

A P P E A R A N C E S

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Mr. Jerry Healy, SC

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I N D E X

Witness: Examination: Question No.:

Owen O'Connell Mr. Coughlan 1 - 503

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 28TH

OCTOBER, 2003, AT 11AM:

CONTINUATION OF EXAMINATION OF OWEN O'CONNELL BY

MR. COUGHLAN:

Q. MR. COUGHLAN: We are still on Book 48, Mr. O'Connell.

A. Yes. Good morning, Mr. Coughlan.

Q. I think on Friday afternoon, we just stopped at Tab

24, I think, Mr. O'Connell. And this is a fax which

Mr. Peter O'Donoghue sent to Mr. Haga, I think, dated

31st July?

A. Yes.

Q. And it's concerning the financial commitment to

Digifone. And it reads: "Further to our conversation

today, I confirm that Advent International and

Communicorp Group Limited have formally entered an

agreement whereby Advent have committed up to €1/230

million to the Communicorp Group in the event that

Esat Digifone is successful in its bid for the second

GSM licence in Ireland. In consideration of Advent

making these funds available, Communicorp has agreed

that Advent will be entitled to participate in up to

5% of the equity capital of Digifone Limited. Denis

O'Brien is also a signatory to this agreement.

"Accordingly, as the above parties represent 100% of

the shareholders of the Communicorp Group, they have given their consent to the increased capital required in Communicorp to facilitate the investment in Esat Digifone.

"I hope the above will assist you in finalising our outstanding issues.

"With best regards.

"Peter O'Donoghue."

Now, I think that doesn't accurately reflect what happened, isn't that correct? And I should just point out to you as well, that we spoke to Mr. O'Donoghue, because I stopped because of this, you will remember on Friday?

A. Yes.

Q. And I we were able to inform Mr. O'Donoghue of your opinion as regards the agreement that the 5% was for the furnishing of the letter of comfort to the Department, and one that would be acceptable to Telenor.

A. Yes.

Q. And in fairness to Mr. O'Donoghue, I should put his position as well. We don't have it in a statement from him, that he accepts that he accepts your view as to the legal aspect of matters.

A. Yes.

Q. So just to bear that in mind.

A. Yes, I would agree that this fax was incorrect. That

the only qualification I'd make to that is that if you depart from the "formally entered an agreement," which is misspelt as "formerly", Denis O'Brien was saying at this time that he had a verbal commitment from Massimo Prelz in regard to the 30 million, and he regarded that as constituting, together with the letter of comfort, a binding commitment, and indeed subsequently, Telenor tried to get me to give an opinion to that effect.

Q. We'll come on to the opinion, yes. You, yourself, weren't able to get to the bottom of that? You weren't party to any negotiations, and you hadn't been involved in any discussions about the 30 million with Advent?

A. No, I hadn't.

Q. In any event, you didn't prepare this particular document

A. No, I didn't.

Q. for Mr. Peter O'Donoghue?

A. No, I didn't.

Q. Now, if you go to the next divider then, it's Divider No. 25. And this is, I think, an attendance of yours dated the 31st July, on Peter O'Donoghue, is that right?

A. Sorry, just to reorganise myself. That one was upside down in mine. I just have to reorganise myself. At

Q. At 25, I think.

A. Yes, I have it now.

Q. It's both handwritten and it has been typed up as well. And then it's I take it that it is an attendance on Mr. O'Donoghue, is it?

A. Yes.

Q. "Telenor agreement", is it?

A. Yes, "agreement".

Q. "Initial 50/50. 40:20:40. Ultimately 33." Is that right?

A. I think there are supposed to be two 33s there.

Q. "With 33 in public domain (per quote).

Not keen to be advised to pay off large amount of money too early only as required, dependent on First Boston funding.

"June '95, Joint Venture Agreement. Agreement will be reviewed by Department of Communications. Agree Telenor appoint CEO. Will not provide $\frac{1}{2}$ million guarantee. Only have letter of comfort from Advent.

There is a joint venture bank account. Esat has spent" I think it's

A. "4 to 500,000."

Q. "4 to 500,000. Itemised Telenor 200,000 also used."

Now, can you just help us about the first part of that memo? "Initially 50/50," that must refer to the joint venture?

A. To Esat Digifone, yes.

Q. Then, "40:20:40", that would be 40:40 for the two main participants, Telenor and Esat, or Communicorp, and 20 would be going, as we know, somewhere else?

A. Yes.

Q. And then, "Ultimately 33 and 33." That's taking into account the placing of 12% after licence, sometime into the future?

A. Yes, he was being

Q. That seems to be the general

A. slightly loose with the numbers. It was 34, 34, 32.

Q. That's generally what is being recounted there?

A. Yes.

Q. Then, "Not keen to be obliged to pay off large amount of money too early only as required, dependent on First Boston funding."

Again, I think I suppose we can understand only to pay up funds as required?

A. Yes.

Q. What does "dependent on First Boston funding" mean?

A. I think that it means that he wanted he expected to be able to get the money he needed for the investment in Esat Digifone for the Credit Suisse First Boston funding in the US, which was being worked on, had been since May, I think, or June.

Q. Right, yes. So then, "June '95 Joint Venture Agreement." That's just referring to the Joint

Venture Agreement between Telenor and Esat?

A. Yes.

Q. "The agreement will be reviewed by Department. Agree Telenor appoint CEO." That's just fairly standard stuff I think, is it?

A. Yes.

Q. "Will not provide $\text{€}1/25$ million guarantee (only if letter of comfort from Advent)." That's the reference to the $\text{€}1/25$ million guarantee in the Joint Venture Agreement, isn't that correct?

A. Yes.

Q. That Telenor required?

A. Yes, it was actually 5 million plus half the licence fee.

Q. Yes. And then there is a joint venture bank account.

Can I just ask you there, we referred to the $\text{€}1/25$ million when we looked at the Joint Venture Agreement, I think, and I think I asked you as to whether it had ever been provided?

A. Yes.

Q. And you said I was of the view that it hadn't been?

A. Yes.

Q. You were of the view that it had been, is that correct?

A. Not in precisely the form required by the Joint Venture Agreement, yes.

Q. Could you just help us there so that we can have an

understanding of it?

A. Yes. In my view the letter of the 29th September was the guarantee.

Q. I see. I see. All right, we'll come to it so, very good. And the investment was dependent on the Credit Suisse First Boston funding?

A. Well

Q. That's what you were being told at least anyway?

A. Yes.

Q. So can we take it, that as of this stage the view was being taken that Advent were out Advent's 30 million now, I mean, because I want to distinguish between the

A. I don't think it was as black and white as that, Mr. Coughlan. I think what he was saying was that he didn't want to rely on Advent and preferred to rely or depend on Credit Suisse First Boston money, which would be firstly cheaper; secondly, probably more abundant; and thirdly, would give him an entre to American financing generally, but I wouldn't say it was as clear-cut

Q. All right. But anyway, this is something that Mr. O'Donoghue was telling you, isn't that right?

A. Yes.

Q. Now, going to the next divider, it's No. 26. This is a fax from Knut Haga, I think, to Denis O'Brien, isn't that correct, dated the 2nd August?

A. Yes.

Q. And it reads: "With reference to Joint Venture Agreement dialogue between Peter O'Donoghue and facsimile letter from Peter 31 July (enclosure), I would like to express my concern related to the issue financial guarantees.

"Based on the letter from Peter, I required a similar statement from Advent International through Baker McKenzie. Ms. Helen Stroud called this afternoon and told me there were not any agreements between Advent and Communicorp related to the said 30 million Irish pounds.

"If this information is correct, I believe we may have serious problem relating to establishing an acceptable level of financial comfort.

"Please be aware of the fact that this situation may jeopardise the whole project."

And he then, I think, enclosed, is that correct, the communication that he had with Helen Stroud, dated 1st August?

A. Yes, that seems to be right.

Q. Where he says to her this is Mr. Haga writing to Helen Stroud "Thank you for your letter of July the 13th. Based on received information, I would kindly ask you to provide Telenor with some statements from AIC confirming the following:

"1. Forwarded financial information (enclosure to

letter dated 13th July) related to various funds as of the 31/12/'94, is correct. Please make reference to each specified fund.

"2. That no material changes have occurred since 31/12/'94. Please make reference to each specified fund.

"3. That an agreement between Advent and Communicorp Group has been signed, and that the agreement is related to an equity increase in Communicorp due to an award of a GSM2 in Ireland to Digifone."

And it looks as though we don't know whose "no" that is. Do you know?

A. No, I don't, I am afraid. It's not mine.

Q. "That investing in the Communicorp Group is within Advent's mandate and general partner of funds mentioned."

But the significant matter there is this question of the agreement, isn't that correct?

A. Yes.

Q. And somebody has written "no" on it anyway. And that, perhaps, is what's giving rise to the fax to Denis O'Brien on the 2nd August from Telenor?

A. Yes. This is the crisis between Communicorp and Telenor immediately before submission of the licence bid, which was due on the 4th August.

Q. Were you aware of it? Were you aware of this crisis?

A. I think I was at the time, yes. I think I'm coming in

in a minute, I became involved shortly afterwards.

Q. You did. Maybe we'll just move on, I think, because the next thing is but just for a moment, Ms. Stroud appears to have informed Mr. Haga, we take it that he is recounting what she informed him correctly, that there was no agreement, is that right? That seems to be the information that he got at least?

A. Yes, although when she says there was no agreement, I think she is meaning that there is no legally binding agreement for the provision of the 30 million, rather than no agreement at all because, in fact, there were a series of agreements.

Q. I agree with you, and I think we should always draw that distinction. The agreement as regard the 5% and the letter, yes, that was signed?

A. Yes, and there was earlier agreements between Advent

Q. There were earlier agreements, which I don't know anything much about. You probably don't at this stage either?

A. I can't recall.

Q. But that related to general funding for Communicorp Group, and Advent had a shareholding in the company, and in fact, a Board member, isn't that right?

A. Yes.

Q. But and that is, I agree with you, a reference to the fact that there was no agreement for the 1/230

million for the funding of the GSM project?

A. Yes.

Q. Now, we have on the 3rd August, Mr. O'Donoghue faxes, sent a fax to Mr. Prelz of Advent, and he says that: "Telenor have requested us to provide them with a slightly reworded financial guarantee from yourselves. I attach the requested wording. I do not believe the attached is any more onerous than you previously provided us with, and I would be grateful if you could prepare a letter addressed to Telenor along the lines of the attached.

"As you are aware, the bid is due for submission tomorrow, the 4th August, and we would require this letter today."

He says if he is not in his office, he gives his mobile number. I think it becomes apparent when we move through the correspondence the type of wording that was required, isn't that right?

A. I don't have the attachment in this book, I am afraid, Mr. Coughlan. I do recall seeing it, but I don't have it here.

Q. I'll get it. If we go to Divider No. 28 then. Now, this is out of date sequence.

A. Yes.

Q. And this is something, when you were dealing with Advent in relation to many matters, what Mr. O'Donoghue informed you about things further back

around this period?

A. At the time we are now discussing, yes.

Q. And it's a fax dated the 3rd November, 1995. And it's

to you from Mr. O'Donoghue, and it says: "Further to

our conversation this morning, I now attach some

handwritten notes of my telephone conversation with

Massimo Prelz on the 3rd August, 1995.

"He accused me of trying to mislead Telenor and stated

that 'You guys (reference to Denis and I) have a way

of playing with words.' This would go back to the

other original discussions on the terms of 1/23.2

million facilities, and that was agreed in respect of

the 5% of Esat Digifone. He stated that the word

'committed' was misleading, and that the fact that

there was no offer as to terms" "and that the fact

that there was no offer as no terms were agreed. I

reminded him that he had put outline terms to Denis,

and even though these were not acceptable to

ourselves, they were, in themselves, terms. He stated

he would not be signing any letters. Letters required

the approval of the Investment Committee, and no

letter would be forthcoming."

He left it to you to make use of the information in

your dealings with Baker McKenzie, isn't that right?

A. Yes.

Q. Now, if you go over the divider then, to Divider No.

29. And you can see here that this is Mr. Donoghue

sending a letter on the 4th August, and he attaches a copy of a revised letter that Telenor have requested Advent to provide to Communicorp Group Limited.

"They wish to establish that the offer referred to in your letter to them on 12th July, 1995, will remain valid for a period of 60 days after the GSM licence is awarded.

"If you have any queries concerning the attached, please contact either Denis or myself."

Then we have the attachment here.

A. I think this is the one I referred to earlier as having seen.

Q. Yes. And the letter that was being sought at this stage was: "Advent International plc, on behalf of its funds under management confirms that it has offered $\text{€}1/230$ million to Communicorp Group Limited for the necessary equity increase in Communicorp Group Limited to establish and operate a GSM network in Ireland.

"This offer is true and valid until 60 days after the Ministry for Transport, Energy and Communications has awarded the licence to Esat Digifone Limited.

"Yours sincerely."

So did you see this particular draft at the time, can you remember?

A. I can't remember, I am afraid.

Q. Does it does it sound like your language, do you

think or

A. It's quite legalistic. It could be. It's also trying to do two things. On the one hand it's trying to get from Advent a commitment which, I imagine, was intended to satisfy Telenor as legally enforceable, but at the same time, it was referring to that as an offer rather than an agreement, so that Communicorp could have not accepted the offer subsequently and still gone with its strategy of using CSFB money instead of Advent money. Because it's quite a subtle letter.

Q. Well, we know from Mr. O'Donoghue's notes that, of the period, that Massimo Prelz told him that they weren't making any offer?

A. Yes. And the commitment

Q. Sorry, a commitment, I use the term a commitment. And that there had been no terms agreed, and that he wouldn't be, isn't that correct?

A. Yes.

Q. Do you know why this particular letter was sent so, just the day after what was probably fairly heated discussion on the phone between Mr. O'Donoghue and Mr. Prelz, I suppose?

A. I think Peter O'Donoghue was still doing his best to square the circle. He was trying on the one hand to satisfy Telenor, who were still demanding the commitment they were entitled to under the Joint

Venture Agreement of June 1995, and he was also trying to get from Advent that commitment, when Advent had said they wouldn't give one. And I suppose, as a minor note in all of this, he was trying to get the commitment in a form which wouldn't oblige him to accept it. Now, I am aware from a note I did later, that

Q. Perhaps we'll come on sorry, you can explain and we'll come on to it then.

A. Okay.

Q. Do you want to

A. I was just going to say that on the same day, I am aware that Mr. Bugge of Telenor was in to see me, and was telling me that he was going to advise Telenor to withdraw.

Q. That's right. We'll come to that. Well, just looking at this particular draft which was being furnished for the consideration of Advent here, again it only refers to an offer, doesn't it?

A. Yes.

Q. And all it's asking which was in like form to the letter which had been furnished to the Department, I think, isn't that right?

A. Yes, I think so.

Q. An offer I think it used "We have offered," I think?

A. Yes.

Q. And was in similar form to what had been furnished to Telenor, isn't it, that an offer had been made?

A. Yes.

Q. Maybe I am wrong, but it doesn't seem to, in any way, require a commitment on the part of Advent, or maybe I am not reading it?

A. Well, confirmation that it has made an offer

Q. Yes, and that that would remain valid for 60?

A. Would be a commitment, I think.

Q. So, it would be open to Mr. O'Brien's side to take up the offer on whatever terms

A. In classic contract terms it would be an offer capable of acceptance; that would be a commitment I think.

Q. Yes. Now, if we go to Divider No. 30. Just before I move on, could I, before it goes out of my head really the letter to the Department from Advent preceded the signing of the agreement, isn't that right? The agreement was signed on the 12th July; this is the agreement providing for the 5%

A. Yes, I remember.

Q. by reason of furnishing the letter to the Department and one to Telenor that was acceptable to Telenor?

A. Yes.

Q. The letter to the Department seems to have been dated two days previously?

A. I haven't been conscious of that. I am not aware of

it or of why it would have been.

