 1 May 1996 to "

A. Yes, I have that now.

Q. This is Mr. O'Connell's memorandum which he submitted to the Tribunal along with the documents and giving his understanding of how matters unfolded

A. Exactly, I haven't seen this obviously.

Q. over those particular days. It may be helpful to you. As you can see, it commences at Paragraph 10:

"On 1st of May, 1996, Martin Brennan wrote to me concerning the direct and indirect ownership of Esat Digifone, the ownership of Communicorp Limited and Esat Telecommunications Holdings Limited and the availability of debt finance. (See Document number 5)." He refers to the particular that is the letter from Martin Brennan, "11. On the 3rd of May 1996"

A. Perhaps it is not to contest this straightaway, but I think implicit in Martin Brennan's letter, if I recall it, implicit perhaps not explicit, was the question of equity finance as well. That might suggest that the focus was only on debt finance, which would be unfair to Martin.

Q. I don't think you need to draw an issue on Mr.

O'Connell in relation to any of these matters, Mr.

Loughrey?

A. That is fine.

Q. All I want to it is very helpful in explaining the documents

A. Sure.

Q. which I am referring to at the moment. I am not asking you to draw an issue with them.

A. Okay.

Q. Then he goes: "On the 3rd of May, 1996, I attended a meeting at the Department with" and he sets out

"with Knut Digerud, Denis O'Brien, Arve Johansen,

Michael Walsh, Paul Connolly, Martin Brennan, Fintan

Towey, Paul Connolly, Regina Finn. A copy of my notes

is attached at Document No. 6. Arising from the

meeting I prepared a list of the documents which were

sought by the Department which is attached to, as

Document No. 7."

So, we have already referred to that particular

document, the note of the meeting.

A. Yes.

Q. Then he goes on. "On the 7th May, 1996 I wrote on behalf of Esat Digifone to the Minister appealing

urgently for the grant of the licence and assuring the

Minister of Esat Digifone's willingness to do

everything to facilitate this."

This is a letter just pushing.

"On the same day I received a phone call from Fintan Towey stating that the Minister had a very strong preference for a 40:40:20 ownership at the time of the licence, but understood the need for flexibility afterwards." Then refers to his note.

"On the 9th of May, 1996, I met with Knut Digerud and Peter O'Donoghue to arrange the provision of information required by the Department. (See his note of the meeting, Document No. 10). And also on the 9th of May, 1996m I met Paul Connolly, Leslie Buckley and Gerry Halpenny to discuss outstanding issues in relation to the licence and associated matters such as the Esat Digifone Shareholders' Agreement and the shareholding of Esat Digifone." And refers to a document he furnished us with.

Then coming on to the document we are just about to deal with now.

"On the 13th of May I, together with Knut Digerud, delivered a package of letters to Martin Brennan and Fintan Towey at the Department in fulfilment of their request for information and certification made on the 3rd of May, 1996. (See Document No. 12.) At the time the package of letters was delivered there was discussion between Martin Brennan, Fintan Towey, Knut Digerud and myself concerning progress on the licence. My handwritten notes of the meeting and a more comprehensive type minute thereof prepared immediately

afterwards or attached as Documents No. 13 A and B.

On the same day Knut Digerud received by fax a revised text of Article 8 of the proposed licence dealing with ownership. I believe that he forwarded the draft to me for review."

So you can see that he prepared this particular typed minute immediately after the meeting?

A. It is a contemporaneous note.

Q. Yes. And he also, I think there are so we just, if we go to it for a moment. The meeting commenced at 12:30 p.m. and it concluded at 1:10 p.m., according to the note. You can see who is present at the meeting and it continues: "The meeting was held in Martin Brennan's office at Department of Transport, Energy and Communications, 44 Kildare Street, Dublin 2. The subject under discussion was the imminent grant to Esat Digifone Limited of the second GSM licence.

"After an exchange of courtesies, the meeting began with Knut Digerud handing a number of letters to Martin Brennan with copies thereof to Fintan Towey. (Copies of the letters in question are enclosed.)

"Martin Brennan and Fintan Towey scanned the letters with Martin Brennan notably pausing to read closely the letters concerning IIU. He noted that Farrell Grant Sparks were IIU's auditors and commented that he would like to have known this fact earlier (this was generally taken as a reference to Greg Sparks position

as programme manager to an Tanaiste, Dick Spring).

Martin Brennan then said that he would send the documents to Department's in-house accountant and also to an accountant in the Department of Finance who was awaiting them. He said there may well be requests for further information and/or clarification of the letters, but it was quite likely that more information would be required in relation to IIU, specifically "more than a statement that they have no money i.e. what money?"

"There was some general discussion about the purpose and manner of the presentation of the letters, all of which was acknowledged by Martin Brennan and Fintan Towey.

"Fintan Towey made the point that the bid had referred to 20% of the company being placed with 'blue chip institutions' (acknowledging that the institutions in question are not identified.)"

Whether that is a correct understanding

A. They haven't been identified in public, they hadn't been identified in public.

Q. "He queried IIU's intention" sorry just to be clear, in fairness to everybody here, whether that is a correct understanding by Mr. O'Connell of what Mr. Towey said or what Mr. Towey said is a matter we will have to take up.

A. Of course.

Q. "He queried IIU's intention in regard to placing of its holding. Owen O'Connell replied that IIU was a financial institution and qualified under the bid description, so the placing question should not arise; and that while it might place its shares in future, if queried now on the point by journalists might reply that recent turmoil over the licence made such a placing unlikely, for market reasons, for some time, (stressing that this was not OOC's view, but was based on comments made by Michael Walsh.)

"Fintan Towey said that a new draft of the licence was imminent, and especially that Article 8 thereof would be amended. He said that a new draft of Article 8 had been received late on Friday last (10th of May) from counsel, and was now with the Parliamentary Draftsman who wished to shorten it. Martin Brennan added that the counsel involved was" he named who the counsel was.

"Martin Brennan said that the thrust of the new Clause 8 was that all change of ownership would be subject to Ministerial approval, but that the grounds for objection by the Minister were specified in the Clause and had been taken" sorry "had been taken largely from the recent EU directive and mobile person telecommunications. After a brief discussion between Martin Brennan and Fintan Towey, Fintan Towey left the room to obtain a copy of the latest draft.

"Knut Digerud and Owen O'Connell were permitted to review the draft (which extended to two pages) but not to do so at length or in detail, or to take copies.

After this review, Owen O'Connell raised the point that one of the paragraphs referred to ministerial consent being required for a private placement of shares could be interpreted as requiring such consent for a routine issue of shares consequent on a financing round. The point was also made that the Clause should distinguish between existing shareholders (who were presumably acceptable to the Minister and thus not require comment on acquisition of shares by them) and new third party shareholders.

After some discussion these points were acknowledged by Martin Brennan and Fintan Towey who said that they would look at the matter further. Apart from this, Knut Digerud and Owen O'Connell indicated that as a very preliminary view, and subject obviously to both detailed examination of the Clause and discussion with shareholders and colleagues, there did not seem to be any fundamental difficulty.

"Martin Brennan asked whether the banks named in one of the letters given to him, ABN-AMRO and AIB, would consent to their names being used in the announcement of the grant of the licence. Having checked the matter with one of his colleagues, Owen O'Connell indicated that the banks would so agree, subject to no

statement concerning them being made which was inconsistent with the letter of the 2nd of May given to him by Martin Brennan, and that any written press release or similar statement which referred to them would be subject to prior clearance with them.

"The meeting moved on to a discussion of events in the immediate future. It was indicated by Martin Brennan and Fintan Towey that they were about to engage in 'feedback meetings', these being meetings with unsuccessful applicants for the second GSM licence for the purpose of giving them reasons for their failure to obtain the licence. It was felt that it might be somewhat insensitive to grant the licence while these meetings were underway, and that accordingly the proposed date for grant of the licence was Thursday next, 16th May. Martin Brennan also said that the Department had written to solicitors for the Persona consortium informing them of their intention to grant the licence and that if the Persona consortium wished to challenge this, they should do so through the courts. However no response had been received."

Can you be of assistance as to when that decision was made, Mr. Loughrey, about the licence was going to be granted on the 16th of May?

A. No. In fact though I may have scanned this document before it only occurred to me that it seems to have emerged actually from this meeting,

whether that had been cleared through the political system, I am not sure. What I would say is though, there seems to be almost an inevitability emerging from that with which I would not have agreed myself.

I just want to say that and I don't want to sound

Q. I was going to come, just reading it to you now, that is how it is emerging to me as well. I was going to ask you

A. Absolutely, of which I would not have agreed. Not to be taken as a criticism of the officers concerned, but is, the idea that we still had issues, and serious issues to be dealt with, and that you would lock in on a day a very, a day close by, would have been something that I mightn't have been entirely happy with, but on the other hand it is a proposed date, and I am quite clear in my mind that it would have had to be changed if the issues hadn't been addressed.

Q. I will continue with the rest of the note because I am interested in your view as to how the discussion appears to be evolving here.

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

"Martin Brennan said that it was the Minister's wish to announce the grant of the licence at a press

conference co-attended by Esat Digifone. Great stress was repeatedly laid on the need to prepare extensively and exhaustively for this press conference and it was stressed that the journalists present would have been briefed in a hostile way by 'others' (this clearly being a reference to unsuccessful consortia). Martin Brennan said he wished to have Esat Digifone to draft answers to them and to explain to the Department the reasons for those answers. He would also then wish to arrange a meeting between the Minister for Transport Energy and Tourism and Knut Digerud, together with 'one or two others' at which the 'the progress of the press conference would be discussed/rehearsed'.

"Martin Brennan indicated that there had been discussions within the Department as to whether shareholders should participate in the press conference, and if so, to what extent and in what way.

At this point Knut Digerud made a strong point to the effect that Digifone saw itself as an entity independent of its shareholders, that it had premises, employees, funds and a viable business in its own right, and that there were issues likely to be raised at a press conference which would not necessarily be a matter for the company, but rather matters for its shareholders. Fintan Towey conceded this as a fair point and acknowledged that the company would be at liberty during the press conference to refer questions

concerning its ownership to its shareholders. Martin Brennan interjected to say that in such a case, the Minister would wish to know what response the shareholders would make when the questions were put to them. Martin Brennan stressed the need to have a number of 'definite clear and acceptable statements for us at the press conference' and he outlined a number of 'obvious questions' as follows:

"(a) Is this the same sort judgement as that which applied?

"(b) Can the Denis O'Brien side of the consortium stand up? (Adding that either Denis O'Brien or Knut Digerud should answer this question)

"(c) Will Telenor support the project to the end?

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

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

and Fintan Towey.

"The meeting ended with Martin Brennan reiterating that he was virtually certain that he would have to get some more information on IIU, some numbers. This meeting concluded at 1:10 p.m.. Its tone throughout was cordial and it concluded amicably."

Now, again just reading it, and perhaps viewing it as you indicated yourself there previously, that it seems to be almost a discussion about a concluded matter.

Now, I would ask you to bear in mind that this is Mr. Owen O'Connell's note of the meeting?

A. Quite.

Q. And not Mr. Martin Brennan's or Mr. Towey's note of the meeting. So I suppose we have to approach it, again not suggesting that Mr. O'Connell didn't report it accurately?

A. One could get the impression that you have cited, Mr. Coughlan.

Q. It is almost like a discussion of a fait accompli: we need a few numbers on IIU seems to be what it's almost about?

A. Yes, quite.

Q. And it also, of course, if I'm correct in understanding your evidence, doesn't accord with the view you were holding as of around this time?

A. No, but I wouldn't stress that too much. It is Mr. O'Connell's note and he does if I may put it this

way, Martin starts and finishes strongly, if I may put it that way, but so much of the limited time, is it 40 minutes we are talking about here?

Q. 40 minutes.

A. So much of the time seemed to be given up to presentation rather than substance.

Q. Yes.

A. That that was still outstanding at the time, but the saving grace is that Martin quite clearly started strongly and the penultimate sentence also gets to the point is that there was unfinished business.

