

A P P E A R A N C E S

THE SOLE MEMBER: Mr. Justice Michael Moriarty

FOR TRIBUNAL: Mr. John Coughlan, SC

Mr. Jerry Healy, SC

Ms. Jacqueline O'Brien, SC

Instructed by: Michael Heneghan

Solicitor

FOR THE DEPARTMENT OF

COMMUNICATIONS, MARINE &

NATURAL RESOURCES:

Mr. Richard Nesbitt, SC

Mr. John O'Donnell, SC

Mr. Conleth Bradley, BL

Mr. Diarmuid Rossa Phelan, BL

Instructed by Matthew Shaw

Chief State Solicitors Office

FOR DENIS O'BRIEN: Mr. Eoin McGonigal, SC

Mr. Gerry Kelly, SC

Mr. James O'Callaghan, BL

Instructed by: Owen O'Connell

William Fry Solicitors

FOR TELENOR: Mr. Eoghan Fitzsimons, SC

Ms. Blathna Ruane, BL

Instructed by: Kilroy Solicitors

For Michael Lowry: Mr. Rossa Fanning, BL

Instructed by: Kelly Noone & Co.,

Solicitors

I N D E X

Witness:	Examination:	Question No.:
Owen O'Connell	Mr. Fitzsimons	1 - 42
Mr. McGonigal	43 - 91	
Mr. Fanning	92 - 94	
Mr. Nesbitt	95 - 276	
Mr. Coughlan	277 - 306	

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY, 4TH
NOVEMBER, 2003 AT 11AM.

CHAIRMAN: I think, Mr. Coughlan, you had indicated at
the conclusion of Friday, that the Tribunal would make
certain inquiries on the matter pertaining to
Mr. Halpenny raised in Mr. Fitzsimons' examination.

MR. COUGHLAN: I can just explain, and I have
explained it to Mr. O'Connell and his advisers and to
Mr. Fitzsimons also, the Tribunal has made contact
with Mr. Halpenny and Mr. Halpenny, whilst he hasn't
had access to files obviously in the short period of
time to his best recollection, that he was acting as
Communicorp's solicitor, he believes, definitely from
the 3rd August of 1995, right through to the
conclusion of the shareholders agreement and the
signing of the licence. He did act for Communicorp
back in 1994 in fundraising matters unrelated to the
GSM. It is possible that he may have done some small
amount of work, but nothing significant prior to the

3rd August, 1995 in relation to GSM matters. That's how the position has been put to the Tribunal by Mr. Halpenny. I have explained that to Mr. O'Connell and to Mr. Fitzsimons.

CHAIRMAN: Thank you. Mr. Fitzsimons.

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

Q. MR. FITZSIMONS: Now, Mr. O'Connell, just one matter I want to correct before I proceed further. I put it to you on Friday that both Mr. Denis O'Brien and Mr. Leslie Buckley were not directors of Esat Digifone on the 18th September, 1995 when you met them. In fact, that was not correct. Denis O'Brien was a director from the 24th June, 1995, but Leslie Buckley did not become a director until the 16th May, 1996.

A. I see, thank you, Mr. Fitzsimons.

Q. Now, in your evidence, you mentioned that you had a meeting with Denis O'Brien in October, 1995 in relation to the Communicorp financial problems and the question of an examinership was discussed. Do you recall?

A. I remember the evidence. I am trying to remember the date. I think it was the 22nd October.

Q. Well, it was before the

A. Announcement.

Q. award of the licence?

A. Before the announcement. Three days before the

announcement.

Q. Before the announcement. Was the examinership that was under consideration that of Communicorp or Esat Digifone?

A. Well, to say there was an examinership under consideration is probably too strong, but the company under discussion was probably would have been Esat Telecom Holdings. I don't think it would have been Communicorp, because well, it wasn't really formulated enough, Mr. Fitzsimons, to say specifically which company it was. At that time, the radio business was, as I understand it, or understood it, financially sound. It was there was, I think, discussion underway by then for the separation of the radio business and the telecoms business. The fixed-line telecoms business was, I think, not making money, and obviously the investment in Digifone was, at that time, consuming, I suspect, fairly modest amounts of money, but if successful, was obviously going to consume more. And, as I said, to say that the discussion concerned the examinership of either company in any very specific or concrete way would be to overstate the case. There was a general discussion concerning the financial difficulties, probably on the telecom's side generally, and as to things which might be done in that respect, one of which I remember concerned the possibility of preserving the business

via examinership which, after all, is the stated purpose of the examinership legislation. And the reason I recall or one of the reasons I recall the conversation is that I think I casually tossed into the conversation the name of someone who might be the examiner if it ever came to that, but it was all very preliminary.

Q. In view of the impact that such a step might have been likely to have on Esat Digifone, did it occur to you to impart this possibility or news of this possibility to the board of that company?

A. No, not remotely. As I say, it was a very, very general discussion. I don't think the meeting was even convened for that purpose. I suspect of it a conversation which developed out of a meeting for another purpose, and three days later anyway, the situation changed radically.

Q. I want to move on to another matter. If you could look at document 48/77 please.

A. Is that a letter from

Q. This is a letter from Knut Digerud to Denis O'Brien dated the 12th October, 1995.

A. Yes, I have it.

Q. Now, I think I can go right down to the final paragraph, because that's the relevant part. He says there:

"We believe it would be a good idea to finalise the

shareholders agreement and articles of association before the decision in the ministry is being announced. We are prepared to do this either late next week or early November. Please notify us regarding what time that would be most convenient for you."

Now, in the course of its inquiry, the Tribunal has put a number of questions to witnesses, the purpose of seeing whether or not people within either Esat or, I suppose, people within Esat knew in advance that the Minister's decision was coming out, and it's been suggested for the purpose of inquiry of course, that they knew it was coming out in October.

Well, isn't it perfectly my question then is, isn't it clear from the final paragraph of this letter that Mr. Digerud, the managing director of Esat Telecom, certainly did not expect the decision before early November at the least, because he was hoping to have the shareholders' agreement signed before the Minister's decision was made?

A. Yes, that would be the logical conclusion of that paragraph, Mr. Fitzsimons. I think most of the references to an early decision were in Mr. Moran's notes. I think there were one or two of Mr. Moran's notes that made that reference rather than any on our side.

Q. That's correct, there are some references there.

Now, I want to move on to another matter. You, in the course of your evidence, stated and I'm summarising your words that it was difficult to carry out research without assistance from Telenor, and you said words to the effect that Telenor were not forthcoming.

And correct me if I'm wrong, but we took that as an effective attack on Telenor, that somehow or another they had assisted you in a way that would have been appropriate so as to enable you to give your evidence.

Could you please clarify the situation in that regard.

A. Yes.

In the first instance, I will say that what I said wasn't intended as an attack on Telenor and I have no desire to attack Telenor.

In the second place, I don't regard Telenor as being under any obligation whatever to assist me in my researches and if I implied the existence of such an obligation, that was unintentional. But what I was really saying was that there seemed, and seems to me, on reviewing the material to which the Tribunal directed me, being primarily books 47 to 50, but also other material that has been provided to the Tribunal related to that period which isn't in those books, and also reviewing the various memoranda which have been provided to the Tribunal, there seems there seemed to me to be a preponderance of material from, to some extent, I suppose, what has been called the

Esat/Communicorp side, quite a lot from the IIU side and rather less, although by no means no material, from the Telenor side. That, of course, allows the possibility that material has been provided to the Tribunal by Telenor individuals which hasn't been made available to us. And the only point I was trying to make was that in reviewing all of these matters chronologically, as I did, in advance of my evidence, I often found myself saying to myself what were Telenor doing? What were Telenor what was Telenor's view on this? And there seemed to be an absence of material in relation to that.

Q. Well, in that regard, could I suggest to you, Mr. O'Connell, that a possible explanation is that the controlling partner was Communicorp in the form of Denis O'Brien and that, in fact, Telenor had very much a subsidiary role throughout this entire transaction?

A. Well, you can certainly suggest it, but I wouldn't agree with it.

Q. And whilst we are on that topic, can you explain why Mr. O'Brien has not made any detailed statement to the Tribunal which might, for example, have assisted me in cross-examining you?

A. I don't have instructions from Mr. O'Brien in that regard, I am afraid.

Q. I see. You are not acting for him in connection with this Tribunal.

MR. MCGONIGAL: I am not sure of the relevance of that question, Chairman.

CHAIRMAN: Well, Mr. Fitzsimons, you are aware that nobody is under a duty or obligation to make a statement.

MR. FITZSIMONS: Oh, I fully appreciate that, Mr. Chairman, but if Telenor is being accused of not providing material, I think it's a fair point to make.

Q. Now, just again another small factual point. You said in your evidence that Mr. Knut Digerud was Chief Executive Officer on the 26th January, 1996. That's at a time of a meeting with the Department on that date recorded in your notes, and there is a reference to this in your third statement. I just want to correct this. In fact, Mr. Digerud did not become Chief Executive Officer of Esat until the 17th February, 1996.

A. I see. I don't recall the point, but I certainly accept your word on that, Mr. Fitzsimons. I think it would have been Mr. Thygesen then, would it?

Q. Correct. Just to move on to a further small point, again, the same train. You stated in your evidence that a letter dated the 27th February, 1996 sent by Mr. Denis O'Brien was received by Mr. Digerud as an executive of Telenor Invest, though it was sent to him as Chief Executive officer of Esat Digifone. Now, just again to correct the record. In fact,

Mr. Digerud was Chief Executive officer of Esat Digifone at that time, and had no association whatsoever with Telenor Invest, so he could not have received it in that capacity.

A. I see. I think the point I made was that the letter was addressed if you look at the letter, you'll see it's addressed to Mr. Knut Digerud, managing director, Telenor Invest AS. And I was making the point that it was so addressed to Mr. Digerud in, as it were, his, or what Mr. O'Brien perhaps perceived to be his Telenor capacity rather than his Digifone capacity.

Q. Well, we assume that Mr. O'Brien who, of course, was responsible for this error, must have known that Mr. Digerud was Chief Executive Officer of Esat Digifone at that time?

A. I am afraid I don't know.

Q. You don't know.

Just one further matter or some further matters, sorry. You referred the letter from yourself to Regina Finn, there has been a lot of discussion about that; that's Book 43 (184). We don't have to go to the letter. You said in your evidence that to enable the letter to be sent, that there were discussions within Esat Digifone. You would not have written the letter without instructions. You would have talked to Knut Digerud and Peter O'Donoghue and probably Denis O'Brien. This was your evidence.

A. Okay.

Q. Where is the attendance recording those discussions?

A. I don't think there is an attendance, Mr. Fitzsimons.

I don't recall any having come to light.

Q. Well, surely there would be an attendance recording instructions relating to such an important letter?

A. Not necessarily. Nor would the nor would my instructions on the matter necessarily have been given at a meeting. They could well have been given over the phone. And it's not the case that I keep an attendance of every meeting, and I have given evidence to that effect. Generally, the purpose of my taking attendances is to record matters which I have to do, but I don't pretend to be infallible in that respect and I have missed matters in the past and no doubt will again.

Q. Moving on to another matter. You stated in your evidence, and you were referring really to the final period, May 1996, that what is in the documents is a tiny fraction of what was going on. People at meetings were dealing with a myriad of issues and you were dealing with the legal end. I think you gave evidence to that effect?

A. Yes.

Q. But could I suggest to you that what was in train at that stage was essentially a legal process?

A. That was one of the processes in train. But at that

time the operational difficulties surrounding the project had, I wouldn't say multiplied, but certainly become very apparent. There were serious difficulties, which I think were being overcome at that time with the radio plan. There were difficulties with sites. There were huge difficulties with planning. There was great uncertainty as to whether the Christmas deadline would be met. In fact, I think by that time it may have been concluded that it wasn't going to be met as indeed it wasn't. There were, I think it was just before that, that the premises were acquired on Baggot Street and there would have been a lot of fitting out. I think too, Mr. Moloney was coming on board or had just come on board and there were issues with his contracts. There were really were very numerous very large numbers of staff were certainly being recruited at that time. There was a lot going on with the potential franchise Esat. I think a strategic decision had just been taken, I couldn't be sure of the timing, I haven't checked it, but it was around then, that the company would adopt a particular route to market, specifically would rely on franchise dealers, rather than direct marketing, and there was a major push underway to sign up good dealers, people with good premises in good locations in the bigger towns and so forth. So there really was a great deal

going on. Now, the licence was certainly a critical precondition to any of this happening, but all of those other tasks couldn't be foregone or neglected until the licence was achieved. They had to be carried on in the assumption that the licence would be obtained.

Q. You told us that you were engaged full-time on the project at this point in time.

A. I said that I think in the week in which the 16th May fell, the 16th being a Thursday, in that week, and indeed the previous certainly Sunday and possibly Saturday as well, I was pretty nearly full-time. I wouldn't have been completely full-time. I am hardly ever any full-time on anything because the demand from other clients, particularly, always intrude; but a very great part of my time would have been given up, if not full-time.

Q. Mr. Digerud, when he gives evidence, will say that you were a very forceful person and that you were effectively in charge of the licence negotiations at this time?

A. I wouldn't accept that at all. Whether I am a forceful person is for others to say, but I generally actively avoid taking charge of things like negotiations unless, on the purest legal points, where there is a commercial aspect I will take instructions in the first instance and then try to progress them,

but before I depart from my instructions, I will always go back to the client to check any departure that has to be made. So it probably would have been the case that I'd have been given a brief in relation to Article 8 and in regard to the windfall gains and the other issues that I'd have progressed that fairly actively. But to the extent that I departed from it, I'd certainly have come back and cleared it with the clients. Indeed, I will refer you to, I think, two sets of notes by Mr. Moran during this period in which I am recorded as coming back from meetings with the Department and reporting to what is effectively a committee of clients, and I will say that I was doing so in order, firstly, to keep them informed, but secondly to get instructions from them as to how I should progress the negotiations. So I wouldn't at all agree that I was in charge in a commercial sense.

Q. I just want to move on to another matter. The arrangement agreement. Did you draft the arrangement agreement?

A. I'd have to go and check it for the initials. I think I probably drafted

Q. Your initials are on it?

A. I think I drafted the first version, the first iteration, but I think Mr. Halpenny took over and drafted subsequent ones, but I am not certain.

Q. Can you assist us as to who either amended or

negotiated it for IIU?