Q. Right. I don't know whether it went two days previously. I just know that the date on it

A. It may have been written and not released until the agreement was signed, something like that.

Q. I think it probably went with the bid on the 4th August?

A. Yes.

Q. Probably?

A. Yes.

Q. I was just trying to clear that up in my own mind.

Now, going over the divider to Divider No. 30. This is a letter from Communicorp, Mr. O'Brien I think to Mr. Bugge of Telenor, dated 4th August. And it reads:

"Dear Sirs,

"We wish to confirm that we have received an offer from Advent International Corporation Limited of funds sufficient to perform our obligations in respect of the bid. We wish, however, to seek alternative sources of funds because the terms of Advent's offer are unfavourable to us.

"We are aware of your concern to ensure that Communicorp has access to sufficient funds to perform its bid obligations, and accordingly agree that if we fail to raise sufficient third party funding in time to provide Esat Digifone with funds as anticipated by the bid, we will accept and conclude Advent's offer of

funding.

"Yours faithfully, Denis O'Brien."

Did you prepare that?

A. I can't recall.

Q. It's carefully worded, isn't it?

A. Yes.

Q. And one would get the impression that it was probably drafted by a lawyer?

A. Possibly, yes. You see, Denis maintained that he did have a verbal commitment from Massimo Prelz, or an offer from Massimo Prelz.

Q. But I understand that, and I know Mr. O'Brien is a businessman, but you as a lawyer, would have appreciated that there didn't seem to be much basis of legal enforceability in respect of any such offer, would you

A. Well, it would have depended on whether he could prove the offer. There is a note later on referring to it.

Q. Do you know anything about that offer? I know you were never able to furnish an opinion about it. Do you know anything about it?

A. I recall vaguely being told that it was on fairly typical Advent terms, which were always very expensive. And to me that would have implied probably about a 30% per annum return on the funds invested, probably a fairly early exit or sale commitment, probably a great many covenants in relation to what

the company would and wouldn't do, which would have amounted, in a common phrase, to negative control of the company. And probably would also have committed Esat medium to long term to Advent as its principal source of funds, whereas Mr. O'Brien always wanted, as he subsequently did successfully, to tap the American market for funds, which could provide much bigger money more quickly in a more straightforward way, and generally more cheaply.

Q. Now and I can understand why somebody would be trying to keep the balls in the air in relation to raising funds and perhaps looking for cheaper money or better terms in terms of somebody who may be investing in the company. But as of this time

CHAIRMAN: I think, Mr. Coughlan, it's just a bit too much. It's not fair to Mr. O'Connell, the cacophony that we are subjected to. I'd ask, perhaps, maybe that our Registrar might have a quiet word. I think I'll rise for three minutes to see if we can elevate

I know people have to get things ready for the Presidency, but I think we are entitled to reasonable working conditions.

THE TRIBUNAL ADJOURNED FOR A SHORT BREAK AND RESUMED

AS FOLLOWS:

Q. MR. COUGHLAN: This letter from Mr. O'Brien to Mr. Bugge is the first indication to Telenor that Mr. O'Brien was potentially or was going to

approach other people to seek alternative funds, isn't that right?

A. I don't know, I am afraid.

Q. On paper anyway

A. I think so, yes.

Q. whatever discussions. But it is also informing them that they had received an offer from Advent International, that there was sufficient funds to perform Communicorp's obligations in respect of the bid, notwithstanding the conversation that had taken place between Mr. Prelz and Mr. O'Donoghue I think two days previously, isn't that right?

A. Yes.

Q. If we go to the next divider now, Divider No. 31; this is your meeting with Mr. Bugge I think, isn't it?

A. Yes.

Q. Is it a meeting or on the telephone?

A. I think it was a meeting.

Q. All right.

A. There is a letter later which I refer to a meeting.

Q. That's right, yes. And it records: "Mr. Bugge and GFH" that's Mr. Halpenny of your office?

A. Yes.

Q. "Opinion re Advent offered to be provided." That's what Mr. Bugge was looking for, is that right?

A. Yes.

Q. "Ask Denis O'Brien for Advent offer agreement that is

legally binding on Advent.

Peter O'Donoghue/Denis O'Brien re Advent offer.

Made clear Owen O'Connell has not seen Advent offer."

So that you hadn't seen it and you were informing

Mr. Bugge of or were you?

A. Oh I was, yes.

Q. And does the note seem to indicate that you were going

to find out about it, is that that you were going

to ask Denis O'Brien and Peter O'Donoghue about it to

see if you could furnish an opinion?

A. Yes. I think Mr. Bugge was there to try to nail down

the situation as regards Communicorp's funding, was

making his calls on Peter O'Donoghue and on me. And

obviously was getting information that was

inconsistent, and was asking me to ask Denis for the

offer, or for the agreement, and I was simply noting

that, but also telling him that I hadn't seen it as of

that point in time.

Q. Yes. Now, I think we needn't concern ourselves,

unless you think so, with the next divider, Mr.

Burke's letter to Mr. McMahon. It's all to do with

regulation in relation to the fixed line

A. Sorry, the next divider I have is a letter from Gerry

Halpenny to Peter O'Donoghue.

Q. Sorry, I beg your pardon, mine is out of sync now.

Sorry, what you have is Mr. Halpenny to Peter

O'Donoghue, is that right?

A. Yes.

Q. And it's the 4th August. Mr. Halpenny writes: "Dear Peter,

"I enclose for your attention copy of the letter handed over to Amund Bugge today in connection with the financing of the GSM bid.

"We also discussed at our meeting this morning what steps should be taken with Advent regarding the funding of the GSM company. As you will recall, Owen O'Connell is strongly of the view that the condition in Clause 4.2 of the agreement dated 12 July, 1995, has not, in fact, been satisfied, and that you should very strongly consider sending a letter along these lines to Advent, stating that as the agreement was not satisfied, the agreement 12 July, 1995, is of no further effect.

"I trust this is in order."

That's a reference there to Telenor being satisfied, is it?

A. Yes, I think so.

Q. Do you know what letter is Mr. Mr. Halpenny is referring to there, that a letter is that Mr. O'Brien's letter?

A. I don't know, it may be. It seems logical.

Q. It seems logical doesn't it, that that was the letter we have opened previously informing them that they would be seeking alternative sources of funding?

A. Yes, that seems logical.

Q. I am not suggesting for a moment that one could ever make concessions that there are Chinese walls in a solicitor's practice, but could I just ask you for a moment, who was Mr. Halpenny acting on behalf of there, do you know?

A. Oh, he would have been acting on behalf of Communicorp Group.

Q. Communicorp Group. And I think at Divider No. 34 I am just wondering it's a handwritten note we have do you know whose handwriting that is?

A. No, I don't, I am afraid. It looks vaguely like Gerry Halpenny's, but I am not familiar enough with his handwriting to be sure.

Q. It reads: "On the 11 August Denis O'Brien met Massimo Prelz in Dublin. Denis O'Brien told Massimo Prelz that Telenor were unhappy and want a better letter. Denis O'Brien told Massimo Prelz that the agreement between Communicorp Group Limited and Advent International had been breached by Advent International, as Telenor had not been satisfied by their letter."

That seems to be giving effect to your advice, doesn't it, if that meeting took place and that's what transpired?

A. Yes.

Q. Did you know about the meeting?

A. I don't think so. I don't recall at this remove, I am afraid.

Q. All right. On the going to Divider No. 35, you wrote, I think, to Mr. O'Brien on the 11th August also, and you stated: "Dear Denis, "As discussed, I had a call at 2 p.m. today from Amund Bugge. He asked whether I was in a position to provide him with the opinion which he had requested last week, as to the enforceability of Advent's offer to you of funding."

That probably confirms that there may have been a meeting, isn't that right, the previous week between yourself and Mr. Bugge?

A. Yes.

Q. "You will recall, that because the offer is verbal it is not possible for me to give any such opinion. He replied that having discussed the matter with you after my last meeting with him, I had taken no further action on the matter, as I understood that you would be in a touch with his clients directly. Mr. Bugge expressed surprise, saying that he had spoken to you earlier today on the subject and believed that as a result that I was progressing the matter. He also told me that his clients had instructed him to pursue me for the opinion (you will recall that when he left me last Friday he said that he would be advising his clients to pull out of the transaction all

together this appears not to have happened).

"The conversation ended rather inconclusively, with me agreeing to discuss the matter further with you and to contact him next week. It accordingly seems that we will have to resolve the matter in some way, and presumably we can decide on how to do so at our meeting on Monday at 3pm.

"Yours sincerely."

I think the "PS" has nothing to do with matters?

A. No.

Q. Now, would you agree that it appears that this letter points to the fact that Mr. Bugge asked you for an opinion, and that he had been led to believe by some conversation he had with Mr. O'Brien that you were progressing the matter along those lines?

A. Or working on something.

Q. Or working on something?

A. Yes.

Q. It seems to have come as a bit of a surprise to you because you are telling Mr. O'Brien that you couldn't give an opinion, isn't that right?

A. Yes. I am not sure whether I was surprised, but, ...

Q. Well, perhaps "surprised" is the inappropriate word, but you were not in a position to give an opinion?

A. No. Although by this point the critical event, being the submission of the bid, had occurred, whereas prior to the last one it had not. And what I think what's

missing from the sequence of events here is the critical series of conversations between Communicorp and Telenor whereby Telenor backed down from insisting that the bid couldn't go in and decided not to withdraw.

If you recall, the Joint Venture Agreement of June provides expressly that the bid cannot be submitted unless Telenor are satisfied with the guarantee, and at this point, they had failed to get the guarantee but had permitted the bid to go in. Now, I think, and I am speculating, but it's reasonably researched, an educated speculation, that Denis O'Brien had hoped that when Telenor allowed the bid to go in in the absence of a commitment or guarantee, the matter had gone away, and what this letter is showing is that it hadn't gone away; that Telenor were still pressing for some form of commitment, and that while, prior to the 4th August, Telenor not having been publicly announced as a member of the Esat Digifone Consortium, conceivably, although very unlikely, they could have walked away and the bid still gone in without them, at this point it could no longer do so because or the bid could no longer be progressed because the bid had gone in with Telenor party to it.

Q. Yes, I understand. And you believe that there must have been some to-ing and fro-ing or some discussion between Communicorp people and Telenor people in the

intervening period, between this letter or this communication from Mr. Bugge and the one that had occurred the week previously?

A. Well, I'm quite sure that on the 4th August there were heated discussions, I recall being I don't recall the detail, but I remember being told that there had basically been a row, and Telenor had eventually decided to let the bid go in. I think the significance of this letter, and one or two others around the same time, that Telenor hadn't treated that as the end of the matter, but were continuing to push for the commitment or the guarantee to which they were entitled under the Joint Venture Agreement.

Q. Right. Now, just before I get to your reply to Mr. Bugge on the 17th August, there is a document at Divider No. 36, and it's a note from Mr. O'Brien to Mr. Desmond. And I'll come back to that I think, if that's all right with you?

A. Okay.

Q. Now, if we go to your letter, then, to Mr. Bugge on the 17th August of 1995. Now, of course, you had full instructions to write this letter?

A. Oh, yes, I did.

Q. It's a long detailed letter. It would have involved discussion and full instructions, isn't that right?

A. I think Mr. O'Brien had asked me to write a letter to Mr. Bugge in the absence of an opinion from me as to

the existence of a commitment, to explain why in Communicorp's view, Telenor didn't actually need such a commitment, weren't at risk or weren't likely to be prejudiced by the absence of such an opinion. It was still progressing the strategy which I think had been there all along of, insofar as Communicorp couldn't provide the guarantee because it didn't have the financial resources to do so, it would seek to persuade Telenor to accept something less which it could provide. Initially, that was the Advent letter of comfort. That didn't really work. I mean, Telenor allowed the bid to go in, but didn't stop pressing for the guarantee. Now this was an attempt at an analysis of the commercial situation, commercial and legal situations, I suppose, trying to demonstrate the relative unimportance to Telenor of such a document.

Q. And it reads: "Dear Amund,

"I refer to your meeting with Gerry Halpenny and myself during the week ended 4 August, and to our telephone conversation of 11 August. I confirm that following our telephone conversation I discussed outstanding issues with Denis O'Brien.

"We are aware that the issue of most concern to you is the ability of Communicorp Group to fund its share of the capital amounts needed in the event that Esat Digifone is granted the second GSM licence for Ireland.

"You have been told by Communicorp Group that Advent International has made an offer to it of the necessary funds. You (in common with the Irish Government) have also been provided with a letter of comfort from Advent confirming this. Communicorp Group has undertaken with you that, if it fails to raise sufficient funds from other sources, it will accept Advent's offer. You have sought a formal legal opinion from this firm in relation to Advent's offer. However, I regret that we are not in a position to provide such an opinion.

"As we have explained to you, Communicorp Group does not wish to take up the Advent offer, mainly because it is on very disadvantageous terms. A number of other funding avenues are being pursued, and it is hoped that these will prove fruitful very quickly. In particular, a US equity and debt placing by Credit Suisse First Boston is at an advanced stage, and is designed to provide ample funds for Communicorp's present and planned projects, including GSM. Indeed, Credit Suisse First Boston have shown particular interest in the GSM project. Communicorp does not wish to enter into discussion with Advent in order to have a letter provided to you in terms stronger than the letter of comfort which you already have. This is due to the delicate nature of the commercial and political relations between Communicorp and Advent; in

essence, while Communicorp could very likely obtain a letter for you from Advent which would be in stronger terms than the existing letter of comfort, the indirect commercial course to Communicorp as regards other discussions which are underway with Advent and other parties would be very high.

"To date, approximately IR 1/21 million has been expended on the GSM project, of which Telenor has met only 1/2200,000 of its committed 1/2400,000, despite having equal participation. I feel that Communicorp's commitment and its intention of providing further funds are amply demonstrated by its expenditure to date. In effect, Telenor has had a substantial carried interest in the project.

"When the GSM licence is awarded, it will either be given to Esat Digifone or it will not. If it is not, then no further funding requirement will ever arise, and the question of Esat's ability to fund its obligations will be academic. Conversely, if (as everyone hopes) the second GSM licence is awarded to Esat Digifone, then significant funding requirements will quickly arise both as regards Communicorp and as regards Telenor. In this situation, either Communicorp will perform its obligations, i.e. provide cash, or it will not. When Communicorp provides the necessary funds, then the question of intervening guarantees, letters of comfort, commitments, legal

opinions, offer letters and all other such documents will be superseded and will be irrelevant because the cash will be in place. It is only in a situation where Esat Digifone is awarded the licence and Communicorp does not provide its share of the necessary funds, that there is any situation to be addressed.

"Although Communicorp is confident of its ability to provide funds, we have analysed Telenor's position in the unlikely event that funds are not forthcoming. It seems to us that Telenor has two alternatives, neither of which should cause it any difficulty nor result in its expending any money in excess of that for which it has provided.

"The first alternative is simply for Telenor to inform the Irish Government, with regret, that its Irish partner (Communicorp) did not meet its financial obligations and Telenor has accordingly been obliged to withdraw. In such a situation the Irish Government will, presumably, award the licence to the second ranked applicant and matters would go on from there without the involvement of either Communicorp or Telenor. We do not believe that any blame would or could attach to Telenor in a situation where its Irish partner had defaulted, and we do not think that there is any reason for Telenor to be reluctant to withdraw from the bid in such a situation.

"The second alternative is for Telenor to seek a new partner or partners to replace Communicorp. In this situation, Telenor would already have a long list of potential partners (being all the members of the losing consortia, who would be free to participate by virtue of the award of the second licence to Esat Digifone and who have already demonstrated their desire to invest in the second GSM licence by joining their consortia). Very many of those consortium members both Irish and international have abundant resources and would be able to replace Communicorp immediately and to any extent wished by Telenor.

"In summary, it seems to us that:

"1. You have been provided with assurances by Communicorp and Advent as to the availability of funds, as well as an undertaking by Communicorp to take them up and an indication of the main alternative source (i.e. Credit Suisse First Boston by a placing).

"2. Even if the licence is awarded to Esat Digifone and Communicorp does not provide its funding (the latter being a very unlikely circumstance for the reasons stated in 1 above), Telenor will not be at any loss, nor placed at any material disadvantage; indeed it will benefit from the $\text{€}1/2800,000$ already spent by Communicorp.