Q. Yes.

A. But clearly there was some preoccupation about presentation.

Q. And there also seems to have been, maybe I am reading this incorrectly, but there seems to be a fair amount of reference to the Minister's requirements, or the Minister's wishes?

A. Well, there are very few politicians, and as I say is that, this is, this is just realism in my acknowledging this, and it is certainly not confined to Ireland, that do not want to position themselves in the best possible light in an announcement of this type so, in other words is, the Minister would have had his own advisor, programme manager, and if I may say so, a very skilled press relation officers who would focus on these issues. I don't know what their

involvement was at the time. Once again is, I say this without distancing myself in any way, I wasn't involved in any way at all with what I can call press information or press releases.

Q. I am just trying to understand, Mr. Loughrey, what was going on. We can only get it from the Departmental side, from people telling us because we don't have the record to this day in the Department?

A. Yes.

Q. We only have Mr. O'Connell's. I am just trying to understand this wasn't looking at what was being discussed at this particular meeting, as recorded by Mr. O'Connell, does not appear to be your line, if I can put it that way?

A. It is possible, I can't remember. In the last few days when it was brought to my attention, I did take a very specific and focused look at this, and this is on the 13th. It may have been the morning of the 13th that I did so and Martin Brennan may have said is, "Well, John Loughrey is going to have a look at this with Donal Buggy and are others", so in this meeting here we are going to look at the emerging draft, is it Article 8? We are going to have a look at the presentation, but I know that the issue, the outstanding issue or issues, plural, is now being dealt in a different track, so to speak. And it may have been that, why the 40 minutes seemed to have been

used up for the most part on issues that you correctly say are to do more with the fait accompli rather than outstanding issues, it can be that that is the explanation, but I don't honestly know, because I know in the last few days I did take a focused interest and it could have, as I say, been before this meeting and therefore Martin would have viewed, well, that is going to be addressed in a different forum. He just may have had that in his mind and may have coloured the sort of inputs that they gave in this meeting, I don't know, I am only offering that as a possible explanation, Mr. Coughlan.

Q. Yes. Well, I just want to, again, if you can assist us: Mr. Brennan, when he came to deal with this period, although you can see he attended a number of meetings, he informed the Tribunal or he gave evidence to the effect that he had been out of the loop on the GSM project until this problem arose in April of 1996, and that he was really, he thought, just brought back in because he had been Chairman of the initial Project Team?

A. Seamless continuity, if I may put it that way.

Q. Yes. And when dealing with many of these issues, I think he indicated to the Tribunal that he wasn't primarily involved, he may have attended meetings as a, I don't know, a chairman or if they were so formally structured, I don't think they were, but he

may have attended like that, but that you were the hands-on person at this stage?

A. I think that would be correct, yes.

Q. But still, as regards the particular discussion which is recorded by Mr. O'Connell, that wasn't your line?

A. Can you just refer can you point that out to me specifically? I am happy to I am not quite sure, just could I don't want to agree just for the sake of agreeing.

Q. I understand that.

A. I need to actually see that document.

Q. I want you to be careful about it. Because really when you look at it, I suppose reading the document, as you say, there was a lot of discussion about Article 8 of the licence and the amendment and a lot of time taken up with that. A lot of time taken up sorry, the date for the issue of the licence is indicated. How it is to be presented and what the Minister would like and the type of questions that are going to be these are all discussed. And as regards the on-going inquiry or the inquiry, as far as you were concerned, the only question that was being asked about IIU was some numbers?

A. But I think Martin has topped and tailed this meeting very effectively, because I have just turned back now.

If you look after the courtesy, if you look at the first paragraph: "Martin and Fintan scanned", etc.,

if we could park that reference.

Q. Yes.

A. Yes, I wouldn't agree with that at all.

Q. I know.

A. But having said that

Q. I know.

A. but after saying that is, he gets to the nub of the

point is, that the Department will be looking to IIU,

you know, to see the colour of their money, so to

speak, I forget what the exact phrase is. He is

putting down a marker but he is not dealing with it

directly himself. I think there is an inference there

that will be dealt with elsewhere and he presumed that

between myself and Mr. Buggy, and perhaps others, it

would be dealt with elsewhere.

Q. Very good.

A. It is probably consistent with his view of his role at

the time.

Q. Very good.

A. That he was there as a link rather than as a decision

taker, or even perhaps as a negotiator.

Q. Very good. Very good. Now, of course it wasn't just

at this stage, it wasn't just an issue of the colour

of IIU's money. The whole question of ownership was

still the major issue, wasn't it?

A. It hadn't ultimately it didn't settle down until

the last 12 hours or so, that's true.

Q. I know it didn't settle down that the licence this never settled down, the ownership issue never settled down, isn't that correct?

A. Well perhaps you would assist me in that assessment.

Q. On the very simple basis that you asked the Attorney General's office for advice about it, your Department and received no advice on it?

A. Mr. Coughlan, I am now conscious of that.

Q. Yes.

A. But even though, if I may put it this way, legal advice from the loftiest, I say this advisedly, the loftiest holder of legal office in the country, in the executive side of Government, the Attorney General, with as key advisor is, it would be advice. Now, it is advice clearly that would always be respected in any Government Department, but it still didn't prevent the Department in general, or me in particular, taking a judgement call at a particular time. Now, my impression at the time was, and perhaps as you raise this, my impression at the time was and clearly I am relying on memory now, is I had been informed that ownership issues had gone to the Attorney General, had been referred to the Attorney General's office. I don't believe I sought paper on this. I just took it as read. I take it as read, I don't believe I saw paper at the time, is, I suppose implicit in the decision-taking process and what lead up to it on the

last three days, if I might put it that way is, as nobody reported back to me that there was a problem, I went ahead on that basis. Now, that's there is always a risk that is, that the papers that are now opened to me now, that I could give that interpretation. I can't guarantee you that that was exactly my thought process at the time, but it mightn't have been unreasonable for me to take that view at the time, but that's the best I can do. I was conscious that we had sought advice from the Attorney General's office on the ownership issue, because I had been so informed, and I suppose perhaps I may have been, blonde is a pejorative word, but the same contacts in the Attorney General's office this is not a criticism of anybody were an implicit part of the clearance system for the licence itself. Now, that doesn't mean we got explicit advice, but implicit in the signing off of a licence due to be signed which they knew, because they were always working against a date. I suppose I somehow accepted that as a form of tacit approval. Now, you may well say, incorrectly on my part, but I suppose that broadly speaking is, is what I think I believe my thinking was at the time.

Q. Okay. How up to speed was the Minister as of the 13th? Obviously he knew that the licence was going to be issued on the 16th?

A. I believe I would have told him in no uncertain manner

what the obstacles were at the time, so he would have been aware. But once again is, I am not aware that he took any line he just noted that I think he would have liked to say is, 'Look Secretary, is it being sorted out?' and I would say is, 'Well it is not sorted out. This is a it is not sorted out but is, but we intend to sort it out, but it is not sorted out.'

I think that is the sort of interaction. He didn't, to my recall now, it is easy to recall when a Minister opposes civil service advice on something that is significant. I have no recall whatsoever of any involvement other than saying almost what I might call his preoccupation with results: 'can we not sort this out as quickly as possible?' but never interfering on how it might be sorted out, let me put it that way.

Q. It was never, might I suggest, going to be sorted out, as I understand the papers, so far in any other way during this period other than that the share configuration was going to be as was indicated at the time of the bid, it was going to be 40:40:20. Am I correct about that?

A. That would be quite impossible, because I would have taken a formal view as accounting officer and this is, this is serious stuff from a civil servant's point of view, that I would have seen the danger of an

immediate challenge to the result, at least the risk of that, thereby putting the State's resources at risk and not to mind the policy of the introduction of competition, but just from an accounting officer point of view. So I don't believe, in those circumstances, I would have been overruled. So there was no question about it, that it was going to go back to 40:40:20.

Q. I understand that. Yes, I understand that. And I know you were going down the line on this one. I understand that. But that was the solution that was going to be, that the Minister knew was going to be achieved?

A. Oh he would have known from me, actually, there would be effectively no alternative but to revert to 40:40:20. He would have known that. He may have known that a lot earlier, like three weeks earlier.

Q. Yes. But he was not being advised that this was maybe a question of telling IIU or to tell Communicorp and Telenor, as you were quite entitled to do, to say "come in here now, you bid for this licence and this is what you bid and we granted you exclusive negotiating rights on this basis. Now put it back to what it was or you are out." You could have done that?

A. And would have done that if circumstances demanded it.

Q. You could have done that?

A. I could have done it, clearly we could have done it.

Q. "This is it, I don't care about IIU or anything"?

A. Sorry, when I was agreeing with you, Mr. Coughlan, I was agreeing with you on configuration . I was not agreeing with you on the identity of the third party investor.

Q. Why is that?

A. Because I didn't see any basis. The bid, as was put in, was for now, we talked about this before.

Q. You know

A. We talked about this before.

Q. To be honest with you, Mr. Loughrey, it is quite painful to go over the whole thing again with you, as we did on Friday, because on Friday I think you accepted that as of the date that the exclusive negotiating rights were granted to the consortium, it was not, the consortium that was granted those exclusive negotiating rights was not the consortium which had bid?

A. Well, if I did so, if I did so, and I am conscious of the fact that I am under oath, if I did so, I did so because I lapsed in concentration. What I meant to have said and at all stages

Q. Mr. Loughrey, are you

A. Sorry, Mr. Coughlan, consistent with my position all along, absolutely consistent with my position all along is, that I saw that the twin engine, so to speak, of Telenor and Esat, being the operational and strategic side of this licence, and we saw from the

very outset that all financial investors are third party investors, if I may use the correct term, is would bring valuable equity finance but didn't touch on the strategic or on the operational. Now, if I had a lapse of concentration, one is, and if I agreed that, I don't want it interpreted that somehow that I gave, took a decision on the 16th or the 15th or the 16th in the teeth of what you have just said.

Q. Very well, Mr. Loughrey. Very well. So I understood you to say, Mr. Loughrey, that it was your understanding, and I give it to you either way, that at the bid, the time of the bid, this was either 50:50

A. Yes.

Q. consortium, or we could say it was a 40:40:20 consortium?

A. Yes. Strictly speaking 50:50, but I am happy to accept either.

Q. Approaching it either way?

A. I am happy to accept either.

Q. The one thing that is absolutely certain, that as of the 25th of October of 1995, it was not either a 50:50 or a 40:40:20; I thought we had been through that?

A. On the 25th of October in

Q. 1995?

A. 1995.

Q. When the date of the announcement was made about the

winning of the competition.

A. Sorry, Mr. Coughlan, I don't want to delay the Tribunal. Could you talk me through that?

Q. You weren't aware of it you weren't aware of it from what we have been through, from what we have been through?

A. We are ad idem again.

Q. This is why I am getting confused.

A. We are ad idem on that, absolutely right.

Q. They were not the same consortium. We have been over it so many times, Mr. Loughrey.

A. Neither the Evaluation Team nor myself knew that.

Q. Yes, yes, yes. I agree with you, I thought we had been over this. Sorry, maybe we are at cross-purposes?

A. We may well be, yes.

Q. Yes. And although you didn't know it, as of the 13th May of 1996, what the true position was, that this consortium had set, had arose out of an agreement which crystalised on the 29th of September, 1995, that you were now dealing with?

A. Had apparently reinvented itself on the 29th of September, 1995 the intention of reinventing itself that is what we covered.

Q. And you didn't know that?

A. No.

Q. And I understand all of that. I understand that. I

thought we had to go back over all

A. No, and I am not asking the Tribunal to do so, but I was making the point, this all was triggered off, if I may say so is, that my conviction and determination at the time was to make sure that the configuration remained the same, but my problem with IIIU was not one of identity, but was one of, I wanted to see a demonstrable ability to meet its requirements as they were emerging now, as effectively under partial underwriters for Communicorp. That was my preoccupation.