A. I think it would have been Neville O'Byrne and Michael Walsh. I should say that my initials would quite likely stay on the agreement even if another lawyer took over the amendment off it, if I had initiated it, and I think I did initiate it.

Q. Now, Telenor's prior authorisation for the signing of the arrangement agreement was not obtained. Why was that?

A. I think it was verbally. There were a number of communications recorded with Telenor. There was a meeting, I think, between Mr. O'Brien and Telenor in Oslo on the 22nd September, '95. And there is a fairly active exchange of correspondence between the 23rd and the 26th, and I think that ends, or I think there is a note by Gerry Halpenny that I think it was Mr. Simonsen gave his approval I am a little uncertain of my ground here now, Mr. Fitzsimons. I'd have to go back to get the details, the documents. But there is certainly quite extensive correspondence between the 23rd and the 26th following the meeting of the 22nd, and I think there is a record by Mr. Halpenny of getting approval, I think, from Mr. Simonsen immediately before signing, and certainly Telenor are sending back amendments to the arrangement agreement during that period. So I think they did consent.

Q. My instructions are no prior authorisation was obtained, but you are saying that Mr. Simonsen gave authorisation or may have?

A. I think there may be a grey area between what Telenor, as the kind of punctilious organisation I have described them as in the past, would regard as authorisation, that is in a formal sense of a perhaps a board resolution or a letter or something similar to that. And certainly I would accept that I saw no such document. On the other hand, in a more informal sense of someone saying on the telephone or at a meeting, that's our last comment or that's all right then, I think there was that and I think from Mr. Simonsen and we would, I think, have regarded that as sufficient.

Q. I see. I want to move now to Bottin. This is the company you said you didn't like.

A. Yes.

Q. Why did you not query Bottin?

A. I think I did.

Q. Well, what did you do about finding out what it was?

A. I didn't do a great deal because I think I regarded it as having gone away. I think I said in my evidence that it periodically came out of the woodwork and went back into it, and I also said that I thought it was related to tax, but I was more or less happy as Esat Digifone, once the commitment was given by IIU to the

Department, and once IIU was going to be the Party to the shareholders agreement and once IIU was the company that took up the shares, all of which were the case. So I think had Bottin ever, to continue the metaphor, come permanently out of the woodwork and started signing documents or cheques, taking share certificates, transfers or whatever, I would have become more concerned and try to do something about it. None of those things occurred, so I think I didn't.

Q. We know that the assignment to Bottin was never revoked?

A. Well, I don't know that, but I am not aware of any revocation.

Q. That's your evidence?

A. My evidence is that I am not aware of any revocation.

Q. Now, how then was Esat Digifone ever to enforce its agreement against IIU if the agreement had been assigned to Bottin?

A. I accept that would have been a problem.

Q. Well, what did you do to protect Esat Digifone and, therefore, Telenor, amongst others, against that eventuality?

A. It wasn't so much what I did as what occurred. IIU became Party to the shareholders agreement and undertook obligations in its own right as did Telenor, which as I said in my evidence, subsumed and

superseded the 29th September obligations which were the ones assigned to Bottin. Bottin was not party to the shareholders agreement in which the obligations were effectively undertaken.

Q. Did you write any letters to Bottin's legal advisers inquiring as to who or what they were?

A. Not that I can recall, or not that I have come across.

Q. I have just a couple of questions to finish.

Which solicitor in your firm was allocated with the task of ensuring that the rules of the GSM competition were complied with?

A. In what period, Mr. Fitzsimons?

Q. Well, throughout the period of the competition.

A. I don't recall anyone being specifically allocated that task. We weren't party to, in the sense of co-draftsmen of the bid, and really once the bid and the oral presentation were in, and the announcement subsequently made, I suppose the question of compliance or otherwise was moot because the company had won the contest. We had very limited role in, if any, in the bid itself. In other words, the bid was drawn up without our active participation.

Q. Okay. Just to finish off. I want to put a number of propositions to you.

I suggest to Mr. O'Connell, and I suggest to you because of your involvement as Mr. O'Brien's and Communicorp's and Esat Digifone's adviser at various

times, that you are in a position to answer them.

I suggest to you that at all material times, Telenor were seen by Mr. O'Brien as a means to an end, namely the obtaining of the licence and the roll-out of the network and that after that, Mr. O'Brien intended to exit them at the earliest possible date.

A. No. I don't think that's true. I think neither party was ever happy initially with the effective deadlock there was between them or subsequently with the position of effective control by virtue of its holding the swing vote that IIU had, and I think both of them, meaning both Esat and Telenor, thought that the company would be better served if they had majority control and both parties periodically expressed that view and periodically made attempts to realise it.

The final attempt to realise it was, of course, Telenor's hostile bid for Esat Telecom made in late 1999, and that in turn precipitated the white knight approached by British Telecom which ended the whole thing. So I think your I don't think either really regarded the other as a means to an end, but each regarded the other as one which would be better in a minority position. That's probably fair.

Q. I suggest to you that Mr. O'Brien never intended to share control with Telenor because in his mind, Telenor had a limited shelf life insofar as the company was concerned?

A. Well, I only have a very imperfect view of Mr. O'Brien's intentions and you'd be better putting that question to him. But so far as I did have any understanding of his intentions, no, I don't think he regarded Telenor as having a limited shelf life.

Although by the way I would add that Telenor at the time regarded itself as having a limited shelf life because it was in merger discussions with Telia. But he certainly regarded it as a company which he would prefer to have in a minority position, and I think that view was reciprocated.

Q. Well, that leads on to this final question. I suggest to you that Mr. O'Brien ran Esat Digifone in the same way as he ran Esat Telecom, in other words, he totally controlled Esat Digifone, as he did Esat Telecom, and had no intention at any time of releasing any control to any other party, particularly, Telenor?

A. I must say, Mr. Fitzsimons, I can think of no statement yet made to me in this Tribunal that's further from the truth. I would certainly accept that Mr. O'Brien would have liked to run Esat Digifone, would have liked to control it, but I think the history of the company is dominated by the struggle between the two parties respectively to control it. Mr. O'Brien had endless issues and rows, as did Telenor, with IIU; they both had rows with the company's management. Indeed, I think it's fair to

say that what is with hindsight perceived as a two-way row between Esat and Telenor, developed certainly by mid to late '96, although there were signs of it in early '96 into a three-way row, because the company itself progressively tried to assert and successfully asserted its own personality and its own independent destiny. And Mr. Digerud initially, and Mr. Moloney later to a much greater extent, did vigorously contest the attempts by both Telenor and Mr. O'Brien to control the company, and there was a long progression of tripartite or quadripartite, if you bring IIU in, they did intervene occasionally, over control. So to say that Mr. O'Brien controlled the company, perhaps is an accurate statement of his desire but is a wholly inaccurate statement of what he ever achieved.

Q. Thank you, Mr. O'Connell.

A. Thank you.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. MCGONIGAL:

Q. MR. MCGONIGAL: Mr. O'Connell, there is just a couple of matters I want to ask you about, mainly in relation to the issue of ownership.

I wonder if you go back to the RFP document.

A. Yes, I'll get it now.

Q. That's the document which has already been opened to you by Mr. Coughlan in relation to a number of matters, particularly, and I want to go through them, Article 3, which was that: "Applicants must give full

ownership details for proposed licensee and will be expected to deal with matters referred to in the following paragraphs." And there is a submission, and Mr. Coughlan has touched upon that. But I want to draw your attention to Article 17, and that is:

"That the licence will incorporate a series of conditions including but not limited to:

1. Unauthorised interception of traffic .
2. Transferability of ownership."

Then it sets out a number of other matters and then it goes on:

"The Minister will reserve the right to incorporate the terms of a successful application into the terms of the licence which will be issued."

Now, I just want to try and get an understanding of the issue of ownership. First of all, in the draft licence which was sent with the documents in relation to the RFP, there was nothing in the draft licence dealing with the transferability of ownership?

A. That's correct.

Q. And the transferability of ownership, what did that relate to in your opinion?

A. At first sight I would have taken the statement literally, and it would have meant ownership of the applicant company, or perhaps arguably ownership of the licence itself, but I would be prepared to accept it probably went beyond mere ownership of the licence.

Q. Now, you have already discussed with Mr. Coughlan that the applicant in this particular application was Telenor 50 and Communicorp 50?

A. Oh, I would say technically, it was Esat Digifone Limited, which was thus owned, yes.

Q. But it was 50:50

A. Yes.

Q. shareholding?

Now, in relation to that aspect of the applicant, can you give any indication as to what, in your opinion, might have happened if one or other of those had dropped out prior to, for example, the competition result being announced?

A. I think the company, the applicant company, would have had to go to the Project Team, inform it of the absence of the other major owner, and put to it proposals for a replacement of the essential elements of Esat Digifone's bid, which the absent shareholder would have brought. The Project Team would probably have had to reconvene, I imagine, to consider that, and would have had to adjust its conclusions to the extent it felt the replacement party or replacement resources, if there was no replacement party, fell short of those which had previously been given to it. If, and to the extent, that the replacement party or resources were better than those brought to the project by the absent partner, I am not sure the

Project Team could have taken that into account, but could, to the extent they were worse.

I am to some extent giving an opinion on the fly here, but that would be my general view.

Q. But clearly in the initial stages it's something you would accept would have to have been drawn to the Project Team's attention?

A. Yes, to the extent it had a major effect or a material effect on the ability of the company to deliver its promises.

Q. And it would then have been a matter of decision for the Project Team to determine what action they took both within the rules of the competition and having regard to the problem that had arisen?

A. Yes, and would almost have certainly had to take legal advice and would have had to communicate with other applicants.

Q. And after the result was announced, that is between the 25th October and the granting of the licence, would the position have been any different in your opinion?

A. It would have been somewhat different procedurally, in that I think if either of the major shareholders had dropped out, again Esat Digifone would have had to go to the responsible body, I suppose, if the Project Team still existed, to that, or if it didn't, to the Minister or his representative, inform him or it of

the events which had occurred and of the company's proposals to fill the gaps which had been left in its commitment. I think the Minister, at that stage, would have either been satisfied or not satisfied with the steps proposed. If not satisfied, he would have had withdrawn the announcement and gone to the second bidder. If satisfied, he'd probably have sought binding assurances and would have appointed some form of monitoring person or group to see whether the commitments were upheld.

Q. Now, I think, in fact, in relation to the transferability of ownership, we are aware and it has been already opened, that in the response to questions posed by the applicants for the licence, that the Department responded in relation to it, and on the 25th page of document 41 (61) I think you may be familiar with this, Mr. O'Connell?

A. I think I have it somewhere. Sorry, I don't seem to have it, Mr. McGonigal. Oh I do. I beg your pardon. I have it. Yes.

Q. It's page 25.

A. Yes.

Q. And this is where we see the outlines of a clause which subsequently became the subject matter of deep discussion.

"But the second GSM operator shall obtain the written consent of the Minister prior to any major change in

the shareholding or control of the licensee transferring the whole of the Party of beneficial in this licence to a third party where such change would substantially alter the identity of the licensee or to materially impair the ability of the licensee to comply with the provisions of this licence. The terms 'major change' and/or 'substantially alter' shall be taken to mean a change in more than 45% of the voting control of the licensee. This would require the prior written consent of the Minister. Such consent shall not be unreasonably withheld."

Now, that, I think, is the first indication from the Department in relation to the way in which they were thinking of the issue in relation to the transferability of ownership?

A. Yes. I think the licence as granted ultimately was a bit more severe than that.

Q. Now, just for a second, Mr. O'Connell, I just want to trace through a number of documents which again have been touched on by Mr. Coughlan in relation to this issue of ownership and they arise from the Tribunal's book. The ones I am going to quote from are contained in the Tribunal's ownership documents, Day 234, which may have been

A. Yes, I have them.

Q. And the first one that I just want to go to is introducing Esat Digifone, which is Tab 3. And there

you will see on the first page about halfway down,

it's their bullet point. They are explaining that:

"Esat Digifone will be majority Irish-owned and will remain so for the long term."

And I just want to draw your attention to three of Ireland's leading institutional investors, "AIB, IBI and Standard Life have already provided written investment commitments through Davys Stockbrokers."

Now, I am going to come back when we deal with the letter to that as to whether or not it was a written investment commitment.

But on the next page then, you have the company's ownership structure. "And Esat Digifone is an Irish incorporated company. Currently 50% of the shares are held by Communicorp and the other 50% by Telenor. On award of the licence, 25% of the equity of the company will be made available to third-party investors. This allocation has been placed by Davys Stockbrokers."

So that the point on that I am trying to emphasise is that for the period of time between the application going in and the grant of the licence, the ownership of Esat Digifone would remain at 50:50?

A. Yes.

Q. And on the grant of the licence, then, the 20% would come into play?

A. Yes, I think that's a fair interpretation. I didn't have a role in the preparation of this document, but

as I explained on Friday to Mr. Fitzsimons sorry, I beg your pardon. It was to Mr. Coughlan I wouldn't have regarded it as likely that these parties, if they became shareholders, would have become so prior to a final completion and grant of the licence.

Q. No, I absolutely appreciate that. But what I'm actually trying to come at in a very long-winded way is the fact that that transfer of the 20%, albeit technically, would also have been subject to the Clause 8 transferability of ownership section?

A. It probably would have, or it could have occurred on the day the licence was granted.

Q. But it would have come in all armed around the same at or about the same time, put it that way?

A. In my view it would, yes.

Q. Then, the next tab is tab 4, just briefly again they have identified formally the four institutions as of submission of this application, and we can then go to Tab 5, which is the shareholders agreement. And I just want to draw your attention and ask for your comment in relation to 5, which deals with additional shareholders. And what the shareholders agreement appears to be saying is that at this stage:

"Provided the company is awarded the licence, the Party's intention at the time of the award is to introduce new shareholders in the company so that each of the Party's shareholding in the company is

successfully reduced to a minimum 40% with a maximum 20% being held by three to five reputable financial institutions. A third party will be admitted as shareholder only if he agrees to be bound with the terms and conditions of this agreement, however with the necessary formal modifications to be agreed between the parties and additional shareholder. The parties can reduce their shareholding either by transfer of shares or by issuing additional shares ."

It then identifies at 5.2 that: "The parties agree that as new shareholders would be chosen, two or more of the following four companies." And it lists AIB, IBI, Standard Life and Advent. "These four companies shall have submitted written investment commitments to Davys Stockbrokers."