"3. Telenor, even in the worst case, will have the

ability to proceed with the project, probably on better terms than those negotiated with Communicorp, because it will be offering participation in a successful consortium.

"Communicorp is satisfied that it has provided adequate assurances to Telenor in respect of its financial obligations, present and future. It has done so by the letters and undertaking already given to you, through its payment of the bulk of expenditure to date, and is evidenced by the efforts and commitment of Mr. O'Brien, its senior management and staff. We feel that continued insistence by Telenor on financial guarantees may have the effect to the detriment of everyone concerned of damaging our joint bid, and we would ask you to accept the letter of comfort which Advent has already provided and the letter of undertaking which Communicorp has given to you in relation to it, and not to seek any further legally binding or other commitment or opinion from Communicorp, or from us, pending the award of the licence. We accept, of course, that if you do not respond favourably to this appeal, it will be necessary for us to meet with you and your clients in an attempt to resolve the impasse, and this we will be very happy to do either in Dublin or in Oslo.

"As a related matter, we are both aware that there are a number of other issues outstanding between

Communicorp and Telenor before the Shareholders Agreement can be signed. The most important of these are additional shareholders (in Clause 5) and transfer of shares (Clauses 13 and 14). Presumably you will also wish to review the draft Articles of Association, which we have provided, and may have comments on them.

It is in the interest of all parties to conclude the Shareholders Agreement as soon as possible, and I suggest these issues be handled as soon as possible either as the major outstanding issues, if you accept our position on the funding question or (if you do not) in conjunction with resolution of the funding question.

"Perhaps when you have reviewed this letter and discussed it with your clients, you would revert to me with a response and perhaps to make arrangements for a meeting between us.

"I look forward to hearing from you."

Now, am I correct, Mr. O'Connell, understanding a number of matters arise in relation to this letter.

First of all, you were informing Telenor that you can't furnish an opinion?

A. Yes.

Q. Secondly, you inform Telenor that you were seeking alternative sources of funding?

A. Yes, I think they had been told that before.

Q. They had been told that before. You are stating it

again?

A. Yes.

Q. Thirdly, you inform Telenor that in the unlikely event of Communicorp not being able to meet their obligations, that it will not put Telenor in any disadvantageous position; they can do one of two things: They can walk away from it or they can attempt to join with somebody from another consortium?

A. Yes, I am making that argument, yes.

Q. But you are also informing Telenor that they had been provided with assurances by Communicorp and Advent as to the availability of funds, isn't that correct?

A. Yes.

Q. Is that correct? Is that statement correct?

A. Yes, I think so.

Q. Well, as of the 17th August, wasn't it the case that Mr. O'Brien had been informed, or through Mr. O'Donoghue, in the first instance, that there were no funds available, isn't that right?

A. Yes, but Mr. O'Brien maintained all along that he had a verbal offer from Massimo Prelz, but that it was on terms so unfavourable that he didn't want to accept it, and he maintained that what Advent were doing with these assessments, as to the absence of any offer, was to try to push him into accepting the offer they had made on the terms they had put forward, and I simply accepted Mr. O'Brien's instructions in that respect.

Q. I see the point you are making. But if Mr. O'Brien had this and you very correctly say a verbal offer, he had no verbal agreement, isn't that right?

A. I think that's correct, yes.

Q. Because if he was able to instruct you as to the nature of the discussion which took place between himself and Mr. Prelz, or himself and Advent, whoever in Advent, you would then have been in a position to form an opinion at least, as to whether it was an enforceable agreement or not?

A. Well, I think if I had been asked indeed I was asked if I was to issue a formal opinion, I would either have had to see the offer in writing or I would have had to have confirmation, probably in writing, from Mr. Prelz. Conceivably Mr. Prelz could have contacted me and confirmed verbally what the situation was and I'd have taken a careful note, but I would not have issued an opinion without being certain beyond the mere acceptance of a client's instructions as to a verbal offer.

Q. Yes. So as far as you were concerned, there was no agreement in respect of which you could furnish an opinion?

A. I think that's fair, yes.

Q. And you very clearly point that out to Telenor, that you are not in a position to furnish an opinion?

A. Yes.

Q. But you do inform Telenor that they have been provided by assurances by Communicorp and Advent as to the availability of funds for the GSM project?

A. Yes, it has that effect, yes.

Q. If you go to page 3 and the summary I think, where you summarise matters?

A. Yes. Yes, I'd have been referring there, I think, to the letter of comfort. I say, "You have been provided with assurances as to the availability of funds."

Q. Yes.

A. And I think Communicorp's offer letter sorry, I misspoke I think Communicorp's comfort letter does do that.

Q. You think that the letter from Advent, that is the offer of 30 million

A. Is an assurance as to the availability of funds, yes.

Q. I'm not going to join issue with you about that at the moment, Mr. O'Connell.

A. Okay.

Q. But might I suggest to you that the effect of this letter was to keep it alive in the minds of Telenor, at least. We know it had gone to the Department, and the way it was received by the Department, that notwithstanding your inability to furnish an opinion, that it was there, that the funds were there?

A. I think there was never any question that the funds were there. It was the degree to which they were

committed that was in question. Advent has abundant funds, had already provided some of them to

Q. Yes, I agree with you. I am not disputing that.

Advent had the funds, there is no doubt about that. I don't think anyone is debating that issue, but Advent were not providing funds for the GSM project?

A. Advent were saying in a letter of comfort that they were willing to do so.

Q. They provided a letter saying, which is very carefully drafted, based on a concluded agreement, that for providing that letter, they would be entitled to subscribe for 5% of the company at par, isn't that right?

A. Yes.

Q. That's all that existed in the agreement?

A. Absolutely. I am talking now about the letter of comfort. When I refer to assurances of funds, I am talking about the letter of comfort.

Q. I see. I see. Very good.

CHAIRMAN: In a sense, Mr. O'Connell, perhaps what you were expecting might be a reaction that would be adopted by Telenor on receipt of that very careful and thorough letter would be a response to the effect that 'If we win the competition, even though we may have legal difficulties about the precise nature of funding,' that it would, nonetheless, be an extremely draconian step to effectively dissolve the partnership

at that stage?

A. Yes, Chairman. The central fact in all of this is, with the best will in the world, Communicorp couldn't provide the guarantee, it simply didn't have the wherewithal to do so. And it grappled continuously throughout this period up to the 28th September, 1995, with that inability. And finally on the 29th September, 1995, it resolved it. But in my view, the period from June to September 1995 was dominated by Communicorp's inability to guarantee a specific amount of funding upon the occurrence of a contingent event, that is the licence award, and Telenor's insistence that it perform its freely undertaken contractual obligation to do so. And that drove, I think, practically all of the correspondence we are reviewing today.

CHAIRMAN: Right.

A. And Chairman, perhaps if I could add, at the risk of being too colloquial on the question; Communicorp and Denis O'Brien were ducking and diving and trying to avoid the essential contradiction in what they had committed to do and couldn't do, and tried periodically to draw others into that, whether that was Advent or whether it was me by way of an opinion. And of course, the people who they tried to draw in were unwilling to be drawn in and thereby to share the problems that Communicorp had. But were always

willing to do what they could within reason to help

Communicorp out of its bind.

Q. MR. COUGHLAN: And I understand you, very correctly, were not in a position to furnish an opinion, and you didn't furnish an opinion?

A. That's correct.

Q. I accept that, Mr. O'Connell. We'll just continue on through this, because you didn't see the, or you may have, but you didn't did you review any portion of the bid document?

A. Not that I can recall.

Q. Right. So as to what went into the Department, was not something that you had any control over?

A. No, I don't think so.

Q. And what the Department was being told was not anything you had control over at that stage?

A. No, I don't think so. It's difficult, I know, at this remove to be positive as to a negative, as it were.

In other words, I couldn't I am conscious, very much so, that I am on oath and to say that I definitely never saw that document, nobody came into my office with a page or a paragraph, I couldn't be that unequivocal, but I certainly wasn't part of the team; I didn't attend meetings on it, I didn't go to drafting sessions, and I'm conscious at this remove, as I say, of having no input to the document whatever.

Q. Yes.

A. And I have no records of having input, which I would probably have kept.

Q. And, in fairness, you were not at the presentations?

A. No, I wasn't. And didn't apart from being told what had been said at it in very scrappy conversations, I never saw I didn't even know there was a transcript of it until it very recently came out at this Tribunal.

Q. And you didn't have any you didn't participate in preparing for the presentation?

A. No, I didn't.

Q. Now, the next document that I want to refer you to is at Divider No. 39, I think. We can skip over the Mr. O'Donoghue to Michael Walsh, that's a different issue. And you received, or Mr. O'Brien received a letter from Mr. Haga. Did you ever receive a response from Mr. Bugge?

A. I don't recall ever receiving one, no.

Q. And we don't see it in the documents, so...

A. No, I think his silence was eloquent though.

Q. And do I take it by that, that what you mean is that there was an acquiescence by reason of the silence?

A. No, the contrary.

Q. You say the contrary?

A. Yes.

Q. Why do you say the contrary?

A. What I mean is that Mr. Bugge did not accept that

Telenor were not entitled to their guarantee. And

Telenor continued to press for their guarantee.

Q. Well, perhaps we'll see that in due course.

A. Yes.

Q. And this is a letter dated the 11th September of 1995,

and it's to Mr. O'Brien from Mr. Haga. And it reads:

"As a financial adviser to Digifone and Telenor Invest AS, I would like to raise some of my concerns related to the content of a letter from Advent International Corporation to Mr. Martin J Brennan, dated 10th July, 1995." This is the letter of comfort?

A. Yes.

Q. "Based on the content in Section 3 in this letter I have drawn the following conclusions:

" Advent has not committed itself to participate as an equity partner.

" Advent's underlying statement is that they regard their position as having an option to participate with a 5% equity stake (without any premium or obligation).

" There has not been made any formal or legal binding agreement between Digifone and Advent (correct me if I am wrong).

"On this basis, I would like to stress that Digifone must not enter into a position where it is obliged to bring in Advent as an equity partner.

"In any case, the terms and conditions for any other equity partner must, based on commercial issues, be

determined between Esat and Telenor.

"Based on this fact, I would like to stress that Advent's letter to Mr. Martin Brennan does not add any value to Digifone. Please take this fact into consideration when you are discussing alternative equity partners."

Now, did you get that?

A. Oh, I think I did, yes, a little later.

Q. So there appears to have been some discussion going on between Mr. O'Brien and Telenor the day before the presentation, isn't that right, on what I might describe as a sensitive issue?

A. Yes, I am not sure whether Mr. O'Brien would have got this letter before the presentation.

Q. I see.

A. But I do think that this letter, combined with events at the presentation the following day, and Telenor's letter of the 15th September, three days later, marked the definitive failure of the Advent strategy, which had been signalled by the crisis of the 4th August.

Q. I want to pass over the IIU stuff now for a moment.

The letter I have is the one dated the 19th September, is that from you to Mr. O'Brien. It's at Divider No. 48. And it relates to Mr. Knut Haga's letter of the 11th?

A. Yes.

Q. And you said: "Dear Denis,

"I refer to Knut Haga's letter to you of the 11th September. While the letter may be of assistance in denying Advent's participation in Esat Digifone (if sent to Advent with an appropriate letter revoking the agreement with them promptly) it also contains some assertions by Telenor which should be challenged.

"I think in particular it should be stated to Telenor in writing that a formal legally binding agreement has been made between Digifone and AIC and a copy has, so far as I am aware, been given to or at least seen by Telenor. On the basis of that agreement, Digifone has already entered into a position where it may be obliged to bring in Advent as an equity partner.

"If you would like me to draft a letter to Mr. Haga and to Advent, I will be happy to do so."

Now, the legally binding agreement you are referring to there was the one dated the 12th July, is that correct?

A. Yes, I think so.

Q. I think we then go on to Divider No. 54, I think. And this is from Denis O'Brien to you, and 1 is, "Draft letter to be received from Telenor.

"2. Document that was circulated to the institutions."

The document circulated to the institutions was the one prepared by Mr. Connolly and someone from Davys, I think?

A. Yes, the business plan kind of document.

Q. The business plan type of letter. What we are concerned with here is the draft letter that should be received from Telenor. If we just look at that.

"Dear Mr. O'Brien,

"We refer to the comfort letter provided by Advent International on July 10. We regret to inform you that having considered the matter at length and taken into account William Fry's representation in their letter of the 17th August, we remain dissatisfied with the comfort letter and require appropriate financial assurances immediately.

"It is also clear from our meeting with the Department of Communications last week, that there is a considerable doubt about the Department having regard to Communicorp's ability to fund 40% of Esat Digifone.

"In order to avoid any uncertainty at this stage, we urge you to take the appropriate action immediately."

Now, do you know who prepared that draft? Because Mr. O'Brien is sending it to you?

A. I think Mr. O'Brien prepared it.

Q. You think Mr. O'Brien prepared that draft?

A. Probably, yes.

Q. And it was being sent to you for your approval?

A. Probably, yes.

Q. Or advice?

A. Yes. It's a reworking of the letter Mr. Haga had

written on the 15th. The main difference I think is in the relative weakness of the financial demand, as opposed to the 15th September letter.

Q. Yes. Now, the second paragraph is something that you wouldn't have known anything about; you weren't at the presentation, isn't that right?

A. Correct.

Q. Do you remember any discussion with Mr. O'Brien about this particular draft?

A. I don't remember, no.

Q. Do you know why Mr. O'Brien wanted to receive such a letter from Telenor?

A. Oh, I don't think he wanted to receive it. I think he wanted to receive it as an alternative to the one he had already received.

Q. Right. Do you know why or

A. I can only speculate why. I think, as I said, it's to do with the relative strength and weakness of the demand for financial commitment in the third paragraph. I think he probably didn't want the 15th September letter on his due diligence side with CSFB, whereas he could live with this one. The 15th September letter, I think I should say at this point, Mr. Coughlan, that I am conscious that in your Opening Statement you referred to a letter from Mr. Haga, in which he said that he expressed a certain amount of confusion about this letter and the

15th September letter, and I have spent quite a lot of time analysing both and analysing the surrounding circumstances and correspondence. I think Mr. Haga is wrong if he has said, and I am not quite certain that he has said because I have only the Opening Statement to go by

Q. Because he hasn't given evidence yet. But we have the information provided by him.

A. I think he is wrong and I should say at this point, in everything that follows I am relying on that I think he is wrong in saying that he wrote the 15th September letter at Denis O'Brien's behest. The reason I think that is, that the letter of the 15th September was completely consistent with everything that had passed between Communicorp and Telenor since the Joint Venture Agreement in June. It was the logical culmination of the crisis in August, and more particularly then, of the continued attempt through August and into September by Telenor to get the financial guarantee; their conclusion on the 11th September that it simply wasn't there, the events at the oral presentation where Denis referred to a commitment having been given by Advent which Telenor having received essentially the same commitment from Advent, or the same letter from Advent, emphatically didn't regard as a commitment, and I think, therefore, that Mr. Haga's letter of the 15th was very much

written in, was very much in the train of thought and logical conclusion of everything which had happened up to that point. And as I have said a few moments ago, it marked the definitive failure, the point of definitive failure of Mr. O'Brien's Advent strategy.

Now, I think the events surrounding the draft letter of the 19th September are related to the CSFB due diligence process, in that the letter of the 15th September was rather harsh as regards financial default, which would have prejudiced the fundraising in the United States. This letter of the 19th is less so. So, my personal belief, and it's only a matter of opinion, is that Denis knew there was no going back as regards the rejection by Telenor of the Advent letter, but at least he wanted that rejection to be couched in terms which were less harsh. And I think when Mr. Haga talks about writing a letter at the behest of Denis O'Brien, it's this letter.

Q. And you think it's this and not the

A. Not the 15th one. In other words, Denis had contacted Mr. Haga and said 'okay' obviously I am speaking metaphorically now said 'okay, you are rejecting all of that, but at least do it in softer terms. Let me suggest something along the following lines to you,' and I think what Mr. Haga remembers is that conversation.

