

A P P E A R A N C E S

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I N D E X

WITNESS: EXAMINATION:Q. NO:

THE TRIBUNAL RESUMED AS FOLLOWS ON FRIDAY, 14TH MARCH, 2003, AT 10.30AM:

CHAIRMAN: Good morning ladies and gentlemen. My apologies to persons present for the significantly late start this morning.

As I understand the position, Ms. O'Brien, it is that by arrangement with Mr. O'Donnell and the State legal team, Mr. Healy had sought a few minutes deferral to make Mr. McMahon aware of some of the main fresh matters to be raised in the balance of his examination today. And I appreciate that these matters are important, but we are a public Tribunal and we must sit on or before ten past eleven.

MS. O'BRIEN: Very good. May it please you, Sir.

THE TRIBUNAL THEN ADJOURNED FOR A SHORT BREAK AND RESUMED AS FOLLOWS:

CHAIRMAN: Perhaps, Mr. Healy

MR. HEALY: I am sorry for the late start, Sir.

You will recall that in the course of yesterday's evidence Mr. McMahon, in endeavouring to, I suppose rack his brains to find answers to questions, was suggesting that the Tribunal might look again at some of the regulatory files. And some of the regulatory files were examined again last night, and in fact they threw up other information which Mr. McMahon feels is there, he is not confident, but he feels there may be

something there, but we'll keep looking. But other information came to light which I think which we feel which the Tribunal feels will be of assistance in dealing with the period between the production of the 18th October version of the draft final report and the period up to the 25th October.

Now, I have brought some of this material to the attention of Mr. McMahon and the Department's legal advisers, and it's clear that the material is going to have to be made of course it will be made available, but made available to the Department in time, and to the other interested parties, in time to enable them to digest it and form a view. That necessarily means that, I think only a limited amount of work can be done today, because that material will have to be incorporated into the evidence that we are some of the evidence Mr. McMahon will be giving today. It will involve a review of some of the evidence he has already given, and may involve a review of evidence given by other witnesses.

So, hopefully the documentation will be made available, or at least a start will be made to making the documentation available this afternoon, and the rest of it will hopefully be made available early next week, maybe on Tuesday, if at all possible.

MR. NESBITT: I am slightly confused, I have to admit.

As I understand it, the documentation that has come to

light concerns Mr. O'Callaghan, not this witness. So I am not at all clear why that leads to any truncation of the continued examination of this witness by the Tribunal team, but maybe I have missed something. I don't understand there to be any document that is authored by this particular witness, whatever the position might be about Mr. O'Callaghan.

CHAIRMAN: Well

MR. HEALY: I haven't had a chance to speak to Mr. Nesbitt. I have spoken to Mr. Phelan, and to Mr. Shaw. I am quite happy to deal with any of this documentation at any time. However, it would be unfair to this witness, and would who has sought an opportunity of examining it himself, and I don't see how the Tribunal would be, seem to be behaving in a fair way towards this witness, number one, and secondly, would gain anything in terms of an accumulation of new information if a witness who needs an opportunity to examine material is going to be presented with a significant amount of material in the witness-box. There is a further factor and it's this: Because the material, as Mr. Nesbitt has pointed out, is material that at this stage, so far as the inquiries go, concerns firstly, or immediately, Mr. Ed O'Callaghan, Mr. O'Callaghan may also have to be brought in, if not indeed to be brought to give evidence before we continue with some of this

witness's evidence, because that material impacts significantly on the evidence he has already given.

What the Tribunal is engaged in is in trying to accumulate as much reliable information as possible concerning aspects of the process, in particular, around the time that this material relates to between the 18th October and the 25th October. And I don't think there is a lot to be gained I don't mind producing a document or two at short notice and giving a witness a short notice opportunity of examining it, but we are talking about a lot of material here, and a lot of a number of other individuals apart from this witness. I don't see the practicality in it. I don't see the benefit to the Tribunal. I don't see we are going to accumulate information in a systematic or coherent way if this witness has to give evidence today in the light of material which he knows is likely to affect his answers but has not had an opportunity to fully digest.

MR. NESBITT: Mr. Chairman, I assume that means that I am correct when I say that the documentation is Mr. O'Callaghan's documentation and not this witness's documentation? I assume that's what was intended to be said. And in relation to the suggestion that this witness sought to examine documentations. My understanding is that this witness was invited to examine documentation that has been with the Tribunal

for some time, and so I don't, with respect, see that answer as constituting an answer to why this witness can't be concluded at this point in time.

CHAIRMAN: It seems not unreasonable, Mr. Nesbitt. I don't want to go behind your back, but if you haven't been privy to these discussions, I am as anxious as anybody here to make dispatch in the matter. And Mr. McMahan, have you a view yourself, having had these discussions with Mr. Shaw and Mr. Phelan and with the Tribunal lawyers?

A. First, apologies, Chairman, for coming in after you there. I have no objection to being examined further today, insofar as that examination can leave these other matters to one side, but that's a question for counsel.

CHAIRMAN: Well, I think

MR. HEALY: That's the point, Sir. That is the difficulty. I am happy to proceed as far as I can. But I don't want to cause confusion in the witness's mind or in terms of a fairly complex story where the Tribunal is concerned.

CHAIRMAN: Look, there is clearly, by common consent, there is plainly some hour and a quarter that can be done on remaining matters, and I think we'll go that far before pausing, and then I'll give counsel an opportunity to discuss the matter more fully. If it doesn't transpire as being feasible, and I am very

conscious that it may be that notice does need to be given to Mr. McGonigal, Mr. Fitzsimons and others to put them in the position to examine this important witness. If it doesn't appear feasible that we can fairly dispose of all remaining matters today, then obviously fairness demands that there be a deferral until the week after next's resumption.

CONTINUATION OF EXAMINATION OF MR. SEAN McMAHON BY MR.

HEALY AS FOLLOWS:

Q. MR. HEALY: Mr. McMahan, just one thing arising from your evidence yesterday. I formed the impression that you had some role in preparing the Minister for his Dail appearances in relation to parliamentary questions, and I understand you had no role in that, in connection with the GSM issue?