And then 5.3: "If for some reason the parties do not choose two or more of four companies as above-mentioned, the parties shall make their best efforts to reach consensus as to whom to admit as an additional shareholder/shareholders and as to the conditions on which the third party shall be admitted.

And if the parties cannot reach such consensus, the parties agree that Telenor, to ensure that the company is backed by shareholders that have the funding deemed necessary but shall have the rights solely to choose one or more third parties an additional shareholding in the company."

Can you help me in relation to all of that?

A. Well, I think I'm almost certain it was a Telenor draft. This is the one that went in with the licence.

It became important, I think later on, because both the Department and Esat Digifone took the view, somewhat legalistically, that if somebody was in the bid, even if scheduled, as in the case of the shareholders agreement, then they were justified in proceeding on the basis of it. And insofar as this document contemplates the possibility that some, all, none, or more than variously the four parties named might be shareholders, it was felt justified that possibility. Also, it was notable that Telenor had the ultimate control or naming option in respect of new shareholders. So it was felt this gave a degree of flexibility in terms of who the financial parties might be.

This is also the agreement in which the 12% referred to later is dealt with in that the parties later talk yes, in the next clause in fact, number 6 about going down to 34% each, which is 68 held by Esat and Telenor, leaving 32%, of which 12 would be placed publicly and 20 would be left to the institutional investors referred to in clause 5. So it was felt, right or wrong, to justify legally at least the various things which occurred later on or at least you give grounds for justifying them, whether on

a rationalised basis or not.

I think there was also a view, in fairness, at this time, that as is generally the case in projects of this kind, and particularly in the relatively boom conditions which prevailed in the telecom's industry at this time, that the problem was never going to be really raising the money. The problem in very technically sophisticated and expensive projects such as this is going to be the execution of the project, the delivery on the ground of the network, the sales force, the marketing effort, the financial team, the banking facilities. It's the management marketing and technical expertise that is in scarce supply. There are actually abundant capital resources available.

And it was Telenor and Esat or Communicorp who brought those practical skills and abilities to the consortium and they were the critical parties, and who actually wrote the cheques for the balance of the money was, again right or wrong, in hindsight was regarded as relatively unimportant.

Q. I think equally in relation to, as we will see later in relation to the practicality of the project and getting it up and running and the marketing and everything else, that was the expertise both Telenor and Communicorp were bringing to the project and that, in a sense, was what the Minister was trying to protect when one looks at the transferability of

ownership, trying to protect the infrastructure and ensure that the project would come to a successful conclusion?

A. Well, obviously, the Minister and his team will have to give their own evidence on that. But logically that is what I say they should have been at, yes.

Q. Just if you could turn to Tab 7 then, which is the letters from the four institutions, and I want to just ask you about them. The first one is from AIB, which has already been opened to us, and they indicate in the second paragraph that: "We have reviewed the information memorandum prepared by the consortium and are now writing to confirm that we are prepared to invest 3 million by way of equity and/or loan stock in a consortium subject to:-

(a) the licence being prepared by the consortium on terms broadly in line with those set out in the memorandum or the tender documents or amended on terms which we agreed with the consortium were acceptable and

(b) that the terms of our investment being approved by our investment committee or board."

Now, can I ask you, first of all, in relation to defining that, is that a letter of commitment?

A. No.

Q. In your opinion?

A. I don't believe it is, no. Or only in the most

general sense.

Q. And what is it? So to ask the second question, and if it's not a letter of commitment, what is it?

A. I would regard it as a letter of intent or comfort of the probable intent is the fairer term.

Q. And is it correct to say that insofar as intent is concerned, it's an indication that, at best, the sum which they would consider would be a sum limited to $i_{\frac{1}{2}3}$ million?

A. Yes, but it's so preliminary and general that it could have been more or less later on.

Q. And fundamentally, of course, it is predicated on the basis that it doesn't come into play until the licence is granted?

A. Yes. It couldn't have been finalised until the licence was granted because their satisfaction with the licence's terms is an express condition.

Q. And I think the second letter then from the IBI is in similar terms in the second paragraph, confirming that "We are prepared to invest 3 million on the basis, A, that the licence being prepared is broadly in line with those set out in the memorandum; and secondly, terms approved by our investment committee or board."

So both banks were effectively taking a similar position in relation to the offer which they were making?

A. Yes, and the wording is so similar I suspect it may

have been put together by Davys.

Q. A similar drafter.

The third letter then from the Standard Life is slightly different. First of all, they are only offering "Confirming they are prepared to invest 2.5 million." The terms that they impose are the licence being in broad terms similar with the one set out in the memorandum; secondly, that it's approved by the investment committee; and thirdly, that details of our interest being confidential to a number of people; and then fourthly, perhaps most interestingly, that the expression of interest is subject to the licence being granted by the 15th November of 1995.

So that that is not only a letter of offer but it's terminable on a particular date if certain things haven't happened?

A. Yes, and it's referred to in a much weaker phrase as an expression of interest.

Q. And I think the last one the next one is Advent, which I am not going to open because we have already dealt with it. But if you skip beyond that, to the fourth page beyond that, there is a letter from ABN-AMRO in connection with finance. And if you go to the last paragraph of that, we'll see that "the letter is to be interpreted as a strong expression of interest and it should in no way be construed as a formal commitment to provide financing." And that, in

a sense, speaks for itself.

A. Yes. And this seems to have been sourced by Telenor.

Q. And then on the next page, you have one from the

NatWest Markets and then if we go to the last

paragraph, NatWest Markets is delighted to provide

support to Esat Digifone in their endeavours.

Naturally, however, this letter is not a commitment to

lend, "and is governed by English law."

A. Yes.

Q. So in a sense, what we have is an indication from five

institutions that if you come with a licence and a

proposal in three cases we are prepared to consider a

financial commitment, which is defined as 3 million or

2.5 million, and in the other two cases, they were

prepared to look at it and consider what the situation

is at that time?

A. Yes.

Q. So that insofar as the document, which was the bid

document, suggested that these were letters of

commitment, in fact, in your opinion, as I understand

it, they should not be so considered?

A. Except in the most general commercial sense but not in a legal sense.

Q. And anyone who read them would have appreciated that?

A. I believe so. The authors were careful to make specific reservations.

Q. Now, the next series of documents that I just want to

turn to, Mr. O'Connell, are the series of documents in April/May of '96 which I have put together and I think you have a copy of them.

Now, the first document, Mr. O'Connell, is a document of 22nd April of 1996 from Regina Finn and the undersigned who are members of the Attorney General's Office, and the purpose of the meeting was to discuss, first of all, the disclosure of information to unsuccessful applicants for the GSM licence; and secondly, the transposition of directive 96/2 and its impact on the award of GSM licence to Esat Digifone. And the document on the second page at paragraph 5 deals with the matter which is concerning me, and that is: "The Department also gave to the Office of the Attorney General a copy of an extract from Esat Digifone's application outlining the ownership of the company together with an internal Department document and a letter from William Fry & Company, solicitors, concerning restructuring of the Esat element. The Department indicated that clarification would be necessary of any change in the ownership structure of Esat Digifone relative to that outlined in the application."

Now, that meeting appears to have resulted, from your letter, I think, of the 17th April of 1996, which you have already discussed with Mr. Coughlan?

A. Presumably, yes.

Q. It seems to, inter alia, indicate that the changes which you had identified in your letter were of concern to not only the Department, but also becoming the subject matter of an issue in the Attorney General's Office?

A. Yes, I think just after this is when I had the conversation with Fintan Towey in which he said that the matter was with his legal people and they weren't yet sure whether they would require any changes but he'd let me know. I think that was on the 29th.

Q. And I think that is, in fact, indicated in the letter, the next letter, which is the 24th April of 1996 from Mr. Towey to Mr. McFadden and Mr. Gormley, and the most important paragraph I think is the third one:

"I would also like to reiterate our requirement for a legal opinion on the restructuring of the ownership of Esat Digifone. (Relevant papers were provided at our meeting on the 22 April.) In particular, the question of whether recent correspondence suggests any change in the identity of the beneficial owners of the company which could be considered incompatible with the ownership proposals outlined in the company's application must be addressed. Before the ultimate award of the licence, it is now considered that it would be preferable to seek warranties in relation to both the beneficial ownership of Esat Digifone and the financing package for the project. This is considered

prudent given the nature of the concession being given to the company. Perhaps you would advise, however, whether such requirement could be challenged by Esat Digifone as an imposition not envisaged in the competition process or otherwise unreasonable on legal grounds.

"Finally, I will provide a brief for counsel on the proposed disclosure procedure ..."

Now in actual fact, that is developing the theme in relation to the changes which had been referred to in your letter, and it is clear it had become, from Mr.

Towey's point of view, a matter on which legal opinion should be sought?

A. Yes.

Q. Now, there is then an interoffice memo from Regina Finn to Fintan Towey, dated 25th April of 1996, dealing with Article 8 ownership, which is effectively transferability of ownership. And it says:

"As discussed, Denis McFadden advises that the revised draft should not go out to Esat Digifone until the ownership issue is resolved. He will consider this further and may request a meeting to clarify the Department's request on this issue. I have informed Peter O'Donoghue (who had asked for the article) of the sense of the revised draft, but that until some questions about ownership are resolved I am not in a position to let him have the revised article."

I think that, in a sense, speaks for itself, but it clearly identifies the importance of the issue of the ownership and the transferability?

A. Yes, but I don't think she is distinguishing between ownership as it was then and ownership as it would be in the future. I think she is saying that we have got to resolve how the company is now owned before we go before we deal at all with the question of how future ownership will be controlled, or ownership will be controlled in the future.

Q. I appreciate that. I think that relates to the Esat Telecom's side of the

A. It's both actually.

Q. aspect of it. I think you were then written to by Mr. Brennan on the 1st May, which is the next letter, which I think is

"I refer to your letter dated 17 April, 1996 concerning the structure of certain ownership interests in the Esat Digifone.

"In accordance with the requirements of the GSM competition documentation, Esat Digifone provided ownership details which indicated that at licence award the ownership would be as follows: Communicorp 40%, Telenor Invest 40%, institutional investors 20%.

The application also provided details of the ownership of the operational partners and identified the probable institutional investors and the broker who

would be responsible for the placement of equity with institutional investors. In the case of Communicorp, it was indicated that it would be 66% owned by Irish investors and 34% by Advent International.

"In view of the information contained in your letter, it would be appreciated if the following could be clarified:

" the nature of any differences between Communicorp Limited and Esat Telecommunications Holdings Limited in relation in particular to expertise or asset strength and

" full details of the ownership and categories of all shares of Esat Telecommunications Holdings Limited including, in particular, by persons other than the owners of Communicorp.

"It is essential that the Department can identify precisely any changes in the effective ownership (both direct or indirect) of Esat Digifone since the time of submission of the application.

"Finally, it would be appreciated if you could confirm that full certification of the following matters will be provided before the award of the licence:

" the precise equity ownership of Esat Digifone including the identity of all institutional investors,

" the identity and financial commitments of providers of debt financing."

Now, in a sense that focuses in completely on the

issue of ownership?

A. Yes, I think I would have regarded this as going much further and much deeper than had been anticipated. I mean, it's only two days, I think, before this that I had a conversation with Fintan Towey in which he said he wasn't sure what he wanted or whether he'd want any changes, and this letter is much stronger.

Personally, as I have given evidence, I think it was down to the press interest at the time, but that may have been too narrow a reason.

I think I'd also and I don't specifically remember doing this but I think I would have taken the view that they probably weren't entitled to go this far, and indeed some doubts on that is, or are evident from Mr. Towey's note of the meeting with the Attorney General's Office and his subsequent letter to them, but I don't think we wanted to get into a dispute with the Department about whether they could be this directive as to the ownership. We just wanted the licence. We were beyond desperation for the licence at this stage. So rather than getting into a debate with them, or worse with the Attorney General's Office, we just said, look, we'll give them everything they want and we'll do whatever they want, and did so.

Q. But equally it is highlighting, in a sense, the change from Communicorp to Esat Telecommunications Holdings Limited and ensuring that the expertise that you were

talking about in relation to the project carried

through to Esat Telecommunications?

A. Yes, it was, and probably more properly in that respect than in the question merely of who provided the money because, after all, money is money unless it's criminally tainted in some way and there was no question of that here.

Q. And in an odd sort of a way, in fact, one can identify that because the bid that I have just referred to is, in fact, dealing with ownership and the change in relation to the question of whether or not there was a change in expertise, whereas in relation to the financial matter, what they are seeking is full certification of who the people might be?

A. Yes.

Q. Now, the next document that I want to ask you about is the last document, which is apparently an opinion from counsel invited by the Attorney General to do one, and I think you have that?

A. I have that, yes.

Q. And were you aware of this opinion?

A. I don't think I was aware of it at the time. I became aware of it later.

Q. The bit that I want to draw your attention to is on the second page?

A. Of the opinion or the covering letter?

Q. Yes, of the opinion.

A. Yes.

Q. And the following terms: "If one analyses why the Minister is concerned about the ownership of shares in the licensee, the only legitimate concern he can have is if there is a change of ownership. The service that has to be provided will in some way"

MR. COUGHLAN: As far as I am aware, this document has never been opened by the Tribunal. I just want to be careful about this now, and how it is being presented here. It would not be it may have been provided to people all right, but it was for the Tribunal in the first instance to consider whether it was appropriate to open the opinion of counsel, an opinion furnished in the matter. I am just unsure and perhaps I'd like to discuss it with My Friend before he proceeds with this particular question, just what is what he seeks to illicit here. This hasn't been brought to the attention of the Tribunal in this respect.

CHAIRMAN: Well, it certainly hasn't been opened.

MR. COUGHLAN: Certainly not, certainly not.

MR. McGONIGAL: But this is a relevant document, Chairman.

MR. COUGHLAN: It's a matter, perhaps, that Mr. McGonigal should discuss with me in the first instance. It is not the practice of the Tribunal to open an opinion of counsel.

MR. MCGONIGAL: It may not be, Mr. Chairman, and that's a matter for Mr. Coughlan and his procedures.

MR. COUGHLAN: Precisely.