Now, I subsequently prepared yet another draft of that

letter, and my goal in doing that was simply to conform as closely as possible to the wording of condition precedent in the Advent agreement so that there would be minimum difficulty in invoking that condition so as to terminate the agreement. Now, I think as matters transpired neither the 19th nor the 21st September draft were ever sent or received; in other words, the thing proceeded on the basis of the 15th September letter. Whatever difficulties there were with CSFB were overcome. And certainly the 15th September letter was used by me in terminating and in corresponding with Helen Stroud on the termination of the Advent agreement.

So I think the 19th and 21st September drafts, to a considerable degree, are red herrings, and the key letter of the 15th September, which I do think was voluntarily written by Telenor by Mr. Haga as the logical conclusion.

I would also take issue, although you may not want to take this up now, with his assertion that he knew nothing about the Department's unhappiness with Communicorp's financial strength as expressed on the 12th September oral presentation.

Q. Well, they didn't express any unhappiness.

A. Well no, but Arve Johansen said they did and he was

Q. I'll come back to that because I just want to be very careful about what happened at the presentation and

the view of the Department.

A. Okay.

Q. I'll come back to the letter of the 15th and this particular letter, because there can be little doubt about this draft, and I know you say it's probably a red herring, that it was probably never sent or never used at all?

A. Yes.

Q. But what it is is, I don't want to use the expression "setting up", it is establishing formally a position to enable repudiation of the agreement of the 12th July, isn't that right?

A. No, I don't think so, Mr. Coughlan. I think the letter of the 15th September had already done that.

Q. Yes, I appreciate that, but this is what this letter was intended for as well; that they still remain unhappy, they won't accept it?

A. Well, I think Telenor had already said that, but yes, this letter says it as well. Or this draft says it as well.

Q. That's right. Do you know what the second paragraph is about at all? Or I don't know why it's in there really.

A. Because it was in the 15th letter.

Q. I see.

A. Denis didn't, I think I stress I am speculating Denis needed, I think, to change the

15th September letter for CSFB purposes, not so he was prepared to leave whatever was in the 15th September letter there. He didn't want Knut Haga to find it too difficult to rewrite his letter, in effect, so he left as much of it in as he could.

Q. I'll just maybe we are talking sorry, the letter of the Mr. Haga's letter of the 11th is the one we are talking about?

A. No, the 15th.

Q. Mr. Haga's letter of the 15th.

A. Certainly the 15th followed logically the letter of the 11th.

Q. Could you just sorry, so that I am not confused now, could you just tell me which divider

A. I don't have it here. I have it somewhere else.

Q. you are referring to there?

A. If you'll just bear with me.

Q. Maybe I just don't have the document here with me.

A. I would add, by the way, Mr. Coughlan, that the letter, I think the letter of the the draft of the 19th was sent to Mr. O'Brien by Mr. Simonsen.

Q. By whom?

A. Mr. Simonsen.

Q. Mr. Simonsen?

A. Yeah. There is a fax sheet from him. Sorry, I am still looking for the letter of the 15th September.

Q. Yes, all right. Maybe we are just getting our dates

wrong, are we?

A. No, I am quite certain it is the letter of the 15th.

Q. Very well. You see, your own letter of the 19th refers to Mr. Haga's letter of the 11th?

A. Yes, it does.

Q. Which is the one we were talking about. Is that the one?

A. No. There is a letter of the 15th from Knut Haga, a signed letter, whereas the one on the 19th isn't signed, in which he says essentially this, but he is harsher on the financial.

Q. I wonder could I trouble you to have a look at that. I am just slightly confused myself. I don't seem to have it in my book.

A. I don't have it, I am looking for it.

Q. Did you say it's a side letter or a signed letter?

A. A signed letter. I am just wondering if any of my colleagues can put their hands on it?

Q. Very good. We'll come back to it.

A. I am sorry, I don't have it, Mr. Coughlan. I'll try to have it this afternoon.

Q. I'll look as well, because I am sure it must be amongst the documents, but I am

A. Oh, it is.

Q. So, apart from the letter of the 11th, you believe that Mr. Haga furnished sorry, as you can see, the document we have of the 11th is unsigned, and

A. Yes.

Q. it's in draft form?

A. Yes.

Q. The letter of the 15th is the same letter but signed?

A. No.

Q. No?

A. No, it's a letter very similar to the draft of the 19th, but in harsher terms as regards Communicorp's finances, and it's signed by Mr. Haga.

Q. I see.

A. Now, my point really is that Mr. Haga wrote the letter, I believe, the letter of the 15th following firstly, the logic of the 11th, and secondly, events at the oral presentation on the 12th.

Q. Right.

A. Denis O'Brien came back to him, having got it, having got the letter of the 15th, and said, 'Look, I accept what you're saying, I accept what you have to say, can you just say it in slightly softer terms as regards Communicorp's finances.' And that's the draft of the 19th.

Q. Right.

A. But there is a signed letter of the 15th from Mr. Haga.

Q. Very good. And I'd be keen to have it.

A. Okay. And I think the date has great significance too.

Q. Very good. The 15th being the day that Mr. O'Brien, I think, had a meeting with Mr. Michael Walsh, did he, on that day?

A. No, he had a meeting maybe he did.

Q. Anyway, we can come back to that. We have it now, and I'll tell you where it is.

A. Okay.

Q. If you go to Divider 61.

A. Yes, that's it.

Q. And this is Mr. O'Brien writing to Mr. Prelz on the 26th, isn't that right, 26th September, 1995?

A. Yes.

Q. And he attaches the letter from Telenor, that's the one dated the 15th?

A. Yes.

Q. And he says that: "Regardless of Telenor's position, it is now clear that we will not be awarded the GSM licence with the existing financial arrangements. We need something much stronger to have any chance of success. I am working on another avenue which could provide us with the answer, at the same time significantly strengthen our bid in other respects. I will explain in further detail when we meet."

If we go over then, this is the letter you were referring to, isn't that right?

A. Yes.

Q. It reads: "Dear Mr. O'Brien,

"We refer to the letter of comfort written by Advent Corporation in respect of funding by you of your proposed equity participation in Esat Digifone Limited.

"We regret to inform that you we are not satisfied with the above mentioned letter. Our concern was further strengthened by our meeting with the Department this week. On this basis we consider the letter as having no significant value to Telenor or Esat Digifone.

"It is vital to our further cooperation that Communicorp Group immediately can provide another letter or agreement giving appropriate financial assurances in a form more acceptable to Telenor.

"We look forward to your instant response."

That's the letter, is it?

A. Yes, it is.

Q. Now, what is the particularly harsh paragraph in that letter that you referred to?

A. I think "being vital to further cooperation that it can provide another letter or agreement giving appropriate financial assurance..." I am speculating that that was the reason that he was unhappy with it.

Q. Now, that is the letter that Mr. Haga says was prepared for him, I think, to sign?

A. Yes, and I think it was actually the one of the 19th that was prepared for him.

Q. Well, the one of the 19th, as you say, is a draft and perhaps a red herring. It doesn't appear to have been used at all?

A. No, it doesn't.

Q. And this is the only one that was used to formally terminate or to put Advent on notice that the agreement couldn't be fulfilled, isn't that right?

A. Yes, because I believe it to have been the one that he signed and sent, whereas that wasn't the case with the one of the 19th.

Q. And that was sent by Mr. O'Brien on the 26th September, 1995?

A. It was copied to Mr. Prelz on that date, yes, but presumably it was sent by Mr. Haga on the 15th.

Q. I see. Well, we'll have to hear Mr. Haga and Mr. O'Brien about we know Mr. Haga has indicated in a Memorandum of Intended Evidence, and you have correctly referred to that, I think?

A. Yes, indeed. And I have said that I think it was the 19th he may have been referring to, the draft of the 19th.

Q. Right.

A. And Mr. Simonsen's fax cover sheet would give weight to that, I think.

Q. Right. And you're speculating that that final paragraph would have presented, or there was a potential for difficulty with CSFB carrying out a due

diligence?

A. Yes, but it is speculation. I haven't been able to get clear in my mind why the draft of the 19th was better than the letter of the 15th. That's speculation. Another may be that the letter of the 19th is marginally closer to the wording of the condition precedent in the Advent letter.

Q. Right.

A. But it is clear that there was a letter sent, signed and sent on the 15th, and a draft letter came back prepared by Denis O'Brien on the 19th, which never seems to have been signed, although Per Simonsen seems to have sent it to Denis as a draft on the 21st. The events surrounding it are quite confusing.

Q. Yes.

A. I do think, though I think it likely, based on all of the circumstances, that the letter which Mr. Haga recalls preparing at Mr. O'Brien's behest was the draft of the 19th.

Q. I am just trying to take all of that on board now. So, it's your belief that the letter of the 15th, dated the 15th September, with Mr. Haga's signature on it, was as a result of, first of all, the letter of the 11th, from what we have seen, is that right?

A. I think it was as a result of everything that had gone before but, in particular, the letter of the 11th and the events of the 12th.

Q. I am just wondering why, at that particular time, after the presentation, and we have listened to the tapes of the presentation and we have seen the bid documents, and I appreciate you were not privy to that information at the time

A. Yes.

Q. why Telenor would be, in effect, pulling the plug?

A. Yes, absolutely, that's what Telenor were doing.

Because well, again, this is my reconstruction of events. Telenor had been plugging away at the guarantee, at Communicorp's financial weakness for months and months. They, not unfairly, I suspect, would have regarded Communicorp's failure to provide the guarantee as a breach of faith as well as a breach of agreement. They had, after all, committed to it in June, and in a phrase I used earlier, had "ducked and dived" ever since trying not to give it.

Q. Yes.

A. They had given all kinds of justifications for not doing it; they clearly couldn't do it. On the 11th, I think Telenor lost patience and said, 'As far as we are concerned, what you have offered us in replacement for the guarantee isn't of any use and you are not to give away any shares in Digifone for it.' I think the straw that broke the camel's back was that Denis went into the oral presentation and in Telenor's presence, and with their implicit backing by virtue of their

presence at the oral presentation, told the Department that he had a commitment from Advent. Telenor, having been in receipt of essentially the same letter, emphatically did not regard that letter as a commitment. And I think their patience snapped, they felt they had been roped into I am putting words in their mouths I think they felt they had been roped into a statement to the Government with which they weren't happy. And on the 15th, they brought down the boom. As you say, they pulled the plug. They said, 'This is it.' And it was that event I mean, it had been signalled, in fairness, by the events of early August, immediately prior to the bid going in. Telenor had pounded and pounded away, had eventually backed down, but had come back again through mid-August, Mr. Bugge's letter and so forth, they had come back at the guarantee issue; it had not gone away. And finally, as I say, the events of the 12th were probably the straw that broke the camel's back as far as Telenor were concerned, and they wrote this letter of the 15th.

Q. You think as a result of being concerned about what had been stated?

A. I think as a result of demanding their guarantee over and over again and failing to get it, and finally, as a result of what occurred at the 12th. I am not saying the 12th was the single event. I am saying it

was the sequence of events over months, up to that point. That's why Telenor wrote this letter, I think.

Q. I see.

A. So Denis had to come up with a commitment at this point, he simply had to. So he did.

Q. Now, I know it's sometime since these events, and you are putting forward a proposition, at least, or an explanation?

A. Yes.

Q. Do you have recall of this type of tension between Telenor and Denis O'Brien around this time?

A. Absolutely. Not just around this time, all the time.

Q. There was always tension?

A. Yes.

Q. But do you remember specifically that there was annoyance about what had happened at the presentation?

A. I can't say that I do, no.

Q. Correct me if I am wrong in my understanding of your view, but this letter seems to have arisen, in your view at least, on a question of trust on the part of Telenor, that is?

A. Trust would logically trust was a lot of it, but breach of contract was more of it, the position with the Government was more again. Simple money was I mean money is at the bottom of all of this. Telenor were looking at a situation in which they were with a partner, an equal partner of vastly lesser financial

strength, and presumably they were looking at a situation, as in fact occurred, where they would have to go on the line for that partner. Now, as matters also transpired, they never actually had to pay out any money sorry, I beg your pardon, they did by way of a loan, but they got it back, but they were certainly looking at a position in which they were going to have to fund or give assurance of funding, directly or indirectly, for this partner for what was really an indeterminate commitment, because everyone knew if they didn't know how much, they knew that the roll-out was going to be very expensive.

Q. I am just and you practice in the area of commercial law, Mr. O'Connell?

A. Yes.

Q. And that would I not be correct in thinking that in those circumstances, Telenor, in fact, would be in a very strong position in dealing with the other shareholder in the company in terms of, if they provided funds, whether it was by way of loan or increased equity for them?

A. Yes

Q. I am just wondering why they would take the step of pulling the plug? That's...

A. Well, I think they took the step because it may be that, in your words, they didn't trust Denis any more.

It may be they stayed on because they were, well Denis

did provide the commitment shortly afterwards, but they may also have felt they were in for a penny and the presentation had been made, the bid submitted and they may as well stay and see how it panned out. I am completely off the reservation now, Mr. Coughlan.

Q. Yes.

A. They may have wanted it on record that they made this final very strong protest, perhaps on record for the Government in the event that the events at the oral presentation came under scrutiny. They may have wanted it for their bosses in Norway. I should say, without wanting to be critical of them, merely that Telenor were a very they were very much a semi-State type company. There was a great deal of accountability within the company. Always a great deal of concern with propriety and proper record-keeping and proper behaviour in all respects, and I suspect they would have wanted this sort of letter on record, but again, it's only supposition on my part.

Q. That's interesting. I wonder would we break for lunch there, Sir.

CHAIRMAN: We are just coming to, I think, the series of letters that maybe ended the Advent and the Davys connection and Mr. O'Callaghan's meeting, and so it's probably a suitable time. Five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH

THE HEARING RESUMED AFTER LUNCH AS FOLLOWS:

CONTINUATION OF EXAMINATION OF MR. OWEN O'CONNELL BY
MR. COUGHLAN:

Q. MR. COUGHLAN: I think just for a moment,
Mr. O'Connell, if you would look at Tab No. 68; this
is Mr. Johansen's letter of the 2nd October. I don't
want to go through all of the matters in detail in it
because they do make some reference to what happened
as a result of IIU entering the picture. But just,
it is addressed to Mr. O'Brien and it reads:

"Dear Denis,

"Referring to our meeting on Friday last and our
following phone conversations, and my conversation
with John O'Callaghan, I will take this opportunity to
elaborate on Telenor's view on our equity
participation in Esat Digifone Limited.

"Telenor was invited to participate on an equal term
basis (as stated in our Joint Venture Agreement) and
all work has been carried out on this basis. Our
draft Shareholders Agreement clearly lines out how a
pro rata reduction of ownership will take place down
to 34% ownership each.

"Telenor has put substantial financial and human
resources, including some of our best mobile expertise
in preparing the bid, as well as conducting the
necessary follow-up work. Site work has explicitly
been kept apart from our cooperation as stated in the

said Joint Venture Agreement. All other bid costs were to be split on an equal basis (including a possible trade-off between advertising costs and Telenor mobile staff costs).

"At an early stage of our collaboration we made our concern clear regarding Communicorp's ability to fund Esat Digifone. After considerable pressure, Advent's comfort letter and your own acceptance letter was presented to us and the Ministry, even though the contents of these letters was not very satisfactory, we decided to submit the bid due to the time constraints.

"As it was quite clear from our meeting with the Ministry, that both the lack of commitment from the institutions, as well as the uncertainty in the Advent/Communicorp relationship created a lack of confidence in the Irish side of the consortium's capacity to raise the necessary funding.

"In order to reassure the Ministry, and give an even stronger signal to the Irish community in general, we are pleased with the plan to have another solid Irish underwriter.

"Apparently this requires us to accept a dilution of about 5% in total. For Telenor, it is definitely very hard to give up ownership stake at all on the basis of supporting Communicorp's and the Irish institutions' capabilities to raise the necessary

funding. But on the basis of the Joint Venture Agreement and draft Shareholders Agreement we feel obliged and accept a pro rata dilution to 37.5% and further to any further dilution, would be in conflict with the principles of our participation and the board resolution of Telenor Invest AS.