A. Yes. And if something I said led you down that road, I am actually sorry, but my role I think you were questioning me about my role. My role would have involved, in the same way as any other civil servant, preparation of material generally for parliamentary questions, adjournment, debates, speeches and such like. But you are quite right, in relation to the material on your files that I have seen that followed the announcement of the award, I had no role that I can recall.

Q. You weren't asked for a comment and you don't recall contributing?

A. I don't recall any drafting or anything like that.

Now, it may have been that some of the draft answers have come across to my division, but I have no recall of seeing them, correcting them, inputting to them or being at meetings discussing them or anything like that.

Q. There was one aspect of the, if you like, of the one aspect related to that. It didn't occur in the Dail, but it was a press conference given by civil servants on the 19th April, I think of 1996. Were you involved in that?

A. No, I was not, no. I believe I was away in, on business somewhere.

Q. I see. Were you aware that it was going to take place?

A. No.

Q. You weren't consulted then?

A. No.

Q. I just want to go back to the 23rd for a moment. You recall your evidence that yourself, Mr. McQuaid, Mr. Brennan and Mr. Fitzgerald went to see the Secretary?

A. Yes.

Q. And that you had a meeting of an hour, hour and a half or two hours. And as a result of that meeting you were informed that you had more time?

A. Yes.



Q. You were not involved in going to the Minister?

A. I don't believe I was. I certainly can't recall it.

Q. You are absolutely certain that this meeting took that length of time, that it was a lengthy meeting? I am not saying that you are certain it was one hour, one hour and three quarters, one and a half hours, but that it was a lengthy meeting?

A. It was a meeting of sufficient length to cover the ground I have described to you. In other words, it was not a short meeting, it was not a ten-minute meeting or a fifteen-minute meeting. It certainly took some time, and I think from my notes there you can see that we rejoined the rest the other members of the group at sometime did I say 5 o'clock or something?

Q. There is no time. There is a time when you left.

A. Right, right. And did I not say a time at which we resumed?

Q. I think you asked me that question already and I think I checked it and I'll check it again now. All you say in your note is, "On our return", and there is no time.

A. All right. Well, if it helps, I can say that it was certainly well after lunchtime that we joined that group.

Q. Well after lunchtime?

A. Well after lunchtime.

Q. Let's just get this clear. You left at 3.30?

A. We left at 3.30, so that in fact was after lunch. My feeling was it was late in the afternoon when we rejoined them.

Q. And you know that Mr. Loughrey doesn't remember such a meeting, though he acknowledges that if you say it occurred it must have occurred?

A. Yes, I realise that.

Q. And Mr. Brennan doesn't remember such a meeting, but acknowledges that if you say it occurred, that it did occur?

A. Yes.

Q. Now, you say that as a result of the debate that you had that evening, I think, and you stayed on a little that evening, isn't that right?

A. That's correct.

Q. Not to the end. You feel that Fintan Towey was given a job to do and he went away?

A. He was, yeah.

Q. How long more do you think you spent at the meeting when you came back after having seen the Secretary?

A. I am guessing that it was 8 or 9 o'clock, maybe even later.

Q. And do I understand that Ed O'Callaghan stayed all that time or

A. No, I believe Ed O'Callaghan left early.

Q. He left early, isn't that right?

A. Yes.

Q. Now, Ed O'Callaghan, so far as your Department was concerned, was the person I think who had had the report the longest, if you like?

A. Yes, I think he had had it before I got it.

Q. Hence, as Mr. Fitzsimons pointed out yesterday, you have recorded that you were the person who had only seen the report that day?

A. Yes, and I think I was actually I was actually recalling what Martin Brennan stated at the outset, that he was acknowledging that I had only just seen the report.

Q. You say that in the course of that day, or in the course of that evening, sorry, you formed the impression that there was clear water between A3 and A5?

A. I did, yes.

Q. Perhaps you'd just explain to me just what you mean by "clear water"?

A. By "clear water" I mean sufficient distance in terms of merit to justify one being ahead of the other, or to say, to conclude that one was ahead of the other. Now, that was not on the basis of sitting to one side of the table on my own with my calculator. It was on the basis of the discussion and listening to Michael Andersen, I believe.

Q. Do you recall any discussion with Martin Brennan or

any discussion between Martin Brennan and Mr. Andersen, or any discussion between anybody at that meeting of the translation of the grades into marks or numerical, a numerical result?

A. I cannot say that I recall it on that specific date.

I do recall such discussions at sometime in or around then, but I can't say with any certainty that it occurred on that day, but it probably would have.

Q. Well, there were only two possible days in which it could have occurred, as far as I can see, that is the 9th or the 23rd?

A. Yes, it may well have occurred on both, but I cannot be certain.

Q. Mr. Brennan gave evidence that he was in Copenhagen, and that when he looked at the tables, he couldn't see a result, he couldn't see a clear distinction between a first, second and third ranked or maybe first and second ranked applicant, and that it was that lack of clarity that prompted him to request the translation well in fact, he says he did it himself, he got up and did it himself, and argued then for the inclusion of that translation in the report?

A. And by the "translation", you mean exactly what?

Q. The translation from the soft scale of grades into numbers?

A. Numbers, yes.

Q. Do you recall him telling you that that was how that

table had evolved?

A. I have some recall of somebody telling me that that's how that table evolved, yes.

Q. And if that happened again, it must have happened at this meeting or at the

A. At the previous one, I can't say with any certainty I am afraid.

Q. If you look at Table 18 of the 25th October version of the report?

A. What book should I be with, Mr. Healy?

Q. It's Book 46, Table 17, sorry.

A. Can you give me the divider number?

Q. Yes, if you go to Divider 56. Sorry, Divider 50, sorry.

A. I have Table 17 now, yes.

Q. Now, you see in Table 17, A5, ranked 1, have a mark of 432. A3, ranked 2, have a mark of 410. And A1, ranked 3, have a mark of 362?