MR. MCGONIGAL: This is in a document which I understand may be at Book 44, document 203. It's a document which is relevant to the issue of ownership and it is a document which, therefore, should be debated in the Tribunal. As to

MR. COUGHLAN: Perhaps this is precisely the type of dispute I wanted to avoid. The Tribunal sought the view of the Attorney General himself on this particular matter, who carried out various inquiries and furnished the Tribunal with a response, which I read out at the Tribunal. That is the stated view of the Attorney General on the matter.

MR. MCGONIGAL: It might be the view of the Attorney General, Mr. Chairman, but my view is this is a relevant document to the issues which the Tribunal is considering, particularly in relation to ownership, and it is important that the document be brought to the attention of the Tribunal in public as is the appropriate way to deal with it.

What the Tribunal does, either as a matter of law or as a matter of weight to be given to that document is a separate issue, but certainly there is absolutely no doubt that this document is relevant to the issues which the Tribunal is considering, and it would be

wrong to exclude it at this time.

CHAIRMAN: I am certainly

MR. COUGHLAN: The document has never been excluded.

The document has been furnished to the parties and to their legal advisers in particular, and the position of the Attorney General has been indicated to all of the parties.

MR. MCGONIGAL: It's been excluded if it hasn't been opened to the public.

CHAIRMAN: What I'll do is this, Mr. McGonigal: I accept that if there is a material matter that merits from the content of what may have been set out at this stage being brought to the Tribunal's attention, it would certainly not be my intention or wish to shut you out. I do have some concern, in the first instance, about what obviously were high level confidential advices furnished in the first instance by Senior Counsel to the Attorney General being opened, and I think I will defer until after lunch taking a final view on this aspect. I'll permit, if you're having a discussion with Mr. Coughlan over lunch and if needs be after lunch, I'll rule on it. I accept if there is a material matter and I have some familiarity with the content of the document that wishes to be that you wish to uncover, that I should be extremely hesitant about depriving you of that opportunity, and I will have regard to that in my

ruling. But just now, to have the entire of the document opened when perhaps there has been no contact made with the attorney's successor, is something that I would be very hesitant about.

MR. McGONIGAL: No, I understand what you're saying, Mr. Chairman, and the paragraph that I want to draw your attention to is on page 2. It is the paragraph that begins with "If" and ends with "Public," and I have no difficulty in the Tribunal taking that paragraph if I am given an assurance that that paragraph is being given consideration as if it had been introduced as evidence, I have no difficulty with that. But I would have difficulty if that paragraph is not considered as part of the evidence, because it is material and I will quote it on that basis.

CHAIRMAN: I certainly have already acquainted myself with that paragraph, Mr. McGonigal. I won't neglect it. I will hold over a final ruling as to whether or not it specifically goes in on the record because I am concerned of the nature of the document in that context.

MR. McGONIGAL: If I understand that correctly, you are going to have regard to it?

CHAIRMAN: I will.

MR. McGONIGAL: Well, that solves my problem I think then.

Q. I just want to be clear, Mr. O'Connell, from your own

point of view, and I don't want you now to discuss that document, other than to say that I think at that time in May of '96, coming up to the 16th May, you were in deep discussion with counsel for the Attorney General in relation to Article 8 and other matters?

A. Counsel for the Department, yes, Mr. McGonigal, I was.

Q. Just one last matter which Mr. O' Sullivan reminds me about, in relation to material change. You will recollect that in the course of your evidence you talked about a number of things that were happening at a particular time, and I think Mr. Coughlan was focusing in on one issue and you indicated that there were many other issues happening at the time. I think this was around August, beyond October '95, in relation to the roll-out and things like that?

A. Yes.

Q. Can you help me in relation to the other things which you had in mind at that time?

A. Probably the biggest single issue was the progressive increase in the budgeted cost of the project as a whole, which increased by certainly 25 million, if not more, over that period, and therefore resulted in the need for both more equity and more debt. There were also changes in personnel. Initially, Mr. Thygesen was Chief Executive, then Mr. Digerud became chief executive. Then Mr. Digerud and Mr. Moloney became joint chief executives. There were significant

changes in how the in the technical side in how the radio plan would work. The original plan was found to be defective and far more sites were required, that in turn contributed to the cost, but also had impacted things like environmental issues, also it tended to complicate and increase the planning issues which arose, to a degree, that wouldn't have been anticipated early on, by any of the applicants, I think. Public concern and political concern, particularly at local authority level, rose to a greater degree than had been anticipated. There was much more debate about the potential health impacts of mobile telephony and that had to be countered. There were really innumerable changes. People came and went at all levels of the organisation, slotted into positions different to what might have been anticipated, went off elsewhere. The statutory provision under which the licence was to be granted, I think, changed. Originally it was to have been carved out of the Telecom Eireann monopoly, the exclusive mandate, and then I think it wasn't to be and then I think it was to be again. So that seesawed back and forth. Indeed, the transposition references in much of the documentation here refers to that issue. There were really the whole thing was in a constant state of flux.

Q. In actual fact, I think, Mr. O'Connell, you have

mentioned this a couple of times, that so long after the event as we are now, and trying to look at it in its totality merely through the documentation that has been produced, we are, in fact, as I understand it, failing to get a sense of all of the things that were happening at the time, not only generally but on a particular day. Nothing was confined to one thing.

There were 10 or 20 different things being dealt with?

A. Yes, and that's true in two senses I think. For all the defects and gaps and errors in the legal record-keeping, it is nevertheless more comprehensive than anyone else's record-keeping. So I think necessarily, the view seen of what was going on is distorted by being seen predominantly through a legal lens as it were. It's the legal record which has tended to survive rather than the commercial, technical or financial records. And secondly, there has not been much interest expressed, nor, in fairness, if there was interest expressed, is there much in the way of records available as to all of those other aspects. So I think we are only seeing the legal view of the licence and ownership issues. We are not seeing other views of those issues and we are not seeing any views of all the other issues that were current at the time.

Q. Thanks very much, Mr. O'Connell.

CHAIRMAN: Mr. Fanning?

MR. FANNING: Just briefly, Chairperson.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. FANNING:

Q. MR. FANNING: Mr. O'Connell, I appear for Mr. Lowry,

the former Government Minister at the relevant times.

If I might just say to you, as I have said to previous

witnesses, just to explain where I am coming from.

You will appreciate that the Tribunal is not

interested per se in the Government decision to award

the second GSM licence to the Esat consortium, and nor

is the Tribunal interested, and much less is it of any

concern to the Tribunal the issue of any

internee-signed warfare that has occurred between the

erstwhile partners in the Esat consortium. What the

Tribunal is concerned with and what the terms of

reference of the Tribunal relate to is the behaviour

and conduct of my client, Mr. Lowry.

Now, can I just ask you then in that context, what

contact or dealings did you have in your capacity that

you have been giving evidence on, in the context of

the awarding of the second GSM licence with the

Minister at the time, Mr. Lowry?

A. The first and only time I met the Minister in the

period on which I have given evidence, was on the 16th

May, the day the licence was awarded, when I was one

of a group of people in an upstairs room in the

Department when the licence was signed and handed

over, as was the side letter of the same date. And

subsequently a couple of hours later, I was in the room when the press conference was held. Prior to that, all my dealings with the Minister were indirect through his various civil servants, and I think I have given evidence on all of those.

Q. Exactly. So can I presume, arising out of that very clear answer, that you are not in a position then to tender any evidence of any improper interference or wrongdoing on the part of Mr. Lowry in the process?

A. No, I am not.

Q. Thank you, Mr. O'Connell.

CHAIRMAN: Anything arising from the departmental side, Mr. Nesbitt?

MR. NESBITT: Yes, there is, Mr. Chairman.

THE WITNESS WAS EXAMINED AS FOLLOWS BY MR. NESBITT:

Q. MR. NESBITT: Now, Mr. O'Connell, I act with my colleagues for the Department of Communications and the Department of Finance and their interests at the relevant times concerning the licence competition and the eventual winning of the licence and the negotiation and the eventual award of the licence.

Now, there is no allegations being made against any of my clients, as I understand it, and there is no allegations being made against any of the witnesses who have come from those two departments to talk about the events that took place. They have been put in the same position as you, to get in and discuss what

appears to be the process of awarding the licence.

And I was wondering if I could ask you to turn to Book 41 and to look at the licence competition. It's Book 41, Divider 46. You may have the document somewhere else.

A. Is this the RFP document?

Q. Yes, the RFP or the RFT or the various names the competition document.

A. It's a five-page document headed: "Competition for a licence"?

Q. Indeed.

A. Yes, I have that.

Q. Now, again, I am not wishing to delay you unduly. Effectively, what this was doing was telling people who read it is if they purchased the appropriate documentation and they put forward a written proposal which could be considered, it would be given due consideration and then a winner would be announced and then there'd be an issue after that of negotiating the terms of a licence, some rudimentary details of which had been given in the licence competition?

A. Yes.

Q. And I assume that for the purposes of completing the application that was made on behalf of your clients, this document would have been looked at to make sure they understood what was required of them?

A. I presume so, but I don't remember looking at it on

their behalf.

Q. Now, one of the reasons I wanted to ask you about this is, in the course of your evidence, you were questioned upon some breach of the competition process, some breach of a rule of competition process, something of what appeared to be enormous importance in the course of the questioning, and it was all to do with a letter you wrote, dated 29th September of 1995, indicating that IIU now had a part to play in the investor funding proportion of the proposal made by your client?

A. Yes.

Q. What I was wondering, where you read in this document any prohibitions on that letter being written or read?

A. I don't think there is any such prohibition.

Q. Fine.

A. I was going to say my understanding is that the prohibition was expressed at the end of the oral presentation, although I don't think I knew that at the time. I do know it now.

Q. I think, in fact, your own counsel, Mr. McGonigal, rather, Mr. O'Brien's counsel, pointed out, in fact, where we see the details of what might happen in relation to the submission of further information is in certain answers given to the written questions that applicants were entitled to make to the Department and

in due course got replies to, isn't that right?

A. Yes, and the replies were generally circulated.

Q. And I presume that you, or your clients, would have had regard to those in the course of dealing with the licence application?

A. Oh, yes, I am certain they would have done, yes.

Q. And again, perhaps I could just refer you to the replies. Again, it's Book 41, Divider 61?

A. Yes, I have the document here.

Q. And I think if you look at that, it's the Department of Transport, Energy and Communications, and it's response to questions posed by perspective applicants for the licence to become the second operator of the GSM mobile telephony within Ireland, and if we turn to the third page of that, we see under the heading "Competition process", there is a box with bullet-point sentences, and the final one was:

"Whether applicants can unilaterally submit additional material after the closing date of the competition."

And at the bottom of the next section you will see a final paragraph saying: "No additional material in relation to applications may be submitted unilaterally after the closing date, but see also reference to presentations in the introduction."

A. Yes, I see that.

Q. And in relation to a letter that was written in circumstances where you were aware that material

shouldn't be submitted, I assume you could get what was going to happen when you sent the letter; it would be returned?

A. I am not certain how aware I was of that prohibition.

I wasn't at the oral presentation and I don't remember being conscious of this sentence at the time, frankly, nor do I recall speculating as to the likelihood that the letter would be returned. I think, if anything, I would have been surprised well, I was going to say that I would have been surprised that it was returned. I don't think I had any particular expectation either way.

Q. Well, given the terms of what we see here, I presume you are not surprised that the letter was returned?

A. No, given what's here and indeed given what I have since become aware was said at the end, I think of the oral presentation, I am not surprised.

Q. Now, again, I think you know from the process of adjudicating the applications that were made, there was quite a large team of people with varying skills and things to bring to the Party when considering the application, to mark the application and decide who was the winner?

A. I am aware of that now and I would have assumed it to be so then.

Q. I mean, I think you can see from the RFP document, Divider 46, that the criteria that were going to be

considered showed that there was going to be a detailed investigation of the applications made and there was going to be clearly technical considerations taken into account, and a substantial amount of work done for the purposes of seeing who might be the winner?

A. Yes, that's clear.

Q. Now, are you suggesting to this Tribunal that you have any view about the ability of the civil servants who received this letter, opened it, discovered what it was and sent it back, to exclude it from their mind when marking the competition?

A. Sorry, I just want to be clear on the question

CHAIRMAN: I think you might rephrase it, Mr. Nesbitt, I am not too clear on it either.

MR. NESBITT: I'll rephrase the question,

Mr. O'Connell. I am asking you this is: Do you have any view in relation to the receipt of this letter by a civil servant, who had to open the letter, discover what it was about, form a view this was a submission of information late, and say that couldn't be done and send it back? Do you have any view about those persons being able to exclude that information from their thought process while dealing with the competition process? Or would you have any reason to believe that they would be unable to do that?

A. I have no particular reason to believe they'd be

unable to do that. Obviously, human nature is what it is. But apart from a general understanding of human nature, I have no particular grounds for believing that to be so or not to be so.

Q. And you have no evidence to suggest that this letter, having been sent back, played any part in the adjudication process of the application that was made?

A. None whatsoever.

Q. In relation to the application that was made, if we turn to

A. Sorry, indeed, Mr. Nesbitt, if I can just elaborate slightly. In one sense I would say that there is some grounds for believing it didn't have an effect because it wasn't, I think, included in the application criteria which were to be enforced against Esat Digifone in the licence. So arguably, I have some grounds for believing it didn't form a basis for the decision.

Q. So far as you have any evidence, it's that it wasn't in fact impacted at all on the competition process?

A. I think that's right, yes.

Q. Very good. Now, in relation to the competition process, again I have to ask you to go back to Clause 19. You understood that the bullet points there, the eight points were being listed in order of importance; the ones that are most important are at the top and

the least important one at the bottom?

A. I don't recall reviewing this document. But I do see now I see and I would have seen subsequently that they are listed in descending or they are stated to be listed in descending order of priority.

Q. Now, I think the first bullet point is the question, the credibility of a business plan and the applicant's approach to marketing. And then the second most important point is a technical approach to doing things. And the third most important is the approach to tariffing which must be competitive.

A. Yes.

Q. In relation to your expertise as a solicitor, I think from the evidence you have given so far, you would be considered in the top echelon, and I don't mind you praising yourself, of commercial solicitors who would have been involved in very, very substantial joint venture arrangements between men of business in Ireland or abroad?

A. Well, I hope I haven't given any evidence as to my own standing, although others have mentioned it, but, well suffice it to say I have significant experience in joint venture transactions over a number of years.

Q. You see, with the exception probably of Mr. Loughrey, we haven't had a witness who has really spoken about those matters, and I want to ask you some questions about this.