"Having said this, we still believe in the compatibility in our partnership. We sincerely appreciate the efforts that you have put in both the actual groundwork on sites, distribution and bid work as well as the tremendous effort in PR and lobbying. However we believe that Telenor Invest's substantial efforts, mobile operating experience and reputation is of equally vital part for both for winning the licence and establishing the network within the promised timeframe."

And then it continues that they look forward to letters.

If you see there, and it is a point you referred to yourself, of course, but Mr. Johansen says in the in the fourth paragraph on the first page, "At an early stage of our collaboration we made our concern clear regarding Communicorp's ability to fund Esat Digifone. After considerable pressure, Advent's comfort letter and your own acceptance letter was presented to us and the Ministry. Even though the contents of these letters were not satisfactory we decided to submit the

bid due to the time constraints."

Now, first of all, you didn't draft this letter, did you?

A. No.

Q. And Mr. Johansen, I think, will express a view about some of the paragraphs in this letter, that they may have been introduced as a result of a suggestion by Mr. O'Brien, but that is not your concern?

A. I see.

Q. I wonder can you give us any assistance, give any assistance to the Tribunal about do you know what pressure Mr. Johansen could be referring to there about adverse comfort letter and your own acceptance, your own acceptance letter was presented to Telenor and the Ministry, do you know what pressure?

A. It was certainly my understanding that Telenor were pressing Communicorp to provide the guarantee referred to in the Joint Venture Agreement throughout their relationship.

Q. But at this time around the time of the bid, Mr. Johansen is making reference to pressure. Like, if we could just pause and recap for a moment, there was the Joint Venture Agreement; there was the agreement entered into with Advent of the 12th July whereby Advent were to provide the comfort letter to the Department and a comfort letter acceptable to Telenor, isn't that right?

A. Yes.

Q. And they were to get an entitlement to subscribe for 5% of the share of the company?

A. Yes.

Q. That wasn't acceptable to Telenor at that stage?

A. No.

Q. And there was no agreement that Telenor could see whereby Communicorp could obtain the money to fund their end of the project?

A. Could secure a commitment to it, an advance commitment, yes.

Q. And that is the basis on which the bid was submitted and everyone knew that?

A. Yes, yes.

Q. By "everyone" I mean Communicorp and Telenor?

A. Yes.

Q. Now, to allow that happen, something must have happened, and Mr. Johansen is referring to some pressure. Was that what you described as there was a lot of heated debate around this time when the bid was submitted?

A. My reading of that sentence was that the pressure was coming from Telenor.

Q. I see.

A. Meaning that after considerable pressure from Telenor, Advent's comfort letter and your own acceptance letter were presented to us in the Ministry; that Telenor had

been pressing from June to get the promised guarantee.

Q. Which they didn't get?

A. Correct.

Q. And is it your reading there that it was pressure from Telenor that caused the comfort letter and the Letter of Acceptance to be submitted to the Ministry with the bid?

A. No, I think it was that Telenor were pressing for their guarantee and what they got was the comfort letter. It may also be that when he was talking about pressure, he was talking about the pressure put on immediately before and up to the 4th August

Q. Yes.

A. when Knut Haga wrote threatening an end to the project and Amund Bugge told me he'd recommend that his clients pull out.

Q. Nevertheless, it went in the unsatisfactory form described here?

A. Yes, I think IIU were put in I beg your pardon, not IIU, but Telenor were put in the position that if they let the bid go in on the 4th August, they could continue to press for the guarantee as indeed they did. But if they didn't let it go in on the 4th August, that was the end of that, because the

Q. They weren't in?

A. There was a clear timescale, they couldn't get the guarantee, for example, a week later and go back to

the Government and say 'we are ready now'. There was a timetable and they had to meet it. So I think rather than, rather than drop the whole thing, they allowed the bid to go in but they didn't, as I think Denis O'Brien hoped they would, drop the issue of the guarantee. They kept on looking for it.

Q. I get your point. And I think, No.70, Tab No. 70, then, is the letter of communication from Mr. O'Brien to Mr. Massimo Prez of Advent International. And it states:

"Dear Massimo,

"As I explained to you at our meeting yesterday and telephone conversation last week, your letter to Telenor and the Irish authorities did not satisfy them.

"You know of my commitment to secure the second GSM Licence and the crucial importance of meeting the conditions in relation to our financial standing. This is why it is necessary to make alternative arrangements."

Do you know who prepared that?

A. No, I don't.

Q. It wasn't prepared by you?

A. I don't think so, no.

Q. Because whatever about Telenor, there was no communication from the Irish authorities, was there, that the letter didn't satisfy them?

A. No.

Q. Now, on the same date there is the, it is a formal document really, isn't it? That is at the next tab,

71. It is addressed to Advent, their head office, I presume?

A. Yes.

Q. "Dear sirs,

"We refer to the agreement of the 12th July, 1995

between Advent International Corporation, Communicorp

Group Limited, and Denis O'Brien. We enclose a copy

of a letter which we have received from Telenor Invest

AS. It is evident that the condition specified in

Clause 4.2 of the agreement (which is not capable of

waiver by you) has not been fulfilled and accordingly

that your rights pursuant to Clauses 2 and 3 have not

arisen and will not arise. We would accordingly be

obliged if you would take this letter as notice of

termination of the agreement."

"Yours faithfully,

Denis O'Brien."

And I think that is sent to the, it must be the letter

of the 15th?

A. Yes, I think so.

Q. And I think we have to go to the next book now because

I don't want to I just want to continue on with

this.

Really what I am doing is dealing with the Baker

McKenzie correspondence, Mr. O'Connell.

And at Tab 81 there is a letter from Baker McKenzie to Mr. O'Brien, isn't that right?

A. Yes.

Q. "Dear sirs,

"We refer to our your letter of the 3rd October 1995 addressed to our client, Advent International Corporation, regarding the agreement between you dated the 12th July, 1995.

"We are surprised to note that in your letter you state the provisions of Clause 2 of the agreement to be 'subject to the condition specified in Clause 4.2 of the agreement'. Clause 4.2 is only of relevance to Clause 3, i.e. the right to participate in the Digifone funding. Our client's rights under Clause 2 were in consideration of the issue of the comfort letters and are entirely independent of Telenor's satisfaction with those comfort letters.

"We now understand that the GSM Licence has been issued to Digifone and we therefore require your immediate confirmation that within 7 days of that issue date, Digifone will issue 5% of its shares to the Advent funds nominated by our client in accordance with Clause 2.1.

"Please note in any event, our clients do not regard Communicorp as having complied with its obligation under Clause 4.2 to use all reasonable endeavours to

ensure Telenor's satisfaction with the comfort letter.

As you know, Telenor had contacted us at the end of June with some queries on the legal standing and financial worth of Advent, which were fully answered on the 13th June, 1995. At no time since that date, have we or our clients been requested for any further information and only on 26th September were we notified that Telenor (by letter of the 15th September) had indicated any dissatisfaction with the terms of the comfort letter. Advent was at all times ready to discuss strengthening the wording and/or rephrasing the letter to satisfy Telenor's concerns but were not given that opportunity. We therefore regard Communicorp as being in breach of its obligation under Clause 4.2 of the Agreement.

"We therefore look forward to your confirmation by return that the Digifone shares will be issued and that our clients will be given a right to participate in the Digifone funding."

So we now had a situation where on receipt of this letter the potential for a major dispute existed, isn't that right, between Advent and Communicorp?

A. Perhaps.

Q. Because we had the situation evolve from the position where Baker McKenzie asked the question what form should the comfort letter be in? And if it needed any strengthening, that they would do their best to comply

with that, isn't that right, originally?

A. That's what they are saying here.

Q. Yes. But isn't that what they had said originally, when Helen Stroud sent the letter originally, I think

A. They may have said very early on but when they were actually asked, they didn't do it.

Q. Well, that is the period when Mr. O'Donoghue was sending the letter to them, isn't that right?

A. Two letters, I think.

Q. Two letters. One was asking that it would remain open for 60 days after the Ministry had awarded the licence, the offer would remain open?

A. Yes, there is a letter from Mr. O'Donoghue on the 3rd, another on the 4th, both contending amended draft letters of comfort, and neither were given. So I felt that, or I feel as a result that Baker McKenzie's reference to their clients never having been given the opportunity to amend the letters was quite wrong.

Q. What they were saying was that what they are saying in this letter, you didn't use your best efforts to get the letter accepted by Telenor, isn't that right, or

A. Yes. But I wouldn't agree with that.

Q. Of course, and then, at 83 we have already opened this particular facsimile from Mr. Peter O'Donoghue sent you whatever information he had, we already

mentioned this, isn't that right?

A. Yes.

Q. Then I think you respond, at Tab No. 85, and again you are responding to their correspondence, you joining issue with them. You are disputing that matter with them. I don't think we need open it in any great detail, Mr. O'Connell, unless there is a particular point you want to make reference to?

A. No, I don't think so.

Q. So there continued to be an exchange of correspondence, isn't that right, in November and December of that year? Baker McKenzie contending for Communicorp and Mr. O'Brien being in breach and you disputing that point and asserting that they were the ones who hadn't complied with the condition, isn't that right?

A. Yes.

Q. Now, ultimately if you go to. I think it is Tab 101

A. Yes.

Q. Matters were resolved, isn't that right, between

A. Yes.

Q. Do you know anything about the negotiations which led to the drawing up of this particular document?

A. I know a certain amount. I wasn't involved

Q. Yes?

A. directly. I think most of the negotiations were

conducted by Mr. O'Toole. I think he was, I think it was he that eventually reached, concluded the agreement with Mr. Prelz. I am sure I would have been aware broadly that there were negotiations underway and I would have, Mr. O'Toole would probably have checked with me on some legal points or perhaps phrasing. I don't have specific recollection of this but it is likely. But I wasn't, I wasn't involved in detail. I think this memorandum of understanding subsequently, as would be the norm, was converted to a series of full-blown legal agreements

Q. Yes.

A. and my firm rather than myself I think were involved in doing that.

Q. Yes. Would I be correct in understanding that, broadly speaking, what occurred was that the radio business was hived off into Communicorp itself, is that right?

A. It remained Communicorp.

Q. It remained Communicorp. The telephone business was taken out of Communicorp?

A. Yes, and put into Esat Telecommunications Holdings.

Q. Into Esat Telecommunications Holdings. Advent relinquished their interest in the radio business and Communicorp, I think, isn't that right?

A. Yes.

Q. And they got an increased shareholding?

A. I think about an extra 3%.

Q. An extra 3% in Esat Telecoms Holdings Limited?

A. I think that is broadly right.

Q. That is really what the agreements were about at that stage?

A. There was some other financial arrangements concerning existing and future loans and I think Mr. O'Brien's loans and things like that but the essence of it was that, yes.

Q. Was that. And that took Advent out of the picture, except that they were

A. Except for the shareholder.

Q. Esat Telecoms Holdings Limited?

A. Yes, it took them out of the direct Digifone picture.

Q. It took them out of the direct Digifone picture.

CHAIRMAN: Did it ever seem, Mr. O'Connell, when the controversy was going on in earlier months, and as you summarised it on Friday, you said the essence of the stance taken by Telenor is that they were looking for a guarantee, whereas what was being discussed between Advent and your clients was perhaps a possible upgrading of a letter of comfort, and whilst you stress that this could have considerable persuasive powers, especially if an EU Government and sizable other parties were involved, it still wasn't enforceable; did it ever come to any proximity to resolving or were they really two ends that just would

not meet?

A. I think the two parties between whom Communicorp was caught both had a very clear understanding of the line which was there to be crossed. Telenor wanted clearly a legally binding and enforceable commitment and Advent clearly wouldn't, wasn't prepared to give one, so, as would quite often be the case, it is certainly a situation as a lawyer I am familiar with, each party is willing to inch ever closer to the line of legal liability, but Telenor were not willing to stop short of it and Advent were not willing to cross it

CHAIRMAN: Yes.

A. And I think, Chairman, everyone knew perfectly well what it was that they were talking about in that respect.

Q. MR. COUGHLAN: I think we will return, now, so, to Book 48, Mr. O'Connell.

If you go to Tab 40. I beg your pardon, it is Tab 42;

I think this is an attendance of yours, isn't that right?

A. Yes.

Q. And Mr. O'Brien and Mr. Leslie Buckley, I think, at your office?

A. Yes.

Q. On the, I think it is the 18th September?

A. Yes, the 18th.

Q. That was the, that was a Monday?

A. Yes.

Q. And the note reads: "Denis O'Brien and Leslie Buckley.

"Dermot Desmond going ahead with financing transaction. Need underwriting letter for Department because finances are seen as the weakness.

"DD wants 30% of GSM. AIB, Standard + IBI to be excluded."

Then under that: "30 DD, 5 Advent International.

32.5 Esat, 32.5 Telenor."

Was this the first occasion that you became aware of Mr. Desmond?

A. It is the first time I have a note of my being aware of it. I except from the phrase "going ahead" that I may have been told about it beforehand, but I can't be sure.

Q. Yes. And what did you do, do you think?

A. Oh, I don't recall. Perhaps just that they were in discussion, but I don't really know, I can't remember.

Q. Do you know why Mr. Buckley was there that day?

A. No, I don't. It could well have been that there was some other discussion concerning the fixed line business. Mr. Buckley hasn't figured a great deal in this but actually I would have seen a lot of him at this time because on the fixed line side there was a great deal going on as well.

Q. Yes. Now, in any event, you're being told that Dermot

Desmond is going ahead with the financing transaction,
isn't that right?

A. Yes.

Q. And then "need underwriting letter for Department."

A. Yes.

Q. What does that mean? Who needed the underwriting
letter?

A. That Mr. O'Brien and Mr. Buckley needed me to draft a
letter, would be my understanding of that.

Q. For the Department?

A. Yes. To be shown to the Department or given to the
Department, I think.

Q. Well, were you told that the Department needed an
underwriting letter?

A. No. As I read this, that is Mr. O'Brien and
Mr. Buckley needed me to draft one.

Q. But for the Department?

A. Yes.

Q. Nothing to do with the guarantee for Telenor?

A. No, that isn't mentioned.

Q. Can you throw any further light as to why an
underwriting letter was needed for the Department?

After all, the bid was in.

A. I think because they felt that the, that Communicorp
was perceived as weak financially and that would
prejudice the bid.

Q. Can you remember making any inquiry?

A. No. And I wouldn't have done. I would accept my client's instructions in these matters, I wouldn't second-guess them.

Q. Well, I wouldn't necessarily ask you if you were second-guessing your client, but might you have said 'what is this about? What type of underwriting letter is required here?'

A. Oh yes, I would certainly I mean, this would be the barest minimum of a note. There would have been a lot more, I am sure. I would have needed to know quite a lot about what they needed in the document before I could draft it, absolutely, yes absolutely. Although I think I ended up sending out a fairly standard form of underwriting letter or agreement in fact initially.

Q. Well, did you have any discussion as to whether one could do anything once the bid was in?

A. No. Not that I can recall.

Q. Right. You are being told here that Mr. Desmond wants 30% of GSM, isn't that right?

A. Yes.

Q. And you are being told that AIB, Standard, IBI to be excluded?

A. Yes.

Q. At that stage Advent were not necessarily out of the picture as regards the 5%?

A. Presumably not.

Q. No. Because that is noted there, isn't that right?

A. Yes.

Q. So notwithstanding the view and the opinion that you might express and had expressed previously that they hadn't complied with the condition, there was the potential for a dispute at least?

A. There was, and it was, I think it was clear there was going to be one, yes.

Q. Yes. So it was clear that it was Mr. Desmond who was coming into the picture?

A. Yes.

Q. Now, I think you then, if you go to the next tab, Tab No. 43, I think this is you received this draft, did you?

A. I think I received it from Michael Walsh.

Q. And this is the letter to Kyran McLaughlin of Davys?

A. Yes. Sorry, the more I thought about it, the more I am not really clear why Michael Walsh would have drafted these and I am not certain that he did. I know I have said that I thought he did, and I do think so, that is my broad recollection but it is not entirely clear why he would have done so.