A. I do, yes.

Q. Do you see that? And those are marks out of 500.

A. Okay.

Q. And there is a 22 point gap between A5 and A3, and I suppose a significantly larger gap, more than double that between A3 and A1. Do you see that?

A. Yes, I do.

Q. And the gap between A5 and A3 is 4 point-odd percent I think. Do you see that?

A. It's 22 with a denominator of what?

Q. Out of 500.

A. Okay. 4 percentage points.

Q. Now, it just seems to me that that 4 percentage points seems to be consistent with the point that was being made by you and Mr. O'Callaghan prior to that date, that the top two were very close?

A. They were, yes.

Q. Doesn't that still leave them very close, 4 percentage points?

A. It does.

Q. Especially in a qualitative evaluation, not a quantitative evaluation. Do you take my point, that a percentage difference is not as any percentage difference has to be viewed in a slightly different light in the context of a qualitative evaluation compared to a quantitative evaluation?

A. Yes, I think you mean because they are softer?

Q. Correct.

A. However, I mean it may be the case that a qualitative criterion would be of more importance to someone when making a final decision for whatever reason, albeit a reason which was difficult to quantify. I mean in the final analysis

Q. I fully accept that.

A. When you are buying two cars identical in every respect, power, comfort, if you simply don't like red,

you are not going to take the red one.

Q. Correct. It's just that when you convert it into marks like this, which Mr. Brennan told us was something he did in order to enable him to distinguish between the rankings, you end up with a 4% difference which is

A. A 4 percentage point difference.

Q. A 4 percentage point difference, which I suggest is not clear water. I am just wondering where the clear water difference came from?

A. I think I would have been more concerned had there been an order of, let's say, an absolute distinction between the two of less than 10 in terms of points.

Q. What do you mean, less than 10? You mean 10 percentage points?

A. Suppose that A3 is 410 marks or points there. If A5 had been only 415, I would then have begun to think in terms of a margin of error, but I think it's fair to say that 22 points is a distinct difference.

Q. Well, what you have in total is a 5-point grading system, isn't that right?

A. Yes.

Q. And on a 5-point grading system, 4%, on a 5-point grading system

A. On a 5-point grading system, I mean it's really you can't have less than 20% difference.

Q. Yes, on a 5-point grading system, a 4% gap is only a

quarter of one grade, a fifth of one grade, isn't that right?

A. But it would still translate, nonetheless, into a ranking

Q. I fully accept that. But on a 5-point grading system, a 4 percentage gap, 100%, 80%, 60%, 40%, 20%, zero.

A. Right.

Q. It's a tiny difference?

A. It is a small amount, but it is nonetheless directly translatable into a ranking.

Q. Of course, I am not disputing that for one moment.

A. That's all the 5-point grading scale is here really.

Q. Yes, but the 5-point scale is based on the notion, I'd say, of clearer distinctions. It may never have been possible to get, to uncouple these two, if you like.

I fully accept that.

A. Right.

Q. It could be there forever.

A. Yes.

Q. 5%, 4%, 3%, 2%, 6%, you are still not going to get a sufficiently large gap to constitute a 20% which is a full grade.

A. Yes.

Q. I don't dispute or suggest for one moment that if you stayed there for another ten weeks, you could end up with a clear gap. All I am suggesting to you is that the gap that was there was not a clear gap, not clear



water. No more than that. I am not suggesting that you weren't left with it.

A. Yes, okay, I take your point. But I would hold to my view that it was sufficiently clear water as clear water as we were going to get in the circumstances.

Q. I think that's a very fair answer. As clear water as you are going to get. But I suppose there is a difference between putting it that way and saying there was clear water, because we have this impression of clear blue water between things meaning a very distinct gap, whereas it seems to me that you had a problem on coupling these two from the 9th October, and on this day, they hadn't been uncoupled. No more than that.

A. Okay. I see your point.

Q. Now, if you look if you go back to Leaf 46 of that book, you see at page 50, the same table. This is the draft of the 18th October. Have you got that?

A. Yes, I do.

Q. Now, it's called Table 17 on the draft of the 25th, the final Evaluation Report, and it's called Table 18 on the draft of the 18th. But you can see it's the same table. Are you satisfied that it's the same table?

A. I am just comparing both of them here now.

Q. Yes, do take your time.

A. Okay.

Q. They are the same table, aren't they?

A. They seem to be the same table, or at least for the same purpose.

Q. Well, I have examined them carefully. I can assure you, they are the same table. If you look at page 50 of the version of the 18th, the table is part of a section of the report entitled "Section 6.4, the results based on a conversion of marks to points."

A. It's 6.2, I believe, is it?

Q. It's 6.2 on the final version. 6.4 on the 18th.

A. That's correct.

Q. And if we just look at the 18th for a moment.

A. Right.

Q. It says, "Also a weighting mechanism was agreed prior to the closing date for quantitative purposes as evident from both Table 17 and 18."

I am far from clear as to what that means, but...

"If the marks (A, B, C, D and E) are converted to arabic points (5, 4, 3, 2 and 1), it could be calculated which applicants come out with the highest score measured by points, although such a calculation distorts the idea of a qualitative evaluation."

Do you see that?

A. I do, yes.

Q. "In order to check the results, this quantification of the results has been carried out."

A. Right.

Q. Now, I just make two points about this. Firstly, this step was never envisaged in the evaluation model.

Remember we went through it the other day?

A. Yes.

Q. This was something that Martin Brennan himself introduced in Copenhagen?

A. Right.

Q. If you just go to the same section of the final report, which is 6.2.

A. Yeah.

Q. See the text is different?

A. Yes.

Q. It simply says, and it is a much simpler explanation of it: "The results contained in Table 16 were converted to arabic points A, B, C, D and E, converted to 5, 4, 3, 2, 1, respectively, in order to determine an overall numeric score for each application."

A. Okay.

Q. Do you see that?

A. Yeah.

Q. And then it says at the end of the table, "As can be seen from the table, the scoring confirms the ranking established in Table 15 and 16." Do you see that?