Q. It would be safer if we just take your state of knowledge and how you viewed things as you went along during this period.

A. Okay.

Q. Now, I think if you go to Divider 214, please. And these are the this is a letter to Mr. Brennan and this is the bundle of documents that has been handed to him and Mr. Towey. And I think we are going to have to go through these with you, because these become relevant in the in the evaluation.

A. I must say they are pretty faint in my photocopy.

Q. I agree with you. They are not the best in mine either. I will see if I can get you a clearer set.

A. I think we can just about see them.

Q. I will go through them anyway.

The first, you can see it is just a letter from Knut

Digerud and it encloses various documents. And the first one is a letter from Telenor Invest AS concerning support for the project. And if we just, that is addressed to Mr. Brennan and it is signed by Mr. Johansen.

MR. O'DONNELL: Would you just open the whole of that letter.

MR. COUGHLAN: First

MR. O'DONNELL: The whole of the covering letter.

Q. MR. COUGHLAN: Yes, I was going to go through it bit by bit if you want to, yes. It says:

"Second GSM licence".

"Dear Mr. Brennan.

"I refer to our recent meeting and to your request for information concerning this company. I confirm that I am a director and Chief Executive of Esat Digifone Limited.

"I enclose the following:

"1. Letter from Telenor Invest AS concerning support for the project.

"2. Copy of a letter from Arthur Andersen and Co. in Oslo concerning the ownership and finances of Telenor Invest AS.

"3. Letter from Chris McHugh, secretary of International Investment and Underwriting Limited.

"4. Letter from Farrell Grant Sparks, financial advisors and auditors to Dermot F. Desmond, the

beneficial owner of International and Underwriting

Limited.

"5. Letter from Paul Connolly, director Communicorp

Group Limited, concerning its ownership and interest

in Esat Digifone Limited.

"6. Letter from KPMG auditors to Communicorp Group

Limited.

"7. Letter from ABN-AMRO bank concerning our

financial facilities."

This is a bit faded.

"Confirmation will be given on or before the grant of

this licence that the company is owned as to 40% each

by Telenor Invest AS, a wholly-owned subsidiary of

Telenor AS and Esat Telecommunications Holdings

Limited a wholly owned subsidiary of Communicorp Group

Limited, and as to 20% IIU Nominees Limited holding on

behalf of Mr. Dermot Desmond. IIU Nominees Limited is

a wholly-owned subsidiary of International Investment

and Underwriting Limited which in turn is also wholly

owned by Mr. Desmond.

"I hope that the above is of assistance.

"Yours sincerely

Knut Digerud."

Now, with that then came the letter, the letter from

Telenor sets out its financial position, its AA credit

rating and matters of that nature. I don't think

anything

A. I think perhaps the significant, as I would see it as they are opened now, that Telenor obviously had to respect its position as a shareholder. It couldn't presume on other shareholders, it says, "Furthermore Telenor," if I can read it correctly, "is capable and willing to increase its financial commitment if necessary," acknowledging obviously that it would have to reach agreement with shareholders. In other words is, there can be no doubt from this letter that Telenor was forced to fall square behind the project.

Q. Yes, there is no doubt about that.

Then the next letter is a letter to Mr. O'Connell from Arthur Andersen and it is about, again about Telenor.

I don't think there is any need to open that particular document.

A. Yes.

Q. Then there is a letter from a letter from Messrs. Farrell Grant Sparks, I think, dated 7th May. We have

A. Perhaps in this order, I have a letter from IIU.

Q. I see the one from Esat Digifone, it is a letter to Esat Digifone from IIU, the Company Secretary.

A. Yes.

Q. I beg your pardon, I beg your pardon, it is to Martin Brennan. This is to Martin Brennan. I beg your pardon.

"Dear Sirs,

"International and Underwriting Limited (IIU) is 100% beneficially owned by Dermot F Desmond. The directors of IIU are:" And it sets out, "Dermot Desmond, Michael Walsh, John McHugh and Nigel McDermott.

Then the letter from Farrell Grant Sparks which says:

"We act as financial advisor and underwriter to Dermot F Desmond. We confirm that Mr. Desmond is the beneficial owner of 100% of International and Underwriting Limited.

"We are informed that Mr. Desmond/IIU have undertaken to invest and/or underwrite an equity investment of up to $\frac{1}{2}$ 40 million in Esat Digifone Limited. We confirm that Mr. Desmond/IIU is in a position to make this investment and to make the underwriting commitment."

Then there is a letter from Communicorp Group Limited addressed to the Department, and it is to Mr. Brennan.

"Further to your request for information regarding the ultimate ownership of Communicorp Group Limited, I confirm that I am a director of Communicorp Group Limited and I am duly authorised to make the following statements:" And then he sets out the shareholding in Communicorp Group Limited.

I don't think there is need for me to specifically open the whole document, unless you wish to refer to any part of it, Mr. Loughrey?

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

Q. Then the next letter then is one from KPMG. It is

about Communicorp, Communicorp Group Limited the company.

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

"1. The company has appointed CS First Boston as exclusive agent for the purpose of a private placement in its subsidiary, Esat Telecommunications Holdings Limited. The placement is being offered in the US to a limited number of institutional investors.

2. The amount of funds expected to be raised in the placement is at least $\text{£}1\frac{1}{2}$ million.

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

4. The company has in addition entered into an agreement with International and Underwriting Limited (IIU) dated the 29th of September, 1996 under which IIU has undertaken to arrange underwriting for the company's proposed interest (through its own subsidiary Esat Telecommunications Holdings Limited) in Esat Digifone Limited. IIU have confirmed that they have arranged the underwriting."

Did you ever see that particular paragraph from KPMG?

A. I am trying to recollect, Mr. Coughlan. I would be

surprised if I didn't ask Mr. Buggy to have sight of

all the documentation.

Q. Yes.

A. So...

Q. Mr. Buggy did, but I am asking you did you?

A. No, no, but I was just coming to it by saying in these circumstances it is probable that I saw that letter.

Q. Yes.

A. Now, I can't hand on heart say I definitely recall it, but I would be surprised, and Mr. Buggy can either confirm or deny this, because he would probably have a greater memory than I would on this, because he did the actual spade work.

Q. Yes, I know that.

A. So he would have been focused on it for maybe 72 hours and perhaps my focus might have been closer to an hour or two, so clearly he would have a better memory, or may have a better memory. I am not asking him to, but he may have a better memory, but I would be surprised if I relied solely on the note he prepared for me. I think I would have liked to have seen the colour of the background documentation. And given that probability, it is probable that I saw this letter, yes.

Q. Well, I suppose

A. I don't have a specific recall of it but it is probable that I saw it.

Q. Looking at it now in the light of all we now know, it raises interesting questions, doesn't it?

A. It does indeed actually. And I it might well raise the question: why wasn't I curious?

Q. Yes.

A. Now, the answer I give to that by saying, why wasn't I curious? I suppose I was looking, I was trying to solve a problem, I wasn't trying to create a difficulty, I was trying to solve a problem. I would have read that and said, it was an open secret that Communicorp actually didn't have the necessary strength, it was already flagged from way back, I must have read that first on the 26th of October when I read the detail of the Evaluation Report, that wasn't a surprise to me, so that they had looked and sought an underwriter and once again, I say, "yeah, good for them, probably a sensible thing to do". But I wasn't to have known that the intent at around that time was to change the shareholding proportions. So I probably read it in is, wise that they saw the light, they needed underwriting and moved on. That's the probable explanation. I would like to have thought in retrospect that I would have had the curiosity to follow that up. I was trying to solve a problem rather than write a history book, if I may put it that way.

Q. All right.

A. And as I am not asking you to obviously clearly it is not my position to even ask you to agree, as we had discussed earlier, underwriting in itself doesn't change ownership.

Q. No, not at all. No, not at all. Then there is the debt provision letter from ABN-AMRO.

"We understand that you have requested Owen O'Connell of William Frys to provide details concerning the identity of financial commitment of providers of debt financing to Esat Digifone Limited. In this regard we can confirm the following:

"ABN-AMRO bank and AIB plc have been appointed as joint arrangers of project finance for Esat Digifone Limited. We are very pleased that Esat Digifone have selected ourselves to arrange such finance as we understand that there was significant competition for this role from a number of other international banks. Since our appointment, ABN-AMRO Bank and AIB plc have entered into a committed facility with the company to provide bridging finance of up to 25 million and we have agreed draft terms for project finance, which would be subject to the bank's normal due diligence, of up to 78 million. It is usual in such financing that a short term bridge facility is provided by the bank while the more time consuming process of the project finance is finalised.

"We are delighted to be associated with Ireland's

second mobile phone operator, and we believe that the combined strengths of the two banks will be of significant assistance to the company over the coming years."

Then it is signed on behalf of the bank.

A. Technically, Mr. Coughlan, this letter is conditional on due diligence. But had I read it at the time, and I am sure I did read it at the time, it wouldn't have caused me the slightest problem that that was a conditional letter because it was a standard sort of conditionality. I had a background in project finance, this was probably the plumb of the year in Ireland in terms of non-recoursed or limited recourse finance. They could have taken their pick of any number of banks. Anybody who is seriously into, as I said, limited recourse finance, would have been knocking their door down. That letter, even though it has a conditionality in it, wouldn't have bothered me in the slightest.

Q. I wasn't even suggesting that it should. But I suppose I will come back to the question of the project finances or the debt finances in due course when we look at the Shareholders' Agreement and the side letter that was furnished to the Department, because it may have some significance

CHAIRMAN: Now would be as good a time to adjourn until ten past two. Thanks, Mr. Loughrey.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH.

CONTINUATION OF EXAMINATION OF JOHN LOUGHREY BY MR.

COUGHLAN:

Q. MR. COUGHLAN: Mr. Loughrey, just so that we can try

and keep some order on things over these few days, as

appears from the documents. That memorandum of

Mr. O'Connell's that I referred you to before lunch,

do you have that with you there? I'll get it for you.

It's just Book 38, yeah.

A. I am sorry to delay you, Mr. Coughlan. Yes, I recall

now.

Q. Now, I think we had dealt with paragraph 15 of

Mr. O'Connell's memorandum. Now, you needn't go to

paragraph 16. This is all about Article 8 of the

licence. If you go over the page to paragraph 17,

because it relates to the next document I was going to

ask you to have a look at. And Mr. O'Connell has

informed the Tribunal that, on the 14th May, 1996, he

was informed of a telephone conversation of the

previous day between Denis O'Brien and the Minister.

His note contains the quotation, "Getting there

slowly but surely". He does not know whether this is

a summary of Mr. O'Brien's view of the overall

position in regard to the licence, or a statement made

by Mr. O'Brien to the Minister, or vice versa." In

any event, the conversation appears to have resulted

in a meeting being arranged for the 14th May between Mr. O'Brien, the Minister, Mr. John Loughrey, the Secretary of the Department. And that's Document No. 15.

But if you just go to Tab 215 of Book 44, the one we were on.

A. Yes, I have that.

Q. You can see Mr. O'Connell's attendance there on his telephone conversation with Mr. O'Brien.

"DOB, Lowry called yesterday.

'Getting there slowly but surely.'

Called last night re auto dialers.

Meeting today, Loughrey + Lowry, re this."

Did you know that the Minister had been in contact with Mr. O'Brien himself at this time?

A. I am trying to jog my memory, Mr. Coughlan. I am not surprised I wouldn't have been surprised totally that he would have been, because obviously I knew that representations had been made and were in all probability, were being made through, perhaps a number of sources actually, because Mr. O'Brien astutely has surrounded himself with some people who knew their way around the city or around the administration and hats off to him for that. So I wouldn't have been surprised, but I don't recollect it specifically, but it's not a surprise.

