

A P P E A R A N C E S

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I N D E X

Witness: Examination: Question No.:

Denis O'Brien Mr. Coughlan 1 - 700

THE TRIBUNAL RESUMED AS FOLLOWS ON WEDNESDAY, 12TH
NOVEMBER, 2003 AT 11AM.

CONTINUATION OF EXAMINATION OF DENIS O'BRIEN BY
MR. COUGHLAN:

Q. MR. COUGHLAN: Now, Mr. O'Brien, I think you want to
make a correction.

A. I just want to make sure, obviously, everything is on
an even keel, Mr. Coughlan. But in regard to my
statement, Chairman, obviously I stand over everything
that is in my statement, but in particular, I should
point out that in certain aspects, obviously being in
a Tribunal, that there was a collaborative effort in
some parts of this. For example, when we talk about
public interest and references to the Attorney
General, I would have obviously consulted with my
lawyers on that particular statement.

The second thing I'd like to just say, that is the
reference to the final remarks, Mr. Coughlan,
yesterday, on the duopoly aspect, and maybe there is a
misunderstanding here, but we were given a right to go
and negotiate a licence which ultimately started up a
new company to go and compete against Eircom
subsidiary, Eircell. So in our view, we had a licence
to invest and spend considerable amounts of money,
like hundreds of millions of euros in doing so. So

maybe there is a misunderstanding here, but that was not a duopoly. A duopoly happens when you have two dominant players under Competition Law and they carve up the market, agree prices and play games with each other. But in our circumstances, we were actually coming in against a company that had been there for ten years with mobile operations. They had hundreds of thousands of customers. So we were in a start-up. So we were under no favouritism.

And in regard to the other point about the scarcity of a scarce national resource, I think that is overbaked, that term, because there was plenty of frequencies and plenty of spectrum available for the Government to go and issue a licence to a third, fourth, fifth, sixth, seventh, eighth operator if the Government at that time decided to do so. So there is a little bit of a misconception here. It's rather like the point you buy a licence for 15 and you sell it on for 2.3. Of course everybody forgets that you have invested and risked your capital in the meantime.

So those are the couple of points I just want to pick up on yesterday.

Q. I have no difficulty at all, Mr. O'Brien, in relation to those matters that you raise this morning, and in fact, I was in fact suggesting to you yesterday that there was some legal collaboration in relation to that statement.

A. Of course.

Q. And I had no doubt about it and I don't think it reflected in any way upon you.

A. Thank you.

Q. There is just one matter this morning, Mr. O'Brien, and I'd like to deal with it now at the first available opportunity, and it relates to what's contained on page 6 of your statement. And the paragraph commences:

"Over the previous two years, the Department of Communications had stalled the granting of Esat's licence despite the existence of the 1990 service directive which guaranteed any company that met certain criteria the right to be granted a licence.

It was only after Minister Cowen came to office that the Department decided to issue Value Added Services licence to new operators. Unfortunately, while Esat immediately signed up numerous large corporate customers to its services, Telecom Eireann deliberately delayed, often by six months, the provision of leased lines for the connecting up of the customers to Esat's international gateway switch in Fenian Street Dublin."

I think somewhere else again, I think, you refer to deliberate activity on the part of Telecom Eireann in relation to the provision of leased lines?

A. Yes.

Q. Now, I am not asking for your to go into this in any great detail at this stage, but this was brought to the attention of Telecom Eireann yesterday and I just want to put into the record their immediate response. Matters can be looked at if they need to be looked at, in the first instance in the private investigative work being conducted by the Tribunal, and you and Telecom would have had an opportunity to deal with that and then if necessary it can be dealt with in public if it arises.

But the response the Tribunal received by facsimile this morning from Eircom, which is the successor to Telecom Eireann, from their solicitor Dr. Eamonn Hall this morning was:

"Eircom rejects the allegation that Telecom Eireann deliberately delayed, often by up to six months, the provision of leased lines for the connecting up Esat customers to Esat's international gateway switch.

These allegations related to allegations made by Esat Telecom to the EU Commission in 1996 concerning the terms and conditions upon which Telecom Eireann granted Esat Telecom access to its network. Telecom strongly rejected the allegations before the Commission and explained to the Commission that it had not treated Esat Telecom in the discriminatory manner as claimed by Esat Telecom.

"Following a thorough investigation in which Telecom

Eireann defended itself in detailed submissions and before the Commission, the Commission rejected the allegations made by Esat Telecom in a formal decision issued in January 2000. Esat Telecom initially appealed the Commission's decision to the European Court of first instance, a procedure in which Eircom intervened in support of the Commission's decision. However, subsequently following a change of ownership in Esat Telecom, the appeal was withdrawn."

That's the statement of fact as delivered by

A. I know we are going to come back to it, but I'd say they haven't actually dealt with the point I had made in my statement. That's something else they are talking about, and it's for them to reply.

Q. Very good.

Now, I will be going to some documents, and I think it's been indicated to you the area we'll be looking at today. But I just want to just briefly put it in its context.

You were part of a consortium which paid for and received the RFP document, isn't that correct?

A. Yes, it's 5,000.

Q. 5,000. And you were part of a consortium which pursuant to that RFP document, submitted a bid for the second GSM licence in Ireland, isn't that correct?

A. That's correct.

Q. And the consortium would have been aware of what was

required in the bid from the RFP document, isn't that right? That set out

A. It was a very broad document, but, yes.

Q. That set it out. And amongst other things, what was required in relation to that document was that ownership, full ownership, details of the proposed licensee must be given, isn't that right? Questions in relation to financial capacity, technical capability and other matters, isn't that right?

A. There is a list of them, yeah.

Q. And that was to enable a team, which was conducting an evaluation, to arrive at a position whereby they could advise their Minister and the Minister in due course advisor recommend to the Government, isn't that right?

A. That's correct.

Q. Now, it's in that context that any of your business dealings are being viewed, Mr. O'Brien. I just want to be clear about that.

Now, I think in the first instance, I would just like to briefly look at matters as they evolved. Your company, Communicorp, had been involved in a number of businesses, isn't that right; the radio businesses, and there was fixed line telecommunications business?

A. Yeah, we had two subsidiaries, one for radio which is Radio Investments, and also Radio 2000 and then we had a company called Esat Telecom, which became Esat Holdings.

Q. Those were the businesses you were engaged in?

A. At that time.

Q. At the time, say in 1994?

A. 1994 well, from 1991 forward, yes, yeah.

Q. And I think am I correct in understanding your statement that Advent became shareholders in Communicorp in 1994, or around that time?

A. In late 1994, yes.

Q. And that arose by reason of Advent investing \$10 million isn't that correct?

A. Yes.

Q. in the company? And in return for that, I think they received something around 32% of the shareholding of the company?

A. Yeah, and 25% voting.

Q. And 25% voting. Now, in 1994 from 1993 on, there was no doubt that there was a lot of discussion about liberalisation of the telecoms market, isn't that right?

A. It was a growing agenda.

Q. It was a growing agenda. And it was known that the European Commission were urging this on Member States?

A. And the States were reluctant.

Q. Yeah, but that's what was happening, isn't that right?

A. Yes.

Q. And in 1994, your company had an interest, or a potential interest in looking at GSM, viewing it as

being a good area to get into?

A. A little bit earlier, but yes.

Q. And we know that there was some discussion taking place inside the Department about the whole question of a second GSM licence in any event, isn't that right, we know from the documents now?

A. From the documentation, yes.

Q. Now, there was a change of Government at the end of 1994, isn't that right?

A. I think it was November, yes.

Q. Now, we know from the documents, again, that there had been a decision in principle perhaps taken by the previous Government, about proceeding with a competition, some form of competition for a second GSM licence, we know from the documentation?

A. Yes.

Q. Now, Mr. Jim Mitchell had been had become a consultant to your company sometime in 1994, would that be correct, or at least

A. Around that time, yes, well in advance.

Q. There was some form of discussion going on in 1994 at least?

A. Yeah, I think he was a consultant at that time, but I'd have to look at the documentation.

Q. I am not holding you specifically.

A. Okay.

Q. And then the first thing I want to look at in terms of

documents this morning is a document a note made by Mr. Jim Mitchell in early 1995. And I just want to refer you to that document now.

By this time, the new Government, the Fianna Fail/Labour and Democratic Left had formed the Government, the new Government?

A. Is that 49 or

Q. I am going to refer to now it's in Book 41 and it's at tab 27(A), and I'll get you a copy, because you needn't have the whole book there at the moment.

CHAIRMAN: I think, Mr. Coughlan, you had Fianna Fail as the lead partner, you meant Fine Gael, with labour and Democratic Left?

MR. COUGHLAN: Did I say Fianna Fail? I am sorry Sir, Fine Gael/Labour and Democratic Left, isn't that right?

A. They may have wanted to be.

Q. MR. COUGHLAN: Now, the note is dated 5th January, 1995. Do you see that?

A. Yes.

Q. And it reads: "I saw Michael Lowry at 3.30 today and informed him of my involvement with Esat.

Tenders to be sought by advertisements in next week or two.

This is a note being made.

"A) DOB not favoured by Department.

"B) DOB Fianna Fail!!.

"Is available to immediate principals of all contestants in February and including DOB but not for lunch.

"Check in 3 weeks to see if this has happened."

Now, do you remember having any discussion with Mr. Mitchell around this time?

A. Yes, I do.

Q. About meeting Mr. Lowry?

A. Yes. I asked Mr. Mitchell to see if he could set up a meeting between me and Mr. Lowry. Mr. Lowry was the new Minister, at that stage maybe two months. I had never met him and I needed an introduction to get to see him.

Q. Did Mr. Mitchell inform you that he had met Mr. Lowry?

A. I don't remember that, now.

Q. Now, do you remember Mr. Mitchell giving you any feedback about meeting Mr. Lowry?

A. It's a long time ago

Q. I understand that.

A. I think that Mr. Mitchell would have phoned me to see, look, Mr. Lowry will meet you, there is no problem, and a meeting then, I think, was subsequently set up.

Q. All right. Now, could I ask you, first of all, why you wanted to meet the new Minister? I am not saying there is anything wrong with it, I'd just like to know why.

A. If you are a player in a market and you are dependent

on the Government of the day for liberalisation so that you can expand your business, the key person to meet, really, is the Minister, because the Minister is driving the policy of the Government, the programme of the Government.

Q. Yes.

A. And what I wanted to do was meet Mr. Lowry, tell him my experiences to date, which were pretty appalling as an entrant into the market, because we had been trying to be stopped and tripped and it was not an easy time for us. And I wanted to outline to him maybe some things that he should maybe try and address the situation with regard to, for example, auto dialers, capacity from Eircom, and also maybe to ask him about if there was going to be a second mobile licence.

Q. So would it be fair to summarise your view and your reasons for wanting a meeting was that you wanted to impress upon the Minister, and lobby the Minister to implement a policy to the extent of liberalising the market and allowing for a second entrant into the mobile business?

A. Yeah. It's normal course that when a Minister comes is appointed, a new Minister, all the different all the different portfolios that he has, all the different players want to come in and meet him to press their position on what the Government can do to open up the market or change things.

Q. I can under understand that, that it was directed towards policy?

A. Policy, yeah.

Q. Now, did Mr. Mitchell tell you, and it mightn't have come as a surprise to you, as you say yourself from your dealings, as you have indicated are the regulatory side of the Department in particular, that you weren't a person who was favoured by the Department? Do you ever remember him telling you that?

A. No, he didn't say that to me.

Q. He didn't say that?

A. No.

Q. Is it something that could have slipped your mind that it mightn't have come to you as a

A. No. I mean, Jim Mitchell was a very straightforward person. He would be circumspect about relaying something like that.

Q. Do you remember having any discussion with Mr. Mitchell about a view being expressed by anybody, but particularly by Mr. Lowry, that there was a view of you as being a Fianna Fail supporter?

A. Quite definitely not, no.

Q. I am just wondering, because Mr. Mitchell made a note, I am just wondering is it just something that you don't recollect that he would have had a meeting I am just wondering why Mr. Mitchell-as you say he was

an experienced man, he was a circumspect man, why he'd have made a note of a meeting with Mr. Lowry if it wasn't, say, for the purpose of having a discussion with you afterwards?

A. I actually don't know. Unfortunately, we can't direct that question to him right now.

Q. Now, it's one of the few documents we have available to us concerning Mr. Mitchell's well, if this was in the context of a consultant to your firm?

A. I believe that he was appointed as a consultant earlier than this date. Can I help you with this Mr. Coughlan?

Q. Yes, indeed.

A. If you send somebody in to see somebody, they will filter things back, in other words, they won't tell you everything that that person said.

Q. I understand.

A. And you know, sometimes remarks to say that person is of political persuasion, they mightn't come back and tell you that because they know it's probably not true and that the people might get upset by it. So and you have to know the personality of Jim Mitchell to understand that maybe why he wouldn't have said DOB not favoured by the Department, or DOB FF.

Q. Whatever about DOB not being favoured by the Department

A. Which is true.

Q. It was that probably wouldn't have caused you upset. You were in constant contact?

A. Mmm, we were getting nowhere.

Q. And Mr. Burke, on your behalf, was probably in constant contact with the Department and there can be little doubt but that there was a lot of discussion going on between the two of you?

A. The Department wasn't set up for liberalising the market. They didn't have the people there within the Departments that really understood the European directives; and particularly, the services directive. And they were struggling. And to be fair to them, that was the reason why they wouldn't answer letters or they were slow coming back because they weren't equipped. And we now have a situation where there is an independent Regulator and they have the right people to handle these kind of inquiries. So if you don't have letters being replied and then you send another letter and everybody is getting very excited, there is tension. So that is the context of probably why he is saying the Minister, because his officials probably fed him back to say, these people are really beating the door down, they have no right to a licence, or they are illegal or whatever. So that's why, you know, probably that remark came through.

Q. Well, the second comment or note: "DOB Fianna Fail !!" and I don't intend going into the question

of political donations at all today.

A. Okay.

Q. But am I not correct in understanding the schedule you supplied to the Tribunal of donations made?

A. Oh, yes.

Q. That donations to Fine Gael commenced in 1995?

A. No.

Q. On the schedule you gave me?

A. Well, I could have bought some raffle tickets, but

Q. I understand. I am not talking about matters of small but am I not correct in understanding that contributions to Fine Gael, in real terms, in significant terms, commenced in 1995, would that be fair?

A. Yes, but I would have also but my records didn't go back that far, probably bought a table at Mr. Mitchell's annual economic forum. But I don't have any records for that.

Q. Right. I understand. I was just trying to put that in its time sequence. I'll come back to it in due course when we deal with the whole question of contributions.

A. Okay, fair enough.

Q. Now, I think you believe that Mr. Mitchell, in due course or sorry, there was a meeting arranged with Minister Lowry in due course after this period, is that correct?

A. That's correct.

Q. Can you remember around when that took place?

A. It would have been in the first two or three months of 1995.

Q. Can you remember where it took place?

A. No. But I know I met him, it was a brief meeting one evening.

Q. Right. It wasn't in the Department, was it?

A. I actually don't know.

Q. You don't know. Can you remember who was present?

A. Mr. Mitchell was present, as far as I can recollect.

It was my memory of the meeting, probably fifteen minutes, even less, just introducing who we were, what Esat was trying to do, the difficulties it had and also the capacity issues, the auto dialers, but with a new Minister taking over a Newport folio, you don't want to blind them with sort of technical jargon.

Q. I understand that.

A. So it was a very brief meeting. It was more out of courtesy to introduce myself.

Q. Do you know did the meeting take place in Fine Gael headquarters?

A. It may have. My offices were across the road.

Q. The only reason I ask you that, is that we have an entry in Mr. Lowry's diary for it's the week of, it seems to be Wednesday, 7th February, which again might coincide with your recollection of a couple of weeks

after the first meeting.

A. Mmm.

Q. And there is just a note in Mr. Lowry's diary:

"18.30, Jim Mitchell, Fine Gael headquarters." Do you think that could have been the meeting?

A. If it's in his diary it could well be.

Q. It doesn't name you, but do you think it could have been?

A. It could have been that venue, my offices were three or four doors down across the road.

Q. I am just wondering now, I think we might go to Book 48, Mr. O'Brien.

And I suppose the first matter I'd just like to discuss with you is the whole question of Southwestern Bell, Detecon and yourselves, and I think you, in your statement you have informed the Tribunal that, yes, you were involved in serious discussions with Southwestern Bell and Detecon. Southwestern Bell probably being more the lead than Detecon, would I be correct in understanding your statement?

A. They had shown an interest in Ireland longer.

Q. And you formed the view that Southwestern Bell were engaging in the negotiations on the basis that they would like to be, in effect, the dominant partner within any consortium which came together. That's how it appeared to you?

A. That's right, yeah.

Q. Would that be correct?

A. What tab are we on now?

Q. Sorry, your statement, first of all

A. So we are on page?

Q. Page 10.

A. 10. Thank you.

Q. I think on page 10 you describe how it came into being. You were approached by Mr. Kirwan of Beauchamps, initially Southwestern Bell and Detecon contributed by sending personnel to Ireland and matters were proceeding along those lines, isn't that correct?