A. Yes.

Q. But do you notice the reference to the fact that, "the use of this method distorts the idea of a qualitative evaluation", do you see that?

A. Yes, yeah.

Q. Do you recall there being any discussion of removing that statement?

A. I don't recall, no.

Q. Do you recall any discussion of whether it did distort it?

A. As I sit here now, I was about to be so bold as to ask you the question as to why it ought to distort it?

Because I can't remember why exactly it would distort the notion or the idea of a qualitative evaluation, because

Q. I suppose because it seems to convert a softer difference between 1, 2 or 3 applications into a harder difference between them.

A. Well...

Q. In that instead of having a difference between a B and a B with an arrow onto it, suggesting a bit more than a B, you end up with 410 and 432, so you have a clearly perceptible and concrete 22 points?

A. You see, I am not sure that that's correct. Can I just put it to you that in the example I gave you during the week of when one might use a qualitative assessment to gauge somebody's feelings about how they agreed or disagreed with something, it was common to ask them to tick a box marked 1, 2, 3, 4 or 5. Now, that is the use of numerical data in a qualitative assessment. And it lends itself more easily to

ultimate quantification of a result than the use of letters. And for my own part I always prefer to see things done in that way using figures, arabic numerals, rather than letters. So I am not sure I see why exactly

Q. Well, can I just deal with that in two different ways.

Firstly we'll just take the approach that you have just adumbrated, that you do the scoring 1, 2, 3, 4, 5. In other words, you are scoring things in a qualitative way which are giving them scores based on broad differences between things?

A. Yeah.

Q. So you are only going to tolerate a difference of an interval of one between each gradation. So if something is very good you give it a 5. If something is very bad you give it a 1. If something is in between you give it a 3 or a 2, as the case may be.

If it's not bad you give it a 2, if it's very good but not quite so top-notch you give it a 4, and so on.

That's a soft scoring system, isn't it?

A. Mm-hmm.

Q. Then you get a result at the end of the day that generates a ranking as you say. The ranking here being 432, 410 and 362. Out of 500, that's a gap of just over 4%. Now, I am asking you to look at that again in the context of an overall grading system. On a 5-point scale, 500 translates into 5, 4, 3, 2, 1

again, isn't that right?

A. Yes.

Q. And so what you have here is A5 with 4.32 and A3 with 4.1?

A. Okay.

Q. Now, on a 5 interval grading system, there is really no difference between 4.1 and 4.32, isn't that right?

A. That's correct.

Q. That's the point I am making. Simply that

A. Okay. I won't attempt I think it wouldn't be right if I attempted to answer this in the way in which a professional statistician might because I am not an expert, but I suppose the proper witness to have here would be Mr. Andersen.

Q. Of course, you are absolute right, and this is my view, and I am testing this view in talking to you about it. Mr. Andersen, clearly, had some view about it, and he was persuaded out of it?

A. Well, I don't know whether that's correct.

Q. He may not have been persuaded out of it, you are quite right. You don't recall any attempt you don't recall being at any meeting at which the entire Project Group agreed to this major deviation from the evaluation model, am I right in that?

A. I am not sure it is a major deviation from the evaluation model. Why do you say that?

Q. Because it wasn't in the evaluation model. You see,

this was an adjudicative process.

A. Yes.

Q. Great emphasis has been placed on the fact that the weightings were known in advance, they were fixed in advance of any application coming in, the order of the criteria was fixed in advance, and the process was conducted strictly in accordance with the representations made in advance. Now, of course changes might have been made. Whether it would have been legitimate or not to make them, I don't know, that's not the point. But there was a deviation from the evaluation model. There were a number of deviations.

A. I think it's fair to say that we expected that in something this complex there would be deviations along the way of a minor kind. I think we would all have felt uncomfortable if there had been a major deviation such as could have a profound effect on the result. And having said that, I think it was also right and proper that we should rely implicitly on the likes of Andersens, unless we could see something fundamentally wrong with what they were doing.

Q. But isn't that the point I made to you just before you asked me to contemplate or to consider your own example? Mr. Andersen did think that this could distort a qualitative evaluation, and I was simply asking you what debate had there been about this

point, and if you credit Andersens with some special expertise in this, if he drew attention to the fact that this could have distorted a qualitative evaluation?

A. For one, I can't be certain that those are Mr. Andersen's own words. I mean, it may have been put to him in drafting, that this is what should go in there. However, even if it is there, I am not sure that I see the point as I sit here now, that to use numbers between 1 and 5 for a qualitative assessment of something, would severely distort the notional idea of a qualitative evaluation. I would worry if something like that was used to multiply scores which had been achieved by fine-tuning methods in a quantitative assessment. But to add them, which I think, going on memory, may have been the case here, would not so distort them. Now, that is subject to my sitting down and reading through this methodology very carefully once again. I mean, I feel I probably would need to do that anyway to answer the line of questioning that you are putting to me.

Q. You may very well be right. But I don't see any evidence of any debate such as you are now saying might have been required to tackle this. It seems to me to have been presented in the first Evaluation Report of the 3rd October. We are told that it appeared in that report as a result of an initiative



of Mr. Brennan's. He says it was his initiative and his initiative alone.

A. I see.

Q. He didn't seem to think it distorted anything.

Therefore, one assumes that the reference to distortion must have come from Mr. Andersen?

A. Okay, I

Q. Inasmuch as that reference to distortion was removed from the final report, I simply wanted to know what debate had there been about it?

A. Well, the answer I can give you is I am not aware of one.

Q. Now, I am going to trespass to some degree, but you are going to have to come back to me with this answer, because this is going to this question pre-figures to some degree the additional information I have given you today.

A. Okay.

Q. In Ms. O'Keeffe's note of the meeting of the 23rd I think, sorry, I beg your pardon, Ms. O'Keeffe's note of the meeting of the 9th, you have to go back to Book 42, Leaf 121.