Q. Mm-hmm. But the handwriting; whose is that?

A. I don't know, I am afraid. Not mine.

Q. I am just wondering is it Mr. O'Brien's by any chance?

A. It could be.

Q. Or it could be somebody else in your office as well?

I think in fairness what you said was it could be

somebody else in your office or it could be Denis

O'Brien's?

A. Yes, it could be either.

Q. Yes.

"I refer to our previous discussion in relation to the funding of the above. Unfortunately, the letters provided by the institutions did not provide the certainty necessary on the availability of sufficient equity finance to the consortium.

"Accordingly, I have arranged firm underwriting through IJU Limited for $\text{€}1\frac{1}{2}$ 30 million of equity finance, being the 60% of the consortium not held by Telenor.

"I want to thank you for your help in the above matter."

Now, you didn't draft this?

A. No, I don't think so.

Q. And what you had been told at your meeting on the 18th was just simply AIB, Standard and IBI to be excluded?

A. Yes.

Q. And you had never been informed that the Department had expressed any dissatisfaction with the letters received from AIB, Standard or IBI?

A. I think I was generally aware at this time or had been told at this time, in conversation, that Communicorp's perceived financial weakness was a problem.

Q. Yes.

A. And implicit in that would have been that it was a

problem for those making the decision, that is the Project Team or if you like the Department, but it was never formally said to me in correspondence, at least that I have been able to locate.

Q. Yes.

A. But I certainly would have had a feeling, and I think there was general discussion in the city but it is too long ago now, that where were Communicorp going with this? That this was going to be a colossally expensive project, how could they fund it?

Q. Yes, let's put Communicorp to one side for the moment.

Was there discussion that the Department or anybody in the Department had indicated that there was a difficulty with IIB, Standard or AIB?

A. No, I don't think so.

Q. They were just going to be excluded because they had to be for what was going to take place, isn't that right?

A. Yes, but remember they hadn't given binding letters, nor would they conceivably have done so.

Q. Sure I know that. I know that. They were never asked for anything else either at that stage?

A. I don't think anyone would have wasted their breath.

Q. Well, we will deal with Mr. McLaughlin's letter to Mr. O'Brien in due course, when Mr. O'Brien comes to give evidence, of course.

A. Yes.

Q. Now, the next letter seems to be another version of a letter to be sent to Mr. McLaughlin, isn't that right?

A. Yes.

Q. Neither of these were sent anyway, as far as I know.

A. I don't know, I am afraid.

Q. Well, we know from the evidence, sorry from a memorandum furnished by Mr. Callaghan, that in fact he went to Mr. McLaughlin's office, I think on the 29th, and that is when the communication took place?

A. I see.

Q. As far as I know, the letters weren't sent. Now, if you go to the next tab, Tab 44.

This is the draft of the letter for the Department, isn't that right?

A. Yes.

Q. And, again, there is handwritten notes on it. Did you prepare this or was it prepared by Michael Walsh?

A. I suspect the typed version of the letter was probably prepared by Michael Walsh, and I say so because he signs himself 'Professor Michael Walsh'.

Q. Yes.

A. But the handwritten notes aren't mine. I think we

Q. They could be in that category of somebody in your office or Mr. O'Brien?

A. Yes, they could be. I think I said as well that I thought the word "Digifone" in the heading was mine.

Q. Of course, that was you.

And then the next document is a letter or a draft to be sent to Mr. O'Brien, and again it is to be sent by Michael Walsh. And we have opened this already. What he is doing is setting out terms in that, isn't that right, as he understood in the agreement?

A. Yes. I think this is as much by way of negotiation as anything else.

Q. Now, up to this time had you been aware that Mr. Desmond was in, up to the 18th?

A. Was in? In the Esat Digifone Consortium?

Q. In the consortium, resulting in an agreement which was consummated on the 29th. Mr. Desmond, in fairness to him, has given evidence to this Tribunal, where he has said that as far as he was concerned he did have discussions with Mr. O'Brien, I think around the 10th August or the 8th of August, sometime around that time, when they went to see Glasgow Celtic play?

A. Yes.

Q. And as far as he was concerned, he was in from then but that the actual agreement was consummated on the 29th; it was working towards that?

A. As I said a few moments ago, I think I may have been aware before the 18th that there was some question of an arrangement with Mr. Desmond and I inferred that primarily from the "going ahead" phrase of my note of that date. Whether there was any agreement, as such, with Mr. Desmond, I certainly wouldn't have been

aware, and even today I would question whether that was the case.

Q. Probably putting 'agreement' is too strong

A. Yes.

Q. a word to be used, but that in his own mind he felt he was in from August and this was just the agreement was formally entered into on the 29th or thereabouts?

A. I think I would have had the impression that as of the 18th, a commercial deal in principle had been done.

Q. Yes, okay. So you would at least date it, say, from the 18th, that in principle there was a commercial deal?

A. And we were now working out the detail of it. Although, in fact the detail, it changed rather more than in just the detail because there was quite significant changes in the deal.

Q. It became 25%, that was the most significant one?

A. And the fee issue went away, which was quite a lot for Communicorp at the time; it was a six figure fee.

Q. Yes. Now, on the 18th, when Mr. Buckley and Mr. O'Brien came to see you and told you that Mr. Desmond was going ahead with the financing transaction, did Mr. O'Brien tell you that he had met the Minister the previous day?

A. I don't recall him doing so and I probably would have noted it if he had.

Q. Right. Now, if we go to Tab 46, you see this is

Mr. O'Brien responding to Mr. Walsh's understanding of the deal, isn't that right? And again there is no need to go into it in any great detail at the moment.

He says: "Thank you for your letter this morning. I have reviewed its contents both commercially and legally. As a result I have had Owen O'Connell prepare the enclosed draft of this document.

"The following points are relevant:

"1. We did not agree any underwriting fee your 'reward' for underwriting is participation in Esat Digifone Limited.

"2. The level of participation I can give you is limited to 20%. Third party constraints make it impossible to commit to more. However, Advent's right to 5% of the project is, according to Owen O'Connell, doubtful. Subject to you taking responsibility for costs etc., involved in the challenge by Advent, I will try to secure that 5% for you.

"3. I have retained Owen O'Connell's format because I feel that it is more likely to achieve our common objective with the Department. I understand that points, 1 (subject to an increase to $\frac{1}{2}$ 35 million) 3, 4, (subject to a decrease to 20% and point 2 above) and 5 are reflected in this draft.

"4. DD agreed to meet his proportion of the bid costs win or lose.

"I hope that the document is acceptable and look

forward to hearing from you. I will be available this afternoon on my "phone number."

And what went with that, am I correct, at Tab 47, is the underwriting letter?

A. Probably, yes, I think so. I can't be sure that is the specific one because there would have been various drafts of that. But probably so.

Q. Yes.

A. And it is dated the 19th September.

Q. It is dated the 19th September?

A. Yes.

Q. Now, that would have been a fairly standard draft prepared by you, would it?

A. I think I would have probably pulled something off our word processing system and adapted it a little bit, yes.

Q. For the moment, I don't intend opening it in any detail at all, Mr. O'Connell.

You then write, at Tab No. 48, to Mr. O'Brien on the 19th. And that is where you refer to Knut Haga's letter of the 11th, isn't that right?

A. Yes.

Q. Just to pause there for a moment, there is no reference there to the letter of the 15th which you believe to be the real letter formally advising Mr. O'Brien that the letter of comfort is not acceptable?

A. It was the formal letter, although I think that it was apparent from the letter of the 11th and the events of the 12th that that was going to be the outcome.

Q. Right. Now, if we go to Tab No. 48A, and I think this is a note of yours, isn't it?

A. Yes.

Q. And is that are you talking to both Mr. Walsh and Mr. O'Brien by phone, do you think, or

A. Probably, yes, that is what it looks like from the top right-hand corner.

Q. And what you talk about, you say, is a commercial deal?

A. Yes.

Q. "25% to IIU or Nominees. Underwrite 40% covenant. No placing of shares with Telecom.

Company competitors of Telenor, otherwise no restriction.

Wording re behave reasonably in placing shares will consult company on all material places" (sic)

A. "Placees".

Q. "Of Placees," I beg your pardon. "Fee: Side letter DOB."

A. Yes.

Q. So what is being worked out here is that Mr. Desmond is to get 25%, and it is to be in IIU Nominees, isn't that right?

A. Yes.

Q. Sorry, "to IIU or nominees," it is to be to IIU or nominees?

A. Yes, I am not sure

Q. Or it may be 'IIU Nominees', you are right.

A. Yes, I am not sure.

Q. If we then go to Tab No. 50 sorry, before I depart from that, I am fascinated by these side letters.

What is that about "Fee: Side letter DOB"? Do you know what that is about?

A. I can't be sure but if you remember there was a disagreement as to whether IIU would be paid a fee for the underwriting

Q. Yes.

A. and what this seems to be saying is that that issue will be resolved by a side letter which Denis O'Brien would deal with directly.

Q. Right.

A. Normally I would the way I write 'DOB' there would imply that it is something for him to deal with rather than something for me to deal with.

Q. Work out whatever terms that were to be between them?

A. Whatever.

Q. Whatever?

A. Generally I keep these notes to record what I have to do.

Q. Yes.

A. And where I put somebody else's initials after

something like that, it would be to remind myself that somebody else is going to do it, not me.

Q. Right. Then at Tab 50, this is another attendance of yours, and this is on the 20th, is that right?

A. Yes, so it is the day before the previous...

Q. And "Denis O'Brien 20" this is Denis O'Brien?

A. Yes.

Q. "20% + 5% from Advent or from Communicorp."

The potential for dispute still existed, isn't that right, with Advent?

A. Yes.

Q. And then the "Fee of 375K, but offset against IIU share of bid costs. (Ignore issue in agreement, i.e.

15% from institutions and Communicorp and Telenor dilute by 5 or 10, depending on Advent outcome."

So it looks as if the side letter, or am I correct, would deal with the fee and I think it ultimately was dealt with in a way that was taken into account as part of IIU or Mr. Desmond's part of the bid costs?

A. I think so, yes.

Q. I think that is what happened. I don't think we need to go through the drafts with you, Mr. O'Connell.

Maybe if we go on to Tab 55. Now you are writing to Mr. O'Brien and urging caution on him here, I think, isn't that right?

A. Yes.

Q. "Dear Denis,

"Further to our telephone conversation of this afternoon" this is on the 21st of September "I enclose three draft letters. I would intend that the letter to Kyran McLaughlin would be accompanied by a more informal and friendly cover note from you.

"I stress again the irrevocable nature of these letters and especially the Telenor and Kyran McLaughlin letters. Accordingly, I strongly urge that you should not issue the McLaughlin letter or obtain the Telenor letter until and unless you are absolutely confident of:-

"1. Obtaining a commitment in appropriate terms from IIU.

"2. Fulfilling the conditions and delivering the consideration for the IIU commitment and

"3. That IIU can and will live up to its commitment.

"I am aware that this is ultimately a commercial decision and will be happy to discuss it further with you, if you wish."

"PS: I remain concerned at the rights and vetoes which Advent have in relation to Communicorp and other companies under their original investment agreement.

As you know, I am not fully familiar with this agreement since I did not draft or negotiate it.

However, as the consequences of an outright dispute with Advent could be serious both for the GSM project and for other businesses, you should be sure that the

5% of Digifone justifies the risk (which is not to say, of course, that such a dispute cannot be resolved by negotiation and will not ultimately turn in your favour.)"

Now, the first part of that letter, or the letter other than the postscript is, I think, easy enough to appreciate and understand. You are saying, 'You better be sure about this IIU matter before you write to Kyran McLaughlin and tell him that the institutions are out.' And is it before you get the letter from Telenor formally advising you of their dissatisfaction or with the Advent offer?

A. Yes, as far as I can tell, I didn't have the 15th September letter at this stage.

Q. Yes. Because you see, the letter that is dated the 15th September is sent. As I recollect, to Mr. Prelz under cover of a letter of the 26th September, isn't that right?

A. Yes, I think so.

Q. Are you sure that the letter which Mr. Haga says that he doesn't have any recollection of, he accepts it is his signature but he doesn't have any recollection of furnishing of his own motion, are you sure that that was in existence as of the 21st September when you are writing these words to Mr. O'Brien?

A. No, I am not sure. And I did make it clear this morning that I found it extremely difficult to

reconstruct events surrounding these letters and spent quite a lot of time both reading and thinking about it. I think it is strongly likely that it was dated and sent on the 15th. As I the point I made this morning concerning Telenor's propriety in these matters was such that I don't believe they would have predated a letter and then signed it.

Q. Yes.

A. Also, I can see no reason for doing so when the letter of the 19th September, the draft of the 19th September was sent by Mr. Simonsen on the 21st. So it is the conclusion I have reached, although I accept that there are a multitude of confusing circumstances surrounding all of these three drafts, I did conclude that the 15th of September letter was sent on the 15th.

Q. Right.

A. As to why it wasn't sent to me, as I think it probably wasn't, I don't know. It may have been that it was simply the somewhat chaotic nature of Mr. O'Brien's office. As to why it wasn't sent until the 26th to Advent, I think that is more readily understandable, in that it was very much, again, in your phrase this morning, 'pulling the plug' on Advent.

Q. Mm-hmm. Well, I think it seems clear from this letter of yours that you didn't know about the letter of the 15th?

A. I think so, yes.

Q. As of the 21st anyway?

A. Yes.

Q. And I think you were alive to the potential for dispute with Advent, isn't that right?

A. Yes, I was.

Q. Not only over the 5%, but perhaps a wider area of dispute regarding their involvement with Mr. O'Brien's companies or other businesses and other investments?

A. Well really what I am getting at there is that if Advent were sufficiently annoyed by being excluded from the direct participation in Esat Digifone, I suspected that there may well be clauses in their agreement of 1994 with Esat which would enable them to make life difficult for Mr. O'Brien. That is really my point.

Q. Yes. If you perhaps would go to Tab No. 57 now, please. Is that in draft form it is in draft form again I think?

A. Yes, that is dated the 22nd.

Q. Yes, it is, yes. I think Ms. O'Brien tells me if we go to Tab 64, 65, 66 yes. Now, perhaps if we go to Tab No. 66 first; this is the arrangement agreement, isn't that right?

A. Yes.

Q. Between Esat Digifone Limited and International Investment and Underwriting Limited. Now, these were

sent in draft form, I understand, to the legal

Department of Telenor?

A. By Mr. Halpenny, I think, yes.

Q. Yes. Now, what was the purpose of that?

A. To get their approval of it, I imagine.

Q. Now, before it was signed, was there ever any formal approval from Telenor, to your knowledge?

A. I can't recall, I am afraid.

Q. Now, it was signed on behalf of Esat Digifone by Mr. O'Brien, isn't that correct?

A. Yes.

Q. And Mr. Walsh signed it for IIU?

A. Yes.

Q. And again, I don't want to read out the whole of this document, unless you want me to?

A. No.

Q. But perhaps you could just briefly tell us what it is and what it contains?

A. I am afraid it is quite a while since I have read it.

Q. Right.

A. As far as I can recall, it is IIU accepting an obligation to come up with whatever amount of money Communicorp failed to come up with to a stated maximum.

Q. I think it is 37.5 million?

A. Yes, in return for the corresponding shares. I mean, underwriting is a concept in which the underwriter

agrees to buy whatever shares aren't bought by others
or sometimes it is done by the underwriter initially
buying the shares and then selling them on.

Q. Would I be correct, again if we could deal with this
in a summary way

A. Yes.

Q. IIU were, and whilst this is with IIU, this is
Mr. Desmond?

A. Yes. Well the agreement was with IIU.

Q. I know the agreement was with IIU. You had a
discussion in relation to the commercial transaction,
which was Mr. Desmond agreeing to go ahead with the
financing, isn't that right?

A. Yes.

Q. I just want to isolate two issues, if I could. First
of all, they were to get, they were entitled to a 25%
interest by providing a letter to the Department,
isn't that right?