A. Yes.

Q. Because I assume any person who made an application under this, from your experience as a commercial solicitor, would have been dealing with some sort of joint venture or consortium issues between themselves?

A. Inevitably, yes, I think that's true.

Q. And two things were happening: People were going to put together a plan, spend money and take a chance in seeing if they could win the competition?

A. Yes. In these situations there is invariably a huge reluctance to spend money. They are nearly always done on the basis of what's nowadays termed an MOU, or Memorandum of Understanding, and it's almost never, in my experience in fact, I can't remember it ever being the case, that there'd be a fully worked shareholders agreement among the members of a consortium, while they are still in a competition phase.

Q. And I assume that the same probably holds true about people who are willing to put forward finance. They are concerned to commit themselves too early. They don't know if it's worth committing themselves until they see there is a successful application?

A. No, and they will rarely know the exact terms on which sometimes they will be concerned as to quite detailed terms of the award. An example of this is the evidence I gave concerning the desire of the banks

to have a mortgage of the licence and when that was rejected, the concern they had that they should nevertheless be entitled to a mortgage of company's assets. Now, that kind of fine detail, would, in my view, never be included in preliminary competition data, but would nevertheless be a critical element for any lender in the subsequent negotiation phase.

Q. But I assume any lender of money into a process such as this would be looking around wondering, what's there that I can actually reach out and touch that I might take security over?

A. That's almost always the first instinct of bankers in my experience, yes.

Q. The second thing is if they couldn't quite understand this, they'd be keeping their hand in their pocket until they had a better idea?

A. They'd want to be clear as to what their security was and failing any security from the project itself would generally look for guarantees from the promoters.

Q. Now, one of the last documents that Mr. McGonigal asked you about was a letter I think you wrote, or was written on the 1st May, concerning the nature of people who would be investing in the Esat company that was the winner and was to take the licence. And I think you were drawing a distinction between operational investors, that may not have been the phrase you used, and people I would describe as pure

providers of money?

A. That's a fair distinction, yes.

Q. As I understand it that was a very important thing in your client's particular application because they perceived themselves as being a joint venture between two people experienced in the telecommunications industry with technical expertise and experience to bring to the licence operation?

A. Yes. And although others may not have agreed at the time, Esat would have regarded itself as really the only Irish player in the telecoms market, apart from Telecom Eireann itself, and is therefore having a fairly unique quality to bring to the competition.

Q. I think, in fact, we have heard evidence that Mr. O'Brien had come to the attention of the regulatory end of the Department of Communications in relation to trying to make a way for himself in the fixed line business?

A. Yes, and I think it's not unfair to say that there was some dissention within the Department as between those who sought to encourage competition and those who sought to protect the State's asset in Telecom Eireann.

Q. I think, in fact, the evidence so far before this Tribunal is that insofar as he was known inside the team that was marking the licence, there probably would have been more people had come across him and

felt he was pushing the envelope on the fixed line

business than would have been supporters of his?

A. Probably, yes.

Q. Now, could I ask you to look at some documentation we

have, which is just extracts from the application that

was put forward by your client.

Now, these just are extracts from the submission

documentation, and I'll bring you through the bits I

am interested in.

The first bundle of documentation is headed,

"Introducing Esat Digifone," and it indicates exactly

who they are, that "they are an Irish company whose

shareholders Communicorp and Telenor have a unique

combination of national/international

telecommunications operating experience and a track

record of success in competitive markets." I presume

as a solicitor you think that's a fair description of

what they were?

A. I didn't see it in advance, but I think it is a fair,

I think, description of what they were at that time,

yes.

Q. I think then the methodology used in this part of the

document is to take bullet headlines that say some

principal point and then explain them. And if we drop

down to the third bullet point, you see that "The

company will be majority Irish-owned and will remain

so for the long term. The ownership structure of Esat

Digifone ensures that no one shareholder dominates.

The company plans a partial public offering within three years, thereby giving the Irish public an opportunity to participate in the growth of telecommunications in Ireland. Three of Ireland's leading institutional investors, Allied Irish Bank, Investment Bank of Ireland, and Standard Life Ireland have already provided written investment commitments through Davy Stock Brokers, Ireland's largest stock broker."

Now, as I understand your evidence, and I think it's the evidence of anybody who has looked at those documents, is they weren't commitments that you could rely upon. They were aspirational letters of intent subject to stringent conditions?

A. Yes, that's correct.

Q. Now, if I ask you to turn to the next document, next page, it is there should be headed strong ownership structure, have you got that?

A. Yes.

Q. At the bottom of that, we have paragraph 2.2 and the company's ownership structure, and we have another statement about Esat Digifone. "Is an Irish incorporated company. Current 50% of the shares are held by Communicorp and the other 50% by Telenor." So that's where you get the concept of a joint venture, 50:50; is that right?

A. Yes. You could have a joint venture without an operating entity, but it would be more common to have a company.

Q. Indeed. And then you say: "Award the licence, 20% of the equity in the company, 10% each from Communicorp and Telenor will be made available to third-party investors."

Now, is that where you are beginning to draw the distinction between a third-party investor who was bringing money and people who were bringing the expertise to make the licence scheme work?

A. I suppose so, yes. It would never have been my view that the specific identity of the providers of funds was terribly important; whereas the operational skills of the lead bidders were very important.

Q. The institutions were named and, in fact, we see in the financial appendix, the letters that you got from them were available, and I'll be dealing with that in a moment. I think we see over the page, we see a diagram that sets out the arrangements for Esat Digifone Limited and we see 40-50% Telenor, 40-50% Communicorp Group and then 20% institutional investors, isn't that right?

A. Yes, up to 20%.

Q. Now, if I could ask you to turn to the next bundle of documents, which is entitled: "Esat Digifone". And it is paragraph 2.1 that I'd like you to pay attention

to, and it's headed: "Ownership and equity holding".

And again, there is a statement as to what Esat Digifone is. It's a company owned by Communicorp and Telenor. The next paragraph, it says:

"The terms of the shareholders agreement between the parties are presented in a management appendix A.

Financial reports of Communicorp Group and Telenor Invest AS are presented in a management appendices B and C respectively.

"The shareholders agreement states that the Communicorp Group and Telenor will each initially hold 50% of the equity of Esat Digifone. In the period leading up to the award of the licence, 20% of the equity (10% from each of the partners) will be formally placed by Davy Stockbrokers, Ireland's largest stockbroker." And it gives some information about that.

Mr. McGonigal asked you about the shareholders agreement that existed then. That was a draft shareholders agreement, wasn't it?

A. Yes.

Q. And it existed between the two participants in Esat Digifone?

A. Yes.

Q. And I am not going to read it again, it's on the record. But again, that document made it clear to any reader that there could be changes in the identity of

the people who were providing money as institutional investors?

A. Yes.

Q. So that was not something that was unclear from the documentation that was submitted by your client when they were applying for this licence?

A. No, I don't feel so.

Q. And I think then, if we turn to the next bundle of documents, we see under the heading 3.3 halfway down, that: "Institutional investors" and what is said there is: "Esat Telecom and Telenor are committed to free enterprise in the telecommunications service provision. Each has direct experience of the stimulating effect of competition on telecommunications market growth. Each is also committed to reinforcing industrial commercial institutional awareness of the potential modern telecommunications. Modern telecommunications is an engine of organisational efficiency and economic growth."

And then you see two paragraphs down: "These considerations lead Esat Telecom and Telenor to invite extended participation of the ownership of Esat Digifone, up to 20% Esat Digifone's equity to be made available to institutional investors in the period prior to the service launch. The initiative already generated considerable interest from the Dublin

investment community. Commitments have been secured from AIB, Investment Bank of Ireland, Standard Life Ireland, in addition to Advent International. Such interest was stimulated by the excellent standing of both parent companies and by the realisation of the potential of telecommunications business and up to the regulated environment. It is strongly supported by research regarding respective performance of GSM operators throughout Europe."

I want to ask you a little bit about institutional investors and institution investment. That's something as a leading commercial solicitor you'd know quite a lot about?

A. Yes.

Q. I think whenever a client of yours comes with an idea you want to get funding for, you'd be involved in the arrangements that are made to try and interest people with money to give it to you to allow to run your business transaction?

A. Yes.

Q. Is that right?

And again, am I right in understanding that the concept of institutional investor there would be somebody providing money as opposed to operational experience and expertise?

A. Yes.

Q. Do you think

A. It could even be a private individual but probably wouldn't be.

Q. In your experience, would anybody reading this have had any other view as to the nature of the institutional investors under this transaction?

A. I don't see why they would have done. But I would accept that different people could bring different perspectives to the document and also would bring different levels of experience and expertise to a reading of the document. But I do think anyone experienced in financing of large capital projects would understand the point.

Q. Indeed. Now, if I ask you to turn the page under the heading "Financing," you will see information about the aspirational performance of the vehicle, if it got the licence. And we can take our own views about that.

If you come down under the heading "Financial strategy," one saw a funding arrangement whereby 40% of the money was going to be equity, in other words people had invested and the rest was going to be bank debt of some sort or other, isn't that right?

A. Yes.

Q. And then we see, again, express reference to the shareholders agreement, the draft shareholders agreement you have told Mr. McGonigal about and the Tribunal about.

At the bottom: "The shareholders agreement state that Communicorp and Telenor will each initially hold 50% of the equity of Esat Digifone. In the period leading up to the award of the licence, 20% of the equity (10% from each of the partners) will be formally placed by Davy Stockbrokers, Ireland's largest stockbroker."

And then as a submission of this application, Davy stockbrokers has received written commitments of 21.35% from and a series of people are listed; isn't that right?

A. Yes.

Q. Now, taken in conjunction with the shareholders agreement and the fact that the expressions of interest were no more than that, as a commercial solicitor experienced in these matters, would it have surprised you at all if there had been a change in the identity of the money investors as this process went along?

A. No, it wouldn't, and such a change is expressly flagged in the shareholders agreement.

Q. Indeed. Now, in relation to the letters of intent, I think again they are the final bundle of documents, and the first one is the Allied Irish Investment Bank document. In the course of your evidence with Mr. Coughlan, you discussed in some detail the nature of the sort of investment that somebody like AIB Capital Markets would make. Do you know AIB Capital

Markets or AIB Investment Managers Limited as the company was called?

A. I do know them. I haven't dealt directly with them in the last couple of years, but I do know them, yes.

Q. But in 1995, you would have known who they were and they would have known who you were?

A. Oh, yes.

Q. And without wishing you to disclose any confidence, the likelihood is you were probably doing work for them on a regular basis?

A. Yes.

Q. Could you tell us a little bit about the nature of the investments that they would make?

A. Excuse me, AIB IM, which is the author of this letter, not sorry, AIB Capital Markets is the division of AIB within which AIB IM is situate and AIB IM is primarily a manager of pension funds, and my understanding of the company is that it mainly invests. In fact, if I had been asked before all of this, I would have said exclusively invests in quoted securities, realisable quoted securities, an realisability is a key requirement in that industry.

Q. I think any investor, even the most initiated, realises if you are going to put money into something, it's a good idea to have an idea how to get it out?

A. Yes.

Q. And I presume these people who have been no different,

they would have wanted an exit strategy?

A. That is more so in the case of these people, because they are responsible to the Trustees of the pension funds whose money they invest for the provision of their money on demand. And also for the adjustment of investment strategies of the pension funds on demand, so they have a greater requirement than someone investing his own money for liquidity.

Q. So anybody who sees this name and has thought it through, and chooses to inform themselves about how the market works, would understand these people come in and out of investments, because that's their business; they buy and sell to allow them make returns to return their business?

A. Yes. I gave evidence that, in fact, I somewhat overstated the case initially, but then corrected myself, that I wasn't sure how AIB IM and Standard would have made this investment because it was a private company, and I then corrected myself to say, well, since they had given these letters, I should give them the credit of assuming they would have had funds available somewhere in the organisation to do so. But I also went on to say that I don't didn't and don't think they could have given commitments to put in the money before the venture was fully there in the sense of a shareholders agreement, a granted licence and then all the operational matters on the

ground.

Q. Now, I think if you turn the page, you will see the IBI Investment Services Limited letter, and I assume you would paint them in the same light as the nature of AIB Investment Managers Limited?

A. I think they were slightly different in that the money they would have sourced, I believe, would have been a group of private investors who high net worth individuals as they are commonly referred to, who would have been approached by IBI, asked whether they were interested in participating in, I suppose, what could be called a sub-consortium put together by IBI, each member putting in some money, and then IBI itself subscribing that money as a trustee or nominee for shares in Esat Digifone.

Q. Now, just dealing with these two letters; neither of them describe they're letters as expressions of intent. They never really describe exactly what they are doing other than that they have reviewed and are prepared to invest. Both of them put in exactly the same condition, which is: "The licence being prepared by the consortium in terms broadly in line with those set out in the memorandum or the tender documents or where amended on terms we agree with the consortium are acceptable." And I assume that's because until they understood what the terms of licence were, they didn't really understand exactly what the nature of

their investment was going to be: could you sell it?

Did you have to hold it? Could you do things? Did it bring commitments with it? That sort of thing.

A. That's correct. The terms of licence were critically important to the value of the investment.

Q. I think the original sort of indicative licence document didn't have any provisions in relation to restriction on transfer of shares?

A. No.

Q. That's a point you made in your evidence?

A. Yes.

Q. You were probably anticipating that would be coming, no doubt?

A. I can't remember thinking about it, but if I did, I would have, yes.

Q. Because there was a scarce resource being given away. It was a national thing to give away and there would have been controls on exactly who was owning it from time to time?

A. Yes, and there was also some degree of sensitivity that I recall in the Department as to the security issues of this.

Q. Okay. In other words, giving away your mobile phone system to somebody who is not the state?

A. Yes, but also that whoever was operating it, would comply with the requirements of the security forces.

Q. Now, I think the second condition was that the terms

of the investment being approved by an investment committee or board.

A. Yes.

Q. So to you, that would be simply an aspirational letter, we'd like to be in but we have got to see exactly what we are going to be in into and we can say we are not interested at any time, but I by just forming the view it's unacceptable?

A. Yes, letter of intent is a fair shorthand description.

Q. If we turn onto the Standard Life letter and I think we needn't delay on this. They make it clear that it's an expression of interest?