A. Yes.

Q. And that was from 1994, is that correct?

A. Yes.

Q. Can you remember approximately when in 1994?

A. It would have been

Q. First half of 1994 perhaps?

A. It would have been probably, yes. Second quarter maybe. I mean, I wouldn't know the precise date.

Q. Yes, and I'm not asking you to be

A. We spent about a year.

Q. Yes. And if you go to page 11 you say that: "As time went by we began to lose confidence in Southwestern Bell. Ironically, they had no problem " and I don't want to repeat that particular part of the statement today, unless you think it's important.

A. No, no.

Q. And you say that a meeting in early 1995, you asked Southwestern Bell how many licence applications they had become involved in worldwide and what success rate there had been. And Mr. Moran replied that they had made 14 licence applications, but in only one case were they successful and that was in Taiwan where they ended up with 8% of the company. And you say that during this time you, that is you and your colleagues on your side of the business, lost confidence in Detecon because it was clear that they were being led by Southwestern Bell. You were beginning to feel that you were with the wrong team and you made your board aware of your views in this respect.

And then you say that "in the meantime the Department was experiencing delays in issuing details of the post competition, and on the 24th October in a meeting with the Department, Doug Goldschmidt was told that the announcement would be published shortly. You say in late 1994/early 1995 further disagreement arose between Esat, Southwestern Bell and Detecon as to the level of Esat's equity participation in the consortium with Esat seeking a larger share and Southwestern Bell and Detecon seeking Esat to be relegated to the status of a token Irish presence. In March 1995 matters came to a head and by mutual consent Esat terminated discussions with Southwestern Bell and Telecom. They

subsequently went on to form the Irish Mobicall

consortium."

So that's your evidence of what happened and the coming into being, the development and the ceasing to exist of a potential consortium, is that correct?

A. Yeah. I mean, you are talking about seven or eight years ago and that's the best of my recollection.

Q. Yes, I understand that. I understand that.

Now, if you go to Divider number 2, I think this is a letter which you sent to Southwestern Bell and Detecon, isn't that correct?

A. Mm-hmm.

Q. And it's dated 27th January, 1995.

A. Yes.

Q. And you say that:

"In our meeting on the 20 January 1995, Southwestern Bell and Detecon asked Esat Telecom to provide a written confirmation from IBI that they are comfortable that they can raise the financing to fund Esat Telecom's anticipated equity investment in Esat Cellular," that was the potential name or the "This request was made by Mr. Liam Coonan of Southwestern Bell.

"We pointed out to you in that meeting that Esat Telecom have already responded to questions from Southwestern Bell and Detecon regarding Esat Telecom's ability to fund the capital to be subscribed by Esat

Telecom and Esat Cellular. Since our meeting on the 20 January, we have gone back to review our discussions with you on this topic and verified that in November 1994, IBI confirmed to you in a meeting at IBI that it was comfortable that it could raise the equity to be contributed by Esat Telecom in Esat Cellular. Accordingly, you already have an assurance from IBI and nothing further should be required in that regard.

"We have also informed you that Advent International, a minority investor in Communicorp Group Limited, the parent company of Esat Telecom and one of the world's largest venture capital investors with 1.4 billion under management, has made certain commitments to provide funds to the Communicorp Group in respect of the GSM project, and has indicated an interest in providing additional fund for this project. In view of the above, Advent International will be providing Esat Telecom with a letter next week regarding its interest and confidence in providing the funds necessary for Esat Telecom's contribution to the GSM project. We will provide you a copy of that letter.

"As you know, Esat Telecom has no obligation to provide you with the assurances requested; however, we are anxious to lay to rest any residual doubts, however irrational, which you have concerning our ability to fund this venture. On receipt of the

Advent International letter you will have received two independent and separate assurances and this issue will presumably have been closed.

"If you have any further questions regarding the matter, please feel free to contact us.

"Yours sincerely"

You sent that letter to Southwestern Bell and Detecon?

A. Yes.

Q. Because am I correct in understanding that they had a concern about your financial position, however irrationally, isn't that correct?

A. Yes, they did.

Q. And you say there had been a meeting with IBI, is that correct, where IBI had assured them of your ability to raise equity?

A. They asked to meet IBI, and I brought them to IBI. I think Padraig O'hUiginn was with me.

Q. Sorry?

A. I think Padraig O'hUiginn was, if I recall rightly, of with me at that meeting and IBI said that they were confident that they could raise the equity for us for, if we went forward and won the licence.

Q. If you went forward and won the licence. Who in IBI said that, do you know?

A. I can't remember.

Q. Can you remember who you were dealing with or how the meeting with IBI was set up?

A. We would have dealt with the a number of different people at that time that worked for IBI.

Q. Right. Now, you also say in this letter that Advent had indicated an interest in providing additional funds for the project, is that correct?

A. That's right.

Q. Can you tell us about that.

A. That's the redeemable preferred.

Q. Sorry?

A. The redeemable preferred. It's in the documents you have.

Q. For the project?

A. It was part of the original investment agreement.

Q. That was the 10 million which had been brought into the company?

A. Yeah.

Q. I understand.

A. Yeah.

Q. So

A. Sorry, in that just to clarify. In that agreement, they put in 10 and then they committed another 4 if we were to win the licence. 4 or 3, but I think it's 4.

Q. Yes, all right. Then you said that in view of the above, Advent would be providing Esat Telecom with a letter next week regarding its interest in confidence in providing the funds necessary for Esat Telecom's contribution to the GSM project, and that you would

provide Southwestern Bell and Detecon with that. Did that letter ever come into being?

A. I actually don't know, Mr. Coughlan.

Q. All right.

Now, if you just go, then, I think the next Divider is Mr. Goldschmidt's submission to the Department in relation to how matters should be dealt with and we can come back to that in due course. But if you go to Divider number 4. There is a letter dated 15th March from Southwestern Bell to you, isn't that correct?

A. That's right.

Q. And by this time, of course, the competition had been announced. I think it was announced on the 2nd March, if I'm not mistaken?

A. I couldn't be totally sure, but it was March.

Q. You can take it from me it was the 2nd March, yes.

Now, there appears to be a mistake on the second line, but I'll just deal with it.

"Denis,

"I understand our group will be meeting in Dublin next Tuesday, 21 March 1994" possibly 1995 I think.

"The sole purpose of the meeting is the shareholders agreement. I know you share my hope that our respective attorneys will have made good progress before next Tuesday.

"I did, however, want to raise a major point related to the Cellular bid. While we were led to believe

that the licence fee would be fixed and that interconnect rates would be reasonable, the RFP now makes us realise the situation is very different. If we look at what has happened in an "auction" environment elsewhere in Europe, it is fairly safe to assume that the licence fee could very well exceed an amount equal to 8, 9 or even 10 times as much as originally envisioned. Obviously, we are working diligently on the financials, but I think it is very safe to assume our view of the equity requirement is no longer applicable. We envision scenarios where it could easily double.

"I hope progress is made on the fundamental issues on the shareholders agreement. There are so many critical and very difficult decisions to be made and the clock is ticking.

"Best regards."

Now, matters seem to have been progressing to a fairly advanced stage as of the 15th March 1995 between yourself, Southwestern Bell and Detecon, isn't that correct?

A. Yes, and no.

Q. Very good.

A. Probably there was more discussion about the shareholders agreement than the sort of material issues about the bid, our strategy, and we felt they were more important than a shareholders agreement.

And probably the third thing is, they were very, very /KHRARPBLG company. They probably, reading into their minds said, here is a small /AEU /SPAOEURG company, and they should have a token presence, which is ultimately what they wanted us to have, and we had greater ambitions.

Q. I understand that. But it had moved to the stage where (large) you were getting close to (/AEU /SPAOEURG) concluding the shareholders agreement?

A. I don't think we were ever there. I mean, when you are going through a shareholders agreement, you could go up to 10 or 15 drafts before you get a final agreement. This could be a very if I recall rightly, we only had preliminary discussions about the shape of a shareholders agreement, but the pillars of a shareholders agreement is what each of the parties will have as a shareholding and we could never agree with them.

Q. All right. Now, if you go to the second paragraph, the letter continues that he wanted to raise a major point related to the cellular bid. That's the GSM bid?

A. Yeah.

Q. "While we were led to believe the licence fee would be fixed and that interconnect rates would be reasonable, the RFP now makes us realise the situation is very different."

Can you assist the Tribunal as to how Southwestern Bell were led to believe that the licence fee would be fixed?

A. I'm just trying to I never saw that. Just one second. Where does it say fixed?

Q. The second paragraph: "I did, however, want to raise a major point related to the cellular bid. While we were led to believe the licence fee would be fixed and that interconnect rates would be reasonable, the RFP now makes us realise the situation is very different."

Because what the RFP, of course, contains

A. Was an auction.

Q. Was an auction element in a beauty contest?

A. Yeah, which I think was a surprise for them.

Q. Well, sorry, I just "We were led to believe the licence fee would be fixed." Where could they have received information from, which would have led them to believe that? Was it from you?

A. I think you'll have to address I mean, he is writing this letter with the knowledge that he has. I don't know I don't know where he is getting that from.

Q. Well, can you help us out, where do you think he could have got that information from?

A. I'm trying to think back to early 1995, whether it was a surprise or not that the Department, in the RFP, were going to have an auction or were they talking

about a fixed? If you look at my or if you look at Doug Goldschmidt's memorandum, it talks about the different alternatives and nobody really knew which way the Department was going to go. These people could have been under the misapprehension that it was going to be a fixed fee rather than auction, which is subsequently what happened between the 15th March and the

Q. The 23rd

A. Well, the 16th, whenever we were told that that was aborted. So it's a very interesting point, but I really can't help you.

Q. I suppose why I am asking you about the letter is the letter is addressed to you and I suppose normally when one would read a letter like this from one person to another, one might take the view that what is being said to you here is, "we were led to believe" that it was from you they were led to believe?

A. Well, they had Irish advisers, Mr. Coughlan.

Q. I see.

A. So...

Q. Okay.

A. And in fact their Irish advisers were very active.

Q. All right. Well, in any event, the RFP set them right about that at least anyway, isn't that correct?

A. It certainly did.

Q. Were you surprised about the auction element in the

RFP?

A. Well, it was either/or, so there wasn't much of a surprise.

Q. Now, can I take it that before the RFP, any discussions that were taking place, and we can see I know there would have been discussions about many matters of a technical nature as well as a financial nature perhaps

A. This is business strategy

Q. taking place?

A. Yeah.

Q. But we can see that as of January of 1995, there had indeed been discussions taking place about your finances, isn't that right?

A. Well, that was one of maybe one out of ten things that were being discussed at that time.

Q. No, I understand that.

A. It was by no means the most important one.

Q. That's as it may be, but it was a matter that was under discussion, isn't that correct?

A. Well, we now have documents that reflect that, but there were many other things.

Q. And can I take it that any discussions that were continued up to this letter of the 15th March, 1995 which related to business plans, costing, injection of equity, debt/equity ratio, were all proceeding on a basis of a fixed fee for the licence?

A. I actually don't remember.

Q. All right. The reason I ask you is that I thought that perhaps you were the smaller company, that it would have been a matter of significance to you?

A. No. I mean, Mr. Coughlan, I always knew I'd get the money. I mean, one of my strengths is raising money, and I had every confidence at that time in early 1995, that we would raise the money and we would have it on the day.

Q. But in conducting your discussions with Southwestern Bell and Detecon and looking at the various scenarios, would I not be correct in thinking that one would have to have some broad understanding of the type of money that needed to be raised?

A. Well, if I remember rightly, Southwestern Bell had a financial model. I mean, you have got to understand this, if you are looking at an opportunity, you get financial people and business people to sit around a table and say, what are the assumptions here? How many people will, you know, buy a mobile phone? What are the fees? What are the interconnect rates? You try and build a picture and then you work out, well, if we are going to lose money for three years, how are we going to finance that? How much equity you need. You know, how much money will come from banks. So Southwestern Bell would have done that and they probably would have had different alternatives,

different scenarios.

Q. But can you remember what type of figure was built into any models which were being looked at at the time as regards the auction fee element?

A. They would have had

Q. Sorry, I beg your pardon, fixed fee element in the first instance. And I can understand if you go alternatively to look, there is an auction fee element?

A. Nobody knew whether was an auction or a fixed fee until the RFP, and obviously people were a bit disappointed, certainly we were disappointed when there was an auction element, but the whole price for the licence never exercised my mind.

Q. Sorry, I beg your pardon?

A. The whole price

Q. The price for the licence never exercised your mind at all?

A. No. I was more interested in seeing whether this was a really good commercial opportunity.

Q. But surely the price for the licence would have a bearing on that, Mr. O'Brien?

A. Well, I always thought that common sense would prevail, and also in the background, the real powers in Europe were always going to make sure that the process was going to be fair. It was outside the orbit of the Department of Communications and the

Minister. It was in Europe.

Q. Was that always your view?

A. Absolutely. If you also look at there was a very interesting article that I am reminded was in just reviewing these papers, that in FT Mobile where they talk about what happened in Italy, so even though we were planning for an auction, we knew that there was potential that the European Union would exercise itself and assert itself with the Department, not in any prescriptive way, but in pointing out certain anti-competitive things that were the features of the RFP.

Q. Now that you mentioned Italy, what had happened there, and you mentioned it in your statement yourself, quite a large fee was imposed upon the newcomer, isn't that right? And there was no fee payable by the incumbent?

A. Yeah.

Q. And what the Commission set about doing there was to try and persuade, is perhaps the best word to use, the Italian Government to ensure that there was equality by imposing a similar fee or taking some sort of measures against the incumbent. Isn't that it in broad terms?

A. An equalisation.

Q. An equalisation. But it wasn't and I'm just trying to understand the thinking of people at the time the Commission were not trying to persuade governments

of Member States to give back any monies which had been received for licence fees, or to rerun competitions?

A. It's probably too late for that, but I think it's a natural kind of thing that, if you're a competitor in a market place and your competitor that is established for ten years hasn't paid for their licence, that is unfair, because they have written off the cost of their network already and they have a lower cost base; whereas you are borrowing money and putting up equity, which is all costing you and you are trying to break into the market. So the European Union, in its machinations, has found ways of actually curing that, maybe not to the total happiness of the aspiring competitors, but it does happen.

Q. What they tried to do in the first instance is persuade governments to do certain things.

A. Yeah.

Q. But the reason I am interested in this is that in understanding how one might approach a competition and the financial makeup of a consortium applying for a licence, what type of matters were exercising your mind as regards the amount of money that would need to be raised?

A. Probably 100, 120, 130 million. What normally happens all these bidders for licences, virtually have the same models. And the actual cost of the

project, there isn't a real big difference. I mean, I am sure if you looked at Mr. Andersen's work and the cost of the project in each of the applications, you'll see that there wasn't that big a disparity in the amount of capital required to set up the business.

Q. That was in a situation where there was one constant: The licence fee was known?

A. Yes.

Q. And everybody knew that once that was known, everyone

A. And obviously the other thing that might change is how quickly people how aggressive they were going to go into the market.

Q. Yes. Because this letter continues on, and obviously what was concerning Southwestern Bell at this stage was that if there was to be an auction, and an auction element in the competition and they had a look at the rest of Europe and they were concerned that the licence fee could well exceed an amount of 8, 9 or 10 times what was of originally envisioned.

Now, can you remember what was originally envisioned?

A. I would like to help you, but I actually don't remember. But there is two elements here that's interesting, Mr. Coughlan. Don't forget they were trying to make us a junior partner. If you are trying to make somebody a junior partner, you try and spook them about the actual cost of the project. And that's

the way I'd read this letter.

Q. All right.

A. The second thing

Q. Sorry, I beg your pardon.

A. is that we I think it's very clear in all the documentation, all the files, that Esat was against an auction. I mean, if you look at Doug Goldschmidt's very first submission

Q. Absolutely no doubt about that. No doubt about that.

And I think it would be fair to say perhaps anyone applying for a licence would be against an auction?

A. No.

Q. Unless they thought that that was the only criteria?

A. The big guns favoured an auction.

Q. Only criteria.

A. If you are a big gun and you have a big balance sheet, you want to get into a market and you have a choice between a beauty parade, which is a game of chance, or you put your money down and say, I will bid X, sometimes the larger corporations prefer that.

Q. I can see that, yes.

A. So...

Q. I am just wondering here, you cannot remember what was originally envisioned in respect of the licence fee by this group of people?

A. No, not

Q. This group of people that you were involved in

discussion with?

A. I can remember a little bit later. Obviously, when we get talking to Telenor about what potentially was the number.

Q. But you cannot remember what was envisioned at this stage?

A. No, no.

Q. Well, whatever it was, and whatever view was now being taken by Southwestern Bell, that this could be a lot more than was envisioned, they continue in their letter: "Obviously, we are working diligently on the financials, but I think it very safe to assume our view of the equity requirement is no longer applicable." So if there was going to be more of an auction fee, there would have to be more equity, isn't that right, it would seem?