A. 121, did you say, Mr. Healy?

Q. Yes, 121.

A. I have got it.

Q. Go to the third page of the printed transcription.

A. Okay.

Q. There is a reference to Table 17 being different from the agreed weighting. Do you see that?

A. I do.

Q. And we discussed that the other day?

A. Yeah.

Q. That somebody must have drawn attention to the fact, I think maybe Ms. Nic Lochlainn, or somebody else, maybe Mr. O'Callaghan, it's not clear, drew attention to the fact that the agreed rating was different in the case of the first three items, "Market development," "Financial key figures," do you see that, and "The experience of the applicant"?

A. Yeah.

Q. Now, if you go on to the version of the 18th, which is the next version, and you go on to the same Table 17.

A. At what divider should I be now?

Q. That's in Divider 46, page 49. You have the same book, Book 46, Divider 46.

A. This is the evaluation of the 18th October?

Q. Yes. We looked at the evaluation of the 3rd October.

At the meeting held on the 9th October, somebody raised the question, "Table 17 different from the agreed weighting"?

A. Right.

MR. NESBITT: I think it would be helpful,

Mr. Chairman, if Mr. Healy noted that further down the page where we have the 17 table differing, Mr.

Andersen says, "The table reflects the discussions in Copenhagen." That would be helpful for the witness to know, if he is being asked this level of question.

MR. HEALY: I don't know what question Mr. Nesbitt thinks I was going to ask. But...

CHAIRMAN: Well, let's proceed.

A. I was going to bring it to your attention, Mr. Healy, Mr. Nesbitt is right there, when you drew my attention to page 3 of that verbatim handwritten note, I think you'll see that under the heading, "Michael Andersen" there, it does say, "16, 17, 18 tables reflect discussions in Copenhagen. If different weighting used, proves you get the same result if different approach."

Q. MR. HEALY: I am going to come to that. That's a totally separate matter to the matter I wanted to address.

A. Okay. The only point being, as I wasn't in Copenhagen, I wouldn't be au fait with

Q. I am not asking you about anything about Copenhagen at the moment.

A. Okay.

Q. I am simply drawing attention to the fact that at the meeting of the 9th to consider the report of the 3rd, a question was asked, and it was pointed out that Table 17, Table 17 was not differed from the agreed weighting. And when we come to the report of the

18th, we'll see that the weighting is the same. Do

you see that?

A. That's Table 18 you are looking at?

Q. Table 17. When we come to the 18th October version of

the report, we'll see that Table 17, and I think it's

the same table

CHAIRMAN: Well, I think we agreed that at the outset

this morning.

Q. MR. HEALY: Yes, I think it is the same.

A. All right. Yeah.

Q. The weighting is the same?

A. Yes, it seems to be.

Q. What discussion was there about the fact that there

had been a variation or a deviation from the agreed

weighting? The reason I am concerned about it is on

the 18th, we are one week away from the conclusion of

the whole process. And there seems to be there

seems to have been a major question asked about

weighting, and I can't see where it was resolved.

A. I think it's fair to say that there was a good deal of

discussion which doesn't get reported, in the ordinary

course of events, in notes.

Q. Of course, I understand that.

A. If, for example, somebody raises a point of

complication and there is a lot of exchange about it

and the thing is resolved fairly quickly or an

explanation given, somebody may deem that not worthy

of reporting when they are reporting something.

Q. Yes, of course.

A. Now, I make this point because that often can prove difficult after two weeks when people are discussing a meeting, but after seven and a half years, it can get some order of magnitude worse. I cannot answer your question and say there was or was not a debate about it, and it would be wrong of me to speculate that it had been ignored completely. Somebody may have questioned this, somebody may not have. Somebody may have given a good explanation. I honestly can't recall.

Q. I quite agree with you, it's extremely doubtful if it was ignored, and seeing as the weighting is such a critical matter and is constantly referred to something that was agreed in advance so it can be sure be sure that the weightings were not being tailored to suit any particular application, and it can, in the context of extreme care taken by Ms. Nic Lochlainn dealing with the weightings in another context, that one would have expected to see a document somewhere recording this change or, if you like, recording clarification of the weightings. If you can't throw any more light on it, I am quite happy to pass on from it.

A. I really cannot. I wish I could, but I can't.

Q. I might now just come to the point that you wanted to

raise yourself. "Michael Andersen, 16, 17, 18 tables reflect discussions in Copenhagen. If different weightings used, prove you get the same result with different approach." Do you see that?

A. Yes.

Q. Now, we'll start at the back, if you like, Table 18 is the last of the three tables mentioned.

A. That would have been Table 18 of the earlier draft.

Q. If you go to the we are still at the draft of the 18th.

A. Right.

Q. Sorry, it's the same on the draft of the 9th, I beg your pardon. We better look at the draft of the 9th or the draft of the 3rd, since it's the only one that makes sense in the context of the issues raised. Now, did you want to make some point about that?

A. No, not really. It's the same point as Mr. Nesbitt was making. I thought you were going to question me about something that had taken place in Copenhagen.

Q. I think, correct me if I am wrong, that you drew attention to that at the meeting of the 18th, at the meeting, sorry, I beg your pardon, at the meeting of the 23rd, because at the meeting of the 23rd you took issue with the notion that there were four different methods of arriving at the result. Michael Andersen says here, "If different weighting used, this proves

you get the same result with a different approach."

But aren't I right in thinking, the only difference between Table 18 and Table 17 is that you convert

A. Let me find Table 18

Q. That you convert grades into marks?

A. What I am looking at now, so I am sure, is the draft of October 3rd, is that right?

Q. Yes.

A. And the table I am looking for is on what page?

Q. Page 46. It's Table 18. Page 45 is Table 17. Page 44 is Table 16.

A. And I am looking at Table 17, is that right?

Q. I asked you to look at Table 18 first.

A. I am sorry.

Q. That has the

A. Yes, it has the

Q. The numerical

A. Table 18 in the draft I am looking at has letters.

Q. Table 18?

A. Yeah. Conversion of marks to points.

Q. Conversion of marks to points. In the bottom it has 362

A. It does, yeah.

Q. And that's all it is, the conversion of marks to points, isn't it, isn't that right? Nothing more than that?

A. This is the sort of question really, Mr. Healy, that I

feel I could answer if I were to spend a day or two going through this sort of thing in great detail, and jogging my memory, and even then there would be no guarantee that I would be giving you answers from memory. I would be merely presenting an apologia for this report.