But equally looking at this note, a thing that might

appear surprising, that here we are coming up to the last few days of this GSM competition, which was very significant, and we all acknowledge that, but that the focus should be on auto dialers, and I don't find that surprising in the sense that Mr. O'Brien, or Esat, had put both eggs in the bun-basket so to speak in approaching the market, and the capital markets can deal with good news very easily, and the GSM was good news, but the Achilles' heel, and I am talking from my own opinion now, would have been on the fixed line business, where Mr. O'Brien, presumably, would have had to say in his prospectus what his expectations were for the development of this market in Ireland, but he wasn't getting the capacity to match his market forecast. Now, that's what I imagine. So even though we are in the last few days of the GSM licence, it doesn't surprise me that his focus could have been on that, because in getting his prospectus or in Credit Suisse First Boston's prospectus out, I imagine this was the missing piece rather than anything on the GSM side.

Q. I understand, and perhaps your analysis is correct, that that was the it was the fixed line business that was the weakness in that respect. But you were not aware, am I correct in understanding so, that the Minister had been in conversation with Mr. O'Brien?

A. No, I wasn't aware, but in a sense, and I know you

haven't put any interpretation on your question, but perhaps, and I am being over-sensitive by saying he was quite entitled this was in the middle of the the Minister could have at any stage opted to have a direct hands-on involvement in the negotiation.

So he was within his entitlement of doing so. But as I say, it doesn't surprise me that Mr. O'Brien's preoccupation with the auto dialers should still be perhaps number one item in the agenda.

Q. Yes. Would I be correct in my understanding that it would be more usual when a meeting is being arranged with the Minister, that it would arise from it being initiated on the official side rather than the Minister initiating a meeting involving the Secretary of the Department?

A. That would give officials an influence and a control on democratically elected Ministers, that in their weaker moments might sound attractive, but when they would think about it actually would not be so. Of course, Ministers who get their seals of State from the President have the discretion to be in contact with whichever citizen they wish legitimately. So, no, I wouldn't have seen any question of somehow that an insistence that approaches are initially made to the officials side, it might be wise for promoters to do so ultimately, because clearly departments would have an influence on any emerging policy or

transaction, but you know, my own, let's say, view, and particularly in the latter 20 years of my career, when I am probably working closer to Ministers, would be that Ministers, quite correctly, do not want to have their contacts with interest groups and individuals somehow filtered by the system and in that, I think they are correct.

Q. But would it be more usual on an official issue, that whether it be GSM or the auto dialers or any other official business be more usual all I was asking is what is more usual?

A. I think it would be more usual, but there again, Mr. O'Brien perhaps wouldn't have been the most usual, if I may say so, of businessmen. And I think we have mentioned earlier about entrepreneurial characteristics. I don't think they probably see things in usual channels or administration quite in the same light as might be in the majority of cases. So once again, such an approach directly by Mr. O'Brien wouldn't surprise me.

Q. And would that again have been your experience with this particular Minister?

A. This particular Minister was very comfortable with operating with businessmen at all levels because he was one of he was an entrepreneur and a businessman himself, and he was very comfortable in business circles actually. So in this particular instance, I

don't think that it might be quite usual for him to operate individually in a milieu such as this, but when it came to others, for instance, when we were if ever came on the overseas side, European Union side, he would invariably only operate through the system, so to speak.

Q. Now, if you go to Divider 217, and I'll just explain to you what the note is. We gather this from Mr. O'Connell's memorandum, again because he has informed the Tribunal that, "Later on the 14th May, 1996, I met Mr. O'Brien and was briefed on the meeting he had with the Minister and John Loughrey. The Minister was seeking information concerning IIU and the availability of finance. The Minister appears to have told Mr. O'Brien that the shareholding in Esat Digifone on that day the licence was granted had to be 40:40:20, but there appears to have been discussion of a change in shareholding to 45:45:10 at a later date. There was also discussion of the terms of Article 8 of the licence. There was discussion of a forthcoming press conference, of which the grant of the licence would be announced, and an apparent agreement as to the need for a rehearsal thereof."

And then Mr. O'Connell referred the Tribunal to this particular document, this note or memorandum of his. Now, I am sorry, it's not transcribed, so I'll have to just do my best in reading it.

"DOB re meeting Lowry/Loughrey."

It's dated 14th May, 1996.

"Minister hadn't got information wants.

" Financial information IIU (Michael Walsh to go to the Department/private meeting.)

" Letter that finance is in place from the underwriters.

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

"Lot of frustration/pressure.

"All by 11.00 tomorrow. Lowry 'will check with Sec' and hold DOB/LB responsible.

"This has to be 40:40:20 on day.

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

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

"Minister informed of 45:45:10 very quickly.

Lowry 'let ink dry'.

"Public announcement Lowry wanted last week do everything in one go, deflect attention away from ownership. Discuss"

A. Mr. Coughlan, just in case you have lost me. When I turned the page, "let ink dry". I think you have lost me because I seem to be on another document or I am not sure if it's incorrectly filed here.

Q. Yes, I'll just check that now. I'll get you an actual

hard copy. It's the second page of this.

A. I see that now.

Q. "Public announcement. Lowry wanted last week. Do

everything in one go. Deflect attention away from

ownership. Discuss business, infrastructure,

contracts, roll-out plan, employment, coverage, new

contracts. Hold off buying phones to public, etc..

"Must be phenomenally well briefed on bid document

plus tenders. OO'C to be present plus to answer

questions.

"Legal ownership issue especially important. All

reporters focused on this.

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

Rehearsal.

"Persona have written another letter to ask licence

not to be granted.

"Just want one person with one signal."

Now, do you remember the meeting with Mr. O'Brien and

the Minister?

A. I have to honestly say I have no recall of it

whatsoever. Now, I could sort of recreate within my

mind, but I have no I have such little recall of

it, you know, a meeting with the Minister with the

principal, with the, let's say, the perceived local

driver in the GSM competition, and I knew I had met

Mr. O'Brien, so I almost have a doubt whether I was

there or not. And there is one phrase that might just

infer that now, I may well have been there and Mr.

Lowry or any other witness may well confirm that

Q. Mr. Loughrey, the Tribunal wants everybody to be of assistance

A. Of course

Q. I know you have a tendency, but I want you to be fair to yourself as well Mr. Loughrey, if you don't believe you were at a meeting?

A. I am not sure I was at the meeting. It says, "Minister to check with Sec." Now, that doesn't infer I wasn't at the meeting, but it could also infer that I wasn't present and he would check with me to see if prescription had been fulfilled, but there is little doubt that while the Minister that may well have been the Minister's own agenda unprompted, if I may put it that way, but this was clearly my agenda to some extent from start to finish, not just the absence on the 40:40:20, but I was relatively relaxed on it moving upwards, in other words, the so-called twin pillars of this initiative. I didn't mind I had no objection to any dilution of the Telenor interest in particular, I didn't but I had no problem whatsoever to see the joint venture partners move up from 40 to 45 percent. So in other words, as I say, the Minister this may be his own personally-held view from start to finish, but clearly I see my own personal agenda in it as well.

Q. I see. You see well, first of all, it doesn't appear to have been a meeting about auto routers or auto dialers?

A. That's correct.

Q. It's clearly a meeting about the GSM?

A. That's absolutely correct.

Q. And "subject to receiving information from IIU, Michael Walsh to go to the Department private meeting", it's proceeding on the fait accompli, in effect?

A. Well, there is one thing in that reference that I would not be entirely happy with, and that is somehow that the idea that Michael Walsh would come and see the Department, and presumably myself, on a private meeting. There is nothing private about the award of this licence because it was a valuable public resource, and there was no way that it was going to be awarded on the basis of some private understanding. Either IIU's finances stood up, to borrow the phrase, or they didn't, and my preoccupation in the last few days, I was actually was that it had been established, and it was that Mr. Desmond was the owner of assets. Now, how encumbered they were is another matter all together, but was the owner of assets. It was established that Farrell Grant Sparks, a very reputable firm, had already written an earlier letter, that they could confirm he could meet up to 40 million

in commitments. But my I myself, I know what my attitude was, assets are all very fine, but even if they were unencumbered and had to be sold, they are in timing, or distress sale, fire sale. I wanted to climb, so to speak, a ladder of liquidity to find out could in fact in terms of cash flow, could the demands of this project be met, and that's what my preoccupation was.

Q. Could the capital calls be met when necessary without any undue delay?

A. That's it exactly right, and that was my particular concern at the time. But the idea now, clearly this may be Mr. O'Connell's, you know, note of something that was relayed to him

Q. Well, it is. Mr. O'Connell has informed the Tribunal, he will come to give evidence, but he has informed the Tribunal that this was a briefing he received from Mr. Denis O'Brien, and that's his note of being briefed by Mr. O'Brien. So it is Mr. O'Brien, as I understand it, Mr. O'Connell's note of what Mr. O'Brien told him occurred at a meeting between Mr. O'Brien, the Minister and you if you were there?

A. If, in fact, I was there. Could you assist me on just one more thing, Mr. Coughlan, and nothing may turn on it. Was Mr. O'Connell the legal adviser to Esat, the fixed line business? Because it may well be that he

only took a note of what was of interest to him, and it may well be that the auto dialers were discussed, but he didn't it didn't warrant noting by him.

Q. Mr. O'Connell was the solicitor to Esat Digifone.

A. I see, yeah. So the auto dialers wouldn't have been of direct interest to him.

Q. The auto dialers would not have been necessarily of direct interest to him. He was the solicitor to Esat Digifone.

A. I see.

Q. Turning over the page, do you ever remember any discussion along the lines as is recorded here, about the public announcement? Well, first of all it's noted here obviously Mr. O'Brien is informing the Esat Digifone solicitor, Mr. O'Connell, that Lowry, meaning the Minister, wanted last week that's a public announcement.

Were you ever aware that the week prior to the this is the 14th, so about the 7th May, that the Minister wanted to make a public announcement about

A. Not specifically. I was constantly aware that this was a Minister and he wasn't the sole Minister I worked to on this basis actually who always wanted action sooner rather than later. So if it were put to me that he wanted the prior week yes, sure I can recall at a Council of Telecommunications, it may have been an Aviation Council meeting in March, where he

wanted the licence issued almost forthwith. So that wouldn't have been inconsistent with the Minister who just wanted this issue dealt with sooner rather than later. But if you asked me on that, no, I can't recall that he wanted it issued the previous week.

Q. Very good.

Now, the next portion of the note is something I'd like your assistance on, because you can see it reads, "Do everything in one go. Deflect attention away from ownership."

Now, discuss business, roll-out, everything, tariffs, that sort of thing.

Reading that note, a member of the public may well take a view that there was concern here about this question of ownership, and the whole thing was to make the announcement, deflect all the attention away from it and hope to get by. That's an interpretation that one could easily take from that, isn't it?

A. Yes, I wouldn't disagree with that.

Q. Do you ever remember such a discussion?

A. No, I don't. I don't remember this meeting clearly, but I don't remember such a discussion, because once again there seems to be, once again, there this idea that there was something wrong in what we were doing. There was absolutely nothing wrong in what we were doing. Once we got the configuration to conform with what had been the bid document's configuration, I

didn't see, myself personally, I wouldn't have had that preoccupation at all. Now, admittedly, as I said, Mr. Desmond isn't the least colourful of people. He has been provider of, if I may say so, exciting copy from the print media from time to time, and he was, as I say, among the most interesting of our captains of industry, if I may put it that way, so and so people would say, perhaps he wasn't seen as one of the he wasn't announced as one of the original institutional investors, and I use the word "institutional" advisedly, because that were the words that were used at the time, though not in the bid document. So there seemed to be this from this note here, that sort of preoccupation. I personally wouldn't have shared that preoccupation. Nor did I at the time.