A. It depends. If they owned if they were bringing on their balance sheet, probably not because then they could borrow. Probably at a higher rating than somebody would with no experience.

Q. Well, the view they are expressing here is: "We envision a scenario where it could easily double."

That is the equity requirement.

Now, wasn't it this particular problem, the problem relating to equity requirement and their view about you, rightly or wrongly, but their view about your financial state, that ultimately resulted in the

collapse of this particular project?

A. When you say financial state, what do you mean by that?

Q. Their view that your inability to meet the equity necessary for this particular project?

A. I don't think we ever got to that stage.

Q. All right.

A. It broke down because we had a view that these people were not the right people to be in business with. And that was compounded by the fact that they wanted to offer us a small token Irish equity holding, and those were the two fundamental reasons, Mr. Coughlan.

Q. Can you remember what small equity holding they wanted to offer you?

A. I don't have any correspondence, but

Q. Well, can you remember roughly?

A. Approximately 20%.

Q. And can you remember what their rationale was for that figure of roughly 20%?

A. There is a mismatch between if you are a small company and a huge big corporation, as they were, there is a mismatch because, number one, you are not dealing with people that are principals; they are foot soldiers in the middle ranks, and even though we were a principal, you know, no matter how persuasive I could be, I could never persuade them of certain things, and one of them was we should have an equal

equity holding. And, you know, big corporations can be the big swinging dick and they behave that way because they have got the power.

Q. But if you were in a position, in their view, to keep up your equity end, where is the mismatch?

A. They lost a great opportunity.

Q. But I am asking, where is the mismatch? If you are in a position to keep up your equity end, there is no mismatch, is there?

A. Well, it depends. If

Q. They are just saying, we are not going to deal with you?

A. Well, if they say we'll give you 5% and you can fund that, that's not attractive for us.

Q. No, I understand that.

A. We never considered ourselves

Q. But you were proceeding along the basis originally of being more or less equal partners, isn't that right?

A. Absolutely. We were wealthy in other ways, Mr. Coughlan. There is different classifications of wealth. Wealth, people think, is money. But it's also ability, it's also the fact that we were developing a liberalised market in Ireland and that we had great strength in that because we were the people who were forging that. Now, that made the Department unhappy, but Southwestern Bell never really recognised that they really had a good Irish partner that could

bring tremendous advantages to them.

Q. I am not disputing that at all, Mr. O'Brien.

A. Okay.

Q. All I'm asking about is that you were proceeding along the basis that you'd be equal partners, or thereabouts?

A. Yes.

Q. Their concern related to your inability to keep up your equity end of matters, isn't that right? Whether they were right or wrong, that was their view?

A. No, to determine that you needed to know how much your partner is going to have in equity terms. So we never even got there.

Q. I see.

A. I mean, the debate between the parties was, what would Esat or Communicorp own in the consortium? We could never agree with them. And then coupled with that, we began to realise that these people never won a licence in their own right, so maybe they weren't competent in this particular area. They were very competent in other areas, and maybe we were with the wrong people. We were backing the wrong horse. So we took an enormous risk, we said, okay, we'll terminate this by mutual consent, and we will take our chances that we can attract somebody that will come with us to go after the licence.

Q. All right. And can you remember when it terminated?

A. It terminated pretty quickly after March/April, somewhere around that time.

Q. Can you remember?

A. You know, we just even though they owed us money for costs, we just didn't even bother collecting the money off them. We just said this marriage is over, we are now moving on.

Q. What I am asking you is can you remember when that was?

A. It would have been April, probably March/April. I don't know where the documents are on that, Mr. Coughlan, if you can help me.

Q. All right. And when it terminated, what was your position?

A. We were solo.

Q. You were solo?

A. Mm-hmm.

Q. And for how long were you solo?

A. Not particularly long. I mean, it could have been six weeks, two months. It wasn't particularly long because, if I remember rightly, in the end of April, we started our discussions with Telenor, but also, Mr. Coughlan, in parallel to all of this happening about partners, we were actually getting planning permissions, doing our research, writing up our bid, doing our planning, as if we had a foreign partner. The irony of all of this is we never needed a foreign

partner but we were told by our advisers we needed a foreign partner.

Q. Well, whether the partner, be it foreign or domestic, were you told by your advisers you couldn't have a domestic partner because there was only one?

A. Well, we didn't want them.

Q. Of course. But you needed a technical partner, didn't you?

A. We didn't really, but it was part of the game and the game was you needed the perception was from all the advisers and probably extended to nearly everybody, that you needed a partner, an international partner for credibility. I would have been happier to go it alone.

Q. You would have been happier to go it alone?

A. Yeah.

Q. Right. You had discussions, I think, with France Telecom, didn't?

A. We had a magnificent dinner in Paris and a lovely lunch, got nowhere though.

Q. Could you tell us about those discussions.

A. Well, we met their head of international a woman, I can't remember her name, in the Intercontinental Hotel, I think, in Paris, Place Vendome, had a long meal for about four hours. We were in this sell mode to say this was a terrific opportunity, we were the right partner. We had experience of the telecoms

market, it would have been a very strong partnership. They obviously asked a lot of questions, then they came back and they said, we'd like to meet you again. So we went off to Paris again, had a long lunch, and nearly the same questions again. And ultimately they just couldn't get their heads together. I mean, this is a classic example when a small company is dealing with a huge company, the small company has the priority of that business at the time and the discussion. The big company doesn't have that priority. And France Telecom were going in all directions being involved in bids and they never got around to it. And the irony was some years later, I met that same woman and she said we were wrong, we should have gone with you.

Q. Did anything at all emerge from those discussions?

A. Nothing, except costs.

Q. You say that those took place in March/April of 1995?

A. I couldn't be totally sure of the date, but definitely in '95, yeah.

Q. And who was with you from your side?

A. I think the first meeting I went in Paris, there were two colleagues with me.

Q. Mr. Callaghan?

A. It could have been Mr. Callaghan, Ms. Gaffney. On the second meeting then, I had Massimo Prelz with me for the lunch meeting.

Q. For the?

A. Lunch meeting.

Q. Lunch meeting.

A. I mean, a funny story about this, we were coming in from the airport and we turned on our GSM phone and we were making calls all the way into Paris and the phone kept on breaking down. So we were kind of conditioned that maybe France Telecom weren't the right people either.

Q. Well, was there discussion with France Telecom about the project being a 50:50 project, can you remember that?

A. Yes, that was a fundamental.

Q. Did they, to your recollection, respond to that?

A. Only in a very general way. We never went that far to get into the nitty-gritty.

Q. Well, could I ask you this: Did it not emerge from one or other of those meetings with France Telecom, and didn't the concept of 20% institutional or other investors emerge from France Telecom?

A. Yes, I think so, yes. It was one of the ways sorry, it was one of the options in the when we were talking about 50:50, we were saying maybe we might be happier to bring in a third party investment

Q. Was that to create some type of equilibrium on a board or

A. In their case they probably wanted to share the risk.

Q. And wasn't it as a result of their suggestion that there should be a 20% third party institutional investor

A. It was one of the things that we discussed as a there were different scenarios.

Q. But wasn't it as a result of that that Mr. O'Callaghan made first contact with Mr. Kyran McLaughlin?

A. On a preliminary basis, yes.

Q. Isn't that right? That's where it came from?

A. I wouldn't be a hundred percent sure, but I think so.

Q. Well, you can

A. Has he put it in his statement to say that?

Q. Mr. O'Callaghan has told us this is where he

A. I haven't seen that, so...

Q. I am sorry if you haven't seen it. It has been furnished to you.

A. Don't worry, I take it it's true.

Q. I think, coincidentally, with discussions with France Telecom, you had retained the services or were involved in discussions to retain the services of PA Consulting in London, isn't that right?

A. Not as a result

Q. I am not saying I am saying coincidentally.

A. It was in parallel, yeah, but I'm not sure whether France Telecom or our meetings with them led us to PA.

Q. No, I am not suggesting that.

A. Sorry.

Q. But am I not correct in or as Mr. O'Callaghan has since indicated to the Tribunal, it was PA who advised that you might be better off not dealing with France Telecom?

A. I actually don't remember that.

Q. You don't remember. And that it was PA were the ones who suggested that you would perhaps be better served becoming involved with one of the

A. Nordic.

Q. mobile operators in the Nordic countries, would that be correct?

A. I recall that, yes.

Q. And this was they made the introduction to Telenor, isn't that right?

A. That is correct, late April 1995.

Q. Late April, 1995. I think there was an initial discussion, isn't that correct, in the way of an introductory meeting with Telenor in late April of 1995, is that correct?

A. Well, what happened was that, if I recollect rightly, Mr. French made contact with them and then they sent two people to see us and very quickly the meeting went extremely well and it was virtually subject to their board approval they would go ahead.

Q. That brings us to tab number 5, you can see

A. 4th May.

Q. 4th May. It's a note which you are sending to Mike

Kedar, John Callaghan and Massimo Prelz, re Telenor.

"Per Simonsen spoke to me today and made the following points:

"Following their meeting here in Dublin last week they briefed their ACE and his reaction was very positive to their involvement in our GSM bid.

"They require board approval and this should be forward coming in the week commencing 15 May.

"In order to finalise a board paper, they intend to do financial due diligence on our GSM business plan on Thursday and Friday of this week.

"In the meantime they are going to provide some resources, particularly in the technical area in order to write the bid document.

"On Monday next, they will send in their technical planner to define how many people we require to write the technical part of the bid. They will then be put in place by the middle of next week.

"I am due to visit Norway next week to meet with their senior management.

"On a separate note. Northern Telecom have now agreed to provide assistance on the radio planning side for the end of this week.

"Telenor have agreed to sign a nondisclosure agreement which has been forwarded to them."

So there were a number of steps to be taken. They had

to get board approval, but they felt confident about that, Telenor, that would be fair to say. They were going to conduct a financial due diligence on your GSM business plan, is that correct, on Thursday or Friday?

Did they do that?

A. They did, yes.

Q. And they were going to provide some resources in the technical area in order to write the bid document; that's the technical side of the bid document?

A. Yes.

Q. Can I take it that was the technical side was not written at that particular time?

A. It would have been started.

Q. I see. By whom?

A. By the bid team.

Q. Who in the bid team would have started the technical side?

A. We had people who were seconded in from Nortel and also there were people in PA, I think two of the seven people from PA were working on the technical part of the bid which was well underway.

Q. Now, this was May of 1995, is that correct?

A. That's right.

Q. And am I correct in understanding your statement that another thing was happening in May of 1995, you had begun some form of discussion with CS first Credit Suisse First Boston in May of 1995, is that correct?

A. That's right.

Q. And what was the purpose of that discussion?

A. To raise long term capital for the business.

Q. And can I take it that you would have informed them of your interest in bidding for the GSM licence?

A. Absolutely, yes.

Q. And that was

A. It was a very important part.

Q. It was a very important part, I think there is no doubt about that.

Now, I think, am I correct in understanding that they were not in a position to make any equity commitment of course?

A. They were, but they couldn't do it in the time-frame, and the person that we were dealing with advised me that it was going to be just too expensive and too dilutive to do at that stage.

Q. Who advised you that?

A. It would have been Tom Keavney and Scott Seaton.

Q. Sorry, Tom Keavney and Scott?

A. Tom Keavney and Scott Seaton - S-E-A-T-O-N.

Q. And when you say that they said that they could make an equity commitment?

A. Mm-hmm, yes.

Q. But that they couldn't do it in the timescale?

A. Yes.

Q. Just explain that to me.

A. Well, what we wanted we had a private company where it was just myself and some other directors had shares. Step two was to bring in a venture capitalist which was Advent. Step three was to bring in US institutions which we ultimately I think we brought in five or six of them in 1996 and then step four was to do a bond offering so that investors in the US would get to know you better. Step five then was an IPO. So this was all planned out in sequence. So our idea at the time was to expand our shareholder base. Instead of having one dominant venture capitalist, we decided then we'd bring in more institutional investors in the US who would help us then with successfully launching a bond offering and an IPO .

Q. In May of 1995, what specific discussions did you have with these two gentlemen in CSFB?

A. About doing a placing.

Q. About doing a?

A. Placing.

Q. And just explain that.

A. A placing where you place shares to investors, it was a private equity placing. It wouldn't be a 144 A which is a public like a public, a semi-public issue. It would be

Q. Could they get private investors to put up equity?

A. Yeah, you go and you meet maybe 20 investors. They all express interest or say we are not interested.

You narrow it down to ten and then you narrow it down to seven with a view to ending up with five.

Q. I understand. And what you would be hoping by that was that they would invest in the company, the private investors?

A. Well, CSFB told us it was doable.

Q. But the purpose of it was to enable the company to have money to meet its equity requirements where necessary in its business?

A. In our fixed line business as well.

Q. Yes, I understand that.

A. For both businesses, yes. Nothing to do with the radio.

Q. Both businesses?

A. Yes.

Q. And CSFB told you it was doable but not in the time-frame, is that right?

A. Well, we started in May and we were

Q. The bid had to be in by the 23rd June.

A. We were never going to get there.

Q. Now, it was extended by a month?

A. We didn't know that though.

Q. No, you didn't know that. Did you have any further discussions with CSFB in the intervening period?

A. We kept them informed every step of the way of what was happening. I think we had a meeting in July, October, lots of conference calls. It was just one

ball that was in the air, being bounced in the air at the same time as everything else.

Q. Now, if it had been doable, when you went to CSFB, of course you would have sufficient funds to meet your equity requirements in both businesses, isn't that correct?

A. Well, I think you need to look at it, whether it was doable and then what was the impact? The impact would have been very dilutive. You were better off trying to continue to build your business because you get a better price, get your licence, you'll get a better price. So

Q. The licence was key to the doability of it, wasn't it?

A. No, not necessarily because we had a very strong business. Or fixed line business was growing rapidly as well, so we would have if we hadn't have won the licence we sort have would have done a deal with CSFB.

Q. Yes, I can understand that. But as you say, when you take account of the dilution, the bigger the business, the better it is for you in terms of any dilution taking

A. Personally, yeah, more valuable.

Q. Makes it more valuable?

A. Yeah, we had a 30 million euro valuation on our business in 1994. We were trying to get it up to 100. And the quicker you can get to 100 the less dilutive it is when you raise new capital.

Q. So you had a value in 1994 going into 1995 of

A. Of 30. That was the Advent price, so it was probably worth a lot more because we had put more meat on the bone by developing our business.

Q. But it was your own view or it was a perception that it was

A. Yeah, the benchmark, though, was Advent.

Q. The benchmark was Advent, very good. But to do, to grow the business and get the licence, and that was very important in growing the business I think we'd all agree, what type of funds were you discussing in May of 1995

A. With Advent?

Q. No, no, with CSFB.

A. Oh. It would have been a mixture of equity and also mezzanine.

Q. How much?

A. I think you'll have to go back to the letter, there was a term sheet or there was a letter there. I mean, can you remind me? Do you know the number?

Q. Could you remember? If you can't, fine

A. I think it was 30/40, but we'll have to look at it.

Q. But at this particular time in May of 1995, when you were having these discussions, you had not commenced any discussion with Advent which resulted in the agreement of the 12th July, isn't that correct?

A. We would have sent signals to Advent that we needed

cash.

Q. I understand that.

A. And it would have been in the board in fact

Q. I understand that, and they mightn't have been surprised?

A. Well, we had monthly board meetings, so they were astute, they could see the cash flows.

Q. But you hadn't commenced discussions with Advent which resulted in the agreement of the 12th July of 1995 when you were having these discussions with CSFB, isn't that right?

A. I don't know if that's entirely true, Mr. Coughlan. Because it was a bit of a movable feast. They knew we were bringing Advent or Telenor in. They knew that the joint venture agreement of the 3rd June, there was a certain condition in there about having a financial

Q. I'll come to that in due course.

A. So I wouldn't have thought it wouldn't have been any great surprise and I would have kept them informed; not just at board meetings, but going to see them in London, on the phone. I mean, they were very, very interested, particularly Mr. Prelz, nearly on a weekly basis, what was going on. And it was a rapidly unfolding story, as such.

Q. Well, what I'm trying to understand here is the reason why you went to CSFB. I presume because you

considered it would be more advantageous to you than dealing with Advent, would that be fair?

A. Yeah, I am always a believer in having alternatives.

Q. Would it be fair to say you wouldn't have gone to them if you thought it would have been more disadvantageous to you?

A. I might have just gone to see what they were at, how good they would be.

Q. You continued with

A. Yeah, if you look at all the people I had running at that time, I had Advent, I had IIU, I had CSFB.

Q. When did you have IIU running?

A. From August, 10th August, 11th August. And we also went to them in June, when we were looking for a \$5 million loan, so we did have a very brief discussion with them, but it wasn't doable.

Q. Now, I just want to turn, as you mention the joint venture agreement, to tab number 7.

Now, this was a joint venture agreement which you entered into with Telenor, isn't that correct?