A. Yes.

Q. And over and above that, they entered an agreement to
take up any shares which Communicorp did not subscribe
for, isn't that right?

A. Yes, that is the underwriting.

Q. And that is that was the essence of the agreement,
isn't that right?

A. Yes.

Q. And if we then go to Tab 64; this is the letter which

went to the Department, isn't that right?

A. Yes.

Q. "Dear sirs,

"We refer to the recent oral presentation made by the Consortium to the Department in relation to their proposal for the second GSM cellular mobile telephone licence. During the course of the presenting there was detailed discussion in relation to the availability of the equity finance, to the Consortium, from Communicorp and a number of institutions.

"We confirm that we have arranged underwriting on behalf of the consortium for all of the equity (i.e. circa 60%) not intended to be subscribed for by Telenor. In aggregate the Consortium now has available equity finance in excess of $\text{€}1\frac{1}{2}$ 58 million.

"We do not foresee any additional need for equity. However, we are confident that if such equity is required, we will not have a difficulty in arranging it."

And it is signed by Michael Walsh.

Now, who agreed the form and the terms of that letter?

A. I think Michael Walsh wrote it and, I can't really recall, but I have a feeling it was largely accepted by us without a huge amount of amendment.

Q. Well, I just no, Mr. Walsh wasn't at the presentations and he wouldn't have known what was said at the presentations, isn't that right?

A. Yes.

Q. So somebody must have told him, somebody from well, Esat Digifone?

A. Yes, I mean technically well not just technically, legally it was Esat Digifone which made the presentation.

Q. Was this information, you think, coming from Communicorp, the Communicorp side?

A. More likely than not, yes.

Q. Now, what this letter does, it tells the Department that IIU are underwriting circa 60%, isn't that right?

A. Yes.

Q. What has been declared in the bid has been 40:40:20 in loose terms and of course 40% would be attributable to Telenor here. But in reality, as of the date of this letter, the position was that Mr. Desmond had 25% interest in that company, isn't that right?

A. Yes.

Q. Communicorp had no access to money itself?

A. Not a great deal, no.

Q. No.

A. Except possibly through Advent.

Q. Except possibly through Advent, yes. And Mr. Desmond - or sorry, through IIU, had entered into an agreement whereby he agreed to take up anything that Communicorp couldn't subscribe for, isn't that right?

A. Yes.

Q. So as of that moment, in effect, Mr. Desmond controlled or had about a 62 and a half percent interest in the Consortium, isn't that right?

A. I wouldn't agree that he either controlled or had 62 and a half percent. I would say that he controlled 25, and was subject to a contingent obligation to take up a further percentage, which would bring him to 62 and a half percent.

Q. That is a fair point.

A. Had he wished to have the 62 and a half percent, he couldn't not necessarily have got there.

Q. But he had the potential for that at least?

A. Yes.

Q. As of this time, that is all?

A. Yes.

Q. As of this time?

A. Yes.

Q. Now, do you know why the reference is made in that letter to "circa 60%"? Again it is not, it is not telling a lie, but it is not wholly accurate, if I may describe it as that, in saying "circa 60%". Whereas in fact what they are doing is they are underwriting 37.5%, taking up 25, 62 and a half percent really, isn't it, in real terms?

A. Yes, 62 and a half. Can I mention in relation to taking up the 25, it is correct that Mr. well that IIU had the right to that 25%, but that the view of, I

believe all parties certainly on the Communicorp side and I believe at that time on the IIU side, was not that Dermot Desmond would acquire and hold the 25%, rather that he would acquire and hold part of that, perhaps 5.

Q. Yes.

A. And that he would place the remainder with his very extensive network of contacts in the Irish economy and overseas. So the underwriting was a genuine underwriting in that sense; he was undertaking to take the shares.

Q. Yes?

A. But

Q. They were his to place?

A. On the basis that they would be placed on that, for instance, is why the famous one free transfer was put in the Articles of Association and that is why the reference to nominees was put in the earlier document, I think.

Q. How did you form the impression, and you haven't stated that, how did you form the impression that there might have been an intention on the part of Mr. Desmond to place some of his interest with other substantial figures in the Irish economy?

A. As far as I was concerned, that was the basis of the transaction from the very start. There was never any question otherwise. It was not intended, in my

understanding, nor I believe in the understanding of anyone else on the Communicorp side and I think even the IIU side, that Dermot Desmond would acquire and hold these shares medium or long-term. It was always intended that they would be passed on. I don't remember any other understanding ever.

Q. What was said to you that

A. I can't remember.

Q. that made you form that understanding?

A. I can't remember, but it was both the spoken and unspoken certainty on all sides. Obviously in hindsight, when Mr. Desmond did retain the shares, at least for a period, he progressively sold them on, it has come to appear as if he was always buying the shares for himself, but I really don't think that was the case. I doubt he would have wanted investment I can't speak for Mr. Desmond, but I doubt he would have wanted a commitment of that size in a single start-up venture.

Q. This isn't apropos Mr. Desmond at all, but we have had evidence here from a large number of witnesses who spoke about the fact that once this licence was obtained, that its potential was considered to be enormous?

A. Oh, absolutely.

Q. That would have been known to anyone competing for the licence, I suppose; that was why they were after it?

A. That was why people were competing for it, no question. It was regarded as a very significant opportunity, albeit a costly one, at least in terms of cash upfront.

Q. Yes.

Now, do you know why this was sent by Professor Michael to Mr. Martin Brennan in the Department? Why the consortium didn't furnish it?

A. Not really. It may have been a matter of logistical convenience. It may have been felt that it was more convincing coming directly from him. I can't say.

Q. But it would be coming directly from him if it went through the normal channels of communication. The consortium had an established communication official with the Department named in the bid?

A. I don't know.

Q. Do you remember having any discussions about how this letter was to be communicated?

A. No I don't, I am afraid.

Q. Did it come out of your office or did it come out of IIU?

A. Oh, I think it would have come out of IIU. It wouldn't have come from us. And in support of it, that is not our typeface.

Q. Right. Right. Did you know this was the way it was going?

A. I can't remember, but I assume I did.

Q. But do you remember any discussion? Do you remember expressing any views or expressing any view, offering any advice?

A. I don't remember at all, I am afraid, no. I mean, whether the letter came from IIU directly to the Department or came from IIU to Communicorp about William Fry, and then went to the Department, I don't think would have been a matter of major interest to me. I can't explain now why it would have happened the way it did, but it wouldn't have been something that I spent a lot of time on or of which I would be likely to have any recall.

Q. Yes.

Now, if you do you remember any discussion about the necessity to have this letter to enable the consortium to have a better chance of succeeding?

A. I don't specifically remember any discussion but that was the underlying or one of the underlying purposes, not underlying purposes, one of the purposes of it.

Q. Do you have any memory or recollection of being informed of what specifically was causing a problem?

A. No, beyond general financial weakness on the Communicorp side.

Q. Were you aware, as of this time, of what Mr. O'Brien had stated at the presentation?

A. I can't remember, I am afraid. I

Q. I know you are being careful about it, Mr. O'Connell.

A. I am trying to remember. I will start from the proposition that I wasn't at the presentation, so I certainly didn't hear it. As to what may have it may well have been that somebody reported to me, perhaps Peter O'Donoghue I am guessing, that Denis had said he had a commitment from Advent.

Q. That he had what?

A. That he had a commitment from Advent. But I can't remember being told that. I wouldn't rule out the possibility I was aware of it.

Q. Right.

A. I probably was by way of speculation I would guess it is rather more likely that I was than I wasn't, but I am afraid that is probably the strongest I can put it.

Q. And the Department, to your knowledge, were not being put on notice that there was no such commitment, were they?

A. I am sorry, I don't understand your question.

Q. The Department were not being put on notice, to your knowledge at least

A. After the

Q. after the presentation, that there was no such commitment?

A. No, not as far as I know. Oh, do you mean did Telenor go in and tell them or something like that?

Q. No. Did Esat Digifone correct what had been stated?

A. No, I don't think so because remember, Denis still maintained at that time that he had a verbal commitment from Advent, so as far as he was concerned there was nothing to correct.

Q. I understand that point, and it is a matter I can take up with Mr. O'Brien. But as far as you were concerned, as a lawyer, you were of the view that there was no commitment, isn't that right?

A. No, that is not right. I am sorry, Mr. Coughlan. I had been instructed by my client

Q. Very good.

A. that there was a commitment.

Q. Very good.

A. I was not prepared to give an opinion confirming that because I couldn't do so in reliance on the verbal assurance, but it wasn't the case that I knew or was aware. I was still in the position that, if my client instructed me

Q. You were accepting instructions?

A. Yes.

Q. Fair enough. But I think what you did indicate was that there was concern from Telenor, isn't that right?

A. In hindsight.

Q. Well, I think you point to the letter of the 15th as being an example or an indication?

A. of their concern

Q. of their concern about this?

A. Yes.

Q. That what had been stated at the presentation could not be

A. sustained

Q. sustained?

A. Yes, but I am not sure when I got the letter of the 15th.

Q. Very good. But apart from you yourself, to your knowledge, nobody on the part of Esat Digifone rectified the position after the presentation?

A. To my knowledge, no.

Q. Now, was there any discussion as to the question of you would have known in general terms I know you didn't see the bid you would have known in general terms that it would have gone in on the form of Telenor, no problems as regards their financial status, or Esat with Advent, as the letter of comfort from Advent, and the financial institutions in the form of the letters that went in. You would have been generally aware, perhaps, of that, generally?

A. Probably, yes.

Q. Was there any discussion that you can remember about whether or not sending this particular letter would muddy the water in some way?

A. I don't recall any discussion to that effect, but I can certainly see the point that it might have done, that the Department may have said to themselves or

perhaps to us

Q. "What is this about?"

A. "Why are we getting this letter when we have already got all this other stuff?" Again, it is only speaking now with hindsight because I don't recall.

We probably would have concluded well what was given to the Department was letters of comfort and letters of intent, and this is a binding commitment and that is better and more substantial.

Q. Do you know if any arrangements were made, before the letter was sent, with the Department to receive it?

A. I don't know. I certainly didn't make any. I don't think I was in touch with the Department at that time at all.

Q. No, I am not suggesting, but do you know was there any discussion?

A. I don't know.

Q. Now, if we go to sorry, just 65, is that a side letter?

A. Yes, it appears to be, yeah.

Q. Is that the one dealing with fees or I don't know.

Sorry, I beg your pardon, this is

A. This is the assignment.

Q. this is the assignment. Perhaps I will deal with that first. This is also dated the 29th September, 1995.

"Dear Denis,

"I am writing to confirm the basis of our agreement with Communicorp Group Limited (Communicorp) as consideration for us issuing attached letters to the consortium and the Department of Transport, Energy and Communications. The definitions in this letter and in the letter to the consortium are the same.

"1. Communicorp has undertaken to subscribe for 37.5% of the consortium (the Obligation) on the same terms and pari passu with the placees. IIU Limited has arranged underwriting for the obligation. As consideration for arranging the underwriting, Communicorp will pay to IIU Limited (the Arranger) a fee of i£½219,000.

"2. All shares will be subscribed for on an absolutely pari passu basis, other than as specifically provided for in the Agreement by all members of the Consortium.

"3. In the event of the bid not being successful, the placees will pay 25% of the net bid costs, excluding the arrangement fee of the GSM Licence incurred by the Consortium. The aggregate of the bid costs will be a maximum of i£½1.6 million and will be independently verified as being properly incurred and paid. The placees's obligations in relation to 25% of the net bit costs will be paid after deduction of the underwriting fee.

"4. In the event that Communicorp fails to meet the

obligation in full and the Arranger or its assignee is called upon to satisfy any of the obligation, the Arranger will procure that for a period of four months Communicorp will have a right to meet the obligation or the Placee (sic) not satisfied, as the case may be, by paying the amount of the balance of the obligation together with interest at a rate of DIBOR + 2% on the amount of such balance."

A. Sorry, Mr. Coughlan, that was "the balance not satisfied," the third-last line.

Q. I beg your pardon, yes.

"3. This letter together with the attached letter addressed to the Consortium and the Agreement represents the full understanding between the parties and no other commitments exists between the Arranger and the Placees on the one hand and the Consortium or its shareholders on the other hand.

"Please sign the enclosed copy of this letter in confirmation of your acceptance of the terms of this arrangement and in confirmation of Communicorp's undertaking to use IIU as its arranger.

Yours sincerely." And it is signed by Michael Walsh and Denis O'Brien for Digifone. What is that document?

A. Well

Q. What is the status of it?

A. It is dealing with sorry, the status of it is

simply an agreement between Communicorp and IIU, not between Digifone and IIU. It is dealing primarily with the fee and it is also giving Communicorp a four-year, sorry a four-month

Q. A four-month?

A. grace period if it can't come up with the money the underwriter is called on, the underwriter effectively is agreeing that it will hold the shares, keep them available.

Q. For four months?

A. For four months subject to its funding costs being met.

Q. Yes. Why wasn't that in the arrangement agreement or is there some technical reason why it couldn't be?

A. Probably because the arrangement agreement was with Digifone, whereas that was with Communicorp, would that be it? I can't remember now.

Q. The arrangement agreement was with Digifone, but the four months could have been in there, couldn't it?

A. No, because it was Communicorp that was being given the four-month right, not Digifone. Digifone had no interest in the four-month right. What Digifone was getting out of the underwriting was the certainty, subject to IIU's creditworthiness, the certainty that its shares would be bought. It was less interested in who bought them.

What Communicorp was getting from this, was an

understanding that if IIU bought them, it would keep them, hold them for Communicorp to buy for a four-month period. Digifone had no interest in that.

Once Digifone had the money and had issued the shares, it had no further interest, but Communicorp did.

Q. But wasn't it Digifone was paying for the underwriting isn't that right, effectively?

A. Effectively.

Q. And this was the mechanics of the underwriting, isn't that right?

A. No, this is post underwriting mechanics. The underwriting has already occurred, if this agreement comes into force, as to the four month grace period.

Q. But did Telenor know at this stage

A. I don't know.

Q. about the four month grace?

A. I don't know. I don't think it would have been of much concern to them. If anything, they would probably have been, well I don't know, I don't want to speak for them. Logically they should have been reasonably either pleased or neutral with this because if this happens, it ends up with the shares in Communicorp where they should have been in the first place if Communicorp met its obligations, and if it didn't happen, they end up with the places as they were going to do anyway under the underwriting agreement. So I don't think Communicorp I don't

think Telenor would have had any great issue,
obviously they can speak for themselves, but logically
they shouldn't have had.

Q. There is another side letter, then, isn't that right,
dated the 29th of September? This is the assignment
to Bottin, isn't that right?

A. Yes.

Q. And this is between Denis O'Brien, Chairman of Esat
Digifone, isn't that right?

A. Yes.

Q. And Michael Walsh on behalf of IIU.

"I am writing to confirm the basis of our agreement
with the Consortium as consideration for us issuing
the attached letter to the Department of Transport,
Energy and Communications. Our agreement is based on
the attached arrangement agreement (the Agreement) if
documented by William Fry Solicitors, but is subject
to this side letter.

"1. In the event that the Consortium is awarded the
second GSM licence then the Consortium undertakes to
place 25% of the equity in the Consortium with IIU
Limited or its nominees (together the Placees) IIU
Limited (the Arranger) will be arrange underwriting
for the 37.5% of the equity which Communicorp Group
Limited (Communicorp) has committed to subscribe for.
The maximum combined commitment under the placing and
underwriting will be $\frac{1}{2}$ 36.5 million (the Commitment).

"2. The Arranger has assigned the agreement in its entirety both benefits and obligations to Bottin (International) Investments Limited.

"3. The obligations of the Arranger or its assignee under the agreement are conditional on:

"A. The terms of the grant of the GSM licence not being materially different from the request for proposals in connection therewith by the Department of Transport, Energy and Communications.

"B. Communicorp and Telenor having signed a shareholders agreement to which the Arranger is also named as a party containing protections in favour of the Arranger to which would be reasonable for a shareholder subscribing for 25% of a private company.