A. Yes, and the same important terms.

Q. I think we needn't worry about the balance of the documentation. The point I want to try and get some agreement with you on is that at this point in time, insofar as 20% of this enterprise was going to be put into institutional hands, you had expressions of interest, the ability for them to get out, the fact that anybody who was going to invest would be concerned to see the final licence terms, and all would want to be able to transfer and move their interests to realise their investment in due time?

A. Yes, all of those were fair.

Q. And do you have any reason to believe that anybody reading the application made by your clients would think that the position was otherwise?

A. No. On the contrary, I think especially in the shareholders agreement, there were indications.

Q. Now, I want to bring you back again to the cut and thrust of making a commercial deal of this nature, where you get two people like Telenor and Esat coming together to make a very substantial investment on their own account and they have got the added problem on this occasion, they don't even know if they are going to make it because they have got to win a competition first.

Now, is it the case that where it's viewed as being a worthwhile investment, if you succeed, there will be jockeying for position among the members of the consortium, everybody will want to get the best they can out of it?

A. Yes, control is always a key issue.

Q. And is that something that is a surprising issue or is it something that always seems to have a part to play where you get two people trying to join together to achieve a common end?

A. It's always present, it's utterly predictable.

Q. And I think from your evidence that Mr. O'Brien was a man who was very anxious to have as much control of this as he could?

A. Yes, he was.

Q. And I think Telenor, on the other side, were a group that took the view if it's a joint venture it's 50:50

or nothing?

A. Certainly 50:50 was the minimum. Well, equality was the minimum. Both parties went below 50, quite willingly early on, but Telenor were always absolutely adamant that equality was the bottom line for them.

Now, there were indications, I remember Mr. Bugge's memo recounted them, and there were other indications too, that Telenor felt it would have been better if they had majority control. As a matter of personal belief, I think that Telenor expected to get the majority control because it's the way of the world, that the Party with more money usually ends up with control, and were perhaps taking I can't speak for them but may have been taken aback when they didn't. But certainly they were never ever prepared to go below equality with Esat.

Q. Well, I think in the words of the people who were looking at the applications, Telenor were deep pocket people, they had a lot of money and a lot of expertise?

A. Yes, they were, to all intents and purposes, the Norwegian state in the way that Telecom Eireann was the Irish State at that time.

Q. Indeed. And Mr. O'Brien was probably in a slightly different mode. He was a young thrusting entrepreneur who had done well but really hadn't got to the point where he had an operation of the size or quality of a

second mobile phone licence?

A. More than slightly different; very different.

Q. That would have been true about other people who were applying in various consortia?

A. I think most of the consortia had a mix of international or very large national telecoms operators, and Irish participation and it's particularly the case in Ireland, and I suspect in other small countries, that where these competitions open up, you will get the same big players coming into the small country, whether it is telecoms or it is construction or it's, I suppose, aviation or almost anything else, and they will feel they have to have local partners, so-called anyway, who will provide a mix of expertise, knowledge, contacts, and so forth, but usually the international member of the consortium will expect to dominate and will dominate the consortium, both by means of its technical resources and its financial resources, and it tends to be a surprise to the international member of the consortium when, as sometimes happens, the local member exerts itself and is unwilling to concede effective domination.

Q. And I think Mr. O'Brien is a man of that type of character; he fought his corner very hard?

A. Yes, he did.

Q. And did that take Telenor by surprise, do you think?

A. Well, you'd have to ask Telenor, I suppose, but my understanding is that it did.

Q. In any event, what happened in the consortium was a robust exchange and development of that business plan between the two of them as the thing developed?

A. Yes. But I would say, Mr. Nesbitt, I have seen that before, I mean, I have seen it end up in court before. This didn't do that.

Q. It's no great surprise to see that, you get a large multinational coming in with money, thinking it can rule the roost and you get an inventive entrepreneur coming from the other side saying, well, it's my idea and I am going to have a fair crack of the whip. You get a bit of tension, but that's what you would expect as a solicitor looking at these types of commercial deals?

A. Absolutely. And in fairness, the characters of the principal members of this consortium were as unlike as any I have ever seen.

Q. And can I suggest to you that that piece of tension, probably constructive tension from the point of view of getting the best business deal, really has nothing to do with how one would look at the presentation of a business plan to persuade the people running the competition that that was the best one to run with?

A. No, I would take the view that those running the competition were entitled to assume that the consortia

members would work out any differences which arose between them as, however unsatisfactorily, indeed happened. I mean, for all the scrapping that occurred between Denis O'Brien and Telenor, when the time came to hang, they hung together and they did sort things out in May '96.

Q. And their business plan that was presented remained the same with the exception of the final identity of the people providing the third-party money, the institutional investors?

A. Largely. The money went up and the radio plan, which was the heart of the technicalities, changed, but largely it remained the same.

Q. It cost a bit more?

A. It cost a good bit more.

Q. Yes indeed. But from your point of view as a commercial solicitor, the business plan stayed the same, the enterprise that was being licensed to operate in the way described in the business plan remained the same?

A. Absolutely, yes.

Q. Right. Now, in relation to the events that occurred, did you go you were at the presentations I should know this

A. I wasn't.

Q. You weren't. You didn't have an opportunity to read the transcript? You probably didn't take it?

A. I haven't read the transcript certainly lately. I think I did scan it, a couple of years ago now, I think.

Q. The evidence that's been given here, and when one hears the various oral presentations that now exist in recorded form, it is to see a presentation by your clients, that was clearly head and shoulders above the next presentation?

A. I see.

Q. And does that surprise you?

A. Not really. I have always had a very high opinion of Denis O'Brien's presentational skills. He is very, very good at packaging a project and I think in this one he also had the key advantage that he was willing to risk real money in acquiring real elements of the business plan when others were only prepared to write what they would do if they won. He uniquely went and actually acquired elements of the business, gave himself a head start, and I don't know what weight the Project Team gave to that, but I certainly regarded that as a differentiating factor between him and others.

Q. Now, the oral presentation took place on the 12th September of 1995, and as I understand your evidence, at that point in time, although there was tension within the consortium as to whether or not Advent were as committed as Mr. O'Brien thought, it was

Mr. O'Brien's view that he had a deal with them?

A. It was Mr. O'Brien's view that he had an offer from them rather than a deal with them, but it's probably fair to well, no, I don't know whether on the 12th he had got the letter of the 11th, but that is the Telenor letter of the 11th, but

Q. I am not talking about Telenor, I am talking about the Advent funding?

A. Yes, I know

Q. They had a very strong view about what he had and what he could get out of them?

A. Yes, but the importance of the Telenor letter of the 11th was that it forbade Mr. O'Brien to give any equity to Advent and it, in my view, fairly definitively signalled the end of what might be termed Mr. O'Brien's Advent strategy. I don't know if there was ever anything as grandiose as that. My evidence was that certainly earlier in the process, Mr. O'Brien understood himself to have an offer from Advent but very much not a deal with Advent. I think there is an important distinction there.

Q. You had an issue about writing an opinion as to whether it was enforceable?

A. Yes, I did.

Q. But what he didn't have on the 12th September was any arrangement that he could put his hand on and understand with IIU?

A. He had done an outline what he called an outline, I can't remember an outline something, on the 11th August, but I don't think it could be termed an arrangement.

Q. As I understand your evidence, it wasn't until the 29th September, or thereabouts, that IIU became a realistic proposal, one that was capable of being enforced?

A. It became capable of being enforced on the 29th, although I know there has been doubt expressed in regard to the Bottin assignment and so forth.

Q. Yes, and as soon as that happened, the letter of the 29th September was written?

A. The letter of 29th September came into being on foot of the arrangement agreement signed on the same date, yes, or it may have been signed on the previous day, I can't remember.

Q. So the letter was written almost contemporaneously with the agreement becoming workable?

A. It was effectively the quid pro quo for the agreement.

Q. Indeed, we now know the letter had been sent back and you are not surprised given that the circumstances I think I think you smiled or you seem slightly amused when you talk about the letter you I think you don't think it was a slight matter for the civil servants, Mr. Towey and Mr. Brennan who had to deal with it and they knew they weren't going to

take it and they knew they had to send it back?

A. No, and I am conscious and I have regret since making the remarks that I have regarded what I said about my reaction to the letter being sent back may have seemed to slight Mr. Towey or Mr. Brennan and that certainly wasn't my intention.

Q. I think you came across them in the course of the process and I think you found them business-like and people of integrity doing their job as civil servants?

A. I developed a great deal of liking and respect for both of them, yes.

Q. I think you probably, also, coming from a commercial solicitor's situation of doing large commercial deals, would have understood that all these types of processes require somebody to drive the process; without people committed to getting it moving forward, it will stop quickly

A. Yes.

Q. I think would you describe Mr. Brennan and Mr. Towey as two people who were doing that for this process?

A. Yes, I would.

Q. And would you be prepared to go as far as saying if they hadn't been doing that, this process would have been in a lot of trouble given the size of the Evaluation Team and the size of the commercial deal that was being looked at?

A. Certainly at the stages I was involved in, had there

been people of what one might term a more classic civil service mentality involved or had there been more people than the relatively small numbers involved, it would have got even more bogged down than it did, yes, that's fair.

Q. Very good. I was going to move to a different topic now.

CHAIRMAN: If you are going to be some time more, Mr. Nesbitt, it's undesirable to sit further. We'll conclude at a quarter past two. Thank you.

Just on the point you made, I think in Mr. Nesbitt's penultimate question, about Mr. O'Brien being willing to advance money on risk before he had a result, you are primarily referring to site purchase?

A. Yes, I am Chairman, yes.

CHAIRMAN: Thank you.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AS FOLLOWS AFTER LUNCH.

CONTINUATION OF EXAMINATION OF OWEN O'CONNELL BY

MR. NESBITT:

A. Mr. Nesbitt, I wonder before you begin, I might bring two matters to the attention of the Tribunal arising out of my examination this morning by Mr. Fitzsimons?

Chairman, Mr. Fitzsimons asked me the source of my instructions in relation to the letter to Regina Finn of the 17th April, 1996, and during the lunch break, one of my colleagues brought to my attention a letter

from me to Knut Haga and Per Simonsen of that date, the 17th April, in which I say that, "I have been asked by the Department of Communications for a note of shareholdings in Esat Digifone Limited and Esat Telecommunications Holdings Limited. Knut Digerud asked me to send you the draft letter for approval before it is sent to the Department and it is accordingly enclosed."

And the second matter concerns the period up to the 29th September, when the agreement was done or reached with IIU, and again one of my colleagues has brought to my attention a letter from Mr. Per Simonsen to Mr. Halpenny of the 28th September, the day, I think, on which agreement was reached in which Mr. Simonsen gives some fairly minor comments on the agreement and goes on to say they would expect to see the final version before it's signed. And I believe, although I don't have it to hand, there is a note by Mr. Halpenny of an attendance on Mr. Simonsen the following day on which that was done.

CHAIRMAN: Thank you.

Q. MR. NESBITT: Now, Mr. O'Connell, in fact, I wanted to move onto the events surrounding the communication you had with Ms. Finn in the beginning of 1996. Now, the material documentation I want to draw your attention to and just discuss with you briefly is to be found in Book 43 of the Tribunal booklets, and the first

document is page 183, and that, in fact, is the copy of a facsimile transmission to Martin Brennan and Fintan Towey from Ms. Finn. And that is the document that has the diagram and represents effectively what she understood to be the position following some form of communication.

A. Yes, I remember the document. I think your colleague is giving it to me now. Yes, Mr. Nesbitt.

Q. As I understand it there is no dispute that there was a discussion between you and her at this point in time in relation to her interest in who exactly was the applicant for the licence?

A. That's correct.

Q. And I think at this point in time, there had been detailed discussions between the Department and your clients and yourselves as legal advisers as to exactly what would be contained in the licence agreement?

A. Yes.

Q. In respect of just negotiating the terms of the licence, you'd gone through the process of presenting an application which had been turned into the winner of the competition. Was there any real relationship between the draft licence agreement that had accompanied the competition documentation and the real job of negotiating with the Department as to what the terms of the licence would be, that would actually run the arrangement for the period of the licence?

A. I never did a line-by-line comparison, but my general impression would be that there was very little relationship.

Q. Yes. I mean, one was an aspirational state of affairs where here's a sort of licence we might talk about but then when it actually came down to negotiating it, things would not have been thought of cropped up and the detail presumably was a complicated negotiation?

A. Yes. The licence itself was vastly longer, it had all these schedules as well, a much more complex and comprehensive document.

Q. Now, in relation to the licence document itself, this was going to be a document emanating from the State which granted you a right under a statute, isn't that right?

A. Yes.

Q. The right to carry on what was otherwise a restricted activity. In those circumstances, we have heard about the side letters that come at the end, and I think you were questioned about why something might be contained in a side letter as opposed to being put into the licence proper. And as I understand it, you are of the opinion as a lawyer, that's because this particular provision was not something that was being was not in the nature of a licence condition.

It was in the nature of a derogation from what otherwise would have been quite a stringent

arrangement.

A. Yes, or perhaps a contractual provision between the Minister and the company as to how he would exercise a particular discretion.

Q. Another thing I'd like to ask you about is the general tenure of the licence negotiation. One gets the impression from reading the documentation and hearing your evidence that the Department had pretty fixed ideas as to what they wanted to put into the licence?

A. Yes.

Q. And although you were presumably making commercial arguments as to why they could go in or couldn't go in or why they could be changed or not changed, we were very much beholden to the views of the Department as to what should be in and could be in?

A. Yes. It was made very clear by Mr. Brennan at the first meeting in November 1995 that it was not going to be a negotiating process and that the combined meeting of the two parties was not a drafting session that the Department would listen to our views, would then finalise a licence, would offer it to us, we would take it or decline it, and if we declined it they already had authority to go to the second bidder. There were two other factors, I think, militating against any meaningful negotiation process. The first was that however detailed I might have liked to get, my clients really didn't have the inclination to get

into a nuts-and-bolts review or negotiation of the document. They took a much broader commercial view of matters and simply wanted to get on with it. And secondly, they became increasingly desperate as '95 went into '96 and '96 advanced, to get almost any licence at all and would have had no tolerance or patience whatever for my making legalistic points.

Q. Now, we have heard the issue of the 180 days that was the time-line given for information presented at the licence, the competition to hold good for the purposes of negotiating a licence. And that had been passed. Is your evidence that the passage of time was being destructive of the position that Mr. O'Brien was in, so to speak?