Q. I am drawing attention to it because I think it's something you drew attention to. Correct me if I am wrong?

A. You may well be right.

Q. I think that you were it was suggested at that meeting, and must have been suggested again at a later meeting, that the conversion of marks to points actually involved a different approach?

A. And in that note that you are talking about there, I said something about

Q. No, you said nothing. This is the note that on the 23rd you said that there was only one approach. There weren't four different approaches. The conversion of marks to points is described as an approach.

A. Right, right, yes.

Q. It wasn't an approach to an evaluation. It simply involved a conversion of a table, where every A became a 5, every B became a 4, every C became a 3 and so on. No more than that.

A. What point are you putting to me or what question are you asking me?



Q. I am trying to say to you if you look at the point made by Michael Andersen here.

A. Yes.

Q. Michael Andersen made a point in relation to different approaches producing the same result.

A. Yes.

Q. If you convert As and Bs and Cs into 5s and 4s and 3s, you are bound to get the same result?

A. Yes.

Q. Aren't you?

A. You should.

Q. There couldn't be any mathematical reason why you couldn't. It would be impossible to get a different result?

A. It would be wrong.

Q. It would be wrong. You'd have to be wrong in your tot or whatever?

A. Yes.

Q. This was at the meeting of the 9th. You have very few notes of the meeting of the 9th?

A. Yes.

Q. I suggested to you that was because you had had very little opportunity to examine the document and were probably only reading it there and then?

A. That's probably correct.

Q. That point was taken up by you much more, if you like, vehemently on the 23rd, because you clearly had a view

on it. You recorded your own view and you recorded the answer you got.

Now, if you go back to Table 16 on page 44, this is a summary of the results based on aspects, dimensions and indicators.

A. Okay.

Q. And what Mr. Andersen appears to have done here is to take the eight criteria, to divide them up into the aspects and dimensions that were the sort of foundation stone of his method of evaluation?

A. Yes.

Q. And to arrive at a total, but if you look at the items here, they are not in the order in which they appear in the RFP. Do you see that?

A. Yes, that seemed to be the case, yeah.

Q. And it seems to me that you must have asked some question about that approach, not at the meeting of the 9th, or if you did, you didn't get an answer that made much sense to you because you raised it again at the meeting of the 23rd.

A. That could well be the case.

Q. If you go back to page 24, for a moment, of the same report, you'll see a heading "Technical aspects". Do you see that?

A. I do.

Q. And there is four criteria: "Radio network architecture", "capacity of the network", "performance

guarantees", "frequency efficiency"?

A. Yeah.

Q. Each of them is graded according to the grades produced by the sub-groups for each one of the six applicants?

A. I am going to use the monitor here now because the copy I have is fairly poor. Right.

Q. So in each column you have, to take A1, a C for "radio network architecture"; a C for "capacity of the network"; a D for "performance guarantees"; and an A for "frequency efficiency".

A. Yes, I see that.

Q. They got two Cs, a D and an A, and the bottom score is a C?

A. Right.

Q. Which doesn't seem unreasonable, I suppose.

A. Okay.

Q. That's done for each of the six applicants. And you get the subtotal of C, D, B, B, A, C. Do you see that?

A. I do.

Q. And if you go then back to page 44, we can leave what's on the monitor on the monitor for a moment, please. If you go back to page 44, you see that that's reflected in the subtotal for "technical aspects": B, C, B, C, A becomes an A/B; do you see that, C

A. Just a moment, Mr. Healy, until I get where you are.

I am looking at Table 17 sorry, I was on the wrong

page it's Table 16 I should be looking at, I take

it, is that right?

Q. Yes. In the left-hand column you see, "Aspects and dimensions".

A. Yes, "subtotal"

Q. "Technical aspects "sub-total"?"

A. Which seems to have been altered.

Q. I think the alteration must have been a mistake

because it's corrected later on. "Why should A5,

Communicorp, get an A/B, when they have four As?"

A. Remind me again of which page I was looking at?

Q. On the monitor you have 24. There is a difference here, there is B, C, B, C, A, B, C. Do you see that?

A. I do.

Q. Now, I think some queries must have been raised at

this point concerning these three tables, 16, 17 and

18?

A. Yes.

Q. For this reason: That it's hard to see how the weighting is applied on page 24. Do you see that?

A. This being on the monitor, being page 24, is that right?

Q. Yes.

A. Well, I can just hazard a guess and that's all it is, is that this emanated from Copenhagen, and that the

technical people sitting around in a sub-group used these letters to reflect their qualitative view of the dimensions there.

Q. It seems to me that if you look at Table 16, that there is no weighting attached to "radio network architecture", "capacity in the network", "performance guarantees" or "frequency efficiency", looking at the tots, I could be wrong, but there doesn't seem to be a weighting applied?

A. No.

Q. Although we know that there was a weighting attached to all of those in the final report?

A. Yes.

Q. Now, if you track that through the report of the 18th October, you'll find further changes, and it seems to me that it came up for discussion again on the 23rd?

A. Are you suggesting that that discussion should have been as to whether there should or should not have been weightings attached to those?

Q. I am suggesting that on the 23rd you again raise this issue, because you seem to refer to it to some extent in your note, because in your note of the 23rd, if we can put it on the monitor again, I think it's in the last page of it. These are the difficulties we are going to encounter without you having access to the other documents, Mr. McMahon. And I think this probably is as far as I can go without the thing

getting out-of-hand.

A. I have no trouble in going back over this material. I can't guarantee that it will jog my memory any more than

Q. Yes, but do you see where you say here, "Much discussion about bottom of summary"

A. "Executive summary."

Q. "Executive summary.

"4 different methods' my point, we didn't use 4 different methods, only 1 the group (i.e. AMI in Copenhagen) simply regrouped."