A. That's right.

Q. And it was prepared by Telenor. I think the actual agreement itself, I think we can be fairly certain?

A. Yes, it's foreign.

Q. Now, this is dated 3rd I think it was on the 3rd June, I think. Was it? It's dated 3rd June anyway at the top. So we can take it that's the 3rd June.

A. In fact, it's executed on the 2nd, but by then it's June anyway.

Q. The beginning of June?

A. Yeah.

Q. Now, if we go to clause 2, that's the financial guarantee portion of the agreement, do you see that?

A. Yes.

Q. And it says:

"Within June 16th, 1995" I presume that means by 16th June 1995 "Communicorp shall provide Telenor with a financial guarantee satisfactory to Telenor.

The guarantee shall amount to $i\frac{1}{2}$ million plus 50% of the licence fee.

"The guarantee period shall be from the day that this agreement is signed".

Now, can you just help us there. What was 50% of the licence fee in the view of you and Telenor as of the 3rd June of 1995, as soon as you entered this agreement?

A. Well, you have to do a bit of mathematics to get there.

Q. Yes.

A. Because you'd have to look at the equity that was being contemplated in the bid document, and then work out, out of the business plan normally in these situations the bank would count the payment of a licence fee as equity. So if you had debt/equity

ratio of 60:40, 40% equity and you paid within that 40% a licence fee, that would go towards your equity.

Q. Well, maybe you are right, Mr. O'Brien, but just looking at the document it says it's very simple to understand. The guarantee was to be for two things, is that right, guarantee for $\text{€}1\frac{1}{2}$ million, plus 50% of the licence fee. That seems to me, maybe I am wrong, to indicate that there is a figure in mind here, an actual figure. If one is giving a guarantee, it has to be for something specific, doesn't it?

A. It would have been too early on the joint business plan to actually determine what the 50% was.

Q. Well, how could you give a guarantee for it so?

A. It's an open-ended we could have been 50% of anything.

Q. No, it had to be given by the 16th June, 1995, Mr. O'Brien. I suggest to you that as of the 3rd June, the postponement of the competition had not been announced, because it was announced on the 16th, isn't that correct?

A. Well

Q. And just bear with me for a moment the 16th June would be one week before the bid had to be submitted on the 23rd/24th June. So surely you can assist the Tribunal as to what figure was in the mind of you and Telenor in relation to the licence fee then.

A. This is a very interesting point you make. And you

are quite right in saying the 16th is the day we were going to seal the printing of the bid. In other words, you took all your documents and you printed them with a professional printer. But we were only going to spend that week, the 16th to the probably the 22nd, deciding on what the final price that we would actually bid for the licence. I mean, we were getting all our documentation together, getting all the sort of more difficult things, the long term stuff, ready which is the licence application and then we were going to go and have that conversation as partners together as to what we were going to pay. And there were, just like Southwestern Bell, they had models, we had models. I actually remember that the models were set at different hurdles, 10, 15, 20, 35, 40, 50, maybe beyond that, I can't recall, but I know we had different models showing that, if we paid X for the licence fee, the internal rate of return, the project would return Y, it was like a matrix. But it certainly wasn't, and I want to be quite frank about it, it wasn't something I was concerned about on the 3rd June.

Q. But between the 3rd and the 16th June, you had entered into this joint venture agreement, are you telling the Tribunal that you cannot sorry, are you saying that between the 3rd and the 16th June, there had been no view taken by you and Telenor as to what you were

going to offer for the licence fee for the licence?

A. Not the precise figure. We probably had ranges and I don't remember the ranges.

Q. I just want to be clear about this.

A. Yeah.

Q. That between the 3rd and the 16th June, neither you, and you say Telenor, knew what you were going to bid for the licence, is that correct?

A. We had not chosen a number.

Q. Now, what discussions had taken place? You had entered into this joint venture agreement, what discussions had taken place?

A. Limited.

Q. Limited?

A. Only that we had done the financial models. I mean, Telenor may have had an internal discussion, what the licence was worth, and then we had a bid team itself was working on financial projections with different licence auction amounts in them. You have got to look at the background here. I want to be helpful to you.

I was more concerned about getting the financial guarantee than I was worried about what the final number was. Step one, in my mind, with all the different things that were going on, was get the financial guarantee and then worry about the 50% of whatever was going to be.

Q. I understand, I understand your state of mind. And I

can understand you saying yes, I want to get the financial guarantee. I want to keep my partners happy, yes, I can understand that. But in order to obtain it was very easy to understand you had to get a financial guarantee for 1/25 million.

A. It's written there.

Q. That's written there. What I want to know is what other financial guarantee, from whom you could have got a financial guarantee, if you didn't know the amount of that financial guarantee, who could give you a guarantee?

A. Well, if we knew what the guarantee was, and what that amount was, it would have gone into this document.

Q. To get a guarantee, you have to know

A. The number.

Q. the number?

A. Correct.

Q. You know that?

A. Yeah.

Q. Now, you say that neither you nor Telenor had a number between the 3rd and the 16th?

A. We hadn't agreed the price we were going to pay for the licence.

Q. How could a guarantee be obtained if you didn't know?

You couldn't walk into a financial institution or to a financier and said, by the way, could I have a guarantee of 50% of the licence fee?

A. Mr. Coughlan, I was actually avoiding discussion of the financial guarantee because step one for me was to get the 5 million guarantee first and the 50% was subsequent to that.

Q. It may be that Telenor will be able to help us about this, but I am going to bring you a document in due course which may be of some assistance.

A. You are asking me, Mr. Coughlan, for numbers seven or eight years ago which were never written down. I don't remember what the number was, and anyway, it became academic.

Q. I know that

A. Because of the fixed fee.

Q. I know that. I want to know what was going on at this time?

A. All I can say, we had done our homework to check how good the project would be at certain levels, how much we could afford and, you know, the only number in fact in all the documentation that the Tribunal have provided me with was the placing document with Davys, where I believe the number was 20.

Q. Yes, I'm going to come to that.

A. Yeah.

Q. Where did that figure come from?

A. It was picked.

Q. But I'll come to that.

A. It wasn't

Q. That was prepared by well it must have been information which came from your side?

A. And Davys.

Q. Well, just bear in mind now the document was prepared by Mr. Paul Connolly who was a financial adviser to your company, isn't that correct?

A. Yes.

Q. And by somebody in Davys?

A. Tom Byrne.

Q. Tom Byrne. Information would have to have been given to Davys; they weren't part of any Project Team?

A. Well, what they would have done, and I know that probably the way they reached this was they would have looked at all the other costs of the licences around Europe and worked out what the per pop cost was per licence and I doubt it would have been any more detailed than that.

Q. Fair enough, and they came up with the 20 million figure. Was that the figure that you had in mind here? If it was simple enough for them to look at the per head of population cost

A. I know you'll find this difficult to understand, but I wasn't concerned about the auction fee until I was going to focus that on the week of the 16th to the 22nd/23rd, and I didn't want to raise it with Telecom Eireann because it was increasing the pressure that I was already under to get the guarantee for the 5

million.

Q. Yes. Now, it wasn't 5 million. It was 5 million plus 50%; that's what the guarantee was for?

A. Step one was if I could satisfy them on the 5 million, that would have taken the pressure off.

Q. Does the agreement provide for two steps, do you think?

A. Not the way it's written, but in my mind I had two steps.

Q. Well, who did you go to to get the 1/25 million guarantee between the 3rd and the 16th?

A. I think we went to Anglo, I went to IIU, I went to I ended up at Advent.

Q. When did you go to Anglo?

A. Well we were in and out of Anglo loads of times.

Q. What guarantee did you seek from them?

A. We went to if I remember rightly, we went to IIU and said to them, can you give Anglo Irish Bank a guarantee so that we can draw funds off a facility in Anglo Irish?

Q. Just explain that to me again; when was that? Between the 3rd and the 16th June 1995?

A. It was sometime May/June, I can't remember the precise date.

Q. I just want to be clear about this now, and I know, as you said yourself you had many balls in the air and I just want to be clear that you are not getting things

mixed up and I am not getting confused either.

A. Fair enough.

Q. And I want to, in fairness to you, I want to be clear about everything.

A. Definitely.

Q. You certainly had a need for money in the Communicorp or fixed line business?

A. Yes, and radio.

Q. And radio

A. I had a business in Sweden that was just started that was losing 50 a month.

Q. If I can call it the other businesses?

A. Yeah.

Q. And you needed about 5 million there, isn't that right, about 5 million dollars, I think?

A. Yeah, to tide us over to the end of the year, early the next year.

Q. And I'll come on to deal with it in due course, but that is a deal you made with Advent on fairly harsh terms, the 30% per annum rate, isn't that right?

A. The trousers were down.

Q. Yeah, but it was that was the deal for that?

A. Yes.

Q. Now, was it in respect of that that you had approached IIU, that 5 million that's what I'm trying to

A. Yes.

Q. And was it in respect of that that you perhaps had

said to IIU would they give a guarantee to Anglo whereby you could draw down 5 million from Anglo; was it that 5 million?

A. That was the facility that ultimately Advent gave us, the 5 million, yeah.

Q. I just want to put that to one side. That was nothing whatsoever to do with the 5 million guarantee which was required here for Telenor?

A. I think the confusion is we probably went to Anglo for the guarantee for Telenor, but we never went to IIU for the Telenor

Q. I want to be very clear about this, that we are not getting at all confused. You think you went to Anglo for a guarantee for 5 million to satisfy Telenor?

A. We would have had, like, a conversation.

Q. I want to be clear about this.

A. We did have a conversation, I know we did.

Q. With whom?

A. One of the people that dealt with us up there.

Q. Who?

A. It could have been a range, there was three or four people we dealt with at that time.

Q. Who?

A. Bill Barrett, Padraig Murray, Jack O'Keeffe; those are the people that spring to mind.

Q. And what was the conversation about? What did you ask them for?

A. Can you give us a bank guarantee for 5? It was a pretty quick conversation because then he'd say, well, I know they did, they'd say: We are worriers, where is your security? And we'd say: Well we have loads of fantastic assets, very valuable and there is an array of security. But it wasn't the security that they were used to and that would be like a building, I mean they were intangible assets like licences.

Q. They liked things that they can put their hands on?

A. Get their hands around.

Q. To realise

A. Yes. Fungible.

Q. I take it that you were refused?

A. Definitely.

Q. It probably didn't come as a surprise to you?

A. No. I mean everybody goes into a bank and they live in hope.

Q. Yes, yes, I understand that. So you now had no guarantee?

A. Yeah. Next port of call was London, and that was AI, Advent.

Q. Advent?

A. Yeah.

Q. Right. And you were going to Advent in relation to two matters so, is that correct? One was the

A. It was good news/bad news.

Q. The $\frac{1}{2}$ 5 million you needed for the overall business

where, I suppose, everyone would agree 30% per annum is a fairly hefty premium?

A. Well we made a

Q. You made the business decision in relation to that; that's that was made and that was done?

A. Well, we it was a very simple calculation. We felt our business was growing at greater than a value of 30%, so it was an arbitrage.

Q. That's a purely business decision, Mr. O'Brien. That is precisely the area of your expertise. You made that business decision, that was your business and it was your judgement in relation to it. But it was perhaps a measure of the difficulty raising funds other than from the likes of Advent. You had asked IIU whether they'd give a letter of undertaking to Anglo; that wasn't forthcoming, was it?

A. Well, there were only two games in town and that was Dermot or Anglo. I mean, if you went down to a clearing bank, I am not mentioning names, it would have been a five minute conversation.

Q. Yes, I understand that. Well, whatever the two games in town were, you didn't get it from one of them?

A. No, we didn't.

Q. And that was from IIU and Anglo?

A. And that's why it's bad news/good news. And bad news was Mr. Prelz, we need 5 and 5, but we have a great chance of winning a licence.

Q. Yes, so you got 5 for the business at 30% per annum?

A. Yeah.

Q. And in fairness, you put up 600,000 of your own funds at that stage as well?

A. That's right.

Q. And then you had to address this question of the licence, isn't that right, the guarantee?

A. Yes.

Q. And that resulted in the agreement of the 12th July of 1995 between yourself and Advent?

A. Yes.

Q. Now, I will come back in a moment to deal with what was prepared by Mr. Connolly and by Davys and the letters which were received.

A. Very well.

Q. But I just want to ask you, in the first instance, and I will come to various statements and memoranda made by Mr. Arve Johansen in due course and allow you have an opportunity to comment fully, but one thing that I just want to deal with at this stage, Mr. Johansen has stated in either one of his memoranda or in a note he made or perhaps in a letter, that when you first had discussions, when Telenor first had discussions with you, they were anxious that it would be on a 50:50 basis that the company would proceed but that you were the one who made the suggestion of the 20% institutional investors?

A. Yes, we would have said that it would be helpful if we had greater Irish content in the bid and the way of doing that to try and keep equilibrium is to actually bring in third-party investors.

Q. I'll come back and deal with that in due course and look at the

A. Very well.

CHAIRMAN: It's probably a fair stopping point. Five past two.

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

THE TRIBUNAL RESUMED AFTER LUNCH AS FOLLOWS.

CONTINUATION OF EXAMINATION OF DENIS O'BRIEN BY MR. COUGHLAN:

Q. MR. COUGHLAN: Now, Mr. O'Brien, I think before lunch you had informed us that you went to Advent, you went to see Mr. Prelz to discuss two matters: One was the $\text{€}1\frac{1}{2}$ million which we have discussed the loan, and you then said that you went to Mr. Prelz looking for a guarantee, is that right?

A. That's correct.

Q. And that was the guarantee for $\text{€}1\frac{1}{2}$ million plus half of the licence fee, or was it just the $\text{€}1\frac{1}{2}$ million pounds, do you think? Can you remember?

A. Well, the agreement was executed on the 12th July, so we would have known that the auction element is gone, so it would have been just the 5.

Q. Just the 5. Now, when did you go to Mr. Prelz, do you

remember?

A. Well, I would have had so many meetings and conversations with him, I couldn't put a particular date on it, but it would have been post the 3rd June anyway.

Q. Perhaps I am not trying to catch you out at all, Mr. O'Brien. I just want to bring matters to your attention that will assist your memory.

A. There could have been a memoranda.

Q. If you go to tab 13. Now, this is a memorandum of yours dated 29th June, 1995, isn't that correct?

A. That's right.

Q. And it's to Massimo Prelz. A bit of a dispute had broken out between you, I think, and

A. There was always a bit of to-ing and fro-ing.

Q. Nothing wrong with that.

A. No.

Q. And you are saying to him that: "On the 19th May 1995 Advent agreed to give Communicorp Group a loan of \$5 million convertible after five years into a 20% of the radio division. This agreement was reached at a meeting in Esat's boardroom attended by Bob Sneiderfield, yourself and myself.

"On the following Saturday, 20th May 1995, the terms of the agreement were confirmed to John Callaghan and John and I spoke to you on the phone from his house. Subsequent to this agreement you attended a meeting

with me at Woodchester Bank and confirmed to them the loan was being made available.

"On Tuesday, 30th May, you spoke to me in Norway and informed me that your board had not approved our agreement and that you were now offering a straight five-year loan with an annual coupon of 30% and specific terms relating to early repayment.

Communicorp never accepted this offer. On the 15th June, John Callaghan, Peter O'Donoghue, yourself and myself met in our GSM office in Jenkinson House. We reached agreement on the terms of the bridging finance and these were documented by John Callaghan, an independent director, a copy of which are attached."

That's all to do with the 5 million loan, isn't that right?

A. Yes. I am just looking at the latter part of that letter. Well, I was just questioning whether they are going to adhere to the agreement and the bridging loan, yeah, so that has nothing to do with the guarantee.

Q. That's all to do with the 5 million?

A. Nothing to do with the guarantee, you are right.

Q. I should perhaps go over the page then. This is only part of dispute really or the and:

"Can you please confirm to me whether Advent are going to adhere to the agreement."

Fine, you got an agreement with Advent in relation to

the 5 million and the terms were agreed and that was

your business that was your business?

A. Yes.

Q. Now, if you just go over the note then, or over the

page, there is a note of this is Mr. Callaghan's

note?

A. Yes.

Q. You can see it's $\frac{1}{2}$ 3.2 million, that would be 5 million

dollars, I presume probably?

A. Yeah.

Q. "Bridging finance.

"One-year bridging facility (the draw down)

" 30% interest/charge for year's use of facility

drawn

" Denis O'Brien, 600K treated the same

" if refinancing takes place, look favourably at

taking out Advent and paying the year's charge."

That's all to do with that, it would appear?

A. Yes, it would.

Q. So that particular business matter was taking place

between about the 19th May of 1995 and sometime around

the middle of June of 1995 or thereabouts, would that

be right?

A. It probably could have been earlier than the memo of

the 19th.