So I am and we are getting here into the realms of presentation, and it may well be, and as I say, I have no recall of being at this meeting, but even if I were at that meeting, I have often excused myself by saying, "Look, Minister, I think I have got as far as I can. I can act on this", and leave the Minister with the visitor concerned, etc.. And but I am not conscious of this conversation whatsoever. And if you wanted me to offer an explanation other than the one I have offered is, it's not up to me, but many commentators, many insiders, so to speak, and Sean

Duignan's book comes to mind, that politicians, for whatever reason, pay, and there are very good reasons obviously, pay very close attention to media and media comment, and maybe this is, in a classical case, an over-reaction to what they might regard as sensitive.

I didn't see it in that light myself, but clearly there is there are echoes of that in that second page.

Q. So can I take it so, you don't actually have a recollection of being at the meeting? It would not be unusual for you if it came to a matter of, as you say, presentation, to excuse yourself from a meeting where you felt that the advice that you were to give was over and it was now time to withdraw?

A. That's right, and sometimes one picks up from Ministers where they want to continue conversation on, perhaps I am not saying I have no recollection on a semi-personal basis or they want to, where it's an acquaintance or, for instance, a political friend, and I would pick up the vibrations. I'd like to think I could take the temperature of the room and say, "Well, look, I have done my part of the business here" and move off, but that's a general explanation. It is not a specific explanation because I actually don't recall this meeting.

Q. And I might just also bring to your attention of course, we don't know about Mr. Lowry because he

hasn't given evidence yet, but you didn't know the history of the relationship in the consortium as of this time?

A. Oh, absolutely not, no. I had no idea whatsoever about the history as unearthed by the Tribunal.

Q. And I take your point that there may be occasions when a Minister would conduct certain business, perhaps with a political adviser rather than a civil servant, and there is nothing inappropriate in the normal course of events?

A. Quite within his or her rights to do so.

Q. The next handwritten note, I don't think we need to deal with. It relates to specific provisions of the Shareholders' Agreement.

A. I take it, Mr. Coughlan, we are having one just so I understand, we are having one eye on Mr. O'Connell's chronology, and at the same time working off

Q. Documents, some of them are Department documents. We are coming to Mr. Buggy's work. Just, I think it is helpful that we can see information which has been provided to the Tribunal by Esat Digifone on one side.

A. Yes.

Q. Because if we perhaps we might approach this. We are coming to Mr. Buggy's involvement now for a moment. And if you go to Divider 221 perhaps, I will come back to 220, which is a letter from Messrs.

Farrell Grant Sparks again. And you can see the way in that Divider 221, it commences with a memorandum which is two and-a-half pages, and it's signed by Mr. Buggy. But if you go just behind that, there is the verbatim typed transcript of Donal Buggy's note, dated 13th May, 1996, relating to financial strength of Esat Digifone Limited consortium.

A. I have to say, Mr. Coughlan, mine is utterly unreadable, in the sense that

Q. You have got a manuscript, have you?

A. I have got a manuscript. Is there a transcription behind it?

Q. There is a transcription of that on top of it.

A. I don't appear to have I have that. That's the original note. I have the original note, but if you are talking about Mr. Buggy's own handwritten notes, they are unreadable.

Q. Yes, I am asking you these are typed, this is a typed copy of the handwritten note?

A. Oh, I see. That's fine.

Q. This was done with Mr. Buggy.

A. I see. That's fine.

Q. Do you have the typed copy?

A. We are talking about Mr. Buggy's memorandum to me dated

Q. No, just behind.

A. No, I don't have the typed copy.

(Document handed to witness.)

Q. I'll put this one up on the screen.

It starts, "Esat Digifone 13/5/96.

" Telenor Invest AS 40%, 20.8 million.

Esat Telecommunications Holdings Limited 40%.

20.8 million.

IIU Nominees Limited/Dermot Desmond 20%, 10.4

million.

"Total share capital 100%. 52 million.

" Telenor very big, financially successful.

"Profits before tax *210 million.

Turnover 2 billion.

No balance sheet.

Very good credit rating for both Moodys and

Standard & Poor.

Arthur Andersen will be able to fund the

20.8 million required.

"IIU 100% owned by Dermot Desmond

Farrell Grant Sparks invest and/or underwrite up

to 40 million confirm in a position to do this.

Not stated what they are

underwriting specifically Communicorp.

" Very little information on which to assess

financial strength.

" Communicorp owned 47.2% by Denis O'Brien.

34.8% by Advent International.

" Owns 100% of ETH limited.

Financing commitments underwritten by or through

IIU.

Appointed CS First Boston for private placement in

ETH. Expected to raise at least 22 million not

yet completed.

" debt financing.

ABN-AMRO Bank plus AIB plc.

Bridging finance of 25 million.

project finance of up to 78 million subject to

banks' normal due diligence.

"Possibly solution:

" Due diligence of Dermot Desmond's personal wealth.

Escrow account, interest bearing.

Cashflow required per business plan is 108.4

million by end year 3

Share capital of 52 million and loans of 72

million by end of Year 4."

Now, if we just stay at that first page for the

moment. Now, from what Mr. Buggy has informed the

Tribunal, and what Mr. Brennan has told the Tribunal,

it looks as if that was a particular briefing which

Mr. Buggy received from Mr. Martin Brennan about the

state of affairs as of that time?

A. I think that would be correct. I I think we noted

already that when I wrote my, sent in my written

submissions to the Tribunal, I hadn't spoken to

anybody, and I was under the impression that Mr. Buggy

was working for me directly in the next room. In fact, that didn't happen until later. He was working in the Planning Section. And I naturally thought I would have commissioned him directly, like somebody working to me in the next room, but it may have been that I did it through Martin Brennan or Sean Fitzgerald.

Q. Mr. Brennan thinks that he briefed Mr. Buggy on your instructions. First of all, can I ask you why Mr. Buggy, if he was in the Planning Section at that time?

A. Because he was put forward, and indeed in practice worked out, as somebody at director level, in then one of the big six accountancy firms; the accountancy managing partners whom I dealt with only allowed people whom they saw as rising stars or partners, imminent people ready, almost, for partnership. So he had a level of competency that I thought would be equal to anything, even if we were to go outside the Department, the work would be done effectively by Donal Buggy in one of the main, then, six big accounting houses. So clearly he had the skill-set to do this work, and that's why I selected Donal Buggy.

It is possible now, I believe that Paul Finnerty was working directly to me, now partner in KPMG corporate finance, but he was involved at the time, I believe, in other major issues, and notably the, I

think, the strategy alliance. And in that case he would have been liaising with Morgan Stanley at the time, from memory, and clearly I wanted somebody not to take away from Donal Buggy's identity kit or Donal Buggy's competencies, but I probably reserved Paul Finnerty for other work, but that's a long winded way for saying why Donal Buggy, because I thought a) he had the skill-set, and b) he was in-house.

Q. And so was Mr. Finnerty, and he was in the office beside you?

A. Mr. Finnerty was in the office beside me.

Q. He could have done what happened here was work which occurred over two to three days?

A. Correct.

Q. It could have been done by Mr. Finnerty, couldn't it?

A. If he were there at the time, and when I say in the office at the time, yes, it could have been number one, but I would have had to take him off other priorities. It was probably a snap decision I took at the time, and I wouldn't there was no other significance in it, I believe, other than that.

Q. Now, the briefing appears reasonably accurate, I think, doesn't it, according to that note anyway of what the statement

A. The statement the last four indents are possible solutions which may or may not might or might not have agreed, but possibly didn't. But the layout of

the facts right down to debt financing, seems

unexceptional, seems correct.

Q. If we just look at the possible solutions for the moment there.

"Due diligence on Dermot Desmond's personal wealth.

Escrow account, interest bearing" you will see

a reference to something coming up in a moment. I

think what that means is that that portion of the

money which would be necessary to underwrite

Communicorp would be placed in an Escrow account. I

think you'll see a note or a reference to it later.

keeping that amount of money in an account wouldn't be

good business or the return you are getting on it.

You either do a due diligence on Dermot Desmond or you

ask them to put, what is their underwriting note,

"Communicorp and underwriting on participation", which

would have meant putting, I am not sure exactly how

much, about 30 million, 31 million in an Escrow

account.

A. And I have to say, with all due respects to Mr. Buggy,

and he may have a much better opinion than I have, I

would regard that as wholly unrealistic. Wholly

unrealistic, because no matter what interest-bearing,

if it were market related interest, it would be

totally the opportunity cost to an operation like IIU,

and we discuss how, for instance, private equity

houses operated on, and for the most part, and this

would have been Mr. Desmond's and Mr. Walsh's mindset, in any event, classically they would have looked for rate return and capital employed up to 30 percent. So the idea of, from a realistic point of view of let's put it this way, of IIU accepting that; now, whether they accepted it or not actually was up for us to decide because we were granting the licence. It wasn't in negotiation. We were granting it, but I have to say it's wholly unrealistic, but it would have been unreasonable from our viewpoint, because for the first time I saw, from Donal Buggy's note, that the demands for cash wasn't a once-and-for-all front-end demand. It was mathematically discrete over two, two and-a-half years to ask somebody to put all of the money in, even in albeit an interest-bearing Escrow account, from my viewpoint, would be wholly unrealistic.

Q. Of course it would be, and I don't think Mr. Buggy Mr. Buggy was looking at possible solutions?

A. Sure. And I am not being critical, as I say.

Q. And I think perhaps in fairness to him, what he was saying here was, "Look, I have to have a look at this I have to have a range of solutions, okay, you can take a broad range of solutions.

A. I hadn't intended to be unfair to Mr. Buggy.

Q. I don't think it may even be that the suggestion

may have come from Mr. Brennan.

A. Yes, of course. Yes, of course.

Q. The other one, due diligence of Dermot Desmond's personal wealth. Again that doesn't seem like an unreasonable possible solution for Mr. Buggy to promote. It doesn't seem unreasonable?

A. I have to say, if Mr. Desmond, if it had been a corporate entity, I think some form of due diligence would have been absolutely necessary, but we are dealing now, not with an entity as such, but with an individual. This is what we had to tackle.

Q. And you see, as we move on, I think you will see where that particular distinction becomes a little bit blurred in the analysis that was carried on as to whether it was on Mr. Desmond or IIU, and IIU were providing the underwriting and Mr. Desmond was the investor, but Mr. Desmond, through IIU Nominees, was to be the beneficial owner of the shares. So in any event, if we move over and we'll have a look at "8.30am Wednesday 15/5/96.

"No dilution below 80% stick to 40:40:20.

Note: DTEC satisfied cruising altitude is reached.

"IIU confirm underwriting Esat.

"Cash balance of DD, but what about liabilities?"

A reasonable enough question for an accountant to ask.

"Conditions under licence agreement roll-out targets will require capital to remain in the

business.

"Could 5 financial institutions stand behind DD?

"Shouldn't be seen to be treating an individual
different from a company therefore need to fall
back on fact that we don't have a track record.

"Is there joint and several liability no use
'big' brother.

"Escrow until money put into company by both parties.

" can't withdraw.

no dividends.

"Monitoring conditions quarterly accounts
(including cashflow) to Regulator.

"Meeting with Michael Walsh.

"Telenor undoubted ability to bankroll this
project.

"Need to ascertain ability of other parties to
bankroll their share.

"Share capital going in as follows:

".75 million, 3 million subscribed so far.

"Today 5 million.

"15 million licence fee.

10 million in August.

9 million in November.

10 million 1997/98."

Under that, "could be 6.3 million."

To the right, "37 million in 1996 compared to 52
million per business plan."

Then if you continue over the page:

"8.30am meeting with Michael Walsh 15/5/96.

"Letter from Telenor underwriting up to 66 2/3% and up to 100% (Clause 14)

" Letter from IIU underwriting up to 33%.

" 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 funds?

" Letter outlining in general all the assets supporting DD's financial position.

" Also confirmation of revised capital requirement from Esat Digifone no.

" Shareholders' Agreement."