My impression is that what you are alluding to there is the fact that the eight criteria as laid down in the RFP and as ultimately represented, if you like, on the bottom line of the report in the last table, were regrouped in Table 16, and the regrouping in Table 16 is based on what we saw on page 24 of the report of the 3rd. You'll see a similar table with slightly different scoring in the report of the 18th.

A. Yes, that may be so. Do you mind going back for a moment to my scribbled note again, Mr. Healy?

Q. Yes.

A. My feeling at the outset is that what I was recalling here was the "much discussion" referred to in the second line of my bullet point there. I have 4 different methods in quotes. In other words, somebody in response to questioning by me was saying 'Oh, we

used 4 different methods', and that I was trying to make a point about this in the way the report should read. Now, I am beginning to enter the realms of speculation myself now, but I think I may have been making the point that the report shouldn't be in the business of saying four different methods were used when it claimed at the outset that only one was to be used. And that we did, in fact, use only one method, which was a quantitative followed by a qualitative assessment, and that they were going to throw readers off by detailed references to the kind of thing that was done in Copenhagen, and that's without any prejudice to what people did in Copenhagen was right or wrong. There would have had to be occasions when they would deviate slightly and depart slightly in order to take qualitative-type measurements back into ordinary alphanumeric-type stuff.

Q. Well can I suggest to you for a moment that you look at Leaf 46 again, of Book 46, and page 48.

A. Page 46?

Q. Leaf 46,?

A. I beg your pardon.

Q. Book 46, and then go to page 48.

A. This is the one on which Table 16 appears, is that right?

Q. Yes, Table 16.

A. Right.

Q. Now, again you have this regrouping of the criteria.

Do you see that?

A. Yes. That was the other point I was going to make to you about my scribbled note.

Q. Maybe I'll just finish my question to you first. If you look at the regrouping of the criteria there, "market development", "coverage" "tariffs" and "international roaming plan" and so on. Do you see that?

A. Yes.

Q. And you get a result at the end, grand total B, D, B, B/C, A/B, C, do you see that?

A. Yes, I do.

Q. Now, if you go over the page on to Table 17, you get a ranking B, C downwards, B, B downwards, B upwards, C upwards. Now, I'll just go through those one which one.

On Table 16, the scoring goes as follows: B.

On Table 17 it's B with an arrow down.

On Table 16 it's D.

On Table 17 it's C with an arrow down.

The next table is B, and it's a B on both tables.

The next item is B/C on Table 16, and B with an arrow down.

The next item is A/B, B with an arrow up.

The next is item C on Table 16, and C with an arrow up on Table 17.



A. Right.

Q. Now, the major differences there are between the C with the arrow up in the case of A6 on Table 17, and the D in the case of A2 on Table 16, and C with the arrow down on Table 17.

A. Yes.

Q. The ranking is, in fact, absolutely the same. Do you see that?

A. 6 and 5 respectively, or 5 and 6

Q. The ranking is the same, 3, 4, 2, 6, 1, 5?

A. Yes.

Q. It seems to me that is what prompted your question it seems to me that questions about this are what prompted the answer about regrouping?

A. You may be right.

Q. And this is one of the four approaches that is mentioned?

A. Right.

Q. That being one approach. You arrive at a conclusion where you do not apply the weightings, instead you use the matrix that Mr. Andersen had. On Table 17 you apply the weightings, you get the same result, but slightly different grades. Do you see that?

A. Yes, I do.

Q. And then Table 18 is simply a translation of what's on Table 17 by converting marks that's not another approach, it's simply

A. All right.

Q. These are difficult enough things to grasp at the moment. But it seems to me that this controversy or this debate was taking place on the 23rd with two days to go. Well, I suppose you didn't know that, a week to go, in the morning time it would have been a day to go. By the afternoon you had longer. To judge from your note, I think I am right in saying this is after you had come back from the sorry, it's before you went to Mr. Loughrey.

A. Right.

Q. And if you go back for a moment to the evaluation model we discussed yesterday, and the meetings at which the evaluation models were adopted, it seems that what was envisaged was that a report would be proposed by Andersens. At your meeting of the 3rd with the other divisional heads, you were to consider that, you were to get it in time to enable you to make written comments, and there was to be, I presume, what at that time you thought would be a round table or plenary discussion?

A. Yes, correct.

Q. None of that took place. Another report was produced on the 18th, not significantly different from the report of the 9th. And then something in the nature of a plenary discussion took place. So that the original plan was that you'd get a report on the 3rd

October and you would have, as the then timescale stood, approximately two months to debate it, if you like?

A. Yeah.

Q. That never occurred. You get it on the 20th. You have a meeting on the 23rd. Some people have had a chance to look at it, and that is when some plenary discussion takes place, or at least you were looking for it. It seems other people were looking for it and some people were opposed to it?

A. All right.

Q. So that that deliberative process doesn't seem to have taken place as it was envisaged at all. It took place instead under, am I right in thinking, under extreme time pressure, because whatever time you got was taken away?

A. Yes, there was a truncation of the time.

MR. HEALY: I think, Sir, it's hard enough to do this without getting too involved in detail. I am going to have to give Mr. McMahon a chance to read the other documentation because, as Mr. McMahon knows, I am pre-figuring some of the things we have seen in the documentation that I showed him this morning, and I think I am going to have to introduce far too much documentation nobody has seen to make any further progress.

CHAIRMAN: Well, yes, though I think, Mr. Healy,

nonetheless, whilst I appreciate that you must go into these matters of weightings, and an examination of what was done necessitates this, I am nonetheless conscious that there must be a limit put on this, and I think perhaps a time factor may enable the parties to realise the position and address net issues.

I might make inquiry of counsel for the various Mr. Fitzsimons, Mr. McGonigal, as of now, is it your preference that we should give the opportunity not only to the witness, of having the matters formulated on papers more clearly and an opportunity to reflect on them, but for each of yourselves, a chance before examining the witness?