Q. Very good. But anyway

A. About six weeks probably.

Q. Very good. So that was something that was going on from May into about mid-June of 1995, that particular issue?

A. Yes.

Q. Now, as and from at least well, the 2nd or the 3rd June of 1995, you had this issue of needing a guarantee, isn't that right, to satisfy

A. A financial guarantee.

Q. Sorry, yes, a financial guarantee.

A. But it didn't describe who would actually give the guarantee.

Q. Yes, you see

A. It's quite an interesting point.

Q. Is it?

A. Yeah.

Q. Perhaps you can explain that to me.

A. Because it wasn't a bank guarantee; it was a financial guarantee, so I could have gone to Joe Bloggs and in their minds, if they were happy with him, and his standing or her standing

Q. Or if they knew he or she had the money?

A. There was a financial guarantee, yeah.

Q. Now, you went to Anglo and you weren't getting anywhere?

A. That's right.

Q. And then you went to Advent, is that right?

A. Yes.

Q. Can you remember when that was?

A. I think it's all mixed into the 3.2 bridge loan, around that time.

Q. You mean you were continuing your negotiations or whatever bit of dispute was going on, fair enough, and normal business

A. I think I went to Advent with sort of three things: The bridging loan, the letters of comfort for both Telenor and for the Department, and then mixed into that was the 5% as a little reward, a touch for them for being helpful.

Q. If I could just isolate and I'll deal with each one of those individually and if they need to be rolled together, we will also.

A. Okay.

Q. But for the moment, what I'm inquiring about is the guarantee for Telenor.

A. Mm-hmm, yes.

Q. What did you ask Mr. Prelz for?

A. I said that I well, first of all, I showed him the agreement and he was aware of the agreement.

Q. The joint venture agreement?

A. Yeah, and he was happy that we signed it. You see, he would have been he would have knowledge and cognizance of the commitment that I had made, so I said to him, look, I have to satisfy them on this and I need you and your institution to help me satisfy

them. And he said he talked around it, talked at length about it, and eventually said okay, well, we will go as far as we can to actually satisfy them on this point and in my view, he went further than we ever thought he would go. He bent over backwards.

Q. He couldn't give you a guarantee, isn't that right?

A. He he couldn't give a guarantee. He could give a commitment. He could give an offer. Which he ultimately did.

Q. Sorry, I just want to be clear about this now. He couldn't give you a guarantee; that's why you had to talk around it, isn't that right?

A. Yeah, but the interesting if you look at the joint venture agreement, it says and I don't want to frustrate you in any way.

Q. Not at all.

A. It says a financial guarantee. Like what is a financial guarantee? What would satisfy a financial guarantee? Would it be a letter of comfort? Would it be an offer of finance to us to show that, you know, that we were raising money to meet our commitments? Or is it a commitment? Because there is a lot of words all mixed up into all those documents, particularly the comfort letters.

Q. Can you tell me what you asked Mr. Prelz for. You showed him the joint venture agreement?

A. I said help me satisfy

Q. And without being a lawyer at all, it says "the financial guarantee", isn't that what it says?

A. Yes.

Q. Is that what you asked him for?

A. I said, help me satisfy Telenor on clause 2. That's really what we were trying to achieve.

Q. What did you ask Anglo Irish Bank for?

A. I would ask them for an actual bank guarantee, knowing that there was an about a one-in-ten chance.

Q. Yes, now, Mr. Prelz couldn't give you a guarantee, isn't that right?

A. He couldn't give a bank guarantee.

Q. He couldn't give you a financial guarantee, isn't that right? He couldn't give you a guarantee? A guarantee just look at it in its might I be so bold as to suggest in a business sense, a guarantee might be something that somebody would be capable of fulfilling?

A. Well, in legal terms, a bank guarantee or a bank guarantees is words like, it's an irrevocable. In business terms, if I say to you, "I guarantee to you," you either accept the word of the person or you don't.

Q. Oh, yes.

A. And I was very happy that, number one, they entered into quite an extensive agreement; and secondly, they wrote a strong letter, and a letter that would never be written lightly; and thirdly, on a personal basis,

that Mr. Prelz committed to me that he would provide the funding. So when you take those three levels

Q. Well, I want to separate them all, Mr. O'Brien, because I am trying to understand them and there is tremendous confusion in my mind

A. Okay.

Q. I suggest and

A. I can see how that

Q. I am trying to understand them and then we can bring them all together.

A. Okay.

Q. Now, he couldn't give you a guarantee, are we agreed on that? He couldn't give you a guarantee. You asked him to see if he could help you satisfy Telenor?

A. The only thing I'd agree in that context is, I'd say he couldn't give me a bank guarantee. The prefix "bank" is important. But he could give me a different kind of guarantee.

Q. Right. Did he give you a guarantee?

A. Yes.

Q. What was that guarantee?

A. That he, if we won the licence, that he would put up to 30 million.

Q. I just want to be clear about this; the joint venture agreement sought are you agreed you agreed with Telenor, you entered into an agreement with Telenor to furnish them with a guarantee for $\frac{1}{2}$ million plus half

the licence fee, isn't that right?

A. A financial guarantee.

Q. Before the 16th June. That's the agreement you entered into?

A. Yes.

Q. Did you get a guarantee for $\frac{1}{2}$ million plus half the licence fee?

A. I did better than that.

Q. Did you get a guarantee?

A. Yes.

Q. What was that guarantee?

A. In my mind, the guarantee was that if we won the licence, I had an offer in my back pocket from Advent for up to 30 million to be drawn.

Q. Did you get that before the 16th June of 1995?

A. No. We would have executed that on the 12th July, if I am correct.

Q. All right. Now, was that enforceable by you or Telenor?

A. Certainly it was enforceable in my mind.

Q. Was it enforceable by Telenor in the first instance?

A. They weren't party to the contract.

Q. Was it enforceable by you?

A. Yes.

Q. Legally enforceable?

A. I'd have to ask my solicitor whether it was or not, but I always viewed it as an agreement that I had with

somebody that I totally trusted and who in subsequent years has met every commitment to me that he ever made right to this day.

Q. What you obtained from Mr. Prelz was a letter of comfort, isn't that correct?

A. I think do you mind if I open it?

Q. Yes, indeed.

A. What tab are we on, do you know?

Q. I'll find it for you now.

A. I have it here, sorry. I think it's tab 9, is it?

No, 20.

Q. 21. Yes.

A. I have it.

Q. Do you have that?

A. Yeah.

Q. Is that the letter that was obtained for Telenor also?

A. Apart from the addressee, yes.

Q. Apart from the addressee. So we can read:

"Dear Telenor" or "Dear Mr. Brennan" so.

"We refer to the application made to you today by Esat Digifone Limited in connection with the grant by you of a licence to operate the second GSM cellular system throughout Ireland.

"Introduction to Advent International.

"Advent International Corporation is a leading international private equity provider.

"With funds under management excess of 1.4 billion and

offices in North America, Europe and Asia, Advent International has provided development capital and private equity to over 200 companies, giving entrepreneurs adequate financial resources to develop independent businesses.

"Advent International's investment strategy is to focus on a selective number of industrial sectors which experience an above-average level of growth. In particular, our funds have made significant investments in media and telecommunications companies in Europe and have deployed a good understanding of the telecommunications business and a strong interest in investing in the same.

"Advent's investment in the Communicorp Group.

"In 1994, certain of the funds managed by Advent International invested a total of approximately \$10 million in Communicorp Group Limited in return for just over 25% of the voting share of the capital.

Communicorp is the holder of 50% of issued share capital of Esat Digifone Limited.

"These funds have committed to invest an additional £9.5 million to further develop the Group's activities.

"Advent's Commitment to the GSM Licence Application.

"We have reviewed the business plan prepared by Digifone in connection with its application for the second GSM licence and consider its operation of the

second GSM cellular system in Ireland to be an attractive and viable project. The application to you by Communicorp sets out how it is intended to inject new equity into Digifone on the licence being granted to it and shows the Advent funds as 5% shareholders participating in the 20% holding which has been allocated to institutional investors. We are delighted to have the opportunity of investing directly in Digifone as well as our indirect investment in the company through Communicorp and Esat Telecom.

"The said application also shows Communicorp Group remaining as a 40% shareholder in Digifone and being required to provide up to 30 million Irish punts to fund that 40% equity participation. We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations.

"Please do not hesitate to contact Massimo Prelz." And the address is given.

So
MR. McGONIGAL: That's a letter, Mr. Chairman, but the letter to Mr. Knut Haga of the 10th July, there is a difference in it, in the paragraph on the second page, and I'll give Mr. Coughlan a copy.

CHAIRMAN: I thought that was so, yes.

MR. COUGHLAN: If My Friend would just refer me to that.

MR. McGONIGAL: In case it wasn't picked up.

MR. COUGHLAN: I'll give you a copy here.

A. Thank you very much.

(Document handed to witness.)

Is there much of a difference here?

Q. MR. COUGHLAN: Sorry?

MR. McGONIGAL: The second page.

MR. COUGHLAN: On the second page. I am just wondering what

A. They are close.

Q. Yes, they are close. I'll read the paragraph.

"We have reviewed the business plan prepared by Digifone in connection with its application for the second GSM licence and consider its operation of the second GSM cellular system in Ireland to be an attractive and viable project. The licence application by Communicorp shows the Advent funds as 5% shareholders, participating in the 20% holding which has been allocated to the institutional investors."

I think what is in the other letter is:

"The application to you by Communicorp sets out how it intends to inject new equity to Digifone on the licence being granted to it and shows the Advent fund at 5% shareholding."

A. Okay.

Q. I don't is there

A. I think they are substantially now the same.

Q. That's what I thought. Well, perhaps we better just operate off the one to Mr. Haga in the form that it is.

A. Right.

Q. It seems to be more or less the same.

Now, that letter, you say, is the guarantee to satisfy what you were required to do under the joint venture agreement, is that right?

A. By a factor, yes.

Q. Is that right?

A. By a multiple, yeah.

Q. By a multiple. So you had no concerns that this was the guarantee that satisfied your requirements under the joint venture agreement?

A. Well, I was under the misconception that this was going to more than satisfy Telenor, which ultimately it didn't.

Q. I want to be very clear, Mr. O'Brien, now. I want to be very clear about this. I understand the point you make that you were trying to satisfy Telenor; that's your own business. What I want to know is, was this letter a guarantee to satisfy what was required under clause 2 of the joint venture agreement? Are you saying this is a guarantee? Specifically a guarantee?

A. Yes.

Q. For $\frac{1}{2}$ million plus 5% of the licence fee; that is a

guarantee, is that what you are saying?

A. Yes. In my mind

Q. Is that

A. Absolutely you are right.

Q. You are saying that unequivocally?

A. Unequivocally.

Q. Very good.

Now, I appreciate you are not a lawyer but it was not in what you would describe as the ordinary form of financial guarantee; you would have had experience of those in business?

A. Well, there is so many different kinds of guarantees.

There is bank guarantees, there is bonds, performance bonds which are really guarantees as well. I mean, there are so many differences of the word "guarantee" in a financial context. You see the context of this is and I am trying to read their minds, but they knew we had a business that was growing and obviously was consuming cash. They wanted to have working capital to make sure that Communicorp could meet its obligations and that was the 5 million. Then they wanted us to have 50% of any potential licence fee or auction fee that we were going to pay; that we would have that money. This went considerably further. This agreement said: "We are making an offer to you of $\frac{1}{2}$ 30 million, and that is available to you if you win the licence." Now, that went way, way, way

further than anybody ever expected in the context of the 3rd June joint venture agreement.

Q. Are you saying that this letter would have enabled you to sue Advent to enforce an agreement?

A. It wouldn't have arisen because

Q. I asked you a question. You can say why it wouldn't have arisen. Are you saying that that letter would have enabled you to sue Advent to enforce what you describe as the guarantee?

A. It was even better than that.

Q. Sorry.

A. All I'd have to do is say

Q. I am asking a question.

A. Yes, I could have.

Q. On that letter?

A. Yes.

Q. Right.

A. There is an element of trust here as well, Mr. Coughlan, which goes beyond paperwork when you have a partner.

Q. I accept that, I accept that.

But you are saying, unequivocally, that that was sufficient to enable you to enforce something against Advent?

A. Yes.

Q. And more importantly, to enable Telenor to enforce it against Advent?

A. No, they weren't party to the agreement so how could they enforce it.

Q. What they sought was a guarantee. It was something that they could enforce, isn't that right?

A. But you know they are not a party to this. I mean, we should open it I mean, it is signed between Communicorp and Advent, so

Q. What is signed between Communicorp and Advent?

A. Which is the 12th July.

Q. Oh, I am going to come to this in due course, Mr. O'Brien.

A. All right, good.

Q. I am talking about this letter, first of all. You are saying that that letter is a guarantee whereby you could force enforce against Advent. You are saying that letter, is it?

A. That is my opinion.

Q. No. You said unequivocally.

A. Yes, that is my opinion.

CHAIRMAN: I suppose in fairness, Mr. O'Brien, I should put to you Mr. O'Connell's evidence of some days ago in which he did, in his evidence and in response to some questions, say that while there may have been an attempt to make these two types of documents, namely a guarantee and a very strong letter of comfort meet, that they never met, and he indicated that it would be extremely difficult to equate or make

the two of them come together. Essentially, in law a guarantee means give him the money. If he does not pay you, I will. Whereas a letter of comfort is a very, very strong reassurance that there will not likely be a default on the part of a financial institution, particularly, whereas here, you had significant corporations and a European Union Member State, but something that falls short of legal enforceability.

A. Well, I would, with respect, Chairman, he was only really looking at it from our point of view. I don't think Telenor could have sued Advent, but certainly we could have potentially sued them because they made us an offer and we always felt that when it came to it, if we asked them to put up that money, that they would do so, and Mr. O'Connell may have a different opinion, and my evidence probably will differ with him on that point, but I'm trying to give you my view of the world in 1995, and that's what I thought.

MR. COUGHLAN: Very good.

Q. Mr. John Callaghan was involved on behalf of the company at this time as well, isn't that right?

A. He was helping us, yes, as a director.

Q. Now, would you look at the note, Mr. Callaghan's note at tab 13. Mr. Callaghan was a senior accountant, isn't that right?

A. He was a managing partner of KPMG.

Q. He was the managing partner of KPMG?

A. Two terms I think.

Q. Yes.

A. Tab 13, is it?

Q. Tab 13. "5% equity in GSM company." Do you see that note?

A. Mm-hmm.

Q. "Advent to invest in 5% of the 20% institutional investment (at par)" do you see that?

A. Yes.

Q. "Advent to give letter to satisfy Telenor and requirement of GSM bid." Do you see that?

A. Yes.

Q. Then "Strong letter but cannot be a 'commitment' to invest." Do you see that?

A. Yes.

Q. "Advent to have opportunity to participate in any financing arrangement for the group and/or GSM company if money is passed directly for GSM company.

"If GSM licence is secured, the contingent payment is deemed to be 3.6 million

A. For 50%.

Q. "Originally 4 million for 50%," or something like that?

A. Yeah.

Q. Now, Mr. Callaghan was with you at this time, isn't that right?

A. Yes.

Q. Mr. Callaghan, I take it we can assume, would understand what was going on both from a commercial and a legal point of view being the managing partner of KPMG at the time?

A. Well, certainly commercially he was very strong.

Q. And would have a reasonable understanding of commercial matters?

A. Yes, he probably would, yes.

Q. And you must have discussed it. Now, what Mr. Callaghan notes is: "Strong letter but cannot be a 'commitment' to invest."

A. But it was an offer.

Q. Mr. O'Brien, just listen to what Mr. Callaghan has noted here, "a commitment to invest," isn't that right? The letter cannot be a commitment to invest. You knew that, Mr. Callaghan knew that when the letter was being sought and agreed upon, that it couldn't be a commitment to invest, therefore, not enforceable by you?

A. Well, may I draw your attention to one thing?

Q. Yes.

A. When was this note written? Because this note could have moved on in everybody's minds to the final documentation of the 12th July. It's undated from what I can see.

Q. I'll just get Mr. Callaghan's if I might just go to

your memorandum on the previous page, it might help us to date it.

"On the 19th May 1995 Advent agreed to give Communicorp Group a loan for US \$5 million." Do you see that?

A. Yes.

Q. Then: "On the following Saturday, 20th May 1995, the terms of the agreement were confirmed to John Callaghan and John and I spoke to you on the phone from his house. Subsequent to this agreement you attended a meeting with me at Woodchester Bank and confirmed to them the loan was being made available.

"On Tuesday, 30th May, you spoke to me in Norway and informed me that your board had not approved our agreement and that you were now offering a straight five-year loan with an annual coupon of 30% and specific terms relating to early repayment.

Communicorp never accepted this offer. On the 15th June, John Callaghan, Peter O'Donoghue, yourself and myself met in our GSM office in Jenkinson House. We reached agreement on the terms of the bridging finance and these were documented by John Callaghan, an independent director, a copy of which are attached."

So it seems to be around

A. It's a perfect example

Q. around the sorry, it seems to be around the 5th June?

A. It's a perfect example of how things were in free flow because the opening paragraph talks about a 5 million convertible.