A. I have seen that on the screen, but it's not in that document.

Q. You must be short a page then.

A. But I see it on the screen.

Q. What we missed out in that particular document was a preceding page, I think.

A. Yeah, I have it now actually.

Q. Which was a meeting with Pearse Farrell on the 14th May, 1996, at 10:30. And this is information,

"Resident abroad,

"assets spread out worldwide. Logistically difficult before you get to confidentiality.

" track record over the years, NCB etc..

1/20 million in bank at present. But leaving it there for up to two months is costly" I think that that may have been a discussion between Mr. Farrell and Mr. Buggy about this Escrow account concept?

A. I think you may be right.

Q. Or Mr. Walsh and Mr. Buggy, I beg your pardon. That's Mr. Farrell and Mr. Buggy at that stage.

"Imagine that IIU was highly capitalised, but can't comment on it definitively. Need to clarify that IIU are underwriting Communicorp as per agreement 29/9/95."

That's now again it doesn't seem clear as to whether Mr. Buggy actually had sight of the agreement.

I don't think so. You certainly didn't

A. I don't believe so. I certainly didn't.

Q. And it may be a reference to that portion of the KPMG document which we looked at before lunch which made reference to the underwriting agreement. I think you remember that?

A. I believe that's reasonable.

Q. Now, obviously Mr. Buggy, first of all, got a briefing. He had, certainly, possible solutions. He had a meeting with Mr. Pearse Farrell in the first instance I think, on the 14th, isn't that correct?

A. Yes, that's the sequence.

Q. And they had certain discussions about things. And then there was the meeting with Michael Walsh on the

15th May of 1996.

Now, do you see the note of the meeting with

Mr. Pearse Farrell on the 14th May, 1996?

A. I do, yes.

Q. "Resident abroad assets spread out worldwide.

Logistically difficult before you get to

confidentiality."

Were you ever briefed about this or do you know what

that particular reference is to?

A. I don't recall those words, but I imagine Donal Buggy

briefed me. I have no recollection of him briefing

me as such, but I'd be amazed with somebody of his

skill-set and experience wouldn't have told me about

that, because I think my focus my memory is, my

focus is on what I want reassurance on is not the

scale or the dispersion of Mr. Desmond's assets. I

want to make sure there is sufficient liquidity to

meet not only the immediate requirements, which was

basically the licence cheque for 15 million, but

whether the roll-out of the capital expenditure could

meet not only his proportion, but also well, as it

turned out subsequently, we didn't look into that at

that stage on the 14th; that his proportion of any

shortfall that might arise if Communicorp couldn't

meet what was required of them as shareholders. So my

emphasis, I think, was on liquidity rather than the

absolute value of

Mr. Desmond's portfolio, no matter how far flown.

Q. I understand that, but you had to be satisfied that it was there?

A. Mm-hmm.

Q. And a proper analysis had to be carried out for that purpose, isn't that correct?

A. That's correct, yes.

Q. And the Department were quite entitled, or the Ministers was quite entitled, if you were so minded, to say to these people, "Go away. No, we are not satisfied"?

A. That's correct.

Q. Now, Mr. Brennan has informed the Tribunal that there was a reluctance on the part of IIU, through Mr. Michael Walsh, to make financial information available. Are you aware of that?

A. I am not specifically aware of it. I don't recall it.

On the other hand, there were pointers to that, for the simple reason, the initial confirmation from Farrell Grant Sparks was sparse, to say the least, no indirect pun intended. And I would not have been happy with that letter, not that I doubted for one moment that a company of the stature of Farrell Grant Sparks would write "We confirm" lightly. They would do so on the basis of professional conviction, but I didn't think it was sufficient at the time. So in other words, even if Martin Brennan hadn't told me

that, I could infer from it that reluctance might be one word, but sufficient information wasn't forthcoming. I don't think I encountered the word "reluctance" personally myself, but I might have, but I have no recollection of it.

Q. Now, did you meet Michael Walsh this time yourself?

A. Once again, and I am not sure whether I am either prompted now by the probability from the file or from my memory, because if you know somebody quite well actually, it's very easy to envisage a meeting, but to the best of my recollection, yes, we had a meeting, and I can't recall whether it was on the 15th, or early on the 16th, but I know it was quite late in the game when I had a conversation with Michael Walsh. If you were to put to me was it over the phone? I couldn't deny it. But my memory of it, I had one meeting with Michael Walsh. I can't remember as of now whether it's the 15th or early on the 16th, but I know it was, as I say, late in the day, so to speak.

Q. And what was the what did you discuss?

A. I think at that stage I am not sure, at this stage, whether we had the documentation we wanted. I am quite certain of one thing, that I had no sight, for instance, of the Shareholders' Agreement.

Q. Yes, I know that.

A. So one thing is certain. So I wanted to make sure that reassurances that were, I believe, coming

through, perhaps as early as the 14th or on the 15th, about changed circumstances, in other words that the shareholders other than Communicorp were agreeing to take up any possible shortfall on a pro rata basis.

That was already in play from my memory. So probably I wanted to tease that and other issues, and the other issues classically is, how much can we rely on the information we have?

Q. On the which?

A. On the information we have. Now, once again, Mr. Coughlan, I can't somehow bring back a magic recall. I don't know when I met Mr. Walsh, whether I had sight of the final letters. For instance, in Farrell Grant Sparks' second letter, whether my meeting with Michael Walsh was in advance of the issue of that letter or afterwards, and perhaps in anticipation of my demand for evidence of a higher reassurance than liquidity, it may have come in advance, even though the meeting might have been settled in advance. So in other words, the sequence of the documentary evidence we were getting towards the end of this process and when I met Michael Walsh to probe him on certain things, I can't fit it in in my mind. You know, there was a sequence of events, but I can't recall the sequence.

Now, we are certainly talking about the 15th or early on the 16th, but I can't recall when Mr. Buggy or

Martin Brennan might have had might have been in receipt of, if I may say so, the enhanced reassurance to come from Farrell Grant Sparks or the emerging default clause in the Shareholders' Agreement. I really I can't know did I have knowledge of those or assurances of those before I met Michael Walsh or did they happen as a result of my meeting with Michael Walsh? I'd love to by the way, I'd love to say it was the latter, but I can't recall precisely.

Q. Mr. Pearse Farrell sent a letter into the Department to Mr. Brennan, dated 15th May, 1996. Is that the letter you are talking about?

A. That's the second letter I had in mind, yes.

Q. That's the second letter. Divider 220.

A. I missed the reference there.

Q. Sorry, 220. Divider 220.

A. Yes, I have it.

Q. And it reads, "Dear Sirs, we act as financial advisers and auditor to Dermot F. Desmond. We confirm that Mr. Desmond is the beneficial owner of 100 percent of International Investment and Underwriting Limited (IIU).

"We are informed that Mr. Desmond's IIU have undertaken to invest and/or underwrite equity investment up to $\text{€}1/240$ million in Esat Digifone Limited.

We confirm that Mr. Desmond/IIU is in a position to make this investment and to make the underwriting

commitment.

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

assets:-

Various marketable securities valued in excess of £10 million.

Principal unquoted investments at cost, International Investment and Underwriting Limited (IIU) 13 million.

London City Airport and associated companies, 25 million.

"44% of Pembroke Capital, 9 million.

"Cash at bank, 15 million.

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

That's 20 million. It gives a total there of 77.

"We trust that this is the information you require.

Should you have any queries, please revert to me.

Yours faithfully, Pearse Farrell."

A. As I say, it is possible, for instance, that I had the letter in advance of a meeting with Michael Walsh, and that I probed the individual items that made up that list, or that Michael Walsh talked me through that list, and the letter came by way of confirmation. I just honestly can't remember.

Q. It seems to be a letter which was in the possession of Mr. Buggy anyway, when he prepared the memorandum to

you, isn't that correct?

A. That's correct.

Q. And if we just go to the memorandum for a moment. We will be coming back to the letter, but if we just go to the memorandum first.

"Mr. Brennan and I have been" this is to you, and it seems to have been seen by you on the 16/5/1996, because it's ticked, "Noted: Thank you JL, 16/5/1996." Would that be?

A. That's a logical conclusion, but it may not be correct. I may have seen it on the evening of the 15th. Very often when I come in, in the morning, I have notes from all over the Department, and I would tend to write that on them and date it the day I was sending them back. It's unfair on officials, in other words, to hold a document, particularly a document that was still in motion, and dated, if I may say so, the previous day or maybe the previous week, if I may exaggerate for effect, because in other words it seems to have left my desk earlier and that's unfair to put, sometimes put people under time pressure. So I am saying it's probable even that I may have read that early in the morning of the 16th, but equally I may have read it on the evening of the 16th. But when I ticked it off my desk I would have initialled it on the day that I was initialling it. But I am comfortable with either interpretation.

Q. Very good. And it reads, "Mr. Martin Brennan and I have been involved in various discussions in respect of the financial strength of the members backing the Esat Digifone consortium over the last two days. And detailed below is my understanding of the current position, and an assessment of the consortium's financial strengths.

"These discussions have been with a number of parties, but principally Mr. Michael Walsh, a director of International Investment and Underwriting Limited (IIU).

"The business plan for Esat Digifone, as submitted with their application in August 1995, states that the share capital will be 52 million, all of which will be raised in year 1. We now understand that after further analysis on the cost of providing the infrastructure, Esat Digifone are satisfied that an amount slightly less than 52 million is required, and this will be phased in as follows:

" To date ĩ½3 million.

Upon signing of the licence ĩ½15 million.

August 1996 - ĩ½10 million.

November 1996 - ĩ½8 million."

That's ĩ½36 million in 1996.

" Sometime in 1997/'98 ĩ½10 million. A total ĩ½46 million.

"Under the Shareholders' Agreement each of the parties

have 4 months after the date of each call on share capital in which to come up with the funds, or else they will be in default. And they are only allowed 3 delays in total before they are also considered to be in default and excluded from increasing their investment any further.

" The underwriting agreements have been revised in the Shareholders' Agreement so that in the event that any one party defaults the other two parties will underwrite the defaulting investment in their agreed share proportions. This means that if Esat Telecommunications Holdings Limited defaults, Telenor and IIU will provide funds in the ratio of two-thirds:One-third. In the event that both Esat Telecommunications Holdings and IIU default, then the Shareholders' Agreement provides for Telenor taking up a 100% of the financial commitment.

"Under these underwriting agreements the maximum exposure based on the above estimated share capital of 52 million, the original estimated share capital of 52 million of each consortia member is as follows:

" Telenor 100% or 52 million.

Esat Telecommunications Holdings 40% or 22.8 million.

IIU 33% or 10.3 million." I think, is it?

A. I would think that would be 17.3.

Q. I beg your pardon, 17.3 million. That's right.

"Telenor is a very strong company based on the annual report which shows net assets of Norwegian kroner 10.97 million, approximately, (i.e. 1/21 billion.)

Therefore, they appear financially strong enough to carry 100% of the share capital of 52 million necessary.

"Esat Telecommunications Holdings are currently in the process of arranging a private placement in the US.

This is expected to raise at least 22 million. The process is at an advanced stage but not yet finalised.

Therefore, we can not rely on this particular time.

" As a result, we must ensure that the parties underwriting ETH's shares are financially strong enough to support the portion if Esat Telecommunications Holdings share along with their own investment.

"We have already seen above that Telenor are strong enough and IIU as discussed below.

"IIU are 100% owned by Mr. Dermot Desmond (DD). And therefore, in looking at IIU's financial strength, we are essentially looking at Dermot Desmond. According to Mr. Walsh, IIU are only in existence since August 1995, and therefore no financial statements have been produced for the company to date.

"In order to finance its own investment and underwrite its portion of Esat Telecommunications Holdings' investment, IIU/DD must have finances of 17.3 million,

being 33.3% 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 in 1,750,000 into the company and has put in another 5 million this evening in advance of signing the licence.

"In order to satisfy us on the remaining 11.55 million 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). 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 some 77 million which DD owns, and which supports their opinion that he is capable of financing up to 40 million of this project.