MR. FITZSIMONS: Well, Mr. Healy has indicated that a large body of new documentation has come to light on files not previously well, the contents of in relation to the contents of files that have not been previously appreciated as being significant relating to the period between the 9th and the 25th October.

If that is that being the case, clearly we would submit that both the witness and the parties should have an opportunity to consider those documents, if they have the importance that Mr. Healy is apparently attaching to them.

CHAIRMAN: Are you of a like view, Mr. McGonigal?

MR. MCGONIGAL: Absolutely, Mr. Chairman. It's absolutely essential. I also need time, I have to

say, to digest Mr. Healy's lecture this morning in relation to weightings, because I thought I had an understanding which is different to Mr. Healy's, and I now have to make sure that I am right.

CHAIRMAN: I'll just hear you in a moment because it's your witness, of course, Mr. Nesbitt.

I take it, Mr. Fanning, you are not pressing to proceed with matters today in the light of the further matters that are emerging?

MR. FANNING: No.

CHAIRMAN: Mr. Nesbitt, I must of course attach weight to you, but it does seem the witness, in ease of him, and he has had an arduous enough week of it, will find it stressful enough to address these further matters without some deferral, and they are not without importance. I am anxious that they be truncated as far as possible, and codified, so to speak, but it does seem to me, whilst I'd much rather press on with despatch, that in fairness, it's not realistic to do much more with Mr. McMahon today.

MR. NESBITT: I wasn't actually going to suggest something like that happen at all, Mr. Chairman. What I was going to ask is this: clearly some theory is developing in the mind of Tribunal counsel concerning weighting. Weighting is a complicated matter. It would be very helpful to us if somebody could put down in writing exactly what the theory is so we can

attempt to assist by bringing such evidence as is available to us to deal with the issue. It is very complicated. I have attempted to keep track of it effectively on my feet, and I sometimes think I have, and sometimes I don't have track of it. But if we could see it in writing it would be hugely of assistance to people on the team and to the witnesses.

MR. HEALY: There is no theory, Sir. This is an outrageous suggestion. It's in the nature of inquiries that things develop. And what has happened is, the Tribunal has examined material which they were directed to, on a totally different basis I may add, by Mr. McMahon, which have thrown light on evidence already given and have caused the Tribunal to look at, in fairness to all the witnesses, the documentation that's already been put into evidence. I am trying to avoid articulating a theory here in the light

CHAIRMAN: I accept it's a live inquiry that occasionally requires elements of conjecture and questioning. I think it's clear that we must defer, perhaps in the context of next week being assigned to other Tribunal work as well as pursuing this, I had envisaged that we would start on Monday, but since we have a lot of work to do on matters not related directly to the GSM licence, and I do think it probably makes sense that at least the legal teams do discuss, whether verbally or in paper, a basis upon

which the ongoing inquiry can be most efficiently addressed the week after next. I think I will, after all, make it Tuesday at 11 o'clock on Tuesday week.

It seems to me, because plainly this matter is too important to neglect, and a degree of particularity and assiduity, as has been rightly shown by Mr. Healy, is necessary. Nonetheless, it must be kept to levels that are manageable and as of now, whilst I am not seeking to make any ruling on the matter, it does seem to me that the two primary matters to be addressed by the Tribunal would be first of all: was the basis of the competition as set forth in the additional request for tenders derived from internal DTEC inquiries with the assistance of Mr. Roger Pye and others? And as subsequently developed into the Andersen scheme with its division into separate subheadings and its further division into a qualitative and quantitative examination, was it one that was properly capable of enabling a proper and fair and just competition to proceed?

And then subsequent to that: Was what was done by the Project Team, with the aid of Andersens, a proper and reasonable adherence to that scheme?

I am not seeking to lay down in stone any rigid formula, but these are the two primary matters, it seems to me, that in the ultimate, the Tribunal should address its attention to. As I have already said,

this does mean that there is required a measure of examination into weightings and other matters, but it is not the case and it certainly is not the business of the Tribunal that in any sense one should be seeking to raise a proliferation of hypothetical situations in which marginal adjustment of marks could have particular repercussions upon events. One has to look at the substantive model and the substantive adherence or non-adherence to it.

And in those questions, Mr. McMahon, obviously the second one, as to whether there were deviations that may have been beyond the de minimus level, is the main thing that you justly need time to reflect on, just perhaps, and if you like you can keep your reply until the week after next.

On the easier end of it, on the first question as to whether or not the eventual model that you were asked to address in the Project Team was a feasible one, undoubtedly the Andersen model did add certain continental convolutions to the original basis set out in the request for tenders and the original dealings that you had had with Dr. Pye?

A. Okay, Chairman, I am quite happy to reflect on the thing over the coming week. Indeed I need, I would feel, that amount of time to come to grips with, after seven and a half years, with what even then was quite complicated.



CHAIRMAN: I appreciate that. Well then, I won't even embark on a particular inquiry on the first matter and I will leave it until the week after next.

MR. NESBITT: The Tribunal has mentioned two primary matters. Could I be taken as reserving my position on that tentative ruling, so I am not taken as having made any position so far. But I would wish to address you on that in the fullness of time.

CHAIRMAN: Mr. Nesbitt, it wasn't a rehearsal. It was merely an intimation of what I see as the main matters: were the rules of the competition proper?

And if so, were they in substance adhered to in a manner that gave rise to a sustainable outcome? And obviously there will be sub-issues that plainly have arisen and which indeed are more directly raised in the Terms of Reference. But in ease of parties, I merely think it no harm to indicate those matters at this juncture.

Very good. I would invite the various legal advisers to confer with the Tribunal lawyers in the course of the coming ten days. And we'll resume with a view to conclusion of Mr. McMahon's evidence on Tuesday week at 11 o'clock. Thank you.

THE TRIBUNAL THEN ADJOURNED UNTIL TUESDAY, 25TH MARCH, 2003, AT 11AM.