Q. Yes.

A. Which they didn't we didn't go ahead with. And then the negotiations changed.

Q. Yes.

A. Then we talk about the 30%.

Q. Yes.

A. And then it talks about the bridging, okay?

Q. Yes.

A. So, if you are saying that this letter is a late June document, we still had another two weeks to go to finalise the 12th July, so I think you'd need to put it to Mr. Callaghan

Q. I'm asking you about it now I will ask Mr. Callaghan about it. I am asking you about it, Mr. O'Brien. Mr. Callaghan clearly records there, isn't that right, and this would have been known to you, that the letter cannot be a commitment to invest, isn't that right? Is that in the note? Is it in the note, Mr. O'Brien?

A. It does

Q. Is it in the note, Mr. O'Brien?

A. We'll come back to the letter.

Q. No, is it in the note?

A. It says here: "Cannot be a 'commitment'."

Q. "A strong letter cannot be an a 'commitment' to invest" "to invest"?

A. You see, you have got to look at things in their context.

This was at the end of June and the document was executed two weeks later and we have a letter here where it talks about offer, it talks about commitment, so it's a bit of a moot point for everybody I would have thought. It says: "Advent's commitment to the GSM licence"

Q. No, I am trying to understand, and I will try to understand why this letter was prepared at all, Mr. O'Brien, the purpose for which it was prepared. That's what I am inquiring into at the moment now.

A. But it's plainly evident, isn't it?

Q. Well, Mr. O'Brien, I am going to bring you in due course to the agreement of the 12th July. And that was the agreement, isn't that right? That was a contract between you and Advent?

A. Correct.

Q. Now, can you show me in that letter where there is a statement that there is a commitment to invest?

A. Well, it says an offer, which is even better.

Q. Ah Mr. O'Brien, you don't have to be a lawyer. Like a businessman knows. Where does it say there is a commitment to invest?

A. Well the word "commitment" is used. It says:

"Advent's commitment to the GSM licence application,"

so they are committed

Q. To the GSM licence application?

A. But they are committed, aren't they?

Q. Sorry, to the GSM licence application. I am reading the words here.

A. But they are committed.

Q. Who prepared this letter, Mr. O'Brien?

A. They did Advent.

Q. Did you have any part to play in it?

A. No hand, act or part.

Q. Where does it say they have a commitment to invest in that letter?

A. It says here this is word-smithing okay

Q. No, this is not words, this is serious stuff,

Mr. O'Brien, it's not just words.

A. It's not that serious because we are going to move forward because this is all academic, we all know that because we know what's in front of us and that is Telenor were not happy with this so we had to move on to somebody else to make Telenor happy.

Q. Mr. O'Brien, that's what I wanted to ask you about.

You have just told us that this was a guarantee?

A. Yes, in my mind.

Q. Enforceable by you?

A. In my mind.

Q. No, enforceable by you. That's what you said.

A. Yes, in my opinion.

Q. Sorry, if that was the case, Mr. O'Brien, and Telenor came to you, as they did and said, we are unhappy with what we received, did you ever say to Telenor: Look, this is going to happen and if not, I would sue Advent or you can sue Advent to ensure that it does happen? Did you say that?

A. They had no right to sue Advent. I mean, a little bit I know about law, they were not a party to the agreement. They couldn't sue anybody.

Q. But did you say to Telenor that I could sue Advent on the basis of this letter?

A. No, because it never even got to that.

Q. Right. Where does it say in the letter that there was a commitment to invest?

A. It says two areas, and I'll repeat them again to help you. One is: "Advent's commitment to the GSM licence application." Then secondly: "We can confirm that we have offered that amount." Now that is better than a commitment; that is an offer. And in commercial terms, that to me is a lot stronger than the word "commitment" because it's specific and it's around an amount of money.

Q. Okay. Where is the offer contained, Mr. O'Brien?

A. It's in the letter there.

Q. Where is the offer? Obviously, if the offer was made

A. The offer then, they talk about

Q. "We are delighted to have the opportunity" sorry, I beg your pardon "We can confirm that we have offered that amount to Communicorp." Where is that offer to Communicorp?

A. Go to the 12th July

Q. No, this is the 10th July. Where was the offer to Communicorp?

A. You have to go to the 12th July to look at the detail of it.

Q. I am asking you, first of all, was there an offer before the 10th July?

A. Yes, there was a verbal offer and then we executed a document talking about the fact that there was an offer.

Q. Tell me about the offer.

A. Let's open it up.

Q. No, tell me about the offer.

A. No, I want to open it up.

Q. You said there was a verbal offer?

A. There was a verbal offer.

Q. Tell me about the verbal offer.

A. That they would provide money to us, okay, at a valuation yet to be determined by nobody knew how much the licence would be worth, and that they would put the money in under different instruments.

Q. When did that offer occur?

A. It was a verbal offer between myself and Mr. Prelz.

Q. When?

A. In June/July of that year.

Q. Where?

A. How do you mean where?

Q. Where did you have this discussion?

A. He would have had a series of discussions with him on a daily basis nearly.

Q. Right. So just give me the full details of it, please, the full details of this offer you talk about.

A. Well, he is offering me 30 million. The terms of that will be would be determined by the valuation on the licence.

Q. So what it was, so, was in the form of an offer if the licence was obtained and the terms were worked out, is that right?

A. Well, you have got to look at this in his eyes. He is a shareholder of a company that he believes is very valuable. He has backed it significantly.

Q. Pardon?

A. He has backed it significantly, and in my mind, he was never going to be difficult in terms of finding a valuation into which the funding would go into the company. But to keep everybody on the right side, we decided that you should always get a third-party offer, which is exactly what we did in New York with five or six institutions, and ultimately Mr. Prelz

invested on the same terms as them. So there was always going to be a benchmark valuation and we were always going to be happy that that was the market rate for the money.

Q. Now, I think what you

A. Can you understand this whole thing that he is already in the business?

Q. Yes.

A. So he wants to support the business because he has a lot riding on it, he has 15 plus 6, 19, plus his reputation.

Q. Yes.

A. And he is making an offer of money to us and then we put in the agreement, the condition precedent here, by the way, is Telenor have to be happy. So when we executed the agreement, we said this is fantastic, we went to Telenor and then they said, no, this doesn't do it for us. Now, we felt at that time, certainly unhappy that maybe Telenor could have been a little bit more constructive.

Q. I just want to get the sequence right here now, Mr. O'Brien, because it's jumping a little.

If you go to page 26 of your statement, Mr. O'Brien, please. The final paragraph.

"For about a month after signing the Telenor joint venture agreement, I had a series of discussions with Massimo Prelz of Advent International in which I

sought his agreement to provide a guarantee to Communicorp. Advent had already, in November 1994, invested \$10 million in Communicorp. Mr. Prelz was unwilling and/or unable to procure a formal commitment by Advent, mainly, I believe, because there was as yet no business in which Advent as a venture capitalist could invest, and I recall it was not permitted to give guarantees as such. However, he was willing, for a price, to have Advent furnish a comfort letter in respect of an investment of up to 30 million. We also had a conversation between us in which we agreed the principal terms of such an investment, including a weighted voting arrangement in my favour, and in which he gave me a commitment as to the availability of such an investment. Advent was and is a major international financial institution," etc.

Now, it's clear there, Mr. O'Brien, isn't it, that Advent couldn't give a guarantee and didn't give a guarantee, isn't that right? That's what you told us yourself?

A. In my view it was a guarantee of funds.

Q. But Mr. O'Brien, yesterday in your statement, you told us that they couldn't give a guarantee. Isn't that right?

A. Well, what sort of I mean, we are playing with words here.

Q. We are not playing with words.

A. What do you call a guarantee?

Q. Mr. O'Brien, you are the one who used it yourself yesterday. You can use it either from the legal point of view

A. Mr. Prelz was unwilling

Q. and you criticised me for that, or you may use it yourself from the businessman's point of view, but you told us yesterday that Advent was not permitted to give guarantees as such.

A. Bank guarantees.

Q. Sorry, you used the expression yourself there, Mr. O'Brien, guarantee, isn't that right?

A. Well, again, I'd have to point out to you, Mr. Coughlan, that there are different kinds of guarantees. And that's what I have been trying to explain to you.

Q. And I appreciate any help you can give me in that regard, Mr. O'Brien. But I want to bring you back to what you said yesterday in your statement.

A. Mm-hmm.

Q. You are now saying that this letter was a guarantee.

A. It was an offer which was stronger than a guarantee, and I said it was a guarantee and I stand by that.

Q. You told us yesterday that Advent couldn't give a guarantee.

A. That's a different kind of guarantee.

Q. Now, Mr. O'Brien, did you say it?

A. I'll read out exactly what I said and this is important, okay?

"Mr. Prelz was unwilling or unable to procure a formal commitment by Advent. However, he was willing, for a price, to have Advent furnish a letter of comfort."

Okay?

Q. The price for that, when we come to the agreement, Mr. O'Brien, was to be entitled to 5% investment in the institutional block in the company, isn't that right? That was the price of the comfort letter?

A. Provided they satisfied Telenor.

Q. Yes. Yes, but it was a comfort letter. You yourself have told us what you secured was a comfort letter, is that right?

A. That's correct.

Q. Not a guarantee?

A. And have you seen comfort letters being dishonoured, because I have never seen them dishonoured?

Q. Mr. O'Brien, that may be so, that may be so.

A. That's a very important point though.

Q. That may be so, and I am not arguing with you about that. What I want to know from you is, why you said yesterday that there was no guarantee and what was obtained was comfort letters and why you are saying today that what you received was a guarantee? Why are you saying that, Mr. O'Brien?

A. Because I viewed it personally as a guarantee. Maybe

you, in a legal context, or maybe somebody else would have a different opinion. But I knew I had a guarantee that he would come up with 30 million if I pressed that button with him. Now, that's all I knew and that's all I needed to know.

Q. Mr. O'Brien, yesterday you told us that it wasn't a guarantee. How can you say you knew that it was a guarantee? How can you say both things and both of them stand?

A. You see, in my mind if somebody makes an offer to me that I trust, that I have worked with, and has already provided me with substantial amount of funding, and if they say to me, I am going to offer you 30 million, that, in my mind, is a guarantee that that person is going to come up with the money. Now, we can play around with words all afternoon here, but you can't change my view of the world at that time and that was I had an offer and I was guaranteed that money from Advent.

Q. Mr. O'Brien, I am not playing around with words at all.

A. Maybe we both are.

Q. No, I am not at all.

A. Well, I am not.

Q. Let me assure you. You made a statement and gave sworn evidence to this effect yesterday. You now say something completely different.

A. No, I don't.

Q. Under oath, this afternoon, I want to know

A. You don't need

Q. I want to know

A. You don't need to wave an oath under me, Mr. Coughlan.

That's a little bit offensive now.

Q. It's not, Mr. O'Brien.

A. It is offensive. Now, we started off yesterday

Q. Mr. O'Brien

A. and we still are on even keel.

Q. Mr. O'Brien, could we please come back to, you

yesterday

A. But you are saying something to me that is untrue.

Q. Sorry, Mr. O'Brien, could we look at it. Yesterday

you informed this Tribunal that you recall sorry,

we'll read the whole thing.

"Mr. Prelz was unwilling and unable to procure a

formal commitment of Advent." That's the first point.

He couldn't procure a commitment from Advent.

"Mainly you believe because there was as yet no

business in which Advent, as a venture capitalist,

could invest." Fair enough point.

"And I recall that it was not permitted to give

guarantees as such."

Now, that's what you told us yesterday, isn't that

right?

A. You are looking at this very purely, Mr. Coughlan.

And my there is no disparity in what I am saying and what's in this statement. There is different kinds of guarantees, okay? In the statement I mean a bank guarantee, okay? A letter of credit or something to that effect where it's an instrument, okay? A financial instrument, okay?

Q. Yes.

A. Mr. Prelz gave me something different, okay? That was an offer, and in my mind that was a guarantee that that would come through if I asked him to meet his commitment to me.

Q. What you told us was that Mr. Prelz gave you a comfort letter or Advent gave you a comfort letter in respect of an investment of up to $\frac{1}{2}$ 30 million.

A. And then I went on to say that I viewed this, if somebody says, I am offering you 30 million, you trust that person, and they funded you to date, then my view is that's a guarantee that they will meet that commitment. Now, there is no disparity in what I am saying. Maybe I am not explaining myself here

Q. Maybe not, all right.

A. What I am saying in this statement and what I'm saying in my evidence and I wouldn't like I hope I am making myself clear on this.

Q. Well, I don't want to misunderstand you at all, Mr. O'Brien, and I want it to be very clear. Now, you used the word "guarantee" and explained the way in

which you wished or in which you used it.

A. The way in which I understand it.

Q. Whichever way you understand it, you did tell us yesterday that Advent couldn't give a guarantee, isn't that right?

A. And I have just explained to you and I hope maybe I'll do it even again, is that

Q. Would you answer the questions first and then explain.

Did you tell us that yesterday?

A. It's in the statement.

Q. Did you tell us that?

A. And I stand by that.

Q. Yes. Did you say in evidence just now that the letter was a guarantee?

A. In my mind, yes.

Q. Well, I want to know how can that be in your mind when yesterday you informed the Tribunal that they couldn't give a guarantee? How could it ever have been in your mind, Mr. O'Brien?

A. Unfortunately, maybe there is a disconnect maybe you don't understand what I am saying and maybe I am not being clear enough. What this is really saying is that they couldn't put a financial instrument in place for a guarantee. But they could make me an offer in my mind which was a guarantee.

Q. All right. All right.

A. We have different views and there is no point in both

of us getting excited about it.

Q. I'll go back to the joint venture agreement, if I may, for a moment and perhaps it's something that I'll take up with Telenor, but just if you can throw any light at all on it for the Tribunal.

A. What tab is that now?

Q. It's Tab 7.

A. That's the Telenor agreement?

Q. Yes, the Telenor Joint Venture Agreement.

"Financial guarantee:

Within the 16th June, 1995, Communicorp shall" is mandatory, that's right, and you agreed to this provide Telenor "

A. I didn't agree how do you mean agreed to that word?

Q. You signed it, Mr. O'Brien.

A. But I didn't write this. I signed it.

Q. I know, but

A. Okay. Let's be clear.

Q. Ah no. I am not suggesting for a moment you wrote it.

I know. I want to be careful about this. The word

"shall" is mandatory. You are agreeing to this. Now under the heading: "Financial guarantee."

"Within the 16th June, 1995 Communicorp shall provide

Telenor with a financial guarantee satisfactory to

Telenor. The guarantee shall amount to $\text{€}1\frac{1}{2}$ million

Irish plus 50% of the licence fee."

That was what was required, isn't that right?

A. That's what we signed up to.

Q. That's what you agreed?

A. We signed up, yeah.

Q. And the question this all arose from me asking you the question, did you ever provide that guarantee?

A. In my mind, we did.

Q. Now, in arriving at the agreement of the 12th July, 1995 between yourself and Advent

A. Which tab is that now?

Q. It is Tab 22. You needn't be concerned for a moment, I am not going to go through the agreement line by line with you at the moment.

A. Okay.

Q. But in due course, I may have to, but I just want to get a couple of matters established first. Your solicitors, Messrs. William Fry, particularly through Mr. Owen O'Connell, were involved in the

A. It wasn't drafted by them.

Q. No. Were involved in the agreement?

A. On our side, yes.

Q. On your side. Who drafted it?

A. I believe it was Baker McKenzie.

Q. Baker McKenzie. And they were Advent's solicitors, isn't that right?

A. That's right.

Q. Now, this particular agreement, went to and fro between the solicitors and they were refining it,

isn't that correct?

A. Yeah, I was not that much involved in it at all.

Q. Well, you have seen the correspondence, that there certainly was correspondence between Mr. O'Connell and Ms. Stroud, as one might expect, some of it very detailed stuff, and I can understand you not being involved in the detail, going through the matter line by line and suggesting alterations and clarifications in relation to it.

Now, do you agree that, in essence, what this agreement was, was that for furnishing the letters of comfort, the one to the Department and the one to Telenor and I agree subject to the proviso that Telenor would be happy with it, that in return for that, that Advent would have the entitlement to invest as to 5% the company, that is the GSM company, in the block which would be attributable to institutional investors?

A. Just repeat that. Sorry.

Q. Right. I'll take it step by step. In return for providing the letters of comfort, Advent were to have an entitlement to invest as to 5% in the GSM company, isn't that right?

A. Yes. It was a number of different things mixed up, but ultimately that's the practicalities.

Q. No, directly. No, this was directly in the GSM company?

A. Yes. In the 20% block.

Q. In the 20% block, and it does go on and I don't want to get into minutiae if you couldn't secure it, that you might have to secure it another way but that's neither here nor there. I am looking at the basic nuts and bolts of the agreement.

A. That's right.

Q. Now, what the agreement further goes on to provide is that Advent, if they wished, could invest in the equity?

A. They always had that right.

Q. Of Communicorp, isn't that right?

A. Regardless of that, they had the right.

Q. So they had that regardless of this agreement?

A. Yeah, they would have had it from 1994. I mean, there would have been standard preemptions.

Q. So including it here might have been moot, irrelevant?

A. A moot point.

Q. Moot. You believe that they had that agreement anyway. They were there?

A. Yeah. It was a moot financing this whole 12th July thing was a waste of time, of very, very valuable time at a critical stage.