"Letters from Telenor and IIU arranging the underwriting of Esat Telecommunications Holdings' investment in the project in the same ratio, 66:33.

" A final version of the Shareholders' Agreement.

"On this basis, considering that the financial strength of DD has been confirmed to the extent that can be relied upon to finance its own investment in Esat Digifone and underwrite the agreed portion of ETH's investment.

"We also reviewed the debt financing portion of Esat Digifone, and reviewed a letter from ABN-AMRO, which confirmed that along with AIB plc they agreed to provide bridging finance of up to 25 million. Esat Digifone and the draft terms for project finance had been agreed, which would provide up to 78 million, subject to the banks normal due diligence. This appears satisfactory to cater for Esat Digifone's debt financing requirements.

Conclusion:

"Based on the discussion documents above and the letter received from the various parties, as outlined above, the shareholders in Esat Digifone appear to have sufficient financial strength to ensure that Esat Digifone is financed in line with the expectations under the business plan, and the required debt financing appears to be available to the company. "

Now, you received that particular memorandum, but you also had the documents, you believe, on which it was based?

A. I don't believe I had the Shareholders' Agreement, because

Q. Right, I think you couldn't have because it wasn't available.

A. Because, to be honest, I have no familiarity with the Shareholders' Agreement, because after that was put to bed, I don't believe I ever revisited this file. So in a sense, that I asked at lunch time today and I saw the Shareholders' Agreement at lunch time today, but I didn't recognise it at all.

Q. I think that's correct, you wouldn't have had it.

A. Yes.

Q. Did anything strike you about the memorandum?

A. It struck me as being extremely conservative, in the sense that there were three players here and they all had to, they were obliged as shareholders to bring something to the party. Can we park Telenor? Its undoubted strength was not an issue at any stage.

Q. We don't need to discuss it.

A. So that leaves us with the other two. But on Communicorp: what Mr. Buggy has done, and he did it quite correctly is, that he has discounted their capacity to bring any finance to the project right down to zero. Now, nothing could be more conservative than that. You know, it was my belief even then that it was just a matter of pricing. It's not that they had access of course they would have had access to the capital markets, but it's a matter of pricing and positioning. How much Mr. O'Brien might have been

willing to give away in terms of equity? But the idea that with access to the capital market, that he couldn't bring any finance to the party, was just incredible almost. But I was happy that Mr. Buggy took this conservative view and discounted Communicorp down to zero. Now, we know that's a nonsense, because I knew from the papers afterwards, very shortly actually, that he completed his financing. So in other words, in the event, we were ultra conservative, and Mr. Buggy was, and it's something that I went along with actually.

So the third leg of the stool, so to speak, was IIU.

And when this was emerging towards the end, and once again, I am trying to recall the sequence of events, but we are talking at least the afternoon of the 15th.

It was already clear, and even now I am not sure, Mr. Coughlan, where the initiative came from, but from within the consortium members, is they saw what was required by the Department and they came up with this effective internal pro rata underwriting of Communicorp.

Now, once that was in place, IIU wasn't in place to face the full, as I say, 46 million, but in fact that, Mr. Buggy's note actually, if the logic of his, IIU's maximum exposure on the financing plan as then put in place was 17.3 million. And on the basis of the evidence brought in, and as teased out with Michael

Walsh

Q. That's what we don't know about, Mr. Loughrey.

A. Can we leave that aside just for one moment. But on the evidence of Mr. Buggy, Esat's note alone actually, we had confirmation that up to 40 million, bearing in mind now 17.3 million was the maximum exposure that unencumbered assets. They had cover for up to 40 million, and the front end of that was an undertaking from a bank that 10 million was guaranteed for the full calendar year of 1996, of which 5 would go in straight away.

Q. 5 was gone?

A. 5 was gone. But there was another 5 available from a reputable, a very reputable bank, and that there was a clear bank undertaking that that would be there until the end of the year. So in other words, evidence of liquidity in event of another quick call, with assets conservatively valued, because they were in at historic cost, of up to net 40 million. Now, I am saying myself that we were conservative in the event by the way, once again, is the frame wasn't frozen on the 16th May. We know what happened subsequently. We know that this was such a phenomenal success, in fact, that the capital, the demands for working capital far exceeded what was envisaged, and they were comfortably bankrolled from within the consortium. So I didn't know that at the time. So I am not

pretending

Q. It's not even an issue.

A. Quite clearly. But at the time I had a clear realisation that this was a fairly conservative analysis.

Q. Can I ask you this now, Mr. Loughrey, because where do you say that there is any information which has been furnished to the Department about any liabilities of Mr. Dermot Desmond or of IIU?

A. There is no written evidence to that. But on the other hand

Q. Sorry, Mr. Loughrey, I'll come to first of all let's look at the documents. The Department was furnished with no information about any liabilities which Mr. Desmond may have had?

A. On the other hand, Mr. Coughlan

Q. Am I correct in that, Mr. Loughrey?

A. You are absolutely correct, but I am entitled to say

Q. Yes, I just want to

MR. O'DONNELL: Just let him

Q. MR. COUGHLAN: I'll let him. Please. Mr. Buggy has stated in his memorandum to you a position relating to Mr. Desmond's unencumbered assets. Where did that information come from and what was it?

A. I have from what we have just opened, I have no basis for knowing where that came from. Clearly

Mr. Buggy may be able to help. It is possible

though

Q. Mr. Buggy can't help.

A. I see. Mr. Buggy signed the note, and I don't mean that pointedly, but it's my responsibility.

Q. You were involved in this, Mr. Loughrey.

A. Not only involved in it

Q. Sorry, the Tribunal needs to know how a document came

to be prepared for the signing off on this licence

which contained a total inaccuracy. There was no

information furnished to the Department about

Mr. Desmond's liabilities, and the Department had no

information on which to base any view about

unencumbered assets of Mr. Desmond, isn't that

correct?

A. Can I deal with your question sequentially?

Q. Yes.

A. The first thing I'd like to say is: Mr. Buggy was the

adviser. I was responsible. I am not trying to in

any sense distance myself from that.

Second thing to say is that you are absolutely

correct, there is no evidence on whether these assets

were encumbered or not, Mr. Coughlan.

Q. Absolutely. It was your it was the Department's

job and your job to ensure that assets were

unencumbered and readily available for capital call,

isn't that correct?

A. The point I was

Q. Is that correct or not, Mr. Loughrey?

A. Of course I say correct. Of course it's correct.

Q. So, I do not see how it is of any assistance to the Tribunal to say whether they were unencumbered or not.

The Department had to know whether they were unencumbered, isn't that right?

A. Mr. Coughlan, if you isolated on that issue

Q. Is that right, Mr. Loughrey?

MR. O'DONNELL: He has to be allowed to answer it in his way.

A. Mr. Coughlan, this is the first time I think you haven't allowed me finish a sentence, and I'd be happy to.

First of all, you are absolutely right. I am not denying that, but if you'd allow me just to say the context; that must be read in the context by a professional confirmation by Farrell Grant Sparks that 40 million would be available to meet a maximum exposure of 17.3 million. Now, if that's your view, and I am perhaps incorrect, that somehow the Department's assessment was lagging, I can't go along with that, Mr. Coughlan.

Q. MR. COUGHLAN: Now, this particular letter from Messrs. Farrell Grant Sparks, which was dated 15th May of 1996, nevertheless, resulted in a meeting with Mr. Michael Walsh on the 16th, I think, isn't that

correct, or the 15th?

A. Once again, Mr. Coughlan, I am trying to be as helpful as possible, but I am not sure whether the letter came before or after my meeting with Michael Walsh. I'd love to be able to help the Tribunal, dearly I would, but I just can't honestly recall which preceded.

Whether that letter was as a result of my conversation with Michael Walsh, or whether it preceded it and I used it as an agenda to tease out the issues with Mr. Walsh.

Q. What did you tease out with him? Because this is quite significant. I think you, Mr. Loughrey, before lunch, you informed the Tribunal that you were aware of Mr. John Glacken's report?

A. Yes, I was.

Q. And you were aware of the contents of that report?

A. Yes, I was.

Q. And you were aware that there had been, what I might describe as adverse findings, made against Mr. Dermot Desmond in that report?

A. I had read John Glacken's report at the time and I knew Mr. Glacken's determinations, yes, I was, yes.

Q. And you knew that among the adverse findings that had been made, there was this difficulty in relation to representations which Mr. Desmond had made which Mr. Glacken did not accept?

A. Yes, I am certainly aware because I had studied the

Glacken Report when it emerged, yes.

Q. I am not going to open it in detail here, but Mr. Brennan, who gave evidence already, was Chairman of the Project Team, and has informed the Tribunal that if he had been aware of the contents of this report, he had been in Brussels when a lot of the business had been conducted, and if he had been aware of those particular findings, he would have had to take them into account, at least, in carrying out any evaluation on the particular person or an entity associated with him. It seems reasonable, doesn't it?

A. Perfectly reasonable.

Q. And the information which was being provided to the Department was fairly, fairly scant information, wasn't it?

A. It may appear to be scant, but I deemed it to be sufficient.

Q. And I suppose the question a member of the public would have to ask then, Mr. Loughrey, you as Secretary of the Department, being aware of the content of Mr. Glacken's report, deemed that to be sufficient information and didn't press for deeper inquiry, at least to show what the liabilities were which related to, if any, which related to the assets which were declared?

A. Mr. Coughlan, I was entitled to rely on a reconfirmation by a front rate, reputable accountancy

firm in Dublin. I was fully entitled to rely on that undertaking.

Q. I don't think it's an undertaking.

A. It's a professional confirmation.

Q. What they say is, "We confirm Mr. Desmond/IIU is in a position to make this investment and to make the underwriting commitment." That's what Messrs. Farrell

Grant Sparks I am not calling them into question at all, but that is what they stated to the Department.

Mr. Desmond/IIU, first of all, might I suggest to you, just as a lay person myself, who is this confirmation being made on behalf of to begin with?

A. I think I was quite clear in my mind at all stages it was Mr. Dermot Desmond.

Q. Mr. Dermot Desmond.

Now, on the initial briefing on the 13th May, 1996, which Mr. Brennan gave Mr. Buggy on your instructions

A. This is the document we have just opened this afternoon.

Q. The first page, yes. The Department had already received a letter from Messrs. Farrell Grant Sparks, isn't that correct?

A. That's correct, yes.

Q. I think it's at Divider 214. It accompanied the bundle of documents that were handed over.

A. 214 I have

Q. This is the bundle of documents that were handed over by Mr. O'Connell at the meeting on the 13th.

A. I have that.

Q. And I think it commenced with the letter from Mr. Digerud, then there is the three pages Telenor, then Arthur Andersen, then IIU, and then there is a letter from Messrs. Farrell Grant Sparks, dated 7th May, 1996. And that had read:

"We act as financial advisers and auditors for Dermot F Desmond. We confirm that Mr. Dermot Desmond is the beneficial owner of 100 percent of International Investment and Underwriting Limited.

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

Now, that letter wasn't sufficient for the Department, and on the briefing of Mr. Buggy by Mr. Brennan on the 13th May, 1996, there is reference made to this. You see under, "IIU, 100 percent owned by Dermot Desmond."

A. Yes, I see that.

Q. "Farrell Grant Sparks invest and/or underwrite up to 40 million. Confirm in a position to do this. Not stated that they are underwriting specifically Communicorp. Very little information on which to assess financial strength." You can see that?

A. I do indeed.

Q. And there is a discussion that goes on about not knowing what the liabilities are, isn't that right?

Mr. Buggy didn't know what the liabilities were.

A. I don't see that specifically, but I am sure you are right.

Q. It's fairly basic sort of

A. I actually don't see it written on my page explicitly, but if it is, I am happy to go along with what you are saying, but I don't see it explicitly here.