A. Well, destructive of the position that Esat Digifone was in. That was the point really being made in the duress letter, although it turned out not to be fatal. There was, I think, a genuine concern at the time that failure to make the Christmas market would severely undermine the business plan of the company, and I think the banks were also quite concerned about that as well.

Q. You may not know the answer to this question, if you don't, say so, but out there you had Eircell on the other side of the coin getting their act together to face real competition. Was that an issue

A. Yes, absolutely.

Q. To be finalised?

A. It was an issue. Eircell, without wanting to be gratuitously critical of them, had not performed terribly well up to the time, certainly, that the competition had been held. I think had about 100,000 subscribers, which was a very small number for a market of this size, and had appointed in response, I think, to the competition announcement, a new Chief Executive, an English man, I think, who was very market oriented, very energetic and was making great strides in modernising the company and making it competitive. So clearly anyone who joined Eircell as a customer at that time was going to be difficult to shift in the short term to make them a customer of Esat Digifone, and of course by definition, such a person was a potential customer before Esat Digifone because he had shown he wanted to have a mobile phone by joining Eircell.

Q. You presumably you were negotiating all sorts of things like number portability and all sorts of things like that to try and make competition work when the licence was granted and the system started?

A. Yes, there were very big issues. One of the way mobile phone companies make a lot of their money is what's called roaming, which simply means telephoning from one country to another and there are usually heavy charges associated with that. The Department

were insisting that Esat Digifone connect internationally through Telecom Eireann which allowed Telecom Eireann to take the lion's share of the revenue accruing from each such call. Esat wanted to be able to negotiate roaming arrangements freely, to interconnect freely with other operators and thereby to negotiate on a competitive basis, the charges. If Esat Digifone could only go to Telecom Eireann, then Telecom Eireann knew it had no rival and could more or less take whatever share it wanted. There were a lot of issues like that. A great many issues.

Q. Well, I presume Mr. O'Brien, in fact, with his land-line business, would have been well aware of being able to buy time outside the State and make money on carrying calls?

A. Yes, and, in fact, Esat Telecom, I think, either then or very shortly afterwards, did have an undersea connection to the UK.

Q. I think, in fact, insofar as Mr. O'Brien was concerned, that the land-line issues, he would have been dealing with the regulatory end of the Department of communications?

A. Yes, Mr. McMahon.

Q. And Mr. McMahon comes back on the scene at this point in time, I think, in dealing with the negotiation of the licence?

A. Yes, although I would have been less conscious of him

being involved. I don't recall meeting him to discuss the licence. He could well have been there, but I don't remember.

Q. The point I want to make is that the people in the Department who were involved dealing with the licence, were well accustomed to people being required to stand by the rules and knew what they wanted to achieve in licence terms?

A. Oh, yes, very available.

Q. Indeed. Just coming back to Regina Finn and the information you gave to her. I think again the record shows that there had been some issues as to the involvement of Mr. Desmond or IIU in the media around this time. And in any event she rings you, as I understand it, and she asks for information. You were happy to give that to her?

A. Yes.

Q. And she was asking for information about the shareholding in the licensee company, wasn't that right?

A. Yes, although a great deal was made of our failure to take up opportunities to disclose the shareholding, on the other side of that coin, there was never, to my knowledge, or recollection, any intent or desire to withhold it. I certainly accept we didn't give it, but I don't think we were concealing it. And as soon as we were asked, we did give it.

Q. Okay. Well, what I want to do is just deal with a couple of issues. I mean her account of what you told her is quite detailed, so can we assume the discussion you had was a reasonably extensive discussion?

A. I am sure it would have taken quite a while to communicate that much information over the phone, yes.

Q. You went through who was going to be doing what in what particular position, and the position of Advent that was known about, the position of IIU,

Mr. Desmond, that was known about, and you gave other information about the uncoupling proposals to

reorganise the land-line and mobile business of Esat.

In fact, you basically gave her everything including

the fact that there was going to be a 20% IIU

involvement with a further 5%, and as I understand it,

that was the 5% coming from the additional public

placing 12% that was discussed in the licence

application, or the competition application form?

A. Well, that was how we had rationalised it, yes.

Q. And I assume, although there it's noted as the right

to acquire a further 5%, the existence of the right

really meant that the IIU position was 25% if they

wanted it?

A. In fairness, I think the IIU position at this time was

25%. It did have the 25%. I doubt I would have

expressed it in that way because I'd have known they

had the 25%, and in the letter the following day, I

did express it as 5%. I can only assume that Ms. Finn picked up my description of IIU's 25% as coming from two different sources, one 20 and one 5 in the wrong way or in a way I hadn't intended. But otherwise I would say that her summary is admirably accurate.

Q. You felt it appropriate to write the following day and you set it out in more detail. I won't bother bringing you through it.

A. I think she may have asked me for it in writing. I think I may have offered or she may have asked me, but yes I did, the next day.

Q. I won't bring you through that. We can read it. At that point in time, besides the plans that had been the subject matter of the application, the application documentation, the fact that it was made clear that there be two joint venture partners giving away 20% to a money investor who wouldn't be an operational investor, the fact that there was going to be an institutional investor who'd want to be able to get out; the fact that the draft shareholders agreement proposed the possibility of other people being put in place of those, all those things were known to the Department, isn't that right?

A. Yes.

Q. And did Ms. Finn exhibit any surprise about anything you were telling her, that you can recollect?

A. I don't remember that she did or she didn't, I am

afraid.

Q. Very good. Well, with that background in mind, I wanted to bring you onto the draft letter of the 10th May, and the terms of the letter that were eventually sent in May on the 13th. And I think they are going to be found in Book 44. I am not certain of this. At Divider either in book 30, it could be in Book 49, 135, or they may be in Book 44 at 213. And then the second document is definitely in Book 44 at 214 and the first is the draft do you have a copy of the draft?

A. I have Book 49 if that's any help.

Q. It's 135 I think is the draft.

A. Book 44, I have Book 44 now, Mr. Nesbitt.

Q. Very good. 214 is the actual letter of the 13th May.

It's actually hard to read and we have prepared a typed-up copy for ease of reference. Perhaps I could give it to you.

A. I see it, yes.

Q. There is a typed-up copy of it. And the other document I'd ask you to look at is the document of the 10th April, which is the draft of what eventually became the letter of the 13th?

A. The 10th May.

Q. The 10th May, sorry.

A. I think it's in Book 49.

Q. 49/135 I think.

A. Right, I have it.

Q. Now, what I wanted to do is to ask you to come to the second page of that document and tease out some of the issues that arise from the two pages of narratives that appear after the eight numbered paragraphs?

A. Yes.

Q. Effectively what we see there, if we take the first paragraph after number 8, it says:

"During our meeting you asked for an explanation of the involvement of International Investment and Underwriting Limited in this transaction, having regard to the prior involvement of Davy Stockbrokers and certain of their clients."

So we agree that that piece of information flowed from the fact that you had communicated with Regina Finn and told them about IIU and the fact they could look back at earlier documentation and see the involvement of Davy Stockbrokers?

A. Yes.

Q. So that was a piece of information in writing on the record and everybody knew it was there to be dealt with one way or the other?

A. Yes.

Q. And then we continue with the next paragraph, which is essentially divided concerns, the ability or the intention to place 32% of the company in the fullness of time. And that was going to be originally 20% and

then a further 12%, wasn't that right?

A. Yes.

Q. So again that piece of information, the fact that that could happen was all in the competition document and again known to everybody on the record, nothing new?

A. Yes.

Q. Then we have what I describe as a somewhat aspirational paragraph, the sort of special pleading. "Throughout the period prior to and after submission of its bid, Esat Digifone behaved consistently on the assumption that it would be awarded the licence, planning and spending accordingly, it was thought desirable to secure the proposed 20% non Telenor and Communicorp funding. In addition, Communicorp wished to improve its financial arrangements for its shares, the cost of the licence and subsequent construction, launch and costing associated with the successful bid."

That was really telling you nothing, it was aspirational, all sort of special pleading?

A. Yes.

Q. I think the next paragraph over the page then: "Following a review of the possibilities available in the financial market, IIU indicated a willingness to arrange funding commitments; in exchange it wished to have a placing of shares and sought in addition a pre-placing of part of 12%."

Now, again, in relation to the essential facts, the fact of IIU being on board and the fact that they wanted or had an additional 5% was again on the record. The Regina Finn interaction and the documentation there meant that was on the record of the Department?

A. Yes, it was.

Q. So again nothing special about that. No doubt it was known to everybody?

A. The letter of the 17th April which predated this by two weeks made all of this clear. More than two weeks.

Q. As you know the bid merely provided institutional investors, of which IIU is, would be approached to take up non-Telenor/Communicorp shares and references to other investors. And you name AIB, IBI and the others, "were given an indicative/intent basis.

Accordingly, we believe that the present structure is fully in accordance with the bid."

Again, that was an expression of opinion but referring to matters that were already known about and on the record in the Department?

A. There is no new fact if, in fact, that I would accept that many of the paragraphs we are discussing here attempt to put the paragraphs or put the facts in a particular way so as to conform to the bid and I have referred to that to a rational letter

Q. You wouldn't be doing your job as a solicitor if you didn't write a letter that put the best case forward?

A. Correct?

Q. And that would be your training or what you'd be trying to do when you were drafting, you'd be doing it?

A. Yes, very much so.

Q. If we go on to the next paragraph:

"IIU has agreed an issue to take up loan stock in lieu of shares in respect of the pre-placing element of its commitment."

I think that was something new that hadn't been anywhere else?

A. Yes, it was. But remember, this letter didn't go.

Q. I appreciate that.

A. And that never happened. I think we have come across, in other documentation during my examination by Mr. Coughlan, references to that proposal which, in fact, never occurred.

Q. Okay. The reason I want to draw your attention to that, that is a piece of fact that had it occurred, probably would have had a place in a solicitor letter?

A. Yes.

Q. It didn't occur?

A. Well, it didn't occur, so it never came out.

Q. Precisely. And then we get your assertion and your desire to make it clear that at the time the licence

is granted, it's going to be 40:40:20?

A. I was concerned, or I think I would have been concerned, if this letter had gone, that it was, it would be taken as stating a set of facts which weren't the case, in other words, the 40:40:20. At this point, the agreement had not been reached where as to the means by which the 40:40:20 would be achieved. In fact, that agreement was reached two days later in principle on Sunday, the 12th. So I was qualifying my letter to make it clear that what I was saying would happen hadn't yet happened.

Q. It's a draft letter. I think we agree that the one new piece of fact, had it been true, which it wasn't, was the loan involvement, loan equity, or loan stock as opposed to part of the pre-placing 5%, isn't that right?

A. Yes, but I am not sure that saying had it been true, which it wasn't, that's to imply it was a lie. It wasn't a lie. It was something which was intended. It didn't occur. The letter never went.

Q. This was a draft working with material and it didn't get sent and that was not something that came to fruition?

A. Correct.

Q. If I could ask you now to turn to the next letter, which is the letter that actually went on the 13th May, to the Department?

A. Yes.

Q. And you have the typed-up copy. The first page is unremarkable. It has the numbered paragraphs, on this occasion 7, and it's over the page that we see what you actually said. Now, this is on the 13th, the day after the arrangement of the 12th that agreement with the 40:40:20 and you are now saying, confirming, that on or before the grant of the licence, the company is owned as to 40% by Telenor Invest and Esat and 20% by IIU Nominees holding on behalf of Mr. Dermot Desmond. So that was a statement of the facts as existing at that point in time, and insofar as anything occurred in the draft letter, all the material facts that are contained in there were already on the record and known?

A. Yes.

Q. So are you surprised to be cross-examined at length as to the distinction between a draft letter that was never sent but contains facts which were already known about and a letter that was sent and puts the position as it was?

A. It would be disingenuous of me to say that I am surprised. I am aware of the Tribunal's interest in the IIU investment. The Tribunal indeed had previously asked me for a memorandum on the subject, so clearly it was going to form a significant part of my examination. I suppose in the very broad sense, I

have made it clear that I regarded the ownership the question of ownership of this 20 or 25% as somewhat overblown, but that's a different issue.

Q. You have said that and that's there to be dealt with insofar as it's relevant to anything.

In relation to another matter that you dealt with in the course of your evidence, it flows from what occurred here. You were struggling to help Mr. Coughlan as to how the draft letter came to transmute into the letter that was actually sent. And as I understand it, you said, by looking at the documentation after the event, and speculating or wondering how it might have been, you opined that maybe somebody in the Department, possibly Mr. Brennan, had asked you to take out material?

A. Mr. Brennan or Mr. Towey. I said I thought they had either agreed to it being taken out or had asked me to take it out.

Q. I think you'll appreciate how important that is to them

A. Yes, I do.

Q. if they were trying to dictate what a letter would look like. So I want you to be as careful as you can be and reach back into your mind. Are you saying you recall them doing that?

A. No, absolutely not. I have made it clear, and I am

happy to do it again, that I do not have a recollection of Mr. Towey or Mr. Brennan asking me to take that material out, or indeed agreeing to any request I might have made, or anyone else might have made to take it out.

Q. Both of those gentlemen say that they never had any discussion which they were asked to agree to it being taken out or asked you to take it out. So if they are in a position to give that evidence, do I understand you to be saying you are not in a position to contradict it?

A. I am not in a position to contradict it by reference to my recollection of any contrary conversation.

Q. That's a very straightforward answer, Mr. O'Connell. And I think there is probably a lot of substance to that. These were civil servants of high position, isn't that right?

A. Yes.

Q. They were good at what they did. You had found them competent. And as we have seen, what was taken out of the draft letter, or what didn't come into the letter that was sent, was all actually on the Department record so it wouldn't have made a lot of sense for them to try and hide it at that point in time?

A. Yes, apart only from the loan stock issue which by this time, the 13th, had gone away.

Q. Yes, so it wasn't an issue and wasn't going to be

something that mattered one way or the other. So there was nothing that they needed to be trying to hide that wasn't on the Department record?

A. No, I don't think so.

Q. And they have been very clear in their own evidence that they were not trying to hide and didn't hide anything.

Now, in relation to the final negotiation of the terms of the licence, the impression I get from the evidence you have given is that although this was the State issuing a licence under statute, the actual final negotiations came to be something like a closing in a commercial transaction. Eventually to get agreement, you get all the parties in the rooms with their lawyers and you sit them down and you turn off the coffee and tea and say let's get it done. Is that the way it sort of developed?