Q. All right. Fair enough. What it was about, so, was the inclusion of their entitlement to invest in Communicorp. They had that anyway, it was a moot financial matter. It was immaterial whether it was in

this agreement now as far as you were concerned?

A. Correct.

Q. But what they did have was an agreement that by furnishing the letters of comfort

A. They can take 5.

Q. they can take 5?

A. Yeah. It was a high price to pay.

Q. For furnishing the letters of comfort?

A. Very much so.

Q. So the agreement of the 12th has nothing to do with Advent having making any offer or any agreement in relation to investing 30 million, as far as you are concerned?

A. Well, it was all academic because the condition precedent wasn't met so the rest of the clauses blew up.

Q. But at the time of the agreement, at the time of the agreement?

A. Well, at the time of the agreement, they, as part of this they were going to issue two letters: One to Telenor, one to the Government. But it all the linchpin on this was the condition precedent, and cleverly our lawyers put that in to protect us and to make sure that Telenor were going to be satisfied.

Q. Yes. Just say that again please. I am sorry, I was distracted there for a moment. You say cleverly your lawyers put in that

A. Yeah, I mean they said: Look Denis, the reason why you are doing this is twofold: one is to have an offer that you can call on, and the second thing is to satisfy Telenor.

Q. I have never seen this offer and neither has Mr. Owen O'Connell.

A. Pardon?

Q. I have never seen this offer and Mr. Owen O'Connell never saw the offer.

A. The offer is in the letter.

Q. That was a letter of comfort, Mr. O'Brien.

A. No, that's a letter of offer. That's an offer letter. We'll never agree on this.

Q. No, no, it's not a question of me. Your own solicitor, Mr. Owen O'Connell

A. I don't care, I mean his evidence is his evidence. I have been asked to give you my

Q. Yes, I understand and I appreciate that. But he was the man who was your lawyer and advising you in relation to this agreement.

A. Are you saying that clients and lawyers don't have different views, you know, have different views?

Q. I am not saying that at all.

A. Well, they do.

Q. I am not saying that at all.

A. Okay.

Q. I am just pointing out to you that Mr. Owen O'Connell

was never aware of the offer. He didn't know about it.

A. He didn't see the letters.

Q. I am sure he did see the letter.

A. It comes back to what's in the documentation and what the person is saying to you and how much trust and steed you put in their offer to you and how much you believe that that person is going to meet that commitment.

Q. I just want to be clear now when you talk about the offer. Are you saying and we'll go back to Mr. Prelz's letter.

A. Yeah.

Q. Right. And the second-last paragraph:

"The said application also shows Communicorp Group remaining as a 40% shareholder in Digifone and being required to provide up to 30 million Irish pounds to fund that 40% equity participation. We can confirm that we have offered that amount to Communicorp to enable it to fund its obligations." Are you saying that's the offer?

A. That's the offer.

Q. That's what we are talking about and that's what you told Mr. O'Connell about?

A. That's the offer well, Mr. O'Connell would have been involved in the process.

Q. So it's those three words, is it, "We have offered"?

A. Yes.

Q. Right. I just want to be clear about that.

The agreement of the 12th July, if you just go to it for a moment.

May I just ask you, the offer you refer to in

Mr. Prelz's letter, how long did that stay open for acceptance?

A. I don't know whether there was a time limit or not in the documentation. I haven't seen whether there was a time limit. There could be, in this documentation somewhere.

Q. Well, there is no documentation, that's why I am asking you, that I have seen.

A. That's even better.

Q. What's even better?

A. That there is no time limit.

Q. You are telling us that that is the evidence, that there was no time limit?

A. If there is nothing in the 12th July agreement about a time limit, that would suit me as the person receiving the equity offer from Mr. Prelz.

Q. So

A. Because the other letters from the other three institutions did have a time limit, certainly one or two of them.

Q. Are you telling us, so, that these venture capitalists made you an offer with no time limit?

A. Unless it's in the documentation, and I don't see it.

There was no time limit.

Q. I want to be clear about this. Are we talking about

the you were saying the offer is the offer which is

in this letter of the 10th June; that's the

offer 10th July?

A. That's the offer that we are talking about.

Q. No other offer?

A. No other offer.

Q. So that's it?

A. That's the offer we are talking about now, yes.

Q. No, no, was that the only offer? I just want to be

clear about that, Mr. O'Brien, from Advent?

A. Advent's 30 million offer, that's the one

Q. That's it?

A. That's it.

Q. And that's the only thing there is about it?

A. It's like somebody saying to you, I am going to give

you an overdraft, but they don't review it. That

leaves things very open-ended and suits you as the

borrower.

Q. There is no documentation about an offer, no other

documentation?

A. Not that I am aware of.

Q. And it's just those three words, as far as you are

aware: "We have offered"?

A. That happens in business. I mean, people say verbally

and they write a letter

Q. All right.

A. And they don't even sometimes consult their lawyers.

Q. Right, I understand that. If you go to the agreement of the 12th. You see there are certain recitals, do you see that?

A. Yeah.

Q. And

A. Can I just say I haven't read this in years.

Q. Fair enough

A. And because I never deemed it to be important, but if you want we could maybe come back to it if there is questions that I can't answer.

Q. Fair enough. That's all right.

Recitals are:

"A. Each of Communicorp and Telenor Invest currently hold 50% of the issued share capital of Esat Digifone Limited.

"B. Digifone proposes to make an application to the Minister for Transport, Energy and Communications to be granted the licence.

"C. In connection with the application, AIC on behalf of Advent Funds (as hereinafter defined) has written to the Minister and to Telenor confirming its offer to provide financing of up to 30 million to enable Communicorp to fund its equity participation in Digifone which will be required should the GSM licence

be granted to Digifone."

And there is copies attached.

"D. In consideration of the issue of the comfort letter by AIC, Communicorp has agreed, subject to fulfillment of the conditions hereinafter set out, to cause Digifone to issue at par a number of new shares to the Advent Funds as is equal to 5% of the fully diluted "

A. "To procure..."

Q. "... to procure fully diluted share capital and to give Advent Funds a right to participate in the funding to be raised by Communicorp relating to Digifone and GSM licence as more specifically set out hereunder.

"E. Digifone is a party to this agreement to record its acknowledgment of and consent to the matters hereinafter set out.

"F. Denis O'Brien is a party to this agreement to record his consent to the amendment to the investment agreement referred to in Clause 7."

A. Sorry, where do you see 'Digifone'?

Q. Sorry, "E. Digifone is a party to this agreement." Do you see that?

A. "DOB is a party to this agreement." I can't see 'Digifone'.

Q. Sorry. You are correct. "DOB" sorry, that was a previous draft. I am sorry.

A. I know I am linked to Digifone but...

Q. There was a draft I think. Sorry, that's my mistake.

A. Fine. No, no.

Q. Then there is definitions. The terms agreed and then there are definitions, isn't that right?

A. Yes.

Q. And then if you go to 2, clause 2, "Agreement to Sell."

"In consideration of the issue of the comfort letters by AIC and subject only to fulfillment of the conditions set out in Clause 4 by the date specified therein, Communicorp agrees within seven days after such conditions have been fulfilled (completion date):

"(i) to use reasonable endeavours to cause Digifone to issue such number of shares, or

"(ii) in the event that Communicorp is not able to procure the issue of new shares to Digifone to transfer at par such number of shares held by it in Digifone."

That's just dealing with it I think what it's saying there is if you can't get them in the 5% in the block you have to now, I think the rest of clause 2 is all dealing with that particular issue and we needn't concern ourselves greatly with it.

Then, 3: "Right of First Refusal." It says:

"Subject only to fulfillment of the conditions set out

in Clause 4 by the date specified therein, Communicorp hereby grants to Advent Funds the right to provide the relevant proportion of the aggregate monies raised from time to time by Digifone or by any member of the Communicorp Group for subscription in (whether direct or indirect) or lending to Digifone provided that

"3.1. If Communicorp decides not to participate directly or indirectly in its proportionate entitlement to fund Digifone and/or through any other member of the Communicorp Group pursuant to the shareholders agreement relating to Digifone to be entered into between Communicorp and Telenor (as amended from time to time) or any other agreement or arrangement between those parties supplementing or replacing the same, the Advent Funds shall be entitled to provide such proportion of Communicorp's funding entitlement as is equal to the percentage of the fully diluted share capital of Communicorp held by the Advent Funds at the time or in the event that the total funding provided to Digifone by all members of the Communicorp Group at the relevant time is less than Communicorp's funding entitlement the Advent proportion of the shortfall."

A. You have lost me now. I don't know what all that means.

Q. I think if I might just briefly deal with that and perhaps nothing much turns on it. Because you say

that this was probably moot in that Communicorp or Advent always had an entitlement through their initial involvement in Communicorp.

A. Yeah, and they wouldn't have I'm not sure what this means, but I think what it means is that if we didn't put up the money in Communicorp, they had the right to participate, but

Q. Exactly, that they had

A. Then the other people, they were not party to that agreement. It's poorly drafted.

Q. There were some very experienced solicitors involved.

A. No, I know that, but how can they if Communicorp doesn't put up its share, how could they then take over and put that money directly into the venture if you know everybody else had an offer round?

Q. Well, what I'm really looking at then, when you come to look at the signing of this agreement, it was signed by you, isn't that right? It was signed by Paul Connolly on behalf of the Communicorp group, isn't that right?

A. Yes.

Q. And it was signed by somebody on behalf of Advent anyway?

A. Yeah, Hennessy, O'Hennessy or

Q. Vice-president?

A. Janet?

Q. Do you know where it was signed?

A. I have no idea.

Q. It doesn't appear to have been signed in your solicitor's office, in Fry's office?

A. It could have been done on the fax.

Q. I see.

A. Does anything hold on that?

Q. I don't know. Because, you see, you entered into an agreement with Advent, and this is the agreement.

Your own view, Clause 3, it was probably moot for two reasons: First of all, they had some entitlement through Communicorp anyway to participate in matters, and giving them a right of first refusal was dependent on Telenor and anyone else being satisfied and they mightn't have been able to get in the door?

A. If I'm reading it rightly, yeah.

Q. I think in broad terms that's probably true.

A. Yeah.

Q. So the significant matter then is that in consideration of furnishing the letters of comfort, they got 5%, isn't that right? That's the main point?

A. I haven't really read this I haven't read this in years, so I'll accept what you are saying.

Q. We can come back to it if there is anything. But do you agree that that was, in your own mind, that was probably it. They furnished letters of comfort. They got 5% of that and as you said yourself, it probably

A. They laid on another couple of rights to participate either indirectly or directly in Digifone.

Q. Now, what I want to come to now, and to ask you something about and it's this and I will be coming back to statements made by Mr. Prelz, I suppose, as noted by Mr. Peter O'Donoghue in due course to give you an opportunity to

A. You do understand the basic thing here, that this is an explodable agreement conditional on Telenor saying they are happy with it? Is that

Q. Yeah. I'm taking your point.

A. Okay.

Q. I'm just looking for a document now, because I think it might be of

A. Which one is it?

Q. It might be appropriate just to deal with it at this point?

A. Which one is it and I'll see if I can find it.

Q. It is a letter which you wrote

A. Oh, accepting it. Here it is, tab 23.

Q. Tab 23. Very good.

A. This is confusing for me.

Q. Yes, it certainly is and that's why I didn't want to ask you about it and that's why I want to that's why I am inquiring about the agreement, what was going on, what was in people's minds.

Now, this is a letter written by you dated 14th July,

1995. The agreement was joined on the 12th July,

1995. And it's addressed to Mr. Prelz.

It reads:

"Dear Massimo,

"I refer to our agreement dated 12th July in regard to the GSM bid to be made by Esat Digifone Limited.

Just a statement of fact, you are referring to the agreement. And then the next sentence:

"As you are aware, you have written to the Minister for Transport, Energy and Communications and to Telenor Invest AS stating that you have offered Communicorp Group Limited $\frac{1}{2}$ 30 million in respect of their equity participation in the bid."

A. That's right.

Q. And that's correct. And then it continues

A. That's my guarantee again.

Q. "We would like to confirm acceptance of our agreement dated the 12th July."

Now, did you draft that letter?

A. Yeah. Yes, I did.

Q. Could you tell me what it's about, please.

A. I was reading this the other day and I said why did I write that letter? And what I do recall is, we had this big debate with Telenor where despite us going to an inordinate amount of trouble to get Advent on board to help with the letters, and we thought that that would satisfy them, they said no, we are not

satisfied. So then I said to them, well, what happens if I write a letter accepting the offer, would that satisfy you? And that's exactly what I did.

Q. So you are saying that this is a letter written accepting the offer?

A. Yes.

Q. All right.

A. Then what happened, to roll the video forward, Telenor still weren't happy, for rightly or wrongly, for wrong reasons, that they weren't happy with this, it didn't satisfy them, so we were then back looking back to the agreement saying condition precedent, Telenor had to be happy.

Now, put this in the context of where we were. We were dealing with a guy who was a lieutenant for a multinational company. He was sent in an aircraft from Oslo and told get a financial guarantee, we don't care. He was doing his job, but every time we came up to something where we thought that would satisfy him and go to an awful lot of trouble, he still wasn't happy with it. He was doing his job. And it wasn't a personal thing, but he was not happy with it.

Now, if I was dealing with a principal, in other words, the top person in a large organisation like Telenor, this probably would not have arisen, and I put that in my own terms right now, where I have partners in different countries from time to time they

have problems, they are my problems as well, because a partnership is a partnership.

Q. Yes, I can understand that.

A. And if somebody can't come up with their funding for a project by a particular time, it's the partnership's problem, not just the one partner. And unfortunately we were dealing with somebody who was doing their job very thoroughly, but we were not talking to the decision maker who was probably the Chair or the Chief Executive of the whole shooting match. We were down in the middle of a multinational.

Q. Okay. I can understand those difficulties. And I can understand the point you make about that. But I have difficulty in understanding this letter as being the acceptance of an offer. Can you just explain to me

A. That's how I believed I had an offer, so I was accepting the offer.

Q. Now, let's just look at it because I think you are the one who said a few moments ago, we are just playing with words. I just want to look at this letter very carefully. We have just dealt with the agreement of the 12th July, 1995, isn't that right?

A. Yeah, we just talked about that, yes.

Q. And that agreement provided that in consideration for furnishing the two letters of comfort, that Advent would have 5%?

A. Yes.

Q. Right.

A. As part of the mix.

Q. Sorry?

A. Part of the mix.

Q. Yeah, well sorry, let's take it, that's what it was about. There was no agreement on the 12th July in relation to $\frac{1}{2}$ 30 million.

A. Ah well, it was the 10th.

Q. Sorry, they are described by Advent as letters of comfort. All right

A. We'll never agree on this. I say it's an offer. You say it's not.

Q. All right. The letter says:

"I refer to our agreement dated the 12th July in regard to the GSM bid to be made by Esat Digifone Limited."

So you are referring to the agreement. Let's just jump to the final sentence.

"We would like to confirm acceptance of our agreement dated 12th July."

A. I don't think it's fair to jump.

Q. Sorry. You refer to the agreement and you accept. Now

A. No, it's the second paragraph I am accepting.

Q. That's what I want to ask you about.

"As you are aware you have written to the Minister for Transport, Energy and Communications and to Telenor

Invest AS stating that you have offered Communicorp Group Limited $\frac{1}{2}$ 30 million in respect of their equity participation in the bid." That is not contained in the agreement of the 12th July.

A. Well, I think that's a moot point because the letters of comfort

Q. It's not a moot point.

A. Well, the letters of agreement comfort as you call them

Q. Are recited?

A. Are part of the mix of things of the 12th July. They are.

Q. So is it the three words, so. Is it the three words, "We have offered," is that what you're saying?

A. That you have offered Communicorp 30 million. And I say: "We'd like to confirm acceptance." And this was a way, as I said just a few minutes ago, of showing Telenor, okay, we'll accept this not with great happiness, but we'll accept it if you believe that this is going to meet the condition precedent.

Q. All right. Well, let's take it, so, on the basis on which you are saying now. On what terms did you accept it?

A. As I described earlier, we had agreements on voting on valuation what the ultimate value of the licence was going to be.

Q. Now, just tell me what terms did you agree to accept

this 1/230 million offer? Just tell me those now and when were they agreed.

A. Well, as I had learnt earlier, there was a mixture of things. One is the valuation was going to be a deferment when we knew the value of the licence, and that we would be subsequently diluted on to what the value of the business was at the time. It was a mix of things. Plus, as I go on to say in the oral hearing, there was certain agreements on voting.

Already Advent had less votes than their weight of capital as per the 1994 agreement.

Q. I'm trying to understand this now, Mr. O'Brien. You were saying this letter is accepting an offer of 1/230 million?

A. Yeah. Now, step two is

Q. No

A. Work out the valuation.

Q. I want to know what terms were agreed whereby you accept this offer.

A. I'm trying to explain to you the second phase of that.

We accept the offer, and now we work out, well, what is the valuation of the business? And that is contingent on what value the licence is and how much the business has moved on in valuation in the intervening period.