Q. I'll find it for you in a moment. But it's fairly basic stuff.

A. I am not denying that, Mr. Coughlan.

Q. And the Department never had it?

A. Hold on a second, what I would say is, I wasn't happy with that letter, that's my memory of it. It's not that it's not I'll be quite clear now on this, it's not that I doubted Farrell Grant Sparks' confirmation that Mr. Desmond was in a position to support a project to the extent of 40 million. If Farrell Grant Sparks, which they did, whenever it was, on the 7th May, or whenever they said that, I wasn't doubting their word. My concern all the time was with liquidity; not, for instance, that statement, and what I believe that the second letter, which was merely a reconfirmation that up to 40 million was there, but what it brought forward and brought out was that the

front end was highly liquid, even to the extent of freezing a cash amount in a bank for up to the end of the calendar year.

Q. Of 5 million?

A. Of 5 million. But I regarded that as sufficient liquidity from my point of view. I was looking for increased liquidity. I believe I got it. And picture this, Mr. Coughlan; you have a firm where its Managing Partner, Pearse Farrell, signs off on a confirmation. He is asked again to sign off. Now, I have no doubt that he is a first class honourable member of his profession, but when asked again, presumably it was explained in the context he was asked again, he has to revisit his confirmation in a very considered and measured way, and when he did so, I still believe I was entitled to rely on that confirmation.

Q. Very good. It was your duty sorry, I beg your pardon, it was yours and the Minister's duty, or the Minister's duty, to ensure that he was satisfied when the licence was being given to somebody, that that particular person, first of all in terms of their ability to invest or meet the capital call, could do so, isn't that right? And that insofar as somebody had underwriting obligations, that they could meet those also, isn't that right?

A. Well

Q. That's just on the financing side?

A. If you were to split that, quite clearly we can dismiss the investment, one, because quite clearly even if liquid funds, he could meet his total Dermot Desmond could meet his total, his full exposure, so that's it. It's only on the underwriting side that you could have any question of any kind actually

Q. What do you mean "any question"? It took a huge question on the underwriting side?

A. I don't believe so, Mr. Coughlan. As I said, this note was written from the most conservative of positions, that you would discount Communicorp's ability to raise any finance at any price down to zero. What could be more conservative an assumption than that?

Q. Well, did you know that Communicorp did not have any money on the day?

A. No, I didn't actually. No, I did not.

Q. So Mr. Buggy was right in conducting that sensitive analysis of the situation. That's the way you'd approach the analysis, isn't that right?

A. Yes, he was, but Mr. Coughlan I am sorry, Mr. Coughlan, and I am sure you didn't mean it, but you were talking about a snapshot in time, namely the 15th of May.

Q. Yes.

A. What I was talking about was the ability of

Communicorp to raise money to meet its side of the financing cost over the lifetime of the project.

That's what I was talking about.

Q. I see.

A. And that was discounted down to zero.

Q. Now, there are just two matters I'd like to ask you about regarding this period. One was: Michael

Andersen was in the Department on the 14th and the 15th May, 1996?

A. An astounding coincidence, I had no knowledge of that.

Q. Ah, Mr. Loughrey, you had no knowledge he was there?

A. I never met Mr. Andersen in my life.

Q. There were meetings taking place in your Department informing the disappointed applicants. Did anybody even say to them Michael Andersen was there?

A. Yes, they did. And perhaps you are right to sound that note as you did, I think, in your voice a moment ago, because now that you put it to me like that, is, of course I would have been probably, in all probability would have been told, but I had never had any relationship with Mr. Andersen, I never met him, and perhaps to jump to an anticipated question which I shouldn't, I never made that linkage, if that is the anticipated question, and it's wrong of me to answer a question

Q. That is the question.

A. The question would be is, did it not occur to me if

Mr. Andersen was in-house, that I might have called on his expertise because we were coming to the end of the game, so to speak? The answer is: I never made the linkage. Probably, for the very human reason is, I had never met the man, I had never seen him in operation, so I didn't attach anything to his skill-set directly.

Q. Very good.

Now, the other issue which arises of course is, you never inquired as to the history of the relationship, the relationships of members of a consortium who were going to receive a licence within a day or two? Did you ever

A. No, I didn't. But I didn't see it was necessary to do so.

Q. Would you just bear with me for a moment, Mr. Loughrey. You were never informed of the true history?

A. No, I was not.

Q. And Mr. Dermot Desmond ended up a partner in this particular consortium on the which received the licence on the 16th May of 1996, isn't that right?

A. Correct.

Q. And he had avoided the evaluation process?

A. I think it's up to Mr. Desmond to explain himself, but I think that would be quite unfair on Mr. Desmond.

Q. Tell me where he was evaluated?

A. No, no, no. Avoided it's the concept of avoided.

After all, it was Professor Michael Walsh who wrote into the Department on the 29th September. They weren't trying to avoid anything. They were trumpeting, declaring themselves as part of a new arrangement. So avoiding, perhaps, would be unfair.

Q. What did they write in and trumpet that they were on the 29th September, Mr. Loughrey, remind me again?

A. Underwriters.

Q. Underwriter, underwriters. They did not even, in that letter, inform the Department of the true nature of the relationship, isn't that correct?

A. Whatever their relationship with Esat at the time, it is evident from what we have opened up already, that they thought a letter of underwriting would enhance the bid as submitted, enhance the bid as submitted.

Q. Ah, Mr. Loughrey! Let's just get that now. You have just stated in the witness-box that on the 29th September they wrote to the Department trumpeting their involvement. They did nothing of the sort, Mr. Loughrey, and we all know that. They wrote a letter to the Department saying that they would be underwriting circa 60% of the operation. That's what they wrote to the Department, isn't that correct?

A. Correct.

Q. They did not inform the Department of the true nature of the relationship, isn't that correct?

A. That's correct.

Q. And up to the day of the 16th May, 1996, you did not know the true historical nature of the relationship, isn't that correct?

A. No, I did not.

Q. And it wasn't until you saw the documents in the course of this Tribunal's business, that you were you became aware of the true historical nature of the relationship, isn't that correct?

A. That is correct.

Q. So, when I use the expression "avoided the evaluation", I put it in the context of those known facts at the moment.

A. Well, as I say, I am not here in a sense in any sense to represent anybody other than myself. But this touches on something that's so fundamental that I still feel I have to return to it, and I hope you'll bear with me.

Q. Of course.

A. It's so fundamental is, as Secretary General of the Department, of course the responsibility administratively rests with me. I am still convinced, Mr. Coughlan, despite what you just said right now, and I am not denying what you said right now, is that the evaluation was done on the basis of the bid, which was basically the two pillars, we have gone through this before Esat and Telenor. They were

awarded with indicative third-party investors.

That's what was that is precisely what is evaluated, and that's precisely what got the licence.

Now, the fact that there were events that we were unaware of doesn't take away from those fundamentals.

Q. Well, can I ask you to comment on this, Mr. Loughrey, please, because I am asking this question as an ordinary member of the public.

Telenor and Communicorp submitted a bid on the 4th August, 1995, and included in their bid documentation they said that coming up to the licence, that 20% would be placed, and they listed four institutional investors. And they had letters from three institutional investors, Irish ones, and Advent, isn't that correct?

A. Mm-hmm.

Q. I understand what you say, they were continual, just like you'd understand, even the debt financing?

A. And unenforceable anyway.

Q. Just bear with me now for a moment. We heard the tapes on the presentation. We heard what was stated by this consortium at the presentation. You have seen the transcripts of it. And that's how the Department saw things, isn't that right? And if the public had had access to it, that's what they'd have seen as well, isn't that right?

A. I don't think you can substitute the public for a

skilled project assessment team, but I grant you

Q. That's what they would have seen. That's what anyone with eyes and ears would have seen and heard?

A. I am not sure the public I wouldn't expect them to fully understand that the institution the so-called institutional investors, that these were indicative.

I think the public might have thought that these amounts were locked in when clearly they weren't.

Q. Everyone knew they weren't locked in, Mr. Loughrey. Even Mr. Arve Johansen, the Chairman of this consortium or sorry, the Telenor side of this consortium stated, a man who would understand matters, had been placed. That was the understanding.

A. He clearly hadn't read the letters.

Q. Ah, Mr. Loughrey! Mr. Loughrey! Just bear with me for a moment. That's everyone's view, that of course everyone knew they weren't locked, these fellas weren't even locked in together. All they submitted was a draft Shareholders' Agreement. So let us bring a little bit of reality so that the public can really understand what went on there, Mr. Loughrey.

Now, what happened was: these two companies submitted a bid, and they submitted the bid on the basis of the institutions, named institutions being involved, isn't that right?

A. That is correct.

Q. And dealing with your question of being locked in, the

institutions never tried to get out of this. They were put out of it.

A. But equally, equally they hadn't been locked in.

Q. They never tried to get out of it, isn't that right?

They were put out of it, for reasons which were explained to them which could not have been correct.

A. I am sorry, I am not perhaps familiar with all of those, but I understood

Q. Just listen to me so, Mr. Loughrey.

A. I am happy to do so.

Q. Was there anybody in the Department, to your knowledge, who informed Mr. Denis O'Brien, or anyone from Telenor, that you needed to strengthen up the financial institutions side to get this licence?

A. Clearly that's not the case.

Q. That's the point. Now, we come to a situation that on the 16th May of 1996, a consortium, which comprises Telenor, Communicorp or Esat Telecommunications Holdings, in their new manifestation, and Mr. Dermot Desmond, get this licence, isn't that right? And are you saying to me that that is the same consortium which applied on the 4th August of 1995?

A. I am saying to you, Mr. Coughlan, and I honestly believe, that while the names of the financial investor or third-party investors have changed, it is fundamentally the same as that was bid initially on the 4th August. That's my belief. That's

my contention.

Q. I understand that's your belief. I am trying to understand the basis for the belief. And genuinely I am trying to understand the basis of the belief. You said yourself before lunch the financial institutions, the grey suited men, you know, sort of, they wouldn't get involved in the running of the company, they wouldn't rock the balance, they'd be looking for the return on investment. They'd be happy taking a dividend, probably, mightn't even seek board representation mightn't. Then you describe Mr. Dermot Desmond, an individual; colourful I think is how you described him? Entrepreneurial?

A. Mm-hmm.

Q. Himself and Mr. Walsh, through Mr. Desmond's vehicle, IIU, not a private equity house, Mr. Desmond's private equity vehicle, that's what it was?

A. But with the characteristics, certainly some of the characteristics of a private equity house.

Q. Would normally be seeking a return, you said, of around 30%?

A. Yes, I think so.

Q. In the same category as the venture capitalist, that's the sort of return they'd be seeking?

A. Well, they wouldn't describe themselves as such, but we won't disagree on that, yes.

Q. And with an interest in, perhaps not a long-term

involvement, maybe a turnover in a three to five-year sort of period

A. Yes.

Q. All that sort of thing. So leave aside even, in terms of identity, in terms of characterisation, surely you couldn't suggest that you can say that Mr. Dermot Desmond is the same as a financial institution?

A. Still only bringing equity capital to the deal, and if anything, enhancing the strength of the deal.

Q. I see. Did you know that IIU ended up with two directors on this board?

A. I think I might have picked that up in the documentation. I don't think I was so aware at the time.

Q. In any event, let's proceed with the documents.

CHAIRMAN: Well, there is certainly some more before

MR. COUGHLAN: I won't be much longer I think with the documents, but certainly I'd imagine that I should be finished before lunchtime tomorrow, Mr. Loughrey, I'd imagine.

A. Well, I am happy to go I am at your disposal.

MR. COUGHLAN: But I'd hope to get you completed as quickly as I can.

CHAIRMAN: I am conscious, Mr. Loughrey, of personal circumstances that you have, which make me all the more appreciative of your co-operation, and I assure

you that all of us here will do our level best to see that your further spell in the witness-box is kept as limited as possible. And there is no earthly question of it going beyond the end of week, hopefully well short of it.

A. Thank you, Chairman.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY, 26TH FEBRUARY, 2003, AT 11AM.