A. Yes, yes, it became very like a completion. I'm not sure we ever did get anyone in a room. In fact that was part of the problem, there was a lot of shuttling. But certainly there was a sense of things coming together and of I would have been consciously trying to prevent people raising new issues. I think I have mentioned already that one of the banes of my life is when you get when I get close to a completion. I constantly find people ringing me up in the morning and saying I was lying awake last night

and I thought of such and such an issue and can you get it in and I have got to go off an a round robin.

By the time I have finished that somebody else comes in with a point they have thought of and it can go on forever. You have to be a little abrupt with people sometimes.

Q. Indeed. This transaction was very commercial in that way. It was a huge licence agreement. I presume every time somebody sat down they could think of some slant that maybe hadn't been fully discussed before and you are telling us that you felt the time had to come to say here is the licence, we've taken it, let's get on with it.

A. And also what's missing a lit bit from this story is that the banks at this time had been pushed into a position of pretty much accepting the licence as it was but weren't terribly happy or willing about that and really wanted to have a greater say in the licence, wanted things put in it or side letters about it which would favour their position, and we were trying to hold them off with one hand as well.

Q. Again, perhaps you could help us from your experience as a commercial solicitor. Is that unusual when the end is coming close that the banks start looking at it in more detail and thinking up things they forgot to mention earlier on?

A. I wouldn't say it's either usual or unusual. It

happens.

Q. Not uncommon?

A. Not uncommon.

Q. And you felt that was happening a little bit in this?

A. I was afraid it would. I don't think it actually did.

Q. Very good. So you also had the commercial reality that presumably this consortium wanted to get on and launch their operation?

A. The overriding concerns, I think, were on the commercial side, that they desperately wanted to get the licence because only with the licence could they draw down the project finance and get the whole show on the road. From the legal side, I had, frankly, a set of fractious shareholders and I wanted to get the thing signed and across the line before any more squabbles broke out.

Q. And I think in relation to the final bits and pieces was the licence negotiation and the agreement that could be signed off and the licence would issue. I think dealing with the Department there was no difficulty in explaining one side to the other, what bits needed to be looked at and asking what people could do to resolve those problems?

A. No. The Department were quite constructive. Once we made a logical point, particularly so in relation to Clause 8, once we made a logical point, they were generally prepared to facilitate it up to a point,

would never really give away anything of critical value to the State, but subject to that were willing to go along.

Q. I think you described Clause 8 as being rather far-reaching in relation to controlling the transfer of ownership interest, isn't that right?

A. I felt that Clause 8, as it ended up even, was probably over the top. But when taken together with the side letter, we could live with it. As it originally emerged, it was grossly over the top.

Q. And that's the purpose of the side letter, you pointed out concerns that there may be an impact on positions that people knew about, unintentionally included in Clause 8 and the suggestion of a side letter was arrived at as a solution to a practical problem?

A. Yes.

Q. And there was no difficulty in agreeing that?

A. Not particularly. It took a bit of time, but it never got hostile or terribly difficult, no.

Q. So it wasn't a major issue at the end of the day?

A. It was a major issue to begin with, but it was resolved satisfactorily.

Q. Once people could see the rationale behind what was being asked for and the common sense of it, they felt that was straightforward?

A. Yes.

Q. Now, another issue that arises, and again you can help

this with your experience and recollection of this, is the suggestion that's implicit in much of the questioning that there is something bad going on, because full notes of minutes of meetings of these last events weren't being put down. Was the nature of the exchange and the speed at which it was going something that could lead to a situation in your experience that might have meant events that are now being looked into were not being minuted?

A. Oh, yes. In most of my files, you'll find notes get more patchy as the time spent and my involvement in meetings gets greater, I have made that point as well. I am slightly surprised that the negotiations which I had with the Department in regard to Article 8 hardly appear to have been minuted by me at all. There is one set of notes which isn't properly headed and I can't even be certain it does relate to that. But that apart, there is nothing, and that somewhat surprised me. But it wouldn't be unusual if one is spending a lot of time in meetings and on the phone and things are getting busier, to find that the note-taking suffers.

Q. So far as you're concerned, the absence of any minutes of some of the discussion concerning Clause 8 doesn't give rise to any issue of concern on your part?

A. If you mean does it imply anything sinister going on, the contrary would be the case, because if I felt

there was anything sinister going on, I'd be much more careful to protect my own position by taking detailed notes.

Q. I assume, besides the two joint venture participants who are going in for the long haul, your institutional investor would have been interested in Clause 8 because that would have affected X with mechanisms or X with ideas they had of getting out?

A. Yes, very and there is a note I had of a meeting I had with Neville O'Byrne and Michael Walsh which is wholly devoted to that subject.

Q. And they were being kept alive to the what was going on and as I understand the Department was being pretty inflexible about giving you a break in Section 8?

A. I wouldn't say they were they were slow to bend but not inflexible.

Q. Well, they were commercial, but didn't take away from the essential control issues that arose out of Section 8?

A. And knowledge was it was as much about knowledge as it was about control. That's why rather than giving any concession in the article itself, the Department made it clear that we always had to apply, that was so they'd be sure they knew what was going on, but were then willing to bind themselves to give consent in certain circumstances.

Q. Now, there is a number of questions I need to ask you, Mr. O'Connell, and they are general in nature but the answers are important to us, given the extent to which the process of the licence award and the negotiation of the licence agreement has been gone into by this Tribunal.

In the course of representing your client in presenting the application to the committee who would decide on who was a winner, are you aware of any occasion when you or your client was inappropriately assisted by anybody on the team judging the applications?

A. No, I am not, but I should make it clear that I wasn't involved in the presentation or of the bid.

Q. When your client had won and then had the right to negotiate and your firm became involved in negotiating the legal elements of the licence agreement, again, I'd ask the same question, are you aware of any evidence you can give this Tribunal of something that happened that showed you were inappropriately advantaged in the course of that negotiation?

A. No, certainly not.

Q. Thank you very much.

THE WITNESS WAS EXAMINED FURTHER BY MR. COUGHLAN:

Q. MR. COUGHLAN: Just a few questions, Mr. O'Connell.

You'll be finished then.

First of all, I was just wondering were you confused

there when Mr. Nesbitt asked about the absence of notes. I think all your references were to your own notes. And the only notes we have of a series of meetings from the beginning of May up to and around the 16th May, with the exception, I think, of Mr. Johansen's memorandum of the period are either your notes or Mr. Johansen's, isn't that correct?

A. I think that's so, yes.

Q. And there were no records at all in the Department files of any of these meetings, you are aware of that now?

A. So I have been told, yes.

Q. So that's a distinction I think. You answered in response to your own notes, and readily understandable as you got busy, your note-keeping perhaps got shorter, would be a fair way to put it?

A. And patchier, yes.

Q. You are not expressing any view about the Department and their note-keeping?

A. No.

Q. Or records?

A. I couldn't.

Q. You couldn't.

Now, if I could just, for a moment, go back to the period when the bid went in. You may have had sight of the bid document. It wasn't something you studied, isn't that correct?

A. That's correct.

Q. Or participated in the preparation of?

A. No, I think I probably did see it afterwards, but I don't think I saw it beforehand.

Q. The question-and-answer session that took place after the RFP, you had no involvement in that; that was being run by the bid team or the

A. I wasn't there, that's correct. And I didn't, I wasn't involved in any preparation for that.

Q. Yes, and you wouldn't have been familiar with the assertion there that no fresh information was to come in particularly, at that time, is that right?

A. No. It was drawn to my attention the point in the RFP, but I don't remember being conscious of that.

Q. That's precisely the point. Well, I think it wasn't in the RFP. It was in the question-and-answer session, yes.

A. I see.

Q. You weren't at the presentation and you didn't hear what was said about no fresh information, isn't that correct?

A. That's correct.

Q. And I think you have given evidence that you were unaware of that when you were involved in the negotiation, or the preparation of what ultimately transpired to be the letter of the 29th September?

A. Yes, I think I was. I was slightly surprised by

seeing the part that you said, the question-and-answer session, or the question-and-answer document, because I don't recall being conscious of that.

Q. And I suppose that's a matter that the Tribunal is of interest to the Tribunal, would have to look into, because as a solicitor, if there were rules governing a competition, it's something you would have expressed a view on if your client was going to breach those rules?

A. Probably.

Q. And can I take it, therefore, then that on the 18th September, when Mr. O'Brien and Mr. Buckley came to you, what you were asked for was to get involved in the preparation of a letter of underwriting for the Department; that's what you were told?

A. Yes.

Q. And the first time that you became aware, it would appear from the evidence you have given and on the documents, that something may have been sent to the Department which was not in conformity with what was required under the rules, was when the letter came back from the Department on the dated the 3rd October, I think, enclosing Mr. Walsh's letter?

A. I think that's right.

Q. Or around that time anyway?

A. Yes, I think that's right.

Q. And I just want to be clear about this, and I

understand what you said about Mr. Towey and Mr. Brennan today and you withdraw the reference to laughing and I understand that entirely. But you don't seem to have any recollection of a major discussion when the letter came back to Mr. O'Brien other than that you have expressed a view that it was the considered view of people that at least the information was in the mind of somebody in the Department, probably Martin Brennan?

A. Yes, I think I said that, and also that there was a sense of having done the best we could and that was it.

Q. Yes. I think also in fairness to you, you said that at the first licence meeting, the preliminary licence meeting in November, when I was asking you wasn't that an opportunity to disclose IIU, I think you expressed the view at that time that it wouldn't have occurred to you because you would have believed that it was in the mind of people present or some people present, isn't that right?

A. Yes.

Q. And that continued to be your state of mind, would that be fair to say?

A. Insofar as I gave it a great deal of thought.

Q. Now, I just want to ask you, coming then to the letter of the 17th April of 1996, when you wrote to Ms. Regina Finn, that was in response to Ms. Finn

asking you to write to her from the previous day,

isn't that right?

A. Probably. It's conceivable I said look, this is all very complicated. I will put it in a letter. But I agree it's probably more likely she said, look, can you put that in writing to me.

Q. Whatever way it arose, you agree you did write?

A. Yes.

Q. But it was Ms. Finn, the request came from Ms. Finn?

A. Probably, yes.

Q. That was the person you were in contact with the previous day, isn't that right?

A. Oh, yes, sorry

Q. It wasn't Mr. Brennan or Mr. Towey?

A. It was Ms. Finn, yes.

Q. That was the

A. Yes, certainly, Ms. Finn.

Q. Whom we know, of course, had not been in that section or perhaps in that Department or that section of the Department during the bid process or anything to do with it, but that's neither here nor there. It's not your concern.

Now, I was just wondering if you were of the view or your clients were of the view that the information, or some information about IIU, was in the mind of the Department, or somebody in the Department at least anyway? And I am asking you this now in fairness to

the civil servants, would it not have been more likely that you would have made a statement somewhere, you know, along these lines? As you are aware, or no doubt you are aware, and I think even in your draft letter yourself in relation to some other matter, the final page, when you are making reference to the bid you used the expression, "as you know, the bid merely provided for," wording to that effect. Wouldn't you think that you might have used words like that?

A. In hindsight it would have been a lot better if I did and I wish I had. I suppose also in hindsight I am absolutely certain I didn't, but I think I didn't.

The only explanation I have been able to give for why we didn't, and I suppose I'm summarising now a matter over which we had, I have given quite a lot of evidence and you have asked me a great many questions.

Q. Yes, I appreciate that.

A. Is either or both of, it was one issue which was going to have to be dealt with in time and/or it is something which had to be presented at the right time in the right way. I think it's possible, but would accept if pressed, that it's unlikely that our failure to make a statement in that regard earlier was simply a matter of omission. I think probably it's more likely that we were waiting for the right time and the right way to say it. Now, I would still characterise that as an issue of moderate importance, and in

particular, I'd refer to the low level of response and recollection which we have in relation to Mr. McManus's article. It didn't cause a huge problem. I think while it's possible, it's unlikely that the omission early on to talk about IIU was accidental.

Q. Fair enough. Now, I now want to come finally to your draft letter of the 10th May, and I am asking this in fairness to you.

Mr. Nesbitt has very fairly put the position that Mr. Towey and Mr. Brennan will say that they didn't make any request of you and that there was no agreement in relation to excluding those particular paragraphs we see not contained in the final letter of the 13th. And you very fairly said you don't have a recollection of that.

A. Yes.

Q. But in fairness to you, is it still your evidence that from the circumstantial evidence available to you, you believe that there was at least an agreement, whether the request emanated from you or from them?

A. Yes, I think that's likely.

Q. Thank you very much.

A. Thank you.

CHAIRMAN: Well, just in conclusion, then, Mr. O'Connell, when Ms. Finn rang you about the ownership details, I think, on checking her own evidence from

some months ago, it was to the effect that she was relatively new to the process, she was working for Mr. McMahon as de facto Regulator and she simply made the inquiry in a fairly perfunctory context, rather than anticipating any fresh information. That seems to largely equate with your own recollection of the

A. That could be so, Chairman.

CHAIRMAN: And you took the view you had been asked the direct question and even though there might have been opportunities to ventilate it earlier, now was the appropriate time to give full chapter and verse.

A. Yes, Chairman, I think so.

CHAIRMAN: Regarding the resolution of the differences with Advent, which I think Mr. O'Toole was instrumental in dealing with, I am right in thinking that Mr. Prelz continued to have a reasonably close association with the consortium, and in fact, took a fairly active part in the eventual negotiations leading to the British Telecom sale.

A. Yes, and I think Mr. O'Brien still has some dealings with him on and off. There was no sundering of relations or anything like that.

CHAIRMAN: Yes, Mr. O'Connell, I am appreciative of the very considerable time, both in giving evidence, and in preparation for it, that you have devoted to the last seven days or so. It has assisted and somewhat presented in a more structured fashion, the

facts that have to be dealt with in the Tribunal's task in dealing with this rather complex issue, and I appreciate the care and trouble you have put into that. I am also conscious you had to equate both your duty to your clients at the time and have regard to your own standards as a senior commercial solicitor in the town, and I am satisfied you sought to equate those matters in a proper and conscientious way.

Thank you for your assistance.

A. Thank you, Chairman.

MR. COUGHLAN: The next witness will be available next Tuesday, Sir.

CHAIRMAN: Yes, I think there was an intended witness for tomorrow, but the gentleman in question has genuine difficulties. Thank you.

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