Q. The letter says nothing about that, does it?

A. I have always said that it was a verbal my

discussions were verbal with Mr. Prelz on the issues of the terms.

Q. So when were the terms concluded so?

A. We ultimately didn't get that far because the condition precedent was invoked because Telenor weren't happy. So this whole thing

Q. So you never achieved any terms?

A. Sorry, we knew what the terms were provided Telenor were happy under the condition precedent. But

Q. Tell me what the terms were and tell me that Advent agreed to these. Just tell me about them now. First of all, did Advent agree these terms?

A. Advent

Q. Advent agreed terms with you?

A. Mr. Prelz, on behalf of Advent

Q. Did he agree terms with you?

A. Yes, he did.

Q. When?

A. We had an understanding between the two of us that we would have the licence valued; that when we won the licence, we didn't know what the terms were yet, we would get the licence valued. So if we had 40% of the licence, we'll get 40% of the value subscribed to the value of the Communicorp, plus we were going to get also a view done on what the valuation of Communicorp was, taking into account that it had a growing business in the fixed line market. When you added

those two businesses, put in the capital which was a mixture of debt which was non-dilutive, which is mezzanine in structure and then pure equity which was dilutive, then you roll in the super voting rights on top of that, that was the mix of things that we would end up with.

Q. I beg your pardon?

A. That was the mix

Q. Would you then what?

A. End up with, to determine the valuation.

Q. Just explain to me now when you reached an agreement with Advent on terms subject to getting the licence.

A. We I agreed all of this in July, June/July with Mr. Prelz over lunches, over many meetings, over telephone calls, but we

Q. Is this documented anywhere?

A. No, absolutely nowhere.

Q. Did you inform your fellow directors?

A. Yes.

Q. Who?

A. All of them.

Q. You informed your fellow directors that you had reached these agreements?

A. The people that were involved in the bid they would have known that I had an arrangement with Massimo that he would fund us.

Q. Mr. O'Brien, just listen to the question: Did you

inform your fellow directors that I want to did

you inform your fellow directors that you had agreed terms with Advent on behalf of Communicorp?

A. The directors that were involved in the bid, those were the people.

Q. Who were they?

A. They were Mr. Callaghan, Mr. O'hUiginn, Mr. Connolly.

Q. And did you inform those directors that you had accepted this offer?

A. Well, this

Q. Did you?

A. This is relating to the 12th July agreement, this letter was written purely to try and show Telenor that we would accept the offer of 30 million from Advent.

Q. Did you inform your directors that you had written a letter, as you say, accepting an offer of $\frac{1}{2}$ 30 million by Advent to Communicorp?

A. No.

Q. You did not inform your directors of that?

A. No. Because the minute I had written the letter, Telenor said we are still not happy. So what was the point in me going off to my directors to tell them a completely useless letter.

Q. You just entered into a contract with Advent yourself?

A. But the contract was explodable because Telenor were still not happy under the condition precedent clause.

I know it's confusing.

Q. Mr. O'Brien, I'll slow up in ease of myself.

A. Sorry?

Q. I'll slow up in ease of myself so that I can try and understand all of this now. I just want to be clear myself about what you are saying; that in the weeks of June and July of 1995, you agreed terms with Mr. Prelz subject to obtaining the licence, is that what you're saying?

A. We agreed a formula to get the valuation which made sure that the dilution and everything else would then fall out of that, so it was a formula as part of the agreement.

Q. Now and this related to on oral offer, you are saying, is that right?

A. Yes.

Q. Is that something different to the offer that you refer to in the letter

A. No, because he has offered me 30 million and then we agree a formula under how that money would come into the company in terms of dilution and valuation.

Q. And you informed your board members of this?

A. The people that were directly involved in the bid, they knew about this.

Q. So you informed Mr. John Callaghan, is that what you are telling the Tribunal?

A. Yes.

Q. And who else, Mr. Padraig O'hUiginn?

A. I believe I told Mr. O'hUiginn, I couldn't be totally sure, but Mr. Connolly definitely.

Q. And Mr. Connolly. And this was before the letter of comfort came into being?

A. No.

Q. Sorry, Mr. O'Brien, I'll take it back again. The letter of comfort is dated the 10th July, 1995.

A. Yes.

Q. You said

A. I can really help you. Because the agreement probably was drafted but only executed on the 12th, but we knew we had the agreement ready to be signed. So the dates are really the same. So view the 10th and the 12th and the same.

Q. Fair enough. Fair enough.

A. It just wasn't executed.

Q. Fair enough. But during June and July of 1995, you discussed and concluded terms with Mr. Massimo Prelz subject to obtaining the licence?

A. We agreed terms and a formula approach, as I have tried to explain, about the value of the licence which would be determined by somebody, and then they'd value of the fixed line business, and then they would inject the capital and it was up to 30 million, so it could have been 15, 20, 25, 29, we didn't know at that stage how much money we needed. But the thing really, from my point of view, and I had ball jumping in the

middle of all this I was trying to get the bid finished, I was trying to satisfy Telenor, I was trying to finance my business, but in my mind, once I had that letter from Advent, I was home and dry.

Q. So it was your interpretation of events that you had an oral agreement, is that right, which culminated in the letter?

A. The other way around, the letter and then I had an oral agreement on the terms.

Q. I am totally confused now, Mr. O'Brien.

A. Sorry. I am saying to you, Mr. Coughlan, I'll give you 30 million, okay? And then you are saying to me, well, Jesus, what are the terms of the 30 million?

Q. That's what most people would say?

A. That's the formula

Q. I presume that's what most people would say, yes. But you were discussing terms, you say, in June and July?

A. Yeah.

Q. So and you were keeping certain directors, at least, informed?

A. I mean

Q. Were you or were you not?

A. This was a dynamics. It was fast moving. I was only telling the people that I told you, Callaghan, Connolly

Q. You say you definitely told Mr. Callaghan?

A. Yes.

Q. And you definitely told Mr. Connolly?

A. Yes. It didn't suit us, you see, to get we weren't going to write down the formula. It was better to keep it loose because we didn't know how much money we actually needed, was it 20, was it 30? We didn't know. But there was a formula.

Q. So you then arrive and I'm just trying to, because I am trying to get this straight in my own mind at the moment you have no doubt that you were having these discussions with Mr. Prelz, and I think you stated that at the time that was Mr. Prelz's view and up to this very day it would be his view, is that right?

A. I am in four different businesses with Mr. Prelz and I have no written agreements with him.

Q. I'm just asking you was that the view of Mr. Massimo Prelz then?

A. Yes.

Q. And you say to this day, because you know him, I don't, that that's his view?

A. Yeah. He had he was a brave guy, he was dealing with a small Irish company. He was going back to his investment committee and saying, I want to invest 10. Then I want to put in 5 and now I am going to commit myself and offer 30 million. That's gutsy in any terms.

Q. And you still do business or you have done business after this with Mr. Prelz?

A. On a word.

Q. But you still

A. Oh, yeah.

Q. And he bears you no ill will and you bear him no ill will?

A. I'll give you an example. Normally people get rid of their venture capitalists when they sell out of the business. He was such a good contributor that we invited him to stay and we awarded him share options. Now, normally business people can't wait to get rid of their venture capitalists, you know, because they can be difficult and troublesome. Yeah, he was troublesome at times but he had a smart head on his shoulders.

Q. All right. Apart from the normal bit of to-ing and fro-ing that you'd expect

A. Like a good rugby match.

Q. doing, as you say, like a good rugby match, but good business, whatever type of business, somebody selling, somebody buying. He was selling money, you were buying money

A. Yeah, but a lot of money, it was high stakes.

Q. Now, could I just ask you to go to tab 28 please.

A. Oh, yeah. "You guys have a way of playing with words."

Q. Let's just look at it now. Because you say that all these negotiations and agreements, just subject to the licence being obtained, was all negotiated between

yourself and Mr. Prelz, and I have expressed a certain degree of confusion surrounding matters as far as I can see it. I am just wondering was Mr. Prelz also confused?

A. No, he was pissed off, completely.

Q. I see. Well, let's just look what he says now.

A. Okay.

Q. And we can take this as being an accurate account.

This is Mr. Peter O'Donoghue's

A. No, he kept very good notes.

Q. What he is doing is he is sending something to Owen

O'Connell. This is after the trouble started when

Advent

A. No, Telenor wouldn't accept Advent.

Q. No, no, no, no, this is the row after the letter of

the 29th September. This is the row that

Mr. O'Connell had to deal with with Advent after IIIU

came in and they and the institutions were out.

A. Yeah.

Q. Sorry, I'll just explain. This is why Mr. O'Connell,

or sorry, this is why Mr. O'Donoghue is giving

information to Mr. O'Connell, Mr. O'Connell is dealing

with Advent post

A. This is the 3rd November but it gives an account of a conversation of the 3rd August.

Q. Precisely.

A. Can I tell you what happened here.

Q. Can I read it first?

A. Okay.

Q. Now, this is Peter O'Donoghue recording a conversation

he had with Massimo Prelz on the 3rd August.

"He accused me of trying to mislead Telenor and stated

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

with playing with words'. This would go back to our

original discussion on the terms of the IRI 1/2 3.2 million

facility and what was agreed in respect of the 5% of

the Esat Digifone.

He stated that the word "committed" was misleading and

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

terms were agreed. I reminded him that he put outline

terms to Denis and that even though these were not

acceptable to ourselves, they were themselves terms.

He stated that he would not be signing any letter.

Letters require the approval of the investment

committee and no letter would be forthcoming."

Then he leaves it to Owen. Now, that's Mr. Prelz.

Could you tell us about it now?

A. Well, this is casting my mind back. Basically, in

effect, everybody was cheesed off. Everybody had

spent weeks and weeks negotiating a 12th July

agreement. Massimo had gone to his investment

committee and everybody believed now wrongly that

Telenor were going to be exceedingly happy, and when

Telenor turned around and said, we are not happy with

your arrangements with Telenor, we are not satisfied with the letters, blah, blah, blah, blah, then everybody went very, very I mean, everybody got very excited, including Massimo and Massimo was completely cheesed off that he spent all that time, instructed lawyers and the next thing Telenor don't accept, rightly or wrongly. I mean, they were entitled to their opinion, but we felt that they were being very, very difficult with us.

Q. But this is the man whom you say you had an agreement with?

A. Yeah.

Q. And he had furnished letters of comfort, isn't that right? He accused you or Peter O'Donoghue, perhaps he was also accusing you, I think it would be unfair to single Peter O'Donoghue out on his own here

A. Massimo is hot-blooded. He was asked for

Q. He was accusing you of misleading Telenor?

A. No, no. He was asked for Telenor said we want this letter now. So we went off and asked for better a tighter worded letter and which he said: Listen, get lost, I am not doing it, I have done as much as I want to do at this stage.

Q. "... a way of playing with words'. This would go back to our original discussions on the terms of the IRÿ½3.2 million facility and what was agreed in respect of the 5% of Esat Digifone. He stated that the word

"committed" was misleading and that the fact that there was no offer as no terms were agreed."

A. And then Peter says:

Q. "I reminded him that he had put outline terms to Denis and even though these were not acceptable to ourselves" "acceptable to ourselves," so that is a rejection, as I understand it. They were nonetheless terms. Now, Mr. O'Brien, this is important for us to try and understand because

A. I can help you.

Q. So you attribute this just to Mr. Prelz being a bit cheesed off?

A. More than cheesed off. He probably spent 30, 40 grand or Baker McKenzie, which is straight out of his centre, profit centre, and then all the agreements that we have signed up are null and void.

Q. But can I just be clear here; Mr. Prelz is clearly stating that there was no offer as no terms were agreed, isn't that right? That's what he said to Peter O'Donoghue. We can take it that Mr. O'Donoghue is recording what he is saying reasonably accurately?

A. Massimo, he is prone to go on a bit of an out' rant, okay, and this is a little rant from Massimo. And you know, Peter rightly reminded him that we had agreed terms.

Q. Peter does, and I can take it, because we have seen Mr. O'Donoghue and we have spoken to Mr. O'Donoghue

and he is a serious man and goes about his business seriously, and he informed Mr. Prelz: "I reminded him that he had put outline terms to Denis and that even though these were not acceptable to ourselves," so, obviously any outline terms were not accepted, so therefore, no terms?

A. I don't know whether Peter would have been aware that I wrote the letter accepting the terms.

Q. You didn't accept any terms?

A. Remember the letter we looked at

Q. You wrote a letter saying and that letter amounted to an acceptance of the offer

A. That we'll accept your terms, we'll accept your offer.

Q. "That they were themselves terms." That's Mr. O'Donoghue making a defence of a position. He is not suggesting there was an acceptance of any terms by Communicorp there. "He stated that he would not be signing any letters. Letters require the approval of the investment committee and no letter would be forthcoming."

Now, you say that Mr. Prelz is the sort of man that might go on a bit of an out' rant. Mr. O'Donoghue is an accountant, isn't that right? He noted this. He thought it significantly important to bring it to the attention of Mr. O'Connell of William Fry, a senior solicitor in that firm, when he was dealing on your behalf with Advent, isn't that right?

A. That's right, yeah.

Q. They are all serious steps?

A. Well, they would be

Q. People whom you would describe as being reasonably serious people?

A. Normal things you do. You push you know, if you have a director ringing you up and you are the financial director, you keep a note of what they are saying.

Q. I beg your pardon?

A. You keep a note of what they are saying.

Q. Oh, yes, yes.

A. And maybe that person doesn't maybe gets in this case Massimo was prone to getting going on an amazing rant, okay, if he got really upset, and other people can give you evidence of that. I mean, I can remember like a whole series of conversations, even with Mr. Callaghan in his home on that Saturday, Massimo went into a rant and said things that were wrong, untrue, and wrong.

Q. Untrue?

A. Untrue and wrong. You know, he would get things mixed up. Like, for example, he is mixing the 3.2 million facility with the 5%.

Q. No, I don't think that is so, Mr. O'Brien.

A. He is.

Q. Because if you look at the note, it says: "This would

go back to our original discussion on the terms of the 3.2 million facility and what was agreed in respect of the 5% of Esat Digifone." They are two separate things, but if you go back to Mr. Callaghan's note

A. I know, but they were two separate agreements. I don't think on the 12th July we talked about the 3.2, did we?

Q. I appreciate that. But if you go back to Mr. Callaghan's note, they are both contained on Mr. Callaghan's note. And it's clear from Mr. Callaghan's note

A. But in the rant he is saying the 3.2 and the 5%.

Q. No. What the rant I'll use your expression that "he accused Peter," I presume, Peter O'Donoghue "of trying to mislead Telenor and stated that 'you guys', reference to Denis and Peter, 'have a way of playing with words. This would go back to our original discussions on the terms of the 3.2 million facility and what was agreed in respect of the Esat Digifone note." That's Peter saying that.

"He stated," this is Mr. Prelz: "that the word "committed" was misleading and that the fact that there was no offer as to terms and no terms were agreed." Peter reminded him of some outline terms which were not accepted by you.

A. Peter wasn't party, you see, to the conversations that I had with Massimo. He would have known that we were

talking about terms.

Q. I'll come back to it in the morning, Mr. O'Brien, but I just want to bring you to Mr. Callaghan's note in respect of those two matters, the 3.2 million facility and what was agreed in respect of the 5% which ultimately was consummated in the agreement of the 12th July, and Mr. Callaghan has them both on the same sheet of paper.

A. But where is the 3.2 in 12th July?

Q. No.

A. Well then...

Q. They were both being discussed.

A. But they were two separate things, though.

Q. I know that, Mr. O'Brien. They were both perhaps being discussed at the same time, because

Mr. Callaghan's note has that, Mr. O'Donoghue makes reference to it and the one thing that's very clear in Mr. Callaghan's note as regards the 5% is that there would be "a strong letter of comfort but cannot be a 'commitment' to invest". And what Mr. Prelz is complaining about, according to Mr. O'Donoghue's note, is that you were misleading Telenor. "He stated that the word "committed" was misleading and that the fact that there was" and that there was no offer. So they do seem to link together, don't they?

A. But you see, this is part of the rant. Go back to the letter, and he signs the letter. He says

"commitment", he says "offer". So it may be language difficulties, because Mr. Prelz is Italian, but he is he clearly says in those letters, there is the offer and I am committing myself to X, Y and Z.

Q. But he has stated to Mr. O'Donoghue here there were no terms agreed.

A. But you see he doesn't know anything.

Q. Mr. Prelz is saying to Mr. O'Donoghue there were no terms agreed, Mr. Prelz, the man whom you have continued to conduct business with?

A. Yeah. You see, the terms were the formulae that I'm trying to convey to you, and that it was the formula of what the valuation of the two parts of the business were.

Q. Perhaps we'll take it up

CHAIRMAN: We'll take it up at eleven o'clock in the morning, Mr. O'Brien. Thanks, Mr. O'Brien.

THE TRIBUNAL THEN ADJOURNED UNTIL THE FOLLOWING DAY,
THURSDAY, 13TH NOVEMBER, 2003 AT 11AM.