"C. GSM market conditions in the Irish telecommunications industry not having materially disimproved.

"In each such case on or before the date of the first issue under the commitment.

"4. The placees will be entitled to nominate a representative (the Placee's representative) to represent their aggregate interest in the consortium and the placees' representative will be a party to the Shareholders Agreement which will be executed in a form substantially similar to the draft supplied to the Arranger by William Fry Solicitors on September 21st, 1995 and the placees' representative will be

deemed to hold the aggregate of all shares held by the placees for such purposes.

"5. In the event that Telenor fail to fully subscribe for their 37.5% share in the Consortium, then all obligations of the Arranger or its assignee or Placee are void save where Telenor and Communicorp collectively subscribe for their 75% share provided in such instances Telenor will retain 30%.

"6. The existing shareholdings in the Consortium represent and warrant that the Consortium will at the date of the award of licence be free of all debt and liabilities other than those bid costs properly incurred. The Placees and the Arrangers will be fully indemnified by Mr. O'Brien and the existing consortium shareholders if this is not the position.

"7. The attached letter is strictly private and confidential for the Department to which it is addressed. It may not be used or taken as a commitment for any purpose other than for the Department submission. Mr. O'Brien and Communicorp will fully indemnify the Arranger and the placees in the event of any cost or obligation or liability arising as a result of the use of this letter or the attached letter for the Department other than the purpose of submitting the attached letter to the Department to which it is addressed.

"8. The terms other than the amount of any tranches

of the obligation provided by the agreement will be subject to the prior approval of the Arranger."

And then it is signed accepting that.

Now, what is the status of that?

A. Well, on the face of it it is an agreement between IIU on the one hand and apparently Mr. O'Brien/Communicorp Group and Esat Digifone on the other.

Q. No, where is Communicorp? Isn't it Esat Digifone?

A. Well it is confirmed on behalf of Mr. O'Brien, Communicorp Group Limited and Esat Digifone Limited at the end.

Q. Yes. Right. All right, I take your point.

A. It occurs to me that paragraph 7 may explain why the 29th September letter was sent to the Department; that IIU seemed to have some sensitivity as to its use for other purposes or its being given to other people. I don't know where that arose or what that was about but that could be why they wanted to send the letter directly to the Department. I am only speculating it just occurred to me at this moment.

Q. I see the point you make. Perhaps it is something that we will take up.

Now, am I correct in understanding this; that as of the 29th September, it was Bottin which had the 25th interest and that it was Bottin had the potential of another 37.5% in its role as underwriter?

A. According to this document, yes you are, although not

as regards the Department, because of course Bottin wasn't named in the letter to the Department, it was IIU which undertook the obligation.

Q. Bottin weren't told about it?

A. No, that is my point, that is exactly why. That insofar as an obligation had been undertaken vis-a-vis the Department, it was an IIU obligation, not a Bottin obligation because Bottin hadn't been disclosed to the Department.

Q. Why?

A. I have no idea.

Q. You have no idea?

A. Sorry, I have no idea why they weren't disclosed well I imagine they weren't disclosed because they weren't a party as substantial as IIU. Sorry, when you ask me why? do you mean why was the obligation IIU's obligation or why weren't Bottin disclosed?

Q. Why wasn't on the 29th September when the letter went to the Department

A. Yes.

Q. Mr. Desmond's and IIU's obligations and benefits had all been assigned to Bottin, isn't that correct?

A. Yes.

Q. The Department was not told about this?

A. No. And the point I was making is, that because the Bottin assignment wasn't disclosed to the Department, and because the commitment was given by IIU to the

Department, the Department had rights against IIU, and the assignment to Bottin was ineffective, in my view, it is a matter of legal opinion, vis-a-vis the Department, not vis-a-vis Esat Digifone, but vis-a-vis the Department.

Q. Well, how was the Department, do you think, going to enforce this anyway? This was comfort, wasn't it?

A. No no, I don't think so. I think that well again this is merely a legal opinion, but I would have thought that had Communicorp defaulted and if in consequence of that Esat Digifone had defaulted following a grant of the licence, then the Department could have called on IIU to perform its obligations pursuant to the letter and IIU would have been estopped from claiming any entitlement not to do so.

Q. No great commercial reality in that, is there, Mr. O'Connell, at all?

A. Who knows. It never became necessary. I mean, there never was any difficulty funding it.

Q. There was no commercial reality?

A. Mr. Coughlan, if I may be so bold, there was no commercial reality in a lot of this because the commercial reality was that whoever won the licence wasn't going to have a moment's difficulty obtaining funding anyway. It was all perception. That would be my overriding view of the whole thing.

Q. I think you put that well, Mr. O'Connell?

A. Thank you, Mr. Coughlan.

Q. So why then did the assignment to Bottin take place at all?

A. I don't know. I was never told. I would say it is something to do with tax.

Q. I don't want to go in this in any great detail at the moment, but you just stated, and I appreciate that you are just in the witness-box and you are not looking at any documents and you say that IIU would be a more significant company, interest, whatever it may be, than Bottin was the view you expressed, and that might be a reason why they wouldn't be disclosed, is that right?

A. Actually this may be an opportune moment, Mr. Coughlan, if I may. I said yesterday, I think, it wasn't yesterday, it was Friday, that IIU was Central Bank regulated. I was reading my papers over the weekend and I came across a note, it was my own note and I am not sure how accurate it was, that they may have become Central Bank regulated in February 1996 rather than earlier.

Q. That is correct.

A. I thought I should correct that. My apologies.

Q. Sorry, we made inquiries. I will be putting the formal position from the Central Bank when we have full details from the Central Bank about the matter but that is correct.

A. Okay.

Q. On the initial information we have, it was not, it did not become centrally bank regulated until 1996, isn't that right?

A. I see.

Q. It was not regulated by the Central Bank at this time?

A. At this moment, yes, my apologies.

Q. No, I just want to and again I think, well perhaps I will wait for the information from the Central Bank before I go through the matter in detail.

So if you go to Tab No. 69 for a moment, you see this is a letter from the Department to Mr. Denis O'Brien, Chairman of Esat Digifone, South Block, the Malt House, Grand Canal Quay, Dublin 2.

Mr. O'Brien was not the person named in the bid documents as the person to whom communications took place?

A. I see.

Q. And it's addressed it reads: "Re additional correspondence received."

"Dear Mr. O'Brien,

"I refer to the ground rules of the competition as outlined at our recent meeting with you on Tuesday 12th September. The Department has already made it clear that Applicants shall not be permitted to provide any further material to supplement their applications, except where expressly requested to do

so by the Department.

"Accordingly, the additional material received from you on Friday last is enclosed herewith. It shall not be taken into consideration in the evaluation process."

Now, did you become aware that this letter was sent by the Department?

A. Yes, I think I was told quite promptly.

Q. By whom?

A. I can't remember.

Q. Well, who was it likely to be?

A. Well, likely to be Mr. O'Brien or Mr. O'Donoghue.

Q. Yes. Now, do you remember a discussion about this?

A. I remember in general terms lots of discussions about it. It is difficult to place them in time because they it became the subject of a lot of discussion.

Q. Certainly it must have been a major issue, musn't it?

This is coming back from the Department.

A. I initially I think it was regarded almost as funny.

Q. Yes?

A. A sort of a typical civil servant thing to do almost.

And we noted that it had been signed by Martin Brennan and how could he have sent it back to us if he hadn't read it?

Q. Yes.

A. And of course he, therefore, knew about the

commitment, the underwriting commitment.

Q. Yes.

A. And I do know that for quite a long time afterwards, we touched on this I think in the context of the draft letter of the 17th November

Q. Yes?

A. we proceeded on the assumption that Martin Brennan, at least, was aware of IIU because he had got that letter and had responded to it. Admittedly had responded to it by sending it back, but had responded to it. And as I said to you also during my evidence last week, I was very surprised to learn from, I think it was Mr. Brennan's evidence here, that he hadn't actually been aware.

Q. Yes. Now, when you say that were you given a copy of Mr. Brennan's letter? You must have seen it at least?

A. I am sure I saw it. I probably was given a copy, quite likely.

Q. Would it have been retained on your files or would it have been destroyed or?

A. It wouldn't have been destroyed.

Q. Or would it have been given back sorry I don't want to

A. I don't know, Mr. Coughlan. I am not sure we were given one. Logically we would have been, I am sure we would have been.

Q. I just want to be careful about this. We have searched and searched through the documents

A. Right, for this letter?

Q. For this letter.

A. Right.

Q. This is the letter from the Department returning. At the moment the only place we can see this letter is in the Department files?

A. I see.

Q. And it must be borne in mind that the IIU letter was not retained by the Department?

A. Yes.

Q. And the only place we found the IIU letter was a copy of the original sent and that's on IIU files?

A. Right.

Q. And we haven't seen the original, either the original from the Department or the original of the letter sent by Professor Michael Walsh.

A. I see. I am afraid, Mr. Coughlan, I can't account for that. I can say that as a matter of very great importance, we wouldn't ever, I think, destroy matters on our files. We destroy files after 12 years, but that is a different matter.

Q. That is what I was just wondering; would you have been shown it or seen it at a meeting where it was being discussed?

A. I am surprised we didn't have a copy on our files. I

am only learning from you now that we didn't. I

hadn't realised that.

Q. That is how it appears to be.

A. Okay.

Q. We are continuing to search and but we don't see it.

A. Well, I am sure our files have been thoroughly gone over by now. In fairness to ourselves, as William Fry, I would say that we have given you a great deal of material and we haven't withheld anything.

Q. That is true. That is true. That is very true.

A. To be honest, I would have had no or we would have had no reason to withhold this letter. We will perhaps have another look, although I suspect if it hasn't come up by now, it isn't going to come up.

Q. I am just wondering was it given to you or was it just something you were shown at a meeting or?

A. As I said to you a few moments ago, I would have assumed it was given to me, but perhaps it wasn't.

Q. Right.

A. But I was certainly aware that the letter, that the IIU letter had been sent back by the Department; I was aware from very early on that was the case.

Q. And you knew that they were stating that it wouldn't be taken into account?

A. Yes, I think so, yes.

Q. Now

A. That would really have been the only purpose for sending it back.

Q. Yes. Did that cause any concern on the Communicorp and/or Telenor side?

A. I am sure it would have done.

Q. You see, as I understand the position from Mr. Walsh's point of view or Mr. Desmond's point of view, it is simply this: I think that in this Memorandum of Intended Evidence their position would simply be, we did what was required of us in our agreement and it wasn't our problem if it was sent back.

A. I have a vague recollection that the view was whatever they said in the letter, that the facts were in their minds, they knew that IIU were involved, they knew by "they" I mean really Martin Brennan that there was an underwriting commitment and however much they tried to exclude it, at the very least it would have the effect of their not dwelling unduly on Communicorp's weakness. I think there was also a certain sense of resignation, what is done is done, we have put our best foot forward and there is nothing more we can do. Those are the broad general recollections or sense I have of the thing.

Q. Was there any discussion or concern expressed that this is a problem now?

A. I don't think so. I don't remember any such concern.

Q. It wasn't viewed as being a problem?

A. I don't remember it being viewed as such, no. I think, I mean, to elaborate slightly, I think the sense of having got the letter into the Department, irrespective of this letter, was palpable, was overriding.

Q. Was there any discussion around this time as to how IIIU might be presented to the Department or the fact of their shareholding? Sorry, I use 'shareholding' their interest?

A. I am sure there would have been, but I don't remember what it was. I had a discussion later on, I think I dealt with that or at least touched on it in evidence last week. At this time I don't remember anything specifically.

Q. I just wonder about that, Mr. O'Connell, because I think around November was there consideration being given to that?

A. Possibly. Possibly. This was the 29th September though.

Q. Yes. What was the view on the 29th of September?

A. The general view was that ownership, provided Esat and Telenor had majority control, was not of much significance. Now, admittedly if we had introduced a major criminal as a shareholder, that might have had some effect, but as I said sometime ago; the original draft licence on which we submitted our bid had no reference to ownership at all except a demand for

independence as between owners and the company. The general answers which were given by the Project Team to questions submitted by all bidders I think dealt briefly with ownership I would have to go and look up the answers but it was along the lines that as long as the principal bidders had majority control, I think, the Department weren't too concerned. So I don't think we were too bothered by the ownership at this point.

Q. Had anybody indicated to you from the Department that they weren't concerned?

A. All I am talking about now is the answers

Q. The formal questions and answers?

A. The written answers that the Department issued.

Q. Yes.

A. I think a third point I personally would have taken the view from a fairly legalistic perspective that the there is a lot of talk herewith about the Consortium, but legally it wasn't a consortium which bid at all. It was Esat Digifone Limited, a legal entity in its own right.

Q. That is true.

A. And whether Mr. X or Mr. Y or Mr. Z had 10% or 20% or 30% or 40%, I wouldn't I would have been surprised had that been of great concern and indeed I would assert that was still so at the end of April the following year when Fintan Towey told me so. But

there would have been a mild view, I suspect, and I can't remember this specifically, that, you know, IIU/Dermot Desmond, we need to present that properly, but not any

Q. Why properly?

A. Oh because Dermot Desmond was, at that time, probably a more controversial figure than he is today, but not particularly so. We didn't have any great concern about it. Certainly the issue about the change in shareholding and the issue about it not being AIB, IBI and Standard but instead IIU, those issues were there and we were conscious of them, but they were issues among other issues; there were planning issues, there were equal treatment of Eircell issues, there were lots and lots of issues and they were among them and we knew they were going to have to be dealt with.

Indeed in the meeting in November with the Department we were told they would have to be dealt with. It is perhaps difficult with hindsight distorting one's view, years have been spent pouring over every detail of ownership and the 5% has come, has been seen to have major significance and Mr. Desmond's or IIU's replacement of the other institutions has come to have major significance, but judging people's actions by their knowledge and perceptions at the time, these were issues but not big issues, just issues, items on the list.

Q. Would you have viewed them as just merely commercial issues or did you see any legal aspect to them?

A. I thought they were probably more commercial than legal because I would have thought that if winding the clock forward, if in May '96, and I did think about this at the time, if in May '96 we had not been able by some method to create the 40:40:20 structure that was demanded by the Minister, I actually remember forming the view at the time that while it would have caused a delay, there was really nothing the Minister could have done about it, that on the terms of the bid the Minister would have had to show, I thought, that whatever change had occurred, was materially adverse to the ability of Esat Digifone Limited to carry out its obligations under the licence. And I mean, for example, if Telenor had been taken over by a major American Corporation in January or Denis O'Brien had been run over by a bus in February, they would have had, those events might have had major implications for the ability of the licensee to carry on the business, but I felt that all the Department could have done, in those circumstances, was come back, ask us what effect we thought it would have, examine our response, ask what we intended to do about it, examine that and possibly appoint a monitoring team then to see how well we did in dealing with the issue. Frankly, I felt that IIU, at 25% versus AIB etc. at

20%, was of infinitesimal importance and who provided the money was sorry, so long as the money was provided was relatively immaterial. I am sorry to have gone on about this.

Q. No, it is very interesting because these were some of the views that were rejected by Mr. Loughrey, the view that you are subscribing for there at the very end.

A. I know that.

Q. So it is interesting to hear your view about it.

A. In fairness, I would add that although I wasn't aware of it at the time, the Department's counsel came to very similar views, because I have since seen that opinion.

Q. Right.

A. I obviously didn't then.

Q. Yes. But what would be material would be if the Department had been dealt with on a less than frank basis, isn't that right?

A. Probably, yes. But frankness would be measured at the time of the grant of the licence.

Q. Yes. Well, I suppose, Mr. O'Connell, we can return to that in the morning and look at the bid document and what transpired over the summer of 1995, just in that regard?

A. Very well, Mr. Coughlan,

CHAIRMAN: 11 o'clock. Thank you very much, Mr. O'Connell.

A. Thank you, Chairman.

THE HEARING THEN ADJOURNED UNTIL THE FOLLOWING DAY,
WEDNESDAY 29TH OCTOBER, 2003, AT 11 A.M..